

January 1994

## Environmental Law - Stanton Road Associates v. Lohrey Enterprises: The American Rule Precludes an Award of Attorneys' Fees in Private-Party CERCLA Cost Recovery Actions

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### Recommended Citation

Dennis J. Byrne, *Environmental Law - Stanton Road Associates v. Lohrey Enterprises: The American Rule Precludes an Award of Attorneys' Fees in Private-Party CERCLA Cost Recovery Actions*, 24 Golden Gate U. L. Rev. (1994).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol24/iss3/5>

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# ENVIRONMENTAL LAW

## *STANTON ROAD ASSOCIATES v. LOHREY ENTERPRISES*: THE AMERICAN RULE PRECLUDES AN AWARD OF ATTORNEYS' FEES IN PRIVATE-PARTY CERCLA COST RECOVERY ACTIONS

### I. INTRODUCTION

In *Stanton Road Associates v. Lohrey Enterprises*<sup>1</sup> and *Key Tronic Corp. v. United States*,<sup>2</sup> the Ninth Circuit addressed an issue of first impression,<sup>3</sup> whether the Comprehensive Environmental Response, Compensation, and Liability Act<sup>4</sup> (CERCLA or the Act), a federal statute providing a mechanism for cleaning up the environment, authorizes private parties to recover attorneys' fees in claims against other parties responsible for causing the pollution as "enforcement costs." The court concluded that the American Rule<sup>5</sup> (Rule) precluded such a re-

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1. *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015 (9th Cir. 1993) (per Alarcón, J., the other panel members were Sneed, J., and Canby, J.).

2. *Key Tronic Corp. v. United States*, 984 F.2d 1025 (9th Cir.) (per Alarcón, J., the other panel members were Sneed, J., and Canby, J.), *cert. granted*, 114 S. Ct. 633 (1993).

3. *Stanton Road*, 984 F.2d at 1018. *But see Idaho v. Hanna Mining Co.*, 882 F.2d 392 (9th Cir. 1989). In *Hanna Mining* the Ninth Circuit declined to award attorneys' fees to the state of Idaho in a claim to recover natural resources damages. The court stated "CERCLA does not state whether attorneys' fees may be awarded for actions for natural resources damages under 42 U.S.C. §§ 9607(a)(4)(C) and 9607(f), nor do any cases appear to resolve the question. We elect to make no award of attorneys' fees." *Id.* at 396.

4. 42 U.S.C. §§ 9601-9692 (1993).

5. The American Rule argues that each party bear all the costs incurred litigating claims. The Rule arose from public policy concerns that forcing the losing party to shoulder the burden of the prevailing party's litigation costs would needlessly limit access to courts by non-wealthy litigants, without regard to the merit of their claims. *See* section III A *infra*.

covery based on: (a) holdings of the United States Supreme Court emphasizing the Rule's prominent guiding role in American jurisprudence,<sup>6</sup> and (b) the absence of sufficiently explicit language in the statute to warrant the court's recognizing an exception to the Rule for private-party CERCLA cost recovery claims.<sup>7</sup>

In *Key Tronic*, the Ninth Circuit found the American Rule's prohibition against the awarding of the prevailing party's attorneys' fees encompassed an award for non-litigation costs incurred by the plaintiff in negotiating a consent decree with the Environmental Protection Agency (EPA) and in identifying other potentially responsible parties.<sup>8</sup> This component of the Ninth Circuit's holding differs from a recent opinion of the Tenth Circuit.<sup>9</sup>

In *Stanton Road*, in addition to reversing the award of attorneys' fees, the Ninth Circuit found error in the trial court's requiring the defendant to establish a \$1.1 million escrow account to pay the plaintiff's future cleanup costs.<sup>10</sup> CERCLA, the court held, only authorized recovery of costs already incurred, not costs to be incurred.<sup>11</sup>

Unlike other courts that have addressed the issue, the Ninth Circuit refused to consider the legislative history of the Act, or weigh CERCLA's policy goals in making its determination.<sup>12</sup> Judge Canby issued a dissenting opinion critical of the majority's analysis in this regard.<sup>13</sup>

Courts interpreting CERCLA have disagreed bitterly on the recovery of attorneys' fees.<sup>14</sup> Prior to the Ninth Circuit's hold-

6. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Runyon v. McCrary*, 427 U.S. 160 (1976).

7. *Stanton Road*, 984 F.2d at 1020; *Key Tronic*, 984 F.2d at 1027.

8. *Key Tronic*, 984 F.2d at 1027-28.

9. *FMC Corp. v. Aero Indus.*, 998 F.2d 842, 847-48 (10th Cir. 1993) *see infra* notes 185-89 and accompanying text for a discussion of the Tenth Circuit's analysis.

10. *Stanton Road*, 984 F.2d at 1021.

11. *Id.* In his dissent, Judge Canby criticized this portion of the majority's holding as counter to CERCLA's underlying remedial purpose, which, he believed, favored the use of such "creative solutions" absent an explicit statutory prohibition. *Id.* at 1025.

12. *Stanton Road*, 984 F.2d at 1019.

13. *Id.* at 1023.

14. *Compare Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991)

ing, only the Eighth Circuit had addressed whether attorneys' fees constituted recoverable response costs, reaching a conclusion opposite to that of *Stanton Road*.<sup>15</sup> The Ninth Circuit criticized the Eighth Circuit's analysis as "reading into the statute words not explicitly inserted by Congress."<sup>16</sup>

Since *Stanton Road*'s publication, the First<sup>17</sup> and Tenth<sup>18</sup> Circuits have issued holdings comporting with the Ninth Circuit's conclusion that the American Rule precludes the award of attorneys' fees in a cost recovery claim. By contrast, the Sixth<sup>19</sup> Circuit chose to adopt the Eighth Circuit's rationale and allow the public policy goals underlying CERCLA to guide its analysis. The Supreme Court has granted certiorari to resolve this split in authority among the Circuits.<sup>20</sup>

## II. FACTS

### A. *STANTON ROAD ASSOCIATES V. LOHREY ENTERPRISES*<sup>21</sup>

Lohrey operated a dry cleaning plant in Burlingame, California<sup>22</sup> on land adjacent to property owned by Stanton Road.<sup>23</sup> Lohrey used the hazardous substance perchloroethylene<sup>24</sup> (perc),

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(finding private party litigation costs recoverable) *with* *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990) (finding such costs not recoverable), *aff'd*, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993) and *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420, 1427 (D. Md. 1991) (finding the transference of fees inappropriate in a case involving corporate equals sharing CERCLA liability); *see also* *Cook v. Rockwell Int'l, Corp.*, 755 F. Supp. 1468, 1476 (D. Colo. 1991) (granting plaintiff's motion to amend a cost recovery claim based exclusively on litigation expenses incurred for the purpose of adding "at least one cognizable response cost").

15. *See generally* *General Elec. Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991); *Gopher Oil Co. v. Union Oil of California*, 955 F.2d 519, 527 (8th Cir. 1992); *United States v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, 491 (8th Cir. 1992) (awarding attorneys' fees in a CERCLA contribution, as opposed to a cost recovery, claim).

16. *Stanton Road*, 984 F.2d at 1020.

17. *In re Hemingway Transp., Inc.*, 993 F.2d 915, 933 (1st Cir.), *cert. denied*, 114 S. Ct. 303 (1993).

18. *FMC Corp. v. Aero Indus.*, 998 F.2d 842, 847 (10th Cir. 1993).

19. *Donahy v. Bogle*, 987 F.2d 1250, 1256 (6th Cir.), *cert. denied*, 114 S. Ct. 636 (1993).

20. 114 S. Ct. 633 (1993).

21. 984 F.2d 1015 (9th Cir. 1993).

22. *THE RECORDER*, December 14, 1993, at 3.

23. *Stanton Road*, 984 F.2d at 1016.

24. A commonly used dry cleaning solvent with toxic properties, perchloroethylene (perc) is subject to CERCLA regulation by Section 101(14), 42 U.S.C. § 9601(14) (1993),

and the chemical spilled into an alley separating the two properties. Eventually, the spilled perc contaminated the Stanton Road property. The Associates brought an action seeking declaratory relief and response costs<sup>25</sup> under CERCLA and various state causes of action, including trespass, negligence and nuisance.<sup>26</sup>

Stanton Road introduced unrefuted evidence that the cleanup of the environmental contamination would cost a minimum of \$1,100,000.<sup>27</sup> Consequently, the trial court awarded Stanton Road over \$460,000 in CERCLA response costs, combined with state law damages, and \$126,000 in attorneys' fees incurred in pursuing the claim.<sup>28</sup> In addition, the court ordered Lohrey to establish an escrow account for \$1,100,000 to finance the cleanup of Stanton Road's property.<sup>29</sup>

As constructed, the defendants exercised no control over the escrow account other than to monitor expenditures. On achieving "all relevant regulatory cleanup levels and requirements," any balance remaining in the fund was to be refunded to Lohrey.<sup>30</sup> In response to an inquiry from the Ninth Circuit, the trial court stated that the escrow account was ordered under the authority of both CERCLA and state law.<sup>31</sup>

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which incorporates by reference chemicals regulated under a number of other federal environmental statutes. See *infra* note 93. Perc is subject to federal regulation as: (1) a listed hazardous waste under Section 3001 of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (1993), (2) a toxic pollutant listed under Section 307 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1993), and (3) a hazardous air pollutant under Section 112 of the Clean Air Act, 42 U.S.C. §§ 7401-7671 (1993). Perc is also recognized as a carcinogen and subject to regulation in California under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop 65), CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.13 (West 1993), which prohibits the discharge of a listed chemical in sources of drinking water or the knowing and intentional exposure of a person to a listed chemical absent a clear and reasonable warning.

25. See text accompanying footnotes 39 and 120, *infra*.

26. *Stanton Road*, 984 F.2d at 1016.

27. *Id.* at 1017.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

B. *KEY TRONIC CORP. v. UNITED STATES*<sup>32</sup>

Both Key Tronic and the United States Air Force disposed of chemical wastes at a disposal site in Colbert, Washington.<sup>33</sup> In 1980, the Washington Department of Ecology discovered contamination in drinking water wells surrounding Colbert and, in conjunction with the EPA, initiated cleanup efforts. The regulatory agencies also sought to recover their cleanup costs from Key Tronic and the Air Force.<sup>34</sup>

Both Key Tronic and the Air Force entered consent decrees with the EPA.<sup>35</sup> Key Tronic's arrangement required the payment of \$4.2 million in response costs to the EPA. The Air Force paid \$1.45 million for the cleanup of Colbert.<sup>36</sup>

Key Tronic brought an action against the Air Force to recover costs under CERCLA.<sup>37</sup> Specific components of Key Tronic's claim included: (a) the right to contribution against the Air Force for Key Tronic's \$4.2 million consent decree payment, and (b) \$1.2 million in response costs Key Tronic incurred prior to its settlement with the EPA.<sup>38</sup> Key Tronic contended that it had incurred five different types of response costs consisting of: (1) remediation costs at the site prior to the EPA's involvement; (2) attorneys' fees expended trying to identify other potentially responsible parties (PRP's); (3) attorneys' fees incurred in negotiating the terms of the consent decree with the EPA; (4) attorneys' fees for the present action; and (5) prejudgment interest.<sup>39</sup>

The district court dismissed Key Tronic's contribution claim on the ground that it was barred by the Air Force's consent decree with the EPA.<sup>40</sup> The court concluded that CERCLA section 122(g)(5)<sup>41</sup> negated any right to contribution from a

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32. 984 F.2d 1025 (9th Cir.), *cert. granted*, 114 S. Ct. 633 (1993).

33. *Id.* at 1026.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Key Tronic*, 984 F.2d at 1026.

38. *Id.*

39. *Id.*

40. *Id.* at 1026-27.

41. 42 U.S.C. § 9622(g)(5) (1993) states in pertinent part: "[a] party who has resolved its liability to the United States under this section shall not be liable for claims

party that had resolved its liability to the United States.<sup>42</sup> The court refused, however, to dismiss Key Tronic's \$1.2 million response cost claim. Such a claim, the court emphasized, arose from the authority of Section 107(a)(4)(B)<sup>43</sup> and was not barred by the "contribution protection" derived from the EPA consent decree.<sup>44</sup> Subsequent to the trial court's holding, the parties resolved their differences except those pertaining to Key Tronic's claim for attorneys' fees and prejudgment interest. The district court awarded both to Key Tronic and the Air Force appealed to the Ninth Circuit. The Air Force's appeal, however, was limited to the issue of whether CERCLA authorizes the recovery of attorneys' fees by private-party cost recovery claimants.<sup>45</sup>

### III. BACKGROUND

#### A. THE AMERICAN RULE

The American Rule states that, absent explicit congressional authorization, attorneys' fees are not a recoverable cost of

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for contribution regarding matters addressed in the settlement."

The court may have cited the wrong authority to support its holding, however. Section 122 was incorporated into CERCLA with the Superfund Amendments and Reauthorization Act of 1986 (SARA) and applies only to de minimis settlements. It is difficult to conceive of a consent decree imposing a \$1.45 million payment as a de minimis settlement. In any event, the discrepancy may be only of academic interest as Section 113(f)(2), 42 U.S.C. § 9613(f)(2) (1993), which was also incorporated into CERCLA with the passage of SARA, provides an identically worded protection from contribution claims to parties settling with the United States, without regard to the scope of the controversy.

CERCLA's contribution claim protection provisions reflect congressional recognition that settlements with potentially responsible parties (PRP's) are the best means of avoiding the needless expenditure of limited Superfund monies while ensuring a timely cleanup response. The immunity from contribution liability "provides the carrot to coax parties into settling." *Transtech Indus. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1087 (D. N.J. 1992), *appeal dismissed*, 5 F.3d 51 (3d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3410 (Dec. 14, 1993). *See generally* Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1537 (1986); Dennis J. Byrne, Note, *Jones-Hamilton Co. v. Beazer Materials: Chemical Supplier "Arranges" for CERCLA Liability*, 23 GOLDEN GATE U. L. REV. 213, 227-30 (1993) (providing an historical review and analysis of the right to contribution CERCLA grants liable parties).

42. *Key Tronic*, 984 F.2d at 1026-27.

43. 42 U.S.C. § 9607(a)(4)(B) (1993) states in pertinent part: "any person . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan."

44. *Key Tronic*, 984 F.2d at 1027.

45. *Id.*

litigation.<sup>46</sup> The Rule stands in contrast to the English Rule which holds that the loser must pay the winner's attorneys' fees in order to make the winner whole.<sup>47</sup> The American Rule evolved, at least in part, to counter the perceived chilling effect that fee shifting can have on potential plaintiffs.<sup>48</sup> In the Rule's absence, a potential litigant may think twice before commencing an action, particularly against a governmental or large corporate entity.<sup>49</sup> The Rule, combined with contingent fee arrangements, grants potential plaintiffs relatively easy access to the courts.<sup>50</sup>

Well-established exceptions to the Rule have arisen from the equitable power of courts.<sup>51</sup> The "Common Fund Exception" applies an unjust enrichment theory to allow an award of attorneys' fees when litigation results in the creation of a specific monetary fund in which non-parties may share.<sup>52</sup> Subtracting the fee award from the total fund and awarding the fee to the plaintiffs and their attorneys spreads the burden of financing the litigation among all who share in the fund's benefits.<sup>53</sup>

The "Substantial Benefit Exception" also arose from unjust enrichment principles but, unlike the common fund exception, is applicable where non-pecuniary benefits are derived for parties and non-parties alike.<sup>54</sup> The substantial benefit exception is commonly applied in shareholder derivative litigation in recognition that all shareholders benefit from the action.<sup>55</sup>

A final non-statutory exception to the American Rule may be recognized when a losing party "acts in bad faith, vexatiously, or for oppressive reasons."<sup>56</sup> However, the fact that a plaintiff

46. *Runyon v. McCrary*, 427 U.S. 160, 185 (1976).

47. See 1 KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 13.02 (Matthew Bender 1993).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* § 13.03.

52. *Id.* § 13.03(1).

53. See, e.g., *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166-67 (1939).

54. MANASTER & SELMI, *supra* note 47, § 13.03(2).

55. See, e.g., *Mills v. Electric Auto-Lite*, 396 U.S. 375, 390-97 (1970); *Hall v. Cole*, 412 U.S. 1, 5-9 (1973) (upholding the award of attorneys' fees to a former union member whose action benefitted all members by establishing certain rights of free speech within the union).

56. *F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974).



prevails on a claim, standing alone, does not establish a basis for imposing the “penalty assessment” of having to pay the plaintiff’s litigation costs.<sup>57</sup>

In the 1960’s and 1970’s, a number of important federal statutes expressly authorized courts to award attorneys’ fees to prevailing parties.<sup>58</sup> This practice reflected congressional awareness that private actions facilitate a law’s enforcement and thereby further the underlying federal interest.<sup>59</sup> The practice became known as the “Private Attorney General Doctrine.”<sup>60</sup>

Fee shifting provisions were incorporated into a number of federal environmental statutes.<sup>61</sup> Nevertheless, in the 1970’s, public interest lawyers attempted to expand the scope of equitably-based exceptions to the American Rule and acquire attorneys’ fees as private attorneys general for actions enforcing environmental statutes that did not explicitly grant an award of litigation costs.<sup>62</sup> Claimants argued that as a practical matter, private enforcement of federal environmental laws depended on the availability of court-awarded fees.<sup>63</sup> The plaintiffs in such actions typically had little or no personal financial stake in the outcome. Moreover, the remedy sought was frequently some manner of injunctive relief, thereby precluding a contingent fee arrangement. Furthermore, proponents argued, unjust enrichment principles favored such a fee shift because the community as a whole benefitted if the plaintiffs prevailed.<sup>64</sup>

In *Alyeska Pipeline Co. v. Wilderness Society*,<sup>65</sup> the United States Supreme Court restricted further expansion of the private attorney general doctrine. An award of attorneys’ fees, the

57. *Runyon*, 427 U.S. at 183.

58. See, e.g., the Freedom of Information Act, 5 U.S.C. § 552(a) (1993); the Fair Housing Act of 1968, 42 U.S.C. § 3613(c)(2) (1993).

59. See 1 MANASTER & SELMI, *supra* note 47, § 13.03(3)(b).

60. *Id.*

61. See, e.g., the Endangered Species Act, 16 U.S.C. § 1540(g)(4) (1993); the Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (1993); the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (1993); the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e) (1993); and the Clean Air Act, 42 U.S.C. § 7604(d) (1993).

62. See MANASTER & SELMI, *supra* note 47, § 13.03(3)(b).

63. *Id.*

64. *Id.*

65. 421 U.S. 240 (1975).

Court declared, must be based on explicit statutory authority.<sup>66</sup> Courts were not to imply the authority for such an award due to the fact that Congress anticipated that private actions would play a substantial role in enforcing a law.<sup>67</sup>

The Court emphasized that the American Rule was “deeply rooted in our history and in congressional policy.”<sup>68</sup> Furthermore, the Court pointed out, rather than repudiate the Rule, Congress had fashioned “specific and explicit provisions for the allowance of attorneys’ fees under selected statutes granting or protecting various federal rights.”<sup>69</sup> Such a determination, the Court declared, was a prerogative of Congress, not the judiciary.<sup>70</sup> In summary, the Court stated:

[C]ourts are not free to fashion drastic new rules with respect to the allowance of attorneys’ fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the court’s assessment of the importance of the public policies involved in particular cases.<sup>71</sup>

## B. LEGISLATIVE HISTORY AND PURPOSE OF CERCLA

Since its enactment in 1980, CERCLA has been the subject of considerable criticism from courts and commentators.<sup>72</sup>

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66. *Id.* at 269.

67. The Court stated:

It is true that . . . Congress has opted to rely heavily on private enforcement to implement public policy and allow counsel fees so as to encourage private litigation. . . . But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys’ fees whenever the court deems the public policy furthered by a particular statute important enough to warrant the award.

*Id.* at 263.

68. *Id.* at 271.

69. *Id.* at 260.

70. “It is apparent that the circumstances under which attorneys’ fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.” *Id.* at 262.

71. *Id.* at 269.

72. *See, e.g., Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992) (“In keep-

CERCLA was enacted to address perceived inadequacies in the Resource Conservation and Recovery Act<sup>73</sup> (RCRA), which Congress conceived as a regulatory tool to ensure the proper management of hazardous waste.<sup>74</sup> The legislation, however, failed to account for abandoned hazardous waste sites.<sup>75</sup> Another deficiency perceived in RCRA was the absence of a government funding source for addressing contaminated sites.<sup>76</sup> RCRA relied exclusively on the availability of a financially responsible owner.<sup>77</sup> Congressional action was spurred by 1979 estimates of the EPA that from 30,000 to 50,000 inactive hazardous waste sites existed throughout the United States, 1,000 to 2,000 of which were believed to present a serious risk to public health.<sup>78</sup>

By enacting CERCLA, Congress intended to “establish a comprehensive response and financing mechanism to abate and control the vast problems with abandoned and inactive hazardous waste disposal sites.”<sup>79</sup> The Act’s purpose was to ensure a rapid recovery of government funds expended in cleanup efforts and to induce persons responsible for creating contaminated sites to clean them up voluntarily.<sup>80</sup> To effect this purpose, the

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ing with its notorious lack of clarity, CERCLA leads us down a convoluted path . . . .”); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988) (“It is not surprising that, as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues . . . .”), *cert. denied*, 488 U.S. 1029 (1989); *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) (“CERCLA is not a paradigm of clarity or precision.”); *Chemical Waste Mgmt. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1293 (E.D. Pa. 1987) (“[I]t is debatable whether any provision of CERCLA is clear . . . .”).

73. 42 U.S.C. § 6901-6992 (1993).

74. *94th Congress Wrap-Up: Much Accomplished, Many Issues Left for the 95th Congress*, 7 ENVTL. L. REP. 10005, 10008 (1977); see also, *The Environment - The President's Message to the Congress*, 7 ENVTL. L. REP. 50057, 50059 (1977) (“The Resource Conservation and Recovery Act, passed in 1976, gave the Environmental Protection Agency the authority it needs to regulate hazardous wastes and to assure the safe disposal of other residues.”).

75. H.R. REP. No. 1016, 96th Cong. 2d Sess. (1980), reprinted in 5 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125 (1980); see also Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 61-62 (1987) (“RCRA, which is intended to control hazardous waste from ‘cradle to grave,’ is a more focused piece of legislation than CERCLA. RCRA’s primary concern is with active solid waste facilities rather than hidden environmental contamination.”).

76. H.R. REP. No. 1016, 96th Cong., 2d Sess. (1980), reprinted in 5 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125 (1980).

77. *Id.*

78. *Id.* at 6120.

79. *Id.* at 6125.

80. *Id.* at 6120.

legislation created a strict liability federal cause of action which courts have construed as applicable to both active and abandoned sites.<sup>81</sup>

Under CERCLA, the President, usually acting through the EPA Administrator, is authorized to take necessary remedial actions at inactive hazardous waste sites that present unreasonable risks to public health or the environment.<sup>82</sup> The Act grants the President authority to order a responsible party to take remedial actions, establishes a cost recovery mechanism for government funds expended in the effort, and provides sanctions against a party refusing to comply with such orders.<sup>83</sup>

The legislation created a so-called "Superfund" to finance cleanup operations.<sup>84</sup> In common parlance, CERCLA is known as the federal "Superfund Act" in recognition of this funding mechanism.<sup>85</sup> The Superfund is financed through a combination of appropriations, industry taxes, and cost recovery actions.<sup>86</sup>

CERCLA is recognized as a remedial statutory scheme necessitating a liberal construction by interpreting courts.<sup>87</sup> The liability imposed is not intended to be punitive.<sup>88</sup> Among the

81. See *Chemical Waste Mgmt. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 (E.D. Pa. 1987) (emphasizing 42 U.S.C. § 9601(20)(A)'s inclusion of "abandoned" within the statutory definition of "owner or operator").

82. H.R. REP. NO. 1016, 96th Cong. 2d Sess. (1980), reprinted in 5 U.S. CODE CONG. & ADMIN. NEWS 6119, 6131 (1980).

83. *Id.* at 6133; see also 2 KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 50.51(3) (Matthew Bender 1993) ("Although issuance of cleanup orders under CERCLA has to date been somewhat rare, the penalty for disobedience of such an order is severe — a fine of up to \$25,000 per day of violation. Furthermore, pre-enforcement judicial review of a cleanup order is generally prohibited by CERCLA [Section 113(h)].").

84. Section 101(11), 42 U.S.C. § 9601(11) (1993).

85. 2 KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 50.51(1) (Matthew Bender 1993).

86. *Id.*

87. See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.* 805 F.2d 1074, 1081 (1st Cir. 1986) ("CERCLA is basically a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes.").

88. See Jane DiRenzo Pigott & Zemeheret Bereket-Ab, *Status of Indemnity Agreements Under CERCLA Section 107(e)*, 6 TOXIC L. REP. (BNA) 1351, 1355 (1992); see also Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1537 (1986) ("The purpose of the statute is not to punish defendants but to ensure that waste sites are cleaned up.").

Act's most important goals are the encouragement of voluntary cleanup efforts or, in the alternative, the reimbursement of government funds expended in addressing contaminated sites.<sup>89</sup> The EPA views inducing voluntary cleanup actions as its primary goal.<sup>90</sup> Courts applying CERCLA have cited two primary legislative purposes underlying the Act: to give governmental agencies the tools for prompt and effective responses to such problems and to force those responsible for creating the pollution to bear the costs of remedying the contamination.<sup>91</sup>

CERCLA was enacted as a last-minute compromise between three competing bills.<sup>92</sup> The Act includes by reference within its statutory definition of hazardous substance a number of chemicals regulated under other federal environmental laws at the time of its enactment.<sup>93</sup> Courts have applied common law doc-

89. DiRenzo Pigott & Bereket-Ab, *supra* note 88, at 1355; *see also* H.R. REP. NO. 1016, 96th Cong., 2d Sess. (1980), *reprinted in* 5 U.S. CODE CONG. & ADMIN. NEWS 6119, 6132 (1980) (emphasizing that the apportionment of costs among responsible parties will result in a more rapid cleanup response and preclude a party having to spend more funds to comply with a cleanup order than their ultimate liability would justify).

90. *Environmental Protection Agency Memorandum on Cost Recovery Action Under the Comprehensive Environmental Response, Compensation, and Liability Act (August 26, 1983)*, *reprinted in* 41 ENVTL. REP. FEDERAL LAWS (BNA) 2865 (1983) (EPA Memorandum).

91. *United States v. Aceto Agric. Chem. Corp.*, 699 F. Supp. 1384, 1387 (S.D. Ohio 1988), *aff'd*, 872 F.2d 1373 (8th Cir. 1989); *accord United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

92. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 365 n.8 (1986) (identifying the competing bills as H.R. 85, H.R. 7020 and S. 1480. The note provides a detailed description of the legislative process involved in integrating the three bills).

93. Section 101(14), 42 U.S.C. § 9601(14) (1993), states, in pertinent part:

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

*Id.*

trine to fill gaps left in the Act's statutory framework.<sup>94</sup>

### C. THE SCOPE OF CERCLA LIABILITY

Courts have perceived the Act as "casting an exceedingly broad, strict-liability net."<sup>95</sup> Facility owners,<sup>96</sup> prior owners,<sup>97</sup> successor corporations,<sup>98</sup> corporate officers who have been in a

94. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988) ("The meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement the statute."), *cert. denied*, 488 U.S. 1029 (1989); *see also* *United States v. Aceto Agric. Chem. Corp.*, 699 F. Supp. 1384, 1390 (S.D. Ohio 1988) ("Where the statutory language and legislative history of CERCLA are inconclusive and the legislative history shows that the common law was intended to fill such gaps, the common law is a proper source of guidance."), *aff'd*, 872 F.2d 1373 (8th Cir. 1989).

95. *AM Int'l v. International Forging Equip.* 743 F. Supp. 525 (N.D. Ohio 1990), *aff'd in part, rev'd in part*, 982 F.2d 989 (6th Cir. 1993). The district court stated:

The scope of CERCLA liability serves to encourage private remedial initiative as to existing sites, to discourage careless disposition of toxic wastes, and not least, to ensure vigilance of those whose proximity to generators of toxic substances creates a potential for liability, who also occupy the most advantageous positions from which to monitor these entities.

*Id.* at 527.

96. *New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985).

97. *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987); *see also* *Nurad Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir.) (imposing liability on an equitable owner who had possessed the property for a short time and never used the leaking underground tanks that caused the contamination problem), *cert. denied*, 113 S. Ct. 377 (1992). The court stated:

We do not think, however, that the word "owned" is a word that admits of varying degrees. Such equitable considerations as the duration of ownership may well be relevant at a later stage of the proceedings when the district court allocates response costs among the liable parties, but we reject any suggestion that a short-term owner is somehow not an owner for purposes of [42 U.S.C. ]§ 9613(f)(1).

*Id.* at 844. The *Nurad* court emphasized that, "[A] defendant need not have exercised actual control of a facility to qualify as an operator under [Section] 9607(a)(2), so long as the authority to control the facility was present." *Id.* at 840.

98. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). Celotex acquired the interests of a company that sold a contaminated property to the plaintiff prior to Celotex's acquisition. Despite Celotex's lack of operation or control of the contaminated facility, the court determined that corporate successors and survivors of corporate consolidations assume the debts and liabilities of the predecessor company, including the predecessor company's CERCLA liability. The court stated, "[t]he costs associated with cleanup must be absorbed somewhere. . . . Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost." *Id.* at 91-92. *See also* *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1266, 1268-9

position to control waste disposal decisions,<sup>99</sup> and those who have arranged for the disposal of hazardous substances at a given facility<sup>100</sup> have confronted CERCLA liability. Courts readily impose joint and several liability when more than one potentially responsible party is involved and the contaminants for which each is responsible have commingled or cannot be addressed adequately on an individual basis.<sup>101</sup>

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(E.D. Va. 1992) (extending CERCLA liability to the inheritor of a sole proprietorship named in a suit for contribution). *But see* United States v. Mexico Feed and Seed Co., 980 F.2d 478 (8th Cir. 1992) (overturning CERCLA liability imposed on a successor corporation where the defendant and its predecessor were two distinct companies in competition with one another prior to the acquisition and where the predecessor failed to disclose the nature of its pending CERCLA liability prior to the transaction).

In United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir.), *cert. denied*, 498 U.S. 1046 (1991), CERCLA liability was extended to a secured creditor with imputed authority to control the waste management practices of the debtor. The court stated;

[A] secured creditor may incur [42 U.S.C.] Section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor to actually involve itself in the day-to-day operations of the facility in order to be liable — although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous wastes. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chooses. .

*Id.* at 1557-1558. Subsequent to *Fleet Factors*, the EPA issued a regulation (57 Fed. Reg. 18,344 (April 29, 1992) (codified in 40 C.F.R. § 300.1100) pertaining to the lender liability exemption of CERCLA (42 U.S.C. § 9601(20)(A) (1993) ("Owner . . . does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest . . .")). Under the EPA rule, "participation in the management" generally means that the holder is actually participating in the management or operational affairs of the debtor and does not extend to the mere capacity to exert influence. *See* 40 C.F.R. § 300.1100(b); *see also* Kurt Burkholder, *The Lender Liability Rule Under CERCLA*, 7 NAT'L ENVTL. ENFORCEMENT J. 3 (1992) (providing an in-depth discussion of the new EPA regulation). *But see* Kelly v. Environmental Protection Agency, 15 F.3d 1100 (DC Cir. 1994) (finding that the EPA exceeded its statutory authority in promulgating a regulation purporting to define the scope of liability imposed by CERCLA).

99. United States v. Northeastern Pharmaceutical Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

100. *See, e.g.*, Jones-Hamilton Co. v. Beazer Materials & Serv., Inc., 959 F.2d 126 (9th Cir. 1992); New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984).

101. *See, e.g.*, United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

Commentators ascribe numerous advantages to a broad interpretation of CERCLA liability.<sup>102</sup> Strict liability represents the best means of replenishing expended Superfund monies, encouraging the safer handling and disposal of wastes and facilitating the internalization of waste disposal costs within the industries that have reaped the financial benefits of using chemicals.<sup>103</sup> This enterprise liability rationale has been upheld by courts and the EPA as comporting with the legislative intent underlying CERCLA.<sup>104</sup>

The Superfund Amendment and Reauthorization Act (SARA) was enacted in 1986. Courts have described SARA as a comprehensive overhaul of CERCLA.<sup>105</sup> The expansion in the definition of "response" in Section 101(25) to include "enforcement activities related thereto" was one of the amendments SARA incorporated into CERCLA.<sup>106</sup> The interpretation of this provision lies at the heart of the controversy between the Circuits.

#### D. COST RECOVERY ACTIONS UNDER CERCLA

CERCLA provides for recovery claims by either government agencies or private individuals who have incurred costs cleaning up contaminated sites.<sup>107</sup> Recoverable costs include any "not in-

102. Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1517 (1986).

103. *Id.*

104. *United States v. Aceto Agric. Chem. Corp.*, 699 F. Supp. 1384 (S.D. Ohio 1988), *aff'd*, 872 F.2d 1373 (8th Cir. 1989).

105. *See, e.g., Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I. 1989).

106. H.R. REP. No. 253, 99th Cong., 1st Sess. (1985), *reprinted in* 4 U.S. CODE CONG. & ADMIN. NEWS 2835, 2848-49 (1986).

107. Section 107(a), 42 U.S.C. § 9607(a) (1993) states:

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

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or



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consistent with the National Contingency Plan"<sup>108</sup> (NCP) for a government agency or Indian tribe claimant,<sup>109</sup> or any necessary costs incurred "consistent with the NCP" for private individuals.<sup>110</sup> The importance of this distinction is that a government claimant need only document that its expenditures were not inconsistent with the NCP<sup>111</sup> while private parties bear the burden of both pleading and proving consistency with the NCP.<sup>112</sup> Despite the disadvantage private parties have in bringing CERCLA actions relative to government claimants, the private suit provisions of the Act serve to promote settlements and thereby conserve the resources of the Superfund which alone is inadequate

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

*Id.*

108. Promulgated by the EPA, the National Contingency Plan (NCP) is a set of regulations establishing procedures and standards for responding to releases of hazardous substances. The Plan is codified in 40 C.F.R. § 300; 47 Fed. Reg. 31,180 (July 16, 1982).

109. Section 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1993) ("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 . . . .").

110. Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1993) ("Any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . ."). *Stanton Road and Key Tronic* concerned cost recovery claims brought under the authority of this provision.

111. *EPA Memorandum, supra* note 90, at 2864; *Developments in the Law: Toxic Waste Litigation, supra* note 41, at 1501.

112. *See County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1514 (10th Cir. 1991). The court upheld the dismissal of a claim for cost recovery against a former owner of a contaminated landfill. The plaintiff's failure to provide an opportunity for public comment on the response measures taken, as required by the NCP, negated any right to cost recovery from the former owner. However, in dicta the court recognized the validity of an action seeking a declaratory right to recover future response costs, providing that such costs are incurred in a manner consistent with the NCP. *Id.* at 1513. *But see Donahey v. Bogle*, 987 F.2d 1250, (6th Cir.), *cert. denied*, 114 S. Ct. 636 (1993). In *Donahey*, the Sixth Circuit found that although consistency with the NCP was a necessary element for the recovery of remedial costs, it would not necessarily follow that strict consistency is required for the recovery of monitoring or investigative costs. *Id.* at 1255. *See also* William B. Johnson, *Application of Requirement in § 107(a) of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.S. § 9607(a)) That Private Cost-Recovery Actions Be Consistent With The National Contingency Plan*, 107 A.L.R. FED 563 (1992) (providing an in-depth discussion of the issue).

to address a problem of national scope.<sup>113</sup> Hundreds of cost recovery actions have been filed since the Act's enactment in 1980.<sup>114</sup>

The elements of a CERCLA cost recovery action include:

1) the contaminated site fits within the definition of facility as stated in Section 101;

2) a release or threatened release of a hazardous substance has occurred at the facility;

3) the release or threatened release caused the claimant to incur response costs; and

4) the defendant falls within at least one of the four categories of liable persons described in Section 107(a).<sup>115</sup>

The cost recovery provisions of CERCLA may provide a means of relief in states where no comparable right is available under state law. The California Hazardous Substance Account Act<sup>116</sup> is the state equivalent of CERCLA. This law, however, does not provide for private cost recovery actions.<sup>117</sup>

113. See *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 573 (6th Cir. 1991) ("This case, even though it involves over \$300,000, is but a pimple on the elephantine carcass of the CERCLA litigation now making its way through the court system."); MANASTER & SELMI, *supra* note 85, § 50.51(1):

[T]he Superfund is incapable of adequately addressing even the presently known waste sites. The \$8.5 billion [fund available] represents less than 3 percent of the \$300 billion that some sources estimate the cleanup of these sites will cost. Rather, the Superfund is designed chiefly as a standby mechanism in case a site is not addressed by those parties CERCLA designates as liable for the cleanup.

*Id.* See also Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 34 (1987) ("Unfortunately, \$8.5 billion will not put more than a modest dent in the contamination problem nationwide."); *Developments in the Law: Toxic Waste Litigation*, *supra* note 41, at 1497 n.69 (emphasizing that government savings in private party cleanups are realized primarily through the reduction in administrative costs and the increased time value of Fund money).

114. See 4 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES*, § 8.11(A) (West 1992) ("[B]illions of dollars in cleanup costs have changed hands and hundreds of billions of dollars in potential liabilities are rebounding through the insurance system.").

115. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1379 (8th Cir. 1989).

116. CAL. HEALTH & SAFETY CODE §§ 25300-25395 (West 1993).

117. DANIEL P. SELMI & KENNETH A. MANASTER, *STATE ENVIRONMENTAL LAW*

## E. ENFORCEMENT ACTIVITIES

The core of the dispute between the Circuits regarding the availability of attorneys' fees as recoverable response costs arises from the Act's notoriously imprecise drafting.<sup>118</sup> CERCLA Section 101(25)<sup>119</sup> defines the terms "respond" or "response" as "re-

§ 9.02(1)(C) (Clark, Boardman, Callaghan 1991); see also Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 65 (1987) ("Unlike the federal Superfund, there is no private right of action under the California Superfund Law. This omission has minimal practical impact on PRP's however, because the federal Superfund provides a response cost recovery right for any site cleaned up under the state law.")

Hingerty's blanket statement fails to consider two significant features of the state law: the broader scope of materials falling within the definition of "hazardous substance" under the state law and that the authority of the state law can only be initiated by a government agency. Section 25363(e) of the state Health & Safety Code (Code) grants a right to persons incurring response costs to join other responsible parties or, in the alternative, to bring a subsequent claim for contribution against other responsible parties. However, the claimant's liability must arise from an abatement order issued by the state Department of Health Services under the authority of Section 25358.3 of the Code.

The state act defines "hazardous substance" in Code Section 25316 which, in addition to the CERCLA definition, incorporates by reference Section 25117, the Code's definition of hazardous waste. Subsection (b) of Code Section 25117 states, "Hazardous waste includes, but is not limited to RCRA hazardous waste." It is therefore possible for liability under the state act to attach for environmental contamination not subject to CERCLA liability. The significance of this disparity between the state and the federal laws is that a potentially responsible party subject to liability only under the state act has no incentive to pursue a voluntary cleanup with the expectation of receiving cost recovery from other responsible parties. Courts have recognized the value of this mechanism as furthering the goals of CERCLA. See, e.g., *County Line Inv. Co. v. Tinney*, 937 F.2d 1508, 1513 (10th Cir. 1991). In his paper, Hingerty makes reference to the powerful force CERCLA's private cost recovery provision contributes toward achieving the Act's purpose by encouraging private environmental cleanups.

It is doubtful that the Environmental Protection Agency, with its national concerns and limited resources, would use the Superfund to clean up a site with only marginally hazardous amounts of contamination. However, a private right of action under CERCLA might be used to recover cleanup costs at more modestly contaminated sites cleaned up by private parties. Private parties have frequently used the private right of action to recover the costs of cleaning up contaminated sites that did not appear on the federal priorities list. The possibility of such private actions gives practical import to the broad definition of CERCLA facilities, despite the unlikelihood of a government action at many of these facilities otherwise.

Hingerty, *supra* at 46.

118. See, e.g., *HRW Sys. v. Washington Gas Light Co.*, 823 F. Supp. 318, 346 (E.D. Va. 1993) ("Once again, the language in which Congress chose to express itself in this area was less than precise. Once again, the Court is forced to attempt to interpret the statute with little more than the dowsing-rod of legislative intent.").

119. 42 U.S.C. § 9601(25) (1993).

move, removal, remedy and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto."<sup>120</sup> The statute provides detailed descriptive definitions of the terms "remove" or "removal"<sup>121</sup> and "remedy" or remedial action,<sup>122</sup> but does not define the term "enforcement activities."<sup>123</sup>

In *General Electric Co. v. Litton Industrial Automation Systems*,<sup>124</sup> the Eighth Circuit concluded that a private-party cost recovery claim under CERCLA constituted an enforcement activity and attorneys' fees incurred were recoverable as "necessary costs of response."<sup>125</sup> The court relied on the definition of Section 101(25) to conclude that ordinary rules of statutory construction would be "strained to the breaking point" if enforcement activities, as reflected in legal costs incurred by private parties, were excluded from the scope of recoverable costs authorized by Section 107(a)(4)(B).<sup>126</sup> Therefore, the *Litton* court determined that the American Rule had been sufficiently satisfied.<sup>127</sup> The Eighth Circuit buttressed its conclusion with an extensive discussion of the public policy goals underlying CERCLA and emphasized that the *Litton* holding was necessary to further these goals.<sup>128</sup>

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120. *Id.*

121. Section 101(23), 42 U.S.C. § 9601(23) (1993).

122. Section 101(24), 42 U.S.C. § 9601(24) (1993).

123. *Alloy Briquetting Corp. v. Niagara Vest, Inc.*, 802 F. Supp. 943, 945 (W.D.N.Y. 1992) ("CERCLA does not define the term 'enforcement activities,' and contrary to the argument of the plaintiff, this Court does not believe that the term has a 'plain and ordinary meaning.' Therefore, the term must be examined in its statutory context and in light of its legislative history.").

124. 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

125. *Id.* at 1422.

126. *Id.*

127. *Id.*

128. The court stated:

This conclusion, based on the statutory language is consistent with two of the main purposes of CERCLA — prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter (such as GE) were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site.

*Id.*

Courts siding with the Eighth Circuit contend that (1) the wording of Section 107(a)(4)(B) is sufficiently precise and explicit to satisfy the American Rule,<sup>129</sup> and (2) that to preclude the recovery of litigation costs frustrates CERCLA's policy goal of encouraging private voluntary cleanups.<sup>130</sup> Legal costs, the Eighth Circuit and its allies argue, are inherent in any pursuit of CERCLA response costs.<sup>131</sup> Precluding the recovery of these costs provides private parties a disincentive to voluntarily clean up contamination if other PRP's may be available.<sup>132</sup> This policy goal argument predominates the analysis of courts in the Eighth Circuit's camp.<sup>133</sup>

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129. See, e.g., *Hastings Bldg. Prod. v. National Aluminum Corp.*, 815 F. Supp. 228, 232 (W.D. Mich. 1993); *Chesapeake and Potomac Tel. v. Peck Iron & Metal*, 814 F. Supp. 1281, 1283 (E.D. Va. 1993); *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990). The *Pease & Curren* court stated:

In ascertaining the plain meaning of "enforcement activities," this Court concludes that Congress intended for enforcement activities to include attorney's fees expended to induce a responsible party to comply with remedial actions mandated by CERCLA. This court cannot ascertain any other logical interpretation which would give effect to this phrase. If this Court were to rule otherwise, the phrase "enforcement activities" would be superfluous.

*Id.* at 951.

130. See, e.g., *HRW Sys. v. Washington Gas Light Co.*, 823 F. Supp. 318 (D. Md. 1993). The court stated:

[E]nvironmental litigation is an extremely expensive business . . . Both private individuals and corporate entities would have to be able to devote significant resources to attorney's fees, were these not to be available as necessary response costs.

This conclusion leads inevitably to the conclusion that the absence of attorney's fees as a recoverable cost of response will act as a huge and, in many cases, insurmountable, obstacle to those seeking to bring private recovery actions under CERCLA. This in turn would frustrate the purpose of the statute in allowing, and in fact encouraging, such actions, and instead throw the lion's share of enforcement actions on the financially stooped shoulders of the Government. This was seemingly the precise result which the institution of the private recovery action under CERCLA was intended to avoid.

*Id.* at 346.

131. *Id.*

132. *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991) ("The court can conceive of no surer method to defeat [CERCLA's] purpose [of encouraging parties to expend their own funds immediately without waiting for other responsible parties to take action] than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs.").

133. See generally *Donahay v. Bogle*, 987 F.2d 1250, 1256 (6th Cir.), *cert. denied*,

Courts mustering under the Ninth Circuit's banner on this issue concede the logic of *Litton*, as it relates to furthering CERCLA's underlying policy goals, but disagree vehemently that the language of Section 107(a)(4)(B) is sufficient to satisfy the American Rule.<sup>134</sup> Furthermore, courts in this camp point to the guidance provided by the Supreme Court in *Alyeska* and *Runyon* to argue that the policy goals of CERCLA are an invalid basis on which to weigh the appropriateness of awarding attorneys' fees.<sup>135</sup>

In addition, courts rejecting the *Litton* rationale frequently cite the legislative history of the Superfund Amendment and Reauthorization Act (SARA) as authority negating any congressional intent that private parties be allowed to recover attorneys' fees.<sup>136</sup> Section 101(25)'s reference to "enforcement activities re-

115 S. Ct. 636 (1993); *Bolin*, 759 F. Supp. at 710.

134. See, e.g., *Alloy Briquetting Corp. v. Niagara Vest, Inc.*, 802 F. Supp. 943, 946 (W.D.N.Y. 1992) ("Even if private party cost recovery suits could be characterized as 'enforcement actions' under CERCLA, the statutory language would still fall far short of 'explicit congressional authorization' for attorney fees."); *Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687, 695 (E.D. Cal. 1991) ("[T]he phrase 'enforcement activities related thereto' falls short of an explicit award of attorneys' fees. When Congress intended to provide for an award of attorneys' fees in other circumstances under CERCLA, it did so explicitly.").

135. See, e.g., *FMC Corp. v. Aero Indus.*, 998 F.2d 842 (10th Cir. 1993) where the court stated:

We recognize that CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others. It may be true that awarding the litigation fees incurred would further this goal. Nonetheless, the efficacy of an exception to the American rule is a policy decision that must be made by Congress, not the courts. The desirability of a fee-shifting provision cannot substitute for the express authorization mandated by the Supreme Court.

*Id.* at 847. See also *Santa Fe Pac. Realty*, 780 F. Supp. at 696, where the court stated: It is not for this court to impose a fee shifting provision simply because it may be consistent with the statutory scheme or purpose of CERCLA.

The court cannot compensate for a decisive lack of explicitness in the statute by importing its informed opinion of what measures would best achieve the purposes of CERCLA [citation omitted]. The "generalized commands" of the statute provide an insufficient basis for concluding that Congress intended attorneys' fees to be recoverable as response costs by a private party.

*Id.* (citing *Runyon*, 427 U.S. at 186).

136. *Santa Fe Pac. Realty*, 780 F. Supp. at 695; *Fallowfield Dev. Corp. v. Strunk*,

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lated thereto" was incorporated into CERCLA by the enactment of SARA.<sup>137</sup> The legislative history of the provision states that the amendment "will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties."<sup>138</sup> SARA, the *Litton* opponents emphasize, was a comprehensive overhaul of CERCLA.<sup>139</sup> The argument continues, had Congress intended to include attorneys' fees among response costs available to private-party claimants, Section 107 could have been easily amended to reflect that fact.<sup>140</sup>

Courts holding that the American Rule precludes the award of attorneys' fees for private-party cost recovery claims find the absence of an explicit authorization for such an award "conspicuous."<sup>141</sup> CERCLA's government cost recovery provision,<sup>142</sup> whistle-blower employee protection provision,<sup>143</sup> and the provision authorizing citizen suits<sup>144</sup> to compel the government to en-

766 F. Supp. 335, 338 (E.D. Pa. 1991).

137. *Alloy Briquetting Corp. v. Niagara Vest, Inc.*, 802 F. Supp. 943, 945-46 (W.D.N.Y. 1992).

138. H.R. REP. No. 253, 99th Cong., 1st Sess. (1985), reprinted in 4 U.S. CODE CONG. & ADMIN. NEWS 2835, 2848-49 (1986); see also *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696, 708 n.13 (D. N.J. 1988) (arguing that private parties do not incur "enforcement costs as contemplated by CERCLA" because they cannot bring an action to enforce CERCLA's cleanup provisions against another private entity).

139. *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I. 1989).

140. *Id.*; *Fallowfield*, 766 F. Supp. at 338; see also, *Santa Fe Pac. Realty*, 780 F. Supp. at 695 ("Instead, Congress chose to insert a phrase outside even the most exhaustive lexicon of customary fee shifting language.").

141. *Abbot Labs. v. Thermo Chem., Inc.*, 790 F. Supp. 135, 142 (W.D. Mich. 1991).

142. Section 104(b), 42 U.S.C. § 9604(b) (1993), states in pertinent part: "[the President] may undertake such . . . legal . . . and other studies and investigations as he may deem necessary or appropriate to plan and direct response actions, to recover costs thereof, and to enforce provisions of this chapter."

143. Section 110(c), 42 U.S.C. § 9610(c) (1993) states:

Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) determined by the Secretary of Labor to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

*Id.*

144. Section 310(f), 42 U.S.C. § 9659(f) (1993), states in pertinent part: "[t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate." See *Regan v. Cherry Corp.*, 706 F. Supp. 145, 148-50 (D.R.I. 1989) (distinguishing the remedies available to a citizen suit petitioner as opposed to a § 107(a)(4)(B) private-

force the statute all contain explicit fee shifting language. Rule adherents cite these provisions to illustrate that Congress is capable of drafting an explicit attorneys' fees recovery provision for CERCLA if desired.<sup>145</sup> Finally, some courts championing the Rule's prominence deny that a private-party cost recovery action can be considered an "enforcement activity" as contemplated by CERCLA.<sup>146</sup>

#### IV. THE COURT'S ANALYSIS

##### A. THE MAJORITY VIEWPOINT

##### 1. *Stanton Road Assoc. v. Lohrey Enterprises*

In *Stanton Road Assoc. v. Lohrey Enterprises*,<sup>147</sup> the majority began its analysis by taking note of the split in authority among district courts within the Circuit on the matter of whether the attorneys' fees of private litigants constituted CERCLA response costs.<sup>148</sup> The discussion then expanded to encompass the dispute among courts nationwide.<sup>149</sup> Clearly, the court concluded, the presence of such disharmony among the nation's courts illustrated that an integration of the language of Sections 101(25) and 107(a)(4)(B) was inadequate to satisfy the American Rule.<sup>150</sup> Furthermore, though conceding that a review of a stat-

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party cost recovery claimant).

145. See, e.g., *In re Hemingway Transp., Inc.*, 993 F.2d 915, 934 (1st Cir. 1993); *Alloy Briquetting*, 802 F. Supp. at 947.

146. See, e.g., *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990) (emphasizing that private-party cost recovery claimants cannot bring an action to enforce CERCLA's cleanup provisions against another private party), *aff'd*, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993); *accord T & E Indus.*, 680 F. Supp. at 708 n.13.

147. 984 F.2d 1015 (9th Cir. 1993).

148. *Id.* at 1018, *comparing* *Pease & Curren Ref. v. Spectrolab, Inc.*, 744 F. Supp. 945, 952 (C.D. Cal. 1990) (allowing recovery) *with* *Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687, 695 (E.D. Cal. 1991) (prohibiting recovery).

149. *Stanton Road*, 984 F.2d at 1019.

150. The court stated:

[T]he fact that those district courts that have confronted this issue disagree on the question of whether attorneys' fees are allowable under section [sic] 101(25) and 107(a)(4)(B) demonstrates that the words "enforcement activities" do not explicitly signal, with any persuasive degree of clarity, that Congress intended to provide for an award of attorneys' fees to private litigants.

*Id.*



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ute's legislative history was in order when the language of a statute seemed ambiguous, the majority found such a review inappropriate in regards to the issue of attorneys' fees.<sup>151</sup> The clear guidance of the Supreme Court in *Alyeska* and *Runyon* precluded such an examination.<sup>152</sup>

The majority found the terms "necessary cost of response" in Section 107(a)(4)(B) failed to "expressly authorize an award of attorneys' fees for legal expenses incurred in remediating the contamination of property."<sup>153</sup> The court criticized the Eighth Circuit's analysis in *Litton* for emphasizing the Act's public policy goals as "misplaced" and defiant of Supreme Court direction.<sup>154</sup>

The majority rejected the district court's escrow account cleanup fund remedy on two grounds; (1) Ninth Circuit precedence required that a plaintiff must actually incur response costs before recovery is permissible,<sup>155</sup> and (2) allowing such an award relieved Stanton Road of its burden of proving in an adversarial proceeding that incurred expenditures were necessary and consistent with the NCP.<sup>156</sup>

Finally, the majority pointed to the Act's savings clause<sup>157</sup> to conclude that CERCLA did not preempt state law.<sup>158</sup> Therefore, the court upheld the award of monetary damages based on

151. *Id.*

152. *Id.*

153. *Stanton Road*, 984 F.2d at 1019.

154. *Id.*

155. *Dant & Russell v. Burlington N. R.R.*, 951 F.2d 246, 250 (9th Cir. 1991).

156. *Stanton Road*, 984 F.2d at 1021.

157. Section 302(d); 42 U.S.C. § 9652(d) (1993), states:

Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

*Id.*

158. *Stanton Road*, 984 F.2d at 1021.

state law remedies, but ordered the matter remanded.<sup>159</sup> The majority found fault in the fact that the district court failed to distinguish the extent to which its monetary damage award arose from permissible state law, as opposed to CERCLA.<sup>160</sup> The Ninth Circuit required clarification on this point.

## 2. *Key Tronic Corp. v. United States*

In *Key Tronic Corp. v. United States*<sup>161</sup> the majority solidified its *Stanton Road* holding on the matter of attorneys' fees, declaring that the American Rule's fee shifting prohibition encompassed all legal costs derived by private-party cost recovery claimants.<sup>162</sup> In this regard, the Ninth Circuit's analysis diverged from that of other courts which, though agreeing that the Rule precluded an award of litigation costs, have nevertheless expressed a willingness to entertain awarding attorneys' fees derived from non-litigation activities related to a private-party CERCLA cost recovery claim.<sup>163</sup>

### B. JUDGE CANBY'S DISSENT

Judge Canby's dissenting opinion arose from the premise that CERCLA is "a machine driven by private litigation, or the threat of it."<sup>164</sup> The judge differentiated between enforcement as opposed to cleanup costs, and stressed that the lion's share of a private party's enforcement costs consists of attorneys' fees.<sup>165</sup> "Congress," the judge exclaimed, "cannot have been ignorant of

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159. *Id.*

160. *Id.*

161. 984 F.2d 1025 (9th Cir.), *cert. granted*, 114 S. Ct. 633 (1993).

162. *Id.* at 1027-82.

163. *FMC Corp. v. Aero Indus.*, 998 F.2d 842, 847-48 (10th Cir. 1993) (finding the American Rule applied only to actual litigation costs, not all legal expenses incurred in negotiating contracts and agreements associated with a CERCLA response action); *United States v. Hardage*, 750 F. Supp. 1460, 1516 (W.D. Okla. 1990) (allowing the recovery of attorneys' fees derived in entering access agreements with adjacent landowners in order to undertake remedial measures and investigate conditions as necessary costs of the response under § 107(a)(4)(B)), *aff'd*, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993); *International Clinical Labs., Inc. v. Stevens*, 30 ENVTL. REP. CASES (BNA) 2066, 2069 (E.D.N.Y. 1990) (awarding \$19,425 in attorneys' fees incurred negotiating a consent decree with a state environmental regulatory agency in a private-party CERCLA cost recovery claim).

164. *Stanton Road*, 984 F.2d at 1023.

165. *Id.*

that fact."<sup>166</sup> Absent a recovery of legal fees, the argument continued, a private party's statutory right to recover enforcement costs was meaningless. Judge Canby concluded that the language of Sections 101(25) and 107(a)(4)(B) must be interpreted as granting a right to recover attorneys' fees if the provisions were to have any effect.<sup>167</sup> Congress inserted Section 101(25)'s expanded definition of "response" into the Act for some purpose, the judge pointed out, and to impose an interpretation consistent with the pre-SARA wording of the provision defied any logical construction of the statute.<sup>168</sup>

Judge Canby placed little weight on the fact that CERCLA contains more explicit grants of authority for awarding attorneys' fees than those relied upon by the Eighth Circuit.<sup>169</sup> "Congress," the judge explained, "is not confined to a particular linguistic formula; it need only manifest its clear intention to permit the litigant to recover fees."<sup>170</sup> As far as Judge Canby was concerned, the 1986 amendments to CERCLA did precisely that.

Judge Canby also criticized the majority's restrictive view of the guidance provided by the Supreme Court in *Alyeska* and *Runyon*.<sup>171</sup> The judge argued that the rule articulated in these cases applied only when Congress has not indicated its intent on the matter of fee shifting.<sup>172</sup> In conclusion, the judge faulted the majority for: (1) recognizing a presumption against the award of fees, and thereby imposing a linguistic burden upon Congress; (2) frustrating the purpose of Congress in enacting CERCLA;

166. *Id.*

167. *Id.*

168. The judge stated:

Had this case arisen between 1980 and 1986, then, Stanton Road would have been entitled to recover its "costs of remedial action." Those recoverable costs might reasonably have been interpreted to be only those incurred in the physical cleanup of a site.

In 1986, however, Congress . . . amended section 101(25) of CERCLA to . . . include enforcement activities . . . In the scheme of CERCLA, this language must mean that private plaintiffs can recover attorneys' fees expended in enforcing the liabilities that CERCLA enforces on polluters.

*Id.*

169. *Id.* at 1023-24.

170. Stanton Road, 984 F.2d at 1024.

171. *Id.*

172. *Id.*

and (3) creating an unnecessary conflict among the Circuits.<sup>173</sup>

Though expressing comfort with the district court's escrow cleanup fund account,<sup>174</sup> Judge Canby's dissent focused primarily on procedural aspects of the matter. The judge emphasized that the defendant had raised no objection to the arrangement at the trial court. Had the defendant done so, the judge pointed out, an arrangement satisfactory to the majority's strict construction of the Act may have been possible.<sup>175</sup> Furthermore, Judge Canby concluded, because of Lohrey's acquiescence, the matter was not sufficiently briefed and argued before the court.<sup>176</sup>

Judge Canby expended few words in his dissent in *Key Tronic*. Because of the majority's finding that attorneys' fees in private-party CERCLA cost recovery actions were not recoverable, a conclusion which the judge criticized at length in *Stanton Road*, he declined to pursue the matter further in *Key Tronic*.<sup>177</sup>

## V. CRITIQUE

In light of the *Stanton Road* and *Key Tronic* holdings, it is counterproductive for a responsible party to initiate a voluntary cleanup. At least, a party doing so can not expect to recover all the cleanup costs from other responsible parties. Any costs recovered will be offset by the amount of legal expenses incurred in the pursuit of the recovery claim. A better approach is to wait until the EPA mandates some cleanup action,<sup>178</sup> at which time contribution claims can be brought against other responsible

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173. *Id.*

174. *Id.* at 1025 ("I would not hastily rule out the use of such a tool unless I were convinced that the statute forbade it.").

175. *Id.*

176. *Id.* ("The issue, I submit, should have been left for a later day, when the parties have properly framed it.").

177. *Key Tronic*, 984 F.2d at 1028.

178. CERCLA Section 106(a), 42 U.S.C. § 9606(a) authorizes the President to secure such relief as may be necessary to abate any imminent and substantial endangerment to the public health or welfare of the environment due to an actual or threatened release of a hazardous substance from a regulated facility. Fines of up to \$25,000 per day may be levied for failing to comply with any order issued under the authority of this Section. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (1993).

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parties.<sup>179</sup> As an added bonus, investigative costs of the contribution claims can be reduced by use of the discovery process to identify other responsible parties through EPA records. This strategy also raises the possibility of contribution claims against oneself being precluded as a result of any accord reached with the EPA.<sup>180</sup> No such advantage is available to a party initiating a voluntary cleanup.

In addition to a claim for contribution, one in the position of the plaintiffs in *Stanton Road* or *Key Tronic* can bring citizen suits against other responsible parties,<sup>181</sup> or against the EPA to compel a vigorous enforcement of CERCLA against contribution claim defendants.<sup>182</sup> The citizen suit provision of CERCLA explicitly grants authority for an award of attorneys' fees to the prevailing party.<sup>183</sup> If properly structured and pursued, the citizen suit may provide a means of recovering many of the legal costs associated with the contribution claim. At a minimum, the added pressure of the EPA's involvement would likely facilitate settlement with contribution claim defendants.

The majority of sites for which CERCLA liability attaches are not sufficiently contaminated to warrant priority treatment from the EPA.<sup>184</sup> Therefore, federal cleanup orders will be issued for relatively few of the known contaminated sites in the United States. For this reason, the Ninth Circuit's determina-

179. CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1) (1993) provides in pertinent part: "[a]ny 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 or under section 9607(a) of this title."

180. CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) (1993), states in part: "[a] person who has resolved its liability to the United States . . . in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." Section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (1993), specifies that a party to such a settlement with the United States is not precluded from pursuing contribution claims against other responsible parties who are not a party to the settlement.

181. CERCLA Section 310(a)(1), 42 U.S.C. § 9659(a)(1) (1993), states in pertinent part: "any person may commence a civil action on his own behalf — (1) against any person . . . who is alleged to be in violation of any standard, condition, requirement, or order which has become effective pursuant to this chapter."

182. CERCLA Section 310(a)(2), 42 U.S.C. § 9659(a)(2) (1993), states in pertinent part: "any person may commence a civil action on his own behalf — (2) against the President or any other officer of the United States . . . where there is alleged a failure . . . to perform any act or duty under this chapter . . . which is not discretionary . . ."

183. See *supra* note 144.

184. See Hingerty, *supra* note 117.

tions in *Stanton Road* and *Key Tronic* run counter to the purposes of CERCLA in that delay in cleanup actions is virtually certain to result. Nevertheless, the clear guidance of the Supreme Court in *Alyeska* and *Runyon* provides a stable foundation on which the Ninth Circuit can rest its holdings. The decisions of the Ninth Circuit comport more closely with the rationale of the Supreme Court than do the conclusions of the Eighth Circuit in *Litton* and its progeny. Despite that fact, the Court may find fault with the Ninth Circuit's analysis.

In *FMC*,<sup>185</sup> the Tenth Circuit articulated a less draconian position on the issue of awarding attorneys' fees. The Tenth Circuit differentiated between legal costs derived from litigation as opposed to non-litigation activities associated with a cost recovery claim.<sup>186</sup> By this means, the Tenth Circuit comported with Supreme Court precedence with minimal frustration of the policy goals underlying CERCLA. Support for this approach may be found in the Court's use of the terms "burdens of litigation" in *Alyeska*<sup>187</sup> and "costs of litigation" in *Runyon*.<sup>188</sup> Furthermore, other courts have concluded that some legal expenditures are "necessary costs," and hence recoverable costs, of a CERCLA response action.<sup>189</sup> The language of Section 107(a)(4)(B) may prove sufficiently explicit to allow the recovery of these

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185. *FMC Corp. v. Aero Indus.*, 998 F.2d 842 (10th Cir. 1993).

186. The *FMC* court stated:

[Nonlitigation attorneys fees] do not fall under the American rule set out in *Alyeska* and *Runyon* because they are not incurred in pursuing litigation. Accordingly, recovery of these fees is not barred as a matter of law. Rather, the issue is whether nonlitigation attorneys fees are necessary response costs within the meaning of section 9607(a)(4)(B). . . . Plaintiffs seek recovery of the nonlitigation attorneys fees generated in designing and negotiating the removal action and in preparing and carrying out the work plan approved by the EPA. For example, plaintiffs submitted affidavits . . . evidencing fees paid for negotiating and drafting contracts with environmental professionals who performed the removal work, negotiating changes to the work plan, and monitoring progress. We cannot say as a matter of law that, under the circumstances here, none of these nonlitigation attorneys fees were necessary response costs.

*Id.* at 847-48.

187. 421 U.S. at 247.

188. 427 U.S. at 185.

189. See, e.g., *HRW Sys. v. Washington Gas Light Co.*, 823 F. Supp. 318, 346 (D. Md. 1993); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991).

costs. Fault may arise in the Ninth Circuit's applying too stringent a standard in assessing the American Rule, imposing a hyper-technical interpretation at the expense of frustrating the Act's underlying congressional purpose. This was the gist of Judge Canby's dissent.

## V. CONCLUSION

CERCLA's imprecise drafting has antagonized courts since its enactment in 1980. Congress' overhaul of the Act, by means of SARA, added little clarity to the law.<sup>190</sup> Traditionally, courts applied a liberal construction to the Act's terms, guided by a desire to further CERCLA's underlying remedial purpose.<sup>191</sup> However, in *Stanton Road* and *Key Tronic*, the Ninth Circuit wrestled with competing focal points of judicial policy; furthering CERCLA's preference that private parties initiate voluntary cleanup actions thereby avoiding the expenditure of public funds, or strict adherence to the American Rule prohibiting the award of attorneys' fees absent explicit statutory authority. The majority concluded that, between the competing policy objectives, the American Rule took absolute precedence.

In any event, CERCLA is scheduled for reauthorization in 1994. Should the Ninth Circuit's holding or the pending Supreme Court assessment of the matter reach a conclusion that does not reflect the intent of Congress, a solution is readily apparent. Congress need only amend section 107(a)(4)(B) to expressly grant private-party cost recovery claimants a right to recover attorneys' fees in clear, unambiguous language.

*Dennis J. Byrne\**

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190. See *supra* note 72.

191. See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *United States v. Aceto Agric. Chem. Corp.*, 699 F. Supp. 1384, 1387 (S.D. Ohio 1988), *aff'd*, 872 F.2d 1373 (8th Cir. 1989); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

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