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Akzo Nobel Coatings, Inc. v. Aigner Corp.: The Settlement Credit Issue Answered for CERCLA Litigation?

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Akzo Nobel Coatings, Inc. v. Aigner Corp.: The Settlement Credit Issue Answered for CERCLA Litigation?

In *Akzo Nobel Coatings, Inc. v. Aigner Corp.*,[1] the United States Court of Appeals for the Seventh Circuit held Akzo liable in contribution to Aigner for costs incurred in a response action[2] under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[3] The court found Akzo's liability to be approximately 13% of Aigner's costs minus the amount Aigner agreed to accept from third parties in settlement.[4] Aigner incurred the costs as the result of a consent decree it entered with the Environmental Protection Agency. In the decree, Aigner and several other responsible parties agreed to pay the costs associated with the cleanup and remediation[5] of a hazardous waste site. Aigner and the other responsible parties also entered into a private-party settlement agreement addressing the distribution of costs of the response action.

Akzo was not a party to the settlement. Aigner then sued Akzo for contribution, claiming Akzo was also a responsible party and should bear a portion of the response costs.[6]

The Seventh Circuit applied a dollar-for-dollar credit rule to determine Akzo's contribution liability. This decision is important because the cost associated with CERCLA response actions is high.[7] The decision is also important because it is the first appellate opinion addressing the issue of the appropriate settlement credit rule in a private party's action for contribution against a non-settling responsible party under the laws of CERCLA. The confusion concerning how the non-settling party's liability should be

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1. 197 F.3d 302 (7th Cir. 1999).

2. 42 U.S.C.A. § 9601 (West 1995). The statute defines "response" to mean "remove, removal, remedy, and remedial action; all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto." "Remove" or "removal" is defined as "the cleanup or removal of released hazardous substances from the environment." The statute states that "remedy" or "remedial action" means "those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment."

3. 42 U.S.C.A. §§ 9601-9675 (West 1995).

4. *Akzo*, 197 F.3d 302, 308 (7th Cir. 1999).

5. *See* 42 U.S.C.A. § 9601 (West 1995).

6. *Akzo*, 197 F.3d at 303-04.

7. It is estimated that the costs involved in CERCLA response actions average $30 million per site. John M. Hyson, *CERCLA Settlements, Contribution Protection and Fairness to Non-Settling Responsible Parties*, 10 Vill. Envtl. L.J. 277, 280 n.18 (1999) (citing *House Subcomm. on Investigations and Oversight of the Comm. on Public Works and Transportation, Administration of the Federal Superfund Program*, H.R. Rep. No. 103-35, at 5 (1993)).

determined exists because Congress enacted a provision under CERCLA that expressly provides for the right of contribution in the private party context, but that provision does not state how settlement agreements should affect the contribution liability of non-settling parties.[8] Most district courts have considered either the Uniform Comparative Fault Act[9] or the Uniform Contribution Among Tortfeasors Act[10] because each Act provides a method for calculating contribution liability when there is a private party settlement. The district courts, however, are split in their holdings.[11]

The Seventh Circuit's decision does not end the confusion because the court reversed the district court without adequately explaining its reasoning. The decision is a good one from the perspective of judicial economy and fairness, but the appellate court decision provide's little certainty in the law. Unless the United States Supreme Court decides to hear the issue, certainty will only be provided if Congress adopts a clear provision addressing this issue. This paper asserts that Congress should adopt the ruling of the United States Court of Appeals for the Seventh Circuit and explicitly declare that the non-settling party should receive a credit for the amount of the settlement. Furthermore, Congress should provide that the non-settling parties must pay an equitable percentage of the orphan shares, *i.e.*, shares of the liability attributable to unknown or insolvent parties.[12]

Part I of this paper describes the facts and holding of *Akzo Nobel Coatings, Inc. v. Aigner Corp.*[13] Part II offers background

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8. 42 U.S.C.A. § 9613(f)(1) (West 1995).

9. Unif. Comparative Fault Act, 12 U.L.A. 123 (1996).

10. Unif. Contribution Among Tortfeasors Act, 12 U.L.A. 185 (1996).

11. Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651 (N.D. Ill. 1988); Lyncott Corp. v. Chemical Waste Management, Inc., 690 F. Supp. 1409 (E.D. Pa. 1988); and United States v. Western Processing Co., 756 F. Supp. 1424 (W.D. Wash. 1990) have favored the proportionate share approach of the Uniform Comparative Fault Act. For an application of the dollar-for-dollar credit rule of the Uniform Contribution Among Tortfeasors Act, see Atlantic Richfield Co. v. American Airlines, Inc., 836 F. Supp. 763 (N.D. Okla. 1993); Allied Corp. v. Frola, 730 F. Supp. 626 (D.N.J. 1990); United States v. Cannons Eng'g Corp., 720 F. Supp. 1027 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990); and United States v. Rohm & Haas Co., 721 F. Supp. 666 (D.N.J. 1989).

12. Akzo Nobel Coatings, Inc. v. Aigner Corp., 197 F.3d 302, 308 (7th Cir. 1999); William D. Auxer, *Orphan Shares: Should They Be Borne Solely by Settling PRP Conducting the Remedial Cleanup or Should They Be Allocated Among All Viable PRPs Relative To Their Equitable Share of CERCLA Liability?*, 16 Temp. Envtl. L. & Tech. J. 267, 269 (1998) [hereinafter Auxer] ("Orphan shares are response costs which are attributable to bankrupt or financially insolvent "PRP" or are costs associated with a portion of hazardous waste not traceable to any known or identifiable PRPs"). PRP is CERCLA jargon for "potentially responsible party."

13. 197 F.3d 302 (7th Cir. 1999).

information on the law of CERCLA, the specific provisions addressing contribution rights, the jurisprudence, and the issues that remain unresolved after the *Akzo* decision. Part III describes the two uniform tortfeasor acts most often considered when addressing the problem of settlement credits and explains the split in the district courts' decisions. Part IV analyzes the Seventh Circuit's opinion in *Akzo*. Specifically, this section explores the court's rejection of the Uniform Comparative Fault Act, its use of the "federal law" argument as support for its choice of the Uniform Contribution Among Tortfeasors Act, the use of the Supreme Court's opinion in the admiralty case of *McDermott, Inc. v. AmClyde,*[14] and the court's reading of Section 113 of CERCLA. Part V addresses the possible effects of the Seventh Circuit's decision. Part VI offers a suggested approach to solving the problem.

I. THE CASE: *AKZO NOBEL COATINGS, INC. V. AIGNER CORP.*

From 1970 to 1986, Fisher-Calo Chemicals and Solvents Corporation operated a facility where spent industrial solvents from more than two hundred companies were distilled and the residues from the distillation process were stored.[15] Both the EPA and the Indiana State Board of Health investigated the site for numerous violations associated with improper handling of hazardous waste, and contamination of the soil and groundwater at the site were reported.[16] In 1988, the EPA conducted an investigation and feasability study of the site. Pursuant to 42 U.S.C. § 105, the EPA designated the facility a Superfund site in 1993.[17] The EPA then issued an administrative order to Fisher-Calo's past customers to engage in emergency cleanup activities.[18] The order covered Akzo and approximately

14. 511 U.S. 202, 114 S. Ct. 1461 (1994).

15. Akzo Nobel Coatings, Inc. v. Aigner Corp., 803 F. Supp. 1380, 1381 (N.D. Ind. 1992).

16. *Id.*

17. *Id.* at 1381.

18. Akzo Nobel Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 762 (7th Cir. 1994). Fisher-Calo had gone out of business before the facility was designated a Superfund site, so pursuant to 42 U.S.C.A. § 9607, the responsibility of cleanup fell to the other parties, referred to in CERCLA jargon as "potentially responsible parties." A potentially responsible party is a "covered person," defined in 42 U.S.C.A. § 9607 (West 1995) as a party that falls into one of the following classes: (1) owner or operator of the facility; (2) any party who owned or operated the facility at the time of disposal of the hazardous substance; (3) any person who by contract, agreement or otherwise arranged for disposal or treatment of hazardous substances owned or possessed by that person; and (4) any person who accepts hazardous substance for the transport to disposal or treatment sites selected by that person. This provision provides for strict liability of the "covered persons" since fault is irrelevant. Fisher-Calo's customers fall into category 3.

twenty other potentially responsible parties. This group agreed to implement a cost sharing and allocation plan that included a provision preventing the parties from later suing each other for the project's cost.[19] Less than a year later, Akzo expressed the belief that it was only liable for contamination at part of the site and withdrew from the group.[20] The remaining parties, including Aigner, entered a consent decree with the EPA in 1991. The consent decree obligated them to remediate the site at a cost of $40 million and to pay the EPA $3.1 million for past cleanup expenses.[21] Akzo was not a party to the consent decree.[22]

Aigner[23] subsequently sought contribution from Akzo[24] for Akzo's portion of the cleanup costs that Aigner and the settling parties had incurred at the site.[25] The district court followed the

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19. Akzo Nobel Coatings, Inc. v. Aigner Corp., 803 F. Supp. 1380, 1381-82 (N.D. Ind. 1992). Akzo participated in part of the "emergency cleanup" spending approximately $1.2 million. The United States Court of Appeals for the Seventh Circuit found that this work was not covered by the consent decree, and therefore Akzo was allowed to pursue a contribution action against Aigner for these costs. Akzo Nobel Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 762 (7th Cir. 1994).

20. Akzo Nobel Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 763 (7th Cir. 1994). Akzo later argued unsuccessfully for this position based on the theory that each individual site comprised a separate "facility" under the terms of CERCLA, and therefore its liability was divisible. The Seventh Circuit upheld the lower courts ruling that all of the individual sites were one "facility." Akzo Nobel Coatings, Inc. v. Aigner Corp., 197 F.3d 302, 304 (7th Cir. 1999).

21. Later in the opinion, the court went on to recite amounts slightly different than these, but these amounts are representative. Akzo Nobel Coatings, Inc. v. Aigner Corp., 803 F. Supp. 1380, 1382 (N.D. Ind. 1992).

22. Akzo Nobel Coatings, Inc. v. Aigner Corp., 881 F. Supp. 1202, 1207 (N.D. Ind. 1994)

23. Aigner represents itself and approximately 50 additional responsible parties in this action.

24. As used in this paper and in the court's opinion, "Akzo" is shorthand for "Akzo and O'Brien," the plaintiffs.

25. The original suit was filed by Akzo against Aigner seeking recovery of the costs Akzo spent on the emergency cleanup and later planning activities. Aigner responded by filing a counter-claim seeking contribution for Akzo's portion of the response costs that it had incurred. Akzo argued to the court that it should not be liable for a percentage of the total response costs because its solvents were sent to only one site within the "facility." "Facility" as defined in 42 U.S.C.A. § 9601 subpart (9)B (West 1995), means "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." Akzo argued that the district court was wrong to include all of the individual sites in its definition of the "facility" and that each individual site should be a separate "facility." The Seventh Circuit rejected this argument. The appellate court also rejected Akzo's claim that liability should be based on the toxicity of the solvents sent by each party to the site, rather than the total volumes as the district court determined. Akzo lost its action against Aigner for recovery of the emergency costs, because both courts found Akzo to be a responsible party. The suit proceeded on Aigner's claim for contribution. Akzo appealed the district court's

approach of the Uniform Comparative Fault Act and held that Aigner's recovery should be reduced by the percentage of fault of the other potentially responsible parties. The court, however, read the Act to require the exclusion of any potentially responsible parties not party to the present suit. Therefore, to make up for any fault not apportioned to either party the court held that Akzo should pay approximately 13% of Aigner's total costs, even though Akzo was only responsible for 9% of the total pollutants shipped to the site.[26]

Akzo appealed to the Seventh Circuit. It argued that the Uniform Comparative Fault Act required the court to determine the liability of all potentially responsible parties before determining the amount of Akzo's contribution liability.[27] The Seventh Circuit rejected both the idea of determining the fault of all parties, as well as the Uniform Comparative Fault Act's proportionate fault approach in general.[28] The court based its rejection of the Uniform Comparative Fault Act approach on the language in Section 113(f)(1) that requires that the contribution action "be governed by Federal law."[29] The court stated that the Uniform Comparative Fault Act was not federal law and had only been adopted by two states.[30] Although no current "federal law" covered the method for determining a non-settling defendant's liability under a CERCLA contribution action, the court interpreted the requirement of Section 113(f) to mean that it must at least apply a nationally uniform law[31] and stated that it was appropriate to borrow a state rule when the only "alternative is judicial invention."[32]

The Seventh Circuit then concluded that the Uniform Contribution Among Tortfeasors Act was the preferred method of calculating Akzo's contribution liability.[33] The court supported its

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decision to determine proportionate share based on the number of gallons of solvent Akzo sent to the site and the court's decision holding Akzo liable for a percentage of the total cleanup cost. The Seventh Circuit found the district court's basis of liability, total gallons of solvents sent to the site, to be an acceptable basis under the statute's "equitable factors" language. Akzo had also argued that the harm was divisible based on its view of what constituted the "facility" under the CERCLA statute. The court rejected the idea of subdividing the site into multiple "facilities" and held Akzo jointly and severally liable with the other potentially responsible parties for the harm to the facility as a whole.

26. Akzo Nobel Coatings, Inc. v. Aigner Corp., 960 F. Supp. 1354 (N.D. Ind. 1996).

27. Akzo Nobel Coatings, Inc. v. Aigner Corp., 197 F.3d 302, 306 (7th Cir. 1999).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 307.

32. *Id.* at 306.

33. *Id.* at 307.

view by citing Section 113(f)(2) of CERCLA.[34] This provision governs the contribution liability of responsible parties that do not enter settlement agreements with the government. It requires that contribution from non-settling parties be reduced by the dollar amount of the settlement.[35] The Seventh Circuit remanded the case to the district court for determination of the actual value of settlements entered into by Aigner and other responsible parties with the instruction that Akzo should pay approximately 13% of the net of Aigner's past and future collections.[36]

II. THE LAW

A. The Comprehensive Environmental Response, Compensation, and Liability Act

Congress enacted CERCLA[37] in 1980 "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[38] CERCLA accomplishes these goals by forcing those responsible for the contamination to bear the burden of remediation, an approach often referred to as an adoption of the "polluter pays" theory.[39] Although CERCLA does not expressly provide for joint and several liability among tortfeasors in government cleanup cases, the jurisprudence has consistently imposed such liability among responsible parties for cleanup costs when the contamination cannot be proven to be divisible.[40]

Until the "Superfund Amendments and Reauthorization Act of 1986" (SARA),[41] the statute also lacked an express provision granting responsible parties who paid the response costs the right to seek contribution from other responsible parties that did not participate in

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34. *Id.*
35. *Id.* at 308.
36. *Id.*
37. 42 U.S.C.A. §§ 9601-9675 (West 1995).
38. *See* SC Holdings, Inc. v. A.A.A. Realty Co., 935 F. Supp. 1354, 1361 (D.N.J. 1996) (citing Pub. L. No. 96-510, 5 Stat. 2767 (1980)).
39. *See generally* Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662 (S.D.N.Y. 1996); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992).
40. *See* United States v. Alcan Aluminum Corp., 964 F.2d 252, 259, 264 (3d Cir. 1992); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988); State of New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).
41. *See* Pub. L. No. 99-499, 100 Stat. 1613 (1986) (extending and amending 42 U.S.C.A. §§ 9601-9675).

the remediation.[42] The courts, however, have consistently held that parties found liable under CERCLA did have the right to seek contribution because that right furthered the goals of CERCLA.[43] When it enacted SARA, Congress specifically endorsed the judicial view[44] by expressly providing a provision that allows for a private action for contribution against responsible parties.[45] Several liability, rather than joint and several liability, is applied under the contribution provision.[46] The SARA amendment also included a provision that provides contribution protection for parties that settle with the government.[47] SARA expressly adopts the policy of encouraging quick settlements with the government and attempts to accomplish this goal by offering protection to those parties that choose to settle early.[48]

B. The Contribution Subsections

The SARA contribution provision, Section 113(f) of CERCLA, contains three specific subsections. Sections 113(f)(1) and 113(f)(2) authorize contribution actions and provide protection from contribution suits for parties who settle with the government. Section 113(f)(3) explains that the government's right to complete relief is superior to any settling party's contribution action.

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42. Section 9607 did provide for cost recovery, but this provision has been construed by the majority of courts to only apply to non-responsible parties that pay for CERCLA cleanups. *See* Auxer, *supra* note 12 (discussing in depth the difference between the two statutes and the case law interpreting them); *Town of New Windsor*, 919 F. Supp. at 681; Stearns & Foster Bedding Co. v. Franklin Holding Corp., 947 F. Supp. 790, 801 (D.N.J. 1996); and SC Holdings, Inc. v. A.A.A. Realty Co., 935 F. Supp. 1354, 1362 (D.N.J. 1996). This paper will be confined to discussion of claims by responsible parties, therefore, this cost recovery provision will not be considered in the discussion of contribution claims

43. J. Whitney Pesnell, *The Contribution Bar in CERCLA Settlements and Its Effect on the Liability of Nonsettlors*, 58 La. L. Rev. 167 (1997) [hereinafter Pesnell] (citing Kristian E. Anderson, Note, *The Right to Contribution for Response Costs Under CERCLA*, 60 Notre Dame L. Rev. 345 (1985)); United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985) (common law right to contribution action exists).

44. Pesnell, *supra* note 43, at 169.

45. 42 U.S.C.A. § 9613(f)(1) (West 1995).

46. New Jersey v. Gloucester Envtl. Management Servs., Inc., 821 F. Supp. 999, 1009 (D.N.J. 1993); United States v. Kramer, 757 F. Supp. 397, 414 (D.N.J. 1991); Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1117 (N.D. Ill. 1988).

47. 42 U.S.C.A. § 9613(f)(2) (West 1995); Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662, 668 (S.D.N.Y. 1996).

48. *See* Atlantic Richfield Co. v. American Airlines, Inc., 836 F. Supp. 763, 775 (N.D. Okla. 1993); City of New York v. Exxon Corp., 697 F. Supp. 677, 693 (S.D.N.Y. 1988); United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 (1st Cir. 1990).

Section 113(f)(1)[49] allows any person to seek contribution from any other person who is liable as a responsible party[50] under CERCLA. The provision states that the claim for contribution shall be governed by federal law.[51] It provides the courts with broad discretion to apply any "equitable factors" which it determines are appropriate in resolving the specific contribution claim.[52]

Section 113(f)(2)[53] protects persons who enter into settlements with states or the federal government to resolve their CERCLA liability. The statute grants to those who settle protection against contribution claims for matters that are addressed in the settlement agreement.[54] Other potentially responsible parties that do not enter the settlement agreement are not released from liability unless the agreement specifically provides for such a release. The settlement does, however, have the effect of reducing the liability of those other potentially responsible parties "by the amount of the settlement."[55]

Soon after these provisions were enacted, debate began concerning their proper interpretation and application. In *United States v. Cannons Engineering Corp.*,[56] the United States Court of Appeals for the First Circuit held that the language of Section 113(f)(2) requires application of a dollar-for-dollar credit when determining the contribution liability of a party that did not join a settlement agreement between the government and other responsible

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49. 42 U.S.C.A. § 9613 (f)(1) (West 1995). The text of the statute reads: Any 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 brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate the response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

50. 42 U.S.C.A. § 9607 (West 1995).

51. 42 U.S.C.A. § 9613(f)(1) (West 1995).

52. *Id.*

53. 42 U.S.C.A. § 9613(f)(2) (West 1995). The text of the statute reads: 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.

54. *Id.*

55. *Id.*

56. 899 F.2d 79, 91 (1st Cir. 1990).

parties.[57] Additionally, a district court in *Atlantic Richfield Co. v. American Airlines*[58] agreed that the pro tanto, or dollar-for-dollar, credit rule should be applied when the settlement involves the government;, but that court also pointed out that the SARA provisions do not specify which credit rule applies when the settlement involves only private parties.[59] Thus, it was unclear which credit rule applies when the settlement involves only private parties.

III. Alternatives for Calculating the Settlement Credit

The two provisions added by SARA concerning contribution claims have raised a considerable debate as to how the credit given to the non-settling tortfeasor in a contribution action should be calculated. The two approaches most often considered by courts are the Uniform Comparative Fault Act and the Uniform Contribution Fault Among Tortfeasors Act. Because use of these approaches can produce greatly different results, the decision of which method to use may affect the litigation strategy of each party to the suit. The large number of parties involved in most CERCLA actions, as well as the complexity of the litigation in these suits,[60] creates a great need for a predictable application.

A. The Uniform Contribution Among Tortfeasors Act Approach

The National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Revised Uniform Contribution Among Tortfeasors Act in 1955. Eleven states have adopted the Uniform Contribution Among Tortfeasors Act,[61] which provides for a contribution action when parties are jointly or severally liable for the same harm.[62] A party's recovery may not exceed the amount it has paid in excess of its own share, nor may the party from whom contribution is sought be forced to pay more than its proportionate share of the total liability in contribution.[63]

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57. *Id.* at 91.
58. 836 F. Supp. 763, 765 (N.D. Okla. 1993).
59. *Id.*
60. Often the number of potentially responsible parties may number in the hundreds, or even thousands. *See generally* Martin A. McCrory, *Who's on First: CERCLA Cost Recovery, Contribution, and Protection*, 37 Am. Bus. L.J. 3 (1999).
61. States adopting the Uniform Contribution Among Tortfeasors Act include: Arizona, Colorado, Florida, Massachusetts, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina and Tennessee.
62. Unif. Contribution Among Tortfeasors Act § 1(a), 12 U.L.A. 194 (1996).
63. Unif. Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996).

Section Four of the Act protects a settling party from contribution claims related to matters addressed in the settlement and reduces the claimant's recovery from the remaining responsible parties by the "amount stipulated by the release or covenant, or in the amount of the consideration paid for it, whichever is the greater."[64] In effect, the Uniform Contribution Among Tortfeasors Act establishes a "pro tanto" or "dollar-for-dollar" method of recovery.

The Uniform Contribution Among Tortfeasors Act imposes two conditions on settling parties. A settlement that releases a responsible party from further liability must be reasonable, and the parties must enter the settlement in "good faith."[65] Some courts have interpreted this requirement to mean that a good faith hearing is required.[66] Disagreement as to the extent of the hearing needed also exists among those courts that find that a hearing is required.[67]

The most important aspect of the Uniform Contribution Among Tortfeasors Act is that the Act guarantees full compensation to parties who settle and seek contribution for remediation of a contaminated site. The Act accomplishes this by providing that non-settling parties remain liable for all remaining costs not recovered in the settlement. Thus, the Uniform Contribution Among Tortfeasors Act encourages claimants to settle by insuring that they will receive full compensation for their loss. This method prevents a party seeking contribution from receiving a windfall by limiting the total recovery to the amount of the loss

Responsible party defendants are also motivated to settle because of the risk of disproportionate liability if the claimant settles with other parties for less than their shares of the costs. The Act may, however, create an incentive to postpone settlement in certain cases in the hopes that the claimant will settle with other parties for more than their proportionate shares, thus reducing the non-settling party's amount of liability. The Uniform Contribution Among Tortfeasors Act approach has been described as "both a sword and a shield" because it protects the settlers from future liability while straddling non-settlers with the difference or "orphan shares."[68]

The Act uses a "pro rata," or "by heads," method of determining each party's share of the harm. Section 113(f)(1) of CERCLA provides that a court may consider "equitable factors" in deciding each party's share of the harm. Therefore, the "pro rata" provision of the Act is not applicable under CERCLA.

64. Unif. Contribution Among Tortfeasors Act §§ 4(a), 4(b), 12 U.L.A. 264 (1996).

65. Unif. Contribution Among Tortfeasors Act § 4, 12 U.L.A. 264 (1996).

66. McDermott, Inc. v. AmClyde, 511 U.S. 202, 213, 114 S. Ct. 1461, 1467 (1994).

67. *See* Pesnell, *supra* note 43, at 240.

68. Steven Ferry, *Allocation and Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. Envtl. L.J. 36, 73

An example may clarify how the statute works. Assume the response costs for a site are forty million dollars and parties A, B, and C are responsible parties. The percentage of fault of each party is later found to be 50%, 30%, and 20% respectively. Party A pays the total cost of $40 million and then enters into a settlement agreement with Party B for fifteen million dollars, or 37.5% of the cost. Party A then may seek contribution from Party C for C's portion of the response costs. Under the dollar-for-dollar credit theory of the Uniform Contribution Among Tortfeasors Act, Party C would pay five million dollars in contribution, because the forty million dollar cost is reduced by the fifteen million dollar settlement, and Party C is only liable for 20% of the remaining total. Therefore, Party C will pay only 12.5% of the total cost.

B. The Uniform Comparative Fault Act

The Uniform Comparative Fault Act of 1977 (the "Comparative Fault Act") was approved by the National Conference of Commissioners on Uniform State Laws and sets forth a proportionate share approach that Iowa and Washington have adopted legislatively. The Act provides that the court will determine the "equitable share" of each party according to the percentage of fault assigned to each party, including those parties released under Section Six of the Act, after trial on the matter.[69] Section Six provides that a "covenant not to sue, or similar agreement entered into by a claimant and a person liable" has the effect of releasing the liable party and protecting it from future claims for contribution. This approach also reduces the claimant's future recovery by the "amount of the released person's equitable share."[70] In addition, Section Four of the Act establishes a right of contribution between two or more parties who are jointly and severally liable, whether or not judgment has been rendered against them.[71]

The key difference between the Uniform Contribution Among Tortfeasors Act and the Comparative Fault Act is that under the Comparative Fault Act each party remains liable for their percentage of harm based on the total costs, regardless of whether a settlement has reduced the actual cost to the party seeking contribution. Furthermore, under the Comparative Fault Act the percentage of fault attributed to the responsible parties is not determined until trial on the matter. Because responsible parties who settle prior to trial cannot know how much fault will be attributed to them, the parties will be

(1994).

69. Unif. Comparative Fault Act § 2, 12 U.L.A. 135 (1996).

70. Unif. Comparative Fault Act § 6, 12 U.L.A. 147 (1996).

71. Unif. Comparative Fault Act § 4(a), 12 U.L.A. 142 (1996).

burdened with the risk of complete recovery. Thus, the claimant may underestimate the party's share and be prevented from recovering completely, or it may overestimate the party's share and receive a windfall. Only rarely will the claimant recover its exact costs because of the uncertainty of each party's share of fault before trial. The strength of this approach is that it promotes equitable allocation of liability among all of the responsible parties; its weakness is the lack of a provision to allow a claimant to recover "orphan shares," thus placing the risk upon the claimant.

Returning to the previous example involving Parties A, B, and C, the Comparative Fault Act approach would result in Party C being liable for contribution to Party A for eight million dollars. This occurs because each party remains liable for their percentage of harm based on the total costs, regardless of any settlements that reduce the actual cost to the party seeking contribution.

C. The Jurisprudence

Many district courts have faced the issue of which partial settlement credit rule should be used in private party CERCLA litigation when a non-settling defendant is faced with an action for contribution. Prior to the enactment of the SARA contribution provisions, the district court in *United States v. Conservation Chemical*[72] expressed its view that the proportionate share approach outlined in the Comparative Fault Act was most consistent with the goals of CERCLA. Interestingly, even after the passage of the SARA amendments most courts[73] continued to follow the Comparative Fault Act as set forth in *Conservation Chemical.* In *Atlantic Richfield Company v. American Airlines, Inc.*,[74] the district court set forth both the majority and minority view on the issue. As the *Atlantic Richfield* opinion explained, most courts found the settlement provision of SARA, which allowed for the pro tanto approach of the Uniform Contribution Among Tortfeasors Act, applied only to settlements with the government. Those courts continued to view the proportionate share approach of the Comparative Fault Act as more consistent with the underlying principles of CERCLA legislation.[75]

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72. 619 F. Supp. 162 (W.D. Mo. 1985).

73. *Id.* (citing Edward Himes Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651 (N. D. Ill. 1987); Lyncott Corp. v. Chemical Waste Management, 690 F. Supp. 1409 (E.D. Pa. 1988); and United States v. Western Processing Co., Inc., 756 F. Supp. 1424 (W.D. Wash. 1990) as support).

74. Atlantic Richfield Co. v. American Airlines, Inc., 836 F. Supp. 763, 765 (N.D. Okla. 1993).

75. *Atlantic Richfield Co.*, 836 F. Supp. at 765.

The *Atlantic Richfield* court then proceeded to recognize that a minority of district courts have taken the approach that Congress' intent in passing SARA was to reject the Comparative Fault Act approach.[76] Those courts have found that the pro tanto rule is the appropriate method for determining the credit due a non-settling defendant. In holding that the pro tanto rule should be followed in the *Atlantic Richfield* case, the district court concluded, "the selection of the proper credit rule is a matter that has been left to the [c]ourt's discretion, to be evaluated on a case-by-case basis."[77]

Although many district courts have considered the partial settlement credit rule issue, it remains unresolved. The district courts are split as to which approach should be adopted, and the issue had not been addressed by an appellate court until the *Akzo* decision.

IV. ANALYSIS OF THE *AKZO* DECISION

The Seventh Circuit rejected the district court's view that the Comparative Fault Act should be applied in determining a non-settling party's liability in a contribution action under CERCLA. The appellate court reasoned that the Comparative Fault Act had the potential of causing disproportionate liability and that the means of preventing such an outcome was costly and time consuming. To support its view that the Uniform Contribution Among Tortfeasors Act was preferable, the Seventh Circuit relied on the language of Sections 113(f)(1) and 113(f)(2) of CERCLA, and the admiralty case of *McDermott, Inc. v. AmClyde.*[78] Although the court came to an equitable and workable solution, it failed to explain the reasoning behind its holding. Therefore, the question of which method should be used in calculating a CERCLA non-settling defendant's contribution liability remains an open one.

A. Rejection of the Uniform Comparative Fault Act

The appellate court provided an inadequate explanation for its decision to reject the Uniform Comparative Fault Act as the appropriate approach for determining the credit due to Akzo. The Seventh Circuit began the discussion by recognizing and rejecting the

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76. *Id.* at 766 (citing Allied Corp. v. Frola, 730 F. Supp. 626 (D.N.J. 1990); United States v. Cannons Eng'g. Corp., 720 F. Supp. 1027 (D.C. Mass. 1989), *aff'd,* 899 F.2d 79 (1st Cir. 1990); and United States v. Rohm & Haas Co., 721 F. Supp. 666 (D.N.J. 1989)).

77. *Atlantic Richfield Co.,* 836 F. Supp. at 766.

78. 511 U.S. 202, 114 S. Ct. 1461 (1994).

district court's misapplication of the Uniform Comparative Fault Act in which it only considered the present parties to the suit. The court found that this approach might allow a responsible party to "turn a tidy profit" by agreeing to remediate a site and then carefully planning its litigation strategy to recover more than the other parties' equitable shares of the costs.[79] As clarification for this view, the court offered two hypotheticals.

In the first hypothetical, firms A, B, and C are responsible for sending 40%, 10% and 50% of the pollutants to a site, respectively. If A agreed to remediate the site and then sued only B for contribution, B would pay 20% of the total costs according to the district court's reading of the Uniform Comparative Fault Act. The Uniform Comparative Fault Act produces this result because B's 10% of the total amount of pollutants sent is 20% of the pollutants A and B generated jointly. If C has already settled and paid his 50% share of responsibility, A will have reduced his contribution to the total costs to 30%, from its original 40%, by choosing to settle with C and file suit against B.[80]

In its second hypothetical, the court considered a situation in which ten firms are equally responsible for contamination of a site. If A once again agreed to perform the remediation and then sued B, A would recover 50% of the costs from B, because they are equally responsible for the waste. A could then proceed to sue C and recover another 50% of the costs. This process could continue with A ultimately recovering 450% of the total cleanup costs from the other responsible parties, thus making an outstanding profit. The court also noted that even if a cap of 100% of costs was set to prevent A from turning a profit, the possible result could still be unfair. B and C could each be held to pay 50% of the costs each, while the remaining firms could be left to pay nothing.[81] The appellate court said of this possibility, "[It] is not a sensible outcome of a process that is supposed to yield an 'equitable' allocation of expenses."[82]

Applying this reasoning to the suit involving Akzo, the appellate court decided that following the district court's approach might have allowed Aigner to receive a windfall because Akzo's liability was increased to cover a percentage of the total cost greater than the actual liability credited to Akzo. The lower court based liability on total gallons of solvents sent to the site by each party. The district court found that Akzo and Aigner shipped approximately 9% and 71%, of the solvents by volume, respectively, but Akzo was ordered

79. *Akzo*, 197 F.3d at 306.
80. *Id.*
81. *Id.*
82. *Id.*

to pay almost 13% of Aigner's total costs.[83] The history of the case does not provide information as to whether all responsible parties were located and solvent, but Aigner did have claims pending against other non-settling responsible parties.[84] If one or more of the responsible parties were missing or unable to pay its portion of the damage, Aigner might have been left to bear the "orphan shares." If all the parties were accounted for, Aigner may have recovered twice for the portion of harm that the district court increased Akzo's share to cover.

One way to prevent such injustice would be to require that all responsibility be apportioned before any party is required to pay. This argument is the heart of Akzo's plea to the court to apportion the fault of all parties before entering judgment regarding Akzo's liability. The court rejected this approach, stating that it would either "complicate an already difficult allocation process or straddle firms such as Aigner with excess costs."[85] The only reasoning for this decision is judicial economy in suits involving numerous parties. In such a case, the determination of fault could be a very lengthy and expensive process for the court, since it is difficult to determine the "responsibility for wastes sent years (if not decades) ago to a firm that did not keep good records and contaminated a wide area."[86]

The possibility also exists that Akzo could have been required to join all of the responsible parties so as to prevent it from bearing all of the orphan shares and also to prevent Aigner from receiving a windfall. This requirement shifts the burden of locating all of the parties onto Akzo rather than Aigner. This burden is an unfair one because the number of potential parties is usually very numerous.[87] The added time and costs involved could have the effect of forcing parties to enter settlement agreements that they feel are unfair just to minimize their losses.

The appellate court also briefly considered the argument that both Akzo and Aigner were wrong concerning the appropriate reading of the Uniform Comparative Fault Act, but then quickly dismissed the idea of considering the approach any further. By raising the question of whether the Uniform Comparative Fault Act might be read to include either pollution shares of other parties or actual recoveries

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83. *Id.* at 304. The appellate court states that the 13% was derived by dividing the Akzo's volume of solvents shipped by the total gallons. However, there is a mathematical discrepancy because nine divided by eighty does not equal thirteen. The opinion does not provide enough information to accurately determine how the value was calculated.

84. *Id.* at 307.

85. *Id.* at 306.

86. *Id.* at 308.

87. McCrory, *supra* note 60.

from other parties[88] and then failing to provide a definitive answer, the court opened its rejection of the Uniform Comparative Fault Act approach to attack. The "pollution shares" approach appears to be workable in this case because the language of SARA allows liability to be based on "equitable factors"[89] other than fault. In the case of Akzo, the court does not explain why it would be difficult to determine the volumes of solvents shipped to the site by all responsible parties.

Later in the opinion, the court returned to its ten-firm hypothetical to demonstrate that the Uniform Contribution Among Tortfeasors Act is a preferable solution. Recall that each of the firms is equally responsible for the contamination. The court considered the situation where A remediates the site and then settles with both C and D for their share of the costs, or a total of 20% of the cost. If A then proceeds to sue B, under the proportionate fault approach of the Uniform Comparative Fault Act, B would be liable for 40% of the total costs, regardless of the amount of the actual recovery by A, if all other parties were excluded from consideration. This result is reached because B must pay half of the remaining 80% of the original cost.

The court then considered the outcome produced by the Uniform Contribution Among Tortfeasors Act. Under the pro tanto approach, or dollar-for-dollar credit, A's recovery would be reduced by the actual amount of collections, and A and D would share the remaining costs equally.[90] The court stated that "[e]xcluding only actual collections from third parties enables the court to conserve its resources."[91] By limiting recovery to the actual costs of the response action, this method also prevents the claimant from receiving a windfall.

B. Reliance on Section 113 for Support of the Uniform Contribution Among Tortfeasors Act

The Seventh Circuit looked to the language of the statute itself to support its view that the Uniform Contribution Among Tortfeasors Act is the appropriate approach for determining the effect of a settlement on the non-settling party in an action for contribution. The court stated, "[t]o the extent language in section 113 speaks to the issue, it prefers the approach" of the Uniform Contribution Among Tortfeasors Act.[92] The court based this broad statement on Section

88. *Akzo*, 197 F.3d at 306.
89. 42 U.S.C.A. § 9613(f)(1) (West 1995).
90. *Akzo*, 197 F.3d at 307.
91. *Id.* at 308.
92. *Id.* at 307.

113(f)(2) which addresses the situation when various responsible parties settle with the government.[93] The court later referred to this provision as the "most closely related rule of law."[94] The language of that provision—"but it reduces the potential liability of the others by the amount of the settlement"—has itself been the issue of much litigation.[95] The court agreed with the majority view and read this language to mean that Congress expressly provided that the pro tanto approach should be used in situations involving government settlements.[96]

Although looking to legislation as a whole to determine the meaning of an unclear provision is a standard method of interpretation, the possibility exists that Congress intended two different interpretations in the CERCLA context. Congress may, in fact, have intended the pro tanto approach to apply when the government is a party and a different approach to apply in cases when it is not. However, the intent of Congress is unclear because the provision does not have language regarding private party settlements.

Many incentives exist to allow the pro tanto approach to apply to the government. One is to allow for complete recovery. The government may pay to remediate a site for which it was not originally responsible. The pro tanto approach guarantees that if the government enters into a settlement, it will immediately know the effect that settlement will have on its total recovery. This approach allows the government to avoid the extensive costs of litigation by leaving it free to accept such settlements without fear that it will be left to pay any "orphan shares."

The incentive to protect what has been referred to as the "liable plaintiff"[97] is much weaker. The basis of this argument is that when a party holds some responsibility for the harm, it is fair to saddle that party with any potential shortfalls in recovery due to pre-litigation settlements. This theory can be reconciled with the "polluter pays" policy of CERCLA because the plaintiff seeking relief is in fact a "polluter." Therefore, the pro tanto approach may unfairly burden the non-settling party, also a responsible party, with the shortfall resulting from settlements the claimant accepted. This approach seems to be even more unfair when the claimant is more responsible than the non-settling party. In that case, the need to protect the claimant's right to total recovery may be outweighed by the goal of requiring each party to pay in proportion to their "equitable share."

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93. 42 U.S.C.A. § 9613(f)(2) (West 1995).
94. *Akzo*, 197 F.3d at 308.
95. *See generally* Pesnell, *supra* note 43.
96. *Akzo*, 197 F.3d at 307.
97. *See* Marc L. Frohman, *Rethinking the Partial Settlement Credit Rule in Private Party CERCLA Actions: An Argument in Support of the Pro Tanto Rule*, 66 U. Colo. L. Rev. 711 (1995).

Adopting a different rule for private party contribution actions would not negatively affect CERCLA's goal of encouraging quick cleanups. As in the *Akzo* case, these claims arise after the remediation has begun, or even after it has been completed by one or more of the other potentially responsible parties. Therefore, speed of settlement is not as strong a goal as it is in governmental settlements. An argument could be made that the responsible parties would not have reached a speedy settlement with the government if they had believed that they would not be capable of recovering some of their expenses through contribution. In reality, responsible parties often do not have much of a choice regarding their actual cleanup activities. Because of the power granted to the government by CERCLA, these parties often are encouraged to enter into a consent decree by the threat of litigation with the government in which they have little chance of winning.[98] Therefore, the more economical choice is to settle.

The Seventh Circuit read the CERCLA provisions to suggest that the same credit rule should apply regardless of the identity of the parties to the suit. For the reasons set forth above, this view is not a necessary one; however, the view may be a sensible one because of its simplicity. Adopting a different view, the proportionate share approach of the Uniform Comparative Fault Act, when private party settlements are at issue, does not undermine the overall goals of the CERCLA legislation. The argument that the statute requires application of the pro tanto rule is not enough to support the court's view that the Uniform Contribution Among Tortfeasors Act must apply to contribution actions among private party litigants; however, it does add support to the court's opinion when read as a whole.

C. McDermott, Inc. v. AmClyde

At least one commentator has argued that CERCLA's legislative history supports the view that common law principles should be used in the absence of express litigation on an issue.[99] The courts have taken this approach by importing the doctrine of divisibility of harm and equitable apportionment into the CERCLA jurisprudence.[100] Unfortunately, this case presents an issue of first impression at the appellate court level, and the Seventh Circuit cannot depend on a

98. Once a party has been identified as a potentially responsible party, it is held strictly liable for the remediation costs. The defenses allowed under CERCLA make it almost impossible to avoid such responsibility.

99. *See* 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, 55 (1994).

100. *Id.*

well-developed body of case-law to answer the question presented. Nevertheless, the court did consider the Supreme Court decision of *McDermott, Inc. v. AmClyde,*[101] a case that involved a similar issue of contribution raised in the admiralty context. Although not binding on the Seventh Circuit's decision because it concerned a different body of law, the Supreme Court, in its *McDermott* opinion, provided an analytical approach to the choice between the Uniform Comparative Fault Act and Uniform Contribution Among Tortfeasors Act that could be easily applied by analogy to the issue under the laws of CERCLA. The Seventh Circuit, however, mischaracterized the Court's efforts by stating that *McDermott* stood for the proposition that the choice was merely a "tossup."[102] Moreover, it failed to apply the Supreme Court's reasoning to the *Akzo* case in order to arrive at a logical and well supported result.

The Supreme Court held that the contribution liability of a non-settling party in an admiralty case should be calculated using the proportionate fault approach of the Uniform Comparative Fault Act rather than the dollar-for-dollar credit rule of the Uniform Contribution Among Tortfeasors Act.[103]

McDermott, Inc.[104] involved an action in admiralty for damages to a crane and offshore platform. AmClyde sold McDermott a specially designed 5,000 ton crane for use in its off-shore operations. McDermott first used the crane in an attempt to lift an oil platform deck from a barge to its base in the Gulf of Mexico. During that transfer, one of the main hooks on the sling broke, causing damage to the crane and the deck. McDermott filed an action against AmClyde, River Don (the hook manufacturer), and the other three companies that supplied parts for the sling that collapsed.[105]

Prior to trial, McDermott entered into a settlement agreement with the three "sling defendants." The agreement stated that in exchange for $1 million McDermott would release the parties from the suit and indemnify them against future action for contribution by AmClyde or River Don.[106]

After a trial on the merits, the trial court determined the damages to be $2.1 million. Based on answers to special interrogatories, the court allocated liability to the parties in the amounts of: 30% to McDermott and the three settling defendants, 32% to AmClyde and 38% to River Don. The court entered judgment against AmClyde

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101. 511 U.S. 202, 114 S. Ct. 1461 (1994).
102. Akzo Nobel Coatings, Inc. v. Aigner Corp., 197 F.3d 302, 308 (7th Cir. 1999).
103. *Id.* at 217, 114 S. Ct. at 1470.
104. *McDermott, Inc.*, 511 U.S. 202, 114 S. Ct. 1461 (1994).
105. *Id.* at 205, 114 S. Ct. at 1463.
106. *Id.* at 205, 114 S. Ct. at 1464.

and River Don in the amount of $672,000 and $798,000 respectively.[107]

The United States Court of Appeals for the Fifth Circuit reversed the judgement of the district court, holding that a contract provision between McDermott and AmClyde prevented any recovery against the crane manufacturer. In addition, the court concluded that the district court improperly allocated final damage awards among the parties, holding that a pro tanto, or dollar-for-dollar, credit rule should have been applied. Thus reducing McDermott's possible recovery by the $1 million received in settlement and the 30% liability attributed to the plaintiff and settling defendants together, or $1,630,000, with AmClyde and River Don liable for the remaining $470,000 according to their percentage of fault.[108]

The Supreme Court granted certiorari to determine the issue of first impression concerning the effect of partial settlement on non-settling defendants in an admiralty action for contribution.[109] The Court noted the lack of legislation as well as the apparent lack of a consensus among the circuit courts in similar cases. The Court then offered a brief overview of the Uniform Comparative Fault Act and the Uniform Contribution Among Tortfeasors Act.

The Court stated that three goals must be considered when determining which of the approaches is the most favorable. Those considerations are: (1) consistency with the Court's earlier holding that the proportionate fault approach of calculating damages applies in maritime cases;[110] (2) promotion of settlement; and (3) judicial economy.[111]

The Court found that the pro tanto rule would lead to a result contrary to its earlier holding that damages should be apportioned based on fault. In drawing this conclusion, the Court noted that the proportionate share rule was consistent with the Court's earlier holding because, under most circumstances, the litigating defendant is only required to pay its share. The pro tanto rule is contrary to the goal of proportionality because it is rare that a settling defendant will ever pay exactly its proportionate share of the loss.

Because decisions to settle most often reflect the uncertainty of trial and the plaintiff's need for a "war chest" to finance future

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107. *Id.* at 206, 114 S. Ct. at 1464.
108. *Id.*
109. *Id.* at 207, 114 S. Ct. at 1464.
110. United States v. Reliable Transfer Co., 421 U.S. 397, 95 S. Ct. 1708 (1975). The Court replaced an equal damage rule with a rule requiring that damages be apportioned based on the proportionate share of fault when such an allocation can be reasonably made in a maritime case. The Court held that the simplicity of the old rule must yield to the fairness promoted by the new rule. McDermott, Inc. v. AmClyde, 511 U.S. 202, 208, 114 S. Ct. 1461, 1465 (1994).
111. *McDermott, Inc.*, 511 U.S. at 211, 114 S. Ct. at 1467.

litigation, the plaintiff will frequently settle for an amount less than the proportionate share of the settling defendants. Settling for less than a party's share leaves the non-settling defendants open to increased judgments. The Court noted that "good faith" hearings are often required to reduce the potential for unfairness, but concluded that these hearings did not effectively protect the non-settling defendants because to do so they would have to be "mini-trials" on the merits. Therefore, the pro tanto approach, even with the requirement of a good faith hearing, ran counter to the Supreme Court's earlier holding that damages in admiralty cases must be calculated based on proportionate fault.[112]

The Court had a more difficult time in determining which rule encourages settlements. The pro tanto rule encourages settlements by allowing the plaintiff to know in advance how much recovery he will receive, and it may entice defendants to settle in the hopes of paying less than they would be ordered to at trial. Because this method leaves the non-settling defendants at a disadvantage by requiring them to remain jointly and severally liable for the remainder of the loss, the method may be viewed as encouraging complete, rather than partial settlements. The Court found that this increased incentive to settle came "at too high a price" to non-settling defendants. The Court reasoned that other factors such as avoidance of litigation costs, interest in certainty of final payments, and the desire to maintain ongoing commercial relationships was enough to encourage pre-trial settlements in most cases. Because the Court could not see any reasonable advantage to the pro tanto rule in encouraging settlements, it held that the proportionate share rule was adequate to promote this goal.[113]

Finally, the Court considered the effect on judicial economy of the two approaches. It stated that the pro tanto rule was obviously more advantageous to the goal of judicial economy. Because the risk of unfairness is high, however, the Court refused to consider applying the pro tanto rule without the requirement of the "good faith" hearing. The additional time which is necessary to comply with this requirement makes it impossible to determine which method is more favorable. The only difference between the approaches is when the determination of fault of the parties would be made. In the pro tanto approach the determination would be made in a pre-trial hearing, whereas in the proportionate share approach it would be made at trial. Although most "good faith" hearings are merely "cursory," the Court acknowledged the possibility that in reserving the apportionment of liability for trial the proportionate share approach may, in certain

112. *Id.* at 212, 114 S. Ct. at 1467.
113. *Id.* at 214-16, 114 S. Ct. at 1468-69.

circumstances, be more efficient. In particular, the Court noted that: (1) the defendants may settle prior to the actual trial rendering the determination unnecessary; (2) because the same facts needed to determine fault may be introduced at the trial anyway, it may not actually require additional court time; and (3) the possibility that the non-settling defendant will escape liability by using the "empty chair" defense supports use of the rule. Therefore, the Court could not make a definitive determination of which method better promotes judicial economy.[114]

In applying the *McDermott* case to the *Akzo* case, the Seventh Circuit did an injustice to the careful reasoning provided by the Supreme Court. The appellate court did not address the fact that the goals of admiralty law and CERCLA are very similar, nor did it engage in the same careful weighing of each approach before incorrectly stating that *McDermott* found the choice between the two methods a simple "tossup."[115] The appellate court then used this description of *McDermott's* careful weighing to support its view that the Uniform Contribution Among Tortfeasors Act approach was preferable by distinguishing the prior case as one of admiralty.

The proportionate fault method of calculating damages, used by the Supreme Court in admiralty cases, is consistent with the "polluter pays" theory of CERCLA. Section 113(f)(1) allows courts to use "equitable factors" in allocating response costs among responsible parties. Therefore, using the reasoning of *McDermott,* the proportionate share approach of the Uniform Comparative Fault Act also appears to be preferable to further this goal under the laws of CERCLA. Actually determining the proportionate share of parties involved in CERCLA litigation may be difficult or even impossible. The complexity of determining responsibility for hazardous waste contamination is usually frustrated by the lack of records or other means of reliably determining events that may have occurred many years prior to the litigation.

The "equitable factor" language recognizes that there is not a standard formula for determining responsibility. In Akzo's case, the courts chose to base liability on volumes of solvents shipped to the facility. Therefore, it would appear that the court could determine the proportionate share of all parties prior to determining liability. However, in many cases this task may not be as easy to accomplish and could add years of trial time to an already lengthy litigation experience. Furthermore, the goals of encouraging settlements and increasing judicial economy weigh more heavily on the decision in

114. *Id.* at 216, 114 S. Ct. at 1469.

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

the CERCLA context. Because CERCLA litigation can involve parties numbering in the hundreds or even thousands,[116] judicial economy must be given serious consideration. The Seventh Circuit briefly pointed out the potential for complex and protracted litigation in the CERCLA context, but it failed to explain the actual weight of this argument.

The pro tanto credit rule favors judicial economy since the court may simply deduct the amount of the settlement agreement from the claimant's recovery before allocating the liability of any non-settling defendants. The proportionate fault approach does not conserve the resources of the court as effectively because the fault of each party must be determined prior to determining liability. The trial court attempted to ease this burden by stating that the Uniform Comparative Fault Act only required the court to consider the fault of the parties to the suit. The Seventh Circuit rejected this view because excluding non-parties may unfairly burden the non-settling party with disproportionate liability.[117] The *McDermott* factors support the choice of the Uniform Contribution Among Tortfeasors Act's pro tanto approach in the complex CERCLA suit context.

D. The "Federal Law" Argument as Support for Uniform Contribution Among Tortfeasors Act

The court rejected the Uniform Comparative Fault Act, reasoning that the statute requires that the action be based on federal law. No federal legislation exists that directly determines the issue. The court justified its choice of the Uniform Contribution Among Tortfeasors Act, which is also not a federal rule, by expressing the principle of interpretation that it may borrow from state law when its only alternative is "judicial invention."[118] The court interpreted the "federal law" requirement to mean that the law it adopts should be "nationally uniform."[119] It then rejected the Uniform Comparative Fault Act because it had only been adopted in two states, while recognizing that the Uniform Contribution Among Tortfeaosrs Act had only been adopted in eleven states.

The Restatement (Second) of Torts also contains a provision addressing contribution.[120] Because its provision was added following the adoption of both the Uniform Acts, it is a source to

116. McCrory, *supra* note 60; *see also* United States v. Cannons Eng'g Corp., 720 F. Supp. 1027 (D. Mass. 1989), *aff'd* 899 F.2d 79 (1st Cir. 1990).
117. *Akzo*, 197 F.3d at 306.
118. *Id.* at 306-07.
119. *Id.* at 307.
120. Restatement (Second) of Torts § 886A (1979).

consult for an answer to the question of which settlement credit rule to apply in a contribution action. In 1979, the Restatement included, for the first time, a provision to address the issue of contribution among tortfeasors.[121] Section 886A provides for a right of contribution among joint tortfeasors similar to the one CERCLA provides in Section 113(f)(1), but it fails to provide for the method of apportionment of the "equitable shares" of the tortfeasors. In the comments to the Restatement, the American Law Institute makes it clear that both the pro tanto and proportionate share approaches were considered, and that each has positive and negative attributes.[122] By failing to adopt one of the methods in particular, the Institute makes it clear that no nationally recognizable preference in approach currently exists.

In making the "federal law" argument, the Seventh Circuit did not clarify its reasoning. The court was faced with legislation that demanded the contribution action be governed by federal law when none currently exists. In spite of this the court was forced to determine which rule should be considered the federally adopted one, and it chose the Uniform Contribution Among Tortfeasors Act. The court explained that Section 113(f)(2), governing settlements with the government, requires the application of the pro tanto approach and that adopting the Uniform Comparative Fault Act for contribution actions among private parties "would undermine that decision."[123] The court's "federal law" argument would have been more persuasive if the court had clearly articulated that it was choosing one of the approaches to be the "federal law," rather than rejecting the other approach because it was not a "federal law."

V. EFFECT OF THE COURT'S HOLDING

In remanding the case to the lower court, the Seventh Circuit ordered that Akzo should be held liable for only "12.56% of the costs net" of Aigner's past and future collections.[124] This order was an application of the pro tanto rule to reduce Akzo's liability by the actual dollar amount of Aigner's collections. Although the court urged the application of the Uniform Contribution Among Tortfeasors Act approach, it modified this approach by including a reduction for actual recoveries.

The Seventh Circuit obviously placed great emphasis on the guarantee of complete recovery for the claimant when it chose to utilize the Uniform Contribution Among Tortfeasors Act. However,

121. *Id.*
122. *Id.*
123. *Akzo*, 197 F.3d at 307.
124. *Id.* at 308.

it also set up a method for preventing Aigner from unfairly benefitting by carefully planning its litigation strategy. The method chosen by the court was to append the requirement that Aigner's actual collections and any future recoveries would be effectively credited towards Akzo's liability.[125]

Although the Seventh Circuit did not specifically address the percentage of liability for which it held Akzo liable, the effect of the holding protects both claimants and non-settling parties from being straddled with all of the orphan shares.[126] The appellate court briefly explained that the district court increased Akzo's liability from the 9% by volume of solvents it sent to the site to 13% of the total liability. The Seventh Circuit later adopted the 13% in its holding, but it is unclear whether it was intentional. The Uniform Comparative Fault Act requires the non-settling party to pay only its proportionate share of the liability, thus causing the claimant to be left with any costs that cannot be recovered from a responsible party. The Uniform Contribution Among Tortfeasors Act reduces the claimants recovery by the amount of actual collections, but it then leaves the parties to the suit each liable for an equal share of the orphan shares. In Akzo's case, this result would be unfair because Akzo was found only to have shipped 9% of all solvents to the site, whereas Aigner's share of the response costs was a much greater 71%. The effect of the Seventh Circuit's decision is to split the orphan shares proportionately among the parties to the suit. This result is fair because neither party is forced to bear all of the orphan shares, and the shares are fairly distributed.

The drawback to this approach is that it may discourage Aigner from pursuing any future claims because its recovery from Akzo would be reduced if it were successful. Also, if Aigner did proceed with litigation in the future, Akzo's liability could remain an issue indefinitely.

The court suggested at the end of the opinion that its choice of the Uniform Contribution Among Tortfeasors Act, which places the risk of shortfall on Akzo, is not unfair to Akzo. If Akzo believed the settlements were too low, it either could have intervened or challenged the good faith of the settlements.[127] However, these options place additional financial burdens on Akzo should it choose

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125. *Id.*

126. *See* Auxer, *supra* note 12 (arguing that allocating orphan shares among all responsible parties in proportion to their equitable share of liability will encourage settlements with the government since claimants will be able to recover these costs through contribution); *see also* Frohman, *supra* note 97 (raising the liable plaintiff argument to support the view that the non-settling party should not bear all of the risk of orphan shares).

127. *Akzo*, 197 F.3d at 308.

to utilize them, and, in reality, they are very unlikely to protect Akzo's interests because a court will rarely disrupt a settlement upon the complaint of a third party.[128] In order to do so, the court would be required to hold an extensive hearing to fully determine the effect the settlement would have on Akzo. It is unlikely that a court will hold such a hearing, and doing so would undermine this court's emphasis on judicial economy.

The problem with the court's opinion is its failure to address fully the reasoning that led to its decision. This decision, addressing an issue of first impression at the appellate court level, will be carefully scrutinized by future courts faced with the same issue. Future courts are unlikely to find strong justification for following the Seventh Circuit's holding. Therefore, this holding will have the effect of strengthening the argument that Congress actually left this decision to the court's discretion to be decided on a case-by-case basis.

VI. SUGGESTED APPROACH TO SOLVING THE PROBLEM

Congress should legislatively adopt the Seventh Circuit's approach for calculating the liability of non-settling responsible parties in CERCLA claims for contribution. By doing so, Congress will provide a fair, easily applicable solution. Adopting express legislation will also provide certainty in the law so that future parties may accurately weigh the potential effects of either choosing to settle or proceeding with litigation. Congress should add language to the existing contribution provision that requires a dollar-for-dollar credit for recovery due to settlement or future litigation and also authorizes the courts to divide the remaining costs on a proportionate share basis to guarantee that the entire risk of any orphan shares are not placed on any single party. The added language should read: "A claimant's recovery shall be reduced by the amount recovered in settlement or future litigation, on a dollar-for-dollar basis, and the non-settling party's liability shall be based on its proportionate share of the remaining claim." The addition of this clearly worded language to the existing contribution provision expressly providing for the method of calculation of a non-settling party's settlement credit should end the judicial debate of which settlement credit rule should be applied in CERCLA contribution suits.[129]

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128. *See* Lynette Boomgaarden & Charles Breer, *Surveying the Superfund Settlement Dilemma,* 27 Land & Water L. Rev. 83 (1992).

129. Revised § 113(f)(1) should read in full:

> Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure. In resolving contribution claims, the court may allocate response costs among the liable parties using such

Until Congress chooses to adopt legislation that explicitly resolves the question of which settlement credit rule should apply in the CERCLA context, courts will have to continue to proceed on a case-by-case basis. The Supreme Court, if it should hear the issue, and the remaining United States Courts of Appeals should follow the Seventh Circuit's lead and adopt a modified version of the Contribution Among Tortfeasors Act. These courts should apply a dollar-for-dollar credit to a non-settling party's liability. Applying this pro tanto rule will further the goals of judicial economy in the complicated litigation scenarios common in the CERCLA context. Adding the requirement that parties to the contribution suit share the orphan shares proportionate to their responsibility also furthers fairness and prevents the entire risk of shortfall from resting on any individual party. The courts hearing future suits should adopt the Seventh Circuit's approach and strengthen it by fully explaining the policies that are being promoted.

CONCLUSION

The *Akzo* court fashioned a workable and fair solution to the problem of determining a non-settling party's liability in a CERCLA contribution action when the claimant has entered a settlement agreement with other responsible parties prior to filing suit. Although the court's decision is a good one, the court missed the opportunity to strengthen the impact of this holding by failing to explain adequately its reasoning. The court's use of the pro tanto credit rule, outlined in the Uniform Contribution Among Tortfeasors Act, will increase judicial economy because the courts will not be burdened with the awesome task of determining the proportionate share of the response costs for every responsible party before it can rule on the defendant's contribution liability. This method will also further CERCLA's goal of encouraging responsible parties to settle their liability with the government, because parties will be guaranteed complete recovery. The court's decision to divide the orphan shares proportionately is also in line with the "polluter pays" theory, and it does not unduly burden any of the parties to the suit.

Because CERCLA actions often involve long, complicated litigation, the need for a predictable application of Section 113 is

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equitable factors as the court determines are appropriate. A claimant's recovery shall be reduced by the amount recovered in settlement or future litigation, on a dollar-for-dollar basis, and the non-settling party's liability shall be based on its proportionate share of the remaining claim. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

great. The *Akzo* decision does not provide certainty in the law because it was rendered at the appellate court level. Unless the Supreme Court chooses to rule on the issue in the future, only lawyers can generate certainty in the law. A legislative adoption of the *Akzo* decision would put an end to the confusion caused by the current wording of Section 113(f)(1). Express legislation would allow responsible parties the opportunity to accurately weigh the choices of settlement and litigation before they find themselves in embroiled in a court battle that will most likely take years to resolve.

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