

## Insurance and Equity in CERCLA: The Missed Opportunity of *Friedland v. TIC*

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The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) allows a party that spends money to clean up a hazardous waste site to sue the polluters of that site to recover cleanup costs. But what happens if the party that cleans up the site already has been reimbursed for his cleanup costs by insurers? Does he still have a claim under CERCLA?

In *Friedland v. TIC*, the U.S. Court of Appeals for the Tenth Circuit became the first court of appeals to address this question.<sup>1</sup> The *Friedland* court held that a plaintiff that already had received insurance proceeds to reimburse him for cleanup costs was barred from suing other polluters in contribution under CERCLA. Unfortunately, by deciding as it did, the Tenth Circuit missed an opportunity to reinforce CERCLA's two principal congressional goals: "to facilitate the clean-up of potentially dangerous hazardous waste sites," and "to force polluters to pay the costs associated with their pollution."<sup>2</sup> Instead, the *Friedland* decision creates an incentive for recalcitrance and an opportunity for polluters to unfairly avoid their CERCLA liability.

### BACKGROUND

Friedland was the former director and president of Summitville Consolidated Mining Company, which operated the Summitville Mine in Colorado. When the mining company declared bankruptcy and abandoned the mine, EPA cleaned up the site and sued Friedland under CERCLA for cost recovery. Friedland ultimately settled with EPA for approximately \$21 million. Friedland then sued various insurers for indemnification and contribution, and settled those claims for more than the \$21 million he had agreed to pay the government for cleanup. Friedland then sued two additional parties that had been involved with the mine for contribution under CERCLA.

The defendants moved for summary judgment, arguing that Friedland was barred from seeking contribution from them as a matter of law because he already had recovered from his insurers amounts exceeding his cleanup costs. Friedland argued that his claims could proceed because the "collateral source rule" prohibited the court from crediting the defendants with any insurance payments he received.<sup>3</sup>

The collateral source rule is a common law rule that "allows a plaintiff to seek full recovery [from a defendant] even though an independent source has compensated the plaintiff in full or in part for the loss."<sup>4</sup> The rule "evolved from the commonsense notion that a tortfeasor ought not be excused because the victim was compensated by another source, often by insurance. The collateral source rule removes the disincentive otherwise faced by potential victims to insure against harm or accept gratuitous compensation from sources other than the tortfeasor for fear that the tortfeasor will then not be required to pay."<sup>5</sup>

The *Friedland* district court rejected application of the collateral source rule on the ground that it "derives from tort law, whereas CERCLA does not."<sup>6</sup> The district court then determined that—as a matter of law—a party that has recovered all of its cleanup costs from insurers cannot recover additional funds from other polluters.<sup>7</sup>

On appeal, the Tenth Circuit agreed that the collateral source rule does not apply to claims for contribution under CERCLA:

We have explained that a claim for contribution is a claim “by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.” Thus, a CERCLA contribution action is not a personal injury action by an innocent plaintiff. Instead, it is a claim between two or more culpable tortfeasors, and 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.<sup>8</sup>

The Tenth Circuit then invoked section 113(f) of CERCLA, which requires a court to consider equitable factors in allocating response costs under CERCLA. Noting that Friedland already had received full reimbursement from his insurers, the court concluded that “permitting a CERCLA contribution-action plaintiff to recoup more than the response costs he paid out of pocket flies in the face of CERCLA’s mandate to apportion those costs equitably among liable parties.”<sup>9</sup> The court affirmed that Friedland was barred from seeking contribution from the defendants as a matter of law.

#### IS ALL “PROFIT” INEQUITABLE?

The *Friedland* court, like many of the district courts that recently have considered similar situations,<sup>10</sup> seems to have placed unquestioned significance on the maxim that a potentially responsible party under CERCLA must not “profit” from his or her pollution. Unfortunately, the actual import of that maxim seems to have been lost. It is clear that Congress did not intend in CERCLA to encourage pollution, but it is equally clear that Congress did intend in CERCLA to encourage parties to clean up hazardous sites.

Thus, most courts considering the equities associated with CERCLA settlements among co-polluters at a site have recognized that there is some risk, but there is also some justified potential reward, for being the party that initially pays for a cleanup. Those courts apply the “proportionate share” approach to allocating settlements. Under the proportionate share approach, a defendant’s liability is reduced by the equitable share of liability of the settling parties, regardless of how much those parties actually settle for:

To clarify how the [proportionate share] rule will operate in this case, consider 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% of the \$100,000 - or \$10,000 per defendant. The plaintiff is found to be liable for 50% - 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.<sup>11</sup>

Accordingly, courts have long considered it “equitable” under CERCLA for a polluter that incurs cleanup costs at a site to bear the burdens or to reap the benefits of the settlements he or she reaches with other polluters. As the *American Cyanamid* court noted, those settlements will sometimes result in a “loss” to the party that incurred cleanup costs and sometimes will result in a

“windfall” to that party. Neither, at least prior to *Friedland*, was considered prohibited by CERCLA.

By elevating “the polluter must not profit” maxim over Congress’s goals in CERCLA to promote efficient site remediation and resolve claims, the *Friedland* decision creates a strong incentive for polluters to delay or avoid involvement in cleanup of contaminated sites. Rather than promoting prompt, voluntary action at hazardous waste sites, the *Friedland* court’s approach rewards recalcitrance. Under the *Friedland* approach, the parties that frustrate regulators, litigate contentiously, and avoid their responsibilities the longest are rewarded with the insurance assets bought and paid for by more cooperative parties. Parties who are able to pay for cleanups 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.

### EQUITABLE ALLOCATION UNDER CERCLA

How can a court, faced with the circumstances in *Friedland*, promote Congress’ cleanup goals in CERCLA while avoiding inequitable profiteering by potentially responsible parties? The answer is not, as the Tenth Circuit correctly held, by application of the collateral source rule. That rule, in its categorical rejection of any consideration of insurance recovery, is as difficult to reconcile with CERCLA’s equitable allocation system as the dollar-for-dollar offset approach to settlement adopted by the *Friedland* court.

CERCLA’s equitable allocation system requires an approach that rejects both absolutes. Section 113(f)(1) of CERCLA, which governs allocation of costs among PRPs, provides: “In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” 42 U.S.C. § 9613(f)(1). There is no statutory command to reduce the liability of non-settling parties by the dollar amount of any settlement the plaintiff receives, just as there is no statutory command requiring a court to ignore any such settlements. Rather, CERCLA § 113(f)(1) provides an open invitation for a court to consider the equities in allocating cleanup costs.

Insurance settlements should be considered by courts as just one equitable factor in CERCLA allocation. In so doing, courts can consider additional factors like the cost of the insurance to the party that procured it, whether the insurance recovery included defense costs, and the cost to the insured of insurance exhaustion or impairment. This approach would recognize that insurance recovery is not “costless” to the insured, and other polluters—as a matter of equity—should not be able to take advantage of a party’s foresight and effort in procuring insurance coverage. Such an approach also would recognize, as courts universally have in the past, that a dollar spent voluntarily on cleanup today is worth far more to the environment than a dollar extracted from a recalcitrant party after years of CERCLA litigation.<sup>12</sup>

A court applying faithfully CERCLA § 113(f)(1)’s command to equitably allocate cleanup liability may still reach the conclusion that one polluter should bear 100% of the cleanup liability at a particular site, even where there are other parties that contributed to the contamination.<sup>13</sup> The *Friedland* court’s dollar-for-dollar offset rule takes this decision out of the realm of equity, however, and creates an absolute rule incompatible with CERCLA.

### CONCLUSION

*Friedland* may be a case of “bad facts make bad law,” where the perception that *Friedland* was profiteering under the guise of CERCLA contribution obscured the broader issues implicated by the Tenth Circuit’s opinion. *Friedland* did not voluntarily clean up the Summitville site; the government cleaned up and then sued him for cost recovery. And *Friedland* engaged in protracted litigation with a number of parties concerning who would pay. Given these circumstances, it may be that a district court considering appropriately CERCLA’s equitable

factors would still reach the conclusion that Friedland was not entitled to receive a single additional dollar in contribution.

But the fact that Friedland is not a sympathetic plaintiff does not validate imposition of an automatic dollar-for-dollar settlement offset rule that undermines the goals of CERCLA. Like other courts considering settlement credits, the Tenth Circuit should have rejected the lower court's determination that Friedland's insurance settlements precluded CERCLA contribution as a matter of law, and instead remanded the case for an equitable determination of cleanup cost allocation. The *Friedland* court's failure to do so may generate a new wave of litigation by recalcitrant polluters trying to take advantage of others' insurance recoveries to escape their own CERCLA liabilities.

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<sup>1</sup> *Friedland v. TIC*, No. 08-1042, [2009 BL 117252](#) (10th Cir. 2009)

<sup>2</sup> *United States v. CDMG Realty Co.*, [96 F.3d 706](#), 717 (3d Cir. 1996).

<sup>3</sup> Friedland also argued that the money he received from the insurers should be allocated to his substantial defense costs (approximately \$28 million), which are not considered CERCLA costs, rather than to his settlement with the government. The district court declined to do so because the settlement agreements between Friedland and the insurance companies did not specify that the money was to be allocated to defense costs. "Without such language, a non-settling party is normally entitled to full credit for the entire amount of the settlement under CERCLA." *Friedland v. TIC*, No. 04-01263, Order Granting Def.'s Joint Mot. for Summ. J. on Damages ("Summ. J. Order") 4 (D. Colo. Jan. 18, 2008). The Tenth Circuit affirmed this determination. *Friedland*, No. 08-1042, Slip Op. at 18 (10th Cir. May 29, 2009)..

<sup>4</sup> *Green v. Denver & Rio Grande W. R.R. Co.*, [59 F.3d 1029](#), 1032 (10th Cir. 1995).

<sup>5</sup> *Quinones v. Pa. Gen. Ins. Co.*, [804 F.2d 1167](#), 1171 (10th Cir. 1986).

<sup>6</sup> *Friedland v. TIC*, No. 04-01263, Summ. J. Order 6-7.

<sup>7</sup> *See id.* at 7.

<sup>8</sup> *Friedland*, No. 08-1042, Slip Op. at 8 (internal citation and ellipses omitted).

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *See, e.g., Basic Mgmt. Inc. v. United States*, [569 F. Supp. 2d 1106](#) (D. Nev. 2008), *Vine Street LLC v. Keeling*, [460 F. Supp. 2d 728](#) (E.D. Tex. 2006).

<sup>11</sup> *Am. Cyanamid Co. v. King Indus., Inc.*, [814 F. Supp. 215](#), 218 (D.R.I. 1993). Other courts that have applied the proportionate share approach to CERCLA settlement allocation include: *Adobe Lumber Inc. v. Hellman*, [No. 05-1510](#), Mem. & Order Re: Motion for Settlement Approval (E.D. Cal. Feb. 3, 2009); *Barton Solvents, Inc. v. Sw. Petro-Chem, Inc.*, [834 F. Supp. 342](#), 348 (D. Kan. 1993); *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); *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](#), 223 (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).

<sup>12</sup> *See, e.g., K.C. 1986 Ltd. P'Ship v. Reade Mfg.*, No. 02-853, Allocation Order 49-52 (W.D. Mo. Jan. 7, 2005) (adjusting allocation based on degree of cooperation), *aff'd in part & rev'd & remanded in part on other grounds*, [472 F.3d 1009](#) (8th Cir. 2007); *Waste Mgmt. of Alameda County v. East Bay Regional Park District*, [135 F. Supp. 2d 1071](#), 1097-98 (N.D. Ca. 2001) (failure to cooperate by "foot dragging" results in increased allocable share); *Raytheon Constructors Inc. v. ASARCO Inc.*, No. 96-2072 Mem., Op., & Order (D. Colo. Apr. 16, 1998) (increasing share of non-cooperating party and decreasing allocable share of cooperating party), *rev'd on other grounds*, [368 F.3d 1214](#), 95 Fed. Appx. 1214 (10th Cir. 2003); *Hastings*

*Bldg. Prods., Inc. v. Nat'l Aluminum Corp.*, No. 88-619 Opinion (W.D. Mich. Apr. 21, 1992) (degree of cooperation considered).

<sup>13</sup> See *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002) (court allocated to the United States 100% of the liability for cleanup at a site contaminated by WWII production of aviation fuel and allocated no liability to the private companies that operated the facility).