

10-4197-cv
In re September 11 Litigation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Submitted: July 12, 2013 Decided: May 2, 2014)

Docket No. 10-4197

- - - - -X

IN RE SEPTEMBER 11 LITIGATION:

Cedar & Washington Associates, LLC,

Plaintiff-Appellant,

- v. -

The Port Authority of New York and New
Jersey, Silverstein Properties, Inc.,
World Trade Center Properties LLC,
Silverstein WTC Management Co. LLC, 1
World Trade Center LLC, 2 World Trade
Center LLC, 3 World Trade Center LLC, 4
World Trade Center LLC, 7 World Trade
Company, L.P., HMM WTC, Inc., Host
Hotels and Resorts, Inc., Westfield WTC
LLC, Westfield Corporation, Inc.,
Consolidated Edison Company of New
York, AMR Corporation, American
Airlines, Inc., UAL Corporation, and
United Airlines, Inc.

Defendants-Appellees.

- - - - -X

Before: JACOBS, CABRANES, and LIVINGSTON, Circuit
 Judges.

1 Cedar & Washington Associates, LLC, appeals from a
2 judgment of the United States District Court for the
3 Southern District of New York (Hellerstein, J.), dismissing
4 its CERCLA indemnity claim for remediation costs it incurred
5 as owner of a building contaminated by toxic dust from the
6 September 11, 2001 attack on the World Trade Center.
7 Because the attack constituted an "act of war" for which
8 CERCLA provides an affirmative defense, we affirm.

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17 for Appellant.

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30 Properties, Inc., et al.

31
32 Christopher Walsh, Paul M.
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35 and Resorts, Inc. & HHM WTC,
36 LLC.

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3 Appellees Westfield WTC LLC &
4 Westfield Corp., Inc.
5

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24 Appellees United Air Lines, Inc.
25 & United Continental Holdings,
26 Inc.
27

28 DENNIS JACOBS, Circuit Judge:
29

30 Real estate developer Cedar & Washington Associates,
31 LLC, sues the owners and lessees of the World Trade Center
32 (and the owners of the airplanes that crashed into it) under
33 the Comprehensive Environmental Response, Compensation, and
34 Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, seeking
35 recovery of costs incurred in remediating a nearby building
36 contaminated by the September 11, 2001 attack on the World
37 Trade Center. The case returns to us after a remand to the

1 district court to determine in the first instance whether
2 the defendants are insulated by CERCLA's "act of war"
3 defense. On remand, the United States District Court for
4 the Southern District of New York (Hellerstein, J.)
5 concluded that the attack constituted an "act of war" for
6 purposes of CERCLA's affirmative defense, and that the
7 defendants therefore were entitled to judgment on the
8 pleadings.

9 We agree. Although CERCLA's strict liability scheme
10 casts a wide net, an "act of war" defense avoids ensnarement
11 of persons who bear no responsibility for the release of
12 harmful substances. The attacks come within this defense.
13 As the "act of war" defense shows, CERCLA was not intended
14 to create liability for the dispersal of debris and wreckage
15 from a catastrophe that was indistinguishable from military
16 attack in purpose, scale, means, and effect. Both the
17 President and Congress responded to the September 11 attacks
18 by labeling them acts of war, and this classification
19 warrants notice, and perhaps some deference, in the CERCLA
20 context. The decisive point is that the attacks directly
21 and immediately caused the release, and were the "sole
22 cause" of the release because the attacks "overwhelm[ed] and

1 swamp[ed] the contributions of the defendant[s]." In re
2 September 11 Litigation, 931 F. Supp. 2d 496, 512 (S.D.N.Y.
3 2013) (quoting William H. Rodgers, Jr., Environmental Law:
4 Hazardous Wastes and Substances § 8.13 (1992)).

6 **BACKGROUND**

7 After the September 11, 2001 attacks that leveled the
8 World Trade Center ("September 11 attacks"), real estate
9 developer Cedar & Washington began renovating its leased 12-
10 story downtown office building into a 19-story business
11 hotel. In late 2004, the New York State Department of
12 Environmental Conservation and the United States
13 Environmental Protection Agency notified Cedar & Washington
14 that the interstitial spaces of the building might contain
15 finely-ground substances from the World Trade Center,
16 including concrete, asbestos, silicon, fiberglass, benzene,
17 lead, and mercury: so-called "WTC Dust." To permit
18 renovation to continue, the government agencies required
19 Cedar & Washington to perform costly remediation. In this
20 suit, Cedar & Washington seeks to recover those costs from:
21 the owner of the World Trade Center site, lessees of World
22 Trade Center buildings, and the companies that owned the two

1 aircraft that were crashed into the towers.

2 The claims are premised on CERCLA and common-law
3 indemnification. The district court initially dismissed the
4 complaint on statute of limitations grounds and
5 (alternatively) on the ground that Cedar & Washington failed
6 to allege a necessary element of a CERCLA cost recovery
7 claim: either a "release" or a "disposal" of hazardous
8 substances. In re September 11 Litigation, No. 08-9146
9 (AKH), 2010 WL 9474432 (S.D.N.Y. Sept. 22, 2010) (citing 42
10 U.S.C. § 9607(a)(1)-(2)). On appeal, we declined to resolve
11 these "thorny questions of statutory interpretation";
12 instead, we remanded under United States v. Jacobson, 15
13 F.3d 19, 22 (2d Cir. 1994), for the district court to
14 determine, in the first instance, whether the defendants
15 could invoke CERCLA's "act of war" defense. In re September
16 11 Litigation, 485 F. App'x 443 (2d Cir. 2012). This
17 affirmative defense requires the alleged polluter to prove
18 by a preponderance of evidence that the release of a
19 hazardous substance was caused "solely by . . . an act of
20 war." 42 U.S.C. § 9607(b).

21 Pursuant to our mandate, the district court ordered
22 briefing and heard argument, and then held, in a March 20,

1 2013 opinion, that Cedar & Washington's claim could be
2 dismissed on this alternative ground (in addition to those
3 identified in its earlier opinion). In re September 11
4 Litigation, 931 F. Supp. 2d 496 (S.D.N.Y. 2013). The
5 district court emphasized that:

- 6 • the attacks were "unique in our history," id. at 509;
- 7 • al-Qaeda's leadership "declared war on the United
8 States, and organized a sophisticated, coordinated, and
9 well-financed set of attacks intended to bring down the
10 leading commercial and political institutions of the
11 United States," id.;
- 12 • "Congress and the President responded by recognizing
13 al-Qaeda's attacks as an act of war" and sent U.S.
14 troops "to wage war against those who perpetrated the
15 attacks and the collaborating Taliban government," id.;
16 and
- 17 • the Supreme Court clarified in Hamdi v. Rumsfeld, 542
18 U.S. 507 (2004), and Hamdan v. Rumsfeld, 548 U.S. 557
19 (2006), that the attacks "were acts of war against the
20 United States." In re September 11 Litigation, 931 F.
21 Supp. 2d at 512.¹

¹ These facts are subject to judicial notice under Federal Rule of Evidence 201(b) because they are "not

1 Further, the district court held that this "act of war" was
2 the sole cause of any release of hazardous substances from
3 the World Trade Center's collapse because the September 11
4 attacks "overwhelm[ed] and swamp[ed] the contributions of
5 the defendant[s]." Id. (quoting Rodgers, supra, at § 8.13).

6 The district court cautioned that its "holding as to
7 the act-of-war defense should be read narrowly, fitting the
8 facts of this case only." Id. at 514. Its decision was not
9 necessarily applicable in contexts presenting different
10 considerations, such as "cognate laws of insurance" or the
11 Anti-Terrorism Act of 1992. Id.

12 Once the district court issued its opinion, Cedar &
13 Washington promptly notified this Court to restore
14 jurisdiction, and the appeal was reinstated.

16 DISCUSSION

17 The district court's decision that the September 11
18 attacks constitute an "act of war" under CERCLA, and that
19 those attacks were the sole cause of the release of WTC

subject to reasonable dispute," are "generally known within
the trial court's territorial jurisdiction," and "can be
accurately and readily determined from sources whose
accuracy cannot reasonably be questioned [here, the 9/11
Commission Report]."

dust, is reviewed de novo. Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010) (grant of a motion for judgment on the pleading accorded de novo review). We accept as true all well-pled allegations and draw all reasonable inferences in Cedar & Washington's favor. Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999) ("In deciding a Rule 12(c) motion, we apply the same standard as . . . under Rule 12(b)(6), accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.").

I

CERCLA imposes strict liability for hazardous waste cleanup on owners and facility operators, on certain persons who arrange for the disposal or treatment of hazardous waste, and on certain persons who transport hazardous waste. 42 U.S.C. § 9607(a)(1)-(4). Three affirmative defenses are made available when CERCLA liability would not be linked to responsibility for contamination. These defenses are listed in Section 107(b):

There shall be no liability under [CERCLA] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting

1 therefrom were caused solely by--

2
3 (1) an act of God;

4
5 (2) *an act of war*;

6
7 (3) an act or omission of a[n unrelated] third party
8 . . . ; or

9
10 (4) any combination of the foregoing paragraphs.

11
12 42 U.S.C. § 9607(b) (emphasis added).

13 “Act of war” is undefined in the statutory text, and
14 the legislative history is silent on the intended meaning of
15 the term. United States v. Shell Oil, Co., 294 F.3d 1045,
16 1061 (9th Cir. 2002). To construe it, we “consider not only
17 the bare meaning of the . . . phrase but also its placement
18 and purpose in the statutory scheme.” United States v.
19 Robinson, 702 F.3d 22, 31 (2d Cir. 2012) (quoting Holloway
20 v. United States, 526 U.S. 1, 6 (1999) (internal quotation
21 marks omitted)).

22 There is no doubt that CERLCA commands a broad reading,
23 and that, accordingly, its several exceptions (including
24 “act of war”) are generally read narrowly. See Gen. Elec.
25 Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 285 (2d Cir.
26 1992) (“It was Congress’ intent that CERCLA be construed
27 liberally”); see also Shell Oil, 294 F.3d at 1061-62
28 (denying “act of war” defense to oil companies who released

1 hazardous substances during wartime at the government's
2 direction); Westfarm Assocs. Ltd. P'ship v. Washington
3 Suburban Sanitary Comm'n, 66 F.3d 669, 677 (4th Cir. 1995)
4 (noting CERCLA's "narrow defenses for damages caused solely
5 by act of God, war, or third parties").

6 However, the reason for that rule of construction is to
7 "accomplish [CERCLA's remedial] goals." Gen. Elec., 962
8 F.2d at 285. CERCLA was passed "to ensure that those
9 responsible for any damage, environmental harm, or injury
10 from chemical poisons bear the costs of their actions."²
11 Id. (internal quotation marks omitted); see also Burlington
12 N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602
13 (2009) ("The Act was designed to promote the timely cleanup
14 of hazardous waste sites and to ensure that the costs of
15 such cleanup were borne by those responsible for the
16 contamination." (internal quotation marks omitted)).

17 That purpose, however broad, is not advanced here by
18 imposing CERCLA liability on the airlines and the owners

² "CERCLA's primary purposes are axiomatic: (1) to encourage the timely cleanup of hazardous waste sites; and (2) to place the cost of that cleanup on those responsible for creating or maintaining the hazardous condition." Price Trucking Corp. v. Norampac Indus., Inc., --F.3d--, No. 11-2917-cv, 2014 WL 1012835, at *3 (2d Cir. Mar. 18, 2014) (internal quotation marks omitted).

1 (and lessors) of the real estate. And the manifest purpose
2 of the defense is served by recognizing the September 11
3 attacks as acts of war. The attacks wrested from the
4 defendants all control over the planes and the buildings,
5 obviated any precautions or prudent measures defendants
6 might have taken to prevent contamination, and located sole
7 responsibility for the event and the environmental
8 consequences on fanatics whose acts the defendants were not
9 bound by CERCLA to anticipate or prevent. See, e.g., 2 The
10 Law of Hazardous Waste: Management, Cleanup, Liability and
11 Litigation § 14.01[8][b] (Susan M. Cooke, ed.) (delineating
12 CERCLA's act-of-war defense as covering "man-made
13 catastrophes beyond the control of any responsible party").
14 We therefore conclude that, solely for purposes of
15 construing CERCLA's affirmative defenses, the September 11
16 attacks were acts of war.³

17 This contextual reading comports with the plain meaning
18 of "act of war" notwithstanding that the September 11

³ Cedar & Washington contend that the September 11 attacks are more appropriately covered by the "third-party" affirmative defense, but that discovery would be required for defendants to meet their burden on that defense. See Appellant Br. 15 n.9. Because the claims are barred by the act-of-war defense, we need not decide whether they would also be barred by the "third-party" defense.

1 attacks were not carried out by a state or a government.
2 War, in the CERCLA context, is not limited to opposing
3 states fielding combatants in uniform under formal
4 declarations.⁴ At the same time, the district court wisely
5 avoided a broad or categorical holding. None was needed
6 because the September 11 attacks were different in means,
7 scale, and loss from any other terrorist attack. Both
8 coordinate branches of government expressly recognized the
9 September 11 attacks as an act of war justifying military
10 response, and these decisions are worthy of deference.
11 Congress, in the immediate aftermath of 9/11, passed the
12 Authorization for the Use of Military Force ("AUMF"), Pub.
13 L. No. 107-40, 115 Stat. 224 (2001), which "constitute[d]
14 the specific statutory authorization" necessary for the
15 President to enter military hostilities abroad under the War
16 Powers Act, 50 U.S.C. §§ 1541-1548, and "to use all
17 necessary and proper force" against those responsible for
18 the September 11 attacks. Similarly, the President declared

⁴ We recognize that in the international law context, "war" has been traditionally defined "as a 'use of force or other action by one state against another' which '[t]he state acted against recognizes . . . as an act of war, either by use of retaliatory force or a declaration of war.'" Shell Oil, 294 F.3d at 1061 (quoting two international law treatises).

1 that the September 11 attacks were acts of war and treated
2 them as such. See Address Before a Joint Session of the
3 Congress on the United States Response to the Terrorist
4 Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347,
5 1347 (Sept. 20, 2011) ("On September 11th, enemies of
6 freedom committed an act of war against our country.").

7 The Supreme Court has deferred to those acts and
8 declarations of the other branches:

9 [N]othing in our analysis turns on the admitted absence
10 of either a formal declaration of war or a declaration
11 of martial law. Our focus instead is on the September
12 11, 2001, attacks that the Government characterizes as
13 the relevant 'act[s] of war,' and on the measure that
14 authorized the President's deployment of military
15 force--the AUMF. . . . [W]e do not question the
16 Government's position that the war commenced with the
17 events of September 11, 2001

18
19 Hamdan v. Rumsfeld, 548 U.S. 557, 599 n.31 (2006). Like the
20 district court, we need not decide whether other terrorist
21 attacks constitute "act[s] of war" under CERCLA; the
22 September 11 attacks fit the category without question.

23 This reading is not at odds with precedent that "act of
24 war" is construed narrowly in insurance contracts. See,
25 e.g., Pan Am. World Airways, Inc. v. Aetna Cas. & Surety
26 Co., 505 F.2d 989 (2d Cir. 1974). The purpose of an all-
27 risk insurance contract is to protect against any insurable

1 loss not expressly excluded by the insurer or caused by the
2 insured. Id. at 1003-04 ("The experienced all risk insurers
3 should have expected the exclusions drafted by them to be
4 construed narrowly against them, and should have calculated
5 their premiums accordingly."). A narrow reading of a
6 contractual "act of war" exclusion thus achieves the
7 parties' contractual intent, insulating the policyholder
8 from loss. The remedial purpose of CERCLA is both different
9 and unrelated.

10 Nor is our interpretation at odds with the Anti-
11 Terrorism Act ("ATA"), 18 U.S.C. §§ 2331 et seq. The
12 purpose of the ATA was "[t]o provide a new civil cause of
13 action in Federal law for international terrorism that
14 provides extraterritorial jurisdiction over terrorist acts
15 abroad against United States nationals." H.R. 2222, 102d
16 Cong. (1992). The statutory exception for an act of war
17 defines it as "any act occurring in the course of--(A)
18 declared war; (B) armed conflict, whether or not war has
19 been declared, between two or more nations; or (C) armed
20 conflict between military forces of any origin." 18 U.S.C.
21 § 2331(4). Acts of war, then, are distinguished from acts
22 of terrorism.

1 Cedar & Washington argues that we should import that
2 distinction into the CERCLA context. However, the ATA is
3 designed precisely to differentiate between acts of
4 terrorism and acts of war, while CERCLA is silent as to
5 terrorism. Indeed, in the CERCLA context, an event may be
6 both an act of war and an act of terrorism; under the ATA
7 regime, it may not. In addition, the "act[s] of war"
8 defined in the two statutes differ geographically, because
9 the ATA applies solely abroad, whereas CERCLA only applies
10 domestically.

11 Given the manifestly distinct statutory text,
12 structure, and remedial purposes of CERCLA and the ATA, we
13 do not construe "act of war" to have the identical meaning
14 in both statutes. See Gen. Dynamics Land Sys., Inc. v.
15 Cline, 540 U.S. 581, 596 (2004) (reading language of ADEA in
16 light of purpose of statute).

17
18 * * *

19 Because they were an "act of war," the September 11
20 attacks fall under CERCLA's exception if they were the
21 "sole[]" cause of the alleged release. 42 U.S.C. § 9607(b).
22 The sole cause standard certainly requires more than just

1 proximate and but for causation. But it is satisfied here
2 because the September 11 attacks overwhelmed all other
3 causes, and because the “release” was unquestionably and
4 immediately caused by the impacts. See Rodgers, supra, at
5 § 8.13 (characterizing the sole cause standard as a
6 “formidable obstacle . . . allow[ing] escape from liability
7 only where external events overwhelm and swamp the
8 contributions of the defendant”); cf. Aegis Ins. Servs.,
9 Inc. v. 7 World Trade Co., L.P., 77 F.3d 166, 180 (2d Cir.
10 2013) (dismissing negligent design claim against owners of a
11 building destroyed on 9/11 because given “severity of the
12 cataclysm that engulfed lower Manhattan . . . , [i]t is
13 simply incompatible with common sense and experience to hold
14 that defendants were required to design and construct a
15 building that would survive the events of September 11,
16 2001”).

17 Cedar & Washington argues that the composition of the
18 dust and flying debris would have been less harmful but for
19 actions previously taken by the owners of the airplanes and
20 the real estate. This argument does not succeed in raising
21 an issue of fact or a subject for discovery. The refutation
22 is found in the text of the statute. The phrase “act of

1 war" is listed in parallel with "act of God," 42 U.S.C. §
2 9607(b); it is useful and sensible to treat the two kinds of
3 events alike when it comes to showing causation. It would
4 be absurd to impose CERCLA liability on the owners of
5 property that is demolished and dispersed by a tornado. A
6 tornado, which scatters dust and all else, is the "sole
7 cause" of the environmental damage left in its wake
8 notwithstanding that the owners of flying buildings did not
9 abate asbestos, or that farmers may have added chemicals to
10 the soil that was picked up and scattered.

11 12 II

13 Cedar & Washington incurred costs removing the dust
14 residues of the planes and the World Trade Center, and seeks
15 common-law indemnification. "Implied, or common-law,
16 indemnity is a restitution concept which permits shifting
17 the loss because to fail to do so would result in the unjust
18 enrichment of one party at the expense of the other."
19 McCarthy v Turner Constr., Inc., 17 N.Y.3d 369, 375 (2011)
20 (internal brackets omitted); see also City of New York v.
21 Lead Indus. Ass'n, Inc., 644 N.Y.S.2d 919, 922-23 (1st Dep't
22 1996) ("The classic situation giving rise to a claim for

1 indemnity is where one, without fault on its own part, is
2 held liable to a third party by operation of law . . . due
3 to the fault of another.”). Under New York law, an
4 indemnitor must bear some fault for the damages suffered by
5 the indemnitee, whether on account of negligence, equitable
6 considerations, or statutory requirements. See Raquet v.
7 Braun, 90 N.Y.2d 177, 183 (1997) (“The duty that forms the
8 basis for the liability arises from the principle that
9 ‘every one is responsible for the consequences of his own
10 negligence, and if another person has been compelled . . .
11 to pay the damages which ought to have been paid by the
12 wrongdoer, they may be recovered from him.’” (quoting
13 Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola,
14 134 N.Y. 461, 468 (1892)) (omission in original)). Thus a
15 polluter who causes (or is obligated by statute to
16 remediate) environmental contamination can be liable to
17 another party who cleans it up. State v. Stewart’s Ice
18 Cream Co., 64 N.Y.2d 83, 86-88 (1984).

19 Here, the act-of-war defense bars the CERCLA claim, and
20 Cedar & Washington does not identify any other basis for its
21 claim of indemnification. Because no legal duty or
22 equitable consideration obligated the defendants to

1 remediate WTC Dust from Cedar & Washington's building, this
2 common law claim fails.

3

4 For the foregoing reasons, we affirm the judgment of
5 the district court.