ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: McDERMOTT, INC., Petitioner v. AmCLYDE AND RIVER DON CASTINGS LTD.

CASE NO: No. 92-1479

PLACE: Washington, D.C.

DATE: Tuesday, January 11, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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McDERMOTT, INC. :

Petitioner :

v. : No. 92-1479

AmCLYDE AND RIVER DON :

CASTINGS LTD. :

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Washington, D.C.

Tuesday, January 11, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ARDEN, J. LEA, ESQ., New Orleans, La.; on behalf of the Petitioner.

WILLIAM K. KELLEY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting Petitioner.

MR. ROBERT E. COUHIG, JR., ESQ., New Orleans, La.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in number 92-1479, McDermott, Inc., v. AmClyde and River Don Castings Limited.

Mr. Lea.

ORAL ARGUMENT OF ARDEN J. LEA

ON BEHALF OF THE PETITIONER

MR. LEA: Mr. Chief Justice, Justices of this honorable Court, may it please the Court:

Petitioner McDermott, Incorporated, is here today to obtain relief from the double penalty placed upon it by the Fifth Circuit, which left in place a trial judge's reduction of its judgment, pursuant to the proportionate fault rule; which, at the same time, it rejected and, then, from that reduced amount, compounded injustice by further deducting from the judgment the full dollar amount of a settlement with another codefendant -- to the detriment, obviously, of the injured plaintiff, McDermott.

Encapsulated in these facts, which, on their own, would require reversal, is a disputed issue of admiralty law requiring resolution by this Court -- namely, which rule on settlement contribution should be adopted by the Court: the proportionate fault rule or the

pro tanto rule?

Interestingly, all parties agree that three fundamental principles surrounding the resolution of this issue -- which are, initially, all agree that the principle of joint and several liability is, and should continue to be, the rule of this Court.

All agree that liability among co-tort phases is and should continue to be determined proportionately at trial and, also, in any contribution action.

All agree that settlement should be encouraged, but not at the expense of the two preceding principles; nor at the expense of needlessly altering the rights of the parties to the remain -- of the non-settling defendant in the proceeding at trial that will later follow.

The disputed issue before the Court is whether the adoption of the proportionate or the dollar-for-dollar settlement -- so-called tanto -- pro-tanto contribution rule -- will best effectuate these fundamental principles mentioned above, and which should be incorporated by this Court into admiralty law.

The Court today has to accommodate its historical favoring of settlement of claims entered into by the injured plaintiff, and the need to protect the rights of the non-settling defendant, who is not a party to the settlement agreement.

McDermott urges this Court to hold that the proportionate settlement contribution rule is the fairest and, thus, the best. The plaintiff is permitted, under this rule, to become -- to remain a master of its own destiny with regard to its claim. He can choose, with consultation of counsel, which method best serves the resolution of the claim that is his anyway.

He, by settling, accepts both the benefits and the detriment of the contract, as is the case with respect to any contract.

On the other hand, most importantly, the non-settle -- settling defendant's contribution rights remain unaltered because, at trial, they will be decided proportionately.

Now, there are certain alleged perceived benefits to the adoption of the pro tanto rule. But McDermott suggests to this Court that in all --

QUESTION: Mr. Lea, you -- you refer to the -- the rule your espousing, I believe, you're referring to it as the proportionate fault rule?

MR. LEA: Proportionate fault rule, yes, sir, Your Honor. Which was basically the rule of comparative fault that was outlined by this Court by its adoption of that in non-collision cases in reliance transfer, and which has been the rule of this case with regard to

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personal injury since the country has existed.

The alleged benefits of the pro tanto, or the dollar-for-dollar credit, usually advanced to justify its adoption, can -- are usually couched in terms of: It ensures full compensation to the plaintiff; it's easy to apply; the dollar-for-dollar credit satisfies the one satisfaction rule; and that it avoids potentially confusing or unnatural realignments of the parties at trial.

McDermott contends that these benefits are merely perceived and, when examined carefully, do not result in the benefits advocated by proponents of the pro tanto rule: initially, full compensation to the plaintiff.

If you really think about that, that presupposes liability on the non-settling defendant. Otherwise, there would be no full compensation to the plaintiff.

It also wrongfully equates, as the Leger opinion pointed out, settlement dollars were judgment dollars. And the way they are determined -- or the amount is determined that is fair -- are subject to completely different rules -- one are personal concerns of the parties to the settlement.

Things like, in a corporation, not tying up key employees by the time necessarily consumed in defending

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any -- or prosecuting any trial. Another thing that would be considered would be litigation expenses, which, as everyone is quite aware, are costly these days.

The judgment dollars are merely what the trier of fact, be it a judge or a jury, think, after a hearing of the evidence, the case is worth -- no more, no less.

This Court has favored, in recent years, the settlement of cases without resort to extra judicial means -- with its favoring of the arbitration proceedings, for instance.

We see no reason why private, out-of-court settlements that do not affect the rights of anyone other than the parties to the agreement, as occurs in the proportionate method that we advocate, should really be of concern to the Court, other than to encourage the fact that they be entered into. There's no --

QUESTION: But what -- what about, counsel, the unseemliness of, if you go with the proportionate fault way, the settling defendant determining that defendant's portion of the liability when that -- that person is a nonparty to the litigation.

MR. LEA: Your Honor, that's precisely what does not happen in the proportionate method, because, in the proportionate method that we're advocating, what happens is that the jury, in the trial of the non-settling

defendant, is charged to render a verdict relating only to the percentage of fault that the defendant decides -- who decides to go to trial contributed to the ultimate --

QUESTION: But would -- wouldn't necessarily the jury have to determine if it's proportioning the fault, what is the respective fault of the settling defendant and the non-settling defendant?

MR. LEA: Yes, ma'am, it would. It would, Your Honor. And there is nothing really wrong with that, though, because if you really think about it, the -- if -- if you looked at it in -- in the practical matter of how a case is tried, really, all the books written on it, there are only -- almost all defendants -- and I'm usually one myself -- come with the same thing: first, they say the accident didn't happen or the damages weren't incurred by the plaintiff. But, if it did, it was the fault of a -- fault of a third party, either a party before the court, one that can't -- the court can't exercise jurisdiction over, or the fault of the plaintiff.

And then, if it loses there, it will usually back it up. But if -- but if you find it's my fault, I only caused a little bit. And --

QUESTION: And, in any event, the statute of limitations has run.

(Laughter.)

MR. LEA: And anything else that can be thrown into the hopper, Mr. Chief Justice.

QUESTION: If you joined the Government you could plead sovereign immunity, too.

(Laughter.)

MR. LEA: I don't often have that benefit, Your Honor.

Now, with regard to ease of application and judicial economy, I think this Court clearly, in Reliable Transfer, held that if this is to be sacrificed -- if -- if equity is to be sacrificed to achieve this, that this Court will not tolerate it. And it --

QUESTION: Well, well, but Justice Ginsburg is -- is correct, is she not, that each -- each of the rules we're going to be discussing has certain disadvantages? And one disadvantage of the proportionate fault rule, as you call it, or pro rata allocation, is that a party may settle for too much or too little, and that the total dollars are not allocated in accordance with the ultimate jury verdict. I mean, that is a -- a -- a flaw in the symmetry of the scheme, is it not?

MR. LEA: It is, Your Honor.

It is, but I don't think there is anything wrong with holding a plaintiff to a settlement that he was satisfied with at the time he made it.

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QUESTION: Is it practicable or does it ever occur that a settling defendant would say, I'll assume that I am responsible for 10 percent, and -- and the -- the settling plaintiff will accept that, but then they leave a -- a certain amount to be deducted or added, depending on the jury's verdict, say, within the range of another $50,000?

MR. LEA: It is not that common. I think what you are referring to would be very closely akin to what's referred to commonly as a Mary Carter agreement.

QUESTION: As -- as a what?

MR. LEA: A Mary Carter agreement, so named --

QUESTION: Yes, yes.

MR. LEA: In my experience, that is not common. And, if it is, most trial judges, as with any evidentiary matter, usually hold that that is relevant information that should be put before the jury in order to any -- to end any faults or hidden misalignment of parties.

QUESTION: But it still is possible to enter into such an agreement, and -- and thereby, by contract, reduce the concerns -- what one party or both parties have about receiving too much and too little? In other words, the contract option is open?

MR. LEA: It is. Yes, it is, Your Honor. Yes.

QUESTION: But what you're saying is whether

they do that or whether they don't, they are -- they're still adjusting their rights and liabilities by agreement, and nobody has to weep if they get it wrong -- they're -- they're both over 21?

MR. LEA: As in any contract, Your Honor. I don't know why a settlement contract, absent fraud or misrepresentation, should be treated under the law by this Court any different than any other contract.

QUESTION: No, it's not unfair to the -- to the plaintiff or to the settling defendant, but -- but is there not -- and it seems to me this the problem -- the non-settling defendant is hauled into court in order to pay the plaintiff, by the power of Government, more -- more than the plaintiff has actually suffered.

The plaintiff has now gotten a settlement -- let's assume both the defendants are 50 percent liable, and let's assume the settling defendant pays what amounts to 75 percent of the -- of the actual harm suffered. Nonetheless, the State is going to make the non-settling defendant pay a full 50 percent -- 25 percent more than the -- than the plaintiff is really entitled to.

The plaintiff walks away with a 25 percent windfall. It's not unfair to the settling defendant. He made a bad settlement. But isn't it unfair to the non-settling defendant to make him pay -- to -- to make

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him do more than make the plaintiff whole?

MR. LEA: No, sir. We wouldn't agree with that. And the reason why is that we don't think that the non-settling defendant has standing to challenge a contract that does not affect him. Because no matter what happens at the ultimate trial, that defendant will only have to pay the amount that the trier of fact, albeit judge or jury, finds that he, in right, should pay.

Another thing that it does is it deters the non-settling defendant's conduct. And -- and -- and -- and why should he be allowed to challenge a contract when it doesn't affect him? And if the plaintiff gets more, the person that really should complain would be the settling defendant, but he was satisfied with the contract, or otherwise he wouldn't have entered into it.

QUESTION: Is this case unusual in that respect, that the settling defendant paid more than what turned out to be the proportionate share? Isn't more common that the settling defendant pays less?

MR. LEA: I would say, in my experience, that usually a plaintiff will discount in exchange for a certainty of recovery in acceptance of a settlement of a lesser amount than he would anticipate getting at trial.

QUESTION: In that case, the plaintiff would end up short? The plaintiff would get less than the full

damages?

MR. LEA: He would, but he would have the stability and the certainty of receiving a sum certain in exchange for gambling and going to trial --

QUESTION: Right.

MR. LEA: Which is usually what happens in any contract.

QUESTION: Don't feel sorry for him. It serves him right. He entered the settlement.

MR. LEA: He did.

QUESTION: It's really only -- it's really only the non-settling defendant who has any cause to complain. The other two have -- have made a deal. And -- and it's -- it's fine to let them live with it.

MR. LEA: Exactly.

QUESTION: But the non-settling defendant is still being made by the court to do more, in fact, than make the plaintiff whole. The plaintiff has been made 75 percent whole by the settlement, so the court should really say, well, you know, you really don't have any claim here, except for the remaining 25 percent. Nonetheless, we're going to make this -- this defendant pay you 50 percent.

That -- that's unfair, it seems to me.

MR. LEA: Well, only if you equate settlement

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dollars with judgment dollars, Your Honor, as I mentioned earlier. And all we're asking the non-settling defendant to do is pay the amount that the jury determines he rightfully owes after a full trial on the merits.

The problem with the pro tanto method, I would like to suggest to you, is we think it borders on being seriously -- having serious constitutional infirmities, because, otherwise, under that system, you are taking a defendant's right to have contribution decided on a proportional basis, which we're advocating here.

And, as a corollary to this, we see no reason to have one rule at trial and another rule at settlement. You are taking his constitutional right -- or his right to have a full trial on his right of contribution by -- against another defendant, and you are letting parties, by private agreement, to which he is not a part, set those rights, with either no right of contribution or, under the so-called fairness hearing -- which we think is a misnomer, because there is nothing fair about substituting a hearing against a nonparticipating defendant for his right to trial -- which is oftentimes to be held before a jury, as was in this case -- and have it determined by private agreement and foisted on him in the name of fairness -- because this really is not fair to anyone.

The Court's review in these so-called fairness

hearing are much akin to the review you would give if you were buying a 200 -- $200 used car -- you kick the tires and you take off. Or, as the California court said, you make sure that the settlement is in the ball park. In effect, they were issuing a summary judgment on this basis against a party that never really had a right to present his case at a full trial -- and depriving him of his right to his possessions, thereby, under the guise -- that's what the State is ordering him to do.

QUESTION: Of course, your -- your answer assumes there's no contribution against him.

MR. LEA: My answer is, under the -- the proportionate method, there is no contribution, because there is no necessity there for, because the trier of fact has determ --

QUESTION: No, but in the -- in the -- in the -- the horrible example you just gave, the solution to the horrible example could be simply to allow contribution against the settling defendant.

MR. LEA: It would be, but in any proceed -- judicial efficiency --

QUESTION: I grant you that. But that's -- that's there's a price to pay for the answer.

MR. LEA: You're correct. Yes, sir. Your Honor is correct.

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Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lea.

Mr. Kelley, we'll hear from you.

ORAL ARGUMENT OF WILLIAM K. KELLEY

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. KELLEY: Thank you, Mr. Chief Justice, and may it please the Court:

In this case, which arises under the general maritime law, the Court has the task of arriving at what it considers the best rule under the circumstances, without the backdrop of any statutory provisions or policies to turn to for guidance. And, in this context, the position of the United States is that the proportional reduction, or pro rata rule, is the appropriate one to adopt.

That rule is fair because it leads to all the parties in the lawsuit --

QUESTION: Now, Mr. Kelley, we've heard that, I believe, described as pro -- pro -- proportionate fault rule. And what you're advocating is the same thing.

MR. KELLEY: In substance, it is, Mr. Chief Justice. In our brief we've used the term pro rata, which, perhaps, was imprecise.

QUESTION: And that is as opposed to pro tanto?

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MR. KELLEY: Yes.

The commentators view it -- view there -- there as being three different options: a pro tanto, a pro rata and a proportional reduction. The pure pro rata approach, which allocates the settlement based on simply the number of people in the lawsuit, is not favored by anyone. So our brief probably should have used the term proportional reduction instead. But, in any event, the substance in the same.

And the substance of that rule is -- is one that leaves the burdens of a party's decision to settle or not to settle a case on that party. We think it's, therefore, fair. It's also efficient because it obviates the need for any collateral litigation, whether in the form of contribution or a fairness hearing.

Now, the primary objection to the proportional reduction rule made by respondents in the Court of Appeals, and Justice Scalia this morning, is that it threatens to violate the so-called one recovery rule: a tort plaintiff is entitled only to recover the amount of damages determined by the jury, and no more. And the pro tanto rule does assure that that will be the case.

But we think that objection is without any merit for the following reasons:

First, it wrongfully equates settlement dollars

with judgment dollars. It's quite clear as an economic matter, it seems to us, that a plaintiff and a defendant, when considering whether to settle, will consider a variety of factors, not necessarily exclusively the value of the claim if it goes to trial, in determining whether to settle, and the appropriate amount at which to settle. Those factors include the cost --

QUESTION: When -- when you say, we cannot equate judgment and settlement dollars, what you're really saying is that the -- the parties place their own value on them. Isn't -- isn't that another way of, in effect, saying, it's their agreement and therefore no one has cause to complain if he happens, ultimately, to end up on the short end of it?

MR. KELLEY: I -- I agree with that, Justice Souter. The point is that, for example, in this case, the sling defendants made a $1 million settlement, which turns out, in retrospect, to appear to have been a bad bargain for them. But we don't know, prior to trial, whether that was so, because they could have considered a variety of factors, in addition to the value of the claim if it goes to trial, in deciding what amount to pay, including the cost of litigating and the -- the -- not only the economic costs, in terms of legal fees, et cetera, but also the distraction to the company.

So it might well have been very worthwhile for them to pay more than they might have lost at judgment.

QUESTION: Mr. Kelley, what's wrong with the solution that Justice Scalia referred to earlier, that one thing they shouldn't have is that the plaintiff gets over 100 percent recovery, so that when the settlement is -- turns out to be too high, that the non-settling defendant should not have to pay more than what would be enough to give the plaintiff a hundred percent of what the jury finds to be the total damages?

MR. KELLEY: We think that argument is -- is incorrect, Justice Ginsburg, because what it does is it requires the plaintiff to transfer the benefit of his good settlement bargain to the non-settling defendant. And that results in nothing but a windfall to that defendant -- as happened in this case under the Court of Appeals' opinion. The plaintiff has not achieved a double recovery in this case, because the settlement that he received was not part of the judgment.

It is true that the jury -- the jury's determination of damages turned out to make it appear that way, but prior to the -- prior to trial, the plaintiff took a risk that the settlement would be a bad deal for the plaintiff. And we don't see any basis for undoing that bargain.

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And -- and --

QUESTION: Well, the -- the basis is, if he had settled with everybody, that -- that's fair enough. You say, you got rid of the whole suit and you didn't even come into court. You didn't ask the court for anything. And if you got more than you were entitled to, well, it's -- you know, that's fair. But when you come into court, it seems to me, you come in saying, I have been injured in a certain amount. And that's a lie if in fact you've gotten 80 percent of it back in a settlement beforehand.

The amount of your injury at that point is only 20 percent. And the courts are here to do justice, not to -- not to enable people to trade -- trade speculations about what a jury is going to say.

MR. KELLEY: Justice Scalia, I disagree. And the reason is -- is this. The 20 percent -- or 80 percent -- excuse me -- that the plaintiff received before trial did not represent his injury. In part, it surely did represent his injury, but it also represented additional economic considerations made by both the plaintiff and the defendant who settled with him.

And it seems to us that the rule you're suggesting -- it's not only unfair to the plaintiff, but it's inefficient in terms of the way the tort system should operate. Because what it does is it rewards a

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defendant for not settling. It makes his ultimate payment not in accord with the damage he caused in maritime commerce. And this Court has consistently, for over a century, held to the notion that rules of liability in -- in -- in maritime courts should be calibrated to encourage parties to take appropriate levels of care in maritime commerce.

QUESTION: Which rule would encourage more settlements, the rule that you just -- that you are advocating or the rule suggested by Justice Scalia's question?

MR. KELLEY: I -- I believe, Justice O'Connor, the rule that -- that we are advocating. The -- the pro tanto rule has disincentives to settle built into it. In -- among them are -- are the possibilities of collateral litigation, which inevitably will occur either in the form of contribution or a fairness hearing.

There's no -- there should be no disincentive to settle under the proportional reduction rule that we're considering, because a defendant knows that he will only be held at trial if he fails to settle for his proportionate share of the damages. We think that is -- is the proper principle.

And to the extent that the settlement allocation rule deviates from that principle and coerces a defendant

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to settle, we think that is an illegitimate coercion. The Court recognized as much in the Reliable Transfer, where it said that a rule that merely encourages settlements is no rule at all if it is unfair.

So, we -- we believe that it's -- it's hard to say for certain in the abstract which rule would -- would encourage settlements to a greater degree, but we don't believe there's any basis for saying the rule we advocate would discourage settlements at all.

QUESTION: Is there any rule like the one that Justice Scalia suggested -- and outlining -- and all the briefs outlined the three different positions that courts take -- and the position that you're advocating is essentially you don't look at the settlement, the settlement doesn't count, whether it's high, whether it's low, it's out of it under the -- what you call the proportionate fault system -- is there any variant of -- of these rules?

MR. KELLEY: There -- there is a variant of the rule, which is the pro tanto rule. That's -- that's what Justice --

QUESTION: I mean -- not the pro tanto rule.

MR. KELLEY: Well, I -- I don't --

QUESTION: But a rule that says, you don't look at the settlement when it's too low, but you do when it's

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too high.

MR. KELLEY: Well, a -- a couple of States -- Texas, I believe, and perhaps New York -- have adopted systems that give the non-settling -- that defendant the option of choosing which system he wants. We think that is -- would needlessly complicate litigation. And we -- we believe also that it -- it unduly and unfairly gives the non-settling defendant the option to -- to minimize his own out-of-pocket payments in a manner than is inefficient in terms of the tort system.

The rule we're advocating is one that treats each party as -- as a party that's able to make its own deals, and should be required to live with the burdens and benefits of that deal.

QUESTION: Why is it inefficient in terms of the tort system?

MR. KELLEY: Because what it does, Justice Ginsburg, is it makes a defendant's liability payment to a plaintiff depend on a factor other than its level of care in -- in the maritime marketplace. And it's clear, under this Court's cases, that rules of tort liability should be calibrated best to induce appropriate levels of care on -- on all sides.

And in this case, for example, River Don, the respondent is going to be -- if -- if it prevails -- is

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going to pay less dollars to the plaintiff than the damage he causes the plaintiff. We think that under-deters, and we think it's inefficient in terms of the tort system's goals. And it's not unfair --

QUESTION: What, you -- you think -- you think he is going to -- when -- that -- that the actor, before he commits the tort, is going to predict that there's going to be a settlement of -- of the other actor?

MR. KELLEY: No, no, no, Justice Scalia --

QUESTION: I -- I don't see how it has any relevance, whatever, to predictable behavior by -- by people in maritime commerce.

MR. KELLEY: It -- it does in the following sense. If there's a chance that you can gain such an advantage in litigation, there might be an incentive not to take appropriate levels of care. So the point is really the converse of what you're suggesting. If your liability is predictable, then you will take appropriate levels of care.

So the fact that his liability might -- might well be lower because of what happens in litigation is -- is something that the -- the tort system does not desire. And it -- and it -- and it's not something the Court should foster. What the Court should do is make defendants pay damages according to the harm they cause.

And that is the theory that leads to efficient conduct in the marketplace.

And I've just emphasized that the pro tanto rule results in a windfall either to the plaintiff or to -- or to the non-settling defendant. In this case it would be.

I thank the Court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kelley.

Mr. Couhig, we'll hear from you.

ORAL ARGUMENT OF ROBERT E. COUHIG, JR.

ON BEHALF OF THE RESPONDENT

MR. COUHIG: Mr. Chief Justice, and may it please the Court:

The goal in any damage claim in admiralty should be compensation, not reward. We agree with the petitioners that there are three fundamental principles that this Court and the law keeps in mind:

First, the promotion of full recovery by an injured plaintiff should be, and has been, consistently followed through.

Secondly, the encouragement of settlements.

And, third, the equitable sharing of losses.

Let me state at the outset that any system adopted hard and fast, whether it's pro tanto, pro rata or proportional, carries with it some problem. And so that, while in this case -- this case was tried as a pro tanto

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case -- and the record, I believe, reflects that -- that is, when the settlement was made on the morning of trial, and -- and the settlement was announced that the sling defendants had paid a million dollars in settlement, we announced that we would take the Hernandez credit.

And I am going to ultimately suggest that this Court has within its power the ability now to set a rule that will give guidance to all parties and meet the discussion and the -- and the questions and the concerns that have been raised this morning.

The problems, obviously, don't exist if the case goes to trial against several multiple defendants. Defendant A is found 30 percent at fault; defendant B is 70 percent at fault; there's a million dollars worth of damage.

If defendant B can only pay half of that amount, this Court would still find -- I believe the law recognizes -- that defendant A would have to come up with the rest, regardless of its proportionate fault finding. And I would suggest that if we go off on a proportionate fault basis today, that we may place that in jeopardy.

On the other hand, if the case goes to trial against only one of those two defendants, it is a fiction to suggest that on the morning of trial, when a settlement is announced among one of the defendants and the

plaintiff, that the jury is going to hear all of the evidence in an appropriate manner to make a reasonable decision as to the real fault in the case.

QUESTION: Well, why isn't it? Because, I mean, you've still got parties with -- with an interest in bringing in, as it were, the -- the two sides of the question. The defendants are going to try to get in one set of evidence. The plaintiff -- he's going to try to get in another. So, it's true, you don't have one defendant there, but it's likely that you've got two parties -- two sets of parties with the same interest to get the evidence in.

MR. COUHIG: Justice Souter, what happens in an instant like that is that the plaintiff who, up until now, had been attempting to prove fault on both A and B, at that moment, becomes the defender of -- of defendant A.

QUESTION: Oh, that's true. It -- it puts the plaintiff in a difficult position, but the plaintiff asked for it. The plaintiff agreed.

MR. COUHIG: It also puts the non-settling defendant in a difficult position. Because now, up until now, the expectation -- and the reasonable expectation -- has been that the plaintiff would attempt to carry the day against that defendant.

And the defend -- the second defendant, the

non-settling defendant, was concerned about his own responsibility vis-a-vis the plaintiff.

QUESTION: Well, I mean, is that realistic? Sure, he's concerned with his own responsibility, but he wants to make sure that the fact-finder thinks that most of that responsibility, whatever it may -- or most of the responsibility -- rested on the head of another defendant. His -- his -- his interest doesn't change.

MR. COUHIG: With respect, sir, I disagree to this extent: As one prepares -- as in this case, two years of discovery -- and you get there and you know what your case is about, and you know that you're going to defend your product, and you know the -- the approach that the plaintiff is going to take, then you have control over your witnesses and you have the responsibility to get there and do it.

But when, on the morning of trial, it is announced that that defendant is no longer a party, you lose control over certain witnesses. You lose certain allegiances that would take place. And at that point it becomes so skewered that it is impossible, in my experience, for a true finding of fact to come out. It becomes a fictionalized account.

QUESTION: When you speak of allegiances, are you speaking of allegiances of witnesses to -- to your

cause?

MR. COUHIG: Simple, practical matters.

QUESTION: Like what?

MR. COUHIG: Will all the witnesses be there that the defendant had heretofore thought would be there?

Now, there are ways that you can take care of that.

QUESTION: Yes, surely, we don't have to --

MR. COUHIG: Right.

QUESTION: -- drastically alter a basic rule in order to see that witnesses --

MR. COUHIG: And -- and -- and I'm not suggesting that we do so, Mr. Chief Justice. What I'm simply suggesting is that -- that there are some problems with.

QUESTION: Well, okay. That's a problem you agree can be alleviated without any -- any shifting of rules. What are the other problems?

MR. COUHIG: If, in -- well, if, in fact, we were to adopt or the pro rata approach is adopted, the first and most obvious to me approach is that we get away from the -- the -- the idea of full compensation to the plaintiff.

QUESTION: No, I mean the -- the -- you've talked about all the practical problems that arise when

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the settlement is announced on the morning of trial. Are there any, other than the -- what you refer to as the allegiance of witnesses?

MR. COUHIG: I -- I think the -- it's difficult to describe, but the orientation in the case changes markedly then. The --

QUESTION: But isn't -- you know, isn't that one reason, counsel, while a plaintiff will often discount the value of his claim against the first settling defendant, because, A, he has less adversaries in the courtroom, and, B, he's got a little money to play with to finance the rest of the litigation, so you often will get a -- a discounted settlement from the first defendant?

MR. COUHIG: You're exactly correct, Your Honor.

The problem with that, I might suggest, though, is that that isn't what the system is about. It's not even what the pro rata system is about. That's not leading to a fair determination as to an individual defendant's responsibility. That's allowing the plaintiff to fund it up and to put on a better case against whom he perceives to have the deeper pocket, perhaps, or the easier target, for whatever reason -- not the -- not the essential fairness as to what that defendant did or did not --

QUESTION: No. But under the pro rata, if you

assume the -- the first settler is 30 percent responsible or something like that, the non-settling defendant gets the benefit of having 30 percent of his potential liability chopped off right at the outset.

MR. COUHIG: He does. And the only problem with that --

QUESTION: So he gets the benefit of the discounted settlement, too.

MR. COUHIG: He -- he does, Your Honor, except he gets that benefit -- and I don't disagree with that -- but he also gets the -- the unbenefit or -- or it's not a benefit to the extent that perhaps at the real trial, under the real circumstances, as I believe in this instance the Court of Appeals talked about, there would have been a higher finding of fault on the non-existent defendant.

QUESTION: Yes --

MR. COUHIG: I mean, so -- so we --

QUESTION: That's one of the risks of the whole pro -- process.

MR. COUHIG: But the point is, as I believe Justice Scalia accurately pointed it out, who should bear that risk? Obviously, in any settlement between a plaintiff and a defendant --

QUESTION: Well, if your policy is to encourage

settlements as much as possible, what's wrong with saying a non-settling defendant should bear that risk?

MR. COUHIG: Well, if that was the only poss -- policy, you'd be absolutely correct. But there are two other competing policies, and that's the equitable sharing of the losses, and that's the promotion of the full recovery on the plaintiff's part. And my suggestion to the court is that this does not allow it.

This skewers in favor of proportional sharing, perhaps, and puts aside the -- the promotion of full re -- recovery.

I would suggest that this Court look into, as the State of Texas --

QUESTION: Yes, but the -- the principle victim of the -- not getting full recovery is the plaintiff. And he made the deal. He -- he accepted less for tactical reasons, in part, as well as for economic reasons. And so he gets less than a full recovery.

MR. COUHIG: Or he gets significantly more, and he has been rewarded for that decision. And that's where I believe the inherent unfairness comes in. If we were to --

QUESTION: Yes, but don't you think the settlement in this case is -- is atypical? Normally, the first settler will pay less than the -- than the -- the

probable judgment.

MR. COUHIG: I -- I don't know that to be the case, Your Honor. I think every case comes under its own force when we look at it, the underlying facts. And -- and that is why, Your Honor, my suggestion to the Court, that it use its inherent power to define the rule, as when the settling parties, the plaintiff and a defendant settle, the party who has been left out of that negotiation then has the option, as they do in Texas, of choosing between a proportional determination or a pro tanto dollar for dollar.

What that does is in insinuates him into, or her into, that discussion -- not, per se, in the -- in the sense of sitting down, but so that when the plaintiff and the defendant are talking about, how do we do this, it is more likely to bring it into the confines of a fair and equitable settlement to everyone.

QUESTION: Mr. Couhig, we've been told by other counsel that perhaps there were two, possible three, different rules that could govern this. Is this one of the three rules, or one of the two rules, or is it, you know, kind of a new proposal?

MR. COUHIG: Your Honor, in our case, it was my belief, and I think the Fifth Circuit law was to the effect that only the pro tanto rule applied. It was

decided in 1988. This case was tried in November of 1990. In September of 1990, the Myers decision also came out of the Fifth Circuit indicating pro tanto was the appropriate way.

We tried this case under the pro tanto regime.

QUESTION: But you --

MR. COUHIG: What I have just suggested is a case for -- is a -- is a rule for the future; yes, Your Honor.

QUESTION: Well, which has not heretofore commended itself to any other court?

MR. COUHIG: It has, Your Honor, with respect, in Texas; that election is allowed under Texas State law. In New York, they have a -- a derivation of it that I think goes to the one satisfaction rule, which says it is the higher of the two. That operates as a -- as a matter of law.

My suggestion is that the Texas approach is really the inherently more fair approach because it allows -- and it gets away from this ques --

QUESTION: Well, now, if you did that, then the settling defendant would never know whether that was the end of the -- the line for him or not. It seems to me you just shift the unfairness.

MR. COUHIG: Your Honor, if I might disagree for

one moment. The -- the -- one of the salutary effects of this is that the settling defendant is gone. There is no fairness hearing or good faith hearing. Because the hearing, in effect, takes place when the plaintiff and that settling defendant discuss it.

And in this case, if they had reached a decision of a million dollars, the plaintiff would be in a position of saying, if I do that and they choose pro rata, here is the effect; if I choo -- if they choose pro tanto, here is the effect.

But, in any case, the defend -- the other defendant is gone. He doesn't have to worry about a settlement conference.

The -- the -- the point would be that at that point in time, in effect, the persons most knowledgeable about the facts would have evaluated their inherent risk, they would have come to an agreement between the two of them, and the third party who is left out of it would still be there, in effect, able to judge it and to make sure that there was not an unfair reward instead of compensation; or, if in fact there had been some collusion or some gamesmanship that would give them an unfair advantage at the trial, he would be protected.

QUESTION: I -- I don't understand. If -- if the defendant that goes to trial has the option at that

stage of selecting the method, and if it's in a jurisdiction that allows recovery, as in the Boca Grande case, to follow from the settling defendant, then I would think that the defendant who settled would have no way of knowing whether the deal was going to stand or not stand, as it was.

MR. COUHIG: Your Honor, let me suggest that there are two possible cures to that. Generally, in a settlement, the settling defendant will place in the settlement document an indemnity provision. So that, contractually, even if -- and -- and I don't want to get into the facts of the other case with not -- out knowing more precision -- but, even if there was a claim against them, the indemnity provision that would run in favor of the plaintiff would, in effect, be a bar to that recovery. They would get a credit for it, or whatever.

This proposal doesn't even need to get to that point, because, as part of it, there'd be no need for a contribution claim because the non-settling defendant would have been a party, in effect, to the settlement. He would have been able to evaluate what was appropriate under the circumstances. Let me --

QUESTION: Mr. Couhig, when --

MR. COUHIG: Yes.

QUESTION: When does -- under your system, when

-- when does the non-settling defendant make this election -- after -- after the fact? I mean, is he Monday morning quarterbacking? He's seen what -- what verdict the jury has come in with?

MR. COUHIG: Absolutely not.

QUESTION: Oh, he makes it at the outset of the trial?

MR. COUHIG: He makes it as soon as practical after the announcement.

Let me -- let me use two examples. You -- you --

QUESTION: This is very sportsmanlike, it really is.

(Laughter.)

MR. COUHIG: Well, there is no easy answer to this. And -- and I could argue, I believe -- and there is an excellent argument for pro tanto -- to do anything else other than pro tanto allows double recovery in many, many instances. And it eviscerates the real need for a sharing of losses and the like. And it allows collusion.

What this does is not sporting, per se; it is -- it is a simple methodology that allows the players most involved in it to evaluated their risk and to come up with a procedure that allows fairness to all sides.

QUESTION: Does the defendant exercising the

option always know the amount of the settlement?

MR. COUHIG: He should. Generally, they do. And I think, certainly, in an instant like this, there would be no need for -- for secrecy.

QUESTION: Of course, they -- they can white that out in the settlement agreement, too. I mean, you -- you -- you talk about what the party -- parties can change by their agreement. So, also, the settling defendant can write into the agreement if a non-settling defendant should choose the other, you will pay me so much.

MR. COUHIG: One -- one --

QUESTION: So we're chasing our own tail in all of this, aren't we, if -- if we're trying to guarantee no more than 100 percent recovery? It can't be guaranteed. The parties can contract out of it.

MR. COUHIG: the parties, Justice Scalia, can contract in many different ways. And -- and you're correct about this. All I'm suggesting is that this is a possible method of eliminating or, if not eliminating, greatly reducing the propensity for either double recoveries or placing a defendant in a disadvantage because of some either collusive or inappropriate settlement or appropriate under the circumstances but unfair to that defendant.

QUESTION: Do I understand your system, the one

-- the election system, the non-settling defendant elects between proportionate fault and pro tanto -- that that would wipe out any suggestion of a right of contribution?

MR. COUHIG: Yes, ma'am.

I -- I -- I don't want to get so far off into this proposal that I forget the reason I'm here, which is our case in particular -- which was tried under the pro tanto regime, in which the fairness of it comes out very dramatically: What do we do with the million dollars that they receive?

To give them -- to give us no credit for that million dollars allows them to --

QUESTION: Would -- would you identify them and us, because there's so many parties here?

MR. COUHIG: Yes, sir.

River Don to -- is the defendant in this case who is obligated under the present judgment of the Court of Appeals to pay approximately $470,000. If one adds to that the million dollars --

QUESTION: Is it correct, just so I get the figure, that if there had been no settlement at all, it would have paid 798,000?

MR. COUHIG: I don't believe, Justice Stevens, we can say that. Because the case wasn't tried in that circumstance. And to suggest that --

QUESTION: If -- if the various factors that affect the judgment are just taken out of the picture, that -- that's the figure they would have paid?

MR. COUHIG: If there was a holding of 38 percent --

QUESTION: Yes.

MR. COUHIG: -- responsibility and a $2.1 million judgment, and if only McDermott was held to be 30 percent responsible, yes, sir.

QUESTION: But it's -- it's correct to say that if -- if your case is decided on the pro rata method, your client cannot be required to pay more than your client's share of the proportionate fault? It's quite true your client doesn't get the benefit of the million dollars, but your client is not going to have to pay a penny more than the fault which is attributable to your client in relation to the total damages; isn't that correct?

MR. COUHIG: Justice Souter, in this case I don't believe that the record reflects enough to -- to make that decision. The case was not tried as a pro rata case. It was tried as a division of responsibility or causation between McDermott, AmClyde and River --

QUESTION: But that's -- that's -- that's a separate problem. And I mean that -- what -- whatever the -- whatever the merits of that argument may be --

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MR. COUHIG: Yes.

QUESTION: -- it doesn't go to the -- to the question of whether -- the -- the broad question, whether -- whether we should choose pro rata or -- or pro tanto?

MR. COUHIG: If -- if you take our case out of it, I agree with you, yes, sir -- that --

QUESTION: And -- and that particular point that you raise is not what we've -- what we've taken cert on?

MR. COUHIG: Yes, sir.

The -- the -- the issue of whether pro rata or pro tanto is the more appropriate one -- pro rata carries with it certain advantages, just as pro tanto does. Each has within it inherent advantages and disadvantages. The choice that has to be made --

QUESTION: Well, I grant -- I grant you that. But the -- the point -- excuse me -- the point of my question was simply that you have been using the word, unfairness, from time to time, and whatever that term may mean, it does not mean, under the pro rata method, that a non-settling defendant would be required to pay any more than the non-settling defendant's share of the responsibility for the total damage. That's -- that is correct, isn't it?

MR. COUHIG: That is correct.

QUESTION: Okay.

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MR. COUHIG: If one pretermits the arguments about how the trial would take place and -- and the things that we've been through before, yes, sir.

QUESTION: Counsel, by pro rata, you mean proportionate?

MR. COUHIG: Proportionate, yes, ma'am. I'm using them interchangeably, and I apologize.

The -- the real point, though, is that the decision that has to be made is, should one -- should the Court and the law favor full recovery, but limited to a single satisfaction, or should the balance go towards an equitable sharing of the losses through a proportional system?

And my only point in all of this is that the first linchpin of it is, what is the purpose of bringing the lawsuit? The plaintiff has sustained damages. It is to make him whole, but not to reward him.

And with the pro rata system, that opportunity exists.

QUESTION: But if you carry that argument to extremes, you say any -- any defendant who pays too much in a settlement ought to be able to challenge the settlement afterwards, because the point of the lawsuit was simply to make the plaintiff whole. I mean, if that's -- if that's relevant in a -- in a situation in which two

parties adjust their differences by agreement, then it seems to me it proves too much.

MR. COUHIG: As to those two parties, it makes no difference. But let me suggest to the Court that, suppose --

QUESTION: Which is simply -- which is simply to say that a total recovery which does not go above damages is not an absolute requirement of the system under -- under -- under anybody's view, including yours? That's not an absolute value. Because, of course, you would let the -- the -- the plaintiff who gets a very good deal in a settlement keep the -- keep the excess.

And -- and -- and if -- if you will allow the plaintiff to keep the excess in his relationship with the settling defendant and you don't require the non-settling defendants to pay any more than their proportional share, then I'm not sure how the -- the value of -- of -- of limiting recovery to damage is -- is a relevant factor in -- in the analysis.

MR. COUHIG: Well, let -- let me, Justice Souter, try this as a -- by way of explanation. Suppose in this instance the jury had determined that the damages were only $1 million and they had already received $1 million from a settling defendant.

QUESTION: The settling defendant would be

firing his lawyer, I presume, and bringing a lawsuit.

(Laughter.)

QUESTION: But I don't know -- I don't know that that should influence our decision on the methodology.

MR. COUHIG: Well, those things happen. And we cited to the Court in our brief an instance from English law where the Court looked at that. And -- and what they saw was that the plaintiff had been made whole. And so there is no need for further recovery.

And it all goes back to what is -- what is driving this. Is it the need to make the plaintiff whole or is it the need to proportionately share fault and give the plaintiff the opportunity to be made more than whole?

QUESTION: Mr. Couhig, I -- I think your response to Justice Souter is that it's one thing to let somebody who, by private agreement, has gotten more money than he's entitled to, which money has been voluntarily given to him by the other person to let him skip off with it -- that's one thing -- it's another thing to use the power and majesty of the State to wring from somebody, who -- who was not a party to that voluntary agreement, more money than the other person deserves. There is just something a little worse about the one than there is about the other.

It's -- it's -- call it State action versus

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State inaction, if you wish, but -- but using the courts to -- to extract an excess is quite different from allowing the parties themselves to create an excess.

MR. COUHIG: Exactly correct, Justice --

QUESTION: And -- and isn't the problem with that answer that there is no excess as between the non-settling defendant and the plaintiff; the non-settling defendant is paying just what the non-settling defendant has caused for harm?

MR. COUHIG: Justice Souter, at that point, the plaintiff is no -- has been compensated for his injury. He lost a million dollars in property. He has received his million dollars.

To follow through, we try the case now. And the defendant -- remaining defendant is found 50 percent responsible for that million dollars.

QUESTION: Look, I'll -- I'll grant you that. Let's -- let's assume that we've got a choice here. You can say, well, it's unfair to the non-settling defendants because they are being required to pay money to -- to fill a pocket which is not as empty as -- as the -- as the court and the plaintiff, in effect, says. Or you could say there is -- there is a certain unfairness to the settling defendant, who obviously did not settle very prudently.

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Let's -- I don't think -- I don't think there is a draw to be called here -- but let's assume we call it a draw, and we say, got some unfairness on -- on either side. We get a simpler system to administer if we -- if we follow the method that -- that has been labelled the -- the proportionate fault or -- or the pro rata method, haven't we, because, under that method the case is over, and under your method the case is not over? Because you're either going to have a -- a good faith hearing or you're going to have a contribution hearing.

MR. COUHIG: You are correct, sir, with -- with this one caveat. When we go try this case -- the remaining defendant -- and now, as the remaining defendant, I will put on the plaintiff's case against the settled defendant, so that that defendant's proportional fault can be found -- the case is going to last just as long, there is going to be just as much argument, just as much evidence, just as many witnesses --

QUESTION: Sure. That's a -- that's -- that's a wash -- on either analysis, that's a wash.

MR. COUHIG: So that there -- I don't think it -- it -- the -- there's no real savings in terms of time. The -- the savings is that you don't have a contribution --

QUESTION: No. There is -- there is a -- there

is a savings -- there is --

MR. COUHIG: -- claim.

QUESTION: With respect, my -- my -- my suggestion is there is a savings of a -- a hearing on the collateral issue, either a contribution issue or a -- or a good faith settlement issue. I'm not saying there's a savings in trial. There may or may not be. I -- I can't predict it. And I assume there is not. But there will be a savings on -- on -- on collateral.

And -- and in your brief, you downplayed -- it seemed to me, you downplayed the -- the -- the potential complication of the collateral hearing. You spoke, for example, I think it was in your brief that you spoke of the -- you know, the good faith hearing as something that can be decided on documents.

Well, I don't see that at all. People aren't going to leave documents lying around attesting to bad faith. And I -- I mean, I think we've got to accept the fact that if we choose a system which is going to function perfectly, as it were, because we're going to allow a good faith hearing, we -- we're -- we're going to have some messy collateral hearing.

MR. COUHIG: And I see the Court's -- your point, sir. But where I would disagree is that you're going to have some messiness or some collateral issues

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regardless.

QUESTION: Mr. Couhig, why -- why do we -- I -- I guess I don't understand your -- your -- the King Solomon approach that you've offered us here. I thought that one of the advantages of that -- you know, putting the choice upon the non-settling defendant -- is that you don't have a good faith hearing.

MR. COUHIG: That's correct.

QUESTION: There isn't any good faith hearing.

MR. COUHIG: There's no good faith hearing.

QUESTION: And that -- that's the advantage of that. He -- he looks at it. If it looks bad faith, he goes the other way.

MR. COUHIG: That's correct.

QUESTION: But even in your suggestion -- the same amount of trial -- when you put in the case against the settling defendant, to -- to enlarge that percent -- his percentage of liability, one of the advantages is the settling defendant won't care, so he won't resist that case. So your case is a little easier on that -- that phase of the case.

MR. COUHIG: That's -- it sounds so, sir, except that, at that point, the plaintiff, just as he does now under a pro rata system, if we were to try it under -- steps forward and, in effect, defends him. But the actual

party, you are correct, has no longer a vested interest in the outcome.

QUESTION: Another complication, it seems to me, is that some of these settlements are not just simply for dollars. Like in this case, the million dollars might possibly have been accompanied by agreement for the next five years we'll buy our slings from your company, or something like that, too.

MR. COUHIG: Yes, sir.

QUESTION: Which makes it kind of hard to measure the dollars sometimes.

MR. COUHIG: There -- there are difficulties with measurement, but I think those can be overcome through -- through the use of either experts or in-house people, and they can be quantified, sir.

QUESTION: I -- I'm not sure how to evaluate your argument that an in -- insolvency would skew the symmetry of the scheme under the pro rata -- or proportionate fault theory. If the settling defendant is insolvent, then I assume the -- the settlement is void. And if -- if the defendant who is insolvent is -- is a non-settling defendant, then it doesn't make any difference.

MR. COUHIG: I agree with how you've just laid out the question, sir. I don't know that I understand --

QUESTION: I had thought you said that the risks of an insolvency on the part -- of a judgment-proof defendant were a reason for adopting your rule. And I -- I don't understand why that should be.

MR. COUHIG: If, for example, under the pro tanto regime, the dollar-for-dollar regime, the -- the court of the law's principle purpose of allowing full recovery is satisfied -- because if there is an insolvent defendant, just as one can do, you -- you would go against the other defendant that would not -- that would have a contribution right, but without real remedy, but the plaintiff could receive his full recovery.

Under the system of choosing among the parties, and after the plaintiff and a settling defendant choose -- it would allow the non-settling defendant to choose -- that non-settling defendant would be aware of the economic circumstances. And -- and let me suggest if, for example, the -- the defendant who was settling had relatively few funds, was, in effect, going to either go out of business or had gone out of business, or the litigation was driving them out of business and they wanted to put up some dollars -- before they did that, the plaintiff would look at it and say, what is this going to do, and, what is this going to create with the non-settling defendant?

And that non --

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QUESTION: I think you -- I think you've answered the question, Mr. Couhig.

MR. COUHIG: Thank you, sir.

QUESTION: Mr. Lea, you have one minute remaining.

REBUTTAL ARGUMENT OF ARDEN J. LEA

ON BEHALF OF PETITIONER

MR. LEA: May it please the Court:

I would like to address the question that I see -- that seems to be of interest -- most interest to the Court, and that is, is the plaintiff purportedly getting a windfall?

First, I would like to point out that in this case, we did not get a windfall, because the sling defendants had exposure in $4.5 million worth of damages that were dismissed in exchange for their million-dollar settlement, as well as this case.

We could have pursued with no East River bar the claim against them for the damage to the Shearleg crane. Next of all, I want to suggest to the Court that there are oftentimes, because we love the law, because we are in it every day, tend to view the law as we would view a child, but we have to realize that the law, no more than our children, are perfect. And to say that a plaintiff gets a windfall presupposes that the true value or worth of a

case is that set by the judicial system, the trier of fact, be it judge or jury, and that the private parties to the agreement, are -- who are intimately familiar with its detail, are incapable of placing an accurate or a judicially approved value on the case.

Thank you much for your attention.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lea.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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McDERMOTT, INC. V. AMCLYDE AND RIVER DON CASTINGS LTD

NO. 92-1479

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)