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Contractual Transfers of Liability under CERCLA Section 107(E)(1): For Enforcement of Private Risk Allocations in Real Property Transactions

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NOTES

CONTRACTUAL TRANSFERS OF LIABILITY UNDER CERCLA SECTION 107(E)(1): FOR ENFORCEMENT OF PRIVATE RISK ALLOCATIONS IN REAL PROPERTY TRANSACTIONS

TABLE OF CONTENTS

I. INTRODUCTION ................................................. 163

II. LEGISLATIVE TREATMENT OF PRIVATE RISK
    ALLOCATION ..................................................... 169
    A. Overview of CERCLA Liability ............................ 171
    B. Allocating the Risk of CERCLA Liability ............... 176

III. JUDICIAL TREATMENT OF PRIVATE RISK ALLOCATION .... 179
    A. Majority View: Enforcement of Risk Allocation .......... 179
    B. Minority View: Prohibition on Risk Allocation .......... 184
    C. Post-Majority Decisions: Enforcement Revisited ....... 188

IV. TOWARD AN ANALYSIS OF PRIVATE RISK ALLOCATION . 190
    A. Characteristics of Private Risk Allocation ............... 191
       1. Sources of Risk and Related Responses ............... 192
       2. Preserving Third-Party Rights .......................... 194
       3. Distributing Risk Without Diluting Liability .......... 198
    B. Two-Step Judicial Inquiry into Private Risk
       Allocation ...................................................... 200
       1. Step One: Statutory Construction ....................... 202
          a. Language ............................................... 202
          b. Legislative History .................................... 204

161
c. Policy ......................................... 207
   2. Step Two: Contract Interpretation .............. 209
C. Limits and Benefits of Private Risk Allocation ... 211
V. CONCLUSION ..................................... 212
I. INTRODUCTION

The costs of liability under the Comprehensive Environmental Response, Compensation, and Liability Act\(^1\) (CERCLA) are a significant concern to buyers and sellers of real estate.\(^2\) Allocation of this potential liability is an important part of many commercial property transactions.\(^3\) These allocations alter the risk of liability associated with purchasing real property.\(^4\)

CERCLA liability risks are frequently distributed among buyers and sellers through contract agreements negotiated as part of the purchase and sale.\(^5\) The agreements may take the form of an

1. The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988) (CERCLA or Superfund), imposes joint and several strict liability on past and present owners of property contaminated with hazardous substances. CERCLA provides a cause of action for the government and private persons to recover costs incurred in cleaning up contaminated property. CERCLA § 107. Due to the high costs of CERCLA cleanups, buyers and sellers of real estate face an incentive to minimize their risk of liability under the statute.

2. Recent estimates indicate that it will cost $752 billion over the next 30 years to clean up known CERCLA sites. See Marianne Lavelle, *Superfund Studies Begin to Fill Hole in Data-Dry Field*, NAT'L. L.J., Jan. 20, 1992, at 19 (reporting results of study by the Waste Management Research and Education Institute at the University of Tennessee). The magnitude of this expense has a significant impact on business decisions, particularly with respect to commercial real estate. See generally J. GORDON ARBUCKLE, ET. AL., ENVIRONMENTAL LAW HANDBOOK 96 (10th ed. 1989) [hereinafter ENVIRONMENTAL LAW HANDBOOK] (“The fact that CERCLA liability can be so all-encompassing and pervasive — coupled with the fact that CERCLA cleanups are becoming incredibly expensive — is dramatically affecting the manner in which companies engage in business and real estate transactions.”).

3. See ENVIRONMENTAL LAW HANDBOOK, supra note 2, at 96-97 (“Companies . . . devote a good deal of effort negotiating over contract terms respecting how any CERCLA liabilities might be allocated.”); Mary K. Ryan, *The Superfund Dilemma: Can You Ever Contract Your Liability Away?*, 75 MASS. L. REV. 131, 131 (1990) (“The parties to commercial real estate and corporate transactions in the post-Superfund era have tried to address concerns about hazardous waste liability through a variety of contractual devices.”); George Pilko, *Negotiating a Fair Division of Environmental Costs*, Mergers & Acquisitions, Mar.-Apr., 1990, at 58, 59 (“[M]any organizations are learning to effectively incorporate specialized expertise in environmental risks into their negotiating processes.”).

4. For purposes of this note, “risk” refers to the likelihood that a party will incur CERCLA response costs. See discussion infra part IV.A (discussing the characteristics of private risk allocation). This narrow use of the term differs from the definition of risk in other environmental contexts. Compare Talbot Page, *A Generic View of Toxic Chemicals and Similar Risks*, 7 ECOLOGY L.Q. 207, 208-14 (1978) (defining environmental risk by nine characteristics impairing ability to predict actual likelihood of potential adverse outcomes) with Alvin L. Alm, *Managing Environmental Risks*, ENVTL. F., May 1985, at 12, 12 (defining risk as the potential toxicity of a substance combined with the potential for human exposure). Other business risks associated with the decision to purchase real estate are not considered.

5. See Kathryn E.B. Robb, *Environmental Risks: Paying for Someone Else's Mistakes*,
indemnity, a hold harmless clause, or a boilerplate “as is” provision contained in the purchase agreement. Alternatively, parties

6. An indemnity is a contractual assumption of another party’s risk for anticipated liability. 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 S.W. L.J. 1349, 1349 n.1 (1991). In an indemnity, one party agrees to pay future costs accruing to the other party. See, e.g., BLACK’S LAW DICTIONARY 769 (6th ed. 1990) (defining indemnity as “Reimbursement . . . . A contractual or equitable right under which the entire loss is shifted” and indemnify as “[T]o secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him . . . [T]o make good; to compensate; to make reimbursement to one of a loss already incurred by him.”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1147 (1971) (defining indemnify as “to exempt from incurred penalties or liabilities . . . . to make compensation to for incurred hurt or loss or damage”). In a typical transaction, buyer might agree to indemnify seller for environmental response costs in exchange for a reduced purchase price. Alternatively, seller might indemnify buyer against liability arising from existing contamination at the time of the transfer. See Gail V. Karlsson, The Impact of Environmental Liabilities on Real Estate Contract Negotiations, 8 PACE ENVTL. L. REV. 37, 59 (1990). Since the indemnitor actively assumes a burden which would otherwise remain with his adversary, indemnification agreements impose an affirmative shifting of responsibility between the two parties. See infra notes 157-62 and accompanying text (distinguishing between risk shifting and risk shielding).

7. In a hold harmless agreement, one party agrees “to hold the other without responsibility for . . . liability arising out of the transaction involved.” BLACK’S LAW DICTIONARY 731 (6th ed. 1990). In other words, one party agrees that it will not sue the other for claims associated with the property. Many agreements incorporate both indemnification and hold harmless language, requiring one party “to indemnify and hold harmless” the other party for liability arising out of the transaction. See, e.g., Southland Corp. v. Ashland Oil, 696 F. Supp. 994, 1002 (D.N.J. 1988) (contract term providing that “[s]eller shall protect, defend . . . indemnify and save and hold harmless [b]uyer”; see also CPC Int’l v. Aerojet-General Corp., 759 F. Supp. 1269, 1282 (W.D. Mich. 1991) (identifying a contract releasing landowners from liability caused by former owners); American Nat’l Can Co. v. Kerr Glass Mfg., No. 89-C-0168, 1990 WL 125368 at *2 (N.D. Ill. Aug. 22, 1990) (indemnification and hold harmless clause contained in agreement); Rodenbeck v. Marathon Petroleum Co., 742 F. Supp. 1448, 1451 (N.D. Ind. 1990) (a third party agreed to “hold harmless and indemnify”). While indemnification represents an active shifting of risk between the parties, a hold harmless agreement merely shields the benefitted party from the risk of suit brought by the other party. In other words, one party agrees to refrain from imposing liability on the other, rather than affirmatively assuming the other’s liability. See infra notes 161-62 and accompanying text.

8. An “as is” agreement requires the purchaser to take the property in the same form as offered by the seller, implying that the buyer takes the risk of any defects not revealed by its own inspection. BLACK’S LAW DICTIONARY 114 (6th ed. 1990). Evoking the common law doctrine of caveat emptor, the inclusion of an “as is” clause is commonplace in many purchase and sell agreements. See Wiegmann & Rose Int’l Corp. v. NL Indus., 735 F. Supp. 957, 961 (N.D. Cal. 1990) (distinguishing an “as is” clause from a release, the
may negotiate a release agreement as part of the sale or as part of an independent settlement. Whether these or other legal terms are used, the intent of the agreements is to distribute liability risks between the contracting parties through private negotiations. These agreements are referred to throughout this note as "private risk allocations."

To a great extent, environmental policy induces private risk allocation. Due to high cleanup costs, buyers and sellers want to
minimize their exposure to potential CERCLA liability.\textsuperscript{13} Liability may be imposed by both parties to the transaction or by outside third parties;\textsuperscript{14} therefore, buyers and sellers face a two-fold risk of liability. First, each party has an incentive to guard against claims brought by the other party to the transaction. Second, both parties want to avoid liability imposed by outside third parties, such as the U.S. Environmental Protection Agency (EPA), state governments, or private individuals.\textsuperscript{15}

It is not clear, however, whether this attempt to minimize the risk of liability is permitted under CERCLA.\textsuperscript{16} The statute itself provides contradictory guidance,\textsuperscript{17} and the obscure legislative language has led to a split in judicial decisions.\textsuperscript{18} The situation is
disturbing because the settled expectations of buyers and sellers of real estate may no longer be upheld. As a result, buyers and sellers face uncertainty in negotiating future private risk allocations.

The controversy surrounding private risk allocations demonstrates a tension between two competing policies: the efficiencies of free market negotiations versus CERCLA's policy of placing cleanup costs on those responsible for pollution. On one hand, private risk distribution is more efficient than mandatory allocation of risk through legislative fiat. Through free market negotiations, parties can take into account their respective expertise and financial positions, the intended and past uses of the property, the extent of contamination, the likelihood of future sales to third parties, and the effect of these considerations on price. The negotiation of private risk allocations enhances the ability of parties to anticipate their exposure to CERCLA liability, lending predictability and stability to real estate markets. In an era of declining real estate markets, and of slow progress in the CERCLA program,

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19. See richard a. posner, economic analysis of law § 1.2, at 13 (3d ed. 1986) ("Where resources are shifted pursuant to a voluntary transaction, we can be reasonably sure that the shift involves an increase in efficiency."); see also Daniel A. Farber, Contract Law and Modern Economic Theory, 78 NW. U. L. REV. 303, 310 (1983) (citation omitted) ("Assuming that trades between parties are both voluntary and are made with full knowledge, every trade logically must be to the benefit of both parties."); Charles J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 Yale L.J. 1261, 1265 n.18 (1980) ("The assumption that enforcement of bargains promotes allocative efficiency is widespread.").

20. See Karlsson, supra note 6, at 54 ("[N]egotiations concerning the allocation of environmental responsibilities will be conditioned on the relative needs and strengths of the parties, the degree of contamination, and the desirability of the property if uncleaned."). Information regarding the extent of contamination and past use of the property is provided by the widespread use of environmental audits. See Ryan, supra note 3, at 132 ("[A]n entire industry has developed to provide site investigation and cleanup services."); Linda J. Collins, Environmental Risk Advisers in Hot Demand, BUS. INS., Oct. 8, 1990, at 3 (reporting 40 percent annual growth in demand for environmental consultants since 1985 and stating that the largest growth has been in area of environmental audits); Susan Q. Stranahan, Environmental Audits Becoming Part of More Commercial Transactions, Chi. Trib., July 14, 1991, at 2H (noting that audits are increasingly required to obtain financing).

21. See infra note 144 and accompanying text (dealing with the decline in real estate
freedom of contract may be increasingly important to ensure proper market functioning.

On the other hand, CERCLA imposes strict liability on current and former owners of contaminated property. By establishing a strict liability standard, Congress intended to place cleanup costs on those parties responsible for creating environmental pollution. Of the various justifications for strict liability, Congress particularly stressed a retributive rationale for CERCLA's liability provisions,

transactions due to CERCLA); Richter, supra note 18, at 1083 (citation omitted) ("Real estate practitioners agree that federal hazardous waste legislation, particularly CERCLA and the broad liability imposed by the courts, has had a chilling effect on the purchase, sale, and financing of real estate.").

22. See William N. Hedeman, et al., Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,413, 10,415 n.13 (July 1991) (collecting government reports criticizing various aspects of CERCLA's functioning); Coalition Plans to Lobby Congress to Seek Fundamental Changes to CERCLA, 22 Env't Rep. (BNA) 2301 (Jan. 31, 1992) (reporting that cleanups have been completed at only 65 of the 1245 CERCLA sites identified).

23. See infra notes 39-48 and accompanying text (citing statutes and cases which imposed strict liability).


25. The legislative history, detailed infra at part II, indicates congressional recognition of strict liability as a legitimate means to distribute societal costs through traditional market mechanisms:

Strict liability . . . assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business. Strict liability is an important instrument in allocating the risks imposed upon society by the manufacture, transport, use, and disposal of inherently hazardous substances.

S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980), reprinted in 1 SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) PUBLIC LAW 96-510, at 320 (1988) [hereinafter LEGISLATIVE HISTORY]. The report also noted the chemical industry's ability to "pass on" CERCLA fees through the market. Id. at 21-22. Congress also recognized that strict liability serves a deterrent function. See id. at 14 ("An important aspect of strict liability is that it would create a compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm."); see infra notes 176-80, 230-32 and accompanying text (arguing that allocation of costs through strict liability is a legitimate policy choice by Congress).
emphasizing that costs would fall on the parties to blame for creating pollution problems. Unfortunately, the "polluters pay" rationale is not always justified because strict liability imposes costs on "innocent" purchasers and other owners irrespective of who is in fact responsible.

This note explains why buyers and sellers of real estate should be permitted to allocate CERCLA liability risk through private agreements. Part II of this note provides an overview of CERCLA and reviews its legislative history, concluding that the statute provides unsatisfactory guidance regarding private risk allocations. Part III reviews the split in judicial authority and examines the tension between the free market and retributive rationales for and against private risk allocations. Part IV proposes an analysis of private risk allocations which defines these agreements and describes how they function. Additionally, part IV sets out a clear judicial framework through which courts can determine the enforceability of private risk allocations in a given case. Based on principles derived from the proposed analytical framework, the note concludes that private risk allocations serve the beneficial function of spreading CERCLA costs without diluting CERCLA liability.

II. LEGISLATIVE TREATMENT OF PRIVATE RISK ALLOCATION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was hastily enacted during the closing days of the 96th Congress. The bill established a $1.6 billion...
trust fund, now known as the Superfund, to pay for cleanup costs at the nation’s most serious hazardous waste sites. After several years of investigating toxic waste scandals, such as the Love Canal disaster in Niagara Falls, New York, Congress de-

measure was approved by the Environment and Public Works Committee but appeared doomed when Congress recessed for the November elections. "Prior to the election, environmentalists had threatened to hold out for more concessions . . . . That kind of talk ended Nov. 4." CQ ALMANAC 1980, supra, at 573, 592 (also noting jurisdictional conflict between senate committees). Ronald Reagan’s landslide election victory brought Republican control of the Senate and a new conservative mandate. LEGISLATIVE HISTORY, supra note 25, at vii ("[S]ubsequent events during the lame-duck session were colored by the fact that the Republicans would become the majority party in the Senate in 1981."). This prospect provided renewed stimulus for congressional leaders to seek prompt action on Superfund legislation. CQ ALMANAC 1980, supra, at 584, 592. The previous legislative efforts by various committees were redrafted to produce the final $1.6 billion bill during private meetings between Senate leaders. Id. at 592. After final Senate approval, this revised version was presented to the House in an unusual "take-it-or-leave-it" floor procedure on December 3, 1980, two days before Congress was scheduled to adjourn. Id. at 593. The Senate version of the bill was grudgingly approved by the House without amendment in a close vote of 274-94, 28 votes more than necessary to pass the bill under suspension of the rules. Id. at 584. Under the circumstances, it was not necessary to convene a conference committee between the House and the Senate. Id. at 593.


31. There are currently over 1,200 sites on the EPA’s National Priorities List. CERCLA § 105(8) required the President to develop "criteria for determining priorities among releases or threatened releases throughout the United States for the purposes of taking remedial action." 94 Stat. at 2779 (codified at 42 U.S.C. § 9605(a) (1988)), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 15. The National Priorities List was developed pursuant to this authority and contains a list of sites deemed eligible for remedial action. See 40 C.F.R. Pt. 300, App. B (1991).

32. Congress held over 50 hearings throughout the 95th and 96th Congress. These are usefully summarized in 3 LEGISLATIVE HISTORY, supra note 25, app. IV at 355-71 (bibliography of congressional documents).

33. Throughout the 1940’s, the Hooker Chemical Company legally buried hundreds of 55 gallon drums containing toxic wastes in a gully on its property. In 1958, the gully was filled in and sold (for $1) to the City of Niagara Falls for a school and playground. Modest homes were also built and the community became known as Love Canal. In 1978, it was discovered that wastes were percolating from the canal into the basements of many homes and that disease rates were alarmingly high. The area was eventually evacuated. See 126 CONG. REC. 30,937-39 (1980) (statement of Sen. Moynihan providing detailed chronology of Love Canal events), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 700-04. For additional information on the Love Canal disaster and recent resurrec-
clared a need “for appropriate environmental response action to protect public health and the environment” from the dangers of hazardous substances.34 Due to political necessities,35 however, the final legislation was produced in private “closed-door” negotiations between Senate leaders.36 In the context of this process, the final statute was marred with numerous technical flaws and inconsistencies,37 including the provision dealing with private risk allocations.38

A. Overview of CERCLA Liability

CERCLA imposes far-reaching liability on current and past owners of contaminated property. Section 107(a) establishes four categories of covered persons, commonly referred to as potentially responsible parties (PRPs).39 PRPs include present owners and

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35. See supra note 28 (discussing the political urgency of CERCLA's enactment).
36. A letter from Senators Stafford and Randolph to House leaders pleaded for House approval without amendment, illustrating the context of Senate negotiations:

That the bill passed at all is a minor wonder. Only the frailest, moment-to-moment coalition enabled it to be brought to the Senate floor and considered. Indeed, within a matter of hours that fragile coalition began to disintegrate . . . . We say this not in a spirit of ultimatum, but with the hope that you and your Members will appreciate the difficult situation here in the Senate.

37. Several Members of the House criticized the Senate bill as containing numerous technical flaws. See, e.g., 126 CONG. REC. 31,969, 31,970 (1980) (statement of Rep. Broyhill expressing distaste for “ridiculous” legislative practice of enacting bill containing “hundreds of errors”), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 785, 787-88; Grad, supra note 28, at 34 (“Opponents of the bill stressed that it contained many substantive defects . . . . Many supporters of the bill conceded that it was seriously flawed, but asserted that it was the best that could be gotten.”).
38. CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1988); see discussion infra part II.B (discussing the conflicting language in CERCLA § 107(e)(1) regarding private risk allocation).
39. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). The relevant language of the section states:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(I) the owner and operator of a vessel or a facility,
operators, owners and operators "at the time of disposal," arrangers and transporters. The statute imposes strict liability which is also joint, several, and retroactive. Moreover, non-pos-

(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 . . .

Id.

40. Id. § 107(a)(1).
41. Id. § 107(a)(2).
42. Id. § 107(a)(3) (imposing liability on any person "who by contract, agreement or otherwise arranged for disposal," treatment, or transport of hazardous substances). Persons covered under § 107(a)(3) are commonly referred to as "generators," however, the term "arrangers" more adequately reflects the scope of liability imposed by the statutory language. See United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1382 (8th Cir. 1989) (manufacturers of pesticide may be held liable under § 107(a)(3) based on contractual relationship with formulator who disposed of hazardous substances); United States v. Pessse, 794 F. Supp. 151, 157 (W.D. Pa. 1992) (sellers of scrap metal may be held liable under § 107(a)(3) for waste created by buyer in the latter's manufacturing process).

43. Id. § 107(a)(4) (covering "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person").

44. See United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983) (holding that based upon federal common law CERCLA imposes joint, several and strict liability when liability is indivisible); United States v. Monsanto Co., 858 F.2d 160, 174 (4th Cir. 1988) (holding that CERCLA liability is retroactive); United States v. Moltolo, 695 F. Supp. 615 (D.N.H. 1988) (CERCLA liability retroactive); see also ENVIRONMENTAL LAW HANDBOOK, supra note 2, at 95 (containing additional case law). Congress expressed its approval of such judicial action in report language accompanying the 1986 amendment to CERCLA. See H.R. Rep. No. 253, 99th Cong., 2d Sess., pt. 1, at 74 (1985) ("The Committee fully subscribes to the reasoning of the court in the seminal case of United States v. Chem-Dyne Corporation . . . allowing for joint and several liability in appropriate CERCLA cases."). reprinted in 1986 U.S.C.C.A.N. 2835, 2856. See generally ENVIRONMENTAL LAW HANDBOOK, supra note 2, at 76 ("CERCLA's scope is far broader than any of the other federal environmental statutes."). Congress deleted language from the original bill which expressly stated that liability was to be joint, several and strict. See, e.g., S. 1480, 96th Cong., 1st Sess. § 4(a) (1979)
sensory land ownership is sufficient to create liability in the event of a release of hazardous substances.45

Liability can be imposed by both public and private CERCLA claimants.46 Most commonly, the government brings an action to recover its expenditures from the Superfund.47 However, private individuals can also file claims against other PRPs.48 Thus,

(containing language imposing "joint, several, and strict liability" as originally introduced), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 155, 169. The floor debate at the time of final passage indicates that Congress still intended to impose a strict liability standard. However, the explicit language was omitted to avoid confusion, deferring instead to § 311 of the Clean Water Act and evolving common law. See 126 CONG. REC. 31,964, 31,965 (1980) (statement of Rep. Florio), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 776, 778; 126 CONG. REC. 30,930, 30,932 (1980) (statement of Sen. Randolph), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 681, 686.

45. See, e.g., Monsanto, 858 F.2d at 176 (landlord held liable for contamination caused by tenant in possession).


47. Niecko, 769 F. Supp. at 988 n.8. Besides seeking cost recovery, the government may enforce CERCLA by commencing litigation or issuing an administrative order to compel abatement. See CERCLA § 106(a), (c), 42 U.S.C. § 9606(a), (c) (1988) (abatement actions). In addition, EPA often seeks voluntary cleanups, usually in exchange for a release from liability, by negotiating "private party settlements." See 42 U.S.C. § 9622 (1988) (providing authority for settlement negotiations). See generally ENVIRONMENTAL LAW HANDBOOK, supra note 2, at 97-114 (explaining substantial controversy surrounding EPA settlement policies); Superfund Implementation: Hearings Before the Subcomm. on Superfund and Environmental Oversight of the Senate Comm. on Environment and Public Works, 100th Cong., 1st Sess. 105-17 (1987) (statement of James W. Moorman, Esq., criticizing EPA settlement process). It is important to distinguish such administrative settlements from the agreements between private parties (private risk allocations) which are the subject of this note. As discussed infra at note 52, private risk allocations are never binding against the government.

48. Private parties may bring an action for cost recovery under CERCLA § 107(a)(4)(B) or an action for contribution under SARA § 113(f)(1). Though similar, the two theories are distinct. See McSlarrow et al., supra note 14, at 10,401 ("Contribution claims presuppose an initial assessment of liability for a third party's response costs, whereas response costs may be sought by one PRP from another PRP without constituting a suit for contribution, if they were incurred independently by that PRP."). The express right to contribution in § 113(f) was provided by Congress in the 1986 amendments to CERCLA, after courts had upheld private rights of action for cost recovery under § 107(a). Jane E. Lin & Kevin M. Ward, Private Party Response Cost Recovery Under CERCLA, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,322, 10,331 (June 1991) (discussing elements of actions for cost recovery); see Steven B. Russo, Note, Contribution Under CERCLA: Judicial Treatment After SARA, 14 COLUM. J. ENVT'L. L. 267, 274-75 (1989) (discussing contribution).
CERCLA creates a risk of liability which includes claims brought by the government as well as claims brought by private individuals. 49

The congressional intent behind CERCLA's liability structure was to ensure that persons responsible for hazardous substances bear the costs of responding to the resulting pollution. 50 Congress was determined to protect taxpayers from absorbing response costs through the Superfund when a solvent PRP was available to pay. 51 In consistently holding private risk allocations ineffective

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49. See discussion infra part IV.A.1 (discussing sources of risk resulting from potential CERCLA claims brought by private individuals and by the government).

50. The legislative history contains numerous appeals to this justification. In summarizing the bill's basic elements, the first goal listed by the Senate Environment and Public Works Committee was "assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S. REP. No. 848, 96th Cong., 2d Sess. 13 (1980), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 305, 320; see also 126 CONG. REC. 30,930, 30,932 (1980) (similar statement by Sen. Randolph), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 681, 685. The committee report continued:

The goal of assuring that those who caused chemical harm bear the costs of that harm is addressed in the reported legislation by the imposition of liability . . . . To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity.

S. REP. No. 848, at 19, reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 305, 320. The theme is continued throughout House and Senate floor debate of the various Superfund measures. See, e.g., 126 CONG. REC. 26,351 (1980) (statement of Rep. Volkmer rejecting chemical industry's claims that society benefits from chemical products and thus should bear cleanup costs), reprinted in 2 LEGISLATIVE HISTORY, supra note 25, at 265.

51. The Senate Environment and Public Works Committee discussed the issue with respect to sources of revenue for the Superfund:

A fund based only on appropriations would not be in the public interest. Taxpayers too often are asked to remedy problems they do not help create. Relying on general revenue to clean up past industrial mistakes could be interpreted by some as a public policy precedent, implying that the longer it takes for problems to appear, the less responsible those who cause the problem are for the solution.

Further, a fund derived exclusively from appropriations would subsidize generators and users of hazardous substances who, while benefiting economically, have exposed society to the risks of commerce in hazardous substances.

Also, to assure the billions of dollars needed to deal with hazardous chemical problems are available, while meeting the equally desired goals of restrained Federal spending, a fee on those who benefit from the commercial and industrial practices which expose society to hazardous substances is especially appropriate to these national concerns.

S. REP. No. 848, at 19, reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 305, 326.
against the government, courts have confirmed this congressional intent.52 Such agreements may only be enforceable, if at all, in a suit among private individuals.53

Generally, private litigation arises under CERCLA after the EPA seeks enforcement against one of several potentially responsible parties.54 The individual party may recover response costs from other responsible parties in a private cost recovery action, or it may seek contribution from other responsible parties in defending against CERCLA claims.55 Under theories of joint and several liability, the first defendant may be held fully liable irrespective of its actual participation in the problem.

From the perspective of buyers and sellers, therefore, CERCLA liability risks can be disproportionate to actual conduct. Under CERCLA’s liability rules, liable parties are not always responsible for creating the initial pollution.56 In the real estate context, congressional intent to impose liability on the blameworthy is achieved imperfectly. “Innocent” purchasers who fail to inspect are held just as accountable as the worst polluter. Besides penalizing parties who cause pollution, CERCLA imposes costs on real estate transactions generally, irrespective of who is actually to blame.57


53. See infra note 170.

54. See supra note 47 (discussing the government’s enforcement options under CERCLA). As a matter of administrative convenience, the EPA may seek enforcement against only one of the many responsible parties at most CERCLA sites. See Fitzsimmons & Sherwood, supra note 13, at 765 (“In the government’s discretion, and depending upon who presents the most suitable targets, cost recovery actions may be initiated against all or only some of the potentially liable parties.”); Alfred R. Light, Antidote or Asymptote to Contribution: Non-Contractual Indemnity Under CERCLA, 21 Envtl. L. 321, 326-27 (1991) (“When there are multiple parties, the United States will almost invariably seek full recovery, under a joint and several liability theory, from only some of those associated with the hazardous substance release . . . .”).

55. See supra note 48 and accompanying text (distinguishing between private cost recovery and contribution).

56. See Fitzsimmons & Sherwood, supra note 13, at 765 (“The parties involved in disposal also will be responsible, but the landowner will be liable irrespective of whether (s)he participated in or benefitted from disposal of the waste.”).

57. See Hedeman, supra note 22, at 10,414 (noting that CERCLA raises overall litigation and negotiation expenses).
B. Allocating the Risk of CERCLA Liability

CERCLA's liability rules provide buyers and sellers with a strong incentive to minimize liability risks. One method to limit CERCLA exposure is the negotiation of private risk allocations.

Section 107(e)(1) of CERCLA provides contradictory guidance in determining whether such private agreements are authorized. The section consists of two sentences:

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.

In the words of one court, “[t]his inartfully drafted provision seems internally inconsistent. The first sentence of section 107(e)(1) appears to prohibit indemnification agreements under all circumstances while the second sentence of section 107(e)(1) appears to permit indemnification under all circumstances.” More precisely,

58. There are other means to limit liability implicitly or explicitly recognized by CERCLA. Section 107(b) provides three outright defenses to liability in the event of an act of God, act of war, or act or omission by an unrelated third party. Furthermore, § 107(e) provides monetary caps on liability applicable in certain circumstances. Another provision, added by SARA, facilitates the provision of pollution insurance by risk retention groups. 42 U.S.C. §§ 9671-9675 (1988). SARA also limits the liability of guarantors who insure responsible parties against CERCLA liability, amending an earlier CERCLA provision. 42 U.S.C. § 9608(d) (1988) (for citation of original provision see infra note 229).

59. CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1988). Section 107(e)(2) provides: “Nothing in this title, 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.”

the first sentence of section 107(e)(1) imposes a prohibition, but
the second sentence provides an exemption which may be read to
permit private risk allocations.61

Beyond the imprecise language, the legislative history of section
107(e)(1) provides limited insight. Initial versions of the first
sentence were proposed as early as the 95th Congress.62 The
Superfund proposal submitted by the Carter Administration also
contained language which paralleled the prohibition in the first
sentence.63

In the House, language similar to the first sentence was incor-
porated into H.R. 85,64 one of the three main Superfund proposals
introduced in the 96th Congress.65 Committee report language in-

61. See discussion infra part IV.B.1.a (dealing with the language of the statute).
62. A precursor to the first sentence of § 107(e)(1) was added by the Committee on
Commerce, Science and Transportation to oil spill liability legislation originally introduced
by Senator Magnuson as S. 1187 on March 30, 1977, and reported by the Committee as
H.R. 2083 on Sep. 12, 1977, during the first session of the 95th Congress. To Establish
a Comprehensive Oil Pollution Liability and Compensation Law: Hearings on S. 2900
Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environmen-
tal and Public Works, 95th Cong., 2d Sess. 86, 128, 148 (1978) (reprinting § 6(j) of H.R.
2083 stating that no indemnification, hold harmless or similar agreement would be effec-
tive except as provided in the act). An almost identical provision was included as § 5(e)
in S. 2900, similar legislation introduced by Senator Muskie on Feb. 6, 1978, during the
second session of the 95th Congress. Id. at 64.

63. The Administration bill proposed the following language:

No indemnification, hold harmless, 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 or threat of release from an uncontrolled hazardous
waste disposal site[,] . . . to any other person the liability imposed under . . .
this section.

H.R. Doc. No. 149, 96th Cong., 1st Sess. 20 (1979), reprinted in 3 LEGISLATIVE HISTO-
RY, supra note 25, at 43. The section also exempted indemnification agreements between
a lessor and the lessee of an interest in oil exploration rights, apparently to accommodate
customary practice in the oil industry. This issue was also the subject of concern during
No. 172, 96th Cong., 1st Sess., pt. 1, at 45 (1979), reprinted in 2 LEGISLATIVE HISTO-
RY, supra note 25, at 555.

64. The relevant language of the bill stated:

No indemnification, hold harmless, or similar agreement shall be effective to
transfer from the owner or operator of a facility, to any other person, the lia-

2 LEGISLATIVE HISTOR Y, supra note 25, at 496. The section also exempted leasehold
interests for oil exploration from the prohibition. Id.

65. H.R. 85, introduced by Representative Biaggi, would have established a fund to
provide compensation for oil spills and hazardous chemical spills in navigable waters.
However, the fund would not be available to pay for hazardous substance releases on
land. A substantially revised version of H.R. 85 was approved by the House on Septem-

dicated that the section was intended to prevent a responsible party "from attempting to pass his liability off to his contractors, whether or not they are negligent, as a cost of doing business with him." This early version of the prohibition was approved by the House, however, no similar language was contained in a companion measure which the House later approved.

In the Senate, the legislative vehicle which ultimately became CERCLA initially contained no language similar to the first sentence of section 107(e)(1). The current first sentence was added to the bill during consideration by the Environment and Public Works Committee. During later deliberation, the committee added a second sentence containing language of exemption, specifically for the benefit of real estate transactions. This early version of

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66. H.R. Rep. No. 172, 96th Cong., 1st Sess., pt. 1, at 45 (1979), reprinted in 2 LEGISLATIVE HISTORY, supra note 25, at 555. The committee report also noted that "[t]he subsection does not, of course, prevent any person from serving as guarantor . . . ." Id.; see infra note 229 (discussing guarantor liability).


70. The initial language of the first sentence differed from the current text in only one way, applying to "facilities" rather than "vessels or facilities":

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.

71. STAFF OF SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 96TH CONG., 2D SESS., STAFF WORKING PAPER [NO. 1] § 4(i), at 28 (1980), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 193, 220. This language was similar to the provisions included by President Carter and also contained in H.R. 85. No reference was made, however, to an exemption for lessees of oil exploration rights. See supra notes 63-64 (discussing H.R. 85 oil lessee exemption).
the exemption was approved by the committee and reported to the full Senate, but it was later deleted during final compromise negotiations. Instead, Senate leaders inserted the current second sentence of section 107(e)(1) providing a more general exception to the first sentence.

There is little public record concerning the drafting process during these private negotiations, and there are few references to the legislative intent behind the changes made to section 107(e)(1). However, the language produced became the final version of CERCLA enacted into law. Unfortunately, the language and legislative history of section 107(e)(1) fail to make clear whether private risk allocations are enforceable, as demonstrated by the resulting judicial treatment of the provision.

III. JUDICIAL TREATMENT OF PRIVATE RISK ALLOCATION

A. Majority View: Enforcement of Risk Allocation

The majority of courts that have examined private risk allocations under CERCLA have found such agreements to be enforceable. However, these decisions merely recite the language of

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72. S. REP. NO. 848, 96th Cong., 2d Sess. 44 (1980), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 245, 275. This provision is more fully discussed in the analysis of this note. See infra notes 213-25 and accompanying text.


74. See supra note 59 and accompanying text (quoting language of exemption). Senate leaders also altered the first sentence of § 107(e)(1) to cover owners or operators of "vessels" as well as "facilities." See supra note 70 (quoting text prior to the addition of "vessels"). The final version of the second sentence may be viewed as an attempt to broaden the proposed language of exemption beyond real estate transactions. See infra note 218 (discussing congressional intent to exempt agreements between transporters as well as agreements between buyers and sellers of real estate).

75. See supra note 28 and accompanying text (describing the circumstances of CERCLA's enactment).

76. But see infra notes 109-10 and accompanying text (discussing written colloquy inserted into the Congressional Record on behalf of Sen. Cannon and Sen. Randolph).

77. A small number of floor amendments, not important for purposes of this note, were permitted during consideration by the full Senate. See 126 CONG. REC. 30,936-56 (1980), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 698-751.


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section 107(e)(1) without recognizing any contradiction between the statute's first and second sentences. Rather, these courts rely on free market principles to justify private risk allocations.

In the leading case, *Mardan Corp. v. C.G.C. Music, Ltd.*, the Ninth Circuit examined a release agreement negotiated almost two years after the original sale. The court concluded that private releases were valid under CERCLA. While the opinion primarily focused on whether to apply state or federal law, the court...
reasoned that "[c]ontractual arrangements apportioning CERCLA liabilities between private 'responsible parties' are essentially tangential to the enforcement of CERCLA's liability provisions. Such agreements cannot alter or excuse the underlying liability, but can only change who ultimately pays that liability." Thus, the court interpreted the agreement as shifting CERCLA's costs without shifting CERCLA's underlying liability. At the same time, however, the persuasive force of this analysis was reduced because the court did not recognize any contradiction in section 107(e)(1).

In addition to finding that private risk allocations are generally valid, the Mardan court also evaluated the release agreement between the parties in the case. The court concluded that the release agreement contemplated CERCLA liability. Three considerations guided the court's interpretation of the agreement. First, because the language included all claims "based upon, arising out of or in any way relating to the Purchase Agreement," the terms of the release were broad enough to include CERCLA claims. Second, the evidence suggested that both par-

84. Id. at 1459. The quoted language continues: "Moreover, . . . the result cannot prejudice the right of the government to recover cleanup or closure costs from any responsible party, including Mardan, Macmillan, or both." Id.; see supra note 52 and accompanying text (discussing further that private risk allocations are ineffective against the government or other third parties).

85. Perhaps unwittingly, this insight represented a major breakthrough in the interpretation of private risk allocations under § 107(e)(1). See discussion infra part IV.A.3 (explaining that while private risk allocations distribute rights between the parties to the agreement, they do not impair underlying liability to third-party CERCLA claimants).

86. It is probably incorrect to assert that the Mardan court overlooked the language of § 107(e)(1). Rather, the court seemed to accept the position advanced by the government as amicus curiae: "As the government points out, section 107(e)(1) expressly preserves agreements to insure, to hold harmless, or to indemnify a party held liable under section 107(a)." Mardan, 804 F.2d at 1458. This statement follows the language of the second sentence of § 107(e)(1), but does not refer to the first sentence. See supra note 79 and accompanying text (citing cases that support private risk allocations under CERCLA without recognizing the contradiction in § 107(e)(1)).

87. 804 F.2d at 1461 (finding that the district court correctly interpreted the release agreement to include CERCLA liability).

88. Id. at 1462. The court explained that "the language releasing Macmillan from all claims by Mardan . . . cannot, under its own terms, . . . be limited to exclude Mardan's section 107 claim, which certainly resulted from its acquisition of the property from Macmillan." Id. The court also rejected Mardan's argument that the CERCLA claims were not part of the release agreement because such claims were not brought "pursuant to" the purchase agreement for the property. Id. at 1462 n.8.

For later interpretations of similar contract language, see, e.g., American Nat'l Can Co. v. Kerr Glass Mfg., No. 89-C0168, 1990 WL 125368, at *4 (N.D. Ill. Aug. 22, 1990) (holding that a clearly worded indemnification agreement encompassing "any claim of any kind or nature whatsoever" is sufficiently broad to support a claim for CERCLA.
ties were aware of conditions at the settling pond and that these conditions were included in the release negotiations. Finally, because CERCLA was enacted one year before the negotiation of the settlement, both parties had notice of its provisions and could be expected to anticipate the legal effects of the statute. Based

response costs), reconsideration in part, No. 89-C-0168, 1990 WL 129657 (N.D. Ill. Aug. 30, 1990); Rodenbeck v. Marathon Petroleum Co., 742 F. Supp. 1448, 1457 (N.D. Ind. 1990) (holding that a release “‘from all claims and obligations of any character or nature whatsoever’ . . . clearly releases [a party] from future arising causes of action of any sort, including CERCLA liability.”); FMC Corp. v. Northern Pump Co., 668 F. Supp. 1285, 1292 (D. Minn. 1987) (holding that a general release “‘from all claims, demands and causes of action’” is sufficiently broad to include environmental claims), appeal dismissed, 871 F.2d 1091 (8th Cir. 1988). But see Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 358 (D.N.J. 1991) (holding that a general agreement to indemnify a party from future liabilities and obligations is insufficient to transfer CERCLA liability unless it makes reference to environmental liabilities).

89. Mardan, 804 F.2d at 1461. One year before the sale of the property to Mardan, Macmillan had filed a “Notification of Hazardous Waste Activity” with the EPA. Id. at 1456. Upon taking possession of the property, Mardan obtained a permit to qualify for interim status pursuant to § 3005(e) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6925(e) (1988). Mardan, 804 F.2d at 1456. When Mardan violated this permit, the EPA brought enforcement actions. Id. During settlement negotiations with Macmillan, Mardan originally sought $112,000 for any “corrective action” that might be necessary to clean up the settling pond. Id. at 1461. However, this specific request was eventually dropped in favor of a lump sum figure of $995,000. Id. at 1456.

Later decisions also examine the language and circumstances of agreements to determine if CERCLA liability was foreseeable and, therefore, included in the agreements. Compare Mobay, 761 F. Supp. at 358 (“The Court cannot expect parties executing a contract prior to CERCLA to have foreseen the statute. However, in order for the Court to interpret a contract as transferring CERCLA liability, the agreement must at least mention that one party is assuming environmental-type liabilities.”) and Chemical Waste Management, Inc. v. Armstrong World Indus., Inc., 669 F. Supp. 1285, 1295 (E.D. Pa. 1987) (holding that implied warranty of indemnification does not exist in all waste disposal contracts: “Congress has enacted a broad statute, and the policies underlying the statute are clear. If owner/operators and generators wish to redistribute the risks distributed by Congress, they must do so clearly and unequivocally.”) with Danella Southwest, Inc. v. Southwestern Bell Tel. Co., 775 F. Supp. 1227, 1241 (E.D. Mo. 1991) (“If the parties know the hazardous nature of the substance, it is fair to assume that the parties were cognizant of possible liability under CERCLA and the parties intended the indemnification clause to shift liability for response costs under CERCLA.”) and FMC Corp., 668 F. Supp. at 1292 (“[t]he language of the Release states unambiguously that [buyer] released [seller] from future arising causes of action . . . . Read in such context, the words can only mean a reference to the future and [are not limited] to present unknown claims.”).

90. Mardan, 804 F.2d at 1461, 1463. Other courts examining private risk allocations executed before CERCLA’s enactment have resolved the problem differently. Compare Mobay, 761 F. Supp. at 348, 358 (holding that an indemnity agreement executed three years prior to CERCLA was insufficient to shift liability without an express statement regarding environmental liabilities) and Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1002 (D.N.J. 1988) (explaining that the parties clearly could not “be expected to have presciently referred to CERCLA in an agreement which was executed two years
on these three factors, the court enforced the release to protect the seller from the risk of the buyer’s claim.\textsuperscript{91}

Later courts following \textit{Mardan} continued to disregard the contradiction in section 107(e)(1).\textsuperscript{92} For instance, in \textit{Rodenbeck v. Marathon Petroleum Co.},\textsuperscript{93} the court upheld a general release between lessor and lessee because the agreements were “mutual releases which clearly shielded [the] plaintiffs” as well as the defendants.\textsuperscript{94} Since there was valid consideration, the court enforced the agreement under general contract principles and held the parties to the benefit of their bargain.\textsuperscript{95} However, the court did not closely examine CERCLA’s language and legislative history.

Instead, the majority courts rely on free market theory as an implicit rationale for enforcing private risk allocations.\textsuperscript{96} These courts recognize the benefits derived through freedom of contract\textsuperscript{97} and see private risk allocations as facilitating transactions between private parties.\textsuperscript{98} However, because they do not address

\textsuperscript{91} See \textit{Rodenbeck v. Marathon Petroleum Co.}, 742 F. Supp. 1448, 1456 (N.D. Ind. 1990); \textit{Southland}, 696 F. Supp. at 1000. However, more recent decisions have recognized the contradiction in § 107(e)(1) while adhering to the majority rule set forth by \textit{Mardan} and its progeny. See, e.g., \textit{Bowen Eng’g v. Estate of Reeve}, No. 89-2649, 1992 U.S. Dist. LEXIS 14548, at *45 (D.N.J. Mar. 13, 1992) (“In spite of the seemingly contradictory language contained in this provision, most courts have found that CERCLA permits some form of contractually distributed liability.”) (to be reported at 779 F. Supp. 467); see also cases cited supra note 60.

\textsuperscript{92} \textit{Mardan}, 804 F.2d at 1461-63.

\textsuperscript{93} \textit{Mardan}, 804 F.2d at 1460 (expressing concern for commercial disruption and noting that through release agreements “the seller can relieve itself of the headaches as well as the benefits of the old business and move on to new ventures”).
the contradiction in section 107(e)(1) and congressional intent behind the statute, the majority decisions do not adequately justify their position. A better approach would be for courts to confront the problems in CERCLA’s statutory language and address the public policy concerns directly.

B. Minority View: Prohibition of Risk Allocation

Due in part to the defects in the majority decisions, a second line of cases has taken a different approach to private risk allocations under CERCLA. The minority view rejects private risk allocations because such agreements conflict with the retributive policy behind strict liability. The cases hold private agreements ineffective between parties who are already liable under the statute. However, such agreements are permissible if they shift risk to persons not already liable under the statute, such as insurers. In other words, private risk allocations can only shift risk beyond CERCLA’s ordinary parameters; they can never allocate risk between buyers and sellers of real estate.

In AM International v. International Forging Equipment, the Northern District of Ohio held that contractual releases between buyers and sellers of real estate were not permitted under CERCLA section 107(e)(1). The court noted that “[o]n its face, this sec-

99. See Polysar, Inc. v. U.S. Indus., Inc., No. 5:89-CV-0238, slip op. at 29 (N.D. Ohio May 15, 1991) (refusing to honor a hold harmless clause contained in a lease agreement); CPC Int’l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1282-83 (W.D. Mich. 1991) (holding that release agreement between state agency and purchaser of property was ineffective to shield the purchaser against agency’s CERCLA claim); AM Int’l, Inc. v. International Forging Equip., 743 F. Supp. 525, 530 (N.D. Ohio 1990) (holding that seller’s release of all claims against buyer was insufficient to bar seller’s suit to recover environmental cleanup costs).

100. See, e.g., CPC Int’l, 759 F. Supp. at 1282 (holding that § 107(e)(1) forbids the use of releases to guard against CERCLA liability and stating that such an interpretation “is consistent with the statute’s broad policies of encouraging cleanups and placing the burden of their costs of those responsible for hazardous waste problems”); see infra notes 117-19 and accompanying text.

101. See infra notes 112-13 and accompanying text.

102. Id.


104. Id. at 530. The facts of AM International are as follows. In 1982, AM International, Inc. (AMI) sold its plating and painting business to International Forging Equipment (IFE). Id. at 526. Two years later, in exchange for $2.3 million, AMI released IFE from “any and all [claims] of every kind and description, known or unknown, in law or in equity, which AMI now has or may hereafter have against” the defendants. Id. at 528. At the insistence of the defendants, AMI left certain hazardous chemicals on the site in proper storage containers; however, the containers were mishandled after AMI’s departure.
tion is internally inconsistent," and rejected the majority decisions because their holdings "render . . . nugatory the first sentence of subsection 107(e)(1)."

The AM International court was the first court to examine in detail the legislative history accompanying section 107(e)(1). The court quoted the Senate committee's proposed exemption for real estate transactions but interpreted this proposal as "disfavor[ing] releases except under strict conditions."

The court also quoted a Congressional Record colloquy inserted after Senate approval of the bill. Senator Randolph, one of the bill’s sponsors, responded affirmatively to the following characterization of section 107(e)(1) by Senator Cannon:

"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."

The emphasized language in this statement significantly influenced the AM International court’s interpretation of the statute. Based on this language, the court concluded:

In sum, Congress intended subsection 107(e)(1) to prevent

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Id. at 526. In 1986, the Ohio EPA notified IFE that remedial action was required to clean up the toxic waste at the site, but IFE refused to comply. Id. The Ohio EPA then requested AMI to perform the cleanup. Id. AMI hired a company to clean up the waste and paid $350,000 in cleanup costs. Id. Despite the release agreement, AMI brought a CERCLA claim against IFE to recover these costs. Id.

105. Id. at 528.
106. Id. at 529. The court also noted that majority court rulings approved of private agreements "with minimal discussion." Id.; see supra notes 79, 86, 92 and accompanying text.
108. Id. at 528; see infra notes 213-25.
109. 743 F. Supp. at 529; see 126 CONG. REC. 30,984 (1980), reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 764; see also 1 LEGISLATIVE HISTORY, supra note 25, at vii (noting conventional practice of inserting bullet symbol to identify "statements or insertions which are not actually spoken by Members [of Congress] on the Floor").
110. 743 F. Supp. at 529 (emphasis added) (quoting 126 CONG. REC. 30,984 (1980)).
111. See id. ("Senator Cannon’s construction suggests a means of construing section 107(e) coherently.").
the parties from contractually relieving themselves of liability under the act . . . . In addition, by the second sentence, 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.112

Thus, the court approved of attempts to spread risk outside CERCLA's ordinary parameters, but prohibited agreements that apportion risk between parties who are already responsible under CERCLA.113

AM International's interpretation of section 107(e)(1) has been followed by at least two federal courts.114 To support its analysis and holding, the AM International court first reasoned that private risk allocations hamper the parties' incentives to undertake prompt voluntary cleanups: "Parties would be less likely to take the initiative if a mutual release were in effect among them, since the release would confine the costs to any party which acted."115 Some commentators have supported this rationale.116

112. Id. at 529.
113. Insurance carriers are the most likely candidates with whom potentially responsible parties could enter into private risk allocations consistent with the AM International decision. However, it is unclear whether environmental insurance policies are widely available. See Stephen C. Jones, Debate Rages Over Insurance Coverage, NAT'L L.J., Feb. 24, 1992, at 20 (surveying insurance coverage issues arising from environmental litigation); Milt Policzer, Courts Are Divided Over Definition of 'Damages,' NAT'L L.J., Nov. 25, 1991, at 28 (noting that "pollution insurance is practically impossible to buy today"); cf. New Policy Protects in Superfund Cases, NAT'L MORTGAGE NEWS, Aug. 19, 1991, at 11 (describing liability insurance offered by the ERIC Group to protect against the risk of undetected hazardous substance contamination).
115. 743 F. Supp. at 529.
116. See Sargent, supra note 18, at 429 ("If a party is barred from seeking contribution by indemnity clauses buried in real estate sales agreements, that party will have far less incentive to assume voluntarily a hazardous waste cleanup."); Servick, supra note 18, at 1591-92 (arguing that a prohibition on contractual transfers of liability is most consistent with CERCLA's primary objective of "provid[ing] incentives for prompt, private cleanup"). However, this argument does not account for the possibility that a purchaser may be more willing to undertake voluntary cleanups if it is benefited by an indemnification agreement that assures prompt recovery against the seller. See infra notes 184-88 and
The court also evoked the retributive justification which Congress had found persuasive when enacting CERCLA, declaring that section 107(e)(1) “forbids giving effect to releases between tortfeasors in CERCLA contribution suits.” This aim, to hold polluters accountable, has also persuaded later courts and commentators. The AM International holding affirms Congress’ intent to impose liability on the persons who are responsible for creating pollution.

However, since the AM International rule permits risk allocation beyond CERCLA’s ordinary parameters, the rule achieves retributive goals only imperfectly. If risk allocations are prohibited so that polluters may be held accountable for their actions, it is inconsistent to permit such distributions of risk to parties otherwise not liable, such as insurers. Because Congress authorized parties to distribute risks under certain circumstances, alternative justifications are required to support the minority position.

accompanying text (discussing justifications for private risk allocations).

In practice, moreover, CERCLA’s liability structure does not seem oriented toward the encouragement of voluntary assumption of cleanup costs. See Hedeman, supra note 22, at 10,426 (“The [Superfund] process remains adversarial .... PRPs retain legal options both to resist EPA and to seek to impose cleanup costs on other parties. It is unrealistic to conclude that PRPs will not continue vigorously to exercise these options in their own self-interest.”).

117. 743 F. Supp. at 530 (emphasis added).

118. See CPC Int’l, 759 F. Supp. at 1282 (stating that although the AM International decision contradicts the weight of authority, it is consistent with CERCLA’s “broad policies . . . of placing the burden of cleanup costs on those responsible for hazardous waste problems”); Polysar, No. 5:89-CV-0238, slip op. at 29 (following AM International “because it best conforms to CERCLA’s policy of allocating environmental response costs to responsible parties”); see also Sevack, supra note 18, at 1592-93 (“Congress intended to foreclose the possibility of any escape from liability. Allowing contractual transfers of liability between potentially responsible parties would allow parties to undermine that intent.”).

119. See supra notes 50-51 and accompanying text.

120. See Purolator Prods. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124, 130 (W.D.N.Y. 1991) (“An insurance agreement between a liable party and an otherwise non-liable party would allow the liable party to shift the response costs just as effectively as an indemnity agreement between two liable parties.”).

In addition, as one commentator has observed, the implication that “wrongdoers” under CERCLA must always bear the costs for their acts is “curious . . . in view of the strict liability nature of that law.” Donald C. Nanney, Hazardous Waste Issues in Real Property Transactions 35 (Cal. Cont. Ed. of the Bar 1990); see supra note 56 and accompanying text.

121. See infra note 229 and accompanying text.
C. Post-Majority Decisions: Enforcement Revisited

In the wake of *AM International*, courts have developed an interpretation of section 107(e)(1) that reaffirms the majority decisions and repudiates the *AM International* holding.\(^{122}\) These courts re-examine the majority rule and openly evoke free market theory to justify the use of private risk allocations.\(^{123}\)

In *Niecko v. Emro Marketing Co.*,\(^{124}\) the Eastern District of Michigan expressly disagreed with the *AM International* court’s interpretation of section 107(e)(1).\(^{125}\) The *Niecko* court analyzed the same legislative history cited by *AM International* but concluded that *AM International* “failed adequately to take into consideration the difference between a transfer of liability and an agreement for indemnification or contribution between parties otherwise liable to the government.”\(^{126}\) The Sixth Circuit upheld *Niecko* as “a more palatable and consistent interpretation” of CERCLA than the minority view.\(^{127}\)

In *Niecko*, the district court focused on the protection afforded to CERCLA claimants, usually the government, under section 107(e)(1).\(^{128}\) The court started with the proposition that responsible parties under CERCLA are jointly and severally liable to the claimant and reasoned that “[i]t is this joint and several liability to which Congress is clearly referring when it speaks of ‘the liability imposed under this section’ in the last words of the first sentence of . . . section [107(e)(1)].”\(^{129}\) Then, like the *AM International* court, the *Niecko* court referenced the colloquy between Senators

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123. See infra notes 136-39 and accompanying text (discussing free market justifications for private risk allocations).


125. Id. at 990.

126. Id.


128. See 769 F. Supp. at 987-88. The court concluded that in § 107(e)(1) “Congress intended to protect the rights of the claimant against attempts by owners or operators to escape liability to claimants through private contractual devices.” Id. at 988.

129. Id. (quoting CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1)). Further interpreting § 107(e)(1), the court stated, “The first sentence simply voids any attempted transfer of joint and several liability to another party.” Id.
Randolph and Cannon following CERCLA's enactment. The Niecko court interpreted the senators' discussion as indicating "that the purpose of the section is to ensure that the responsible parties will fund the cleanup. These responsible parties may enter insurance agreements to add parties who will pay for the cleanup. They may not, however, avoid liability to the claimant (usually the government) by transferring this liability." Thus, the Niecko court, like the court in Mardan, concluded that section 107(e)(1) prohibits allocations of liability, not allocations of costs associated with liability. The Niecko court stated:

There is nothing in the first sentence that purports to prevent liable parties under the Act from apportioning, allocating, or even shifting completely among themselves the liability that each party will owe the CERCLA claimant, so long as each contracting party understands that it will remain jointly and severally liable to that CERCLA claimant. . . . The liability remains with the transferor; the transferee simply agrees to fund the cleanup on behalf of the transferor.

This emerging line of decisions, exemplified by Niecko,
openly acknowledges that a prohibition of private risk allocations “would effectively burden all contractual exchanges involving property that may fall under CERCLA’s purview.” The Niecko court concluded that such a burden on contractual exchanges “was not Congress’ intention.” Thus, these recent decisions follow the same free market approach underlying Mardan and other majority decisions and clarify this approach in response to the criticisms raised by AM International. Observing that real estate transactions are significantly assisted by private risk allocations, this view finds in section 107(e)(1) an implicit balancing between public and private interests in the real estate market. Private risk allocations allow the parties to shift risk between themselves without diluting CERCLA liability. As argued in this note, these agreements are consistent with CERCLA’s language and legislative history.

IV. TOWARD AN ANALYSIS OF PRIVATE RISK ALLOCATION

The judicial treatment of private risk allocations creates uncertainty in real estate markets. On one hand, a court may enforce private risk allocations consistently with free market principles. On the other hand, a court may reject such agreements as permitting responsible parties to escape CERCLA liability. Without satisfactory guidance, buyers and sellers are unable to predict whether their agreements are enforceable. Reluctant to negotiate

137. Id.
138. For a discussion of the market approach relied upon by the majority decisions, see supra notes 96-98 and accompanying text.
139. See supra note 106 and accompanying text.
140. See, e.g., Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1460 (9th Cir. 1986) (“In fashioning a statute to further a federal interest, Congress seldom if ever intends to pursue that interest at any cost. Rather, Congress seeks to balance that interest against countervailing considerations, such as the utility of indemnification agreements, which it recognized in section 107(e)(1).”).
142. See supra notes 96-98, 136-39 and accompanying text.
143. See supra notes 117-19 and accompanying text.
over liability risks, and generally wary of environmental liability, buyers and sellers may hesitate to enter new real estate transactions.\footnote{144}{See Gordon C. Duus, \textit{Environmental Issues Here to Stay in Real Estate}, \textit{Crain's N.Y. Bus.}, Jan. 29, 1990 (noting that CERCLA has made real estate negotiations more complex, has caused closings to be postponed pending environmental audits, and has killed some deals altogether); Chris Foran, \textit{Deals in the Balance: In Real Estate, Environmental Risks Cloud the Art of the Deal}, \textit{The Bus. J.} \textit{Milwaukee}, May 21, 1990 (claiming that uncertainty over the environmental status of some properties has slowed many deals and killed others); \textit{New Policy Protects in Superfund Cases}, supra \textit{note} 113 (the danger of acquiring contaminated properties has reduced the number of real estate deals completed); Stranahan, supra \textit{note} 20 (noting that environmental liabilities may discourage economic activity in the areas that need it the most).} A uniform judicial stance is needed to prevent doubt and apprehension from impeding sales in the real estate market.\footnote{145}{No court or commentator has attempted to catalogue the language of private risk allocations, and a re-examination of these terms would assist in understanding their functions. While a complete catalogue is beyond the scope of this note, see supra notes 6-10 and accompanying text for a brief description of basic types of private risk allocations. In addition to the uncertainty caused by CERCLA itself, the courts may reach inconsistent conclusions when forced to interpret poorly drafted agreements. See discussion \textit{infra} part IV.B.2.} Courts should adopt a coherent analytical framework which views private risk allocations as distinct contractual mechanisms distributing the risk of CERCLA liability.\footnote{146}{Failure to recognize differences in contract language can result in considerable confusion. \textit{See}, \textit{e.g.}, Rodenbeck v. Marathon Petroleum Co., 742 F. Supp. 1448, 1455-56 (N.D. Ind. 1990) (examining whether \textit{release} can "transfer" or "shift" liability, but not interpreting related language of \textit{indemnity}).} An appropriate framework should be based on principles defining the function of private risk allocations.\footnote{147}{See infra part IV.A.} With these principles in mind, the judicial inquiry should consist of two steps: 1) the determination that private risk allocations are permitted under CERCLA; and 2) the interpretation of agreements in specific cases.\footnote{148}{See infra part IV.B.} Applying the approach suggested in this note, private risk allocations are shown to be consistent with CERCLA's language and legislative goals. Thus, the proposed analysis will assist courts and practitioners to alleviate uncertainty in real estate transactions.

A. Characteristics of Private Risk Allocation

An understanding of private risk allocations requires an examination of how these agreements function. This analysis consists of
three parts. First, courts must recognize that the common intent of private risk allocations is to distribute risk between the parties. The language of the agreements provides two ways for buyers and sellers to achieve this purpose, by active “risk shifting” or passive “risk shielding.”149 Second, courts should recognize that private risk allocations bind only the parties to the contract, not absent third parties.150 Third, because the rights of third parties are not impaired, private risk allocations shift costs between buyers and sellers without diluting underlying liability.151 With an understanding of these principles, a coherent approach to private risk allocations can be easily developed.

1. Sources of Risk and Related Responses

The purpose of private risk allocations is to distribute risk between the parties.152 From the perspective of buyer and seller,153 there are two sources of risk corresponding to the two claimants authorized under CERCLA’s provisions.154 The first source of risk is potential claims by the other party to the transaction. Both buyer and seller want to avoid liability resulting from the other party’s use of the property.155 The second source of risk is potential claims by third parties who are outside of the initial transaction. For example, the government or outside private parties, such as arrangers, transporters, neighbors, or the next generation of purchasers may bring claims.

The contractual language156 chosen for private risk allocations

149. See discussion infra part IV.A.1 (defining and discussing “risk shifting” and “risk shielding” agreements).
150. See discussion infra part IV.A.2.
151. See discussion infra part IV.A.3.
152. See supra note 4 (defining “risk” as the likelihood that a party will incur CERCLA response costs).
153. For purposes of the analysis of private risk allocations, it is essential to fix the point of reference to one party’s perspective in the transaction.
154. See discussion supra part II.A (discussing CERCLA liability provisions).
155. Seller fears that buyer will try to recover for costs incurred after seller has sold the property. Of course, seller may also wish to foist liability upon buyer. Like seller, buyer wants to avoid seller’s claims, but buyer also wishes to ensure that seller remains responsible for contamination left behind on the property. These concerns may be satisfied through private risk allocations. See Michael Dore, A Practical Guide to Environmental Indemnification Agreements, 55 DEF. COUNS. J. 297, 297 (1988) (“Whenever real property or industrial establishments are sold or transferred, purchasers may demand indemnification agreements in order to protect them from liabilities arising from prior maintenance or use of the property.”).
156. As in all contract analysis, the analysis of private risk allocations should begin
allows the parties to distribute these risks in two distinct ways, by active "risk shifting" or passive "risk shielding." From the perspective of the benefitted party, risk shifting is an offensive method, involving an affirmative shifting of risk away from itself to the other party. For example, party X could negotiate to have party Y assume all of X's liability. The primary language used for this type of allocation is the language of indemnification. Thus, X would possess an enforceable contract right to make Y pay for X's liability costs. Because one party actively assumes the other party's risk of liability, risk shifting allocates existing liability or alters exposure to third-party claims.

with the language of the agreements. See Restatement (Second) of Contracts § 202(1) (1981) ("If the principal purpose of the parties is ascertainable it is given great weight."); E. Allen Farnsworth, Contracts § 7.10, at 513 (2d ed. 1990) ("Sometimes, in the case of a written contract, the court need not look outside the writing to discern the parties' purpose."). Of course, determining the purpose of a contract based exclusively on the language is widely criticized. See, e.g., 3 Arthur L. Corbin, Corbin on Contracts § 535, at 17-21 (1960) (criticizing the frequently-expressed judicial statement that courts must construe contracts "in accordance with the plain and literal meaning of the language used"); but see John D. Calamari & Joseph M. Perillo, The Law of Contracts § 3-10, at 167 (3d ed. 1987) ("Although the Plain Meaning Rule has been condemned [by commentators] . . . it is undoubtedly still employed frequently or on occasion by the great majority of the jurisdictions in this country.").

157. For reasons of convenience, this note treats these concepts in a simplified form. In the real world, "[e]xperienced business persons, and their counsel, go to great lengths to protect against future 'surprises,' so contractual provisions regarding environmental liability can be quite sophisticated and complex." Ryan, supra note 3, at 132. An allocation may include both active risk shifting and passive risk shielding in the same contract, with only one party benefitted. For instance, "seller agrees to indemnify and hold harmless buyer." See cases cited supra note 7. The analysis becomes even more complex if buyer and seller mutually agree to indemnify and hold harmless each other, causing the burdens and benefits to flow in both directions simultaneously. While these subtleties will not be discussed, the analysis holds true in all cases.

158. This example uses the generic variables X and Y (instead of S for seller and B for buyer) to illustrate that the burdens and benefits of private risk allocations can flow in either direction, from buyer to seller or from seller to buyer. For purposes of simplicity, the example assumes a total offensive shifting of risk from X to Y. In practice, it might be more common for Y to assume only a specified portion of X's liability. For example, Y could indemnify X, but only against environmental harm caused by Y. Or Y could assume all of X's liability up to a specified dollar amount. See Dore, supra note 155, at 300 ("[a]ll parties negotiating indemnification agreements should consider proposing caps on the amount subject to indemnification"); Karlsson, supra note 6, at 54-55 (describing a variety of contractual cost-shifting options).

159. See supra note 6 (defining and discussing indemnification agreements).

160. For instance, if X gets sued by an outside third party, X would be able to recover its loss from Y by virtue of the indemnity. In general, parties will probably be unwilling to assume existing liability; however, an indemnity may also deal with the first source of risk involving potential claims between the buyer and seller. Buyer may seek to be indemnified by seller for contamination left on the property. Seller may seek an indemnity
By contrast, a *risk shielding* agreement is more defensive, involving a passive shielding against the risk of claims brought by the other person. This second method uses the language of hold harmless or release agreements. For instance, X could negotiate an agreement where Y forgoes future rights to bring a claim against X. In a risk shielding agreement, one party *relinquishes* the right to bring a claim against the other. Thus, risk shielding represents a means to deal primarily with the first source of risk between the buyer and seller.

Parties may employ risk shifting and risk shielding to limit exposure to claims brought by each other and by outside third parties. Risk shifting and risk shielding differ in that the former involves an active assumption of responsibility, while the latter involves a passive release of the right to sue. Thus, contractual language allows the parties to accommodate both offensive and defensive concerns in minimizing their exposure to risk. The third part of the analysis will further define allocations of risk, as distinguished from allocations of liability. However, it is first necessary to consider which parties are bound by the agreements.

2. Preserving Third-Party Rights

Private risk allocations impose obligations on the parties who negotiate the agreement. However, the buyer and seller cannot bind the rights of the government or other third parties, such as the next generation of purchasers. Otherwise, private risk allocations

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161. See supra notes 7, 9 and accompanying text.

162. The distinction between third-party claims and claims brought by the other party to the transaction (i.e., buyer or seller) is retained for the purpose of analytical clarity. See supra notes 153-57. One can see how this distinction may become blurred. For instance, a claim brought by a third party against Y may give Y a basis to bring suit against X. Even though the catalyst for Y's suit is a third-party claim, Y's action is classified as a claim brought by the other party to the transaction. Similarly, note that risk shifting may also perform a defensive function, effectively neutralizing claims brought by the burdened party against the benefitted party.

163. See discussion infra part IV.A.3.

164. See Dore, supra note 155, at 297 ("The federal Superfund statute explicitly provided that while indemnification agreements would not shield the contracting parties from liability to the government or injured third parties, they were enforceable as between the contracting parties."); Fitzsimmons & Sherwood, supra note 13, at 783 ("CERCLA specifically recognizes the legitimacy of liability shifting instruments as between the parties to the instrument, but only as between those parties."). For purposes of this note, the possibility of an agreement between more than two parties is not considered.
would allow the parties to escape CERCLA liability, contrary to public policy.

There is no impediment to the enforcement of private risk allocations between buyers and sellers of real estate. For example, seller (S) negotiates a release with buyer (B), providing that B releases S in exchange for a reduced purchase price. Since a release agreement is risk shielding, S has effectively shielded itself by B's relinquishing the right to bring a claim against S. Because there is valid consideration, and presumably no fraud, the agreement is enforceable as between S and B.

However, the agreement provides no protection to S against claims brought by third parties. S has shielded itself, but only against the risk of claims brought by B. If B sells the property to a second buyer (B'), B is not bound by the agreement between S and B. If B incurs response costs, B retains the option to bring a claim against either B, S, or both. The outcome would be the same if the government or an unrelated third party (e.g.,

165. For the moment, the problem is considered in the abstract, aside from the debate surrounding CERCLA § 107(e)(1). Further justifications for enforcing private risk allocations between buyer and seller are considered in part IV.A.3.

166. See CALAMARI & PERILLO, supra note 156, § 4-2, at 187 (footnote omitted) ("The essence of consideration . . . is legal detriment, that has been bargained for by the promisor and exchanged by the promisee in return for the promise of the promisor."). In this hypothetical, B promises to release S in exchange for the reduction in purchase price.

167. See id. § 4-4, at 193 (footnotes omitted) ("[E]conomic inadequacy may constitute some circumstantial evidence of fraud, duress, over-reaching, undue influence [or] mistake . . . "). Here, the reduction in purchase price is presumed to be adequate, so there is no defect in the formation of the contract.

168. See id. § 17-3 (citation omitted) ("The presumption is that the parties contract for their own benefit and not for the benefit of third parties."). Thus, under the second part of the analysis, S would be prohibited from requiring the agreement with B to be binding on all of B's "heirs and assigns." Nor could S insist that B include a release agreement to the benefit of S in B's purchase agreement with B'. Such attempts would be void as against public policy. See infra notes 172-77 and accompanying text. On the other hand, interesting scenarios develop when B and B voluntarily negotiate independent private risk allocations. Unfortunately, this note cannot analyze all the various outcomes.

169. See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988) (imposing liability for "any other necessary costs of response incurred by any other person consistent with the national contingency plan"); SARA § 113(f)(1), 42 U.S.C.A. § 9613(f)(1) (West Supp. 1992) ("Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title."); see also supra note 48 and accompanying text (discussing private causes of action).

170. As previously noted, all courts agree that private risk allocations do not bar CERCLA claims brought by the government. See supra note 52 and accompanying text. However, some cases erroneously read the majority view as enforcing private risk allocations under all circumstances. See, e.g., Danella Southwest, Inc. v. Southwestern Bell Tel. 1992]
a neighboring property owner, a transporter, etc.) were substituted for the second buyer. Thus, third-party CERCLA claimants retain their rights under the statute irrespective of the agreement between the first buyer and seller.7

As the example suggests, private risk allocations bind only the parties to the agreement and do not impose burdens on the property that will run with the land.77 In general, covenants on the property which burden successive takers are enforceable.78 However, courts do recognize an exception against the enforcement of covenants which violate public policy.79 Although free market theory supports private risk allocations generally, CERCLA policy imposes some constraint on the free market.80 Put simply, public

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171. Although the dynamics change slightly, the principle holds true if the parties choose risk shifting rather than risk shielding. If $S$ and $B_1$ negotiate an indemnification agreement, with $S$ remaining as the benefitted party, $S$ will be able to enforce the agreement and recover from $B_1$ the liability costs imposed on $S$ by $B_2$. Thus, the indemnification agreement actively shifts the risk from $S$ to $B_1$ for liability imposed by $B_2$. However, $S$ remains liable to $B_2$ regardless of the private risk allocation negotiated between $S$ and $B_1$; if $B_1$ breaches the indemnification agreement, $S$ can still be forced to pay.

172. See, e.g., Watterville Indus. v. First Hartford Corp., 124 B.R. 411 (D. Me. 1991). In Watterville, a second generation real estate purchaser faced cleanup costs imposed by the Maine Department of Environmental Protection and successfully challenged a mutual release agreement between the original seller and the first buyer of the property. The release agreement purported to bind the parties' successors and assigns. Considering whether the release constituted an encumbrance running with the land, the court stated:

> I do not find the release to be a covenant or burden that will run with the land. The promise does not touch or concern the land . . . . It is not part of an easement or conveyance . . . but a general release between the parties.

Id. at 414 (emphasis added).

173. See GERALD KORNOLD, PRIVATE LAND USE ARRANGEMENTS § 10.01 (1990) (noting that restrictive covenants meeting legal requirements "are generally considered valid and enforced by the courts").

174. Id. § 10.02. Few courts actually bar enforcement of restrictive covenants on public policy grounds, and those that do "usually base their decision on a conflict between the covenant and an express statutory provision or a long-standing common law policy." Id.; see also FARNSWORTH, supra note 156, § 5.1 ("Occasionally, . . . a court will decide that the public interest in freedom of contract is outweighed by some public policy and will refuse to enforce the agreement or some part of it on that ground.").

175. See CALAMARI & PERILLO, supra note 156, § 1-3 ("While the parties' power to contract as they please for lawful purposes remains a basic principle of our legal system,
policy requires that the rights of third parties cannot be impaired.

This restriction on freedom of contract prevents property owners from avoiding CERCLA liability altogether merely by selling contaminated property. Although current owners would appreciate this absolute protection, such an alternative would undermine the policy behind CERCLA’s liability provisions. Congress designed CERCLA to facilitate cost recovery by the government and other private parties. This right to cost recovery is a fundamental component of CERCLA’s liability scheme. While voluntary allocation of liability risks between buyer and seller may be justified, allowing parties to escape all liability to CERCLA claimants would thwart the liability provisions and impede the statute’s objectives. For this and other reasons, Congress prohibited responsible parties from escaping CERCLA liability altogether.

CERCLA’s legitimate policy objectives require that private risk allocations bind only the parties to the agreement. While private risk allocations are enforceable between the parties to such agreements, buyer and seller cannot bind the rights of subsequent generations, the government, or other third persons. Thus, the second part of the analysis shows that private risk allocations do not impair the statutory rights of third-party CERCLA claimants. As shown in the third part of the analysis, since third-party rights are protected, underlying CERCLA liability is unaffected by private

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176. See supra notes 66, 131 and accompanying text. For example, without the restriction, S could negotiate a release with B, binding B, and all other third parties. Thus, S would be shielded not only against the risk of claims imposed by B, but against the risk of liability imposed by any CERCLA claimant.

177. See, e.g., Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989) ("[O]ne of CERCLA’s key provisions . . . permits both government and private plaintiffs to recover from responsible parties the costs incurred in cleaning up and responding to hazardous substances . . . .").

178. See supra note 19 and infra notes 184-88, 232-34 and accompanying text.

179. Other policy goals would also be impaired if private risk allocations were effective to prevent third-party claims. Congress wanted to ensure that the market price of goods reflects true societal costs, including the costs of environmental response; strict liability is an effective means to distribute societal costs through traditional market mechanisms. See supra note 25 (CERCLA’s legislative history shows Congress’ intent to employ strict liability to ensure that industry bears the risks it presents to society). In addition, strict liability may serve to deter reckless conduct. See id. The private cost recovery right also supports the EPA’s policy of negotiating settlements with solvent PRP’s willing to begin cleanups. See supra note 47 (discussing EPA settlement policy).

180. The first sentence of CERCLA § 107(e)(1) leads to this conclusion. See infra text accompanying notes 197-201 (construing the first sentence of § 107(e)(1)).
risk allocations.

3. Distributing Risk Without Diluting Liability

The third part of the analysis applies principles derived from the first two parts. Because private risk allocations do not bind the rights of absent third parties, both buyer and seller remain liable to these potential CERCLA claimants. The only true impairment of rights is between the parties to the private risk allocation. Thus, private risk allocations permit buyer and seller to distribute risk between themselves; they do not allow the parties to escape underlying CERCLA liability.

There are only two possible effects of private risk allocations: 1) to prevent either buyer or seller from suing the other; or 2) to provide either party with a contractual right to reimbursement from the other. Since the agreements have no power to limit the rights of third parties, the allocation of risk only raises or lowers the probability that a party will incur costs under CERCLA. It does not prevent the actual imposition of liability by third-party CERCLA claimants.

In other words, private risk allocations transfer exposure to potential liability, not liability in fact. If the burdened party breaches the agreement or becomes insolvent, the original allocation of liability provided by the statute remains unaltered. The liability of either party to the third-party claimant remains fixed regardless of disputes between the parties over the private risk allocation. Since the parties always remain liable to third-party CERCLA claimants, buyer and seller allocate liability exposure between themselves (e.g., expected costs of third-party claims) but not underlying CERCLA liability.

181. Private risk allocations supplement CERCLA's liability structure without displacing the statute's terms, a principle illustrated by the example used in part IV.A.2 above. Since the agreement is a passive release of $S$ by $B_1$, or a shielding of $S$ from the risk of $B_1$'s claims, the agreement provides no remedy to $S$ against $B_1$ for liability costs imposed by $B_1$. However, if $B_2$ sued only $S$, $S$ would still retain her statutory right under CERCLA to recover costs from $B_1$. In this case, the release agreement bars only suits brought by $B_1$ against $S$, not $S$ against $B_1$. Of course, the parties remain free to negotiate a mutual risk shielding agreement benefitting both buyer and seller, or an agreement combining both risk shielding and risk shifting. See supra note 157 and accompanying text.

182. See supra notes 133-34 and accompanying text.

183. The conception of risk is consistent with the holdings in Mardan and Niecko recognizing that private risk allocations shift costs, not liability. See supra notes 84-85 (discussing Mardan) and 131-34 (discussing Niecko) and accompanying text.
Free market theory provides an adequate justification for any impairment of actual liability between the buyer and seller.\textsuperscript{184} By negotiating the terms of private risk allocation, buyer and seller alter the degree of risk assumed according to their unique needs and circumstances in the particular transaction.\textsuperscript{185} Under free market theory, this voluntary allocation of risk should lead to efficiency gains.\textsuperscript{186} Further, any change in position is offset by an adjustment in the purchase price equal to the value of the risk assumed. As the \textit{Mardan} court stated, "If parties have intentionally waived their right to cost-recovery, they have almost certainly received some form of consideration in exchange for their waiver that substitutes for the damages they could have otherwise collected."\textsuperscript{187} Thus, private risk allocations permit buyers and sellers to make fundamental choices about resource allocation and risk distribution. Besides benefiting buyer and seller, this private allocation of risk can also further CERCLA's goals.\textsuperscript{188}

These principles are illustrated by the example described in part two above: \( S \) sells the property to \( B_1 \), who releases \( S \) in exchange for a reduced purchase price. \( B_1 \) sells the property to \( B_2 \), and \( B_2 \) incurs response costs. If \( B_2 \) sues only \( B_1 \), \( B_1 \) is prevented from seeking contribution against \( S \) by virtue of the valid release agreement. This result is justified because \( B_1 \) assumed the risk that future claims might be brought by \( B_2 \) in exchange for a reduced purchase price. In addition, the parties may be uniquely able to allocate risk efficiently. For instance, \( B_1 \) is in a good position to

\textsuperscript{184} See Farber, \textit{supra} note 19, at 319 (the "neoclassical [economic] model supports the enforcement of contracts . . . as a means of attaining several economic goals: spreading or shifting risks, optimizing choices between present and future consumption, and eliminating disruptions caused by mistaken expectations").

\textsuperscript{185} See DEAN W. CROWELL & ROGER L. FREEMAN, NEGOTIATING REAL ESTATE TRANSACTIONS § 5.26 (Mark A. Senn ed., 1988). The authors state: "Commonly, the parties to a particular transaction will agree to some allocation of the liability for environmental conditions depending on the individual desires of the parties and the exigencies of the transaction." Id. § 5.26, at 308.

\textsuperscript{186} See supra note 19.

\textsuperscript{187} Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1459 n.4 (9th Cir. 1986).

\textsuperscript{188} It is not difficult to imagine situations where private risk allocations further CERCLA's aims. For example, \( B \) might be a large oil company able to execute cleanup more efficiently than \( S \), the individual owner of a contaminated gas station. However, due to externalities, such as the high costs of potential litigation, or for other reasons, \( B \) may be unwilling to complete the purchase unless relieved from defending against \( S \)'s claims. If \( S \) were not able to release \( B \), the transaction might never take place and the cleanup might not be completed.
determine the likelihood of selling the property to a potential future claimant, \( B_2 \). Other results would be unjustified because one party would be allowed to speculate at the other's expense. If \( B_1 \) were allowed to recover costs from \( S \), despite the release agreement, \( B_1 \) would obtain a windfall (such as a reduced purchase price) without assuming a corresponding burden.

On the other hand, the release agreement provides no basis for the parties to avoid liability to third parties. If \( B_2 \) sues only \( S \), \( S \) would still be liable to \( B_2 \) regardless of the agreement between \( S \) and \( B_1 \). Despite the allocation of risk between \( S \) and \( B_1 \), \( S \) cannot escape its underlying CERCLA liability to \( B_2 \), the government, or other third parties.\(^{189} \) The agreement permits risk distribution between buyer and seller, but it has no effect on liability to third parties. In effect, buyer and seller adjust financial responsibility between themselves without diluting CERCLA liability.

As shown by this analysis, private risk allocations distribute the risk of potential CERCLA claims between buyer and seller. Regardless of this risk distribution, however, buyer and seller remain liable to third-party CERCLA claimants. The impairment of liability rights between buyer and seller is justified by the efficiency gains realized through free market negotiations. While private risk allocations permit voluntary risk distribution between the contracting parties, they do not impair underlying liability to third parties. Thus, the agreements allow cost shifting without diluting liability. As discussed in the next section, this analysis of private risk allocations is consistent with CERCLA's language and policy goals.

**B. Two-Step Judicial Inquiry into Private Risk Allocation**

When considering whether private risk allocations are enforceable, courts and commentators should separate the analysis of justifications for such agreements from the examination of agreements in specific cases. Uncertainty over the enforceability of private risk allocations may arise from two sources. First, CERCLA's language, legislative history, and policy support conflicting assertions about whether such agreements are permissible. Second, poorly drafted private risk allocations may obscure the intent of the agreements. Besides defining the abstract function of private risk allocations, an

\(^{189}\) See *supra* note 171 (illustrating the analysis in the case of risk shifting agreements).
analytical framework should resolve the uncertainty regarding the enforcement of such agreements.

A two-step inquiry will help the courts to determine whether private risk allocations are enforceable. First, it is necessary to determine whether such agreements are permissible under CERCLA. This step requires construction of the statute based on the language, legislative history, and policy of the law. Second, courts must examine the agreements themselves to determine the intent of the parties. This step requires interpretation of the contract based on the terms and circumstances of the agreement. Both steps are important in resolving the uncertainty surrounding private risk allocations. In addition to concluding that private risk allocations are consistent with CERCLA's language and policy goals, this section offers brief observations concerning the drafting of such agreements.
1. Step One: Statutory Construction

   a. Language

   The task of statutory construction is facilitated by applying the three part analysis of private risk allocations. Consistent with the rights of third-party claimants, section 107(e)(1) prohibits attempts to escape CERCLA's liability provisions by negotiating contractual agreements. In barest form, the first sentence of the section states that no agreement or conveyance "shall be effective to transfer . . . the liability imposed under this section." In its ordinary sense, "transfer" means a passing from one to another, implying that nothing remains with the first party. The term "liability" means liability imposed under section 107(a) by the CERCLA claimant. Thus, the first sentence prohibits a party from transferring to someone else the liability which is owed to the CERCLA claimant.

   This sentence is consistent with the proposed analysis of private risk allocations. Since private risk allocations bind only the parties to the agreement, buyers and sellers remain liable to third-party claimants irrespective of the agreement between them. In this manner, private agreements allocate costs without diluting CERCLA liability. The proposed analysis upholds the intent of the first sentence to prevent transfers of underlying liability owed to the CERCLA claimant.

196. See supra part IV.A.
198. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2427 (1986) (defining transfer as verb meaning "to cause to pass from one person or thing to another"). In its legal sense, the term is often used in connection with a "transfer" of real property. See BLACK'S LAW DICTIONARY 1497 (6th ed. 1990) (defining transfer as verb meaning "[t]o convey or remove from one place, person, etc., to another; . . . specifically, to change over the possession or control of (as, to transfer a title to land)"). Because the term "transfer" may imply a concept of removal, it is stronger than the terms defined in this note as "risk shifting" or "risk shielding," which imply that the benefitted party can transfer risk but must retain liability.
200. See supra notes 84-85, 131-34 and accompanying text.
201. See supra note 66 and accompanying text.
However, from the first sentence alone, it is not clear that private risk allocations are authorized. The first sentence imposes a prohibition; it does not provide authority. Further, the sentence does not mention transfers between liable parties, rather it applies generally to transfers from potentially responsible parties. Read in isolation, this prohibition on transfers "to any other person" might seem to preclude risk allocations between buyers and sellers. However, the scope of the prohibition in the first sentence of section 107(e)(1) is determined by reference to the second sentence.

The second sentence of section 107(e)(1) limits the breadth of the first. It states: "[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." Because the term "subsection" refers to section 107(e) itself, the second sentence provides an exemption which limits the prohibition in the first sentence.

This exemption in the second sentence narrows the scope of section 107(e)(1). By virtue of the second sentence, the first sentence does not prohibit agreements to "indemnify" or "hold harmless" the benefitted party. The exemption thus applies to agreements which are risk shifting as well as to agreements which are risk shielding. Further, the exemption is not limited to agreements between particular persons; rather, the second sentence applies generally to "any agreement" benefiting "a party to the agreement." Therefore, the exemption extends to private risk allocations where buyers and sellers are parties to the agreement. Finally, the sentence mentions agreements to insure, indicating that risk distribution (i.e., cost spreading) is contemplated for inclusion within the scope of the exemption. Because private risk allocations are expressly exempted from the prohibition against liability

202. Sevack, supra note 18, at 1587 n.78 (interpreting language "owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release" in § 107(e)(1) to mean transfers from potentially responsible parties).
204. See Sevack, supra note 18, at 1588 (discussing "unavoidable conclusion" that the first sentence of § 107(e)(1) prohibits agreements between responsible parties, but reaching conclusion without consideration of second sentence).
206. See supra part IV.A.1.
207. See Sevack, supra note 18, at 1588 ("Admittedly, nothing in this [second] sentence expressly limits or defines the relative parties.").
transfers, the implication is that these agreements are authorized by the second sentence.

Section 107(e)(1) prohibits attempts to undermine CERCLA by transferring the liability owed to the CERCLA claimant. By the first sentence of the section, responsible parties are held accountable for their actions and prohibited from escaping CERCLA liability. However, the second sentence provides an exemption which narrows the scope of the first sentence. This sentence exempts agreements to allocate the costs of liability between private responsible parties. These private risk allocations are permitted because they are consistent with the intent of the first sentence to prevent responsible parties from escaping CERCLA liability. They are also of significant assistance in facilitating the conduct of real estate transactions.

b. Legislative History

The legislative history of CERCLA provides additional insight into congressional intent regarding private agreements. However, due to the manner in which CERCLA was enacted, it is likely that a minor provision such as section 107(e)(1) received inadequate legislative attention. The controversy surrounding the language of section 107(e)(1) may have been the result of political necessities and last-minute compromises in the drafting of the statute. In this context, it is likely that Congress approved section 107(e)(1) without careful forethought.

The draft proposals of section 107(e)(1) illustrate the context in which the section was enacted. The House version of section 107(e)(1), flatly prohibiting contractual transfers of CERCLA liability, indicated congressional desire to prevent parties from escaping CERCLA liability. The Senate's proposed version, on the other hand, added language expressly exempting certain real estate transactions. While inferences based on legislative history are

208. See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48.03 (5th ed. 1992) (noting that it is established practice to consider legislative history in determining the construction of a statute, especially where the statutory language is inadequate or unclear).
209. See supra note 28 (describing the legislative history behind CERCLA’s enactment).
211. See supra notes 75-77 and accompanying text (noting the paucity of public record to explain the final version of § 107(e)(1)).
212. See supra notes 64-68 and accompanying text.
213. STAFF WORKING PAPER NO. 2, supra note 71, § 4(i), at 31, reprinted in 1 LEG-
necessarily tentative, it is clear that the Senate gave special consideration to the problem of real estate transactions.

The Senate's proposed exemption for real estate transactions took effect if three conditions were met. First, the sale had to be a "bona fide" conveyance in an arms-length transaction. Second, there had to be written disclosure of all material facts and conditions relating to the property. Third, the new taker of the facility had to demonstrate adequate financial responsibility in relation to the risks assumed. The exemption for real estate was approved by the Environment and Public Works Committee and included in the bill as reported to the full Senate. However,
er, the unique concern for real estate transactions proved to be short-lived, and Senate leaders substituted the current version of section 107(e)(1) which fails to include a real estate exemption. 219

Despite the strong congressional desire to hold responsible parties accountable for CERCLA liability, 220 the proposed real estate exception indicates that Congress was not as concerned about private allocations of costs in properly functioning markets. 221 Rather, the conditions in the proposal indicate congressional intent to guard against market imperfections. For example, the requirements of notice and disclosure indicate concern to eliminate disparities in knowledge and bargaining power. 222 Moreover, the conditions of arms-length dealing and financial responsibility indicate concern to prevent sham transactions between related parties (e.g., transferring contaminated property to a willing insolvent). 223 Finally, while favoring beneficial transactions, the concern for financial responsibility indicates a concern to ensure that cleanup costs do not fall on third-party claimants, such as the government. 224 In theory, the conditions create a perfect market for the proper negotiation of private risk allocations. While the proposal indicates concern about market imperfections, it does not indicate opposition to private agreements allocating cleanup costs. 225

and accompanying text.

219. See supra note 73-74 and accompanying text.

220. See supra notes 50-51 and accompanying text.

221. Similar support for private allocations in properly functioning markets is demonstrated by congressional adoption of the “pollution credits” approach to the problem of acid rain in the 1990 Clean Air Act Amendments. See 42 U.S.C.S. § 7651 (Law. Co-op. Supp. II 1989-1991) (declaring that emissions limitations “may be met through alternative methods of compliance provided by an emission allocation and transfer system.”).

222. STAFF WORKING PAPER No. 2, supra note 71, § 4(i), at 31, reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 275; see supra note 216 and accompanying text.

223. STAFF WORKING PAPER No. 2, supra note 71, § 4(i), at 31, reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 275; see supra notes 215, 217 and accompanying text.

224. STAFF WORKING PAPER No. 2, supra note 71, § 4(i), at 31, reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 275; see supra note 217 and accompanying text.

225. The AM International court was unimpressed by the draft proposal and dismissed it as “disfavor[ing] releases except under strict conditions.” AM Int’l v. International Forging Equip., 743 F. Supp. 525, 528 (N.D. Ohio 1990); see supra note 108 and accompanying text (discussing the court’s interpretation of the proposed real estate exemption); see also Sevack, supra note 18, at 1584 n.58 (accepting AM International court’s dismissal of the Senate proposal without further analysis).

However, the AM International court did not consider whether these conditions exist in typical real estate transactions. The court ignored the evident intent of the proposed
Although not conclusive, the legislative history of section 107(e)(1) is not adverse to private risk allocations. Congress intended to prevent responsible parties from passing off their liability to subordinate entities possessing unequal bargaining power.\footnote{226} This intent justifies the first sentence of section 107(e)(1) prohibiting the transfer of liability.\footnote{227} In arms-length real estate transactions, however, Congress contemplated (at least momentarily) allowing parties to allocate liability between themselves through private agreements.\footnote{228} This provision and the current second sentence of section 107(e)(1) appear consistent with an overall congressional intent to permit risk allocation in appropriate circumstances.\footnote{229}

Despite this apparent support for private risk allocations, CERCLA’s legislative history is not conclusive. Because the process of CERCLA’s enactment was chaotic and politically charged, inferences based on legislative history alone are not sufficiently persuasive. Adequate policy justifications must be developed to support a rule governing private risk allocations under CERCLA.

c. Policy

In interpreting CERCLA’s language and legislative history, the courts have resorted to implicit and explicit policy assumptions. Echoing the concern expressed among congressional decisionmakers, the AM International court viewed private risk allocations as allowing liable parties to escape responsibility under

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228. See, e.g., STAFF WORKING PAPER NO. 2, supra note 71, § 4(i), at 31, reprinted in 1 LEGISLATIVE HISTORY, supra note 25, at 275; see supra notes 213-25 and accompanying text.
The court maintained that CERCLA's retributive justifications required those who create pollution to be held responsible for the consequences. This "polluters pay" rationale has powerful appeal, but it is not always appropriate when applied to real estate transactions. As a strict liability statute, responsible parties under CERCLA are liable without fault. Liable parties may be responsible for problems not of their own making, and innocent purchasers may be punished for failure to inspect the premises. In these circumstances, the retributive notion loses its force because the parties who are legally liable may not be actually responsible for creating pollution problems.

Nonetheless, despite these shortcomings, the imposition of strict liability is justified. By placing liability on parties to real estate transactions, Congress ensured that pollution costs are reflected in the value of real property. This liability encourages inspection and deters environmental contamination. In CERCLA, Congress maximized governmental cost recovery and internalized the cost of pollution in the real estate market. In determining whether the government or private responsible parties should pay for environmental response costs, Congress clearly chose the latter. This decision represents a legitimate allocation of CERCLA liability by Congress. While the allocation of costs to the private sector generally may be appropriate, CERCLA's liability structure does not settle the question of who should pay as between private individuals.

Statutory allocation of liability runs counter to free market justifications for allowing private parties to negotiate liability risks. In a properly functioning market, private risk allocations permit parties to apportion risks between themselves in an efficient and cost-effective manner. This private negotiating process provides certainty and stability in real estate markets and allows parties to minimize their risks before consummating a transaction. In addition, private allocation of risk may provide confidence and allow parties to enter new transactions more freely. With the current weakness in real estate markets, the benefits of private risk al-


231. 743 F. Supp. at 530; see supra note 119 and accompanying text.

232. See Fitzsimmons & Sherwood, supra note 13, at 790 ("Once [a] rough total estimate of liability is determined, the buyer is in a better position to make a judgment on the transaction. If the potential liability is less than the value of the transaction, it may still be worth going forward. If the liability is more, or equivalent with a realistic assessment of the value of the transaction, it should not be consummated.")

233. J.P. Morgan, Other Big Banks Report Net Income Gains, L.A. Times, July 14,
location may be increasingly important.

The market rationale favoring private risk allocations is consistent with the legislative intent of CERCLA. Congressional interest in the market benefits of private agreements is apparent in the language and legislative history of section 107(e)(1). This language and legislative history indicate support for private risk distribution, so long as private efforts do not impair CERCLA's effectiveness in funding cleanups of hazardous substances. A free market justification is also relied on by the judicial decisions that enforce private risk allocations under CERCLA.

2. Step Two: Contract Interpretation

After examining the language, legislative history and policy considerations of CERCLA, courts must also interpret the language of private risk allocations in specific cases. The interpretation of agreements in particular circumstances is a distinct question from whether or not such agreements are permissible. To facilitate judicial interpretation, drafters of private risk allocations should explicitly refer to environmental liabilities, preferably mentioning CERCLA by name.

Because the goal of contract interpretation is to determine the meaning of the language used, courts will look directly to the contract language to determine if environmental liabilities are included in the agreement. Courts will also examine surrounding circumstances to determine whether CERCLA-type liabilities were contemplated at the time of negotiations. Using clear expressions of intent, practitioners can assist courts in this effort. In drafting private risk allocations, counsel should specifically state the intended purpose to allocate the risk of environmental liability. Precise drafting of the contract terms will protect the parties' intent.

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1992, at D2 (noting that Chase Manhattan Corporation expects its credit loss provisions to remain at very high levels because of the continuing weakness in the economy and the depressed commercial real estate market); Terri Thompson, A Crushing Load for the Banks, U.S. NEWS & WORLD REP., June 15, 1992, at 50 (explaining that due to the "shattered" real estate market America's ailing bank industry remains in critical condition).

234. See supra parts IV.B.1.a-b (discussing the language and legislative history of § 107(e)(1)).

235. See FARNSWORTH, supra note 156, § 7.7, at 496 (discussing in detail the process of interpretation).

236. See cases cited supra note 88 (discussing judicial interpretation of various contract language).

237. See cases cited supra note 89 (discussing foreseeability of CERCLA liability in contract negotiations).
and remove uncertainty in the enforcement of such agreements.

Private risk allocations should employ the techniques of active risk shifting or passive risk shielding.\(^{238}\) The selection of appropriate contract terms is important. For instance, a boilerplate "as is" provision will likely be held ineffective against the risk of CERCLA liability.\(^{239}\) On the other hand, a release agreement may be upheld in a contract of sale, even though it is similarly buried in boilerplate language.\(^{240}\) Counsel should avoid the difficulty of selecting appropriate terms by expressly memorializing that environmental liabilities have been negotiated.

Contract interpretation is a legitimate exercise of judicial expertise. If buyers and sellers wish to allocate the risk of environmental liability, they should expressly state this intention in the purchase agreement rather than assume that this intent will be read into traditional contract language.\(^{241}\) The traditional uses of indemnification, hold harmless, "as is" and release agreements may be well understood, but these terms are less familiar to courts in the specific context of environmental liability. If the parties merely rely on traditional contract language without explicitly mentioning environ-

238. See discussion supra part IV.A.1 (discussing in detail the concepts of risk shifting and risk shielding).


240. See, e.g., FMC Corp. v. Northern Pump Co., 668 F. Supp. 1285, 1292 (D. Minn. 1987) (finding that a release "from all claims, demands and causes of action" is sufficient to release a party from CERCLA liability), appeal dismissed, 871 F.2d 1091 (8th Cir. 1989).

241. See cases cited supra notes 88-89. Of course, the parties should also expressly state their intention to have the agreement survive merger of the contract terms into the deed of sale. See generally MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 7.2, at 790-92 (4th ed. 1984) ("The effect of merger may be qualified by agreement. . . . The usual effect of merger by deed is to reduce the obligations of the seller . . . . But this is not invariable."). Where the deed is not a complete statement of the parties' obligations, extrinsic evidence of intent will usually be controlling. See, e.g., Szabo v. Superior Court, 148 Cal. Rptr. 837, 840 (Ct. App. 1978) (determining whether deed supersedes representations in purchase agreement requires interpretation of parties' intent).
mental liability, the parties' intent may be frustrated by judicial interpretation of the agreement.

Nevertheless, judicial oversight may also function to temper imperfections in the negotiating process. As with other market economies, the market for private risk allocations may be adversely affected by imperfect or improper negotiations. The potential problems include unequal bargaining power, lack of information, or misrepresentations about environmental conditions. In addition, courts have recognized that a seller's failure to disclose conditions on the property is a perversion of the negotiating process. Courts will police private risk allocations in order to limit unfairness in specific cases. However, as with other contracts, enforcement of freely negotiated private risk allocations should be recognized as the general rule.

C. Limits and Benefits of Private Risk Allocation

Parties should be fully aware of the limitations and benefits of private risk allocations. These agreements do not provide absolute protection against CERCLA liability. On the contrary, since third parties are not bound by the terms of these agreements, private risk allocations may be less worthwhile than buyers and sellers currently believe. In effect, third parties such as the government or future generations of purchasers can trump risk allocations

242. See supra note 20 (discussing the widespread use of environmental audits to provide potential buyers with information about property).
243. See CROWELL & FREEMAN, supra note 185, § 1.5, at 15 ("[W]hen the seller knows something about the property that is material and detrimental, courts may find the seller liable on a fraud theory if the seller fails to disclose the information."); see also Easton v. Strassburger, 199 Cal. Rptr. 383, 387 (Ct. App. 1984) (holding that a real estate broker was required to disclose soil problems on land sold to the plaintiffs since the soil problems were material defects known to the broker but not known to the plaintiffs); Griffith v. Byers Constr. Co., 510 P.2d 198, 203 (Kan. 1973) (holding that where a seller has knowledge of a defect in property which is not reasonably observable or discoverable by the buyer, the failure to disclose the defect constitutes fraudulent concealment).
244. See, e.g., Rodenbeck v. Marathon Petroleum Co., 742 F. Supp. 1448, 1455 (N.D. Ind. 1990) (considering plaintiff's claim that releases were contracts of adhesion and therefore unenforceable).
245. See FARNsworth, supra note 156, § 4.1, at 226 (stating that courts are reluctant to interfere with the substance of contractual agreements and will generally enforce the bargain as made, "favoring the stability or security of transactions and the protection of parties' expectations").
246. See supra notes 168-71, 189 and accompanying text (illustrating how private risk allocations do not allow the contracting parties to escape their ultimate liability under CERCLA).
negotiated between the original buyer and seller.\textsuperscript{247} Buyers and sellers of commercial property must take account of the risk represented by potential third-party claims when negotiating private risk allocations.\textsuperscript{248}

Despite these limitations, however, private risk allocations substantially assist in facilitating real estate transactions. Risk shifting provides a mechanism for the parties to minimize exposure to the risk of third-party CERCLA claims.\textsuperscript{249} While also protecting against third-party claims,\textsuperscript{250} risk shielding primarily represents a means to protect against the risk of claims by the other party to the transaction.\textsuperscript{251} These techniques provide flexibility in the negotiating process and facilitate the parties' ability to close real estate transactions successfully. Because of these benefits, private risk allocations may further CERCLA's ultimate goal of cleaning up pollution caused by hazardous substances.\textsuperscript{252}

V. CONCLUSION

The controversy surrounding private agreements to allocate CERCLA liability creates doubt and uncertainty in real estate markets. A consistent approach is needed in order to provide stability and alleviate apprehension among buyers and sellers. The analytical framework developed in this note demonstrates why these "private risk allocations" should be enforceable.

First, the agreements must be viewed as allocating the risk, or expected costs, of potential CERCLA liability claims, not the CERCLA liability itself. Private risk allocations distribute this risk by either active risk shifting or passive risk shielding. Second, private risk allocations bind only the parties to the agreement. Between these private parties, the impairment of liability rights is justified by the efficiency gains realized through free market nego-

\textsuperscript{247} See supra notes 164, 169, 177, 180 and accompanying text (explaining how and why parties to private risk allocations remain liable to third parties).

\textsuperscript{248} See supra note 232 and accompanying text (discussing how parties determine the overall value of transactions by examining potential liabilities).

\textsuperscript{249} See supra notes 160, 162 and accompanying text (describing risk shifting and noting that it may also serve a defensive function).

\textsuperscript{250} Risk shielding protects a party against suits for contribution brought by the other party to the transaction after third-party liability is imposed on that other party to the transaction. This occurs if \( B_2 \) sues \( B_1 \) who then attempts to sue \( S \), who is protected from \( B_1 \)'s suit by a risk shielding agreement. See supra notes 157, 162, 181.

\textsuperscript{251} See supra note 162 and accompanying text.

\textsuperscript{252} See supra note 188.
tions. Third, because third-party rights are not impaired, private risk allocations allow buyer and seller to allocate risk between themselves, without diluting underlying liability to other CERCLA claimants. By virtue of this analysis, the congressional concern to preserve CERCLA liability is harmonized with the policy of promoting private risk distribution.

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