

512 US 1218 (1994)

No. 93-180

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In The  
Supreme Court of the United States  
October Term, 1993

BOCA GRANDE CLUB, INC.,

*Petitioner,*

vs.

FLORIDA POWER & LIGHT COMPANY, INC.,

*Respondent.*

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On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit

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AMICUS CURIAE BRIEF OF NATIONAL  
ASSOCIATION OF SECURITIES AND COMMERCIAL  
LAW ATTORNEYS ("NASCAT"), IN SUPPORT  
OF NEITHER PARTY, URGING REVERSAL

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**QUESTION PRESENTED**

Whether a settlement between a joint tortfeasor and plaintiff may bar nonsettling defendants' later claims for contribution against the settling tortfeasor.

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I. INTEREST OF AMICUS CURIAE

NASCAT is an association of law firms and attorneys located throughout the United States. NASCAT advocates principled interpretations of law to facilitate the effective prosecution and settlement of securities fraud class actions and other complex commercial litigation. NASCAT's members frequently represent plaintiffs in such actions.

NASCAT and its members have an interest in this case because this Court's decision may affect the rules governing settlement of claims against joint tortfeasors. Although the parties before the Court frame the issues in terms of the rules that apply to settlements under maritime law or in admiralty, the underlying principles of joint liability and contribution are not necessarily limited to the field of admiralty. Joint liability applies generally whenever common law or statutory claims are based on the wrongdoing of more than one person, and claims for contribution are recognized in an ever-increasing variety of cases – from common law actions for negligence to federal statutory claims.

Of particular importance to NASCAT and its members is the fact that contribution is available to joint wrongdoers under the federal securities laws.<sup>1</sup> Recognition of contribution under the securities laws has a profound impact on the prosecution and settlement of securities fraud cases. Depending on how the interest in contribution is interpreted and applied by the courts, settlement of claims and compensation of victims of fraud may be facilitated or frustrated.

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<sup>1</sup> The Securities Act of 1933 (the "Securities Act") provides for contribution among those jointly liable for violations of §11 of that Act, *see* 15 U.S.C. §77k(f), and Sections 9 and 18 of the Securities Exchange Act of 1934 (the "Exchange Act") also provide for contribution among defendants who violate their provisions. *See* 15 U.S.C. §§78i, 78r. This Court recently recognized an implied right to contribution to benefit defendants who violate Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b). *See Musick, Peeler & Garrett v. Employers Insurance of Wausau*, \_\_\_ U.S. \_\_\_ 113 S. Ct. 2085, 2091-92 (1993).

## II. SUMMARY OF ARGUMENT

This Court granted certiorari to consider a single issue: Whether “settlement between a joint tortfeasor and a plaintiff bars all claims for contribution by nonsettling tortfeasors against the settling tortfeasor.” See Petition for Certiorari at i; *Boca Grande Club, Inc. v. Florida Power & Light Co.*, \_\_\_ U.S. \_\_\_, 125 L.Ed.2d 788, 62 U.S.L.W. 3241 (Sept. 28, 1993) (granting certiorari).

The Petitioner correctly urges the Court to hold that a partial settlement of claims may bar actions for contribution by defendants who did not settle and are ultimately found to be liable. See *infra* §III.A. Contribution is based on equitable principles, and should be shaped to further the public policy goals of compensating tort victims and of simplifying litigation. See *infra* §III.A.1. If claims for contribution can be barred, a joint defendant has an incentive to compensate its victim with a partial settlement because by doing so it can avoid the risks and expense of litigating the case through trial. However, a defendant gains little or nothing by settling a plaintiff’s claims against it if the defendant remains liable to its codefendants for contribution based on the very claims that were settled. The equitable doctrine permitting actions for contribution among joint tortfeasors should not be allowed to defeat the superior equitable interest of their victims in obtaining compensation through such settlements. See *infra* §III.A.2-4.

The parties may ask this Court to decide – or assume the answer to – a second question: The effect a settlement and contribution bar will have on a plaintiff’s claims against defendants who do not settle. The Court should not reach this second issue which is not encompassed in

the grant of certiorari. *See infra* §III.B. The real dispute on this point is not between the Petitioner and the Respondent. It is between the Respondent and the victims of the parties' joint tort, who are not represented before this Court. The issues involved are important and complicated. This Court need not and should not reach the question of the precise effect a settlement has on the claims of a settling plaintiff. The decision of this issue could have far reaching consequences; it should be reserved for a case where it is squarely presented and can be thoroughly briefed. *See infra* §III.B.1.

This Court should *not*, in any event, endorse the parties' assumption that their victims' right to be made whole may be prejudiced by requiring a "proportionate fault" reduction of the nonsettling defendant's liability to the plaintiffs in this case. The proportionate fault rule that the parties approve of deprives tort victims of the right to be made whole, imposing a severe penalty on plaintiffs who settle with some but not all of the defendants in the case. The proportionate fault rule discourages settlement and greatly complicates litigation of complex cases. Contribution is an equitable doctrine that can facilitate the settlement of claims, permitting a joint tortfeasor who compensates the victim to spread the cost of that payment to its joint tortfeasors who otherwise would be unjustly enriched by avoiding their liability to the plaintiff; it cannot reasonably be interpreted to shift the cost of a settlement to the victim of a tort. In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272 n.30 (1979), this Court observed that while a joint tortfeasor's equitable interest in obtaining contribution from other joint tortfeasors "may sometimes limit the

ultimate loss" suffered by a tortfeasor, "it does not justify allocating more of the loss to the innocent [victim of their tort], who was not unjustly enriched." *Id.* See *infra* §III.B.2.

### III. ARGUMENT

#### A. A Settling Defendant Should Be Able To Bar Its Joint Tortfeasors' Claims For Contribution

The fact that courts, in the exercise of their equitable powers, properly permit actions for contribution in order to encourage settlement of claims, and to prevent unjust enrichment of tortfeasors who refuse to settle or pay, provides no legitimate ground for holding that defendants who do settle claims against them must remain exposed to the very liability they sought to avoid by entering a settlement.

##### 1. Joint Tortfeasors' Equitable Interest In Contribution Should Not Be Construed Or Applied To Defeat The Equitable Interest Of Their Victims In Compensation Through Partial Settlement Of Claims

Respondent's claimed "right" to contribution is in reality an equitable interest, recognized by courts in the exercise of their equitable discretion.<sup>2</sup> The victim of a tort

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<sup>2</sup> "Traditionally, equity has been the hallmark of contribution. The doctrine originated in courts of equity, and its rationale has not been altered by adoption in the common law." *Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163, 170

has a superior interest in obtaining compensation without unnecessary delay and expense. Courts should *not* transform the equitable interest in contribution among joint wrongdoers into a legal right that tramples the equitable interests of their victims by making partial settlements virtually impossible.

The common law initially rejected contribution among joint tortfeasors on the ground that courts should not intervene among wrongdoers.<sup>3</sup> When courts recognized contribution among joint tortfeasors they did so pursuant to principles of equity in order to favor the tortfeasor who discharged a common liability by paying more than its proportionate share of damages, and to prevent the unjust enrichment of joint tortfeasors who refused to compensate victims of their joint wrongdoing. See *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219, 220-21 (D.C. Cir. 1942). "Such contribution, however, must arise from the duty each of the wrongdoers owes to the injured party and not from any obligation among themselves." *Fischbach & Moore International Corp. v. Crane Barge R-14*, 632 F.2d 1123, 1125 (4th Cir. 1980).

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(D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); accord *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 731-32 (D.C. Cir. 1972); *Jones v. Schramm*, 436 F.2d 899, 901 (D.C. Cir. 1970).

<sup>3</sup> See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 634 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 86-88 & n.16 (1981); *Union Stock Yards Co. v. Chicago B. & Q.R. Co.*, 196 U.S. 217, 224 & 228 (1905); *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

If the interest in contribution is equitable in character, and arises from the duty each of the wrongdoers owes to the injured party, then it ought to be interpreted and applied in a fashion that takes account of the interests of the joint tortfeasors' victim. The party whose interests have the greatest equitable weight in shaping the right of contribution among joint wrongdoers is the victim of their wrongdoing. See *Edmonds*, 443 U.S. at 272 n.30. Sensibly applied, contribution among wrongdoers may actually benefit the injured party – for partial settlements are encouraged if a defendant who compensates the victim of a joint tort obtains a cause of action for contribution against the other joint tortfeasors.<sup>4</sup>

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<sup>4</sup> The settling defendant's access to contribution creates an incentive encouraging settlement, because a defendant who knows a joint tort was committed is free to pay the victim and to pursue contribution against its joint wrongdoers. Congress recognized that availability of contribution can encourage settlement when it provided for contribution under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§9601-9675. When amendments providing for contribution under CERCLA were offered, the Chairman of the Senate Judiciary Committee explained their purpose: "All of the expert witnesses before the Committee agree that the right to contribution should be codified *in order to encourage responsible parties to engage in cleanup and settlement.*" 131 Cong. Rec. S. 11,857 (daily ed. Sept. 20, 1985) (emphasis added) (quoted in *United States v. New Castle County*, 642 F. Supp. 1258, 1268 n.10 (D. Del. 1986)). In shaping CERCLA Congress provided that a person "who has resolved its liability to the United States . . . for some or all of a response action . . . in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement." 42 U.S.C. §9613(f)(3)(B). Congress further provided that a defendant who settles the claims against it "shall not be liable for

The availability of partial settlements increases the likelihood that the injured party will receive speedy compensation for the wrongs he or she has suffered. Whenever courts are faced with choices in shaping the right to contribution among joint wrongdoers, their first consideration must be whether the rules to be chosen will have an impact on the victim of joint wrongdoing. Rules that operate to the disadvantage of the victim of joint wrongdoing ought to be rejected, and rules that operate to the advantage of the victim of the joint wrongdoing ought to be favored. Considerations of equity among wrongdoers ought never be allowed to control over the overriding interest of doing equity to their joint victim: "Promoting full recovery and encouraging partial settlement take

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claims for contribution regarding matters addressed in the settlement." 42 U.S.C. §9613(f)(2). Congress thus encouraged settlement while preserving the right to full recovery by providing that "[s]uch settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." *Id.*; see also 42 U.S.C. §9622(g)(5). These provisions were designed "to codify the right [to contribution] and, *retaining current law* would allow a judge the discretion and flexibility to manage the contribution issues in a law suit." 131 Cong. Rec. S. 11,857 (emphasis added) (quoted in *New Castle County*, 642 F.Supp. at 1268 n.10).

The Eleventh Circuit's holding in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1584-85 (11th Cir.), *cert. denied*, 113 S. Ct. 484 (1992), that a settling defendant retains the right to pursue claims for contribution against joint tortfeasors who did not settle is eminently sensible. Its holding that claims for contribution *against* a settling defendant cannot be barred is not sensible. See *infra* §III.A.2.

precedence over the . . . policy of enforcing an equitable apportionment of a loss among responsible defendants.'<sup>5</sup>

## 2. Without Contribution Bars Partial Settlements Are Virtually Impossible

Settlement of claims can be encouraged only if a defendant who settles with the plaintiff thereby avoids further liability. Settlement makes sense precisely because it defines and limits the scope of a party's liability. If a joint tortfeasor who settles a victim's claim against it still faces claims for contribution based upon the very same liability, he or she gains nothing by settling. See *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991); *Nelson v. Bennett*, 662 F. Supp. 1324, 1328-29, 1334-35 (E.D. Cal. 1987). Thus, virtually every court to consider the question has held that a joint tortfeasor's settlement of claims may properly act as a bar to its subsequent liability for contribution.<sup>6</sup> The Eleventh Circuit stands alone by holding

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<sup>5</sup> *FDIC v. Geldermann, Inc.*, 763 F. Supp. 524, 529 (W.D. Okla. 1990) (quoting Thomas V. Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and Reasonableness Hearing Requirement*, 20 Gonz. L. Rev. 69, 167 (1985)), *rev'd on other grounds*, 975 F.2d 695 (10th Cir. 1992).

<sup>6</sup> See, e.g., *Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593, \_\_\_ F.2d \_\_\_, 1993 U.S. App. LEXIS 25013, at \*11-\*14 (7th Cir. Sept. 29, 1993); *Jiffy Lube*, 927 F.2d at 160; *FDIC v. Geldermann, Inc.*, 975 F.2d 695, 698 (10th Cir. 1992); *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F.2d 1020, 1031-32 (2d Cir. 1992); *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1362-63 (2d Cir. 1991); *Miller v. Christopher*, 887 F.2d 902, 906-07 (9th Cir. 1989); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990); *McDonald v. Union*

otherwise in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 484 (1992) and *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 607 (11th Cir.), *cert. granted*, \_\_\_ U.S. \_\_\_, 62 U.S.L.W. 3241 (Sept. 28, 1993).

The Eleventh Circuit's assertion in *Great Lakes Dredge & Dock* that "rejecting the settlement bar rule has a slight disincentive effect upon settlements" is ridiculous. 957 F.2d at 1582. This "slight" disincentive would eliminate partial settlements. See *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987); *Nelson*, 662 F. Supp. at 1334. "[N]o defendant would settle with [the plaintiff] if he was to find himself back in the suit as a third party defendant." *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969). If there is no bar to contribution "then partial settlement of any federal securities case before trial is, as a practical matter, impossible." *Nucorp*, 661 F. Supp. at 1408. As the Ninth Circuit explained in *Franklin v. Kaypro Corp.*:

"Any single defendant who refuses to settle, for whatever reason, forces all others to trial. Anyone foolish enough to settle without barring

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*Carbide Corp.*, 734 F.2d 182, 184 (5th Cir. 1984); *Nelson*, 662 F. Supp. at 1334-35; *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987); *TBG, Inc. v. Bendis*, 811 F. Supp. 596, 602 (D. Kan. 1992), *motion for reconsideration denied*, 813 F. Supp. 766 (D. Kan. 1993); *In re Washington Public Power Supply System Sec. Litig.*, 720 F. Supp. 1379, 1399-1401 (D. Ariz. 1989); *In re Washington Public Power Supply System Sec. Litig.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,326, at 92,144-45 (W.D. Wash. 1988); *Kirkorian v. Borelli*, 695 F. Supp. 446, 452-54 (N.D. Cal. 1988).

contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented."

*Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990) (quoting *Nucorp*, 661 F. Supp. at 1408); *accord TBG, Inc. v. Bendis*, 811 F. Supp. 596, 602 (D. Kan. 1992), *motion for reconsideration denied*, 813 F.Supp. 766 (D. Kan. 1993).

Even the Eleventh Circuit cannot abide the consequences of a general holding that claims for contribution may not be barred. In *In re U.S. Oil & Gas Litig.*, 967 F.2d 489 (11th Cir. 1992), it limits *Great Lakes Dredge & Dock's* holding to maritime cases, *id.* at 494 n.3, recognizing "that bar orders play an integral role in facilitating settlement." *Id.* at 494. "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 related to the underlying litigation." *Id.*

Equitable considerations favor prompt compensation of tort victims and public policy favors simplification and settlement of litigation. With partial settlements, tort victims "who otherwise might have to wait many years are assured some immediate compensation; the settling defendants are able to free themselves from litigation and pursue more productive matters; and the scarce societal resources which might be consumed by increasingly expensive litigation can be put to other redeeming uses." *Nelson*, 662 F. Supp. at 1334-35. Justice Powell has aptly observed that "parties to litigation and the public as a whole have an interest - often an overriding one - in

settlement rather than exhaustion of protracted court proceedings."<sup>7</sup> Bars to contribution should be permitted in connection with the partial settlement of claims against joint tortfeasors.

### 3. The Interest Of Nonsettling Defendants May Be Protected By A Good Faith Hearing And Findings That A Settlement Is Reasonable

If nonsettling defendants are forced to pay plaintiffs anything it will be because a factfinder concludes they committed a tort and are jointly liable for the entire damage caused. Their own wrongful conduct is an unseemly basis for invoking a court's equitable jurisdiction, asking it to prevent partial compensation of their victims. The interest of nonsettling defendants – in ensuring against "collusive" settlements on unfair and unreasonable terms – can be adequately protected when claims for contribution are barred in connection with a partial settlement. Simple economic self interest should ensure that plaintiffs will seldom settle for an unreasonably low payment from a substantially culpable defendant. However, where it appears that a settlement may be collusive and unfair, a court can always require a good faith hearing where the likelihood of recovery, the settling defendant's ability to pay, and the roles of the several defendants in causing the harm suffered may be considered to ensure that the settlement is reasonable. *See, e.g., Miller v.*

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<sup>7</sup> *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363 (1981) (Powell, J., concurring); *see also Marek v. Chesney*, 473 U.S. 1, 5 (1985); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 408 (1992); *Nelson*, 662 F. Supp. at 1334-35.

*Christopher*, 887 F.2d 902, 907-08 (9th Cir. 1989); *TBG*, 811 F. Supp. at 604; *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 263 (1985).

The notion that allowing a bar to contribution would encourage "collusive" settlements is misplaced. Exactly what constitutes "collusion" under such circumstances is not at all clear. However, the economic self-interest of plaintiffs should be enough to ensure that they seldom will settle for unreasonably small amounts. They are particularly unlikely to let the most culpable defendants out of a case for an unreasonably small payment, for the absence of such defendants decreases the likelihood of a favorable jury verdict and reduces the expectation that remaining defendants will be held jointly and severally liable for the wrongs committed.

The one situation in which plaintiffs are likely to settle with culpable defendants for an amount that is truly disproportionate with those defendants' relative fault arises when the settling defendants lack substantial insurance coverage or are close to insolvency. It certainly makes sense for a plaintiff to settle with a defendant for a small amount if that defendant lacks the assets to pay a substantial judgment. Under such circumstances the nonsettling defendants' interest in contribution itself likely amounts to little. The defendant who lacks the resources to pay a substantial judgment to the plaintiff also lacks the resources to pay a substantial amount in contribution.

#### **4. This Court's Precedents Do Not Prohibit Bars To Contribution In Connection With Partial Settlements**

This Court's holdings in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), and *Cooper Stevedoring Co. v. Fritz*

*Kopke, Inc.*, 417 U.S. 106 (1974), do not prohibit contribution bar orders. *Cooper Stevedoring* recognizes an interest in contribution in admiralty, but it does not address whether contribution claims may be barred by a good faith settlement. *Reliable Transfer* also does not address the issue; rather, it holds that where two vessels collide, and both are at fault, principles of comparative negligence apply to adjudicate claims between them. It *does not* hold that principles of comparative negligence between defendants can control over the right of a victim of their joint tort to obtain compensation through partial settlements.

No precedent at this Court justifies a rule prohibiting bars to claims for contribution in connection with the partial settlement of a claim. The rule created in *Great Lakes Dredge & Dock* and applied by the Eleventh Circuit in this case is grossly inequitable to the victims of joint torts because it makes it virtually impossible for them to enter partial settlements of their claims when some but not all joint tortfeasors are willing to settle on favorable terms. This Court ought to reject the Eleventh Circuit's new rule, for the interest of allocational equity among wrongdoers is insufficient to overcome the equitable interest of assuring prompt compensation to their victim.

**B. This Court Need Not And Should Not Reach  
The Question Of What Impact A Settlement  
Should Have On Plaintiffs' Claims**

Once it is determined that settlement of claims may bar a settling defendant's liability for contribution, the question remains as to what effect the settlement and bar should have on the plaintiffs' claims against remaining defendants. Because a plaintiff who settles with one of