

Environmental Advisory: Massachusetts Supreme Judicial Court Holds Parent Corporation Not Liable under Massachusetts Superfund Law for Contamination Caused by Subsidiary

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The Massachusetts Supreme Judicial Court (SJC) has held that a parent corporation is not liable under M.G.L. c. 21E, the Massachusetts Superfund law, for the liability of a subsidiary that the parent did not own or control at the time the subsidiary released hazardous materials and sold a contaminated site. The SJC has also held that a plaintiff is liable for a defendant's attorney's fees in a Chapter 21E lawsuit if there is no "reasonable basis" for the claim against defendants. *Scott v. NG U.S. 1, Inc.* (March 7, 2008).

In *Scott*, the plaintiff had discovered contamination allegedly coming from property owned and operated as a gas works by Salem Gas from 1850 to 1890. Salem Gas was dissolved in 1998, but, starting in 1926, a series of stock purchases had led to Salem Gas becoming a subsidiary of NEES, the corporate predecessor to defendant NG U.S. 1, in 1947. NEES consolidated the operations of Salem Gas with those of two other gas companies and later sold the stock and assets of the consolidated corporation.

The SJC followed the U.S. Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), which held that CERCLA, the federal Superfund law, does not override the fundamental rule of corporate law that a parent corporation is not directly or indirectly liable for the acts of its subsidiaries except in limited circumstances.

Now, under both *Bestfoods* and *Scott*, a parent corporation may be liable under CERCLA, or Chapter 21E, for its subsidiary's contamination only when:

- the parent "manage[s], direct[s], or conduct[s] operations specifically related to pollution"; or
- the subsidiary's "corporate veil" may be pierced.

The SJC held that the corporate veil may be pierced to hold a parent responsible for a subsidiary's actions only if the parent exercises "pervasive control" and there is some "fraudulent or injurious consequence" or there is "confused intermingling with 'substantial disregard of the separate nature of the corporate entities.'"

In *Scott*, NG U.S. 1 and its predecessors had not had any direct involvement in activities at the site during the relevant time period. In going on to determine whether there could be the sort of "control" or "intermingling" that would allow piercing the corporate veil, the SJC held that the proper focus is on the events giving rise to the underlying claim and concluded that, because NG U.S. 1 and its predecessors had had no control or other involvement during the relevant time period, it did not matter whether they had such control at times after 1926.

Scott also addressed another important issue in Chapter 21E litigation. The defendants sought attorney's fees under M.G.L. c. 21E, § 4A, which requires a court to award fees and costs if a plaintiff does not participate in pre-suit negotiations in good faith, or if a plaintiff has no reasonable basis for claiming that the defendant is liable. In one of the very few reported court decisions involving Section 4A, the SJC held that the standard for determining whether attorney's fees must be awarded is whether, at the time of filing the complaint, application of the facts to existing law made it "reasonably clear" that defendants were not liable. Because the trial judge had used the wrong standard—the standard governing motions to dismiss, a relatively easy one for plaintiff to meet—the SJC sent the case back to the trial judge.

Thus, not only has the plaintiff failed to find anyone to pay to clean up the century-old contamination on his property, he may find himself paying the defendants' attorney's fees as well.

*If you have any questions regarding this topic
or any related issue, feel free to contact*

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