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ENVIRONMENTAL TORT LITIGATION

Strategies and Defenses

With changing environmental policy and an increase in environmental tort claims, it is more important than ever for companies to seek ways to mitigate potential liability arising from an environmental incident.

Companies and their counsel must be prepared to handle various challenges, from developing an initial emergency response to navigating through each phase of an ensuing litigation.



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Managing the legal fallout from a mass environmental emergency, such as an accidental chemical release or contamination, can be an overwhelming prospect for potential defendants. These cases involve hundreds or thousands of potential claimants and uncertain lines of responsibility and liability. Developing a plan to navigate the incident and its aftermath requires counsel to carefully consider the risks and benefits of different strategies at each procedural phase.

This article offers companies and their counsel practical guidance to effectively:

- Manage the initial emergency response.
- Narrow the litigation through motion practice.
- Identify and coordinate with relevant third parties.
- Prepare for settlement negotiations.



Search [Environmental Tort Litigation: Strategies and Defenses](#) for the complete online version of this resource, which includes information on criminal, civil, and internal investigations of an environmental incident, substantive and procedural considerations specific to environmental class actions, document preservation strategies, and bellwether trials.

Search [Environmental Law: Overview](#) for an explanation of the environmental regulatory framework and the major environmental statutes that impact businesses, as well as the types of liability imposed on violators of these laws and regulations.

THE INITIAL RESPONSE

State laws generally give the primary authority for emergency responses to local and state agencies and permit them to call on federal authorities if a response requires resources beyond state and local capacity. Although a company involved in an environmental incident does not control or direct the emergency response, the company should participate in the response to the extent it is safe and helpful to do so.

To mitigate liability and help manage the public perception of the incident, the company should offer local authorities and the public whatever relevant assistance and resources it safely can provide. The company might have valuable technical expertise, resources, and equipment to contribute. It should also insist that employees follow pertinent protocols and use appropriate personal safety equipment, even if the authorities in charge do not require these measures.

Promptly after an environmental incident occurs, a company should:

- Notify the company's insurers.
- Hire outside counsel.
- Explore early settlement opportunities.
- Develop a media strategy.
- Retain necessary experts.
- Identify and coordinate with other parties that may become co-defendants.

NOTIFY INSURANCE CARRIERS

A company should notify all of its insurance carriers promptly after an environmental incident and in accordance with relevant

policy terms. This is particularly important where, under the terms of an applicable policy, the insurance carrier selects outside counsel for the insured (see below *Hire Outside Counsel*).

If an insurer is responsible for retaining outside counsel, it may try to minimize costs by recommending less sophisticated counsel. Company counsel should insist on experienced attorneys with proven track records, given the costliness of a bad outcome.

Where a policy includes environmental releases, an insurer may argue that it is not responsible for coverage due to "pollution exclusion" language, which has been commonly included in insurance policies issued in the last 20 years. To the extent that releases occurred before that language was added, some coverage may still apply. Company counsel should discuss these coverage issues with outside counsel.

Additionally, company counsel should put in place a reliable insurance notification procedure to ensure that relevant insurers receive required notice of each incoming complaint. Following an environmental incident, plaintiffs may file multiple complaints throughout the statute of limitations period.

HIRE OUTSIDE COUNSEL

A company facing environmental tort liability should retain experienced outside counsel promptly. Because the potential liability in these cases is often significant, it is critical to retain counsel with expertise in handling the broad range of issues that these cases may present. Outside counsel's familiarity with the company is also helpful and important.

Company counsel should consider retaining either one firm that can handle all anticipated issues (such as tort liability, agency investigations, potential criminal enforcement, insurance coverage, and other issues that might arise) or a "virtual" firm composed of attorneys at different firms who collectively possess the needed expertise.

After outside counsel has been retained, company counsel should consult with outside counsel as soon as possible about:

- Emergency response activities.
- Media communications.
- Evidence preservation.
- Anticipated claims and releases.

While an insurer may push for a company to retain certain (generally inexpensive) counsel, the company should carefully evaluate the suitability of that counsel, particularly given the possibility that any liability is likely to exceed the insurance limits for the carrier making the initial retention suggestion, leaving the company to bear the excess liability.

Of course, should an insurer inappropriately deny coverage, the company should consider retaining separate counsel to pursue claims against the insurer.

PURSUE EARLY SETTLEMENTS

In the aftermath of an environmental emergency, a company should consider seeking an early settlement with potential plaintiffs in exchange for a release of future claims arising out

The company should instruct all employees not to speak with the media unless specifically authorized to do so by a designated corporate office or manager.

of the incident. Certain environmental incidents, like large-scale chemical releases, lend themselves to this strategy because the potential class of plaintiffs — namely affected residents and businesses — is usually easy to identify. Approaches vary based on circumstances, but a company can reach potential claimants by canvassing door-to-door or setting up a settlement office a safe distance from the incident. Typical claims in these situations include lost wages (or lost income for businesses) and reimbursement of housing and meal expenses incurred while residents were required to relocate.

For any early, pre-litigation settlements, company counsel should:

- **Instruct settlement assistance personnel not to communicate with represented parties.** If represented parties want to negotiate an early settlement without counsel, company counsel should require the potential claimant to demonstrate that she has terminated representation before engaging with company settlement assistance personnel. Additionally, if an attorney represents multiple potential claimants, company counsel should confer with the attorney to obtain current and updated client lists, if applicable.
- **Assess the scope of any releases.** This will require jurisdiction-specific research. Some jurisdictions may require certain language for a release to be effective (see, for example, *Fair v. Bakhtiari*, 40 Cal. 4th 189, 199-200 (2006) (holding that a mediated settlement agreement must contain a provision specifically stating that the agreement is enforceable or binding to be effective)). Releasing “all claims” may also be problematic if, for example, diseases have not manifested (for example, Cal. Civ. Code § 1542 (stating that a general release does not extend to unknown claims)).
- **Research the applicable law on settlements with minor children.** In some jurisdictions, including California and New Jersey, parents or guardians cannot dispose of a child’s cause of action without statutory authority or a judicial determination that the settlement is fair and reasonable (see, for example, *Moscatello ex rel. Moscatello v. Univ. of Med. & Dentistry of N.J.*, 776 A.2d 874, 879-80 (N.J. Super. 2001) (citing New Jersey Rule of Court 4:44-3); *Scruton v. Korean Air Lines Co.*, 39 Cal. App. 4th 1596, 1605-06 (2d Dist. Ct. App. 1995); see below *Minors*).

MANAGE THE MEDIA RESPONSE

If a company does not already have a public relations advisor, it should hire one as soon as possible following an environmental incident. A media consultant can help draft press releases and

respond to media inquiries, as well as prepare executives and other personnel who may need to speak with the media directly. The media consultant’s goal is to defend against negative press and, to the extent possible, foster positive press coverage.



Search [Managing Litigation PR](#) for more on developing an effective and disciplined communications strategy and integrating it with a corporate litigation strategy.

Hire a Media Consultant

A company should consider hiring a media consultant in advance of any environmental incidents to ensure that the company has adequate resources available if an incident occurs.

When selecting a media consultant, company counsel should:

- Confirm that the consultant is familiar with both the relevant:
 - industry and market; and
 - geographic area and population demographics.(For example, social media is a quick way to disseminate important information to the public, but it is effective only if the population is likely to include a high percentage of social media and smart phone users.)
- Review the consultant’s references to determine whether the consultant has done similar work for peer companies.
- Compare consultant candidates by asking about their plans for responding to negative press and fostering positive press.

After hiring a media consultant, the company should:

- Develop a crisis communications plan.
- Schedule training sessions conducted by the consultant for any company representatives who will likely handle the company’s crisis communications.

Develop Consistent Messaging

During an environmental emergency, a company should work with its media consultant and outside counsel to develop a strategy for responding to inquiries and providing clear and concise messaging designed to mitigate harm to the public and to the company’s operations and reputation. Among other things, this strategy should provide:

- Guidance on message coordination with law enforcement and emergency response authorities.
- Instructions and approved messaging to all personnel with whom the public or media interact, including switchboard

operators and employees who work in customer relations. Additionally, the company should instruct all employees not to speak with the media unless specifically authorized to do so by a designated corporate office or manager.

- A process for monitoring relevant media to identify inaccuracies, and providing clarifying information where needed.
- Protocols for secure internal communications. Inconsistent and confusing messaging can result from media personnel “overhearing” communications that were not intended for public exposure. Similarly, the company should develop protocols identifying communication lines for relatives of employees participating in the emergency response and, if necessary, assist injured parties and their families in dealing with the media.

A company should generally avoid making broad, unqualified statements on issues relevant to potential litigation. This includes statements on whether the chemicals at issue are harmful, whether other entities are responsible for the incident, and other topics that might impact a company’s arguments or be used against it in future litigation.

Information flow is critical following an environmental incident. After conferring with its media consultant and outside counsel, a company should publicly:

- Acknowledge what occurred.
- Explain the circumstances in non-technical terms.
- Describe what the company is doing to address the situation.

Clear communication on these points will help mitigate harm to the public and preserve the company’s operations and reputation. The media response, however, should not drive legal strategy.

RETAIN EXPERTS

A company’s defense may involve experts from various disciplines, including toxicology, epidemiology, industrial hygiene, hydrogeology, meteorology, and different medical specialties, among others. Experienced outside counsel will be familiar with and can quickly retain leading experts across the necessary range of disciplines. Additionally, counsel should integrate the experts into the media planning and decision-making processes to ensure accurate messaging.

Depending on the scope of the litigation, counsel might consider hiring separate experts for consulting and testifying. While retaining two sets of experts increases defense costs, it enables counsel to evaluate the testifying strength of an expert and compartmentalize the experts’ evaluations for purposes of preserving the attorney-client privilege.

Company counsel should consult with outside counsel to determine whether expert communications and draft reports are privileged under the law of the applicable jurisdiction. If they are not privileged, counsel should consider negotiating a stipulation with opposing counsel to protect these communications.



Search [Expert Toolkit](#) for a collection of resources to help counsel with using experts in federal civil litigation, including guidance on the differences between consulting and testifying experts.

Search [Expert Privilege and Confidentiality Considerations Checklist](#) for key considerations to protect privilege, work product immunity, and confidentiality when working with experts during litigation.

COORDINATE WITH POTENTIAL CO-DEFENDANTS

Environmental incidents often involve more than one responsible party. Accordingly, companies should consider coordinating with potential co-defendants early in a litigation.

In these circumstances, executing a joint defense agreement is often an effective strategy and a helpful preliminary step. The typical purposes of a joint defense agreement are to:

- Confirm the existence of a shared “joint defense privilege” to permit information sharing without waiving the attorney-client privilege.
- Defer litigation of cross-claims via a tolling agreement to allow the co-defendants to present a united front in defending against the plaintiffs’ claims.

Counsel must draft a joint defense agreement carefully to account for the possibility that the co-defendants will wish to exit the agreement. Counsel typically include, for example, provisions that require the exiting party to return or destroy any documents that were shared under the agreement, as well as stipulations providing that counsel who received confidential information from the parties will not be subject to disqualification should the parties subsequently become adverse.



Search [Joint Defense and Confidentiality Agreement](#) for a sample agreement that counsel can use to allow parties with similar legal interests, who are involved in an investigation or a legal proceeding, to share information with each other without waiving any applicable privilege or protection, with explanatory notes and drafting tips.

Similarly, where the co-defendants’ interests are closely aligned, they may consider sharing experts to reduce defense costs and ensure uniform approaches. Sharing experts poses risks, however, especially in the early stages of a case as defendants sort out the facts, analyze their potential liability, and determine their legal positions.

If conflicts emerge, shared experts who have obtained confidential information from more than one co-defendant may be barred from participating in the litigation. Additionally, shared experts may be less helpful where the defendants would benefit from having multiple experts in each relevant discipline.

STRATEGIES TO NARROW THE LITIGATION

When a company is sued over an environmental incident, it must consult with counsel and make decisions about numerous issues that will arise during the pretrial stages of the litigation. Often, the key pretrial consideration is how a company can narrow the complaint through motions to dismiss or for summary judgment.

CLAIMS SUBJECT TO DISMISSAL

The primary claims that are susceptible to dismissal without discovery are claims alleging:

- Increased costs and expenses relating to medical monitoring.
- Trespass.
- A fear or risk of future harm.

In addition to using motions to dismiss to narrow the scope of discovery, counsel should consider whether to seek a so-called *Lone Pine* order. This case management tool is often used in complex environmental tort cases to require plaintiffs to define their alleged injuries and to make an early prima facie showing of exposure and causation before full discovery proceeds.

Further, environmental tort cases often affect hundreds or thousands of plaintiffs, making individual discovery complex and burdensome. To mitigate the discovery burden and streamline proceedings, courts frequently grant party requests for “bellwether” discovery, where only a select group of plaintiffs engages in complete discovery.



Search [Environmental Tort Litigation: Strategies and Defenses](#) for more on *Lone Pine* orders and bellwether discovery requests.

exposed to the chemicals at issue, even if these would-be claimants are not currently experiencing medical consequences.

Medical monitoring claims are permitted in only some states, while other states refuse to recognize this type of negligence claim (see, for example, *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 688-89 (Mich. 2005) (finding that medical monitoring claims were not cognizable under Michigan law); see generally D. Scott Aberson, Note, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 Wm. Mitchell L. Rev. 1095, 1114-15 (2006)).

When a company faces suit in a jurisdiction that recognizes medical monitoring claims, the company may move to dismiss these claims if the state treats medical monitoring as a compensable item of damages instead of an independent cause of action.

This is the case in both New Jersey and California, where court decisions have implicitly or expressly treated medical monitoring allegations as a component of a plaintiff’s damages (see *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1009 (1993) (noting that the cost of medical monitoring is a compensable item of damages); *Ayers v. Twp. of Jackson*, 525 A.2d 287, 312-13

Plaintiffs often seek to drive up the overall settlement value by aggregating large numbers of potential plaintiffs who may have been exposed to the chemicals at issue, even if these would-be claimants are not currently experiencing medical consequences.

Medical Monitoring Claims

Medical monitoring claims are typically styled as negligence claims where a plaintiff alleges that she was exposed to a proven hazardous substance through the defendant’s negligent actions and, as a result of the exposure, must undertake periodic medical examinations to monitor, detect, and treat medical conditions that commonly occur following that type of exposure (see *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993)).

In many environmental cases, medical monitoring claims are a key financial driver. Plaintiffs often seek recovery for medical monitoring costs covering the rest of their lives to guard against latent injury concerns, particularly where a form of cancer has been linked to the chemicals at issue. Moreover, plaintiffs often seek to drive up the overall settlement value by aggregating large numbers of potential plaintiffs who may have been

(N.J. 1987) (in an action alleging injuries caused by exposure to pollutants leaching into an aquifer from a township landfill, specifically referring to medical surveillance as a “compensable item of damages” rather than a cause of action); but see *Theer v. Philip Carey Co.*, 628 A.2d 724, 733 (N.J. 1993) (interpreting *Ayers* as holding a medical surveillance claim to be both “a special compensatory remedy” and a “cause of action”).

Trespass Claims

Common law trespass claims typically require a plaintiff to prove that the defendant intentionally entered or remained on the plaintiff’s property without permission, or caused someone or something else to do so, or failed to remove something from the plaintiff’s property that the defendant was obliged to remove (Restatement (Second) of Torts § 158 (1965)). In the environmental tort context, this typically refers to contamination that spreads or migrates to a plaintiff’s land.

Environmental mass tort defendants often move to dismiss trespass claims because they require a showing of intent under the governing state law (Restatement (Second) of Torts § 158). For example, under the common law of many states, a trespass claim requires an intentional rather than a negligent intrusion (see, for example, *Clover Leaf Plaza, Inc. v. Shell Oil Co.*, 1998 WL 35288754, at *7 (D.N.J. Aug. 13, 1998); *Tex.-N.M. Pipeline Co. v. Allstate Constr., Inc.*, 369 P.2d 401, 402-03 (N.M. 1962); *Kite v. Hamblen*, 241 S.W.2d 601, 603 (Tenn. 1951)).

Notably, although a plaintiff generally must establish that the defendant acted intentionally, the plaintiff does not have to show a specific intention to trespass (see, for example, *City of Townsend v. Damico*, 2014 WL 2194453, at *3-4 (Tenn. Ct. App. May 27, 2014) (holding that “the defendant’s intent to trespass or knowledge that he is trespassing is immaterial ... [t]he controlling issue is the intent to complete the physical act, regardless if, in so acting, the actor did not intend to commit a trespass and acted in good faith”).

Defendants moving to dismiss trespass claims can focus their arguments on a plaintiff’s failure to allege that:

- The trespass was caused by any intentional actions or inactions of the defendant.
- Factual circumstances reasonably support the inference that the defendant intended to commit the tort at issue.

Fear of Harm Claims

Claims alleging a fear or risk of harm from contamination typically allege a fear of harm to either a person or her property. Claims alleging the former are more common and typically involve allegations relating to the plaintiff’s increased risk or fear of cancer. By contrast, property-focused fear of harm claims typically arise in connection with nuisance claims. Both types of claims are often susceptible to dismissal depending on the applicable state law.

Where a claim alleges an increased risk or fear of harm to a plaintiff’s person, many courts will dismiss claims that, based on the plaintiff’s exposure to contamination, allege only:

- An increased risk of a medical condition.
- A fear of developing an illness.

Instead, these courts require a plaintiff to allege an actual injury, meaning a manifested and present medical condition. (See, for example, *Sabra ex rel. Waechter v. Iskander*, 2008 WL 4889681, at *2 (N.D. Ga. Nov. 10, 2008); *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1364 (S.D. W. Va. 1990) (analyzing West Virginia and Virginia common law), *aff’d sub nom. Ball v. Joy Techs., Inc.*, 958 F.2d 36 (4th Cir. 1991); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 851-52 (Ky. 2002); see also *Williams v. Manchester*, 888 N.E.2d 1, 13 (Ill. 2008) (dismissing a risk of future harm claim as only a compensable item of damages rather than an injury itself); *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846, 870 (Fla. 2007) (Cantero, J., dissenting) (collecting cases); but see *Day v. NLO*, 851 F. Supp. 869, 877-79 (S.D. Ohio 1994) (concluding that a plaintiff’s exposure to harmful chemicals alleged a sufficient physical injury to state a claim for emotional distress under Ohio law).)

Notably, some jurisdictions have held that claims alleging an increased risk of cancer sufficiently allege an actual injury. In these cases, plaintiffs have alleged that an environmental incident caused present, permanent, and irreparable genetic and chromosomal (known as “subcellular”) damage, and courts have permitted the claims to proceed to a fact finder to determine whether the plaintiffs established an actual injury. (See, for example, *Brafford v. Susquehanna Corp.*, 586 F. Supp. 14, 17-18 (D. Colo. 1984); see also *Barth v. Firestone Tire & Rubber Co.*, 673 F. Supp. 1466, 1468-70 (N.D. Cal. 1987) (denying a motion to dismiss where the complaint alleged an injury to the plaintiff’s immune system that rendered him “more susceptible to developing various forms of cancer”).

By contrast, the law in other jurisdictions is less favorable to defendants and requires plaintiffs to allege only that a future harm is “reasonably probable” to occur. In these jurisdictions, defendants may have to forgo a motion to dismiss and engage in discovery on these claims. (See, for example, *Abuan*, 3 F.3d at 334; *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1204-05 (6th Cir. 1988) (describing the standard as whether the plaintiff could prove “there is a reasonable medical certainty that the anticipated harm will result”); *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 319-20 (5th Cir. 1986); *Potter*, 863 P.2d at 815; *Mauro v. Raymark Indus., Inc.*, 561 A.2d 257, 264 (N.J. 1989).)

Claims based on a plaintiff’s fear of harm to her property may be subject to dismissal in certain jurisdictions. These courts have rejected nuisance claims based on a plaintiff’s subjective fear of contamination, even where the plaintiff alleged that the potential contamination lowered the value of her property. (See, for example, *Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921, 927 (8th Cir. 2015) (noting that under Missouri nuisance law, “the putative class fear of contamination spreading ... to harm their property is not a sufficient injury to support a claim for common law nuisance in the absence of proof”).)

However, several jurisdictions permit a plaintiff’s alleged fear of contamination to provide a sufficient basis for a nuisance claim (see *Lewis v. Gen. Elec. Co.*, 37 F. Supp. 2d 55, 61 (D. Mass. 1999) (denying a motion to dismiss a nuisance claim based on the plaintiffs’ fears of contamination and noting that nuisance law requires only “an interference with use and enjoyment of land”); *In re Tutu Wells Contamination Litig.*, 909 F. Supp. 991, 997-98 (D.V.I. 1995) (describing cases disallowing nuisance claims based on fear of contamination as “unpersuasive” and “work[ing] an injustice”); see also *Allen v. Uni-First Corp.*, 558 A.2d 961, 963-65 (Vt. 1988) (reversing and remanding a nuisance claim based on “public perception of widespread contamination” that caused the plaintiff’s property value to decrease, where the trial court had instructed the jury to consider only whether the plaintiff’s property was actually contaminated)).

CLAIMS RESOLVED THROUGH SUMMARY JUDGMENT

Having proceeded through the discovery phase of a litigation, a company may have a variety of arguments for a summary judgment motion targeting claims that the evidence does not support. In addition to these failure of proof claims, a company should also consider whether, on summary judgment, it can further narrow the litigation by:

While defendants frequently move to dismiss claims against parents and affiliates of the primary defendant, courts often allow claims against these types of related companies to move forward based on minimal and sometimes conclusory allegations.

- Challenging the availability of punitive damages.
- Removing corporate parents or affiliates from the litigation.

Punitive Damages

In most environmental tort litigation, a plaintiff's request for punitive damages is not subject to dismissal, unless the plaintiff failed to plead the requisite mental state. Indeed, there are few true affirmative defenses to punitive damages and none can be established on the face of a complaint. For this reason, most courts entertain defense challenges to punitive damages demands only at the summary judgment phase.

To recover punitive damages, most state laws require a plaintiff to prove that the defendant acted willfully, wantonly, or recklessly. Further, most jurisdictions have adopted a heightened standard of proof for punitive damages that requires the plaintiff to prove this requisite mental state by clear and convincing evidence, and at least one state, Colorado, requires proof beyond a reasonable doubt. (See generally Kircher & Wiseman, 1 Punitive Damages: Law and Practice § 9:10 (2d ed. 2016); Colo. Rev. Stat. § 13-25-127(2).) Where the issue is unclear under state law, defense counsel often successfully push courts to adopt the heightened evidentiary standard as a matter of state common law, given the severity of the remedy.

Some courts have suggested that compliance with governmental regulations or industry standards negates the state of mind necessary to impose punitive damages as a matter of law (see *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 584 (W.D. Okla. 1979), rev'd on other grounds, 769 F.2d 1451 (10th Cir. 1985)).

Together, the required mental state and the evidentiary standard required to prove it offer opportunities for defendants to make fact-based arguments that the evidence elicited fails to meet the demanding standard. Such arguments may be especially appropriate where a company can point to undisputed evidence that its conduct complied with all applicable state and federal regulations or that it employed state-of-the-art technologies.

Corporate Parents and Affiliates

Plaintiffs sometimes assert claims against both the company that actually owned or operated the facility involved in an environmental incident and its parent company or other affiliated organizations. While defendants frequently move to dismiss claims against parents and affiliates of the primary defendant, courts often allow claims against these types of related companies to move forward based on minimal and sometimes conclusory allegations.

To survive summary judgment, however, a plaintiff must provide evidence that supports holding a parent company or an affiliate liable. These claims are often ripe for summary judgment, especially if the plaintiff did not sufficiently focus on parent company liability in discovery. It is well settled that corporations are separate legal entities and that a parent company generally is not liable for the acts of its subsidiaries. To hold a parent company liable, a plaintiff must establish some basis for either derivative or direct liability.



Search [Piercing the Corporate Veil](#) for more on parent-subsidiary relationships in litigation, including information on what parent companies can do to limit their exposure to the liabilities of their subsidiaries.

THIRD-PARTY PRACTICE

In cases where a plaintiff's alleged injuries are caused by, for example, exposure to groundwater contamination, a company should consider whether it has a basis to assert:

- **Contribution claims against prior polluters operating in the same area.** These claims are most successful where another party historically used contaminants in the same area where the environmental incident occurred. A company may also assert federal law claims, such as claims against these parties grounded in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. §§ 9607(a), 9613(f)(1)). A company can bring these claims through:

USING THE “EMPTY CHAIR” AT TRIAL

Where the law underlying a plaintiff’s substantive claims does not provide for joint and several liability, and all potentially liable parties are not participating in the trial, counsel should consider whether to identify these absent parties to the jury as “empty chairs” that are liable for the plaintiff’s alleged injuries.

A potentially liable party might not be present during the trial for a number of reasons, including that the party:

- Prevailed on a procedural motion to dismiss.
- Is immune from suit.
- Settled with the plaintiff.
- Is outside of the court’s jurisdiction.

Even if the jurors do not attribute all blame to the empty chairs, this tactic increases the likelihood that the jurors will attribute some liability to other actors even if the company is ultimately found liable, thereby reducing the company’s share of liability.

Jurisdictions have different rules on whether and to what extent a defendant may inform the jury of other potentially

liable parties that are not at trial. For example, in some jurisdictions, a defendant generally is not allowed to notify the jury that the plaintiff has already entered into a settlement or to specify the amount of any settlement, but information about previous settlements may be admissible for purposes such as avoiding jury confusion or demonstrating bias (Fed. R. Evid. 408; see *Belton v. Fibreboard Corp.*, 724 F.2d 500, 505 (5th Cir. 1984) (finding evidence of settlement by 15 co-defendants was admissible for the purpose of explaining why those defendants were not in court); *Thibodeaux v. Lanclos*, 704 So.2d 1226, 1227 (La. Ct. App. 1997) (finding evidence that a settling defendant would receive a percentage of recovery from the other defendants under a “Mary Carter” settlement agreement was admissible to show bias)).

Similarly, whether an absent defendant may be included on the verdict form and assigned a share of liability also varies by jurisdiction (Restatement (Third) of Torts: Apportionment Liab. § 17 (2000), reporter’s note (offering a 50-state survey outlining who may be submitted for assignment of comparative negligence)).

- a cross-claim, if the prior polluters are already parties in the litigation (for more information, search [Responsive Pleadings: Counterclaims and Crossclaims](#) on Practical Law); or
- a third-party complaint, if the prior polluters are not already named (for more information, search [Third-Party Complaint \(Federal\)](#) on Practical Law).

If the federal or a state government files a CERCLA action against another party, a settlement of that action could potentially extinguish the company’s contribution claims against that party (42 U.S.C. § 9613(f)(2); see *Box, Using the “Empty Chair” at Trial*).

- **Contractual and other claims against prior owners.** Where there is evidence of preexisting contamination dating back to prior owners, a company should consider whether it has a basis for a claim against a prior owner under the relevant transaction documents. Applicable provisions might include, for example, a clause affording a current owner a right to indemnification from the previous owner. The company should also evaluate potential claims under both state law and federal law, including CERCLA.



Search [Responsive Pleadings: Third-Party Practice](#) for guidance on drafting a pleading asserting third-party claims seeking indemnification, contribution, or similar relief from a person not yet party to the action.

Search [Environmental Law: Overview](#) for more on CERCLA liability.

Notably, public entities involved in the emergency response and regulation of chemical use may possess important information about other potentially relevant parties, including, for example, documentation relating to:

- The emergency response and the persons and organizations involved.
- The historic use of contaminants by other entities in the vicinity.
- Investigations relevant to the environmental incident.

Companies should consider requesting copies of relevant documentation through the federal Freedom of Information Act (FOIA) and its state law counterparts.



Search [Freedom of Information Act: Overview](#) for more on the demand requirements for FOIA disclosures.

SETTLEMENT CONSIDERATIONS

Settlement of any complex litigation involves numerous considerations. In the environmental tort context, counsel should consider the potential issues presented by settlements that involve:

- Multiple defendants and plaintiffs, or different plaintiffs’ attorneys and law firms.
- Insurance policies.
- Claims brought on behalf of minors.



Search [Settlement Tactics in US Litigation](#) for an overview of the principal factors that can help counsel decide whether, when, and how to settle litigation proceedings.

MULTIPLE PARTIES AND LAW FIRMS

The dynamics created by the differing settlement interests of the numerous defendants, plaintiffs, and counsel involved in most environmental tort cases present both opportunities and risks for parties.

Plaintiffs' counsel may want to narrow the litigation by removing defendants and pursuing only specific claims against a defendant that the plaintiffs believe is more culpable or presents a less formidable threat at trial. Plaintiffs' counsel may also be motivated to settle with one or more co-defendants early on to secure additional funding for the remainder of the litigation.

While a defendant company may benefit from an individual settlement with the plaintiffs, this approach also poses certain risks. For example:

- After learning of a company's settlement discussions, co-defendants may revoke their joint defense agreements in response to what they view as a hostile act.
- Engaging in settlement negotiations is time-consuming and can distract defendants and their counsel from critical discovery and trial preparation.
- A company may be less engaged in litigation efforts because it wishes to avoid incurring those expenses when settlement appears likely.
- A company or its counsel might pursue defensive arguments less aggressively due to a concern that "full bore" litigation may antagonize the plaintiffs and jeopardize settlement discussions.

Given these dynamics, it is often preferable for co-defendants to maintain a united front and engage in collective settlement discussions. Under this approach, co-defendants typically agree on their respective shares of any settlement before negotiating with the plaintiffs.

Conversely, where a litigation involves multiple plaintiffs represented by different counsel, defense counsel may exert leverage on settlement negotiations by obtaining a cheaper settlement with "weaker" plaintiffs' counsel. This tactic permits the company to set a low monetary settlement as the standard for purposes of settling with other, stronger plaintiffs' counsel.

When settling with a number of different plaintiffs' counsel, it can be helpful for defense counsel to create a settlement grid

that accounts for several key factors impacting each individual plaintiff's recovery, including, among many potential factors:

- The degree of each plaintiff's exposure.
- The severity of each plaintiff's injury.
- Each plaintiff's age.

INSURANCE CONSIDERATIONS

Counsel should keep the company's insurers informed and engaged in the settlement process, particularly where the insurers are responsible for funding all or part of a settlement.

Counsel should also consider using insurance policies to enhance settlement offers. In environmental tort matters, the plaintiffs and their counsel often consider the most significant claims to be those that involve potential future medical issues associated with the plaintiffs' alleged exposure. In these cases, a company's insurance policy might be triggered only when the feared medical condition actually develops. However, to address these claims and provide peace of mind, counsel can consider using an insurance policy that would provide coverage should the feared medical conditions develop. This approach generally has the benefit of providing a higher potential payment than would a straight payout or escrow approach.

MINORS

Counsel should take special care when settling claims with minors given the significant variation among states in their treatment of those settlements. State law may:

- Permit a party to settle a claim brought on behalf of a minor if the minor's parent approves (for example, Md. Code Ann., Cts. & Jud. Proc. § 6-405(a), (b); see, for example, *BJ's Wholesale Club, Inc. v. Rosen*, 80 A.3d 345, 355-56 (Md. 2013) (citing statute)).
- Impose a monetary limit on parent-approved settlements (for example, Or. Rev. Stat. § 126.725 (permitting a parent to enter into a settlement agreement for a minor if the total amount of the claim, minus certain specified expenses, is less than \$25,000)).
- Require court approval for any settlement of a claim with a minor (see, for example, *Scott By & Through Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 11 (Wash. 1992); *White v. Allied Mut. Ins. Co.*, 31 P.3d 328, 330 (Kan. Ct. App. 2001) (noting that a minor is not bound by a settlement agreement "until court approval has been obtained" and, further, that "the minor may escape the settlement if the review hearing was inadequate to protect his or her interests")).