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Solidarity and Contribution in Maritime Claims

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I. INTRODUCTION

Four years ago, this university's law review criticized the confusion in the maritime law in several important areas of daily practice, including the difficult problem of fairly crediting partial settlements in multi-defendant litigation.[1] In the intervening period, the Supreme Court of the United States has been busy about its maritime responsibilities, addressing questions of seaman's status,[2] longshore negligence,[3] forum non conveniens in the domestic maritime context,[4] the "true doubt" rule under the Administrative Procedure Act in the context of the Longshore and Harbor Workers' Compensation Act (LHWCA),[5] and selection of fault-proportional credit as the guiding principle for solution of contribution problems among multiple maritime defendants.[6] As a practical matter, the adjustment of responsibility among several defendants or potentially liable parties is a matter receiving intensive daily attention in the corporate offices, law firms, and courthouses that deal with maritime cases, since resolution of most disputes must await identification of the resources with which to fund both final judgments and settlements. The Supreme Court's opinion in *McDermott, Inc. v. AmClyde*[7] does not purport to reveal long-hidden wisdom or to invoke a principle derived from the days before steam. It exemplifies judicial lawmaking as a dispute-resolving selection among alternatives, and in so doing, provides a principle with which practitioners can address the daily problems of solidarity and contribution among multiple maritime tortfeasors.

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* This paper addresses questions of joint and several liability and contribution among tortfeasors in the context of maritime causes of action for collision, property damage and personal injury. It does not address questions of contractual indemnity or liability. Particular attention is given to McDermott, Inc. v. AmClyde, 114 S. Ct. 1461 (1994).

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1. Gus A. Schill, Jr., *Recent Developments Regarding Maritime Contribution and Indemnity*, 51 La. L. Rev. 975, 987 (1991).

2. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 111 S. Ct. 807 (1991); Southwest Marine, Inc. v. Gizoni, 112 S. Ct. 486 (1991).

3. Howlett v. Birkdale Shipping Co., S.A., 114 S. Ct. 2057 (1994).

4. American Dredging Co. v. Miller, 114 S. Ct. 981 (1994).

5. Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S. Ct. 2251 (1994). The LHWCA is codified at 33 U.S.C. §§ 901-950 (1988).

6. McDermott, Inc. v. AmClyde, 114 S. Ct. 1461 (1994).

7. 114 S. Ct. 1461 (1994).

II. POLICY OBJECTIVES

In approaching the problem of reconciling the interests of plaintiffs, defendants, and society in the problem of partial settlements among parties to multi-defendant, multi-liability litigation, the Supreme Court articulated three "paramount" considerations.[8] These considerations are (1) consistency with the proportionate fault approach of *United States v. Reliable Transfer Co.*,[9] (2) promotion of settlement, and (3) judicial economy. *Reliable Transfer Co.* is a collision case in which the Supreme Court abandoned the divided damages rule[10] in favor of allocating responsibility for payment of damages in proportion to the relative fault of the tortfeasors, as found by the trier of fact. The Supreme Court in *AmClyde* takes the opportunity to observe that its decision in *Reliable Transfer Co.* nineteen years before was based on what it perceived to be a consensus among scholars and jurists,[11] but that such a consensus had not developed regarding the treatment of partial settlements. The Supreme Court therefore chose among several reported alternatives, as discussed below, to meet its policy objectives, with particular emphasis on "consistency with *Reliable Transfer.*"[12]

There are two unarticulated policy objectives implicit in the *AmClyde* decision. The first is that the ultimate allocation of responsibility should be perceived to be fair, both objectively and by the parties to the litigation. From the practitioner's point of view, it is a perception of fairness that makes a particular litigation result acceptable, however much advantage may be sought during the heat of the litigation itself. Fairness—"'the just and equitable' allocation of damages"[13]—was a major goal of *Reliable Transfer Co.* The *AmClyde* Court's emphasis on consistency with *Reliable Transfer Co.* strongly suggests that a sense of fairness was one of its objectives as well. Additionally, the Court's willingness to tolerate litigation results that in hindsight appear to benefit or disadvantage a particular party, as when a fact-finder's determinations of fault and damages are not consistent with a settling defendant's prior payment, turns at least in part on the settling parties' willing participation in the partial settlement decision. Parties bearing the burden of their own bargains are less likely to be heard on grounds of unfairness.[14]

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8. *Id.* at 1466-67.

9. 421 U.S. 397, 95 S. Ct. 1708 (1975).

10. Prior to *Reliable Transfer Co.*, the traditional United States rule in collision cases left each party whose fault was found or presumed to be even partially a cause of the loss liable for an equal share of the total combined damages. Grant Gilmore & Charles L. Black, Jr., Law of Admiralty 492 (2d ed. 1975).

11. *AmClyde*, 114 S. Ct. at 1465.

12. *Id.* at 1470.

13. *Reliable Transfer Co.*, 421 U.S. at 411, 95 S. Ct. at 1715.

14. *AmClyde*, 114 S. Ct. at 1467.

The second implied policy objective in the *AmClyde* decision is the elevation of the "fair payment" principle over the "one recovery" or "compensatory" principle of tort damages. The Court expressly recognized that "settlements frequently result in the plaintiff getting more than he would have been entitled to at trial."[15] It addressed this policy argument in terms of the common-law "one satisfaction" rule, but rejected it with the pronouncement that "[t]he law contains no rigid rule against overcompensation,"[16] citing the collateral source rule as an example of legally accepted multiple recovery by a plaintiff.[17] In the Fifth Circuit, the "compensatory" or "one recovery" principle of tort damages is exemplified by *Hernandez v. M/V Rajaan*,[18] in which a dollar credit for the amount of a co-defendant's settlement was allowed against the plaintiff's recovery against a non-settling defendant. *Hernandez* was not cited by the Supreme Court in *AmClyde*, although the Court acknowledged that the courts of appeals had "adopted different approaches to this important question."[19]

In the context of the current presentation, the subject is the interaction of contribution principles and joint and several liability principles. The United States Supreme Court's recent *AmClyde* decision addresses these principles in the context of "how a settlement with less than all of the defendants in an admiralty case should affect the liability of the non-settling defendants."[20]

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15. *Id.* at 1471.

16. *Id.* at 1462.

17. The collateral source rule precludes a tort defendant from taking credit for a plaintiff's injury-related recoveries from non-tort related sources, such as private insurance policies. Certainly, an injured person's foresight in providing collateral resources in the event of injury should not mitigate the tortfeasor's responsibility for making the victim whole, and the collateral source rule is widely accepted. However, from a societal point of view, if all insurance is seen as ultimately distributing risk from the individual to the society, there is no reason to transfer wealth from society to an individual beyond the amounts necessary to make him whole under the risk-sharing principle. The requirement for coordination of Social Security benefits with tort and workers' compensation recoveries is reflective of this latter view, with relief granted to the collateral source provider rather than to the tortfeasor or employing industry. *Cf.* 42 U.S.C. § 424a (1988 & Supp. V 1993); 20 C.F.R. § 404.408 (1994). *See also* 4 Arthur Larson, Law of Workmens' Compensation § 97, at 18-9 to -127 (1989).

18. 841 F.2d 582 (5th Cir.), *modified and reh'g denied*, 848 F.2d 498, *cert. denied sub nom.* Dianella Shipping Corp. v. Hernandez, 488 U.S. 981, 109 S. Ct. 530 (1988), *cert. denied sub nom.* Hernandez v. Dianella Shipping Corp., 488 U.S. 1030, 109 S. Ct. 837 (1989). *Hernandez* was followed and a dollar credit applied in a non-personal injury context in Constructores Tecnicos v. Sea-Land Servs., Inc., 945 F.2d 841 (5th Cir. 1991).

19. McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1464 (1994). *Cf.* Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575 (11th Cir.), *cert. denied sub nom.* Chevron Transp. Corp. v. Great Lakes Dredge & Dock Co., 113 S. Ct. 484 (1992); Rollins v. Cenac Towing Co., 938 F.2d 599 (5th Cir. 1991), *cert. denied sub nom.* Cenac Towing Co. v. South Tex. Towing Co., 502 U.S. 1121, 112 S. Ct. 1242 (1992); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540 (11th Cir. 1987), *cert. denied sub nom.* Great Lakes Dredge & Dock Co. v. Chevron Transp. Corp., 486 U.S. 1033, 108 S. Ct. 2017 (1988); Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979).

20. *AmClyde*, 114 S. Ct. at 1464.

III. *McDERMOTT, INC. V. AMCLYDE*

AmClyde involved a property damage claim arising from a crane failure. There were three defendants, one of which (a group of three sling suppliers) settled with the plaintiff, McDermott, for $1,000,000 prior to trial. The trial jury found that McDermott's damages were $2,100,000 and that the two non-settling defendants were responsible for 32% and 38% respectively of the apportioned fault. McDermott and the settling defendants were found to be responsible for the remaining 30% of fault. The court of appeals had reduced the verdict by the plaintiff's 30% fault, and then applied a dollar credit for the $1,000,000 prior settlement amount, with the net amount of damages held to be $470,000. The AmClyde non-settling defendant (32%) was found to be entitled to a contractual defense to liability. The River Don non-settling defendant (38%), however, was cast in liability for this $470,000 residual damage figure because it was less than the $798,000 figure which represented River Don's 38% allocation of plaintiff's damages. On appeal, the Supreme Court rejected the dollar credit approach in favor of a proportional fault allocation of liability. The $1,000,000 prior settlement was held to settle only the 30% liability attributable to McDermott and the settling defendants. AmClyde's 32% liability was controlled by AmClyde's contractual protection, which was treated as a "quasi-settlement in advance of any tort claims."[21] River Don, however, was held liable for its 38% of McDermott's damages, or $798,000, even though the sum of the plaintiff's recoveries ($2,470,000)[22] "totalled" more than the jury's determination of its damages ($2,100,000).

The Supreme Court observed that "[t]he law contains no rigid rule against overcompensation,"[23] and that "[i]t seems to us that a plaintiff's good fortune in striking a favorable bargain with one defendant gives other defendants no claim to pay less than their proportionate share of the total loss."[24]

The Supreme Court's reason for selecting this result was apparently simply a choice among at least three credit alternatives as articulated by the American Law Institute:[25] (1) full dollar credit, sometimes called the pro tanto rule, leaving contribution claims among defendants unaffected; (2) full dollar credit, but forbidding contribution claims against settlors by non-settling defendants; or (3) proportionate share credit only, leaving contribution claims unnecessary since no defendant will be asked to pay more than its proportionate share.

For the Supreme Court, the proportionate share approach best serves the policy objectives of consistency with *Reliable Transfer Co.*, promotion of settlement, and judicial economy, as discussed above. From the practitioner's

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21. *Id.* at 1466 n.10.

22. $1,000,000 (prior settlement) + $672,000 (32% settled by prior contract) + $798,000 (38% attributable to non-settling defendant) = $2,470,000.

23. *AmClyde*, 114 S. Ct. at 1470.

24. *Id.* at 1471.

25. *Id.* at 1462.

perspective, the proportionate share approach seems to reflect the Supreme Court's understanding that a jury's determination of damages is no more "true" or "accurate" or "right" than is the jury's apportionment of fault.

A settlor's negotiated payment, reflecting the parties' perception of the relative fault of the payor and the approximate value of the plaintiff's claim (i.e., exposure to the settlor), may or may not reflect the jury's (fact-finder's) assessment of that exposure, either because the jury perceives the relative fault of the parties differently or because the jury perceives the amount of damages differently, or both. Said another way, while negotiations are ongoing, plaintiff's damages are just as uncertain as the percentages of liability, although this observation is sometimes less valid in property damage and collision cases than in unliquidated claims such as those involving personal injury. The Supreme Court considered its policy objectives better served by requiring a non-settling defendant to pay the actual trial result it earned or brought down on itself by refusing to settle (proportionate share of damages found). The perception of over-compensation or under-compensation, based on comparison of settled amounts with trial findings, did not trouble the Court, both for the reasons discussed above and because the jury's finding on damages is so frequently just as arbitrary as the percentages assigned for purposes of proportionate liability.

One difficulty not addressed by the Court is the distortion resulting from altered trial strategies, target designations, or non-monetary trial advantage agreements which may occur after a partial settlement has been made. The uncertainty and insecurity that may result to a non-settling defendant, who is left to try his lawsuit by himself after a partial settlement by plaintiff with the co-defendants, may be in furtherance of the Court's policy objective of promoting settlement.

IV. LOUISIANA SOLIDARITY

For purposes of this presentation, Louisiana solidarity will be treated essentially as joint and several liability, in the common-law or maritime sense.[26] The statutory constraints on solidary liability among joint tortfeasors under Louisiana law, as exemplified by Louisiana Civil Code article 2324, are preempted by the federal supremacy of maritime joint and several liability.[27]

In *Mayo v. Nissan Motor Corp.*,[28] the Louisiana Third Circuit Court of Appeal considered a maritime case in which a small boat's passenger sued three products liability defendants for injuries sustained in a boating accident. The

26. Mayo v. Nissan Motor Corp., 639 So. 2d 773 (La. App. 3d Cir. 1994); M. Kevin Queenan, Comment, *Civil Code Article 2324: A Broken Path to Limited Solidary Liability*, 49 La. L. Rev. 1351, 1355 (1989). The Louisiana Supreme Court granted a writ in *Mayo* and remanded the case to consider certain third party claims. Mayo v. Nissan Motor Corp., 644 So. 2d 661 (La. 1994).

27. *Mayo*, 639 So. 2d at 789.

28. 639 So. 2d 773 (La. App. 3d Cir.), *writ granted and remanded*, 644 So. 2d 661 (1994).

defendants impleaded the operator as a third-party defendant.[29] The fact-finder assessed 67% fault against the operator and 11% fault against each of the remaining three defendants, one of which had settled with the plaintiff. Pursuant to Louisiana statutory constraints on solidarity, the trial court held the non-settling defendants liable only for their respective 11% shares of the damages and dismissed the third-party complaint as unnecessary since the defendants were cast in liability only for their own shares of the liability.[30] On appeal, the intermediate appellate court held federal maritime law preempts the Louisiana ban on solidary liability, so that the two non-settling defendants were jointly and severally liable (liable in solido) for all of plaintiff's damages, subject only to an 11% reduction under *AmClyde* for the fault assigned to the settling defendant.[31]

No reduction in plaintiff's damages or contribution against the operator was allowed with respect to the 67% at fault operator/third-party defendant, for the technical reason that no appeal of the trial court's dismissal of the third-party complaint had been preserved. The principle of joint and several liability under the maritime law permitted the plaintiff to pursue her entire damages against whatever combination of defendants she chose, subject only to reduction in proportion to the fault of those with which she had settled. The failure of the defendants to preserve their contribution claims against the operator did not affect their own liability to the plaintiff.[32]

V. COMMON-LAW AND MARITIME JOINT AND SEVERAL LIABILITY

Just prior to its decision in *Reliable Transfer Co.*, the United States Supreme Court, in *Cooper Stevedoring Co. v. Kopke*,[33] recognized that contribution among joint tortfeasors had an accepted place in maritime jurisprudence. The decision even foreshadowed *Reliable Transfer Co.* by expressly observing that the lower court's finding, that it could not distinguish degrees of fault in the case more precisely than the then-familiar divided damages split, precluded consideration by the court on the question of whether contribution should be apportioned according to fault.[34]

In *Cooper Stevedoring Co.*, a vessel was sued by a longshoreman for injuries caused by a hole in the stow created by a prior port stevedore. Tort contribution was permitted against the stevedore, in spite of earlier judicial statements that

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29. The omission of the operator as a direct party defendant was presumably related to the fact the operator was the husband of the plaintiff.

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

31. *Id.* at 789.

32. The Louisiana Supreme Court granted a writ and remanded for reconsideration of the third-party contribution claims against the operator. Mayo v. Nissan Motor Corp., 644 So. 2d 661 (La. 1994). On remand, the appellate court rendered judgment allowing contribution against the 67% at fault operator, to be consistent with its finding of maritime joint and several liablity. Mayo v. Nissan Motor Corp., 647 So. 2d 676 (La. App. 3d Cir. 1994), *writ denied*, No. 95-C-0147 (Mar. 17, 1995).

33. 417 U.S. 106, 94 S. Ct. 2174 (1974).

34. *Id.* at 108 n.3, 94 S. Ct. at 2176 n.3.

contribution was not available in maritime non-collision cases. The Court's analysis limited the applicability of those statements to situations affected by the statutory bar of the LHWCA,[35] which did not apply in *Cooper Stevedoring Co.* because the prior port stevedore was not the plaintiff's employer. The Court was left with the unexceptionable proposition that the plaintiff could have sued either the vessel or the stevedore, "or both of them to recover full damages for his injury."[36] Note that this is a statement of joint and several, or solidary, liability. Because plaintiff could have elected to make the prior port stevedore bear the share of the damages caused by its negligence, the vessel (joint tortfeasor) was also permitted to do so. The Court found no reason not to apply "the well-established maritime rule allowing contribution between joint tortfeasors."[37]

The principle relied upon by the *Cooper Stevedoring Co.* Court was again articulated by the United States Fifth Circuit Court of Appeals in *Hardy v. Gulf Oil Corp.*[38] In *Hardy*, the court held a jury finding of no negligence on the part of an alleged contributor/indemnitor precluded an award of non-contractual indemnity or contribution.[39]

VI. CURRENT MARITIME TORT INDEMNITY, IF ANY

There is almost no tort indemnity per se in current maritime practice,[40] although concepts of *Ryan*[41] indemnity may still be viable where not precluded by statute. *Ryan* indemnity arose in the context of strict unseaworthiness liability visited upon shipowners by a maritime (usually stevedoring) contractor's breach of its warranty of workmanlike performance. Where a shipowner sustained unseaworthiness liability based on the contractor's conduct or equipment, indemnity was available from the contractor in favor of the vessel, based on a theory of implied contractual warranty.[42]

The 1972 amendments to the LHWCA ended vessel unseaworthiness liability to persons covered by that act[43] and expressly precluded indemnity in favor of

35. 33 U.S.C. §§ 901-950 (1988).

36. *Cooper Stevedoring Co.*, 417 U.S. at 113, 94 S. Ct. at 2178.

37. *Id.*

38. 949 F.2d 826, 830 (5th Cir. 1992).

39. There was no reduction available to the appellant, even if Texas law were held to be applicable, because the Texas contribution statute only reduces the plaintiff's recovery in the event of a settlement with the plaintiff by a co-defendant. Since the appellant had settled with the plaintiff in an attempt to obtain contribution from the co-defendant which had also settled with the plaintiff, application of Texas law would preclude any contribution without regard to percentages of fault. *Id.* at 832-33. See the discussion of Texas statutory rules *infra* text accompanying notes 56-59.

40. *Hardy*, 949 F.2d at 833; Loose v. Offshore Navigation, Inc., 670 F.2d 493, 501-02 (5th Cir. 1982).

41. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S. Ct. 232 (1956).

42. *Id.* at 133, 76 S. Ct. at 237.

43. 33 U.S.C. § 905(b) (1988).

vessel owners.[44] Where the LHWCA does not apply, however, as in foreign territorial waters[45] or with respect to employees of governmental entities,[46] the unseaworthiness remedy is likely still available for seamen, including "Sieracki seamen."[47] In these circumstances, *Ryan* indemnity is also likely still available, although there are a number of judicial statements indicating that *Ryan* indemnity concepts should not be extended beyond the circumstances that spawned them.[48] It remains a contractual concept, however, based on an implied warranty of workmanlike performance, and is therefore not a contribution or joint and several liability theory.

It is an interesting speculation, in light of the recent *AmClyde* emphasis on liability proportioned according to fault, whether the preclusion defense to a *Ryan* indemnity claim would have evolved to a proportional fault concept after *Reliable Transfer Co.* If a vessel owner's conduct was "sufficient to preclude" the recovery of indemnity, even if the stevedore/employer had breached its warranty of workmanlike performance, indemnity would be wholly denied (not apportioned). Only in settlements could the parties apportion liability in proportion to the negotiated perception of the relative fault of the tortfeasors.

The importance of the *Ryan* indemnity claim, and the defenses to that claim, declined as a result of the abrogation of the unseaworthiness remedy and the creation of the statutory indemnity bar in the 1972 amendments to the LHWCA, just as the *Reliable Transfer Co.* emphasis on proportional fault came into being. The possibility of a preclusion defense apportioned to fault never developed; instead, the issue came to the Supreme Court only in the context of a claimed reduction in a plaintiff's recovery based on his employer's fault.[49] The concept of a plaintiff's right to a whole recovery against whichever jointly and severally liable defendant might be available prevailed.

The issue has not been wholly academic, however, since the *AmClyde* court felt obliged to address a perceived inconsistency between *Edmonds v. Compagnie Generale Transatlantique*[50] and the proportional fault concept. The answer was

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44. *Id. Cf.* H.R. Rep. No. 1441, 92d Cong., 2d Sess. 4-8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4701-05.

45. Cormier v. Oceanic Contractors, Inc., 696 F.2d 1112 (5th Cir.), *cert. denied*, 464 U.S. 821, 104 S. Ct. 85 (1983).

46. Aparicio v. Swan Lake, 643 F.2d 1109 (5th Cir. 1981).

47. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946), recognized that a stevedoring contractor's employees aboard a vessel were in many instances doing work which was historically seamen's work, and therefore extended to such "Sieracki seamen" the vessel's warranty of seaworthiness as a third-party remedy. This form of liability without fault led to the development of *Ryan* indemnity, discussed *supra* text accompanying notes 40-44, and eventually to the 1972 amendments to the LHWCA, which abrogated the unseaworthiness recovery and the *Ryan* indemnity claim where the LHWCA is applicable.

48. *E.g.*, Rockwell Int'l Corp. v. M/V Incotrans Spirit, 707 F. Supp. 272 (S.D. Tex. 1989), *aff'd*, 998 F.2d 316 (5th Cir. 1993).

49. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 99 S. Ct. 2753 (1979).

50. 443 U.S. 256, 99 S. Ct. 2753 (1979).

that a compensation-protected employer/tortfeasor is just different from a settlement-protected joint tortfeasor. A plaintiff can fairly be said to have settled his solidary rights against the settlement-protected tortfeasor, but apparently not against the compensation-protected employer/tortfeasor where it is a statute rather than a settlement that bars the plaintiff's claim against the protected tortfeasor.

VII. CURRENT MARITIME CONTRIBUTION AMONG JOINT TORTFEASORS: THEORY AND PRACTICE

The proportional fault approach to contribution among multiple maritime tortfeasors, as made familiar to Fifth Circuit practitioners in *Leger v. Drilling Well Control, Inc.*,[51] has been validated by the Supreme Court in *AmClyde*. *Leger*'s procedural mandate[52] for third-party impleader of contribution defendants, however, is not necessarily part of the Supreme Court's implementation of proportional fault. In *Boca Grande Club, Inc. v. Florida Power & Light Co.*,[53] the Supreme Court held without discussion that under the *AmClyde* rule, "actions for contribution against settling defendants are neither necessary nor permitted." On remand in *Boca Grande Club, Inc.*, the Eleventh Circuit affirmed a grant of summary judgment in favor of a settling defendant against the cross-claims of the non-settling codefendants.[54] This result is not necessarily dictated by a partial settlement regime,[55] but is unremarkable in preserving to the settling defendant the benefit of its bargain and therefore encouraging settlements. The same result is now reached under Texas law by virtue of a statutory provision: "No defendant has a right of contribution against any settling person."[56]

It seems necessary under this approach, however, for the fact-finder to address the proportion of fault attributable to the settling defendant(s), even if the settling defendant is no longer a party to the suit. Because the rationale for *Boca Grande Club, Inc.*'s abandonment of cross-actions against settling defendants is the *AmClyde* "proportionate share" rule, a question arises whether cross-actions are necessary or permitted against non-settling tortfeasors not targeted by the plaintiff but against whom there is some evidence of proportionate responsibility. Joint and several liability (i.e., solidarity) is sometimes described as permitting a plaintiff to choose from which tortfeasor he will seek to enforce recovery for his damages, leaving that target defendant to seek contribution from other tortfeasors if the target believes it is being asked to pay more than its share. *Leger* requires that contribution action to be made a part of the plaintiff's

51. 592 F.2d 1246 (5th Cir. 1979).
52. *Id.* at 1248.
53. 114 S. Ct. 1472, 1472 (1994).
54. Boca Grande Club, Inc. v. Polackwich, 25 F.3d 974 (11th Cir. 1994).
55. McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1465 n.8 (1994).
56. Tex. Civ. Prac. & Rem. Code Ann. § 33.015(d) (West 1994).

litigation against the target.[57] If the potential contributor has made a settlement with the plaintiff, however, under *AmClyde* and *Boca Grande Club, Inc.*, it is neither necessary nor permitted to add the settlor to the suit because, in effect, the plaintiff has accepted as a reduction in damages whatever proportionate share is attributed by the fact-finder to the settlor. If there has been no settlement or only a partial settlement, the plaintiff is still entitled to his joint and several (solidary) liability against all non-settling tortfeasors. It appears that the fact-finder must address the proportionate share of responsibility of every tortfeasor (1) that has made any settlement, however large or small, or (2) that has been added as a party to the suit, whether by the plaintiff or as a third-party defendant. The mere fact that the evidence tends to show proportionate fault[58] on a particular non-party, non-settling entity does not require the fact-finder to address that entity's share, because the plaintiff is entitled to joint and several liability against all defendants who have not already settled. Under Texas law, this necessity is alleviated by a strict statutory schedule which permits dollar credits only against the plaintiff's recovery, in the total amount of all prior settlements, if so elected by *all* non-settling defendants, or in a dollar amount measured by a sliding percentage of the damages found by the trier of fact (i.e., 5% up to damages of $200,000, on up to 20% of damages greater than $500,000).[59] Under the Texas statute, the proportionate share of fault attributable to the settling defendant, whether large, small or zero, does not affect the amount of the reduction in plaintiff's recovery from the non-settling defendant(s).[60]

VIII. UNRESOLVED ISSUES AFTER *MCDERMOTT, INC. V. AMCLYDE*

A. Insolvency

There is a potential difficulty with this development in the context of joint and several liability and insolvent defendants, however, if a solvent defendant is left to pay the share of other insolvent defendants, but plaintiff's overall recovery is greater than the compensatory principle or one recovery approach would dictate. Can this theoretical problem actually occur? Consider the nominal *AmClyde* fact pattern of three defendants, one of which has settled. Judgment against the remaining two non-settling defendants would have been joint and several, except that one was contractually protected. The contract was treated

57. Texas law also requires the contribution action to be asserted in the plaintiff's original suit, and does not permit reservation of a claim for contribution until after settlement or trial of the plaintiff's claim against the target, even if creative devices such as assignment of the plaintiff's cause of action are attempted. Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987).

58. Proportionate causation has expressly not been rejected as a basis for apportionment. McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1469 n.25 (1994).

59. Tex. Civ. Prac. & Rem. Code Ann. § 33.012(b) (West 1994).

60. Hardy v. Gulf Oil Corp., 949 F.2d 826, 832 (5th Cir. 1992); McNair v. Owens-Corning Fiberglas Corp., 890 F.2d 753, 760 (5th Cir. 1989).

as a "quasi-settlement,"[61] so the remaining non-settling defendant bore liability only for his own proportionate fault. If that contractually protected non-settling defendant were instead insolvent, the joint and several liability principle would leave the sole remaining solvent defendant responsible for all of plaintiff's damages not apportioned to the fault of the settling defendant. Insolvency risk is by itself not remarkable, but in the partial settlement context, distortion of the proportionate fault allocation by reason of an insolvent's weakness could leave a solvent, non-settling defendant with substantial exposure to liability under *AmClyde*, without dollar credit for amounts paid by settling defendants. The solvent, non-settling defendant might rather have the fact-finder make its apportionment only among the plaintiff, the settlor(s), and those solvent non-settlors. If so, some attempt to get the insolvent or under-insured codefendant out of the case will be necessary, whether by formal bankruptcy stay, motion or objection based on the anticipated distortion of the fault allocation process, or consolidation of the defense (as plaintiff did with the settling defendants in *AmClyde*).

B. Maintenance and Cure

One important exception to the settlement bar rule relates to a claim by an injured seaman's employer against third-party tortfeasors for contribution or indemnity for maintenance and cure payments made to the injured seaman. In *Bertram v. Freeport McMoran, Inc.*,[62] the court held post-*AmClyde* that a third-party tortfeasor's settlement with an injured seaman did *not* bar the employer's claim for indemnity for the maintenance and cure payments to the seaman. While the employment relationship or contractual basis of the maintenance and cure obligation is seen as the reason for permitting the indemnity claim to survive the tort settlement, contribution principles are implicated by the court's treatment of the employer's and the seaman's contributory (comparative) fault. When the employer is wholly free from fault, the seaman's own comparative fault does not reduce the third-party tortfeasor's duty to indemnify the employer for maintenance and cure payments.[63] If the employer is partially at fault, however, the third-party tortfeasor's liability to the employer is reduced not only by the employer's percentage of fault but also by the seaman's own comparative fault.[64]

This treatment of maintenance and cure indemnity claims is significantly different than that given to LHWCA compensation liens under *Edmonds*[65] and *Peters v. North River Insurance Co.*[66] There the third-party tortfeasor's liability

61. *See supra* text accompanying note 21.
62. 35 F.3d 1008 (5th Cir. 1994).
63. *Id.* at 1021.
64. *Id.*
65. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 99 S. Ct. 2753 (1979).
66. 764 F.2d 306 (5th Cir. 1985).

for lien repayment is always reduced by the employee's comparative fault but never the employer's comparative fault, and is in any event limited by the employee's tort recovery.[67] Whether the longshore employer's *Burnside Shipping Co.*[68] cause of action is more like *Edmonds* or like *Bertram* is not immediately obvious, although there are cases suggesting that the *Burnside Shipping Co.* cause of action is affected by the employer's comparative fault.[69]

C. *Mary Carter Agreements*

In *Myers v. Griffin Alexander Drilling Co.*,[70] the court held that a Mary Carter agreement avoided the credit-offset rule, since the Mary Carter feature avoided the possibility of double recovery to the plaintiff. Because *AmClyde* renders insignificant the possibility of double recovery, a Mary Carter settlor will likely be treated as any other partial settlor. The trial distortion perceived when a Mary Carter settlor remains in the suit[71] is potentially similar to the situation when plaintiff attempts to minimize the fault proportion attributable to a post-*AmClyde* settlor in the residual trial against the non-settling defendant(s), particularly where the amount of the partial settlement is inadmissible, as discussed above. The Mary Carter taint should not reach post-*AmClyde* cases, however, because the definitional requirement that the settling defendant with a Mary Carter interest in plaintiff's recovery also remain a party in the case[72] would not be met after *AmClyde* and *Boca Grande Club, Inc.* The mere need for fact findings of the settlor's proportional fault probably would not meet the participation requirement (mere presence) because the plaintiff's self-interest in arguing for any position before the fact-finder is presumably self-evident; and the plaintiff's own efforts to maximize his recovery or to minimize the settlor's fault, whether effective or not, should not be per se deceptive. Mary Carter agreements may become less practical, or operate more as guarantees, if the plaintiff is faced with both a reduction in recovery for the settlor's fault under *AmClyde and* a reduction in net recovery for whatever Mary Carter participation the settlor may hold in plaintiff's success.

D. *Procedure*

Even if there are no issues of insolvency or under-insurance in a case, courts will still have to fashion evidence rulings and jury submissions, where jury trials are available, that will address the proportionate fault of settled parties who are no

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67. Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74, 100 S. Ct. 925 (1980); Ochoa v. Employers Nat'l Ins. Co., 754 F.2d 1196 (5th Cir. 1985).

68. Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 89 S. Ct. 1144 (1969).

69. *Peters*, 764 F.2d at 320.

70. 910 F.2d 1252 (5th Cir. 1990).

71. In Elbaor v. Smith, 845 S.W.2d 240 (Tex. 1992), Texas joined a number of other jurisdictions in holding Mary Carter agreements are against public policy.

72. *Id.* at 247 n.14.

longer defendants in the litigation. Does the mere fact of a settlement entitle the non-settling defendants to a jury inquiry regarding the settlor's fault, without actual evidence of the settlor's fault and causation? Does the amount of the settlement become probative of the proportion of fault to be assigned to the settlor, even in the face of evidence rules forbidding admission of even the fact of the settlement, much less its amount, for purposes of proving liabilities?[73] This is a familiar problem, but *AmClyde*'s abandonment of dollar credits and cross-actions against settled parties make the evidence rule's strict prohibition of such evidence very tough indeed when attempting to fairly persuade a jury under *AmClyde* that a significant proportion of fault should be assigned to an otherwise absent entity. There may be some significant risk that a plaintiff's refocused trial strategy, after a partial settlement, will result in what will be perceived as multiple recoveries, rather than mere inaccuracy in the correlation between settled amounts and trial results.

There are several solutions potentially available to a reviewing court challenged by a settlement plus trial result that appears to reflect multiple recoveries or an unpalatable distortion of the litigation process. Those might include: (1) extension of the settlement bar rule to 100% of certain, more quantifiable, elements of damages that appear to be duplicated, such as wage loss,[74] present value of future loss of earning capacity, or property damage, rather than extension merely to the fault-proportioned percentage of total damages dictated by *AmClyde*; (2) resurrection of major-minor fault concepts which flourished prior to *Reliable Transfer Co.* in response to perceived inequities in the divided damages rule;[75] or (3) reduced deference to fact-finders and greater fact-specific review, with respect to percentages of fault, in situations where apparently multiplied recoveries bespeak distorted or inequitable results being imposed on non-settling tortfeasors.

IX. SUMMARY AND CONCLUSION

The United States Supreme Court's recent decision in *McDermott, Inc. v. AmClyde* has accomplished a significant clarification in handling litigation of cases involving settlements with fewer than all potential defendants. It accepts the principle of joint and several liability and promotes the concept that each non-settling defendant should be liable for its proportionate share of plaintiff's damages. It may well have the intended effect of promoting settlements, both by encouraging plaintiffs to accept partial settlements and by discouraging non-settling defendants from accepting the trial burden of persuading a fact-finder to assign fault to an absent, settled party. It may, however, also create a risk of multiple recoveries as a result of shifting trial strategies after partial settlements.

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73. Fed. R. Evid. 408. *Cf.* Powers v. Bayliner Marine Corp., 855 F. Supp. 199, 205 (W.D. Mich. 1994).

74. *Cf.* Stanislawski v. Upper River Servs., Inc., 6 F.3d 537, 540 (8th Cir. 1993).

75. *See supra* note 10.