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SUPERFUND

In this Analysis & Perspective article, attorneys Peter E. Seley and Stacie B. Fletcher discuss the superfund law's limitation on "double recovery," focusing on three recent cases in which the courts adopted "an expansive limitation on CERCLA claimants' rights." The authors argue that such a limitation on CERCLA claims is contrary to congressional intent and the language of the statute.

Profit or Profiteering: The Growing Fight Over 'Double Recovery' in CERCLA

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In theory, if you spend money to clean up a hazardous waste site, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)¹ provides you with a federal claim for cost recovery or contribution against those that played a role in the contamination. The language of CERCLA, as has been noted repeatedly, embodies a strong presumption that a polluter should pay its fair share of the cleanup costs at sites it contaminated.² As one Senate commit-

¹ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601- 9675 (2000).

² *United States v. CDMG Realty Co.*, 96 F.3d 706, 717 (3d Cir. 1996) ("Congress enacted CERCLA with two principal goals in mind-to facilitate the cleanup of potentially dangerous hazardous waste sites, and to force polluters to pay the costs associated with their pollution," (citations omitted)); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260 (3d Cir.

tee report on CERCLA explains, one of the statute's principal goals is "assuring that those who caused chemical harm bear the costs of that harm."³

The ability to pursue claims against polluters under CERCLA is not unfettered, of course. Congress included in the statute restrictions intended to prevent parties from receiving compensation under CERCLA for cleanup costs they already had recovered, either under CERCLA or under some other state or federal law. In recent cases, however, that limitation on "double recovery" has increasingly been cited as an expansive limitation on CERCLA claimants' rights.

Traditionally, courts concerned with "double recovery" were addressing one of two scenarios: (1) the potential for a claimant to recover the same cleanup costs under CERCLA that it already had recovered under some other federal or state law; or (2) the potential for a claimant to recover the same cleanup costs under CERCLA that it already had recovered through settlements with other responsible parties.⁴ Courts addressing these scenarios reached fairly consistent and relatively narrow conclusions about the limits on claims of "double recovery," grounding their decisions in an analysis of the statute's language and intent.⁵

Recently, however, defendants have invoked the specter of "double recovery" in far different scenarios. Defendants have claimed, for example, that CERCLA claims cannot be pursued where a claimant has received insurance payments to cover its cleanup costs, where the value of the claimant's property has gone up as a result of cleanup, or even where a claimant has set the price of its products to cover cleanup costs. In some cases these defenses have led courts to adopt dramatically expansive views of the types of "double recovery" that can be considered for offset under CERCLA. Although in large part, these cases can each be dismissed with the maxim "bad facts make bad law," together they advance the dubious proposition that any cost recovery that can even remotely be associated with remediation can offset a plaintiff's damages (and derivatively, a defendant's financial liability) under CERCLA. Further, to the extent the potential plaintiff has received "recovery" of all of their costs, that recovery can extin-

guish entirely the potential plaintiff's statutory rights under CERCLA and can allow otherwise liable parties to escape their CERCLA obligations.

"Double recoveries" should, in fact, be given little weight in a district court's determination of liability and allocation under CERCLA. When a court offsets a defendant's financial responsibility with a plaintiff's prior recovery, the court discourages voluntary cleanup and encourages recalcitrance and protracted litigation over cleanup liability. While federal courts are increasingly trying to address—and prohibit—the potential for profiteering by plaintiffs under CERCLA, in doing so they are undermining the primary cleanup goals of the statute.

The New Face of 'Double Recovery' Under CERCLA

The first case to embrace a broad interpretation of double recovery under CERCLA was *Vine Street LLC v. Keeling*.⁶ In that case, two prior owners of the site, the Roosth and Genecov Groups, received insurance proceeds covering the cleanup at issue. Those prior owners turned over their insurance payments to the plaintiff, Vine Street, to finance the cleanup while its CERCLA action was pending.⁷

The Eastern District of Texas held that the proceeds paid to Vine Street by the Roosth and Genecov Groups offset the defendant's liability, despite the fact that those payments were derived from insurance proceeds covering the cleanup. In allowing this deduction, the court greatly expanded traditional case law describing how prior CERCLA settlements with other potential responsible parties should offset non-settling parties' share of liability or costs.

After reciting that under the plain language of CERCLA § 113(f)(2), a non-settling responsible party's liability for the government's response costs is reduced by the dollar amount of previous settlements with the government, the court unaccountably expanded that concept to include all settlements with all parties. Without citation to any statutory authority, the court concluded that "[o]nce the CERCLA claimant obtains complete recovery from one or more responsible parties, that claimant cannot obtain additional recovery under CERCLA because this would create impermissible double recovery."⁸ "The Court is unaware of any previous instance in which a private CERCLA claimant received reimbursements of nearly all of its past and present response costs prior to any adjudication of responsibility."⁹

In reaching these conclusions, the court characterized its consideration of prior recoveries as a factor in the equitable allocation phase of the litigation and invoked an equitable prohibition on "profit." The court concluded that it may consider "preventing someone

1992) (recognizing that "the available legislative history of CERCLA does indicate that Congress created the statute to force all polluters to pay for their pollution").

³ See Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Senate Committee of Environment and Public Works, S. Doc. No. 97-14, at 320.

⁴ *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1189-90 (9th Cir. 2000) (private party settlement is an equitable factor under CERCLA § 113(f)(1)); *Raytheon Aircraft Co. v. United States*, No. 05-2328, 2007 WL 4300221, *2 (D. Kan. Dec. 8, 2007) (observing that CERCLA § 114(b) simply prohibits "a party from receiving the same recovery under both CERCLA and a comparable state statute—an interpretation that is supported by a litany of cases"); *United States v. Davis*, 31 F. Supp.2d 45, 64 (D.R.I. 1998) (private parties settlements must be considered under CERCLA § 113(f)(1) to prevent "double recovery").

⁵ For example, in *K.C. 1986 Limited Partnership v. Reade Manufacturing*, 472 F.3d 1009, 1017 (8th Cir. 2007), the Eighth Circuit explained that a lower court erred in failing to consider a judicially approved government settlement because CERCLA § 113(f)(2) specifically provides that judicially approved settlements with the United States or a state operate to "reduce the potential liability of others by the amount of the settlement."

⁶ 460 F. Supp.2d 728 (E.D. Tex. 2006).

⁷ See *id.* at 732-35 (describing the relationship between the parties and the history of ownership for the site); *id.* at 762 (detailing evidence that Penn National Insurance Company paid Roosth and Genecov Groups' insurance claim for the cleanup and that "[u]sing the proceeds . . . Roosth and Gencov [sic] Groups . . . reimbursed Vine Street" for expenditures in connection with the contamination).

⁸ *Id.* at 765 (citing common law's "one satisfaction" rule).

⁹ *Id.* at 764.

from recovering for the same harm twice” as an equitable factor in resolving CERCLA contribution claims and found that such consideration was “consistent with the fact that private CERCLA claimants cannot recover damages resulting from contamination, but can only be reimbursed for some or all of their incurred response costs. Vine Street cannot make a profit.”¹⁰

The *Vine Street* opinion is somewhat limited by the facts that underlie its holding. The court clearly was concerned that Vine Street was attempting to manipulate its claim for CERCLA recovery. The parties whose insurance payments were used to offset Vine Street’s liability were prior owners of the site at the time of the release, and thus were potentially liable for response costs under CERCLA themselves. The court’s ruling can be read in that light as a repudiation of Vine Street’s effort, through informal settlement of CERCLA claims, to avoid having the settlement proceeds it received offset its remaining claims.¹¹ The court also was hampered by a failure to develop fully the evidentiary record. Despite “Vine Street’s argument that recovering all response costs from Borg-Warner would not result in double recovery because Vine Street has promised or is obligated to pay back the Roosth and Genecov Groups and/or Penn National for all reimbursements received,” the court noted that “Vine Street introduced no evidence to demonstrate any subrogation obligation.”¹² It is not clear whether the court would have reached the same result if a subrogation obligation would have been supported with adequate evidence.¹³

After *Vine Street*, a series of courts addressed the impact of prior recoveries in the context of insurance payments. Defendants in these cases claimed that the insurance proceeds received by the plaintiffs are “recovery” of the plaintiff’s response costs, and that recovery reduces or extinguishes the plaintiff’s CERCLA claim.

In a typical tort setting, a defendant is not permitted to offset its liability based on a plaintiff receiving insurance proceeds. The common law rule that prevents an insurance offset is known as the collateral source rule—a doctrine that “allows a plaintiff to seek full recovery . . . even though an independent source has compensated the plaintiff in full or in part for the loss.”¹⁴ This doctrine is grounded in basic equity: “Collateral source funds are usually created through the prudence and foresight of persons other than the tortfeasor, frequently including the injured person himself. They are intended for the benefit of the injured person, and not

for that of the person who injures him.”¹⁵ Courts considering insurance payments in the CERCLA context, however, seem largely to have neglected this equitable principle.

One of the first cases to address the impact of prior insurance recovery was *Basic Management v. United States*.¹⁶ In that case, the plaintiff had not spent any of its own funds; rather, the plaintiff’s insurers paid for cleanup directly and had given up their rights of subrogation. The plaintiff, nonetheless, filed a CERCLA claim against other parties involved at the site. The *Basic Management* court, relying in part on *Vine Street*, refused to allow plaintiffs to recover under CERCLA any costs that had been paid to remediation vendors by their insurers, stating that “[a]llowing Plaintiffs to recover those costs ‘again’ from Defendants would in essence allow Plaintiffs to profit from their own and prior contamination of the site simply because they are in the subsequent chain of title. The purpose of the Contribution element of CERCLA was to reallocate the remedial cost to those who were ultimately responsible for the pollution, not to provide a windfall recovery for parties who happen to be in the chain of title.”¹⁷

After *Basic Management*, the Tenth Circuit weighed-in on the impact of a prior insurance recovery and the availability of the collateral source rule in *Friedland v. TIC-The Industrial Company*.¹⁸ In that action, the defendants alleged that the plaintiff already had recovered all of its environmental costs from prior actions and insurance proceedings. Accordingly, the defendants argued, allowing the plaintiff to recover any additional amounts from them—regardless of their liability—would amount to profiteering and the collateral source rule cannot be invoked to allow that result. Citing both *Vine Street* and *Basic Management*, the Tenth Circuit agreed and held that, “even assuming that CERCLA generally contemplates application of the collateral source rule, it is clearly inapplicable in the specific context of a § 113(f) contribution action” between liable parties.¹⁹ Because contribution actions by definition involve “claims between two or more culpable tortfeasors . . . the policy underlying the collateral source rule—to provide the innocent party with the benefit of any windfall—is simply not advanced in such cases.”²⁰

The Tenth Circuit in *Friedland* then reached beyond the context of insurance, noting in dicta that “[a]lthough Mr. Friedland is correct that the source of the payment is relevant to whether the collateral source

¹⁰ *Id.* at 765.

¹¹ *See id.* at 766 (“That Vine Street made no formal settlement agreement with the Roosth and Genecov Groups cannot enable Vine Street to recover monies from Borg-Warner that it has already recovered. Further, notwithstanding that Roosth and Genecov Groups’ assignments of legal interests to Vine Street, it did not plead and has never alleged it is asserting claims on behalf of those prior owners by virtue of such assignments.”). *Compare id.* at 732 (noting that Roosth and Genecov owned the contaminated property from 1949 to 1996 and, during that time, releases occurred).

¹² *Id.* at 766.

¹³ Unfortunately, this opinion has never been tested on appeal. After this decision, one of the parties filed for bankruptcy and the appeal to Fifth Circuit has been stayed for the bankruptcy proceedings.

¹⁴ *Green v. Denver & Rio Grande W. R. R. Co.*, 59 F.3d 1029, 1032 (10th Cir. 1995).

¹⁵ *Gypsum Carrier Inc. v. Handelsman*, 307 F.2d 525, 534–35 (9th Cir. 1962).

¹⁶ 569 F. Supp. 1106, 1120 (D. Nev. 2008).

¹⁷ *Id.* at 1124.

¹⁸ 566 F.3d 1203 (10th Cir. 2009).

¹⁹ *Id.* at 1206.

²⁰ *Id.* at 1207. The question of whether the collateral source rule applies in the CERCLA context is far from settled, however. A recent Seventh Circuit opinion addressing the impact of prior insurance recovery on CERCLA claims signaled that it might disagree with the Tenth Circuit’s *Friedland* decision. Although it did not decide the issue, in addressing the argument that the collateral source rule does not apply in the CERCLA context, the Seventh Circuit wrote: “The [defendants] do not explain why Kerr-McGee’s insurance should redound to their benefit rather than Kerr-McGee’s stockholders who paid for the coverage.” *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, No. 03-2991 (7th Cir. June 30, 2009).

rule applies, the source of the payment is not relevant in the context of [CERCLA] Section 113(f)(1)'s instruction to allocate response costs equitably. What matters is that the contribution plaintiff has recovered some or all of its response costs; the identity of the entity providing the recovery is irrelevant."²¹ With this dicta, the Tenth Circuit signaled that any prior recovery of costs for a cleanup—not just insurance recovery—could extinguish a plaintiff's right to recovery under CERCLA in whole or in part.

Conflict With Prior CERCLA Decisions

Not only does the expansive view of "double recovery" that this recent series of cases represents lack a foundation in CERCLA's statutory language, it also represents a departure from CERCLA precedent. Cases addressing how to allocate CERCLA settlements have long concluded that the desire to prevent a "profit" under CERCLA should give way to CERCLA's primary goals of encouraging voluntary cleanup and settlement.

For years, courts considering the impact of settlements have accepted that certain methods of allocation may provide "windfalls" to CERCLA plaintiffs resulting from favorable settlements with other responsible parties.²² For example, in *American Cyanamid Co. v. King Industries, Inc.*, 814 F. Supp. 215, 218 (D.R.I. 1993), the district court recognized that there is some risk, but also some justified potential reward, associated with being the party that initially pays for a cleanup. In applying a "proportionate share" approach to allocating settlements, in which a defendant's liability is reduced only by the equitable share of liability of the settling parties regardless of how much those parties actually settle for, the court used the following example:

A private party sues five defendants for contribution under § 113(f)(1) of CERCLA. Plaintiff seeks recovery for \$100,000 for response costs. One defendant settles for \$5,000. At trial, it is determined that each of the five original defendants are liable for an equitable share equaling 10 percent of the \$100,000—or \$10,000 per defendant. The plaintiff is found to be liable for 50 percent—or \$50,000. The settling defendant is still responsible for only \$5,000. The non-settling defendants, however, may reduce their collective share of liability by the amount of the settling defendant's equitable share—in this case, \$10,000. Thus, the four nonsettling defendants are responsible for \$10,000 each, for a total of \$40,000. The plaintiff bears the "loss" of \$5,000 in contribution recovery as a result of compromising for less than the settling party's equitable share. Conversely, the plaintiff may reap any "windfall" from a settlement with one of the five defendants for more than \$10,000, or more than the defendant's equitable share. That is the rub of the green.²³

²¹ *Id.* at 1208 n.4.

²² *See, e.g., Am. Cyanamid Co. v. King Indus. Inc.*, 814 F. Supp. 215, 218 (D.R.I. 1993) (a CERCLA plaintiff "may reap any 'windfall' from a settlement . . . [for] more than the defendant's equitable share"); *see also Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 20 n.5 (1st Cir. 2004) (same); *Agere Sys. v. Advanced Envtl. Tech. Corp.*, No. 02-3830, 2008 U.S. Dist. LEXIS 91887 at *97-98 n.43 (E.D. Pa. Aug. 18, 2008) (same).

²³ *Am. Cyanamid Co.*, 814 F. Supp. at 218.

As the *American Cyanamid* court noted, there is no inherent prohibition on a CERCLA plaintiff receiving a "windfall" as a result of its willingness to conduct cleanup activities and pursue other responsible parties. Rather, it is a natural result of CERCLA's emphasis on responsible parties paying their equitable share of cleanup costs. Since *American Cyanamid*, a number of other courts have accepted this same proportionate share approach, windfall and all, in allocating CERCLA settlements.²⁴ These cases are fundamentally incompatible with the approach of *Vine Street*, *Basic Management*, and *Friedland*.

Where Does This Conflict Lead?

These conflicting lines of cases present two very different views of the breadth of "double recovery," and two very different views of the goals and intent of CERCLA. The courts reading "double recovery" as an expansive prohibition on CERCLA claims focus on statutory provisions in CERCLA that reflect "Congress's apparent desire to prevent claimants from recovering the same response costs twice" under CERCLA or comparable state laws,²⁵ while those reading "double recovery" more narrowly consider as paramount Congress' stated goals in CERCLA of encouraging efficient, voluntary cleanup and settlement of claims without resort to litigation.²⁶

The impact of the expansive *Vine Street*, *Basic Management* and *Friedland* decisions already is being felt. CERCLA defendants have jumped to plead setoff defenses. Not only are defenses associated with insurance offset proliferating, CERCLA defendants are reaching well beyond the insurance context to claim offset for other types of conduct. For example, in a series of recent cases, the United States has invoked a new claim of offset in defending against CERCLA claims by government contractors.²⁷ The United States has argued that government contractors include in their product

²⁴ *E.g., Adobe Lumber Inc. v. Hellman*, No. 05-1510 (E.D. Cal Feb. 2, 2009); *Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co.*, 936 F. Supp. 1274 (E.D. Va. 1996); *United States v. GenCorp Inc.*, 935 F. Supp. 928 (N.D. Ohio 1996); *Hillsborough County v. A & E Rd. Oiling Serv. Inc.*, 853 F. Supp. 1402 (M.D. Fla. 1994); *Barton Solvents v. Sw. Petro-Chem.*, 834 F. Supp. 342 (D. Kan. 1993); *United States v. SCA Servs.*, 827 F. Supp. 526 (N.D. Ind. 1993); *Comerica Bank-Detroit v. Allen Indus. Inc.*, 769 F. Supp. 1408 (E.D. Mich. 1991); *Allied Corp. v. Acme Solvent Reclaiming, Inc.*, 771 F. Supp. 219 (N.D. Ill. 1990); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988), *aff'd on other grounds*, 861 F.2d 155 (7th Cir. 1988); *Lyncott Corp. v. Chem. Waste Mgmt. Inc.*, 690 F. Supp. 1409, 1418-19 (E.D. Pa. 1988).

²⁵ *Vine Street*, 460 F. Supp. 2d at 765.

²⁶ *See* 131 Cong. Rec. 24,730 (Sept. 24, 1985) (statement of Sen. Domenici) ("One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available."); *see also Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) ("CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.").

²⁷ *Raytheon Aircraft Co. v. United States*, No. 05-2328, 2007 WL 4300221, *1 (D. Kan. Dec. 8, 2007); *see also TDY Holdings LLC v. United States*, No. 07-0787 (S.D. Cal.) (defense alleged in pleadings); *Westinghouse Electric Co. v. United States*, No. 03-861 (E.D. Mo.) (same).

pricing overhead costs, which can include the contractors' costs for environmental remediation. Because the contractors' prices are set to recover their costs (as any profitable company must), payment received for the contractors' products amounts to the recovery of cleanup costs precluding CERCLA claims. To date, every court to consider the United States' attempt to use government contractors' pricing as an offset to CERCLA liability on the merits has rejected this theory.²⁸ Nevertheless, the government continues to assert "pricing offset" as a defense.²⁹

The United States' assertion of a "pricing offset" defense demonstrates the illogical impact of *Vine Street* and its progeny. If, as the United States asserts, the mere act of setting product prices at a level sufficient to recover costs spent to clean up a hazardous waste site extinguishes a plaintiff's CERCLA rights, than no profitable company could ever bring a CERCLA claim. Every defendant in a CERCLA case would be able to argue that a company that is profitable has, by definition, "recovered" through its sales of goods or services any costs it has spent.³⁰

Rather than promoting prompt, voluntary action to clean up contaminated sites, the approach taken by the *Friedland*, *Basic Management*, and *Vine Street* courts rewards recalcitrance. It allows the least cooperative

parties to take advantage of the insurance assets or other recoveries of parties who actually perform CERCLA cleanups.³¹ CERCLA cleanups will become large and very expensive games of "chicken," rewarding the parties that frustrate regulators, litigate contentiously, and avoid their responsibilities the longest at the expense of more cooperative parties. Parties who are able to pay for cleanups with collateral sources will be forced—if they can—to delay pursuing insurance recovery, or forego it altogether, in order to exercise their statutory right to contribution under CERCLA. Congress could not have intended such a result.

Courts should resist the *Vine Street* line of cases' consideration of "double recovery" in stark terms. CERCLA undoubtedly contains the flexibility, in the command of Section 113(f)(1) that a reviewing court "allocate response costs using such equitable factors as the court determines are appropriate,"³² to curb plaintiff profiteering. Yet that same command requires a court to consider not only the dollar amount of settlements or insurance recovery as *Vine Street et al.* did, but also factors like the rights given up by a plaintiff in exchange for settlement, the benefit of voluntary cleanup and detriment of recalcitrance, the time value of money, the cost of procuring, invoking, and exhausting insurance coverage, and innumerable other case-specific factors before ruling that a defendant can claim a dollar-for-dollar offset. A reactive invocation of "double recovery" to diminish or extinguish CERCLA claims furthers neither the statute's language nor its goals. As the *Vine Street* line of cases and the creative defenses they have triggered illustrate, however, there soon should be ample opportunity to examine expansive claims of double recovery under CERCLA in both district and appellate courts.

²⁸ *Lockheed Martin v. United States*, No. 08-1180, slip op. at 15 (D.D.C. Sept. 29, 2009) (finding that the United States' defense was "invalid . . . insofar as it asserts that Lockheed cannot recover costs under CERCLA that it has billed to the government as indirect costs"); see also *Raytheon Aircraft Co.*, 2007 WL 4300221, at *2.

²⁹ See cases cited *supra* note 27.

³⁰ At least one court has resisted a similarly expansive reading of "double recovery." In 2003, the Central District of California considered the scope of "double recovery" in *Carson Harbor Village v. Unocal Corp.*, 287 F. Supp.2d 1118 (C.D. Cal. 2003). The defendant in that case argued that the plaintiff raised the rent charged to its tenants to cover increased operating costs caused by its remediation efforts. *Id.* at 1149. The defendant claimed that the plaintiff's increased rental income offset the plaintiff's response costs and therefore any further recovery under CERCLA would amount to a "double recovery." *Id.* at 1181. The court rejected this argument, finding that the increased rental payments were not the recovery of response costs as contemplated by CERCLA, but rather were a pricing mechanism permitting the plaintiff "to maintain a profit level similar to its gross profit level prior to the large increase in operating expenses. . . ." *Id.*

³¹ In the case of insurance specifically, a CERCLA defendant will be allowed to reap the benefit of the plaintiff's insurance policy even though the recalcitrant responsible parties neither paid for nor were an insured under the relevant insurance policy, ignoring the fundamental public policy preference that the benefit of insurance should inure only to the insured party. See *FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070, 1083 (10th Cir. 1994) ("If the plaintiff is responsible for the benefit—e.g., because he maintained his own insurance, or if the benefit was a gift to the plaintiff, he should not be deprived of the benefit.").

³² 42 U.S.C. § 113(f)(1).