Admiralty - Settlement - Liability of Nonsettling Defendant - Proportionate Share

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ADMIRALTY—SETTLEMENT—LIABILITY OF NONSETTLING DEFENDANT—PROPORTIONATE SHARE—The United States Supreme Court held that a nonsettling defendant's liability in an admiralty action should be calculated by an allocation of proportionate responsibility and not by giving the nonsettling defendant a dollar for dollar credit for the amount paid by a settling defendant.


On October 10, 1986, McDermott, Inc. ("McDermott") was attempting to use a crane mounted on a work barge to install a deck on an offshore oil and gas drilling platform. The hook and sling portions of the crane failed and the deck crashed down onto the barge. The accident resulted in extensive damage to both the deck and the equipment. The crane had been designed and manufactured by AmClyde ("AmClyde"). The hook had been manufactured by River Don Castings, Ltd. ("River Don"). The sling had been supplied by a group of three companies.

McDermott brought an admiralty action against AmClyde, River Don and the sling defendants in the United States District Court for the Southern District of Texas seeking to recover damages to both the deck and the equipment. On the day before

3. McDermott, 979 F.2d at 1070. AmClyde had previously been known as Clyde Iron and was a division of AMCA International, Inc. McDermott, 114 S. Ct. at 1463 n.1.
4. McDermott, 114 S. Ct at 1463.
5. Id. River Don had produced the crane under a sub-contract with AmClyde. McDermott, 979 F.2d at 1070.
6. McDermott, 114 S. Ct. at 1463. The suppliers of the sling were International Southwest Sling, Inc., British Ropes, Ltd., and Hendrik Veder B.V. Id. at 1463 n.2.
7. Id. at 1463-64. The district court had admiralty jurisdiction pursuant to section 1333 of title 28 of the United States Code. Id. The relevant portions of the statute provide:

The district courts shall have original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors

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the trial, McDermott entered into a settlement with the sling defendants for $1 million.\textsuperscript{8}

At trial, the judge ruled that McDermott could not recover for damage to the crane.\textsuperscript{9} As part of its opening statement, McDermott accepted responsibility for the damage attributable to the sling defendants.\textsuperscript{10} The jury determined the damage to the deck to be $2.1 million and attributed the cause of the accident thirty-two percent to AmClyde, thirty-eight percent to River Don and thirty percent to McDermott and the sling defendants.\textsuperscript{11} The trial court denied AmClyde and River Don’s motion to reduce the damage award pro tanto\textsuperscript{12} by the sling defendants’ settlement and entered judgment in accordance with the jury’s allocation of proportionate responsibility.\textsuperscript{13}

AmClyde and River Don appealed the decision to the United States Court of Appeals for the Fifth Circuit.\textsuperscript{14} The Fifth Circuit held that a clause in the contract between McDermott and AmClyde barred McDermott’s claim for the damage to the deck and therefore the district court erred in denying defendants’ motion for a pro tanto credit.\textsuperscript{15} Accordingly, the court of appeals reversed the judgment against AmClyde and reduced the judgment against River Don to $470,000.\textsuperscript{16}

in all cases all other remedies to which they are otherwise entitled. 28 U.S.C. § 1333(1) (1988).
\textsuperscript{8} McDermott, 114 S. Ct. at 1464. Under the terms of the settlement, McDermott agreed to release the sling defendants from liability and to indemnify them in the event of contribution actions by the other defendants. Id.

\textsuperscript{9} Id. AmClyde and River Don originally moved for a partial summary judgment claiming that the contract between AmClyde and McDermott limited their liability to the repair and replacement of the damaged equipment. McDermott, 979 F.2d at 1070. This motion was denied. Id. The district court, relying on an earlier Supreme Court case, held that McDermott could not recover for the damage to the crane but that it could recover for damage to the deck as “other property.” Id. at 1071 (citing East River Steamship Corp. v. Transamerica Delval, Inc., 476 U.S. 858 (1986) (holding that admiralty law did not recognize a right of recovery for product damage and resulting economic loss)).

\textsuperscript{10} McDermott, 114 S. Ct. at 1464. The Supreme Court characterized McDermott’s acceptance of this responsibility as “obscure” and reasoned that it must have been done in order to prevent liability under its indemnity obligation. Id. at 1464 n.4.

\textsuperscript{11} Id. at 1464.

\textsuperscript{12} A pro tanto credit is a one-to-one reduction of the award against a nonsettling defendant by the amount paid by a settling defendant. Id. at 1465.

\textsuperscript{13} Id. at 1464. The Defendants relied on Hernandez v. M/V RAJAAN. McDermott, 979 F.2d at 1070 (citing Hernandez v. M/V RAJAAN, 841 F.2d 582 (5 Cir. 1988)). In Hernandez, the Fifth Circuit reduced an award against a shipowner by the amount that an injured stevedore had recovered by settling with a third party defendant. Hernandez, 841 F.2d at 591. See notes 106-10 and accompanying text for discussion of the Hernandez decision.

\textsuperscript{14} McDermott, 979 F.2d at 1070.

\textsuperscript{15} Id. at 1076.

\textsuperscript{16} Id. at 1081. To arrive at the $470,000 figure the Fifth Circuit used a two
Because the circuits were split, the United States Supreme Court granted certiorari. In a unanimous opinion delivered by Justice Stevens, the Court explained that Congress had neither provided policy guidance nor limited the Court's ability to create a rule in this case. The Court relied on United States v. Reliable Transfer Co. as an example of judicial reformation of an "unnecessarily crude and inequitable" rule in favor of one that promoted fairness. However, unlike in Reliable Transfer, the Court explained, no consensus existed as to the rule that should be applied to the instant situation.

The Court identified three principal alternatives for determining a nonsettling defendant's liability: pro tanto with contribution, pro tanto without contribution and proportionate share. In determining which of the three alternatives it would follow, the Court identified three policy considerations as controlling: consistency with Reliable Transfer, encouragement of settlement and judicial economy.

Based on these considerations, the Court immediately dis-
missed the pro tanto with contribution approach, reasoning that this approach failed to serve the first two policy considerations.\textsuperscript{26} The Court explained that the pro tanto with contribution rule simultaneously created a disincentive to settle and led to additional, unnecessary litigation by allowing favorable settlements to be defeated by subsequent contribution actions.\textsuperscript{27}

The choice between the remaining two options was found to be less decisive, so the Court compared the interaction of each approach with the desired policy objectives.\textsuperscript{28} The proportionate share approach was recognized as better serving the underlying policy of \textit{Reliable Transfer} because a litigating defendant would only be asked to pay its equitable share of the judgment.\textsuperscript{29} The Court reasoned that the pro tanto without contribution approach would frequently result in discrepancies between a defendant’s legal and equitable share of the damages.\textsuperscript{30} The Court identified this as a likely phenomenon because settlements were not usually good predictions of liability and were frequently the result of compromise in order to avoid litigation.\textsuperscript{31} This problem was further compounded, according to the Court, by the fact that settlements could be used as “war chests” to finance suits against other defendants.\textsuperscript{32} The Court noted that judiciaries and legislatures had frequently required that the pro tanto without contribution approach be augmented with mandatory good faith hearings.\textsuperscript{33} The Court explained, however, that such hearings had significant drawbacks because they were cursory mech-

\textsuperscript{26} McDermott, 114 S. Ct. at 1467.
\textsuperscript{27} Id. The Court recognized that although this effect could be mitigated by an indemnity agreement, curative measures would come at the expense of additional litigation to enforce such agreements. Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 1467. Discrepancies would occur because settlements were often based on more factors than those relating to liability and therefore usually did not represent accurate forecasts of a jury’s eventual apportionment of damages. Id. For example, a defendant who had suffered $100 worth of damages at the hands of three equally responsible wrongdoers might readily accept a settlement of $10 from two of the three who were willing to settle to avoid trial. If, then, at the trial, plaintiff’s damages were determined to be $100, the nonsettling defendant would be forced to pay $80 under the pro tanto approach.
\textsuperscript{31} McDermott, 114 S. Ct. at 1467.
\textsuperscript{32} Id.
\textsuperscript{33} Id. A good faith hearing is a mechanism for protecting a settling defendant from contribution actions upon a showing that the settlement was a fair forecast of its equitable share of the judgment. Id. The Court reasoned that a pro tanto approach without a right of contribution needed to be coupled with good faith hearings in order to avoid inequities. Id. at 1469. This fact was apparently recognized by respondents and amicus, as none of them urged the court to adopt the pro tanto rule without accompanying good faith hearings. Id.
anisms that imposed additional burdens on the courts and seldom served their intended purpose adequately.\textsuperscript{34} The Court concluded that the pro tanto without contribution approach, even when coupled with good faith hearings, was likely to result in an inequitable allocation of liability and was therefore inconsistent with the policy considerations of Reliable Transfer.\textsuperscript{35}

Next the Court examined the effect of the two rules on settlement.\textsuperscript{36} The Court acknowledged that the pro tanto without contribution rule promoted more settlements, but that it did so largely as a result of the inequities discussed above.\textsuperscript{37} This occurred because a settling party often paid less than its equitable share while a nonsettling party was faced with the possibility of paying the balance of the entire judgment.\textsuperscript{38} The Court reasoned that although public policy favored settlement, such an approach served that policy with too heavy a hand by unnecessarily pressuring defendants.\textsuperscript{39} The same ends, according to the Court, would also be achieved by existing, evenhanded incentives.\textsuperscript{40} The Court found no reason why either of the two approaches could not yield comparable settlement rates.\textsuperscript{41}

\textsuperscript{34} Id. at 1468. The Court also pointed out that even where such hearings worked as intended, they often produced inequities. Id. As an example, the Court presented a hypothetical in which a plaintiff suffered $1 million in damages and only one of two equally culpable defendants settled for $250,000. Id. at 1468 n.19. At the good faith hearing, the settling defendant persuasively showed that the settlement figure was based on a good faith mutual agreement that it was 50% responsible and that plaintiff had a 50% chance of prevailing at trial. Id. At trial, however, the damages were determined to be $1 million and each defendant was found to be 50% culpable. Id. Thus, under the pro tanto approach, the court would be faced with the unfortunate situation of either preventing the overpaying defendant from recovering or penalizing the defendant who arrived at its settlement in good faith. Id.

\textsuperscript{35} Id. at 1468.

\textsuperscript{36} McDermott, 114 S. Ct. at 1468.

\textsuperscript{37} Id. The Court also added that coupling this approach with mandatory good faith hearings, as was almost universally done, significantly reduced the likelihood of settlement, because a settling defendant was saddled with the extra burden of showing that a settlement was a fair forecast of its potential liability. Id.

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id. at 1468-69. Such incentives included the desire to avoid litigation, to maintain certainty, and to continue commerce. Id. at 1469. The Court reasoned that such real life considerations made a more convincing case for the proportionate share approach than the theoretical ones often levied in favor of the pro tanto approach. Id. As authority for this notion, the Court cited an empirical study which considered the effect of complex factors such as litigation costs and perceived probabilities of victory on settlement behavior and concluded that "neither rule is consistently better than the other." Id. at 1469 n.24 (citing Lewis A. Kornhauser & Richard L. Revesz, Settlement Under Joint and Severable Liability, 68 N.Y.U. L. Rev. 427 (1993)).

\textsuperscript{41} McDermott, 114 S. Ct. at 1468. The Court noted that over 95% of the
The Court next turned its attention to the effect of the differing approaches on judicial economy, and found that neither rule was superior. In order to avoid significant inequities, the Court reasoned that the pro tanto without contribution approach would have to be accompanied by good faith hearings. Thus, the pro tanto without contribution rule, would require an additional pre-trial hearing while the proportionate share rule would require only one trial. On this basis, the Court reasoned that the pro tanto without contribution approach would be more judicially economical only if a settling defendant's liability could be calculated more efficiently at a good faith hearing than at a trial. The Court also pointed out that where a settling defendant was not present at trial, a nonsettling defendant might be inclined to "argue the empty chair" in an attempt to show that the settling defendant was solely responsible for the damages.

The Court concluded that neither rule was superior in its ability to promote settlement or judicial economy, but that the proportionate share rule was more consistent with Reliable Transfer. The Court, therefore, elected to adopt the proportionate share approach.

The Court also rejected two additional arguments; first, that adoption of the proportionate share approach was inconsistent with the "one satisfaction rule" and second, that the adoption
of the proportionate share approach would be inconsistent with precedent. In rejecting the first argument, the Court held that the one satisfaction rule was not applicable to the instant situation. The Court observed that the law contained no absolute prohibition on overcompensation and that policy considerations, such as those underlying the "collateral benefits rule" established the principle that ensuring that wrongdoers paid was more important than preventing overcompensation. The Court added that because settlements were only estimates of liability based on complex factors, they could not be expected to precisely reflect eventual damage awards. Thus, the Court reasoned, a defendant should not expect to have its equitable liability reduced by another defendant's willingness to settle. Such an approach was believed to best serve the underlying principles of proportionate responsibility — that a defendant pay exactly its equitable share.

The Court next rejected the argument that the proportionate share approach was inconsistent with Edmonds v. Compagnie Generale Transatlantique. In Edmonds, the Supreme Court considered the effect of payment under the Longshoremen and Harbor Workers' Compensation Act on a nonsettling defendant's liability. Because there was no settlement involved in Edmonds, the Court elected to read it as merely an application of settled principles of joint and several liability. The Court held that there was no inconsistency between concepts of joint and several liability and allocations of proportionate the extent necessary to prevent compensation beyond the jury's determination of the loss. Id. at 1470-71.

51. Id. at 1470-71.
52. McDermott, 114 S. Ct. at 1470.
53. Id. Under the collateral benefits rule, if a defendant received compensation for injuries from a source wholly independent from the wrongdoer, the wrongdoer would not be credited for the amount received. BLACK'S LAW DICTIONARY 263 (6th ed. 1990).
54. McDermott, 114 S. Ct. at 1470. The Court further pointed out that it was entirely more likely that a defendant would be under-compensated than over-compensated. Id. at 1471.
55. Id.
56. Id.
57. Id.
58. 443 U.S. 256 (1979). In Edmonds, the Supreme Court refused to reduce a judgment against a shipowner by the proportionate fault attributable to a stevedore whose liability was limited by the Longshoremen's and Harbor Worker's Compensation Act. Edmonds, 443 U.S. at 263-64. See notes 89-96 and the accompanying text for discussion of the Edmonds decision.
60. McDermott, 114 S. Ct. at 1471 (citing Edmonds, 443 U.S. at 271-72 n.30).
61. McDermott, 114 S. Ct. at 1471.
ate liability because the former applied to judgments against multiple defendants and the latter applied only to settlements.\textsuperscript{62} Accordingly, the Supreme Court reversed and remanded, ordering that River Don's liability be determined with reference to the jury's allocation of its proportionate responsibility.\textsuperscript{63}

In \textit{The Schooner Catharine v. Dickinson},\textsuperscript{64} the United States Supreme Court first considered the issue of apportionment of damages in an admiralty action.\textsuperscript{65} \textit{The Schooner Catharine} involved the division of damages between a plaintiff and defendant, both of whom were at fault in a collision.\textsuperscript{66} The Court held that where both parties were at fault in a collision, the damages should be divided equally among them.\textsuperscript{67} In adopting the divided damages rule, the Court relied heavily on the fact that such a rule prevailed in English admiralty law.\textsuperscript{68} The Court reasoned that the rule both provided the most equitable division of liability and encouraged care by all those engaged in navigation.\textsuperscript{69}

After almost one hundred twenty years of applying the divided damages rule, the Supreme Court re-examined the rule's applicability in \textit{United States v. Reliable Transfer Co.}\textsuperscript{70} Reliable

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\item \textit{Id. at 1471-72.}
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Transfer involved the apportionment of liability between a plaintiff and a defendant who were both at fault in a collision.71 The Court abandoned the divided damages rule, and held that where two or more parties were at fault in a maritime collision, the liability of the parties should be calculated by their respective degrees of proportionate fault.72 The Court re-examined the policy considerations on which the divided damages rule rested and determined that they were no longer applicable.73 The rule was only capable of providing a just result, according to the Court, where the parties to a collision were equally at fault.74 The Court reasoned that careful navigation would be encouraged by a rule that fully punished degrees of wrongdoing, rather than by a rule that capped a wrongdoer's liability at half of the total damages.75 Because the divided damages rule applied only after there had been a collision and was not subject to expectation based reliance, the Court concluded that it was free to replace it with a proportionate fault based rule.76

In Leger v. Drilling Well Control, Inc.,77 the Fifth Circuit con-
sidered the effect of Reliable Transfer on a nonsettling defendant's liability in a personal injury action. In *Leger*, an employee was injured while working on a barge during operations on an offshore oil drilling platform. The employee sued his employer and both the barge and platform owners. The employer and platform owner settled, but the claim against the barge owner went to trial. The trial court denied the nonsettling defendant's motion for a pro tanto credit against the judgment in the amount of the settlement. Instead, the district court applied the proportionate share approach, reducing the jury award by both the plaintiff's and the settling defendants' respective degrees of fault.

The Fifth Circuit affirmed, reasoning that the case simply called for an application of Reliable Transfer and *Cooper Stevedoring Co. v. Fritz Kope, Inc.* to a situation in which some of

78. *Leger*, 592 F.2d at 1249.
79. *Id.* at 1247. *Leger* was employed by Drilling Well Control, Inc.; the barge was owned by Dresser Offshore Services, Inc.; the platform was owned by Continental Oil Company. *Id.*
80. *Id.* Claims against Drilling Well were predicated on the Jones Act and general maritime law; claims against Dresser and Continental were predicated on general maritime law. *Id.* The Jones Act gives seamen a cause of action in negligence against their employer for injuries sustained in the course of their employment. See 46 U.S.C. § 688 (1988). General maritime law provides seamen with maintenance and cure, and warranty of seaworthiness remedies. See Thomas J. Schoenbaum, *ADMIRALTY AND MARITIME LAW* 157, 175 (1987). Maintenance and cure is a no fault remedy entitling a seaman to wages and medical expenses when injured while in the service of his vessel. *Id.* at 159; see also *The Osceola*, 189 U.S. 158, 175 (1903). The warranty of seaworthiness is a non-delegable duty placed on shipowners to provide a vessel and appurtenant gear fit for their intended purpose. *The Osceola*, 189 U.S. at 175.
81. *Leger*, 592 F.2d at 1247. Both Drilling Well and Continental had the same insurer who paid $82,331 to settle the claim against Drilling Well and $100,000 to settle the claim against the Continental. *Id.* The jury determined the total damages to be $284,090 and allocated responsibility for the accident as 45% to the Dresser, 20% to Continental, 0% to the Drilling Well, and 35% to Leger. *Id.* at 1248. This allocation of liability took place at a second trial devoted solely to that issue. *Id.* at 1247-48. The trial court had granted a motion for a new trial on the grounds that the jury should have been allowed to consider the indemnity agreement between the settling defendants when allocating responsibility. *Id.*
82. *Id.* at 1248.
83. *Id.*
84. 417 U.S. 106 (1974). In *Cooper Stevedoring*, a longshoreman was injured when he stepped in a concealed crevice created by another stevedoring company's loading of cargo. *Cooper Stevedoring*, 417 U.S. at 107. The longshoreman sued the vessel, which filed a third party complaint against the stevedoring company responsible for loading the cargo. *Id.* at 106. Longshoremen can seek a recovery from a vessel by an in rem action. 33 U.S.C. § 905(b) (1988). On appeal, the Supreme Court did not reach the issue of the applicability or continued validity of the divided damages rule because the district court had found that both defendants were 50% at fault. *Cooper Stevedoring*, 417 U.S. at 108 n.3. The Court expressly recognized a
the defendants had settled. Despite the fact that the plaintiff had received a sum of money exceeding the jury's determination of damages, the court elected to view the settlement as a favorable bargain rather than a double recovery. The court found that the double recovery argument drew its strength from hindsight and that the plaintiff could have just as easily been undercompensated. Concluding that it could not adopt a rule that had the inherent potential of rewarding a defendant who did not settle, the Fifth Circuit followed the proportionate share approach.

Two months later, in Edmonds v. Compagnie Generale Transatlantique, the Supreme Court considered the question of how to calculate a defendant's share of the damages when a joint tortfeasor's liability was limited by the 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act. In Edmonds, the plaintiff was injured while unloading cargo from a ship, received benefits from his employer under the statute and then sued the shipowner seeking an additional recovery. The Fourth Circuit interpreted the 1972 Amendment right of contribution among joint tortfeasors, reasoning that a defendant should have the same right as a plaintiff to force a joint tortfeasor to pay for its share of the damages. Id. at 113.

85. Leger, 592 F.2d at 1249. The Fifth Circuit expressly overruled two previous decisions holding that the pro tanto approach should be used to calculate a nonsettling defendant's liability. Id. (overruling Billiot v. Stewart, 382 F.2d 662 (5th Cir. 1967) and Loffland Brothers Co. v. Huckabee, 373 F.2d 528 (5th Cir. 1967)).

86. Leger, 592 F.2d at 1250.

87. Id.

88. Id. at 1251. The Court noted that such a situation would arise under the pro tanto approach whenever one defendant settled for an amount that turned out to be more than its equitable share and the other defendant(s) refused to settle. Id.

89. 443 U.S. 256 (1979).


91. Edmonds, 443 U.S. at 258. The plaintiff was employed as a longshoreman by Nacirema Operating Co. to unload cargo from a ship owned by Compagnie Generale Transatlantique. Id. Seeking recovery against Compagnie, Edmonds filed a negligence action in federal district court. Id. The jury fixed the total damages at $100,000 and allocated responsibility as 70% to Nacirema, 20% to Compagnie and 10% to Edmonds. Id. The district court awarded the plaintiff a full recovery against the shipowner reduced only by his own negligence. Id. The district court's decision was guided by the then existing principles of admiralty law. Id. at 259. A longshoreman had a right to recover full damages against a shipowner, even if his employer contributed to his injuries. See Cooper Stevedoring, 417 U.S. at 108. A longshoreman's employer's liability was limited by the Longshoremen's and Harbor
as mandating that a shipowner's liability to an injured longshoreman be calculated on a proportionate fault basis when the longshoreman's employer was a joint tortfeasor. The Fourth Circuit Court of Appeals reasoned that such a result was necessary to reconcile the inconsistency between the first two sentences of the amendment. The Supreme Court, however, read the second sentence of the amendment as applying only to the limited class of situations in which a shipowner was directly employing longshoremen, and thus avoided the conflict discovered by the court of appeals. The Court held that while the amendment did prevent a shipowner from recovering against an injured longshoreman's employer under an indemnity agreement, it did not alter the admiralty rule allowing a longshoreman to recover in full for his injuries against a shipowner even where he had already received benefits under the Longshoremen's and Harbor Workers' Compensation Act.

The question of how to calculate a nonsettling defendant's liability arose again in Self v. Great Lakes Dredge & Dock Co.

Prior to this amendment, a shipowner who was found liable to an injured longshoreman could seek contribution from the longshoreman's employer under a theory of breach of duty to provide workmanlike services. See Ryan Stevedoring v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 133-34 (1955). The shipowner's right of contribution was eliminated by the amendment. Schoenbaum, cited at note 79, at 233.

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Id. The two sentences were irreconcilable, according to the Fourth Circuit, because the first sentence allowed a longshoreman to recover against a shipowner, but the second barred recovery if his injury was caused by anyone providing stevedoring services. Id. Under the Fourth Circuit's reading of the statute, a longshoreman had a cause of action against a shipowner, but only as long as his injury had not been caused, to any extent, by the actions of his employer or a fellow longshoreman. Id. (citing Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153, 1155 (5th Cir. 1978) (a fellow longshoreman's negligence was imputed to the employer)). Thus, the Court concluded that the amendment made no sense unless it was read to impose a proportionate fault system. Edmonds, 443 U.S. at 258-59.

Edmonds, 443 U.S. at 264.

Id. at 263-64.

Id. 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988).
Self involved a collision between a ship and a dredge. The plaintiff settled with the shipowner, but the claim against the dredge owner went to trial. The court of appeals reversed the district court’s application of the proportionate share approach and applied the pro tanto rule. The court found that Edmonds had undermined the validity of the proportionate share approach endorsed by Leger. The Eleventh Circuit reasoned that Edmonds had established a policy of avoiding under-compensation of injured parties at all costs, and that wrongdoers rather than victims should bear the burden of unfair allocations of damages. According to the Eleventh Circuit, because Edmonds allowed the application of joint and severable liability even where there was no hope of recovery through contribution or indemnity, the Supreme Court had established a policy of ensuring that an injured party always recovered at least the jury’s determination of its total damages. Because the proportionate share approach could result in under-compensation of an injured party who had settled with a defendant for less than its equitable share of the damages, the court held that such a rule was inconsistent with the policy set forth in Edmonds. The court concluded that because the pro tanto approach would always result in compensation at least equal to the jury’s determination of damages, it was compelled to adopt the pro tanto approach.

98. Self, 832 F.2d at 1542-43. The ship was owned by the Chevron Transportation Corporation and operated by Chevron Shipping Company (collectively “Chevron”); the dredge was owned by Great Lakes Dredge and Dock Company. Id. at 1542. Numerous seamen were killed in the collision, including the petitioner’s husband. Id.

99. Id. at 1545. This was the second of two appeals involving this case. Id. at 1544. Originally, Self, and numerous other claimants, filed separate actions against Great Lakes. Id. Great Lakes filed a third party complaint against Chevron and also separately sued the owners of the dredge and barge, Chevron and Italia Siciete Per Az Di Nav. Id. In the first trial, the judge severed the third party complaint and the jury found Great Lakes negligent; but the case was reversed. See Edbanks v. Great Lakes Dredge and Dock Co., 688 F.2d 716, cert. denied 460 U.S. 1083 (1983). On remand, all the actions were consolidated and all claims except Self’s were settled. Self, 832 F.2d at 1544. Chevron settled with Self for $315,000. Id. at 1545. In the trial against Great Lakes, the jury determined the total damages to be $961,354 and allocated 70% of the responsibility to Chevron and 30% to Great Lakes. Id. The district court relied on Leger and applied the proportionate share approach, awarding Self only 30% of the total damage award. Id.

100. Self, 832 F.2d at 1548.
101. Id. at 1545.
102. Id. at 1546.
103. Id.
104. Id. As authority for this one sided approach, the court cited the remedial nature of admiralty in fashioning rules for the speedy and full compensation of seamen. Id. at 1548.
In *Hernandez v. M/V RAJAAN*, the Fifth Circuit reexamined its analysis in *Leger*. In *Hernandez*, a longshoreman, was partially paralyzed while unloading a ship. The longshoreman sued the vessel and its owner. On appeal, the Fifth Circuit acknowledged that the defendants were entitled to a credit for the settlement because the award against them represented the entirety of the damages less the plaintiff's comparative fault.

The court of appeals, however, did not apply the proportionate share approach as it had in *Leger*, but rather, without explanation, applied the Eleventh Circuit's pro tanto approach as outlined in *Self*.

The Eighth Circuit, however, in *Associated Electric Cooperative, Inc. v. Mid-America Transportation Company* applied *Leger* to prevent a seamen's employer from seeking indemnity and contribution from a joint tortfeasor who had settled with an injured employee. In *Associated Electric*, an injured seaman sued both his employer and a barge owner for injuries sustained while working on the barge. The plaintiff settled only his

105. *Self*, 832 F.2d at 1548.
106. 841 F.2d 582 (5th Cir.), cert. denied, 488 U.S. 981 (1988).
107. *Hernandez*, 841 F.2d at 585. Alejandro Hernandez was employed as a longshoreman and was injured while unloading the M/V RAJAAN. *Id.* Hernandez suffered his injury when a winch broke and a 110-pound bag of rice fell onto him. *Id.*
108. *Id.* The M/V RAJAAN was owned by Dianella Shipping Corp. *Id.* The defendants impleaded numerous third party defendants who settled. *Id.* These third party defendants included the manufacturer of the winch that broke, the manufacturer of the remote control mechanism used with the winch, the company that bagged the rice and numerous others who were dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Id.* at 585 n.1. The settlement included an agreement that Hernandez would reimburse the settling defendants if he recovered more than $3 million at trial. *Id.* at 585. The claims against the vessel and its owner went to trial. *Id.* at 585. The district court found Dianella and RAJAAN liable and assessed the total damages at $3,969,693. *Id.* Liability was found to exist pursuant to the Longshoremen's and Harbor Worker's Compensation Act. *Id.* The district court, however, refused to give the nonsettling defendants any credit for the settlement, reducing the award by only the 5% comparative fault attributable to Hernandez. *Id.*
109. *Id.* at 591.
110. *Id.* The only explanation given by the Fifth Circuit for its adoption of *Self* was its characterization of the Eleventh Circuit's decision as "sound reasoning." *Id.*
111. 931 F.2d 1266 (8th Cir. 1991).
112. *Associated Electric*, 931 F.2d at 1271.
113. *Id.* 1267-68. Seamen Teddy Teasley was employed by Associated Electric Cooperative and was working on a barge owned by Mid Atlantic Transportation Company. *Id.* He was injured when he slipped and fell after the barge moved unexpectedly. *Id.* Teasley received maintenance and cure benefits from Associated Electric. *Id.* at 1268. See note 80 for a discussion of maintenance and cure benefits. The claims that formed the object of the suit, however, were predicated on negligence.
claim against the barge owner. The employer brought an action in district court seeking contribution and indemnity from the settling barge owner, but the claim was dismissed.

The Eighth Circuit affirmed the order and held that a nonsettling defendant was entitled to a proportionate share reduction of the jury award and, thus, had no reason to seek contribution from a settling defendant. Although the court identified all three possible alternatives pro tanto with contribution, pro tanto without contribution in conjunction with good faith hearings, and proportionate share, the court only analyzed the latter two alternatives. The court distinguished the instant case from Edmonds on the ground that the barge owner avoided trial by settling. According to the court, the instant case raised policy considerations involving encouraging settlement and preventing collusion by settling parties. Because the proportionate fault approach more effectively removed the possibility of collusion in order to shift liability onto a nonsettling party, the court found the proportionate share rule superior to the pro tanto without contribution approach.

The Supreme Court considered McDermott against a context of conflicting interpretations of Edmonds' effect on a nonsettling defendant's liability. The Supreme Court's rejection of Edmonds as applicable to settlement rested primarily on the fact that Edmonds involved the statutory construction of the 1972 amend-

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114. Id.
115. Id. at 1267. The district court also lifted an injunction preventing Teasley from suing in state court. Id.
116. Id. at 1271.
117. See note 22 for a description of the pro tanto with contribution approach.
118. See note 23 for a description of the pro tanto without contribution approach, and note 36 for the definition of a good faith hearing.
119. See note 24 for a description of the proportionate share approach.
120. Associated Electric, 931 F.2d at 1269-71. The court gave no reason for its failure to consider the pro tanto with contribution approach.
121. Id. at 1270-71. The court distinguished the instant situation from Edmonds, where the settling party avoided trial because the Longshoremen's and Harbor Workers' Compensation Act fixed its liability. Id.
122. Id. at 1271.
123. Id. The court also declined to characterize favorable settlements as double recoveries, reasoning that because settlement dollars were often valued in ways that judgement dollars were not, settlements reflected a conscious balancing of risks. Id. at 1271 (citing Leger v. Drilling Well Control, 592 F.2d 1246, 1250 (11th Cir. 1979) (noting that settlement dollars may be worth more or less that judgment dollars, depending on which party received the more favorable settlement)). Although the court did not explain the distinction between the value of "settlement" dollars and the value of "judgment" dollars, it can be assumed that the court recognized that settlements were often the product of a host of factors, including a desire to avoid litigation, which have value independent of the amount of money received.
ment to the Longshoremen’s and Harbor Worker’s Compensation Act while McDermott called for judicial fashioning of principles governing settlement. The Court’s reading of Edmonds as inapplicable to settlement is clearly less strained than the Eleventh Circuit’s reasoning in Self. This distinction draws additional force from the fact that Edmonds was a legislative response to the complexities that had evolved in determining a ship’s liability to an injured longshoreman. It could be reasoned that both the defendants in Edmonds and McDermott came to trial in similar positions because a joint tortfeasors’ liability had already been determined. Such an analogy, however, ignores the plaintiff’s role in the legal relationship among the parties. The Court adopted a more comprehensive analysis in McDermott, distinguishing the situations on the grounds that in McDermott, liability was affected by the plaintiff’s choice to settle, while in Edmonds, liability was affected by an act of Congress. The Court’s decision was also guided by three principles — consistency with Reliable Transfer, promotion of settlement and judicial economy. The Court’s reasoning that Reliable Transfer compelled the adoption of the proportionate share approach, however, rests on conscious abstraction of its facts. Reliable Transfer involved the allocation of liability among parties who were both were present at trial. McDermott, by definition, involved an allocation of liability where one of the parties was absent from trial. Therefore, in order to apply Reliable Transfer to the facts of McDermott, the Court went through a two step abstraction process. First, the Court treated a settling defendant as the equivalent of a party whose liability had been fixed at a trial. Second, the Court read Reliable Transfer broadly as holding that an at fault party should be responsible for only its equitable share of the damages. Ironically, if read this way, Reliable Transfer seems to demand the adoption of the pro tanto with contribution approach. This must be true because the pro tanto

124. McDermott, 114 S. Ct at 1471.
125. Id.
126. See note 92 for a discussion of the rules governing a ship’s liability to an injured longshoreman that existed prior to the amendment.
127. McDermott, 114 S. Ct. at 1471.
128. Id. at 1466-67.
129. The Court reasoned that neither rule was superior in its ability to serve judicial economy or settlement. McDermott, 114 S. Ct. at 1468-70. Therefore, the Court elected to adopt the proportionate share approach on the basis that it better served the policy underlying Reliable Transfer. Id. at 1470.
130. Reliable Transfer, 421 U.S. at 400. See notes 70-76 and the accompanying text for a discussion of Reliable Transfer.
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with contribution approach is the only rule which ensures that a defendant never pays more than its equitable share.131

Because the Court avoided adopting the pro tanto with contribution approach by heavily favoring settlement and judicial economy, the debate over consistency with Reliable Transfer was limited to the choice between the proportionate share and pro tanto without contribution approaches.132 Nevertheless, it is still not clear that the proportionate share approach is more consistent with Reliable Transfer. The Court reasoned that the proportionate share approach better served Reliable Transfer because a litigating defendant would not be asked to pay more than its equitable share.133 The Court ignored the fact that the situation involved two defendants.

While it is true that the proportionate share approach is more consistent with Reliable Transfer as far as a litigating defendant's liability is concerned, it is not consistent with Reliable Transfer as far as a settling defendant's liability is concerned. In fact, under the proportionate share approach, settling parties take the result of their bargain no matter how inconsistent it may be with the eventual equitable apportionment of liability.134 The pro tanto without contribution attempts to, at least, mitigate the discrepancy by requiring a good faith hearing to show that the settlement was a fair forecast of expected liability. Therefore, under the pro tanto without contribution approach, it is more likely that the amount paid by a settling defendant will accurately reflect a damage award.

The Court also reasoned that neither approach was superior in its ability to further judicial economy.135 Although the

131. Because contribution actions are not allowed under either the proportionate share or pro tanto without contribution approaches, it is likely that a settling defendant's liability will not match its equitable share of the damages. The Court recognized that settlements rarely accurately reflected the jury's allocation of damages. McDermott, 114 S. Ct. at 1467.

132. The Court dismissed the pro tanto without contribution approach based on that approach's failure to meet these considerations and did not discuss it in light of Reliable Transfer. Id.

133. McDermott, 114 S. Ct. at 1467.

134. In dismissing this objection, the Court relied on the argument that factors unrelated to the determination of individual shares of liability often provided compelling reasons for deferring to the parties' determination of appropriate compensation rather than relying on a factfinder. McDermott, 114 S. Ct. at 1468-69. These factors include the cost of litigation and the desire for speedy and certain disposition. Id. By recognizing that these factors ought to be considered in determining a nonsettling defendant's liability, the Court is effectively sanctioning extra-judicial maneuvering in an attempt to increase costs and delay in hopes of obtaining a favorable settlement.

135. McDermott, 114 S. Ct. at 1469.
Court's analysis was not completely accurate, closer examination reveals that the Court would not have reached a different conclusion because the proportionate share approach proves to better serve judicial economy. The Court reasoned that neither approach was superior because both required a calculation of the parties' relative degrees of liability and differed only in the mechanisms used to calculate liability.\textsuperscript{136} It is true that where there are only two defendants, the liability of each is calculated \textit{de facto} under either rule. However, this does not hold true where there are multiple defendants. For example, if three of five defendants settle, under the proportionate share approach all three settling defendants can be treated as one entity and only the non-settling defendants' individual shares of fault need to be determined. There is no need to calculate each settling defendants' degree of fault because there is no right of contribution. The pro tanto without contribution approach, on the other hand, always requires a calculation of each settling defendants' liability, at least in a cursory fashion, at a good faith hearing.\textsuperscript{137} Thus, the rules are only comparable in their impact on judicial economy where there are two defendants. Where there are three or more, the proportionate share rule is clearly superior.

The Court further found that the effect of the two rules on settlement was ambiguous and that any beneficial effect that the pro tanto without contribution rule provided was the result of threatening non-settling defendants with overpayment.\textsuperscript{138} On this basis, the Court concluded that comparable settlement rates could be achieved under either rule and thus neither rule was preferable.\textsuperscript{139}

This analysis oversimplifies the nature of the effect of the two rules on settlement. Although it is true that the effect of the rules on settlement is ambiguous, this phenomenon is a result of the fact that each of the respective rules better encourages settlement under a different set of circumstances and not because the rules necessarily yield comparable settlement rates.\textsuperscript{140} Not

\textsuperscript{136} Id.
\textsuperscript{137} Id. The Court dismissed the possibility of adopting the pro tanto approach without accompanying good faith hearings. Id. See notes 33 and 43 for a discussion of why good faith hearings are a necessary component of the pro tanto approach.
\textsuperscript{138} Id. at 1468.
\textsuperscript{139} Id. at 1468-69. The Court reasoned that comparable settlement rates would be achieved by the parties' desire to avoid litigation, uncertainty and interruption of business relationships. Id.
\textsuperscript{140} See Kornhauser & Revesz, cited at note 40, at 447-63. Assuming perfect, mathematically rational behavior, some of the more important factors in determining
only does a complex host of factors affect which rule better encourages settlement, but each factor has the inherent possibility of combining other factors to either mitigate or further enhance the impact on settlement behavior. Thus, the prevalence of underlying circumstances determines which rule is more likely to better encourage settlement.

The court reasoned that the pro tanto without contribution rule encouraged settlement by threatening the non-settling defendant with overpayment and thus employed heavy handed tactics to force settlement. Closer examination reveals that the Court's analysis does not hold true under all circumstances. For instance, when the cost of litigation is comparatively high, and the plaintiff's probability of recovering against either defendant is independent, the proportionate share approach actually has a coercive and unfair effect on settlement behavior. When the cost of litigation is high, the plaintiff is more likely to obtain a favorable initial settlement because the defendant will want to avoid the high cost of litigation. Then, because the plaintiff's recovery against the nonsettling defendant will not be capped at the balance of the damages, the plaintiff is likely to pursue litigation against the nonsettling defendant in search of a windfall. The nonsettling defendant, in order to avoid the high cost of litigation, also is likely to settle for an amount that is greater than its proportionate share of the damages. Under the proportionate share approach then, the plaintiff is likely

which rule will better encourage settlement are: litigation costs, perceptions of the likelihood of success and independent versus correlative probability of success of the claim. If the likelihood of success against the defendants is perfectly correlative, (assuming litigation) the plaintiff can not recover from one defendant without recovering from all defendants. Thus, the plaintiff's probability of recovery is always 50%. If the likelihood of success against the defendants is perfectly independent, (assuming litigation) the defendant can either recover in full from all defendants, not recover from any defendant, or recover from any one defendant individually. Thus the plaintiff's probability of recovery is 75%. Assuming a perfectly rational model, this difference affects settlement behavior because a greater likelihood of recovery will prompt a plaintiff to seek more in settlement. For example, assume that a defendant settles with one of two equally responsible defendants for $75. Assume further that the cost of litigation against the second defendant will be $30. Under the pro tanto rule, the maximum recovery against the second defendant is $25, yielding a net loss of $5. However, under the proportionate share rule, the recovery against the second defendant will be $50, yielding a net gain of $20.

141. For example, assume that a defendant settles with one of two equally responsible defendants for $75. Assume further that the cost of litigation against the second defendant will be $30. Under the pro tanto rule, the maximum recovery against the second defendant is $25, yielding a net loss of $5. However, under the proportionate share rule, the recovery against the second defendant will be $50, yielding a net gain of $20.

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to obtain a favorable disposition whether he settles or litigates against the second defendant. Such a favorable situation arises not because of a beneficial bargain, but rather because of coercive circumstances.

The Court was correct in identifying that neither rule was systematically better at encouraging settlement. The Court, however, failed to take the critical next step by not identifying whether admiralty cases generally gave rise to the types of circumstances under which one rule is more likely to outperform the other. As should be obvious, such an analysis would have involved a painstaking survey of admiralty claims in search of the prevalence of relevant factors.

On balance, neither rule is more consistent with Reliable Transfer; the proportionate share rule is more judicially economical where there are three or more defendants; and neither rule is systematically better at encouraging settlement. However, each rule performs better under a given set of circumstances. The Court listed the encouragement of settlement as one of only three factors guiding its decision, but failed to adequately analyze whether the rule that it chose would actually serve that end. Although the Court's decision may provide some relief to overcrowded federal court dockets by promoting judicial economy, it also runs the risk of destroying any such advances by encouraging litigation in some cases. Given the breadth and complexity associated with determining which rule better serves settlement, the choice of rules would have been better left to Congress.

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