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MISCONCEPTIONS OF CONTRACTUAL INDEMNIFICATION AGAINST CERCLA LIABILITY: JUDICIAL ABROGATION OF THE FREEDOM TO CONTRACT

In the mid-1970s, the gravity of the disposed hazardous waste problem received national attention with the discovery of Love Canal and similar sites. In recognition of this problem, Congress enacted the Comprehensive

   a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
   (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
   (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

   Id. § 6903(5).

   Solid wastes include "garbage, refuse, sludge . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material." Id. § 6903(27). A waste can be classified as hazardous under RCRA by listing or by a characteristic of the waste. See 40 C.F.R. §§ 261.11, 261.20 (1991). If a waste contains one or more of the substances listed as hazardous in 40 C.F.R. § 261.11, the waste is a listed hazardous waste. See id. § 261.11. A characteristic hazardous waste exhibits at least one of the four characteristics of ignitability, corrosivity, reactivity, or toxicity. Id. §§ 261.21-.24.


3. See, e.g., Bill Richards, U.S. to Sue on Hazardous Waste Dumping, WASH. POST, Feb. 3, 1979, at A2 (reporting on the "Valley of the Drums," a Kentucky hazardous waste site that contained 200,000 drums, which were leaking toxic material); THOMAS M. HOBAN & RICHARD O. BROOKS, GREEN JUSTICE 3 (1987) (providing examples of environmental horrors, such as excessive levels of DDT in mothers' breast milk and in salmon from Lake Michigan, threatening Americans in the latter half of this century).

4. 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 17-18 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120 [hereinafter H.R. REP. No. 1016]. The Oversight and Investigation Subcommittee of the Committee on Interstate and Foreign Commerce investigated over 12 hazardous waste sites and found that the sites shared four characteristics: 1) each site contained a tremendous amount of hazardous waste; 2) design and disposal methods were unsafe; 3) a substantial danger to the environment existed at each site; and 4) many of the sites posed high hazards to human health. Id. at 18-19. The Subcommittee also found the following: 1) that state and local responses to the health threats posed by hazardous waste disposal were lacking; 2) that while proper initial disposal of hazardous waste costs less than cleaning up improperly disposed wastes, millions were being spent cleaning up
Environmental Response, Compensation, and Liability Act\(^5\) (CERCLA, commonly referred to as "Superfund") in order to protect human health and the environment.\(^6\) Specifically, one of Congress' goals in passing CERCLA was to provide the funding and means for the government to clean up hazardous waste facilities without delay.\(^7\) Another goal of Congress in enacting CERCLA was to induce persons liable for contamination caused by hazardous waste to volunteer to take appropriate measures to rectify the situation.\(^8\)


\(^6\) H.R. Rep. No. 1016, supra note 4, at 17, reprinted in 1980 U.S.C.C.A.N. at 6119 (explaining how CERCLA was intended to protect human health and the environment by providing for a "national inventory of inactive hazardous waste sites" and creating "appropriate environmental response action[s]"); see Senate Comm. on Environment and Public Works, Environmental Emergency Response Act, S. Rep. No. 848, 96th Cong., 2d Sess. 56 (1980) [hereinafter S. Rep. No. 848] (stating that the paramount purpose of § 104(a)(1), CERCLA's response mechanism, is to protect human health, welfare, and the environment). Because delay in determining whether a release has occurred could make a dangerous situation worse, and it is "preferable to err on the side of protecting public health, welfare and the environment," the only prerequisite for the government to respond is a threat of release. Id. CERCLA governs "hazardous substance[s]," which incorporates by reference substances classified as hazardous under numerous federal statutes (including "hazardous waste[s]" under the Resource Conservation and Recovery Act (RCRA)), "pollutant[s]," and "contaminant[s]." See 42 U.S.C. §§ 9601(14) and (33). This Comment uses the terms hazardous substance and hazardous waste interchangeably.

\(^7\) S. Rep. No. 848, supra note 6, at 12; see Charles M. Chadd & Lynn L. Bergerson, Guide to Avoiding Liability for Waste Disposal 27 (BNA Corporate Practice Series 1986) (explaining that CERCLA allows the government to respond as early as the threat of release of a hazardous substance into the environment arises); Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Envtl. L. 1, 2 (1982) (stating that CERCLA's and RCRA's hazardous waste subtitle created "sufficient authorization to begin the cleanup of old hazardous waste sites and to avoid the consequences of new hazardous waste spills"). CERCLA broadly defines "facility" as "any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or . . . any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9).

It was CERCLA’s noble purpose and the inadequacies of the existing hazardous substance laws\(^9\) that spurred Congress to pass the bill in a lame-duck session,\(^{10}\) despite allegations that the bill contained numerous defects and inconsistencies.\(^ {11}\) Although there was little opposition in the Senate, many members of the House of Representatives voiced strong opposition to the bill.\(^ {12}\) Several of the bill’s supporters even expressed misgivings.\(^ {13}\) In addition to the intent of Congress that potentially responsible parties assume responsibility for effectuating the cleanup of improperly disposed wastes); Philadelphia v. Stephan Chem. Co., 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982) (stating that CERCLA’s legislative history clearly indicates that the party responsible for the problem should bear the cost).


10. Grad, supra note 7, at 1. A lame-duck session of Congress is one that is “conducted after election of new members but before they are installed and hence one in which some participants are voting for the last time as elected officials because of failure to become re-elected or voluntary retirement.” Black’s Law Dictionary 877 (6th ed. 1991). Congress enacted CERCLA on December 3, 1980, subsequent to Jimmy Carter’s defeat in the presidential election and only a few days before the 96th Congress was scheduled to adjourn. Joseph A. Sevack, Note, Passing the Big Bucks: Contractual Transfers of Liability Between Potentially Responsible Parties Under CERCLA, 75 Minn. L. Rev. 1571, 1573 n.8 (1991) (quoting former EPA Administrator Douglas M. Costle’s statement that the enactment of a major piece of legislation such as CERCLA during a lame-duck administration was “an ‘extraordinary action’”.


12. See, e.g., id. at 31,969 (statement of Rep. Broyhill) (expressing concern about the bill’s defects and suggesting that the House amend the bill and return it to the Senate); id. at 31,970 (statement of Rep. Harsha) (stating that the Senate’s ultimatum violated the principle of checks and balances, that the poor drafting would provide a “field day” for the courts to ridicule Congress, and characterizing the bill as “a welfare and relief act for lawyers”); id. at 31,972 (statement of Rep. Roberts) (criticizing the drafting of the bill and the lack of a provision for oilspills); id. at 31,974 (statement of Rep. Jenkins) (warning that bad legislation should not be passed in the rush to end a Congressional session); id. at 31,975 (statement of Rep. Snyder) (complaining that the bill was poorly drafted, contained inadequate liability coverages, and failed to cover oilspills); id. at 31,980 (statement of Rep. Frenzel) (describing the bill as flawed and incomplete).

13. Id. at 31,970 (statement of Rep. Breaux) (explaining that while the bill was not perfect, it was better than nothing); id. at 31,971 (statement of Rep. Studds) (supporting the bill reluctantly because it did not contain an oilspill provision); id. at 31,972 (statement of Rep. Gibbons) (suggesting “this is not a full loaf, but let us take what we can get”); id. (statement of Rep. Vento) (declaring that while he was “not particularly pleased with the bill as it stands, I believe it is of extreme importance that we tackle this problem as quickly as possible and seriously consider the compromise at hand”); id. at 31,979 (statement of Rep. Clinger) (stating that he supported the bill “flawed though it may be, because I am convinced that is the last
tion, what little legislative history exists is vague\textsuperscript{14} and contradictory.\textsuperscript{15} Due to these infirmities, federal courts have reached opposite conclusions on CERCLA liability issues.\textsuperscript{16}

One issue on which federal courts disagree concerns the effect of CERCLA § 107(e) on contractual indemnifications between parties who are potentially liable under CERCLA.\textsuperscript{17} The majority of federal courts have held that although § 107(e) prevents a potentially responsible party from com-


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... completely avoiding liability, a potentially responsible party may contractually indemnify another potentially responsible party for the costs of liability that CERCLA imposes. Recently, however, two district courts located in the Sixth Circuit reached the opposite conclusion, stating that indemnity agreements are valid only if one of the parties does not face CERCLA liability. Although the United States Court of Appeals for the Sixth Circuit since then adopted the majority view, district courts located outside the Sixth Circuit have indicated a willingness to perpetuate the minority view. Thus, there is enormous potential for widespread apprehension among potentially responsible parties and their attorneys. For example, suppose your client, the president of Squeaky Clean Company (Squeaky), suspected that Midnight Dumpers Incorporated (Midnight Dumpers), his partner in a hazardous waste treatment operation, was illegally disposing of hazardous waste on the property. Your client wished to end the partnership but did not want the property because of the suspected problems. Therefore, you negotiated a deal whereby Midnight Dumpers agreed to indemnify Squeaky against all environmental liability arising out of the partnership activities in return for the business and several valuable pieces of art. Your client then approached you and told you that he had informed the National Response Center of his suspicions, as required by CERCLA. Due to the current developments in the Sixth Circuit and elsewhere, there is no guarantee that, if the government forces Midnight Dumpers to pay for cleanup and Midnight Dumpers subse-

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22. This example is a hypothetical intended for illustration. Any similarity to any former or current companies is unintended and coincidental.

23. 42 U.S.C. § 9603(a) (1988). An individual who has a duty to notify the National Response Center of a reportable release and fails to perform that duty may be fined or imprisoned up to five years, or both. *Id.* § 9603(b).
quently sues your client for contribution, a court will uphold the indemnity agreement.

This Comment argues that CERCLA § 107(e) should be interpreted to allow a party liable under CERCLA to allocate contractually the financial burden of liability. First, this Comment outlines the legislative history, language, and purposes behind CERCLA § 107(e). Next, this Comment documents how federal courts, increasingly confronted with contractual indemnification between potentially liable parties, have resolved the issue. This Comment concludes, based on the statutory language, legislative history, and goals of CERCLA, that CERCLA allows indemnity agreements between liable parties. Thus, this Comment urges Congress to amend CERCLA to make its authorization of indemnity agreements between potentially
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responsible parties more explicit and to prevent the erosion of the freedom to contract.

I. ORIGINS OF THE MISCONCEPTIONS ON CERCLA LIABILITY

A. The ABCs of CERCLA Liability

Section 107(a) of CERCLA imposes liability on several classes of "potentially responsible parties" (PRPs): (1) current owners and operators of vessels or facilities, (2) persons who owned or operated the property when the hazardous wastes were deposited thereon, and (3) generators and transporters of hazardous substances. Under CERCLA, the Environmental...
Protection Agency (EPA) may direct a person to clean up a contaminated site. If the party refuses to obey the EPA's order, the EPA can clean up the site and recover expenses from the noncomplying party. In addition, any party found liable under CERCLA may seek contribution from other

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,

(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.

28. 42 U.S.C. § 104(a)(1) grants the President the power to compel a responsible party to cleanup a contaminated site. The President, however, delegated this power to the EPA through Exec. Order No. 12,580. 3 C.F.R. 193 (1987), reprinted in 42 U.S.C. § 9615 (1988). Liability may also attach if any private person incurs response costs. Id. § 9607(a)(4)(B). Response costs are those costs incurred in removal or remedial action. Id. § 9601(25). Remedial actions consist of the initial attempt to contain and control the contamination. See id. § 9601(23). Removal actions involve cleaning up a site. See id. § 9601(24). In order to recover the costs, the responding party’s costs must have been consistent with the national contingency plan. Id. § 9607(a)(4)(B). The national contingency plan governs the cleanup activities of the government and private parties. CHADD & BERGESON, supra note 7, at 32. The party claiming that certain costs were not consistent with the national contingency plan bears the burden of proof. United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726, 747 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).


30. Id. § 9607(a)(4)(A).
PRPs. Courts impose strict liability under CERCLA, holding violators jointly and severally liable.

The defenses to CERCLA liability are as narrow as the provisions imposing liability are broad. The Act provides only three defenses: an act of God, an act of war, and the "third party" defense, a narrow defense based upon an act or omission of certain third parties. Furthermore, to escape CERCLA liability, a party must prove by a preponderance of the evidence that one or more of the three aforementioned acts was the only cause of the release, or threat of release, and any resulting damages.

Due to the pervasive liability of CERCLA and the limited chances for qualifying under one of the three enumerated defenses, PRPs have a strong incentive to mitigate their responsibility. One method parties commonly employ to achieve this end is to enter into an indemnity agreement. These contractual agreements are reached when parties attempt to allocate the fi-

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33. United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983). CERCLA does not expressly provide for joint and several liability, however, such a scheme is consistent with Congress' intent. See Central Ill. Pub. Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1505 (W.D. Mo. 1990) (stating unequivocally that "the statute provides for joint and several liability"); Garber, supra note 14, at 368-69 (stating that joint and several liability enable the government to recover all of its cleanup costs from any responsible party without having to determine all the parties who may be liable).

34. See 42 U.S.C. § 9607(b).


36. See Penny L. Parker & John Slavich, Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On?, 44 Sw. L.J. 1349 (1991) (stating that "[a]s the breadth of environmental liabilities have become more apparent, contracting parties have attempted to expressly apportion the risks of these liabilities between themselves").

37. See id. An indemnity is a "[r]eimbursement . . . [a] contractual or equitable right under which the entire loss is shifted." BLACK'S LAW DICTIONARY 769 (6th ed. 1990) (emphasis added).
nancial burden of potential liability. 38 CERCLA’s indemnity provision, § 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. 39

The first two sentences of § 107(e) appear to contradict one another. 40 The first sentence makes indemnity agreements ineffective to transfer CERCLA liability, while the second sentence states that the subsection does not preclude indemnity agreements. 41 Notwithstanding this apparent contradiction, the underlying intent of this language becomes clear when one distinguishes between transferring the strict liability under CERCLA and distributing the costs that arise due to such liability. 42 The confusion and


42. See Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1434, 1459 (9th Cir. 1986) (stating that agreements apportioning CERCLA liability do not relieve a party of liability, but only alter who pays for the liability).

[i]f ‘transfer’ [in the first sentence of § 107(e)(1)] . . . means to shift or to pass through, such that the transferor remains primarily accountable but the transferee ultimately must pay, this sentence clearly and completely negates the sentence that follows it. If, however, ‘transfer’ means to escape or evade absolutely, such that the transferor is no longer liable to anyone, then the two sentences of § 107(e)(1) are perfectly consistent.

Conrad, supra note 18, at 10048.
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seeming contradiction created by § 107(e) is due in part to CERCLA's legislative history.43

B. CERCLA's Legislative History

Three bills relating to environmental problems contributed in varying degrees to the genesis of CERCLA.44 The final bill, titled the Hazardous Waste Containment Act, emerged from the Senate in the last days of a lame-duck session.45 The Senate, in its haste to pass the bill, did not even provide a committee report46 and sent the bill to the House with a warning that the Senate would not accept any further amendments.47 Facing a take-it-or-leave-it ultimatum, the House grudgingly passed the bill with minimal debate.48

43. See infra notes 44-48 and accompanying text.

44. See CHADD & BERGESON, supra note 7, at 27; 1A FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02, at 4A-51 (1991). In 1979, the House of Representatives introduced and passed H.R. 85, entitled The Oil Pollution Liability and Compensation Act. Grad, supra note 7, at 3-4. This bill created a fund and the response mechanisms to clean up navigable waters contaminated by spills of hazardous substances and oil. CHADD & BERGESON, supra note 7, at 27. The Senate did not act on this bill until they incorporated portions of it into the final bill that became CERCLA. Grad, supra note 7, at 4. Additionally, the House introduced H.R. 7020, the Hazardous Waste Containment Act, which emerged from committee as an amendment to the RCRA. GRAD, supra, at 4A-52 to -53. This bill had a very narrow scope, applying only to inactive hazardous waste sites, and contained limited liability provisions, avoiding joint and several liability. Id. at 4A-53 to -54. The bill imposed strict liability on those parties responsible for the spill and provided for apportioning the costs among multiple tortfeasors. Id. at 4A-53. The Senate introduced the third and furthest-reaching of the three bills, S. 1480, the Environmental Emergency Response Act or EERA, which called for strict, joint and several liability. Id. at 4A-54 to -57. The bill provided that acts of God and acts of war were the only two defenses to liability. Grad, supra note 7, at 9. The House passed the Hazardous Waste Containment Act and sent it to the Senate. Grad, supra, at 4A-74. Before considering this bill, the Senate amended its Environmental Emergency Response Act. See Grad, supra note 7, at 19-21. In reality, however, a substitute bill was introduced by Senator Helms under the guise of an amendment. Id. at 20-21. Senators Baker and Byrd indicated that any amendment to the bill other than Senator Helms' amendment would be opposed by the Senate leadership. Id. at 19. The new bill made many changes, including a deletion of all references to joint and several liability, which allowed common law principles to determine when such liability would attach to parties. Id. at 21. The new bill also reduced the size of the fund from $4.1 billion for six years to $1.6 billion for five years and added the "third party" defense to liability. Id. at 22. After the EERA was amended, the Senate struck all the language after the enacting clause of the House's Hazardous Waste Containment Act, inserted the language of the Senate's amended EERA, and passed the Hazardous Waste Containment Act, as amended. Id. at 29. The Senate conducted this maneuver because the Act was partly a revenue measure and therefore required a House number to show that it originated in the House. Id.

45. See Grad, supra note 7, at 1.

46. See Ellis, supra note 41, at 1954.

47. See id.

48. See supra notes 12-13 and accompanying text.
II. JUDICIAL INTERPRETATIONS OF CERCLA'S INDEMNITY PROVISION

Prior to 1990, every federal court that addressed the validity of indemnity agreements between CERCLA PRPs upheld the validity of the contracts. \(^49\) Two district courts located in the Sixth Circuit, however, have recently held that all indemnity agreements between PRPs are invalid. \(^50\) Furthermore, some district courts have indicated that they are receptive to the minority view, \(^51\) and others have detected a schism in the rationale of the courts that do allow indemnity agreements between PRPs. \(^52\) These post-1989 decisions have turned what appeared to be an established rule into an unsettled area of the law, \(^53\) potentially eroding the freedom to contract, "[o]ne of the cornerstones of American jurisprudence . . . protected by the Fifth and Fourteenth Amendments." \(^54\)

A. The Early Inroads

In 1986, the District Court for the Western District of Missouri upheld the validity of an indemnity agreement in United States v. Conservation Chemical Co. \(^55\) The four co-defendants in the action, FMC Corporation, International Business Machines Corporation, Armco, Inc., and AT&T Technologies, Inc., had each supplied waste to Conservation Chemical Company (CCC) for disposal at CCC's chemical waste disposal facility pursuant to a contract with CCC. \(^56\)

The United States initiated suit against all of the defendants, seeking reimbursement for the response costs that the government incurred in the cleanup of CCC’s facility as well as an injunction requiring the defendants to rectify the environmental dangers posed by the facility. \(^57\) The United States alleged that the hazardous wastes that had been deposited at CCC's facility were either escaping into the environment or leaking from the facility as leachate. \(^58\) The co-defendants alleged that their waste disposal contracts

\(^{49}\) See Conrad, supra note 18, at 10045.
\(^{50}\) See infra text accompanying notes 91-92 and 129-30.
\(^{51}\) See supra note 21 and accompanying text.
\(^{52}\) See infra notes 123-25 and accompanying text.
\(^{53}\) See 22 Env't Rep., supra note 16, at 2414.
\(^{54}\) Ellis, supra note 41, at 1957 (citing Board of Regents v. Roth, 408 U.S. 564, 572 (1972)).
\(^{55}\) 653 F. Supp. 152 (W.D. Mo. 1986). The court denied the summary judgment motions of Conservation Chemical Company's four co-defendants against CCC for contractual indemnification of their CERCLA liability. \(^{56}\) at 161.
\(^{56}\) Id. at 162. The facility was located in Kansas City, Missouri on the Missouri River floodplain.
\(^{57}\) Id. at 163.
\(^{58}\) Id. Leachate is defined as a "liquid that has percolated through soil or other medium." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1282 (1986).
with CCC provided that CCC would purchase insurance to indemnify and hold them harmless, that CCC had acquired such insurance coverage, and therefore CCC was solely responsible for all of the response costs.  

The district court in *Conservation Chemical* declared that § 107(e) does not bar indemnity or hold harmless agreements for liability established under § 107(a). 60 The court tempered that statement, however, noting that § 107(e) does not encourage or authorize such agreements. 61 Furthermore, the court found no clear Congressional intent in the language of § 107(e) that would permit parties found liable under CERCLA to shift their current liability through indemnity agreements. 62 Yet, the court reasoned that because CERCLA liability is retroactive, 63 Congress must have considered the likelihood of PRPs relying on pre-existing indemnity agreements. 64 Therefore, the court concluded that Congress intended § 107(e) not to bar indemnity agreements for retroactive CERCLA liability or actions for indemnification based upon those agreements. 65

Two months after *Conservation Chemical*, the United States Court of Appeals for the Ninth Circuit upheld the validity of an indemnity agreement between CERCLA PRPs in *Mardan Corp. v. C.G.C. Music, Ltd.* 66 In *Mardan*, the Court of Appeals examined a disputed settlement agreement between the seller and purchaser of a musical instrument manufacturing plant. 67 C.G.C. Music (CGC), a subsidiary of MacMillan, Inc. (MacMillan), dumped waste from its electroplating operations into an on-site settling pond while manufacturing instruments at the plant. 68 Mardan Corporation (Mardan) acquired the plant from MacMillan and sought to recover the

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60. *Id.* at 239.  
61. *Id.* at 239-40.  
62. *Id.* at 240.  
65. *Id.* The court did not address the effect of indemnity agreements on future CERCLA liability.  
66. 804 F.2d 1454 (9th Cir. 1986).  
67. *Id.* at 1460.  
68. *Id.* at 1456 n.1. The waste disposal site included heavy metals, cyanide, and trichloroethylene. *Id.* at 1456.
costs incurred in cleanup and closing of the waste disposal site located at the plant. 69 Mardan, however, had continued CGC's practice of generating wastes and dumping them into the settling pond. 70

Several months after the sale of the plant, the parties signed a settlement agreement whereby MacMillan paid Mardan for a release of "all actions, causes of action, [or] suits . . . based upon, arising out of or in any way relating to the Purchase Agreement." 71 Subsequently, Mardan entered into a consent agreement with the EPA, whereby Mardan was required to clean up and cease operating the settling pond. 72 Mardan then sought damages from MacMillan under § 107 of CERCLA. 73

The Ninth Circuit agreed with the United States, which appeared as amicus curiae, that § 107(e)(1) "expressly preserves agreements . . . to indemnify a party held liable under section 107(a)." 74 Yet the Mardan court was careful to qualify its assertion by emphasizing that indemnity agreements do not eliminate CERCLA liability. 75 The court explained that the nature of an indemnity agreement was such that it only changes who has the ultimate financial responsibility to pay for that liability. 76 Furthermore, the court

69. Id.
70. Id.
71. Id.
72. Id. Prior to the agreement between Mardan and the EPA, the EPA brought enforcement actions against Mardan for violating the plant's RCRA interim status requirements, which Mardan acquired when it bought the plant. Id. Pursuant to the consent agreement, Mardan agreed to install a system to monitor the groundwater and to increase the height of the dike surrounding the pond. Id.
73. Id. Mardan sought reimbursement for past and future expenses relating to the cleanup and closing of the pond. Id.
74. Id. at 1458. Before examining the validity of the settlement agreement, the Ninth Circuit concluded that state law rather than federal law would determine if and when agreements between private responsible parties validly released claims for cost-recovery under CERCLA. Id. The court reached its conclusion by applying a three-part test. Id. Under the test, a court must determine (1) if the need exists for a "nationally uniform body of law" (2) "whether application of state law would frustrate specific objectives of the federal programs" and (3) "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979) (unanimous opinion), quoted in Mardan, 804 F.2d at 1458. Specifically, the court found that there was no need for a uniform federal law, that application of state law would not frustrate CERCLA's goals, and that a uniform federal law would disrupt commercial relationships based on state law. Mardan, 804 F.2d at 1458-60; see also Hudson Ins. Co. v. Double D Management Co., 768 F. Supp. 1538 (M.D. Fla. 1991) (applying state law to the interpretation of insurance contracts in CERCLA actions), aff'd, 957 F.2d 826 (11th Cir. 1992); American Nat'l Can Co. v. Kerr Glass Mfg. Corp., No. 89 C 0168, 1990 U.S. Dist. LEXIS 10999, at *4 (N.D. Ill. Aug. 20, 1990) (applying state contract law), motion for reconsideration granted in part, denied in part, 1990 U.S. Dist. LEXIS 11417 (N.D. Ill. Aug. 29, 1990).
75. Mardan, 804 F.2d at 1459.
76. Id. Accord Village of Fox River Grove v. Grayhill, Inc., 806 F. Supp. 785, 792 (N.D. Ill. 1992) (stating that "in terms of financial liability, the parties may allocate the costs of the
added that indemnity agreements cannot prejudice the government’s right to recover cleanup expenses from any responsible party and therefore do not impede CERCLA’s objectives.\textsuperscript{77}

Despite the federal courts’ willingness to enforce the obligation of PRPs to indemnify one another, a PRP must have specifically included such an agreement in its contract with another PRP to gain full protection via indemnification.\textsuperscript{78} Four years after its decision in \textit{Conservation Chemical}, the District Court for the Western District of Missouri refused to impose equitable indemnity upon the plaintiffs in \textit{Central Illinois Public Service Co. v. Industrial Oil Tank & Line Cleaning Service}.\textsuperscript{79} In \textit{Central Illinois}, the EPA had informed the plaintiffs and defendants that they were potentially responsible parties for the environmental problems at a site formerly operated by a chemical company.\textsuperscript{80} The plaintiffs entered into two agreements with the EPA to remedy the situation.\textsuperscript{81} The plaintiffs then filed suit against the defendants and the government.

\begin{itemize}
\item \textit{Mardan}, 804 F.2d at 1459. The court stated that “all responsible parties will be fully liable to the government regardless of the indemnification contracts they have entered into.” \textit{Id. Accord Smith Land & Imp. Corp. v. Celotex Corp.}, 851 F.2d 86, 89 (3rd Cir. 1988) (dictum) (stating that indemnity agreements “are enforceable between the parties but not against the government”); \textit{Olin Corp. v. Consolidated Aluminum Corp.}, 807 F. Supp. 1133, 1140 (S.D.N.Y. 1992) (stating that indemnity agreements have “no impact on the central goal of CERCLA—to hold PRPs, rather than taxpayers, liable for the cost of environmental cleanup” because the parties remain jointly and severally liable to the government); \textit{Southland Corp. v. Ashland Oil, Inc.}, 696 F. Supp. 994, 1000 (D.N.J. 1988) (same).


\item \textit{Id. at 1498 (W.D. Mo. 1990)}.

\item \textit{Id. at 1501}. The “Rose Site,” which was contaminated with polychlorinated biphenyls, was abandoned by its owner in 1986. \textit{Id.}

\item \textit{Id.}. The first agreement related to assessing, securing, and stabilizing the Rose Site. \textit{Id.} The second agreement concerned containment and removal of the wastes as well as measures to mitigate the harm that the wastes had caused. \textit{Id.} This second agreement also contained a provision by which the EPA agreed not to take administrative action against a potentially responsible party that had settled with the plaintiffs. \textit{Id.}
fendants, seeking to establish the defendants' liability and to secure contribution for the costs of their cleanup efforts. The defendants counterclaimed, alleging that if liable, they were entitled to indemnification, from the plaintiffs. Rejecting the remedy of equitable indemnification, the court stated that the parties should have specifically included indemnity agreements in their contracts if they intended to allocate the risk in that manner.

The court in Central Illinois explained that although indemnification releases a party of liability, CERCLA does not expressly create a right to indemnification merely because it allows enforcement of indemnity agreements. The court then implied that the two sentences of § 107(e)(1) are inconsistent, stating that the only sensible interpretation precludes a party with an indemnity agreement from escaping liability but does allow that party to initiate suit to recover the costs of cleanup from a third party if it has previously secured an indemnity agreement from that third party. The court concluded that the defendants could not shift liability to the plaintiffs without a specific agreement and that imposing equitable indemnity would thwart CERCLA's purpose and intent.

For several years following the Mardan decision, no federal court deviated from the determination that indemnity agreements between PRPs were valid contracts. The apparent inconsistency that the Central Illinois court noted, however, soon thereafter provided the opportunity for federal courts to depart from precedent.
B. Emerging Divergence

Four years after Mardan, in AM International, Inc. v. International Forging Equipment, the District Court for the Northern District of Ohio invalidated an indemnity agreement between PRPs, holding that AM International's (AMI's) release of all claims against the defendants was ineffective. The court allowed AMI's claim, which sought contribution from the defendants for cleanup activities, to proceed to trial, notwithstanding what the court acknowledged as a "sweeping, but hardly ambiguous" release. In AM International, AMI sold and partially leased back property to D&B Realty, owned by Robert Dziak and Donald Diemer. Dziak, doing business as Euclid Industrial Center (EIC), then assumed D&B's obligations to AMI. When AMI's lease expired, it entered into a series of agreements with another of Dziak's corporations, International Forging Equipment Corporation (IFE), whereby IFE bought certain assets of AMI and AMI released all claims against EIC and Dziak. Subsequently, Dziak refused to comply with the state's requests to clean up toxic wastes on the property. AMI, however, cleaned up the property after receiving a similar request. After AMI filed suit against Dziak, EIC, and IFE for contribution, the defendants counterclaimed for indemnification pursuant to the release agreement between AMI and IFE.

The district court in AM International began its analysis by mentioning that courts were split on the effect of releases on CERCLA liability. The court also declared that § 107(e) was internally inconsistent on its face.

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92. Id. at 530.
93. Id.
94. Id. at 526. The property leased back was the site of AMI's plant which included a machine shop and facilities for plating, heat-treating, and painting.
95. Id.
96. Id. Among the assets IFE purchased were AMI's plating and painting operations.
97. EIC paid AMI $2.3 million for the release.
98. Id.
99. Id. AMI hired another company to conduct the cleanup operations for approximately $350,000.
100. Id. The court did not support the assertion with any citations.
advancing one step beyond the Central Illinois court’s reference to reconciling the two sentences of § 107(e). The court then turned to the meager legislative history of CERCLA to determine the provision’s precise meaning. The court first examined a Senate draft of the bill, which allowed releases only in limited circumstances. From this draft, the court surmised that Congress generally disfavored releases from CERCLA liability. The court then cited the Senate debates and determined that Congress intended the first sentence of § 107(e)(1) to prohibit parties from contractually escaping their liability under the Act, while intending the second sentence to allow parties “to contract with others not already liable under the act to provide additional liability by way of insurance or indemnity.”

In addition to CERCLA’s legislative history, the court relied on the language of § 107(e)(2) to support its interpretation. The AM International court reasoned that because the second sentence of § 107(e)(1) allows only a limited right to contract away liability and because § 107(e)(2) prohibits such contracts from preventing suits against parties liable under CERCLA, indemnity contracts between tortfeasors are unenforceable under CERCLA. The court characterized this interpretation as consistent with CERCLA’s policies. According to the court, indemnification agreements between potentially responsible parties would undermine CERCLA’s main policy of encouraging voluntary cleanup because private parties would not act voluntarily where a mutual release, which precluded cost recovery, existed between them. The court then addressed previous decisions permitting contractual indemnification of CERCLA liability under § 107(e).

The court explained that in order for those courts to find explicit support for

103. AM Int’l, 743 F. Supp. at 528.
104. See infra notes 196-97 and accompanying text.
105. See AM Int’l, 743 F. Supp. at 528.
106. See infra notes 202-04 and accompanying text.
107. AM Int’l, 743 F. Supp. at 529. The court based this conclusion on a Senate debate that occurred after the Senate amended the draft legislation to read as it does currently, drawing attention to a colloquy between Senators Cannon and Randolph. But see Niecko v. Emro Mktg. Co., 769 F. Supp. 973, 988 (E.D. Mich. 1991) (concluding that potentially liable parties are free to allocate CERCLA liability among themselves).
108. AM Int’l, 743 F. Supp. at 529.
109. Id.
110. Id. See generally supra note 6 and accompanying text. But see infra text accompanying notes 214-29.
111. AM Int’l, 743 F. Supp. at 529.
112. Id. at 529-30.
apportioning CERCLA liability in the text of § 107(e)(1), they had adopted an interpretation that "renders nugatory" the section's first sentence. The court then conceded that it agreed with other courts that despite the section's inconsistency, it had concluded that the first sentence of § 107(e)(1) voids contractual agreements used as a defense to a claim by the government. Yet, while those courts interpreted the second sentence of § 107(e)(1) to allow private suits for contribution, the AM International court construed that sentence more narrowly, allowing a contract to be binding only if a party not already liable was insuring or indemnifying a liable party.

C. The Beginning of Alignments?

Departing from the AM International approach, the District Court for the Northern District of California upheld an indemnity agreement between the owner of a chemical formulation facility and the raw material suppliers in Jones-Hamilton Co. v. Kop-Coat, Inc. In the indemnity agreement, the parties agreed that the Jones-Hamilton Company (Jones-Hamilton) would produce wood preservation compounds from materials supplied by the defendants, Kop-Coat, Inc., Beazer Materials and Services, Inc., and Koppers Company, Inc. The agreement contained a clause by which Jones-Hamilton agreed to indemnify the defendants against any failure by Jones-Hamilton to obey applicable federal, state, and local laws and regulations. Jones-Hamilton then discharged certain chemicals into its ponds, contravening a state waste discharge permit. The California Water Quality Board

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114. AM Int'l, 743 F. Supp. at 529-30. See, e.g., Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986) (stating that the government can recover its cleanup costs from responsible parties regardless of how a court interprets indemnity agreements).

115. AM Int'l, 743 F. Supp. at 530.


117. Id.

118. Id.

119. Id. at 1023-24. The California Regional Water Quality Control Board issued the waste discharge permit to the plaintiff four days before he entered the agreement with the defendants. Id. at 1023. The permit restricted the allowed wastes to chlorides, phosphates, carbonates, and sulfates. Id. at 1023-24. The plaintiff discharged prohibited chemicals while formulating compounds for the defendants. Id. at 1024.
ordered Jones-Hamilton to remedy the dumping site, and Jones-Hamilton sued the defendants seeking contribution.\footnote{120}

The court rejected Jones-Hamilton's argument that California's public policy forbidding contractual indemnification for strict liability offenses extended to contractual indemnification for CERCLA's strict liability.\footnote{121} Instead, the court in \textit{Jones-Hamilton} examined Congress' intent, as expressed in the statute's language, to determine the public policy underlying CERCLA.\footnote{122} The court, in its examination, identified the apparent inconsistency in \S \textit{107(e)} and suggested that federal court decisions present three different interpretations to resolve the section's ambiguity.\footnote{123} According to the court, most of the federal courts construing \S \textit{107(e)(1)} have held that the second sentence negated the first sentence, thereby allowing parties to bargain freely concerning their CERCLA liability.\footnote{124} The court in \textit{Jones-Hamilton}, however, implicitly criticized the majority view for failing to discuss CERCLA's legislative history.\footnote{125} The court then classified Mardan's approach as the minority view, stating that despite its great appeal, it also failed to cite CERCLA's legislative history.\footnote{126} The court found the third and final interpretation, \textit{AM International}'s approach, persuasive because it cited CERCLA's

\footnote{120} \textit{Id.}

\footnote{121} \textit{Id.} at 1025. The court correctly reasoned that the public policies underlying California's products liability law and CERCLA may be different, and that it was thus improper to discern CERCLA's policies by examining the state legislature's views on products liability. \textit{Id.}

\footnote{122} \textit{Id.}


\footnote{125} \textit{See Jones-Hamilton}, 750 F. Supp. at 1025.

legislative history. Nonetheless, as the court was located in the Ninth Circuit it was bound to follow the Ninth Circuit rule iterated in Mardan.

In CPC International, Inc. v. Aerojet-General, Corp., the District Court for the Western District of Michigan did, however, follow AM International's approach, invalidating a contractual indemnification of PRPs against CERCLA liability. The district court denied Aerojet-General's (Aerojet) motion for summary judgment seeking dismissal of a cross-claim by the Michigan Department of Natural Resources (MDNR) under CERCLA. The MDNR had entered into agreements with Aerojet whereby Aerojet's Cordova division purchased highly contaminated land from a bankrupt company and the MDNR agreed to indemnify Cordova for the cleanup costs. Although Aerojet and the MDNR removed some of the wastes from the site, they failed to alleviate a groundwater problem, prompting CPC International, Inc. (CPC) to bring suit against MDNR, Aerojet, and Cordova. CPC asserted that the defendants' indemnity contract in conjunction with CERCLA § 107(a)(3) required the defendants to prevent the further spread of groundwater contamination and to dispose of the hazardous substances. MDNR then cross-claimed against Aerojet and Cordova seeking contribution. Aerojet and Cordova alleged that their consent order with MDNR indemnified them from MDNR's cross-claim.

The CPC court adopted AM International's conclusion, stating that while AM International's reading of § 107(e) appeared to deviate from established case law, the AM International court correctly determined that § 107(e)(1) forbids parties from utilizing release agreements to bar CERCLA liability. The court explained that the AM International result properly furthered CERCLA's policies of encouraging voluntary cleanups and placing

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128. Id. The court stated that Mardan's approach had great appeal because it furthered CERCLA's "polluter's pay" policy while not impinging a party's freedom to contract to mitigate the risk of CERCLA liability. See id.
130. Id.
131. Id. at 1285.
132. Id. at 1273-74. The Michigan Attorney General's Office, MDNR and Cordova signed a document labeled "stipulation and consent order." Id. at 1273. However, the parties were not embroiled in litigation with one another and court approval of the disposal methods was not considered. Id. The MDNR originally became involved in the land when it ordered Story Chemical Company, which was responsible for the spread of the hazardous substances beyond the site, to ameliorate contamination problems at the site. Id. When Story Chemical Company filed for bankruptcy it had not adequately addressed the problem. Id.
133. Id. at 1275.
134. See id.
135. Id.
136. Id. at 1281.
137. Id. at 1282.
the financial burden on those responsible for the creation of the problem. The court further reasoned that the outcome was harmonious with the legislative history of CERCLA. The court concluded that it was irrelevant whether the indemnity agreement was between a private party and the government, as in AM International, or between two private parties because all such agreements are invalid.

In a subsequent decision, Purolator Products Corp. v. Allied-Signal, Inc., the District Court for the Western District of New York upheld the validity of an indemnity agreement between private parties, mirroring Mardan's view that § 107(e) prohibits transferring liability, not costs. Purolator alleged that pursuant to an administrative consent order, the EPA was to choose the means by which Purolator and Allied were to cleanup hazardous substances disposed of at an automotive parts factory in Elmira, New York. In addition, Purolator brought suit to recover the costs it expended for the investigation and cleanup of the chemical wastes, alleging that Allied refused to comply with the order. Allied counterclaimed, alleging that it had incurred response costs due to the EPA's order and that Purolator was contractually bound to indemnify Allied. Relying on AM International, Purolator argued that § 107(e) barred indemnity agreements between parties liable under CERCLA.

The court in Purolator Products reasoned that the Act specifically states that it does not prohibit indemnity agreements covering CERCLA liability. Furthermore, the court explained that CERCLA's legislative history

138. Id. See generally supra notes 7-8 and accompanying text.
139. CPC Int'l, 759 F. Supp. at 1283. The court merely cited AM International's discussion of section 107(e)(1) without any examination of its own of CERCLA's legislative history. Id.
140. See id.
142. Id. at 129. See supra notes 75-76 and accompanying text. The court also classified the AM International decision as the erroneous minority view. Purolator, 772 F. Supp. at 129.
143. Id. at 126. Bendix Corporation, which operated the factory from 1925 until 1975, allegedly disposed of the hazardous substances. Id. Subsequently, Bendix created Facet Enterprises, Inc., a wholly-owned subsidiary, and transferred the plant to Facet. Id. Allied Corporation acquired Bendix in 1983. Id. After Allied Corporation and Facet entered the administrative consent order with the EPA, each company changed its name. Id. Allied Corporation changed its name to Allied-Signal, and Facet changed its name to Purolator Products Corporation. Id.
144. Id. at 127. Purolator sought only a determination that Allied was liable for the cleanup costs, intending damages to be resolved at a subsequent date. Id.
145. Id. Allied based its argument on an agreement Facet made that it would indemnify Bendix, despite the fact that the agreement was entered before Congress enacted CERCLA and thus made no mention of CERCLA liability. See id.
146. Id. at 129.
147. Id. The court noted that "[t]he only restriction [CERCLA] places on [indemnity] agreements is that they may not be used to transfer liability." Id. The court stated that a
indicates Congress' intent to provide for quick recovery of governmental cleanup expenditures and to induce potentially responsible parties to clean up wastes voluntarily. Accordingly, the court reasoned that if a party remains liable to the government, an indemnity agreement would not interfere with the purposes of the Act. The court then rejected Purolator's interpretation of § 107(e)(2), that an indemnity agreement would not prohibit the indemnitor from seeking contribution against the indemnitee, reasoning that such an interpretation was not only inconsistent with the express authorization of indemnity agreements in § 107(e)(1), but was also an attempt to nullify the effect of indemnity agreements. The court concluded that § 107(e)(2) "ensures that Section 107(e)(1) will not be interpreted to abrogate such contractual agreements" and that indemnity agreements between potentially liable private parties are not forbidden by CERCLA.

Although the Sixth Circuit recently adopted the Ninth Circuit's Mardan approach, there has been discussion by courts outside the Sixth Circuit of adopting the AM International approach. Still, no court outside the Sixth Circuit has determined that § 107(e) prohibits indemnity agreements between PRPs. The AM International approach may gain in strength, however, as courts outside the Sixth and Ninth Circuit addressing the issue of indemnity agreements between PRPs begin to adopt the rationale of that case. A proper examination of the language and legislative history of

liable party may shift responsibility for the response costs while retaining the underlying liability. Id.


149. Purolator, 772 F. Supp. at 129. See infra notes 214-29 and accompanying text.

150. Id. at 130.

151. Id.

152. Id.


§ 107(e) and CERCLA's policy should convince courts, however, that the AM International approach is incorrect.

III. Dispelling the Misconception

Although the majority of federal courts have properly interpreted § 107(e), the more recent lower court decisions could be a harbinger of the way courts will interpret § 107(e) in the future. The established method of interpreting the meaning and purpose of a statute is to examine first the statutory language. An analysis of the language of § 107(e) supports the view that indemnity agreements between PRPs are valid under CERCLA. Only if the statutory language does not provide the answer to a question of interpretation should one proceed with an examination of the statute's legislative history. While some courts have looked to CERCLA's legislative history, courts should accord little weight to such legislative history because it is ambiguous and contradictory. Still, some aspects of that history do support the majority position that indemnity agreements between PRPs are valid under § 107(e). In addition, allowing indemnity agreements between PRPs is consistent with CERCLA's policies.

A. Probing the Language of § 107(e)

Many commentators and courts have criticized the language of CERCLA § 107(e)(1) for being internally inconsistent. The first sentence of CERCLA § 107(e)(1) provides that "[n]o indemnification . . . agreement or conveyance shall be effective to transfer . . . from any person who may be liable . . . under this section, to any other person the liability imposed under this section." This sentence provides that a person cannot transfer the liabil-

157. See infra notes 161-90 and accompanying text.
159. See infra notes 191-213 and accompanying text.
160. See infra notes 214-29 and accompanying text.
ity imposed by § 107(a), i.e. the responsibility, to pay the response costs incurred by the government or another person. The second sentence of § 107(e)(1) states: "Nothing in this subsection shall bar any agreement to... indemnify a party to such agreement for any liability under this section." Accordingly, § 107(e)(1) does not prohibit indemnity agreements for § 107(a) liability. The key to unlocking this section is the word "transfer." If one interprets "transfer" to mean that the transferor remains liable for response costs but that another party must pay the costs, then the first sentence prohibits what the second sentence seemingly allows. However, if "transfer" means that the transferor remains liable to no one, then the two sentences do not contradict each other. The first sentence prohibits a PRP only from using an indemnity agreement to escape the underlying liability while the second sentence allows the transferor to pass on the costs or seek reimbursement for that liability. Thus, the proper interpretation of "transfer" must be determined in order to arrive at the proper scope of the prohibition.

While some may consider it fashionable to denounce the canons of interpretation on grounds that the canons negate one another, the courts often rely on them in cases involving statutory interpretation. One such canon of statutory interpretation is the "plain meaning rule," which states that if a statute's language is plain on its face, courts may not look past it for other meanings. A second canon of statutory interpretation demands that a

163. See supra note 27. See also Sevack, supra note 10, at 1587.
166. 42 U.S.C. § 9607(e)(1).
167. Conrad, supra note 18, at 10048.
168. Id.
169. Id.
171. DICKERSON, supra note 158, at 227-29 (characterizing this criticism as unrealistic and "more than a little glib" because it assumes that courts do not apply the canons with moderation).
172. See, e.g., Union Bank v. Wolas, 112 S. Ct. 527, 531 (1991) (stating that "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning") (citation omitted); Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986) ("If the statute is clear and unambiguous 'that is the end of the matter, for the court... must give effect to the unambiguously expressed intent of Congress.'") (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).
173. DICKERSON, supra note 158, at 229. See also Board of Governors, 474 U.S. at 368 (refusing to interpret "legal right" as the limited right of doing something "as a matter of practice"); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 922, 927 (D.C. Cir. 1985) (interpreting the scope of the fly-ash exception within the CERCLA definition of "hazardous substance").
statute be interpreted to contain no internal tensions or inconsistencies.\textsuperscript{174}

Employing these canons to analyze § 107(e)(1), it becomes apparent that "transfer" as used in the first sentence means to escape or avoid.\textsuperscript{175} This interpretation is consistent with the plain meaning of the statute and eliminates any conflict between the two sentences.\textsuperscript{176} The Mardan court correctly interpreted the meaning of "transfer," stating that the underlying responsibility cannot be avoided although another party may have to bear the cost of that liability.\textsuperscript{177} The Jones-Hamilton court's alleged majority approach, which is of dubious existence,\textsuperscript{178} ignores the plain meaning of § 107(e) as well as the nature of an indemnity agreement.\textsuperscript{179} An indemnity agreement shifts the financial loss, not the underlying liability.\textsuperscript{180} Thus, the first sentence of § 107(e)(1) merely reiterates the nature of an indemnity agreement by stating that "[n]o indemnification . . . agreement or conveyance shall be effective to transfer . . . the liability imposed under this section."\textsuperscript{181} Although Congress merely sought to recognize the effect of indemnity agreements in § 107(e)(1), some courts give credence to different meaning,\textsuperscript{182} thereby creating unnecessarily the apparent inconsistency. The language of § 107(e)(2) supports this analysis\textsuperscript{183} by providing that a party may bring an action to enforce an indemnity agreement if sued by a CERCLA claimant,\textsuperscript{184} thus ensuring "that Section 107(e)(1) will not be interpreted to abrogate such contractual agreements."\textsuperscript{185}

Employing a different analysis, the AM International court was able to resolve the apparent inconsistency in § 107(e)(1) and held that indemnity agreements were not valid between PRPs, but were valid between a

\textsuperscript{174} See American Fed'n of Gov't Employees Local 2782 v. Federal Labor Relations Auth., 803 F.2d 737, 741 (D.C. Cir. 1986) ("[C]re[ating] tension within [a statute] . . . is not favored, particularly when another reading obviates any conflict that would otherwise be created.") (citation omitted).

\textsuperscript{175} See Conrad, supra note 18, at 10048.

\textsuperscript{176} See id.

\textsuperscript{177} See Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1459 (9th Cir. 1986).

\textsuperscript{178} See supra notes 123-28 and accompanying text; see also Conrad, supra note 18, at 10047 n.22 (stating that all the courts that have followed Mardan, upholding the validity of indemnity agreements between PRPs, "either subscribe expressly to the Central Illinois analysis or are implicitly consistent with it").

\textsuperscript{179} See infra, notes 180-85 and accompanying text.

\textsuperscript{180} See supra text accompanying notes 75-76.


\textsuperscript{182} See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 38 (1982) ("[T]he very fact that sometimes there is uncertainty . . . ought to keep us from creating false uncertainty where it does not exist.").


\textsuperscript{184} Id.

\textsuperscript{185} Id.
tortfeasor and a person not already liable.\textsuperscript{186} Section 107(e)(1), however, states that an indemnity agreement may not transfer liability to "any other person,"\textsuperscript{187} not to another person "not already liable."\textsuperscript{188} By adopting an interpretation of the statute that required the insertion of additional words, the \textit{AM International} court violated a third canon of statutory interpretation.\textsuperscript{189} The \textit{AM International} court incorrectly justified its strained interpretation by relying on CERCLA's meager legislative history.\textsuperscript{190}

\section*{B. Section 107(e)’s Legislative History}

Assuming arguendo that CERCLA § 107(e)(1) is vague or ambiguous,\textsuperscript{191} the \textit{AM International} court was correct to consider CERCLA's legislative history to resolve that ambiguity.\textsuperscript{192} However, CERCLA's legislative history accompanying § 107(e) is vague and contradictory, and should not be accorded much weight when analyzing the Act.\textsuperscript{193}

Prior to \textit{AM International}, most federal courts addressing the validity of indemnification agreements did not cite CERCLA's legislative history.\textsuperscript{194} Since the \textit{AM International} decision, however, courts have cited CERCLA's legislative history more frequently.\textsuperscript{195} In examining § 107(e)'s legislative history, the \textit{AM International} court first examined a Senate draft of the En-

\textsuperscript{188} \textit{AM Int'l}, 743 F. Supp. at 529.
\textsuperscript{189} Conrad, \textit{supra} note 18, at 10049.
\textsuperscript{190} \textit{See AM Int'l}, 743 F. Supp. at 528-29.
\textsuperscript{191} \textit{See generally supra} notes 14-15 and accompanying text.
\textsuperscript{192} \textit{See supra} note 158 and accompanying text.
\textsuperscript{193} \textit{See supra} notes 14-15 and accompanying text.
vironmental Emergency Response Act, which contained a subsection on indemnification with language almost identical to the first sentence of § 107(e)(1), followed by three provisions for when the subsection would not apply. From this draft version, the AM International court determined that the Senate approved of releases only in limited circumstances. The court, however, failed to consider the committee report that accompanied the Senate draft of the Environmental Emergency Response Act. The committee report explained that the section did allow the complete avoidance of liability in some circumstances. The section, however, did not deal with private release agreements. In addition, the other pre-compromise bills that contributed to the genesis of CERCLA distinguished between transferring liability and reallocating costs.

After examining the Senate draft of the bill, the AM International court cited a colloquy, which occurred in the Senate during the floor debate.


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 an 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.

Id. 197. Id. (quoting S. 1480, 96th Cong., 2d Sess., 126 CONG. REC. 30,900 (1980)). 198. See Ellis, supra note 41, at 1955 (stating that the Senate “bill did not ‘disfavor releases except under strict conditions,’ as the AM court construed it, because under S. 1480 the strict liability of the seller would itself be transferred to the buyer where the conveyance involved unaffiliated parties, adequate disclosure, and financial assurances”). 199. Id. 200. Id. at 1956. 201. Id. at 1956. 202. The colloquy, which involved a sponsor of the bill, never occurred on the Senate floor, but was created after passage of the bill and inserted in the revised remarks. See 1 CONGRESSIONAL RESEARCH SERV., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), prepared for SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS. 193, 220 (Comm. Print 1983). Furthermore, both courts and commentators have sharply criticized reliance on floor debates. See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980) (stating that “even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history”); Schwemmamn Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (Jackson, J., concurring) (“[W]e should not go beyond Committee Reports...[T]o select casual statements from floor debates...as a basis for making up our minds what law Congress intended to enact is to substitute ourselves
The colloquy characterized § 107(e)(1) as prohibiting the transfer of liability through indemnification agreements but not invalidating such agreements.203 The colloquy also stated that § 107(e)(1) prevents an owner or operator of a facility from completely “escaping” liability.204 From this exchange, the district court correctly determined that neither sentence of § 107(e)(1) relieves a party from liability.205 However, the AM International court incorrectly concluded that the first sentence of § 107(e)(1) creates an exception, allowing liability to be shifted by “agreements that may provide for indemnity or additionally liable parties.”206 The court’s use of the disjunctive in its analysis of the first sentence is intriguing in light of its holding that indemnity agreements between liable parties are invalid.207 The court did not condition the validity of an indemnity agreement according to whether or not the agreement was with an “additionally liable” party.208


204. Id. The colloquy between Senators Cannon and Randolph was as follows:

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. It is my understanding that this section is 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].

Mr. RANDOLPH. That is correct.

205. Id.

206. Id. (emphasis added). See supra notes 75-76 and accompanying text (discussing that liability is not transferred).

207. AM Int’l, 743 F. Supp. at 529.

208. See id.
Therefore, an indemnity agreement between PRPs should be valid according to the court’s interpretation of the first sentence of § 107(e)(1).

The court then surmised that the second sentence of § 107(e)(1) permits “additional contractual liability.” Assuming that the court means the same thing by “additionally liable parties” and “additional contractual liability,” the second sentence only reiterates that an indemnity agreement between a liable party and a third party not already liable under CERCLA is valid. Without further explanation, the court concluded that an indemnity agreement between private parties already liable is unenforceable. That conclusion does not follow from the court’s premises.

The AM International court attempted to bolster its conclusion with an interpretation of § 107(e)(2). However, the court’s analysis of § 107(e)(2) is also flawed. Contrary to the court’s interpretation, § 107(e)(2) does not state that indemnity agreements may not bar suits against parties liable under CERCLA. Rather, § 107(e)(2) states that nothing in the “subchapter” bars a cause of action a party may have. The court substituted “contribution” for “otherwise” at the end of § 107(e)(2) to support the theory that a suit for contribution cannot be defeated by § 107(e)(1). Yet, “indemnity” could be substituted for “otherwise” just as easily. If this is done, it strengthens the conclusion that indemnity agreements between potentially liable parties are enforceable. Thus, the court’s word substitution argument is unpersuasive. By authorizing indemnity agreements, § 107(e)(1) does not affirmatively bar a cause of action. Instead, § 107(e)(1) merely recognizes a means by which two parties may bar a cause of action if the parties so agree. Therefore, the parties to an indemnity agreement, not § 107(e) or another provision of the subchapter, bar the cause of action.

C. CERCLA’s Policy Considerations

CERCLA’s main policies seek to promote voluntary cleanup of hazardous waste sites and to place the costs of cleanup on the parties responsible for the contamination. The AM International and CPC courts determined

209. Id.
211. AM Int’l, 743 F. Supp. at 529.
213. AM Int’l, 743 F. Supp. at 529.
214. See S. REP. NO. 848, supra note 6, at 12.
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that limiting the parties who can indemnify a PRP furthered those policies. However, these holdings do not further CERCLA’s goals any more than a contrary decision allowing PRPs to contractually allocate response costs for CERCLA liability among themselves. Allowing PRPs to indemnify one another increases the incentive to clean up voluntarily a hazardous waste site and increases the likelihood that the polluters will bear the cost of the cleanup.

While the AM International court is correct in its analysis, the premise is flawed. The AM International court expressed concern that a “mutual release” between liable parties would eliminate the incentive to clean up voluntarily a site because any party who acted unilaterally could not then recoup expenses from the other parties. An indemnity agreement, however, is not a “mutual release” among the parties, but rather a means by which the costs of liability are transferred. Thus, a party indemnified by another liable party still has an incentive to initiate voluntary cleanup actions because he can recover response costs from the other liable party. The level of incentive remains unchanged if the indemnitee’s agreement is with a third party not already liable. However, if courts allow a party to be indemnified by a liable party and also to acquire insurance with a non-liable third party, the indemnitee has a greater incentive to clean up a site because there are more persons from whom he can recover his costs.

AM International’s real concern was the scenario wherein your client, Squeaky, agrees to indemnify Midnight Dumpers. Although both parties are potentially liable, the AM International court opined that neither Squeaky nor Midnight would have any incentive to clean up voluntarily the contaminated land on which the hazardous waste treatment facility was located. This premise is correct only if Squeaky has not acquired an indemnity agreement from a previously uninvolved third party, such as Lucky Land Deals Company (Lucky). If Squeaky has acquired an indemnity agreement, then Squeaky’s incentive remains unchanged because Squeaky can still recover its response costs from Lucky. Therefore, the only situation warranting the concern of the AM International court is where a PRP such as Squeaky does not have an indemnity or insurance agreement of its own and has indemnified another PRP. In order to provide an incentive to initi-

217. Conrad, supra note 18, at 10051 (stating “it is easy to show that the AM International view advances CERCLA’s policies no better, or less well, than the Mardan view does”).
218. See infra text accompanying notes 219-20 and 227-29.
220. See supra text accompanying notes 75-76.
221. Conrad, supra note 18, at 10051.
222. See supra note 111 and accompanying text.
ate a cleanup, the *AM International* court has invalidated indemnity agreements between PRPs.223

This approach is unrealistic and, because it interferes with the freedom to contract, paternalistic.224 Invalidating indemnity agreements between PRPs does not ensure that Squeaky will initiate a cleanup. First, Midnight Dumpers may not have the money with which to reimburse Squeaky. Second, Squeaky may have neither the money nor the desire first to conduct the cleanup and then take Midnight Dumpers to court to recover the costs. Most parties that enter into CERCLA indemnity agreements are businesses that can protect their own interests without interference from the courts.225 Therefore, it is difficult to discern how *AM International*'s226 holding will provide incentive for voluntary cleanup.

In addition to CERCLA's policy to promote voluntary cleanup, its policy of having polluters bear the cost of cleanup227 is not tarnished by allowing indemnity agreements between potentially responsible parties. First, a party that is at least partially responsible for the contamination incurs the expenses.228 Second, if for some reason the indemnitor cannot pay the expenses, the indemnitee still remains fully liable to the government or to any other CERCLA claimant who has not waived its claim.229 Finally, by prohibiting indemnity agreements between PRPs, the *AM International* court is encouraging parties to seek indemnity or insurance agreements with parties not liable under CERCLA, thus thwarting CERCLA’s policy of “polluters pay.”

IV. ENTERING INTO INDEMNIFICATION AGREEMENTS: A DECISION CONGRESS ENTRUSTED TO POTENTIALLY RESPONSIBLE PARTIES

Although two federal district courts in the Sixth Circuit have now held that allowing parties potentially liable under CERCLA to allocate contractually CERCLA response costs runs contrary to the Act,230 these courts based their conclusions on an improper characterization of the function of an indemnity agreement.231 This mischaracterization was the first in a series

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225. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1460 (9th Cir. 1986); *Olin, supra* note 18, at 10051.
228. *See Conrad, supra* note 18, at 10051.
229. *See Mardan, supra* note 18, at 1459.
231. *See supra* text accompanying notes 186-90.
of errors that have resulted in an impermissible restraint on the freedom to contract,\textsuperscript{232} which CERCLA expressly preserves.\textsuperscript{233} The minority view elevates the freedom to contract to a luxury for those who can afford the expense of insurance, rather than a right shared equally by all. Likewise, the minority courts have created a disincentive for the would-be purchaser of contaminated land who cannot afford the potentially enormous cost of CERCLA liability.\textsuperscript{234} The courts’ holdings thus increase the likelihood that the sector of the commercial real estate market already having trouble finding purchasers will stagnate and that a more productive use for contaminated land will not materialize.\textsuperscript{235}

Additionally, the minority courts’ failure to recognize the import of CERCLA’s statutory language magnifies their flawed analysis of the Act.\textsuperscript{236} The holdings in \textit{AM International} and \textit{CPC} are plausible only if one ignores the plain meaning of the statutory language. In addition, CERCLA’s scant legislative history does not adequately justify the courts’ conclusions.\textsuperscript{237} The \textit{AM International} and \textit{CPC} courts’ assessment that their holdings furthered CERCLA’S goals\textsuperscript{238} is dubious.\textsuperscript{239} There is no assurance that prohibiting indemnity agreements between PRPs will provide an incentive for a party to clean up voluntarily a hazardous waste site. Furthermore, prohibiting such indemnity agreements fosters the incentive to acquire insurance, increasing the likelihood that the polluters will not pay the response costs.

Contrary to \textit{AM International} and \textit{CPC}, the majority of federal courts, as evidenced by \textit{Mardan},\textsuperscript{240} properly allow indemnification agreements between CERCLA PRPs.\textsuperscript{241} The majority position comports with the plain meaning of § 107(e) and does not restrict a party’s freedom to contract.\textsuperscript{242} Furthermore, the majority position does not require support from CERCLA’s legislative history, although aspects of the legislative history do support the majority position.\textsuperscript{243}

Allowing indemnity agreements between PRPs is also the more effective method for advancing the goals of CERCLA. First, the likelihood that “polluters pay” is increased because it does not force someone seeking pro-

\textsuperscript{232} See supra note 54 and accompanying text.
\textsuperscript{233} See supra note 74 and accompanying text.
\textsuperscript{234} See Conrad, supra note 18, at 10051; Ellis, supra note 41, at 1957.
\textsuperscript{235} See Ellis, supra note 41, at 1957.
\textsuperscript{236} See supra notes 161-90 and accompanying text.
\textsuperscript{237} See supra notes 191-213 and accompanying text.
\textsuperscript{238} supra text accompanying notes 110 and 138.
\textsuperscript{239} See Conrad, supra note 18, at 10051; Ellis supra note 41, at 1957.
\textsuperscript{240} 804 F.2d 1454, 1457 (9th Cir. 1986).
\textsuperscript{241} See supra note 18, at 10051; Ellis supra note 41, at 1957.
\textsuperscript{242} See id; Ellis, supra note 41, at 1954-57.
\textsuperscript{243} Ellis, supra note 41, at 1955-56.
tection from CERCLA liability to acquire an insurance contract. If the indemnitee is insolvent or unable to pay for any reason, the indemnitee still must pay the response costs that the government or other CERCLA claimant incurs. If the indemnitor is insolvent or unable to pay for any reason, the indemnitee still must pay the response costs that the government or other CERCLA claimant incurs. Second, although there is no guarantee that the majority view provides incentive for voluntary cleanup, it does not reduce the attractiveness of buying contaminated property. So long as there are potential buyers, there exists the possibility that either the seller or buyer will want to clean up the site.

In light of the foregoing, Congress should amend CERCLA to quell this debate, as it did when it enacted the Superfund Amendment and Reauthorization Act (SARA) to silence any disagreement over whether or not contribution suits were permitted under CERCLA. The amendment should unequivocally authorize indemnity agreements between PRPs. Such a legislative response would alleviate the current uncertainty existing in those jurisdictions that have yet to decide the issue, while simultaneously restoring contractual rights to those who have been unjustifiably stripped of them, in the name of CERCLA, by the proclivity of federal judges.

V. CONCLUSION

Congress enacted CERCLA to compensate for the inadequacies of other federal laws designed to protect the environment. The Act, however, has its own shortcomings: poor drafting and ambiguity. The ambiguity in some sections of CERCLA requires courts to look at CERCLA's legislative history for guidance in interpreting the statute. Since 1990, some federal courts have overcompensated for an apparent deficiency in the language of § 107(e) of CERCLA by unnecessarily relying on § 107(e)'s legislative history and interpreting it to invalidate indemnity agreements between PRPs. This minority view fails to comprehend the true nature of indemnity agreements and does not follow the language and intent of CERCLA § 107(e). Furthermore, a complete examination of the legislative history does not support the minority interpretation. The validity of an indemnity agreement should not be contingent upon the indemnitor's status as a party not potentially liable under CERCLA.

244. Supra note 77 and accompanying text.
245. See Conrad, supra note 18, at 10051; Ellis, supra note 41, at 1957.
246. See supra note 17. An indemnification provision that adequately describes the difference between escaping liability for environmental cleanup costs and acquiring an agreement to pay for such costs appears in California's Health and Safety Code. See CAL. HEALTH & SAFETY CODE § 25299.74(a) (West 1992) ("No indemnification, hold harmless, conveyance, or similar agreement shall be effective to preclude any liability for costs recoverable under this article. This section does not bar any agreement to insure, hold harmless, or indemnify a party to the agreement for any costs under this chapter.")
The majority interpretation of § 107(e) allows complete freedom of contract to allocate the costs of CERCLA liability and is consistent with the plain meaning of CERLCA. Also, the majority interpretation more effectively promotes CERCLA’s goals. In contrast to the minority view, the traditional approach permitting indemnity agreements between PRPs is consistent with CERCLA’s legislative history.

Although only a few courts espouse the minority view, or indicate agreement with it, it would not be prudent to ignore those decisions because they may represent the subtle beginning of a shift in the judicial attitude towards the validity of indemnity agreements between potentially liable parties. If the minority view should one day become the majority view, the consequential loss in freedom to contract would be detrimental to the Congressional scheme designed to deal with the national problem of hazardous waste. Therefore, Congress should amend CERCLA to authorize unequivocally indemnity agreements between potentially responsible parties.

_Brian O. Dolan_