

PCS Wins Fraudulent Conveyance Claim in CERCLA Case



BNA Snapshot

PCS Nitrogen Inc. v. Ross Dev. Corp., 2015 BL 272044, D.S.C., No. 09-CV-3171, 8/21/15

Key Holding: The directors and shareholders of a defunct company that owned a contaminated site must pay \$4.7 million into a trust after a trial court finds they fraudulently took distributions, leaving the company with no assets to pay superfund creditors.

Impact: PCS Nitrogen Inc. may recover on its claim of fraudulent conveyance against the directors and shareholders of Ross Development Corp.

The directors and shareholders of a defunct company that owned a contaminated site must pay \$4.7 million into a trust after a federal court found they fraudulently took distributions, leaving the company with no assets to pay superfund creditors (*PCS Nitrogen Inc. v. Ross Dev. Corp.*, 2015 BL 272044, D.S.C., No. 09-CV-3171, 8/21/15).

The U.S. District Court for the District of South Carolina ruled in favor of PCS Nitrogen Inc. on its claim of fraudulent conveyance against the directors and shareholders of Ross Development Corp.

"In fact, this case is quite unusual in the context of superfund," Professor Joel Mintz of the Nova Southeastern University Law Center in Davie, Fla., told Bloomberg BNA Aug. 25. Professor Mintz's scholarship encompasses environmental law and policy, environmental enforcement and regulation of hazardous waste.

"At the same time, courts have shown a willingness to 'pierce the corporate veil,'" Mintz said.

"The most important of those cases was *United States v. Bestfoods* (524 U.S. 51, 46 ERC 1673 (1998)), when the court defined the circumstances under which a parent corporation may be liable for the actions of its corporate subsidiaries under superfund."

"In that case, Justice Souter, writing for the court, noted that it is 'a fundamental principle of corporate law' that 'the corporate veil may be pierced and [a] shareholder held liable for the corporation's conduct when ... the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud.'"

"Presumably, the same general principle would apply to wrongdoing corporate directors, in addition to shareholders who commit fraud," Mintz said.

Case 'Awoke a Sleeping Dog'

Superfund attorney Lawrence Schnapf of Schnapf LLP agreed the case is unusual.

"Fraudulent conveyance is hard to prove, so these cases are indeed rare, even more so for environmental issues," Schnapf told Bloomberg BNA Aug. 25.

"The *Ashley* litigation was ill-conceived and basically awoke a sleeping dog," Schnapf said. "PCS has embarked on a scorched-earth approach in its defense."

The ruling is the latest in long-running litigation between PCS and Ross over the cleanup of a former fertilizer plant in South Carolina.

Ross and its predecessor operated the plant from 1906 until 1966, when PCS purchased the property. As part of the transaction, Ross agreed to indemnify PCS for contamination occurring before 1966.

PCS operated the plant until 1972 and sold it to Ashley II of South Carolina Inc. in 2003. Ashley discovered contamination on the site and filed a superfund action against PCS in 2008 as a former owner (20 EDDG 59, 8/18/11).

Claims Against Multiple Parties

PCS then filed superfund contribution claims against multiple parties, including Ross. In July 2015, the district court of South Carolina ordered Ross to reimburse PCS \$746,000 for superfund cleanup and litigation costs following trial (24 EDDG 60, 8/20/15).

In the latest post-trial ruling, the court voided transfers made by the directors to shareholders of Ross between 1998 and 2006, and ordered them to fund a trust with the amounts equal to those distributions, totalling \$4,670,762.10.

"Here, the evidence shows that the board knew of the potential liability associated with the site and nonetheless continued to make regular and substantial distributions to shareholders," the court said.

"Furthermore, whenever the 'threat' seemed particularly acute, as it did after the 1998 [newspaper] article [about the site] or after the beginning of the *Ashley II* litigation in 2006, the board responded by accelerating the tempo of distributions to shareholders, making two distributions in each 1999 and 2006."

"Ross failed to prove by clear and convincing evidence that the distributions to shareholders were bona fide transactions and not, in reality, transfers designed to defeat the known potential claims of Ross's subsequent creditors," the court said.

The court said PCS hasn't yet established the amount of response costs it has incurred at the site beyond the share apportioned to it in the *Ashley II* litigation.

The court ruled PCS can't recover any of the funds in the trust until it establishes the amount it is owed as a creditor of Ross.