

ENVIRONS

Washington Court Addresses Contractual Allocation of Environmental Cleanup Liability

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Breaking Developments In Environmental Law

Parties who want to shift or limit their liability for environmental cleanup would do well to heed the latest Washington Court of Appeals ruling, which found that an expired contractual indemnity agreement was insufficient to preclude later liability for cleanup costs under the Washington Model Toxics Control Act ("MTCA").

In *Hulbert v. Port of Everett*, the Port acquired the defendants' property, which had a lengthy history of industrial uses dating back to the early 1920s. Both parties to the transaction knew that the property likely had environmental issues. The sellers agreed to indemnify the Port against liability arising from the presence of hazardous substances, but only for three years after the date of sale. The parties established an escrow account funded with a portion of the sellers' proceeds from the purchase price and used it to pay for investigation and cleanup costs related to an environmental issue identified prior to closing. After the cleanup was completed, the sellers received the remainder of the escrow funds, and the Port did not require the sellers to perform any additional cleanup during the three-year period after closing.

Fifteen years later, however, the Washington Department of Ecology required the Port to perform additional investigation and cleanup on the property. The Port asserted that the sellers were liable under MTCA for the additional costs associated with the investigation and cleanup. The sellers responded that the Port was barred from seeking contribution because responsibility for environmental liability ended three years after closing when the agreement's indemnity provision expired.

The trial court ruled in favor of the Port and the court of appeals agreed. According to the appellate decision, the parties' agreement did not manifest a mutual intent to release the sellers from all liability *after* the expiration of the three-year indemnity period. Rather, the court held that the agreement simply made the sellers responsible for all costs or expenses related to the presence of hazardous substances during the three-year indemnity period. Thereafter, the sellers continued to be statutorily liable under MTCA for a proportional share of any cleanup costs because the parties had not explicitly included release or waiver language in the agreement to preclude a statutory MTCA claim.

The *Hulbert* decision builds on a previous Washington Court of Appeals case from 1994, *Car Wash Enterprises, Inc. v. Kampanos*, which held an "as is" clause in a real estate contract that did not specifically reference MTCA was insufficient to contractually allocate MTCA liability to

the buyer.

Hulbert reinforces the lesson of *Kampanos* that a contract must be absolutely clear that the parties are allocating future MTCA liability from the seller to the buyer. If there is any ambiguity, Washington courts will reject reliance on a contractual limitation and allow contribution claims under MTCA's strict liability scheme.

A copy of *Hulbert v. Port of Everett* opinion can be found at:

<http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinionTextOnly&filename=641026MAJ&printOnly=y>

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