Denying Private Attorney Fee Recovery Under CERCLA: Bad Law and Bad Policy

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I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)\(^1\) to require and to encourage the cleanup of property contaminated by hazardous substances. The statute establishes a strict liability regime under which anyone falling within several broad categories of responsible parties is required, without regard to fault, to pay for cleaning up the hazardous substances.\(^2\)

The CERCLA statutory scheme incorporates public and private enforcement mechanisms. The federal government may enforce the statute's requirements either by ordering responsible parties to clean up contamination\(^3\) or by cleaning up contamination itself and then recovering its costs from responsible parties.\(^4\)

Recognizing the inherent budgetary and political limitations of federal enforcement, Congress authorized private enforcement of CERCLA's requirements.\(^5\) Section 107(a)(4)(B) makes responsible parties liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."\(^6\) Whether a private party is entitled to recover its attorneys' fees under CERCLA depends on whether Congress intended to include litigation expenses and attorneys' fees in the phrase "necessary costs of response."


\(^2\) Id. § 9607.
\(^3\) Id.
\(^4\) Id. §§ 9604(a), 9607(a)(4)(A).
In *Stanton Road Associates v. Lohrey Enterprises*, a divided panel of the Ninth Circuit held that private parties could not recover their attorneys' fees in cost recovery actions brought pursuant to CERCLA section 107(a)(4)(B). In reaching its decision, the court expressly rejected reasoning previously adopted by the Eighth Circuit. The court's holding in *Stanton Road* represents a step backward for hazardous waste law. The court avoided any serious analysis of CERCLA's language and legislative history by almost ritualistically invoking

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7. 984 F.2d 1015 (9th Cir. 1993).

8. See 42 U.S.C. § 9607(a)(4)(B) (1988). On the same day that it decided *Stanton Road*, the Ninth Circuit decided Key Tronic Corp. v. United States, 984 F.2d 1025 (9th Cir. 1993), which also concerned the recovery of attorneys' fees by private parties under CERCLA.

9. *Stanton Road*, 984 F.2d at 1019-20; see Gopher Oil Co. v. Union Oil Co., 955 F.2d 519 (8th Cir. 1992); General Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), cert. denied, 111 S. Ct. 1390 (1991). The Sixth Circuit recently held that private parties may recover their attorneys' fees under CERCLA. See Donahay v. Bogle, 987 F.2d 1250 (6th Cir. 1993). The Third Circuit has previously awarded attorneys' fees to a prevailing plaintiff in a CERCLA § 107 action, although it has not directly confronted the issue. See *Jersey City Redevelopment Auth. v. PPG Indus.*, 28 Env't Rep. Cas. (BNA) 1873, 1881 (3d Cir. Dec. 28, 1988). Since *Stanton Road*, both the First and Tenth Circuits have held that private parties may not recover litigation attorneys' fees in CERCLA actions. See *FMC Corp. v. Aero Indus.*, Inc., 998 F.2d 842 (10th Cir. 1993); *In re Hemingway Transp.*, Inc., 993 F.2d 915, 934-35 (1st Cir. 1993).


the American Rule against fee shifting. The court's decision also undermines CERCLA's broad remedial purposes by eliminating an important incentive to clean up hazardous substances voluntarily.

This Article argues that the Ninth Circuit decision in Stanton Road was wrong. Section II of this Article describes the majority and dissenting opinions in Stanton Road. Section III argues that the majority misread Supreme Court precedent, leading it to adopt an excessively formalistic approach to statutory construction. It argues that the majority should have used traditional approaches to statutory construction and that those approaches would have produced a different result. Finally, the Article concludes by arguing that the Ninth Circuit's decision distorts the intent of Congress in enacting CERCLA and hinders private efforts to clean up hazardous waste.

II. THE NINTH CIRCUIT'S HOLDING IN STANTON ROAD

Stanton Road presented the CERCLA attorney fee issue to the Ninth Circuit in a relatively straightforward and uncomplicated form. The defendant, Lohrey Enterprises (Lohrey), owned and operated a dry cleaning plant on property next to property owned by the plaintiff, Stanton Road Associates (Stanton Road). Hazardous chemicals spilled onto Stanton Road's property during the dry cleaning plant's operation. Stanton Road brought an action against Lohrey seeking response costs and declaratory relief under CERCLA. Stanton Road prevailed at trial and recovered $77,374 for costs incurred in cleaning up the contamination and $126,198 in attorneys' fees. Stanton Road also obtained a declaratory judgment holding Lohrey liable for the future costs associated with cleaning up the contamination, which were expected to exceed one million dollars. On appeal, Lohrey challenged the district court's award of attorneys' fees under CERCLA.

Judge Alarcon, joined by Judge Sneed, wrote the majority's opinion, reversing the district court's award of attorneys' fees.

10. Stanton Road, 984 F.2d at 1016.
11. Id. at 1017. Stanton Road also recovered $389,925 in damages under state law.
12. Id.
13. Id. The district court's order that Lohrey place $1,100,000 in escrow for the cleanup of contamination on Stanton Road's property was also at issue on appeal. Id. at 1020-21.
14. Id. at 1016.
The majority's analysis began with the American Rule, which provides that a prevailing party is generally not entitled to recover its attorneys' fees. The majority argued that under the Supreme Court's holdings in *Alyeska Pipeline Service Co. v. Wilderness Society* and *Runyon v. McCrory*, a federal court may award attorneys' fees to a prevailing party only if Congress has expressly and unambiguously departed from the American Rule and authorized the award of fees. The majority concluded that CERCLA contained no such unambiguous, express authorization.

Two provisions of CERCLA are relevant in determining whether a private party may recover its attorneys' fees. Section 107(a) provides the following:

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

(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 substance for transport . . . 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;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

15. *Id.* at 1018.
19. *Id.* at 1019.
Section 101(25) defines response as follows:

The term “respond” or “response” means remove, removal, remedy, and remedial action; all such terms (including the terms “removal” and “remedial action”) include enforcement activities related thereto.21

The majority concluded that although these sections authorize recovery of the costs related to “enforcement activities,” the sections do not “explicitly authorize the payment of attorneys’ fees.”22 The majority compared the statute’s reference to enforcement activities with its other references to “legal . . . costs”23 and “attorney . . . fees”24 and concluded that “Congress has repeatedly demonstrated that it knows how to express its intention to create an exception to the American Rule.”25 The majority acknowledged that, in a general sense, a private response cost action is an enforcement action, but the majority explained that the Ninth Circuit had never considered whether a private cost action is an enforcement activity in the context of an attorneys’ fees award under section 107(a)(4)(B).26

Finally, the majority refused to consider the policies and purposes underlying CERCLA. Relying on Alyeska, the majority explained that “[w]e cannot imply authority to award attorneys’ fees because we determine that such a rule would enhance public policy.”27

Judge Canby dissented, arguing that private cost recovery actions are properly seen as enforcement activities within the CERCLA scheme.28 He noted that the majority failed to give any meaning to Congress’ decision to amend CERCLA in 1986 to add enforcement activities to the definition of response costs.29 Judge Canby concluded that the award of attorneys’

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21. Id. § 9601(25).
22. Stanton Road, 984 F.2d at 1019.
24. Id. § 9659(f).
25. Stanton Road, 984 F.2d at 1019.
26. Id. at 1018. The Ninth Circuit has twice described private cost recovery actions as enforcement actions. See Cadillac Fairview/California Inc. v. Dow Chem. Co., 840 F.2d 691, 694 (9th Cir. 1988); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986).
27. Stanton Road, 984 F.2d at 1020.
28. Id. at 1022-24 (Canby, J., dissenting).
29. Id. at 1023.
fees furthered CERCLA's basic purposes of encouraging the prompt cleanup of hazardous waste sites and imposing the cost of cleanups on the responsible parties.\textsuperscript{30}

III. The \textit{Stanton Road} Majority Misread Precedent, Ignored Traditional Methods of Statutory Interpretation, and Came to the Wrong Result

The majority in \textit{Stanton Road} came to the wrong conclusion. More importantly, the majority misinterpreted Supreme Court precedent to impose a general rule against awarding attorneys' fees and, as a result, ignored traditional approaches to statutory construction.

A. The Majority Misread Precedent Regarding the American Rule

The majority's analysis began and ended with the American Rule and the Supreme Court's commands in \textit{Alyeska} and \textit{Runyon}. The majority misread those cases, however, to require an unambiguous statutory authorization to award attorneys' fees. Those cases, in fact, merely require some indication that Congress intended to permit fee awards.

In \textit{Alyeska} and \textit{Runyon}, the Supreme Court held that courts could not award attorneys' fees in the absence of Congress' expressed intent to authorize their award. The Supreme Court did not, as the majority contends, hold that a court may never award attorneys' fees whenever the relevant statutory language is ambiguous.\textsuperscript{31} The Supreme Court insisted on a statutory authorization of attorneys' fees, but not necessarily an authorization that is completely unambiguous.\textsuperscript{32}

In \textit{Alyeska}, the plaintiffs sought an injunction to prohibit the issuance of various rights-of-way to oil companies. The plaintiffs argued that the rights-of-way would violate the Min-

\textsuperscript{30} \textit{Id.} at 1024.

\textsuperscript{31} See \textit{id.} at 1019 ("The rule set forth in \textit{Alyeska} and \textit{Runyon}, however, precludes us from implying from ambiguous language an intent that attorneys' fees can be awarded in a private response action.").

\textsuperscript{32} The Supreme Court has insisted on an unambiguous expression of Congressional intent in other contexts. \textit{See, e.g.}, \textit{Atascadero State Hosp. v. Scanlon}, 473 U.S. 234, 241 (1985) ("Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").
eral Leasing Act of 1920\textsuperscript{33} and the National Environmental Policy Act of 1969.\textsuperscript{34} The D.C. Circuit concluded that the plaintiffs were entitled to recover their attorneys’ fees, but the Supreme Court reversed.\textsuperscript{35} Significantly, neither the Court nor the plaintiffs pointed to any provision in either statute that could have been interpreted to authorize the award. Instead, the question before the Court was whether there should be a broad judicially created exception to the American Rule for litigants who have acted to vindicate important statutory rights.\textsuperscript{36} The Court refused to create such an exception and instead left it to Congress to authorize the award of attorneys’ fees by statute.\textsuperscript{37} The Court explained as follows:

It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. . . . But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys’ fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.\textsuperscript{38}

In Runyon, the plaintiffs brought actions under 42 U.S.C § 1981\textsuperscript{39} and Title II of the Civil Rights Act of 1964\textsuperscript{40} against a school refusing to admit African American students. The district court awarded the plaintiffs their attorneys’ fees, the court of appeals reversed, and the Supreme Court affirmed.\textsuperscript{41} The plaintiffs argued that 42 U.S.C. § 1988,\textsuperscript{42} which confers broad jurisdiction on the district courts to remedy civil rights violations, authorized the district court’s attorneys’ fee award.\textsuperscript{43} The Supreme Court rejected the plaintiffs’ argument, but not

\begin{itemize}
\item 34. 42 U.S.C. § 4321 (1988).
\item 36. See id. at 245-47.
\item 37. Id. at 269-71.
\item 38. Id. at 263.
\item 40. Id. § 2000c. The plaintiffs’ attorney withdrew their Title II claim before trial.
\item 41. Runyon, 427 U.S. at 182.
\item 43. Runyon, 427 U.S. at 184.
\end{itemize}
because § 1988 was ambiguous. Rather, the Court considered § 1988's language and legislative history and concluded that Congress did not intend to authorize the award of attorneys' fees through the jurisdictional provision.

A court applying *Alyeska* and *Runyon*, therefore, must look to a statute and interpret its provisions in light of the traditional rules of statutory construction. If the court is unable to discern a Congressional intent to authorize the award of attorneys' fees, the court may not award attorneys' fees. The *Stanton Road* majority's opinion is problematic precisely because the majority refused to engage in this type of traditional statutory analysis. Instead, the majority misread *Alyeska* and *Runyon* to rigidly preclude attorneys' fee awards except when the statutory authorization is absolutely unambiguous.

**B. Traditional Approaches to Statutory Interpretation Produce a Different Result**

Instead of abandoning any attempt to interpret an ambiguous statutory provision, the *Stanton Road* majority should have employed the traditional methods of statutory interpretation. Three basic rules of statutory construction are particularly relevant in this context: First, a court should consider the plain meaning of the statutory language. Second, a court should interpret a statute in a way as to give each part meaning. Third, a court should interpret a statutory provision in a way that would further the purposes underlying the statutory scheme.

1. The Statute's Plain Meaning

When read together, section 107(a)(4)(B), which allows a private party to recover response costs, and section 101(25), which defines "response" to include "enforcement activities related thereto," clearly authorize the recovery of costs associ-

44. *Id.* at 185.
45. *Id.* at 186.
47. *See In re Oxborrow*, 913 F.2d 751, 754 (9th Cir. 1990); Beisler v. Commissioner, 814 F.2d 1304, 1307 (9th Cir. 1987).
ated with enforcement activities. However, two questions remain. First, do costs of enforcement activities under CERCLA include attorneys’ fees? Second, are private response cost recovery actions enforcement activities within the meaning of section 101(25)?

The answer to the first question seems simple. Anyone enforcing the technical legal regime established by CERCLA requires attorneys and accompanying litigation expenses. 49 CERCLA's provision allowing the recovery of the costs of enforcement activities, therefore, cannot be reasonably interpreted to exclude the recovery of attorneys' fees incurred in the course of those activities.

If a court assumes that the attorneys' fees incurred in connection with enforcement activities are recoverable, the remaining question is whether section 107(a)(4)(B) cost recovery actions brought by private parties are enforcement activities within the meaning of section 101(25). "Enforce" is typically defined to mean "to give force to," "to put in force, [to] cause to take effect." 50 Private litigation does just that; it effectuates the requirements of CERCLA. 51

As the Stanton Road majority acknowledged, the Ninth Circuit has previously referred to private cost recovery actions as enforcement actions in other contexts. 52 The majority failed, however, to explain why private cost recovery actions should not be considered to be enforcement activities in this context. The majority's Alyeska and Runyon analysis is simply beside the point. Congress clearly authorized the recovery of enforcement costs. Even a presumption against attorneys' fees awards would not be relevant to a determination of what constitutes an enforcement activity under CERCLA.


51. See General Elec., 920 F.2d at 1422 ("A private party cost-recovery action . . . is an enforcement activity within the meaning of the statute.").

52. Stanton Road Assocs. v. Lohrey Enters., 984 F.2d 1015, 1018 (9th Cir. 1993); see Cadillac Fairview/California Inc., v. Dow Chem. Co., 840 F.2d 691, 694 (9th Cir. 1988); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986).
2. Recovery of Attorneys' Fees is Necessary to Give Meaning to Congress' Amendment of Section 101(25) in 1986

The most serious flaw in the majority's opinion is its complete failure to offer an interpretation of CERCLA sections 107(a)(4)(B) and 101(25) that gives any meaning to the phrase "all such terms . . . include enforcement activities related thereto." The majority concluded that this phrase is not an unambiguous authorization to award attorneys' fees, but at the same time failed to explain what purpose the phrase serves.

As Judge Canby's dissent noted, Congress amended CERCLA in 1986 and added the phrase "all such terms (including the terms 'removal and remedial action') include enforcement activities related thereto" to section 101(25)'s definition of "response." The legislative history supports the dissent's position. As one court explained, "Congress intended for 'enforcement activities' to include attorney's fees expended to induce a responsible party to comply with the remedial actions mandated by CERCLA. This Court cannot ascertain any other logical interpretation which would give effect to this phrase."

The defendant in Stanton Road argued that the phrase "enforcement activities" refers only to actions brought by the federal government and, consequently, that CERCLA authorizes only the federal government to recover its attorneys' fees and response costs. This interpretation is unsupported by the statutory language. CERCLA section 107(a)(4) authorizes federal, state, and tribal cost recovery in a subparagraph different from the subparagraph authorizing cost recovery by private parties. Section 107(a)(4)(A) provides that responsible parties will be liable for "all costs of removal or remedial action incurred

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54. Stanton Road, 984 F.2d at 1019.
by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan."\(^{59}\) Section 107(a)(4)(B), in contrast, makes responsible parties liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."\(^{60}\)

In 1986, Congress expressly included enforcement activities in the definition of "response," a term that only appears in section 107(a)(4)(B)'s private cost recovery provision. Congress' amendment of section 101(25) to include enforcement activities within the definition of "response," as well as within the definitions of "removal" and "remedial action," would be rendered ineffective and meaningless unless enforcement activities are interpreted to include private cost recovery actions.\(^{61}\)

CERCLA's legislative history makes clear that Congress intended private parties to play an important, and perhaps even a dominant, role in the enforcement of the statute.\(^{62}\) Congress knew that government-sponsored cleanups would be insufficient to solve the problem of hazardous substance releases and that private parties would have to take the lead in cleaning up many sites.\(^{63}\) Because the EPA alone cannot enforce CERCLA, private response cost recovery actions play an essential role in enforcing the statute.\(^{64}\)

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60. Id. § 9607(a)(4)(B) (emphasis added).

Congress specifically included "enforcement activities" in the definition of "respond" or "response"—the terms particularly applicable to cost recovery actions by private litigants. If Congress did not contemplate that private parties could perform "enforcement activities," it would have defined only the terms applicable to governmental entities—i.e., "remove" or "removal" and "remedy" or "remedial action"—to include "enforcement activities," or it would have defined enforcement activities as applying only to actions brought by the federal government.

Id. (citations omitted); Pease & Curren, 744 F. Supp. at 951.

62. See H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1, at 55 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2837 ("It is clear from the accumulating data on waste sites that EPA will never have adequate moneys or manpower to address the problem itself. As a result, ... Congress must facilitate cleanups of hazardous substances by the responsible parties."); cf. Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1988) (interpreting the statute in a way that "promotes the effectiveness of private enforcement").


64. See Stanton Road Assocs. v. Lohrey Enters., 984 F.2d 1015, 1023 (9th Cir. 1993) (Canby, J., dissenting) ("CERCLA is to a large degree a machine driven by private litigation or the threat of it."); Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1365 (9th Cir. 1990) (Pregerson, J., dissenting), cert. denied, 111 S. Ct. 2014 (1991);
Furthermore, an interpretation of sections 107(a)(4)(B) and 101(25) that would authorize only the federal government to recover its litigation costs and attorneys' fees would render Congress' amendment of section 101(25) unnecessary in light of section 104(b)(1), which already authorized the federal government to collect its legal expenses.65

3. Private Party Recovery of Attorneys' Fees Furthers CERCLA's Statutory Purposes

Finally, the Stanton Road majority refused to consider CERCLA's underlying purposes. Congress enacted CERCLA to serve primarily two purposes: to encourage the prompt, voluntary cleanup of hazardous substances,66 and to make the parties responsible for hazardous substances pay for the cleanup.67 Courts that interpret CERCLA sections 107(a)(4) and 101(25) to authorize private parties as well as the federal government to recover their attorneys' fees and litigation expenses as costs of enforcement activities further these statutory purposes.

Courts permitting private parties to bring cost recovery actions and to recover their litigation expenses encourage them to clean up hazardous substances promptly and voluntarily.68 One district court concluded that

[b]y providing private parties with a federal cause of action for the recovery of necessary expenses in the cleanup of hazardous wastes, Congress intended section 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take actions. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial

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65. 42 U.S.C. § 9604(b)(1)(1988). The Stanton Road majority pointed to § 104(b)(1) as an example of Congress' ability to unambiguously authorize the recovery of attorneys' fees. Stanton Road, 984 F.2d at 1019. Although that section does demonstrate that Congress is capable of drafting legislation clearly, it poses the question of why, in light of an authorization of federal legal fee recovery, Congress amended § 101(25) to authorize the recovery of enforcement costs.


67. See Union Gas Co., 491 U.S. at 11; Dedham, 805 F.2d at 1081.

burden of the very litigation that is necessary to recover these costs.\textsuperscript{69}

In light of the inherent limitations of federal enforcement of CERCLA,\textsuperscript{70} any provision encouraging voluntary cleanup of hazardous substances is essential to the statute's effectiveness.

Furthermore, if prevailing plaintiffs in cost recovery actions did not recover their attorneys' fees, the parties responsible for hazardous substances would not be paying all of the costs associated with cleaning them up.\textsuperscript{71} Another court explained that

[t]he statute clearly meant for those responsible for dumping chemical wastes to pay for the cleanup of those wastes. If the court narrowly read the statute . . . then even innocent purchasers of property who clean up hazardous wastes and subsequently seek recovery from the responsible parties would be unable to recover the entirety of the expenses incurred in holding the responsible parties accountable for their pollution.\textsuperscript{72}

By ignoring the purposes underlying CERCLA's statutory scheme, the \textit{Stanton Road} majority failed to consider an important aid to the interpretation of sections 107(a)(4)(B) and 101(25).

\textbf{IV. Conclusion}

In rejecting the award of attorneys' fees under CERCLA, the \textit{Stanton Road} majority eliminated a substantial incentive designed to further Congress' goal of encouraging the prompt, voluntary cleanup of hazardous substances. More significantly from a jurisprudential standpoint, the majority abdicated its responsibility to determine a reasonable interpretation of statutory provisions that were less than artfully drafted. Courts do not have the luxury of continuing to apply common law principles once Congress has legislated on a matter. Even with increasingly complicated and poorly drafted legislation, courts


\textsuperscript{70} \textit{See supra} notes 61-63 and accompanying text.

\textsuperscript{71} \textit{See} \textit{General Elec.}, 920 F.2d at 1422.

\textsuperscript{72} Key Tronic Corp. v. United States, 766 F. Supp. 865, 872 (E.D. Wash. 1991), \textit{rev'd}, 984 F.2d 1025 (9th Cir. 1993).
have an obligation to employ traditional tools of statutory analysis to determine what result Congress intended to legislate.