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"Daigle v. Shell Oil Company" and the Bumpy Road to the Recoverability of Medical Monitoring Expenses Under CERCLA

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Daigle v. Shell Oil Company and the Bumpy Road to the Recoverability of Medical Monitoring Expenses Under CERCLA

I. INTRODUCTION

In 1980, President Carter signed the first hazardous waste cleanup bill into law.[1] The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) serves as a tool for government cleanup of hazardous waste sites, but those who anxiously waited for Congress to pass a hazardous waste cleanup bill were disappointed with the final bill.[2] The proposed bill had been broadly compromised.[3]

The lack of legislative history indicates the rushed process through which Congress passed the bill.[4] Like a game show contestant who must accept or reject what is behind the door without knowing exactly what it entails, the House had to either pass or reject the bill without the opportunity for revisions or comments. A bipartisan Senate group wrote and passed the revised bill, and then, under a suspension of the rule that prohibited amendments, placed it before the House as an amendment to the earlier House Bill.[5] After waiting over three years for the Senate to enact a hazardous waste cleanup bill, the House faced two options: it could accept this complicated bill or risk three more years of debate during which time no hazardous waste cleanup legislation would exist.

The fact that the Senate essentially "snuck" CERCLA through Congress partially explains why Congress appears to have left some pertinent issues unaddressed and why it left other issues unresolved in the final bill.[6] Although CERCLA provides a mechanism for government cleanup of hazardous waste sites, it does not provide a cause

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1. Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified at 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1991).

2. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767, codified at 26 U.S.C. §§ 4611-4682, 42 U.S.C. §§ 6911a, 9601-9675 (1988 & Supp. 1991). This Recont Development will refer alternatively to sections of the Act as CERCLA §§ 101-405.

3. Comments from Senators and Representatives that reflect the needs of special interest groups plague the little legislative history that exists. Due to the stake that special interest groups have in the legislation and the potentially burdensome effect of the legislation, some issues could not be resolved in the legislative process and others required significant compromises to pass both houses of Congress.

4. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envir. L. 1, 1 (1982).

5. Id. Senator Gordon Humphrey of New Hampshire expressed concern over the pressure and rush under which the legislation was being adopted. 126 Cong. Rec. 30946 (1980). Although this game show analogy may appear extreme, comments from Senators and Representatives indicate it may be surprisingly representative of the legislative process through which Congress enacted CERCLA.

6. 42 U.S.C. §§ 9601-9675.

of action for personal injury resulting from exposure to hazardous wasto.[7]

Congress creatod CERCLA in response to the ineffectiveness of other federal legislation.[8] Specifically, none of the existing federal programs allowed the government to initiato an environmental cleanup or held owners of abandoned or inactive sitos liable for the cleanup costs.[9] Congress recognized the need for a powerful statute that would enable the government to clean up wasto sitos and then recover the costs from the responsible parties.[10]

CERCLA provides two methods for cleaning up hazardous waste sites. First, the government can use money from the Hazardous Substance Response Trust Fund (Superfund)[11] to clean up a hazardous waste site[12] and then sue the responsible party or parties to recover the costs.[13] Alternatively, the Environmental Protection Agency (EPA) can order the responsible private parties to perform the cleanup in cases in which an imminent danger to human health or the environment exists.[14]

CERCLA has two parts: (1) damage remedy provisions and (2) liability provisions.[15] No provision specifically allows privato parties to sue for damages for personal injuries; however, Section 107(a)(4)(B) of CERCLA makes responsible parties liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[16] The problem raised, therefore, is to determine what qualifies as "necessary costs of response."

The determination of "necessary costs of response" often is a straightforward analysis. For example, imagine the following situation: Mr. X and Ms. Y live on two property lots adjacent to a hazardous waste site. If Mr. X has to monitor his backyard well for hazardous waste contamination, he can recover his costs under CERCLA. If

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7. See id.

8. H. R. Rep. No. 96-1016, 96th Cong., 2d Sess. 6120 (1980).

9. 126 Cong. Rec. 30941 (1980).

10. Dan A. Tanenbaum, Comment, *When Docs Going to the Doctor Serve the Public Health? Medical Monitoring Response Costs Under CERCLA*, 59 U. Chi. L. Rev. 925, 925-26 (1992) (citing S. Rep. No. 96-848, 96th Cong. 2d Sess. 11 (1980)).

11. Superfund is the popular name for this Act because it authorizes the institution of this Hazardous Substance Response Trust Fund. This Recent Development does not focus on the parties' ability to recover under the Fund; therefore, it will refer to the Act as CERCLA.

12. Tanenbaum, Comment, 59 U. Chi. L. Rev. at 926 (citing 42 U.S.C. § 9611).

13. 42 U.S.C. §§ 9604(a), 9607(a).

14. 42 U.S.C. § 9606(a). The statuto specifically authorizes agency action when there exists "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance . . . ." Id.

15. See Pub L. No. 96-510, 94 Stat. 2767 (1980).

16. 42 U.S.C. § 9607(a)(4)(B). The phrase "any other person" encompasses the government, any state, and any Indian tribe. See 42 U.S.C. § 9607(a)(4)(A).

Ms. Y seeks compensation for eye injuries caused by the hazardous substance's release, however, she cannot recover her costs.[17]

The more difficult question is whether Section 107(a)(4)(B) of CERCLA provides for the recovery of medical monitoring expenses. Individuals exposed to toxic substances often seek medical monitoring to enable them to detect and treat latent diseases that may arise as a result of the exposure. The process involves monitoring human bodies and assessing the effects that hazardous wastes in the environment have on the exposed persons. Medical monitoring costs, therefore, are the quantifiable costs of periodic medical examinations necessary to detect the onset of disease or other injury resulting from the hazardous substance release.

The district courts are split as to whether Section 107(a)(4)(B) enables private individuals to recover medical monitoring costs[18] as a "necessary cost of response." This Recent Development trudges through the murky wording of CERCLA and analyzes the courts' approaches to the recovery of medical monitoring costs under CERCLA.[19]

Part II of this Recent Development examines the district courts' differing approaches to recovery and the resulting split in authority. Part III analyzes the first federal appellato decision considering the question of the recovery of medical monitoring expenses under CERCLA, the Tenth Circuit's decision in *Daigle v. Shell Oil Co.*[20] Part IV acknowledges that, as currently written, CERCLA does not provide for medical monitoring costs. Because medical monitoring is necessary to determine hazardous substances' effects on persons and the environment, however, Part IV calls for the legislature to amend CERCLA to allow recovery of medical monitoring costs. Moreover, it argues that through this amendment Congress will fulfill the goals of CERCLA by holding private parties responsible for the true costs of their hazardous wasto contamination.

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17. 126 Cong. Rec. 30932 (1980) (comments of Sen. Randolph) (noting that the compromise bill deleted the cause of action for personal injury). See also Grad, 8 Colum. J. Envir. L. at 21-22 (cited in note 4). As stated, the compensation issue in these situations is straightforward and therefore is not considered in this Recent Development.

18. The courts do not explicitly define medical monitering, but they suggest medical monitering consists of medical testing and screening conducted to assess the effect of the release or discharge on public health or to identify potential public health problems presented by the release. See *Brewer v. Ravan* , 680 F. Supp. 1176, 1179 (M.D.Tenn. 1988), and *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1534 (10th Cir. 1992).

19. Medical monitering costs are distinguishable from medical expenses incurred in the treatment of personal injuries or disease. CERCLA § 107(a), as indicated by the legislative history, clearly does not permit recovery of these types of personal medical expenses. See 126 Cong. Rec. 14964 (1980); 42 U.S.C. § 9607(a).

20. 972 F.2d 1527 (10th Cir. 1992).

II. THE RECOVERY OF MEDICAL MONITORING COSTS—A QUAGMIRE OF DECISIONS

District courts are split as to whether plaintiffs can recover medical monitoring costs as "necessary costs of response" under CERCLA. Three factors contribute to the district courts' approaches toward medical monitoring costs. First, an important, but not determinative, factor is the court's view of CERCLA's purpose. Second, courts consider the characterization of medical monitoring costs. Courts that compare medical monitoring costs to a personal injury remedy refuse te award medical monitoring expenses.[21] Third, and most important, the court's interpretation of CERCLA's language greatly affects its approach to the recovery of medical monitoring costs.

Although related, all three factors deserve independent treatment because each factor influences the court's determination of the recoverability of medical monitoring expenses differently. For example, whether a court examines the purpose of a statute depends on its mode of statutory interpretation, but the purpose the court assigus to the statute may relate very little to the court's method of statutory interpretation. Because the first and second factors, the purpose the court assigus to the statute and the characterization of medical monitoring costs, overlap with the issue of statutory interpretation, and because the reader must understand the distinctions between various methods of statutory intorpretation to understand the analysis of courts' interpretations of Section 107(a)(4)(B), the next subpart examines the competing methods of statutory interpretation.

A. Statutory Interpretation

CERCLA Section 107(a)(4)(B) governs the recovery of "any other necessary costs of response" that many plaintiffs argue include medical monitoring expenses. Therefore, courts confronted with claims to recover medical monitoring costs usually begin their analyses by interpreting the language of this section. The courts agree on only one issue related to the interpretation—that the language of CERCLA, particularly this section, is ambiguous.[22]

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21. Id. at 1535.

22. Section 107(a)(4)(B) of CERCLA reads as follows:

(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—

Both courts and scholars employ several competing theories in their attempts to interpret statutes. These theories divide into two categories, foundationalist and static theories, which consider the text a non-changing document, and dynamic theories, which assume the statutory text evolves over time.[23] Various approaches to statutory interpretation exist within each of these branches.[24] This Recent Development examines how the courts' differing interpretations of the statute affect the recoverability of medical monitoring costs.

1. Foundationalist Theories

Foundationalist theories, including textualism, purposivism, and intentionalism (originalism),[25] differ in their approach to statutory interpretation and the sources they examine in the process; however, they all strive to find an objective standard to interpret the statute accurately and to minimize the discretion of judicial interpreters.[26] To achieve this aim, they seek to minimize nontextual sources of authority from judicial consideration.[27]

a. Textualism

The language used by Congress is the starting point for interpreting statutes.[28] Textualists assert that, in most cases, statu-

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

42 U.S.C. § 9607(a)(4)(B).

23. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 21 (1988) (describing dynamic theories: "Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail. This model understands a statute as an on-going process (a voyage) in which both the shipbuilder and subsequent navigators play a role."). See also Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 Tex. L. Rev. 1073, 1082-83 (1992). Using Aleinikoff's analogy, foundationalist theories, on the other hand, would consider the ship's destination a product of the enacting Congress's actions, rather than facters arising during the voyage.

24. This Recent Development does not attempt to analyze all the competing methods of statutery interpretation.

25. For a more thorough discussion of each of these methods of statutery interpretation, see William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321 (1990).

26. Id. at 325.

27. Zeppos, 70 Tex. L. Rev. at 1074 (cited in note 23).

28. *CBS, Inc. v. FCC*, 453 U.S. 367, 377 (1981).

tory interpretation also ends upon ascertaining the apparent meaning of the statutory language.[29] Although traditional textualists assert that the plain meaning[30] of a statute governs its interpretation unless negated by strongly contradictory legislative history,[31] new textualists[32] assert that legislative history, in all but the most extreme cases, is a forbidden tool.[33] New toxtualists, like Justice Antonin Scalia and Judge Frank Easterbrook, believe legislative history is irrelevant.[34]

Despite the differing approaches, all textualists have the same goals. Textualists argue that a pure textual intorpretation enables citizens to predict their rights and duties under the law and prevents judicial lawmaking.[35] Moreover, they argue that nothing indicates the statuto's meaning more than the words enacted into law;[36] therefore, those words must comprise the law.[37] Critics argue that language is susceptible to various intorpretations and that it would be impossible to intorpret a statuto properly without considering the context in which Congress enactod it.[38]

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29. See Eskridge and Frickey, 42 Stan. L. Rev. at 340 n.71 (cited in note 25).

30. Proponents of the "plain meaning rule" argue that only the plain, or ordinary, meaning of the words in the text should be used to intorpret the statute. William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. Rev. 621, 623 (1990).

31. Id. at 624.

32. Scholar William Eskridge has labeled Justice Scalia's approach to statutory interpretation the "new toxtualism." Other judges, like Frank Easterbrook, also employ this method on the bench. See id. at 623 n.11 and accompanying toxt.

33. See Zeppos, 70 Tex. L. Rev. at 1084 (cited in note 23). See also Eskridge, 37 U.C.L.A. L. Rev. at 623-25 (cited in noto 30).

34. Justice Scalia has set forth his textualist views from the bench on numerous occasions. See, for example, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (stating, "Although it is true that the Court in recent times has expressed approval of this doctrine [that legislative history can sometimes trump plain meaning], that is to my mind an ill-advised deviation from the venerable principle that if the language of a statuto is clear, that language must be given effect—at least in the absence of a patont absurdity."); *West Va. Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991) (Scalia, J.); *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2490 (1991) (Scalia, J., concurring).

Judge Easterbrook alse has set forth his textualist views. See, for example, *In re Sinclair*, 870 F.2d 1340, 1342-44 (7th Cir. 1989) (Easterbrook, J.); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J. L. & Pub. Pol. 59, 60 (1988); Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 544 (1983) (suggesting that "unless the statuto plainly hands courts the power to creato and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process"). See also Zeppos, 70 Tex. L. Rev. at 1080 n.36 (cited in neto 23).

35. Eskridge and Frickey, 42 Stan. L. Rev. at 340-41 (cited in noto 25).

36. Id.

37. *Caminctti v. United States*, 242 U.S. 470, 490 (1917).

38. Henry Hart and Albert Sacks of the Harvard Law School posit that words have many meanings and that meaning depends on context. See Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1144-47 (Cambridge, 1958). See also Eskridge and Frickey, 42 Stan. L. Rev. at 340-48 (cited in note 25).

b. Intentionalism and Purposivism

Intentionalism and Purposivism exist in various forms. Intentionalism seeks to discover and apply the legislators' original intent as the touchstone for statutory interpretation.[39] Intentionalists recognize that Congress leaves some questions unresolved but allow the judiciary to fill the gaps by executing Congress's desires faithfully.[40] Because courts strive to effectuate the lawmakers' intentions, proponents of intentionalism consider it the only legitimate theory of statutory interpretation.[41]

Purposivism is similar to intentionalism. This approach attempts to identify the legislature's purpose in adopting the law and to interpret the statute consistently with that purpose.[42] This theory is founded on the assumption that Congress developed every statute with a specific purpose or objective in mind.

Critics argue, however, that both purposivism and intentionalism rely on the false assumption that the legislative purpose and intent of a statute are discernible.[43] In addition, they argue that legislative history is indeterminate and imprecise and suggest that attributing statements of committee members and bill sponsors to the entire body of the bill produces faulty conclusions and, therefore, inaccurate statutory interpretation.[44] Critics suggest that this process results in judicial lawmaking.[45]

2. Dynamic Theories: Practical Reasoning and Public Values

Some scholars believe that textualism, purposivism, and intentionalism require excessive judicial restraint that prevents adhering scholars from interpreting statutes objectively and definitively.[46] These scholars, called dynamic theorists, urge the judiciary to take an

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39. Eskridge and Frickey, 42 Stan. L. Rev. at 325-26 (cited in note 25).

40. Richard A. Posner adopts a form of this approach. Critics often label Posner's approach "imaginative reconstruction." See Richard A. Posner, *The Federal Courts: Crisis and Reform* 286-87 (Harvard U., 1985) (stating that "the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him"). See also Zeppos, 70 Tex. L. Rev. at 1080 (cited in note 23).

41. Eskridge and Frickey, 42 Stan. L. Rev. at 326 (cited in note 25).

42. Id. at 332-33.

43. An economic theory of legislation would posit that a statuto, although the work of reasonable legislators, often has no "purpose" other than distributing benefits to the interest group that purchased the statute. William N. Eskridge, Jr. and Philip P. Frickey, *Cases and Materials on Legislation, Statutes and the Creation of Public Policy* 595 (West, 1988).

44. Id. at 571-72. See also Eskridge and Frickey, 42 Stan. L. Rev. at 326-29 (cited in note 25).

45. Eskridge and Frickey, 42 Stan. L. Rev. at 335.

46. See id. at 345.

active policy-making role[47] and reach results based on what society considers important today, as opposed to merely enforcing ancient statutory ideals.[48] Dynamic theorists urge courts to consider public values and practical considerations when interpreting statutes; therefore, they encourage judges to consult a broader range of sources when making their determinations.[49]

Practical reasoning and public values, two dynamic theories of statutory interpretation, are closely related. Public values theorists envision the judiciary making the government more responsive to societal needs.[50] Equally result-oriented, practical reasoning theorists emphasize the workability or value of a particular result and seek an interpretation of the statute that will produce the most desirable consequences.[51] The practical reasoning approach accepts that the interpretive process is creative and acknowledges outside influences in the effort to interpret statutes reasonably.[52] Accordingly, the theorists consider a variety of factors including, but not limited to: statutory language, Congress's original expectations, fairness, related statutory policies, and constitutional values.[53] Dynamic theorists argue that the Supreme Court currently interprets statutes in this fashion.[54]

B. The Brewer *Courts*

The court in *Brewer v. Ravan*[55] first addressed the issue of medical monitoring costs in more than a cursory manner.[56] In *Brewer*, former employees of a capacitor manufacturing plant located in Waynesboro, Tennessee, and their families, brought a claim that included, but was not limited to, recovery of necessary response costs as a result of the release of polychlorobenzenes (PCBs) and other hazardous substances from the Waynesboro plant.[57] The plaintiffs

47. Zeppos, 70 Tex. L. Rev. at 1082-83 (cited in note 23).

48. Cass Sunstein rejects originalism and argues that courts should implement background norms as they relate to important public values. Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 157-59 (Harvard U., 1990). See also Zeppos, 70 Tex. L. Rev. at 1080 n.35 and accompanying text (cited in note 23).

49. Zeppos, 70 Tex. L. Rev. at 1082-83.

50. Id. at 1083.

51. Id. See also Richard A. Posner, *The Problems of Jurisprudence* 270 (Harvard U., 1990); Eskridge and Frickey, 42 Stan. L. Rev. at 322 (cited in note 25).

52. Eskridge and Frickey, 42 Stan. L. Rev. at 345-60.

53. Id.

54. Id.

55. 680 F. Supp. 1176 (M.D. Tenn. 1988).

56. Tanenbaum, Comment, 59 U. Chi. L. Rev. at 938-39 (cited in note 10).

57. *Brewer*, 680 F. Supp. at 1178-79.

alleged that the "necessary response costs" under Section 107(a)(4)(B) included medical monitoring expenses.[58]

Unlike the majority of courts, the *Brewer* court suggested that "necessary costs of response" include medical monitoring costs. The *Brewer* court upheld the claim against a 12(b)(6) motion to dismiss.[59] The court's treatment of the three pertinent factors—purpose, characterization of medical monitoring costs, and statutory language—led to its holding. Other courts that have reached the same result as *Brewer*[60] appear to follow its reasoning wholeheartedly.

1. CERCLA's Primary Purpose

The *Brewer* court began its opinion by stating CERCLA's primary purpose: to promote prompt cleanup of hazardous waste sites by requiring the responsible parties to pay for the remediation.[61] The court did not explain how it determined CERCLA's purpose, nor did it recognize the protection of public health[62] or deterence[63] as purposes of the statute; the court did not attempt to paint a broad public health picture of CERCLA and did not acknowledge CERCLA's deterrent purpose. Rather, the court merely stated the purpose and asserted that this purpose, in conjunction with the statutory language, demonstrated that Section 107(a)(1-4)(B) creates a private cause of action for the "necessary costs of response" against the responsible parties.[64]

Although the court, in its opinion, did not rely explicitly on CERCLA's purpose as the basis for its conclusions, its belief that CERCLA strives to hold parties accountable for their damage pervades its statutory analysis. Accordingly, the court found that the statute's purpose, in conjunction with the private right of recovery

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58. Id. at 1178.

59. Id. at 1179-80. The parties apparently settled the case before they instituted the monitering program, so its details are unknown. It is likely that the program would have included physical examinations and tests for genetic and cellular damage.

For a case in which a court approved similar medical monitering programs under common-law toxic tort principles, see *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847, 852 (M.D. Pa. 1988).

60. *Lykins v. Westinghouse Elec. Corp.*, 27 Envir. Rptr. (BNA) 1590 (E.D. Ky. 1988), and *Williams v. Allied Automotive*, 28 Envir. Rptr. (BNA) 1223 (N.D. Ohio 1988), have followed the *Brewer* rationale.

61. *Brewer*, 680 F. Supp. at 1178 (quoting *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985)).

62. See generally Tannanbaum, Comment, 59 U. Chi. L. Rev. at 925 (cited in note 10) (proposing that CERCLA seeks to protect the public health and, therefore, "necessary costs of response" inevitably include medical monitering expenses).

63. The court simply cited the Sixth Circuit's opinion in *Walls*, 761 F.2d at 318.

64. *Brewer*, 680 F. Supp. at 1178.

created by Section 107, establishes a right to medical monitoring costs as necessary costs of response.

2. The Characterization of Medical Monitoring Costs

The *Brewer* court[65] continued its analysis by distinguishing medical monitoring costs from medical expenses incurred in the treatment of personal injuries or diseases caused by an unlawful release or discharge of hazardous substances.[66] Recognizing that CERCLA's legislative history clearly indicates that medical expenses incurred in the treatment of personal injuries or disease caused by an unlawful release or discharge of hazardous substances are not recoverable,[67] the court distinguished the plaintiffs' medical monitoring claim[68] because the plaintiffs sought to recover the cost of medical testing and screening conductod *"to assess the effect of the release or discharge on public health* or *to identify potential health problems presented by the release"*; their claim, unlike claims for medical expenses, was cognizable under Section 107(a).[69]

The *Brewer* court's ability to distinguish medical monitoring expenses from personal injury claims was indispensable to its holding because plaintiffs cannot recover for personal injuries under CERCLA. Although distinguishing personal injury claims from monitoring claims eased the *Brewer* court's challenge to finding medical monitoring costs "a necessary cost of response," the court's mode of statutory interpretation ultimately enabled it to conclude that medical monitoring costs are a "necessary cost of response."

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65. Those who adopt its mode of analysis naturally proceed along the same line. In fact, many courts merely state that they are adopting the *Brewer* analysis without further examination. See note 60 for a list of cases. To minimize confusion, this analysis continually will refer to the *Brewer* court, but the reader should note that it similarly applies to these other cases.

66. *Brewer*, 680 F. Supp. at 1179.

67. Id. See also *Chaplin v. Exxon Corp.*, 25 Envir. Rptr. (BNA) 2009, 2011-12 (S.D. Tex. 1986) (discussing CERCLA's legislative history concerning this issue); *Artesian Water Co. v. Gov't of New Castle County*, 605 F. Supp. 1348, 1356 n.10 (D. Del. 1985). The *Brewer* court acknowledged that costs of testing, monitering, and investigating the actual site generally are recoverable. This type of soil and groundwator monitoring is very different than the medical monitoring that is at issue.

68. *Brewer*, 680 F. Supp at 1179.

69. Id. The *Brewer* court cites *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1429-30 (S.D. Ohio 1984) (emphasis in original), for this proposition; however, the heavy reliance on *Jones* by courts that award medical monitoring costs seems misplaced. The plaintiffs in *Jones* sought costs for medical testing and the loss of the use of their wells for drinking water and farming purposes. The *Jones* court only stated that "the statutory definitions of removal and remedial actions are broadly drawn and appear to cover *at least some* of the elements of damages claimed by these plaintiffs." Id. at 1430 (emphasis added). Although this statement does not exclude the recovery of medical testing expenses, it does not state that medical monitering costs are necessarily part of the "some" elements of damages that are covered.

3. The *Brewer* Court's Approach to Statutory Interpretation

The *Brewer* court, like other courts, struggled to apply Section 107(a) because of its ambiguous language. CERCLA does not define the phrase "necessary costs of response" and only defines "response" in the most indirect and ambiguous manner.[70] The *Brewer* court appropriately began its analysis with the statute's language, but found that it provided little guidance. The court considered the text ambiguous and noted that it lacked a definition for the phrase "necessary costs of response." Acknowledging that the plain language of CERCLA provided it little guidance, the court looked to the legislative history—a primary tool in interpreting statutes for intentionalists and purposivists. The court stated that the legislative history clearly indicated that plaintiffs may not recover personal medical expenses caused by an unlawful hazardous waste release under Section 9607(a).[71] Without further explanation, however, the court stated that to the extent the plaintiffs sought to recover costs for medical monitoring conducted "*to assess the effect of the release or discharge on public health or to identify potential public health problems presented by the release,*" they presented a cognizable claim under Section 9607(a).[72] The court therefore implicitly assumed that a claim for medical monitoring costs is not a claim for personal medical expenses.

The *Brewer* court next considered CERCLA's definitions of "response" and "remove." Section 101(25) defines "response" te mean "remove or removal," "remedy," and "remedial action."[73] The court explained further that "remove" and "removal" costs include those costs necessary to "monitor, assess, or evaluate a release."[74] The *Brewer* court, without examining the definitions' context or the context of the remainder of the statute, stated that because public health-related medical tests and screening are necessary to "monitor, assess, or evaluate a release," CERCLA allows for their recovery.[75] For example, the court ignored Congress's specific examples of what it meant by removal actions, which directly follow the definition of "removal." These examples include: security fencing, alternative water supplies, temporary evacuation and housing, and other

70. *Brewer*, 680 F. Supp. at 1179 (quoting *Jones*, 584 F. Supp. at 1429-30).

71. *Brewer*, 680 F. Supp. at 1179 (citing *Chaplin*, 25 Envir. Rptr. (BNA) at 2011-12, and *Artesian Water Co.*, 605 F. Supp. at 1356 n.10).

72. *Brewer*, 680 F. Supp. at 1179 (citing *Jones*, 584 F. Supp. at 1429-30) (emphasis in original).

73. 42 U.S.C § 9601(25).

74. *Brewer*, 680 F. Supp. at 1179 (citing 42 U.S.C. § 9601(23)).

75. *Brewer*, 680 F. Supp. at 1179.

emergency assistance.[76] These actions all contemplate immediate responses to problems caused by exposure te hazardous wastes and, therefore, are entirely different from medical monitoring expenses.

Courts should employ a combination of several theories of statutory intorpretation. The *Brewer* court interpreted the statute in two steps: First, the court established that Section 107(a)(1-4)(B) creates a private cause of action against responsible parties for the recovery of "necessary costs of response." Second, the court concluded that the private right of recovery included medical testing and screening costs. The court employed different methods of interpretation to clear each of these hurdles.

To establish that Section 107(a) creates a private cause of action, the court employed a purely purposivist approach. After asserting CERCLA's purpose, the court reasoned from the purpose that Section 107(a) creates a private cause of action for necessary response costs. The court did not engage in a textual analysis but did mention that the purpose and language agreed. Several presuppositions underlie this traditional purposivist approach. It assumes that statutes have a discernible and laudable purpose. Moreover, it assumes that because statutes are good things, judges read them broadly. Critics, specifically public choice theorists, would argue that CERCLA is special interest legislation that reflects the outcome of a battle between environmentalists and corporate entities. Although Section 107 clearly creatos a private cause of action for "necessary cost(s) of response," critics would argue that a judge sensitive to special interest group politics would have scrutinized the statuto more closely, being careful not te give either side more than it acquired in the bargaining process.

Moreover, the court's opinion suffers from its failure to acknowledge, much less justify, CERCLA's purpose of deterring hazardous waste releases by holding responsible parties strictly liable. By asserting the "facilitation of cleanup purpose" and ignoring the "detorrence purpose," some would argue that the court engaged in judicial lawmaking.[77] The peril of asserting only one purpose is that there can be too much of a good thing—Congress may have intended to facilitate cleanup by making responsible parties pay, but not to the extent that private parties should pay medical treatment costs.

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76. 42 U.S.C. § 9601(23).

77. See Eskridge and Frickey, 42 Stan. L. Rev. at 336-37 (cited in note 25) (criticizing the result in the Title VII Supreme Court case *United Steelworkers v. Weber*, 443 U.S. 193 (1979), in which the Court asserted the "results purpose" of Title VII and neglected the "color-blindness purpose").

The court did not engage in a textual analysis but acknowledged that the text and the statute's purpose both supported the interpretation that Section 107 establishes a private cause of action. Although the well-settled starting point for statutery interpretation is the text, the *Brewer* court appears te have shirked that duty. Textual analysis is virtually inconsequential to this part of the court's analysis, however, because examining both CERCLA and judicial opinions makes it clear that Section 107 creates a private cause of action.

The second part of the court's analysis is much more controversial for two reasons. First, this portion of the opinion concludes that medical monitoring costs are necessary costs of response per se, and the court engages in a less traditional mode of statutery interpretation. The *Brewer* court failed to perform a thorough textual analysis. It looked to the definitions of remove and removal, but did not look beyond the definitions to the specific examples of each that Congress provided. The court next turned to the legislative history. It noted the clear indication in the legislative history that plaintiffs may not recover medical expenses incurred in the treatment of personal injury or disease. From Congress's failure to exclude medical monitoring costs specifically, the court reasoned these expenses were included necessarily.[78]

Second, the court deviated even further from traditional statutory analysis and made value judgments as to the necessity of medical monitoring to effectuate a cleanup. By incorporating current values and its knowledge of the cleanup process, the court adopted a dynamic approach to statutory interpretation. This court concluded that CERCLA's definition of response costs includes medical tests related to the public's health because they are "necessary to monitor, assess, or evaluate a release."[79] As evidenced by the *Coburn*[80] line of cases, other courts have reached the opposite conclusion—that medical monitoring is not absolutely necessary to monitor or assess a release, and therefore, medical monitoring costs are not recoverable.

It is apparent that the *Brewer* court employed several theories of statutory interpretation. The court relied on CERCLA's text, Congressional purpose, the legislative history, and also on its own policy decisions and value judgments as to what it deemed necessary to monitor and evaluate a release. This notion that the court employed an eclectic approach is not original. In fact, one scholar has argued

78. *Brewer*, 680 F. Supp. at 1179.
79. Id.
80. *Coburn v. Sun Chemical Corp.*, 28 Envir. Rptr. (BNA) 1665 (E.D. Pa. 1988).

that the Supreme Court's approach to statutory interpretation is an eclectic one, employing sources from originalist, textual, and dynamic theories.[81]

This Recent Development does not advocate the *Brewer* court's method of statutory intorpretation. A thorough examination of the statutory text, which would have included studying the examples of remove and removal that Congress provided as well as how the statutory provision cohered with the remainder of the statute,[82] should precede any indulgence into legislative history and public values. In the instant case, if the court had looked beyond the definitions of the terms te the specific examples of what Congress meant by remove and removal, it would have seen that Congress contemplated physical means of stopping the migration of hazardous substances or alternatively emergency evacuation procedures in the event the physical means of stopping the migration of the hazardous substances were not enacted in a timely manner. Moreover, in the absence of other evidence supporting the recovery of medical monitoring costs, the court's implicit assumption that Congress's failure to exclude medical monitoring costs implies that they are recoverable is contrary to what most scholars would consider sound statutory interpretation,[83] especially in light of the hurried manner in which CERCLA was passed. Few things are settled in the legislative history, making it even more unlikely that some specific item's absence from the legislative history reflects Congressional intent to cover it.

Indeed, some scholars argue that cases anticipated by the statute's framers and expressly resolved in the legislative process should limit the statute's domain; other matters should be outside the statute's scope, governed instead by common law.[84] In the instant case, toxic tert law could provide petitioners with a means to recover medical monitoring expenses.[85] Although some scholars would support the *Brewer* court's judicial gap-filling, they also would have sought guidance from other extrinsic sources or attempted to achieve the legislature's vision of the statute's application.[86] They would not have assumed blindly that Congress's failure to prohibit the recovery of

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81. Zeppos, 70 Tex. L. Rev. at 1120 (cited in note 23).

82. See Eskridge and Frickey, 42 Stan. L. Rev. at 355 (cited in note 25) (stating that textual analysis should consider how the provision works with the general structure of the statute because other provisions might shed light on the one being interpreted).

83. See, for example, Easterbrook, 50 U. Chi. L. Rev. at 544-52 (cited in note 34) (stating that the domain of the statute should be restricted te cases anticipated by its framers).

84. Id.

85. See Part III.E. of this Recent Development, which discusses the relationship between texic tert law and the recoverability of medical monitoring costs.

86. Posner, *The Federal Courts* at 286-93 (cited in noto 40).

medical monitoring costs automatically allows for their inclusion. A thorough analysis of the legislative history, Congressional purpose and intent, and current values, would have informed the *Brewer* court that "necessary costs of response" do not include medical monitoring costs under CERCLA as currently written. Unfortunately, although the *Brewer* court's result is laudable, its flawed statutory analysis undermines its precendential value, and as evidenced by the *Coburn* line of cases, plaintiffs cannot rely on *Brewer* to recover medical monitoring expenses. Consequently, this Recent Development advocates a statutory amendment to ensure plaintiffs that medical monitoring costs will be included as "necessary costs of response."

C. *The* Coburn *Line of Cases*

In contrast to *Brewer*, the opposing line of cases refuses to grant medical monitoring costs as a "necessary cost of response" under Section 107(a)(4)(B) of CERCLA. The result in *Coburn v. Sun Chemical Corporation*[87] supports the proposition that costs for future medical monitoring are not "necessary costs of response." In *Coburn*, the plaintiffs, residents of Dublin, Pennsylvania, had been exposed to well-water contaminated with hazardous chemicals released from the defendant's property.[88] The plaintiffs' claims included recovery of future medical screening costs under Section 107(a)(4)(B) of CERCLA.

1. CERCLA's Primary Purpose

The *Coburn* court acknowledged only one purpose of CERCLA—to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial burden on the parties responsible for the environmental release[89]—and accordingly, refused to award medical monitoring expenses.[90] If the court had conceded that CERCLA has a public health purpose, it may have invited claims that CERCLA allows the recovery of medical monitoring costs because monitoring is necessary to protect the public health. Similarly, admitting a deterrence purpose may have welcomed arguments that CERCLA's deterrence purpose cannot be fulfilled without requiring responsible parties to pay all the costs of the harm they caused. The court's failure to acknowledge these other purposes lessens the value

87. 19 Envir. L. Rptr. (ELI) 20256 (E.D. Pa. 1988); 28 Envir. Rptr. (BNA) 1665 (E.D. Pa. 1988).
88. *Coburn*, 28 Envir. Rptr. (BNA) at 1666.
89. Id. at 1667 (quoting *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986)).
90. *Coburn*, 28 Envir. Rptr. (BNA) at 1670.

of its opinion. If the court had recognized the additional purposes behind the enactment of CERCLA, but emphasized that Congress intentionally decided that these purposes should yield to the extent they provide for recovery of personal medical treatment costs, its opinion would have been strengthened.

2. The Crucial Distinction

The courts that grant medical monitoring costs necessarily distinguish them from personal injury claims.[91] The courts that deny claims for medical monitoring costs are subtle about the distinction, and although most courts do not equate the claims, they draw very cursory distinctions.[92] Although equating the two would simplify these courts' analyses because CERCLA specifically excludes personal injury medical expenses, it would diminish the value of the court's opinion significantly because the two claims are distinguishable: one serves the public health and the other compensates victims.[93] Unlike many courts that prohibit the recovery of medical monitoring expenses, the *Coburn* court appears to have recognized the distinction between the two claims.[94] For example, it agreed with the *Brewer* court's position that medical expenses incurred in the treatment of personal injuries are not recoverable response costs under CERCLA. The court disagreed, however, that medical expenses incurred as a result of medical testing conducted to assess the effect of the release on the public health constitute recoverable response costs.[95]

The *Coburn* court concluded that neither claim is recoverable. The court, however, did not equate or distinguish explicitly the two types of claims; it merely stated that CERCLA's phrase "necessary costs of response" refers to costs required to stop physically the migration of hazardous wastes, not to treat or evaluate their medical effects. For additional support, the *Coburn* line of cases continually refers te and relies on the deletion of medical expenses from CERCLA and the Supreme Court's observation that Congress did not intend to compensato private parties for damages resulting from hazardous substance discharge.[96] These cases therefore hold that CERCLA

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91. See *Brewer*, 680 F. Supp. 1176 (M.D. Tenn. 1988).

92. See *Coburn v. Sun Chemical Corp.*, 28 Envir. Rptr. (BNA) 1665 (E.D. Pa. 1988).

93. Medical monitoring serves the public health while recovery of medical expenses incurred in the treatment of personal injuries compensates victims.

94. See *Coburn*, 28 Envir. Rptr. (BNA) at 1670.

95. Id. at 1670-71 (citing *Chaplin v. Exxon Corp.*, 25 Envir. Rptr. (BNA) 2009, 2012 (S.D. Tex. 1986)).

96. See, for example, *Artesian Water Co. v. Gov't of New Castle County*, 851 F.2d 643, 643-49 (3d Cir. 1988).

excludes medical monitoring cost claims, as it does personal injury claims. This line of cases would be more potent if the courts had acknowledged that the two types of claims are distinguishable and had justified the exclusion of medical monitoring expenses by examining the statutory language and pieces of the legislative history that refer to medical monitoring. The *Coburn* line of cases arrive at the correct result; however, their analysis is far from flawless.

3. The *Coburn* Court's Mode of Statutory Interpretation

The *Coburn* court began its analysis with CERCLA's plain, yet ambiguous, language.[97] The court first considered the definitions that the statute provided.[98] It then acknowledged the context of the definitions of both "remove"[99] and "remedy"[100] by noting the examples the drafters gave to signify their intentions. As the court noted, the statutory definitions of the words contain no reference to medical expenses nor do the words imply that such costs are recoverable.[101] Rather, the *Coburn* court concluded that the statute only contemplates the cleanup of toxic substances from the environment.[102]

In examining CERCLA as a whole, the *Coburn* court noted that although the statute's text contains medical monitoring provisions, they are separate from the liability provisions of Section 107(a). The court explained that Congress created the Agency for Toxic Substances and Diseases Registry in Section 104(i) of CERCLA to provide medical care and testing to exposed individuals. Thus, the *Coburn* court concluded that Congress explicitly provided for the recovery of medical monitoring costs when it wished to do so.[103] Using its in-depth textual analysis, the *Coburn* court presumed that Congress did not intend to include medical monitoring costs as "necessary costs of response," but it sought additional support for this conclusion in the legislative history.

The court recognized that the legislative history would provide little insight into the statute's meaning due to the unique circum-

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97. It is well settled that the starting point for interpreting a statute is the statute itself. *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 56 (1987).

98. *Coburn*, 28 Envir. Rptr. (BNA) at 1667.

99. Id. The specific examples of "remove" include security fencing, alternative water supplies, and evacuation and other emergency assistance. 42 U.S.C. § 9601(25).

100. The specific examples of "remedy" include containment actions, treatment or incineration, provision of alternative water supplies, and any monitoring necessary to assure that the actions taken protect the public health. 42 U.S.C. § 9601(25).

101. *Coburn*, 28 Envir. Rptr. (BNA) at 1670.

102. Id.

103. Id.

stances of CERCLA's enactment.[104] The court quoted the Third Circuit in *Artesian Water Co. v. New Castle County,*[105] which stated that "[the] circuitous language of CERCLA reflects the statute's checkered legislative formulation."[106] In its examination of the legislative history, the *Coburn* court emphasized the compromises that went inte the enactment of CERCLA.[107] Relying on Senater Randolph's comment that in the final compromise bill Congress had deletod the federal cause of action for medical expenses or property or income loss, the *Coburn* court concluded that the final bill specifically excluded the medical monitoring costs.[108]

The *Coburn* court then considered other judicial opinions that addressed the recovery of medical monitoring costs, and notod its support for those that refused to allow recovery. The court cited *Chaplin v. Exxon Corporation*[109] and *Wehner v. Syntex Corporation,*[110] two cases that prohibited recovery. In *Chaplin,* the court, after examining CERCLA's legislative history, concluded that Congress intentionally deleted the federal cause of action for medical expenses from CERCLA and that medical testing costs differed from both the response costs and cleanup costs that were recoverable under Section 9607.[111] The *Coburn* court also cited the *Wehner* court's opinion, which similarly concluded that although Congress contemplated including medical monitoring costs under "necessary response costs," it excluded them in the final bill. The *Coburn* court felt that because Congress obviously considered allowing recovery of medical monitoring costs,

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104. Id. at 1667.

105. 851 F.2d 643 (3d Cir. 1988).

106. Id. at 643. The court continued:

> After a number of predecessor bills failed to muster sufficient support, a group of senators submitted the Stafford-Randolph compromise bill to a lame duck Congress in the waning days of the Cartor Administration. That bill, however, did not receive careful study by a committee, and voting on the floor was controlled by a procedure that permitted no amendments, other than one previously cleared. The legislative history, therefore, furnishes at best a sparse and unreliable guide to the statute's meaning.

Id. The bizarre manner in which the Senators essentially snuck CERCLA by Congress is no secret—lengthy articles have been written on the process of CERCLA's enactment. See, for example, Grad, 8 Colam. J. Envir. L. 1 (cited in note 4).

107. See notos 172 and 175 accompanying the Legislative History discussion in Part III, which discuss the compromises reached during the passing of CERCLA. In the original Senate Superfund Bill, Congress contomplated including medical monitoring, but the Act, as passed, did not contain any language reflecting Congress's desire to include medical monitoring as a "necessary cost of response." *Coburn,* 28 Envir. Rptr. (BNA) at 1668.

108. *Coburn,* 28 Envir. Rptr. (BNA) at 1670.

109. 25 Envir. Rptr. (BNA) 2009 (S.D. Tex. 1986).

110. 681 F. Supp. 651 (N.D. Cal. 1987).

111. *Coburn,* 28 Envir. Rptr. (BNA) at 1668 (citing *Chaplin,* 25 Envir. Rptr. (BNA) at 2012).

the decision not to provide for their recovery explicitly in CERCLA indicated Congressional intent not to grant this relief.[112]

The *Coburn* court's heavy reliance on the legislative history is surprising because it previously had noted that the bizarre manner in which this bill was passed delegitimized the legislative history. The court indicated that the voting parties were not given the opportunity to amend or delete provisions of the bill, or even to study its provisions. Nevertheless, the *Coburn* court ultimately concluded that the absence of any provision for medical monitering costs indicates that Congress intentionally eliminated them.

The *Coburn* court then confronted decisions that permitted claims for medical monitoring costs to proceed past the summary judgment stage. It noted that in *Jones v. Inmont Corporation*,[113] the court relied on the broad definitions of "removal" and "remedial" to allow the claim to proceed past the sunimary judgment stage; it never actually interpreted the phrase "necessary costs of response."[114] The *Coburn* court found the *Jones* decision unpersuasive because it merely relied on the broad definitions of "removal" and "remedial" without actually addressing the issue of whether medical monitoring costs are "necessary costs of response."[115]

In addition, the *Coburn* court analyzed the district court's reasoning in *Brewer*. The *Coburn* court correctly stated that the *Brewer* court had based its conclusion on the rationale that "public health related medical tests and screening clearly are necessary to 'monitor, assess, [or] evaluate a release' and, therefore, constituto 'removal' under Section 9601(23)."[116] Because "response" is defined in part as "remove," the *Brewer* court concluded that costs incurred as a result of such tests and screening are recoverable. The *Coburn* court recognized that the *Brewer* court's line of reasoning necessarily distinguished medical expenses incurred in the treatment of personal injuries or disease from those incurred as a result of medical monitoring. Although the *Coburn* court never stated that it saw no distinction between medical expenses incurred in the treatment of personal injuries and those incurred from medical monitoring to protect the public health, it did conclude that the *Brewer* court's detormination that medical monitoring costs were necessary to "monitor, assess, or evaluate a release" contravened the plain

112. *Coburn*, 28 Envir. Rptr. (BNA) at 1670.
113. 584 F. Supp. 1425 (S.D. Ohio 1984).
114. *Coburn*, 28 Envir. Rptr.(BNA) at1669.
115. Id. at 1670.
116. Id. at 1669 (quoting *Brewer*, 680 F. Supp. at 1179).

meaning of the statute.[117] The court stated: "Quite simply, we find it difficult to understand how future medical testing and monitoring of persons who were exposed to contaminated well water prior to the remedial measures currently underway will do anything to 'monitor, assess, [or] evaluate a release' of contamination from the site."[118] On these grounds the *Coburn* court found *Brewer* unpersuasive and elected not to follow its rationale. Although the *Coburn* court correctly determined that medical monitoring costs are not "necessary costs of response," the court's blanket conclusion that medical monitoring could be of no assistance to evaluate a release is erroneous. Medical monitoring may illuminate the contaminants to which persons have been exposed, at what level, and possibly through what median, enabling more effective remedial measures in the future.

Additionally, another aspect of the court's line of reasoning may be flawed. *Coburn* relied on the exclusion of medical expenses from the final bill to infer the exclusion of medical monitoring costs. Are medical monitoring costs equivalent to medical expenses? An affirmative answer likely would preclude the recovery of medical monitoring costs because Congress clearly deleted medical expenses from the final bill. Alternatively, if medical monitoring is a public health-related screening process necessary to detect the effects of hazardous chemical exposure on the human body, and if medical expenses are distinguishable, then it is not clear that Congress necessarily excluded medical monitoring claims along with claims for medical expenses.

The *Coburn* court engaged in a more thorough examination of CERCLA than did the *Brewer* court; however, its mode of statutory interpretation seems equally eclectic. The court appears to have analyzed CERCLA from a textualist's perspective. It engaged in a thorough analysis of Section 107(a)(4)(B) and its surrounding language, but because of the statute's ambiguity, resorted to the legislative history to support its presumption against recovery of medical monitoring expenses. It is arguable whether a toxtualist would have examined the legislative history. Certainly a new textualist like Justice Scalia would have ended the analysis after concluding that the examples of removal that Congress contemplatod are all physical means of stopping contaminants from spreading, as opposed to screening procedures. The *Coburn* court discounted the value of CERCLA's legislative history yet proceeded to examine it, and

117. *Coburn*, 28 Envir. Rptr. (BNA) at 1671.
118. Id.

actually relied on the legislative history for the basis of its opinion. Under the guise of a textual analysis, the court then stated that finding medical monitoring costs recoverable contravenes the plain meaning of the statute. The court appears to have made a value judgment that medical monitoring costs are not necessary and couched it in a textual analysis to reduce the criticism of its opinion.

As evidenced by the *Brewer* and *Coburn* decisions, the district courts are split as to whether medical monitoring costs are "necessary response costs." These conflicting approaches precipitated the Tenth Circuit's opinion in *Daigle v. Shell Oil Co.*

III. RECENT DEVELOPMENT: *DAIGLE V. SHELL OIL CO.*[119]

In 1956, the Army constructed and began using Basin F, a ninety-three acre hazardous waste impoundment on the Rocky Mountain Arsenal ("the Arsenal"), near Commerce City, Colorado.[120] The Army operated the Arsenal, using Basin F for the impoundment of hazardous waste generated from its chemical product, chemical warfare agent, and incendiary munition manufacturing activities.[121] Under a lease agreement from the Army, Shell Oil Company also used Basin F to impound hazardous waste generated in its pesticide and herbicide manufacturing activities on the Arsenal.[122] The combined activities of Shell and the Army left the Arsenal one of the worst hazardous waste pollution sites in the United States,[123] and Basin F represents only a small portion of a much bigger problem.[124] Army officials estimate that the twenty-seven square mile Arsenal has 120 contamination sites that contain enormous quantities of solid and liquid wastes. Some of that waste is unique because of the mixture of private herbicide and pesticide manufacturing activities with Army munitions manufacturing activities.[125] In 1984, with guidance from the EPA, the Army began a Remedial Investigation and Feasibility

119. 972 F.2d 1527 (10th Cir. 1992).
120. Id. at 1531.
121. Id.
122. Id.
123. Id.
124. Id. The entire Arsenal currently is ranked as the number two priority on the National Priorities List (NPL), an EPA-compiled list that prioritizes CERCLA sites for cleanup based on the relative risk or danger to public health or welfare or the environment. See 42 U.S.C. § 9605(a)(8). The list is published at 40 C.F.R. pt. 300 app. B (1991).
125. *Daigle*, 972 F.2d at 1531 (citing the declaration of Donald L. Campbell, Deputy Program Manager, Army Program Manager's Office).

Study (RI/FS)[126] pursuant to CERCLA.[127] Through this arduous and complex process, the Army identified fourteen specific sites that needed Interim Response Actions (IRAs) to protect human health and the environment.[128] The Army included Basin F on this list of fourteen sites.[129]

The IRA finally began in April 1988, many years after hazardous wastes began leaking into the surrounding environment from Basin F.[130] In agreement with the EPA and the State of Colorado, the Army and Shell jointly initiated the IRA. The IRA lasted for one year, ending in March 1989 with the capping of the solid waste pile.[131]

In *Daigle v. Shell Oil Co.*, the plaintiffs sued for alleged injuries resulting from the cleanup effort itself. The containment effort had stirred noxious odors and airborne pollutants that blew over the plaintiffs'[132] residences, most of which were located in a trailer park one-and-a-half miles due west of Basin F.[133] Although some plaintiffs registered complaints about the odors by December 1988, before the IRA was completed, the government decided that the long-term benefits of removing the hazardous waste outweighed the intermittent discomfort caused by the odors.[134] The plaintiffs alleged that this "intermittent discomfort" caused property and economic damage and a variety of ailments, ranging from conjunctivitis te skin rashes, including the possibility of latent disease.[135]

The plaintiffs asked the Colorado District Court to establish a fund to finance long-term "medical monitering" to detect the onset of

126. The purpose of an RI/FS is to identify contamination sites and determine the feasibility of proposed responses.

127. Remedial Investigation and Feasibility Studies are taken pursuant te CERCLA § 104, 42 U.S.C. § 9604, which authorizes the President to respond te threatened or actual hazardous waste releases. See 42 U.S.C. § 9604(a)(1). The Army teok actions at Basin F, under the supervision of the EPA and in joint agreement with Shell, in accordance with this overall grant of authority. See Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987) (delegating CERCLA response authority te the EPA, and for military institutions such as the Arsenal, to the Secretary of Defense).

128. See *Daigle*, 972 F.2d at 1532. Intorim Response Actions are to take place before the implementation of a permanent remedial response. Id. These actions temporarily stop the immediate spreading of contaminants.

129. Id.

130. Id.

131. Id. The plan involved "the government contract[ing] Ebasco Constructors, Inc., a private contractor, te transfer the liquid hazardous waste from Basin F to on-site storage tanks and lined surfaco impoundments, move contaminated solids into a lined and capped waste pile, and place a clay cap, top soil, and vegetation over soils remaining within the Basin." Id.

132. The plaintiffs are a group of individuals who reside near the Arsenal. Id.

133. Id.

134. Id. (quoting Donald L. Campbell, Deputy Program Manager, Army Program Manager's Office, stating the Army's position).

135. *Daigle*, 972 F.2d at 1532.

any latent disease possibly caused by the Basin F cleanup.[136] The plaintiffs stated that the fund and the monitoring were necessary to assist them in the prevention, early detection, and treatment of chronic disease resulting from the exposure.[137] They argued that Section 107(a) of CERCLA, which allows a private right of recovery for "necessary response costs," should enable them to recover medical monitoring expenses. Due to uncertainty resulting from the poorly developed record and the complete lack of appellate guidance, the District Court denied Shell's and the government's motions to dismiss the CERCLA monitoring claims.[138] Shell and the Government appealed, asserting that the term "response costs" under CERCLA Section 107(a) does not encompass medical monitoring costs.[139]

A. The Court's Brief Look at the Purpose of CERCLA

The Tenth Circuit began its analysis of the *Daigle* plaintiffs' claims by looking at CERCLA's purpose,[140] as amended by the 1986 Superfund Amendments and Reauthorization Act (SARA).[141] The Tenth Circuit recalled its decision in *Colorado v. Idarado Mining Company*[142] to determine the purpose of CERCLA. In *Idarado Mining*, the Tenth Circuit stated that Congress enacted CERCLA to expedite the cleanup of environmental contamination caused by hazardous waste releases. It noted that to further this purpose, the Act establishes several mechanisms to respond to actual or threatened releases and delineates the respective powers and rights of governmental entities and private parties. The *Daigle* court concluded that Congress designed Section 107(a) to fulfill the overall objective of shifting liability for cleanup costs to responsible parties.[143] Specifically, Section 107 (a)(4)(B) states that responsible parties may be sued for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[144] The Tenth Circuit acknowledged that the defendants were the responsible parties and that

136. Id. at 1532-33.
137. Id. at 1533.
138. Id. at 1531.
139. Id.
140. 42 U.S.C. §§ 9601-9675.
141. Pub. L. No. 99-499, 100 Stat. 1613 (1986). See *Daigle*, 972 F.2d at 1533.
142. 916 F.2d 1486, 1488 (10th Cir. 1990).
143. *Daigle*, 972 F.2d at 1533 (citing *Idarado Mining Co.*, 916 F.2d at 1488).
144. 42 U.S.C. § 9607(a)(4)(B). The part of the statement referring to "any other person" is based on the framework of Part A directly preceeding that provision, which states that the "costs of removal or remedial action" that can be recovered are those that were "incurred by the *United States Government* or a *State* or an *Indian Tribe* . . . " (emphasis added). 42 U.S.C. § 9607(a)(4)(A).

the only issue was whether the plaintiffs' monitoring claim fell within Section 107(a)(4)(B)'s private right of recovery for "any other necessary costs of response. . . ."[145]

B. A Hard Look at the Text of CERCLA in the Context of the Whole

The Tenth Circuit sought to determine through a literal interpretation of the text whether CERCLA provided for recovery of medical monitoring costs. The *Daigle* court acknowledged the difficulty courts face in interpreting the language of CERCLA when it stated: "In keeping with its notorious lack of clarity, CERCLA leads us down a convoluted path to the definition of 'any other necessary costs of response.'"[146] The court began its textual interpretation on the accurate premise that the drafters did not directly define the phrase "any other necessary costs of response" as a whole, but rather defined only the term "response."[147] Having only the definition of "response" with which to work, the court began its analysis there. It recognized that "response" is defined as a "removal action" or a "remedial action."[148] The *Daigle* court concluded that "removal actions" are actions designed to effect an interim solution to a contamination problem.[149] CERCLA defines "removal" as cleanup or removal of released hazardous substances from the environment, which includes actions that may be necessary to monitor and evaluate the release or threat of release, and other actions that may be necessary to prevent, minimize, or mitigate damage to the public health or the environment. The *Daigle* court then took the next step, one that courts which refuse to award medical monitoring expenses appear not to take; the court looked at the context in which Congress defined "removal actions." Congress provided specific examples of "remove" or "removal," which include security fencing, provision of alternative water supplies, temporary evacuation, and housing of threatened individuals.[150]

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145. *Daigle*, 972 F.2d at 1533. The court noted that "whether costs are consistent with the national contingency plan" as required by the latter part of subsection (B) also was not at issue. Id. at 1533 n.4. The National Contingency Plan (NCP) is a body of substantive and procedural guidelines that governs CERCLA cleanup actions. Id. (citing 42 U.S.C. § 9605).

146. *Daigle*, 972 F.2d at 1533.

147. Id. (quoting 42 U.S.C. § 9601(25)).

148. *Daigle*, 972 F.2d at 1533.

149. Id. at 1533-34.

150. 42 U.S.C. § 9601(23). In full, the text reads:

"[R]emove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be

The Tenth Circuit then examined the other definition of response, "remedial actions," and noted that it refers to a permanent solution to a contamination problem.[151] The court found that "remedy" or "remedial action," as defined by CERCLA, means permanent actions taken instead of or in addition to removal actions in the event of a release or threat of a release that operate te prevent or minimize the migration of the substances.[152]

Again, the *Daigle* court turned to the legislature's examples. CERCLA states that remedial actions are actions taken at the location of the release, including storage, confinement, and perimeter protection using dikes, trenches or ditches, clay cover, neutralization, cleanup, and any monitoring required to assure that such actions protect the public health and welfare and the environment.[153]

The *Daigle* court then critiqued the plaintiffs' and the defendants' arguments in light of its own thorough textual analysis. The plaintiffs relied on the plain language in the definitions of "removal" and "remedy" that refers to "monitoring" in the "public health and welfare context"[154] to argue that CERCLA clearly covers the monitor-

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necessary to prevent, minimize, or mitigate damage to the public health or welfare or te the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures te limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974. [42 U.S.C.A. § 5121 et seq.]

Id.

151. *Daigle*, 972 F.2d at 1534.

152. Id.

153. 42 U.S.C. § 9601(24). CERCLA's definition reads in full as follows:

Those actions censistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances, or centaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, cellection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment....

Id. The statute concludes by stating that the term "remedy" or "remedial action" means those actions consistent with permanent relocation of residents and businesses and community facilities when the President determines that, alone or in combination with other measures, relocation is more cost-effective than and environmentally preferable te the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare. The term includes offsite transport and offsite storage treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials. Id.

154. See text accompanying notes 74-76.

ing costs they sought and cited *Brewer v. Raven*[155] and several other cases that arrived at the same result as *Brewer*.[156] The *Daigle* court then critiqued the *Brewer* court's holding and noted that the *Brewer* court applied what it considered to be the plain language of the definitions to hold that Section 9601 "removal" and "remedial" costs encompass medical monitoring, provided the monitoring is "conducted *to assess the effect of the release or discharge on public health or to identify potential public health problems presented by the release.*"[157] The *Daigle* court acknowledged that the statutory language indicates that certain monitering costs are recoverable as "removal action" or "remedial action" response costs.[158] The Tenth Circuit concluded, however, that the plaintiffs and the *Brewer* court interpreted the "public health and welfare" language in the definitions teo broadly.[159] It also noted that other district courts,[160] after examining tlie plain language of the definitions in tlie context of CERCLA's overall structure and history, similarly rejected the *Brewer* holding for its overbreadtli.[161] The defendants relied on this reasoning in their argument.[162]

In its analysis, the Tenth Circuit proceeded to do what it claimed the plaintiffs and the courts following tlie *Brewer* line of cases had failed to do: it examined the "moiitoring" and "health and welfare" language in the context of the statute, concluding that both definitions address containing and cleaning up hazardous substance releases.[163] The Tenth Circuit dismissed the plaintiffs' argument that

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155. 680 F. Supp. 1176 (M.D. Tenn. 1988).

156. The plaintiffs also cited *Williams v. Allied Automotive*, 704 F. Supp 782, 784-85 (N.D. Ohie 1988); *Adams v. Republic Steel Corp.*, 621 F. Supp. 370, 376-77 (W.D. Tenn. 1988); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1429-30 (S.D. Ohio 1984).

157. *Daigle*, 972 F.2d at 1534 (quoting *Brewer*, 680 F. Supp. at 1179) (emphasis in original).

158. *Daigle*, 972 F.2d at 1535.

159. Id.

160. The aforementioned district courts referred te the comprehensive analysis in *Coburn v. Sun Chemical Corp.*, 28 Envir. Rptr. (BNA) 1665 (E.D. Pa. 1988) (declining te award medical monitering costs). See Tanenbaum, Comment, 59 U. Chi. L. Rev. at 925 (cited in note 10).

161. *Daigle*, 972 F.2d at 1535 (citing *Woodman v. United States*, 764 F. Supp. 1467, 1469-70 (M.D. Fla. 1991); *Bolina v. Cessna Aircraft Co.*, 759 F. Supp. 692, 713-14 (D. Kan. 1991); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1473-74 (D. Colo. 1991); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1246-50 (M.D. Pa. 1990); *Werlein v. United States*, 746 F. Supp. 887, 901-05 (D. Minn. 1990).

162. *Daigle*, 972 F.2d at 1535.

163. Id. The court noted as an example that the "moniter[ing]" allowed under the "removal action" definition relates under the plain statutery language only to the evaluation of the extent of a "release or threat of release of hazardous substancos." Id. (quoting 42 U.S.C. § 9601(23)). The court similarly noted that the "remedial action" definition expressly focuses only on actions nocessary to "prevent or minimize the release of hazardous substances so that they do not migrate te cause substantial danger to present or future public health or welfare or the environment." *Daigle*, 972 F.2d at 1535 (quoting 42 U.S.C. § 9601(24)).

the additional language in Section 9601(23), which refers to "other actions as may be necessary to prevent, minimize, or mitigato damage to the public health or welfare," deserves a broad reading to cover any type of monitoring that would mitigate health problems.[164] The circuit court stated that even though medical monitoring would mitigato the plaintiffs' potential individual health problems, the general provision for prevention or mitigation of "damage to public health or welfare" requires an interpretation consistent with the specific examples of "removal costs" enumerated in the definition.[165] The court also explained that the specific examples all prevent or mitigate damage to public health by preventing contact between the spreading contaminants and the public,[166] and that the sort of long-term health monitoring requestod by the plaintiffs[167] clearly could not further this aim because the release would have already occurred prior to any monitoring.[168]

C. *CERCLA's Critical Characterization and Ambiguous Legislative History*

After thoroughly analyzing the statutory text, the *Daigle* court finally examined CERCLA's legislative history to ascertain whether it clarified the language that had been adopted into law. Before analyzing the legislative history, the Tenth Circuit made a presumption critical to its holding:[169] it stated that the plaintiffs' request for medical monitoring expenses resembled a personal injury cause of action for damages.[170] The court erred on this critical point. Medical monitoring costs do not result from personal injury; rather, medical monitoring is a public health-related procedure used to detect whether any personal injury, in the form of chronic disease, has occurred. The Tenth Circuit, however, pursued its analysis of the legislative history beginning with that erroneous presumption. Noting the sparse

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164. *Daigle*, 972 F.2d at 1535.

165. Id. (citing *Ambrogi*, 750 F. Supp. at 1247).

166. The court referred to the specific examples given by the drafters that include fencing, altornato water supplies, and temporary housing. *Daigle*, 972 F.2d at 1535. The court noted that the statute does not limit "removal" costs to these specific examples, but that it is only reasonable under traditional statutory canons of construction te conclude that any other recoverable costs must be at least of a similar type. Id. (citing *Ambrogi*, 750 F. Supp. at 1247 & n.17, for its discussion of *ejusdem generis*).

167. The plaintiffs requested monitering "to assist plaintiffs and class members in the prevention or early detection and treatment of chronic disease." *Daigle*, 972 F.2d at 1535 (citations omitted).

168. Id.

169. See Tanenbaum, Comment, 59 U. Chi. L. Rev. at 941 (cited in note 10).

170. *Daigle*, 972 F.2d at 1535.

legislative history supporting the definition of "response costs,"[171] the *Daigle* court stated that the history of CERCLA's enactment reveals that both houses of Congress considered and purposefully rejected any provision that would allow recovery of medical or other private damages unrelated to the cleanup effort.[172] The court then referred te the intentional deletion of any private cause of action for personal injury by examining Senator Randolph's statement that Congress "deleted the Federal cause of action for medical expenses or income loss."[173] The Tenth Circuit concluded that Senator Randolph's status as co-sponsor of the compromise bill made his statements reliable indicaters of Congressional intent te exclude "medical expenses" from recovery.[174] Further, the court noted that other Senators and Representatives supported Senater Randolph's statements throughout CERCLA's evolution,[175] thereby confirming the obvious implication that Congress intentionally deleted all personal rights to recovery of medical expenses from CERCLA.[176]

The *Daigle* court explained that its conclusion does not suggest that CERCLA ignores public health; rather, the conclusion implies that other provisions within CERCLA address these needs. The court specifically noted that Section 104(i), which establishes the Agency for Toxic Substances and Disease Registry (ATSDR), empowers the ATSDR[177] te assess the health effects of actual and threatened

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171. Id. (citing *Exxon v. Hunt*, 475 U.S. 355, 373 (1986)).

172. *Daigle*, 972 F.2d at 1535. The court explained:

> Each chamber of Congress considered Bills which contained provisions for causes of action for certain economic damages and for personal injury. For example, the original House Bill contained a provision for private recovery of "all damages for personal injury, injury te real or personal property, and economic loss, resulting from such release or threatened release." . . . This provision did not make it out of committee, and the final Bill as enacted by the House included no provision for medical expense recovery. . . . The Senate Bill also contained a provision for private recovery of "all out-of-pocket medical expenses, including rehabilitation costs or burial expenses, due to personal injury." But this provision was later deleted by amendment, and H.R. 7020 was ultimately substituted as a compromise bill, amended, enacted by both chambers and signed into law without any reference to medical expenses.

Id. at 1535-36 (citations omitted). See also *Exxon Corp.*, 475 U.S. at 366-67 n.8 (providing a concise account of the bills Congress considered in the evolution of CERCLA).

173. *Daigle*, 972 F.2d at 1536 (citing 126 Cong. Rec. 14964 (1980) (statement of Sen. Randolph)).

174. *Daigle*, 972 F.2d at 1536. See also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (noting the "authoritative" status of the remarks of a bill's sponsor).

175. *Daigle*, 972 F.2d at 1536. In support of its conclusion, the court noted that Representative Gore expressed dismay at "the drastic whittling down of the original liability provisions. . . ." Id. at n.7 (citing H.R. Rep. No. 96-1016, pt. I, at 62-65 (1980) (statement of Representative Albert Gore)). The dissatisfaction with CERCLA expressed by Al Gore could produco extensive proposals for change within CERCLA given his current office as vice-president.

176. *Daigle*, 972 F.2d at 1536.

177. ATSDR's power comes from the 1986 SARA amendments. Id.

hazardous substance releases through an elaborate array of functions.[178] The Tenth Circuit also dismissed the plaintiffs' argument that the medical monitoring ("health surveillance") provisions under 104(i) indicate that the types of medical expenses intentionally excluded from CERCLA response costs do not include medical surveillance.[179] The Tenth Circuit explained that the deleted provisions addressed the personal right to recover medical expenses and not the comprehensive ATSDR health assessment procedures enacted under SARA, and that ATSDR liability is distinguishable from response costs."[180] The *Daigle* court explained that Section 107(a) is a liability provision that provides the government a cause of action for the recovery of Section 104(i) ATSDR health assessment costs, which is separate from the cause of action for response costs.[181] It concluded its analysis by stating that Congress's provision for separate recovery and funding provisions for health assessment costs indicates that such costs, including the medical monitoring the plaintiffs sought, differ from response costs and therefore are not available to private parties under the Section 107(a)(4)(B) liability provision. Accordingly, the Tenth Circuit held that, given the language of the response definitions and the history and structure of CERCLA, the medical monitoring expenses that the plaintiffs sought are not recoverable under CERCLA Section 107(a).[182]

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178. Id. See generally Susan M. Cooke, *The Law of Hazardous Waste, Management, Cleanup, Liability and Litigation*, § 13.01 at (4)(d)(vii) (MB, 1992) (reviewing the ATSDR health assessment functions under CERCLA § 104(i) as amended by SARA). The court noted as an example, that the ATSDR must conduct formal health assessments for every NPL facility pursuant to CERCLA § 104(i)(6)(A), and that it is authorized to conduct formal health assessments on other sites if individuals or physicians provide information regarding human contact with released hazardous materials pursuant to CERCLA § 104(i)(6)(B). *Daigle*, 972 F.2d at 1536 (citations omitted). Such individuals and physicians may petition the ATSDR to conduct a health assessment, and the ATSDR must provide a written explanation of why an assessment is inappropriate in case of a denial. Id. Depending on the results of a health assessment that is performed, the ATSDR is empowered, under CERCLA § 104(i)(7), to conduct pilot epidemiological studies, and, under CERCLA § 104(i)(8), to establish a registry of persons that have been exposed and in the event of a serious health risk, establish a long-term "health surveillance program" to include "periodical medical testing" and treatment referral mechanisms for those persons who are screened positive. *Daigle*, 972 F.2d at 1537 (citations omitted).

179. *Daigle*, 972 F.2d at 1537.

180. Id.

181. Id. See text accompanying note 177. Compare CERCLA § 107(a)(4)(D), which deals with health assessment costs, with subsection (4)(A), which addresses response costs. CERCLA § 111 provides Superfund reimbursement for § 104(i) ATSDR health assessment costs separately from reimbursement for response costs. Compare CERCLA § 111(a)(1) (addressing funding authorization for general response costs) with § 111(c)(4) & (m) (addressing funding authorization for ATSDR costs). See *Daigle*, 972 F.2d at 1537 (offering the above comparisons).

182. *Daigle*, 972 F.2d at 1537.

D. *Analyzing the* Daigle *Opinion and Assessing Its Potency*

As the first Circuit Court ruling on the subject, the Tenth Circuit's opinion is a potentially powerful precedent in the area of recovery of medical monitoring costs under CERCLA. Although the decision may be influential in courts' future decisions, it is important to consider its deficiencies.

Two of the court's important premises could limit the decision's impact: (1) the finding that CERCLA's purpose is narrow and (2) the court's characterization of the plaintiffs' claims as seeking compensation for personal injuries. The court first analyzed CERCLA's structure with the premise that the statute has a narrow purpose; Congress enacted it to facilitate the expeditious cleanup of environmental contamination caused by hazardous waste releases.[183] The court noted that Section 107(a) in particular facilitates the cleanup of hazardous waste sites by shifting liability for cleanup costs to responsible parties.[184] Conversely, other courts and scholars have stated that CERCLA has as many as three purposes: the facilitation of cleanup, protection of the public health, and deterrence of environmental contamination.[185]

If the statute's purpose is considered a broad attempt to further the public health and welfare or to deter environmental releases at the outset, the appropriateness of medical monitoring costs seems more compelling, and their usefulness to further these objectives is readily apparent. Alternatively, under a narrow reading of the statute's purpose medical monitoring costs seem unrelated to this purpose; medical monitoring rarely would facilitate cleanup or prevent contact between the environmental release and the public because the release and the cleanup of environmental contamination will at least have begun and possibly been completed before the medical monitoring indicates the development of latent disease.

In *Daigle,* the Tenth Circuit asserted one purpose of the legislation that was consistent with its analysis, yet ignored the existence of any other purposes.[186] As statutory interpretation scholars Profes-

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183. Id. at 1533.

184. See id. and text accompanying notes 143-44.

185. See Grad, 8 Colum. J. Envir. L. at 2 (cited in note 4) (stating that CERCLA, combined with Subtitle C of RCRA, form a sufficient authorization to begin the cleanup of old hazardous waste sites and to avoid the consequences of new hazardous waste spills, for the protection of health and the environment). See also Tanenbaum, Comment, 59 U. Chi. L. Rev. at 949-50 (cited in note 10) (arguing that CERCLA and particularly § 107(a) were enacted with a broad public health purpose that could not be effectuated without the recovery of medical monitoring costs).

186. In *Daigle,* the Tenth Circuit is guilty of the same mistake the Supreme Court made in the landmark case of *United Steelworkers v. Weber,* 443 U.S. 193 (1979). In that case, the Court

sors Frickey and Eskridge note, however, complex compromises are endemic in the legislative process; therefore, legislation frequently reflects different and possibly conflicting purposes.[187]

A better-reasoned opinion would have acknowledged that protection of the public health and deterrence of hazardous releases also are goals of CERCLA. The court then could have justified its conclusion by noting that the legislative history suggests that public health is not a principle Congress was willing to implement unconditionally and at any expense.[188] Even more praiseworthy, the court could have acknowledged that CERCLA's purpose may not be discernible. Although the Tenth Circuit's treatment of CERCLA's purpose seems to be a major deficiency in its decision, it is somewhat irrelevant; the purpose the court attributed to CERCLA is relevant to its position on the recoverability of medical monitoring costs, but it is not determinative. Even assuming that CERCLA seeks to facilitate cleanup, protect the public health and welfare, and deter hazardous releases, a sound textual analysis supported by an examination of the legislative history demonstrates Congress's unwillingness to adopt a law that would place unconditional liability on responsible parties. Moreover, few disagree that sound statutory interpretation begins with the text,[189] and the strength of the Tenth Circuit's opinion in *Daigle* stems from its thorough textual analysis supported by a thoughtful examination of the legislative history. Although the court examined the legislative purpose, it clearly was not the focus of the court's opinion.

The *Daigle* court's second assumption that threatens to weaken the opinion's precendential value is the Tenth Circuit's characterization of the medical monitoring claim as an attempt to recover personal injury damages. The Tenth Circuit found that the plaintiffs' request for medical monitoring to allow prevention or early detection and treatment of chronic diseases "smacks of a cause of action for damages resulting from personal injury."[190] The legislative history rather unambignously eliminates any cause of action for

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asserted the result-oriented purpose of Title VII, that of achieving nondiscrimination, and ignored the color-blindness purpose. By asserting one purpose and suppressing the other, scholars argue, the Court in *Weber* distorted the evidence and overstated its argument. Eskridge and Frickey, 42 Stan. L. Rev. at 336 (citod in note 25).

187. See Eskridge and Frickey, 42 Stan. L. Rev. at 336-37.

188. See id. at 336 (commenting that the statutery exceptions for small businesses and union seniority in Title VII demonstrate that nondiscrimination was not a purpose Congress was willing to implement at any price).

189. See id. at 337.

190. *Daigle*, 972 F.2d at 1535. See text accompanying notos 170-72.

personal injury.[191] Arguably, however, medical monitoring is an attempt to further the public health and welfare and is unrelated to any claim for personal injury.[192] If this statement is true, the court's premise for analyzing the legislative history is invalid and drains the opinion of validity.

This observation also appears more problematic at first glance than it actually is. Regardless of the label placed on the plaintiffs' claim, it appears the claim would be unable to clear the hurdle presented by the plain language of the provisions when viewed in the context of the remainder of CERCLA. CERCLA does not contemplate medical monitoring costs; the examples of what it does cover involve preventing further physical contact between the contaminants and the public, not monitoring the effects of that contact.

This Recent Development argues that *Daigle* may leave a gap in the law—CERCLA explicitly excludes medical monitoring expenses only if characterized as a cause of action for damages resulting from personal injury. Despito this lacuna, judges interpreting Section 107(a)(4)(B) in the future will be hard-pressed to grant medical monitoring costs when faced with precedent demonstrating that medical monitoring costs are entirely different than other actions considered in CERCLA's liability provisions and that the statute contomplates medical monitoring in other sections.

As demonstratod by the analyses of the *Brewer* and *Coburn* lines of cases, a court's method of statutory interpretation dramatically influences whether plaintiffs can recover medical monitoring expenses under CERCLA. Beyond strictly examining the definitions, the courts' methods of statutory interpretation differ wildly. *Daigle*'s analysis is similar to *Coburn*'s in that it proceeds from the provided definitions to an examination of their context and the relationship between those provisions and the general structure of CERCLA. The Tenth Circuit could have ended its analysis with this sound textual approach, but it looked further to the legislative history for support of its textual interpretation. Finding support for its position in the legislative history, the Tenth Circuit virtually ended its statutory analysis at that point. Although the Tenth Circuit's conclusion in *Daigle* is correct—medical monitoring costs are not "necessary costs of response"—a dynamic approach to the intorpretation of CERCLA would have been meritorious.[193] Considering CERCLA's overtly

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191. See notes 170-76 and accompanying text.

192. See Tanenbaum, Comment, 59 U. Chi. L. Rev at 938-40 (cited in note 10).

193. See Part II (discussing the statutory intorpretation of the *Brewer* court) for a discussion of the merits of dynamic interpretation, particularly practical reasoning.

ambiguous language and arguably indeterminate legislative history, a dynamic interpretation would consider the factors that prompted CERCLA's enactment, as well as the current values influencing its interpretation. Although the result probably would be the same, the inaccurate assumptions on which the court based its analysis significantly undermine the opinion.[194]

E. Resolution of the Issue Outside of CERCLA

The Tenth Circuit's holding that medical monitoring costs are not "necessary costs of response" leaves unresolved the issue of recoverability of medical monitoring costs. Thus, it is appropriate to inquire whether common law provides persons with an adequate remedy and whether it is a more appropriate avenue to pursue recovery of medical monitering expenses.

Plaintiffs increasingly plead common-law tort theories of liability in environmental cleanup actions, particularly the abnormally dangerous activities doctrine, because, among other reasons, tort claims may offer them damages not easily recovered under CERCLA.[195] Medical monitoring costs provide a prominent example.[196] To establish a claim under the abnormally dangerous activities doctrine, the plaintiff need not establish duty, breach of duty, causation, and damages as in negligence cases.[197] Courts must decide as a mattor of law at the summary judgment stage whether an activity is "abnormally dangerous."[198] Some courts have denied recovery of medical monitoring costs as "necessary costs of response," but have upheld common-law tort claims for the same expenses.[199] They have held under common-law tort theory that medical monitoring is a clearly recoverable future medical cost.[200] These

194. See *Daigle*, 972 F.2d at 1535.

195. Jim C. Chen and Kyle E. McSlarrow, *Application of the Abnormally Dangerous Activities Doctrine to Environmental Cleanups*, 47 Bus. Law. 1031 (1992).

196. Id. at 1045.

197. Id. at 1033.

198. For a thorough discussion of the abnormally dangerous activites doctrine, see generally id. at 1031.

199. See, for example, *Werlein v. United States*, 746 F. Supp. 887, 904-05 (D. Minn. 1987). See also Chen and McSlarrow, 47 Bus. Law. at 1045-46 (cited in note 195).

200. *Werlein*, 746 F. Supp. at 904-05. See also *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 849-52 (3d Cir. 1990) (considering a petitioner's common-law claim for medical monitoring expenses and holding the cause of action cognizable in Pennsylvania to cover costs of periodic medical examinations needed to protect against exacerbation of latent diseases brought about by exposure to hazardous substances); *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847, 848-52 (M.D. Pa. 1988) (finding that the plaintiffs were entitled to recover the costs of periodic medical examination made necessary by significantly enhanced risk of serious disease); *Ayers v. Township*

decisions are particularly potent because common-law claims also allow plaintiffs to discover facts to support subsequent claims for personal injury,[201] actions that were deleted from the final CERCLA bill.

One may argue that if tort law provides the remedy then CERCLA need not. Moreover, the argument may follow that because CERCLA defines potentially responsible parties so broadly and contains no causation requirement, requiring parties to pay medical monitoring costs under CERCLA as well would impose crushing liability on potentially responsible parties. Furthermore, these same persons may argue that Congress intended the common law to govern,[202] or at the least, that issues left unresolved by a statute fall outside its domain.[203]

This Author agrees that CERCLA does not contemplate medical monitoring costs in its current form, but disagrees with arguments that it would be inappropriate for "necessary costs of response" under CERCLA to encompass medical monitoring costs. CERCLA is a hazardous waste cleanup bill. It would seem appropriate for the statute to cover all aspects of the cleanup process: First, hazardous waste releases will not be deterred if responsible parties are not required to pay the full costs of all their activities. Second, judicial efficiency would suggest that all claims should be pursued in the federal courts under CERCLA. Judicial efficiency, however, is not a reason to go beyond the actual text of the statute. Rather, Congress should amend CERCLA so that its text provides for the recovery of medical monitoring costs.

The argument that allowing recovery of medical monitoring costs would "load up" CERCLA in the absence of a causation requirement is equally unpersuasive for two reasons. First, medical monitering costs are inexpensive compared to the other costs associated with cleaning up a hazardous waste site, and therefore would not add an outrageous amount to the total cleanup bill. Second, the lack of a causation requirement does not justify refusing to allow the recovery of medical monitering costs under CERCLA because the alternative remedy would be the abnormally dangerous activities doctrine, a strict

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of Jackson, 525 A.2d 287, 308-15 (N.J. 1987) (holding that residents were entitled to damages for the cost of medical surveillance based upon enhancod future risk of disease).

201. Chen and McSlarrow, 47 Bus. Law. at 1046 (cited in note 195).

202. See 126 Cong. Rec. 14964 (1980) (recording Senator Randolph as stating that "[i]t is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law").

203. See Easterbrook, 50 U. Chi. L. Rev. at 544 (cited in noto 34) (stating that "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers").

liability claim that similarly does not contain a causation requirement.

IV. CONCLUSION

Examined independently, words have numerous meanings. It is from their context that the reader can determine precisely what the writer intended. When looking at the words of Section 107(a)(4)(B) in the context of the entire Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the legislative history, and the "lets make a deal" legislative process, it appears that the drafters, as the Tenth Circuit concluded in *Daigle v. Shell Oil Co.*, did not contemplate the recovery of medical monitoring costs under this statute.[204] The examples of "removal" and "remedial action" supplied by Congress are unrelated to medical monitoring of the public health, and instead refer only to containing and cleaning up hazardous wasto. The monitoring contemplated consists of means to prevent further physical contact between contaminants and the public. Moreover, medical monitoring costs are mentioned in the legislative history, but their recovery was not incorporated into CERCLA's language.

This reality does not suggest that medical monitoring is not a valuable and an appropriate means of assessing damage to the public and the environment from hazardous waste exposure. This Recent Development calls for legislative reform that explicitly allows for medical monitoring, so that courts and injured parties can stop construing the enactod legislation to say something it does not.

As currently written, CERCLA does not provide for the recovery of medical monitoring expenses and thereby deprives the public of a valuable tool in assessing the impact of hazardous chemicals on both the environment and people. This omission is an enormous gap in the law, leaving courts like *Daigle* no choice but to interpret CERCLA as excluding medical monitoring costs. Rather than advocating judicial lawmaking, this Recent Development pleads for legislative reform. Amended legislation should make responsible parties liable not only for environmental damage, but also for harm suffered by the public. Explicit legislation that defines medical monitoring costs,

204. See Senate Debate on the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), in which Senator George Mitchell stated that "[u]nder this bill, if a toxic waste discharge injures both a tree and a person, the tree's owner, if it is a government, can promptly recover . . . for the cost of repairing the damage, but the person cannot. In effect, . . . it is alright to kill people, but not trees." 126 Cong. Rec. 30941 (1980) (statement of Senator Mitchell).

distinguishes them from personal injury causes of action, and delineates exactly when a plaintiff may recover them, would serve as a valuable tool for preventing and detecting human disease resulting from exposure to toxic chemicals.

This Recent Development not only supports the view that medical monitoring costs are not "necessary costs of response" under Section 107(a)(4)(B) of CERCLA,[205] but more importantly, it advocates immediate and well-thought-out legislative action[206] to allow for medical monitoring as a "necessary cost of response." Not only is medical monitering an invaluable tool for assessing the effects of hazardous substances on the public health and the environment, but recovery of these costs is required if CERCLA is to fulfill its intended

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205. The University of Chicago Law Review has published a Comment on the topic of recovering medical monitoring costs under CERCLA. See Tanenbaum, Comment, 59 U. Chi. L. Rev. at 925 (cited in note 10). Although both the Tanenbaum Comment and this Recent Development recognize the value of medical monitoring as a teol in the prevention and detection of disease, the pieces reach opposite conclusions. See id. at 926-27. The Tanenbaum piece concludes that "necessary response costs" under CERCLA include medical monitoring costs, but this Recont Development concludes that medical monitoring costs are not necessary costs of response under CERCLA as currently written. A critical difference in these pieces is the approach to the issue of statutory interpretation. This Recent Development advocates an approach that is not purely toxtualist, intentionalist, or purposivist. See Eskridge and Frickey, 42 Stan. L. Rev. at 324-45 (cited in note 25) (pointing out the weaknesses of these approaches). Rather, it asserts a dynamic approach that begins with a thorough examination of the text in the context of the entire statute, supported by further examination of the legislative history, legislative purposes, the evolution of the statute, and current policy. See id. at 345-62 for an in-depth discussion of dynamic statutory interpretation, particularly the Practical Raasoning Approach.

In contrast, the Tanenbaum Comment seems to advocate a purposivist approach—interpreting the Act according to its actual or presumed purpose. The Comment approaches purposivism consistent with the method advocated by non-public choice legal scholars. See Hart and Sacks, *The Legal Process* at 166-67 (cited in note 38); Eskridge and Frickey, 42 Stan. L. Rev at 333. This method basically entails deciding what purpose should be attributed to the statute and the subordinate provision in question, and then interpreting the words in question to carry out that purpose.

This Recent Development suggests two flaws in Tanenbaum's analysis. First, Tanenbaum asserts the public health purpose of CERCLA and glosses over any examples in the statute that appear inconsistont with that purpose in order to allow § 107(4) to carry out that purpose. Professors Eskridge and Frickey point out some of the flaws of that type of analysis, namely, the relianco on unrealistic assumptions, indeterminacy, and the often competing values apparent in legislation. See Eskridge and Frickey, 42 Stan. L. Rev. at 332-45. Moreover, public choice scholars recognize that legislation does not have a discernible or laudable purpose. Second, even a true purposivist thoroughly examines the text of the statute. Professors Eskridge and Frickey state that courts most often begin with the text, and textual arguments carry the greatest weight. Id. at 354-56. Without a hard look at the language in the context of the entire statute, the Tanenbaum Comment seems unpersuasive. All of its arguments concerning the value of medical monitoring as a teol in the prevention, detection, and treatment of disease are undisputed, however, in this Recent Development.

206. The legislative history shouts of Al Gore's disgust with the whittling away at recovery available under CERCLA. See note 175 and accompanying text. It is entirely possible that the legislature could take action putting some teeth inte CERCLA, or enact legislation that appropriatoly allows for medical monitoring expenses.

function. CERCLA has dual purposes: to deter environmental releases and to facilitate cleanup after a release occurs. Common sense dictates that in order for a liability rule to function properly, all the costs incurred must be included in the penalty. An inadequate penalty will not serve the deterrence function, thereby defeating the purposes of the law. Without an amendment to CERCLA, the public is left virtually without protection under CERCLA—unable to recover for physical injury and unable to recover costs to monitor whether exposure could eventually lead to a deadly disease with the potential to infect an entire community.[207]

The time is ripe, with President Bill Clinton and Vice-President Al Gore in office, to move for clear environmental laws that leave courts no choice but to grant recovery for medical monitoring costs. When the legislature goes in to play "lets make a deal," they will know that the executive's priority will be to protoct the people from the industries as opposed to protecting the industries from the people. CERCLA currently does not meet society's needs because its ambiguous wording leaves courts a back door that is left perpetually open.

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207. See note 204 (referring to statement of Senator Mitchell).