

# Beyond the Gore Factors: What Courts Consider in Allocating CERCLA Section 113(f) Liability

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## I. Contribution Under CERCLA: Equitable Allocation

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, imposes strict liability on responsible parties for all response costs incurred by government entities and, if consistent with the National Contingency Plan, by private parties, in connection with a release or threatened release of a hazardous substance. Where there are multiple liable parties, CERCLA section 113(f)(1) allows a party who has shouldered more than its



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"fair share" of response costs to seek contribution against the other liable parties.<sup>1</sup> In such situations, the court resolves contribution claims by allocating response costs among the liable parties "using such equitable factors as the court determines are appropriate."<sup>2</sup>

"[I]n any given case, a court may consider several factors, a few factors, or only one determining factor...depending on the totality of circumstances presented to the court."<sup>3</sup> However, CERCLA does not expressly provide any list of factors or other guidelines to assist the district court in determining its allocation of response costs amongst the liable parties. Instead, CERCLA section 113(f)(1) leaves the matter entirely up to the discretion of the court, based on equitable considerations.

## II. The Gore Factors

Faced with this broad grant of discretion, courts in nearly every federal circuit have turned to the "Gore Factors" for guidance in making a section 113(f)(1) allocation.<sup>4</sup> The Gore Factors are named for their author, then-congressman Albert Gore, who proposed them in an unsuccessful amendment to CERCLA in 1980.<sup>5</sup> The Gore Amendment was an effort to soften the perceived harshness of imposing joint and several liabilities on parties liable under CERCLA without regard to relative culpability.<sup>6</sup> Despite the exclusion of the Gore Factors from the final version of CERCLA as enacted in 1980, courts apply the Gore Factors under the authority of CERCLA section 113(f)(1), and some states have adopted the Gore Factors in their versions of CERCLA.<sup>7</sup>

The six Gore Factors are:

- (i) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
- (ii) the amount of hazardous waste involved;
- (iii) the degree of toxicity of the hazardous waste;
- (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.<sup>8</sup>



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The underlying theme of the Gore Factors is that allocation of liability is proportionally related to the harm that each party causes to the environment. "Those parties who can show that their contribution to the harm is relatively small in terms of amount of waste, toxicity of the waste, involvement with the waste, and care, stand in a better position to be allocated a smaller portion of response costs."<sup>9</sup>

Courts universally recognize that the Gore Factors are neither exhaustive, nor exclusive.<sup>10</sup> Thus, CERCLA practitioners are continually confronted with the question—what else beyond the Gore Factors does a district court consider in order to allocate contribution claims under CERCLA section 113(f)(1)?

This article analyzes various elements apart from the Gore Factors which district courts have used in fashioning section 113(f)(1) allocations. Hopefully, this discussion will assist CERCLA practitioners in preparing their arguments advocating a particular allocation, or in anticipating an opposing scheme.

## III. Beyond the Gore Factors: Case Studies

### A. *Acushnet Company v. Coaters, Inc.*

In *Acushnet*, a potentially responsible party ("PRP") who had entered into a consent decree with

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the U.S. Environmental Protection Agency ("EPA") brought a contribution action against other non-settling PRPs, who moved for judgment as a matter of law. While citing the Gore Factors, the court primarily looked at the extremely small quantity or "mass" of waste allegedly dumped by defendants, and the waste's lack of durability (or persistence in the environment), and concluded that defendants should be allocated zero liability.<sup>11</sup>

**B. Bethlehem Iron Works, Inc. v. Lewis Industries, Inc.**

In *Bethlehem*, the current owner of contaminated property sought contribution against the two prior owners. In allocating response costs, the court considered: how each owner used the property during the time of ownership (e.g., industrial operations, disposal, lack of operations);<sup>12</sup> whether a party should have been aware of the condition of the property at the time of purchase, benefits received by the parties from the contaminating activities; knowledge and/or acquiescence of the parties in the contaminating activities; and any financial benefit to the parties arising from remediation.<sup>13</sup>

**C. United States v. R.W. Meyer, Inc.**

In *Meyer*, the district court allocated one third of plaintiff's response costs to defendant property owner. Defendant appealed, claiming that the district court improperly considered his status as a landowner in fashioning its section 113(f)(1) allocation. The Court of Appeals disagreed, holding that the district court properly considered defendant's landowner status in combination with actions he took or failed to take as the landowner, since the latter determined the manner in which the property would be used.<sup>14</sup> Additionally, the Court of Appeals stated that "the court may consider the state of mind of the parties, their economic status, any contracts between them bearing on the subject, any traditional equitable defenses such as mitigating factors and any other factors deemed appropriate to balance the equities in the totality of the circumstances."<sup>15</sup>

**D. Environmental Transportation Systems, Inc. v. Ensco, Inc.**

In *Environmental Transportation Systems, Inc.*, a truck transporting hazardous materials was involved in a single vehicle accident, resulting in a spill of polychlorinated biphenyls. Plaintiff carrier, who owned the truck and whose employee was the driver, sought contribution from defendant generator of the materials and defendant contracting shipper. The district court granted summary judgment in favor of defendants, and the Court of Appeals affirmed, holding that the district court properly allocated response costs based on relative fault—plaintiff's employee was entirely at fault for the accident, so plaintiff was allocated all of the costs of cleanup.<sup>16</sup> The court also concluded that, although not supported by evidence here, compliance with industry regulations is another equitable factor for potential consideration.<sup>17</sup> Lastly, the court noted that other courts have considered the financial resources of the parties involved,<sup>18</sup> and the benefits received by the parties and the knowledge and/or acquiescence of the parties in the contaminating activities.<sup>19</sup>

**E. Kerr-McGee Chem. v. Lefton Iron & Metal**

In *Kerr-McGee*, the Court of Appeal found error where the district court failed to consider an indemnity agreement between the parties when fashioning its section 113(f) allocation. Beyond the Gore Factors, courts may consider relative fault, and any contracts between the parties bearing on the allocation of clean-up costs.<sup>20</sup> Here, even where the district court found an indemnification agreement to be inapplicable to a determination of statutory liability, the Court of Appeals held that the district court should have considered one party's intent to indemnify another party.<sup>21</sup>

**F. Control Data Corporation v. S.C.S.C. Corporation**

In *Control Data*, defendant appealed the district court's allocation of thirty-three percent of the

response costs to defendant even though defendant had only contributed ten percent of the volume of pollution. In affirming the allocation, the Court of Appeal looked beyond mere volume and considered the fact that defendant was responsible for contamination due to the presence of perchloroethylene, which was more toxic than other substances present, was a carcinogen, and was more difficult to strip from the airstream in the remediation system.<sup>22</sup> "Allocating responsibility based partially on toxicity [places the costs of response on those responsible for creating the hazardous condition] because those who release substances that are more toxic are more responsible for the hazardous condition."<sup>23</sup>

### G. *Boeing Company v. Cascade Corporation*

In *Boeing*, plaintiff and defendant each conceded responsibility for a contaminant plume, but disputed how response costs should be allocated as to a third plume located in between the first two. In allocating response costs, the court determined that the best approach was to start with the mass of contaminants which each party contributed to the contamination plume, then revise that figure in light of contaminant flow analysis.<sup>24</sup> The court considered the nature of fractures in the geological layers underneath the property, the types of chemicals involved, and the overall geology and hydrogeology of the area as it affected contaminant flow.<sup>25</sup>

### H. *Farmland Industries, Inc. v. Colorado & Eastern R.R. Co.*

In *Farmland*, a potentially responsible party ("PRP") who had settled with the United States sought contribution under CERCLA section 113(f) through its cross-claims against other PRPs. The district court considered the following equitable factors in allocating remedial costs: (1) the relative fault of the parties (including causation); (2) the duties of certain defendants as land owners; (3) Gore Factors four through six, cited above; (4) the state of mind of the parties; and (5) the benefits received by the parties as a result of the cleanup.<sup>26</sup>

### IV. Conclusion

Based upon the above decisional law, it is apparent that while courts may consider whatever equitable factors they deem appropriate in arriving at a fair allocation, courts have tended to focus on three primary factors, beyond the Gore Factors. These factors are (i) the relative fault of the parties;<sup>27</sup> (ii) use of the property during the time of ownership by a landowner party,<sup>28</sup> and (iii) the state of mind of the parties.<sup>29</sup> Knowledge of or acquiescence to the contaminating activity, benefit from remediation, and contracts between the parties are also commonly considered.<sup>30</sup>

Thus, CERCLA practitioners should consider and address the above case law when advocating in favor of or against the use of particular factors in fashioning an allocation of response costs under CERCLA section 113(f).

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### Endnotes

1. CERCLA § 113(f)(1).
2. *Id.*
3. *Environmental Transp. Sys. Inc. v. Enesco, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992).
4. See, e.g., *In re Hemingway Transport, Inc.*, 993 F.2d 915, 921-22 (1st Cir. 1993); *United States v. Kramer*, 953 F. Supp. 592, 598 (D.N.J. 1997); *American Color & Chem. v. Tenneco Polymers*, 918 F. Supp. 945 (D.S.C. 1995); *Matter of Bell Petroleum Svcs., Inc.*, 3 F.3d 889, 899-900 (5th Cir. 1993); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 576 (6th Cir. 1991); *Kerr-McGee Chem. Corp. v. Leflon Iron & Metal Co.*, 14 F.3d 321, 326 (7th Cir. 1994); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (9th Cir. 1995); *United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995).
5. See *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249 (S.D. Ohio 1984) for an extended discussion of CERCLA's legislative history and the Gore Amendment.
6. *Id.* at 1256.
7. See, e.g., Cal. Health & Safety Code § 25356.3(c) (West 1998).
8. *United States v. A & F Matls. Co., Inc.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); see also H.R. Rep. No. 253, 99th Cong., 1st Session 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News at 2835, 3042.
9. *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995).
10. See, e.g., *U.S. v. Colorado & Eastern R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995).
11. *Acushnet Co. v. Coaters, Inc.*, 948 F. Supp. 128, 138-39 (D. Mass. 1996).
12. This element ties in with the fourth Gore Factor: the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste.
13. *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 1996 WL 557592 (E.D. Pa. 1996).
14. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 577 (6th Cir. 1991).
15. *Id.* at 572-73.
16. *Environmental Transp. Sys., Inc. v. Enesco, Inc.*, 969 F.2d 503, 510 (7th Cir. 1992).
17. *Id.*
18. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1206 (2d Cir. 1992).
19. *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420, 1426 (D. Md. 1991).
20. *Kerr-McGee Chem. v. Leflon Iron & Metal*, 14 F.3d 321, 326 (7th Cir. 1994).
21. *Id.*
22. *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 938 (8th Cir. 1995).
23. *Id.*
24. *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1137-39 (D. Or. 1996).
25. *Id.*
26. *Farmland Indus., Inc. v. Colorado & Eastern R.R. Co.*, 944 F. Supp. 1492, 1499 (D. Colo. 1996).
27. See *Environmental Transp. Sys. Inc. v. Enesco, Inc.*, 969 F.2d 503 (7th Cir. 1992); *Kerr-McGee Chem. v. Leflon Iron & Metal*, 14 F.3d 321 (7th Cir. 1994); *Farmland Indus., Inc. v. Colorado & Eastern R.R. Co.*, 944 F. Supp. 1492 (D. Colo. 1996).
28. See *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 1996 WL 557592 (E.D. Pa. 1996); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991); *Farmland Indus., Inc. v. Colorado & Eastern R.R. Co.*, 944 F. Supp. 1492 (D. Colo. 1996).
29. See *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991); *Kerr-McGee Chem. v. Leflon Iron & Metal*, 14 F.3d 321 (7th Cir. 1994); *Farmland Indus., Inc. v. Colorado & Eastern R.R. Co.*, 944 F. Supp. 1492 (D. Colo. 1996).
30. See *Bethlehem, Enesco, Meyer, Farmland, Kerr-McGee, supra*.