

***United States v. R.W. Meyer, Inc.*: THE SIXTH CIRCUIT CLARIFIES COURTS' USE OF EQUITABLE DISCRETION IN CERCLA CONTRIBUTION ACTIONS**

R.W. Meyer, Inc. (Meyer) owned a parcel of industrial land in Cadillac, Michigan. Eager to lease the site, it contacted Northernnaire Plating Company, a metal electroplating operation, as a prospective tenant. Northernnaire signed a ten-year lease for the property. As part of the deal, Meyer constructed a sewer line to remove Northernnaire's treated electroplating waste, which consisted of caustic acids, sludges, and cyanide byproducts created by the electroplating process. The sewer line was used to transport the waste to a City of Cadillac treatment facility. Northernnaire, however, did a poor job of pretreating the hazardous waste at the site before discharging it into the sewer line. After the levels of caustic acids in the runoff rose dangerously high, the City of Cadillac revoked Northernnaire's permit to use the sewer. In addition, Meyer's construction of the sewer line included a defect which caused the line to leak. Hazardous wastes began to build up at the site, which by that time had been abandoned by Northernnaire, causing it to "degenerate into a true environmental disaster area."¹ After a small child received chemical burns while playing at the site, the Environmental Protection Agency (EPA) mounted an Immediate Response Action (IRA), under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), to quickly clean up the site.² The district court granted EPA's motion for partial summary judgment finding the defendants, Meyer, Northernnaire, and Northernnaire's principal stockholder, Willard S. Garwood, jointly and severally liable for the costs incurred during the cleanup of the Northernnaire site.³ The district court's decision was affirmed on appeal.⁴

In the subsequent indemnification action, the United States District Court for the Western District of Michigan ruled that

1. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 570 (6th Cir. 1991).

2. 42 U.S.C. §§ 9601-9675 (1988).

3. See *United States v. Northernnaire Plating Co.*, 670 F. Supp. 742, 749 (W.D. Mich. 1987), *aff'd sub nom. United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

4. *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1508 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

the three defendants should each pay one third of the 342,823 dollar cost to clean up the site.⁵ Meyer appealed, arguing that the trial court placed too much emphasis on its ownership of the site. Meyer argued that the court abused its discretion by making the corporation pay, in damages, an amount which exceeded the percentage of harm caused by Meyer's defective construction of the sewer line.⁶ The United States Court of Appeals for the Sixth Circuit rejected Meyer's argument and affirmed the decision of the district court, holding: (1) Contribution decisions were a matter for trial court discretion and should be reviewed under the abuse of discretion standard; and (2) in assessing liability for contribution under CERCLA, trial courts could employ, but were not limited to, the so-called Gore factors⁷ in assessing liability, and could even weigh a responsible party's degree of "moral responsibility" as an additional factor when assessing cleanup costs. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991).

The district court found the defendants liable under CERCLA, which allows the government to recover cleanup costs from responsible parties.⁸ Congress added the statutory right to have contribution assessed between liable parties under CERCLA in the Superfund Reauthorization Act Amendments of 1986 (SARA).⁹ However, actions to assess contribution among liable parties for cleanup costs arising pursuant to CERCLA represent an area of law which is "both new and complex."¹⁰ In approaching this issue, courts generally start with the plain text of the statute,¹¹ which provides that a court "may allocate response costs among liable parties *using such equitable factors*

5. *Northernair*, 670 F. Supp. at 748; see also CERCLA, 42 U.S.C. § 9613(f)(1) ("[T]he court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate").

6. Specifically, Meyer asserted its sole contribution to the hazard was its negligent construction of the sewer line which, it argued, was not the cause of Northernair's inability to dispose safely of the toxic substances. Meyer contended that Northernair (and Garwood) was the major cause of the toxic hazard at the site, but agreed to pay 1,709 dollars of the 342,000 dollar judgment, an amount Meyer alleged was proportionate to the amount of harm caused by the improperly constructed sewer line.

7. See *infra* text accompanying notes 13-17.

8. See 42 U.S.C. § 9607(a).

9. See Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923, 991 (1990).

10. *Meyer*, 932 F.2d at 574 (Guy, J., concurring).

11. See, e.g., *O'Neil v. Picillo*, 883 F.2d 176, 183 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990).

as the court determines are appropriate."¹² Thus, according to the plain text of the statute, courts are to use their own discretion in deciding which equitable factors to weigh.

In searching for factors to guide their discretion in CERCLA contribution actions, courts have also examined CERCLA's legislative history, federal common law, and tort law contribution doctrines. Looking to CERCLA's legislative history for enlightenment, courts fastened onto the so-called Gore factors as an extremely useful guide with which to assess contribution among parties under CERCLA.¹³ The Gore factors, articulated by then Representative Albert Gore (D. Tenn.) during the initial debate over CERCLA, comprise a method for responsible parties to petition a court to invoke joint and several liability. These factors include:

- 1) [T]he ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
- 2) the amount of the hazardous waste involved;
- 3) the degree of toxicity of the hazardous waste involved;
- 4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- 5) 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
- 6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.¹⁴

Though extremely influential, the Gore factors never became part of CERCLA's statutory text.¹⁵ Courts have concluded that Congress' failure to include the Gore factors in the text of CERCLA need not denote a rejection of the factors.¹⁶ Rather, by not including the factors, Congress meant to allow courts more discretion in apportioning costs among joint and

12. 42 U.S.C. § 9613(f)(1) (emphasis added).

13. See, e.g., *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 86 (D. Me. 1988), *aff'd sub nom. Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 641 (1st Cir. 1989); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); *Colorado v. Asarco*, 608 F. Supp. 1484, 1488 (D.C. Colo. 1985).

14. *Meyer*, 932 F.2d at 576 (citing 126 CONG. REC. 26,779, 26,781 (1980)).

15. See *Asarco*, 608 F. Supp. at 1486-89 (the Gore factors were offered as an amendment to H.R. 7020; however, they were never enacted).

16. See, e.g., *A & F Materials*, 578 F. Supp. at 1256-57.

severally liable parties.¹⁷

While finding useful guidance in the Gore factors, courts have realized that they may address additional considerations when arriving at contribution percentages. In *O'Neil v. Picillo*, the First Circuit noted that district courts should "be free to allocate responsibility according to *any combination of equitable factors . . . [they] deem[] appropriate*."¹⁸ Courts have also looked to tort law for answers to questions of contribution apportionment under CERCLA.¹⁹ Because of the paucity of caselaw in this area, however, the list of other equitable factors which courts have brought to bear in deciding this issue remains limited. Accordingly, *Meyer* represents perhaps the most comprehensive treatment to date of the proper factors for consideration in a contribution action under CERCLA.

Defendant Meyer argued for a narrow, technical construction of the term "contribution" in 42 U.S.C. § 9613(f)(1), limiting a party's contribution to the exact percentage of its improper conduct causing the toxic harm at the site.²⁰ In rejecting Meyer's argument for narrow construction, the Sixth Circuit pointed to the wide discretion judges have enjoyed in framing equitable decrees, as evidenced by federal common law. The majority cited *Swann v. Charlotte-Mecklenburg Board of Education*,²¹ where the Supreme Court noted that "flexibility is proper in the successful shaping . . . of an equitable decree."²² The court also found persuasive a Third Circuit case, *Charles v. Charles*,²³ interpreting a Virgin Islands statute which directed courts to weigh "the equities of the case" when framing a decree

17. See, e.g., *Colorado v. Asarco*, 608 F. Supp. 1484, 1489 (D.C. Colo. 1985).

18. 883 F.2d 176, 183 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990).

19. See, e.g., *Asarco*, 608 F. Supp. at 1490; *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 917 (N.D. Okla. 1987).

20. *Meyer*, 932 F.2d at 572. Meyer's contention was based on the common-law tort contribution doctrine. Under this doctrine, a tortfeasor cannot be forced by a court to pay more than its "equitable share" of a judgment. See RESTATEMENT (SECOND) OF TORTS, § 886A (1982). This doctrine differs slightly from CERCLA contribution, whereby a court may choose the equitable factors to weigh in reaching a fair apportionment of cleanup costs among liable parties. See 42 U.S.C. § 9613(f)(1). Meyer contended, apparently analogizing to tort law contribution, that its share of the cleanup costs must exactly equal its share of the "negligence" in causing the accident. *Meyer*, 932 F.2d at 572. Thus, implicitly Meyer argued that its conduct as owner of the site should be given no weight by the court when assessing contribution percentages. *Id.* at 574.

21. 402 U.S. 1 (1971).

22. *Id.* at 15.

23. 788 F.2d 960 (3d Cir. 1986).

for apportioning community property in divorce cases.²⁴ The statute at issue in *Charles* authorized the trial court to "use a variety of means to obtain an equitable result."²⁵ To determine the acceptable definition of "equitable," the Third Circuit cited the definition of "equity" from Black's Law Dictionary, which called it "[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law."²⁶ Citing *Kay v. Mills*,²⁷ the majority noted that "[t]he hallmark of a court of equity is its ability to frame its decree to effect a balancing of all the equities and to protect the interest of all affected by it, including the public."²⁸ The majority concluded that Congress, by using the "equitable factors" language, intended the trial court to "invoke its moral as well as its legal sense" in arriving at contribution percentages.²⁹

Thus, the court stated that Congress did not intend to require "meticulous findings of the precise causative contribution each of several hundred [liable] parties made to a hazardous site."³⁰ Rather, under 42 U.S.C. § 9613(f)(1), a court may consider any equitable factor it deems appropriate in allocating contribution shares.³¹ Accordingly, the Sixth Circuit determined that, in addition to the Gore factors,³² the trial court may also consider "the state of mind of the parties, their economic status, any contracts between them bearing on the subject, any traditional equitable defenses as mitigating factors and any other factors deemed appropriate"³³ under the circumstances, in order to "balance [those factors] in the interest of justice."³⁴ This approach, taking into account more factors than the common-law contribution doctrine,³⁵ furthers the Congressional intent of prompt cleanup of hazardous sites, and ensures that "[t]he parties actually performing the cleanup can look for reimbursement from other potential responsible parties without fear that their

24. *Id.* at 965-66.

25. *Id.* at 966.

26. *Id.* at 465 n.13 (quoting BLACK'S LAW DICTIONARY 482 (5th ed. 1979)).

27. *Kay v. Mills*, 490 F. Supp. 844, 855 (E.D. Ky. 1980).

28. *Meyer*, 932 F.2d at 572 (quoting *Kay v. Mills*, 490 F. Supp. at 855).

29. *Id.*

30. *Id.* at 573.

31. *Id.* at 572; 42 U.S.C. § 9613(f)(1).

32. The majority found the Gore factors "appropriate" in determining contribution shares. *Meyer*, 932 F.2d at 572.

33. *Id.* at 572-73.

34. *Id.* at 573.

35. *Id.*

contribution actions will be bogged down by the impossibility of making meticulous factual determinations as to the causal contributions of each party."³⁶ Based on this approach, the court concluded that the trial court, in assessing one-third of cleanup costs to Meyer, had not exceeded the wide discretion afforded to it by CERCLA.³⁷

Judge Guy's lengthy concurrence differs from the majority's view, particularly in its emphasis on the standard of review for contribution decisions, and its focus on Meyer's conduct in creating the toxic harm.³⁸ Judge Guy agreed that courts can use, but are not limited to, the Gore factors as a point of departure for contribution analysis.³⁹ From his reading of the Gore factors and other portions of CERCLA's legislative history, Judge Guy reasoned that Congress' primary intent was for the judiciary to apportion liability "in a fair and equitable manner."⁴⁰ He concluded that a trial court's apportionment should be set aside only upon a showing that the court "arbitrarily or unreasonably ignore[d] the comparative fault of the parties."⁴¹

Looking to federal common law, Judge Guy noted that the Fourth Circuit had found the Restatement (Second) of Torts to represent "the correct and uniform rules applicable to CERCLA cases."⁴² The Restatement maintains that "[n]o tortfeasor can be required to make contribution beyond his own equitable share of the liability."⁴³ Thus, for Judge Guy, the relevant inquiry was whether the trial court required Meyer to pay more than its fair share.⁴⁴ Indeed, that the district court made Meyer pay more than its "fair share" was the essence of Meyer's argument on appeal.⁴⁵

Judge Guy also found the district court's finding of the degree of causation attributed to Meyer's faulty construction of the sewer line to be clearly erroneous.⁴⁶ Because the waste was

36. *Id.* at 573-74.

37. *Id.* at 574.

38. *Id.* at 574-78. Though all three judges joined in the majority opinion, Judge Guy's concurring opinion, joined by Judge Boggs, captured a majority of the three-judge panel.

39. *Id.* at 576.

40. *Id.* at 577.

41. *Id.*

42. *Id.*

43. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 886A (1982)).

44. *Id.* at 574-78.

45. *Id.* at 571.

46. *Id.* at 575.

toxic before it reached the sewer line, Meyer's negligence in the construction of the sewer could not have contributed significantly to the overall harm at the site.⁴⁷ Judge Guy's contrary factual finding notwithstanding, his ultimate decision remained the same, as he viewed finding the facts and assessing liability for contribution as two separate inquiries, with each subject to a different standard of review by an appellate court.⁴⁸

Judge Guy held that while facts were subject to a clearly erroneous review, the actual contribution percentage was a matter for the judge's discretion.⁴⁹ Accordingly, the contribution percentage should be tested under the abuse of discretion standard.⁵⁰ Thus, although finding that the amount of blame due to Meyer's negligent construction of the sewer line was clearly erroneous, Judge Guy concluded that the trial court's subsequent apportionment of one-third of the blame for the cleanup to Meyer was not an abuse of the court's discretion.⁵¹

Instead of focusing solely on equity's tradition of wide discretion, Judge Guy focused on what Meyer actually did to cause the harm at the site. He noted that Meyer was instrumental in bringing Northernaire to Cadillac and was "fully aware of the nature of [Northernaire's] manufacturing" operations at the site.⁵² Judge Guy reasoned that Meyer's knowledge, coupled with his failure to take action to prevent harm at the site, clearly supported the one-third liability for cleanup costs imposed on Meyer by the district court.⁵³

The Sixth Circuit's decision in *Meyer* represents a well-reasoned and useful approach to what is a new and rapidly developing area of environmental law. The majority opinion, by setting out a long list of permissible factors to consider, gives courts a point of departure for their CERCLA contribution analyses. Judge Guy's concurrence, by re-emphasizing Congress' intent to vest broad discretion in the trial court, fosters the goal of quick conflict resolution. On the negative side, the standards may be so broad that companies will have little inkling of what to expect when entering into a proceeding for contribution of cleanup

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 578.

53. *Id.* at 575, 578.

costs. Given CERCLA's broad sweep and liberal interpretation, however, such uncertainty is unavoidable.

Nor can one fault the majority for injecting the element of moral blame into the CERCLA contribution calculus. Proceedings sounding in equity, which traditionally allow defenses such as "clean hands," necessarily focus the court's attention on a liable party's "culpability." In that context, the focus on a party's moral responsibility becomes unavoidable. The concurrence's greater emphasis on Meyer's role in causing the toxic harm at the site, however, somewhat dilutes the majority's contention that moral blameworthiness alone can justify forcing a defendant to pay a contribution percentage which is out of proportion to the harm his conduct actually caused.

On balance, the Sixth Circuit's approach provides vastly more help than harm. *Meyer* re-emphasizes the view that Congress intended district courts to have wide discretion in assessing CERCLA contribution percentages. The decision reinforces the message to litigants that their "best bite" at the apple will be in district court. Once contribution percentages are apportioned, parties will have little chance of changing those percentages. As a result, the decision gives litigants no incentive to file costly, time-consuming appeals.

Additionally, the Sixth Circuit's approach provides parties with some guidance on what to plead. In jurisdictions electing to follow *Meyer*, parties will know to structure their arguments for contribution of cleanup costs using the Gore factors, along with traditional equitable claims and defenses. Because it provides courts with a range of standards and directs the attention of litigants to the district court, *Meyer* will aid the cause of quick and fair resolution of CERCLA contribution disputes, and will serve the greater goal of swift and efficient cleanup of Superfund sites.

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