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Allowing Intervention By Non-Settling PRPS: Not the "Environmentally Correct" Decision, But One that is Unavoidable

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I. Introduction

The first Earth Day in April of 1970 marked the beginning of environmental awareness in the United States.[1] The reality that the Earth was headed for an environmental disaster of incomprehensible proportions could no longer be ignored.[2] The social conscience of the United States, as demonstrated by the historic Earth Day celebration, began to examine the environmental issues facing the country and create solutions designed to address those issues.[3] In other words, society realized that it was time to reevaluate its outlook toward the environment and take steps to revamp the "primitive environmental law[s]"[4] which had then existed.[5]

As society has advanced, industrial knowledge and technology has developed in stride. Concurrently, environmental problems which had not been foreseen had to be addressed and dealt with in some fashion. Chemical, nuclear, hazardous, and radioactive wastes are prime examples, albeit not exclusive ones, of environmental problems facing our society

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1. Marty M. Judge et al, *History of Environmental Problems*, *in* 1 ENVIRONMENTAL DISPUTE HANDBOOK: LIABILITY AND CLAIMS 5 (David A. Carpenter et al. eds., 1991).
2. *See id.*
3. *See id.*
4. *See id.* at 7.
5. *See id.*

due to its development. These problems also represent the fact that society is trading technological advancement for the degradation of the environment, a bargain that Professor Alvin Weinberg has called a Faustian pact.[6] To ensure that our environmental Faustian bargain mirrors the outcome of the literary work, society must learn to responsibly deal with the consequences that are derived from the benefits of technological advancement.[7]

One particular statute enacted to deal with such consequences is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[8] CERCLA addresses the cleanup of existing hazardous waste sites located throughout the country.[9] Under CERCLA, the Environmental Protection Agency (EPA), after using government money to cleanup a hazardous waste site, is authorized to enter into an agreement either to (1) finance the cleanup of hazardous waste sites[10] or (2) limit the liability of certain persons or organizations that may be responsible for the damage at the hazardous waste site.[11] These agreements, referred to as

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6. *See* WARREN FREEDMAN, HAZARDOUS WASTE LIABILITY 75 (1992) (referring to Goethe's *Faust*, where Faust, the protagonist made a deal with the devil. Faust would receive success and fame in his life, but would have to exchange his soul for these benefits. The culmination of the play is Faust's attempt to try to renege on his deal with the devil and save his soul. Similarly, our society has accepted the benefits that the advancement of technology has given us, but the trade off has been the partial degradation of the environment. The bargain made by society is compared to Faust's bargain because both traded something precious for an immediate short term gain, and like Faust, society is attempting to avoid the consequences of its actions).

7. *See id.*

8. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) §§ 101-405, 42 U.S.C. §§ 9601-75 (1988 & Supp. V 1993).

9. *See* CERCLA § 102(a), 42 U.S.C. § 9602(a) (referring to the duties of the Administrator of the EPA to: (1) create regulations indicating what substances are to be classified as hazardous substances, to specifically focus upon those which are substantially dangerous to the health or welfare of humans or the environment; (2) create regulations concerning the quantity of hazardous substances necessary for CERCLA to be utilized).

10. *See* CERCLA § 122(a), 42 U.S.C. § 9622(a).

11. *See* CERCLA § 122(c)(1), 42 U.S.C. § 9622(c)(1) (stating that the agreement entered into by the potentially responsible parties (PRPs) and the United States is the mechanism for determining the liability of the settling PRP(s)).

consent decrees,[12] generally contain a provision that protects the signing polluter from any and all contribution claims brought by a non-settling party[13] using its statutorily granted right of contribution as a basis for the claim.[14] This Comment addresses whether a non-settling party can successfully move to intervene in a consent decree, which EPA is attempting to enter in a federal district court, in order to protect the statutorily granted right of contribution.

The courts are split as to whether a non-settling party is legally allowed to intervene in this type of circumstance.[15] One line of reasoning holds that a non-settling party may not intervene because such an action would interfere with congressional intent.[16] Conversely, the other line of reasoning holds that a non-settling party may intervene to protect its claim of contribution.[17] This line of decisions has evolved from an examination of the statute, a reading of its plain and unambiguous language, a following of applicable rules from other areas of law, and a commitment towards enforcing the law that Congress has created.

Part II of this Comment explains the basic background of CERCLA, its terminology, its purpose, how it works, and the provisions regarding intervention and contribution. Part III examines *United States v. Union Electric*,[18] a leading case recently decided by the Eighth Circuit Court of Appeals, which held that a party may intervene to protect a contribution claim. Part III will also discuss *United States v. Alcan Aluminum, Inc.*,[19] a leading case decided by the Third Circuit

12. *See* CERCLA § 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A).

13. *See* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (stating that those PRPs who have "resolved" their liability with the federal or state government are not liable for contribution claims concerning the matters directly relating to the agreement).

14. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (giving "[a]ny person" the right to seek contribution from any liable or potentially liable party, as long as the contribution claim is brought during or after the litigation and the original action was brought under sections 106 or 107(a) of CERCLA).

15. *See infra* notes 16 & 17 and accompanying text.

16. *See* United States v. Alcan Aluminum, Inc., 25 F.3d 1174 (3d Cir. 1994).

17. *See* United States v. Union Electric, 64 F.3d 1152 (8th Cir. 1995).

18. *Id.*

19. 25 F.3d 1174.

Court of Appeals which supports the position, contrary to *Union Electric*, that a party may not use its contribution claim to intervene in a consent decree. Part IV analyzes both of these decisions and examines their strengths and weaknesses. Furthermore, the probable consequences of each ruling will be brought to light, in conjunction with the procedural controls that are imposed upon CERCLA actions. Part V will conclude that the ruling of *Union Electric* has the more logical analysis and that the denial of intervention to non-settling parties is an incorrect interpretation of the present law.

II. Background

CERCLA was passed in 1980 when Congress realized that inactive hazardous waste sites "presented [a] great risk to the public health and [ ] environment [ ] that existing law did not address . . . ."[20] CERCLA was designed to act as a mechanism whereby hazardous substances could be cleaned up[21] in order to protect the health of individuals and to protect the environment from the dangers associated with sites contaminated by hazardous waste.[22] The focal point of CERCLA and its Amendments[23] is not to regulate the disposal of hazardous substances. Rather, it is to finance the cleanup of sites contaminated by hazardous substances.[24]

CERCLA has two major purposes. "The primary one is to enable the federal government to swiftly clean up abandoned and uncontrolled hazardous waste sites."[25] The "sec-

20. Robert T. Lee, *Comprehensive Environmental Response, Compensation, and Liability Act*, *in* ENVIRONMENTAL LAW HANDBOOK 225 (Thomas F.P. Sullivan ed. 13th ed. 1995).

21. *See* Pub. L. No. 99-499, 100 Stat. 1613 (1986); Pub. L. No. 101-508, 104 Stat. 1388 (1990).

22. *See* Gail H. Allyn & Paul W. Pocalyko, *Liability for Environmental Problems Under Federal Statutes*, *in* 1 ENVIRONMENTAL DISPUTE HANDBOOK: LIABILITY AND CLAIMS 51, 54.

23. *See, e.g.*, Pub L. No. 99-499, 100 Stat. 1613 (1986); Pub. L. No. 100-707, 102 Stat. 4689 (1988); Pub. L. No. 103-429, 108 Stat. 4377 (1994).

24. *See* Allyn & Pocalyko, *supra* note 22, at 54.

25. VALERIE M. FOGLEMAN, HAZARDOUS WASTE CLEANUP, LIABILITY AND LITIGATION 1 (1992) (citing Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1386 (5th Cir. 1989); Dickerson v. Administrator, EPA, 834 F.2d 974, 978

ondary purpose is to make persons who were responsible for the improper disposal of hazardous waste bear the cost and responsibility of cleaning it up."[26] To attain these two goals, Congress has taken steps to ensure that EPA has sufficient power to act. First, Congress created Superfund,[27] an allocation of billions of dollars for EPA to use in order to investigate, abate, and clean up hazardous waste from hazardous waste sites.[28] Second, Congress imposed (1) strict and (2) joint and several liability for those persons who polluted at a contaminated site.[29]

A crucial point to note when looking at CERCLA is that it only deals with hazardous substances.[30] Section 101(14) provides a list of applicable hazardous substances by reference to other environmental statutes enacted by Congress.[31] Any substance that appears on this list is a hazardous substance for purposes of determining whether CERCLA applies

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(11th Cir. 1987); J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 264 (6th Cir. 1985)).

26. *Id.* (citing Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991)).

27. *See* Lee, *supra* note 20, at 267.

28. *See* CERCLA §111(a), 42 U.S.C. § 9611(a).

29. *See id.* § 107(a), 42 U.S.C. § 9607(a).

30. *See id.* § 102(a), 42 U.S.C. § 9602(a).

31. *Id.* § 101(14), 42 U.S.C. § 9601(14), which defines the term "haz ardous substance" as:

> (A) any substance designated pursuant to section 1321(b)(2)(A) to Title 33, (B) any element, compound mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics, identified under or listed pursuant to section 3001 of the Solid waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 1132 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

to the particular site.[32] As evidenced by the explicit language of section 101(14),[33] the list is comprehensive and the courts will not partake in "judicial legislation" in order to determine whether a substance *should* have appeared on the list of hazardous substances.[34] However, section 101(14) does provide that this list may be expanded if another environmental regulatory statute deems a substance to be a hazardous substance.[35]

After indicating which substances CERCLA applies to, the statute further explains that Superfund may only be invoked when there is a release[36] or threatened release of "hazardous substances"[37] from facilities which dispose of or contain hazardous substances.[38] A determination that CERCLA applies in a given situation allows EPA to exercise dif-

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32. *See id.*

33. *Id.*

34. *See* CERCLA §101(14), 42 U.S.C. § 9601(14) (1991) (citing General Elec. Co. v. Litton Business Systems, Inc., 715 F. Supp. 949, 957-58 (W.D.Mo. 1989)).

35. *Id.* at 73.

36. "Release" is defined as

> "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant, but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release or source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C.A. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer."

CERCLA § 101(22), 42 U.S.C. § 9601(22).

37. See *supra* note 31 and accompanying text for a definition of "hazardous substance".

38. *See* CHARLES M. CHADD, et al., AVOIDING LIABILITY FOR HAZARDOUS WASTE: RCRA, CERCLA, AND RELATED CORPORATE LAW ISSUES A-27 (citing CERCLA § 107, 42 U.S.C. § 9607(a)).

ferent options. Initially, EPA may negotiate with those parties responsible for the release of the hazardous substances in an attempt to get the site cleaned by the polluters, thereby avoiding the expenditure of money from Superfund.[39] Alternately, EPA is empowered to use money from Superfund to enter a waste site and perform a cleanup operation to remove all hazardous waste.[40] If this occurs, EPA is authorized to bring a recovery action against the suspected polluter to recoup the entire amount the government expended on the cleanup operation.[41]

The EPA must first make a determination as to (1) who it will negotiate with to get the site cleaned without expending federal funds, or (2) who it will pursue to get reimbursed for the use of Superfund monies.[42] CERCLA identifies those individuals or entities, collectively referred to as "Potentially Responsible Parties" (PRPs),[43] who fall into either of the above categories. To be classified as a PRP, an individual or entity must be the:

> 1) current owners and operators of facilities from which a release occurs (including, in the case of abandonment, the owner and operator immediately prior to abandonment);
> 2) past owners and operators of such facilities at the time of the disposal;
> 3) persons who arranged for disposal, treatment, or transport of wastes (including waste generators) at the facility;
> 4) persons who accepted hazardous substances for transport to a disposal or treatment facility selected by them.[44]

When the government demonstrates a nexus between a PRP and a hazardous waste site, CERCLA holds that PRP liable under a theory of (1) strict and (2) joint and several liability.[45] These elements become very important during the

39. *See* CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1).
40. *See id.*
41. *See* CERCLA § 107, 42 U.S.C. § 9607.
42. *See* CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).
43. *See* Lee, *supra* note 20, at 274.
44. Chadd, *supra* note 38, at A-27 (citing CERCLA § 106(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4)).
45. CERCLA § 107, 42 U.S.C. § 9607.

course of negotiations or litigation because the PRP is being confronted with liability for the entire cleanup cost of a hazardous waste site.[46]

If the PRP does not clean up the site using its own money, or if the PRP cannot be located, and Superfund money is used to clean up a hazardous waste site, EPA "may negotiate and settle with whichever PRPs it chooses," so long as EPA does so in good faith.[47] The EPA may also settle with any PRP whose contribution of hazardous substances to the site was minor, and had minimal involvement with the disposal site.[48]

When EPA negotiates a settlement with a PRP, that settlement takes the form of a consent decree between the government and the specific PRP.[49] A consent decree is an agreement negotiated between the PRPs and EPA and entered in a federal district court as a "judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing."[50] As long as the consent decree conforms to specific requirements dictated by federal statute,[51] it becomes a tool that effectively brings an end to the dispute before litigation becomes necessary. Those PRPs who choose to enter into a

46. There are, however, four (4) exceptions to this statutory rule: (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, under certain circumstances; or (4) any combination of the first three. *See* CERCLA § 107(b), 42 U.S.C. § 9607(b). An "act of God" is defined as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of care of foresight." *Id.* § 101(1), 42 U.S.C. 9601(1).

47. *See* FOGLEMAN, *supra* note 25, at 107 (citing United States v. Cannons Eng'g Corp., 899 F.2d 79, 93 (1st Cir. 1990)).

48. CERCLA § 122(g)(1), 42 U.S.C. § 9622(g)(1) (allowing for expedited final settlement with PRPs by allowing a final settlement with those PRPs who satisfy all of the criteria under subparagraphs (A) and (B). This section could release the de minimis PRPs from all liability with the United States and claims for contribution from other PRPs).

49. *See* FOGLEMAN, *supra* note 25, at 109.

50. BLACK'S LAW DICTIONARY 410 (6th ed. 1991).

51. *See, e.g.*, SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (requiring that no stipulated penalties be more than $25,000 a day for a violation of the decree; requiring that all consent decrees go before the Attorney General for approval).

consent decree with the government are referred to as settling PRPs.

If a PRP chooses not to settle with the government (a non-settling PRP) and is found to be liable under CERCLA, that PRP is statutorily allowed to bring a contribution claim[52] against all other responsible parties to recoup money paid to the government for the reimbursement of Superfund.[53] However, a standard practice in consent decrees is the protection from a contribution claim brought by non-settling PRPs.[54] This offers the PRP an incentive to settle by: (1) minimizing the PRP's liability; (2) limiting the PRP's potential exposure for the cost of the Superfund clean-up operation; and (3) offering an avenue whereby a non-settling PRP is prevented from seeking a contribution claim against the settling PRP. This protection is valid against all individuals and entities, regardless of whether they have been designated as PRPs by EPA, *if* the consent decree is properly entered in a United States district court.[55]

The question that arises is whether a non-settling PRP interested in protecting the statutorily granted right of contribution can intervene[56] *before* the consent decree is entered in the federal district court. Section 113(i) of CERCLA[57] and

52. A contribution claim is a right of a tort-feasor to recover a proportionate share of judgment rendered against him/her from other tort-feasors who are liable. *See* BLACK'S LAW DICTIONARY 328 (6th ed. 1991).

53. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1); *See supra* note 14.

54. *See* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2); *See supra* note 13.

55. *See* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (stating that a person who has "resolved its liability to the United States or a State" cannot be sued by other PRPs for contribution).

56. Intervention is defined as "the procedure by which a third person, not originally a party to the suit, but claiming an interest in the subject matter, comes into the case, in order to protect his/her right or interpose his claim." BLACK'S LAW DICTIONARY 820 (6th ed. 1991).

57. CERCLA § 113(i), 42 U.S.C. § 9613(i). This section states that:

> [i]n any action commenced under this chapter . . . in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties. *Id.*

Rule 24(a)(4) of the Federal Rules of Civil Procedure (FRCP)[58] provide authority for a non-settling PRP to file a motion to intervene in a consent decree.

With regard to intervention in consent decrees, both section 113(i) of CERCLA and FRCP 24(a)(4) are applied in accordance with the same principles.[59] Courts apply a four-step analysis to determine whether intervention should be allowed: (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit.[60]

Under both section 113(i) and FRCP 24(a)(4), the party seeking to intervene must have a protectable interest under step two of the above analysis before intervention will be allowed. With regard to CERCLA and non-settling PRPs, courts throughout the country are grappling with the issue of whether a contribution claim by a non-settling PRP is a protectable interest, thereby allowing the non-settling PRP to intervene in a consent decree negotiated with a settling PRP.[61] Although the Supreme Court has never ruled on this issue, courts of appeals and district courts have actively addressed the issue.[62] However, in various jurisdictions the reasoning is different, the analysis is different, and the outcomes are diametrically opposed to one another. One line of cases, rep-

58. Fed R. Civ. P. 24(a)(2), which states that:
[u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicants's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

59. *See* 64 F.3d at 1157-58 (holding that the only difference between FRCP 24 (a)(2) and § 9613 of CERCLA is in who bears the burden of proof as to the fourth prong).

60. *See supra* notes 57 & 58.

61. *See infra* notes 63 & 65 and accompanying text.

62. *See, e.g., infra* note 203.

resented by *United States v. Union Electric Co.*,[63] holds that the statutorily granted right of contribution is a legally protectable interest that supports intervention.[64] The alternate line of cases follows *United States v. Alcan Aluminum Inc.*,[65] which supports the proposition that a contribution claim under CERCLA is not a legally protectable interest, and therefore, intervention should not be allowed.[66]

III. — *United States v. Union Electric Laboratories, Inc.*[67]

A. Facts

United States v. Union Electric Co.[68] is an action involving an inactive hazardous waste site located at an old electrical repair facility, Missouri Electric Works (MEW), which was contaminated with polychlorinated biphenyls (PCBs).[69] Although useful in reducing the risk of fire and explosions in transformers, PCBs are dangerous to people and the environment due to their extreme toxicity.[70] Prior to the promulgation of regulations dealing with PCBs in the late 1970s, leaks and spills of PCBs regularly occurred on the MEW site.[71]

In the 1980s, EPA discovered that the Union Electric site was contaminated with PCBs,[72] and EPA identified over 700 PRPs associated with the site who had "sold used transformers to MEW, junked transformers with MEW, or sent transformers to MEW for repair."[73] In order to avoid litigation, EPA entered into negotiations with the PRPs to try to create a consent decree.[74] One-hundred and seventy-nine of the over 700 PRPs wanted to enter into the final consent decree

63. 64 F.3d 1152.
64. *See id.* at 1170.
65. 25 F.3d 1174.
66. *Id.*
67. 64 F.3d 1152.
68. *Id.*
69. *See id.* at 1155.
70. *See id.*
71. *See id.* at 1152.
72. *See* 64 F.3d at 1155.
73. *Id.*
74. *See id.*

negotiated with EPA.[75] The non-settling PRPs consisted of owners of service shops who "sold electrical transformers directly to MEW for resale, sold transformers to third parties who resold them to MEW, or sent transformers owned by others to MEW for repair."[76] Also, the non-settling PRPs claimed to have never sent a transformer to MEW to be junked or scrapped.[77]

The primary reason the non-settling PRPs did not enter into the consent decree was the allocation formula used to determine liability arrived at during the negotiations.[78] The non-settling PRPs claimed the formula did not accurately reflect the "comparative responsibilities of the various PRPs and did not correlate costs of remedial action with contaminates contributed by the parties."[79] Basically, the non-settling PRPs believed that the proportion of the clean-up cost allocated to them was not reflective of their liability.

After negotiations, EPA had the Department of Justice file suit in the District Court for the Eastern District of Missouri against the 179 settling PRPs and filed the proposed consent decree with the federal district court.[80] The consent decree contained the allocation formula that the non-settling PRPs found so objectionable.[81] More significantly, the consent decree contained a provision stating that the settling PRPs would be protected from any claim of contribution from those PRPs who chose not to enter into this consent decree and from any other future PRPs.[82]

Two months after EPA filed the consent decree, the non-settling PRPs moved to intervene claiming their statutorily granted right to contribution under CERCLA as a legally protectable interest.[83] When the non-settling PRPs moved to in-

75. *See id.* at 1156.
76. *See id.* at 1155.
77. *See* 64 F.3d at 1155.
78. *See id.*
79. *Id.*
80. *See id.* at 1156.
81. *See id.*
82. *See* 64 F.3d at 1156.
83. *See id.*

tervene, the District Court had not accepted the settling parties consent decree.[84]

B. The District Court's Decision[85]

In a short and analytically incomplete decision, the district court denied the non-settling PRPs motion to intervene and granted EPA's motion for the consent decree to be accepted by the court.[86] Regarding the non-settling PRPs' motion to intervene, the district court found the non-settling PRPs claimed contribution interest did not satisfy the requirements of the second prong of intervention because it was (1) not a "significantly protectable interest" and (2) the interest was "too speculative and contingent."[87]

As to the protectable interest claim, the court's decision focused on the structure of CERCLA and the intent of Congress to allow a consent decree to protect settling PRPs from claims of contribution brought under section 113(f)(1).[88] The court relied upon the Supreme Court's ruling in *K Mart Corp. v. Cartier, Inc.*,[89] which held that "when construing the plain meaning of a statute, a court must read the particular statutory language at issue in light of the language and design of the statute as a whole."[90] The court viewed the "structure and goals"[91] of CERCLA as (1) promoting early settlement by giving settling PRPs protection from contribution claims, and (2) punishing non-settling PRPs by holding them jointly and severally liable for the remaining amount of money, even if it is disproportionate to true liability.[92] Thus, allowing a non-settling PRP to use a contribution claim, in support of a motion to intervene in a consent decree, would frustrate these goals of CERCLA and, therefore, should not be allowed.[93]

84. *See id.*
85. United States v. Union Electric Co., 863 F. Supp. 1001 (E.D. Mo. 1994).
86. *See id.*
87. *Id.* at 1004.
88. *See id.*
89. 486 U.S. 281 (1988).
90. 863 F. Supp at 1005 (quoting *K Mart*, 486 U.S. at 291).
91. *Id.*
92. *See id.* at 1004.
93. *See id.*

The district court also held that intervention should not be allowed because of the "speculative nature" of the non-settling PRPs' contribution claims.[94] For the contribution claim to arise, (1) EPA would have to commence litigation against the non-settling PRPs, (2) a court would have to find the non-settling PRPs liable for the clean-up costs of the hazardous waste site, and (3) the non-settling PRPs would have to be found liable for a portion of the damage larger than their actual liability.[95] The district court found that this created an interest that was contingent upon factors that might not occur in the future; as such, the contribution claim could not be the legally protectable interest required for intervention.[96] The non-settling PRPs appealed to the United States Court of Appeals for the Eighth Circuit.[97]

C. United States Court of Appeals, Eighth Circuit

Union Electric was a case of first impression for the Eighth Circuit.[98] The non-settling PRPs claimed that their statutorily granted right of contribution against the settling PRPs, which would be lost due to the entering of the consent decree, was a legally protectable interest, and, thus, their motion to intervene should have been granted.[99] Specifically, the non-settling PRPs claimed that this interest was neither speculative nor contingent because it was created by a specific provision of CERCLA.[100]

The respondents, EPA and the settling PRPs, argued that the district court was correct in ruling that the interest was too speculative and contingent and that to allow non-settling PRPs to bring contribution claims would violate Congress' intent when it passed this section of CERCLA.[101] EPA and the settling PRPs argued that the legislative intent was

94. *See id.*
95. *See* 863 F. Supp. at 1004.
96. *See id.*
97. 64 F.3d at 1155.
98. *See id.* at 1156.
99. *See id.*
100. *See id.* (referring to CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1)).
101. *See id.* at 1157.

to allow the non-settling PRPs to take the consequences of their failure to enter into the consent decree; a complete loss of their right to seek a claim of contribution.[102] Under this reasoning, there would be no legally protectable interest advanced by the non-settling PRPs.[103]

The court of appeals began its analysis by determining that the similarity of the language of CERCLA section 113(i) and FRCP 24(a)(2) demonstrates that "the same standards should be applied to intervention under CERCLA section 113(i) as are applicable to intervention under [FRCP] 24(a)(2)."[104] The court congratulated the district court for its correct pronouncement of the four-pronged test in evaluating whether or not intervention is proper.[105] After doing so, the court of appeals noted the district court's complete and utter failure to properly apply this test in the *Union Electric* case[106] and took the appeal on de novo review.[107]

Following this line of reasoning, the Eighth Circuit went through the four prongs of the test:

> (1) timely application; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect the interest; and (4) the applicants interest is [not] adequately represented by existing parties.[108]

Primarily, the contention between the parties was the application of the second prong; namely whether the non-settling PRPs' contribution right is a legally protectable interest warranting intervention.[109]

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102. *See* 64 F.3d at 1157.
103. *See id.* at 1156-57.
104. *Id.*
105. *See id.* at 1158.
106. *See id.*
107. *See* FED. R. CIV. P. 24.
108. 64 F.3d at 1159-60.
109. *See id.* at 1156.

In applying the second prong, the court defined what interest would be strong enough to support a motion for intervention.[110] Since this was a case of first impression for this circuit, the court looked to other circuits to determine what would constitute an interest that would support intervention under CERCLA.[111] Specifically, the court looked to decisions in the Tenth, Eleventh, and Fifth Circuits to resolve the issue of whether a party seeking to intervene must have an interest that is "direct, substantial, and legally protectable."[112]

After laying this foundation, the court in *Union Electric* stated that the legislative history of Congress is not to be the first source examined when interpreting a statute.[113] Rather, "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquires must begin: with the language of the statute itself."[114] The *Union Electric* court noted that the United States Supreme Court has held that this plain meaning rule "is the one, cardinal canon before all others,"[115] and that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[116] In recognizing the role of the judiciary, the *Union Electric* court again followed the Supreme Court in holding that when the language of a statute is unambiguous the role of the court is not to interpret the law, but simply to enforce it.[117] Lastly, the court noted that this rule is to govern "except in the rare case [where] the literal application of a

110. *See id.* at 1161. *See infra* note 111.

111. *See* 64 F.3d at 1161.

112. *Id.* at 1161 (citing Alameda Water & Sanitation Dist. v. Browner, 9 F.3d 88, 90 (10th Cir. 1993); Panola Land Buying Ass's v. Clark, 844 F.2d 1506, 1509 (11th Cir. 1988); United States v. Perry County Bd. of Educ., 567 F.2d 277, 279 (5th Cir. 1978)).

113. *See id.* at 1165.

114. *Id.* (citing United States v. Ron Pair Enters. Inc., 489 U.S. 235, 241 (1989); Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); United States ex rel. Harlan v. Bacon, 21 F.3d 209, 210 (8th Cir. 1994)).

115. *Id.* (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992)).

116. 64 F.3d at 1165 (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. at 253).

117. *Id.* (quoting Ron Pair, 489 U.S. at 241).

statute will produce a result demonstrably at odds with the intentions of its drafters."[118] Following this line of reasoning, the *Union Electric* court dismissed the legislative intent argument.[119]

The court began its interpretation by examining the language of section 113(i) of CERCLA.[120] The language of the statute reads that "any person"[121] may intervene provided that the dictates of the statute are followed.[122] The court noted that no restrictions or limitations are placed upon who may seek to intervene, including non-settling PRPs seeking to intervene in a consent decree. At this point, the court had simply recognized that non-settling PRPs fall under the statutory definition of a party who could intervene. The next step in the court's reasoning was to follow the statutory factors[123] to determine whether non-settling PRPs have the right to intervene.[124] The conflict between the circuits, and the focus of this article, is the second factor: whether there "an interest relating to the subject of the action."[125]

In determining that such an interest exists, the court examined the language of CERCLA section 113(f)(1)[126] which states:

> Any person may seek contribution from any other person who is liable or potentially liable under section [107](a) of this title, during or following any civil action under section [106] of this title or under section [107](a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal Law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court deter-

118. *Id.* (citing Ron Pair, 489 U.S. at 242).
119. *See id.*
120. *See id.*
121. CERCLA § 113(i), 42 U.S.C. § 9613(i).
122. *See* 64 F.3d at 1165.
123. *See supra* note 60 and accompanying text. The court specifically refers to factors two, three, and four as its three part test. *See* 64 F.3d at 1166-69.
124. *See id.* at 1166.
125. *Id.* (quoting CERCLA § 113(i), 42 U.S.C. § 9613(i)).
126. *See id.*

> mines are appropriate. Nothing is this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] or section [107] of this title.[127]

In making its determination about whether intervention should be allowed, the *Union Electric* court "found that the [contribution] interest was statutory and would be extinguished if the consent decree was entered, and, therefore was legally protectable."[128] The *Union Electric* court pointed out that certain considerations used by other courts in making their determinations were "inappropriate."[129] Specifically, the court stated that to follow policy considerations and legislative intent over the factors "dictated by [FRCP] 24(a)(2) and section 113(i) of CERCLA" was clear error.[130] The court held that "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself."[131] In so deciding, The *Union Electric* court followed Supreme Court precedent.[132]

The Eighth Circuit stated that CERCLA's use of the phrase "any person," in section 113(i), is plain and unambiguous.[133] The words "*[a]ny person* may intervene as a matter of right"[134] means that any person, regardless of the status or position of that person, is allowed to intervene so long as the requirements of section 113(i) are met.[135]

The *Union Electric* court then looked to the non-settling PRPs' claimed contribution interest to determine whether it

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127. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

128. 64 F.3d at 1167.

129. *See id.*

130. *See id.*

131. *Id.* (holding that when interpreting a statute, the plain meaning of the words are to be the first place to look for guidance).

132. *See, e.g.*, Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992); United States v. Ron Pair Enters, Inc., 489 U.S. 235, 241 (1989); Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); United States v. Manthei, 979 F.2d 124, 126 (8th Cir. 1992); United States ex rel. Harlan v. Bacon, 21 F.3d 209, 210 (8th Cir.1994)).

133. *See* 64 F.3d at 1165.

134. CERCLA § 113(i), 42 U.S.C. 9613(i) (emphasis added).

135. *See* 64 F.3d at 1165.

could be held to be a legally protectable interest.[136] Looking at the wording of CERCLA section 113(f)(1), which states, "[a]ny person may seek contribution from any other person who is liable or *potentially liable* under section 107(a) of this title, *during or following any civil action* under section [106] of this title or under section [107(a)] . . . ,"[137] the court found that the right to contribution could support a motion to intervene in a consent decree.[138]

There are three elements of section 113(f)(1) that the court implicitly examined in reaching its conclusion that contribution is a legally protectable interest.[139] First, the language of 113(f)(1) requires that the action be brought under one of the two sections specifically listed.[140] The action in *Union Electric* satisfies this element because it was brought under section 106 of CERCLA.[141] Second, the contribution section states that "[a]ny person" may seek contribution.[142] The court noted that this element does not require that the party seeking contribution have already been found liable[143] so long as the PRP has an interest "which is directly related to the subject matter of the litigation."[144] In *Union Electric*, the non-settling PRPs satisfy this requirement in that they were named as PRPs by EPA; thus, they had an interest in the litigation.[145] Third, the section requires that the party seeking contribution do so "during or following *any* civil action" brought.[146] This element is clear. Those who satisfy the first two requirements may seek contribution while the action is being litigated or after the closure of the action. This element is satisfied in *Union Electric* because EPA had insti-

136. *See id.* at 1166.
137. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (emphasis added).
138. *See* 64 F.3d at 1170-71.
139. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).
140. *See id.* § 113, 42 U.S.C. § 9613 (stating that contribution may be sought from any person potentially liable or found liable under section 106 or 107(a) of CERCLA).
141. *See* 64 F.3d at 1156.
142. CERCLA § 113 (f)(1), 42 U.S.C. § 9613(f)(1).
143. 64 F.3d at 1163.
144. *Id.* at 1166.
145. *Id.*
146. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (emphasis added).

tuted a civil action against the settling PRPs under section 106 and section 107 of CERCLA[147]

1. Contribution as Being too Speculative or Contingent

The Eighth Circuit went on to address the district court's holding that the non-settling PRPs' interest was too speculative or contingent to support a motion for intervention under CERCLA.[148] The court ruled that the district court's determination was "wrong in law."[149] The language "direct, substantial, and legally protectable" does not exclude an interest that is contingent upon the outcome of the litigation.[150] "No finding of liability is required, nor assessment of excessive liability, before the contribution interest arises."[151] The fact that the right has not vested is not determinative in this context[152] and this contingency does not bar intervention.[153]

The *Union Electric* court specifically noted that when an individual is named a PRP, liability is of such a nature that it will serve as a legally protectable interest.[154] The court implicitly found that under CERCLA, when an individual is found to be a PRP, liability is "sufficiently certain . . . to support intervention."[155] Additionally, the court held that the interest in this context was statutorily granted, thereby precluding any ruling that it was contingent or speculative.[156] A person may assert an interest to support interven-

147. 64 F.3d at 1155-56.

148. *See id.* at 1166-67.

149. *Id.* at 1167.

150. *See id.* at 1161, 1162 (reading together the courts statements that (1) an "intervenor [shall] have an interest that is direct, substantial, and legally protectable", and (2) that "intervention may be based on an interest that is contingent upon the outcome of the litigation").

151. *Id.* at 1167.

152. *See* 64 F.3d at 1167.

153. *See id.*

154. *See id.*

155. *Id.* (citing Securities and Exchange Commission v. Flight Trans. Corp., 699 F.2d 943, 949).

156. *See id.* (citing Acton, 131 F.R.D. at 433).

tion prior to suffering a harm in order to prevent a harm that may occur based on the outcome of the litigation.[157]

In other contexts, the Eighth Circuit has held that the legally protectable interest asserted by a party to support a motion to intervene can be contingent upon the outcome of the case for which intervention is being sought.[158] Additionally, other circuits have held that a contingent interest is sufficient to satisfy the second prong of the test in order to determine whether intervention should be allowed.[159]

This does not mean that any interest asserted would be acceptable, but that the determination as to 'speculativeness' should be made on a case-by-case basis. An interest advanced which had no realistic basis and was only a theoretical possibility, could be held to be too speculative.[160] The court refused to accept the contention that an interest that could be speculative would not satisfy the criteria for intervention.[161]

The court of appeals allowed the non-settling PRP to intervene in the submission of the consent decree.[162] Essentially, it reversed the district court's decision and disallowed the submission of the consent decree with that court. In its decision the Eighth Circuit distinguished its holding with that of *United States v. Alcan Aluminum, Inc.*,[163] which held that a contribution claim cannot be used as a basis for intervention by a non-settling PRP.[164]

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157. *See* 64 F.3d at 1162.

158. *See id.* at 1162 (*See* Jenkins by Agyei v. Missouri, 967 F.2d 1245, 1248 (8th Cir. 1992), *cert. denied sub nom*, Clark v. Jenkins, 503 U.S. 249 (1992); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 738 F.2d 82 (8th Cir. 1984)).

159. *See* Sierra Club v. Espy, 18 F.3d 1202 (5th Cir.1994) (holding that intervenors contractual interest were not too speculative when they were threatened by a potential bar).

160. *See* 64 F.3d at 1162 (*See* City of Cleveland, Ohio v. NRC, 17 F.3d 1515, 1517-18 (D.C. Cir. 1994)).

161. *See id.*

162. *See id.*

163. 25 F.3d 1174.

164. *See id.*

IV. *United States v. Alcan Aluminum, Inc.*

Many district courts following the same reasoning used in *Alcan*, have concluded that non-settling PRPs may not assert the loss of a contribution claim as an interest to support intervention.[165] The court in *Alcan* reasoned a non-settling PRP's contribution claim "depends on the outcome of some future dispute in which the applicant may, or may not, be assigned a portion of liability."[166] The court opined this was significantly different than a case where a settled PRP was seeking to intervene.[167] A settled PRP, the *Alcan* court concluded, has a protectable interest because liability has already been determined.[168] Liability may not be known at the time that intervention is sought, but "the act of settling transforms a PRP's contribution right from a contingency to a mature, legally protectable interest."[169]

The *Alcan* court focused on the legislative history of CERCLA and found that intervention based on a contribution claim should not be allowed for non-settling PRPs.[170] The court stated that Congress specifically intended to expose the non-settling party "to liability for the rest of the cleanup cost even if that exposure exceeds the amount the [non-settling PRP's] "actually contributed to causing the damage at the hazardous waste site."[171] The *Alcan* court believed, like the district court in *Union Electric*, that the purpose of CERCLA's contribution section was to encourage settlement. For the Alcan court to rule in a manner that would, or could, interfere with the possibility of settlement would be to contradict legislative intent.[172]

As to the contingent or speculative nature of the interest asserted by the non-settling PRPs, the *Alcan* court noted that

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165. *See id.*
166. *Id.* at 1184.
167. *See id.*
168. *See* 25 F.3d at 1184.
169. *Id.*
170. *See id.* at 1185.
171. *Id.* at 1184 (citing United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1040 (D.Mass. 1989), aff'd, 899 F.2d 79 (1st Cir. 1990)).
172. *See id.* at 1185.

the right of contribution could not be asserted to support a motion to intervene.[173] The court observed that a right to contribution does not arise for a PRP until after a court finds that the party is liable and determines the amount of harm caused by the PRP.[174] The *Alcan* court held that a PRP who wants to intervene to protect a statutorily granted right of intervention must be denied.[175] Due to the contingent and speculative nature of the interest asserted, the district court in *Union Electric*, like the court of appeals in *Alcan*, rejected the non-settling PRP's contention that their right of contribution was sufficient to support a motion to intervene.[176]

V. Analysis

Whether a contribution claim is a legally protectable interest and should support a motion for intervention has ramifications on both the judicial system and society. Particularly, who is going to pay for the clean up of hazardous waste sites? The majority view, as the *Alcan* court stated in dictum, is that the loss of the right to seek contribution is not a legally protectable interest and a contribution claim cannot serve as a basis for intervention. The minority view, which follows the decision in *Union Electric*, is that a contribution claim is a legally protectable interest and can serve to support a motion for intervention.

The two rationales espoused in *Union Electric* and *Alcan* have little or no common ground. The primary distinction occurs in the initial interpretation of the legally protectable interest aspect of the intervention provision of CERCLA.[177] On the one hand, *Union Electric* follows the first canon of statutory construction which states that the language of the

173. *See* 25 F.3d at 1184.

174. *Id.* There are too many steps between the actual ability to seek contribution (a trial, a determination of liability, and a failure to accurately proportion the damages between the party) and the present status of the non-settling PRP (an individual or entity who EPA suspects may have been responsible for a hazardous waste site).

175. *See id.*

176. *See id.*

177. *See* CERCLA § 113(i), 42 U.S.C. § 9613(i).

statute is to be followed when it is clear and unambiguous.[178] Section 113(i) of CERCLA states "any person" may intervene as long as the four requirements of the existence of a legally protectable interest are met.[179] When read in conjunction with section 113(f)(1) of CERCLA, which provides PRPs the right of contribution, section 113(i) allows intervention because the legally protectable interest is the statutorily granted right of contribution.[180] On the other hand, *Alcan* firmly supports the proposition that the legislative history is to control a court's conclusion.[181] According to the court's ruling in *Alcan*, the statute's language is not applicable even when it is unambiguous and can be read to mean only one thing. An examination of the Eighth Circuit's reasoning, in light of other materials[182] will illustrate that the *Union Electric* court was correct in its interpretation of the rule of law.

The United States Supreme Court has held that when a statute is clear and unambiguous on its face, there is no reason to look to additional sources to determine the legislative intent.[183] When the meaning of a statute is illustrated by it's clarity of wording and the language used by the legislature is unambiguous, the plain meaning must determine the outcome.[184] It would be inapposite to conclude that environmental statutes would be exempted from this clear ruling. If this simple guideline for interpretation is to be followed by courts, as the Supreme Court dictates that it must be, it becomes clear that the court's analysis in *Union Electric* is proper.

The *Union Electric* court explicitly held that it followed Supreme Court precedent when it ruled that the legislative history is not the primary tool to be used when interpreting the law.[185] Rather, plain meaning of a statute, if clear and unambiguous, is to control.[186] This distinction in the rulings

178. *See* 64 F.3d at 1165.
179. CERCLA § 113(i), 42 U.S.C. § 9613(i).
180. *See* 64 F.3d at 1166.
181. *See* 25 F.3d at 1181.
182. *See supra* note 131.
183. *See supra* note 131.
184. *See supra* note 131.
185. *See* 64 F.3d at 1165.
186. *See id.*

may appear to be frivolous, but the interpretation of a statute, and the application of the law according to such interpretations, shapes the creation of the law itself.

CERCLA gives any PRP the right to sue other PRPs for contribution.[187] It is important to note that within section 113(f)(1) there is no limitation placed on who may seek contribution.[188] The *Union Electric* court soundly concluded the parties seeking contribution must have some grounds for believing that they might be liable for the cost of cleaning the hazardous waste site. The grounds for this belief in *Union Electric*, as in *Alcan*, are that EPA has named those seeking to intervene as PRPs. Having been named as PRPs, liability is sufficiently certain to find that their contribution interest would support a motion to intervene.

Section 113(f)(2) states that PRPs who settle with EPA are protected from contribution claims.[189] Here, the terminology of the statute is unambiguous: "A person who has *resolved* its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution. . . ."[190] The key to this provision is that the PRP must have *resolved* its liability according to the terms of CERCLA, which dictates that the consent decree be entered with a federal district court.[191] Only upon acceptance by a federal district court is a PRP's liability resolved. It is at this point in the process that the protection from contribution claims from other PRPs, as is provided for in 113(f)(2), takes effect.[192]

CERCLA permits PRPs to intervene whenever a legally protectable right might be "impair[ed] or impede[d]" because of "any action commenced under this chapter. . . ."[193] When examining the language of sections 113(f)(1) and (2), that in-

187. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).
188. *Id.* (stating that "[a]ny person" may seek contribution).
189. CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).
190. CERCLA § 113, 42 U.S.C. § 9613
191. *See id.* (stating that only those PRPs who have "resolved" their liability through the administrative or judicial process are eligible for contribution protection).
192. *See id.*
193. CERCLA § 113(i), 42 U.S.C. § 9613(i).

tervention must be allowed when a contribution claim is to be extinguished. Section 113(f)(1) gives PRPs the right to seek contribution[194] and section 113(f)(2) gives settling PRPs protection from contribution after the entry of the consent agreement.[195] If section 113(i),[196] the intervention provision of CERCLA, is to have effect, it must be interpreted, as did the *Union Electric* court, to mean that intervention is allowed in order to protect the statutorily granted right of contribution.[197]

Section 113(i) states that intervention is allowed in "any action."[198] Following the clear language doctrine, as required by the Supreme Court, "any action" must include an action by EPA against PRPs. Logically, this must be the case since under CERCLA no other action would be filed to recover money for expenditures made out of Superfund. Therefore, under *Alcan*, this provision of CERCLA would have no meaning and would be "legislative dictum." To disregard the clear language would be to ignore the Supreme Court's ruling that the plain language of a statute shall be the first avenue the courts pursue when interpreting a statute.[199] Moreover, it would ignore the wording of section 113(i).

On the other hand, *Alcan* held that legislative history is to be followed when determining whether a claim of contribution can be used to support intervention.[200] This determination blatantly ignores the Supreme Court's ruling that the first canon of construction is to be the unambiguous language of the statute. The CERCLA provision that allows for contribution, section 113(f)(1), states that "any person" may move to intervene.[201] It would appear that *Alcan's* judicial construction of the statute, which does not allow "any person" to intervene, would exclude an individual or entity simply due to the court's attempt at interpreting the legislative history.

194. *See* CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).
195. *See* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).
196. *See* CERCLA § 113(i), 42 U.S.C. § 9613(i).
197. *See* 64 F.3d at 1170.
198. CERCLA § 113(i), 42 U.S.C. § 9613(i).
199. *See* Connecticut Nat'l Bank v. Germain, 503 U.S. at 249.
200. *See* 25 F.3d at 1181.
201. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

Since the *Alcan* court's interpretation of the non-settling parties ability to intervene violates the Supreme Court's rulings and the statutory language, it's conclusion must fall.

Additionally, the part of the *Alcan* ruling concerning non-settling PRP's right to intervene is dicta.[202] Although only dicta, other district court decisions have followed this language.[203] These decisions, while ignoring the plain meaning of CERCLA, looked toward legislative history and used a policy argument to make a final determination that non-settling PRPs did not have a legally protectable interest to support a claim for intervention.[204]

That aside, the *Alcan* court did an excellent job of reading the legislative intent from alternate sources. This is the preferred means when the intent is not clear from the wording of the statute, but it is subject to the legislative posturing and grandstanding; the very concerns which forced the Supreme Court to accept the rule that the first canon of construction is the plain meaning rule. The legislative history approach to statutory construction causes the meaning of a statute to be subject to alternate views and interpretations. This is a less reliable means of interpretation than the plain meaning rule. When the very words of the statute indicates the meaning of the law and what was intended by the legislature, there is no need to enter into guesswork and speculation in gleaning legislative intent.

The social ramifications as to the outcome of this issue are fairly clear. The *Alcan* court had the 'environmentally correct' decision. Following the ruling articulated would be extremely helpful in furthering the overall goals of CERCLA and in ensuring that hazardous waste sites are cleaned up and paid for. If the *Alcan* ruling were to be followed, PRPs would be encouraged to settle disputes under a proposed con-

202. *See* 64 F.3d at 1163.

203. *See* United States v. ABC Indus., 153 F.R.D. 603, 607-08 (W.D. Mich. 1993); United States v. Vasi, 22 Chem. Waste Lit. Rep. 218, 219 (N.D.Ohio 1991); United States v. Beazer East, Inc., 22 Chem. Waste Lit. Rep. 218, 222-23 (N.D.Ohio 1991); United States v. Mid-State Disposal, Inc., 131 F.R.D. 573 576-77 (W.D.Wis. 1990).

204. *See* 64 F.3d at 1164.

sent agreement in order to get the contribution protection from CERCLA. This would lead to more money coming into the Superfund, less money being spent on litigation, less administrative time being spent attempting to prosecute PRPs, and less judicial resources being spent on the issue of strict liability. All of which would save time and money, both of which are in short supply considering the political outlook of the present Congress on environmental issues.

These social ramifications are both appealing and desirable attributes. As a society which is becoming more and more environmentally aware, and whose concern for the environment is growing, the ability to quickly settle disputes and end litigation is a worthy goal in and of itself. To forbid non-settling PRPs from using a contribution claim as a protected interest for intervention would advance the long term environmental goals of this country. There would be less litigation, and thus, more resources available to clean-up hazardous waste sites and to investigate/prosecute other PRPs. Also, the more consent decrees that the government enters into, the more money that is coming in to repay Superfund for the expenditures made in cleaning up hazardous waste sites.

However, the problem is that these extremely attractive benefits have little to do with the underlying legal argument. Courts are designed to view the facts according to the legal principles that are laid down by statutes and Supreme Court rulings. To ignore the dictates of statutes and case precedents would be to undermine the structure of our judicial system. Regardless of how attractive the goals and eventual outcomes of following the *Alcan* case may be, there exists no legal grounds to support its acceptance.

Additionally, under the *Union Electric* holding, there is no actual loss of benefits. Section 113(f)(2), as illustrated in *Union Electric*, offers protection from contribution claims to any and all PRPs that complete the settlement process.[205] This is a specific, statutorily granted protection that cannot be successfully challenged. This provision offers PRPs the incentive to quickly enter into a consent decree. The district

205. *See* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

courts' limitation of only protecting completed consent decrees gives non-settling PRPs an incentive to stay abreast of negotiations and to be active in all levels of participation.

There are a few practical reasons that illustrate why following the *Alcan* decision would be inappropriate. The passage of statutes is part of the political process. Political realities can have an effect on the courts' interpretation of the meaning of a statute, which is a practical reason why the plain meaning rule exists. Two such realities are: (1) the rule gives legislators the freedom to debate on related topics and not be overly concerned with a bill's interpretation from what is debated and (2) it allows politicians (regardless of any personal feelings of the topic) an opportunity to pass a law that may not be viewed by the masses as the optimal solution and at the same time avoid political repercussions.

First, the ability of a legislator to rely on the application of this canon of construction offers him a means to openly argue and debate on the floor of the legislature or committee about related topics or ideas, but to vote on only what is enclosed in the legislative package. The floor debate may be useful in gleaning what was in the minds of specific legislators, but there is no need to dig for an explanation when the intent is so clearly set out in the statute that it is nearly impossible for a legislative officer to miss. Floor debate on a clear and unambiguous statute offers a convenient means for a legislator to vote on a bill and not have to take political responsibility for the consequences. Political repercussions can be avoided by saying that the court's interpretation is not what was intended when the vote was taken, and there is a legislative floor debate transcript to prove it.

Second, the plain meaning rule laid down in *Connecticut National Bank* offers legislators of the majority party the ability to bury the intent of the statute within the wording of the statute and to let floor debate give illustrations of its meaning. This would be done for political reasons in order to gain protection from public backlash. In the event that new legislation is initially unpopular, there exists a port for the legislator to take refuge in by claiming that the statute was

misinterpreted and that how it is working was not how he intended.

These two examples are political realities that happen every day. With this in mind, it becomes more apparent that when a statute is written in a clear and unambiguous manner, when there can be no real question as to its meaning, it is essential to follow the specific wording of the statute. This canon of construction, as the Supreme Court noted in *Connecticut National Bank*, avoids political posturing and lessens misinterpretation of the statute by the judiciary.

To this point, only the problems with the law as it stands now have been articulated. Creating a solution, and examining the effect of that solution on present problems, is infinitely more important. The circuits are split as to whether or not a statutorily granted right of contribution can serve as a legally protectable interest, thus, allowing intervention in a consent decree. Citizens and entities throughout the country are treated differently based on where their cases are brought and the jurisdiction in which the consent decree is filed. The goal is to avoid this schism in the federal court rulings. Since the Supreme Court has not addressed this specific issue, to give uniformity to the law, the best solution would be for Congress to amend and alter section 113(f)(1) and (2), and 113(i).

Congress has two obvious choices. First, it may state that non-settling PRPs can intervene in a consent decree prior to submission to the court. Second, it may declare that non-settling PRP's right to contribution is not a legally protectable interest and, thus, intervention cannot be allowed to protect this interest. A look at the ramifications of codifying the outcomes of the *Union Electric* and *Alcan* cases is necessary to illustrate why a solution is desirable and necessary.

First, either solution would limit the scope of a courts' inquiry when determining whether intervention should be allowed. If CERCLA were altered to address the right of non-settling PRPs to use their contribution claim as a legally protectable interest, the FRCP would not be at issue and the focus would be purely upon CERCLA. This would limit confusion in two areas. One area is that the law that controls the courts' decisions would be easily identifiable. A specific

CERCLA provision would address the subject of intervention as it relates to contribution claims by non-settling PRPs, and the specific handling of the issue by Congress would override the more general provision of the FRCP. The other area, which relates to the first, is the confusion about which test to apply to intervention claims. The tests articulated for the use of the FRCP and CERCLA are very similar,[206] but not identical.[207] Action by Congress to address this issue would tell the federal courts which test to apply when a non-settling PRP moves to intervene.

Second, an act of Congress that clearly describes the rights of non-settling PRPs regarding intervention would eliminate the lack of uniformity between jurisdictions. The Supreme Court has even acknowledged the need and desire of uniformity.[208] In *Clearfield Trust Co. v. United States*, the Court stated that where there is a real possibility that differing opinions will result in essentially the same case depending on the jurisdiction, there is a need for uniformity to ensure consistent treatment to all those affected by the law.[209]

In cases with facts similar to *Union Electric* and *Alcan*, a non-settling PRP could be liable for enormous money damages and have the statutorily granted right of contribution cut off for failure to join a consent decree. Alternatively, a court could preserve a non-settling PRP's right to intervene and ensure that the right of contribution continues to exist. The outcome of this monetary issue will affect the cleanup liability of all hazardous waste sites. The ability to intervene to preserve a contribution claim will affect who pays for cleanup, the government or the polluters, which directly affects the stated financial goals of CERCLA.

206. *See* text accompanying note 60.
207. *See supra* note 59.
208. *See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).
209. *See id.* at 365.

VI. Conclusion

The outcomes of the *Union Electric* and *Alcan* cases are diametrically opposed to each other. *Union Electric* allowed non-settling PRPs to establish a viable contribution claim for intervention by refusing to look beyond the plain meaning of the statute. This is contrasted by *Alcan* which would have refused to allow non-settling PRPs to use a contribution claim for intervention. This result was reached by specifically ignoring the plain meaning of the statute and looking at legislative history. Of these two decisions it is clear that the holding in *Union Electric* is judicially correct in its interpretation.

The court in *Alcan* cannot be criticized for the rationale employed in its opinion, nor can any of the district courts that followed its reasoning. The *Alcan* court was concerned with the effect that their interpretation would have on the environment, which is reflective of the growing social awareness of environmental issues. The essential point is that the rationale used by courts to decide whether a contribution claim is a protectable interest to support a motion for intervention must conform to the specific rules and requirements of the judicial system. *Alcan's* failure to do so makes its decision unstable and unsupported.

The central key to resolving this issue is to have Congress amend the CERCLA statute in order to clarify the issue. The split in the courts over the intervention issue is a reflection of the complexity of CERCLA and the inherent difficulty in interpreting this legislation. Either the courts are going to have to follow the holding from the *Union Electric* case and allow intervention by non-settling PRPs, which could hinder the stated goals of CERCLA, or Congress should act and clearly establish that contribution claims can not be used as a legally protectable interest to support a motion for intervention. The problem does not lie with any part of the judiciary. Rather, the problem lies with Congress' failure to fulfill its role of creating a workable statute. This issue will not be resolved until the Supreme Court orders the circuits to follow a specific interpretation of this CERCLA provision or

Congress amends CERCLA so it might operate in a workable fashion.