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As the number of private parties forced to address hazardous waste sites on their land increases,[1] the concern about transaction costs[2] incurred by these persons,[3] some of which have little or no culpability for the contamination, has gained increased recognition as well. One specific area of concern is the statutory authority provided by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for private parties to recover attorney fees incurred in private cost recovery actions.[4] This concern has evidenced itself through the split of authority that exists among the federal circuit courts[5] and district courts.[6]

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[1] See UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/RCED-88-44, SUPERFUND: EXTENT OF NATION'S POTENTIAL HAZARDOUS WASTE PROBLEM STILL UNKNOWN (1987)(estimating the number of hazardous waste sites to be between 130,000 and 425,000).

[2] *See* Janet Morris Jones, Comment, *Attorney Fees: CERCLA Private Recovery Actions*, 10 PACE ENVTL. L. REV. 393 n.9 (1992)(citing J.P. ACTON & L.S. DIXON, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND THE VET? (1992)); William N. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10413 (July, 1991).

[3] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) defines "person" to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA § 101, 42 U.S.C. § 9601(21)(1988)(outlining costs involved in Superfund process).

[4] 42 U.S.C. §§ 9601-9675.

[5] *Compare* FMC Corp. v. Aero Indus., 998 F.2d 842 (10th Cir. 1993) (holding private plaintiffs can recover attorney fees incurred in nonlitigation removal related activities, but not for litigation to recover costs); Donahey v. Bogle, 987 F.2d 1250, (6th Cir. 1993) (holding attorney fees recoverable); General Electric Co. v. Litton Industrial Automation Sys., 920 F.2d 1415 (8th Cir. 1990) (holding attorney fees recoverable), *cert denied*, 111 S.Ct. 1390 (1991); *with* In re Hemingway Transport, 993 F.2d 915 (1st Cir. 1993) (holding attorney fees not recoverable); Stanton Road Associates v. Lohrey Enterprises, 984 F.2d 1015 (9th Cir. 1993) (holding attorney fees not recoverable).

This note provides an analysis of the propriety of awarding attorney fees in light of the express statutory authority provided by CERCLA. Following a brief discussion of CERCLA's purpose and structure, this note analyzes the statutory language applicable to government and private cost recovery actions which has created the controversy over the appropriateness of awarding attorney fees. This note will then discuss the common law rules relevant to an award of attorney fees. Finally, this note reviews the three approaches followed by the circuit courts and the rationale for each approach. This note suggests the approach that should be followed and advocates that an amendment to CERCLA explicitly allowing attorney fees is required to effectively carry out the purpose of the Act.

I. HISTORY, PURPOSE, AND STRUCTURE OF CERCLA

Congress enacted CERCLA in 1980 in response to the increased discovery of incidents involving improper disposal of hazardous substances.[7] Although statutory authorities designed to protect public health and the environment already existed,[8] Con-

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[6] *Compare* Anspec Co. v. Johnson Controls, Inc., 788 F. Supp. 951 (E.D. Mich. 1992) (holding that attorney fees are not recoverable in a private cost recovery action under CERCLA); Sante Fe Pacific Realty Corp. v. United States, 780 F. Supp. 687 (E.D. Cal. 1991) (holding attorney fees not recoverable); Leonard Partnership v. Town of Chenango, 779 F. Supp 223 (N.D.N.Y. 1991) (holding attorney fees not recoverable); Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 949-52 (C.D. Cal. 1990) (holding attorney fees not recoverable); United States v. Hardage, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990) *rev'd and remanded on other grounds*, 982 F.2d 1436 (holding attorney fees not recoverable); Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335, 337-38 (E.D. Pa. 1991)(holding attorney fees not recoverable); Mesiti v. Microdot, Inc., 739 F. Supp. 57, 62-63 (D.N.H. 1990) (holding attorney fees not recoverable); Regan v. Cherry Corp., 706 F. Supp. 145, 149 (D.R.I. 1989) (holding attorney fees not recoverable); T & E Industries v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988) (holding attorney fees not recoverable); BCW Assoc. v. Occidental Chem. Corp., No. 85-5947, 1988 WL 102641, at *23 (E.D. Pa. 1988) (holding attorney fees not recoverable); *with* Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (D. Kan. 1991) (holding attorney fees recoverable); Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998 (D. Minn. 1991) (holding attorney fees recoverable); Shapiro v. Alexanderson, 741 F. Supp. 472, 480 (S.D.N.Y. 1990) (holding attorney fees recoverable).

[7] Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W. RES. L. REV. 65, 68-69 (1992)(citing three incidents which "sparked interest in and support for" CERCLA: the Love Canal in New York, the Valley of the Drums in Kentucky, and James River ketone discharges in Virginia).

[8] Resource Conservation and Recovery Act of 1976 §§ 101-704, 42 U.S.C. §§ 6901-6992 (1988); Toxic Substances Control Act of 1976 §§ 2-214, 15 U.S.C. §§ 2601-2692 (1988).

gress perceived a need for further protection and therefore provided for the immediate, large-scale response to the dangers of hazardous waste sites.[9]

CERCLA was enacted with two overriding purposes: (1) to ensure and assist in the prompt cleanup of hazardous substances; and (2) to require those parties responsible for the contamination to compensate for the cleanups or clean up the site themselves.[10] However, because of the great haste with which CERCLA was enacted, a number of ambiguities exist. Thus, a great deal of litigation has occurred in determining how these goals are to be accomplished.[11]

CERCLA provides the government with several mechanisms of enforcement to ensure immediate and effective cleanup of hazardous waste sites.[12] The government may require a private party to clean up waste sites,[13] or it may undertake the cleanup itself,[14]

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[9] Healy, *supra* note 7, at 68.

[10] *See* H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 3, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."); Christopher D. Knopf, *Breaking New Ground: Recovery of Transaction Costs in Private CERCLA Cost-Recovery Actions*, 28 WILLIAMETTE L. REV. 495, 496 (1992).

[11] *See* Kanad S. Virk, Comment, General Electric Co. v. Litton Automation Systems, Inc.: *Are Attorney Fees Recoverable in CERCLA Private Cost Recovery Actions?*, 75 MINN. L. REV. 1541, 1547 n. 38 (1991).

[12] *See* infra notes 14-16 and accompanying text.

[13] CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988) provides:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. *The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.* (Emphasis added)

[14] 42 U.S.C. § 9604(a) provides in pertinent part:

> (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 con-

using resources from the Hazardous Substances Trust Fund[15] to finance its efforts. Moreover, the government may recoup the costs of the cleanup by bringing an action against the responsible parties.[16] Persons subject to these government actions, also known as potential responsible parties, include owners or operators of a site, both past and present, and transporters or generators who contrib-

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taminant 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.

Id.

[15] Hazardous Substances Superfund is established in 26 U.S.C. § 9507 (1988), which provides:

There is established in the Treasury of the United States a trust fund to be known as the "Hazardous Substance Superfund" (hereinafter in this section referred to as the "Superfund"), consisting of such amounts as may be—

(1) appropriated to the Superfund as provided in this section, (2) appropriated to the Superfund pursuant to section 517(b) of the Superfund Revenue Act of 1986, or (3) credited to the Superfund as provided in section 9602(b).

Id.

[16] 42 U.S.C. § 9604(b)(1) provides in pertinent part:

[T]he 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, and to enforce the provisions of this chapter.

Id.

Also, 42 U.S.C § 9607(a)(4)(A) provides:

[Covered persons] 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.

Id.

uted to the contamination.[17] These persons are subject to joint, several,[18] and strict liability.[19]

CERCLA also allows private parties to clean up hazardous waste sites and then seek recovery of "response costs" from responsible parties.[20] To recover, a private plaintiff must prove that: (1) the defendant was a covered person as defined in section 9607(a); (2) there was a release or a threatened release of a hazardous substance; (3) the plaintiff incurred necessary response costs; and (4) the response costs were incurred consistently with the National Contingency Plan.[21] A private plaintiff is similarly situated to the government except the plaintiff does not have a statutory injunction remedy, cannot recover punitive damages, cannot seek damages for harm to natural resources, and must have acted consistently with the NCP.[22] In addition to indemnifi-

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[17] 42 U.S.C. 9607(a) holds the following parties liable for response costs, subject only to defenses set forth in subsection (b) of this section:

> (1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

Id.

[18] United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) (holding that joint and several liability applies to CERCLA). This decision was adopted by Congress in the 1986 Superfund Amendments and Reauthorization Act of 1986 (SARA), H.R. REP. No. 253, 99th Cong., 2d Sess., pt. 2, at 79-80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861-62 ("nothing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court").

[19] Strict liability is not expressly imposed in CERCLA. However, § 9601(32) provides that "liability" and "liable" are to be construed as the standard of liability applicable to the Federal Water Pollution Control Act, 33 U.S.C. § 1321(1988), which has been interpreted to impose strict liability. *See, e.g.*, Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979). For a discussion of the strict liability standard under CERCLA, see Healy, *supra* note 7, at 86-87.

[20] 42 U.S.C. § 9607(a)(1)-(4)(b).

[21] 42 U.S.C. § 9607(a). The National Contingency Plan (NCP) is established at 40 C.F.R. pt. 300. It provides specific requirements that must be followed for a private party or the government to recover.

[22] Daniel Riesel, *Private Hazardous Substance Litigation*, C778 A.L.I.-A.B.A. COURSE OF STUDY 59, 66-67 (1992).

cation, a private plaintiff may seek contribution through a private action.[23]

II. PROVISIONS RELEVANT IN ASSESSING THE AVAILABILITY OF AN AWARD FOR ATTORNEY FEES INCURRED IN PRIVATE COST RECOVERY ACTIONS

The controversy over the ability of a private plaintiff to recover attorney fees arises from the statutory provisions providing for recovery of cost actions. Section 9607(a)(4) provides for government and private cost recovery actions as follows:

> [Covered persons] 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;[24]

These provisions must be read in conjunction with the definition of response in section 9601(25) which provides:

> The terms "respond" or "response" mean remove, removal, remedy, and remedial action, all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

SARA modified this definition by adding the phrase "include enforcement activities."

The legislative history of SARA provides some insight into the meaning of "enforcement activities." The House Energy and Commerce Committee made the following comment: "[S]ection [9601] also modifies the definition of 'response action' to include

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[23] 42 U.S.C. § 9613 (f)(1) provides in pertinent part:
> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title . . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate . . . .

Id.

[24] For a discussion of the difference in the statutory language of these provisions, *see* Heather M. Harvey, Note, *The Availability of Attorneys' Fees as a Necessary Cost of Response in Private Cost-Recovery Actions Under CERCLA*, 26 U. RICH. L. REV. 213, 224-25 (1991).

related enforcement activities. The change will confirm the [Environmental Protection Agency's] authority to recover costs for enforcement actions taken against responsible parties."[25]

Virtually no dispute exists as to the government's ability to recover attorney fees as a cost of removal.[26] However, a private plaintiff's right to recover attorney fees remains in serious dispute.

III. THE AMERICAN RULE

While England historically has allowed the prevailing party in litigation to recover attorney fees, the rule in the United States is that "the prevailing litigant is ordinarily not entitled to collect reasonable attorneys' fees from the loser" (the American Rule).[27] In *Alyeska Pipeline Service Co. v. Wilderness Society*, the United States Supreme Court addressed the appropriateness of awarding attorney fees to environmental groups who had successfully sought to enjoin the Secretary of the Interior from issuing right-of-way and special land-use permits to a consortium of oil companies who intended to build a pipeline to transport oil across Alaska. The environmental groups alleged that the permits and right-of-ways violated section 28 of the Mineral Leasing Act of 1920[28] and the National Environmental Policy Act of 1969.[29] A preliminary injunction was granted by the federal district court.[30] Subsequently, the district court dissolved the preliminary injunction, denied a permanent injunction, and dismissed the complaint. However, the appellate court reversed and granted the permanent injunction.[31]

The appellate court then considered the environmental groups' request for an award of attorney fees. The court granted the attorney fees based on a "private attorney general" theory, stating that the environmental groups had acted to vindicate im-

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[25] 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.

[26] *See* United States v. Hardage, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 1009 (D.S.C. 1984)(holding attorney fees recoverable); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 851 (W.D. Mo. 1984)(holding attorney fees recoverable).

[27] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); *see* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

[28] 30 U.S.C. § 185 (1920).

[29] 42 U.S.C. §§ 4321-4370d (1969).

[30] Wilderness Soc'y v. Morton, No. 928-70, 1972 WL 20824 (D.D.C. Aug. 15, 1972).

[31] Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. 1973), *cert. denied*, 411 U.S. 917 (1973).

portant statutory rights of all citizens.[32] The court required Alyeska to pay one-half of the full award of attorney fees.[33]

The Supreme Court reversed.[34] Following a thorough historical analysis of the American Rule and its exceptions, the Court refused to judicially create a private attorney general exception.[35] The Court recognized that "absent [a] statute or [an] enforceable contract, litigants pay their own attorneys' fees." [36]

The American Rule was reaffirmed in *Runyon v. McCrary*, wherein the Court stated that "the law of the United States, but for a few well-recognized exceptions . . . has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation," and more than "generalized commands" in a statute are required for a court to award attorney fees.[37]

Three well-established common law exceptions to the American Rule exist. First, a trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, may recover his costs and expenses from the fund.[38] Second, a party may recover attorney fees from his opponent when the opponent has acted in willful disobedience of a court order.[39] The final exception requires a losing party who has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons" to pay the prevailing party's attorney fees.[40] In addition, Congress has created more than one hundred statutory exceptions.[41] If attorney fees are to be awarded under CERCLA, authority must be found to have been provided explicitly in the statute.[42]

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[32] Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. 1974).

[33] *Id.* at 1036.

[34] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[35] *Id.* at 269-71.

[36] *Id.* at 257 (citing F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 126-31 (1974)).

[37] 427 U.S. 160, 186-87 (1976).

[38] *Alyeska*, 421 U.S. at 257; Trustees v. Greenough, 105 U.S. 527 (1881).

[39] *Alyeska*, 421 U.S. at 258 (citations omitted); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923).

[40] *Alyeska*, 421 U.S. at 258-59; *see* FED. R. CIV. P. 11; F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974).

[41] *See* Marek v. Chesny, 473 U.S. 1, 44-51 (1985)(Brennan J., dissenting)(providing the statutory exceptions to the American Rule prohibiting attorney fees).

[42] The statutory exception must be discerned from the plain meaning of the statute. Two approaches exist in determining the plain meaning of a statute: the purist plain meaning approach and the quasi plain meaning approach. The purist plain meaning approach,

IV. APPROACHES FOLLOWED IN EVALUATING ALLOWANCE OF ATTORNEY FEES UNDER CERCLA

A. Recovery Specifically Permitted under CERCLA

The Eighth Circuit Court of Appeals was the first appellate court to address a private party's ability to recover attorney fees under CERCLA. In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*,[43] General Electric filed suit against Litton seeking to recover response costs it had incurred in cleaning up land it owned and had purchased from Litton in 1970. Litton was the successor corporation of Royal-McBee who, from 1959 to 1962, dumped cyanide-based electroplating wastes, sludge, and other pollutants onto a forty-acre tract of land. The district court held for General Electric, ordering Litton to pay more than $940,000 as reimbursement for response costs incurred and more than $419,000 in attorney fees and expenses.[44]

After affirming the district court's decision on the necessity of the response costs incurred by General Electric[45] due to its consistent following of the NCP requirements,[46] the appellate court addressed the appropriateness of the award of attorney fees. The court, relying on the Ninth Circuit's decision in *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*,[47] stated that "[a]ttorney 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 section 9607(a)(4)(B) allows private parties to recover."[48] Consequently, the court concluded that CERCLA, with a sufficient degree of explicitness, authorized the recovery of attorney fees and expenses by private parties. The court further declared that its

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advocated by Justice Antonin Scalia, examines only the language of the statute. The quasi plain meaning approach discerns congressional intent by examining the legislative history. *See* Jones, *supra* note 2; *see also* 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 (1950).

[43] 920 F.2d 1415, 1416 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1990), *reh'g denied* 111 S. Ct. 1697 (1991).

[44] General Electric Co. v. Litton Business Sys., Inc., 715 F. Supp. 949 (W.D. Mo. 1989).

[45] *General Electric*, 920 F.2d at 1419.

[46] *Id.* at 1420.

[47] 840 F.2d 691, 694 (9th Cir. 1988) (holding that private cost recovery actions are included within the scope of "enforcement activities").

[48] *General Electric Co.*, 920 F.2d at 1422.

conclusion was "consistent with two of the main purposes of CERCLA—prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party" and that "[t]hese purposes would be undermined if a non-polluter . . . were forced to absorb the litigation costs . . . ."[49]

This decision has been criticized as constituting an improper application of the American Rule.[50] The *General Electric* court improperly looked to policy in its analysis. Further, the court did not consider the legislative history of section 9601(25)[51] in making its determination.[52]

Nonetheless, in *Donahey v. Bogle*,[53] the Sixth Circuit Court of Appeals agreed with the decision in *General Electric*. In support of its conclusion, the court quoted the rationale set forth in *Bolin v. Cessna Aircraft Co.*:[54]

> By providing private parties with a federal cause of action for the recovery of necessary expenses in the cleanup of hazardous wastes, Congress intended § [9607] as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action . . . . The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs.[55]

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[49] *Id.*

[50] Virk, *supra* note 11, at 1562.

[51] *See supra* note 11 and accompanying text.

[52] One commentator has said that this is an example of the quasi plain meaning approach to statutory construction. Jones, *supra* note 2; *see also* note 46 and accompanying text. However, the legislative history of §9601(25) provides no support for the conclusion that Congress intended a recovery of attorney fees. Moreover, the *General Electric* court did not consider this in its decision, but based its opinion solely on policy. *General Electric Co.*, 920 F.2d 1415. Even under the quasi plain meaning approach, a fair reading of the language of both the statue and the legislative history provides no support for a finding that Congress created a statutory exception.

[53] 987 F.2d 1250 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 636 (1993).

[54] 759 F. Supp. 692, 710 (D. Kan. 1991) (citations omitted).

[55] *Donahey*, 987 F.2d at 1256.

B. Statutory Language Does Not Explicitly Provide for Attorney Fees as Enforcement Activities or as Necessary Costs of Response

The Ninth Circuit Court of Appeals in *Stanton Road Associates v. Lohrey Enterprises*[56] concluded that a strict application of the American Rule prohibits an award of attorney fees in private cost recovery actions. Consequently, the court reversed the district court's award of $126,198 in attorney fees.[57] To reach this conclusion, the court was required to explain its holding in *Cadillac Fairview*, wherein it held that private cost recovery actions were enforcement actions that did not require a prior government action to be pursued.[58] In *General Electric,* the Eighth Circuit relied on *Cadillac Fairview* for its authority that private cost recovery actions were "enforcement activities."[59] The *Stanton Road* court distinguished its decision in *Cadillac Fairview* by simply recognizing that its decision in that case did not include a determination on the viability of an award of attorney fees.[60]

Thereafter, the court determined that the words "enforcement activities" did not provide explicit authorization for an award of attorney fees. The court based this conclusion on the fact that Congress had demonstrated its ability to create an express statutory exception to the American Rule in other statutes, specifically sections 9604(b) and 9659(f) of CERCLA.[61] Moreover, the court relied on the dispute that exists among district courts ad-

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[56] 984 F.2d 1015 (9th Cir. 1993), *cert. granted*, 114 S. Ct. 633 (1993), *cert. dismissed*, 114 S. Ct. 652 (1993).

[57] *Id.* at 1016.

[58] Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 693 (9th Cir. 1988)(citing Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986)).

[59] General Electric Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1990), *reh'g denied*, 111 S. Ct. 1697 (1991).

[60] *Stanton Road Assoc.*, 984 F.2d at 1018.

[61] *Id.* at 1019. Section 104 of CERCLA provides in pertinent part:

> [T]he 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, and to enforce the provisions of this chapter.

CERCLA § 104(b)(1), 42 U.S.C. § 9604(b)(1)(1988). Similarly, 42 U.S.C § 9659(f) provides in pertinent part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

42 U.S.C. §9659(f).

dressing this issue as evidence of an absence of express authorization.[62]

Following this analysis, the court criticized the Eighth Circuit's decision in *General Electric* as improperly relying on the policy underlying CERCLA to imply authorization for an award of attorney fees.[63] The court emphasized that the American Rule prohibits any implication of authorization for attorney fees, and concluded that the words "necessary costs of response" did not provide any express authority. The court stated that it would be required to read words into CERCLA to uphold the district court's award of attorney fees.[64]

The First Circuit followed this approach in *In re Hemingway Transport, Inc.*[65] The court added further support for a disallowance of attorney fees by recognizing that Congress did not consider or include an attorney fees amendment applicable to section 9607(a)(4)(B) private cost recovery actions when it enacted SARA in 1986.[66] Moreover, the court refused to imply such authority, concluding that the task was "one for the legislative venue."[67]

This approach is harsh, but accurate. "Necessary costs of response" read in conjunction with "enforcement activities" simply does not provide *explicit authority* for a court to award attorney fees. Moreover, the only legislative history of the statute, the report of the House Energy and Commerce Committee,[68] does not evidence Congress's intent to provide private parties with an action to recover attorney fees. The legislative history of SARA states, with specificity, that the inclusion of "enforcement activities" allows the EPA to recover all its costs in enforcement actions.[69] Consequently, a negative inference can be made that Congress did not deem attorney fees a recoverable expense incurred in enforcement activities.

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[62] *Stanton Road Assoc.*, 984 F.2d at 1018.

[63] *Id.* at 1019-20.

[64] *Id.* at 1020.

[65] 993 F.2d 915, 935 (1st Cir. 1993), *cert. dismissed*, 114 S. Ct. 303 (1993).

[66] *Id.* at 934 (citing Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 461 (1st Cir. 1992)); *see* Regan v. Cherry Corp., 706 F. Supp. 145, 149 (D.R.I. 1989).

[67] *In re* Hemingway Transp., Inc., 993 F.2d at 934.

[68] 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.

[69] *See supra* note 25 and accompanying text.

C. Nonlitigation Removal-Related Attorney Fees Distinguished from Attorney Fees Incurred in Litigation

The Tenth Circuit identified a third approach in *FMC Corp. v. Aero Industries, Inc.*[70] In that case, the court considered the plaintiff's claims for both attorney fees incurred in response cost litigation and those incurred in nonlitigation removal-related activities. Distinguishing the two as different claims, the court concluded that the former were not recoverable. The court stated "[w]e simply cannot agree with those courts that find an explicit authorization for the award of litigation fees from the fact that response costs include related enforcement activities."[71] The court acknowledged the policies in support of an award of these attorney fees, but concluded that "[t]he desirability of a fee-shifting provision cannot substitute for the express authorization mandated by the Supreme Court [in *Alyeska Pipeline Service Co.*]."[72]

In response to the plaintiff's latter claim, however, the court reached an opposite conclusion. The attorney fees in question were incurred in carrying out the EPA's order and included activities such as negotiating and drafting contracts for the removal action and preparing the work plan approved by the EPA.[73] The court declared that these fees were exempted from the American Rule.[74] Consequently, the court held that these costs could be included as necessary costs of response, and remanded the case for a determination of which fees were necessary to the containment and cleanup of the hazardous wastes on the site.[75]

This approach reaches a logical conclusion. Attorney fees incurred by a party in cleaning up a hazardous waste site are not per se unrecoverable. Certainly legal assistance is always going to be required in carrying out the cleanup. Therefore, courts should classify the two forms of attorney fees incurred by private parties as was done by the *FMC Corp.* court.

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[70] 998 F.2d 842 (10th Cir. 1993).

[71] *Id.* at 847.

[72] *Id.*

[73] *Id.* at 848.

[74] *Id.*

[75] *Id.*

CONCLUSION

The approach identified by the *FMC Corp.* court is the most reasonable of the three current approaches. The phrase "necessary costs of response" does not constitute an express exception to the American Rule. Moreover, as can be discerned from other statutes, Congress is aware of the demand for attorney fees and has demonstrated its ability to provide for such fees. Further, Congress had ample opportunity to provide an express exception to the American Rule when it enacted SARA. In addition, SARA provides no support for the *General Electric* court's conclusion but only includes EPA activities as being encompassed within the phrase "enforcement activities."

Although the policies applied in *General Electric* are supportive of CERCLA, the American Rule requires that these considerations be left to congressional discretion.[76] However, Congress, in any future revision to CERCLA, should consider these policy arguments and amend CERCLA to provide for an award of attorney fees in private cost recovery actions. Such an amendment would provide private plaintiffs with the incentive to clean up hazardous waste sites without any hesitation.

Finally, the distinction recognized by the *FMC Corp.* court's conclusion should be followed by district courts. The attorney fees incurred by private parties in carrying out the cleanup fall within the necessary costs of response imagined by Congress. Congress is cognizant of the private parties' need for legal assistance as well as the transaction costs a party will incur in negotiating and carrying out large cleanup contracts. Moreover, these types of contracts are not of the type involved in most private parties' ordinary course of business; thus, their need for legal assistance is even greater. Consequently, it is reasonable for one to conclude that Congress intended that these transaction costs be included as a necessary cost of response.

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[76] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975).