



SUPERFUND LIABILITY: HOW RECENT COURT DECISIONS MAY AFFECT COMPANIES' ABILITY TO RECOVER COSTS

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Recent court decisions are likely to have a significant effect on the ability of companies to recover amounts directly expended for clean-up costs, as well as those paid to federal and state agencies for Superfund site remediation. [The Comprehensive Environmental Response, Compensation and Liability Act](#) (“CERCLA”), the federal statute generally known as [Superfund](#), provides two mechanisms to allow [potentially responsible parties](#) (“PRPs”) to recover costs arising out of the remediation of a polluted site. Section 107(a) permits PRPs to bring cost recovery actions against other PRPs for “any necessary costs of response incurred” by the PRP bringing suit. Section 113(f) permits PRPs to bring actions for contribution against other PRPs who have been sued under section 107(a) or have entered into a judicially-approved settlement with a federal or state government. Although CERCLA has been around for many years, recently federal courts have taken a fresh look at indemnification and contribution claims among PRPs.

Whether a claim can be brought under §107(a) or §113(f) can be significant. A plaintiff asserting a claim under §107(a) only bears the burden of proving that the defendant is a PRP, that hazardous substances were disposed of at a facility, that there was a release or threatened release of hazardous substances into the environment, and that the plaintiff incurred response costs. Under §113(f), the plaintiff also must demonstrate that it paid more than its proportionate share of the costs. Another key difference is in the statute of limitations. Claims under §107(a), depending on the nature of the response action, may be subject to a six-year statute of limitations, while claims under §113(f) have a three-year limitations period.

The most important difference, however, has always been the nature of the liability. Section 107(a) generally imposes joint and several liability on defendants, whereas the right to contribution under §113(f) allows a PRP to collect from the defendants only their proportional share of the costs – often leaving plaintiffs paying far more than their own share owing to the inability to identify or collect from polluters long since gone. But in 2009, the United States Supreme Court decided the case of [Burlington N. & Santa Fe Rwy. Co. v. United States](#), 129 S. Ct. 1870 (2009), [holding that CERCLA did not mandate joint and several liability in every case](#) that “apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm.” As a result, Burlington Northern suggests, and subsequent

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SUPERFUND LIABILITY (cont'd)

lower court decisions have acknowledged, that joint and several liability is not appropriate in all cases. Thus, §107(a) defendants who disposed of relatively small amounts of hazardous materials may be less likely to be held responsible for the entire cost of the clean up or for orphan shares – that is, for the share of liability that should rightfully fall upon a missing or defunct entity.

Another group of recent decisions by several Courts of Appeals suggest that non-settling PRPs generally may intervene as of right to challenge a consent decree between the government and settling PRPs. Rejecting earlier cases, these cases have almost universally held that a proposed intervenor's right to seek contribution from the settling parties under §113(f) is a sufficient interest to support intervention. These cases also rejected the argument that the availability of an administrative notice-and-comment period on a proposed settlement agreement between the government and the settling parties was sufficient to protect the intervenor's interests.

The primary theme that has emerged from these decisions is that defendants have secured expanded and potentially significant avenues to seek protection from inequitable shares of liability. Those who find themselves on the receiving end of claims brought under §107(a) have added power to challenge the scope of their liability, while those who may in the future face contribution claims under §113(f) now have the opportunity to intervene in government settlements in order to limit their potential future liability.