ENFORCING ENVIRONMENTAL INDEMNIFICATION AGAINST A SETTLING PARTY UNDER CERCLA

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TABLE OF CONTENTS

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I. INTRODUCTION: ENVIRONMENTAL CLEANUP LIABILITY: THE "WILD CARD" OF A TRANSACTIONAL COST-BENEFIT ANALYSIS

The comprehensive environmental regulations enacted during the past decade have had an enormous impact on the world in which we live. Regrettably, this well-intended legislation has probably had a more dramatic effect on the manner in which business transactions and operations are structured, analyzed and implemented than on the quality of our natural resources.[1]

For example, when a business evaluates a major transaction, such as the acquisition of another business, it must now consider the possibility that mammoth environmental cleanup costs may be imposed on any of a number of players involved. In many business transactions, the parties allocate, among themselves, the various liabilities and obligations.[2] A reliable economic analysis of the true impact of environmental liability, however, is often impossible to achieve given the number of unpredictable variables involved. Among these variables are the potential enormity of the cleanup costs,[3] the strict nature of environmental liability, the relative recency of the environmental statutes and of the envi-

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[1] Judge Alfred Wolin of the United States District Court for the District of New Jersey recently observed:

> At long last we have recognized the frailty created by our shortsightedness and have begun to take steps to reduce the rate of the Earth's destruction, and to remediate our past transgressions against the planet. For its part, through the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 . . . Congress has fashioned a statutory framework intended to motivate individuals to clean up their own land by providing the incentive that they may recover all costs from other parties to whom the environmental damage is attributable. Conceived in haste and born out of compromise, that statute has produced significant litigation over the meaning of even its most basic terms, and has not, after a decade, produced a fraction of the results envisioned by Congress.

Hatco Corp. v. W.R. Grace & Co., 801 F. Supp. 1309, 1314 (D.N.J.), *amended*, 801 F. Supp. 1334 (D.N.J. 1992) (footnote omitted). In 1985, a congressional committee noted that "[t]o date, only 4 toxic waste sites, according to EPA officials, have been fully cleaned up. Two others . . . are claimed to have been cleaned up by the EPA. But recent disclosures about pollutants still present at these sites suggest that the remedial measures taken may have been inadequate." H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 5, at 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3126.

[2] Often, for example, the purchaser and seller of a business will agree upon an appropriate allocation of specified liabilities, assume their respective liabilities and each would then normally indemnify the other with respect to the liabilities it assumed.

[3] By 1985, it appeared clear, albeit in hindsight, that solving the "pollution problem" would prove much more daunting, financially and otherwise, than had been assumed upon the enactment of the Superfund legislation:

ronmental enforcement agencies[4] and the sometimes erratic level of political attention paid to environmental issues. As a result, financial allocation of environmental liabilities is often the "wild card" of the business transaction. Indeed, the interplay of legal, economic and political forces often creates more of an obstacle in effecting cleanup than do the technical aspects involved in the

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> Superfund was passed in 1980 to address what many believed was a relatively limited problem. The EPA was instructed to find 400 hazardous waste sites. Most believed that cleaning up a site was relatively inexpensive and involved removing containers or scraping a few inches of soil off the ground. The Agency was given $1.6 billion to administer the cleanup of the 400 sites.
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> . . . Today, five years later, our understanding of the problem posed by abandoned hazardous chemicals is entirely different. . . . [T]here may be as many as 10,000 Superfund sites across the Nation, or an average of 23 sites per Congressional district. . . . The total cost of completing the Superfund program is estimated to be as much as $100 billion. The total time will be decades.

H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 54-55 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2836-37. Then-President Reagan continued to be concerned with the costs associated with the Superfund program. When signing the 1986 amendments into law, Reagan stated:

> While I approve of the programmatic changes in the Superfund legislation, I have expressed concern in the past regarding the level of funding and the funding mechanism itself. I am assured by the Administrator of the Environmental Protection Agency that the Agency will spend only what is necessary to accomplish the objectives of the program, and no more.

Statement of President Ronald Reagan Upon Signing H.R. 2005, 22 Weekly Compilation of Presidential Documents 1412, October 27, 1986, *reprinted in* 1986 U.S.C.C.A.N. 3441. Only time will tell whether the "revised" 1985 estimates also prove to be overly optimistic.

[4] According to some, in addition to facing the inherent difficulties of enforcing new (and poorly drafted) federal legislation with inadequate financial resources, the Environmental Protection Agency (EPA) suffered from mismanagement during its early years:

> Unfortunately, the first few years of the Superfund program were characterized by delays and mismanagement. An examination of the Environmental Protection Agency's efforts to carry out the Superfund law . . . during 1982 and 1983 led to disclosures that the program's managers had adopted policies more oriented towards conserving monies in the Fund rather than spending them to clean up the thousands of abandoned toxic waste dumps around the country.
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> . . . [T]he EPA administrator was cited by Congress for contempt and resigned in March of 1983. Shortly thereafter, approximately 20 other senior agency officials were either fired or resigned.

H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 5, at 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3126. *See also* H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 55 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2837 ("To compound the problem the first administrator of the Superfund program undermined the intent of the program. Under the initial leadership of Assistant Administrator Lavelle, the program was victimized by gross mismanagement . . . .").

cleanup itself.[5]

Even if the parties to a business transaction are able to agree in principle to an appropriate allocation of, and indemnification for, financial responsibility for environmental cleanup, enforcement of that agreement may prove to be a difficult task. When a party sues to compel environmental indemnity, the court must decide as a threshold matter if the indemnity is enforceable under the environmental statutes. If the court determines that environmental indemnity is indeed enforceable, it will cast a very leery and critical eye towards any contractual language that purports to allocate environmental cleanup responsibility.

An interesting additional hurdle is presented when the party providing environmental indemnity settles its *own* environmental liability with the EPA. In general, a settling party has statutory protection against a *contribution* suit by a third party, if that suit is based on a matter addressed in the settlement with the EPA.[6] The courts have not determined, however, whether this statutory protection against contribution claims also encompasses *indemnity* claims.[7]

If a party is able to avoid existing environmental indemnity obligations by settling its own environmental liability with the EPA, the valuation and allocation by private parties of financial responsibility for environmental cleanup becomes even more difficult because the indemnitee must therefore consider the "risk" of an indemnitor's settlement with the EPA. On the other hand, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[8] evinces a clear statutory preference for responsible parties to settle, once and for all, their liability for environmental cleanup. The courts have as yet neither reconciled nor prioritized these divergent interests.

This Article argues that as a matter of statutory construction, legislative intent and sound public policy, CERCLA does not prohibit the enforcement of bona fide environmental indemnity claims—as opposed to and distinct from contribution claims—

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[5] *See Hatco*, 801 F. Supp. at 1314.

[6] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), § 113(f)(2), § 113(f)(2), 42 U.S.C. § 9613(f)(2).

[7] Suits seeking contribution are indeed distinct from suits seeking indemnity. For a discussion of the difference, see *infra* notes 69-83 and accompanying text.

[8] 42 U.S.C. §§ 9601-75, *as amended by* the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-149, 100 Stat. 1613 (codified as amended in scattered sections of 42 U.S.C. §§ 9601-75 (1982 & Supp. IV 1987)).

against an indemnitor that has settled its own liability with the federal government.

Section II of this Article briefly summarizes the current federal framework of environmental regulation under CERCLA. The extent to which private parties may allocate financial responsibility for CERCLA liability is examined in Section III. Section IV discusses the contractual language needed to effect such an allocation. In Section V, this Article reviews the relatively few cases that have addressed an indemnitee's ability to pursue an environmental indemnity claim against a settling indemnitor, and concludes that the statutory ban on contribution claims against settling parties does not immunize those settling parties from bona fide indemnity claims.

II. THE CERCLA ENVIRONMENT: NEW RULES TO FURTHER SOCIAL POLICY

The oft-cited beginning of the move towards a national environmental consciousness was the publication, in 1962, of Rachel Carson's book entitled *Silent Spring*.[9] By the Earth Day celebration in 1970, momentum in favor of comprehensive environmental cleanup had reached the critical level; Congress responded with a succession of legislative initiatives, which were enacted throughout the decade and into the 1980s.[10]

One such statute was CERCLA. While other environmental statutes may be implicated in connection with the historic activi-

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[9] RACHEL CARSON, SILENT SPRING (1962). Before this point, "only a relatively small and arguably elitist minority advocated the political agenda that would later be supported by the environmental movement." Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889, 891 (1991) (footnote omitted).

[10] One article described the impetus behind Congressional initiatives as follows:

> The tumultuous events of the 1960's created a heightened awareness of the increasing degradation of the environment. People grew concerned that air was becoming unbreathable and water undrinkable and that natural resources were being carelessly wasted. At the same time, there was a growing disenchantment with the ability of the federal government, as represented by administrative agencies, to solve national problems and specifically to protect and conserve national environmental resources. People no longer held to the New Deal dream that the ills of society could be cured by delegating authority to administrative agencies that would creatively regulate complex social problems in the public interest.

Walter B. Russell, III & Paul T. Thomas Gregory, Note, *Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 GA. L. REV. 307, 307-08 (1984) (footnotes omitted).

ties at, and the cleanup of, a particular site,[11] the relevant analysis within this Article falls within the statutory parameters of CERCLA.[12]

Subject to very limited defenses,[13] CERCLA imposes liability on a broad range of parties, including past and current owners and operators of contaminated sites and generators or transporters of hazardous substances.[14] The liability of these specified parties is for removal costs, other response costs consistent with the National Contingency Plan (NCP)[15] or damages to natural resources.[16]

Liability under CERCLA is generally joint and several among responsible parties,[17] except perhaps where the environmental harm is clearly divisible among the responsible parties.[18]

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[11] A list of other primary federal environmental statutes includes: the Resource, Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified in scattered sections of 42 U.S.C. §§ 6901-92, and generally known as "RCRA"); the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified in scattered sections of 33 U.S.C. §§ 1251-1387); the Refuse Act of 1899, 33 U.S.C. § 407; the Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 997 (codified in scattered sections of 42 U.S.C. §§ 6901-87); and the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified in scattered sections of 42 U.S.C. §§ 7401-7642). In addition, many states have enacted their own environmental cleanup statutes, some similar in scope and structure to CERCLA.

[12] Whether or not a party may pursue an indemnity claim under CERCLA against a responsible party that has settled its own liability with the EPA is to be determined under CERCLA § 113, 42 U.S.C. § 9613. This statutory provision provides certain protections to settling parties. For a discussion of these protections, see *infra* Section V.

[13] *See* CERCLA § 107(b), 42 U.S.C. § 9607(b).

[14] *See* CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).

[15] The National Contingency Plan includes EPA regulations setting forth "procedures and standards for responding to releases of hazardous substances . . . ." *See* CERCLA § 105(a), 42 U.S.C. § 9605(a). Private party response costs *not* consistent with the national contingency plan may not be recoverable under CERCLA. *See* County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1513 (10th Cir. 1991) ("[c]onsistency with the NCP is an element of a private cost recovery claim").

[16] *See* CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).

[17] *See* United States v. Monsanto Co., 858 F.2d 160, 167 & n.11 (4th Cir. 1988) (footnote omitted) (agreeing with abundant caselaw construing CERCLA as embodying a strict liability scheme and citing cases), *cert. denied*, 490 U.S. 1106 (1989); Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1316 (9th Cir. 1986) (noting that CERCLA imposes strict, but not absolute, liability).

[18] The Fourth Circuit explained the distinction as follows:

> Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of harm that he causes. . . . When such persons cause a single and indivisible harm, however, they are held liable jointly and severally for the entire harm.

Monsanto, 858 F.2d at 171-72 (citations omitted). *See also County Line*, 933 F.2d at

In the more typical case of indivisible environmental harm,[19] any one responsible party alone may be held financially accountable for the related CERCLA liability. That party's remedy would be, in turn, to seek contribution from other responsible parties.[20]

III. Allocation by PRPs of Responsibility for CERCLA Liability

A. *The Majority Rule: PRPs May Contractually Allocate CERCLA Responsibility Among Themselves*

The majority rule espoused by federal courts is that CERCLA does not prohibit potentially responsible parties (PRPs) from contractually allocating, *among themselves*, the financial responsibility for CERCLA liability.[21] The controlling language is set forth in section 107(e) of CERCLA[22] as follows:

> (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

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1515 n.11 (observing that where the harm is divisible, CERCLA may not impose joint and several liability).

19 For example, indivisible harm may be found where successive property owners have continued the "dirty" industrial practices of their predecessors, or where scores of entities transport hazardous wastes to a single dump site.

20 *See, e.g.*, United States v. R.W. Meyer, Inc., 932 F.2d 568, 570-71 n.2 (6th Cir. 1991) ("Joint and several liability may be imposed on a responsible party, even though its role in creating the hazardous site was small, if the harm is indivisible. It may then seek contribution from other potential responsible parties . . . .").

21 *See, e.g.*, Jones-Hamilton Co. v. Beazer Materials & Serv., Inc., 959 F.2d 126, 129, *reh'g denied and opinion amended and superseded*, 973 F.2d 688 (9th Cir. 1992); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 837 (1989); Hatco Corp. v. W.R. Grace & Co., 801 F. Supp. 1309 (D.N.J. 1992), *amended*, 801 F. Supp. 1334 (D.N.J. 1992); Armotek Indus., Inc. v. Freedman, 790 F. Supp. 383, 386-87 (D. Conn. 1992); Ganton Technologies, Inc. v. Quadion Corp., No. 89 C 6869, 1992 WL 71658 (N.D. Ill. Mar. 30, 1992); Danella Southwest v. Southwestern Bell Tel. Co., 775 F. Supp. 1227, 1240 (E.D. Mo. 1991); Purolator Prod. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124, 129 (W.D.N.Y. 1991); Niecko v. Emro Mktg. Co., 769 F. Supp. 973, 989 (E.D. Mich. 1991); Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 355 (D.N.J. 1991); Rodenbeck v. Marathon Petroleum Co., 742 F. Supp. 1448, 1456 (N.D. Ind. 1990); Central Illinois Pub. Serv. Co. v. Indus. Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1507 (W.D. Mo. 1990); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1000, *modified in part*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,738 (D.N.J. 1988).

22 CERCLA § 107(e), 42 U.S.C. § 9607(e).

> 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.[23]

The leading case adopting this rule is *Mardan Corp. v. C.G.C. Music, Ltd.*[24] In that case, the United States Court of Appeals for the Ninth Circuit articulated that contractual agreements between "responsible parties" regarding the allocation of CERCLA liability only determine who will bear financial responsibility for cleanup costs, but have no impact on the underlying statutory liability, which remains unaffected by private agreement.[25] Additionally, the court stated, regardless of the interpretation of such agreements, the government retains the right to pursue "responsible parties" to recover cleanup or closure costs.[26]

Notwithstanding the general rule allowing contractual allocation of CERCLA responsibility, courts often struggle with the perceived inconsistency between the first sentence of paragraph (1) of section 107(e), which appears to prohibit transfers of CERCLA liability, and the second sentence of the paragraph, which appears to allow allocations of CERCLA liability.[27]

Many courts adopting the majority rule have reconciled the first and second sentences of paragraph (1) of section 107(e) by reasoning that although CERCLA allows private parties to allocate the financial responsibility for CERCLA liability among PRPs, such allocation is only binding between PRPs, and not between PRPs and the EPA.[28] This approach forbids a PRP from *transferring* liability

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[23] *Id.*

[24] 804 F.2d 1454 (9th Cir. 1986).

[25] *Id.* at 1459.

[26] *Id.*

[27] *See, e.g.*, Jones-Hamilton Co. v. Kop-Coat, Inc., 750 F. Supp. 1022, 1025 (N.D. Cal. 1990), *aff'd in part, rev'd in part sub nom.* Jones-Hamilton Co. v. Beazer Materials & Serv., Inc., 959 F.2d 126 (9th Cir.) *reh'g denied and opinion amended and superseded*, 973 F.2d 688 (9th Cir. 1992) ("This inartfully drafted provision seems internally inconsistent."); Danella Southwest v. Southwestern Bell Tel. Co., 775 F. Supp. 1227, 1240 (E.D. Mo. 1991) (citing inconsistency of the language); AM Int'l, Inc. v. Int'l Forging Equip., 743 F. Supp. 525, 528 (N.D. Ohio 1990) ("On its face, this section is internally inconsistent.").

[28] For cases supporting this proposition, see *infra* note 37. Some of the judicial decisions that have addressed the threshold issue of whether contractual allocation of CERCLA liability is in fact allowed under CERCLA do not, however, address the further issue of whether that allocation would be binding on the EPA. *See, e.g.*, Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1573 (E.D. Pa. 1988);

under CERCLA (consistent with the first sentence of section 107), but allows that PRP to contract with another party (whether PRP, insurance carrier, etc.)[29] as to the ultimate financial responsibility for such liability.[30]

B. *The Minority Rule: PRPs May Transfer CERCLA Responsibility, But Not to Any Other PRP*

In contrast to the general rule allowing private allocation of financial responsibility for CERCLA liability, two recent federal district court decisions have refused to recognize private contractual allocation of CERCLA liability among PRPs. In *AM International, Inc. v. International Forging Equipment*,[31] the United States District Court for the Northern District of Ohio ruled that in enacting the second sentence of section 107(e), "Congress intended to permit any person to contract with others *not already liable under the Act* to provide *additional* liability by way of insurance or indemnity."[32] In other words, under the *AM International* reasoning, an indemnity agreement would not be enforceable against a PRP, but would be enforceable against a party not otherwise facing CERCLA liability, such as, for example, an insurance carrier.[33]

Chemical Waste Management, Inc. v. Armstrong World Indus. Inc., 669 F. Supp. 1285, 1293 (E.D. Pa. 1987).

29 The lengths to which businesses will go to avoid environmental liability is reflected in the lengthy, complex and bitterly contested insurance litigation that has become increasingly commonplace. Corporate policyholders often look to their comprehensive general liability insurance companies for coverage of environmental cleanup costs. These carriers, to say the least, tend to be rather reluctant to provide insurance coverage for these costs. *See generally* Daniel R. Avery, *Massachusetts Follows the Judicial Trend: A Reasoned and Proper Approach to Determine Recovery for Environmental Cleanup Costs Under Comprehensive General Liability Insurance Policies*, 24 SUFFOLK U. L. REV. 891 (1990).

30 For example, a federal district court recently stated:

> In my view, the intent of this section is to allow parties to bring an action to enforce their contractual rights to indemnification or contribution, notwithstanding the language of § 107(e)(1). Thus, if a party that is the beneficiary of an indemnity agreement is sued by a CERCLA claimant, that party may seek indemnification from the other party to the agreement. This language ensures that Section 107(e)(1) will not be interpreted to abrogate such contractual agreements.

Purolator Prod. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124, 130 (W.D.N.Y. 1991) (citations omitted).

31 743 F. Supp. 525 (N.D. Ohio 1990).

32 *Id.* at 529 (emphasis added).

33 *AM International* has provoked pointed criticism. Wholesale adoption of the approach taken in the case could, according to one commentator, "produce a regulatory and political fiasco comparable to that created by the Eleventh Circuit's decision in *United States v. Fleet Factors Corp.* regarding lender liability under CERCLA."

Recently, the United States District Court for the Western District of Michigan, in *CPC International, Inc. v. Aerojet-General Corp.*,[34] adopted the *AM International* approach. In so doing, the court simply stated that "*AM International* correctly names Section 107(e)(1) as a general statement rule forbidding the application of releases to bar CERCLA liability."[35] The court added that, in its view, such a result was consistent with both the legislative history of section 107(e)(1) and CERCLA's broad goals of encouraging cleanups and charging those responsible with the attendant costs.[36]

The *AM International* and *CPC International* decisions do not, however, reflect a trend in judicial interpretation. Relevant cases decided after the March, 1991 *CPC International* decision have consistently adopted the majority rule allowing private allocation of CERCLA responsibility among PRPs.[37]

James W. Conrad, Jr., *CERCLA Does Not Invalidate Contractual Allocations of Liability*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10,045, 10,046 (Jan. 1992).

One compelling criticism of the *AM International* analysis is that the court, in effect, derived a meaning from the statute which simply is not evident from its plain wording. CERCLA § 107(e)(1) nowhere states that the exception to the prohibition against transferring CERCLA responsibility only applies to non-PRPs: "[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." CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (emphasis added). In this regard, the *AM International* interpretation is contrary to fundamental principles of statutory construction. *See generally* 73 AM. JUR. 2D *Statutes* § 198 (1974 & 1991 Supp.) (footnote omitted) ("The general rule is that nothing may be read into a statute which is not within the manifest intention of the legislature as gathered from the act itself . . . .").

CPC International, the other case adopting the minority approach of disallowing private allocation of financial responsibility for CERCLA liability, provides no additional argument in support of this position. Indeed, *CPC International* adopted the *AM International* approach with virtually no analysis. *See* notes 30-36 and accompanying text (discussing *AM International* and *CPC International*).

34 759 F. Supp. 1269 (W.D. Mich. 1991).

35 *Id.* at 1282.

36 *Id.* at 1282-83.

37 *See, e.g.*, Hatco Corp. v. W.R. Grace & Co., 801 F. Supp. 1309, 1317, *amended*, 801 F. Supp. 1334 (D.N.J. 1992) ("CERCLA liabilities can be allocated between parties . . . ."); Armotek Indus., Inc. v. Freedman, 790 F. Supp. 383, 386-87 (D. Conn. 1992) (footnote omitted) ("By its express terms, Section 107(e)(1) of CERCLA preserves the right of private parties to contractually transfer to or release another from financial responsibility arising out of CERCLA liability."); Ganton Technologies, Inc. v. Quadion Corp., No. 89 C 6869, 1992 WL 71658 at *3 (N.D. Ill. Mar. 30, 1992) ("private parties . . . retain the freedom to contract out of CERCLA liability"); Danella Southwest, Inc. v. Southwestern Bell Tel. Co., 775 F. Supp. 1227, 1240 (E.D. Mo. 1991) (CERCLA allows for private allocation of liability); Purolator Prod. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124, 129 (W.D.N.Y. 1991) (under CERCLA, private parties may "contractually shift responsibility" vis-a-vis each other); Niecko v. Emro Mktg. Co., 769 F. Supp. 973, 989 (E.D. Mich. 1991)

IV. How Much Is Enough? The Level of Detail Needed to Allocate CERCLA Responsibility

As discussed above, CERCLA does not per se prohibit a PRP from contractually transferring the financial burden of its CERCLA liability to another party. The parties may transfer financial responsibility for CERCLA liability, however, only if their contract demonstrates a clear intent to do so.[38] The judicial decisions yield a very broad and general set of guidelines that help demonstrate the level of specificity necessary to transfer CERCLA responsibility.[39]

A. "As Is" Clauses

An "as is" clause, for example where a purchaser agrees to purchase property "as is," is insufficient to transfer CERCLA responsibility to the purchaser.[40] The courts ruling on this issue often view the "as is" clause as precluding breach of warranty claims, but not necessarily statutory claims, such as those falling under CERCLA.[41]

("[I]nsurance, indemnification, or hold harmless agreements are valid so long as they do not transfer liability from an owner or operator to a third party."); Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 355 (D.N.J. 1991) ("private parties may contractually transfer to or release another from CERCLA financial responsibilities").

[38] *In re* Hemingway Transp., Inc., 126 B.R. 650, 653 (D. Mass. 1991), *aff'd*, 954 F.2d 1 (1st Cir. 1992).

[39] Before reviewing the level of specificity required, one should note that courts are not clear on whether state or federal law should be followed when interpreting indemnity agreements. *See Purolator Prod. Corp.*, 772 F. Supp. at 131 n.3 (commenting on the "unsettled" question of "whether the construction of indemnity agreements in CERCLA should be governed by federal or state law"). *Compare* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1548 (9th Cir. 1986) (stating that "Congress seems to have expressed an intent to preserve the associated body of state law under which agreements between private parties would normally be interpreted") *with Mobay Corp.*, 761 F. Supp. at 351 (noting that "CERCLA's legislative history strongly suggests a congressional directive to federal courts to develop uniform federal rules").

[40] *See, e.g., Mobay Corp.*, 761 F. Supp. at 355-56 (observing that "[c]ourts have agreed that purchases [sic] of a business 'as is' do not absolve a seller from CERCLA liability"); Int'l Clinical Lab., Inc. v. Stevens, 710 F. Supp. 466, 469 (E.D.N.Y. 1989) (stating that an "as is" clause does not necessarily bar CERCLA claims); Channel Master Satellite Sys., Inc. v. JFD Elec. Corp., 702 F. Supp. 1229, 1232 (E.D.N.C. 1988) (noting that an "as is" clause "does not shift affirmative obligations of the parties imposed by statute independent of the contract").

[41] *See* Wiegmann v. Rose Int'l Corp., 735 F. Supp. 957, 961 (N.D. Cal. 1990) (stating that an "as is" clause protects seller from claims of breach of warranty, not from statutory causes of action). As the United States District Court for the District of New Jersey observed:

> [A]n "as is" provision is merely a warranty disclaimer and as such pre-

In addition, whether or not the purchaser *knew* of environmental contamination on the subject property may also be relevant in the "as is" clause analysis. Where a party unknowingly purchases contaminated property, courts may be all the more resistant to imposing liability on the purchaser merely because the purchaser signed an agreement containing an "as is" clause.[42]

B. All-Inclusive Language

A very broad transfer or assumption of liability contained in the language of a sales contract may, however, include the transfer of CERCLA responsibility. Thus, where a purchaser contractually agrees to assume any and all liabilities of any type whatsoever arising from or in connection with the property transferred, CERCLA responsibility may be passed to the purchaser. This may be the case even if CERCLA liability is not specifically identified as falling within the broad category of liabilities assumed.[43]

For example, in enforcing a contractual allocation of environmental responsibility among private parties, the Ninth Circuit, in *Mardan*, construed language in a settlement agreement relieving the seller from liability for " 'all actions . . . based upon, arising out of or in any way relating to the Purchase Agreement.' "[44] In the absence of extrinsic evidence demonstrating a contrary intent, the court concluded that such expansive language encompassed CERCLA liability, and accordingly held the

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> cludes only claims based on breach of warranty. It does not act to shift liability from one party to an agreement to another and is inapplicable in a cause of action which is not based on breach of warranty. Therefore, standing alone, the "as is" clause cannot defeat Southland's CERCLA claims.

Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1001, *modified in part*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,738 (D.N.J. 1988) (citations omitted).

[42] Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 803 n.20 (1989). *See also Wiegmann*, 735 F. Supp. at 961 (finding an "as is" clause insufficient to transfer CERCLA liability where purchaser had no knowledge of environmental contamination).

[43] *See* Purolator Prod. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124, 135 (W.D.N.Y. 1991) (stating that "where the language of an indemnity agreement is all-inclusive, it must be given effect") (citations omitted); Rodenbeck v. Marathon Petroleum Co., 742 F. Supp. 1448, 1456 (N.D. Ind. 1990) (concluding that discharge and release from all claims and obligations covered CERCLA liability). *See also* United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984), *aff'd in part, vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

[44] Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1456 (9th Cir. 1986).

buyer responsible.[45]

C. *Specified Non-CERCLA Liability*

Language that is not overly broad in scope, and that identifies certain liabilities, which are not "CERCLA-type liabilities," is often considered insufficient to transfer CERCLA liability between private parties.[46] One of the more recent relevant decisions on this issue is *Armotek Industries, Inc. v. Freedman*.[47] This case involved a purchase and sale of stock in which the seller provided certain representations and warranties regarding compliance with environmental laws.[48] Under the relevant agreement (entered into prior to the enactment of CERCLA), the purchaser was entitled to bring indemnity claims relating to these representations and warranties only until October 31, 1982.[49]

In a suit to recover cleanup costs, the United States District Court for the District of Connecticut ruled that the parties had allocated the risk of environmental compliance to the seller for the period prior to October 31, 1982, and to the purchaser after that time, because the purchaser would then be unable to bring claims for indemnity against the seller regarding environmental compliance.[50] The court found the language of the contract to be sufficiently precise, stating that the relevant test was whether the parties' agreement conveyed an intent to allocate "CERCLA-type environmental liability," not whether the text of the agreement explicitly referred to CERCLA.[51]

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45 *Id.* at 1461-63.

46 *See Mobay Corp.*, 761 F. Supp. at 358 (observing that where indemnity was "typical" and related to ownership and operation of property, language would not encompass CERCLA liability); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1001, *modified in part*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,738 (D.N.J. 1988) (positing that an "as is" clause, accompanied by a two year representation and warranty period, and an obligation of seller to remove hazardous waste upon notice from buyer, not sufficiently specific as to CERCLA liabilities).

47 790 F. Supp. 383 (D. Conn. 1992).

48 *Id.* at 384.

49 *Id.* at 384-87.

50 *Id.* at 392. A flaw in the *Armotek* court's analysis is that while the agreement, by its terms, "cuts off" contractual indemnity claims as of the specified date, it does not necessarily follow that a statutory claim under CERCLA (for example, a private response cost recovery action or a suit for contribution) would similarly be barred after that date. One would expect a purchaser in these factual circumstances to argue that its agreement to abandon claims of indemnity for breach of representation and warranty upon a certain date does not include a release of statutory claims arising after that date.

51 *Id.* at 391.

V. ENFORCING ENVIRONMENTAL INDEMNITY AGAINST A SETTLING PRP

In the previous section, this Article discussed private parties' rights to allocate CERCLA responsibility. In this section, the Article will explore the legitimacy of these agreements when one PRP decides to settle its liability with the EPA.

A. The Statutory Settlement Structure

CERCLA is intended to facilitate settlement of cleanup responsibility between PRPs and the EPA,[52] and to discourage the pursuit of cleanup cost reimbursement through litigation.[53] While a PRP is not per se obligated to join in a settlement between other PRPs and the EPA, a non-settling PRP faces considerable disadvantages. First and foremost, a non-settling PRP may be faced with financial exposure disproportionately greater than the liability originally allocated to that PRP. Upon settlement, the reduction in liability of the non-settling PRPs is tied to

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[52] Indeed, CERCLA states in pertinent part:

> The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action . . . if the President determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.

CERCLA § 122(a), 42 U.S.C. § 9622(a).

[53] *See* United States v. Cannons Eng'g Corp., 899 F.2d 79, 88 (1st Cir. 1990) (advancing that CERCLA is intended to achieve "prompt settlement and a concomitant head start on response activities"); Central Illinois Pub. Serv. Co. v. Indus. Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1502 (W.D. Mo. 1990) (commenting that CERCLA "is designed to promote quick action by encouraging settlements among potentially responsible parties"); Hazen Paper Co. v. United States Fidelity and Guar. Co., 555 N.E.2d 576, 581 (Mass. 1990) (footnote omitted) (explaining that "the EPA processes for the enforcement of obligations to aid in the cleaning up of environmental pollution have moved away from the use of lawsuits toward the use of agency demands for participation in remedial action").

As one federal district court explained:

> Cleanup plans embodied in consent decrees possess numerous advantages. Bypassing the time and expense required by litigation is an obvious plus. Cleanups funded and conducted by potentially responsible parties under a consent decree relieve the government of considerable burdens on its limited resources. Further, negotiated solutions are born of a desirable cooperation among the parties concerning the complex technical aspects of the remedial action.

United States v. Bliss, 133 F.R.D. 559, 567-68 (E.D. Mo. 1990).

the amount paid under the settlement, and *not* to the actual amount discharged as a result of that settlement (even if the amount paid is significantly less than the actual liability).[54] Thus, to the extent that settling PRPs pay less than their allocated share of liability—which might well be expected in a settlement—CERCLA "apparently compels the non-settlers to absorb the shortfall."[55] The shifting of responsibility for settlement shortfall to non-settling PRPs therefore provides a real and meaningful incentive for PRPs to settle, and creates "a corresponding detriment to their more recalcitrant counterparts."[56]

In addition, a non-settling PRP may find it very difficult to challenge, by judicial means, a settlement between the EPA and other PRPs, even if the non-settling party is faced with disproportionate liability. In particular, courts have had little patience with attempts by non-settling PRPs to challenge a settlement that had been earlier rejected.[57] As the First Circuit stated in *Cannons*, because a non-settling PRP has "called the tune by [its] refusal to

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[54] CERCLA provides in relevant part that:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2).

[55] City of New York v. Exxon Corp., 697 F. Supp. 677, 681 n.5 (S.D.N.Y. 1988), *aff'd in part*, 932 F.2d 1020 (2d Cir. 1991). *See also In re* Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F. Supp. 1019, 1026 (D. Mass. 1989) ("The words of the statute are clear: the potential liability of the others is reduced 'by the amount of settlement,' not by the settlor's proportionate share of any damages ultimately determined to have been caused.").

[56] *Cannons*, 899 F.2d at 91. The United States District Court for the District of Massachusetts, discussing the shift in responsibility to non-settling PRPs, observed:

> This result is in keeping with Congress' intent to encourage CERCLA settlements and reduce the time and expense of enforcement litigation that necessarily diverts money from cleanup and restoration. Were the law otherwise, the responsibility of the settlor for damages would need to be fully litigated by the sovereigns and the non-settlors to determine the settlor's proportional share, thus largely duplicating the aspects—and expense—of the litigation the settlement was designed to avoid.

In re Acushnet River, 712 F. Supp. at 1027 (footnotes omitted).

[57] Sensitive to the statutory preference for prompt settlement and cleanup, courts give the EPA considerable leeway in developing and finalizing CERCLA settlements. *See Cannons*, 899 F.2d at 88 ("Because we are confident that Congress intended EPA to have considerable flexibility in negotiating and structuring settlements, we think reviewing courts should permit the agency to depart from rigid adherence to formulae wherever the Agency proffers a reasonable good-faith justification for departure.").

subscribe to the administrative settlement," that PRP "should have to pay the piper."[58] Indeed, some courts have even refused to recognize a non-settling PRP's standing to challenge a settlement between the EPA and other PRPs,[59] notwithstanding CERCLA's intervention provision.[60]

While *contribution* suits among PRPs are, as a general matter, allowed by statutory mandate under CERCLA,[61] a PRP that *settles*

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[58] *Cannons*, 899 F.2d at 89. The court also stated: "SARA's legislative history makes pellucid that, when such consent decrees are forged, the trial court's review function is only to 'satisfy itself that the settlement is reasonable, fair and consistent with the purposes that CERCLA is intended to serve.' " *Id.* at 85 (quoting H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 3, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042).

[59] One court explained its refusal to grant a non-settling PRP standing to challenge a settlement between the EPA and other PRPs as follows:

> Here, defendants . . . are unwilling or unable to settle. Yet, they wish to be able to object to the settlement of other parties. This court will not allow defendants to frustrate the settlement process simply because there is a possibility that they may bear a disproportionate liability of the cleanup costs.

State of Arizona v. Motorola, Inc., 139 F.R.D. 141, 146 (D. Ariz. 1991). *See also* United States v. Mid-State Disposal, Inc., 131 F.R.D. 573, 577 (W.D. Wis. 1990) ("After refusing to reach a settlement, intervenors cannot now claim prejudice because of potential contribution actions against them"); City of New York v. Exxon Corp., 697 F. Supp. 677, 694 (S.D.N.Y. 1988), *aff'd in part*, 932 F.2d 1020 (2d Cir. 1991) ("To the extent that the non-settling parties are disadvantaged in any concrete way by the applicability of section 113(f)(2) to the overall settlement, their dispute is with Congress.").

[60] CERCLA's intervention provision reads:

> [A]ny person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect the interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

CERCLA § 113(i), 42 U.S.C. § 9613(i).

The United States District Court for the District of Arizona, in *Arizona v. Motorola*, ruled that the non-settling party did not have a legal interest warranting intervention: "The Court, in light of CERCLA's statutory scheme favoring early settlements and joint and several liability, believes that defendants do not have a substantial and legally protectable interest. At best, defendants have a remote economic interest that is insufficient to support intervention." *Motorola*, 139 F.R.D. at 146. Likewise, the court in *Mid-State Disposal* rejected a non-settling PRP's request for intervention on a "timeliness" basis, stating:

> The interveners' delay in this case would render the negotiations between the original parties a waste of time and delay the implementation of the remedy designed to benefit the public health and safety at the site. The original litigating parties as well as the public would be prejudiced. The court finds that the prejudice to the original parties make the motion to intervene untimely.

Mid-State Disposal, 131 F.R.D. at 576-77.

[61] Under CERCLA "[a]ny person may seek contribution from any other person

its CERCLA liability with the EPA receives considerable statutory protection against contribution suits brought by other parties. The relevant statutory provision states in pertinent part: "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."[62]

The SARA legislation in 1986 added these contribution-related provisions,[63] which have been described as a "powerful tool" of the EPA.[64] The bar to contribution claims against settling parties was intended to encourage settlement and, in turn, reward settling PRPs with some degree of finality.[65] Settling with

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who is liable or potentially liable under section 9607(a) of this title." CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

62 CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

63 One court explained the impetus behind the SARA amendments as follows:

> As enacted in 1980, CERCLA made no express provision for contribution actions among parties held jointly and severally liable under its section 107 liability scheme. As a result, a potentially liable party under section 107 faced the prospect of being singled out as a defendant in a government or private cost recovery action without any apparent means of fairly apportioning CERCLA costs awarded against it to other persons liable for these costs under the statute. The courts responded to the inequity of this situation, and its negative implications for encouraging private parties to undertake voluntary CERCLA cleanups, by recognizing an implicit federal right to contribution under CERCLA. Congress ratified these efforts in 1986 by amending CERCLA section 113 to expressly recognize a right of contribution under the statute.

County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1515-16 (10th Cir. 1991) (citations omitted).

64 *See, e.g.*, *In re* Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F. Supp. 1019, 1027 (D. Mass. 1989). In *Acushnet River*, Judge Young observed:

> Congress passed [CERCLA's settlement] provision to encourage settlement of CERCLA cases. Previously, settlors had no statutory assurance that any settlement that they reached with the EPA would end their liability in a case because non-settlors might later seek contribution from them. In an attempt to offset this disincentive to settle, the Environmental Protection Agency ("EPA") adopted a policy of reducing its judgment against non-settlors to the extent necessary to extinguish the settlor's liability to the non-settlors. SARA's contribution provision eliminates the need for such a policy where the settlement is "administrative or judicially approved."

Id. at 1026 (citation omitted).

65 United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 (1st Cir. 1990). *See also* H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 59 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841 (providing that "[t]hese provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups").

certain PRPs does not preclude the EPA from continuing to pursue non-settling PRPs under CERCLA.[66] The post-settlement liability of the non-settling PRPs, however, would be reduced by the amount of the settlement.[67]

In addition to statutory protection from contribution claims, settling PRPs themselves retain the right to seek contribution from non-settling PRPs.[68] Thus, if one PRP settles with the EPA but another PRP does not, the contribution claims of the first PRP against the second are preserved.

B. Why PRPs Are Entitled Under CERCLA to Pursue Environmental Indemnity Claims Against Settling PRPs

1. Statutory Construction

As indicated above, CERCLA provides that settling PRPs "shall not be liable for claims for contribution regarding matters addressed in the settlement."[69] The provision does not, by its terms, protect against claims for indemnity. It is a basic rule of statutory construction that "the mention of one thing implies the exclusion of the other."[70] Therefore, if indemnification and contribution are indeed different concepts, then the specific mention of contribution claims within CERCLA section 113 implies that claims for indemnification are to be considered excluded from the same provision.

It may be stated almost without dispute that indemnity and contribution are separate and distinct legal concepts:

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66 CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (providing that "[s]uch settlement does not discharge any of the other potentially liable persons unless its terms so provide. . . .").

67 *Id.* For further discussion regarding post-settlement liability, see *supra* notes 54-55 and accompanying text.

68 CERCLA provides in relevant portion:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement . . . ."

CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B).

69 CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

70 This rule is often expressed as the maxim *expressio unius est exclusio alterius*. *See, e.g.*, 73 AM. JUR. 2D *Statutes* § 211 (1974 & 1991 Supp.). Although the identification of one specific matter may be a "strong signal" that Congress intended to omit other similarly specific matters, Dep't of Air Force v. Fed. Labor Relations Auth., 877 F.2d 1036, 1041 (D.C. Cir. 1989), the rule is one of construction, not of law, and may be "overcome by a strong indication of contrary legislative intent or public policy." 2A SUTHERLAND, STATUTORY CONSTRUCTION § 47.23 (1991 ed. & 1992 Supp.).

> There are fundamental distinctions between contribution and indemnity. Contribution is the right of a person who has been compelled to pay what another should have paid to require partial (usually proportionate) reimbursement and arises from principles of equity and natural justice; indemnity, on the other hand, arises from contract, express or implied, and is the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement.[71]

Indemnification generally arises either from an express contractual arrangement[72] or by virtue of a special relationship between the parties. Such special relationships may include that of an employer and its employee or a principal and its agent.[73] In addition, courts sometimes recognize claims for "total indemnification," even in the absence of a contractual arrangement or special relationship, where the facts warrant one tortfeasor bearing complete financial responsibility for the liability.[74] This "equitable indemnity" or "tort-based indemnity," however, is not actually indemnity at all, but rather total

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71 18 AM. JUR. 2D *Contribution* § 2 (1985 & 1992 Supp.) (footnotes omitted). *See also* Milai v. Tradewind Indus., Inc., 556 F. Supp. 36, 37 (E.D. Mich. 1982) ("Contribution is the method by which a tortfeasor sues a joint tortfeasor for its share of a joint liability to an injured plaintiff. Indemnity is the device by which a tortfeasor 'passes through' his entire liability to a third party . . . .").

72 Liability insurance is one type of indemnification contract. It is quite interesting to observe the radically different manner in which the courts view insurance contracts and non-insurance contracts when one party to the contract (the policyholder/indemnitee) is seeking indemnity for environmental cleanup costs. As discussed above, in reviewing indemnity provisions in non-insurance contracts, courts require a significant level of detail within the contractual language to show that the allocation of the CERCLA liability was, in fact, intended. *See supra* notes 38-51 and accompanying text. In these cases, ambiguity or lack of specificity within the relevant provision operates to the detriment of the party seeking indemnity. In the insurance indemnity context, however, the courts generally construe ambiguities in the policies *in favor of* the policyholder seeking indemnity for cleanup costs. For example, some courts have even ruled that the word "sudden," when used in a comprehensive general liability contract to describe a release of contaminants, is "ambiguous," thereby drastically cutting down the scope of the exclusion in which the word is used. *See, e.g.*, New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1198-99 (3d Cir. 1991); Claussen v. Aetna Casualty & Surety Co., 380 S.E.2d 686, 687-88 (Ga. 1990). *But see* Am. Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423, 1429 (D. Kan. 1987), *aff'd*, 946 F.2d 1482, *vacated in part on reh'g*, 946 F.2d 1489 (10th Cir. 1991) ("The language is clear and plain, something only a lawyer's ingenuity could make ambiguous.").

73 *See* Allied Corp. v. Frola, 730 F. Supp. 626, 639 & n.7 (D.N.J. 1990) (noting that special relationships may include those between lessor-lessee, union-member, employer-employee and principal-agent).

74 *See* Central Illinois Pub. Serv. Co. v. Indus. Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1506 (W.D. Mo. 1990) (citing authority allowing equitable indemnification in the absence of a contractual or special relationship, but refusing to impose it in the context of CERCLA).

contribution by one party.[75]

Moreover, some provisions of CERCLA address contribution by name; others identify indemnification as the subject.[76] This suggests that Congress, in drafting CERCLA, recognized the meaningful distinction between indemnity and contribution. On the other hand, Congress has also expressed its intent to promote prompt settlement between the EPA and PRPs, and the courts are receptive to the need to protect settling parties against further liability in connection with the cleanup at issue in the settlement.[77]

While reading the statute in accordance with basic principles of statutory construction shows that settling PRPs are not immune from bona fide indemnity claims, the analysis is not complete without a review of the relevant legislative history.[78]

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[75] *See, e.g.*, United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 (1st Cir. 1990) (stating that the noncontractual indemnity claim at issue was simply an extreme form of contribution claim); Drake v. Raymark Indus., Inc., 772 F.2d 1007, 1011 n.2 (1st Cir. 1985) (same), *cert. denied*, 476 U.S. 1126 (1986).

The Second Circuit, in deciding the effect of a statutory liability limitation under the Longshoremen's and Harbor Workers' Compensation Act, described this type of "equitable indemnity" in a historical context:

> Indemnity was [historically] available on a number of grounds. One, which we may call tort indemnity, was based "merely upon a difference between the kinds of negligence of the two tortfeasors; as for instance, if that of the indemnitee is only 'passive,' while that of the indemnitor is 'active.'" As Judge Learned Hand perceived, "[s]uch cases may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors . . . . When both are liable to the same person for a single joint wrong, and contribution, *stricti juris*, is impossible, the temptation is strong if the faults differ greatly in gravity, to throw the whole loss upon the more guilty of the two."
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> . . . [T]his tort-based form of indemnity was hardly distinguishable from contribution . . . .

Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 718-19 (2d Cir. 1978) (citations omitted).

[76] For example, as discussed in Section III, *supra*, CERCLA § 107, 42 U.S.C. § 9607, addresses the enforceability of indemnification agreements. *See also* CERCLA § 119, 42 U.S.C. § 9619 (allowing the EPA to indemnify response action contractors).

[77] As one court stated in barring a non-settling party's contribution claim, 42 U.S.C. § 9613(f) "provides the settlors with a statutory signal that any settlement they reach would end their liability in the case." Allied Corp. v. Frola, 730 F. Supp. 626, 638 (D.N.J. 1990). *See also* Burlington Northern R.R. Co. v. Time Oil Co., 738 F. Supp. 1339, 1342 (W.D. Wash. 1990) (commenting that "§ 9613(f)(2) encourages parties to settle their CERCLA liability by offering them the promise of fully extinguishing their alleged liability"). *But cf.* United States v. Alexander, 771 F. Supp. 830 (S.D. Tex. 1991) (allowing action against settling party to determine if that party's contribution was greater than de minimis).

[78] Indeed, CERCLA's relevant legislative history should be examined because the rules of statutory construction should not be applied so as to result in a reading

2. Legislative History

Words within a statute should be interpreted in accordance with their plain meaning.[79] CERCLA's underlying legislative history confirms that the "plain reading" of the statute is appropriate and correct—that CERCLA does not preclude indemnity claims against settling parties. The *original* SARA bill[80] stated that a PRP settling its CERCLA liability pursuant to a court-approved settlement "shall not be liable for claims for *contribution or indemnity* regarding matters addressed in the settlement."[81]

Later, in October, 1985, the Judiciary Committee adopted the contribution protection provision of H.R. 2817, but amended the provision to clarify "that entry into a judicially-approved settlement with the government protects a party only against the contribution claims of other potentially liable parties, *and not against indemnification claims*."[82] The Judiciary Committee went on to explain the distinction between contribution and indemnification:

> Contribution is a statutory or comon [sic] law right available to those who have paid more than their equitable share of an entire liability. Indemnity is a right arising from a contract or a

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of the statute that is inconsistent with clear legislative intent. *See infra* note 79 and accompanying text.

79 *E.g.*, SUTHERLAND, *supra* note 70, at § 46.01.

80 "A Bill to Amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and for Other Purposes," H.R. REP. 2817, 99th Cong., 1st Sess. (1985) ("H.R. 2817"). The final bill, H.R. 2005, replaced, but incorporated much of, H.R. 2817. *See* 1986 U.S.C.C.A.N. 2835.

81 H.R. 2817, *supra* note 80, at 40 (emphasis added). A September 1985 report by the House Committee on Energy and Commerce reflected the inclusion of both contribution claims and indemnification claims within the original bill, observing that under these provisions, "[i]f a party has resolved its liability to the U.S. or a state in a judicially-approved, good-faith settlement, the party would not be liable for claims for *contribution or indemnity* on matters addressed in the settlement." H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 59 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841 (emphasis added). *See* H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 5, at 24 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3147 (a settling party "is not to be liable for claims for contribution or indemnity regarding matters addressed in the settlement"); H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 ("The section contemplates that if an action under section 106 or 107 of the Act is under way, any related claims for contribution or indemnification may not be brought in such an action."); H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 79 (1985), 1986 U.S.C.C.A.N. 2835, 2861 ("The section also confirms a Federal right of contribution or indemnification for persons alleged or held to be liable under section 106 or 107 of CERCLA and prohibits the assertion of such rights against a party who has entered into a judicially approved settlement with EPA.").

82 H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 3, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3042 (emphasis added).

special relationship between parties. Settlement with the government under CERCLA should not abrogate independently existing rights of persons to indemnity.[83]

The resulting statutory language, adopted by Congress and signed into law by the President, reflects the Judiciary Committee's well-founded and intentional exclusion of indemnity claims from a settling party's "contribution protection." The legislative history confirms a plain reading of the statute to this effect.

3. The Cases: "Bona Fide" Indemnity Claims Can Probably Be Enforced Against a Settling PRP

Direct case law on whether CERCLA's contribution protection encompasses contractual indemnity claims is scant. The cases, however, appear to confirm, or at least predict the likely judicial acceptance of, the position that CERCLA's contribution protection provisions do not bar bona fide indemnity claims.[84]

In certain cases, plaintiffs barred by section 113 from pursuing contribution claims against settling PRPs have sought to recast their claims as arising from equitable, as opposed to contractual or special relationship, indemnity.[85] Not surprisingly, courts have been loathe to allow this type of "end-run" around CERCLA's contribution protection provisions.[86] While these cases address claims of equitable indemnity,[87] they often provide guidance as to how a court might rule with respect to contractual or other bona fide indemnity claims.[88]

The First Circuit, for example, in *United States v. Cannons Engineering Corp.*,[89] rejected indemnity claims against certain settling parties where the complaining parties had not alleged any *contractual* basis for indemnification.[90] Instead, the court construed the

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83 *Id.*

84 *See infra* notes 85-102 and accompanying text (discussing cases).

85 *See, e.g.*, Drake v. Raymark Indus. Inc., 772 F.2d 1007, 1011 n.2 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986); Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 718-19 (2d Cir. 1978); Central Illinois Pub. Serv. Co. v. Indus. Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1506 (W.D. Mo. 1990).

86 *See* United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 (1st Cir. 1990) (refusing to impose a right of indemnification in contravention of § 9613(f)(2) so as not to allow "non-settlors to make an end run around the statutory scheme").

87 Equitable indemnity claims have been held to be tantamount to claims for "total" contribution. *See supra* notes 73-75 and accompanying text (explaining the construction of equitable indemnity claims).

88 *See infra* notes 89-102 and accompanying text (discussing cases that suggest the probable resolution of contractual or other bona fide indemnity claims).

89 899 F.2d 79 (1st Cir. 1990).

90 *Id.* at 92.

noncontractual indemnity claim as "a more extreme form" of contribution claim.[91] Noting that claims for partial contribution could be precluded in the context of a CERCLA settlement, the court stated that the claims for total contribution—indemnity—could likewise be barred.[92] The *Cannons* court did not explicitly hold, however, that a bona fide indemnity claim based on a valid contract between PRPs would be foreclosed.

Similarly, the court in *Central Illinois Public Service Co. v. Industrial Oil Tank & Line Cleaning Service*[93] distinguished between contractual and noncontractual rights of indemnity under section 113(f) of CERCLA.[94] In so doing, the court ruled that section 113(f) would bar claims of equitable indemnity because to construe otherwise would contravene CERCLA's contribution protection provisions.[95] At the same time, however, the court recognized that CERCLA *does* permit the enforcement of an indemnity agreement.[96]

In *United States v. Pretty Products, Inc.*,[97] the court barred a claim for indemnity against a settling party, holding that the indemnity claim was, in actuality, a claim for contribution.[98] In so doing, the court stated that in the *absence of an indemnity agreement*, the claim was simply an equitable claim for total contribution that was preempted by CERCLA.[99] Note, however, that notwithstanding its distinction between contractual and equitable indemnity, the court stated that it would be skeptical of any *contractual* endeavor intended to contravene CERCLA's provisions on contribution immunity.[100]

A 1990 federal district court case comes closest to explicitly stating that contractual indemnity claims against settling parties are not barred by the CERCLA contribution protection provisions. In *Allied Corp. v. Frola*,[101] the United States District Court for the District of New Jersey espoused: "[a]lthough it does foreclose most contribution claims, CERCLA *does not restrict the right to*

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91 *Id.* (quoting Drake v. Raymark Indus., Inc., 772 F.2d 1007, 1011 n.2 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986)).

92 *Id.* at 92-93.

93 730 F. Supp. 1498 (W.D. Mo. 1990).

94 *Id.* at 1506.

95 *Id.* at 1507.

96 *Id.*

97 780 F. Supp. 1488 (S.D. Ohio 1991).

98 *Id.* at 1495.

99 *Id.* at 1495-96.

100 *Id.* at 1496 n.7.

101 730 F. Supp. 626 (D.N.J. 1990).

common law indemnification."[102] Taken together, the few relevant decisions would appear to be consistent with the statutory and legislative analysis provided above. Given the plain meaning of the statute and the underlying legislative history, it would be inappropriate, and indeed wrong, for a court to preclude, based on section 113 of CERCLA, bona fide indemnity claims against a settling party.

VI. CONCLUSION

The American people benefit when the EPA is able to settle cleanup liability with PRPs quickly and efficiently, instead of relying on litigation to compel reimbursement for cleanup costs previously incurred. Our endangered national resources are thereby provided protection, and our limited financial resources are maximized.

In turn, the statutory immunity from contribution suits provides an important incentive to a PRP to settle. This immunity gives the PRP the comfort of knowing that it no longer faces the prospect of being "tagged" with environmental liability *for which it has not previously bargained.* As a result, the PRP can obtain a reasonably quantifiable level of finality with respect to the cleanup costs at issue.

If the settling party has agreed with another party to assume financial responsibility for, and provide indemnity against, environmental liabilities, the settlement with the EPA should not extinguish the settling party's liability to the indemnitee. The potential indemnification claim would not hamper the cleanup because the claim, if disputed, could be litigated without direct impact on either the EPA or the settlement. The settling party's "level of finality" would not be diminished because the settling party—and in many cases the EPA—would, of course, already *know* of its obligations to the other party. In addition, at least in theory, the settling party would have negotiated and bargained for, and received consideration in exchange for, the indemnification provided. Contribution claims, on the other hand, are not normally bargained for, but rather arise out of tortious or other wrongful conduct for which joint and several liability is imposed. By forbidding the indemnitee from pursuing the indemnity claim, the indemnitee would lose a real and valuable asset for

[102] *Id.* at 639 (emphasis added). In its decision, the court did not allow the claims for indemnity, given that there was neither an indemnity agreement nor a "special legal relationship" under New Jersey law. *Id.*

which it had bargained and given something in exchange. Not only would the indemnitee be unjustly punished, but the settling party would unjustly benefit.

There are valid legal and public policy reasons for treating contribution claims in a different manner than indemnification claims. CERCLA's clear language, as well as the congressional intent underlying it, correctly adopt this distinction.