St. John's Law Review

Volume 83
Number 1 *Volume 83, Winter 2009, Number 1*

Article 7

January 2012

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MAKING IT A FEDERAL ISSUE: THE UNJUSTIFIABLE EXPANSION OF FEDERAL COMMON LAW TO CORPORATE SUCCESSOR LIABILITY UNDER CERCLA

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INTRODUCTION

One of the most established principles of Supreme Court jurisprudence is that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law."[1] Nonetheless, the question of whether to apply federal common law has resurfaced in the context of corporate successor liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund" or the "Act").[2] CERCLA was enacted in 1980 to combat "the serious environmental and health risks posed by industrial pollution."[3] The statute authorizes the President to finance cleanup efforts from the "Hazardous Substance Superfund"[4] ("Superfund" or the "Fund") upon satisfaction of

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[1] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). The Supreme Court has since identified a few specific areas of the law in which it can articulate substantive rules of decision that have the force of federal law, such as interstate and international disputes implicating the conflicting rights of states or relations with foreign nations, admiralty cases, and some matters involving Indian tribes. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 507 (2006).

[2] *See* Philip G. Watson, Note, United States v. General Battery Corp.: *The Third Circuit Applies Federal Common Law Rather than State Law To Determine Successor Liability Under CERCLA, Despite Opposing Result in Other Circuits—But Are the Splitting Circuits Really Just Splitting Hairs?*, 20 TUL. ENVTL. L.J. 219, 222–26 (2006).

[3] United States v. Bestfoods, 524 U.S. 51, 55 (1998).

[4] 26 U.S.C. § 9507 (2000). The term "Superfund" is often used to refer generally to the environmental program established to address abandoned hazardous waste sites, as well as the name of the fund established by CERCLA. *See* U.S. Envtl. Prot.

certain statutory conditions.[5] Presidential action is typically taken through the Environmental Protection Agency (the "EPA"),[6] by a delegation of executive power also authorized within the Act.[7] Expenditures from the Fund may be recovered through actions permitted against four categories of potentially responsible parties, including "any person who at the time of disposal of any hazardous substance owned or operated any facility."[8] The Act also provides for cleanup liability not involving expenditures from the Fund, such as recovery of "necessary costs" of response incurred by any person and damages for injury, destruction, or loss of natural resources.[9]

The circuit courts are unanimously of the opinion that successor liability exists under CERCLA for those situations in which a corporation has passed through one or more hands of ownership or operation since the act giving rise to the liability occurred.[10] As a preliminary matter, CERCLA recovery actions may be brought against corporations in general because section 9601 of the Act includes corporations and other business entities within the definition of "person."[11] Moreover, federal statutory law generally defines "company" or "association" used in reference to a corporation to include successors and assigns.[12] Read together, these provisions arguably implicitly recognize the existence of successor liability under the Act.[13] Implicit is the

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Agency, Superfund: Basic Information, http://www.epa.gov/superfund/about.htm (last visited Apr. 5, 2009).

[5] *See* 42 U.S.C. § 9604 (2000 & Supp. V); *see also Bestfoods*, 524 U.S. at 55.

[6] *See* U.S. Envtl. Prot. Agency, About EPA, http://www.epa.gov/epahome/about epa.htm (last visited Jan. 21, 2009); U.S. Envtl. Prot. Agency, Superfund: Basic Information, http://www.epa.gov/superfund/about.htm (last visited Jan. 21, 2009).

[7] *See* 42 U.S.C. § 9615 (2000).

[8] *Id.* § 9607(a)(2).

[9] *Id.* § 9607(a)(4). *See generally id.* § 9613(g) (listing types of actions that may be brought under the Act).

[10] United States v. Gen. Battery Corp., 423 F.3d 294, 298 n.3 (3d Cir. 2005) (discussing the unanimous recognition of successor liability under CERCLA among the courts of appeals).

[11] 42 U.S.C. § 9601(21) ("The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.").

[12] 1 U.S.C. § 5 ("The word 'company' or 'association', when used in reference to a corporation, shall be deemed to embrace the words 'successors and assigns of such company or association', in like manner as if these last-named words, or words of similar import, were expressed.").

[13] *See* Watson, *supra* note 2, at 221.

operative word fueling the choice of law debate. Can successor liability—never directly addressed in the statute—be excepted from the general principle that the state law typically prevails?

Some courts have looked to a test established by the Supreme Court in *United States v. Kimbell Foods, Inc.*[14] to decide whether to resort to a uniform federal standard.[15] The test is comprised of three considerations: (1) whether the nature of the federal program requires uniformity; (2) whether the application of state law would frustrate specific objectives of the federal program; and (3) the extent to which the application of a federal rule would disrupt commercial relationships based on state law.[16] The Supreme Court, however, has indicated that a uniform standard may never be required in this particular context, further confounding an already complicated circuit split. In *United States v. Bestfoods*,[17] the Court made statements in dicta that cast serious doubt on any contention that federal common law should govern in cases to determine corporate successor liability in CERCLA actions.[18]

Still, those dicta statements have not reconciled the diverging approaches taken by different circuit courts. Some circuit courts have maintained that federal law should apply. Most recently, in *United States v. General Battery Corporation, Inc.*,[19] the Third Circuit reaffirmed its prior holding that CERCLA required application of a uniform federal standard to determine corporate successor liability despite any contrary holdings in other circuits and the possible contrary Supreme Court treatment of the issue.[20] The Supreme Court subsequently

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[14] 440 U.S. 715 (1979).

[15] *See* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 206 (2d Cir. 2006); *General Battery*, 423 F.3d at 299, 303–04; United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001); Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 363 (9th Cir. 1997).

[16] *See Kimbell Foods*, 440 U.S. at 728–29.

[17] 524 U.S. 51 (1998).

[18] *See id.* at 63 ("CERCLA is thus like many another congressional enactment in giving no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute' . . . ." (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979))).

[19] 423 F.3d 294 (3d Cir. 2005).

[20] *See id.* at 298, 300 (discussing prior holdings and stating that the validity of those holdings had not been undermined by recent Supreme Court decisions). *But see id.* at 309 (Rendell, J., concurring in part and dissenting in part) (arguing that the determination that CERCLA corporate successor liability must be controlled by federal common law runs contrary to recent Supreme Court pronouncements).

declined to hear the case.[21] Some circuits have shown no intention or movement to disturb prior holdings. For example, the latest decision from the Fourth Circuit applied federal common law in a CERCLA corporate successor liability case.[22] Other circuits, however, have insisted that there is no reason to depart from the application of state law—in decisions that arose both before and after *Bestfoods*.[23] Given the variance in the resolution of this issue across circuits and the refusal of the Supreme Court to review the Third Circuit decision that espouses what may now be considered an unpopular view, there is bound to be continued confusion over what law should apply in cases involving corporate successor liability under CERCLA.

Part I of this Note explores the background of CERCLA liability, including the history and purposes of the statute, and further identifies the ambiguity in the statutory language. Part II discusses the controlling principles regarding application of federal common law and the extent to which different courts have followed those principles in this context. Part III introduces

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[21] Exide Techs. v. United States, 549 U.S. 941 (2006) (denying petition for writ of certiorari).

[22] *See* United States v. Carolina Transformer Co., 978 F.2d 832, 837–38 (4th Cir. 1992). The Eighth Circuit also seems to weigh in favor of applying a uniform federal standard despite *Bestfoods*. *See* United States v. Mexico Feed & Seed Co., 980 F.2d 478, 487 n.9 (8th Cir. 1992) (declining to decide whether federal or state law should apply but stating that the district court was "probably correct" in applying federal law); *see also* K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1022 (8th Cir. 2007) (concluding that the subsequent Supreme Court decision in *Bestfoods* did not directly address corporate successor liability, and therefore, does not completely disturb its prior holding).

[23] *See* United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) (endorsing prior conclusion that the majority rule is to apply state law when there is no conflict with the federal interests behind CERCLA and recognizing that there would be no frustration of federal objectives by applying state law to the facts of the case); Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1998) (stating that there is no evidence that the application of state corporation law would frustrate the objectives of CERCLA because it is "unrealistic to think that a state would alter general corporate law principles to become a peculiarly hospitable haven for polluters"); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1502 (11th Cir. 1996) (concluding that federal law governing liability under CERCLA should incorporate the applicable state rule for determining limited partner liability); City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 250 (6th Cir. 1994) (recognizing that the liability of a successor corporation under CERCLA is determined by state law); *see also* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 208–09 (2d Cir. 2006) (declining to decide whether CERCLA requires the displacement of state law but failing to see any conflict between applying state law and the relevant federal interests).

different theories of corporate successor liability and their relationship to both state and federal common law. Part IV of this Note determines the viability of the competing interests that are at play on either side and suggests whether state or federal common law should be applied to determine successor liability in CERCLA actions.

I. CERCLA: STATUTORY BACKGROUND AND CONSTRUCTION

Since its enactment on December 11, 1980,[24] CERCLA has been met with opposition from interest groups and individual corporations in Congress, the federal courts, and within the bureaucracy.[25] The opposition is not surprising considering the enormous exposure to liability that the Act creates for American businesses, many of which have spent decades improperly disposing of hazardous waste and contaminating tens of thousands of sites across the country.[26] The $550 million in private party funding commitments secured by the EPA during its fiscal year 2006 through agreements of potentially responsible parties to conduct $391 million in future response work and to reimburse EPA for $164 million in past costs is a clear illustration of the heavy liability costs that businesses face.[27] Potentially liable corporations will presumably look for ambiguity in CERCLA as a way out, with seemingly good odds of success.

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[24] *See* U.S. Envtl. Prot. Agency, CERCLA Overview, http://www.epa.gov/superfund/policy/cercla.htm (last visited Jan. 21, 2009).

[25] *See* SHELDON KAMIENIECKI, CORPORATE AMERICA AND ENVIRONMENTAL POLICY 44 (2006) (listing the potential forums for battles over environmental regulations and noting that various industrial sectors led an attack on CERCLA during the Reagan administration). General Electric has been involved in an ongoing battle with the EPA over whether it should be forced to remove PCBs from the Hudson River under the Natural Resource Damages provisions of CERCLA. *See id.* at 145. The disagreement began in 1980 and continued until the EPA and GE finally reached an agreement on an abatement plan for the Hudson River in 2003—a period marked by aggressive and expensive campaigning by GE. *See id.* at 145–51. The PCB contamination of the Hudson River, with abatement costs predicted at hundreds of millions of dollars, represents the most expensive Superfund site in the nation. *Id.* at 145.

[26] *See* U.S. Envtl. Prot. Agency, Region 2 Superfund, http://www.epa.gov/region02/superfund/ (last visited Jan. 21, 2009).

[27] *See* U.S. Envtl. Prot. Agency, Superfund National Accomplishments Summary Fiscal Year 2006, http://www.epa.gov/superfund/accomp/numbers06.htm (last visited Jan. 21, 2009).

A. *Setting the Scene for CERCLA: History and Purpose*

CERCLA's legislative history does not provide definitive answers to many questions of interpretation that have surfaced since the legislation was passed.[28] A prime example of "eleventh-hour" legislation, the Act was passed in haste as a compromise bill without any House-Senate conference report.[29] The broad goals of CERCLA, however, can be discerned from the face of the Act.[30] It seeks "[t]o establish a comprehensive federal-state mechanism for [efficient] response to releases or threatened releases . . . of hazardous substances at facilities that . . . are not owned or operated by [a party] financially capable or willing to undertake appropriate response action."[31] The Act also establishes a federal trust fund to pay the response costs of government agencies or private volunteers as well as the costs of natural resource damage assessment and restoration.[32] CERCLA further establishes a federal cause of action against certain responsible parties for recovery of costs incurred in response to hazardous substance releases.[33] An overriding objective of the Act is that responsible parties ultimately bear the costs of cleanup and pay for damages to natural resources.[34]

While the common law had allowed private individuals to enjoin others from harming their land and permitted recovery of damages for injury to private land, it did not adequately protect public resources.[35] The government, therefore, lacked the broad

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[28] *See* BRADFORD F. WHITMAN, SUPERFUND LAW AND PRACTICE § 1.03(c), at 13 (1991).

[29] *See id.* CERCLA was derived from basic provisions contained in three bills: (1) H.R. 85, The Comprehensive Oil Pollution Liability and Compensation Act; (2) H.R. 7020, the Hazardous Waste Containment Act of 1980; and (3) S. 1480, the Environmental Emergency Response Act. *See* VALERIE M. FOGLEMAN, HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION 7 (1992). The resultant draft was then passed by a lame duck Congress before its adjournment. *See id.* at 5.

[30] WHITMAN, *supra* note 28, at 14.

[31] *Id.*; *see also* 42 U.S.C. § 9604 (2000 & Supp. V 2005).

[32] WHITMAN, *supra* note 28, at 14; *see also* 26 U.S.C. § 9507 (2000); 42 U.S.C. § 9611.

[33] *See* 42 U.S.C. § 9607(a); WHITMAN, *supra* note 28, at 14.

[34] KEVIN M. WARD & JOHN W. DUFFIELD, NATURAL RESOURCE DAMAGES: LAW AND ECONOMICS 80 (1992).

[35] *See* Frederick R. Anderson, *Natural Resource Damages, Superfund, and the Courts*, *in* VALUING NATURAL ASSETS: THE ECONOMICS OF NATURAL RESOURCE DAMAGE ASSESSMENT 26, 26 (Raymond J. Kopp & V. Kerry Smith eds., 1993). This is true despite the doctrines of public trust and parens patriae, which contained limitations to the categories of natural resources protected and the standing of a

power it needed to recover damages for injury to public natural resources.[36] The discovery of abandoned hazardous waste sites in the late 1970s, coupled with the governmental realization that no scheme was in place to correct future problems arising from these sites, prompted a call for federal action.[37] CERCLA was thus a "response to the serious environmental and health risks posed by industrial pollution,"[38] through which "Congress created the first federal and state resources trustees and empowered them to seek damages for injuries to public natural resources caused by toxic wastes."[39]

The hazardous waste sites that the Act seeks to clean and redevelop are commonly called "Superfund sites," and there is at least one Superfund site in every state.[40] On the Act's twenty-fifth anniversary in December 2005, the EPA claimed to have completed work at sixty-two percent of the Superfund private and federal sites then in existence and to have work in progress

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state to assert claims. *See generally* WARD & DUFFIELD, *supra* note 34, at 11–23 (discussing general principles of and exceptions to public trust and parens patriae doctrines). Even in suits brought by private individuals, the common law presented problems of proving liability, particularly against previous owners. *See* Note, *Development in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1602, 1624–27 (1986). Specifically, the lack of sufficient records and the generic nature of many toxic substances made it very difficult for a plaintiff to meet the legal causation burden of identifying a specific defendant who could be held responsible as the source of the substance causing the injury. *See id.*

[36] *See* Note, *supra* note 35.

[37] Martina E. Cartwright, *Superfund: It's No Longer Super and It Isn't Much of a Fund*, 18 TUL. ENVTL. L.J. 299, 302 (2005). The most famous discovery of this time occurred in 1978, when approximately 80,000 tons of toxic wastes were discovered in Love Canal, New York. *See, e.g.*, WARD & DUFFIELD, *supra* note 34, at 1. The "sensationalistic" national media coverage of this event was the most obvious catalyst of political action. *See* JOEL S. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS 3–4 (2d ed. 1995).

[38] United States v. Bestfoods, 524 U.S. 51, 55 (1998). *But see* Bruce Yandle, *Superfund and Risky Risk Reduction*, *in* CUTTING GREEN TAPE: TOXIC POLLUTANTS, ENVIRONMENTAL REGULATION AND THE LAW 27, 46 (Richard L. Stroup & Roger E. Meiners eds., 2000) ("The program is basically about finding revenues, no matter how, for the purpose of addressing emotional concerns about risks that can be quite small. The program is also about emergency cleanups of truly hazardous waste sites.").

[39] *See* Anderson, *supra* note 35, at 27.

[40] U.S. Envtl. Prot. Agency, Superfund's 25th Anniversary: Capturing the Past, Charting the Future, http://www.epa.gov/superfund/25anniversary/index.htm (last visited Jan. 21, 2009). The Act is often referred to as "Superfund" or as having created the "Superfund program." *See id.*

at an additional 422 sites.[41] Despite this apparent success, approximately one out of every four Americans at the time was living within four miles of a Superfund site.[42] This leads to serious public concerns, as assessment of potentially hazardous waste sites may reveal previously unknown chemicals and wastes that require research and new technologies to combat possible threats posed to human life and the environment.[43]

The Superfund cleanup process is long and complex, and usually begins with a site discovery or notification to the EPA of a possible release of hazardous substances.[44] It then follows a number of steps that ultimately end in site redevelopment.[45] One of the earliest and most pivotal steps in the cleanup process is the placement of a site on the National Priorities List—"[a] list of the most serious sites [that have been] identified for possible long-term cleanup."[46] The result of this long process is ideally a cleaner, safer environment, but the efforts to decrease the dangers presented by toxic materials also result in liabilities facing citizens estimated at hundreds of billions of dollars.[47] CERCLA retroactively imposes this liability for activities that may have taken place decades before and, in many cases, the corporate entity that engaged in the initially harmful activity either exists in a different form or no longer exists at all.[48] The

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[41] *Id.* Superfund also employs an emergency response program that has been put to use at thousands of sites to reduce immediate threats to human health, including the World Trade Center and Pentagon Attacks, the 2001 Anthrax Attacks, the Columbia Space Shuttle Disaster, and Hurricanes Katrina and Rita. *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* U.S. Envtl. Prot. Agency, Cleanup Process, http://www.epa.gov/superfund/cleanup/index.htm (last visited Jan. 21, 2009).

[45] *See id.* Through Superfund's Redevelopment Initiative, Superfund sites have transformed into model airplane fields, airports, major department stores, soccer fields, golf courses, and wildlife refuges, among others. *See* U.S. Envtl. Prot. Agency, Superfund's 25th Anniversary: Capturing the Past, Charting the Future, http://www.epa.gov/superfund/25anniversary/index.htm (last visited Jan. 21, 2009).

[46] *See* Cleanup Process, *supra* note 44.

[47] *See* Richard L. Stroup & Roger E. Meiners, *The Toxic Liability Problem: Why Is It Too Large?*, *in* CUTTING GREEN TAPE: TOXIC POLLUTANTS, ENVIRONMENTAL REGULATION AND THE LAW, *supra* note 38, at 1, 5. The relevant study estimated that remedying existing hazardous waste problems over a period of thirty years would cost approximately $750 billion in resources. *Id.* at 6. The estimate accounts for remediation under three federal programs, one of which being Superfund sites on the National Priority List. *See id.*

[48] *See* Alicia C. Rood, *CERCLA Successor Liability: Theories of Liability*, FINDLAW, June 1, 1997, http://library.findlaw.com/1997/Jun/1/127681.html.

government or private party seeking to allocate or recover the costs of remediation may then attempt to impose the liability on a successor corporation.[49]

B. *CERCLA Breakdown: Not "a Model of Legislative Draftsmanship"*

It is well recognized that CERCLA is not "a model of legislative draftsmanship."[50] If CERCLA itself provided a standard for determining corporate successor liability—or squarely addressed the issue at all—there would be no cause for this inquiry. The statute, however, is organized in a complex and confusing manner, leaving questions open as to whether successor liability exists under the Act and, if so, how it should be determined.

CERCLA authorizes the President, who in turn typically delegates the power to act to the EPA,[51] to initiate removal of hazardous substances or to take other measures that the President deems necessary to protect the public health or the environment.[52] Such action is permitted whenever a hazardous substance or a pollutant or contaminant posing "imminent and substantial danger to the public health or welfare" is released or when there is a substantial threat of such a release into the environment.[53] The financing of the expenditures related to the cleanup may be initially taken from the "Hazardous Substance Superfund."[54] The financing costs then may be recovered through a CERCLA claim, since the Act makes "any *person* who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" liable for all costs of removal or remedial action incurred by the United States government, as well as other costs related to the disposal of the hazardous substance.[55] The basic elements that a plaintiff must demonstrate to prevail on a CERCLA claim are that (1) the relevant site is a "facility" as defined by the Act, (2) "a release or threatened release of a

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[49] *See id.*

[50] *See, e.g.*, United States v. Gen. Battery Corp., 423 F.3d 294, 298 (3d Cir. 2005).

[51] *See supra* notes 6–7 and accompanying text.

[52] 42 U.S.C. § 9604(a)(1) (2000).

[53] *Id.*

[54] *See* 26 U.S.C. § 9507.

[55] 42 U.S.C. § 9607(a) (emphasis added).

hazardous substance has occurred," (3) "the release or threatened release caused the plaintiff to incur response costs consistent with the [Act]," and (4) "the defendant is a 'covered person' under the [Act]."[56]

This cursory explanation of liability under the statute leaves unclear how and where corporate liability fits into the statutory scheme. While the Act's definition of "person" expressly includes corporations, it is silent about corporate successors.[57] Yet there is no disagreement among the circuit courts that corporate successor liability exists under CERCLA.[58] That conclusion is a product of statutory construction incorporating the general provisions of federal law, which provide that the terms "company" and "association" used in reference to a corporation include successors.[59] Courts cannot agree, however, on the proper law to determine successor liability.[60]

The disagreement becomes particularly relevant in the context of contribution lawsuits. Once a successful suit is brought under section 9607(a) of the Act, the liable party can seek contribution from any other person who is liable or potentially liable under section 9607.[61] When resolving such claims, courts may allocate response costs among liable parties using equitable factors they deem appropriate.[62] In many cases, the liable party has sought contribution from a corporate successor, but there is uncertainty over whether the applicable law supports recovery. Basically, the Act seeks to satisfy the need for expeditious and effective removal of hazardous waste, while providing cost-spreading mechanisms to hold the maximum number of responsible parties accountable for cleanup costs. The cost-spreading mechanisms, however, are generally only as effective as permitted by the law that is determined to govern the issue of successor liability.

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[56] Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496–97 (11th Cir. 1996).

[57] *See* 42 U.S.C. § 9601(21) (defining "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body").

[58] *See* United States v. Gen. Battery Corp., 423 F.3d 294, 298 n.3 (3d Cir. 2005).

[59] *See* 1 U.S.C. § 5.

[60] Watson, *supra* note 2, at 221.

[61] 42 U.S.C. § 9613(f).

[62] *Id.*

II. THE FEDERAL JUDICIARY AND THE STATE OF THE LAW

The law of corporate successor liability as applied in the context of CERCLA has presented problems for many years.[63] Depending on the theory of successor liability that a court chooses to apply, there can be considerable differences in the characteristics and number of successor corporations that will come within the purview of the Act.[64] For example, the "mere continuation" theory of successor liability requires the satisfaction of certain specific and intricate factors before an asset purchaser will held liable for the obligations of a seller, but the "substantial continuation" theory sometimes applied typically makes it easier to hold a purchaser liable because it involves consideration of more factors with less detailed requirements.[65] The problem arises when a court chooses to displace the state successor liability standard in favor of a federal common law standard, which may be more expansive. As described below, certain circuit courts have each arrived at a particular theory by conducting a choice of law analysis in the face of longstanding principles about the propriety of a federal common law.

A. *From* Erie *to* O'Melveny*: General Principles in Application of Federal Common Law*

It was famously pronounced in *Erie Railroad Co. v. Tompkins*[66] that "[t]here is no federal general common law."[67] If the choice of law issue were really that simple, however, the circuit courts would not be in disagreement over which law to apply to issues of corporate successor liability under CERCLA. In *United States v. Kimbell Foods, Inc.*,[68] the Supreme Court stated that, when Congress has remained silent in an area that compromises issues substantially related to an established program of government operation, federal courts are directed to "fill the interstices" of the federal legislation by applying their

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[63] For example, this Note discusses cases addressing corporate successor liability under CERCLA that date as far back as 1988. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988); *see also* discussion *infra* Part II.C.

[64] *See* discussion *infra* Part III.

[65] *See* discussion *infra* Part III.B–C.

[66] 304 U.S. 64 (1938).

[67] *Id.* at 78. The only possible exceptions provided to that principle were those matters governed by the Federal Constitution or by acts of Congress. *Id.* at 78–79.

[68] 440 U.S. 715 (1979).

own standards.[69] So despite what *Erie* seems to stand for, the Court has determined that the formulation of controlling federal rules *is* necessary in the context of certain kinds of federal programs.[70] The resultant test inquires as to (1) whether the nature of the federal program requires uniformity, (2) whether the application of state law would frustrate specific objectives of the federal program, and (3) to what extent the application of a federal rule would disrupt commercial relationships based on state law.[71] If these considerations weigh against the application of federal law, then state law should be incorporated to govern the case.[72]

The three inquiries are each different and distinct, leaving unanswered the question as to which, if any, merits greater or lesser weight in the balancing process. In *O'Melveny & Myers v. Federal Deposit Insurance Corp.*,[73] the Court explained that the second consideration, conflict, should be paramount to the first consideration, uniformity.[74] The Court very clearly stated that cases in which judicial creation of a special federal rule would be justified are " 'few and restricted' " and are limited to instances in which a significant conflict exists between federal policy and state law.[75] "Our cases uniformly require the existence of such a conflict *as a precondition* for recognition of a federal rule of decision."[76] The Court also called the federal interest in uniformity the "most generic (and lightly invoked) of alleged

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[69] *Id.* at 727.

[70] *Id.* at 728.

[71] *See id.* at 728–29.

[72] *See id.* at 728.

[73] 512 U.S. 79 (1994). In *O'Melveny*, American Diversified Savings Bank ("ADSB") had engaged in many risky real estate transactions, and its owners had used sham accounting practices to disguise the bank's dwindling net worth. *See id.* at 81. During its representation of ADSB in two real estate syndications, the law firm O'Melveny & Myers never looked into the bank's financial status. *See id.* When federal regulators concluded that ADSB was insolvent, the FDIC stepped in as a receiver for the bank and soon after began receiving demands from investors who claimed they were deceived in connection with the real estate syndications. *Id.* at 81–82. In a suit against the law firm, the FDIC argued that a federal common law rule should apply to determine whether the knowledge of corporate officers acting against a corporation's interest will be imputed to the corporation, and also should apply to determine whether such knowledge by officers should be imputed to the FDIC when it sues as receiver of the corporation. *Id.* at 83.

[74] *See id.* at 85–89.

[75] *Id.* at 87 (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

[76] *Id.* (emphasis added).

federal interests."[77] Although the Court did not seem to consider the disruption of commercial relationships a factor, it is at least apparent that the foremost *Kimbell Foods* consideration is the frustration of specific objectives of a federal program and that the interest in uniformity is more of a supplemental consideration.

B. Bestfoods*: The Supreme Court Passes on the Issue*

The closest the Supreme Court has come to addressing the issue of which law should apply in CERCLA successor liability cases was *United States v. Bestfoods*.[78] That case involved the intentional and unintentional dumping of hazardous substances that began in 1957 and polluted the ground water and soil around the site of a chemical manufacturing plant in Michigan.[79] By the time the EPA required cleanup of the site in 1981, the plant had passed through a number of corporate hands.[80] Five defendants were named as responsible parties, and the trial focused on the issue of whether two of those defendants, as parent corporations of the other defendants, had "owned or operated" the facility within the meaning of the Act.[81]

In its discussion of corporate veil-piercing principles, the Court stated that "CERCLA is thus like many another congressional enactment in giving no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.' "[82] It did not directly address successor liability, but the Court concluded that a parent corporation may be charged with derivative CERCLA liability for its subsidiary's actions when the corporate veil may be pierced.[83] The Court also noted "significant disagreement among courts and commentators" over whether courts should borrow state law or apply a federal common law of veil-piercing when enforcing CERCLA's indirect liability.[84] It then declined to further address the issue, finding that it had not been presented because the parties had not challenged the Sixth

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[77] *Id.* at 88.
[78] 524 U.S. 51 (1998).
[79] *Id.* at 56.
[80] *See id.* at 56–58.
[81] *Id.* at 58.
[82] *Id.* at 63 (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979)).
[83] *Id.* at 63–64.
[84] *Id.* at 64 n.9.

Circuit's determination of derivate liability.[85] Despite *Bestfoods*' seemingly negative dicta about the propriety of using a federal law standard, at least one lower court has construed *Bestfoods* as favoring a federal standard because the Court "applied 'fundamental' and 'hornbook' principles of indirect corporate liability, not the law of any particular state."[86] The next Subpart, however, will illustrate that many courts have given due significance to the language in *Bestfoods* and have concluded that state law should apply. There is no foreseeable resolution to this controversy in light of the Supreme Court's recent denial of certiorari to review a Third Circuit case clearly holding that a uniform federal standard should apply in CERCLA successor liability cases.[87]

C. *Circuit Cases in Favor of State Law*

The prevalent view in a number of circuits is that there is no need to displace state law in order to meet the purported federal interests of CERCLA. In *City Management Corp. v. U.S. Chemical Co.*,[88] the Sixth Circuit summarily determined that Michigan law of successor liability applied in determining successor corporation liability under CERCLA.[89] The plaintiff corporation had acquired the defendant corporation through an asset purchase and sale agreement which expressly limited the plaintiff's assumption of hazardous waste liabilities to those connected with the property where the facility to be purchased was located.[90] After the execution of the agreement, a group of corporations involved as "potentially responsible part[ies]" in a

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[85] *Id.*

[86] United States v. Gen. Battery Corp., 423 F.3d 294, 300 (3d Cir. 2005). The Third Circuit contended that, while the Court of Appeals for the Sixth Circuit had applied Michigan Law, the Supreme Court declined to do so and instead looked to the general rule of veil-piercing. *Id.*

[87] Exide Techs. v. United States, 549 U.S. 941 (2006).

[88] 43 F.3d 244 (6th Cir. 1994).

[89] *Id.* at 250.

[90] *See id.* at 248. During the course of negotiations between the parties, the successor corporation had an environmental site investigation conducted regarding the property where the facility was situated. *See id.* at 247. The investigation revealed a significant risk of contamination. *Id.* Two other consulting firms later confirmed those findings. *See id.* Also in the course of negotiations, the predecessor corporation had received notice from the EPA that it was a potentially responsible party for up to $44 million in CERCLA liability with respect to dumping at an off-site landfill. *See id.* It never disclosed this notification to its successor, despite a subsequent request for information regarding Superfund Sites. *See id.*

CERCLA action sought payment from the successor corporation of its predecessor's exposure to liability at an off-site dumping location.[91] In turn, the successor corporation sought declaratory judgment that, as a purchaser of assets, it was not liable as a successor corporation for any off-site liability arising from pre-sale disposal of hazardous waste at landfills.[92] The district court held that there was no successor liability because none of the exceptions had been met to defeat the general rule that a corporate purchaser of assets is not liable for the corporate seller's liabilities.[93] On appeal, the Sixth Circuit stated that "[a]s the district court held and all parties . . . acknowledge, the liability of a successor corporation for CERCLA obligations is determined by reference to state corporation law, rather than federal common law."[94] The district court had stated:

> CERCLA does not purport to be a source of authority for corporate existence and corporate vicarious liability; rather the act was intended "to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the hazardous wastes." Therefore, CERCLA does not require that federal law displace state laws governing corporate existence and vicarious liability unless the state laws permit action prohibited by the ACT [sic], or unless "their application would be inconsistent with the federal policy underlying the cause of action."[95]

The circuit court seemed to implicitly approve of the district court's reasoning, putting it in line with other circuit precedent holding that state law applies.[96] Previously, in *Anspec Co. v. Johnson Controls, Inc.*,[97] the Sixth Circuit had concluded that successor corporations could be held liable under CERCLA, but specifically found that it was "not necessary to fashion a federal common law rule."[98] It held that the district court should "follow

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[91] *See id.* at 247–48. U.S. Chemical's share of the cleanup costs was estimated at $5.3 million. *Id.* at 248.

[92] *See id.* at 249.

[93] *See id.* at 250.

[94] *Id.*

[95] City Envtl., Inc. v. U.S. Chem. Co., 814 F. Supp. 624, 634 (E.D. Mich. 1993), *aff'd sub nom. City Mgmt. Corp.*, 43 F.3d 244.

[96] *See City Mgmt. Corp.*, 43 F.3d at 250.

[97] 922 F.2d 1240 (6th Cir. 1991).

[98] *See id.* at 1245. The intricate discussion of when it may be appropriate to adopt a federal common law seemed, however, to be more focused around whether it would be a creation of federal common law to conclude that corporate successors are

Michigan law in its application of successor liability."[99] In his concurrence, Judge Kennedy explained that state law should apply based on a belief "that the existence and status of a 'corporation' . . . should be determined by reference to the law under which the 'corporation' was created" and that as "creatures of state law . . . such questions should be determined by reference to the law of the state of their incorporation, unless the application of that law would conflict with federal policy."[100] Judge Kennedy also found generalized arguments for uniformity an insufficient substitute for concrete evidence that adopting state law would actually affect the federal interests involved when determining whether application of state law conflicted with federal policy.[101] Noting the lack of necessity for a federal common law standard to prevent a state from creating a polluter-friendly environment, Judge Kennedy concluded that there was no reason to promulgate a uniform federal rule.[102]

The Eleventh Circuit has also considered the choice-of-law question, but in the context of a limited liability partnership case, and concluded that state law should apply. *Redwing Carriers, Inc. v. Saraland Apartments*[103] was a contribution suit brought by a past owner of a parcel of land whose operation of a trucking terminal caused contamination of the property against a number of parties that owned, operated, and managed the site at the time of the suit.[104] One of the parties, the Hutton Partners, became limited partners in the entity that owned the site at the time of the suit by purchasing a ninety-nine percent interest in

included under the Act, not which law to apply in determining liability. *See id.* at 1246.

[99] *Id.* at 1248.

[100] *Id.* (Kennedy, J., concurring).

[101] *Id.* at 1250.

[102] *See id.* at 1249–50.

[103] 94 F.3d 1489 (11th Cir. 1996).

[104] *See id.* at 1494–95. Redwing Carriers, Inc. had been in the business of hauling materials used in construction and other industries using trucks that were cleaned out at the terminal located on the site. *Id.* at 1494. The waste water from the cleaning was permitted to drain onto the property, and the ground at the site became contaminated with hazardous chemicals that formed a tar-like toxic substance. *Id.* The property changed hands and an apartment complex was built on the site. *Id.* Eventually, the tar began seeping to the surface, and in 1985, Redwing entered into the first of two consent orders with the EPA agreeing to monitor the site and to remove any seeps that appeared. *Id.* at 1494–95. Redwing claimed it spent $1.9 million investigating and cleaning the site and sought to recoup those costs by action under sections 113(f) and 107(a) of CERCLA. *Id.*

that entity.[105] The court considered whether the Hutton Partners should be deemed "owners" of the site under CERCLA because of their stake in and power to control the owning entity—an argument that ran contrary to Alabama law.[106] It noted that "[o]ne of the more significant gaps . . . arises where the right to recovery created by the Act confronts state law governing business entities like corporations and partnerships" and that "courts have reached different conclusions on whether state or federal common law provides the rule of decision."[107]

The *Redwing* court then applied the *Kimbell Foods* test to determine whether federal common law or state law should govern a limited partner's accountability for the CERCLA liability of the partnership.[108] First, although the court recognized that a uniform rule would expedite enforcement of the Act by making liability assessment more certain, it was not convinced of a *need* for a uniform rule because that same argument could be made in the context of almost any federal statute.[109] Second, it concluded that the state rules governing the liability of limited partners would not have conflicted with CERCLA's goals because they allowed for accountability of limited liability partners in certain circumstances, and the court did not anticipate the enactment of more protective statutes "to defeat CERCLA's goal of having the polluter pay."[110] Finally, the court recognized the attractiveness of limited partnerships as investment vehicles and determined that, because the state limited-partnership statutes defined the extent to which a partner could manage business without losing limited liability status, it should not upset the expectations investors have under the state law rules by adopting a federal common law

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[105] *Id.* at 1495.

[106] *See id.* at 1498.

[107] *Id.* at 1499–1500.

[108] *Id.* at 1501.

[109] *Id.* at 1501. The court prudently acknowledged that if convenience in enforcement justified departure from state law in every case, then the Court in *Kimbell Foods* would not have endorsed adopting state law as the federal rule of decision. *See id.*

[110] *See id.* at 1501–02.

standard.[111] After weighing the factors, it concluded that state law should apply.[112]

Courts considering the issue after *Bestfoods* seem even more likely to decide in favor of state law. In *United States v. Davis*,[113] the First Circuit considered CERCLA contribution litigation revolving around disposal of hundreds of thousands of gallons of hazardous waste at a site that occurred in the late 1970s.[114] The court considered the choice-of-law question because one of the liable parties argued that the federal common law standard required its corporate predecessor to be found liable instead.[115] The court then discussed the traditional "mere continuation test," the federal "substantial continuation test,"[116] and the driving factors that led other courts to choose one or the other.[117] The First Circuit had concluded almost a decade prior that the majority rule was to apply state law "so long as it is not hostile to the federal interests animating CERCLA" in matters of successor liability.[118] The *Davis* court used the Supreme Court precedent of

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[111] *See id.* The court stated that the unsettling effect that a federal rule could have on relations dependent on state law was the strongest support for adopting the state law in this case. *See id.*

[112] *See id.* at 1501–02. The court stated that the "federal law governing liability under CERCLA should *incorporate* the applicable state law rule" and then looked to Alabama law. *Id.* at 1502 (emphasis added). This clarifies confusing language found earlier in the opinion, stating that "federal law determines the issue of CERCLA liability" and that because "CERCLA is a federal statute targeting a national problem . . . the rights and liabilities created by CERCLA are governed by federal law." *Id.* at 1500. The principle of incorporation demonstrated here is treated as the equivalent of an outright choice of state law for the purposes of this Note because, logically, it has the same consequence.

[113] 261 F.3d 1 (1st Cir. 2001).

[114] *Id.* at 14. In 1970, the owner of ten acres of land in Rhode Island opened a waste disposal site that was placed on the EPA's National Priorities List of hazardous waste sites in 1982. *Id.* at 15. The EPA estimated that the cleanup work would cost $30 million in total. *See id.* In 1990, the United States brought an action against a number of parties for recovery of past and future response expenditures. *See id.* at 15–16. One of the defendants, United Technologies Corporation, sued some of its co-defendants and eighty-eight other companies under the contribution suit provision of the Act. *Id.* at 16. The trial court eventually issued a declaratory judgment in favor of United Technologies and against some of the defendants to the contribution suit. *See id.* at 18.

[115] *See id.* at 52–53.

[116] *See generally infra* Part III.B–C (providing detailed analysis of the difference between the two tests).

[117] *Davis*, 261 F.3d at 53. In doing so, the court referred to the *Kimbell Foods* test. *See id.*

[118] *See id.* at 54 (quoting John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 406 (1st Cir. 1993)).

Bestfoods[119] and *O'Melveny* to reaffirm that position and concluded that there was no evidence that the application of state law would frustrate any federal objective.[120] The court, therefore, determined that Connecticut's "mere continuation" test was the correct test to apply.[121]

Some circuits that avoid resolution of the choice-of-law issue nonetheless take the opportunity to suggest how they might resolve it in an appropriate case. The Second Circuit did just that in *New York v. National Service Industries, Inc.*,[122] when it hinted that it might choose state law over a federal common law if it were unable to avoid the issue.[123] The case involved the cleanup of a National Priority List contaminated site in New York where several drums of a hazardous substance used in dry cleaning had been dumped in 1978.[124] The party responsible for the dumping had sold almost all of its assets to a company that would later merge into National Services Industries, Inc. ("NSI").[125] In 1999, the State sued NSI to recover response costs under CERCLA, asserting that NSI could be held liable because it fell under the continuity exception to the general rule that a purchaser corporation is not liable for debts of the seller.[126] The Second Circuit had previously determined that CERCLA required a uniform federal rule and that the substantial continuity test was the appropriate test to apply when considering that exception.[127] The court, however, rejected the argument that it was bound by that decision because its rationale for displacing state law had been overruled by the determination

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[119] *See id.* at 54 ("The Court applied state corporation law in a recent CERCLA case . . . and left little room for the creation of a federal rule of liability under the statute.").

[120] *See id.* The court relied on *Bestfoods* and *O'Melveny* for the proposition that there must be a concrete federal policy that is actually compromised by the application of state law in order to justify the creation of a federal rule. *See id.*

[121] *Id.*

[122] 460 F.3d 201 (2d Cir. 2006).

[123] *See id.* at 208.

[124] *Id.* at 204.

[125] *Id.*

[126] *Id.*

[127] *Id.*; *see also* B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir. 1996). The court had held that the substantial continuity test was a CERCLA-specific rule to displace the narrower and more restrictive state rules concerning asset purchasers as mere continuations of sellers. *See Betkoski*, 99 F.3d at 519.

that the substantial continuity test could not survive *Bestfoods*.[128] After acknowledging the split among circuit courts, the court stated that the *Kimbell* factors "appear to favor the absorption . . . of state law" because a mere federal interest in uniformity is not a sufficient basis for the displacement of state law.[129] Ultimately, it declined to decide whether CERCLA requires the displacement of state law because the State's claim failed under both New York and traditional common law principles—but the court did not pass up the opportunity to state that it failed to see any conflict between the application of state law and the federal interests at issue in CERCLA.[130]

D. Circuit Cases in Favor of Federal Law

While there is some stability in temperament among those circuit courts that favor state law, the courts on the other side of the issue are considerably more irregular. Some are vehement in arguing for a uniform federal rule, others provide only dormant support, and at least one circuit leaves doubt as to whether it has changed its mind. The Fourth Circuit has not addressed the issue since it decided *United States v. Carolina Transformer Co.*[131] in 1992. The United States had brought suit under CERCLA to recover costs incurred decontaminating a site where dielectric fluid had been spilled or dumped in the course of salvaging and repairing electronic transformers.[132] The district court found all of the defendants liable, but one defendant appealed on the issue of whether it could be held liable for the original dumping party's acts as its successor-in-interest.[133] Without mentioning *Kimbell* or any significant weighing of factors, the Fourth Circuit determined that "[t]he national interest in the uniform enforcement of CERCLA and the same interest in preventing evasion by a responsible party by even *legitimate* resort to state law are the reasons we think the

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[128] *See Nat'l Serv. Indus.*, 460 F.3d at 206–07. The court only held that CERCLA required a uniform rule because it could then adopt the substantial continuity test, persuaded by the primary concern that some inflexible and easily evaded state law rules would defeat the goals of the Act. *See id.* at 207–08.

[129] *Id.*

[130] *See id.* at 208–09.

[131] 978 F.2d 832 (4th Cir. 1992).

[132] *Id.* at 834.

[133] *Id.* at 834–35.

successor liability is appropriate where factually justified."[134] The court then considered both " 'traditional and evolving principles of federal common law.' "[135] It defined the traditional "mere continuation" exception standard to require that a corporation not be considered a continuation unless, "after the transfer of assets, only one corporation remains, and there is [only one] identity of stock, stockholders, and directors between the two corporations"—a rule which the court acknowledged would not be adequate to find the successor corporation liable in the case.[136] It then considered the eight factors of the "substantial continuity" approach and was able to conclude that the district court had not erred in finding the successor corporation liable.[137] Implicitly, the court seemed to choose the substantial continuity test over the traditional approach only because it allowed for a finding of liability.

One of the cases that provided major support for the Fourth Circuit's position, *Louisiana-Pacific Corp. v. Asarco, Inc.*,[138] has been seriously called into question by a subsequent case from that same circuit.[139] *Louisiana-Pacific* was a Ninth Circuit case involving the cleanup of log sort yards where heavy metals were found in ground water and soil resulting from the use of a certain by-product of copper smelting called "slag."[140] The owner of the copper smelter used Industrial Mineral Products ("IMP") to market and sell the slag to several businesses before it ceased operations in 1985.[141] When the purchasing businesses sued the owner for cleanup costs under CERCLA, the owner in turn brought a claim for contribution against the successor-in-interest

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[134] *Id.* at 837 (emphasis added). In making this assertion, the court relied on two decisions favoring a uniform standard from the Ninth and Third Circuits. *See id.* The court created some confusion by discussing whether corporate successor liability exists at all and what standard should apply, without differentiating between those two distinct issues. *See id.*

[135] *Id.* (quoting United States v. Monsanto, 858 F.2d 160, 171 (4th Cir. 1988)).

[136] *Id.* at 838. There was no overlap of stock ownership between the two corporations. *Id.*

[137] *Id.*

[138] 909 F.2d 1260 (9th Cir. 1990).

[139] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 362 (9th Cir. 1998).

[140] *Louisiana-Pacific Corp.*, 909 F.2d at 1262. Slag, a hard, rock-like substance, was commonly used as a ballast to stabilize the grounds at log sort yards. *Id.*

[141] *Id.* Louisiana-Pacific Corp. was one of the businesses that bought the slag. *Id.*

to IMP.[142] The Ninth Circuit determined that federal law governed the issue of successor liability under CERCLA based on considerations of national uniformity.[143] It did not, however, adopt the broader "continuing business enterprise" approach.[144] Later, in *Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*,[145] the parties asked the Ninth Circuit to use its "powers" under federal common law to expand corporate successor liability under CERCLA.[146] The court, however, declined to embrace the broader notion of substantial continuation and expressed doubt in its decision in *Louisiana-Pacific* before concluding that it need not determine whether state law instead would control because the same result would be reached under federal common law.[147] The Ninth Circuit considered its precedent in light of *O'Melveny* and recognized that the Supreme Court had rejected many of the arguments that *Louisiana-Pacific* rested on to find a need for uniform federal rules.[148] It turned to the *Kimbell Foods* factors and found that, because state law on successor liability was largely uniform throughout the country, the alleged "need" for uniformity truly reflected a desire for a more expansive notion of liability than state law provided—in essence an attempt to correct perceived inadequacy in state law on the issue.[149] This time, the court did not seem to perceive any inadequacy, and it found no evidence

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[142] *See id.*

[143] *See id.* at 1263. In so concluding, the court was relying heavily on a case from the Third Circuit that had been decided two years prior. *See id.* at 1262–63.

[144] *See id.* at 1265 ("Even were we to adopt the exception, it is inapplicable here."). The name "continuing business enterprise" is interchangeable with "substantial continuation."

[145] 159 F.3d 358 (9th Cir. 1998).

[146] *Id.* at 360. The Railroad parties had leased land to an agricultural chemical company, and the site eventually was investigated by both state and federal environmental agencies. *Id.* The EPA issued an order to the Railroad parties after it became apparent that their lessee could not complete the cleanup activities itself. *Id.* The chemical company sold its business, and the Railroad parties filed a contribution suit against the purchaser as a successor in interest. *Id.* at 360–61.

[147] *See id.* at 364. The result would have been the same because the court chose not to extend the "mere continuation" exception to include the broader concept of "substantial continuation." *Id.*

[148] *Id.* at 362.

[149] *See id.* at 363. The court also noted that "while state law on successor liability is well-developed and uniform, the courts that have attempted to fashion federal common law rules for successor liability under CERCLA have created conflicts and uncertainties over a number of issues, including whether to adopt the expanded 'continuity of enterprise' theory." *Id.* at 363 n.5.

that the application of state law would frustrate the objective of imposing the costs of cleanup on responsible parties or that states would change their laws just to attract corporate business.[150] The Ninth Circuit emphatically rejected the broader notion of liability,[151] and its blatant shift in view regarding federal common law is difficult to ignore despite the fact that the court has not expressly overruled *Louisiana-Pacific*.[152]

In contrast, the Third Circuit has consistently held that federal common law governs CERCLA successor liability issues. In *Smith Land & Improvement Corp. v. Celotex Corp.*,[153] the court reasoned that successor liability issues must be resolved with considerations of national uniformity to avoid evasion of CERCLA goals by responsible parties that arrange for mergers or consolidations under state laws that are particularly restrictive of successor liability.[154] It also interpreted the little legislative history available to indicate "that Congress expected the courts to develop a federal common law to supplement the statute."[155] It concluded that the general rule of successor liability in operation in most states should be decisive as a federal common law standard rather than the particular state law standard.[156] After numerous developments in the law, the Third Circuit reconsidered the issue in *United States v. General Battery*

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[150] *See id.* at 364.

[151] *See id.* ("[T]here is no 'substantial continuation' exception in this circuit.").

[152] Courts within the circuit continue to decide successor liability cases under CERCLA according to the "federal common law" rules. *See* Cal. Dep't of Toxic Substances Control v. Cal.-Fresno Inv. Co., No. CV F 06-0488 LJO SMS, 2007 WL 1345580, at *4 (E.D. Cal. May 8, 2007). *But see* United States v. Gen. Battery Corp., 423 F.3d 294, 315 (3d Cir. 2005) (Rendell, J., concurring in part and dissenting in part) ("[I]t is abundantly clear that the Ninth Circuit, were its hand forced, would follow the recent directives of the Supreme Court and hold that state law should govern successor liability under CERCLA.").

[153] 851 F.2d 86 (3d Cir. 1988). The plaintiff land owner was seeking indemnification from the defendant, as the corporate successor to the company responsible for the manufacturing of a waste pile that contained asbestos found on the relevant tract of land. *Id.* at 87–88.

[154] *See id.* at 92.

[155] *Id.* at 91. The court did not expand upon this statement, but simply cited to two district court cases that do not seem to support the proposition. *See id.*; United States v. Bliss, 667 F. Supp. 1298, 1308 n.8 (E.D. Mo. 1987); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983).

[156] *See Smith Land*, 851 F.2d at 92. The Third Circuit has also held that the federal interest in uniform application of CERCLA requires use of federal common law, not state law, in the context of a parent/subsidiary veil-piercing issue. Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1225 (3d Cir. 1993).

Corp.[157] and provided a detailed explanation for maintaining its position that federal common law should apply.[158] First, it stood by its precedent and reasoning in *Smith Land* despite contrary Supreme Court developments, stating that "[t]he Supreme Court has neither addressed nor disturbed these holdings."[159] The court recognized that *Bestfoods* noted the issue without resolving it and distinguished *O'Melveny* as a case brought under a state law cause of action dealing with the preemptive force of federal banking statutes.[160] The Third Circuit suggested that *Bestfoods* may actually support the federal common law standard that it employs—a novel argument based on the belief that the Court applied "fundamental" and "hornbook" principles of corporate liability rather than the law of any particular state.[161] It also directly addressed the *Atchison* argument that state law is largely uniform by simply contending that there is some variance and that the resulting unpredictability supports CERCLA uniformity.[162] The court praised the more "uniform and predictable" federal liability standard for corresponding with CERCLA objectives by "encouraging settlements and facilitating a more liquid market" and criticized incorporating "variable and

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[157] 423 F.3d 294. The United States filed an action against Exide Corporation, alleging that it was responsible for another company's waste disposal as a successor in interest. *Id.* at 296. The company manufactured lead acid batteries and had disposed waste materials at numerous sites that later were found to contain elevated levels of lead. *Id.* The EPA concluded that remedial action was necessary, and the United States incurred response costs of several million dollars. *Id.*

[158] *See id.* at 298–305.

[159] *See id.* at 298–99.

[160] *See id.* at 299–300. The court also distinguished *Atherton v. FDIC*, 519 U.S. 213 (1997), because that case involved the pre-emptive scope of the federal banking laws. *See id.* at 300.

[161] *Id.* at 300 ("If anything, *Bestfoods* cuts in favor of a uniform federal standard."). The court buttressed this argument by pointing out that other Supreme Court decisions used general common law principles to fill gaps in federal liability statutes such as the A.D.A. and Title VII. *See id.*

[162] *Id.* at 301–02 ("Whether a mixed cash/stock acquisition triggers successor liability . . . does not command uniform treatment among the states . . . . New Jersey corporations may be held responsible for successor environmental liability from which New York corporations may be exempt.").

uncertain" state standards for increasing CERCLA litigation and transaction costs.[163] The court concluded:

> To summarize, the Supreme Court has neither overruled nor directly undermined *Smith Land*. Furthermore, a uniform federal standard is appropriate under *Kimbell Foods* and *O'Melveny*: (1) the nature of the federal program, a comprehensive federal liability statute, counsels in favor of national uniformity; (2) a uniform successor liability standard is necessary to advance CERCLA's remedial objectives and to facilitate a fluid market in corporate and brownfield assets; and (3) uniform application of the majority state standard accords proper respect to commercial relationships predicated on the majority state law. Therefore, we will apply "the general doctrine of successor liability in operation in most states."[164]

The court, however, did acknowledge *Bestfoods*' holding that CERCLA does not abrogate fundamental common law principles of corporate liability and agreed that "substantial continuity" is therefore an untenable basis for successor liability.[165] The Supreme Court has decided not to review the case.[166]

Is the Third Circuit really the "last man standing" for federal common law? A recent Eighth Circuit case may indicate otherwise. The Eighth Circuit had determined in *United States v. Mexico Feed & Seed Co.*[167] that the district court was "probably correct in applying federal law,"[168] and further discussed and

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[163] *See id.* at 302–03. The court referred to "statutory interests in 42 U.S.C. § 9622, which aims to encourage early settlements, and in § 9607(r), which aims to facilitate a liquid market in brownfield assets." *Id.* at 303.

[164] *Id.* at 303–04 (quoting Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988)). *But see id.* at 309 (Rendell, J., concurring in part and dissenting in part) ("This determination is unnecessary to the resolution of the issues before us and runs counter to recent Supreme Court pronouncements which both call into question the concept of federal common law and explicitly state that only in the most limited of circumstances should we look beyond applicable state law.").

[165] *Id.* at 309 (majority opinion).

[166] Exide Techs. v. United States, 549 U.S. 941 (2006) (denying petition for writ of certiorari).

[167] 980 F.2d 478 (8th Cir. 1992). The case involved a parcel of land that had been contaminated with hazardous substances called "PCBs" during the operations of a waste oil hauling company. *Id.* at 482–83. The EPA cleaned up the site and sued a number of parties to recover costs, including the corporate successor to the waste oil hauling company. *Id.* at 483.

[168] *Id.* at 487 n.9. The court stated that it did not decide whether federal or state law should apply because the parties had not raised the issue. *Id.*

endorsed the "substantial continuation" theory.[169] It stated that the cases applying this theory "correctly focused on preventing those responsible for the wastes from evading liability through the structure of subsequent transactions."[170] Since CERCLA is aimed at imposing costs on responsible parties, the court reasoned that "the imposition of successor liability under the 'substantial continuation' test is justified by a showing that in substance, if not in form, the successor is a responsible party."[171] The court then continued its analysis under the "substantial continuation" theory.[172] In *K.C. 1986 Ltd. Partnership v. Reade Manufacturing*,[173] the court discussed its conclusion from *Mexico Feed & Seed* that "the policy objectives of CERCLA would justify imposing successor liability . . . under the broader standard by extending liability to a successor corporation which . . . had acquired assets 'with knowledge that the wrong remains unremedied.' "[174] It also acknowledged that the continuing viability of the "substantial continuation" theory was seriously called into doubt by the Supreme Court in *Bestfoods* and that other circuits were abandoning the theory.[175] Ultimately, however, the Eighth Circuit concluded that "there may yet be contexts in which the substantial continu[ation] test could survive" because *Bestfoods* did not directly address corporate successor liability and that it need not decide if the theory is still viable because the facts of the case would not satisfy it anyway.[176] The court again stated that it would not decide whether CERCLA requires the displacement of state law in favor of a national rule of successor liability,[177] although the court's insistence that it has not decided this issue is odd considering its endorsement and application of the "substantial continuation" test—which it acknowledges was "originally created by federal courts."[178]

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[169] *See id.* at 487–90.

[170] *Id.* at 488.

[171] *Id.*

[172] *See id.* at 489–90.

[173] 472 F.3d 1009 (8th Cir. 2007).

[174] *Id.* at 1021 (quoting *Mexico Feed & Seed*, 980 F.2d at 488 (emphasis omitted)).

[175] *See id.* at 1022.

[176] *See id.*

[177] *Id.* at 1025 n.4. There was no assertion that the state corporation law would be any different from traditional common law principles. *Id.*

[178] *See id.* at 1021.

Nonetheless, this practice of courts to sidestep the issue seems to be quite common in this context.

This Part has demonstrated just how convoluted the issue has become. Given the temporal length of the disagreement, the number of circuits involved, and the uncertainty the split is creating for corporate practitioners and parties seeking to recoup costs under the Act, it is almost surprising that the Supreme Court has declined to squarely address the issue and grant certiorari to review *General Battery. K.C. 1986 Ltd. Partnership* is a clear demonstration that courts will continue to skirt the issue and perpetuate diverging viewpoints that have a tendency to further impede the already long process of CERCLA recovery. The issue is far from being resolved in the courts, but the next two Parts suggest an approach that can provide some stability for practitioners and parties seeking to recover under the Act.

III. "MERE" AND "SUBSTANTIAL" CONTINUITY

It is difficult to soundly contend that there is any material need to apply a federal common law standard over the relevant state law standard in decisions of corporate successor liability. A comparison of the different standards makes it clear that applying a federal standard accomplishes either a minimal appreciable difference in result, or an unprecedented and capricious alteration of settled corporate law principles without adequate justification. The divergence lies in which "federal standard" the court chooses to apply—the traditional common law "mere continuation" theory or the "substantial continuation" theory spawned from federal law and not widely accepted among states. Each of these theories operates as an exception to the general rule against liability, but one is considerably broader than the other.

A. Corporate Successors: A Roadmap of Liability

A tactic often employed by corporations seeking to avoid liability is acquisition of the other corporation's assets instead of its shares.[179] A corporation that purchases the assets of another

[179] MOSKOWITZ, *supra* note 37, at 112. After a sale of a corporation's stock, the liabilities of the corporation remain with the corporation despite any change in ownership. *See* Kenneth K. Kilbert, *Successor Liability Under CERCLA: Whither Substantial Continuity?*, 14 PENN ST. ENVTL. L. REV. 1, 2 (2005).

corporation typically does not become liable for the obligations of the seller by virtue of the asset transaction alone, but it will be held liable:

> (1) where the purchasing corporation expressly or impliedly agrees to assume the selling corporation's liabilities; (2) where the transaction amounts to a consolidation or merger of the two corporations; (3) where the purchasing corporation is a mere continuation of the selling corporation; [or] (4) where the transaction is entered into fraudulently, in order to escape liability for obligations of the selling corporation.[180]

So, the general rule that an asset purchaser does not become liable for the obligations of the seller is subject to four exceptions by which liability may be imposed. This is the overarching principle that serves as the backdrop for the ensuing debate. The divergence occurs as a function of the third exception, which is focused around the concept of continuity.

B. The "Mere Continuation" Theory

Most states articulate the "mere continuation" standard as a consideration of some form of the following factors: (1) the divesting corporation's transfer of assets; (2) payment of less than fair market value by the buyer for the assets; (3) continuation by the buyer of the divesting corporation's business; (4) a common officer of the buyer and divesting corporations who was instrumental in the transfer; and (5) the inability of the divesting corporation to pay its debts after the transfer.[181] "[C]ommon identity of officers, directors, and stockholders . . . is the key element" of this standard.[182] The mere continuation standard would be used both in circuits that apply the law of a particular state subscribing to the popular approach and in circuits that apply a federal common law standard based on the law generally applicable in most states.[183]

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[180] City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 251 (6th Cir. 1994); *see also* Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 361 (9th Cir. 1998).

[181] *See* United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001).

[182] Kilbert, *supra* note 179, at 6.

[183] *See, e.g.*, *Atchison*, 159 F.3d at 362, 364 ("[W]e choose not to extend the 'mere continuation' exception to include the broader notion of a 'substantial continuation.' *Louisiana-Pacific* recognized that 'the traditional rules of successor liability in operation in most states' should determine the limits of CERCLA successor liability."); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d

At least one scholar has identified various "species" of mere continuation applied throughout states.[184] The differences between the "species" lie in whether the state has taken an elemental bright-line approach, a threshold approach with consideration of other non-dispositive factors, a flexible non-dispositive factor approach, or an undefined approach.[185] Nonetheless, this slight variation does not affect the general stringent characteristic of mere continuity because a common identity of shareholders, directors, or officers is presumably always a prominent feature of the standard.[186] There still would be little difference in the ultimate outcome if a court chose to adopt some form of this standard as a "federal standard" as long as it is substantially the same as the state law standard to be displaced.

C. *The "Substantial Continuation" Theory*

A real discrepancy between state and federal law outcomes theoretically would occur if a court chose to incorporate the "substantial continuation" standard as the federal continuity rule. The substantial continuation standard requires consideration of eight factors:

> (1) retention of the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the [buyer] holds itself out as a continuation of the previous enterprise.[187]

Cir. 1988) ("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."); Nelson, *supra* note 1, at 534 ("Several . . . circuits . . . read CERCLA to incorporate 'general' law on this point; they determine successor liability under CERCLA according to '[t]he general doctrine of successor liability in operation in most states . . . .' " (quoting *Smith Land & Improvement Corp.*, 851 F.2d at 92)).

[184] *See* George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 32–34 (2007) [hereinafter *Taxonomy*].

[185] *See id.*

[186] *See id.* at 35.

[187] United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992); *see also* United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001); MOSKOWITZ, *supra* note 37, at 115.

By increasing the number of relevant factors and decreasing the complexity of each factor, the circuits adopting this broader federal common law approach make it easier to recover from a corporate successor. For example, the substantial continuation test does not require continuity of shareholders or directors or officers between the predecessor corporation and the successor—an element that is considered one of the more dispositive factors under the mere continuation test.[188] Some courts have noted that altering the traditional "mere continuation" exception to encompass the broader "substantial continuation" exception in order to hold an asset purchaser liable may actually be unnecessary because in many cases where the traditional exception cannot be met there has been some fraudulent intent or collusion, making the corporation liable under the fourth exception to the traditional rule—that the transaction was entered into fraudulently to escape liability for selling corporation's obligations.[189]

Ultimately, a federal court deciding that a federal standard should determine issues of corporate successor liability under CERCLA might choose to incorporate either the "mere continuation" or the "substantial continuation" exception to the general rule against liability. The basic effect of these exceptions is that a successor is "more likely to be held liable for the CERCLA liability of its predecessor as it becomes more closely identified with that predecessor,"[190] although the substantial continuation exception casts a wider net of liability. Any given state's continuity test could range from a basic standard of "mere continuation" to the more expansive "substantial continuity."[191] A court seeking maximum liability from successors in a state that embraces the "mere continuation" theory might look to hold in favor of a federal standard and then incorporate the "substantial continuity" theory as a means to reach that goal. Before making such a departure from settled state principles of corporate law, however, it is necessary to consider whether it is

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[188] *See* Kilbert, *supra* note 179, at 7; *Taxonomy*, *supra* note 184, at 31.

[189] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1998).

[190] WHITMAN, *supra* note 28, § 5.03, at 151–52.

[191] *See generally Taxonomy*, *supra* note 184, at 62–148 (discussing different variations on successor liability standards from state to state). Typically, states do not use standards that restrict liability further than it is under the traditional mere continuation exception. *See id.*

justifiable—or even necessary—to advocate and employ either federal standard.

IV. STATE LAW V. FEDERAL LAW: THE RESOLUTION

The *Kimbell Foods* factors that guide the application of federal law take into account three basic considerations: (1) need for uniformity; (2) frustration of specific federal objectives; and (3) disruption of commercial relationships.[192] *O'Melveny* states that the second consideration is paramount as a precondition to the others.[193] A walk through the arguments for either side as they relate to these factors leads to the inevitable conclusion that irrefutable support for a federal common law standard of CERCLA successor liability cannot be found in the guidelines the Supreme Court has set for applying federal law.

A. *Disruption of Commercial Relationships*

As a number of courts have recognized, courts should be hesitant to displace state law in favor of a federal standard because corporations and investors often rely on the state law of incorporation in making business decisions.[194] This argument finds its place in the third *Kimbell Foods* factor—the extent to which the application of a federal rule would disrupt commercial relationships based on state law.[195] Since the line of cases descending from *Erie* generally favors the application of state law in most situations,[196] the consideration of the interests behind state law is more relevant once a court has found that there is some reason to displace state law in favor of a federal common law rule. In most cases, the interests supporting a federal

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[192] *See supra* Part II.A.

[193] *See supra* Part II.A.

[194] *See* United States v. Gen. Battery Corp., 423 F.3d 294, 299 (3d Cir. 2005) (citing Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 105 (1991)); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1502 (11th Cir. 1996).

[195] *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728–29 (1979); *see also Redwing Carriers*, 94 F.3d at 1502 (analyzing the third *Kimbell Foods* factor and reasoning that the potential to upset the expectations of investors under state law rules is the strongest support for adopting state law).

[196] *See* Rodney B. Griffith & Thomas M. Goutman, *A Hiccup in Federal Common Law Jurisprudence:* Sosa, Bestfoods *and the Supreme Court's Restraints on Development of Federal Rules of Corporate Liability*, 14 U. MIAMI BUS. L. REV. 359, 360 (2006).

common law rule are likely to be considered first and are therefore pivotal—and typically more controversial.

B. *The "Need" for Uniformity*

A general need for uniformity cannot be adequate justification to invoke a federal standard. The federal interest in uniformity, however, is the principal—and sometimes the only—interest invoked to support the argument that federal law should apply.[197] Although a federal uniform standard logically would increase certainty in application and decrease litigation and transaction costs, these considerations do not rise to the level of a "conflict" as required by *O'Melveny*.[198] Considering that the traditional federal rule is derived from the law in place in the majority of states, it cannot be explained rationally how any significant frustration will occur from applying one rule over the other.[199] State law does not vary widely on the issue of successor liability.[200] The only rule that would produce a different result across the board is the "substantial continuation" approach,[201] a rule that has been recognized as an untenable basis for successor liability after *Bestfoods*.[202]

The "need for uniformity" is not about a patchwork of state laws that is currently in disarray, but can only be about the desire to apply the broader substantial continuity standard to reach more corporate successors than can be held liable under state law as it stands.[203] The motivation is therefore a concern of

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[197] *See, e.g.*, *General Battery*, 423 F.3d at 301–02; La.-Pac. Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 n.2 (9th Cir. 1990).

[198] *See General Battery*, 423 F.3d at 310–12 (Rendell, J., concurring in part and dissenting in part); Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 363–64 (9th Cir. 1997).

[199] *See* Watson, *supra* note 2, at 234 (recognizing the homogeneity between federal and state law).

[200] *See generally Taxonomy*, *supra* note 184, at 62–148 (providing a compilation of relevant judge-made successor liability laws for each state in the appendix).

[201] *See* Watson, *supra* note 2, at 233–34 (stating that the broader "substantial continuity" test allowed courts to hold more parties liable under CERCLA, and since courts have moved away from the broader approach, federal common law and state law are one and the same).

[202] *General Battery*, 423 F.3d at 309; *see also* JOEL S. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS 76 (2d ed. Supp. 2008) (noting that several courts of appeal have concluded that the substantial continuity theory of successor liability did not survive *Bestfoods*).

[203] *See General Battery*, 423 F.3d at 314 (Rendell, J., concurring in part and dissenting in part).

inadequacy, not conflict.[204] The courts should be wary of embracing federal common law rules using a pretext of "uniformity" whenever the widely accepted laws of the states merely seem inadequate. If no significant conflict appears, then the laws are adequate enough under current Supreme Court precedents and should not be displaced. By reducing the standard for displacement of state law from conflict with an important federal policy to a mere need for uniformity, courts would create the potential for a body of federal common law to be developed around virtually every federal act.[205]

C. *Conflict: The Frustration of Specific Federal Objectives*

There is no support for the argument that application of state law would rise to the level of conflict with federal goals because states typically do not employ restrictive standards that would frustrate the specific federal objectives of CERCLA. Since states have an interest in protecting their land and the well-being of their citizens, they will not create a law to make themselves particularly hospitable places for polluters.[206] That sound argument illustrates the negligible probability of conflict between a specific state law and the objectives of CERCLA and the lack of real need to abrogate a state's chosen standard. The best attempt by a circuit to meet the conflict standard was the argument that variable and uncertain state successor liability

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[204] *See* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 207 (2d Cir. 2006) (recognizing that the court had only held in favor of a uniform federal rule so it could adopt the substantial continuity test to bypass state laws that were "easily evaded" and that its original rationale for displacing state law had been overruled after *Bestfoods*); *General Battery*, 423 F.3d at 314.

[205] *See* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1501 (11th Cir. 1996) (noting that, although adopting a uniform rule has the potential to expedite CERCLA enforcement by decreasing uncertainty in assessing liability, the argument is not unique to CERCLA and could be made for just about any federal statute).

[206] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1998) (recognizing that states have their own interest preventing successor corporations from evading liability and that it is unrealistic to think that a state would alter general corporate law principles—developed to address much more than environmental liability—simply to become hospitable to polluters); Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1249–50 (6th Cir. 1991) (Kennedy, J., concurring) ("States have a substantial interest in protecting their citizens and state resources. Most states . . . share a complementary interest . . . in enforcement of laws . . . used to remedy environmental contamination. I see no necessity to create federal common law . . . to guard against the risk that states will create safe havens for polluters.").

standards taken altogether would increase CERCLA litigation and transaction costs, creating conflict with certain statutory interests in encouraging settlements and facilitating a liquid market.[207] This hybrid position uses the alleged lack of uniformity as a basis for a conflict with statutory objectives.

There are two things inherently wrong with this argument. First, the second consideration of *Kimbell Foods* and the conflict standard from *O'Melveny* should not involve evaluation of "the jurisprudential landscape of all fifty states."[208] Rather, a court should only consider whether "*the particular state law in question* is inconsistent with the policies underlying the federal statute."[209] This clarification obliterates any argument of conflict with statutory aims of decreasing litigation and encouraging settlements due to variance because the court should only properly consider the effect of the law of one state, making variation among states irrelevant. The danger in this argument lies in the attempt to dovetail the first and second *Kimbell Foods* factors, which are separate and distinct. Allowing lack of uniformity to be the basis of conflict has the potential to completely subvert the rationale behind the holding of *O'Melveny* that conflict is a precondition to the creation of federal law.[210] The second fault in this argument, which relates to the rationale behind *O'Melveny*, is that it could be made for a large percentage of federal statutes—taking the number of instances from few and restricted to vast and limitless. Decreasing litigation and encouraging settlements is presumably *always* a federal interest, and is dissimilar to the instances that the Supreme Court has detailed as the "few and restricted" cases in which it created a federal common law.[211] If decreased litigation could be a paramount concern, uniform federal standards would be the

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[207] *See General Battery*, 423 F.3d at 302–03.

[208] *See id.* at 312 (Rendell, J., concurring in part and dissenting in part).

[209] *See id.* (quoting Kamen v. Kemper Fin. Servs., 500 U.S. 90, 111 (1991)).

[210] *See id.* at 317–18 ("To say that the need for uniformity is the articulated federal policy supplying the rationale for creating federal common law is to put the analytic rabbit in the hat, so to speak.").

[211] *See* Atherton v. FDIC, 519 U.S. 213, 225–26 (1997) (listing controversy between two states regarding apportionment of streamwater, federal government contractors and civil liability of federal officials, relationship between Federal Government and members of its armed forces, liability of federal officials in the course of official duty, and relationships with other countries).

norm as predictability would almost always be lacking in every case due to even the slightest variation in law from state to state.

D. *Beyond* Kimbell—*Congressional Intent*

Courts deciding in favor of federal common law in these cases have desperately attempted to supplement a weak *Kimbell* analysis with the argument that Congress expected courts to develop federal rules to supplement the statute.[212] Taking a first look at whether there has been a congressional directive for federal judges to develop their own rules is indeed a well-recognized approach.[213] Speculation that such a directive exists here, however, is completely unwarranted, especially in light of the scant legislative history of the Act.[214] The Supreme Court has made clear that, when dealing with comprehensive and detailed federal statutes, courts should presume that anything left unaddressed in the statutory scheme is subject to state law.[215] Although CERCLA has been criticized for its less than optimal draftsmanship, the Act is nonetheless comprehensive,[216] and it does specifically address the law that should apply in other instances.[217] Considering the lack of a clear directive from Congress and the comprehensive nature of the statute, the position that Congress expected courts to create federal common law to cover successor liability under CERCLA is completely untenable. CERCLA is wholly silent about successor liability, and courts should be hesitant to infer anything contrary to state law.[218]

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[212] *See General Battery*, 423 F.3d at 299.

[213] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 362 (9th Cir. 1998).

[214] *See id.*

[215] *See* O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994); *Atchison*, 159 F.3d at 362.

[216] The very first letter in the acronym "CERCLA" stands for "comprehensive." *See* 42 U.S.C. § 9607 (2000 & Supp. I). That seems to be a clear indication that Congress viewed the statute as such. *See* United States v. Bestfoods, 524 U.S. 51, 55 (1998) ("As its name implies, CERCLA is a comprehensive statute . . . ." (quoting Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994))).

[217] *See, e.g.*, 42 U.S.C. § 9613(f)(3)(C) (2000) ("Any contribution action brought under this paragraph shall be governed by Federal law.").

[218] *See* Nelson, *supra* note 1, at 558 n.265 ("[C]ourts should resist the idea that because 1 U.S.C. § 5 expresses a generic intention to include 'successors and assigns' whenever Congress uses the word 'association' in reference to a corporation, federal statutes that impose liability on 'associations' . . . are thereby federalizing questions of successor liability.").

E. State Law: The Right Choice

State law should apply when deciding issues of corporate successor liability under CERCLA. When the law of that particular state creates no clear conflict with the objectives of the Act and adequately provides for the cleanup and cost distribution that the Act is meant to perpetuate, then that law should determine whether the successor can be held liable. That is the only conclusion that can withstand *Kimbell* analysis and other jurisprudential considerations.[219] If there is an actual conflict between specific federal objectives found in CERCLA and the law of a particular state, then the court may permissibly choose to apply the rule of law generally applicable in most states. The conclusion that relevant state law should apply is not defeated by the argument that predictability will be lacking without a uniform federal standard. Uniformity is but one issue to consider, with greater emphasis falling on the more restrictive standard of significant conflict required by *O'Melveny*. Under the significant conflict standard, only the law of the particular state is relevant and variance among many states is not a proper consideration.

If the law of the particular state does conflict with CERCLA objectives, then courts should look to the traditional mere continuation exception because it is the applicable rule in most states.[220] There is no support, however, for applying the substantial continuation exception as a federal rule after the Court's statement in *Bestfoods* against replacement of the " 'entire corpus of state corporation law' " simply because the cause of action is based on CERCLA.[221] Application of that standard as a federal rule would both fail to show deference to the state's chosen standard and disrupt the commercial

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[219] *See supra* Part IV.A–D.

[220] *See Taxonomy*, *supra* note 184, at 35 (describing the mere continuation exception as "traditional and long standing"); *see also supra* note 183 and accompanying text. *But see* Kilbert, *supra* note 179, at 20 ("[O]nce it is determined that a uniform federal common law should apply, federal courts have fairly broad latitude . . . . It is not . . . an exercise in weighing which particular test is most widely established in the federal or state common law. If majority rule were the lone criterion, the first courts deciding an issue would set and fix the course of federal common law forever. . . . While this approach might result in uniformity, uniformity for uniformity's sake is not the purpose of federal common law.").

[221] *See Bestfoods*, 524 U.S. at 63 (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979)).

relationships based on that state law. The only time the substantial continuation test should be applied is when it is the chosen standard of the particular state.[222] Some may contend that defaulting to state law unless conflict exists will lead to increased litigation and transaction costs because parties will always argue that the law of the particular state conflicts with CERCLA objectives. Such frivolous suits would be unlikely and impractical, however, because the vast uniformity of state corporation law would lead to widely applicable precedents. Moreover, the fact that the state law is the law that is contemplated by the parties when making business decisions would make any argument of unexpected consequences from its application untenable.

CONCLUSION

The environmental harms that CERCLA is aimed to correct and prevent are arguably among the most important issues facing society today. The goal of having the responsible party pay is indeed very admirable. There is no need, however, to make corporate successor law a "federal issue." Individual states have the same strong interest to protect their citizens and resources and they fashion their corporate responsibility laws accordingly. Supreme Court jurisprudence advises against displacing state law without a concrete federal policy that would be defeated by applying a state law.

When courts are faced with the issue of corporate successor liability under CERCLA, they first should ask whether the particular state law significantly conflicts with any federal policy or objective embodied in CERCLA. If not, the law of that state should apply. Only when a significant conflict can be found should the courts resort to the application of a "federal" standard—the traditional mere continuation exception derived from the law of most states. The law of the state, however, should always be the default choice of law.

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[222] Some states, like New York, seem to have adopted the more expansive substantial continuation test. *See* George W. Kuney, *Successor Liability in New York*, N.Y. ST. B.J., Sept. 2007, at 22, 24–25. As this Note has already demonstrated, that choice by certain states and not others does not support the application of a federal standard in every case because need for uniformity alone is not a proper basis to argue for a federal rule.