

## 9th Circ. Deepens Split Over Complex CERCLA Sites

--By Michael Daneker and Lauren Daniel, Arnold & Porter LLP

Law360, New York (April 22, 2015, 11:01 AM ET) -- On April 2, 2015, the Ninth Circuit issued a decision in *AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*[1] holding that, in a contribution suit under the Comprehensive Environmental Response, Compensation, and Liability Act, district courts have discretion in accounting for past settlements between responsible parties. This holding deepens an unresolved circuit split and increases uncertainty regarding the legal effect of settlement with fewer than all responsible parties at complex CERCLA sites.

### **Potential Approaches to Settlement by Some, But Not All, Responsible Parties**

At complex multiparty CERCLA sites, one responsible party will often agree to perform a cleanup with the intent of later suing other potentially responsible parties to recover their share of cleanup costs. In this context, the party performing the cleanup will often find that some responsible parties are willing to settle early and, for a variety of reasons, others are not. The key question addressed by the Ninth Circuit is what effect settlement between some, but not all, responsible parties will have on the liability of nonsettling responsible parties.

Generally, when a statute does not provide an approach for determining how to credit settlements in cases involving settlements with less than all the jointly and severally liable tortfeasors, courts look to one of two competing methods: the Uniform Contribution Among Tort Feasors Act or the Uniform Comparative Fault Act.

The UCATA approach provides that settlement with one tortfeasor reduces the claim against other tortfeasors by the dollar value of the settlement. Under the UCATA dollar-value approach, if an injured party settles for too little with one tortfeasor, the nonsettling tortfeasors will pay more than their proportionate share. This encourages early settlement, but can also encourage inequitable “sweetheart” deals in which a plaintiff may seek to settle early with one or more defendants to the detriment of others.

The UCFA approach provides that settlement with one tortfeasor reduces the claim against other tortfeasors by a proportionate share of the damages. Under the UCFA approach, an injured party who settles for too little may not receive full recovery. This discourages early settlement before the liability of all parties is well-understood and reduces the litigation risks for nonsettling defendants. It could, on the other hand, result in a more equitable allocation.

### **Background and Procedural History of *AmeriPride v. TEO***

The *AmeriPride* action arose out of trichloroethylene (TCE) contamination of soil and groundwater associated with the operation of a laundry in an industrial area of Sacramento, California. Parties responsible for contributing to contamination at the site included *AmeriPride Services Inc.*, *Texas Eastern Overseas Inc.*, *Chromalloy American Corp.* and *Petrolane Inc.*

Under the direction of the state agency, *AmeriPride* performed investigation and remediation of the contamination. It then settled its CERCLA contribution claims against *Chromalloy* and *Petrolane*. In its order approving these settlements, the district court stated that it would adopt the UCFA approach for purposes of determining the legal effect of the settlement agreements with other responsible parties — meaning that the settlements with *Chromalloy* and *Petrolane* would reduce the contribution claim against *TEO*, the only

nonsettling party, by a proportionate share (rather than a dollar value).

Meanwhile, AmeriPride's contribution suit against TEO continued to be litigated and the district court eventually held that, contrary to its representation in its approval of the settlements, it would apply the UCATA approach and reduce AmeriPride's claims against TEO by the dollar value (rather than the proportionate share) of the settlements with the other two responsible parties. TEO appealed to the Ninth Circuit.

### **Decision on the Treatment of CERCLA Settlements**

On appeal, the Ninth Circuit held that CERCLA gives a district court discretion to choose between the UCATA and UCFA approaches to private party settlements in a Section 113 contribution action. The Ninth Circuit remanded the case for further proceedings, however, because it believed the district court's midstream change in approach may have unduly prejudiced TEO.

To reach its holding, the Ninth Circuit first recognized that CERCLA expressly requires courts to apply the UCATA dollar-value approach to settlement agreements between the government and a private responsible party. However, because the statute does not contain a similar provision extending to settlements between two private responsible parties, the Ninth Circuit fell back on Section 113's general mandate that a "court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate," leaving the treatment of private party settlements up to district courts.

The Ninth Circuit is the third circuit court to address the question of whether the UCFA or UCATA approach should be applied to CERCLA private party settlements. The AmeriPride decision concurs with the First Circuit's holding in *Am. Cyanamid Co. v. Capuano*,<sup>[2]</sup> but declines to follow the reasoning of the Seventh Circuit in *Akzo Nobel Coatings Inc. v. Aigner Corp.*<sup>[3]</sup> In *Akzo*, the Seventh Circuit held that CERCLA requires application of the UCATA proportional share approach.

In light of both the circuit split and the Ninth Circuit's decision to leave the choice between the UCATA and UCFA approach to the district courts, significant uncertainty remains as to how private party settlements will be treated in an equitable allocation among responsible parties. Knowing which approach will apply is important to understanding how to value a settlement and without this certainty parties in CERCLA contribution suits may be inclined to litigate rather than settle.

It is important to bear in mind that early resolution of this question will likely require an upfront commitment of resources from both responsible parties and the court. Differently situated responsible parties are likely to favor different approaches. Parties implementing a remedy are likely to favor the UCFA proportionate share approach, while all other parties are likely to favor the UCATA dollar-value approach. Therefore, early resolution of this question may require a court to invite briefing on the issue if and when the first private party settlements occur.

*Michael Daneker* is a partner and *Lauren Daniel* is an associate in Arnold & Porter's Washington, D.C., office.

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[1] No. 12-17245, \_\_\_ F.3d \_\_\_ (9th Circ. 2015).

[2] 381 F.3d 6 (1st Circ. 2004).

[3] 197 F.3d 302 (7th Circ. 1999).