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Fair Settlement and the Non-Settling Defendant: *In Re Masters, Mates & Pilots Pension Plan and IRAP Litigation*

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COMMENTS

FAIR SETTLEMENT AND THE NON-SETTLING DEFENDANT: IN RE MASTERS, MATES & PILOTS PENSION PLAN AND IRAP LITIGATION

It is axiomatic that most litigation settles rather than going to trial. In fact, courts have traditionally favored settlement. However, in the context of complex litigation, it may be possible to effectuate only a partial settlement, often as a result of the differing degrees of culpability of the multiple defendants. For example, if the non-settling defendants have a right of contribution against the settling defendant, the settling defendant's incentive to settle may be diminished because he achieves no finality through settlement. For this reason (and under controlled circumstances), a court may be willing to extinguish the non-settling defendant's right of

1. See infra note 20 and accompanying text.
2. See infra note 17 and accompanying text.
3. Complex litigation is not a term of art. However, this comment uses the term to characterize cases with complex procedural issues, generally involving multiple plaintiffs, often as members of one or more classes; multiple defendants, usually with a wide range of culpability; and many claims and counterclaims, frequently necessitating consolidation of actions from several jurisdictions. See MANUAL FOR COMPLEX LITIGATION § 20.12 (2d ed. 1985) (for a discussion regarding the benefits of having one judge preside over complex litigation). For another "definition" of the term complex litigation, see AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 11 (Tent. Draft No. 1 Apr. 14, 1989) (exclusively defining complex litigation as "multiparty, multiforum litigation").
4. See infra note 31 and accompanying text for a brief explanation of contribution.
contribution with a bar order. However, many courts are coming to realize that the non-settling defendant must be offered some sort of procedural protection, such as a fairness hearing or future judgment reduction, to compensate for this lost right. How to achieve the judicial system’s goals of compensation and deterrence, while balancing concerns about fairness to the defendant in this situation, has posed a difficult question for the courts.

A court asked to approve a partial settlement may consider a number of questions in analyzing the proposed settlement. A primary question is whether the settlement compensates the plaintiffs. At least in the eyes of a court, the question of whether the settlement terms are fair to the non-settling defendants is a secondary one. In addition, as a corollary, the court must decide what standard should be used to judge the fairness of the settlement terms and how to weigh the competing interests of the plaintiffs, the settling defendants, and the non-settling defendants.

The Second Circuit recently confronted these competing concerns in In re Masters, Mates & Pilots Pension Plan & IRAP Litigation. In that case, the court directly faced the issue of a contribution bar order with a judgment reduction provision when a non-settling defendant appealed from the district court’s approval of a partial settlement. The district court had provided for a judgment reduction to compensate the non-settling defendant for the contribution bar; however the Second Circuit found the method to be in error and reversed. Although the issue had previously been addressed, with a divergence of opinion, in the areas of admiralty and securities law, the Second Circuit decision was the first case regarding settlement bar orders and judgment reduction methods in the ERISA area.

This comment begins with a review of the policies underlying settlement, contribution rights and judgment reduction methods. The availability of the right of contribution and its impact on the settlement process are discussed. Settlement bar orders and the three methods of judgment reduction are described. Furthermore,
contemporaneous developments in admiralty and securities law and under ERISA are reviewed, noting that courts have fashioned rules considering both the policies of those areas of the law and the competing interests of all the parties to the litigation.\textsuperscript{12}

Next, the Masters litigation is discussed. The complex history of this litigation is reviewed, illustrating the varying degrees of culpability of the parties involved.\textsuperscript{13} The partial settlement approved by Judge Broderick of the Southern District of New York is described, with emphasis on how the plans' insurers would cover the liabilities of the trustees, including the non-settling defendant.\textsuperscript{14} The Second Circuit's analysis of that settlement and the faults it detected are detailed, culminating in a description of the settlement policy the court announced.\textsuperscript{15}

Finally, the Second Circuit's decision is analyzed, concluding that the Second Circuit's reversal of the settlement was correct because the district court's settlement left the non-settling defendant with potential liability far exceeding his culpability.\textsuperscript{16} In so holding, the Second Circuit announced that in order for a right of contribution to be barred, the settlement must be fair to the non-settling defendant. The court's fairness standard is examined, and the method is found to be flawed in several respects. First, the method is not sufficiently clear so that it may be easily applied in future cases. Nor does the method adequately answer the questions of compensation, fairness and deterrence raised by judgment reduction provisions. Finally, this comment concludes that the Second Circuit's decision does not appropriately balance the policies of the ERISA statutes and the policies of settlement.

I. PARTIAL SETTLEMENTS, CONTRIBUTION BAR ORDERS AND JUDGMENT REDUCTION METHODS

The settlement of complex litigation before trial is generally favored by the federal courts.\textsuperscript{17} Complex cases can and do drag

\textsuperscript{12} See infra notes 56-110 and accompanying text.
\textsuperscript{13} See infra notes 111-25 and accompanying text.
\textsuperscript{14} See infra notes 126-37 and accompanying text.
\textsuperscript{15} See infra notes 138-58 and accompanying text.
\textsuperscript{16} See infra notes 159-70 and accompanying text.
\textsuperscript{17} See Wald v. Wolfson (In re U.S. Oil & Gas Litig.), 967 F.2d 489, 493 (11th Cir. 1992) (stating, "Public policy strongly favors the pretrial settlement of class action lawsuits . . . . Accordingly the Federal Rules of Civil Procedure authorize district courts to facilitate settlements in all types of litigation . . . .") and citing Fed. R. Civ. P. 16(a)) (hereinafter "U.S Oil"). See also Fed. R. EVID. 408 advisory committee's note ("[P]ublic
on for years; they crowd the dockets and deplete the parties’ and courts’ resources. Therefore, for efficiency reasons and in order to provide meaningful relief, the Federal Rules of Civil Procedure authorize the district courts to facilitate settlements and, in fact, a majority of suits do settle before trial. This is because settlement offers the plaintiff relief from the uncertainty of litigation; the settlement may provide a “war chest” for ongoing litigation; and the present value of the settlement may be greater than a recovery later. For the defendant, in addition to relief from the litigative uncertainty, and cost of maintaining the litigation, settlement also offers privacy and avoidance of an admission of guilt.

A. The Availability of Contribution and the Incentive to Settle

Typically, the decision to settle and the terms thereof rest wholly within the discretion of the parties and the judicial system does not play any role in those issues. However, certain settlements, such as class actions and shareholder derivative suits, require judicial approval; further, in some situations parties are unwilling to dismiss litigation unless the court agrees to invoke its equitable enforcement powers. In the usual case the standard for

policy favor[s] the compromise and settlement of disputes.”). See also infra note 19 and accompanying text.

18. U.S. Oil, 957 F.2d at 493.

19. Id. See FED. R. CIV. P. 16(a), (c); FED. R. CIV. P. 16(c) advisory committee note (“Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible.”). FED. R. CIV. P. 23(e) states only that “[a] class action shall not be dismissed or compromised without the approval of the court.” The courts have formulated the standard that a class action settlement must be “fair, adequate and reasonable” to the parties to the settlement and any third parties who could be affected. See, e.g., Williams v. City of New Orleans, 729 F.2d 1554, 1559-60 (5th Cir. 1984) (noting a heightened standard in a Title VII consent decree case).


22. Jones, supra note 20, at 444.


24. FED. R. CIV. P. 23(c).


26. Masters, 957 F.2d at 1025.
judicial approval of a settlement is the "fairness, reasonableness and adequacy of the settlement" to the plaintiffs.27

Where the rights of third parties are affected, however, their interests too must be considered. In other words, where the rights of one who is not a party to a settlement are at stake the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval.28

Thus, in suits involving multiple defendants, obtaining a settlement can be quite complex because of the court's involvement29 and because the parties' incentives to settle may be skewed based on the defendants' ability to recover from each other. Historically, the common law doctrine of joint and several liability favored full compensation of the victim, and ignored the relative culpability of the defendants.30 A victim was allowed to collect the entire amount of her damages from any of the defendants. Since the relative wrongdoing of each defendant was irrelevant, a right to contribution was barred. In other words, one defendant was not allowed to recover any reimbursement from the others.31 However, a right to indemnity, i.e., shifting the entire amount of the damages payment, did exist at common law.32

Most states33 and most commentators34 have rejected the common law's per se bar against contribution among defendants. However, if a right to contribution exists, a defendant's incentive to settle may be diminished. For example, if the judgment against a non-settling defendant exceeded his proportionate fault, then he would seek payment of the excess amount of the judgment in a separate suit for contribution against the settling defendant. If this happens the finality the settling defendant thought he had achieved

27. Id. at 1025-26.
28. Id. at 1026 (citations omitted).
31. Id.
32. Id. § 51.
33. Most states have adopted statutes which to some extent allow contribution among tortfeasors. Id. § 50, at 338.
34. Id. § 50. See also Donovan v. Robbins, 752 F.2d 1170, 1178 (7th Cir. 1985) ("[T]he common law's rejection of contribution among joint tortfeasors has itself been rejected by most states and most commentators.").
through settlement was illusory. This disincentive to settle caused by a right of contribution is particularly strong in complex litigation, where a huge cast of defendants may have dramatically different levels of culpability and the plaintiffs' damages can be astronomical.35

B. Settlement Bar Orders and Judgment Reduction

To reduce the disincentive to settle, some courts have been willing to include a contribution bar as part of the settlement.36 "In essence, a bar order constitutes a final discharge of all obligations of the settling defendants and bars any further litigation of claims made by non-settling defendants against settling defendants."37 In other words, the right of one defendant to seek contribution from another is cut off. However, because an out-and-out contribution bar may be unfair to the non-settling defendants, some jurisdictions permit judgment reduction.38 A judgment reduction, or credit rule, is a means by which any judgment against the non-settling defendant is to be reduced in light of the settlement with the other defendants. Courts have used three methods for reducing settlements: pro rata, proportionate fault, and pro tanto.39

36. U.S. Oil, 967 F.2d 489, 494 (11th Cir. 1992). The Eleventh Circuit stated:
Modern class action settlements increasingly incorporate settlement bar orders such as the one at issue in this case. The reason for this trend is that bar orders play an integral role in facilitating settlement. Defendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes relating to the underlying litigation . . . . In short, settlement bar orders allow settling parties to put a limit on the risks of settlement.
Id. (citations omitted).
38. See infra notes 60-63, 69-99 and accompanying text (discussing different courts' approaches to judgment reduction).
Under the *pro rata* method of judgment reduction, the relative culpability of the defendants is irrelevant.\(^{40}\) The court simply apportions equal shares of the liability to all the defendants;\(^{41}\) e.g., four defendants are each one quarter liable. Thus, if a plaintiff settles with three of four defendants, a judgment against the non-settling defendant is reduced by three quarters, regardless of the actual liability of the settling defendants. Particularly in cases where there are a large number of defendants, this method of judgment reduction diminishes the plaintiff's willingness to reach even a partial settlement.\(^{42}\) A plaintiff that can achieve a judgment against all the defendants will get a larger recovery than if he partially settles, achieves a judgment against the remaining defendants, and then has that judgment reduced away. Equally, non-settling defendants whose culpability is slight find this method less attractive because they are deprived of a strong right of contribution and instead receive a judgment reduction of potentially lesser value.\(^{43}\)

In contrast, the relative culpability of the defendants is highly relevant in the proportionate fault method of judgment reduction.\(^{44}\) The relative fault of all the defendants, both settling and non-settling, is considered, and the judgment against the non-settling defendants is reduced by a percentage corresponding to the cumulative degree of fault of the settling defendants.\(^{45}\) Theoretically, this method is appealing because it seems the defendants pay the victim...
in proportion to their actual liability. In practice, however, a number of troublesome problems arise. First, a holdout defendant can stall the settlement because the plaintiff bears the risk of a bad settlement. Moreover, it is hard for the plaintiffs in a class action to determine the worthiness of a proposed settlement because the amount of the setoff is not determined until after the trial. Furthermore, the factfinder bears the heavy burden of determining relative fault. Taken together, this obviates much of the policy underlying the judicial enthusiasm for settlement.

Finally, the pro tanto method of judgment reduction reduces the judgment against the non-settling defendant by the amount of the settlement paid by the settling defendants. Thus, if the three defendants settled for $1 million, and a judgment of $25 million was rendered against the fourth defendant, the $25 million would be reduced to $24 million. If the fourth defendant was only minimally culpable, he has paid dearly for the loss of his right of contribution, and the settling defendants have gotten away very cheaply. The opportunity to get away cheaply encourages collusion between plaintiffs and favored defendants. Because of this possibility some jurisdictions require a hearing to show good faith and to discuss relative culpability. A protracted fairness hearing

46. Id. at 161 n.3.

The timing of the decision regarding the judgment reduction method has itself been a subject for litigation. See Jiffy Lube, 927 F.2d 155, 157 (4th Cir. 1991) (characterizing the issue as “whether . . . a partial settlement between plaintiffs and most defendants which grants the non-settling defendants a right of setoff, in exchange for a contribution bar, may be approved when the settlement agreement provides that the method for calculating that setoff will not be determined until . . . judgment” and holding that this situation constituted prejudice to both plaintiffs and non-settling defendants); In re Granada Partnership Sec. Litig., 803 F. Supp. 1236, 1239 (S.D. Tex. 1992) (holding that the setoff method must be determined upon approval of the settlement and adopting the proportionate fault method); In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1368 (2d Cir. 1991) (characterizing the second issue as “whether the method of judgment reduction must be determined” upon approval of the settlement and holding that it did not).

47. Jiffy Lube, 927 F.2d at 160 n.3.

48. Kaypro, 884 F.2d 1222, 1230 (9th Cir. 1989), cert. denied sub nom. Franklin v. Peat Marwick Main & Co., 489 U.S. 890 (1990). See also M. Patricia Adamski, Contribution and Settlement in Multiparty Actions Under Rule 10b-5, 66 IOWA L. REV. 533, 549 (1981) (stating that the pro tanto approach leads to collusion "since the plaintiff — who will be able to collect total damages less the settlement amount from the remaining defendants — theoretically has nothing to lose by accepting an inadequate sum in settlement").

wherein the non-settling defendant protests the *pro tanto* method defeats the very purpose of settlement, i.e., cost reduction and efficiency. In effect, the fairness hearing essentially converts the *pro tanto* method into a modified proportionate fault method of judgment reduction.

As one commentator has noted, the decision whether to reduce the judgment against the non-settling defendant by the *pro tanto* or proportionate fault method is essentially a question of who bears the risk of a bad settlement — the settling plaintiff or the non-settling defendant. Under the proportionate fault rule, the risk of an inadequate settlement is placed on the plaintiff, the party best able to evaluate the settlement. On the other hand, the *pro tanto* rule places the risk on the non-settling defendant, the party who did not participate in the settlement. Most courts have determined that although the policy of promoting settlements is furthered by the *pro tanto* method, the policy of promoting fundamental fairness to litigants must prevail. “Ultimately the role of the judiciary and the trial process is to fairly assess culpability in determining the outcome of litigation." Courts that have rejected the *pro tanto* method in favor of proportionate fault reduction persuasively argue that the proportionate fault method best matches the equitable nature of contribution as well as the policies of deterrence and compensation. Thus, for this reason the majority of courts prefer the proportionate fault method of judgment reduction over the *pro tanto* method.

C. Judgment Reduction Under Admiralty, Securities and ERISA Laws

Decisions in the areas of admiralty, securities and ERISA laws provide some insight into how courts have determined the appropriateness of a judgment reduction method for the non-settling defen-

51. See id. at 106.
52. *Jiffy Lube*, 927 F.2d at 161.
53. Id.
55. *Alvarado*, 723 F. Supp at 553.
dant whose right to contribution has been barred. Typically, a three
stage analysis is employed. At the first stage, the court assesses the
existence of a right of contribution, usually by considering the
policies underlying that area of law or statute. Next, the court
determines whether the defendant’s right to contribution may be
barred. If the court determines the right is extinguishable, then the
court provides for a method of judgment reduction in order to
compensate the defendant for his lost right. Of course, the three
stage analysis is generally made in a series of decisions, rather
than in a single case.

In admiralty, the traditional maritime rule provides that a
wrongdoer who has paid more than his share of the damages can
seek contribution from the other wrongdoers. Two admiralty cas-
es decided before the U.S. Supreme Court allowed the injured
party who obtained a judgment against joint tortfeasors to satisfy
the full amount of the judgment from any tortfeasor, regardless of
their comparative fault. These cases do not, however, address the
issue of the non-settling defendants’ right to contribution where a
settlement and bar order have been effectuated. This has created
widely disparate authority. For example, although the Eleventh
Circuit adopted a pro tanto method in *Self v. Great Lakes Dredge
& Dock Co.*, the most recent decision from that court sought to

56. See, e.g., USF&G, 772 F. Supp. at 1572 (“The Court’s analysis necessarily begins
with the public policies that underlie Rule 10b-5.”).
57. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1546 (11th Cir. 1987),
cert. denied sub nom., *Great Lakes Dredge & Dock Co. v. Chevron Transport Co.*, 486
58. See *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) and *Edmonds v.
admiralty law followed the principle of divided damages, where damages were divided
equally between the parties involved in a collision or stranding regardless of fault. *Reli-
able Transfer* referred to the more modern principles of comparative negligence to allocate
a longshoreman’s injuries were caused by the stevedore employer and the shipowner. The
Supreme Court rejected an argument that the shipowner’s liability for damages should be
limited to its proportionate fault, and allowed the longshoreman to collect all of his dam-
ages from the shipowner under the traditional principle of joint and several liability.
*Edmonds*, 443 U.S. at 266. However, the shipowner had a right of contribution against
the stevedore employer, and in that fashion, damages would ultimately be apportioned
according to fault. *Id.* at 269.
59. See *Miller v. Christopher*, 887 F.2d 902, 903 (9th Cir. 1989) (stating that it “symp-
thetize[d] with the district court’s difficulties in finding guidance from controlling author-
ty on the settlement bar issue [because] [t]here is none”).
60. *Self*, 832 F.2d at 1548 (following *Edmonds* and noting the need to provide “special
protection” to seamen).
preserve the principle of comparative fault by rejecting a settlement bar rule that would cut off the non-settling defendant’s right of contribution. In addition, the Fifth Circuit has followed the proportional fault approach of United States v. Reliable Transfer Co., so that the liability of any non-settling defendants is limited to the share of damages caused by their proportional fault. Similarly, the Ninth Circuit has allowed the non-settling defendant’s right of contribution to be barred where the settlement was made in good faith, making a finding of good faith based on the settlement’s proportionality to the settling defendant’s liability. As can be seen from this body of case law, even though the substantive law of admiralty has recognized the principle of comparative fault, it has not yet decisively concluded which judgment reduction method best suits its objectives.

The federal courts have also grappled with the issue of contribution bar orders and corresponding judgment reduction methods in securities litigation. An express statutory right of contribution among defendants found jointly and severally liable exists in certain securities actions. Moreover, an implied right has been found under Rule 10b-5 promulgated under section 10(b) of the Securities Exchange Act of 1934. However, having determined that the right of contribution exists, some courts have been willing to extinguish that right with a settlement bar order. The


63. Miller, 887 F.2d at 907.


67. See Smith v. Mulvaney, 827 F.2d 558, 560 (9th Cir. 1987).

68. Kaypro, 884 F.2d 1222, 1229 (9th Cir. 1989), cert. denied sub nom. Franklin v. Peat Marwick Main & Co., 498 U.S. 841 (1990) ('[N]or do we think Congress intended the right to contribution to be inextinguishable.'). See U.S. Oil, 967 F.2d 489, 496 (11th Cir. 1992) (extinguishing right of defendant who had full opportunity to preserve its rights).
courts that have considered the question are divided over the appropriate judgment reduction method to use. Some courts have adopted a proportionate fault method, concluding that method best satisfies the statutory, equitable and policy goals underlying the federal securities laws. The Ninth Circuit described three policies at work in a Rule 10b-5 action: "the statutory goal of punishing each wrongdoer, the equitable goal of limiting liability to relative culpability, and the public policy goal of encouraging settlements." These policies, although difficult to satisfy simultaneously, "are best achieved if the credit method reflects the same objectives as the contribution claim which it replaces." The proportionate fault method punishes each wrongdoer and provides for deterrence because the "most culpable parties bear the consequences of their actions." Thus, these courts argue the equitable principles underlying contribution are served when liability is apportioned according to fault because the non-settling defendant pays only his share of a future judgment. Furthermore, settlements are encouraged because the settling defendant knows the non-settling defendant cannot sue for contribution, but the non-settling defendant has been compensated for this lost right.

The courts that have adopted the pro tanto method argue that these same principles are achieved by holding a hearing in which the fairness of the settlement to the non-settling defendants is considered. To determine fairness the court considers such factors as the probability of collecting a larger judgment, the strength of plaintiff's case, the relative culpability of all the defendants, and the extent of the court's participation in the settlement process. A critical problem with the use of the fairness hearing is that two of these factors, the strength of plaintiff's case and relative culpability, can only be adequately assessed when discovery is completed and the case is near trial. In fact, the fairness hearing de-

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70. *Kaypro*, 884 F.2d at 1231.


72. *Id.*

73. *Id.*


75. *USF&G*, 772 F. Supp. at 1573. Most courts adopting the pro tanto method do so when discovery is near completion. See, e.g., Westheimer v. Finesod (*In re Terra-Drill*
volves into a mini-trial. Such a mini-trial negates many of the benefits of settling.

Furthermore, other problems with the pro tanto method have been noted. The method provides incentives for the plaintiff to collude with certain defendants. Specifically, further litigation can be funded if the plaintiff accepts a low partial settlement, and the amount of the total recovery possible is not diminished. Low settlement with those defendants with limited resources forces wealthier defendants to pay more than if all defendants went to trial. The Ninth Circuit has expressed skepticism that a good faith hearing could resolve these problems. In fact, it has been argued that the pro tanto method may actually encourage such “bad” settlements, i.e., those “in which a defendant settles for less than his likely share of liability at trial.” In this way the potential may be for litigation to be prolonged, thereby reducing judicial efficiency.

Singer v. Olympia Brewing Co. is most often cited in support of the pro tanto judgment reduction method. However, the Singer case does not involve a bar order, and therefore does not discuss the “policy question of what credit method would be required to compensate the non-settling defendant for the barring of his equitable right to contribution.” More correctly, Singer can be cited as support that the Second Circuit applies “the one satisfaction rule, which provides that a plaintiff is entitled to only one satisfaction for each injury.” In Singer, the plaintiff brought

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76. Donovan v. Robbins, 752 F.2d 1170, 1181 (7th Cir. 1985).
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
84. 878 F.2d 596 (2d Cir. 1989).
85. See, e.g., Jiffy Lube, 927 F.2d 155, 161 (4th Cir. 1991). See also infra note 97.
86. USF&G, 772 F. Supp. at 1571.
87. Singer, 878 F.2d at 600. For example, the Second Circuit paints this scenario: [P]laintiffs settle with some defendants for a large sum, at trial the non-settling defendants are found to be primarily responsible for the damage and are
nearly identical actions against Loeb Rhoades and Olympia Brewing under federal securities laws for the same injury.\textsuperscript{88} Two weeks after a verdict was rendered against Olympia, the plaintiff obtained a $1.25 million settlement from Loeb Rhoades.\textsuperscript{89} Olympia then obtained a setoff of the judgment against it by the amount of the settlement with Loeb Rhoades.\textsuperscript{90} The Second Circuit determined that because the settlement and the judgment represented common damages for the same injury, the non-settling defendant Olympia was entitled to the setoff.\textsuperscript{91}

In analyzing the \textit{Singer} decision, the Second Circuit in \textit{Masters} noted that \textit{Singer} had not addressed the question of whether the non-settling defendants could seek contribution in excess of the amount of the judgment reduction, i.e., the amount of the settlement.\textsuperscript{92} Nothing in \textit{Singer} would prevent such a reduction even if the settlement exceeded the settling defendant’s proportionate liability.\textsuperscript{93} The court noted that if the contrary were true, “then a plaintiff could maximize his total recovery by proving that a party who made the largest contribution to a settlement was the party least at fault.”\textsuperscript{94}

Subsequent to \textit{Singer}, in \textit{In re Ivan F. Boesky Securities Litigation},\textsuperscript{95} the Second Circuit refused to specify a method of judgment reduction.\textsuperscript{96} At issue in that case was whether the adoption of the method of judgment reduction could be deferred until a judgment was reached; the Second Circuit allowed the parties to defer that decision.\textsuperscript{97} In dictum, the court noted that contribution bars were required to pay a large sum, and plaintiffs end up with more money than they would have received if all parties had gone to trial.

\textit{Kaypro}, 884 F.2d 1222, 1231 (9th Cir. 1989).
\textsuperscript{88} \textit{Id.} at 599.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.} at 600.
\textsuperscript{92} \textit{Masters}, 957 F.2d 1020, 1030 (2d Cir. 1992).
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} 948 F.2d 1358 (2d Cir. 1991).
\textsuperscript{96} Boesky cites \textit{Singer} as authority for the Second Circuit’s adoption of the \textit{pro tanto} method. Boesky, 948 F.2d at 1362.
\textsuperscript{97} \textit{Id.} at 1369. The court notes that its decision was in part a function of the fact that none of the parties objected to deferral. In cases where the non-settling defendant has objected to deferral, the courts have determined that the method must be specified before the settlement is approved because the judgment reduction method affects settlement and trial strategy. See also supra note 46 (citing Boesky for the foregoing proposition and citing two other cases holding that the decision regarding the method of judgment reduc-
desirable because they facilitated settlement. Later, the Masters court firmly stated that although it had not adopted a judgment reduction method in Boesky, "in no way did [it] intimate that [it] later would approve a method . . . that did not conform to Singer." Exactly what the court meant by this remains to be seen.

Prior to Masters, only the Seventh Circuit had considered the issue of a contribution bar order in the context of ERISA law. In Donovan v. Robins, the Seventh Circuit followed the same sort of analysis as that found in securities law. First, the court determined that a right of contribution was available under ERISA. Second, utilizing the lessons of admiralty and securities laws, the court declined to permit the non-settling defendants' rights of contribution to be extinguished by a settlement bar. And finally, the court announced its adoption of the proportional fault rule, which would provide a "neat solution" to the problems encountered in encouraging settlements.

A vigorous concurrence critiqued the majority's adoption of the proportional fault rule as inconsistent with the policies underlying the ERISA statutes. The "history of ERISA," wrote Judge Coffey, "demonstrates that Congress intended to codify the principles of trust law." Trust law permits equitable contribution among co-trustees — i.e., liability is joint and several. According to Judge Coffey, Congress intentionally adopted joint and several liability so that an ERISA plaintiff could recover the full amount of damages from any of the breaching trustees. And, under the
principles of joint and several liability, the full amount of the recovery would be reduced by the amount of any settlement with one or more of the breaching trustees. Therefore, Judge Coffey believed the majority's proportional fault rule was inappropriate because the rule does not ensure the ERISA plaintiff will be fully compensated as Congress intended.

From this review of the decisions concerning judgment reduction in various areas of the law and in different jurisdictions, it is clear that no one method has prevailed. Therefore, it was that question which was addressed in Masters.

II. THE MASTERS, MATES & PILOTS PENSION PLAN AND IRAP LITIGATION

A. The History of the Litigation

In 1983, the trustees of the Masters, Mates & Pilots' Pension Plans and Individual Retirement Income Plan ("IRAP") (hereinafter collectively referred to as the "plans") selected Tower Asset Management, Inc. as the investment manager for $15 million of IRAP assets. Additional plan assets were entrusted to Tower Asset so that by November 1985 Tower Asset was managing approximately $30 million of the plans' assets. During this time, Tower Asset invested the plans' assets in numerous risky ventures, mainly involving companies in the maritime industry. These companies generally had little or no capital and extremely high debt ratios. Many of these entities had arrangements to raise capital with Tower Capital Corporation and Tower Securities, Inc. As the similarity of the names suggests, the three corporations were closely related. The three individual defendants involved in the suit served as the officers and directors of each corporation and cumulatively owned 100% respectively of each corporation.

109. Id. at 1186.
110. Id.
111. The IRAP was an individual account or defined contribution plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34) (1988). The Pension Plan was a defined benefit plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35) (1988). Id.
113. Id.
114. Id.
115. Id.
117. Id.
In fact, there was evidence that these defendants actually owned substantial equity interests in the maritime companies in which the plans' assets were invested.\textsuperscript{118}

When it was discovered that the value of the plans' assets had declined drastically, Tower Asset was dismissed as the investment manager;\textsuperscript{119} litigation ensued in December 1985.\textsuperscript{120}

Based on the extensive documentation of these transactions provided by the plaintiffs, the district court judge had little difficulty finding that the Tower corporations and the named individuals violated the prohibited transactions provisions of ERISA.\textsuperscript{121} Specifically, the investments made by Tower Asset violated ERISA sections 406(b)(1) and 406(b)(3).\textsuperscript{122} To reach this decision, the judge determined that the Tower corporations were fiduciaries within the meaning of ERISA.\textsuperscript{123} Additionally, the "close and intimate relationship between the corporate and individual defendants" allowed the corporate veil to be pierced, so that all the defendants, corporate and individual, were held jointly and severally liable.\textsuperscript{124} After a de novo review, the Second Circuit affirmed

\textsuperscript{118} Id.  
\textsuperscript{119} Id. By early 1986 the plans' assets had declined from $30 million to $9.5 million. Id.  
\textsuperscript{120} Id. The litigation was made more complex by the number of related actions. The Secretary of Labor brought a similar action not only against the Tower corporations and their owners, but also against the trustees of the plans who had initially selected Tower Asset as the plans' investment manager. The Secretary also sued the plans themselves. Moreover, his motion to intervene in the above-described litigation was granted by the district court. Additional litigation ensued when the plans' participants sued the trustees for breaching their fiduciary duties by selecting and monitoring Tower Asset as the plans' investment manager. Finally, the plans' attorneys and auditors were sued for malpractice, and the plans' custodial trustee, a bank, was also charged with ERISA violations. The actions that were consolidated before the district court include the Secretary of Labor's action against the trustees and the Tower defendants, the participants' consolidated class actions against the trustees and Tower, the participants' class action against the plans' former counsel, and the trustees' actions against the custodial trustee. Three actions against the former accountants were not consolidated. Masters, 957 F.2d 1020, 1023 (2d Cir. 1992). For an additional description of the litigation see Cerisse Anderson, Judge Removes Proskauer Over Fund Conflict, N.Y..., Jan. 26, 1990, at 1.  
\textsuperscript{122} Id. Section 406(b) prohibits a fiduciary from dealing "with the assets of the plan in his own interest or for his own account," (§ 406(b)(1), 29 U.S.C. § 1106(b)(1)) or from receiving "any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." (§ 406(b)(3), 29 U.S.C. § 1106(b)(3)). Lowen, 653 F. Supp at 1553.  
\textsuperscript{123} Lowen, 653 F. Supp. at 1551.  
\textsuperscript{124} Id.
the district court’s ruling, and required the defendants to disgorge about $1 million in fees and other consideration received for the improper investments.\textsuperscript{125}

B. The Settlement

In October of 1991 the district court approved a settlement that allowed the participants to recoup about $22 million of the loss suffered by the plans.\textsuperscript{126} The settling parties included the following defendants: the plans’ trustees, the law firms, the auditors, and the custodial trustee. In exchange for settling, these defendants received complete protection from future liability. Additionally, the settlement contained a bar order, so that a non-settling defendant would be barred from pursuing claims of contribution or indemnity against the settling defendants.\textsuperscript{127} The settlement also contained several judgment reduction provisions to credit the non-settling defendants for the payments of the settling defendants. Specifically, any judgment obtained against a non-settling defendant would be reduced by the lesser of (1) the amount paid by the settling defendants or (2) the proportional share of the damages attributable to the settling defendants.\textsuperscript{128} Thus, if and when a non-settling defendant attempted to reduce the amount of the judgment against him, the court would have to determine the proportional fault of the settling parties.\textsuperscript{129} Second, the settlement provided that any judgment obtained against Riley would be reduced by the amount paid by Aetna, the plans’ insurer, on behalf of the trustee defendants, i.e., $7.5 million.\textsuperscript{130} Potentially, the settlement would also compensate Riley through the Republic payment, but the parties disagreed as to whether Riley’s coverage under the Republic policy extended to claims beyond those for “damages uniquely attributable to breaches of fiduciary duty alleged to have been committed by him in 1985.”\textsuperscript{131}

The Tower defendants did not agree to the settlement. Nor did Franklin K. Riley, Jr., who served as a plan trustee in 1984 and

\textsuperscript{125} Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1221 (2d Cir. 1987).
\textsuperscript{127} Masters, 957 F.2d at 1024.
\textsuperscript{128} Id. at 1025.
\textsuperscript{129} Id. See Settlement at *5.
\textsuperscript{130} Masters, 957 F.2d at 1024.
\textsuperscript{131} Id. at 1024-25.
was affiliated with the plans prior to that date. Riley "has vigorously disputed his ERISA liability and has argued that, even if liable his share of the blame pales in comparison to that of other defendants." Thus, he and his excess liability insurer, Federal Insurance Company, appealed from the settlement order on the grounds that it unfairly cut off their rights and potentially subjected them to disproportionate liability.

The settlement was approved after a day-long hearing to explain how it would work, why it was favorable to the plaintiffs and why it did not inequitably burden the non-settling defendants. Judge Broderick stated that he found the settlement to be "fair, reasonable, and adequate." The district court focused on maximizing return to the injured plaintiffs, although Riley and his insurer, insisting Riley had valid claims for indemnity, contribution and malpractice, urged the court "to put fairness to Riley on an even footing with other legitimate concerns."

C. The Second Circuit's Review of the Settlement

The Second Circuit reached the conclusion that the district court should not have approved the settlement. The court's conclusion was grounded on two issues. First, the court opined that, in order to determine whether a settlement is "fair, reasonable and adequate," the court must consider relative fault. Second, the court directed that contribution bars were acceptable if they were (1) narrowly tailored and (2) conform to the common law of ERISA.

To reach its conclusion, the court began by analyzing the standard of review to be used in approving or disapproving settlements. The normal focus of a class action settlement is the plaintiff class — is the settlement fair, reasonable and adequate as to them? However, when non-settling defendants are involved, the court

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132. Id. at 1024.
133. Id.
134. Id. at 1023.
135. Id. at 1025.
136. Id. This is the classic Rule 23(e) standard for approving class action settlements. See supra note 19.
137. Masters, 957 F.2d at 1025.
138. Id. at 1033.
139. Id.
140. Id.
141. Id. at 1025. See supra note 137.
noted that their rights must also be considered. A compromise that is equitable to all must be reached before the settlement can be approved. The Second Circuit determined it should review the settlement de novo because the validity of the settlement "rest[ed] on the determination of novel issues of ERISA law."

The court next reviewed the means by which courts have attempted to ensure fair distribution of damages among solvent defendants, namely contribution or, in the alternative, judgment reduction by a pro rata, proportionate fault, or pro tanto method. As part of the federal common law of ERISA, the court determined that a system of proportional fault, incorporating rights to indemnity and contribution, must be developed. The court noted, however, that the Second Circuit had not determined the scope of such indemnity and contribution rights, nor defined the defendant's ability to obtain them when the parties settled. Masters provided the Second Circuit an opportunity to clarify these issues.

In his appeal, Riley argued that the district court should have considered relative fault and granted a judgment reduction in an amount at least equal to the amount of the settlement. The plaintiffs argued that the non-settling defendant could not receive credit for any settlement amount that exceeded the proportionate fault of the settling defendant. Relying on Singer and Boesky the Second Circuit ruled that "a non[-]settling defendant whose rights against settling defendants are to be barred is entitled to judgment reduction at least in the amount paid by all settling parties."

If the court approves a fair settlement bar, then the non-settling defendant loses the right to contribution and the right to indemnity based on differences in fault.

142. Id. at 1026.
143. Id. at 1025-26.
144. Id. at 1026. See also supra text accompanying note 101.
145. Id. at 1028-1029.
146. Id. at 1029.
147. Id. (citing Chemung Canal Trust Co. v. Sovran Bank, 939 F.2d 12 (2d Cir. 1991)).
148. Id.
149. Id. at 1029-30. The plaintiffs' argument was based on their reading of Singer v. Olympia Brewing Co., 878 F.2d 596 (2d Cir. 1989), and In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358 (2d Cir. 1991). Id. at 1030.
150. See supra notes 85-95 and accompanying text.
151. See supra notes 96-100 and accompanying text.
152. Masters, 957 F.2d at 1031.
153. Id.
154. Id. at 1032.
The fairness of the settlement bar would be determined by several factors, held the court. The bar could not be approved unless it was (1) narrowly tailored, (2) preceded by a judicial determination of good faith, and (3) included a judgment reduction of no less than the amount paid by the settling defendants. The court noted that although relative fault was a crucial element in determining the fairness of the settlement, the court could also consider the probability of the plaintiff prevailing at trial and the adequacy of the resources of the most culpable party.

Based on these factors, the court reviewed the settlement approved by the district court and determined it could not stand. The district court had not considered relative fault nor had it determined whether the settlement would compensate Riley for his lost right of contribution because the judgment reduction amount could have been less than that paid by the settling defendants.

III. ANALYSIS

The Second Circuit decision can be analyzed on three levels. The first level considers the impact of the decision on the non-settling defendant Riley. The second level of analysis considers the overall logic of the court's decision, and in particular, whether the court adequately followed Second Circuit precedent. The third level of analysis focuses on the appropriateness of the decision in the context of the policies underlying ERISA.

A. The Treatment of the Non-settling Defendant

Non-settling defendant Riley is the classic "bit player" of complex litigation. Although he was involved with the plans, Riley did not become a plan trustee until 1984, after the initial decision to utilize Tower Asset as the plans' investment manager had already been made. Relative to the other defendants, settling and non-settling, Riley's culpability for the plans' participants' losses seems minimal.

However, because ERISA provides for joint and several liability, it is theoretically possible under the original district court theory that if a judgment was reached against Riley, the plaintiffs could have recovered the entire amount of their losses, estimated in ex-
cess of $50 million, from Riley. Absent the settlement provisions, Riley would have sued the other defendants for contribution. And, due to his minimal culpability, Riley would have had a strong right of contribution. Yet, under the district court’s settlement provisions, Riley’s right was extinguished, and in exchange, any judgment against him could be reduced by some amount less than the amount paid by the settling defendants or less than an amount related to Riley’s relative fault. However, under the Second Circuit’s one satisfaction rule, the $50 million judgment would necessarily be reduced by the $22 million settlement, leaving a gap of $28 million to be recovered. Thus, the amount Riley is theoretically responsible for still exceeds the amount the settling defendants paid and is still in no way related to the relative fault of Riley and the settling defendants. Obviously such an outcome is egregiously unfair to Riley since he is left “holding the bag” for the difference. Therefore, the Second Circuit’s insistence that the settlement be “fair” to Riley appears to have been appropriate. However, as is evident, the Second Circuit may not have adequately addressed this concern.

B. The Judgment Reduction Method

Given that the non-settling defendant’s right of contribution has been extinguished, the Second Circuit’s insistence on a “fair” settlement has strong precedential and policy validity. However, the judgment reduction rule announced by the court is not crystal clear, combining as it does elements of the proportional fault method of judgment reduction and the one satisfaction rule. It is unclear whether the court is advocating a pro tanto reduction with a fairness hearing as to fault, or a proportionate fault reduction with a floor of the settling defendant’s payment. The language stating the settlement must be fair seems to imply the former, while the focus on relative fault to determine fairness seems to imply the latter.

The court further confuses the issue by throwing in other factors beyond relative fault to assist in determining the fairness of the settlement. First, it is not clear if the two factors mentioned by the court — the probability of the plaintiff prevailing at trial, and the adequacy of the resources of the most culpable party — are illustrative or exclusive. Second, the court does not clarify to what extent these other factors would modify a determination of relative fault. It is possible to hypothesize a scenario in which the three factors would point to different judgment reduction methods; in such a case, the rule does not provide a clear guideline for a court
faced with this issue.

In reaching its decision the Masters court relied on Singer and Boesky, noting that although those cases involved securities law and not ERISA, it "may look to them for guidance." However, neither of the cases truly addressed the issue before the Second Circuit in Masters, i.e., the appropriate judgment reduction method in an ERISA case. Although cited as authority for the Second Circuit's adoption of the pro tanto approach, the Singer decision really stands for a one satisfaction rule. Given the court's concern with fashioning the "common law of ERISA," it is interesting to note that one court has observed that the one satisfaction rule derives from the common law, whereas contribution is "a statutory deviation from the common law." Boesky addresses only the issue of when the decision concerning judgment reduction must be made, and not the method itself.

Had the Second Circuit truly wished to rely on securities law to inform its decision, it would have done better to turn to cases such as In re Kaypro Corporation Litigation and United States Fidelity & Guaranty Co. v. Development Authority. In both cases, the courts carefully reviewed how the right of contribution developed and then weighed the pros and cons of the different approaches to judgment reduction in light of the policies supporting contribution and shaping securities law. Both courts persuasively argued that the proportionate fault method was most appropriate.

The Second Circuit could also have turned to Donovan, an ERISA decision that addressed the same issue. Although the Donovan court refused to impose a bar order, shutting off the non-settling defendant's right of contribution, its decision was based on the adoption of comparative fault. The incentives of settlement under each of the judgment reduction methods were carefully considered, and the court concluded comparative fault provided the best incentives.

159. Id. at 1030.
160. See supra notes 85-95 and accompanying text.
161. Masters, 957 F.2d at 1029.
163. See supra notes 96-100 and accompanying text.
164. See supra notes 70-84 and accompanying text.
165. See supra notes 101-11 and accompanying text. Masters cites Donovan in the context discussing third parties' rights in class action settlement, 957 F.2d at 1026, so it is clear the Second Circuit was aware of the Donovan decision.
In sum, the Second Circuit has made a step in the right direction by realizing that partial settlements must be fair to all parties, not just the parties to the settlement. Yet, beyond its insistence that relative fault be part of the fairness calculus, the court failed to delineate exactly how fairness to all parties should be achieved. As such, the holding of Masters is inadequate.

C. Judgment Reduction Under ERISA

The Second Circuit prefaced its de novo review of the Masters settlement by stating that “judgment reduction affects substantive ERISA rights and is part of pension plan regulation.”166 Given this premise and the critical importance of pension plan regulation, the Second Circuit’s decision is inadequate on additional grounds as well.

When formulating the ERISA statutes, Congress intentionally specified that the liability of pension plan trustees be joint and several. This form of liability implies that the overriding concern of the legislators was to fully compensate the participants and beneficiaries of ERISA plans.167 It is important to recall the involuntary dimension of the ERISA plaintiff’s involvement. Unlike securities litigation, the individual plaintiff here has not chosen to enter the free-for-all brawl of the securities markets, hoping to make a “fast buck” instead of “losing his shirt.” Rather, the individual ERISA plaintiff is fighting for his right to retire with some modest guarantee of a dignified standard of living. As more and more pension plans are revealed as being underfunded or defrauded,168 congressional concern is validated. By specifying joint and several liability, the legislators perhaps intended for those involved with such plans to monitor their own and others’ involvement lest they be forced to pay damages for an entire loss.

Congress, however, left the fashioning of a common law of

166. Masters, 957 F.2d at 1027.
167. See Chemung Canal Trust Co. v. Sovran Bank, 939 F.2d 12, 18 (2d Cir. 1991) (“ERISA was designed specifically to provide redress for plaintiffs — the plan’s participants and beneficiaries.”), cert. denied sub nom. Fairway Spring Co. v. Sovran Bank, 112 S. Ct. 3014 (1992).
168. See Albert R. Karr, Imperiled Promises: Risk to Retirees Rises as Firms Fail to Fund Pensions They Offer, WALL ST. J., Feb. 4, 1993, at A1, A12. See also J. Robert Suffoletta, Jr., Note, Who Should Pay When Federally Insured Pension Funds Go Broke?: A Strategy for Recovering from the Wrongdoers, 65 NOTRE DAME L. REV. 308 (1990) (arguing that a comprehensive strategy should include RICO charges against fiduciaries and pursuit of nonfiduciaries such as accountants, attorneys and solvent officers and directors).
ERISA to the courts and thus, a right of contribution among the co-trustees has been judicially implied. Given that the courts have fashioned such a right, they must now be willing to protect the right and deal equitably with the competing interests of plaintiffs, settling defendants, and non-settling defendants. Yet, because the ERISA plaintiff has not voluntarily placed his assets at risk, the dependence on admiralty and securities law to formulate an ERISA judgment reduction rule may not be appropriate. In the case of ERISA, to correspond to the underlying legislative objectives it seems that the court's primary objective in approving or disapproving a settlement should be compensation of the plaintiffs' injuries. Thus, the pro tanto method of judgment reduction has a certain intuitive appeal where the specified liability is joint and several. However, if the right of contribution is cut off, the assessment of judgment reduction methods must be altered to include compensation for the lost right. Given that the objective of plaintiff compensation is met, however, it is imperative that the interests of the settling and non-settling defendants be treated equally. The proportionate fault method seems to be the only method that meets all of the competing objectives.

IV. CONCLUSION

The Second Circuit's decision in Masters is illustrative of the problems courts have in balancing the goals of compensation, fairness and deterrence when approving or disapproving partial settlements. It is important to consider the fairness of the settlement, yet absent rigorous definition and guidelines, fairness is a hazy judicial ideal. A court must fashion clear guidelines to ensure such settlements are indeed fair. Although the Second Circuit attempted to remedy the lack of fairness to the non-settling defendant, the test it laid down is insufficiently clear to guide future decisions or to inform the decisionmaking of future parties to a partial settlement. Nor have the statutory goals of ERISA been fully served by this decision. Full compensation of the participants can be assured, but the wrongdoers must be treated equitably as well for the goal of deterrence to be achieved.

At least one commentator has argued the need for a federal

uniform contribution bar rule in securities actions. However, the need for a uniform rule, whether statutory or judicial, extends beyond securities law. Where federal courts have determined a right of contribution exists, and that the right may be extinguished by a bar order, then the courts need to fashion an equitable remedy for the non-settling defendants whose rights are cut off. In conclusion, the proportionate fault method of judgment reduction seems to best fulfill the goals of compensation, fairness and deterrence inherent in our justice system. This is the case even where the underlying liability is joint and several. Therefore this should have been the method adopted by the Second Circuit in Masters and should be the method uniformly adopted across the country in ERISA cases.

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