

## Attorney Fee Awards In CERCLA Private Party Response Actions

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Environmental litigators whether representing plaintiffs or defendants in private party response actions must be aware of the arguments supporting attorney fees in such actions. Attorney fees are usually substantial and their award can have a significant impact on the parties. Although the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides that if a party remediates contaminated property on its own initiative or in compliance with a governmental request, that party has a right of recovery against other responsible parties, courts are divided as to whether the prevailing plaintiff can recover attorney fees. This article briefly outlines the arguments in favor of awarding attorney fees and against.

Section 107 of CERCLA provides the basis for private party response actions. CERCLA expressly establishes a private right of action for recovery of response costs under Section 107(a)(1-4)(B). Responsible parties or defendants in private party response actions include: (1) current owners and operators of CERCLA (hazardous substance) facilities; (2) owners and operators of facilities at the time of disposal; (3) generators who dispose of hazardous waste at the facility; and (4) transporters of hazardous waste to the facility. (see endnote 1) As responsible parties, defendants are strictly liable for any "necessary costs of response incurred . . . consistent with the National Contingency Plan." (see endnote 2) Thus, the question is whether or not attorney fees are "necessary costs of response."

There is currently a "sharp split of authority" as to whether CERCLA authorizes awarding attorney fees in private party response actions. (see endnote 3) District courts in the Second, (see endnote 4) Fourth, (see endnote 5) Sixth, (see endnote 6) Seventh, (see endnote 7) Eighth, (see endnote 8) Ninth (see endnote 9) and Tenth (see endnote 10) Circuits have awarded attorney fees to successful plaintiffs. Out of three Circuit Court of Appeals to address the issue, the Sixth (see endnote 11) and Eighth (see endnote 12) Circuit Court of Appeals have upheld the award of attorney fees in private party response actions. The Ninth Circuit Court of Appeals (see endnote 13) and district courts in the Second, (see endnote 14) Third, (see endnote 15) Sixth, (see endnote 16) Ninth (see endnote 17) and Tenth (see endnote 18) Circuits have held that attorney fees are not recoverable.

### A. Attorney Fees Recoverable

Support for awarding attorney fees in private party response actions focus on two arguments: (1) attorney fees are "necessary costs of response" incurred in pursuing "enforcement activities"; (2) the policy implications of CERCLA, prompt cleanup of contamination and imposition of all cleanup costs on the responsible party, are furthered by awarding attorney fees.

1. Attorney Fees are "Necessary Costs of Response". The first argument supporting attorney fees contends that litigation costs are included as "enforcement activities" under the definition

of response actions and as such are "necessary costs of response." "Necessary costs of response" are not defined in CERCLA, however, "response" or "respond" are defined. The terms "respond" or "response" are defined to mean "remove, removal, remedy and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." (see endnote 19) "Response" costs thus include the costs of removal and remedial actions taken pursuant to Section 107(a)(1-4)(B) and related enforcement activities. Although attorney fees are not included in the definitions of removal or remedial actions, this argument asserts that they are included as "enforcement activities related thereto."

The reasoning of the Eighth Circuit Court of Appeals in *General Electric Co. v. Litton Industrial Automation Systems, Inc.* (see endnote 20) is persuasive. The General Electric court reasoned that a Section 107 private party response action is an enforcement action to force the responsible party to reimburse the plaintiff for its response cost incurred in pursuing removal or remedial action. Therefore, the plaintiff should be able to recover the necessary costs of its enforcement activity, i.e. attorney fees. (see endnote 21) As stated by the court, "[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 107(a)(1-4)(B) allows private parties to recover." (see endnote 22)

2. Policy Implications Support Awarding Attorney Fees. CERCLA is essentially a remedial statute designed to protect and preserve public health and the environment and courts are obligated to construe its provisions liberally. (see endnote 23) Two predominant policy objectives of CERCLA are (1) prompt cleanup of hazardous waste sites; and (2) imposition of all cleanup costs on the responsible party. (see endnote 24) Prompt cleanup and imposition of cleanup costs on the responsible party are undermined if a plaintiff cannot recover its attorney fees in private party response actions. Often, attorney fees are substantial and equal or exceed response costs. If the plaintiff has to pay for its own attorney fees, the responsible party is not being held accountable for all the cleanup costs. (see endnote 25) Likewise, if private parties have to bear the financial burden of the litigation that is necessary to recover their response costs, (see endnote 26) they will have little incentive to remediate the site. Policy implications support awarding attorney fees.

#### B. Attorney Fees Not Recoverable.

There are two basic arguments against awarding attorney fees in private party response actions: (1) the legislative history behind the amendment of "respond" or "response" to "include enforcement activities related thereto" confirms the government's ability to recover enforcement costs and not private parties'; and (2) no explicit language allows private party attorney fees.

1. Legislative History. One argument against awarding attorney fees is based on the legislative history behind the amendment of "respond" or "response" by the SARA amendments of 1986. Before the amendment, the definition provided that "respond" or "response" means "remove, removal, remedy and remedial action." (see endnote 27) SARA amended "respond" or "response" to mean "remove, removal, remedy and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement

activities related thereto." (see endnote 28)

The legislative history is virtually nonexistent on this amendment except for comments made before the Committee of Energy and Commerce. These comments stated that this "section also modifies the definition of 'response action' to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." (see endnote 29) Thus, it is argued, Congress intended to clarify the EPA's authority to recover costs for enforcement actions, not to allow private parties to recover attorney fees. (see endnote 30)

According to this argument, only the government may bring a Section 107 enforcement action. Although private parties may recover their response costs under Section 107, they cannot bring an enforcement action, i.e. an action to enforce CERCLA's cleanup provisions against another private party. (see endnote 31) Moreover, legislative history arguably confirms the government's ability to recover enforcement costs, not private parties.

2. CERCLA Lacks Explicit Statutory Language to Award Attorney Fees. The second argument against awarding attorney fees is that CERCLA does not explicitly state that plaintiffs can recover attorney fees in private party response actions. Although CERCLA explicitly provides for attorney fees in citizen suits under Section 310, and for response actions taken by the United States pursuant to Section 104, it does not provide for attorney fees under Section 107. The closest language to attorney fees is provided in the definition of "response," which includes "enforcement activities" related to remedial or removal actions. This language, however, has been held by the Ninth Circuit in *Stanton Road Associates v. Lohrey Enterprises, Inc.* (see endnote 32) to be insufficient to overcome the American Rule regarding attorney fees, which states that attorney fees are not recoverable as costs of litigation absent explicit congressional authorization. (see endnote 33)

### C. Summary - Convincing the Court to Award Attorney Fees

The arguments supporting attorney fees and those denying attorney fees are compelling enough to create a split among the courts. The key to convincing the court, however, is to persuade the court that attorney fees are costs of "enforcement activities." The first basis of contention is the lack of explicit language allowing attorney fees in private party response actions. CERCLA contains no language which states that a plaintiff may recover attorney fees in private party response actions. However, "enforcement activities" must be given some meaning. Given that the language does not limit "enforcement activities" to the government, it must apply equally to private parties. Therefore, private parties may recover their necessary costs of response, which include enforcement activities related to remedial or removal action. Thus, if "enforcement activities" is given any meaning, arguably attorney fees should be recoverable.

Additionally, considering the language allowing the government to recover attorney fees, which has uniformly been held sufficient, (see endnote 34) the argument that "enforcement activities" include attorney fees is stronger. Section 104(b) provides that the government may "undertake such planning, legal, physical, economic, engineering, architectural, and other studies or investigations as he [it] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof . . . ." This language, however, is far from clear

and not nearly as explicit as the citizen suit provision language, yet it has been held sufficient. The "enforcement activities" language, likewise, does not explicitly state that attorney fees are recoverable, but when other factors are considered, strong arguments can be made that it is sufficient. (see endnote 35)

Legislative history is inconclusive. The comments before the Committee of Energy and Commerce regarding the addition of the "enforcement activities" language indicates that it was added to confirm the government's authority to recover its costs in bringing a Section 107 enforcement action. However, the lack of comments in subsequent legislative history casts some doubt on this conclusion. Additionally, there was no need for the amendment if it applies only to the government, given that the government already had authority to recover attorney fees under Section 104(b).

Policy implications are yet a third element of consideration. Most courts will readily admit the policy objectives of CERCLA are furthered by allowing private parties to recover their attorney fees in private party response actions. Allowing private parties to recover their attorney fees furthers the goals of prompt cleanup, and imposition of the cost of the cleanup on the responsible parties. The key, however, is whether these policy implications combined with the statutory language are sufficient to allow a court to allow attorney fees.

#### ENDNOTES

1. 42 U.S.C. § 9607(a)(1-4).
2. 42 U.S.C. § 9607(a)(1-4)(B).
3. Santa Fe Pacific Realty Corp. v. United States, 780 F. Supp. 687, 694 (E.D. Calif. 1981).
4. New York v. SCA Servs., Inc., 754 F. Supp. 995 (S.D.N.Y.), proceeding on different grounds, 761 F. Supp. 1415 (S.D.N.Y. 1991).
5. Chesapeake and Potomac Telephone Co. of Virginia v. Peck Iron and Metal Co., Inc., 814 F. Supp. 1281 (E.D. Vir. 1993).
6. Hastings Bldg. Products, Inc. v. National Aluminum Corp., 815 F. Supp. 228 (W.D. Mich. 1993).
7. BTR Dunlop, Inc. v. Rockwell Int'l Corp., No. 90-C-7414, 1933 U.S. Dist. LEXIS 1720 (N.D. Ill. Feb. 12, 1993).
8. Gopher Oil Co., Inc. v. Union Oil Co. of California, 757 F. Supp. 998 (D. Minn. 1991).
9. Pease & Curren Refining, Inc. v. Spectrolab, Inc., 744 F. Supp. 945 (C.D. Cal. 1990).
10. Bolin v. Cessna Aircraft Co., 759 F. Supp. 692 (D. Kan. 1991).
11. Donahey v. Bogle, 87 F.2d 1250 (6th Cir. 1993).

12. General Electric Co. v. Litton Indus., Inc., 920 F.2d 1415 (8th Cir. 1990), cert. denied, \_\_\_\_\_ U.S., 111 S.Ct. 1390, 113 L.Ed.2d 446 (1991).
13. Stanton Road Assocs. v. Lohrey Enters., Inc., 984 F.2d 1015 (9th Cir. 1993); Keytronic Corp. v. United States, 984 F.2d 1025 (9th Cir. 1993).
14. SCA Services, Inc., 754 F.Supp. 995; Leonard Partnership v. Town of Chenango, 779 F. Supp. 223, 229-30 (N.D.N.Y. 1991).
15. T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696 (D.N.J. 1988); Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335 (E.D. Pa. 1991); Redland Soccer Club, Inc. v. Dept. of the Army of the United States, 801 F. Supp. 1432, 1437 (M.D. Pa. 1992).
16. Abbott Laboratories, 790 F. Supp. 135; Anspec Co., Inc. v. Johnson Controls, Inc., 788 F. Supp. 951, 957-58 (E.D. Mich. 1992).
17. Santa Fe Pacific Realty Corp., 780 F. Supp. 687.
18. United States v. Hardage, 750 F. Supp. 1460 (W.D. Okl. 1990).
19. 42 U.S.C. § 9601(25)(1986) (emphasis added).
20. 920 F.2d 1415; See also, Hastings Bldg. Prods., Inc., 815 F. Supp. 228 (W.D. Mich. 1993).
21. Id. at 1422; Hastings, 915 F. Supp. at 233.
22. Id.
23. United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992).
24. General Electric Co., 920 F.2d at 1422.
25. Id.
26. Id. See also, Donahey, 987 F.2d at 1256.
27. 42 U.S.C. § 9601(25)(1983).
28. 42 U.S.C. § 9601 (1986).
29. H.R. Rep. 253, 99th Cong., 1st Sess., Pt. 1 at 66-67 (1985), reprinted in 1986, U.S. Code Cong. & Admin. News 2835, 2848-49.
30. Fallowfield Dev. Corp., No. 89-8644, 1990 U.S. Dist. LEXIS 4820.
31. Reagan v. Cherry Corp., 706 F.Supp. 145, 148-50 (D.R.I. 1989).

32. 948 F.2d 1015, 1019-20 (9th Cir. 1993).

33. See, *Fallowfield Dev. Corp.*, 766 F. Supp. 335, 338 (E.D. Penn. 1991); see, *Aleyska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Runyan v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976).

34. *T&E Indus., Inc.*, 680 F. Supp. at 708.

35. See, *BTR Dunlop, Inc.*, No. 90-C-7414, 1993 LEXIS 1720, \*7 (N.D. Ill. Feb. 12, 1993).