

# CERCLA Contribution Claims and the Collateral Source Rule

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**T**HE QUESTIONS of whether and how the collateral source rule might apply in CERCLA cost recovery actions have been issues of interest to potentially responsible parties (“PRPs”) under the Comprehensive Environmental Response, Compensation, and Liability Act<sup>1</sup> (“CERCLA”) (e.g. owners, operators, arrangers, and transporters who select disposal locations) and their insurers. Over the past several years, four federal district court opinions discussed the possible application of the collateral source rule<sup>2</sup> to CERCLA cost recovery and contribution actions: *Vine Street, LLC v. Keeling*<sup>3</sup>; *Raytheon Aircraft Co. v. United States*<sup>4</sup>; *Friedland v. TIC, Inc.*<sup>5</sup> and *Basic Management Inc. v. United States*.<sup>6</sup> In 2008, the issue was squarely presented for the first time to a federal court of appeals in merits and amicus briefs filed in the Tenth Circuit in *Friedland v. TIC*.<sup>7</sup>

<sup>1</sup> 42 U.S.C. § 9601 et seq.

<sup>2</sup> The collateral source rule in tort law provides that “if an injured party receives compensation for the injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay.” BLACK’S LAW DICTIONARY 279 (8th ed. 2004).

<sup>3</sup> *Vine Street, LLC v. Keeling*, 460 F. Supp.2d 728 (E.D. Tex. 2006) (declining to apply collateral source rule to CERCLA contribution claims).

<sup>4</sup> *Raytheon Aircraft Co. v. United States*, 2007 WL 4300221 (D. Kan. Dec. 8, 2007) (finding collateral source rule inapplicable to CERCLA contribution claims).

<sup>5</sup> *Friedland v. TIC, Inc.*, 2008 WL 185693 (D. Colo. Jan. 18, 2008) (holding collateral source rule inapplicable to CERCLA contribution claims).

<sup>6</sup> *Basic Management Inc. v. United States*, 569 F. Supp.2d 1106 (D. Nev. 2008) (CERCLA preemption of common law tort doctrine renders collateral source rule inapplicable).

<sup>7</sup> *Friedland v. TIC – The Industrial Co.*, 566 F.3d 1206 (10th Cir. 2009).



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On May 29, 2009, the Tenth Circuit affirmed the district court’s grant of summary judgement in favor of the defendants in *Friedland v. TIC, Inc.* holding that the collateral source rule does not apply in CERCLA contribution actions, and for the first time applying the specific allocation rule<sup>8</sup> in a CERCLA proceeding. This article

<sup>8</sup> The specific allocation rule provides that a party may seek a particular allocation of settlement proceeds against a non-settling party only if the amount is “specifically stipulated in the settlement

reviews the case history of *Friedland v. TIC*, articulates the arguments made by the parties at trial and on appeal, and analyzes the bases for the Tenth Circuit's landmark decision and the impact of the decision on PRPs contemplating CERCLA cost recovery or contribution actions.

### **Robert Friedland and the Summitville Mine**

The Summitville Mine sits high in the San Juan mountains of southern Colorado, 25 miles south of Del Norte, Colorado. The location has been the site of known mining activity since at least 1870, and likely was explored by and known to the first Spanish explorers. More recently, Summitville gained notoriety as the highest profile environmental calamity to hit the modern American mining industry.

In the mid-1980s, the Summitville Consolidated Mining Company ("SCMCI"), a subsidiary of Galactic Resources, Ltd., designed and constructed the 550 acre Summitville Mine, a heap-leach gold mine facility. The heap-leach process employed at the Mine involved spraying a cyanide solution on mined ore in a heap-leach pond to precipitate gold. Robert Friedland, an officer and director of Galactic, at certain times served as President and Director of SCMCI.

In 1991, the State of Colorado served SCMCI with a cease and desist order based on evidence of elevated metal levels in nearby water supply. In 1992, SCMCI filed bankruptcy and announced that it would abandon Summitville. The Environmental Protection Agency ("EPA") commenced an emergency removal action to prevent contaminated water in the heap-leach pad at

the mine from flowing over the heap-leach pad containment dike.<sup>9</sup>

### **The Summitville Cleanup**

As a result of SCMCI's bankruptcy and the acid mine drainage and release of cyanide into the environment from the Summitville mine heap-leach pad and related storage facilities, the federal government ultimately has paid more than \$200 million to remediate Summitville.<sup>10</sup>

CERCLA allows parties to recoup costs associated with hazardous waste cleanup through two types of legal proceedings: (1) cost recovery actions under § 107(a),<sup>11</sup> and (2) contribution actions under § 113(f).<sup>12</sup> In a contribution action, potentially responsible parties ("PRPs") "who have contributed to the waste at a site may recover from other PRPs that portion of their cleanup costs which exceeds their pro rata share."<sup>13</sup>

Section 113(f) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], during or following any civil action under [§106] . . . or under [§107(a)]."<sup>14</sup> PRPs under CERCLA are defined to "broadly include current and former owners and operators of a facility or vessel involved in hazardous substance disposal and persons who arranged for or accepted hazardous substances for disposal or transportation."<sup>15</sup> The EPA commissioned an investigation of Summitville's operations to identify PRPs in anticipation of a cost-recovery action.

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documents what allocation of damages were applicable to each cause of action." Hess Oil Virgin Island Corp. v. UOP, Inc., 861 F.2d 1197, 1209 (10th Cir. 1988). See also note 26, *infra*.

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<sup>9</sup> See *Colorado v. Sunoco, Inc.* 337 F.3d 1233, 1236 (10th Cir. 2003) (describing the open-pit, heap-leach mine techniques employed at Summitville).

<sup>10</sup> Mark Jaffe, *Stimulus Cash Will Pour Into Mine Cleanup*, DENVER POST, Apr. 16, 2009.

<sup>11</sup> 42 U.S.C. § 9607(a).

<sup>12</sup> 42 U.S.C. § 9613(f). See *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005).

<sup>13</sup> *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1194 (10th Cir. 1997).

<sup>14</sup> 42 U.S.C. § 9613(f)(1) (2009).

<sup>15</sup> *Public Service Co. v. Gates Rubber Co.*, 175 F.3d 1177, 1181 n.6 (10th Cir. 1999).

The EPA's final report named several dozen PRPs.

### **The Government's Cost Recovery Action and Friedland's Third-Party Claims**

In 1996, the United States and the State of Colorado filed a cost-recovery action against Friedland under CERCLA §§ 107 and 113(g), seeking to recover the cost of responding to and cleaning up contamination at Summitville. Friedland filed third-party contribution claims against twelve entities, including: Bechtel; Columbia GeoSystems, Ltd.; Burnett Construction Company; Conveyor Engineers, Inc.; and Industrial Constructors Corp. ("ICC").

In 2000, Friedland entered into a consent decree and paid State of Colorado and the United States approximately \$20.7 million for costs incurred in responding to the Summitville site. Friedland settled his § 113 contribution claims against the third-party defendants for cash and other consideration.

As part of his settlement with ICC, Friedland received an assignment of all of ICC's claims against ICC's insurer, USF&G. Friedland later sued USF&G in Montana state district court and received a cash settlement. ICC subsequently filed bankruptcy and was liquidated.

Friedland initiated a second action in Colorado state court against The Travelers Indemnity Company ("Travelers"), which issued SCMCI's employer's liability insurance policy. That action was also settled by payment of cash to Friedland.

By 2004, Friedland had recovered more dollars from the third-party defendants USF&G and Travelers combined, than the \$20.7 million he had paid to the government under the consent decree.

### **Friedland's Claims Against TIC and GeoSyntec**

In 2004, Friedland filed a civil action in the United States District Court for the District of Colorado seeking CERCLA contribution under § 113 from TIC and GeoSyntec to recover some or all of the \$20.7 million Friedland paid the government for response costs under the consent decree. Neither TIC nor GeoSyntec had been named as PRPs by the EPA. Neither TIC nor Geosyntec had been named as a third-party defendant in the cost-recovery action.

After discovery was completed, TIC and GeoSyntec moved for summary judgment on the grounds that Friedland had no compensable damages because, by 2004, he had already recovered from USF&G, Travelers, and others more than he had paid to settle the cost-recovery action. The defendants argued that under these undisputed facts, Friedland could not establish an essential element of a contribution claim – that he had paid "more than his fair share."

Friedland opposed the motion for summary judgment and advanced in two theories why he should be allowed to seek additional compensation from TIC and GeoSyntec.

*First*, Friedland argued that the collateral source rule applied and dictated that his insurance recovery should *not* offset the damages he was seeking from TIC and GeoSyntec.

*Second*, Friedland argued that if the collateral source rule did not apply, he should be allowed to present evidence at trial allocating the settlement proceeds from USF&G and Travelers between clean-up and legal defense costs.<sup>16</sup>

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<sup>16</sup> Because CERCLA permits recovery only of "cleanup costs," a PRP may not recover in a contribution action attorneys' fees or litigation expenses incurred in connection with the original CERCLA claim. *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994).

### The District Court Ruling

Ruling on the defendants' motion for summary judgment, the United States District Court for the District of Colorado agreed with TIC and GeoSyntec and concluded that the collateral source rule does not apply in CERCLA actions:

Plaintiff argues . . . that the collateral source rule prohibits me from crediting defendants with any insurance payments received by him. I wholeheartedly disagree. CERCLA contribution actions such as this one are governed by federal law. 42 U.S.C. § 9613(f)(1). Despite the fact that the collateral source rule has been applied under federal law in other contexts . . . it has never been applied in the context of a CERCLA action, *see Raytheon Aircraft Co. v. United States*, 2007 WL 4300221 at \*4 (D. Kan. Dec. 8, 2007) (slip op.) (citing *Vine Street, LLC v. Keeling ex. rel. Estate of Keeling*, 460 F.Supp.2d 728, 765 (E.D. Tex. 2006)). Nor is it likely that it will be, considering that the collateral source rule derives from tort law, whereas CERCLA does not. *See Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005) (“CERCLA is not a general vehicle for toxic tort claims”).<sup>17</sup>

The district court then considered Friedland's argument that, even if the collateral source rule did not apply in CERCLA, the defendants should be permitted to offset only those portions of the USF&G and Traveler's payments that represented indemnity for response costs, and further that, although the settlement agreements contained no allocation between indemnity and legal defense costs, he should be permitted to offer evidence to establish what an allocation might have been. The court disagreed, and held that in the absence of an express allocation, the full

amounts of the USF&G and Travelers settlements must be deducted against anything TIC or GeoSyntec might be required to pay in contribution:

The parties agree that neither Travelers nor the USF&G settlement makes any express or implied allocation between indemnification for amounts plaintiff agreed to pay in the cost recovery action, on the one hand, and legal defense costs, on the other. Generally, a party can insist on a particular allocation of settlement proceeds as against a non-settling party only if it is ‘specifically stated in the settlement documents what allocation of damages were applicable to each cause of action.’ *Hess Oil Virgin Island Corp. v. UOP, Inc.*, 861 F.2d 1197, 1209 (10th Cir. 1988). In the absence of such specific language, the non-settling party is entitled to full credit for the entire amount of the settlement.<sup>18</sup>

The district court court rejected Friedland's argument that under *United States v. Burlington Northern Railroad Co.*,<sup>19</sup> the settlement amounts were attributable to divisible harms (i.e., cost recovery and legal defense costs), which could be allocated even without express language in the settlement agreements. That argument, according to the district court, failed as a matter of simple logic because the response costs and defense costs were “inextricably intertwined” as the defense costs “arose proximately and directly from [Friedland's] liability for response costs.”<sup>20</sup>

In the end, the district court concluded that because the settlements collectively accounted for more than Friedland agreed to pay out in recovery costs, Friedland had no compensable damages to recover from TIC

<sup>17</sup> *Friedland*, 2008 WL 185693 at \*3.

<sup>18</sup> *Id.* at \*2.

<sup>19</sup> *United States v. Burlington Northern Railroad Co.*, 200 F.3d 679, 696 (10th Cir. 1999).

<sup>20</sup> *Friedland*, 2008 WL 185693 at \*2.

or GeoSyntec, and entered judgment for the defendants.<sup>21</sup>

### The Tenth Circuit Appeal

Friedland appealed the dismissal of his claims, arguing that the district court erred in not applying the collateral source rule, and in preventing him from presenting after-the-fact testimony of a reasonable allocation between indemnity payments and legal defense costs in the USF&G and Travelers settlements.

### Friedland's arguments

On appeal, Friedland presented the following arguments in favor of applying the collateral source rule and allowing him to present evidence on the allocation between indemnity payments and his legal defense costs:

- USF&G and Travelers were not joint tortfeasors or co-PRPs with TIC and GeoSyntec. Their separate contractual obligations to Friedland meet the classic definition of a collateral source, and should not be applied to setoff any damages that might be recovered from TIC or GeoSyntec.
- The language of CERCLA § 114(b) only precludes a party like Friedland from receiving the same recovery under both CERCLA and a comparable state statute, and does not apply to proceeds from private insurance contracts.
- TIC and GeoSyntec should not benefit from insurance proceeds purchased by others to pay for their share of responsibility for Summitville clean-up costs.
- CERCLA specifically preserves a right of subrogation for insurers who have paid a party's clean-up costs. If the insured's rights are extinguished by insurance recovery, the insurer's derivative right would be extinguished as well, under §§ 112(c)(2) and 107(e)(2).
- Allowing Friedland to "make a profit" on CERCLA cleanup is better than allowing a responsible party to escape liability entirely because of Friedland's (or another's) foresight in purchasing insurance.
- Extending the collateral source rule to CERCLA claims would encourage mining entities to maintain environmental insurance.
- The collateral source rule furthers the fundamental congressional goal in CERCLA to assure that "polluters pay."
- With no collateral source rule, PRPs will have incentive to delay or avoid involvement in remediation of a contaminated site. The least cooperative parties will be allowed to take advantage of insurance assets of parties who actually perform CERCLA cleanups.
- With no collateral source rule, insured parties will be forced to delay pursuing insurance recovery, or forego it altogether, in order to exercise their statutory right to CERCLA contribution.

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<sup>21</sup> Two months later the United States district court in Nevada, citing *Vine Street* and *Raytheon*, also concluded that the collateral source rule conflicted with CERCLA's statutory scheme, writing that "[t]he field has been preempted by the federal statutory mandate of CERCLA § 114." *Basic Management*, 569 F. Supp. 2d at 1125.

- CERCLA PRPs will be allowed to reap the benefits of a plaintiff's insurance policy even though recalcitrant PRPs neither paid for nor were insured under a relevant insurance policy.
- Dollar-for-dollar reduction of a defendant's liability by the amount of insurance proceeds received undercuts multiple public policy considerations and the commercial realities of insurance and insurance claim settlements.
- CERCLA requires the trial court to determine whether the settlements with USF&G and Travelers represent "damages in common" with the cost recovery action. The amounts Friedland received from USF&G and Travelers for legal defense costs were not "damages in common" with the cost recovery action.
- Friedland's settlements with USF&G and Travelers, although not expressly allocated, included compensation for Friedland's defense costs, bad faith breach of contract claims, and "buy back" of insurance coverage that were not part of his CERCLA contribution claims against TIC and GeoSyntec, and should not be deducted from any recovery.
- Including legal fees, Friedland paid over \$48,000,000 in the course of defending the cost recovery action, \$28,000,000 more than the amount he paid to the government for response costs under the consent decree.

### The Defendants' Arguments

TIC and GeoSyntec presented the following arguments in response to Friedland's appeal:

- Friedland, having been reimbursed completely for the response costs he paid to the government, cannot satisfy the *sine qua non* of a CERCLA or traditional contribution action: that he had paid more than his fair share of those costs.<sup>22</sup>
- Unlike a tort plaintiff, Friedland is not an injured party. In a CERCLA case, the environment is the "injured party," and those entities responsible for causing the injury and who fronted the money for repair are entitled to reimbursement. Friedland is seeking reimbursement for a known amount that was used to repair the Summitville site, not damages for his own personal injury.
- An important principle of CERCLA contribution rules is the prevention of double recovery,<sup>23</sup> which would be undermined if Friedland were allowed to recover from other alleged PRPs more than he paid to the government to clean-up Summitville.
- CERCLA expressly prohibits double recovery in CERCLA actions: "[a]ny person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or

<sup>22</sup> See *United States v. Atlantic Research Corp.*, 551 U.S. 128, 138-39 (2007).

<sup>23</sup> See *Exxon Corp. v. Hunt*, 475 U.S. 355, 370 (1986),

claims pursuant to any other State or Federal law.”<sup>24</sup>

- Examples of courts applying the collateral source rule as a matter of federal law in other contexts all involve tort claims where a plaintiff or his property had suffered injury.<sup>25</sup> The collateral source rule has never been applied in a contribution action, or where the rule would conflict with the purpose and express objectives of a federal statute.
- Friedland’s legal defense expenditures are irrelevant because they are not “response-costs” recoverable in a CERCLA action.
- Friedland’s settlements with USF&G and Travelers failed to contemporaneously allocate between indemnity (response costs) potentially recoverable under CERCLA and non-recoverable legal defense costs.<sup>26</sup>
- Friedland could have joined TIC and GeoSyntec as parties in Colorado’s cost recovery action, where their liability (if any) would have been resolved. There would have been no need for subsequent contribution claims or after-the-fact allocations.
- Friedland could have requested special interrogatories to allow a jury to allocate between response costs and legal defense costs in the coverage litigation with USF&G and Travelers.
- Friedland failed to ask or persuade USF&G or Travelers to allocate any portion of their payments between indemnity and legal defense costs. What allocation might, or might not, have been agreed then can never be known.

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<sup>24</sup> 42 U.S.C. § 9614(b) (2009).

<sup>25</sup> See, e.g., *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 534 (9th Cir. 1962) (action in negligence to recover for personal injury under the Jones Act); *Thyssen, Inc. v. S/S Euronity*, 21 F.3d 533, 537-38 (2d Cir. 1994) (recovery for damage property during transit under the Carriage of Goods by Sea Act); *Stanley v. Bertram-Trojan, Inc.*, 868 F. Supp.2d 541, 543 (S.D.N.Y. 1994) (action in negligence for recovery for personal injuries under admiralty law).

<sup>26</sup> A legal presumption arises if no allocation is made between covered and non-covered claims in a settlement agreement that the entire amount will be presumed to be a valid set-off in subsequent proceedings involving non-parties. See, e.g., *Nauman v. Eason*, 572 So.2d 982, 983-84 (Fla. Dist. Ct. App. 1990) (explaining that in the absence of allocation by settling parties, entire settlement amount should be offset against subsequent recovery); *Farrall v. A.C. & S. Co.*, 586 A.2d 662, 667 (Del. Super. Ct. 1990) (determining that where a party has commingled his recovery instead of separately listing an allocation, court “should not speculate on what the parties might have done,” but should offset subsequent award by entire amount

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plaintiff received from settling defendant); *Duke v. Hoch*, 468 F.2d 973, 979-80 (5th Cir. 1972) (noting general rule that an insured who fails to seek allocation at the time of settlement or trial faces “an impossible burden of proof” in a subsequent coverage action); *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal.App.4th 1017, 1042 (Cal. Ct. App. 2002) (refusing to engage in a post-hoc allocation that could have been explicitly set forth in the settlement agreement at issue); *Patton v. Carbondale Clinic, S.C.*, 641 N.E.2d 427, 433 (Ill. 1994) (explaining that where a plaintiff recovers for several injuries in a previous lawsuit and fails to allocate damages among them, “a subsequent defendant should not bear the burden of proving what portion of the plaintiff’s previous settlement should be set-off or be denied a setoff”); *Hirsovescu v. Shangri-La, Inc.*, 870 P.2d 859, 860 (Or. Ct. App. 1994) (holding that a non-settling defendant was entitled to a full setoff for a prior settlement where no allocation was made among claims); *Weeks v. City of Colo. Spgs.*, 928 P.2d 1346, 1349 (Colo. Ct. App. 1996) (determining that plaintiffs were not entitled to “manipulate” the allocation of an unallocated pre-trial settlement in order to increase further a total recovery already in excess of the damages determined by the jury).

### The Tenth Circuit Decision

The Tenth Circuit, in an opinion drafted by Judge Tacha on behalf of a panel that included Judges Baldock and O'Brien, held that the collateral source rule was "clearly inapplicable in the specific context of §113(f) contribution action by a PRP such as Mr. Friedland."<sup>27</sup>

The court found the collateral source rule inapplicable to a CERCLA contribution action because a CERCLA contribution action is not a personal injury action by an innocent plaintiff. It is instead, a claim between two or more culpable tortfeasors, and the policy underlying the collateral source rule – to provide the *innocent party* with the benefit of any windfall – "is simply not advanced in such cases."<sup>28</sup> Indeed the court observed that "We are unaware of any court that has applied the collateral source rule to a claim for contribution, even outside the CERCLA context."<sup>29</sup>

The court also agreed with the defendants' argument that permitting a CERCLA contribution-action plaintiff like Friedland to recoup more than the response costs he paid out of pocket "flies in the face of CERCLA's mandate to apportion those costs equitably among liable parties."<sup>30</sup> The court noted that every federal district court that had considered the issue had also concluded that general equitable principles prevent a contribution plaintiff from seeking recovery of costs for which he has or will be compensated.<sup>31</sup>

The court distinguished the authority that Friedland advanced in support of his argument, noting that *Louisiana Department of Transportation v. Kansas City Southern Railway*<sup>32</sup> concerned an innocent plaintiff (Louisiana) suing a railway company for pollution cleanup costs

after the federal government had paid for 90% of the remediation costs. Similarly, the court observed that *Town of East Troy v. Soo Line Railroad*<sup>33</sup> concerned an innocent plaintiff (East Troy) suing for the full amount of the clean-up costs even though the town already had used federal grant money to clean up the site. The court noted further that the two cases were not relevant or persuasive because "the plaintiffs in those cases were innocent parties, not PRPs seeking contribution from other PRPs," and because "the causes of action in both cases arose under state law, not CERCLA."<sup>34</sup>

Having held that the collateral source rule is not available to a PRP advancing a CERCLA contribution claim, the court turned to the next issue – whether the district court erred in reducing Friedland's damages (the \$20.7 million settlement amount) by the full amount of the payments he received from USF&G and Travelers (stipulated to be more than \$20.7 million).

The court concluded that the district court properly refused to allow Friedland to present expert testimony or other evidence allocating insurance payments between his \$28 million legal fees and the \$20.7 million response costs he paid in settlement to the government. The court first observed that under the "one satisfaction rule," where the conduct of multiple defendants result in a single injury with common damages, and one of the defendants settles with the plaintiff, the entire amount of the settlement must be credited against the amount that may be recovered from the non-settling defendants.<sup>35</sup> There was no dispute that Friedland was seeking to recover from TIC and GeoSyntec the \$20.7 million that he had paid in settlement to Colorado and the United States – which was also what he had sought to recover from USF&G and Travelers.

The court then addressed Friedland's effort "to create a divisible harm where it

<sup>27</sup> See *Friedland v. TIC - The Industrial Co.*, 566 F.3d at 1206.

<sup>28</sup> *Id.* at 1207.

<sup>29</sup> *Id.* at 1207 n.3.

<sup>30</sup> *Id.* at 1207.

<sup>31</sup> *Id.*

<sup>32</sup> 846 So. 2d. 734 (La. 2003).

<sup>33</sup> 653 F.2d 1123 (7th Cir. 1980).

<sup>34</sup> *Friedland v. TIC - The Industrial Co.*, 566 F.3d at 1208.

<sup>35</sup> *Id.* at 1209-10.

otherwise does not exist” by contending that a substantial portion of the amount he recovered from USF&G and Travelers settlements were attributable to his \$28 million defense costs instead of the \$20.7 million settlement amount.<sup>36</sup> The problem with this attempt, the court reasoned, was that the settlement agreements with USF&G and Travelers did “not expressly or impliedly allocate the settlement money toward amounts Mr. Friedland paid in settling the underlying litigation on the one hand, and for legal defense costs on the other.”<sup>37</sup> Citing the specific allocation rule applied most recently by the Tenth Circuit in *Hess Oil Virgin Islands Corp. v. UOP, Inc.*<sup>38</sup> the court held that Friedland’s failure to allocate between CERCLA response costs and his own defense costs in his agreements with USF&G and Travelers precluded him from attempting an after-the-fact division.<sup>39</sup> Absent a contemporaneous allocation made at the time he settled with USF&G and Travelers, the court held that the *entire* amount of Friedland’s insurance recovery was properly credited against the damages he was seeking from TCI and GeoSyntec in the contribution action.<sup>40</sup> Because Friedland admitted that he had already recovered more in insurance payments from USF&G and Travelers than the paid to settle the cost-recovery action, he had no cognizable damages and could have no viable claim for contribution.

### Conclusion

Following *Friedland v. TIC*, PRPs evaluating possible CERCLA § 107 cost

recovery or §113 contribution claims should assume that the collateral source rule will not apply and that recovery of insurance proceeds will limit their potential recovery in later contribution actions. In addition, PRPs settling with insurance carriers but anticipating possible later contribution actions should seek an express allocation, if appropriate, between CERCLA’s compensable response costs, on one hand, and costs of defense and other costs not recoverable under CERCLA, on the other.

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<sup>36</sup> *Id.* at 1210.

<sup>37</sup> *Id.*

<sup>38</sup> *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197, 1209 (10th Cir. 1988) (a party may seek a particular allocation of settlement proceeds against a non-settling party only if the amount is “specifically stipulated in the settlement documents what allocation of damages were applicable to each cause of action.”).

<sup>39</sup> *Friedland v. TIC - The Industrial Co.*, 566 F.3d at 1209-10.

<sup>40</sup> *Id.*