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Expiration of Contractual Indemnity Allocating Environmental Liability Does Not Bar Subsequent MTCA Claim
By Jessica Ferrell

Washington's Court of Appeals recently held that a three-year indemnity provision in a real estate contract--once it expires--does not bar a subsequent statutory claim for contribution under the state's Superfund law, the Model Toxics Control Act (MTCA). *William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett,* 159 Wash. App. 389, 245 P.3d 779 (Div. 1 2011). The appeals court emphasized that parties may contractually allocate liability for environmental response costs, but that the intent of such agreements to bar statutory rights of recovery must be clear and reflect the mutual intent of both parties.

Background

The *Hulbert* appeal arose from a 1991 sale of 30 acres (the "Property") by Appellants (the Hulberts) to Respondent, the Port of Everett (the "Port"). The Property had been industrial since the 1920s. The Hulberts and the Port were aware that the Property was likely contaminated, so they negotiated an Agreement of Purchase and Sale (the "Agreement"), which included an addendum titled "Additional Environmental Testing and Clean Up Activities" and a "Certificate and Indemnity Regarding Hazardous Substances" (the "Certificate").

The Certificate set forth the Hulberts' obligation to indemnify the Port for three years after the date of sale. It also included the Hulberts' representations that they had no notice of environmental contamination from any governmental agency or other party and--except as set forth in a prior Phase I report--no knowledge of any hazardous substances on the Property, discharges of hazardous substances on the Property, or violation of any laws relating to hazardous substances. [FN1]

The indemnity provision expired in 1994. In 2006, the Washington Department of Ecology required the Port to perform a remedial investigation and to clean up the Property. The Port sent letters to all potentially liable parties, including the Hulberts, notifying them that they were potentially liable for MTCA response costs incurred at the Property. Four months after receiving that letter, the Hulberts sued the Port, seeking injunctive, declaratory, and other relief. Specifically, they sought a declaration that the 1991 purchase and sale Agreement barred any MTCA claims the Port may have had against them, and enjoining any remedial investigation until there was a judicial determination of the Hulberts' liability or lack thereof. The trial court denied the Hulberts' request for injunctive relief. The Port counterclaimed for MTCA contribution and sought summary judgment. The trial court granted the Port's motion for partial summary judgment, concluding that the Agreement did not bar the Hulberts' MTCA liability. The court subsequently entered final judgments against the Hulberts on the issue and awarded the Port its attorneys' fees. The Hulberts appealed.

Appellate Decision

Since 1994, Washington courts have recognized that parties are free to allocate MTCA liability by contract. *See* *Car Wash Enterprises, Inc. v. Kampanos,* 74 Wash. App. 537, 543, 874 P.2d 868 (Div. 1 1994) (acknowledging

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parties' abilities to contractually allocate MTCA liability, but concluding that parties did not intend an "as-is" clause in a purchase and sale agreement to allocate the risk of MTCA liability to the buyer; also noting that the pollution was unknown to the parties at the time of the transaction and MTCA had not yet been adopted, so the legal liability the seller claimed had been allocated by the agreement did not exist when the agreement was executed). But courts have consistently required that intent to be clearly stated, with respect to CERCLA, MTCA, or other environmental liability, in order for a contract to effectively shift liability or allocate response costs.

In *Hulbert*, the court had to decide whether the Agreement allocated MTCA liability. To do so, it applied Washington's "objective manifestation" theory of contract interpretation, under which "courts attempt to ascertain the intent of the parties 'by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.'" [FN2]

Thus, courts will:

• "impute an intention corresponding to the reasonable meaning of the words used";

• give words "their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates otherwise"; and

• examine extrinsic evidence--which includes "the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties, and the reasonableness of the respective interpretations urged by the parties"--"relating to the context in which a contract is made to determine the meaning of specific words and terms." [FN3]

Courts will not:

• use extrinsic evidence to "show an intention independent of the instrument" or to "vary, contradict or modify the written word"; or

• admit "extrinsic evidence of a party's subjective, unilateral intent as to the contract's meaning[.]" [FN4]

The Hulberts argued that the Certificate capped their liability and constituted a complete defense to the Port's contribution claim. They argued that the parties intended to allocate all environmental liability at the Property, present and future, and that the Certificate reflected that intent through inclusion of, among other things, reference to 15 separate federal and state environmental statutes, including MTCA. [FN5] They described the Agreement as containing a "quid pro quo with respect to environmental liabilities": The Port received certain investigation and remediation work and a three-year indemnity, and the Hulberts received a date certain on which their environmental liabilities on the Property vis-à-vis the Port would end. They also argued that a provision in the Agreement stating that the Port inspected the Property and accepted its condition subject to the recitations in the Agreement (the "inspect and accept clause") did not control, and that it did not constitute an "as is" clause. [FN6]

The Port characterized the Agreement as reflecting the parties' intent to add to the Port's rights, not take any away. The Port characterized the inspect and accept clause as an "as is" clause, arguing that such clauses do not shift liability from one party to another in an agreement, and preclude only breach of warranty claims. [FN7] Thus, the Port asserted that--despite the presence of citations to various statutes, including MTCA--the Agreement did not affect any of its statutory rights.

The appellate court agreed with the Port and the trial court. It held that:

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> the Agreement does not objectively manifest a mutual intent that the Hulberts, after the termination of the three-year period, would be released from all environmental liability, including under the MTCA or any other statute. Instead, the Certificate simply guarantees the Port that the Hulberts would be responsible for any costs or expenses related to the presence of hazardous substances on the Property for three years following the sale. Upon the expiration of the three-year period, the protections provided by the Certificate ceased to exist, and the Port could no longer seek indemnification *under the Certificate or its terms.* But in the absence of any language indicating that the Port agreed to release or waive any *other* rights it might have in the future, the Agreement did not preclude a statutory MTCA contribution action after the three years expired. [FN8]

The court noted the "conspicuous absen[ce] from the Agreement" of any "explicit expression of an intent to allocate MTCA liability." It characterized the inspect and accept clause as an "as is" clause, and explained that, "where the evidence does not demonstrate that the parties so intended, an 'as is' clause does not contractually allocate MTCA liability." [FN9]

Without a specific contractual allocation under MTCA, or an implied or express waiver or release, the court determined that the Port's MTCA rights were unaffected by the expiration of the contractual indemnity period, and that the Agreement did not shift all potential liability to the Port. The court found that, while the evidence demonstrated the Hulberts' subjective, personal understanding that the Agreement would preclude any liability on their part to the Port after the indemnity period ended, it did not objectively demonstrate that that was the parties' mutual intent.

The court therefore affirmed the trial court on the merits, as well as on its CR 54(b) certification of its summary judgment order and attorneys' fee award.

Conclusion

The *Hulbert* opinion is consistent with most MTCA and CERCLA case law on the issue of contractual allocation of liability under those statutes. Courts typically hold that parties are free to contractually allocate expenses for cleaning up a site between themselves, but require that a contract purporting to shift liability do so clearly. *Hulbert* is also consistent with federal district court opinions construing "as is" clauses; those courts have uniformly determined that such clauses, without more, are not enough to release a seller from liability for CERCLA contribution or cost recovery claims.

Less clear is what constitutes clear language. Judicial inspection of each contract will be extremely text-specific, with limited reliance on extrinsic evidence, only for specific purposes. The *Hulbert* opinion cautions against assuming that broad, nonspecific language and a statutory citation in a contractual indemnity provision will effectively insulate a party from statutory liability once that indemnity expires.

For more information contact Jessica **Ferrell** or any other member of Marten Law's Cleanup practice group.

[FN1]. The Certificate is included as Appendix A to the Respondent's Brief in *Hulbert v. Port of Everett,* which is available, along with all other briefing cited herein, through the Washington Court of Appeals' Web site.

[FN2]. *William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett,* 159 Wash. App. 389, 245 P.3d 779 at *4 (Div. 1 2011) (quoting *Hearst Communications, Inc. v. Seattle Times Co.,* 154 Wash. 2d 493, 503, 115 P.3d 262 (2005)).

[FN3]. *Id.*

[FN4]. *Id.*

[FN5]. *See* Appellants' Opening and Reply Briefs.

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[FN6]. They conceded that such a clause "would be insufficient to contractually allocate MTCA liability." App. Op. Br. at 23.

[FN7]. *See* Resp. Br. at 16.

[FN8]. *William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett,* 159 Wash. App. 389, 245 P.3d 779 at *4 (Div. 1 2011) (emphasis in original).

[FN9]. *Id.* at *5 (citing cases).

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