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Up in the Air: Recovery of Attorney Fees in a CERCLA 107(a)(4)(B) Suit

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UP IN THE AIR: RECOVERY OF ATTORNEY FEES IN A CERCLA § 107(a)(4)(B) SUIT

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I. INTRODUCTION

The federal courts are split on the question of whether an action by a private party to recover cleanup costs against another private party pursuant to § 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[1] authorizes the award of attorney fees as part of recoverable response costs to the party bringing the suit.

This article maintains that the correct view, in terms of legitimate statutory construction, although not necessarily environmental policy, is that CERCLA does not authorize the award of attorney fees to a party bringing this kind of suit. The chief obstacle to the recovery of attorney fees in our legal system is the American Rule, which requires parties to a lawsuit to bear their own legal expenses unless one of the exceptions to the rule applies. One major exception to the American Rule if there is a statutory authorization for the award of attorney fees. The division of authority on the award of attorney fees centers on the issue of whether CERCLA has provided sufficient authorization for the award of attorney fees in a § 107(a)(4)(B) suit to overcome the American Rule. This article, like the majority of federal courts, maintains it does not.[2]

II. UNDERSTANDING CERCLA

A. THE STATUTE

The Comprehensive Environmental Response, Compensation and Liability Act, commonly known as the "Superfund" law, was originally enacted by Congress in 1980[3] and revised by the Superfund Amendments and Reauthorization Act of 1986

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1. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-75 (1988 & Supp. 1991)).

2. *But see* Eric Kaplan, *Attorney Fee Recovery Pursuant to CERCLA Section 107(a)(4)(3)*, 42 WASH. U.J. URB. & CONTEMP. L. 251, 253 (1992) (arguing in favor of award of attorney fees).

3. Pub. L. No. 96-510, 94 Stat. 2767.

(SARA).[4] CERCLA was created to compensate for a major shortcoming of the Resource Conservation and Recovery Act (RCRA)[5] of 1976. RCRA had ostensibly created a cradle-to-grave regulatory system for the control of hazardous waste that covered generators, transporters, and storage and disposal facilities. The major flaw with the RCRA regulatory approach was its prospective nature—its coverage was confined to active and new disposal facilities. Left uncovered by the RCRA net was a large part of the hazardous waste problem haunting the nation from the past, namely, abandoned and inactive hazardous waste sites. Propelled by the Love Canal disaster in 1978,[6] which made it apparent that the RCRA was not well-suited for dangerous releases of chemicals from old dump sites, Congress enacted CERCLA[7] to clean up leaking hazardous waste disposal sites.[8]

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4. Pub. L. No. 99-499, 100 Stat. 1615. CERCLA and SARA are known collectively as CERCLA and codified at 42 U.S.C. §§ 9601-9675.

5. Pub. L. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6992i (1988 & Supp. 1991)).

6. *See* Bulk Distrib. Ctr., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 835 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

The Love Canal disaster in New York state attracted national media attention shortly after RCRA was enacted. In 1953, Hooker Chemical and Plastics Company conveyed a 16-acre chemical dump site that had been covered with clay to the Niagara Falls Board of Education. The selling price was one dollar. School officials were informed that the company had buried chemicals at the site. The deed included a disclaimer stating Hooker was not liable for any harms that might be caused by the dump site. Eventually an elementary school and a subdivision of 100 homes were built upon the site. Sludge began leaking into at least one basement as early as 1959. Chemicals began seeping into other basements and bubbling up to the surface after heavy rains in 1978. Over 80 chemical compounds were found, many of which were cancer-causing. Eventually 1,000 families were permanently evacuated from the area. *See* ADELINE GORDEN-LEVINE, LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE (1982).

7. *See* H.R. REP. No. 1016, 96th Cong. 2d Sess. 22, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6124-25; S. REP. No. 848, 96th Cong., 2d Sess. 10, 10-11 (1980); *see also* David A. Rich, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 646-48 (1986); Richard C. Belthoff, *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141, 144 (1986); United States v. Shell Oil Co., 605 F. Supp. 1064, 1071 (D. Colo. 1985) (stating that "'deficiencies in' RCRA have left regulatory gaps"); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 839 (W.D. Mo. 1984) (stating that "[i]t was the precise inadequacies resulting from RCRA's lack of applicability to inactive and abandoned hazardous waste disposal sites that prompted passage of CERCLA"), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). *See also*, United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983).

8. RCRA of 1976 § 7003, 42 U.S.C. § 6973 (1988). The imminent endangerment provision of the legislation arguably can be applied to past hazardous waste wrongs today, but there was sufficient doubt on the applicability of RCRA to inactive sites to justify the passage of CERCLA in 1980. As originally enacted in 1976, § 7003 provided that if the EPA found that the "handling, storage, treatment, transportation or disposal" of any hazardous waste was "presenting an imminent and substantial endangerment to health or the environment," it could institute suit in federal district court to immediately restrain any person contributing to "such handling, storage, treatment, transportation or disposal or to take such other action as may be necessary." *See* United States v. Waste Indus., 556 F. Supp. 1301 (E.D.N.C. 1982), *rev'd*, 734 F.2d 159 (4th Cir. 1984) (regarding past disposers);

CERCLA is not the customary federal regulatory standard-setting statute found in federal environmental law which is concerned with imposing controls on pollution sources.[9] Nor is CERCLA a comprehensive regulatory regime addressing inactive and abandoned facilities. Rather than being the typical federal pollution statute aimed at the control of pollution, CERCLA is directed at the abatement of pollution. CERCLA is a combination cleanup and liability measure that attempts to carry out its objectives by creating an administrative system for removing harmful materials which have been improperly dumped into the environment in the past. CERCLA interjects the federal government into the role of undertaking pollution cleanup, and forces a polluter to pay for this federal remediation through taxes and reimbursement liability. CERCLA, in sum, applies to situations in which damage from hazardous waste has already occurred and is meant to facilitate cleanup, to impose responsibility upon responsible parties, and to adequately compensate injured parties.

CERCLA applies a liability approach rather than a standard-setting approach to environmental protection. CERCLA does not direct the federal government to issue regulations that dictate the conditions under which persons must comply or state which actions they must take to prevent environmental damage. Instead, CERCLA uses its liability provisions to pronounce the potential consequences to responsible parties if hazardous substances are released or if conditions posing a serious threat of such a release are created. The liability approach provides not just a means to finance cleanups, but also serves as a deterrent to mismanagement of hazardous substances.

CERCLA is a mess, however. The legislation was hurried through Congress, and its structure and language reflect this urgency. As one court put it, CERCLA is "virtually incomprehensible" in its draftsmanship which has gained it a "quirky notoriety," resulting in legislation resembling the King Minos' labyrinth.[10] Another court has dryly noted that "CERCLA is not a

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United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982) (regarding non-negligent off-site generators). Section 7003 was amended in 1984 to extend the imminent danger provision to past or present generators, disposers and transporters of hazardous waste. Pub. L. No. 98-616, Title IV § 403(a), 98 Stat. 3271.

9. While CERCLA is one of the few environmental statutes that delegate implementation authority to the President, this authority has largely been transferred to the EPA. Exec. Order No. 12580, 52 Fed. Reg. 2923 (1987).

10. *In re* Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution, 675 F. Supp. 22, 25-26 n.2 (D. Mass. 1987). *See also* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (stating that the legislative history was shrouded in mystery); United States v. Mottolo, 605 F. Supp. 898, 902

paradigm of clarity or precision."[11] Nevertheless, standing behind the jumbled facade of CERCLA is a relatively simple approach for the cleanup of hazardous substance sites. The administrative system design in CERCLA for environmental remediation begins with reporting measures for hazardous waste sites[12] and releases.[13] Based upon information received from reports of hazardous waste sites and releases, the federal government establishes a Hazard Ranking System (HRS).[14] The HRS is used to create a National Priorities List (NPL)[15] that serves to direct response actions under a National Contingency Plan (NCP)[16] to the most dangerous sites first. The NCP is the cornerstone of CERCLA because it establishes the priorities and responses for sites.[17] In sum, the HRS is used to identify sites and subsequently generate the NPL, which in turn is used to prepare the NCP, which then serves as the coordinating document in a federal effort to respond to hazardous waste releases.

B. FEDERAL GOVERNMENT RESPONSE AUTHORITY AND COST RECOVERY

CERCLA is primarily an instrument by which the *federal government* can instigate the cleanup of hazardous substances through a system which is part administrative and part liability in nature. On the administrative side, the federal ability to respond envisions two alternative courses for cleanup of hazardous sites. First of all, the EPA can order the potentially responsible party to

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(D.N.H. 1985) (commenting upon the well-deserved notoriety for lack of clarity in the legislation).

11. Pease & Curren Refining, Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 950 (C.D. Cal. 1990).

12. The 1980 legislation required present and past owners of hazardous waste disposal facilities and past transporters of hazardous waste who selected particular facilities, to file a report with the EPA describing the disposal sites, the quantities of waste disposed, and the nature of the disposal. CERCLA § 103(c), 42 U.S.C. § 9603 (1988).

13. Spills from vessels and releases from on-land facilities must be reported to the National Response Center in the Center for Disease Control immediately.

14. CERCLA § 105(c)(1), 42 U.S.C. § 9605 (c)(1) (1988).

15. CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B). The EPA prepares an elaborate study of site conditions and cleanup options for every NPL site, which is called the Remedial Investigation and Feasibility Study (RI/FS). *Id.* § 9604(a)(1). The RI/FS is an EPA precondition for any site remediation. *Id.*

16. CERCLA § 105(a), 42 U.S.C. § 9605(a). The NCP is prepared by the EPA and governs cleanup efforts by "establish[ing] procedures and standards for responding to releases of hazardous substances. . . ." *Id.*

17. The NCP is located in the Federal Register. 40 C.F.R. §§ 300-300.920 (1991). The unabbreviated title for the NCP is the National Oil and Hazardous Substance Pollution Contingency Plan. *Id.* § 300.1. The NCP is composed of a set of EPA regulations "which describe methods of responding to hazardous waste problems and set forth guidelines for the appropriate roles of state and federal agencies and private parties." Walls v. Waste Resource Corp., 761 F.2d 311, 318 n.5 (6th Cir. 1985).

instigate and conduct the cleanup. Alternatively, when the potentially responsible party cannot properly or promptly be forced to conduct the cleanup, the federal government can itself arrange to have the cleanup done and pay for it. For cleanups arranged or undertaken by the EPA, CERCLA has established a large fund called the Hazardous Substance Response Fund (but commonly known as the Superfund),[18] from which government cleanup expenses are to be paid.[19] On the liability side, CERCLA creates a cause of action pursuant to § 107(a)(4)(A) which allows the federal government to recoup from the responsible parties the actual costs incurred by the Superfund in conducting the cleanup.[20]

Since Superfund monies are finite, Congress clearly intended private parties to assume cleanup responsibility. CERCLA makes potentially responsible parties strictly liable[21] for four kinds of costs: governmental response costs, private response costs, dam-

18. CERCLA § 111(a)(1), 42 U.S.C. § 9611(a)(1) (1988). The Superfund was authorized for $8.5 billion for the period from 1986-1991. *Id.* In 1990, the Superfund was extended through 1994 with a $5.1 billion appropriation. *Id.* The Superfund is primarily financed by a combination of federal appropriations, special taxes, and money recovered by the EPA from responsible parties. *See* CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A). The Superfund taxes are on chemical feedstocks, certain imported substances from chemical feedstocks, domestic and imported petroleum, and a small corporate environmental tax. 26 U.S.C. §§ 4611-12, 4661-62. *See generally* J.L. Carlson and C.W. Bausell, Jr., *Financing Superfund: An Evaluation of Alternative Tax Mechanisms*, 27 NAT. RESOURCES J. 103, 105 (1987).

19. CERCLA § 111(a), 42 U.S.C. § 9611(a) (1988 & Supp. 1991).

20. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1988). In addition to allowing the federal government to bring an action for actual costs incurred by the Superfund in conducting the cleanup, the statute creates a cause of action allowing the EPA, in its discretion, to bring a claim in federal district court to recover up to three times the amount of any costs incurred by the Superfund from any person who is liable for a release or threatened release of a hazardous substance and who fails without sufficient cause to properly comply with the EPA's order. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1988). CERCLA also makes responsible parties liable to federal suits for damages to natural resources, including the reasonable costs of assessing such damages, and the costs of federal health assessment studies. CERCLA § 107(a)(4)(C), (D), 42 U.S.C. § 9607(a)(4)(C), (D) (1988).

21. *See* CERCLA § 101(32), 42 U.S.C. § 9601(32) (1988). CERCLA does not in express terms hold responsible parties strictly liable, but it is clear that Congress intended CERCLA to be a strict liability statute. *Id.* CERCLA § 101(32), 42 U.S.C. § 9601(32), provides that "liability" under CERCLA "shall be construed to be the standard of liability" provided under § 311 of the Clean Water Act, 33 U.S.C. 1321, which the courts have construed to be a strict liability statute. *Id. See also* Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979) (finding that Congress understood the statute to impose strict liability); General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1418 (8th Cir. 1990) (noting that liability under CERCLA is unequivocally strict), *cert. denied*, 111 S. Ct. 1390 (1991); United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); Tanglewood-East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162, 204 (W.D. Mo. 1985); *In re* T.P. Long Chem., Inc., 22 ERC 1547 (N.D. Ohio 1985); United States v. Ward, 618 F. Supp. 884, 893 (D.C. N.C. 1985); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Price, 577 F. Supp. 1103, 1113 (D.N.J. 1983); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio

ages to natural resources, and the costs of government health assessments.[22] In addition, the courts have almost always found potentially responsible parties jointly and severally liable in such cost recoveries.[23]

Out of awareness of the serious consequences which might come from delaying the cleanup of hazardous waste sites, CERCLA gives the Environmental Protection Agency (EPA) extensive latitude in responding to hazardous waste dangers without the need to wait for any final judicial determination of the liabilities of potentially responsible parties. CERCLA authorizes the EPA to arrange for cleanups of sites on the NPL on its own[24] or to order the parties responsible for the situation to conduct cleanups.[25] Ordinarily, the EPA will give responsible parties an opportunity to negotiate a consent decree under which the parties will conduct the cleanup.[26] If negotiations fail, the EPA is given ample enforcement options to compel parties to comply with a cleanup order.[27]

There are two primary kinds of cleanup responses: (1) *removals*,[28] which are short-term measures undertaken to minimize the dangers to health and the environment in emergency situations; and (2) *remedial actions*,[29] which are long-term measures that attempt to eliminate site dangers on a permanent basis. Addition-

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1983); City of Philadelphia v. Stephan Chem. Co., 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982).

CERCLA contains narrow exceptions to strict liability for releases caused solely by acts of God or war or acts or omissions of certain third parties. CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988).

22. CERCLA § 107(a)(4)(A)-(D), 42 U.S.C. § 9607(a)(4)(A)-(D).

23. *See* United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); O'Neil v. Picillo, 883 F.2d 176, 182 (1st Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); United States v. Conservation Chem. Co., 589 F. Supp. 59, 63 (W.D. Mo. 1984); United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp. 823, 845 (W.D. Mo. 1984); United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983); United States v. Chem-Dyme Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983). *See also* David A. Rich, *Personal Liability for Hazardous Waste Cleanup: Examination of CERCLA SECTION 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 654 (discussing CERCLA's liability); E.P.J. Comment, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157 (1982).

24. CERCLA § 104(a), 42 U.S.C. § 9604(a) (1988). These response actions may be conducted by the EPA directly, through contractors, or through cooperative agreements with the states. *Id.* § 9604(d)(1)(A)-(C).

25. CERCLA § 103(c)(3), 42 U.S.C. § 9603(c) (1988).

26. CERCLA § 122(a)-(d), (g), 42 U.S.C. § 9622(a)-(d), (g) (1988).

27. *See* CERCLA §§ 104, 106, 42 U.S.C. §§ 9604, 9606 (providing that the EPA can issue an administrative order mandating cleanup); CERCLA § 106(a), 42 U.S.C. § 9606(a) (conduct the cleanup, sue to compel cleanup); CERCLA §§ 107, 122, 42 U.S.C. §§ 9607, 9622 (negotiate and sue for the remedial costs). *See also infra* notes 169-74 and accompanying text.

28. CERCLA § 104(a)(2), 42 U.S.C. § 9604(a)(2) (1988).

29. *Id.* § 9604(c)(1).

ally, pursuant to the Act, the EPA is given authority to respond to releases of a hazardous substance which may pose an imminent and substantial danger to the public health or welfare or the environment.[30]

CERCLA operates on a simple premise. It squarely places responsibility for cleaning up sites on the responsible parties,[31] but provides monies to undertake federal cleanups before the typically protracted negotiation and litigation necessary to obtain reimbursement to the Superfund from the responsible party can be accomplished. CERCLA charges the federal government with responsibility for obtaining cleanups at NPL sites, but it also operates to impose the ultimate burden of paying for these cleanups upon potentially responsible parties rather than the Superfund.

C. PRIVATE RESPONSE AUTHORITY AND COST RECOVERY

CERCLA is primarily meant to be a statute wielded by the federal government to respond to hazardous substance sites. However, CERCLA also allows a private party to undertake a response action on its own and later sue the responsible parties for response costs.[32] Potential plaintiffs include owners of land adjacent to leaking disposal sites or the owner of a site pursuing a defendant who has previously deposited waste on the site.[33] CERCLA additionally permits private parties, similar to the federal government in this respect, to petition the Superfund for reimbursement of response costs.[34] As a result, the private party has two choices in seeking recovery of its response costs. It may either sue the responsible party for repayment or petition cleanup cost reimbursement from the Superfund.

In order to receive reimbursement from the Superfund, the

30. *See* CERCLA § 106(a), 42 U.S.C. § 9606(a). If the EPA determines that a release of a hazardous substance may pose an imminent and substantial danger to the public health or welfare or the environment and that responsible parties will not properly respond, it may arrange for the cleanup itself and pay for it using funds from the Superfund. The federal government may also bring an action in federal district court to compel immediate abatement relief by a potentially responsible party. *Id.*

31. *See* CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4). Specifically, CERCLA imposes liability upon four categories of potentially responsible parties for hazardous waste cleanup costs. These four classes are: (1) owners or operators of vessels that contain hazardous substances; (2) owners or operators of a facility at the time of disposal; (3) persons who arranged for disposal; and (4) any person who accepted hazardous substances for transport or disposal. *Id.*

32. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988).

33. In order for a private party to recover response costs from a responsible party, "the release of hazardous substances must have 'caused' the occurrence of the costs." General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1417 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

34. CERCLA § 111(a)(2), 42 U.S.C. § 9611(a)(2) (1988).

private response costs must be necessary, approved under the NCP, and federally certified.[35] Simply stated, prior federal approval is required for private claims against the fund. In contrast, prior government approval is not required in order for private individuals to sue other private parties for response costs.[36] Nor are actions for recovery of costs limited to sites identified by the EPA on the NPL in suits where private parties sue other private parties for response costs.[37]

CERCLA provides several terms and conditions for private recovery that are different than those for government recovery of response costs which are reimbursable from the Superfund. CERCLA subjects such private recovery to more strenuous requirements than government recovery. Section 107(a)(4)(A), which authorizes the government cause of action for recovery of response costs from responsible parties, does not require that the response expenses be necessary.[38] Section 107(a)(4)(B), which authorizes private recovery, expressly stipulates that the response costs sought from responsible parties must be "necessary."[39] The two subsections also differ in the relationship between the response expenses sought to be recovered and the NCP. Section 107(a)(4)(A) authorizes government recovery of response costs so long as they are "not inconsistent with" the NCP.[40] Section 107(a)(4)(B) only allows private recovery of necessary response costs when they are "consistent with" the NCP.[41] The difference in language concerning consistency between CERCLA § 107(a)(4)(A) and CERCLA § 107(a)(4)(B) regarding the govern-

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35. *Id.* Section 111(a)(2) provides:

> Payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of title 33 and amended by section 9605 of this title: *Provided, however*, That such costs must be approved under said plan and certified by the responsible Federal official.

Id. (emphasis included).

36. Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 695-96 (9th Cir. 1988); NL Indus., Inc. v. Kaplan, 792 F.2d 896, 899 (9th Cir. 1986); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986). *See also* 50 FED. REG. 47912, 47934 (1985) (providing that regulations governing private response actions, set forth in 40 C.F.R. 300.71, do not require governmental approval of a response action unless the responding party wishes the EPA, rather than a liable party, to reimburse its costs, or the response is taken by a liable party to comply with an EPA administrative order or a consent decree).

37. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1045-46 (2d Cir. 1985); Allied Towing Corp. v. Great Eastern Petroleum Corp., 642 F. Supp. 1339, 1349 (E.D. Va. 1986); New York v. General Elec. Co., 592 F. Supp. 291, 301-02 (N.D.N.Y. 1984).

38. 42 U.S.C. § 9607(a)(4)(A) (1988).

39. *Id.* § 9607(a)(4)(B).

40. *Id.* § 9607(a)(4)(A).

41. *Id.* § 9607(a)(4)(B).

ment and private causes of action, respectively, suggests a difference in who bears the burden of proving that response costs were consistent with the NCP.[42] When the government seeks to recover its response costs, the defendant has the burden of demonstrating that they are not consistent with the NCP. When private parties seek reimbursement for response costs, courts have held that they bear the burden of proof for consistency with the NCP.[43]

III. RECOVERY OF ATTORNEY FEES AS RESPONSE COSTS

The federal courts have sanctioned a wide variety of costs which are recoverable by either the federal government or private parties proceeding in a § 107(a)(4)(A) action. The costs of both planning and implementing removal and remedial actions have clearly been found to be recoverable.[44] The costs of investigating, testing, monitoring, hiring experts, and site recovery also have been held recoverable.[45] Early CERCLA case law held that medical expenses, relocation costs, and funds spent to remedy damage to private property were recoverable.[46] More recent cases suggest that medical monitoring costs and private property damage may not be recoverable,[47] preserving a view that Congress meant CERCLA for remediation of hazardous substances and not for victim compensation.

While there are many kinds of response costs which both the federal government and private parties can recover in a § 107(a)(4) suit, it is uncertain whether private parties may recover attorney fees as response costs. It is clear that the government can recover attorney fees as response costs pursuant to a CERCLA § 107(a)(4)(A) action. There is a split of authority whether private parties can recover attorney fees as necessary response costs pursuant to a CERCLA § 107(a)(4)(B) action, with the majority of courts concluding that these fees are not recoverable.

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42. *See* United States v. Conservation Chem. Co., 619 F. Supp. 162, 186 (W.D. Mo. 1985).

43. *See* City of Philadelphia v. Stephan Chem. Co., 544 F. Supp. 1135, 1144 (E.D. Pa. 1982).

44. United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984).

45. Ascon Properties, Inc. v. Mobil Oil, 866 F.2d 1149, 1154 (9th Cir. 1989); Cadillac Fairview/California v. Dow Chem. Co., 840 F.2d 691, 695 (9th Cir. 1988).

46. *See, e.g.*, Williams v. Allied Automotive, Autolite Div., 704 F. Supp. 782, 784 (N.D. Ohio 1988).

47. Artesian Water Co. v. New Castle County, 851 F.2d 643, 648-49 (3d Cir. 1988).

A. RECOVERY OF GOVERNMENT ATTORNEY FEES AS RESPONSE COSTS

There is both strong statutory and judicial authority supporting the recovery of attorney fees by the federal government for a § 107(a)(4)(A) suit against a responsible party. The typical government course of action is to clean up sites by drawing funds from the Superfund pursuant to § 104 of CERCLA, and then to seek recovery via a § 107(a)(4)(A) suit against the responsible party for reimbursement to the Superfund. The statutory authority for judicial award of attorneys fees in this instance is expressly found in § 104(b)(1),[48] which allows the federal government to engage in legal planning for a Superfund financed cleanup and to recover any of its enforcement costs.[49]

The federal government has had relatively little trouble obtaining recovery of litigation expenses related to Superfund financed cleanups. In *United States v. Northernaire Plating Company*,[50] a federal district court considered the attorney fees of the Department of Justice and the EPA as a legitimate part of the indirect costs associated with administering a Superfund cleanup.[51] Another federal district court in *United States v. Northeastern Pharmaceutical and Chemical Company*[52] held that the federal government is entitled to recover all its litigation costs, including attorney fees, incurred in connection with a Superfund financed cleanup pursuant to § 104(a).[53] Section 107(a)(4)(A)[54] authorizes government recovery of response costs which are "not inconsistent with" the NCP, which places the burden upon potentially responsible defendant's to show that any government cleanup expenses are inconsistent with the NCP. The NCP provides that the legal costs of the federal government are considered a legitimate part of the costs of a response action.[55]

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48. 42 U.S.C. § 9604(b)(1) (1988).

49. *Id.*

50. 685 F. Supp. 1410 (W.D. Mich. 1988), *aff'd.*, 889 F.2d 1497 (6th Cir. 1989).

51. United States v. Northernaire Plating Co., 685 F. Supp. 1410, 1417, 1420 (W.D. Mich. 1988), *aff'd*, 889 F.2d 1497 (6th Cir. 1989). *See also* United States v. Ottati & Goss, Inc., 900 F.2d 429, 443-45 (1st Cir. 1990) (remanding a district court decision and requiring an explanation why that court denied the EPA indirect costs).

52. 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

53. United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp. 823, 851 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

54. 42 U.S.C. § 9607(a)(4)(A) (1988).

55. 40 C.F.R. § 304.12(o) (1988).

B. RECOVERY OF PRIVATE ATTORNEY FEES AS RESPONSE COSTS

CERCLA provides for two causes of action for private implementation of its provisions. Under one type, citizen suits, the recoupment of attorney fees is clearly allowed. Under the second type of suit, cost recovery actions pursuant to § 107(a)(4)(B), securing attorney fees is subject to debate.

The clear private enforcement measure in CERCLA is the citizen suit,[56] which is common in most major federal pollution control statutes.[57] The typical citizen suit measure in federal environmental statutes allows for citizen enforcement (*i.e.*, enforcement by citizen organizations, individuals, and state and local governments) either to compel a federal agency, usually the EPA, to carry out a mandatory regulatory duty (usually tardy or erroneous implementation of regulations) or to bring suit against violations by regulated parties (usually for violating pollution standards or permit requirements). The first type of citizen suit compelling the government to perform a regulatory responsibility can be described as an "action-forcing suit,"[58] and the second type of citizen suit enforcing the law against polluters can be described as a "private enforcement action."[59] CERCLA's citizen suit provision has both the action-forcing[60] and private enforcement[61] features. As is typical with citizen suit provisions, CERCLA authorizes the courts to award the costs of litigation, including reasonable attorney and expert witness fees, to a prevailing or sub-

56. CERCLA § 206, 42 U.S.C. § 9659 (1988).

57. There are citizen suit provisions in at least a dozen federal pollution control laws including: Clean Air Act (CAA) § 304, 42 U.S.C. § 7604 (1988 & Supp. 1991); Federal Water Pollution Control Act (FWPCA) (often called the Clean Water Act (CWA)) § 505, 33 U.S.C. § 1365 (1988); Marine Protection, Research and Sanctuaries Act (MPRSA) § 105(g), 33 U.S.C. § 1415(g) (1988); Noise Control Act § 12, 42 U.S.C. § 4911 (1988); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (1988); Deepwater Ports Act (DPA) § 16, 33 U.S.C. § 1515 (1988); Surface Mining Control and Reclamation Act (SMCRA) § 520, 30 U.S.C. § 1270 (1988); Outer Continental Shelf Lands Act (OCSLA) § 23(a), 43 U.S.C. § 1349(a) (1988); Toxic Substances Control Act (TSCA) § 20, 15 U.S.C. § 2619 (1988); Emergency Planning and Community Right-to-Know Act (EPCRA) § 325, 42 U.S.C. § 11046 (1988); Resource Conservation and Recovery Act (RCRA) § 7002, 42 U.S.C. § 6972 (1988); Energy Policy and Conservation Act (EPCA) § 335, 42 U.S.C. § 6305 (1988).

58. *See* Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Law*, 34 BUFF. L. REV. 848 (1985).

59. *Id.* The "citizen as prosecutor" is another way to describe the use of citizen suits by private citizens to enforce the provisions of pollution statutes and regulations against violators. Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337 (1988).

60. CERCLA § 310(a)(2), 42 U.S.C. § 9659(a)(2) (1988).

61. *Id.* § 9659(a)(1).

stantially prevailing party.[62] Therefore, CERCLA unquestionably allows a successful plaintiff in a citizen suit to recover attorney fees.

The second private cause of action conferred by CERCLA is a cost recovery action which allows citizens to recover the costs of responding to environmental contamination or threats of such contamination, such as conducting a cleanup of contaminated sites.[63] Unlike the citizen suit provision, CERCLA's cost recovery provision does not expressly provide for the award of litigation costs, including attorney fees. In fact, during the early years of CERCLA, the courts were reluctant to recognize a private cause of action for cleanup cost recovery under § 107(a)(4)(B),[64] making the question of the recoverability of attorney fees irrelevant. However, the federal courts now widely agree that § 107(a)(4)(B) does provide a private cause of action to recover cleanup costs.[65] Thus, the recovery of attorney fees relating to a private cause of action under § 107(a)(4)(B) is now at issue.

During most of 1980s, the federal courts had only indirectly addressed the issue of attorney fees as recoverable response costs. For example, in *Bulk Distribution Centers, Inc. v. Monsanto Co.*,[66] the plaintiffs in the suit requested litigation expenses, including attorney fees. The federal district court in Florida rejected a § 107(a)(4)(B) action as premature because there was no EPA authorization of a response plan, but it intimated that if this condition to relief was satisfied it would not turn down a claim for attorney fees.[67] The *Monsanto* court declared that if and when "a claimant has begun to implement a government authorized cleanup program, then those preliminary costs heretofore non-

62. *Id.* § 9659(f).

63. *Id.* § 9607(a)(4)(B).

64. *See e.g.*, Walls v. Waste Resources Corp., 22 ENV'T REP. CAS. (BNA) 1039, 1042 (E.D. Tenn. 1984) (ruling that Congress did not intend a right of action for individuals under CERCLA), *aff'd in part and rev'd in part*, 761 F.2d 311 (6th Cir. 1985). The Sixth Circuit subsequently reversed the district court's holding in Walls v. Waste Resources Corp., 761 F.2d 311, 316 (6th Cir. 1985) (*Walls II*). The *Walls II* decision declared that the district court incorrectly construed CERCLA, and that CERCLA did create a private right of action. *Id.* at 318.

65. *See* Cadillac Fairview/California v. Dow Chem. Co., 840 F.2d 691, 693 (9th Cir. 1988); NL Indus. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890 (9th Cir. 1986); New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985); Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 289 (N.D. Cal. 1984); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 588 F. Supp. 515, 517 (D. Mass. 1983); Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Ohio 1984); City of Philadelphia v. Stephan Chem. Co., 544 F. Supp. 1135, 1140 n.4, 1143 (E.D. Pa. 1982).

66. 589 F. Supp. 1437 (S.D. Fla. 1984).

67. Bulk Distribution Ctr., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1452 (S.D. Fla. 1984).

recoverable (*e.g.*, expenses for legal, architectural, engineering, and other planning) may be recaptured."[68]

It was not until 1988 that a federal court specifically considered and ruled on the issue of whether attorney fees were recoverable expenses in a private response recovery suit.[69] Two sharply divided lines of cases have since emerged. The minority, taking a broad approach to construing CERCLA, held that attorney fees were recoverable as response costs. The majority view, however, takes a more restrictive view and refuses to permit the award of attorney fees.

1. *Broad Approach—General Electric v. Litton*

The broad or permissive approach to interpreting CERCLA has been employed by a small number of federal courts as the basis for their conclusion that attorneys fees are recoverable as response costs. These courts have often differed in the nature or the emphasis of the rationale offered for concluding that attorney fees are encompassed within response costs. For instance, a Washington federal district court saw attorney fees as justifiable enforcement costs which were recoverable under CERCLA § 107.[70] A federal district court in Kansas concluded that when litigation costs can be justified as "necessary costs" under § 107(a)(4)(B), they are recoverable.[71] Stressing that it was consistent with congressional purpose, attorney fees were regarded as recoverable as response costs by a Minnesota federal district court.[72] Federal district courts in California[73] and New York[74] have concluded that Congress intended, primarily in an implicit manner, for attorney fee recovery under CERCLA § 107(a)(4)(B). And finally, a Missouri federal district court has held that CERCLA "specifically allows for the recovery of attorney fees."[75]

The Eighth Circuit Court of Appeals is the only federal circuit to adopt the permissive approach and award attorney fees as response costs in a § 107(a)(4)(B) suit.[76] In fact, it is the only fed-

68. *Id.*

69. BCW Assoc. v. Occidental Chem. Corp., 1988 WL 102641, at *23 n.4 (E.D. Pa. 1988) (holding that attorney fees in a § 107(a)(4)(B) action were not recoverable).

70. Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993).

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

72. Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998, 1006-07 (D. Minn. 1991).

73. Pease & Curran Ref. Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 950 (C.D. Cal. 1990).

74. Shapiro v. Alexanderson, 741 F. Supp. 472, 480 (S.D.N.Y. 1990).

75. General Elec. Co. v. Litton Business Sys., Inc., 715 F. Supp. 949, 959 (W.D. Mo. 1989), *aff'd*, 920 F.2d 1415 (8th Cir. 1990).

76. *See also* United States v. Mexico Feed and Seed Co., 980 F.2d 478, 490 (8th Cir.

eral circuit court so far to directly dispose of the issue of the recoverability of attorney fees in such suits.[77] The permissive approach of the Eighth Circuit is expressed in *General Electric Co. v. Litton Industrial Automation Systems, Inc.*,[78] in which the court sought a way to encompass attorney fees within CERCLA's definition of "response" costs.[79] The Eighth Circuit affirmed the district court award[80] of $419,000 to General Electric for attorney fees incurred before, during and after instituting a suit for response cost recovery.[81]

The chief obstacle that had to be overcome by the Eighth Circuit in order to allow the award of attorney fees (as would be the case for any court) was the American Rule. Under the American Rule, each party in litigation is normally required to bear its own legal expenses, including legal fees.[82] Allowing one party to recover attorney fees from another is also called *fee-shifting*.[83]

1992) (providing that attorney fees can be included in a contribution award in a CERCLA § 9613(f) action among responsible parties, relying upon the *General Electric* court's holding that attorney fees are recoverable as private response costs).

77. *See infra* note 100.

78. 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

79. General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1421-22 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1990). The *General Electric* court represents the permissive line of cases which finds in CERCLA's language and policy a statutory exception to the American Rule. *Id.* The district court decision reviewed by the Eighth Circuit, like other district courts endorsing the minority view, operated on the view that Congress intended that "CERCLA be given a broad interpretation so as not to restrict the liability of those responsible parties." General Elec. Co. v. Litton Business Sys., Inc., 715 F. Supp. 949, 959 (W.D. Mo. 1989). Another district court concluded it was necessary for the Courts to read CERCLA in a broad manner so as to permit recovery and hold polluters responsible. *See* Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993). For these courts, like the Eighth Circuit, a broad interpretation of CERCLA centered around the statutory language of "response costs." The Eighth Circuit concluded that the award of attorney fees were part of necessary response costs and fulfilled Congress' intention that cleanup costs be imposed on the polluter.

80. *General Elec. Co.*, 715 F. Supp. at 959.

81. *General Elec. Co.*, 920 F.2d at 1417, 1422.

82. The American Rule is in contrast to the English Rule, so-called because it is the practice in England to allow the prevailing party to recover attorney fees.

83. Congress has expressly authorized fee-shifting in an assortment of non-environmental statutes. *See* Clayton Antitrust Act, 15 U.S.C. § 15 (1988); Securities Exchange Act, 15 U.S.C. §§ 78i(e), 78r(a) (1988); Communications Act, 47 U.S.C. § 206 (1988); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1988); Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1964 (1988); Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1988); Civil Rights Attorney's Fee Act, 42 U.S.C. § 1988 (1988); and the patent laws, 35 U.S.C § 285 (1988) (providing that "award authorized in exceptional cases"). In fact, well over 100 federal statutes authorize the award of attorney fees. THE ATTORNEY FEE AWARDS REPORTER, Feb. 1988, at 2-3. The Supreme Court has indicated that there are more than 150 "fee-shifting" provisions in federal statutes. Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983). Virtually every major piece of anti-pollution legislation enacted since 1970 includes a citizen suit measure that provides for direct citizen enforcement and expressly authorizes the recovery of attorney fees and costs. *See supra* note 57. CERCLA includes a citizen suit provision. CERCLA § 310, 42 U.S.C. § 9659 (1988). While the CERCLA citizen suit provision has an obvious reference for fee-shifting,

The Supreme Court dictated application of the American Rule in the federal courts in *Alyeska Pipeline Services Co. v. Wilderness Society*,[84] ruling that the attorney fees of a successful plaintiff could only be shifted to the defendant for payment if a statute specifically authorized such an award, if it was specified in an enforceable contract, or if certain other traditionally recognized special exceptions applied.[85] In the subsequent decision of *Runyon v. McCrary*,[86] the Supreme Court reiterated the rule that "absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation."[87]

The Eighth Circuit was conscious of the impediment of the American Rule and referred to *Alyeska* concerning the need to find statutory authorization for the recovery of attorney fees. It noted that the "general rule is that 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.' "[88] The Eighth Circuit observed that due to the American Rule "in order to uphold an award of attorney fees, we look to the language of CERCLA."[89] Acknowledging that statutory authorization had to be found for an award of attorney fees, the *General*

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the cost recovery provision is not clear on its face. *Id.* § 9659(f). *See also infra* notes 114-16 and accompanying text.

84. 421 U.S. 240 (1975). *Alyeska* involved a challenge by the Wilderness Society to the Department of Interior's issuance of construction permits to a joint venture constructing the Trans-Alaska pipeline. *Id.* at 241. The plaintiff environmental group prevailed in its suit and requested the award of attorney fees under the "private attorney general" doctrine. *Id.* The Court reasoned that the "general statutory rule," established in an 1853 court-costs statute and carried forward by successor provisions, limits attorney fees to nominal amounts in the absence of statutory authority. *Id.* at 251-60. The Court further found that the existence of numerous statutory provisions for awarding attorney fees creates a scheme under which such awards are to be left to Congress to determine. *Id.* at 260-62. For a detailed discussion of *Alyeska*, see *Alyeska, The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 170-82 (1975).

85. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245-46, 257-59, 269 (1975). There are three long-recognized exceptions to the American Rule. One exception is for expenses incurred in enforcing a court order which has been willfully disobeyed. *See* Hutto v. Finney, 437 U.S. 678, 689 (1978). *See also* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923).

The second exception, called the bad faith theory, applies to expenses incurred by the prevailing party where the losing party has prosecuted or defended the case in egregious bad faith. *Hutto*, 437 U.S. at 689 n.14. *See also* F.D. Rich Co. v. United States ex. rel. Indus. Lumber Co., 417 U.S. 116, 129 (1974). *See also* Fairley v. Patterson, 493 F.2d. 598, 606 (5th Cir. 1974).

The third exception, known as the common fund theory, allows the award of attorney fees to a party out of any common fund secured in the litigation where the fund was created "for the benefit of others in addition to himself . . . from the fund . . . or directly from the other parties enjoying the benefit." *Alyeska*, 421 U.S. at 257. *See also* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166-67 (1939).

86. 427 U.S. 160 (1976).

87. *Id.* at 185 (citing *Alyeska*, 421 U.S. at 247).

88. General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1421 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991) (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975)).

89. *Id.*

Electric court explained that "[w]e must find more than 'generalized commands;' there must be a clear expression of Congress' intent."[90]

The Eighth Circuit began its inquiry into the availability of attorney fees in a private recovery action with a purportedly plain meaning statutory analysis. The court found in CERCLA's definition of "response" costs the statutory authorization for attorney fees which, in its view, provided the clear expression of congressional intent needed to overcome the American Rule. As the starting point of its analysis, the *General Electric* court pointed out that CERCLA § 107(a)(4)(B) allows private parties to recover all necessary "response" costs. The term "response" is defined by CERCLA[91] to mean "removal"[92] and "remedial action"[93] and includes "enforcement activities related thereto."[94] As the premise for its logic, the Eighth Circuit characterized a CERCLA § 107(a)(4)(B) private cost recovery suit as an enforcement action. It stated that a "private party cost recovery action such as this one is an enforcement activity within the meaning of the statute."[95] The Eighth Circuit then concluded that "it would strain the statutory language to the breaking point" to exclude attorney fees from being encompassed within the " 'necessary [response] costs' that section 9607(a)(4)(B) allows private parties to recover."[96] In sum, the Eighth Circuit concluded that CERCLA § 107(a)(4)(B) provided a statutory exception to the American Rule because attorney fees definitely were "response" costs.

Not only did the Eighth Circuit find authority for fee-shifting in the statutory language of CERCLA § 107(a)(4)(B), but it buttressed this interpretation by stating that its conclusion fulfilled the policy objectives of Congress in enacting CERCLA. The Eighth Circuit stated that awarding attorney fees based on its con-

90. *Id.* (quoting Runyan v. McCrary, 427 U.S. 160, 198 (1976)).

91. CERCLA § 101(25), 42 U.S.C. § 9601(25) (1988).

92. *Id.* § 9601(23). "Removal" includes "such actions as may be necessary taken in the event of the threat of release of hazardous substances" and "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." *Id.*

93. *Id.* § 9601(24). "Remedial action" includes "actions consistent with a permanent remedy" such as confinement, neutralization, or cleanup of hazardous substances. *Id.*

94. *Id.* § 9601(25).

95. General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991). *See also* Pease & Curren Ref. Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 951 (C.D. Cal. 1990). The California Federal District court explained that Congress meant enforcement activities to include legal fees in a private recovery action. It explained: "This court cannot ascertain any other logical interpretation which would give effect to this phrase. If this court were to rule otherwise, the phrase 'enforcement activities' would be superfluous." *Id.*

96. *General Elec. Co.*, 920 F.2d at 1422.

struction of CERCLA's statutory language "is consistent with the two main purposes of CERCLA—prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party."[97] The Eighth Circuit was particularly emphatic about the latter purpose, finding that one of the objectives of CERCLA was the "imposition of *all* cleanup costs on the responsible party."[98] The *General Electric* court stressed that CERCLA's key purposes would be undermined if a non-polluter like General Electric had to absorb the litigation costs in a recovery action against a polluter. It pointedly noted that "litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site."[99]

To escape the strictures to fee-shifting created by the American Rule, the broad approach embodied in *General Electric* is totally contingent upon the most liberalized interpretation imaginable of statutory language and congressional intent. This approach does not overtly diminish the obstacle presented by the American Rule as easy to overcome. But, the approach does treat its permissive construction of the statute as providing sufficient energy to catapult the private plaintiff over the American Rule.

2. *Restrictive Approach—Majority View*

To date, no circuit court has used the restrictive approach in directly ruling on the question of whether attorney fees are recoverable as private response costs in a CERCLA § 107(a)(4)(B) action.[100] The restrictive approach is, however, the majority view

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97. *Id.* Other case law echoes the Eighth Circuit view that awarding attorney fees serves two primary congressional purposes. The first purpose is expeditious cleanup. *See* Walls v. Waste Resource Corp., 823 F.2d 977, 980 (6th Cir. 1987) (stating that "Congress intended that the federal government be immediately given the tools necessary for prompt and efficient responses"); Jones v. Inmont Co., 584 F. Supp. 1425, 1428 (S.D. Ohio 1984) (finding prompt cleanup to be a key objective of CERCLA); United States v. Reilly Tar & Chem. Co., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (same); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982) (same). The second purpose is to place the ultimate responsibility for the costs of cleanup upon responsible parties. *See* Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269, 1276 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); Bulk Distrib. Ctr., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1443 (S.D. Fla. 1984); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 848 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

98. *General Elec. Co.*, 920 F.2d at 1422 (emphasis added).

99. *Id.*

100. Two circuit courts of appeals have ruled on other matters of recovery pursuant to CERCLA and indicated in *dicta* their support for the proposition that litigation expenses are not permitted in CERCLA § 107 suits. The First Circuit stated that because "litigation-related expenses are, *of course*, not compensable as response costs incurred by private parties under CERCLA § 107," the plaintiff could not recover the costs of consultants hired to search for polluters to sue. Dedham Water v. Cumberland Farms Dairy, 972 F.2d 453, 461 (1st Cir. 1992) (emphasis added). The First Circuit further noted that while recovery of

among the district courts which have ruled on the recoverability of attorney fees as response costs in § 107(a)(4)(B) suits.[101] These courts have found that the language of CERCLA does not sufficiently furnish a statutory exception necessary to overcome the American Rule. In contrast to the broad approach, courts endorsing the restrictive view do not start their analysis with acceptance of a broad interpretation of CERCLA's definition of "response" so as to include attorney fees expended in the course of a private party cleanup.

Three district court cases best represent the principal arguments that have been expressed in the majority approach to support the conclusion that CERCLA does not authorize attorney fees in private response actions. The representative district court cases are *T & E Industries v. Safety Light Corp.*,[102] *Fallowfield Development Corp. v. Strunk*,[103] and *Santa Fe Pacific Realty Corp. v. United States*.[104] None of these courts found clear statutory permission for attorney fees and refused to create a right of recovery in light of this lack of certainty.

The most thoroughly reasoned of the district court decisions is from the eastern district of California. In *Sante Fe Pacific Realty Corp. v. United States*, the court considered the claim that Congress intended a private plaintiff to recover attorney fees. The plaintiff's reasoning followed a syllogism along these lines. First, it asserted that the language of CERCLA § 107(a)(4)(B) permitted a private party to recover its "necessary costs of response."[105] Second, the plaintiff recited and relied upon the definition of "response" from CERCLA § 101(25), which stated removal and remedial actions were to be defined to "include *enforcement activ-*

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attorney fees was barred in a CERCLA § 107 action, such fees were capable of recovery under Massachusetts law. *Id.* at 464 n.9. The Ninth Circuit has declined to award attorney fees in an action for natural resources damages under CERCLA §§ 107(a)(4)(C) and 107(f), finding that CERCLA did not state whether attorney fees were permitted. Idaho v. Hanna Mining Co., 882 F.2d 392, 396 (9th Cir. 1989).

101. Sante Fe Pacific Realty Corp. v. United States, 780 F. Supp. 687 (E.D. Cal. 1991) (finding that attorney fees were not recoverable); New York v. SCA Serv., Inc.. 754 F. Supp. 995 (S.D.N.Y. 1991) (same); Fallowfield Dev. Corp. v. Strunk, 1990 WL 52745, at *5-*6 (E.D. Pa. 1990) (same); United States v. Hardage, 750 F. Supp. 1460 (W.D. Okla. 1990) (same); Mesiti v. Microdot, Inc. 739 F. Supp. 57, 62-63 (D.N.H. 1990) (same); Regan v. Cherry Corp., 706 F. Supp. 145, 149 (D.R.I. 1989) (same); T & E Indus. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988) (same); BCW Assoc. v. Occidental Chem. Corp., 1988 WL 102641, *23 (E.D. Pa. 1988) (same); Hemingway Transp., Inc. v. Khan (*In re* Hemingway Transp. Co.), 108 B.R. 378, 383 (Bankr. D. Mass 1989) (same), *aff'd*, 126 B.R. 656 (D. Mass 1991).

102. 680 F. Supp. 696 (D.N.J. 1988).

103. No. 89-8644, 1990 WL 52745 (E.D. Pa 1990).

104. 780 F. Supp. 687 (E.D. Cal. 1991).

105. Santa Fe Pacific Realty Corp. v. United States, 780 F. Supp. 687, 694 (E.D. Cal. 1991).

ities related thereto."[106] The plaintiff therefore concluded that the phrase "enforcement activities related thereto" embraced the actions of a private party to enforce its CERCLA rights via a § 107(a)(4)(B) lawsuit, and that these actions included litigation. Accordingly, the plaintiff contended that attorney fees were recoverable. The plaintiff's argument was essentially the *General Electric* holding.

The *Sante Fe* court acknowledged the sharp split of authority over whether attorney fees were available to a private party as "response costs" under CERCLA.[107] This district court determined that in this split of authority, three distinct yet interrelated lines of inquiry had emerged.[108] The first line of inquiry was directed at whether the phrase "enforcement activities related thereto," which had been added to the CERCLA definition of response by the SARA amendments of 1986, included the activities of private persons. The second line of inquiry concerned whether CERCLA's language was sufficiently explicit to provide an exception to the American Rule. And the third line of inquiry, intertwined with the other two, examined whether congressional policy considerations supported the award of attorney fees. For all three inquiries, the *Sante Fe* court determined that an award of attorney fees to private parties was not authorized as a form of response costs under CERCLA.

Regarding the first inquiry, the *Sante Fe* court did not find it clear from the statutory scheme that private parties' activities are enforcement activities.[109] It noted that the legislative history not only did not provide much guidance but tended to support the inference that Congress did not intend that private parties could recover enforcement costs. The pertinent legislative history for this court was the explanation given by the House Committee on Energy and Commerce for the 1986 SARA legislation, which amended the definition of response to include the phrase "enforcement activities related thereto." The report noted that "[t]he change will confirm *EPA's* authority to recover costs for enforcement actions taken against responsible parties."[110] The *Sante Fe* court noted that it could be inferred from this legislative history that Congress meant to confirm enforcement authority for

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Santa Fe*, 780 F. Supp. at 695 (quoting H.R. REP. NO. 253, 99th Cong., 1st. Sess., pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2835, 2848-49 (emphasis added)).

the EPA but not for private parties, and thus did not intend to allow private parties to collect attorney fees in private cost-recovery actions.

The *Sante Fe* court also rejected the plaintiff's argument that the Conference Committee Report[111] on SARA conclusively showed that Congress intended the award of attorney fees.[112] The plaintiff asserted that the omission of the reference to the "EPA" in the Conference Committee Report meant that Congress viewed the phrase "enforcement activities related thereto" to incorporate not just the government enforcement activities but all enforcement activities, which would include private parties.[113] For the district court, the omission of a reference to the EPA in this portion of the legislative history could only be interpreted as creating doubt about whether Congress intended to solely restrict enforcement responsibilities to the EPA. However, the district court did not see the omission as sufficient to affirmatively conclude that Congress intended to give private parties enforcement authority and thus allow them to recover attorney fees as part of such enforcement costs.

The *Sante Fe* court then addressed the obstacle of the American Rule and concluded that CERCLA provided no escape from the confines of the rule.[114] The court operated on the principle that Congress would have to provide an explicit award of attorney fees, a requirement for which it concluded CERCLA "falls short."[115] The court observed that this requirement of explicit provision of attorney fees has been clearly fulfilled in another section of CERCLA, the citizen suit.[116] The court further observed that Congress had an opportunity during its comprehensive overhaul of CERCLA by SARA in 1986 to explicitly incorporate an attorney fee provision "but chose not to do so."[117] Referring to the 1986 SARA amendment in which the definition of "response" was changed to include "enforcement activities," and for which the plaintiff argued formed the basis for attorney fees, the court noted derisively that "[i]nstead, Congress chose to insert a phrase outside even the most exhaustive lexicon of customary fee shifting

111. H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 1985 (1986).
112. *Santa Fe*, 780 F. Supp. at 695.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Santa Fe*, 780 F. Supp. at 695 (quoting Regan v. Cherry Corp., 706 F. Supp. 145, 148-50 (D.R.I. 1989)). "SARA was a comprehensive overhaul of CERCLA. Therefore it would have been a simply [sic] matter to amend 107 to allow recovery of attorney fees." *Id.*

language."[118] The *Sante Fe* court followed the time-worn tenet of prudent statutory construction and stated that it was outside the judicial function to insert omissions in a statute even if such omissions might have been the result of oversight and inadvertence.[119]

The final matter of inquiry for the *Sante Fe* court was to address the extent to which the policy considerations of Congress in enacting CERCLA justified the award of attorney fees in a private response recovery action. It observed that an examination of the congressional policy for the statute "cannot compensate for a *decisive* lack of explicitness in the statute by importing its informed opinion of what measures would best achieve the purposes of CERCLA."[120] The *Santa Fe* court declared that it was not its place to find a fee-shifting provision simply because it may conform with the statutory scheme or purposes of CERCLA.[121] It ironically adhered to the admonition of the Eighth Circuit in *General Electric* that "generalized commands"[122] were not sufficient to overcome the American Rule.[123]

In *T & E Industries v. Safety Light Corp.*,[124] a New Jersey federal district court stated that its careful review of CERCLA language did not uncover an indication that legal costs were recoverable in a private action.[125] Likewise, in the *Fallowfield Development Corp. v. Strunk*[126] decisions, the federal eastern district court in Pennsylvania could not discern an intention by Congress to allow the award of attorney fees in a CERCLA § 107(a)(4)(B) action.[127] In short, these courts' review of CERCLA could not find that it provided a statutory exception to the American Rule. Like the *General Electric* court, both the *T & E Industries* and *Fallowfield* courts focused their analysis upon the word "response" in CERCLA § 107(a)(4)(B)[128]—same focus, different conclusion. They differed with *General Electric* by concluding that a § 107(a)(4)(B) private recovery action was not an "enforcement" action within the meaning of CERCLA.

The *T & E Industries* court concentrated its analysis on

118. *Id.*
119. *Id.* at 695-96 n.4.
120. *Id.* at 696 (emphasis added).
121. *Id.*
122. *See supra* note 85 and accompanying text.
123. *Santa Fe*, 780 F. Supp. at 696.
124. 680 F. Supp. 696 (D.N.J. 1988).
125. T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 707 (D.N.J. 1988).
126. No. 89-8644, 1990 WL 52745 (E.D. Pa. 1990).
127. Fallowfield Dev. Corp. v. Strunk, No. 89-8644, 1990 WL 52745, at *6 (E.D. Pa. 1990).
128. *See T & E Indus.*, 680 F. Supp. at 705; *Fallowfield*, 1990 WL 52745, at *6.

whether CERCLA provided an exception to the *Alyeska* requirement that a party cannot recover attorney fees unless provided by statute. It concentrated its inquiry on the presence of an explicit reference to attorney fees as part of government response costs as stated in CERCLA § 104(b) and the absence of such a reference to attorney fees for private response activities.[129] The district court stated that it "can find no analogous portion of the statute which would entitle a private party to recover for legal action taken and refuses to create a right to recovery of attorney fees where Congress has not expressly stated such to exist."[130] Furthermore, the court rejected the argument that statutory authorization for attorney fees could be found in the 1986 SARA amendment which defined response costs to include "enforcement activities related thereto."[131] The *T & E Industries* court concluded that private parties cannot incur enforcement costs as conceived by CERCLA because while "plaintiffs may bring an action for recovery of response costs, they may not bring an action to enforce CERCLA's cleanup provisions against another private entity."[132] The court further concluded that as a consequence, "private parties do not incur 'enforcement costs' as contemplated by CERCLA."[133] This kind of reasoning was followed in *Fallowfield* as well.[134]

The *Fallowfield* litigation produced two decisions by the federal district court in the eastern portion of Pennsylvania, an original hearing and a rehearing. The original *Fallowfield* decision not only concluded that private parties cannot bring enforcement actions as they were contemplated by Congress, but went further and found that Congress actually intended to exclude private party legal fees in a CERCLA § 107(a)(4)(B) action. In so holding, the *Fallowfield* court determined that it was exactly the intention of Congress to restrict enforcement activities to government suits. The *Fallowfield* court reviewed the legislative history of SARA and concluded that it showed that "Congress . . . did not intend to allow private parties to collect attorneys' fees in cost-recovery actions."[135] The legislative history to which the district court

129. *T & E Indus.*, 680 F. Supp. at 708.
130. *Id.* at 708.
131. *Id.* at 708 n.13.
132. *Id.*
133. *Id.*
134. *Fallowfield*, 1990 WL 52745, at *6.
135. *Id.* According to the court, the congressional intent restricting enforcement activities to government suits is exhibited in the Superfund Amendments and Reauthorization Act of 1986 which amended CERCLA. *Id.* (construing Pub. L. No. 99-499, 100 Stat. 1615). CERCLA and SARA are known collectively as CERCLA and codified at 42 U.S.C. §§ 9601-9675.

referred was comments in the report by the House Committee on Energy and Commerce.[136] According to the federal district court, these comments lead to the conclusion that the term "response" in § 101 only applies to government recovery of enforcement costs.[137] The *Fallowfield* court determined that the comments about CERCLA § 101 clarified the definition of "response action" to mean EPA enforcement activities only. The change in SARA was construed as exclusively intending to confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties.[138] The district court did not see the comments as showing that Congress regarded private party cost recovery to be an enforcement measure.[139]

The *Fallowfield* court was asked to reconsider its original decision in light of the Eighth Circuit decision in *General Electric*.[140] In its opinion denying a rehearing, the *Fallowfield* court lambasted the Eighth Circuit reasoning and focused, like the *Santa Fe* court, on the crippling absence of an explicit statutory authorization for fee-shifting in CERCLA for a private party to recover response costs.[141] The federal district court maintained that the Eighth Circuit failed to adhere to the standard set in *Alyeska*, which requires an explicit statement in order to be set free from the American Rule and permit fee-shifting.[142] While the Eighth Circuit maintained in *General Electric* that "it would strain the statutory language to the breaking point to read [attorney fees] out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover,"[143] the *Fallowfield* district court found to the contrary that "the definition of *explicit* [statutory authorization] is strained to the breaking point" by the Eighth Circuit's construction.[144]

The district courts which convey the restrictive view regard the American Rule as a formidable barrier to fee-shifting. Unlike the broad approach, these courts do not find in the statutory lan-

136. *Fallowfield*, 1990 WL 52745, at *6 (citing H.R. REP. NO. 253, 99th Cong., 1st Sess. pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848).

137. *Id.*

138. *Id.*

139. *Id.*

140. Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335, 337 (E.D. Pa. 1991).

141. *Id.*

142. *Id.* at 338.

143. General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d at 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991).

144. *Fallowfield*, 766 F. Supp. at 338 (emphasis added). "The requirement of an explicit statement of congressional intent to shift fees from the successful plaintiff to the defendant renders the Eight Circuit rationale deficient." *Id.*

guage and legislative history of CERCLA an apparent and easy boost over the American Rule. The restrictive view is as prudent in construing CERCLA as the broad view is imaginative.

IV. UP IN THE AIR—RESTRICTIVE APPROACH AS THE BETTER VIEW

To say the least, the permissibility of awarding attorney fees in private actions for cleanup cost recovery is up in the air due to the split in the federal courts between the permissive perspective and the restrictive perspective. Both the broad and restrictive approaches agree that allowing the award of attorney fees would help advance CERCLA's key purposes of achieving prompt remediation and imposing certain liability upon responsible parties.[145] However, this article finds that the restrictive approach is a more defensible position as a matter of reasonable statutory analysis. It is certainly not clear, except with a large dose of imagination, that CERCLA provides for the application of fee-shifting in a § 107(a)(4)(B) action. What is good environmental policy cannot, in this instance, be overcome by a lack of clear statutory expression. As the *Sante Fe* court correctly noted, an exploration into the policy of CERCLA is not relevant when there is a decisive lack of explicit statutory reference to fee-shifting, which is *sine qua non* to overcoming the American Rule.[146]

The fact that the majority of the federal district courts have thus far adopted a restrictive view for fee-shifting in a private cleanup cost recovery action is in sharp contrast with the extraordinarily liberal interpretation which normally dominates the judicial interpretations of other features and issues of CERCLA. The federal courts have been markedly inclined to broadly interpret CERCLA to achieve the two important and interrelated objectives generally seen as key purposes of the legislation—namely, achieving prompt cleanup of contaminated sites and of exacting recovery costs from responsible parties. A readily evident tilt toward generally employing a broad, permissive reading of CERCLA has been adopted by federal circuit courts of appeals in the Second,[147]

145. *But see* Kanad S. Virk, Comment, *General Electric Co. v. Litton Industrial Automation Systems, Inc.: Are Attorney Fees Recoverable in CERCLA Private Cost Recovery Actions?*, 75 MINN. L. REV. 1541, 1562-65 (1991) (explaining that these policy arguments are still not "compelling enough to overcome the negative implication regarding attorney fees that the absence of explicit statutory authorization creates").

146. Santa Fe Pacific Realty Corp. v. United States, 780 F. Supp. 687, 695-96 (E.D. Cal. 1991).

147. New York v. Shore Realty Corp., 759 F.2d 1033 (2d Cir. 1985). The Second Circuit pronounced that it refused to construe CERCLA § 107, 42 U.S.C. § 9607(a) in "any

Sixth,[148] and Ninth[149] Circuits in order to fulfill the widely agreed-upon purposes of the legislation.

Highly liberalized notions of imposing liability on responsible parties have been accepted by the federal courts as extremely important, if not necessary, to achieving the purposes of CERCLA. The federal courts have liberally construed CERCLA § 107(a) to impose sweeping liability upon responsible parties through the adoption of substantially diluted causation requirements[150] and strict,[151] joint and several liability.[152] The pervasive liberal inter-

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way that frustrates" the statute's goals, absent a specific expression of congressional purpose. *Id.* at 1045.

148. Walls v. Waste Resource Corp., 823 F.2d 977 (6th Cir. 1987). In applying the notification requirements of CERCLA, the Sixth Circuit clearly employed a broad approach. *See id.* at 981. The Sixth Circuit also affirmed a district court decision which took a patently permissive approach to granting indirect cost recovery by the federal government. *See* United States v. Northernaire Plating Co., 685 F. Supp. 1410, 1419 (W.D. Mich. 1988), *aff'd*, 889 F.2d 1497 (6th Cir. 1989).

149. Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887 (9th Cir. 1986). The Ninth Circuit liberally construed the CERCLA § 107(a)(4)(B) provision to permit cleanups by private parties without prior federal approval or involvement. *See id.* at 892.

150. A plaintiff who brings a CERCLA § 107(a) action must carry the burden of proof, which is consistent with common law remedies. Most courts have liberally construed § 107 to relieve a plaintiff from traditional common law causation, and instead, have adopted a diluted standard of causation in which recovery is permitted merely by showing that the defendant released or threatened to release hazardous wastes. *See* United States v. Monsanto Co., 858 F.2d 160, 162 (4th Cir. 1988) (showing chemical similarity between hazardous substances released from waste storage facility and chemical waste of defendants who generated and stored chemical waste at the facility establishes CERCLA liability), *cert. denied*, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (finding that CERCLA § 107(a)(1) "unequivocally imposes strict liability on the current owner of a facility from which there was a release or threat of release, without regard to causation"); United States v. Mottolo, 695 F. Supp. 615, 623 (D.N.H. 1988) (noting that plaintiff does not have to prove off-site pollution actually caused response costs in order to recover response expenses under CERCLA); United States v. Bliss, 667 F. Supp. 1298, 1309 (E.D. Mo. 1987) (finding that "traditional tort notions, such as proximate cause, do not apply"); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) (noting that case law and legislative history reveal that CERCLA § 107(a) contains no causation requirement); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) (finding that CERCLA § 107(a) imposes strict liability without regard to causation); Violet v. Picillo, 648 F. Supp. 1283, 1293 (stating that "CERCLA § 107(a) requires only a minimal nexus between the defendants' waste and the harm caused by the release at a particular site"), *overruled by* Unites States v. Davis, 794 F. Supp. 67 (D.R.I. 1992); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985) (finding that generators found liable under CERCLA in light of their failure to show that all their drums had been removed prior to cleanup); United States v. Conservation Chem. Co., 619 F. Supp. 162, 234 (W.D. Mo. 1985) (concluding that "a generator whose hazardous substances are treated or disposed of at any site owned or operated by someone other than the generator is liable for response costs incurred with respect to that site"); Missouri v. Independent Petrochemical Corp., 610 F. Supp. 4, 5 (E.D. Mo. 1985) (finding that CERCLA liability was incurred by those who arranged for disposal of released hazardous substances); United States v. Cauffman, 21 ENV'T REP. CAS. (BNA) 2167, 2168 (1984) (finding that the government may recover cleanup costs under CERCLA, despite the contention that the government failed to allege that the defendant proximately caused the release of a hazardous substance); United States v. Price, 577 F. Supp. 1103, 1114 n.11 (D.N.J. 1983) (stating that proximate cause is not required for a plaintiff to recover response costs under CERCLA).

151. *See supra* note 21.

152. Joint and several liability has been universally accepted by the courts and formed the cornerstone of the federal government's implementation of CERCLA. *See* United

pretation of CERCLA by the federal courts on the matter of liability has occurred in the face of an extraordinarily vague and poorly drafted statute.[153] However, unlike the issue of fee-shifting for a § 107(a)(4)(B) suit, there is an interrelated statutory anchor and fairly convincing legislative history to justify application of a broad or liberal construction by the courts when dealing with liability questions.[154]

While it is widely agreed that CERCLA is to be given broad interpretation to accomplish the purposes intended by Congress, there are limits to this kind of interpretation. As the Ninth Circuit has cautioned, while CERCLA is to be given broad interpretation to accomplish its remedial goals, this does not excuse any "construction that the statute on its face does not permit, and the legislative history does not support."[155] This admonition has been heeded by the courts rejecting the award of attorney fees for private response recovery actions and has not been heeded by the courts which have allowed such awards.

Both express and indirect references for attorney fees for a private CERCLA § 107(a)(4)(B) action are conspicuously absent in comparison to the presence of such references for other activities in CERCLA. As noted earlier, CERCLA expressly provides that

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States v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Bliss, 667 F. Supp. 1298, 1312-13 (E.D. Mo. 1987); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-11 (S.D. Ohio 1983). *See supra* note 23.

153. *See* United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) (stating that "CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history"); United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983) (noting that Congress drafted CERCLA hastily and inadequately, thus making it difficult to pinpoint the scope of the legislation).

154. For instance, references to "strict, joint and several liability" are nowhere to be found in CERCLA. Moreover, express references to strict, joint and several liability were deleted from the Senate bill that became CERCLA prior to a Senate floor vote. However, there is a clear statutory anchor to strict, several and joint liability as the standard of liability in CERCLA found in the definitional section of the statute. CERCLA § 101(32) declares that the "terms 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains [*sic*] under section 1321 of Title 33 [§ 311 of the federal Clean Water Act]." 42 U.S.C. § 9601(32) (1988). Section 311 of the Clean Water Act imposes strict, joint and several liability. Congress clearly wished to impose such liability in CERCLA. *See* S. REP. NO. 848, 96th Cong., 2d Sess. 34 (1980). The chief counsel of the Senate Environment and Public Works Committee at the time of the passage of CERCLA explained that referring to the § 311 of the Clean Water Act as the standard of liability was part of the final compromise prior to the Senate's passage of CERCLA:

> The committee staff had argued that strict, joint and several liability, explicitly referred to in S. 1480 and the November 18 substitute, was not radical but was the standard of liability under § 311 of the CWA. Alan Simpson (R-Wyoming) was skeptical; if that were so, he countered, why not just say that. The committee staff agreed to put in the reference to the standard of liability under § 311 that is now § 101(32) of CERCLA.

Cummings, "*Completing the Circle*," ENVTL. FORUM 11, 15 (Nov.-Dec. 1990).

155. 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1362-63 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2014 (1991).

legal costs are included as part of government response costs[156] which can be recovered in a CERCLA § 107(a)(4)(A) action by the government.[157] Attorney fees are also expressly allowed in a CERCLA citizen suit action.[158] A permissive interpretation is not needed to stretch CERCLA's statutory language to allow the award of attorney fees in the case of a government recovery action or a citizen suit, but a permissive interpretation is clearly required for recovery of attorney fees in a private response action. The condition stated by the court in *General Electric* that "more than generalized commands"[159] must be found in a statute to overcome the American Rule, is clearly satisfied in the instances of government recovery actions and citizen suits, but is unsatisfied in the CERCLA § 107(a)(4)(B) recovery context.

The puny and confusing legislative history of CERCLA, when enacted in 1980,[160] expresses neither favor nor disfavor for attorney fees in a private cost recovery action. In contrast, the legislative history of the 1986 SARA amendments to CERCLA has been taken quite seriously by the district courts taking the restrictive approach. As noted earlier, *Fallowfield* relied upon the text of a report by the House Committee on Energy and Commerce which stated that the change in the definition of "response action" in the statute was directed at "confirm[ing] EPA's authority to recover costs for enforcement actions against responsible parties."[161] For the *Fallowfield* court, these comments demonstrated that when enacting SARA in 1986, Congress conceived enforcement to be a role which was part of the response mounted by the federal government, not by private parties, because there was no mention of the latter in the House Report. It has not been lost to the courts taking the restrictive approach that Congress failed to take advan-

156. *See* CERCLA § 104(b)(1), 42 U.S.C. § 9604(b)(1) (1988). Section 9604(b)(1) declares: "In addition, the President may undertake such planning, *legal*, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, *to recover the costs* thereof . . . ." *Id.* (emphasis added).

157. *See supra* notes 48-55 and accompanying text.

158. CERCLA § 310(f), 42 U.S.C. § 9659(f) (1988). *See supra* note 83.

159. *See supra* note 90 and accompanying text.

160. As one court noted, "CERCLA's legislative history is riddled with uncertainty because lawmakers hastily drafted the bill, and because last minute compromises forced changes that went largely unexplained." Bulk Distrib. Ctr., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984). *See also* H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 1, *reprinted in* 1980 U.S.C.C.A.N. 6119. CERCLA's legislative history is meager, largely a result of the hastiness in which the legislation was enacted in the closing days of the 96th Congress.

161. Fallowfield Dev. Corp. v. Strunk, No. 89-8644, 1990 WL 52745, at *6 (E.D. Pa. 1990) (quoting H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 66-67, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848).

tage of the opportunity in enacting SARA in 1986 to clarify that attorney fees were recoverable in a § 107(a)(4)(B) action. The Rhode Island Federal District Court in *Regan v. Cherry Corp.*[162] explicitly found that attorney fees could not be awarded in a CERCLA § 107(a)(4) suit because Congress had failed to specifically provide for the fees when it amended CERCLA in the 1986 SARA amendments.[163] It explained that had Congress wished to permit the award of attorney fees in a private response action, "it would simply have amended [SARA] § 107 to allow the recovery of these litigation costs . . . ," since "SARA was a comprehensive overhaul of CERCLA."[164]

The central premise for courts taking the broad view is the assertion that private parties have an enforcement role in CERCLA, and that their enforcement role is important. Both the existence and importance of § 107(a)(4)(B) as an enforcement measure is highly debatable. The key to the permissive approach is to broadly interpret CERCLA's definition of "response" to conceive a private party response as an enforcement action. In other words, the private response action is equated with a private enforcement role. The statutory language, statutory structure, and legislative history do not separately or in combination support this interpretation.

Courts customarily start their statutory construction with the statute's language and apply a plain meaning analysis to determine the meaning of the statute.[165] It is not so apparent that the plain meaning interpretation of the private cost recovery provision, whether read together or separate from the definition of "response" in § 101(32), indicates that attorneys' fees are enforcement costs which are recoverable. By comparison, plain language analysis of CERCLA unquestionably uncovers support for recovery of attorney fees by the government in § 107(a)(4)(A) actions because incurring legal expenses is expressly stated in § 104(b)(1) as part of the federal enforcement response.[166]

Plain meaning analysis has little use when the terms of a statute are ambiguous, in which case the courts customarily turn to legislative history to derive a construction consistent with congres-

162. 706 F. Supp. 145 (D.R.I. 1989).

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

164. *Id.* at 149.

165. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56 (1987) (noting that the " 'starting point for interpreting a statute is the language of the statute itself' ").

166. *See supra* notes 48-55 and accompanying text.

sional intent.[167] But as noted earlier, the legislative history is nonexistent on the matter of whether Congress plainly intended a private recovery action under § 107(a)(4)(B) to be an enforcement measure and whether attorney fees were recoverable as such enforcement costs—the interpretation advocated by the broad view. On the other hand, as noted earlier, SARA's legislative history confirms congressional intent that attorney fees are part of recoverable government enforcement costs.[168]

General Electric and other cases adopting the broad approach stress the importance of private enforcement to CERCLA's purposes. However, a review of the overall statutory structure reveals that private enforcement in CERCLA is extremely circumscribed, and that enforcement authority is overwhelmingly concentrated in federal hands. Private cleanup authority is no where regarded near the equal of federal authority. All the express private enforcement authority in CERCLA is contained in the citizen suit provision. In contrast, there are numerous expressly stated provisions for federal enforcement.

CERCLA, as noted earlier, is primarily an instrument by which the federal government can instigate cleanups and impose liability upon responsible parties. Federal enforcement authority is quite considerable in CERCLA, making private enforcement actions through the citizen suit provision and any arguable enforcement through a § 107(a)(4)(B) action appear meager in comparison. Congress gave the federal government, specifically the EPA, authority to initiate cleanup operations[169] prior to final judicial determination of the rights and liabilities of the parties affected, and to pay for the cleanup costs from the Superfund.[170] Through CERCLA § 107(a)(4)(A), the EPA can sue for reimbursement of cleanup costs from any responsible party, allowing the federal government to respond immediately while attempting to shift the burden to responsible parties. CERCLA gives the EPA the discretion to sue in federal district court to recover up to three times the amount of any costs incurred by the Superfund from a responsible party who fails without sufficient cause to properly comply with an EPA response order.[171] The EPA is authorized to seek an injunction in federal district court to force a responsible party to clean up any site or spill that presents an imminent and

167. *See Gwaltney*, 484 U.S. at 60.
168. *See supra* notes 160-61 and accompanying text.
169. CERCLA § 104(a), 42 U.S.C. § 9604(a) (1988).
170. CERCLA § 111(a), 42 U.S.C. § 9611(a) (1988 & Supp. 1991).
171. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1988).

substantial danger to public health or welfare or the environment.[172] The EPA can also bring an action in federal district court requesting an order directing compliance with a cleanup order using the contempt powers of the court as a sanction for non-compliance.[173] It can bring an action seeking fines of up to $25,000 a day for non-compliance of one of its orders.[174]

To the extent that there is private enforcement authority in CERCLA, the only clear enforcement measure provided is the citizen suit provision. The citizen suit provision (as opposed to the cost recovery provision) allows citizen enforcement of, among other things, cleanup standards and requirements that become effective under the Act for specific hazardous waste sites. Recovery of reasonable attorney fees is not difficult in citizen suit cases, since such recovery is relatively well established[175] and clearly provided by clear statutory language.[176]

Even the sole express measure for a private enforcement role provided by the citizen suit in CERCLA has considerably less sig-

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172. *Id.* § 9606(a).

173. *Id.*

174. *Id.* § 9606(b).

175. There is at least one reported case of fee awards under the citizen suit provisions of most of the federal environmental statutes:

Clean Air Act: Ruckelshaus v. Sierra Club, 463 U.S. 680, 682 (1983); Alabama Power Co. v. Gorsuch, 672 F.2d 13 (D.C. Cir. 1982); Northern Plains Resource Council v. EPA, 670 F.2d 847, 849 (9th Cir. 1982), *vacated and remanded*, 104 S. Ct. 54 (1983), *rev'd* 734 F.2d 408 (9th Cir. 1984); Metropolitan Wash. Coalition for Clean Air v. District of Columbia, 639 F.2d 802, 803 (D.C. Cir. 1981); NRDC v. EPA, 539 F.2d 1068, 1070 (5th Cir. 1976); Citizens Ass'n of Georgetown v. Washington, 535 F.2d 1318, 1320 (D.C. Cir. 1976); NRDC v. EPA, 512 F.2d 1351, 1353 (D.C. Cir. 1975); NRDC v. EPA, 484 F.2d 1331, 1334 (1st Cir. 1973), *rev'd on other grounds sub nom.* Train v. NRDC, 421 U.S. 60 (1975); Friends of the Earth v. Potomac Elec. Power Co., 546 F. Supp. 1357, 1359 (D.D.C. 1982); Neighborhood Preservation Coalition v. Claytor, 553 F. Supp. 919, 921 (E.D. Pa. 1982); Consolidated Edison Co. v. Realty Inv. Assoc., 524 F. Supp. 150, 151 (S.D.N.Y. 1981); Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co., 367 F. Supp. 1040 (D. Del. 1974) *aff'd without opinion*, 510 F.2d 969 (3d Cir. 1975).

Clean Water Act: Roosevelt Campobello Int'l Park Comm'n v. EPA, 711 F.2d 431, 433 (1st Cir. 1983); Montgomery Envt'l Coalition v. Costle, 646 F.2d 595, 596 (D.C. Cir. 1981); Citizens Coordinating Comm. v. Washington Metro. Area Transit Auth., 568 F. Supp. 825, 827 (D.D.C. 1983); Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1139 (D.R.I. 1977).

Noise Control Act: PROD, Inc. v. Train, 6 ENVTL. L. REP. 20341 (D.D.C. March 26, 1976).

Endangered Species Act: Roosevelt Campobello Int'l Park Comm'n v. EPA, 711 F.2d 431, 440 (1st Cir. 1983); Village of Kaktovik v. Watt, 689 F.2d 222, 224 (D.C. Cir. 1982); Palila v. Hawaii Dep't of Land and Natural Resources, 512 F. Supp. 1006, 1007 (D. Haw. 1981); Carpenter v. Andrus, 499 F. Supp. 976, 977 (D. Del. 1980).

Resource Conservation and Recovery Act: Environmental Defense Fund, Inc. (EDF) v. Lamphier, 12 ENVTL. L. REP. 20843 (E.D. Va. 1982), *aff'd*, 714 F.2d 331 (4th Cir. 1983).

Toxic Substance Control Act: EDF v. EPA, 672 F.2d 42, 61-63 (D.C. Cir. 1982).

Surface Mining Control and Reclamation Act: Council of Southern Mountains, Inc. v. Watt, 13 ENVTL. L. REP. 20393 (E.D. Ky. Oct. 18, 1982).

Outer Continental Shelf Lands Act: Village of Kaktovik v. Watt, 689 F.2d 222, 228 (D.C. Cir. 1982).

176. CERCLA § 310(f), 42 U.S.C. 9659(f) (1988).

nificance than the federal enforcement role. When enacted in 1980, CERCLA represented the last piece in an array of environmental statutes which Congress began to enact in the early 1970s, virtually all of which include citizen suit provisions and are largely identical.[177] In all of its decisions concerning the environmental citizen suit, the Supreme Court has construed these private enforcement measures very narrowly, and it has pointedly subordinated private enforcement to federal enforcement.[178] In a case concerning the citizen suit provision in the Clean Water Act, the Supreme Court rejected the notion that private enforcement under the citizen suit provision duplicated or was co-equal with that of the federal government.[179] The Supreme Court characterized citizen suit measures as "supplementary" and "interstitial" relative to federal authority.[180] In the only Supreme Court decision specifically addressing fee-shifting under environmental citizen suit provisions, the Court narrowly construed the statutory language and downplayed the enforcement function of citizen suits relative to federal enforcement.[181]

V. CONCLUSION

The restrictive approach represents the more supportable view on the question of whether attorney fees are recoverable under CERCLA § 107(a)(4)(B). Contrary to the liberal approach, an action under § 107(a)(4)(B) cannot be regarded as an "enforcement" action, and thus, private parties cannot incur enforcement costs as contemplated by CERCLA. Neither the statutory language, the overall statutory framework, nor the legislative history of CERCLA supports the conclusion that a § 107(a)(4)(B) suit is an enforcement action, particularly when compared alongside the numerous federal enforcement responsibilities.

Even if § 107(a)(4)(B) can be regarded as having an enforce-

177. *See supra* note 57.

178. *See* Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found. Inc., 484 U.S. 49 (1987) (construing Clean Water Act citizen suit provision narrowly and limiting citizen suits seeking penalties to those for "wholly past" violations); Hallstrom v. Tillamook County, 493 U.S. 20 (1989) (construing the citizen suit provision of RCRA narrowly and holding statutory notice and delay requirements are mandatory conditions precedent to commencing a suit under RCRA).

179. *Gwaltney*, 484 U.S. at 60.

180. *Id.*

181. Burlington v. Dague, 112 S. Ct. 2638 (1992). The *Dague* Court rejected enhancing attorney fees for plaintiffs for citizen suits taken on a contingency basis and brought pursuant to RCRA and Clean Water Act. *Id.* at 2640-41. In his dissent, Justice Blackmun, joined by Justice Stevens, contended that the ruling would thwart Congress' purpose in fee-shifting provisions, which is to strengthen the enforcement of federal laws. *Id.* at 2644 (Blackmun, J., dissenting).

ment nature, there still must be explicit statutory reference to the award of attorney fees to overcome the American Rule. While there is good reason to believe that the award of attorney fees would effectuate congressional objectives for CERCLA to further environmental protection, this is not sufficient to excuse compliance with the American Rule which has been imposed upon federal litigation by the Supreme Court in *Alyeska*. For better or worse, the federal courts are bound by the American Rule; therefore, in order for statutory language to be regarded as allowing fee-shifting, it must be more than the generalized commands upon which the liberal approach so loosely relies. The majority view is thus correct in the conclusion that attorney fees are not recoverable in a § 107(a)(4)(B) action.