Louisiana Law Review

Volume 72 | Number 3
Spring 2012

Giving Credit Where Credit Is Due: Applying the Proper Set-Off Rules in FELA and Jones Act Cases After AmClyde, Ayers, and Schadel

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I. INTRODUCTION

Courts have recently begun grappling with a new issue in cases brought under the Federal Employers' Liability Act (FELA) and the Jones Act: what sort of credit, if any, should a jointly and severally liable FELA or Jones Act defendant receive for settlements that the plaintiff has made with negligent third parties?[1] Although this is a relatively new issue in FELA cases, courts have long considered this issue in other areas of federal law.[2] In the seminal 1994 case of *McDermott, Inc. v. AmClyde*, the United States Supreme Court held that a plaintiff's recoverable damages from a jointly and severally liable maritime defendant should be reduced by the proportionate share of damages attributable to a settling defendant.[3] Under this method, the nonsettling defendant receives a "settlement credit" (also known as a "set-off") in proportion to the settling defendant's share of the injury, regardless of how much money the plaintiff actually recovered from the settling defendant.[4] The *AmClyde* Court

1. *See* Schadel v. Iowa Interstate R.R., Ltd., 381 F.3d 671 (7th Cir. 2004) (FELA); Benson v. CSX Transp., Inc., 274 Fed. App'x 273 (4th Cir. 2008) (FELA); Lewin v. Am. Exp. Lines, Inc., 224 F.R.D. 389 (N.D. Ohio 2004) (Jones Act); Krueger v. Soo Line R.R., No. 02-C-0611, 2005 WL 2234610 (E.D. Wis. Sept. 12, 2005) (FELA); Mancini v. CSX Transp., Inc., No. 08-CV-933, 2010 WL 2985964 (N.D. N.Y. July 27, 2010) (FELA); Torrejon v. Mobil Oil Co., 876 So.2d 877 (La. Ct. App. 4th 2004) (Jones Act); Palmer v. Union Pacific R. Co., 311 S.W. 3d 843 (Mo. Ct. App. 2010) (FELA); Hess v. Norfolk Southern Ry. Co., 835 N.E. 2d 679 (Ohio 2005) (FELA).

2. *See, e.g.*, McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994) (adopting a proportionate share approach); Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979) (adopting a proportionate share approach); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540 (11th Cir. 1987) (adopting a *pro tanto* approach); *see also* Gus A. Schill, Jr., *Recent Developments Regarding Maritime Contribution and Indemnity*, 51 LA. L. REV. 975, 987 (1991) (discussing the history of the set-off debate before *AmClyde*); W. Robins Brice, *Solidarity and Contribution in Maritime Claims*, 55 LA. L. REV. 799 (1995) (discussing the issue in light of *AmClyde*).

3. *AmClyde*, 511 U.S. at 217.

4. *Id.* at 210.

favored this set-off rule over the proposed alternative: the "*pro tanto* method," under which the nonsettling defendant would receive a settlement credit for only the amount actually paid by the settling defendant, regardless of the level of fault attributable to each party.[5]

To illustrate the way the "*pro tanto* method" operates (and its potential to lead to inequity among defendants), the *AmClyde* Court posed the following hypothetical:

> Suppose, for example, that a plaintiff sues two defendants, each equally responsible, and settles with one for $250,000. At trial, the non-settling defendant is found liable, and plaintiff's damages are assessed at $1 million. Under the *pro tanto* rule, the nonsettling defendant would be liable for 75% of the damages ($750,000, which is $1 million minus $250,000). The litigating defendant is thus responsible for far more than its proportionate share of the damages.[6]

The possibility of such inequity among defendants was one of the many reasons that the *AmClyde* Court embraced the proportionate share rule over the *pro tanto* method.

Following the Supreme Court's decision in *AmClyde*, the majority of state and federal courts have adopted the proportionate share method, rather than the *pro tanto* method, in the areas of the law that still call for joint and several liability.[7] But, in recent years, an exception has emerged in one area of the law: FELA cases[8] (and shortly thereafter, in Jones Act cases).[9] This development arose in the wake of the Supreme Court's 2003

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5. *Id.* at 208.

6. *Id.* at 212 n.14.

7. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 16 cmt. c (2000); *see, e.g.*, Bragger v. Trinity Capital Enterp. Corp., 30 F.3d 14, 17 (2d Cir. 1994) (securities litigation); Banks ex rel. Banks v. Yokemick, 177 F. Supp. 2d 239 (S.D.N.Y. 2001) (§ 1983 of the Civil Rights Act); *In re* WorldCom, Inc. ERISA Litigation, 339 F. Supp. 2d 561 (S.D.N.Y. 2004) (ERISA); *see also* Martin Davies, McDermott v. AmClyde*: The Quiet Achiever*, 39 J. MAR. L. & COM. 11, 12 (2008) (noting the influence of *AmClyde* in other areas of state and federal law, and commenting that "[p]erhaps only *Robins Dry Dock & Repair Co. v. Flint* has had more influence outside of maritime law").

8. *See* cases cited *supra* note 1.

9. This Article discusses a specific line of cases that have adopted the *pro tanto* approach. Most of these cases are FELA cases. Therefore, the majority of this Article discusses the FELA, rather than the Jones Act. However, because the Jones Act incorporates the standards of the FELA, *see infra* Part III.A, the FELA cases discussed in this Article will likely have an influence on Jones Act claims as well. In fact, this issue has already arisen in two Jones Act cases. *See* Lewin v. Am. Exp. Lines, Inc., 224 F.R.D. 389 (N.D. Ohio 2004); Torrejon v. Mobil Oil Co., 876 So.2d 877 (La. Ct. App. 4th 2004).

decision in *Norfolk & Western Railway Co. v. Ayers*, which held that a FELA defendant is not entitled to a reduction of damages for the negligence of a third party.[10] Notably, the Court's decision in *Ayers* did not involve the situation discussed above, in which one of the defendants has already settled. Rather, in *Ayers*, neither the FELA defendant nor the allegedly negligent third parties had reached a settlement with the plaintiff.[11] Even so, several lower courts have held that the rationale of *Ayers* requires application of the *pro tanto* set-off rule, rather than *AmClyde*'s proportionate share method.[12] The most notable of these cases is the Seventh Circuit's decision in *Schadel v. Iowa Interstate Railroad, Ltd.*, which was the first case to address the issue and which has subsequently been followed by most other jurisdictions that have addressed the issue.[13] In these cases, courts have applied the *pro tanto* set-off method, requiring FELA defendants to pay more than their share of the damages in order to make up for the plaintiff's having settled for too little.[14]

This Article argues that *Schadel* and its progeny are incorrect. The well-established proportionate share set-off method, unanimously adopted by the Supreme Court in *AmClyde*, should determine the amount of credit a FELA defendant receives for the settlement of a third party. *Schadel* was incorrect in holding that *Ayers* requires an abrogation of the *AmClyde* rule in FELA cases. Although *Ayers* emphasized that joint and several liability is still the rule in FELA cases, the opinion said nothing regarding settlement credits or the effect of a plaintiff's settlement with a negligent third party. Furthermore, the rationale of *Ayers* is not

10. Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 165 (2003).

11. *See id.* at 159–66.

12. *See* Schadel v. Iowa Interstate R.R., Ltd., 381 F.3d 671 (7th Cir. 2004) (FELA); Benson v. CSX Transp., Inc., 274 Fed. App'x 273 (4th Cir. 2008) (FELA); Lewin v. Am. Exp. Lines, Inc., 224 F.R.D. 389 (N.D. Ohio 2004) (a Jones Act case reasoning that the maritime nature of the claim required application of *AmClyde*, not *Ayers*, but nevertheless applying a pro tanto approach on the theory that the calculation of a proportionate share set-off was "unreasonable" under the facts of the case); Krueger v. Soo Line R.R., No. 02-C-0611, 2005 WL 2234610 (E.D. Wis. Sep. 12, 2005) (FELA); Mancini v. CSX Transp., Inc., No. 08-CV-933, 2010 WL 2985964 (N.D.N.Y. July 27, 2010) (FELA); Torrejon v. Mobil Oil Co., 876 So.2d 877 (La. Ct. App. 4th 2004) (Jones Act); Palmer v. Union Pacific R. Co., 311 S.W. 3d 843 (Mo. Ct. App. 2010) (FELA); Hess v. Norfolk Southern Ry. Co., 835 N.E. 2d 679 (Ohio 2005) (FELA). *But see* Palmer v. Union Pacific R. Co., 311 S.W.3d 843 (Mo. Ct. App. 2010) (expressly disagreeing with the above line of cases and holding that a nonsettling FELA defendant was not entitled to *any* set-off for the settlement of a negligent third party).

13. *Schadel*, 381 F.3d at 678.

14. *Id.*; *see also supra* note 12.

applicable in settlement scenarios for two reasons: first, as the Supreme Court has emphasized, the doctrine of joint and several liability exists to protect the plaintiff from outside forces such as a defendant's insolvency, but not from the plaintiff's own agreement to settle.[15] Second, settlement scenarios change the analysis because, unlike the scenario in *Ayers*, once a negligent third party has settled, the FELA defendant will be left without a valid action for contribution against the settling third party.[16] For these reasons, this Article argues that courts faced with FELA or Jones Act claims should decline to adopt the *Schadel* approach and should instead follow the set-off method that the Supreme Court has already prescribed: *AmClyde*'s proportionate share method.

Part II of this Article introduces the general rule for calculating settlement credits: *AmClyde*'s proportionate share method. Part III discusses *Schadel* and its progeny and analyzes those cases' application of the *pro tanto* set-off rule. Part IV argues that *Schadel* and its progeny are incorrect and asserts that courts should apply *AmClyde*'s proportionate share set-off rule in FELA and Jones Act cases.

II. THE GENERAL RULE: THE "PROPORTIONATE SHARE" METHOD OF SET-OFF

For many years, circuit courts and legal commentators deliberated over the proper method for calculating a settlement credit.[17] But in 1994 the Supreme Court settled the debate with its unanimous decision in the case *McDermott, Inc. v. AmClyde*.[18] Although *AmClyde* was neither a FELA nor Jones Act case, courts have adopted its approach as the general rule for calculating settlement credits in areas of both state and federal law that still

15. *AmClyde*, 511 U.S. at 221.

16. *See infra* Part III.C.

17. *See* Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979) (adopting a proportionate share approach); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540 (11th Cir. 1987) (adopting a *pro tanto* approach); RESTATEMENT (SECOND) OF TORTS: APPORTIONMENT OF LIABILITY § 886A (1977) (discussing both the *pro tanto* and proportionate share methods but declining to express a preference for either rule); Daniel Klerman, *Settling Multidefendant Lawsuits: The Advantage of Conditional Setoff Rules*, 25 J. LEGAL STUD. 445 (1996) ("the conditional *pro tanto* rule pressures both defendants to settle for relatively high amounts"); Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427 (1993) ("neither [set-off] rule is consistently better than the other"); Schill, *supra* note 2, at 987 (discussing the history of the set-off debate before *AmClyde*).

18. *AmClyde*, 511 U.S. at 221.

retain joint and several liability (as do the FELA and Jones Act do).[19] Therefore, this Article will devote considerable attention to the Supreme Court's decision in *AmClyde*.

A. McDermott v. AmClyde*: The Supreme Court Embraces the "Proportionate Share" Method of Set-Off*

AmClyde addressed an accident on an offshore oil platform that involved various defendants and several million dollars in damages.[20] While a crane owned by McDermott was lifting a prefabricated platform dock, the crane's main hook malfunctioned. A large steel cable sling unraveled, and the platform dock crashed down onto its transport barge, causing significant damage. McDermott sued AmClyde, the manufacturer of the crane, along with the manufacturer of the crane's hook that broke, and three manufacturers of the crane's steel cable slings (known as the "sling defendants"). Prior to trial, the sling defendants settled for $1 million. At trial, the jury found that McDermott had suffered $2.1 million in damages, allocating 32% of the fault to AmClyde and 38% to the manufacturer of the crane's defective hook.[21]

When the case reached the Supreme Court, the Court faced the question of what sort of credit the nonsettling defendants should receive for the plaintiff's settlement with the sling defendants.[22] The Court approached this question with a clean slate, noting Congress had not provided any guidance on the issue.[23] Therefore, the Court turned to another source: the *Restatement (Second) of Torts*.[24] As the Court noted, the Restatement did not take a position on this issue, but provided three basic options: (1) *pro tanto* with contribution: the nonsettling defendant gets credit only for the amount actually paid by the settling defendant, and if the settling defendant paid less than his share, the nonsettling defendant may seek contribution from the settling defendant; (2) *pro tanto* without contribution: the nonsettling defendant gets credit only for the amount actually paid by the settling defendant, and may not seek contribution from a settling defendant who paid less than his share; and (3) proportionate share: a nonsettling defendant receives credit for the settling defendant's share of liability, regardless of how

19. *See* sources cited *supra* note 7.
20. *AmClyde*, 511 U.S. at 205.
21. *Id.*
22. *Id.* at 207.
23. *Id.*
24. RESTATEMENT (SECOND) OF TORTS: APPORTIONMENT OF LIABILITY § 886A (1977).

much the settling defendant actually paid.[25] With these three set-off rules in mind, the Court weighed the pros and cons of each option.

The Court quickly rejected the first option, *pro tanto* with contribution, reasoning that it was "clearly inferior to the other two, because it discourages settlement and leads to unnecessary ancillary litigation."[26] The Court noted that it discouraged settlements "because settlement can only disadvantage the settling defendant"—in other words, a defendant would have nothing to gain by settling, because a contribution action by the nonsettling defendant could ultimately make the settling defendant liable for his full share of the damages anyway.[27] In addition, "the claim for contribution burdens the courts with additional litigation," the Court noted.[28]

Having dismissed the *pro tanto* with contribution method, the Court turned its attention to the other two set-off options. The Court quickly noted that the *pro tanto* approach would often lead to the nonsettling defendant paying more than its equitable share of the damages. The Court reasoned that plaintiffs often settle for an amount that is "significantly less than the settling defendant's equitable share of the loss, because settlement reflects the uncertainty of trial and provides the plaintiff with a 'war chest' with which to finance the litigation against the remaining defendants."[29] And under the *pro tanto* method, when a plaintiff settles for this discounted amount, the nonsettling defendant is left to make up for the difference. Such a regime might have the beneficial effect of encouraging settlements, but only at the cost of wreaking inequity, the Court reasoned.[30] For that reason, the Court concluded that it was "persuaded that the proportionate share approach is superior."[31]

After reaching this conclusion, the Court took great pains to emphasize that its holding did not abrogate the longstanding rule of joint and several liability in admiralty law,[32] which had recently been reaffirmed by the Court's opinion in *Edmonds v. Compagnie Generale Transatlantique*.[33] In *Edmonds*, the Court refused to reduce the judgment against a shipowner by the proportionate fault

25. *AmClyde*, 511 U.S. at 208–209.
26. *Id.* at 211.
27. *Id.*
28. *Id.* at 212.
29. *Id.* at 213.
30. *Id.* at 214–15.
31. *Id.* at 217.
32. *Id.* at 218.
33. 443 U.S. 256 (1979).

of a stevedore whose liability was limited by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Instead, the Court allowed the plaintiff to collect the entirety of his damages from the shipowner.[34] Notably, the *AmClyde* Court distinguished *Edmonds* based on the fact that "*Edmonds* did not address the issue in this case, the effect of a settlement on nonsettling defendants. Indeed, there was no settlement in that case."[35] For this reason, the Court held that the rationale of *Edmonds* did not prevent a proportionate share set-off in *AmClyde*, because *Edmonds* "merely reaffirm[ed] the well-established principle of joint and several liability"—and as the Court emphasized "there is no tension between joint and several liability and a proportionate share approach to settlements."[36]

The *AmClyde* Court explained that joint and several liability requires a defendant to pay more than his share of the damages "when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency."[37] However, the Court held that joint and several liability does not impose such burdens on a defendant when "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."[38] The *AmClyde* Court reasoned that the proportionate share method provided the most equitable result: just as nonsettling defendants "are not entitled to a reduction in liability when the plaintiff negotiates a generous settlement, so they are not required to shoulder disproportionate liability when the plaintiff negotiates a meager one."[39]

By distinguishing the rationale in *Edmonds*, the *AmClyde* Court emphasized an important distinction between two different types of apportioning fault: first, the type of apportionment that occurs when a court divides the damages owed by two or more nonsettling defendants at the judgment of a trial (a procedure that the Court did not allow in *Edmonds*); and second, apportionment that occurs in the calculation of a proportionate share set-off, which gives a nonsettling defendant the appropriate amount of credit for the plaintiff's settlement with a negligent third party (a procedure that the Court unanimously embraced in *AmClyde*).[40]

34. *Id.* at 271–73.
35. *AmClyde*, 511 U.S. at 220.
36. *Id.*
37. *Id.* at 221.
38. *Id.*
39. *Id.*
40. *See id.* at 220–21.

Under the *AmClyde* Court's rationale, the doctrine of joint and several liability prohibits the former type of apportionment, but not the latter. This Article will revisit the distinction between these two types of apportionment in Part IV, which provides a critique of the *Schadel* court's rejection of *AmClyde*.

B. AmClyde*'s Legacy: the "Proportionate Share" Method Emerges as the General Rule of Setoff in Federal Joint and Several Liability Cases*

After the Supreme Court issued its ruling in *AmClyde*, the case quickly became a staple of everyday maritime practice.[41] As one maritime expert recently commented, "[w]henever there is a partial settlement of a multiparty maritime case, the *McDermott* rule shapes the parties' behavior, and so it is probably no exaggeration to say that *McDermott* is considered by some practicing lawyer somewhere every day."[42]

But, *AmClyde's* influence has not been limited to the field of admiralty. Rather, *AmClyde* is routinely cited and applied in other areas of federal law that employ joint and several liability, such as ERISA, securities fraud, and claims under § 1983 of the Civil Rights Act.[43] And in non-maritime tort claims, the proportionate share approach to partial settlement is generally the rule in states that still adhere to joint and several liability among tortfeasors, and several of those states have arrived at that result by citing and applying *AmClyde*.[44]

Notably, there is one additional area in which courts have often applied *AmClyde*: Jones Act cases.[45] At first blush, this might seem obvious, given that *AmClyde* was an admiralty case. But as the reader will recall, *AmClyde* was *not* a Jones Act case, but a property damage case brought under the general maritime law. Even so, state and federal courts have routinely applied *AmClyde*'s proportionate share method to seamen's personal injury claims brought under maritime theories such as unseaworthiness, and,

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41. *See generally* Davies, *supra* note 7.
42. *Id.* at 12.
43. *Id.*; *see also* cases cited *supra* note 7.
44. Davies, *supra* note 7 at 12; *see also* cases cited *supra* note 7.
45. *See, e.g.*, Great Lakes Dredge and Dock Co. v. Tanker Robert Watt Miller, 92 F.3d 1102 (11th Cir. 1996); Nunez v. B&B Dredging. Inc., 108 F. Supp. 2d 656 (E.D. La. 2000); Slaven v. BP Am. Inc., 958 F. Supp. 1472 (C.D. Cal. 1997); Geyer v. USX Corp., 896 F. Supp. 1440 (E.D. Mich. 1994); Miller v. Int'l. Diving and Consulting Servs., Inc., 669 So. 2d 1246 (La. Ct. App. 5th 1996).

most relevant to this Article, the Jones Act.[46] Presumably, courts were comfortable adopting *AmClyde* in maritime personal injury cases because Jones Act claims (as well as claims for unseaworthiness) are controlled by joint and several liability, just like the claims in *AmClyde*. However, some recent cases have broken this trend and applied the *pro tanto* set-off rule to Jones Act claims.[47] Those decisions followed the Seventh Circuit's approach in *Schadel*, a case addressed below.

III. THE EXCEPTION: FELA AND JONES ACT CASES BEGIN TO ADOPT THE ALTERNATIVE "*PRO TANTO*" METHOD OF SET-OFF

After the Supreme Court issued its ruling in *AmClyde*, lower courts consistently applied the proportionate share method, rather than the *pro tanto* method, in other areas of federal law that call for joint and several liability.[48] But, in the past few years, a line of cases has emerged that has carved out an exception for FELA and Jones Act cases.[49] To explain the emergence of this exception, Part III will provide a brief background of the FELA and the Jones Act, as well as a discussion of the Supreme Court's 2003 decision in *Norfolk v. Ayers* and the Seventh Circuit's 2004 decision in *Schadel v. Iowa Interstate Railroad*.

A. FELA (and the Jones Act): A Brief Primer

A brief background of the FELA is necessary to understand why some courts have rejected *AmClyde*'s proportionate share rule in favor of the *pro tanto* method of set-off. Congress enacted the FELA in 1908 as a fault-based statute designed to compensate railroad workers who had suffered work-related injuries and to "shif[t] part of the 'human overhead' of doing business from employees to their employers."[50] FELA provides a claim for injuries resulting "in whole or in part from the negligence of" the railroad.[51] At the time that the FELA was enacted, workers' compensation laws did not exist for injured employees in other

46. *See* cases cited *supra* note 45.
47. *See* cases cited *supra* note 12.
48. *See* sources cited *supra* note 7.
49. *See* cases cited *supra* note 12.
50. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994) (quoting Tiller v. Atl. Coast Line R. Co., 318 U.S. 54, 58 (1943)); *see also* Victor E. Schwartz & Cary Silverman, *Toppling the House of Cards That Flowed From an Unsound Supreme Court Decision: End Inadmissibility of Railroad Disability Benefits in FELA Cases*, 30 TRANSP. L.J. 105, 112 (2003).
51. 45 U.S.C. § 51 (2006).

industries.[52] Rather, the only method of recovery for injured workers was the common law doctrine of negligence.[53] At the time, common law tort principles made recovery by an injured employee very difficult, as the doctrines of contributory negligence and assumption of the risk often prevented employees from prevailing in court.[54]

Because workers' compensation laws did not exist at the time, Congress crafted the FELA based on common law negligence principles.[55] But, in order to ensure a reasonably reliable compensation system, Congress eased recovery for injured railroad workers by "(1) doing away with both the fellow-servant rule and the doctrine of assumption of risk, and (2) replacing the common law principle of contributory negligence as a complete defense with a rule of comparative negligence."[56] FELA also retains the common law doctrine of joint and several liability, meaning an injured worker can recover the entirety of his damages from a railroad, even if the worker's injury was caused jointly by the fault of the railroad and a third party.[57]

So far, this Part has focused on the FELA. But all of the above FELA standards apply with equal force to another federal statute: the Jones Act. The Jones Act was passed in 1920 to grant injured seamen a cause of action against their employers for negligence.[58] The Jones Act states that "[l]aws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."[59] In other words, the Jones Act grants injured seamen the right to seek damages against their employers under the same standards by which the FELA allows claims by railroad employees.[60] Thus, the key features of the FELA discussed above—the abolition of traditional common law defenses and the retention of joint and several liability—apply with equal force under the Jones Act.[61] This highlights "an important

52. *See* Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 SAN DIEGO L. REV. 49, 50 (1988); Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 82 (1992).

53. *See* Phillips, *supra* note 52, at 50.

54. *See id.*; Baker, *supra* note 52, at 82; *see also* CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2638 (2010).

55. *See* Baker, *supra* note 52, at 80–82.

56. *Id.* at 82.

57. *See* Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 138 (2003).

58. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 6-21 (5th ed. 2011).

59. 46 U.S.C.A. § 30104 (West Supp. 2011).

60. SCHOENBAUM, *supra* note 58, at § 6-21.

61. *Id.*

lesson for the maritime lawyer: any decision interpreting the FELA is a 'must read' for the maritime lawyer because of the Jones Act's incorporation of the FELA."[62]

B. Norfolk v. Ayers*: The Supreme Court Reaffirms Joint and Several Liability for FELA Cases*

One of the Supreme Court's most recent interpretations of the FELA came in its 2003 decision in *Norfolk & Western Railway Company v. Ayers*.[63] That case is probably best known for its holding that mental anguish damages resulting from the fear of developing cancer may be available under the FELA by a railroad worker who has been exposed to asbestos.[64] However, relevant to this Article, the *Ayers* Court also addressed a second question: when there is evidence that a plaintiff's injury has non-railroad causes, does the FELA permit reasonable apportionment so that the railroad is responsible only for those damages attributable to its own negligence?[65] The careful reader will notice that this question, presented in *Ayers*, is distinguishable from the subject of this Article in an important way: it mentions nothing about settlement. In Part III, this Article will argue that this distinction makes *Ayers* irrelevant to the question of determining proper set-off rules. Nevertheless, some courts have recently cited the rationale of *Ayers* as justification for applying the *pro tanto* method in FELA cases. Therefore, a thorough discussion of the Court's holding in *Ayers* is appropriate.

In *Ayers*, six former employees of Norfolk & Western Railway who suffered from asbestosis brought FELA claims to recover damages they suffered as a result of exposure to asbestos.[66] At the end of trial, Norfolk requested that the court "instruct the jury to apportion damages between Norfolk and other employers alleged to have contributed to [the plaintiffs'] disease."[67] The trial court denied this request and instructed the jury "'not to make a deduction for the contribution of non-railroad exposures,' so long as it found that Norfolk was negligent and that 'dust exposures at [Norfolk] contributed, however slightly, to the plaintiff's injuries.'"[68] The jury awarded damages to all six plaintiffs,

62. FRANK L. MARAIST, THOMAS C. GALLIGAN, JR., & CATHERINE M. MARAIST, CASES AND MATERIALS ON MARITIME LAW 488 (2d ed. 2009).
63. 538 U.S. 135 (2003).
64. *Id.* at 157–59.
65. *Id.* at 159–60.
66. *Id.* at 140.
67. *Id.* at 143.
68. *Id.* at 144.

resulting in a total of $4.9 million owed by Norfolk. The trial court denied Norfolk's motion for a new trial and the Supreme Court of Appeals of West Virginia denied Norfolk's request for discretionary review.

On appeal before the Supreme Court, Norfolk argued that the trial court erred in instructing the jury not to make a deduction from the damages award for the contribution of non-railroad asbestos exposures. The Supreme Court disagreed and affirmed the ruling of the trial court.[69] In reaching this conclusion, the Court began by reciting the relevant portion of the FELA:

> Every common carrier by railroad while engaging in [interstate commerce], shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of . . . such carrier . . . .[70]

Applying this language, the Supreme Court reasoned that "[t]he claimants here suffer from asbestosis (an 'injury'), which is linked to their employment with Norfolk and 'result[ed] in whole or in part from . . . negligence' by Norfolk. Norfolk is therefore 'liable in damages . . . *for such injury*.'"[71] The Supreme Court therefore concluded Norfolk was liable for the entire damages award because "[n]othing in the statutory text instructs that the amount of damages payable by a liable employer bears reduction when the negligence of a third party also contributed in part to the injury-in-suit."[72]

The crux of the Court's reasoning in *Ayers* was based on the FELA's retention of joint and several liability. The Court went to great length to document the fact that "the federal and state reporters contain numerous FELA decisions stating that railroad employers may be held jointly and severally liable for injuries caused in part by the negligence of third parties."[73] Thus, the Court reaffirmed that "joint and several liability is the traditional rule [in FELA cases]" and concluded that

> [o]nce an employer has been adjudged negligent with respect to a given injury, it accords with the FELA's overarching purpose to require the employer to bear the burden of identifying other responsible parties and

69. *Id.* at 166.
70. 45 U.S.C. § 51 (2006).
71. *Ayers*, 538 U.S. at 160.
72. *Id.*
73. *Id.* at 162 (citing numerous state and federal cases).

> demonstrating that some of the costs of the injury should be spread to them.[74]

As that last quote by the Court suggests, much of the Court's rationale in *Ayers* hinged on the fact that FELA defendants, if found liable to the plaintiff, would possess a right of contribution against third party tortfeasors. Citing numerous state and federal cases, the Court stressed that "FELA defendants may bring indemnification and contribution actions against third parties under otherwise applicable state or federal law."[75] The Court also pointed out that "FELA defendants may be able to implead third parties and thus secure resolution of their contribution actions in the same forum as the underlying FELA actions."[76] The Court's holding in *Ayers* emphasized that a FELA defendant, having been found answerable for the entirety of a plaintiff's injuries, will be given the opportunity to "demonstrate[e] that some of the costs of the injury should be spread to [third parties]."[77]

C. Schadel v. Iowa Interstate Railroad*: An Exception to the "Proportionate Share" Method Emerges for FELA and Jones Act Cases*

In 2004, a little over a year after the Supreme Court decided *Ayers*, the Seventh Circuit issued its ruling in the FELA case *Schadel v. Iowa Interstate Railroad*.[78] In that case, the Seventh Circuit reasoned that the proportionate share method of set-off was inconsistent with the purpose of the FELA and the rationale of *Ayers*.[79] Therefore, the *pro tanto* method is the proper way to calculate set-offs for nonsettling defendants in FELA cases, the court held.[80] The Seventh Circuit's opinion in *Schadel* is notable not only for its holding, but for its influence—out of the handful of jurisdictions that have addressed the set-off issue in subsequent FELA cases, almost all of them have adopted *Schadel*'s *pro tanto* approach.[81] Although these cases purport to follow the Supreme Court's rationale in *Ayers*, *Schadel* and its progeny represent a fundamental misreading of *Ayers* and a departure from the

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74. *Id.* at 165.
75. *Id.* at 162 (citing numerous state and federal cases).
76. *Id.* at 165 n.23 (citing as examples Ellison v. Shell Oil Co., 882 F.2d 349, 350 (9th. Cir 1989); Engvall v. Soo Line R. Co., 632 N.W.2d 560, 563 (Minn. 2001)).
77. *Id.* at 165.
78. *See* Schadel v. Iowa Interstate R.R., Ltd., 381 F.3d 671 (7th Cir. 2004).
79. *Id.* at 675–76.
80. *Id.* at 678.
81. *See supra* note 12 and accompanying text.

Supreme Court's well-settled rule espoused in *AmClyde*.[82] For these reasons, the Seventh Circuit's opinion in *Schadel* deserves considerable attention.

The facts of *Schadel* are relatively straightforward. Douglas Schadel, a conductor for Iowa Interstate Railroad (IAIS), prepared to board an IAIS train that was stopped at a railroad crossing.[83] All of a sudden, a vehicle driven by Brenda Kowalewicz flew toward the railroad crossing, crashed through the gates, and struck Schadel, propelling him into a nearby ditch.[84] Schadel suffered serious knee injuries and was no longer able to work as a conductor.[85]

Schadel filed suit in the Northern District of Illinois, suing the railroad under the FELA and Kowalewicz under state law.[86] The railroad filed cross-claims against Kowalewicz for contribution.[87] Before the case went to trial, Schadel settled with Kowalewicz for $100,000.[88] Thereafter, in accordance with state law, the district court dismissed Kowalewicz from the case with prejudice, thereby extinguishing the railroad's claims against her for contribution.[89]

At the jury trial on Schadel's FELA claim against the railroad, the district court did not allow the railroad to present any evidence or argument about the Kowalewicz settlement.[90] At the end of the trial, the court instructed the jury to assign fault only to Schadel or the railroad.[91] The jury found Schadel's overall damages to be $450,000.[92] It found he was 50% contributorily negligent, which reduced his recoverable damages to $225,000. Applying a *pro tanto* set-off method, the court then reduced that number to $125,000 to account for the settlement.[93] Finally, by agreement of the parties, the court added another $5,000 to account for a loss of consortium claim brought by Mrs. Schadel, resulting in a final total of $130,000 due from the railroad.[94]

On appeal before the Seventh Circuit, the railroad argued that the district court erred by applying a *pro tanto* set-off, contending the court should have followed *AmClyde* and applied a

82. *See infra* Part III.
83. *Schadel*, 381 F.3d at 673.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 674.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

proportionate share set-off.[95] The Seventh Circuit disagreed, holding that the proportionate share approach was inconsistent with the Supreme Court's opinion in *Ayers*.[96] The court started by posing a hypothetical to illustrate the effect of applying the proportionate fault method: suppose the jury was allowed to apportion fault, and found Kowalewicz's reckless driving was responsible for 80% of the damages, the railroad was responsible for 10%, and Schadel himself was responsible for 10%.[97] "Applying those proportions to the overall figure of $450,000, that would mean that Kowalewicz should have paid $360,000; that [the railroad] would pay $45,000, and that Schadel would have absorbed $45,000 of the loss (for his own negligence) before taking the settlement into account."[98] With these numbers in mind, the Seventh Circuit concluded that "Schadel would wind up substantially under-compensated under this regime, because he would also be left [to absorb] $260,000 of Kowalewicz's liability. This strikes us as, at best, in serious tension with the rule of joint and several liability that applies to FELA cases."[99]

The Seventh Circuit perceived such tension in spite of the Supreme Court's emphasis in *AmClyde* that "there is no tension between joint and several liability and a proportionate share approach to settlements."[100] The Seventh Circuit only briefly addressed *AmClyde* and ultimately held that the case was not applicable to FELA claims.[101] In reaching this conclusion, the Seventh Circuit did not discuss the facts or analysis of *AmClyde*. Rather, in a puzzling fashion, the Seventh Circuit cited an earlier Supreme Court case, *Edmonds v. Compagnie Generale Transatlantique*,[102] as evidence that *AmClyde* was not controlling in FELA cases.[103] The logic of the Seventh Circuit's conclusion on this point is far from clear and will be discussed in more depth in Part IV. In the end, citing the principles of joint and several liability and the Supreme Court's approach in *Ayers*, the Seventh Circuit concluded that the *pro tanto* approach was the correct set-off rule for FELA cases.[104]

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95. *Id.* at 675.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 675–76.
100. McDermott, Inc. v. AmClyde, 511 U.S. 202, 220 (1994).
101. *Schadel*, 381 F.3d at 678.
102. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).
103. *Schadel*, 381 F.3d at 678.
104. *Id.*

Schadel was the first case to address whether *Ayers* affected a FELA defendant's right to receive a proportionate share set-off for the plaintiff's settlement with a negligent third party. After the Seventh Circuit issued this ruling, several other jurisdictions addressed the same issue in subsequent FELA and Jones Act cases.[105] Almost all of these courts, including the Fourth Circuit and the Supreme Court of Ohio, have adopted *Schadel*'s approach and applied the *pro tanto* method.[106] Because *Schadel* has become the "go to" case on this issue, *Schadel* is the case to which this Article will devote the most attention.

IV. MAKING SENSE OF THE EXCEPTION FOR FELA AND JONES ACT CASES: A CRITIQUE OF *SCHADEL*

After the United States Supreme Court embraced the proportionate share rule in *AmClyde*, "the legal system largely followed suit,"[107] especially in areas of federal law that call for joint and several liability.[108] However, *Schadel* and its progeny declined to follow *AmClyde*, giving rise to an exception to the general rule. Part III provides a critique of that exception. First, this Part explains the differences between two distinct concepts: on the one hand, the allocation of fault between nonsettling defendants; and on the other hand, the calculation of a proportionate set-off to give a nonsettling defendant credit for the contributions of a settling defendant. Then, this Part will discuss the ways the *Schadel* court conflated these two concepts, resulting in a misreading of both *AmClyde* and *Ayers.*

A. "Apportionment of Liability": One Phrase, Multiple Meanings

Much of the Seventh Circuit's opinion in *Schadel* focuses on the phrase "apportionment of liability." Because the Supreme Court in *Ayers* held that apportionment of liability was not allowed under the FELA, the Seventh Circuit reasoned that a proportionate share set-off would also be inconsistent with the FELA. This rationale by the Seventh Circuit ignored the fact that the *Ayers* holding referred to apportionment in the context of *nonsettling* defendants. Such an oversight is of no small consequence, for

105. *See* cases cited *supra* note 1.

106. *See, e.g.*, Benson v. CSX Transp., Inc., 274 Fed. App'x 273 (4th Cir. 2008); Hess v. Norfolk Southern Ry. Co., 835 N.E.2d 679 (Ohio 2005).

107. Michael J. Sturley, *Vicarious Liability for Punitive Damages*, 70 LA. L. REV. 501, 526 (2010).

108. *See supra* Part II.B.

apportionment has drastically different implications in the context of calculating a proportionate share set-off. To understand where the *Schadel* court went wrong, it is important to understand the distinctions between apportionment among nonsettling defendants, and apportionment for purposes of calculating a proportionate settlement credit.

The first example of the "apportionment of liability" occurs in the context of comparative negligence, when a fact-finder determines the amount of damages owed by each tortfeasor (none of whom have settled) by calculating the shares of fault attributable to each defendant as well as to the plaintiff.[109] But this is not the only time that a court employs apportionment. The phrase "apportionment of liability" is also used in the context of calculating settlement credits.[110] Under *AmClyde*'s proportionate share method of set-off, a court is required to assign the percentages of liability for each party. Courts and commentators often use the phrase "apportionment of liability" to refer to both of the above procedures.[111] However, in spite of the shared terminology, the two procedures have drastically different implications.

The first of these procedures, apportionment among nonsettling tortfeasors, is precisely what the defendant railroad requested in *Ayers*. The railroad requested that the court abandon the rule of joint and several liability by requiring an initial allocation of fault among third parties who were not before the court (such as prior or subsequent employers or asbestos manufacturers or suppliers), such that the railroad would be liable only for the portion of damages attributable to its employment of the plaintiffs.[112] The *Ayers* Court rejected the railroad's request, holding such an approach would force the plaintiff to bear the burden of identifying negligent third parties.[113] Under the doctrine of joint and several liability, this is a burden the defendant must bear, the Court reasoned.[114] The need for the defendant to carry this burden distinguishes the *Ayers* scenario from settlement scenarios, discussed below.

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109. *See, e.g.*, Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135 (2003) (defendant railroad, having been found liable for the plaintiff's asbestosis, requested an allocation of fault among itself and other potentially negligent third parties, such as prior or subsequent employers or asbestos manufacturers); *see generally* David Robertson, *Eschewing Ersatz Percentages: A Simplified Vocabulary of Comparative Fault*, 45 ST. LOUIS U. L.J. 831 (2001) (discussing the underlying principles behind apportionment and comparative fault).

110. *See, e.g.*, McDermott, Inc. v. AmClyde, 511 U.S. 202, 217 (1994).

111. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 1, 16 (2000).

112. *Ayers*, 538 U.S. at 143–44.

113. *Id.* at 165.

114. *Id.*

When a court calculates a proportionate share set-off, the court applies the fact-finder's assignment of fault among tortfeasors in order to provide a nonsettling defendant with a settlement credit proportionate to the fault of a settling tortfeasor. This is the procedure the Supreme Court unanimously embraced in *AmClyde*.[115] Unlike the *Ayers* scenario above, a proportionate share set-off does not violate joint and several liability. The Supreme Court made this very clear in *AmClyde*.[116] The proportionate share set-off does not place a burden on the plaintiff to identify negligent third parties. Rather, the plaintiff has already recovered from those third parties, and by his own choice has extinguished the portion of the liability attributable to those third parties. Under the proportionate share rule, the defendant still bears the burden of compensating the plaintiff for the portion of injury caused by insolvent tortfeasors, but the defendant will not be forced to bear the cost of the plaintiff's own decision to settle for too little.

Keeping the distinctions between these two types of apportionment in mind, this Part will now analyze *Schadel* and examine that case's misreading of *Ayers* and its misguided adoption of the *pro tanto* rule.

B. Schadel*: Misreading* Ayers *and Misunderstanding Apportionment*

The *Schadel* court adopted the *pro tanto* rule based on an inherently flawed reading of both *Ayers* and *AmClyde.* The court misread *Ayers* when it reasoned that the *Ayers* rationale makes sense in the context of settlement. And it misread *AmClyde* when it attempted to distinguish that case and the Supreme Court's earlier decision in *Edmonds v. Compagnie General Transatlantique*.

Schadel contended that "*Ayers*, as we have already noted, addressed a question very close to the one before us, insofar as it dealt with the way that liability could be apportioned under [FELA]."[117] This statement illustrates one of the biggest flaws in the *Schadel* court's rationale. The court makes a fatal mistake by conflating the two distinct versions of apportionment discussed above—apportionment among nonsettling tortfeasors, as rejected by *Ayers*, and the calculation of a proportionate set-off, as embraced by *AmClyde.* The scenario in *Schadel* clearly involved the latter, for the defendant requested that it receive a credit for the settlement of the other defendant, and that this credit be calculated

115. *See generally AmClyde*, 511 U.S. 202.
116. *Id.* at 220–21.
117. Schadel v. Iowa Interstate R.R., Ltd., 381 F.3d 671, 676 (7th Cir. 2004).

in proportion to the settling defendant's share of the fault.[118] As explained in the discussion above, although the calculation of such a set-off does require apportionment, this is clearly not the same type of apportionment the Court rejected in *Ayers*.

Schadel also reasoned that "[t]he fact that the [*Ayers*] Court rejected a rule under which the railroad's liability would be reduced by the negligence of third-party tortfeasors is of no small interest to us here, since that is exactly what IAIS wants—a reduction in its liability directly tied to Kowalewicz's negligence."[119] Here, the *Schadel* court again oversimplifies the analysis, resulting in confusion over the purpose of a settlement credit. The *negligence* of a third party tortfeasor is *not* the basis for a court's issuance of a settlement credit to the nonsettling defendant. Rather, the *settlement* of the third party forms the basis for the set-off. This distinction is made clear by the separate approaches the Supreme Court takes in *AmClyde* and *Ayers*.

After discussing *Ayers*, the *Schadel* court explained why it felt *AmClyde* was not applicable to the FELA.[120] The court's justification for rejecting *AmClyde* is perplexing, to say the least. *Schadel* declined to follow *AmClyde* based on that case's discussion of an earlier maritime case, *Edmonds v. Compagnie Generale Transatlantique*.[121] In *Edmonds*, the Supreme Court rejected a shipowner's request for a reduction in liability for the proportionate fault attributed to a stevedore whose liability was limited by the Longshoremen's and Harbor Worker's Compensation Act (LHWCA). Instead, the plaintiff in *Edmonds* was permitted to collect from the shipowner the entirety of his damages, after adjusting for the plaintiff's own negligence.[122] The *AmClyde* Court, in embracing the proportionate share set-off method, distinguished *Edmonds* for a very simple reason: the third party tortfeasor in *Edmonds* had not settled.[123] Therefore, under the rule of joint and several liability, the shipowner was answerable for the entirety of the plaintiff's damages. For this reason, the *AmClyde* Court held that *Edmonds* "merely reaffirm[ed] the well-established principle of joint and several liability," a doctrine that the Supreme Court emphasized is entirely consistent with the proportionate share set-off rule.[124]

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118. *Id.* at 674.
119. *Id.* at 676.
120. *Id.* at 678.
121. *Id.*
122. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).
123. McDermott, Inc. v. AmClyde, 511 U.S. 202, 220–21 (1994).
124. *Id.*

Ironically, the *Schadel* court quoted this portion of *AmClyde*, discussing *Edmonds*, as grounds for rejecting the proportionate share rule.[125] This justification is extremely puzzling. *AmClyde's* statements regarding *Edmonds* illustrate exactly why *AmClyde* should control, not the other way around. The *Schadel* court's explanation of *AmClyde* and *Edmonds* seems confused, to say the least. It seems that the Seventh Circuit was of the belief that the facts of *Schadel* made the case more akin to *Edmonds* than to *AmClyde*. But the exact opposite is true, and *AmClyde* itself explains why—"*Edmonds* did not address the issue in [*AmClyde*], the effect of a settlement on nonsettling defendants."[126] For this reason, the Supreme Court held that the rationale of *Edmonds* was not applicable to the Court's calculation of settlement credits. The same logic illustrates why the rationale of *Ayers* should not have controlled in *Schadel*. Like *Edmonds*, the Court's opinion in *Ayers* "merely reaffirm[ed] the well-established principle of joint and several liability."[127] As *AmClyde* points out, joint and several liability does not prevent the application of a proportionate share set-off.[128] The *Schadel* court suggested otherwise, evidencing an inherently flawed reading of *AmClyde*.

C. Settlement is Different: The Bar on Contribution

As discussed above, *Ayers* is not inconsistent with *AmClyde*. In fact, a better view is to look at *Ayers* and *AmClyde* as complementing each other; both cases adhere to the doctrine of joint and several liability as it applies to two entirely different circumstances.

On the one hand, in the absence of a settlement, a defendant is not entitled to an initial allocation of fault to reduce his liability for the fault of other non-settling entities. *Ayers* makes clear that in this scenario, joint and several liability applies, allowing a plaintiff to recover the entirety of his damages from the FELA–Jones Act defendant. *Ayers* also makes clear that in this scenario, if the nonsettling defendant is found liable, he will be able to pursue a claim for contribution against negligent third parties who contributed to the plaintiff's injury.[129]

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125. *Schadel*, 381 F.3d at 678 ("These final comments about *Edmonds* [by the *AmClyde* Court], coupled with the approach in *Ayers*, persuade us that the *pro tanto* approach effectively used by the district court is the correct one for a FELA case.").

126. *AmClyde*, 511 U.S. at 220.

127. *Id.*

128. *Id.* at 220–21.

129. Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 165 (2003).

On the other hand, if there has been a settlement, the nonsettling defendant is entitled to a proportionate share reduction for the settling tortfeasor's responsibility. *AmClyde* makes clear that "there is no tension between joint and several liability and a proportionate share approach to settlements."[130]

The importance of adhering to this bifurcated analysis becomes clear when one considers the contribution rights that a nonsettling defendant possesses in each of the above scenarios. This is vital because *Ayers* recognizes that FELA–Jones Act defendants are entitled to spread liability to negligent third parties: "Once an employer has been adjudged negligent with respect to a given injury, it accords with the FELA's overarching purpose to require the employer to bear the burden of identifying other responsible parties and demonstrating that some of the costs of the injury should be spread to them."[131]

When there has been no settlement, *Ayers* makes clear the nonsettling defendant can achieve this spreading of costs by seeking contribution from the negligent third party, who can be impleaded in the underlying FELA action.[132] But when there has been a settlement, contribution will not be available to the FELA defendant looking to spread costs to a negligent third party who settled for less than its proportionate share. As a matter of law, once the negligent third party extinguishes his liability to the plaintiff through a settlement, the settling defendant will be immune from claims for contribution from the FELA defendant.[133] The same is true under the Jones Act.[134]

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130. *AmClyde*, 511 U.S. at 220.

131. *Ayers*, 538 U.S. at 165.

132. *Id.* at n.23.

133. In FELA claims, it is well settled that a defendant railroad's right to recover contribution from a third party is governed by state law. *See, e.g.*, Shields v. Consol. Rail Corp., 810 F.2d 397, 399 (3d Cir. 1987) ("Our analysis of the merits begins by recognizing that third-party actions for contribution arising out of FELA claims are governed by state law."). The vast majority of states do not allow a party to recover contribution from a defendant who has already settled. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 15-108(b) (McKinney 2010) ("A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules."); *see also* Jean Macchioroli Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions*, 73 TEX. L. REV. 1701, 1707 (1995) (surveying state approaches to contribution and concluding that the vast majority do not allow contribution actions against defendants who have already settled).

134. The Jones Act applies only to a seaman's claim against his or her employer; "the seaman's claim against others is governed by general maritime tort law, if the tort is maritime, or by state law." FRANK L. MARAIST, THOMAS C.

Although the Seventh Circuit in *Schadel* purported to follow the rationale of *Ayers*, this bar on contribution illustrates that the *pro tanto* method is inconsistent with the *Ayers* Court's emphasis that a jointly and severally liable FELA defendant will be afforded the opportunity to spread the costs of the plaintiff's injury to other negligent third parties. Because a settling defendant is immune from claims for contribution, the *pro tanto* method makes it impossible for a nonsettling defendant to spread the costs to tortfeasors who have settled for less than their share of the damages.

The Seventh Circuit in *Schadel* was seemingly unaware that such contribution actions are generally barred, for the court contended that the nonsettling defendant's contribution rights presented a "far too complex" question that it expressly reserved "for another day."[135] Elsewhere in the opinion, the Seventh Circuit cited *Ayers* for the proposition that such contribution actions *are* allowed.[136] This represents yet another example of *Schadel*'s misreading of *Ayers* and its confusion over the distinctions present in the settlement context. The *Ayers* Court did encourage FELA defendants to seek contribution from negligent third parties as a means of alleviating the burden of joint and several liability. But, *Ayers* did so in a scenario that did not involve settlement. When a negligent third party has settled with the plaintiff, such claims for contribution are generally not available.[137] And because the *Ayers*

GALLIGAN, & CATHERINE M. MARAIST, ADMIRALTY IN A NUTSHELL 248 (6th ed. 2010). As discussed in *supra* note 133, under the majority state law rule, once the seaman settles with a defendant, that defendant is relieved from liability to other defendants for contribution. The rule is the same under the general maritime law. *See AmClyde*, 511 U.S. at 211–12 (holding that contribution actions against settling defendants should not be allowed, because allowing such actions would "discourage[] settlement and lead[] to unnecessary ancillary litigation").

135. Schadel v. Iowa Interstate R.R., Ltd., 381 F.3d 671, 678–679 (7th Cir. 2004). As discussed in *supra* note 133, in FELA cases, state law governs such actions for contribution. In spite of the Seventh Circuit's comments, it seems clear that Illinois law (the applicable state law in *Schadel*) precluded the defendant railroad from recovering contribution from the settling defendant. *See* 740 ILL. COMP. STAT. ANN. 100/2(d) (West 2010) ("The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor.").

136. *Schadel*, 381 F.3d at 676 ("The [*Ayers*] Court was clear that [its prohibition of apportionment] did not preclude railroads from seeking contribution or indemnity from those other tortfeasors, 'under otherwise applicable state or federal law,' . . . but the railroad's own responsibility was affected only by the plaintiff's comparative negligence.").

137. *See supra* note 133.

rationale hinged so heavily on the fact that FELA defendants are capable of spreading costs by impleading third parties, the analysis necessarily must change when the negligent third party has settled, as in *Schadel*.

AmClyde's proportionate share method of set-off solves this problem by providing an equitable method of spreading costs among responsible parties. Under this rule, a FELA or Jones Act defendant will be responsible for the plaintiff's damages (including portions attributable to insolvent tortfeasors), subject only to reductions for the proportionate share of third parties with whom the plaintiff has settled. If the plaintiff reaches a favorable settlement with such third parties, the plaintiff will enjoy a windfall, for he will be able to collect from the nonsettling FELA defendant an amount greater than is required to make the plaintiff whole.[138] Likewise, if the plaintiff agrees to an unwise settlement, he will suffer the loss, rather than the nonsettling defendant who was not a party to the settlement agreement. This provides an efficient and equitable method of sharing costs among responsible parties. For this reason, the spreading of costs by *AmClyde*'s proportionate share rule is consistent with *Ayers*, not barred by *Ayers*.

D. The Remedial Purpose of the FELA Does Not Justify a Departure from AmClyde

So far, this Article has critiqued *Schadel* based on that case's inconsistency with prior Supreme Court precedent. But *Schadel* and its progeny have also justified their adoption of the *pro tanto* rule based on policy grounds—namely, the argument that the *pro tanto* rule is more consistent with the purposes of the FELA and the Jones Act. This Part discusses such policy arguments and concludes that the goals of the FELA and the Jones Act do not justify a departure from the Supreme Court's decision in *AmClyde.*

Illustrative of this policy approach is the Supreme Court of Ohio's 2005 decision in *Hess v. Norfolk Southern Railway Co.*[139] That case applied the *pro tanto* set-off method to a plaintiff's asbestos claim under the FELA. In that case, the court discussed both *Ayers* and *Schadel*, but ultimately based its conclusion on policy grounds. The *Hess* court conceded that *Ayers* did not address the calculation of settlement credits.[140] Likewise, *Hess* conceded that "a proportionate-share approach to settlements is not

138. *See* McDermott, Inc. v. AmClyde, 511 U.S. 202, 221 (1994).
139. 835 N.E.2d 679 (Ohio 2005).
140. *Id.* at 689.

generally inconsistent with joint and several liability."[141] Nevertheless, the *Hess* court applied the *pro tanto* rule. The court reasoned that a *pro tanto* set-off was more consistent with the objectives of FELA than the *AmClyde* approach.[142] In enacting the FELA, "Congress was much more concerned with assuring the employee's complete recovery than it was with fairness in loss allocation among multiple tortfeasors," the *Hess* court contended.[143] The court further reasoned that because the FELA guarantees "full recovery against a railroad whose negligence played only the slightest part in an employee's injury or death, while providing for apportionment of responsibility only between employer and employee based on comparative fault, the statute plainly envisions that the employer may be forced to shoulder disproportionate liability when other parties are partially at fault."[144]

This rationale by the court in *Hess*, if nothing else, is refreshing for its candor. Unlike the Seventh Circuit's holding in *Schadel*, the opinion in *Hess* makes perfectly clear that its holding is grounded on policy, not on precedent. However, the policy rationale applied in *Hess* does not justify a departure from the established Supreme Court precedent of *AmClyde*.

Hess correctly points out that the principal policy objective of the FELA was to ease recovery for injured railroad employees by eliminating traditional common law defenses.[145] However, the *Hess* opinion is somewhat misleading when it asserts that one of the policies embodied in the FELA is "ensuring *full* recovery against a railroad whose negligence played only the slightest part in an employee's injury or death."[146] Although the doctrine of joint and several liability is certainly the rule in FELA cases, this policy is not found in the text of the FELA. Rather, because the FELA does not speak to the issue, courts have held that the FELA merely adopted the common law rule—joint and several liability.[147]

Because the origin of such policy is not the FELA itself, but the common law, *Hess* went too far by adopting the *pro tanto* rule as a matter of FELA policy. The Supreme Court has repeatedly held that because the FELA "is founded on common-law concepts of negligence and injury," courts interpreting the FELA must lend

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141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *See id*. at 686–87; *see also* Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542–44 (1994) (discussing the history of the FELA).
146. *Hess*, 835 N.E.2d at 689 (emphasis added).
147. *See* Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135 (2003).

"great weight" to the common law rule, unless that rule is "expressly rejected in the text of the statute."[148] The same analysis applies under the Jones Act.[149] The text of the FELA says nothing about joint and several liability, or about how damages should be divided between a settling defendant and a nonsettling defendant. In such a situation, the Supreme Court has made clear that judges should look to the common law for answers.[150]

AmClyde and its proportionate share rule represent the clear federal common law approach for calculating settlement credits. *AmClyde* is the first and last time that the Supreme Court has spoken on the issue. *AmClyde*'s approach has since become the majority rule under both state and federal laws that still apply joint and several liability.[151] This well-established rule should not be abrogated simply because of the FELA's remedial purpose; as the Supreme Court has emphasized, although the FELA was drafted with a clear goal in mind, "[i]t does not follow, however, that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees."[152] Under the Supreme Court's approach to interpreting the FELA, because the statute does not speak to the issue of third party liability or settlement credits, the remedial goals of the FELA and the Jones Act do not warrant an abrogation of the well-established common law rule of *AmClyde.* Therefore, in FELA and Jones Act cases, courts should apply the proportionate share method of set-off, rather than the *pro tanto* method.

148. *Gottshall*, 512 U.S. at 544 ("Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision."); *see also, e.g.*, Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 168 (2007) ("The fact that the common law applied the same causation standard to defendant and plaintiff negligence, and FELA did not expressly depart from that approach, is strong evidence against Missouri's disparate standards."); Monessen S.W. Ry. Co. v. Morgan, 486 U.S. 330, 337–38 (1988) (holding that, because FELA abrogated some common law rules explicitly but did not address "the equally well-established doctrine barring the recovery of prejudgment interest, . . . we are unpersuaded that Congress intended to abrogate that doctrine sub silentio.").

149. *See, e.g.*, Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1430 (5th Cir. 1988) ("[W]e must construe the FELA, and hence the Jones Act, consistent with the common law, except where the statute explicitly departs from the common law or has been judicially construed to do so.").

150. *Gottshall*, 512 U.S. at 544; *Sorrell*, 549 U.S. at 168.

151. *See* sources cited *supra* note 7.

152. *Sorrell*, 549 U.S. at 171.

V. CONCLUSION: COURTS SHOULD REAFFIRM *AMCLYDE* AS THE PROPER RULE IN FELA AND JONES ACT CASES

The debate over the best way to calculate settlement credits is not a new one. For many years, courts disagreed over whether the *pro tanto* rule or the proportionate share method provided the best set-off rule. But once the Supreme Court expressed its preference for the proportionate share method in *AmClyde*, the debate all but ended. Both state and federal courts joined the Supreme Court's approach, embracing *AmClyde* as the general rule for calculating set-offs.

But shortly after the Supreme Court issued its opinion in the 2003 case of *Ayers*, the debate was suddenly reignited. Even though *Ayers* did not speak to the set-off issue, the Seventh Circuit in *Schadel* held that the rationale of *Ayers* necessitated a different approach for FELA and Jones Act cases. Several other jurisdictions have agreed. These courts are in error. Their holdings are a result of a misreading of *Ayers*. Again, *Ayers* said nothing about calculating settlement credits, and ultimately, like *Edmonds*, "merely reaffirm[ed] the well-established principle of joint and several liability."[153] And as the Supreme Court has emphasized, "there is no tension between joint and several liability and a proportionate share approach to settlements."[154] Therefore, the Supreme Court's decision in *Ayers* provides no justification for abrogating the well-established proportionate share set-off rule.

As one prominent maritime scholar recently observed, after the Supreme Court adopted the proportionate share rule in *AmClyde*, "the legal system largely followed suit."[155] FELA and Jones Act cases should not be exceptions. In future FELA and Jones Act cases, courts should decline to adopt the *Schadel* approach, and instead adhere to the Supreme Court's decision in *AmClyde.*

153. McDermott, Inc. v. AmClyde, 511 U.S. 202, 220 (1994).
154. *Id.*
155. Sturley, *supra* note 107, at 526.