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Note

Passing the Big Bucks: Contractual Transfers of Liability Between Potentially Responsible Parties Under CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also referred to as the Superfund Act)¹ to establish and fund enforcement mechanisms for the cleanup of property containing environmental hazards.² CERCLA seeks to protect the

1. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1989)). CERCLA originally was to have expired September 30, 1991, but Congress inserted language into the 1990 omnibus budget package that reauthorized the Act through the end of fiscal year 1994. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat. 1388 (1990); see also *Superfund Gets New Lease on Life*, Engineering News-Record, Nov. 8, 1990, at 8 (legislators were not up for another big fight over environmental legislation, having just completed work on the Clean Air Act). The quick action "short-circuited" what promised to be an intense battle over reauthorization. *Id.* EPA officials claimed that without the extension of the Act, they would have had to begin shutting down the program by early 1991. *Id.* Senator Frank Lautenberg of New Jersey, who inserted the extension provision in the 1990 budget act, said he believed Congress should consider changes in CERCLA, but "should not let the program grind to a halt" in the meantime. *Congress Wraps It Up: A Drawn-Out Session Permits Last-Minute Legal Changes*, NAT'L L.J., Nov. 12, 1990, at 29. Because of the length of the extension, many interested parties hope Congress will consider amendments to the law. *Id.*

2. See HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, HAZARDOUS WASTE CONTAINMENT ACT OF 1980, H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 22, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125; SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, ENVIRONMENTAL EMERGENCY RESPONSE ACT, S. REP. NO. 848, 96th Cong., 2d Sess. 12 (1980). For CERCLA's legislative history, see ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS FOR THE SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) (Comm. Print 1983) [hereinafter LEGISLATIVE HISTORY] (reprinting the legislative history of CERCLA in three volumes); SUPERFUND: A LEGISLATIVE HISTORY (H. Needham & M. Menefee eds. 1982) (three volumes); Grad, *A Legislative History of the Comprehensive Environmental Response*,

public health by ensuring quick responses³ to the threats posed by improperly managed hazardous waste sites, by encouraging the voluntary cleanup of those sites, and by making certain that those responsible⁴ bear the costs of cleanup.⁵ To carry out these goals, Congress cast a very broad liability net.⁶

CERCLA was controversial even before its passage in 1980.⁷ Because the Act was rushed through a lame-duck ses-

Compensation and Liability ("Superfund") Act of 1980, 8 COLUM. J. ENVTL. L. 1 (1982) (detailing the history of CERCLA).

3. "Response" under CERCLA includes such actions as confinement, storage, dredging or excavations, and repair or replacement of leaking containers. See 42 U.S.C. §§ 9601(23)-(25) (1988).

4. These parties targeted by Congress include "the key industries of the modern American postwar industrial economy, including chemical manufacturing, petroleum refining, pesticide production, plastics manufacturing, electronics production, and mining." Lyons, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?*, 6 STAN. ENVTL. L.J. 271, 275 (1986-1987).

5. H.R. REP. NO. 1016, pt. 1, *supra* note 2, at 17, 29, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6119-20, 6132; *see also* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)) (one of CERCLA's goals is to ensure "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created"); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 404 (W.D. Mo. 1985) ("the fundamental purpose of CERCLA is to provide for the expeditious and efficacious cleanup of hazardous waste sites"); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982) (CERCLA's objective is "to facilitate the prompt clean up of hazardous dump sites by providing a means of financing both governmental and private responses and by placing the ultimate financial burden upon those responsible for the danger").

6. CERCLA achieves its goals through its strong liability structure. Note, *CERCLA, Successor Liability, and the Federal Common Law: Responding to an Uncertain Legal Standard*, 68 TEX. L. REV. 1237, 1241 (1990). The liability provisions supply funds to continue the cleanup of hazardous conditions while also deterring improper hazardous-material management. *Id.*

7. See H.R. REP. NO. 1016, pt. 1, *supra* note 2, at 65, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6141 (Representative William Danemeyer, expressing general opposition to H.R. 7020, as originally passed by the House of Representatives, *see infra* note 9 (discussing CERCLA's voyage through Congress), remarked that "[w]hen the epitaph is written . . . for the inactive hazardous waste site-cleanup bill [H.R. 7020] just reported by the full Commerce Committee it may well read 'noble of purpose but notorious in operation'"); *see also* Bayko & Share, *Stormy Weather on Superfund Front Forecast as "Hurricane SARA" Hits*, NAT'L L.J., Feb. 16, 1987, at 24 ("[a]lthough there was widespread agreement on the urgent need for funds and authority to clean up existing hazardous-waste sites, Congress was badly divided on how to accomplish this task").

In 1979, prior to the passage of CERCLA, both the EPA and Congress believed that a site could be adequately cleaned up by "scraping a few inches of soil off the ground." H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 54 (1985); *see also* Note, *Superfund Amendments and Reauthorization Act of 1986: Lim-*

sion of Congress⁸ and was the result of a "last minute compromise" between three competing bills,⁹ it has gained a well-

iting Judicial Review to the Administrative Record in Cost Recovery Actions by the EPA, 74 CORNELL L. REV. 1152, 1155 (1989). Politicians and professionals alike had little knowledge regarding the cleanup process and the financial resources required. *Id.* at 1156.

8. Congress enacted CERCLA on December 11, 1980, just one month after Ronald Reagan defeated incumbent President Jimmy Carter in the presidential election. Noting that Congress passed the statute during a "lame duck" administration, former EPA Administrator Douglas M. Costle termed the enactment of a major piece of legislation such as CERCLA "an extraordinary action." 16 [Current Developments] *Env't Rep.* (BNA) 7 (May 3, 1985).

9. See *United States v. Mottolo*, 605 F. Supp. 898, 902, 905 (D.N.H. 1985) (Congress passed CERCLA hastily after very limited debate and under a suspension of the rules).

Representative Biaggi introduced H.R. 85, 96th Cong., 1st Sess., on January 15, 1979. 125 CONG. REC. 130 (1979). The three House committees that considered the bill substituted a new version of the bill and submitted it to the full House of Representatives with a favorable report. See H.R. REP. NO. 172, 96th Cong., 2d Sess., pts. 1-3 (1979-1990). Because of resistance from the oil and chemical industries, the full House considered and passed a replacement bill advanced by Representative Breaux as an amendment to H.R. 85. 126 CONG. REC. 26,391-92 (1980). The bill, as passed, established two funds financed from taxes on petroleum and chemical feedstocks. One fund was to provide compensation for oil spills and the other for hazardous chemical spills in navigable waters; the bill did not encompass hazardous substance releases on land. The bill permitted governments and individuals to recover damages for cleanup costs and certain economic losses, and imposed strict liability on owners and operators of vessels and other facilities.

Representative Florio introduced H.R. 7020, 96th Cong., 2d Sess., on April 2, 1980. 126 CONG. REC. 7490 (1980). The bill was reported out of Committee, see H.R. REP. NO. 1016, 96th Cong., 2d Sess., pts. 1-2 (1980), and enacted by the House. 126 CONG. REC. 26,799 (1980). The bill created a fund financed from a tax on oil and chemicals and from general revenues. The fund was to support government response to releases of hazardous substances, including oil, from inactive hazardous waste sites; it did not cover spills in navigable waters, nor did it provide for compensation for economic losses.

The most ambitious of the bills, S. 1480, 96th Cong., 1st Sess., was introduced by Senators Culver, Muskie, Stafford, Chafee, Randolph, and Moynihan on July 11, 1979. 125 CONG. REC. 17,988 (1979). It was favorably reported. See S. REP. NO. 848, 96th Cong., 2d Sess. (1980). As reported, the bill provided for a \$4 billion fund from general revenues and fees on petroleum and chemicals, and for strict liability for a broad range of persons responsible for releases of hazardous chemicals (not including oil). The liability and compensation provisions covered cleanup costs and a variety of private damages, including medical expenses.

As all three bills reached the Senate, S. 1480 was attacked as too comprehensive and H.R. 85 and H.R. 7020 as too weak. Eventually the Senate passed a substitute bill as an amendment to H.R. 7020. The new H.R. 7020 was enacted by both Houses, and signed into law on December 11, 1980. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (prior to 1986 amendment). See generally LEG-

deserved reputation for vaguely-drafted provisions¹⁰ and an ambiguous, often contradictory legislative history.¹¹ As a result, the answers to key issues are sometimes obscure.¹²

One such issue is the contractual transfer of liability between two parties potentially responsible for cleanup costs under CERCLA's liability provisions.¹³ For example, Goodstone, a tire manufacturer, sells a contaminated plant site to Fireyear, another tire manufacturer that plans to continue to manufacture tires at the site. The sales contract contains a clause purporting to indemnify and release Goodstone from all past and future liability to Fireyear for matters arising out of the transaction or in respect to the site. Fireyear manufactures

ISLATIVE HISTORY, *supra* note 2; Grad, *supra* note 2 (detailing CERCLA's development and legislative history).

10. *Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision"). In fact, during the final House debates, a number of Representatives identified over forty drafting errors in the bill that became CERCLA. See 126 CONG. REC. 31,975-76 (1980) (remarks of Rep. Snyder); see also *id.* at 31,969-70 (remarks of Rep. Broyhill listing 22 serious problems with the bill). But see Grad, *supra* note 2, at 2 (because of the inadequate knowledge of the effects of hazardous waste on the environment in 1980, CERCLA was perhaps "the best that could be done at the time").

11. "Although Congress had worked on 'Superfund' toxic and hazardous waste cleanup bills . . . for over three years, the actual bill which became law had virtually no legislative history at all." Grad, *supra* note 2, at 1. Because the final bill emerged from floor fights in the Senate where major amendments were made and adopted, the little history available often proves vague and sketchy. See Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 *ECOLOGICAL L.Q.* 365, 366 (1987). This point has not been lost on the courts. See, e.g., *Walls v. Waste Resource Corp.*, 823 F.2d 977, 980 (6th Cir. 1987) (quoting *Walls v. Waste Resources Corp.*, 761 F.2d 311, 318 (6th Cir. 1985)); *McGregor v. Industrial Excess Landfill, Inc.*, 709 F. Supp. 1401, 1410 (N.D. Ohio 1987), *aff'd*, 856 F.2d 39 (6th Cir. 1988); *Pinole Point Properties, Inc., v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 287 (N.D. Cal. 1984); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142 (E.D. Pa. 1982). For a general discussion of the problems attendant to construing hastily drafted legislation, see *Scarborough v. United States*, 431 U.S. 563, 569-71 (1977).

12. See, e.g., *Artesian Water*, 851 F.2d at 649 (the question of reimbursement for property or income loss was deliberately omitted from CERCLA); see also Bayko & Share, *supra* note 7, at 24 n.1.

13. Parties become potentially responsible under CERCLA § 107(a). 42 U.S.C. § 9607(a) (1988); see *infra* notes 17-33 and accompanying text (discussing CERCLA's liability structure). A single party is seldom responsible for the hazardous waste pollution of a site. Usually, such a site will have numerous potentially responsible parties. See, e.g., *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696, 697 (S.D. Ind. 1988) (more than 350 potentially responsible parties connected with one site).

tires at the site in the same fashion as did Goodstone. Sometime later, Fireyear, aware of hazardous waste problems at the site and desiring to avoid interaction with the government, voluntarily cleans up the site, incurring heavy costs.¹⁴ Fireyear files suit against Goodstone seeking to recover from Goodstone a portion of those cleanup costs.¹⁵ Under CERCLA's liability provisions, both Goodstone and Fireyear are potentially responsible parties liable for the cleanup costs.¹⁶ Nonetheless, can Goodstone successfully use the purported indemnity and release to avoid liability?

This Note examines the effect of contractual transfers of liability between potentially responsible parties under CERCLA. Part I describes CERCLA's liability provisions and discusses how various courts have dealt with contractual agreements purporting to transfer liability between potentially responsible parties. Part II considers the statutory language, the relevant legislative history, and the purposes of CERCLA and concludes that CERCLA prohibits such contractual transfers. This Note further argues that voiding contractual transfers of CERCLA liability between potentially responsible parties will not disrupt commercial expectations. Finally, this Note illustrates the tangible benefits of such an interpretation.

I. THE SCOPE OF CERCLA LIABILITY AND SOME ATTEMPTS TO AVOID IT

A. OVERVIEW OF CERCLA

Under CERCLA, a broadly-defined group of landowners, transporters, and generators of hazardous waste are potentially liable for the costs of cleaning up hazardous waste sites.¹⁷ The

14. See *infra* notes 17-33 and accompanying text (discussing CERCLA's liability structure).

15. See *infra* notes 23-24 and accompanying text (discussing the method by which private parties can recover costs from other potentially responsible parties).

16. Goodstone would be liable as a past owner or operator under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1988), and Fireyear as a present owner or operator under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1988). See *infra* notes 17-33 and accompanying text.

17. See 42 U.S.C. § 9607(a) (1988). Section 107(a) provides in relevant part: Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
(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,

wide scope of CERCLA liability encourages private parties to remedy problems on existing sites and discourages careless disposal of toxic wastes.¹⁸

CERCLA imposes liability in two ways. First, the United States Environmental Protection Agency (EPA)¹⁹ has the authority to compel responsible parties to clean up a site,²⁰ or it may clean up the site itself²¹ and recover its expenses from

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and 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, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

18. *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525, 527 (N.D. Ohio 1990) (CERCLA liability serves to "encourage private remedial initiative"); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 998 (D.N.J. 1988) (CERCLA liability imposed to remedy serious environmental hazards caused by negligent hazardous waste disposal practices).

19. The EPA derives its response authority from CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988). This section authorizes the President to "take any . . . response measure . . . which the President deems necessary to protect the public health or welfare or the environment." The President delegates to the EPA and other administrative agencies the authority to implement CERCLA through Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987), *reprinted in* 42 U.S.C. § 9615 (1988).

20. *See* CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988). When the release or threatened release of a hazardous substance poses an imminent danger to the health and welfare of the public, the EPA may require the Attorney General to initiate an action in federal district court to secure whatever relief is necessary to abate the danger. *Id.* The EPA may also issue administrative orders directing private parties to take whatever action is necessary to protect the public and the environment. The recipient of such an order is not entitled to judicial review of the order prior to enforcement. *Wagner Elec. Corp. v. Thomas*, 612 F. Supp. 736, 740 (D. Kan. 1985).

21. If a party refuses to comply with a cleanup order, the EPA can respond directly and clean up the site. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988). The cleanup is financed by the Superfund. *See* CERCLA

those parties.²² Second, private parties may recover costs incurred in a response action under section 107(a)(4)(B).²³ Under section 107(a)(4)(B), potentially responsible parties may be liable to any party that incurs response costs.²⁴ Additionally, under the Superfund Amendments and Reauthorization Act of

§ 111(a)(1), 42 U.S.C. § 9611(a)(1) (1988) (authorizing reimbursement of response costs through Superfund).

22. The EPA can seek reimbursement from potentially responsible parties under CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1988). See *supra* note 17.

23. 42 U.S.C. § 9607(a)(4)(B) (1988). See *supra* note 17.

24. If a potentially responsible party voluntarily cleans up a site prior to government action, it may recover under § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988). See generally Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 *ECOLOGY L.Q.* 181, 216-19 (1986) (detailing actions under § 107(a)(4)(B)); Note, *Private Cost Recovery Actions Under CERCLA*, 69 *MINN. L. REV.* 1135 (1985) (same). To recover, however, all response costs must have been incurred "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The National Contingency Plan is a detailed set of regulations appearing at 40 C.F.R. §§ 300.1-300.81, which describes methods of responding to hazardous waste problems and sets forth guidelines for the appropriate roles of state and federal agencies and private parties.

Before 1985, courts disagreed over whether private party complaints must allege and prove EPA approval of the response action. Compare *Artesian Water Co. v. Government of Newcastle County*, 605 F. Supp. 1348, 1357-60 (D. Del. 1985) (requiring prior government approval), *aff'd on other grounds*, 851 F.2d 643 (3d Cir. 1988) with *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290 (N.D. Cal. 1984) (not requiring federal preauthorization of private recovery action). In 1985, the EPA revised the National Contingency Plan to make it "absolutely clear" that preapproval of a response action is not necessary for recovery of costs under CERCLA § 107(a). EPA 1985 National Oil and Hazardous Substance Pollution Contingency Plan, 50 Fed. Reg. 47,912, 47,934 (1985). The Ninth Circuit subsequently deferred to the EPA regulation in *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 891-92 (9th Cir. 1986).

Some courts have held that the "unclean hands" doctrine may act to bar private liability actions by potentially responsible parties. See, e.g., *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1058 (D. Ariz. 1984), *aff'd on other grounds*, 804 F.2d 1454 (9th Cir. 1986) (district court applied unclean hands defense as bar to private action between potentially responsible parties; Ninth Circuit decided case on other grounds and did not address validity of unclean hands approach); *infra* notes 41-49 and accompanying text; see also *Violet v. Picillo*, 648 F. Supp. 1283, 1294-95 (D.R.I. 1986) (in private liability action under CERCLA § 107(a)(4)(B), because the plaintiff seeks equitable relief, defendants are not barred from asserting equitable defenses).

Other courts, however, have not looked favorably upon the use of the unclean hands doctrine as a bar to CERCLA liability actions. In *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1291 (E.D. Pa. 1987), the court held that a party liable for response costs may sue other potentially responsible parties under § 107(a)(4)(B) and that the doctrine of unclean hands as espoused in *Mardan* has no place in CERCLA actions. *Id.* at n.7; see also *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 404-05

1986 (SARA),²⁵ any party found liable under CERCLA may seek contribution from any other potentially responsible party.²⁶

CERCLA section 107(a)²⁷ defines four classes of potentially responsible parties: current owners and operators of facilities, past owners and operators at the time of waste disposal, arrangers of hazardous waste transportation and disposal, and transporters of hazardous wastes for disposal.²⁸ The Act imposes strict liability.²⁹ Parties are liable, regardless of fault, for the

(W.D. Mo. 1985) (“[a]pplication of the unclean hands defense in this context [CERCLA liability] would turn Congressional intent on its head”).

25. 42 U.S.C. § 9613(f)(1) (1988). The section provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims . . . shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

Id.

26. *Id.* Parties found liable under either § 107(a) or § 106 may seek contribution from other responsible parties. *Id.* SARA expressly pertains to civil actions in which the government holds the potentially responsible party liable under § 106 or § 107(a)(4)(A), or the party is found liable to a private party under § 107(a)(4)(B). In those cases, the potentially responsible party may seek contribution from other potentially responsible parties pursuant to § 113(f)(1). 42 U.S.C. § 9613(f)(1) (1988).

Even before SARA, the majority of federal courts had implied a right to contribution from either the overall scheme and objectives of CERCLA or from the federal common law. See *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-09 (S.D. Ohio 1983).

27. 42 U.S.C. § 9607(a) (1988); see *supra* note 17.

28. 42 U.S.C. § 9607(a) (1988); see *supra* note 17.

29. The Act itself does not explicitly state that the strict liability standard applies, but states that the term “liable” should be interpreted in the same way as the standard of liability of § 311 of the Clean Water Act, 33 U.S.C. § 1321(b)(3) (1988). CERCLA § 101(32), 42 U.S.C. § 9601(32) (“‘liable’ or ‘liability’ under this subsection shall be construed to be the standard of liability which obtains under section 1321 of title 33”). Courts concluded that a federal common law standard was required and that the comparable Clean Water Act standard was strict liability. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 844 (W.D. Mo. 1984). Courts chose a liability rule that took no account of state law. A uniform rule, they reasoned, would discourage illegal waste dumping in states having “lax liability laws” and protect from the vagaries of state law the government’s ability to obtain reimbursement for Superfund expenditures. See *Chem-Dyne*, 572 F. Supp. at 809. The courts also

costs of cleaning up hazardous substances simply on the basis of their relationship either to the site contaminated with hazardous substances or to the hazardous substances themselves.³⁰ The liability is also joint and several.³¹ The Act recognizes only three defenses to liability: an act of God, an act of war, or the "third party" defense.³² Courts have construed these defenses narrowly.³³

viewed a uniform federal law as consistent with CERCLA's exclusive federal court jurisdiction and the special federal interest in hazardous waste. See *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1255 (S.D. Ill. 1984); see also Garber, *supra* note 11, at 368 (citing *A & F Materials*, 578 F. Supp. at 1255; *United States v. Stringfellow*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,385, 20,386 (C.D. Cal. 1984)).

30. See Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1470 (1989). As Representative Florio, the Sponsor of the House version of CERCLA, explained, CERCLA's "strong liability scheme will insure that those responsible for releases of hazardous substances will be held strictly liable for costs of response and damages to natural resources." 126 CONG. REC. 31,964 (1980), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 2, at 777.

31. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983). Courts have adopted the joint and several liability formula of the RESTATEMENT (SECOND) OF TORTS. *Id.*; see also RESTATEMENT (SECOND) OF TORTS §§ 433A, 433B, 875, 881 (1979) (setting forth instances where tort law imposes joint and several liability). Although CERCLA does not expressly impose joint and several liability, such liability carries out Congress's intent by enabling the government to recover the entire cleanup cost from any liable party without having to identify all responsible parties. Garber, *supra* note 11, at 369; see also *Shore Realty*, 759 F.2d at 1042 n.13 (earlier House and Senate versions contained language providing for "strict, joint and several liability;" although this language was removed from CERCLA, "joint and several liability is consistent with the contribution language of 42 U.S.C. § 9607(e)(2)").

32. See 42 U.S.C. § 9607(b) (1988). The "third party" defense excuses a potentially responsible party from liability for the acts or omissions of third parties, other than those employed by or under a contractual relationship with the party claiming the defense, when that party has exercised due care and taken reasonable precautions. *Id.* This defense, sometimes referred to as the innocent landowner defense, is difficult to prove, requiring the landowner to show that he or she did not know or have reason to know of the presence of the hazardous substance at the time of purchase, or that the property was acquired through escheat, eminent domain, condemnation, inheritance, or bequest. SARA § 101(f), 42 U.S.C. § 9601(35) (1988).

For a detailed discussion of the defenses available under CERCLA, see *Developments in the Law — Toxic Waste Litigation*, 99 HARV. L. REV. 1543 (1986) (ch. IV. Affirmative Defenses).

33. See Note, *Toward an Optimal System of Successor Liability for Hazardous Waste Cleanup*, 6 STAN. ENVTL. L.J. 226, 245-46 (1986); see also *Shore Realty*, 759 F.2d at 1044-45 (significantly limiting the scope of the "third party" defense).

B. CONTRACTUAL TRANSFERS OF CERCLA LIABILITY

Courts are split on the issue of whether a potentially responsible party can "contract out" of CERCLA liability through the use of an agreement between itself and another potentially responsible party.³⁴ Section 107(e) is ambiguous and on its face provides little guidance on this question.³⁵ Section 107(e) states:

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.³⁶

The provision appears expressly to prohibit all contractual transfers of liability in one sentence, then expressly to allow them in the next.³⁷ As a result of this ambiguity, the interpretations that courts give the provision vary considerably.³⁸

34. See *infra* notes 38-63 and accompanying text.

35. See *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1025 (N.D. Cal. 1990); *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525, 528 (N.D. Ohio 1990).

36. 42 U.S.C. § 9607(e) (1988).

37. See *Jones-Hamilton*, 750 F. Supp. at 1025 ("This inartfully drafted provision [§ 107(e)(1)] seems internally inconsistent. The first sentence . . . appears to prohibit indemnification agreements under all circumstances while the second sentence . . . appears to permit indemnification under all circumstances."); *infra* notes 64-95 and accompanying text (discussing alternate interpretations of § 107(e)(1)).

38. See, e.g., *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1461 (9th Cir. 1986) (contractual transfer of CERCLA liability enforceable under New York law) (discussed *infra* notes 41-49 and accompanying text); *AM Int'l*, 743 F. Supp. at 530 (contractual transfer of CERCLA liability between two or more potentially responsible parties prohibited by § 107(e)) (discussed *infra* notes 53-63 and accompanying text); *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1456 (N.D. Ind. 1990) (holding that CERCLA expressly preserves the right of private parties to contractually transfer liability); *Weigmann & Rose Int'l Corp. v. NL Indus.*, 735 F. Supp. 957, 961-62 (N.D. Cal. 1990) (purporting to apply federal law to hold release ineffective where parties had no knowledge that property contained hazardous waste and could not have anticipated CERCLA liability because land was conveyed in 1975, five years before CERCLA took effect); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1000 (D.N.J. 1988) ("[b]y its own terms, CERCLA expressly preserves the right of private parties to contractually transfer to or release an-

The disparity among the courts is not limited, however, to whether section 107(e) allows any contractual transfers of liability. Even among the courts interpreting the section to allow such agreements, there is disagreement over what law, state or federal, should provide the basis for evaluating their scope.³⁹ The majority of courts faced with the issue of CERCLA liability releases have interpreted the language of section 107(e) to permit the use of contractual transfers of liability as a defense to private actions for cleanup cost recovery and contribution.⁴⁰ The leading case on the question is *Mardan Corp. v. C.G.C. Music, Ltd.*⁴¹ In *Mardan*, the Ninth Circuit held that a settlement agreement in which the buyer of a contaminated site released the seller from all claims related "in any way" to the sale agreement barred the buyer's action against the seller for contribution under CERCLA.⁴²

other from . . . CERCLA liability"); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1573 (E.D. Pa. 1988) (CERCLA liability not sufficient for the recovery of clean-up costs between private parties where one such party has released the other from its CERCLA liability).

All courts have, however, agreed that a contractual agreement purporting to transfer liability between potentially responsible parties is never effective to protect the transferring party from direct government action. *See, e.g., Mardan*, 804 F.2d at 1459.

One court has taken the position that § 107(e) does not even apply to contractual releases. *See Waterville Indus. v. First Hartford Corp.*, No. 89-0209-B (D. Me. Jan. 28, 1991) (LEXIS, Genfed library, Dist. file, at 10). The section specifically encompasses "indemnification, hold harmless, or similar agreement[s] and conveyance[s]." Although the overwhelming majority of courts presume that contractual releases fall under the heading "similar agreement and conveyance," the *Waterville* court held that the contractual agreement at issue was a release of cause of action "relating to the real estate — not an indemnification, hold harmless or similar agreement such as is prohibited in some circumstances by CERCLA [§ 107(e)]." *Id.*

39. *See infra* notes 41-49 and accompanying text.

40. *Mardan*, 804 F.2d at 1459; *Mobay Corp. v. Allied-Signal, Inc.*, 753 F. Supp. 1248, 1253 (D.N.J. 1991); *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1027 (N.D. Cal. 1990); *Rodenbeck*, 742 F. Supp. at 1456; *Southland Corp.*, 696 F. Supp. at 1000; *Versatile Metals*, 693 F. Supp. at 1573; *Chemical Waste Management, Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1294-95 (E.D. Pa. 1987); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1289 (D. Minn. 1987).

41. 804 F.2d 1454 (9th Cir. 1986).

42. *Id.* at 1462. The plaintiff had purchased a musical instrument manufacturing plant from the defendant in 1980. For several years prior to the sale of the plant, the defendant had dumped hazardous wastes into a settling pond on the site. *Id.* When the plaintiff acquired the site, it continued to use the settling pond for the same purpose. Both plaintiff and defendant were aware at the time of sale that the settling pond contained hazardous wastes and that it was subject to regulatory activity by the EPA. *Id.* at 1456. In 1981, after a series of disputes had arisen, the parties entered into an "Agreement of Gen-

In reaching this conclusion, the *Mardan* court never considered whether section 107(e) absolutely prohibited contractual transfers of CERCLA liability between potentially responsible parties.⁴³ Assuming it permitted them,⁴⁴ the court concentrated its analysis on whether federal or state law should govern the effect of the release.⁴⁵ Finding no clear indication of congressional preference,⁴⁶ the court applied the three-part test promulgated by the Supreme Court in *United States v. Kimbell Foods*⁴⁷ and decided that state law should provide the rule of decision.⁴⁸ Accordingly, the court evaluated the release under

eral Settlement and Release," under which the defendant paid the plaintiff \$995,000 in settlement of all claims arising out of the purchase agreement. Two years later, the EPA brought an enforcement action against the plaintiff requiring the plaintiff to clean up the settling pond. The plaintiff then filed suit against the defendant to recover part of the cleanup costs. *Id.*

43. *See id.*

44. *Id.* at 1458. The court simply stated that "section 107(e)(1) expressly preserves agreements to insure, to hold harmless, or to indemnify a party held liable under section 107(a)." *Id.* The court appears to have completely disregarded the first sentence of § 107(e)(1). The court's interpretation provides that potentially responsible parties are free to contract among themselves with respect to CERCLA liability, but "responsible parties will be fully liable to the government regardless of the . . . contracts they have entered into." *Id.* at 1459.

45. *Id.* at 1458. The court noted that § 107(e)(1) "expressly preserves agreements to insure, to hold harmless, or to indemnify a party held liable under § 107(a)." *Id.* Because these agreements would normally be governed under state law, the court reasoned, by preserving them Congress may have expressed an intent to preserve the associated body of state law. The court concluded, however, that this intent was not "entirely clear." *Id.*

46. Congress may specify that state law should provide the content of the federal law. *See De Sylvia v. Ballentine*, 351 U.S. 570, 580 (1956).

47. 440 U.S. 715 (1979). Briefly, this test involves asking (1) whether the issue requires a "nationally uniform body of law;" (2) whether the application of state law would frustrate specific objectives of the federal program; and (3) whether the application of a federal rule would disrupt commercial relationships predicated on state law. *See Mardan*, 804 F.2d at 1458.

48. *Mardan*, 804 F.2d at 1458. Applying the first prong of the *Kimbell Foods* test, the court concluded that a uniform body of law was not required, because parties looking to sell their assets "will normally look to state law to interpret their indemnification provisions." *Id.* at 1458. Applying the second prong of *Kimbell Foods*, the court held that the application of state law to interpret the agreements transferring CERCLA liability would not frustrate the statute's objectives, because regardless of any private contractual agreement the parties would remain liable to the government. *Id.* at 1459. Finally, the court found that a uniform federal rule governing contractual transfers of CERCLA liability would disrupt commercial relationships predicated on state law. The court reasoned that a seller will normally desire to "wipe its slate clean" through the use of a general release or indemnification agreement, thereby relieving itself of the "headaches" of the old business and allowing it

New York law and found it enforceable.⁴⁹

Other courts that have considered the issue of contractual transfers of CERCLA liability have implicitly held that the second sentence of section 107(e)(1) completely negates the first sentence, thereby permitting parties to bargain over CERCLA liability under all circumstances.⁵⁰ None of these courts discussed the language of section 107(e), nor did they cite the legislative history of the provision.⁵¹ Instead, these courts appear to have based their interpretation on a public policy that parties should be able to distribute the risk of CERCLA liability because of the far-reaching nature of that liability.⁵² Recently, an Ohio federal district court, confronted with facts similar to those in *Mardan*, held that section 107(e) expressly prohibits

to move on to new ventures. *Id.* at 1460; see *infra* notes 138-50 and accompanying text.

For a case directly contrary to *Mardan*, see *Mobay Corp. v. Allied-Signal, Inc.*, 753 F. Supp. 1248, 1254 (D.N.J. 1991). *Mobay* holds that *Kimbell Foods* requires the formulation of a uniform federal rule regarding the validity of CERCLA liability releases. *Id.* The court adopted a rule similar to the one suggested by Judge Reinhardt in his *Mardan* dissent: In order to preclude recovery of response costs under CERCLA, there must be a clear provision in the release contract that allocates those risks to one of the parties. *Id.* at 1260.

49. Applying New York law, the court concluded that the parties had clearly intended the settlement agreement to include all possible claims related to the property, including possible claims under CERCLA. *Mardan*, 804 F.2d at 1460-61. In reaching this conclusion, the court emphasized the importance of the parties' knowledge of the settling pond and its toxic content, the fact that the parties specifically addressed the possibility that corrective action would be required, and the fact that CERCLA had been in existence for over a year at the time the parties executed the settlement agreement. *Id.*

50. This reasoning allows courts to proceed as if the provision does not exist; the words are just surplusage. See, e.g., *Marmon Group, Inc. v. Rexnord*, 822 F.2d 31 (7th Cir. 1987) (no mention of § 107(e)'s applicability to issue of indemnity agreement purporting to transfer CERCLA liability); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1573 (E.D. Pa. 1988) (CERCLA's liability provisions do not abrogate party's contractual rights); *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1294-95 (E.D. Pa. 1987) (language of § 107(e)(1) authorizes release agreements between owner/operators and generators); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1289 (D. Minn. 1987) ("a person that is liable under the terms of [§ 107(a)] may by agreement be held harmless or indemnified by another party").

51. It is not inconceivable, however, that § 107(e) was not part of either parties' briefs in these cases and, as a result, never entered into the court's consideration. The legislative history of § 107(e)(1), while quite limited, is illuminating as to the provision's meaning. See *infra* notes 58, 96-106 and accompanying text.

52. *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1026 (N.D. Cal. 1990) (reviewing how other courts have dealt with purported transfers of CERCLA liability).

the transfer of CERCLA liability between potentially responsible parties. In *AM International v. International Forging Equipment*,⁵³ conflicts in the sale of a metal plating plant resulted in an agreement under which the seller gave the buyer a release of all claims in return for which the buyer paid a cash settlement to the seller.⁵⁴ Later, when the buyer refused to obey an EPA order to clean up toxic wastes at the plant site, the EPA looked to the seller to undertake the cleanup.⁵⁵ The seller then sued the buyer for contribution.⁵⁶

The *AM International* court examined the language and legislative history of section 107(e) more extensively than any court that has thus far considered the issue.⁵⁷ Finding section 107(e)(1) internally inconsistent, the court turned to the legislative history to "construe section 107(e) coherently."⁵⁸ It con-

53. 743 F. Supp. 525 (N.D. Ohio 1990).

54. *Id.* at 526. The parties' relationship began in 1979 when AM International sold the plant site to principals of International Forging, then leased part of it back. In 1982, AM International informed the principals of International Forging that it would discontinue operations at the site when its lease ran out that fall. The parties then entered into an agreement whereby International Forging was to purchase AM International's equipment and supplies. The contractual relationship between the parties ended in 1984 when International Forging paid AM International \$2.3 million as accord and satisfaction, and AMI gave a release of all claims. *Id.*

55. *Id.* AM International had the cleanup work completed at a cost of \$350,000. *Id.*

56. *Id.*

57. *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1026 (N.D. Cal. 1990).

58. *AM Int'l*, 743 F. Supp. at 528. The court first examined a previous Senate draft of § 107(e):

No indemnification, hold harmless, conveyance, or similar agreement shall be effective to transfer from the owner or operator of a facility, or from any person who may be liable for a release under this section, to any other person the liability imposed under this section: *Provided, That this subsection shall not apply to a transfer in a bona fide conveyance of a facility or site (1) between two parties not affiliated with each other in any way, (2) where there has been adequate disclosure in writing . . . of all facts and conditions (including potential economic consequences) material to such liability, and (3) to a transferor who can provide assurances of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with such facility or site.*

S. 1480, 96th Cong., 2d Sess., § 4(i), 126 CONG. REC. 30,984 (1980) (emphasis added), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 2, at 275. From this draft the court inferred that the provision, at least as originally conceived, disfavored releases except under strict conditions. *AM Int'l*, 743 F. Supp. at 528. This inference, the court found, was further bolstered by the content of an exchange between two Senate sponsors of the bill, which took place during the Senate debate leading to the final draft of the provision. The exchange took

cluded that although section 107(e) allows the transfer of liability between a potentially responsible party and an indemnifier that was not otherwise liable, such as an insurance company, Congress intended to prohibit the contractual transfer of CERCLA liability between two or more potentially responsible persons.⁵⁹ The court further noted that this interpretation squares firmly with CERCLA's policy of encouraging clean-up initiative on the part of responsible parties.⁶⁰ Because a contractual agreement would not insulate a party from a direct action for clean-up costs by the government,⁶¹ a policy of allowing such agreements as defenses to contribution suits would undercut this policy.⁶² Parties would be less likely to take initiative if an indemnity or release were in effect among them because the agreement would confine the costs to any party that acted.⁶³

II. RESOLVING THE INCONSISTENCIES OF SECTION 107(e)

The disparity of result in the cases dealing with contractual transfers of CERCLA liability is undoubtedly the result of the

place between Senator Randolph, a chief sponsor of S. 1480, and Senator Cannon:

Mr. CANNON: Section 107(e)(1) prohibits transfer of liability from the owner or operator of a facility to other persons through indemnification, hold harmless, or similar agreements or conveyances. Language is also included indicating that this prohibition on the transfer of liability does not act as a bar to such agreements, in particular to insurance agreements. The net effect is to make the parties to such an agreement, which would not have been liable under this section, also liable to the degree specified in the agreement.

Mr. RANDOLPH: That is correct.

126 CONG. REC. 30,984 (1980).

59. *AM Int'l*, 743 F. Supp. at 529. The court held that the first sentence of subsection 107(e)(1) absolutely prohibits the effectiveness of any agreement to relieve a party from liability; the second sentence does not relieve a party from liability, but recognizes contracts with others not already liable under the act to provide additional liability by way of insurance or indemnity. This interpretation, the court reasoned, is supported by subsection 107(e)(2); because the second sentence of subsection 107(e)(1) authorizes a limited right to contract regarding liability, and because subsection 107(e)(2) expressly directs that such contracts may not limit suits against persons liable under the act, the manifest conclusion is that such contracts cannot be enforced to prevent suits between potentially responsible parties under the Act. *Id.*

60. *Id.*

61. *Id.* To this extent, the court expressly agreed with the *Mardan* court.

62. *AM Int'l*, 743 F. Supp. at 529.

63. *Id.* For an extensive discussion of this point, see *infra* notes 108-16 and accompanying text.

ambiguity of section 107(e)(1) itself.⁶⁴ The *Mardan* court glossed over the section's inconsistencies and instead focused on the issue of whether state or federal law should be used to evaluate agreements purporting to transfer CERCLA liability.⁶⁵ In doing so, the court ignored the possibility that Congress's true intent was present within the strained language of the provision.⁶⁶ Other courts, apparently finding section 107(e)(1) hopelessly flawed, have proceeded as if it did not exist.⁶⁷

The *AM International* court, however, confronted section 107(e)(1) head on.⁶⁸ By giving greater emphasis to the language and legislative history of the provision, the court interpreted the provision as prohibiting the contractual transfer of CERCLA liability between potentially responsible parties.⁶⁹

The *AM International* court's conclusion is appealing.⁷⁰ Unlike previous attempts at interpreting section 107(e)(1), the *AM International* formulation eliminates the section's facial inconsistency by giving independent meaning to both sentences.⁷¹ The court's analysis, however, is less convincing than its conclusion. Jeopardizing its persuasiveness is its heavy reliance on a legislative history consisting only of one prior version of section 107(e)⁷² and a colloquy between two Senators.⁷³ As argued be-

64. See *supra* notes 34-63 and accompanying text.

65. See *supra* notes 41-49 and accompanying text.

66. *Id.*

67. See *supra* notes 50-52 and accompanying text.

68. *AM Int'l*, 743 F. Supp. at 525; see *supra* notes 53-63 and accompanying text.

69. *AM Int'l*, 743 F. Supp. at 530; see *supra* notes 57-63 and accompanying text.

70. At least one court agrees with this sentiment. See *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1026 (N.D. Cal. 1990) (following the *Mardan* precedent, the court stated that "[a]lthough *AM International's* citation to the legislative history has persuasive appeal, *AM International* . . . is not the law of the Ninth Circuit").

71. The interpretation comports with the well settled principle of statutory interpretation that all parts of a statute, if at all possible, should be given effect. See *Jarecki v. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). A statute should not be interpreted so as to render one part inoperative, superfluous or insignificant. *McClanahan v. Vernan (In re Gasteiger)*, 471 F. Supp. 13, 15 (E.D. Tenn. 1977). According to the *AM International* court's interpretation, the first sentence of § 107(e) disallows contractual transfers of CERCLA liability between potentially responsible parties, while the second sentence allows CERCLA liability transfers between a potentially responsible party and a party not potentially responsible. See *supra* notes 57-63 and accompanying text.

72. See *supra* note 58.

73. *Id.* Courts and commentators have recently become more selective in their reliance on statements by sponsors. W. ESKRIDGE & P. FRICKEY, LEGIS-

low, the *AM International* court could have strengthened its reasoning by a closer analysis of the statutory language itself.

A. THE STATUTORY LANGUAGE

The first sentence of section 107(e)(1) provides that no agreement will be effective to transfer from "any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section."⁷⁴ To determine the meaning of this sentence, one must define the scope of the "liability imposed under this section."⁷⁵ The "section" referred to is section 107(a).⁷⁶ Under section 107(a), a potentially responsible party is liable for the costs of remedial or removal action incurred by the EPA or any other person.⁷⁷ Accordingly, the "liability" that the sentence prevents a potentially responsible party from transferring by way of contractual agreement is the affirmative obligation to contribute to response costs incurred by the EPA or any other person.⁷⁸

The first sentence of section 107(e)(1) thus prohibits the contractual transfer of liability between two potentially responsible parties. To illustrate, recall the earlier example involving the two tire manufacturers, Goodstone and Fireyear.⁷⁹ Fireyear, the present owner of the tire manufacturing plant, executed an agreement purporting to indemnify and release Goodstone, the former owner, from all past and future liability with respect to the site.⁸⁰ Subsequently, Fireyear voluntarily responded to hazardous waste problems on the site, thereby incurring heavy response costs.⁸¹ Under section 107(a), Goodstone, as a potentially responsible party,⁸² is liable to Fireyear

LATION: STATUTES AND THE CREATION OF PUBLIC POLICY 735 (1988). This is due to their recognition that sponsors or their friends might have incentive to distort the legislative history through "planned colloquies." *Id.*

74. 42 U.S.C. § 9607(e)(1) (1988); see *supra* note 36 and accompanying text.

75. 42 U.S.C. § 9607(e)(1) (1988).

76. *Id.* § 9607(a); see *supra* note 17 and accompanying text.

77. See 42 U.S.C. §§ 9607(a)(4)(A), (B) (1988); *supra* notes 17-24 and accompanying text.

78. "[O]wner or operator of any vessel or facility or from any person who may be liable for a release or threat of release," 42 U.S.C. § 9607(e)(1) (1988), is a comprehensive way of saying "potentially responsible party." See *supra* notes 17-33 and accompanying text.

79. See *supra* notes 13-16 and accompanying text.

80. *Id.*

81. *Id.*

82. *Id.*

for at least its proportionate share of those costs.⁸³ If, however, the prior indemnity and release agreement bars enforcement of that liability, Goodstone will have effectively transferred its liability to Fireyear,⁸⁴ directly contrary to the express prohibition on such transfers contained in the first sentence of section 107(e)(1).⁸⁵

In all suits for contribution between potentially responsible parties, one party will be liable to the other for response costs under section 107(a).⁸⁶ Because any agreement whereby one party indemnifies or releases the other will effect a transfer of that liability,⁸⁷ the unavoidable conclusion is that the first sentence of section 107(e)(1) prohibits enforcing such agreements between potentially responsible parties.⁸⁸

The second sentence of section 107(e)(1) provides that "[n]othing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section."⁸⁹ Admittedly, nothing in this sentence expressly limits or defines the relative parties.⁹⁰ In ac-

83. 42 U.S.C. § 9607(a)(4)(B) (1988); see *supra* notes 17-24 and accompanying text.

84. Fireyear, unable to enforce Goodstone's liability, will instead be forced to assume that liability by financing the entire cost of the response.

85. See *supra* notes 74-78 and accompanying text.

86. The plaintiff in a contribution suit seeks to recover all or part of either the cost of its own response action or the amount it has paid or will have to pay for response actions taken by another party. See generally Garber, *supra* note 29 (discussing the equitable considerations relevant to contribution under CERCLA).

87. See *supra* notes 78-86 and accompanying text.

88. Clearly, because every indemnity, hold harmless or release agreement between potentially responsible parties would, if given effect, transfer the liability imposed by § 107(a), all such agreements are prohibited under the first sentence of § 107(e)(1).

89. 42 U.S.C. § 9607(e)(1) (1988); see *supra* notes 36-37 and accompanying text.

90. A potentially significant clue as to Congress's intent, however, is the inclusion of the word "insure" in the second sentence, but not the first. This usage supports the proposition that Congress envisioned different parties to agreements under the second sentence as opposed to the first.

The role of liability insurance in CERCLA recovery actions is a major topic of discussion today. See, e.g., Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942 (1988) (exploring the relationship between environmental liability and liability insurance); Comment, *Insurance Coverage for Hazardous Waste Cleanup: The Comprehensive General Liability Insurance Policy Defined*, 39 CATH. U.L. REV. 196 (1989) (analyzing the division of authority regarding coverage for environmental liabilities); Note, *Environmental Cleanup Costs and Insurance: Seeking a Solution*, 24 GA. L. REV. 705 (1990) (examining the role insurance companies play in forwarding the goals of environmental protection policies); Note, *CERCLA Cleanup Costs*

cordance with the foregoing interpretation of the first sentence of the section,⁹¹ however, it logically follows that the second sentence permits agreements under which an outside party (a party not potentially responsible under section 107(a)) undertakes to insure or indemnify a potentially responsible party.

Such an agreement does not run afoul of the express language of the first sentence of section 107(e)(1). For example, if Allwaste, an outside party, insured or indemnified Goodstone, Goodstone itself, although insured, would still be liable to Fireyear.⁹² The agreement between Goodstone and Allwaste would not transfer the liability imposed by section 107(a) on Goodstone and Fireyear.⁹³ A close reading of the statutory language, therefore, demonstrates that the *AM International*⁹⁴ court was correct: Section 107(e) prohibits the contractual transfer of liability between potentially responsible parties, but allows for insurance or indemnity agreements between a potentially responsible party and an outside party.⁹⁵

B. LEGISLATIVE HISTORY

The legislative history of section 107(e), though meager, supports the interpretation just derived from its language.⁹⁶ This history consists of a version of section 107(e)⁹⁷ appearing

Under Comprehensive General Liability Insurance Policies: Property Damage or Economic Damage, 56 FORDHAM L. REV. 1169 (1988) (arguing that environmental relief under CERCLA constitutes restitution, not "property damage" within the meaning of comprehensive general liability insurance policies); Note, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 U. ILL. L. REV. 897 (discussing the legal effect of standard pollution exclusion clauses contained in general comprehensive liability insurance policies).

91. See *supra* notes 74-88 and accompanying text.

92. Goodstone would remain subject to direct action by Fireyear, even though Goodstone could recoup any losses from Allwaste.

93. Goodstone would remain liable to Fireyear under § 107(a), and Allwaste would be liable to Goodstone under their insurance agreement.

94. *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525 (N.D. Ohio 1990); see *supra* notes 53-63 and accompanying text.

95. *AM Int'l*, 743 F. Supp. at 529; see *supra* notes 57-63 and accompanying text. As the *AM International* court notes, support for this conclusion is also found in § 107(e)(2), which specifically directs that § 107(e)(1) does not bar causes of action by potentially responsible parties against any other person for subrogation or contribution. 743 F. Supp. at 529; see *supra* notes 59-60 and accompanying text.

96. For the complete text of the legislative history of § 107(e), see *supra* note 58.

97. S. 1480, 96th Cong., 2d Sess., 126 CONG. REC. 30,900 (1980); see 1 LEGISLATIVE HISTORY, *supra* note 2, at 495. For the text of the provision, see *supra* note 58.

in an earlier draft of CERCLA and a colloquy occurring during the Senate debate considering amendments transforming that draft into its present form.⁹⁸

The earlier draft of section 107(e) indicates Congress's early apprehension concerning the transfer of CERCLA liability by use of indemnity and release agreements, permitting them only under strict conditions.⁹⁹ The Senate subsequently amended that draft to read as it now does.¹⁰⁰ During the ensuing Senate debate on these amendments, an exchange took place between Senator Cannon and Senator Randolph, a sponsor of the bill.¹⁰¹ During that exchange, Senator Cannon construed section 107(e)(1) as making parties "which would not have been liable under [section 107(a)], also liable to the degree specified in the [indemnity, hold harmless, etc.] agreement."¹⁰² Senator Cannon went on to state that as he understood it, section 107(e)(1) was "designed to eliminate situations where the owner or operator of a facility uses its economic power to force the transfer of its liability to other persons, as a cost of doing business, thus escaping its liability under the act all together [sic]."¹⁰³ Senator Randolph affirmed Senator Cannon's interpretation.¹⁰⁴

The most significant aspect of the Senators' construction of section 107(e)(1) is their belief that it would allow agreements to transfer liability only to parties that were not already liable under section 107(a).¹⁰⁵ That interpretation, as well as the collective trepidation concerning contractual transfers of CER-

98. 126 CONG. REC. 30,984 (1980); see 1 LEGISLATIVE HISTORY, *supra* note 2, at 764; *supra* note 58 and accompanying text.

99. S. 1480, 96th Cong., 2d Sess., 126 CONG. REC. 30,900 (1980); see 1 LEGISLATIVE HISTORY, *supra* note 2, at 495; *supra* note 58 and accompanying text.

100. See 1 LEGISLATIVE HISTORY, *supra* note 2, at 564; *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525, 528 (N.D. Ohio 1990); *supra* note 58 and accompanying text.

101. 126 CONG. REC. 30,984 (1980); 1 LEGISLATIVE HISTORY, *supra* note 2, at 764. One of the Senators, Senator Randolph, was the Chairman of the Senate Committee on Environment and Public Works and a chief sponsor of the bill that became CERCLA. See *AM Int'l*, 743 F.Supp. at 528-29; 1 LEGISLATIVE HISTORY, *supra* note 2, at 564; Grad, *supra* note 2, at 21; *supra* note 58 and accompanying text.

102. 126 CONG. REC. 30,984 (1980); 1 LEGISLATIVE HISTORY, *supra* note 2, at 764.

103. 126 CONG. REC. 30,984 (1980). Senator Cannon's concern underscores Congress's determination to ensure that those responsible for hazardous waste contamination bear the costs of cleanup. See *supra* note 5 and accompanying text.

104. 126 CONG. REC. 30,984 (1980).

105. *Id.* This indicates that, at least as Senator Cannon and Senator Ran-

CLA liability that both Senator Cannon's further remarks and the earlier draft of section 107(e) illustrate, bolster this Note's construction of the provision.¹⁰⁶

C. FURTHERING CERCLA'S GOALS

Perhaps most importantly, interpreting section 107(e) as prohibiting any contractual transfer of liability between potentially responsible parties is most consistent with the purposes and objectives of CERCLA.¹⁰⁷ One of CERCLA's primary objectives is to provide incentives for prompt, private cleanup.¹⁰⁸ Although CERCLA authorizes the government to perform necessary cleanup and then recover its costs from responsible parties,¹⁰⁹ this action is a last recourse taken only after voluntary private action fails.¹¹⁰ The purpose of CERCLA's right of private cost recovery is to avoid government involvement by encouraging potentially responsible parties to clean up quickly and then secure contribution from other responsible parties.¹¹¹ The current owner or operator of a site is typically in the best position to take such action.¹¹² If a contractual

dolph understood it, § 107(e) did not allow contractual transfers of liability between potentially responsible parties.

106. See *supra* notes 96-104 and accompanying text.

107. See *supra* notes 3-5 and accompanying text.

108. See *supra* note 5 and accompanying text. Voluntary action is vital to CERCLA's success. "[T]he government's ability to monitor numerous sites and initiate cleanups on a nationwide basis is constrained by limited resources." *Mobay Corp. v. Allied Signal, Inc.*, 753 F. Supp. 1248, 1254 (D.N.J. 1991) (citing *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1465 (9th Cir. 1986) (Reinhardt, J., dissenting)). The EPA also recognizes that government initiated cleanup "will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites." 50 Fed. Reg. 5034 (1985); see also *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986) ("a review of CERCLA's legislative history shows one of the Act's principle goals to be the achievement of expeditious response to environmental hazards through *voluntary* compliance by responsible parties . . .") (emphasis in original); Gaba, *supra* note 24, at 183 (CERCLA's private cause of action provides parties with a "powerful incentive to respond to hazardous waste problems without prior government action. Private parties who voluntarily undertake hazardous waste cleanups may be able to recoup their expenses.").

109. See *supra* notes 17-22 and accompanying text.

110. See Note, *supra* note 30, at 1472; see also *supra* notes 17-33 and accompanying text (providing an overview of CERCLA).

111. See *supra* notes 3-5 and accompanying text.

112. See SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, ENVIRONMENTAL EMERGENCY RESPONSE ACT, S. REP. NO. 848, 96th Cong., 2d Sess. 15 (1980) (current owners or operators are in the best position to control the risks because, "they have more knowledge about the risks inherent in their wastes

transfer of liability prohibits a current owner or operator from obtaining contribution from other potentially responsible parties, he will have little incentive to act.¹¹³ The current owner will be more inclined to wait for the government to perform the cleanup, because the government can then apportion its costs among all potentially responsible parties.¹¹⁴ In that case, the owner or operator would be required to pay only its share rather than all the costs.¹¹⁵ Because the statute seeks to achieve voluntary private action, such a result would be aberrant to CERCLA's purposes.¹¹⁶

Additionally, Congress passed CERCLA with the express intention of placing the burden of cleanup on those responsible for improper disposal.¹¹⁷ By imposing liability on both present and past owners and operators of contaminated sites,¹¹⁸ Congress intended to foreclose the possibility of any escape from liability.¹¹⁹ Allowing contractual transfers of liability between

and how to avoid them, and they determine whether and how to dispose of these wastes . . ."); see also *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1464 (9th Cir. 1986) (Reinhardt, J., dissenting) ("Ordinarily, the current operator . . . is the party best able to respond quickly and efficiently . . . to perform or arrange for the clean-up, even if it did not create the problem.").

113. See *Mobay Corp. v. Allied Signal, Inc.*, 753 F. Supp. 1248, 1253-54 (D.N.J. 1991) (citing *Mardan*, 804 F.2d at 1465 (Reinhardt, J., dissenting)) (the incentive for voluntary cleanup could be eliminated if an operator has waived its right to cost recovery); see also *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525, 529 (N.D. Ohio 1990) (CERCLA's primary policy is encouragement of cleanup on the part of responsible parties; permitting defenses to contribution would undercut this policy); *supra* notes 60-63 and accompanying text.

114. See generally Note, *supra* note 30 (discussing in depth the liability provisions of CERCLA and suggesting that in order to achieve the fairest apportionment of cleanup costs, a potentially responsible party must spread the liability among the greatest number of possible contributors to the hazardous waste problem).

115. Pursuant to § 106(a), a party is subject to substantial fines for failing to comply with an EPA cleanup directive. See 42 U.S.C. § 9606(b)(1) (1988). Because average site cleanup costs are approximately \$30 million, however, the fines would be unlikely to have much deterrent effect. See SURVEYS AND INVESTIGATIONS STAFF OF HOUSE COMM. ON APPROPRIATIONS, REPORT ON THE STATUS OF THE ENVIRONMENTAL PROTECTION AGENCY'S SUPERFUND PROGRAM, 101st Cong., 2d Sess. (1988), reprinted in *Practical Approaches to Reduce Environmental Cleanup Costs*, 317 P.L.I. REAL EST. L. & PRAC. 405, 424 (1988).

116. "CERCLA's goals must serve as a constant beacon for interpreters; otherwise, they may kill CERCLA with kindness, intending the best, but ultimately impairing CERCLA's functionality." Note, *supra* note 6, at 1241. See *supra* notes 3-5 and accompanying text.

117. See *supra* note 5 and accompanying text.

118. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988); *supra* notes 17-33 and accompanying text.

119. See *supra* notes 17-33 and accompanying text.

potentially responsible parties would allow parties to undermine that intent.

Finally, the need for national uniformity in dealing with hazardous waste sites was also a prominent factor in the passage of CERCLA.¹²⁰ As one court stated, "[o]ne can hardly imagine a federal program more demanding of national uniformity than environmental protection."¹²¹ National uniformity is essential to best accomplish CERCLA's goals of promoting quick, voluntary cleanup and placing the financial burden on the responsible parties.¹²² For example, a typical hazardous waste site will consist of waste produced by companies operating in several different states.¹²³ Under an interpretation of section 107(e) allowing contractual transfers of liability between potentially responsible parties, indemnity or release agreements between those companies will likely be construed under state law.¹²⁴ If so, that state law would inevitably produce disparate results,¹²⁵ or at the least, uncertainty in the

120. Representative Florio, CERCLA's house sponsor, specifically addressed the question of uniformity: "To insure the development of a uniform rule of law, and to discourage business[es] dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in [the CERCLA liability] area of law." 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980); 1 LEGISLATIVE HISTORY, *supra* note 2, at 778.

121. *In re Acushnet River & New Bedford Harbor*, 675 F. Supp. 22, 31 (D. Mass. 1987) (fashioning a uniform federal rule for questions of piercing the corporate veil in parent-subsidiary liability cases under CERCLA). Moreover, the recognition that response to hazardous waste problems at the state level was generally inadequate was also a driving force in the development of CERCLA. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) (citing 1980 U.S. CODE CONG. & ADMIN. NEWS 6142); *see also* SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, ENVIRONMENTAL EMERGENCY RESPONSE ACT, S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980) ("the legal mechanisms in the States . . . are generally inadequate for redressing toxic substances-related harms").

122. *See supra* notes 5, 108-19 and accompanying text.

123. *Id.* (citing W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 619-97 (1977)). The pollution of air, ground water, surface water, and land entails potential interstate problems. *Chem-Dyne*, 572 F. Supp. at 808; *see infra* note 149 and accompanying text.

124. *See Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1460 (9th Cir. 1986) (construing release agreement under state law); *see also* *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1454 (N.D. Ind. 1990) (same); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1001 (D.N.J. 1988) (same); *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1289 (E.D. Pa. 1987) (same). *But see* *Mobay Corp. v. Allied-Signal, Inc.*, 753 F. Supp. 1248, 1249 (D.N.J. 1991) (fashioning a uniform federal rule to govern contractual transfers of CERCLA liability).

125. Congress, in enacting CERCLA, was concerned with varying stan-

minds of the parties.¹²⁶ Uniform treatment of CERCLA liability disputes is necessary to prevent the vagaries of divergent state laws from adversely affecting the incentive for voluntary cleanup and frustrating Congress's intent to place the burden of that cleanup on the responsible parties.¹²⁷

D. DISTURBING UNSETTLED EXPECTATIONS

Properly interpreted, section 107(e) prohibits contractual transfers of CERCLA liability between potentially responsible parties.¹²⁸ At least one court, however, avoided this result for fear that such a uniform federal law would upset settled expect-

dards reflected in different state laws. See SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., REPORT TO CONGRESS, INJURIES AND DAMAGES FROM HAZARDOUS WASTES — ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES 25-146 (Comm. Print 1983). A liability standard that varies in different states would undermine CERCLA's policies by encouraging illegal dumping in states with lax liability laws. *Chem-Dyne*, 572 F. Supp. at 809 (citing 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1990)). The varying standards of state laws could allow responsible parties to escape liability, contrary to Congress's intent. See *supra* notes 118-20 and accompanying text.

Without a uniform federal standard for evaluating contractual agreements purporting to transfer CERCLA liability, courts are likely to reach their conclusions based largely on particular factual circumstances or issues of contract interpretation preset in a given case. See, e.g., *Marmon Group, Inc. v. Rexnord, Inc.*, 822 F.2d 31, 34 (7th Cir. 1987) (indemnity agreement executed in 1974 could not have anticipated the passage of CERCLA seven years later); *Mardan*, 804 F.2d at 1461 (effectiveness of release as to CERCLA liability turning upon issue of whether parties discussed environmental hazards prior to execution); *Jones Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1027 (N.D. Cal. 1990) (to be effective, California law does not require that indemnity agreement executed in 1970 specifically mention CERCLA liability); *Weigmann & Rose Int'l Corp. v. NL Indus.*, 735 F. Supp. 957, 961 (N.D. Cal. 1990) (effect of "as is" clause turning in issue of whether parties were aware or could have anticipated CERCLA liability and whether the language of the agreement was meant to be "comprehensive").

126. Parties looking to diverse state law to evaluate their contractual agreements would be uncertain as to their liability exposure. Such uncertainty may delay or even preclude voluntary cleanup. In contrast, under the proposed interpretation of § 107(e), once a party determines its responsibility under § 107(a), they can quickly ascertain the validity of their agreements. See *supra* notes 17-24, 74-94 and accompanying text; *infra* notes 141-50 and accompanying text.

127. See *Mobay*, 753 F. Supp. at 1253-54 (citing *Mardan*, 804 F.2d at 1464 (Reinhardt, J., dissenting)); see also *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) ("The subject matter dealt with in CERCLA is easily distinguished from areas of primarily state concern, such as domestic relations or real property rights, where state law was applied and there was no overriding interest in nationwide uniformity.").

128. See *supra* notes 74-127 and accompanying text.

tations predicated on state law.¹²⁹

In *Mardan Corp. v. C.G.C. Music, Ltd.*,¹³⁰ the Ninth Circuit concluded that the application of a uniform federal rule governing the validity of contractual transfer of CERCLA liability would unduly disrupt the function of agreements formulated on the basis of state law.¹³¹ The court reasoned that the seller of a site or company will generally desire to "wipe its slate clean, making some general release a condition of the sale so that the seller can relieve itself of the headaches as well as the benefits of the old business and move on to new ventures."¹³² To do so, the court asserted, sellers and buyers will normally look to state law to govern their agreements.¹³³ A uniform federal rule governing contractual transfers of liability, the court concluded, would create confusion and uncertainty in commercial relationships because buyers and sellers would be unsure about which body of law governs.¹³⁴

Critics of this Note's proposal could argue that the *Mardan* analysis demonstrates the proposal's flaw: upsetting the expectations of parties to contracts transferring CERCLA liability. This argument, however, is not persuasive. First, because Congress passed CERCLA with the express intention of placing the burden of cleanup on those responsible for improper disposal,¹³⁵ whether or not sellers of contaminated sites desire to "wipe the slate clean"¹³⁶ is irrelevant. By imposing liability on both present and past owners and operators of contaminated sites,¹³⁷ CERCLA forecloses the possibility of any such escape from liability.¹³⁸ This is especially true because potentially responsible parties will remain vulnerable to direct actions by the government regardless of any agreements with other potentially responsible parties.¹³⁹ In this sense, a uniform federal

129. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986); see *supra* notes 47-48 and accompanying text.

130. 804 F.2d 1454 (9th Cir. 1986).

131. *Id.* at 1460. Although the *Mardan* court's analysis pertained to the question of whether federal or state law should govern the effectiveness of contractual transfers of liability, it is nonetheless germane in the immediate context. See *supra* notes 41-49 and accompanying text.

132. *Mardan*, 804 F.2d at 1460.

133. *Id.*

134. *Id.*

135. See *supra* note 5 and accompanying text.

136. *Mardan*, 804 F.2d at 1460.

137. 42 U.S.C. § 9607(a) (1988); see *supra* notes 17-24 and accompanying text.

138. See *supra* notes 17-33 and accompanying text.

139. If the government undertakes a cleanup action, potentially responsible

rule prohibiting contractual transfers of CERCLA liability would not disturb the settled expectations of parties to such agreements simply because those expectations are not settled until the government says they are.¹⁴⁰

Second, it is unrealistic to assert that parties will be unsure which body of law governs their agreements.¹⁴¹ CERCLA is a much publicized program of national scope.¹⁴² Parties involved in the transfer of sites possibly contaminated with hazardous waste are likely to be well aware of CERCLA's implications.¹⁴³ Moreover, transactions involving potentially contaminated sites will probably involve several other aspects of CERCLA, all of which must be considered in view of applicable federal law.¹⁴⁴ Certainly parties to such transactions will also give serious consideration to their potential liability should the government take it upon itself to clean up the site and sue them directly for cost recovery.¹⁴⁵ In that case, the uniform federal standards of CERCLA section 107(a) would govern their liability.¹⁴⁶ In light

parties are relieved of their liability to the government only after the government formally releases them. See Note, *supra* note 30, at 1483-88.

140. See *id.*

141. *Mardan*, 804 F.2d at 1458.

142. Since the 1960s, Americans have become increasingly aware of the hazardous waste dilemma. W. RODGERS, *supra* note 123, at 2. Searching the NEXIS database for mention of either CERCLA or Superfund yields in excess of 23,000 articles.

143. See Note, *supra* note 30, at 1475 ("Any person linked by even a tenuous thread to a site where hazardous wastes have been released should assess its liability promptly. If the person qualifies as a PRP [potentially responsible party] under section 107, it should assume that it may be held jointly and severally liable for cleanup costs.").

144. See *Mobay Corp. v. Allied-Signal, Inc.*, 753 F. Supp. 1248, 1254 (D.N.J. 1991) (citing *Mardan*, 804 F.2d at 1465-66 (Reinhardt, J., dissenting)) (documents covering transaction involving potentially contaminated sites must be prepared in light of applicable federal law regarding other CERCLA provisions). Under these circumstances, it seems fair to say that a party might be surprised to find their indemnity or release agreement, unlike all other aspects of their CERCLA compliance requirements, not construed under federal law.

145. See Note, *supra* note 30, at 1475; see also Kiesche, *Facing the Environmental Chill on Acquisitions*, CHEM. WEEK, Sept. 21, 1988, at 26 (noting that both buyers and sellers are apprehensive of property transfers); Kittrell, *Bigger Liability Risks Alter Business Routines*, BUS. INS., Jan. 23, 1989, at 30 (noting that corporations "worry not only about their own environmental liabilities, but also about the potential liabilities of other companies with which they might be considering merger or acquisition activity"); Note, *supra* note 6, at 1255 ("[e]xpanded successor liability [under CERCLA] greatly diminishes the value of the tainted assets").

146. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988); see *supra* notes 17-24 and accompanying text.

of the established rule that federal law governs the release of federal claims,¹⁴⁷ potentially responsible parties attempting to contractually relieve themselves of CERCLA liability are unlikely to be surprised to find that federal law governs their agreements.¹⁴⁸

Finally, many transactions involving potentially contaminated sites involve large companies with operations in more than one state.¹⁴⁹ Far from creating confusion, a uniform federal law governing contractual transfers of CERCLA liability would promote certainty on the part of these companies as to which law governed their agreements.¹⁵⁰

E. LIFE WITHOUT CONTRACTUAL TRANSFERS OF CERCLA LIABILITY

Returning to the now familiar hypothetical scenario,¹⁵¹ the positive effect of prohibiting contractual transfers of liability between potentially responsible parties is apparent. Fireyear, undeterred by the contractual agreement with Goodstone, will be in a position to move quickly to clean up the tire manufacturing plant site.¹⁵² Because the indemnity and release is ineffective as to CERCLA liability,¹⁵³ Fireyear knows it will have the opportunity to apportion its costs with Goodstone.¹⁵⁴ In contrast, if the effectiveness of the agreement were uncertain, as it would be under state law,¹⁵⁵ Fireyear might decide that it is more prudent to refuse to comply with the cleanup order and wait for the EPA to perform the cleanup and then sue both parties for recovery of its costs.¹⁵⁶ Although this might be a wise strategy for Fireyear,¹⁵⁷ it contravenes CERCLA's

147. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952); *Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981).

148. It seems more likely, given that federal law governs all other aspects of CERCLA, that these parties would be more surprised to find that their CERCLA release agreements are *not* governed by federal law.

149. *See supra* notes 4, 123 and accompanying text.

150. These entities, rather than weeding through various state provisions, could instead turn to one source to interpret all their agreements.

151. *See supra* notes 13-16 and accompanying text.

152. *See supra* note 112 and accompanying text.

153. Per the interpretation proposed by this Note. *See supra* notes 74-127 and accompanying text.

154. Fireyear can clean up the site and then sue Goodstone under § 107(a)(4)(B). *See supra* notes 17-24 and accompanying text.

155. The validity of the agreement would be uncertain at least until the matter was litigated. *See supra* notes 124-26 and accompanying text.

156. *See supra* notes 107-16 and accompanying text.

157. *See supra* notes 114-15 and accompanying text.

purpose.¹⁵⁸

CERCLA will not expire again until December, 1994.¹⁵⁹ Until that time, Congress probably will not act to "clean up" some of the confusing, inconsistent and ambiguous provisions remaining in the statute.¹⁶⁰ Courts should not wait for Congress to act. They should instead interpret section 107(e) to prevent the contractual transfer of CERCLA liability between potentially responsible parties. Immediate action would go far to saving litigants money, courts time, and the statute itself from interpretations contrary to the intent of Congress.¹⁶¹

CONCLUSION

In attempting to eliminate the dangers of hazardous wastes, CERCLA offers a national solution to a nationwide problem. Contractual transfers of liability between potentially responsible parties, however, detract from CERCLA's effectiveness.

This Note argues that the language of CERCLA section 107(e) expressly prohibits the transfer of CERCLA liability between potentially responsible parties. Such an interpretation is supported by legislative history and is necessary to further CERCLA's purposes of promoting quick voluntary cleanup of hazardous waste sites and holding responsible parties accountable for the costs.

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158. See *supra* notes 5, 116 and accompanying text.

159. See generally *Superfund Gets New Lease on Life*, *supra* note 1, at 8 (CERCLA funding is extended through fiscal year 1994); see also *Congress Wraps It Up*, *supra* note 1, at 1 (extension provision added so program would not "grind to a halt"). During the last reauthorization cycle almost a year lapsed before Congress passed the SARA amendments. Leifer & Musiker, *Cleaning Up Superfund: 10 Changes to Make During Reauthorization*, 21 *Env't Rep. (BNA)* 915 (Sept. 14, 1990). Considering the embarrassment caused by the cessation of cleanup efforts, government, environmental groups, and industry were already preparing for a spirited battle over the form and substance of the Superfund program. See *id.* Congress, however, has recently postponed this battle until at least 1994. See *supra* note 1 and accompanying text.

160. See Leifer & Musiker, *supra* note 159, at 915 (proposing 10 suggested changes in CERCLA, but not touching on the issue of liability releases). Congress will have its hands full when reauthorization of the Resource Conservation and Recovery Act is considered in 1991. See *Superfund Gets New Lease on Life*, *supra* note 1, at 8; see also *supra* note 1 and accompanying text.

161. *Superfund Gets New Lease on Life*, *supra* note 1, at 8.