



## Environment, Land Use & Natural Resources ADVISORY ■

**APRIL 20, 2015**

### Ninth Circuit Affirms Use of Proportionate Share Approach in CERCLA Settlements

**By Doug Arnold, Sarah Babcock and Ronnie Gosselin**

The Ninth Circuit recently confirmed that district courts have discretion to use a proportionate share approach when crediting private party settlements under CERCLA. *AmeriPride Servs. Inc. v. Tex. E. Overseas Inc.*, No. 12-17245 (9th Cir. Apr. 02, 2015).

When determining how to credit settlements in CERCLA cases, courts generally have two options: the Uniform Contribution Among Tortfeasors Act (UCATA) *pro tanto* approach or the Uniform Comparative Fault Act (UCFA) proportionate share approach. Under the UCATA *pro tanto* approach, the amount of a settling defendant's settlement is subtracted from the overall claimed damages. Additionally, the defendant receives a bar against any contribution claims from the remaining parties. Because the settling defendant's payment is credited against the overall damages without regard to that defendant's actual equitable share, the remaining defendants bear the risk that the settlement amount is too low. As a result, courts are required to conduct a good faith and fairness hearing prior to approving the settlement.

The UCFA proportionate share approach, on the other hand, places the risk of an insufficient settlement on the plaintiff. Under this approach, the total damages amount is reduced by the amount of the settling party's *equitable share*, regardless of the actual settlement amount. If a plaintiff settles for too little and releases a defendant for less than its equitable share, the shortfall is borne by the plaintiff. The proportionate share approach therefore eliminates the need for a good faith and fairness hearing. Moreover, the settling defendant can potentially obtain a bar on contribution claims by both nonsettling defendants and any *future* claimants because the plaintiff has effectively taken on the settling party's equitable share of the liability.

These two settlement approaches met head to head in the recent *AmeriPride* decision. The case involved alleged releases of PCE and other hazardous materials by multiple parties into soil and groundwater in Sacramento, California. In addressing certain early settlements, the trial court adopted the UCFA proportionate share approach as the law of the case. Four years later, however, the court declined to apply that approach

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after determining that defendant Texas Eastern Overseas, Inc. (TEO) was liable for plaintiff AmeriPride's response costs, instead holding that the claims against TEO would be reduced only by the dollar value of the earlier settlements.

On appeal, TEO argued that CERCLA required the district court to apply the UCFA proportionate share approach when crediting the prior settlements. TEO also contended that the court had abused its discretion by first ruling that it would apply the UCFA proportionate share approach, and then refusing to apply that approach later.

Unsurprisingly, the Ninth Circuit rejected TEO's claim that CERCLA *requires* the application of UCFA. The Ninth Circuit found that CERCLA is silent as to which approach to use when crediting settlements among private parties. Moreover, the court found that CERCLA's provision allowing a court to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate" gives district court judges the discretion to determine the most equitable method. In other words, a court can use the UCFA proportionate share approach whenever appropriate in the court's view, but is not required to do so. The Ninth Circuit also held, however, that the district court should not have changed settlement approaches midstream and remanded for further proceedings on that issue.

The *AmeriPride* decision reconfirms that the UCFA approach is an appropriate allocation method under CERCLA for purposes of crediting private party settlements. Accordingly, CERCLA defendants would be wise to evaluate the potential availability of UCFA as part of any settlement strategy. The contribution bar that UCFA potentially provides against future claims—by both parties and nonparties—can add a degree of finality that too often is absent in most Superfund settlements.

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