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KEY TRONIC CORPORATION v. UNITED STATES: RECOVERY OF ATTORNEY'S FEES IN PRIVATE COST-RECOVERY ACTIONS UNDER CERCLA

I. INTRODUCTION

Prior to 1980, hazardous substance regulation focused on the prevention of hazardous waste problems. To mitigate environmental hazards caused by existing waste sites, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). The function of this legislation was to provide a mechanism for the decontamination of hazardous waste sites and the allocation of clean-up costs among those responsible for pollution.

Under CERCLA, the federal government may issue an administrative order compelling private parties to initiate remediation of contaminated locations, or may seek a court order enjoining responsible parties to undertake response activities, or may commence cleanup of environmentally hazardous sites and recover


3. Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989); Mardan Corp. v. C.G.C. Music Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986) (holding that section 107 of CERCLA "authorizes both governmental and private entities to sue statutorily defined 'responsible parties' to recover costs incurred in cleaning up hazardous waste disposal sites"); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986).

4. CERCLA § 106(a), 42 U.S.C. § 9606(a). CERCLA authorizes the President to issue administrative orders requiring cleanup when the President determines that there may be an imminent and substantial danger to the public health and welfare or to the environment due to an actual or threatened release of a hazardous substance. Id.

5. Id. The court issuing the order selects the removal and remediation plan. Id.
costs from responsible parties. CERCLA promotes private cleanup of environmental hazards by providing a party who has incurred expenses cleaning up a contaminated site with a private cause of action to recover response costs. Federal courts have consistently held that CERCLA creates a private cause of action for the recovery of response costs. However, federal circuit courts were sharply di-

6. Id. § 104(a), 42 U.S.C. § 9604(a). CERCLA establishes the situations in which the federal government may initiate clean-up activities:

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

Id.

7. Id. § 107(a) (4), 42 U.S.C. § 9607(a)(4). Specifically, CERCLA imposes liability on four classes of potentially responsible parties:

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

Id. “Person” is defined as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” Id. § 101(21), 42 U.S.C. § 9601(21). These parties “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. . . .” Id. § 107(a), 42 U.S.C. § 9607(a). Additionally, CERCLA authorizes private parties to seek recovery of response costs from the Hazardous Substance Superfund (“Superfund”). Id. § 111(a)(2), 42 U.S.C. § 9611(a)(2). Private claims against the Superfund require federal certification and prior governmental approval under the National Contingency Plan (“NCP”), but private cost recovery actions do not have that requirement. Sidney M. Wolf, Up in the Air: Recovery of Attorney Fees in a CERCLA § 107(a)(4)(B) Suit, 69 N.D. L. Rev., 275, 282 (1993).

vided regarding whether CERCLA permits private party recovery of attorneys' fees as a necessary response cost. The recovery of attorneys' fees in private cost recovery actions is a crucial issue due to the potentially enormous financial impact upon a large number of litigants. The CERCLA liability system generates transaction costs which are manifestly high. In some remediation actions, attorneys' fees incurred as an expense of litigation could exceed the clean-up costs.

This Note addresses the recoverability of attorneys' fees in private cost recovery actions, with emphasis on the main issues addressed by the United States Supreme Court in Key Tronic Corp. v. United States. In this decision, the Court held that CERCLA does

cover response costs from responsible parties under section 9607(a)(4)(B) is thus consistent with both the language of section 9607(a)(4)(B) and with the congressional purpose underlying CERCLA as a whole." Walls, 761 F.2d at 318. In a CERCLA private cost recovery action, the plaintiff must prove that "(1) the site is a facility as defined in 42 U.S.C. § 9601(9), (2) defendant is a responsible person as defined in 42 U.S.C. § 9607(a), (3) the release or threatened release of a hazardous substance has occurred, and (4) the release or threatened release has caused the plaintiff to incur response costs." FMC Corp. v. Aero Indus., 998 F.2d 842, 845 (10th Cir. 1993) (citing Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989)).

9. See FMC, 998 F.2d. at 847 (holding only non-litigation fees are recoverable); In re Hemingway Transport, 993 F.2d 915 (1st Cir. 1993), cert. denied, 114 S. Ct. 303 (1993) (denying litigation fee recovery); Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993) (allowing attorney fee recovery); Stanton Rd. Assocs. v. Lohrey Enters., 984 F.2d 1015 (9th Cir. 1993), cert. dismissed, 126 L. Ed. 2d 609 (1993) (denying attorney fee recovery); Gophers Oil Co. v. Union Oil Co., 955 F.2d 519 (9th Cir. 1992) (holding attorneys' fee non-recoverable); General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir. 1990), cert. denied, 499 U.S. 987 (1991) (allowing recovery of litigation fees).

10. Janet Morris Jones, Comment, Attorney Fees: CERCLA Private Recovery Actions, 10 Pace Envtl. L. Rev. 393, 418 (1992). In 1989, an average cleanup of a waste site cost $26,000,000 exclusive of transaction costs; potentially responsible parties ("PRPs") spent $6,100,000, and insurance companies expended approximately $410,000,000. Id.; see Kanad S. Virk, General Electric Co. v. Litton Industrial Automation Systems, Inc.: Are Attorney Fees Recoverable in CERCLA Private Cost Recovery Actions?, 75 Minn. L. Rev. 1541, 1566 (1991). "The total number of cost recovery actions filed has increased since 1988. Attorneys have noted a growing awareness on the part of potential industrial plaintiffs regarding the availability of environmental law remedies." Virk, supra, at 1566.

11. See Jones, supra note 10, at 419. A study conducted by the Rand Corporation in 1992 revealed that transaction costs composed 88% of insurance companies' total clean-up costs. Furthermore, large industrial firms' transaction costs amounted to 21% of their total expenses. Id.

12. General Elec. Co., 920 F.2d at 1422 (noting that "[t]he litigation costs could easily approach or even exceed response costs."). General Electric Company's total response costs amounted to $940,000, of which $419,000 were attorneys' fees. Id. at 1417; see also J. Christopher Jordan, Recovery of Attorneys' Fees in Private Contribution Actions Pursuant to CERCLA Section 107(a)(4)(B), 10 Rev. Litig. 823, 894 (1991).

not authorize the award of attorneys’ fees to the prevailing party in a private cost recovery action. However, recovery was granted for non-litigation related legal expenses which were closely associated to the actual clean-up and, thus, constituted a necessary cost of response under section 107(a)(4)(B) of CERCLA. In analyzing whether attorneys’ fees should be recoverable as response costs under CERCLA, this Note first examines CERCLA’s statutory framework and the award of attorneys’ fees under the traditional American Rule on costs. Next, this Note reviews statutory interpretation and evaluates relevant case law dealing with the awarding of attorneys’ fees under CERCLA. Part III of this Note presents an analysis of the Key Tronic decision, describing the holding and the rationale behind the opinion of the Court. Part IV then critiques the Key Tronic decision and asserts that the Court’s narrow interpretation of enforcement activities coupled with strict adherence to the explicitness requirements established by the Court in Alyeska Pipeline Service Co. v. Wilderness Society and Runyon v. McCrary results in no infringement upon the discretion of the legislature and no erosion of the American Rule. Finally, Part V of this Note concludes that the Key Tronic decision is consistent with prior decisions of the Court because the Court declines to create rights not specifically enumerated in the statute. In Key Tronic, the Court does not preclude the future availability of the recovery of attorneys’ fees, but defers to the legislative power of Congress to affirmatively grant recovery.

14. Key Tronic, 114 S. Ct. at 1968. For a discussion of the Key Tronic decision regarding attorneys’ fees incurred in litigation, see infra notes 111-23 and accompanying text.

15. Key Tronic, 114 S. Ct. at 1968. For a discussion of the Key Tronic holding regarding the issue of non-litigation related attorneys’ fees, see infra notes 124-30 and accompanying text.

16. For a discussion of CERCLA’s statutory framework and the American Rule, see infra notes 24-43 and accompanying text.

17. For a discussion of statutory interpretation, see infra notes 44-66 and accompanying text. Additionally, for a discussion of case law relevant to the recovery of attorneys’ fees in private cost recovery actions under CERCLA, see infra notes 67-100 and accompanying text.

18. For a discussion of the issues and the Court’s reasoning in Key Tronic, see infra notes 103-37 and accompanying text.


21. For a critical analysis of the Key Tronic decision, see infra notes 138-79 and accompanying text.

22. For a discussion of decisions restricting judicial enhancement of statutory language, see infra notes 63-66 and accompanying text.

23. For a discussion of the impact of the Key Tronic decision, see infra notes 180-203 and accompanying text.
II. BACKGROUND

Determining whether attorneys' fees should be recoverable as a response cost requires an assessment of the scope of cost recovery available to a private party under CERCLA. This section examines the textual statutory authorization of cost recovery under CERCLA in its amended version, discusses the American Rule and its application to the recovery of attorney fees, and traces conflicting federal court decisions regarding the recoverability of legal fees in a CERCLA private cost recovery action.24

A. Statutory Authorization of Cost Recovery Under CERCLA

CERCLA authorizes two cost recovery causes of action for private parties who have incurred response costs in the decontamination of hazardous waste sites. Private parties may seek reimbursement from the Hazardous Substances Superfund ("Superfund")25 if they have incurred such response costs and proved nonliability.26 Private parties may also sue other "potentially responsible parties" ("PRPs")27 for contribution to the recovery of any "necessary costs of response."28

Although the phrase "costs of response" is not specifically delineated within CERCLA, section 101(25) defines "response" as "removal, remedy, and remedial action."29 Section 101(25) states that

24. For a discussion of the statutory authorization of CERCLA, see infra notes 25-36 and accompanying text. Additionally, for a discussion of the conflicting circuit court decisions regarding the recoverability of attorneys' fees, see infra notes 67-102 and accompanying text.

25. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). Congress established the Superfund to provide funding for decontamination of hazardous waste sites. 26 U.S.C. § 9507 (1988). The Superfund may be used for the payment of governmental response costs under CERCLA § 104 and for the "[p]ayment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of title 93 and amended by section 9605 of this title." CERCLA § 111(a), 42 U.S.C. § 9611(a).


27. Id. § 107(a)(4), 42 U.S.C. § 9607(a)(4). For further discussion of the four classes of PRPs as defined under CERCLA, see supra note 7.

28. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). For further discussion of the right of private parties to sue other PRPs for contribution, see supra notes 6-9 and accompanying text.

29. CERCLA § 101(25), 42 U.S.C. § 9601(25). A "removal action" is one which focuses on an immediate hazard caused by toxic waste. Id. § 101(23), 42 U.S.C. § 9601(23). "Removal" is defined as follows: [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such ac-
“all such terms (including the terms ‘removal’ and ‘remedial action’) include enforcement activities related thereto.” However, CERCLA contains no precise statutory definition of the term “enforcement activities.” This statutory silence has left room for conflicting federal court interpretations as to whether attorneys’ fees incurred in private recovery actions fall within the scope of “enforcement activities,” and are recoverable as a “cost of response” under CERCLA.

Another source of inconsistent interpretation is CERCLA’s textual differences in the authorization of cost recovery to the federal government and to private parties. Section 107(a)(4)(A) holds responsible parties liable for “all costs of removal or remedial action incurred by the United States government . . . not inconsistent with the national contingency plan.” In a private recovery action, section 107(a)(4)(B) holds responsible parties liable for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.” Interpretative differences arise between the substantive content of the federal government’s authorization to recover “all costs” and the “necessary costs” which are awarded to private parties. Although courts have affirmed re-

Id. § 101(23), 42 U.S.C. § 9601(23). 

"Remedy" or "remedial" is defined as follows:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment . . . .

Id. § 101(24), 42 U.S.C. § 9601(24).


31. For a discussion of conflicting interpretations in federal circuit court cases, see supra note 9. Additionally, for a discussion of federal district court cases which embody dissimilar interpretations, see infra note 101.


34. Hemingway, 993 F.2d at 934 (holding attorneys’ fees are not recoverable to private parties in “enforcement activity”); General Elec., 920 F.2d at 1421-22 (holding private cost recovery is within meaning of “enforcement activity”).
covery of attorneys’ fees by the government,\textsuperscript{35} there have been inconsistent judicial awards of fees as “necessary costs of response” in private party litigation.\textsuperscript{36}

B. The American Rule

In England, courts have been statutorily empowered to award attorneys’ fees to the prevailing party.\textsuperscript{37} However, in 1796 the United States Supreme Court held that litigating parties are responsible for their own attorneys’ fees absent express statutory authorization.\textsuperscript{38} This “American Rule” was reaffirmed by the Court in \textit{Alyeska Pipeline Service Co. v. The Wilderness Society}.\textsuperscript{39} The rule denies arbitrary judicial awards of litigation fees and mandates that parties in litigation must sustain the expense of their own attorneys’ fees.\textsuperscript{40} The \textit{Alyeska Pipeline} Court held that attorneys’ fees may be awarded only if there is specific statutory authorization.\textsuperscript{41} Similarly, in \textit{Run-}

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\textsuperscript{36} For a list of conflicting federal circuit court holdings, \textit{see supra} note 9. Additionally, for a list of conflicting federal district court decisions, see \textit{infra} note 101.

\textsuperscript{37} \textit{Alyeska}, 421 U.S. at 247; \textit{see Virk, supra} note 10, at 1543 (citing Statute of Gloucester, 1278, 6 Edw. 1, Ch. 1). Currently in England, “taxing masters” conduct hearings to determine the applicable award of litigation fees. Virk, \textit{supra} note 10, at 1543 n.17.

\textsuperscript{38} Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). In the United States, the recovery of attorneys’ fees is generally denied, and “even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till [sic] it is changed, or modified, by statute.” \textit{Id.} at 310.

\textsuperscript{39} 421 U.S. 240, 270-71. Environmental groups sued to prevent the issuance of permits which were required in the construction of the Trans-Alaska oil pipeline. \textit{Id.} at 241. The Court of Appeals for the District of Columbia stated that the environmental groups had represented the statutory rights of all citizens and were entitled to attorneys’ fees in order to encourage private parties to initiate litigation which benefits the public. \textit{Id.} at 245-46. The Supreme Court reversed, stating that under the American Rule, the prevailing party may not recover attorneys’ fees, unless there is statutory authorization. \textit{Id.} at 270.

\textsuperscript{40} \textit{Id.} at 247.

\textsuperscript{41} \textit{Id.} at 269. The Court stated that attorneys’ fees may be awarded only where Congress has ‘carve[d] out specific exceptions to a general rule that federal courts cannot award attorneys’ fees ....” \textit{Id.} There are two other common law exceptions to the American Rule. \textit{See Virk, supra} note 10, at 1544 n.25. First, the bad faith exception occurs when a court deems that a litigant has acted in “bad faith, vexatiously, wantonly, or for oppressive reasons.” \textit{Id.} (quoting F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 129 (1974)). Secondly, the common fund exception prevents unjust enrichment by awarding attorneys’ fees to a litigant who is successful in an action to prevent erosion of a fund in which he and others have a mutual interest. \textit{Id.} at 1544-45 n.25.
yon. the Court determined that the recovery of attorneys' fees requires "explicit congressional authorization."

C. Statutory Interpretation

Judicial determination of the existence of an explicit statutory mandate is crucial to the recoverability of attorneys' fees under CERCLA. In determining the existence of statutory authorization, courts have traditionally looked first to the plain language of a statute. Furthermore, plain language purists determine the meaning of a statute by focusing on its actual words. The purist isolates the drafter's grammar and style in an attempt to eliminate judicial bias. However, CERCLA's statutory language is burdened with a

42. Runyon, 427 U.S. at 185.
43. Id. The Court stated that "the law of the United States . . . has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." Id. Congress has enacted numerous statutes which directly provide for the recovery or redistribution of attorneys' fees. Alyeska, 421 U.S. at 260 n.33. For a discussion of the explicit statutory authorization of attorney's fees within CERCLA, see infra note 70 and accompanying text.
44. See Jones, supra note 10, at 401. Courts which have found no explicit provision for attorneys' fees have denied their award. For further discussion of federal district and federal circuit court cases denying the recovery of attorneys' fees, see infra notes 67-88 and accompanying text.
45. Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151, 2157 (1993) (commenting that "[t]he starting point in interpreting a statute is its language."). Justice Scalia has written that "[i]t is our task, as I see it, not to enter the minds of the members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times." Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989); see Cadillac Fairview/California v. Dow Chem. Co., 840 F.2d 691, 697 (9th Cir. 1988) (resolving issue based on the plain language of CERCLA).
46. See Jones, supra note 10, at 402 (commenting that since there is no express statutory authorization for recovery of attorneys' fees to private party litigants, plain meaning purists would disallow recovery); see also William D. Popkin, Lawmaking Responsibility and Statutory Interpretation, 68 Ind. L.J. 865, 872-875 (1993) (discussing surface textualism). The author stated that "[m]eaning is plain when writer and audience share an understanding about the text's meaning (hence, 'common understanding' is a synonym for 'plain meaning')." Popkin, supra, at 873. However, plain language has been postulated as transcending the dictionary meaning of each word. See A. Raymond Randolph, Dictionaries, Plain Meaning, and Context in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 71, 73 (1994) (stating "[a] statute, however, cannot be understood merely by understanding the words in it."); see also Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994). Justice Easterbrook commented that "['p]lain' meaning as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid . . . than a dictionary—which is a museum of words. . . ." Easterbrook, supra, at 67.
47. See Easterbrook, supra note 46, at 63. The author stated that "[o]ne thing we wish the legal system to do is to give understandable commands, consistently
lack of clarity and poor drafting, which has been attributed to its hasty consideration and enactment, and does not easily yield to a "plain language" interpretation. Ambiguities are abundant due to CERCLA's sparse definitions which have compounded the complexities of textual interpretation. In *West Virginia University Hospitals, Inc. v. Casey*, the Supreme Court stated that a statutory ambiguity presented to the court for the first time must be construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." Thus, dual interpretations of a statute's textual language encourage examination of its amendments.

A court may also look at the surrounding language and textual syntax of the statute as a whole to determine the meaning of a statutory phrase in accordance with the linguistic canons of interpretation.

The maxim "inclusio unius exclusio alterius" indicates that the inclusion of one entity is evidence of the intent to exclude another interpreted. . . ." *Id.* Furthermore, "[a]nother thing political society wishes to do is confine judges." *Id.; see generally* Jones, *supra* note 10, at 402.

48. *Dedham*, 805 F.2d at 1080. CERCLA's legislative history is "indefinite if not contradictory." *Id.* After three years of deliberation, CERCLA was enacted as the result of a "last minute compromise." *Id.* At the close of its ninety-sixth session, Congress quickly passed CERCLA in response to severe contamination and public health hazards. Eric D. Kaplan, *Attorney Fee Recovery Pursuant to CERCLA Section 107(a)(4)(B)*, 42 WASH. U. J. URB. & CONTEMP. L. 251, 253-54 (1992) (citing Bulk Distrib. Ctr., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984) (stating that "CERCLA's legislative history is riddled with uncertainty because lawmakers hastily drafted the bill, and because last minute compromises forced changes that went largely unexplained.").

49. *Exxon Corp. v. Hunt*, 475 U.S. 355, 373 (1986); *Dedham*, 805 F.2d at 1080 (citing United States v. Mottolo, 605 F. Supp 898, 902 (D.N.H. 1985)) (stating that "CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history"); *see Mardan*, 804 F.2d at 1458 (noting that CERCLA is a poorly drafted statute, lacking clarity and precision). The definition of the term "response costs" has been problematic. *Id.; see generally* Wolf, *supra* note 7, at 277-78.

50. *See Kaplan*, *supra* note 48, at 256. The Third Circuit stated that "CERCLA is not a paradigm of clarity or precision. . . . Problems of interpretation have arisen from the Act's use of inadequately defined terms." *Id.* at 256 n.32 (citing Artesian Water Co. v. Government of New Castle County, 851 F.2d 643, 648 (3d Cir. 1988)).


52. *Id.* at 100.

53. *See Easterbrook*, *supra* note 46, at 61. The meaning of a word may be imputed from its context, other words within the text, and social and linguistic conventions. *Id.*

other. The concept that words take shape from those around them is embodied in the maxim "ejusdem generis," demonstrating that the use of a phrase in context narrows the broad scope of the meaning it may have had as a term in isolation. Alternatively, if the language of a statute is rendered unclear after plain meaning and contextual analysis, courts consult the statute's legislative history to determine the intent of Congress. In recent years, however, the Court's reliance on legislative history in statutory interpretation has declined. Generalizations about legislative intent may be inaccurate, and CERCLA's legislative history is sparse.

55. Id. at 927. The Supreme Court utilized the maxim "exclusio alterius" in determining that a statute which specifically permitted the Attorney General, a railroad employee or collective bargaining representative to bring a particular cause of action, excluded a passenger from instituting such a suit, because the statute did not specifically empower a "passenger" to bring suit. Id. at 929 (citing National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974)).

56. Id. at 929. In the interpretation of a state statute which referred to a "dagger, dirk, stiletto or other dangerous weapon," a federal district court used the maxim "ejusdem generis" to determine that the statute did not encompass the use of a rifle because the statutory specified weapons were used to stab victims, not to shoot them. Id. at 930-31 (citing People v. Smith, 225 N.W.2d 165, 166-67 (Mich. 1975)).

57. Barnhill v. Johnson, 112 S. Ct. 1386 (1992). Legislative history should be considered only if there is statutory ambiguity. Blum, 465 U.S. at 896; Mardan, 804 F.2d at 1458. In Mardan, the court stated that in a case which implicates a federal statute, "the predominant consideration must be Congressional intent." 804 F.2d at 1458. To avoid lengthy debates on statutory language, legislators often try to obtain clarity by explaining their intent in committee reports and floor statements. Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 872 (1992). However, some critics "maintain that it is constitutionally improper to look beyond a statute's language, or that searching for 'congressional intent' is a semi-mystical exercise like hunting the snark." Id. at 846.

58. See Breyer, supra note 57, at 846. In 1981, the Court referred to legislative history in almost every statutory case, but in 1990, 19 of 55 had no such analysis. Id.

59. See id. at 861-69. A frequent criticism of legislative history in statutory interpretation is that the legislative history is more ambiguous than the statutory language. Id. at 861. A statute enacted by Congress has received the majority of votes from both houses of the legislature, and a presidential signature, but the reports and floor speeches have not. Furthermore, unelected members of the congressional staff or lobbyists often write the floor statements, reports, messages and testimony which compose the legislative history. Id. at 863. Judge Easterbrook stated that "society wishes to . . . confine judges" and to "empower Congress." Easterbrook, supra note 46, at 68. Mr. Randolph comments that it is "[b]etter then to restrict judges to the text of the statute than to have them rummaging through committee reports and floor debates, where they are bound to get lost." Randolph, supra note 46, at 74.

60. See Harvey, supra note 30, at 223. Lack of legislative history necessitates close examination of CERCLA's language. Id. (citing Pease & Curren Ref. Inc. v. Spectrolab Inc., 744 F. Supp. 945, 951 (C.D. Cal. 1990)).
Policy considerations may also be a factor in statutory interpretation. Courts have held that because CERCLA is a remedial statute, it should be interpreted broadly.\footnote{Dedham, 805 F.2d at 1081.} Even though a broad interpretation would further the policies of CERCLA, if there is a clear statutory difference in the treatment of two issues, the courts must not treat them alike.\footnote{West Virginia Univ. Hosps., 499 U.S. at 101 (stating that "it is not our function to eliminate clearly expressed inconsistency of policy, and to treat alike subjects that different Congresses have chosen to treat differently.").}

Statutory silence must not be interpreted to be evidence of affirmative congressional intent.\footnote{Central Bank v. First Interstate Bank, 511 U.S. at 250-51 (1994).} In Central Bank v. First Interstate Bank,\footnote{Id.} the Court asserted that Congress' failure to act cannot be construed as approval of the courts' statutory interpretation.\footnote{Id.} The Court also stated that a statute cannot be amended by congressional inaction.\footnote{Id.}

D. Conflicting Judicial Interpretations

Some courts have held that CERCLA contains no explicit authorization for the recovery of attorneys' fees in private cost recovery actions and have therefore refused to award them.\footnote{Id. at 1453 (stating "[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.").} For example, the court in In re Hemingway Transport, Inc.\footnote{Id.} denied recovery of attorneys' fees because explicit authorization was absent.\footnote{Id. Congress may legislate only by direct action, composed of the passage of a bill by both the House of Representatives and the Senate, and the signature of the President. Id. (citing Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989)).} The court reasoned that since there are sections of CERCLA that explicitly provide for attorneys' fees in other types of actions, the absence of such language in section 1076(a) indicates a lack of congressional intent in the private cost recovery context.\footnote{For a discussion of court decisions denying recovery of attorneys' fees, see infra notes 67-88 and accompanying text.} This is af-
firmed by the fact that Congress did not explicitly establish recovery of attorneys’ fees as a cost of response in the Superfund Amendments and Reauthorization Act (“SARA”). The First Circuit concluded that statutory silence, by negative implication, suggests that a private party may not recover attorneys’ fees. Although the remedial goals of CERCLA might be advanced by legal fee recovery, the Hemingway court stated that Congress must specifically authorize such recovery. Similarly, in Regan v. Cherry Corp., a district court held that attorneys’ fees were not recoverable because of the absence of statutory authorization. The court asserted that if Congress intended private party recovery of attorneys’ fees, it could have amended section 107 of CERCLA to specifically provide for it when the 1986 SARA amendments were enacted. In Stanton Road Associates v. Lohrey Enterprises, the Ninth Circuit denied an award of attorneys’ fees in a private cost recovery action. The court reasoned that although legal fees may be incurred in a private response action, they are not “necessary costs of response” unless explicitly authorized by Congress. The judiciary may not imply the authority to award attorneys’ fees. Subsequently, in Louisiana-Pacific v. Asarco Inc., the Ninth Circuit held that attorneys’ fees were not recoverable under CERCLA, but that litigation expenses, excluding legal costs, could be awarded.

the Attorney General to recoup attorneys’ fees expended in the recovery of Superfund compensation. Id.

71. Hemingway, 993 F.2d at 934.
72. Id.
73. Id.
75. Id. at 148; see Santa Fe Realty Corp. v. United States, 780 F. Supp. 687, 687 (E.D. Cal. 1991) (commenting that if Congress intended citizens seeking recovery of response costs to recover attorneys’ fees, it would have simply amended CERCLA § 107 to provide for recovery).
76. 984 F.2d 1015 (9th Cir. 1993).
77. Id. at 1020. The district court awarded Stanton Road Associates $77,374 in response costs and $126,198 in attorneys’ fees. Id. at 1016.
78. Id. at 1019. The Stanton Road court contrasted the lack of explicit authorization of private party recovery of attorneys’ fees under § 107 of CERCLA, with §§ 110(c), 112(c)(3) and 310 which expressly provide recovery. The Ninth Circuit determined that the term “enforcement activities” was outside the scope of “customary fee shifting language.” Id. (citing Santa Fe Realty, 780 F. Supp. at 695).
79. Stanton Road, 984 F.2d at 1019. The Ninth Circuit determined that the recovery of attorneys’ fees could not be implied merely because recovery would enhance public policy. The court concluded that “to uphold the district court’s award of attorney’s fees in a private response action, we have to read into the statute words not explicitly inserted by Congress.” Id.
80. 6 F.3d 1332 (9th Cir. 1993).
81. Id. at 1342. The court in Louisiana-Pacific upheld the award of litigation expenses, exclusive of attorneys’ fees, stating they were generally authorized by
The Tenth Circuit refused to award attorneys' fees in *FMC v. Aero Industries, Inc.*,[82] and determined that although the phrase "costs of response" included related "enforcement activities," it did not provide explicit authorization of attorneys' fees.[83] However, the court distinguished attorneys' fees composing non-litigation expenses, because they are not encompassed under the American Rule and are therefore not denied as a matter of law.[84] The court held that non-litigation attorneys' fees are recoverable if deemed a "necessary cost of response" under section 107(a)(4)(B).[85]

In *Fallowfield Development Corp. v. Strunk*,[86] a Federal District Court maintained that the phrase "enforcement activities" was included only to establish the Environmental Protection Agency's ("EPA") authority to recover attorneys' fees and enforcement costs.[87] This decision held that only the government can "enforce" a statute; thus, private parties cannot incur "enforcement costs."[88]

Federal Courts of Appeals that permit the recovery of litigation fees have determined that CERCLA provides explicit statutory authorization for recovery, and have concluded that litigation represents a necessary cost of response.[89] In *General Electric Co. v. Litton Industries Automation Systems Inc.*, the Eighth Circuit affirmed the American Rule's applicability. Examining the textual language, the court held that CERCLA authorizes private party recovery of attorneys' fees "with the sufficient degree of explicitness" required in

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Federal Rule of Civil Procedure 54(d) to be awarded to the prevailing party in federal court litigation. *Id.*

82. 998 F.2d 842 (10th Cir. 1993).

83. *Id.* at 847. The court in *FMC* recognized that the recovery of legal fees would help effectuate the remedial goal of CERCLA; however, it held that "an exception to the American rule is a policy decision that must be made by Congress, not the courts. The desirability of a fee-shifting provision cannot substitute for the express authorization mandated by the Supreme Court." *Id.*

84. *Id.* The *FMC* court concluded that the American Rule only includes attorneys' fees incurred in litigation. *Id.* For a discussion of the American Rule, see *supra* notes 37-43 and accompanying text.

85. *FMC*, 998 F.2d at 848. The court determined that to qualify as a necessary cost of response, an expenditure "must be necessary to the containment and cleanup of hazardous releases." *Id.* (citing United States v. Hardage, 982 F.2d 1436, 1446 (10th Cir. 1992)).


87. *Id.* at 359.


89. For a discussion of decisions denying recovery of attorneys' fees, see *supra* notes 67-88 and accompanying text.

90. 920 F.2d 1415 (8th Cir. 1990). The district court ordered Litton to pay General Electric $940,000 in clean-up costs and $419,000 in attorneys' fees. *Id.* at 1417.
Runyon and Ayleska.\textsuperscript{91} The Eighth Circuit reasoned that attorneys’ fees are a cost which is incurred in a private cost recovery action, and a private cost recovery action is an “enforcement action” encompassed by the statute.\textsuperscript{92} The court concluded that “it would strain the statutory language to the breaking point” to exclude attorneys’ fees from the “necessary costs” of section 107(a)(4)(B) of CERCLA.\textsuperscript{93} The General Electric court justified this conclusion by stating that the award of litigation fees is consistent with CERCLA’s dual objectives of the prompt decontamination of hazardous waste sites and the assignment of costs to responsible parties.\textsuperscript{94} The court reasoned that since the cost of attorneys’ fees expended in litigation could equal or exceed the clean-up costs, denial of recovery would give a party a reduced incentive to clean up a site and initiate a cost recovery action.\textsuperscript{95}

In Gopher Oil Co. \textit{v.} Union Oil Co.,\textsuperscript{96} the Eighth Circuit followed its own reasoning in the General Electric decision.\textsuperscript{97} The Gopher Oil court’s holding affirmed the principle that a prevailing party in a private cost recovery action is authorized to recover attorneys’ fees under CERCLA section 107(a)(4)(B).\textsuperscript{98} The Sixth Circuit awarded recovery of attorneys’ fees in a CERCLA private cost recovery action in Donahey \textit{v.} Bogle.\textsuperscript{99} The court was persuaded by the policy consideration that the prompt clean up of waste sites could be defeated by burdening private parties with the costs of legal fees incurred in litigation.\textsuperscript{100}

\textsuperscript{91} Id. at 1422. In General Elec., the court explained that in order to ascertain explicit authorization, it was necessary to find within the statute a “clear expression of Congress’ intent” which consists of more than “generalized commands.” Id. at 1421. For further discussion of Ayleska, see supra notes 39-41 and accompanying text. Additionally, for further discussion of Runyon, see supra note 42 and accompanying text.

\textsuperscript{92} General Elec., 920 F.2d at 1422.

\textsuperscript{93} Id.

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} 955 F.2d 519 (8th Cir. 1992). The district court in Gopher Oil awarded Gopher $559,380.52 in attorneys’ fees. The Eighth Circuit affirmed the portion of the award related to the CERCLA cost recovery action, but remanded the case back to the district court for exclusion of the legal fees procured in an ancillary fraud case. Id.

\textsuperscript{97} Id. at 527.

\textsuperscript{98} Id.; see also United States v. Mexico Feed and Seed Co. Inc, 980 F.2d. 478, 490 (8th Cir. 1999) (relying on General Elec. in holding that attorneys’ fees are recoverable in a CERCLA § 113 action).

\textsuperscript{99} 987 F.2d 1250, 1256 (6th Cir. 1993). The Sixth Circuit overturned the trial court’s denial of recovery of legal fees amounting to $279,000. Id.

\textsuperscript{100} Id. The court noted the following as a persuasive argument:
1995] KEY TRONIC CORPORATION V. UNITED STATES 419

The conflicting interpretations among the federal circuits\(^1\) regarding the statutory authorization of attorneys' fees in private cost recovery actions under CERCLA led the Supreme Court to grant certiorari in *Key Tronic* to resolve the controversy.\(^2\)

III. *Key Tronic v. United States*

In *Key Tronic*, the Supreme Court addressed three aspects of the recovery of attorneys' fees in a private cost recovery action under CERCLA: (1) the recovery of litigation fees incurred in prosecuting a response cost recovery action, (2) the recovery of legal fees expended in the identification of other potentially responsible parties, and (3) the recovery of legal costs incurred in the preparation for, and negotiation of, a consent decree with EPA.\(^3\)

A. Facts and Procedural Disposition

During the 1970s, Key Tronic Corporation, the United States Air Force and other parties disposed of liquid chemicals at the Colbert Landfill in Washington state.\(^4\) In 1980, the Washington Department of Ecology tested drinking water surrounding the landfill

Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs. *Id.* (quoting Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (D. Kan. 1991) (citations omitted)).


103. *Id.* at 1964-69.

and determined that it was contaminated with toxins. Key Tronic Corporation expended necessary clean-up costs in response to this discovery, and subsequently entered into a consent decree with EPA. After Key Tronic established CERCLA liability against the United States Air Force in a section 107 contribution claim for response costs expended prior to the consent decree with EPA, the United States and Key Tronic negotiated a consent decree. In Key Tronic Co. v United States, the United States District Court for the Eastern District of Washington held that a private party may recover enforcement costs, including attorneys’ fees, incurred in bringing a cost recovery action under CERCLA. On appeal, the Ninth Circuit denied Key Tronic recovery of attorneys’ fees incurred in the prosecution of the action, in the identification of PRPs and in the preparation and negotiation of the consent decree.

B. The Key Tronic Decision and Its Reasoning

1. Recoverability of litigation fees expended in private cost recovery actions

In the Key Tronic decision, the United States Supreme Court individually addressed three specific aspects of private party recovery of attorneys’ fees. The initial issue was the recovery of litigation fees incurred by a private party in prosecuting a response cost re-

105. Id.

106. Id. Key Tronic asserted that it voluntarily spent $1,271,511.10 in response to the discovery of the hazardous waste disposal site. Id.

107. Id. In accordance with the consent decree, Key Tronic agreed to pay $4,400,000 in clean-up costs. Id. Likewise, the Air Force entered into a consent decree, agreeing to pay $1,450,000 in remediation expenses. Id.

108. Key Tronic, 766 F. Supp. at 866. This consent decree did not resolve the issue of liability for the attorneys’ fees expended by Key Tronic in the prosecution of the private cost recovery action. Id. Furthermore, no determination was made regarding liability for legal fees incurred in the negotiation of the consent decree, and the identification of additional PRPs, which amounted to $365,649. Id.

109. Id. at 872. The district court in Key Tronic construed the provisions of § 107 and § 101(25) of CERCLA liberally, and held that attorneys’ fees expended in litigation were recoverable. Id. The court also held that the search for responsible parties is an “enforcement activity” and the attorneys’ fees incurred are recoverable as necessary response costs. Id. Attorneys’ fees expended in negotiation of the consent decree were deemed to be necessary response costs and therefore recoverable. Id.

110. Key Tronic Corp. v. United States, 984 F.2d 1025, 1027-28 (9th Cir. 1993). The Ninth Circuit followed the decision in Stanton Road, and held that attorneys’ fees incurred in a private response cost recovery action were not recoverable because of lack of explicit congressional authorization. Key Tronic, 984 F.2d at 1027-28.
covery action.\textsuperscript{111} The Court held that section 107 of CERCLA does not authorize the recovery of private litigants’ attorneys’ fees incurred in a private cost recovery action.\textsuperscript{112}

Reasoning that a private party’s action to recover clean-up costs from other PRPs is encompassed by the term “enforcement activities” included in CERCLA section 101(25), Key Tronic contended that attorneys’ fees are recoverable as “necessary costs of response” under section 107(a)(4)(B), of CERCLA.\textsuperscript{113} This argument was rejected for three reasons.

First, the Court reaffirmed the American Rule, that absent “explicit congressional authorization,” attorneys’ fees are not recoverable as a cost of litigation.\textsuperscript{114} The Court stated that since a cause of action for private cost recovery is not explicit in the text of section 107, it would be unprecedented to declare that this section of the statute, which only “impliedly” authorizes a cause of action, provides authorization of attorneys’ fees with the degree of explicitness required under \textit{Alyeska}.\textsuperscript{115}

Second, the Court stated that the absence of explicit authorization is not dispositive if “the statute otherwise evinces an intent to provide for such fees,”\textsuperscript{116} and the intent is not expressed in “generalized commands.”\textsuperscript{117} In determining the existence of congressional statutory intent, the Court contrasted two SARA amendments that contain an explicit authorization of attorneys’ fees\textsuperscript{118} with sec-

\textsuperscript{111} \textit{Key Tronic}, 114 S. Ct. at 1964-69.

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 1965. The petitioner’s brief stated that the Court should reverse the decision of the Ninth Circuit and award recovery of attorneys’ fees utilizing the following rationale: federal courts have consistently held that the statutory language in CERCLA § 101(25) authorizes recovery of costs of “enforcement activities,” entitling the United States to recover attorney’s fees when it brings an action under § 107(a). Petitioner’s Brief at 11-12, \textit{Key Tronic}, 114 S. Ct. 1960 (1994) (No. 93-376). If it were the intent of Congress that attorneys’ fees were only recoverable by the government, it would be redundant to amend CERCLA to permit litigants to recover the costs of “enforcement activities.” Id.

\textsuperscript{114} \textit{Key Tronic}, 114 S. Ct. at 1964 (citing \textit{Runyon}, 427 U.S. at 185). For a discussion of the American Rule, see supra notes 37-43 and accompanying text.

\textsuperscript{115} \textit{Key Tronic}, 114 S. Ct. at 1966. For a discussion of \textit{Alyeska}, see supra notes 39-41 and accompanying text.

\textsuperscript{116} \textit{Key Tronic}, 114 S. Ct. at 1965.

\textsuperscript{117} Id. (stating that “[m]ere ‘generalized commands,’ however, will not suffice to authorize such fees”) (quoting \textit{Runyon}, 427 U.S. at 186).

\textsuperscript{118} Id. at 1967. The amendments containing explicit authority for the recovery of attorneys’ fees are 42 U.S.C. § 9659(f) and 42 U.S.C. § 9606(b)(2)(E). For further discussion of these amendments, see supra note 154 and accompanying text.
tions 107 and 113 of CERCLA. The Court concluded that the absence of explicit authorization in these sections suggests a deliberate congressional decision not to authorize recovery in a private cost recovery action.

Third, the court rejected Key Tronic Corporation’s argument that the United States government can recover attorneys’ fees even though CERCLA does not use the words “attorneys’ fees” and that the costs of “enforcement activities” encompasses attorneys’ fees incurred in private cost recovery actions. In response, the Court noted that Congress affirmed governmental recovery by redefining “response” to include “enforcement activities,” but that a private action under CERCLA section 107 is not an “enforcement activity.”

The Court stated that the inclusion of this private cost recovery action would “stretch the plain terms of ‘enforcement activities’ too far,” and held that “enforcement activities” did not explicitly include a private action under section 107.

2. Recoverability of attorneys’ fees incurred in the identification of responsible parties

The Key Tronic Court next addressed the recoverability of attorneys’ fees expended in the identification of responsible parties. The Court stated that the American Rule does not apply to non-litigation fees. However, to be recoverable, the attorneys’ fees must be closely connected to the actual cleanup to constitute a “necessary cost of response” under CERCLA section 107(a)(4)(B). The Court noted that Key Tronic’s identification of other PRPs served a

119. Key Tronic, 114 S. Ct. at 1967. Petitioner’s brief stated that § 9659(f) expressly provides for recovery of attorneys’ fees, because § 9659(c) is a citizens suit provision which authorizes “the imposition of civil penalties, but not the recovery of response costs.” Petitioner’s Brief at 22-23, Key Tronic (No. 93-376). Furthermore, the petitioner reasons that the term “enforcement activities” is a more expansive term and “encompasses a broader meaning than ‘attorneys’ fees.’” Id. at 23.

120. Key Tronic, 114 S. Ct. at 1967.

121. Id. at 1966. The petitioners contended that private parties are entitled to costs of “enforcement activities.” Petitioner’s Brief at 17, Key Tronic (No. 93-376). Under CERCLA, private parties undertake activities which would constitute “enforcement activities” if performed by EPA. Id. Key Tronic also asserted that the dictionary meaning and “common understanding” of the word “enforce” makes it applicable to a private party. Id.


123. Id.

124. Id.; see FMC, 998 F.2d at 847-48. Key Tronic argued that non-litigation related attorneys’ fees do not fall under the American Rule. Petitioner’s Brief at 26, Key Tronic (No. 93-376).

125. Key Tronic, 114 S. Ct. at 1966. For further discussion of the term “costs of response,” see supra notes 29-32 and accompanying text.
statutory purpose other than the reallocation of costs by significantly benefitting the entire clean up, and was distinguishable from litigation expenses.\textsuperscript{126} Accordingly, the attorneys' fees expended in the identification process were held to be recoverable because of their proximity to the actual cleanup.\textsuperscript{127}

3. \textit{Recovery of attorneys' fees associated with EPA negotiations}

Addressing the third issue, the Court held that the attorneys' fees incurred during the negotiation and preparation of the consent decree between Key Tronic and EPA were not recoverable as a cost of response.\textsuperscript{128} The Court noted that the documents that Key Tronic attorneys prepared may have assisted with the cleanup, but the work's primary focus was the protection of Key Tronic as a defendant in liability proceedings.\textsuperscript{129} Thus, the legal fees incurred in generating the consent decree were not encompassed within the "necessary costs of response."\textsuperscript{130}

4. \textit{Dissent}

The dissent in \textit{Key Tronic} disagreed with the Court's holding regarding the non-recoverability of attorneys' fees expended in a private cost recovery action,\textsuperscript{131} asserting that the plain language of section 107(a) (4) (A) and (B) and section 101(25) authorizes a private party to be awarded the costs incurred in a cost recovery action.\textsuperscript{132} The dissent reasoned that a cost recovery action is included within the scope of "enforcement activities" of a private party because it would not "stretch the plain terms of the phrase 'enforcement activities' too far"\textsuperscript{133} and it is the "only 'enforcement activity[ies] he can conceivably conduct.'"\textsuperscript{134} Noting that the term "enforcement activities" often characterizes government prosecution, the dissent asserted that the term has other meanings, including

\begin{footnotesize}
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  \item \textsuperscript{126} \textit{Key Tronic}, 114 S. Ct. at 1966.
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} \textit{Id.} at 1968.
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Key Tronic}, 114 S. Ct. at 1968.
  \item \textsuperscript{131} \textit{Id.} (Scalia, J., dissenting).
  \item \textsuperscript{132} \textit{Id.} For a discussion of the use of plain language in statutory interpretation and its applicability to CERCLA, see supra notes 44-50 and accompanying text.
  \item \textsuperscript{133} \textit{Key Tronic}, 114 S. Ct. at 1969 (Scalia, J., dissenting).
  \item \textsuperscript{134} \textit{Id.} at 1968.
\end{itemize}
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the enforcement of private judgements and the enforcement of contractual obligations.\textsuperscript{135}

The dissent stated that the statutory text does not have to include the "magic phrase" specifically enumerating "attorneys' fees" to meet the requirements of explicitness required in \textit{Runyon}, because the costs of enforcement activities "naturally (and indeed primarily) include attorney's fees."\textsuperscript{136} Furthermore, the dissent rejected the majority's reasoning that the inclusion of recoverability of attorneys’ fees in two sections of the statute and the omission of it in others suggests deliberate congressional exclusion, because attorneys' fees are clearly included within "enforcement activities" of private parties.\textsuperscript{137}

\section*{IV. Critical Analysis of Key Tronic}

CERCLA was enacted to provide a uniformly prompt and effective cleanup of waste disposal sites throughout the nation, and private cost recovery actions are an important impetus to rapid remediation.\textsuperscript{138} Since these actions often generate sizeable legal fees in both litigation and non-litigation activities, the recoverability of these expenditures has become an important legal issue which has enormous financial impact.\textsuperscript{139} The uncertainty of conflicting federal circuit court decisions would precipitate needless delays in cost recovery and frustrate CERCLA's goals.\textsuperscript{140} Thus, the Supreme Court appropriately addressed the issue to establish a national standard and provide certainty in cost recovery actions under CERCLA.

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\textsuperscript{135} \textit{Id.} at 1969 (stating that "[w]e have called the private rights of action created by the Clayton Act 'vehicle[s] for private enforcement' of the law") (citing Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109 (1986)).

\textsuperscript{136} \textit{Key Tronic}, 114 S. Ct. at 1969 (Scalia, J., dissenting).

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Union Gas}, 491 U.S. at 21-22. To assist the Federal Government's efforts in the remediation of hazardous waste sites, Congress permitted private parties who voluntarily participate in cleanups to bring suit to recover costs from other PRPs. \textit{Id.}

\textsuperscript{139} See Virk, \textit{supra} note 10, at 1566. For further discussion of the financial impact of attorney fee recovery, see \textit{supra} notes 10-11 and accompanying text.

\textsuperscript{140} \textit{General Elec.}, 920 F.2d at 1422; \textit{Bolin}, 759 F. Supp. at 710 ("Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action."); see Jordan, \textit{supra} note 12, at 834-36 (commenting that recovery of attorneys' fees gives PRPs incentives to voluntarily initiate cleanups); see also Karen M. McGaffey, \textit{Denying Private Attorney Fee Recovery Under CERCLA: Bad Law and Bad Policy}, 17 U. Puget Sound L. Rev. 87, 98-100 (1993) (stating provisions which encourage initiation of voluntary cleanup are essential to attainment of CERCLA's goals); Kaplan, \textit{supra} note 48, at 280-81 (noting plaintiff's recovery of attorneys' fees could prevent prolonged delays by PRP in cost recovery actions).
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A. The American Rule and Requirement of Explicitness

The Supreme Court's decision in *Key Tronic* is largely based on the American Rule and statutory interpretation.\(^{141}\) In the analysis of recoverability of attorneys' fees incurred in prosecuting a private response cost recovery action, both the majority and the dissent claimed their rationale was consistent with the American Rule, which denies recovery of attorneys' fees incurred in litigation absent explicit authorization from Congress.\(^{142}\) Recovery under this rule is dependent upon the scope of the term "explicit," and both the majority and the dissent examined the plain language of the statute to determine if attorneys' fees are explicitly authorized in section 107.\(^{143}\) However, the dual interpretations of the identical statutory language effectuated diametrically opposing results.\(^{144}\) A strict interpretation of the explicitness required in *Runyon*, however, was consistent with the majority's denial of attorney fee recovery.\(^{145}\)

Invoking a disparate interpretation of the plain language of the statute and utilizing a similar analysis to that in *General Electric*,\(^{146}\) the dissent stated that the term "explicit" did not require a "magic phrase" expressly specifying "attorneys' fees."\(^{147}\) The dissent justified adherence to *Runyon* by the fact that CERCLA sections 107 and 101(25) both contain explicit authorization for the recovery of enforcement activity costs, which the dissent asserted "naturally" in-

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141. *Key Tronic*, 114 S. Ct. at 1964-68. The *Key Tronic* decision embodied much of the rationale encompassed by the United States' brief. The Respondent reasoned that *Key Tronic* should be denied recovery of attorneys' fees as response costs because, in *Alyeska*, the Court ruled that absent explicit statutory authorization, federal courts may not award attorneys fees to prevailing parties. Respondent's Brief at 6-7, *Key Tronic* v. United States, 114 S. Ct. 1960 (1994) (No. 93-376). However, under § 107 of CERCLA, there is no explicit authorization to award attorneys' fees in a cost recovery action brought by a private party. *Id.* at 10-11. Furthermore, in other sections of CERCLA, Congress used explicit language to authorize the award of attorneys' fees. *Id.* at 12-15. Although CERCLA authorizes recovery of response costs and defines "response" to include enforcement activities, a contribution action is not an enforcement action. *Id.* at 16-25.


143. *Id.* at 1965.

144. *Central Bank*, 114 S. Ct. at 1453 (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (commenting "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction").

145. See Virk, *supra* note 10, at 1563. The strict approach requires adherence to *Runyon* and *Alyeska* and a narrow interpretation of section 107(a) (4) (B) of CERCLA. Kaplan, *supra* note 48, at 274.

146. *General Elec.*, 920 F.2d at 1415.

cluded attorneys' fees. However, this rationale was based upon the dissent's determination that private cost recovery actions are included within the term "enforcement activities." This was a pivotal determination in the Key Tronic decision, because section 107 of CERCLA authorizes recovery for "necessary costs of response" and "response" is defined in section 101(25) as including "enforcement activities." If "enforcement activities" includes private cost recovery actions it would constitute explicit statutory authorization of cost recovery in such actions. Although CERCLA contains no definition of "enforcement activities," the dissent reasoned that the plain language interpretation incorporates a cost recovery action into the term "enforcement activities" because that is the only enforcement activity that a private party can "conceivably conduct."

The dissent also noted various private enforcement actions such as the enforcement of private judgments and enforcement of contractual obligations. The existence of these other meanings contradict the dissent's assertion that a cost recovery action is the only activity that a private party can conduct, and may be construed as evidence of the lack of explicitness required by the American Rule. Adding a degree of latitude without usurping the congressional function, the majority in Key Tronic held that the absence of specific language could be overcome by statutory intent. The Court found that the lack of congressional intent to award recovery of attorneys' fees in a private cost recovery action was evidenced by Congress' inclusion of two express attorneys' fee awards in other SARA amendments and the omission of such awards in section

148. Id.
149. CERCLA § 101(25), 42 U.S.C. § 9601(25). For further discussion of § 101(25) of CERCLA, see supra note 30 and accompanying text.
150. Key Tronic, 114 S. Ct. at 1968 (Scalia, J., dissenting).
151. Id. at 1969.
152. See Shapiro, supra note 54, at 951 (stating that a court might consider the application of a statute "not as a matter of 'statutory construction' but rather in light of the policy embodied in the statute"); see generally Virk, supra note 10.
153. Key Tronic, 114 S. Ct. at 1965; see Shapiro, supra note 54, at 993 (noting contextual interpretation may elucidate the intent); Popkin, supra note 46, at 868. Judge Learned Hand stated:

[It is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing . . . . But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Popkin, supra note 46, at 868.

154. CERCLA § 199(f), 42 U.S.C. § 9659(f). The awarding of attorneys' fees is expressly authorized in a suit brought by private citizens to enforce CERCLA. Id.
107 of CERCLA, which pertains to private cost recovery actions, and section 113(f), which expressly creates a cause of action for contribution.155

The "inclusio unius" canon of textual interpretation supports the Court's determination that it was the intent of Congress to exclude fee recovery.156 This reasoning is consistent with West Virginia University Hospitals157 and Central Bank,158 where the Court employed the rationale of not supplying by judicial interpretation that which Congress has omitted.159 Employing a narrow interpretation of plain meaning and requisite explicitness, the majority in Key Tronic stated that the inclusion of private cost recovery actions would "stretch the plain terms of the phrase 'enforcement activity' too far . . . ."160 The majority's restricted interpretation of the scope of the phrase "enforcement activities" is consistent with the confinement of judicial discretion.161 It is based on the interpretative doctrines of plain language162 and "narrow construction,"163 which prevent judicial trespass beyond legislative intent.

The Court's narrow interpretation of enforcement activities coupled with strict adherence to the explicitness requirements of the American Rule resulted in no infringement upon the discretion of the legislature and no erosion of the American Rule.164 If Con-

§ 106(b)(2)(E), 42 U.S.C. § 9606(b)(2)(E). In suits by the Attorney General, a party mistakenly ordered to pay response costs may obtain reimbursement for costs pursuant to 28 U.S.C. § 2412(a) and (d) which may include recovery of attorneys' fees. CERCLA § 106(b)(2)(E), 42 U.S.C. § 9606(b)(2)(E).


156. For a discussion of the "inclusio unus, exclusio alterius" canon of statutory interpretation, see supra note 55 and accompanying text.

157. 111 S. Ct. at 1138.

158. 114 S. Ct. at 1439.

159. Id. at 1452.

160. Key Tronic, 114 S. Ct. at 1967; see also General Elec., 920 F.2d at 1422. In General Elec., the court used similar, but varying language to express a conflicting holding: "it would strain the statutory language to the breaking point to read . . . [attorneys'] fees] out of the necessary costs." 920 F.2d at 1422.

161. See Easterbrook, supra note 46, at 63. For a discussion of judicial restriction, see supra note 47 and accompanying text.

162. For a discussion of the plain language doctrine, see supra notes 45-47 and accompanying text.

163. For a discussion of narrow judicial construction, see infra note 164.

164. See Popkin, supra note 46, at 881. Justice Scalia has written: "our jurisprudence abounds with rules of 'plain statement,' 'clear statement,' and 'narrow construction' designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional projections eliminated, or seemingly inequitable doctrines applied." Id. (citing Cipollone, 112 S. Ct. at 2633 (Scalia, J., concurring in part and dissenting in part)).
gress wants to establish recoverability of attorneys' fees, it may include specific authorization by amending the statute.165

B. Legislative History and Policy Considerations

In prior decisions, if the language of a statute lacked textual clarity or explicitness, the Court examined the related legislative history to determine congressional intent.166 Noting that the House Committee Report on SARA confirmed only EPA’s recovery of attorneys’ fees,167 the Court determined that statutory silence regarding the award of attorneys’ fees in private cost recovery actions manifested Congress’ intent to exclude them,168 and, therefore, refrained from the analysis of legislative history which has been found to be scarce and indefinite.169 Although various lower court decisions have stated that the recoverability of attorneys’ fees would have a positive impact on the achievement of CERCLA’s goals,170 in Key Tronic the Court did not directly address such policy considerations.171 However, the Court made reference to the FMC decision which stated that the desirability of fee recovery cannot override the express authorization required in the American Rule and that it is Congress, not the courts, that must make such a policy decision.172 The adoption of a broad interpretation of the statute, based on CERCLA’s remedial nature, must be tempered by the textual

165. FMC, 998 F.2d at 847. See Popkin, supra note 46, at 888 (stating that a “judicial decision to allocate law-making responsibility to the legislature makes sense when the legislature is aware of a technically complex or politically controversial issue”).

166. See, e.g., Blum, 465 U.S. at 896 (“Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.”).


169. Dedham Water Co., 805 F.2d at 1081 (stating that CERCLA’s legislative history was shrouded in mystery); see also Harvey, supra note 30, at 223 (“Since Congress hastily drafted CERCLA at the close of the ninety-sixth Congress, the legislative history is almost non-existent.”). For a discussion of CERCLA’s indefinite or contradictory legislative history, see supra notes 59 & 60 and accompanying text.

170. For a discussion of decisions that involved policy considerations, see supra notes 96-102 and accompanying text.

171. The Petitioner argued that the right of action under § 107 of CERCLA encourages prompt cleanup by providing for recovery of response costs. Petitioners' Brief at 7, Key Tronic (No. 99-376). Additionally, it stated that the award of attorneys' fees promotes CERCLA's goal of prompt cleanup. Id.

172. Key Tronic, 114 S. Ct. at 1967 n.13. In FMC the Tenth Circuit stated:
exactitude required by the American Rule.\textsuperscript{178} Regardless of whether the authorization of attorneys' fees would further the purposes of CERCLA, it is not the role of the judiciary to compensate for the congressional omission of explicitness.\textsuperscript{174}

Consistent with stringent adhesion to the American Rule and plain meaning textual interpretation, the Supreme Court has asserted the will of Congress as expressed in the textual language of this statute. However, the Court has not precluded the future availability of attorney fee recovery. Instead, the \textit{Key Tronic} decision has established a national standard of certainty which can be overridden by the legislature's specific authorization of the recoverability of attorneys' fees in an amendment to CERCLA.\textsuperscript{175}

C. Non-litigation Related Attorneys' Fees

The \textit{Key Tronic} decision established parameters for the recovery of non-litigation related attorneys' fees.\textsuperscript{176} Stating that the American Rule requires explicit statutory authorization only for attorneys' fees generated in litigation, the Court provided for the recovery of expenditures for non-litigation legal activity, if it is closely connected to the actual cleanup, and is a "necessary cost of response" under CERCLA section 107(a) (4) (B).\textsuperscript{177} This holding is consistent with CERCLA's goal of allocating costs of remediation to responsi-
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ble parties,178 but does not abridge the American Rule's restriction
on recovery of litigation fees.179

V. IMPACT

Prior to the Key Tronic decision, the federal courts' conflicting
decisions regarding litigation fee recovery led to inconsistent
awards of attorneys' fees.180 In Key Tronic, the Supreme Court estab-
lished a federal standard which denies private party recovery of at-
torneys' fees incurred in the litigation of a private cost recovery
action, and authorizes recovery of non-litigation fees if they are
closely connected with the actual clean-up and are a "necessary cost
of response" under CERCLA section 107.181 This decisive holding
will affect whether a party will decide to initiate an action, and the
manner in which it proceeds with litigation. The Key Tronic decision
affords a private party, who is considering commencement of a cost
recovery action, more certainty in regard to anticipated legal ex-
penditures. This certainty permits a private party to make a more
knowledgeable decision in pursuing response recovery. The poten-
tial recovery of litigation expenses could encourage private parties
to initiate a response action.182 Alternatively, the high cost of legal
representation, coupled with the certainty of non-recovery, may dis-
courage parties from bringing suit.183 The pending liability for an-
other party's litigation costs might encourage a PRP to consider an
efficient settlement, rather than engage in protracted litigation.

The legal fee recovery standard established in the Key Tronic
decision will help resolve pending litigation. The holding has al-
dready impacted several judicial determinations.184 In March 1994,
while awaiting the Court's decision in Key Tronic, the District Court
for the Eastern District of Virginia in Northwestern Mutual Life Insur-
ance Co. v. Atlantic Research Co.,185 deferred ruling on the question

178. For a discussion of the goal of assigning costs of remediation to respon-
sible parties, see supra note 3 and accompanying text.
180. For a discussion of conflicting court decisions, see supra notes 67-102
and accompanying text.
182. See Harvey, supra note 30, at 292 (noting attorney fee recovery is power-
ful incentive in initiation of response actions); Jones, supra note 10, at 420 (pos-
ting that Congress should amend CERCLA to include recovery of attorneys' fees,
thereby encouraging settlements and cleanups).
183. See McGaffey, supra note 140, at 98-99. For a discussion of the high costs
of legal representation, see supra notes 11-12 and accompanying text.
184. For discussion on the resolution of cases, see infra notes 186-89 and ac-
companying text.
of whether attorneys' fees associated with environmental studies constituted recoverable "response costs."186 In *McNabb v. Riley*,187 the Eighth Circuit followed *Key Tronic* and stated that recovery costs did not implicitly include attorneys' fees.188 Similarly, the Seventh Circuit denied recovery of attorneys' fees in a private party cost recovery action because they were not "necessary response costs" recoverable under CERCLA section 107(a)(4)(B) in *Akzo Coatings, Inc. v. Aiger Corp.*189

It is uncertain whether the *Key Tronic* decision will impede the primary goals of CERCLA. Proponents of attorney fee recovery have asserted that denial of recovery would not appropriately apportion costs to responsible parties.190 It is questionable whether allowing private parties to recover litigation costs would actually produce more rapid cleanups. The anticipation of reimbursement of attorneys' fees might encourage excessive litigation and result in increased legal fees and the exaggeration of actual costs.191 Also, the denial of litigation-related fees, coupled with the recovery of prelitigation expenses, might encourage private parties to focus on the research and documentation of other PRPs. The lack of recovery of attorneys' fees could deter extensive litigation and promote negotiated settlements because potential plaintiffs would be certain that they would be responsible for their litigation fees even if they prevailed. This would reduce the incidents of spurious litigation. Whether or not the goals of CERCLA would be encumbered by the denial of attorneys' fees, the *Key Tronic* Court determined that is not the role of the judiciary to expand CERCLA's statutory language to encompass private party recovery of attorneys' fees in private cost recovery actions.192 Congress may not have anticipated that the Court would have interpreted CERCLA as denying recovery of attorneys' fees,193 but the legislature may explicitly authorize statu-

186. *Id.* at 397.
187. 29 F.3d 1309 (8th Cir. 1994).
188. *Id.* at 1306.
189. 30 F.3d 761 (7th Cir. 1994).
190. *See* McGaffey, *supra* note 140, at 99. Under CERCLA, if the responsible parties are to assume all the costs of response, the prevailing litigants should recover their attorneys' fees. *Id.* The denial of recovery of attorneys' fees reduces incentives for initiation of private cleanup. *Id.; see also* Harvey, *supra* note 30, at 232.
191. *See* Virk, *supra* note 10, at 1567 (asserting existence of fee recovery initiates excess litigation regarding the amount of recovery).
tory recovery if it so desires. During the one-hundred and third session of Congress, both the Senate and the House of Representatives considered proposed bills reauthorizing CERCLA. The House version of the bill redefined the term “response” to explicitly include the recovery of attorneys’ fees when the action is initiated by the President, a State or an Indian Tribe. However, there is no express recovery of attorneys’ fees designated for private parties in a private cost recovery action.

Representative Lehman from California proposed a separate amendment which was incorporated as part of an en bloc amendment to be introduced on the floor of the House. This amendment would permit private parties to recover attorneys’ fees incurred in a private cost recovery action. There were some restrictions on this right of recovery. A private party seeking recovery must have first reached settlement with any potentially involved

194. See Popkin, supra note 46, at 888. For a discussion of congressional election to authorize recovery of attorneys’ fees in a private cost recovery action, see supra notes 165 & 173.

195. Superfund Reform Act, 103 H.R. 4916, 103d Cong., 2d Sess. (1994). This bill was introduced in the House of Representatives by Representative Al Swift of Washington. Superfund Reform Act, 103 S. 1834, 103d Cong., 2d Sess. (1994). This bill was introduced in the Senate by Senator Baucus of Montana.

196. 103 H.R. 4916 § 606(5)(C). The definitions of § 101(25) of CERCLA, pertaining to the terms “respond” and “response,” would have been amended “by striking ‘related thereto’ and inserting ‘(including attorneys’ fees and expert witness fees) and oversight activities related thereto when such activities are undertaken by the President, a State or Indian Tribe.’” Id.

197. Id.

198. Amendment to H.R. 3800, as reported (text of H.R. 4916), offered by Representative Lehman (September 12, 1994).

199. Id. This amendment explicitly authorizes the recovery of reasonable attorneys’ fees incurred in private recovery actions that have not reached final settlement before the date of enactment, stating the following:

(5) ATTORNEYS’ FEES IN CONTRIBUTION ACTIONS—(A) In any action under section 107(a) and this section brought by a private party to recover costs described in section 107(a) (4) (B), the following provisions apply:

(i) The attorney fee portion of such costs that is reasonable and incurred after the date of the enactment of this paragraph is recoverable in any such action—

(I) that is brought after the date of the enactment of this paragraph; or

(II) that is brought before the date of the enactment of this paragraph but that is not final of such date.

(ii) The attorney fee portion of such costs is not recoverable in any cost recovery action that is final as of the date of the enactment of this paragraph.

Id.
governmental entities, and a party could not obtain recovery from a de minimus contributor. Furthermore, if a party bringing the action rejects a settlement offer from a PRP, and the judgment contains an award smaller than the proffered settlement, attorneys' fees related to the action may not be recovered. However, Congress adjourned for elections prior to consideration of these bills and related amendments. The present session of Congress may have the opportunity to consider the reauthorization of CERCLA. At that time, the legislature may overturn the Key Tronic decision by an express award of attorneys' fees in private party cost recovery actions or it may affirm the Key Tronic decision by congressional inaction.

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200. Id. Recovery may not be obtained unless the following limitations are met:

(iii) The attorney fee portion of such costs is not recoverable by any person who has been identified as a potentially responsible party under this Act by the United States, a State, or and [sic] Indian tribe, and that has not either—

(I) resolved the person's liability to the United States, the State, or Indian tribe, where the United States, State, or Indian tribe is responsible for the response action at the facility; or

(II) agreed to perform a response action selected by the United States, State, or Indian tribe is responsible for the response action at the facility.

(iv) The attorney fee portion of such costs that is attributable to a person's defense of a judicial or administrative enforcement action commenced by the United States, a State or an Indian tribe is not recoverable by any person.

Id.

201. Id.

202. Amendment to H.R. 3800, as reported (text H.R. 4916). The amendment states that the following limitations apply to awards that have been preceded by rejected settlement offers:

(E) In any contribution action referred to in subparagraph (A), if—

(i) the person against whom the action is brought makes an offer of settlement to the person bringing the action,

(ii) such offer is not accepted, and

(iii) the judgment finally obtained is not more favorable to the person bringing the action than such offer of settlement, then the person bringing the action may not recover any attorneys' fees related to the action than such offer of settlement.

Id.

203. For discussion of the congressional option to authorize recovery of attorneys' fees in a private cost recovery action, see supra notes 165 & 173.