Reviving CERCLA’s Liability: Why Government Agencies Should Recover Their Attorneys’ Fees in Response Cost Recovery Actions

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The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) imposes strict, retroactive liability on owners or operators of sites contaminated with hazardous waste. CERCLA also authorizes private parties and the Environmental Protection Agency (EPA) to initiate the cleanup process and to recover the costs of that cleanup from the responsible party. The language of section 7 of CERCLA, however, is ambiguous as to whether attorneys’ fees incurred in litigation to recover these response costs are recoverable. The Supreme Court in Key Tronic Corp. v. United States, held that private parties cannot recover attorneys’ fees in such actions. Even so, the Court expressly reserved judgment on the issue of whether, in recovery actions taken by EPA, attorneys’ fees could be recovered. This Comment argues that the history, structure, and purpose of CERCLA all suggest that the Supreme Court should follow the decision of the Ninth Circuit in United States v. Chapman, and hold that EPA attorneys’ fees are recoverable as part of the response costs of cleanup.

INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)1 imposes retroactive liability on a broad basis and prompts environmental restoration where hazardous materials have been released.2 As part of its scheme, it provides a party or parties that clean up a release of hazardous materials an opportunity to recover their costs.3 CERCLA’s provisions for governmental cost recovery and private party cost recovery are in different subsections.4 Since neither cost recovery directly addresses whether

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4See id. § 9607(a) (4) (A), (B).
attorneys' fees are included, it is unclear whether Congress intended them to be recoverable.\(^5\) Two recent cases, *Key Tronic Corp. v. United States*\(^6\) and *United States v. Chapman*,\(^7\) have addressed whether Congress intended to authorize the recovery of attorneys' fees in actions to recover response costs under CERCLA.\(^8\) In *Key Tronic*, the Supreme Court held that private parties could not recover attorneys' fees in such an action,\(^9\) while in *Chapman*, the Ninth Circuit limited *Key Tronic*, holding that EPA could recover its attorneys' fees under CERCLA.\(^10\) This Comment argues that, in reading *Key Tronic* narrowly and awarding attorneys' fees to government agencies for their response costs, the Ninth Circuit has taken the correct approach because CERCLA's legislative history and language express an intent to award the government its attorneys' fees, and the policy objectives achieved by fee shifting further justify imposing the costs upon the responsible party.\(^11\)

Section I discusses fee-shifting in the United States and the "American Rule" presumption against shifting fees without clear legislative intent to do so. Section II outlines and discusses CERCLA in general as well as the specific provisions that address actions to recover the costs of response. Section III then addresses the case law that has developed with respect to the recoverability of attorneys' fees under CERCLA in actions to recover costs of response. Section III also addresses the tools of statutory interpretation that these courts relied upon in analyzing congressional intent. Finally, Section IV analyzes the case law in light of CERCLA's language, the remedial purpose canon of construction and legislative intent, and the public policy implications underlying awarding attorneys' fees to governmental agencies when they seek to recover their costs of response under CERCLA.

## I. Fee Shifting in the United States

When evaluating fee shifting, courts deal with two competing principles: (1) the American Rule generally prohibiting fee shifting

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\(^5\)See id.

\(^6\)511 U.S. 809 (1994).

\(^7\)146 F.3d 1166 (1998).

\(^8\)See generally *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994); *United States v. Chapman*, 146 F.3d 1166 (9th Cir. 1998).

\(^9\)See *Key Tronic*, 511 U.S. at 819.

\(^10\)See *Chapman*, 146 F.3d at 1175.

\(^11\)See infra IV.A-B.
absent express statutory authority to do so; and (2) policy objectives favoring fee shifting.\[12\]

A. The American Rule

There are two fee-shifting paradigms. In the United States, each party must bear its own litigation costs.\[13\] As early as 1796, the Supreme Court said: "The general practice of the United States is in opposition to [awarding attorneys' fees to prevailing parties]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute."\[14\] This rule, known as the "American Rule," contrasts with the "loser pays" rule used in most modern countries where the losing party pays the costs associated with litigation.\[15\]

The American judiciary has been reluctant to modify its traditional notions of allocating attorneys' fees.\[16\] Usually, exceptions are legislatively created to further some specific policy.\[17\] Even when the statutory language and construction seem to indicate a legislative intent to shift attorneys' fees, our courts have expressed reluctance to do so.\[18\]

Although the American Rule is firmly entrenched in United States jurisprudence, it has several exceptions.\[19\] For example, courts have awarded attorneys' fees where a statute authorizes it or where a contract provides for it.\[20\] In equity, courts have shifted fees to the losing party when "overriding considerations of justice seemed to compel such a result."\[21\]

Courts have created another exception to the American Rule with the "private attorney general" doctrine.\[22\] This doctrine, which

\[15\] See Miller, supra note 13, at 591.
\[16\] See id. at 589.
\[18\] See id. at 451-52.
\[19\] See id. at 451.
\[20\] See id. at 453.
\[21\] See id. (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967)).
\[22\] See Miller, supra note 13, at 614.
broadened the exception to the American Rule in the 1960s and 1970s, reflected a policy of encouraging socially beneficial litigation. The theory of the doctrine was 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 attorneys' fees reduces the barrier to suit created by high litigation costs."  

_Alyeska Pipeline Service Co. v. Wilderness Society_, however, curtailed this exception. The Supreme Court declared that the power to establish a private attorney general exception belonged to Congress rather than the Judiciary. In the absence of express statutory authority, courts were not to shift attorneys' fees based upon public policy. The Court reasoned that because Congress had remained silent on the allocation of fees, it intended the traditional American Rule to apply.

While _Alyeska_ supports the proposition that courts are not to shift fees unless the underlying statute provides for it, it left unanswered how explicit Congress needed to be to manifest its intention to shift fees. The Court addressed this question in _Runyon v. McCrory_. There, the Court focused on whether there was enough congressional intent to justify fee shifting. The plaintiffs argued that the applicable civil rights statute gave private parties broad authority to enforce civil rights. The Court rejected this argument because the statute contained no explicit provision for fee shifting and was too "generalized" to be a clear indication of congressional intent to set aside the American Rule. By relying on legislative history, the Court implicitly validated the practice of looking beyond the mere words of the statute to determine whether enough congressional intent existed to supplant the American Rule.

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23See id. at 612-13.


26See Miller, supra note 13, at 646.

27See id. at 623.

28See id. at 262.

29See _Alyeska_, 421 U.S. at 262.

30See id. at 260.

31See id. at 262.


33See id.

34See id. at 184–85.

35See id. at 185–86.
B. Policy Objectives Considered in Fee Shifting

A major criticism of the American Rule is that it prevents a large portion of the population from bringing lawsuits. For individuals who have no hope of recovering attorneys' fees, the legal redress might not be justified by the costs incurred in retaining able counsel. Lawyers' hourly rates can be prohibitively expensive for a large portion of the population, especially the financially underprivileged. On the other hand, contingency fee payment systems are criticized for encouraging counsel to accept early, lower, settlement offers, thereby depriving the aggrieved party of his or her due damages.

Moreover, detractors of the American Rule argue that absent fee shifting, a wronged plaintiff often cannot be made whole again. When the jury is not allowed to consider the plaintiff's lawyer's fees in granting an award, the plaintiff cannot be in the same position in which he or she would have been had he or she not suffered a legal wrong. The English Judiciary justifies its fee-shifting rule using a similar rationale: because the victor incurs litigation expenses due to the losing party's conduct, the losing party should have to pay those expenses.

Proponents of the American Rule argue that imposing a "loser pays" rule deters lawsuits by the financially-challenged because the uncertainty of litigation discourages poorer plaintiffs from instituting actions by confronting them with the prospect of paying the defendant's fees. Although this may be true in very close cases, it is probably untrue where the plaintiff is likely to win.

Proponents of the American Rule also argue that a party's legal expenses are a function of its own strategy decisions, and the opposing party should not be held responsible for expenses it cannot control. These proponents believe that the uncertainty of litigation in U.S. courts justifies the American Rule, reasoning that parties should not be forced to abstain from bringing or defending litigation.

36 See Miller, supra note 13, at 596.
37 See id.
38 See id. at 596 n.72.
39 See id.
40 See id. at 599.
41 See Miller, supra note 13, at 599.
42 See Keenan, supra note 17, at 452-53.
43 See Miller, supra note 13, at 599.
44 See id.
45 See Keenan, supra note 17, at 453.
46 See id.
due to the possibility of being penalized. These competing rationales surface whenever a party tries to shift attorneys’ fees to a polluting party under CERCLA’s cost of response provisions.

II. CERCLA GENERALLY

A. History and Goals

CERCLA was enacted in part to assuage public outrage towards the parties responsible for high profile releases of hazardous substances. One such high profile example is Love Canal. The tragedy at Love Canal prompted the passing of CERCLA in the last days of the Carter Administration.  

The legislative history of CERCLA lacks clarity, making it difficult for the judiciary to discern the full legislative intent of the law. In 1980, the bills eventually comprising CERCLA were hurriedly passed with only limited debate over its intricacies and implementation. They were put together by a bipartisan group of senators. After the Senate passed the bill, it was presented to the House as an amendment to a former House bill. The House considered and passed the

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47 See id.
48 See PLATER, ET AL., supra note 2, at 803.
49 See id.
50 See Keenan, supra note 17, at 458. CERCLA was already on its way to being drafted before the residents of Love Canal were exposed to carcinogenic wastes. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 682 (2d ed. 1994). However, few, if any, would refute that such incidents led to CERCLA’s passage. See id. “Love Canal” was a community of approximately 100 homes and a school, built upon a site contaminated with toxic wastes. See United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 549 (W.D.N.Y. 1988). The company that sold the sixteen acres to the Niagara Falls Board of Education for one dollar, Hooker Chemicals and Plastics Corporation, acknowledged that it had buried chemicals on the site and covered them with clay. See Lana Knedlik, Comment, Attorney’s Fees in Private Party Cost Recovery Actions Under CERCLA: The Key Tronic Decision, 44 U. Kan. L. Rev. 365, 366 (1996). The deed transferring ownership to the Board of Education stated that Hooker would be free of any liability for injuries resulting from exposure to the chemicals. See id. Twenty-five years later, in 1978, heavy rains caused the chemicals, many carcinogenic, to seep into nearby basements. See id. The government spent approximately $140 million to clean the site. See id.
51 Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980, 8 COLUM. J. ENVTL. LAW 1, 1 (1982). In the Ninety-sixth Congress, the bills that contributed to the Act were H.R. 7020, H.R. 85, and S. 1480. See id. at 2.
52 See id.
53 See id. at 1.
54 See id.
bill with only limited debate because the House was acting under a take-it-or-leave-it policy that allowed no amendment.\footnote{55 See id.}

In 1986, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act (SARA).\footnote{56 See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended 42 U.S.C. §§ 9601-9675 (1994 & Supp. II 1996)).} The main focus of SARA was to effectuate faster response and subsequent cleanup.\footnote{57 See Keenan, supra note 17, at 459.} SARA simultaneously re-authorized CERCLA and changed much of the Act.\footnote{58 See Kenneth F. Rosman IV, Casenote, Key Tronic Corp. v. United States: Ratifying an Inequitable Distribution of Private Party Costs Under Superfund by Refusing to Shift Attorney’s Fees, 4 GEO. MASON L. REV. 113, 117 (1995).} Because the Environmental Protection Agency (EPA) had de-listed only six sites from the National Priorities List (NPL) in the five years since CERCLA was passed, many of the changes enacted by SARA concerned EPA’s authority to initiate and expedite environmental restoration.\footnote{59 See Knedlik, supra note 50, at 368.}

CERCLA creates a system for cleaning hazardous waste sites in order “to protect public health and the environment from dangers posed by [these sites],” and for holding responsible parties liable for the costs thereof.\footnote{60 See H.R. REP. No. 96-1016, pt. 1, at 17 (1980), reprinted in 1980 U.S.C.C.A.N. at 6119-20; see also Knedlik, supra note 50, at 367.} The party faced with restoring the environment or paying recovery costs to the government may attempt to recover its costs from any other Potentially Responsible Party (PRP) under common law doctrines of joint and several liability\footnote{61 See Plater, et al., supra note 2, at 807-08. Plater points out that Congress removed references to strict liability and joint and several liability as a compromise in order to pass CERCLA. See id. Courts uniformly have held that CERCLA at least allows joint and several liability, and some have held that it should be imposed unless the defendant can establish a reasonable basis for apportionment. See id. at 808.} and the statutory right of recovery provision of section 113.\footnote{62 See 42 U.S.C. § 9613(f) (1) (1994 & Supp. II 1996).} Rather than attempting to achieve these goals by broad regulation of the thousands of actors across the United States that handle hazardous substances, Congress chose to impose strict, joint and several liability for costs of response on PRPs.\footnote{63 See Rossman, supra note 58, at 117-18.}

Section 106 of CERCLA authorizes the President to issue a cleanup order to a PRP.\footnote{64 See 42 U.S.C. § 9606(a).} The President may delegate this authority to
EPA under section 115. Thus, Congress empowered EPA to bring administrative or judicial enforcement actions against PRPs to force them to perform the remediation. Section 104 of CERCLA authorizes EPA to initiate the remediation of hazardous wastes at "release" sites and section 111 allows EPA to pay for it out of the "Superfund." Section 107 allows EPA to recover its costs by bringing actions against PRPs. CERCLA also permits private parties to initiate the cleanup process themselves and to recover their costs under section 113.

This system created by CERCLA is designed to increase the speed with which the environment is restored.

B. Defining the Process and Standards

Underlying CERCLA's liability structure of imposing liability is the belief that those responsible for creating hazardous materials problems should bear the cleanup costs. Ultimately, EPA must establish processes, standards, and methods by which to effectuate this goal. After identifying hazardous substance release sites, CERCLA requires EPA to prioritize sites by hazard in the Hazard Ranking System (HRS). From the HRS, EPA establishes the NPL, which operates to ensure the sites that pose the greatest risk to human health and the environment are cleaned up first. EPA periodically updates the NPL to account for information regarding new sites and the status of existing sites.

The National Contingency Plan (NCP), section 105 of CERCLA, is a set of guidelines that prescribes the procedures and actions...
to be taken in cleaning a particular site with hazardous substances upon it.\textsuperscript{79} Pursuant to the NCP, EPA is to "establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants."\textsuperscript{80} These procedures and standards must, at a minimum: (1) delineate methods for investigating, evaluating, and cleaning sites; (2) delegate the roles of the Federal, State, and local governments; and (3) ensure that remediation is cost-effective.\textsuperscript{81}

C. CERCLA's Response Authority

CERCLA provides for two types of cleanup response authority: removal actions and remedial actions.\textsuperscript{82} Generally, "removal" actions are primarily those intended for the short-term abatement of toxic waste hazards, while 'remedial' actions are typically those intended to restore long term environmental quality.\textsuperscript{83} Subsection C.1 herein addresses governmental response authority and subsection C.2 addresses private party response authority.

1. Government’s Response Authority

Whenever hazardous substances are released or a threat of release exists, the President and EPA have authority either to undertake remediation or removal consistent with the NCP.\textsuperscript{84} The government may invoke either the administrative process or the judicial process to restore the environment.\textsuperscript{85} For example, section 106 allows EPA, through the President's delegation, to issue an administrative order compelling a PRP to clean up a site.\textsuperscript{86} The party compelled may then seek to recover its costs from other PRPs through section 107(a)(1)-(4).\textsuperscript{87}

If, on the other hand, EPA prefers to initiate the process on its own rather than expending time and other valuable resources searching for PRPs, it may do so using funds from the Superfund.\textsuperscript{88} Under

\textsuperscript{79}See Plater, et al., supra note 2, at 835 n.15.
\textsuperscript{81}See id. § 9605 (a)(1)-(7).
\textsuperscript{82}See id. § 9601(23), (24).
\textsuperscript{84}See Rodgers, supra note 50, at 687.
\textsuperscript{85}See Knedlik, supra note 50, at 368.
\textsuperscript{87}See id. § 9607(a)(1)-(4), 9615.
\textsuperscript{88}See id. § 9611.
section 107(a)(4)(A), the government may then seek to recover "all costs of removal or remedial action"99 from the PRPs to replenish the fund.90 Since liability is joint and several, the government can choose to recover from only one party,91 rather than expending resources to find other PRPs. In that case, the party held responsible might seek to avoid disproportionate cost bearing through common law contribution or indemnification actions against other PRPs.92

2. Private Party's Response Authority

Compared to the government, a private party is subject to stricter requirements when he or she attempts to recover response costs for voluntary cleanup initiatives.93 A private party may hold a PRP liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan,"94 but has the additional burden of proving its costs were "necessary."95

3. CERCLA's Broad Liability

The liability for response costs under CERCLA is very broad and applies retroactively.96 Four categories of PRPs are subject to CERCLA's scope of environmental liability: (1) current owners and operators of a vessel or facility with hazardous wastes; (2) persons who owned or operated the facility at the time of disposal; (3) persons who arranged for the disposal, treatment, or transportation of the hazardous substances that contaminated the facility; and (4) any person who accepts any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person.97

90 See id. §§ 9604(b), 9607(a) (1)-(4).
91 See PLATER, ET AL., supra note 2, at 809.
92 See id. at 863 n.46. Plater remarks that CERCLA does not explicitly provide for strict, joint and several liability among PRPs. See id. at 807-08. All courts, however, uniformly have held CERCLA does impose such liability. See id. If the government seeks to recover its response costs, a PRP stands to be held liable for all those costs. See id. at 863. Thus, it may need to seek contribution from other PRPs. See id. Although CERCLA also does not explicitly provide for indemnification, Plater suggests it is available through common law doctrines. See id. n.46. CERCLA does provide for contribution in section 113(f). See 42 U.S.C. § 9613(f)(1) (1994 & Supp. II 1996).
93 See Knedlik, supra note 50, at 369.
95 See Knedlik, supra note 50, at 369.
96 See PLATER, ET AL., supra note 2, at 803.
97 42 U.S.C. § 9607(a) (1)-(4).
The liability imposed is consistent with CERCLA’s major purposes—to force responsible parties to internalize the costs.98

4. Response Costs and Amount Recoverable

Section 107(a) (4) of CERCLA states that a party which:

causes the incurrence of response costs, of a hazardous substance, shall be liable for (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .99

Subsection (A) deals with governmental cost recovery, whereas subsection (B) deals with private party cost recovery.100 The definition of “respond” includes the terms “removal” and “remedial action.”101

Two textual differences exist between cost recovery provisions involving the government and those involving private parties.102 First, the government may recover “all costs” incurred by the government103 while a private party may recover only “any other necessary costs” incurred by other persons.104 The government’s response costs implicitly are presumed necessary and, consequently, recoverable, whereas private parties explicitly bear the burden of proving that the costs incurred are “necessary” for the response.105 The second textual difference is that the government’s response cost must be “not inconsistent” with the NCP,106 whereas a private party’s response costs must be

98 See Knedlik, supra note 50, at 367.
100 See Knedlik, supra note 50, at 369.
101 See 42 U.S.C. § 9601(25). “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.” Id. Therefore, the difference between “costs of removal or remedial action” in subsection (A) and “costs of response” in subsection (B) is insignificant. See id. § 9607(a) (4) (A)-(B).
102 Compare 42 U.S.C. § 9607(a) (4) (A) (“all costs of removal or remedial action incurred by the . . . Government . . . not inconsistent with the national contingency plan”) with id. § 9607(a) (4) (B) (“any other necessary costs of response incurred by any other person consistent with the national contingency plan”).
103 See 42 U.S.C. § 9607(a) (4) (A).
104 Id. § 9607(a) (4) (B).
105 See Knedlik, supra note 50, at 369.
"consistent" with the NCP. The difference in statutory language probably creates a presumption in favor of the government's response expenditures vis-à-vis a defendant, while a private party seeking contribution carries the burden of proving its response costs were consistent with the NCP.

IV. CASELAW ON FEE SHIFTING UNDER CERCLA

Though the language differs between the two subsections, nothing in CERCLA directly addresses whether attorneys' fees are recoverable for a party, private or governmental, seeking to recover response costs. Since CERCLA does not explicitly address whether attorneys' fees are recoverable, the statutory interpretation has been left to the judiciary. The Supreme Court's decision in Key Tronic Corp. v. United States addressed the recoverability of attorneys' fees by private parties. The recent Ninth Circuit case, United States v. Chapman, addressed the recoverability of attorneys' fees by EPA and other governmental agencies.

A. Key Tronic

1. Facts and Procedural Background

In the late 1970s, Key Tronic Corporation (Key Tronic) and other parties, including the United States Air Force, disposed of liquid chemicals at the Colbert Landfill in eastern Washington. In 1980, the Washington Department of Ecology (WDOE) found that the water supply deteriorated due to these chemicals and brought an action against Key Tronic, the Air Force, and other PRPs. After Key Tronic settled with EPA and WDOE for $4.2 million, it brought an action to seek contribution from other PRPs under CERCLA sec-

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107 See id. § 9607(a)(4)(B).
110 See Kneidlik, supra note 50, at 370.
112 146 F.3d 1166 (1998).
113 See Key Tronic, 511 U.S. at 811.
114 See id.
tion 113(f). Additionally, Key Tronic sought $1.2 million from other PRPs for response costs incurred before the settlement in a cost recovery claim under CERCLA section 107(a)(4)(B). Included in the $1.2 million were costs incurred by Key Tronic for the following legal services: (1) litigation expenses associated with prosecuting the costs of response recovery; (2) identifying other PRPs that were liable for the Colbert Landfill cleanup; and (3) preparing and negotiating the settlement.

The district court ruled that Key Tronic could pursue the $1.2 million cost of response recovery action under CERCLA section 107(a)(4)(B). Section 107(a)(4)(B) states that parties shall be liable for “necessary costs of response ... consistent with the national contingency plan.” Section 101(25) defines “respond” as “remove, removal, remedy, and remedial action ... includ[ing] enforcement activities related thereto.” The district court construed sections 107(a)(4)(B) and 101(25) “liberally so as to achieve the overall objectives of the statute." The court ruled that private parties may incur costs for enforcement activities. The court also ruled that attorneys' fees incurred in searching for other PRPs and negotiating the settlement were “necessary” under section 107.

On appeal, the Ninth Circuit reversed the decision. The Circuit Court held that the district court lacked the authority to award attorneys' fees as “necessary." The Circuit Court relied upon its earlier decision in Stanton Road Associates v. Lohrey Enterprises, where it held that a private party seeking to recover response costs from a party responsible for pollution was prohibited from obtaining attorneys' fees. The Circuit Court interpreted CERCLA's language strictly, emphasizing that “Congress had not explicitly authorized private litigants to recover their legal expenses incurred.”

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115 See id.
116 See id. at 812.
117 See id.
120 Id. § 9601(25).
121 See Key Tronic, 766 F. Supp. at 872.
122 See id.
123 See id.
124 See Key Tronic Corp. v. United States, 984 F.2d 1025, 1028 (9th Cir. 1993).
125 See id. at 1027.
126 See id. (citing Stanton Road Assocs. v. Lohrey Enterps., 984 F.2d 1015 (9th Cir. 1993)).
127 See id. at 1028.
2. The Supreme Court in *Key Tronic*

Justice Stevens, delivering the opinion of the Court, identified the first issue in *Key Tronic III* as “whether the fees for prosecuting this action against the Air Force are recoverable [by a private party] under CERCLA.” In order to decide this issue, the Court had to determine whether the phrase “enforcement activities” within the section 101(25) definition of “response” included a private party’s action to recover cleanup costs. Thus, it had to determine whether private party attorneys’ fees associated with that action would be within the “necessary costs of response” of section 107(a)(4)(B). The Court also recognized that an award to recover private party attorneys’ fees would have to be justified by CERCLA’s language and intent, given the long-standing American Rule against fee shifting.

The Supreme Court categorized attorneys’ fees into three groups: (1) fees incurred while prosecuting recovery actions; (2) fees incurred in non-litigation response related activities; and (3) fees incurred during negotiations with EPA. It then analyzed each of the three categories to see whether they fit within CERCLA’s “necessary costs of response.”

As for attorneys’ fees incurred while prosecuting recovery actions, the majority rejected, on three bases, Key Tronic’s argument that the attorneys’ fees in its recovery action against the Air Force were “enforcement activities.” The Court found that section 107 merely implied a private party’s costs of response recovery action, thereby bringing the provision into conflict with the American Rule. The Court then reasoned that using an implied provision to create an exception to the American Rule “would be unusual if not unprece-

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130 Id.
131 See *Key Tronic*, 511 U.S. at 815–16.
132 See id.
133 See id. at 814–15.
134 See id. at 812.
135 See generally *Key Tronic*, 511 U.S. at 816–21.
136 See *Key Tronic*, 511 U.S. at 818; see also 42 U.S.C. § 9607(a) (4) (B) (stating that “costs of response” are recoverable by private party); id. § 9601(25) (stating that “response” includes “enforcement activities”).
137 See *Key Tronic*, 511 U.S. at 816.
dented" given the clarity of the American Rule.138 The Court was not willing to stretch the Rule that far.139

The Court also employed a structural argument based on CERCLA's language.140 Pointing out that Congress had omitted language expressly allowing recovery of attorneys' fees in section 107(a)(4)(B)141 while expressly providing for them in other sections,142 the Court found that Congress had in fact affirmatively decided "not to authorize such awards."143 Finally, the Court rejected Key Tronic's argument on the basis of the "plain meaning of the text."144 According to the majority, it would torture its interpretation of "enforcement activities" to squeeze within it a private action to recover attorneys' fees.145

As for the second category of attorneys' fees sought by Key Tronic, non-litigation attorneys' fees, the Court held that these costs were recoverable if "closely tied to the actual cleanup"146 under section 107. The Court followed the Tenth Circuit's decision in FMC Corp. v. Aero Industries, Inc., holding that non-litigation fees are an exception to the American Rule.147 Key Tronic argued that attorneys' fees used to find PRPs "benefit the entire process" and should therefore be recoverable.148 The Court agreed and found a distinction between litigation fees and non-litigation fees, reasoning that any number of professionals might perform PRP-searching, which may include attorneys.149 Therefore, non-litigation fees incurred by a private party's attorney in searching for other PRPs were distinguishable from attorneys' fees incurred in litigating the cost recovery action.150

The third category of attorneys' fees the Court analyzed in Key Tronic related to negotiating its settlement with EPA.151 Key Tronic

138 See id. at 818.
139 See id. at 819.
140 See id. at 818–19.
142 See, e.g., id. § 9610(c) ("Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including attorney’s fees) determined by the Secretary of Labor. . . .").
143 Key Tronic, 511 U.S. at 818–19.
144 See id. at 819.
145 See id.
146 See id. at 820.
147 See id. at 820–21 (citing FMC Corp. v. Aero Industries, Inc., 998 F.2d 842, 847 (1993)).
148 See Key Tronic, 511 U.S. at 820–21.
149 See id.
150 See id.
151 See id.
argued that attorneys' fees incurred in preparing studies for negotiating the consent decree that were ultimately used in the cleanup process were "closely tied to the actual cleanup."\textsuperscript{152} The Court held that attorneys' fees incurred in settling consent decrees were unrecoverable in a private party recovery action under section 107.\textsuperscript{153} It reasoned that Key Tronic prepared the studies to limit its scope of liability, rather than to "benefit the entire cleanup."\textsuperscript{154}

By interpreting its provisions broadly, the Court declined to utilize a canon of construction that would further CERCLA's purposes.\textsuperscript{155} Rather, the Court relied upon the plain terms of the phrase "enforcement activities" to conclude that Congress had not expressed a clear intention to shift fees.\textsuperscript{156}

Justice Scalia, in his dissent, criticized the majority's reasoning and conclusions.\textsuperscript{157} He chastised them for characterizing the right of cost recovery as "implied."\textsuperscript{158} According to Scalia, the provision that "covered persons . . . shall be liable for . . . necessary costs of response incurred by any other person"\textsuperscript{159} created an express right of recovery.\textsuperscript{160} He also criticized them for requiring a "magic phrase" to effectuate Congress' intent.\textsuperscript{161} Finally, he attacked the majority for interpreting "enforcement activities" so strictly as to deprive it of any meaning in its context.\textsuperscript{162} Although he concurred that the non-

\textsuperscript{152}See Key Tronic, 511 U.S. 809 at 820–21.
\textsuperscript{153}See id.
\textsuperscript{154}See id.
\textsuperscript{155}See id. at 817–18. The remedial purpose canon of construction is discussed more fully infra Part IV.A.2.
\textsuperscript{156}See Key Tronic, 511 U.S. at 819.
\textsuperscript{158}See Key Tronic, 511 U.S. at 822 (Scalia, J., dissenting in part).
\textsuperscript{160}See Key Tronic, 511 U.S. at 824 (Scalia, J., dissenting in part). Justice Scalia supported his contention with CERCLA's language and structure. See id. For example, section 107(a)(4)(D) refers to "amounts recoverable in an action under this section." See id. (paraphrasing 42 U.S.C. § 9607(a)(4)(D)). Also, section 113 refers to a "civil action . . . under section [107(a)]." See id. at 822 (citing 42 U.S.C. § 9613(f)(1)).
\textsuperscript{161}See id. at 823 (Scalia, J., dissenting in part). Scalia discussed the need to satisfy Runyon v. McRary, 427 U.S. 160, 185 (1976), which requires a determination that Congress intended to shift fees. See id. at 823. Scalia argued that Congress needs to be explicit, not to incant any magic phrase. See id.
\textsuperscript{162}See id. at 824 (Scalia, J., dissenting in part). Justice Scalia acknowledged that "enforcement" usually sounds in governmental prosecution, but argued that such an interpretation is not exclusive. See id. For example, Scalia argued, lawyers and courts often refer to "enforceable contracts" and the Clayton Act has been described as "a vehicle for private
litigation attorneys’ fees were recoverable,\textsuperscript{163} Scalia thought private parties should also be able to recover attorneys’ fees associated with litigation and negotiation.\textsuperscript{164}

Since Key Tronic dealt with private party attorneys’ fees, it did not resolve whether government’s attorneys’ fees are recoverable under section 107(a) (4) (A).\textsuperscript{165} In Key Tronic, the Supreme Court expressly refused to offer “comment on the extent to which [the] phrase [‘enforcement activities’] forms the basis for the Government’s recovery of attorneys’ fees.”\textsuperscript{166} However, the Court did not rule out the possibility that it might have to decide the question later.\textsuperscript{167}

B. The Ninth Circuit’s Decision in United States v. Chapman\textsuperscript{168}

1. Facts and Procedural Background

In United States v. Chapman, Harold B. Chapman, Jr. manufactured small metal collars, and stored and resold surplus chemicals on his five-acre parcel of land in Palomino Valley, Washoe County, Nevada.\textsuperscript{169} In 1989, Washoe County requested that EPA investigate the site.\textsuperscript{170} Ecology & Environment (E&E) was hired to inspect and photograph the site in October.\textsuperscript{171}

On December 20, 1989, EPA’s On Scene Coordinator (OSC), Robert Bornstein, conducted a preliminary assessment of the site.\textsuperscript{172} Mr. Bornstein found approximately 2000 5-gallon containers holding a wide assortment of known chemicals, oil, and paint.\textsuperscript{173} Approximately 100 55-gallon drums of unknown substances were present as well.\textsuperscript{174} Most of the drums were stored outside, and the soil was visibly

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\textsuperscript{163} See Key Tronic, 511 U.S. at 821 (Scalia, J., dissenting in part).
\textsuperscript{164} See id. at 824.
\textsuperscript{165} See Key Tronic, 511 U.S. at 821 (Scalia, J., dissenting) (citing 42 U.S.C. § 9607(a) (4) (B)).
\textsuperscript{166} See Key Tronic, 511 U.S. at 824 (Scalia, J., dissenting).
\textsuperscript{167} See id.
\textsuperscript{168} 146 F.3d 1166 (9th Cir. 1998).
\textsuperscript{169} Id. at 1168.
\textsuperscript{170} See id.
\textsuperscript{171} See id.
\textsuperscript{172} See id.
\textsuperscript{173} See Chapman, 146 F.3d at 1168.
\textsuperscript{174} See id.
stained from substances leaking out of deteriorated containers. After E&E found that a sample of the substances exhibited qualities of flammability, corrosivity, and combustibility, Washoe County attempted to force Chapman to comply with the cleanup order. The County issued Chapman a misdemeanor citation, revoked his business license, and asked for assistance from EPA.

Using its power under section 106, EPA issued an Administrative Order compelling Chapman to take immediate action to secure the site and contain (or prevent) the release of hazardous substances. He was to submit site security and safety plans, a detailed work plan, and remove any hazardous substances.

In January 1991, Mr. Bornstein again investigated Chapman's property and found several hundred 1- to 5-gallon containers of waste and flammable liquids. He also found approximately fifty 55-gallon drums containing flammable liquids. Since Chapman failed to comply with the Administrative Order, EPA initiated a response action according to CERCLA by determining what actions would be necessary to remove the hazardous substances.

In February 1991, Chapman began to comply with the Administrative Order and, under the supervision of EPA and E&E, removed the containers from the site and submitted soil samples to EPA. EPA incurred response costs totaling approximately $34,000. EPA sent letters demanding that Chapman reimburse EPA for the $34,000 it had incurred. Chapman resisted. The United States then brought an action in district court against Chapman to recover response costs. The district court judge granted summary judgment in favor of the United States. Chapman appealed to the Ninth Circuit.
2. The Ninth Circuit in *Chapman*

The Ninth Circuit first concluded that the district court had not erred in holding that EPA had established a prima facie case which Chapman failed to rebut and that EPA's response action was "not inconsistent" with the NCP.¹⁹⁰ It next turned to the question of whether EPA was entitled to recover its attorneys' fees as part of its response costs.¹⁹¹ Based on statutory language and public policy, the court concluded that EPA could recover attorneys' fees related to litigating its recovery action, but the court limited the amount recoverable.¹⁹²

In its analysis, the Ninth Circuit acknowledged that under the American Rule, attorneys' fees are generally not recoverable "absent explicit congressional authorization."¹⁹³ The court distinguished the language in section 107(a) (4) (A), which allows government to recover response costs, from that in section 107(a) (4) (B), which allows a private party to recover response costs.¹⁹⁴ It reasoned that because "respond" is defined in section 101(25) to mean "remove, removal, remedy or remedial action" including "enforcement activities,"¹⁹⁵ the government's recoverable costs include not only remedial costs, but also attorneys' fees.¹⁹⁶ It also rested its conclusion on the broad language in CERCLA.¹⁹⁷ Language in section 107(a) (4) (A) making parties liable for "all costs of removal"¹⁹⁸ and in section 104(b) allowing the government to "undertake such planning, legal, fiscal, economic, engineering or architectural, and other studies or investigations . . . to recover the costs"¹⁹⁹ helped convince the court that CERCLA specifically allows for the recovery of attorneys' fees.²⁰⁰ Further, the court relied upon Justice Scalia's dissent in *Key Tronic* to conclude that

¹⁹⁰See *id.* at 1173.
¹⁹¹See *id.* The district court held that the government was entitled to attorneys' fees attributable to litigating the recovery action. See *id.*
¹⁹²See *id.* at 1176. Although agreeing with the district court that EPA could recover its attorneys' fees, the circuit court vacated the district court's award and remanded it for a test of reasonableness. See *id.*
¹⁹³See *Chapman*, 146 F.3d at 1173 (citing Runyon v. McRary, 427 U.S. 160, 185 (1976) and Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975)).
¹⁹⁴See *id.* at 1173–74 n.8.
¹⁹⁶See *Chapman*, 146 F.3d at 1174.
¹⁹⁷See *id.*
¹⁹⁹Id. § 9604(b).
²⁰⁰See *Chapman*, 146 F.3d at 1174.
Congress did not have to use the term “attorneys’ fees” to evince its intent that they should be included.\textsuperscript{201} The Ninth Circuit recognized public policy as a relevant consideration because “Congress intended to ‘facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous waste.’”\textsuperscript{202} The court relied on CERCLA’s remedial purpose to justify considering general policy reasons to award the government attorneys’ fees.\textsuperscript{203} It declared that CERCLA’s purpose is to clean the environment; thus, liberally construing its provisions furthers that purpose.\textsuperscript{204} The court, then, recognized CERCLA’s remedial purpose and construed its terms broadly consistent with that purpose.\textsuperscript{205} Further, awarding attorneys’ fees could deter both contamination and delaying clean-ups.\textsuperscript{206}

In \textit{Chapman}, the Ninth Circuit imposed a “reasonableness” limit on the amount of attorneys’ fees EPA can recover in a response cost recovery action.\textsuperscript{207} EPA’s costs of actual cleanup, disregarding the litigation, were $34,000, but the litigation expenses incurred in pursuing those costs were over $400,000.\textsuperscript{208} The court remanded the case for a finding of whether the attorneys’ costs were reasonable.\textsuperscript{209}

V. THE NINTH CIRCUIT COURT CORRECTLY INTERPRETED CERCLA AND \textit{Key Tronic} TO ALLOW FOR RECOVERY OF GOVERNMENTAL ATTORNEYS’ FEES

A. Statutory Authority for Fee Shifting Under CERCLA

1. Express Statutory Language of CERCLA

The textual provisions of CERCLA dealing with government cost recovery are sufficiently clear to create a legislative exception to the American Rule.\textsuperscript{210} The argument allowing government plaintiffs to

\textsuperscript{201} See id.
\textsuperscript{202} See id. at 1175 (quoting Washington Dep’t of Transp. v. Washington Natural Gas Co., Pacificorp, 59 F.3d 793, 799 (9th Cir. 1995)).
\textsuperscript{203} See id.
\textsuperscript{204} See id.
\textsuperscript{205} See Chapman, 146 F.3d at 1175.
\textsuperscript{206} See id. at 1175–76.
\textsuperscript{207} See id. at 1176.
\textsuperscript{208} See id.
\textsuperscript{209} See id.
recover costs of response is based on the contention that section 107(a)(4)(A)'s "costs of removal or remedial action" encompasses attorneys' fees through sections 101(23) and 104(b).

CERCLA section 101(23) defines a removal action with reference to section 104(b). Section 104(b) expressly allows the government, through the President and EPA, to "undertake such planning, legal ... and other studies as [it] may deem necessary or appropriate ... to recover the costs [of response actions]." Thus, these sections should be read as allowing the government, usually acting through EPA, to recover costs for all its investigation and enforcement activities, including legal work.

Further textual support is found in CERCLA section 107(a)(4)(A), which makes "all costs" recoverable by a government plaintiff in a removal or remedial response action. Although this section does not use the term "respond," section 101(25) defines "respond" as a removal or remedial action, and includes "enforcement activities related thereto." Since attorneys' fees associated with litigating response cost recovery are "enforcement activities related"

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211 Id. § 9607(a) (4)(A).
212 Id. § 9601 (23). "Remove" means:

the cleanup or removal of released hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing, or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action under section 9404(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.

213 Id. § 9604(b) (stating "the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter").
214 Id. § 9601 (23).
216 Id.
217 See Chapman, 146 F.3d at 1175.
220 Id. § 9601 (25).
the term "enforcement activities" would be superfluous if not interpreted to include activities that compel a PRP to internalize the cost of polluting.222 To give plain meaning to CERCLA's terms without rendering "enforcement activities" superfluous requires a broad reading of "enforcement activities."223 Enforcement activities should include the legal expenses incurred by EPA in trying to recover its response costs under section 107(a)(4)(A).224 Therefore, in the context of government plaintiffs trying to recover costs associated with litigating response cost recovery, the text of CERCLA supports fee shifting.225

Moreover, while Congress did not use the terms "attorneys’ fees" or "legal expenses," it should not be required to do so to evince an intent to shift attorneys’ fees to a PRP.226 Since Congress used the phrase "enforcement activities" and these activities primarily include attorneys’ fees, the text is sufficiently clear to avoid the application of the American Rule.227

2. Remedial Purpose Canon of Construction

CERCLA is generally seen as a remedial statute and should be interpreted with this purpose in mind.228 The remedial purpose canon of construction states that remedial legislation should be construed liberally to effectuate the beneficial purpose for which it was enacted.229 Since all legislation is theoretically remedial,230 the reme-

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222 See Mullins, supra note 12, at 1530.
223 See id.
224 See id.
225 See Chapman, 146 F.3d at 1175.
226 See Key Tronic Corp. v. United States, 511 U.S. 809, 815 (1994) (stating that "absence of specific reference to attorney's fees is not dispositive if the statute evinces an intent to provide for such fees"); see also id. at 823 ( Scalia, J., dissenting in part) (Congress need not incant the magic phrase "attorney's fees").
227 See id. at 823 ( Scalia, J., dissenting in part).
229 See id. at 201.
dial purpose canon has become a post-hoc explanation for the purpose of construing a statute’s terms broadly. It is most often invoked when the underlying statute is curative in nature.

Courts look at many factors when determining whether to employ the remedial purpose canon. For example, courts have looked at the intrinsic nature of the legislation, its legislative history, as well as its text and structure, but these factors are by no means exclusive.

Lower courts have almost universally held that CERCLA is remedial in nature. In fact, every circuit that has considered CERCLA has analyzed it using the remedial purpose canon as an interpretive principle. In light of CERCLA's legislative history, structural scheme, and congressional intent, use of the remedial purpose canon is justified as an interpretive tool. A liberal interpretation to effectuate CERCLA's remedial purpose in accordance with the canon would hold that Congress intended CERCLA to create a legislative exception to the American Rule that would allow fee shifting.

CERCLA is an excellent candidate for the application of the remedial purpose canon. It has been characterized as "overwhelmingly remedial," and its history and structure indicate that courts should give a liberal construction to its terms in order to effectuate its goals. CERCLA's overriding purpose is to protect human health and the environment from the dangers posed by hazardous sub-

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232 See id. at 938. For example, courts have invoked the canon when construing laws enacted to protect the public against socially detrimental business practices, such as antitrust, securities, and unfair competition. See Watson, supra note 228, at 236–37.
233 See Watson, supra note 228, at 238–40.
234 See id.
235 See, e.g., Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991), rev’d, 984 F.2d 1025 (9th Cir. 1993), aff’d, 511 U.S. 809 (1994). The District Court in Key Tronic characterized CERCLA as “a remedial statute designed by Congress to protect and preserve public health and the environment.” Id.
236 See Watson, supra note 228, at 262–63.
238 See Watson, supra note 228, at 271–72.
239 NEPACCO, 810 F.2d at 733.
240 See Watson, supra note 228, at 271–72.
stances. Further, it accomplishes this in two ways: (1) enabling more expeditious cleanup of toxic spills; and (2) allocating the costs of cleanup to those responsible for the harm.

CERCLA is, by its nature, more remedial than other non-penal statutes. Its fundamental focus is to remedy the harmful effects of hazardous substance releases to protect human health and the environment. Rather than regulating future actions by requiring compliance with regulatory standards, CERCLA imposes liability on past actions. Contrasted with the Resource Conservation and Recovery Act (RCRA), which regulates storage, transportation, and disposal of hazardous wastes via a permitting system, CERCLA in no way directly regulates future behavior by standard setting or permitting.

Additionally, congressional intent, as documented in the legislative history of S. 1480 (one of the bills that eventually constituted CERCLA), indicated that Congress wanted CERCLA to be remedial in nature. Although the majority of its most controversial features were deleted, what survived was the remedial focus. "The basic concept of creating response authority and a response fund to prevent and remedy health and environmental threats from releases or

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241See supra note 60 and accompanying text.
243See Watson, supra note 228, at 271.
244See WILLIAM MURRAY TABB & LINDA A. MALONE, ENVIRONMENTAL LAW: CASES AND MATERIALS 637 (1992). The authors note that: "[t]he Act is distinctive in the spectrum of federal environmental protective legislation in that the principal focus is remedial and corrective rather than regulatory. CERCLA does not set standards for prospective compliance by industry but essentially is a tort-like, backward-looking statute designed to cleanup expeditiously abandoned hazardous waste sites and respond to hazardous spills and releases of toxic wastes into the environment."
Id.
245See id.; see also United States v. Northeast Pharmaceutical & Chem. Co. (NEPACCO), 810 F.2d 726, 733 (8th Cir. 1986), cert. denied 484 U.S. 848 (1987) (citing retrospective nature of CERCLA as main reason to characterize as "overwhelmingly remedial"); New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985) (stating that "CERCLA is not a regulatory standard-setting statute such as the Clean Air Act").
247See United States v. Alcan Aluminum Corp., 964 F.2d 252, 263 n.19 (3d Cir. 1992) (acknowledging that CERCLA is remedial while RCRA is regulatory).
249See Watson, supra note 228, at 290-91.
threatened releases of hazardous substances is the same in both the House and Senate version of H.R. 7020."250

3. Remedial Purpose and Legislative Intent in Enacting CERCLA

CERCLA’s fundamental purposes are to provide for the rapid cleanup of hazardous materials release in order to protect human health and the environment, and to impose the costs of cleanups upon the PRP.251 The legislative history indicates congressional intent to further CERCLA’s goals by making the scope of liability more inclusive.252

When SARA was enacted in 1986,255 part of it modified the definition of “response” explicitly to include “enforcement activities.”254 The Conference Committee commented that the purpose of the amendment was to clarify that “such costs are recoverable from responsible parties, as removal and remedial costs under section 107.”255 Although Congress explicitly provided for attorneys’ fees in other portions of SARA,256 it does not follow that its failure to use identical language in section 107 suggests a decision not to shift fees.257 According to Justice Scalia, “enforcement activities” unambiguously refers to attorneys’ fees, and Congress therefore did not need to mention them by name.258

Also, by redefining “response” in SARA, Congress endorsed the lower courts’ interpretation of CERCLA to allow EPA to recover its attorneys’ fees.259 Arguably, if Congress had disapproved of such in-

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258 See id.
259 See id. at 817.
interpretation, it would have restricted the scope of liability to exclude shifting attorneys' fees.

Awarding attorneys' fees to EPA furthers both of CERCLA's overriding purposes. Courts must effectuate congressional purpose in accordance with Alyeska's mandate that courts not substitute their own judgment for that of the legislature. Shifting fees helps protect human health and environment by encouraging PRPs to undertake the cleanup process rather than relying on EPA, thereby conserving EPA resources for cleaning sites that have no identified PRP. It also promotes the principle that the polluter must pay. If EPA faces uncompensated litigation fees from pursuing a costs of response recovery action, the polluter will not have internalized all the costs associated with the remediation or removal.

B. Public Policy

Policy objectives support awarding attorneys' fees in cost recovery actions by the government. The Ninth Circuit in Chapman supported its conclusion that EPA could recover its attorneys' fees by pointing out that awarding attorneys' fees could act as a powerful deterrent to similarly situated polluters. The court reasoned that polluters such as Chapman, when faced with the added liability of attorneys' fees, would be more likely to undertake the cleanup process themselves. Providing incentive for PRPs to clean up hazardous substance releases not only reduces the number of actions EPA must bring to recover its cost, but also reduces the burden on the judicial system. PRPs faced with the possibility of paying EPA's attorneys' fees might consider more carefully the merits of resisting the action to recover costs.

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260 Cf. Keenan, supra note 17, at 473 (arguing that shifting fees in private party response cost recovery actions furthers CERCLA's two main goals).
262 See Knedlik, supra note 50, at 386.
263 See id. at 385.
264 See id.
265 See United States v. Chapman, 146 F.3d 1166, 1175 (9th Cir. 1998).
266 See id. at 1175–76.
267 See id.
268 Knedlik, supra note 50, at 386.
269 See id.
The court in *Chapman* also intimated that fee shifting might actually deter hazardous substance releases. Imposing attorneys' fees upon the responsible party increases the liability facing polluters and helps ensure that polluters pay all of the cleanup costs. Were the government prohibited from collecting its attorneys' fees, imposition of cleanup costs on the responsible party would be undermined.

**CONCLUSION**

CERCLA does not specifically address whether plaintiffs seeking to recover their costs of response may recover their attorneys' fees. In 1994, the Supreme Court in *Key Tronic* interpreted section 107(a)(4)(B) to conclude that Congress had not provided enough evidence of its intent to create a legislative exception to the American Rule against fee shifting for private party plaintiffs. Since then, the recoverability of EPA's attorneys' fees has been questionable because the Supreme Court intimated that it might yet have to decide that question.

Although courts have been reluctant to shift fees in light of Supreme Court precedent mandating express legislative authority, CERCLA's history, text, and purpose provide the judiciary with enough evidence to find that Congress indeed wanted to impose costs upon polluters. Furthermore, public policy justifies shifting fees to polluters when EPA seeks to recover its costs of response under CERCLA section 107(a)(4)(A).

For example, the language of CERCLA's provisions suggest that the term "enforcement activities" must include response activities besides remediation and removal, and it is reasonable to conclude that these other activities would include the litigation expenses involved in seeking contribution or indemnification from a PRP. Further, given the uniformity with which CERCLA has been held as a remedial statute, its terms should be construed broadly consistent with that purpose under the remedial purpose canon of construction. As CERCLA's goals are to effectuate environmental restoration while imposing the costs of doing so on those who are responsible for releasing pollutants, requiring a polluter to pay for the government's attorneys' fees when it is forced to litigate is consistent with these

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270 See *Chapman*, 146 F.3d at 1176 (stating that "[fee shifting] might even encourage responsible parties not to pollute and contaminate property in the first place").

271 See *Mullins*, supra note 12, at 1532.

272 See id.