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# CORPORATE SUCCESSOR LIABILITY UNDER CERCLA: WHO'S NEXT?

by

Daniel H. Squire,\* William P. Ingram,\*\* and Don J. Frost, Jr.\*\*\*

WITH the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),<sup>1</sup> Congress sought to achieve a number of goals. Two of the most prominent goals were the identification and cleanup of inactive hazardous waste disposal sites and the imposition of liability for the costs of remedying hazardous conditions on the parties responsible for creating or contributing to such conditions. Section 107(a)<sup>2</sup> of CERCLA specifically identifies four categories of persons responsible for the costs associated with remedying a hazardous waste site: (1) current owners and operators of the site; (2) persons owning or operating the site at the time of waste disposal; (3) generators of hazardous wastes that were disposed of at the site; and (4) transporters who selected the area as a disposal site.<sup>3</sup> CERCLA, however, does not expressly impose liability on the corporate successors of these responsible parties for costs associated with their predecessors' hazardous waste operations. Consequently, an important issue concerning CERCLA's reach is to what extent courts will hold corporate successors jointly and severally liable for the remediation costs at a waste site where the successors' only connection is through their predecessors.

This Article addresses that issue. Section I discusses the general rules governing successor liability, and summarizes the traditional common law rules governing mergers, consolidations, and stock and asset transactions. Section I concludes with a discussion of modern expansions of the traditional exceptions to the general rule of successor liability for asset transfers and the approaches taken by federal courts in non-CERCLA cases.

Section II analyzes the corporate successor liability issue as it is presently

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1. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

2. 42 U.S.C. § 9607(a) (1988).

3. *Id.*

developing under CERCLA. It first discusses the approach federal courts have applied in CERCLA cases. The section then examines the United States Environmental Protection Agency's (EPA) and United States Department of Justice's (DOJ) positions with respect to the appropriate successor liability rules under CERCLA as these agencies have set them forth in policy guidance documents and briefs.

Section III, drawing upon the preceding discussion of the developing law of corporate successor liability under CERCLA, analyzes a detailed hypothetical situation. This analysis demonstrates how corporate transactions can be structured to minimize the acquiring corporation's exposure to potential successor liability.

## I. THE DOCTRINE OF SUCCESSOR LIABILITY<sup>4</sup>

### A. *State Common Law of Corporate Successor Liability*

#### 1. *The Traditional Rules of Corporate Successor Liability*

The corporate successor liability issue can arise in two basic contexts: a statutory merger or consolidation and a sale of the assets of a corporation. Where the transaction is a statutory merger or consolidation, the surviving corporation generally acquires all assets and liabilities of the corporations merged or consolidated, unless the parties have made specific arrangements to avoid this result.<sup>5</sup>

Where one corporation purchases the assets of another corporation, the general rule is that the purchaser does not also acquire the debts and liabilities associated with these assets.<sup>6</sup> Courts have fashioned four traditional exceptions to this general rule, which are triggered when: (1) the purchaser expressly or implicitly assumes the seller's liabilities;<sup>7</sup> (2) the parties enter into the transaction fraudulently to escape liability;<sup>8</sup> (3) the acquisition constitutes a *de facto* (i.e., non-statutory) merger or consolidation between the

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4. Section I does not present an exhaustive discussion of the successor liability doctrine. Rather, the purpose of this section is to provide a brief summary of the successor liability rules, their application, and the theories underlying these rules, as the basis for an analysis of the application of successor liability under CERCLA. For a more thorough discussion, see 15 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* §§ 7117-7129 (rev. perm. ed. 1983 & Supp. 1989).

5. See generally 15 W. FLETCHER, *supra* note 4, § 7117, at 178 (consolidation), § 7121, at 185 (statutory merger). Similarly, when one corporation purchases the stock of a second corporation, the assets and liabilities of the acquired corporation remain, absent other arrangements, because the acquired corporation's integrity as an on-going corporation has not been affected at all. Thus, this situation is not one of successor liability since there is no successor. Whether the acquiring corporation could ever become liable for the obligations of the acquired corporation involves the doctrine of piercing the corporate veil, which this Article does not consider. *But cf. infra* notes 97 & 165.

6. See 15 W. FLETCHER, *supra* note 4, § 7122, at 188.

7. An express assumption is a straightforward concept requiring little discussion. An implicit assumption is usually found because the purchase agreement is inartfully drafted or the parties failed to consider the issue at all. See generally 15 W. FLETCHER, *supra* note 4, § 7122, at 189 (discussing mere purchase or acquisition of another company's property).

8. The fraud exception involves tortious or criminal activity and thus is not an appropriate subject for extensive analysis in this Article, which focuses on the proper legal structure of transactions. In many cases, however, where courts apply another exception, the facts suggest

purchaser and seller; or (4) the purchaser is merely a continuation of the seller.<sup>9</sup>

The policy rationales underlying the traditional rule and its exceptions include: the protection of minority shareholders and creditors, the proper assessment of taxes, and the promotion of alienability of corporate assets.<sup>10</sup> The de facto-merger and mere continuation exceptions also serve the same objectives that underlie the general rule of successor liability for statutory mergers or consolidations.<sup>11</sup> In determining whether these two exceptions apply, the courts focus on the form of the transaction, imposing liability where the successor is merely the predecessor under a new guise.<sup>12</sup> Consequently, under either of these two exceptions, "the central issue is whether the purchasing corporation effectively has become the selling corporation by acquiring not only the latter's assets but also its entire business."<sup>13</sup>

In determining whether a transaction constitutes a de facto-merger or consolidation exposing the successor to liability, the courts generally consider the following factors: (1) whether there is a continuation of the enterprise of the seller corporation, i.e., through a continuity of management, other personnel, physical location, assets, and general business operations; (2) whether there is a continuity of shareholders because the purchasing corporation pays for the acquired assets with shares of its own stock; (3) whether the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (4) whether the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.<sup>14</sup> Several courts have noted that not all of these factors are necessary, nor is any one of the factors alone sufficient, to establish a de facto merger.<sup>15</sup>

With respect to the traditional continuation exception, the courts look to factors similar to those pertinent to the de facto merger exception.<sup>16</sup> Gener-

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at least a hint of fraud. See generally 15 W. FLETCHER, *supra* note 4, § 7122, at 189 (footnotes cases from seventeen jurisdictions where courts found fraud).

9. See *id.*, § 7122, at 189.

10. See *Polius v. Clark Equip. Co.*, 802 F.2d 75, 78 (3d Cir. 1986) (outlines policy rationales for "corporate contractual world"); Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. Rev. 906, 909 (1983) (explains rationale behind de facto merger doctrine).

11. Phillips, *supra* note 10, at 909.

12. See generally *Santa Maria v. Owens-Illinois, Inc.*, 808 F.2d 848, 858-59 n.12 (1st Cir. 1986) (discussing continuity of enterprise theory); *Polius*, 802 F.2d at 78 (when form of transfer fails to accurately portray substance, courts may hold new entity is older one in another guise).

13. Phillips, *supra* note 10, at 909.

14. *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1457-58 (11th Cir. 1985); *accord Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 311 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985); *Keller v. Clark Equip. Co.*, 715 F.2d 1280, 1291 (8th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); *Atlas Tool Co. v. Commissioner*, 614 F.2d 860, 870-71 (3d Cir. 1980), *cert. denied*, 449 U.S. 836 (1980); 15 W. FLETCHER, *supra* note 4, § 7165.5, at 340 (1983).

15. See, e.g., *Bud Antle, Inc.*, 758 F.2d at 1457-58; *Atlas Tool Co.*, 614 F.2d at 870; *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1010, 1015 (D. Mass. 1989).

16. See 15 W. FLETCHER, *supra* note 4, § 7122, at 189.

ally, "[t]he traditional indications of 'continuation' are: common officers, directors, and stockholders; and only one corporation in existence after the completion of the sale of assets."<sup>17</sup> A number of courts, however, have eliminated the dissolution requirement and instead consider the identity of key personnel between the selling and purchasing corporations to be the key element of a continuation.<sup>18</sup> Some courts also have required that the consideration paid in the transaction be inadequate.<sup>19</sup> Regardless of the particular elements emphasized, however, the court in *Bud Antle, Inc. v. Eastern Foods, Inc.*<sup>20</sup> explained that the exception applies when the purchasing corporation is simply a disguise for essentially the same or similar corporate entity.<sup>21</sup>

## 2. Modern Exceptions to the General Rule

Courts in several jurisdictions have adopted two closely related exceptions—the product-line rule<sup>22</sup> and the continuation of the enterprise doctrine<sup>23</sup>—to broaden the scope of liability beyond the four traditional exceptions. Courts have applied these modern exceptions primarily in product liability cases to find a successor strictly liable for injuries caused by equipment that its predecessor manufactured.<sup>24</sup> However, at least one lower state court has applied the product-line theory to environmental claims.<sup>25</sup>

17. *Id.* at 33 (Supp. 1989); *accord* *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174-75 (5th Cir. 1985); *Weaver v. Nash Int'l, Inc.*, 730 F.2d 547, 548 (8th Cir. 1984); *Travis v. Harris Corp.*, 565 F.2d 443, 447 (7th Cir. 1977); *Estey & Assocs., Inc. v. McCulloch Corp.*, 663 F. Supp. 167, 171 (D. Or. 1986) (court recognizes traditional continuation exception without accepting or rejecting it); *Groover v. West Coast Shipping Co.*, 479 F. Supp. 950, 951 (S.D.N.Y. 1979); *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977).

18. *Bud Antle, Inc.*, 758 F.2d at 1458-59; *accord* *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 693 (1st Cir. 1984); *Tucker v. Paxson Mach. Co.*, 645 F.2d 620, 626 (8th Cir. 1981); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 440 (7th Cir. 1977).

19. *See, e.g., Louisiana-Pacific Corp. v. ASARCO, Inc.*, 1989 Hazardous Waste Litig. Rep. (Andrews Publications) 17,239, 17,305 (W.D. Wash. 1989) (inadequate consideration deemed fraudulent transfer of assets); *Crawford Harbor Assocs. v. Blake Constr. Co.*, 661 F. Supp. 880, 884 (E.D. Va. 1987) (inadequate consideration may establish consolidation, continuance, or fraudulent transaction).

20. 758 F.2d 1451 (11th Cir. 1985).

21. *Id.* at 1458. The court said:

The mere continuation exception applies when the purchasing corporation is merely a continuation or reincarnation of the selling corporation. . . . In determining whether one corporation is a continuation of another, the test is whether there is a continuation of the corporate entity of the seller—not whether there is a continuation of the seller's business operation.

*Id.* (citations omitted).

22. Jurisdictions that have adopted the product-line rule include the following: California (*Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977)); New Jersey (*Ramirez v. Amsted Indus., Inc.*, 171 N.J. Super. 261, 408 A.2d 818 (Super. Ct. App. Div. 1979), *aff'd*, 86 N.J. 332, 431 A.2d 811 (1981)); Pennsylvania (*Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (1980)).

23. Michigan has adopted the continuation of the enterprise doctrine in *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976); *see infra* note 26 and accompanying text.

24. For example, the court in *Dawejko*, 434 A.2d at 107, 112, held the successor corporation liable for plaintiff's injuries caused by a defective product of the predecessor corporation under the product-line exception to the general rule.

25. *See Department of Transp. v. PSC Resources, Inc.*, 175 N.J. Super. 447, 419 A.2d

These two modern exceptions differ from the four traditional exceptions in several ways. First, unlike the traditional exceptions, the product-line and continuation of the enterprise rules did not arise from the need to protect corporate creditors or dissenting shareholders, or to facilitate tax assessment. Rather, the rules evolved in the product liability area as a means to provide relief to the victims of manufacturing defects. The courts developed the modern exceptions in recognition that: (1) unless liability can be imposed on the successor, the victim is without a remedy due to the predecessor's dissolution or inability to compensate the victim; (2) the purchasing corporation can assume the risk of injury better than the consumer of the product through various risk spreading measures employed when it acquires the seller's assets and by improvements of the product's quality; and (3) equitable factors, such as enjoyment of the seller's goodwill, favor the purchasing corporation retaining liability.<sup>26</sup>

Second, the focus of these exceptions is not the form of the transaction by which the successor acquires the business of the predecessor. In determining whether to impose liability on the successor, the courts are not limited to the determination of whether the successor corporation effectively becomes the selling corporation through the acquisition of not only the seller's assets, but its entire business as well.<sup>27</sup> Instead, the product-line and continuation of the enterprise rules emphasize the "practical effect of a particular corporate transaction [on third parties]."<sup>28</sup>

With respect to the specific elements of the modern exceptions, the crucial distinction between these exceptions and either the de facto-merger or the traditional continuation exceptions is that continuity of shareholders, directors, officers, and stock is not considered.<sup>29</sup> Thus, under the product-line rule, the courts consider whether the purchaser: (1) has acquired substantially all of the seller's assets, leaving no more than a corporate shell; (2) is holding itself out to the general public as a continuation of the seller by producing the same product line under a similar name; and (3) is benefiting from the seller's goodwill.<sup>30</sup> With respect to the continuation of the enterprise theory, the test, as developed in *Turner v. Bituminous Casualty Co.*,<sup>31</sup> is based upon three of the four factors forming the traditional de facto merger

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1151 (Super. Ct. Law Div. 1980) (product-line test invoked to find PSC liable as successor for water pollution attributable to the action of its predecessor).

26. See, e.g., *Kline v. Johns-Manville*, 745 F.2d 1217, 1219 (9th Cir. 1984) (product-line rule); *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1154 (1st Cir. 1974) (continuation of the enterprise theory); *Jacobs v. Lakewood Aircraft Serv., Inc.*, 512 F. Supp. 176, 182-83 (E.D. Pa. 1981) (product-line rule); *New Jersey Dep't of Env'tl. Protection v. Gloucester Env'tl. Management Servs., Inc.*, 28 Env't Rep. Cas. (BNA) 1397, 1399 (D.N.J. 1988) (product-line rule); *Ray v. Alad Corp.*, 560 P.2d at 5-6 (product-line rule); *Ramirez v. Amsted Indus., Inc.*, 431 A.2d at 820-22 (product-line rule); *Department of Transp. v. PSC Resources, Inc.*, 419 A.2d at 1162 (product-line rule).

27. Phillips, *supra* note 10, at 909.

28. *Polius v. Clark Equip. Co.*, 802 F.2d 75, 78 (3d Cir. 1986) (quoting *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 341-42, 431 A.2d 811, 816 (1981)).

29. *Martin v. Abbott Laboratories*, 689 P.2d 368, 387 (Wash. 1984).

30. See *Ray*, 560 P.2d at 8-9; *Ramirez*, 431 A.2d at 820-22; *Martin*, 689 P.2d at 387 (en banc) (construing *Ray*).

31. 397 Mich. 406, 244 N.W.2d 873 (1976).

exception:<sup>32</sup> (1) continuity of management, other personnel, physical location, assets, and general business operations (but not directors, officers or shareholders); (2) prompt dissolution of the seller corporation; and (3) the buyer's assumption of those liabilities and obligations necessary to continue normal business operations.<sup>33</sup>

At the state level, then, all states apply the general rule that, in an asset sale transaction, the purchaser does not automatically acquire the liabilities associated with the assets.<sup>34</sup> All states also admit the four traditional exceptions to this general rule in some form.<sup>35</sup> A few states, and primarily in the product liability area, have adopted additional modern exceptions which increase the likelihood that a successor corporation will be held liable for the actions of its predecessor.<sup>36</sup>

### B. Federal Common Law of Successor Liability

When confronted with the issue of whether successor liability should be imposed under a federal statute, the federal courts have sought to develop a uniform federal rule of successor liability that furthers the purposes of the particular statute.<sup>37</sup> In developing such a rule, the courts either have adopted the general rule of successor liability, as applied in the majority of the states,<sup>38</sup> or have created an independent federal rule of successor liability specifically tailored to further the purposes of the statute involved.<sup>39</sup> In CERCLA cases involving successor liability issues, the federal courts so far have adopted the first approach.<sup>40</sup> The second method has been used in employment discrimination and labor disputes under the National Labor Relations Act (NLRA),<sup>41</sup> the Civil Rights Act of 1866 (CRA),<sup>42</sup> and the Equal Employment Opportunity Act (EEOA)<sup>43</sup> and, in one notable environmental case, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>44</sup>

32. See *supra* note 14 and accompanying text.

33. *Turner*, 244 N.W.2d at 883-84; see also *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 175 (5th Cir. 1985) (explains continuity of enterprise theory as less radical departure from traditional corporate theory than product-line theory); *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1153-54 (1st Cir. 1974) (sets forth considerations justifying jury's treatment of successor as continuation of predecessor for purposes of imposing liability).

34. See cases cited *supra* note 33.

35. *Id.*

36. *Id.*

37. See *infra* notes 49-53 and accompanying text.

38. See, e.g., *United States v. Metropolitan Dist. Comm'n*, 16 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,621 (D. Mass. 1985) (court invokes traditional continuation exception to find Massachusetts Water Resources Authority liable for its predecessor's violations of Federal Water Pollution Control Act); *Goldstein v. Gardner*, 444 F. Supp. 581, 582-84 (N.D. Ill. 1987) (court invokes general rule of successor nonliability with traditional exceptions to find successor not liable for its predecessor's violations of the Securities Exchange Act); see also cases cited *infra* notes 59-129 and accompanying text.

39. See *infra* notes 49-53 and accompanying text.

40. See *infra* note 59.

41. 29 U.S.C. §§ 151-169 (1982 & Supp. IV 1986).

42. 42 U.S.C. § 1981 (1982).

43. *Id.* § 2000e-2(a)(1).

44. 7 U.S.C. §§ 136-136W (1982 & Supp. IV 1986).

The practical distinctions between these two approaches are two-fold, affecting the scope and actual uniformity of the federal rule a particular court adopts. With respect to the rule's scope, the federal courts generally have developed an independent federal rule when they have found the traditional rule of successor liability to be too narrow and limited.<sup>45</sup> Successor corporations potentially liable under such an independent rule may differ from those liable under a more traditional analysis.

Similarly, the actual uniformity of the rule is contingent upon which of the two approaches the court adopts. If the court adopts an independent rule and clearly states the elements necessary to find a successor liable, a consistent, bright-line rule provides clear guidance to corporations planning transactions. However, if the court simply adopts the general doctrine of successor liability as it has evolved in the majority of the states,<sup>46</sup> the federal rule's uniformity is contingent upon its evolution and application in the majority of the states, as subsequently applied by the federal courts. Consequently, as several of the CERCLA successor liability cases demonstrate,<sup>47</sup> a so-called uniform federal rule may be uniform in name only. The practical implication of such an approach for corporate transactions is the introduction of an additional element of uncertainty.

### 1. *Federal Court Development of an Independent Successor Liability Doctrine*

Primarily in the labor and employment discrimination areas, but also in one environmental case, the federal courts have developed federal common law of successor liability that generally combines the traditional exceptions and the more expansive continuation of the enterprise rule. In a labor case,<sup>48</sup> the United States Supreme Court, after reciting the general rule of successor liability and some of its traditional exceptions, observed that prevailing policies in the labor-law field necessitate the National Labor Relations Board's application of a broad successor liability doctrine.<sup>49</sup>

In determining whether a successor is liable for its predecessor's employ-

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45. See *infra* text accompanying note 53.

46. See *supra* notes 5-36 and accompanying text.

47. See cases cited *infra* notes 79-126 and accompanying text.

48. *Golden State Bottling Co. v. National Labor Relations Bd.*, 414 U.S. 168 (1973).

49. *Id.* at 182-83 n.5. The Court stated:

The perimeters of the labor-law doctrine of successorship, however, have not been so narrowly confined. Successorship has been found "where the new employer purchases a part or all of the assets of the predecessor employer, [and] where the entire business is purchased by the new employer. . . ." The refusal to adopt a mode of analysis requiring the Board to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the "employing industry," the public policies underlying the doctrine will be served by its broad application.

*Id.* (citations omitted). These policies, as the United States Court of Appeals for the Seventh Circuit succinctly explains in *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740 (7th Cir. 1985), are threefold: "First, an overriding federal policy against unfair and arbitrary employment practices is implicated. . . . Second, the victim of the illegal employment practice is helpless to protect his rights against an employer's change in the business. . . . Third, the successor can provide relief at a minimum cost." *Id.* at 746. Note the similarity between the last two poli-



ment-related violations, the federal courts have invoked a balancing test in which they consider: the successor's notice or lack thereof of the alleged violation; the predecessor's capacity to provide relief; the substantial continuity of the business operations; the buyer's use of the same plant, machinery, equipment, and production methods; the buyer's retention of the same employees (including supervisory personnel) in the same jobs and under substantially identical working conditions; and the buyer's production of the same product.<sup>50</sup> These elements, with the exception of the first, are quite similar to those applied in both of the modern exceptions. Thus, in the labor and employment discrimination areas, the federal courts have fashioned a federal rule of successor liability that goes beyond the generally accepted rule and its traditional exceptions and tends to broaden the universe of those who may be held liable for the actions of their predecessors.

In the environmental area, the United States Court of Appeals for the Ninth Circuit, in *Oner II, Inc. v. United States Environmental Protection Agency*,<sup>51</sup> apparently adopted a similarly broad successor liability rule. Although the court did not clearly define the elements of the rule it applied, the factors on which it relied to find Oner II liable as a successor are instructive. Specifically, the court pointed out that Oner II had notice of the outstanding fines that its predecessor, Del, owed the EPA; the president of Del was also the president of Oner II; the same personnel were retained; and the same business was conducted.<sup>52</sup> There appears to have been no continuity of stock, shareholders or directors, however, and Del did not dissolve. In finding Oner II liable, the court also relied heavily on the remedial purpose of the environmental laws: "The EPA's authority to extend liability to successor corporations stems from the purpose of . . . [FIFRA], which is to regulate pesticides to protect the natural environment."<sup>53</sup>

## 2. Federal Court Adoption of State Successor Liability Rules

Under a number of other federal statutes, the federal courts have deemed it appropriate to apply the traditional rules of successor liability as developed in the majority of the states.<sup>54</sup> The courts that have proceeded in this manner struggled to define a uniform federal rule of successor liability that furthers the policy objectives of the federal statute in the face of a number of variations in the state rules and exceptions.<sup>55</sup> The successor liability cases under CERCLA, discussed in the following section, are prime examples of the federal courts' attempt to deal with these issues.

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cies and policies advanced to support the modern exceptions. *Cf.* cases cited *supra* note 26 and accompanying text.

50. See generally *Trujillo v. Longhorn Mfg. Co.*, 694 F.2d 221, 223 (10th Cir. 1982) (claim based on CRA); *Equal Employment Opportunity Comm'n v. MacMillian Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974) (claim based on EEOA).

51. 597 F.2d 184 (9th Cir. 1979).

52. *Id.* at 186-87.

53. *Id.* at 186.

54. See cases cited *supra* note 38.

55. *Id.*

## II. SUCCESSOR LIABILITY UNDER CERCLA

With one exception,<sup>56</sup> federal courts have not seriously questioned the applicability of successor liability under CERCLA. In those decisions applying successor liability under CERCLA, the courts have uniformly found that the doctrine of successor liability furthers the remedial purposes of CERCLA and have applied the traditional rules of successor liability.<sup>57</sup> The EPA and the DOJ, however, continue to press for the application of the more expansive rules adopted by a minority of states.<sup>58</sup>

*A. Successor Liability Under CERCLA as Currently Applied by the Courts*

Those federal courts that have imposed successor liability under CERCLA agree that they should apply a uniform federal rule.<sup>59</sup> It is not a simple task, however, to extract the elements of a uniform successor liability rule from these decisions. Rather than develop an independent, carefully tailored rule for application under CERCLA, the courts have attempted to synthesize a uniform rule from the law as it is generally applied in the states on a more or less ad hoc basis.<sup>60</sup>

This approach has several practical consequences that are troubling. At

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56. See *Anspec Co. v. Johnson Controls, Inc.*, 1989 Hazardous Waste Litig. Rep. (Andrews Publications) 18,126 (E.D. Mich. 1989). After rejecting *Smith Land & Improvements Corp. v. Celotex Corp.*, 851 F.2d 86, 93 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 837, 102 L. Ed. 2d 969 (1989), and its progeny, the *Anspec* court held that successor liability under CERCLA is "unnecessary." 1989 Hazardous Waste Litig. Rep. at 18,127. For further discussion of *Smith Land*, see *infra* notes 63-69 and accompanying text. In so holding the court reasoned that, contrary to the *Smith Land* court's assumption that Congress intended the courts to develop a federal common law for all of CERCLA's provisions, Congress meant for the courts to develop a federal common law for only those provisions of CERCLA that are ambiguous. 1989 Hazardous Waste Litig. Rep. at 18,127. Consequently, because the court found CERCLA's provision explicitly limiting potentially liable parties to generators, transporters, and past and present owners or operators to be unambiguous, it was precluded from applying the common law of successor liability to find the defendants (successor corporations of owners and operators) liable under CERCLA because of their successor status. *Id.*

57. See cases cited *infra* notes 63-68 and accompanying text.

58. Compare *infra* Section II.A (discussion of the federal courts application of successor liability in CERCLA cases) with *infra* Section II.B (discussion of the EPA's and the DOJ's position vis-a-vis the appropriate scope of successor liability under CERCLA). A number of commentators have criticized the EPA's policy, arguing that successor liability under CERCLA should be limited to the traditional rules. See, e.g., Barnard, *EPA's Policy of Corporate Successor Liability Under CERCLA*, 6 STAN. ENVTL. L.J. 78 (1986-87) (arguing against an expansive rule of successor liability under CERCLA); Burach & Brown, *EPA's Policy on Corporate Successor Liability Under Superfund*, 9 Chem. & Radiation Waste Litig. Rep. (Chem. & Radiation Waste Litig. Rep.) 649 (1985) (criticizing equities of EPA's policy); Spracker, *Corporate and Liability Consequences of Acquiring Environmental Sensitive Properties*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,364 (1988) (analyzing policy reasons against expanded successor liability under CERCLA).

59. See, e.g., *Smith Land & Improvements Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 837, 102 L. Ed. 2d 969 (1989); *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1010, 1013-14 (D. Mass. 1989); *United States v. Bliss*, Nos. 84-2086C(1), 87-1558C(1), 84-1148C(1), 84-2092C(1), slip op. at 13-14 (E.D. Mo. Sept. 27, 1988); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 1989 Hazardous Waste Litig. Rep. (Andrews Publications) 17,239, 17,305 (W.D. Wash. 1989).

60. *Smith Land*, 851 F.2d at 91-92.

best, the federal courts would be engaged in the task of defining general rules of successor liability under CERCLA by reconciling or choosing from among several state variations. In practice, however, the courts usually have ignored the differences among the states and have simply determined that the rule applied in the interested state is sufficiently representative of the general rule to be accepted as a guide for the rule of decision in the instant case.<sup>61</sup> The result is a degree of unpredictability in the elements of a given exception, especially the traditional continuation of the business exception, that a deciding court will apply.

To further complicate the matter, the courts in CERCLA cases have frequently justified their adoption of the rule of decision with policy arguments substantially similar to those enunciated for adopting the modern successor liability rules for asset transactions, while restricting the exceptions actually applied to the four traditional exceptions.<sup>62</sup> Accordingly, it is difficult to predict whether the courts, in an appropriate case, would limit successor liability to the traditional exceptions or would expand it beyond these boundaries. The federal courts have not yet squarely addressed a case in which one or more of the elements of the traditional exceptions were absent but in which each element of one of the modern exceptions was present.

### 1. Policy Basis for Applying Successor Liability Under CERCLA

As the United States Court of Appeals for the Third Circuit noted in *Smith Land & Improvement Corp. v. Celotex Corp. (Smith Land)*,<sup>63</sup> CERCLA does not explicitly require the imposition of successor liability.<sup>64</sup> In finding that successor liability nevertheless furthers the goals of CERCLA, that court explained that congressional intent favored successors bearing the costs, inasmuch as successor corporations enjoy both the benefits of using pollutants and of failing to employ non-hazardous disposal methods.<sup>65</sup>

In a number of subsequent decisions concerning successor liability under

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61. *Id.* at 92.

62. For discussion of four exceptions, see *supra* notes 7-9 and accompanying text.

63. 851 F.2d at 86.

64. The court stated that "CERCLA failed to address many important issues, including corporate successor liability." *Id.* at 91.

65. *Id.* at 91-92. In supporting the application of traditional concepts of successor liability, the court reasoned:

Just as there is liability for ordinary torts or contractual claims, the obligation to take necessary steps to protect the public should be imposed on a successor corporation.

....

Congressional intent supports the conclusion that, when choosing between the taxpayers of a successor corporation, the successor should bear the cost. Benefits from use of the pollutant as well as savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, its successors, and their respective stockholders and accrued only indirectly, if at all, to the general public. We believe it in line with the thrust of the legislation to permit—if not require—successor liability under traditional concepts.

*Id.*

CERCLA, the courts have invoked the *Smith Land* court's rationale.<sup>66</sup> After quoting *Smith Land* at length, the United States District Court for Massachusetts in *In re Acushnet River & New Bedford Harbor (Acushnet)*<sup>67</sup> added that Congress certainly did not intend to deny the government recourse against polluters simply because intervening transactions might make the corporate entity that caused the pollution unavailable to meet the costs of remediation.<sup>68</sup>

These statements of policy upon which the courts have based the application of successor liability under CERCLA more closely parallel those supporting the modern rules than the traditional rules. The courts clearly are not imposing successor liability under CERCLA for the limited purposes of protecting minority shareholders and facilitation of tax assessment, although it could be argued that an environmental claimant represents a creditor of the corporation that deserves protection in the same way the traditional rules sought to protect creditors. Rather, the courts appear to view the innocent third party injured or threatened by environmental contamination in the same light as the innocent consumer for whose protection the courts created the product-line and continuation of the enterprise exceptions.<sup>69</sup>

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66. See *Acushnet*, 712 F. Supp. at 1013. The court in *United States v. Crown Roll Leaf, Inc.*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,260 (D.N.J. 1988), said:

As the *Smith [Land]* court explained, the economic benefits the predecessor corporation reaped from creating toxic pollutants as well as the savings resulting from the failure to use more costly non-hazardous disposal methods "inured to the original corporation, its successors and their corporate stockholders." Thus, those parties responsible under CERCLA include all current owners and operators of corporations which generate hazardous substances regardless of whether they owned or operated the facility when hazardous waste was disposed of at the site in question.

*Id.* at 20,265; see *Michigan v. Thomas Solvent Co.*, Nos. K86-164, K86-167, slip op. at 23 (W.D. Mich. Dec. 2, 1988) (court reasoned that "the equities favor successor liability here, as in other successor liability contexts, because it is the successor corporations who have benefited from any polluting practices of their predecessor); *United States v. Bliss*, Nos. 84-2086C(1), 87-1558C(1), 84-1148C(1), 84-20926(1), slip op. at 14 (E.D. Mo. Sept. 27, 1988) (imposing successor liability furthers "CERCLA's policy of placing the burden of response costs upon responsible parties rather than the public at large").

67. 712 F. Supp. 1010 (D. Mass. 1989).

68. *Id.* at 1014. The court reasoned:

A paper transaction should not furnish a shield suitable to deflect CERCLA liability for environmental transgressions preceding the transaction. Yet, in the absence of successor liability, the government may find itself without any practical recourse against polluters where, as here, the predecessor corporation is long disbanded, its assets long disbursed, and its shareholders difficult if not impossible to locate should they be held personally liable in any way. Congress could not have intended such a result.

*Id.*; accord *Michigan v. Thomas Solvent Co.*, Nos. K86-164, K86-167, slip op. at 23 (W.D. Mich. Dec. 2, 1988). The court explained:

The historical basis for imposing successor liability is founded upon principles of equity that seek to prevent creditors of the original corporation from being left without a remedy while the corporation escapes responsibility by transferring its assets into a new form. There is no reason why a corporation should escape liability for costs that their pollution imposes on society. Where federal law assigns responsibility for restitution costs, principles of equity support leaving a remedy available for the government on behalf of society.

*Id.*

69. See *supra* notes 22-36 and accompanying text.

## 2. *Federal Uniform Rule of Successor Liability Under CERCLA*

Although there have been only a handful of decisions in which courts have discussed and applied the various successor liability doctrines under CERCLA, the following examination of these decisions provides some insight as to the pertinent elements of the evolving rules.

### a. *Statutory Mergers and Consolidations*

Both of the two reported decisions that have addressed the imposition of CERCLA liability on a corporation that becomes a successor through either statutory merger or consolidation found the corporate successors liable, following the rule universally applied in the states.<sup>70</sup> In addition to establishing a simple rule for statutory mergers and consolidations (i.e., a corporation that either merges or consolidates with a responsible party is accountable for its predecessor's CERCLA liabilities<sup>71</sup>), *Smith Land* is important because it is the only federal appellate court decision on the successor liability issue under CERCLA. Therefore, several district courts have looked to it for guidance in determining whether to find a successor liable in an asset sale.<sup>72</sup>

### b. *Asset Transactions*

While there have been only a few decisions addressing successor liability after an asset transaction, the courts in these cases, following the lead of *Smith Land* in the merger and consolidation context, have uniformly held that the general rule of successor liability as it has evolved in the majority of jurisdictions should be applied under CERCLA.<sup>73</sup> Under CERCLA, therefore, the courts have adopted the general rule—the successor is not liable if it only purchases the assets of the predecessor—together with its four traditional exceptions.<sup>74</sup>

As in most state cases on the issue of successor liability, the federal courts in these CERCLA cases have focused on the de facto merger and the traditional continuation of the business exceptions in finding successor corporations liable.<sup>75</sup> The federal courts, however, have not uniformly applied the traditional continuation of the business exception or, to a lesser extent, the de facto-merger exception, which, unlike the simple rule adopted for statutory mergers and consolidations, are not standardized among the states.<sup>76</sup> This is because the federal courts, after determining that the interested

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70. See *Smith Land*, 851 F.2d at 92 ("The general doctrine of successor liability in operation in most states should guide the court's decision rather than the excessively narrow statutes which might apply in only a few states."); *Crown Roll Leaf, Inc.*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,265 (court follows *Smith Land* and finds Crown Roll Leaf, Inc., which had merged with responsible party, liable under CERCLA because of its successor status).

71. *Smith Land*, 851 F.2d at 92.

72. See generally *Acushnet*, 712 F. Supp. at 1013 (court follows Third Circuit's "compelling" resolution of the issue in *Smith Land*).

73. See *infra* notes 79-129 and accompanying text.

74. See *supra* text accompanying notes 7-9.

75. See *infra* notes 79-129 and accompanying text.

76. *Id.*

state's successor liability law conforms to the generally accepted rule, typically invoke the applicable exception as it has evolved in the interested state, giving little if any attention to whether the interested state's formulation of the rule contains or lacks specific elements that other states use in their formulations.<sup>77</sup> Furthermore, in a number of cases, rather than turn to a particular state's construction of the general rule, the courts have applied another federal court's formulation of the general rule.<sup>78</sup>

(i) *De Facto-Merger Exception*. There have been three decisions involving a successor's liability under CERCLA in which the courts have discussed the de facto-merger doctrine in detail.<sup>79</sup> In all of these cases, the courts found that the generally accepted four-factor de facto-merger test<sup>80</sup> should govern the determination of whether successor liability should be imposed under CERCLA. Of these three, however, only one—*Acushnet*<sup>81</sup>—provides sound guidance as to application of the four-factor test in a CERCLA case. In *Ametek, Inc. v. Pioneer Salt & Chemical Co.*<sup>82</sup> the United States District Court for the Eastern District of Pennsylvania merely set forth the appropriate test and deferred any analysis of its applicability to trial.<sup>83</sup> Although, in *United States v. Vertac Chemical Corp.*,<sup>84</sup> the United States District Court for the Eastern District of Arkansas applied the de facto-merger doctrine, the court's findings<sup>85</sup> have no legal validity after the Eighth Circuit Court of Appeals vacated the decision on the grounds that the alleged successor corporation was not properly joined as a party in the lower court, and thus had not been given a sufficient opportunity to present evidence.<sup>86</sup> Consequently, the following discussion will focus on the *Acushnet* decision.

In *Acushnet* the United States District Court for Massachusetts applied the four-factor de facto-merger test to find the successor liable under CERCLA.<sup>87</sup> The underlying transaction was a stock-for-assets exchange involving RTE Corporation (RTE), Aerovox, and Aerovox Industries, Inc. (A.I.). Pursuant to the purchase agreement, Aerovox, a newly created, wholly-owned subsidiary of RTE, acquired "all of [A.I.'s] assets, property, and rights of any kind . . . [and] assume[d] all of [A.I.'s] balance sheet liabilities. . . . [But] Aerovox specifically disclaimed any liability arising out of

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77. *Id.*

78. See *infra* text accompanying notes 111-112.

79. See *Acushnet*, 712 F. Supp. at 1015-19; *Ametek, Inc. v. Pioneer Salt & Chem. Co.*, 709 F. Supp. 556, 559-60 (E.D. Pa. 1988); *United States v. Vertac Chem. Corp.*, 671 F. Supp. 595, 615-16 (E.D. Ark. 1987), *vacated on procedural grounds without reported opinion*, 855 F.2d 856 (8th Cir. 1988).

80. See *supra* note 14 and accompanying text.

81. 712 F. Supp. at 1010.

82. 709 F. Supp. 556 (E.D. Pa. 1988).

83. *Id.* at 559-60.

84. 671 F. Supp. 595 (E.D. Ark. 1987), *vacated on procedural grounds without reported opinion*, 855 F.2d 856 (8th Cir. 1988).

85. The district court found the successor corporation liable under the de facto-merger exception. 671 F. Supp. at 615-17. The court also held that the successor corporation was liable under the continuation of the business and fraud exceptions. *Id.* at 614-15, 617-18.

86. *Inter-Ag Corp. v. Vertac Chem. Corp.*, No. 87-2260, slip op. at 3 (8th Cir. Apr. 25, 1988).

87. *Acushnet*, 712 F. Supp. at 1015-17.

[A.I.'s] use or disposal of polychlorinated biphenyls (PCBs)."<sup>88</sup> In exchange, A.I. acquired one share of RTE stock for each share of A.I. stock outstanding. Additionally, A.I. agreed "to liquidate and dissolve promptly after the transfer of assets, and to distribute the RTE shares to its shareholders on a pro rata basis."<sup>89</sup>

In holding Aerovox liable as a successor to A.I., the court had little difficulty finding two of the four factors satisfied.<sup>90</sup> First, in concluding that there was a continuity of the enterprise, the court relied on a number of indicators: the officers of A.I. became the officers and directors of Aerovox; the middle management and employees of A.I. and Aerovox were substantially the same; and furthermore, Aerovox continued the production of the same products, using the same manufacturing facilities, product name, banking institutions, and insurance company.<sup>91</sup> In finding continuity of the enterprise, the court rejected Aerovox's assertion that continuity did not exist, because it ceased manufacturing PCB-filled capacitors and had discontinued some products and added others.<sup>92</sup> The court explained that Aerovox's main business continued to be the manufacture of capacitors, and that there was no evidence that eliminating PCBs from the capacitors "fundamentally altered the quality or capability of the capacitors or the market place's perceptions of the product."<sup>93</sup>

Second, with respect to the assumption of the seller's obligations necessary to continue the seller's business operations without interruption, the court concluded:

Aerovox clearly assumed all those obligations of [A.I.] necessary for it to continue [A.I.'s] normal business operations uninterrupted. Under the terms of the 1978 agreement, Aerovox assumed all [A.I.'s] balance sheet liabilities and agreed to perform all its written contracts. The only liability specifically excluded was liability arising from [A.I.'s] use and disposal of PCBs.<sup>94</sup>

With respect to the third factor, continuity of shareholders, the issue was more complex, but the court determined that this element was also satisfied, rejecting Aerovox's assertion that, since A.I. had received shares not of the buyer (Aerovox) but of the buyer's parent (RTE), the requisite continuity was missing.<sup>95</sup> The court explained that, under the rule there was no logical reason for the court to require that the shares traded for the seller's assets be only those of the purchasing corporation.<sup>96</sup> Otherwise, the court reasoned, a corporation desiring to buy the assets of another company with shares of stock could always avoid the risk of liability pursuant to the de facto-merger doctrine by simply creating a wholly-owned subsidiary to act as a

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88. *Id.* at 1012.

89. *Id.*

90. *Id.* at 1015.

91. *Id.* at 1015-16.

92. *Id.* at 1015 n.8.

93. *Id.*

94. *Id.* at 1016.

95. *Id.*

96. *Id.* at 1017.

purchaser.<sup>97</sup>

With respect to the fourth requirement, the seller's dissolution, the court found that the seller had also satisfied this element, noting that A.I. did in fact liquidate and dissolve immediately after the transaction.<sup>98</sup> Three years after its dissolution, however, over the objection of interested parties, the Secretary of State of Massachusetts revived A.I. for the limited purpose of defending the litigation. Thus, despite A.I.'s continued existence as a technical matter, A.I. had made every effort to terminate its corporate existence. In sum, following its analysis of each of the four factors, the court concluded that as a successor to A.I., Aerovox was liable under CERCLA because the transaction was essentially a *de jure* merger.<sup>99</sup>

Although the four factors underlying the *de facto*-merger exception are clearly established, the *Acushnet* decision demonstrates that, in determining whether the specific circumstances satisfy any one element, the particular limits of each element are flexible.<sup>100</sup> For example, with respect to the continuity of enterprise factor, the court in *Acushnet* found that this element was met although the successor corporation did not manufacture PCB-filled capacitors as did its predecessor.<sup>101</sup> The *Acushnet* court also found that there was a continuity of shareholders even though the selling corporation received shares of the purchaser's parent rather than the purchaser.<sup>102</sup> Finally, the *Acushnet* court found that the dissolution requirement had been satisfied because the seller had been revived solely for the purposes of the litigation.<sup>103</sup> Thus, where the facts do not neatly satisfy one of the four elements, the courts may stretch the literal terms of the element to find substantial satisfaction of the factor in question.

(ii) *Continuation of the Business Exception.* As previously shown, in developing a uniform federal rule, the courts have drawn upon the laws of the various states that they have determined to be representative.<sup>104</sup> With respect to the particular elements of the traditional continuation of the business exception applicable under CERCLA, the federal courts have applied

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97. *Id.* at 1016. Although the court concluded, on these facts, that this form of transaction did not insulate the purchasing corporation that exchanged its parent corporation's stock for the transferor's assets, it opined that under certain circumstances such a transaction is "an effective way for [the parent] to protect itself from liability." *Id.* at 1017. This dictum is based on the court's prior decision in which, after considering the underlying facts, it rejected the United States' position that the court should "pierce the corporate veil of Aerovox [purchasing corporation] in order to assert jurisdiction over RTE [parent corporation of Aerovox]." *In re Acushnet River & New Bedford Harbor*, 675 F. Supp. 22, 30 (D. Mass. 1987).

98. *Acushnet*, 712 F. Supp. at 1017-18.

99. The court noted, however, that because "*de facto* merger is an equitable doctrine . . . it is appropriate under the circumstances, so long as no additional burden of proof is placed upon the plaintiffs, to require that the assets of [A.I.] must first be looked to to satisfy any damages resulting from the releases of [A.I.]" *Id.* at 1019.

100. See *supra* notes 81-99 and accompanying text.

101. 712 F. Supp. at 1015.

102. *Id.* at 1016-17.

103. *Id.* at 1018. Similarly, in *Vertac* the court found that the dissolution requirement had been satisfied although the seller did not dissolve but had continued its existence as a shell company. 671 F. Supp. 595, 616 (E.D. Ark. 1987), *vacated on procedural grounds without reported opinion*, 855 F.2d 856 (8th Cir. 1988).

104. See *supra* notes 38-40 and accompanying text.



various combinations of the factors that make up the traditional test. Unfortunately, this approach has generated a federal rule, the specific elements of which are uncertain.

In *United States v. Bliss*<sup>105</sup> the United States District Court for the Eastern District of Missouri simply adopted the successor liability rules applied in Missouri. The court held that the successor liability doctrine applied, and it further concluded that the successor corporation to an unincorporated waste transportation business was liable under CERCLA.<sup>106</sup>

The facts in *Bliss* were that: (1) two of the three officers, directors, and sole shareholders of the successor corporation were the former owners of the unincorporated business and the third officer, director, and shareholder was a former employee of the unincorporated business; (2) the business operations continued unchanged; (3) the successor corporation used the same office, trucks, and employees as its predecessor; (4) the successor retained the same customers; and (5) the successor presented itself as a continuation of its predecessor by advertising that it had been in business for over forty years and continuing to use its predecessor's decals on the side of at least one of its trucks.<sup>107</sup> The presence of these factors had previously led the Supreme Court of Missouri, under Missouri law, to find the successor corporation responsible for liability resulting from its predecessor's hazardous waste management and disposal practices.<sup>108</sup> Under the Missouri law, as stated by the Missouri Supreme Court, it is uncertain which of these factors is controlling because:

The general rule is that where one corporation sells, or otherwise transfers, its assets to another corporation, and the circumstances are such that the purchasing corporation is a continuance of the selling corporation, the purchasing corporation *ipso facto* is liable for the debts and liabilities of the selling corporation.<sup>109</sup>

The federal court, under the doctrine of collateral estoppel, applied Missouri's successor liability standard as its rule of decision, explaining that the circumstances warranted imposition of liability in order to further CERCLA's policy of holding the responsible party liable for response costs rather than the general public.<sup>110</sup>

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105. Nos. 84-2086C(1), 87-1558C(1), 84-1148C(1), 84-2092C(1), slip op. at 13-14 (E.D. Mo. Sept. 27, 1988).

106. The *Bliss* court's holding that the doctrine of corporate successor liability applied where the predecessor was an unincorporated entity is contrary to the contemporaneous holding of the court in *United States v. Mottolo*, 695 F. Supp. 615 (D.N.H. 1988), which found the doctrine inapplicable. However, the issue may not be of profound significance under many fact patterns. The *Mottolo* court itself imposed liability through application of the alter ego doctrine while indicating that, if applicable, the successor liability doctrine's requirements also would have been met. *Id.* at 624-25 n.5.

107. *Jerry-Russell Bliss, Inc. v. Hazardous Waste Management Comm'n*, 702 S.W.2d 77, 83 (Mo. 1985) (en banc) (Missouri court decision on state law claims in the same case).

108. *Id.*

109. *Id.* at 82.

110. The district court stated:

The Missouri doctrine of corporate successor liability is consistent with generally recognized common law principles of successor liability. Imposition of successor liability under the circumstances permitted under Missouri law would

The United States District Court for the Western District of Michigan in *Michigan v. Thomas Solvent*<sup>111</sup> drew on a different source by applying the traditional continuation of business exception as it was stated by the Eighth Circuit in *Tucker v. Paxson Machine Co.*<sup>112</sup> Courts have used this manner of application elsewhere.<sup>113</sup> The test emphasizes only three key factors: (1) continuity of shareholders; (2) continuity of directors, and (3) continuity of officers.<sup>114</sup>

In *Thomas Solvent*<sup>115</sup> the predecessor company operated an industrial solvent distribution and transportation business out of five facilities. In 1982, the Michigan Department of Natural Resources notified Thomas Solvent Company that two of its five facilities were suspected sources of groundwater contamination. Shortly thereafter, Thomas Solvent Company reorganized through the creation of four additional corporate entities: Thomas Solvent Company of Detroit, Inc., Thomas Solvent Company of Muskegon, Inc., Thomas Solvent Inc. of Indiana, and TSC Transportation, Inc. (collectively, the spinoff companies).

Richard Thomas and his mother (two of the three directors of Thomas Solvent Company) became the sole directors of the spinoff companies; Richard Thomas (who was also president of Thomas Solvent Company) became the president of each of the spinoff companies. Thomas Solvent Company subsequently transferred all of its assets, with the exception of the two facilities that allegedly were causing the groundwater contamination, to the spinoff companies. In return, the spinoff companies' stock was issued to Richard Thomas,<sup>116</sup> as trustee of his living trust.<sup>117</sup> Thomas Solvent Company itself retained none of the consideration paid for its assets.

Following the reorganization, Richard Thomas continued to manage Thomas Solvent Company and the spinoff companies. The spinoff companies retained substantially the same employees and provided the same products and services. The spinoff companies also continued to do business with the former customers of the Thomas Solvent Company's branch operations. In 1984, confronted with a court order requiring it to initiate containment

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further CERCLA's policy of placing the burden of response costs upon responsible parties rather than the public at large.

*Bliss*, Nos. 84-2086C(1), 87-1558C(1), 84-1148C(1), 84-2092C(1), slip op. at 14 (citations omitted).

111. Nos. K86-164, K86-167, slip op. at 21-22 (W.D. Mich. Dec. 2, 1988).

112. 645 F.2d 620, 625-26 (8th Cir. 1981). *Tucker* was a products liability case in which the federal court, sitting in diversity, refused to find that a Missouri court would apply either of the modern exceptions to the general rule.

113. See, e.g., *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458-59 (11th Cir. 1985); *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 693 (1st Cir. 1984); *Leannis v. Cincinnati, Inc.*, 565 F.2d 437, 440 (7th Cir. 1977); see also *United States v. Vertac Chem. Co.*, 671 F. Supp. 595, 614-15 (E.D. Ark. 1987), *vacated on procedural grounds without reported opinion*, 855 F.2d 856 (8th Cir. 1988).

114. *Tucker*, 645 F.2d at 625-26.

115. Nos. K86-164, K86-167, slip op. at 3.

116. The stock of Thomas Solvent, Inc. of Indiana was initially issued to Thomas Solvent Company, but very shortly thereafter was transferred to Richard Thomas' Living Trust.

117. The Trust, therefore, owned 100% of the stock of Thomas Solvent Company and each of the spinoff companies.

and remediation activities and with liability for the costs of EPA's remedial action already taken to contain and clean up the groundwater contamination, Thomas Solvent Company filed bankruptcy. Thomas Solvent's liquidation generated an amount insufficient to meet these liabilities.

In finding the spinoff corporations liable because of their successor status, the United States District Court for the Western District of Michigan invoked the three-factor test discussed above.<sup>118</sup> By limiting its inquiry to the continuity of shareholders, directors, and officers,<sup>119</sup> the court concluded it was immaterial that Thomas Solvent Company did not dissolve after the reorganization, and that each of the spinoff companies performed discreet functions and was located in a separate geographical area.<sup>120</sup>

In *United States v. Stringfellow*<sup>121</sup> the United States District Court for the Central District of California applied a different variation of the traditional continuation of the business exception. Specifically, the court applied California's formulation of the traditional rule, which requires either that no consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors, or that one or more persons were officers, stockholders, or directors of both corporations.<sup>122</sup>

The United States District Court for the Western District of Washington in *Louisiana-Pacific Corp. v. ASARCO, Inc.*<sup>123</sup> applied yet another variation of the traditional continuation of the business exception drawn from Washington law. In addition to continuity of officers, directors, and stockholders, this formulation requires that the consideration to the seller be inadequate.<sup>124</sup> This variation is in contrast to California's formulation, which requires one or the other element to be present, and to the *Tucker* version which focuses only on the identity of personnel.<sup>125</sup>

In *ASARCO, Inc.*,<sup>126</sup> L-Bar Products, Inc. (L-Bar) acquired substantially all of the assets of Industrial Mineral Products, Inc. (IMP). Prior to the acquisition, IMP processed and marketed smelter slag from a copper mill that ASARCO owned. L-Bar neither continued IMP's slag business, nor used the equipment at ASARCO. Furthermore, L-Bar did not purchase IMP's stock or its name. L-Bar hired a number of IMP's officers and employees; however, most of them resigned and those that remained assumed

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118. Although the court did not specifically consider the fraud exception, it did find that the conveyance was fraudulent under Michigan law. Nos. K86-164, K86-167, slip op. at 18. Thus, if the court had not found the continuation of the business exception applicable, the court might well have relied on the fraud exception.

119. Even though the court did not discuss the adequacy of consideration as pertinent to its determination of successor liability, it is evident that the consideration was inadequate. Thomas Solvent Company retained none of the sale proceeds.

120. Nos. K86-164, K86-167, slip op. at 22.

121. No. CV-83-2501-MML, slip op. at 3-5 (C.D. Cal. Feb. 21, 1984).

122. *Id.* at 4.

123. 1989 Hazardous Waste Litig. Rep. (Andrews Publications) 17,304 (W.D. Wash. 1989).

124. *Id.* at 17,305.

125. 645 F.2d 620, 625-26 (8th Cir. 1981).

126. 1989 Hazardous Waste Litig. Rep. (Andrews Publications) at 17,304.

substantially different positions than the ones they filled while employed by IMP. Finally, the plaintiff failed to show that the consideration was inadequate. The court, therefore, concluded that the elements necessary for the traditional continuation of the business exception were not satisfied.<sup>127</sup>

In sum, although the federal courts have sought to establish a uniform federal rule of successor liability under CERCLA, they have not yet developed a traditional continuation of the business exception that is uniform among the federal courts in terms of its constituent elements.<sup>128</sup> The most generally accepted, and the simplest, formulation of the exception seems to be the *Tucker* test, which focuses solely on identity of certain key personnel and stockholders.<sup>129</sup> Since some courts, however, do look to the law of the interested state and apply a test that requires the consideration of additional factors, examination of the adequacy of the consideration in the transaction or the dissolution of the predecessor corporation, a corporation structuring an asset transaction should be cognizant of each of these factors in order to minimize potential successor liability.

### *B. Efforts to Expand Successor Liability Under CERCLA Beyond the Traditional Rule*

#### *1. The EPA's and the DOJ's Arguments for Expansion of Successor Liability Under CERCLA*

Although the federal courts to date have limited corporate successor liability to the general rule and its traditional exceptions in CERCLA cases, there is pressure from other sources to expand liability beyond these constraints. For example, the EPA maintains the position that successor liability for asset transactions under CERCLA should not be limited to the traditional exceptions.<sup>130</sup> The EPA advocates the adoption of the continuity of business operations exception that the federal courts developed for matters arising under the NLRA, CRA, EEOA, and FIFRA, in addition to the traditional exceptions.<sup>131</sup> As noted above, this exception is similar to the modern product-line and continuation of the enterprise exceptions.<sup>132</sup> The EPA contends that if a successor corporation continues substantially the same business operations of its predecessor, then it should also be held liable

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127. *Id.* at 17,306. Also, in rejecting the fraud exception, the court explained that the purchase agreement provided for IMP's payment and/or indemnification of the cleanup costs, and there was evidence that the liquidation trust still in existence on behalf of the shareholders of IMP might contain sufficient assets in the form of an outstanding note of \$1.3 million to pay an actual liability. *Id.*

128. This lack of uniformity is more troublesome when one considers that the courts in *Bliss* and *Mottolo* did not agree on the preliminary issue of whether the doctrine of successor liability even applied to a situation where the predecessor was an unincorporated business entity. See *supra* note 105 and accompanying text.

129. 645 F.2d at 625-26.

130. EPA Memorandum, *Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)* 11 (June 13, 1984) [hereinafter EPA Memo].

131. See *supra* notes 48-53 and accompanying text.

132. See EPA Memo, *supra* note 130, at 11 and text accompanying *supra* note 130.

under CERCLA.<sup>133</sup> The EPA, however, neither identifies the specific elements of the continuity of business operations rule it would have applied, nor discusses in detail the policy basis for the application of such a rule under CERCLA. Despite criticism of its approach,<sup>134</sup> the EPA continues to adhere to its position.<sup>135</sup>

The DOJ has supported EPA's position in a number of briefs, asserting that the application of an expansive successor liability rule is appropriate under CERCLA.<sup>136</sup> In a memorandum filed in *United States v. Allied Chemical Corp.*<sup>137</sup> the DOJ attempted to clarify the elements of and policy basis for a continuity of business operations exception under CERCLA.

The DOJ's argument relied on two policy objectives. First, the DOJ concluded from CERCLA's strict liability standard that "Congress intended to shift the costs of remedying the problems created at waste sites away from the public to industries that were responsible for creating dangerous conditions or that profited from activities at the sites."<sup>138</sup> Consequently, the DOJ contends that permitting a successor to exploit corporate laws undermines the intent of CERCLA.<sup>139</sup> Second, the DOJ maintains that the adoption of a broad successor liability rule will force purchasing corporations to evaluate their predecessors' environmental practices, thereby advancing the statutory goal that businesses internalize the costs of responsibly disposing of hazardous substances.<sup>140</sup>

Based on these policy objectives, the DOJ has asserted, as the Ninth Circuit found in *Oner II, Inc. v. United States Environmental Protection Agency*,<sup>141</sup> that the development of an independent general federal rule for successor liability under CERCLA consistent with the *Golden State Bot-*

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133. As EPA points out, a lower court in New Jersey has specifically found the product-line exception applicable to environmental liabilities. EPA Memo, *supra* note 130, at 14 (citing *New Jersey Transp. Dep't v. PSC Resources, Inc.*, 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980)).

134. *See, e.g.*, Barnard, *supra* note 58, at 78; Burack & Brown, *supra* note 58, at 649; Spracker, *supra* note 58, at 10,364.

135. Telephone interview with EPA staff attorney, Office of Enforcement and Compliance Monitoring (Sept. 21, 1989).

136. *See, e.g.*, Joint Motion of Plaintiffs for Summary Judgment on Fraudulent Conveyance and Successor Corporation Claims, *Mihigan v. Thomas Solvent Co.*, Nos. K86-164, K86-167, at 42-44 (W.D. Mich. Dec. 2, 1988) (filed Feb. 5, 1988); Memorandum of Points and Authorities of the United States in Opposition to Motion of Chemical & Pigment Company for Partial Summary Judgment and in Support of Cross-Motion of United States for Partial Summary Judgment, *United States v. Allied Chem. Corp.*, Nos. C-83-5898JPV, C-83-5896JPV, at 15 (N.D. Cal. May 27, 1987) (filed Mar. 12, 1987) [hereinafter DOJ Memo].

137. Nos. C-83-5898JPV, C-83-5896JPV (N.D. Cal. May 27, 1987).

138. DOJ Memo, *supra* note 136, at 20.

139. *Id.* at 20-21. The DOJ asserted:

[W]here the successor corporation takes up and continues the business of its predecessor . . . allowing the successor to exploit principles of corporate law that were fashioned for other reasons and thereby evade liability would defeat the purposes of CERCLA, and thwart the Congressional intent to shift the costs of injury away from the public.

*Id.*

140. *Id.* at 21-22.

141. 597 F.2d 184, 186-87 (9th Cir. 1975).

ting<sup>142</sup> approach is warranted.<sup>143</sup> However, the DOJ also has identified the specific approach adopted in *New Jersey Department of Transportation v. PSC Resources*<sup>144</sup> (essentially the modern product-line exception) as appropriate under CERCLA.<sup>145</sup> Under *PSC Resources* a successor is liable for the damages resulting from environmental discharges that are attributable to its predecessor when the successor corporation acquires all or substantially all of a predecessor's assets for cash, and the successor corporation continues essentially the same operation as its predecessor corporation.<sup>146</sup>

In sum, the EPA and the DOJ have clearly staked out the position that successor liability under CERCLA following asset transactions should not be limited by the traditional rules. The DOJ and the EPA complicate their argument, however, by treating as interchangeable the independent federal rules adopted in such cases as *Golden State Bottling* with the modern state exceptions to liability applied in such cases as *PSC Resources*. As noted earlier, the specific elements of these approaches differ.<sup>147</sup> Moreover, the policy reasons on which the independent federal rules and the modern state exceptions are based do not necessarily complement those underlying CERCLA.<sup>148</sup> Ironically, the federal courts have tended to accept the EPA's and the DOJ's views as to the policy reasons for successor liability under CERCLA, but have not carried this to its logical conclusion by adopting the modern exceptions.

## 2. Judicial Response to the Attempted Expansion of Successor Liability

A few courts have discussed the product-line exception to successor liability in the CERCLA context, with two courts merely noting that the facts

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142. 414 U.S. 168 (1973).

143. DOJ Memo, *supra* note 136, at 15.

144. 175 N.J. Super. 447, 449, 419 A.2d 1151, 1162 (Super. Ct. Law Div. 1980).

145. DOJ Memo, *supra* note 136, at 19.

146. *Id.*

147. In particular, the modern state rules do not require that the successor corporation have notice of the alleged violation or liability, whereas notice is an important element of the successor liability test under the NLRA, CRA, EEOA, and FIFRA. See *supra* note 50 and accompanying text. For a discussion of the limitations and hazards of such an "eclectic approach," see Burack & Brown, *supra* note 58, at 651-53.

148. See generally Bernard, *supra* note 58, at 100-01 (corporate transfer of assets does not terminate EPA's remedy; if held liable for cleanup costs of abandoned hazardous waste sites, it will be difficult for corporate successors to "assume the risk spreading role;" and successor corporation does not benefit from its predecessor's goodwill); Spracker, *supra* note 58, at 10,365 (unlike product liability, United States can recover from other parties or use federal funds to finance cleanup actions where successor corporations not held liable; and because conditions and liabilities are generally unknown, successor may not be in best position to assess and bear risks of cleanup costs).

did not trigger the exception.<sup>149</sup> In *United States v. Stringfellow*,<sup>150</sup> however, the court squarely addressed the applicability of the product-line exception under CERCLA and rejected it. After explaining that there was "no authority in California or in [the Ninth] Circuit extending the application of *Ray* beyond product liability cases,"<sup>151</sup> the court held that the factors causing that state supreme court to extend strict product liability to successor corporations were not as compelling in this particular case.<sup>152</sup> Specifically, the successor defendant was one of thirty defendants and, therefore, the plaintiff would not be without a remedy if the court were to refuse to find the successor liable. Moreover, the successor defendant could not spread the costs of liability by passing such costs on as price increases to its customers,<sup>153</sup> because the price of its commodity (lead) was determined in the world market. Consequently, as a matter of law, the court rejected the application of the product-line exception on the facts before it.<sup>154</sup>

There can be no assurance, however, that the federal courts will not expand the successor liability doctrine under CERCLA beyond its traditional limits in the future. As noted above,<sup>155</sup> the federal courts repeatedly have based their application of successor liability under CERCLA on policy arguments very close to those used to support more expansive rules. In addition, as time passes, more states may adopt the more expansive rules so that it may be possible to argue that they are the generally accepted rules. As the EPA and the DOJ continue to press their arguments, and as environmental cleanup burdens on taxpayers mount, the courts may find grounds to advance beyond the parameters that they have set thus far. Under these circumstances, it is especially important for corporations to pay careful attention to successor liability issues in structuring corporate transactions. The following section outlines some of these practical issues that deserve attention.

### III. PRACTICAL IMPLICATIONS OF THE APPLICATION OF SUCCESSOR LIABILITY UNDER CERCLA

In a corporate sale of assets, the parties now are well advised to pay close attention to the existence and disposition of environmental liabilities. Certain aspects of the transaction structure may have key implications for suc-

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149. See *Philadelphia v. Stepan Chem. Co.*, Nos. 81-0851, 83-5493, slip op. at 10 n.5 (E.D. Pa. May 1, 1989) (available at 1989 U.S. Dist. LEXIS 4762) (discussing product-line exception as adopted by Pennsylvania Superior Court without explaining why product-line exception is applicable under CERCLA); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 1989 Hazardous Waste Litig. Rep. (Andrews Publications) 17,304, 17,306 (W.D. Wash. 1989) (although product-line exception not recognized in Washington, court opined in dicta that elements of product-line exception not satisfied because successor continued some but not all of seller corporation's operations).

150. No. CV-83-2501-MML, slip op. at 4-5 (C.D. Cal. Feb. 21, 1984).

151. *Id.* at 4.

152. *Id.* at 5.

153. *Id.*

154. *Id.*

155. See *supra* notes 47-51 and accompanying text.

cessor liability issues. To illustrate this point, consider the following hypothetical scenario.

In September 1989 numerous hazardous substances are discovered to contaminate the aquifer from which the town of *N* obtains its drinking water. The source of the contamination is subsequently located—an inactive dump site. As a result of its investigation, the EPA learns that, from 1952 to 1968, *A*, an unincorporated waste disposal business, owned and operated the dump site in question. In 1968 the trench in which approximately 5,000 drums of chemical and petroleum wastes were dumped was full. *A* covered the pit with soil, regraded the surface, and sold the property to *B*, which still owns the site but has no other assets. Four years after *A* sold the site, *A*'s owners incorporated the business, thereby forming *A-One Corp.*, which continues to exist.

The EPA investigation also identifies the three corporations (*C*, *D*, and *E*) responsible for generating the wastes that were disposed of at the site. *C*, a manufacturer of industrial chemicals, engaged in a statutory merger with *U* in 1972, forming *CU*. In 1985 *CU* declared bankruptcy and subsequently dissolved.

*D* manufactured widgets from 1949 to 1970, at which time *V* purchased all of *D*'s assets for cash. The purchase agreement did not specifically address the issue of liabilities. *V* continues to manufacture widgets at these facilities, using the trade name it acquired from *D* and holding itself out to the public as a continuation of *D*. None of the officers, directors, or shareholders of *D* is an officer, director, or shareholder of *V*. *D* terminated its corporate existence after the sale.

The third generator, *E*, manufactured PCB transformers from 1948 to 1973, at which time *W*, acting through a wholly-owned subsidiary, *W-One*, obtained all of *E*'s assets and all liabilities with the exception of those resulting from *E*'s use or disposal of PCBs, which were expressly disclaimed. In exchange, *E*'s shareholders received one share of *W* stock for every outstanding share of *E* stock. Subsequent to this transaction, *E* dissolved and *W-One* retained *E*'s officers, management, and other salaried and hourly employees. Although *W-One* continued the production of transformers, it modified the process immediately to discontinue the use of PCBs.

Finally, in its investigation, EPA discovers two corporations that transported wastes to the site. The first, *F*, was a large, multistage transporter with five regional subsidiaries. Subsidiary *F-One* transported wastes to the site. In an attempt to minimize its exposure to liability for the site, *F*, through a series of corporate transformations, formed *X* (a new holding company) in 1986 into which *F*'s four subsidiaries other than *F-One* were transferred. *F* continues to exist as a going concern. Its sole asset is the stock of *F-One*. *F-One*'s assets are insufficient to meet the liabilities arising from its transporting activities with respect to the site.

*G*, the second transporter, a corporation with four shareholders (who also were the corporate officers), transported hazardous wastes until 1975. At that time *Y* purchased *G*'s assets for cash and *G* dissolved. The corporation



distributed its assets to its shareholders. The four shareholders/officers of *G* did not become shareholders, officers, or employees of *Y*. *Y* continued the hazardous waste transportation operation virtually unchanged. For example, *Y* retained *G*'s other employees (including supervisory personnel), continued to transport wastes with the identical trucks and under the same corporate name, and held itself out to be a continuation of *G*.

Which of this alphabet soup of corporations is liable under CERCLA? Pursuant to the express provisions of section 107(a),<sup>156</sup> the EPA can seek recovery from *A, B, C, D, E, F-One*, and *G*. However, *A, C, D, E*, and *G* no longer exist, and *B* and *F-One* have limited assets. The issue becomes which, if any, of the successors (*A-One, CU, V, W, W-One, X* and *Y*) are liable for remediation costs incurred under CERCLA.

There is a strong likelihood that liability would attach to *A-One*, although the precise doctrine under which a court would reach that result is debatable. As noted above, the two district court decisions addressing the issue of corporate successor liability where the predecessor is an unincorporated business entity disagree on the result.<sup>157</sup> If successor liability is held applicable, *A-One* would likely be subject to liability as a mere continuation of the business of *A*. Even if the successor liability doctrine is held not to apply, it is likely that a court would find *A-One* liable under the alter ego doctrine.<sup>158</sup>

If *CU* still existed, it would almost certainly be found liable for the liabilities created by the actions of its predecessor, *C*. The *Smith Land* decision makes clear that a successor corporation created as the result of a statutory merger is subject to CERCLA liability.<sup>159</sup> In order to avoid such liabilities, the parties would have been required to take action prior to the merger to remove the liabilities from the entities being merged. Actions that they might have considered to accomplish this result include setting up a separate entity such as a new corporation or a liquidating trust that would possess the liabilities and into which they would place sufficient assets to meet these liabilities.<sup>160</sup> While such alternatives almost certainly would not have been contemplated at the time of the 1972 merger of *C* and *U*, corporations would be well advised to consider them today where the potential liabilities are fairly well known in order to free the corporation created from the merger from this burden.

The use of such devices where the extent of the liabilities is not so clear is more problematic since, if the actual costs significantly exceed the amount of assets supporting the specially created entity, a court might still look to the successor based on fraud or some other theory. This would likewise be true

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156. 42 U.S.C. § 9607(a).

157. See *supra* note 76 and accompanying text.

158. See *United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988) (discussed *supra* note 106).

159. 851 F.2d at 92.

160. Such a trust was used in *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 1989 Hazardous Waste Litig. Rep. (Andrews Publications) 17,304 (W.D. Wash. 1989) (discussed *supra* notes 123-127 and accompanying text). Indeed, its continued existence and possession of assets that were likely sufficient to meet the liabilities at issue was one of the factors the court relied upon in not holding the successor purchaser of the assets liable.

if the funding of the entity were inadequate in light of the extent of the liabilities known at the time of its creation. As the situation stands, *CU* might or might not be amenable to suit,<sup>161</sup> but in view of the fact that its dissolution was a result of bankruptcy, any such suit would likely be pointless.

A court also would be likely to find *V* liable as successor to *D* based upon the implied assumption exception to the general rule. Although the purchase agreement did not deal specifically with the issue of liabilities, a strong argument could be made that *V* implicitly assumed all of *D*'s liabilities, including the liabilities associated with the site in question, when *V* effectively took over all of *D*'s business operations. If the transaction was being negotiated today, after the environmental liabilities became known, *V* would be well advised, at the least, to structure the purchase agreement so that it assumed only enumerated liabilities and expressly disclaimed environmental liabilities. It would also be in *V*'s interest that *D* not dissolve immediately. In seeking to avoid liability as a successor corporation, it is extremely helpful to be able to point to an ongoing predecessor that has in its possession valuable assets to meet its obligations. The dissolution at the behest of the successor of such an entity to which creditors and claimants could look for redress is one of the factors that the California Supreme Court expressly relied upon in creating the product-line exception to the general rule.<sup>162</sup>

A court probably would not find *V* liable as a successor under the traditional de facto merger or continuation of the business exceptions to the general rule. While there is a continuity of business operations at the same location as the predecessor—the predecessor dissolved, and the purchasing corporation evidently assumed at least those liabilities necessary to continue the business without interruption—there is no continuity of the stockholders, which is a necessary element under the traditional de facto-merger test. The absence of the continuity of directors, officers, and stockholders, as well as the payment of a cash consideration that was presumably fair, make it unlikely that a court would view *V* as a mere continuation of *D*.

If, however, the court were to expand the generally accepted rule to include either the product-line or continuation of the enterprise exceptions, it might find *V* liable under these theories. The three elements of the de facto-

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161. Most state laws governing dissolution of corporations provide for a limited period of time after dissolution during which the dissolved corporation is amenable to suit. See generally 16A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8143 (rev. perm. ed. 1988). Two federal court decisions in CERCLA cases disagree on whether CERCLA preempts state laws in this area, and whether the dissolved corporation may be sued after expiration of this time limit. Compare *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987) (CERCLA does not preempt California law determining dissolved corporation's capacity to be sued) with *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1498 (D. Utah 1987) (holding "if the effect of a state capacity statute is to limit the liability of a party Congress meant to hold liable for cleanup costs, Congress intended CERCLA to preempt it").

162. See *Ray v. Alad Corp.*, 560 P.2d 3, 5, 8-10 (Cal. 1977); see also *supra* note 26 and accompanying text (development of product-line exception).

merger exception that are present constitute the essential elements of both of the modern exceptions. Before the fact, in order to protect against liability without taking steps that would likely have made the transaction considerably less attractive (such as moving the assets, replacing the employees, changing product names and so forth), *V* might have looked to creation of a liquidating trust or an agreement by *D* (in which adequate indemnification was provided) to remain in existence and to hold valuable assets, such as all or part of the consideration paid by *V*, to meet its obligations.

The facts relating to *W-One's* and *W's* purchase of *E's* assets are essentially identical to those presented to the court in *Acushnet* discussed above.<sup>163</sup> In that case the court found satisfaction of all elements of the traditional de facto-merger exception.<sup>164</sup> Where the end result is a de facto-merger, the express disclaimer of assumption of *E's* PCB liabilities would probably be unavailing since no entity remains to service those obligations. If such a transaction structure were permitted to relieve the purchaser of the liabilities, it would open a loophole of immense proportions in the whole doctrine of successor liability.

Based on the elements of the de facto merger exception, one alternative that might have been considered to avoid liability is the payment of consideration other than the stock of an affiliated company, although this is not always a viable possibility. Since a claim against a successor is less likely to succeed if the predecessor is available to meet its obligations, another possibility would have been for *W-One* to keep *E* in existence for the purpose of holding the liabilities together with some valuable assets to meet them. *W* should not be subject to liability on these facts unless an argument can be made that the corporate veil between *W* and *W-One* should be pierced.<sup>165</sup>

The facts regarding *X*, *F* and *F-One* are similar to those in *Thomas Solvent*, in which the court found successor liability.<sup>166</sup> There are several differences, however, that probably would lead to the opposite conclusion here. Most important, *F-One* was a separate operating subsidiary of *F* before and after the reorganization, not the rump entity left after the reorganization in *Thomas Solvent*. The fact that *F-One* had a separate corporate existence means that a claimant would have to argue that the court should pierce the corporate veil between *F-One* and *F*. If the court did pierce the corporate veil between *F-One* and *F*, it would then analyze whether *X* is subject to liability as a successor to *F*. The court would consider such issues as the identity of key personnel and stockholders and the adequacy of the consideration paid to *F* for the assets. A court might also analyze the relationship among *F*, *X* and the four other subsidiaries under the corporate veil doctrine.

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163. See *supra* notes 81-99 and accompanying text.

164. 712 F. Supp. at 1098-99.

165. Presumably, one of the reasons *W* may have structured the transaction through a subsidiary was to avail itself of the additional protection provided by the corporate veil doctrine. For a discussion of the corporate veil doctrine in federal law cases, see Note, *Piercing the Corporate Veil: The Alter Ego Doctrine under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

166. See *supra* notes 111-120 and accompanying text.

*Y* is another corporation that probably would not be found liable as a successor under the traditional exceptions. It has not paid for the acquired assets with stock, a fact which makes it very difficult to establish that a de facto merger took place. There is no continuity of either shareholders, officers, or directors between *Y* and *G*. This fact undercuts any effort to establish that *Y* is a mere continuation of *G*'s business under that traditional exception. Absent an express or implied assumption of the liabilities or some underlying fraud, *Y* should not be held liable unless a court were to expand the generally accepted rule in accordance with the modern exceptions. If that were to occur, *Y*, like *V* above, might be caught in the more broadly thrown net of the expanded rule.

If *Y* is not amenable to a claim, the dissolved *G* might still be a target. As noted above in discussing *CU*, at least one federal court has held that a dissolved corporation may be resurrected under CERCLA for an action regarding environmental claims.<sup>167</sup> If such a suit were permitted and successful, the assets of *G* could presumably be traced into the hands of its shareholders.

## V. CONCLUSION

At the present time, federal courts in CERCLA cases are adhering to the generally accepted, traditional rule regarding the liability of successor corporations for the actions of their predecessors. Under this rule, a corporation that acquires the assets of another corporation generally does not also acquire the liabilities associated with those assets. Four exceptions to this rule are traditionally recognized: the express or implied assumption of the liabilities by the successor; a fraudulent basis underlying the transaction to secrete assets from legitimate creditors; a transaction so structured that it is essentially a merger of the predecessor into the successor; and such an identity of key personnel and stockholders between the predecessor and the successor (and, in some cases, the presence of other factors) that the latter may be legitimately said to be a mere continuation of the former.

In applying this traditional rule the federal courts have attempted to synthesize a uniform rule from the law as it is generally applied in the states, rather than develop an independent, carefully tailored successor liability rule for CERCLA, an approach taken by federal courts under other statutes. Because the federal courts in CERCLA cases have typically ignored the variations in the general rule that have evolved among the states, there exists a degree of uncertainty in the specific elements of a given exception (especially the traditional continuation of the business exception) that a deciding court will apply. Moreover, the federal courts have further complicated the developing uniform successor liability rule under CERCLA by frequently justifying their adoption of the traditional successor liability doctrine with policy arguments substantially similar to those underlying the development of the

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167. See *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1497-98 (D. Utah 1987). Considering that *G*'s dissolution occurred fourteen years ago, it is fairly certain that any time period for suits against a dissolved corporation established under the governing state law would have long since expired.

modern, expansive successor liability rules. Despite this incongruity, thus far the federal courts clearly have limited successor liability associated with asset transactions under CERCLA to the four traditional exceptions recognized under the general rule.

The EPA and the DOJ, however, both continue to argue that this rule should be expanded under CERCLA to reach any successor that essentially continues the same enterprise or product line as the predecessor. This more expansive approach is very similar to the broader modern exceptions adopted in some states, primarily in product liability cases. As these agencies continue their pressure and as the burdens of environmental cleanups continue to grow, it is conceivable that the courts could acquiesce in an expansion of the traditional rule.

In light of the substantial environmental liabilities that may be involved in a corporate transaction, it is vital that the parties to the transaction give careful consideration to the potential allocation of these liabilities following the transaction, both under current law and with an eye to possible expansion of currently accepted doctrines. Failure to address such issues may result in a corporation discovering a few months or years after a transaction that it is unexpectedly saddled with multimillion dollar liability which, with better planning, it could have avoided.