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## Navigating the Straits of Settlement and Insolvency: A Reconciliation of Joint and Several Liability and Proportionate Settlement Under the Maritime Law

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# Navigating the Straits of Settlement and Insolvency: A Reconciliation of Joint and Several Liability and Proportionate Settlement Under the Maritime Law

David D. Jensen\*

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### I. Introduction

Who pays for a judgment-proof defendant? Does a plaintiff's interest in full compensation outweigh a defendant's interest in paying only for the harm that it caused? Multidefendant litigation raises one more question: What happens when one defendant settles, one goes to trial, and a third winds up judgment-proof?<sup>1</sup> The law should encourage litigants to resolve disputes, but should it do so to the detriment of defendants that demand their day in court?

The questions in the preceding paragraph do not have easy answers; in fact, the Third Restatement of Torts devotes an entire volume solely to the issue of damage apportionment.<sup>2</sup> This Note considers only one aspect of the tension between comparative fault and full compensation: reallocating uncollectible damages among parties to a lawsuit. This aspect lacks a clear consensus. For example, the Third Restatement suggests no fewer than five schemes for allocating a judgment-proof defendant's share of damages among parties.<sup>3</sup> The significance of this issue is apparent when one considers the

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1. Several factors can make a defendant judgment-proof. Unless specified otherwise, the terms "judgment proof," "insolvent," "bankrupt," and "immune" are interchangeable.

2. See generally RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000).

3. See *id.* § A19 cmt. e (providing that, under a system of "pure" joint and several liability, a jury should not include defendants that are immune to judgment in its allocation of comparative fault; however, a jury should determine the plaintiff's share of fault in relation to all parties and then apportion liability among only the non-immune parties); *id.* § B19 cmt. e (providing that a factfinder should allocate fault to an immune defendant under a several-liability-only regime); *id.* § C20 (providing that, under a "hybrid" joint and several liability system "with reallocation," a factfinder should not allocate fault to a plaintiff's immune employer unless some parties can pursue contribution against the employer under "applicable law," or unless "applicable law" allows for the reduction of damages based on the employer's fault); *id.* § C21 (providing that, under a "hybrid" joint and several liability system "with reallocation," a court should re-allocate the portion of a judgment for which codefendants cannot obtain contribution among all parties, including the plaintiff, on the basis of those parties' comparative responsibility); *id.* § D19 cmt. f (providing that, under a "hybrid" joint and several liability system in which joint and several liability depends on a threshold level of fault, a factfinder should allocate liability to an immune employer unless the defendants can "only"

numerous high-profile lawsuits in which nominally responsible defendants have paid grossly disproportionate damages to plaintiffs. For example, in 1987 the Supreme Court of Florida imposed 86% of a damages award against Walt Disney World, which was itself only 1% at fault for the plaintiff's injuries.<sup>4</sup> The plaintiff's husband, 85% liable for her injuries, was immune to suit,<sup>5</sup> so Walt Disney World bore both its 1% share and the husband's 85% share of the plaintiff's \$750,000 award.<sup>6</sup>

This Note examines a topic narrower than just the reallocation of uncollectible portions of plaintiffs' awards. Specifically, this Note discusses the reallocation issue in the context of partial settlements perfected under the maritime law. The maritime law is an excellent area of inquiry because it allows exploration of the interplay between "pure" joint and several liability and "pure" comparative fault.<sup>7</sup> Furthermore, the bounds of one defendant's responsibility for another's inability to pay are unclear under the current maritime jurisprudence. Although this issue is admittedly narrow, it reaches wider in that its resolution requires one to reconcile tensions between joint and several liability and proportionate fault.

Admiralty and maritime actions fall under the jurisdiction of the federal courts.<sup>8</sup> Approximately 6.5% of tort claims in federal courts concern maritime law.<sup>9</sup> Maritime jurisdiction applies to torts that both occur on the navigable waters of the United States and bear a significant relationship to traditional maritime activity.<sup>10</sup> Because the maritime law is a distinct pronounce-

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be held jointly and severally liable); *id.* § E19 cmt. f (providing that, under a "hybrid" joint and several liability system in which the type of damages determines whether or not defendants are jointly or severally liable, a factfinder allocates liability among all parties and "identified persons," including immune tortfeasors, unless the plaintiff can recover only economic damages for which the defendants are jointly liable).

4. See *Walt Disney World Co. v. Wood*, 515 So. 2d 198, 202 (Fla. 1987) (affirming state appellate court's distribution of liability).

5. See *id.* at 201 (stating that "competing social policy" prohibits imposition of liability against spouses).

6. *Id.* at 199.

7. In this Note, the term "pure joint and several liability" references a system of joint and several liability that is not contingent upon the relative faults of the parties. The term "pure comparative fault" references a comparative fault scheme in which a comparatively negligent plaintiff recovers reduced damages, even if the plaintiff is himself predominantly liable.

8. U.S. CONST. art. III, § 2, cl. 1.

9. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, Mar. 31, 2002, at 44 (2002) (stating, *inter alia*, that 2,240 of 34,424 total "tort actions" concerned "marine" claims). Moreover, 5% of contract claims in federal courts concern maritime matters. See *id.* (stating, *inter alia*, that 2,402 of 48,927 contract claims concerned "marine" claims).

10. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 672-73 (1982) (reviewing

ment of "federal common law,"<sup>11</sup> maritime decisions can be highly influential in tort law's development.<sup>12</sup> For example, the United States Supreme Court's decision in *East River Steamship v. Transamerica Delaval, Inc.*,<sup>13</sup> articulating the grounds and rationales of the economic loss rule,<sup>14</sup> has strongly influenced both state and federal causes of action.<sup>15</sup>

Recently, the Court has modified the maritime law by adopting comparative fault,<sup>16</sup> retaining joint and several liability,<sup>17</sup> and applying "proportionate share" apportionment when parties partially settle claims.<sup>18</sup> Notwithstanding

historic bounds of maritime jurisdiction and the effect of the Court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972)).

11. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1332 (1996) (stating that maritime law is "[p]erhaps the most extensive modern enclave" of federal common law).

12. See Arden J. Lea & R. Jeffrey Bridger, *McDermott v. AmClyde and the Rule of Proportionate Fault: Maritime Law Leads in Developing a Fair, Consistent, and Efficient Credit for Settlement Rule*, 19 TUL. MAR. L.J. 261, 277 (1995) (noting that the Court's maritime decision in *McDermott, Inc. v. AmClyde* will likely "impact" many other areas of law); see also *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207 (1994) ("[T]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime." (quoting *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975))).

13. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). *East River Steamship* concerned tort claims for damages arising from an oil tanker's defective steam turbine. *Id.* at 861. As a result of the turbine's defect, the tanker's owners had incurred repair costs and had lost income while the tanker could not be used. *Id.* Because the statute of limitations barred actions for breach of contract, *id.*, the Court considered whether or not the plaintiff's claims were cognizable in tort. *Id.* at 859. After reviewing other courts' approaches to the problem, the Court concluded that a manufacturer has no tort duty to prevent a product from damaging itself. *Id.* at 868-71.

14. See *id.* at 876 (stating that whether framed in negligence or strict liability, no tort action lies for purely economic loss).

15. See Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075, 1086-87 (1996) (stating that "most states" have followed *East River Steamship's* articulation of the economic loss rule). For examples of cases relying on *East River Steamship*, see *2-J Corp. v. Tice*, 126 F.3d 539, 542 (3d Cir. 1997); *Nat'l Tel. Co-op. Ass'n v. Exxon Corp.*, 38 F. Supp. 2d 1, 14 (D.D.C. 1998); *Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671, 672 (Ala. 1989); *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1224 (Fla. 1999); *Trans States Airlines v. Pratt & Whitney Can., Inc.*, 682 N.E.2d 45, 54 (Ill. 1997); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 489 (Ind. 2001); *Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 618 (Mich. 1992).

16. See *Reliable Transfer*, 421 U.S. at 411 (holding that the maritime law should allocate liability according to the comparative fault of the parties).

17. See *McDermott*, 511 U.S. at 220 (stating that the *Edmonds* opinion, which adopted comparative fault in the maritime law, "merely reaffirm[s]" joint and several liability); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271 n.30 (1979) (holding that adoption of comparative fault "did not upset" the scheme of joint and several liability).

18. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 204 (1994).

these developments, the precise interplay of these principles in the arena of judgment-proof defendants remains unclear.<sup>19</sup> On the one hand, joint and several liability allows a plaintiff to recover all of its damages from any concurrent tortfeasor and thus makes codefendants liable for a judgment-proof defendant's share of damages.<sup>20</sup> On the other hand, comparative fault and proportionate share apportionment limit the liability of nonsettling defendants to their proportionate shares of the plaintiff's damages.<sup>21</sup> The Third Restatement describes joint and several liability's imposition of the risk of insolvency on codefendants as "difficult to square with comparative responsibility."<sup>22</sup>

Though this issue is not unique to the maritime law, it is one that many states do not face because of widespread legislative modification of joint and several liability principles at the state level in recent years.<sup>23</sup> The issue of apportioning a judgment-proof defendant's share of damages is often null at the state level because tort reform has eliminated the issue or provided statutory guidance for its resolution.<sup>24</sup> However, the maritime law still incorporates "pure" joint and several liability.<sup>25</sup> Moreover, the Supreme Court has stated that the first goal of the maritime law in apportioning damages is full compensation to the plaintiff.<sup>26</sup> The rub, then, is doing so in a manner that is fair to all parties.

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19. See *Lea & Bridger*, *supra* note 12, at 275 (1995) (noting that most discussions of settlement regimes "raise the problems" of insolvent tortfeasors).

20. See *Edmonds*, 443 U.S. at 269 (holding shipowner solely liable for longshoreman's damages, in spite of statutorily immune stevedore's concurrent fault, by operation of joint and several liability).

21. See *McDermott*, 511 U.S. at 209 (stating that under proportionate share allocation, nonsettling defendant cannot seek contribution because it pays only its proportionate share of plaintiff's damages).

22. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 10 cmt. a (2000).

23. See Kathleen M. O'Connor & Gregory P. Sreenan, *Apportionment of Damages: Evolution of a Fault-Based System of Liability for Negligence*, 61 J. AIR L. & COM. 365, 374-75 (1996) (noting that approximately thirty-five states have abolished or modified joint and several liability).

24. See *id.* at 375 (stating that joint and several liability reforms range from complete abolition to modification or limited application); *id.* at 377-78 (noting that some state statutes reallocate judgment-proof defendants' shares).

25. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220-21 (1994) (reviewing the history of joint and several liability in maritime law and concluding that the adoption of both comparative fault and proportionate share apportionment did not modify this doctrine).

26. See *id.* at 221 (stating that, under joint and several liability, codefendants bear the burden of a defendant's insolvency rather than the plaintiff); see also O'Connor & Sreenan, *supra* note 23, at 375 (noting that the "real issue" in apportionment is the allocation of the risk of a defendant's insolvency or absence, and that several liability places that risk entirely on the plaintiff).

Part II of this Note reviews two influential maritime decisions from the Supreme Court, *Edmonds v. Compagnie Generale Transatlantique*<sup>27</sup> and *McDermott, Inc. v. AmClyde*,<sup>28</sup> and articulates the exact problems their holdings present when defendants are judgment-proof. Part III lays the groundwork for solving these problems by arguing that partial settlements reflect the potential damages, not the actual damages, awarded among parties at trial. Part IV then suggests that the mutual embrace of pro rata apportionment and joint and several liability compels proportionately reallocating judgment-proof defendants' shares of damages to all defendants and imputing those shares to prior settlements. Furthermore, Part IV details the operation of this solution, labeling the approach "limited joint and several liability." Part IV then analyzes limited joint and several liability in light of the objectives and bases of damages allocation pronounced by the Court. Both Parts III and IV incorporate mathematical abstractions to demonstrate the effect of various apportionment schemes on the parties to a suit. Part V analogizes the approach to state and federal decisions addressing the reallocation of individuals' joint obligations. Part VI concludes that the end is in fact the beginning: confusion over the apportionment of damages owes to the frame of reference, not the intractability of the problem.

## II. *The McDermott and Edmonds Problem: The Judgment-Proof Defendant*

### A. *Edmonds v. Compagnie Generale Transatlantique: Continued Vitality for Joint and Several Liability*

*Edmonds v. Compagnie Generale Transatlantique* begins this Note because it was in *Edmonds* that the Court concluded that joint and several liability survived as a mode for fully compensating plaintiffs, notwithstanding two intervening legal developments: comparative fault and immunity for employers. In *Edmonds*, a longshoreman recovered a \$100,000 verdict against the stevedoring company that employed him and the owner of the ship on which he was working.<sup>29</sup> Because federal law made the stevedoring company immune from the longshoreman's claim for damages,<sup>30</sup> the Supreme Court

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27. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). A discussion of the issues, holding, and import of *Edmonds* follows in subpart II.A.

28. *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994). For a discussion of the issues, holding, and import of *Edmonds*, see *infra* subpart II.B.

29. *Edmonds*, 443 U.S. at 258.

30. *Id.* at 261 (citing 33 U.S.C. § 905 (1976), amended by 33 U.S.C. § 905 (Supp. II 1984)).

faced the task of reallocating this company's share of damages.<sup>31</sup> Moreover, recent amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA)<sup>32</sup> barred contribution claims against the employer.<sup>33</sup> The U.S. Court of Appeals for the Fourth Circuit had reasoned that Congress's disallowance of contribution against the stevedoring company, in conjunction with its allowance of claims against the shipowner, dictated a strictly proportionate damages allocation: the preclusion and allowance could "be harmonized only if read in apportioned terms."<sup>34</sup> Thus, the Fourth Circuit had held that the shipowner was liable only for its proportionate share of the plaintiff's damages.<sup>35</sup>

Reversing the Fourth Circuit, the Court began its decision by noting that Congress had amended the LHWCA in response to rulings of the Court.<sup>36</sup> Nothing in the legislative history of the LHWCA amendments indicated that Congress had intended to change the common law rule of joint and several liability.<sup>37</sup> Furthermore, the Court found that Congress contemplated the continuation of joint and several liability in a longshoreman's claims against a negligent shipowner.<sup>38</sup> Though "[s]ome inequity appears inevitable in the present statutory scheme," that inequity does not indicate that Congress intended to place the burden on the injured longshoreman "whom the [LHWCA] seeks to protect."<sup>39</sup>

The Court also considered overruling joint and several liability on its own accord. Finding that Congress had understood joint and several principles to stipulate full recovery from a negligent shipowner, the Court declined to modify the principle. The Court reasoned that such a modification "would effectively alter the statute by causing it to reach different results than Congress envisioned."<sup>40</sup> When Congress acts on conditions created by the Court

31. See *id.* at 258–59 (stating that Court granted certiorari to resolve whether or not shipowner was liable for only its proportionate share of damages).

32. 33 U.S.C. §§ 901–950 (2000).

33. *Edmonds*, 443 U.S. at 262–63 (quoting 33 U.S.C. § 905 (1976), amended by 33 U.S.C. § 905 (Supp. II 1984)).

34. *Id.* (quoting *Edmonds v. Compagnie Generale Transatlantique*, 577 F.2d 1153, 1155 (4th Cir. 1978)).

35. *Id.* at 258–59 (citing *Edmonds*, 577 F.2d at 1155–56).

36. *Id.* at 262.

37. See *id.* at 266–67 (noting that the legislative history counseled against the Fourth Circuit's construction).

38. See *id.* at 267–68 (discussing 33 U.S.C. § 905 (1976), amended by 33 U.S.C. § 905 (Supp. II 1984), and noting that Congress expressed no intent to change the common law, but did express an interest in not limiting a shipowner's liability).

39. *Id.* at 270.

40. *Id.* at 273.



itself, the Court is "not as free as [it] would otherwise be" to change those conditions.<sup>41</sup>

In the end, *Edmonds* resolves tension between proportionate fault and joint and several liability in favor of full compensation for the plaintiff.<sup>42</sup> Though the law favors the proportionate allocation of judgments among defendants, a plaintiff's interest in full recovery outweighs a defendant's interest in limiting its exposure.<sup>43</sup> Joint and several liability remains the course, even though it sometimes results in grossly disproportionate judgments against defendants.

#### B. *McDermott, Inc. v. AmClyde: Enter the Proportionate Settlement*

Fifteen years after *Edmonds*, the Court faced a somewhat different juxtaposition: comparative fault, joint and several liability, and partial settlement. *McDermott, Inc.* sued a crane manufacturer (AmClyde), the manufacturer of a hook (River Don), and three manufacturers of steel slings for property damage.<sup>44</sup> Before trial, the sling defendants settled with *McDermott* for \$1 million.<sup>45</sup> The jury trial resulted in a \$2.1 million verdict, with liability apportioned 32% to AmClyde and 38% to River Don.<sup>46</sup> The plaintiff and the sling defendants were collectively 30% responsible.<sup>47</sup> At trial, the district court apportioned damages under a pro rata approach, entering judgment for 32% of the \$2.1 million verdict against AmClyde (\$672,000) and 38% against River Don (\$798,000).<sup>48</sup> Under the district court's judgment, *McDermott's* total recovery was \$2,470,000: the \$1 million settlement and the \$1,470,000 against AmClyde and River Don.

When *McDermott* made its way to the U.S. Court of Appeals for the Fifth Circuit, the court reversed the district judge.<sup>49</sup> First, the Fifth Circuit found AmClyde immune to *McDermott's* action by operation of a prior contract

41. *Id.*

42. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220 (1994) (stating that *Edmonds* both affirmed joint and several liability and demonstrated that the adoption of proportionate fault did not "abrogate" joint and several liability).

43. *See Edmonds*, 443 U.S. at 270 (reasoning that any inequity in the allocation of damages should not fall on an injured longshoreman, as this is the party that Congress intended to protect).

44. *McDermott*, 511 U.S. at 204–05.

45. *Id.* at 205.

46. *Id.* at 206.

47. *See id.* at 206 n.5 (stating that a special interrogatory to the jury instructed it to consider the fault of the plaintiff and the sling defendants jointly).

48. *Id.* at 206.

49. *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1072 (5th Cir. 1993), *rev'd sub nom.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994).

between the two.<sup>50</sup> Second, the Fifth Circuit apportioned the judgment "pro tanto," reducing it "dollar for dollar" by the amount of McDermott's prior settlement.<sup>51</sup> Because the damages taxed against all defendants at trial were \$1.47 million (\$2.1 million reduced by the 30% fault apportioned to plaintiff McDermott and the settled defendants), the Fifth Circuit held that McDermott could recover a maximum of \$470,000 (\$1.47 million less the \$1 million settlement).<sup>52</sup>

The Supreme Court granted certiorari; the issue on appeal was damages apportionment in cases of partial settlement.<sup>53</sup> Should a plaintiff recover the "net" of the verdict less the amounts received in settlement<sup>54</sup>—making the nonsettlers liable for all of the judgment that is not yet paid? Or instead, should the plaintiff recover only the nonsettling defendant's comparative share of damages<sup>55</sup>—in this instance resulting in the plaintiff recovering a sum greater than the verdict?

The Court began its decision with the Second Restatement of Torts.<sup>56</sup> The Restatement suggested three possible allocation mechanisms. The first allocation rule, "pro tanto with contribution," reduces the nonsettling defendants' liability by the amount of the settlement. Defendants paying more than their equitable shares of damages are free to pursue contribution from other defendants.<sup>57</sup> The second apportionment mechanism, "pro tanto without contribution," reduces the nonsettling defendants' liability by the amount of the settlement, but does not allow contribution. Nonsettling defendants are liable for the full damages awarded to the plaintiff, reduced by any settlement amounts.<sup>58</sup> The Court unanimously adopted the final rule, "pro rata" allocation, though it elected to refer to it as "proportionate share" allocation.<sup>59</sup>

Under the proportionate share approach, a defendant that settles extinguishes its own future liability and reduces other defendants' liabilities by its "equitable share" of damages.<sup>60</sup> Nonsettling defendants remain liable for their

50. *Id.* at 1075–76.

51. *Id.* at 1079–80.

52. *Id.* at 1080–81.

53. *See McDermott*, 511 U.S. at 204 (stating that the question presented is the calculation of a nonsettling defendant's liability).

54. *Id.*

55. *Id.*

56. *See id.* at 208–09 (stating that no consensus exists regarding apportionment problems, as evinced by the Restatement's varied positions on the matter).

57. *Id.* at 208 (quoting RESTATEMENT (SECOND) OF TORTS § 886A(1) (1977)).

58. *Id.* at 208–09 (quoting RESTATEMENT (SECOND) OF TORTS § 886A(2) (1977)).

59. *Id.* at 217. "Pro rata" apportionment is the same as proportionate share apportionment. *Id.* at 210 n.9.

60. *Id.* at 209 (quoting RESTATEMENT (SECOND) OF TORTS § 886A(3) (1977)). A defen-

own proportionate shares of damages.<sup>61</sup> River Don's assessed liability was 38%, so River Don should pay 38% of the \$2.1 million verdict.<sup>62</sup> The Fifth Circuit had also held that AmClyde was immune to McDermott's claim for damages because of an agreement between the two that waived liability.<sup>63</sup> The parties did not raise the issue of River Don's responsibility for AmClyde's share of damages, and the Court did not consider it—nor did it consider the liability of other parties for AmClyde's share.<sup>64</sup>

Three considerations were "paramount" in the Court's selection of an apportionment scheme: (1) consistency with the principle of proportionate fault, (2) promotion of settlement, and (3) judicial economy.<sup>65</sup> With regard to judicial economy, the Court found pro tanto with contribution inferior to the other two approaches because it encourages additional contribution litigation.<sup>66</sup> Moreover, because pro tanto with contribution leaves settling defendants open to future contribution claims, the Court felt that it would not encourage litigants to settle.<sup>67</sup>

Deciding between the proportionate share and pro tanto without contribution mechanisms, the Court focused on the rules' consistency with comparative fault. The Court reasoned that the proportionate share approach is more consistent with proportionate fault because, unlike pro tanto without contribution, nonsettling defendants never pay more or less than their equitable shares of damages.<sup>68</sup> Furthermore, the Court reasoned that, because trial uncertainty and the plaintiff's desire for "war chest" funds normally reduce settlement values to less than the amounts of verdicts rendered at trial, using pro tanto apportionment without contribution likely would result in settling defendants paying less than their equitable shares of damages.<sup>69</sup> Though "good faith" hearings could help ensure that partial settlements are accurate reflections of

dant's "equitable share" is that portion of damages that corresponds with the defendant's proportionate fault. RESTATEMENT (SECOND) OF TORTS § 886A cmt. h (1977).

61. *McDermott*, 511 U.S. at 210.

62. *Id.*

63. *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1076 (5th Cir. 1993), *rev'd sub nom.*, *McDermott*, 511 U.S. at 202.

64. *McDermott*, 511 U.S. at 210 n.10.

65. *Id.* at 211.

66. *Id.* at 212.

67. *See id.* at 211–12 (reasoning that settlement can "only disadvantage" a settlor with contribution claims in the future or with overpayment in the present).

68. *See id.* at 212 (reasoning that, under pro tanto without contribution, nonsettling defendants will "frequently" be liable for more than their equitable shares).

69. *See id.* at 213 (reasoning that settlement amounts are likely less than a defendant's equitable share of damages because they reflect future uncertainty and can be used to finance further litigation by a plaintiff).

a defendant's liability, the Court concluded that these hearings would not "fully remove" potential inequity because experience in other courts showed that they are normally "cursory."<sup>70</sup> That a plaintiff's success at trial is uncertain further compounded the use of hearings.<sup>71</sup>

The Court felt that *pro tanto* without contribution would encourage early settlement by allowing early-settling defendants to pay less than their equitable shares of damages.<sup>72</sup> At the same time, this incentive to settle is at the expense of nonsettling defendants, who remain liable for all damages less the amounts of the low, early settlements.<sup>73</sup> While public policy should encourage settlement, doing so at the expense of nonsettling parties is "too high a price in unfairness."<sup>74</sup> The Court found that other factors—the cost of litigation, the desire to avoid uncertainty, and the maintenance of commercial relationships—normally provide "sufficient" incentives to settle.<sup>75</sup>

The Court also concluded that proportionate share allocation better serves judicial economy. The "potential for unfairness" in *pro tanto* without contribution (in that some defendants settle for less than their shares because other defendants have "deep pockets") necessitates "good faith" hearings.<sup>76</sup> These hearings require district courts to predict a settling defendant's "fair share" of damages long before trial.<sup>77</sup> Though courts must determine the relative faults of parties at some point, the Court felt that reserving the determination for trial would save judicial time for two reasons.<sup>78</sup> First, all parties may settle before trial, negating the need for any determination.<sup>79</sup> Second, determining settled parties' relative faults at trial, in addition to determining the fault of the nonsettling defendants, may consume "little or no additional trial time."<sup>80</sup> The

70. *Id.* at 213–14.

71. *Id.*

72. *See id.* at 215 (reasoning that *pro tanto* without contribution encourages parties to settle because parties that refuse to settle may be forced to pay more than their "fair share" of damages).

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.* at 216 (noting that, because of potential unfairness, no party or amicus advocates *pro tanto* allocation without contribution unless coupled with good faith hearings).

77. *See id.* at 216–17 (noting that while a court must determine a settling party's fault at some point, under a *pro tanto* scheme the court must determine the settlor's fault at a separate pretrial hearing).

78. *Id.* at 217.

79. *Id.*

80. *Id.*

nonsettling parties likely need to describe the role of all defendants "to provide context for the dispute."<sup>81</sup>

Ultimately, the Court came to consider the interplay between joint and several liability in *Edmonds* and its adoption of proportionate share apportionment. The Court maintained that "no tension" exists between joint and several liability and proportionate share allocation, just as the adoption of comparative fault did not abrogate joint and several liability principles.<sup>82</sup> *Edmonds* "merely reaffirm[s]" joint and several liability, which can "result in one defendant[] paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency."<sup>83</sup> The Court went on to state: "When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall."<sup>84</sup> A settlement is not a limitation on the plaintiff's recovery "by outside forces, but by [the plaintiff's] own agreement to settle."<sup>85</sup> Thus, *Edmonds* "did not [even] address the issue in this case, the effect of a settlement on nonsettling defendants."<sup>86</sup>

### C. The Collision over Judgment-Proof Defendants

The progress of knowledge sometimes requires that we look not to what has been said, but rather, to what those statements discuss in the first place.<sup>87</sup> Arguably, the *McDermott* Court's adoption of pro rata apportionment creates

81. *Id.*

82. *Id.* at 220.

83. *Id.* at 220–21 (emphasis added).

84. *Id.* at 221.

85. *Id.*

86. *Id.* at 220.

87. An allusion to cultural icon Ken Kesey illustrates this theme:

The answer is never the answer. What's really interesting is the mystery. If you seek the mystery instead of the answer, you'll always be seeking. I've never seen anybody really find the answer—they think they have, so they stop thinking. But the job is to seek mystery, evoke mystery, plant a garden in which strange plants grow and mysteries bloom. The need for mystery is greater than the need for an answer.

These words, attributed to Kesey, appeared on the programs distributed at his November 14, 2001 funeral. M.L. Lyke, *Ken Kesey Goes Out in Proper Tie-Dye*, SEATTLE POST-INTELLIGENCER, Nov. 15, 2001, at A1. One can find the quote in its entirety at <http://www.intrepidtrips.com> (last visited February 23, 2003). For a thought-provoking account of Ken Kesey's exploits during the 1960s, see Washington and Lee alumnus Tom Wolfe's excellent book, *THE ELECTRIC KOOL-AID ACID TEST* (1968).

more questions than it answers when some defendants can't pay.<sup>88</sup> This Note uses the following hypothetical example to help clarify the nature of the problem and its resolution. Suppose that Adam owns a crane that Becky manufactured and sold directly to Adam. This crane uses steel cable that Cindy manufactured and also sold to Adam. At the time Adam bought the crane and cable, both Becky and Cindy recommended the use of Cindy's steel cable with Becky's crane. After the sale, Cindy realizes that her steel cable is very susceptible to corrosion and should not be used in waterfront applications. Cindy notifies Becky, but not Adam. Becky, in turn, realizes that she has advised Adam to use Cindy's cabling on the crane and warns Adam to replace the Cindy-manufactured cable with one of several alternate brands immediately. Adam ignores Becky's warning, and two years later a corroded cable breaks and severely injures Paul, a longshoreman in Adam's employ. Paul sues Adam, Becky, and Cindy, and all three defendants assert that Paul is comparatively negligent. In addition, Adam asserts immunity under LHWCA as a defense. Before trial, Becky settles with Paul for \$250,000. At trial, the jury apportions liability 40% to Adam, 30% to Becky, and 20% to Cindy, with 10% comparative fault to Paul. The jury awards \$1 million in damages. Were there no settlements and no claims of immunity, the mechanics of contribution would make Adam pay \$400,000, Becky \$300,000, and Cindy \$200,000.<sup>89</sup> However, because Adam is judgment-proof, Becky and Cindy are jointly liable for Adam's share of the damages (\$400,000). Normally, the question would be one of how to divide Adam's share of damages between Becky and Cindy. However, Becky has settled and is no longer liable as a party. Does Cindy, herself only 20% responsible for Paul's injuries, pay 60% of Paul's damages? Or does Paul's settlement with Becky extinguish any joint liability on Cindy's party, leaving her responsible only for her 20%?

The holdings of *McDermott* and *Edmonds*, representing the amalgamation of comparative fault and joint and several liability, stand ambiguous to the resolution of this problem. Though the decisions advocate joint and several liability when factors beyond the plaintiff's control limit recovery,<sup>90</sup>

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88. See Eric M. Danoff, *Settlement Credit and Contribution Under Maritime Law: The Effect of McDermott, Inc. v. AmClyde*, 7 U.S.F. MAR. L.J. 187, 201 (1994) (noting that joint and several liability "does not always square" with the *McDermott* Court's proportionate fault goals); Lea & Bridger, *supra* note 12, at 275 (noting that most commentators on apportionment methods raise the problem of insolvent defendants).

89. Although Paul can execute his \$900,000 judgment (\$1 million less 10% comparative negligence) against any of the three jointly and severally liable defendants, any defendant forced to pay more than its proportionate share of damages can seek contribution from the others. Thus, after the contribution actions conclude, each party will have paid its proportionate share of the judgment.

90. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220-21 (1994) (holding that

*McDermott* also provides that a plaintiff's act of settlement is not such an "involuntary" factor.<sup>91</sup> In a footnote discussion, the *McDermott* Court noted that one party's inability to pay damages "might be thought" to make the remaining at-trial defendants liable for that party's share of damages.<sup>92</sup> However, the Court then stated that it felt the "best way of viewing" the contractual provision limiting AmClyde's prospective liability was as a "quasi settlement in advance of any tort claims," thus not implicating the other defendants' obligation to cover a judgment-proof defendant's share of damages.<sup>93</sup> Looking to the allocative principles at work in the Court's decisions, this Note now delves into the legal views underlying the Court's joint and several liability and pro rata apportionment pronouncements. The amalgamated approach labeled limited joint and several liability develops from this framework of underlying principles.

### III. Partial Settlements as Proportionate Pieces of the Expected Pie

#### A. Settlements as Expected (*vis-à-vis* Actual) Damages

Partial settlements are not "dollar for dollar" equivalents of a settling defendant's actual share of damages at trial,<sup>94</sup> and the Court recognized this fact in choosing the proportionate share rule.<sup>95</sup> According to the *McDermott* Court, the disparity between pretrial settlement amounts and damages awarded at trial results from trial uncertainty and the plaintiff's interest in obtaining "war chest" funds to finance continued litigation against remaining defendants.<sup>96</sup> Commentators have identified a number of additional factors that discount settlements: litigation costs, risk aversion, informational inaccuracies, the structure and timing of settlement offers, and parties' knowledge

*Edmonds* "merely reaffirm[s] the well-established principle of joint and several liability," which requires one defendant to pay more than its proportionate share of damages when "factors beyond the plaintiff's control" limit a plaintiff's recovery).

91. *See id.* at 221 (stating that limitations on a plaintiff's recovery because of settlement are not "outside forces").

92. *See id.* at 210 n.10 (stating that, while principles of joint and several liability and *Edmonds* could be seen to mandate this result, the plaintiff has not requested that the defendant pay more than its individual, proportionate share of the damages).

93. *See id.* (stating that under such a view a proportionate credit approach "takes into account" this "quasi settlement").

94. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 16 cmt. c (2000) ("[M]ost settlements are discounted by the estimated probability of liability of the settling tortfeasor and, to some extent, for the costs and fees saved . . .").

95. *See* *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 213 (1994) (noting that settlements normally do not "reflect an entirely accurate prediction of the outcome of a trial").

96. *Id.*

of other settlement offers and of other parties' financial solvency.<sup>97</sup> The time value of money—the idea that a dollar today is worth more than a dollar tomorrow—also discounts settlements.<sup>98</sup> To a litigant, then, a settlement payment intrinsically outweighs a verdict of equal amount because the settlement payment is certain (as opposed to uncertain) and immediate (as opposed to prospective).<sup>99</sup>

While a defendant's settlement may not accurately reflect the total damages assessed against the defendant at trial, the settlement still reflects the parties' expectations about the individual defendant's probable obligation to the plaintiff.<sup>100</sup> Thus, the settlement represents the *expected value* of the settling defendant's share of damages *at the time of settlement*.<sup>101</sup> Close analysis reveals that the Supreme Court's concern about the "unfairness" of pro tanto allocation stems from the disparity between actual and expected damages.<sup>102</sup> Because of both the uncertainty of success at trial and the plain-

97. See Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427, 458–64 (1993) (detailing the potential role of these factors in the economic modeling of settlement negotiations).

98. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.5, at 613 (5th ed. 1998) (discussing how discount rates affect settlement by generally increasing the stakes of maintaining litigation, but also noting that relative discount rates between the plaintiff and the defendant may differ).

99. See *id.* (noting that the discount rate is related to the probability of success because "[d]elay increases uncertainty" and thus both decreases the probability of success and increases the discount rate).

100. See Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1076 (1989) (reasoning that economic modeling anticipates disparity between expected lawsuit values and actual verdict amounts because the subjective value equals expected damages multiplied by the subjective probability of award); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 116–18 (1996) (reasoning that settlement values reflect both probabilities of success at trial and parties' risk preferences, but that litigants may make "suboptimal" settlement decisions because of other factors). Cooter and Rubinfeld also note that risk aversion may further increase this disparity. See Cooter & Rubinfeld, *supra*, at 1076 (reasoning that trial is a "gamble" and thus the subjective value to risk-averse participants differs from the expected value).

101. Much of the law and economics literature implicitly assumes a divergence between actual verdicts and parties' subjective values during settlement. See POSNER, *supra* note 98, § 21.5, at 609–11 (evaluating the discrepancy between at-trial judgments and parties' subjective, pre-trial settlement valuations on the bases of subjective probabilities of success, litigation costs, discount rates, and degrees of risk aversion).

102. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 213–14 (1994) (stating that even when liability can be accurately determined in advance of trial, the uncertainty of trial can make pro tanto allocation visit "substantial unfairness" on nonsettling defendants).



tiff's interest in obtaining proceeds immediately, the Court felt that settlements do not reflect the actual damages that juries award at trial.<sup>103</sup>

The distinction between viewing settlements as reflective of actual damages and viewing them as reflective of expected damages is crucial. Using the dollar amount of a verdict as the measure of a defendant's responsibility yields systemically biased results because (among other reasons) many settled claims would never ultimately result in verdicts for plaintiffs. Because many suits never result in verdicts at all—there are summary judgment dismissals, settlements, and defense verdicts—saying that any particular claim *would have netted X-dollars* at trial presupposes too much. If settlements do not reflect actual, at-trial damages, then deducting settlement amounts from verdicts results in disproportionate (and thus, unfair) allocations of damages to nonsettling defendants.<sup>104</sup> Significantly, even some jurisdictions that use pro tanto allocation recognize that damages expected at the time of a settlement may differ substantially from the actual damages found at trial.<sup>105</sup> Thus, to effectuate a division of damages that is actually proportionate to fault, the dollar amount of pretrial settlements cannot be the "ruler" in a post-verdict entry of judgment against nonsettling defendants.

#### B. Allocating Discounting Factors Among the Parties

The real unfairness of pro tanto apportionment is that it places the risk of deviation between actual and expected damages not on the parties to a settlement agreement, but rather, on the defendants that are *not* parties to the agreement.<sup>106</sup> A return to the previous hypothetical illustrates this,<sup>107</sup> although

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103. *Id.* at 213.

104. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 16 cmt. c (2000) (reasoning that pro tanto allocation is unfair because settlement amounts are normally less than actual damages assessed at trial); RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (1977) (stating that pro tanto apportionment provides a "clear incentive" for collusion and that it can be "very unfair" to other tortfeasors); see also *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 698 P.2d 159, 166 (Cal. 1985) (finding that a "good faith" settlement hearing should consider the amount of the settlement relative to the settling defendant's share of the plaintiff's expected damages, but that courts should recognize that settling parties pay less than they would if found liable at trial); *River Garden Farms, Inc. v. Superior Court*, 103 Cal. Rptr. 498, 503 (Cal. Ct. App. 1972) (noting that pro tanto apportionment is "vulnerable to abuse" because a plaintiff can select certain defendants to bear disproportionate shares of damages).

105. See *Tech-Bilt*, 698 P.2d at 167 (stating that "practical considerations" require the evaluation of the reasonableness of a settlement amount on the basis of the information available at the time of the settlement).

106. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 16 cmt. c (2000) (stating that a disadvantage of pro tanto allocation is that it imposes settlement inadequacies on nonsettling tortfeasors and that pro tanto allocation usually increases the liabilities of

for simplicity this discussion assumes that Adam is not judgment-proof. If the case goes to trial and no one settles, Adam pays \$400,000, Becky pays \$300,000, and Cindy pays \$200,000.<sup>108</sup> However, before trial occurs, no one knows: (1) what verdict the jury will return, (2) how the jury will allocate fault among the parties, and (3) whether any other party will actually be able to pay damages if a court enters judgment against it. Because of these uncertainties, suppose that Adam and Paul settle before trial for \$300,000. Trial results in the aforementioned \$1 million verdict with liability apportioned 40% to Adam, 30% to Becky, and 20% to Cindy. In a pro tanto regime, Becky and Cindy together pay \$600,000: the \$900,000 "net" verdict less the \$300,000 that Adam paid in settlement. Thus, Becky pays 60% ( $\frac{30\%}{30\% + 20\%}$ ) of the \$600,000, or \$360,000: \$60,000 more than she would have paid if all parties had proceeded to trial. In contrast, under the proportionate share rule Becky pays only her share (30%) of the verdict, \$300,000: the Adam-Paul settlement does not affect Becky's liability.

Discounting factors mean that settlements typically are lower than damages awarded at trial; thus, a regime of pro tanto apportionment generally increases nonsettling defendants' expected liabilities.<sup>109</sup> On the other hand, if the settling parties underestimate Adam's relative fault or the amount of damages, then the Adam-Paul settlement might actually benefit Becky under pro tanto allocation. If the jury awards \$800,000 and finds Adam 20% responsible, Becky 30% responsible, and Cindy 40% responsible, Becky pays \$240,000 in the absence of a settlement agreement. Because Adam and Paul have settled for \$300,000, under pro tanto apportionment Becky and Cindy are only liable for \$420,000: \$720,000 (\$800,000 less 10% comparative negli-

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nonsettling tortfeasors); Daniel Klerman, *Settling Multidefendant Lawsuits: The Advantage of Conditional Setoff Rules*, 25 J. LEGAL STUD. 445, 451-52 (1996) (reasoning that, under pro tanto apportionment, settlement with one defendant leaves the nonsettling defendant "with a larger expected liability" than if both parties went to trial).

107. See *supra* text accompanying notes 88-89 (detailing hypothetical example).

108. This hypothetical continues to assume that a joint defendant satisfying the judgment will pursue contribution from the other tortfeasors. Thus, all defendants ultimately pay their proportionate shares.

109. Cf. Frank H. Easterbrook et al., *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 356-60 (1980) (demonstrating that under a rule of no contribution, codefendants' settlements increase the expected liabilities of nonsettling defendants and inferentially supporting the proposition that failing to deduct a settled defendant's proportionate share of damages increases the nonsettling defendants' expected liabilities). The *McDermott* Court entertains a similar calculus to demonstrate the attractiveness of settlement to plaintiffs under pro tanto apportionment. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 214 n.20 (1994). *McDermott* also illustrates the "potential for unfairness" to nonsettling codefendants under a pro tanto rule. *Id.* at 212 n.14.

gence) less the \$300,000 prior settlement. Becky pays 42.9% ( $\frac{30\%}{30\% + 40\%}$ ) of \$420,000, or \$180,000, which is \$60,000 less than she would have paid had Adam and Paul not settled. Thus, in this situation, the Adam-Paul settlement agreement benefits Becky, instead of increasing her liability or allocating the surplus of the bargain back to Adam.

The source of the inequity between pro tanto and pro rata allocation is the fundamental difference between expected loss and actual loss: settled defendant Adam's *expected* loss is subtracted from the *actual* verdict.<sup>110</sup> Proportionate share apportionment, on the other hand, subtracts Adam's actual share of damages (40%) from the verdict. Becky's at-trial liability remains the same under a proportionate share system.

Based on the foregoing discussion, we can say that the amount a defendant pays at trial (assuming there are no settlements) is a function of the damages found by a jury and that defendant's relative culpability. Thus:

$$P_a = D \cdot f_a$$

where  $P_a$  is the amount that defendant  $a$  pays,  $D$  is the total amount of damages awarded by a jury, and  $f_a$  is  $a$ 's proportionate share of fault. If damages are \$100 and  $a$  is 50% at-fault, then  $a$  will pay 50% of \$100, or \$50. On the other hand, the amount the parties expect  $a$  to pay at trial is:

$$E[P_a] = E[D] \cdot E[f_a] \cdot p_a \cdot r$$

where  $E[P_a]$  is  $a$ 's expected payment,  $E[D]$  is the expected amount of total damages,  $E[f_a]$  is  $a$ 's expected share of fault,  $p_a$  is the probability of prevailing against  $a$ , and  $r$  is the discount rate applied to the future payment to reflect the time value of money.<sup>111</sup> Thus, if the parties correctly expect damages to be

110. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 16 cmt. c (2000) (stating that a plaintiff and a settling tortfeasor effectively "externalize" a part of the settling tortfeasor's liability to nonsettling tortfeasors); see also *McDermott*, 511 U.S. at 214 (stating that pro tanto apportionment "is likely to lead to inequitable apportionments of liability"); cf. CHARLES O. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS; A STUDY IN ADMINISTRATIVE ASPECTS OF COMPARATIVE NEGLIGENCE AND CONTRIBUTION IN TORT LITIGATION 77 (1936) (showing that when a plaintiff secures a joint and several verdict against one defendant, the plaintiff transfers the risk of insolvency entirely to that defendant; thus showing that a partial settlement under a pro tanto regime transfers risk from the settling parties to the nonsettling parties).

111. Scholars examining the expected value of a lawsuit generally view this value as a function of the expected amount of damages and the expected proportion of fault. See POSNER, *supra* note 98, § 21.5 (examining parties' decision to settle or proceed to trial as a function of the amount of the judgment and the subjective probability of prevailing against a defendant, but subtracting costs). Judge Posner elsewhere considers the time value of money an appropriate discounting factor. See Richard A. Posner, *An Economic Approach to Legal Procedure and*

\$100 and correctly expect  $a$ 's share of fault to be 50%, then the present value of the claim depends on the probability that the plaintiff can prevail at all and on the discount rate applied to reflect uncertainty. A 0.9 chance of prevailing on the merits and a discount rate of 0.8 means that the present value of  $a$ 's future claim payment is \$36 ( $E[D] \cdot E[f_a] \cdot p_a \cdot r = \$100 \cdot 0.5 \cdot 0.9 \cdot 0.8$ ).

Assuming instead a situation with two defendants,  $a$  and  $b$ , the total payments made by the defendants ( $P$ ) are:

$$P = D \cdot f_a + D \cdot f_b$$

And the expected value of the total payments to the plaintiff is:

$$E[P] = E[D] \cdot E[f_a] \cdot p_a \cdot r + E[D] \cdot E[f_b] \cdot p_b \cdot r$$

How do things change if someone settles? If  $b$  settles and the only defendants to the suit are  $a$  and  $b$ , then  $a$  pays the total judgment against the defendants, less the settlement offset:

$$P_a = P - \text{offset} = D \cdot f_a + D \cdot f_b - \text{offset}$$

Assuming that plaintiffs never settle for less than, and defendants never pay more than, the expected value of claims,<sup>112</sup> defendant  $b$ 's settlement will be:

$$E[P_b] = E[D] \cdot E[f_b] \cdot p_b \cdot r$$

In other words, after discounting the anticipated award to reflect uncertainty and the time value of money, the parties will not agree to a settlement that is more or less than the present value of the amount they actually expect to change hands at trial. Under a pro tanto regime, the court offsets this settlement amount from the payment made by the remaining defendant:

$$P_a = P - E[P_b] = D \cdot (f_a + f_b) - E[D] \cdot E[f_b] \cdot p_b \cdot r$$

*Judicial Administration*, 2 J. LEGAL STUD. 399, 417 (1973) (reasoning that plaintiff's offer is a function of the "present value" of the judgment). On the other hand, economically oriented legal analyses sometimes do not consider costs as a factor on account of simplicity. See Lewis A. Kornhauser & Richard L. Revesz, *Multidefendant Settlements: The Impact of Joint and Several Liability*, 23 J. LEGAL STUD. 41, 71 (1994) (restricting inquiry by excluding costs "[f]or simplicity"). This Note's analysis focuses on the impact of allocation mechanisms on the amounts of damages that parties expect to pay at trial. Though costs are undoubtedly a critical factor in whether or not the parties do, in fact, decide to *proceed* to trial, they do not directly contribute to the amount of damages assessed against a defendant at trial, and this Note accordingly excludes them from inquiry. For another scholar's analysis of the expected cost of a lawsuit, considering this cost to be a function of the amount of damages and the probability of prevailing with costs subtracted, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 107-09 (2d ed. 1989).

112. This again assumes that contribution claims will equitably adjust the amounts paid by the defendants. *Supra* note 108.

Assuming that the parties' expectations regarding damages and proportionate fault are accurate (that is,  $E[D] = D$  and  $E[f_b] = f_b$ ), then we can simplify  $a$ 's payment as:

$$P_a = P - E[P_b] = D \cdot f_a + f_b \cdot (1 - p_b \cdot r)$$

At trial,  $a$  will pay all of the damages attributed to it ( $D \cdot f_a$ ) and also will pay the portion of  $b$ 's damages not paid by  $b$  in settlement due to uncertainty ( $D \cdot f_b \cdot (1 - p_b \cdot r)$ ). Thus, if there is a 0.9 chance of prevailing against  $b$  and a 0.8 discount rate applied to the settlement payment, then  $a$  will pay 28% ( $1 - .72$ ) of the amount that  $b$  would have paid at trial ( $D \cdot f_b$ ). Defendant  $b$ 's settlement with the plaintiff thus increases  $a$ 's at-trial payment to the tune of  $D \cdot f_b \cdot (1 - p_b \cdot r)$ .

If projections regarding damages or proportionate fault prove inaccurate, the at-trial defendant similarly bears the burden:

$$P_a = P - E[P_b] = D \cdot (f_a + f_b) - E[D] \cdot E[f_b] \cdot p_b \cdot r$$

Thus, if the pre-trial expectations are that  $a$  and  $b$  are equally liable for a \$100 obligation, the probability factor is the aforementioned 0.9, and the discount rate is the aforementioned 0.8, then  $b$  will pay up to \$36 ( $E[D] \cdot E[f_b] \cdot p_b \cdot r = \$100 \cdot 0.5 \cdot 0.9 \cdot 0.8$ ) in settlement. However, if a factfinder apportions 60% of the fault to  $b$  and awards \$120 in damages, then besides  $a$ 's share of the judgment ( $D \cdot f_a = .4 \cdot \$120 = \$48$ ),  $a$  will also pay  $D \cdot f_b - E[D] \cdot E[f_b] \cdot p_b \cdot r$ , or the difference between  $b$ 's at-trial share ( $D \cdot f_b = \$120 \cdot 0.6 = \$72$ ) and what  $b$  paid in settlement ( $E[D] \cdot E[f_b] \cdot p_b \cdot r = \$100 \cdot 0.5 \cdot 0.9 \cdot 0.8 = \$36$ ). Here,  $a$  pays \$84 when it is but 40% liable for a \$120 judgment.

In contrast, the pro rata rule uses  $b$ 's actual share of damages as the measure of offset. Thus, in a pro rata regime,  $a$ 's at-trial payment is:

$$P_a = P - \text{offset} = P - P_b = D \cdot f_a + D \cdot f_b - D \cdot f_b = D \cdot f_a$$

What does it all mean? It means that the end-result difference between pro tanto and proportionate share apportionment is whether nonsettling defendant  $a$  pays the shortfall between  $b$ 's expected and at-trial shares of damages, represented as  $D \cdot f_b - E[D] \cdot E[f_b] \cdot p_b \cdot r$ .

Once one understands the choice between the pro tanto and pro rata rules as a choice between the setoff of expected versus actual damages, *McDermott*'s selection of proportionate share apportionment supports two propositions. First, the selection shows that settlement reflects a party's expected liability at trial. Because expectations and actualities differ,<sup>113</sup> a

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113. See *McDermott*, 511 U.S. at 213 (reasoning that settlements normally do not reflect "entirely accurate" predictions of trial outcomes).

settlement with a defendant for expected damages eliminates all damages that would be taxed to the settling defendant at trial.<sup>114</sup>

Second, the result of proportionate share allocation is that partial settlements limit joint and several liability's application.<sup>115</sup> Under a pro tanto scheme, nonsettling defendants are responsible for the entire amount of a judgment, less a credit for the amounts of the settlements. Substantively, pro tanto apportionment results in nonsettling defendants remaining jointly liable in that they may be forced to pay settled defendants' bargained-away shares of uncertainty. Under proportionate share apportionment, the plaintiff's voluntary act of partial settlement completely excuses the settling defendant by barring contribution. Thus, the liability for the share of damages that would go to the settling party becomes several, while the nonsettlers remain jointly liable for their collectively allocated shares of damages.<sup>116</sup> The risk of inaccurate settlement lies with the parties making the settlement; as the *McDermott* Court stated, "nonsettling defendants pay no more than their share of the judgment."<sup>117</sup>

#### *IV. Fulfilling Expectations: Imputing Uncollectible Shares to Prior Settlements*

##### *A. Limited Joint and Several Liability*

A plaintiff's act of partial settlement is a limitation on recovery within the plaintiff's control; thus, it destroys the joint and several relationship among the remaining defendants.<sup>118</sup> Nevertheless, a tortfeasor's inability to pay damages is beyond the plaintiff's control, so other defendants must cover the judgment-proof defendant's shortfall.<sup>119</sup> Thus, when both voluntary and involuntary

114. *Cf. id.* at 212 (stating that, under proportionate share allocation, a nonsettling defendant pays only its proportionate share of a judgment, whereas under a pro tanto system a settlement for less than a defendant's equitable share "requires the nonsettling defendant to pay more than its share").

115. *See id.* at 221 (stating that settlement is not a limitation on a plaintiff's recovery due to "outside forces" and, thus, that joint and several liability does not implicate nonsettling codefendants for the "shortfall"); *see also id.* at 220 (stating that "no inconsistency" exists between joint and several liability and proportionate share apportionment).

116. *See id.* (noting that, in the case of settlement, a plaintiff's recovery is limited only by the plaintiff's decision to settle with a defendant).

117. *Id.* at 209.

118. *See id.* at 221 (stating that "no reason" exists to allocate a recovery "shortfall" to nonsettling defendants when a plaintiff negotiates a partial settlement).

119. *See id.* (stating that joint and several liability can make one defendant pay more than its proportionate share of damages when a plaintiff's recovery is limited by factors beyond the plaintiff's control); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 269 (1979)

factors limit a plaintiff's recovery, the logically consistent solution calls for an amalgamation of joint liability and several liability: the nonsettling tortfeasors remain jointly and severally liable with respect to the involuntary limitation on recovery, but the nonsettling defendants are only severally liable for the voluntary factors that limit recovery. Stated differently, a court should apportion damages to replicate the allocation that would result for the nonsettlers (after contribution) had no settlement occurred. The court never enters judgment against the settled parties, but instead divides the judgment-proof defendant's share of damages among all of the defendants that are not judgment-proof. The court presumes that the prior settlements incorporated the settling defendants' shares of the judgment-proof defendant's shortfall. For simplicity, this Note labels this method of damages apportionment "limited joint and several liability."

Though this approach reconciles the inherent conflict that occurs when joint and several liability's application depends on whether limitations are "voluntary" or "involuntary,"<sup>120</sup> the chief advantage of this approach is that, properly applied, it best preserves the parties' expectations. Defendants that proceed to trial do not pay more simply because other defendants settled.<sup>121</sup> Significantly, the Third Restatement of Torts essentially adopts this approach for systems of "pure" joint and several liability, though in a somewhat different form.

Under the limited joint and several liability approach, a factfinder first allocates fault to all parties—litigating defendants, defendants that have settled, defendants that are insolvent, and defendants that are immune to judgment—and then proportionally reallocates the fault assessed to a judgment-proof defendant among the other defendants. The earlier hypotheti-

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(holding that a codefendant is liable for "all" damages, "yet its negligence may have been only a minor cause of the injury"); see also *supra* notes 37–43 and accompanying text (discussing *Edmonds*'s elaboration of a codefendant's joint liability for an immune tortfeasor's share of damages).

120. Recall that the *McDermott* Court suggested that the issue was one of whether recovery limitations were "voluntary" or "involuntary." *McDermott*'s dicta does not resolve how one should characterize the situation in which one defendant is judgment-proof and some of the parties have partially settled. Compare *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 211 n.10 (1994) (stating that "[i]t might be thought" that joint and several liability and *Edmonds* make a nonsettling party liable for all damages less the plaintiff's share and the settling defendant's share) with *id.* at 221 ("Unlike the rule in *Edmonds*, the proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement."). This Note's conclusion returns to this point.

121. Cf. *id.* at 212 (stating that a chief advantage of proportionate share allocation is that "a litigating defendant ordinarily pays only its proportionate share of the judgment").

cal example illustrates this apportionment scheme.<sup>122</sup> If all parties proceed to trial, Adam, Becky, and Cindy are jointly and severally liable for \$900,000. If Paul collects the \$900,000 judgment from Becky, Becky will attempt to recover \$600,000 from Adam and Cindy. However, because Adam is immune to Paul's claim, only Cindy can pay. Under the "pure" joint and several scheme of the maritime law, Becky and Cindy must collectively pay the damages assessed to all defendants. Thus, the court's first step is to allocate the \$900,000 between Becky and Cindy.

Becky and Cindy collectively bear 50% of the total allocated fault. Compared to one another, Becky bears 60% ( $\frac{30\%}{50\%}$ ) responsibility and Cindy bears 40% ( $\frac{20\%}{50\%}$ ) responsibility. Becky will collect \$360,000 (40% of \$900,000) from Cindy, so Becky will, in the end, pay a net of \$540,000 (60% of \$900,000 or \$900,000 - \$360,000).

When a court adjudicates a partially settled suit, it should render judgments against the nonsettling defendants to replicate this result. If Cindy had settled with Paul instead of proceeding to trial, then the court should not enter the \$900,000 joint and several judgment against Adam, Becky, and Cindy, but instead should enter judgment against Becky for the amount she would have ultimately paid: \$540,000. Thus, Becky pays her own share of the damages (\$300,000) plus her share of judgment-proof Adam's damages (\$240,000).

The Third Restatement achieves a close result by removing the judgment-proof defendant from the factfinder's damage apportionment.<sup>123</sup> In the hypothetical example, the jury would allocate fault among only Becky, Cindy, and Paul. However, because the risk of a defendant being judgment-proof falls solely on the defendants in a "pure" joint and several regime, the Restatement suggests that a factfinder first consider the fault of all defendants (judgment-proof or not) to determine the plaintiff's comparative responsibility.<sup>124</sup> The factfinder then *re-considers* the fault among *only* the defendants, but without regard to the judgment-proof defendant.<sup>125</sup> Thus, the jury would consider

122. See *supra* text accompanying notes 88–89 (detailing hypothetical example).

123. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § A19 cmt. c (2000) (stating that regime of "pure" joint and several liability "does not permit" a factfinder to allocate liability to any defendants that are immune to judgment); see also *id.* § A19 cmt. b, reporters' note (clarifying that "parties" included in a factfinder's apportionment are only those that are parties to the suit and that are further "bound by the judgment in it"). Whether or not this "bound by the judgment" language means that the allocation should include bankrupt defendants, against whom litigation is stayed, is unclear.

124. See *id.* § A19 cmt. e (stating that "the jury [should] initially decide any comparative share of responsibility for the plaintiff in reference to all other[]" defendants, whether parties to the suit or not).

125. See *id.* (stating that after determining plaintiff's comparative fault, the factfinder "apportion[s] the remaining responsibility to [the party] defendants").



Paul's fault relative to Adam, Becky, and Cindy and find Paul 10% comparatively at-fault. Next, the jury would consider the split of fault between Becky and Cindy only. Presumably, the jury would find Becky and Cindy culpable in the same proportions, so they would still pay \$540,000 and \$360,000, respectively, in the end.

However, removing a judgment-proof defendant from the jury's allocation of fault can be problematic. The reporters' note to the Restatement admits that "[i]n theory, it might be preferable to submit immune parties for an assignment of responsibility," but cites "administrative inefficiencies entailed" as a weightier, countervailing interest.<sup>126</sup> Specifically, the "administrative inefficiencies" are the costs associated with "discover[ing] and try[ing] the responsibility of a nonparty."<sup>127</sup> However, considerations that the Restatement either does not consider or does not fully consider weigh in favor of inclusion: the uncertainty of whether or not a party will become judgment-proof, the need for the allocation in other contexts, and an accurate allocation by the jury in the first instance.

To start, the Restatement approach is not a "one size fits all" garment. A plaintiff may be litigating against three joint defendants, but suppose one files for bankruptcy during or after trial. At such a late point, simply removing this defendant's share from the factfinder's allocation is impossible; the choice facing the court is reallocation or retrial.<sup>128</sup> Reallocation, a matter of arithmetic, is clearly preferable to trying the entire case all over again. Moreover, what if a defendant with a bankruptcy stay *loses* that stay?<sup>129</sup> If codefendants have paid an outstanding judgment that does not consider the fault of the previously judgment-proof defendant, ancillary contribution litigation must determine the liability of that defendant anew.

126. *Id.* § A19 cmt. e, reporters' note.

127. *Id.* § C19 cmt. e. The comment also notes that "immunities" mean simply that a "person has no duty or has not breached any duty as a matter of law" and that a court must "sort out" these "immunities" from actual immunities. *Id.* Suffice it to say that summary judgment is available to any defendant that owes or has breached no duty as a matter of law. *See generally* FED. R. CIV. P. 56.

128. For a published example, see *Austin v. Raymark Industries, Inc.*, 841 F.2d 1184, 1186, 1196 (1st Cir. 1988), in which the U.S. Court of Appeals for the First Circuit reallocated the 60% share of liability allocated to a defendant that had become bankrupt while an appeal was pending.

129. For the uninitiated: Federal law "stays" proceedings against persons and entities that file for bankruptcy. 11 U.S.C. § 362(a) (2000). Among other things, bankruptcy stays prevent "the commencement or continuation" of actions against those filing for bankruptcy, as well as the enforcement of judgments. *Id.* § 362(a)(1)-(2). There are a number of exceptions to bankruptcy stays, e.g., *id.* § 362(b), and a court can end or modify a stay "for cause" or for other reasons, *id.* § 362(d).

But even when a bankrupt defendant does not lose its stay, codefendants may attempt to recoup that defendant's share of the damages by asserting contribution claims in the defendant's bankruptcy proceedings.<sup>130</sup> Clearly, determining the judgment-proof defendant's share of damages will expedite the joint tortfeasors' contribution claims. Additionally, other practical considerations weigh in favor of including a judgment-proof defendant in a factfinder's liability allocation. A shipowner, immune to its employees' tort claims by operation of LHWCA, may assert an indemnification claim for "maintenance and cure" benefits paid to its employee.<sup>131</sup> In such an instance, whether or not the shipowner was itself negligent is relevant to the indemnity action because it can negate or limit recovery,<sup>132</sup> making this determination at trial can avoid unnecessary litigation in the future.<sup>133</sup>

Finally—most importantly?<sup>7</sup>—removing a culpable party from the allocation of fault can *change* that allocation.<sup>134</sup> That a jury finds that Adam, Becky,

130. For example, 11 U.S.C. § 502 (2000) allows claims for contribution under certain circumstances.

131. "Maintenance and cure" is a shipowner's obligation to provide seamen who become ill or suffer injury in the service of a vessel both per diem living allowances and payments for medical expenses. *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008, 1011–12 (5th Cir. 1994). A shipowner must pay maintenance and cure benefits without regard to fault. *Id.* at 1012. A shipowner forced to pay maintenance and cure benefits due to another's negligence may be able to recover the payments from the negligent party. *See infra* notes 166–68 and accompanying text (discussing tortfeasors' obligation to reimburse shipowners for maintenance and cure payments).

132. *See Knight v. Alaska Trawl Fisheries, Inc.*, 154 F.3d 1042, 1046 (9th Cir. 1998) (holding that "Ryan indemnity," allowed by *Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp.*, 350 U.S. 124 (1956), is not available to a shipowner that is itself negligent). Other circuits have held that a shipowner's negligence only reduces the shipowner's claim on a comparative basis, *id.*, or that it does not affect a shipowner's claim for Ryan indemnity at all, *id.* at 1045.

133. *Cf. McDermott, Inc. v. AmClyde*, 511 U.S. 202, 211 (1994) (noting that a significant drawback to pro tanto allocation is its tendency to create "unnecessary ancillary litigation").

134. *See Chaney v. Falling Creek Metal Prods., Inc.*, 906 F.2d 1304, 1308 n.7 (8th Cir. 1990) (finding that district court should have included an immune party in the jury's liability apportionment in order to clarify that immune party's role, and that the court afterwards should have reallocated the immune party's share of damages to the other parties); *see also Pierringer v. Hoger*, 124 N.W.2d 106, 111–12 (Wis. 1963) (stating that a nonsettling defendant's comparative fault can only be determined "by a proper allocation of all the causal negligence"). The Restatement explicitly considered this possibility. It notes:

The immune nonparty's share of comparative responsibility may not be assigned to (and borne by) the parties in the same proportion as would have occurred if the factfinder assigned comparative responsibility to the immune person and that share were then reallocated . . . . Nevertheless, the immune person's responsibility will be apportioned among those who otherwise bear responsibility.

RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C19 cmt. e (2000).

and Cindy share fault in a 4:3:2 proportion does not mean that the same jury will find that Becky and Cindy, compared without reference to Adam, share fault in a 3:2 ratio. In fact, the relative culpabilities of Becky and Cindy, the manufacturers of the crane and cable, respectively, likely *will* change when one does not consider Adam's act of ignoring the warning that Becky, but not Cindy, gave him. In fact, many maritime courts conclude that they must allocate liability to judgment-proof defendants.<sup>135</sup> The *McDermott* Court itself reasoned that "parties will often need to describe the settling defendant's role in order to provide context for the dispute," and suggested that such a determination would "require little or no additional trial time."<sup>136</sup> Thus, to whatever extent "administrative inefficiencies" inure in including a judgment-proof defendant, inefficiencies are equally present in not including a judgment-proof defendant. A factfinder should include judgment-proof defendants because this inclusion results in a more equitable result and often will be more efficient in the long run.

### *B. Harmony with the Court's Settlement Considerations*

The Court's pronounced "paramount" settlement concerns—consistency with proportionate fault, the promotion of settlement, and judicial economy<sup>137</sup>—are as good a place as any to begin analysis of limited joint and several liability. How well does the approach reconcile these considerations? With respect to the first consideration, the *McDermott* Court favored proportionate share apportionment over the pro tanto method because pro tanto apportionment was more likely to result in nonsettling defendants paying more than their equitable shares of damages at trial.<sup>138</sup> In contrast, under proportionate share allocation, "nonsettling defendants pay no more than their share of the judgment."<sup>139</sup>

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135. See, e.g., *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1116 (5th Cir. 1995) (stating that liability should be apportioned to both an immune employer and a non-immune codefendant); *Geyer v. USX Corp.*, 896 F. Supp. 1440, 1446 (E.D. Mich. 1994) (ruling that the need to apportion liability to all defendants does not prevent the dismissal of a settled party from the action because liability can be apportioned to an "empty chair" defendant (quoting *McDermott*, 511 U.S. at 217)); cf. *Harrison v. Garber Bros., Inc.*, 750 F. Supp. 203, 204 (E.D. La. 1990) (ruling that a jury should both consider and determine a settled, nonparty tortfeasor's share of relative fault); *Bordelon v. Consol. Georex Geophysics*, 628 F. Supp. 810, 812 (W.D. La. 1986) (ruling that comparative fault cannot be determined without reference to an immune party's culpability).

136. *McDermott*, 511 U.S. at 217.

137. *Id.* at 211.

138. See *id.* at 212 (reasoning that, under pro tanto allocation, a nonsettling defendant's liability will "frequently" differ from its equitable share of damages).

139. *Id.* at 209.

To be consistent with proportionate fault, then, an apportionment scheme should divide a judgment-proof defendant's share of damages among the settled and nonsettled codefendants as though no settlement had occurred at all. Were the damages divided among the nonsettling defendants only, the final result would run afoul of the command that "nonsettling defendants pay no more than their share of the judgment."<sup>140</sup> Nonsettling codefendants' liabilities would increase as other defendants settled, the very evil the Court sought to avoid in adopting proportionate share over pro tanto allocation.<sup>141</sup> Were the damages not divided at all (in other words, if joint and several liability simply terminated upon the occurrence of any settlement), the settlement of one defendant would instead decrease the liabilities of the other defendants,<sup>142</sup> again obstructing the judicial goal that nonsettling tortfeasors pay their proportionate shares of damages without regard to other parties' settlements.<sup>143</sup> Limited joint and several liability, in contrast, results in each nonsettling defendant paying only the share of damages it would have paid had all defendants gone to trial.

With respect to the second consideration, the promotion of settlement,<sup>144</sup> the Court reasoned that, although pro tanto apportionment (without the right of contribution) would generally encourage settlement, that encouragement would come as "a consequence of the inequity" present when some defendants settle early, leaving others with a disproportionate share of the plaintiff's damages.<sup>145</sup> On the other hand, adopting pro tanto apportionment with the right of contribution would have discouraged settlement because settlement could "only disadvantage" a settling defendant: a low settlement would leave the settling defendant open to future contribution claims,<sup>146</sup> and a high settlement would leave the settlor paying too much, without a means of recouping

140. *Id.*

141. *See id.* at 212 (reasoning that pro tanto allocation is inconsistent with proportionate fault allocation because a settlement with one defendant for less than its equitable share requires the other defendants to pay more than their equitable shares).

142. Before the settlement, all defendants would be responsible for both their own shares of the damages and the damages of the judgment-proof defendant. After the settlement, defendants would be liable only for their own shares of damages, as the joint and several relationship among the defendants would terminate.

143. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 213 n.14 (1994) (stating that a drawback of pro tanto allocation is that nonsettling defendants likely pay either more or less than their equitable shares of damages).

144. *Id.* at 211.

145. *Id.* at 214-15.

146. *See id.* at 211-12 (reasoning that nonsettling defendants can sue a settling defendant for contribution).

its losses.<sup>147</sup> Thus, a method of apportioning a judgment-proof defendant's share of damages should insulate settlers from future liability. Otherwise, the threat of contribution will diminish the incentive to settle. Nevertheless, incentives to settle cannot come at the expense of nonsettling parties. Limited joint and several liability satisfies both criteria, as settled parties are immune from future contribution claims, and other parties' settlements do not increase or decrease nonsettlers' expected liabilities. Much like proportionate share apportionment, limited joint and several liability preserves settlement incentives, but does not provide additional incentives at the expense of other, nonsettling defendants.

The Court's final consideration was judicial economy; although an important factor, the Court felt it could not come at "too high a price in unfairness."<sup>148</sup> The Court preliminarily found that pro tanto apportionment with contribution was "clearly inferior" to other apportionment modes because it burdened the courts with ancillary contribution litigation.<sup>149</sup> A pro tanto rule that did not allow contribution would maximize judicial economy;<sup>150</sup> however, this approach had such a "large potential for unfairness" that the Court would not consider it.<sup>151</sup> Between pro tanto with "good faith" settlement hearings and proportionate share apportionment, the Court found the differences in judicial economy slight.<sup>152</sup> However, the proportionate share approach maximized judicial economy by delaying the determination of a settled party's liability until trial, where it would take "little or no additional trial time" or, for that matter, the case might have already settled.<sup>153</sup>

Limited joint and several liability similarly serves the interests of judicial economy. Reallocating a judgment-proof party's share of damages among the other parties is straightforward, and the division of those damages among the other parties will take little or no additional trial time. Because partial settlement does not change the liabilities of nonsettling parties, courts do not need to conduct the "good faith" settlement hearings that the *McDermott* Court

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147. *See id.* at 211 n.13 (explaining that settlers "ordinarily" have no right of contribution).

148. *Id.* at 215. "Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." (citing *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975)).

149. *Id.* at 211-12.

150. *See id.* at 216 (reasoning that pro tanto apportionment without "good faith" hearings would be easy to administer because a court would never adjudicate the settling defendant's fault).

151. *See id.* (stating that the approach would be so unfair that "no party or *amicus*" advocates it).

152. *See id.* ("The effect of the two rules on judicial economy is also ambiguous.").

153. *Id.* at 217.

disfavored.<sup>154</sup> Contribution litigation is likewise superfluous.<sup>155</sup> Like proportionate share allocation, then, limited joint and several liability can minimize demands on the courts.

### C. Modeling the Bargaining of Uncertainty

The mathematical abstraction developed in Part III, taken further, can show that the limited joint and several approach best preserves parties' expectations in settlement. Recall that, in a claim against two defendants, the at-trial payment to the plaintiff ( $P$ )—assuming no defendants are judgment-proof—is  $D \cdot f_a + D \cdot f_b$ . The expected value of this payment prior to trial is  $E[D] \cdot E[f_a] \cdot p_a \cdot r + E[D] \cdot E[f_b] \cdot p_b \cdot r$ , reflecting the unknown nature of fault and damages, the uncertainty of prevailing against either defendant, and the discount rate. If defendant  $a$  is or becomes judgment-proof, then defendant  $b$  will pay  $D \cdot (f_a + f_b)$ , or all damages attributed to either defendant. Before trial, defendant  $b$  will expect to pay both its proportionate share of damages and  $a$ 's share of damages if  $a$  is or becomes judgment-proof. The risk that  $a$  is or will become judgment-proof varies; the variable  $u_a$  represents it.<sup>156</sup> If, as in *Edmonds*,  $a$  is immune to the plaintiff's suit, then  $b$  will certainly pay  $a$ 's share of damages, and  $u_a = 1$ . If  $a$  is simply facing potential bankruptcy, then  $b$ 's liability for  $a$ 's share of damages is less than certain, and  $0 < u_a < 1$ . Accordingly, after relaxing the assumption that defendant  $a$  can and will pay its share of a judgment,  $b$ 's expected payment is  $b$ 's expected share of damages and the risk that  $a$  will be judgment-proof:

$$E[P_b] = E[D] \cdot E[f_b] \cdot p_b \cdot r + u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$$

For example, if the risk that  $a$  will be judgment-proof is 0.4, then  $b$  faces both its expected share and 40% of  $a$ 's expected share.

Another hypothetical defendant,  $c$ , is necessary to show the allocation of this risk in settlement. Assuming that only  $a$  can become judgment-proof, defendants  $b$  and  $c$  collectively bear both their own expected shares of damages and the risk that  $a$  will be judgment-proof ( $u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$ ).<sup>157</sup> Because

154. See *id.* (discussing the superiority of at-trial determinations of relative culpability versus pretrial determinations); see also *supra* notes 78–81 and accompanying text (discussing *McDermott's* expressed favor for at-trial liability determinations).

155. Cf. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 209 (1994) (holding that, under proportionate share approach, contribution suits are both unnecessary and prohibited because nonsettling defendants "pay no more than their share of the judgment").

156. Though it is impossible (or close to impossible) to cite others for every step in this subpart's analysis, it is still noteworthy that other authorities have modeled the impact of a defendant's potential insolvency by multiplying the solvency risk times the expected damages. Kornhauser & Revesz, *supra* note 111, at 520.

157. Of course this assumption is unrealistic, as any defendant has the potential of being

*b* and *c* will proportionately share the risk of *a*'s inability to pay under the limited joint and several system, *b* will share *a*'s damages in the ratio  $\frac{f_b}{f_b + f_c}$ . Defendant *c* will share in *a*'s share of damages in the ratio of  $\frac{f_c}{f_b + f_c}$ , meaning that *b* and *c* together pay *a*'s full share of damages. Defendant *b* will expect to share uncollectible damages attributed to *a* in the ratio:

$$s_b = \frac{E[f_b] \cdot p_b}{E[f_b] \cdot p_b + E[f_c] \cdot p_c} \quad 158$$

Defendant *c* will expect to pay a similar ratio:

$$s_c = \frac{E[f_c] \cdot p_c}{E[f_b] \cdot p_b + E[f_c] \cdot p_c}$$

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or becoming judgment-proof. A more accurate approach would view an individual defendant's expected payment as that defendant's expected share of damages discounted by the possibility that it (the individual defendant at issue) will be insolvent, plus each other defendant's expected payments multiplied by the possibility that those defendants will become insolvent. Under this formulation, *b*'s expected payment is  $E[P_b] = (1 - u_b) \cdot E[D] \cdot E[f_b] \cdot p_b \cdot r + E[f_b] \cdot p_b + (E[f_b] \cdot p_b + E[f_c] \cdot p_c) \cdot u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r + E[f_a] \cdot p_a + (E[f_a] \cdot p_a + E[f_b] \cdot p_b) \cdot u_c \cdot E[D] \cdot E[f_c] \cdot p_c \cdot r$ . Thus, *b* expects to pay its expected share of damages discounted by its own risk of insolvency, as well as proportionate shares of *a*'s and *c*'s damages if those defendants become judgment-proof. However, even this model is incomplete because it does not fully account for the risk that both *a* and *c* will be judgment-proof, in which case *b* will pay all damages. Nevertheless, by assuming that only one defendant is in danger of being judgment-proof, the simpler model illustrates precisely the same point: parties have rational expectations regarding other parties' solvency. Moreover, this assumption is not entirely unrealistic: because most defendants are not judgment-proof, typical cases will not involve more than one defendant that is realistically in danger of being judgment-proof.

158. One might think that the expected ratio is simply the fraction of the expected faults, but this ignores the fact that whether or not a factfinder will even find liability is unknown at trial. Suppose that *b* and *c* expect to share fault equally (30% each), but that the chance of prevailing against *c* is very low (0.1) while the chance of prevailing against *b* is good (0.9). Without considering the probability of success, one would think that *b* expects to pay half of *a*'s damages in the event *a* is judgment-proof. However, before trial *b* knows that the plaintiff probably cannot prevail against *c*, and that if the plaintiff cannot prevail, then *b* will pay both its share of damages and *a*'s share of damages (if *a* is insolvent). Because *c* probably will not pay any damages, the plaintiff thus *expects* to pay 90% of *a*'s damages if *a* is judgment-proof:  $(E[f_b] \cdot p_b) + (E[f_b] \cdot p_b + E[f_c] \cdot p_c) = (0.3 \cdot 0.9) + (0.3 \cdot 0.9 + 0.3 \cdot 0.1) = 0.9$ . For the sake of simplicity, this Note represents the ratio with the variable  $s_b$ . Note that if  $p_b = p_c$ , then the expression simplifies back to  $E[f_b] + (E[f_b] + E[f_c])$  because  $p_b$  and  $p_c$  become the same constant that equally affect the numerator and denominator. Many cases will involve probabilities of success that are highly correlated, thus negating the need to consider the import of uncorrelated probabilities of success. See Kathryn E. Spier, *Settlement with Multiple Plaintiffs: The Role of Insolvency*, 18 J.L. ECON. & ORG. 295, 296 (2002) (noting that positive correlation can result from common unresolved questions of law or from the fact that the cases rely upon the same evidence or facts).

And finally, note that  $s_b + s_c = 1$  and that  $s_b = 1 - s_c$ . Because  $b$  expects to pay  $a$ 's damages in the ratio  $s_b \cdot u_a$ ,  $b$ 's expected payment becomes:

$$E[P_b] = E[D] \cdot E[f_b] \cdot p_b \cdot r + s_b \cdot u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$$

In the event of partial settlement, *McDermott* stipulates the entry of proportionate share judgments against the nonsettling defendants. Thus, if plaintiff and  $c$  settle, then the court will enter judgment against  $b$  for the full amount of the damages, less those damages attributed to other defendants or to the plaintiff (recall that  $P$  is the sum of all payments by defendants):

$$P_b = P - \text{offset} = P - D \cdot f_a - D \cdot f_c = D \cdot f_b$$

Otherwise stated, the judgment against  $b$  will be the multiple of the total damages and  $b$ 's comparative fault. However, if  $a$  is judgment-proof, then under the limited joint and several approach the court will enter judgment against  $b$  for both its own share of damages and for its proportionate share of  $a$ 's damages:

$$P_b = D \cdot f_b + \frac{f_b}{f_b + f_c} \cdot D \cdot f_a$$

If  $c$  settles before trial—when damages ( $D$ ), fault ( $f$ ), probability of success ( $p$ ), and probability that  $a$  will be judgment-proof ( $u_a$ ) are uncertain—then  $b$ 's expected at-trial payment is:

$$E[P_b] = E[D] \cdot E[f_b] \cdot p_b \cdot r + s_b \cdot u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$$

This is, of course, the amount that  $b$  expects to pay before  $c$  settles. Thus, under the limited joint and several liability regime,  $c$ 's settlement does *not* affect  $b$ 's expected liability to the plaintiff.

A good way to illustrate how the limited joint and several approach best preserves party expectations is to use two hypothetical examples in which a court does not follow it. In the simplest of terms, a court could choose to enter judgment against  $b$  for either more or less than the amount indicated by the limited joint and several liability approach. At one extreme, a court could hold that a settlement between  $c$  and the plaintiff makes  $b$  only severally liable for damages. After the plaintiff and  $c$  had settled,  $b$ 's expected payment would become:

$$E[P_b] = E[D] \cdot E[f_b] \cdot p_b \cdot r$$

Accordingly, after  $c$ 's settlement,  $b$  would not expect to pay  $s_b \cdot u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$ , and the plaintiff would not expect to recover  $a$ 's share of damages from any party if  $a$  were to become judgment-proof. The settlement between  $c$  and the plaintiff would thus alter the liability that  $b$  faced. This system would discourage partial settlement because any partial settlement would extinguish



the plaintiff's ability to collect any of *a*'s share of damages at trial if *a* were judgment-proof.

In this situation, the plaintiff's *pre*-settlement expectation would be full recovery by operation of joint and several liability:

$$E[P] = E[D] \cdot (E[f_a] \cdot p_a + E[f_b] \cdot p_b + E[f_c] \cdot p_b) \cdot r$$

While all defendants were still parties, the risk that *a* would be judgment-proof ( $u_a$ ) would be immaterial to the plaintiff because any shortfall by *a* would be paid by *b* and *c*. After settlement, however, the plaintiff could not collect any damages allocated to *a* in the event that *a* was judgment-proof. The plaintiff's expected recovery *post*-settlement would be:

$$E[P] = E[D] \cdot E[f_b] \cdot p_b \cdot r + (1 - u_a) \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$$

In other words, the plaintiff would expect to recover both *b*'s share and *a*'s share, but its recovery of *a*'s share would be discounted by the probability that *a* becomes judgment proof. The settlement thus reduces the plaintiff's expected recovery at trial by the multiple of the risk of *a*'s insolvency and *a*'s expected share of damages,  $u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$ ; the plaintiff bears the risk of *a*'s insolvency. Unless *c* were willing to pay both its own share of damages and an amount representing the *entire* risk of *a*'s insolvency, no plaintiff would rationally settle with *c* because the settlement would place the plaintiff in a worse position than it previously occupied. Thus, the plaintiff will not settle with *c* for less than:

$$E[D] \cdot E[f_c] \cdot p_c \cdot r + u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$$

Defendant *c*'s expected liability at trial is functionally identical to *b*'s:

$$E[P_c] = E[D] \cdot E[f_c] \cdot p_c \cdot r + s_c \cdot u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$$

It follows that the plaintiff will not accept less than *c*'s expected share *and* the risk of *a*'s insolvency, and that *c* will not pay more than its own expected share and its expected share of the risk that *a* will become insolvent. Unless the risk of insolvency is insignificant ( $u_a \approx 0$ ), or unless *c*'s expected share of *a*'s damages is great ( $s_c \approx 1$ ), the parties' own interests will likely keep them from reaching a settlement. Moreover, any settlement they do reach will materially alter the expectations of the nonsettlers.

At the other extreme, a court could hold that a settlement between the plaintiff and *c* in no way limited the joint liability between *a* and *b*. In the event that *a* were judgment-proof, *b* would pay the full amount of damages allocated to *a*. Defendant *b*'s expected payment after *c*'s partial settlement would be:

$$E[P_b] = E[D] \cdot E[f_b] \cdot p_b \cdot r + u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$$

Thus, after *c*'s settlement, *b*'s expected payment on account of *a* would increase from  $s_b \cdot u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$  to  $u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$ . The increase to *b*'s expected payment is:

$$(1 - s_b) \cdot u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r = s_c \cdot u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$$

Of course, this amount is the share of *a*'s obligation that *c* expects to pay prior to its settlement. Effectively, *c*'s settlement transfers *c*'s share of the joint obligation to *b*.

At this extreme, the plaintiff still expects to recover *b*'s share of damages and all of *a*'s share of damages after it settles with *c*. The plaintiff will rationally settle with *c* for an amount equal to or greater than *c*'s own individual share of the damages ( $E[D] \cdot E[f_c] \cdot p_c \cdot r$ ). By so settling, *c* and the plaintiff simply transfer *c*'s share of the joint liability for *a*'s potential insolvency ( $s_c \cdot u_a \cdot E[D] \cdot E[f_a] \cdot p_a \cdot r$ ) to *b*. Clearly, then, a rule of unlimited joint and several liability encourages *c* to settle by allowing it to settle for less than its expected payment, but does so at the expense of an increase in *b*'s expected payment.

This analysis demonstrates that deviating from the limited joint and several approach allows partial settlements to change other parties' expectations. Because the proportionate share rule's justification is that it preserves parties' expectations, failing to attribute portions of judgment-proof defendants' damages to prior settlements is at odds with the allocative mechanism's use. The considerations that compel the use of the proportionate share approach duly compel the use of the limited joint and several liability approach.

## V. Do Lower Court Decisions Support the Limited Joint and Several Approach?

### A. Federal Decisions

At least one decision that pre-dates *McDermott* from the U.S. Court of Appeals for the Fifth Circuit supports the proportionate reallocation of judgment-proof defendants' shares of damages. In *Bertram v. Freeport McMoran, Inc.*,<sup>159</sup> an injured oil barge worker (Bertram) sued four defendants, including his employer.<sup>160</sup> Before trial, Bertram settled with all four, but contribution claims among the parties remained.<sup>161</sup> Notably, Bertram's employer, Energy Catering Services, Inc., sought recovery from Freeport-McMoran, Inc. and Houma Industries, Inc. for maintenance and cure benefits

159. *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir. 1994).

160. *Id.* at 1011.

161. *Id.* Recall that a shipowner must pay maintenance and cure benefits to an injured seaman regardless of fault. *Supra* note 131.

it (Energy) had paid to Bertram.<sup>162</sup> A bench trial allocated liability 60% to Bertram and 20% each to Freeport and Houma.<sup>163</sup> Because Freeport and Houma had partially caused Bertram's injury, and because Energy was faultless, Energy could recover the entirety of its maintenance and cure payments from the two codefendants, notwithstanding Bertram's own negligence.<sup>164</sup> Thus, the issue before the *Bertram* court was the correct reallocation of damages among two codefendants, each only 20% responsible for the plaintiff's harm.

The Fifth Circuit discussed the rationales of comparative fault.<sup>165</sup> When a shipowner is negligent, that shipowner can recover only individual defendants' proportionate shares of the maintenance and cure benefits that the shipowner has paid.<sup>166</sup> However, when a shipowner is negligence-free, tortfeasors are jointly and severally liable to the shipowner for the amount of its maintenance and cure payments.<sup>167</sup> After this discussion, the Fifth Circuit affirmed the district court's equal division of the maintenance and cure benefits between Houma and Freeport.<sup>168</sup>

Unfortunately, the Fifth Circuit did not precisely articulate its allocation methodology. Given the court's discussion of comparative fault principles, one could reasonably conclude that the court reallocated fault on a comparative basis: each defendant was 20% responsible, so relative to each other they were equally at-fault and split damages likewise. This interpretation accords with the doctrine of proportionate fault, which the Court described in *Reliable Transfer* as the doctrine that liability "be allocated among the parties proportionately to the comparative degree of their fault."<sup>169</sup> In other words, even though certain defendants are jointly and severally liable for an amount that exceeds their individual shares of damages, those defendants still share this joint obligation on a proportionate basis.

The U.S. Court of Appeals for the Ninth Circuit's decision in *In re Exxon Valdez*<sup>170</sup>—litigation arising from the infamous oil spill that occurred when

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162. *Bertram*, 35 F.3d at 1011.

163. *Id.*

164. *Id.* at 1013, 1021.

165. *Id.* at 1019–21.

166. *See id.* at 1020 (stating that a tortfeasor contributes to a concurrently negligent employer "to the extent" the accident was occasioned by the tortfeasor's fault (quoting *Adams v. Texaco, Inc.*, 640 F.2d 618, 621 (5th Cir. Unit A 1982))).

167. *See id.* (stating that a fault-free shipowner can collect all maintenance and cure benefits from the negligent parties).

168. *Id.* at 1021.

169. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).

170. *In re Exxon Valdez*, 229 F.3d 790 (9th Cir. 2000).

the oil tanker *Exxon Valdez* ran aground in Prince William Sound, Alaska, releasing 11 million gallons of oil<sup>171</sup>—also supports the proportionate imputation of joint obligations to settled parties. In the *Valdez* litigation, the U.S. District Court for the District of Alaska consolidated hundreds of punitive damage claims against the Exxon Corporation into a mandatory class action.<sup>172</sup> Exxon's settlements with individual plaintiffs eliminated those plaintiffs from the allocation of the punitive damages award, but did not reduce the amount of the award itself.<sup>173</sup> Thus, Exxon was to remain liable for the full amount of punitive damages taxed against it, notwithstanding its prior settlement of many of the individual suits giving rise to the damages. To overcome this "disincentive" to settlement, Exxon settled with several plaintiffs using a "cede back" arrangement under which the plaintiffs remained parties to the suit, but agreed to return their shares of the future punitive damages award to Exxon.<sup>174</sup> After a jury returned a \$5 billion punitive damages award—"the largest award of its kind in history"<sup>175</sup>—the nonsettling plaintiffs argued that the court should not allocate damages to plaintiffs who had agreed to return their shares of the punitive damages to Exxon.<sup>176</sup>

Although the issue before the Ninth Circuit concerned multiple plaintiffs' claims against a single defendant, the court analogized to the *McDermott* scenario in which a single plaintiff presents claims against multiple defendants.<sup>177</sup> The court reasoned that the "potential distortion of settlement incentives" was "the same"<sup>178</sup> and that Exxon's settlement using the "cede back" arrangement was "the functional equivalent of a proportionate share allocation of damages."<sup>179</sup> The court went on to hold that the settlement agreement was enforceable and that the court should not have informed the jury of its existence.<sup>180</sup>

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171. *Id.* at 793.

172. *Id.*

173. *See id.* ("[A] plaintiff's release of its slice of the future lump-sum punitive damages award merely reduced the number of claimants sharing the punitive damages pie, not the size of the pie itself.")

174. *Id.*

175. *Id.* at 794.

176. *Id.*

177. *See id.* at 796 ("We deal here with multiple plaintiffs suing one defendant, but an analogous problem frequently occurs in the more typical situation of a single plaintiff with claims against multiple defendants.")

178. *Id.* at 797.

179. *Id.* at 798.

180. *See id.* ("[W]e cannot hold such an agreement unenforceable as a matter of public policy."); *id.* at 799 ("[I]t is clear that cede back agreements should generally not be revealed

Exxon's obligation to pay punitive damages to a class of plaintiffs is, of course, very similar to jointly liable defendants' obligation to pay a plaintiff the damages assessed against a judgment-proof codefendant. In both instances, parties must transfer a sum to other parties, and that sum is either a collective obligation or a collective benefit. In both instances, a legal system that seeks to facilitate dispute resolution must ensure that partial settlements do not change the incentives faced by nonsettling parties. Just as two parties can agree to eliminate all liability between them without disturbing other parties' claims, so too can parties agree to eliminate liability for other forms of collective damages—whether those damages are a defendant's anticipated share of damages reallocated from a judgment-proof defendant, or a plaintiff's anticipated share of punitive damages allocated to it from a lump sum amount. Thus, *In re Exxon Valdez* supports the proposition that proportionate share settlements can reach damages that lie beyond the fault-based damages allocated between settled parties.

### B. State Decisions

Two decisions from Louisiana's Circuit Courts of Appeal appear to interpret *McDermott* to require only *nonsettling* defendants to share in an absent codefendant's share of damages. The precise facts of the first case, *Mayo v. Nissan Motor Corp.*,<sup>181</sup> are important to understanding the decision's import. The opinion came down but two months after the Supreme Court decided *McDermott*.<sup>182</sup> A bench trial had apportioned liability 11% to each of three defendants and 67% to the plaintiff's husband, who was operating the boat in which the plaintiff was a passenger at the time of the accident giving rise to her tort.<sup>183</sup> The plaintiff had not named her husband as a defendant; instead, the other defendants had impleaded the husband as a third-party defendant.<sup>184</sup> One defendant settled, and the trial court applied a pro rata comparative fault approach to its apportionment of damages.<sup>185</sup> Thus, the trial

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to juries deliberating on punitive damages.").

181. See *Mayo v. Nissan Motor Corp.*, 639 So. 2d 773, 789 (La. Ct. App. 1994) (concluding, partially on the basis of *McDermott*'s "equitable share" holding, that "plaintiff is entitled to recover up to 100% of her damages from either Nissan or Red River, less the amount of the equitable share (proportion of fault) of the obligation of Fisher Marine, the settling tortfeasor").

182. Compare *id.* at 773 (decision of June 22, 1994) with *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994) (decision of Apr. 20, 1994).

183. *Mayo*, 639 So. 2d at 776.

184. *Id.* at 790.

185. See *id.* at 782 ("This Court can find no prohibition from extending comparative fault to admiralty cases in state courts." (quoting trial court)).

court held each of the two nonsettling defendant's liable for only their individual 11% shares of the plaintiff's damages.<sup>186</sup> The trial court accordingly dismissed the defendants' contribution claims against the plaintiff's husband.<sup>187</sup>

The framing of the issues at the trial and appellate levels is somewhat informative. The trial court had considered the issue one of proportionate fault. Incorrectly concluding that Louisiana law (as opposed to federal maritime law) applied to the suit,<sup>188</sup> the trial court had held each defendant liable "for only [its] joint, divisible obligation."<sup>189</sup> On appeal, the state's Third Circuit Court of Appeals considered the issue one of joint and several liability, noting that joint and several liability principles under state law conflict with those of the maritime law.<sup>190</sup> Under maritime law, a plaintiff can recover its "full damages" from any joint tortfeasor.<sup>191</sup>

From this framework, the court next considered apportionment. The court read *McDermott's* adoption of the proportionate share rule (against the backdrop of the Fifth Circuit's prior use of pro tanto apportionment)<sup>192</sup> to require that the two nonsettling defendants bear "100% of [the plaintiff's] damages" less the "equitable share (proportion of fault)" of the settling defendant.<sup>193</sup> Thus, the court held the two 11% defendants liable for 89% of the plaintiff's award.<sup>194</sup>

The *Mayo* court additionally considered a related issue: the nonsettling defendants' contribution claims against the plaintiff's husband.<sup>195</sup> The court declined to decide whether the nonsettling defendants' claims (dismissed by the trial court) could proceed because the parties had not raised the issue on appeal.<sup>196</sup> Partially because of this, the decision's real import is unclear. The

186. *Id.* (quoting trial court).

187. *Id.* at 790 (quoting trial court).

188. *See id.* at 782 (stating that comparative fault "is the law of the State of Louisiana and petitioners shall be bound by it" (quoting trial court)).

189. *Id.* (quoting trial court).

190. *See id.* at 789 ("It is clear that there is a conflict between maritime and state law regarding the extent of exposure for joint tortfeasors.").

191. *Id.* at 788.

192. *See id.* at 789 (stating that in *McDermott*, "the United States Supreme Court reversed the Fifth Circuit's long-standing rule that a nonsettling tortfeasor is entitled to full credit in the amount the plaintiff received from a settling tortfeasor").

193. *Id.*

194. *See id.* at 791 (imposing joint judgment for full damages less 11% attributed to settled tortfeasor).

195. *Id.* at 790-91.

196. *See id.* at 791 ("The judgment dismissing the third-party demands against Everette

effect of the decision was that the two 11% defendants were jointly liable for 89% of the plaintiff's damages. However, the court did not necessarily intend this result: the court confined itself to simply imposing joint and several liability pursuant to maritime law, and in crediting the settled defendant's "share" of damages. The court did not consider the treatment of uncollectible shares of damages as a whole, or even whether the husband's share of damages was in fact "uncollectible." If the defendants could pursue contribution from the husband, then (collectibility issues aside) the decision did not even reach the issue of partial settlements and judgment-proof defendants, as future contribution actions would ensure that each party paid only its proportionate share of damages. On the other hand, if the defendants could not pursue contribution against the husband, then the decision is silent even as to the allocation among the two nonsettling defendants themselves. (For example, if the plaintiff collected the full 89% from one defendant, could that defendant recover only 11% from the other defendant? Or 44.5%? Or 29.7%?). Thus, although the *Mayo* decision does suggest an allocation that is at odds with limited joint and several liability, whether the opinion does anything more than "suggest" that allocation is unclear.

Louisiana's Fourth Circuit Court of Appeals construed *Mayo* in *Hennegan v. Cooper/T. Smith Stevedoring Co.*<sup>197</sup> Unfortunately, the actual holding and import of this decision is likewise unclear. Hennegan sued his former employer and a number of asbestos manufacturers for damages arising from mesothelioma.<sup>198</sup> Before trial, Hennegan settled with Cooper/T. Smith and two of the manufacturers.<sup>199</sup> A number of defendants were dismissed as parties: the City of New Orleans (a former employer of Hennegan), an additional manufacturer, and other unnamed defendants.<sup>200</sup> Bankruptcy proceedings stayed litigation against one final defendant.<sup>201</sup> Ultimately, the trial court considered the liability of Garlock, Inc., the manufacturer of asbestos gaskets and packings used in Hennegan's work maintaining steam

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*Mayo* is final. Nissan and Red River Marine did not appeal from this judgment and we are powerless to revive it.").

197. *Hennegan v. Cooper/T. Smith Stevedoring Co.*, 837 So. 2d 96 (La. Ct. App. 2003).

198. *See id.* at 100-01 (detailing plaintiff's original claim against employer Cooper/T. Smith and this party's third-party claims, ultimately included in plaintiff's petition, against various asbestos manufacturers and an additional former employer of the plaintiff).

199. *Id.* at 100, 101.

200. *See id.* at 101 (detailing dismissals of claims against City of New Orleans, Eagle, Inc., and "[o]ther defendants . . . dismissed without prejudice before trial" and presumably not listed in the court's opinion).

201. *Id.*

derricks on bargages,<sup>202</sup> Cooper/T. Smith, and the two settled manufacturers.<sup>203</sup> The court apportioned 80% fault to Garlock, 20% to Cooper/T. Smith, and found the two settled defendants faultless.<sup>204</sup> (The court apparently did not consider the fault of the bankrupt defendant.<sup>205</sup>) Citing "maritime joint and several liability,"<sup>206</sup> the trial court entered judgment against Garlock for 80% of the \$3,096,769.62 award.<sup>207</sup>

Facially, this result seems to square with proportionate share allocation: Garlock was 80% liable and paid 80% of the damages. However, the trial court's decision suggests that a nonsettling defendant is liable for *all* damages, less the share of damages apportioned to settled defendants, even when codefendants are judgment-proof.<sup>208</sup> As noted, the court apparently did not consider the fault of bankrupt defendant Owens Corning Fiberglass. The trial court reasoned that Garlock bore 80% responsibility because, under maritime joint and several liability, a joint defendant "is liable unto plaintiff for the whole of plaintiff's injuries."<sup>209</sup> The court relied on *Mayo* to support the proposition that a maritime court should limit its allocation of fault to defendants named as parties.<sup>210</sup> The court then built from this to conclude that "the risk of the inability to collect from joint tortfeasors rests with the defendant"<sup>211</sup>—a proposition contextually suggesting that only *nonsettling* defendants should bear the risk of insolvency.

In support of its final proposition, the court cited *Coats v. Penrod Drilling Corp.*,<sup>212</sup> the case in which the U.S. Court of Appeals for the Fifth Circuit declined to apportion an immune defendant's share of damages between a defendant and a *plaintiff*.<sup>213</sup> This case's support for allocating only to

202. *Id.* at 100.

203. *Id.* at 101.

204. *Id.*

205. *See id.* (detailing trial court's liability determination and not mentioning role of defendant Owens Corning Fiberglass).

206. *Id.* at 111 (quoting trial court's Reasons for Judgment).

207. *See id.* at 101 (amount also increased by unspecified amount of prejudgment interest).

208. *See id.* at 111 ("Under a claim of solidary liability, the risk of non-collectability of the judgment against the party not named by the plaintiff rests with the solidary obligors").

209. *Id.* (quoting trial court's Reasons for Judgment).

210. *See Hennegan v. Cooper/T. Smith Stevedoring Co.*, 837 So. 2d 96, 111 (La. Ct. App. 2003) (stating that in *Mayo* a state appellate court "held that limiting the plaintiffs' recovery to percentages of fault attributable to the named defendants was inconsistent with maritime solidary liability").

211. *Id.*

212. *Id.* (citing *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995)).

213. *See Coats*, 61 F.3d at 1122 (detailing appellant's claim for modification of trial



nonsettling defendants is dubious; *Coats* merely stands for the proposition that the burden of an immune defendant's share of damages lies only with defendants, not the plaintiff<sup>214</sup> and does not consider how the risk of a judgment-proof defendant should be spread among those defendants. Additionally, although the *Mayo* court had indeed addressed partial settlement and an absent party, the opinion confined itself to reversing the trial court's imposition of the husband's share of fault to his plaintiff wife, without considering the liability of the husband.<sup>215</sup>

The *Hennegan* court concluded its discussion of joint and several liability with a discussion of *McDermott's* footnote ten: According to *Hennigan*, the *McDermott* Court "noted" that "the non-settling defendant's share of the judgment includes any fault attributable to immune or absent parties."<sup>216</sup> The court did not mention that the *McDermott* Court qualified its footnote discussion to clarify that it was not dispositively addressing the issue of allocating uncollectible damages among defendants,<sup>217</sup> nor did it discuss the other portions of *McDermott* that suggest a different joint and several liability approach where both settlement and immunity restrict a plaintiff's ability to recover.<sup>218</sup> Moreover, the rationale underlying *Hennegan's* assertion that a court should only allocate fault to at-trial defendants does not stand up well on close analysis. The court noted the plaintiff's argument that failing to allocate fault to "missing tortfeasors" would discourage settlement because settlement would cause the plaintiff to lose the ability to collect damages from the

court's judgment "by limiting [plaintiff's] ability to recover the entire judgment from either [appellant or the immune codefendant] in proportion to [plaintiff's] own contributory negligence"; *id.* at 1139 (affirming trial court).

214. See *id.* at 1123 (detailing appellant's rejected allocation rule, which would make "a partially-negligent plaintiff . . . bear part of the risk of noncollection, rather than placing the entire burden upon the defendants").

215. See *Mayo v. Nissan Motor Corp.*, 639 So. 2d 773, 786 (La. Ct. App. 1994) ("[W]e hold that imputation of Reverand Mayo's negligence to Mrs. Mayo on the basis of the marital relation would be improper.").

216. *Hennegan*, 837 So. 3d at 111 (citing *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 210 n. 10 (1994)).

217. See *McDermott*, 511 U.S. at 210 n. 10 (stating that the result "could be seen as mandated by principles of joint and several liability" but that "[n]evertheless, *McDermott* has not requested that River Don pay more than its 38% share of the damages"). The Court ultimately resolved the matter by stating that the "best way" of viewing *AmClyde's* damage waiver was "as a quasi settlement in advance of any tort claims." *Id.*

218. See *id.* at 221 ("Unlike the rule in *Edmonds*, the proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement.").

missing parties, but it did not elaborate upon the point.<sup>219</sup> Had it done so, it might have noted that the *McDermott* Court found pro tanto allocation's promotion of settlement (by allowing early-settling defendants to settle with low amounts) outweighed by its "high price in unfairness." Under such a rule, the Court concluded that settlement would unfairly "threaten[] the nonsettling defendant with the prospect of paying more than its fair share of the loss."<sup>220</sup> In any event, there may be some comfort in the knowledge that *Hennegan's* assertion that "the non-settling defendant's share of the judgment includes any fault attributable to immune or absent parties"<sup>221</sup> is questionable as precedent. Because the trial court found Garlock 80% liable and assessed 80% of the judgment against Garlock, the issue of Garlock's liability for a judgment-proof defendant's shares of damages was beyond the issues necessary for the court to reach its opinion,<sup>222</sup> and the pronouncement arguably has the status of dicta. Nonetheless, both decisions are disturbing in that they analyze the apportionment of partial settlements through the lens of joint and several liability, without considering what damages lie within a jointly liable tortfeasor's settlement. By making the issue the relatively simple one of, "does joint and several liability make other defendants liable for judgment-proof defendants' shares of damages?," both courts essentially decide the issue before they consider it. A better framing might be, "given that defendants are jointly liable for a judgment-proof codefendant's share, but that settlements encom-

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219. *Hennegan v. Cooper/T. Smith Stevedoring Co.*, 837 So. 2d 96, 111 (La. Ct. App. 2003).

220. *McDermott*, 511 U.S. at 215.

221. *Hennegan*, 837 So. 2d at 111.

222. Garlock challenged the court's failure to include defendants that were absent from the litigation. *See id.* at 110–11 (detailing Garlock's claim that "the trial court erred in finding Garlock liable for all of Mr. Hennegan's damages and by failing to apportion an appropriate share to the remaining defendants" and noting that maritime law considers fault of all defendants "regardless of whether they settled before trial"). Though Garlock also argued that the trial court should have found both that the two settling defendants were liable and that Cooper/T. Smith was more than 20% liable, *see id.* at 111–12 (detailing claims on appeal concerning fault determinations), the appellate court did not find error in the trial court's liability allocations, *id.* Thus, the only claim adjudicated by the court's holding concerned the "remaining" defendants, *id.* at 110, non-parties and the bankrupt Owens Corning not at all considered by the trial court. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996); *see also Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 128 (La. 2000) ("Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a 'constant stream of uniform and homogenous rulings having the same reasoning,' *jurisprudence constante* applies and operates with 'considerable persuasive authority.'" (quoting James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993))).

pass all damages taxed to a defendant at trial, should the court's reallocation depend upon whether any individual defendant has settled?"

The reallocation of judgment-proof defendants' shares of damages finds better support in state tort law.<sup>223</sup> For example, in *Paradise Valley Hospital v. Schlossman*,<sup>224</sup> a California appellate court considered the correct treatment of an insolvent defendant's share of damages.<sup>225</sup> California had both adopted comparative fault and retained joint and several liability.<sup>226</sup> The court reasoned that the "next logical extension" of these principles was to allocate an insolvent defendant's share of damages among solvent defendants proportionately.<sup>227</sup> Because the legal system assesses liability on the basis of fault, *not* dividing an insolvent's share proportionately would "create a philosophically and legally unacceptable burr."<sup>228</sup> As the court had stated earlier in its decision, the non-proportionate division of an insolvent's share of damages "is not compatible with the comparative negligence goal of apportioning damages

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223. See, e.g., CONN. GEN. STAT. ANN. § 52-572h(g) (West Supp. 2001) (providing that an insolvent's share of damages be allocated proportionately among all the other defendants); *Gauthier v. O'Brien*, 618 So. 2d 824, 832 (La. 1993) (holding that the damages attributed to an immune employer should be reallocated to other defendants on a relative fault basis), *overruled* by *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 657 So. 2d 975, 983 (La. 1995) (holding that state's apportionment statute does not require the inclusion of an employer in the factfinder's liability allocation).

224. *Paradise Valley Hosp. v. Schlossman*, 191 Cal. Rptr. 531 (Cal. Ct. App. 1983). In *Paradise Valley Hospital*, California's Fourth District Court of Appeals considered the apportionment of an insolvent defendant's share of damages among the remaining, solvent defendants. *Id.* at 532. Plaintiffs sued a hospital and two doctors in negligence and recovered a verdict for \$1.5 million. *Id.* at 533. One doctor, 50% responsible for the plaintiffs' injury, filed for bankruptcy. *Id.* The hospital, 10% responsible, paid \$500,000, and the other doctor, 40% responsible, paid \$1 million to satisfy the judgment. *Id.* The hospital and the solvent doctor cross-complained for contribution for the amounts that each had paid in excess of its proportionate share of damages. *Id.* The court reasoned that California's adoption of comparative negligence did not "compel the demise" of joint and several liability. *Id.* Rejecting the position that the insolvent doctor's share of damages should be divided equally between the two solvent defendants, the court ruled that the "next logical extension" of comparative fault required the division of the insolvent doctor's share of damages between the solvent defendants proportionate to those defendants' comparative faults. *Id.* at 536. The hospital, 10% responsible, should pay \$300,000 in damages (it's \$150,000 share of the \$1.5 million judgment and 20% of the insolvent's \$750,000 share), and the solvent doctor, 40% responsible should pay \$1.2 million in damages (his \$600,000 share of the \$1.5 million judgment and 80% of the insolvent's \$750,000 share). *Id.*

225. *Id.* at 532.

226. *Id.* at 536.

227. *Id.*

228. *Id.*

according to [tortfeasor's] degree of fault."<sup>229</sup> Indeed, at least one scholar discussing California's adoption of comparative fault reasons that comparative fault principles, coupled with joint and several liability, indicate that "all solvent parties whose culpable conduct is causally implicated in an injury should bear the burden of an insolvent defendant according to their relative proportionate fault."<sup>230</sup>

### C. Comparing the Pierringer Release

Many courts' treatment of settlements made with "Pierringer releases" supports the limited joint and several liability approach to apportioning judgment-proof defendants. Pierringer releases derive their name from *Pierringer v. Hoger*,<sup>231</sup> a 1963 Wisconsin Supreme Court decision construing the effect of a release that discharged a defendant's proportionate share of liability.<sup>232</sup> A Pierringer release encompasses all damages "caused by the negligence" of a settling defendant, and the settling plaintiff agrees to release and discharge the defendant for "the sum of the portions or fractions or percentages of causal negligence for which [the defendant] hereto [is] found to be liable."<sup>233</sup> Because the plaintiff releases the portion of the cause of action attributed to the settling defendant, a nonsettling defendant pays only its proportionate share of the plaintiff's damages.<sup>234</sup> Thus, nonsettling

229. *Id.* at 535 (citing VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 16.7, at 261 (1st ed. 1974)).

230. Harry N. Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of American Motorcycle Association v. Superior Court*, 14 *LOY. L.A. L. REV.* 775, 817 (1981).

231. *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963). In *Pierringer*, the Wisconsin Supreme Court reviewed contribution claims asserted by nonsettling parties against defendants that settled with releases discharging the portion of the plaintiff's damages caused by the settling parties' negligence. *Id.* at 108. The plaintiffs had been injured in an explosion allegedly caused by multiple defendants. *Id.* at 107. All defendants, except one, settled before trial using such releases and sought dismissal of the contribution claims asserted against them. *Id.* The court ruled that settlement for a defendant's share of liability barred contribution claims asserted against that defendant. *See id.* at 112 (ruling that trial court's grant of summary judgment was not erroneous). The release agreements provided that the plaintiff would satisfy any portion of a judgment against a nonsettling party that was in excess of that party's proportionate share of damages, so the court ruled that a trial court should give the release "immediate effect" and enter judgment only for the nonsettlor's proportionate share of damages. *Id.*

232. *See id.* at 111 (rejecting nonsettling codefendant's argument that prior case law allowed its contribution action to proceed against settled codefendants).

233. *Id.* at 108 (quoting language of release).

234. *See id.* (construing release language and noting the superfluity of provisions providing for the indemnification of a settling defendant).

codefendants cannot seek contribution from settling parties.<sup>235</sup> Finally, because a settled defendant's share of liability materially affects the liability of nonsettling defendants, the trier of fact must determine that settled party's relative culpability.<sup>236</sup> In practical effect, *Pierringer* settlements are very similar to proportionate share apportionment: under both arrangements, settlements represent a settling defendant's (yet-to-be-determined) share of liability, nonsettling defendants pay no more than their equitable shares of damages, settling defendants are not subject to future contribution claims, and triers of fact must determine settled parties' relative culpabilities.<sup>237</sup>

States are divided on the effect of *Pierringer* releases on judgment-proof defendants' shares of damages.<sup>238</sup> Minnesota's construction, expressed in *Frederickson v. Alton M. Johnson Co.*,<sup>239</sup> supports the limited joint and several liability approach. In *Frederickson*, the plaintiff sought recovery from three joint tortfeasors. Trial by jury resulted in findings of 40% fault to each of two defendants, 12% fault to another defendant, and 8% comparative fault to the plaintiff.<sup>240</sup> The plaintiff settled with one of the 40% defendants using a *Pierringer* release, and the other 40% defendant's share of damages proved uncollectible.<sup>241</sup> Thus, the Minnesota Supreme Court considered the reallocation of a joint codefendant's share of damages among settled and nonsettled parties.<sup>242</sup>

First, the court limited the impact of the settlement on joint and several liability: the plaintiff's settlement with one defendant under a *Pierringer*

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235. See *id.* at 111 (holding that the trier of fact must determine the settling parties' liabilities because contribution actions are barred).

236. See *id.* at 112 (holding that the failure to include a settled party in liability apportionment was prejudicial error).

237. See *In re Exxon Valdez*, 229 F.3d 790, 797 (9th Cir. 2000) ("*Pierringer* releases have the effect of reaching a proportionate share result . . ."); Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 WM. MITCHELL L. REV. 1, 3 (1994) (reviewing key components of *Pierringer* releases); see also Daniel Levi, Note, *A Comparison of Comparative Negligence Statutes: Jury Allocation of Fault—Do Defendants Risk Paying for the Fault of Nonparty Tortfeasors?*, 76 WASH. U. L.Q. 407, 418–20 (1998) (reviewing the characteristics of *Pierringer* releases and noting the impropriety of using pro tanto credits with them).

238. See Knapp, *supra* note 237, at 26 (noting that courts are split regarding the allocation of insolvent and immune parties' shares under *Pierringer* releases).

239. *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 798 (Minn. 1987).

240. *Id.* at 796.

241. *Id.*

242. See *id.* (stating that the two issues considered are the appropriateness of verdict reduction and the reallocation of uncollectible portions of the judgment).

release does not "waive joint liability between all defendants."<sup>243</sup> Thus, the court held the remaining (nonsettling) parties jointly and severally liable for the uncollectible 40% share.<sup>244</sup> However, Minnesota's comparative negligence statute provided for the reallocation of an uncollectible judgment among "the other parties" according to those parties' percentages of fault.<sup>245</sup> Thus, the court reallocated the 40% uncollectible share such that the nonsettling (12%) defendant paid 20% of the verdict, the plaintiff (8%) paid 13 1/3% of the verdict, and the settled (40%) defendant's settlement covered 66 2/3% of the verdict.<sup>246</sup> Equally significant, the court held that the prior settlement between the plaintiff and the 40% defendant extinguished the plaintiff's ability to collect *any* damages from that defendant. The plaintiff's release of the 40% liable defendant "to the extent [that it] was liable" released both the defendant's 40% share of liability and the 26 2/3% share of damages reallocated to the defendant.<sup>247</sup>

The only difference between the outcome in *Frederickson* and the outcome under the limited joint and several liability regime is the allocation of uncollectible shares to the plaintiff. However, when one considers background differences between Minnesota law and the maritime law, the two approaches are even more harmonious. Minnesota law expressly requires reallocation of uncollectible damages among all parties, "including a claimant at fault."<sup>248</sup> Alternatively, the maritime law provides that the risk of uncollectibility is borne by defendants rather than plaintiffs.<sup>249</sup> Thus, the decision supports much of the reasoning of limited joint and several liability, though applied with different game rules. Specifically, it supports the proposition that courts should attribute all damages that would be taxed against a party at trial to that party's earlier proportionate share settlement.<sup>250</sup>

243. *Id.* at 797 (quoting *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 292 (Minn. 1986)).

244. *Id.*

245. *Id.* at 797-98 (quoting MINN. STAT. § 604.02 (1984)).

246. *Id.* at 798.

247. *See id.* (ruling that a plaintiff may recover only from the nonsettling defendant because a release "to the extent of" another solvent defendant's liability encompasses the uncollectible damages reallocated to the settling defendant).

248. *Id.* at 797-98 (quoting MINN. STAT. § 604.02 (1984)).

249. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 221 (1994) (holding that joint and several liability can result in one defendant paying more than its equitable share of damages when a plaintiff's recovery is limited by factors outside the plaintiff's control); *supra* notes 42-43 and accompanying text (discussing *Edmonds*'s resolution of joint and several liability among defendants).

250. *See Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 798 (Minn. 1987) (ruling that a *Pierringer* settlement includes a settled defendant's liability share after increase

In a case that is highly illustrative of the reasoning underlying limited joint and several liability, the U.S. Court of Appeals for the First Circuit held that Maine law required joint tortfeasors to allocate joint obligations proportionately among themselves. In *Austin v. Raymark Industries, Inc.*,<sup>251</sup> the plaintiff settled with several defendants using *Pierringer* releases.<sup>252</sup> Trial by jury resulted in an assessment of 60% fault to a company in Chapter 11 bankruptcy proceedings.<sup>253</sup> Because the court found that Maine law had an expressed interest in according full compensation to plaintiffs by way of joint and several liability, it reallocated the bankrupt defendant's share among the remaining jointly and severally liable defendants.<sup>254</sup> Maine law also strongly advocated the allocation of damages on the basis of comparative responsibility, and the First Circuit accordingly found that the 60% obligation for the bankrupt defendant's share of damages should be proportionately reallocated among the remaining defendants.<sup>255</sup> Thus, for example, the court reallocated 22.5% (9/40) of the total damages to a defendant assessed 9% responsibility.<sup>256</sup> The court then took its reasoning a step further, holding that the prior settlements encompassed the settling parties' full liabilities imposed at trial.<sup>257</sup> The verdict amount should be reduced by the *total* proportionate liability of the settling parties, including the damages that would have been reallocated

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from the reallocation of an uncollectible portion of damages).

251. *Austin v. Raymark Indus., Inc.*, 841 F.2d 1184 (1st Cir. 1988). In *Austin*, the U.S. Court of Appeals for the First Circuit considered the effect of settlement with *Pierringer* releases on the reallocation of an insolvent defendant's share of damages. *Id.* at 1187. The plaintiff, the widow of an asbestos worker who died from lung cancer, sought recovery from sixteen asbestos suppliers. *Id.* at 1185. Prior to trial, she settled with eight defendants using *Pierringer* releases. *Id.* at 1188. One defendant, Unarco, did not settle before trial. *Id.* at 1185. Unarco was in bankruptcy proceedings and was found 60% responsible for injury to the plaintiff's husband. *Id.* at 1195. The court ruled that Unarco's share of damages should be reallocated to the other defendants proportionate to those defendants' comparative fault. *Id.* at 1196. Because the plaintiff had agreed to "stand in the shoes" of the defendants settling with *Pierringer* releases, the verdict was reduced by the portion of Unarco's damages reallocated to them. *Id.*

252. *Id.* at 1188.

253. *Id.* at 1185.

254. *See id.* at 1195-96 (reviewing the trial court's allocation of an insolvent defendant's share of damages and noting that a "powerful principle[]" of Maine law is the full compensation of plaintiffs by means of joint and several liability).

255. *See id.* at 1196 (holding that reallocation relative to proportionate fault accords with goals of full compensation and comparative negligence).

256. *Id.* at 1195.

257. *See id.* at 1196 (reasoning that the plaintiff agreed to "stand in the shoes" of settling parties and, therefore, she must "be held responsible" for the uncollectible damage shares attributed to them).

to them at trial.<sup>258</sup> Such a reallocation "seemed to deprive the plaintiff of a part of her award," but, in fact, reflected only a reduction of the verdict by the settled defendants' total proportionate share of liability.<sup>259</sup>

In contrast, both North Dakota and Wisconsin allocate insolvent defendants' shares of damages to nonsettling defendants only.<sup>260</sup> The reasoning underlying North Dakota's refusal to impute judgment-proof defendants' shares to settled parties is that plaintiffs would not expect to have their recoveries diminished by any more than the proportionate share of fault attributed to a settled defendant.<sup>261</sup> When parties use *Pierringer* releases, North Dakota statutory law requires the reduction of a plaintiff's verdict only by the proportionate amount of fault attributed to the settling defendant.<sup>262</sup> This fact, coupled with the absence of a device for reallocating fault, led the North Dakota Supreme Court to conclude that a scheme reducing verdicts because of parties' insolvency or immunity would not fall within the expectations of plaintiffs.<sup>263</sup>

In Wisconsin, *Pierringer* releases do not require imputation of insolvents' shares of damages to settled tortfeasors because "[t]here exists no rule requiring solvent, nonsettling tortfeasors to equitably share that part of a judgment which is uncollectible from an insolvent, nonsettling tortfeasor."<sup>264</sup> Because a plaintiff has the right to recover his total damages from any jointly liable tortfeasor, and because tortfeasors can only seek contribution for others' proportionate shares of negligence, a defendant forced to pay an insolvent's share of damages has no right to demand contribution for that amount from

258. See *id.* (holding that, for example, the verdict should be reduced by a settled defendant's 22% share of proportionate liability and an additional 9% share attributed to the settled defendant because of a codefendant's insolvency).

259. See *id.* (reasoning that the reduction of the award did not deprive the plaintiff because she had assumed all obligations of the settled parties).

260. See *Hoerr v. Northfield Foundry & Mach. Co.*, 376 N.W.2d 323, 332 (N.D. 1985) (reasoning that a *Pierringer*-type release does not require the imputation of insolvent or immune defendants' shares to a plaintiff's prior settlement because the plaintiff would not "expect [this] as a natural consequence" of release); *Chart v. Gen. Motors Corp.*, 258 N.W.2d 680, 687 (Wis. 1977) (holding that courts may not impute an insolvent defendant's share of damages to settled defendants because no requirement exists that defendants share in a codefendant's insolvency proportionately).

261. See *Hoerr*, 376 N.W.2d at 332 (reasoning that plaintiffs would not expect such a reduction "as a natural consequence" of settlement).

262. *Id.* at 331-32 (construing N.D. CENT. CODE § 32-38-04(2) (1996) and *Bartels v. City of Williston*, 276 N.W.2d 113, 122 (N.D. 1979)).

263. See *id.* at 332 (holding that a plaintiff would not view such a reduction as a "natural consequence" of settlement).

264. *Chart*, 258 N.W.2d at 687.



the other defendants.<sup>265</sup> Furthermore, the Wisconsin Supreme Court reasoned that such a rule would require a plaintiff using a *Pierringer* release to "step into the shoes" of the settling defendant.<sup>266</sup> Because the value of the *Pierringer* release "would become contingent on the lawsuit," the court stated that a plaintiff would have no motivation to settle.<sup>267</sup>

Failing to impute an insolvent's share of damages to a *Pierringer* settlement vitiates the significance of the settlement. An essential element of a *Pierringer* settlement is that it does not disrupt claims asserted against other defendants.<sup>268</sup> Allowing settling parties to allocate the risk of insolvency to nonsettling parties "is fundamentally unfair."<sup>269</sup> That imputation causes the value of a *Pierringer* release to be contingent on trial is insignificant because the value of any *Pierringer* settlement is contingent on the outcome at trial.<sup>270</sup> Although the risk of a codefendant's insolvency increases the total risk involved in settlement, courts should allow the settling parties to contract among themselves for the allocation of that risk.<sup>271</sup> Such a system is preferable to one in which settling parties change the liabilities of nonsettling parties.<sup>272</sup> Notably, neither Wisconsin nor North Dakota based their refusal to impute judgment-proof defendants' shares to prior settlements on grounds of equity or public policy. Rather, Wisconsin reasoned that, because a plaintiff could recover the insolvent's share of damages from *any* tortfeasor, and because that tortfeasor had no right of contribution from other defendants, no such imputation was necessary.<sup>273</sup> North Dakota ruled that its legal precedents

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265. *Id.* at 687 n.9 (discussing *Bielski v. Schulze*, 114 N.W.2d 105, 107 (Wis. 1962)).

266. *Id.* at 687.

267. *See id.* at 687-88 (reasoning that requiring a plaintiff to "step into the shoes" of a settled defendant would defeat the plaintiff's motive to settle because the value of the release would be contingent on the outcome of a lawsuit).

268. *See Siler v. Northern Trust Co.*, 80 F. Supp. 2d 906, 909 (N.D. Ill. 2000) (stating that one fundamental characteristic of a *Pierringer* release is that nonsettling defendants "pay no more than their fair share of the verdict").

269. *Knapp, supra* note 237, at 31; *see also supra* notes 107-11 and accompanying text (discussing allocation of the risk of insolvency).

270. *Knapp, supra* note 237, at 30.

271. *See id.* at 30-31 (noting increased uncertainty because of insolvency and stating that Minnesota's system, allowing settling parties to allocate the risk of insolvency among themselves, is "preferable").

272. *See id.* at 31 (noting the fundamental unfairness of allowing settling parties to allocate risks to nonsettling parties).

273. *See Chart v. Gen. Motors Corp.*, 258 N.W.2d 680, 687 (Wis. 1977) (stating that imputation is based on the assumption of apportionment of an insolvent's share of damages and, further, that "no rule" provides for the apportionment of an insolvent's share of damages or contribution to a defendant forced to pay an insolvent's share).

dictated that a plaintiff's recovery could be reduced only by the amount of the settled defendant's proportionate liability and, thus, that imputing a portion of an insolvent's share of damages would not accord with the expectations of settling plaintiffs.<sup>274</sup> How these courts square the result of these decisions—namely, that certain defendants pay much more than certain other defendants for reasons *unrelated* to the parties' relative faults—with basic notions of comparative fault is unclear, at least to the author of this Note.

A *Pierringer* settlement is so similar to proportionate share allocation that the reasoning of one should apply equally to the other. In *McDermott*, the Supreme Court noted that a fundamental advantage of the proportionate share approach was that settlements did not affect the liabilities of nonsettling defendants.<sup>275</sup> Under a system of proportionate share allocation, the risk that a settlement is too meager or too generous falls entirely on the settling parties.<sup>276</sup> The value of a proportionate share settlement, like a *Pierringer* settlement, is contingent on trial.<sup>277</sup> If a "proportionate share" *Pierringer* settlement encompasses all damages assessed against a settling defendant at trial, so too should a "proportionate share" settlement under the maritime law.

### VI. Conclusion

When the Supreme Court unanimously adopted proportionate share apportionment, the Justices foresaw this Note's dilemma. In a footnote discussion, the Court suggested that "[i]t might be thought" that the issue was one of joint and several liability, and that a nonsettling defendant should perhaps thus pay both its share of damages and *all* of the damages allocated to a judgment-proof codefendant.<sup>278</sup> Defendants that did not settle would be the only defendants to which a court allocated judgment-proof defendants' shares of damages. However, the Court declined to reach the issue after noting that the plaintiff "ha[d] not requested that [the nonsettling defendant] pay any more than its 38% share of the damages."<sup>279</sup> Later in its opinion, the Court suggested that the issue might be framed as one of proportionate settle-

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274. See *Hoerr v. Northfield Foundry & Mach. Co.*, 376 N.W.2d 323, 332 (N.D. 1985) (reasoning that a plaintiff would not expect a reduction in the verdict of more than a settled defendant's share of liability).

275. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220 (1994) (stating that this characteristic is a "virtue" of proportionate share apportionment).

276. See *id.* at 221 (stating that defendants' burdens do not change if a plaintiff's settlement is "meager" or "generous").

277. See *id.* at 213 (reasoning that settlements will often deviate from trial outcomes for various reasons).

278. *Id.* at 210 n.10.

279. *Id.*

ment, writing that "[w]hen the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall," but that a plaintiff's agreement to settle is not a limitation on recovery due to "outside forces."<sup>280</sup> In such an instance, according to the Court, "There is no reason to allocate any shortfall to the other defendants . . . ."<sup>281</sup> If a plaintiff's "voluntary" settlement with one defendant eliminates the joint and several relationship among the remaining defendants, then axiomatically the remaining defendants are liable *only* for their proportionate shares of damages.

So perhaps the theme here is not one of, "what is the answer?," but is instead one of, "what is the question?" Framing the issue to be whether or not joint and several liability makes one defendant liable for damages allocated to another leads to one result; framing it as whether or not a "voluntary" partial settlement limits nonsettling defendants to their "proportionate shares" of damages leads to another. But if both questions are really just their own answers, then the astute jurist should wonder: What is it that we are actually asking?<sup>282</sup>

The Court's pronouncements on joint and several liability and proportionate settlement reach broader than the pigeonholing of "joint and several liability" and the "proportionate share rule." Both of these concepts are specific applications of broader principles. The broader principles at play are, first, full compensation to plaintiffs by operations of joint and several liability, and second, protection of parties' expectations in settlement by the use of pro rata apportionment. Focusing exclusively on one manifestation or the other leads to differing results, results that are essentially pre-determined when a court preliminarily decides that what is really at stake is "joint and several liability" or "proportionate share" settlement. It is thus necessary to first focus inquiry on what is really at issue: How do defendants share in joint obligations to plaintiffs? One can describe this selection of an analytic viewpoint in a number of ways; one of the simpler ways is with the somewhat-philosophic idea of looking to "mysteries" instead of "answers."<sup>283</sup> In any event,

280. *Id.* at 221.

281. *Id.*

282. *Cf.* Donald K. Hill, *Law School, Legal Education, and the Black Law Student*, 12 T. MARSHALL L. REV. 457, 486 (1987) ("The objective is accomplished by the method itself. To the student's question, 'What is the answer, Prof.?', I pose the proposition, 'The answer is the question.'").

283. *Supra* note 87. Some of Ken Kesey's literature also conveys this theme. In *One Flew Over the Cuckoo's Nest*, Kesey tells the story of Patrick McMurphy, who teaches other patients in a mental health facility to question the internal controls of the "Big Nurse." As the story develops, many of the characters ultimately reject the Big Nurse's rules and procedure, instead

only by beginning inquiry with the aims of allocation in mind can one hope to avoid the quagmire that develops when the perceived answer dictates the content of the question.

Throughout this Note, I have attempted to rely primarily on how courts' manifestations of the underlying allocative mystery actually *function*; analogy to factual similarities in the vast expanse of American law secondarily supports my conclusions. By so doing, I hope that I have kept in mind that, in the end, it is a method of shifting money among people that we are expounding.<sup>284</sup> By turning my eyes to this end, I similarly hope that my analysis shows that both solutions intimated by the Court are fatally inconsistent with its established rationales for allocating damages. Rather, express and implicit principles of joint and several liability, comparative fault, and pro rata apportionment point towards a scheme in which codefendants pay judgment-proof defendants' shares of damages on a consistent, predictable basis that does not change as parties settle. While the reallocation of damages apportioned to judgment-proof defendants awaits final determination by the Court, I hope that this Note provides some guidance in the interim.

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choosing to live according to their own dictates. Ultimately, the characters and the reader come to recognize the Big Nurse's ward as its own alter-reality, complete with pronouncements of right and wrong. The reader thus faces the idea that the frame of reference in which people operate can change, and that its change can bring about dramatically different viewpoints for the people involved. *See generally* KEN KESEY, *ONE FLEW OVER THE CUCKOO'S NEST* (1962).

284. *Cf. M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is a *constitution* we are expounding.").



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# ARTICLES

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