Designation of Responsible Third Parties and Impact on Statutes of Limitations and Repose

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Just when you thought it was safe to close your file...

- Lawsuit is filed against your company or your insured is filed after the statute of limitations expires
- You or your counsel brings this to the attention of the plaintiff’s lawyer
- Plaintiff non-suits you, i.e. voluntary dismissal without prejudice
- You close your file
Weeks later the same lawsuit is re-filed against your company or insured

How? The plaintiff convinced one of the other defendants to designate your company/insured as a “Responsible Third Party” (RTP)

Revived the statute of limitations

You’re back in the case with no statute of limitations defense
Texas “Responsible Third Party” Designation Statute - Background

- Tort reform movement in 2003 as part of House Bill 4
- Intended as defense favorable legislation
- Allowed defendants to request court to submit to the jury the responsibility of the “empty chair”
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Plaintiff’s lawyer lobby succeeded in achieving compromise language allowing joinder of RTP even if limitations expired
In **tort** cases, i.e., negligence cases or **non-breach of contract cases**, Texas juries are allowed to consider the following when determining percentages of responsibility:

- Each claimant
- Each defendant
- Each settling person
- Each responsible third party who has been designated under Civil Practice & Remedies Code Section 33.004 (RTP Statute).
“Responsible Third Party” (RTP) defined as any person who is not a party in the case and is alleged to have caused or contributed to the harm causing a plaintiff’s damages.

Includes:

1. Bankrupt persons
2. Persons outside court’s jurisdiction
3. Unknown criminals
(a) A defendant may seek to designate a person as a responsible third party by filing a motion for leave to designate that person as a responsible third party. The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.
RTP Designation available in tort cases only

- RTP Statute found in Chapter 33 of the Texas Civil Practice & Remedies Code
- Chapter 33 only applies to tort cases
(h) By granting a motion for leave to designate a person as a responsible third party, the person named in the motion is designated as a responsible third party for purposes of this chapter without further action by the court or any party.

(i) The filing or granting of a motion for leave to designate a person as a responsible third party or a finding of fault against the person:
(1) does not by itself impose liability on the person; and
(2) may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.
(e) If a person is designated under this section as a responsible third party, a claimant is **not barred by limitations** from seeking to join that person, **even though such joinder would otherwise be barred by limitations**, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third party.
Flack v. Hanke 2009 Case
San Antonio

- Legal malpractice case
- Plaintiff timely sued one lawyer, Flack, but not law firm or other lawyers
- Plaintiff reached settlement with Flack
- Settlement agreement called for Flack to designate law firm and other lawyers as RTPs to revive the statute of limitations in exchange for discounted settlement
Flack v. Hanke 2009 Case
San Antonio

- Legal
- Plaintiffs
  - but not
- Plaintiffs
- Settled
  - to design
- lawyers
  - as RT
- limitations, but held that
- Texas law did not
  - prohibit such collusion

Trial and appellate courts recognized the agreement as strategy to avoid statute of limitations, but held that
RTP Designation Can Avoid Limitations in Tort Cases

Hypothetical Construction defect case against construction and design teams

- No Certificate of Merit against design defendants
- Design defendants are entitled to dismissal without prejudice (i.e. can be re-filed) under Texas Certificate of Merit Statute
- Design defendants wait until after the statute of limitations to file motions to dismiss
RTP Designation can avoid limitations defense in tort cases

- Court grants motion to dismiss without prejudice
- Statute of limitations expired so Plaintiff cannot re-file the suit against design team
- Contractors designate design professionals as RTPs
- Plaintiff gets Certificate of Merit and re-files against design professionals who are now in the case to stay
RTP Designation can avoid limitations defense in tort cases

- However, if the Plaintiff’s case is really a breach of contract case only
- If the Plaintiff’s tort claims are subject to the economic loss rule
- Designation of RTP is not allowed in breach of contract cases because:
  - Chapter 33 of Texas Civil Practice & Remedies Code applies to torts only
RTP Designation does not revive claims barred by Statute of Repose

Galbraith Engineering v. Pochuca, Texas Supreme Court 2009
RTP Designation does not revive claims barred by Statute of Repose

Pochucas sued home builder for construction defects 8 years after finished
RTP Designation does not revive claims barred by Statute of Repose

Two years into the lawsuit, the home builder designated the foundation engineer as RTP
RTP Designation does not revive claims barred by Statute of Repose

Pochucas sued engineer 10 years after substantial completion of the home
RTP Designation does not revive claims barred by Statute of Repose

Summary judgment for engineer based on 10 year statute of repose
RTP Designation does not revive claims barred by Statute of Repose

On appeal, the San Antonio Court of Appeals reversed summary judgment for the engineer. Held statute of repose is the same as statute of limitations. Ruling abrogated the statute of repose by judicial fiat.
RTP Designation does not revive claims barred by Statute of Repose

Texas Supreme Court reinstated the summary judgment.

**Held:** RTP statute does not revive a claim otherwise barred by the statute of repose.
(f) A court **shall** grant leave to designate the named person as a responsible third party **unless** another party files an **objection** to the motion for leave on or before the 15th day after the date the motion is served.
Objections to RTP Designation

(g) If an objection to the motion for leave is timely filed, the court shall grant leave to designate the person as a responsible third party unless the objecting party establishes:

(1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure;

(2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure.
(I) After adequate time for discovery, a party may 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. The court shall grant the motion to strike unless a defendant [designator] produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage.
(j) Within 60 days of filing its answer, a defendant can file an RTP Motion alleging that an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit.

The court shall grant a motion for leave to designate the unknown person as an RTP if:

(1) defendant pleaded facts showing criminal acts;
(2) the defendant identified all known characteristics of the unknown person; and
(3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.
(k) An unknown person designated as a responsible third party under Subsection (j) is denominated as "Jane Doe" or "John Doe" until the person's identity is known.
Tips for Using RTP Designation to Your Advantage

- **Investigate** to determine if your case involves non-parties who:
  - (1) may be responsible for Plaintiff’s damages who are absent from the case because Plaintiff blew statute of limitations or failed to identify them
  - (2) Are solvent or have insurance to help settle the case or pay any judgment
- If so, designate the non-parties as RTPs and assist/encourage the Plaintiff in adding them to the case, because, **importantly**:
  - RTP designation without joinder does not always help settle the case. Joinder is needed to bring deep pockets to the table.
  - If it turns out that potential RTPs are indeed more responsible than your company or insured, then endeavor to work out a favorable settlement in exchange for RTP designation to allow Plaintiff’s joinder of the RTP.
Tips for Avoiding RTP Designation

- Nothing a non-party can do to stop RTP designation
- Object to and move to strike RTP designation when joined
- Try to avoid dilemma of being non-suited, designated as RTP, and then re-joined, by doing the following:
  1. **Remain silent** on limitations defense
  2. **Seek Agreed Scheduling Order** that imposes an earlier deadline for designating RTPs
  3. **After deadline expires, raise limitations defense and file motion for summary judgment.** Will be too late for plaintiff to non-suit and obtain help of co-defendants to designate you as an RTP and revive time-barred claims
- Object to RTP designation if you’re still a party to the case
Tips for Avoiding RTP Designation

Does the RTP statute apply to your case?

- Determine if the Plaintiff’s claims are really breach of contract not tort
- Does economic loss rule bar the tort claims or is Plaintiff bringing a breach of contract claim only?
- If so, then file Motion to Strike the RTP designation as legally invalid
Is RTP Designation recognized in federal court?

- Some federal district courts in Texas do not recognize or allow RTP designations as contrary to federal joinder rules.
- Others allow RTPs because joinder is not mandatory and thus no conflict with Federal Rules of Procedure.
- Fifth Circuit has not addressed.
Conclusion

- Texas RTP Designation Statute a defense-favorable tool in tort cases for increasing settlement leverage and assisting at trial
- Can also be a Plaintiff-favorable tool to help avoid the statute of limitations
- Strategies are available to help defendants avoid the RTP designation reviving time-barred claims
- Consider possibility that RTP Statute may be unavailable in federal system when deciding whether to remove a case to federal court
Thank You

At 1:00pm | Ethical Issues in the Tripartite Relationship