

## **RESPONSIBLE THIRD PARTIES**

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### **CHAPTER 9**



## Biography

John Gsanger is a trial and appellate lawyer with a national practice focused on dangerous and defective products. His cases have helped achieve landmark legal victories that resulted in the national recall of defective vehicles and nationwide campaigns to increase awareness of dangerous tires, defective seatbelt buckles, and other unsafe products.

John received his law degree from University of Texas School of Law, where he was editor-in-chief of the *Review of Litigation*, editor of the American Law Institute's *Symposium on Complex Litigation*, and president of the University Civil Liberties Union. After law school, he studied comparative law at the Queen Mary and Westfield College, University of London. Early in his career, John served as a lawyer with the international law firm of Youngstein & Gould in London, England, a briefing intern with Justice (now Senator) John Cornyn at the Texas Supreme Court, and a staff attorney with the Thirteenth Court of Appeals in Corpus Christi, Texas.

John currently serves the State Bar of Texas as an oversight member and contributing author of the Pattern Jury Charge Committee, serves the Attorneys Information Exchange Group as National Co-Chairman of the Tire Litigation Group, serves as an elected board member of the Corpus Christi Bar Association, and serves the American Civil Liberties Union as the local Legal Chairman. John is board certified in civil appellate law by the Texas Board of Legal Specialization, and he is a Member of the College of the State Bar of Texas. He has the highest Martindale-Hubbell peer review rating of Very High to Preeminent in legal abilities and the highest rating in ethics, and *Texas Monthly* magazine has listed John as a Texas Super Lawyer, an honor designating the top 5 percent of Texas lawyers. John is a frequent teacher, author, and syndicated radio talk-show guest on the topics of product safety and the law, and he has been invited to lecture college and professional audiences across the nation. A sample of John's presentations and publications includes *New Developments in Tire Litigation* (2010); *Proving and Defeating Privileges: Plaintiff and Defendant Perspectives* (2010), *The Charge Conference: Plaintiff and Defendant Perspectives* (2009), *Protective Orders: New Abuses, New Strategies in Response* (2009), *Pharmacy Law and Ethics* (2009), *Trends at the Texas Supreme Court* (2009), *Defective Tire Cases – What to Look for and How to Find It* (2009), *Arbitration Appeals and Challenges* (2008), *Emergency Room Litigation* (2008), *Responsible Third Parties and Irresponsible Third Non-Parties* (2008), *A Five Year Retrospective on House Bill 4's Impact on Products Liability* (2008), *Fraudulent Drug Marketing* (2008), *Defective Safety Belt and Dangerous Tire Litigation* (2008), *Centocor's Fraudulent Marketing of Remicade* (2007), *The Jury Charge Conference* (2007), *Identifying the Products Liability Issues within Car Wreck Cases* (2006), *The Tire Industry's Unconscionable Failure To Warn about Old Tires* (2006), *Patient Anti-Dumping EMTALA Statute vs. Medical Negligence* (2006), *Preservation of Error* (2005), *Defective Tire Litigation* (2005), *Automotive Product Liability Discovery* (2004), *Supreme Court Update* (2003), *Winning Cases Before Trial* (2002), *Top Ten Mandamus Pitfalls* (2001), *Issues of Professional Responsibility* (2000), *The New Rules of Civil Discovery* (1999), and *The Courts' Contempt Powers* (1998).

John Gsanger has been honored as Boss of the Year by the Corpus Christi Association of Legal Professionals, and with the John Howie Mentorship Award from the Texas Trial Lawyers Association. He is married to appellate guru Cecile Gsanger, and they have three children: Reilly, Jack, and Finn.

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## RESPONSIBLE THIRD PARTIES

### I. THE HISTORY OF THE RESPONSIBLE THIRD PARTY UNDER TEXAS LAW

In 1995, the Texas Legislature adopted a new provision within the Texas Civil Practice and Remedies Code to allow for the joinder of responsible third parties so that juries might consider such parties when assigning percentages of proportionate responsibility. See Act of May 8, 1995, 74th Leg., R.S., ch. 136, §1, 1995 Tex. Gen. Laws 971, 972-73. In addition to the explicit language of the 1995 amendment to the Civil Practice & Remedies Code, the legislative history also confirms the express intention that a responsible third party “has to be a person who’d be properly joined in the court.” William D. Underwood & Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by Another*, 55 Baylor L. Rev. 617, 634 (2003) (quoting Sen. David Sibley’s comments at the Senate Economic Development Committee hearing).

In 2003, the Texas Legislature again revised the Texas Civil Practice and Remedies Code to change from a joinder procedure to a designation procedure for the identification of so called “responsible third parties” for the juries’ consideration in the apportionment of responsibility. See Act of June 2, 2003, 78th Leg., R.S., ch. 204, H.B. 4, § 4.05, 2003 Tex. Gen. Laws 847, 857 (codified at Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003-33.004).<sup>1</sup> For suits “filed on or after July 1, 2003” this most recently amended version of section 33.004 employs a procedure where by the defendant designates the responsible third party, and if the court accepts the defendant’s designation, the plaintiff may then join the responsible third party without regard to the statute of limitations. Act of June 2, 2003, 78th Leg. R.S., ch. 204, H.B. 4, §§ 4.03-04, 23.02(c).

These 2003 legislative changes created procedural avenues by which broader categories of parties might be designated. See Tex. Civ. Prac. & Rem. Code Ann. §§ 33.004(i)(1), (j). Yet it remains to be seen whether the 78<sup>th</sup> Legislature of 2003 invented a procedure where a “responsible third party” might not be joined (and, thus, not become a party) or liable for its conduct (and, thus, not responsible), thereby inverting the responsible third party procedure to encompass irresponsible third non-parties.

### II. FATALLY FLAWED DESIGNATIONS

#### A. Plead to Satisfy Rules of Procedure

The Texas Civil Practice and Remedies Code

requires that a designation must “plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure.” Tex. Civ. Prac. & Rem. Code § 33.004(g)(1). If the defendant fails to meet this pleading standard, the defendant gets one chance to amend its designation, and if it still fails to meet the designation standard, its motion is denied. Tex. Civ. Prac. & Rem. Code § 33.004(g).

To satisfy the pleading requirement of the Texas Rules of Civil Procedure, as required by 33.004(g)(1), counsel’s signature on the designation “must constitute a certificate by them that” the allegations reflect their “best of knowledge, information, and belief formed after reasonable inquiry” and that the allegations are not groundless. Tex. R. Civ. P. 13; see also Tex. Civ. Prac. & Rem. Code § 10.001 (the signature on the designation “constitutes a certificate by the signatory that to the signatory’s best knowledge, information, and belief, formed after reasonable inquiry ... each allegation or other factual contention in the pleading or motion had evidentiary support” or will be supported); *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). If the allegations in the designation are not set forth as true to counsel’s best of knowledge, information, and belief formed after reasonable inquiry, the designation should be stricken under 33.004(g)(1).

Similarly, to satisfy the pleading requirement of the Texas Rules of Civil Procedure, as required by 33.004(g)(1), the designation must set forth a “statement of the cause of action sufficient to give fair notice of the claim involved.” Tex. R. Civ. P. 47(a); see also Tex. R. Civ. P. 45(b) (court papers must give “fair notice to the opponent” of the cause or causes of action alleged); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000) (the allegations should be sufficiently specific as to give the opposing party notice as to “what testimony will be relevant” in the trial of the claims asserted). To meet this requirement, the designation must identify the causes of action asserted by their elements. *Winters v. Parker*, 178 S.W.3d 103, 105-06 (Tex. App.-Houston [1st Dist.] 2005, no pet.); *Castano v. San Felipe Agric. Mfg., & Irrigation Co.*, 147 S.W.3d 444, 452-53 (Tex. App.—San Antonio 2004, no pet.); *Mowbray v. Avery*, 76 S.W.3d 663, 677-80 (Tex. App.—Corpus Christi 2002, pet. denied); *Barto Watson, Inc. v. City of Houston*, 998 S.W.2d 637, 639 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Accordingly, if a designation is unclear in its allegations about what specific duties were breached by the responsible third party, what acts of that responsible third party breached those duties, in what manner those duties were breached, and how the plaintiffs’ harms at issue were caused by the breach of those duties, the designation should be re-pleaded to clarify those issues or the designation should be stricken.

<sup>1</sup>References are to the Texas Civil Practice and Remedies Code.

### B. Supported by Evidence of Responsibility

If the designation is pleaded (or re-pleaded after objection) to “satisfy the pleading requirement of the Texas Rules of Civil Procedure,” then the motion will typically be granted. Tex. Civ. Prac. & Rem. Code § 33.004(g). Once the motion is granted, the non-designating party may wait until “after an adequate time for discovery” has passed and then “move to strike the designation of a responsible third party on the ground that there is no evidence that the designated person is responsible for any portion of the claimant’s alleged injury or damage.” *Id.* § 33.004(l). Significantly, the court must strike the designation unless the designating party offers evidence proving that the responsible third party is responsible:

The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person’s responsibility for the claimant’s injury or damage.

*Id.* This requirement that the designation must be stricken unless the designating party proves that the responsible third party was – in fact – legally responsible reflects the fact that the statute “does not allow a submission to the jury of a question regarding conduct” of a responsible third party “without sufficient evidence to support the submission.” *Id.* § 33.003(b).

This evidence of responsibility sufficient to avoid a motion to strike the designation (or to warrant submission in the proportionate responsibility question) presumably requires proof of the breach of “applicable legal standard” because that standard is incorporated into the statutory definition of a responsible third party:

“Responsible third party” means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.

*Id.* § 33.011(6); *see also id.* § 33.003(a) (“The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for [a responsible third party] causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that

violates an applicable legal standard”); *id.* § 33.011(4) (similarly defining “percentage of responsibility” with reference to the standard of proof of a “negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity violative of the applicable legal standard”).

### III. DOES THE TEXAS THIRD PARTY PROCEDURE APPLY IN FEDERAL COURTS?

The Fifth Circuit has not yet directly addressed whether the Texas procedure for the designation of responsible third parties applies in United States District Courts in Texas.

In this vacuum, the Texas United States District Courts have struggled with this issue:

[D]ifficulty in reconciling chapter 33 with various other laws is nothing new. *See Fid. & Guar. Ins. Underwriters, Inc. v. Wells Fargo Bank*, No. H-04-2833, 2006 WL 870683, at \*5 (S.D. Tex. March 31, 2006) (noting that “courts and commentators alike have recognized the difficulty in reconciling the language of [chapter 33] with certain causes of action”). This is another such case.

...

[N]either KOF or Diamond address the question of whether SingFun would be subject to this Court’s jurisdiction in any detail. Thus, the question of whether SingFun is indeed beyond a Court’s jurisdiction and the effect jurisdiction over SingFun might have on the Chapter 33 and 82.0003(a)(7) analysis remains open.

*Diamond H. Recognition LP v. King of Fans, Inc.*, 589 F.Supp.2d 772, 774, 777 (N.D. Tex. 2008); *cf. Hegwood v. Ross Stores, Inc.*, 2007 WL 14256 (N.D. Tex. 2007) (“It is the defectiveness of the product and not the fault of the party that is determinative. To construe the statutes the way the court has apparently construed them in this case, is to render useless the exceptions to the innocent retailer defense provided in Chapter 82, and to presume in a products liability case it is the fault of the parties rather than the defectiveness of the product that controls the outcome of the case...”).

#### A. Possibly Not

Why might the Texas third-party procedures be inapplicable in federal court? There are at least two reasons.

First, when a matter, specifically including the state law procedures governing third party practice, “is covered by a Federal Rule the federal courts must apply the Rule without regard to whether the matter might arguably be labeled substantive or procedural.” *Hiatt v. Mazda Motor*



*Corp.*, 75 F.3d 1252, 1258 (8th Cir.1996) (citing *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)); *see also Exxon Corp. v. Burglin*, 42 F.3d 948, 950 (5th Cir. 1995). Accordingly, the Fifth Circuit has confirmed that whenever there is an applicable federal procedural rule on point, then the federal rule controls and “no regard need be paid to contrary state provisions.” *Exxon*, 42 F.3d at 950 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) and *Wright & Miller*, Federal Practice and Procedure § 4508)). Under *Hanna* and *Hiatt* and *Exxon*, the question whether the procedures governing third-party practice are procedural or substantive is immaterial. Rule 14 governs third party practice in federal court “even where it differs from a state rule and could lead to a different outcome.” *Hiatt*, 75 F.3d at 1258 (citing *Burlington No. R.R. Co. v. Woods*, 480 U.S. 1, 6 (1987)). Other courts have read the issue differently. *See, e.g., Eisenstadt v. Telephone Electronics Corporation*, 2008 WL 445299 (N.D. Tex. 2008).

Second, even if the question whether the rules governing third-party procedures are procedural or substantive under Erie were not irrelevant under *Hanna*, the Fifth Circuit and several other circuits have ruled that third party practice procedures are not substantive but procedural. *See, e.g., Kim v. Fujikawa*, 871 F.2d 1427, 1434 (9th Cir. 1988); *Colton v. Swain*, 527 F.2d 296, 300 (7th Cir. 1975); *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975); *Travelers Ins. Co. v. Busy Elec. Co.*, 294 F.2d 139, 146 (5th Cir. 1961); *D'onofrio Constr. Co. v. Recon. Co.*, 255 F.2d 904, 910 (1st Cir. 1958); *see also Kelley v. Wal Mart Stores, Inc.*, 224 F.Supp.2d 1082, 1083-84 (E.D. Tex. 2002); *In re DOE Stripper Well Exemption Litig.*, 968 F.2d 27, 31-33 (Temp. Emer. Ct. App. 1992); *Kearney v. Phillips Industries, Inc.*, 708 F.Supp. 479 (D. Conn. 1987); *Yanick v. Pennsylvania Railroad Co.*, 192 F.Supp. 368, 370 (E.D.N.Y. 1961); 3 J. Moore, Moore's Federal Practice ¶ 14.05[1], [a] (3d ed. 1997) (citing numerous cases).

#### **B. If So – Remand or Dismissal?**

While a few Texas United States District Courts have not applied 33.004, most others have. *Compare, e.g., Marella v. Autozone, Inc.*, No. 3:04-CV-1157-H (N.D. Tex. Dec. 10, 2004) (rejecting application of 33.003); *Bigelow v. New York Lighter Co.*, NO. A03 CA 340 LY (W.D. Tex. Nov. 25, 2003) (same) *with Davis v. Dallas County, Tex.*, 541 F.Supp.2d 844, 857 (N.D.Tex.2008) (citing 33.004(e) as basis for rejecting limitations defense after plaintiffs filed an amended complaint joining the responsible third party); *Dumas v. Walgreens Co.*, 3:05-CV-2290-D, 2007 WL 465219, at \*1 (N.D. Tex. Feb.13, 2007) (“Once [defendant] relied on Tex. Civ. Prac. & Rem.Code Ann. § 33.004 to

designate [a responsible third party], plaintiffs became entitled under § 33.004(e) to seek to join her as a party” which warranted remand); *Werner v. KPMG LLP*, 415 F.Supp.2d 688, 709 n. 22 (S.D.Tex.2006) (“Under Section 33.004(e), the plaintiff has a sixty-day window following the responsible third party designation during which it may join the newly designated party and assert claims against that party regardless of the statute of limitations.”); *The Estate of Figueroa v. Williams*, 2007 WL 2127168 (S.D. Tex. 2007) (denying designation of an unknown third party under 33.004(j) because the designation was filed more than 60 days after the answer); *Fisher v. Halliburton*, 2009 WL 1098457 (S.D. Tex. 2009) (denying designation of responsible third parties where submitting the Army's actions in Iraq to a judicial proceeding – even with no liability attached – is beyond the authority and competence of the court but allowing designation of insurgents); *Goodman Mfg. Co. v. Field Warehousing Corp.*, 2007 WL 2220964 (S.D. Tex. 2007) (denying designation on grounds that “Field ... may not simply rely on Goodman's allegations in its petitions in the ASHA litigation” but must “make its own allegations as to how this conduct relates to the harms Goodman complains ... the question is whether Field can allege legally viable theories supported by adequate facts”) ~~He~~ the court in the *Werner v. KPMG* case which found that a defendant's invocation of 33.004 to designate a non-diverse responsible third party warranted remand, the designation and joinder of a non-diverse was found to be grounds to remand the case in *The Estate of Paul Brent Dumas v. Walgreens Co.*, 2007 WL465219 (N.D. Tex. 2007). Yet the court reached a slightly different result in *Wolmack v. Home Depot USA, Inc.*, 2007 WL 496660 (N.D. Tex. 2007). Rather than allowing joinder of the non-diverse responsible third party and then remanding the case, the *Wolmack* court chose to dismiss the federal case without prejudice to refilling the action in state court.

#### **IV. DESIGNATIONS, MANDAMUS, SUMMARY JUDGMENT, AND JOINT & SEVERAL LIABILITY**

Several cases have held that mandamus is not available with respect to denial of a designation of responsible third parties. *See e.g. In re SDI Industries, Inc.*, 2009 WL 781562 (Tex. App – Corpus Christi 2009, org. proc.); *In re Wilkerson*, 2008 WL 2777418 (Tex. App. – Houston (14<sup>th</sup> Dist. 2008, org. proc.); *In re Scoggins Construction Co., Inc.*, 2008 WL 4595202 (Tex. App. – Corpus Christi 2008, org. proc.); *In re Investment Capitol Corp.* 2009 WL 310899 (Tex.App. – Houston (14<sup>th</sup> Dist.) 2009, org. proc.).

At least one court has addressed the question whether a summary judgment disposes of the designation of a responsible third party, and that court concluded that summary judgment disposes of the designation:

Our disposition of Issue No. 1B regarding the no evidence summary judgment is dispositive of appellants' Issue No. 1A regarding the trial court's denial of the motion to designate Christian as a responsible third party with regard to Matbon.

*Matbon, Inc. v. Gries*, 288 S.W.3d 471, 479 (Tex. App.—Eastland 2009, no pet. h.).

In the *Bay Rock Operating* case, the defendant designated a responsible third party, and the plaintiff elected not to join that designee. *Bay Rock Operating Co. v. St. Paul Surplus Lines, Ins. Co.*, 2009 WL 856040 (Tex. App. — San Antonio 2009, no pet. h.). Although the jury found the responsible third party 49% responsible as compared to the defendant's 51% share of responsibility, the court found the defendant jointly and severally responsible for the whole judgment. *Id.*

## V. LURKING CONSTITUTIONAL ISSUES INHERENT IN DESIGNATION WITHOUT JOINDER

Even in the absence of the clear legislative history requiring it, the statute of limitations must yield to the designation of responsible third parties rule because the designation of responsible third parties rule would be constitutionally invalid without a provision to allow the claimant to bring the designated third party into the law suit as a party. *See, e.g., Plumb v. Fourth Judicial Dist. Ct.*, 927 P.2d 1011, 1020 (Mont. 1996) (holding that designation of responsible third party rules which do not allow the plaintiff to add the designated third party violate the U.S. and Montana constitutions). If there are multiple ways to construe a legislative scheme, the Courts are bound to construe the laws in a manner that renders the statutes to be constitutional. *See, e.g., Tex. Gov't Code Ann. § 311.021(1)* (Vernon 2005); *Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex.1998); *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 191 (Tex. App.-Fort Worth 1995, writ denied). The authority within section 33.004(e) for a claimant to join someone designated as a responsible third party is a necessary part of third party practice under section 33.004 because, without this joinder provision, section 33.004 would fail constitutional scrutiny.<sup>2</sup>

The law allowing for the designation of responsible third parties is still relatively new in Texas so there is little constitutional analysis thus far, but similar laws

from other jurisdictions have received constitutional scrutiny. Significantly, courts in other states which have considered rules for the designation of responsible third parties have ruled that such schemes are unconstitutional when the claimant does not have an opportunity to join that third party. These other states have rejected the constitutionality of “empty chair” schemes where a party is blamed but not joined as a party to defend itself.

### A. Montana's Experience

The Montana Supreme Court was one of the first to evaluate the constitutionality of a rule allowing for the designation of a responsible third party. *See Newville v. State Department of Family Services*, held that such an “empty chair” statute violated the plaintiff's due process and equal protection rights because the statute:

. . . unreasonably mandates allocation of percentages of negligence and nonparties without any kind of procedural safeguard. As a result, plaintiffs may not receive a fair adjudication of the merits of their claims. It imposes a burden upon plaintiff to anticipate defendants' attempt to apportion blame up to the time of submission of the verdict form to the jury. Such an apportionment is clearly unreasonable as to plaintiff, and can also unreasonably affect defendants and nonparties.

*Newville*, 267 Mont. 237, 252, 883 P.2d 793 (1994).

The Montana Supreme Court addressed this significant constitutional concern in greater depth two years later in *Plumb v. Fourth Judicial Dist. Ct.*, 927 P.2d 1011 (Mont. 1996). The Montana Supreme Court held that the U.S. Constitution and the Montana Constitution both precluded a proportionate responsibility statute which allowed for the designation of a third party who could not be joined:

The percentage of liability assigned [a designated third party who could not be joined] would not be a reliable or accurate apportionment of liability .... The [claimant's] right to recover that amount of damages from the defendant for which the defendant is proportionally responsible ... is jeopardized by the potential this procedure affords for disproportionate assignment of liability to an unnamed, unrepresented, and nonparticipating third person.... The greater the degree of fault that is assigned to unnamed nonparties, the greater the reduction in the [claimant's] recovery. Yet, without the opportunity to appear and defend themselves, nonparties are

<sup>2</sup>What is said about limitations should be equally true about designation of “responsible third parties” who for one reason or another cannot be joined as active parties or who are bankrupt. The unfairness of the “empty chair” strikes with equal force in these cases.

likely to be assigned a disproportionate share of liability, and the [claimant's] recovery is likely to be reduced beyond the degree to which a third party would be found at fault if he, she, or it actually had an opportunity to defend themselves. ... [T]here is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of the unrepresented parties, and requiring the plaintiff's attorney to serve in such a dual capacity is actually antithetical to his or her primary obligation, which is to represent the plaintiff by proving the plaintiff's case.

*Id.* at 1020 (citations omitted).

In *Plum v. Missoula County Dist. Ct.*, 279 Mont. 363, 927 P.2d 1011 (1996), the Montana Supreme Court noted that the non-party's interest would not be represented at trial and as a result the application of percentage of negligence would be higher than it would have been otherwise. *Id.* at 373. Specifically, the court held that while the state had an interest in enacting a scheme of liability which apportions liability based on a degree of fault, the statute itself was not rationally related to that legitimate governmental objective but, instead, was more likely to accomplish the opposite result. *Id.* at 377.

The Montana court noted that the claimant's right of recovery would be jeopardized by the potential for disproportionate assignments of liability to an unnamed, unrepresented, and non-participating third persons. *Id.* at 377-378. This legitimate concern is especially warranted where those unnamed parties are immune from liability.

The Texas Supreme Court has previously expressed concerns similar to those same concerns recognized by the Montana Supreme Court in the *Plumb* case. In the context of addressing why Mary Carter agreements violate Texas public policy, the Texas Supreme Court gave thought to the same concerns which motivated the *Plumb* court to reject Montana's scheme for designating third parties:

The case before us reveals yet another jury trial and verdict distorted by a Mary Carter agreement... Mary Carter agreements skew the trial process. This effect reasonably could be construed as unfairly influencing the decision maker.

And we do not favor settlement arrangements that skew the trial

process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment.

*Elbaor v. Smith*, 845 S.W.2d 240, 249-50 (Tex. 1993).

## B. Illinois' Experience

Since the Montana Supreme Court's ruling in the *Plumb* case, the Illinois Supreme Court has also sustained constitutional objections to the Illinois statute authorizing a similar scheme to designate responsible third parties who could not be joined as parties to the lawsuit. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1087-89 (Ill. 1997).

The Illinois Supreme Court's decision in the *Best* case rejected the constitutionality of a designation of third parties scheme on grounds that the statute violated due process guarantees and also violated the prohibition against special laws. *See Best*, 689 N.E.2d at 1083-89. Like the Texas Constitution's prohibition against special laws,<sup>3</sup> the Illinois Constitution's prohibition against special laws seeks "to prevent arbitrary legislative classifications that discriminate in favor of a select group." *Id.* at 1069-70 (addressing Ill. Const. art. IV, § 13). The specific problem with Illinois' responsible parties law was the fact that it did not apply to medical malpractice claims in the same manner as it applied to other claims. *Best*, 689 N.E.2d at 1087-88. Because the Illinois responsible parties law applied differently to litigants in medical malpractice cases as compared to how it applied to all other litigants in non-medical malpractice cases, the law was an improper special law. *Id.* at 1088-89.

## C. Arkansas' Experience

After the rulings by the Montana Supreme Court in the *Plumb* case and the Illinois ruling in the *Best* case, the *Taylor* court in Arkansas has also sustained constitutional

<sup>3</sup>"The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing ... limitation of civil or criminal actions" and "in all other cases where a general law can be made applicable, no local or special law shall be enacted." Tex. Const. art. III, § 56(a)(28), (b); *see also Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 450 (Tex. 2000) (An unconstitutional special law is a law "limited to a particular class of persons distinguished by some characteristic other than geography"); *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex.1996) (The purpose of the constitutional prohibition against special laws is to "prevent the granting of special privileges and to secure uniformity of law throughout the State as far as possible").

objections to another statute authorizing one more scheme to designate responsible third parties who could not be joined as parties to the lawsuit. *Taylor v. Jensen Construction Co.*, No. CV-04-28 (Cir. Prairie County Ark. Apr. 25, 2006).

As in Texas, the right to trial by jury is a fundamental right under the state constitution. “Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of that right to a jury trial should be scrutinized with the utmost care.” *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959) (quoting *Dimick v. Schiedt*, 293 U.S. 474 (1935)).

If a statute infringes on a fundamental right, constitutional review of the statute requires strict scrutiny rather than a more lax rational-basis review. In Arkansas (as in Texas), strict scrutiny analysis demands that the proponent of the statute carry the burden of showing a “compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out the state interest.” *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002).

## VI. THE UNRESOLVED QUESTION OF LEADING QUESTIONS

The Texas Rules of Evidence provide that “[l]eading questions should not be used on ... direct examination” but “should be permitted on cross-examination,” and when “a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.” Tex. R. Evid. 611(c). It remains unclear under Texas law whether plaintiffs’ counsel, defense counsel, neither, or both should be allowed to use leading questions in the examination of responsible parties who have not been joined as parties. As one commentator has noted, “In the legislature’s haste, it failed to examine how the designation of a responsible third party fosters confusion for trial courts, especially with regard to the mode and method of interrogation during trial.” Jas Brar, *Friend or Foe?: Responsible Third Parties and Leading Questions*, 60 Baylor L. Rev. 261, 277 (Winter 2008).