100230-1

No. 80032-9-I

COURT OF APPEALS, DIVISION I, OF
THE STATE OF WASHINGTON

POPE RESOURCES LP, a Delaware Limited Partnership,

Respondent,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; CERTAIN LONDON MARKET COMPANIES; CONTINENTAL CASUALTY COMPANY; and THE CONTINENTAL INSURANCE COMPANY (as successor in interest to the rights and obligations under certain policies issued by HARBOR INSURANCE COMPANY); AMERICANREINSURANCE COMPANY; ASSOCIATED INTERNATIONAL INSURANCE COMPANY; CENTRAL NATIONAL INSURANCE COMPANY; CENTURY INDEMNITY COMPANY; EMPLOYERS INSURANCE COMPANY OF WAUSAU; EMPLOYERS REINSURANCE COMPANY; GRANITE STATE INSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERNATIONAL INSURANCE COMPANY as successor to INTERNATIONAL SURPLUS LINES INSURANCE COMPANY; NEW HAMPSHIRE INSURANCE COMPANY; and NORTHBROOK INSURANCE COMPANY,

Appellants,

and

POPE & TALBOT, INC.; GENERAL INSURANCE COMPANY OF AMERICA; LIBERTY MUTUAL INSURANCE COMPANY; and JOHN DOES 1-20,

Defendants.

PETITION FOR REVIEW

Robin E. Wechkin
WSBA #24746
Sidley Austin LLP
8426 316th Place Southeast
Issaquah, WA 98027
(415) 439-1799

Constantine L. Trela
(*pro hac vice*)
Robert Hochman
(*pro hac vice*)
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Attorneys for Petitioners Granite State Insurance Company, The Insurance Company of the State of Pennsylvania, and New Hampshire Insurance Company

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IDENTITY OF PETITIONERS

Defendants-Appellants Granite State Insurance Company, The Insurance Company of the State of Pennsylvania, and New Hampshire Insurance Company (collectively, "Granite") petition for review of the Court of Appeals decision terminating review designated in the next section of this Petition.

COURT OF APPEALS DECISION

The decision of the Court of Appeals that Granite asks this Court to review was issued and published on September 7, 2021. The opinion of the Court of Appeals is attached as Appendix A.[1]

INTRODUCTION AND QUESTIONS PRESENTED FOR REVIEW

In *American Continental Insurance Co. v. Steen*, 151 Wn.2d 512, 91 P.3d 864 (2004), this Court interpreted Washington's anti-annulment statute, RCW 48.18.320, for the

[1] The Court of Appeals' opinion is cited herein as "Op. __."

first time. The statute is concise and, this Court held, clear and unambiguous and thus "not subject to judicial construction." *Id*. at 518, 522. The statute's text, attached as Appendix C, confirms the Court's conclusion:

> No insurance contract insuring against loss or damage through legal liability for the bodily injury or death by accident of any individual, or for damage to the property of any person, shall be retroactively annulled by any agreement between the insurer and insured after the occurrence of any such injury, death, or damage for which the insured may be liable, and any such annulment attempted shall be void.

The Court of Appeals in this case ignored both the plain language of the statute and this Court's admonition regarding when judicial construction is appropriate, and when it is not. The result is a wholesale rewriting of the statute, an exercise in judicial legislation that distorts the unambiguous text of the statute and the legislative purpose underlying it. That result is also contrary to public policy because it undermines settlements of insurance coverage disputes and, by doing so, harms the very persons the statute was intended to protect. This Court should

intervene to correct the Court of Appeals' improper deviation from *Steen* and legally erroneous construction of the statute, and to prevent the serious adverse consequences that deviation and construction will unavoidably produce.

The questions presented are:

1. Did the Court of Appeals commit legal error by assigning meanings to unambiguous statutory terms—"insurance contract" and "retroactively annulled"—that conflict with this Court's reading of the statute in *Steen* and are contrary to the natural and ordinary meanings of those terms? (RAP 13.4(b)(1))
2. Did the Court of Appeals commit legal error by construing RCW 48.18.320 to render void any and all agreements between liability insurers and policyholders to resolve insurance coverage disputes by settlement—thereby eliminating any motivation for insurers presented with contestable claims to agree to resolve those claims by settling with policyholders

using insurance proceeds they seek, which would also benefit injured third parties—rather than litigating to a final conclusion? (RAP 13.4(b)(4))

STATEMENT OF THE CASE

From 1968 to 1985, Granite issued 11 general liability insurance policies to Pope & Talbot, Inc. (P&T). (Op. 41; CP 12695.) P&T was a Delaware corporation, headquartered in Oregon, that operated lumber mills at sites throughout the United States and in Canada. (*See* CP 11025.) In 1985, P&T created Pope Resources in a spin-off transaction, transferring P&T's Port Gamble, Washington site, among others, to the new entity. (Op. 4.) P&T continued to operate the Port Gamble facility under lease from Pope Resources until 1995. (Op. 4-5.) In 1995, Pope Resources asserted that P&T was responsible for alleged environmental damage at Port Gamble, and formally asserted a claim against P&T in 1997. (Op. 5.) Pope Resources and P&T communicated extensively concerning that claim, on issues that included possible coverage under P&T's insurance

policies. (*E.g.*, CP 8977, 8981, 8983-85, 8987-91, 9006, 9010-12, 9023.)

In 1995, while it was having these discussions with Pope Resources, P&T sued its insurers in Oregon federal court, asserting a claim for coverage of potential environmental liability at its St. Helens, Oregon site. (CP 12801-16.) In 1999, the litigation moved to Oregon state court, where P&T asserted claims not only for St. Helens, but also for potential liability arising from Pope Resources' claim with respect to Port Gamble and potential liability for another site in Port Ludlow, Washington. (CP 12828-31.) In both the federal and state cases, Granite and the other insurers argued that their policies did not provide coverage for the alleged liabilities, and the parties litigated those coverage disputes for years.

In 2001, after more than five years of litigation, P&T and Granite entered into a settlement agreement. (CP 12671-95.) Pursuant to the settlement, Granite paid P&T a substantial sum under its policies to resolve the three insurance claims P&T had

asserted, including the Pope Resources Port Gamble claim. In return for Granite's payment, P&T agreed to dismiss the Oregon litigation with prejudice as to Granite and to release Granite from any further liability for environmental claims at the three disputed sites. (*Id*.) The settlement agreement left the Granite policies in effect as to other potential liabilities—including non-environmental claims at Port Gamble, Port Ludlow, and St. Helens, and claims of any kind at other P&T sites. (*Id*.)

As a result of negotiations stretching over a number of years, P&T reached settlements with its other insurers, both before and after its settlement with Granite (Op. 5), and received substantial payments from those insurers as well. Indeed, in a May 2001 letter, P&T's counsel told Pope Resources' counsel that P&T had "recovered sufficient funds from its insurers to pay for much of the necessary cleanup work." (CP 9135.)

Shortly thereafter, in 2002, having received almost $17 million in insurance proceeds from Granite and the other insurers through their settlements (CP 10614), P&T entered into an agreement with Pope Resources to settle Pope Resources' Port Gamble claim (CP 9138-46). In general, that agreement assigned responsibility for the Port Gamble clean-up to P&T, and P&T performed under the agreement for years thereafter. (Op. 5.) P&T's performance stopped in 2007, when it sought reorganization under Chapter 11 of the Bankruptcy Code; that proceeding was later converted to a Chapter 7 liquidation. (Op. 5.) Pope Resources submitted a claim in the P&T bankruptcy for approximately $4 million to cover the estimated remaining costs for remediation at the Port Gamble site. (CP 11284.) It was not until 2016, 15 years after Granite and P&T settled P&T's coverage claim, that Pope Resources asserted its derivative claims against Granite and the other insurers in this action. (Op. 6.) The clean-up of the Port Gamble site has now largely been completed. (CP 7303.)

In April 2019, the superior court granted Pope Resources' motion for summary judgment, holding that all of P&T's settlement agreements with its insurers, including the Granite agreement, are void under RCW 48.18.320. (CP 15763-67, attached as Appendix B.) The court refused to conduct a choice-of-law analysis as to any of the 10 settlement agreements at issue, holding that no such analysis was necessary. (CP 15766.)

The insurers sought discretionary review, which the Court of Appeals granted. In a published decision, that court first held that the superior court had erred by refusing to analyze choice of law. (Op. 8.) The Court of Appeals then conducted its own choice-of-law analysis and concluded that all of the settlement agreements are subject to Washington law and that RCW 48.18.320 therefore governs. (Op. 8-26.)

The Court of Appeals went on to hold that, under RCW 48.18.320, all of the settlement agreements are void. (Op. 26-44.) With respect to Granite, the court acknowledged that the

agreement did not actually cancel any insurance policy and released only the three specific claims asserted in P&T's lawsuit. (Op. 40.) The court also acknowledged that *Steen* involved the cancellation of an entire insurance policy. (*Id*.) The court noted, however, that *Steen* included references to "insurance coverage" and "insurance contracts," and concluded that this meant the *Steen* Court intended the statute to extend to agreements that did *not* cancel insurance policies, despite clear language to the contrary in the statute. (Op. 40-41.)

The court further noted that the record here did not indicate that, at the time of the 2001 settlement, any other occurrences had harmed third parties. (Op. 41.) From this absence of evidence, the court appears to have reasoned that the only insurance coverage that existed in 2001 was the environmental coverage at issue in the Granite settlement and that "[u]nder these particular circumstances," that "coverage qualifies as an insurance contract." (Op. 41-42.) In other words, the court acknowledged that the actual insurance

contracts to which P&T and Granite were parties provided for coverage beyond the settled claims for environmental liability at Port Gamble, Port Ludlow, and St. Helens, but nevertheless concluded that because other potential claims had either already been resolved or might never be brought against P&T in the future, the "insurance contract" should be viewed as limited solely to the coverage available under Granite's policies for the three settled claims.

Granite asks this Court to review the Court of Appeals' published decision.

ARGUMENT FOR SUPREME COURT REVIEW

As explained in the Petitions for Review submitted by Granite's co-defendants,[2] the Court of Appeals' decision has the effect of invalidating any agreement between an insurer and insured that resolves a dispute regarding the insurance coverage

[2] One petition is being filed by Allstate Insurance Company ("Allstate Petn."); another by Evanston Insurance Company and TIG Insurance Company; and a third by the remaining insurer defendants ("London Petn.").

available for third-party claims. That published decision is contrary to this Court's decision in *Steen* and fundamental principles of contract law. It also directly conflicts with Washington public policy by discouraging settlement and encouraging lengthy, contentious litigation.

The Court of Appeals' error—misinterpreting the statute and misapplying this Court's decision in *Steen*—and the dire consequences of that error are particularly apparent in the Court of Appeals' treatment of the Granite settlement agreement. That agreement is a conventional, narrow settlement of a litigated dispute regarding insurance coverage for specific, identified claims, with a release limited to those claims, and leaving coverage in force for any and all other claims covered by the insurance policies.[3]

The Granite settlement agreement expressly and narrowly resolved P&T's disputed claim to coverage for

[3] Allstate and Continental Casualty and Continental Insurance entered into similar settlements with P&T. (Op. 36-39.)

environmental liabilities arising from three specific sites, two in Washington and one in Oregon. Coverage remains in place for any actual and potential environmental liabilities P&T might face at other sites, and for other liabilities of any kind at any P&T location, including the three sites addressed in the settlement. And the settlement agreement was far from an annulment of coverage even with respect to the specific claims at issue: the agreement resulted in a substantial payment to P&T under the policies—a payment P&T evidently regarded as adequate to address its clean-up responsibilities (*see* CP 9135)—thus giving effect to P&T's insurance coverage, not "annulling," "rescinding," or "cancelling" that coverage.

The Court of Appeals' construction of RCW 48.18.320 treats this kind of standard litigation settlement agreement involving an insurance coverage dispute as void. That cannot be correct, either as a matter of statutory construction or sound public policy. The settlement of a dispute over the application of a contract does not "annul" that contract, and that is equally

true of insurance coverage disputes. A construction that treats ordinary settlements of specific disputes as annulments of insurance contracts will prevent or greatly discourage settlements of coverage disputes. It promises to promote lengthy, resource-consuming litigation and to deprive insureds and injured third parties of the funds needed to redress injuries, such as the clean-up of polluted industrial sites. This Court's review is urgently needed to correct the Court of Appeals' error and prevent the harm to the public interest it will create.

I. The Court of Appeals Improperly Engaged in Judicial Construction of an Unambiguous Statute and Adopted a Construction that Conflicts with the Statute's Plain Language and This Court's Decision in *Steen*.

Under no conceivable construction of "insurance contract" and "retroactively annulled" can the Granite settlement agreement fall within the scope of RCW 48.18.320. And by contorting the statutory language to reach this agreement and declare it void, the Court of Appeals made clear that, under its construction of the statute, it is virtually

impossible for insurers and insureds to resolve coverage disputes short of litigation to a final, non-appealable judgment—a result that can only harm the injured claimants the Court of Appeals asserted its construction protects.

A. The Court of Appeals Erroneously Construed "Insurance Contract" in RCW 48.18.320.

The starting point is the language of the statute. As detailed in the London petition (pp. 11-15), when the legislature used the term "insurance contract," it was referring to an insurance *policy*. This Court in *Steen* made clear that for the statute to apply, there must be an "agreement between the insured and the insurer to cancel an *insurance policy*." 151 Wn.2d at 516 n.1 (emphasis added); *see also id*. at 519, 522 (statute voids agreements to cancel or rescind "insurance policies"). The Court repeatedly confirmed that the statute applies to "insurance policies," *see, e.g*., *id*. at 518-19, 519, 522, and in its analysis the Court repeatedly treated "insurance contract" as interchangeable with "insurance policy," *see, e.g*., *id*. at 519, 522, 524-25. That treatment was in line with the

Insurance Code, which consistently equates "insurance contract" with "insurance policy" (*see infra* at 15-16), and is the only reading of RCW 48.18.320 that gives the statute the unambiguous meaning the Court in *Steen* held that it has.

The Court of Appeals' conclusion that "insurance contract" in RCW 48.18.320 requires judicial construction not only conflicts with this Court's determination in *Steen* that the statute is clear and unambiguous and thus not subject to judicial construction, 151 Wn.2d at 518, 522,[4] but also calls into question the interpretation and application of the multiple other Insurance Code provisions that use the term "insurance contract." *E.g.*, RCW 48.18.140(1), 48.18.520, 48.18.200, 48.18.210(3). When the legislature uses the same term in multiple sections of an enactment like the Insurance Code, it is presumed that the legislature intended that the term have the

[4] *See also State v. Groom*, 133 Wn.2d 679, 689, 947 P.2d 240 (1997) (holding "it is imperative that we not rewrite statutes to express what we think the law should be"; courts "simply have no such authority").

same meaning in each. *See, e.g., State v. Keller*, 98 Wn. App. 381, 383-84, 990 P.2d 423 (1999), *aff'd*, 143 Wn.2d 267 (2001). If, as the Court of Appeals necessarily found, "insurance contract" requires judicial construction in RCW 48.18.320, then that would likewise be true for each of the many other Insurance Code provisions in which the term appears. (*See* Allstate Petn. 22.) There is no basis in the text of the statute, legislative history, or precedent to suggest that the meaning and application of each of these provisions depend on a court's views in a particular case.

Beyond that, even if the Court of Appeals were correct and "insurance contract" as used in RCW 48.18.320 means something different from "insurance policy," the statute still cannot apply here. As even the Court of Appeals acknowledged, an "insurance contract" must actually be a contract: "a legally enforceable promise or set of promises" (Op. 30) that "manifest[s] a mutual intent" (*id*. at 33). An insurance contract, like any other contract, must reflect a

meeting of the minds, an offer and acceptance, regarding particular obligations and consideration for undertaking those particular obligations. *See Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 48, 470 P.3d 486 (2020) ("Mutual assent is required for the formation of a valid contract. It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time." (citation omitted)); *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004) (explaining that to form a valid contract, "the parties must objectively manifest their mutual assent," "the terms assented to must be sufficiently definite," and "the contract must be supported by consideration"). These fundamental principles of contract law apply fully to insurance contracts. *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 912 n.2, 631 P.2d 947 (1981). A court's role is to "try to give effect to the parties' mutual intent." *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 590, 269 P.3d 1017 (2012).

Nothing in this record supports the Court of Appeals' assumption that there was any "mutual assent" on the part of P&T and any of the insurers, including Granite, to enter into a legally-enforceable obligation other than the entire integrated bundle of coverages, terms and conditions, and consideration reflected in the insurance policies. Stated another way, there is no basis in this record to find that P&T ever intended, for example, to purchase coverage for environmental liabilities, much less environmental liabilities only at Port Gamble, separate and apart from the rest of the policy coverages and terms, and no basis to find that any of the insurers agreed or ever would have agreed to provide that specific, stand-alone coverage. Even if an "insurance contract" need not necessarily and always be an insurance policy, it assuredly must be a "contract," and the record reflects no contracts other than the integrated insurance policies P&T purchased and Granite and the other insurers sold.

B. The Court of Appeals Erroneously Construed "Retroactively Annulled" in RCW 48.18.320.

Nor can any "retroactive annul[ment]" of an insurance contract be found in any event. As the Court explained in *Steen*, to "annul" an insurance contract means to cancel it, make it void, nullify or abolish it, and "deprive it of *all* force and operation." 151 Wn.2d at 520 (emphasis added) (citation omitted). An agreement that does something less than this—like the settlement agreements here—is not covered by the statute.

Again, the Granite settlement agreement highlights the Court of Appeals' fundamental error. That agreement did not retroactively annul or cancel any (much less "all") of P&T's insurance coverage. As noted above, coverage remains in place for non-environmental liabilities at any P&T site and for environmental liabilities at P&T sites other than the three

addressed in the settlement,[5] so there was no annulment or cancellation of any of that coverage. Nor was there an annulment or cancellation even as to the three settled claims. Just the opposite. Despite the existence of a dispute regarding the availability of any coverage for those claims—a dispute embroiled in litigation for years—Granite paid P&T a substantial sum under its policies, thus actually providing coverage for those claims, not annulling coverage for those claims.

Therefore, even if there were some plausible basis to conclude that P&T and Granite had entered into an "insurance contract" limited to coverage for Port Gamble—and, as explained above, there is none—nothing about the Granite settlement deprived that "insurance contract" of "all force and operation," to use the formulation this Court used in *Steen*. 151

[5] The record reflects that P&T had numerous sites and operations beyond the three addressed in the Granite settlement. (*See* CP 11028-29.)

Wn.2d at 520. Granite provided substantial insurance coverage for the Port Gamble claim and paid under that coverage, and coverage remains in place under the Granite policies for other potential claims. Only by giving the statute a purely results-oriented construction divorced from any natural reading of the language the legislature chose to express its actual intent could the Court of Appeals conclude that the Granite settlement agreement is void under the statute.

This Court should grant review to correct the Court of Appeals' error and reaffirm the holding in *Steen* that RCW 48.18.320 is clear and unambiguous and is to be given its plain and ordinary meaning, not a meaning created by an imaginative, but wholly unfounded, judicial construction.

II. The Court of Appeals' Published Decision Is Contrary to Both the Strong Public Policy Promoting Settlement and RCW 48.18.320's Specific Purpose to Protect Injured Claimants.

The Court of Appeals' error is material and requires this Court's intervention. If left uncorrected, that error will harm the very claimants the Court of Appeals purported to protect.

Under the Court of Appeals' erroneous construction, any settlement of a coverage dispute, no matter how narrowly circumscribed, is void because it releases the insurer from some further liability. Although the Court of Appeals proclaimed itself "not convinced" that its decision would discourage settlements (Op. 44), it offered neither any way to effect settlements of coverage disputes that would not run afoul of its reading of the statute, nor any reason a rational insurance company would agree to pay substantial sums to settle a contested coverage dispute when the statute, as the Court of Appeals construed it, declares all such settlements "void." Given the choice between litigating to a final, definitive conclusion or entering into an agreement known at the outset to be void, a rational insurer will not choose the settlement route. And even if some settlements nevertheless might be effected, the amounts insurers would be willing to pay in such settlements would necessarily be substantially lower than they otherwise would be, because the insurers must reserve funds to

deal with the possibility that third-party claimants like Pope Resources may come out of the woodwork a dozen or more years later to claim that the settlements are void—even if they were well aware of the insurance policies and the settlements at the time.

Discouraging settlements, or causing them to be less valuable to the insured, is squarely contrary to the public interest, including the interest of third-party claimants. First, of course, Washington public policy strongly favors settlement. Negotiated resolutions of contested claims are not only a more efficient use of the resources of the parties and the courts, but because they reflect the agreement of the parties, they are far more likely to address and satisfy the parties' competing interests than will a judicial decree many years later. *See Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (2007) ("Washington law strongly favors the public policy of settlement over litigation."); *City of Seattle v.*

Blume, 134 Wn.2d 243, 258, 947 P.2d 223 (1997) ("the express public policy of this state [] strongly encourages settlement.").

Second, by settling insurance coverage disputes, rather than engaging in years of litigation, insurers provide, and insureds obtain, funds to address third-party claims much earlier than they otherwise would. More importantly, coverage-dispute settlements protect insureds, and their underlying claimants, from at least two significant risks: first, the risk that the coverage dispute, if litigated to a conclusion, will result in a determination that no coverage exists at all and, second, the risk that even if coverage ultimately is found, other claims that arose in the intervening years will have consumed all or most of the available policy limits. As this Court held in *Steen*, the purpose of the statute is to avoid an adverse impact on persons injured by an occurrence, 151 Wn.2d at 522; by declaring that agreements that make insurance proceeds available sooner and without risk are void, the Court of Appeals has guaranteed the

precise adverse impact this Court in *Steen* held the statute was intended to avoid.

This Court should undo the Court of Appeals' misinterpretation of the statute and prevent the harm to the public interest that misinterpretation will cause. At minimum, if it is to be the law of Washington that any agreement between an insurer and an insured to resolve a coverage dispute that releases the insurer from some further liability is void, this Court should issue a clear declaration to that effect. Alternatively, if Washington law does not definitively preclude such agreements, the Court should provide the guidance insurers and insureds need to know which settlement agreements are permitted and which are void.

CONCLUSION

The Court should grant Granite's petition for review of the Court of Appeals' published decision in this case.

This document contains 4,011 words, excluding the parts of the document exempted from the word count by RAP 18.17.

October 7, 2021

Respectfully submitted,

s/ Robin Wechkin
Robin E. Wechkin
WSBA #24746
Sidley Austin LLP
8426 316th Place Southeast
Issaquah, WA 98027
(415) 439-1799

Constantine L. Trela
(*pro hac vice*)
Robert Hochman
(*pro hac vice*)
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Counsel for Petitioners Granite State Insurance Company, The Insurance Company of the State of Pennsylvania, and New Hampshire Insurance Company

CERTIFICATION

I hereby certify that on October 7, 2021, I caused a copy of the document to which this certification is attached to be filed electronically with:

Clerk of the Court
Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

I further certify that I caused a true and correct copy of the same to be delivered by Court Portal to each of the following counsel:

Steven P. Soha
Geoffrey C. Bedell
Soha & Lang, P.S.
1325 Fourth Avenue, Suite 2000
Seattle, WA 98101-2570
soha@sohalang.com
bedell@sohalang.com

Elizabeth G. Smith
Catherine A. Becker
Law Office of Elizabeth G. Smith
1730 Minor Avenue, Suite 1130
Seattle, WA 98101-1448
smite21@nationwide.com
beckec8@nationwide.com

Robin D. Craig
Bruce H. Winkelman
Craig & Winkelman, LLP
2140 Shattuck Ave., Suite 409

Berkeley, CA 94704
rcraig@craig-winkelman.com
bwinkelman@craig-winkelman.com

David C. Linder
Larson King, LLP
30 East 7th St., Suite 2800
Saint Paul, MN 55101
dlinder@larsonking.com

Sarah Eversole
Wilson Smith Cochran Dickerson
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
metteer@wscd.com

Patrick M. Paulich
Herbert Matthew Munson
Betts, Patterson & Mines, P.S.
701 Pike Street, Suite 1400
Seattle, WA 98101-3927
ppaulich@bpmlaw.com
mmunson@bpmlaw.com

David M. Schoeggl
Ryan McBride
Lane Powell, P.C.
1420 Fifth Avenue, Suite 4200
Seattle, WA 98111
schoeggld@lanepowell.com
mcbrider@lanepowell.com

Louise M. McCabe
Jordan K. Jeffery
Troutman Pepper Hamilton Sanders LLP
11682 El Camino Real, Suite 400

San Diego, CA 92130
louise.mccabe@troutman.com
Jordan.jeffery@troutman.com

Mark Nadler
Liberty Waters
John S. Dolese
Jay Carlson
The Nadler Law Group, PLLC
720 Third Avenue, Suite 1400
Seattle, WA 98104
mnadler@nadlerlawgroup.com
lwaters@nadlerlawgroup.com
jay@carlsonlegal.org
jsdolese@yahoo.com

Carl E. Forsberg
Matthew S. Adams
Charles A. Henty
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-1039
cforsberg@foum.law
madams@foum.law
chenty@foum.law

Jacquelyn A. Beatty
Karr Tuttle Campbell
701 5th Ave., Ste. 3300
Seattle, WA 98104
jbeatty@karrtuttle.com

Philip A. Talmadge
Talmadge/Fitzpatrick
2775 Harbor Avenue SW

Third Floor, Suite C
Seattle, WA 98126
phil@tal-fitzlaw.com

Marta Deleon
Attorney General of Washington
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
Marta.deleon@atg.wa.gov

/s/ Robin Wechkin
Robin Wechkin

APPENDIX A

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

POPE RESOURCES LP, a Delaware limited partnership, Respondent, v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; CERTAIN LONDON MARKET COMPANIES; CONTINENTAL CASUALTY COMPANY; and THE CONTINENTAL INSURANCE COMPANY (as successor in interest to the rights and obligations under certain policies issued by HARBOR INSURANCE COMPANY); AMERICAN REINSURANCE COMPANY; ASSOCIATED INTERNATIONAL INSURANCE COMPANY; CENTRAL NATIONAL INSURANCE COMPANY; CENTURY INDEMNITY COMPANY; EMPLOYERS INSURANCE COMPANY OF WAUSAU; EMPLOYERS REINSURANCE COMPANY; GRANITE STATE INSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; INSURANCE COMPANY OF THE STATE OF PENNSLYVANIA; INTERNATIONAL INSURANCE COMPANY as successor to INTERNATIONAL SURPLUS LINES INSURANCE COMPANY; NEW HAMPSHIRE INSURANCE COMPANY; and NORTHBROOK INSURANCE COMPANY, Appellants.	No. 80032-9-I PUBLISHED OPINION

POPE & TALBOT, INC.; GENERAL INSURANCE COMPANY OF AMERICA; LIBERTY MUTUAL INSURANCE COMPANY; and JOHN DOES 1-20,

Defendants.

VERELLEN, J. — Washington's broad and inclusive anti-annulment statute, RCW 48.18.320, voids any agreement between an insurer and insured attempting to retroactively cancel, rescind, void, buy back, or otherwise annul an insurance contract for liability coverage after a potentially covered injury or damage to a third party has occurred. When analyzing whether a particular settlement agreement and release implicates an "insurance contract," we must consider whether the substance of the agreement and release impacts a risk-shifting and risk-distributing device, not necessarily an entire policy.

Applying recognized conflict of law principles, we conclude Washington's paramount interest in environmental cleanup and pollution remediation requires we apply RCW 48.18.320 to each of the settlement and remediation agreements between ten different Insurers and Pope & Talbot, Inc., the previous owner and operator of the Port Gamble Bay and mill site located in Washington. We further conclude that RCW 48.18.320 renders all ten agreements unenforceable.

Therefore, we affirm.

FACTS

The history underlying the current dispute is extensive. In 1853, Pope & Talbot, Inc. began operating a mill in Port Gamble, Washington. In 1964, Pope & Talbot, which had become a publicly traded Delaware corporation, moved its headquarters to Oregon.

Between 1959 and 1986, various insurance companies issued comprehensive general liability insurance policies to Pope & Talbot. Over the years, Pope & Talbot also obtained various excess and umbrella coverages.[1]

Here, we are concerned with the policies issued by TIG Insurance Company,[2] Evanston Insurance Company,[3] Westport Insurance Corporation,[4] London Market Insurers,[5] Munich Reinsurance America Inc.,[6] Century

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[1] A primary comprehensive general liability policy provides an insured with "the first line of defense in the event of accident or injury." Safeco Ins. Co. of Ill. v. Auto. Club Ins. Co., 108 Wn. App. 468, 479, 31 P.3d 52 (2001). Excess and umbrella policies provide coverage only after the primary policy has been exhausted and "protect the insured in the event of a catastrophic loss in which liability damages exceed available primary coverage." Id. at 479-80 (citing 15 LEE R. RUSS & THOMAS F. SAGALLA, COUCH ON INSURANCE 3D § 220:32 (3d ed. 2000)).

[2] TIG Insurance Company is the successor insurer to International Surplus Lines Insurance Company. Clerk's Papers (CP) at 10855-58.

[3] Evanston Insurance Company is the successor insurer to Associated International Insurance Company. CP at 10860-62.

[4] Westport Insurance Corporation is the successor insurer to Employers Reinsurance Corporation. CP at 4835, 4856.

[5] Certain Underwriters at Lloyd's London and Certain Market Insurance Companies (London Market) issued their policies to Pope & Talbot. CP at 10737-814.

[6] Munich Reinsurance America Inc. was previously named American Reinsurance Company. CP at 6068, 6070, 10730-33.

Indemnity Company,[7] Employers Insurance Company of Wausau,[8] Allstate Insurance Company,[9] Continental Insurance Company,[10] and Granite State Insurance Company [11] (Insurers).

In 1985, Pope & Talbot created Pope Resources, a limited partnership.[12] Pope & Talbot transferred all of its Washington real property, including the Port Gamble Bay and mill site, to Pope Resources.[13] In exchange, Pope Resources assumed upwards of $22 million of Pope & Talbot's debt. Pope Resources leased the mill site back to Pope & Talbot, which continued to operate the mill until 1995, when it was shut down due to significant environmental

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[7] Century Indemnity Company is the successor insurer to Insurance Company of North America. CP at 2765-68, 10709-15.

[8] Employers Insurance Company of Wausau is the successor insurer to Employers Mutual Liability Insurance Company of Wisconsin. CP at 10863-909.

[9] Allstate Insurance Company is the successor insurer to Northbrook Insurance Company. CP at 3994-4058, 10694-701.

[10] Continental Insurance Company is the successor insurer to Harbor Insurance Company. CP at 3144-48, 3156-62, 10706-708.

[11] Granite State Insurance Company, the Insurance Company of the State of Pennsylvania, and the New Hampshire Insurance Company are affiliated with American Insurance Group. CP at 6817-22, 10815-54.

[12] "Pope Resources . . . has independent management and is largely a timber operator/owner and real estate . . . company. Pope & Talbot maintained all of the operating manufacturing assets and did not own any timberland after that spinoff. They were separate companies." CP at 2511.

[13] "The Company hereby conveys, assigns, transfers, sets over and delivers, as is and without representations or warranties except as expressly set forth herein, to the Partnership all of the Company's right, title, and interest in and to the Properties [including] the Timber Properties." CP at 8820. The "Port Gamble Bay and Mill Site consists of the Property together with the former sawmill area, and uplands areas to the west and south of the former sawmill area." CP at 626.

contamination. The Washington State Department of Ecology listed the Port Gamble mill as a hazardous waste site. The estimated cost to clean up Port Gamble, including the mill site, is $22 million.[14]

In June of 1995, Pope Resources and Pope & Talbot started communicating about their shared responsibility for the environmental contamination at Port Gamble.

In 1997, Pope Resources sent Pope & Talbot a formal demand letter. A few years later, Pope Resources and Pope & Talbot entered into a remediation agreement. In summary, Pope & Talbot assumed responsibility for the cleanup at Port Gamble and, once completed, Pope Resources would clean up the other sites contaminated by Pope & Talbot's operations.

Around the same time, Pope & Talbot filed suit against Insurers in King County Superior Court seeking insurance coverage for its Washington liabilities. Between 1998 and 2003, Pope & Talbot and Insurers entered into ten separate settlement and remediation agreements.

In November 2007, Pope & Talbot filed for Chapter 11 bankruptcy in Delaware and stopped all remediation work at Port Gamble. The bankruptcy was converted to a Chapter 7 proceeding.

On February 4, 2013, the bankruptcy court granted Pope Resources relief from the automatic stay to enable Pope Resources "to liquidate its claims

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[14] CP at 14718.

against [Pope & Talbot] for contamination arising from [Pope & Talbot's] ownership or operation of the property."[15]

In 2015, Pope Resources filed suit in King County to obtain coverage for its environmental liabilities against its own insurers, seeking declaratory judgment for breach of contract, bad faith, and violations of the Consumer Protection Act. In 2016, Pope Resources amended its complaint to seek contribution from Pope & Talbot and Insurers for the costs of the environmental remediation.

The court entered a case management order phasing the litigation. Pope Resources and Insurers filed cross motions for summary judgment regarding conflicts of law and the enforceability of the settlement agreements.

On April 30, 2019, the court denied Insurers' motion for summary judgment and granted Pope Resources' motion for summary judgment. The trial court noted that no conflict of law analysis was necessary because Pope Resources was "not a signatory or [a] party to [the] settlement agreements."[16] The court concluded, "Allowing the settlement agreements to be used as a shield . . . against a third party, non-signatory, to retroactively cancel insurance coverage of a potentially covered event, would be to enforce a contract that is illegal as violative of Washington public policy."[17] Accordingly, the court held that all ten settlement agreements were unenforceable.

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[15] CP at 60.

[16] CP at 15794.

[17] CP at 15794-95.

Insurers filed motions for discretionary review in this court.[18] Commissioner Mary Neel granted the motions for discretionary review as to the conflict of law issue and interpretation of Washington's anti-annulment statute.[19]

Subsequent phases of this litigation will determine whether Pope Resources has compensable damages and is entitled to a judgment against Pope & Talbot and Insurers.

ANALYSIS

At the outset, we emphasize the very narrow issues before this court. Commissioner Neel granted discretionary review of the conflict of law "threshold issue" and the "interpretation and application" of Washington's anti-annulment statute, RCW 48.18.320, as it pertains to the claims involving the Port Gamble Bay and mill site.[20]

We are not deciding other issues nor are we deciding any conflict of law as it may pertain to any other issues.[21] We are focused on how the particular language of the ten settlement and remediation agreements between Pope & Talbot and Insurers impact the potential claims of Pope Resources, a

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[18] Westport, Allstate, Granite State, Munich, Evanston, and TIG sought review of the trial court order entered on April 30, 2019. London Market, Century, Wausau, and Continental sought review of both the April 30, 2019, order and the summary judgment order entered on March 11, 2019.

[19] We decline to reach the capacity to be sued issue that Commissioner Neel allowed the parties to brief but was not a ground for discretionary review.

[20] CP at 16094.

[21] "[D]ifferent issues in a single case arising out of a common nucleus of facts may be decided according to the substantive law of different states," sometimes referred to as depecage. FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 175 Wn. App. 840, 857 n.15, 309 P.3d 555 (2013).

prospective garnishor of the insurance contracts that was known to the Insurers as the current owner of the Port Gamble mill site when all 10 settlement agreements were entered into.

I. Conflict of Law

Insurers contend that the trial court failed to engage in the appropriate conflict of law analysis before determining whether RCW 48.18.320 applied to the ten settlement agreements.

We disagree with the trial court's conclusion that no conflict of law analysis was required because Pope Resources was not a signatory or a party to any of the settlement agreements. Whether the settlement agreements are valid impacts the prospective claims of Pope Resources. Because Pope Resources has a potential interest in the outcome of the dispute, a conflict of law analysis is required. To determine whether RCW 48.18.320 applies to the settlement agreements, we must first engage in a conflict of law analysis to decide which state's law applies. We review the question of conflict of law de novo.[22]

Actual conflict. The first step in the conflict of law analysis is to determine whether an actual conflict exists.[23] An actual conflict exists if the

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[22] Shanghai Com. Bank Ltd. v. Kung Da Chang, 189 Wn.2d 474, 479-80, 404 P.3d 62 (2017); Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 691, 167 P.3d 1112 (2007).

[23] Freestone Cap. Partners L.P. v. MKA Real Est. Opportunity Fund I, LLC, 155 Wn. App. 643, 664, 230 P.3d 625 (2010); see also Shanghai Com. Bank, 189 Wn.2d at 480-81; Erwin, 161 Wn.2d at 692.

outcome of an issue is different depending on which state's law applies.[24] Here, there is an actual conflict.

Insurers contend an actual conflict exists because the enforceability of the settlement agreements depends on whether Washington law applies. Pope Resources argues that the result is the same under Washington law and the common law of any other state because, similar to RCW 48.18.320, the common law generally recognizes an insurer and insured should not be allowed to enter into an agreement to annul insurance coverage after an injury has occurred, leaving an injured third party with no recourse.[25] But Pope Resources does not cite any authority supporting its contention that the common law of other states provides the same level of protection to an injured third party as does RCW 48.18.320.

Here, some Insurers argue that Oregon law should govern their settlement agreements but did not contract for a specific state's law to apply. Others specifically contracted for Oregon, California, or New Jersey law to apply. Because Oregon, California, and New Jersey do not have anti-

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[24] Freestone Cap. Partners, 155 Wn. App. at 664 (quoting Seizer v. Sessions, 132 Wn.2d 642, 648, 940 P.2d 261 (1997)); Erwin, 161 Wn.2d at 692.

[25] See Finkelberg v. Cont'l Cas. Co., 126 Wash. 543, 549, 219 P. 12 (1923) (insurer and insured's cancellation of insurance policy after car accident occurred does not relieve the insurer from obligations under indemnity policy); STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS, & JORDAN R. PLITT, 2 COUCH ON INSURANCE § 31:49 (3d. ed. 1995) ("Where the contract of insurance provides for liability to third persons, the insurer and the insured cannot terminate such a contract by their voluntary action to the prejudice of a claimant's rights which have already vested.").

annulment statutes comparable to Washington's statute, the validity of each settlement agreement turns on which state's law applies. Therefore, there is an actual conflict.

Agreements with no choice of law provision. Once an actual conflict is established, the next step in the conflict of law analysis depends on whether the parties have contracted for a specific state's law to apply.

Washington applies section 188 of the Restatement (Second) of Conflicts of Law when an actual conflict exists and the parties have not contracted for a choice of law provision. Under section 188 subsection (2), the "most significant relationship test," a court will apply "[t]he local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties."[26] In determining which state has the most significant relationship to the transaction, the factors to be considered are "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties."[27]

We begin with Insurers that did not contract for a choice of law provision. Pope & Talbot's settlement agreements with Granite State, TIG, Evanston, and Wausau do not contain a choice of law provision, but the insurers contend that

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[26] Canron, Inc. v. Fed. Ins. Co., 82 Wn. App. 480, 493, 918 P.2d 937 (1996).

[27] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 188(2) (1971).

Oregon law applies. For these four Insurers, the tangle of these various factors is not conclusive; some factors favor the Insurers, some do not. Although inconclusive, we include a summary of the factors as to each Insurer:

(1) Granite State. Granite State, the Insurance Company of the State of Pennsylvania, and the New Hampshire Insurance Company are affiliated with American Insurance Group. Granite State contracted for its settlement agreement with Pope & Talbot in either Oregon or New York.[28] Pope & Talbot's president in Oregon and Granite State representatives in New York handled the final settlement negotiations.[29] Pope & Talbot's president signed the settlement agreement in Oregon, and Granite State's "authorized agent" signed the agreement in New York.[30] Granite State delivered the settlement check to Pope & Talbot in Oregon.[31] Pope & Talbot deposited the check in Oregon.[32] Granite State is domiciled in Pennsylvania and its principle place of business is in New York.[33] Pope & Talbot is incorporated in Delaware and is headquartered in Oregon.[34] The agreement released Granite State from liability resulting from Pope & Talbot's operations in Oregon and Washington.[35]

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[28] CP at 3679, 3691.

[29] CP at 3692.

[30] CP at 2534-36.

[31] CP at 3695.

[32] CP at 3695.

[33] CP at 3698.

[34] CP at 8812.

[35] CP at 2537-38.

(2) TIG. TIG is the successor insurer to International Surplus Lines Insurance Company.[36] International is the insurer that entered into the settlement agreement with Pope & Talbot.[37] Pope & Talbot and International contracted for the settlement agreement in either Oregon or New Hampshire.[38] Pope & Talbot's representatives negotiated from Oregon, and International's "decision maker" participated in the negotiations from New Hampshire.[39] During negotiations, International was also represented by Washington counsel.[40] Negotiations occurred "either in Oregon or over the telephone and in writing between" Pope & Talbot's representatives in Oregon and International's representatives and counsel in Oregon, New Hampshire, and Washington.[41] Pope & Talbot accepted and executed the agreement in Oregon and International signed the agreement in New Hampshire.[42] International delivered the settlement check to Pope & Talbot in Oregon and Pope & Talbot deposited the check in Oregon.[43] Pope & Talbot is incorporated in Delaware and is headquartered in Oregon.[44] International is an Illinois corporation and is

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[36] CP at 3680 n.2.

[37] CP at 3680-710.

[38] CP at 3691.

[39] CP at 3692-93.

[40] CP at 3692-93.

[41] CP at 3692-93.

[42] CP at 3691.

[43] CP at 3696.

[44] CP at 8812.

headquartered in New Hampshire.[45] The agreement released International from liability arising from Pope & Talbot's operations in Oregon and Washington.[46]

(3) Evanston. Evanston is the successor insurer to Associated International Insurance Company.[47] Associated International is the insurer that entered into the settlement agreement with Pope & Talbot.[48] Pope & Talbot contracted for the agreement with Associated International in either Oregon or California.[49] During negotiations, Pope & Talbot's counsel in Oregon negotiated with Associated International's counsel in Oregon and New York.[50] Pope & Talbot accepted and executed the agreement in Oregon, and Associated International signed the agreement in California.[51] Associated International delivered the settlement check to Pope & Talbot's counsel in Oregon, and Pope & Talbot deposited the check in Oregon.[52] Pope & Talbot is incorporated in Delaware and is headquartered in Oregon.[53] Associated International is a California corporation headquartered in California.[54] The

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[45] CP at 3698.

[46] CP at 3002, 9049-52.

[47] CP at 3680 n.1.

[48] CP at 3680-710.

[49] CP at 3691.

[50] CP at 3693.

[51] CP at 3691.

[52] CP at 3696.

[53] CP at 8812.

[54] CP at 3698.

agreement released Associated International from liability arising from Pope & Talbot's operations in Oregon and Washington.[55]

(4) Wausau. Wausau and Pope & Talbot contracted for the agreement in either Oregon or Illinois.[56] Pope & Talbot's counsel and management in Oregon negotiated with Wausau's counsel in Oregon and Texas.[57] During negotiations, some in-person meetings were held in Oregon.[58] Pope & Talbot executed the agreement in Oregon, and Wausau signed the agreement in Illinois.[59] Wausau wired the settlement amount to Pope & Talbot's bank in Oregon.[60] Pope & Talbot is incorporated in Delaware and is headquartered in Oregon.[61] Wausau is a Wisconsin company headquartered in Wisconsin.[62] The agreement released Wausau from liability arising from Pope & Talbot's operations in Oregon, Canada, and Washington.[63]

A variety of states were involved in aspects of negotiating, executing, and performing the settlement agreements. On the surface, the mix of section 188 factors do not favor applying the law of any particular state. But section 188 factors "'are to be evaluated according to their relative importance with

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[55] CP at 3059, 3063, 9049-52.

[56] CP at 3691.

[57] CP at 3692.

[58] CP at 3692.

[59] CP at 3691.

[60] CP at 12144.

[61] CP at 8812.

[62] CP at 3698.

[63] CP at 12132.

respect to the particular issue' and in conjunction with the principles set forth in [section] 6 of the Restatement."[64] These principles include:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[65]

These principles "underlie all rules of choice of law" and are used to evaluate the significance of a relationship to the potentially interested states, the thing, and the parties with respect to the particular issue.[66] Thus, we weigh the contacts with potentially interested states under the circumstances and in the context of relevant policy considerations to determine which state's laws applies.

Here, Washington has a significant interest in ensuring that a hazardous waste site located in Washington is remediated. Specifically, Washington's Model Toxic Control Act provides:

> Each person has a fundamental and inalienable right to a healthful environment, and . . . has a responsibility to preserve and enhance that right. The beneficial stewardship of the land,

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[64] Canron, 82 Wn. App. at 493 (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 188(2) (1971)).

[65] RESTATEMENT (SECOND) CONFLICTS OF LAW § 6 (1971). If the purposes of the state's law would be furthered by its application to the facts, this is a good reason for such an application to be made. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 cmt. e (1971). The state with the dominant interest should have its law applied. RESTATEMENT (SECOND) OF CONFLICTS LAW § 6 cmt. f (1971); see also Seizer, 132 Wn.2d at 652-53.

[66] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 222, cmt. b (1971).

> air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations."[67]

And, as this court articulated in Canron, Inc. v. Federal Insurance Company, Washington has "a paramount interest" in protecting its residents from environmental contamination and promoting the "health and safety of its people."[68] Insurance can play a significant role in safeguarding that interest. Here, as in Canron, "[t]he existence or absence of insurance proceeds can determine whether or not a hazardous waste site is remediated. Washington, therefore, has a significant interest in [the] insurance coverage."[69]

Additionally, the comparative cost of cleanup at a particular location can impact the conflicts analysis.[70] Bridgewater Group, Inc. conducted an assessment of known and potential environmental liabilities associated with

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[67] RCW 70A.305.010(1).

[68] 82 Wn. App. 480, 494, 918 P.2d 937 (1996). In Canron, a Canadian corporation based in Canada shipped byproducts containing zinc to Western Processing, a Kent, Washington facility, for recycling and disposal. Id. at 482-83. The Environmental Protection Agency closed the Kent facility and designated it a "Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act." Id. at 482. Canron's insurer denied coverage, and Canron sued. Id. at 483-84. Canron's insurer argued that Quebec law should govern the dispute because Quebec was the place where the contract was entered. Id. at 492-93. This court upheld the trial court's decision that Washington law applied to the dispute primarily because of Washington's interest in ensuring that the "hazardous waste site was remediated." Id. at 492-94.

[69] Id. at 494.

[70] See Ingenco Holdings, LLC v. Ace Am. Ins. Co., 921 F.3d 803, 811 (9th Cir. 2019) (holding that Washington law applied in an environmental cleanup because the coverage amounts for a single site in Washington "dwarfed" the coverage amounts for the 12 sites located in Virginia.).

Pope & Talbot's operations"[71] and concluded that the environmental contamination occurring in Port Gamble was by far the most costly. Bridgewater predicted that the contamination resulting from Pope & Talbot's operations of the mill site was approximately $11 million and the total damage of its operations in Port Gamble would cost upwards of $22 million.[72] Estimated liability at Pope & Talbot's operations at several other sites in Washington was upwards of $21 million.[73] By contrast, its operations in St. Helens, Oregon, was approximately $12 million, and its operations at other sites in Oregon was estimated at $6 million.[74] Because the single most expensive cost of cleanup site is at Port Gamble, this also favors applying Washington rather than Oregon law.

Further, in adopting Washington's anti-annulment statute, the legislature intended "to ensure that cancellation of [an insurance contract would not] adversely impact any person who was injured or damaged by an occurrence before such cancellation."[75] Because the application of the law of other states, such as Oregon, could prevent parties injured in Washington from filing insurance claims, Washington's interests in protecting its citizens from pollution

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[71] CP at 14714.

[72] CP at 14718.

[73] CP at 14718-19.

[74] CP at 14718-19. Pope & Talbot's operations in South Dakota and Canada together amounted to less than $1 million. CP at 14716-19. And its operations in Wisconsin caused approximately $5 million in damages. CP at 14716-19.

[75] Am. Cont'l Ins. Co. v. Steen, 151 Wn.2d 512, 522, 91 P.3d 864 (2004).

at Port Gamble are the "most deeply affected."[76] Taken together, Washington's interest in protecting the health and safety of its residents, the greater extent of the loss suffered in Washington, and the policy of the anti-annulment statute itself establishes that Washington has the most significant relationship to the settlement agreements.[77]

Thus, Washington law applies to Pope & Talbot's settlement agreements with Granite State, TIG, Evanston, and Wausau.

Agreements with choice of law provisions. Next, we turn to the agreements in which Pope & Talbot and certain Insurers contracted for a specific state's law to apply. Pope & Talbot's settlement agreements with Century, Westport, Continental, and Allstate all contain an Oregon choice of law clause.[78] Its agreement with London Market contains a California choice of law provision.[79] And its agreement with Munich contains a New Jersey choice of law provision.[80] For these six Insurers, our analysis also begins with the most significant relationship test.

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[76] "The forum should seek to reach a result that will achieve the best possible accommodation of these policies. The forum should also appraise the relative interests of the states involved in the determination of the particular issue. In general, it is fitting that the state whose interests are most deeply affected should have its local law applied." RESTATEMENT (SECOND) CONFLICTS OF LAW § 6 cmt. f (1971).

[77] See Canron, 82 Wn. App. at 493.

[78] CP at 2800, 15524, 3168, 11731.

[79] CP at 5716.

[80] CP at 4818. In the alternative, London Market Companies and Munich argue that Oregon law should apply. But consistent with the section 188 analysis above, we do not find this argument compelling.

Specifically, Washington applies section 187 of the Restatement (Second) of Conflicts of Law when an actual conflict exists and the parties have contracted for a specific state's law to apply.[81] Section 187 subsection (2) applies to particular issues that the parties could not have determined by explicit agreement, such as the validity of the agreement itself.[82] Under section 187 subsection (2)(b), we will disregard the party's chosen state's law and "apply Washington law if, without the provision, Washington law would apply[,] if the chosen state's law violates a fundamental public policy of Washington[,] and if Washington's interest in the determination of the issue materially outweighs the chosen state's interest."[83] All three questions must be answered in the affirmative to disregard the parties' chosen state's law.[84]

The first question in the 187 analysis, whether Washington law would apply if the contract did not contain a choice of law provision, must be answered using the same most significant relationship factors listed in section 188 and discussed above. For these six Insurers, again, some factors favor them, some do not. And, once again, the factors are inconclusive.

(1) Century. Century representatives contracted for their settlement agreement from Pennsylvania with Pope & Talbot's president and

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[81] Shanghai Com. Bank, 189 Wn.2d at 482; Erwin, 161 Wn.2d at 694.

[82] Erwin, 161 Wn.2d at 695.

[83] McKee v. AT&T Corp., 164 Wn.2d 372, 384, 191 P.3d 845 (2008) (citing id. at 694-95); see RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 188(2)(b) (1971).

[84] Erwin, 161 Wn.2d at 696.

representatives located in Oregon.[85] During negotiations, Pope & Talbot's president and counsel were in Oregon, Century's representative was in Pennsylvania, and Century's counsel was in Washington.[86] Century signed the agreement in Pennsylvania, and Pope & Talbot signed the agreement in Oregon.[87] Century delivered its settlement check to Pope & Talbot in Oregon.[88] Pope & Talbot deposited the check in Oregon.[89] Pope & Talbot is a Delaware corporation headquartered in Oregon.[90] Century is a Pennsylvania corporation.[91] The agreement released Century from liability arising from Pope & Talbot's operations in Oregon and Washington.[92]

(2) Westport. Westport is a successor insurer to Employers Reinsurance Corporation.[93] Employers Reinsurance entered into the settlement agreement with Pope & Talbot.[94] Pope & Talbot's representatives and counsel in Oregon negotiated remotely with Employers Reinsurance's Kansas representative and its counsel in California and Oregon.[95] The agreement was signed by Pope &

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[85] CP at 2749-50.

[86] CP at 2746, 2801-03.

[87] CP at 2801-03.

[88] CP at 2747.

[89] CP at 8816.

[90] CP at 8812.

[91] CP at 3610.

[92] CP at 2795-96, 9050-52.

[93] CP at 4835.

[94] CP at 4838.

[95] CP at 4838.

Talbot's president and Employers Reinsurance's claims specialist.[96] Employers Reinsurance was a Missouri corporation with its principle place of business in Kansas.[97] Pope & Talbot is incorporated in Delaware and is headquartered in Oregon.[98] The settlement agreement released Employers Reinsurance from liability arising from Pope & Talbot's operations in Oregon, Canada, Wisconsin, and Washington.[99]

(3) Continental. Continental is an Illinois corporation.[100] Continental's Oregon counsel contracted for the settlement agreement with Pope & Talbot's Oregon counsel.[101] The attorneys, both located in Oregon, negotiated telephonically and through the mail.[102] Pope & Talbot's president and Continental's claims counsel executed the agreement.[103] Pope & Talbot signed the agreement in Oregon.[104] Continental delivered the settlement check to Pope & Talbot in Oregon.[105] And Pope & Talbot deposited the check in

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[96] CP at 4868. The record on appeal does not provide where Pope & Talbot and Westport representatives were located when contracting for their settlement agreement. And the record also does not provide where the representatives were located when the settlement agreement was executed.

[97] CP at 4837.

[98] CP at 8812.

[99] CP at 4838.

[100] CP at 3101.

[101] CP at 2785, 3208-09.

[102] CP at 3099, 3208-09.

[103] CP at 3236.

[104] CP at 3099.

[105] CP at 14751.

Oregon.[106] Pope & Talbot is incorporated in Delaware and is headquartered in Oregon.[107] The agreement implicated Continental's liability arising from Pope & Talbot's operations in Canada.[108]

(4) Allstate. Allstate representatives contracted with Pope & Talbot for the settlement agreement from Illinois, Oregon, and California.[109] Pope & Talbot's representatives and counsel negotiated from Oregon, while Allstate's "claim analyst" and counsel negotiated from Illinois, California, and Oregon.[110] The "[n]egotiations took place in Portland and remotely by video conference and telephone between Portland, Oregon, California, and Illinois."[111] The agreement was signed by Allstate's representative in Illinois and by Pope & Talbot's representative in Oregon.[112] Allstate delivered the settlement check to Pope & Talbot in Oregon, and Pope & Talbot deposited the check in Oregon.[113] Allstate is headquartered in Illinois.[114] Pope & Talbot is incorporated in Delaware and is headquartered in Oregon.[115] The release discharged Allstate

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[106] CP at 2784.

[107] CP at 8812.

[108] CP at 3170-72.

[109] CP at 3962.

[110] CP at 3962-63.

[111] CP at 3963.

[112] CP at 4652-53.

[113] CP at 3963.

[114] CP at 11793-94.

[115] CP at 8812.

from liability arising from Pope & Talbot's operations in Oregon, Canada, Wisconsin, and Washington.[116]

(5) London Market. London Market representatives located in California contracted for the settlement agreement with Pope & Talbot representatives located in Oregon.[117] Pope & Talbot's Oregon counsel and London Market's California counsel negotiated remotely, but some settlement negotiations occurred in person in London.[118] Pope & Talbot signed the agreement in Oregon, and London Market's counsel signed the agreement in California.[119] London Market delivered the settlement check to Pope & Talbot in Oregon, and Pope & Talbot deposited the check in Oregon.[120] London Market is an entity based in London.[121] Pope & Talbot is incorporated in Delaware and is headquartered in Oregon.[122] The settlement agreement released London Market from liability arising from Pope & Talbot's operations in Oregon, Canada, North Dakota, and Washington.[123]

(6) Munich. Munich is a successor insurer to American Reinsurance Corporation.[124] American Reinsurance Corporation entered into the settlement

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[116] CP at 3962.

[117] CP at 2785, 9154.

[118] CP at 3324.

[119] CP at 5716-17.

[120] CP at 3326.

[121] CP at 14168.

[122] CP at 8812.

[123] CP at 5707-24, 9429-30.

[124] CP at 6046.

agreement with Pope & Talbot.[125] American Reinsurance's New Jersey counsel contracted for the settlement agreement with Pope & Talbot's Oregon counsel.[126] Negotiations occurred remotely between American Reinsurance representatives in New Jersey, its counsel in Chicago, and Pope & Talbot representatives and counsel in Oregon.[127] The settlement discussions consisted of written communications between Pope & Talbot's Oregon counsel and American Reinsurance's claims representative in New Jersey and its Chicago counsel.[128] American Reinsurance representatives signed the agreement in New Jersey, and Pope & Talbot's president signed the agreement in Oregon.[129] American Reinsurance and Pope & Talbot are incorporated in Delaware.[130] American Reinsurance's headquarters are in New Jersey, and Pope & Talbot's headquarters are in Oregon.[131] The settlement agreement discharged American Reinsurance from liability arising from Pope & Talbot's operations of sites in Oregon and Washington.[132]

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[125] CP at 6048.

[126] CP at 2785, 4793, 12567-68.

[127] CP at 4793.

[128] CP at 6048.

[129] CP at 4819-20.

[130] CP at 4794.

[131] CP at 4794.

[132] CP at 9050-52.

Again, the negotiations leading up to the settlement agreements were held in multiple states, and the only consistent contacts occurred in Oregon and Washington.

As discussed above, the section 188 factors must be evaluated in the context of section 6 policy considerations. Accordingly, Washington's interests in protecting its residents from environmental contamination, its interests in cleaning up the severe contamination that occurred in Washington, and its interests in adhering to the policy behind RCW 48.18.320 displaces the much less significant relationships that these settlement agreements have with Oregon, California, and New Jersey.

The next question in the section 187 analysis is whether the laws of Oregon, California, and New Jersey violate a fundamental public policy of Washington. In answering this question, we return to the policy of RCW 48.18.320. Because the application of Oregon, California, and New Jersey law could prevent injured parties from filing insurance claims for environmental claims involving Port Gamble, each of the chosen states' laws violates Washington's fundamental public policy preferences.

The last question in the section 187 analysis is whether Washington's interests materially outweigh the interests of Oregon, California, and New Jersey. Consistent with the section 188 and section 6 analyses above, taken together, Washington's "paramount interest" in protecting the health and safety of its residents, the sheer volume of contamination and resulting cost of remediation in Washington, and the policy behind Washington's anti-annulment

statute materially outweighs the individual interests of Oregon, California, or New Jersey. Because each question prescribed by section 187 favors the application of Washington law, Washington law also applies to Pope & Talbot's settlement agreements with Century, Westport, Continental, Allstate, London Market, and Munich.

We conclude that Washington law applies to all ten settlement and remediation agreements.

Pope Resources, citing Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC,[133] argues that section 187 has no application because it is not a party to the settlement agreements. But Freestone held that the guarantors were not bound by choice of law provisions contained solely in the promissory note because promissory notes and guarantees create separate obligations for differently situated parties.[134]

Here, however, Pope Resource's interest in the insurance policies is based upon its potential role as a judgment creditor of Pope & Talbot, entitled to garnish the benefits of Pope & Talbot's policies. Because Pope Resources seeks to "stand in the shoes" of Pope & Talbot and benefit from the agreements between Pope & Talbot and Insurers, Pope Resources' argument is unavailing.

II. RCW 48.18.320

Because Washington law applies to each settlement agreement, we next consider whether the ten agreements violate Washington's anti-annulment

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[133] 155 Wn. App. 643, 661-62, 230 P.3d 625 (2010).

[134] Id.

statute, RCW 48.18.320, which voids any agreement between an insurer and insured attempting to retroactively cancel, rescind, void, buy back, or otherwise annul an insurance contract for liability coverage after a potentially covered injury or damage to a third party has occurred.[135]

"'To determine legislative intent, we look first to the language of the statute.'"[136] "'If a statute is unambiguous, we may derive its meaning from the language of the statute alone.'"[137] The statute provides:

> No insurance contract insuring against loss or damage through legal liability . . . for damage to the property of any person, shall be retroactively annulled by any agreement between the insurer and insured after the occurrence of any such . . . damage for which the insured may be liable, and any such annulment attempted shall be void.[138]

The statute "is broad and inclusive."[139]

To analyze whether RCW 48.18.320 is ambiguous, we consider in turn each requirement of the statute.[140]

An "annulment" subject to the statute can take the form of attempts to abrogate, abolish, buy back, cancel, nullify, rescind, or void an insurance

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[135] Steen,151 Wn.2d at 521.

[136] Bremerton Pub. Safety Ass'n v. City of Bremerton, 104 Wn. App. 226, 230, 15 P.3d 688 (2001) (citing Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995)).

[137] Id. (citing Cherry v. Mun. of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)).

[138] RCW 48.18.320.

[139] Steen, 151 Wn.2d at 519.

[140] See id. at 518-25.

contract.[141] Insurers often desire to "buy-back" liability insurance as part of settlement agreements with their insureds.[142] But neither a cancellation, rescission, "buy back," nor other form of annulment is enforceable to defeat an injured third party's vested rights.[143]

"Retroactively" as is used in the statute means "while looking back or affecting things past" and extends to either prospectively cancelling an agreement or rescinding it ab initio.[144]

An "occurrence" for purposes of the statute extends "both [to] events that do give rise to legal liability covered by the [insurance] policy and [to] events

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[141] Id. at 520.

[142] RICHARD A. ROSEN, LIZA M. VELAZQUEZ, GITA. F. ROTHSCHILD & STACI JANKIELEWICZ, SETTLEMENT AGREEMENTS IN COM. DISPUTES: NEGOTIATING, DRAFTING AND ENFORCEMENT, § 19.10 (2d ed. 2021) ("The broadest release—and consequently the one most desired by insurers—is the 'policy buy-back.' Put simply, policies subject to a complete buy back are void ab initio. An insurer's defense and indemnity obligations for any and all past, present, and future claims of any type under the released policies are released.").

[143] STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS, & JORDAN R. PLITT, 2 COUCH ON INSURANCE 3D § 31:49 (1995) ("A completed surrender and cancellation of an insurance policy terminates the contract, and the parties are relieved from any liability that might otherwise accrue under the policy, though not from liability already accrued."); 8B JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 5020 (1981) ("[I]t is the general rule that an injured person's rights cannot be defeated by a cancellation or settlement after an accident has occurred."); see SCOTT M. SEAMAN & JASON R. SCHULZE, ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS § 15:1 (2020-21 ed.) ("Additionally, even a policy buy-back or mutual rescission agreement with complete releases of all known and unknown claims does not guarantee finality. For example, an insurer may not be able to enforce a policy buy-back agreement against vested third-party rights such as those of underlying claimants whose claims have accrued and are not parties to the agreement.").

[144] Steen, 151 Wn.2d at 521 (quoting RCW 48.18.320).

that could give rise to legal liability covered by the [insurance] policy."[145] But "[t]he statute does not void agreements that are made before the occurrence of any injury, death or damage for which the insured may be liable [but renders an agreement] ineffectual when the agreement is made after the occurrence of the potentially covered event."[146]

An agreement is "'a manifestation of mutual assent by two or more persons to one another.'"[147] Thus, the phrase "any agreement" as used in the statute clearly extends to a settlement agreement between an insurer and an insured.[148]

Insurers contend that the various settlement agreements and releases do not impact an "insurance contract" as referred to in the statute because only an "insurance policy" is an "insurance contract."[149] We disagree. The statute does not define "insurance contract." The basic meanings of "contract" and "insurance" are a starting point, but it is also helpful to consider our case law regarding what constitutes a "contract of insurance."

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[145] Id.

[146] Id. at 521.

[147] Corbit v. J. I. Case Co., 70 Wn.2d 522, 531, 424 P.2d 290 (1967) (quoting RESTATEMENT (FIRST) OF CONTRACTS § 3 (1932)).

[148] See Courville v. Lamorak Ins. Co., 301 So. 3d 557, 560 (La. Ct. App. 2020) (applying an anti-annulment statute identical to RCW 48.18.320 to void a settlement agreement that "essentially rescinded or annulled policy contracts for injuries sustained years ago" by a third party tort victim).

[149] Appellant's Opening Br. at 54-58.

"A contract is a legally enforceable promise or set of promises."[150] "Insurance" is broadly defined as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."[151] To be a contract of insurance, the agreement must be both a risk-shifting and risk-distributing device. "A contract may be a risk-shifting device, but to be a contract of insurance, which is a risk-distributing device, it must possess both features, and unless it does[,] it is not a contract of insurance whatever be its name or its form."[152] Similarly, "[w]hen deciding whether a law applies to a contract, we are 'guided by the substance or effect of the transaction rather than the particular form or label adopted.'"[153]

The Washington State Insurance Commissioner, an amicus, convincingly argues that "insurance" may take many forms, and the term "insurance contract" applies to a general and broad category of contracts that are both risk-shifting and risk-distributing devices.[154] Although most insurance comes in the

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[150] 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 301.01, at 163 (7th ed. 2019). "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1971).

[151] RCW 48.01.040.

[152] In re Smiley's Estate, 35 Wn.2d 863, 867, 216 P.2d 212 (1950) (emphasis added).

[153] Ten Bridges, LLC v. Guandai, 15 Wn. App. 2d 223, 237, 474 P.3d 1060 (2020) (quoting id. at 866, 216 P.2d 212 (1950)).

[154] Wash. Court of Appeals oral argument, Granite State Ins. Co. v. Pope Resources, No. 80032-9-I, (Apr. 21, 2021), at 53 min., 18 sec. through 55 min., 54 sec., video recording by TVW, Washington State's Public Affairs Network, https://www.tvw.org.

form of a written "policy," there are a variety of contracts that may satisfy the definition of "insurance" without resembling a traditional "policy."[155] Additionally, the more specific term "insurance policy" has a limited and precise meaning. For example, insurance policy forms must be filed with and approved by the insurance commissioner.[156] And the insurance commissioner has authority to define various standard form policies.[157] Stated another way, an "insurance policy" qualifies as one form of "insurance contract,"[158] but that does not mean only a document labeled "policy" constitutes an "insurance contract."

Therefore, we read the term "insurance contract" in RCW 48.18.320 broadly and flexibly, applying it based upon the true substance of each settlement agreement and release rather than any particular form or label.[159] Specifically, we consider whether the substance of the settlement agreement

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[155] See STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, 1 COUCH ON INSURANCE 3D § 1:12 (2009) (some forms of performance bonds, guaranty agreements, surety agreements, and other miscellaneous contracts may satisfy the definition of "insurance").

[156] RCW 48.18.100.

[157] RCW 48.18.120.

[158] See Steen, 151 Wn.2d at 521 (applying RCW 48.18.320 to an insurance policy); see also Strojnik v. General Ins. Co. of Am., 201 Ariz. 430, 435, 36 P.3d 1200 (Ariz. Ct. App. 2001) ("Although the legislature has not defined an 'insurance contract,' it has defined 'insurance' as 'a contract by which one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.' A.R.S. § 20-1123 (A). An insurance policy, therefore, is an 'insurance contract.'") (construing Arizona's anti-annulment statute, which is identical to RCW 48.18.320).

[159] In a related sense, a contract of insurance itself is a promise or set of promises, rather than a written memorialization labeled as a "policy." See RCW 48.18.140 (distinguishing between written instrument and contract).

and release impacts a risk-shifting and risk-distributing device. As the Supreme Court explained in American Continental Insurance Company v. Steen:

> [T]he legislative intent expressed in RCW 48.18.320 is to ensure that cancellation does not adversely impact any person who was injured or damaged by an occurrence before such cancellation. . . .
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> . . . .
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> The purpose of RCW 48.18.320 is not the protection of either the insured or the insurer. Its purpose is to protect the injured and damaged by preventing insureds and insurers from coming together and canceling or rescinding insurance contracts after a potentially covered injury, death, or damage has occurred.[160]

Focusing on the substance instead of the form of the parties' settlement agreements and releases better implements the intent of RCW 48.18.320.

Therefore, our review of the plain meaning of the anti-annulment statute confirms its broad application. A cancellation, rescission, buy back, or other annulment of an insurance contract by mutual agreement is a contract formed like any other contract and requires mutual assent.[161] "Washington follows the objective manifestation test for contract formation."[162] And, notably, RCW 48.18.320 expressly refers to annulments "attempted." Consistent with Steen, we conclude RCW 48.18.320 is not ambiguous and extends to any

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[160] 151 Wn.2d 512, 522, 91 P.3d 864 (2004).

[161] STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, 2 COUCH ON INSURANCE 3D § 31:58 (2009).

[162] Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998) ("Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party." (citations omitted)).

attempt to cancel, rescind, void, buy back, or otherwise annul a contractual obligation that in substance is a risk-shifting and risk-distributing device manifesting a mutual intent to insure against liability resulting from triggering events occurring before a settlement agreement and release was entered into.[163]

Over many decades, the Port Gamble mill released toxic substances, including wood debris sedimentation, that triggered environmental insurance claims and implicated Pope & Talbot's "long tail" environmental coverage provided by Insurers.[164] Here, each of the ten settlement agreements contain broad release provisions and specific language attempting to cancel, rescind, void, buy back or otherwise annul liability coverage for injury or damage that occurred prior to the agreement.

Pope & Talbot's settlement agreements with TIG, Evanston, Westport, London Market, Munich, Century, and Wausau all contain language objectively manifesting an intent to cancel, rescind, void, buy back, or otherwise annul their broadly defined "policy" or "policies" issued to Pope & Talbot.

TIG. TIG's settlement agreement provides, "In further consideration of the covenants contained in this Agreement, the parties hereto agree that the

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[163] Steen, 151 Wn.2d at 522.

[164] CP at 2527, 7100. "The term 'long-tail harms' describes a series of indivisible harms, whether bodily injury or property damage, that are attributable to continuous or repeated exposure to the same or similar substances or conditions that take place over multiple years or that have a long latency period. The paradigmatic examples of long-tail harms are asbestos-related bodily injuries and environmental property damage." RESTATEMENT (SECOND) OF LIABILITY INSURANCE § 33 cmt. f (2019); see Appellant's Opening Br. at 56.

Policies shall be rescinded, treated as null and void ab initio, and considered never to have been issued to Pope & Talbot by International."[165] "Policies" is defined to broadly include any and all policies TIG issued to Pope & Talbot.[166]

Evanston. Evanston's agreement states it is "a final settlement . . .with the Policy void ab initio."[167] "Policy" is defined to include any liability policy issued to Pope & Talbot.[168]

Westport. Westport's agreement refers to a "complete policyholder release and a cancellation of the Policy."[169] "The Policy" is defined as one specific named policy.[170]

London Market. London Market's agreement provides, "This Release is intended to operate as though the London Market Insurers which pay their allocated several share of the settlement amount had never subscribed to the Subject Insurance Policies."[171] "Subject Insurance Policies" is defined as "all known and unknown insurance policies incepting prior to January 1, 1993."[172]

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[165] CP at 3005.

[166] CP at 3004.

[167] CP at 3063.

[168] CP at 3061.

[169] CP at 4866.

[170] CP at 4865.

[171] CP at 5711.

[172] CP at 5709.

Munich. Munich's agreement acknowledges "that all Policies have been bought back . . . as of the inception date thereof and cancelled."[173] "Policies" is defined as all "actual or alleged" policies issued to Pope & Talbot.[174]

Century. Century's agreement states the settlement "constitutes a complete and unqualified policy release for insurance coverage."[175] The policies are defined as "any and all known or unknown policies" issued by Century to Pope & Talbot.[176]

Wausau. The Wausau agreement acknowledges that the parties "have agreed to a buy-back of the Policies, retroactively effective as of their inception dates."[177] The "Policies" refers to fifteen separate policies issued by Wausau to Pope & Talbot.[178]

For each of these seven settlement agreements, Pope & Talbot and the named insurer objectively manifested their mutual intent to cancel, rescind, void, buy back, or otherwise annul the entirety of liability policies issued to Pope & Talbot. Such attempts are subject to RCW 48.18.320. Because the agreements purport to accomplish exactly what the statute precludes—"insured and insurers . . . coming together and canceling or rescinding insurance

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[173] CP at 4816.

[174] CP at 4815.

[175] CP at 2795.

[176] CP at 2794.

[177] CP at 3774.

[178] CP at 3782.

contracts after a potentially covered injury, death, or damage has occurred"—these attempts violate the anti-annulment statute.[179]

Pope & Talbot's settlement agreements with Allstate, Continental, and Granite State also violate RCW 48.18.320 because the substance of these three agreements manifest the mutual intent to cancel, rescind, void, buy back, or otherwise annul an insurance contract issued to Pope & Talbot.

Allstate. Allstate's settlement agreement provides, "[Pope & Talbot] hereby forever fully and irrevocably releases, acquits, and discharges Allstate, of and from any liability or obligations, or alleged or potential liability, or obligation of whatever kind, nature or description, known or unknown."[180] The agreement states the parties "desire to completely extinguish and terminate any and all contractual and insurance relationships."[181]

Allstate focuses upon the specific release provision contained in its agreement with Pope & Talbot to argue that their release is a "site-specific, not a global release of the Policies and applies only to claims against Pope & Talbot that it has asserted or in the future could assert obligate Allstate to provide Pope & Talbot with coverage under The Policies for the Sites as defined herein."[182] "The Policies" include "any and all policies of insurance of

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[179] Steen, 151 Wn.2d at 524.

[180] CP at 4640.

[181] CP at 4633.

[182] CP at 11722.

any kind whatsoever" issued by Allstate to Pope & Talbot.[183] "Sites" is defined to include property owned or operated by Pope & Talbot in St. Helens, Oregon, Port Ludlow, Washington, Port Gamble, Washington, Ladysmith, Wisconsin, and Castlegar, British Columbia.[184] Notwithstanding the "not a global release" language, the broad recital of intent to extinguish and terminate any insurance relationship cannot be ignored.[185] The objective manifestation of intent to completely terminate any insurance relationship is an attempt to cancel or rescind every policy issued by Allstate.[186] The anti-annulment statute applies.

Continental. Continental's settlement agreement provides, "The settling carriers have no further obligations to Pope and Talbot whatsoever under any policy of insurance except as expressly reserved herein."[187] The settlement agreement broadly provides for the release of all environmental claims "except only [those] relating to the [British Columbia] Sites and the St. Helens Site."[188]

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[183] CP at 11719.

[184] CP at 11716.

[185] See, e.g., Hawkins v. Empres Healthcare Mgmt., LLC, 193 Wn. App 84, 96, 371 P.3d 84 (2016) ("In Washington, special recitals accompanying a release of "all claims" limit the scope of the release." (citing Fradkin v. Northshore Util. Dist., 96 Wn. App. 118, 128, 977 P.2d 1265 (1999))).

[186] Allstate also contends that all of its insurance policies with Pope & Talbot had expired prior to entering into the settlement agreement and thus, the policies were no longer operational. Appellant Allstate's Br. at 17-18. But given the nature of long tail environmental coverage, the underlying policy remains effective as to environmental claims.

[187] CP at 3231.

[188] CP at 3231.

To the extent Continental argues it has ongoing coverage, we are not convinced.

Specifically, the agreement provides, "With respect to the [British Columbia] Sites only, this Agreement shall release and forever discharge the Settling Carriers from any and all alleged obligations under the Excess Policies . . . but not under any primary policy issued by the Settling Carriers."[189] However, there is no evidence of any primary policies. Continental advised the trial court that it "issued two policies to [Pope & Talbot] in Oregon, with policy periods between 1967 and 1970 and between 1974 and 1977."[190] The two policies were excess or "excess-umbrella" coverage.[191]

Neither of those Continental policies were primary policies. Continental did not identify any primary policy issued to Pope & Talbot. There is nothing in the record before us confirming or even suggesting that Continental ever issued Pope & Talbot a primary insurance policy, and Continental makes no assertion that it ever issued such a policy.[192] On this record, the reservation for British

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[189] CP at 3231 (emphasis omitted).

[190] CP at 3098; see also CP at 3144-48, 10706-08.

[191] CP at 3099, 3145 ("Excess Umbrella Liability"), 3150 ("Excess Umbrella Policy"). Continental "may have issued a third policy to Pope & Talbot in Oregon for a policy period between 1973 and 1976." CP at 3098. The third policy, an "Excess Third Party Liability Policy" appears to have been cancelled and rewritten as part of an "Umbrella Liability Renewal [on] January 1, 1974." CP at 3098-99, 3156.

[192] The settlement agreement defines "The Excess Policies" as two specific policies. CP at 3229. And recitations to the settlement agreement merely state "Pope & Talbot alleges that the Settling Carriers sold comprehensive liability insurance to Pope & Talbot . . . including, but not limited to, the Excess Policies." CP at 3230. The recitals also include Continental's

Columbia sites for any "primary policy issued by the Settling Carriers"[193] is insignificant. For purposes of RCW 48.18.320, the 'buy back' of all insurance other than primary coverage of the British Columbia sites is, in substance, a cancellation of the only documented Continental policies issued by Continental or known to Pope & Talbot. The reservation as to primary coverage for British Columbia sites does not create a safe harbor for Continental.

As to the St. Helens site, the agreement expressly stated that "Pope & Talbot's claims relating to the St. Helens site were resolved by a separate agreement relating to that site, executed prior to this Agreement."[194] The resolution of the St. Helens site claims by means of a separate settlement agreement does not support the existence of any ongoing Continental liability coverage of the St. Helens site claims.[195] This reservation is also insignificant.

For purposes of RCW 48.18.320, in substance, the only Continental insurance coverage was completely eliminated by the settlement agreement. The anti-annulment statute applies.

Granite State. Granite State's 2001 settlement agreement provides, "[T]he Policies shall be considered null and void ab initio, of no further force and

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representation that it "has searched its record for excess or umbrella policies" and has not found information or records "of such other policies and has no knowledge that such other policies may have been issued to Pope & Talbot." CP at 3230. There are no representations about any search for or knowledge of any primary policy.

[193] CP at 3231.

[194] CP at 3216, 3231.

[195] See CP at 3221.

effect with respect to any Environmental Claims released hereunder."[196] Such a provision is commonly called an environmental buyout.[197] The release of "environmental claims" was limited to "St. Helens, Oregon, Port Gamble, Washington, the latter including, but not limited to, wood debris sedimentation in Port Gamble Bay, and the upland portion of Port Ludlow, Washington."[198]

Granite State argues that RCW 48.18.320 is limited to cancellation of an entire insurance policy. In its agreement with Pope & Talbot, Granite State provided, "[T]his Release does not apply to Port Ludlow Bay . . . or any sites not expressly included in this Release."[199] Granite State contends that its policies continued to apply after the 2001 settlement agreement both to environmental claims at other sites and to nonenvironmental claims at any site.[200] But the "broad and inclusive" anti-annulment statute is not so limited.

Steen factually involved the cancellation of an entire insurance policy, but our Supreme Court did not hold that only entire insurance policies qualify as "insurance contracts" for purposes of RCW 48.18.320.[201] In addition, Steen included multiple references to "insurance coverage" and to "insurance

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[196] CP at 2538.

[197] See Steven Plitt, Policy Buyback Limitations (July 29, 2021), https://www.insuranceexpertplitt.com/blog/2021/07/policy-buyback-limitations/.

[198] CP at 2538.

[199] CP at 2539.

[200] See CP at 13057.

[201] Steen, 151 Wn.2d at 521-23.

contracts" when discussing the application of the statute.[202] Nothing in Steen prohibits a broad and inclusive interpretation of the anti-annulment statute. Indeed, the court interpreted the statute as applicable to "all insurance contracts" and prohibiting "agreements retroactively annulling insurance coverage."[203]

And, as discussed, we must consider the nature and substance of the Granite State insurance in the context of its settlement agreement. From 1968 to 1985, Granite State issued eleven insurance policies to Pope & Talbot, including eight umbrella policies.[204] The most recent term of Granite State insurance was fifteen years prior to its 2001 settlement agreement.[205] The original focus of the litigation involving Granite State was environmental claims arising from sites operated by Pope & Talbot in Oregon and Washington.[206] The record before us does not suggest that when the 2001 settlement agreement was entered into there were any existing occurrences causing damage to third parties other than environmental events. At the time of the 2001 settlement, the substance of Granite State's coverage was limited to such

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[202] See, e.g., id. at 521-24 ("cancels or rescinds ab initio an insurance contract," "for which the insurance contract provides coverage," "agreements retroactively annulling insurance coverage are prohibited and void," "retroactively annul coverage of that event," "did not intend to prohibit the cancellation of insurance contracts," "canceling or rescinding of insurance contracts") (emphasis added).

[203] Id. at 518-19, 521.

[204] CP at 2765-66, 10815-54.

[205] CP at 6822, 10851-52.

[206] CP at 2765-66, 10814-54.

long tail environmental claims. Under these particular circumstances, such risk sharing and risk distributing coverage qualifies as an insurance contract.

Further, in this context, the agreement between Pope & Talbot and Granite State terminated Granite State's coverage of environmental claims by providing that the agreement rendered the insurance coverage void ab initio, frustrating the fundamental purpose of RCW 48.18.320. Allowing the buyout of all potential long tail environmental claims as of 2001, even when limited to the Port Gamble, St. Helens, and the upland portion of Port Ludlow sites, leaves third parties damaged by the pre-2001 environmental occurrences without access to that coverage. And the possibility that there may be hypothetical environmental claims as to other sites does not bar the application of RCW 48.18.320. Voiding the coverage of substantial long tail environmental claims at major contaminated sites adversely impacts those injured or damaged by environmental occurrences before the 2001 settlement agreement. The anti-annulment statute applies.

Because in operation all ten settlement agreements were attempts to cancel, rescind, void, or buy back liability insurance coverages in violation of RCW 48.18.320, we conclude that each of the ten settlement agreements between Pope & Talbot and its insurers is unenforceable.

Insurers' remaining arguments regarding RCW 48.18.320 are not persuasive. First, Insurers contend that the arms-length settlement of known or potential environmental claims against Pope & Talbot, for which Pope & Talbot received much more than a partial or complete return of premiums, is not

subject to RCW 48.18.320. But the inclusion of express and specific provisions that purport to cancel, rescind, void, buy back or otherwise annul liability coverage for past occurrences went far beyond a release of known or potential claims, thus triggering RCW 48.18.320. The attempted annulment of liability coverage arising out of past environmental occurrences is prohibited by the statute.

Contrary to Insurers' arguments, the public policy favoring settlement does not outweigh the strong public policy of RCW 48.18.320 to preclude adversely impacting those injured or damaged by environmental occurrences before the settlement agreements were entered into.[207]

Insurers argue the use of broad releases including voiding or buying back past insurance coverage is legitimate. Insurers are not precluded from agreeing with insureds to cancel liability coverage so long as such cancelation is limited to claims for damage or injury resulting from occurrences after the agreement.[208] Although Insurers may have preferred Pope & Talbot's broad release of known or potential claims together with an agreement cancelling, rescinding, voiding, buying back or otherwise annulling liability coverages, RCW 48.18.320 bars an attempt to defeat vested third party claims for loss or damage occurring before the agreement.

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[207] Steen, 151 Wn.2d at 522.

[208] Id. ("The statute does not void agreements that are made before the occurrence of any injury, death, or damage for which the insured may be liable.").

To the extent Insurers contend that the application of RCW 48.18.320 adversely impacts the practicality of long tail environmental claim settlements, they fail to establish that public policy warrants the insureds and Pope & Talbot stranding injured third parties with vested rights solely because they have long tail environmental claims. We are not convinced by Insurers' prediction of the death of long tail environmental claim settlements.

Insurers also contend Pope Resources lacks standing because it is not a party to the settlement agreements, but an injured third party may pursue the issuer of a liability policy by means of garnishment of the policy once a judgment is obtained against the insured. As a potential judgment creditor, Pope Resources' zone of interest extends to the possible garnishment of the liability insurance policies.[209] The extent of Pope Resources' actual and bona fide injury and damage, as well as questions of agency and alter ego, are more properly addressed in the trial court in the remaining phases of this litigation.

Insurers further argue that as to Pope Resources, any portions of their settlement agreements providing for cancellation, rescission or buy back of

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[209] In re Custody of S.R., 183 Wn. App. 803, 809, 334 P.3d 1190 (2014) (to establish that an injured party is within the zone of interests, "'[t]he litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests'" (quoting Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed.2d 411 (1991))); Burr v. Lane, 10 Wn. App. 661, 670, 517 P.2d 988 (1974) ("the injured party, after recovering judgment against the insured, may recover under the policy to the extent of the insurance afforded by this policy. He may recover by the means of a writ of garnishment") (internal quotation marks omitted).

liability insurance are severable either under express severability provisions or under common law. We disagree.

Insurers cite to Zurich v. Airtouch Communications, Inc.,[210] to support their contention that the severability provisions in the settlement agreements with Continental, Evanston, TIG, Wausau, and Allstate are enforceable. But in Zurich, our Supreme Court narrowly held that "when parties have agreed to a severability clause in an arbitration agreement, courts often strike the offending unconscionable provisions to preserve the contract's essential term of arbitration."[211] Zurich is not applicable where, as here, the contracts' essential terms are prohibited by statute and were prohibited when the contracts were formed.

The remaining five settlement agreements, London Market, Century, Munich, Westport, and Granite State, do not contain severability provisions, but those insurers contend that their agreements are "still severable" under section 208 of Restatement (Second) of Contracts.[212] Section 208 governs an unconscionable contract or term and applies where "a contract or term thereof is unconscionable at the time the contract is made."[213] Insurers argue that "the settlements can be enforced against [Pope Resources] as settlements of [Pope & Talbot's] insurance claim regarding [Pope Resources'] claim against [Pope &

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[210] 153 Wn.2d 293, 103 P.3d 753 (2004).

[211] Id. at 320.

[212] Appellants' Opening Br. at 64.

[213] RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

Talbot]."[214] But Insurers provide no compelling authority in support of their proposition that an agreement rendered unenforceable by RCW 48.18.320 can still be severable, with the remainder of the settlement enforceable under section 208.[215]

Insurers next argue that the release provisions of the settlement agreements are an accord and satisfaction and therefore do not constitute an agreement subject to the statute.[216] But an accord and satisfaction is an agreement.[217] The express language contained in the agreements and releases here, cancelling, rescinding, voiding, buying back, or otherwise annulling liability coverage, is just as effective as if set out in a separate cancellation, rescission, buy back or other annulment agreement.

Further, Insurers argue that it would be unconstitutional under the full faith and credit clause of article IV of the United States Constitution and the due

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[214] Appellants' Opening Br. at 65.

[215] Alternatively, Insurers cite Saletic v. Stamnes, 51 Wn.2d 696, 321 P.2d 547 (1958), in support of severability. In Saletic, our Supreme Court stated, "'Whether a contract is divisible depends very largely on its terms and on the intention of the parties disclosed by its terms. As a general rule[,] a contract is entire when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts are interdependent and common to one another and the consideration.'" (quoting Traiman v. Rappaport, 41 F.2d 336, 338, 71 A.L.R. 475 (3d Cir. 1930)). But "any agreement" that violates RCW 48.18.320 is unenforceable. RCW 48.18.320 does not contemplate severability.

[216] Appellant's Reply Br. at 56-57.

[217] 27 MARJORIE DICK ROMBAUER, WASHINGTON PRACTICE: CREDITORS' REMEDIES—DEBTORS' RELIEF § 5.63, at 532 (1998) ("An accord and satisfaction is a contract between a creditor and a debtor that compromises a doubtful or disputed claim and substitutes a new performance for the original claim with the intention of discharging the original claim.").

process clause of the Fourteenth Amendment to invalidate the release agreements based upon RCW 48.18.320. Insurers contend that in determining whether the release agreements are "fair," the most important consideration is the intention of the parties.[218] Alleging they did not anticipate that Washington law would apply, Insurers argue that invalidating the settlement agreements based upon RCW 48.18.320 would be unconstitutional.

But the due process and full faith and credit clauses prohibit certain choice of law decisions only when the choice of law is arbitrary or fundamentally unfair, such as when "the selection of forum law rested exclusively on the presence of one nonsignificant forum contact."[219] In Phillips Petroleum Company v. Shutts, for example, the Court held the Kansas Supreme Court violated the Constitution by applying Kansas law to members of a nationwide class who had no connections to Kansas other than their coincidental membership in a nationwide class action filed in Kansas.[220] Because here, it is not arbitrary or fundamentally unfair to apply the anti-annulment statute, their argument is not compelling.

Finally, some Insurers argue that because Pope Resources "encouraged and benefited from" the settlement agreements it seeks to invalidate, Pope Resources is not an innocent third party.[221] But in Steen, our Supreme Court

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[218] Appellants' Opening Br. at 64.

[219] Allstate Ins. Co. v. Hague, 449 U.S. 302, 308-09, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981).

[220] 472 U.S. 797, 822-23, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985).

[221] Appellants Evanston and TIG Br. at 1.

stated that the purpose of RCW 48.18.320 "is to protect the injured and damaged by preventing insureds and insurers from coming together and canceling or rescinding insurance contracts."[222] RCW 48.18.320 does not require that the injured third party be oblivious to the annulment agreement between the insurers and insured. We note it is possible that Pope Resources' particular role in the events leading up to the settlement agreements may arise in the remaining phases of this litigation.

We affirm the trial court's conclusion that the ten settlement and remediation agreements are void under Washington's anti-annulment statute.

WE CONCUR:

[222] Steen, 151 Wn.2d at 524.

APPENDIX B

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KING COUNTY
SUPERIOR COURT CLERK

CASE #: 15-2-13277-6 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

POPE RESOURCES, LP, A DELAWARE LIMITED PARTNERSHIP,

Plaintiff,

vs.

POPE & TALBOT, INC., *et al.*,

Defendants.

NO. 15-2-13277-6 SEA

ORDER GRANTING PLAINTIFF'S MOTION, AND DENYING INSURERS' MOTIONS REGARDING APPLICATION OF THE ANTI-ANNULMENT STATUTE TO ENFORCEMENT OF INSURER'S SETTLEMENT AGREEMENT AGAINST POPE RESOURCES

THIS MATTER came before the Court on Cross Motions for Summary Judgment. The Court has reviewed all materials submitted in support of, and in opposition to, the Motions. The Court heard oral argument from the Parties on April 5th, 2019. The Court, being fully informed, rules as follows:

The Washington Anti-Annulment Statute and Public Policy Prohibit Enforcement Against Pope Resources of Defendants' Settlement Agreements With Pope & Talbot

ORIGINAL

Judge Theresa Doyle
King County Superior Court
516 Third Ave
Seattle, WA 98104

A. RCW 48.18.320, the Anti-Annulment Statute, Bars Use of the Settlement Agreements as A Defense Here

RCW 48.18.320 applies to retroactive annulments resulting from settlement of disputed claims, as here. The statute provides:

> "No insurance contract insuring against loss or damage through legal liability for the bodily injury or death by accident of any individual, or for damage to the property of any person, shall be retroactively annulled by any agreement between the insurer and insured after the occurrence of any such injury, death, or damage for which the insured may be liable, and any such annulment attempted shall be void."

In American Continental Insurance Company v. Steen, 151 Wn.2d 512, 91 P.3d 864 (2004), the Washington Supreme Court held that an agreement between an insurer and hospital to cancel the hospital's malpractice policy, entered into after the allegedly negligent acts, could not be enforced against a third-party injured claimant. The purpose of the statute, the Court held, is to protect an injured claimant from the cancellation or annulment by the insurer and insured of a policy after the occurrence of a covered event. Steen, at 524-25.

The language of the Anti-Annulment statute applies to "any agreement" between the insured and insurer. The Court in Steen found the statute is unambiguous, and is broad and inclusive. Steen, at 867-68. Thus, the Court held that it applied to a "claims made" policy. The Court also observed that the statute has existed since 1947 and the Legislature had not seen fit to amend to narrow its application.

As the Steen Court held regarding a "claims made" policy, the statutory purpose is broad and the language is clear. The Legislature could have, and did not, choose to exempt settlement agreements.

Nor is there any indication in the statute -- or in the Steen Court's analysis of it -- that the Legislature intended to restrict its reach to claims unknown and not disputed at the time of the agreement, as the Insurers here contend. The statute applies to "any potentially covered injury". Steen, at 512, 514. Had the Legislature intended to exclude disputed claims, it could have done so.

The statute applies to all the releases of liability between Pope & Talbot and the Insurers at issue here. There is no credible argument to the contrary.

B. Other Defense Arguments

Insurers also argue that the defenses of waiver and laches apply, and that Pope & Talbot was agent for Pope Resources in entering into the settlement agreements here. There is no factual support in the record for these theories and defenses.

C. Choice of Law

Much briefing and argument has been devoted to the issue of what law applies to analysis of rights and responsibilities under the various settlement agreements entered into by Insurers and Pope & Talbot. An entire round of briefing was devoted to the Restatement, sections 187 and 188, which concern choice of law in contracts.

This line of argument misses the point. It is irrelevant to this proceeding what law some Insurers and Pope & Talbot chose in their settlement agreements, and what law applies to other settlement agreements between other Insurers and Pope & Talbot, in which no choice of law was made.

Here, Pope Resources has brought claims against the Insurers. Insurers have raised as an affirmative defense the settlement agreements Insurers entered into with Pope & Talbot. Pope Resources was not a party to the settlement agreements. This is not litigation between Pope & Talbot and Insurers. It matters not what law would apply in a lawsuit between Insurers and Pope & Talbot regarding the settlement agreement. Pope Resources is not a signatory or party to these settlement agreements.

The law governing this dispute between Insurers and Pope Resources is not complex. With regard to the affirmative defense of the settlement agreements, they cannot bar this litigation between Pope Resources and Insurers, because to so allow would be against Washington public policy. The Anti-Annulment Statute renders unenforceable any agreement, such as the settlement agreements here, that would annul or cancel insurance coverage after the occurrence of a potentially covered injury or damage. The Steen Court held that the statute also expresses strong Washington public policy. Steen, 151 Wn.2d at 512, 524. Allowing the settlement agreements to be used as a shield, as attempted here, against a third party, non-signatory, to retroactively cancel insurance coverage of a potentially covered event, would be

to enforce a contract that is illegal as violative of Washington public policy. Reed v. Johnson, 27 Wash. 42, 55 (1901). That, the court will not do.

D. Conclusion

Therefore, this Court GRANTS Plaintiff Pope Resources' Motion for Summary Judgment Regarding Application of the Anti-Annulment Statute, and DENIES Insurers' summary judgment motions on this issue. Washington law applies to this litigation.

DATED this 30 day of April, 2019.

JUDGE THERESA DOYLE

Judge Theresa Doyle
King County Superior Court
516 Third Ave
Seattle, WA 98104

APPENDIX C

RCW 48.18.320

Annulment of liability policies.

No insurance contract insuring against loss or damage through legal liability for the bodily injury or death by accident of any individual, or for damage to the property of any person, shall be retroactively annulled by any agreement between the insurer and insured after the occurrence of any such injury, death, or damage for which the insured may be liable, and any such annulment attempted shall be void.

[1947 c 79 § .18.32; Rem. Supp. 1947 § 45.18.32.]

SIDLEY AUSTIN LLP

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- smite21@nationwide.com
- soha@sohalang.com
- susoeff@wscd.com
- tara.goodwin@troutmansanders.com
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