COURT DECISIONS

SUPERFUND LITIGATION

Successor Liability

NO OWNER LIABILITY CREATED BY PURCHASE OF CORPORATE DIVISION, TRIAL COURT DECIDES

A company's acquistion of a corporate division did not expose it to successor liability under the superfund law, a federal district court in Wisconsin held March 10 (*A.C. Reorganization Trust v. E.I. du Pont de Nemours & Co.*, DC EWis, No. 94-574, 3/10/97).

The Comprehensive Environmental Response, Compensation, and Liability Act "nullifies any attempted transfer" of superfund liability in an asset purchase, the U.S. District Court for the Eastern District of Wisconsin held. Thus, indemnification language in the pre-CERCLA purchase agreement did not transfer the parent company's superfund liability, the court said.

Lawrence P. Schnapf, an adjunct law professor and environmental attorney specializing in successor liability issues, praised the decision. "Had the court found the purchaser liable [for contribution] under CERCLA Section 113, it would have resulted in a big expansion of successor liability," he said. "A corporate division is not a legally recognized entity," and the court correctly dismissed the parent seller's contribution claim, he added.

PRP Seeks Indemnification, Contribution

Newport Co. manufactured chemicals at a number of locations between 1915 and 1931. Newport consisted of a chemicals division and a wood distillate division, which operated as separate, distinct businesses.

The chemicals division manufactured organic chemicals and dyestuffs at a plant in Oak Creek, Wis. The distillate division produced turpentine, pine oil, and other products from pine trees at three plants in Alabama, Florida, and Louisiana.

E.I. du Pont de Nemours & Co. purchased the chemicals division in 1931, requiring Newport to indemnify it for any environmental liabilities at the Oak Creek facility. Newport continued to operate the distillate division.

Following a series of corporate mergers, Newport became a division of Tenneco Chemicals Inc. In 1996, the court found that environmental liabilities at Oak Creek had shifted to Tenneco through the mergers.

Reichhold Chemicals Inc. purchased Tenneco's Newport division in 1973 in a transaction that conveyed the assets of the Alabama, Florida, and Louisiana plants.

An indemnification clause in the purchase agreement required Reichhold to assume all of Tenneco's "debts, obligations, contracts and liabilities . . . with respect to its Newport Division."

DuPont voluntarily cleaned up the Wisconsin site between 1985 and 1989. The Environmental Protection Agency later issued an order requiring DuPont and the site's owners to investigate remaining contamination. Trustees for the bankrupt site owners filed a CERCLA action against DuPont, which then sought CERCLA contribution from various parties including Tenneco. Tenneco brought claims for indemnification and contribution against Reichhold.

CERCLA Liability Cannot Be Shifted

Reichhold moved to dismiss Tenneco's indemnity claim, arguing that the 1973 agreement did not obligate it to indemnify Tenneco for liabilities at Oak Creek. Reichhold also sought dismissal of Tenneco's contribution claims, arguing that Reichhold was not the facility's owner or a successor to the owner.

The court found that the 1973 agreement showed Reichhold's "unambiguous intent" to indemnify Tenneco for liabilities arising out of the Newport division. This "expansive" agreement may reach Tenneco's liability for Oak Creek, the court said, denying Reichhold's motion to dismiss the indemnity claim.

However, saying that a seller's liabilities do not pass to the purchaser in an asset sale, the court granted the motion to dismiss Tenneco's contribution claim.

CERCLA Section 107(e)(1) nullifies the portion of the indemnification agreement assigning to Reichhold Tenneco's CERCLA liabilities with respect to the Newport division, the court held. Tenneco retained liabilities that did not flow to the Newport division and could not pass to Reichhold, the court said.

Section 107(e)(1) says:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer . . . to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

The opinion was written by Chief Judge J.P. Stadtmueller.

Reichhold was represented by William A. Ruskin and Adam J. Freedman of Schulte, Roth & Zabel in New York City. James A. Vroman, Stephen A.K. Palmer, and Christine M. Riewer of Jenner & Block in Chicago represented Tenneco.

(A.C. Reorganization Trust v. E.I. du Pont de Nemours & Co., DC EWis, No. 94-574, 3/10/97).