OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BOCA GRANDE CLUB, INC., Petitioner v.

FLORIDA POWER & LIGHT COMPANY, INC.

CASE NO: No. 93-180

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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BOCA GRANDE CLUB, INC., :

Petitioner :

v. : No. 93-180

FLORIDA POWER & LIGHT COMPANY, :

INC. :

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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 11:03 a.m.

APPEARANCES:

DAVID F. POPE, ESQ., Tampa, Florida; on behalf of the Petitioner.

STUART C. MARKMAN, ESQ., Tampa, Florida; on behalf of the Respondent.

RONALD J. MANN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

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PROCEEDINGS

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-180, the Boca Grande Club, Inc., v. Florida Power & Light Company.

Mr. Pope.

ORAL ARGUMENT OF DAVID F. POPE

ON BEHALF OF THE PETITIONER

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

The previous case considered the relationships in a maritime tort system between the claimants and the nonsettling tortfeasors. In this case, we're going to consider the relationship in a maritime tort system between the settling tortfeasor and the nonsettling tortfeasors.

This proceeding arises from a limitation of liability case filed as a result of an accident which occurred on the navigable waters of the United States. The accident was a collision between a sailboat and an electric power line in a place called Gasparilla Pass on the West Coast of Florida.

Boca Grande Club was the owner of the sailboat. Florida Power & Light Company was the owner of the power line. The sailboat had been rented to Dr. Robert

Polackwich, who was a member of the club, and his stepson, Jonathan Richards. Both Dr. Polackwich and Mr. Richards died from electrocution as a result of the collision. Boca Grande Club started this limitation case, and claims were filed in the action by the Polackwich and Richards personal representatives, relatives of the deceased, Florida Power & Light Company, and O'Day Corporation, the sailboat's manufacturer.

Boca Grande Club filed a motion for summary judgment with the district court as to all claims, based on the contention that the collision was solely caused by the fact that Florida Power & Light Company did not erect and maintain the power line at the minimum height above the navigable waters as required by the Army Corps of Engineers permit.

QUESTION: Mr. Pope, I suppose the disposition of this case will depend in large part on the disposition of the case we've just heard.

MR. POPE: I would agree, Your Honor. The choice between a proportionate credit rule and a pro tanto or dollar-for-dollar deduction rule would, if the Court selects a proportional credit rule, basically eliminate any claim for contribution as an operation of law. The claim would not arise.

The district court in this case granted Boca

Grande Club summary judgment as to the contribution claims of Florida Power & Light Company following settlement with the Polackwich and Richards Claimants. The basis of the summary judgment granted by the district court was the decision of the Eleventh Circuit in Self v. Great Lakes, which had recognized the settlement bar rule with respect to contribution claims.

The Eleventh Circuit decided a subsequent case, styled Great Lakes v. Tanker, before the time to appeal the summary judgment had expired. Boca Grande -- excuse me. The Great Lakes case held that the settlement bar rule announced in Self was dicta, and said that both settling and nonsettling tortfeasors could sue for contribution.

The Great Lakes Tanker case does not place a limitation as to whether the party bringing the contribution claim is one who himself has settled, or one who is seeking contribution from a party who already settled.

Florida Power & Light Company appealed the summary judgment, and the Eleventh Circuit reversed on the basis of its decision in Great Lakes.

The relief Boca Grande Club seeks is reversal of the ruling by the Eleventh Circuit and establishment of a rule in this case that will allow it to be protected from

contribution claims. This relief can be accomplished regardless of which settlement credit the Court may adopt as a result of the McDermott case.

QUESTION: May I ask you, Mr. Pope, just so -- has there been a determination in the litigation as to the proportionate responsibility of the co-defendants?

MR. POPE: There has been a -- Your Honor, there has been no determination of Boca Grande Club's contributory fault for the collision. Your question will require me to go outside the record to state that in the State court trial between the Polackwich claimants and Florida Power & Light Company, there was a determination of proportionate fault between those parties and the allocation of fault was 65 percent for Florida Power & Light and 35 percent for the Polackwich-Richards claimants.

QUESTION: So there would not be an issue on remand as to what the --

MR. POPE: No, sir.

QUESTION: -- correct division was?

MR. POPE: No, sir, at least not as the case presently stands. I should point out --

QUESTION: The reason I raise the question -- the plaintiff isn't here, as I understand it -- is not a party to this proceeding.

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MR. POPE: That is correct, Your Honor.

QUESTION: And conceivably could have an interest in what the allocation could be if Boca Grande is out of the case.

MR. POPE: Yes, sir, and I would also believe that the claimants would have a great interest in this Court's decision in the McDermott case, since the verdict and judgments in the State court of Florida are on appeal at the present time.

QUESTION: Well, if the Court in the preceding case were to adopt a proportionate fault rule -- I don't know that it will, but if it did, what would be our best disposition of this case, just to vacate and remand?

MR. POPE: Justice O'Connor, I believe that would be correct, because the cause of action upon which Florida Power & Light Company sues -- namely, the contribution claim -- would cease to exist as a matter of law, because it could not be paying more than its proportionate share of the fault, period, so there would be no -- the contribution as a theoretical right would exist, but not for them.

As Justice O'Connor has indicated, under the proportionate credit, or sometimes it's been called the pro rata rule, the nonsettling tortfeasor receives a credit for the settling tortfeasor's concurrent fault.

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The nonsettling tortfeasor is held responsible only for its own fault. No claim for contribution exists, since the nonsettling tortfeasor is not being held liable for anyone's fault but its own.

We would suggest, however, that even under a proportionate credit or pro rata rule, a settlement bar would still be necessary because of the ruling of the Eleventh Circuit in Great Lakes v. Tanker, which permitted settling tortfeasors to seek contribution. Under those circumstances, it is conceivable that there could be a complete settlement between all of the parties, and nonetheless one of the settling parties believing it had paid too much, institute contribution actions against others.

QUESTION: But if this Court went the other way in the McDermott case, then wouldn't the Great Lakes -- wouldn't that have to be reconsidered, or --

MR. POPE: I'm sorry --

QUESTION: If this Court adopts proportionate fault as the rule --

MR. POPE: Yes, ma'am.

QUESTION: -- then doesn't the Eleventh Circuit have to rethink its position?

MR. POPE: Yes, ma'am, that's correct. The Eleventh Circuit's position was to adopt a pro tanto, or

dollar-for-dollar deduction, and allow full contribution as a means by a two-step or more procedure to achieve what is in effect the proportionate credit rule.

QUESTION: So Great Lakes would essentially be wiped out if this Court should adopt the proportionate fault.

MR. POPE: That's correct.

QUESTION: There was some suggestion that the Edmonds case impeded the Eleventh Circuit from adopting a proportionate fault position.

MR. POPE: The suggestion was that the Edmonds result dictated that with respect to the seamen, who were the personal injury claimants in the Great Lakes scenario, which is -- it starts with Ebanks, it goes to Self, and then it goes to Great Lakes v. Tanker, that Edmonds -- the decision of this Court in Edmonds, recognizing joint and several liability, placed one of the defendants, the Great Lakes defendant in that case, in a situation where it, as a 30-percent-responsible-for-the-collision party, would end up paying 100 percent of the damages, whereas the 70-percent-at-fault party, the Chevron vessel, which had already made a settlement with all of the personal injury claimants, would not be responding unless contribution were allowed.

QUESTION: You say that the State court action

is still alive, it's not dead. I mean, if that were completely terminated and we adopted the proportional rule, or the pro rata -- whatever you want to call it -- there'd be a pretty mess to sort out, wouldn't there?

MR. POPE: Yes, sir.

QUESTION: But that's not the case, you say.

MR. POPE: No, sir.

QUESTION: The State action is still alive.

MR. POPE: The State action was -- the settlement between Boca Grande Club and the Polackwich-Richards claimants occurred in -- I believe it was September-October of 1990. The case between Polackwich-Richards claimants and Florida Power & Light took place in the State courts of Florida, I believe it was in February-March of 1993, and is currently on appeal.

We would suggest that even under the pro tanto or dollar-for-dollar credit, this Court can nonetheless find that a settlement bar rule should be effective. Under a pro tanto credit, the nonsettling tortfeasor receives a credit against the claimants' damages equal to that paid by the settling tortfeasor.

Under a pro tanto credit, unlike the proportional fault rule, a settlement bar -- an explicit settlement bar is required, because it is possible, as we have heard in the prior argument, that the dollar amount

of the settlement will not equal the settling tortfeasor's proportional fault for the casualty. It could be higher, it could be lower, he made a good bargain, he may not have made a good bargain.

It is still possible, under a pro tanto regime, that all parties will settle. In fact, that's what happened in the Great Lakes case. The Eleventh Circuit Court of Appeals found a pro tanto or dollar-for-dollar deduction which -- we invite the Court to examine all three opinions -- has never taken place yet in that case. The amount paid by Chevron has never been accounted for to this day in that case, but nonetheless there was a pro tanto deduction where the right of contribution came up.

QUESTION: I don't understand what you mean. What do you mean --

MR. POPE: I'm sorry, because what happened in the Great Lakes case was that Chevron early on settled with all of the personal injury claimants who were crew members of the other vessel. Great Lakes, the owner of the other vessel and employer of the crewmen, did not settle with its employees because the employees had claims under the Jones Act and for unseaworthiness that they did not have against Chevron as the owner of the other vessel.

In point of fact, throughout the case, Chevron settled early on, Great Lakes settled with Self, the last

remaining claimant, after the second appeal to the Eleventh Circuit, so in fact all the claims were settled, none of them were ever tried, and the district court in the Great Lakes remand is now faced with the unhappy prospect of trying eleven separate personal injury actions between two settling defendants on damages for people that 10 years ago left the lawsuit.

In fact, the district court entered an order on December 22nd in that case scheduling the case for trial the weeks -- during the trial term beginning in April of 1994.

The Uniform Contribution Among Tortfeasors Act and the Restatement of Torts (Second) in 886A recognized this type of credit, but I would point out that the Restatement lists all the credits that are possible, a proportionate, a pro tanto credit, and a settlement bar with a good faith hearing requirement.

We would submit that any good faith hearing requirement under a pro tanto credit regime, which goes beyond satisfying the court that the agreement between the settling parties is noncollusive, would have an extremely adverse effect on settlements.

In effect, there would be a minitrial, trying to equate the settling parties' fault or proportional fault and damages in advance of the main trial, which would

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necessarily involve factual issues, and therefore probably would be subject to appeal, and the benefit derived to the settling tortfeasor of being able to close his books on this matter would be lost. There would probably be an appeal, and the matter might be kept alive for a great amount of time.

QUESTION: Would you help me, Mr. Pope? What do the lawyers mean when they talk about a collusive settlement in this regard? I mean, it seems to me it's always an agreement between two adversaries. That's collusion. It has to be.

MR. POPE: Your Honor, I believe -- and I will advert to a decision, the recent decision of the Florida supreme court, because I heard the word Mary Carter agreement in an earlier argument, and there is a decision that was just announced in the Florida supreme court along with several other decisions that had to do with Florida's adoption of a comparative fault regime which outlawed Mary Carter agreements.

And basically the thrust of that opinion, which is called Dasdorian -- I can't remember the second name of the party, but the Dasdorian case said that henceforth in Florida we're not going to allow cases to go forward where as part of the settlement agreement the settling defendant either agrees to participate in the trial and lay off

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blame, or help the plaintiff lay off blame on the nonsettling defendants, or agrees to assist or aid the claimant in some way that is improper.

QUESTION: Is that a Mary Carter agreement, what you've just described?

MR. POPE: Yes, sir. A Mary Carter agreement is an agreement whereby, at least as I understand it in Florida, whereby a defendant secretly settles with the plaintiff but nonetheless agrees to participate in the trial and assist the plaintiff in the prosecution of the claim against the nonsettling defendant, and the Florida courts have outlawed that.

The -- I would like to note that the agreement that was described to you earlier in the prior argument is what I would call in Florida a high-low agreement. That is, an agreement whereby a defendant agrees to settle, and if you recover X dollars from the nonsettling defendant, I'll pay you this, but if you don't get that much, I'll pay you X plus something else, and that's called a high-low agreement, and the Florida said that kind of agreement's okay, as long as you don't procure assistance to subvert the trial process. In other words, what they try to do is protect the nonsettling defendant's day in court, as I understand.

If a pro tanto credit with full contribution,

which is the Eleventh Circuit rule, is adopted, any settlements in a multiparty maritime tort case will be extremely unlikely. I say this for the following reasons. The settling tortfeasor is subject to the results of the trial he does not participate in. In the instant case, this very matter, the Polackwich and Richards claim trial, went to trial in the State court, which resulted in an $8.7 million verdict.

QUESTION: Mr. Pope, I hate to -- I'm getting an education from you, so I hope you don't mind one more question about the Mary Carter --

MR. POPE: Yes, sir.

QUESTION: -- formula. Would Florida hold the agreement unenforceable if it were not secret, if the agreement on its face said, we're going to pay X dollars and we will agree to take the position that the other side was primarily -- the other defendant was primarily responsible?

MR. POPE: As I understand it, that would be an illegal agreement in Florida whether it --

QUESTION: So secrecy is not an element.

MR. POPE: Secrecy has nothing --

QUESTION: You just can't agree that your position in the litigation will be X rather than Y.

MR. POPE: Correct, and as I understand it, it

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does not matter whether the agreement is secret or not secret, the interest the court was trying to protect is the integrity of the ongoing trial process, and parties can settle -- great -- but apparently in Florida it was becoming more of a problem than maybe it should have been.

We would go back to the Eleventh Circuit rule and suggest to the Court that a settling tortfeasor who is subject to the results of the trial and does not participate in it would probably be disinclined most -- extremely disinclined to enter into any settlement agreement with the plaintiff.

An additional disadvantage to the settling tortfeasor is that he cannot close his books on this casualty. He has to keep this matter open until the claim is ultimately resolved against the settling tortfeasor, and if there is contribution, that's resolved.

In this very case, we may be looking at procedures 3, 4, and 5 years in the future if the Eleventh Circuit's ruling is upheld, given the State court appeals, the possibility of a retrial in the State court, and then perhaps a contribution action at some later date against Boca Grande Club who, as a limitation plaintiff, the only place that court -- that case could be heard would be in the U.S. district court in Tampa, so we have that situation.

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I heard it mentioned in the earlier argument that a full contribution or nonsettlement bar probably would penalize a claimant, too, because a cautious settling defendant would probably insert into the settlement agreement an indemnity provision or maybe escrow some of the funds, I don't know quite how -- there's many ways it could be accomplished, but which would protect the possibility if contribution -- there were no settlement bar, that the settling defendant might have to pay back some money at some time in the future.

Every maritime court, other than the Eleventh Circuit, which has considered the settlement bar issue, has opted for a rule that terminates the contribution claim either by a proportionate credit or by a pro tanto rule with a settlement bar. The cases other than this case that have adopted pro tanto and settlement bar have all opted for a good faith hearing.

This Court -- excuse me, those courts that recognize a settlement bar rule are recognizing a corollary principle of conservation of judicial resources and encouraging settlement. We believe that these policies are worthy of consideration in this case.

Boca Grand Club does not believe that any decisions of this Court prohibit adoption of a settlement bar rule. The rules established in reliable transfer for

comparative fault in Cooper for contribution and Edmonds for joint and several liability can still all operate as between the nonsettling parties. Nothing in those cases would prohibit a settlement bar rule. None of them dealt with the situation of a settling tortfeasor and a nonsettling tortfeasor.

Boca Grande Club notes that in the recent decision of Musick, Peeler, this Court recognized its authority to provide a just and equitable remedy for cases within admiralty jurisdiction. We would submit that recognition of a settlement bar rule is further recognition of a just and equitable resolution of this maritime tort problem.

The arguments advanced against a settlement bar rule by Florida Power & Light in the United States are flawed because the basic assumption of those arguments is incorrect. I believe in the earlier argument we alluded to this a little bit, but the basic assumption of Florida Power & Light in the United States is that the primarily liable tortfeasor who is the deep pocket, as that term is used, will be called to go to trial, while the -- excuse me, I misspoke myself. The primarily liable but impecunious defendant who settles will transfer his liability to the less liable but deep pocket defendant.

In other words, the plaintiff will proceed to

trial against the party that can best pay the judgment, rather than the party that has the greatest culpability.

This is really not an objection to a settlement bar rule. This is really an objection to this Court's ruling in Edmonds on joint and several liability. What they're complaining about -- no one can complain, the United States, not Florida Power & Light -- if the ultimate determination is that they were 65 percent at fault for the casualty, and they pay 65 percent of the damages, nobody's got a complaint coming. So nobody can argue with proportionate fault.

What they're arguing about is, we're paying -- like they did in Great Lakes -- 100 percent of the damages and we're 30 percent at fault.

QUESTION: Why can't the plaintiff argue against proportionate fault if the plaintiff has settled for less than the settling defendant's share?

MR. POPE: I agree, I think the plaintiff would argue against, because it would want the benefits of joint and several liability, but we are not here in this case to question the applicability of joint and several liability as to the parties that go forward with the litigation.

We don't see any reason why the plaintiff among the nonsettling defendants can't collect all of its judgment from one of those defendants and then they settle

among themselves on contribution, since they didn't settle their respective proportionate degrees of fault, so we think the rules still operate, but they should operate only as to the nonsettling parties.

We would also point out that if a settling tortfeasor really has limited assets, all the discussion about contribution is somewhat meaningless, since the contribution claim is going to be basically worthless either. If he wasn't interested in defending his position and trying to get out cheaply on the initial claim, I doubt seriously any contribution claim would cause any great concern.

A final matter on the arguments of Florida Power & Light and the United States, they suggest that if a tortfeasor is truly the most culpable and will settle, that the claimant will go along with that. It has been my experience that the claimant, the plaintiff in an action, avoids if at all possible an empty chair. It is stretching the imagination to suggest that the empty chair the plaintiff will accept for a minimum settlement is the most culpable defendant.

In other words, he will go to trial against a deep pocket who is not really culpable and let out the very party who is the most culpable. If nothing else, the defendant, given the fact of joint and -- excuse me. The

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plaintiff, given the fact of joint and several liability, would continue and keep in the less culpable but impecunious defendant because he can recover it all if he proves fault -- any fault on the other party.

He wouldn't settle with anybody. He wants that chair filled. He wants that party defending his position, and he doesn't want to be the person standing up in front of the judge or the jury defending somebody that is the most culpable for the very accident for which he claims relief.

Boca Grande Club submits that the better rule among the proportionate credit and the pro tanto rule is the proportionate credit rule, although we recognize that that really is a decision for the prior case.

The proportionate credit best accommodates the competing interests of the parties in a multiparty maritime tort. The claimant can settle part of his claim. The settling tortfeasor can close his file, and his liability is extinguished. The nonsettling tortfeasor receives a credit for the settling tortfeasor's proportionate fault. He certainly can't complain about being held liable for what he did.

In addition, the remaining liabilities among the nonsettling parties can be resolved in accordance with the prior rulings of this court in Edmonds, Cooper, and

Reliable. The claimant still has these benefits of joint and several liability against the nonsettling tortfeasors.

Boca Grande Club requests that this Court reverse the order of the Eleventh Circuit and adopt a settlement bar rule either under a proportionate credit or a pro tanto credit system with a settlement bar.

Thank you.

QUESTION: Thank you, Mr. Pope. Mr. Markman, we'll hear from you.

ORAL ARGUMENT OF STUART C. MARKMAN

ON BEHALF OF THE RESPONDENT

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

By this rather advanced stage of these coupled arguments, much has already said about the three possible approaches that this Court could select. We're dealing with the settlement in the context of a multidefendant maritime tort action. With Florida Power's time, I'd like to focus briefly -- very briefly on one key and, we think, critical point.

In the event this Court does not adopt the proportionate credit approach, of the remaining options for dealing with partial settlements in this setting, law and fairness dictate that the settlement bar rule and the pro tanto setting be rejected and the contribution

approach adopted. The first and foremost reason for this position is one of simple fairness, and it's been discussed and alluded to today.

The settlement bar rule tends to disrupt the normal litigation incentives and the pattern of risks. That is to say, the settlement bar rule creates an incentive for the settling parties to saddle the nonsettling defendant with an amount of liability or culpability that far exceeds its true share.

The settling defendant is willing to settle at a deep discount. The settling plaintiff may be willing to extend that deep discount because it knows, as a certainty under the pro rata settlement bar rule, that any shortfall or any bad bargain it entered into, has to be made up by the nonsettling defendant.

The net result is that the nonsettling defendant will bear the burden of a settlement to which it was not a party. The extent of the nonsettling defendant's liability in that setting will not be based on its true fault or culpability. It will instead be based on an outside-of-court, private deal made by parties and the settling defendant was not a party to the agreement.

QUESTION: I'm not sure -- I'm really not sure I understand your argument. You're saying that the settling parties will try to magnify the percentage of

responsibility for the nonsettling defendant, is that the point? Won't they try to do that, even if there's a trial?

MR. MARKMAN: Well, Your Honor, the settling parties have the incentive, perhaps, not so much between them to magnify the nonsettling defendant's fault. The plaintiff simply doesn't care any more what relationship that settlement bears, in that setting, to the nonsettling defendant's actual fault. It gives the plaintiff an incentive to enter into a deal virtually with an insurance policy, and let me premise, and let me give the caveat --

QUESTION: I'm really not sure I understand.

MR. MARKMAN: Yes, sir.

QUESTION: So go through it slowly for me.

MR. MARKMAN: Okay. It works this way. A plaintiff and a defendant decide to settle. They know that the settlement bar rule controls and governs, the pro tanto settlement bar rule. The plaintiff understands in that setting -- and it may hinge somewhat on the degrees of fault that are perceived, or resources.

At any event, the plaintiff knows in that setting that if I don't cut a particularly good deal with this defendant, it doesn't matter, because waiting in the wings is a Florida Power & Light, for example, who I need

only establish 1 percent blame upon to get a total recovery against. They will --

QUESTION: Oh, I see, you're assuming -- your whole argument is resting on the predicate that we adopt the pro tanto rule.

MR. MARKMAN: Yes, Your Honor, and let me --

QUESTION: I see. I understand. I didn't --

MR. MARKMAN: -- and I think I need to restate my preface. As far as Florida Power is concerned, we will be happy with either rule. We will accept either proportionate credit or the contribution approach.

I'm assuming that in the event that this Court doesn't opt for the proportionate credit approach, I'm trying to highlight the unfairness of the settlement bar rule in that setting, and I think part of the unfairness comes out of this Court's own cases. Supreme Court cases tell us -- for example, in the Cooper Stevedoring case, this Court disapproves a rule that permits a plaintiff to force the entire liability on one of two defendants even if that defendant is equally -- that is, the settling defendant is equally or more at fault.

In the Reliable Transfer case, which has been discussed at length, this Court talked about principles of fair fault allocation and the fact that those principles should take precedence over quick but inequitable

settlements.

Now, it's also been discussed that the settlement bar rule perhaps has one advantage in the pro tanto setting over a contribution approach. The one advantage that the proponents of the settlement bar rule claim is that it is efficient. The argument runs as follows: it's efficient because it has promoted that initial settlement between the plaintiff and the first settlor, but in practice the rule is not efficient, and in practice the rule really doesn't encourage the sort of settlements that the courts want to encourage, the sort of settlements that affect the true judicial economy.

In practice, the settlement bar rule and the pro tanto setting frustrates complete settlements, and it will only encourage that initial partial settlement. The reason is the reason I gave earlier. The settlement can, in effect, serve as a war chest for the plaintiff.

The plaintiff will be encouraged to litigate against the nonsettling defendant because it knows that whatever bargain it struck at the outset, the nonsettling defendant will be required to make up the shortfall, the discount. The nonsettling defendant will be required to save it from its own bad bargain, and what makes it particularly unfair, thinking of Reliable Transfer and Cooper Stevedoring, is that that will be the case even

though the settling defendant is far, far more culpable.

Of course, in this case the Court required, we do not yet know the relative culpabilities of Florida Power & Light vis-a-vis the Boca Grande Club.

Another efficiency that has been claimed on behalf of the settlement bar rule as an advantage over contribution has to do with ancillary litigation and the good faith hearing requirement that we've heard discussed. It is true that the contribution approach necessarily definitionally involves a second proceeding, a contribution action.

It is also true, however, and the settlement bar rule's own proponents almost universally acknowledge this, that if you're going to administer the settlement bar rule in any sort of meaningful way, and in any way that would detect, perhaps not collusion, that's been discussed, but certainly patent unfairness, then the good faith hearing itself to be efficacious is going to have to be akin to a minitrial. It's going to have to be a full evidentiary hearing on the merits, and it's going to necessarily entail --

QUESTION: Well, what would the issues be in that hearing?

MR. MARKMAN: Your Honor, I'm not certain that the cases have clearly told us that.

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A number of cases that have discussed good faith hearings have said that if the good faith hearing is to be truly efficacious and accomplish the result that's intended, then it seems to me the issue the Court wants to address there is one that's akin to a determination of proportional fault.

The good faith of the settlement under a number of cases that adopt the settlement bar rule, the good faith of the settlement, will at least in part hinge on the comparative liability of the parties, which speaks to its inefficiency.

QUESTION: Well, good faith, at least to the uneducated, of whom I'm certainly one in this area, sounds like -- you know, honest -- honest belief, or something like that, but I gather from what you say it means some -- it isn't just to see if there was a fraud in the settlement. Something more than that is required.

MR. MARKMAN: The -- that's the way the cases read, as I read them, Your Honor. They have a more -- even the proponents of the settlement bar rule and the cases they cite, and the cases in the briefs in this particular case, envision a much more probing inquiry, not one that just looks at the settlement superficially to determine solely if there's collusion or not, but one that really looks at the merits of the action, and it seems

assumed in this setting that that's necessary.

QUESTION: Well, what would collusion be? What would amount to collusion in the case of a settlement between a plaintiff and one of several defendants?

MR. MARKMAN: My understanding of the cases is that -- and this may or may not sound like definitional collusion. My understanding of the cases is, wholly unrelated to the merits of the action, the two parties just decide that we're simply going to get the deep pocket, here's a pittance, don't worry about it, you're going to be able to sue the deep pocket for the balance, and you've got a guarantee that you're going to be able to collect it. Now --

QUESTION: Why is that collusive?

MR. MARKMAN: It may not be definitionally collusive, Your Honor, but the same cases that speak to the need of a good faith hearing use in tandem with the discussion of collusion the necessity to assure that the proceeding is fair. In other words, to assure that the settlement is fair.

QUESTION: Fair not just as between the plaintiff and the settling defendant but fair also to the nonsettling --

MR. MARKMAN: It seems to me that they're speaking of a global fairness, which is the whole point,

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and which undercuts the efficiency that's claimed by the proponents of the settlement bar rule. If you're truly going to inquire as to global fairness, then you've got a trial on the merits.

QUESTION: Well, Mr. Markman, you -- don't you -- don't most of the jurisdictions that use the pro rata or proportional rule also require good faith hearings?

MR. MARKMAN: They do, Your Honor.

QUESTION: Unless they adopt the variant of it, where the nonsettling defendant can -- you know, can opt one way or the other, but those that just employ a straight pro rata, they also have a good faith hearing.

MR. MARKMAN: That is correct, Your Honor.

QUESTION: So -- and you're willing to accept that disposition. The good faith hearing doesn't bother you in that context?

MR. MARKMAN: No, Your Honor, we're -- I guess maybe I didn't make my position clear. We are arguing against a pro rata rule that bars contribution suits even if it has a good faith hearing. In this instance, for example, Boca Grande Club has said, well, let's have no good faith hearing and a settlement bar.

What we're asking the Court is to determine the following: first, we are equally satisfied with the

proportionate credit approach as we are to the contribution approach.

QUESTION: I see, but with a proportional credit approach, you still insist that there be contribution.

MR. MARKMAN: That issue isn't even addressed. I don't --

QUESTION: I think there's some confusion here. You're using the term, pro rata, to mean something different than proportionate.

MR. MARKMAN: Well, there's a lot of confusion in the terminology in this case.

QUESTION: But there isn't any -- if you have the proportionate fault rule, then there isn't any question of contribution, isn't that right?

MR. MARKMAN: That's correct. That's correct. There would be -- under the proportionate credit or proportionate fault rule, or what some courts and parties have called the pro rata rule, they all mean the same thing, the proportionate allocation rule, there is no necessity for a contribution action because a nonsettling defendant like Florida Power & Light is well satisfied that whatever the finder of fact determines is the proportional fair --

QUESTION: And when does a good faith hearing have any place in a proportional fault rule?

QUESTION: That's what I don't understand.

MR. MARKMAN: There's no requirement of a good faith hearing --

QUESTION: There's neither.

MR. MARKMAN: -- in that setting, and perhaps I used the wrong terms earlier, Your Honor. I apologize. I'm only speaking about -- I'm only discussing a pro tanto situation with a settlement bar, not proportionate credit, but what has been called the settlement bar rule in the briefs in this case.

QUESTION: So you agree that if proportionate fault as recognized by -- is adopted, no good faith hearing is required?

MR. MARKMAN: That's correct, Your Honor. In this case, for example, Florida Power would be happy -- and I think this would be the necessary result if proportionate fault is adopted -- Florida Power would be -- Florida Power & Light would be well-satisfied to have another trial on liability and have our proportional fault vis-a-vis Boca Grande determined. That's what would be required.

QUESTION: You agree to that, but do the courts that apply the proportionate fault rule agree to that? Do none of them require good faith hearings?

MR. MARKMAN: I --

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QUESTION: I mean, there -- if what you're worried about is fraud, there is always the possibility, even under that system, of the settling defendant being paid off, in effect, to participate in the trial in order to shift more -- a higher percentage of the blame on the nonsettling defendant. I don't see why that system dispenses with the need for a good faith hearing, if you think a good faith hearing is ever necessary.

MR. MARKMAN: It does, Your Honor, dispense with the necessity of a good faith hearing for this reason. To the extent there is a patently unfair deal, we might call it struck between the plaintiff and the settling defendant, under a proportionate fault regime, the impact of that, the burden of that, is going to be visited on the parties who struck the deal. It will not be visited on the nonsettling defendant.

QUESTION: Well, it's not unfair for the plaintiff. The plaintiff is paying for the avid cooperation of the settling defendant in foisting a higher percentage of the liability upon the nonsettling defendant.

MR. MARKMAN: I agree --

QUESTION: It's a good deal for him.

MR. MARKMAN: I agree with that, and that --

QUESTION: But that's okay. That's the way the

world should work.

MR. MARKMAN: Yes, and that --

QUESTION: But a defendant always -- one -- jointly liable defendants always try to foist liability off on the other defendants, don't they?

MR. MARKMAN: That's correct, Your Honor, but the critical flaw in the settlement bar approach is that the process of that foisting will always be visited, the result of that will always be visited on the nonsettling defendant, and as compared to the proportionate credit approach, the parties can cut their own deal and they can live with it. They're the parties to the agreement.

In the other situation, the settlement bar situation under the pro tanto approach, a nonsettling defendant like Florida Power has absolutely no input in that process, and a jury verdict can come back that can be grossly unfair to it --

QUESTION: Mr. Mark --

MR. MARKMAN: -- grossly disproportionate placed damages against --

QUESTION: I'm sorry, I didn't mean to interrupt you.

I think what is perplexing to at least some of us is, why outlaw a Mary Carter agreement on the one hand and refuse to look into the good faith of the settlement

in the proportional credit situation, because it seems to me the defendant may well agree on a proportionate credit settlement to do precisely what is outlawed under the Mary Carter agreement.

He says, look, I will go into court, and I will say, there was absolutely no negligence on the part of the plaintiff, and all the negligence was on the part of these co-defendants. Why doesn't -- if a court, as apparently Florida does inquire into the legitimacy of doing that as a general rule, why wouldn't it do so if it adopted, or if we imposed a proportionate fault rule?

MR. MARKMAN: Well, it seems to me, Your Honor, that that, with all due respect, is perhaps we have the finder of fact and juries in this case.

I don't think that we have to worry about -- I believe the Court would be describing a sort of in-court collusion that will have to be held up to the light of the trial process. Under the settlement bar rule, there's no such probing inquiry. Under the settlement bar rule, we have an out-of-court agreement that when struck initially doesn't have anything to do with the judicial process.

QUESTION: You're saying we don't, but why shouldn't we? How do you -- I still don't understand why we're -- why a court would distinguish between the two situations.

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MR. MARKMAN: My belief is that if they are going to try to collude in that fashion they're going to have to prove it up. None of these rules operates perfectly. It's our position, though, that the proportionate credit rule in that aspect is far more fair. At the very least, under the proportionate credit rule the nonsettling defendant knows that his liability will be limited and the negligence of others will be taken into account.

QUESTION: He knows that unless some court is going to say, if we're outlawing Mary Carter in other situations, we had better look to good faith here.

MR. MARKMAN: Your Honor, I just don't -- it's our position that the good faith hearing, because of the way the system operates overall, isn't a necessary appendage. We certainly have no objection to it. In other words, if the Court wants to impose a good faith requirement --

QUESTION: You're -- you're always a defendant.

MR. MARKMAN: Well, perhaps, Your Honor.

QUESTION: Or you're always the defendant who's left, rather, I should say.

MR. MARKMAN: That would seem to be the case.

QUESTION: Do you know of any system that has the proportional fault approach that has its extra hearing

because of the risk that the settling defendant will get together with the plaintiff and insulate the plaintiff from any showing of fault on the plaintiff's part? Is there -- is there --

MR. MARKMAN: Your Honor, I am not aware of a jurisdiction that has adopted a proportionate credit approach coupled with a good faith hearing requirement, and I think the reason probably is the one I began with, and that is efficiency.

It seems, at least comparatively speaking, unnecessary to impose that, and I guess the thinking is the efficiency, and that is, the efficiency that comes from the fact that the proportionate credit approach of all these options is the only one trial solution, that efficiency would be lost if there were an ancillary appendage to it.

QUESTION: Your position is the one that most deters settlements though, isn't it, because then the settling defendant is uncertain, is always vulnerable to the contribution suit.

MR. MARKMAN: With the preface that we're equally happy with the proportionate credit approach, I would say no.

I mean, I believe that the settlements that are deterred by the application of the contribution rule are

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settlements that are not worth encouraging to begin with. As I said at the outset, we're trying -- the sort of settlements that the settlement bar rule encourages are the partial settlements that don't yield the judicial efficiency.

They're the partial settlements that encourage a prolongation of litigation anyway, and when you throw into the mix that you've got to go back and try to make them somewhat fair by imposing a good faith requirement and having an additional proceeding, I don't think, on balance, we discourage settlements.

If the deal struck is relatively fair, it seems to me that a contribution action will be discouraged because the party's going to say, hey, I don't want to spend the money on a contribution suit. That's pretty close, when you consider litigation costs and risks.

Under the maritime common law, the Supreme Court is free to select the fairest and best solution to govern this situation. The core maritime principles that have guided this Court teach that this Court should reject the settlement bar rule in the pro tanto setting, and in the alternative adopt either the proportionate credit approach or the contribution approach.

Thank you.

QUESTION: Thank you, Mr. Markman. Mr. Mann,

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we'll hear from you.

ORAL ARGUMENT OF RONALD J. MANN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

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

A lot of the lengthy discussion that has gone on this morning, I think it might be useful to step back for a minute and emphasize a few points about the fundamental principles relative to the cases before the Court today.

First, the Court's modern maritime cases consistently have emphasized the virtues of a comparative fault regime, because such a regime tends to allocate responsibility in accordance with fault, and that in turn tends to give all maritime actors an appropriate incentive to avoid accidents. Each of the rules that Mr. Kelley and I have urged would be consistent with that principle, because each ultimately would result in solvent defendants who do not settle being held liable for a share of the total damages proportionate to their share of the fault.

The second principle the Court has followed, absent congressional intervention, is a principle of joint and several liability, under which a plaintiff is entitled to receive all of its damages from any single tortfeasor so that the tortfeasors as a group bear the risk that one

or more of them are insolvent, or that one or more of them may have some statutory defense to liability, as in Edmonds.

Again, neither of the rules that we have urged today would undercut that principle, except in cases where the plaintiff voluntarily chooses to accept from a defendant a sum less than that defendant's proportionate sum of damages -- share of damages, and in that case we see no inequity in holding the plaintiff to the burdens as well as the benefits of the bargain.

Now, we suggest another principle that should guide the Court in deciding the cases today. A settlement agreement between two parties should not have the effect of altering the liability to the tort claimant of third parties that are not a party to the settlement.

Now, the position urged by petitioners in this case, adoption of a contribution bar, is the only one of the three principal rules discussed in the briefs that would lead to that anomalous result, and we submit that the opportunities for collusion, together with the alternate ways of resolving the problem, counsel against adopting that rule.

Now, with respect to the question of collusion, I thought it would be helpful if we explained what we see as the type of collusion that courts are concerned about

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in this area. I think that if you look at a simplified version of the facts in the McDermott case, you can see the problem.

You have a plaintiff who owns a boat. A subsidiary of the plaintiff -- we can call it Hudson Engineering -- designs a device for picking up a very heavy object on the boat. For one reason or another, the device doesn't work, the object falls, it causes a lot of damage. The plaintiff sues everybody -- the people who made everything, the people who did everything, and then one of the defendants --

QUESTION: The plaintiff being the boat owner.

MR. MANN: The plaintiff being the boat owner sues everybody, as you would expect.

Now, one person who might have some liability is the person who designed the sling that picked up the thing and dropped it. Now, since that person is -- in fact they might have a very large share of the liability, but because that person is a wholly-owned subsidiary of the plaintiff, the plaintiff could enter into a settlement agreement with that party under which that party pays $100,000, even though you might think that the damages are $10 million or $20 million.

Now, if you adopt a contribution bar rule with the pro tanto approach, let's say you go to trial, the

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nonsettling defendants, the parties that aren't related to the plaintiff, there's a verdict for $10 million. Under the contribution bar rule, the verdict is reduced by $100,000 to take account of the settlement with the related party and the plaintiff, and that leaves the nonrelated parties paying $9,900,000 although the jury might have found that they were responsible for, say, 50 percent of the accident. That's the type of collusion that we think is unfair.

QUESTION: But Mr. Mann, is that type of collusion a problem if we do not adopt the pro tanto rule?

MR. MANN: No. If you adopt the proportionate credit rule, you wouldn't have a problem with that at all, and that's what I would go into -- it seems to us that in choosing the two rules that Mr. Kelley advocated in the first case and the rule that we advocate here, which we advocate on the assumption that we lose the first case, which -- is that the rule advocated by Mr. Kelley is a simpler rule that reduces the need for collateral litigation.

QUESTION: Do you agree that if we adopt the proportionate fault rule there's no need for good faith hearings?

MR. MANN: Yes. I guess the most precise way to refer to the rule that we've urged in the first case is

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the proportionate reduction rule, which refers to --

QUESTION: Jesus, don't give us another version.

(Laughter.)

MR. MANN: No, I think that it's useful to explain. The Court has -- I think the reason that people try to call that rule the proportionate fault rule is because your cases say that you like proportionate fault, though Reliable Transfer case rejected the flat divided damages rule in favor of what you can call a proportionate or comparative fault regime, which says that everybody is liable for their percentage of the damages.

The reason we call it proportionate reduction is because you're reducing the plaintiff's claim proportionately, and if you do adopt that rule in McDermott, then it seems to us there would be no need for a good faith hearing.

Now, the issue that Justice Souter and several people were talking about towards the end of Mr. Markman's argument, a Mary Carter agreement, that seems to us an entirely separate question. The issues before the Court today I think have to do with how you account in the claim for the effect of a settlement to one of the tortfeasors.

Now, there are separate common law rules, and I would presume this Court would consider on the proper occasion how to deal with a situation where a plaintiff in

one of the tortfeasors enter into an agreement under which the defendant -- the settling tortfeasor's going to assist at trial.

In many States and many common law jurisdictions, the rule is not that that agreement is illegal, the rule is that it is supposed to be presented to the fact-finder. It's discoverable, it's admissible at trial, the nonsettling defendant comes in and says, don't believe what the settling defendant is saying, he's getting paid to say that, don't listen to him, it's his fault and not mine, and that is a separate rule, and the Court as a matter of its maritime power under Article III could consider adopting such a rule.

QUESTION: So you're saying that the same interest which leads courts under some circumstances to outlaw Mary Carter in other circumstances would lead simply to a mandatory disclosure rule, and therefore you can adopt proportionate reduction without running the risk of adding another collateral hearing to the enterpri -- to the proceedings before they're done.

MR. MANN: You certainly can do that. I mean, what I'd like to emphasize is, it's too entirely separate questions. You don't -- I don't think --

QUESTION: Oh, I think we agree on the separateness of the question. We're just wondering if we

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go down the road of proportionate reduction on the theory that that is going to simplify proceedings, are we acting on an assumption which is in fact true, because if we had to -- if later on we found that the courts were saddling the proportionate reduction rule with collateral proceedings to look into good faith, we wouldn't have gotten quite as much for our rule as we thought.

And I think you're answering that by saying the interest that might lead you to worry, or a court to worry about the terms of the settlement, does not necessarily portend another collateral proceeding, it simply portends a disclosure rule.

MR. MANN: That's right. I think we would believe in all circumstances the best rule in these cases would be to put the greatest amount of evidence before the fact-finder, tell the fact-finder about the agreement -- I mean, our system rests on the assumption, true or not, that the fact-finder is going to make the right decision after being presented with all the evidence, and I think that really takes care of that problem.

QUESTION: Mr. Mann, what is the Government's position on the variation of the proportional liability rule that has been proposed?

MR. MANN: I guess I'd like -- there seems just -- there's two new rules. They're not really new,

but two additional rules that weren't really discussed in the briefs that have come up today. The first of them I'd refer to as the one-recovery rule, which is the rule that you seem to advocate in the McDermott argument, under which a settlement -- you would have a proportionate reduction rule, except that in no circumstances would the plaintiff be allowed to recover more than one recovery.

You asked if there was any system that adopted that. I think that if you look at subsection (3) of section 885 of the Restatement (Second) of Torts, there's a suggestion to that effect, although it's not entirely clear it would apply here, but that seems to adopt something like that rule.

QUESTION: But you don't favor that. I know your position on that, but before your time runs, just tell me your position on the other one.

MR. MANN: Okay. Our position on the other one is that we don't -- which is what I would refer to as the election rule --

QUESTION: Right.

MR. MANN: -- under which the nonsettling defendant can choose between the pro rata and pro tanto approaches, we don't favor that rule, either. The reasons why we don't favor that rule first are that it seems to us it would have an adverse effect on settlements, because

it's going to take away from the plaintiff the incentive to make a settlement, because if the plaintiff makes a good settlement, he doesn't get the benefit of it, so it certainly is going to decrease the plaintiff's incentive for settlement.

A second problem with that rule with respect to your concerns is that it doesn't necessarily get rid of the one recovery problem that seems to concern you, because at least as I understood the rule that was proposed, the person would choose immediately after the settlement was made whether they wanted pro rata or pro tanto, so if he chose wrong, the plaintiff still might get more than one recovery, and the third problem with it, it seems to us --

QUESTION: But at least you could say he got what he deserved.

MR. MANN: Well, that's our view of why we don't like -- we would disagree with the one recovery rule, is that the plaintiff -- we think the plaintiff gets what he deserves, and we think that the nonsettling tortfeasor pays what they deserve.

The last thing we wanted to say about that rule also is it seems to us it's rather complicated, and you're progressing down a road where you're making up increasing levels of complicated exceptions. Defendants get to

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choose between this rule and that rule. That starts to sound more like something that might be adopted by a legislature than a common law rule, I think, at that point.

QUESTION: Or a television show, maybe.

(Laughter.)

QUESTION: Thank you, Mr. Mann.

Mr. Pope, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DAVID F. POPE

ON BEHALF OF THE PETITIONER

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

I would like to go back over one thing mentioned by Florida Power & Light Company in its presentation, would suggest to the Court that a review of the documents contained in the Joint Appendix with respect to the settlement reached between Boca Grande Club and the Polackwich and Richards claimants will contain representations that in fact the settlements were made for noncollusive purposes and were made in good faith.

We would also note that this Court has recently approved changes to Rule 11 that in the Federal procedure, since we and the claimants in that case submitted documents to the court signed by counsel which represented that they were being submitted to the court for

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appropriate purposes, would probably -- could probably lead to sanctions if in fact it later turned out that the claimants had procured the cooperation unduly of Boca Grande Club or its employees, and that wasn't disclosed in the settlement papers submitted to the court.

We would also submit that there has been some discussion about collusive situations, and I think the Court needs to distinguish between collusive situations which is what we've talked about, whereby as part of the settlement agreement the settling party agrees to cooperate with, however that may be, in presenting the case against the nonsettling party and enhancing or assisting the plaintiff outside of the normal court processes, and the normal trial practice of the empty chair.

It is an anathema to plaintiff's counsel to have an empty chair, and it is the ideal situation for the defense counsel to have somebody to point to who isn't in court that can be suggested as the more culpable party. We would suggest that any requirement for a good faith hearing be limited to -- under a pro tanto situation to an examination to determine the collusive effects, and even in the Federal court system we would suggest that the Rule 11 would pose severe concerns to a counsel who participated in a collusive agreement and then obtained a

dismissal from a U.S. district court based on some pleadings submitted to that court that it turned out resulted in a collusive effect at the trial which later took place, and I would submit that certainly the nonsettling defendant would be well aware of what happened later at the trial.

If there are no questions, that completes our presentation.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pope. the case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Mari Federico

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