Acts of God, War, and Third Parties: The Previously Overlooked CERCLA Defenses

by Frank Leone and Mark A. Miller

Frank Leone and Mark A. Miller are attorneys with Hollingsworth LLP in Washington, D.C.

I. Introduction

In a recent decision, a federal appeals court for the first time relied on the statutory act of war defense to dismiss a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] claim, one that sought recovery of the costs of remediating asbestos and other hazardous substances that were released by the September 11, 2001, attack on the World Trade Center (WTC).[2] CERCLA imposes strict liability on a broad range of potentially responsible parties (PRPs) for releases of hazardous substances into the environment. CERCLA provides three statutory defenses: A PRP can avoid liability if it can demonstrate that an act of God, act of war, or act of third party was the sole cause of the hazardous substance release. The act of third-party defense has been asserted succesfully only rarely, and the other two defenses not at all. The U.S. Court of Appeals for the Second Circuit's application of the act of war statutory defense in *In re September 11 Litigation* may open the door (at least slightly) to broader use of these usually narrowly construed and underused defenses.

This Comment explores the three statutory defenses, the difficulties CERCLA defendants have faced in trying to assert them, and whether *In re September 11* will result in more successful assertions of these defenses in the future. As discussed below, although the *September 11* decision dismissed a CERCLA action based on the act of war defense for the first time, that defense may be limited to war-like events such as occurred on September 11. The *September 11* case, however, recognized a broader definition of act of war than is traditionally applied; applied an expansive definition of sole cause; and, in dicta, recognized that an act of God (like a tornado) can be the sole cause of a release, thus suggesting a potentially broader application of these defenses. In particular, if predictions that climate change will bring more severe storms prove accurate, CERCLA defendants may be looking increasingly to the act of God defense.

II. CERCLA Statutory Liability and Defenses

The U.S. Congress enacted CERCLA to fund and promote the remediation of sites where there is a release or threat of release of hazardous substances into the enviroment by imposing liability on a broad group of PRPs. As originally enacted in 1980, CERCLA allowed federal or state governments or private parties to seek recovery of necessary response costs incurred in cleaning up contaminated sites through claims under §107(a). Section 107 imposes strict liability on current owners or operators of facilities where hazardous substances were released, owners and operators of facilities at the time of disposal of hazardous substances, and parties that arranged for disposal or transportation of these substances.[3] Governments may recover damages "not inconsistent" with the U.S. Environmental Protection Agency's (EPA's) National Contingency Plan (NCP), and private parties may recover damages "consistent with" the NCP. Congress has also amended CERCLA to provide for a right of contribution under certain circumstances.[4]

CERCLA §107(b) provides that a PRP will not be liable for damages resulting from a release if it can establish by a preponderance of the evidence that the release was caused *solely* by:

> (1) an act of God;
>
> (2) an act of war;
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a

1. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
2. In re Sept. 11 Litig., 751 F.3d 86, 44 ELR 20104 (2d Cir. 2014), *cert. denied sub nom.* Cedar & Washington Assocs. v. Port Auth. of N.Y. & N.J., No. 14-239, 2014 WL 6724336 (U.S. Dec. 1, 2014).
3. 42 U.S.C. §9607.
4. 42 U.S.C. §9613(f).

common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.[5]

Congress has amended CERCLA over time to add additional, also narrow, statutory defenses.[6]

As a practical matter, the primary "defenses" a PRP can assert to a CERCLA claim are that the plaintiff has failed to meet the statutory elements. For example, a PRP may assert that there has not been a release or threatened release[7]; a chemical is not a hazardous substance[8]; the relevant site is not a facility[9]; the PRP did not own or operate the property at the time of a release[10]; the PRP did not arrange for the disposal of a hazardous substance, but instead, for example, sold a useful product[11]; a parent company is not responsible for its subsidiary's actions[12]; and response costs are not necessary and consistent (or not inconsistent) with the NCP.[13] Nevertheless, as discussed below, a PRP also may be able to assert the statutory defenses.

A. *CERCLA's Act of War Defense*

In the *September 11* case, the court confronted two key questions: (1) Whether the terrorist attacks were an "act of war" under CERCLA; and (2) whether the attacks were the "sole cause" of the enviromental releases of hazardous substances. The case was brought by the developer of a building one block south of the WTC Twin Towers site against the Port Authority of New York and New Jersey as owner of the WTC, the primary lessee of the WTC, operators of businesses at the WTC, and the two airlines whose hijacked airplanes crashed into the Twin Towers. The plaintiff leased the property in 2003 and sought to redevelop it, but in 2007 allegedly incurred over $26 million in costs for removing pulverized dust (containing asbestos and other hazardous substances) that infiltrated into the building after the collapse of the towers. The plaintiff sought to recover those abatement and cleanup costs from the defendants.

In granting the defendants' motion to dismiss, the Southern District of New York recognized that CERCLA does not define an act of war, and its legislative history is also silent on the issue. Nevertheless, the court determined that the al Qaeda terrorist attacks of September 11, 2001, constituted an act of war because the attacks were "[a]n act of terror and devastation that provokes the response of war"; and that they were the sole cause of release of the WTC dust.[14] The district court therefore granted defendants' motions to dismiss.

5. 42 U.S.C. §9607(b).
6. Additional statutory defenses to §107 liability include defenses for contiguous landowners (§107(q)), bona fide prospective purchasers (§107(r)), secured creditors (§101(20)(E)), and response action contractors (§119); as well as the statute of limitations (§113(g)) and contribution protection defenses (§113(f)(2)). In addition, at least one case has recognized a government contractor defense, similar to that announced in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). *See* Richard-Lexington Airport Dist. v. Atlas Props., 854 F. Supp. 400, 424 (D.S.C. 1994). Most courts, however, have rejected a government contractor defense as inconsistent with CERCLA §120, the strict liability language of §107, and the third-party defense discussed in this Comment. *See, e.g.*, United States v. Shell Oil Co., No. CV 91-0589-RJK, 1992 WL 144296, at *10, 22 ELR 20791 (C.D. Cal. Jan. 16, 1992).
7. *See, e.g.*, 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1360 (9th Cir. 1990) (use of asbestos as a building material in constructing a facility did not constitute a release because there was no disposal into the environment, which "includes the atmosphere, external to [a] building, but not the air within a building" (quotations omitted)). A "release" is defined as

   > any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 . . . , and (D) the normal application of fertilizer.

   42 U.S.C. §9601(22).
8. *See* Hassayampa Steering Comm. v. State of Ariz., 942 F.2d 791 (9th Cir. 1991) ("Appellant has not asserted that diphacinone is listed as a hazardous substance pursuant to any of the enumerated statutes, nor has appellant asserted that diphacinone exhibits any of the specified characteristics of a hazardous substance.").
9. For example, a consumer product in consumer use does not qualify as a facility. A "facility" is defined as:

   > (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

   42 U.S.C. §9601(9).
10. *See, e.g.*, Joslyn Mfg. Co. v. Koppers Co., 40 F.3d 750, 761-62, 25 ELR 20476 (5th Cir. 1994) (former owner and "primary contaminator" of the property could not obtain contribution from a subsequent purchaser who was not responsible for contamination during its ownership of the property).
11. *See, e.g.*, Tex Tin Corp. v. United States, No. CIV A G-96-247, 2006 WL 2546395, at *8 (S.D. Tex. Aug. 31, 2006) (sale of nitric acid to the plaintiff's site constituted the sale of a useful product and defendant could not be held liable as an arranger because it lacked actual control over the disposition of those products once they arrived at the site).
12. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 71, 28 ELR 21225 (1998) (a parent is directly liable only where it: (1) is a joint venturer with the subsidiary in the operations of the facility; (2) operates the facility in the stead of the subsidiary; or (3) is otherwise an operator because the facts of the case demonstrate that the parent is directing or operating the environmental affairs of the facility).
13. *See, e.g.*, County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1517, 21 ELR 21299 (10th Cir. 1991) ("Congress did not intend for CERCLA, a narrowly drawn federal remedy, to make injured parties whole or to be a general vehicle for toxic tort actions. Unless Congress sees fit to provide such a remedy, full compensation for hazardous waste harms will in most instances remain the province of state law." (quotations omitted)).
14. In re Sept. 11 Litig., 931 F. Supp. 2d 496, 511 (S.D.N.Y. 2013), *aff'd*, 751 F.3d 86, 44 ELR 20104 (2d Cir. 2014), *cert. denied sub nom.* Cedar & Washington Assocs. v. Port Auth. of N.Y. & N.J., No. 14-239, 2014 WL 6724336 (U.S. Dec. 1, 2014).

The Second Circuit affirmed, and in doing so provided further reasoning why the attacks constituted an act of war. The court noted that CERCLA is a strict liability statute, "passed to ensure that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions."[15] But although the statute casts a "wide net," CERCLA's act of war defense "avoids ensnarement of persons who bear no responsibility for the release of harmful substances."[16]

The traditional definition of act of war involves the use of military force by one sovereign state against another.[17] The plaintiff in the *September 11* litigation argued that, because the terrorist attacks were not a military action by another state, the defense would not apply. The Second Circuit rejected that argument, stating: "War, in the CERCLA context, is not limited to opposing states fielding combatants in uniform under formal declarations."[18]

Although not deciding the issue of whether terrorist attacks more broadly are acts of war for purposes of CERCLA, the court held that the attacks "fit the category without question,"[19] stating that: "Both coordinate branches of government expressly recognized the September 11 attacks as an act of war justifying military response, and these decisions are worthy of deference."[20] The Second Circuit then distinguished the plaintiff's attempt to draw analogies from terrorism exclusions in insurance contracts, finding parties' contractual intent in insurance exclusions to be "different and unrelated" from the remedial purposes of CERCLA.[21] Neither did the court believe that the definition of act of war in the Anti-Terrorism Act (ATA),[22] which excludes terrorism, should apply because the ATA was designed "precisely to differentiate between acts of terrorism and acts of war," and an action could be both an act of terrorism and an act of war for CERCLA purposes.[23]

The plaintiff argued that, even if the attacks were an act of war, they were not the sole cause of its damages because the defendants should have foreseen and taken actions to avoid or reduce such harm.[24] The court rejected that argument, comparing the situation to a tornado in the act of God context:

> It would be absurd to impose CERCLA liability on the owners of property that is demolished and dispersed by a tornado. A tornado, which scatters dust and all else, is the "sole cause" of the environmental damage left in its wake notwithstanding that the owners of flying buildings did not abate asbestos, or that farmers may have added chemicals to the soil that was picked up and scattered.[25]

In the end, the Second Circuit's reasoning was grounded in the fact that:

> The attacks wrested from the defendants all control over the planes and the buildings, obviated any precautions or prudent measures defendants might have taken to prevent contamination and located sole responsibility for the event and the environmental consequences on fanatics whose acts the defendants were not bound by CERCLA to anticipate or prevent.[26]

Thus, the sole-cause prong of §107(b) was satisfied "because the September 11 attacks overwhelmed all other causes, and because the 'release' was unquestionably and immediately caused by the impacts."[27]

The §107 act of war defense is a narrow exception to CERCLA liability that depends upon state military action or, as the Second Circuit held, a terrorist action that "overwhelmed all other causes."[28] In cases involving environmental releases merely related to wartime efforts,

15. *In re Sept. 11 Litig.*, 751 F.3d at 91.
16. *Id.* at 89.
17. *See* United States v. Shell Oil Co., 281 F.3d 1045, 32 ELR 20783 (9th Cir. 2002).
18. *In re Sept. 11 Litig.*, 751 F.3d at 92.
19. *Id.*
20. *Id.*
21. *Id.* at 93.
22. Anti-Terrorism Act (ATA), 18 U.S.C. §§2331 et seq.
23. *In re Sept. 11 Litig.*, 751 F.3d at 93.
24. In a brief filed in the Second Circuit, the plaintiff claimed that the terrorist attacks were not the sole cause of the contamination because negligence of the ground defendants (the Port Authority, the lessee of the WTC, and others) contributed to the release, and the defendants owed a duty to plaintiff and failed to exercise reasonable care to provide a safe environment with respect to reasonably foreseeable risks. Specifically, the plaintiff alleged that the ground defendants "failed to design the WTC according to safe engineering practices and to provide adequate sprinkler systems and fireproofing, and that they failed to inspect, discover and repair unsafe and dangerous conditions," including the inadequacy of the fireproofing. The plaintiff further contended that the release was foreseeable by the defendants because the defendants were aware, since a 1993 terrorist attack using a truck bomb in the WTC garage, that the buildings contained asbestos and other hazardous materials that could be released in the event of a future terrorist attack, yet did nothing to abate those risks. Moreover, the defendants should have foreseen that airplanes could crash into the towers (given a near miss in 1981) and that the WTC "was a prime target for terrorists." Br. for Pl.-Appellant at 34-36, In re Sept. 11 Litig., No. 10-4197-cv (2d Cir. May 23, 2013), *available at* 2013 WL 2365140.
25. *In re Sept. 11 Litig.*, 751 F.3d at 93-94.
26. *Id.* at 91.
27. *Id.* at 93. The plaintiff filed a petition for a writ of certiorari in the U.S. Supreme Court. *See* Pet. for Writ of Cert., Cedar & Wash. Assocs., LLC v. Port Auth. of N.Y. & N.J., No. 14-239 (U.S. Aug. 27, 2014). In the petition, the plaintiff first argued that the Second Circuit's view of an act of war being committed by a non-state actor such as al Qaeda impermissibly expands the bright-line definition beyond the Supreme Court's precedent, is inconsistent with how the legislative and executive branches viewed the attacks, and undermines the separation of powers by providing the president with unchecked authority to wage war without congressional approval. Second, the expanded definition of act of war conflicts with the underlying purpose of CERCLA to provide broad liability for potentially responsible parties and narrow defenses for those defendants (citing *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608 (2009)). Third, the Second Circuit's view on the sole cause aspect of the §107 defenses (i.e., the defendants were not liable because the September 11 attacks "overwhelmed all other causes") conflicts with U.S. Court of Appeals for the Fifth Circuit authority, *United States v. West of England Ship Owner's Mut. Prot. & Indem. Ass'n*, 872 F.2d 1192, 19 ELR 20952 (5th Cir. 1989), stating that "sole" cause means the "only" cause. The defendant argued in opposition that the lower court's decision was inherently fact-based, the claimed circuit split did not pose a conflict given the inherently unique nature of the September 11 attacks, and multiple government branches declared the attacks to be an act of war. *See* Br. in Opp'n for Resp'ts at 1-2, Cedar & Wash. Assocs., LLC v. Port Auth. of N.Y. & N.J., No. 14-239 (U.S. Oct. 29, 2014). The Supreme Court denied certiorari on Dec. 1, 2014, without comment. *See* Cedar & Washington Assocs. v. Port Auth. of N.Y. & N.J., No. 14-239, 2014 WL 6724336 (U.S. Dec. 1, 2014).
28. *In re Sept. 11 Litig.*, 751 F.3d at 93.

courts have rejected the defense. For example, in *United States v. Shell Oil Co.*, the United States and California sued the defendant oil companies for recovery of cleanup costs at a Superfund site the companies operated during World War II; the oil companies counterclaimed that the government was liable under CERCLA for cleanup costs.[29] On cross-motions for summary judgment, the trial court rejected the oil companies' argument that the federal government's requisitioning of aviation fuel and regulation of aviation fuel production during World War II constituted an act of war that exempted them from liability. In affirming the trial court's ruling, the court held that the act of war defense did not apply to the oil companies because the evidence did not show that they were compelled by the government to dispose of waste in any particular manner, and they disposed of such waste both before and after World War II. In a later opinion, the U.S. Court of Appeals for the Ninth Circuit read the act of war defense narrowly, rejecting the oil companies' construction of the term as encompassing actions taken under Article I, Section 8, Clause 11 of the Constitution granting Congress the power to declare war.[30]

Thus, the act of war defense was not available where the defendants claimed their actions were taken pursuant to wartime efforts. Other courts examining whether wartime efforts entitled the defendant to the act of war defense have reached similar conclusions.[31]

B. CERCLA's Act of God Defense

The act of God defense has enjoyed even less success than the act of war defense. CERCLA defines an "act of God" as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight."[32] While common sense might suggest that the release of a hazardous substance caused by a natural catastrophe like a hurricane or flood might provide grounds for the defense, CERCLA's legislative history sharply limits its application:

> The [CERCLA] defense for the exceptional natural phenomenon is similar to, but more limited in scope than, the traditional "act of God" defense . . . . The [traditional] "act of God" defense is more nebulous, and many occurrences [traditionally] asserted as "acts of God" would not qualify as [CERCLA-required] "exceptional natural phenomenon." For example, a major hurricane may be an "act of God," but in an area (and at a time) where a hurricane should not be unexpected, it would not qualify as a "phenomenon of exceptional character."[33]

Thus, the lack of foreseeability is an element of establishing the act of God defense under CERCLA.

No reported opinons have rejected liability based on an act of God defense. Some courts have found that the defense does not apply because the natural event was not "grave" enough to meet the statutory definition. Heavy rainfall in 1969 and 1979 that contributed to the overflow of a toxic waste disposal site in California did not qualify.[34] Neither did a cold spell that caused pipes carrying hazardous materials in New York to burst.[35] One court even held that "[f]orest fires, floods, and high winds are normal for northern Idaho" and thus not grounds for an act of God defense.[36]

Courts have rejected other attempted assertions of the defense, finding that the event was anticipated, the defendants failed to exercise due care, or the contamination was not solely caused by the event. For example, in *United States v. Alcan Aluminum Corp.*, the United States filed a cost recovery action against a defendant that disposed of oil emulsion, which had been commingled with other oily wastes containing hazardous substances, that discharged from a mine tunnel into the Susquehanna River in 1985 in the wake of Hurricane Gloria.[37] The U.S. Court of Appeals for the Third Circuit affirmed the Pennsylvania district court's holding that the hurricane did not provide the basis for an act of God defense under CERCLA because: (1) the hurricane was not the sole cause of the hazardous release; (2) the effects of the hurricane could have been prevented or avoided; and (3) heavy rainfall is not the kind of "exceptional natural phenomenon" to which the act of God defense applies.[38]

Similarly, *United States v. M/V Santa Clara I* involved an action by the owner of a cargo ship acting as a common carrier, whose vessel was hit by a storm, resulting in the release of hazardous chemical substances both onboard and into the ocean, against the sellers and buyers of the chemicals.[39] The South Carolina district court held that the act of God defense was not available to the carrier because it was aware that the National Weather Service had predicted the storm and the damage was avoidable, as evidenced by

29. United States v. Shell Oil Co., 281 F.3d 812 (9th Cir.), *vacated*, 294 F.3d 1045, 32 ELR 20783 (9th Cir. 2002).
30. *Shell Oil Co.*, 294 F.3d at 1061-62.
31. *See* R.E. Goodson Constr. Co. v. Int'l Paper Co., No. C/A 4:02-4184-RBH, 2005 WL 2614927, at *19 (D.S.C. Oct. 13, 2005) (prior owner of property leased to the U.S. government as a World War II bombing range could not claim the defense); Coeur D'Alene Tribe v. ASARCO, Inc., No. CV91-0342NEJL, 2001 WL 34139603, at *10 (D. Idaho Mar. 30, 2001) (government wartime actions were not the sole cause of release of mining wastes because "even if USA required higher production levels during war, there is no showing that USA was sole cause of releases during that time period").
32. 42 U.S.C. §9601(1).
33. H.R. Rep. No. 99-253,pt. 4, at 71 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3068, 3101.
34. *See* United States v. Stringfellow, 661 F. Supp. 1053, 1061, 17 ELR 21134 (C.D. Cal. 1987).
35. *See* United States v. Barrier Indus., 991 F. Supp. 678, 679-80, 28 ELR 21128 (S.D.N.Y. 1998).
36. Coeur D'Alene Tribe v. ASARCO, Inc., No. CV91-0342NEJL, 2001 WL 34139603, at *10 (D. Idaho Mar. 30, 2001).
37. United States v. Alcan Aluminum Corp., 892 F. Supp. 648, 25 ELR 21556 (M.D. Pa. 1995), *aff'd*, 96 F.3d 1434 (3d Cir. 1996).
38. *Id.* at 658 ("[W]ere it not for the unlawful disposal of this hazardous waste Hurricane Gloria would not have flushed 100,000 gallons of this chemical soup into the Susquehanna River."); *see also Stringfellow*, 661 F. Supp. at 1061 ("The rains were forseeable based on normal climatic conditions . . . .").
39. United States v. M/V Santa Clara I, 887 F. Supp. 825, 843, 26 ELR 20264 (D.S.C. 1995).

instructions to the crew members to secure the cargo for rough seas prior to departure.[40]

And in *United States v. W.R. Grace & Co.*, the Ninth Circuit affirmed a Montana district court's rejection of a vermiculite mine owner's assertion that the act of God defense precluded liability when EPA removal actions, which were instituted to address the threatened release of asbestos at the defendant mine owner's facilities, caused naturally occurring vermiculite and asbestos to be released from the mines.[41] The mine owners claimed that, because the vermiculite and asbestos were naturally occuring, the materials were a natural phenomenon that triggered the act of God defense. The court held that these releases as a byproduct of the mining operations were not the "sole cause" of contamination, even if the release could qualify as a "natural phenomenon of an exceptional, inevitable, and irresistible character."[42]

Although to date courts have not recognized an act of God defense, the *September 11* decision's statement that "a tornado, which scatters dust and all else, is the 'sole cause' of the environmental damage left in its wake"[43] may provide a basis for arguing that such natural disasters constitute CERCLA-recognized acts of God and are defenses to liability. Indeed, given predictions of more severe weather events associated with climate change, the act of God defense may become more useful.

C. CERCLA's Third-Party Defense

CERCLA's §107(b) third-party defense allows a PRP to avoid liability for a hazardous substance release *solely* caused by the act or omission of a third party (1) who is neither an employee, agent, nor in a direct or indirect contractual relationship with the defendant (unless the contract arises from a published tariff and acceptance for carriage by a common carrier by rail), and (2) the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result therefrom.[44] Courts have interpreted this section as an affirmative defense that must be timely raised or waived.[45]

The third-party defense is the most frequently invoked of the §107(b) statutory defenses. It typically arises in the context of current owners of properties at which there have been releases of hazardous substances and allows those PRPs to escape liability by showing they (1) did not cause the release; (2) were not in a contractual relationship with the party that solely caused the release; and (3) acted with due care and took precautions with respect to the hazardous substances.[46]

As with the other defenses, courts recognize that what it means to be caused solely by the actions of a third party is "ambiguous."[47] In trying to bring clarity to the analysis, the Eastern District of California stated in *Lincoln Properties, Ltd. v. Higgins*:

> If the . . . release was not foreseeable, and if [the defendant's] conduct . . . was so indirect and insubstantial in the chain of events leading to the release, then the defendant's conduct was not the proximate cause of the release and the third-party defense may be available.[48]

While the "solely caused by" prong will sharply limit application of the third-party defense, courts also evaluate the other elements.

1. No Relevant Contractual Relationship With Third Party

To prevail under the third-party defense, the PRP must not have been in a "contractual relationship" with the party that caused the release.[49] In the case of a property owner, the mere existence of a contractual relationship with a prior owner who may have caused a release or others in the property chain does not necessarily eliminate the defense. For example, in *Redwing Carriers, Inc. v. Saraland Apartments*, an original owner of a property, on which it conducted trucking operations that caused releases of hazardous substances, brought a contribution action against subsequent owners of the property, including a group of investors that purchased a 1% general partnership interest in one of the prior property owners who had performed construction activities at the site.[50] The U.S. Court of Appeals for the Eleventh Circuit held that the general partnership did not have either direct or indirect contractual relationships with the prior property owners whose conduct potentially caused the release or threatened release of hazardous substances.[51] Thus, the general partnership established the third-party defense to the claim by the original property owner.

Conversely, in *United States v. Domenic Lombardi Realty*, the defendant purchased a contaminated junkyard directly from the prior owner of the junkyard. The Rhode Island district court held that this type of direct contractual relationship with the party responsible for releases of

40. *See also Coeur D'Alene Tribe*, 2001 WL 34139603, at *10 ("There is no showing that the fires, floods, and winds were so extreme in severity to be unforseeable by the Defendants.").
41. United States v. W.R. Grace & Co., 280 F. Supp. 2d 1135, 1148 (D. Mont. 2002), *aff'd*, 429 F.3d 1224 (9th Cir. 2005).
42. *Id.*; *see also* State of N.Y. v. Green, No. 01-CV-196A, 2004 WL 1375555, at *9 (W.D.N.Y. June 18, 2004) (a fire caused the release of hazardous substances at a polymer mixing facility, but no act of God defense was recognized because "the release of hazardous substances at the site was well documented prior to the fire").
43. In re Sept. 11 Litig., 751 F.3d 86, 93-94, 44 ELR 20104 (2d Cir. 2014), *cert. denied sub nom.* Cedar & Washington Assocs. v. Port Auth. of N.Y. & N.J., No. 14-239, 2014 WL 6724336 (U.S. Dec. 1, 2014).
44. 42 U.S.C. §9607(b)(3).
45. United States v. Mottolo, 26 F.3d 261, 263, 25 ELR 20289 (1st Cir. 1994).
46. *See* 42 U.S.C. §9607(b)(3).
47. Lincoln Props., Ltd. v. Higgins, 823 F. Supp. 1528, 1540 (E.D. Cal. 1991).
48. *Id.* at 1542.
49. *See* 42 U.S.C. §9601(35).
50. Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 27 ELR 20028 (11th Cir. 1996).
51. *Id.* at 1507-08.

hazardous substances precluded application of the third-party defense.[52]

A PRP that has a contractual relationship with the third party causing the release may still claim the defense if the contract was not connected to the release of hazardous substances and the PRP did not control the third party's activities. For example, in *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, the owner of a property that had been used for gas operations filed a CERCLA cost recovery/contribution suit against the prior owner that had initially caused the site contamination.[53] The releases in question, however, occurred when the purchaser disturbed the existing contamination. The Second Circuit ruled that the contract for sale between the parties did not necessarily make the third-party defense unavailable to the original owner if the offensive activity (the construction leading to the contamination) was not undertaken "in connection with" the contract of sale.[54] The contractual relationship clause of §107(b)(3) does not embrace "all acts by a third party with any contractual relationship with a defendant. Such a construction would render the language 'in connection with' mere surplusage."[55]

In *Delaney v. Town of Carmel*, moreover, a group of homeowners sued a variety of former owners of the land where their homes were built, including the developer of the property.[56] The developer had purchased the property from one of the former owners, but did so years after septic waste dumping activities had ceased. The Southern District of New York held that the developer was protected from liability under the third-party defense because the acts or omissions that caused the release of hazardous substances (i.e., dumping of septic waste) did not occur in connection with any contractual relationship between the developer and the former owners who were responsible for the dumping.[57]

CERCLA also provides an "innocent purchaser" or "innocent landowner" exception to its strict liability scheme, which is related to the contractual relationship prong of the §9607(b)(3) third-party defense and is derived from the definition of contractual relationship in 42 U.S.C. §9601(35)(A)(i). The innocent landowner defense provides that, even if there is a contractual relationship, a purchaser of contaminated property is not liable as an owner if, after carrying out all appropriate inquiries, it neither knew nor should have known about the presence of contamination.[58]

2. Exercise of Due Care and Precautions Against Release

Application of the third-party defense's due care requirement varies depending on the nature of the contamination and surrounding circumstances, but it generally requires a PRP to take those steps that are necessary to protect the public from a health or environmental threat. As CERCLA's legislative history states: "The defendant must demonstrate that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances."[59] In other words, whether a PRP exercises due care depends on what the PRP does with contaminated property once it becomes the owner of that property.

In *Interfaith Community Organization v. Honeywell International, Inc.*, for example, the New Jersey district court found that the property lessee exercised the requisite due care by cooperating with the state environmental agency in its attempts to compel its successor to conduct an investigation and remediation of the subject property.[60] On the other hand, in *United States v. Domenic Lombardi Realty, Inc.*, the Third Circuit affirmed a finding that due care was not established where the government submitted unrebutted testimony establishing that the landowner failed to comply with a notice of violation ordering it to inform property visitors of soil contamination and hazards, and also failed to properly store contaminated soil following its removal.[61]

52. United States v. Domenic Lombardi Realty, 204 F. Supp. 2d 318, 331-32 (D.R.I. 2002); *see also* United States v. Monsanto Co., 858 F.2d 160, 169, 19 ELR 20085 (4th Cir. 1988) (site owners failed to establish absence of contractual relationship where they leased property to and accepted rent from chemical manufacturer for storage of raw materials and finished products, and chemical manufacturer later incorporated as chemical and waste recycling company).
53. Westwood Pharms., Inc. v. National Fuel Gas Distrib. Corp., 964 F.2d 85, 22 ELR 20813 (2d Cir. 1992).
54. *Id.* at 91.
55. *Id.* at 89.
56. Delaney v. Town of Carmel, 55 F. Supp. 2d 237 (S.D.N.Y. 1999).
57. *Contra, e.g.*, United States v. 175 Inwood Assocs., LLP, 330 F. Supp. 2d 213, 228 (E.D.N.Y. 2004) (an owner who was a party to a lease with tenant/polluter had a "contractual relationship" with that tenant where the lease expressly mentioned the activities that gave rise to the release of hazardous materials and the lease gave the owner the right to control the activities of the tenant).
58. *See* Western Prop. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 688 (9th Cir. 2004) (a landowner cannot be granted complete recovery if they knew or should have known when purchasing the property that it was contaminated; such an owner does not qualify as an innocent landowner, even if they themselves did not contribute to the contamination); New York v. DelMonte, No. 98-CV-0649E, 2000 WL 432838, at *3 (W.D.N.Y. Mar. 31, 2000) (party could not invoke innocent purchaser defense because it: (1) acknowledged the whole area was contaminated; (2) accepted the property "as is," thus belying claims that the transfer was a gift; (3) the transferor confided to the party that he no longer "wanted to be responsible" for the site; and (4) was found to be in demolition and construction business and should have conducted reasonable inquiry before transfer of property); Foster v. United States, 922 F. Supp. 642, 654-55, 26 ELR 21327 (D.D.C. 1996) (the plaintiff's failure to investigate possible contamination at the site prior to its acquisition and neglect to take appropriate remedial measures once the contamination was discovered precluded him from asserting the innocent landowner defense with respect to the counterclaims against him).
59. H.R. Rep. No. 1016, pt. 1, at 34 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6137.
60. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 263 F. Supp. 2d 796, 864-65 (D.N.J. 2003).
61. United States v. Domenic Lombardi Realty, Inc., 290 F. Supp. 2d 198 (D.R.I. 2003), *aff'd*, 399 F.3d 248 (3d Cir. 2005); *see also* State of New York v. Lashins Arcade Co., 91 F.3d 353, 361-62, 26 ELR 21506 (2d Cir. 1996) (purchaser of contaminated property exercised due care, even though it did not supplant, duplicate, or underwrite remedial investigation/feasibility study previously commissioned by state and federal agencies to address the pollution, where the purchaser maintained water filter on its property, regularly took and analyzed water samples for volatile organic compound contamination, instructed all tenants to avoid discharging hazardous substances into waste and septic systems, incorporated that requirement into

Finally, the "take precautions" requirement provides that the party claiming the third-party defense must have taken precautions against the third party's foreseeable acts or omissions and the consequences thereof.[62] Courts often analyze the "took precautions" and "due care" elements together, looking at the facts to determine whether, on the whole, the actions taken by the party asserting the defense were reasonable to protect public health and the environment.

The cases of *Lincoln Properties* and *Westfarm Associates LP v. Washington Suburban Sanitary Commission*[63] provide a good contrast. In both cases, the defendant was an entity responsible for maintaining a sewer system and in both cases, tetrachlorethylene (PCE) used in dry cleaning operations was released through leaky sewer pipes into the environment. In *Lincoln Properties*, the court found that the county engaging in the normal activities in owning and maintaining a sewer line could claim a third-party defense because: (1) there was no evidence that it could or should have foreseen the leaks and thus was not the proximate cause of the release and, therefore, the release was "caused solely by" other parties; (2) the county did not have a contract with the dry cleaner generators and, even if it did, such a contract was not "connected with the handling of hazardous substances"; and (3) it exercised due care because it built and maintained the lines in accordance with industry standards and prohibited the discharge of cleaning solvents to the sewer.[64] In *Westfarm Associates*, however, the U.S. Court of Appeals for the Fourth Circuit rejected the third-party defense, finding that the sewer operator knew that the dry cleaner used PCE and disposed of it in the sewer, and that cracks were present in the sewer, but did not take precautions such as mending the pipes or banning the discharge that would have prevented the release.[65]

III. Conclusion

CERCLA's act of war, act of God, and third-party defenses are narrowly construed affirmative defenses, and PRPs have had difficulty meeting their burden. The application of all these defenses requires a court to answer the basic questions of whether an act of war, of God, or of a third party was the sole cause of the release; and whether the act was unforseeable or preventable. The *September 11* decision, however, provides support for asserting these defenses, and may be used to further develop favorable case law that will broaden the application of these defenses.

tenant leases, and conducted inspections to ensure compliance); *Foster*, 922 F. Supp. at 654-55 (due care not shown because partner had duty to investigate possible contamination at site given the commercial/industrial setting, high duty of inquiry attached to commercial transactions, relative ease with which contamination could have been discovered prior to purchase, real estate experience of partners, and disparity between purchase price and appraised value of site without contamination, and, additionally, even after discovering contamination, the partners took no steps to abate it, to notify appropriate regulatory authorities or adjoining landowners, or to secure the site or restrict access to it).

62. *See* Westfarm Assocs. LP v. Washington Suburban Sanitary Comm'n, 66 F.3d 669, 683, 25 ELR 21587 (4th Cir. 1995) ("WSSC took no precautions—such as mending the pipes or banning the discharge of toxic organics—against the foreseeable result that hazardous substances such as PCE would be discharged into the sewer."); Major v. Astrazeneca, Inc., No. 5:01-CV-618 (FJS/GJD), 2006 WL 2640622, at *28 (N.D.N.Y. Sept. 13, 2006) (third-party defense established even where no precautions taken because the purchaser could not have taken precautions against the defendants' acts or omissions since they occurred more than 10 years prior to purchase of the property).

63. 66 F.3d 669, 25 ELR 21587 (4th Cir. 1995).

64. Lincoln Props., Ltd. v. Higgins, 823 F. Supp. 1528, 1543-44 (E.D. Cal. 1991).

65. *Westfarm Assocs.*, 66 F.3d at 683.