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Asset Purchasers as Potentially Responsible Parties Under Superfund

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Asset Purchasers as Potentially Responsible Parties Under Superfund*

I. INTRODUCTION

Whether or not asset purchasers can be held liable under "Superfund" has been a source of much litigation in the past few years. The debate has centered on the conflict between successor liability under traditional common law and the Environmental Protection Agency's (EPA) desire to expand successor liability beyond the common law.[1] The U.S. Supreme Court has not ruled on this issue, as it pertains to Superfund, and the Circuit Courts are divided in their rulings.[2] This Comment will argue in favor of the traditional approach and against the EPA's expansive approach. Part II will establish the background and history of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as it relates to traditional corporate law. In addition, it will discuss the EPA's attempt to expand the list of potentially responsible parties under CERCLA. Part III will discuss the general rule that asset purchasers are not liable, under traditional corporate law, as successors in interest. Part III will also explore the traditional exceptions to that rule. Part IV will discuss the history and reasoning behind the substantial continuity test as applied to CERCLA. Part V will analyze the various rationales and policy considerations supporting the substantial continuity approach and provide arguments against applying this test to CERCLA liability. Part VI will conclude the Comment.

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1. 4 JACKSON B. BATTLE & MAXINE I. LIPELES, ENVIRONMENTAL LAW: HAZARDOUS WASTE 288 (2d ed.1993) (citing C. M.. PRICE, LIABILITY OF CORPORATE SHAREHOLDERS AND SUCCESSOR CORPORATIONS FOR ABANDONED SITES UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, June 13, 1984, 11-12 (hereinafter "EPA Memorandum")).

2. Circuit cases using the Traditional common law approach include: Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 1997 WL 792675, *1 (9th Cir. 1997); Aluminum Co. of America v. Beazer East Inc., 124 F.3d 551 (3d Cir. 1997); SmithKline Beecham Corp. v. Rohm & Haas Co., 89 F.3d 154 (3d Cir. 1996); City Management Corp. v. United States Chemical Co., 43 F.3d 244 (6th Cir. 1994); John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993); Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991); and, Smithland & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988).

Circuit cases supporting the EPA's preferred rule (hereinafter the "substantial continuity test") include: B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996); United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992); United States v. Mexico Feed, 980 F.2d 478 (8th Cir. 1992); and, Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990).

II. BACKGROUND

On December 11, 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as "Superfund."[3] CERCLA was passed in the wake of the Love Canal incident,[4] where the Hooker Chemical and Plastics Co. had deposited nearly 22,000 tons of industrial waste on a sixteen acre site in Niagara Falls, New York. The chemical company buried the waste and then sold the site to the Niagara Falls Board of Education for $1. Homes and schools were later built on or near the site. In the mid 1970's Chemicals began seeping into residential basements, and by 1979 the New York Commissioner of Health ordered an area of the site vacated by all families with pregnant women and children under the age of two.[5]

The EPA recognized that none of the then-existing environmental laws enabled the EPA to adequately address environmental problems like Love Canal which pose a public health threat.

> Congress drafted CERCLA in order to provide the EPA with a powerful means of responding promptly and effectively to cases of environmental contamination. . . .
>
> . . . CERCLA empowers the EPA to respond to the actual or threatened release of a hazardous substance . . . by conducting the cleanup itself and suing a wide range of responsible parties for reimbursement . . . .[6]

Specifically, CERCLA lists four broad categories of "covered persons" which may be held jointly and severally liable for the cost of clean up as Potentially Responsible Parties (PRP's).[7] PRP's include:

> (1) owners and operators of vessels or facilities;
> (2) persons who at the time of disposal of hazardous substances owned or operated a facility where such substances were disposed of;
> (3) generators of hazardous substances or any person who arranges for their disposal or treatment; and
> (4) transporters of waste, if they participate in the selection of the disposal site or facility.[8]

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3. PUB. L. NO. 96-510, 94 STAT. 2767 (1980), *codified as* 26 U.S.C. § 4611 & 42 U.S.C. § 9601 (1997).
4. 4 BATTLE & LIPELES, *supra* note 1, at 179-180.
5. *Id.*
6. *Id.*
7. Aluminum Company of America v. Beazer East, Inc., 124 F.3d 551, 552 (3d Cir. 1997).
8. *Id.* (citing 42 U.S.C. § 9607(a)(1)-(4) (1997)).

The consequences of being labeled a PRP can be devastating. One author likened CERCLA to a bus "carreen[ing] through the countryside and crush[ing] all obstacles in its way."[9]

> [PRPs] are strictly, jointly, and severally liable for the cost of cleaning up an abandoned or uncontrolled hazardous waste site. PRPs are also liable for any damages to natural resources resulting from the release of a hazardous substance. Courts construe CERCLA liability broadly and liberally so as not to frustrate CERCLA's major purposes or to create loopholes in CERCLA's liability scheme. Exceptions to CERCLA liability are construed narrowly.[10]

Notwithstanding its power as a tool in the EPA's hands, CERCLA is not without its weaknesses. For instance, "CERCLA was drafted behind closed doors before being passed hastily by a lame duck Congress before its adjournment, a process that resulted in an ambiguous and confusing statutory and legislative history."[11] As a result, there is very little legislative history which would help explain the intent of Congress.[12] CERCLA was later amended and reauthorized on October 17, 1986 under the name of the Superfund Amendments and Reauthorization Act (SARA).[13] Among other things, SARA increased the size of Superfund from $1.5 to $8.5 billion.[14] While SARA is not as ambiguous as CERCLA, it is certainly not a "paradigm of clarity either."[15]

As a result of this ambiguity and the enormous potential for liability, CERCLA and SARA have generated a tremendous amount of litigation, much of it centering on whether a particular party is a PRP. The litigation involves either the EPA seeking reimbursement from a PRP or one PRP seeking cost recovery or contribution from another PRP.[16]

In an effort to broaden the reach of CERCLA, the EPA has sought to expand the list of PRPs to include individuals or corporations who purchase the assets of PRPs. In 1984 the EPA's Administrator for Enforcement and Compliance Monitoring issued a memo wherein she outlined a policy in which the EPA would encourage the courts to adopt the more

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9. 4 BATTLE AND LIPELES, *supra* note 1, at 179.

10. VALERIE M. FOGLEMAN, HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION 1 (1992).

11. *Id.* at 5.

12. *Id.*

13. PUB. L. NO. 99-499, 100 STAT. 1613 (1986), *codified as* 42 U.S.C. § 9601 & 10 U.S.C. § 211 (1997).

14. 4 BATTLE & LIPELES, *supra* note 1, at 182.

15. FOGLEMAN, *supra* note 10, at 5.

16. 4 BATTLE & LIPELES, *supra* note 1, at 182.

expansive substantial continuity test with regard to successor liabiiity.[17] Essentially, this test expands liability to include purchasers of assets who might otherwise not be liable under traditional corporate Law.

III. TRADITIONAL CORPORATE LAW AND SUCCESSOR LIABILITY

Under traditional corporate law, there is a "universally accepted general rule that a corporation which purchases the assets of another corporation does not, simply by virtue of the asset purchase transaction, become liable for the obligations of the seller."[18] However, there are four traditional exceptions in which an asset purchaser may be deemed liable as a successor if:

> (1) the purchasing corporation expressly or impliedly agrees to assume the liability;
> (2) the transaction amounts to a 'de-facto' consolidation or merger;
> (3) the purchasing corporation is merely a continuation of the seller corporation; or
> (4) the transaction was fraudulently entered into in order to escape liability.[19]

Thus, an asset purchaser generally would not be liable as a successor unless one of these four exceptions applied.[20] The remainder of Part III will briefly discuss each of these exceptions in the context of CERCLA. A more complete analysis of the various arguments for or against the application of the traditional corporate law rule will be given in part IV.

A. The Purchasing Corporation Expressly or Impliedly Agrees to Assume the Liability

Whether or not a corporation assumed the liabilities of its predecessor is generally a concern of contract interpretation.[21] "There has never been any doubt that an acquiring company could assume the target company's contingent future liabilities."[22]

The Ninth Circuit addressed the issue of implied assumption of liability by an asset purchaser in *Louisiana-Pacific v. Asarco*.[23] However, the

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17. *Id.* at 288.
18. City Management Corp. v. United States Chemical Co., 43 F.3d 224, 251 (6th Cir. 1994).
19. Louisiana-Pacific Corp. v. Asarco, 909 F.2d 1260, 1263 (9th Cir. 1990).
20. United States v. Mexico Feed, 980 F.2d 478, 487 (8th Cir. 1992).
21. Lisa Cope, Comment, *Who Should Pay Cleanup Costs—The Federal Response to Corporate Successor Liability Under CERCLA*, 32 SANTA CLARA L. REV. 539, 549 (1992).
22. RONALD J. GILSON, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 1099 (1986).
23. 909 F.2d 1260 (9th Cir. 1990).

court declined to rule on this issue because the plaintiff failed to raise it at the district court level. Despite this, the court did offer some guidance when it stated that "the question of implied liability is a fact specific issue, and additional facts would have to be developed" at the district court level. Thus, it appears that a court may find an asset purchaser liable as a PRP under CERCLA if it can be shown that the purchaser impliedly assumed the liability.[24]

In *Aluminum Co. of America v. Beazer East Inc.*,[25] the Third Circuit addressed the issue of express assumption of liability by an asset purchaser. The *Beazer* court held that the asset purchaser (Beazer) expressly assumed the liabilities of the now dissolved predecessor (ALT Corp.). ALT was the party actually responsible for the original contamination. In 1954 Beazer purchased the assets of ALT Corp. As part of the agreement Beazer expressly assumed all of the liabilities of ALT Corp. Because the agreement was found to be clear and unambiguous Beazer was deemed to have "assum[ed] 'all of the liabilities and obligations of [ALT Corp.] whatsoever.' "[26] The court concluded that although the agreement occurred years before the existence of CERCLA, Beazer's assumption of liability was sufficiently broad to include CERCLA liability.[27]

Beazer argued that under Delaware law a corporation's liabilities cease to exist three years after dissolution. Since ALT was dissolved in 1957, its liabilities ceased with it. Therefore, Beazer argued, it should not be liable under CERCLA. The court agreed that under Delaware law a creditor cannot enforce a corporate obligation three years after dissolution. However, the court held that this does not mean that "when a separate entity has received assets of a dissolved corporation and assumed its corporate liabilities, a creditor may not bring a suit to enforce that obligation against the continuing entity."[28] The court held that Beazer "is an ongoing entity, with an existence separate from the dissolved corporation, which received corporate assets and assumed corporate obligations, and which existed both at the time ALCOA and CBI's CERCLA claims arose."[29] Thus, the court found that Beazer succeeded to ALT's CERCLA liabilities by express assumption.[30]

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24. *See* United States v. Chrysler Corp., 31 ERC 1997 (D. Del. 1990) (The court closely examined the purchasing agreement and held that there was an express assumption of liability and therefore the purchasing corporation was liable as PRP under CERCLA).

25. 124 F.3d 551 (3d Cir. 1997).

26. *Id.* at 555, (quoting A5158).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 16.

B. The Transaction Amounts to a 'De-facto' Consolidation or Merger

An asset purchaser may be liable under the de-facto merger exception. In general, a transaction is in reality a de-facto merger when:

> (1) there is a continuation of the enterprise of the seller in terms of continuity of management, personnel, physical location, assets, and operations;
> (2) there is a continuity of shareholders;
> (3) the seller ceases operations, liquidates, and dissolves as soon as legally and practically possible; and
> (4) the purchasing corporation assumes the obligations of the seller necessary for uninterrupted continuation of business operations.[31]

All four of these factors are required in order to find a de-facto merger.[32]

The Ninth Circuit in *Louisiana-Pacific* held that a continuity of shareholders is essential in determining whether or not the transaction amounts to a de-facto merger.[33] Continuity of shareholders occurs where an asset purchaser pays for the purchase with shares of stock.[34] Thus, the shareholders in the selling corporation continue to have an interest in the assets which they sold.

In *Louisiana-Pacific*, the Asarco company operated a copper smelter in Washington State. Asarco was being sued by two PRP's, including Industrial Mineral Products (IMP), "for recovery of costs incurred in cleaning up the release of hazardous waste."[35] Asarco then sued L-Bar Inc., claiming L-Bar was a successor in interest to IMP because L-Bar had purchased all of the assets of IMP.[36] Asarco claimed that L-Bar was the successor in interest to IMP under the de-facto exception.

The court ruled that L-Bar, as an asset purchaser, was not a PRP under CERCLA. The court reasoned that although some of the seller's shareholders now held stock in the purchasing corporation, no stock was exchanged as part of the sale. The court found that there was no continuity of shareholders because stock was not used as part of the purchase price of the assets. The stock was bought independently on the open market by the shareholders in question.[37]

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31. Louisiana-Pacific Corp. v. Asarco Inc., 909 F.2d 1260, 1264 (9th Cir. 1990); *see also* SmithKline Beecham v. Rohm & Haas Co., 89 F.3d 154, 162 n.6 (3d Cir. 1996).
32. Cope, *supra* note 21, at 552.
33. *Louisiana-Pacific*, 909 F.2d at 1265.
34. *Id.* at 1264.
35. *Id.* at 1262.
36. *Id.*
37. *Id.* at 1265.

C. *The Transaction Was Fraudulently Entered Into in Order to Escape Liability.*

The rationale behind this exception is to avoid assets being transferred in an effort to defraud creditors.[38] "The creditors defrauded by the transfer may, in equity, follow the property into the hands of the new corporation."[39]

The issue of fraudulent transfers was discussed in relation to CERCLA in *City Management Corp. v. U. S. Chemical Co.*[40] In this case, City Management purchased the assets of U.S. Chemical. City Management then sued U.S. Chemical seeking a declaratory judgement stating that City Management, as an asset purchaser, was not liable for the seller's CERCLA liabilities.[41] Other PRPs claimed that the asset purchase was fraudulent, and therefore City Management was potentially liable under CERCLA.[42] The court determined that state law should apply and held that under the Michigan Fraudulent Conveyance Act the party alleging fraud must "show that the conveyance was made 'without fair consideration.' "[43]

According to the Act, "fair consideration" does not require an exact equivalent, but only a fair equivalent of the value of the property.[44] Thus, the court agreed with the district court's ruling that City Management's payment of $720,000 for U.S. Chemical's assets, valued at $1 million, did amount to fair consideration. Consequently this transaction did not violate Michigan's Fraudulent Conveyance Act. City Management was therefore not liable as a successor corporation under CERCLA.[45]

D. *The Purchasing Corporation Is Merely a Continuation of the Seller Corporation*

"The traditional 'mere continuation' exception to the general rule of purchaser non-liability 'encompas[es] the situation where one corporation sells its assets to another corporation with the same people owning both corporations.' "[46] Essentially, under the "mere continuation" theory "a corporation is not to be considered the continuation of a predecessor unless, after the transfer of assets, only one corporation remains, and there is an

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38. 15 WILLIAM M. FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7125 (perm. ed. rev. vol. 1990).

39. *Id.*

40. 43 F.3d 244 (6th Cir. 1994).

41. *Id.* at 249.

42. *Id.* at 253.

43. *Id.* at 254 (citing Mich. Comp. Laws § 566.15 (1990)).

44. *Id.* (citing Mich. Comp. Laws § 566.13(a) (1990)).

45. *Id.*

46. *Id.* at 251 (citing Turner v. bituminous Casualty Co., 244 N.W.2d 873, 878 n.3 (Mich. 1976)).

identity of stock, stockholders, and directors between the two corporations."[47]

The "substantial continuity" test evolved from the "mere continuation" exception and is a more expansive approach to successor liability.[48] Essentially this approach considers the following factors to determine if there is a "substantial continuity" between the two corporations:

> (1) retention of the same employees;
> (2) retention of the same supervisory personnel;
> (3) retention of the same productions 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; or
> (8) whether the successor holds itself out as the continuation of the previous enterprise.[49]

The EPA has encouraged the use of this test in an effort to expand the number of potentially responsible parties under CERCLA.[50] This test goes beyond the four traditional exceptions to the general rule of successor corporation non-liability.

IV. THREE CIRCUITS THAT HAVE APPLIED THE SUBSTANTIAL CONTINUITY DOCTRINE TO CERCLA ANALYSIS OF THE SUBSTANTIAL CONTINUITY DOCTRINE

In *United States v. Carolina Transformer Co.*, Carolina Transformer had a site, contaminated with polychorinated biphenyls (PCB's), which it had owned from 1959 to 1984.[51] In 1984 the EPA ruled that there was a "threat of release of PCB's into the environment" and therefore instructed Carolina Transformers to conduct cleanup operations.[52] By the end of 1984, Carolina Transformers had transferred most of its assets to FayTranCo.[53] FayTranCo had been incorporated in 1979 and its board of directors consisted of former officers of Carolina Transformer.[54] The court ruled that the successor corporation (FayTranCo) would not have been lia-

47. United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992).
48. United States v. Mexico Feed, 980 F.2d 478, 487 (8th Cir. 1992).
49. *Carolina Transformer*, 978 F.2d at 838.
50. *See supra* text accompanying note 17.
51. *Carolina Transformer*, 978 F.2d at 834.
52. *Id.* at 835.
53. *Id.* at 839.
54. *Id.* at 835.

ble under a mere continuation theory because there was no overlap of shareholders between the two companies.[55] However, the court did find FayTranCo liable under the more expansive "substantial continuity" approach.[56]

The court reasoned that there was substantial continuity between FayTranCo and Carolina Transformers; therefore FayTranCo was liable as a PRP under CERCLA.[57] The court found that nearly all of Carolina's employees and supervisors went to FayTranCo and performed the same jobs at the same salary. Also, FayTranCo produced the same product and acquired most of the assets of Carolina Transformers. Finally, the former president of Carolina Transformers continued to have a substantial influence in the affairs of FayTranCo.[58] The court stated that "[t]he record as a whole leaves the unmistakable impression that the transfer of the Carolina Transformer business to FayTranCo was part of an effort to continue the business in all material respects yet avoid the environmental liability arising from the PCB contamination . . . ."[59] For this reason, the court felt justified in utilizing the broad substantial continuity approach.[60]

The court determined that FayTranCo had purchased the assets of Carolina merely as a means to avoid CERCLA liability.[61] The court stated that they were unwilling to allow a corporation to split off a part of its operation, which was responsible for the environmental contamination, and then continue the rest of its operations under a new name in order to avoid environmental liability. The court reasoned that "such a result . . . would not serve the remedial purposes of CERCLA, nor would it further the Congressional intent [of CERCLA]."[62]

In *B.F. Goodrich v. Betkoski*,[63] the Second Circuit commented on the remedial purposes of CERCLA. The court used the substantial continuity theory to impose successor liability upon various asset purchasers in order to "fulfill that purpose."[64] In this case, hazardous waste had been deposited into two separate landfills in Connecticut.[65] Numerous PRPs sought contribution from numerous other PRPs. The district court granted summary judgment in favor of those defendants who claimed they were not liable as

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55. *Id.* at 838.
56. *Id.* at 840.
57. *Id.* at 841. (The district court awarded response costs of $977,921.01 and punitive damages totaling three times that amount, or $2,933,376.03. Thus, the total cost amounted to $3,922,684.04).
58. *Id.* at 841.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 840.
63. 99 F.3d 505 (2d Cir. 1996).
64. *Id.* at 519.
65. *Id.* at 511.

asset purchasers under traditional corporate law.[66] The Second Circuit reversed the summary judgement ruling under the theory of "substantial continuity."[67] The court ruled that since CERCLA was a remedial statute, it should be construed liberally in order to "give effect to its purposes."[68] These purposes "include facilitating efficient responses to environmental harm, holding responsible parties liable for the costs of the cleanup . . . and encouraging settlements that reduce the inefficient expenditure of public funds on lengthy litigation."[69]

Likewise, in *United States v. Mexico Feed*, the Eighth Circuit upheld the substantial continuity test finding it consistent with the goals of CERCLA.[70] Mexico Feed and Seed had previously leased land to Pierce Waste Oil Service (PWOS). PWOS stored waste oil in tanks located on the leased property. Over the years waste oil had either leaked or been spilled onto the property. In 1983, PWOS sold its assets to Moreco and later PWOS was dissolved. In 1984, the EPA cleaned up the site and then sued to recover its costs. Among others, the EPA sued Mexico Feed as the owner of the property. The EPA also sued Moreco by claiming Moreco was the successor of PWOS under the substantial continuity doctrine.[71] The court justified using the substantial continuity approach, because it felt CERCLA was directed at imposing liability upon those parties that are responsible; and this test would prevent responsible parties from escaping liability.[72] The problem, the court reasoned, is this test could potentially hold non responsible parties liable for the cost of cleanup. The court dramatized its view of successor liability when it stated, "Congress could not have intended that those corporations be enabled to evade their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities."[73]

It is important to note that while the *Mexico Feed* court upheld the substantial continuity doctrine, it also found that the asset purchaser (Moreco) was not a substantial continuation of its predecessor (PWOS) and therefore not liable under CERCLA.[74] The court held that the asset purchaser in this case (1) was a larger pre-existing corporation and did not consist entirely of the predecessor's assets, (2) had previously been a competitor of the predecessor, and (3) had no notice of the contamination.[75]

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66. *Id.* at 513.
67. *Id.* at 520.
68. *Id.* at 514.
69. *Id.*
70. United States v. Mexico Feed, 980 F.2d 478, 488 (8th Cir. 1992).
71. *Id.* at 483.
72. *Id.* at 488.
73. *Id.* at 487.
74. *Id.* at 490.
75. *Id.* at 489.

V. ANALYSIS OF THE SUBSTANTIAL CONTINUITY DOCTRINE

The facts of the preceding cases would seem to justify application of the substantial continuity doctrine in CERCLA, because it appears that without such a broad test a responsible party may escape liability. However, closer examination reveals significant flaws in the reasoning supporting this broad interpretation of successor liability. Utilization of this test would require the fashioning of federal common law because of the general rule that asset purchasers are not liable as successor corporations unless one of the four traditional exceptions applies.

A. Improperly Fashioning Federal Common Law

1. The Anspec *court's analysis*

In *Anspec Co. v. Johnson Controls, Inc.*,[76] the Sixth Circuit Court noted that a successor corporation would be liable under CERCLA. However, it is important to note that an asset purchaser is not necessarily a successor corporation. In 1978, Anspec purchased land with improvements from Ultraspherics Corp. In 1987, Ultraspherics merged with Hoover Group, which was designated as the surviving corporation of Ultraspherics. Prior to selling the land to Anspec, Ultraspherics deposited hazardous waste into various underground and above ground tanks located on the property. As a result of this disposal, hazardous waste was "routinely released into the soil and ground water."[77] In its decision, the court concluded that there is an important distinction that must be made "between interpreting a statute and fashioning federal common law."[78] Similarly, the U.S. Supreme Court has noted that "the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt."[79]

Prior to the circuit court's ruling in *Anspec*, the district court determined that including the term "successor corporation" within the definition of "person" would, in effect, be fashioning federal common law and federal common law cannot be formed when the statute is clear and unambiguous.[80]

The Sixth Circuit held that § 101(21) of CERCLA clearly defines who is liable as a "person" under § 107(a).[81] Although Congress did not specifically include "successor corporations" within the definition of "person" (under CERCLA § 101(21)), the court ruled that the definition of "person"

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76. 922 F.2d 1240 (6th Cir. 1991).
77. *Id.* at 1243.
78. *Id.* at 1246.
79. Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 97 (1981).
80. *Anspec*, 922 F.2d at 1244.
81. *Id.*

under CERCLA 101(21) includes the term "corporation," and there is a "universally accepted rule that a reference to liability of corporations includes successors."[82] The court added, "[w]e are not creating or fashioning federal common law when we adopt an interpretation of a statute that is in harmony with a universally accepted rule of law."[83] This universally accepted rule includes successor corporations within the term corporation.[84] The court held that it was merely interpreting a word within the statute "to include one of its generally accepted components."[85]

However, utilization of the substantial continuity test to find asset purchasers liable as successor corporations would require the fashioning of federal common law since asset purchasers generally do not incur successor liability.[86] As discussed previously in Part III of this Comment, under traditional state corporate law an asset purchaser only becomes a liable successor when one or more of the four recognized exceptions applies.[87] And while the "mere continuation" exception is one of the four recognized exceptions, the broader "substantial continuation" exception is not.[88] Indeed, the "substantial continuation" exception is not recognized at all in most states.[89] Thus, by expanding the definition of successor corporations to include asset purchasers, the courts are fashioning federal common law. It is universally accepted "that a corporation that purchases the assets of another corporation does not, simply by virtue of the asset purchase transaction[], become liable for the obligations of the seller."[90]

It should be noted, however, that whether Hoover was a liable successor under state law was not at issue in *Anspec*. An applicable Michigan statute provided that any corporation surviving a merger took on all liabilities of every party to the merger.[91] Hoover was the designated survivor and so, under the statute, it was the liable successor. Had there been no Michigan statute on point, the court would have had to look to traditional state corporate law to find Hoover liable as a successor under the de-facto merger exception or, that failing, fashion a new federal common law rule holding Hoover liable as a mere asset purchaser. As it was, the court simply applied the state statute to find that Hoover was a liable successor and

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82. *Id.* at 1246.
83. *Id.*
84. *Id.*
85. *Id.*
86. Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 1997 WL 792675, *1 (9th Cir. 1997).
87. *See supra* text accompanying notes 18-20.
88. *See supra* text accompanying notes 36-48.
89. *See Atchison,* 1997 WL 792675, at *5.
90. *Id.*
91. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1244-45 (6th Cir. 1991) (citing Mich. Comp. Laws § 450.1834(e) (1990)).

then addressed the disputed issue whether a liable successor under state law is a PRP under CERCLA.

For these reasons the formation of a federal common law, in the context of asset purchasers, must be examined closely. It is one thing to extend CERCLA liability, as the *Anspec* court did, to an asset purchaser whom traditional state corporate law deems to be a liable successor. It is an altogether different thing to take the next step of extending CERCLA liability, as courts applying the substantial continuation test have done, to an asset purchaser whom traditional state corporate law has never deemed to be a liable successor. In *Louisiana-Pacific* the Ninth Circuit held that "Congress expected the courts to develop a federal common law to supplement [CERCLA]."[92] However, in *Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc.*, the Ninth Circuit diverged from its prior opinion in *Louisiana-Pacific* and held that there was "no need for a federal common law of successor liability under CERCLA, and that state law supplies the rule of decision in this area."[93]

2. *The* Atchison *court's analysis*

In *Atchison*, Brown & Bryant, Inc. operated a agricultural chemical business on property leased to it by Atchison, Topeka and Santa Fe Railway. In the mid 1980's, state and federal agencies began investigating the property for contamination and ultimately required Brown & Bryant to clean up the site. Since Brown & Bryant could not afford the entire cost of the cleanup, the EPA required the Railway company, as owners of the land, to pay the balance. Brown & Bryant realized that it could not afford the cost of the required cleanup and decided to sell the business to its competitors. One half of Brown & Bryant's equipment was sold to PureGro. Subsequently the Railway company sued PureGro as a PRP, claiming PureGro was a successor in interest.[94]

In *Atchison*, the Ninth Circuit cites two Supreme Court cases[95] which "call into question the ease with which *Louisiana-Pacific* created a set of federal rules . . . . These cases counsel that the need for such special federal rules will be only in 'few and restricted instances.' "[96] The court reasoned that before fashioning a federal common law, courts should first look at "whether Congress intended federal judges to develop their own rules or to incorporate state law. . . . If there is no congressional directive,

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92. Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990).

93. *Atchison*, 1997 WL 792675, at *1.

94. *Id.* at *1-2.

95. *See* O'Melveney & Myers v. FDIC, 512 U.S. 79 (1994) and Atherton v. FDIC, 117 S.Ct. 666 (U.S. 1997).

96. *Atchison*, 1997 WL 792675, at *3 (citation omitted).

then a court should turn to the three part test articulated in *United States v. Kimbell Foods, Inc.*"[97] The court in *Atchison* concluded that since "CERCLA lacks any clear directive that federal court develop standards for successor liability,"[98] courts must turn to the *Kimbell Foods* test in order to determine whether a supplemental federal rule, such as the substantial continuity approach, is necessary. We turn now to an examination of the *Kimbell Foods* test.

3. Factors for determining whether fashioning federal common law is improper

In *Kimbell Foods*, the Supreme Court noted that only under certain circumstances should federal common law be fashioned. The court must determine (a) whether the law requires a "nationally uniform body of law;" (b) whether "application of state law would frustrate specific objectives of the federal program . . .; and (c) to what "extent . . . application of a federal rule would disrupt commercial relationships predicated on state law."[99]

a. Whether there is a need for a nationally uniform body of law. As noted earlier, those courts applying the substantial continuity approach have argued that application of traditional corporate law would frustrate the remedial purposes of CERCLA. However, "neither the language nor the legislative history of CERCLA provides a basis for concluding that the creation of a uniform federal common law rule of successorship liability was intended."[100] In addition, it is apparent that application of the traditional corporate law regarding asset purchasers would not hinder a national uniform body of law. After all, there is already a universal acceptance of the traditional view that asset purchasers are not liable as successors unless one of the four exceptions applies.[101] "Without a showing that state law is inadequate to achieve the federal interest, 'we discern no imperative need to develop a general body of federal common law to decide cases such as this.' "[102] Thus, by fashioning a new federal common law, the courts which have applied the substantial continuity approach have actually disrupted the national uniformity which already existed. Indeed, if the courts' pri-

97. *Id.* at 3. (citing U.S. v. Kimbell Foods, Inc., 440 U.S. 715 (1979)).

98. *Atchison*, 1997 WL 792675, at *4.

99. *Kimbell Foods*, 440 U.S. at 728-29.

100. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1248 (6th Cir. 1991) (Kennedy, Circuit Justice, concurring).

101. City Management Corp. v. U.S. Chemical Co., 43 F.3d 224, 251 (6th Cir. 1994).

102. *Anspec*, 922 F.2d at 1249 (Kennedy, Circuit Justice, concurring) (quoting Wilson v. Omaha Indian Tribe, 442 U.S. 653, 673, (1979).

mary concern was to foster national uniformity, then the courts should have utilized traditional corporate law as it already existed.[103]

In *Carolina Transformer*, the court argued in favor of applying the substantial continuity test because of the "national interest in the uniform enforcement of CERCLA."[104] It is difficult to understand how the court concluded this in light of the fact that a majority of states currently utilize traditional corporate law regarding the liability of asset purchasers under Superfund.[105]

> [T]he law in the fifty states on corporate dissolution and successor liability is largely uniform . . . . The argued 'need' for uniformity thus stems not from disarray among the various states, but from the alleged need for a more expansive view of successor liability than state law currently provides–in other words, the notion that state law on this issue is inadequate for CERCLA's purposes.[106]

The Supreme Court has ruled that implementation of federal common law requires a "significant conflict between some federal policy or interest and the use of state law."[107] In *Atchison* the court reasoned that to demonstrate "such a conflict, more than speculation is required–there must be a 'specific, concrete federal policy or interest that is compromised' by the application of state law."[108] Thus the court found no reason in Atchison to develop a federal law simply to provide a more expansive view of successor liability.

b. Whether application of the traditional corporate law of successor liability would frustrate the purposes of CERCLA. Each of the circuits which applied the substantial continuity approach to CERCLA argued that traditional corporate law would frustrate the intent of Congress, which is to impose the cleanup costs on the responsible parties rather than the taxpayers.[109]

In *Carolina Transformer,* the court was concerned that FayTranCo (who purchased the assets of Carolina Transformer) would not be liable under the traditional rules of successor liability.[110] Apparently FayTranCo

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103. *Id.* (The court states "the law in the fifty states on corporate dissolution and successor liability is largely uniform").

104. United States v. Carolina Transformer Co., 978 F.2d 832, 837 (4th Cir. 1992).

105. *See supra* note 1.

106. Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 1997 WL 792675, *4 (citing Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1249 (6th Cir. 1991).

107. O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994).

108. *Atchison*, 1997 WL 792675, at *5 (citing *O'Melveny*, 512 U.S. at 87).

109. *See Carolina Transformer*, 978 F.2d at 837; United States v. Mexico Feed 980 F.2d 478, 487 (8th Cir. 1992); B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996).

110. *Carolina Transformer*, 978 F.2d at 838.

was fraudulently formed merely to avoid CERCLA liability, and thus the court felt it necessary to utilize the substantial continuity approach in order to hold FayTranCo liable. However, the *Atchison* court reasoned that "[i]n the cases in which the broader exception has been applied to hold an asset purchaser liable, there has almost always been some fraudulent intent and collusion present, in which case the purchaser would have likely already have been liable under another traditional exception–the fraudulently-entered transaction exception."[111] The court then cited *Carolina Transformer* as just such an example.

It is important to note that the owners and operators of FayTranCo were the same owners and operators of Carolina Transformer. Thus, these individuals could be, and ultimately were held to be, personally liable as corporate officers of Carolina Transformer. The result was that the responsible parties were held liable for the cost of the cleanup even without the use of the substantial continuity test.

"To date, the EPA has focused its efforts, with considerable success, on holding corporate officers and shareholders liable directly under CERCLA . . . by proving that they personally owned and operated the facility, or that they personally arranged for the disposal of hazardous substances."[112] In Carolina Transformer, the court found two corporate officers liable as "owners" and "operators" of Carolina Transformers under CERCLA 107(a)(1). Therefore, these two officers were jointly and severally liable for the cost of the clean-up, and the taxpayers were not burdened with the cost of the cleanup.

The standard for liability of corporate officers is rather broad. To qualify as an "operator" does not require one to exercise actual control, rather a majority of the courts have adopted the "authority to control" standard to determine officer liability.[113] Thus, it is more likely that the government will be able to find a party liable for the cleanup, such as a corporate officer, and avoid burdening the taxpayers.

In determining corporate officers' liability, the court considers the extent of "the corporate officer's ownership and control of the corporation; whether or not the corporate officer is in charge of day to day operations . . . whether or not the corporate officer could have prevented, abated, or stopped the contamination."[114] Another theory of corporate officer liability considers the:

> corporate officer's supervision and control over the handling and disposal of hazardous substances; the nature and degree

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111. *Atchison*, 1997 WL 792675, at *5.
112. 4 BATTLE & LIPELES, *supra* note 4, at 276 (citing 42 U.S.C. § 9607(a)(1) (1994)).
113. *Id.*
114. FOGLEMAN, *supra* note 10, at 196.

> of knowledge, responsibility, opportunity, and involvement in the disposal process; the individual's corporate status, management duties, percentage ownership of shares, position in the corporation's hierarchy; and responsibility for hazardous waste disposal activities including possible illegal disposal activities.[115]

Under these theories it would be very difficult for a corporate officer to escape liability under circumstances similar to *Carolina Transformer*. Thus, it is unlikely that the taxpayers will be burdened with the cost of cleanup simply because the asset purchasers are not liable for the cleanup. Any party (including a corporate officer) who is found to be liable is jointly and severally liable for the entire cost of the cleanup.[116]

In *Mexico Feed*, the Eighth Circuit stated that one of CERCLA's essential purposes was to hold responsible parties liable.[117] Although the court applied the substantial continuity approach, it found that the asset purchaser was not a substantial continuation of the predecessor corporation. The court reasoned that the purchaser; (1) had been a competitor of the selling corporation, (2) had no notice of the potential liability, and (3) pre-existed the sale and was a larger corporation then the predecessor.[118] It is thus evident that application of the traditional corporate rule would not frustrate the federal purposes of CERCLA in this case, since application of the traditional rule would have reached the same result. That is, under either the traditional theory or the substantial continuity approach, the asset purchaser would not have been liable.

In addition, "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, or unless 'their application would be inconsistent with the federal policy underlying the cause of action.' "[119] In determining whether or not a state law is inconsistent with federal policy, the Supreme Court has stated that there must be some "concrete evidence that adopting state law would adversely affect [federal interests]."[120] Thus, "generalized pleas for uniformity" are not, by themselves, sufficient to determine inconsistency between state law and federal policy.[121] "CERCLA 'provides a mechanism for cleaning up hazardous-waste sites . . . and imposes the costs of the cleanup on those responsible

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115. *Id.* at 197.
116. 42 U.S.C. § 9607(e)(1) (1994).
117. United States v. Mexico Feed, 980 F.2d 478, 487 (8th Cir. 1992).
118. *Id.* at 489.
119. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, Circuit Justice, concurring) (quoting Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975)).
120. *Id.* (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979)).
121. *Id.* at 1250.

for the contamination' . . . . There is no evidence that the application of state corporation law will frustrate this objective."[122]

There is a concern that some states might engage in a "race to the bottom" by having less stringent environmental laws than other states, in order to attract corporate business. However, as one circuit judge noted, "[s]tates have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and the EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA . . . ."[123] Thus it is unlikely that a state would sacrifice the health and safety of its citizens in order to attract businesses, and currently "[n]o state provides a haven for liable companies. Nor is there reason to think that states will alter their existing successor liability rules in a 'race to the bottom' to attract corporate business."[124]

c. Whether the application of the substantial continuity test would disrupt the purposes of traditional corporate law. Application of the substantial continuity approach would frustrate the commercial relationships which are predicated on state law. The general rule of non-liability of asset purchasers developed in order to "facilitate the fluid transfer of corporate assets."[125] The "public has a substantial interest in the free transfer of capital and the reorganization of unprofitable businesses. Imposing liability on a successor, when a predecessor could have provided no relief whatsoever, is likely to severely inhibit the reorganization of, or transferring of the assets of, a failing business."[126] Finally, the "fluidity of corporate assets . . . is impeded if assets [which are] sold piecemeal are each encumbered by the liabilities of their previous owner."[127] Under CERCLA there is a tremendous incentive to avoid liability. If a corporation could be liable under CERCLA merely because it purchased the assets of another corporation, the fluidity of asset transfers will be seriously impeded as illustrated by the "brownfields" problem.

The brownfields problem concerns corporations seeking to build industrial sites facing "strong disincentives to selecting previously developed urban industrial sites, or brownfields."[128] The problem is that companies will prefer to build on previously undeveloped land rather then face poten-

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122. Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 1997 WL 792675, *5 (9th Cir. 1997) (citing Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989)).

123. *Anspec*, 922 F.2d at 1250.

124. *Atchison*, 1997 WL 792675, at *5 (citing *Anspec*, 922 F.2d at 1250).

125. Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323, 1326 (7th Cir. 1990).

126. Musikiwamba v. EESI, Inc., 760 F.2d 740, 750-51 (7th Cir. 1985).

127. EEOC v. Vucitech, 842 F.2d 936, 945 (7th Cir. 1988).

128. Brian C. Walsh, *Seeding the Brownfields: a Proposed Statute limiting Environmental Liability for Prospective Purchasers*, 34 HARVARD J. ON LEGIS. 191, 191 (1997).

tial liability under CERCLA.[129] Thus, many urban sites are unable to be sold and remain vacant or underutilized.[130] It is estimated that there are as many as 450,000 brownfield sites nationwide.[131]

A problem similar to the brownfields could occur with respect to asset purchasers. Parties will be unwilling to purchase the assets of a corporation who is potentially liable under CERCLA. It has been argued that the purchase price could be adjusted to reflect the potential liability. However, because PRP's under CERCLA are jointly and severally liable, the liability could very well exceed the cost of the assets, as one party could be forced to pay the cost of the entire cleanup. For this reason it would be very difficult, if not impossible, for the purchase price to reflect the potential CERCLA liability. Thus, the application of the substantial continuity approach may adversely affect the fluidity of asset transfers much like current environmental law has led to the brownfields problem.

Corporations are created under state laws and "[t]hose state laws define [the corporations'] powers, rights, and liabilities, prescribe their procedures, govern their continued existence, and define the terms upon which mergers may occur and the effect to be given to mergers."[132] Thus, corporations are generally formed, and continue to be governed under state law throughout their existence. The Federal Rules of Civil Procedure state that the "capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."[133] In addition, CERCLA "provides that claims for contribution shall be brought 'in accordance with the Federal Rules of Civil Procedure.' "[134] State law should continue to govern corporate liabilities since the corporation came into existence under, and continues to be governed by, state law.

Finally, the court in Atchison determined that under the Kimbell test there was no justification for the creation of a federal common law.

> Since the states already have rules in place to prevent the use of the corporate form to avoid liability, the only possible justification for a new federal (and more expansive) rule is to 'enrich the fund' by imposing liability on more asset purchasers . . . . As the Court pointed out in O'Melveny, these 'more money' arguments are unavailing . . . .
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> O'Melveny and Atherton reaffirm the Kimbell Foods analysis and clarify the difficulty of proving the need for a federal rule of decision. The imposition of liability under any statute

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129. *Id.*
130. *Id.* at 198.
131. *Id.*
132. *See supra* note 82.
133. FED. R. CIV. P. 17(b).
134. *See supra* note 82.

> "involves a host of considerations that must be weighed and appraised . . . . Within the federal system, at least, we have decided that that function of weighing and appraising is more appropriately for those who write laws, rather than for those who interpret them."[135]

B. Application of the Substantial Continuity Test in Labor and Products Liability Law Cases Does Not Justify its Application in CERCLA Cases.

The substantial continuity test, or approaches similar to it, have been used in the context of labor law and products liability.[136] However, it will be shown that the reasoning supporting application of these broad tests in labor and products liability law cases does not support applying this test to CERCLA liability. In addition, CERCLA liability is potentially far more extensive than that of either labor or products liability law.

1. Labor law and CERCLA distinguished

The substantial continuity test stems from a U.S. Supreme Court ruling in *Golden State Bottling Co. v. NLRB*,[137] a case relating to labor law. The Court ruled that an employer who purchases the assets of a predecessor could be liable under the National Labor Relations Act for the predecessor's unlawful discharge of an employee. The Court justified the application of the substantial continuity approach by balancing the interests of "the bona fide successor, the public, and the affected employee."[138] The Court concluded that the purpose of the National Labor Relations Act outweighed the interest of the purchaser because: (1) there is minimal cost to the purchaser; (2) the potential liability may be reflected in the price the purchaser pays for the business; or (3) the purchaser may indemnify itself with a clause in the sales contract.

The liability for unlawfully discharging one employee in *Golden State Bottling* is vastly different from the potential liability under CERCLA. Realistically, the cost of clean up and other damages under Superfund can greatly exceed the price originally paid for the assets. Often the cost of clean up amounts to millions, if not tens of millions, of dollars.[139] Also, it

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135. Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 1997 WL 792675, *5 (9th Cir. 1997) (citing O'Melveney & Myers v. FDIC, 512 U.S. 79, 88 (1994)).

136. United States v. Mexico Feed, 980 F.2d 478, 487-88 (8th Cir 1992).

137. 414 U.S. 168 (1973).

138. Id. at 181.

139. *See*, SmithKline Beecham v. Rohm & Haas Co., 89 F.3d 154, 157 (3rd Cir. 1996) (estimated clean up costs amounting to *$123 million*); City Management Corp. v. U.S. Chemical Co., 43 F.3d 224, 247 (6th Cir. 1994) (response costs amounting to *$44 million*); Ninth Avenue Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716, 720 (Bankr. N.D. Ind. 1996) (clean up costs exceeding *$20 million*); B.F. Goodrich v. Betkoski, 99 F.3d 505, 512 (2nd Cir. 1996) (settlement by one party alone amounted to *$5,375,000*); United States v. Carolina Transformer Co., 978 F.2d

must be remembered that PRP's are jointly and severally liable under CERCLA. Thus, the asset purchaser could potentially be liable for the entire cost of the cleanup.[140] Additionally, the price of the clean up often exceeds the value of the assets purchased, regardless of the purchase price.

For this reason the purchase price may not be able to be adequately adjusted to fully compensate for any potential loss, and this in turn would likely hinder the fluidity of assets.[141] "Neither CERCLA nor the EPA's accompanying regulations specifies a consistent standard for determining what constitutes a sufficient cleanup of contaminated property. As a result, any estimate of cleanup costs is necessarily imprecise."[142] Thus, there is a risk that "an agency official overseeing a cleanup may require significantly more expensive procedures than the purchaser estimated."[143]

Finally, the court noted in *Golden State* that, in regards to labor law, the purchaser can protect himself against potential liability through an indemnification clause in the sales contract.[144] While it is true that parties can also attempt to allocate cleanup costs among themselves, under CERCLA they will remain jointly and severally liable to the government for the *entire* cost of the cleanup.[145]

To summarize, the justifications for applying the substantial continuity approach to labor law simply do not apply to CERCLA. The cost of cleanup is usually not minimal, but rather often amounts to millions of dollars. Also, the price of the cleanup cannot adequately be reflected in the purchase price of the assets because the cleanup price is (1) difficult to estimate and (2) may exceed the cost of the assets. Finally, the parties are not able to indemnify themselves against liability in the same way that parties can in the case of labor law because, under CERCLA, the parties remain jointly and severally liable to the government, regardless of any indemnity clause.

2. *Products liability law and CERCLA distinguished*

Under products liability law, a few state courts have adopted more expansive rules of successor liability beyond the four traditional exceptions to non-liability. Two similar exceptions have developed, namely the "continuity of enterprise" exception, adopted by the Michigan Supreme

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832, 841 (4th Cir. 1992) (response costs plus punitive damages amounting to nearly *$4 million*).

140. *Smithkline Beecham Corp.*, 89 F.3d at 158.

141. Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323, 1326 (7th Cir. 1990).

142. Walsh, *supra* note 128, at 199.

143. *Id.*

144. Golden State Bottling Co. v. NLRB, 414 U.S. 168, 186 (1973).

145. *Smithkline Beecham Corp.*, 89 F.3d at 158.

Court,[146] and the "product line" exception, adopted by the California Supreme Court.[147] While the "continuity of enterprise" theory is more similar to the "substantial continuity" theory, both products liability tests will often reach similar results.[148] Without discussing the details of either view, suffice it to say that both rules "permit liability to be imposed on an economic entity distinct from the predecessor."[149]

Essentially these rules were created out of a "concern for the plight of products liability claimants [who had] no entity to sue."[150] Conversely, the EPA does not seek to use the substantial continuity test because they lack entities to sue, but because they desire more entities to sue.[151] Furthermore, nearly every other state has rejected both of these more expansive views of successor liability, and the application of an expanded view of successor liability is declining with regard to products liability.[152] Despite this, some federal courts are implementing the substantial continuity test with regard to CERCLA liability and citing the products liability arena for support of this broad interpretation.[153]

The courts that have rejected the "product line" exception have cited various reasons. First, the product line exception would amount to "an imposition of liability without corresponding duty."[154] Second, such a theory poses a serious risk to small businesses because of the difficulty in obtaining adequate insurance for a predecessors' product defects.[155] And third, such a radical change from corporate law should be left to the legislature.[156]

Likewise courts that have rejected the "continuity of enterprise" theory of products liability have done so for a variety of reasons. First, the successor corporation did not place the defective product onto the market and therefore did not create the risk.[157] Second, profit received from the defective product is "received in a remote way;" thus a purchaser does not directly benefit from the predecessor's defective product.[158] Third, "the successor has not represented to the public the safety of the predecessor's

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146. Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 875 (Mich. 1976).

147. Ray v. Alad Corp., 560 P.2d 3, 5 (Cal. 1977).

148. Santa Maria v. Owens-Illinois, 808 F.2d 848, 858 (1st Cir. 1986).

149. Michael D. Green, *Successors and CERCLA: The Imperfect Analogy to Products Liability and An Alterative Proposal*, 87 NW. U. L. REV. 897, 909 (1993).

150. *Id.*

151. *See supra* note 17

152. *Id.*

153. *Id.*

154. Alfred R. Light, *"Product Line" and "Continuity of Enterprise" Theories of Corporate Successor Liability Under CERCLA*, 11 MISS. C. L. REV. 63, 69 (1990).

155. *Id.*

156. *Id.*

157. *Id.* at 74.

158. *Id.*

product."[159] Finally, other courts have noted that a successor does not receive any profit or benefit from a predecessor's product, the successor does not create the risk, the predecessor is not able to "enhance the safety of a product already on the market,"[160] and such a theory poses an "economic threat to small businesses."[161]

These same arguments against expanding successor liability in products liability cases apply to CERCLA liability as well. For example, "corporate successors have not created the risk of environmental harm under CERCLA and do not benefit from the predecessor's previous waste disposal practices. A successor is normally not in a position to lessen the danger of environmental problems . . ." caused by the predecessor.[162] Also, the EPA is never left without a means of paying for the cleanup. It can seek payment from other PRPs or the Superfund itself. After all, "CERCLA specifically provides for a fund to cover situations where there are no liable parties."[163] It is not for the courts to impose liability where liability was not intended. Additionally, such a broad policy would pose an economic threat to all businesses, both small and large, because it would hamper the fluidity of transfers of corporate assets due to the threat of tremendous liability.[164] For the foregoing reasons the use of the "product line" and "continuity of enterprise" theories are not valid justifications to hold asset purchasers liable under CERCLA beyond the traditional corporate law exceptions.

VI. CONCLUSION

In an effort to expand the reach of CERCLA, the EPA has tried to increase the number of PRP's in order to find "deep pockets" to help fund the cost of cleanup.[165] Recognizing that under traditional corporate law successor liability does not generally extend to asset purchasers, the EPA has sought implementation of the "substantial continuity test." It has been argued that under the traditional corporate law many PRP's would escape liability, thus frustrating the remedial purpose of CERCLA that responsible parities should pay the cost of cleanup. However, under a traditional cash for assets transfer of property, the successor "is a distinct entity with no involvement in hazardous waste disposal, other than its purchase of assets that belonged to the responsible party."[166] Nevertheless, some courts

159. *Id.*
160. *Id.* at 75.
161. *Id.*
162. *Id.* at 78.
163. *Id.* at 79.
164. *See supra* note 127.
165. BATTLE & LIPELES, *supra* note 1, at 275.
166. Green, *supra* note 149, at 916.

have cited the broad interpretations under labor and products liability law in an effort to justify application of the substantial continuity theory to CERCLA liability. However, these analogies fail primarily because of the potentially enormous liability under CERCLA. As one author noted, "despite concerns about the federal budget deficit, we have not yet stooped to random selection of wealthy entities to assume pieces of the governments liabilities. Yet imposing liberal successor liability . . . does exactly that. In effect CERCLA becomes a gun-toting lunatic who randomly fires financial bullets at those unfortunate enough to stray in the vicinity."[167]

Curtis J. Busby

167. *Id.*