

COMMENTS

Navigating CERCLA Settlements in an Age of Uncertainty: Fallout From *Ameripride Services v. Texas Eastern Overseas*

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I. Introduction

In April 2015, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Ameripride Services, Inc. v. Texas Eastern Overseas, Inc.*¹ that could significantly impact private parties' settlement strategy at multiparty sites subject to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).² In vacating and remanding a decision by the Eastern District of California, the Ninth Circuit held that courts have discretion under CERCLA §113(f)(1) to determine, based on the facts of the particular case, the most equitable method of accounting for settlements between private parties in a contribution action,³ and thus can choose the proportionate share approach adopted by the Uniform Comparative Fault Act (UCFA),⁴ the pro tanto approach adopted by the Uniform Contribution Among Tortfeasors Act (UCATA), or something different.⁵

The Ninth Circuit decision is in direct conflict with *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, a 1999 U.S. Court of Appeals for the Seventh Circuit decision holding that courts must use the pro tanto approach under the UCATA, and further widens the split among various circuit courts over which approach is appropriate under CERCLA.⁶ Until the circuit split is resolved, responsible parties deciding when and how to settle third-party contribution claims should carefully consider the law of the circuit where the property is located, as the differ-

ent approaches may require significantly different settlement strategies.⁷

II. CERCLA Contribution Claims and the Interplay of the UCATA and the UCFA

The impact of the Ninth Circuit's decision in *Ameripride* hinges primarily on the difference in treatment of CERCLA contribution settlements under the UCFA and the UCATA. Thus, understanding the general framework of CERCLA contribution actions, as well as the different approaches for valuing contribution settlements, is critical to determining the potential impact of contribution claim settlements on responsible parties.

Due to the broad scope of CERCLA liability and the nature of historical industrial activity in the United States, it is very common for multiple parties to have responsibility for some portion of the contamination at any given site. Because CERCLA imposes joint and several liability on responsible parties, the U.S. Environmental Protection Agency (EPA) often targets one responsible party to fund the remediation. In turn, CERCLA §113 permits the party incurring remedial costs to seek contribution from the other responsible parties.⁸ As a result, owners or primary contributors at multiparty sites frequently enter into individual agreements with EPA (or state regulators) to conduct or pay for a cleanup, and then seek contribution from other responsible parties. This allows the remediating party to maintain control over the cleanup without significant

1. 782 F.3d 474, 45 ELR 20066 (9th Cir. 2015).

2. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

3. 42 U.S.C. §9613(f)(1).

4. UCFA §2.

5. UCATA §4. The pro tanto approach refers to UCATA §4(a)'s provision that the value of the injured party's claim against the remaining tortfeasors is to be reduced by the dollar value of the settlement.

6. 197 F.3d 302, 30 ELR 20180 (7th Cir. 1999).

7. The principles and considerations described in this Comment apply not only to contribution actions under CERCLA, but also more generally to contribution actions under other similar statutory regimes where courts are required to account for defendants that settle before trial.

8. 42 U.S.C. §9613(f)(1). Only those costs deemed to be "consistent with the [National Contingency Plan]" may be recovered under CERCLA §113. See 42 U.S.C. §9607(a)(4).

interference from other responsible parties, while still protecting the remediating party from paying more than its equitable share of remedial costs.

Under this framework, remediating parties asserting claims against other responsible parties often resolve their claims through private settlement agreements, obviating the need for a court to evaluate their respective liabilities at trial. Where settlements cannot be accomplished, the parties may go to trial and request that the court determine the relative shares of each responsible party. The Ninth Circuit's opinion in *Ameripride* pertains to those circumstances where some but not all responsible parties settle, and the court is asked to divide the remaining portion of the remedial costs among the nonsettling parties. In such circumstances, nonsettling parties frequently argue that the settling parties have paid less than their proportionate share of the costs, and that as a result, the amount still in controversy is artificially large. Because CERCLA is silent with respect to how amounts recovered in settlement should be credited against the total damages, courts have generally looked at two competing approaches in tort for guidance.

First, under the UCATA, when an injured party settles with one of multiple tortfeasors, UCATA §4(a) provides that the value of the injured party's claim against the remaining tortfeasors is reduced by the dollar value of the settlement. This method, referred to as the *pro tanto* approach, has the effect of encouraging parties to settle early because those who refuse to settle end up litigating over whatever portion of the damages has not been recovered through settlement. Many argue that this method creates an incentive for unfair or collusive settlements whereby parties settling early are let off the hook for much less than their relative share because those costs can be recovered from other nonsettling parties later in litigation.

Recognizing the incentive for collusion in the *pro tanto* approach, some courts that adopt it require "good-faith hearings" before approving settlements, whereby "the settling defendant is protected against contribution actions for nonsettling defendants only if it shows [to the court] that the settlement is a fair forecast of its equitable share of the judgment."⁹ At such hearings, nonsettling parties have an opportunity to challenge the fairness of the settlement. Notably, CERCLA §113(f)(2) expressly requires use of the *pro tanto* approach when accounting for settlements with government parties, but is silent with respect to accounting for settlements between private parties.

In contrast, under the UCFA, when an injured party settles with one of multiple tortfeasors, UCFA §6.5 provides that the value of the injured party's claim against the remaining tortfeasors is reduced not by the dollar amount of the settlement, but instead by the settling

party's relative share of liability. This method, referred to as the proportionate share approach, requires a court to determine the relative liability of the settled parties, and subtract that proportionate share from the total damages at issue, regardless of the actual settled amount. The proportionate share method protects nonsettling parties from sweetheart deals struck during settlement. However, it has the effect of broadening the scope of the parties' burden and the court's analysis with respect to liability at complex CERCLA sites. The court cannot simply divide the total damages minus settled amounts by each party's relative liability; instead, the court must determine the appropriate share of each settled party, and subtract from the total damages the proportional amount that would be attributable to the appropriate share of each settled party.¹⁰

III. *Ameripride v. Texas Eastern Overseas*

A. District Court's Analysis

The *Ameripride* action arose as a result of perchloroethylene (PCE) contamination from a dry cleaning and laundry business at a site in Sacramento, California. Ameripride Services Inc. (AmeriPride) performed a cleanup of the site, and in 2000 brought suit against several other CERCLA potentially responsible parties (PRPs), including Texas Eastern Overseas, Inc. (TEO). Ameripride entered into settlement agreements with several of the PRPs, but did not settle with TEO.

In 2007, the California district court approved Ameripride's settlement agreements in an order entering judgment under Federal Rule of Civil Procedure 54(b). In its order, the court noted that federal courts in California approving settlements under CERCLA have adopted the proportionate share approach as federal common law, and (as summarized by the Ninth Circuit) held that "Section 6 of the UCFA, in pertinent part, is hereby adopted as the federal common law in this case for the purpose of determining the legal effect of the settlement agreements."¹¹ The district court did not hold a fairness hearing or determine that such a hearing was necessary.

Litigation between Ameripride and TEO continued. TEO moved for a pretrial order reconfirming the court's previous ruling that the UCFA proportionate share approach would apply to determine the effect of Ameripride's settlements with the other parties. The district court denied the motion and indicated that, based upon equitable factors, it would instead reduce Ameripride's claims against TEO by the dollar amount of those settlements under the *pro tanto*

9. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 213 (1994).

10. See, e.g., *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 20 (1st Cir. 2004).

11. See *Ameripride Srvs., Inc. v. Texas Eastern Overseas, Inc.*, 782 F.3d 474, 482, 45 ELR 20066 (9th Cir. 2015).

approach. At trial, the court determined that Ameripride and TEO were each 50% liable, and divided the remaining share equally between the two parties.

TEO filed motions for judgment as a matter of law and to amend or alter the judgment, arguing that although the district court properly recognized that TEO was entitled to a credit for Ameripride's earlier settlements, it applied the wrong methodology to determine how that credit should be treated. The district court denied the motions and TEO appealed to the Ninth Circuit.

B. Parties' Arguments

TEO argued on appeal that the district court committed reversible error by applying the pro tanto approach. First, TEO argued that the lower court's decision to shift from the proportionate share approach to the pro tanto approach violated the plain language of CERCLA. Specifically, TEO argued that CERCLA requires courts to use the proportionate share approach when allocating damages, because §113(f) calls for courts to allocate response costs using "equitable factors."¹² TEO argued that, contrary to this requirement, the use of the pro tanto approach constitutes "simple arithmetic," and does not satisfy the court's duty to assign liability equitably.¹³ TEO asserted that this reading of the statute is supported by Congress' decision to require the pro tanto approach in settlements involving federal or state governments, but not for private-party settlements.

Second, TEO pointed to several other statutes with similar contribution language (specifically, cases dealing with securities and admiralty), and noted that courts interpreting those statutes found the proportionate share approach to be the best method for allocating a nonsettling defendant's liability in contribution actions.¹⁴ As described by TEO, those cases focused on the various disadvantages of the pro tanto approach, including that "Plaintiffs may be tempted to engage in collusion with certain defendants . . . and thereby force wealthier defendants to pay more than if all parties proceeded to trial."¹⁵ In contrast, TEO asserted that the "proportionate share approach does not have these disadvantages but instead 'comports with the equitable purpose of contribution,' as well as encourages settlements."¹⁶

Finally, TEO urged the court to reject the Seventh Circuit's approach set forth in *Akzo Nobel Coatings, Inc. v. Aigner Corp.* In *Akzo*, the court vacated a district court's decision applying the proportionate share approach, and

remanded the case with directions that district courts must apply the pro tanto approach in accounting for settlements at CERCLA multiparty sites. The decision was based primarily on the Seventh Circuit's determination that because §113(f)(2) calls for the pro tanto approach with respect to government settlements, adopting the UCFA in private-parties' settlements "would undermine that decision."¹⁷ The court also noted that the pro tanto approach "enables the district court to avoid what could be a complex and unproductive inquiry into the responsibility of missing parties," thus conserving judicial resources.¹⁸ Critically, the court held that even if a nonsettling party believes that another party settled for less than its fair share, the nonsettling party "is not free to bring its own contribution actions against them."¹⁹ Instead, it held that a nonsettling party "that wants to guard against inadequate collections from third parties must either intervene in the suits against them or challenge the bona fides of the settlements immediately after they are reached."²⁰

Ameripride, on the other hand, argued that the district court acted within its broad discretion in determining how to allocate the settlement payments, and that its application of the pro tanto approach was permissible under CERCLA §113(f).²¹ Ameripride relied upon the U.S. Court of Appeals for the First Circuit's decision in *American Cyanamid Co. v. Capuano*, which held that it is within the district court's discretion to determine how private-party settlements affect the liability of nonsettling parties.²² Ameripride also disputed TEO's argument that CERCLA requires the pro tanto approach only for governmental settlements. Finally, Ameripride argued that because fault is only one factor that a court may or may not consider in its equitable assessment, the court may deviate from the proportionate share approach and adopt the approach best-suited for the circumstances.

C. Ninth Circuit's Decision

Relying primarily on the First Circuit's holding in *Capuano*, the Ninth Circuit ruled that CERCLA provides courts with broad discretion to determine the most equitable method of accounting for settling parties at multiparty CERCLA sites, and does not require courts to apply either the pro tanto or proportionate share approach. In reaching its decision, the court focused on the statutory language, emphasizing that CERCLA does not require courts to adopt any particular method of accounting. Instead, the court said, Congress' intent to accord discretion is demonstrated by its decision to "mandat[e] the use of UCATA for government settlements but not for private settlements,"

12. 42 U.S.C. §9613(f)(1).

13. See Appellant Br. 22, Feb. 27, 2013, ECF No. 11-1, *Ameripride*, 782 F.3d 474.

14. See *id.* at 25-28 (citing approaches taken by the Ninth Circuit in *Franklin v. Kaypro*, 884 F.2d 1222 (9th Cir. 1989) (rejecting the pro tanto approach and applying the proportionate share approach in the context of a contribution action under the 1933 Securities Act) and the U.S. Supreme Court in *McDermott v. AmClyde*, 511 U.S. 202 (1994) (rejecting the pro tanto approach and applying the proportionate share approach in the context of a maritime contribution action)).

15. See Appellant's Br., *supra* note 13, at 27 (quoting *Franklin*, 884 F.2d at 1230-31).

16. *Id.*

17. *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 307, 30 ELR 20180 (7th Cir. 1999).

18. *Id.* at 308.

19. *Id.* (emphasis added).

20. *Id.*

21. See Answer Br. of Appellee 26, April 30, 2013, ECF No. 19, *Ameripride Svs., Inc. v. Texas Eastern Overseas, Inc.*, 782 F.3d 474, 45 ELR 20066 (9th Cir. 2015).

22. 381 F.3d 6, 20-21 (1st Cir. 2004).

and its instruction to courts “to allocate response costs among liable parties using such equitable factors as [they] determine[] appropriate.”²³ The Ninth Circuit specifically rejected the Seventh Circuit’s *Akzo* holding that CERCLA requires courts to apply the pro tanto approach.

Notwithstanding its holding that CERCLA confers broad discretion on courts to determine the most equitable method of accounting, the Ninth Circuit ruled that in this case the UCFA proportionate share approach was required because the district court earlier had ruled that it would apply. “[B]ecause a district court’s chosen method will likely affect parties’ decisions to settle or contest a proposed settlement,” the Ninth Circuit said, “once a district court selects a method in a final order approving a settlement agreement, failing to follow that approach may produce a result that is inequitable and inconsistent with CERCLA’s goals.”²⁴ Because the district court initially ruled that it would apply the UCFA approach, TEO had no reason to contest the settlements or adduce evidence as to their fairness at the time of settlement. Due to TEO’s justifiable reliance on the district court’s UCFA ruling, TEO should continue to have the benefit of that decision.

IV. Impact of the Circuit Split on Settlement Strategy

The Ninth Circuit’s decision deepens and clarifies the circuit split on how settlements at multiparty CERCLA sites should be credited in later litigation against nonsettling parties. In the First and Ninth Circuits, district courts are granted broad discretion to apply whatever method they find equitable in the circumstances of a particular case, whether it be the pro tanto approach, the proportionate share approach, or something different. In the Seventh Circuit, district courts are required to use the pro tanto approach set forth in the UCATA. Finally, under the approach advocated for by TEO, but not yet adopted by any circuit, courts would be required to adopt the proportionate share approach. Because the different approaches have vastly different implications for both settling and nonsettling parties, responsible parties at contaminated sites should, in determining their settlement strategy, consider carefully which approach a district court might take and how it might impact settlement negotiations.

With respect to sites in the Seventh Circuit, district courts are required to apply the pro tanto approach set forth in the UCATA. As noted, this rule may have the tendency to drive early settlement because parties who fail to settle early in the litigation may be left holding a disproportionate share of the liability later in the litigation. Parties must keep in mind, however, that under *Akzo*, to the extent a nonsettling party disagrees with a previous settlement, that nonsettling party cannot later contest the settlement as disproportionate; instead, the nonsettling party must

intervene prior to settlement or challenge the settlement immediately after it is reached.

This rule has several implications for both settling and nonsettling parties. First, parties that have only a small share of liability and wish to exit the site early through settlement should be prepared to face collateral attacks from other responsible parties prior to or following settlement, particularly if the settled amount appears disproportionate to their liability. Such attacks may not only increase settlement costs, but also tie up the party seeking to settle in protracted litigation. The increased costs may, in turn, vastly outweigh the benefit of an early settlement. As a result, parties that wish to settle early and incur minimal transaction costs may consider paying more in settlement to decrease the likelihood of a challenge, or seek an indemnity from the remediating party as part of the settlement. Parties that do not wish to settle must keep a close eye on potential settlements between other responsible parties, as those nonsettling parties could lose their chance to object if they do not act early in the process.

Conversely, if a circuit were to adopt TEO’s proposed methodology, district courts within that circuit would be required to apply the proportionate share approach. As noted, this approach decreases the incentive for a remediating party to settle with responsible parties early and for less than those parties’ fair share, because the remediating party alone would bear any loss from that settlement. As a result, remediating parties would have to carefully consider any settlement, as nonsettling parties that reach trial are likely to challenge the legitimacy of those settlements after the fact. In addition, to the extent any party seeks to litigate the matter to resolution, the scope of the ensuing trial may be significantly broader, as Circuit Judge Frank Easterbrook noted in the *Akzo* opinion, because it would require an analysis of the relative liabilities of all responsible parties at the site.²⁵ With respect to sites in former industrial areas, which can have hundreds of PRPs, such an analysis could increase the burden on a remediating party substantially: At trial, that party may not only have to justify each of its settlements, but also account for the relative liability of parties that it did not involve in the litigation.

Finally, with respect to sites in the First and Ninth Circuits, district courts have the ability to apply whatever methodology they deem equitable. At sites within these circuits, all parties—whether they are the remediating party, a settling party, or a nonsettling party—may have their interests significantly impacted based upon the approach chosen by a court. In these jurisdictions, parties may want to consider seeking an early declaration from the court with respect to the method that should be applied to the case. Under *Ameripride*, once the court selected its approach, it would be bound to that approach throughout the case. Once that determination was reached, parties could rely more generally on the principles and considerations described above, depending on whether the court

23. *Ameripride*, 782 F.3d at 488.

24. *Id.*

25. *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 306, 30 ELR 20180 (7th Cir. 1999).

sought to account for settlements under the UCATA or the UCFA.

Given the current circuit split, parties with significant exposure in undecided circuits may be inclined to initiate appeals with the hope of moving courts in that jurisdiction toward their preferred approach. Due to the discrete nature of the issue (there have been only two relevant appeals since the Seventh Circuit's 1999 *Akzo* decision), it appears unlikely that the U.S. Supreme Court would grant certiorari unless a deeper divide between the circuits emerges. As a result, parties must continue to pay attention to the law of the circuit, and gear their settlement and cleanup approaches accordingly.

Our view is that if the Supreme Court were to address the issue, it might favor the approach taken by the First and Ninth Circuits because it gives courts the flexibility to tailor the method of allocation to the specific facts and circum-

stances. If such an approach were adopted, parties would need to keep in mind that district courts might adopt differing liability models at different sites within the same circuit. On the other hand, the Supreme Court could adopt a single-approach rule that only one method is allowed; such a decision would likely be based on the Court's desire to increase predictability and consistency across the jurisdictions, and allow PRPs to more easily assess their potential risk and vulnerability.

Unless and until the Supreme Court does rule on the issue, it is important for parties to understand the changing landscape and differences across jurisdictions. Parties should consider the implications that the different contribution accounting methods may have on their strategies, particularly given that resolving liability at multiparty sites can take years.