Historically, contributory negligence was not a defense to fraud or other causes of action not founded in negligence. Yet, in Texas, things have changed. Chapter 33 of the Texas Civil Practice and Remedies Code now applies to virtually all tort claims, including many fraud and other claims.

In sum, the proportionate responsibility statute provides a means by which the fact finder may apportion responsibility among each claimant, each defendant, each settling person and any “responsible third party” alleged to have caused or contributed to the harm for which damages are sought. See, TEX. CIV. PRAC. & REM. CODE ANN. § 33.003 (West 2008)(hereinafter, “CPRC §”); Challenger Gaming Solutions, Inc. v. Earp, 402 S.W.3d 290, 292 (Tex. App. – Dallas 2013, no pet.); JCW Elec., Inc. v. Garza, 257 S.W.3d 701, 702 (Tex. 2008). From a defendant’s perspective, there are many benefits to be derived from successfully pleading and proving proportionate fault: a) a claimant may not recover damages if his percentage of responsibility is greater than 50% (CPRC § 33.001) and the court must reduce the recoverable damages by a claimant’s lesser percentage of fault, CPRC § 33.012(a); b) the court must further reduce recoverable damages by the sum of the dollar amounts of all settlements, CPRC § 33.012(b); and, but for certain exceptions, a defendant is liable only for the percentage of damages found by the fact finder equal to that defendant’s percentage of responsibility, CPRC § 33.013. It is now well established that the statute applies to any “cause of action based on tort”, including negligence, fraud, the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”), products liability, or breach of implied warranty. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002 (West 2008); Challenger, 402 S.W.3d at 292, JCW Elec., 257 S.W.3d at 707.

There are some exceptions to the statute’s application. For example, proportionate responsibility does not apply to statutory tort claims which have a conflicting fault-allocation scheme. Southwest Bank v. Information Support Concepts, Inc., 149 S.W.3d 104, 111 (Tex. 2004). Thus, because UCC Article 3 contains a
“comprehensive and carefully considered allocation of responsibility among parties to banking relationships,” Chapter 33 does not apply to a conversion action brought under Texas Business and Commerce Code § 3.420. And, some courts have held that proportionate responsibility does not apply to claims based upon vicarious liability theory, such as respondeat superior. See, e.g., Villarreal v. Wells Fargo Brokerage Servs., LLC, 315 S.W.3d 109, 125-26 (Tex. App. – Houston [1st Dist.] 2010, no pet.); Bedford v. Moore, 166 S.W.3d 454, 460 (Tex. App. – Fort Worth 2005, no pet.).

However, for the most part, Texas' proportionate liability scheme applies to almost all tort-based causes of action, including claims for common law fraud, Isaacs v. Bishop, 249 S.W.3d 100, 116-17 (Tex. App. – Texarkana 2008, pet. denied); breach of fiduciary duty, Underwriters at Lloyds v. Edmond, Deaton & Stephens Ins. Agency, Inc., 2008 WL 5441225, at *3 (Tex. App. – Houston [14th Dist.] Dec. 30, 2008); breach of implied warranty under UCC Article 2, JCW Elec., 257 S.W.3d at 707; statutory claims under the Texas Securities Act and the Texas Trust Act, Villarreal, 315 S.W.3d at 124-25; negligent misrepresentation, Galle, Inc. v. Pool, 262 S.W.3d 564, 571 (Tex. App. – Austin 2008, pet. denied); and claims under the Dram Shop Act, FFP Oper. Partners v. Duenez, 237 S.W.3d 680, 681 (Tex. 2007).\footnote{As summarized above, defendants who successfully plead and prove the applicability of proportionate responsibility can derive significant benefits in minimizing their responsibility in cases when claimants, settling parties, other defendants and/or responsible third parties actually should bear most, if not all, of the responsibility for the harm alleged.}

Indeed, the proportionate liability statute potentially allows a defendant to try the “empty chair” by designating as a “responsible third party” anyone alleged to have caused or contributed to causing the harm for which recovery of damages is sought. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (West 2008). A person may be designated as a responsible third party if they caused or contributed to the harm by

\footnote{1 It should be noted that in Davis v. Estridge, 85 S.W.3d 308, 312 (Tex. App. – Tyler 2001, pet. denied), the court of appeals held that Chapter 33 did not apply to claims under § 27.01 of the Business & Commerce Code, Fraud in Real Estate and Stock Transactions. However, the Davis court reasoned that the proportionate responsibility statute did not apply because the Legislature did not specifically say it would when § 27.01 was enacted. Given the reasoning of Southwest Bank, JCW Elec., and Villarreal, it is likely that the holding of Davis is no longer good law.}
negligent act or omission, by any defective or unreasonably dangerous product or by any conduct that “violates an applicable legal standard.” TEX. CIV. PRAC. & REM. CODE ANN. § 33.011 (West 2008). This diminishes a plaintiff’s ability to not join as defendants those who are clearly responsible but have limited assets, are judgment proof, or are beyond the jurisdiction of the court.

In sum, in the hands of skilled counsel, the Texas proportionate responsibility statute can be wielded as a very effective weapon.

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2 A defendant generally can no longer designate a person as a responsible third party if the claimant’s cause of action against such person is barred by limitations. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(d) (West 2008).

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