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Can Immune Parties Really be Responsible: An Analysis of the Current Interpretation of the Texas Responsible Third Party Statute and Its Vulnerability to Constitutional Challenge.

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ARTICLE

CAN IMMUNE PARTIES REALLY BE RESPONSIBLE?: AN ANALYSIS OF THE CURRENT INTERPRETATION OF THE TEXAS RESPONSIBLE THIRD PARTY STATUTE AND ITS VULNERABILITY TO CONSTITUTIONAL CHALLENGE

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I. INTRODUCTION

The Texas Responsible Third Party (RTP) statute¹ was amended in 2003 to give defendants the opportunity to have the jury apportion responsibility for the plaintiff's damages to persons who were not joined in the lawsuit.² A defendant could achieve this result by designating a "responsible third party."³ Plaintiffs could usually respond by joining the responsible third party as an additional defendant in the lawsuit.⁴ Under this scenario, all culpable parties were before the court, defending themselves, and accountable to the plaintiff for their percentage of responsibility. When the statute worked in this fashion, it achieved "a carefully constructed scheme balancing the interests of both defendants and claimants."⁵ Moreover, the statute enhanced the original

1. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (West Supp. 2011).

2. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 4.04, 2003 Tex. Gen. Laws 847, 855–56 (codified as amended at CIV. PRAC. & REM. § 33.004), *repealed in part by* Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.02, 2011 Tex. Sess. Law Serv. 758, 760 (West) (repealing CIV. PRAC. & REM. § 33.004(e)).

3. CIV. PRAC. & REM. § 33.004(a). A responsible third party is defined as an individual deemed "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) (West 2008).

4. *See* Act of May 10, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.004, 1995 Tex. Gen. Laws 971, 972 (permitting designation of responsible third parties under Civil Practice and Remedies Code section 33.004(e)), *repealed by* Act of May 30, 2011 § 5.02.

5. *Molinet v. Kimbrell*, 356 S.W.3d 407, 420 (Tex. 2011) (Lehrmann, J., dissenting); *see also Kimbrell v. Molinet*, 288 S.W.3d 464, 471 (Tex. App.—San Antonio 2008) (mem. op.) (Simmons, J., concurring) (discussing the balance developed by the Texas Legislature with "[t]he designation of responsible third parties within the proportionate responsibility framework . . ."), *aff'd*, 356 S.W.3d 407.

defendant's prospects to pay only that percentage of the plaintiff's damages for which he was found responsible.

Texas courts soon construed the RTP statute, however, to allow designation of essentially immune parties. These immune parties included employers,⁶ sovereign governmental bodies,⁷ foreign manufacturers beyond the jurisdiction of the court,⁸ and those protected by bankruptcy,⁹ statutes of repose,¹⁰ or healthcare liability limitations.¹¹ For example, in *Galbraith Engineering Consultants, Inc. v. Pochucha*,¹² the Texas Supreme Court held that the plaintiffs could not join in their lawsuit an engineering firm, which was designated as a responsible third party, because

6. See *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 58 n.5 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (highlighting that the 2003 amendment did not permit immunity for an employer due to its participation in Texas's workers' compensation program); David W. Holman, *Responsible Third Parties*, 46 S. TEX. L. REV. 869, 885 (2005) (“[T]he 2003 statute . . . permits immune employers to be submitted as an RTP. . . . As a trade-off . . . , the legislators provided that the [workers'] compensation carrier's subrogated lien will be reduced in accordance with the percentage of fault attributed . . . to the employer.”); Gregory J. Lensing, *Proportionate Responsibility and Contribution Before and After the Tort Reform of 2003*, 35 TEX. TECH L. REV. 1125, 1176 (2004) (commenting that participation in the workers' compensation system no longer provides employers immunity from the RTP statute).

7. David W. Holman, *Responsible Third Parties*, 46 S. TEX. L. REV. 869, 885 (2005) (noting that a governmental unit, which was typically immune, can now be submitted as a responsible third party).

8. *Id.* (stating that “[f]oreign defendants with no contact with the forum (or even with the United States)” may be included as an RTP).

9. *Id.* at 886 (discussing the removal of restrictions on designating a bankrupt entity as a responsible third party).

10. *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868–69 (Tex. 2009).

11. See, e.g., *id.* at 868 n.6 (commenting on the initial proportionate responsibility scheme and the subsequent amendments); *Kimbrell v. Molinet*, 288 S.W.3d 464, 469–70 (Tex. App.—San Antonio 2008) (mem. op.) (Simmons, J., concurring) (discussing the 2003 expansion of the proportionate responsibility statute), *aff'd*, 356 S.W.3d 407 (Tex. 2011); *Unitec Elevator*, 178 S.W.3d at 58 n.5 (noting that the section 33.011 amendments broadened the definition of a responsible third party); see also 19 William V. Dorsaneo III, *Texas Litigation Guide* § 291.03[2][b][i] (2011) (distinguishing between the 1995 statute and the 2003 proportionate responsibility statute); David W. Holman, *Responsible Third Parties*, 46 S. TEX. L. REV. 869, 883–84 (2005) (discussing the 2003 changes that resulted in a “veritable free-for-all” by permitting responsible-third-person assignment to “any person” who may have caused or contributed to a plaintiff's injuries (emphasis in original)); Gregory J. Lensing, *Proportionate Responsibility and Contribution Before and After the Tort Reform of 2003*, 35 TEX. TECH L. REV. 1125, 1177 (2004) (considering the liberalization of the 2003 definition of responsible third party).

12. *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863 (Tex. 2009).

the firm was protected by the statute of repose.¹³ Similarly, in *Molinet v. Kimbrell*,¹⁴ the Texas Supreme Court held that the plaintiff could not join doctors who were designated as responsible third parties because the doctors were protected by the statute of limitations for health care liability claims.¹⁵

What was left of the 2003 statutory balance was repealed in 2011.¹⁶ For lawsuits filed after August 31, 2011, plaintiffs can no longer join designated responsible third parties after the statute of limitations has expired.¹⁷

This Article suggests why the RTP statute may not actually authorize defendants to designate most immune non-parties as a responsible third party. To the extent this practice is authorized, this Article discusses the most likely constraints under the United States Constitution and the Texas Constitution on any resulting imbalance of responsibility.¹⁸

13. *Id.* at 864 ([T]he [l]egislature did not intend for [section 33.004(e)] to revive claims extinguished by a statute of repose.”).

14. *Molinet v. Kimbrell*, 356 S.W.3d 407 (Tex. 2011).

15. *Id.* at 409, 416.

16. *See* Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.02, 2011 Tex. Sess. Law Serv. 758, 760 (West) (repealing Civil Practice and Remedies Code section 33.004(e), which allowed plaintiffs to join a responsible third party even though joinder would otherwise be barred by the statute of limitations).

17. *See id.* §§ 6.01–.02, 2011 Tex. Gen. Laws at 761 (affecting civil actions filed on or after September 1, 2011).

18. The ballot initiative, which amended the Texas Constitution in 2003 to give the legislature the authority to limit non-economic damages by statute, does not limit a constitutional analysis of the RTP statute under the Texas Constitution. This amendment, with the exception of the contemporaneous medical malpractice legislation, only applies to legislation enacted by the Texas Legislature after January 1, 2005. *See* TEX. CONST. art III, § 66(c) (“Notwithstanding any other provision of this constitution, after January 1, 2005, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, in a claim or cause of action not covered by [s]ubsection (b) . . .”). The former version of the RTP statute, which allowed designation, as opposed to joinder, of responsible non-parties, was enacted in June 2003. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.04, 2003 Tex. Gen. Laws 847, 855 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(e) (West Supp. 2011)) (striking joinder from article 4 of the statute, Proportionate Responsibility and Designation of Responsible Parties), *repealed by* Act of May 30, 2011 § 5.02. Less viable constitutional challenges under the equal rights clause and the guarantee of the right to trial by jury under the Texas Constitution, as well as its division of powers provision and its prohibition against special laws, are beyond the scope of this Article. *See generally* TEX. CONST. art. I, §§ 3, 15 (guaranteeing equal rights and the right to jury trial); *id.* art. II, § 1 (defining the separation of powers and the powers held by each branch); *id.* art. III, § 56(a) (limiting the Texas Legislature’s ability to pass laws on specific matters). In this regard, the Texas Constitution provides at least the same protections as the United States

II. A PLAIN READING OF THE RESPONSIBLE THIRD PARTY STATUTE MAY NOT ACTUALLY AUTHORIZE THE DESIGNATION OF MOST IMMUNE NON-PARTIES AS RESPONSIBLE THIRD PARTIES

The principles of statutory construction are well established: When construing a statute, the “primary objective is to give effect to the legislature’s intent.”¹⁹ Courts first look to the plain language of the statute to discern the legislature’s intent.²⁰ Courts do not confine their review to a clause in isolation, but instead examine the entire statute to determine its meaning.²¹ Moreover, courts “avoid treating statutory language as surplusage where possible.”²² Only when they cannot discern the legislature’s apparent intent do courts look to canons of construction or other aids, such as former statutory provisions.²³ Additionally, courts should “presume the [l]egislature intended a just and reasonable result[,]”²⁴ and they should strive to “interpret the language of the statute[s] in a manner that renders [them] constitutional”²⁵

With these principles of statutory construction in mind, it should first be noted that the RTP statute does not expressly authorize the designation of a non-party who enjoys immunity as a responsible third party for reasons other than the statute of limitations.²⁶ Moreover, an examination of the entire RTP statute reveals that its application requires that a “cause of action” exist²⁷

Constitution. See *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986) (“The federal constitution sets the floor for individual rights; state constitutions establish the ceiling.”).

19. *Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

20. *Id.*

21. *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001).

22. *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010).

23. See *id.* (recognizing that plain meaning is the preferred method of legislative interpretation); *Galbraith Eng’g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867–68 (Tex. 2009) (instructing that only when interpretation of plain meaning fails may the court consider secondary construction aids).

24. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008); accord *TEX. GOV’T CODE ANN. § 311.021(3)* (West 2005) (“In enacting a statute, it is presumed that . . . a just and reasonable result is intended . . .”).

25. *Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex. 1998); accord *GOV’T § 311.021(1)* (requiring that enacted laws comply with the United States and Texas Constitutions).

26. See Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.01, 2011 Tex. Sess. Law Serv. 758, 760 (West) (codified at *TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(d)* (West Supp. 2011)) (describing the requirements for designating a third party who may be protected by the “applicable limitations period” without discussing third parties who may be protected by other means).

27. *CIV. PRAC. & REM. § 33.002(a)* (West 2008).

and that the defendant plead sufficient facts²⁸ to show that the designated responsible third party violated an “applicable legal standard.”²⁹ Violation of a legal standard presumes the existence of a duty as well as a breach of that duty.³⁰ By definition, “immune” parties are exempt from a duty.³¹ Similarly, a cause of action implies a legal remedy.³² Presumably, this statutory language requiring a cause of action and the violation of an applicable legal standard is not surplusage. More to the point, courts should “not read statutory language to be pointless if it is reasonably susceptible of another construction.”³³ A plain reading of the entire RTP statute arguably suggests that a viable cause of action must exist against a designated responsible party.³⁴

Furthermore, there must be an affirmative finding on a theory of liability or comparative fault before responsibility can be apportioned under the RTP statute.³⁵ Apportioning responsibility first requires a finding that there was a violation of the applicable legal standard.³⁶ So how can someone be responsible if he has no liability?

28. *Id.* § 33.004(g) (West Supp. 2011).

29. *Id.* § 33.011(6) (West 2008) (noting that a responsible third party is a party who allegedly violated the applicable legal standard for which recovery is sought).

30. *See* *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 233 (Tex. App.—Dallas 1993, writ denied) (“A duty represents a legally enforceable obligation to conform to a particular standard of conduct.”); BLACK’S LAW DICTIONARY 1535 (9th ed. 2009) (defining “standard of care” as “the degree of care that a reasonable person should exercise”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 53 (5th ed. 1984) (analyzing duty in negligence cases as an obligation “to conform to the legal standard of reasonable conduct in the light of the apparent risk”).

31. *See* BLACK’S LAW DICTIONARY 817 (9th ed. 2009) (defining “immune” as being “exempt from a duty or liability”).

32. *See id.* at 251 (identifying a cause of action as “a factual situation that entitles one person to obtain a remedy in court from another person”).

33. *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995), *superseded by statute on other grounds*, TEX. LABOR CODE ANN. § 504.053(e) (West 2006), *as recognized in* *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 57 (Tex. 2011).

34. *See* CIV. PRAC. & REM. § 33.002(a) (West 2008) (setting forth the applicability of the RTP statute); *see also* *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010) (instructing reliance on the plain meaning of the statute whenever possible).

35. *See* *Block v. Mora*, 314 S.W.3d 440, 445, 448 (Tex. App.—Amarillo 2009, pet. *dism’d*) (“Because comparative responsibility involves measuring the parties’ comparative fault in causing plaintiff’s injuries, it necessitates a preliminary finding that the plaintiff was in fact contributorily negligent Proportionate responsibility questions, such as [Pattern Jury Charges] 4.1 and 4.3, are appropriate when the defendant has met his burden of proof on contributory negligence.”).

36. *Id.*; *accord* CIV. PRAC. & REM. § 33.011(4), (6) (West 2008) (affirming that a

In addition, the legal and factual predicate for assigning responsibility to a defendant or a designated responsible third party is the same under the RTP statute.³⁷ If a defendant has a complete defense as a matter of law, a jury should never have the opportunity to assign that defendant a percentage of responsibility. Nothing in the statute suggests that all available legal defenses, such as immunity, cannot be raised on behalf of the designated responsible third party as well.³⁸ Furthermore, the statute does not prohibit a plaintiff from striking the designation of a responsible third party based on the same defenses that could be raised by an immune party if the immune party was erroneously joined in the lawsuit.³⁹

When the RTP statute expressly allows the designation of a non-party, against whom the plaintiff cannot make a claim, it also prescribes specific procedures for this practice.⁴⁰ For example, for a defendant to designate someone protected by the statute of limitations, the statute requires that the defendant comply with its obligations to disclose that person as a responsible third party under the Texas Rules of Civil Procedure.⁴¹ Similarly, for a defendant to designate an “unknown” person for committing a criminal act, the statute sets forth pleading requirements that must be met within sixty days after the defendant files an original answer.⁴² Interestingly, the RTP statute does not provide similar

defendant or responsible third party must be found in violation of an “applicable legal standard” to be held liable for damages).

37. See CIV. PRAC. & REM. §§ 33.003(a), 33.011(4) (West 2008) (codifying comparative law principles in conjunction with the RTP statute).

38. See generally *id.* §§ 33.001–.004, .011–.017 (West 2008 & Supp. 2011) (recognizing that the complete RTP statute reveals no limitation on possible defenses). While the statute makes no specific mention of available defenses, it does preserve “existing rights of indemnity,” ensuring that “rights of indemnification *shall* prevail over the provisions of this chapter.” *Id.* § 33.017 (emphasis added).

39. “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.” *Id.* § 33.004(l).

40. *Id.* § 33.004(j), (k).

41. See Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.01, 2011 Tex. Sess. Law Serv. 758, 760 (West) (codified at CIV. PRAC. & REM. § 33.004(d)) (detailing the requirements of designating a third party when the statute of limitations for bringing a claim against the third party has passed).

42. See CIV. PRAC. & REM. § 33.004(j), (k) (stating that an unknown third party may be designated as a responsible third party if, within sixty days of the filing of the original answer, the defendant pleads facts sufficient for the court to determine with reasonable

types of restrictions on the designation of non-parties who enjoy other forms of immunity, such as employers, sovereign governmental bodies, those protected by bankruptcy, and foreign manufacturers who are beyond the jurisdiction of the court.⁴³

The assumption that the RTP statute authorizes designating and assigning percentages of responsibility to immune non-parties does not come from a plain reading of the statute.⁴⁴ It comes from looking at the statute's former provisions and comparing them to the statute's current provisions.⁴⁵ More specifically, the 2003 amendments to the RTP statute eliminated its restrictions on who may be named as a responsible third party.⁴⁶ The 2003 amendments, however, added the requirement that the designating defendant plead sufficient facts "[to satisfy] the pleading requirements of the Texas Rules of Civil Procedure."⁴⁷ Texas Rule of Civil Procedure 47 also expressly requires that the pleadings be sufficient to state a cause of action.⁴⁸ Why would the legislature require that a cause of action be pled against

probability that the party acted criminally, that all identifying characteristics of the party are stated, and that the pleading requirements of the Texas Rules of Civil Procedure are met).

43. See generally *id.* §§ 33.001–.004, .011–.017 (identifying no specific procedures for certain immune parties); *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 58 n.5 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (noting that an employer who is a subscriber to the workers' compensation system may be designated as a responsible third party); David W. Holman, *Responsible Third Parties*, 46 S. TEX. L. REV. 869, 885–86 (2005) (discussing the expansion of the RTP definition to include governmental units, foreign defendants, and parties protected by bankruptcy).

44. See CIV. PRAC. & REM. § 33.004 (failing to express the particular percentage designation of responsibility to immune non-parties).

45. See, e.g., *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868–69 n.6 (Tex. 2009) (explaining that proportionate responsibility has been modified by a series of amendments); *Kimbrell v. Molinet*, 288 S.W.3d 464, 469–70 (Tex. App.—San Antonio 2008) (mem. op.) (Simmons, J., concurring) (discussing the expansion of proportionate responsibility framework by the subsequent amendments), *aff'd*, 356 S.W.3d 407 (Tex. 2011); *Unitec Elevator*, 178 S.W.3d at 58 n.5 (demonstrating the alterations made by the 2003 amendment to the statute).

46. Compare CIV. PRAC. & REM. § 33.004 (placing no restrictions on who may be named as a responsible third party), with Act of May 10, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.004, 1995 Tex. Gen. Laws 971, 972 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(a)) (excluding sellers eligible for indemnity from being named as responsible third parties in most circumstances).

47. CIV. PRAC. & REM. § 33.004(j).

48. TEX. R. CIV. P. 47(a).

responsible third parties if it intended to allow all immune parties to be designated as responsible third parties?⁴⁹

With the exception of unknown criminals and those protected by statutes of limitation, nothing in the text of the RTP statute indicates intent by the legislature to allow immune non-parties to be designated and assigned a percentage of responsibility. Undoubtedly, some legislators supporting the 2003 amendments to the RTP statute intended to allow defendants to designate all immune non-parties as responsible third parties.⁵⁰ But, the majority opinion in *Molinet* dismissed evidence of individual legislators' intent with the following observation:

Statements made during the legislative process by individual legislators or even a unanimous legislative chamber are not evidence of the collective intent of the majorities of both legislative chambers that enacted a statute. Moreover, the [l]egislature expresses its intent by the words it enacts and declares to be the law. Construing clear and unambiguous statutes according to the language actually enacted and published as law—instead of according to statements that did not pass through the law-making processes, were not enacted, and are not published as law—ensures that ordinary citizens are able to rely on the language of a statute to mean what it says. When a statute's language is clear and unambiguous “it is inappropriate to resort to the rules of construction or extrinsic aids to construe the language.”⁵¹

Are the RTP statutory requirements that a cause of action exist and that the designated responsible third party have violated an applicable legal standard ambiguous? If not, restraint in resorting to former statutory provisions or other canons of construction might be appropriate.⁵²

49. For a history of the amendments to the proportionate responsibility statute, see *Kimbrell*, 288 S.W.3d at 469–70 (Simmons, J., concurring).

50. See David W. Holman, *Responsible Third Parties*, 46 S. TEX. L. REV. 869, 880 (2005) (stating that the tort reformers “were removing all procedural and substantive restrictions on who could be a responsible third party . . .”).

51. *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011) (refusing to consider the legislative intent expressed in floor debate and published in the Senate Journal by unanimous consent because the statute's text appeared unambiguous) (citations omitted).

52. See *id.* at 418–19 (Lehrmann, J., dissenting) (noting that “the [l]egislature's simultaneous adoption of a ten-year repose period for medical liability claims and its amendments to chapter 33 create an ambiguity that justifies consideration of legislative history . . .”).

III. DUE PROCESS MAY PROHIBIT DESIGNATING IMMUNE NON-PARTIES AS RESPONSIBLE THIRD PARTIES

The Texas Constitution guarantees, “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”⁵³ According to the Texas Supreme Court, this due course clause is “nearly identical to the federal due process clause”⁵⁴ under the Fourteenth Amendment.⁵⁵ Due process under the United States Constitution requires both substantive due process and procedural due process.⁵⁶

A. *Allocating Responsibility to Non-Parties Raises Substantive Due Process Concerns*

The primary substantive due process concern with allocating responsibility to a non-party is that the plaintiff may not receive a fair adjudication of his claim.⁵⁷ In addressing this concern, courts confronting non-party apportionment schemes in other states have discussed the existence, or lack thereof, of procedural safeguards to ensure a fair allocation of fault to the unrepresented non-parties.⁵⁸ The reasoning of the Montana Supreme Court in

53. TEX. CONST. art. I, § 19.

54. Univ. of Tex. Med. Sch. at Hous. v. Than, 901 S.W.2d 926, 929 (Tex. 1995).

55. U.S. CONST. amend. XIV, § 1.

56. See United States v. Salerno, 481 U.S. 739, 746 (1987) (naming both substantive and procedural due process as requirements of the Due Process Clause, which protects individuals from government action).

57. See Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1062–63 (Alaska 2002) (addressing the issue of whether a plaintiff’s substantive due process rights are violated by the scheme of allocating responsibility to third parties); Plumb v. Fourth Judicial Dist. Court, 927 P.2d 1011, 1020 (Mont. 1996) (noting that the plaintiffs’ right to recovery was endangered by the apportionment scheme), *superseded by statute*, Act of Apr. 18, 1997, 55th Leg., R.S., ch. 293, 1997 Mont. Laws 1374, *as recognized in* Stokes v. Mont. Thirteenth Judicial Dist. Court, 259 P.3d 754 (Mont. 2011); Newville v. State, Dep’t of Family Servs., 883 P.2d 793, 802–03 (Mont. 1994) (noting that procedural issues may interfere with substantive due process rights of the plaintiff); Haff v. Hettich, 593 N.W.2d 383, 389–90 (N.D. 1999) (considering the plaintiff’s contention of substantive due process violations).

58. See *Kutch*, 56 P.3d at 1063 (declining to find a substantive due process violation because Alaska’s non-party apportionment scheme had adequate safeguards); *Plumb*, 927 P.2d at 1020 (explaining that procedural safeguards in a non-party apportionment scheme failed to protect plaintiffs’ substantive due process rights); *Newville*, 883 P.2d at 802–03 (holding that a non-party apportionment scheme lacked adequate procedural safeguards to ensure accurate apportionment of fault); *Haff*, 593 N.W.2d at 389–90 (distinguishing a non-party apportionment scheme from schemes in other states by noting the scheme’s procedural safeguards).

*Plumb v. Fourth Judicial District Court*⁵⁹ is instructive for those wishing to challenge the constitutionality of the “empty chair” defense under the RTP statute.

In *Plumb*, the Montana Supreme Court struck down Montana’s non-party apportionment statute because it violated the plaintiffs’ federal substantive due process rights.⁶⁰ The court recognized that the state had a legitimate interest in apportioning liability among those responsible for a person’s damages.⁶¹ The court observed, however, that:

[W]ithout the opportunity to appear and defend themselves, non-parties are likely to be assigned a disproportionate share of liability, and the [plaintiffs’] 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.⁶²

Because the percentage of liability assigned to a non-party “would not be a reliable or accurate apportionment of liability[,]” the court concluded that Montana’s non-party apportionment statute “is not rationally related to that legitimate governmental objective [of fair apportionment of liability], but is *more likely to accomplish the opposite result.*”⁶³

Texas Supreme Court Justice Lehrmann’s dissent in *Molinet* described the “distortion inherent in such a procedure” that requires the plaintiff to “prove the liability of the party defendant . . . , while at the same time defending [an] empty chair.”⁶⁴ Justice Lehrmann noted that “[t]he result would likely

59. *Plumb v. Fourth Judicial Dist. Court*, 927 P.2d 1011 (Mont. 1996), *superseded by statute*, Act of Apr. 18, 1997, ch. 293, *as recognized in Stokes*, 259 P.3d 754.

60. *Id.* at 1021.

61. *Id.* at 1019.

62. *Id.* at 1020.

63. *Id.* at 1019–20 (emphasis added). See generally Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437, 472–77 (2007) (discussing how non-party apportionment is treated under the Restatement (Third) of Torts and the Uniform Comparative Fault Act as well as why non-parties are likely to be assigned a disproportionate share of liability). The premise that non-parties are likely to be assigned a disproportionate share of liability, however, was rejected in *Salazar v. American Sterilizer Co.*, 5 P.3d 357, 371 (Colo. App. 2000), *Smiley v. Corrigan*, 638 N.W.2d 151, 154 n.7 (Mich. Ct. App. 2001), and *Haff*, 593 N.W.2d at 390.

64. *Molinet v. Kimbrell*, 356 S.W.3d 407, 419 (Tex. 2011) (Lehrmann, J., dissenting) (quoting Wes Christian & Alexandra Mutchler, *Musical Chairs: Apportioning Responsibility*, 44 THE ADVOC. (TEX.) 118, 124 (2008)).

be an inaccurate diminution of fault allocated to defendants and an increase of fault attributed to unrepresented [responsible third parties].”⁶⁵ Justice Simmons’s concurrence in the lower court also acknowledged that apportionment of responsibility could be skewed.⁶⁶ This is partly because, as Justices Lehrmann and Simmons both observed, the designated responsible third party “has no legal incentive to vigorously contest liability or attempt to assign responsibility to the defendant.”⁶⁷

Distorted apportionments of responsibility with an immune, but designated, responsible third party could occur for other reasons as well. The jury might erroneously suspect that the non-party has greater responsibility simply because the non-party did not show up to defend itself. Moreover, a jury might assign a disproportionate percentage of responsibility to the designated non-party as a compromise between those jurors siding with either the plaintiff or the defendant. The jury might even assume that the non-party is not in court because it has already entered into a generous settlement with the plaintiff.

The misallocation of responsibility has concerned the Texas Supreme Court before. In *Elbaor v. Smith*,⁶⁸ the Texas Supreme Court deduced that “Mary Carter agreements”⁶⁹ could unfairly influence allocation of negligence in a trial.⁷⁰ The court accordingly declared Mary Carter agreements void on public policy grounds.⁷¹ The misallocation of responsibility that

65. *Id.* at 419 (Lehrmann, J., dissenting) (second alteration in original) (quoting Nancy A. Costello, *Allocating Fault to the Empty Chair: Tort Reform or Deform*, 76 U. DET. MERCY L. REV. 571, 598 (1999)).

66. “Presented with a passive designee and the defendant’s bold assertions of blamelessness, the jury likely may apportion responsibility to the designee from whom the plaintiff cannot recover.” *Kimbrell v. Molinet*, 288 S.W.3d 464, 470 (Tex. App.—San Antonio 2008) (mem. op.) (Simmons, J., concurring), *aff’d*, 356 S.W.3d 407.

67. *Molinet*, 356 S.W.3d at 418 (Lehrmann, J., dissenting); *see Kimbrell*, 288 S.W.3d at 470 (Simmons, J., concurring) (reasoning that a designee may lack incentive to tirelessly contest liability or shift the alleged responsibility to the defendant); *see also* Elaine A. Carlson, *Tort Reform: Redefining the Role of the Court and the Jury*, 47 S. TEX. L. REV. 245, 261 (2005) (noting the probability of a phlegmatic defense by a designated responsible third party who is unconcerned with liability unless joined).

68. *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992).

69. A “Mary Carter agreement” is defined as “one in which the settling defendant possesses a financial stake in the outcome of the case and the settling defendant remains a party to the litigation.” *Id.* at 247 n.13 (citations omitted).

70. *See id.* at 250 (finding that Mary Carter agreements can unfairly influence the probability of a less culpable defendant incurring full liability).

71. *Id.*

concerned the *Elbaor* court may well have a similar potential to occur when responsibility can be allocated to non-parties.

Justice Lehrmann's dissent in *Molinet* concluded that the "empty chair defense" the court allowed under the RTP statute placed "an impossible burden upon plaintiffs to represent [the responsible third party's] interests as well as their own."⁷² This is because "[a] plaintiff . . . has no knowledge, possession, or control of evidence that a [responsible third party] could use to protect himself from a finger-pointing defendant."⁷³ The Montana Supreme Court went further in *Plumb*, however, and held that placing such a task on the plaintiffs also violated the plaintiffs' federal substantive due process rights.⁷⁴ The court reasoned the RTP statute placed an unreasonable burden on the plaintiffs when balanced against the Montana legislature's purpose in enacting its non-party apportionment statute.⁷⁵ According to the court:

"[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.⁷⁶

The plaintiff's attempt to exonerate the immune non-party may be particularly difficult if there is cooperation, or even collusion,⁷⁷

72. *Molinet*, 356 S.W.3d at 419 (Lehrmann, J., dissenting) (alteration in original).

73. *Id.* (quoting Wes Christian & Alexandra Mutchler, *Musical Chairs: Apportioning Responsibility*, 44 THE ADVOC. (TEX.) 118, 124 (2008) (alteration in original)); see also *Kimbrell v. Molinet*, 288 S.W.3d 464, 470 (Tex. App.—San Antonio 2008) (mem. op.) (Simmons, J., concurring) ("A plaintiff may be forced to expend considerable time and expense to prevent the defendant from shifting liability to a designated responsible third party from whom the plaintiff cannot recover."), *aff'd*, 356 S.W.3d 407; Nancy A. Costello, *Allocating Fault to the Empty Chair: Tort Reform or Deform*, 76 U. DET. MERCY L. REV. 571, 598 (1999) (explaining how the empty chair defense may result in an inaccurate apportionment of fault between the defendant and responsible third party).

74. *Plumb v. Fourth Judicial Dist. Court*, 927 P.2d 1011, 1021 (Mont. 1996), *superseded by statute*, Act of Apr. 18, 1997, 55th Leg., R.S., ch. 293, 1997 Mont. Laws 1374, *as recognized in Stokes v. Mont. Thirteenth Judicial Dist. Court*, 259 P.3d 754 (Mont. 2011).

75. *Id.* at 1020.

76. *Id.* (quoting *Newville v. State, Dep't of Family Servs.*, 883 P.2d 793, 802 (Mont. 1994)). *But see Haff v. Hettich*, 593 N.W.2d 383, 390 (N.D. 1999) (holding that placing the burden on the plaintiff to defend the non-party did not violate substantive due process).

77. *But see Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1063 n.105 (Alaska 2002) (declining to find a substantive due process violation based on the theoretical possibility

between the non-party and the defendant.⁷⁸

The RTP statute initially allowed defendants to designate a time-barred responsible third party; the statute also allowed plaintiffs to join these responsible third parties in most circumstances.⁷⁹ This was undoubtedly an important procedural safeguard. The statute's repeal in 2011 could invite mischief in the fair allocation of fault to unrepresented parties.⁸⁰ In balancing the purpose of the RTP statute—fairly apportioning liability—against the risk of plaintiffs losing their remedy through a skewed apportionment, the scales may now tip against the RTP statute with the loss of this procedural safeguard.

B. *Allocating Responsibility to Non-Parties Raises Procedural Due Process Concerns*

A person has a protected property or liberty interest in his reputation under the Texas Constitution⁸¹ as well as the United States Constitution.⁸² Designating someone as a responsible third party subjects that individual to a public adjudication of responsibility, even though it does not impose liability on him.⁸³ Because designation implicates a protected interest, procedural due process concerns may also circumscribe the RTP statute.

In *University of Texas Medical School at Houston v. Than*,⁸⁴ the Texas Supreme Court held that a medical student's procedural due process rights were violated by an inadequate hearing after the student was accused of cheating.⁸⁵ The court explained:

that the defendant may have colluded with a non-party employer).

78. See *Kimbrell*, 288 S.W.3d at 470 (Simmons, J., concurring) (“In a health care liability claim, the unchecked ability of a defendant to designate a time-barred responsible third party may invite mischief.”).

79. See Act of May 10, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.004, 1995 Tex. Gen. Laws 971, 972 (providing in Civil Practice and Remedies Code section 33.004(e) that a claimant may join a time-barred responsible third party within sixty days after the party is designated), *repealed by* Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.02, 2011 Tex. Sess. Law Serv. 758, 760 (West).

80. See *generally Kimbrell*, 288 S.W.3d at 470 (Simmons, J., concurring) (observing situations in which a jury may apportion responsibility to a party that the plaintiff cannot recover from).

81. *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995).

82. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

83. See CIV. PRAC. & REM. § 33.004(i) (stating that designation of a responsible third party “does not by itself impose liability” on that party).

84. *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926 (Tex. 1995).

85. *Id.* at 931–32.

[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of due process must be satisfied. . . .

. . . .

. . . Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.⁸⁶

Because the Texas Supreme Court traditionally follows contemporary interpretations of the federal Due Process Clause,⁸⁷ the United States Supreme Court's opinion in *Goss v. Lopez*⁸⁸ is also instructive. In *Lopez*, the Court found that students' protected interests in their reputation were violated when school administrators suspended the students without any kind of hearing.⁸⁹ According to the Court: "The fundamental requisite of due process of law is the opportunity to be heard, a right that has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest."⁹⁰ The Court added that the students had to be given, "[a]t the very minimum, . . . *some* kind of notice and afforded *some* kind of hearing."⁹¹

The RTP statute does not provide designated non-parties with the minimum protections of reasonable notice and the opportunity to be heard.⁹² The statute does not require the defendant to notify the designated responsible third party.⁹³ The statute also fails to provide any method for the designated responsible third

86. *Id.* at 930.

87. *Id.* at 929.

88. *Goss v. Lopez*, 419 U.S. 565 (1975).

89. *Id.* at 579.

90. *Id.* (alteration in original) (quoting *Mullane v. Cent. Hannover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations and internal quotation marks omitted); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

91. *Id.*

92. See generally TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001–.004, .011–.017 (West 2008 & Supp. 2011) (providing limited rights to designated non-parties). "The RTP has limited rights regarding its designation presumably because the designation or finding of fault against the RTP does not, absent joinder as a defendant, impose liability or responsibility on the RTP and may not be used in other proceedings." *Flack v. Hanke*, 334 S.W.3d 251, 262 n.6 (Tex. App.—San Antonio 2010, pet. dismissed) (citing CIV. PRAC. & REM. § 33.004(i)).

93. *Kimbrell v. Molinet*, 288 S.W.3d 464, 470 n.6 (Tex. App.—San Antonio 2008) (mem. op.) (Simmons, J., concurring), *aff'd*, 356 S.W.3d 407 (Tex. 2011).

party to object to the designation.⁹⁴ Furthermore, the statute does not provide the designated responsible third party with any kind of hearing if it is not joined in the lawsuit.⁹⁵

In *Plumb*, the Montana Supreme Court also overturned Montana's non-party apportionment scheme for similar procedural due process deficiencies.⁹⁶ More specifically, the court held that Montana's non-party apportionment statute deprived the *non-party* of federal due process by allowing the defendant to assign liability to the non-party without affording the non-party an opportunity to defend himself.⁹⁷ In *Plumb*, the non-party was a doctor. As a result, the court found that the doctor's professional reputation and economic interests were jeopardized when he was not given an adequate opportunity to appear on his own behalf, cross-examine those who might criticize the care he provided, or offer evidence in support of his course of treatment.⁹⁸ Interestingly, the court affirmed the *plaintiffs'* standing to assert the due process rights of the doctor "because by the denial of that [non-]party's procedural rights, the plaintiffs suffered potential economic loss."⁹⁹

94. *Flack*, 334 S.W.3d at 262.

95. See generally CIV. PRAC. & REM. §§ 33.001-.004, .011-.017 (providing a hearing only for designated responsible parties joined in a suit). Interestingly, the Texas Supreme Court recently declined to decide whether an immune governmental entity could be joined under the pre-2003 RTP statute solely for the purposes of apportioning fault in *Zachry Construction Corp. v. Texas A&M University*, 298 S.W.3d 617 (Tex. 2009).

96. *Plumb v. Fourth Judicial Dist. Court*, 927 P.2d 1011, 1021 (Mont. 1996), *superseded by statute*, Act of Apr. 18, 1997, 55th Leg., R.S., ch. 293, 1997 Mont. Laws 1374, as recognized in *Stokes v. Mont. Thirteenth Judicial Dist. Court*, 259 P.3d 754 (Mont. 2011).

97. *Id.* at 1019-20; see also Wes Christian & Alexandra Mutchler, *Musical Chairs: Apportioning Responsibility*, 44 THE ADVOC. (TEX.) 118, 123 (2008) (arguing that allowing the designation of responsible third parties who are not part of the suit violates due process). Because non-parties could not be bound by the judgment under a similar Kentucky non-party apportionment scheme, the reasoning of the Montana Supreme Court did not persuade the Sixth Circuit in *Stanley v. Aeroquip Corp.*, Nos. 97-6472, 97-6475, 98-5005, 1999 WL 266250, at *7 n.2 (6th Cir. Apr. 22, 1999) (unpublished).

98. *Plumb*, 927 P.2d at 1020.

99. *Id.* at 1017; see *Newville v. State, Dep't of Family Servs.*, 883 P.2d 793, 798-99 (Mont. 1994) (finding that the plaintiffs had standing to bring constitutional due process claims of unrepresented designated third parties because the plaintiffs could suffer economic loss).

IV. THE TEXAS “OPEN COURTS PROVISION” MAY PROHIBIT
DESIGNATING IMMUNE NON-PARTIES AS RESPONSIBLE
THIRD PARTIES

The Texas Constitution also guarantees, “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”¹⁰⁰ This “Open Courts Provision”¹⁰¹ accords Texas citizens rights in addition to those guaranteed under the Due Process, or Due Course,¹⁰² Clauses of the United States¹⁰³ and Texas Constitutions.¹⁰⁴ Because the ambit of these additional rights is not well established, the Open Courts Provision may well provide the most fertile ground for challenging legislation that may be unfair to litigants.

In making an Open Courts challenge, a litigant must satisfy two criteria.¹⁰⁵ “First, it must be shown that the litigant has a cognizable common law cause of action that is being restricted. Second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.”¹⁰⁶

The first criteria only requires showing that a common law *cause of action* has been restricted in some way.¹⁰⁷ In *Lucas v. United States*,¹⁰⁸ this requirement was satisfied when the plaintiffs, who brought a medical negligence claim, demonstrated that their damages were restricted by the damage caps in the medical malpractice statute.¹⁰⁹ Because the RTP statute can restrict the recoverable damages under the common law cause of action for

100. TEX. CONST. art. I, § 13. See generally Kathryn Kase, Casenote, *Lucas v. United States*, 31 *Tex. Sup. Ct. J.* 423 (1988), 20 ST. MARY’S L.J. 397, 399–402 (1989) (discussing the history and body of law regarding the Texas Open Courts Provision).

101. *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

102. TEX. CONST. art. I, § 19.

103. *Lucas v. United States*, 807 F.2d 414, 420 (5th Cir. 1986) (“The Texas Supreme Court has held, however, that section 13 is broader in its protections than the [F]ourteenth [A]mendment.” (citing *Sax*, 648 S.W.2d at 664)).

104. *LeCroy v. Hanlon*, 713 S.W.2d 335, 340 (Tex. 1986); see *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984) (“[T]he two Texas due course of law provisions are not coterminous.”).

105. *Sax*, 648 S.W.2d at 666.

106. See *id.* (analyzing a litigant’s right to redress).

107. *Id.*

108. *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988).

109. *Id.* at 690.

negligence by allowing apportionment of fault to a non-party, the statute may meet this requirement.

Alternatively, a plaintiff might argue that the RTP statute restricts the common law cause of action for negligence by making proof of causation more problematic. This is because a typical negligence claim only requires proving that a defendant's conduct was a proximate cause of the plaintiff's damages.¹¹⁰ When a defendant is allowed to designate immune non-parties, the plaintiff can only collect a full recovery by proving that the defendant was the *sole* cause of the plaintiff's damages.¹¹¹ Thus, the RTP statute elevates the plaintiff's burden to proving that the defendant's conduct was the sole cause of the plaintiff's damages in such cases.

In meeting the second criteria for an Open Courts challenge, the reasoning of the Montana Supreme Court in *Plumb* remains instructive:

The percentage of liability assigned to [the non-party] following this kind of process would not be a reliable or accurate apportionment of liability and cannot, therefore, be rationally related to the objectives [of its] supporters

[The plaintiffs'] right to recover . . . is jeopardized by the potential this procedure affords for disproportionate assignment of liability to an unnamed, unrepresented, and nonparticipating third person. . . .

. . . “[T]here is no reasonable basis for requiring plaintiffs to [present their case] from the standpoint of the unrepresented parties”¹¹²

110. See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 2.4 (2010) (“There may be more than one proximate cause of an event.”); cf. *Doe v. Boys Clubs of Greater Dall., Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) (stating that the standard for the cause in fact requirement of proximate causation is whether the “act or omission was a substantial factor in bringing about the injury” (emphasis added) (quoting *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995) (internal quotation marks omitted))).

111. See TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a) (West 2008) (“[A] liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant’s percentage of responsibility”).

112. *Plumb v. Fourth Judicial Dist. Court*, 927 P.2d 1011, 1020 (Mont. 1996) (quoting *Newville v. State, Dep’t of Family Servs.*, 883 P.2d 793, 802 (Mont. 1994)), *superseded by statute*, Act of Apr. 18, 1997, 55th Leg., R.S., ch. 293, 1997 Mont. Laws 1374, *as recognized in Stokes v. Mont. Thirteenth Judicial Dist. Court*, 259 P.3d 754 (Mont. 2011).

Bestowing immunity on a potential tortfeasor is a public policy decision with consequences to both plaintiffs and defendants. Limiting the consequences of immunity to just plaintiffs by still allowing defendants to apportion responsibility to immune non-parties, however, may unconstitutionally tip the scales against plaintiffs.¹¹³ This might be particularly true when, as in Texas practice, the jury is not informed of the effect of its allocation of percentages of responsibility or informed about the plaintiff's lack of a remedy against the immune responsible third party.

V. CONCLUSION

So can immune parties really be responsible? The Texas Supreme Court in *Galbraith Engineering* observed that, while the RTP statute “initially equated responsibility with liability to the plaintiff or claimant, this is no longer the case.”¹¹⁴ This was arguably dicta, which stemmed from an unnecessary comparison of current and former statutory provisions, without any apparent attempt to first discern the answer solely from the text of the current statute.¹¹⁵ Nonetheless, this observation is consistent with the court's recent conclusion that “[c]hapter 33 expresses the [l]egislature's intent to hold defendants responsible for only their own conduct.”¹¹⁶

Whether any imbalance in the proportionate responsibility framework impinges constitutional safeguards,¹¹⁷ or simply reflects the legislature's considered judgment on matters of public policy,¹¹⁸ remains to be decided. The Texas Supreme Court's

113. *But see* *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1062 (Alaska 2002) (affirming the lower court's holding that it is “inevitable” that someone will be disadvantaged by the presence of “empty chairs,” and that the choice between apportionment schemes which disadvantage either defendants or plaintiffs is a “pure public policy choice” for the legislature and “not one that is vulnerable to constitutional attack”).

114. *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868 (Tex. 2009).

115. *Id.* at 868 n.6.

116. *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 505 (Tex. 2010).

117. *See generally* James C. Harrington, *Framing A Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 437–38 (1993) (suggesting a structure for challenging legislation under the Texas Constitution).

118. *See Kutch*, 56 P.3d at 1062 (affirming the lower court's holding “that the choice between a system which disadvantages defendants and a system which disadvantages plaintiffs is a pure public policy choice that [is] made by the legislature and not one that is vulnerable to constitutional attack” (internal quotation marks omitted)).

opinion in *Molinet* did not address constitutional concerns,¹¹⁹ although the result allowed defendants to designate responsible third parties who were protected by the statute of limitations.¹²⁰ In response to the “imbalanced” apportionment scheme decried by the dissent,¹²¹ the court may have foreshadowed the outcome of a constitutional challenge by stating that such imbalances “are matters to be addressed by the [l]egislature.”¹²²

While aggrieved plaintiffs may have legitimate constitutional concerns of their own, their most compelling constitutional challenge might be one made on behalf of a designated responsible third party who is deprived of its due process right to defend its reputation. Construing the RTP statute to not allow the designation of most immune non-parties would ensure that the statute survives most constitutional challenges.

119. A constitutional challenge to the statute of limitations for healthcare liability claims under the circumstances presented in *Molinet* may have been of limited benefit to the plaintiff. See *Molinet v. Kimbrell*, 356 S.W.3d 407, 415–16 (Tex. 2011) (distinguishing *Molinet* from previous cases involving chapter 74 of the Texas Civil Practice and Remedies Code). This is because of the 2003 Texas constitutional amendment that gave the legislature authority to “determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care” TEX. CONST. art III, § 66(b). A constitutional challenge under similar circumstances to the general statute of limitations for non-healthcare liability claims would not encounter this legislative prerogative. This is because the 2011 amendment to the RTP statute, which repealed the plaintiff’s right to join a designated responsible third party after the statute of limitations had expired, did not pass the legislature with a three-fifths vote of all members elected to each house or with the required language citing the applicable constitutional provision. Compare TEX. CONST. art III, § 66(c), (e), with Act of May 30, 2011, 82d Leg., R.S., ch. 203, § 5.02, 2011 Tex. Sess. Law Serv. 758, 760 (West) (repealing Texas Civil Practice and Remedies Code section 33.004(e), which allowed plaintiffs to join a responsible third party even though joinder would otherwise be barred by the statute of limitations).

120. See *Molinet*, 356 S.W.3d at 416 (concluding that *Molinet*’s liability claims brought against two doctors after they had been designated responsible third parties were barred).

121. *Id.* at 417–18 (Lehrmann, J., dissenting).

122. *Id.* at 416 (majority opinion).