

NO. 09-0048

IN THE SUPREME COURT OF TEXAS

MCI Sales and Service, Inc., f/k/a Hausman Bus Sales, Inc. and Motor Coach Industries
Mexico, S.A. de C.V., f/k/a Dina Autobuses, S.A. de C.V.

Petitioners/Respondents

v.

James Hinton, Individually and as Representative
of the Estate of Dolores Hinton, deceased, *et al.*

Respondents/Petitioners

On Appeal from the Court of Appeals
For the Tenth Judicial District of Texas

MCI'S RESPONSE TO CROSS-PETITIONERS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

ISSUES PRESENTED iv

STATEMENT OF FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT..... 6

I. Central Texas was a “settling person” under Chapter 33..... 6

 A. Central Texas’ actions meet the statutory definition of “settling person,” notwithstanding statements made by others in the bankruptcy proceeding..... 6

 B. The Plaintiffs rely on requirements that are not found in Chapter 33. 7

 C. The court of appeals correctly held that Central Texas made payments to the Plaintiffs. 11

 D. The court of appeals correctly held that Central Texas was a settling person “at the time of submission.” 12

 E. The lower court’s opinion is correct and will not adversely affect bankruptcy law or “settlement jurisprudence.” 12

II. The Plaintiffs’ position is inconsistent with Texas public policy. 15

CONCLUSION AND PRAYER 16

CERTIFICATE OF SERVICE 18

INDEX OF AUTHORITIES

Cases

<i>C&H Nationwide v. Thompson</i> , 903 S.W.2d 315 (Tex. 1994).....	6, 15
<i>Elbaor v. Smith</i> , 845 S.W.2d 240 (Tex. 1992)	15, 16
<i>F.F.P. Operating Partners, L.P. v. Duenez</i> , 237 S.W.3d 680 (Tex. 2007).....	15
<i>Gilcrease v. Garlock, Inc.</i> , 211 S.W.3d 448 (Tex. App.—El Paso 2006, no pet.)	9, 11
<i>HCBeck, Ltd. v. Rice</i> , 284 S.W.3d 349, 2009 Tex. LEXIS 120 (Tex. App. 3, 2009)	11
<i>Knowlton v. U.S. Brass Corp.</i> , 864 S.W.2d 585 (Tex. App.—Houston [1st Dist.] 1993).....	14
<i>MCI Sales & Service, Inc. v. Hinton</i> , 272 S.W.3d 17 (Tex. App.—Waco 2008, pet. filed).....	passim
<i>Nat’l Liab. & Fire Ins. Co. v. Allen</i> , 15 S.W.3d 525 (Tex. 2000).....	7
<i>Palais Royal, Inc. v. Gunnels</i> , 976 S.W.2d 837 (Tex. App.—Houston [1st Dist.] 1998, pet. dism’d).....	14
<i>Turoff v. McCaslin</i> , 222 S.W.3d 664 (Tex. App.—Waco 2007, no pet.).....	16

Statutes

TEX. CIV. PRAC. & REM. CODE § 33.003	1, 6
TEX. CIV. PRAC. & REM. CODE § 33.011	passim

Other Authorities

Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41 (amended 1995 and 2003).....	1
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ISSUES PRESENTED

1. Is a party that pays \$5 million to be distributed to the plaintiffs in exchange for a release of any liability for its role in causing the plaintiffs' personal injuries a "settling person" for purposes of proportionate responsibility under Chapter 33 of the Civil Practice and Remedies Code?

2. May plaintiffs arrange their receipt of \$5 million paid by a potentially liable party in such a manner that they can prevent the trial court from submitting the paying party's proportionate responsibility to the jury as a "settling person"?

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

In this personal injury case involving a bus accident, Cross-Petitioners James Hinton *et al.* (“Plaintiffs”) argue that they have discovered how a defendant can pay \$5 million and get a full release from liability, yet not be a “settling person.” The court of appeals saw through this charade and correctly held that the trial court erred by refusing to submit to the jury (1) the bus driver, Johnny Cummings, and (2) his employer and the bus owner, Central Texas,¹ to determine their proportionate responsibility. Plaintiffs’ petition for review should be denied or, in the alternative, the portion of the court of appeals’ judgment reversing and remanding for a new trial should be affirmed.

The sole issue presented in the Plaintiffs’ petition is straightforward: was Central Texas a “settling person” under the applicable version of Civil Practice and Remedies Code chapter 33? That statute required the court to submit to the jury “a person who at the time of submission has paid or promised to pay money or anything of monetary value to a claimant at any time in consideration of potential liability.” Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41 (amended 1995 and 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(5)); *see also* TEX. CIV. PRAC. & REM. CODE § 33.003 (requiring the jury to determine the percentage of responsibility with respect to each settling person). As its language makes clear, the statute requires the Court to focus on Central Texas’ conduct. Yet Plaintiffs spend the

¹ “Central Texas” refers to Central Texas Trails, Inc., Central Texas Bus Lines, Inc., and Kincannon Enterprises. As the court of appeals does in the portion of its opinion addressing the proportionate-responsibility issue, this Brief will refer to Central Texas and Cummings collectively as “Central Texas.”

² Unless otherwise noted, all references to Chapter 33 will refer to the version in existence before the 2003 amendments.

bulk of their brief discussing the conduct of everyone but Central Texas—the Plaintiffs, the MCI defendants³ and their counsel, other MCI affiliates, the bankruptcy court, other claimants in the bankruptcy proceeding, and even other parties in unrelated bankruptcies. The simple fact is that Central Texas meets the statutory definition of a “settling person.” Accordingly, the court of appeals correctly reversed the trial court’s judgment.

STATEMENT OF FACTS

The sections of Plaintiffs’ Statement of Facts regarding “The Accident,” “Pretrial Chronology,” and “The State Court Trial” consist primarily of information and argument that is irrelevant to the single issue raised in Plaintiffs’ petition. One fact that is undisputed is that Central Texas’ negligence was a proximate cause of Plaintiffs’ injuries. Plaintiffs acknowledge that they were required to establish this fact to recover any amounts in the bankruptcy court proceedings. (*See* Pls.’ Br. at 19) Thus, Plaintiffs proved this point before the “Special Judge” and obtained a finding. (84 CR 20038) The court of appeals even noted that the Plaintiffs “make no argument that the evidence [of Central Texas’ negligence] was legally insufficient.” *MCI Sales & Serv., Inc. v. Hinton*, 272 S.W.3d 17, 40 (Tex. App.—Waco 2008). Yet in their brief to this Court, Plaintiffs suggest that Central Texas’ conduct may not have been a factor that contributed to the accident. (*See* Pls.’ Br. at 2, 22). In addition to contradicting the position Plaintiffs took in the bankruptcy court proceedings and in the court of appeals, Plaintiffs’ argument relies on an exhibit that was never admitted in evidence in the underlying state court trial. (*See id.* at 2 (citing PX 163)) No party disputes that Central Texas was negligent and that

³ Petitioners/Cross-Respondents MCI Sales and Service, Inc. and Motor Coach Industries Mexico, S.A. de C.V. will collectively be referred to in this Brief as “MCI.”

its negligence was a contributing cause of the Plaintiffs' injuries.

On February 14, 2003, the Plaintiffs boarded a bus chartered from Central Texas and driven by Cummings to take them from Temple to Dallas. (5 CR 1111; 5 RR 98-99, 133; 9 RR 110) The weather was overcast with reduced visibility due to fog, haze, and heavy rain. (5 RR 135; PX 17 at pp. 3, 20; PX 20) The stretch of highway between Temple and Waco was particularly treacherous because of the ascending grade, the flooded road surface, and the 20-foot wide earthen median that had no temporary or permanent barrier. (PX 17 at pp. 5-6, 20) The tread on one of the rear tires of the bus measured 2/32 of an inch and on another measured 3/32 of an inch, so thin that the Plaintiffs' own expert testified that he would not have felt safe riding in that particular bus. (6 RR 200-03; PX 17 at p.39)⁴

According to the Plaintiffs who noticed, Cummings was driving too fast for the conditions—about 65 mph. (5 RR 171-73; 13 RR 80-86) As the bus crested a hill Cummings saw cars stopped ahead.⁵ (PX 16 at p.8; PX 17 at pp. 3, 6, 35) Instead of trying to stop, Cummings steered hard left and drove the bus across the rain-soaked median into the southbound lanes of Interstate 35, hoping to successfully navigate through the head-on traffic. (*Id.*) His tactic failed. The bus slammed into the front of a Suburban (instantly killing two of its occupants) causing the bus to spin counterclockwise, tip over on its right side, and slide to a stop over the ditch between

⁴ The NTSB's Vehicle Dynamics Simulation Study stated that on marginal wet pavement tire treads with less than 4/32 inch are as slippery as ice when the surface of the roadway is just barely flooded. (PX 17 at p.39)

⁵ An accident had previously occurred and the traffic was stopped because I-35 northbound was shut down. (7 RR 48-50)

southbound I-35 and the access road. (PX 17 at p.3)⁶ As a result, five occupants of the bus died, and many others were injured. (*Id.*)

After the accident, but before the Plaintiffs filed suit, Central Texas and Cummings filed for bankruptcy in the Western District of Texas, Waco Division. (16 CR 3804; *see* DX 312) The Plaintiffs filed claims as creditors against the bankruptcy estate based on their injuries that were caused by the negligence of Central Texas and Cummings. (DX 312 (Debtors' Second Amended Plan of Reorganization, at pp. 6-7); 44 RR DXOP) The Plaintiffs separately filed the underlying suit against MCI, claiming that the bus was unreasonably dangerous because it was not equipped with three-point passenger seatbelts or with laminated glass passenger windows. (5 CR 1117) The Plaintiffs did not assert claims against Central Texas or Cummings in the state court litigation. (5 CR 1111-59)

With respect to the proceedings in bankruptcy court, the relevant facts are these:

- (1) Central Texas paid \$5 million of its insurance proceeds into an interest-bearing account in the registry of the bankruptcy court in June 2003. (84 CR 20022)
- (2) The Plaintiffs prepared and agreed to an "Apportionment Plan" in September 2003, over two years before the underlying suit was submitted to the jury. (84 CR 20051; 85 CR 20192)
- (3) The Apportionment Plan placed Central Texas' payment into a dedicated "Liability Fund" for the sole purpose of being apportioned to persons with claims arising from the bus accident. (84 CR 20051)
- (4) The Apportionment Plan gave each Plaintiff the option of immediately electing to take an assigned portion of the Liability Fund. (84 CR

⁶ The NTSB's Vehicle Dynamics Simulation Study concluded that the bus would not have lost control if it had not been steered to the left so hard and followed by hard breaking, but probably would have smashed into the rear of other vehicles before it was able to stop. (PX 17 at p.39)

20052, ¶ 5(A); 85 CR 20194)

- (5) Alternatively, the Apportionment Plan allowed each Plaintiff the option of placing his or her portion of the Liability Fund into a “Litigation Fund.” The Litigation Fund would then be distributed after a proceeding before a Special Judge chosen by those who opted for the Litigation Fund and under procedures selected by the Litigation Fund participants. (84 CR 20052, ¶ 5(B))
- (6) Those participating in the Litigation Fund retained the option to “agree at any time to approve full or partial distribution of the Litigation Funds to any or all participants.” (84 CR 20053, ¶5(B)(6))
- (7) Central Texas was discharged (*i.e.*, released) from tort liability when its Reorganization Plan was approved in July 2004. (DX 312 (Debtors’ Second Amended Plan of Reorganization, at p. 8))

The Apportionment Plan was approved and the bankruptcy estate was closed before the underlying state court lawsuit was tried. MCI sought to submit Central Texas and Cummings in the charge as settling persons. (16 CR 3804; 83 CR 19706) The trial court refused to submit Central Texas or Cummings in the charge. (83 CR 19731) Moreover, the court refused to allow MCI’s lawyers to cross-examine the Plaintiffs about their claims against the bankruptcy estate. (9 RR 127-46, 277-90; 13 RR 279-96; 16 RR 213-31; 23 RR 9-14; 44 RR DXOP) The jury found that MCI was liable and awarded the Plaintiffs approximately \$17 million. (83 CR 19731)

SUMMARY OF THE ARGUMENT

The Plaintiffs’ petition for review invites this Court to approve a clever settlement scheme created for the sole purpose of avoiding the submission of the settling party’s responsibility in violation of Chapter 33. Under the plain language of section 33.011, Central Texas and Cummings are “settling persons,” and the court of appeals correctly

held that the trial court erred by refusing to submit their proportionate responsibility to the jury.

ARGUMENT

I. Central Texas was a “settling person” under Chapter 33.

At the time the case was submitted to the jury, the record plainly shows that Central Texas had made a payment to the Plaintiffs (or, at a minimum, a promise to pay the Plaintiffs) in consideration of Central Texas’s potential tort liability. Central Texas was therefore a “settling person,” and the trial court erred by refusing to submit Central Texas’s proportionate responsibility to the jury. TEX. CIV. PRAC. & REM. CODE §§ 33.003, 33.011(5); *see also C&H Nationwide v. Thompson*, 903 S.W.2d 315, 330 (Tex. 1994) (“[W]e hold that ‘settlement,’ as used in the Comparative Responsibility Law, means money or anything of value paid or promised to a claimant in consideration of potential liability.”).

A. Central Texas’ actions meet the statutory definition of “settling person,” notwithstanding statements made by others in the bankruptcy proceeding.

The Plaintiffs advance various arguments in an effort to refute the appellate court’s conclusion that Central Texas’ payment and the Plaintiffs’ carefully crafted handling of that payment through the Apportionment Plan was a settlement under Chapter 33. The Plaintiffs first point to a statement in Central Texas’ Second Amended Plan of Reorganization that the Plaintiffs “have not settled their claims.” (Pls.’ Br. at 15) The court of appeals correctly afforded no weight to this conclusory statement in Central Texas’ reorganization plan. *MCI Sales & Serv.*, 272 S.W.3d at 41-42 (“We also give no

credence to the *ipse dixit* statement in Central Texas’ reorganization plan that ‘[s]ome of the bus crash claimants [the Plaintiffs] have not settled their claims against the Debtors [Central Texas]’”). Conclusory statements such as this within the various plans and bankruptcy court orders have no effect on the Court’s determination whether, under Texas law, Central Texas is a “settling person.” See TEX. CIV. PRAC. & REM. CODE § 33.011(5). If possible, a court must ascertain a statute’s meaning from its language alone, without reference to extraneous matters. See *Nat’l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

The Plaintiffs also assert that “an MCI affiliate was a party to the bankruptcy proceedings [and] voted without objection for the plan of reorganization.” (Pls.’ Br. at 16) None of the defendants in this lawsuit were parties to the bankruptcy proceeding. The bankruptcy court filings identify two MCI-affiliated corporations with no connection to the underlying lawsuit—MCI Financial Services, Inc., the servicer on a bus lease on which Central Texas owed money; and MCI Service Parts, Inc., a trade creditor of Central Texas. (See DX 312 (Debtors’ Second Amended Plan of Reorganization)) The Plaintiffs argue that, because these two corporations had some involvement with Central Texas’ reorganization plan, the MCI defendants in this suit agreed with the Plaintiffs’ efforts to get around Chapter 33. This argument is specious.

B. The Plaintiffs rely on requirements that are not found in Chapter 33.

Next, the Plaintiffs contend that they did not *voluntarily* release their claims against Central Texas. (Pls.’ Br. at 17) But the Plaintiffs acknowledge that all of their

tort claims arising from the bus accident were discharged by operation of law when Central Texas' reorganization plan was approved. (*Id.* at 17-18) That reorganization plan further required Central Texas to pay \$7,000 per year for five years to the class of "bus crash claimants," including all Plaintiffs, to be disbursed under the previously agreed-to Apportionment Plan. (DX 312 (Debtors' Second Amended Plan of Reorganization, at pp. 6-7)) The Plaintiffs voted in favor of approving the reorganization plan, thereby consenting to the release of Central Texas' liability. (*See* DX 312 (Ballot Summary (by Claim) for Debtor's Second Amended Plan of Reorganization)) More importantly, nowhere does Chapter 33 require that the release be voluntary. Rather, to be a "settling person," Central Texas had to make a payment (or a promise to pay) to the Plaintiffs in consideration of its tort liability; it did this.

Finally, the Plaintiffs repeatedly assert there was no settlement at the time of submission because the Plaintiffs' recoveries at that time were still "contingent" and "uncertain." But any contingency or uncertainty about recovering money was solely a product of the Plaintiffs' own choosing. Central Texas had already irrevocably paid \$5 million into the registry of the bankruptcy court and promised to pay an additional \$35,000 over five years. The Plaintiffs adopted and approved the Apportionment Plan, giving them the opportunity to either take the money now or take it later. And the Plaintiffs undeniably did receive something of value—the ability to choose to take the settlement money at any time.

The Plaintiffs contend that Central Texas could have appeared at the proceeding before the Special Judge and objected to the Plaintiffs' evidence or offered its own

evidence in defense of the Plaintiffs' claims. But what possible reason would Central Texas have for doing so? Any liability for Central Texas arising from the bus accident had been extinguished long before, when its reorganization plan was approved. And as the bankruptcy judge later noted, regardless of what the Special Judge decided, none of the money was going back to Central Texas or its insurer. (*See* 86 CR 20228)

The claim that the Plaintiffs' ultimate recovery was "uncertain" or "contingent" (which is a stretch) is irrelevant to whether Central Texas is a "settling person" under Chapter 33. *See Gilcrease v. Garlock, Inc.*, 211 S.W.3d 448, 454-55 (Tex. App.—El Paso 2006, no pet.) (rejecting the argument that a party in bankruptcy was not a "settling person" because its payment was contingent on the bankruptcy proceedings). For example, suppose that instead of placing Central Texas' funds into a Liability Fund, the Apportionment Plan called for the money to be placed in a "Lottery Fund" and used to purchase lottery tickets for each fund member for a drawing in the future. Under the Plaintiffs' logic, they could argue they had not agreed to settle because the amount of each Plaintiff's recovery was contingent and uncertain—indeed, it was possible they may not recover any money at all. Yet under this scenario, no one could credibly argue that Central Texas was not a "settling person." The same is true under the plan the Plaintiffs concocted.

The Plaintiff's entire "contingency" argument is a red herring. It is an attempt to impose a requirement not contained in Chapter 33. Chapter 33 does not limit the set of people who are settling persons to those whose payments are not contingent. If anything, the statute contemplates some amount of contingency because a settling person is one

who “has paid *or promised to pay.*” TEX. CIV. PRAC. & REM. CODE § 33.011(5) (emphasis added). A “promise to pay” necessarily contemplates some level of uncertainty. Central Texas did more than promise to pay; well before submission it had already paid money into the registry of the court.

The court of appeals correctly held Central Texas’ payment was “nonrefundable” and “unconditional.” *MCI Sales & Serv.*, 272 S.W.3d at 42. With respect to that payment, “nothing provided for its return or other disposition if the Plaintiffs did not prove the negligence of Central Texas or Cummings to the Special Judge.” *Id.* The bankruptcy court judge made clear that in no case would the money be returned to Central Texas or its insurer:

[The Litigation Plan] doesn’t say what happens if, for some reason, there’s money left over with the 22, the group of 22 [Plaintiffs]. What happens to it? Doesn’t say. ***I don’t think you’re going to give it back to the insurance company. I don’t think the Debtor gets it.***

(85 CR 20228 (emphasis added)) Moreover, the Litigation Plan expressly provides that those parties participating in the Plan (*i.e.*, the Plaintiffs) “may agree at any time to approve full or partial distribution of the Litigation Funds to any or all participants.” (84 CR 20053, ¶ 5(B)(6)) Thus, regardless of whether the proceeding contemplated in the Litigation Plan was truly adversarial, the only contingency affecting the Plaintiffs’ receipt of the payment from Central Texas was the Plaintiffs’ choice over when to receive it.

In any event, the Plaintiffs’ alleged contingency did not happen; it was a mere possibility—however unlikely—that the Plaintiffs rely on to muddy the waters. Under the terms of the Apportionment Plan, none of the Plaintiffs could recover more than

110% of what they had been assigned. (84 CR 20053, ¶ 5(B)(3)) With only one exception, each Plaintiff ultimately received within 2% of the allocated amount. *MCI Sales & Serv.*, 272 S.W.3d at 39. As this Court recently held in *HCBeck, Ltd. v. Rice*, the Court decides matters based on what actually happened, not based on a hypothetical possibility that did not occur. *See* 284 S.W.3d 349, 2009 Tex. LEXIS 120, at *29 n.4 (Tex. Apr. 3, 2009); *see also id.* at *43 (Johnson, J., dissenting).

C. The court of appeals correctly held that Central Texas made payments to the Plaintiffs.

The Plaintiffs argue that Central Texas' funds were not paid to the Plaintiffs, but rather "were deposited into the Litigation Fund to be dispensed, if at all, under the provisions of the Litigation Plan." (Pls.' Br. at 26) But this argument ignores the simple fact that the Plaintiffs were in control of the plan and, therefore, in control of the funds. The Plaintiffs created and approved a plan under which the Plaintiffs could choose to either take a share of the money now or place the money in a separate fund to be disbursed later. The Plaintiffs agreed on the procedure by which the Litigation Fund would be disbursed. And the Plaintiffs retained for themselves the option to agree to a distribution of those funds "at any time."

The Plaintiffs argue that Central Texas' money was at all times under the control of the bankruptcy court, which required the Plaintiffs to request and obtain approval for distribution of the funds. This is the same argument the court of appeals considered and rejected in *Gilcrease*. *See* 211 S.W.3d at 454-55. Moreover, the bankruptcy court judge expressly acknowledged that the Plaintiffs were allowed to take a share of the \$5 million

whenever they wanted it. The only limitations were those imposed by the Plaintiffs themselves, either through the terms of the Apportionment Plan, or through their conduct in the state court litigation. In fact, it was the Plaintiffs' conduct in the state court trial that led to a challenge by other claimants to the Plaintiffs' recovery and the bankruptcy court's show-cause hearing at which he expressed grave concerns over statements the Plaintiffs made in the state court proceeding. (*See* 85 CR 20161)

D. The court of appeals correctly held that Central Texas was a settling person “at the time of submission.”

The Plaintiffs claim the court of appeals considered only that portion of the statute that defines a settling person as “one who pays or promises to pay ‘at any time,’” and that the court of appeals “ignored the statute’s language” requiring that a settling person’s payment or promise to pay be made “at the time of submission.” (Pls.’ Br. at 30-31 (quoting *MCI Sales & Serv.*, 272 S.W.3d at 41)) But the court did not ignore this statutory language; it directly addresses it within the same paragraph the Plaintiffs quote: “[A]s of the time of submission of this case to the jury, the Litigation Plan had been in place for over two years.” *MCI Sales & Serv.*, 272 S.W.3d at 41. At the time of submission, Central Texas had already made its payment to the Plaintiffs, and the means by which the Plaintiffs chose to divide that payment—the Apportionment Plan—had already been agreed to by the Plaintiffs. The court of appeals correctly concluded that Central Texas was a “settling person” under the applicable version of Chapter 33.

E. The lower court’s opinion is correct and will not adversely affect bankruptcy law or “settlement jurisprudence.”

The Plaintiffs repeatedly and incorrectly refer to MCI’s position as a collateral

attack on the bankruptcy court orders. (*See* Pls.’ Br. at 35, 37) The Plaintiffs even begin their argument with the assertion that the court of appeals’ holding “demonstrated a fundamental misunderstanding of the law of bankruptcy.” (*Id.* at 13) But MCI does not challenge or otherwise attack any of the bankruptcy court’s holdings. MCI’s only disagreement is with the bankruptcy court’s *ipse dixit* statement in the order approving Central Texas’ reorganization plan that the Plaintiffs “have not settled their claims.” Nor does the Court’s resolution of the Plaintiffs’ petition require an interpretation of bankruptcy law. To the contrary, the Plaintiffs try to use the bankruptcy court’s statement to support their interpretation of Texas law.

The Plaintiffs contend that the procedure they devised for handling their claims has been used in other complex bankruptcies involving tort claims. (*See* Pls.’ Br. at 24-28) As the Plaintiffs acknowledge, the three examples they cite are bankruptcy cases involving “many thousands of claimants and hundreds of millions of dollars in claims (billions of dollars in some cases).” (*Id.* at 25) Moreover, in the cases the Plaintiffs cite, the party in bankruptcy faced an unknown number of future claims which required some procedure by which potential claimants could establish their entitlement to a share of the funds. In contrast, the present case involves a finite number of claims from a limited, known class of claimants, each of whom agreed to a plan that controlled how Central Texas’ payment would be divided. The bankruptcy cases cited by the Plaintiffs are plainly distinguishable from this case. More importantly, however, none of these other, unrelated bankruptcies cited by the Plaintiffs address the issue in this case: whether Central Texas is a “settling person” under Chapter 33.

The Plaintiffs claim that the court’s opinion will somehow “confuse existing settlement jurisprudence.” (Pls.’ Br. at 42-46) But the Plaintiffs provide no examples or otherwise support this claim in any way. The Plaintiffs similarly assert, with no support whatsoever, that the court’s opinion “will impair the ability of parties in complex bankruptcy matters to reach an agreement over how to manage disputed claims against limited funds.” (*Id.* at 45) The issue in this case is not whether Central Texas’ payment and the agreed-upon Apportionment Plan would constitute an enforceable “settlement agreement” under the common law. The sole issue is whether Central Texas is a “settling person” as defined by section 33.011(5). The Court should not base its decision on rank speculation about how the interpretation of this statute may or may not affect parties in situations having nothing to do with Chapter 33.

The Plaintiffs cite two cases from Houston’s First Court of Appeals for the proposition that a party cannot be a “settling person” unless the settlement occurs before the case is submitted to the jury. (Pls.’ Br. at 29-30) Both cases are distinguishable because there is no evidence that the parties who allegedly were “settling persons” tendered their settlement money before submission. To the contrary, the alleged “settling person” in those cases apparently participated in the underlying trial and settled only after submission of the case. *See Knowlton v. U.S. Brass Corp.*, 864 S.W.2d 585, 598 (Tex. App.—Houston [1st Dist.] 1993) (holding that Vanguard, a defendant in the underlying lawsuit, was not a “settling person” because it did not settle its claims with the plaintiffs until after the charge had been submitted), *aff’d in part and rev’d in part on other grounds*, 919 S.W.2d 644 (Tex. 1996); *Palais Royal, Inc. v. Gunnels*, 976 S.W.2d 837,

854 (Tex. App.—Houston [1st Dist.] 1998, pet. dismiss'd) (holding that Lott, a defendant in the underlying lawsuit, was not a “settling person” because it did not settle its claims with the plaintiffs until seven months after trial). Here, Central Texas is a “settling person” under the statute because at the time of submission it had already paid its \$5 million to the Plaintiffs in consideration of its potential liability and had been fully released as part of the order approving Central Texas’ reorganization plan. *See* TEX. CIV. PRAC. & REM. CODE § 33.011(5); *C&H Nationwide*, 903 S.W.2d at 330.

II. The Plaintiffs’ position is inconsistent with Texas public policy.

The Court should decline the Plaintiffs’ invitation to endorse a scheme that perverts Texas policy as expressed in Chapter 33. As the Court held in *F.F.P. Operating Partners, L.P. v. Duenez*, the Proportionate Responsibility Act expresses the Legislature’s intent to hold defendants responsible only for “their own conduct causing injury,” and not the conduct of others. 237 S.W.3d 680, 690 (Tex. 2007). “This is consistent with a fundamental tenet of tort law that an entity’s liability arises from its own injury-causing conduct.” *Id.*

The Plaintiffs take exception to the court of appeals’ reference to “Mary Carter” agreements, arguing that the specific factors for such agreements are not present. (Pls.’ Br. at 44 (citing *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992))) But the court of appeals did not hold that the Litigation Plan was a Mary Carter agreement. The court merely noted, correctly, that “the law on Mary Carter agreements in Texas has evolved to include agreements that violate the principles laid out in *Elbaor* even if the precise structure of the agreement does not fit the precise pattern of an agreement previously

determined to be in violation of public policy.” *MCI Sales & Serv.*, 272 S.W.3d at 40 (quoting *Turoff v. McCaslin*, 222 S.W.3d 664, 668 (Tex. App.—Waco 2007, no pet.)). In *Elbaor*, this Court distanced itself not only from settlements that meet the strict definition of a “Mary Carter” agreement, but from all “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.” 845 S.W.2d at 250. If the Court accepts the Plaintiffs’ invitation to approve their clever scheme, nothing will prevent plaintiffs from inducing settling defendants to place their funds in the court’s registry, a qualified settlement fund, or some other vehicle where the plaintiffs have access to the money, and yet plausibly deny they have received the money.

Moreover, the Plaintiffs ask the Court to condone a procedure that apparently created an incentive for several of the Plaintiffs to testify in a manner that, according to Bankruptcy Court Judge Kelly, “concerned me greatly.” (85 CR 20178) Far from “mocking” the Plaintiffs’ testimony, Judge Kelly expressed consternation that seemingly decent people were providing inconsistent or misleading answers that lacked credibility, presumably because “money somehow got involved.” (85 CR 20223) Despite his belief that much of the Plaintiffs’ testimony was “total BS” (85 CR 20216), Judge Kelly concluded that he could not take action based on that testimony because it did not occur in his court. (85 CR 20224)

CONCLUSION AND PRAYER

MCI Sales and Service, Inc. and Motor Coach Industries Mexico, S.A. de C.V. respectfully request that the Court grant their petition for review, reverse the judgments

of the trial court and the court of appeals with respect to federal preemption, and render judgment that the Plaintiffs take nothing. With respect to the Plaintiffs' petition for review, MCI respectfully requests that the Court deny the petition or, in the alternative, affirm that portion of the court of appeals' judgment reversing the trial court's judgment. MCI also prays for any and all other relief to which it may be entitled.

Respectfully submitted,

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Sales, Inc. and Motor Coach Industries
Mexico, S.A. de C.V., f/k/a Dina Autobuses,
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument has been mailed to all counsel of record by U. S. Mail, certified mail, return receipt requested on the 29th day of September, 2009, as follows:

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