

2-1-2017

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### Recommended Citation

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Available at: <http://scholarship.law.berkeley.edu/elq/vol43/iss3/3>

### Link to publisher version (DOI)

<http://dx.doi.org/>

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# Accounting for Partial Settlements in CERCLA Private-Party Cost Allocation: No Rule Is the Best Rule

Haley Oveson\*

*To the extent that litigation makes a muddle of private-party ordering, the Comprehensive Environmental Response, Compensation, and Liability Act has created more messes than it has cleaned up. Congress enacted the Act to clean up hazardous waste spills. The litigious explosion that resulted, however, caused widespread and pervasive private sector disarray. Private parties rely on settlement to extricate themselves from litigation under the Act, but their attorneys will agree that planning a strategy to settle multi-party litigation is “difficult under the best of circumstances.” At the heart of this difficulty is uncertainty. One source of uncertainty is the choice of rule to apply to measure the effect of a settlement on the potential liability of nonsettling defendants. This is the partial settlement credit issue.*

*In AmeriPride Services, Inc. v. Texas Eastern Overseas, Inc., the Ninth Circuit ruled on the partial settlement credit issue and left the choice of rule to the district courts. Private-party representatives viewed the AmeriPride decision as a missed opportunity to provide certainty to beleaguered litigants. This Note will argue that AmeriPride was decided properly, and that a partial settlement credit rule would be an ineffective tool for providing certainty to private-party litigants. The Note considers the choice between rules and rulelessness, and concludes that, for determining the effect of partial settlements in private-party litigation under the Comprehensive Environmental Response, Compensation, and Liability Act, no rule is the best rule.*

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DOI: <http://dx.doi.org/10.15779/Z38HK2G>

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\* J.D., University of California, Berkeley, School of Law (Boalt Hall), 2016; B.S., Industrial Engineering, Oregon State University, 2011. I would like to thank Professor Robert Infelise for his infinite patience. I also want to express my gratitude to the *Ecology Law Quarterly* editing staff, especially Eric DeBellis and Taylor Ann Whittemore, for their editing expertise.

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## INTRODUCTION

When Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980, it set out to make private parties clean up their own hazardous messes.<sup>1</sup> Motivated by the desire to spare taxpayers cleanup costs,<sup>2</sup> Congress defined CERCLA liability broadly.<sup>3</sup> One court observed that CERCLA imposes liability on “anyone who disposes of just about anything.”<sup>4</sup>

Today, you might feel bad for a fish stuck in the CERCLA barrel—once in, it’s hard to get out. Parties encompassed by CERCLA’s sweeping definition of liability, known as potentially responsible parties (PRPs), face years, or maybe decades, of litigation.<sup>5</sup> PRPs in complex CERCLA suits number in the hundreds.<sup>6</sup> A PRP who dumped waste in 1965 may find itself embroiled in litigation fifty years later.<sup>7</sup> Frequently, evidence of liability has disappeared.<sup>8</sup> PRPs often have dissolved or reorganized.<sup>9</sup> CERCLA’s statutory scheme adds

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1. *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 602 (2009) (describing CERCLA’s goals of protecting public health and the environment by promoting the prompt cleanup of hazardous waste and ensuring that the parties responsible for that waste bear the costs of cleaning it up).

2. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 806 (S.D. Ohio 1983) (Congress intended “those responsible for the problems caused by the hazardous wastes . . . to bear the costs and responsibilities for remedying the condition.”); *O’Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989) (“[W]here all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty.”), *cert. denied*, 493 U.S. 1071 (1990).

3. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 136 (2007) (referencing the “broad definitions” of liable parties under CERCLA); *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 893 (10th Cir. 2000) (referring to the “broad scope of CERCLA liability”).

4. *A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998).

5. “The explosion of litigation under CERCLA has been commented upon widely.” 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, 722 (1994). *AmeriPride Servs. Inc. v. Tex. E. Overseas, Inc.* is the CERCLA case that is the topic of this Note. 782 F.3d 474 (9th Cir. 2015). The litigation has been ongoing since the year 2000. *Id.* at 481. In 2015 the Ninth Circuit remanded to the district court. *Id.* at 492.

6. Daniel Riesel & Ashley S. Miller, *Cleanup and Liability: Fundamental Issues in Hazardous Materials Litigation*, SR045 ALI-ABA 841, 926 (2010) (“[T]he major problem that litigants have faced in contribution actions is the number of PRPs in any particular litigation.”); *see, e.g.*, *Hillsborough County v. A & E Rd. Oiling Serv., Inc.*, 853 F. Supp. 1402, 1407 (M.D. Fla. 1994) (170 defendants); *City & County of Denver v. Adolph Coors Co.*, 829 F. Supp. 340, 342 (D. Colo. 1993) (119 settlers); *United States v. SCA Servs. of Ind., Inc.*, 827 F. Supp. 526, 529 (N.D. Ind. 1993) (over 80 third-party defendants); *United States v. Kramer*, 757 F. Supp. 397, 412 (D.N.J. 1991) (more than 250 third-party defendants); *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960, 961 (D. Conn. 1991) (“hundreds of parties”), *aff’d*, 958 F.2d 1192 (2d Cir. 1992); *United States v. Cannons Eng’g Corp.*, 720 F. Supp. 1027, 1033 (D. Mass. 1989) (300 defendants), *aff’d*, 899 F.2d 79 (1st Cir. 1990); *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 681 (S.D.N.Y. 1988) (350 third-party defendants).

7. *See, e.g., AmeriPride*, 782 F.3d at 480 (named defendant conducted operations on the site for seventeen years prior to selling in 1983).

8. *Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 547 (6th Cir. 2001) (observing that “the passage of time” may make “direct evidence difficult or impossible to obtain”).

9. *See, e.g., AmeriPride Servs. Inc. v. Valley Indus. Serv., Inc.*, No. CIV. S-00-113, 2012 WL 1413880, at \*6 (E.D. Cal. Apr. 20, 2012) (prior to a decision by the Delaware Supreme Court, defendants were “defunct corporations who had no capacity to respond to cleanup orders”); *Burlington*

to the morass. It is widely acknowledged that Congress passed CERCLA in haste and that its provisions lack clarity.<sup>10</sup> Further, a series of Supreme Court decisions in the past decade shifted CERCLA's liability scheme.<sup>11</sup> As a result, PRPs face an "ever-changing" legal landscape.<sup>12</sup> As one commentator reflected, "life just keeps getting tougher" for CERCLA litigants.<sup>13</sup>

Generally, settlement is the only avenue of escape from the CERCLA barrel of fish.<sup>14</sup> Recognizing this truth, Congress has emphasized the importance of settlement in CERCLA litigation.<sup>15</sup> Given the number of litigants in CERCLA suits, partial settlements are common.<sup>16</sup> A settlement with fewer than all jointly and severally liable defendants, however, raises the partial settlement credit issue: courts must determine the effect of the partial settlement on the potential liability of nonsettling defendants.<sup>17</sup> In the absence of statutory guidance, courts generally look to two approaches for determining the value of a partial settlement credit: the Uniform Contribution Among Tortfeasors Act (UCATA) pro tanto method and the Uniform Comparative Fault Act (UCFA) proportionate share method.<sup>18</sup> The UCATA reduces the liability of nonsettling defendants by the dollar amount of the settlement.<sup>19</sup> The

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N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 605–06, n.4 (2009) (insolvent former owner-operator was predominantly responsible for contaminating the site); *see also* Kenneth K. Kilbert, *Neither Joint Nor Several: Orphan Shares and Private CERCLA Actions*, 41 ENVTL. L. 1045, 1052 (2011).

10. Courts have criticized CERCLA as poorly drafted, hastily considered, and lacking a useful legislative history. *See* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989); *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.").

11. *See* Martha L. Judy, *Coming Full CERCLA: Why Burlington Northern is Not the Sword of Damocles for Joint and Several Liability*, 44 NEW ENG. L. REV. 249, 264 (referring to *Cooper Indus. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004), *United States v. Atl. Res. Corp.*, 551 U.S. 128 (2007), and *Burlington N. and Santa Fe Ry. v. United States*, 556 U.S. 599 (2009), as the "Supreme Court's 'CERCLA trilogy'").

12. Thomas A. Bloomfield, *The Topsy Turvey World of CERCLA—Uncertain Law—Uncertain Science* 1 (Am. Bar Ass'n, 37th Annual Conference on Environmental Law, Keystone, Colorado), [http://www.americanbar.org/content/dam/aba/migrated/enviro/programs/keystone/2008/bestpapers/Bloomfield\\_Keystone2008.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/enviro/programs/keystone/2008/bestpapers/Bloomfield_Keystone2008.authcheckdam.pdf).

13. William Session, *Life Just Keeps Getting Tougher for CERCLA Contribution Seekers*, AM. C. ENVTL. LAWS. (May 1, 2012), <http://www.acoel.org/post/2012/05/01/LIFE-JUST-KEEPS-GETTING-TOUGHER-FOR-CERCLA-CONTRIBUTION-SEEKERS.aspx>.

14. Affirmative defenses to CERCLA liability are very narrow. To escape liability, an otherwise responsible party must demonstrate that hazardous waste release was caused by (1) an act of God, (2) an act of war, or (3) an act or omission of an unrelated party. 42 U.S.C. § 9607(b) (2012); *see* Eric DeGroff, *Raiders of the Lost Arco: Resolving the Partial Settlement Credit Issue in Private Cost Recovery and Contribution Claims Under CERCLA*, 8 N.Y.U. ENVTL. L.J. 332, 341 (2000).

15. The 1986 CERCLA amendments sought to encourage partial settlements. William W. Balcke, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 136 (1988).

16. *See, e.g., AmeriPride Servs., Inc. v. Tex. E. Overseas, Inc.*, 782 F.3d 474, 481–82 (9th Cir. 2015) (summarizing settlements reached with responsible parties).

17. *See, e.g., id.* at 483 (addressing a challenge to the method applied to determine the effect of a partial settlement).

18. *Id.*

19. *Id.* at 484–85.

UCFA, in contrast, reduces the liability of nonsettling defendants by the settling defendant's proportionate share of liability.<sup>20</sup>

The import of the two approaches depends on the degree to which a settlement amount reflects the settling defendant's actual liability. Consider an example where the plaintiff, P, sustains \$100 in damages. Two jointly and severally liable defendants, D1 and D2, are each responsible for 50 percent of P's damages. P settles with D1 for \$40. Under the UCATA, the value of the partial settlement credit is \$40—the dollar value of D1's settlement. D2's liability is reduced by \$40, which allows P to recover the full value of damages and makes D2 liable for \$60. Thus, the UCATA places the risk of a low settlement on the nonsettling defendants. In contrast, under the UCFA, the value of the partial settlement credit is \$50—D1's proportionate share of the total liability. D2's liability is reduced by \$50, which makes D2 liable for \$50 and allows P to recover \$90 in total. The UCFA, therefore, requires the plaintiff to assume the risk of a low settlement. Note that if D1 had settled for *more* than its fair share of liability, the UCATA would grant D2 a windfall, while the UCFA would grant P a windfall.

The choice between the UCATA and the UCFA may impact the probability of settlement, the fairness of the distribution of liability, and the consumption of judicial resources.<sup>21</sup> Thus, the two approaches are hotly debated. The Ninth Circuit entered the fray in deciding *AmeriPride Services, Inc. v. Texas Eastern Overseas, Inc.* The *AmeriPride* court weighed the UCATA and UCFA in the context of CERCLA but ultimately decided that district courts have discretion to choose between the two.<sup>22</sup>

Following the *AmeriPride* decision, commentators threw up their collective hands. Many interpreted the Ninth Circuit's ruling as yet another source of uncertainty for PRPs.<sup>23</sup> The headlines read “Ninth Circuit Deepens Uncertainty for Responsible Parties Settling Contribution Claims at Complex CERCLA Sites”<sup>24</sup> and “Navigating CERCLA Settlements in an Age of Uncertainty: Fallout From *AmeriPride Services v. Texas Eastern Overseas*.”<sup>25</sup> Commentators predicted that increased uncertainty resulting from *AmeriPride* would impede CERCLA settlements.<sup>26</sup> Given the quagmire that defines

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20. *Id.* at 483–84.

21. Frohman, *supra* note 5, at 714.

22. *AmeriPride*, 782 F.3d at 487.

23. See, e.g., Michael D. Daneker & Lauren Daniel, *Ninth Circuit Deepens Uncertainty for Responsible Parties Settling Contribution Claims at Complex CERCLA Sites*, ARNOLD & PORTER LLP (Apr. 16, 2015), <http://www.arnoldporter.com/publications.cfm?action=advisory&u=NinthCircuitDeepensUncertaintyforResponsiblePartiesSettlingContributionClaimsatComplexCERCLASites&id=1255&p=2>.

24. *Id.*

25. Barry M. Hartman et al., *Navigating CERCLA Settlements in an Age of Uncertainty: Fallout from AmeriPride Services v. Texas Eastern Overseas*, 45 *Envtl. L. Rep.* (Envtl. Law Inst.) 10,846 (2015).

26. Daneker & Daniel, *supra* note 23 (“Knowing which approach will apply is important to understanding how to value a settlement, and without this certainty, parties in CERCLA contribution suits may be inclined to litigate rather than settle.”).

CERCLA litigation and the critical role settlement plays in allowing litigants to extricate themselves from the muck, courts may be motivated to provide certainty for CERCLA litigants by way of a common law rule requiring the blanket application of either the UCFA or the UCATA. This Note argues that undecided circuits should resist this impulse.

Part I explains the evolution of private-party cost recovery and contribution under CERCLA. Part II frames the debate between the UCATA and the UCFA in the context of CERCLA. Part III argues that the adoption of a common law rule requiring the blanket application of either the UCFA or the UCATA would be an ineffective method of providing certainty for CERCLA litigants. Finally, Part IV suggests that in the CERCLA context, no rule is the best rule when it comes to application of the UCATA and the UCFA.

### I. CERCLA: PRIVATE-PARTY COST RECOVERY

In *AmeriPride*, the Ninth Circuit considered whether the UCATA or the UCFA should apply when allocating costs among private parties under CERCLA.<sup>27</sup> In order to understand the role of partial settlements in CERCLA and the impact of the application of either the UCATA or the UCFA, it is important to first understand CERCLA's mechanisms for allowing private parties<sup>28</sup> to recover cleanup costs at hazardous waste sites. This Part describes CERCLA's liability scheme, and uses the *AmeriPride* litigation to illustrate the application of sections 107(a) and 113(f)(1).

#### A. Cost Recovery and Contribution under Sections 107(a) and 113(f)(1)

Congress enacted CERCLA in 1980 to fund the cleanup of hazardous waste sites.<sup>29</sup> The primary goal of the statute was to "make polluters pay."<sup>30</sup> CERCLA identifies four categories of PRPs that are strictly liable for cleanup

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27. *AmeriPride*, 782 F.3d at 487 ("[W]e conclude that a district court has discretion under [section] 9613(f)(1) to determine the most equitable method of accounting for settlements between private parties in a contribution action.")

28. At issue in *AmeriPride*, and the focus of this Note, is a *private* party's ability to recover costs. Both private parties and federal and state governments may recover hazardous waste cleanup costs under CERCLA. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160–62 (2004). However, the partial settlement credit issue exists only in the private-party context. While CERCLA is silent on the treatment of partial settlements among private parties, the statute requires the UCATA approach where the federal or state government has incurred response costs and entered into a settlement. 42 U.S.C. § 9613(f)(2) (2012), which states:

A person who has resolved its liability to the United States or a State in a[] . . . settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement . . . reduces the potential liability of [nonsettling parties] by the amount of the settlement.

*Id.*

29. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96–510, pmb., 94 Stat. 2767, 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2012)). CERCLA section 101 defines "hazardous substances." 42 U.S.C. § 9601(14) (2012).

30. See, e.g., *Agere Sys., Inc. v. Adv. Envtl. Tech. Corp.*, 602 F.3d 204, 228 (3rd Cir. 2010).

costs at contaminated sites.<sup>31</sup> PRPs include any person who (1) owned a contaminated site, (2) operated a contaminated site, (3) arranged to have hazardous substances disposed of or treated at a site, or (4) transported hazardous substances to a site.<sup>32</sup>

In order to ensure that responsible parties bear the cost of cleanup, CERCLA allows private-party plaintiffs to sue PRPs to recover cleanup costs.<sup>33</sup> As previously observed, the scope of liability under CERCLA is broad.<sup>34</sup> The statute defines liability so that “even a minimal amount of hazardous waste brings a party under the purview of the statute as a PRP.”<sup>35</sup> As a result, a party who spends money to clean up a site is frequently also liable as a PRP, and most private-party cost-recovery actions are brought by one PRP against another PRP.<sup>36</sup>

A private party may recoup cleanup-related expenses under two CERCLA provisions: sections 107(a) and 113(f)(1).<sup>37</sup> Section 107(a) allows a private party that has directly incurred cleanup costs to sue to recover those costs.<sup>38</sup> Section 113(f)(1), in contrast, establishes a right to contribution, and allows a party that has been sued under CERCLA to seek contribution from other liable parties.<sup>39</sup> The proper application of section 107(a) and 113(f)(1) is an evolving area of the law.<sup>40</sup>

#### *B. Courts’ Interpretations of Section 107(a) Prior to CERCLA’s Amendments*

As originally enacted, CERCLA did not contain section 113(f)(1).<sup>41</sup> A private party’s only avenue of recovery was section 107(a).<sup>42</sup> Section 107(a) states that PRPs “shall be liable for (A) all costs of removal or remedial action incurred by the United States Government or a State” and “(B) any other necessary costs of response incurred by any other person[.]”<sup>43</sup> Courts agreed that the express language of section 107(a) created a right of action for private

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31. § 9607(a)(1)–(4).

32. *Id.*

33. *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 609 (2009).

34. *See, e.g., Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 131 (2d Cir. 2010).

35. *Id.*

36. The private-party plaintiff in *AmeriPride* was liable for a share of the response costs as a PRP. *AmeriPride Servs. Inc. v. Tex. E. Overseas Inc.*, 782 F.3d 474, 482 (9th Cir. 2015). *See* John M. Hyson, PRIVATE COST RECOVERY ACTIONS UNDER CERCLA 25 (2003) (“[G]iven the breadth of liability under § 107(a), it will be the rare circumstance in which a non-liable party (a non-PRP) will incur response costs and then bring a pure private cost recovery action.”).

37. *United States v. Atl. Res. Corp.*, 551 U.S. 128, 138–39 (2007).

38. *Id.* at 138.

39. *Id.* at 139.

40. Kilbert, *supra* note 9, at 1069 (stating that “lower courts are all over the board when it comes to deciding whether section 107 or section 113 applies in a variety of common CERCLA contexts”).

41. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 162 (2004).

42. *Id.* at 161–62.

43. 42 U.S.C. § 9607(a)(4)(B) (2012) (emphasis added).



parties seeking to recover costs from PRPs.<sup>44</sup> However, courts debated (1) whether liability under section 107(a) was joint and several and (2) whether section 107(a) contained an implied right of contribution, through which a PRP that paid more than its fair share of response costs could force other PRPs to pay their equitable shares.<sup>45</sup>

Three years after CERCLA's enactment, the District Court for the Southern District of Ohio decided the first question in the seminal decision *United States v. Chem-Dyne Corp.*,<sup>46</sup> holding that liability under section 107(a) is presumptively joint and several.<sup>47</sup> Joint and several liability applies where two or more parties' tortious conduct is a legal cause of a single and indivisible harm. Each jointly and severally liable defendant is subject to liability for the entire harm.<sup>48</sup> Courts may apportion liability only when harms are "distinct" or when "there is a reasonable basis for determining the contribution of each cause to a single harm."<sup>49</sup> Thus, a single defendant in a section 107(a) action is subject to liability for the entire cost of cleanup, unless there exists a "reasonable basis" for apportionment.<sup>50</sup>

The specter of joint and several liability under section 107(a) raised the second question: whether section 107(a) contains an implied right to contribution. Contribution ameliorates the potentially harsh result of joint and several liability.<sup>51</sup> As explained, joint and several liability allows a section 107(a) plaintiff to recover the entirety of its response costs from any *single* PRP.<sup>52</sup> Contribution is the "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."<sup>53</sup> A party who has been sued under 107(a) and who has paid more than its fair share may bring a

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44. *See Aviall*, 543 U.S. at 162.

45. Kilbert, *supra* note 9, at 1056; *see Aviall*, 543 U.S. at 161 (after CERCLA's enactment, litigation arose as to whether private parties could bring suit under section 107(a)).

46. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); *see Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 613 (2009).

47. *Chem-Dyne Corp.*, 572 F. Supp. at 810-11.

48. Rest. (Second) of Torts § 875 (1979).

49. § 433A(1)(b) (1965).

50. *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 614 (2009) ("CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists.").

51. Joint and several liability "may often result in defendants paying for more than their fair share of the harm." *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989). In CERCLA sites "where wastes of varying (and unknown) degrees of toxicity and migratory potential commingle," it is frequently "impossible to determine the amount of environmental harm caused by each party." *Id.* Thus, it is difficult for responsible parties to escape joint and several liability. *Id.* at 178. "[A] right of contribution undoubtedly softens the blow where parties cannot prove that the harm is divisible." *Id.* at 179.

52. Kilbert, *supra* note 9, at 1049 (explaining that "[j]oint and several liability can result in one defendant being responsible for plaintiff's entire harm, even though that one defendant may have been relatively less culpable than the other tortfeasors").

53. *United States v. Atl. Res. Corp.*, 551 U.S. 128, 138 (2007) (citation omitted).

contribution action to recover costs from other PRPs.<sup>54</sup> Courts have held, almost unanimously, that section 107(a) contains a right to contribution.<sup>55</sup>

Congress codified a PRP's right to contribution in its 1986 amendments to CERCLA.<sup>56</sup> Section 113(f), "Contribution," states that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [CERCLA section 107(a)]."<sup>57</sup>

### *C. Application of Sections 107(a) and 113(f)(1) after CERCLA's Amendments*

Following the 1986 amendments to CERCLA, courts struggled to delineate the application of sections 107(a) and 113(f)(1).<sup>58</sup> Section 113(f)(1) instructs courts to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate."<sup>59</sup> Courts generally described liability under section 113(f)(1) as several.<sup>60</sup> Where liability is several, a defendant is liable for no more than its equitable share of the harm.<sup>61</sup> Thus, under section 113(f)(1), a plaintiff may only recover from a PRP its share of the cleanup costs.<sup>62</sup>

The alternate liability schemes of sections 107(a) and 113(f)(1) motivated private parties to seek relief under section 107(a).<sup>63</sup> Under section 107(a), a defendant was potentially liable for the full cost of cleanup.<sup>64</sup> In contrast, under section 113(f)(1), a defendant was liable for only its proportionate share of costs.<sup>65</sup> If a private party waited to be sued by the government under section 107(a), its only avenue of recourse was to seek contribution under section

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54. *See id.* at 140; Kilbert, *supra* note 9, at 1083–84.

55. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004).

56. Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA) in response to CERCLA criticism. *See Balcke, supra* note 15, at 126.

57. 42 U.S.C. § 9613(f)(1) (2012).

58. Kilbert, *supra* note 9, at 1056.

59. § 9613(f)(1).

60. *See, e.g., Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192–94 (10th Cir. 1997) (noting that section 107 imposes joint and several liability while section 113 imposes several liability); *United States v. Kramer*, 757 F. Supp. 397, 414–15 (D.N.J. 1991) (contrasting section 107 and section 113 claims).

61. Rest. (Third) of Torts § 11 (2000).

62. Kilbert, *supra* note 9, at 1050.

63. *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349 (6th Cir. 1998):

[A]fter the adoption of SARA . . . PRPs who were the initial parties to undertake and pay for cleanup understandingly wished to seek joint and several cost recovery solely under [section] 107, which imposed strict liability against defendants and would allow them to sue only one party for the entire response costs regardless of that party's degree of fault.

64. *See id.* at 348 (describing liability under section 107(a) as joint and several and liability under section 113(f)(1) as several).

65. *See id.*

113(f)(1). In order to access the joint and several liability provided by section 107(a), parties began “voluntarily” cleaning up sites.<sup>66</sup>

By the late 1990s, courts had resolved this issue almost unanimously.<sup>67</sup> Most courts agreed that a “non-innocent” party, meaning a party who was liable for a portion of response costs, was limited to suing under section 113(f)(1).<sup>68</sup> Among other rationales, courts reasoned that responsible private parties should not enjoy the benefits of joint and several liability under section 107(a).<sup>69</sup> The Supreme Court overruled this consensus in a series of decisions, the first issued in 2004.

#### D. Current State of the Law

Between 2004 and 2009, the Supreme Court issued three opinions interpreting CERCLA sections 107(a) and 113(f)(1): *Cooper Industries, Inc. v. Aviall Services, Inc.*,<sup>70</sup> *United States v. Atlantic Research Corp.*,<sup>71</sup> and *Burlington Northern and Santa Fe Railway Co. v. United States*.<sup>72</sup> These decisions, sometimes referred to as the Supreme Court’s “CERCLA trilogy,”<sup>73</sup> overturned settled case law and changed the rules of private-party cost recovery in CERCLA suits.<sup>74</sup> The CERCLA trilogy addressed “when and whether private parties can assert claims for recovery of response costs or contribution under [s]ections 107 and 113.”<sup>75</sup>

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66. Kilbert, *supra* note 9, at 1057 (“[S]ome savvy responsible parties, rather than waiting for the government to perform the cleanup and then be sued, had begun ‘voluntarily’ cleaning up contaminated sites for which they were subject to liability.”).

67. *Id.*

68. See, e.g., *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530 (8th Cir. 2003); *Centerior Serv. Co.*, 153 F.3d at 351; *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989).

69. *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997) (“[U]nder CERCLA, a PRP does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability.”).

70. 543 U.S. 157 (2004).

71. *United States v. Atl. Res. Corp.*, 551 U.S. 128 (2007).

72. *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599 (2009).

73. *Judy*, *supra* note 11, at 255.

74. See *Judy*, *supra* note 11, at 264–65 (describing *Aviall* as “turn[ing] upside-down the norms common in nine circuits”); Nancy Kubasek & Jay Threet, *Cooper Industries, Inc. v. Aviall Services, Inc.: Time for a Legislative Response to Restore Voluntary Remediation*, 51 ST. LOUIS U. L.J. 165 (2006) (describing *Aviall* as a “surprising” decision that “overturned settled case law”); Michael K. Murphy & Jessica Greenston, *CERCLA in the Post-Atlantic Research World: Some Emerging Questions*, 20 AM. BAR ASS’N ENVTL. LITIGATOR 1, 2 (2009) (“*Atlantic Research* brushed aside nearly two decades of case law.”).

75. See Murphy & Greenston, *supra* note 74, at 1 (describing *Aviall* and *Atlantic Research* as “resolv[ing] some of the most fundamental issues” in CERCLA litigation).

1. *Distinct Causes of Action under Sections 107(a) and 113(f)(1)*

Today, a private party may recover cleanup-related expenses under both sections 107(a) and 113(f)(1).<sup>76</sup> However, the two provisions apply to parties in different procedural circumstances and offer different remedies.<sup>77</sup>

The Supreme Court has emphasized that the nature of the rights established in sections 107(a) and 113(f)(1) are distinct.<sup>78</sup> A cause of action exists for a private party under section 107(a) only if the private-party plaintiff has incurred direct cleanup costs. In other words, a private party may bring suit under section 107(a) only if it has *itself* spent money on investigation or remediation costs.<sup>79</sup> In contrast, section 113(f)(1) allows a private party to seek contribution “*during or following* any civil action” brought under sections 106 (governing actions brought by the federal government) or 107(a) of CERCLA.<sup>80</sup> Therefore, a private party may recover under section 113(f)(1) only if another party has first brought a CERCLA action against it. A private party may recover under section 107(a), on the other hand, regardless of whether it has been sued as a PRP, but only if it has directly incurred cleanup costs.

Consider an example where a private party, P, owns a contaminated site. Private parties, D1 and D2, both contributed to contamination on the site. P pays to clean up the site. P may bring an action under section 107 against D1 and D2 to recover cleanup costs. Suppose, however, that P only sues D1. D1 may then bring an action under section 113 against D2 to recover D2’s fair share of the costs.

2. *A Section 113(f)(1) Counterclaim to a Section 107(a) Claim*

The Supreme Court has emphasized that sections 107(a) and 113(f)(1) do not provide a “choice of remedies” for a private party seeking to recover cleanup-related expenses.<sup>81</sup> However, the two sections closely interact where a party that has been sued by a PRP under section 107(a) brings a counterclaim under section 113(f)(1). Recall that most private-party actions under section 107(a) are brought by one PRP against another PRP.<sup>82</sup> In such cases, a defendant PRP may bring a counterclaim under section 113(f)(1).

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76. *Atl. Res. Corp.*, 551 U.S. at 138–39.

77. Separate statutes of limitations also apply to the two sections. A six-year statute of limitations applies to recovery claims under section 107(a), 42 U.S.C. § 9613(g)(2) (2012), while a three-year statute of limitations applies to contribution claims under section 113(f)(1), § 9613(g)(3).

78. *Atl. Res. Corp.*, 551 U.S. at 138.

79. *Id.* at 139.

80. § 9613(f)(1) (emphasis added).

81. *Atl. Res. Corp.*, 551 U.S. at 140.

82. *See id.* at 136 (“[CERCLA] defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs.”); *see also* Hyson, *supra* note 36, at 25.

As the Supreme Court has acknowledged, the joint and several liability of section 107(a) creates a potential for inequity.<sup>83</sup> Under a joint and several liability scheme, a PRP who contributed a relatively small amount of waste may be responsible for the full amount of response costs.<sup>84</sup> The Court has explained that “a defendant PRP in such a [section] 107(a) suit could blunt any inequitable distribution of costs by filing a [section] 113(f) counterclaim.”<sup>85</sup> In other words, where a PRP incurs cleanup costs and then brings an action to recover those costs under section 107(a), the defendant PRP may file a counterclaim under section 113(f)(1). In that case, resolution of the “counterclaim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the [section] 107(a) action.”<sup>86</sup>

#### *E. Sections 107(a) and 113(f)(1) Applied in AmeriPride*

The litigation in *AmeriPride* illustrates how district courts apply sections 107(a) and 113(f)(1), where a PRP incurs cleanup and remediation costs and seeks to recover those costs from fellow PRPs. The district court in *AmeriPride* acknowledged the less-than-clear distinction between sections 107(a) and 113(f)(1) when it described the two sections as “overlapping and somewhat convoluted mechanisms” for allocating responsibility among private parties.<sup>87</sup>

*AmeriPride* concerned cleanup costs associated with a site in Sacramento, California.<sup>88</sup> The plaintiff, AmeriPride, owned the site and conducted industrial washing operations on the site’s property.<sup>89</sup> In 1997 AmeriPride’s environmental consultants discovered perchloroethylene (PCE) contamination on the site.<sup>90</sup> PCE is a CERCLA-defined “hazardous substance.”<sup>91</sup> AmeriPride reported the contamination to the state regulatory agency.<sup>92</sup> Under the regulatory agency’s direction, AmeriPride conducted investigation and remediation of the soil and groundwater on the site.<sup>93</sup> In 2000 AmeriPride brought a CERCLA action against fourteen named defendants to recover the costs it incurred in cleaning up the site.<sup>94</sup>

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83. *Atl. Res. Corp.*, 551 U.S. at 140 (acknowledging the potential for an “inequitable distribution of costs” under section 107).

84. *See* Kilbert *supra* note 9, at 1049 (“Joint and several liability can result in one defendant being responsible for plaintiff’s entire harm, even though that one defendant may have been relatively less culpable than the other tortfeasors.”).

85. *Atl. Res. Corp.*, 551 U.S. at 140.

86. *Id.*

87. *AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. CIV. S-00-113, 2012 WL 1413880, at \*3 (E.D. Cal. Apr. 20, 2012).

88. *AmeriPride Servs., Inc. v. Tex. E. Overseas, Inc.*, 782 F.3d 474, 480 (9th Cir. 2015).

89. Joint Pretrial Statement, *AmeriPride Servs., Inc., v. Valley Indus. Servs., Inc.*, No. CIV. S-00-113, 2011 WL 12544146, at \*6 (E.D. Cal. Sept. 19, 2011).

90. *AmeriPride*, 782 F.3d at 481.

91. *Id.* at 480.

92. *Id.* at 481.

93. *Id.*

94. *AmeriPride’s Third Amended Complaint*, *AmeriPride Servs., Inc., v. Valley Indus. Servs., Inc.*, No. CIV-S-00-113, 2000 WL 35799756, at \*3–8 (E.D. Cal. Dec. 18, 2000).

The PCE contamination on AmeriPride's site spread to neighboring sites owned by Huhtamaki Foodservices, Inc. (Huhtamaki) and California-American Water Company (Cal-Am).<sup>95</sup> During AmeriPride's lawsuit, both Huhtamaki and Cal-Am sued AmeriPride under CERCLA to recover costs associated with the spread of the PCE contamination to their properties.<sup>96</sup> AmeriPride reached settlement agreements with both parties, and paid \$2 million to Cal-Am and \$8.25 million to Huhtamaki.<sup>97</sup> Meanwhile, AmeriPride's CERCLA action continued.

Seven years after AmeriPride's initial filing, the district court approved settlements between AmeriPride and two defendants, Petrolane and Chromalloy.<sup>98</sup> Petrolane was the parent company of a former owner of the AmeriPride site.<sup>99</sup> Petrolane's wholly owned subsidiary had deposited hazardous waste on the site before AmeriPride purchased the property.<sup>100</sup> Chromalloy owned property near the AmeriPride site and was responsible for chemical releases that contributed to the AmeriPride site contamination.<sup>101</sup> Petrolane and Chromalloy paid AmeriPride \$2.75 million and \$0.5 million, respectively.<sup>102</sup> In its decision approving the settlements, the district court also dismissed Petrolane and Chromalloy's cross-claims against another defendant.<sup>103</sup> Following the 2007 settlements, AmeriPride's only remaining claim existed against Texas Eastern Overseas, Inc (TEO).<sup>104</sup>

At the time of the settlement, TEO was a dissolved Delaware corporation.<sup>105</sup> In 2008 the district court granted a stay in order to allow AmeriPride to petition the Delaware Court of Chancery to reinstate TEO as a party with the capacity to be sued.<sup>106</sup> The Delaware Court of Chancery reinstated TEO as a corporation with the capacity to be sued in 2009.<sup>107</sup>

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95. *AmeriPride*, 782 F.3d at 481.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 480.

100. *Id.*

101. *Id.* at 481.

102. *Id.*

103. *AmeriPride Servs., Inc. v. Valley Indus. Servs., Inc.*, Nos. CIV. S-00-113 and S-04-1494, 2007 WL 1946635, at \*5 (E.D. Cal. July 2, 2007).

104. All claims and counterclaims asserted in the *AmeriPride* lawsuit were dismissed, with the exception of those against Texas Eastern Overseas, Inc. and Valley Industrial Services, Inc. *Id.* However, as the result of merger, TEO was the successor in interest to all claims against Valley Industrial Services, Inc. Joint Pretrial Statement, *AmeriPride Servs., Inc., v. Valley Indus. Servs., Inc.*, No. CIV S-00-113, 2011 WL 12544146, at \*5 (E.D. Cal. Sept. 19, 2011).

105. *AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. CIV. S-00-113, 2012 WL 1413880, at \*6 (E.D. Cal. Apr. 20, 2012) (observing that "until the decision of the Delaware Supreme Court, the defendants were defunct corporations"); Joint Pretrial Statement, *AmeriPride Servs., Inc., v. Valley Indus. Servs., Inc.*, No. CIV S-00-113, 2011 WL 12544146, at \*5 (E.D. Cal. Sept. 19, 2011).

106. *AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. CIV. S-00-113, 2008 WL 5068672, at \*8 (E.D. Cal. Nov. 25, 2008).

107. *In re Tex. E. Overseas, C.A. No. 4326*, 2009 WL 4270799 (Del. Ch. Nov. 30, 2009) (unpublished opinion).

Following the Court of Chancery's ruling, TEO had no assets other than potential rights under insurance policies.<sup>108</sup>

After over a decade of litigation, AmeriPride filed a motion for summary judgment against TEO in 2011.<sup>109</sup> AmeriPride sought to hold TEO liable under section 107(a) for AmeriPride's response costs, including its settlement payments to Huhtamaki and Cal-Am, and to dismiss TEO's section 113(f)(1) counterclaim.<sup>110</sup> In a May 2011 order, the district court found TEO liable for AmeriPride's response costs as a matter of law.<sup>111</sup> The court held, however, that the settlements paid to Huhtamaki and Cal-Am were not recoverable under section 107(a), "[b]ecause AmeriPride simply paid funds to Huhtamaki and Cal-Am, rather than actually purchasing replacement water."<sup>112</sup> Therefore, AmeriPride did not directly incur liability for those cleanup costs, which would have allowed it to sue under section 107(a). Instead, the court permitted AmeriPride to file an amended complaint under section 113(f)(1) to recover the settlement costs.<sup>113</sup>

At a bench trial in 2012, the district court allocated costs between AmeriPride and TEO under section 113(f)(1).<sup>114</sup> The court first totaled AmeriPride's costs.<sup>115</sup> Although the court had previously required AmeriPride to amend its complaint to recover the Huhtamaki and Cal-Am settlements under section 113(f)(1), the court ultimately lumped together AmeriPride's investigation, remediation, and regulatory costs—recoverable under section 107(a)—with AmeriPride's settlement costs—recoverable under section 113(f)(1).<sup>116</sup> The court then applied the UCATA approach, which reduces the liability of nonsettling defendants by the dollar amount of the settlement, by subtracting the dollar amount of AmeriPride's settlements with Chromalloy and Petrolane from AmeriPride's total costs.<sup>117</sup> The sum of AmeriPride's response and settlement costs, minus the dollar amount of the settlements paid to AmeriPride, equaled \$15,508,912; this was the amount of AmeriPride's damages subject to allocation under section 113(f)(1).<sup>118</sup> Ultimately, the district court concluded that the fairest allocation of the costs was "to divide responsibility equally" between AmeriPride and TEO.<sup>119</sup>

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108. Joint Pretrial Statement, *AmeriPride Servs., Inc., v. Valley Indus. Servs., Inc.*, No. CIV. S-00-113, 2011 WL 12544146, at \*5 (E.D. Cal. Sept. 19, 2011).

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

110. *Id.* at 481–82.

111. *Id.* at 482.

112. *AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. CIV. S-00-113, 2011 WL 1833179, at \*17 (E.D. Cal. May 12, 2011).

113. *Id.* at \*16.

114. *See AmeriPride*, 782 F.3d at 482.

115. *Id.*

116. *Id.*

117. *See id.*

118. *Id.*

119. *AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. CIV. S-00-113, 2012 WL 1413880, \*6 (E.D. Cal. Apr. 20, 2012).

TEO appealed the district court's ruling. On appeal, TEO argued that the district court was *required* as a matter of law to apply the UCFA, and not the UCATA, to account for the value of AmeriPride's prior settlements with Chromalloy and Petrolane. The uncertainty and high stakes surrounding the handling of partial settlements in the *AmeriPride* litigation is far from exceptional. Partial settlements are common in CERCLA actions, and district courts must decide how to treat them.

## II. THE PARTIAL SETTLEMENT CREDIT ISSUE: THE UCATA VS. THE UCFA

The issue faced in *AmeriPride* on appeal is commonly known as the "partial settlement credit" issue: where the statute is silent on the matter, a court must decide how settlements with fewer than all jointly and severally liable defendants—partial settlements—affect the liability of nonsettling parties. Courts generally decide between two methods of accounting for partial settlements: the UCATA pro tanto approach and the UCFA proportionate share approach.<sup>120</sup>

Scholars and courts have analyzed the advantages and disadvantages of the UCATA and the UCFA ad nauseam.<sup>121</sup> This Note does not aim to take a side. Rather, its aim is to show that there is no clear winner between the UCATA and the UCFA in the context of CERCLA—which approach is "best" is a fact-specific determination. This Part begins by summarizing the oft-repeated arguments in favor of and against the UCATA and the UCFA. It concludes by discussing the debate between the UCATA and the UCFA as it has played out in the CERCLA context.

### A. Arguments for and against the UCATA and the UCFA

The National Conference of Commissioners on Uniform State Laws developed the UCATA and the UCFA as model acts that advocate opposing methods for accounting for partial settlement credits.<sup>122</sup> Whereas the UCATA reduces the liability of nonsettling defendants by the dollar amount of prior settlements, the UCFA reduces the liability of nonsettling defendants by the settling parties' equitable share of liability.<sup>123</sup> The Restatement (Second) of Torts acknowledges both approaches but declines to take a position in favor of either.<sup>124</sup> Courts generally look to three factors when comparing the UCATA

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120. *AmeriPride*, 782 F.3d at 483.

121. See Frohman, *supra* note 5, at 747–61, 765 (summarizing majority and minority arguments for each approach and explaining that "[t]he merits of the arguments in favor of and against each credit rule have been argued at length, in various contexts").

122. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 208–09 n.8 (1994).

123. *AmeriPride*, 782 F.3d at 483–84.

124. Rest. (Second) of Torts § 886A cmt. M (1979). The Restatement mentions a third approach, sometimes referred to as "pro tanto set off without contribution." However, courts have largely rejected the third approach, because it fails to protect a settling tortfeasor against contribution claims by other tortfeasors, and, therefore, provides little incentive for settlement. See *id.*; *McDermott*, 511 U.S. at 208 n.8. Section 885 of the Restatement specifies only that "[a] payment by any person made in



and the UCFA: (1) whether the approach promotes settlement, (2) whether the approach results in a fair outcome, and (3) whether the approach fosters judicial economy.<sup>125</sup>

### B. Settlement

The majority of courts view the UCATA as the superior approach for promoting settlement.<sup>126</sup> Courts often rely on any of three rationales to justify the UCATA's superiority in terms of settlement. First, courts argue that the UCATA acts as a "stick" by creating a risk of disproportionate liability for nonsettling defendants.<sup>127</sup> Under the UCATA, nonsettling defendants bear the risk of a low settlement, because total liability is reduced by the dollar amount of the settlement.<sup>128</sup> A defendant that settles early gains the "opportunity to pay less than its fair share of the damages, thereby threatening the nonsettling defendant with the prospect of paying more than its fair share of the loss."<sup>129</sup>

Second, courts contend that the UCATA encourages plaintiffs to settle early and low, because the plaintiff does not bear the risk of low settlements.<sup>130</sup> The UCATA allows a plaintiff to reach a disproportionately low settlement and then recover the remainder of its damages from nonsettling defendants. In contrast, under the UCFA the plaintiff bears the risk of any disproportionately low settlements.<sup>131</sup>

Finally, courts reason that the UCATA better facilitates settlement by providing certainty for plaintiffs.<sup>132</sup> The UCATA makes clear what a plaintiff is giving up by settling.<sup>133</sup> Under the UCFA, on the other hand, the proportionate share of the settling defendant—and thus the value of the

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compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors." Rest. (Second) of Torts § 885(3) (1979).

125. See *McDermott*, 511 U.S. at 211 (in the context of admiralty law, describing the three paramount considerations as "consistency with the proportionate fault approach" of admiralty law, "promotion of settlement," and "judicial economy"); Frohman, *supra* note 5, at 714 (explaining that the choice of approach is impactful because "[t]he nature of . . . the partial settlement credit, directly influences the likelihood that settlement will occur, the equitable effect of the partial settlement on the settlor, the plaintiff, and the non-settlers, and judicial economy").

126. See *Atl. Richfield Co. v. Am. Airlines*, 836 F. Supp. 763, 777 (N.D. Okla. 1993) (district court concluding that the UCATA approach was "clearly superior" under the facts at issue).

127. *United States v. Cannons Eng'g. Corp.*, 899 F.2d 79, 91–92 (1st Cir. 1990) (describing the effect of disproportionate liability caused by the *pro tanto* approach under section 113(f)(2)).

128. *McDermott*, 511 U.S. at 215.

129. *Id.*

130. See, e.g., *United States v. W. Processing Co.*, 756 F. Supp. 1424, 1430 (W.D. Wash. 1990); *MFS Mun. Income Trust v. Am. Med. Int'l, Inc.*, 751 F. Supp. 279, 284 (D. Mass. 1990); *Alvarado Partners v. Mehta*, 723 F. Supp. 540, 552–53 (D. Colo. 1989); *Hartman et al.*, *supra* note 25, at 10,849.

131. *Hartman et al.*, *supra* note 25, at 10,849.

132. See *Atl. Richfield Co. v. Am. Airlines*, 836 F. Supp. 763, 775 (N.D. Okla. 1993) ("The ease of calculation and the certainty of result renders the *pro tanto* approach vastly superior to the proportionate rule in bringing about agreed resolutions.").

133. DeGroff, *supra* note 14, at 352.

settlement credit—is resolved at trial.<sup>134</sup> The UCFA requires a plaintiff to guess the actual value of the settling defendant’s liability.

However, some courts and commentators have pushed back against the predominant view that the UCATA is the superior approach in terms of encouraging settlement. First, some courts argue that the UCFA more effectively encourages *total* settlement, because there is no strategic advantage to holding out.<sup>135</sup> One district court reasoned that under the UCATA “the non-settlor’s exposure decreases to the extent of any settlement windfall, [while] under the [UCFA], the non-settlor’s liability remains unaffected by other settlements.”<sup>136</sup> Second, courts argue that the UCFA is the superior approach for promoting settlement, because it avoids the need for a good-faith hearing.<sup>137</sup> One commentator observed that, under the UCATA, nonsettling parties are motivated to challenge settlements, especially where the settled amount appears disproportionate to the settling defendant’s liability.<sup>138</sup> Such attacks may waylay settlement.<sup>139</sup> The costs associated with defending such attacks reduce the value of settlement and may discourage parties from settling.<sup>140</sup>

Alternatively, courts have posited that the UCATA’s inducement to settle is unwarranted. In the context of admiralty law, the Supreme Court explained that additional pressure to settle might be unnecessary.<sup>141</sup> The Court reasoned that the “parties’ desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relationships is sufficient to ensure nontrial dispositions in the vast majority of cases.”<sup>142</sup> While CERCLA litigants are less likely to have ongoing commercial relationships, the parties are undoubtedly motivated to avoid the uncertain outcome and costs associated with litigation.<sup>143</sup> Thus, the threat of making up the difference from a low settlement may be unnecessary to motivate defendants to settle.

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134. Frohman, *supra* note 5, at 755.

135. *United States v. W. Processing Co.*, 756 F. Supp. 1424, 1430–31 (W.D. Wash. 1990).

136. Frohman, *supra* note 5, at 755.

137. See Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427, 488–89 (1993).

138. Hartman et al., *supra* note 25, at 10,849.

139. *Id.*

140. See *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1984):

The fairness hearing makes the settlement process more costly; and as the costs of settlement rise closer to those of trial, the likelihood of settlement falls—maybe far enough to offset the incentive to settle that a defendant has who knows that settling will enable him to avoid all liability to the other tortfeasors.

141. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994).

142. *Id.*

143. When explaining its desire to settle with Chromalloy, AmeriPride stated that the “decision to settle was motivated by the desire to avoid the significant legal and expert costs required to further litigate this case as well to avoid the uncertainty inherent in the litigation process.” Memo of Points and Authorities in Support of Joint Motion for Approval of Settlement and Entry of a Contribution Bar Order, *AmeriPride Servs., Inc. v. Valley Indus. Servs., Inc.*, Nos. S-00-113 & S-04-1494, 2006 WL 1858818, at \*11 (E.D. Cal. May 22, 2006).

Finally, in their article “Settlement Under Joint and Several Liability,” Professors Lewis Kornhauser and Richard Revesz cast doubt on the ability of courts to draw *any* meaningful conclusions about the impact of the UCATA and the UCFA on settlement. Kornhauser and Revesz explained that “practically all of the judicial decisions [evaluating the effects of the UCATA and the UCFA on settlement] stem from basic conceptual misunderstandings of the dynamics of the settlement process.”<sup>144</sup> The authors relied on tools of economic analysis to conduct what they described as “the first comprehensive analysis of the problem of settlement in cases involving joint tortfeasors.”<sup>145</sup> Based on their systematic examination of settlement incentives, Kornhauser and Revesz reached the strong conclusion that courts’ predictions concerning the effect of the UCATA and the UCFA on settlement “are the product, quite simply, of logical flaws.”<sup>146</sup> The authors found that where settlement costs are low, the UCATA is more likely to induce settlement, but where settlement costs are high, the UCFA is more likely to induce settlement.<sup>147</sup> In short, there is no clear winner between the two approaches. The authors’ analysis impugns the settled view of the UCATA as the superior approach for encouraging settlement. Moreover, Kornhauser and Revesz suggest that courts are not equipped to meaningfully compare the impact of each approach on settlement in most cases.<sup>148</sup>

### C. Fairness

Whereas courts have generally regarded the UCATA as superior in terms of settlement, most courts characterize the UCFA as superior in terms of fairness. The Commissioners enacted the UCFA with the primary goal of ensuring an equitable distribution of liability among tortfeasors.<sup>149</sup> In this context, fairness represents the idea that a “party should bear the cost of the harm for which it is legally responsible.”<sup>150</sup> Courts argue that the same characteristics that make the UCATA the superior approach for promoting settlement also make the UCATA the *inferior* approach when it comes to fairly allocating liability among responsible parties.<sup>151</sup> Specifically, the UCATA does not take into account the actual liability of settling defendants. Thus,

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144. Kornhauser & Revesz, *supra* note 137, at 482.

145. *Id.* at 434.

146. *Id.* at 492.

147. *Id.* at 480, 488.

148. *Id.* at 493 (“[T]he choice among the competing legal rules might be better made by administrative agencies than by common law judges.”).

149. *Comparative Fault Act Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Comparative%20Fault%20Act> (“The aim of the Uniform Act is absolute fairness in distribution of damages.”); see DeGroff, *supra* note 14, at 353–54.

150. *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 87 (1st Cir. 1990).

151. Frohman describes the “critical premise” in the UCATA-UCFA debate as the belief that “the promotion of settlement and the principles of comparative fault are inconsistent and that the proportionate share approach necessarily achieves a result more consistent with comparative fault.” Frohman, *supra* note 5, at 747.

nonsettling defendants may be forced to pay more than their fair share. When choosing to apply the UCFA in the context of admiralty law, the Supreme Court explained that the advantages of the UCATA came “at too high a price in unfairness.”<sup>152</sup> Commentators argue that the potential for unfairness under the UCATA is magnified by the fact that a nonsettling party’s only opportunity to challenge a settlement is through a good-faith hearing.<sup>153</sup> In other words, a “nonsettling party must intervene prior to settlement or challenge the settlement immediately after it is reached.”<sup>154</sup>

Further, some courts maintain that the UCATA raises fairness concerns due to the risk of collusion among the settling parties.<sup>155</sup> Courts reason that, under the UCATA, the plaintiff may be willing to reach a disproportionately low settlement, because settlement “provides the plaintiff with a ‘war chest’ with which to finance the litigation against the remaining defendants.”<sup>156</sup> This argument is premised on the belief that the good-faith hearings required under the UCATA are insufficient to protect against collusion between the plaintiff and the settling parties.<sup>157</sup>

On the other hand, at least one commentator has argued that the UCFA may result in a *less* equitable outcome than the UCATA in certain types of CERCLA actions. Marc Frohman, in his article “Rethinking the Partial Settlement Credit Rule in Private Party CERCLA Actions: An Argument in Support of the Pro Tanto Rule,” posited that when a CERCLA plaintiff is liable for a significant proportion of the total cleanup costs, the UCATA approach “is even more consistent with the principle of comparative fault than the [UCFA] approach[.]”<sup>158</sup> Frohman explains that, in the “liable-plaintiff case[.]” any shortfall or windfall from a partial settlement is distributed among *all* nonsettling parties, including the liable plaintiff, in proportion to their fault.<sup>159</sup> Moreover, no risk of collusion exists in the liable-plaintiff case, because “the plaintiff must share, in proportion to its fault, any [settlement] shortfall it creates.”<sup>160</sup>

Lastly, some commentators argue that, even if the UCFA is superior in terms of reaching an equitable distribution of liability, fairness should not be emphasized in the selection between the UCATA and the UCFA. Commentators argue the UCATA is preferable because CERCLA’s goals prioritize prompt site cleanup over the fair distribution of liability among liable parties.<sup>161</sup> One court explained, “[d]isproportionate liability, a technique which promotes early settlements and deters litigation for litigation’s sake, is an

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152. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994).

153. *Id.* at 221.

154. Hartman et al., *supra* note 25, at 10,849.

155. *See e.g.*, *United States v. W. Processing Co.*, 756 F. Supp. 1424, 1430 (W.D. Wash. 1990).

156. *McDermott*, 511 U.S. at 213.

157. DeGroff, *supra* note 14, at 389–90.

158. Frohman, *supra* note 5, at 766.

159. *Id.*

160. *Id.* at 772.

161. *See* DeGroff, *supra* note 14, at 390.

integral part of [CERCLA's] statutory plan.”<sup>162</sup> This argument, however, rests on the premise that expedient settlements facilitate the timely cleanup of CERCLA sites. One author observed that settlement has little effect on the speed at which cleanup is accomplished where a private party, rather than the EPA is cleaning up the site.<sup>163</sup> In *AmeriPride*, for example, AmeriPride began cleaning up the site several years before reaching any settlements with PRPs and over a decade before the Ninth Circuit ruled on the case.<sup>164</sup>

#### D. Judicial Economy

In addition to taking into account settlement and fairness, courts consider how the UCATA and the UCFA each affect judicial economy. When comparing the consumption of judicial resources, courts that endorse the UCFA rest their opinion on the fact that the UCATA requires a good-faith hearing; courts that champion the UCATA base their reasoning on the requisite determination of settling parties' liability under the UCFA.

A good-faith hearing requires parties to litigate the legitimacy of partial settlements. The UCATA requires that good-faith hearings accompany settlements in order to protect against collusion among the settling parties.<sup>165</sup> Courts argue that such hearings consume judicial resources that would otherwise be conserved under the UCFA.<sup>166</sup> The measure of judicial resources consumed by a good-faith hearing, however, depends on the nature of the evidence at the hearing.<sup>167</sup> Some courts reason that a good-faith hearing need not be long and arduous in order to “create a general sense of fairness and reasonably accommodate CERCLA's goals.”<sup>168</sup> Where a good-faith determination requires only a finding that the settling parties did not act in bad faith,<sup>169</sup> a good-faith hearing may consume relatively few judicial resources. On the other hand, where a good-faith hearing focuses on the “reasonableness” of a settlement, the hearing may “rise to the level of a mini-trial.”<sup>170</sup>

While the UCATA requires good-faith hearings, the UCFA requires the trial court to determine the proportionate share of the liability of settling

162. *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990).

163. Frohman, *supra* note 5, at 736.

164. *AmeriPride Servs., Inc. v. Tex. E. Overseas, Inc.*, 782 F.3d 474, 481–82 (9th Cir. 2015).

165. Uniform Contribution Among Tortfeasors Act § 4.

166. *See, e.g., Hillsborough Cty. v. A & E Rd. Oiling Serv., Inc.*, 853 F. Supp. 1402, 1408 (M.D. Fla. 1994) (citing *United States v. W. Processing Co.*, 756 F. Supp. 1424, 1430 (W.D. Wash. 1990)); *Lyncott Corp. v. Chem. Waste Mgmt., Inc.*, 690 F. Supp. 1409, 1418 (E.D. Pa. 1988); *Allied Corp. v. ACME Solvent Reclaiming, Inc.*, 771 F. Supp. 219, 223 (N.D. Ill. 1990).

167. Frohman, *supra* note 5, at 752 (“At one extreme, evidence may be limited to expert and fact witness affidavits, not subject to cross-examination. At the opposite extreme, the settlement hearing may blossom into a full blown mini-trial with in-court testimony from fact and expert witnesses.”).

168. DeGroff, *supra* note 14, at 395.

169. *See, e.g., in re Atl. Fin. Mgmt., Inc.*, 718 F. Supp. 1012, 1015 (D. Mass. 1988) (holding that under the pro tanto rule, the settlement will be approved “[a]bsent a showing of bad faith, i.e. if the settlement figures were so inadequate as to suggest collusion, or the parties' dealings were not at arms length”).

170. Frohman, *supra* note 5, at 752; *see McDermott, Inc. v. AmClyde*, 511 U.S. 202, 213 (1994).

parties. Some courts argue that the process of determining a settling defendant's proportionate share is equally, if not more, taxing than holding a good-faith hearing. Courts reason that the "scope of [the] ensuing trial may be significantly broader" under the UCFA, because the process of determining settling parties' proportionate liability at trial is arduous.<sup>171</sup> The UCFA may require the plaintiff to "not only . . . justify each of its settlements, but also account for the relative liability of parties it did not involve in the litigation."<sup>172</sup> A trial court's obligation to determine settling parties' proportionate share of liability causes some courts to conclude that the UCFA "is only 'easier' in the short run."<sup>173</sup>

#### E. CERCLA: the UCATA or the UCFA? It's a Close Match

Many legal scholars have written on the advantages and disadvantages of the UCATA and the UCFA in the context of CERCLA.<sup>174</sup> Courts and commentators alternately argue that the UCATA should apply in every case,<sup>175</sup> that the UCFA should apply in every case, that either the UCATA or the UCFA should apply in specific cases,<sup>176</sup> or that courts should ignore prior settlements entirely when allocating costs under section 113(f)(1).<sup>177</sup>

Whether the UCATA or the UCFA should be applied when allocating costs under CERCLA section 113(f)(1) is the source of an eleven-year-old circuit split. Prior to the *AmeriPride* decision, both the First and Seventh Circuits issued opinions on the handling of partial settlement credits in section 113(f)(1) actions. In 1999 the Seventh Circuit mandated the application of the UCATA for claims brought under section 113(f)(1) in *Akzo Nobel Coatings, Inc. v. Aigner Corp.*<sup>178</sup> The *Akzo* court reversed the lower court's application of

171. See Hartman et al., *supra* note 25, at 10,849; *Atl. Richfield Co. v. Am. Airlines*, 836 F. Supp. 763, 766 n.7 (N.D. Okla. 1993) (explaining that the UCFA required that "a percentage of responsibility . . . be individually determined at trial for each of 340 (or more) absentee settling defendants").

172. Hartman et al., *supra* note 25, at 10,849.

173. *Atl. Richfield Co.*, 836 F. Supp. at 766 n.7.

174. See, e.g., DeGroff, *supra* note 14, at 336 (recommending that the UCFA be applied to claims brought under section 113(f)(1), but not to claims brought under section 107(a)); Joseph A. Fischer, Comment, *All CERCLA Plaintiffs Are Not Created Equal: Private Parties, Settlements, and the UCATA*, 30 HOUS. L. REV. 1979 (1994) (recommending that the UCATA be applied in all CERCLA claims brought by private plaintiffs); Frohman, *supra* note 5, at 783–84 (recommending that the UCATA be applied to all private-party claims under CERCLA except those brought by innocent parties).

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

176. DeGroff, *supra* note 14, at 336 (arguing that the UCFA should be applied to section 113(f)(1) claims, while the UCATA should be applied to section 107(a) claims).

177. Hyson, *supra* note 36, at 270 ("Since . . . a nonsettling PRP is liable [under section 113(f)(1)] only for its equitable share of the PRP plaintiff's response costs, it makes no difference whether there have been any settlements and, therefore, the amount of any settlement is irrelevant."). Note, however, that Hyson's book was published before the Supreme Court's decisions in *Aviall* and *Atlantic Research*. At the time of publication, courts almost unanimously required private party PRPs to recover costs under section 113(f)(1).

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

the UCFA and “resist[ed] all temptation to give the UCFA a close reading.”<sup>179</sup> The court explained that “[e]xtending the [UCATA] approach of [section] 113(f)(2) to claims under [section] 113(f)(1) enables the district court to avoid what could be a complex and unproductive inquiry into the responsibility of missing parties.”<sup>180</sup>

Five years after the Seventh Circuit’s decision, the First Circuit decided in *American Cyanamid Co. v. Capuano* that section 113(f)(1) gives district courts discretion to choose the most equitable method of accounting for settling parties.<sup>181</sup> The court acknowledged that a district court’s decision to apply the UCATA or the UCFA may “produce a result so inequitable that it would constitute an abuse of discretion.”<sup>182</sup> Nevertheless, the *Capuano* court held that the district court “did not abuse its discretion by applying the [UCATA] approach given the circumstances of [the] case.”<sup>183</sup>

Prior to the decisions in *Akzo* and *Capuano*, the Supreme Court weighed in on the UCATA-UCFA debate in the context of admiralty law. In *McDermott, Inc. v. AmClyde*, the Court held that, while the two approaches were “closely matched,” the UCFA was superior for cases involving damages from admiralty collisions.<sup>184</sup> Although the Court ultimately required the application of the UCFA, the Court acknowledged that the choice between the two approaches was less than clear.<sup>185</sup> Moreover, one of the Court’s key considerations in siding with the UCFA was its consistency with precedent in admiralty law.<sup>186</sup> This rationale does not extend to the CERCLA realm.<sup>187</sup>

Today, in the CERCLA context, district courts generally apply the UCFA when allocating costs under section 113(f)(1).<sup>188</sup> However, application of the UCFA is not ubiquitous.<sup>189</sup> For example, in *AmeriPride*, the district court chose to apply the UCATA, despite expressly adopting the UCFA when

179. *Id.* at 306.

180. *Id.* at 308.

181. *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 20 (1st Cir. 2004).

182. *Id.* at 21.

183. *Id.* at 20.

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

185. *Id.* at 213–16 (describing the effect of the two rules on settlement and judicial economy as “ambiguous”); see *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999) (stating that “*McDermott* explained the choice between the [two approaches as] a tossup”).

186. *McDermott*, 511 U.S. at 212 (stating that the UCFA is “more consistent with *Reliable Transfer*”).

187. See *AmeriPride Servs., Inc. v. Tex. E. Overseas, Inc.*, 782 F.3d 474, 487 (9th Cir. 2015) (distinguishing *McDermott* on the basis that, unlike admiralty law, CERCLA does not have a rule that damages be assessed on the basis of fault).

188. *Adobe Lumber, Inc. v. Hellman*, No. CIV. 05-1510, 2009 WL 256553, at \*3 (E.D. Cal. Feb. 3, 2009) (“[D]istrict judges in the Ninth Circuit, particularly in [the Eastern] District, appear to uniformly employ the proportionate share approach for settlements between private PRPs.”); *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 897 (10th Cir. 2000) (stating that the majority of courts deciding contribution suits between private parties under section 113(f)(1) apply the UCFA).

189. See *Atl. Richfield Co. v. Am. Airlines, Inc.*, 836 F. Supp. 763, 777 (N.D. Okla. 1993) (district court concluded that the UCATA approach was “clearly superior” under the facts at issue).

approving the partial settlement agreements five years prior.<sup>190</sup> Equitable considerations might have motivated the district court's decision.<sup>191</sup> The plaintiff, AmeriPride, emphasized that the district court was correct to consider that AmeriPride both performed all of the cleanup work and incurred the attorneys' fees and costs necessary to prosecute claims against the settling PRPs.<sup>192</sup> The ongoing debate between the two approaches, and the willingness of district courts to go against the majority and apply the UCATA in some cases, suggests that neither the UCATA nor the UCFA is clearly superior under all circumstances.<sup>193</sup> In discussing the broad application of the UCATA and the UCFA, Professors Kornhauser and Revesz concluded that "any simplistic choice of one rule stems from a lack of appreciation of the complexity of the problem."<sup>194</sup> Frohman also maintained that the best approach depends on the facts at hand.<sup>195</sup> Frohman argued that factors that are common to CERCLA litigation "may be highly significant" to selection of the best approach and may "vary dramatically" from case to case.<sup>196</sup> Therefore, some commentators urge "courts considering the partial settlement credit rule in private party CERCLA actions [to] adopt a flexible approach."<sup>197</sup>

F. *AmeriPride: the Ninth Circuit Leaves the Choice to District Courts*

In *AmeriPride*, the Ninth Circuit declined to resolve the partial settlement credit issue on the basis of the relative strengths and weaknesses of the two approaches. The Ninth Circuit did not decide which approach was "best." Despite acknowledging that the Ninth Circuit "ha[d] generally favored the

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190. *AmeriPride*, 782 F.3d at 481–82.

191. The court's strain to achieve a fair outcome is evident in its discussion of cost allocation under section 113(f)(1). The district court rejected application of the factors often relied on by other courts, explaining that they would "not fairly measure apportionment" under the *AmeriPride* facts. *AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. CIV. S-00-113, 2012 WL 1413880, at \*6 (Apr. 20, 2012). The district court noted, for instance, that "it is hardly insignificant that, until the decision of the Delaware Supreme Court, the defendants were defunct corporations[.]" *Id.*

192. *AmeriPride's* Brief in Support of Application of the *Pro Tanto* Method For Allocation of Settlement Payments, No. CIV 2-00-113 MCE-EFB, Doc. 993, \*7 (E.D. Cal. Sept. 3, 2015).

193. See Frohman, *supra* note 5, at 716.

194. Kornhauser & Revesz, *supra* note 137, at 492 (explaining that "courts systematically fail to focus on the complex, strategic relationships among the plaintiff and the various defendants under schemes of joint and several liability").

195. Frohman, *supra* note 5, at 789–90 (advocating against a uniform federal rule).

196. Frohman explained:

Factors that cause low settlement values, such as impecunity and evidentiary problems peculiar to CERCLA, may be highly significant and vary dramatically. Other factors also common to CERCLA litigation, such as the complexity of the case and the nature of the parties, may also warrant consideration. In addition, the extent to which it is appropriate to increase the plaintiff's leverage through the use of the pro tanto rule may vary with the plaintiff's posture—where on the spectrum between voluntary and involuntary actor the plaintiff falls.

*Id.* at 789.

197. *Id.*



UCFA proportionate share approach[.]”<sup>198</sup> the *AmeriPride* court ruled that Congress intended to grant discretion to district courts to determine “the most equitable method of accounting for settlements between private parties in a contribution action.”<sup>199</sup> The *AmeriPride* court inferred Congress’s intent from the structure of section 113(f), the language of section 113(f)(1), and “CERCLA’s overall statutory purpose.”<sup>200</sup>

First, the court considered the structure of section 113(f) by comparing sections 113(f)(1) and 113(f)(2).<sup>201</sup> Section 113(f)(2) applies to settlements reached with the government.<sup>202</sup> Courts have widely interpreted the language of section 113(f)(2) to adopt the UCATA approach.<sup>203</sup> Whereas section 113(f)(2) specifies that a settlement reduces the potential liability of nonsettling parties by “the amount of the settlement,” section 113(f)(1) provides no guidance as to the effect of a settlement on nonsettling defendants. The Ninth Circuit explained that “[t]he requirement that courts apply the UCATA [] approach . . . in section 9613(f)(2), and the lack of any such requirement [in section 9613(f)(1)], leads to the conclusion that Congress did not intend to impose a uniform requirement.”<sup>204</sup>

Second, the court looked to the discretion granted to district courts by the text of section 113(f)(1).<sup>205</sup> Section 113(f)(1) permits a district court to allocate response costs “using such equitable factors as the court determines are appropriate.”<sup>206</sup> The Ninth Circuit explained that the discretionary language of section 113(f)(1) applies to a court’s determination of how to allocate liability among PRPs.<sup>207</sup> Thus, a district court may determine whether the UCFA or the UCATA is an appropriate “equitable factor” in allocating liability under section 113(f)(1).<sup>208</sup>

Finally, the Ninth Circuit relied on CERCLA’s goal of promoting settlement. The court explained that providing district courts with the discretion to apply either the UCFA or the UCATA approach fosters settlement “without unnecessarily further complicating already complicated litigation.”<sup>209</sup>

Thus, the Ninth Circuit held that Congress intended to grant district courts the discretion to decide whether to apply the UCFA or the UCATA when allocating costs among liable parties under section 113(f)(1).

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198. *AmeriPride Servs., Inc. v. Tex. E. Overseas, Inc.*, 782 F.3d 474, 484 (9th Cir. 2015).

199. *Id.* at 487.

200. *Id.* at 486 (internal quotations omitted).

201. *Id.*

202. 42 U.S.C. § 9613(f)(2) (2012).

203. DeGroff, *supra* note 14, at 357–58.

204. *AmeriPride*, 782 F.3d at 486.

205. *Id.*

206. § 9613(f)(1).

207. *AmeriPride*, 782 F.3d at 486.

208. *Id.*

209. *Id.* (quoting *Chubb Custom Ins. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013)).

### III. UNDECIDED CIRCUITS SHOULD RESIST THE URGE TO COMMIT TO ONE APPROACH IN ORDER TO PROVIDE CERTAINTY

The Ninth Circuit's ruling triggered a swift reaction from legal practitioners. Commentators almost unanimously concluded that the Ninth Circuit's decision increased the *uncertainty* faced by CERCLA litigants by granting district courts the *discretion* to apply either the UCATA or the UCFA.<sup>210</sup> The post-*AmeriPride* chorus may prompt undecided circuits to adopt a common law rule requiring the blanket application of either the UCATA or the UCFA. This Part will make a case that a uniform rule is an ineffective tool for providing certainty for CERCLA litigants.

#### A. *The Call for a Partial Settlement Credit Rule*

Following *AmeriPride*, commentators agreed that allowing the district court discretion to apply either the UCATA or the UCFA increased uncertainty for litigants in private-party CERCLA suits. One legal blog explained that “[s]ignificant uncertainty remains as to how private party settlements will be treated in an equitable allocation among responsible parties.”<sup>211</sup> The post-*AmeriPride* commentary implied that a partial settlement credit rule, requiring the uniform application of either the UCFA or the UCATA, would reduce uncertainty for CERCLA litigants.

Convention supports commentators' conclusion that a rule reduces uncertainty. Professor Cass Sunstein has defended rules as effective tools for providing certainty, because “rules narrow or even eliminate the range of disagreement and uncertainty faced by people attempting to follow or to interpret the law.”<sup>212</sup> A partial settlement credit rule would reduce disagreement as to whether courts should apply the UCATA or the UCFA in a specific case. The uniform application of either approach would allow parties to predict, at the onset of litigation, the effect of any partial settlements.

Certainty, in turn, allows litigants to make informed decisions during litigation and may facilitate settlement. Sunstein has explained that rules have “enormous virtues in terms of promoting predictability and planning[.]”<sup>213</sup> “Planning,” in this context, refers to a litigant's ability to negotiate settlement agreements and develop a litigation strategy. One commentator reasoned that “[k]nowing which approach will apply is important to understanding how to value a settlement, and without this certainty, parties in CERCLA contribution

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210. See, e.g., Daneker & Daniel, *supra* note 23; see also Lynn T. Manolopoulos, *Non-Settling CERCLA Defendants Beware: Ninth Circuit Provides Lower Courts with Discretion to Allocate Liability Using Equitable Factors*, ENERGY & ENVTL. L. BLOG (Apr. 15, 2015), <http://www.energyenvironmental-law.com/2015/04/15/non-settling-cercla-defendants-beware-ninth-circuit-provides-lower-courts-with-discretion-to-allocate-liability-using-equitable-factors/>.

211. Daneker & Daniel, *supra* note 23.

212. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1022 (1995).

213. *Id.*

suits may be inclined to litigate rather than settle.”<sup>214</sup> Thus, certainty may also play an important role in CERCLA litigation by encouraging settlement.<sup>215</sup>

Certainty’s effect on settlement is especially important because settlement plays a key role in CERCLA’s statutory scheme.<sup>216</sup> CERCLA’s enactment resulted in an “explosion of litigation.”<sup>217</sup> In 1986 Congress responded to the litigation problem by adopting the Superfund Amendments and Reauthorization Act (SARA).<sup>218</sup> One of the primary goals of SARA was to promote settlement in CERCLA actions.<sup>219</sup> Today, courts agree that CERCLA emphasizes settlement.<sup>220</sup>

Given that CERCLA prioritizes settlement, that uncertainty may induce a party to litigate rather than settle, and that rules reduce uncertainty, the argument implied in the post-*AmeriPride* chorus—that circuits should adopt a partial settlement rule—seems unassailable. However, the call for a partial settlement credit rule requires a closer examination. Specifically, in this context, it is far from certain that a partial settlement credit rule would provide the *type* of certainty that CERCLA litigants seek. The following subpart provides two reasons why a partial settlement credit rule is not a panacea for uncertainty.

#### B. A Partial Settlement Credit Rule Is a Poor Tool for Providing Certainty

In a private-party cost-recovery action, CERCLA litigants face two sources of uncertainty regarding their potential liability: (1) the value of a

214. Daneker & Daniel, *supra* note 23.

215. Courts and commentators appear to widely accept the premise that certainty facilitates settlement. *See, e.g.*, Frohman, *supra* note 5, at 755. However, not all academics agree that certainty promotes settlement. Professors Kornhauser and Revesz state that “there is no reason to equate less uncertainty with a higher probability of settlements.” Kornhauser & Revesz, *supra* note 137, at 486. Kornhauser and Revesz explain that uncertainty regarding the nonsettling defendant’s and plaintiff’s liability encourages settlement only where parties are risk-averse and pessimistic about a positive outcome. *Id.* at 487.

216. Some commentators argue that encouraging settlement is less important in some types of CERCLA actions. Frohman argues that the “effect of settlement on furthering CERCLA’s goals, particularly with respect to expediting cleanup, is not equally applicable to all case postures.” Frohman, *supra* note 5, at 738. Frohman contends:

[I]n the private party circumstance, the speed with which settlement is accomplished is of little relevance to cleanup. . . because the commencement and completion of a cleanup pursuant to a consent decree or agreement are not directly dependent on the timeliness of the PRP’s ability to obtain from other PRPs cost recovery under section 107(a) and/or contribution under section 113(f).

*Id.* at 736. In addition, Frohman argues that settlement is necessary to ensure the availability of cleanup funds only where “failure to settle . . . threaten[s] the solvency of all PRPs.” *Id.* at 737.

217. Frohman, *supra* note 5, at 722.

218. Pub. L. No. 99-499, 100 Stat. 1613–1782 (1986).

219. Frohman, *supra* note 5, at 735 (citing *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1029 (D. Mass. 1989) (“[V]oluntary settlement of litigation is high in judicial favor both generally and in CERCLA actions in particular.” (citations omitted)); *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 693 (S.D.N.Y. 1988) (“Congress, in enacting the 1986 amendments to CERCLA sought to ‘expedite effective remedial actions and minimize litigation.’”).

220. *See, e.g.*, *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990).

partial settlement credit and (2) allocation of total liability. Imagine total liability as a pie. The entire pie must be eaten. A litigant cares about the amount of the pie it must eat. Where there is a partial settlement, a slice of the pie is removed. Litigants desire to know the size of the slice, so that they can know the amount of the pie that remains. The value of the partial settlement credit tells us the size of the pie slice. The size of the slice is one source of uncertainty for litigants. However, litigants ultimately care about the amount of pie they themselves must eat. Thus, the second source of uncertainty for litigants is how a court will allocate the pie remaining after the partial settlement slice is removed.

A partial settlement credit rule is an ineffective tool for providing certainty to litigants for two reasons: first, a rule provides certainty regarding the value of the partial settlement credit *only* where the rule requires the application of the UCATA; second, although a rule that requires the application of the UCATA provides certainty regarding the value of a partial settlement credit, such a rule does not provide certainty as to how a court will allocate liability among remaining PRPs, and thus does not provide certainty regarding the amount of a litigant's potential liability.

*C. A Partial Settlement Credit Rule Requiring Uniform Application of the UCFA Does Not Provide Certainty for Litigants Regarding Potential Liability*

A partial settlement credit rule provides certainty for CERCLA litigants *only* if the rule requires the blanket application of the UCATA. A partial settlement credit rule that adopts the UCFA provides little certainty regarding the value of a partial settlement credit.

Sunstein explained that “[t]he key characteristic of rules is that they attempt to specify outcomes before particular cases arise.”<sup>221</sup> Courts must be clear about what outcome is specified by a partial settlement credit rule. A partial settlement credit rule does not specify the value of a partial settlement credit. Rather, a partial settlement credit rule specifies the *method* applied to *measure* a partial settlement credit. Under the UCATA, a partial settlement credit is measured as the dollar amount of the settlement; at the time of settlement, litigants know that total potential liability will be reduced by the dollar amount of the settlement. In contrast, under the UCFA, the value of a partial settlement credit is measured as the settling defendant's proportionate share of liability. Under CERCLA, a private-party defendant's proportionate share of liability is determined based on “equitable factors” as described in section 113(f)(1).

The district courts' broad discretion under section 113(f)(1) makes accurately estimating a defendant's proportionate share of liability at the time of settlement nearly impossible. Section 113(f)(1) grants incredible discretion to district courts to allocate liability among PRPs. Courts may allocate liability

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221. Sunstein, *supra* note 212, at 961.

based on whichever “equitable factors” the court deems appropriate.<sup>222</sup> Sunstein explains that, under a system of factors, the practical effect of the law is generally not known until the factors are applied to the particulars of a case.<sup>223</sup>

The equitable factors standard under section 113(f)(1) provides “little concrete guidance as to the proper distribution of liability among the responsible parties.”<sup>224</sup> The Sixth Circuit explained that the use of the phrase “equitable factors” demonstrates that Congress intended to require courts to “construct a flexible decree balancing all the equities in the light of the totality of the circumstances.”<sup>225</sup> Litigants are generally unable to predict the equitable factors that a court will apply.<sup>226</sup> Moreover, section 113(f)(1) allows a court to “invoke its moral as well as its legal sense[,]”<sup>227</sup> and “cost allocation is inevitably based on value judgments and is not simply a matter of applying scientific formulas.”<sup>228</sup> A court’s consideration of factors under section 113(f)(1) is limited only by the requirement that a factor be “in the interest of justice in allocating contribution recovery.”<sup>229</sup>

In some cases, courts rely on cost causation to allocate costs under section 113(f)(1). However, one analyst has explained that “most site remediation is so complex that applying volumetric or toxicity-based techniques would be arbitrary.”<sup>230</sup> Thus, even where courts rely on cost causation evidence, allocation of liability under section 113(f)(1) is unpredictable.

Under the UCFA, the partial settlement credit is the settling defendant’s proportionate share of liability. Liability determinations under section 113(f)(1) are highly variable. It follows that a partial settlement credit rule that required the blanket application of the UCFA would provide little certainty regarding the value a partial settlement credit. Therefore, courts seeking to provide certainty to CERCLA litigants by adopting a partial settlement credit rule are limited to adoption of the UCATA.

*D. A Partial Settlement Credit Rule Does Not Resolve Uncertainty Regarding the Allocation of Liability Amongst Litigants*

While a rule requiring the uniform adoption of the UCATA provides certainty regarding the value of a partial settlement credit, it does not address the uncertainty as to how courts will allocate liability under section 113(f)(1).

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222. 42 U.S.C. § 9613(f)(1) (2012).

223. Sunstein, *supra* note 212, at 964.

224. John C. Butler III et al., *Allocating Superfund Costs: Cleaning Up the Controversy*, 23 *Env'tl. L. Rep.* (Env'tl. Law Inst.) 10,133, 10,134 (1993) (quoting Laurie Burt & Robert S. Sanoff, *Allocating Contribution Shares in Superfund Cases*, 20 *CHEM. WASTE LITIG. REP.* 203, 204 (1990)).

225. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991).

226. Butler III et al., *supra* note 224, at 10,135.

227. *R.W. Meyer*, 932 F.2d at 572.

228. Butler III et al., *supra* note 224, at 10,143.

229. *R.W. Meyer*, 932 F.2d at 572 (stating that “[n]o exhaustive list of criteria need or should be formulated”).

230. Butler III et al., *supra* note 224, at 10,143.

When evaluating a potential rule, courts should concentrate on whether the rule provides certainty regarding the value of a litigant's potential liability, rather than whether the rule provides certainty regarding the value of a partial settlement credit. Many commentators in the post-*AmeriPride* chorus stressed the importance of knowing the "true" worth of settlements.<sup>231</sup> This phrasing, however, is somewhat misleading. Litigants make settlement and litigation decisions based on the value of their potential liability, not the "true" value of settlement.<sup>232</sup> Decisions are based on perceived risk. So, litigants benefit from certainty regarding the value of their potential liability.

Under section 113(f)(1), litigants face significant uncertainty regarding how a court will allocate costs—or how a court will slice the remaining pie. As described above, section 113(f)(1) allows a court to rely on any number of factors to allocate costs among PRPs. Which factor or factors a court will base its decision on is difficult to predict.

Moreover, CERCLA litigants face an additional source of uncertainty regarding the allocation of costs under section 113(f)(1): orphan shares. Orphan shares are a pervasive problem in CERCLA actions.<sup>233</sup> Orphan shares are the "equitable shares of cleanup cost liability attributable to insolvent, dead, or defunct responsible parties"<sup>234</sup> or "not traceable to any known or identifiable PRP."<sup>235</sup> Courts' inconsistent handling of orphan shares is an additional source of uncertainty for CERCLA litigants under both the UCATA and UCFA.

Whether a defendant PRP is jointly and severally liable or severally liable affects the allocation of orphan shares. Where liability is several, a tortfeasor is responsible only for his or her fair share of the harm. Thus, the plaintiff must absorb the cost of the orphan share.<sup>236</sup> On the other hand, where liability is joint and several, a tortfeasor is responsible for the entire harm. As such, the defendant must absorb any costs that are attributable to insolvent, dissolved, or unidentifiable parties. Because PRPs are presumptively jointly and severally liable under section 107(a), but severally liable under section 113(f)(1), whether an action is brought under section 107(a) or section 113(f)(1) may determine whether the plaintiff or defendant is liable for the orphan share. One commentator explained that orphan shares "could swing wholly to the plaintiff

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231. See e.g., James J. Dragna et al., *Ninth Circuit Widens Judges' Discretion to Allocate CERCLA Contribution Damages*, MORGAN LEWIS (Apr. 14, 2015), <https://www.morganlewis.com/pubs/ninth-circuit-widens-judges-discretion-to-allocate-cercla-contribution-damages>.

232. See *id.*

233. See Aaron Gershonowitz, *United States v. Atlantic Research Corp.: Who Should Pay to Clean up Inactive Hazardous Waste Sites?*, 19 DUKE ENVTL. L. & POL'Y 119, 148–49 (2008) (orphan shares are present in almost every CERCLA case).

234. Kilbert, *supra* note 9, at 1047.

235. William D. Auxer, Comment, *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) (citing *United States v. Kramer*, 757 F. Supp. 397, 410–11 (D.N.J. 1991)).

236. But see Frohman, *supra* note 5, at 726 (stating that a contribution action defendant is liable for only its proportionate share of the orphan share).

or to the defendant depending upon which CERCLA section governs the claim.”<sup>237</sup>

Recall that, as a result of three Supreme Court decisions in the past eleven years, the proper application of sections 107(a) and 113(f)(1) is an evolving area of the law.<sup>238</sup> In the aftermath of the Supreme Court’s decisions, district courts have reached different conclusions regarding whether section 107(a) or section 113(f)(1) apply in many common circumstances.<sup>239</sup> For example, courts are in disagreement as to whether section 107 or section 113 applies where a PRP has entered into a consent decree.<sup>240</sup> One commentator explained that “lower courts are all over the board when it comes to deciding whether section 107 or section 113 applies in a variety of common CERCLA contexts.”<sup>241</sup>

The *AmeriPride* proceedings provide an example of the confusion regarding the proper applicability of sections 107(a) and 113(f)(1). *AmeriPride* brought suit to recover the expenses under section 107(a). The district court held that the company could not recover the amounts it paid in settlement under section 107(a), but allowed *AmeriPride* to file an amended complaint to recover the settlement amounts under section 113(f)(1).<sup>242</sup> The inconsistent application of sections 107(a) and 113(f)(1) add to litigants’ uncertainty regarding cost allocation, because whether an action is brought under section 107(a) or 113(f)(1) determines whether liability is joint and several or several. Whether liability is joint and several or several, in turn, impacts whether a plaintiff or defendant PRP is responsible for any orphan shares. Under a true several liability scheme, the plaintiff has sole responsibility for any orphan shares.<sup>243</sup>

To conclude, *only* a rule adopting the UCATA provides certainty regarding the value of a partial settlement credit. Moreover, even where the value of a partial settlement credit is known, the broad discretion granted to

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237. Kilbert, *supra* note 9, at 1069.

238. *See supra* Part I.A.

239. *New York v. Solvent Chem. Co.*, 685 F. Supp. 2d 357, 425 (W.D.N.Y. 2010) (“These recent rulings [*Aviall*, *Atlantic Research*, and *Burlington Northern*] have done little to provide the lower courts with useful guidance in determining which subsection of CERCLA provides a cause of action for parties seeking reimbursement of response costs in differing situations.”).

240. *See* Kilbert, *supra* note 9, at 1065; *compare* *Niagara Mohawk Power v. Chevron U.S.A., Inc.*, 596 F.3d 112, 124–26 (2d Cir. 2010) (finding that administrative consent order with state agency resolved plaintiff’s CERCLA liability, so plaintiff’s claim against other responsible parties was governed by CERCLA section 113(f)(3)(B)), and *Morrison Enters. v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011) (“§ 113(f) provides the exclusive remedy for a liable party compelled to incur response costs pursuant to an administrative or judicially approved settlement under §§ 106 or 107.”), with *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, 559 F.3d 85, 92–93 (2d Cir. 2009) (holding that administrative consent order with state agency did not resolve plaintiff’s CERCLA liability, so plaintiff’s claim against other responsible parties was governed by CERCLA section 107); *see also* *ITT Indus., Inc. v. Borgwarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007) (finding that an administrative consent order with the United States Environmental Protection Agency (EPA), despite resolving CERCLA liability, did not constitute an administrative settlement for purposes of section 113(f)(3)(B), so plaintiff’s claim against other responsible parties was governed by CERCLA section 107).

241. Kilbert, *supra* note 9, at 1069.

242. *AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. CIV. S-00-113, 2011 WL 1833179, at \*19 (E.D. Cal. May 12, 2011).

243. Kilbert, *supra* note 9, at 1047-48.

district courts under section 113(f)(1), in conjunction with the orphan share problem, make it difficult to predict how a district court will allocate liability among PRPs. This uncertainty reduces the comparative value of certainty regarding the amount of a partial settlement credit.

#### IV. UCATA OR UCFA: RULELESSNESS IS BETTER THAN A RULE

*“Many of the most difficult issues in law involve the choice between rules and rulelessness in cases in which both seem unacceptable.”*<sup>244</sup>

For undecided circuits, a decision looms: mandate the uniform application of a single rule (either the UCATA or the UCFA), as in *Akzo*, or follow *AmeriPride* and *Capuano* in leaving the choice to district courts. This is a choice between a rule and rulelessness. The previous Part focused on the impact of a rule on certainty, but there are many advantages to rules over and above promotion of private-party planning. Rules are impersonal: they reduce the risk that decision makers will rely on improper factors when making decisions, and they reduce the cost of reaching decisions in individual cases.<sup>245</sup> Further, rules provide uniformity by ensuring that parties are treated consistently among decision makers.<sup>246</sup> Given these advantages, under what circumstances is it appropriate to rely on rulelessness rather than rules?

In his article, “Problems with Rules,” Sunstein explained that the choice between rules and rulelessness is context dependent.<sup>247</sup> Several factors are pertinent to the determination of whether a rule is appropriate in a given context. These factors include, but are not limited to, the likelihood of bias, the extent of current information, the stakes, the quality of those who apply the law, and the sheer number of cases.<sup>248</sup> This Part will apply the factors set forth by Sunstein to conclude that, in the context of cost allocation under section 113(f)(1), rulelessness is best.

First, rulelessness is appropriate here because we trust district court judges to make impartial decisions. Rules are preferable where there is a high

244. Sunstein, *supra* note 212, at 1022; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (identifying the “hardest question” as determining when a “totality of the circumstances” analysis is avoidable).

245. Sunstein, *supra* note 212, at 972–74 (“[r]ules [that m]inimize the [i]nformational and [p]olitical [c]ost of [r]eaching [d]ecisions in [p]articular [c]ases” “[a]re [i]mpersonal and [b]lind,” and reduce the risk that decision makers will consider illegitimate or irrelevant factors).

246. See *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 21 (1st Cir. 2004) (“The different approaches to accounting for settling parties can produce different results and, for uniformity purposes, it may be wise to choose one of these two approaches.”); *McDermott, Inc. v. AmClyde, Inc.*, 511 U.S. 202, 207 (1994) (granting certiorari to resolve incongruity among the circuits regarding the application of either the UCATA or the UCFA).

247. Sunstein, *supra* note 212, at 1016.

248. *Id.* Other factors listed by Sunstein include “the location and nature of social disagreement,” “the risk of over-inclusiveness,” and “the alignment or nonalignment of views between lawmakers and others.” *Id.* This Note does not discuss those factors, because they are more applicable to rules adopted via vote (such as statutes) or via a rulemaking procedure (such as regulations).



likelihood of bias.<sup>249</sup> By limiting discretion, rules reduce the ability of decision makers to make decisions based on improper considerations.<sup>250</sup> For example, a rule may be appropriate to guide administrative agencies where there is a high likelihood of agency capture as a result of the agency's close dealings with the industry that it regulates.<sup>251</sup> In contrast, legal academics widely agree that judges attempt to make decisions free of personal bias and emotion.<sup>252</sup> To the extent that we trust district court judges to act impartially, rules limiting the discretion of judges are less valuable than rules in other contexts.

Second, a rule is less acceptable in this context due to courts' limited access to information on the effects of the UCATA and the UCFA on settlement, fairness, and judicial economy. Sunstein explained that rules will likely be avoided "when the lawmaker lacks information and expertise[.]"<sup>253</sup> The merits of the UCATA and the UCFA have been extensively considered.<sup>254</sup> Circuit courts, however, are not well equipped to choose one approach to uniformly apply. This is because the effect of the two rules depends substantially on variables particular to individual CERCLA actions.<sup>255</sup> The Supreme Court selected between the two rules in the context of admiralty law, but it acknowledged that the effect of each rule on settlement and judicial economy was "ambiguous."<sup>256</sup> Two commentators suggest that administrative agencies, rather than judges, should choose among the two rules, because courts are not equipped to assimilate data regarding the effect of a rule on a broad range of CERCLA actions.<sup>257</sup>

Third, the high stakes in CERCLA cost-allocation actions make rulelessness sensible in this context. Rules are less acceptable when the costs of

249. *Id.* at 1012.

250. *Id.* at 976.

251. See generally Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501 (2015) (discussing the effect of administrative agencies that are poorly constrained by legislation).

252. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001) (quoting Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 4 (1994)) ("We are confident that most judges attempt to 'reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors.'"); but see Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2004) (examining "bad judges" who are "incompetent, self-indulgent, abusive, or corrupt").

253. Sunstein, *supra* note 212, at 1003.

254. See *supra* Part I.

255. See *supra* Part I.B.

256. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 214–16 (1994).

257. Kornhauser & Revesz, *supra* note 137, at 493:

[T]he choice among the competing legal rules might be better made by administrative agencies than by common law judges. When presented with a particular case, judges are unlikely to be able to collect the data necessary to determine whether, for the bulk of cases in that category, the plaintiff's probabilities of success are highly correlated, or whether litigation costs are high. These determinations are easier for administrative officials, who have better means of obtaining empirical information and easier access to the types of expertise necessary to analyze this information.

error in individual circumstances is high.<sup>258</sup> CERCLA cleanup costs generally number in the millions of dollars. Experts estimated the average cost of CERCLA cleanups at between \$25–\$30 million per site.<sup>259</sup> In *AmeriPride*, investigation and cleanup costs were estimated to be “as low as \$8–\$10 million and as high as \$20 million,” not taking into account the necessary cleanup on neighboring properties.<sup>260</sup> The high costs of CERCLA cleanups make increasing the risk of reaching the wrong outcome highly undesirable.

Courts’ unwillingness to follow a rule in order to avoid an unfair outcome in the orphan shares context is evidence that the stakes of the decision in CERCLA litigation are high enough to make rulelessness preferable. Courts’ disparate treatment of orphan shares shows that district courts might subvert a rule in order to avoid an unfair outcome when allocating liability for cleanup costs under section 113(f)(1).<sup>261</sup> As discussed previously, principles of joint and several liability require that a defendant PRP in a section 107(a) action shoulder the cost of orphan shares. Given that the orphan share may be substantial, joint and several liability may result in an unfair outcome, where the defendant PRP is forced to bear the entire cost of any orphan shares and the plaintiff PRP bears none of the costs.<sup>262</sup> Some district courts that are unwilling to allow such an outcome have ignored the rules of joint and several liability when allocating orphan share liability.<sup>263</sup> Rather than requiring defendant PRPs to bear the entire cost of orphan shares, some courts have forced plaintiff PRPs to share the costs.<sup>264</sup> District courts may act similarly where the outcome from the application of a partial settlement credit rule is unacceptably unfair.<sup>265</sup> The

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258. Sunstein, *supra* note 212, at 1014.

259. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349 n.9 (6th Cir. 1998).

260. Memo of Points and Authorities in Support of Joint Application for Approval of Settlement and Contribution Bar, *AmeriPride Servs. Inc. v. Valley Indus. Servs., Inc.*, No. CIV. S-00-0113, 2006 WL 1858816, at \*5 (E.D. Cal. May 15, 2006).

261. See Sunstein, *supra* note 212, at 994 (“When rules yield a good deal of inaccuracy in particular cases, people in a position of authority may simply ignore them.”).

262. See Jason E. Panzer, *Apportioning CERCLA Liability: Cost Recovery or Contribution, Where Does a PRP Stand?*, Note, 7 *FORDHAM ENVTL. L.J.* 437, 481 (stating that it “seems extremely inequitable to hold a limited number of liable parties responsible for the entire orphan share”).

263. Kilbert, *supra* note 9, at 1077.

264. *Id.* (“[A] few courts have shown a willingness to equitably allocate the orphan shares among all viable responsible parties in private CERCLA section 107 cases where a contribution counterclaim has been asserted under section 113.”)

265. The district court’s decision in *Burlington Northern* may be another example of courts’ unwillingness to follow a rule that would result in an unfair outcome when allocating cleanup costs under section 113(f)(1). Commentators have pointed out that the district court probably apportioned costs because there was no opportunity for meaningful contribution. Judy, *supra* note 11, at 289. The district court stated:

The concept that a passive owner of a contiguous parcel, not representing more than [nineteen percent] in area of a CERCLA site, operated less than [forty-four percent] of the time, where substantially smaller volumes of hazardous substance releases occurred, should be strictly liable for the entire site remediation, because no other responsible party is judgment-worthy, takes strict liability beyond any rational limit.

*Id.* at 289–90 (quoting *United States v. Atchison*, No. CV-F-92-5068 OWW, 2003 WL 25518047, at \*87 (E.D. Cal. July 15, 2003)).

high stakes in CERCLA cost-allocation actions make it likely that courts will subvert a partial settlement credit rule if it results in an outcome that the court perceives as unfair.

Fourth, the relatively limited number of CERCLA actions makes rulelessness feasible in this context. A less-than-perfect rule becomes more tolerable when the number of cases is very large.<sup>266</sup> Because rules save informational and political costs associated with decision making, the value of rules increases when more decisions are made.<sup>267</sup> As of April 2016, the National Priority List of all CERCLA sites includes 1328 sites; 391 sites had been deleted from the list.<sup>268</sup> Although the number of CERCLA sites and, thus, the number of potential CERCLA lawsuits, is far from insignificant, it is not prohibitive for rulelessness.<sup>269</sup>

Finally, lawmakers are more willing to choose rulelessness when the quality of the decision maker is high.<sup>270</sup> Although courts may not be well situated to develop a rule of broad application, district court judges are best placed to decide whether the UCATA or the UCFA should be applied in an individual case. This is because the choice between the UCATA and the UCFA is context dependent. As discussed in Part II, whether the UCATA or the UCFA results in the best outcome in terms of settlement, judicial economy, and fairness depends on variables that are specific to the CERCLA action. Thus, district court judges who are familiar with the facts of an individual case ought to choose between the two approaches.<sup>271</sup>

#### CONCLUSION

Circuit courts that are tempted to save the fish in the CERCLA barrel should resist adopting a partial settlement credit rule as a net. A partial settlement credit rule, especially a rule that requires the uniform application of the UCFA, will do little to provide certainty for private-party CERCLA litigants regarding their potential liability. While rules are appropriate in many circumstances, the Ninth Circuit correctly interpreted Congress's intent to grant

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266. Sunstein, *supra* note 212, at 1015.

267. *Id.* at 1015 (“rules—once they are in place—economize on information costs at the point of application”).

268. *NPL Site Totals by Status and Milestone*, EPA, <http://www2.epa.gov/superfund/npl-site-totals-status-and-milestone> (last updated Apr. 12, 2016).

269. As compared to, for instance, speeding tickets.

270. Sunstein, *supra* note 212, at 1016.

271. This is not to say that district court judges are infallible. *See* Guthrie et al., *supra* note 252, at 829:

Despite their best efforts, however, judges are vulnerable to the influence of the cognitive illusions that we have described in this Article. Our study demonstrates that judges rely on the same cognitive decision-making process as laypersons and other experts, which leaves them vulnerable to cognitive illusions that can produce poor judgments.

discretion to district courts to apply either the UCATA or the UCFA when allocating costs under section 113(f)(1).<sup>272</sup>

Sunstein warned against both “extravagant enthusiasm for rules and excessive focus on the possibility of achieving accurate outcomes through fine-grained encounters with particulars.”<sup>273</sup> This Note does not denounce the utility of a good rule. Rather, this Note concludes that given the high stakes of CERCLA litigation, the difficulty of aggregating information to draw broad conclusions about the efficacy of the UCATA and the UCFA, and the quality of district court judges as unbiased decision makers, no rule is the best rule in the context of partial settlement credits under CERCLA.

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272. See Hartman et al., *supra* note 25, at 10,850 (“Our view is that if the Supreme Court were to address the issue, it might favor the approach taken by the First and Ninth Circuits because it gives courts the flexibility to tailor the method of allocation to the specific facts and circumstances.”).

273. Sunstein, *supra* note 212, at 1016.

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We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.