Key Tronic v. United States – The Case That Locked the Door on Attorneys’ Fees Under CERCLA Section 107(a)(4)(B)

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KEY TRONIC v. UNITED STATES—THE CASE THAT LOCKED THE DOOR ON ATTORNEYS' FEES UNDER CERCLA SECTION 107(a)(4)(B)

In 1980, Congress responded to the burgeoning number of disposal sites contaminated with hazardous waste by enacting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹ CERCLA aims to “protect human health and the environment”² by encouraging swift and effective cleanup of hazardously contaminated sites and by placing the cost of cleanup on the parties responsible for such...


². H.R. REP. No. 253(I), 99th Cong., 2d Sess. 66 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 2848; see also Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1443-44 (S.D. Fla. 1984) (finding that payment of response costs by Potentially Responsible Parties (“PRPs”) is important in achieving CERCLA's goals of quick cleanup of hazardous sites); Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Ohio) (recognizing that one of CERCLA's key purposes is to aid the federal government in promptly cleaning hazardous waste sites), recons. denied, 22 Envt Rep. Cas. (BNA) 1447 (S.D. Ohio 1984). The Senate Committee Report articulated five basic purposes for enacting CERCLA. S. REP. No. 848, at 13. They were: (1) to make those responsible for environmental harm, damage, or injury caused by hazardous chemical materials pay the price of their actions; (2) to provide funds to pay for cleanup where a responsible party fails to clean or cannot afford to clean up due to lack of funds or cannot be found; (3) to support such cleanups upon the contributions of those who have benefited from the use of hazardous substances in the past; (4) to provide the federal government with ample authority to assist in cleaning hazardous waste sites; and (5) to compensate those who have suffered damages due to hazardous wastes. Id.
contamination.\(^3\) The federal government effectuates these goals by either initiating the cleanup itself,\(^4\) or by ordering the potentially responsible parties (PRPs) to clean the contamination.\(^5\)

Making PRPs initially liable for cleanup causes parties who are not responsible, or not solely responsible, for the contamination to shoulder the cleanup or "response" costs preliminarily.\(^6\) Section 107(a)(4) of CERCLA, however, permits both the federal government and private parties to file contribution actions to recover response or cleanup costs\(^7\) from

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3. See General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990) (stating that two main purposes of CERCLA are "prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party"), cert. denied, 499 U.S. 937 (1991); Patricia L. Quentel, Comment, The Liability of Financial Institutions for Hazardous Waste Cleanup Costs under CERCLA, 1988 Wis. L. Rev. 139, 142 (discussing EPA's power to place responsibility of payment for cleanup on responsible parties).

4. CERCLA § 104(a)(4), 42 U.S.C. § 9604(a)(1) (1988). Whenever there is a release or a "substantial threat" that a hazardous substance posing a substantial threat may be released, the government may initiate cleanup of the site. \(\text{Id.}\)

5. 42 U.S.C. § 9606(a) (1988) (allowing the federal government to obtain a judicial order to make a party cleanup). Under CERCLA, the executive branch's second option, as opposed to initiating the cleanup, is to compel a private party to undertake a response action for any waste which is endangering or threatening to endanger the environment. \(\text{Id.}\) The party chosen to undertake the cleanup action is held strictly liable. \(\text{Id.}\) § 9607(a) (stating that responsible parties "shall be liable") (emphasis added).

6. See \(\text{Id.}\) § 9607. The EPA may select a PRP to undertake the cleanup action from the following groups of PRPs:

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

\(\text{Id.}\) Given the EPA’s latitude in deciding who it may charge with cleaning up a contaminated site, an entity minimally responsible for the contamination, such as a transporter, may be selected. \(\text{Id.}\) § 9607(a)(4); see \(\text{id.}\) § 9601(26) (defining transport). As defined by CERCLA, "[t]he terms 'respond' or 'response' means [sic] remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." \(\text{Id.}\) § 9601(25).

7. \(\text{Id.}\) § 9607(a)(4)(A), (B). For the purposes of this Note, the author will, based on personal convention, use the terms "cleanup" costs and "response" costs interchangeably.
parties identified as PRPs. In *Key Tronic Corp. v. United States*, the Supreme Court addressed whether attorneys' fees constitute a recoverable response cost in private party response recovery actions.

Despite Congress' attempt to clarify CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA), there has been a substantial amount of litigation over whether CERCLA section 107(a)(4)(B), the provision applicable specifically to private parties, allows for the recovery of attorneys' fees. Five circuit courts addressed this issue; the Sixth and Eighth Circuits allowed the recovery of attor-

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8. See id. § 9607(a)(1-4). The section of CERCLA from which private parties are given the authority to seek contribution from other PRPs is § 107(a)(4)(B), which states in relevant part:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . .

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . .

(4) . . . shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . .


10. *Id.* at 1963.


neys' fees, while the First, Ninth, and Tenth Circuits denied recovery. The Supreme Court finally resolved the conflict in *Key Tronic*, holding that recoverable response costs under CERCLA section 107(a)(4)(B) do not include attorneys' fees.

The facts of *Key Tronic* are paradigmatic of most private party cost recovery actions under CERCLA section 107(a)(4)(B). The Environmental Protection Agency (EPA) identified Key Tronic Corporation (Key Tronic) as one of several parties, including the United States Air Force, responsible for chemically contaminating a landfill in the state of Washington during the 1970s. The chemicals leached into the soil and poisoned the water supply of the surrounding area. In settling a lawsuit the EPA brought against Key Tronic, Key Tronic agreed to pay 4.2 million dollars into the EPA cleanup fund. Key Tronic then sued the Air Force and other PRPs under CERCLA to recover a portion of its 4.2 million dollar commitment, including attorneys' fees. The attorneys' fees Key Tronic sought to recover included the cost associated with litigating its case, as well as the legal expenses it incurred from searching for other responsible parties and negotiating its settlement with the EPA.

The United States District Court for the Eastern District of Washington determined that Key Tronic could recover all attorneys' fees under

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14. FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847-48 (10th Cir. 1993) (holding litigation-related attorneys' fees not recoverable under CERCLA); In re Hemingway Transp., Inc., 993 F.2d 915, 934 (1st Cir.) (finding attorneys' fees not recoverable), *cert. denied*, 114 S. Ct. 303 (1993); Stanton Rd. Assocs. v. Lohrey Enters., 984 F.2d 1015, 1020 (9th Cir. 1993) (same).

15. *Key Tronic*, 114 S. Ct. at 1966-67 (holding attorneys' fees not recoverable under CERCLA § 107(a)(4)(B) because there is not an explicit statutory grant allowing for the reward of attorneys' fees to private parties in response recovery actions).

16. As in other cases dealing with hazardous waste cleanup, the party identified and charged with the cleanup of the site in *Key Tronic* was not, or at least not solely, responsible for the contamination. *Key Tronic*, 114 S. Ct. at 1963; see, e.g., *FMC Corp.*, 998 F.2d at 844 (involving the cleanup of a site contaminated by various corporations, but owned by Aero Industries at the time of the charged cleanup); *Donahey*, 987 F.2d at 1252-53 (involving the cleanup of a site contaminated by a lessee of Bogle, who then sold the land to Donahey, the person charged with cleanup by the government); *Stanton Rd.*, 984 F.2d at 1016 (involving the cleanup of Stanton's property, but caused by Lohrey Enterprises); *General Elec.*, 920 F.2d at 1416 (involving the cleanup of a site charged to General Electric, but which had been originally owned and contaminated by Litton).


18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*
section 107(a)(4)(B) of CERCLA, holding that the legal expenses Key Tronic incurred were necessary costs of response compensable under CERCLA section 107(a)(4)(B). On appeal, the Court of Appeals for the Ninth Circuit reversed the district court's holding, finding the language of section 107(a)(4)(B) insufficiently specific to permit the recovery of attorneys' fees.

In Key Tronic, the Supreme Court, following the Ninth Circuit's decision and the emerging trend in the majority of federal circuits addressing the issue, held that section 107(a)(4)(B) of CERCLA does not cover attorneys' fees associated with litigation. The majority opinion, authored by Justice Stevens, adhered to the traditional analysis regarding the recoverability of attorneys' fees. His opinion concluded that the language of section 107(a)(4)(B) fails to grant the recovery of attorneys' fees explicitly, as the "American Rule" requires. Conversely, Justice Scalia argued, in his dissent, that the language of section 107(a)(4)(B) meets the American Rule's demands regarding the award of legal fees.

This Note first examines the long-standing "American Rule" on fee shifting and shows how this rule permits a victorious party to recover attorneys' fees in certain instances. Next, this Note reviews the conflict-
ing decisions among the Appellate Courts regarding recovery of legal fees under CERCLA section 107(a)(4)(B). After examining the reasoning of the federal circuits, this Note provides a detailed analysis of both the majority and dissenting opinions in Key Tronic. Finally, this Note concludes that the Supreme Court's holding misinterpreted precedent and is inconsistent with the language of CERCLA section 107(a)(4)(B) itself, as well as the American Rule and the legislative purposes underlying the enactment of CERCLA.

I. THE HISTORY OF FEE SHIFTING

A. The American Rule: Winner Pays All

Unlike the English legal system where the losing party reimburses prevailing party's costs, American jurisprudence requires the winning litigant to bear the financial burden of any courtroom success. This concept, known as the "American Rule," evolved out of the common law and was first recognized and adopted by the Supreme Court in 1796. In Arcambel v. Wiseman, the Supreme Court stated that "[t]he general practice in the United States is in opposition to [fee shifting]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till [sic] it is changed, or modified, by [s]tatute." In so stating, the Supreme Court recognized that the legislature, not the
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judiciary, holds the authority to create exceptions to the American Rule.\footnote{Alyeska, 421 U.S. at 263. Indeed, there are situations in which Congress has chosen to award attorneys' fees, but this does not mean that courts have independent authority to award attorneys' fees in those situations which judges decide to promote the public policy behind an important statute absent legislative authority. \textit{Id.} In fact, the situations in which attorneys' fees may be granted are completely within the discretion of the United States legislature, and therefore courts must follow congressional guidance in determining the situations in which recovery of attorneys' fees is appropriate. \textit{Id.}}

Although the statutory genesis of the American Rule can be traced to legislation enacted prior to the \textit{Arcambel} decision,\footnote{Id. at 248 \textit{n}19 (outlining statutes allowing, and not allowing, recovery of attorneys' fees). Legislation dating prior to the \textit{Arcambel} decision indicates that American jurisprudence was to refrain from rewarding attorneys' fees. \textit{Id.}} Congress did not legitimize the American Rule completely until 1853, when it enacted legislation standardizing the costs that parties could recover in litigation.\footnote{Id. at 263-64.} Any litigation costs not mentioned expressly in the statute could not be

\begin{itemize}
\item On March 1, 1793, Congress enacted a general provision governing the awarding of costs to prevailing parties in federal courts: \ldots This provision was to be in force for one year and then to the end of the next session of Congress, \ldots, but it was continued in effect in 1795, Act of Feb. 25, 1795, c. 28, 1 Stat. 419, and again in 1796, Act of Mar. 31, 1796, 1 Stat. 451, for a period of two years and then until the end of the next session of Congress; at that point, it expired. \textit{Id.} at 248-49 \textit{n}19 (citation omitted).
\item Id. at 251-52. In an attempt to standardize the costs allowable in federal legislation, Congress passed the "Act of Feb. 26, 1853, 10 Stat. 161." \textit{Id.} at 251-53. The Act limited counsel fees collectible from the losing party to the amounts expressly stated in the Act. \textit{Id.} at 252. The Act was far-reaching in specifying the amount of attorneys' fees that could be charged to a losing party. \textit{Id.} The Act extensively and specifically detailed the nature and amount of fees charged to losing parties. \textit{Id.} The Act was not intended to limit the amount an attorney could charge his clients, but, rather, was meant to limit counsel fees collectible from the losing party. \textit{Id.} The Act states the following:
\begin{quote}
In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: \textit{Provided}, That in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars, the docket fee of his proctor shall be but ten dollars.
\end{quote}
\begin{quote}
"In cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.
\end{quote}
\begin{quote}
"For scire facias and other proceedings on recognizances, five dollars.
\end{quote}
\begin{quote}
"For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.
\end{quote}
\begin{quote}
"A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal . . . ."
\textit{Id.} at 253 \textit{n}25 (quoting the Act of Feb. 26, 1853, 10 Stat. 161-62). The American Rule was a negative implication of the Act and its amendments because the Act only stated those costs which could be recovered during litigation, and was silent on those which could not. \textit{Id.}}
recovered. Over the years, Congress enacted a plethora of legislation allowing specifically for the recovery of attorneys' fees. Adhering to the precedent it established in Arcambel, the Supreme Court has avoided, with very few exceptions, interpreting ambiguous or non-explicit statutory language to allow the award of attorneys' fees. The Supreme Court more recently reinforced its deference to the American Rule in 1976 in its ruling in Alyeska Pipeline Service Co. v. Wilderness Society.

Recognized as the beginning of modern attorneys' fee jurisprudence, the Alyeska Court stated that the American Rule is ingrained in the judicial history of the United States. It would be inappropriate, the Court argued, to invade the legislative function of Congress by judicially determining when to permit an award of attorneys' fees. The Court further explained, however, that despite its allegiance to the American Rule, it has recognized several exceptions which allow recovery of reasonable attorneys' fees.

36. See id. at 253-57 (citing cases supporting the American Rule). As the Court stated in The Baltimore, 75 U.S. (8. Wall.) 377 (1869), "in lieu of the compensation now allowed by law to attorneys, . . . no other compensation shall be allowed." Id. at 392.


38. See infra note 43 (detailing exceptions to the American Rule); Eric D. Kaplan, Note, Attorney Fee Recovery Pursuant to CERCLA Section 107(a)(4)(B), 42 WASH. U. J. URB. & CONTEMP. L. 251, 267-68 (1992) (discussing one of the few exceptions to the American Rule developed by the Supreme Court).

39. See supra note 32 and accompanying text (listing cases that have denied recovery of attorneys' fees since the Supreme Court's Arcambel decision).


41. Id. at 271. The Supreme Court stated that the rule followed by American courts with respect to not allowing the recovery of attorneys' fees has survived. Id.; see also Kaplan, supra note 38, at 266-67 (stating that the American Rule "has prevailed and is now well entrenched in American jurisprudence").

42. See Alyeska, 421 U.S. at 262. The Court stated that the American Rule "is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs." Id. at 271.

43. Id. at 259. The Court stated that there unquestionably exists situations in which the judiciary may assert its inherent power to award attorneys' fees, but that in Alyeska none of the exceptional circumstances were present to allow for recovery. Id. For example, the Court has found it within its power to grant attorneys' fees when such compensation would create equity among the litigants. See Trustees v. Greenough, 105 U.S. 527, 535-36 (1882) (establishing that 1853 Act did not interfere with the historic power of equity to recover costs, including attorneys' fees). The Court has also found it within its power to award attorneys' fees where a party is willfully not in compliance with an order of the court. See Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923) (holding that when there is willful disobedience of a court order the Court may award reasonable
While Congress has not dismissed the Court's creation of certain limited exceptions to the American Rule, neither has the Court viewed itself as holding the unlimited power to allow fee shifting among litigants whenever it deems the award of attorneys' fees warranted. In fact, one year after *Alyeska* was decided, the Court, in *Runyon v. McCravy*, effectively put to rest the issue of attorneys' fees under the American Rule. In *Runyon*, the Court reiterated that the traditional rule in the United States is that attorneys' fees may only be collected, but for several well-entrenched exceptions, when the statute in question calls for their recovery explicitly. Otherwise, courts simply may not award them.

The Supreme Court's rulings in *Alyeska* and *Runyon*, that attorneys' fees are not recoverable absent express statutory authorization, failed to prevent conflict and confusion among the circuits regarding the recoverability of attorneys' fees under CERCLA section 107(a)(4)(B). The confusion is, no doubt, attributable partly to the poorly drafted language attorneys' fees to the prevailing party, as the "punishment for contempt . . . is in the discretion of the court"). Finally, if the losing litigant has acted in bad faith, maliciously, or for oppressive purposes, the court may award attorneys' fees. *See F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974) (recognizing that the defendant could be required to pay attorneys' fees if it "acted in bad faith, vexatiously, wantonly, or for oppressive reasons").

44. *Alyeska*, 421 U.S. at 260 (stating that "Congress has not repudiated the judicially fashioned exceptions to the general rule").

45. *See id.* at 260 (limiting discretion of courts to award attorneys' fees to when the statute is explicit on the issue of fee recovery); *supra* note 33 (discussing limits on court authority to allow fee recovery).


47. *See id.* at 185.

48. *Id.* Echoing *Alyeska*, the Court in *Runyon* stated that "the law of the United States, but for a few well-recognized exceptions not present in these cases, has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." (footnote omitted).

49. *Id.*

of CERCLA, particularly sections 107(a)(4)(B) and 101(25).\textsuperscript{51} Section 107(a)(4)(B) states that a party shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."\textsuperscript{52} Section 101(25), when amended by SARA in 1986,\textsuperscript{53} expanded the original meaning of "response" to include any "enforcement activities related thereto."\textsuperscript{54} SARA's ambiguous language did little to resolve the confusion concerning the recovery of attorneys' fees under CERCLA section 107(a)(4)(B).\textsuperscript{55} The Conference Committee, commenting on the SARA amendments, failed to clarify the issue.\textsuperscript{56} Although the Committee stated that response costs are recoverable from responsible parties, the House Conference Committee Report failed to distinguish between private and government parties.\textsuperscript{57} This lack of clarity left the federal circuits with the task of resolving the issue.


\textsuperscript{52} CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988) (outlining the costs recoverable from other PRPs in private party cost recovery actions).


\textsuperscript{54} CERCLA § 101(25), 42 U.S.C. § 9601(25) (1988) (broadening the types of costs recoverable by private parties in litigation against other PRPs by adding the non-specific term "enforcement activities").

\textsuperscript{55} \textit{Id.} The addition of the phrase "and enforcement activities related thereto" to the term "response" in CERCLA § 101(25) was seen as an express grant to the EPA (a government party) to recover its attorneys' fees in actions taken against responsible parties. However, it cannot be said to preclude similar recovery from private parties as explicitly. See H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 66 (1985), \textit{reprinted in} 1986 U.S.C.C.A.N. 2835, 2848-49 (describing modification to language in CERCLA relating to "response action").


\textsuperscript{57} \textit{Id.} The Conference failed to distinguish between the government or private parties by confirming only that "[response costs] are recoverable from responsible parties, as removal or remedial costs under section 107." \textit{Id.} (emphasis added).
Several appellate courts addressed whether attorneys' fees are recoverable under CERCLA before the issue's resolution in *Key Tronic.* Initially, these circuit courts viewed the recovery of attorneys' fees as both provided for explicitly in the language of CERCLA section 107(a)(4)(B) and consistent with the policy reasons behind the legislation's enactment. The tide changed, however, as other circuits reached a polar conclusion, despite utilizing an analysis identical to that which opposing circuit courts used in their contradictory decisions.

1. **The Eighth and Sixth Circuits Allow Attorneys' Fees Under CERCLA Section 107(a)(4)(B)**

In 1990, the Court of Appeals for the Eighth Circuit held in *General Electric Co. v. Litton Industrial Automation Systems* that attorneys' fees are recoverable “response” costs under CERCLA section 107(a)(4)(B). In reaching this conclusion, the court used a two-pronged approach. First, the court focused on the language of the statute itself. Second, the court reviewed the policy justifications underlying CERCLA.

Litton Industries owned and operated a typewriter plant which dumped cyanide-based electroplating wastes, sludge, and other pollutants onto the land surrounding the plant. After the plant closed, Litton sold...
it and the surrounding land to General Electric, who was charged with the cleanup of the contamination Litton caused. General Electric then brought an action against Litton to recover the cleanup costs.

In concluding that the language of the statute explicitly allowed for the recovery of attorneys' fees, as the American Rule requires, the Litton court focused its analysis on the term "response" as defined by the Superfund Amendments made to CERCLA section 107(a)(4)(B) in 1986. The Superfund Amendments expanded the term "response," originally defined as "remove, removal, remedy, and remedial action," to include "enforcement activities related thereto." The Eighth Circuit reasoned that attorneys' fees are an inevitable cost of "enforcement activities" as defined by SARA, therefore they must be included as CERCLA section 107(a)(4)(B) "necessary costs of response."

The Eighth Circuit concluded that CERCLA contained a "sufficient degree of explicitness" to allow for the recovery of attorneys' fees. The court buttressed its position by stating that its holding advanced the purposes behind CERCLA — prompt cleanup of contaminated sites and im-

67. Id. at 1416-17.
68. Id. at 1417.
69. Id. at 1422. The statute defines "response" to include the term "enforcement activities." 42 U.S.C. § 9601(25) (1988); see also H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 185 (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3278. The Conference failed to distinguish between governmental or private parties by confirming only that "[response costs] are recoverable from responsible parties, as removal or remedial costs under section 107." Id.
71. General Elec., 920 F.2d at 1421-22; see 42 U.S.C. § 9607(a)(4)(B) (1985). The majority in General Electric stated "[a]ttorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover." General Elec., 920 F.2d at 1422.
72. General Elec., 920 F.2d at 1422 (concluding that to find otherwise would strain the language of § 107(a)(4)(B) beyond the breaking point and create an unnecessary obstacle for the recovery of attorneys' fees).
position of the cost of cleanup on responsible parties.\textsuperscript{73} Not allowing for the recovery of such fees, the court reasoned, would serve as a disincentive to clean contaminated sites because litigation costs for contribution actions often approach or exceed the original cost of cleanup.\textsuperscript{74} The court further opined that denying a party the attorneys' fees associated with litigation effectively prevents the rapid cleanup of hazardously contaminated sites because no entity will shoulder the cleanup cost voluntarily for fear that such cost will not be recoverable.\textsuperscript{75} Litton, the loser, applied for certiorari, but the Supreme Court denied its request.\textsuperscript{76}

Three years passed before the issue again reached the federal appellate level, this time in the Sixth Circuit.\textsuperscript{77} In \textit{Donahey v. Bogle}, the Court of Appeals for the Sixth Circuit resolved the issue of attorneys' fees in much the manner as the Eighth Circuit had in \textit{General Electric}.\textsuperscript{78} Bogle leased property for a term of twenty years to the St. Claire Rubber Company.\textsuperscript{79} Throughout most of the twenty-year lease period, St. Claire used the land to dump and burn sludge created at its plant.\textsuperscript{80} Upon completion of the lease, Bogle sold the land to Donahey, who, after state notification, undertook the task of cleaning up the contamination St. Claire caused.\textsuperscript{81}

The court in \textit{Donahey}, analyzing the reasoning of previous district and appellate courts,\textsuperscript{82} determined that Congress had created an exception to


\textsuperscript{74} \textit{See General Elec.}, 920 F.2d at 1422 (stating it would undermine the purposes of CERCLA to allow non-polluters such as General Electric to pay for cleanup, and then not be reimbursed for the cost of bringing litigation to recover the response costs, and that this would serve as a disincentive to clean hazardously contaminated sites).

\textsuperscript{75} \textit{See id.}


\textsuperscript{78} \textit{See id.} at 1256 (relying on the language of § 107(a)(4)(B) and legislative purposes of CERCLA to determine whether attorneys' fees are recoverable).

\textsuperscript{79} \textit{Id.} at 1252.

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} \textit{Id.} at 1252. All parties in this case were private; there was no formal state or federal action against the former or present landowners. \textit{See id.} Donahey tried to recover his cleanup costs under CERCLA, and rescind his purchase contract for the property under state law. \textit{Id.} at 1253.

the American Rule by creating a private cause of action for the recovery of "necessary expenses." Hence, allowing the recovery of attorneys' fees as "necessary expenses" complied with the American Rule. In addition, the Donahey court focused on the purposes of CERCLA and asserted that Congress intended section 107 to serve as an incentive for both the federal government and private individuals to assume the cost of response initially, thereby promoting the prompt cleanup of hazardously contaminated sites. The Sixth Circuit stated that the denial of attorneys' fees in private party response recovery actions would surely defeat the prompt cleanup of waste sites because PRPs would not shoulder willingly the heavy financial burdens that cleanup of waste sites and subsequent litigation entail. This approach to attorneys' fees under CERCLA was short-lived, however, because the remaining circuits to address the issue reached a contrary conclusion.

2. Private Parties Pay the Price — Attorneys' Fees Denied in Three Circuits

The issue of whether attorneys' fees are recoverable under CERCLA section 107(a)(4)(B) surfaced in different circuits three other times in 1993, but these circuit courts scrutinized the language of CERCLA section 107(a)(4)(B) more closely than their Sixth and Eighth Circuit counterparts. These circuits concluded that Congress neither authorized explicitly nor intended implicitly to award attorneys' fees to private par-

recovery of attorneys' fees is a guaranteed way of defeating the efficient cleanup of hazardous waste sites. *Id.* (quoting *Bolin*, 759 F. Supp. at 710); see 42 U.S.C. § 9607(a)(4)(B) (1988) (entitling private parties to bring an action to recover "necessary" expenses from other responsible parties).

83. *Id.* (quoting *Bolin*, 759 F. Supp. at 710); see 42 U.S.C. § 9607(a)(4)(B) (1988) (entitling private parties to bring an action to recover "necessary" expenses from other responsible parties).


86. *See id.* (stating that there is "no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs") (quoting *Bolin*, 759 F. Supp. at 710).

87. *See FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 848 (10th Cir. 1993) (only non-litigation attorneys' fees may be recoverable); *In re Hemingway Transp., Inc.*, 993 F.2d 915, 934 (1st Cir.) (finding litigation fees not recoverable), *cert. denied*, 114 S. Ct. 303 (1993); *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993) (same).

88. *See supra* note 87 (citing the circuits that disallowed recovery of attorneys' fees). The Sixth and Eighth Circuits found § 107(a)(4)(B) explicit enough to allow for private parties to recover attorneys' fees, while the First, Ninth, and Tenth Circuits decided that recovery of such fees requires something more explicit. *See supra* notes 13-14 and accompanying text.
ties as part of response costs associated with cleaning hazarding contaminat painted sites.

The Court of Appeals for the Ninth Circuit, in *Stanton Road Associates v. Lohrey Enterprises*, was the first federal appellate court to create conflict among the circuits over the recoverability of attorneys' fees. Stanton Road Associates owned property adjacent to Lohrey Enterprises. While operating its dry cleaning plant, Lohrey spilled the hazardous chemical perchlorethelene and thereby contaminated Stanton Road's property. Stanton Road then sued Lohrey Enterprises to recover the response costs under CERCLA.

Using two lines of reasoning, the *Stanton Road* court concluded that the language of CERCLA section 107(a)(4)(B) did not call for the award of attorneys' fees expressly, as the American Rule requires. First, the court reasoned that because CERCLA permits recovery of attorneys' fees expressly in other sections of the Act, Congress clearly had the ability to provide specifically for the recovery of attorneys' fees under section 107(a)(4)(B). Second, the court pointed to the disagreement among the district courts, both in the Ninth and Eighth Circuits, as a solid indication that the language of section 107(a)(4)(B) was ambiguous, and

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89. See supra note 87 and accompanying text. The First, Ninth, and Tenth Circuits found CERCLA § 107(a)(4)(B) did not meet the American Rule's requirement of explicitness as set out by *Alyeska* and *Runyon*. See id.

90. 984 F.2d 1015 (9th Cir. 1993).

91. *Compare Stanton Road*, 984 F.2d at 1015 (decided January 28, 1993) with *In re Hemingway Transp.*, 993 F.2d at 915 (decided May 4, 1993) and *FMC Corp.*, 998 F.2d at 842 (10th Cir. 1993) (decided July 9, 1993).

92. *Stanton Road*, 984 F.2d at 1016.

93. *Id*. Lohrey shared an alley adjacent to Stanton Road, and spilled hazardous chemicals which found their way onto Stanton Road's property. *Id*.

94. *Id*. At trial undisputed evidence was introduced that estimated the cost of the cleanup at over one million dollars. *Id* at 1017.

95. See id. at 1018-20 (arguing that both the existence of more explicit sections which do allow for the recovery of attorneys' fees and the disagreement among various courts addressing the issue of attorneys' fee recoverability suggest that § 107(a)(4)(B) is not sufficiently explicit to permit recovery of attorneys' fees under the American Rule).

96. See, e.g., CERCLA § 310(f), 42 U.S.C. § 9659(f) (1988) (authorizing courts to "award costs of litigation (including reasonable attorney and expert witness fees) to the . . . prevailing party whenever the court determines such an award is appropriate"); CERCLA § 104(b), 42 U.S.C. § 9604(b) (1988) (providing the "President may undertake such planning, legal, fiscal, . . . investigations . . . to plan and direct response actions [and] to recover the costs thereof").

97. *Stanton Road*, 984 F.2d at 1019 (stating that "Congress has repeatedly demonstrated that it knows how to express its intention to create an exception to the American Rule").
therefore, contrary to the American Rule's requirement of clear and specific statutory authorization sanctioning the recovery of attorneys' fees.\textsuperscript{98}

In this two-pronged analysis, the Ninth Circuit discarded as a secondary issue whether the allowance of attorneys' fees bolstered the purposes underlying CERCLA.\textsuperscript{99} The court explained that such an analysis would be irrelevant because the language of the statute did not provide explicitly for recovery of attorneys' fees.\textsuperscript{100} The Stanton Road court did agree with the Eighth Circuit's determination that attorneys' fees inevitably are incurred in a private response action.\textsuperscript{101} The Ninth Circuit noted, however, that under the American Rule the cost of litigation cannot be redirected to others merely because the positive residual effect of doing so enhances public policy.\textsuperscript{102} The Stanton Road court explained that although reading CERCLA to allow such fee shifting would support the purposes behind the legislation, a court cannot usurp the legislature's power to make policy decisions by implying an authority to award attorneys' fees.\textsuperscript{103}

In \textit{In re Hemingway Transportation, Inc.},\textsuperscript{104} the First Circuit also rejected the recovery of attorneys' fees under section 107(a)(4)(B).\textsuperscript{105} The

\textsuperscript{98} Id. The Stanton Road court stated that:
the fact that those district courts that have confronted this issue disagree on the question whether attorneys' fees are allowable under section 101(25) and 107(a)(4)(B) demonstrates that the words 'enforcement activities' do not explicitly signal, with any persuasive degree of clarity, that Congress intended to provide for an award of attorneys' fees to private litigants.
\textsuperscript{100} Stanton Road, 984 F.2d at 1020 (stating that the Eighth Circuit's decision in \textit{General Electric} to rely "on the policy underlying CERCLA to support its conclusion that Congress must have intended that litigants may recover attorneys' fees in a private response action... is misplaced").
\textsuperscript{101} See id. (implying that to award attorneys' fees to enhance public policy is contrary to the Supreme Court's rulings in \textit{Alyeska} and \textit{Runyon}); see also \textit{supra} text accompanying notes 28-57 (discussing the American Rule as it was developed by the Supreme Court in \textit{Alyeska} and \textit{Runyon}).
\textsuperscript{102} Stanton Road, 984 F.2d at 1020 (agreeing with the "Eighth Circuit that attorneys' fees are ordinarily expended in a private response action").
\textsuperscript{103} Id. (stating that the "cost of representation cannot be shifted by implication under the American Rule").
\textsuperscript{104} Id. The Ninth Circuit succinctly stated, "[w]e cannot imply authority to award attorneys' fees because we determine that such a rule would enhance public policy. The Supreme Court rejected this notion in \textit{Alyeska}." Id.
\textsuperscript{105} 993 F.2d 915 (1st Cir.), \textit{cert. denied}, 114 S. Ct. 303 (1993).
first part of the court's analysis mirrored that of the Ninth Circuit’s opinion in Stanton Road. As in Stanton Road, the Hemingway court reviewed other sections of CERCLA and found “explicit provisions authorizing attorney fee awards in certain other types of actions.” The Hemingway court reasoned that these explicit provisions prevented the courts from assuming that Congress designed less specific provisions of CERCLA, such as section 107(a)(4)(B), to allow for the recovery of attorneys’ fees. If Congress intended to allow recovery under section 107(a)(4)(B), the court maintained, it would have drafted the provision with equally explicit language.

In addition, the First Circuit analyzed SARA, and reasoned that Congress had the opportunity to clarify its intention with regard to the award of attorneys’ fees when it passed the Superfund Amendments in 1986. In adding the non-specific phrase “enforcement activities,” the court reasoned that Congress consciously “elected not to authorize attorney fee awards in [section 107(a)(4)(B)] actions.” The First Circuit concluded that despite the strong argument that allowing attorneys’ fees promotes CERCLA’s remedial aims, it is not proper for a court, without legislative guidance, to consider certain statutes more important than others. Allowing the recovery of litigation fees when they are not expressly delegable by the statute grants too much power to the courts.

The last circuit to address attorney fees recovery was the Tenth Circuit in FMC Corp. v. Aero Industries, Inc. FMC brought an action to recover response costs it incurred in cleaning up the soil contamination that

106. Id. (citing 42 U.S.C. § 9659(f) (1988) (prevailing private parties are entitled to recover the costs of litigation, “including reasonable attorney fees”) and 42 U.S.C. § 9610(c) (1988) (stating that “all costs and expenses (including the attorneys’ fees)” are recoverable in actions involving employee-whistleblowers)).
107. See id. (concluding CERCLA’s inclusion of explicit provisions authorizing rewards of attorneys’ fees in other types of actions indicates that “Congress did not consider” or include a similar attorneys’ fee award provision in § 107(a)(4)(B)).
108. Id. Absent express legislative authority, a prevailing party will not be allowed to recover attorneys’ fees. Id. Therefore, because § 107(a)(4)(B) is not as explicit as other sections of CERCLA, Congress did not intend for attorneys’ fees to be recoverable under it. Id.
109. Id. (stating that SARA’s purposeful omission of an explicit provision allowing for recovery of attorneys’ fees under § 107(a)(4)(B) indicates that Congress elected not to authorize awards in private party response recovery actions).
110. See id. at 934-35 (acknowledging that awarding attorneys’ fee may well promote the remedial aims of efficient cleanup and placing the liability on the responsible party, but noting that such a determination is one for the legislative venue, not the judiciary).
111. Id. at 935.
112. See id. (deciding that whether to award attorneys’ fees is not a question to be decided in the judicial venue).
113. 998 F.2d 842 (10th Cir. 1993).
the operation of Aero Industries' chemical facility had caused. Following the emerging trend other circuits developed, the *FMC* court refused to recognize an express grant of litigation fee recovery in the CERCLA term "enforcement activities." As in the other cases denying recovery of attorneys' fees under section 107(a)(4)(B), the Tenth Circuit acknowledged that allowing such recovery would further the social goals of CERCLA. The court stated, however, that despite the potential positive result of fee shifting, *Alyeska* mandated that attorneys' fees may not be awarded without an explicit delineation from Congress.

II. **Key Tronic Closes The Door On Attorneys' Fees Under Section 107(a)(4)(B)**

In *Key Tronic Corp. v. United States*, the issue of attorney fee recovery under CERCLA section 107(a)(4)(B) was finally ripe for Supreme Court adjudication, and the Supreme Court granted certiorari in December of 1993. Key Tronic attempted to recover 1.2 million dollars in response costs, including attorneys' fees, from the Air Force and other PRPs. First, Key Tronic sought recovery of the attorney costs associated with its identification of the other PRPs. Second, Key Tronic wanted to recover funds it expended on attorneys while organizing and negotiating its settlement agreement with the EPA. Finally, Key Tronic sought recovery for the cost of the ensuing litigation between itself and the United States Air Force and other responsible parties.

114. *Id.* at 844-45. The property was bought at an auction by Aero Industries, who did not investigate the environmental conditions of the property despite their knowledge that the plant had been used as an arsenic refining facility. *Id.* at 844.

115. *Id.* at 847. The court recognized the split among the circuits on the issue of attorneys' fees under § 107(a)(4)(B) by citing the decisions of *Donahey, General Electric, Stanton Road,* and *Hemingway,* but said that it simply could not “agree with those courts [Donahey and General Electric] that find an explicit authorization for the award of litigation fees from the fact that response costs include related enforcement activities.” *Id.*

116. *Id.*; see also supra note 2 and accompanying text (describing CERCLA's purposes).

117. *FMC*, 998 F.2d at 847 (stating that “[t]he desirability of a fee-shifting provision cannot substitute for the express authorization mandated by the Supreme Court” in *Alyeska*).


120. *Key Tronic*, 114 S. Ct. at 1963. The costs were incurred by Key Tronic to clean liquid chemicals disposed of in a landfill which contaminated the local water supply. *Id.*

121. *Id.*

122. *Id.* Key Tronic had agreed to contribute $4.2 million into a cleanup fund in it's settlement with the EPA. *Id.*

123. *Id.*
The District Court for the Eastern District of Washington and the Court of Appeals for the Ninth Circuit, hearing Key Tronic's claim, had split on the issue of attorneys' fees.\textsuperscript{124} The district court had construed CERCLA liberally to achieve the general objectives of the Act, viewing all three types of legal services as recoverable "response" costs.\textsuperscript{125} The court of appeals, however, followed its earlier reasoning in Stanton Road and denied Key Tronic's request for recovery of any of the three types of attorneys' fees.\textsuperscript{126}

With the issues in Key Tronic clearly established by the lower courts, the Supreme Court sought to settle the split among the circuit courts on whether attorneys' fees are recoverable under section 107(a)(4)(B) of CERCLA.\textsuperscript{127} The majority opinion applied the American Rule as outlined in Alyeska and Runyon.\textsuperscript{128} It explained that these two decisions require that the legislature expressly and specifically provide for the award of attorneys' fees, and that it would not construe any statutory provision not meeting this burden to allow for the recovery of attorneys' fees.\textsuperscript{129} After scrutinizing the language of the provision, the majority concluded that section 107(a)(4)(B) did not meet the threshold of precision the American Rule required.\textsuperscript{130} In contrast, the dissent argued that the majority read the Alyeska/Runyon line of cases too narrowly, and, as a result, required more than statutory explicitness.\textsuperscript{131}

\begin{itemize}
\item \textsuperscript{124} Key Tronic Corp. v. United States, 984 F.2d 1025, 1027 (9th Cir. 1993) (denying recovery of all three types of attorneys' fees under § 107(a)(4)(B) of CERCLA), aff'd in part, rev'd in part, 114 S. Ct. 1960 (1994); Key Tronic Corp. v. United States, 766 F. Supp. 865, 872-73 (E.D. Wash. 1991) (allowing recovery of all three types of attorneys' fees at issue in the case), rev'd, 984 F.2d 1025 (9th Cir. 1993).
\item \textsuperscript{125} Key Tronic, 766 F. Supp. at 872 (construing § 107(a)(4)(B) and § 101(25) "liberally to achieve the overall objectives of the statute").
\item \textsuperscript{126} Key Tronic, 984 F.2d at 1027-28 (prohibiting the recovery of attorneys' fees by interpreting "necessary response costs" so as to exclude attorneys' fees (citing Stanton Road, 984 F.2d at 1020)); see also supra notes 120-23 and accompanying text (detailing the three types of attorneys' fees Key Tronic sought to recover).
\item \textsuperscript{127} Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1964 (1994).
\item \textsuperscript{128} Id. at 1965; see Runyon v. McCrary, 427 U.S. 160, 185 (1976) (stating that "the law of the United States, but for a few well-recognized exceptions ... has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation") (footnote omitted); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (holding attorneys' fees not recoverable without specific congressional authorization).
\item \textsuperscript{129} See Key Tronic, 114 S. Ct. at 1965.
\item \textsuperscript{130} Id. at 1966-68 (holding that recovery of attorneys fees is not explicitly required by the term "necessary costs of response" in § 107(a)(4)(B)).
\item \textsuperscript{131} Id. at 1968-69 (Scalia, J., dissenting) (stating that the majority rule required the inclusion of "magic words" in the statute, not just an express authorization).
\end{itemize}
A. The Majority: Section 107(a)(4)(B) is Insufficiently Clear Under the American Rule

The *Key Tronic* majority opinion, written by Justice Stevens, described the statutory basis for private party cost recovery actions under CERCLA. The Supreme Court first observed that prior to SARA, no express provision existed allowing a private cause of action to recover cleanup costs, but that district courts had interpreted section 107(a)(4)(B) consistently to create such a right. Justice Stevens noted that, although the Superfund Amendments created an express right to seek contribution under section 113(f) of CERCLA, SARA did not grant a right to contribution explicitly under section 107. At most, SARA implied such a right by using language in section 107 in connection with the language in section 113 — which presupposed that a right to a civil cause of action existed under section 107. After discussing the history and development of private rights of action under CERCLA, the Court provided

132. Id. at 1962. Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Souter and Ginsburg joined in the majority opinion.

133. Id. at 1965 (considering the statutory basis for private party cost recovery actions and the effect of SARA on that legislative basis).

134. Id. at 1965-66. The Court quoted from the opinion in Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985), which stated that "District Court decisions have been virtually unanimous in holding that section 9607(a)(4)(B) creates a private right of action against section 9607(a) responsible parties." *Key Tronic*, 114 S. Ct. at 1965 n.7.


136. *Key Tronic*, 114 S. Ct. at 1965-66. Section 9607(a) states in relevant part:

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . .

> (4) shall be liable for -

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . .


137. *See Key Tronic*, 114 S. Ct. at 1965-66; see also Keyt, *supra* note 136, at 1032 (discussing how CERCLA § 113 in conjunction with § 107 deals with apportioning liability for cleanup among responsible parties).
three reasons for its decision to deny attorneys’ fees, all of which rested on the American Rule’s requirement of statutory explicitness.\textsuperscript{138}

First, although the Supreme Court acknowledged the generally accepted view that section 107 of CERCLA implies the ability of a private party to bring a cost recovery action, the Court reasoned that it would be erroneous to imply further that section 107 allows the recovery of attorneys’ fees, given the statutory clarity \textit{Alyeska} and \textit{Runyon} require.\textsuperscript{139} Certainly, the Court reasoned, a provision that does not even explicitly permit a private cause of action for contribution cannot be found to state expressly that attorneys’ fees are recoverable by the prevailing party in such actions.\textsuperscript{140} Second, Congress included in its SARA amendments to CERCLA two provisions that allow the award of attorneys’ fees expressly, but did not set forth similar provisions in sections 113 or 107.\textsuperscript{141} The Court maintained that such a purposeful omission forcefully suggests a deliberate intention by Congress not to authorize the recovery of legal fees associated with private party cost recovery litigation.\textsuperscript{142} Finally, the Supreme Court reasoned that if it included attorneys’ fees within the scope of the “response” costs that private parties are entitled to recover under section 107, it would be stretching the definition of “enforcement activities” too far.\textsuperscript{143} The Court concluded that the term “is not sufficiently explicit to embody a private action under § 107 to recover” such costs of cleanup.\textsuperscript{144}

Despite its conclusion that litigation-related costs are not recoverable under section 107, the majority stressed that a private party could recover some payments it makes to an attorney in the course of cleaning hazard-

\textsuperscript{138} Key Tronic, 114 S. Ct. at 1965-67. The three reasons the majority gave for denying recovery of attorneys’ fees were: (1) the language of CERCLA § 107(a)(4)(B) was not as explicit as \textit{Alyeska} required; (2) SARA amended several other provisions of CERCLA to allow expressly for recovery of attorneys’ fees, but did not do the same for § 107(a)(4)(B); and (3) it would “stretch” the meaning of “enforcement activities” too far to include attorneys’ fees as a recoverable “response” under § 107(a)(4)(B). Id. at 1966-67.

\textsuperscript{139} Id. at 1966-67; see also supra notes 28-57 and accompanying text.

\textsuperscript{140} See Key Tronic, 114 S. Ct. at 1966-67 (discussing the development of the American Rule denying recovery of attorneys’ fees unless there is a clear mandate in the statute).

\textsuperscript{141} Id. at 1966-67 (stating that “[t]o conclude that a provision [§ 107(a)(4)(B)] that only impliedly authorizes suit nonetheless provides for attorney’s fees with the clarity required by \textit{Alyeska} would be unusual if not unprecedented”).

\textsuperscript{142} Id. at 1967.

\textsuperscript{143} Id.

\textsuperscript{144} Id. Curiously the Supreme Court refused to comment on why the same phrase, “enforcement activities,” provides the government with the right to recover attorneys’ fees, but yet is not explicit enough to grant similar recovery to private parties under § 107(a)(4)(B) of CERCLA. Id.
ously contaminated sites. The fact that a lawyer performs work associated with the effective cleanup of a site, rather than a scientist or an environmental engineer, for example, is not dispositive of whether the fee for such work is recoverable. In order for the work conducted by a lawyer to be considered a non-recoverable cost, it must be associated specifically with the role and function of an attorney. The Court found that work outside of litigation and negotiation could be done by a lawyer as well as an engineer, chemist, or other professional. For this reason, the Court granted Key Tronc's request for reimbursement of fees associated with the identification of other PRPs. The Court denied, however, the recovery of the cost for negotiating the settlement with the EPA because it viewed such work as being performed traditionally by attorneys.

B. The Dissent: No Magic Words Required to Grant Attorneys' Fees Under Section 107(a)(4)(B)

Justice Scalia began his dissenting opinion in Key Tronc by disagreeing with the majority's finding that a private cause of action for the recovery of response costs is merely implied by section 107(a)(4)(B). Justice Scalia found no other way to interpret the language of section 107(a)(4)(B), which states that "[c]overed persons... shall be liable for..."

Id. at 1967-68 (stating that the earlier-stated rationale regarding work which may also be done by other professionals does not extend to work done by lawyers in connection with litigation and negotiation).

Id. at 1967 (reasoning that work done in connection with the identification of other PRPs falls into the category of recoverable response costs).

Id. at 1967 (distinguishing recoverable services from non-recoverable services).

Id. at 1967-68 (arguing that the statute expressly creates such a cause of action).
He argued that the majority would accept section 107(a)(4)(B) as creating an explicit cause of action only if it contained the exact words “cause of action.” Justice Scalia argued that the majority’s view that section 107(a)(4)(B) fails to offer private parties an express right of action exhibits a “confusion between a requirement of explicitness and a requirement of a password.” After establishing this position, Justice Scalia rebutted the three reasons the majority proffered for its denial of attorney’s fees associated with litigation.

Justice Scalia argued that the first line of reasoning the majority advanced displayed a confusion over the American Rule’s requirement of explicitness similar to the confusion the court exhibited with regard to CERCLA’s creation of a cause of action under section 107(a)(4)(B). He agreed with the majority’s statement that Alyeska and Runyon require explicitness, but argued that explicitness need not require the incantation of the “magic phrase ‘attorney’s fees.’” Rather, he maintained, Congress explicitly authorized the recovery of costs relating to “enforcement activities,” and because such costs primarily consist of attorneys’ fees, the statute meets the explicitness requirement of the American Rule.

Next, the dissent turned to the majority’s second argument that the existence of more specific provisions within CERCLA allowing for the recovery of attorneys’ fees indicates both a purposeful omission of similarly specific language in section 107(a)(4)(B) and a lack of intent to al-

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154. Key Tronic, 114 S. Ct. at 1968 (Scalia, J. dissenting). Justice Scalia reasoned that “Section 107(a)(4)(B) states, as clearly as can be, that ‘[c]overed persons . . . shall be liable for . . . necessary costs of response incurred by any other person.’ Surely to say that A shall be liable to B is the express creation of a right of action.” Id. (emphasis in original).
155. Id. Justice Scalia reasoned that the majority’s “assumption seems to be that only a statute that uses the very term ‘cause of action’ can create an ‘express’ cause of action.” Id.
156. Id. at 1969. By arguing that the majority required a “password,” Justice Scalia meant that they would only allow for the recovery of attorneys’ fees if the statutory provision included the specific term “attorneys’ fees.” See id.
157. Id. at 1968-69.
158. See id. at 1969 (arguing that the majority misread the Alyeska and Runyon requirement of explicitness necessary to counter the American Rule).
159. Id.
160. Id. (arguing that attorneys’ fees are naturally a part of the term “enforcement activities” and therefore recoverable as a “necessary” cost of response). The dissent argued that Runyon required only that the statute be explicit enough to evince an intention on behalf of Congress to provide for recovery of such fees, not the inclusion of a specific reference to “attorney’s fees.” Id.
low for recovery of attorneys' fees under the same.\textsuperscript{161} Justice Scalia refuted this argument by reasserting the "magic words" reasoning he used to reject the majority's first justification.\textsuperscript{162} He reasoned that Congress' use of the term "attorney's fees" in two other provisions of CERCLA is irrelevant in determining whether section 107(a)(4)(B) allows for their recovery.\textsuperscript{163} Justice Scalia maintained that this argument would be persuasive only if the language of section 107(a)(4)(B) was ambiguous.\textsuperscript{164} As he had argued previously, the language of section 107(a)(4)(B) provides explicitly for attorneys' fee recovery through its employment of the phrase "enforcement activities," therefore the fact that the statute uses more specific language elsewhere is of little relevance in determining whether section 107(a)(4)(B) also allows for recovery.\textsuperscript{165} Justice Scalia classified the majority's second line of reasoning as nothing more than "a watered-down version of the 'magic words' argument."\textsuperscript{166}

Finally, Justice Scalia rejected the majority's contention that "enforcement activities" is sufficiently specific to allow the government to recover its litigation fees, but not private parties.\textsuperscript{167} Justice Scalia recognized that "enforcement" normally is an activity associated with the executive power of a state or federal government in prosecutions.\textsuperscript{168} Pointing to the manner in which attorneys often use the term "enforcement" in civil litigation, he argued against its exclusive reference to formal government action.\textsuperscript{169} Justice Scalia concluded that limiting the meaning of "enforce-

\begin{itemize}
\item \textsuperscript{161} Id.; see also supra note 138 and accompanying text (discussing that, in light of what the Supreme Court said in \textit{Alyeska}, it is unusual to interpret non-specific language as authorizing recovery of attorneys' fees).
\item \textsuperscript{162} \textit{Key Tronic}, 114 S. Ct. at 1969 (Scalia, J., dissenting). Justice Scalia reasoned that the omission of the phrase "attorney's fees" would be persuasive only in arguing that § 107(a)(4)(B) does not allow for the recovery of litigation fees, if there was not an equally express authorization for recovery. \textit{Id.} Justice Scalia argued that is not the case here, however, because Congress included the term "enforcement activities." \textit{Id.}
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. Only if the Court's previous argument about the explicitness of "enforcement activities" was valid would the existence of more explicit sections be persuasive, "[b]ut since it is not, the fact that Congress provided for the recovery of attorney's fees \textit{eo nomine} in two other sections is of little relevance." \textit{Id.}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.} The majority reasoned that the phrase "enforcement activities" in § 107 was sufficiently clear to allow for the government to recover it attorneys' fees, but did not offer an explanation as to why the same phrase was insufficiently clear to allow similar recovery to private parties. \textit{Id.} at 1967.
\item \textsuperscript{168} \textit{Id.} at 1969 (Scalia, J., dissenting) (stating that "the term 'enforcement' often — perhaps even usually — is used in connection with government prosecution").
\item \textsuperscript{169} \textit{Id.} (stating that the use of the term enforcement "clearly includes the assertion of a valid private claim against another private litigant. Lawyers regularly speak of . . . 'enforcing' a private judgement"). The dissent pointed out that the Court had recognized that
ment” to actions brought by the government would be incorrect and inconsistent with the term's usage in the legal profession.170

III. INTERNAL ANOMALY, CERCLA LANGUAGE, AND PUBLIC POLICY ENCOURAGE INTERPRETING ATTORNEYS’ FEES AS A RECOVERABLE RESPONSE COST

Despite the majority’s position on the recoverability of attorneys’ fees under CERCLA section 107(a)(4)(B), significant flaws in the Supreme Court’s reasoning suggest that CERCLA section 107(a)(4)(B) should be interpreted to allow private parties reimbursement of their litigation costs.171 In implying that the government is entitled to recovery, yet denying the same privilege to private litigants, the majority overlooks three significant ramifications which illustrate weaknesses in its reasoning.172

First, the Court’s approach creates an internal anomaly regarding the award of attorneys’ fees.173 Second, the Court overlooks the double-edged implication of relying on statutory explicitness to determine the recoverability of litigation fees. Third, the Court ignores a strong public policy rationale supporting the grant of attorneys’ fees in private party response actions.174 The importance of these implications, neglected by the majority in Key Tronic, indicates that section 107(a)(4)(B) should be construed to permit the recovery of attorneys’ fees.175

A. Internal Anomaly — Different Treatment Between the Government and Private Parties

When the Court in Key Tronic held that private party recovery of attorneys’ fees tenuously stretches the limits of the phrase “enforcement activ-

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170. Id. (arguing to read the term “enforcement activity” to include both private and government and to “cover the attorney's fees incurred by both the government and private plaintiffs successfully seeking cost recovery under § 9607 of CERCLA”).

171. Id.; see supra notes 28-57 and accompanying text (discussing the American Rule’s requirement that a statute explicitly authorize recovery of attorneys’ fees).

172. Key Tronic, 114 S. Ct. at 1966-67. The majority reasoned that it would be unprecedented to read the recovery of attorneys' fees into a provision that only impliedly authorizes a private cause of action. Id.

173. See infra part III.A.

174. See infra part III.C.

175. See discussion infra notes 172-233 and accompanying text.
ities," it also passively endorsed government recovery of attorneys' fee under CERCLA section 107(a)(4)(A). The Supreme Court accomplished this endorsement by implying, without comment, its approval of the reasoning of the United States District Court for the Western District of Missouri in United States v. Northeastern Pharmaceutical & Chemical Co. ("NEPACCO").

The NEPACCO court had held that the government is entitled to the recovery of its attorneys’ fees under CERCLA section 107(a)(4)(B). The NEPACCO court recognized that CERCLA section 104(b)(1) allows the government to recover attorneys' fees which influenced and reinforced its belief that section 107(a)(4)(A) was sufficiently explicit to grant the government recovery of attorneys' fees under its provision. The Supreme Court in Key Tronic, however, did not apply the rationale the

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176. See Key Tronic, 114 S. Ct. at 1965. The majority attempted to rationalize the government's ability to recover its litigation fees, stating that "[t]hough we offer no comment on the extent to which that phrase ['enforcement activities'] forms the basis for the Government's recovery of attorney's fees through § 107, the term 'enforcement activity' is not sufficiently explicit to embody a private action under § 107 to recover cleanup costs." Id. at 1967 (emphasis added); see, e.g., United States v. Mottolo, 695 F. Supp. 615, 630-31 (D.N.H. 1988) (allowing the government to recover its attorneys' fees); United States v. Ottati & Goss, 694 F. Supp. 977 (D.N.H. 1988) (same), aff'd in part, vacated in part, 900 F.2d 429 (1st Cir. 1990).

177. See id. at 1966 n.9 (citing U.S. v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 851 (W.D. Mo. 1984) (concluding, pre-SARA, that the federal government may recover attorneys' fees), aff'd in part, rev'd in part, 810 F.2d 726 (8th Cir. 1986) and cert. denied, 484 U.S. 848 (1987); see also supra note 154 and accompanying text (stating that there is an explicit grant for a private cause of action under § 107(a)(4)(B)).

178. NEPACCO, 579 F. Supp. at 851. The NEPACCO court interpreted the language of § 107(a)(4)(A) loosely and used the existence of another CERCLA provision that expressly allows for the government to recover attorneys' fees to influence its decision to allow government parties to recover under § 107(a)(4)(A). Id. In particular, the NEPACCO court utilized the connection between the language in § 104(b) and § 101(23) to conclude that "legal" costs were recoverable under the terms of § 107(a)(4)(A). Id.

179. Id. see K.K. Du Vivier & Carolyn L. Buchholz, Attorney Fees as Superfund Response Costs, 6 Nat. Resources & Env't 34 (1991). In describing the reasoning the NEPACCO court used, Du Vivier & Buchholz state:

In determining that CERCLA specifically allows the federal government to recover attorney fees, the NEPACCO court first examined section 107(a)(4)(A) and the definition of 'remove' or 'removal' under section 101(23). The connection to the language in section 104(b) addressing 'legal' costs was established only through a reference to section 104(b) in the definition for 'remove' and 'removal' in section 101(23).

Id.
NEPACCO court developed to section 107(a)(4)(B). The inconsistent treatment of government and private parties seems peculiar because the comparative styled reasoning — existence of express recovery provisions elsewhere in CERCLA — used to deny private parties recovery of attorneys’ fees under section 107(a)(4)(B) in Key Tronic is precisely the same reasoning which created the government’s entitlement to attorneys’ fees under section 107(a)(4)(A) in NEPACCO. The inconsistency becomes even more acute when one analyzes the substantially similar language between subsections (A) and (B) of section 107(a)(4).

180. The NEPACCO court began by reading § 107(a)(4)(A) very broadly so as to include the recovery of attorneys’ fees. NEPACCO, 571 F. Supp. at 851. In its analysis, the court stated that “[i]f Congress had intended otherwise, they would have merely stated in section 107(a)(4)(A), ‘all reasonable costs,’ instead of the present language of ‘all costs.’” Id. The NEPACCO court justified its reasoning by reading CERCLA § 104(b)(1), a section that allows the government to recover its attorneys’ fees, contemporaneously with § 107(a)(4)(A). Id. See Du Vivier & Buchholz, supra note 179, at 34 (stating that “[i]t is well established that the federal government can recover its attorney fees as response costs. This conclusion is based upon section 104(b)(1) of CERCLA”); J. Christopher Jordan, Note, Recovery of Attorneys’ Fees in Private Contribution Actions Pursuant to CERCLA Section 107(a)(4)(B), 10 Rev. Litig. 823, 829 (1991) (stating that the court in NEPACCO relied on § 104(b)(1) in reasoning that CERCLA § 107(a)(4)(B) allows for the recovery of attorneys’ fees). Section 104(b)(1) essentially states that the President of the United States may undertake such legal studies or investigations needed to plan response actions, and “recover the costs thereof” to enforce the provisions of CERCLA. See CERCLA § 104(b)(1), 42 U.S.C. § 9604(b)(1) (1988). Although it is unclear whether § 104(b)(1) allows for the recovery of the cost of investigation or the actual response action, the NEPACCO court held that § 104(b)(1) allows the government to recover its litigation costs. See NEPACCO, 579 F. Supp. at 851. Note that “[t]he term ‘thereof’ in § 104(b)(1) refers to costs of the studies and investigations, not the costs of response actions,” making it seem as if the NEPACCO court erroneously concluded that attorneys’ fees are rewarded to governmental parties under § 107(a)(4)(A). See Jordan, supra note 180, at 829 (stating that the NEPACCO court relied on § 104(b)(1) as part of its determination that attorneys’ fees are recoverable by governmental parties).

181. See Key Tronic, 114 S. Ct. at 1965-67. In Key Tronic, the Supreme Court refused to engage in the same kind of statutory arithmetic that the NEPACCO court used to allow the government recovery of its attorneys’ fees. See id.

182. Compare NEPACCO, 571 F. Supp. at 851 (allowing the recovery of attorneys’ fees for governmental parties by reading CERCLA § 107(A)(4)(A) language broadly and in conjunction with § 104(B)(1) which does allow for recovery of attorneys’ fees by governmental parties) with Key Tronic, 114 S. Ct. at 1966-67 (denying recovery of attorneys’ fees to private parties by reading § 107(a)(4)(B) language narrowly and interpreting different provisions in CERCLA).

183. See CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1988). Section 107(a)(4) states in relevant part that a person shall be liable for: “(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.” Id. The only relevant difference is that sub-section (A) uses “all costs” while (B) uses “necessary costs.” Id. The term “necessary,” unlike its counterpart in subsection (A), could limit recovery, but because it is impossible to bring a response recovery action without incurring the cost
The majority in *Key Tronic*, citing the existence of separate and express recovery provisions for attorneys' fees within CERCLA,\(^{184}\) refused to allow these provisions to influence the recovery of attorneys' fees by private parties under section 107(a)(4)(B).\(^{185}\) Courts do, however, read these separate statutory provisions in conjunction with one another to grant government parties recovery of attorneys' fees.\(^{186}\) Permitting this type of synthesis to grant recovery by government parties under section 107, as the *NEPACCO* court did and as the Supreme Court endorsed in *Key Tronic* implicitly,\(^{187}\) while prohibiting the same practice for private party litigants, is inconsistent.\(^{188}\)

of attorneys' and other fees associated with litigation, the limiting definition is counteracted by the practical realities of bringing a lawsuit. See id.; see also Stanton Rd. Assocs. v. Lohrey Enters., 984 F.2d 1015, 1020 (9th Cir. 1993) (agreeing with the 8th Circuit that attorneys' fees are normally incurred in private party response actions); General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1421-22 (8th Cir. 1990) (stating that attorneys' fees are necessarily incurred in cost recovery actions and that the litigation costs easily approach and often exceed the actual cost of cleanup), cert. denied, 499 U.S. 937 (1991); Jones, supra note 51, at 264-65 (quoting *General Electric* regarding the necessity of incurring attorneys' fees when bringing an enforcement action against another party); Jordan, supra note 180, at 834 (stating that contribution litigation to recover response costs involve substantial costs).

\(^{184}\) See *Key Tronic*, 114 S. Ct. at 1967 (interpreting strictly *Alyeska's* requirement of "explicit statutory authority" to mean the inclusion of the term "attorney's fees"); see also supra note 96 (providing examples of CERCLA provisions that expressly allow recovery of attorneys' fees).

\(^{185}\) *Key Tronic*, 114 S. Ct. at 1967 (reasoning that the existence of separate provisions which do allow for recovery of attorneys' fees indicates that they are not to be read in conjunction with one another to allow for the recovery of attorneys' fees under § 107(a)(4)(B)); See supra note 8 and accompanying text (indicating an absence of language in § 107(a)(4)(A) explicitly creating a cause of action); see also In re Hemingway Transp., Inc., 993 F.2d 915, 934 (1st Cir.) (concluding that Congress had the opportunity to include an attorney fee amendment to § 107(a)(4)(B), but chose not to do so, and refusing to read explicit CERCLA sections (e.g. § 110(c)) as authorizing recovery under § 107(a)(4)(B)), cert. denied, 114 S. Ct. 303 (1993); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 461 (1st Cir. 1992) (explaining that litigation expenses are not recoverable as response costs).


\(^{187}\) See *Key Tronic*, 114 S. Ct. at 1967 (stating that it offered no comment as to why government parties are allowed to recover litigation fees, yet not denying the practice).

\(^{188}\) Compare id. at 1965-67 (holding attorneys' fees not recoverable by private parties in response recovery actions under § 107(a)(4)(B) with *NEPACCO*, 579 F. Supp. at 851 (allowing governmental parties to recover attorneys' fees); see also Du Vivier & Buchholz,
Key Tronic stated that litigation fees cannot be recovered under section 107(a)(4)(B) because that provision does not specifically allow for such recovery. In so holding, the Court read into the American Rule the requirement that the specific provision of a statute which creates the cause of action, rather than the synthesis of an act's provisions, must explicitly authorize recovery of attorneys' fees. However, the NEPACCO court engaged in, and the Key Tronic Court tacitly approved, exactly this type of statutory arithmetic to create the government's right to recover attorneys' fees under section 107(a)(4)(A). Therefore, if the Supreme Court allows this practice under section 107(a)(4)(A), it cannot logically forbid the same practice under section 107(a)(4)(B).

The Court further perpetuated the statutory anomaly it created between the government and private parties by refusing to adhere to the plain meaning of the language of sections 107(a)(4)(A) and (B). Subsection (A) holds a party liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." Subsection

\[supra\), note 179, at 34 (stating that it is well established that government parties may recover attorneys' fees as response costs).

189. Key Tronic, 114 S. Ct. at 1966-7 (stating that attorneys' fees are not recoverable because § 107(a)(4)(B) does not expressly call for them); see Runyon v. McCrary, 427 U.S. 160, 185 (1976) (requiring specific congressional authorization to allow recovery of attorneys' fees); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (requiring legislative guidance to allow recovery of attorneys' fees).

190. See Key Tronic, 114 S. Ct. at 1967. The requirement of an express authorization by statute for the award of attorneys' fees precludes combining separate provisions of a statute to authorize such an award. See id. at 1966-67. Although the synthesis approach clearly was rejected by the Supreme Court with regard to private parties, it has been used by several courts to allow government parties recovery of attorneys' fees under § 107(a)(4)(A).


192. See Karen M. McGaffey, Denying Private Attorney Fee Recovery Under CERCLA: Bad Law and Bad Policy, 17 U. Puget Sound L. Rev. 87, 94 (1993) (stating that a "court should consider the plain meaning of the statutory language"). For cases discussing the basic principles of statutory interpretation; see Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (stating that courts should consider the plain meaning of statutes); Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335, 1341 (9th Cir. 1990) (stating that legislative purpose should be derived from ordinary meaning); Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801, 804 (9th Cir. 1989) (discussing the doctrine of last antecedent); Beisler v. Commissioner, 814 F.2d 1304, 1307 (9th Cir. 1987) (stating that statutes should be interpreted so as to give effect to each word); New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (stating that courts should not interpret statutes to frustrate the purposes underlying their enactment).

(B) holds a responsible party liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."\(^{194}\) The only relevant difference between the two subsections is that subsection (A) uses the term "all costs" and subsection (B) employs the phrase "necessary costs."\(^{195}\) This minute difference does not warrant denying attorneys' fees to private parties, while allowing their recovery to government parties.\(^ {196}\) Furthermore, the majority provided no justification for this anomaly.\(^{197}\)

An analysis of the plain meaning of the words that sections 107(a)(4)(A) and (B) use reveals a strong basis for extending attorneys' fees to private parties. The term "necessary," means that which is obligatory, essential or required.\(^ {198}\) The commencement of any response recovery litigation requires one to incur the cost of an attorney.\(^ {199}\) Logically, "all costs" implies any cost necessary to bring an action.\(^ {200}\) Therefore, if


195. See 42 U.S.C. § 9607(a)(4)(A), (B); see also Jordan, supra note 180, at 832 (stating that the NEPACCO court did not distinguish between §§ 107(a)(4)(A) and (B)); McGaffey, supra note 192, at 90-91 (comparing the language of §§ 107(a)(4)(A) and (B) and finding no significant difference).

196. See Key Tronic, 114 S. Ct. at 1967 (1994) (holding that private parties are barred recovery of attorneys' fees under § 107(a)(4)(B), and not explaining why government parties are not similarly barred under § 107(a)(4)(A)).

197. Id.; see supra note 176 and accompanying text (explaining that the majority in Key Tronic offered no explanation for passively endorsing the recovery of attorneys' fees to government parties).

198. See Webster's New Universal Unabridged Dictionary, 1200 (2d ed. 1983). "Necessary" is defined as: "That [which] cannot be dispensed with: essential; indispensable . . . that [which] must be done; mandatory; not voluntary; required." Id.

199. See Key Tronic, 114 S. Ct. at 1968 (Scalia, J., dissenting). A cost recovery action "is the only 'enforcement activit[y]' [one] can conceivably conduct. Obviously, attorney's fees will constitute the major portion of those enforcement costs." Id.

the Supreme Court is willing to interpret "all costs" in subsection (A) to include attorneys' fees, it must also construe "necessary costs" in subsection (B) in the same manner.201

B. The Language of Section 107(a)(4)(B) Contains Sufficient Clarity to Allow Recovery of Attorneys' Fees

In Key Tronic, the American Rule provided the basis for all three of the majority's arguments.202 By interpreting the American Rule to demand specific terminology explicitly demonstrating an intent to award attorneys' fees, the majority parted with the Court's previous understanding of the rule as laid out in Alyeska and Runyon.203

In Alyeska and Runyon, the Supreme Court established clearly that, absent express congressional authorization, attorneys' fees could not be awarded.204 As the Court noted in Key Tronic, under this jurisprudence, the absence of the specific term "attorneys' fees" is not enough, in itself, to conclude that Congress did not intend the statute to allow for recovery of such fees.205 Despite its own recognition of this principle, however, the majority relied exclusively on the fact that section 107(a)(4)(B) does not call expressly for the award of attorneys' fees in its decision to deny the prevailing party in Key Tronic recovery of its attorneys' fees.206

The majority in Key Tronic supported its position by arguing that CERCLA's more explicit provisions demonstrate that Congress did not intend

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201. Jordan, supra note 180, at 830 (stating that it seems counter-intuitive "to assert that the lack of an express provision for recovery of attorneys' fees indicates congressional intent to permit such recovery under subsection (A), but to prohibit such recovery under subsection (B)").

202. See Key Tronic, 114 S. Ct. at 1965-67. In ruling that CERCLA § 107(a)(4)(B) does not allow for the recovery of attorneys' fees to private parties, the majority focused on the term "enforcement activities" and concluded that, in light of the Court's adherence to the American Rule, this language was not express authorization to reward attorneys' fees. Id. at 1967.

203. See id. at 1965. The majority itself recognized that the "absence of specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees." Id. If the Court were to require more than language that evinces congressional intent to reward attorneys' fees, the result would be, as Justice Scalia aptly termed in his dissent, the incantation of "magic words" to create the recovery of attorneys' fees. Id. at 1969 (Scalia, J., dissenting).


206. Id. at 1967.
for private parties to recover such fees under section 107(a)(4)(B). 207 This argument is flawed for two reasons. First, the fact that other sections are more explicit does not negate the possibility that a less explicit section allows for recovery of attorneys' fees. Instead, that several of CERCLA's provisions expressly allow for the recovery of attorneys' fees actually tends to increase the likelihood that Congress intended section 107(a)(4)(B) to do the same. 208 Second, because courts glean enough intent from section 107(a)(4)(A) to grant the government recovery of its attorneys' fees, 209 it would not stretch the language of section 107(a)(4)(B) improperly to allow private parties the same right to recovery. 210 In fact, given the substantial similarity between the two subsections, awarding attorneys' fees to private parties is statutorily reasonable. 211

Additionally, in interpreting the American Rule to require specific language in order to allow for the recovery of attorneys' fees under section 107(a)(4)(B), the Key Tronic Court did not acknowledge the consequences of employing such a strict explicitness requirement. That is, if the majority in Key Tronic was willing to forgo the rule of strict explicitness in subsection (A) of section 107(a)(4) for government parties, 212 it

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207. Id.

208. See CERCLA § 104(b)(1), 42 U.S.C. § 9604(b)(1) (1988). It is widely accepted that the federal government can recover its attorneys' fees under § 107(a)(4)(A) because of this section. Du Vivier & Buchholz, supra note 179, at 34; see supra note 186 and accompanying text (listing in part, cases where government parties were allowed to recover attorneys' fees).


any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

Id. (emphasis added). If "all costs" evinces the intent that Congress intended to allow for the recovery of attorneys' fees, "necessary costs" should evince the same congressional intent. See NEPACCO, 579 F. Supp. at 851-52 (establishing the reasoning by which government parties are entitled to the recovery of attorneys' fees).


212. See Key Tronic, 114 S. Ct. at 1967 (explaining that the court would not comment as to why the government is allowed to recover its litigation fees).
must do the same in subsection (B) for private parties. At first impression, this argument may seem without merit because, contrary to the reasoning in Key Tronic, the Court would be using the American Rule to read a requirement of explicitness out of section 107(a)(4)(B). In Key Tronic, the majority construed the American Rule's requirement of sufficient clarity to mean unambiguous statutory authorization (i.e., the inclusion of the phrase "attorney's fees"). However, by implicitly treating government parties differently than private parties on the issue of attorneys' fees, the Court ignored the Alyeska/Runyon requirement of statutory explicitness with regard to section 107(a)(4)(A), and read out a requirement of explicitness for government parties. Although the majority in Key Tronic misapplied the American Rule, it must apply its interpretation consistently to each provision of section 107. The Supreme Court cannot selectively misapply the American Rule.

213. Although the cause of action which allows private parties to seek contribution is statutorily based, the suit still should be governed by common law principles of equity and fairness, which should persuade the Court to award private parties attorneys' fees. See Key, supra note 136, at 1032-33; Elizabeth F. Mason, Comment, Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin's Lead, 19 B.C. ENVTL. AFF. L. REV. 73, 99-100 (1991) (discussing the equitable principles that underlie contribution actions); see also supra note 210 and accompanying text (scrutinizing the language of § 107(a)(4)(B) reveals that it does not explicitly disallow recovery of attorneys' fees).

214. See Key Tronic, 114 S. Ct. at 1967 (holding that CERCLA § 107(a)(4)(B) was not specific enough to allow private parties recovery, noting that it did not include the term "attorney's fees").

215. See id. at 1969 (Scalia, J., dissenting). As Justice Scalia observed in his dissenting opinion, the majority is requiring the incantation of the password "attorney's fees" in order for the Court to evince congressional intent to allow recovery of litigation costs. Id.

216. See also id. at 1967 (endorsing the practice of awarding attorneys' fees to governmental parties even though doing so requires combining separate provisions of CERCLA, and § 107(a)(4)(A) does not expressly call for the award of such fees); see supra notes 176-80 and accompanying text (explaining NEPACCO reasoning by which government parties may recover attorneys' fees).

217. The Court in Key Tronic, despite requiring an explicit congressional authorization to allow recovery of attorneys' fees, states that a statute need only include language that discloses an intent on the behalf of Congress to award such fees. Key Tronic, 114 S. Ct. at 1965. Therefore, the mere absence of the phrase "attorneys' fees" is not dispositive of whether attorneys' fees are recoverable. Id.

218. See Runyon v. McCrary, 427 U.S. 160, 185 (1976) (establishing the precedent that courts need express congressional authorization to allow the award of attorneys' fees); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y., 421 U.S. 240, 269 (1975). The principle of stare decisis will be severely damaged if courts are allowed to apply the American Rule stringently when private parties are before the court, but apply it loosely when the government stands before the court. See id. at 269-71.
C. Public Policy: Persuasive Arguments for Allowing Recovery of Attorneys' Fees Under Section 107(a)(4)(B)

Two strong public policy arguments highlight the negative implication of the Court's holding in *Key Tronic*. First, because the party charged with cleanup may not be responsible for the actual contamination of a site, denying attorneys' fees to that party may be unjust. Second, the denial of attorneys' fees frustrates the legislative purposes behind CERCLA's enactment and destroys any incentive for PRPs to cooperate in cleanup efforts or to settle recovery actions before litigation.

In delegating the responsibility for cleaning a hazardously contaminated site under CERCLA, the EPA may select from a variety of parties. The basis on which the EPA chooses a party depends little on the degree of responsibility for the contamination. Rather, this choice is based on which party the EPA can locate most easily. This implies that the EPA often charges the current owner with the responsibility of commencing cleanup.

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219. Jordan, *supra* note 180, at 834. The author states that:

One can envision the frustration of parties who contributed minimally to the wastes disposed at a particular site, but nevertheless receive response orders simply because the EPA identified them first.

If they invest the substantial resources necessary to prove apportionment among defendants, but cannot recover their attorneys' fees for doing so, their litigation expenses could easily exceed their proportionate share of the cleanup costs.

*Id.*

220. See *supra* note 2 and accompanying text (outlining the purposes behind CERCLA enactment).

221. Jones, *supra* note 51, at 261. The rate of cleanup will be sure to decrease “[i]f landowners are forced to absorb their attorneys' fees incurred in recovering response costs from the primary polluter, hazardous waste sites will most likely not be cleaned up promptly or effectively and responsible parties will not have to pay their share of cleanup costs which necessarily includes attorneys' fees.” *Id.* at 277. If CERCLA is amended “to allow fee awards[, it] would create incentives for private parties to undertake a response action. By knowing that they will be able to recover fees when pursuing a response action against other PRPs, private parties can better estimate whether they can afford a response action.” *Keyt, supra* note 136, at 1070.

222. CERCLA § 107(a)(1)-(4), 42 U.S.C § 9607(a)(1)-(4) (1988). Under the statutory scheme set up by CERCLA, past and present owners and operators, as well as transporters, are potentially liable for cleanup of a contaminated site. *Id.*

223. See Jordan, *supra* note 180, at 834 (explaining that a PRP often feels frustrated when it receives response orders because the EPA may have simply identified that PRP first, without having actually considered that PRPs contribution to the actual contamination).

224. *Id.*

225. See *id.*
CERCLA requires the selected PRP to clean the site before that party may attempt to shift liability to other PRPs. This cleanup and removal of hazardous substances often entails heavy financial burdens, but CERCLA attempts to offset these cleanup costs by allowing for response recovery actions under section 107(a)(4)(B). After the Key Tronic decision, an identified PRP has no motive to make use of the cause of action created by section 107(a)(4)(B) because the cost of litigation often exceeds the party's proportionate share of the contamination. The potential result of this patently unfair statutory plan is that a party who may not be responsible for contaminating a site may have to bear the cost of cleanup because it is either unable or unwilling to incur the additional expense of recovery litigation.

Aside from creating equity among PRPs, the inclusion of attorneys' fees as part of the recoverable response costs also would create several positive cooperation incentives for the PRPs. First, there is the incentive to settle response recovery actions prior to engaging in expensive and time-consuming litigation. For example, a party, such as a transporter

226. See CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2) (1988) (allowing actions to be commenced "under section 9607 of this title for recovery of costs at any time after such costs have been incurred") (emphasis added); see also Dickerson v. Environmental Protection Agency, 834 F.2d 974, 977 (11th Cir. 1987) (construing § 113(h) to mean that courts have no pre-enforcement review power to review EPA's cleanup orders).


229. General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990) (noting that "[t]he litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site"), cert. denied, 499 U.S. 937 (1991); see also Jones, supra note 51, at 265 (citing General Electric for the idea that litigation costs may exceed the cost of cleanup).

230. Jordan, supra note 180, at 833-34. Jordan, pointing to the dan, pointing to the unfairness inherent in CERCLA, states:

A party who cleans the site and proves apportionment can then recover response costs from the other responsible parties in a contribution suit. In the process, however, that party may incur substantial, nonrecoverable legal fees. The inequity becomes especially acute when non-negligent or causally-remote parties bear these costs.

Id. (footnotes omitted).

231. Id. at 834. The system is unfair because "[i]f the parties are unable or unwilling to incur the expense of multi-party contribution litigation, they are saddled with the entire costs [sic] of cleanup. Either way, these parties will pay vastly more than their proportionate share of the cleanup expenses." Id.

232. See Keyt, supra note 136, at 1070-71, 1075.

233. Id. at 1075. Allowing prevailing private parties to recover their attorneys' fees would provide an important, practical, and obvious incentive for parties to settle a situation that could develop into extremely long and costly litigation. Id.
of hazardous material, who contributes relatively little to the contamination of a site, but faces the possibility of a long and expensive court battle, will settle early rather than confront the potential liability of litigation costs, which far outweigh its proportionate share of the cleanup.\textsuperscript{234} Second, permitting the recovery of attorneys' fees creates the incentive to undertake a cleanup action.\textsuperscript{235}

As previously discussed, CERCLA requires a party the EPA identifies as a PRP to clean up the site before it can seek contribution from other PRPs.\textsuperscript{236} If attorneys' fees are not a recoverable response cost, the party is likely to delay commencing cleanup because that money, in effect, is lost.\textsuperscript{237} If attorneys' fees may be recovered, however, a party will more likely begin cleanup as soon as the EPA identifies them as a PRP in order to obtain the right to a cause of action.\textsuperscript{238} These incentives will act to further the legislative goals of CERCLA.\textsuperscript{239}

\begin{footnotes}
\textsuperscript{234} Id.; see O'Neil v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989) (explaining that de minimis parties in contribution actions are offered the possibility of settling at low cost), cert. denied, 493 U.S. 1071 (1990).

\textsuperscript{235} Jordan, supra note 180, at 834. A potentially responsible party identified by the EPA, realizing that they "may be subject to claims for attorneys' fees by other parties would have an incentive to voluntarily contribute to the cleanup effort at the outset." Id.

\textsuperscript{236} See supra note 222 and accompanying text (explaining pre-enforcement review bar).

\textsuperscript{237} Keyt, supra note 136, at 1074. A PRP will be very reluctant to expend the initial expense of cleanup.

Because PRPs are only potentially responsible, the EPA typically pursues only a few of the largest ones and attempts to force them to conduct a response action . . . If they decide to participate in the ongoing action with the EPA, the company may be held responsible for some or all of the EPA's transaction costs. But if they decide not to participate, they may be sued later by PRPs that do participate and at that point would not be responsible for attorneys' fees. Thus, the private party can save money by not participating and dragging out the cleanup process. Id. (footnotes omitted).

\textsuperscript{238} See Keyt, supra note 136, at 1070; see also supra note 222 and accompanying text (stating that an incentive to cleanup will be present because cleanup is a requisite step to gaining a cost recovery cause of action).

\textsuperscript{239} See Jones, supra note 51, at 277. Allowing attorneys' fees under § 107(a)(4)(B) will promote the policy reason behind CERCLA because "[i]f landowners are forced to absorb their attorneys' fees incurred in recovering response costs from the primary polluter, hazardous waste sites will most likely not be cleaned up promptly or effectively and responsible parties will not have to pay their share of cleanup costs which necessarily includes attorneys' fees." Id. If they are allowed to recover their attorneys' fees, the opposite will be true. See id. CERCLA's objective is to promote prompt cleanup of sites determined to be hazardously contaminated and to place the cost of cleanup on the party responsible of the contamination. See supra note 2 and accompanying text (discussing policy behind CERCLA's enactment).
\end{footnotes}
Prior to *Key Tronic* a lack of consensus existed among the circuit courts as to whether attorneys' fees are a recoverable response cost under CERCLA section 107(a)(4)(B). The Supreme Court, in resolving the conflict among circuits, concluded in *Key Tronic* that attorneys' fees are not recoverable by private parties because section 107(a)(4)(B) does not comply with the American Rule, in particular with the interpretation the *Alyeska* and *Runyon* cases assert. Given the Court's desire to rely on this staple of American jurisprudence, and the Court's own recognition that a lack of specific reference to attorneys' fees does not negate *ipso facto* a statute's intent to award such fees, the holding in *Key Tronic* seems erroneous. As the title of the Act itself suggests, one of the constituent elements of CERCLA is the notion of compensation. In refusing to extend the language of CERCLA section 107(a)(4)(B) to allow private parties to recover attorneys' fees, the Supreme Court is neglecting this important component, and in the process severely undermining the legislative purposes the statute aims to achieve.

In light of the Court's misconstruction and misapplication of the American Rule, and the negative effects that are likely to result from the Court's holding in *Key Tronic*, Congress should enact specific legislation to counteract the potential consequences flowing from the *Key Tronic* decision.

*Sergio I. Borgiotti*