Federal Court Holds Parent Corporation Not Liable At Ott-Story Site

Many important legal decisions concerning liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), including an important 1998 Supreme Court decision regarding the liability of parent corporations, have resulted from the Ott-Story Superfund Site located near Muskegon, Michigan. After more than ten years of litigation at all levels of the federal court system, a recent decision by the United States district court will apparently leave the United States and the State of Michigan unable to recover most of the approximately $90 million (including interest) in costs they incurred cleaning up the site (at least if no further appeals are taken.)

From 1957 to 1965, the Ott Chemical Company (Ott I) operated a chemical manufacturing plant at the site. From 1965 until 1972, the plant was owned and operated by a wholly owned subsidiary of CPC International, Inc. (CPC) known as Ott Chemical Company (Ott II). In 1972, Ott II sold the site to Story Chemical Company (Story), which owned and operated the site until Story went bankrupt in 1977.

In 1977, the Michigan Department of Natural Resources (MDNR) urged Aerojet General Corporation (Aerojet) to take over the site and resume operation of the plant. MDNR negotiated a consent order with Aerojet and Aerojet's subsidiary, Cordova Chemical Company (Cordova), under which Cordova agreed to accept responsibility for a limited environmental cleanup at the plant. After the consent order was in place, Cordova purchased the site from Story's bankruptcy trustee. Cordova owned and operated the site until 1986, when the plant ceased operation.

In 1982, the Environmental Protection Agency (EPA) placed the site on the National Priorities List, and later began extensive remedial action for contaminated soil, surface water and

groundwater. In 1989, EPA and MDNR sued Aerojet and CPC and their subsidiaries for all response costs.

In 1991, the district court ruled that CPC was liable under CERCLA as an "operator" of the plant owned by its subsidiary Ott II, because CPC actively participated in and exercised control over Ott II. It also held that Aerojet was similarly liable as an operator of the site, because Aerojet had actively participated in and exercised control over its subsidiary Cordova.

In 1995, the court of appeals reversed, holding that although a parent corporation can be liable for contaminated property owned by a subsidiary, the facts of this case did not justify such a holding for either Aerojet or CPC. EPA appealed to the United States Supreme Court, which decided that neither the court of appeals nor the district court had correctly analyzed the issue of parent corporation liability under CERCLA. The Supreme Court held that a parent corporation is liable under CERCLA for contaminated property owned and operated by its subsidiary only if the parent corporation actively participated in the operation of the facility itself, as opposed to actively participating in the overall management of the subsidiary. The Supreme Court asked the lower courts to decide the case again based on the Supreme Court's new rules for a parent corporation liability.

After the Supreme Court decision, EPA and MDNR entered into settlements with Aerojet and Cordova. Thus, the district court had to resolve the issue of parent corporation liability only for CPC. The court based its decision on the testimony and documents concerning CPC and Ott II that had been presented during the 1991 trial, plus an additional fifty exhibits and new legal briefs that the parties submitted to address the standard established by the Supreme Court decision.

At the new hearing, EPA and MDNR argued that CPC, the parent corporation, should be held directly liable as an operator of the site because: 1) a CPC employee who coordinated environmental matters for CPC and its subsidiaries allegedly controlled the environmental affairs of Ott II in a way that exceeded normal oversight by a parent corporation over the activities of its subsidiaries; and 2) CPC operated the chemical manufacturing portions of the plant along with its subsidiary in manufacturing certain chemicals intended for use by CPC. EPA and MDNR also argued that CPC was liable because the way in which CPC acquired the plant from Ott I constituted a *de facto* ("in fact") merger between the two corporations.

On their first point, EPA and MDNR argued that G.R.D. Williams, an in-house lawyer at CPC who coordinated CPC's environmental affairs, exerted excessive control over the pollution control decisions of Ott II. EPA and MDNR cited memos in which Williams had demanded that Ott II obtain his approval for all environmental decisions, and urged Ott II to delay installing pollution control devices. However, the court rejected this argument because the company records showed that "Ott II generally did not comply with such requests" by Williams. Therefore, the court concluded that Williams did not actually have authority to require Ott II to take any particular action with respect to environmental matters, and that Williams' actions did not show that CPC exerted excessive control over the environmental practices of Ott II.

EPA's and MDNR's second argument was that CPC had had actually operated the plant, either on its own or in a joint venture with Ott II, because CPC lent money to Ott II to expand production facilities for a chemical that CPC needed; arranged for Ott II to manufacture a new chemical developed by CPC; and arranged for Ott II to manufacture a paper coating product for CPC. The court rejected all these arguments, because the evidence did not show that there was a joint venture between the two corporations, and because Ott II personnel denied that anyone

outside Ott II had the authority to direct manufacturing at the facility. Therefore, the court concluded that EPA and MDNR had failed to show that CPC exerted sufficient actual control over the manufacturing operations of the facility to make CPC liable as an operator of the facility.

Finally, EPA and MDNR argued that CPC should be held liable under CERCLA as a successor corporation to Ott I, which had operated the plant from 1957 to 1965. The court held that EPA and MDNR had waived that legal theory because they had not notified CPC before the 1991 trial that they would make such an argument, and because neither of them had listed that argument as an issue to be briefed when the district judge asked the parties to identify issues remaining to be decided after the Supreme Court's 1998 decision. Even though the district court held that EPA and MDNR had waived the issue, it went on to consider their arguments, and decided that CPC was not a successor to Ott I.

EPA and MDNR have until January 9, 2001 to decide whether they wish to appeal the ruling.

Bestfoods, f/k/a CPC International, Inc. v. Aerojet General Corporation, and *United States of America v. Cordova Chemical Company of Michigan,* Civil Nos. 1:89-CV-503 and 1:89-CV-961, W.D. of Mich., Nov. 9, 2001.

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