Attorney Fees in Private Party Cost Recovery Actions Under CERCLA

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INTRODUCTION

In 1994, the United States Supreme Court resolved a conflict among lower courts by holding that litigation-related attorney's fees cannot be recovered in CERCLA private party cost recovery actions. This note examines the American Rule against fee shifting and concludes that the Court's analysis failed properly to consider appropriate evidence of congressional intent to allow fee shifting.

The United States Supreme Court's June 1994 decision in Key Tronic Corp. v. United States,1 resolved a disagreement among the United States Courts of Appeals2 as to whether attorney's fees can be awarded to a private party who has successfully sued to recover response costs under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).3 Key Tronic came to the Supreme Court from the Ninth Circuit, which had held, in Key Tronic and its companion case Stanton Road Associates v. Lohrey Enterprises, that private parties could not recover any attorney's fees in such situations.4 The Supreme Court upheld the portion of the Ninth Circuit's holding that private parties cannot recover "attorneys' fees associated with bringing a cost recovery action" or negotiating a consent decree under CERCLA.5 However, it reversed the Ninth Circuit by holding that private parties can recover fees paid to attorneys

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2. The Eighth and Sixth Circuits had held that attorney's fees in Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) private party cost recovery actions were recoverable. General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990), cert. denied, 499 U.S. 937 (1991); Donahy v. Bogle, 987 F.2d 1250, 1256 (6th Cir. 1993), cert. denied, 114 S. Ct. 636 (1993), cert. granted and judgment vacated sub nom. Donahy v. Livingstone, 114 S. Ct. 2668 (1994). The Ninth and First Circuits, on the other hand, had held that attorney's fees in these actions were not recoverable. Key Tronic Corp. v. United States, 984 F.2d 1025, 1027-28 (9th Cir. 1993), aff'd in part and rev'd in part, 114 S. Ct. 1960 (1994); Stanton Road Assocs. v. Lohrey Enters., Inc., 984 F.2d 1015, 1019 (9th Cir. 1993), cert. granted, 114 S. Ct. 633 (1993), cert. dismissed, 114 S. Ct. 652 (1993); Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 934 (1st Cir. 1993), cert. denied, 114 S. Ct. 303 (1993). Finally, the Tenth Circuit had come closest to anticipating the Supreme Court's ruling when it held that nonlitigation response-related attorney's fees were recoverable, while litigation attorney's fees were not. FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847 (6th Cir. 1993).
4. Key Tronic, 984 F.2d 1025 (9th Cir. 1993), aff'd in part and rev'd in part, 114 S. Ct. 1960 (1994); Stanton Road Assocs., 984 F.2d 1015 (9th Cir. 1993), cert. granted, 114 S. Ct. 633 (1993). Stanton Road was settled and the writ of certiorari was dismissed. Stanton Road, 114 S. Ct. 652 (1993). The Ninth Circuit's reasoning was fully expounded only in Stanton Road Assocs., and so that decision will be regularly referred to when the Ninth Circuit's opinion is under discussion.
5. Key Tronic, 114 S. Ct. at 1967-68. Justice Scalia, joined by Justices Blackmun and Thomas, dissented on the grounds that he would have allowed private parties to recover
ATTORNEY FEES UNDER CERCLA

for identifying other potentially responsible parties, a function the
Court identified as nonlitigation-related.6

The Supreme Court concluded that only nonlitigation-related attor-
ney's fees are recoverable.7 The Court relied on the American Rule,8 which usually requires that a party bear its own attorney's fees rather than allowing the victor to shift its fees to the loser.9 Although the American Rule is not absolute, recent Supreme Court decisions have confirmed the principle that Congress, not the courts, should de-
termine when exceptions to the rule are appropriate.10 In determining
congressional intent with respect to attorney's fees, the Supreme
Court has historically used all the tools of statutory construction: the
language of the statute, legislative history, and policy concerns consid-
ered by Congress when enacting the legislation. This note argues that,
in Key Tronic, the Court departed from its traditional method of statu-
tory interpretation by ending its analysis after considering only statu-
tory language.11 This note seeks to establish that the Court
misinterpreted that language. If it had completed a more traditional
analysis, the Court would have found that Congress intended to make
attorney's fees recoverable in CERCLA private party cost recovery
actions.

Part I of this note reviews the history of the American Rule and
the evolution of exceptions to the rule. Part II first briefly summarizes
the circumstances leading to the enactment of CERCLA and the
Superfund Amendments and Reauthorization Act (SARA). Then

attorney's fees associated with bringing a cost recovery action. Id. at 1968-69 (Scalia, J.,
dissenting).

6. Id. at 1968. The Court decided that these nonlitigation-related attorney's fees
were not governed by the American Rule. To determine whether work performed by an
attorney was "litigation-related," the Court looked at whether the work was "closely tied
to the actual cleanup," whether the services might just as well have been performed by a
nonlawyer, and whether the work primarily advanced the cleanup or just one party's inter-
ests. Id. at 1967. The Court found that the work performed by Key Tronic's lawyers in
identifying other potentially responsible parties fell into the nonlitigation-related attor-
ney's fees category. Id. Further examination of this part of the Court's holding is beyond
the scope of this note, which focuses on the Court's treatment of litigation-related attor-
ney's fees.

7. Id. at 1967-68.

8. For a detailed examination of the development of the American Rule and its ex-
ceptions (especially the "private attorney general" theory), see Terry M. Miller, Comment,
The Discretionary Award of Attorney's Fees by the Federal Courts: Selective Deviation from
the No-Fee Rule and the Regrettably Brief Life of the Private Attorney General Doctrine, 36

Inc.: Are Attorney Fees Recoverable in CERCLA Private Cost Recovery Actions?, 75 MINN.

10. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975);

11. See infra notes 132-34 and accompanying text.
part II outlines lower court decisions on the question of the recover-
ability of attorney's fees in CERCLA private party cost recovery ac-
tions. Part III analyzes the Supreme Court's opinion in *Key Tronic*
and argues that the Court's analysis was flawed. The conclusion ex-
plains why the issue of attorney's fees under CERCLA is important
and suggests congressional action.

I

THE AMERICAN RULE

A. History

English courts' ability to award reasonable attorney's fees to pre-
vailing parties is well established, deriving from a series of statutes the
first of which was passed in 1278. Although the United States ini-
tially received the English system of costs as an element of its com-
mon law, the actual practice in the two countries quickly began to
diverge, with U.S. courts being reluctant to award fees. Commenta-
tors are puzzled by, and disagree as to the reasons for, this diver-
gence. By 1796, the change was such that the Supreme Court could
say: "The general practice of the United States is in opposition to
[awarding attorney's fees to prevailing parties]; and even if that prac-
tice were not strictly correct in principle, it is entitled to the deference
of the court, till it is changed, or modified, by statute." Although
*Arcambel* was a short opinion lacking detailed analysis and at first was
not uniformly followed, courts and commentators point to it as
the birth of the American Rule.

The difference between the American and English Rules is best
explained by the difference in the policies underlying the rules. In
England, it is believed that since the victor incurs litigation expenses
because of the losing party's conduct, the losing party should have to

12. Statute of Gloucester, 1275, 6 Edw. 1, ch. 1 (Eng.); Statute of Westminster, 1607, 4
   Jam. 1, ch. 3 (Eng.). See generally Arthur L. Goodhart, Costs, 38 YALE L.J. 849, 852
   (1929); CHARLES T. MCCORMICK, DAMAGES § 60 (1935) (describing the history of the
   English system of attorney's fees awards).
13. Miller, supra note 8, at 593.
14. Id.
15. Id. at 593-96; Goodhart, supra note 12, at 873.
17. John Leubsdorf, Toward a History of the American Rule on Attorney Fee Recov-
19. Eric D. Kaplan, Attorney Fee Recovery Pursuant to CERCLA Section 107(a)(4)(B), 42 WASH. U. J. URB. & CONTEMP. L. 251, 266 (1992); Sevack, supra note 9, at 1542 n.16.
pay those expenses.20 In America, the uncertainty of litigation outcomes dictates that a party should not be penalized for pursuing or defending its position.21 Additionally, the amount of legal expenses incurred frequently results from a party's strategic decisions, and the opposing party should not be held responsible for expenses it cannot control.22 Also, poor plaintiffs should not be discouraged from bringing suit, as they might be if they were forced to pay their opponent's attorney's fees.23

B. Exceptions to the American Rule

Over the years, courts have recognized a number of exceptions to the American Rule. At law, federal courts will award fees to a prevailing party where there is statutory authority or, in a contract dispute, where the contract provides for it.24 In equity, courts traditionally believed they had the power to shift fees "when overriding considerations of justice seemed to compel such a result."25 In the late 1960's and early 1970's, courts began to develop the equitable "private attorney general" exception to the rule.26 This exception reflected a policy of encouraging socially beneficial litigation27 and recognized that: "[A] successful litigant can sometimes act as a 'private attorney general' by detecting statutory violations and encouraging compliance through private actions.... In such cases, where the court is seeking to promote private enforcement, awarding attorney's fees reduces the barrier to suit created by high litigation costs."28

21. Fleischmann Distilling Corp., 386 U.S. at 718; see also Leubsdorf, supra note 17, at 22 ("Men often differ honestly in regard to their rights, and it is a very difficult matter to determine which is wrong.") (quoting CONG. GLOBE, 32d Cong., 2d Sess. 584 (1853) (statement of Sen. Adams)).
22. Leubsdorf, supra note 17, at 23.
23. Fleischmann Distilling Corp., 386 U.S. at 718.
24. Id. at 717.
25. Id. at 718. "Allowance of [attorney's fees] in appropriate situations is part of the historic equity jurisdiction of the federal courts." Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939). For example, courts have shifted fees where a party willfully disobeyed a court order or otherwise acted in bad faith in the course of litigation. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923); Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962). Under the common fund exception, courts prevent unjust enrichment by allowing a party whose suit created or preserved a fund that benefitted others, as well as herself, to recover attorney's fees. Trustees v. Greenough, 105 U.S. 527, 532-33 (1881).
27. Miller, supra note 8, at 612-13.
Courts have used this exception most frequently in civil rights and environmental litigation, where the plaintiff's litigation served the public interest and where fee shifting encouraged such litigation. In *La Raza Unida v. Volpe*, the court set out three criteria to determine whether attorney's fees should be shifted under statutes that do not preclude it: (1) the prevailing party effectuated a strong congressional policy, (2) effectuation of the policy benefitted a large class of people, and (3) private enforcement of the statute is both so necessary and so burdensome that an award of attorney's fees is essential.

C. Alyeska and Runyon

In 1975, the Supreme Court dramatically curtailed the further evolution of equitable exceptions to the American Rule. In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Court emphasized that the establishment of a private attorney general exception to the American Rule was a congressional and not a judicial power. In the absence of statutory authorization, or one of two historic exceptions, courts were not to assess the importance of the public policies involved.

Overturning an award of attorney's fees granted to the Wilderness Society, the Supreme Court disputed the D.C. Circuit Court's conclusion that fee shifting was justified because the plaintiff's actions advanced "broad public interests." The litigation had been initiated...
by public interest organizations\textsuperscript{38} attempting to prevent the Secretary of the Interior from issuing permits that were required for the construction of the trans-Alaska oil pipeline.\textsuperscript{39} Specifically, the suit charged that the issuance of such permits exceeded the maximum allowable right-of-way through a public land in violation of the Mineral Leasing Act of 1920\textsuperscript{40} and failed to adequately consider the alternative of a trans-Canada pipeline as required by the National Environmental Policy Act (NEPA).\textsuperscript{41}

After the district court's grant of a preliminary injunction against issuing the permits, Alyeska was allowed to intervene in the litigation.\textsuperscript{42} After hearing arguments on both issues, the district court dissolved the preliminary injunction, denied the permanent injunction, and dismissed the complaint.\textsuperscript{43} On appeal, the D.C. Circuit reversed, enjoining construction of the pipeline, holding that construction would violate the Mineral Leasing Act.\textsuperscript{44}

Congress reacted by amending the Mineral Leasing Act to allow the permits sought by Alyeska to be granted and by declaring that no further action under NEPA was necessary before construction of the pipeline could proceed.\textsuperscript{45} The Supreme Court could have applied the test developed in \textit{La Raza Unida v. Volpe}\textsuperscript{46} and considered the congressional response to be evidence that the \textit{Alyeska} litigation did not effectuate a strong congressional policy. Instead, "the Court went much further and ruled that fee awards to those functioning as private attorneys general are wholly impermissible in the absence of an authorizing statute."\textsuperscript{47}

Congress' response to the litigation shows that the equitable case for fee shifting in \textit{Alyeska} was comparatively weak. By amending the Mineral Leasing Act and declaring that Alyeska needed to take no further action to comply with NEPA,\textsuperscript{48} Congress expressed an intent to encourage the pipeline. Thus, the plaintiffs could not have been acting to effectuate congressional policy concerns by opposing the pipeline. Additionally, the D.C. Circuit's justifications for fee shifting

\begin{itemize}
  \item \textsuperscript{38} The Wilderness Society, Environmental Defense Fund, and Friends of the Earth are groups that initiated suits to prevent the construction of the pipeline.
  \item \textsuperscript{39} \textit{Alyeska}, 421 U.S. at 241.
  \item \textsuperscript{40} Id. at 242-43; see 30 U.S.C. § 185 (1988 & Supp. V 1993).
  \item \textsuperscript{41} \textit{Alyeska}, 421 U.S. at 243 n.6 (noting the appeals court's characterization of the claim); see 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993).
  \item \textsuperscript{42} Id. at 243.
  \item \textsuperscript{43} Id. at 244.
  \item \textsuperscript{44} Id.
  \item \textsuperscript{46} \textit{La Raza Unida v. Volpe}, 57 F.R.D. 94 (N.D. Cal. 1972).
  \item \textsuperscript{47} Miller, supra note 8, at 646; \textit{Alyeska}, 421 U.S. at 262.
  \item \textsuperscript{48} Mineral Leasing Act of 1970 § 101, 87 Stat. at 576.
\end{itemize}
were exceptionally broad and vague. The appellate court characterized those interests as: (1) maintaining the constitutional balance of power between the executive and legislative branches,\(^ {49}\) (2) precipitating the amendment of the Mineral Leasing Act of 1920 in a way “designed to protect the public interest,”\(^ {50}\) (3) heightening congressional attention to important issues,\(^ {51}\) and (4) prompting the Department of the Interior to draft a thorough impact statement.\(^ {52}\) In the absence of statutory language or other expression of congressional intent, the *Alyeska* majority emphasized that fee shifting, if based on a general policy concern such as ensuring the proper function of government, is beyond the proper judicial role.\(^ {53}\)

*Alyeska’s* primary impact was to cut off courts’ ability to fashion equity exceptions to the American Rule; “[t]he circumstances under which attorney’s fees are to be awarded . . . are matters for Congress to determine.”\(^ {54}\) Congress has extended no “roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted.”\(^ {55}\) The *Alyeska* Court noted that Congress, not the courts, must determine policy; thus the Court insisted that courts have “legislative guidance” before reallocating the burdens of litigation.\(^ {56}\)

Justices Brennan and Marshall wrote separate dissents.\(^ {57}\) Both argued that the private attorney general exception to the American Rule was a legitimate exercise of federal courts’ equity powers.\(^ {58}\) As Justice Marshall noted, the majority was inconsistent in recognizing equity-based, court-made exceptions to the American Rule, while denying the theory that allowed those exceptions to be created.\(^ {59}\) Justice Marshall also noted that limiting the courts’ power in the fee shifting area “flies squarely in the face of our prior cases.”\(^ {60}\)

In effect, the majority froze the development of new equity exceptions after 1974. The longstanding “bad faith” and “common ben-

\(^ {49}\) See Wilderness Soc’y v. Morton, 495 F.2d 1026, 1033 (D.C. Cir. 1974).

\(^ {50}\) Id.

\(^ {51}\) See id. at 1033-34.

\(^ {52}\) Id. at 1034.


\(^ {54}\) Id. at 262.

\(^ {55}\) Id. at 260.

\(^ {56}\) Id. at 247.

\(^ {57}\) Justices Douglas and Powell did not participate in the decision, making *Alyeska* a five to two decision. *Id.* at 240.

\(^ {58}\) Id. at 271-88 (Brennan, J., and Marshall, J., dissenting).

\(^ {59}\) Id. at 275 (Marshall, J., dissenting).

\(^ {60}\) Id. at 272 (Marshall, J., dissenting).
exceptions to the American Rule were allowed to stand because their development predated *Alyeska*.

As the *Alyeska* majority admits, Congress has not spoken to "re-pudiate the judicially fashioned attorney’s fees." In other words, because Congress remained silent in response to historic court-made exceptions to the American Rule, its silence can be interpreted as congressional approval. One commentator has noted that this view similarly could have been applied to the judicially developed private attorney general doctrine. Thus, it could be argued that *Alyeska* was not consistent with history or logic when it severely limited courts' equity powers to allow fee shifting.

In contrast to *Alyeska*'s emphasis on what courts could not do, in *Runyon v. McCrory*, the Supreme Court provided some guidance to help courts determine whether there is sufficient expression of congressional intent to allow fee shifting. In *Runyon*, the plaintiffs claimed that the applicable civil rights statute implicitly authorized awarding attorney’s fees. Arguing that the statute contained a "uniquely broad commission" to the federal courts to search for remedial devices and procedures to enforce the civil rights statutes, the plaintiffs claimed this obligated courts to award attorney’s fees to encourage private parties to seek relief against illegal discrimination. The prevailing plaintiff cited the following language in support of this contention:

The jurisdiction in civil . . . matters conferred on the district courts . . . shall be exercised and enforced in conformity with the laws of the United States . . . but in all cases where [the laws] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies[,] . . . the common law . . . so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts . . . .

The Court rejected this argument because the statutory language contained no explicit provision for such fees and was too "generalized" to be a clear expression of congressional intent to set aside the American Rule. The Court also relied on evidence of congressional intent, noting that "nothing in the legislative history of that statute suggests that such a radical departure from the long-established

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61. The common benefit spreads the cost of litigation proportionately among the beneficiaries of the litigation. *Id.* at 245.
62. *Id.* at 260.
63. See Miller, *supra* note 8, at 653.
65. *Id.* at 184.
66. *Id.* at 184-85.
67. *Id.* at 184 (quoting 42 U.S.C. § 1988 (1970)).
68. *Id.* at 185-86.
American Rule forbidding the award of attorneys' fees was intended." In so doing, the Court validated the practice of looking beyond the words of the statute when determining whether Congress intended to create an exception to the American Rule. Thus, after Alyeska, exceptions to the American Rule must be justified by an expression of congressional intent; after Runyon, courts may look beyond ambiguous statutory language to determine if congressionally expressed policy authorizes fee shifting.

II

ATTORNEY'S FEES IN PRIVATE COST RECOVERY ACTIONS
UNDER THE COMPREHENSIVE ENVIRONMENTAL
RESPONSE, COMPENSATION AND
LIABILITY ACT

A. Overview of the History of CERCLA and the Superfund
Amendments and Reauthorization Act

Passed in 1980 during the last days of the Carter Administration, CERCLA was enacted in response to the release of hazardous waste at Love Canal. CERCLA was "hastily drafted" and passed at a time when little information was available about the extent of the hazardous waste problem. The speed with which it was written meant that the language of the statute was not as carefully drafted as it could have been. As a result, CERCLA is notorious for being "virtually incomprehensible," reflecting a legislative history "riddled with uncertainty."

CERCLA's lack of clarity required judicial action to resolve the many questions that arose upon its implementation. For example, in the area of attorney's fees, courts interpreted CERCLA to allow the Environmental Protection Agency (EPA) to recover attorney's fees in

69. Id. at 185.
70. For a more expansive treatment of the history and structure of CERCLA, see Frederic M. Mauhs, Judicial Limitations on the CERCLA Private Right of Action, 15 Env'l. L. 470, 473-78 (1985).
73. Hayes & Mackerron, supra note 71, at 9.
cost recovery actions. The courts also found an implied right to private cost recovery actions. The question of whether private parties could recover attorney's fees was unresolved.

As a part of CERCLA, Congress created the Hazardous Waste Response Fund, popularly known as Superfund, to fund EPA-administered cleanups. Originally, tax support for Superfund was due to expire on September 30, 1985. Just prior to this expiration, Congress passed the Superfund Amendments and Reauthorization Act of 1986, an act designed not only to re-fund Superfund, but to try to correct some of the problems with the original act. After lengthy and difficult committee sessions, SARA received overwhelming support in both Houses of Congress.

Among the many amendments was the addition of the following emphasized words to the definition of "respond" or "response": "The terms 'respond' or 'response' means [sic] remove, removal, remedy, and remedial action; [sic] all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." This change expands the rights of private parties to recover the costs of response by including in those costs "enforcement activities." If enforcement costs include attorney's fees, Congress created a statutory basis for allowing fee shifting in private cost recovery actions under CERCLA. The critical question therefore is whether a court reads this change in language to provide sufficient evidence of congressional intent to permit the court to allow fee shifting in spite of the American Rule.


77. Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985). Unexpectedly, the Supreme Court in Key Tronic cast some doubt on the statutory underpinnings of private party cost recovery actions in general. Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1966-67 (1994); see infra part III.A (discussing the Court's holding in Key Tronic that CERCLA § 107 does not authorize private parties to recover attorney's fees).


79. Id.


82. The Senate vote was 88-8, 132 CONG. REC. S14,943 (daily ed. Oct. 3, 1986); the House vote was 386-27, id. at H9634.


84. A person is liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." Id. § 9607(a)(4)(B) (1988).
B. Lower Court Decisions

The lower courts diverged as to whether this language in CERCLA allows for the shifting of attorney's fees. The First Circuit took a very narrow approach in *Hemingway Transport, Inc. v. Kahn*, a case concerning the intersection of bankruptcy law and CERCLA interpretation, citing *Runyon* for the requirement that an authorization to shift attorney's fees be explicit. After purchasing land from a trucking business in bankruptcy, the buyer received an EPA cleanup order for drums of petroleum constituents leaching into wetlands. Both the bankruptcy court and the district court allowed the buyer's claim against the estate for past cleanup costs, but denied recovery for anticipated response costs and attorney's fees.

On appeal, the First Circuit upheld the denial of fees because it read CERCLA to lack explicit authorization for them. The court cited language from other statutes specifying attorney's fees recovery and noted that Congress failed to use the phrase "attorney's fees" during enactment or when making other amendments in SARA. Acknowledging that attorney's fees awards would likely promote CERCLA's aims, the court nevertheless wrote that it would be inappropriate to read their recovery as being a component of necessary response costs; Congress must make that determination.

Conversely, the Eighth Circuit reasoned that those very phrases were sufficiently explicit authorization for attorney's fees recovery. When General Electric attempted to sell property it had purchased from Litton, Missouri officials required General Electric to clean up contaminants left by a typewriter plant operated by a company Litton had acquired. After a bench trial of General Electric's claim for indemnification, the district court held that Litton was responsible for the hazardous substance release, that General Electric's response was necessary and satisfied CERCLA and National Contingency Plan requirements, and that, therefore, General Electric could recover its response costs, including attorney's fees. The Eighth Circuit agreed,

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87. *Hemingway Transport* was in Chapter 11 at the time of sale, but the bankruptcy proceeding was converted to Chapter 7 by the time the suit was filed. *Id.* at 919-20.
88. *Id.* at 921.
89. *Id.* at 934.
90. *Id.*
91. *Id.* at 935.
93. *Id.* at 1415-17.
94. *Id.* at 1417.
ruling that attorney’s fees are essential to enforcement activity, itself a part of the statutory definition of necessary response costs.95 Additionally, the court gave weight to the argument that attorney’s fees recovery is consistent with the congressional purposes of encouraging prompt cleanup and having responsible parties bear all of the costs.96

Similarly the Sixth Circuit also believed expressions of congressional intent outside the statute should inform a court’s search for statutory meaning.97 In a multiparty dispute over land contaminated with rubber manufacturing wastes, the trial court decided that attorney’s fees recovery was precluded.98 The ruling was based on the American Rule and on the fact that the statute specifies government recovery, indicating that Congress meant to limit recovery to only that body.99

The Sixth Circuit considered other circuits’ decisions, including General Electric and Hemingway Transport, and determined that allowing attorney’s fees recovery was the only reasonable way to further Congress’ objective of facilitating private party cleanup.100 “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.”101 The court also rejected the trial court’s reasoning concerning the mention of only the government in the statutory language.102

In FMC v. Aero Industries, the Tenth Circuit distinguished categories of attorney’s fees.103 This approach proved to be most similar to the Supreme Court’s Key Tronic reasoning. Pursuant to an EPA administrative order, the former and then-current owners of property partially contaminated by waste from a gallium and arsenic refining facility agreed to the terms of a cleanup.104 When the defendants failed to carry out the agreement, the plaintiffs proceeded with the cleanup and sought reimbursement.105 The bench trial resulted in findings of fact and conclusions of law that allocated the response costs;106 the district court also found that attorney’s fees were not re-

95. Id. at 1422.
96. Id.
98. Id.
99. Id.
100. Id.
102. Id.
103. FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847 (10th Cir. 1993).
104. Id. at 844.
105. Id.
106. Id. at 845.
coverable as a matter of law because they are not response costs under CERCLA.\textsuperscript{107} The Tenth Circuit held that, although the statute defines response costs to include enforcement activities, this is not sufficient to explicitly authorize an exception to the American Rule.\textsuperscript{108} This court agreed with courts reasoning that, if Congress believed CERCLA's goals were hindered by the lack of recovery, it was up to that body to revise the statute.\textsuperscript{109}

However, the court also ruled that, because the American Rule governs only litigation costs, any attorney's fees outside of litigation might be recoverable.\textsuperscript{110} The case was remanded to determine whether FMC's lawyers' nonlitigation billings—for activities such as designing and negotiating the removal action and work plan—were compensable as part of the necessary response costs.\textsuperscript{111}

The Ninth Circuit first addressed attorney's fees in CERCLA cost recovery actions in \textit{Stanton Road Associates v. Lohrey Enterprises, Inc.}\textsuperscript{112} The plaintiff sued to recover the costs of cleaning up perchlorethelene that spilled from the defendant's dry cleaning plant, contaminating the plaintiff's adjacent property.\textsuperscript{113} Although the trial court awarded recovery of response costs, including attorney's fees, the Ninth Circuit reversed as to the latter.\textsuperscript{114} It reasoned that no statutory language explicitly designates attorney's fees as a response cost, so to read attorney's fees into the definition of enforcement activities is "outside even the most exhaustive lexicon of customary fee shifting language."\textsuperscript{115} The court noted that Congress "knows how to express its intention to create an exception to the American Rule," illustrating with other sections of CERCLA that use the phrase "attorneys' fees."\textsuperscript{116} The Ninth Circuit relied primarily on its \textit{Stanton Road} reasoning when deciding \textit{Key Tronic}.\textsuperscript{117}

The \textit{Key Tronic} lawsuit arose after the U.S. Air Force and Key Tronic both disposed of hazardous wastes at the Colbert Disposal Site in Washington.\textsuperscript{118} After the Washington Department of Ecology found that the local area drinking water was contaminated, Key Tronic conducted a cleanup and both parties negotiated consent de-

\begin{itemize}
\item \textsuperscript{107} \textit{Id.} at 847.
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Stanton Road Assocs. v. Lohrey Enters., Inc.}, 984 F.2d 1015 (9th Cir. 1993).
\item \textsuperscript{113} \textit{Id.} at 1016.
\item \textsuperscript{114} \textit{Id.} at 1022.
\item \textsuperscript{115} \textit{Id.} at 1019 (quoting \textit{Santa Fe Pac. Realty Corp. v. United States}, 780 F. Supp. 687, 695 (E.D. Cal. 1991)).
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.} at 1027-28.
\item \textsuperscript{118} \textit{Key Tronic Corp. v. United States}, 984 F.2d 1025, 1026 (9th Cir. 1993).
\end{itemize}
Key Tronic sought contribution for its costs, even though the terms of the Air Force's consent decree protected it from such exposure. The parties then negotiated their own consent decree covering all issues except Key Tronic's attorney's fees and pre-judgment interest, both of which the district court awarded. The Ninth Circuit flatly rejected the attorney's fees claim by citing Stanton Road and offering no other explanation. The Supreme Court validated this reasoning as to most attorney's fees, making a distinction only for those incurred while identifying other potentially responsible parties.

III
THE SUPREME COURT'S ANALYSIS IN KEY TRONIC: DISCUSSION AND CRITIQUE

The Supreme Court set out its analysis of the attorney's fees issue in a single paragraph in Key Tronic. The Court referred to Alyeska's and Runyon's requirement of "explicit congressional authorization" for an exception to the American Rule; that is, a court must determine that Congress intended to make an exception. The Court then took a new direction in the analysis of attorney's fees questions by stating: "The absence of specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees." This insistence on looking for congressional intent only in the statute itself is a departure from previous fee-shifting analysis and resulted in the holding that private parties cannot recover litigation-related attorney's fees in CERCLA private party cost recovery actions.

Although the Supreme Court's shift in analysis was subtle, it followed the course more explicitly taken by the Ninth Circuit. In Stanton Road, the Ninth Circuit interpreted the decisions of the Supreme Court as having instructed lower courts to consider only the statutory language and not the other tools usually used in statutory interpretation, such as legislative history and evidence of congressional policy.

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119. Id.
120. Id.
121. Id. at 1027.
122. Id.
124. Id. at 1965.
126. Id. (citing Runyon, 427 U.S. at 185-86).
127. Id. (emphasis added).
128. Id. at 1967.
The Ninth Circuit first reviewed the usual course of analysis:

Ordinarily, where there is a dispute regarding whether a statute applies to the facts before the court, we first look to the plain meaning of the language used by Congress. If the words used in the statute are ambiguous, however, we must consult the legislative history to determine the intent of Congress.130

The court then set out what the Supreme Court had indicated was proper when courts are confronted with ambiguous language regarding fee shifting: "The rule set forth in Alyeska and Runyon, however, precludes us from implying from ambiguous language an intent that attorneys' fees can be awarded in a private response action."131

The Ninth Circuit failed to distinguish between a court using its equity power to make independent policy determinations with regard to fee shifting, which is prohibited by Alyeska and Runyon, and a court construing statutory language using all of the available tools, which is not prohibited by Alyeska and Runyon.132 The Ninth Circuit noted that the Supreme Court had clearly precluded the judiciary from inserting its own policy determinations regarding fee shifting into federal legislative schemes.133 The Supreme Court had not, however, directed the federal judiciary to abdicate its duty to say what the law is.134 In the absence of unambiguous language, the usual model of statutory construction is to use legislative history and congressionally expressed policy concerns to determine congressional intent.135 Alye-

129. Stanton Road Assocs. v. Lohrey Enters., Inc., 984 F.2d 1015, 1019 (9th Cir. 1993).
130. Id. (citations omitted).
131. Id.
132. For a discussion of Alyeska and Runyon, see supra part I.C.
133. Stanton Road Assocs., 984 F.2d at 1019.
135. For example, in Touche Ross & Co. v. Redington, the Supreme Court decided that Congress did not imply a private cause of action in § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a) (1970). Touche Ross & Co., 442 U.S. 560, 571 (1979). The Court stated it was "limited solely to determining whether Congress intended to create the private right of action." Id. at 568. The Court considered the language of the statute and found that it did not facially provide a cause of action; in fact, the Court found that "the plain language of the provision weighs against implication of a private remedy." Id. at 571. The Court went on to consider legislative history and the general scheme of the statute, noting: "[T]he language and focus of the statute, its legislative history and its purpose . . . are [factors] traditionally relied upon in determining legislative intent." Id. at 571-76.

In Thompson v. Thompson, the Court reiterated the tools available to it for determining congressional intent and noted that congressional intent may appear in a statute's language, structure, or circumstances of enactment. 484 U.S. 174, 179 (1987) (quoting Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 18 (1979)). Although the Court found that Congress had not implied a cause of action, id. at 187, the Court's analysis included examinations of "Congress' perception of the law," id. at 180, "the principal problem Congress was seeking to remedy," id. at 181, "the purpose and context of the legislative scheme," id. at 183, and the legislative history, id. at 183-87.
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eska and Runyon do not prohibit the use of this model; rather they direct courts to look for congressional intent, not supply their own.136

The Ninth Circuit found that CERCLA's language did not unambiguously indicate congressional intent to allow fee shifting.137 Once it had decided that the language was ambiguous, the Ninth Circuit declared its analysis at an end, holding that CERCLA's private cost recovery language does not overcome the American Rule's presumption against fee shifting.138

The Supreme Court's analysis, although different in some particulars, was at heart the same analysis as that of the Ninth Circuit. The Court did not look beyond the statute itself139 and so, like the Ninth Circuit, engaged in incomplete statutory analysis. Proper examination of all indications of congressional intent, however, leads to the conclusion that attorney fee shifting should be allowed for private parties suing under CERCLA.

In Key Tronic the Supreme Court determined from examination of statutory language alone that Congress did not intend to allow private parties bringing CERCLA cost recovery actions to recover litigation-related attorney's fees.140 This note argues that the Court's reasons for rejecting a "plain meaning" construction of the statute that would allow fee shifting are flawed.141 This note further argues that, because the Court considered only the language of CERCLA and did not examine other indications of congressional intent, its analysis was incomplete.

A. The Supreme Court's Reasons for Rejecting the Argument That Statutory Language Indicates Congressional Intent to Allow Fee Shifting

In Key Tronic, the Supreme Court rejected the Eighth Circuit's "plain meaning" interpretation of CERCLA.142 The Eighth Circuit had first noted that CERCLA section 107(a)(4)(B) "allows private parties to recover 'necessary costs of response . . . consistent with the national contingency plan.' "143 CERCLA defines "response" as "re-

136. For a discussion of Alyeska, see supra notes 53-56 and accompanying text. For a discussion of Runyon, see supra notes 67-69 and accompanying text.
137. Stanton Road Assocs. v. Lohrey Enters., Inc., 984 F.2d 1015, 1019 (9th Cir. 1993).
138. Id. at 1020.
139. "The absence of specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees." Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1965 (1994) (emphasis added).
140. Id. at 1967.
141. See infra part III.A.4.
move, removal, remedy, and remedial action; [sic] all such terms . . . include enforcement activities related thereto." The court then relied on two Ninth Circuit decisions to find that private party cost recovery actions are enforcement activities. The court concluded its analysis by noting that attorney’s fees “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.”

The Supreme Court found the Eighth Circuit’s analysis unconvincing for three reasons: (1) CERCLA section 107 does not explicitly set out a cause of action for private parties to recover cleanup costs; (2) Congress “knows how” to write a statute that more clearly expresses an intent to allow fee shifting; and (3) the term “enforcement activity” is not sufficiently explicit to include private, rather than governmental, cost recovery actions.

1. Private Party Cost Recovery Actions

In examining CERCLA section 107, the Supreme Court noted that even before SARA, district courts “‘virtually unanimous[ly]’” interpreted CERCLA section 107(a)(4)(B) as authorizing private parties to seek recovery of response costs. Further, the Court noted that certain provisions of SARA indicated congressional acknowledgment of private party cost recovery actions. The Court stated that although CERCLA section 107 “unquestionably” creates a private party cost recovery action, it does not do so explicitly. The Court then concluded that a statute that created a cause of action so indirectly could not authorize the shifting of attorney’s fees with the explicitness required by Alyeska.

In dissent, Justice Scalia, joined by Justices Blackmun and Thomas, argued that the creation of a cause of action by CERCLA section 107(a)(4)(B) is “as clear[ ] as can be,” because it sets out who is liable to whom for what. He further noted that the majority would treat identical language differently depending on whether or not it referred to the government: the language that the majority

145. See Cadillac Fairview/Cal., Inc. v. Dow Chem. Co., 840 F.2d 691, 694 (9th Cir. 1988) (referring to “private enforcement actions”); see also Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986) (referring to “private enforcement actions”).
146. General Elec., 920 F.2d at 1422.
148. Id. at 1965 n.7 (quoting Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985)).
149. Id. at 1965-66.
150. Id. at 1966.
151. Id. at 1966-67.
152. Id. at 1968 (Scalia, J., dissenting).
pointed to in CERCLA section 107(a)(4)(A) as "'expressly identifying the Government as a potential plaintiff'" is identical to the language regarding private parties, which the majority asserted creates only an implied cause of action.

2. Congress "Knows How" to Express Its Intent to Allow Fee Shifting

The Court, in a two-sentence analysis, noted that SARA included two express provisions for fee shifting without including such a provision with regard to private party cost recovery actions. This omission indicated to the Court a "deliberate decision" by Congress not to authorize such fee shifting.

Again, Justice Scalia in dissent faulted the majority for looking for too particular a degree of explicitness. Justice Scalia argued that Congress did not need to use any "magic words" because it is not ambiguous whether the enforcement costs of a private party include attorney's fees.

Furthermore, the Supreme Court had previously rejected this reasoning. In Pennsylvania v. Union Gas, the Court held that CERCLA indicated congressional intent to override the Eleventh Amendment presumption that states are immune from being sued in federal court for cost recovery. The Court agreed that the language of another statute was "more pointed" on the subject, but noted that each statute purportedly overcoming a presumption should be evaluated "on its own terms, not defeated by reference to another statute that uses more specific language." The Court wrote that, when Congress wants to abrogate an assumption, "no magic words are required."

In addition, the majority in Key Tronic failed to consider differences in how the CERCLA provisions were created. Private party

153. Id. at 1968 n.* (Scalia, J., dissenting).
154. See id. (Scalia, J., dissenting).
156. Key Tronic, 114 S. Ct. at 1967. The Ninth Circuit engaged in a similar, but more fully developed analysis of this point. Stanton Road Assocs. v. Lohrey Enters., Inc., 984 F.2d 1015, 1019 (9th Cir. 1993).
159. Id. at 13 n.4.
160. Id. The Court did not require "magic words" to express congressional intent to abrogate a constitutionally based presumption. As the American Rule is not constitutionally based, it would seem reasonable for the Court to be satisfied with an even less explicit expression of congressional intent in these cases.
cost recovery actions were included in CERCLA as originally passed. There is evidence that, in SARA, Congress intended to resolve the fee-shifting question by adding the words “enforcement activities” to the definition of “response.” Further, during the complicated and time-consuming process of passing SARA, it seems likely that Congress would have chosen to resolve the fee shifting issue by simply adding words to an existing provision, rather than by completely rewriting a section. In contrast, the citizen suit provision, one of the provisions that the Court pointed to as being sufficiently explicit to allow fee shifting, was entirely new with SARA. It is conceivable that provisions written by Congress at different times may be worded differently yet still be intended to express the same meaning.

The majority in Key Tronic did not mention the CERCLA language that had been interpreted to allow attorney’s fees to be recovered when EPA is the plaintiff. Under the American Rule, a court must presume that the government, like any other party, cannot recover attorney’s fees without statutory authorization. Before SARA, EPA had been allowed to recover attorney’s fees based on section 104(b) of CERCLA: “[The] President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations . . . to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.” Despite mentioning the word “legal,” this provision is not an unambiguous statement of congressional intent to allow fee shifting. The term “legal studies and investigations” is by no means as talismanic as the term of art “attorney’s fees” used in the citizen suit provision. Still, courts have concluded from this language alone, and without analysis, that EPA may recover “all litigation costs, including attorneys’ fees.”

While it is likely that when Congress passed CERCLA it intended that EPA be able to recover attorney’s fees, that conclusion is not compelled by the statutory language. To be certain of how that language should be construed, a court would have to examine CER-

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162. See infra part III.B.1.
163. See supra part II.A.
CLAs legislative history. Similarly, an examination of the legislative history concerning private party cost recovery actions would have been appropriate in Key Tronic to determine whether Congress intended to allow fee shifting in those actions.

3. Private Party "Enforcement"

The Eighth Circuit and other courts had found that because attorneys fees are an integral part of private party enforcement, they must be included in the response costs that private parties can recover. The Ninth Circuit acknowledged that attorneys fees are "ordinarily" incurred in a cost recovery action, but held that this was not enough to "read into" Congress' words a fee-shifting provision.

In his Stanton Road dissent, Judge Canby of the Ninth Circuit argued that not only are attorneys fees necessary to private cost recovery actions, they represent a large proportion of the cost of private party enforcement:

When Congress amended CERCLA to permit such private litigants . . . to recover the "costs" of "enforcement activities," it is difficult to imagine what it might have had in mind other than the recovery of attorneys' fees. The "enforcement" of CERCLA by a private party consists in suing to hold the polluter liable. The lion's share of the enforcement cost, as opposed to cleanup cost, will lie in attorneys' fees. Congress cannot have been ignorant of that fact. A private party simply cannot recover its cost of enforcement if it cannot recover its attorneys' fees.

Judge Canby concluded that the language of CERCLA cannot be given effect without allowing private parties to recover attorney's fees.

Judge Canby called attention to a reality that the Eighth Circuit tacitly recognized, but that the Ninth Circuit majority apparently ignored: private parties have little, if any, enforcement costs other than attorney's fees. Without attorney's fees recovery, the SARA amendment of section 9601(25) becomes largely meaningless for private parties.

The Key Tronic majority summarily rejected the premise that private parties can enforce CERCLA. Private party litigation is thus not enforcement, and its costs are not response costs for which CER-
CLA authorizes recovery. The majority's discussion of this point is brief, giving no reasons why the Court concluded private parties cannot "enforce" CERCLA.

Justice Scalia's dissent, on the other hand, argued that although the term "enforcement" is usually used when referring to government prosecutions, normal legal usage does not limit the term to that meaning. Justice Scalia noted, for example, that attorneys regularly speak of "enforcing" obligations, contracts, and judgments obtained in actions between private parties. He noted that the Supreme Court itself has written of the private enforcement of a federal statute. Furthermore, the plain meaning of enforce is "[t]o put into execution; to cause to take effect; to make effective." By undertaking cleanup without waiting for EPA and by acting to identify and hold liable other responsible parties, private parties are putting CERCLA's goals into effect.

In addition to the case Justice Scalia noted, the Supreme Court itself also referred to nongovernmental enforcement in the case that the majority cites for the American Rule. In Alyeska, the Supreme Court noted that Congress sometimes utilizes the private attorney general concept when it opts to "rely heavily on private enforcement to implement public policy." At these times, Congress allows fee shifting "so as to encourage private litigation." As the private attorney general example shows, being a private party does not disable a person from enforcing a statute. Although private cost recovery actions are not private attorney general actions, Congress noted that CERCLA "contemplate[s] a significant role for private parties in response actions." Congress was aware of the slow progress EPA had made. Thus, Congress relies on the actions of private parties to implement the public policies behind CERCLA and thereby "enforce" the statute.

172. Id.
173. Id. at 1969 (Scalia, J., dissenting).
174. Id. (Scalia, J., dissenting).
175. Id. (Scalia, J., dissenting) (citing Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109 (1986)).
178. See supra note 175.
180. Id.
4. The Supreme Court's Examination of CERCLA's Language Was Flawed

The *Key Tronic* majority found that CERCLA's "plain meaning" did not supply the degree of explicitness required by *Alyeska* and *Runyon*.183 As Justice Scalia noted in dissent, however, there is a difference "between a requirement of explicitness and a requirement of a password."184 As did the Eighth Circuit and some other lower courts, Justice Scalia took note of the realities of CERCLA cost recovery litigation in engaging in the only practically logical reading of the statute: Congress has clearly authorized the recovery of enforcement costs, and in CERCLA cost recovery actions the natural and primary such costs are attorney's fees.185 Thus the Justice best known of all the current Court for his aversion to judicial activism would have read the statute itself to indicate that Congress has made the decision to allow fee shifting in CERCLA private party cost recovery actions.

B. A Full Examination of Congressional Intent Indicates That Fee Shifting Should Be Allowed in CERCLA Private Cost Recovery Actions

The conclusion that Congress intended to allow fee shifting in private cost recovery actions is supported by aspects of the legislative history, as well as by the purposes expressed by Congress itself in enacting CERCLA and creating this type of action.

1. Legislative History

When SARA was enacted, the Conference Committee commented on the purpose of amending CERCLA section 101(25): "The House amendment proposes to modify . . . the definition of 'response,' to explicitly include enforcement activities . . . . The conference substitute adopts the House proposal. This amendment clarifies and confirms that such costs are recoverable from responsible parties, as removal or remedial costs under section 107."186 Since section 107 pertains to both EPA and private party cost recovery actions, it is reasonable to interpret this amendment as expressing congressional intention to expand the recoverable costs for both types of plaintiffs.

In contrast, in *Fallowfield Development Corp. v. Strunk*, a district court interpreted a report of the House Committee on Energy and

184. *Id.* at 1969 (Scalia, J., dissenting).
185. *Id.* (Scalia, J., dissenting).
Commerce to indicate that Congress did not intend private parties to be able to shift fees.\textsuperscript{187} The committee wrote: "The change [including 'enforcement' in the definition of 'response activities'] will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties."\textsuperscript{188} The \textit{Fallowfield} court, apparently relying on an unexpressed application of \textit{inclusio unius est exclusio alterius}, held that this report evidenced a congressional intent not to allow private parties to shift fees.\textsuperscript{189}

The \textit{Fallowfield} court failed to consider the possibility that instead of meaning to exclude private parties, the committee may have been using shorthand by referring only to EPA. While discussing SARA's addition of an explicit right of contribution,\textsuperscript{190} the committee noted: "This does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107."\textsuperscript{191} Despite the committee's failure to mention the analogous right of private parties, courts continue consistently to uphold the settled interpretation that section 107(a)(4)(B) creates a private cause of action.\textsuperscript{192} Later in its report, the committee recognized that the National Contingency Plan contemplates a "significant role" for private parties to play in response actions.\textsuperscript{193} The committee's language reflects the common conception of EPA as the primary enforcer of CERCLA, but should not be interpreted to deny private party cost recovery actions or private party ability to recover enforcement costs.

In addition, since EPA's ability to recover attorney's fees had been universally accepted in the courts prior to passage of SARA,\textsuperscript{194} there was little, if any, reason for Congress to act just for the sake of EPA. Further, if Congress had intended to address only EPA's ability to recover attorney's fees, it could have amended section 104, which

\begin{itemize}
  \item \textsuperscript{189} Fallowfield Dev. Corp., 1990 WL 52745, at *6.
  \item \textsuperscript{190} 42 U.S.C. § 9613(g)(3) (1988).
  \item \textsuperscript{192} For a list of cases holding, both before and after SARA, that § 107(a)(4)(B) creates a private cost recovery action, see Kaplan, supra note 19. In addition, EPA explicitly recognizes private party cost recovery actions. National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.700(b)(1), (c)(2), (c)(3)(i) (1992).
  \item \textsuperscript{194} For a partial list of CERCLA cases that hold that EPA cannot recover attorney's fees, see Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1966 n.9 (1994).
\end{itemize}
applies only to EPA actions. That Congress chose to amend section 101, which applies to both EPA and private cost recovery actions, supports the conclusion that Congress intended both EPA and private parties to be able to recover enforcement costs.

2. Congressionally Expressed Policy

Congress has clearly and frequently expressed its policy concerns in enacting CERCLA and SARA and in providing for private party cost recovery actions. Examining these congressional policy expressions is part of a court's duty to construe the law and is consistent with Alyeska's admonition that courts not insert their own determinations of which statutes are important enough to merit fee shifting. Two of Congress' main policy concerns in enacting CERCLA—the need for speedy cleanups and reliance upon private parties to help achieve them—would be directly advanced by allowing private parties to recover attorney's fees.

The committees reviewing the bills that became SARA commonly expressed the need to expedite cleanup as an overall policy concern. For example, the House Committee on Energy and Commerce stated that protecting the public from hazardous substances is one of the Nation's most pressing environmental problems. It also noted that in writing the bill, Congress had focused on ensuring rapid and thorough cleanup of hazardous wastes. The House Committee on the Judiciary also commented that its amendments emphasized the need to strike a balance between facilitating speedy cleanup and protecting the rights of potential victims and potentially responsible parties.

The House Committee on Public Works and Transportation noted EPA's slow progress in cleaning up hazardous waste sites between 1980 and 1985. The House Committee on Energy and Commerce wrote that information collected during CERCLA's history made clear that "EPA will never have adequate monies or manpower to address the problem itself. . . . As a result, an underlying principle

196. See supra notes 179-93 and accompanying text.
201. "[O]verall progress in remedying the abandoned toxic waste site problem . . . can only be called disappointing. To date, only four toxic waste sites, according to EPA officials have been fully cleaned up." Id. pt. 3, at 3, reprinted in 1986 U.S.C.C.A.N. at 3126.
of H.R. 2817 is that Congress must facilitate cleanups of hazardous substances by the responsible parties ...."^202

Congress’ emphasis on the necessary part private parties must play in expediting the cleanup of hazardous waste explains its enactment of SARA’s new section 122,^203 which covers government settlements with private parties. The purpose of this section was to encourage voluntary, negotiated private party cleanups by allowing EPA to accept less than full payment of response costs and limit a private party’s future liability.^204 The House Committee on Energy and Commerce believed “that encouraging such negotiated cleanups will accelerate the rate of cleanup and reduce its expense by tapping the technical and financial resources of the private sector.”^205

Similarly, Congress intended to encourage private party cleanup by adding an express right of contribution for private parties in SARA section 113(f).^206 The House Committee on Energy and Commerce noted in its comments on this section: “The section should encourage private party settlements and cleanups. . . . Private parties may be more willing to assume the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others.”^207

Allowing private parties who have voluntarily undertaken response actions to recover their attorney’s fees from other responsible parties will likewise serve Congress’ purpose of expediting cleanup. Just as parties who know they can seek contribution are more likely to step forward, so parties who know they will be able to recover attorney’s fees as part of their response costs will be encouraged to undertake response. Without this security, especially in light of the high dollar amounts involved in cost recovery litigation,^208 private parties will be more likely to wait for EPA to respond.

Courts have recognized that Congress meant to encourage private parties to shoulder some of the response burden.^209 One district
court noted: "[S]pending precious Superfund monies on a site when there are responsible parties ready and willing to accomplish the same result would hardly be an efficient use of government resources . . . . [P]ublic policy demands that preference be given to the use of private funds for the cleanup of hazardous waste sites."210 The Supreme Court also took note of Congress’ goals:

Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government’s resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.211

Finally, EPA itself recognizes that it must rely on private party participation. EPA has admitted that voluntary private party cleanups and negotiated settlements are essential to achieving CERCLA’s goals.212 EPA acknowledges that private parties can act more quickly, and, therefore, cleanups conducted by private parties are preferable.213

Courts should allow private parties to recover attorney’s fees in cost recovery actions because this would further Congress’ express policy concerns in enacting CERCLA. Legislative history and Congress’ general policy expressions support the view that Congress intended private parties to help EPA enforce CERCLA. However, the Supreme Court in Key Tronic did not consider any of these factors. Because the Court examined only “the four corners of the document” it was able to adhere to a narrow reading of the statute precluding shifting of litigation-related attorney’s fees in CERCLA private party cost recovery actions.

CONCLUSION

The Key Tronic holding will have a significant impact on the future of toxic site cleanup. Attorney’s fees in these actions are usually very high.214 The events that gave rise to the action typically occurred

213. Id.
in the distant past; the statutory language is unclear and the case law is often contradictory; and cleanup is expensive, so significant dollar amounts are at stake.\textsuperscript{215} This means that usually there is a need for extensive legal work, resulting in high attorney's fees. For example, in *Stanton Road*, the district court awarded the plaintiff attorney's fees of $126,198.\textsuperscript{216}

Attorney's fees are also significant as a percentage of other response costs. In 1989, the Office of Technology Assessment estimated that 30\% to 60\% of funds spent by private parties went to legal expenses.\textsuperscript{217} In *General Electric*, attorney's fees were more than $419,000 and other costs were more than $940,000,\textsuperscript{218} making attorney's fees 31\% of the plaintiff's total expenditures. In *Hemingway Transport*, attorney's fees were about 58.6\% of the $92,088 total response costs claimed.\textsuperscript{219}

It has been suggested that private party plaintiffs are typically large corporations that would not be induced to expedite cleanup by the availability of attorney's fees recovery.\textsuperscript{220} However, even large corporations keep an eye on the bottom line. In deciding whether to commence a cleanup, any potential plaintiff will balance the monetary costs it can recover against those it cannot. For example, a potential plaintiff estimates its cleanup costs will be $500,000 and its attorney's fees will be $500,000. Only one other party could be held responsible for cleanup under CERCLA. If attorney's fees cannot be recovered, the potential plaintiff must weigh a recovery of $250,000 (from the other party) against a cost of $750,000 (its half of the direct cleanup...


\textsuperscript{216} Stanton Road Assoc. v. Lohrey Enters., Inc., 984 F.2d 1015, 1017 (9th Cir. 1993).


\textsuperscript{219} Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 920 n.2 (1st Cir. 1993). It is not possible to compare attorney's fees and other costs in *Stanton Road* because part of the cleanup cost consisted of $1,100,000 that Lohrey was required to place in an escrow account to fund future cleanup on Stanton Road's property. *Stanton Road Assoc.*., 984 F.2d at 1017. The district court indicated that this amount was awarded both under CERCLA and under state law. Therefore, a total amount attributable to CERCLA-related expenses cannot be calculated.

\textsuperscript{220} Sevack, supra note 9, at 1565-66.
costs plus all of the attorney’s fees). Few corporations, even Fortune 500 ones, will find this rate of return worthwhile. The inability to collect attorney’s fees will not only dissuade a company from pursuing a cleanup on its own but will also lessen the incentive to settle with EPA.

In 1985, the General Accounting Office estimated that 4000 major hazardous sites existed and that potential cleanup costs could amount to $39 billion. In the same year, the Office of Technology Assessment estimated that over the next fifty years 10,000 sites may be found, with the government’s share of the cleanup costs reaching up to $100 billion. Other estimates for the total cost of cleanup extend into the $1 trillion range. Private parties now perform approximately half of all site studies and cleanups. If private parties become unwilling to pursue cleanup independently of EPA, or become unwilling to settle, the overall speed of cleanup is likely to decrease, resulting in ongoing resource damage and health risks from exposure to contaminated sites. Thus, the issue of whether attorney’s fees are allowable in a private cost recovery action is critical.

In Key Tronic, the Supreme Court departed from its Runyon analytic framework for deciding whether a statute authorizes fee shifting: consideration of the plain language, legislative history, and congressionally expressed policy. In Alyeska and Runyon, the Court was concerned that the judiciary not usurp Congress’ role as policymaker. In Key Tronic, the Court needed only to examine policy set out by the proper policymaker—Congress—to determine that private parties should be able to recover attorney’s fees in cost recovery actions.

In response to the Supreme Court decision in Key Tronic, Congress should further clarify its intent to allow private party fee shifting when it next reauthorizes CERCLA. Congress could clearly con-

221. Id.
222. CERCLA specifically entitles parties that have settled with EPA to seek contribution for response costs from other, nonsettling parties. 42 U.S.C. § 9613(f)(3)(B) (1988). If response costs are deemed not to include attorney’s fees, parties seeking contribution would presumably be as unable as parties seeking cost recovery to recover attorney’s fees.
226. Hedeman et al., supra note 217, at 10,423.
228. Congress faces many important issues in the CERCLA reauthorization process; attorney’s fees for private parties may not prove to be the most critical. For examples of the kinds of issues that Congress is considering, see generally Craig N. Johnston, Who Decides Who’s Liable Under CERCLA?: EPA Slips a Bombshell into the CERCLA
firm its intent by amending CERCLA section 107(a)(4)(B) to read: "any other necessary costs of response, including attorney's fees, incurred by any other person." Alternatively, Congress could amend CERCLA section 101(25) to indicate that "response" includes cost recovery litigation. Either amendment would provide the more talismanic language that the Supreme Court's "narrow" interpretation seems to require.

In the meantime, private parties may not recover attorney's fees in cost recovery actions unless the fees can be characterized as nonlitigation-related. Attorneys for parties contemplating cleaning up hazardous sites should advise their clients to add attorney's fees attributable to recovering costs from other responsible parties into the costs that the clients will have to absorb if they decide to pursue their own cleanup.