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PACE ENVIRONMENTAL LAW REVIEW

Volume 10 Fall 1992 Number 1

COMMENT

Attorney Fees: CERCLA Private Recovery Actions

Janet Morris Jones

I. Introduction

Congress enacted The Comprehensive Environmental Response, Compensation and Liability Act[1] of 1980 (CERCLA) to encourage responsibility in handling hazardous substances,[2]

1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1983 & Supp. 1990), *amended by* The Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

2. CERCLA defines what substances are considered hazardous waste under the statute.

> The term "hazardous substance" means (A) any substance designated pursuant to § 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to § 9602 of this title, (C) any hazardous waste having characteristics identified under or listed pursuant to § 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 9601] has been suspended by Act of Congress), (D) any toxic pollutant listed under § 1317(a) of Title 33, (E) any hazardous air pollutant listed under § 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to § 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is

provide rapid response to environmental emergencies, encourage voluntary cleanup of hazardous spills, encourage early reporting of violations, and ensure that parties responsible for the release[3] of hazardous substances bear the costs of response.[4] CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA) in 1986 and is due for reauthorization in 1994. The reauthorization debate will begin in the 103d Congress, 1993. It will inevitably focus on the success and validity of the liability approach of the statute, which attempts to shift the cost burden of cleanup to responsible parties rather than to the taxpayer.[5]

> not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14) (1989).

3. CERCLA defines release:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under § 170 of such Act [42 U.S.C. § 2210], or, for the purposes of § 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under § 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

42 U.S.C. § 9601(22) (1989).

4. Chemical Waste Mgmt. v. Armstrong World Indus., 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987).

5. 42 U.S.C. § 9607 (1989); *see infra* note 8. *See also* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1421 (8th Cir. 1990). *See generally* Katherine N. Probst & Paul R. Portney, ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY OPTIONS (1992) [hereinafter Probst & Portney]. CERCLA is scheduled for reauthorization in 1994. Probst and Portney analyze the advantages and disadvantages of alternatives to the current Superfund liability approach: 1) status quo, 2) expanded mixed funding for orphan shares, 3) liability release for all closed co-disposal sites, 4) liability release for current NPL sites.

To further the purpose of CERCLA, Congress enacted § 9604 to authorize the federal government to clean up hazardous substances.[6] To pay for these federal cleanup actions, Congress allocated taxpayer dollars to Superfund in § 9611.[7] In § 9607 Congress authorized private parties to recover response costs incurred in cleaning up sites.[8] This liability ap-

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6. CERCLA defines the circumstances under which the government may respond to a release or threatened release of hazardous substances.

> (1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a) (1989).

7. CERCLA provides for the funds to clean up hazardous substances.

> For the purposes specified in this section there is authorized to be appropriated from the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26 not more than $8,500,000,000 for the 5-year period beginning on October 17, 1986, and not more than $5,100,000,000 for the period commencing October 1, 1991, and ending September 30, 1994, and such sums shall remain available until expended. The preceding sentence constitutes a specific authorization for the funds appropriated under title II of Public Law 99-160 (relating to payment to the Hazardous Substances Trust Fund). The President shall use the money in the Fund for the following purposes: (1) Payment of governmental response costs incurred pursuant to § 9604 of this title . . . (2) 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 § 1321(c) of Title 33 and amended by § 9605 of this title.

42 U.S.C. § 9611(a) (Supp. II 1991).

8. CERCLA imposes liability upon those who are responsible for the release or threatened release of hazardous substances.

> (1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal

proach under § 9607 has led to legal action, especially when multiple potentially responsible parties contest liability.[9] However, Congress did not explicitly authorize the recovery of attorney fees from responsible parties. Courts have consistently held that § 9607 creates a private cause of action for recovery of response costs.[10] Permitting private parties to recover response costs for cleaning up hazardous substances is intended to encourage greater voluntary cleanup.[11] "Private cleanups conserve the resources of the EPA and Superfund, and enhance the EPA's effort to deal with the massive prob-

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> or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for— (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under § 9604(i) of this title.

42 U.S.C. § 9607(a) (1989).

9. John Paul Acton & Lloyd S. Dixon, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCE OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS (1992) [hereinafter Acton & Dixon]. A recent Rand Institute study found that 88% of the money spent on Superfund activity by large insurance companies went to transaction costs rather than cleanup. The breakdown of this expenditure included: 42% on coverage disputes and 37% on policy holder defense. According to Rand, large industrial firms spent an average of 21% of Superfund on transaction costs. These firms spent an average of 39% on transaction costs at multiple PRP sites. "Most of the costs were for legal costs." *Id.* at 61.

10. *See, e.g.*, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1078 (1st Cir. 1986).

11. *See* Richard F. Stool & Karen M. Wardzinski, *A "CERCLA — Quality Cleanup:" The New Path to Righteousness (and Recovery) for Volunteers*, C506 A.L.I. A.B.A 191, (1990) [hereinafter Stool & Wardzinski]. In order to bring a private cost recovery action, a plaintiff's cleanup of a site must be " 'consistent with the National Contingency Plan.' " *Id.* at 193-94. However, the courts have applied different interpretations as to what constitutes NCP "consistency." *Id.* at 197. In an effort to reduce much of the confusion and debate over the issue, the EPA on March 8, 1990, released its final revisions to the NCP which included "detailed regulation defining NCP consistency." *Id.* at 199. The EPA revisions established greater flexibility in meeting the requirements set forth in the NCP. *Id.* at 204. While parties under the new EPA revisions need only substantially comply with the NCP's procedural requirements, they must nonetheless achieve a "CERCLA-quality cleanup." *Id.* at 202.

lem of improper disposal of hazardous substances."[12]

Although CERCLA clearly defines the parties liable for cleanup costs in § 9607,[13] the statute does not clearly define what costs may be recovered as response costs.[14] Section 9601 provides that response costs include enforcement activities related to the removal[15] or remedial[16] actions. However, courts

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12. Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW 923, 952 (1990) [hereinafter Barr] (quoting Stevens Creek Assoc. v. Barclays Bank, Toxics L. Rep. (BNA) No. 88-15503, 1364-65 (March 29, 1989), Brief for the United States as Amicus Curiae at 2 (U.S. Feb. 17, 1989)).

13. 42 U.S.C. § 9607(a) (1989).

14. "The terms 'respond' or 'response' means remove, removal, remedy, and remedial action;, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25) (1989).

15. CERCLA defines what is considered a removal under the statute.

> The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under § 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5121].

42 U.S.C. § 9601(23) (1989).

16. CERCLA defines what is considered a remedy under the statute.

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

do not agree on the issue of whether the recovery of attorney fees is included in the terms "response costs" and "enforcement activities."[17]

The Eighth Circuit[18] is the only circuit court of appeals to address the issue of whether attorney fees are recoverable as response costs in a private party CERCLA action.[19] The court held in *General Electric Co. v. Litton Industries* (*Litton*) that attorney fees were recoverable under the statute. Litton petitioned the Supreme Court on the issue of attorney fees, but the Supreme Court denied certiorari.[20] As a result, the issue remains unresolved.[21]

In addition, recent studies indicate that transaction costs for CERCLA actions are very high. If Congress continues the liability approach for the cleanup of hazardous substances, it should amend the statute to encourage settlements and reduce transaction and legal costs. If responsible parties know they are liable for cleanup costs and legal fees of plaintiffs seeking recovery, they will have an incentive to settle and to spend money on the actual clean up rather than disputing the claim.

To analyze whether attorney fees should be recoverable as response costs under CERCLA, this article addresses four issues. First, it reviews the American Rule for payment of attorney fees, the exceptions to this Rule, and the exceptions applicable to CERCLA. Second, it analyzes whether the language in CERCLA satisfies the requirements of the applicable

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> businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public heath or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24) (1989).

17. Fallowfield Dev. Corp. v. Strunk, 776 F. Supp. 335, 337-38 (E.D. Pa. 1991).

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

19. *Id.* To date, *Litton*, is the only circuit court of appeals to deal with this issue.

20. *Litton*, 111 S. Ct. 1390 (1991).

21. *Infra* pp. 20-29.

exception. Third, it examines the relevant case law since certiorari was denied. And finally, it discusses the current status of the issue.

II. American Rule and its Exceptions

A. American Rule

Unlike the English law, which authorizes courts to award attorney fees to prevailing parties,[22] the United States has historically held litigating parties responsible for their own legal fees.[23] This is known as the American Rule. Despite this general rule, three exceptions are firmly rooted in United States legal history. These exceptions are authorized by statute, court order, rules of procedure, and contract.[24]

B. Exceptions to American Rule

As early as 1796, the Supreme Court recognized the first exception to the American Rule: attorney fees are recoverable by explicit statutory authorization.[25] Today, Congress has en-

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22. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 n.18 (1975) (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967)).

> As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims [have] terminated, to conduct separate hearings before special 'taxing Masters' in order to determine the appropriateness and the size of an award of counsel fees. To prevent the ancillary proceedings from becoming unduly protracted and burdensome, fees which may be included in an award are usually prescribed, even including the amounts that may be recovered for letters drafted on behalf of a client.

23. *Alyeska*, 421 U.S. 240, 247 (1975).

24. Donald G. McCabe, FEDERAL RULE 11: NEW SANCTIONS FOR OVERZEALOUS ADVOCACY, BROKER-DEALERS: REG. & LITIG. PROGRAM (Practicing Law Institute, New York, N.Y.) Nov. 18-19, 1985, at 177, 180.

25. *See* Arcambel v. Wisemen, 3 U.S. 306 (1796). Even when there is no statutory provision for attorney fees in the statute under which a party is bringing an action, the party may be awarded fees under the Equal Access to Justice Act. A plaintiff may recover attorney fees under this Act if: 1) the action is by or against the federal government and the government cannot show its position was "substantially justified"

acted over eighty-nine statutory provisions for the recovery of attorney fees.[26] Furthermore, Congress has enacted numerous fee-shifting statutes that authorize the recovery of attorney fees in environmental actions.[27]

By 1882, the Supreme Court recognized a second exception to the American Rule: the common benefit/common fund exception.[28] According to the Supreme Court, a successful plaintiff may recover attorney fees when the litigation provides a common benefit to a group.[29] When there has been a common fund established for the benefit of plaintiffs and third parties, attorney fees may be paid by the fund rather than by the plaintiffs.[30]

Recognizing a third exception, the Supreme Court held that courts may award attorney fees against parties whose

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and 2) special circumstances make the award unjust. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A)(1988).

26. Daniel Riesel, *Citizen Suits, and the Award of Attorneys' Fees in Environmental Law,* C637 A.L.I.A.B.A. 1001, 1047 n.30 (1991) (citing Legislative History of the Civil Rights Attorneys' Fees Awards of 1976, prepared by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Riesel also comments that many other federal statutes may provide authority for fee-shifting in environmental actions, e.g. The Freedom of Information Act). *See also Alyeska*, 421 U.S. at 260 n.33 (list of federal statutes authorizing the recovery of attorney fees).

27. Robert L. Boes, *Liability for Attorney's Fees in Environmental Litigation,* 38 AUG. LA. B.J. 93, 94 n.6 (environmental statutes that authorize the recovery of attorney fees: Toxic Substances Control Act, 15 U.S.C. § 2618(d); Endangered Species Act, 16 U.S.C. § 1540(g)(4); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d); Deep Seabed Hard Minerals Resources Act, 30 U.S.C. § 1427(c); Clean Water Act, 33 U.S.C. § 1365(d); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(4); Deepwater Port Act, 33 U.S.C. § 1515(d); Safe Drinking Water Act, 42 U.S.C. § 300J-8(d); Noise Control Act, 42 U.S.C. § 4911(d); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Clean Air Act, 42 U.S.C. § 7607(f); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(d); Ocean Thermal Energy Conservation Act, 42 U.S.C. § 9124(d)); Riesel *supra* note 26 (list of federal environmental statutes that authorize the award of attorney fees: Toxic Substance Control Act 15 U.S.C. § 2619(c)(2); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(4); Clean Water Act, 33 U.S.C. § 1365(d); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund") § 310(f), 42 U.S.C. § 9659(f).

28. Trustees v. Greenough, 105 U.S. 527 (1881).

29. Hall v. Cole, 412 U.S. 1 at 5-6 n.7 (1972) (quoting Mills v. Electric Auto-Lite, 396 U.S. 355, 393-94 (1970)). The rationale for this exception is that it would be unfair for the plaintiff to pay attorney fees while the group enjoys the benefits.

30. Boeing Co. v. Van Gemert, 444 U.S. 472 (1980).

conduct in the judicial process merits censure under a variety of circumstances. For instance, courts may enforce their own orders by awarding attorney fees for the intentional violation of a court order.[31] Also, a court may order the recovery of attorney fees based on a showing of bad faith.[32]

Generally, courts are unwilling to award attorney fees unless the requirements for one of these exception are fully met. The second exception mentioned above, explicit statutory authorization, is applicable to CERCLA.

C. Application to Private Recovery Actions Under CERCLA

The courts' debate centers on the definition of response costs. Every court that has addressed the issue of whether to award attorney fees in private CERCLA actions has applied the American Rule and the explicit statutory authorization exception. The courts that have refused to award fees have held that the statute does not explicitly provide for such recovery. The courts that have awarded attorney fees have found these costs to be included in the terms "response costs" and "enforcement activities."

III. Statutory Interpretation: Plain Meaning

A. Purist Plain Meaning

In order to determine whether attorney fees are explicitly authorized in private party CERCLA recovery actions, courts often apply a "plain meaning" approach in their statutory in-

31. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923).

32. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974). The Federal Rules of Civil Procedure (FRCP) provide other exceptions. The 1983 amendments to Rule 11 of the FRCP authorize the award of attorney fees to a party if the other party is found to either advance meritless claims and defenses or have engaged in improper litigation tactics. Additionally, rule 16(f) authorizes recovery of attorney fees for the other party's disobeying of pre-trial orders while rules 26(g) and 37(a)-(g) permit a court to assess reasonable attorney fees against a party or attorney for acting in a manner that warrants disciplinary action during discovery. Moreover, usually, federal courts must award attorney fees if provided for by contract. FED. R. CIV. P. 11; *See also* McCabe, *supra* note 24 at 181. (citing 6 J. Moore et al., MOORE'S FEDERAL PRACTICE P.54.77[2] (2d. 1974); *see also* Equitable Lumber Corp. v. I.P.A. Land Dev. Corp., 344 N.E.2d 391 (N.Y. 1976)).

terpretation. However, within this approach, courts differ as to what should be considered when determining "plain meaning."

The plain meaning purists, led by Justice Scalia, only look at actual words used in a statute to determine its meaning.[33] While scholars and judges who promote this method of interpretation prevent the abuse of judicial bias, some believe that they also prevent the beneficial use of subjective factors when the actual words do not clearly state the meaning of a statutory provision.[34] The purist isolates the actual language[35] in CERCLA to determine whether to award attorney fees as response costs. CERCLA states that the federal government[36] and private parties[37] may recover response[38] costs that they incur in response to a release[39] or threatened release of hazardous substances[40] as long as the response is consistent with the National Contingency Plan.[41] The definition of recoverable response costs includes enforcement activities, but it does not specifically list attorney fees or litigation costs. Therefore, plain meaning purists refuse to award attorney fees since there is no explicit statutory authority for recovery. Accordingly, they assert that the statutory exception to the American

33. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law,* 45 VAND. L. REV. 533, 559 (1992). *Contra* Steven F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?,* 45 VAND. L. REV. 561, 564 (1992). The other end of the statutory interpretation spectrum is led by scholars, such as Eskridge, and judges who advocate a more dynamic approach to statutory interpretation. These advocates favor an interpretation that gives effect to contemporary public values. This method may reflect contemporary values, but it also exposes statutes to the risk of judicial activism. The dynamist approach of statutory interpretation is not a focus of this paper since each court that has awarded attorney fees in private response actions has reasoned that attorney fees are within the plain meaning of the term "response costs."

34. Farber, *supra* note 33, at 559.

35. Farber, *supra* note 33, at 533.

36. 42 U.S.C. § 9604(a) (1989).

37. 42 U.S.C. § 9607(a) (1989).

38. 42 U.S.C. § 9601(25) (1989).

39. 42 U.S.C. § 9601(22) (1989).

40. 42 U.S.C. § 9601(14) (1989).

41. "The term 'national contingency plan' means the national contingency plan published under § 1321(c) of Title 33 or revised pursuant to § 9605 of this title." 42 U.S.C § 9601(31) (1989).

Rule is not satisfied under CERCLA.

B. Quasi Plain Meaning

While Justice Scalia favors a purist interpretation, others, who also consider themselves to be plain meaning advocates, recognize that it is sometimes necessary to look past the actual words of the statute to understand the plain meaning of a term that is not defined in the statute.[42] These "quasi plain meaning advocates" first look at the precise language of the statute. Then, if this language is unclear, they analyze the precise language based on a consideration of the legislative purpose and history.

While it would be preferable to use the definition section of CERCLA to determine the meaning of enforcement activities, the absence of a definition forces readers of the statute to look to the plain meaning of the word. Black's Law Dictionary defines enforce as "to put into execution, to cause to take effect, to make effective."[43] Using such an approach, a quasi plain meaning advocate could conclude that legal action is an enforcement activity and attorney fees are therefore recoverable costs in private response actions. Quasi plain meaning advocates may also look at legislative intent and history when statutory terms are unclear.

The following represents a compilation of the analysis used by quasi plain meaning advocates:

Congress enacted CERCLA as a response to the threat to public health posed by the widespread use and disposal of hazardous substances.[44] CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment.[45] Its provisions therefore should

42. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950). According to Karl Llewellyn, statutory language is of primary importance. He also urged courts to consider the court's sense of the situation, overall coherence of the situation and legal system, presumed purpose of the statute and recent legislative history. Farber, *supra* note 33, at 537.

43. BLACK'S LAW DICTIONARY 528 (6th ed. 1990).

44. Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).

45. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081

be construed liberally to avoid frustration of the legislative intent.[46] CERCLA's purpose was to ensure the prompt and effective cleanup of waste disposal sites as well as to assure that parties responsible for hazardous substances bore the cost of the conditions they created.[47] CERCLA authorizes government and private party recovery of response costs. Private parties may recover costs when the parties are directed by the EPA and when they act voluntarily. In order to encourage voluntary private responses, CERCLA does not require private parties to receive government approval in order to bring a recovery action.[48]

> The private recovery provisions of the statute, however, serve a different purpose; they assure an incentive for private parties, including those who may themselves be subject to liability under the statute, to take a leading role in cleaning up hazardous waste facilities as rapidly and completely as possible. To require private parties to await governmental approval would be to restrict the overall national effort to the volume of activity which the federal government could centrally supervise, and this would defeat the Act's basic intent. Congress provided for both of these types of recovery actions in order to promote voluntary cleanup and to shift the cost burden to the parties responsible for the release or threatened release.[49]

Referring to CERCLA, Senator Bradley stated: "Federal government cleanup and containment capability is viewed as something of an appeal of last resort in the absence of any other adequate and timely response."[50]

Quasi plain meaning advocates then may seek further support in the SARA amendments of 1986.[51] Before 1986, the term "response" was defined as meaning "remove, removal,

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(1st Cir. 1986).

46. *Id.*

47. *Mardan*, 804 F.2d at 1455.

48. Barr, *supra* note 12, at 997.

49. *Id.*

50. 26 Cong. Rec. 30,949 (1980).

51. Barr, *supra* note 12, at 949.

remedy, and remedial action."[52] When Congress passed the SARA amendments[53] in 1986, "response" was redefined to include enforcement activities related to costs of response.[54] There is limited legislative history to explain Congress' intent in changing the definition of response.[55] In reference to these amendments, the EPA Administrator, Lee M. Thomas, emphasized that there is a need to conserve scarce taxpayer dollars in the Superfund to those situations where responsible parties are not held accountable for their actions.[56] The EPA needs to prioritize its efforts, handle the most immediately dangerous environmental problems and leave less immediate problems to private parties rather than the government.[57] Quasi plain meaning advocates may also look to the 1990 revision to the National Contingency Plan, which further encouraged voluntary cleanups.[58] The new regulations provide that immaterial or insubstantial deviations from certain governmental procedures will not make a private action inconsistent with the NCP.[59] "EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the

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52. 42 U.S.C.A. § 9601(25) (1983).

53. 42 U.S.C. § 9601(25) (1989), *amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

54. *Id.* at 1615.

55. *See* Kanad D. Virk, General Electric Co. v. Litton Industrial. Automation Systems, Inc.: *Are Attorney Fees Recoverable in CERCLA Private Cost Recovery Actions?*, 75 MINN. L. REV. 1541, 1556 (1991) [hereinafter Virk], (quoting H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1, at 55, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2838). Virk quotes from H.R. 2817, the bill drafted to amend CERCLA that was not the same bill that was eventually passed. "[T]he section modifies the definition of 'response action' to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." Virk argues that the inclusion of one thing indicates the exclusion of another. Nevertheless, Virk concedes that the Conference Report, H.R. Conf. Rep., No. 962, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 3276. does not distinguish between private parties and the government and concedes that there are no comments about the addition of enforcement fees in the bill that eventually passes.

56. Barr, *supra* note 12, at 949.

57. *Id.*

58. Stool & Wardzinski, *supra* note 11, at 192.

59. 55 Fed Reg. 8792-93 (1990).

contamination."[60]

Quasi plain meaning advocates could then conclude that it is necessary to encourage private parties to clean up hazardous substances in order to successfully achieve the legislative purpose of CERCLA.[61] Private parties that clean up hazardous substances most commonly retain legal counsel to recover response costs from a responsible party.[62] Allowing a private party to recover attorney fees is consistent with the purpose of CERCLA since it will encourage voluntary cleanup. Such cleanup will reduce the administrative burden on the government and the financial burden on the taxpayer.[63]

IV. Case Law

A. Purist Plain Meaning

Since the Supreme Court denied certiorari on the issue of recovery of attorney fees, some district courts applying the purist plain meaning approach have refused to award attorney fees.[64] They examined the language of the statute and held that Congress did not explicitly authorize the recovery of attorney fees in private party response actions.[65] In each case, the judge emphasized that the courts disagreed on the issue.[66]

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60. *Id.*

61. *See* Barr, *supra* note 12, at 950.

62. *Cf.* Don J. DeBenedictis, *How Superfund Money is Spent*, A.B.A.J., Sept. 1992, at 30 (according to a Rand Institute for Civil Justice study, in 1989 insurance companies spent 88% of Superfund money on litigation expenses and only 12% on actual clean up); *Cf.* Marianne Lavelle, *Study Measures Superfund Costs*, NAT'L L. J., May 4, 1992, at 3 (citing a Rand Institute for Civil Justice study that found that in 1989 insurance companies spent $410 million on legal fees and only $60 million on actual cleanup); *Cf.* Mark Trumbull, *Cost of Superfund Lawsuits Stir Up Calls for Change*, CHRISTIAN SCIENCE MONITOR, May 11, 1992 at 7 (according to Insurance Information Institute, much Superfund litigation could be avoided by use of a no fault system of cleaning up sites).

63. *See* Barr, *supra* note 12, at 933.

64. *See Fallowfield*, 766 F. Supp. 335; In re Hemingway Transport, 126 B.R. 656 (D. Mass. 1991); New York v. S.C.A. Serv., 754 F. Supp. 995 (S.D.N.Y. 1991).

65. *Fallowfield*, 766 F. Supp. 335; *Hemingway*, 126 B.R. 656, *S.C.A.*, 754 F. Supp. 995.

66. *Fallowfield*, 766 F. Supp. 335; *Hemingway*, 126 B.R. 656; *S.C.A.*, 754 F. Supp. 995.

In *In re Hemingway Transportation*,[67] Juniper Development Group brought a CERCLA action against Hemingway Transport and Bristol Terminals (collectively "Hemingway"), the former owner of the site in question, to recover response costs including attorney fees.[68] The bankruptcy court held that attorney fees are not recoverable as response costs in a private party CERCLA action.[69] Juniper appealed the decision.[70]

The bankruptcy court of appeals affirmed the denial of attorney fees.[71] It stated that CERCLA does not define "response costs" despite the language in § 9601(25) providing recovery for enforcement activity.[72] The court held that absent explicit Congressional authorization, attorney fees are not a recoverable cost of litigation.[73] The court also held that legal expenses may not be deemed recoverable as enforcement activity.[74] The court reasoned that the statute specifically provides for the recovery of attorney fees in other sections, but that it does not specifically authorize recovery in private party response actions.[75]

In *New York v. S.C.A. Service*,[76] defendant Cortese Construction operated a landfill at which S.C.A. disposed of industrial and chemical wastes.[77] In 1983, the government brought an action under CERCLA to recover response costs.[78]

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67. *Hemingway*, 126 B.R. at 656.

68. *Id.* at 658. Hemingway filed for bankruptcy in 1982 and, while in Chapter 11, sold a parcel of the property to Juniper. In 1985, the EPA discovered barrels of hazardous waste on the property and directed Juniper to remove the drums and surrounding soil. Juniper subsequently complied with the EPA order.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Hemingway*, 126 B.R. at 658.

73. *Id.* (quoting Runyon v. McCrary, 427 U.S. 160 (1976)).

74. *Hemingway*, 126 B.R. at 663. "[p]laintiffs 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." *Id.* (quoting T & E Indus. v. Safety, 680 F. Supp. 696, 708 (D.N.J. 1988)).

75. *Id.*

76. *S.C.A.*, 754 F. Supp. at 995.

77. *Id.* at 997.

78. *Id.* at 998. The state brought the action on its own behalf and as *parens patriae* on behalf of its residents.

SCA's counterclaim sought reimbursement for attorney fees incurred when responding to conditions at the site.[79] Plaintiffs sought to dismiss the counterclaim.[80] The court dismissed S.C.A.'s counterclaim for award of attorney fees.[81] The court emphasized that attorney fees are not recoverable if there is no statutory provision for recovery.[82] It reasoned that if Congress had intended to permit recovery of attorney fees in private party response actions, it would have included the language in the appropriate section of the statute.[83]

In *Leonard Partnership v. Town of Chenango*,[84] the owner of property next to a municipal landfill[85] brought an action against the town alleging that hazardous substances had been released from the landfill, thereby damaging the Leonard property.[86] Leonard claimed that, as a result of the landfill, "they have incurred substantial expenses and response costs."[87] The court was unsure whether Leonard was seeking attorney fees as part of its response costs.[88] Nonetheless, the court addressed the issue and held that absent a Congressional amendment of CERCLA, attorney fees are not recoverable.[89]

In *Fallowfield v. Strunk*,[90] Fallowfield brought an action against Strunk, a former owner of Fallowfield's property, to recover cleanup costs and attorney fees under CERCLA.[91]

79. *Id.* at 999.
80. *S.C.A.*, 754 F. Supp. at 999.
81. *Id.* at 1003.
82. *Id.* at 1000.
83. *Id.* (quoting Regan v. Cherry Corp., 706 F. Supp. 145, 149 (D.R.I. 1989)).
84. 779 F. Supp. 223 (N.D.N.Y. 1991).
85. *Id.* at 226. Leonard had applied to the town for a subdivision and building permit, which the town denied, stating that the application must be accompanied by a site plan and Department of Health (DOH) approval for water supply and septic systems.
86. *Id.*
87. *Id.* at 227.
88. *Id.* at 228.
89. *Id.* at 230.
90. *Fallowfield*, 766 F. Supp at 335. *Contra Pottstown*, 1992 WL 50084 at *1 (E.D. Pa. 1992)(district court in third circuit dismissed the issue of attorney fees in a private party recovery action under CERCLA without prejudice, waiting for direction from the Supreme Court or the Court of Appeals in the Third Circuit).
91. *Id.* at 336. Strunk sold his property to Callaghan who assigned all rights to

The court ruled that attorney fees are not recoverable under CERCLA and denied Strunk's motion for reconsideration.[92] The court based its decisions on two reasons. First, it examined the legislative history of CERCLA and determined that Congress did not intend for private parties to collect attorney fees in private party cost recovery actions.[93] Second, it reasoned that, "absent explicit Congressional authorization, attorney fees are not a recoverable cost of litigation."[94] Since attorney fees are not specifically listed as recoverable in a private party cost recovery action under CERCLA, the court denied recovery.[95]

In *Anspec Co., Inc. v. Johnson Controls, Inc.*,[96] plaintiff was an interim owner of a hazardous substance site.[97] Anspec and the current owner, Montgomery, brought a private recovery action under CERCLA against the previous owner, Hoover,[98] to seek indemnification for past and future costs and attorney fees.[99] While the court recognized that the Eighth Circuit Court of Appeals had awarded attorney fees on this issue,[100] it also recognized that district courts in other circuits

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Fallowfield. The agreement of sale between Callaghan and Strunk provided that the property was free of hazardous, toxic, carcinogenic substances, and other pollutants.

In 1989, Fallowfield discovered bottles of chemicals buried on the property. State and federal law required Fallowfield to initiate an investigation and a cleanup. Tests revealed that the samples contained toxic and carcinogenic substances that were hazardous wastes.

92. *Id.* at 338.

93. *Id.*

94. *Id.* (quoting *Runyon*, 427 U.S. 160, 185 (1976)).

95. *Fallowfield,* 766 F. Supp. at 338.

96. 788 F. Supp. 951 (E.D. Mich. 1992).

97. *Id.* at 954-55. Anspec learned of the contamination of the site when it was notified by the Michigan Department of Natural Resources (MDNR). The MDNR required Anspec to test the site for contamination. Anspec hired environmental consultants to perform these tests. The tests indicated that the site was contaminated.

98. *Id.* at 954. The former owner, Ultraspherics, operated a metal and plastic grinding business and disposed of wastes from the grinding business in underground storage tanks and underground septic tanks. Ultraspherics merged with Hoover. Hoover was the surviving corporation of the merger and assumed all assets and liabilities of Ultraspherics.

99. *Id.* at 955. The plaintiffs also brought claims for fraud and nuisance as well as a claim under the Michigan Environmental Protection Act.

100. *See infra* notes 109-20 and accompanying text. (The *Litton* court applied a quasi plain meaning analysis and awarded attorney fees).

had refused to award attorney fees. The court did not find the reasoning in *Litton* persuasive and refused to award attorney fees as response costs under CERCLA. The court was not satisfied with the *Litton* explanation of how the award of attorney fees in private recovery actions harmonized with the American Rule. The court was particularly troubled by:

> [the] resulting incongruity of CERCLA, providing explicit and unequivocal language allowing the government to seek attorney fees under § 9604(b)(1), but providing only a circumscribed textual basis, as stated in *Litton* for granting the same right to private parties. What is more, the holding in *Litton* does not consider Congress' failure to include a provision for recovery of attorney fees by private party litigants in the comprehensive amendments to CERCLA passed in 1986.[101]

The court expressed further concern with the *Litton* holding in its critique of the analysis.

> While the court is well aware of the judicial tendency to interpret CERCLA expansively in the hope of effecting its remedial goals, it nonetheless believes that such an ambitious effort with respect to the issue of attorney fees would be disingenuous and would denigrate settled rules of statutory interpretation and the integrity of the statutory scheme. The court declines to invigorate the *Litton* court's achievement of an expansion — rather than an interpretation of the term 'response.'[102]

In *Santa Fe Pacific Realty Corp. v. United States*,[103] the plaintiff, Catellus (formerly Santa Fe Pacific Realty Corp.) who owned property on which defendants, Clifford and Dora Dana, leased a warehouse, brought an action against the United States, Richard Armor (a sublessee), and the Danas.[104]

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101. *Anspec*, 788 F. Supp. at 957.

102. *Id.* at 958.

103. 780 F. Supp. 687 (E.D. Cal. 1991).

104. *Id.* at 689. The Danas subleased the warehouse to Richard Armor from 1981 to 1989. In 1989, county officials discovered hazardous substances on the property,

Among its motions to dismiss, the government moved for judgment on the pleadings on plaintiff's claim for attorney fees. The court granted the motion.

Recognizing the dispute on the issue of attorney fee recovery in private response actions, the court noted that three distinct lines of inquiry had emerged:

> (1) whether the phrase 'enforcement activities related thereto,' added to the definition of 'response' by the 1986 amendments to CERCLA, includes the activities of private persons; (2) whether the language is sufficiently explicit to constitute congressional authorization for an award of fees; and (3) the degree to which policy considerations support an award of fees to a private party.[105]

Examining the first line of inquiry, the court concluded that it is not clear that private parties can incur attorney fees underlying enforcement activities.[106] Undertaking the second

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the majority of which had been purchased by defendant Armor, from the United States government.

> Catellus sought
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> 1) a declaration that all defendants are liable under the Comprehensive Environmental Response, Compensation, and Liability Act; 2) recovery of costs under CERCLA against all defendants; 3) breach of lease against the Danas; 4) contractual indemnity against the Danas; 5) breach of third party beneficiary contract against Armor; 6) negligence against the United States; . . . 9) nuisance against Armor and the Danas; 10) for strict liability against Armor and the Danas; 11) waste against Armor and the Danas; and 12) conspiracy against Armor and the United States.

Id.

105. *Id.* at 694.

106. *Id.* at 694-95. This court came to this conclusion even though it acknowledged the Ninth Circuit had "twice characterized a response cost recovery brought by a private party as a 'private enforcement action' since those characterizations only appeared in dicta." The *Santa Fe* court also looked to legislative history to further examine the first line of inquiry. The court found that the Committee on Energy and Commerce's explanation that "section [101] also modifies the definition of 'response action' to include related enforcement activities" supported the inference that Congress did not intend private parties to recover enforcement costs. The court made this inference in part because the Committee on Energy and Commerce followed this statement with the words: "the change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." The *Santa Fe* court did not find the Conference Committee Report that omits reference to the EPA on this precise issue to be persuasive.

line of inquiry, the court determined that the language in CERCLA is not sufficiently explicit to constitute Congressional authorization to award attorney fees.[107] When the court undertook the third line of inquiry, it held that policy considerations did not support an award of attorney fees in private recovery actions.[108]

B. Quasi Plain Meaning

In *General Electric v. Litton Industrial Automation Systems*,[109] the court of appeals applied a quasi plain meaning approach and held that the language in CERCLA authorized recovery.[110] General Electric (GE) brought an action against Litton, the previous owner of the site in question, seeking the recovery of cleanup costs.[111] The district court held Litton lia-

107. *Id.* at 695. The court reasoned that Congress used explicit language in other statutes to permit the recovery of attorney fees, however Congress did not use such explicit language here.

108. *Id.* at 696. The court noted a striking similarity in the outcome of second and third lines of inquiry in courts that have awarded attorney fees in private recovery actions.

> It is not for this court to impose a fee shifting provision simply because it may be consistent with the statutory scheme or purposes of CERCLA. "The power to declare what the law shall be belongs to the legislative branch of government; the power to declare what the law is, or has been, belongs to the judicial branch of government." (quoting *In re Shear*, 139 F. Supp. 217, 220 (N.D. Cal. 1956)).

109. *Litton*, 920 F.2d 1415.

110. *Id.*

111. *Id.* at 1416-17. Royal McBee dumped cyanide based electroplating wastes, sludge and other pollutants on the site of its Missouri typewriter plant prior to merging into Litton. Litton closed the plant in 1969 and in 1970 sold it to General Electric (GE) without disclosing the dumping. In 1980, GE became aware of the dumping when the Missouri Department of Natural Resources (MDNR) discovered that hazardous substances had been dumped on the site. In 1981, MDNR and GE determined that there was no groundwater contamination at the site and, therefore, did not perform a cleanup. In 1984, GE agreed to sell nineteen acres of the site to Enterprise Park, a real estate concern that intended to use the land for commercial rather than industrial purposes. In 1985, the MDNR proposed placing the site on the Missouri Registry of Abandoned and Hazardous Waste Sites of Missouri. GE appealed the state registry. Enterprise Park notified GE and Litton of potential CERCLA claims regarding the nineteen acre tract. GE and Enterprise Park entered into a settlement agreement making GE liable for the cleanup costs incurred at the site and requiring GE to take all necessary actions to keep the site off the state registry. Pursuant to the settlement agreement, GE and Enterprise Park negotiated a consent decree, and de-

ble for cleanup costs and interest. The Eighth Circuit ordered Litton to pay GE more than $419,000 in attorney fees and expenses.[112] On appeal, Litton argued that the district court erred in allowing recovery of attorney fees.[113] Affirming the decision of the lower court,[114] the court held that CERCLA allows a private party to recover its attorney fees and expenses incurred in bringing a cost recovery action pursuant to 42 U.S.C. § 9607(a)(4)(B).[115] The court recognized that the American Rule denies the award of attorney fees, yet it held that the statutory exception to the general American Rule applied.[116] According to the court, the term "enforcement activities," authorized the recovery of attorney fees with a sufficient degree of explicitness.[117]

The district court reasoned that this interpretation furthered the purposes of CERCLA: prompt cleanup of hazardous wastes and shifting the cost burden to the responsible

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veloped and implemented a cleanup plan for the site. According to the decree, the plan was to be consistent with the National Contingency Plan (NCP), the EPA Superfund Program, 400 CFR pt. 300 and approved by the MDNR. GE began excavation of the site and discovered four large drums, one containing extremely hazardous waste. Most of the soil was disposed of as non-hazardous waste. The drums and contaminated soil were disposed of as hazardous waste. The MDNR approved the cleanup in early 1988 and removed the site from the registry.

112. *Id.* at 1417.

113. *Litton,* 920 F.2d at 1417. Litton also argued that: 1) GE should not recover costs because the cleanup was induced by threat of a lawsuit from Enterprise Park, 2) GE's response was not consistent with NCP, and 3) the district court erred in not apportioning some cost to GE.

114. *Id.* at 1422.

115. *Id.* It also held that in response to Litton's first claim (that GE's response was caused by a possible lawsuit), CERCLA is a strict liability statute with only a limited number of statutorily-defined defenses available. The court reasoned that a plaintiff's motives for cleanup were irrelevant and the only necessary inquiry was whether or not there had been a release or threatened release. *Id.* at 1418.

Responding to Litton's second claim, the Appellate Court agreed with the lower court in determining that GE's action was a removal in accordance with NCP. The court reasoned that although CERCLA's definition of remedial action lists excavations as a remedial example and its definition of removal action does not explicitly mention excavations, excavations may also be considered a removal. In response to Litton's third claim, the appellate court held that there were no non-necessary costs and thus no costs should be apportioned to GE. *Id.* at 1418-20.

116. *Id.* at 1421-22.

117. *Id.* at 1422.

party.[118] Finally, the court stated that the purposes of CERCLA would be undermined if the non-polluter were forced to pay litigation costs related to the response.[119] Such an allocation of costs would discourage cleanup of hazardous waste sites.[120]

Since *Litton* several district courts have applied a quasi plain meaning approach awarding attorney fees as response costs. In *Key Tronic Corp. v. United States*,[121] plaintiff Key Tronic, who deposited hazardous substances at the Colbert Disposal Site, sought contribution and recovery costs from the United States Air Force and Alumax for disposing of hazardous substances at the Colbert facility, and brought motions for summary judgment to recover attorney fees and prejudgment interest.[122] The court held that attorney fees and prejudgment interest were recoverable as response costs. It awarded attorney fees and costs incurred by attorneys and investigators to search for potentially responsible parties, negotiate for the Consent Decree, and prosecute the action. The court emphasized the need to interpret CERCLA in accord with its purpose when it stated that: " 'CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment, courts are obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes in the absence of a specific Congressional intent otherwise.' "[123] It specifically contrasted the situation of private response costs under CERCLA with *Alyeska* when it noted that: "the plaintiff in this case points to a statutory provision which entitles the recovery of all necessary

118. *Id.*

119. *Litton*, 920 F.2d at 1422.

120. *Id.*

121. 766 F. Supp. 865 (E.D. Wash. 1991).

122. *Id.* at 866-67. The Colbert Disposal Site was maintained by Spokane County, Washington, who had contracted with William Schmidt to accept and dispose of refuse at Colbert. Key Tronic entered into a Consent Decree and agreed to pay 4.2 million to clean up the site. *Id.* The Consent Decree did not, however, resolve the issue of liability between Key Tronic and the United States.

123. *Key Tronic*, 766 F. Supp. at 871, (quoting Wilshire Westwood Assoc. v. Atlantic Richfield, 881 F.2d 801, 804 (9th Cir. 1989)).

response costs."[124]

In *Gopher Oil Co. v. Union Oil Co.*,[125] Gopher Oil Co. brought a CERCLA action against Union Oil Co. to recover costs for investigating, cleaning up, and responding to a contaminated site in Minnesota.[126] Gopher moved for an amendment to an earlier judgment to include an award of attorney fees, costs, and disbursements.[127] The court reasoned that "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created."[128] The court recognized that parties to a lawsuit ordinarily pay for their own attorney fees unless there is express statutory authorization to the contrary.[129] Applying this exception, the court held that the term "enforcement activities" authorized the award of attorney fees in private party CERCLA actions.[130] It referred to policy issues and the purpose of CERCLA when it stated:

> Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary costs" that § 9607 (a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses. This conclusion based on the statutory language is consistent with the two purposes of CERCLA-prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter (such as GE) were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could

124. *Id.* at 871.

125. 757 F. Supp. 998 (D. Minn. 1991).

126. *Id.* at 1001.

127. *Id.*

128. *Id.* (quoting United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982)).

129. *Id.* at 1005.

130. *Gopher*, 757 F. Supp. at 1006 n.5.

> easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site.[131]

The court also hypothesized why Congress may not have added the actual words "attorney fees" for private party actions when it amended CERCLA in 1986 with the SARA amendments.[132] It stated that "although Congress could have specifically provided for recovery of attorney fees when it enacted SARA, the case law was not particularly well developed prior to SARA and thus Congress may not have been aware that courts would interpret CERCLA as disallowing the recovery of attorney fees."[133] Thus, the court saw the absence of express words as an oversight rather than an intentional decision to have private parties pay their own attorney fees and expenses.

V. Analysis

Congress must take active measures to clarify the issue of attorney fee recovery in CERCLA actions. The courts remain divided on the issue and the Supreme Court has appropriately refused to address this Legislative matter. Congressional action will provide individuals and corporations notice of their entitlements and responsibilities under CERCLA.

The general American Rule holds parties responsible for their own attorney fees, yet the fees may be shifted if there is explicit statutory authorization.[134] To determine whether a statute has explicitly authorized the recovery of attorney fees, the plain meaning approach to statutory interpretation is the appropriate analysis.[135]

Although CERCLA explicitly authorizes the recovery of attorney fees in government and citizen suit actions, it does not list attorney fees or litigation costs for private recovery

131. *Id.* at 1006-07.
132. *Id.*
133. *Id.* at 1006 n.5.
134. *See supra* note 23.
135. *See supra* note 33.

actions.[136] The courts that have followed the purist plain meaning approach have held that there is no explicit authorization for attorney fee recovery.[137] These courts frustrate the overall purpose of CERCLA in order to accurately apply the explicit statutory exception of the general American Rule.

The quasi plain meaning advocates urge that the plain meaning of the term "enforcement activities" includes the activities of attorneys establishing the liability of responsible parties.[138] They argue that it is not possible to "ascertain any other logical interpretation which would give effect to this phrase . . . . [O]therwise the phrase 'enforcement activities' would be superfluous."[139] Courts that have found the term "enforcement activities" to be explicit statutory authorization for the recovery of attorney fees adhere to the overall purpose of CERCLA, but stretch the meaning of explicit to the extreme.

Providing for the recovery of attorney fees in private recovery actions would further the overall purpose of CERCLA, nevertheless recovery is not explicitly listed. If recovery were explicitly authorized, it would shift the cost to responsible parties, encourage settlements, lower transaction costs, and increase funds for the cleanup of hazardous substances. Awarding attorney fees to parties who voluntarily clean up hazardous wastes would encourage cleanup of such sites. Current owners who voluntarily clean up property confront a significant economic burden: cleanup costs and costs of recovery.[140] To recover the cost of cleanup, owners must usually bring an action against the other responsible parties.[141] Such an action will generate attorney fees and litigation expenses.[142] "It is also counterproductive to CERCLA's goals to encourage parties who disposed of hazardous wastes to litigate every conceivable issue in a cost recovery action, secure in the

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136. *See supra* notes 1-16.
137. *See supra* notes 64-108.
138. Pease & Curren v. Spectrolab, 744 F. Supp. 945, 951 (C.D. Cal. 1990).
139. *Id.*
140. *See supra* note 62.
141. *Id.*
142. *Id.*

knowledge that the only risk they face is the need to pay clean-up costs if their defense is unsuccessful."[143]

When current owners are not compensated for legal fees incurred to recover removal costs, the net recovery does not actually compensate them for their cleanup efforts.[144] Moreover, if parties knew they could recover attorney fees from responsible parties when they prevail in CERCLA actions, they would be more willing to voluntarily clean up the sites.[145]

Courts recognize that it is difficult for Congress to draft statutes to such a degree of perfection and prescience.[146] Specifically, courts have criticized CERCLA for being poorly drafted and hastily considered.[147] The inconsistency in the courts indicates that even after the 1986 SARA amendments, the statute continues to be a difficult document to interpret.[148] While the statute may be difficult to interpret and its terms may be unclear, it is the role of the legislature, not the judiciary to clarify these terms. If Congress neglected to explicitly authorize the recovery of attorney fees in private recovery actions, it is not the role of the court to legislate from the bench even if such a ruling would further the overall purpose of the statute.

Clearly, the cleanup of hazardous substances has resulted in a tremendous cost to industry, insurance companies, and to the U.S. taxpayer. The EPA spends $1.5 billion per year on Superfund activities.[149] Insurance companies spent approximately $410 million in 1989 alone.[150] Expenditures by PRPs in 1989 were $6.1 million. An average cleanup of an NPL site is $26 million plus transaction costs.[151] Some sites are estimated to cost hundreds of millions.[152]

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143. Brief for Appellee at 46, *Litton* (No. 89-2845).
144. *Cf.* Brief for Appellee at 46, *Litton* (No. 89-2845).
145. *See* Brief of Plaintiff-Appellee at 46, *Litton*, 920 F.2d at 1415 (No. 89-2845 WM).
146. *See, e.g., Mardan*, 804 F.2d at 1458.
147. *See* Exxon Corp. v. Hunt, 475 U.S. 355, 373 (1986).
148. *See supra* notes 64-133 and accompanying text.
149. *See* Acton & Dixon, *supra* note 9, at xv.
150. *Id.* at xl.
151. *Id.* at 11.
152. *Id.*

Critics of the liability system argue it has serious disadvantages.[153] A recent study conducted by the Rand Institute for Civil Justice found that the liability system results in very high transaction costs. Transaction costs involve costs that have nothing to do with the actual cleanup. Another recent study, by Resources for the Future, analyzes the liability system and sets forth possible alternatives to the system.[154] Congress must closely scrutinize these and other studies when it considers the statute for reauthorization. Such studies should provide the context for a thorough evaluation of the proposed changes to the statute.

According to Rand, insurance companies spent 88% of total Superfund expenditures on transaction costs.[155] The insurers allocated 42% of total expenditures to coverage disputes and 37% of total expenditures on defense of policy holders.[156] Transaction costs of PRPs are also very high. Rand studied the very large[157] industrial firms and found that transaction costs at these firms averaged 21% of total expenditures.[158] Rand found that the bulk of the transaction costs for these firms was for legal representation. The firms that were able to categorize the different types of transaction costs spent 75% of the transaction costs on external or internal attorney fees.[159]

Despite the high transaction costs associated with the liability approach, the benefits of the liability approach still outweigh the disadvantages. Abandoning the liability approach would eliminate the incentive for voluntary cleanup. The cost of cleanup is enormous and should be paid by responsible parties rather than the taxpayer. A system that relies on the efficiencies of private industry can best accomplish the difficult task of efficiently paying for the cleanup. The sites with PRP

153. *See* Probst & Portney, *supra* note 5, at 1-3.

154. *Id.*

155. *See* Acton & Dixon, *supra* note 9, at xi.

156. *Id.*

157. The EPA is currently studying transaction costs at small and medium size firms.

158. *See* Acton & Dixon, *supra* note 9, at 33.

159. *Id.* at 41.

financed cleanups have 18% lower costs than sites with government financed cleanups.[160] Eight percent of the large sites in Rand's study were initiated by PRPs without any direct government involvement.[161] One half of these PRP initiated cleanups related to property transfers that stipulated that the seller cleanup the site before the deal would close.[162] The other PRP initiated cleanups resulted from state action and private party law suits.[163] If Congress abandoned the liability approach for the cleanup of hazardous substances, taxpayers would pay for the improper practices of industry and the illegal release of hazardous substances which most often directly or indirectly generated profits for the individual companies. In addition, elimination of the liability system would cancel virtually all incentives for efficiency. If PRPs did not have a financial stake in the outcome of CERCLA actions, they would not have an incentive to properly dispose of hazardous substances and would not need to insist on efficient government cleanup. In addition, PRPs would have no motivation to initiate their own cleanups.

Rather than eliminate the liability system, it is important for Congress to amend CERCLA. Specifically, Congress should amend CERCLA to encourage settlements, reduce transaction costs, and encourage PRP initiated cleanups. In order to encourage such cleanups, Congress should amend the statute to award attorney fees to prevailing parties in private party response actions.

VI. Conclusion

Until Congress acts, some courts will stretch the meaning of explicit to promote the overall purpose of the statute.

160. *Id.* at 55. When PRPs coordinated the cleanups they spent an average of 8% of total costs on transaction costs. The government spent 32-38% of total costs on transaction costs when it coordinated the cleanup. Despite these figures, it is important to note that Rand concluded that it was primarily multiple parties involved in a site that resulted in increased transaction costs, not government coordination. *Id.* at 56, 58.

161. *Id.* at 47.

162. *See* Acton & Dixon, *supra* note 9, at 47.

163. *Id.*

Other courts will frustrate the overall purpose of the statute and deny recovery. Congress must clarify the terms of the statute and answer the question: are attorney fees recoverable in private recovery actions?