

Ninth Circuit Holds District Courts Have Discretion in Accounting For CERCLA Private Party Settlement When Allocating to Non-Settling Parties

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On April 2, 2015, the Ninth Circuit held that a district court has the discretion to determine the most equitable method of accounting for settlement between private parties when it allocates liability to a non-settling defendant in a CERCLA contribution action. *AmeriPride Serv. v. Texas Eastern Overseas*, Case no. 12-17245 (9th Cir. Apr. 2, 2015). The Ninth Circuit's decision is consistent with previous case law from the First Circuit (*Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 20-21 (1st Cir. 2004)) but splits with case law from the Seventh Circuit (*Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999)), which has held that a court must use the *pro tanto* approach of the Uniform Contribution Among Tortfeasors Act when allocating liability to a non-settling defendant.

AmeriPride brought CERCLA § 107(a) and § 113(f) claims against Texas Eastern Overseas (TEO) related to a contaminated industrial site in Sacramento, California. The district court granted a summary judgment motion filed by AmeriPride, holding that TEO was liable for AmeriPride's response costs under CERCLA § 107(a) and that AmeriPride could recover amounts AmeriPride had paid in settlement to other parties from TEO under CERCLA § 113(f). In an earlier order in the case, the court also said it would adopt the proportionate share approach of the Uniform Comparative Fault Act in allocating response costs. Under this approach, the court must determine the responsibility of all parties that have settled, as well as those still involved in the litigation. The non-settling parties are responsible only for their proportionate share of the costs, even if a settling party settles for less than its fair share of the injury. After trial on the equitable allocation of response costs between AmeriPride and TEO, however, instead of using the proportionate share approach the court utilized the *pro tanto* approach in allocating costs. Under this approach, the settling parties are allocated the amounts set forth in the settlement agreements, regardless of whether those amounts were less than their fair share. To the extent the settling parties paid less than their fair share, TEO was left bearing part of those costs.

On appeal, TEO argued that the district court should have used the proportionate share approach in allocating liability. The Ninth Circuit explained that while federal common law has favored use of the proportionate share approach of allocating liability, there was strong evidence that Congress did not intend to apply the proportionate share approach to cases involving litigation among private parties. Additionally, the court noted that CERCLA itself does not specify how private party settlements affect liability of non-settling parties. Thus, the court held that a district court has discretion under CERCLA

to determine the most equitable method of accounting for settlements between private parties in a contribution action.

TEO also argued that the district court improperly represented that it would use the proportionate share approach prior to trial and then changed to the *pro tanto* approach after trial. The Ninth Circuit held that while a district court has discretion in deciding which approach it uses to account for settling parties, it must explain its decision and how that decision complies with CERCLA § 113(f). The district court must also provide parties with reasonable opportunity to present evidence and argument on the fairness of the district court's allocation approach. Because the district court did not provide such an explanation or opportunity before switching from the proportionate share to *pro tanto* approach for allocation, the Ninth Circuit remanded the case to the district court for further proceedings.

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