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29 TXLR 407

*Cost Recovery*

## Superfund Suit Against WTC Parties Fails; Could Impact Claims Related to Climate Change

*By Perry Cooper*

May 6 — The "act of war" affirmative defense relieves World Trade Center owners and lessees of Superfund liability for dust that infiltrated a building a block away after the collapse of the Twin Towers, the U.S. Court of Appeals for the Second Circuit affirmed May 2, in a ruling that could have implications for claims related to climate change (*In re Sept. 11 Litig. (Cedar & Washington Assocs. LLC v. Port Auth. of N.Y. & N.J.),* 2014 BL 123476, 2d Cir., No. 10-4197, 5/2/14).

The Superfund law "was not intended to create liability for the dispersal of debris and wreckage from a catastrophe that was indistinguishable from military attack in purpose, scale, means, and effect,"the court said.

William Ruskin, of Epstein Becker Green in New York, told Bloomberg BNA in a May 5 e-mail that it is significant that the court analogized 9/11, an act of war, to a tornado, an act of God. This may be important dicta for climate change cases, he said.

"The court is almost setting the plate for future litigation when they say that a tornado is like an act of war," Ruskin said.

"With all of the pollution caused by storm events, which seem to be increasing, would this decision provide a defense to a chemical manufacturer, whose product was released into a waterway because of a hurricane? Based upon cited language, the manufacturer might have a defense to a CERCLA claim," he said.

Ruskin predicted that the next time this case is cited, it will be in a climate change case. "Act of God hasn't been litigated much in the CERCLA context," he said.

### BNA Snapshot

*In re Sept. 11 Litig. (Cedar & Washington Assocs. LLC v. Port Auth. of NY & NJ),* 2014 BL 123476, 2d Cir., No. 10-4197, 5/2/14

**Holding:** Owners and lessees of the World Trade Center aren't liable to the owners of a nearby building because contamination that spread to that building when the Twin Towers collapsed was caused by an "act of war."

**Potential Impact:** The court's comparison of the act of war defense to the act of God defense in the case of a tornado could be important dicta in the climate change litigation context.

### Response of War

Real estate developer Cedar & Washington Associates LLC owns a 12-story building one block south of the World Trade Center site. It alleged that it incurred substantial cleanup and abatement expenses to remove pulverized dust that infiltrated its building from the collapse of the WTC Sept. 11, 2001.

Cedar & Washington sued the owner of the WTC site, lessees of the WTC buildings and the companies that owned the two airplanes that crashed into the towers. The plaintiff sought indemnification under the Comprehensive Environmental Response, Compensation and Liability Act and common law.

The district court granted the defendants' motion to dismiss, finding that the claims were time-barred and didn't fall under CERCLA. The Second Circuit remanded the case for additional consideration of whether the Sept. 11 attacks were an "act of war" within the meaning of CERCLA's affirmative defense.

On remand, the district court found that the act of war defense applied, and dismissed the claims against the WTC owners and lessees (28 TXLR 365, 3/28/13).

The district court found that a terrorist act becomes an act of war when it provokes the response of war.

### Doesn't Have to Be Pearl Harbor

CERCLA provides three defenses to strict liability for releases of hazardous substances. The alleged polluter must prove that the release was "caused solely" by (1) an act of God, (2) an act of war, or (3) an act of a third party.

The appeals court acknowledged that CERCLA's exceptions are generally read narrowly to further the statute's purpose of ensuring that those responsible for pollution bear the costs of their actions.

"That purpose, however broad, is not advanced here by imposing CERCLA liability on the airlines and the owners (and lessors) of the real estate,"the court said.

The defendants had no control over the planes or buildings and couldn't have done anything to prevent the contamination, the court said. The attacks "located sole responsibility on fanatics whose acts the defendants were not bound by CERCLA to anticipate or prevent."

Ruskin said this was likely an easy decision for the Second Circuit to make because 9/11 was such a unique event. He said it would have been a much closer question in the case of a "lesser, albeit tragic event like the Boston Marathon bombing."

Congress created the defense for situations like this, he said. "It didn't have to be the Japanese invasion of Pearl Harbor to invoke the act of war defense."

### 'Sole Cause,' Like a Tornado

The court held that the attacks were the sole cause of the alleged release, comparing the situation to the application of CERCLA's "act of God" affirmative defense to a tornado.

"It would be absurd to impose CERCLA liability on the owners of property that is demolished and dispersed by a tornado," the court said.

"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."

### Unusual Superfund Case

Ruskin said it is interesting that this case came up in the CERCLA context because it is "very, very different" from the typical suit involving the release of hazardous substances.

But the plaintiffs likely brought it as a Superfund case rather than a tort case for several reasons, he said. First, the statute of limitations on tort actions in New York is three years, which has elapsed. This was their "last chance," he said.

Second, "the plaintiff would have the almost insurmountable hurdle of having to demonstrate the contamination that resulted from the attack was proximately caused by the defendants' negligence," he said.

"Unless they had antiaircraft defenses on their roof, how could they have prevented these planes from crashing into the building?"

The act of war determination was "cut and dry" for the court, he said.

"The Second Circuit was able to rely on pronouncements by the U.S. Supreme Court; the chief of the Executive Branch, the President, that 9/11 was an 'Act of War'; and Congress authorized the President to act under the War Powers Act," he said. "Thus, the Second Circuit could give deference to the statements and determinations by the highest levels of our three branches of government."

Counsel for the plaintiffs and defendants didn't respond to e-mails requesting comment.

Judge Dennis G. Jacobs wrote the opinion. Judges Jose A. Cabranes and Debra A. Livingson also served on the panel.

Sari E. Kolatch of Cohen Tauber Spievack & Wagner P.C. in New York represented Cedar & Washington.

Leah W. Sears of Schiff Hardin LLP in New York represented the port authority.

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**For More Information**

The opinion is at
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