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# General Electric Co. v. Litton Industrial Automation Systems, Inc.: Are Attorney Fees Recoverable in CERCLA Private Cost Recovery Actions

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**General Electric Co. v. Litton Industrial Automation Systems, Inc.: Are Attorney Fees Recoverable in CERCLA Private Cost Recovery Actions?**

General Electric (GE) purchased a forty acre plot (the site) in Springfield, Missouri from Litton Industries, Inc.<sup>1</sup> Subsequently, GE contracted to sell nineteen acres of the site to Enterprise Park, a real estate concern that planned to develop the property for commercial use.<sup>2</sup> The plan stalled, however, when the Missouri Department of Natural Resources (MDNR) discovered that the owner of the site before Litton had dumped cyanide-based electroplating wastes, sludges, and other pollutants at the site.<sup>3</sup> Under threat of legal action from Enterprise Park,<sup>4</sup> the Environmental Protection Agency (EPA) and the MDNR, GE began its cleanup of the site.<sup>5</sup>

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1. General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1416 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1697 (1991). Litton acquired the site in 1965, when it merged with the previous owner, Royal McBee Corporation. *Id.* at 1416 n.3. Royal McBee had operated a typewriter plant on the site beginning in 1959. *Id.* Litton sold the site to General Electric in 1970. *Id.*

2. *Id.* GE contracted to sell the site to Enterprise Park in 1985. *Id.*

3. *Id.* The Royal McBee Typewriter Company had dumped wastes at the site from 1959 to 1962. *Id.*

4. *Id.* at 1417. In July 1985, when the MDNR placed the site on the state's Registry of Abandoned and Uncontrolled Hazardous Waste Sites of Missouri, Enterprise Park notified both GE and Litton that it intended to file CERCLA claims. *Id.* at 1416.

5. *Id.* at 1416-17. The facts are slightly more complex. In 1980, the Missouri Department of Natural Resources (MDNR) learned that wastes had been dumped at the site by Royal McBee Corp. in the early 1960s. *Id.* at 1416. The MDNR and GE jointly concluded in 1981 that the dumping posed no dangers of groundwater contamination. *Id.* In 1984, GE contracted to sell the site to Enterprise Park. *Id.* In 1985, the EPA, motivated by findings made by another state health agency, the Missouri Department of Health (MDOH), declared the results of the 1981 study erroneous, and ordered Missouri to enforce the site's cleanup. *Id.* at 1416-17. In December, 1985, GE entered into a settlement with Enterprise Park under which GE agreed to assume liability for the cleanup. *Id.* at 1417. In early 1986, GE, the MDNR, and Enterprise Park entered into a Consent Decree providing for the development and implementation of a cleanup plan for the site. *Id.* The Consent Decree required any cleanup to be "consistent with the National Contingency Plan," EPA Superfund programs, and required MDNR approval of all actions. *Id.* GE hired an independent contractor, OH Materials Company, to investigate cleanup options. *Id.* GE chose excavation as the most effective response ac-

GE brought suit against Litton under the CERCLA<sup>6</sup> statute to recover its response costs<sup>7</sup> for cleaning up the site and the attorney fees it incurred in bringing the claim.<sup>8</sup> The federal district court ordered Litton to pay GE \$940,000 as reimbursement for cleanup costs.<sup>9</sup> The court also ruled that CERCLA permits plaintiffs to recover attorney fees and ordered Litton to pay GE \$419,000 in attorney fees and expenses.<sup>10</sup> In December 1990, the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision.<sup>11</sup>

*General Electric* raises the question of whether private plaintiffs may recover attorney fees in cost recovery actions under CERCLA. Attorney fees sometimes exceed cleanup costs<sup>12</sup> and therefore assume vast importance in private cost recovery actions.<sup>13</sup> Until the Eighth Circuit's decision in *General Electric*, however, no federal appellate court had ruled on the validity of awarding attorney fees in a private cost recovery ac-

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tion, although it was the most costly method suggested by OH Materials. *Id.* Excavation began at the site on October 13, 1986, and continued at selected intervals until completed in December 1987. *Id.* During the course of the cleanup, GE unearthed four large drums, one of which contained "extremely hazardous substances." *Id.* GE disposed of the drums and the contaminated soil as hazardous waste. *Id.* In early 1988, the MDNR approved the cleanup of the site. *Id.*

The United States District Court awarded GE \$940,843.23 for the cost of the cleanup. *General Elec. Co. v. Litton Business Sys., Inc.*, 715 F. Supp. 949, 963 (W.D. Mo. 1989), *aff'd sub nom. General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1697 (1991). The court subdivided the amount into \$84,182.39 on the initial study, \$5,100 in "utility costs," and \$851,560.84 for the cleanup. *Id.*

6. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

7. *General Elec.*, 715 F. Supp. at 952.

8. *Id.* at 958-59.

9. *Id.*

10. *General Elec.*, 920 F.2d at 1417.

11. *Id.* at 1416.

12. The Eighth Circuit noted that "[t]he litigation costs could easily approach or even exceed the response costs . . ." *Id.* at 1422. The cleanup procedures mandated by the SARA amendments to CERCLA "would drive the cost of a superfund cleanup from its present average of \$9 million per site to between \$30 million and \$60 million per site." 17 Env't Rep. (BNA) 778-79 (Sept. 26, 1986). When long term costs, such as groundwater cleanup, are included, the cost estimate rises to between \$300 million and \$600 million. *Id.* The completion of the Superfund program is estimated to cost as much as \$100 billion. H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 55, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2838 [hereinafter H.R. REP.].

13. See *General Elec.*, 920 F.2d at 1417. GE's attorney fees, at \$419,000, were nearly half its response costs, which totalled over \$940,000. *Id.*

tion.<sup>14</sup> Because of the lack of other appellate case law on the issue, the *General Electric* decision likely will reverberate through all CERCLA litigation as the highest judicial word on attorney fees. Further, its allowance of attorney fees will encourage defendants either to settle their claims instead of litigating, to settle on less favorable terms, or to risk huge penalties should they lose at trial.<sup>15</sup>

This Comment argues that *General Electric* is inconsistent with prior law and ignores important statutory language and policy arguments. Part I traces the development of attorney fees and CERCLA cost recovery action jurisprudence. Part II describes the holding and reasoning of the Eighth Circuit's *General Electric* opinion. Part III critiques the *General Electric* opinion and argues that the Eighth Circuit failed to consider crucial arguments based on CERCLA's statutory language and underlying policies. Finally, this Comment proposes an interpretation that respects the statutory text and better satisfies the objectives of CERCLA.

## I. ATTORNEY FEES UNDER CERCLA

### A. THE AMERICAN RULE

The American Rule requires each party to bear its own costs of litigation, including attorney fees.<sup>16</sup> The rule differs from the traditional English practice of awarding attorney fees to the prevailing party.<sup>17</sup> Despite vigorous scholarly criticism,<sup>18</sup>

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14. *Id.* at 1422 n.10.

15. See *infra* notes 166-68 and accompanying text. Defendant Litton's attorney Bruce Kauffman, of the Philadelphia firm Dilworth, Paxson, Kalish & Kauffman, commented that the court's decision will have "'consequences more dramatic than the court recognizes . . . [and] will encourage a great deal of this litigation' that otherwise may not have been brought." 54 Fed. Cont. Rep. (BNA) 885, 885 (Dec. 24, 1990).

16. The American Rule was purportedly established in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796). The Supreme Court noted in *Arcambel* that "[t]he general practice of the United States is in opposition to [the awarding of attorney fees]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Id.* For a discussion on the American Rule's origins, see Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 15 (1984).

17. The English practice of awarding attorney fees to successful plaintiffs dates to 1278. Statute of Gloucester, 1278, 6 Edw. 1, ch. 1. The current practice in England is to conduct hearings before special "taxing masters" to determine an appropriate award of attorney fees. See Stoebeuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202, 204-05 (1966). A majority of other nations with litigation systems similar to that of the United

the Supreme Court has upheld the rule on numerous occasions,<sup>19</sup> defending it with three principal rationales.<sup>20</sup> First, because the outcome of most litigation is uncertain, parties should not be penalized simply for participating in a lawsuit.<sup>21</sup> In addition, an award of attorney fees to a prevailing party might discourage the poor from instituting suit.<sup>22</sup> Finally, the added administrative and financial expense involved in determining the amount of attorney fees would excessively burden the judicial system.<sup>23</sup>

Because of the American Rule's arguably harsh effects,<sup>24</sup> both common law<sup>25</sup> and statutory exceptions long have existed

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States allow some amount of fee shifting. However, foreign practice could reflect substantial differences in legal costs, predictability of outcome, and legal culture. For a broader discussion of European practice, see Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 55-59 (1984).

18. See McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 638-43 (1931); Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Award Act*, 80 COLUM. L. REV. 346, 348 (1980); Note, *Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 GA. L. REV. 307, 312 n.25 (1984) (citing Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 792-94 (1966)); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 648-55 (1974).

19. See e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269-71 (1975); *Hall v. Cole*, 412 U.S. 1, 4-9 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939).

20. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

21. *Id.*

22. *Id.*

23. *Id.*

24. See *supra* note 18.

25. Courts have used their inherent equity powers to fashion two broad exceptions to the American Rule: the bad faith exception and the common fund or common benefit exception. Courts invoke the bad faith exception to punish litigants who abuse the judicial process by acting in "bad faith, vexatiously, wantonly, or for oppressive reasons." *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). See generally Comment, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319 (1977) (discussing bad faith exception). During the 1960s, courts expanded the bad faith exception to include instances where defendants had not directly abused the judicial process, but simply refused to comply with a federal statute, forcing a private citizen to institute legal proceedings to vindicate her constitutional or statutory rights. See *Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963).

Courts used the common fund exception not to punish evil litigants, but to prevent unjust enrichment. The exception rested on the belief that "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van*

to the Rule.<sup>26</sup> In addition to these traditional exceptions, courts before 1975 occasionally awarded fees on the "private attorney general" rationale.<sup>27</sup> In *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>28</sup> however, the Supreme Court resoundingly rejected the practice of awarding fees in the absence of statutory authorization.<sup>29</sup> After *Alyeska*, courts will award attorney fees in statutorily-based causes of action only if the common law allows fees<sup>30</sup> or if a statute specifically authorizes them.<sup>31</sup> Congress reacted to *Alyeska* by passing a series of explicitly worded fee provisions in statutes concerning such areas, including civil rights and the environment.<sup>32</sup> In addition, Congress passed the Equal Access to Justice Act, which allows private plaintiffs to

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Gemert, 444 U.S. 472, 478 (1980). Courts addressed the problem by permitting a fee award to a plaintiff who successfully sued to protect a fund in which he and others had a common monetary interest. *Id.* For the origin of the "common fund" doctrine, see *Trustees v. Greenough*, 105 U.S. 527, 532-37 (1881).

26. Over 100 federal statutes authorize fee awards. For a list of these statutes, see *Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting).

27. The rationale behind the "private attorney general" doctrine was that the plaintiff acted as a private attorney general, vindicating public rights. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). Courts applied the doctrine most commonly in civil rights cases, where successful plaintiffs arguably benefitted large classes of similarly situated persons and furthered public policies. *Id.*

28. 421 U.S. 240 (1975).

29. *Id.* at 269-71.

30. Few of the traditional common law exceptions have much general application today. Courts may award fees if a contract calls for payment of attorney fees to the fee claimant. See, e.g., *Peter Fabrics, Inc. v. S.S. "Hermes,"* 765 F.2d 306, 316 (2d Cir. 1985) (*dicta*). In addition, courts may award attorney fees as an item of damages in malicious prosecution suits. See, e.g., *Kerr v. City of Chicago*, 424 F.2d 1134, 1141 (7th Cir. 1970) (allowing civil rights plaintiff to recover attorney fees incurred in a wrongful criminal prosecution). Last, when a defendant's tortious conduct or breach of contract causes the plaintiff to litigate with a third party, the defendant may be liable for attorney fees generated. See, e.g., *Mutual Fire, Marine & Inland Ins. Co. v. Costa*, 789 F.2d 83, 88-90 (1st Cir. 1986). However, the primary reasons a court may grant a fee award today remain litigant misconduct, the common fund exception, and an authorizing statute. See Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 439-45.

31. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 267-71 (1975); see Dobbs, *supra* note 30, at 439. A few states, including California and Minnesota, still make fee awards under state law on the private attorney general rationale. See *Serrano v. Priest*, 20 Cal. 3d 25, 38-48, 569 P.2d 1303, 1312-15, 141 Cal. Rptr. 315, 420-27 (1977); *Senior Citizens Coalition v. Minnesota Pub. Utils. Comm'n*, 355 N.W.2d 295, 302 n.10 (Minn. 1984).

32. See, e.g., 16 U.S.C. § 1540(g) (1988) (citizen suit provision allowing attorney fee recovery for commencing suit to protect an endangered species); 42 U.S.C. § 5412(b) (1988) (Manufactured Home Standards provision allowing attorney fee recovery to plaintiff suing noncomplying builders); 42 U.S.C. § 6971(c) (1988) (Solid Waste Disposal Act provision allowing attorney fee re-

recover attorney fees in all actions brought under a federal statute against the United States.<sup>33</sup>

## B. PRIVATE COST RECOVERY ACTIONS UNDER CERCLA

Sensing heightened public anxiety over improper hazardous waste disposal<sup>34</sup> and concerned about the lack of common law remedies for toxic waste damage,<sup>35</sup> Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>36</sup> in 1980. Congress equipped CERCLA with a wide array of remedies to deal with hazardous dumpsites, including injunctive relief against active polluters and strict liability for waste discharge; in addition, Congress allowed innocent private and government plaintiffs to recover costs expended in cleanups.<sup>37</sup> Due to its hasty passage, CER-

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covery for whistleblowing employees). All these sections provide explicitly for attorney fees.

33. The principal exception to the American Rule is the Equal Access to Justice Act, which authorizes the recovery of attorney fees in actions brought against the United States under any statute. See 28 U.S.C. § 2412(b) (1988). Significantly, the Act will not apply to most cost recovery actions, because the government is usually not the defendant. The Act allows a prevailing plaintiff who is either an individual whose net worth is less than \$2 million, or a corporation whose net worth is less than \$7 million to collect attorney fees from the United States in a suit where the court finds the government's position is not substantially justified. See Carbone, *The Misguided Application of the Traditional Fee Doctrine to the Equal Access to Justice Act*, 26 B.C.L. REV. 843, 872-73 (1985).

34. In 1976, the Love Canal disaster in Niagara Falls, New York, brought national recognition to the hazards of improper waste disposal. 1 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, at 700 (M. Reisch ed. 1983). In 1977, Senator Jennings Randolph of West Virginia, responding to public outrage, began a study of the problem that culminated in congressional passage of CERCLA. *Id.*

35. See generally Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859 (1981) (discussing inadequacies of pre-CERCLA common law remedies for toxic waste caused damage); Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1058-65 (1981) (discussing common law remedies for toxic waste damage); Comment, *Superfund: Conscripting Industry Support for Environmental Cleanup*, 9 ECOLOGY L.Q. 524, 532-35 (1981) (discussing pre-CERCLA common law remedies for toxic waste damage).

36. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

37. CERCLA mandates the reporting of any release of a hazardous substance. 42 U.S.C. §§ 9601-9603 (1988). The Act empowers the President to take all necessary steps to effect the disposal and removal of hazardous waste. *Id.* § 9604. CERCLA goes so far as to authorize the permanent relocation of indi-

CLA is rife with ambiguities<sup>38</sup> that provide a fertile source of litigation.

CERCLA contains dual remedies for the cleanup of hazardous waste and the corresponding allocation of "response costs."<sup>39</sup> First, CERCLA established the Superfund,<sup>40</sup> which provides financial resources for governmental response to those hazardous waste sites deemed to create the most imminent threat to public health.<sup>41</sup> In addition, CERCLA allows governmental entities and parties faced with the cleanup of a hazardous situation to recover the costs of the operation from the polluters.<sup>42</sup>

CERCLA provides for two distinct causes of action whereby plaintiffs may recover their cleanup expenditures. A state or local government, or the EPA may sue a polluting party under section 107(a)(4)(A) for cleanup costs.<sup>43</sup> Alterna-

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viduals when a health assessment shows a significant risk of health danger through exposure to a toxic substance. *Id.* § 9604(i)(11). See generally 1A F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02(1) (1990) (discussing numerous avenues of relief provided by CERCLA).

38. See generally F. GRAD, *supra* note 37, § 4A.02(2)(a) (discussing hurried manner in which Congress passed CERCLA). CERCLA was considered on December 3, 1980, "in the closing days of the lame duck session of an outgoing Congress." *Id.* It was passed after a limited debate, and under a rules suspension allowing for no amendments. *Id.* Thus, "[f]aced with a complicated bill on a take-it or leave it basis, the House took it, groaning all the way." *Id.* The draft eventually adopted did not undergo technical revisions due to sponsors' fears that any delay would destroy the wavering coalition that supported its passage. See *id.* § 4A.02(2)(g).

39. See 42 U.S.C. §§ 9607, 9611 (1988) (Congress provided Superfund with governmental cleanup and liability provisions for private cleanup costs allocation). "Response costs" is simply CERCLA's term for costs incurred in a cleanup. *Id.* § 9601(25).

40. *Id.* § 9611(p). The Hazardous Substance Response Fund, commonly called the "Superfund," originally allocated \$1.6 billion in federal funds to finance government cleanup of hazardous substances. Bulk Distrib. Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1442 (S.D. Fla. 1984).

41. See *supra* note 40.

42. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982); see also 42 U.S.C. § 9607 (1988).

43. 42 U.S.C. § 9607(a) is central to enforcement of CERCLA. It provides for the assignment of liability to clearly designated classes of persons. These persons are:

- (1) the owner and operator of a vessel or facility;
- (2) any person who at the time of disposal of any hazardous substance owned or operated a facility at which such hazardous substances were disposed of;
- (3) any person who by contract or 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,

tively, a private party may sue a responsible party under section 107(a)(4)(B) for cleanup costs that the private party has incurred.<sup>44</sup> The latter is termed a "private cost recovery action."<sup>45</sup>

CERCLA specifically permits the federal government to recover its attorney fees incurred in enforcement actions.<sup>46</sup> Private plaintiffs, however, may recover "necessary" costs of response consistent with the National Contingency Plan.<sup>47</sup> Because of the language's ambiguity, it remains unclear whether private parties may recover attorney fees under the rubric of "necessary response costs."<sup>48</sup>

### C. RECOVERY OF ATTORNEY FEES IN PRIVATE COST RECOVERY ACTIONS: DIVIDED COURTS

Until *General Electric*, no Circuit Court of Appeals had addressed the issue of whether CERCLA permits prevailing private litigants to recover their attorney fees.<sup>49</sup> Those federal district courts that addressed the issue were split. More than half of the district courts faced with the attorney fees issue held that attorney fees are per se unrecoverable as private litigant response costs.<sup>50</sup> The remaining courts held, as in *General*

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at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances and

- (4) any person who accepts or accepted any hazardous substances for transport for disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or threatened release of a hazardous substance which causes the incurrence of response costs.

42 U.S.C. § 9607(a) (1988).

44. *Id.* § 9607(a)(4)(B).

45. *Id.*; see also *New York v. Exxon Corp.*, 633 F. Supp. 609, 615-16 (S.D.N.Y. 1986) (explaining definition and procedural requirements of private cost recovery action).

46. CERCLA provides, in pertinent part: "[T]he President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." 42 U.S.C. § 9604(b) (1988).

47. *Id.* § 9607(a)(4)(B); see also *infra* note 76 (describing National Contingency Plan).

48. See *infra* notes 49-52 and accompanying text.

49. *General Elec. Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1422 n.10, *cert. denied*, 111 S. Ct. 1697 (1991).

50. See *New York v. SCA Servs.*, 754 F. Supp. 995, 1000 (S.D.N.Y. 1991); *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990); *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, slip op. at 5-6 (E.D. Pa. Apr. 23, 1990) (WESTLAW, Allfeds database); *Mesiti v. Microdot, Inc.*, 739 F. Supp. 57,

*Electric*, that private litigants may recover attorney fees.<sup>51</sup> Only one federal district court took a middle approach, holding that attorney fees are partially recoverable to the extent that they correspond to congressional intent behind the statutory definition of "response costs."<sup>52</sup> These courts have differed in their interpretation of CERCLA's statutory language, legislative silence, and the policies underlying CERCLA's private cost recovery action provisions.

# 1. Malleable Statutory Language: Definition of Response Costs

Section 101(25) defines "response costs" to include "remedy, remedial action, all such terms . . . includ[ing] *enforcement activities related thereto*."<sup>53</sup> Congress amended section 101 in 1986 to include the italicized language,<sup>54</sup> and the section, which provides definitions for the entire Act, applies to both government and private plaintiffs.<sup>55</sup> A number of courts have in-

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62-63 (D.N.H. 1990); *Regan v. Cherry*, 706 F. Supp. 145, 150 (D.R.I. 1989); *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 708 (D.N.J. 1988); *Juniper Dev. Group v. Kahn* (*In re Hemingway Transport*), 108 B.R. 378, 378 (Bankr. D. Mass. 1989).

51. *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 949-52 (C.D. Cal. 1990); *Shapiro v. Alexanderson*, 741 F. Supp. 472, 480 (S.D.N.Y. 1990); *General Elec. Co. v. Litton Business Sys., Inc.*, 715 F. Supp. 949, 958-59 (W.D. Mo 1989), *aff'd sub nom. General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1697 (1991); *Lykins v. Westinghouse Elec. Corp.*, 18 E.L.R. 21498, 21500 (E.D. Ky. 1988) (*dicta*).

52. *BCW Assoc. v. Occidental Chem. Corp.*, No. 86-5947, slip op. at 12-15 (E.D. Pa. Sept. 29, 1988) (WESTLAW, Allfeds database).

53. 42 U.S.C. § 9601(25) (1988) (emphasis added).

54. Congress realized soon after the passage of CERCLA that toxic wastes posed a greater problem than they had anticipated in 1980, and accordingly enacted a five year amended extension of the CERCLA program, the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (amending various sections of 42 U.S.C. §§ 9601-9675 (1988)). SARA provided an additional \$8.5 billion for the fund. 42 U.S.C. § 9607 (1988). The new fund was called the Hazardous Substances Superfund, and it is a continuation of the Hazardous Substances Response Trust Fund established by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 221, Pub. L. No. 96-510, 94 Stat. 280, *repealed by* Act of Oct. 17, 1986, § 517(c)(7), 100 Stat. 1774. SARA also attempted to provide a more equitable distribution of cleanup responsibility. *See Note, Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1471-73 (1989). SARA created an innocent landowner defense to liability. 42 U.S.C. § 9601(35)(A) (1988). SARA also provided for a right to contribution for potentially responsible parties. *Id.* § 9613(f)(1).

55. 42 U.S.C. § 9601 (1988) is the "Definitions" section of the CERCLA Act, and, as such, presumptively applies to the entire Act.

cluded attorney fees in a plain meaning interpretation of "enforcement activities."<sup>56</sup> One court reasoned that any other construction of "enforcement activities," would render the phrase meaningless,<sup>57</sup> because the enforcement role of private parties under CERCLA is limited to bringing suits to compel cleanup and recover costs.<sup>58</sup>

Other courts have rejected this construction of the statute, holding that the 1986 addition of the "enforcement activities" language to CERCLA merely clarifies the EPA's authority to recover its legal fees and enforcement costs.<sup>59</sup> In addition, these courts posit that a private cost recovery action is not an "enforcement action," because only the government can "enforce" a statute; hence, private plaintiffs do not incur "enforcement costs" as contemplated in CERCLA.<sup>60</sup>

Some courts have denied recovery of attorney fees by private parties on the premise that, had Congress wanted private parties to recover attorney fees, it could have authorized such recovery explicitly in the language of CERCLA.<sup>61</sup> For example, section 104 of the Act specifically allows the President or the EPA to recover its attorney fees. Section 310, added in the 1986 amendments, authorizes private *citizen suit* plaintiffs who bring actions to compel the government to perform its mandatory duties under CERCLA<sup>62</sup> to recover attorney fees.<sup>63</sup>

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56. *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 950-51 (C.D. Cal. 1990).

57. *Id.* at 951.

58. *Id.*

59. *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, slip op. at 6 (E.D. Pa. Apr. 23, 1990) (WESTLAW, Allfeds database).

60. *Id.* The *Fallowfield* court based its decision in part on the earlier holding to this effect in *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 707-08 (D.N.J. 1988).

61. As the court noted in *Regan v. Cherry*, 706 F. Supp. 145 (D.R.I. 1989), "[i]f Congress had intended to permit citizens seeking response costs to recover their attorney fees, it would have simply amended sec. 107 to allow the recovery of these litigation costs." *Id.* at 149; accord *Fallowfield*, slip op. at 5-6; *T & E Indus.*, 680 F. Supp. at 707-08.

62. See 42 U.S.C. § 9659(a) (1988). Citizen suits are undertaken by private plaintiffs to "protect human health and the environment or both." H.R. REP., *supra* note 12, pt. 5, at 81, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 3204. Congress installed the citizen suit provision in recognition that before 1986, only CERCLA and the Federal Fungicide, Insecticide and Rodenticide Act (FIFRA) did not contain such provisions. *Id.* at 83, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 3206. Congress sought to encourage two main purposes with the citizen suit provision, namely, "encouraging diligent Federal enforcement of environmental statutes" and "locating and taking actions against violators of these Acts." *Id.*

63. *Regan*, 706 F. Supp. at 150. 42 U.S.C. § 9659, the CERCLA citizen's

There is no corresponding provision in section 107, the provision that allows private plaintiffs to bring cost recovery actions.<sup>64</sup> Focusing on this legislative silence, a number of courts have concluded that such silence, by negative implication, suggests that a private party may not recover attorney fees.<sup>65</sup> These courts emphasize that when Congress thoroughly overhauled CERCLA in the 1986 amendments, it easily could have inserted an explicit provision authorizing courts to award attorney fees in private cost recovery actions.<sup>66</sup> In addition, courts denying recovery of attorney fees have focused on section 107's different language when describing costs the government and private parties may recover. For example, the federal government, or a state, can recover "all costs . . . not inconsistent with the national contingency plan"<sup>67</sup> under section 107(a)(4)(A). In contrast, private plaintiffs can recover only "necessary costs of response . . . consistent with the national contingency plan"<sup>68</sup> under section 107(a)(4)(B). Thus, Congress may have intended to allow private plaintiffs a more narrow measure of recovery than the government.<sup>69</sup>

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suit provision, permits a plaintiff to recover attorney fees in an action brought against EPA to perform a mandatory duty under CERCLA. It provides, in pertinent part: "(f) Costs. The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate . . . ." 42 U.S.C. § 9659(f) (1988).

64. *Regan*, 706 F. Supp. at 150; see also Appellant's Brief at 42, General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir. 1990) (No. 89-2845), cert. denied, 111 S. Ct. 1697 (1991).

65. Reply Brief of Defendants at 2, *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, slip op. (E.D. Pa. Apr. 23, 1990) (WESTLAW, Allfeds database).

66. *Regan v. Cherry*, 706 F. Supp. 145, 149-50 (D.R.I. 1989). The court in *Regan* noted:

Plaintiffs' argument is unconvincing. If Congress had intended to permit citizens seeking response costs to recover their attorney fees, it would simply have amended sec. 107 to allow the recovery of these litigation costs. SARA was a comprehensive overhaul of CERCLA. Therefore, it would have been a simply [sic] matter to amend sec. 107 to allow recovery of attorney fees.

*Id.*

67. 42 U.S.C. § 9607(a)(4)(A) (1988).

68. *Id.* § 9607(a)(4)(B).

69. Defendant's Memorandum of Points and Authorities at 14, *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990) (No. 89-4468). "In short, Congress clearly intended to restrict the scope of a private plaintiff's recovery under § 107. Attorney's fees are not 'necessary' response costs and therefore should not be recoverable." *Id.* Defendants made the identical argument in *Fallowfield*:

If Congress intended private litigants to be able to recover their attor-

## 2. Policy Rationales

A number of courts have reasoned that Congress passed CERCLA to achieve broad remedial goals, and that awarding attorney fees to prevailing plaintiffs furthers these purposes.<sup>70</sup> These courts contend that awarding attorney fees advances the principal goals of CERCLA, namely "the prompt clean-up of hazardous waste sites and the imposition of all costs of responding to the waste on the responsible party."<sup>71</sup> Furthermore, if courts refuse to award attorney fees, they may discourage private parties who cannot bear large litigation costs from bringing cost recovery actions.<sup>72</sup> Indeed, courts have hinted that such a refusal might discourage hazardous waste defendants from negotiating settlements, knowing that the threat of protracted litigation will discourage plaintiffs from pressing their claims.<sup>73</sup>

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ney's fees under CERCLA, it would have included that item of relief in the definition of response costs. Instead, it made a reasonable distinction allowing the EPA to recover a broader measure of damages under CERCLA than private litigants.

Reply Brief of Defendants at 2, *Fallowfield* (No. 89-8644).

70. *Pease & Curren*, 744 F. Supp. at 957; *General Elec. Co. v. Litton Business Sys., Inc.*, 715 F. Supp. 949, 959 (W.D. Mo. 1989), *aff'd sub nom.* *General Elec. Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1697 (1991).

71. Brief of Plaintiff-Appellee at 46, *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990) (No. 89-2845), *cert. denied*, 111 S. Ct. 1697 (1991).

72. *Id.* GE argued that "[i]t would be counterproductive to [CERCLA's] goals to discourage voluntary private responses by forcing parties to bear their own attorney fees, which often can be a significant portion of response costs." *Id.*; see, e.g., *NAACP v. Allen*, 340 F. Supp. 703, 710 (M.D. Ala. 1972); Comment, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALBANY L. REV. 148, 160 (1981) (discussing the need for attorney fee provisions to enable indigent claimants to bring suit).

73. See *supra* note 72. GE argued on appeal in front of the Eighth Circuit that "[i]t is also counterproductive to CERCLA's goals to encourage parties who disposed of hazardous wastes (such as Litton) to litigate every conceivable issue in a cost recovery action, secure in the knowledge that the only risk they face is the need to pay clean-up costs if their defense is unsuccessful." Brief of Plaintiff-Appellee at 46, *General Elec.* (No. 89-2845); see also *Lyden v. Howerton*, 731 F. Supp. 1545, 1554 (S.D. Fla. 1990) (discussing similar rationale behind the attorney fees provision in the EAJA). See, for example, *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1986), where the Court notes that "whatever the risk of winning or losing in a specific case might be, a fee award should be informed by the statutory purpose of making it possible for poor clients with good claims to secure competent help." *Id.* at 730-31.

## II. GENERAL ELECTRIC: THE EIGHTH CIRCUIT'S OPINION

*General Electric* represents the first United States Court of Appeals decision on whether a private party may recover attorney fees under CERCLA. Before deciding the attorney fees issue, the Eighth Circuit addressed a number of preliminary issues. First, the *General Electric* court found that Litton caused General Electric to incur response costs.<sup>74</sup> Litton failed to satisfy any of the narrowly drawn statutory defenses.<sup>75</sup> Next, the court held that General Electric's response actions were consistent with the National Contingency Plan.<sup>76</sup> The Eighth Circuit rejected Litton's argument that GE claimed non-

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74. *General Elec.*, 920 F.2d at 1418. Litton argued that General Electric cleaned up the site to avoid suit from Enterprise Park, with which it had contracted to sell the land. *Id.* at 1417-18. Thus, the desire to avoid suit, and not Litton's release "caused" the cleanup. *Id.* at 1418. The Eighth Circuit rejected this unlikely argument, noting that CERCLA prescribes strict liability for parties who effect a release, subject only to statutorily enumerated defenses. *Id.* Litton had "effected" the release because it had merged with Royal McBee, the corporation who actually dumped waste on the property. *Id.* at 1417-18.

75. *Id.* at 1418. A CERCLA defendant's only statutory defenses require the defendant to prove affirmatively that the release was caused wholly by (1) an act of god; (2) an act of war; or (3) a third party whose actions were not foreseeable by the defendant, who exercised due care with regard to the hazardous substance. 42 U.S.C. § 9607(b) (1988). In addition, the third party must not have been an agent or employee of the defendant, or have entered into a contractual relationship with the defendant. *Id.* Thus, a majority of courts do not recognize equitable defenses to CERCLA liability. *See, e.g.,* United States v. Stringfellow, 661 F. Supp. 1053, 1061-62 (C.D. Cal. 1987). *But see* United States v. Mottolo, 695 F. Supp. 615, 626-29 (D.N.H. 1989) (holding equitable defenses not precluded, but refusing to find estoppel, or release and waiver).

76. *General Elec.*, 920 F.2d at 1418-20. EPA compiles a list of all hazardous waste dumps, termed the National Priorities List, as part of the National Contingency Plan. *See* 42 U.S.C. § 9605(a)(8)(b) (1988). EPA evaluates the dump sites on a set of enumerated criteria to determine the threat each site poses to the public. *Id.* EPA then creates a timetable for the clean up of the sites. *Id.* In order to reach this question, the court had to make a preliminary determination classifying the cleanup as either a *remedial* or *removal* action. *General Elec.*, 920 F.2d at 1419-20. A remedial action involves a permanent solution to a hazardous waste problem. *Id.* A removal action is intended as a temporary measure. *Id.* Despite the permanent nature of the response in this case, the Eighth Circuit upheld the lower court's finding that GE conducted a removal action. *Id.*

The court found that GE had excavated the site, and further noted that "excavation" is included within the enumerated list of "remedial action" activities under CERCLA § 101(24), and not under the similar list for "removal actions" listed under § 101(23). *Id.* at 1420. Although the cleanup was permanent, it took little over a year and did not seem too time consuming to be a remedial action. *Id.*

necessary expenses as "necessary costs of response."<sup>77</sup> Although the court recognized that GE's cleanup had the added effect of making the site available for sale, it found no evidence that GE made excessive improvements unrelated to compliance with the state-imposed toxic chemical standards.<sup>78</sup>

On the issue of GE's demand for attorney fees, Litton argued that CERCLA did not contain the explicit congressional authorization required under *Alyeska*<sup>79</sup> for a court to award attorney fees to a prevailing party.<sup>80</sup> The Eighth Circuit rejected this assertion, relying on the language in CERCLA that allows a plaintiff to recover "necessary costs of response."<sup>81</sup> Noting that CERCLA section 101(25) defines "response" to include "enforcement activities related thereto,"<sup>82</sup> the court held that private parties' lawsuits amount to enforcement activities under CERCLA.<sup>83</sup> In analyzing the statutory language, the Eighth Circuit stated that "it would strain the statutory language to the breaking point to read [attorney fees] out of the 'necessary costs' that section 107(a)(4)(B) allows private parties to recover."<sup>84</sup> Significantly, the Eighth Circuit did not examine the legislative history of section 107(a)(4)(B) in its opinion.<sup>85</sup> Finally, the court reasoned that its holding would further the public policy goals of a prompt cleanup of hazardous waste sites and the imposition of all cleanup costs on the responsible

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77. *Id.* at 1421. Litton argued that GE incurred some of its claimed costs of response in improving the property simply to increase the profit on its sale. *Id.* The court began by remarking that GE's cleanup had to comport with state-imposed standards, which had been promulgated by the Missouri Department of Natural Resources ("MDNR"). *Id.* MDNR supervised the cleanup at all stages and eventually pronounced the site "clean" in 1987. *Id.* The court recognized further that compliance with the MDNR standards was "necessary" within the meaning of CERCLA § 107(a)(4)(B). *Id.*

78. *Id.*

79. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269-71 (1975).

80. *General Elec.*, 920 F.2d at 1421. The court cited *Runyon v. McCrary*, 427 U.S. 160, 185 (1976), for this proposition. The court also noted language in *Runyon* stating that authorizing language must amount to more than "generalized commands." *Id.* (quoting *Runyon*, 427 U.S. at 186). The court concluded that there "must be a clear expression of Congress' intent" for attorney fees to be awarded. *Id.*

81. *Id.* at 1421-22.

82. *Id.*

83. *Id.* (citing *Cadillac/Fairview v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986)).

84. *Id.* at 1422.

85. *Id.* at 1421-22.

parties.<sup>86</sup>

### III. ATTORNEY FEES IN PRIVATE COST RECOVERY ACTIONS AND CERCLA'S LEGISLATIVE HISTORY AND POLICIES

The *Alyeska* court held that a plaintiff cannot recover attorney fees in a statutory cause of action absent statutory authorization.<sup>87</sup> A standard method of interpreting a statute to discern congressional intent on a particular issue involves a court first examining its text, and looking elsewhere only if an ambiguity in the language exists.<sup>88</sup> If such an ambiguity is found, the court then turns to the statute's legislative history.<sup>89</sup> In the absence of meaningful legislative history, the court examines relevant public policy concerns in an effort to determine the enacting legislature's intent.<sup>90</sup> Applying this paradigm analysis to CERCLA private party attorney fees demonstrates the error in the *General Electric* analysis.

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86. *Id.* at 1422. In addition, the Eighth Circuit upheld the size of the award, giving "great deference" to the district court's findings. *Id.* The Eighth Circuit justified its deference on two grounds. First, the district court is generally best equipped to determine whether the hours charged reflect a proper total. *Id.* Second, the district court is better able to compare the claimed rate to rates charged by attorneys for similar work in the immediate region. *Id.* (quoting *Moore v. City of Des Moines*, 766 F.2d 343, 346 (8th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986)).

87. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 267-91 (1975).

88. See W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 616-18 (1988); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987). Eskridge posits, in regard to a recently enacted statute such as CERCLA, that statutory text ought to control unless current historical perspective indicates Congress did not consider the issue and present public policy would strongly favor an alternative interpretation. Eskridge, *supra*, at 1497.

89. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1981). The *Griffin* Court notes that "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, and those intentions must be controlling." *Id.* Frickey and Eskridge note the traditional rule, namely that extrinsic aids such as legislative history should only be considered if the language of the statute is ambiguous. W. ESKRIDGE & P. FRICKEY, *supra* note 88, at 696-97.

90. See, e.g., *Leo Sheep Co. v. United States*, 440 U.S. 668, 680-83 (1978) (using "imaginative reconstruction" method to divine intent of the enacting Congress). In recently enacted legislation, strong applicable social policies are valuable insofar as they shed light on the motives of the enacting legislature. See W. ESKRIDGE & P. FRICKEY, *supra* note 88, at 607-10, 616-17.

## A. THE LANGUAGE OF SECTION 101(25)

Section 107 authorizes both EPA and private party cost recovery actions.<sup>91</sup> Specifically, section 107(a)(4)(B) allows private parties to recover their "necessary response costs."<sup>92</sup> Section 101(25) defines "response costs" to include "enforcement activities."<sup>93</sup> Because of its location in the early definitions section of CERCLA, section 101(25) presumptively applies to the entire act;<sup>94</sup> therefore, it must necessarily apply to section 107.<sup>95</sup>

The pivotal issue, therefore, becomes whether private parties can engage in enforcement activities, as contemplated by CERCLA. If enforcement activities are limited, by definition, to government entities, any provision of CERCLA that deals with enforcement activities is inapplicable to private party plaintiffs.<sup>96</sup> Because the Act does not explicitly define "enforcement activities,"<sup>97</sup> an examination of the relevant legislative history is necessary.

## B. THE LEGISLATIVE HISTORY

Congress added the phrase "enforcement activities" to the definition of "response costs" in the 1986 amendments.<sup>98</sup> Unfortunately, the legislative history explaining Congress's intent in this change to section 101(25) is sparse.

## 1. House Report

The report of the House Committee on Energy and Commerce ("House Report") on H.R. 2817, one of two competing bills drafted to amend CERCLA, notes that the addition of "enforcement activities" to the definition of response costs "will confirm EPA's authority to recover costs for enforcement ac-

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91. 42 U.S.C. § 9604(a) (1988).

92. *Id.* § 9607(a)(4)(B).

93. *Id.* § 9601(25).

94. 42 U.S.C. § 9601 (1988) is entitled "Definitions," and defines its terms "[f]or the purposes of this subchapter . . ." *Id.*

95. *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 950-51 (C.D. Cal. 1990).

96. *See T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 708 n.13 (D.N.J. 1988). For example, suppose only x-type people pay y-type taxes. Any law effecting an increase in y-type taxes will only affect x-type people, because, obviously, they are the only people who pay y-type taxes.

97. CERCLA fails to define "enforcement activities." *See* 42 U.S.C. §§ 9601-9675 (1988).

98. *Pease & Curren*, 744 F. Supp. at 951.

tions taken against responsible parties.”<sup>99</sup> Litton argued that the House Report’s failure to mention private parties suggests by negative implication that section 101(25) relates only to the EPA’s cost recovery efforts.<sup>100</sup> Although no such comments about the addition of “enforcement activities” appear in the reports appended to H.R. 2005, the bill that eventually passed,<sup>101</sup> the proposed language of section 101(25) was the same in both bills.<sup>102</sup> The remarks, therefore, have considerable probative weight.<sup>103</sup> Thus, because the only legislative history mentioning the amendment to section 101(25) and its effect on attorney fees discusses only the EPA’s authority to recover such fees, it suggests that section 101(25) does not authorize private parties to recover attorney fees.<sup>104</sup>

## 2. Conference Report

The only legislative history that directly addresses the current statutory language is the Conference Committee Report (“Conference Report”).<sup>105</sup> The Conference Report observes that section 101(25) “confirms that such costs [response costs generally] are recoverable from responsible parties, as removal

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99. H.R. REP., *supra* note 12, pt. 1, at 66, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2848-49. The report reads: “This section also modifies the definition of ‘response action’ to include related enforcement activities. The change will confirm the EPA’s authority to recover costs for enforcement actions taken against responsible parties.” *Id.*

100. *See Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, slip. op. at 6 (E.D. Pa. Apr. 23, 1990).

101. *See* H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276 [hereinafter H.R. CONF. REP.].

102. H.R. 2817, 99th Cong., 2d Sess., 131 CONG. REC. 11,619, 11,620-21 (1985); H.R. CONF. REP., *supra* note 101, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 3278. The Conference Report discusses the alternative proposals for the text of § 101(25), and notes that the House version was adopted, and does not differentiate between the competing House versions. *Id.* It does distinguish the Senate version, which was dropped. *Id.*

103. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 581 (1977) (noting that when “Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute”).

104. This reading of the legislative history is inspired by the maxim of statutory construction *expressio unius est exclusio alterius* — “inclusion of one thing indicates exclusion of the other.” W. ESKRIDGE & P. FRICKEY, *supra* note 88, at 641. For an example of the use of this maxim in a case, see *Tate v. Ogg*, 170 Va. 95, 95, 195 S.E. 496, 496 (1938) (statute regulating “any horse, mule, cattle, hog, sheep or goat” did not cover turkeys).

105. H.R. CONF. REP., *supra* note 101, at 185, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 3278.

or remedial costs under section 107."<sup>106</sup> The Conference Report makes no distinction between government and private party plaintiffs.

The Conference Report's failure to distinguish between government and private party plaintiffs, however, is not dispositive. If only government agencies can engage in enforcement actions and private parties cannot, the Conference Report would not have addressed the issue; rather, the Conference Committee may have assumed that the phrase "enforcement activities" was self-explanatory.<sup>107</sup> As such, any reference to enforcement actions would obviously apply only to the government, in the same sense that automobile owner registration requirements apply only to people who own automobiles.

Using this analysis, defendant Litton argued that a private plaintiff may not recover attorney fees under CERCLA *unless* she first shows that she engaged in "enforcement activities" within the meaning of the statute. A private cost-recovery action is not an enforcement action under CERCLA, Litton continued, and thus, private parties do not incur "enforcement costs" as contemplated by CERCLA.<sup>108</sup> In response, GE argued that private cost-recovery actions are simply private sector enforcement of CERCLA's goals.<sup>109</sup> Government action compelling a defendant to reimburse it for response costs constitutes enforcement; a private party's cost recovery action serves the

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106. *Id.*

107. For example, some courts awarding attorney fees have based their interpretation upon a plain meaning reading of the statute. See *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1697 (1991); *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 951 (C.D. Cal. 1990).

108. Brief of Plaintiff-Appellee at 47 n.35, *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990) (No. 89-2845), *cert. denied*, 111 S. Ct. 1697 (1991); see also *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, slip. op. at 6 (E.D. Pa. Apr. 23, 1990) (WESTLAW, Allfeds database) (adopting the same argument); *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 707 (D.N.J. 1988) (holding that Congress only intended the government to recover attorney fees for "enforcement activities").

109. Brief of Plaintiff-Appellee at 47 n.35, *General Elec.* (No. 89-2845); *accord* Brief in Opposition to Defendant's Motion to Dismiss and/or Strike Portions of the First Amended Complaint at 15, *Pease & Curren* (No. 89-4468) [hereinafter Brief in Opposition to Defendant's Motion, *Pease & Curren*]. "The term 'enforcement activities' found in the definition of response is *not* limited on the face of the statute to CERCLA actions brought by *the federal government*; it applies equally to private party enforcement of CERCLA." Brief in Opposition to Defendant's Motion at 15, *Pease & Curren* (No. 89-4468).

same purpose, and hence, should be treated as enforcement.<sup>110</sup>

The Eighth Circuit agreed with GE, citing two cases in which the Ninth Circuit characterized private cost recovery actions as private party "enforcement" of CERCLA.<sup>111</sup> The *General Electric* court relied on *Wickland Oil Terminals v. Asarco, Inc.*<sup>112</sup> and *Cadillac/Fairview v. Dow Chemical Co.*,<sup>113</sup> to support the proposition that private cost recovery actions are "private enforcement" of CERCLA.<sup>114</sup> Upon closer examination, however, these cases are not strong precedent for determining that Congress intended "enforcement" to include private party action.<sup>115</sup> *Wickland Oil* makes a wholly unsupported state-

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110. Brief of Plaintiff-Appellee at 47 n.35, *General Elec.* (No. 89-2845). GE argued that:

GE invoked CERCLA in precisely the same way EPA does when it seeks to collect CERCLA response costs. Since the government's action in compelling a responsible party to reimburse it for response costs constitutes 'enforcement,' a private party's action in doing precisely the same thing under the same statute can hardly be something else.

*Id.*

111. Plaintiffs frequently cite *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887 (9th Cir. 1986). The *Wickland* court held that one of the central purposes of CERCLA is to promote the "effectiveness of private enforcement actions under section 107(a) as a remedy independent of government actions financed by Superfund." *Id.* at 892.

112. 792 F.2d 887 (9th Cir. 1986).

113. 840 F.2d 691 (9th Cir. 1988).

114. *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (citing *Cadillac/Fairview*, 840 F.2d at 691; *Wickland Oil Terminals*, 792 F.2d at 892), *cert. denied*, 111 S. Ct. 1697 (1991).

115. Words have many meanings, and the plain or colloquial meaning of a particular word may differ from the meaning Congress intended to apply regarding the statute. *See, e.g.*, *Federal Land Bank v. Cupples Bros.*, 889 F.2d 764, 769 (8th Cir. 1989) (Arnold, J., dissenting) (noting that "it makes no sense to transplant . . . common-law doctrine . . . [to a case involving] not . . . common-law doctrines but . . . statutory interpretation"). In other words, the court might find that a private party is simply attempting to enforce its rights under the CERCLA statute. The government, by contrast, acts in a far more comprehensive manner in directing cleanups, setting standards, and monitoring community involvement — all of which entail a larger enforcement role than private plaintiffs can effectuate.

An examination of the plain and the legal meaning of "enforcement" in CERCLA § 101(25) demonstrates the contrast. *Webster's* defines "enforcement" as "compulsion, . . . forcible urging or argument . . . ; the compelling of the fulfillment (as of a law or order) . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (1976). *Black's Law Dictionary* defines "enforcement" as "[t]he act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or a command." BLACK'S LAW DICTIONARY 474 (5th ed. 1979). Although one private party can compel another to perform certain acts in a plain language sense, a private party is utterly powerless to legally compel another private party to do anything without the assistance of

ment regarding "private enforcement" of CERCLA; *Cadillac/Fairview* simply cites *Wickland Oil* verbatim.<sup>116</sup> As Litton argued correctly, neither of these cases involved the attorney fees issue; consequently, the Eighth Circuit relied upon poor precedent.<sup>117</sup> Moreover, the *General Electric* court ignored other precedent holding that private parties cannot engage in "enforcement activities."<sup>118</sup>

### 3. Government and Private Party Roles Contrasted

Given the lack of clarity in the House and Conference Reports, it may be helpful to examine the role of the government and private parties under CERCLA. Government enforcement under CERCLA may involve monitoring, compliance orders and a host of other activities short of legal action that nonetheless are costly and for which the government should be reimbursed.<sup>119</sup> For example, the government may have to relocate people threatened by toxic releases and bring criminal actions against polluters.<sup>120</sup> In contrast, private parties may bring an action to recover response costs already incurred but cannot bring an action to "enforce" CERCLA's provisions against another private party.<sup>121</sup> Private plaintiffs simply hire a waste removal contractor to perform the clean up.<sup>122</sup> The much broader enforcement responsibility of the government suggests that the phrase "enforcement activities" pertains more appro-

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judicial process. Significantly, the EPA can compel a private party to act under other sections of the CERCLA statute. The court in *Sisters of the Holy Cross v. Brookline*, 347 Mass. 486, 198 N.E.2d 624 (1964), noted that "[t]he ordinary meaning of 'enforce' is 'to compel obedience to,' 'to cause to be executed.'" *Id.* at 491, 198 N.E.2d at 628 (citing *Larson v. New England Tel. & Tel. Co.*, 141 Me. 326, 337, 44 A.2d 1, 7 (1945)).

116. *Cadillac/Fairview*, 840 F.2d at 694; *Wickland Oil Terminals*, 792 F.2d at 892.

117. Petition for Certiorari at 18 n.21, *General Elec. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990) (No. 90-1221), *cert. denied*, 111 S. Ct. 1697 (1991).

118. *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, slip. op. at 6 (E.D. Pa. Apr. 23, 1990) (WESTLAW, Allfeds database); *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 709 (D.N.J. 1988).

119. See *T & E Indus.*, 680 F. Supp. at 708 n.13.

120. See F. GRAD, *supra* note 37, § 4A.02(c) (discussing unique congressional grant of authority to the President under CERCLA to take various emergency measures to protect national health).

121. *T & E Indus.*, 680 F. Supp. at 708 n.13.

122. See Baker & Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites*, 10 HARV. ENV. L. REV. 99, 100-02 (1986) (contrasting typical government and private party cleanups under CERCLA).

priately to government plaintiffs, rather than to private party plaintiffs.

#### 4. Legislative Silence

In three relatively minor CERCLA provisions, Congress explicitly allowed attorney fees for private parties. As part of the 1986 amendments to CERCLA, for example, Congress placed a phrase in section 310 allowing attorney fee awards in citizen suits.<sup>123</sup> Congress also provided for attorney fees in section 110(c), a provision designed to enable financially out-matched whistleblowing employees of polluting companies to bring suit.<sup>124</sup> Congress provided for awards of attorney fees a third time in section 112(c)(3), a provision that allows the Attorney General to recover fees incurred in replenishing Superfund payouts.<sup>125</sup> Because Congress explicitly provided for attorney fee awards in three sections of CERCLA, its failure to do so in section 101(25) may suggest that it did not intend private parties to collect attorney fees in cost recovery actions. Further, section 107 is the greatest source of attorney fees in the statute;<sup>126</sup> the lack of an explicit provision in that section, therefore, is even more suggestive that Congress did not intend private parties to receive attorney fees. Although congressional silence alone is not dispositive,<sup>127</sup> it seems unlikely that Congress would specifically allow private parties to recover attor-

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123. 42 U.S.C. § 9659 (1988).

124. CERCLA § 110(c) provides, in pertinent part:

Whenever an employee brings an application to the Secretary of Labor for the alleged discriminatory practices of an employer with respect to a discharge . . . and an order issues in applicant's favor, the prevailing applicant *shall be entitled to a reasonable attorney's fee* from the violator, if the applicant so requests and as determined by the Secretary of Labor.

42 U.S.C. § 9610(c) (1988) (emphasis added).

125. CERCLA § 112(c)(3) provides, in pertinent part:

Upon the request of the President, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this title . . . and, without regard to any limitation of liability, all interest, administrative and adjudicative costs, and *attorney's fees* incurred by the Fund by reason of the claim.

42 U.S.C. § 9612(c)(3) (1988) (emphasis added).

126. Remember that "corporate America's potential liability for some 22,000 waste sites could eventually exceed \$100 billion." N.Y. Times, Feb. 15, 1988, at 22, col. 2. As the government only cleans up a small percentage of these sites, the remainder must be cleaned up by private parties. Baker & Markoff, *supra* note 122, at 100-01.

127. W. ESKRIDGE & P. FRICKEY, *supra* note 88, at 772-74.

ney fees in these three minor provisions of CERCLA.<sup>128</sup>

The *General Electric* court only cursorily considered legislative history in resolving the attorney fees issue. It neglected, for example, to address Congress's failure to specify private party attorney fee awards in section 107. Likewise, it did not consider the legislative history of the amended section 101(25).<sup>129</sup> Rather, it justified its holding that private parties could engage in enforcement activities<sup>130</sup> by focusing on questionable precedent<sup>131</sup> and broader policy arguments.<sup>132</sup>

C. AWARDING ATTORNEY FEES TO PLAINTIFFS WOULD NOT  
SERVE CERCLA'S "BROAD REMEDIAL PURPOSES:"  
HOW COURTS SHOULD WEIGH OUTCOME-  
DETERMINATIVE POLICY CONSIDERATIONS

Courts cannot discern congressional intent regarding private party attorney fees from a "plain language" reading of CERCLA.<sup>133</sup> Consequently, courts interpreting the statute should continue to examine its legislative history; this history implies that Congress did not intend private party fee recovery, but fails to resolve the issue.<sup>134</sup> Thus, courts must turn to policy rationales and weigh these considerations to determine congressional intent.<sup>135</sup>

In analyzing public policy considerations, the *General Electric* court based its holding in part on the policy ground that awarding attorney fees would serve CERCLA's beneficial remedial purposes.<sup>136</sup> After *Alyeska*, however, courts should consider such policy arguments only to the extent that they suggest Congress intended to allow plaintiffs to recover attorney fees.<sup>137</sup> *Alyeska* precludes any argument that the courts should fashion an exception to the American Rule based on a "private attorney general" theory.<sup>138</sup> Although *Alyeska* does not preclude policy arguments, it does require a court to relate

128. See *supra* note 66 and accompanying text.

129. See *supra* note 85 and accompanying text.

130. See *supra* note 83 and accompanying text.

131. See *supra* notes 111-18 and accompanying text.

132. See *supra* note 86 and accompanying text.

133. See *supra* notes 91-97 and accompanying text.

134. See *supra* notes 98-107 and accompanying text.

135. See *supra* note 90 and accompanying text.

136. See *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422, cert. denied, 111 S. Ct. 1697 (1991).

137. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269-71 (1975).

138. See Comment, *Awarding Attorney's Fees to Environmental Plaintiffs*

those policies to legislative intent.<sup>139</sup>

A strict interpretation of *Alyeska* would mandate a denial of attorney fees.<sup>140</sup> In this case, the statutory language is ambiguous;<sup>141</sup> the legislative history unclear and largely silent,<sup>142</sup> and the judicial interpretations of the issue divided.<sup>143</sup> *Alyeska*, however, need not be read so strictly. Even under *Alyeska*, courts should take a searching look at the policies that Congress intended to effectuate in passing CERCLA and assess if awarding attorney fees in private cost recovery actions would further these policies.<sup>144</sup> This approach does not usurp the legislative function and advocate the awarding of attorney fees for policy reasons alone, without statutory authorization.<sup>145</sup> It attempts merely to determine if awarding attorney fees would serve CERCLA's remedial purposes, reduce delay by defendants, and enable impoverished plaintiffs to bring suit.<sup>146</sup> Courts also should examine the effect of awarding attorney fees upon

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*Under a Private Attorney General Theory*, 14 B.C. ENV. AFFAIRS L. REV. 287, 289 (1986).

139. The *Alyeska* opinion notes that Congress, while "fully recognizing and accepting the general rule [American Rule], has made specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." 421 U.S. at 260. The preceding quote can be interpreted as the Court prohibiting an award of attorney fees unless the provision explicitly mentions them by name. This interpretation would obviously prohibit CERCLA private cost recovery action plaintiffs from recovering attorney fees.

However, *Alyeska* reflects a judicial deference towards congressional intent regarding attorney fees issues. *Alyeska* specifically recognizes the right of Congress to carve out exceptions to the American Rule at will. *Id.* at 260-61. Consequently, congressional intent predominates. Thus, given an ambiguous statute, the *Alyeska* opinion could also be interpreted as directing a court to search further to determine and follow legislative intent. *Id.*

140. See *supra* note 139; see also *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940) (discussing the "plain meaning" rule, and its corollary, the "absurd result" exception to the Rule). The strict "literalist" or "plain meaning" approach enjoyed widespread popularity at the turn of the century and has received recent life from recent politically conservative appointees to the federal bench. See W. ESKRIDGE & P. FRICKEY, *supra* note 88, at 591-97. Commentators criticize the "plain meaning" rule as oversimplified and subject to manipulation. See generally Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195-99 (1983) (discussing shortcomings of "plain meaning" rule in statutory interpretation).

141. See *supra* notes 91-97 and accompanying text.

142. See *supra* notes 98-107 and accompanying text.

143. See *supra* notes 45-52 and accompanying text.

144. See *supra* notes 137-40.

145. *Id.*

146. See *infra* notes 152-79 and accompanying text.

the existing balance of power between CERCLA plaintiffs and defendants, keeping in mind the balance Congress intended to strike.<sup>147</sup> After compiling the policy implications, the final inquiry would involve assessing the extent to which such considerations increase the likelihood that Congress intended to allow awards of attorney fees under the rubric of "response costs."<sup>148</sup>

General Electric argued successfully that an award of attorney fees to victorious private plaintiffs would further CERCLA's broad purposes as a remedial statute,<sup>149</sup> and supported its contention with two policy arguments. First, General Electric argued that because attorney fees in CERCLA cases can be enormous, a denial of awards would have a "chilling effect" on plaintiff suits.<sup>150</sup> Further, absent the threat of an attorney fees award, CERCLA defendants will attempt to increase the plaintiffs' litigation costs, secure in the knowledge that, at worst, all the defendant will have to pay for is the cost of the cleanup.<sup>151</sup>

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147. *Id.*

148. *Id.*

149. *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1697 (1991). The Eighth Circuit noted that its conclusion "based on the statutory language is consistent with two of the main purposes of CERCLA — prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party." *Id.*

150. See Brief of Plaintiff-Appellee at 45-46, *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990) (No. 89-2845), *cert. denied*, 111 S. Ct. 1697 (1991). Congress also recognized the importance of awarding fees in private attorney general actions when it passed the Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (1988). The Senate Report, which accompanied the Act, stated that fee shifting is "an integral remedy necessary to achieve compliance with our statutory policies." See SEN. REP. NO. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5908-10 (1976) (stating that the rationale behind the passage of the Civil Rights Attorney's Fees Awards Act of 1976 is that awarding fees is vital to private actions). The Report noted that in "many cases the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." *Id.*; see also Larson, *Current Proposals in Congress to Limit and to Bar Court Awarded Attorneys' Fees in Public Interest Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 523, 533-38 (1986) (elaborating on rationale given by Congress for passing fee-shifting statutes). See generally Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 32 (1984) (noting that "[t]he message . . . may be that Congress is now willing to award fees to a relatively poor party who prevails against a wealthy institutional litigant").

151. See Brief of Plaintiff-Appellee at 46, *General Elec.* (No. 89-2845); accord *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 420-22 (1978). For a comprehensive discussion, see Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 150-53 (1984) (discussing effect of attorney fee awards in discouraging nuisance suits by plaintiffs brought in hopes that defendant's attorney fees exceed the amount plaintiffs will accept to settle their claim). Here, CERCLA plaintiffs use the argument in reverse.

None of these arguments, however, is compelling enough to overcome the negative implication regarding attorney fees that the absence of explicit statutory authorization creates.

### 1. No Chilling Effect Shown

The three CERCLA sections with explicit attorney fee provisions all protect defenseless plaintiffs whose actions create a public benefit. Section 310 applies to citizen suits brought to compel the EPA administrator to perform his duties under the statute and serve a codified "private attorney general" purpose.<sup>152</sup> Section 110(c) applies to complaints filed by an employee against a polluting employer.<sup>153</sup> As with "whistleblower" provisions in other statutes,<sup>154</sup> Congress meant to encourage such suits in the public interest as well as assist an overmatched single employee battling a corporation.<sup>155</sup> Significantly, section 110 is entitled "Employee Protection."<sup>156</sup> Lastly, section 112(c)(3), which authorizes attorney fee recovery by the Attorney General to replenish the Hazardous Substances Trust Fund<sup>157</sup> simply demonstrates congressional intent to reimburse the government, not a private party. The policy reasons behind these explicit fee clauses seem completely inapposite in the *General Electric* context. In *General Electric*, two large private corporations were the parties. Indeed, GE and Litton Industries are both "Fortune 500" corporations.<sup>158</sup>

In addition, CERCLA private cost recovery plaintiffs like GE would not be precluded from bringing suit if they had to pay their own legal fees. In civil rights actions, the absence of an attorney fees provision significantly deters indigent but deserving plaintiffs from bringing claims with competent counsel.<sup>159</sup> In contrast, plaintiffs in CERCLA cost recovery actions, by and large, are industrial corporations for whom the absence of a provision to recover attorney fees would not affect the decision to sue.<sup>160</sup> Although attorney fees often are significant in

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152. See *supra* note 123 and accompanying text.

153. See *supra* note 124 (quoting language of the statute).

154. See 5 U.S.C. §§ 1206-08, 2302, 7121 (1988); MD. ANN. CODE art. 64A, §§ 12G-12K (1980); see also Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615, 615-20 (discussing motives behind congressional passage of whistleblower provisions).

155. *Id.*

156. 42 U.S.C. § 9610 (1988).

157. See *supra* note 40.

158. *The Fortune 500*, FORTUNE, Apr. 22, 1991, at 286.

159. See *supra* note 150 and accompanying text.

160. Telephone interview with Sheryl Auerbach, Dilworth, Paxson, Kalish

CERCLA actions, a review of plaintiffs' briefs in three recent major cases reveals none in which counsel argued that the suit could not be brought absent an attorney fees provision.<sup>161</sup>

Moreover, the availability or lack of an opportunity to recover attorney fees has not produced a "chilling effect" on most private plaintiffs' ability to file suit. The total number of cost recovery actions filed has increased since 1988.<sup>162</sup> Attorneys have noted a growing awareness on the part of potential industrial plaintiffs regarding the availability of environmental law remedies.<sup>163</sup> Thus, the presence or absence of a fee recovery provision does not seem crucial to the typical CERCLA plaintiff's ability to file or prosecute a lawsuit.

Contrary to GE's assertions, awarding attorney fees may have the reverse effect of chilling potentially legitimate claims by defendants that the statutory scheme intended them to assert,<sup>164</sup> such as the enumerated defenses to liability.<sup>165</sup> Defend-

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& Kauffman, attorney for defendant Litton (May 10, 1991) [hereinafter Auerbach interview]. Attorney Auerbach noted that many CERCLA plaintiffs in cost recovery actions are corporations. *Id.* Auerbach noted further that since many actions involve an industrial site where pollutants have been dumped in earlier years, the buyer, the seller, and the polluter (if different) are often corporate entities. *Id.* Defendants assert in most of their briefs that CERCLA's remedial purposes do not extend to rewarding calculating corporations. In *General Electric*, plaintiffs' legal fees, which plaintiffs supported with "conclusory affidavits and summary billings," amounted to three times defendants' billing. Appellant's Brief at 45, *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990) (No. 89-2845), *cert. denied*, 111 S. Ct. 1697 (1991). Nonetheless, the United States District Court awarded plaintiffs all claimed fees, which amounted to \$311,928.32. *Id.*

161. See Appellant's Brief, *General Elec.* (No. 89-2845); Defendant's Memorandum of Points and Authorities, *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990) (No. 89-4468); Reply Brief of Defendants, *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, slip op. (E.D. Pa. Apr. 23, 1990).

162. See *Hazardous Waste Prompts Lawsuit From Partnership*, San Francisco Bus. Times, Feb. 15, 1991, § 1, at 4; *Environment, Energy and Safety Outlook '89*, Daily Report for Executives (BNA), Jan. 26, 1991; Auerbach interview, *supra* note 160.

163. See Clark, *How to Survive in the Environmental Jungle*, INSTITUTIONAL INVESTORS, Dec. 1990, at 89 (discussing the need for corporate executives to be aware of environmental hazards and remedies); see also *Legal Business Booming*, Business Journal-San Jose, Dec. 28, 1987, § 2, at 12 (discussing increasing sophistication of businesses regarding environmental matters).

164. See *supra* note 75. See generally Note, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALBANY L. REV. 148, 165-67 (1981) (noting that the "central premise of the English fee system (winner awarded attorney fees) is that the wrongdoer should bear the costs of litigation to assure that the innocent party does not always prevail). Proponents of fee shifting would counter that the wrongdoer is usually the losing litigant. *Id.* at 165. However, indigent litigants "are the most likely victims of incorrect

ants probably will forego litigating claims offering less than a guaranteed promise of success for fear that if they lose, they will be forced to pay the plaintiff's attorney fees as well as their own.<sup>166</sup> Likewise, awarding fees would tip the balance in favor of coercive settlements for the benefit of plaintiffs.<sup>167</sup>

An eagerness to award attorney fees might also encourage plaintiffs either to incur excessive legal costs or to exaggerate actual expenses.<sup>168</sup> Indeed, in two cases in which the courts awarded attorney fees, the courts have made a specific reduction of the amount claimed by plaintiffs to ensure that the attorney fees were truly necessary costs of response. In one case, the court trimmed excessive transportation expenses that an attorney incurred absent any proof of their necessity.<sup>169</sup> In the other action, the court had to reduce the billing rates of two of

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decisions, particularly when they face wealthy opponents with vastly superior legal resources." *Id.* For a civil rights example, of the cases brought through 1935 to challenge desegregation, the NAACP lost 44 cases out of 44 attempts. R. KLUGER, *SIMPLE JUSTICE* 169 (1976).

165. See *supra* note 75.

166. See *infra* note 167. In their haste to condemn the depredations of toxic polluters, courts should not forget that a certain percentage are innocent landowners, or culpable of only a small, divisible, and readily severable portion of the total harm.

167. For a detailed discussion on the effect of attorney fee awards on settlement, see Rowe, *supra* note 151, at 154-70. Attorney fee awards have a double effect on the settlement process. Defendant is usually willing to offer more than she would have in the absence of fee shifting; likewise, plaintiff may also feel she can ask for more. *Id.* at 155. Additionally, the effect of risk aversion increases with the prospective cost of a negative outcome. *Id.* at 156. The combined effect of these three factors increases the likelihood for settlement on more adverse terms to the defendant. *Id.* at 157-58; see also Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUDIES 55, 68-69 (1982) (discussing effects on likelihood of settlement under the English rule (two-way shifting), one-way shifting, and the American rule).

168. See *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). In addition to the potential unfairness of attorney fee awards, their existence stimulates litigation over the amount of the awards, which has been universally condemned as wasteful. See Larson, *supra* note 150, at 540; see also Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 219 n.10 (1983). Coffee quotes an unnamed federal judge as saying, "[d]uring the One Hundred Years War, Europe was nearly brought to its knees by roving bands of mercenaries who pillaged and robbed and left a barren landscape in their wake. The modern equivalent of these mercenaries is the plaintiff's attorney." *Id.*

169. *BCW Assocs. v. Occidental Chem.*, No. 86-5947, slip op. at 15 (E.D. Pa. Sept. 29, 1988) (WESTLAW, Allfeds database). The United States District Court awarded one plaintiff \$30,422.71 in attorney fees, deducting \$1,052.00 in expenses claimed for an air taxi fare for one attorney. *Id.* The court held that the plaintiff failed to present any evidence that the charge was necessary. *Id.*

the plaintiffs' attorneys to the level of local legal rates.<sup>170</sup> Faced with numerous awards of attorney fees in CERCLA cases, however, courts' antipathy towards additional burdens may cause them simply to accept plaintiffs' tabulations. Scarcity of time, coupled with a limited ability to scour expenses, could reduce courts' effectiveness in monitoring fee requests and result in the imposition of unfair burdens upon losing CERCLA defendants.

## 2. Unnecessary Delay

GE and other CERCLA plaintiffs argue that failing to award attorney fees encourages defendants to unnecessarily delay in litigation. Courts should reject this argument. If this argument were credible, plaintiffs should be able to produce evidence of dilatory tactics by defendants in virtually every private cost recovery action. Because courts have split on the attorney fee issue, defendants in such actions can always argue a good faith belief that attorney fees are not awardable, and, if nothing more, litigate that single issue.<sup>171</sup> There is, however, no evidence of such behavior.<sup>172</sup> Furthermore, courts should not use a CERCLA provision to prevent defendants from using dilatory tactics when Rule 11 exists for this very purpose.<sup>173</sup>

CERCLA defendants, on the other hand, frequently argue

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170. See *General Elec. Co. v. Litton Business Sys., Inc.*, 715 F. Supp. 949, 963 (W.D. Mo. 1989), *aff'd sub. nom. General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1697 (1991). Plaintiff requested attorney's fees for 2,663.03 hours expended by partners, associates, of counsel attorneys, legal assistants, law clerks, and law librarians. *Id.* The court approved the hours listed as reasonable. *Id.* The hourly rates claimed by plaintiff varied from \$25 per hour for an assistant librarian to \$195 per hour for a partner. *Id.* The court found the partner's rate excessive and reduced it to \$135 to better comport with rates in the Springfield, Missouri area. *Id.*

171. Before the Eighth Circuit's *General Electric* decision was issued in December, 1990, the existence of the split among the federal district courts permitted every defendant to freely contest any award of attorney fees to a successful plaintiff. Most did, and the resulting litany of cases should provide CERCLA plaintiffs with innumerable instances of dilatory tactics on the part of defendants.

172. In not one of the 11 cases discussed above dealing with attorney fees in private cost recovery actions against CERCLA has the court awarded sanctions to the plaintiff for the conduct of the defendant. See *supra* notes 50-51 (for full citation of all cases on the topic).

173. FED. R. CIV. P. 11; see Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632-44 (1983). The Note discusses the effect of the 1983 amendments to Rule 11. *Id.* at 632. The new rule imposes an affirmative obligation on the attorney to conduct prefiling in-

that allowing plaintiffs to recover attorney fees would encourage plaintiffs to bring garden variety tort claims disguised as CERCLA claims.<sup>174</sup> Courts should likewise reject this assertion. As one court noted, allowing a plaintiff to recover attorney fees for a CERCLA claim does not automatically allow it to recover for every count in its entire complaint.<sup>175</sup> The court then held that fees could be allocated to reflect attorney time spent on distinct parts of the complaint.<sup>176</sup>

#### D. *GENERAL ELECTRIC* REVISITED

In *General Electric*, the Eighth Circuit claimed to rest its decision on the amended language of the CERCLA statute,<sup>177</sup> but the *General Electric* decision was motivated by an equitable desire to force the rapid clean up of toxic dumpsites, even at the potential price of unfairly penalizing defendants.<sup>178</sup> In finding that CERCLA allows the awarding of attorney fees to prevailing private litigants, the court ignored conflicting readings of the statutory language and opposing policy arguments.<sup>179</sup> Future courts can reach a more appropriate result through the consideration of a broader range of plausible statutory interpretations and policy arguments to better divine the intent of Congress in drafting CERCLA's statutory language. Given the explicit provisions for attorney fees awards elsewhere in CERCLA<sup>180</sup> and the absence of any compelling policy arguments to overcome the effect of legislative silence,<sup>181</sup> courts should de-

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quiries into relevant facts and law. *Id.* at 633. Additionally, the new Rule 11 does not limit the motives a court can consider improper. *Id.*

Litigants have enthusiastically invoked the new Rule. From 1938 to 1976, only 19 reported cases invoked the old Rule 11, and only three of these resulted in judicial sanctions. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-37 (1976). In contrast, from the adoption of the Rule 11 amendments on August 1, 1983, to August 1, 1985, more than 200 cases involved the imposition of Rule 11 sanctions. Nelkin, *Sanctions Under Amended Fed. R. Civ. P. 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1326 (1986). The new Rule 11 places a definite limit on oppressive attorney conduct.

174. Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 952 (C.D. Cal. 1990).

175. *Id.*

176. *Id.*

177. See *supra* notes 79-84 and accompanying text.

178. See *supra* note 86 and accompanying text.

179. See *supra* notes 133-76 and accompanying text.

180. See *supra* notes 152-61 and accompanying text.

181. See *supra* notes 133-76 and accompanying text.

mand explicit congressional authorization before awarding attorney fees to private plaintiffs under the statute.

### CONCLUSION

In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, the United States Court of Appeals for the Eighth Circuit addressed the issue of whether a successful plaintiff in a CERCLA private cost recovery action could recover attorney fees.<sup>182</sup> The court's decision to allow such awards reflects a public policy that encourages courts to force industrial polluters to bear the entire cost of their conduct. On a practical level, the decision represents a significant victory for CERCLA plaintiffs, and a correspondingly great shift in the balance against CERCLA defendants in cost recovery actions. *General Electric* undoubtedly will spawn more speedy and advantageous settlements for private CERCLA plaintiffs.<sup>183</sup>

On March 26, 1991, the Supreme Court declined to hear *General Electric*.<sup>184</sup> Consequently, the Eighth Circuit opinion continues to influence all federal district courts hearing private cost recovery actions. The majority of winning plaintiffs will henceforth recover attorney fees. Hopefully, another circuit will reach a different result that better serves congressional intent as indicated by CERCLA's language, statutory history, and public policy. Until this indefinite point in the future, plaintiffs shall continue to reap a windfall and force defendants to settle or risk huge losses.

*Kanad S. Virk*

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182. See *supra* notes 79-86 and accompanying text.

183. See *supra* note 167 and accompanying text.

184. *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1697 (1991).