

Pro Rata or *Pro Tanto*? Why Equity Dictates the Choice Is Not a “Toss Up” in Private Party CERCLA Settlements

FRED M. BLUM
ERIN K. POPPLER

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is extremely complicated. Adding to this complexity is the near impossible task of predicting how settlements will be credited. In most tort cases, courts use the pro tanto approach and give the remaining defendants a dollar-for-dollar credit for settlement amounts received by the plaintiff. However, the trend in CERCLA cases is to forego the pro tanto approach and give the remaining defendants credit for the settling defendants’ proportional, or pro rata, share of the liability. This article examines the two approaches and posits which one is more aligned with the spirit of CERCLA.

INTRODUCTION

As if the Comprehensive Environmental Response, Compensation, and Liability Act¹ was not complicated enough, ascertaining how settlements are credited and what, if any, setoffs are available is very difficult to predict. In most tort cases, courts use what has been called the *pro tanto* approach and give the remaining defendants a dollar-for-dollar credit for settlement dollars received by the plaintiff. However, the overwhelming trend in CERCLA cases is to forego the arithmetically based *pro tanto* approach and to give the nonsettling defendants credit for the settling defendant’s proportional, or pro rata, share of the liability irrespective of the actual settlement amounts paid. While the trend is apparent, whether the district court will use either approach, or create one of its own, is not a settled question and creates an unwanted level of unpredictability in most CERCLA cases.

Fred M. Blum is a founding partner at Bassi Edlin Huie & Blum. Mr. Blum has been litigating cases for over thirty years, and his practice is primarily focused in the area of environmental law. Erin K. Poppler is a civil litigation attorney at Bassi Edlin Huie & Blum with a diverse practice focused on complex and business litigation, environmental law, and product liability.

Address correspondence to Fred M. Blum, Bassi Edlin Huie & Blum, 500 Washington Street, Suite 700, San Francisco, CA 94111. E-mail: fblum@behblaw.com

¹ 42 USCA §§ 9601 et seq. (CERCLA).

Neither the United States Supreme Court,² nor most of the circuit courts of appeals, have determined which approach to utilize. The majority of the courts that have looked at the issue have utilized the pro rata approach.³ The courts of appeals that have reached a conclusion are split with the Seventh Circuit's finding that the *pro tanto* approach is proper, the Tenth Circuit's use of the pro rata approach,⁴ and the First Circuit's conclusion that the selection of the proper credit rule is a matter best left to the discretion of the district court.⁵ The Ninth Circuit weighed in on the issue in the recent case of *AmeriPride Services Inc. v. Valley Industrial Services, Inc.*, in which it agreed with the First Circuit's conclusion that a district court has discretion to select the appropriate settlement credit method.⁶

For carriers and litigants alike, the resolution of the conflict is more than just an academic exercise. While under § 107 of CERCLA, defendants are jointly and severally liable for the damages they may cause, the heart of any CERCLA litigation is the concomitant contribution action under § 113. It is pursuant to the contribution action where the true liability of each party is assessed. Knowing how the liability of settling parties will affect nonsettling parties is a critical piece of information litigants need to know. Presently, in most instances, this critical piece of information is unknown until the specific district court makes its own determination.

While there are several advantages to the *pro tanto* approach, it is the pro rata approach that is the one likely to be accepted by most courts. This article discusses the differences between the two approaches, concludes that CERCLA most likely requires that the pro rata approach be used, and explains the effect that determination will have on litigants and insurers.

In Section I of this article, the main differences between the two approaches is developed. Section II discusses the particular aspects of the CERCLA statutory scheme that will guide courts in determining which approach to use. Section III discusses how courts have decided the issue in a non-CERCLA

² In dicta, the Supreme Court has discussed contribution rights under CERCLA and defined contribution rights as based on a party's "equitable share of the liability," or in other words, the pro rata approach (*U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 138–141 (2007)).

³ The majority of courts deciding between the two approaches have chosen to utilize the proportional share approach (*Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 897 (10th Cir. 2000)). For instance, district court judges in the Ninth Circuit have, except in one instance, uniformly employed the proportionate share approach for settlements between private PRPs. See, e.g., *Lewis v. Russell*, 2012 WL 5471824, *1 (E.D. Cal. Nov. 9, 2012); *Tyco Thermal Controls, LLC v. Redwood Industrials*, 2010 WL 3211926, *8 (N.D. Cal. Aug. 12, 2010); *Adobe Lumber v. Warren Hellman*, 2009 WL 256553, *3 (E.D. Cal., Feb. 3, 2009) (citing Ninth Circuit district court cases applying UCFA); *U.S. v. W. Proc. Co., Inc.*, 756 F. Supp. 1424, 1432 (W.D. Wash. 1990). But see *AmeriPride Servs. Inc. v. Valley Indus. Servs., Inc.*, No. CIV S-00-113, 2007 WL 1946635 (E.D. Cal. July 2, 2007).

⁴ *Tosco Corp.*, 216 F.3d, 897.

⁵ *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 19–20 (1st Cir. 2004).

⁶ *AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*, No. 12-17245 (9th Cir. Apr. 2, 2015).

setting. Section IV discusses why it is likely that the pro rata approach will be accepted by the Supreme Court. Finally, Section V addresses the resulting effect of such a decision.

I. DEFINING THE TERMS

The American Law Institute⁷ has identified the *pro tanto* and pro rata approaches as possible alternatives for how settlements are generally to be credited.⁸ The ALI did not take a position as to which should be used since “[e]ach has its drawbacks and no one is satisfactory.”⁹ The alternatives are described as follows. Under the *pro tanto* approach

[t]he money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation.

[Under the pro rata approach] [t]he money paid extinguishes any claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the equitable share of the obligation of the released tortfeasor.¹⁰

The best way to describe the practical differences between the approaches is through the following example. Plaintiff is injured by the combined conduct of Defendants 1, 2, and 3, and seeks twelve dollars in damages. Each defendant is equally responsible for the injury. For various reasons, Plaintiff settles with Defendant 1 for two dollars, Defendant 2 for three dollars, and proceeds to trial against Defendant 3. Under the *pro tanto* approach, if Plaintiff receives a verdict of twelve dollars, his damages are reduced by the five dollars he has already received and Plaintiff is entitled to the additional seven dollars. Under the pro rata approach, Plaintiff can only receive four dollars, the proportional share that Defendant 3 is liable for since Defendant 3 is entitled to a setoff of the 66 percent liability of the other settling defendants.

In a CERCLA setting, the issue is substantially more complex since there are typically far more than four parties and plaintiff is almost certainly one of the parties that are partially liable for the contamination. Understanding

⁷ ALI, hereinafter.

⁸ There is a third approach that would not allow any contribution claim for a defendant that has overpaid. CERCLA in § 113 expressly provides for such a contribution claim and thus this approach will not be discussed.

⁹ Restatement (Second) of Torts §§ 886A, pp. 343–344 (1977).

¹⁰ *Id.*

the CERCLA scheme is important in order to evaluate the effect that any particular setoff may have.

II. THE CERCLA STATUTORY SCHEME

Any statutory analysis looks “first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.”¹¹ CERCLA contains two sections that are primarily concerned with determining liability. The first is § 107.¹² Under § 107, each party that qualifies as a “responsible party” is generally jointly and severally liable to the plaintiff for all response costs that plaintiff has paid to remediate contamination.¹³ In order to recover, the plaintiff need not be an innocent party. Rather, it is enough that plaintiff directly incurred the response costs.¹⁴ Defendants are strictly liable and there are very few defenses allowed under § 107.

The second section is § 113(f). Section 113 creates the process by which the parties that have been found liable under § 107, the “responsible parties,” apportion the liability between all of the other responsible parties and the plaintiff. Section 113 provides that:

[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall . . . be governed by Federal law. *In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.*¹⁵

Section 113 provides a vehicle to determine the proportional share of liability among all parties to the CERCLA case. The response costs are allocated based on the court’s use of equitable factors.

How § 107 and § 113 interact can be explained using the same example of Plaintiff suing Defendants 1, 2, and 3 for an injury causing twelve dollars in damages. Plaintiff sues defendants under § 107 seeking to recover the twelve dollars in response costs. Each defendant files counter claims for contribution under § 113 against each other and against Plaintiff, and alleges that whatever sums it is liable to pay Plaintiff, each of the other parties should contribute to that sum.

¹¹ *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (en banc).

¹² 42 USCA §§ 9607.

¹³ A response cost is a sum expended in order to remediate contamination at a facility that is expended substantially consistent with a process known as the National Contingency Plan.

¹⁴ 42 USCA § 9607(a); *U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993).

¹⁵ 42 USCA § 9613(f)(1) (emphasis added).

Because § 107 provides for both joint and several liability, each defendant is found liable for the entire twelve dollars expended by plaintiff. In the jointly filed § 113 action, the court is required, using equitable factors, to determine how the twelve dollars is to be allocated among the four parties. The allocation can be complicated if there are defendants who are bankrupt, have insufficient assets to pay any judgment, or who no longer exist. The shares of liability for these defendants are referred to as *orphan shares*. When orphan shares exist, the court must use equitable factors to determine how the orphan share percentage of liability is to be allocated to the remaining solvent or insured parties.

The requirement that the allocation be made based on equitable factors is inherent in the contribution claim that § 113 creates. As noted by the Ninth Circuit, “[c]ontribution is an equitable doctrine. To apportion damages without regard to fault reduces, to an extent, the equity which the doctrine was intended to provide.”¹⁶

Congress’ requirement that equitable factors be considered is consistent with the overall purpose of CERCLA: to ensure equitable sharing of liability.¹⁷ At the heart of § 113 is the need to promote fairness and prevent responsible parties from bearing a disproportionate burden of the liability.¹⁸ CERCLA does not delineate what the equitable factors are. Instead, it has been left to the courts to determine exactly what factors should be considered. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.¹⁹

The “Gore factors” are a nonexclusive list of equitable factors often considered by the courts and include: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of hazardous waste can be distinguished; (2) the amount of hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, and disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with the federal, state, or local officials to prevent any harm to the public or environment.²⁰

Courts have also looked to other factors in allocating liability, including the relative fault of the parties, use of the property during the time of ownership by a landowner party, and the parties’ states of mind.²¹ Four critical factors

¹⁶ *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1231–1232 (9th Cir. 1989).

¹⁷ *Carson Harbor*, 270 F.3d, 871.

¹⁸ *SmithKline Beecham Corp. v. Rohm & Haas Co.*, 89 F.3d 154, 163 n.7 (3d Cir. 1996) (noting that CERCLA policy disfavors apportionment of liability in disregard of equities affecting parties).

¹⁹ *Burlington Northern & Santa Fe Railway Co. v. U.S.*, 556 U.S. 599, 129 S. Ct. 1870, 1882, n. 9 (2009).

²⁰ *U.S. v. Township of Brighton*, 153 F.3d 307, 318–19 (6th Cir. 1998).

²¹ *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 938 (8th Cir. 1995).

commonly considered by courts in allocating CERCLA response costs among liable parties in a contribution suit have been commonly referred to as Judge Ernest C. Torres's "List of Four." The four factors are: (1) the extent to which cleanup costs are attributable to wastes for which a party is responsible; (2) the party's level of culpability; (3) the degree to which the party benefited from disposal of the waste; and (4) the party's ability to pay its share of the cost.²²

The equitable nature of the inquiry can be readily seen in comparing the two parts of § 113. The first part, § 113(f)(1), applies to private party contribution actions and specifically calls for the use of equitable factors. The second part, § 113(f)(2), addresses actions in which the state or federal government is the plaintiff and specifically requires the application of the *pro tanto* approach in determining the effect of any settlement with the government. Section 113(f)(2) states:

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.²³

While it remains unsettled what approach applies under § 113(f)(1) in the context of settlements between private parties, the Supreme Court has determined that the *pro rata* approach should be used in non-CERCLA contexts.

III. CONSIDERATION OF SETTLEMENT ALLOCATION IN NON-CERCLA CASES

While the applicability of the two approaches to a CERCLA contribution claim has not been decided by the Supreme Court, in admiralty cases the Supreme Court has spoken on which approach it finds to be more equitable and preferable.²⁴ In *McDermott v. AmClyde*, the Court found that the *pro rata* approach is "superior" since the *pro tanto* approach was "likely to lead to inequitable apportionments of liability."²⁵ In reaching this decision the Court relied partially on the Ninth Circuit decision in *Franklin v. Kaypro Corp.*, in which the Ninth Circuit considered nearly identical language to § 113 in the securities law context.²⁶ The Ninth Circuit has found that "[t]he

²² *U.S. v. Davis*, 31 F.Supp.2d 45 (D.R.I.,1998), aff'd, 261 F.3d 1 (1st Cir. 2001).

²³ 42 USCA § 9613(f)(2).

²⁴ *McDermott v. AmClyde*, 511 U.S. 202, 217 (1994).

²⁵ *Id.*, 214, 217.

²⁶ *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989).

proportionate share approach [that reduces a non-settling defendant's liability by the proportional share of settling defendants] is the law in the Ninth Circuit, and has been adopted by the Supreme Court for use in maritime actions, and is the approach recommended by the American Law Institute."²⁷

In *Franklin v. Kaypro*, the controlling statute was section 11(f) of the 1933 Securities Act, 15 USCA §77k(f). The language in CERCLA § 113(f)(1) is similar to the securities statute in that they are both contribution statutes that consider equity to determine the parties' shares.²⁸ Both also require that federal and not state law applies. Like the Supreme Court, the Ninth Circuit ruled in non-CERCLA contribution cases that the principles underlying the proportionate share approach provide the best method for allocating nonsettling defendant's liability.

In determining that partial settlements should be credited under the pro rata approach, the Ninth Circuit explained: "At trial, the...[fact finder] is asked not only to determine the total dollar damage amount, but also the percentage of culpability of each nonsettling defendant as well as that of the settling defendants."²⁹ The Court found the proportionate share approach offered the most equitable means to ensure all defendants paid their fair share, and avoided the disadvantages of the *pro tanto* approach.³⁰

The Ninth Circuit further delineated the disadvantages of the *pro tanto* approach. It stated:

Plaintiffs may be tempted to engage in collusion with certain defendants. By accepting a low partial settlement, plaintiffs would be able to fund further litigation with no diminution of the total amount eventually received. Similarly, plaintiffs could effect low settlements with defendants who had limited resources, and thereby force wealthier defendants to pay more than if all parties proceeded to trial.³¹

The proportional share approach does not have these disadvantages, but instead "comports with the equitable purpose of contribution," as well as encourages settlements.³²

Five years later, the McDermott decision was reached by the Supreme Court in the context of admiralty cases.³³ Relying partially on *Franklin*, the Court also found that the proportional share approach was "superior" since the *pro tanto* approach was "likely to lead to inequitable apportionments of liability."³⁴ The Supreme Court noted that a plaintiff enters settlements for

²⁷ *In re Exxon Valdez*, 229 F.3d 790, 796 (9th Cir. 2000).

²⁸ 15 USCA § 77k(f); 42 USCA § 9613(f)(1).

²⁹ *Franklin*, 884 F.2d, 1231.

³⁰ *Id.*, 1230.

³¹ *Id.* (footnote omitted) (emphasis in original).

³² *McDermott*, 511 U.S. 202.

³³ *McDermott*, 511 U.S. 202.

³⁴ *Id.*, 214, 217.

many reasons that range from the ability of a defendant to pay, the need to finance ongoing litigation, the uncertainty of any favorable outcome, or a strategic or tactical advantage (*Id.*). If the *pro tanto* approach is used, a plaintiff has no incentive to require a defendant to settle for its proportional liability since “a settlement with one defendant for less than its equitable share requires the nonsettling defendant to pay more than its share.”³⁵ The Court found under the *pro tanto* approach, “[s]uch deviation from equitable apportionment of damages will be common, because settlements seldom reflect an entirely accurate prediction of the outcome of a trial.”³⁶

The Supreme Court recognized plaintiff controlled when it would settle and could reject any unreasonable settlement. Under the *pro tanto* approach, defendants were incentivized to settle first for less than their fair share. Defendants that settle later will then be required to absorb any shortfall.³⁷ While both the proportional share and *pro tanto* approach create incentives to settle, those embodied in the *pro tanto* approach “come[] at too high a price in unfairness.”³⁸ When all the factors were weighed, the Supreme Court concluded that the proportional share approach was superior, especially because it ensured that, regardless of a party’s settlement amount, each party was liable for its proportional share only.³⁹

Subsequently, in *In re Exxon Valdez*, the Ninth Circuit adopted the pro rata approach as the law of the Circuit.⁴⁰ The *Exxon* court found that: “[t]he proportionate share approach [that reduces a non-settling defendant’s liability by the proportional share of settling defendants] is the law in the Ninth Circuit, and has been adopted by the Supreme Court for use in maritime action, and is the approach recommended by the American Law Institute.”⁴¹

When taken together, the *McDermott*, *Franklin*, and *Exxon* decisions may foretell how the Supreme Court will resolve the issue in the context of private party partial settlements and contribution claims under CERCLA.

IV. THE PRO RATA APPROACH WILL LIKELY BE REQUIRED

A. Statutory Construction

CERCLA mandates that in private-party cost recovery suits, all parties who are liable shall be responsible for their proportional share based on “such equitable factors as the court determines are appropriate.”⁴² As discussed

³⁵ *Id.*, 212.

³⁶ *Id.*, 212–13.

³⁷ *Id.*, 214.

³⁸ *Id.*

³⁹ *Id.*, 217.

⁴⁰ *In re Exxon Valdez*, 229 F.3d 790, 796 (9th Cir. 2000).

⁴¹ *Id.*

⁴² 42 USCA § 9613(f)(1).

above, CERCLA § 113(f)(2) requires that in actions involving the state and federal governments, the *pro tanto* approach be used to credit settlements. Except for the mandate in § 113(f)(2) that “equitable factors” be used in resolving contribution actions, CERCLA is otherwise silent as to how private-party settlements are to be credited.

When the guidelines of statutory construction are applied, the statute is most accurately read as limiting the use of the *pro tanto* approach to settlements involving the federal government and states. Had Congress intended the *pro tanto* approach to apply to private-party settlements, it would have said so. To apply the *pro tanto* approach used under § 113(f)(2) to private cost recovery actions under § 113(f)(1) would require one to conclude that while Congress used different language when discussing actions brought by private parties and governmental agencies, Congress actually meant to treat them the same. One would also have to conclude that when Congress limited § 113(f)(2) to the United States and individual states, Congress also meant to include private parties. One would further have to conclude that when Congress required equitable factors be considered in § 113(f)(1), while a dollar-for-dollar reduction applied in § 113(f)(2), Congress actually meant for the terms to be treated synonymously despite the different language.

These conclusions are not supported by any rational tenet of statutory interpretation. The reverse is true. It is a canon of statutory construction that “[w]here the legislature has included certain exceptions to [a statute], the doctrine of *expressio unis est exclusio alterius* counsels against judicial recognition of additional exceptions.”⁴³ Thus, Congress should be presumed to have intended to limit the application of the *pro tanto* approach to matters involving the state or federal governments.

To treat settlements concerning the government differently than those between private parties is consistent with other sections of CERCLA, as well as the traditional notion that settlements involving the government come with policy considerations that are absent in private-party resolutions.⁴⁴ Unlike private-party settlements, a determination by the USEPA as to the relative fault of parties is given deference and “what constitutes the best measure of comparative fault at a particular Superfund site. . . should be left largely to the EPA’s expertise.”⁴⁵ Moreover, unlike a private litigant, the USEPA is working in the public interest and its determinations are not to be presumed to be colored by more materialistic motives that might infect private parties.⁴⁶ This distinction helps explain why, “application of the. . . [pro rata approach] in actions between PRPs and the. . . [pro tanto approach] where the EPA or

⁴³ *Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1116n.3 (11th Cir. 2005).

⁴⁴ *United States v. Cannons Engineering Corp.*, 899 F. 2d 79, 91–92 (1st Cir. 1990).

⁴⁵ *Id.*, 87.

⁴⁶ *Id.*, 84.

other state brings the action” is the legally correct result.⁴⁷ Further, in many other aspects, CERCLA treats actions brought by the government differently than private cost recovery actions. For instance, the USEPA need not prove that its actions were consistent with the National Contingency Plan to recover its response costs; however a private party must make such a showing.⁴⁸

B. Policy Considerations

CERCLA generally instructs courts to “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”⁴⁹ “CERCLA section [113(f)] is aimed at promoting equitable allocations of financial responsibility.”⁵⁰ The allocation process is intended to promote fairness and prevent relatively innocent parties from being forced to bear a disproportionate burden of the liability. According to the Ninth Circuit, “[t]he contribution provision aims to avoid a variety of scenarios by which a comparatively innocent PRP [Potentially Responsible Party] might be on the hook for the entirety of a large cleanup bill.”⁵¹

In determining which approach best comports with CERCLA’s overarching intent to avoid inequitable results, the pro rata approach appears to be more in line with CERCLA’s intent. This is not to say that equity is assured under the pro rata approach. Far from it. Yet, at least under the pro rata approach, it is the goal to equitably allocate the liability, whereas under the *pro tanto* approach there is no such goal. The court applies mere arithmetic without regard to whether the nonsettling party is being held liable for a grossly disproportionate share of the liability. If equity is achieved, it is only by happenstance.

The proportionate share approach can also, of course, produce an inequitable result when a settling defendant pays less than its equitable share. In that scenario, the plaintiff can no longer recover its full damages since its total recovery is reduced by the equitable share of the settling defendant. CERCLA, however, provides a safety net in the event a defendant is unable to pay its fair share. Under that circumstance, a plaintiff can attempt to convert the share to an orphan share. In fact, it is in the context of settlements with

⁴⁷ *Hillsborough County v. A & E Road Oiling Serv., Inc.*, 853 F. Supp. 1402, 1409 (M.D. Fla. 1994) (citing *U.S. v. SCA Servs. of Ind., Inc.*, 827 F. Supp. 526, 534 (N.D. Ind. 1993)).

⁴⁸ *In the Matter of Bell Petroleum Services*, 3 F.3d 889, 907 (5th Cir. 1993).

⁴⁹ 42 USCA § 9613(f)(1).

⁵⁰ *In re Hemingway Transp., Inc.*, 993 F.2d 915, 922 (1st Cir. 1993). See also *SmithKline Beecham Corp. v. Rohm & Haas Co.*, 89 F.3d 154, 163, 163 n.7 (3d Cir. 1996) (noting that CERCLA policy disfavors the apportionment of liability “in disregard of the equities affecting the parties” (citing *Smith Land & Imp. Co. v. Celotex Corp.*, 851 F.2d 86, 90 (3d Cir. 1988)).

⁵¹ *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001) (en banc).

parties that do not have sufficient means to pay judgments that the inequity of the *pro tanto* approach is most apparent.

This inequity can best be understood by turning again to the example of the same three equally liable defendants and twelve dollars in response costs. Let us assume that Defendant 1 can only pay one dollar and Plaintiff accepts a settlement from Defendant 1 in that amount. Using the *pro tanto* approach, Defendants 2 and 3 will be responsible for the remaining portion of Defendant 1's liability. Plaintiff has every incentive to settle low with Defendant 1 since the difference between the settlement and Defendant 1's actual liability will be absorbed by the remaining defendants.

Using the pro rata approach, Plaintiff might be less likely to settle low with Defendant 1 since the remaining defendants will not absorb the difference. Plaintiff would have the option of attempting to have defendants share of liability declared an orphan share. Under that scenario, each of the parties, including Plaintiff, would potentially be liable for an equitable portion of Defendant 1's liability. Plaintiff would recover what it should and each defendant would pay its proportional share of that liability.

The proportionate share approach makes it more likely that partial pre-trial settlements and the overall litigation will achieve an equitable allocation of liability among all responsible parties. Under the proportionate share approach it is the plaintiff who bears any shortfall of a too low settlement. This is an equitable allocation of the risk given that plaintiff is the party that decides whether to settle with any defendant and is in the best position to mitigate that risk by settling only when the proposed amount approximates the settling defendant's equitable share of liability.⁵² In contrast, under the *pro tanto* approach, nonsettling defendants bear the burden and injury of a too low settlement. This is an inequitable result given the fact that nonsettling defendants have no control over or ability to effect the settlement amount.

An analysis of the minority of cases that apply the *pro tanto* approach to private-party CERCLA settlements demonstrates how the approach is incompatible with CERCLA's equitable policies. The Seventh Circuit adopted the *pro tanto* approach in *Akzo Nobel Coatings*.⁵³ The court stated that it was basing its holding on *McDermott*, but in actuality misread the Supreme Court's decision. Further, the court did not pay sufficient attention to the equitable mandate of CERCLA.⁵⁴

⁵² *Comerica Bank-Detroit v. Allen Indus., Inc.*, 769 F.Supp. 1408, 1414 (E.D.Mich.1991).

⁵³ 197 F.3d, 302.

⁵⁴ Without discussing any differences between sections 1 and 2 of § 113(f), the court found that applying the proportional share approach would undermine section 2 and, therefore, section 2 should control (*Id.*, 307–08). The court did not discuss the differences between the sections, the requirement of section 1 that courts utilize equity, or that CERCLA regularly treats private cost recovery actions different than USEPA actions. Moreover, the court did not explain how USEPA cost recovery actions would be undermined.

The Seventh Circuit reasoned that the *McDermott* court declared the choice between the approaches was a “toss up” and then justified its adoption of the proportionate share rule in maritime actions based on “the way related issues in admiralty have been handled.”⁵⁵ The Seventh Circuit concluded that the *pro tanto* method should thus govern settlements between PRPs because that approach was specified in CERCLA § 113(f)(2), “the most closely related rule of law” (*Id.*).

The problem with the Seventh Circuit’s rationale was the *McDermott* court never found that the two approaches were a “toss up.” Rather, the Supreme Court found that the pro rata approach was “superior.”⁵⁶ The Seventh Circuit accurately recognized that both approaches promoted settlement, but ignored the crucial distinction drawn by the Supreme Court: the *pro tanto* approach achieved this end “at too high a price in unfairness.”⁵⁷ To reach its conclusion, the Seventh Circuit necessarily had to disregard the Supreme Court’s determination that the *pro tanto* approach “is likely to lead to inequitable apportionments of liability.”⁵⁸

Other courts that have adopted the *pro tanto* approach have relied on reasoning similar to that of the Seventh Circuit. A synthesis of the cases reveals that the decisions are largely based on the court’s desire to avoid judicial administrative inconvenience. It is readily apparent that use of subtraction is a substantially easier way for the district court to credit previous settlements. In addition, the *pro tanto* approach allows the district court to remove the settling parties from the mix of parties for which an equitable allocation is required under § 113. If simplicity was the only consideration, the *pro tanto* approach would surely be the proper approach.

However, judicial inconvenience does not justify the refusal to apply the more equitable pro rata approach. The Ninth Circuit has cautioned that the trial court’s natural desire to clear court dockets in an expeditious manner must be tempered by the need “to assure factual fairness and the correct application of legal principles.”⁵⁹ Congress’ insistence that equity be the controlling principle in determining a proper allocation of liability under § 113 trumps the desire for simplicity and convenience. As the journalist H. L. Menken once wrote, “[f]or every complex problem there is an answer that is clear, simple, and wrong.”

⁵⁵ *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999).

⁵⁶ *McDermott*, 511 U.S., 217.

⁵⁷ *Id.*, 215 (footnote omitted).

⁵⁸ *Id.*, 214.

⁵⁹ *Franklin*, 884 F.2d, 1225.

V. THE EFFECT OF THE PRO RATA APPROACH ON LITIGANTS AND INSURERS

The reasonable follow-up question to any conclusion as to what approach is chosen by the courts is how the decision will affect both litigants and their insurers. The answer is that it will make some things more difficult and many things easier.

The chief practical downside of the pro rata approach is that there is an increased risk for a plaintiff who settles with a defendant based on insufficient information or for a sum that is below that defendant's expected proportional liability.

Depending on the risk averseness of the plaintiff, this may be a disincentive for quick "down and dirty" settlements. It is these settlements that are frequently used by plaintiffs to create a war chest to fund the continued litigation. Plaintiffs will have to weigh whether the risk of not collecting a portion of the response costs they are entitled to is worth the resulting war chest created by a settlement.

From a defense perspective, the inability of plaintiff to create a war chest is a positive aspect since it puts more pressure on plaintiff not to pursue costly, but needless, litigation strategies. CERCLA does not contain an attorney fees provision and each dollar spent on the defense effectively reduces the value of any award for response costs.

The obvious downside is that if you are the defendant who is dangling the early settlement with plaintiff, you may not care that your money will be funding further litigation. If plaintiff does not settle with you the effect is that your litigation costs will increase and you will possibly pay a higher amount to settle. While that is a negative for you, it is exactly the intent of the pro rata approach—to insure that all parties pay their fair share of the response costs.

In assessing settlements under the pro rata approach, there is a premium on global settlements. That is the only way for plaintiff to be assured of the amount of response costs it will be able to recover. A good deal of plaintiff's leverage will disappear in attempting to force early settlements since it is plaintiff who will have to live with the future allocation. A mistake in the assessment of the liability could have significant consequences down the line.

Defendants will also be aware that plaintiffs need to globally settle the matter. As a result, defendants will be more inclined to enter into meaningful settlement discussions early in the litigation. Since plaintiff will be less likely to be susceptible to grabbing whatever they can in early settlements, there will need to be more reasonableness in and information gathering before the settlement discussion process.

Whatever the practical effect is on the settlement process, the disincentive for the "quick and dirty" settlement will lead to a more equitable allocation of response costs. Parties who are responsible for response costs will pay sums closer to their fair share.

CONCLUSION

When all factors are considered, and although it adds to the complexity of cases, the pro rata approach is clearly preferable to the *pro tanto* approach under CERCLA. In this context, the pro rata approach is more in keeping with the spirit of this particular piece of legislation and leads to more equitable settlements for all of the parties involved.

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