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Class Action Settlement Bars, Cross Claims, and Co-Defendants: The Search for a Uniform Standard - In re U.S. Oil & (and) Gas Litigation

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CLASS ACTION SETTLEMENT BARS, CROSS CLAIMS, AND CO-DEFENDANTS: THE SEARCH FOR A UNIFORM STANDARD

In re U.S. Oil & Gas Litigation[1]

I. INTRODUCTION

The number of private lawsuits for the violation of the federal securities and exchange laws[2] has risen dramatically in the last decade. Increasingly these suits are brought on behalf of a group of injured plaintiffs in the form of a class action.[3] From the onset of class action litigation, tremendous pressure is brought to bear on defendants due to the enormous complexity and cost involved in defending them. Because securities suits often involve multiple defendants and cross-claims, it is common for all or some of the defendants to enter settlement agreements with the plaintiff in order to minimize the likelihood of suffering an adverse judgment at trial. This is particularly true in the area of securities litigation, where 71 percent of securities class actions settle before trial.[4] According to the Federal Rules of Civil Procedure (FRCP), these class-action settlement agreements must be approved by the court.[5] Almost always, the settlement agreement will contain provisions in which the court orders that the

1. 967 F.2d 489 (11th Cir. 1992).

2. Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (1988); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-7811 (1988).

3. Rule 23(a) of the Federal Rules of Civil Procedure provides that one or more class members may sue in representative capacity only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are common questions of law or fact to the class, (3) the claims of the representative parties are typical of claims of the class, and (4) the representative parties will fairly and adequately protect the interests of absent class members. FED. R. CIV. P. 23(a).

4. Franklin v. Kaypro Corp., 884 F.2d 1222, 1225 (9th Cir. 1989).

5. Rule 23(e) dictates that proposed settlements or compromises of a class action must be approved by the court and notice of the proposed dismissal must be given to all of the members of the class. FED. R. CIV. P. 23(e). Furthermore, courts must evaluate the reasonableness, fairness, and adequacy of the settlement to all parties named in the suit. Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (10th Cir. 1984).

other defendants are barred from bringing contribution[6] or indemnity[7] claims arising out of the underlying suit against the settling defendant. This presents little problem with regard to indemnity since the federal courts have consistently held that indemnity actions are not cognizable under the securities laws.[8] However, with respect to contribution, it would seem that the non-settling defendant is immediately placed at a disadvantage since the federal securities acts expressly and impliedly provide for a substantive right of contribution among defendants.[9]

The purpose of a settlement-bar rule is to promote the settlement of complex litigation. Few defendants wish to settle disputes if they can not be assured that the settlement will extricate them from the litigation indefinitely. Settling defendants want to be free from later claims of contribution arising from defendants who remain in the suit and suffer an adverse judgment.[10] Since the settlements must be approved by the court,[11] a hearing is held in which all defendants, in an adversarial proceeding, are allowed to debate the merits of a party's settlement with the plaintiff. In the end, courts will almost always enter the bar order as part of the settlement agreement. The bar extinguishes the substantive rights of the defendants to pursue cross-claims against those that settle with the plaintiff.

In approving the settlement, the court relies on the plaintiff and defendants to determine the proper amount of damages. What normally is a judicially determined set-off to each defendant's joint and several liability is thrown into the arena of the settlement negotiations for the parties to determine.

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6. *See* Dawson v. Contractors Transp. Corp., 467 F.2d 727, 729 (D.C. Cir. 1972) ("Under the principle of contribution, a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.").

7. Indemnity requires another to reimburse completely one who has discharged a common liability based either on a contract for indemnity between the parties, vicarious liability or by operation of law to prevent injustice. W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 341 (5th ed. 1984).

8. *See* Stowell v. Ted S. Finkel Inv. Servs., 641 F.2d 323, 325 (5th Cir. 1981); South Carolina Nat'l Bank v. Stone, 749 F. Supp. 1419, 1429 (D.S.C. 1990).

9. Under a theory of joint and several liability, joint tortfeasors have a right of contribution among each other. *See* 15 U.S.C. § 77k(f). Section 77k(f) of the Securities Act of 1933 provides for a right to contribution from "[a]ny one or more of the persons specified in subsection (a) of this section [who] shall be jointly and severally liable . . . [for] fraudulent misrepresentation." *Id.* Express contribution provisions are also found in the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 78i(e), 78r(b).

Furthermore, an implied right of contribution exists as a private cause of action under § 10(b) of the Securities Exchange Act of 1934, *see* 15 U.S.C. § 78j, and Rule 10b-5 of the Securities Exchange Commission's Rules. *See* 17 C.F.R. § 240.10b-5 (1992); *see also Franklin*, 884 F.2d at 1226; Alvarado Partners, L.P. v. Mehta, 723 F. Supp. 540, 550 (D. Colo. 1989).

10. *See Franklin*, 884 F.2d at 1225 ("In essence, a bar order constitutes a final discharge of all obligations of the settling defendants and bars any further litigation of claims [for contribution or indemnity] made by non-settling defendants against settling defendants.").

11. *See supra* note 5 and accompanying text.

Prior to the *U.S. Oil & Gas* decision, the federal courts had only considered settlement bars as related to non-settling defendants. In the *U.S. Oil & Gas* case, all of the defendants sought to settle with the plaintiff.[12] Only one settling defendant chose to contest the entry of the bar order.[13] In *U.S. Oil & Gas*, the Eleventh Circuit Court of Appeals was faced with a defendant who settled with the plaintiff but opposed an order barring its seemingly independent claims against the third-party defendant who also settled. For this reason it was a case of first impression.[14]

II. FACTS AND HOLDING

U.S. Oil and Gas Company sold federal oil and gas leases to 8,000 investors in the late 1970s.[15] It provided a money-back guarantee to participating investors seeking a lower risk.[16] To accomplish this, U.S. Oil hired a broker, Alexander and Alexander, Inc. (A&A), which obtained a $1 million insurance policy from Pinnacle Reinsurance Company (Pinnacle), a Bermuda corporation.[17] The leases became worthless over time, and the investors sought to collect.[18] The Federal Trade Commission filed an enforcement action in the U.S. District Court for the Southern District of Florida against the companies involved.[19] The court appointed a receiver soon after initiation of the case to safeguard the interests of the investors; the receiver filed a civil action against the companies alleging Racketeer Influenced and Corrupt Organizations Act[20] and Securities Act[21] violations.[22] The investors filed a class-action suit against the companies as well.[23] Pinnacle cross-claimed against A&A for indemnification, contribution, fraud, and negligence, claiming that A&A did not inform Pinnacle of the fraudulent activities of those whom A&A represented.[24]

Not surprisingly, the litigation quickly became "breathtakingly complex."[25] Compromise and settlement negotiations began near the end of 1990.[26] In the initial settlements approved by the court, the court dismissed the class's and receiver's actions against the settling defendants and barred all claims, including

12. *U.S. Oil & Gas*, 967 F.2d at 491-92.
13. *Id.* at 492.
14. *Id.* at 491.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. 18 U.S.C. §§ 1961-1968 (1988).
21. 15 U.S.C. §§ 77a-77bbbb.
22. *U.S. Oil & Gas*, 967 F.2d at 491.
23. *Id.*
24. *Id.* at 492.
25. *Id.* at 491.
26. *Id.*

those for contribution and indemnification, by non-settling defendants against settling defendants.[27] It also barred all claims against non-settling defendants by settling defendants.[28] Consequently, when the plaintiffs asked the court to approve the settlements with A&A and Pinnacle, the court stated that Pinnacle's cross-claim would be extinguished if Pinnacle settled with the plaintiffs.[29] Pinnacle had vehemently objected to this during the litigation and expressly sought to preserve its claim against A&A, while at the same time seeking settlement with plaintiffs.[30]

The plaintiffs, as well as A&A, insisted on the settlement bar.[31] The district court concluded after numerous hearings that the settlement bar order was justified as a condition to approval of all settlements.[32] Pinnacle did not withdraw from the settlement agreement with plaintiffs and other defendants, but it filed a timely notice of appeal as to the bar order.[33] The district court entered a fairness order approving the settlement and final judgment orders dismissing all claims, including Pinnacle's cross-claim against A&A.[34]

On appeal, Pinnacle argued that settlement bars cannot be used to extinguish claims of indemnity, fraud, and negligence such as it maintained against A&A.[35] Pinnacle sought to distinguish such claims as independent of the transaction or occurrence giving rise to the case-in-chief.[36] Pinnacle also maintained that the manner in which the bar was issued by the district court deprived Pinnacle of its due process rights.[37] The U.S. Court of Appeals for the Eleventh Circuit rejected Pinnacle's contentions and held that when cross-claims "arise out of the same facts as those underlying the litigation, then the district court may exercise its discretion to bar such claims in reaching a fair and equitable settlement."[38] With regard to Pinnacle's due process challenge, the court held that when a settling party has participated fully in negotiations and has made use of all means to preserve its legal rights within the context of the negotiations, and when it has had a full opportunity to challenge the propriety of the bar order at trial and on appeal, a district court may enter an order barring claims as a condition of approving fair settlement agreements.[39]

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27. *Id.* at 492.
28. *Id.*
29. *Id.*
30. *Id.* "Pinnacle stated emphatically that it did not seek to withdraw from the settlement [with the plaintiffs]. Rather, it sought to maintain its settlement . . . and . . . to preserve its cross-claim against A&A." *Id.*
31. *Id.* at 493.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 495.
36. *Id.*
37. *Id.* at 493.
38. *Id.* at 496.
39. *Id.*

III. LEGAL BACKGROUND

A. Contribution

The equitable doctrine of contribution[40] is based on the notion that a defendant who discharges a liability shared with another should not be the only party responsible for paying for the obligation.[41] The principle of contribution distributes damages caused by defendants among the wrongdoers by forcing each to contribute to the total damages of the plaintiff.[42] At early common law, courts would not permit a tortfeasor to recover from another using contribution.[43]

While many American jurisdictions once extended this rule to preclude contribution among intentional tortfeasors,[44] the liberal joinder provisions of the FRCP led courts to apply the rule allowing contribution generally.[45] By the beginning of the 20th Century, the rule allowing contribution was recognized in nearly every jurisdiction.[46] Today, 19 states have adopted the Uniform Contribution Among Joint Tortfeasors Act[47] and permit contribution in all instances of joint and several liability, however there are significant differences among jurisdictions as to the measure of damages and the effect of a settlement on the right to contribution.[48] The U.S. Supreme Court has not set forth a

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40. *See supra* note 6 (explaining contribution).

41. *See* KEETON ET AL., *supra* note 7, § 50.

42. J. D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY & LITIGATION § 20.01 (rev. ed. 1988).

43. *See* Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799).

44. *See, e.g.*, Miller v. Fenton, 11 Paige Ch. 18 (N.Y. Ch. 1844); Atkins v. Johnson, 43 Vt. 78 (1870).

45. *Franklin*, 884 F.2d at 1226 (citing KEETON ET AL., *supra* note 7, § 50).

46. *Franklin*, 884 F.2d at 1226. In *Franklin*, the Ninth Circuit notes:

> The extension of the rule against contribution to negligent tort feasors engendered much criticism. The rule was criticized as enormously unfair and for facilitating collusion between plaintiffs and wrongdoers. In 1939 the American Law Institute proposed a Uniform Contribution Among Tortfeasors Act. An amended Uniform Act was proposed in 1955. By the 1970s, "half a century of vigorous attack upon the original rule . . . had its effect in the passage of statutes in most states, which to a greater or lesser extent permit contribution among tortfeasors."

Id. at 1226-27 (quoting KEETON ET AL., *supra* note 7, § 50 (citations omitted)) (alteration in original).

47. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §§ 1-9, 12 U.L.A. 57 (1975) [hereinafter UCATA]. This Act has been adopted either in whole or in part in Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Maryland, Massachusetts, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Tennessee. *See* UCATA, 12 U.L.A. at 79 (Supp. 1992).

48. *See* Northwest Airlines v. Transportation Workers Union, 451 U.S. 77, 87 n.17 (1981) (stating that thirty-nine states and the District of Columbia recognize the right of contribution among tortfeasors).

uniform standard for contribution in cases of federal question.[49] However, the district courts are increasingly moving toward adopting a blanket rule of implied contribution in cases involving joint tortfeasors.[50]

B. Indemnity

Indemnification is similar to contribution in that it shifts the burden of loss to another party. Indemnification, however, shifts the entire loss to another party from one who is merely vicariously liable.[51] To allow indemnification in Securities Act violations frustrates the policy of securities legislation by allowing the wrongdoer to shift his entire responsibility to another defendant.[52] As noted by the Fifth Circuit Court of Appeals, a "securities wrongdoer should not be permitted to escape loss by shifting his entire responsibility to another party."[53] Common law also provides no avenue for indemnification among co-defendants when the third-party plaintiff itself is at fault.[54] In a similar case where the third-party plaintiffs were broker-dealers charged with fraud, breach of contract, and breach of fiduciary duty, indemnity from a third party defendant was held to be inappropriate.[55]

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49. *See* Dianne M. Hansen, *The Effect of Partial Settlements on the Rights of Non-Settling Defendants in Federal Securities Class Actions: In Search of a Standardized Uniform Contribution Bar Rule*, 60 UMKC L. REV. 91, 100 (1991).

50. *See, e.g.*, *Franklin*, 884 F.2d at 1228 (recognizing the doctrine of contribution among joint tortfeasors in securities cases); *Alvarado Partners*, 723 F. Supp. at 550 (recognizing implied right of contribution in securities cases); deHaas v. Empire Petroleum, 286 F. Supp. 809, 815 (D. Colo. 1968), *rev'd in part on other grounds*, 453 F.2d 1223 (10th Cir. 1970).

51. *See supra* note 7 (explaining indemnity).

52. *Stone*, 749 F. Supp. at 1429; *see also Alvarado Partners*, 723 F. Supp. at 549 (holding that the non-settling defendants' pleaded or potential claims for indemnification were contrary to the regulatory scheme of the federal securities laws).

53. *Stowell*, 641 F.2d at 325 (quoting Heizer Corp. v. Ross, 601 F.2d 330, 334 (7th Cir. 1979)).

54. *See Stone*, 749 F. Supp. at 1430. According to the *Stone* court, there is no right to indemnification at common law:

> Indemnity is . . . unavailable to the third-party plaintiffs on the common law claims. Indemnity is an equitable remedy that assigns responsibility to the true wrongdoer, that is, where the third-party plaintiff is liable to the plaintiff in the main action only vicariously. Evidence that the third-party plaintiff itself is at fault would bar indemnification.

Id. (citing *In re* Baldwin-United Corp. Litig., [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,951, at 94,651 (S.D.N.Y. June 27, 1986)); *see also, e.g.*, Stratton Group, Ltd. v. Sprayregen, 466 F. Supp. 1180, 1185 (S.D.N.Y. 1979).

55. *Baldwin-United Corp. Litig.*, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 94,651.

C. CONTRIBUTION UNDER THE SECURITIES AND EXCHANGE ACTS

Since indemnification is inappropriate under the Securities Acts, the act specifically provides for the right of contribution under Section 11 of the Securities Act.[56] However, the right to contribution under the act suppresses the incentive for defendants to settle.[57] There is little incentive to enter into a settlement that does not terminate or reduce future financial exposure.[58] While the primary policies of the federal securities statutes are the promotion of fairness to defendants and the deterrence of wrongdoing, no defendant wants to settle with a plaintiff if he or she remains liable for contribution to non-settling co-defendants.[59] It is for this reason that federal courts normally hold that in order to encourage settlement of complex federal securities actions, it is appropriate to bar a defendant's express and implied rights of contribution.[60] According to the Ninth Circuit Court of Appeals, "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 the settling defendants."[61]

As stated by the District Court of Massachusetts in *In re Atlantic Financial Management Securities Litigation*,[62] "[t]he reason to adopt settlement bar rules, is that they further both strong federal policies of encouraging settlement, by insulating the settling defendant from further indeterminate liability, and of spreading liability for violations of securities law among violators."[63] Generally, objections to the imposition of settlement bars come from non-settling defendants who worry that (1) if they are jointly and severally liable, they will become exposed to greater liability than they are due as a result of a favorable settlement

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56. *See* 15 U.S.C. § 77k(f). This section provides:

> All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

Id.

57. Hansen, *supra* note 49, at 100. "A 'no bar' rule is thought to inhibit settlements because there is no incentive to enter a settlement that does not reduce or eliminate the threat of future financial exposure to the settlor." *Id.*

58. Nelson v. Bennett, 662 F. Supp. 1324, 1334 (E.D. Cal. 1987).

59. *See Alvarado Partners*, 723 F. Supp. at 550-51.

60. *See, e.g., Franklin*, 884 F.2d at 1229; *Alvarado Partners*, 723 F. Supp. at 550-51; *In re* Washington Pub. Power Supply Sec. Litig., 720 F. Supp. 1379, 1399 (D. Ariz. 1989); *In re* Sunrise Sec. Litig., 698 F. Supp. 1256, 1257 (E.D. Pa. 1988); *In re* Nucorp Sec. Litig., 661 F. Supp. 1403, 1408 (S.D. Cal 1987).

61. *Franklin*, 884 F.2d at 1225.

62. 718 F. Supp. 1012 (D. Mass. 1988).

63. *Id.* at 1016 (citing Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1985)).

reached by the settling defendant[64] or the method used by the court to determine the set-off;[65] (2) if the court applies "comparative fault" in determining the set-off amount for non-settling defendants, the non-settling defendant will have to argue the plaintiff's case against the settling defendant in order to convince the jury that the settling defendant is more to blame for the tort than the defendant who remained in the case;[66] (3) independent causes of action are extinguished by the bar;[67] and (4) the contribution bar violates the Seventh Amendment right of the non-settling defendants to have their share of any liability to the plaintiffs determined by a jury.[68] Other general concerns include diminished deterrence

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64. *Franklin*, 884 F.2d at 1230. The Ninth Circuit described conduct by a plaintiff in such a case as "strategic blackmail." *Id.* The court explained that

> [b]y accepting a low partial settlement, plaintiffs would be able to fund further litigation with no diminution of the total amount eventually received. Similarly, plaintiffs could effect low settlements with defendants who had limited resources and thereby *force* wealthier defendants to pay more than if all parties proceeded to trial.

Id. (emphasis in original). The *Franklin* court used the following example to show the effect of the "pro tanto" method of calculating a set-off when approving partial settlements by defendants in securities litigation:

> If the total amount of damages determined at trial is T, the settling defendants' relative culpability is S, and the non-settling defendants' relative culpability is N, then S + N = T. T remains constant. Thus, if settling defendants pay any amount less than S, that amount *must* be added to the amount paid by non-settling defendants. (S - X) + (N + X) = T.

Id. n.15 (emphasis in original).

65. The method of offset to the plaintiff's recovery against non-settling defendants determines how much "risk" non-settlement defendants choosing to remain in the lawsuit are exposed to vis-a-vis settling defendants. *See In re* Jiffy Lube Sec. Litig., 927 F.2d 155, 160-61 (4th Cir. 1991). The Fourth Circuit Court of Appeals stated that "[i]t is clear that the method of set-off chosen [by the court] affects the desirability of a proposed partial settlement. For example . . ., under the "pro tanto" rule the risk passes to the non-settling defendants and plaintiffs gain more certainty from the earlier resolution of the set-off figure. *Id.* at 161. The *Jiffy Lube* court also stated:

> [a]s to the non-settling defendants . . . , the choice of set-off method determines to a large extent the manner in which a defense should be made at trial. The extent of wrongdoing of the settling defendants in relation to the [non-settling defendants] is either highly relevant . . ., minimally important . . ., or not important at all [depending on which method of set-off the court chooses].

Id.; *see* Brian R. Hajicek, Note, *Settlement in Securities Fraud: Is Settlement Promoting Litigation?*, 1992 J. DISP. RESOL. 197, 206-08 (discussing the *Jiffy Lube* decision); *see also* Biben v. Card, 789 F. Supp. 1001, 1002-03 (W.D. Mo. 1992).

66. *See, e.g.*, Hansen, *supra* note 49, at 106.

> As a general rule, settling defendants do not appear at the actual trial between the plaintiffs and the non-settling defendants. In addition, their attorneys have no right to introduce evidence or cross-examine witnesses. The burden falls on the plaintiff to prove that greater damages were caused by the non-settling defendant. The non-settling defendant can, of course, argue vigorously that the absent defendant is to blame. The jury is not informed that the absent defendant has settled. Thus, all evidence against any defendant will be weighed by the jury when apportioning liability to the various parties.

Id.

67. *Stone*, 749 F. Supp. at 1431.

68. *Id.*

resulting from the most culpable getting out of the lawsuit too cheaply, coercion by plaintiffs to settle frivolous claims, and collusive settlement agreements between plaintiffs and defendants.[69]

D. Set-off For Settling Defendant's Liability

Courts generally agree that some form of offset, by which a non-settling party's portion of liability is reduced by an amount congruous to the settling party's settlement amount promotes settlement, fairness, and deterrence.[70] However, when both defendants settle, there is nowhere to apply a judicially determined offset; contribution seems to be a defendant's only means of making up for an unfavorable settlement in which he bears more than his share of liability vis-a-vis other settling defendants. The settlement bar removes this means of recovery from the settling defendant's arsenal. The settling defendant must achieve a set-off amount equal to or greater than one which the trier of fact would have determined. This is necessary in order to decrease the settling defendant's liability and to achieve an equitable settlement.

In order to understand the significance of the offset in settlement negotiations, one must consider the three methods courts use in determining the set-off amount. There are currently three methods used by the courts to determine the amount of "offset" to be deducted from any judgment entered against non-settling defendants: "pro rata," "pro tanto" and "proportionate fault".[71]

The "pro rata" method is the traditional approach used in early securities cases.[72] Courts utilizing the "pro rata" method divide liability into equal portions, and a portion is given to each of the defendants.[73] Under this approach, the total judgment at trial is merely divided by the number of defendants named in the suit, whether or not they settle with the plaintiff.[74] Settling defendants prevail if their settlement amount is less than their slice of liability.

The "pro tanto" method follows the reduction method codified in the 1955 Uniform Contribution Among Tortfeasors Act.[75] Using this method, any judgment obtained after any defendant settles is reduced by the amount actually paid by the settling defendant(s) and the non-settling defendant(s) pay the

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69. *Nelson*, 662 F. Supp. at 1335.

70. *Alvarado Partners*, 723 F. Supp. at 550.

71. Hansen, *supra* note 49, at 101; *see* Hajicek, *supra* note 65, at 201-06 (discussing each method).

72. *See, e.g.*, Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27, 38-39 (2d Cir. 1976); Wassel v. Eglowksy, 399 F. Supp. 1330, 1370-71 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, 957-58 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

73. *Stone*, 749 F. Supp. at 1432.

74. *Jiffy Lube*, 927 F.2d at 161 n.3.

75. UCATA, *supra* note 47, § 4.

remainder.[76] Disadvantages involved in this method include plaintiffs conspiring with defendants to settle for low amounts so that the plaintiff can go after wealthier non-settling defendants which are more able to satisfy a judgment[77] and forcing non-settling defendants to bear disproportionate shares of liability which rightfully belong to settling defendants.[78]

The "proportionate fault" or "comparative fault" rule is a response to the shortcomings of the other two approaches. Under this approach, a non-settling defendant only pays that part of a judgment which corresponds to his or her percentage of fault, as determined by the trier of fact.[79] Under this method, the plaintiff bears the risk of entering into a disadvantageous settlement agreement.[80]

E. Extent of Settlement Bars in Securities Litigation

In securities class action suits, courts frequently find the settlement bars to exclude all claims which are interrelated to the parties' liability in the case-in-chief and also all of those arising out of similar transactions or occurrences.[81] The complex nature of the litigation has led many courts to find cross-claims among co-defendants to be interrelated and arising from the same transaction or occurrence so as to be extinguished by the settlement bar.[82] In the leading district court case, *South Carolina National Bank v. Stone*,[83] the non-settling defendant desired to maintain actions against the settling defendants for breach of contract, negligence, and fraud.[84] The non-settlers contended that the claims were independent rights of action rather than actions for contribution and that therefore they were properly excluded.[85] The *Stone* court adopted the settling defendant's position that

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76. *Jiffy Lube*, 927 F.2d at 161 n.3.

77. *See Franklin*, 884 F.2d at 1230; *see also supra* note 64.

78. *See Franklin*, 884 F.2d at 1230; *see also supra* note 64.

79. Donovan v. Robbins, 752 F.2d 1170, 1180 (7th Cir. 1985).

80. Hansen, *supra* note 49, at 105.

81. *See, e.g.*, *Jiffy Lube*, 927 F.2d 155 (barring contribution action by non-settling defendant); *Stone*, 749 F. Supp. 1419 (barring non-settling defendant's third-party claims for breach of contract, negligence, and fraud, and barring contribution and indemnity claims); Dalton v. Alston & Bird, 741 F. Supp. 157 (S.D. Ill. 1990) (barring contribution and indemnification); *Alvarado Partners*, 723 F. Supp. 540 (barring contribution and indemnification); Hall v. Atlantic Fin. Management, 718 F. Supp. 1012 (D. Mass. 1988) (barring contribution); *In re* Washington Pub. Power Supply Sys. Sec. Litig., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,326 (W.D. Wash. July 26, 1988) (court approved a partial settlement with a bar provision barring all federal and state law cross-claims for contribution and ordered that the third party plaintiffs were barred from instituting, prosecuting or continuing to prosecute any action to the extent such action asserts any claim against the settling defendant on whatever theory, whether under state or federal law, to recover any liability).

82. *See Stone*, 749 F. Supp. at 1430-31; *see also supra* note 81.

83. 749 F. Supp. 1419.

84. *Id.* at 1433.

85. *Id.*

> a rose by any other name is still a rose and . . . that regardless of the title given to the claims the . . . defendants seek to assert, the . . . [non-settling] [d]efendants' alleged damages arise only if the [settling] [d]efendants were found liable to the [p]laintiffs, and that, accordingly, these purported causes of action are nothing more than claims for contribution or indemnification with a slight change in wording.[86]

F. Conclusion

In summary, courts recognize contribution among joint tort-feasors as deterring negligent and intentional misconduct; they recognize contribution as promoting equal burden-sharing among tortfeasors.[87] However, these twin goals must be balanced against the equal need to settle complex cases that clog court dockets across the nation.[88] In an effort to paint clear lines to define this area of law, courts across the country are shifting toward settlement agreements that include bars to non-settling and settling defendants' rights to obtain contribution from each other.[89] Caught in this shift toward judicial efficiency are cross-claims and counter-claims that appear to arise out of the underlying transaction or occurrence but may in fact deserve to serve apart from the all-encompassing and all-extinguishing settlement bars that the courts favor in promoting the settlement of complex litigation.

IV. INSTANT DECISION

The court in *U.S. Oil & Gas* noted that public policy encourages the pretrial settlement of complex lawsuits.[90] It pointed out that complex suits — class actions — can occupy dockets for years without conclusion, while at the same time closing the doors of the court to more worthy actions.[91] The court drew on FRCP 16(a) to make clear that district courts have broad discretion to promote and to encourage settlements of all types.[92] The rule states that "(a) [i]n any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as . . . (5) facilitating the settlement of the case."[93] Therefore, approval of class action settlements is within the discretion of the trial court.[94]

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86. *Id.*
87. *See supra* notes 40-50 and accompanying text.
88. *See* Hansen, *supra note* 49, at 100.
89. *Id.*
90. *U.S. Oil & Gas*, 967 F.2d at 493.
91. *Id.*
92. *Id.*; *see* FED. R. CIV. P. 16(a).
93. FED. R. CIV. P. 16(a)(5).
94. *U.S. Oil & Gas*, 967 F.2d at 493.

Because the court noted that the purpose of settlement is to remove oneself from litigation altogether, it also stated the corollary that bar orders are crucial in facilitating this type of complete settlement.[95] Settling defendants must be protected against cross-claims for indemnity, contribution, and other actions related to the litigation.[96] Settlement-bar orders make it possible for parties wishing to settle to quantify the risk of that settlement.[97] Therefore, according to the Eleventh Circuit, the district court properly entered a settlement-bar order in the case below.[98]

The instant case, the court reasoned, was distinct from existing precedent in that it presented a settlement-bar order being challenged by a settling defendant, not a non-settling defendant.[99] It is for this reason that the instant case is one of first impression.[100] Furthermore, the court added that settlement-bar orders are not usually reviewable apart from the settlement of which they are a part.[101] The court held that Pinnacle properly executed its settlement with Plaintiff in order to sever the bar order from the underlying valid settlement agreement.[102] Therefore, because Pinnacle carefully preserved its right to appeal, it was able to benefit from the settlement and also to challenge the bar order.[103]

Addressing the merits of Pinnacle's contentions, the court spoke to the substantive weakness of a claim for indemnity in a securities action,[104] citing case law disallowing such actions similar to the case at hand.[105] In *U.S. Oil & Gas*, the plaintiffs allege the defendants damaged them by violating the Securities Acts of 1933 and 1934.[106] According to the *U.S. Oil & Gas* court, "[i]ndemnification claims are not cognizable under the Securities Acts of 1933 and 1934."[107] Therefore, the court upheld the order barring an indemnity claim by Pinnacle against A&A.[108]

The court stated that Pinnacle's cross-claims for fraud and negligence against A&A were not viable apart from the underlying class action;[109] it found the claims to be so related that they were merely disguised claims for contribution.[110] The court found each of Pinnacle's cross-claims against A&A

95. *Id.* at 494.
96. *Id.* at 493.
97. *See id.* at 494.
98. *Id.* at 493.
99. *Id.* at 494
100. *Id.*
101. *Id.* at 495.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* (citing *Stowell*, 641 F.2d at 325); *see also, e.g.*, *Stone*, 749 F. Supp. at 1429.
108. *U.S. Oil & Gas*, 967 F.2d at 495.
109. *Id.* at 495-96.
110. *Id.* at 496.

to be interrelated and appropriately extinguished by the bar.[111] However, the court did not decide that a settlement bar can extinguish what is a truly independent claim in a class-action suit, only that Pinnacle's claims did not qualify.[112]

The court found that Pinnacle did not intend for the bar order to be part of its original settlement agreement with the plaintiff's class.[113] However, by the date that the court entered the bar order as a condition of approving the settlement, Pinnacle was aware of it.[114] The district court held full adversary proceedings regarding the fairness of the settlement bar and afforded Pinnacle the opportunity to withdraw from the settlement it negotiated.[115] Pinnacle chose not to withdraw but carefully reserved its right to appeal the bar apart from the settlement.[116] Because a court can institute a bar order against a non-settling defendant when it is equitable,[117] the court may enter a bar against a settling defendant who participates fully in negotiations and reaches a settlement with the plaintiff.[118] Therefore, it was proper for the district court to bar Pinnacle from pursuing its actions against A&A, a settling defendant, for fraud and negligence.[119]

V. COMMENT

Prior to the *U.S. Oil & Gas* case, the Eleventh Circuit had not decided whether settlement bars could extinguish claims for contribution by settling defendants against settling co-defendants; it had only upheld the legality of settlement bar orders against non-settling defendants by settling defendants.[120] Previously, the court found it reasonable to extinguish the non-settling defendant's cause of action against the settling defendant because the cross claims were almost always ones for indemnification or contribution.[121] In these cases, the jointly and severally liable non-settling co-defendant enjoyed a reduction in any judgment against him by a judicially determined "offset" compatible with the amount for which the settling co-defendant settled with the plaintiff.[122] The end result in such cases is that the non-settling defendant is not appreciably disadvantaged by the entering of a settlement bar order and loses few legal rights, if any.[123] The

111. *Id.*
112. *Id.* n.5.
113. *Id.* at 496.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*; *see also Jiffy Lube*, 927 F.2d at 158-60; *Franklin*, 884 F.2d at 1232.
118. *U.S. Oil & Gas*, 967 F.2d at 496.
119. *Id.*
120. *Id.* at 494.
121. *Id.*
122. *Id.*
123. *See id.*

non-settling defendant is not denied his chose in action nor does he bear a disproportionate share of liability.[124]

In the instant case, the settling defendant was not offered the same luxuries as was the non-settling defendant. While a non-settling defendant does not have to negotiate with the opposing party in order to determine his fair share of liability, the settling defendant, who may be jointly and severally liable along with other defendants, must in the negotiating session reach some agreement with the plaintiff as to his fair share of liability in the lawsuit. As it would seem, the plaintiff has a marked advantage in this bargaining process.

In its opinion, the *U.S. Oil & Gas* court failed to note the important fact that a joint tortfeasor wanting to settle must now negotiate what traditionally has been a judicially determined offset figure which reduces the plaintiff's recovery against the defendant.[125] The offset figure shapes the plaintiff's recovery to reflect the defendant's liability and to prevent a double recovery by the plaintiff.[126] If a defendant is unable to negotiate a settlement for an amount equal to his share of liability, he or she cannot now recover through contribution from the co-defendant who also settles. The end result can be a windfall recovery for plaintiffs choosing some form of alternative dispute resolution to reach settlements with co-defendants.

In any action against joint tortfeasors, the plaintiff negotiates from the position that he or she can recover the total amount of liability from one defendant, or spread the recovery across all the defendants. In settlement negotiations, it is up to the parties to determine their proportionate share of liability and not the fact-finder. In the end, settlement figures for each defendant should reflect his or her proportionate liability. However, if there are disparate bargaining positions among the plaintiff and the defendant which desires to settle a claim against it, this defendant may end up bearing a greater share of liability than he might if he proceeded to trial. It is for this reason that the *U.S. Oil & Gas* decision removes the incentive to settle in certain complex lawsuits. It also gives plaintiffs an added weapon to bargain with as the liability of co-defendants must now be injected into meaningful settlement negotiations. In the event that a defendant in a multi-party tort action is judgment-proof and settles for an amount less than his or her actual liability, other defendants desiring to settle will have to bear a portion of the insolvent defendant's liability without recourse in the courts to recover through indemnification or contribution.

The *U.S. Oil & Gas* court held it reasonable to extinguish the claims of Pinnacle against A&A due to the fact that, as a practical matter, the two would have to relitigate the merits of an incredibly complex set of facts in order to determine contribution liability among them.[127] Due to the fact that Pinnacle's

124. *Id.*
125. *See generally id.* at 493-96.
126. *Id.* at 494; *see also* Hansen, *supra* note 49, at 100-11.
127. *U.S. Oil & Gas*, 967 F.2d at 494.

claim against A&A was relatively small compared to A&A's liability to the plaintiff, the court exercised its discretion.

A&A drew Pinnacle into litigation by virtue of its representations to Pinnacle regarding the value of the oil and gas leases which it brokered.[128] Securities law allowed the plaintiff to join Pinnacle as a party tortfeasor even though A&A was the primary wrongdoer.[129] The court forced Pinnacle to forego its claim against A&A, to pay the plaintiff, and to bear the loss. The result cleared the court's docket, but placed unfair hardship on Pinnacle.

A final consideration in light of the *U.S. Oil & Gas* decision involves a change in litigation strategy. Consider a joint tortfeasor who stands a 50 percent chance of being found liable to the plaintiff, but stands a 95 percent chance of being found liable to the co-defendant/joint tortfeasor in a cross-claim for contribution. If this defendant can settle with the plaintiff for an amount commensurate with his liability and likelihood of successfully defending himself, the settlement bar will work to shift the burden of defending the settling defendant to the other defendant. Should the other defendant want to settle, he or she is then put into the position of bargaining for a fair offset amount to reduce his or her own liability.

While settlement bars are fair and equitable in most cases, it is possible and even likely that cases will come along similar in facts to the instant one where a defendant is made party to a lawsuit by operation of a statute such as RICO or the Securities and Exchange Acts. Although a party may only be a limited actor in the underlying dispute, the securities statutes make this party a joint tortfeasor and expose him or her to the possibility of incurring significant obligations. The logical choice is to settle, but the settling defendant will have to give up his cross-claim against other co-defendants if a bar order is entered. Once it was possible to settle for the entire amount of liability and collect from non-settling defendants later. Unless settling parties accurately and fairly reach a settlement amount, joint tortfeasors will bear liability disproportionate to their fault.

VI. CONCLUSION

In the wake of the *U.S. Oil & Gas* decision, class action defendants must now consider whether or not they can achieve a settlement amount commensurate with their actual liability apart from contribution as a fallback measure. In the event that the court would have applied an offset method which would have exposed this defendant to some of the settling defendants' liability (e.g., either the "pro tanto" or the "pro rata" method), the defendant is bargaining from an inherently weak position. *U.S. Oil & Gas* makes it clear that the settlement negotiation is the last hope for this defendant to remove himself from the lawsuit with a payment to the plaintiff that represents his liability. No more can this defendant settle with the plaintiff and bring suit against other defendants to

128. *Id.* at 491.
129. *Id.*

recover those portions of the judgment which rightfully should have been paid by other defendants. It is for the foregoing reasons that the federal courts should move toward adopting a uniform policy applying settlement bars in complex securities class actions; in these actions, certain defendants are often relatively less culpable than defendants who perpetrated the greatest wrongs against the plaintiffs.

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