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## Common Law Tort Defenses under CERCLA

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# COMMON LAW TORT DEFENSES UNDER CERCLA

## INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")<sup>1</sup> was Congress' first systematic attempt to deal with the environmental problems created by hazardous waste disposal.<sup>2</sup> CERCLA was designed as a comprehensive response to the problems caused by the leaking,<sup>3</sup> often abandoned and largely unregulated hazardous waste dumps scattered throughout the nation.<sup>4</sup> The Act established procedures by which the government would respond to hazardous waste spills<sup>5</sup> and created a "Superfund" to pay for that response.<sup>6</sup> It also fashioned a cause of action designed to make "responsible parties"<sup>7</sup> pay for the clean up of such spills.<sup>8</sup> Subsection 9607(a) of

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1. The major provisions of CERCLA are codified at 42 U.S.C. §§ 9601-9657 (1982). The section numbers in Title 42 have corresponding numbers in the Act, i.e. 9601 corresponds with 101. The Superfund Amendments and Reauthorization Act of 1986 (SARA) is the latest amendment to CERCLA. 42 U.S.C. §§ 9601-9675 (Supp. IV 1986) codify the major provisions of SARA. For a short legislative history of CERCLA, see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COL. J. ENV. L. 1 (1982) (hereinafter Grad). For a legislative history of SARA, see Atkeson, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 ENV. L. REP. 10363 (Dec. 1986).

2. Several statutes have isolated provisions relating to hazardous wastes, including the Clean Air Act (42 U.S.C. §§ 7401 *et. seq.*), Clean Water Act (33 U.S.C. §§ 1251 *et. seq.*), Toxic Substance Control Act (15 U.S.C. §§ 2601 *et. seq.*) and the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 *et. seq.*).

3. CERCLA was meant to address contamination caused by hazardous wastes leaking from improperly maintained disposal facilities into the surrounding environment. See Grad, *supra* note 1, at 7.

4. *Id.* at 8-13 (discussing the committee report for S. 1480, the original Senate bill). In at least one case, defendants argued that CERCLA was meant to apply *only* to abandoned facilities. See *Chemical Waste Mgmt. v. Armstrong World Industries*, 669 F. Supp. 1285, 1291 (E.D. Pa. 1987) (The court noted that 42 U.S.C. § 9601(20)(A) (1982) suggests that CERCLA applies to both active and abandoned facilities and rejected defendants arguments); see also 42 U.S.C. § 9601(20)(A)(ii) & (iii) (Supp. IV 1986) (retaining the references to both active and abandoned facilities).

5. See 42 U.S.C. §§ 9602-9606.

6. See 42 U.S.C. §§ 9631-9633 (1982). SARA repealed these sections and reenacted them as part of the Internal Revenue Code. 26 U.S.C. § 9507 (Supp. IV 1986).

7. See 42 U.S.C. § 9607(c)(2) (Supp. IV 1986) ("responsible person"); *United States v. Hooker Chem. & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988) ("responsible parties").

8. See *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1140 (E.D. Pa. 1982). CERCLA's term for these "responsible parties" is "covered persons." See *infra* note 9. Courts applying the common law concept of public nuisance developed an analogous "pay as you go" concept to deal with situations where the economic benefits of the nuisance outweigh the harm caused, but the nuisance is nevertheless causing injury. See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 218, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). The concept has been applied to common law strict liability torts as well. See *infra* note 77. 42 U.S.C. § 9606 (1982 & Supp. IV 1986) defines the other CERCLA cause of action which is designed to allow the United States to respond quickly to "imminent hazards."

CERCLA defines this liability. It provides that, "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section,"<sup>9</sup> certain entities<sup>10</sup> shall be liable for response costs<sup>11</sup> and damages for injury to natural resources<sup>12</sup> associated with the release or threatened release<sup>13</sup> of hazardous sub-

9. 42 U.S.C. § 9607(a) (Supp. IV 1986). Section 9607 is styled "Liability," and subsection (a) is styled *inter alia* "Covered persons; scope".

10. These entities (referred to as "covered persons") are:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . at any facility . . . containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, . . .

42 U.S.C. § 9607(a) (Supp. IV 1986).

The terms "owner or operator," "vessel," "facility," "hazardous substance," "disposal," "treatment," "transport," "release," and "response" are terms defined in § 9601, the Act's dictionary section.

11. See 42 U.S.C. § 9607(a)(4)(A) and (B) (Supp. IV 1986). Response costs include not only "removal costs," the immediate costs associated with cleaning up the release of a hazardous substance (including monitoring and assessment costs), but also "remedial costs," the costs of long term remedies like capping and storage. See *id.* § 9601(23), (24) and (25) (Paragraph (25) defines response as "remove, removal, remedy, and remedial action." Paragraphs (23) and (24) define "remove or removal" and "remedy or remedial action" respectively). Compare *T & E Industries, Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 705-707 (D.N.J. 1988) (discussing response costs with reference to § 9601(23), (24), and (25)) with *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (comprehensive definition of "necessary costs of response" is "somewhat elusive"). CERCLA consistently differentiates between the concepts of removal and remedial action. See 42 U.S.C. § 9601(23) & (24) (Supp. IV 1986); *id.* § 9604(a)(2) ("Any removal action undertaken . . . under this subsection . . . should to the extent . . . practicable, contribute to the efficient performance of any long term remedial action with respect to the release or threatened release concerned." (emphasis added)); *id.* § 9607(a)(4)(A) ("all costs of removal or remedial action"); *id.* § 9613(g)(2) ("An initial action for recovery of [costs under 42 U.S.C. § 9607] must be commenced- (A) for a removal action . . . and (B) for a remedial action . . ."). But see *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1105-1106 (N.D. Ill. 1988). The court held that 42 U.S.C. § 9622(e)(6) (Supp. IV 1986), "explicitly mandates, as a prerequisite to [cost recovery under 42 U.S.C. § 9607], EPA approval of [potentially responsible party] response in situations where the EPA has initiated an investigation of the site." (emphasis added). However, § 9622(e)(6), by its terms, applies only to unauthorized "remedial action." Some of the costs alleged appear to be associated with "removal" action, for instance, "the disposal of removed material." Disallowance of these costs appears to be based on the erroneous notion that remedial action and response are interchangeable terms.

12. See 42 U.S.C. § 9607(a)(4)(C) (Supp. IV 1986). Damages include "reasonable costs of assessing" the resulting injury.

13. As defined by subsection 9601(22) "release" excludes employee exposure solely within the workplace when the employee sues the employer, emissions from engine exhaust, nuclear wastes covered by other statutes, and the normal application of fertilizer. In the case of a threatened release, response costs must be incurred before liability accrues. See *infra* note 79. There is no comprehensive definition of "threatened release" in

stances.<sup>14</sup> The subsection (b) defenses are an act of God,<sup>15</sup> an act of war<sup>16</sup> and, under certain circumstances, an act or omission of a third party.<sup>17</sup> Although these provisions of the statute relating to defenses appear straightforward, many courts have been unsure about what defenses may be asserted in a cost recovery action under CERCLA.<sup>18</sup>

The clauses "notwithstanding any other provision of law" and "subject only to the defenses [of] subsection (b)" qualify the scope of the sentence. Read literally, this language suggests that cost recovery actions are not subject to "other provisions of law," and that defenses other than those listed in subsection (b) may not be interposed in such actions. However, many courts have ignored this "normal and natural" reading of these clauses.<sup>19</sup> These courts call CERCLA ambiguous<sup>20</sup> and, noting its sparse legislative history, proceed to give the clauses a variety of interpreta-

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the cases, and few cases attempt to supply a definition. *Cf.* *United States v. Northern Plating Co.*, 670 F. Supp. 742, 747 (W.D. Mich. 1987) ("The evidence of the presence of hazardous substances at the facility, when combined with the evidence of the unwillingness of any party to assert control over the substances, amounts to a threat of release.").

14. 42 U.S.C. § 9601(14) (Supp. IV 1986) defines hazardous substances by reference, referring to 33 U.S.C. § 1321(b)(2)(A), 42 U.S.C. § 9062, 42 U.S.C. § 6921, 33 U.S.C. § 1317(a), 42 U.S.C. § 7412, and 15 U.S.C. § 2606, sections which list, designate, or otherwise provide for a mechanism for identifying hazardous substances. 42 U.S.C. § 9602 (1982 & Supp. IV 1986) authorizes the Administrator of the Environmental Protection Agency to designate by regulation, other hazardous substances. Oil and natural gas are explicitly excluded from the definition of hazardous substances. *See* 42 U.S.C. § 9601(14) (Supp. IV 1986).

15. *See* 42 U.S.C. § 9601(1) (Supp. IV 1986) (defining an act of God). *See also* *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (defendant failed to make out a proper "act of God" defense).

16. CERCLA does not define "act of war" nor has any court had occasion to pass on this term.

17. *See* 42 U.S.C. § 9607(b)(3) (1982); *infra* note 39. In addition, a person may only invoke these defenses if "the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely" by the enumerated intervening forces. *See* 42 U.S.C. § 9607(b) (1982); *infra* note 38.

18. *See infra* notes 23-28.

19. *See* *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986); *United States v. Mottolo*, 605 F. Supp. 898 (D.N.H. 1985); *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983); *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982). *See also* *Moore & Kowalski, When is One Generator Liable for Another's Waste?*, 33 CLEV. ST. L. REV. 93, 104, n.67 (1984), which argues that section 311 of the Clean Water Act (33 U.S.C. § 1321(f) (1982)) while similarly worded, has not been construed as delimiting defenses. The authors also argue that in listing certain defenses, "Congress was providing exceptions to liability under Section 107(a) where liability might otherwise have been imposed under common law." (emphasis added). *Id.* However, since the enumerated defenses are a subset of the common law defenses to a strict liability tort, this seems unlikely.

20. *See* *Mottolo*, 605 F. Supp. at 902 ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."); *Stepan*, 544 F. Supp. at 1142; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986) (citing *Mottolo*); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986).

tions.<sup>21</sup> Courts have especially objected to the second clause's narrow circumscription of defenses available to a cost recovery action.<sup>22</sup>

This Note examines the defense clause and the judicial interpretations which have given it meaning. Part I proposes an interpretation that does not strain the language of the statute, and resolves the question of whether the enumerated defenses are exclusive. Part II suggests an analytical framework within which one can better understand CERCLA cost recovery actions.

### I. THE RESTRICTIVE LANGUAGE OF SUBSECTION 9607(A): JUDICIAL INTERPRETATIONS

Plaintiffs have often urged courts to apply the prefatory clauses of subsection 9607(a) in a literal, even mechanical fashion.<sup>23</sup> When determining whether "subject only to the defenses . . ." is exclusive language, courts have searched for ways to avoid the harshness of such interpretations.<sup>24</sup> Some courts have acknowledged the clause's literal meaning but

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21. CERCLA was passed at the end of 1980, at the end of a "lame duck" session. There were many floor changes in the final version of the Act and none of the earlier committee reports reflected the Act as finally passed. See *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982). Courts and commentators have therefore considered the comments and debate surrounding the bill's final passage as persuasive as any of the reports. This dual perception of CERCLA as a hastily drafted statute with an inconclusive legislative history has daunted at least one court. See *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (court must depend on legislative history "unusually riddled by self-serving and contradictory statements" to interpret ambiguous statute). This view of CERCLA as a difficult statute to interpret may also account for some of the curious constructions courts have proposed. See, e.g., *Reilly Tar*, 546 F. Supp. at 1118 (holding "notwithstanding any other provision or rule of law" prohibits the application of other sections of CERCLA to § 9607, even though § 9601(22)(D) explicitly excludes "the normal application of fertilizer" from the term "release" of a hazardous substance); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987) (engrafting an "accountability for the disposal of hazardous wastes" requirement in private party cost recovery actions).

22. See *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1056 n.9 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986); *Violet v. Picillo*, 648 F. Supp. 1283 (D.R.I. 1986) (citing *Mardan*).

23. See, e.g., *Mardan*, 600 F. Supp. at 1056; *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1305 (N.D. Ohio 1983); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1078 (1st Cir. 1986).

24. Many cases have had no occasion to decide whether the defenses set forth in subsection (b) are the only defenses a defendant may raise, since defendant's case turned on an enumerated defense, most often an act or omission of a third party. See *Washington v. Time Oil Co.*, 687 F. Supp. 529 (W.D. Wash. 1988); *United States v. Northern Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986). Other courts avoid deciding the issue of exclusivity by finding that the defenses raised have no substantive merit. See *United States v. Dickerson*, 640 F. Supp. 448, 451 (D. Md. 1986) (discarding the defenses of laches and estoppel); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1407-1408 (D.N.H. 1985) (discarding an estoppel defense).

It should be noted that at least one court has granted a motion to strike defenses, including equitable defenses, on the basis that they are not listed in § 9607(b). See *United States v. Stringfellow*, 661 F. Supp. 1053, 1061-1062 (C.D. Cal. 1987).

have found ways to blunt harsh results.<sup>25</sup> Other courts have rejected its restrictive tenor and have simply refused to apply the clause.<sup>26</sup> *State ex. rel. Brown v. Georgeoff*,<sup>27</sup> is perhaps the most interesting of the cases that have found ways to evade the exclusive language of the defense clause,<sup>28</sup> and *Mardan Corp. v. C.G.C. Music, Ltd.*,<sup>29</sup> is the progenitor of a line of cases that has rejected its restrictive effect.<sup>30</sup>

#### A. *State ex rel. Brown v. Georgeoff*

The court in *State ex rel. Brown v. Georgeoff* looked to the substantive basis of a section 9607 action and deemed it a strict liability tort action.<sup>31</sup> It therefore accepted defendant's argument that causation continued to be a part of the liability analysis.<sup>32</sup> In particular, defendants argued that since an independent intervening cause negates causation in a strict liability tort, such a cause could be pleaded as a "defense" in a section 9607 action.<sup>33</sup> In the court's analysis, an intervening cause was not a defense within the meaning of subsection 9607(b). Instead, it was an occurrence that negated the causation element of the cause of action.<sup>34</sup>

The court in *Georgeoff* was correct in characterizing a cost recovery action as a strict liability tort.<sup>35</sup> However, it overlooked the fact that

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25. Some courts recite the § 9607(b) defenses, declare them exclusive, then hear issues labeled defenses which do not fit the statutory categories. *See Dickerson*, 640 F. Supp. at 451 (court considered "affirmative defenses" of statute of limitations, laches and estoppel even though "CERCLA imposes strict liability . . . subject only to the very limited defenses enumerated in [42 U.S.C. § 9607(b) (1982)]").

26. *See infra* note 30.

27. 562 F. Supp. 1300 (N.D. Ohio 1983).

28. Other cases dismiss for failure to state a cause of action on dubious grounds. *See United States v. Price*, 577 F. Supp. 1103, 1110 (D. N.J. 1983) (government's section 9607 action dismissed because no cleanup undertaken at date of complaint even though actual release occurred); *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1450-1451 (S.D. Fla. 1984) (plaintiff failed to state a claim because costs incurred were not consistent with the National Contingency Plan and because response costs had not been incurred, again, even though an actual release occurred). Still other courts hear non § 9607(b) defenses even while recognizing the exclusive language of the defense clause. *See supra* note 25.

29. 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (1986).

30. *Id.*; *United States v. Hardage*, 116 F. R. D. 460 (W.D. Okla. 1987); *Violet v. Picill*, 648 F. Supp. 1283 (D.R.I. 1986); *United States v. Mottolo*, 605 F. Supp. 898 (D.N.H. 1985).

31. 562 F. Supp. 1300, 1306 (N.D. Ohio 1983).

32. *Id.* at 1305. The main issue in *Georgeoff* was whether CERCLA applied retroactively. In this context, the Justice department made the argument that because a release was a continuing nuisance, the transporters' failure to cleanup constituted present conduct, and therefore there was no question of retroactive application. *Id.* at 1304. In support of their contention that CERCLA was being applied to them retroactively, the transporters argued that independent intervening causes would discharge any liability based on their pre-CERCLA conduct. *Id.* at 1305.

33. *Id.*

34. *Id.* at 1306. The court also decided that § 9607 sounded in strict liability, not nuisance.

35. *See infra* notes 74-85 and accompanying text.

subsection 9607(b) defenses are a subset of the class of independent intervening causes, the traditional strict liability tort defenses.<sup>36</sup> An act of God, act of war, or act or omission of a third person, are "causes" that are independent of the defendant and that intervene to negate causation.<sup>37</sup> The statute further restricts these listed defenses in several ways. First, the release of hazardous material must be caused *solely* by one or more of these causes.<sup>38</sup> Second, the third party defense is very closely defined.<sup>39</sup> Finally, other subsections which qualify the liability defined in subsection 9607(a) are very narrowly drawn.<sup>40</sup> Thus, while the *Georgeoff* court correctly noted that intervening causes are defenses to strict liability torts, it erred in failing to note that subsection 9607(b) restricts a party's defenses to a narrow subclass of such independent intervening causes.

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36. This seems strange since the court discussed the transporters' argument concerning third party intervening causes, one of the enumerated defenses in subsection 9607(b). Intervening causes are also called superceding or supervening causes. See W.P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) (hereinafter PROSSER). PROSSER tells us that the question is not one of causation at all, but rather whether the harm and the intervening cause were within the foreseeable risk created by defendant's conduct. PROSSER at 312-313.

37. See PROSSER, *supra* note 36, at 563-564. Prosser does not mention acts of war specifically, but it is clear that they are in the nature of "unforeseeable intervening forces," as are acts of God and independent acts of third persons.

38. The court in *United States v. Hooker Chem. & Plastics Corp.*, had occasion to discuss this requirement. 680 F. Supp. 546 (W.D.N.Y. 1988). The court noted that Occidental Chem. Corp. could not assert the third party defense set forth in 42 U.S.C. § 9607(b)(3) (1982), because its "disposal practices were at least partially responsible for the release or threatened release" at Love Canal. *Id.* at 558; see also *O'Neil v. Picillo*, 682 F. Supp. 706, 728 (D.R.I. 1988) ("The defendants must demonstrate . . . that 'a *totally unrelated third party* is the *sole* cause of the release.'"). It may be that "solely" is used merely to emphasize the strictness of the common law standard. See *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315, 414 N.E.2d 666, 670, 434 N.Y.S.2d 166, 169 (1980) ("Where the acts of a third person intervene between defendant's conduct and the plaintiff's injury, . . . liability turns upon whether the intervening act is a normal or foreseeable consequence of . . . defendant's negligence (citations omitted)."). However, at common law an independent intervening cause did not have to be the *sole* cause of the harm. See *Ventricelli v. Kinney System Rent A Car*, 45 N.Y.2d 950, 952, 383 N.E.2d 1149, 1150, 411 N.Y.S.2d 555, 556 (1978) (although Kinney's negligence caused plaintiff to be standing behind his parked car, co-defendant's act of striking plaintiff was the proximate cause of plaintiff's injuries).

See also *Violet v. Picillo*, 648 F. Supp. 1283, 1293 (D.R.I. 1986) ("solely" narrows § 9607(b) defenses which "essentially serve to shift the burden of proof of causation to the defendants" which in turn serves to "encourage defendants to mark and dispose of their hazardous wastes with the greatest care").

39. Parties with whom defendant has contracted do not qualify as third parties under this exception. Moreover, even if the third party is a complete stranger, defendant must have "exercised due care with respect to the hazardous substances" and he must have taken "precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." 42 U.S.C. § 9607(b)(3).

40. See text discussion *infra* at notes 47-50.

## B. Mardan Corp. v. C.G.C. Music, Ltd.

In contrast to *Georgeoff*, the *Mardan* court's analysis attacked the exclusivity language directly, claiming that a literal reading would produce ridiculous results. In *Mardan*, plaintiff Mardan Corp. ("Mardan") argued that the defenses set forth in subsection (b) are the only defenses to a cost recovery action under CERCLA. Since subsection (b) sets forth neither release nor unclean hands as a defense, Mardan moved to strike them.<sup>41</sup> According to the district court, Mardan's interpretation would make defendants liable despite having made payment in a previous cost recovery action, since the statute lists neither *res judicata*, payment<sup>42</sup> nor accord and satisfaction as defenses. The court felt that such reasoning would also bar such defenses as statute of limitations, waiver and laches, and found this result ridiculous.<sup>43</sup>

The *Mardan* court's analysis ignores the plain meaning of the statute as well as CERCLA's broad purpose—to assure the clean-up of hazardous waste sites.<sup>44</sup> The language of subsection 9607(a), "subject only to the defenses set forth in subsection (b)" is clearly restrictive. The adverb "only" modifies the verb "subject [to]," which means that subsection 9607(b) defenses are the only defenses to a CERCLA cost recovery action. Other internal cues bolster this reading. Subsection 9607(a) goes on to read "[a covered person] shall be liable," mandatory language which suggests that subsection (b) defenses are exclusive. The narrowness of the third party defense<sup>45</sup> also suggests that courts should honor the restrictive tenor of "subject only."<sup>46</sup>

CERCLA sections which refer to subsections (a) and (b) further reinforce this construction. They evidence an intent to make as many parties as possible liable for payment of cleanup costs. For instance, subsection 9607(e) invalidates any attempt to transfer liability under subsection 9607(a) by indemnification or other "hold harmless" agreements.<sup>47</sup> Sub-

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41. *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1056 n.9 (D. Ariz. 1984), *aff'd on other grounds*, 804 F.2d 1454 (9th Cir. 1986). Unclean hands is inequitable conduct with respect to the transaction upon which suit is based which will bar equitable relief. See H. McCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 26 (2d ed. 1948). Since "unclean hands" is for the protection for the court, it can be raised *sua sponte*. *Id.* at p. 60 n.56.

42. As defined in CALAMARI & PERILLO, *THE LAW OF CONTRACTS* (2nd ed. 1977), payment "is a delivery of money or its equivalent in specific property or services by one from whom it is due to another person to whom it is due." (citation omitted) *Id.* at 777.

43. *Id.*

44. See *Wall v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) ("[T]he statute was designed primarily to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the hazardous wastes.").

45. See *supra* notes 38 and 39 and accompanying text.

46. "Subject only" like "solely" suggests a restrictive intent.

47. 42 U.S.C. § 9607(e) (1982). The use of the word "transfer" is significant because 9607(e) doesn't bar making these agreements, or enforcing them against the signatory parties. It does prohibit raising such agreements against parties suing under section 9607(a) who were not parties to the proffered agreement. Cf. *Mardan Corp. v. C.G.C.*

section 9608(c) authorizes the assertion of a cost recovery claim directly against a guarantor.<sup>48</sup> Finally, although subsection 9608(d) limits the liability of a guarantor acting in good faith,<sup>49</sup> it explicitly provides that the subsection does not alter the liability of any person under subsection 9607(a).<sup>50</sup> *Mardan's* interpretation is inconsistent with this effort to assure cost recovery since it would allow a prospective defendant many more defenses to a section 9607 action than the words of the statute provide.

Moreover, rejecting the *Mardan* analysis does not necessarily produce ridiculous results. Subsection 9607(b) discharges the liability of a defendant who is "otherwise liable."<sup>51</sup> Therefore, subsection (b) addresses defendants who meet the substantive liability criteria set forth in subsection (a).<sup>52</sup> Thus, the defense clause does not bar defendant from proving that plaintiff has not stated a cause of action under 9607(a).<sup>53</sup>

Other "*Mardan* defenses" are procedural rather than substantive and are therefore not defenses as CERCLA employs that term.<sup>54</sup> *Res judi-*

Music, Ltd., 804 F.2d 1454, 1459 (9th Cir. 1986) (such agreements between private parties "cannot prejudice the right of the government to recover cleanup or closure costs"). It is unclear whether indemnity and release agreements may also be raised against a party in privity with a party to such an agreement.

48. Prior to the passage of SARA in 1986, the guarantor could assert only those defenses which the owner or operator had unless the owner/operator's misconduct was willful. 42 U.S.C. § 9608(c) (1982). SARA left the liability of guarantors of "vessels" unchanged. 42 U.S.C.A. § 9608(c)(1) (Supp. IV 1986). However, with respect to "facilities" direct action is now restricted to cases where the guaranteed party is insolvent or jurisdiction cannot be obtained over a covered person who is "likely to be solvent at the time of judgment." In addition, the guarantor can raise any defense she had against the owner or operator. *Id.* § 9608(c)(2).

49. A guarantor remains liable at common law for bad faith. 42 U.S.C. § 9608(d)(2) (Supp. IV 1986).

50. 42 U.S.C.A. § 9608(d)(2) (Supp. IV 1986) ("Nothing in this subsection shall be construed, interpreted, or applied to diminish the liability of any person under section 9607 of this title or other applicable law."). This means that even if the guarantor is sued directly, the guaranteed party is still subject to suit.

51. 42 U.S.C. § 9607(b) (1982).

52. *See supra* note 9.

53. This can be done by showing that the party has never been an owner or operator of a vessel or facility, never contracted for the disposal or treatment of hazardous substances or transported to and selected the sites for such substances, or the party can show that there has been no release, and no threatened release which has caused response costs, of any of its hazardous substances. *See United States v. Bliss*, 667 F. Supp. 1298, 1311 (E.D. Mo. 1987) (In order to escape liability, "defendants . . . bear the burden of showing that the hazardous substances at the site came solely from a third party."); *Jersey City Redevelopment Auth. v. PPG Industries*, 655 F. Supp. 1257, 1259-1261 (D.N.J. 1987) (The court found that PPG was not a covered person under 42 U.S.C. § 9607(a) because it had never owned the site from which there was a release, nor had it arranged for transport of or transported wastes to the site, nor was it the owner of the wastes when they were disposed at the site.).

54. 42 U.S.C. § 9607(b) (1982), enumerates defenses which are substantive; they address the causation element of the underlying tort, and negate plaintiff's prima facie showing of liability. Procedural defenses are reasons why the court should not hear the case even given plaintiff's prima facie showing of liability. Still other "defenses" only concern the *amount* of damages which should be assessed. *See United States v. Stringfel-*

cata<sup>55</sup> and collateral estoppel<sup>56</sup> are not defenses since they concern the court's authority to hear the case or particular issue, not defendant's liability.<sup>57</sup> The statute of limitations provision of subsection 9612(d) also addresses procedure rather than substance.<sup>58</sup>

Subsection 9607(e) covers the "defenses" of waiver, release, and indemnification.<sup>59</sup> That subsection invalidates any purported transfer of subsection 9607(a) liability, but does not prohibit such agreements.<sup>60</sup> This means that non-contracting parties seeking recovery are not bound by such agreements even though they may have effect between the contracting parties.<sup>61</sup> Of course, because liability may not be transferred, a waiver, release, indemnification or other such hold harmless agreement is not a substantive "defense" in the sense that subsection (b) defenses are; the agreement and not CERCLA liability is at issue.<sup>62</sup> In *Mardan*, the defendants, C.G.C. Music, Ltd. and Macmillan Inc., invoked the release that Mardan had signed.<sup>63</sup> The Ninth Circuit held that the release

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low, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987) ("[C]omparative fault, contributory negligence, . . . and set-off are not defenses to liability, although they may be relevant factors to consider with respect to damages.").

55. Because each release of hazardous wastes (or potential release which incurs response costs) is deemed a separate cause of action, *res judicata* would seem to have little significance in the typical case.

56. 42 U.S.C. § 9612(e) (1982), limits the collateral estoppel effect of decisions in CERCLA cases to other CERCLA actions. A plaintiff losing a CERCLA action would therefore not be collaterally estopped from suing again under state law, for example. By the same token, a winning plaintiff could not assert a CERCLA judgment to foreclose defenses to a similar non CERCLA action.

57. See *supra* note 54 and *infra* note 58.

58. Since 42 U.S.C. § 9612(d) (1982 & Supp. IV 1986), merely bars the presentation of a claim, but doesn't render it void, this statute of limitations would be considered procedural under traditional common law principles. *Cf.* *Bournias v. Atlantic Maritime Co., Ltd.*, 220 F.2d 152 (2d Cir. 1955). In any case, limitations periods are always procedural in the sense that the passage of time can only be justification for not hearing the case, not justification for the act or omission creating liability.

59. 42 U.S.C. § 9607(e) (1982).

60. Paragraph (1) of subsection 9607(e) states that no "indemnification, hold harmless, or similar agreement or conveyance" can transfer liability from a covered person to any other person. Paragraph (2) states that nothing "in this subchapter including the provisions of paragraph (1) of this subsection," bars a covered person from enforcing such an agreement. 42 U.S.C. § 9607(e)(1) and (2) (1982).

61. Thus, in *Mardan Corp. v. C.G.C. Music, Ltd.*, "Defendants' remain liable to the state or federal government in an action based upon Section 107(a)(4)(A)" because neither government body was a party to the release between Mardan and defendant. 600 F. Supp. 1049, 1058 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986).

62. Given that the agreement is being raised, this "defense" is not substantive in the sense that subsection (b) defenses are. See notes 54 and 58 *supra*. The same is true of an accord and satisfaction defense. An accord (agreement to discharge an obligation) which has been satisfied is raised in defense. See *Harrison v. Gooden*, 439 F.2d 1070, 1072 (1st Cir. 1971).

63. *Mardan*, 600 F. Supp. at 1058. This "defense" of waiver, indemnification or release can be thought of as a counterclaim for breach of the waiver, indemnification or release agreement. Several cases have dealt with this grounds for dismissal. See, e.g., *FMC Corp. v. Northern Pump Corp.*, 668 F. Supp. 1285 (D. Minn. 1987); *Chemical Waste Mgmt. v. Armstrong World Industries*, 669 F. Supp. 1285 (E.D. Pa. 1987).

barred Mardan's cost recovery action.<sup>64</sup>

Thus, we see that while neither the *Mardan* nor the *Georgeoff* analysis adequately explains the "subject only to the defenses . . ." language of subsection 9607(a), a careful analysis of the text in the context of the whole statute does. In *Mardan*, the court also characterized a cost recovery action as equitable, since it was restitutionary in nature, and reasoned that equitable relief was always subject to equitable defenses.<sup>65</sup> The question of equitable defenses<sup>66</sup> should therefore be addressed.

## II. PLAINTIFF IN A SECTION 9607 COST RECOVERY ACTION "WAIVES THE TORT AND SUES IN QUASI-CONTRACT": IMPLICATIONS

Courts have often characterized the CERCLA cost recovery remedy as restitutionary.<sup>67</sup> These courts in turn characterize restitution as an equitable remedy, making a cost recovery action an action in equity, subject to equitable defenses.<sup>68</sup> At least one recent article has taken issue with the latter categorization.<sup>69</sup> Because the standard of liability under section 9607 is strict liability,<sup>70</sup> courts have also analyzed cost recovery actions in tort terms. The common law concept of waiving the tort and suing in quasi-contract integrates these apparently disparate views.<sup>71</sup>

64. *Mardan*, 804 F.2d at 1457.

65. *Mardan*, 600 F. Supp. at 1057-1058. The Ninth Circuit did not reach this question. However, the court observed in a footnote that "most district courts that have faced the issue have interpreted section 107 of CERCLA to impose, as a matter of federal law, joint and several liability with a correlative right of contribution." *Mardan*, 804 F.2d at 1457 n.3.

66. See *infra* notes 96-105 and accompanying text. Of course, unless Congress expressly limits federal court jurisdiction (see *Ex parte McCardle*, 74 U.S. 506 (1868)), a party can always raise constitutional defenses. See *United States v. Union Gas Co.*, 792 F.2d 372 (3rd Cir. 1986) (third party defendant State prevailed using eleventh amendment argument).

67. See, e.g., *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1058 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986); *Sunnen Products Co. v. Chemtech Industries, Inc.*, 658 F. Supp. 276, 278 n.3 (E.D. Mo. 1987) (citing *Mardan*); *Violet v. Picillo*, 648 F. Supp. 1283, 1294 (D.R.I. 1986) (citing cases); *United States v. Mottolo*, 605 F. Supp. 898, 909 (D.N.H. 1985). The concept of restitution is defined in general terms as the restoration of unjust enrichment. See *Restatement of Restitution* § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

68. See *supra* note 67. The equity characterization also serves to bar jury trials. See *United States v. Dickerson*, 640 F. Supp. 448, 453 (D. Md. 1986); *Mottolo*, 605 F. Supp. at 913.

69. Seng, *The Quasi Contractual Nature of Cost Recovery Actions Under CERCLA*, 5 VA. J. NAT. RESOURCES 85 (1985) (hereinafter Seng). Ms. Seng argues that cost recovery actions are restitutionary actions at law.

70. 42 U.S.C. § 9601(32) (Supp. IV 1986), defines liability as "the standard of liability which obtains under section 1321 of Title 33." Courts have construed the standard of liability under 33 U.S.C. § 1321 as strict liability. See, e.g., *Burgess v. M/V Tamano*, 564 F.2d 964, 982 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978).

71. At common law, the victim of certain torts could sue in and obtain the remedies available in assumpsit. See D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 238-239

This conceptualization of a cost recovery action explains the structure of subsection 9607(a),<sup>72</sup> and explains why a defendant may not assert equitable defenses to a cost recovery action.<sup>73</sup>

#### A. A CERCLA Action Is Based in Tort

The basis of a cost recovery action under section 9607, is the occurrence of a tort.<sup>74</sup> Like all torts, liability under section 9607 is based on an act or omission causing harm or injury.<sup>75</sup> As is the case in other ultrahazardous activities,<sup>76</sup> liability is strict.<sup>77</sup> Engaging in the business of creating, storing or disposing of hazardous wastes is itself the act which confers liability for subsequent harm.<sup>78</sup> The release of a hazardous substance, or a threatened release that results in actual clean-up costs<sup>79</sup> are

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(1973) (hereinafter DOBBS). Compare Seng, *supra* note 69, at 92-96. Ms. Seng notes that the cost remedy of a 9607 action is typical of an action in quasi-contract. The typical tort remedy is damages. Ms. Seng rejects the notion that a 9607 action is one in tort for several reasons in addition to the atypical nature of its remedy. She asserts that unlike tort actions, a 9607 action "does not accrue upon the completion of a *defendant's* acts, but upon the completion of *plaintiff's* acts." Ms. Seng also maintains that neither causation nor "defendant's breach of duty" are elements of a 9607 cause of action, although both are elements of any traditional tort. *Id.* at 88-92. It is this writer's position that Ms. Seng is mistaken about when a 9607 action accrues, that elements of causation are a part of a cost recovery action, and that defendant's breach of duty is implicit in the strict liability standard. See *infra* notes 74-85 and accompanying text.

72. See *infra* note 75-91 and accompanying text.

73. See *infra* notes 96-105 and accompanying text.

74. In purely formalistic terms, waiving the tort and suing in quasi-contract would mean waiving the tort remedy as well. Thus, CERCLA's damages remedy (subparagraph 9607(a)(4)(C)) is technically troublesome. There are at least two possible solutions. First, the combination remedy can be characterized as extraordinary relief, noting that it is only available to government entities. Second, we may posit two distinct torts, an ultrahazardous activities tort, and a public nuisance tort. Damages for damage, loss or destruction of public rights is a possible remedy for public nuisance. See *State ex. rel. Dresser Ind., Inc. v. Ruddy*, 592 S.W.2d 789, 792-793 (Mo. 1980). Moreover, many pre-CERCLA cases characterized the release of hazardous substances as public nuisances. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 104-105 (1972).

75. See PROSSER, *supra* note 36, at 2. Stressing the difficulty of defining the term tort, Prosser tentatively defined a tort as "a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." Many torts, however, do share the common elements of defendant's act or omission, legal causation, and legally cognizable harm or injury.

76. See PROSSER, *supra* note 36, at 536, 554-555.

77. See PROSSER, *supra* note 36, at 554-556.

78. 42 U.S.C. §§ 9607(a)(1),(2),(3) and (4) (Supp. IV 1986), define the classes of liable people, covering almost any person who might possibly deal in hazardous waste disposal including, substance generators or transporters, and the contemporaneous owners or operators of facilities where substances were stored. However, transporters are only liable if they decide where the hazardous wastes will be delivered. *Id.* § 9607(a)(4).

79. Subsection 9607(a)(4) confers liability on *inter alia*, "any person who accepts . . . hazardous substances for transport to . . . facilities . . . , from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . ." (emphasis added).

The "threatened release" phrase in the quoted passage is clearly parenthetical. *But see* *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 n.18 (2d Cir. 1985) (calling the passage grammatically clumsy and ambiguous). Both the threatened release which has

the harmful or injurious events for which a party is liable. From these events flow liability for all damages<sup>80</sup> to natural resources,<sup>81</sup> all the cost of government clean-up efforts, and all the clean-up costs incurred by third persons.<sup>82</sup> It is implicit in this structure that these "responsible parties" by their acts or omissions, caused the "release or threatened release."<sup>83</sup>

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caused the incurrence of response costs and the bare release of a hazardous substance will trigger liability. Ms. Seng as well as the courts have assumed that the incurrence of response costs was the event which triggered liability. See Seng, *supra* note 69, at 88; see also *United States v. Price*, 577 F. Supp. 1103, 1110 (D.N.J. 1983); *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1450-1451 (S.D. Fla. 1984); *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988); cf. *Shore Realty Corp.*, 759 F.2d at 1044 n.18 (statute is ambiguous about whether "there is liability from a release without the incurrence of 'response costs'").

80. 42 U.S.C. § 9601(6) (Supp. IV 1986), defines damages as "damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title."

81. Clearly, damage to natural resources can occur in the absence of any response efforts.

82. These costs must be necessary and consistent with the National Contingency Plan. Courts have construed this remedy more narrowly than that of subparagraph 9607(a)(4)(A), but no court has undertaken an extensive discussion of necessary costs. See *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 405 (W.D. Mo. 1985) (The term necessary "has received scant attention in CERCLA litigation."); cf. *N.L. Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986) (On a motion to dismiss for failure to state a cause of action, the allegation by plaintiff that "he was required by state and local agencies to incur the response costs that he seeks to recover" is sufficient to show the costs were "necessary."). For a discussion of consistent as opposed to not inconsistent, see *United States v. Northeastern Pharm. & Chem. Co. (NEPPACO)*, 579 F. Supp. 823, 850-851 (D. Minn. 1984), *rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *infra* note 91.

83. Owner/operators cause releases by owning or operating a facility. A release or threatened release would not occur "but for" a "subsequent landowner's" (i.e., present owner ignorant of past disposal) failure to conduct an environmental audit. 42 U.S.C.A. § 9601(35)(A) (Supp. IV 1986) tends to support this proposition. That subsection defines "contractual relationship" so that the "innocent landowner" who purchases without knowledge of the presence of hazardous wastes on the property can assert the third party defense. However, if at the time of purchase, the buyer would have been alerted to the presence of hazardous wastes by any "appropriate inquiry," the defense is unavailable. See *Id.* §§ 9601(35)(A),(B) (Supp. IV 1986).

Transporters also satisfy "but for" causality. Transporters are factually related to releases when hazardous wastes which they have transported have been released. Perhaps because they function more as conduits than other responsible parties, transporters are only liable when they select the facility to which they convey wastes. 42 U.S.C. § 9607(a)(4) (Supp. IV 1986).

Finally, generators of hazardous wastes are factually related to the release of *their* wastes since but for their production, the wastes could not be released. The more difficult question arises when there is no showing that defendant's wastes have been released. Causation as an element of a 9607 action was discussed in *United States v. Bliss*, where the court opined that a generator might defend a 9607 action by showing that its particular wastes had not been released even though similar wastes had been. 667 F. Supp. 1298, 1310 (E.D. Mo. 1987). According to the court, this showing would take defendant outside the category of "covered person." *Id.*

This is at odds with the language of section 9607(a)(4) which speaks of liability based on the release or threatened release of a hazardous substance. See 42 U.S.C. § 9607(a)(3),(4) (Supp. IV 1986); *United States v. New Castle County*, 642 F. Supp. 1270, 1276 (D. Del. 1986); *United States v. Wade*, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983). It

Another indication of the tort character of a 9607 action is the nature of the subsection (b) defenses. They are independent intervening cause defenses, the only ones available to tortfeasors under common law formulations of strict liability.<sup>84</sup> Thus, a tort, the act of dumping hazardous wastes which are later released, is the underlying wrong for which subsection 9607(a)<sup>85</sup> provides a remedy.

### B. *The Cost Recovery Remedy is Quasi-Contractual*

At common law the victim of a tort could waive the tort and sue in quasi-contract.<sup>86</sup> The common count of quantum meruit,<sup>87</sup> the reasonable value of the services rendered, is analogous to the cost recovery remedy of subsection 9607(a).<sup>88</sup> In a cost recovery action defendant is liable

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is unclear that CERCLA should be read to impose liability even when defendant has shown that there is no causal relationship between its wastes and the release or threatened release. In any case, the logical implication from the structure of section 9607(a) is that causation is presumed when a party fits a category of "covered person." Causation refers to whether defendant's activities in some sense caused the release or threatened release, not whether the release or threatened release caused the response costs. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) ("Congress specifically rejected including a causation requirement" when it deleted from the liability provision "any person who caused or contributed to the release or threatened release," and substituted "classes of persons without reference to [causation]."); *see also Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1282 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988) (missing this distinction).

84. *See* PROSSER, *supra* note 36, at 559-565

85. Amendments to CERCLA have provided for recovery by the government of the costs "of any health assessment or health effects study carried out under [42 U.S.C. § 9604(i)]." 42 U.S.C.A. § 9607(a)(4)(D) (Supp. IV 1986). The provision was added because the "reasonable costs of assessing" language of subparagraph (C) did not appear to cover such studies.

86. *See* DOBBS, *supra* note 71, at 239. Dobbs gives two reasons for the persistence of this "waiver of tort" idea, first to manipulate the statute of limitations, and second to get the benefit of quasi-contractual remedies. *See United States v. C & R Trucking Co.*, 537 F. Supp. 1080, 1083 (N.D. W.Va. 1982) (Action to recover costs under 33 U.S.C. § 1321 is quasi-contractual and subject to the six year contract statute of limitations.); *Interform Co. v. Mitchell*, 575 F.2d 1270 (9th Cir. 1978) (Recovery for trespass to chattels would have been minimal, but under quantum meruit plaintiff recovered the rental value of the forms.); *cf. Manhattan Egg Co. v. Seaboard Terminal & R. Co.*, 137 Misc. 14, 242 N.Y.S. 189 (City Ct. N.Y. 1929) (conversion counterclaim could not be interposed in contract action but quasi-contractual claim could). Something of this spirit is reflected in an old couplet:

"Thoughts much too deep for tears subdue the Court

When I *assumpsit*, bring and god-like waive the tort."

Adolphus, *The Circuiteers, an Ecologue*, 1 L.Q. REV. 232, 233 (1885).

87. "The law of quasi-contract . . . developed in a group of very specific factual patterns [that] became so standardized that they acquired names as special versions of the general *assumpsit* form. These subordinate categories of *assumpsit* were called the common counts." *See* DOBBS, *supra* note 71, at 236-238.

88. While the measure of recovery in a section 9607 action is costs, those costs must be reasonable. For instance, government response must be "not inconsistent with" the National Contingency Plan. Moreover, private party response must be "consistent with" the National Contingency Plan and their response costs must be "necessary costs." 42 U.S.C. § 9607(a)(4)(A),(B). *See NEPPACO*, 579 F. Supp. 823, 851 (D. Minn. 1984), *rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987)

for "all costs of removal or remedial action incurred," subject to certain restrictions.<sup>89</sup> This is exactly the type of implied contract for services rendered to defendant that quantum meruit would create.<sup>90</sup> As in all quasi-contractual actions, only reasonable costs are recoverable.<sup>91</sup>

From a policy perspective, creating a quasi-contractual remedy for this "tort action" is very sensible for at least two reasons. First, the waiver of the tort prevents CERCLA actions from being bogged down in the complex task of determining the nature, extent<sup>92</sup> and cause of plaintiff's injury.<sup>93</sup> Second, making costs recoverable encourages private clean-up efforts,<sup>94</sup> minimizing the drain on government funds.<sup>95</sup>

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(Costs of government action taken "in harmony with" the National Contingency Plan are presumed reasonable.); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1106 (N.D. Ill. 1988).

89. See *supra* note 88. The term incurred has not been discussed much. Some courts seem to assume that the term includes costs *to be incurred*. See *United States v. Wade*, 577 F. Supp. 1326, 1335 (E.D. Pa. 1983) (noting this distinction and suggesting that costs incurred included "amounts for services contracted for but not yet performed"). Other courts have invoked their power to render declaratory judgments. See *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1316 (N.D. Ohio 1983) (incurrence of costs is sufficient to create a "real controversy" between the parties, making declaratory judgment appropriate); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 407-408 (W.D. Mo. 1985) (citing cases).

90. See *DOBBS*, *supra* note 71, at 237-238. Dobbs mentions the common wisdom that while quantum meruit recovery is allowed for unrequested services, it is denied if such services are rendered "officiously" or "with no expectation of payment." Cf. *Wade, Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966) (hereinafter *Wade*) (arguing that quantum meruit should be subject to a strictly objective test of intent).

91. It is implicit in the statutory standard that costs must be reasonable. Costs must be consistent (private party recovery under § 9607(a)(4)(B)), or not inconsistent (government recovery under § 9607(a)(4)(A)), with the National Contingency Plan. It is not clear what the differences between these standards are, but the court in *NEPPACO* opined that reasonableness "is conclusively presumed to have been built into the plan" and therefore, actions "in harmony with the national contingency plan [and] costs incurred pursuant to those actions are presumed to be reasonable and therefore recoverable." 579 F. Supp. 823, 851 (D. Minn. 1984), *rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987). That court also suggested that the difference in wording indicated a difference in the burden of proof. Private plaintiffs are required to show that the costs incurred are consistent with the National Contingency Plan, whereas in government cost recovery actions, the "not inconsistent" language means that defendant has the burden of proof to show that costs were inconsistent. *Id.* at 850; see also *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1394-1395 (D.N.H. 1985) (defendants had burden of proof of showing costs incurred by government were inconsistent with National Contingency Plan).

92. This becomes especially important in the hazardous waste context since many of the effects of a release may not be known or even knowable for many years after a release.

93. Thus, the classic *Palsgraf* problem is avoided. *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928) (was defendant's conduct the proximate cause of plaintiff's injury). Personal and personal property injury remedies may also have been excluded for this reason. In this respect, it should be noted that the original Senate bill contained a provision for damages for personal injury. See *Grad*, *supra* note 1, at 21-22.

94. For instance, the present owner of land on which a release occurs has an interest in maintaining the value of the land, if only for resale. Without this remedy he might very well decide not to undertake clean-up since the most he is likely to recover under a

C. *Equitable Defenses May Not Be Asserted Against  
A Cost Recovery Action*

On a purely formal level, quasi-contractual actions, as actions at law, are not subject to equitable defenses.<sup>96</sup> Even given the modern merger of law and equity however,<sup>97</sup> there exist compelling policy reasons for restricting the use of equitable defenses in CERCLA actions. Most importantly, cost recovery actions were designed to expedite the cleanup of hazardous waste sites by assuring that parties who undertake cleanup recover their costs in a timely fashion.<sup>98</sup>

Creating an equitable cause of action subject to equitable defenses would frustrate this purpose by vastly complicating cost recovery actions. An equity court must balance the relative burdens and benefits, the "equities" between the parties.<sup>99</sup> This will generally be a complicated and time consuming task for the court, as well as encouraging parties to raise issues which would otherwise be irrelevant.<sup>100</sup> Increased complex-

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tort theory is the diminution in the value of the land. *See Seng, supra* note 69, at 93 n.31 & 32. Against this benefit, he would have to offset the cost of cleanup. Thus, his ability to charge responsible parties for the cleanup costs encourages his cleanup efforts.

95. *See, e.g., Reauthorization of Superfund, March 7 and April 2, 1985: Hearings on H.R. 2005 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 99th Cong., 1st Sess. 10 (1985) (Statement of Milton J. Socolar, GAO).* The General Accounting Office estimated that federal government clean-up costs over the next several years might approach 39 billion dollars. The Environmental Protection Agency expected the Superfund's tax provisions to raise "approximately \$5.3 billion [from fiscal year 1986 to fiscal year 1990]." *Id.* at 79. It seems clear therefore, that private cost recovery actions were intended to play an essential role in the clean-up effort. This, especially if courts were to interpret "costs incurred" to mean that government cleanup costs would have to be incurred before being recoverable because the Fund would be depleted by current expenditures. *But see Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986) ("Contractual arrangements apportioning CERCLA liabilities between private 'responsible parties' are essentially tangential to the enforcement of CERCLA's liability provisions.").

96. *See DOBBS, supra* note 71, at 45. According to DOBBS, courts of law now give full effect to the equitable defenses of estoppel and laches, but the same is not true of the "unclean hands" defense.

97. *See DOBBS, supra* note 36, at 65.

98. *Cf. supra* note 44. *See also Tarasi v. Pittsburgh Nat. Bank*, 555 F.2d 1152, 1156 n.9 (3d Cir.), *cert. denied*, 434 U.S. 965 (1977) (advancing statutory purpose calls for rejecting recognition of unclean hands defense).

99. *See H. McCLINTOCK, supra* note 41, at § 23 ("Equitable relief . . . is granted in the discretion of the court . . . by applying established principles of equity to the situation presented by all the facts in the case, and adapting the remedy to accomplish the most equitable result possible."); DOBBS, *supra* note 71, at 52-54; *cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims") (citations omitted).

100. *Cf. O'Neil v. Picillo*, 682 F. Supp. 706, 726 (D.R.I. 1988) ("By delaying thorny considerations of equitable apportionment to a later contribution proceeding, the government is provided immediate funds after the initial liability hearing to take prompt remedial action at the earliest opportunity."). In *United States v. Stringfellow*, the court noted that "the Court's discretion in apportioning damages among the defendants during the contribution phase does not effect the defendants' liability." 661 F. Supp. 1053, 1060

ity also tends to diminish both plaintiff's and defendant's ability to assess the probable outcome of litigation.<sup>101</sup> Such uncertainty would encourage defendants to litigate since their liability is restricted to cleanup costs.<sup>102</sup>

Finally, unlike most equitable restitutionary remedies, a quasi-contractual remedy<sup>103</sup> gives plaintiffs no interest in particular property of the defendant;<sup>104</sup> it is merely a money judgment.<sup>105</sup> Thus, since they do not partake of the advantages of equitable remedies, the cost recovery remedies under subsection 9607(a) should not be subject to their disadvantages—equitable defenses.

### CONCLUSION

This Note has explored the language of the defenses clause of subsection 9607(a) and has attempted to derive a sensible interpretation of its

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(C.D. Cal. 1987). Similarly, an unclean hands defense is unrelated to whether defendant in any way caused a release or threatened release. See *supra* note 41.

101. See F.R.C.P. 16(c)(10). Rule 16(c)(10) authorizes judicial adoption of "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." The need for such procedures is based on "an awareness that the tensions between an attorney's responsibilities as an advocate and as an officer of the court frequently are aggravated in complex litigation and that the tactics of counsel may waste time and expense if the judge passively waits until problems have arisen." Manual for Complex Litigation, Second § 20.1. "Fair and efficient resolution of complex litigation depends upon effective control and supervision by the court, dedication and professionalism of counsel, and the collaboration of the judge and the attorneys in developing, implementing, and monitoring a positive plan for the conduct of pretrial and trial proceedings." *Id.*

102. F.R.C.P. 11 would not be an effective deterrent in this context. It would be virtually impossible to show that defending the action was frivolous or in bad faith if a defendant can always argue the "balancing of the equities" in what usually qualifies as multi-party complex litigation to begin with. For a not untypical cast of parties and claims, see *United States v. Ottati & Goss*, 630 F. Supp. 1361 (D.N.H. 1985) (plaintiffs included state and federal governments who claimed under CERCLA, RCRA and state statutory and common law, defendants included generators, owners/operators and transporters).

103. Ejectment, replevin and detinue are restitutionary remedies at law which would give plaintiff an interest in specific property, but only if plaintiff could establish that it had title superior to defendant's in the disputed property. Thus specific restitution at law would be useless to the plaintiff in possession of the site, and a party out of possession of the site would not be made whole by recovering the site.

104. Equitable liens and constructive trusts give the plaintiff an interest in the specific property, something which may be helpful when the defendant is a Chapter 7 debtor. See, e.g., *Ohio v. Kovacs*, 469 U.S. 274 (1985) (debtor's obligation to clean up hazardous waste disposal site under state court injunction is a "claim" dischargeable in bankruptcy). In *Kovacs*, since the debtor was the owner/operator, plaintiff would not want to recover the contaminated real property (although recovery of the cleaned-up property would be desirable). But, in the case of a prior owner, it may be that assets from a sale of the property are still traceable and thus recoverable. Cf. *In re Teltronics*, 649 F.2d 1236, 1239 (7th Cir. 1981) ("The rule that property obtained by fraud is not part of the bankrupt's estate represents the policy that property should remain in the hands of its rightful owners no matter how legitimate the claims of creditors."). The imposition of a constructive trust is a determination in equity that the trust beneficiary is the "rightful owner."

105. See DOBBS, *supra* note 71, at 241 ("Where the quasi-contract plaintiff wins a simple money judgment, the constructive trust plaintiff wins an *in personam* order that requires the defendant to transfer specific property in some form to the plaintiff.").

scope based on the text of the statute, and the common law tradition out of which it arose.<sup>106</sup> Obviously, a strictly textual interpretation is sometimes not possible or even desirable.<sup>107</sup> However, as Justice Frankfurter wrote, "Though we may not end with the words in construing a disputed statute, one certainly begins there."<sup>108</sup> A closer adherence to this maxim would serve to minimize much of the spurious interpretation which has accompanied CERCLA cost recovery litigation to date.

In particular, when read in their "natural and normal" sense, the prefatory clauses of section 107(a) tell us that the defenses of subsection 9607(b) are exclusive. Characterizing subsection 9607(b) defenses as exclusive inevitably leads to an inquiry into the definition of "defenses" under CERCLA. In an attempt to answer this question this Note has proposed that a cost recovery action is appropriately characterized as a strict liability tort with a quasi-contractual remedy. As a consequence, under traditional remedial theory the section 9607 cause of action would be at law and therefore not subject to equitable defenses.

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106. For further background, see Seng, *supra* note 69, at 92-106; see generally Wade, *supra* note 94.

107. Many philosophers would tell us that no text may be interpreted without extrinsic information. See, e.g., Ingram, *Hermeneutics and Truth* in HERMENEUTICS AND PRAXIS (R. Hollinger 1985).

108. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527 (May 1947). A thorough analysis of the text of the statute should precede appeals to legislative history. See also *United States v. Mottolo*, 605 F. Supp. 898, 901-902 (D.N.H. 1985) ("The general rule of statutory construction . . . is to look first to the language of the statute and then to the legislative history if the statute is unclear.").

