Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 3
Issue 3 *1995-1996*

Article 6

1995

To Intervene or Not to Intervene: The Right of Non-Settling PRPs to Intervene in CERCLA Litigation. United States v. Union Electric Co.

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To Intervene or Not to Intervene: The Right of Non-Settling PRPs to Intervene in CERCLA Litigation

United States v. Union Electric Co.[1]

by Erick Roeder

I. Facts and Holding

The Missouri Electric Works Site (MEW Site) in Cape Girardeau, Missouri was occupied by an electrical equipment and repair shop for nearly forty years.[2] The shop's business during this period included salvaging, repairing, and selling transformers and other electronic equipment.[3] Beginning in the 1950s, coolant oil, containing polychlorinated biphenyls (PCBs), was used in transformers to reduce the risk of fires and explosions.[4] Although PCBs were an effective coolant, they presented a threat to the environment because of their toxicicity and persistence.[5] Prior to the late 1970s, when PCB regulation began, coolant leaks and spills containing PCBs were common at the MEW Site.[6]

In the early 1980s, the Environmental Protection Agency (EPA) discovered PCB contamination at the MEW Site.[7] In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[8] the EPA identified approximately 735 potentially responsible parties (PRPs).[9] These parties consisted of companies that had sold or sent used transformers to MEW to be junked or repaired.[10] Many of these companies joined a "PRP group," which participated in negotiations with the EPA.[11] These negotiations, which took place over approximately two years, addressed the allocation of cleanup costs at the MEW Site.[12]

The EPA presented all known PRPs with a proposed consent decree in September 1991. In order for a PRP to be included in the proposed settlement a response was required within sixty days.[13] In June 1992, the EPA filed suit based on CERCLA §§ 106 and 107[14] against 179 PRPs who signed the proposed consent decree and agreed to settle.[15] The settlement decree required the settling PRPs to contribute various amounts to the clean-up costs based on an allocation formula arrived at during the negotiations between the "PRP group" and the EPA.[16] According to the Consent Decree, the settling PRPs would receive protection from contribution actions or claims, as provided by § 113(f)(2) of CERCLA.[17]

In November 1992, a group of twelve non-settling PRPs[18] moved to intervene in this suit.[19] They claimed that they had a protectable interest in preserving potential contribution claims

1 United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995).
2 *Id.* at 1155.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 42 U.S.C. §§ 9601-9675 (1988).
9 *United States v. Union Elec. Co.*, 64 F.3d at 1155.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 42 U.S.C. §§ 9606-9607 (1988).
15 *United States v. Union Elec. Co.*, 64 F.3d at 1155-56.
16 *Id.* at 1156.
17 *Id.* The statute reads, "[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 regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. § 9613(f)(2) (1988).
18 *United States v. Union Elec. Co.*, 64 F.3d at 1155. "The non-settling PRPs are service shop owners who either 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. However, the non-settling PRPs did not send any transformers to MEW to be scrapped or otherwise disposed of. . . .[they] assert that the allocation formula arrived at in these negotiations 'grossly overstated' their potential liability, because it did not allocate response costs in a way that reflected the comparative responsibilities of the various PRPs and did not correlate costs of remedial action with contaminants contributed by the parties." *Id.*
19 *Id.* at 1156.

against the settling PRPs and an interest in fair apportionment of liability for the "MEW clean-up."[20] They also asserted that Fed. R. Civ. P. 24(a)[21] and Section 113(i) of CERCLA[22] gave them a legal right to intervene.[23] The district court rejected these claims and denied the non-settling PRPs' motion to intervene.[24]

The non-settling PRPs then brought an appeal before the United States Court of Appeals, Eighth Circuit.[25] This court reversed the district court's holding.[26] It held that when there is a suit by the EPA against PRPs who agree to settle, and the settling parties would thereby be protected from claims of PRPs who do not wish to settle, the non-settling PRPs have a legally protectable interest in a right to contribution under CERCLA section 113(f)(1).[27] Thus, the non-settling PRPs are given a right to intervene pursuant to Fed. R. Civ. P. 24[28] and CERCLA § 113(i).[29]

II. Legal Background

The issue presented in *United States v. Union Electric Co.* is whether non-settling PRPs have a legal right to intervene in an action by the EPA against settling PRPs based on the non-settling PRPs' interest in preserving possible contribution claims and preventing unfairly apportioned liability.[30] The Eighth Circuit decided this issue as one of first impression.[31] Decisions from other jurisdictions result in a split of authority on the issue.[32] Although no consensus has been reached, these decisions do provide insight as to how a court faced with this issue should proceed.

A. Rules and Statutes

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)[33] was enacted to provide a plan of action for when hazardous substances escape into the environment,[34] and to provide for the cleanup of inactive hazardous waste sites.[35] Congress based CERCLA on the policy that taxpayers should not have to pay to protect the public from dangers created by those who profit from businesses that deal with hazardous substances.[36] Instead, Congress chose to place this burden on those potentially responsible for the pollution through a system of retroactive strict liability.[37] Under this system, the EPA may require PRPs to investigate and/or remediate hazardous waste sites, or alternatively, may require PRPs to reimburse the EPA for taking such action.[38] Congress's two purposes in enacting CERCLA were:

> (1) to promote prompt investigation and remediation of facilities or sites at which the release or threatened release of hazardous substances presents a risk to human health and the environment; and (2) to shift the costs

[20] *Id.*

[21] *Id.* The Rule states that "[u]pon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) 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 applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

[22] *See infra* note 50 and accompanying text.

[23] *United States v. Union Elec. Co.*, 64 F.3d at 1156-57.

[24] *Id.* at 1156. The district court gave two reasons for denying the motion. First, it stated that a "significantly protectable interest" is not created by a claim for intervention under CERCLA § 113(f)(1). Therefore, intervention was not warranted. Second, the district court reasoned that the interest in contribution claims was "too speculative and contingent" to support intervention. According to the court, this was because interest in contribution would arise only if future litigation was commenced against the non-settling PRPs and such litigation might or might not result in liability being placed on these PRPs. *Id.*

[25] *Id.*

[26] *Id.* at 1170-71.

[27] *Id.* at 1166-67. The statute reads "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(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 determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title." 42 U.S.C. § 9613(f)(1) (1988).

[28] *See infra* note 50 and accompanying text.

[29] *Id.*

[30] *United States v. Union Elec. Co.*, 64 F.3d at 1156.

[31] *Id.*

[32] *Id.* at 1163-64 (citing United States v. ABC Indus., 153 F.R.D. 603, 607-08 (W.D. Mich. 1993); United States v. Wheeling Disposal Serv., Inc., No. 92-0132-CV-W-1, 1992 WL 685724 (W.D. Mo. Oct. 1, 1992); 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); United States v. Acton Corp., 131 F.R.D. 431 (D. N.J. 1990)).

[33] 2 U.S.C §§ 9601-9675 (1988).

[34] Lynette Boomgaarden and Charles Breer, *Surveying The Superfund Settlement Dilemma*, 27 Land & Water L. Rev. 83, 84 (1992).

[35] *Id.* at 84.

[36] *Id.* (citing Congressional Research Service, 96th Cong., 2d Sess., Environment and Natural Resources Policy Division, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 405 (Comm. Print 1983).

[37] Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 Geo. Wash. L. Rev. 1043, 1046-48 (1994).

[38] *Id.* at 1050-51.

> of investigating and remediating such sites, whenever possible, to the PRPs.[39]

In its first attempts at implementing CERCLA, the EPA was unable to accomplish either of these goals.[40]

In response, Congress passed the Superfund Amendment and Reauthorization Act (SARA) in 1986 to ensure the quick and effective cleanup of hazardous waste sites.[41] The 1986 Act added several new sections to CERCLA.[42] These new sections create the following step by step process which is used in the settlement of CERCLA actions.

The EPA begins formal negotiations by identifying PRPs and sending them special notice letters.[43] The PRPs then have sixty days to organize themselves and set forth a good faith proposal which shows they are qualified and willing to conduct and pay for a Remedial Investigation/Feasibility Study.[44] If a "substantial portion" of the PRPs and the EPA come to an agreement, the agreement is entered in the appropriate United States district court as a proposed consent decree.[45] The EPA must give public notice of the proposed consent decree by publishing it in the Federal Register.[46] Following publication, there is a thirty day period for public comment.[47] If there are comments indicating that the proposed agreement is "inappropriate, improper, or inadequate," the EPA or the Attorney General may withhold or withdraw consent to the agreement.[48] If the Attorney General and the EPA do not choose to withhold or withdraw consent, the district court in which the proposed consent decree is filed may begin proceedings to finalize the settlement.

Once such litigation begins, SARA gives interested parties the right to intervene.[49] Section 113(i) provides:

> In any action commenced under this chapter or under the Solid Waste Disposal Act 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.[50]

This language is nearly identical[51] to the language of Federal Rule of Civil Procedure 24(a),[52] so courts use virtually the same test in deciding whether to allow intervention under section 113(i) as they do when applying Rule 24(a).[53] This test has four requirements: 1) the application for intervention must be timely; 2) the applicant must have a recognized interest in the subject matter of the litigation; 3) that interest must be at risk of being impaired by disposition of the litigation; and 4) the interest is not adequately protected by existing parties.[54]

Even though the purposes of Rule 24 and section 113(i) of CERCLA are so similar, non-settling parties usually attempt to intervene under both. The reason for intervening under both is to overcome the possible argument that Congress did not intend section 113(i) to be a means for non-settling PRPs to challenge consent decrees.[55] Section 159(h) of CERCLA[56] states that CERCLA will not impair any person's rights under federal law.[57] Therefore, if a court finds that non-settler intervention is not available under section 113(i), intervention is still possible under Rule 24(a).[58]

Although it is clear that, in some

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[39] *Id.* at 1051-52.
[40] *Id.* at 1052.
[41] United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1179-80 (3rd Cir. 1994) (citing H.R. Rep. No. 253, 99th Cong., 2nd Sess. 55 (1986) *reprinted* in 1986 U.S.C.C.A.N. 2835, 2837).
[42] *United States v. Alcan*, 25 F.3d at 1180.
[43] Boomgaarden and Breer, *supra* note 34, at 89.
[44] *Id.* (citing 42 U.S.C. § 9622(e)(2)(A) (1988)).
[45] 42 U.S.C. § 9622(d)(1)(A) (1988).
[46] Boomgaarden and Breer, *supra* note 34, at 89 (citing 42 U.S.C. § 9622(i)(1) (1988)).
[47] Boomgaarden and Breer, *supra* note 34, at 89.
[48] *Id.* (citing 42 U.S.C. § 9622(d)(2)(B), (i)(3) (1988)).
[49] *United States v. Alcan*, 25 F.3d at 1180.
[50] 42 U.S.C. § 9613(i) (1988).
[51] The only distinction between the two provisions is that under Rule 24(a)(2), the prospective intervenors have the burden of proving that their interests are not adequately protected by the existing parties, while under section 113(i), the burden of proof is placed on the government. *United States v. Acton*, 131 F.R.D. at 433.
[52] See *supra* note 21.
[53] *United States v. Alcan*, 25 F.3d at 1181 (citing Utah v. Kennecott Corp., 801 F.Supp. 553, 571-572 (D. Utah 1992); Arizona v. Motorola, Inc., 139 F.R.D. 141, 144 (D. Ariz. 1991); *United States v. Acton*, 131 F.R.D. at 433).
[54] Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 997 (8th Cir. 1993) (citing Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861, 869 (8th Cir. 1977)).
[55] Boomgaarden and Breer, *supra* note 34, at 112 n.196.
[56] 42 U.S.C. § 9659(h) (1988).
[57] Boomgaarden and Breer, *supra* note 34, at 112 n.196.
[58] *Id.*

circumstances, parties may intervene in a CERCLA actions, it is not yet determined whether a party's interest in contribution claims is enough to warrant intervention in a CERCLA proceeding.[59] However, courts do seem to agree that the four part test,[60] derived from Federal Rule of Civil Procedure 24(a), is the starting point for analysis of this issue.

B. Case Law

In determining whether to allow intervention, courts first determine whether the intervention motion is timely.[61] In *Mille Lacs Band of Chippewa Indians*,[62] a non-CERCLA intervention case, the factors for determining timeliness in the Eighth Circuit were set out as follows: the reason for delay in seeking intervention; how far the litigation had progressed before attempted intervention; and how much prejudice other parties would suffer if intervention is allowed.[63]

Courts hearing CERCLA actions in other jurisdictions have used different factors in determining timeliness. In *Mid-State Disposal*,[64] the court looked to: the length of time the party knew or should have known of the interest in litigation before attempting to intervene; prejudice to litigating parties due to delay caused by intervention; prejudice to the party attempting to intervene if intervention is denied; and any unusual circumstances in the case.[65] In *Mid-State*, the non-settling PRPs withdrew from settlement negotiations in May 1989.[66] The other parties settled, and the EPA filed a complaint against the settlers and a proposed consent decree in November 1989.[67] The non-settling PRPs did not attempt to intervene until March 1990, when the court heard the motion for entry of the consent decree.[68] The court found the delay excessive, holding that the original parties would suffer prejudice because allowing intervention would render the original negotiations useless.[69] The court also found that the intervenors would not suffer prejudice because they could have voiced objections to the consent decree during the period for public comment.[70]

In *United States v. Browning-Ferris Industries Chemical Services, Inc.*,[71] the court considered the same factors as *Mid-State* to determine timeliness.[72] However, in *Browning-Ferris*, the court allowed intervention.[73] In this case, notice of the proposed consent decree was published on August 7, 1989, and application for intervention was filed on September 8, 1989.[74] The government argued that intervention should not be allowed because of section 122(d)(2)(A) of CERCLA,[75] requiring that application be filed within thirty days. In allowing intervention, however, the court reasoned that the statutory period was not absolute.[76]

The general rule that can be extracted from *Mid-State* and *Browning-Ferris* is that courts will consider an applicant's attempt at intervention timely as long as there is a showing of reasonable diligence on the part of the party seeking intervention and as long as the existing parties will not be prejudiced by intervention.[77]

Once a court decides whether a motion to intervene is timely, the next step is to determine whether the party seeking intervention has a legally protectable interest in the litigation.[78] Courts addressing the issue of whether an interest in contribution claims is legally protectable have arrived at differing results.[79] In *United States v. ABC Industries*,[80] the court found that an interest in contribution claims was not sufficiently protectable.[81] It reasoned that although the interest did not appear to be "contingent or speculative," it was subordinated by CERCLA's policy of promoting early de minimis settlements and final judgments achieved through those settlements.[82]

59 *See supra* note text accompanying note 49.
60 *See supra* note 54 and accompanying text.
61 *See supra* note 54 and accompanying text.
62 *See supra* note 54 and accompanying text.
63 *Mille Lacs*, 989 F.2d at 998.
64 *United States v. Mid-State*, 131 F.R.D. at 573.
65 *Id.* at 576 (citing Bloomington Ind. v. Westinghouse Elec. Corp., 824 F.2d 531 (7th Cir. 1987)).
66 Boomgaarden and Breer, *supra* note 34, at 113 (citing *United States v. Mid-State*, 131 F.R.D. at 576).
67 *Id.*
68 *Id.* at 114.
69 *Id.*
70 *Id.*
71 No. 89-568-A, 1989 U.S. Dist. LEXIS 16596 (M.D. La. Nov. 15, 1989).
72 *Id.*
73 *Id.*
74 *Id.*
75 42 U.S.C. § 9622(d)(2)(A) (1988).
76 *Browning-Ferris*, No. 89-568-A, 1989 U.S. Dist. LEXIS 16596 (M.D. La. Nov. 15, 1989).
77 Boomgaarden and Breer, *supra* note 34, at 114.
78 *See supra* note 54 and accompanying text.
79 *United States v. Union Elec. Co.*, 64 F.3d at 1157.
80 *United States v. ABC Indus.*, 153 F.R.D. at 603.
81 *Id.* at 607-08.
82 *Id.*

The importance of this policy has been emphasized by many courts involved in CERCLA litigation. *United States v. Cannons Engineering Corp.*[83] was not a case involving an intervention issue, but its holding is relevant to the analysis of CERCLA intervention actions. In *Cannons*, a group of non-settling PRPs argued that the immunity from contribution claims granted to the settling PRPs by CERCLA Section 113 (f)(2) would result in a disproportionate allocation of response costs.[84] The non-settling PRPs argued that this was "unfair and inconsistent with the statutory plan."[85] The court rejected this argument, stating that although the immunity from contribution claims granted to settling PRPs by Section 113 (f)(2) does create a risk of disproportionate liability, it is not forbidden.[86] In fact, the court held that such disproportionate liability was an integral part of the statutory plan designed to promote early settlements and deter "litigation for litigation's sake."[87] The court found that the risk of being subject to disproportionate liability was imposed on PRPs by Congress to encourage PRPs to take part in settlements.[88] The court's conclusions in *Cannons* seem to suggest that the right to contribution claims and fairly apportioned liability are not legally protectable interests.

In *United States v. Acton*,[89] the court came to the opposite conclusion and held that an interest in contribution claims was sufficiently protectable to warrant intervention.[90] The court granted the non-settling PRPs' right to contribution pursuant to Section 113(f)(1)[91] of CERCLA.[92] The court found that the right asserted by the non-settling PRPs was not merely economic, but a statutory right that might later be "extinguished."[93] Since this right to contribution was the only means by which the non-settlers could be made whole, if liability was imposed on them beyond their "fair share," the court held that a "substantial legally protected interest" existed.[94]

Once a court has determined that an application to intervene in a CERCLA action is timely and the intervenor has a sufficiently protectable interest, the court next must determine whether that interest is at risk of being impaired by disposition of the litigation and whether the interest is adequately protected by existing parties.[95] Both of these steps come into play only after the court has determined that a protectable interest exists. Therefore, *Acton*, being the only case to hold that there is a legally protectable interest in contribution claims in a CERCLA intervention action,[96] provides the logical guideline for a court applying these requirements.

After concluding that the non-settling PRPs had a legally protectable interest, *Acton* determined that allowing the litigation to proceed without intervention would impair the non-settling PRPs' "ability to protect that interest."[97] The court reasoned that approval of a consent decree would completely eliminate the non-settling PRPs' contribution claims against the settling PRPs.[98]

Next, *Acton* addressed the question of whether the non-settling PRPs' interest was adequately represented by parties already involved in the litigation.[99] The government argued that the non-settling PRPs' interest was represented in the consent decree proceedings because the non-settling PRPs had submitted public comments on the matter.[100] The court rejected this argument, stating that representation must be provided "by existing parties," and there was no party in the litigation that represented the non-settling PRPs.[101]

It is with the above legal background, consisting of the four part statutory test and case law with varied results, that the court in *United States v. Union Electric Co.*[102] set out to resolve the question of whether to recognize a right of non-settling PRPs to intervene in CERCLA cases, based on an interest in contribution claims and prevention of unfairly apportioned liability.

III. The Instant Decision

In the instant decision, the court

[83] 899 F.2d 79 (1st Cir. 1990).
[84] *Id.* at 92.
[85] *Id.*
[86] *Id.* at 91.
[87] *Id.* at 92.
[88] *Id.*
[89] *United States v. Acton*, 131 F.R.D. at 431.
[90] *Id.* at 434.
[91] 42 U.S.C. § 9613(f)(2) (1988).
[92] *United States v. Acton*, 131 F.R.D. at 433.
[93] *Id.* at 434.
[94] *Id.*
[95] *See supra* text accompanying note 54.
[96] *United States v. Union Elec. Co.*, 64 F.3d at 1164.
[97] *United States v. Acton*, 131 F.R.D. at 436.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *United States v. Union Elec. Co.*, 64 F.3d at 1152.

began its analysis by comparing Section 113(i) of CERCLA[103] with Federal Rule of Civil Procedure 24(a).[104] Because of the similarity in language between the two provisions, the court found that the same standards for intervention should be used when analyzing CERCLA intervention cases as are used in intervention cases under Rule 24(a).[105] In addition, the court found that the district court erred by basing its decision on policy considerations instead of the standards for intervention outlined in Rule 24(a).[106] The court then proceeded to apply Rule 24(a) standards to the facts of the present case.[107]

In examining the first step in the Rule 24 analysis of determining whether the motion to intervene is timely,[108] the court noted that the key consideration is whether the delay in moving for intervention will prejudice the existing parties.[109] It then stated that in this case any prejudice against the existing parties was not due to delay by the non-settling PRPs.[110] The court reached this result because, although the motion to intervene was not filed until almost four months after the lawsuit began, litigation was still in its early stages when the motion to intervene was filed.[111] The court found that the timeliness requirement protects against prejudice suffered as a result of delay in filing for intervention, not from prejudice suffered as a result of an intervenor's presence in a lawsuit.[112] Therefore, it held that delay in entry of the Consent Decree was not barred by the timeliness requirement because this delay was not caused by an untimely motion for intervention.[113]

After resolving that timeliness was not a bar to intervention in this case, the court turned to the question of whether the non-settling PRPs had a recognized interest in the subject matter of the litigation.[114] Despite the fact that the majority of jurisdictions that had previously addressed this question answered in the negative, the court held that non-settling PRPs did have a legally protectable interest in contribution claims sufficient to warrant intervention.[115] In reaching this conclusion, the court rejected the lower court's analysis which was based on policy considerations and legislative intent.[116] The court reasoned that, since there was no ambiguity in the relevant statutes, policy and legislative intent should not be considered.[117]

Therefore, the court based its analysis on applying statutory provisions to the facts of the instant case.[118] It first examined CERCLA Section 113(f)(1)[119] and determined that the non-settling PRPs were among those to whom the statute granted a right of contribution.[120] The court next reasoned that, since this right was asserted during the litigation and arose from liability which would be a result of the litigation, this right was directly related to the litigation.[121] Furthermore, the court noted that, because a final settlement in this litigation would cut off the non-settling PRPs' right to contribution under CERCLA Section 113(f)(2),[122] the non-settling PRPs' interest in the subject matter of the litigation was "direct and immediate."[123]

After concluding that the non-settling PRPs had a legally protectable interest, the court addressed whether this interest would be impaired by the litigation.[124] It held that the interest in contribution claims would be impaired because such claims against the settling PRPs would be barred or reduced in value under CERCLA Section 113(f)(2).[125]

Lastly, the court addressed whether the existing parties adequately represented the non-settling PRPs.[126] The court noted that generally potential intervenors must meet only a "minimal"

[103] *See supra* note 50 and accompanying text.
[104] *United States v. Union Elec. Co.*, 64 F.3d at 1157. *See supra* text accompanying note 21.
[105] *United States v. Union Elec. Co.*, 64 F.3d at 1158. The court noted one exception: Under § 113(i), the burden of showing that the prospective intervenors' interest is adequately represented by existing parties is placed on the President or the State, while under Rule 24(a) the prospective intervenor has the burden to show that "no existing party adequately represents its interests." *Id.*
[106] *Id.*
[107] *Id.*
[108] *See supra* text accompanying note 54.
[109] *United States v. Union Elec. Co.*, 64 F.3d at 1159.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 1160-65.
[115] *Id.* at 1164-65.
[116] *Id.* at 1165.
[117] *Id.*
[118] *Id.* at 1166.
[119] *See supra* note 50 and accompanying text.
[120] *United States v. Union Elec. Co.*, 64 F.3d at 1166.
[121] *Id.*
[122] *See supra* note 17.
[123] *United States v. Union Elec. Co.*, 64 F.3d at 1167.
[124] *Id.*
[125] *Id.*

burden in showing inadequate representation by existing parties.[127] However, "where the state is a party to a suit involving a matter of sovereign interest, the state is presumed to represent the interests of all of its citizens."[128] The court noted that this presumption can be rebutted by showing that the potential intervenor's interest is not the same as the interest shared by all of the citizens of the state.[129] Furthermore, the court reasoned that the potential intervenors had a narrow and "parochial" financial interest, while the general interest of citizens was in the cleanup of polluted sites.[130]

The court rejected the EPA and settling PRPs' contention that the non-settling PRPs' interest was adequately represented because the non-settling PRPs had an opportunity to voice their arguments through negotiations and public comment prior to the drafting of the consent decree.[131] According to the court, this argument was not on point because "[t]he question is not whether the intervenors had any other way of protecting their interests, but whether those interests are protected in this litigation."[132]

The court further held that the non-settling PRPs' interest was not represented by the parties involved in the litigation.[133] It reached this conclusion by comparing the interests of the EPA and the settling PRPs with those of the non-settling PRPs.[134] The court found that since the settling PRPs wished to terminate the non-settling PRPs' contribution claims, the interests of the two groups conflicted.[135] Therefore, it would be impossible for the settling PRPs to represent the interest of the non-settling PRPs in the litigation.[136]

IV. Comment

A. Relation to Precedent

In *United States v. Union Electric Co.*, the court began its analysis by looking to Section 113(i) of CERCLA[137] and Rule 24(a) of the Federal Rules of Civil Procedure.[138] The court used the four part analysis derived from these provisions, which is used by virtually all courts in deciding CERCLA intervention cases.[139] In its application of the second step of the analysis, the court reached a different result from that reached by most courts presented with similar facts. Generally, courts have found that non-settling PRPs do not have a protectable interest in preserving potential contribution claims.[140] This court, however, followed the minority view and held that non-settling PRPs do, in fact, have such an interest.[141]

In breaking from the majority view, the court flatly rejected policy considerations and legislative intent as relevant concerns.[142] Instead, the court purported to use the plain language of the statutes involved.[143] It stated that because the statutory provisions which provide for intervention are unambiguous, allowing intervention would not be "a result demonstrably at odds with the intentions of the framers."[144] The court stated that allowing intervention under Section 113(i) of CERCLA[145] would not preclude the effect of Section 113(f)(2).[146] It was because of this conclusion[147] that the court decided not to consider policy or legislative intent.[148]

When a statute is unambiguous the courts should simply enforce it according to its plain language.[149] However, in the instant case it is not clear that the statutes are unambiguous. In fact, the provisions of Section 113(i) are in direct conflict with those of Section 113(f)(2) in the context of the present

[126] *Id.* at 1168-70.
[127] *Id.* at 1168.
[128] *Id.* (citing *Mille Lacs*, 989 F.2d at 1000).
[129] *United States v. Union Elec. Co.*, 64 F.3d at 1169.
[130] *Id.* (citing *Mille Lacs*, 989 F.2d at 1001).
[131] *Id.*
[132] *Id.* (citing *Mille Lacs*, 989 F.2d at 997-99).
[133] *United States v. Union Elec. Co.*, 64 F.3d at 1170.
[134] *Id.* at 1169.
[135] *Id.* at 1170.
[136] *Id.*
[137] *See supra* note 50 and accompanying text.
[138] *United States v. Union Elec. Co.*, 64 F.3d at 1156-57. *See supra* note 50 and accompanying text.
[139] *See supra* text accompanying note 54.
[140] *See United States v. Alcan*, 25 F.3d at 1174; *United States v. ABC Indus.*, 153 F.R.D. at 607-08; *United States v. Wheeling Disposal*, No. 92-0132-CV-W-1, 1992 WL 685724; *United States v. Vasi*, 22 Chem. Waste Lit. Rep. at 219; *United States v. Beazer East*, 22 Chem. Waste Lit. Rep. at 222-23; *United States v. Mid-State*, 131 F.R.D. at 576-77.
[141] *United States v. Union Elec. Co.*, 64 F.3d at 1164.
[142] *Id.* at 1165-66.
[143] *Id.* at 1165.
[144] *Id.* at 1166 (citing U.S. v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989)).
[145] *See supra* text accompanying note 50.
[146] *See supra* text accompanying note 125.
[147] *United States v. Union Elec. Co.*, 64 F.3d at 1165-66.
[148] *Id.* at 1166.
[149] *See* Melahn v. Pennock Ins., Inc., 965 F.2d 1497, 1502 (8th Cir. 1992).

case. Allowing the non-settling PRPs to intervene under 113(i) nullifies the incentive to prompt settlement created by Section 113(f)(2)'s protection against contribution claims. When such a conflict exists, the majority view, which recognizes the conflict and then considers the policies behind the statutes,[150] is the more sensible approach. Hence, in cases in which non-settling PRPs attempt to intervene in CERCLA actions, the plain language approach is not the best.

B. Policy Considerations

When Congress enacted CERCLA in 1980, it had the dual policy concerns of (1) promoting prompt investigation and remediation of hazardous waste sites and (2) shifting costs to PRPs.[151] In 1986, Congress significantly changed CERCLA by enacting SARA.[152] The provisions of SARA were intended to further encourage the thorough and rapid cleanup of waste sites.[153]

The majority of courts considering CERCLA cases give great weight to the policies underlying both CERCLA and SARA.[154] These courts place great importance on the incentive for quick settlement under section 113(f)(2) of CERCLA which provides settling PRPs with immunity from contribution claims provided to settling PRPs.[155]

In *United States v. Union Electric Co.*, the court refused to consider the policies underlying CERCLA.[156] Instead, the court read the plain language of the statutes and concluded that intervention by the non-settling PRPs was not barred.[157]

The problem with this approach is that when a court looks to statutory language alone, it has no context in which to interpret that language. When read in a sterilized, fact free environment, Sections 113(i)[158] and 113(f)(2)[159] of CERCLA do not necessarily conflict. Section 113(f)(2) simply provides protection from contribution claims to settling PRPs, while Section 113(i) grants a right of intervention to interested parties. However, when one party seeks intervention in order to protect potential contribution claims, a conflict is created. It becomes unclear whether the settling PRPs' expectation of being free from contribution claims or the non-settling PRPs' interest in intervention should prevail. In *United States v. Union Electric Co.*, the court denied that such an ambiguity was created.[160] Therefore, the court refused to consider the policy underlying the statutes.[161]

In the future, courts addressing cases with facts similar to those in *United States v. Union Electric Co.* should recognize that a statutory ambiguity is created when intervention is sought in order to protect contribution claims. In the face of such ambiguity, the accepted course of action is to use policy and legislative intent to determine whether intervention is proper.[162] Since one of the primary policies behind CERCLA is to promote prompt response to hazardous waste problems,[163] courts should attempt to reach results that are consistent with this goal. When non-settling PRPs seek to intervene in CERCLA actions, the denial of intervention is the only result that is consistent with CERCLA's underlying policy.

C. Results and Ramifications

In *United States v. Union Electric Co.*, the court found that Section 113(f)(1) of CERCLA[164] gave the non-settling PRPs a legally protectable interest in contribution claims.[165] Based on this finding, the court held that under Section 113(i) of CERCLA,[166] the non-settling PRPs were among those to whom CERCLA granted a right of intervention.[167] By reaching this conclusion and allowing the non-settling PRPs to intervene in this case, the court set a precedent that will impact the settlement process in future Eighth Circuit CERCLA cases.

The most significant impact of this decision will be its effect on EPA's ability to reach settlements with PRPs in a quick and effective manner. It is well accepted that CERCLA's success is dependent on the voluntary settlement of PRPs.[168] Congress, realizing this fact as well, has provided incentives to encourage PRPs in CERCLA cases to enter settlement agreements.[169] One of the

[150] *See supra* note 140 for a list of cases using this approach.
[151] *See supra* text accompanying note 39.
[152] *See supra* note 41 and accompanying text.
[153] *See supra* note 41 and accompanying text.
[154] *See supra* text accompanying note 142.
[155] *See supra* note 17 and accompanying text.
[156] *United States v. Union Elec. Co.*, 64 F.3d at 1165-66.
[157] *Id.* at 1152
[158] *See supra* text accompanying note 50.
[159] *See supra* note 17 and accompanying text.
[160] *United States v. Union Elec. Co.*, 64 F.3d at 1152.
[161] *Id.*
[162] Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984).
[163] *United States v. Cannons*, 899 F.2d at 90.
[164] *See supra* text accompanying note 29.
[165] *See supra* text accompanying note 120.
[166] *See supra* note 50 and accompanying text.
[167] *United States v. Union Elec. Co.*, 64 F.3d at 1159-60.
[168] Boomgaarden and Breer, *supra* note 34, at 90.

strongest of these incentives is provided in Section 113(f)(2) of CERCLA,[170] which grants settling PRPs protection from contribution claims brought by non-settling PRPs.[171] Under Section 113(f)(2), PRPs who choose not to settle are left with the possibility of being subject to a disproportionate share of liability. It has been held that such a technique "which promotes early settlements and deters litigation for litigation's sake, is an integral part of the statutory plan."[172]

United States v. Union Electric Co. effectively abrogates the primary incentive of Congress' plan. The court found that the goal of Section 113(f)(2), encouraging prompt settlement, will remain intact if intervention is allowed under Section 113(i).[173] This conclusion improperly ignores the fact that allowing non-settling PRPs to intervene will impede prompt settlement in CERCLA cases. Allowing non-settling PRPs to intervene to protect contribution claims will eliminate the incentive created by Section 113(f)(2). Settling PRPs will no longer possess the security of knowing that they are immune from contribution claims, while non-settling PRPs will have the ability to wait until a proposed settlement is under judicial review before asserting a right to such claims. The main ramification of case law such as *United States v. Union Electric Co.* is the prelongation of CERCLA settlement litigation.

V. Conclusion

The majority view is that non-settling PRPs do not have a right to intervene in CERCLA actions in order to protect possible contribution claims against settling PRPs. This view is supported by the policies and legislative intent underlying CERCLA. By holding that non-settling PRPs do have a right to intervene based on their interest in protecting contribution claims, *United States v. Union Electric Co.* parts from the majority view and sets a precedent which will hamper the quick settlement of CERCLA actions in the Eighth Circuit.

[169] *Id.*
[170] *See supra* note 17 and accompanying text.
[171] Boomgaarden and Breer, *supra* note 34, at 94.
[172] *United States v. Cannons*, 899 F.2d at 92.
[173] *United States v. Union Elec. Co.*, 64 F.3d at 1166.