

4-29-2016

Distribution to Undo Excess: The Ninth Circuit Looks to an Equitable Approach to Apportion the Costs of Environmental Cleanup in *AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*

Sean A. Feener
Boston College Law School, sean.feener@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/bclr>



Part of the [Civil Law Commons](#), [Environmental Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Sean A. Feener, *Distribution to Undo Excess: The Ninth Circuit Looks to an Equitable Approach to Apportion the Costs of Environmental Cleanup in AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*, 57 B.C. L. Rev. E. Supp. 160 (2016), <https://lawdigitalcommons.bc.edu/bclr/vol57/iss6/10>

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.

DISTRIBUTION TO UNDO EXCESS: THE NINTH CIRCUIT LOOKS TO AN EQUITABLE APPROACH TO APPORTION THE COSTS OF ENVIRONMENTAL CLEANUP IN *AMERIPRIDE SERVICES INC. v. TEXAS EASTERN OVERSEAS INC.*

Abstract: On April 2, 2015, in *AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*, the U.S. Court of Appeals for the Ninth Circuit joined the U.S. Court of Appeals for the First Circuit in holding that district courts are not bound to a single method of distributing response costs in contribution actions under § 9613(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). The First and Ninth Circuits have held that courts may allocate such costs according to the most equitable method as long as it is consistent with the language and the purposes of CERCLA. The U.S. Court of Appeals for the Seventh Circuit, alternatively, has ruled that district courts must allocate response costs using the method prescribed by the Uniform Contribution Among Tortfeasors Act, which accounts for settlements by reducing total liability by the dollar amount of the agreement. This Comment argues that the First and Ninth Circuits’ interpretation of CERCLA is correct because it accounts for the variety and complexity of contribution actions under CERCLA and because it furthers CERCLA’s goals of promoting the prompt cleanup of hazardous waste sites and ensuring that parties responsible for environmental harm bear the cost of cleaning the damage.

INTRODUCTION

In 1997, consultants for AmeriPride Services Inc. (“AmeriPride”), discovered evidence of perchloroethylene (“PCE”) in the soil under its Sacramento, California location.¹ PCE is a solvent used in dry cleaning, exposure to which has been found to be carcinogenic in a number of studies.² PCE is

¹ See *AmeriPride Servs. Inc. v. Tex. E. Overseas Inc. (AmeriPride II)*, 782 F.3d 474, 481 (9th Cir. 2015).

² See generally NAT’L TOXICOLOGY PROGRAM, TOXICOLOGY AND CARCINOGENESIS STUDIES OF TETRACHLOROETHYLENE (PERCHLOROETHYLENE) (1986), https://ntp.niehs.nih.gov/ntp/htdocs/lt_rpts/tr311.pdf [<https://perma.cc/Z7BV-QXHA>] (finding clear evidence of carcinogenicity of Perchloroethylene (“PCE”) in rats exposed to the chemical); *Tetrachloroethylene (Perchloroethylene)*, AM. CANCER SOC’Y, <http://www.cancer.org/cancer/cancercauses/othercarcinogens/intheworkplace/tetrachloroethylene-perchloroethylene> [<https://perma.cc/ZM7C-R638>] (“[PCE] has been suspected of causing some types of cancer, based on both human and animal evidence.”).

also listed as a “hazardous substance” under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), which the statute defines as “such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment.”³ Under CERCLA’s statutory framework, costs of response associated with cleanup may be distributed among parties liable for environmental harm using equitable factors deemed relevant by the courts, with an emphasis on encouraging elective cleanup by private parties.⁴ Section 9613(f) also provides parties held responsible for contamination at a hazardous waste site with a cause of action for contribution against other “potentially responsible parties” (“PRPs”) for cleanup costs resulting from the same environmental harm when the party that performed the cleanup has paid a sum in excess of its equitable portion.⁵ In the event of partial settlement among a number of

³ See 42 U.S.C. § 9602 (2012) (defining “hazardous substances,” in relevant part, as “such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment . . .”). The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) further defines “hazardous substances” as substances named by section 311(b)(2)(A) of the Federal Water Pollution Control Act, section 3001 of the Solid Waste Disposal Act, section 307(a) of the Federal Water Pollution Control Act, or section 112 of the Clean Air Act; and any “imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act.” *Id.* § 9601 (definitions). CERCLA excludes “petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance,” and “natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel.” *Id.* Perchloroethylene is also called “perchloroethene,” “tetrachloroethylene,” and “tetrachloroethene.” See Matthew Valentine, Comment, *Regulating Soil Vapor Intrusion in New York State*, 16 ALB. L.J. SCI. & TECH. 457, 464, 471 & n.134 (2006). “Tetrachloroethene” is listed as a “hazardous substance” in the Code of Federal Regulations. 40 C.F.R. § 302.4 (2015).

⁴ See 42 U.S.C. § 9613(f)(1) (2012); Frank B. Cross, *Settlement Under the 1986 Superfund Amendments*, 66 OR. L. REV. 517, 541 (1987) (concluding that the inclusion of settlement authority in § 9622 of CERCLA is “significant testimony” of Congress’s plan to encourage voluntary settlement of liability disputes over hazardous waste sites); Joseph A. Fischer, Comment, *All CERCLA Plaintiffs Are Not Created Equal: Private Parties, Settlements, and the UCATA*, 30 HOUS. L. REV. 1979, 1989–90 (1994) (noting that CERCLA evinces Congress’s intent to promote private response to hazardous waste sites).

⁵ See 42 U.S.C. § 9613(f)(1); see also William B. Johnson, Annotation, *Amount and Characteristics of Wastes as Equitable Factors in Allocation of Response Costs Pursuant to § 113(f)(1) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, 42 U.S.C.A. § 9613(f)(1): *Multiple Waste Streams*, 162 A.L.R. FED. 371, § 2[a] (2000). Under CERCLA, “potentially responsible parties” (“PRPs”) are “covered persons,” which are defined in § 9607 as:

- (1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned

PRPs, where some but not all parties have entered agreements with the party suing for contribution, CERCLA is silent on how to account for the value of such settlements in future contribution actions against non-settling parties.⁶

This ambiguity in CERCLA has left courts divided on how to interpret § 9613(f) when accounting for third party settlements.⁷ In 2015, in *AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*, the U.S. Court of Appeals for the Ninth Circuit joined the U.S. Court of Appeals for the First Circuit in concluding that trial courts have discretion under § 9613(f) to determine the most equitable method of accounting for settlements in a private party's contribution action against non-settling parties.⁸ Alternatively, the U.S. Court of Appeals for the Seventh Circuit has held that the proper way to account for settlements is a method proposed by the Uniform Contribution Among Tortfeasors Act ("UCATA"), which provides for the reduction of total liability by the dollar amount of the settlement.⁹

This Comment argues that the Ninth Circuit's is the proper interpretation of § 9613(f) of CERCLA.¹⁰ Part I reviews the factual and procedural history of *AmeriPride* and the legislative history of CERCLA.¹¹ Part II explores the circuit split between the First, Ninth, and Seventh Circuits on the issue of how to account for third-party settlements in contribution actions under CERCLA.¹² Part III argues that the First and Ninth Circuits correctly interpreted CERCLA in holding that district courts have discretion under

or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

42 U.S.C. § 9607(a) (2012); see Amy Lewis Champagne, Note, *Akzo Nobel Coatings, Inc. v. Aigner Corp.: The Settlement Credit Issue Answered for CERCLA Litigation?*, 62 LA. L. REV. 247, 249 & n.18 (2001) (defining "potentially responsible parties"). Under § 9607(a), any party that has owned a contaminated site could be held liable for the full costs of historical contamination. Tom Lininger, *Green Ethics for Lawyers*, 57 B.C. L. REV. 61, 83–84 & n.114 (2016).

⁶ See 42 U.S.C. § 9613(f)(1); see also Champagne, *supra* note 5, at 255 (noting that following the enactment of CERCLA it was unclear what credit rule applied when settlements included only private parties). "Non-settling parties" are those parties who have not entered into an agreement with the party suing for contribution. See Champagne, *supra* note 5, at 247.

⁷ See *AmeriPride II*, 782 F.3d at 487–88; *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 20 (1st Cir. 2004); *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999).

⁸ See *AmeriPride II*, 782 F.3d at 487–88; *Capuano*, 381 F.3d at 20.

⁹ See *Akzo*, 197 F.3d at 308.

¹⁰ See *infra* notes 84–87 and accompanying text.

¹¹ See *infra* notes 14–39 and accompanying text.

¹² See *infra* notes 40–80 and accompanying text.

§ 9613(f) to determine the most equitable method of accounting for settlements in a private party's contribution action against non-settling parties.¹³

I. *AMERIPRIDE* AND THE LEGISLATIVE HISTORY OF CERCLA

On April 2, 2015, in *AmeriPride*, the Ninth Circuit held that district courts have discretion to account for partial settlements in private party contribution actions under CERCLA by considering equitable factors.¹⁴ This Part first details the factual and procedural history of *AmeriPride*, including the lower court's decision on remand.¹⁵ This Part then examines the language and legislative history of CERCLA and its 1986 amendment, the Superfund Amendments and Reauthorization Act, which added the provision at issue in *AmeriPride*.¹⁶

A. *Factual and Procedural History of AmeriPride*

In 1997, AmeriPride, the owner of an industrial dry cleaner in Sacramento, California, found evidence of PCE contamination in the soil beneath its business.¹⁷ Releases of PCE into the soil and groundwater occurred under both the previous owner's and AmeriPride's operations.¹⁸ Chromalloy American Corporation ("Chromalloy"), which owned property near the Sacramento site, also contributed to the contamination on AmeriPride's property.¹⁹ AmeriPride has been performing cleanup efforts at the site since 2002.²⁰

In 2000, AmeriPride filed a complaint in the U.S. District Court for the Eastern District of California against Valley Industrial Services, Petrolane, and Texas Eastern Overseas ("TEO")—the former owners of the site—as well as fellow polluter Chromalloy, under §§ 9607 and 9613 of CERCLA, seeking costs incurred in responding to the PCE contamination.²¹ Subse-

¹³ See *infra* notes 81–96 and accompanying text.

¹⁴ See 42 U.S.C. § 9613(f)(1); *AmeriPride II*, 782 F.3d at 488.

¹⁵ See *infra* notes 17–29 and accompanying text.

¹⁶ See *infra* notes 30–39 and accompanying text.

¹⁷ *AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. Civ. S–00–113 LKK/JFM, 2011 WL 1833179, at *8 (E.D. Cal. May 12, 2011).

¹⁸ *AmeriPride II*, 782 F.3d at 480.

¹⁹ *Id.* at 481.

²⁰ *Id.* In 2002, a California state agency took control of the site and has been directing AmeriPride's cleanup of the PCE contamination around the Sacramento site. *Id.* In the intervening five years between detection and remediation, AmeriPride was conducting investigation and cleanup efforts as mandated by California state law. *Id.*

²¹ Third Amended Complaint at 1–2, *AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc.* (*AmeriPride I*), 2012 WL 3913081 (E.D. Cal. Sept. 7, 2012) (No. Civ. S–00–113 LKK/JFM), 2000 WL 35799756 (E.D. Cal. Dec. 18, 2000). The site was formerly operated for a number of years by Valley Industrial Services ("VIS"). *AmeriPride II*, 782 F.3d at 480. VIS, once a wholly owned subsidiary of Petrolane, Inc., eventually merged into Texas Eastern Overseas ("TEO"),

quently, AmeriPride entered into settlement agreements with Chromalloy and Petrolane totaling \$3,250,000.²² The district court held TEO liable for AmeriPride's response costs less the dollar amounts of settlements that AmeriPride received from Petrolane and Chromalloy.²³ The district court then allocated this amount equally between AmeriPride and TEO.²⁴

In 2015, in *AmeriPride*, a three-judge panel of the Ninth Circuit held that district courts may distribute the costs of response associated with cleanup among parties liable for environmental harm using equitable factors deemed relevant by the courts, as long as the chosen method is consistent with § 9613(f)(1) and the purposes of CERCLA.²⁵ The Ninth Circuit vacated the district court's judgment against TEO and remanded the case for further proceedings, ordering the lower court to explicate which equitable factors it considered when distributing the value of the settlements that AmeriPride received from Petrolane and Chromalloy to settling parties, or to choose such factors and allocate costs in accordance.²⁶

On remand, on September 28, 2015, the U.S. District Court for the Eastern District of California held that it would apply the proportionate share approach to account for the \$3,250,000 settlement agreements.²⁷ In reaching this decision, the court considered such equitable factors as: TEO's reasonable reliance on the court's initial decision to use the proportionate share approach; the requirement that settling parties Chromalloy and Petrolane defend settlement agreements eight years after they were reached in fairness hearings under the UCATA approach; and the lack of unfair results

which assumed its liabilities. *Id.* Petrolane sold the site in 1983, after which AmeriPride eventually purchased it. *Id.* TEO later asserted a counterclaim for contribution under § 9613(f). *Id.* at 481.

²² *AmeriPride I*, 2012 WL 3913081, at *2.

²³ *Id.*; see UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §§ 1–9 (UNIF. LAW COMM'N 1955). The district court first ruled that it would account for these settlements and apportion response costs among all PRPs using the proportionate share approach of the Uniform Comparative Fault Act ("UCFA"). *AmeriPride II*, 782 F.3d at 488; see UNIF. COMPARATIVE FAULT ACT §§ 1–11 (UNIF. LAW COMM'N 1977). Under the proportionate share approach, settlements are accounted for by determining the settling parties' actual percentage of liability and then deducting that amount from the total liability, regardless of the cash value of the settlement agreement. UNIF. COMPARATIVE FAULT ACT § 6. After a bench trial, however, the U.S. District Court for the Eastern District of California did not determine the proportionate share of all PRPs and effectively imposed the Uniform Contribution Among Tortfeasors Act ("UCATA") approach. See *AmeriPride I*, 2012 WL 3913081, at *2; see also *infra* notes 47–50 and accompanying text (describing the UCATA approach).

²⁴ *AmeriPride I*, 2012 WL 3913081, at *2. TEO appealed the district court's decision after the court denied its motion to amend or alter the judgment. *AmeriPride II*, 782 F.3d at 483.

²⁵ See *AmeriPride II*, 782 F.3d at 488 (concluding that courts must utilize their discretion in a way that aligns with the language of § 9613(f)(1) and CERCLA's objectives).

²⁶ *Id.* at 488, 492.

²⁷ *AmeriPride Servs. Inc. v. Tex. E. Overseas Inc.*, No. 2:00-cv-00113-MCE-EFB, 2015 WL 5734544, at *4 (E.D. Cal. Sept. 28, 2015).

for AmeriPride under the proportionate share approach.²⁸ The court reasoned that the proportionate share approach was consistent with CERCLA's central purpose of environmental protection because it would not conflict with the quick cleanup of the hazardous waste site at issue in this case.²⁹

B. *The Legislative History of CERCLA*

In 1980, Congress enacted CERCLA to promote prompt cleanup of hazardous waste sites and to ensure that the parties responsible for environmental contamination bear the costs of necessary cleanup efforts.³⁰ When a state or the federal government detects hazardous waste contamination at a given site, the government actor may bring suit under § 9607 to recover its costs of response against the parties responsible for the contamination.³¹ In a cost recovery suit under § 9607, CERCLA imposes joint and several liability against each PRP for the contamination at a hazardous waste site.³² As originally enacted, CERCLA did not contain a provision explicitly allowing a private party that had taken on the costs of cleanup to seek contribution from other parties responsible for the contamination at a hazardous waste site.³³

In 1986, Congress passed the Superfund Amendments and Reauthorization Act, which expressly created a cause of action by which private parties who believed that they had contributed more than their equitable portion to the cost of cleanup could seek contribution from other parties re-

²⁸ See *id.* at *4–5.

²⁹ *Id.* at *5. The court found that there was no reason to believe that the cleanup of the site would end if it adopted the proportionate share approach, as cleanup had been ongoing since 2002. *Id.* The court also found that the proportionate share approach would not deter settlement in this case because the only remaining defendant was TEO, and neither TEO nor AmeriPride indicated that application of this approach would deter it from settling. *Id.*

³⁰ See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26, 33, and 42 U.S.C.); *Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (quoting *Consol. Edison Co. of N.Y. v. UGI Util., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005)); Martin A. McCrory, *The Equitable Solution to Superfund Liability: Creating a Viable Allocation Procedure for Businesses at Superfund Sites*, 23 VT. L. REV. 59, 59 (1998). CERCLA is also known as “the Superfund Act.” McCrory, *supra*.

³¹ See *Capuano*, 381 F.3d at 9 (citing *United States v. Davis*, 261 F.3d 1, 28–29 (1st Cir. 2001)).

³² 42 U.S.C. § 9607; see Fischer, *supra* note 4, at 1983. Joint and several liability under CERCLA is subject only to four defenses, including: an act of God; an act of war; an act or omission of certain third parties; or any combination of the three. 42 U.S.C. § 9607(b). Under a joint and several liability scheme, where one indivisible harm is caused by two or more parties, each party may be held liable for the whole harm. See *United States v. W. Processing Co.*, 734 F. Supp. 930, 942 (W.D. Wash. 1990) (quoting *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983)).

³³ See *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990).

sponsible for contamination at a hazardous waste site.³⁴ Under the language of § 9613(f), response costs may be allocated among liable parties using such equitable factors deemed proper by the court.³⁵ Liability in contribution actions is not joint and several; rather, each party's liability will correspond in theory with its individual share of fault for contamination at the site.³⁶ In the event of partial settlement among a number of PRPs where a party reaches a settlement with a state or the federal government, CERCLA allows for the reduction of the total liability of all PRPs not made party to the agreement by the dollar amount of the settlement agreement.³⁷ There is, however, no analogous provision in CERCLA that dictates how to account for settlements between private parties.³⁸ Thus, determination of the proper method of accounting for private settlements in a contribution action under CERCLA has generally been left to the courts.³⁹

³⁴ See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (2012)). Section 9613(f)(1) states that “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . .” for the costs of cleanup at a hazardous waste site. 42 U.S.C. § 9613(f)(1); see also Johnson, *supra* note 5, at § 2[a] (noting that the Superfund Amendments and Reauthorization Act added a cause of action for contribution for those parties who feel that they have paid more than their fair share of the cleanup costs).

³⁵ 42 U.S.C. § 9613(f)(1) (“In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”). “Response costs” is not clearly defined by CERCLA. See § 9601; see also William B. Johnson, Annotation, *What Are Necessary Costs of Response Within Meaning of § 107(a)(4)(b) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42 U.S.C.A. § 9607(a)(4)(b)), 113 A.L.R. FED. 1, § 2[a] (originally published in 1993).

³⁶ See *Davis*, 261 F.3d at 29 (quoting *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997)) (holding that liability in contribution actions is based on each party's portion of total liability, not a joint and several liability scheme).

³⁷ 42 U.S.C. § 9613(f)(2). For example, suppose that the Environmental Protection Agency (“EPA”) sends notice of potential liability to ten PRPs for response costs totaling \$10 million. See *Cannons*, 899 F.2d at 83 (providing an example of the EPA's issuance of notices of potential liability). Later, the government settles with four defendants for \$500,000 each, for a total of \$2 million. See *id.* The response costs for which the remaining six non-settling defendants are held joint and severally liable is then \$8 million, or the total liability of \$10 million less the value of the settlements reached between the government and settling parties of \$2 million. See 42 U.S.C. § 9613(f)(2); *Cannons*, 899 F.2d at 83; Steven Ferrey, *Allocation and Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36, 69 (1994) (“Hence, the liability of the nonsettlers is . . . reduced by the amount of the settlor's settlement . . .”).

³⁸ See Marc L. Frohman, *Rethinking the Partial Settlement Credit Rule in Private Party CERCLA Actions: An Argument in Support of the Pro Tanto Credit Rule*, 66 U. COLO. L. REV. 711, 735 (1995) (noting the nonexistence of a rule for accounting for partial settlements between private parties in contribution actions under CERCLA); cf. 42 U.S.C. § 9613(f) (lacking a provision dictating how to account for settlements between private parties).

³⁹ See, e.g., *AmeriPride II*, 782 F.3d at 487-88 (holding that the language of CERCLA does not mandate the application of a single method of accounting for settlements in private party contribution actions); *Capuano*, 381 F.3d at 20 (holding that district courts have discretion to apportion response costs among liable parties); *Akzo*, 197 F.3d at 307 (holding that district courts must

II. COMPETING APPROACHES TO CONTRIBUTION: UCATA, PROPORTIONATE SHARE, AND EQUITY

U.S. Courts of Appeals are split regarding the proper method of accounting for private party settlements under CERCLA.⁴⁰ This Part examines the various approaches taken by U.S. Courts of Appeals in accounting for settlements between private parties.⁴¹ Section A details the UCATA approach adopted by the U.S. Court of Appeals for the Seventh Circuit, which accounts for partial settlements using a dollar-for-dollar rule.⁴² Section B explains the proportionate share approach, which reduces total liability by the percentage of liability of settling parties.⁴³ Finally, section C explains the equitable approach taken by the U.S. Courts of Appeals for the First and Ninth Circuits, which gives courts discretion to determine the most equitable method of accounting for partial settlement in a given case.⁴⁴

A. The UCATA Approach

The UCATA approach involves reducing total liability only by the dollar value of third-party settlements, an approach favored by CERCLA in settlements with the government.⁴⁵ To illustrate, suppose that party A seeks contribution of response costs totaling \$150,000 from potentially responsible parties B, C, and D.⁴⁶ The proportionate liability of each party would

allocate response costs using the UCATA approach); *see also* Ferrey, *supra* note 37, at 53–54 (noting that because CERCLA lacks certain stipulations related to liability, the evolving federal common law is an important tool in interpreting the statute).

⁴⁰ Compare *AmeriPride Servs. Inc. v. Tex. E. Overseas Inc. (AmeriPride II)*, 782 F.3d 474, 487–88 (9th Cir. 2015) (holding that district courts have discretion to determine the most equitable system to account for settlements), and *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 20 (1st Cir. 2004) (holding that district courts have discretion to apportion response costs among liable parties), with *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999) (holding that district courts must allocate response costs using the UCATA approach).

⁴¹ See *infra* notes 45–80 and accompanying text.

⁴² See *infra* notes 45–53 and accompanying text.

⁴³ See *infra* notes 54–67 and accompanying text.

⁴⁴ See *infra* notes 68–80 and accompanying text.

⁴⁵ See 42 U.S.C. § 9613(f)(2) (2012) (providing that a party's settlement agreement with a state or the federal government reduces total liability by the dollar value of the settlement); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §§ 1–9 (UNIF. LAW COMM'N 1955); *Akzo*, 197 F.3d at 307, 308. The Uniform Contribution Among Tortfeasors Act was first recommended for legislation by the Uniform Law Commission in 1939; the Act was subsequently revised in 1955. See W.E. Shipley, Annotation, *Uniform Contribution Among Tortfeasors Act*, 34 A.L.R. 2D 1107, § 1 (1954). Though Congress has not adopted the UCATA, it has been enacted, with some modifications, in a number of states. See *id.*; *see also* *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1227 (9th Cir. 1989) (explaining that Congress has neither ratified the UCATA nor given any other guidance on the matter).

⁴⁶ See Eric DeGroff, *Raiders of the Lost Arco: Resolving the Partial Settlement Credit Issue in Private Cost Recovery and Contribution Claims Under CERCLA*, 8 N.Y.U. ENVTL. L.J. 332,

thus be \$50,000.⁴⁷ If party A entered a settlement for \$25,000 from party B, parties C and D would remain severally liable for the remaining \$125,000, even though their combined proportionate liability was only \$100,000.⁴⁸

In 1999, in *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, the Seventh Circuit framed the issue of accounting for third-party settlements between private parties as a choice between the UCATA approach and the proportionate approach.⁴⁹ The Seventh Circuit found that the proper way to account for settlements in a § 9613 contribution action is to reduce third-party claims by the dollar amount of settlements reached between PRPs, opting for the UCATA approach.⁵⁰ The court found the UCATA approach preferable as a matter of conserving judicial resources because the UCATA approach does not require courts to apportion each party's individual liability for hazardous materials sent to a site over a period of what could be many years, which the proportionate share approach does require.⁵¹ Additionally, the *Akzo* court found that because CERCLA provides for a similar approach with regard to settlements with the government, the handling of private settlements should be the same.⁵² Relying on the U.S. Supreme Court's 1994 decision in *McDermott, Inc. v. AmClyde*, the Seventh Circuit reasoned that it should look to the way "intersecting principles of law" work, which, in contribution actions under § 9613(f), favors the UCATA approach.⁵³

352–53 (2000). DeGroff used a variation of this hypothetical to illustrate the operation of the UCATA approach. *See id.*

⁴⁷ *See id.*; *see also* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 2 ("In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.").

⁴⁸ DeGroff, *supra* note 46, at 353; *see also* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 (describing the UCATA's rule for crediting partial settlements, where a settlement with one joint tortfeasor reduces total liability for the others by either the amount provided in the agreement or the dollar amount paid in settlement, whichever is greatest).

⁴⁹ *See Akzo*, 197 F.3d at 307; *see also* DeGroff, *supra* note 46, at 350 (noting that courts have generally adopted the proportionate share approach or the UCATA approach to account for partial settlements in contribution actions under CERCLA). In 1999, in *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, the U.S. Court of Appeals for the Seventh Circuit noted that the choice between these two approaches could produce large disparities in "incentives to settle" and in the level of complication of the litigation. *Akzo*, 197 F.3d at 307.

⁵⁰ *See Akzo*, 197 F.3d at 308.

⁵¹ *See id.*; *see also* Fischer, *supra* note 4, at 2029. Under the proportionate share approach, settling parties are forced to dispute contribution problems with non-settlers in order to minimize the settlor's liability and maximize the share of parties that have not settled, potentially making CERCLA litigation more difficult and costly than other approaches. *See* Fischer, *supra* note 4, at 2029–30.

⁵² *See Akzo*, 197 F.3d at 308.

⁵³ *See* *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 217 (1994); *Akzo*, 197 F.3d at 308. In *McDermott, Inc. v. AmClyde*, in 1994, the U.S. Supreme Court decided that even though the proportionate share approach and the UCATA approach were "closely matched," the proportionate share approach was a better system to account for settlements in contribution actions because of

B. The Proportionate Share Approach

Under the proportionate share approach, a method utilized by the Uniform Comparative Fault Act, settlements are accounted for by determining the settling parties' actual percentage of liability and then reducing total liability by that amount, without regard for the dollar amount of the settlement.⁵⁴ For example, suppose the court determines that party A is responsible for 40% of the contamination at a hazardous waste site, party B is responsible for 10%, and party C for 50%.⁵⁵ Party A performs the cleanup at a total cost of \$3 million, and later sues B and C for contribution; subsequently, A settles with B.⁵⁶ Regardless of the dollar amount of the settlement, the total liability is then reduced by B's 10% of the responsibility, or \$300,000.⁵⁷ \$2.7 million then remains for apportionment between A and C.⁵⁸

The Ninth Circuit has noted that the proportionate share approach has generally been its preferred method of apportionment when interpreting statutes that allow contribution but do not make clear how to account for the value of partial settlement agreements.⁵⁹ In 1989, in *Franklin v. Kaypro Corp.*, the Ninth Circuit concluded that because the Securities Act of 1933 does not provide guidance regarding how to account for settlements in contribution actions, it was necessary to create federal common law on the matter.⁶⁰ The court found that the proper way to account for settlements was to

its consistency with a past case in admiralty law, *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 411 (1975). See *McDermott*, 511 U.S. at 217. In *Reliable Transfer*, the Court held that the proportionate share approach is the sole method to account for settlements in maritime actions and that liability will only be distributed in equal parts when the parties' fault is equal or when it is impossible to equitably measure their relative degree of fault. See *id.*

⁵⁴ See UNIF. COMPARATIVE FAULT ACT § 6 (UNIF. LAW COMM'N 1977); *Akzo*, 197 F.3d at 307; see also J. Whitney Pesnell, *The Contribution Bar in CERCLA Settlements and Its Effects on the Liability of Nonsettlers*, 58 LA. L. REV. 167, 180 (1997) (concluding that under the proportionate share approach, the potential liability of the nonsettlers is reduced by the settlers' equitable shares of the response costs at a site). The Uniform Comparative Fault Act was approved by the National Conference of Commissioners on Uniform State Laws in 1977. See UNIF. COMPARATIVE FAULT ACT §§ 1–11; Champagne, *supra* note 5, at 257. Since then, the UCFA has not been adopted by Congress and has been enacted in only a few states. See *id.*

⁵⁵ See *Akzo*, 197 F.3d at 306. A variation of this hypothetical was provided by the U.S. Court of Appeals for the Seventh Circuit to illustrate the operation of the proportionate share approach. See *id.*

⁵⁶ See *id.*

⁵⁷ See UNIF. COMPARATIVE FAULT ACT § 6 (providing that the remaining liability is reduced by the settling party's "equitable share of the obligation").

⁵⁸ See *Akzo*, 197 F.3d at 306.

⁵⁹ See *AmeriPride II*, 782 F.3d at 484–85; see also *In re Exxon Valdez*, 229 F.3d 790, 796 (9th Cir. 2000) (concluding that when one plaintiff brings an action against multiple defendants, the proportionate share approach "is the law in the Ninth Circuit" when accounting for settlements).

⁶⁰ See *Franklin*, 884 F.2d at 1228. A 1989 case from the U.S. Court of Appeals for the Ninth Circuit, *Franklin v. Kaypro Corp.*, was a class action suit involving contribution actions under the Securities Act of 1933. See *id.* at 1223. As with CERCLA, the Securities Act of 1933 imposes

allow a factfinder to determine the proportional responsibility of both settling and non-settling defendants at trial, and then to hold non-settling defendants liable for their remaining cumulative percentage of fault, a method consistent with the proportionate share approach.⁶¹ Under *Franklin* and subsequent cases, the proportionate share approach was used in the Ninth Circuit when accounting for settlements in cases in which a single plaintiff brought an action against multiple defendants.⁶²

In 2015, in *AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*, the Ninth Circuit found that Congress did not intend to mandate application of the proportionate share approach in contribution actions between private parties.⁶³ As a result, the court refused to read federal common law into the statute where it determined that it was contrary to congressional intent.⁶⁴ Because CERCLA prescribes a method for allocating liability to non-settling third-party defendants only in actions involving settlements with a state or the federal government, the court concluded that Congress's intent was not to require a particular approach in private party settlements.⁶⁵ The court concluded that CERCLA's overall statutory purpose weighs against mandatory application of the proportionate share approach because its primary focus is on protecting the environment and public health by making possible the fast and efficient cleanup of hazardous waste sites.⁶⁶ Making sure that the parties responsible pay for the costs of cleanup, the court reasoned, is merely a subordinate purpose.⁶⁷

C. The Equitable Approach of the First and Ninth Circuits

Section 9613(f)(1) of CERCLA provides that response costs may be allocated among liable parties using such equitable factors deemed proper

joint and several liability upon responsible parties and allows for contribution actions against any person who, if sued separately, would also have been held liable in an action under the statute. *See* 15 U.S.C. § 77k(f) (2012).

⁶¹ *See* UNIF. COMPARATIVE FAULT ACT §§ 2, 6; *Franklin*, 884 F.2d at 1231 (noting that where there has been a partial settlement, the proportionate share approach requires a jury to determine both the total dollar amount of damages and the individual percentage of liability of settling and non-settling defendants alike, after which non-settling defendants will be held jointly and severally liable for their total portion of the liability).

⁶² *See In re Exxon Valdez*, 229 F.3d at 796 (concluding that the law in the Ninth Circuit dictates the use of the proportionate share approach).

⁶³ *See AmeriPride II*, 782 F.3d at 486.

⁶⁴ *See id.* at 485.

⁶⁵ *See id.* at 486; *Franklin*, 884 F.2d at 1231.

⁶⁶ *See AmeriPride II*, 782 F.3d at 487 (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001)) (holding that CERCLA's first priority is safeguarding environmental and public health, with a secondary purpose of making sure that parties responsible for contamination bear the financial burden of the cleanup).

⁶⁷ *See id.*

by the court.⁶⁸ Courts vested with this discretion are not limited to a certain set of factors, but rather may consider the equities in a given case in order to determine the most equitable method of accounting for settlements.⁶⁹ Appellate courts review the decisions of district courts in these cases under an abuse of discretion standard.⁷⁰

In 2004, in *American Cyanamid Co. v. Capuano*, the U.S. Court of Appeals for the First Circuit weighed the relative merits of the UCATA and proportionate share approaches before affirming the lower court's decision to use the UCATA approach to account for third-party settlements in contribution actions under CERCLA.⁷¹ The court noted that the proportionate share approach could lead to a futile investigation into the exact proportional liability of each party, particularly where hazardous materials were dumped into a site over the course of many years.⁷² The court further reasoned that even though defendants' liability will often be different from their equitable shares under the UCATA approach, the UCATA approach is more administrable and is the approach expressly adopted by CERCLA when there is a settlement between a party and a state or the federal government.⁷³

The First Circuit held that the district court did not abuse its discretion by applying the most equitable method for accounting for settling parties by using the UCATA approach.⁷⁴ The court noted that though it may be sensible to choose one of these two approaches in the interest of uniformity, the language of § 9613(f) permits a district court the discretion to use equitable

⁶⁸ 42 U.S.C. § 9613(f)(1) (“In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”).

⁶⁹ See *Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998) (concluding that § 9613(f)(1) does not limit the factors that a court may consider in its exercise of discretion); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571–72 (6th Cir. 1991) (holding that § 9613(f)(1) clarifies Congress's intent to provide district courts with wide discretion to determine which equitable factors to use when apportioning response costs).

⁷⁰ See *AmeriPride II*, 782 F.3d at 489 (holding that, in order to conduct meaningful abuse of discretion review, a district court must articulate the equitable factors it considered and how its decision furthered the goals of CERCLA); *Capuano*, 381 F.3d at 21 (concluding that a district court's decision may sometimes lead to a result so inequitable that it constitutes an abuse of discretion).

⁷¹ See *Capuano*, 381 F.3d at 20 (interpreting CERCLA to provide trial courts the discretion to decide the “most equitable method” of taking settlements into account, and holding that the district court's determination was not an abuse of discretion under the facts of the case).

⁷² See *id.* (citing *Akzo*, 197 F.3d at 307). One benefit of the proportionate share approach, the court reasoned, is its ability to theoretically ensure that each party bears its equitable share of the damages. See *id.*

⁷³ See *id.* at 21. The court reasoned, however, that one benefit of the UCATA approach is that defendants' liability will frequently differ from their equitable shares because a settlement with one defendant for less than its share will require other defendants to pay more than their own share. See *id.* (quoting *McDermott*, 511 U.S. at 212).

⁷⁴ See *id.* at 20.

factors to choose how a settlement affects its apportionment of liability.⁷⁵ The court observed that applying either the proportionate share approach or the UCATA approach may in some cases produce a result “so inequitable” as to constitute an abuse of discretion, but that in this case, it did not.⁷⁶

In *AmeriPride*, the Ninth Circuit adopted the First Circuit’s reasoning, concluding that a district court has discretion under § 9613(f)(1) to determine the most equitable method of accounting for settlements between private parties in a contribution action.⁷⁷ The court held that this method of accounting furthers CERCLA’s dual purposes of encouraging settlement through an incentive system and avoiding unnecessarily complicated litigation.⁷⁸ In reaching its decision, the Ninth Circuit declined to follow the Seventh Circuit’s conclusion in *Akzo* that the UCATA approach must be applied in every case because courts must use the UCATA approach in settlements with a state or the federal government.⁷⁹ Instead, the Ninth Circuit held that because the language of CERCLA mandates the use of UCATA for government settlements but not for private settlements, Congress did not require

⁷⁵ See *id.* at 21.

⁷⁶ See *id.*; cf. *Adobe Lumber, Inc. v. Hellman*, No. CIV. 05-1510 WBS EFB, 2009 WL 256553, at *4 (E.D. Cal. Feb. 3, 2009). In 2009, in *Adobe Lumber, Inc. v. Hellman*, the U.S. District Court for the Eastern District of California posited that the proportionate share approach can produce an inequitable result when a settling defendant pays less than its share. *Adobe Lumber*, 2009 WL 256553, at *4. The court further noted that in that situation, the plaintiff cannot possibly recover fully since its total recovery is lowered by the settling defendant’s equitable share. *Id.* Under circumstances like these, one can imagine that application of the proportionate share approach may be “so inequitable” as to constitute an abuse of discretion. See *Capuano*, 381 F.3d at 21; see also *AmeriPride II*, 782 F.3d at 488 (holding that courts must exercise their discretion in a manner consistent with § 9613(f)(1) and the purposes of CERCLA and that choosing a method that would discourage settlement or produce plainly inequitable results could result in an abuse of discretion).

⁷⁷ See 42 U.S.C. § 9613(f)(1); *AmeriPride II*, 782 F.3d at 487 (citing *Capuano*, 381 F.3d at 20–21) (holding with the First Circuit’s “well-reasoned” decision to account for settlements according to the most equitable method).

⁷⁸ See *AmeriPride II*, 782 F.3d at 486 (quoting *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013)); see also *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119 (2d Cir. 1992) (holding that Congress intended CERCLA to promote settlements that avoid spending public money on long trials); *Cal. Dep’t of Toxic Substances Control v. City of Chi.*, 297 F. Supp. 2d 1227, 1235 (E.D. Cal. 2004); *United States v. Dravo Corp.*, No. 8:01–CV–500, 2002 WL 1832274, at *3 (D. Neb. Mar. 6, 2002) (concluding that a court has two goals in a CERCLA case: encouraging efficiency in the remediation of environmental contamination and promoting efficient settlement).

⁷⁹ See *AmeriPride II*, 782 F.3d at 488; *Akzo*, 197 F.3d at 308 (concluding that, to determine which approach to apply to partial settlements, it was “best to match the handling of settlements with the way intersecting principles of law work,” which, for CERCLA is the UCATA approach, because CERCLA provides for *pro tanto* accounting with regard to settlements with the government).

federal courts to adopt a single method of allocating liability among non-settling parties.⁸⁰

III. NOTHING WILL COME OF NOTHING: THE NINTH CIRCUIT'S WISDOM AND THE WAY FORWARD

The U.S. Court of Appeals for the Ninth Circuit correctly interpreted § 9613(f)(1) to allow district courts the discretion to determine the most equitable method of accounting for settlements in contribution actions under CERCLA.⁸¹ First, this Part argues that the Ninth Circuit's equitable approach is the proper reading of § 9613(f)(1).⁸² Next, this Part argues that mandatory application of either the proportionate share approach or the UCATA approach is contrary to the goals of CERCLA and thus based on an inappropriate understanding of the language of the statute.⁸³

The Ninth Circuit ruled correctly in determining that Congress did not require a single method of accounting for settlements between private parties in contribution actions under § 9613(f)(1).⁸⁴ CERCLA was designed to promote the prompt cleanup of hazardous waste sites, to ensure that parties responsible for environmental contamination incur the costs of the cleanup efforts, and to encourage settlement in the promotion of elective private cleanup.⁸⁵ In the interest of these statutory goals, § 9613(f) provides district courts with the discretion to allocate response costs based on “such equitable factors as the court determines are appropriate,” which is directly tied to

⁸⁰ See *AmeriPride II*, 782 F.3d at 488 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)) (noting that when Congress uses specific words in one part of a statute and not in another, it is thought to have acted deliberately to use such language or exclude it).

⁸¹ See *AmeriPride Servs. Inc. v. Tex. E. Overseas Inc. (AmeriPride II)*, 782 F.3d 474, 487–88 (9th Cir. 2015); *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 20 (1st Cir. 2004).

⁸² See *infra* notes 84–87 and accompanying text.

⁸³ See *infra* notes 88–96 and accompanying text.

⁸⁴ See 42 U.S.C. § 9613(f)(1) (2012) (granting district courts discretion to apportion response costs according to equitable factors); *Atl. Richfield Co. v. Am. Airlines, Inc.*, 836 F. Supp. 763, 771 n.11 (N.D. Okla. 1993) (noting that because Congress neither expressly provided for nor expressly barred application of the UCATA approach, the language of the statute grants courts discretion to follow that approach or to look to equitable factors to apportion costs among responsible parties). In 1993, in *Atlantic Richfield Co. v. American Airlines, Inc.*, the Northern District of Oklahoma noted that the proportionate share approach is likewise permissible, but not required as the only equitable method of apportionment, under the language of CERCLA. *Atl. Richfield*, 836 F. Supp. at 771 n.11. *But see* Fischer, *supra* note 4, at 2037 (concluding that because the UCATA approach is most protective of the public health and the environment, courts must apply this approach).

⁸⁵ See *Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (quoting *Consol. Edison Co. of N.Y. v. UGI Util., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005)); *AmeriPride II*, 782 F.3d at 487; Fischer, *supra* note 4, at 1988.

a court's method of accounting for settlements.⁸⁶ Thus, given the plain language of the statute, and in consideration of the complex nature of cases involving hazardous waste contamination, it follows that district courts must have discretion to balance equities on a case-by-case basis in order to account for settlements in the way that best furthers the goals of the statute given a particular set of facts.⁸⁷

Moreover, the Ninth Circuit was correct in its holding that CERCLA does not require mandatory imposition of the proportionate share approach in contribution actions under § 9613(f)(1) because of its incompatibility with the goals of CERCLA in some cases.⁸⁸ The proportionate share approach requires a complicated investigation into each party's proportionate share of the blame for contamination at a hazardous waste site.⁸⁹ Undertaking this inquiry runs counter to CERCLA's goal of promoting the prompt cleanup of hazardous waste sites, as it requires drawn-out and complex litigation regarding responsibility for environmental contamination that, in reality, may not be cleanly divisible in the end.⁹⁰ To require courts to use the proportionate share approach in cases where the harm cannot be divided,

⁸⁶ See 42 U.S.C. § 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."); *Capuano*, 381 F.2d at 21 (concluding that CERCLA gives district courts discretion with regard to how to allocate response costs, which includes determining how to account for settlements); DeGroff, *supra* note 46, at 371 (noting that CERCLA is "truly silent" on the issue of a mandate for crediting partial settlements in private party actions); Frohman, *supra* note 38, at 746 (arguing that Congress's failure to include a provision dictating how to account for settlements in private party contribution actions should be interpreted as providing lower courts with discretion). Courts have generally held that a district court is not bound to an enumerated set of equitable factors in the exercise of its discretion. See *Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998) (concluding that § 9613(f)(1) does not restrict a court's discretion to a certain list of factors, but rather allows a district court the ability to look to all the equities in a given case in order to administer justice); see also *Env'tl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992) (concluding that § 9613(f)(1) makes obvious that Congress intended to let courts use their discretion to determine which factors to consider, rather than binding courts to a certain set of factors); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571-72 (6th Cir. 1991) (holding that the language of § 9613(f)(1) evinces congressional intent to give district courts broad discretion in determining which equitable factors they use to allocate response costs).

⁸⁷ See H.R. REP. NO. 99-253, pt. 3, at 2214 (1985), as reprinted in 1986 U.S.C.A.N. 2835, 3206 (clarifying Congress's intent to resolve contribution claims on a case-by-case basis, with consideration for relevant equitable factors); *AmeriPride II*, 782 F.3d at 487-88; see also *Env'tl. Transp. Sys.*, 969 F.2d at 509 (holding that apportioning cleanup costs is an exercise that lends itself well to a particularized determination in each individual case).

⁸⁸ See *AmeriPride II*, 782 F.3d at 487; Ferrey, *supra* note 37, at 355 (noting that under the UCFA approach, a plaintiff may receive an amount less than the actual damages incurred in cleanup); *supra* note 77 and accompanying text (highlighting that inequity may result when one party settles for less than its fair share, precluding a plaintiff from recovering the total measure of damages). Defendant TEO argued that CERCLA required mandatory imposition of the proportionate share approach. *AmeriPride II*, 782 F.3d at 487.

⁸⁹ See *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999).

⁹⁰ See Fischer, *supra* note 4, at 2006-07.

then, is to hold parties liable for a share of the total liability that is at best a guess, and may not result in an equitable apportionment of response costs, particularly if settling parties have paid substantially less than their equitable share in settlement.⁹¹ Because the proportionate share approach may tend to produce inequitable results in certain contribution actions under CERCLA, mandating its application is contrary to the language of the statute, which provides district courts with the discretion to choose the most equitable method of accounting for settlements.⁹²

Furthermore, the Ninth Circuit appropriately declined to follow the Seventh Circuit's conclusion that the UCATA approach must be applied in every contribution action under CERCLA because that holding is based on an inappropriate reading of the statute.⁹³ The Seventh Circuit reasoned that because CERCLA requires application of the UCATA approach in settlements involving a state or the federal government, it follows that the UCATA approach must also be used in private party settlements.⁹⁴ As a matter of

⁹¹ See *AmeriPride II*, 782 F.3d at 484 (concluding that, under the UCFA approach, parties who do not settle are held responsible merely for their proportionate share of cleanup costs, even in the event that parties who settle pay less than their equitable portion of the harm). *But see* Fischer, *supra* note 4, at 2006–07 (positing that harm at CERCLA sites is never divisible). A scenario in which chemicals are traceable only to one specific defendant, however, would allow a court to cleanly divide the damage. See *United States v. W. Processing Co.*, 734 F. Supp. 930, 942 (W.D. Wash. 1990). For example, in a 1990 case from the Western District of Washington, *United States v. Western Processing Co.*, a portion of the contamination at a hazardous waste site was specifically traceable to one defendant because of the nature of the chemicals it had dumped on the site. *Id.* Rare though such cases may be, district courts must have discretion to account for settlements according to proportionate blame using the UCFA approach in instances where the harm is divisible in some way. See *id.* (concluding that the possibility exists that a defendant may demonstrate that its actions created a specific, separate harm in some cases). This construction is supported by the text of the statute. See 42 U.S.C. § 9613(f)(1); *infra* notes 93–96 and accompanying text (arguing that the express reference to “equitable factors” in § 9613(f)(1) allows courts discretion in the method they use to account for settlements).

⁹² See 42 U.S.C. § 9613(f)(1); *AmeriPride II*, 782 F.3d at 487 (holding that § 9613(f)(1) of CERCLA provides district courts with the discretion to determine which method is most equitable when accounting for settlements); *Capuano*, 381 F.3d at 21 (concluding that district courts may determine the most equitable method of accounting for settlements as an exercise of the discretion granted them by § 9613(f)(1)); DeGross, *supra* note 46, at 355 (arguing that because the plaintiff cannot know at the time of settlement each defendant's exact proportionate share, the UCFA approach “virtually guarantees” that the amount recovered by the plaintiff will be different from the exact amount to which it is entitled).

⁹³ See 42 U.S.C. § 9613(f)(1) (providing that the court may allocate response costs “using such equitable factors as the court determines are appropriate” but not mandating any one method of apportionment); *AmeriPride II*, 782 F.3d at 487–88 (declining to follow the reasoning of the Seventh Circuit, which held that CERCLA required courts to adopt a single method of accounting for settlements); Ferrey, *supra* note 37, at 371 (noting that § 9613(f) allows courts to consider equitable factors when distributing costs among responsible parties); *cf.* *Akzo*, 197 F.3d at 307–08 (holding that courts must apply the UCATA approach to account for partial private party settlements).

⁹⁴ *Akzo*, 197 F.3d at 308.

statutory interpretation, however, sounder logic would hold that Congress's silence on an accounting method for private party settlements suggests that courts may apportion costs using "equitable factors," which includes the discretion to determine how a settlement affects the liability of non-settling parties.⁹⁵ Although the imposition of a single method of accounting may provide predictability, the complex nature of environmental contamination cases, coupled with the statute's express reference to "equitable factors" in determining the apportionment of response costs, makes the Ninth Circuit's reading of the statute most conducive to furthering the goals of CERCLA.⁹⁶

CONCLUSION

Private party settlements in contribution actions under § 9613(f) of CERCLA should be accounted for using the most equitable method in a given case. Accordingly, the Ninth Circuit correctly held with the First Circuit that no single apportionment method controls every case under § 9613(f). Exclusive imposition of either the UCATA approach or the proportionate share approach fails to account for the complexity and variability of the facts of CERCLA cases, and thus would fail to further the goals of the statute.

SEAN A. FEENER

Preferred Citation: Sean A. Feener, Comment, *Distribution to Undo Excess: The Ninth Circuit Looks to an Equitable Approach to Apportion the Costs of Environmental Cleanup in AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*, 57 B.C. L. REV. E. SUPP. 160 (2016), <http://lawdigitalcommons.bc.edu/bclr/vol57/iss6/10>.

⁹⁵ See 42 U.S.C. § 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."); *AmeriPride II*, 782 F.3d at 488 (concluding that because Congress mandated use of the UCATA approach to account for settlements with the government and not for private party settlements, the inference is raised that Congress did not intend to mandate use of the UCATA approach in the latter case); *Capuano*, 381 F.2d at 21 (concluding that § 9613(f)(1) gives district courts discretion to allocate response costs according to "equitable factors," which includes determining how to account for settlements); Frohman, *supra* note 38, at 746–47 (arguing that Congress's silence with regard to accounting for settlements in private party contribution actions is most properly construed as bestowing discretion on the lower courts).

⁹⁶ See 42 U.S.C. § 9613(f)(1); *AmeriPride II*, 782 F.3d at 487 (holding that § 9613(f)(1) of CERCLA provides district courts with the discretion to decide the most equitable method of accounting for settlements as long as that method is consistent with the language and aims of the statute); *Capuano*, 381 F.3d at 21 (concluding that district courts may determine the most equitable method of accounting for settlements as an exercise of the discretion granted them by § 9613(f)(1)); see also H.R. REP. NO. 99-253, pt. 3, at 2214 (evinced Congress's intent to resolve contribution claims on a case-by-case basis by "taking relevant equitable considerations into account").