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Continued Expansion of Corporate Successor Liability in the Products Liability Arena

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CONTINUED EXPANSION OF CORPORATE SUCCESSOR LIABILITY IN THE PRODUCTS LIABILITY ARENA

Ramirez v. Amsted Industries, Inc.
86 N.J. 332, 431 A.2d 811 (1981)

The Supreme Court of New Jersey in *Ramirez v. Amsted Industries, Inc.*,[1] recently addressed the turbulent issue of corporate successor responsibility for defective products. Traditionally, a corporate successor was not held responsible for injuries caused by the defective products manufactured and sold by its predecessor.[2] Several judicial exceptions, however, were created to allow for the imposition of successor liability in certain situations.[3] These exceptions have been narrowly applied in the past and are available to the injured products liability plaintiff only on rare occasions.[4] This traditional corporate rule has been severely criticized as very harsh and not responsive to the public policies underlying strict products liability.[5] In response, many courts have expanded the traditional rule in order to absorb many of the claims presented by products liability plaintiffs.[6] Other courts have substantially altered the traditional rule in treating products liability claims differently, independent of any notions reflecting corporate law.[7]

The *Ramirez* court joined ranks with those courts opting for a complete overhaul of the traditional rule in dealing with products lia-

1. 86 N.J. 332, 431 A.2d 811 (1981). Decided along with *Ramirez* was the companion case of Nieves v. Bruno-Sherman, 86 N.J. 361, 431 A.2d 826 (1981).

2. *See, e.g.*, Knapp v. North American Rockwell Corp., 506 F.2d 361, 363 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Shannon v. Samuel Langston Co., 379 F. Supp. 797, 800 (W.D. Mich. 1974).

3. *See, e.g.*, Menacho v. Adamson United Co., 420 F. Supp. 128, 131 (D.N.J. 1976); Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 667, 388 N.E.2d 778, 780 (1979).

4. *E.g.*, Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979); McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 264 A.2d 98 (1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (1972).

5. *See* Note, *Products Liability—Corporations—Asset Sales and Successor Liability*, 44 TENN. L. REV. 905 (1977); Note, *The Extension of Products Liability To Corporate Asset Transferees—An Assault On Another Citadel*, 10 LOY. L.A. L. REV. 584 (1977); Comment, *Extension Of Strict Tort Liability To Successor Corporations*, 61 MARQ. L. REV. 595 (1978); Comment, Cyr v. B. Offen & Co.: *Liability Of Business Transferees For Product Injuries*, 27 MAINE L. REV. 305 (1975).

6. *See* Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974); Knapp v. North American Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Shannon v. Samuel Langston Co., 379 F. Supp. 797 (W.D. Mich. 1974); Wilson v. Fare Well Corp., 140 N.J. Super. 476, 356 A.2d 458 (1976). *See also* text accompanying notes 94-104 *infra*.

7. Ray v. Alad Corp., 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977); Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873 (1976). *See also* text accompanying notes 105-23 *infra*.

bility claims. In doing so, the court adopted the "product line approach" first presented by the Supreme Court of California in *Ray v. Alad Corp.*,[8] which extended products liability to the corporate successor where the successor continued to manufacture the same product line of its predecessor. The *Ramirez* court was forced to address some questions regarding the fairness of imposing liability upon a business both completely free of fault and without any capacity to prevent the injury.[9] Furthermore, the court added a new dimension to this area of law by giving its ruling a retroactive effect, in furtherance of the purposes of strict products law.[10] This new dimension will undoubtedly have an impact upon judicial decision-making in the products liability arena.[11]

This comment will review the development of corporate successor liability and will trace its gradual expansion in response to the needs of the products liability plaintiff. It will then trace the liberal development of tort law principles, which reflect a movement toward the era of "enterprise liability." This liberal development toward enterprise liability concepts will be synthesized with a discussion of *Ray v. Alad Corp.*[12] and *Turner v. Bituminous Casualty Co.*,[13] the two landmark decisions that signaled a major change in the law of corporate successor responsibility. A discussion and analysis of the *Ramirez* decision will

8. 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977). *See* notes 105-12 and accompanying text *infra* for a discussion of the product line approach.

9. The facts in *Ramirez* indicate that Johnson Machine and Press Co. manufactured a defective power press in 1948 or 1949. This press allegedly caused serious injury in 1975. However, Amsted could not have prevented the defective manufacture, because it had not taken over the Johnson product line until 1962. *See* 86 N.J. at 333, 431 A.2d at 813. *See also* text accompanying notes 125-34 *infra*.

10. A rule emanating from a case is considered as being given a retroactive application when it is applied in such a manner as to have a legal effect upon conduct which has occurred prior to the announcement of the new rule. Annot., 10 A.L.R.3d 1371, 1377 (1966). By contrast, a case is regarded as being given a prospective application when the new rule derived from that case only applies to conduct that occurs after the announcement of the new rule. *Id.* The justification for retroactive, or retrospective, decision-making is based upon Blackstonian jurisprudence, which traditionally held that appellate judges do not espouse or create new law, rather they maintain and expound law that has always existed. 1 BLACKSTONE'S COMMENTARIES *69. Therefore,

> a later judicial decision which seems to change the law has not really changed it at all but has only discovered the "true" rule which was always the law. It follows that any judicial "change" in the law must necessarily be retroactive. It could not be otherwise, for the judge is deemed merely to be articulating what the law has always been.

Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2 (1960). Prospective decision-making, on the other hand, is frequently employed to avoid undue hardship to parties that have maintained their conduct in conformity with the existing law. Traynor, *Transatlantic Reflections on Leeways and Limits of Appellate Courts*, 1980 UTAH L. REV. 255, 265-66 [hereinafter *Traynor*].

11. *See* text accompanying notes 194-95 *infra*.

12. 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977).

13. 397 Mich. 406, 244 N.W.2d 873 (1976).

then follow. In addition, this comment will assess the *Ramirez* court's responses to this troubling area of the law. Finally, this comment will reveal how a retroactive application of the *Ramirez* decision furthers the purposes of strict products liability.

HISTORICAL BACKGROUND

Successor Liability Under Corporate Law

A "successor," in a very broad sense, can be defined as "one who takes the place that another has left, and sustains the like part or character; one who takes the place of another by succession."[14] Although there is no specific definition of a "corporate successor," it is clear that one corporation can "succeed" another corporation in any number of ways.[15] Nevertheless, a "successor" in the corporate arena is an entity that has assumed the rights and obligations of another corporation by amalgamation, consolidation, or any other legally authorized method of acquisition.[16] However, this simple definition of "corporate successor" gives no hint as to the basis of corporate successor liability. For this reason, an analysis of the theories of corporate successor liability will be discussed below.

Traditionally, the liability of a successor corporation has been governed by the law of corporations.[17] Under corporate law, the general rule holds that where one entity "sells or otherwise transfers all of its assets to another company the latter is not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortious conduct."[18] Courts commonly refer to this principle as the

14. BLACK'S LAW DICTIONARY 1283 (rev. 5th ed. 1979). *See* City of New York v. Turnpike Development Corp., 36 Misc. 2d 704, 706, 233 N.Y.S.2d 887, 890 (N.Y. Sup. Ct. 1962).

15. The transfer of an ongoing business concern can be accomplished in one of three ways: 1. by statutory merger or consolidation; 2. through the purchase of the stock of a target corporation; and 3. through the purchase of assets of the target corporation. D. HERWITZ, BUSINESS PLANNING 679-80 (1966). It should be noted that the form of the acquisition will determine whether a corporate successor will assume the existing and contingent obligations of its predecessor. *See* Note, *Products Liability: Developments in the Rule of Successor Liability for Product-Related Injuries*, 12 U. MICH. J.L. REF. 338, 346-50 (1979). However, acquisition through the purchase of a target corporation's assets is especially advantageous, because the purchaser will be responsible only for those liabilities that he expressly or impliedly assumes. *Id.* at 349-50.

16. International Ass'n of Machinists v. Falstaff Brewing Corp., 328 S.W.2d 778, 781 (Tex. Civ. App. 1959).

17. *See, e.g.*, Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977); Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979); McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 264 A.2d 98 (1970).

18. Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 453, 419 A.2d 1151, 1154 (1980). *See also* Knapp v. North American Rockwell Corp., 506 F.2d 361, 363 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Freeman v. White Way Sign & Maintenance Co., 82 Ill. App. 3d 884, 893, 403 N.E.2d 495, 501 (1980).

"general rule of nonliability."[19] The rule is obviously intended to limit the liability of successor corporations under several circumstances[20] and flows from the notion that the law does not compel the purchaser of a business to assume the liability that his predecessor has incurred.[21]

But the general rule of nonliability is not all-encompassing. Judicially created limitations have been placed upon the rule in the form of four exceptions.[22] The purchasing corporation may be held responsible for the liabilities of the seller where:

1. The purchasing corporation expressly or impliedly agrees to assume the debts and liabilities of the selling corporation.[23]
2. The transaction amounts to a consolidation or merger.[24]
3. The purchasing corporation is merely a continuance of the selling corporation.[25]
4. The transaction is entered into fraudulently in order to escape

19. *E.g.*, Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 668, 388 N.E.2d 778, 780 (1979); Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 453, 419 A.2d 1151, 1154 (1980); Turner v. Bituminous Cas. Co., 397 Mich. 406, 436, 244 N.W.2d 873, 886 (1976) (dissenting opinion).

20. *See* notes 31-33 and accompanying text *infra*.

21. *See generally* 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (rev. ed. 1973) [hereinafter FLETCHER].

22. *See generally* Comment, *Extension of Strict Tort Liability to Successor Corporations*, 61 MARQ. L. REV. 595, 598-99 (1978), for a discussion of the exceptions to the general rule of nonliability.

23. Typically, courts will look to the terms of the purchase agreement in determining whether certain liabilities were expressly or impliedly assumed by the purchaser. *See, e.g.*, Gee v. Tenneco, Inc., 615 F.2d 857, 863 (9th Cir. 1980); Ortiz v. South Bend Lathe, 46 Cal. App. 3d 842, 847-48, 120 Cal. Rptr. 556, 557-58 (1975); McKee v. Harris-Seybold Co., 109 N.J. Super, 555, 561-63, 264 A.2d 98, 101-03 (1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (1972). However, in some cases obligations of the predecessor were impliedly assumed from the acquisition of the predecessor's business and continuation of the operations. *See* Bouton v. Litton Indus. Inc., 423 F.2d 643 (3d Cir. 1970); Pearce v. Schneider, 242 Mich. 28, 217 N.W. 761 (1928).

24. Very simply, a merger of two corporations occurs where one corporation is absorbed by another and goes out of existence, but the absorbing corporation remains; whereas, in a consolidation both corporations go out of existence and an entirely new corporate entity takes the place of the former corporations. Knapp v. North American Rockwell Corp., 506 F.2d 361, 365 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Wilson v. Fare Well Corp., 140 N.J. Super. 476, 485, 356 A.2d 458, 463 (1976). This exception is sometimes referred to as the "de facto merger." *E.g.* Gee v. Tenneco, Inc., 615 F.2d 857, 863 (9th Cir. 1980); Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977); Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873, 887 (1976) (dissenting opinion).

25. The mere continuation exception is probably the most confusing and misunderstood of the four exceptions. Turner v. Bituminous Cas. Co., 397 Mich. 406, 448-49, 244 N.W.2d 873, 892 (1976) (dissenting opinion). However, many courts have held that one corporation is a mere continuation of another where there is a common identity of stockholders, officers and directors between the seller and purchaser. *See* Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817, 821-22 (D. Colo. 1968); Lopata v. Bemis Co., 383 F. Supp. 342, 345 (E.D. Pa. 1974); Wilson v. Fare Well Corp., 140 N.J. Super. 476, 485, 356 A.2d 458, 464 (1976). Thus, "for liability to attach, the purchasing corporation must represent merely a 'new hat' for the seller." Turner v. Bituminous Cas. Co., 397 Mich. 406, 450, 244 N.W.2d 873, 893 (1976) (dissenting opinion); McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 570, 264 A.2d 98, 106 (1970), *aff'd per curiam*, 118 N.J. Super, 480, 288 A.2d 585 (1972). This concept is actually nothing more than a corporate reorganization. *See* FLETCHER, *supra* note 21, § 7122.

liability.[26]

In addition, a fifth exception, sometimes incorporated as an element of one of the above exceptions, has been invoked in the absence of adequate consideration.[27] Even though the exceptions appear to be pervasive, they were given a very limited application.[28] This was due, in part, to a strong judicial emphasis upon the freedom of commercial activity and right to contract.[29] Furthermore, these exceptions applied with equal force to either stock or asset acquisitions.[30]

These limitations upon successor nonliability were initiated in response to concerns within the business community. Specifically, the exceptions were developed to protect creditors,[31] dissenting stockholders,[32] and to determine liability in tax assessment cases.[33] This

26. Courts have characterized numerous types of business transactions as fraudulent transfers. *See* Annot., 66 A.L.R.3d 824, 850-53 (1975); Annot., 49 A.L.R.3d 881, 884-99 (1973). For example, a transfer is considered fraudulent where the consideration is paid directly to the selling company's shareholders rather than to the corporation itself. *See, e.g.*, Lamb v. Leroy Corp., 85 Nev. 276, 454 P.2d 24 (1969); Annot., 49 A.L.R.3d 881, 895-98 (1973). Another fraudulent conveyance occurs where the purchasing corporation had knowledge of the fact that the selling corporation intended to default on its debts. *See, e.g.*, City of Altoona v. Richardson Gas & Oil Co., 81 Kan. 717, 106 P. 1025 (1910). *See generally* 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 324 (rev. ed. 1940).

27. *See* Shannon v. Samuel Langston Co., 379 F. Supp. 797, 800 (W.D. Mich. 1974); Menacho v. Adamson United Co., 420 F. Supp. 128, 131 (D.N.J. 1976); McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 561-62, 264 A.2d 98, 102 (1970), *aff'd per curiam*, 118 N.J. Super, 480, 288 A.2d 585 (1972). *See also* FLETCHER, *supra* note 21, §§ 7122-24; 19 AM. JUR. 2d *Corporations* § 1546 (1965). Typically, transfers for inadequate consideration are characterized as a fraudulent attempt to escape liability. *See, e.g.*, Economy Refining & Service Co. v. Royal National Bank, 20 Cal. App. 3d 434, 97 Cal. Rptr. 706 (1971); Jackson v. Diamond T. Trucking Co., 100 N.J. Super. 186, 241 A.2d 471 (1968).

28. Juenger & Schulman, *Assets Sales And Products Liability*, 22 WAYNE L. REV. 39, 45-46 (1975). In fact, the general rule of nonliability, with its exceptions, has acted as a security blanket for corporate successors, protecting them from the unknown or contingent liabilities of the predecessor. *See, e.g.*, Oak Distributing Co. v. Miller Brewing Co., 370 F. Supp. 889 (E.D. Mich. 1973); National Dairy Prod. Corp. v. Borden Co., 363 F. Supp. 978 (E.D. Wis. 1973); Bazan v. Kux Mach. Co., 358 F. Supp. 1250 (E.D. Wis. 1973); Ortiz v. South Bend Lathe, 46 Cal. App. 3d 842, 120 Cal. Rptr. 556 (1975); Schwartz v. McGraw-Edison Co., 14 Cal. App. 3d 767, 92 Cal. Rptr. 776 (1971).

29. *See* Kadens, *Practitioner's Guide to Treatment of Seller's Products Liabilities in Assets Acquisitions*, 10 TOL. L. REV. 1, 4 (1978). The freedom to contract is linked to the notion that a bona fide purchaser of property has a right to make such a purchase free of any unknown or unassumed claims against that property. *See* FLETCHER, *supra* note 21, § 7122 n.1 for cases espousing this principle.

30. In this respect, the limitations upon the general rule of nonliability supplement the rule which previously held the asset purchaser responsible for only those liabilities he expressly or impliedly assumes. *See supra* notes 23-28 and accompanying text. *See also* Note, *Products Liability: Developments In The Rule of Successor Liability for Product-Related Injuries*, 12 U. MICH. J.L. REF. 338, 347-51 (1979).

31. *See* Note, *Assumption of Products Liability In Corporate Acquisitions*, 55 B.U.L. REV. 86, 91 (1975); Comment, *Products Liability—Corporations—Asset Sales and Successor Liability*, 44 TENN. L. REV. 905, 908 (1977).

32. Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 159 A.2d 146, *aff'd*, 33 N.J. 72, 161 A.2d 474 (1960).

broad rule and its narrow limits became firmly entrenched in the American judiciary long before the concept of strict products liability had even reached an embryonic stage.[34] Thus, it is not surprising that the public policies behind products liability received no attention in the evolution of traditional corporate successor liability.

The Development Of Tort Law: A More Liberal Attitude Toward The Injured Plaintiff

At the same time the traditional corporate rule of successor liability became more firmly entrenched in the American judiciary, some dynamic changes in the area of tort law began to emerge.[35] The most notable of these changes was the adoption of the concept of strict products liability.[36] This movement into the strict liability arena was not as significant as it appears on the surface because, as we will see, the doctrine of strict products liability was more of a response to the changing emphasis in tort law rather than a total abrogation of existing tort principles.[37] For this reason, it is critical to first examine the changing theories in tort law before proceeding to evaluate the underpinnings of strict products liability.

In a very broad sense, the development of modern tort law can best be presented through a brief analysis of three distinct theories of tort liability that have pervaded the common law. A chronological discussion of each of the three evidences a gradual change in the underlying emphasis of tort liability.[38] Generally speaking, the American judiciary has continually expanded tort liability to increase the likelihood that an injured plaintiff will be fully compensated for harm caused by wrongful conduct. This focus is the principle reason for the

33. West Texas Refining & Dev. Co. v. Commissioner, 68 F.2d 77 (10th Cir. 1933).

34. The traditional corporate rule regarding corporate successor liability was firmly established as the majority rule in the United States even before the concept of strict products liability was first adopted by the Supreme Court of California in 1963. *Compare* FLETCHER, *supra* note 21, § 7122, *with* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

35. *See, e.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (elimination of the privity concept with regard to products liability). *See also* Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1099-1115 (1960) [hereinafter cited as Prosser, *Assault*].

36. The doctrine of strict products liability was first adopted by the California Supreme Court in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

37. *See* Schwartz, *Forward: Understanding Products Liability*, 67 CALIF. L. REV. 435, 435-48 (1979); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COL. L. REV. 153 (1976) [hereinafter cited as Klemme].

38. *See infra* text accompanying notes 39-62.

more liberal attitude toward expanding tort liability in the twentieth century.

The oldest, and conceptually the most difficult, theory of tort liability was the theory of force.[39] Under the force theory, "[t]he only limitations on the imposition of liability are that the defendant must have voluntarily intended to do the act which caused the injury, and the act must have been a fairly 'direct' cause of the injury."[40] Thus, the cornerstone of liability was the defendant's voluntary intent to commit an affirmative act coupled with the direct cause of injury.[41] The application of these criteria to actual cases was, as a practical matter, very difficult and confusing.[42] However, it is clear that an application of the force theory in many situations was egregiously unfair to the injured plaintiff. For example, "by requiring an affirmative act, the force theory did not normally result in the imposition of liability when the conduct of the defendant was in the form of an omission,"[43] because an omission was not an affirmative act.

By the late 1800's another concept of tort liability gained acceptance in American courts—the fault theory of liability.[44] The fault theory discarded the perplexing requirements mandated by the force theory and, instead, focused on the necessity of deterring socially undesirable behavior.[45] Thus, a defendant would be held liable for those injuries proximately caused by his or her socially undesirable conduct.[46] The "fault" concept is more commonly known to all legal practitioners as the law of negligence and is still entrenched in the common law today.[47] Imposing the stricter negligence standards upon the defendant's conduct made it much easier for the plaintiff to recover from the culpable defendant for his injuries.[48] However, the fault theory was,

39. *See* Klemme, *supra* note 37, at 166. *See also* O. HOLMES, THE COMMON LAW 90-92 (1881).

40. Klemme, *supra* note 37, at 166-67. See 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.4 (1956); PROSSER, HANDBOOK OF THE LAW OF TORTS § 13 at 63-66 (4th ed. 1971) [hereinafter cited as PROSSER].

41. *See* Klemme, *supra* note 37, at 167.

42. It was the application of the "direct cause" requirement of the force theory which ultimately caused such difficulties. *See* O. HOLMES, THE COMMON LAW 90-92 (1881).

43. Klemme, *supra* note 37, at 168.

44. *See* A. EHRENZWIEG, NEGLIGENCE WITHOUT FAULT 9-14 (1951) [hereinafter cited as EHRENZWEIG]; Klemme, *supra* note 37, at 170-73.

45. *See* PROSSER, *supra* note 40, § 4 at 23; James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 557 (1948).

46. Actually, the fault theory was employed before the concept of proximate cause was first introduced by Justice (then Judge) Cardozo in the landmark decision of Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). *See* Klemme, *supra* note 37, at 170-71.

47. *See generally* PROSSER, *supra* note 40, 16-21, 492-94.

48. This is so because the "[fault] theory, unlike the force theory, allowed the law to take into

and still is, internally inconsistent in many respects.[49] Furthermore, many courts eagerly expanded tort liability upon a defendant whose conduct could not be characterized as "negligent." One such example was the employer's liability under the doctrine of *respondeat superior*.[50] Such an expansion of liability actually contradicts the basis of the fault theory, *i.e.*, the responsibility for injuries proximately caused by the *defendant's* negligent conduct. For this reason, some commentators have suggested that courts have actually employed strict tort principles under the cloak of negligence law.[51]

This ever-expanding reach of tort liability under the fault theory further facilitated the injured plaintiff's ability to pursue recovery from the defendant. But more importantly, the expansion was evidence of a trend away from the concept of fault and closer to a new concept of liability—the enterprise theory.[52] The basic philosophy of the enterprise liability theory is that injuries from accidents are losses to society, losses which should be borne by the enterprise or activity which created

account omissions as well as commissions." Klemme, *supra* note 37, at 170. In this critical respect, the fault theory differed substantially from the force theory in that the former theory

> continued to hang on tenaciously to the fault idea in the sense of *causal* fault, that is, "It's his fault. He caused it." "Fault," for the fault theory, however, means not only that the defendant caused it, but he caused it by "faulty" behavior—behavior which was itself socially undesirable.

Id.

49. For example, the primary function of fault theory is two-fold: to deter similar conduct in the future and to compensate the injured plaintiff ("make the plaintiff whole"). *See* EHRENZWIEG, *supra* note 44, § 10 at 38-41. Yet, these two goals are in conflict with each other, because "[t]he attempt is to compensate the plaintiff for one set of reasons, and to punish the defendant for an entirely different set of reasons, by the single act of making the defendant pay a sum of money to the plaintiff." *Id.* at 39 n.140, *quoting* Morris, *Rough Justice and Some Utopian Ideas*, 24 ILL. L. REV. 730, 733 (1930). The divergence between these two functions was made patently clear by one author who said that the

> internal inconsistency between the fault theory and its deterrence rationale lies in the rule allowing a tortfeasor to insure against the actual damages he may incur as a result of having engaged in faulty, tortious conduct. Of course, to the extent one suffers an increase in his liability insurance premiums and he knows the increase is the result of his tortious conduct, some specific, and possibly general, deterrence can be expected. But because the economic impact of an increase in insurance rates on any one insured is almost always likely to be less than the amount of any tort judgment, the amount of individual deterrence achieved by imposing this financial burden on the actor is likely to be substantially diminished.

Klemme, *supra* note 37, at 173 (footnotes omitted).

50. *See* EHRENZWIEG, *supra* note 44, at 18-19. Of course, the expansion of fault liability spread into a multitude of other areas with equal fervor. *See id.* at 48-52. *See also* Prosser, *Assault, supra* note 35, at 1099-1114.

51. *See* EHRENZWEIG, *supra* note 44, at 48-52. *See generally*, Prosser, *Assault, supra* note 35. This practice by courts prompted at least one author, more than thirty years ago, to suggest that the true rule of tort law is a form of strict liability called "negligence without fault." EHRENZWIEG, *supra* note 44, at 47.

52. *See* Klemme, *supra* note 37.

that risk and ultimately caused the injury, regardless of fault.[53] The focus of enterprise liability is upon two factors. First, the manufacturer is in the best position to absorb and spread the *costs* of injuries which are the inevitable results of its manufacturing enterprise.[54] Furthermore, the manufacturer is also in the best position to prevent the *risks* of injury posed by its enterprise.[55] In this manner, imposing liability in such a wide range of circumstances acts as an economic incentive for the manufacturer to increase his efforts to reduce the risks of injury.[56]

The ultimate goal of enterprise liability is to obtain the maximum prevention of serious harm which is economically feasible.[57] Thus the underlying assumption is that the ultimate risks inherent in a given industry can best be prevented and accounted for by imposing the initial responsibility for those risks upon the manufacturers in that industry.[58] Stated very simply, enterprise liability places the entire economic burden upon the manufacturer because he is the best risk preventer and the best cost allocator.[59]

The enterprise theory is actually an outgrowth of the advances and innovations of industrialized society.[60] Along with the greater technological capabilities came dramatic increases in the risk of serious permanent harm. As a result, society gradually demanded that the vast growth in industry's wealth carried with it a commensurate responsibility for protection against the risk of harm.[61] This ultimately developed

53. *See, e.g.*, Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172, 1173 (1952); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 382-83, 386 (1951); James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 538 (1952). This concept has also been referred to as the "deep pocket" theory of liability. *See, e.g.*, Calabresi, *Some Thoughts On Risk Distribution And The Law Of Torts*, 70 YALE L.J. 499, 527-28 (1961).

54. *See, e.g.*, EHRENZWIEG, *supra* note 44, at 16-17; Calabresi, *Some Thoughts On Risk Distribution And The Law Of Torts*, 70 YALE L.J. 499, 517-19 (1961); Prosser, *Assault, supra* note 35, at 1120-21.

55. Klemme, *supra* note 37, at 186-90.

56. *Id.* at 189.

57. *Id.* at 188.

58. *Id.* at 186-87.

59. *Id.* at 188.

60. EHRENZWIEG, *supra* note 44, at 16-17.

61. *Id.* Professor Ehrenzweig synthesized the effect of the industrial revolution when he wrote:

> A development towards a stricter liability cannot be observed until the second half of the nineteenth century. That development was apparently due to a certain sentiment of hostility against innovations caused by the increase of industrial risks and financial failures; to the humanitarian demand for broader protection in a more social minded era; and finally to the fact that the growing industrial wealth and stability, coupled with a spreading system of liability insurance, made it easier to dispense with the injurer's protection afforded by a liability law primarily based on fault. It became more and more apparent that it was "socially expedient to spread and distribute throughout the community the inevitable losses."

into a belief that the costs of preventing and compensating for injuries was an obligation that one assumed by going into business.[62] Greater increases in manufacturer responsibility once again meant that the injured plaintiff would have a much easier opportunity to recover from a culpable defendant.

PUBLIC POLICIES UNDERLYING STRICT PRODUCTS LIABILITY

The trend towards the theory of enterprise liability was paralleled by the corresponding development of the law of products liability.[63] In 1842, the court in *Winterbottom v. Wright*[64] denied recovery to the passenger in a defective carriage because he lacked privity of contract with the manufacturer.[65] However, not long after the turn of the century, the narrow position taken by the *Winterbottom* court was rejected by Judge Cardozo in *MacPherson v. Buick Motor Co.*,[66] where the New York Court of Appeals broke the privity barrier, and held a manufacturer liable to the ultimate purchaser under negligence principles. The *MacPherson* court's willingness to divert from the privity path was analogous to the changing emphasis in tort theory. But more significantly, this change was consistent with the more liberal attitude toward the injured plaintiff's ability to recover from the manufacturing enterprise.

The question, however, of imposing strict liability upon the manufacturer of an unreasonably dangerous product was not squarely addressed until 1944, when Justice Traynor of the California Supreme

Id. (footnotes omitted).

62. *Id.* at 54. This idea is actually derived from an application of the landmark contract case of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), to tort cases. *Id.* The resulting doctrine is that a business will be held to have assumed all those liabilities it should have anticipated at the time it engaged in that business activity. *Id.* This trend for imposing certain liabilities as a cost of doing business is best exemplified by the area of workmen's compensation law, wherein it can be said that:

> A community which accepts the principle of [liability under workmen's compensation] cannot be expected to find anything intrinsically unreasonable in the doctrine which seeks to throw upon the undertaker the full responsibility for harm arising from his enterprise, on the theory that the business should bear its losses in the first instance regardless of fault or proximate cause, and that ultimately, like any other overhead charge, they would fall on the consumer.

Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 802-03 (1916).

63. EHRENZWIEG, *supra* note 44, at 28 ("The development of tort law from rudimentary strict liabilities and a general liability for negligence towards compensation and loss distribution can perhaps be best observed in the changing pattern of the products liability of manufacturers and other sellers.") (footnotes omitted).

64. 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

65. In fact, Lord Albinger abhorred the prospect of straying from the privity concept, stating that doing so would lead to "the most absurd and outrageous consequences, to which I can see no limit." *Id.* at 114, 152 Eng. Rep. at 405.

66. 217 N.Y. 382, 111 N.E. 1050 (1916).

Court wrote his famous concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno*.[67] Subsequently, several commentators espoused the virtues of the new theory and pressed for its adoption by the judiciary.[68] California became the first state to subscribe to the new doctrine in 1963 with the case of *Greenman v. Yuba Power Products, Inc.*[69] Moreover, the American Law Institute added increased credibility to strict products liability when it adopted section 402A of the Second Restatement of Torts.[70]

The rationale for imposing strict liability upon the manufacturer was grounded upon expressed public policy concerns that bore a striking resemblance to the two-fold thrust of enterprise liability—the manufacturer's superior ability to effectively spread costs and prevent risks.[71] Specifically, "[i]t is to the public interest to discourage the marketing of products having defects that are a menace to the public."[72] Public policy demands that a fixed standard be imposed upon a manufacturer, one that will most effectively reduce the hazards to life and health inherent in defective products that reach the market.[73] Such a demand was necessary because a consumer is not familiar with the complex manufacturing processes used today and no longer has the means or skill sufficient to investigate the soundness of a product.[74] For these reasons, "[a] manufacturer is strictly liable in tort when an

67. 24 Cal. 2d 453, 461-68, 150 P.2d 436, 440-44 (1944). The majority opinion never addressed any notions of strict products liability, but decided to impose liability based upon a less sound *res ipsa loquitur* theory. *Id.* at 457-61, 150 P.2d at 438-40. Justice Traynor, however, could not subscribe to the majority's position and wrote a separate concurring opinion espousing the virtues of strict products liability.

68. *E.g.*, Prosser, *Assault, supra* note 35; Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957).

69. 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

70. § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

71. *See supra* text accompanying notes 53-58.

72. 24 Cal. 2d at 462, 150 P.2d at 441.

73. *Id.*

74. 24 Cal.2d at 467, 150 P.2d at 443.

article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[75] These underlying public policies, so closely linked to the foundation for the enterprise liability theory, became the basis for the theory of strict products liability.

THE REFUSAL TO RECOGNIZE POLICIES BEHIND STRICT PRODUCTS LIABILITY

The doctrine of strict products liability spread rapidly. In fact, since the *Greenman* case, nearly forty additional American jurisdictions have adopted the doctrine.[76] Such widespread acceptance is ample evidence of society's concern for the injured consumer and the necessity of enhancing the safety of industry's wares.[77] At any rate, it was inevitable that the policies behind strict products liability would run against the grain of the traditional corporate rule regarding successor liability. As a result it is not surprising that there would be a dramatic increase in the number of products liability cases that successor corporations have been required to defend.

The expansion of the reach of products liability caused many courts to confront the issue of a corporate successor's liability for the defective products of its predecessor. The legal issue, in turn, was whether the general rule, with its exceptions, should apply to the products liability plaintiff. More narrowly, the question was whether the policies underlying strict products liability for defective products call for a special exception to the traditional corporate rule that would otherwise insulate the corporate successor from an injured party's claim.[78] This issue becomes more problematic when one considers that the general rule of nonliability does not reflect the public policies underpinning strict products liability.[79] Furthermore, this conflict becomes even more pronounced in most cases because the selling

75. 59 Cal.2d at 62, 27 Cal. Rptr. at 700, 377 P.2d at 900.

76. At the time this comment was being written, 40 jurisdictions, including the District of Columbia, had adopted the concept of strict products liability either by statute or case decision. HURSH & BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4.41 (2d ed. 1974 & Supp. 1981). By contrast, only five jurisdictions seem to have rejected the strict products rule. *See* Ciociola v. Delaware Coca-Cola Bottling Co., 53 Del. 477, 172 A.2d 252 (1961); Poppell v. Waters, 126 Ga. App. 385, 190 S.E.2d 815 (1972); Swartz v. General Motors Corp., 375 Mass. 628, 378 N.E.2d 61 (1978); Johnson v. Chrysler Corp., 74 Mich. App. 532, 254 N.W.2d 569 (1977); Fowler v. General Electric Co., 40 N.C. App. 301, 252 S.E.2d 862 (1979).

77. *See* A. WEINSTEIN, A TWERSRI, H. PIEHLER & W. DONAHER, FINAL REPORT TO THE NATIONAL SCIENCE FOUNDATION ON PRODUCT LIABILITY: A STUDY OF THE INTERACTION OF LAW AND TECHNOLOGY 15 (1977).

78. Ray v. Alad Corp., 19 Cal.3d 22, 30, 136 Cal. Rptr. 574, 579, 560 P.2d 3, 8 (1977).

79. *See supra* notes 31-34 and accompanying text.

corporation often dissolves shortly after the sale of its assets.[80] Therefore, the injured plaintiff has only one defendant from whom to seek recovery, the successor corporation. When this cause of action is dismissed, the products liability plaintiff is effectively denied a remedy for his injuries.[81]

Nevertheless, many courts continued to apply traditional corporate law in the products liability arena. In *McKee v. Harris-Seybold Co.*,[82] a New Jersey Superior Court held that a successor corporation could not be held responsible in strict liability for the injuries arising from the defective products sold by its predecessor.[83] The court took a very narrow approach in applying the exceptions to the general rule,[84] and was later criticized for taking such an approach.[85]

A California appellate court reached a similar conclusion in *Ortiz v. South Bend Lathe*.[86] However, the *Ortiz* court justified its holding by suggesting that the plaintiff should attempt to recover from the directors and shareholders of the dissolved seller.[87] The court went on to say that the "lack of an available remedy against [the seller] would not be grounds for shifting that liability to [the successor]."[88]

The dissent in *Ortiz* was highly critical of the majority opinion and

80. *See, e.g.*, Hernandez v. Johnson Press Corp., 70 Ill. App.3d 664, 666, 388 N.E.2d 778, 779 (1979) (original manufacturer dissolved approximately three years after corporate successor ultimately gained control of the business operations); Knapp v. North American Rockwell Corp., 506 F.2d 361, 364 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975) (predecessor dissolved 18 months after transaction with successor); Gee v. Tenneco Inc., 615 F.2d 857, 860 (9th Cir. 1980) ("Upon completion of the transfer of its asset to [the successor, the predecessor] changed its name . . . and was subsequently dissolved").

81. *See, e.g.*, Ortiz v. South Bend Lathe, 46 Cal. App.3d 842, 120 Cal. Rptr. 556 (1975); McKee v. Harris-Seybold, 109 N.J. Super. 555, 264 A.2d 98 (1970), *aff'd per curiam*, 188 N.J. Super. 480, 288 A.2d 585 (1972); Bazan v. Kux Machine Co., 358 F. Supp. 1250 (E.D. Wis. 1973).

82. 109 N.J. Super. 555, 264 A.2d 98 (1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (1972).

83. *Id.* at 570, 264 A.2d at 106.

84. There were several factors that led the court to this conclusion: 1. The purchase agreement did not expressly contain an all-inclusive assumption of liabilities; 2. The transaction was primarily a cash sale; 3. Both corporations were strangers before the sale and continued to remain strangers after the sale; 4. The purchaser absorbed only the manufacturing operations of the seller, not the entire entity; and 5. The seller continued to remain in existence for over a year after the sale. *Id.* at 563-71, 264 A.2d at 102-107.

85. Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 457, 419 A.2d 1151, 1156 (1980) (refers to *McKee* as a "harsh outcome"); Wilson v. Fare Well Corp., 140 N.J. Super. 476, 486, 356 A.2d 458, 464 (1976) (indicates that the *McKee* decision represents an "extremely limited viewpoint").

86. 46 Cal. App. 3d 842, 120 Cal. Rptr. 556 (1975).

87. *Id.* at 849, 120 Cal. Rptr. at 560. The *Ortiz* court further justified its holding in a rather ridiculous manner, merely stating that the injured plaintiff "is no worse off than if [the predecessor] had gone bankrupt early in the game." *Id.* Such a speculative argument by the court was clearly not warranted.

88. *Id.*

argued that the consumer has a right to "reasonably expect a degree of protection from the entity currently carrying on the business, even though that entity may not be the one that originally manufactured and marketed the particular item."[89] The dissent took an equally extreme approach, stating that products liability "attaches to the business like fleas to a dog, where it remains imbedded regardless of changes in ownership of the business."[90]

Many courts have paralleled the approach of the *Ortiz* and *McKee* decisions.[91] Basically, the analysis is the same in every case: the opinion will only acknowledge that the general rule of corporate nonliability exists;[92] the outcome will be a summary judgment in favor of the defendant corporate successor.[93]

AN EXPANDING APPLICATION OF THE EXCEPTIONS TO THE GENERAL RULE OF NONLIABILITY

Other courts have been able to give the narrow general rule of nonliability a flexible interpretation, thus recognizing that the injured products liability plaintiff may be without a remedy if he cannot seek

89. *Id.* at 850, 120 Cal. Rptr at 561. The dissenting judge's remarks on this matter come inescapably close to a virtual restatement of the "consumer expectation theory" of defectiveness as it applies to strict products liability actions. The basis for the theory appears in the Comments to § 402A of the Second Restatement of Torts, wherein it is stated in pertinent part:

> g. *Defective condition*. The rule stated in this section applies only where the product is, at the time it leaves the seller's hands, *in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him* . . . .
>
> i. *Unreasonably dangerous*. The rule stated in this section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . [W]hat is meant by *"unreasonably dangerous"* in this Section [is that *the*] *article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it*, with the ordinary knowledge common to the community as to its characteristics."

RESTATEMENT (SECOND) OF TORTS § 402A, Comments g & i (1965) (emphasis added). *See also* Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185 (1976).

90. *Id.* at 851, 120 Cal. Rptr. at 561. The dissenting judge went on to say that "[s]o long as the business retains its distinctive identity and character and continues to be operated as it has in the past, defective product liability adheres to the business and remains there until discharged by bankruptcy or comparable judicial act." *Id.*

91. *See* Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977); Freeman v. White Way Sign & Maintenance Co., 82 Ill. App. 3d 884, 403 N.E.2d 495 (1980); Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979); Jackson v. New Jersey Mfrs. Ins. Co., 166 N.J. Super. 448, 400 A.2d 81 (1979).

92. Two decisions have acknowledged the existence of expanding theories on successor liability, but nevertheless rejected those theories. *See* Freeman v. White Way Sign & Maintenance Co., 82 Ill. App. 3d 884, 893-94, 403 N.E.2d 495, 502 (1980); Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 667-70, 388 N.E.2d 778, 780-82 (1979).

93. Freeman v. White Way Sign & Maintenance Co., 82 Ill. App. 3d 884, 403 N.E.2d 495 (1980), is an exception. There the court on appeal reversed a lower court decision against the successor as a matter of law. *Id.* at 894, 403 N.E.2d at 502.

recovery from the corporate successor. The first decision exhibiting this flexibility was *Cyr v. B. Offen & Co.*[94] In *Cyr* the plaintiff was injured in 1969 when he entered the ovens of a negligently designed printing press which had been manufactured by B. Offen & Company in 1959. In 1962, the president and sole stockholder of the manufacturer died. The employees of that company eventually purchased the business in 1963 and agreed to continue its operations exactly as before.[95]

The issue in *Cyr* was whether there was sufficient continuity between the predecessor and successor to warrant a conclusion that the transaction fell into the "mere continuation" exception to the general rule of nonliability.[96] The United States Court of Appeals for the First Circuit ruled in favor of the plaintiffs. This ruling represented an expansion in the scope of successor liability, because previous courts had required a continuity of ownership between the predecessor and successor to satisfy the mere continuation exception.[97] Obviously, no such continuity of ownership existed under the *Cyr* facts because the selling party had retained no interest in the corporation after the transaction was completed. The *Cyr* court based its decision upon the notion that "[t]he very existence of strict liability for manufacturers implies a basic judgment that the hazards of predicting and insuring for risk from defective products are better borne by the manufacturer than by the consumer."[98]

In this respect, the successor stands in a much better position than the consumer to gauge the risks and the costs of meeting them.[99] Even though the successor was not the legal entity which placed the product into the stream of commerce, it nevertheless was profiting from the accumulated goodwill which those products had earned.[100] Therefore,

94. 501 F.2d 1145 (1st Cir. 1974).

95. In fact, as one court has said of the transaction in the *Cyr* case, "Continuity was the essence of the bargain." Wilson v. Fare Well Corp., 140 N.J. Super. 476, 488, 356 A.2d 458, 465 (1976).

96. *See id.* at 488, 356 A.2d at 465. The *Cyr* court relied on the reasoning of two labor law cases in determining whether there was sufficient continuity to warrant a conclusion that the transaction fulfilled the requirements of the mere continuation exception. *See* John Wiley & Sons, Inc., v. Livingston, 376 U.S. 543 (1964); NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972). *See supra* note 25 for a discussion of the mere continuation exception.

97. *E.g.*, Ozan Lumber Co. v. Davis Sewing Mach. Co., 284 F. 161, 165 (D. Del. 1922); McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 264 A.2d 98 (1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (1972).

98. 501 F.2d at 1154.

99. *Id.* The court indicated that the successor was in such a position because of its "experience and expertise." *Id.*

100. Other courts have considered the fact that the successor profits from the goodwill of the predecessor as a justification for imposing successor liability. *See* Ray v. Alad Corp., 19 Cal. 3d

the imposition of successor liability in this instance could not be characterized as unfair. Moreover, the lack of continuity of ownership between predecessor and successor should not have precluded the plaintiff from seeking recovery, especially since the entire business operation was continual and without change.[101]

Several courts have followed the lead of the *Cyr* court in expanding the scope of successor liability under a specific set of circumstances. In doing so, many decisions have pointed to additional reasons calling for such an expansion. Some courts have said that the imposition of products liability should *not* be dependent upon the form of the transaction between two companies.[102] In addition, other courts have observed that the successor corporation has received the benefits of an ongoing concern, and thus should accept the burdens commensurate with those benefits.[103] Therefore, the public policies underlying strict products liability favor imposing responsibility upon the "enterprise," or going concern, which should bear the liability for damages done by the defective products.[104]

BREAKING AWAY FROM THE CORPORATE TRADITION

Turner v. Bituminous Casualty Co.

Within three years of the *Cyr* decision, two courts drastically changed the emphasis in products liability cases involving corporate successors. Both decisions generally recognized that the successor's liability stemming from defective products should be evaluated according to principles underlying tort law, not corporate law.

In *Turner v. Bituminous Casualty Co.*,[105] the Michigan Supreme

22, 31, 136 Cal. Rptr. 574, 580, 560 P.2d 3, 9 (1977); Turner v. Bituminous Cas. Co., 397 Mich. 406, 425, 244 N.W.2d 873, 881 (1976).

101. 501 F.2d at 1154.

102. *See* Knapp v. North American Rockwell Corp., 506 F.2d 361, 369 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975) ("questions of an injured party's right to seek recovery are to be resolved by an analysis of public policy considerations rather than by a mere procrustacean application of formalities"); Menacho v. Adamson United Co., 420 F. Supp. 128, 133 (D.N.J. 1976) ("no corporation should be permitted to place into the stream of commerce a defective product and avoid liability through corporate transformations or changes in form only."); Shannon v. Samuel Langston Co., 379 F. Supp. 797, 803 (W.D. Mich. 1974) ("going concerns, should not be permitted to discharge their liabilities to injured persons simply by shuffling paper and manipulating corporate entities").

103. Shannon v. Samuel Langston Co., 379 F. Supp. 797, 803 (W.D. Mich. 1974); Wilson v. Fare Well Corp., 140 N.J. Super, 476, 356 A.2d 458 (1976); Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 467, 419 A.2d 1151, 1162 (1980).

104. Shannon v. Samuel Langston Co., 379 F. Supp. 797, 802 (W.D. Mich. 1974). *See* Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 467, 419 A.2d 1151, 1162 (1980).

105. 397 Mich. 406, 244 N.W.2d 873 (1976).

Court reasoned that the responsibility for product-related injuries should not be determined with reference to principles developed to protect business creditors and minority shareholders.[106] In fact, such principles were not a response to the needs of a products liability plaintiff[107] who has the same legitimate concerns regardless of the formalities of the acquisitions.[108] For this reason, in asset acquisitions, the absence of commonality of ownership between transferee and transferor would not, by itself, preclude the imposition of successor responsibility for products liability claims.[109]

The majority took into account the successor's ability to predict and insure against the risks presented by the predecessor's defective products, along with the benefits the successor gained from the goodwill developed by the predecessor.[110] From this, the court determined that the successor's responsibility hinged upon the "continuity of interest" between the transferor and transferee.[111] Thus, liability would be imposed upon the successor if three elements were satisfied:

1. A continuity of the outward appearance of the enterprise, its management, personnel, physical plant, assets, and business operation.
2. The dissolution of the seller corporation as soon after the transfer of assets as is legally and practically possible.
3. Assumption by the transferee of those liabilities and obligations necessary to the uninterrupted continuation of normal business operations.[112]

Ray v. Alad Corp.

The Supreme Court of California in *Ray v. Alad Corp.*,[113] completely abandoned the traditional test and approached the issue solely in terms of the policies underpinning strict liability in tort and products law.[114] The court observed that although the corporate principles gov-

106. *Id.* at 429-30, 244 N.W.2d at 883-84.

107. *See supra* notes 31-34 and accompanying text.

108. 397 Mich. at 418, 244 N.W.2d at 878.

109. *Id.* at 422, 244 N.W.2d at 880.

110. Actually, this idea is not significantly different from the equitable concerns considered by other courts in expanding successor liability within the parameters of the traditional corporate rule. *See supra* note 103 and accompanying text.

111. 397 Mich. at 429, 244 N.W.2d at 883. In this context, the court eliminated the requirement of a commonality of ownership between the successor and predecessor, stating that "the first, third and fourth criteria quoted in *Shannon* from *McKee* as tests of continuity of interest, and therefore responsibility, are all relevant, with the first perhaps of greatest significance." *Id.*

112. The factors listed by the *Turner* court as being significant in actuality are no different from the test employed in *Cyr.* *See* Note, *Products Liability: Developments In The Rule Of Successor Liability For Product-Related Injuries*, 12 U. MICH. J.L. REF. 338, 373 (1979).

113. 19 Cal. 3d 22, 136 Cal. Rptr. 572, 560 P.2d 3 (1977).

114. 19 Cal. 3d at 30-31, 136 Cal. Rptr. at 579-80, 560 P.2d at 8-9.

erning successor liability were not designed to address the special problems involved in a products liability claim,[115] the public policies flowing from strict products liability would justify imposing liability upon the successor for three reasons. First, the plaintiff's remedies against the original manufacturer are virtually destroyed by the successor's acquisition of the business.[116] Second, the successor has the ability to assume the original manufacturer's risk-spreading role.[117] Finally, successor responsibility is a burden which equitably attaches itself to the original manufacturer's goodwill which has inured to the successor's continued operation of the business.[118]

The court's analysis of the relevant policies and justifications led to the articulation of what is now known as the "product line exception."[119] As the court noted:

> We therefore conclude that a party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired.[120]

Few courts have subscribed to the reasoning and judgment of either the *Turner* or *Alad* approaches.[121] In fact, in at least one instance there has been marked criticism of such an expansion.[122] Of course,

115. The court indicated that the plaintiff would be entirely precluded from recovering against the successor under general rules of successor liability. 19 Cal. 3d at 28, 136 Cal. Rptr. at 578, 560 P.2d at 7. The court concluded that a "*special* rule should be applicable to a successor corporation's *tort* liability for its predecessor's *defective products.*" *Id.* at 8 (emphasis in original).

116. 19 Cal. 3d at 31, 136 Cal. Rptr. at 580, 560 P.2d at 9.

117. This is because of the fact that the seller invariably dissolves not long after the sale is completed, thus causing potential legitimate claimants to "face formidable and probably insuperable obstacles in attempting to obtain satisfaction of the judgment from former stockholders or directors [of the predecessor]." 19 Cal. 3d at 32, 136 Cal. Rptr. at 580, 560 P.2d at 9. *See also supra* note 80 and accompanying text.

118. This justification is actually not a new one and has been used before to support the expansion of successor liability. *See* Cyr v. B. Offen & Co., 501 F.2d 1145, 1154 (1st Cir. 1974) ("in the most real sense [the successor] is profiting from exploiting all of the accumulated good will which the products have earned").

119. It is interesting to note that the California Supreme Court did not attach such a label to the new principle it had created. However, other courts have referred to the new rule in this manner. *See, e.g.*, Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977) ("product line theory"); Ramirez v. Amsted Indus., Inc., 171 N.J. Super. 261, 273, 408 A.2d 818, 824 (1979), *aff'd*, 86 N.J. 332, 431 A.2d 811 (1981) ("product line exception").

120. 19 Cal. 3d at 34, 136 Cal. Rptr. at 582, 560 P.2d at 11 (overruling "[a]nything to the contrary in *Ortiz v. South Bend Lathe*," 46 Cal. App. 3d 842, 120 Cal. Rptr. 556 (1975)).

121. *See* Ramirez v. Amsted Indus., Inc., 171 N.J. Super. 261, 408 A.2d 818 (1979), *aff'd*, 86 N.J. 332, 431 A.2d 811 (1981) (adopting the *Alad* rule); Gee v. Tenneco, Inc., 615 F.2d 857 (9th Cir. 1980) (adopting *Alad*); Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136 (E.D. Mich. 1979) (adopting *Turner*); Rawlings v. D.M. Oliver, Inc., 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979) (combining principles of both *Turner* and *Alad*).

122. *See* Leannais v. Cincinnati, Inc., 565 F.2d 437, 440-41 (7th Cir. 1977); Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977).

such criticism typically arises where courts have broken new ground with the law.[123] Nevertheless, the pendulum continues to swing in favor of plaintiffs in products liability cases. The question is open as to how far the pendulum will continue in the same direction.

RAMIREZ V. AMSTED INDUSTRIES, INC.[124]

Statement of the Case

On August 18, 1975, Efrain Ramirez was injured while operating an allegedly defective power press on the premises of his employer.[125] The machine had been manufactured by Johnson Machine and Press Company[126] sometime in 1948 or 1949. Johnson, however, had transferred all of its assets and liabilities to the Bontrager Construction Company in 1956.[127] Thereafter, Johnson transacted no business as a manufacturing entity.[128] Bontrager then undertook the primary activity of producing the Johnson line of presses. By August of 1962, the Johnson Company was subjected to yet another corporate transformation. Amsted Industries, Inc. purchased all of the assets of Bontrager, including all of the Johnson assets that Bontrager had acquired in 1956.[129] Also included in the purchase was the "exclusive right to adopt and use the trade name 'Johnson Machine and Press Corporation.' "[130]

The 1962 agreement provided that Amsted would assume certain debts and liabilities in order to continue the operation of Bontrager's business without interruption.[131] However, it was clear from the agree-

123. *See, e.g.*, In Re Lyra Shipping Co., 360 F. Supp. 1188, 1194 (E.D. La. 1973) (criticizing Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928)); Franks v. Nat'l Dairy Prods. Corp., 282 F. Supp. 528, 533 (W.D. Tex. 1968) (criticizing Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963)); Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 147-48, 542 P.2d 774, 776 (1975) (en banc) (criticizing Greenman v. Yuba).

124. 86 N.J. 332, 431 A.2d 811 (1981). The companion case of *Nieves v. Bruno Sherman Corp.* was decided in the same manner as *Ramirez*. *See* 86 N.J. 361, 431 A.2d 826 (1981).

125. The plaintiff's employer was Zamax Manufacturing Co. of Belleville, New Jersey.

126. Hereinafter Johnson.

127. The Bontrager construction company was an Indiana Corporation [hereinafter Bontrager].

128. 86 N.J. at 337, 431 A.2d at 814. Bontrager did retain a single share of Johnson common stock so as to continue the Johnson name in corporate form. *Id.* at 338, 431 A.2d at 814.

129. The Johnson assets included the single share of Johnson common stock. *Id.* Furthermore, it appears that Bontrager dissolved shortly after this transaction was completed. *See* Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136, 144 (E.D. Mich. 1979); Ortiz v. South Bend Lathe, 46 Cal. App. 3d 842, 846, 120 Cal. Rptr. 556, 558 (1975).

130. 86 N.J. at 338, 431 A.2d at 814.

131. However, the agreement also contained the following clause: "It is understood and agreed that Purchaser shall not assume or be liable for any liability or obligations other than those herein expressly assumed by Purchaser; all other liabilities and obligations of Seller shall be paid,

ment that Amsted expressly declined to assume liability for any claims arising from defective products manufactured by its predecessors.[132] Amsted then continued to manufacture the Johnson presses[133] and was assigned the single outstanding share of Johnson common stock previously held by Bontrager as of 1956. The corporate existence of Johnson was then dissolved in July, 1965.[134]

Ramirez filed a suit against Amsted as a successor corporation to Johnson, seeking to recover damages on theories of negligence, breach of warranty, and strict products liability for defective design and manufacturing. The trial court granted a summary judgment in favor of Amsted and held, according to the appellate court, that "there is no assumption of liability when the successor purchases the predecessor's assets for cash and when the provisions of the purchase agreement between the selling and purchasing corporations indicate an intention to limit the purchaser's assumption of liability.[135]

On appeal, the New Jersey Superior Court reversed the trial court, holding that when a successor corporation purchases substantially all of the assets of the predecessor corporation and continues essentially the same manufacturing operation as the predecessor, the successor remains liable for the product liability claims of its predecessor.[136] In so holding, the court recognized the recent trend towards a rule imposing liability on the successor without regard to the form of acquisition.[137] The court stated that the public policies behind the doctrine of strict products liability should not allow a corporation to exculpate itself from legitimate claims through the use of disclaimers.[138]

performed and discharged by Seller." 86 N.J. at 338, 431 A.2d at 814 (quoting from the 1962 agreement between Amsted and Bontrager).

132. *Id.* at 339, 431 A.2d at 814.

133. Amsted's wholly owned subsidiary, South Bend Lathe, Inc., manufactured the Johnson line at the original Johnson plant in Elkhart, Indiana. *Id.*

134. Amsted continued to manufacture Johnson presses until 1975, when the business was sold to a newly formed corporation also named South Bend Lathe, Inc. As part of this agreement Amsted agreed to indemnify South Bend Lathe, Inc. for any losses arising out of defects in machines manufactured prior to the closing date. *Id.* at 815.

135. 86 N.J. at 336, 431 A.2d at 813.

136. Ramirez v. Amsted Indus., Inc., 171 N.J. Super, 261, 278, 408 A.2d 818, 827 (1979).

137. *Id.* at 269-70, 408 A.2d at 823, *citing* Ray v. Alad Corp., 19 Cal.3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977); Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873 (1976); Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974); Knapp v. North American Rockwell Corp., 506 F.2d 361, 371 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

138. The Superior Court concluded that to preclude recovery based upon any such disclaimers would be "wholly anachronistic in the context of the development of our product liability law." 171 N.J. Super. at 276, 408 A.2d at 826. However, before reaching this conclusion the court first analyzed many of the earlier decisions calling for the expansion of successor liability along with the public policy justifications for expanding the doctrine. *Id.* at 269-74, 408 A.2d at 823-26.

The Ramirez *Opinion*

On further appeal, the Supreme Court of New Jersey held that the plaintiff should not be precluded from recovery based upon traditional principles of successor liability.[139] A thorough analysis of case law revealed that the narrow approach employed in *McKee v. Harris-Seybold Co.*[140] was inconsistent with the developing principles of strict products liability.[141] Indeed, the exceptions to the general rule had not been meaningful to the injured plaintiff.[142] The court also noted that several decisions had expanded successor liability.[143] The bases for such an expansion were the public policy considerations relied on by previous courts.[144]

After deciding to apply tort rather than corporate principles to products liability plaintiffs, the court then considered whether it should adopt the modern approach of either *Turner* or *Alad*. In doing so, the *Ramirez* court called attention to the fact that the public policies underlying strict products liability played an entirely different role in both landmark decisions. In *Turner*, these public policies merely acted as a justification for broadening the scope of traditional corporate successor liability.[145] On the other hand, in *Alad*, the Supreme Court of California utilized the underlying public policies to justify creating an entirely new rule of successor accountability in products cases. Furthermore,

139. Justice Clifford authored the opinion of the court.

140. *See supra* notes 82-85 and accompanying text for a complete discussion of the *McKee* approach.

141. 86 N.J. at 342-43, 431 A.2d at 816.

142. *Id., quoting* the *Turner* court's language wherein it stated:

> To the injured persons the problem of recovery is substantially the same, no matter what corporate process led to transfer of the first corporation and/or its assets. Whether the corporate transaction was (1) a traditional merger accompanied by exchange of stock of the two corporations, or (2) a de facto merger brought about by the purchase of one corporation's assets by part of the stock of the second, or (3) a purchase of corporate assets for cash, the injured person has the same problem, so long as the first corporation in each case legally and/or practically becomes defunct. He has no place to turn for relief except to the second corporation. Therefore, as to the injured person, distinctions between types of corporate transfers are wholly unmeaningful.

397 Mich. 406, 419, 244 N.W.2d 873, 878. Indeed, a similar concern has been expressed elsewhere. *See* Ray v. Alad Corp., 19 Cal. 3d at 31-33, 136 Cal. Rptr. at 579-81, 560 P.2d at 9-10.

143. 86 N.J. at 343, 431 A.2d at 817, *citing* as examples: Knapp v. North American Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974); Shannon v. Samuel Langston Co., 379 F. Supp. 797 (W.D. Mich. 1974); Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873 (1976); Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (1974); Wilson v. Fare Well Corp., 140 N.J. Super. 476, 356 A.2d 458 (1976).

144. *See* 86 N.J. at 343-45, 431 A.2d at 817.

145. *Id.* at 347, 431 A.2d at 818-19. *See also* Comment, *Extension of Strict Tort Liability to Successor Corporations*, 61 MARQ. L. REV. 595, 607-14 (1978), where the author considered *Turner* to be merely an expansion of traditional corporate principles and *Alad* a separate tort concept of liability.

the court observed that the focus in *Alad* was entirely on the continued manufacture of the product causing injury.[146] This approach was much more consistent than the *Turner* court's focus upon the continuation of the actual manufacturing operation.[147] Because subsequent applications of the *Turner* approach had yielded contradictory results, these considerations necessitated the adoption by the court of *Alad's* product line approach.

The defendant had put forward three logical arguments against the imposition of successor liability. First, such an expansion of successor responsibility would necessarily have a crippling effect on the ability of the small manufacturer to transfer ownership of its business assets.[148] Business planners would be hesitant to purchase a business with unpredictable contingent liabilities, thus forcing the small businessman into liquidation proceedings.[149] The court did not make short shrift of this argument, and, in fact, admitted that the defendant's concerns were entirely legitimate. However, the social policy underlying products liability mandated that the true worth of a selling corporation should reflect the potential liability for product defects.[150] This responsibility is a cost of doing business which has been created by social policy.[151]

Second, it had been asserted that it would be unfair to impose liability upon a successor with twice removed status and where the predecessor had placed the product in the stream of commerce twenty-eight years before the injury occurred. The court's response to this contention was simply that these questions were matters of repose, and appro-

146. *See supra* text accompanying note 120.

147. 86 N.J. at 347-48, 431 A.2d at 819. Indeed, as the court illustrated, an application of the *Turner* criteria has led to contradictory results under two identical fact patterns. *See id.* at 348, 431 A.2d at 819 n.3. *Compare* Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979) *with* Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136 (E.D. Mich. 1979). *See also* Note, *Products Liability: Developments in the Rule of Successor Liability for Product-Related Injuries*, 12 U. MICH. J.L. REF. 338, 380-87 (1979).

148. 86 N.J. at 353, 431 A.2d at 822.

149. The court explained that business planners will be reluctant to purchase a "potential can of worms" that would explode into an astronomical number of products liability claims. This would drive down the purchase price of the small manufacturer's business. 86 N.J. at 353, 431 A.2d at 822. The price will be much less than the true worth of the manufacturer's business assets, thus forcing him to liquidate rather than sell the business to a larger corporation. *Id.*

150. *Id.* at 353-54, 431 A.2d at 822.

151. The court added that "[i]n addition to making adjustments to the purchase price, thereby spreading the potential costs of liability between predecessor and successor corporations, it can obtain products liability insurance for contingent liability claims, and it can enter into full or partial indemnification or escrow agreements with the selling corporation." *Id.* at 354, 431 A.2d at 822-23.

priately a task for the legislature.[152]

Finally, Amsted had argued that such a new standard of liability should be applied prospectively.[153] This contention hinged upon the fact that its business planners had relied on the existing state of the law in entering into the transaction with Bontrager in 1962.[154] Furthermore, insurers had relied on the existing law in calculating the degree of risk involved when determining premiums and providing coverage.

The court agreed that there may have been a reasonable basis for such reliance, but stated that the plaintiffs in the present case should not be denied the reward for the effort and expense involved in successfully challenging the traditional rule. Furthermore, the new rule was also held to apply to products liability plaintiffs similarly situated, in suits against successor manufacturers affected by this rule. These affected cases must have been in progress as of November 15, 1979, the date of the Appellate Division decision.[155] The decision was given such an effect because the law recognized that certain persons who have exercised the initiative to challenge the existing law should not be barred from recovery if their claims have not yet been resolved when the new

152. At this time, the court drew analogy to a New Jersey statute, N.J. STAT. ANN. § 2A:14-1.1, which the court said

> provides that no action for an injury arising out of the defective and unsafe condition of an improvement to real property shall be brought against any person performing or furnishing the design or construction of such improvement more than ten years after the performance or furnishing of such services and construction.

86 N.J. at 355, 431 A.2d at 823. Stated very simply, the statute cited was a "statute of repose," a legislative enactment intended to "cut back on the potential of [construction companies] to be subject to liability for life." *Id.* at 356, 431 A.2d at 824, *quoting* Hudson County v. Terminal Constr. Corp., 154 N.J. Super, 264, 268, 381 A.2d 355, 357 (1977). From this, the court reasoned that "[w]ith the expanded potential liability of successor corporations for injuries arising out of defects in their predecessors' products, a similar legislative response may be in order with respect to product liability claims." *Id.* (footnote omitted).

153. 86 N.J. at 356-57, 431 A.2d 824. The defendant relied upon *Darrow v. Hanover Township*, 58 N.J. 410, 278 A.2d 200 (1971), where the New Jersey Supreme Court prospectively applied its holding in *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970), abrogating the rule of interspousal immunity in automobile negligence cases. *Immer* was given a prospective application because the defendants had established justifiable reliance upon earlier decisions upholding interspousal immunity. 58 N.J. at 418-20, 278 A.2d at 204-05.

154. "Reliance" is only one of many factors considered by courts to determine whether a decision will be given a prospective or retrospective application. For a discussion of all of the factors a court considers in determining whether to give a decision a retroactive effect, *see* Comment, *Legal Method—Deciding The Retroactive Effect of Overruling Decisions—Lau v. Nelson*, 92 Wn. 2d 823, 601 P.2d 527 (1979), 55 WASH. L. REV. 833 (1980) [hereinafter cited as *Legal Method*].

155. It is important to remember here that the decision of the Appellate Court essentially adopted the "product line approach" of the Supreme Court of California in *Alad. See supra* notes 81-91 and accompanying text. Thus, the appellate decision presumably put all prospective defendants on notice of the possibility of a forthcoming change in New Jersey law regarding corporate successor liability. *See* 86 N.J. at 357, 431 A.2d at 824.

rule of law is announced.[156] Furthermore, successor manufacturers would be liable only for those injuries arising after November 15, 1979.

The Concurring Opinion

The concurring opinion of Justice Schreiber disagreed with the majority only as to the retrospective application of the decision.[157] The Justice observed that it was inequitable to saddle previous purchasers of assets with liabilities they have not assumed simply because the injury occurred after November 15, 1979. Furthermore, the defendant in this case had not placed the defective product into the stream of commerce. Amsted had neither contributed to the accident nor had been responsible for the product when the purchase contract was made.[158]

Moreover, the defendant had contracted in good faith, relying upon the law that it would not be responsible for the seller's defective products. Contingent liabilities, such as those arising from the seller's defective products, had not been taken into consideration by Amsted when calculating the contract purchase price.[159] In this respect, the defendant was being subjected to a double burden. First, the purchaser had paid more than it would have had it been aware of its liability for the predecessor's manufacturing enterprise. It had also been deprived of any opportunity to contractually provide for indemnification from the seller, or for some other protective device, such as an escrow that would have covered contingent product liabilities.[160] In addition, Jus-

156. The court went on to say that "[t]his is not unfair to defendants in similar asset-acquisition transactions who, except for the handful of cases caught up by the limited retroactive application of today's rule, now have a 'cut-off' date of November 15, 1979 for exposure to liability." *Id.*

157. *Id.* at 358-61, 431 A.2d at 825-26 (Schreiber, J., concurring).

158. This line of argument appears to be accusing the majority of giving legal effect to part of an agreement that had no legal effect when the agreement was entered into. However, this argument is, in essence, a contract argument that would be inappropriate in this case, because the majority's decision was based upon tort principles.

159. In fact, Justice Schreiber reminded the court that it had recognized this fact. 86 N.J. at 359-60, 431 A.2d at 825. *See also id.* at 353-54, 431 A.2d at 822.

160. This argument appears to be very persuasive. On the one hand,

> it is clear that once corporations considering such transactions become aware of the possibility of successor products liability, they can make suitable preparations [to account for such liability]. Whether this takes the form of products liability insurance, indemnification agreements or of escrow accounts, or even a deduction from the purchase price is a matter to be considered between the [successor and predecessor].

Turner v. Bituminous Cas. Co., 397 Mich. at 428, 244 N.W.2d at 883. On the other hand, it is also clear that Amsted Industries is being unfairly subjected to a new rule of law which had not been the law of the state of New Jersey. Nevertheless, as the *Turner* court noted:

> While the first such successor to be faced with such a liability may claim surprise, the claim lacks legal force. For this kind of surprise is endemic in a system where legal principles are applied case by case and is no more an injustice than was the retroactive application of the strict liability doctrine in *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970).

tice Schreiber examined statistics which indicated that it is questionable whether purchasers can realistically acquire insurance to protect against those liabilities.[161] Finally, the dissent was concerned that the plaintiff would, in reality, not be left completely without a remedy; various monetary sources may have still been available for compensation.[162]

In the final analysis, the concurring opinion would have respected the contracts of those parties who had entered into a corporate transfer agreement on or before November 15, 1979. Therefore, an equitable resolution would have been to focus on the date of acquisition. Only those purchasers who had entered into contracts after November 15, 1979 should have been subjected to the new rule.

ANALYSIS

The *Ramirez* court placed considerable emphasis upon the public policies underlying strict products law as a justification for the expansion of tort liability to the corporate successor.[163] Although the special interests underlying the traditional corporate rules were to be given some weight, those interests were superceded by the necessity of pro-

Id., quoting Cyr v. B. Offen & Co., 501 F.2d at 1154.

161. 86 N.J. at 360, 431 A.2d at 826. *See* SENATE SELECT COMM. ON SMALL BUSINESS, 28TH ANNUAL REP., ch. 18, IMPACT OF PRODUCT LIABILITY ON SMALL BUSINESS 167-71, S. REP. NO. 629, 95th Cong., 1st Sess. (1977); *Dept. of Commerce, Interagency Task Force on Product Liability*: FINAL REPORT at VI-2 to VI-38 (1977); *Products Liability Insurance: Hearings Before the Subcomm. on Capital, Investment and Business of the House Comm. on Small Business*, 95th Cong., 1st Sess. (Part I) 4 (1977). *See also* Kadens, *Practitioner's Guide to Treatment of Seller's Products Liabilities in Assets Acquisitions*, 10 U. TOL. L. REV. 1, 22-25 (1978); Note, *Products Liability and Successor Corporations: Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance*, 13 U.C. DAVIS L. REV. 1000, 1002-04, 1022-24 (1980).

162. As the concurring opinion stated, "the injured persons may not have been left totally unrecompensed. Worker's compensation, accident and health insurance policies, and liability of the manufacturer of the defective product or its insurer are some monetary sources which may be available to compensate the injured plaintiff." 86 N.J. at 361, 431 A.2d at 826.

163. The court specifically referred to this "public policy" when it said:

> In our view these *policy considerations* likewise justify the imposition of potential strict tort liability [upon the successor corporation] under the circumstances here presented.
>
> . . . .
>
> . . . the imposition of successor corporation liability upon Amsted is consistent with the *public policy* of spreading the risk to society at large for the cost of injuries from defective products.

86 N.J. at 349-50, 431 A.2d at 820 (emphasis added). Moreover, the *Ramirez* court also utilized the liberalization of tort law principles as further justification for the expansion of corporate successor liability, and stated that:

> The progressive character of New Jersey decisional law in the area of strict products liability is well known. . . .

Id. at 350, 431 A.2d at 820.

viding for the needs of the injured plaintiff.[164] To be more specific, the court in *Ramirez* was willing to impose strict products liability upon the corporate successor because of its abilility to function as the best "risk preventer" and the "cheapest cost avoider."[165] Ironically, these considerations are virtually identical to the two-pronged foundation for enterprise liability.[166] In fact, the *Ramirez* court went so far as to say, in effect, that strict products liability *is* "enterprise liability."[167] The court went even further, when it based the successor's liability *solely* upon its function as the most effective *cost spreader*. This can be deduced from the simple fact that the successor could not have been in a position to prevent the risk of harm presented by the predecessor's defective products.[168] At any rate, the adoption of the "product line exception" first espoused in *Ray v. Alad Corp.* [169] would be in the name of public policy.

However, the expansion of corporate successor liability in such a manner is not entirely new. The *Ramirez* opinion is not a significant one because of its expansion of products liability for public policy reasons—this had been done in the past.[170] Rather, *Ramirez* is important because it addressed three novel issues regarding the imposition of corporate successor liability. Two of these issues, which essentially focused on the fairness of imposing liability under these facts, were raised by Amsted. The first argument made was that the imposition of liability would have a crippling effect upon the ability of the small manufacturer to transfer ownership of its business.[171] It was also argued that it would be unfair to impose liability because the product was placed into the stream of commerce nearly three decades before the injury and be-

164. The court's emphasis upon this notion was fairly self-evident:

> The [corporate successor's] contentions raise legitimate concerns. We do not look upon them as "cassandrian arguments."
>
> . . . .
>
> . . . However, these concerns, genuine as they may be, cannot be permitted to overshadow the basic social policy, now so well-entrenched in our jurisprudence, that favors imposition of the costs of injuries from defective products on the manufacturing enterprise and consuming public rather than on the innocent injured party.

Id. at 353-54, 431 A.2d at 822-23.

165. *Id.* at 350-51, 431 A.2d at 821-22.

166. *See supra* text accompanying notes 54 & 55.

167. 86 N.J. at 351, 431 A.2d at 821 ("Strict liability for injuries caused by defective products placed into the stream of commerce is 'an enterprise liability.' ").

168. Since the corporate successor in *Ramirez* was not even in existence at the time the defective product was produced, it certainly could not have been in a position to prevent the defect in the Johnson press, and thus, the risk of harm presented by that defect.

169. *See supra* text accompanying notes 81-91.

170. Public policy is the very basis of the doctrine of strict products liability. *See supra* text accompanying notes 67-75.

171. It is interesting to note that Amsted offered no explanation as to why this effect was, in a broad sense, a negative by-product of the court's decision. Perhaps the defendant was hoping the *Ramirez* court would come to the rescue of the small businessman in this case.

cause Amsted was the second successor of Johnson.[172] The third issue, whether to give the decision a retroactive effect, was essentially addressed by the court on its own volition.[173]

The Crippling Effect Upon Business

The court was very candid in its approach to the defendant's argument that corporate successor responsibility for defective products would have a crippling effect upon business interests. Indeed, Amsted had raised legitimate, if not pressing, concerns. The court expressly contradicted other authorities that had dismissed this contention as being far too speculative to address.[174] Nevertheless, the policies underlying strict products liability required that the true value of a corporation reflect potential liability for defective products. Thus, it is likely that a large manufacturer would be unwilling to purchase a smaller manufacturer's business because the potential successor liability for defective products may be far too great. This possibility may force the smaller manufacturer to liquidate because he is too small to cover the potential products liability claims himself. The force of social policy dictates, however, that this result is a necessary cost of doing business.

The court need not have pressed this issue any further. The public policies calling for successor responsibility under these circumstances were sufficiently compelling to justify the decision.[175] For some reason, however, the court needed to inject the notion of fairness with respect to this issue, perhaps because it did not want its decision to be charac-

172. Basically, this argument translates into the contention that it is unfair to impose liability upon a corporate successor with "twice removed status." Amsted had been the unsuccessful proponent of this argument in an earlier case where it was contesting the imposition of corporate successor liability. *See* Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136 (E.D. Mich. 1979). In *Korzetz*, the court's response to this argument was equally as negative as that given in *Ramirez*:

> Amsted's twice removed status (vis-a-vis Johnson) does not appear to be legally significant. Amsted continued the business that Johnson established. That fact was in no way negated by Bontrager "picking up the ball" from Johnson and then "passing it" to Amsted.

Id. at 144-45.

173. The retroactivity of a decision will basically have an effect upon two groups of litigants, those who are parties to the litigation giving rise to the new rule, and those future litigants whose past conduct will be subject to the scrutiny of the new rule. *See* Traynor, *supra* note 10, at 264-70. Of course, the overruling court cannot avoid deciding whether the parties to the suit will be prevailed upon to follow the new rule. Such a decision is not volitional. However, the court's declaration of the effect of a new rule upon future litigants is merely dictum. *See id.* at 269-70; *Legal Method*, *supra* note 154, at 846-47 (1980).

174. It has been said that this claim is frivolous; one that argues fictions that simply do not exist. *See* Turner v. Bituminous Cas. Co., 397 Mich. at 428-29, 244 N.W.2d at 883; Juenger & Schulman, *Assets Sales and Products Liability*, 22 WAYNE L. REV. 39, 57 (1975).

175. Indeed, this legal proposition was the thread that held together the forceful reasoning of the court in *Ray v. Alad Corp.*, 19 Cal. 3d 22, 136 Cal. Rptr. 572, 560 P.2d 3 (1977).

terized as "anti-business."[176]

At any rate, the opinion suggested that the defendant could have protected itself against these liabilities either by obtaining products liability insurance or through the use of full or partial indemnity or escrow agreements. This assertion with respect to insurance flew in the face of overwhelming contrary authority presented in the concurring opinion. The unfortunate reality of the situation is that the small manufacturer *cannot* protect itself with insurance coverage in this area.[177] Furthermore, the court has the benefit of hindsight to introduce the point that an escrow agreement would have protected Amsted. The court neglected to mention that when the contract between Bontrager and Amsted was entered into, Amsted lawfully exculpated itself from liability for its predecessor's defects. For this reason, it would have been utterly ridiculous for Amsted to require Bontrager to place funds in escrow as a security to cover for liability arising from defective products manufactured prior to the closing. Bontrager had already agreed to assume these liabilities.

The core of the court's basis for this conclusion hits the proverbial nail on the head. Strict products liability carries with it certain strong public policies. Among these policies are: the virtual destruction of the injured plaintiff's remedies against the original manufacturer caused by the transfer of business; the successor's ability to spread the cost of injuries; and the fairness of requiring the successor corporation to assume the predecessor's responsibility for the defective products sold.[178] These policies outweigh the interests of business and justify the successor's assumption of the predecessor's liability.[179]

176. A consideration of this nature is not as novel as it appears at first glance. For example, the dissenter in a critical Illinois Supreme Court decision regarding the expansion of the tort of retaliatory discharge, recently stated that:

> The deteriorating business climate in this State is a topic of substantial interest. A general discussion of that subject is not appropriate to this dissent. It must be acknowledged, however, that Illinois is not attracting a great amount of new industry and business and that industries are leaving the State at a troublesome rate. I do not believe that this court should further contribute to the declining business environment by creating a vague concept of public policy. . . .

Palmateer v. International Harvester Co., 85 Ill. 2d 124, 143, 421 N.E.2d 876, 885 (1981) (Ryan, J., dissenting).

177. *See supra* note 161 and accompanying text.

178. Ramirez v. Amsted Indus. Inc., 86 N.J. at 349-50, 431 A.2d at 820; Ray v. Alad Corp., 19 Cal. 3d at 31, 136 Cal. Rptr. at 580, 560 P.2d at 9.

179. The product line approach of *Alad* and *Ramirez* has been recently criticized in Nguyen v. Johnson Mach. & Press Corp., 104 Ill. App. 3d 1141, 433 N.E.2d 1104 (1982). In *Nguyen*, the court indicated that the "product line approach" could not be accepted because it created liability without duty. *Id.* at 1147, 433 N.E.2d at 1109. This characterization of *Alad* and *Ramirez* is, at the very least, absolutely incorrect. The product line approach *does not* create liability in the successor in its own respect. Rather, *Alad* and *Ramirez* clearly utilize the public policies underly-

Questions of Repose

Amsted made a very strong argument with regard to the manifest unfairness of imposing liability for defects in a product that was manufactured twenty-eight years before the injury occurred. However, the court correctly refused to create an absolute twenty-eight-year limitation cutting off the manufacturer's liability. Any hard-and-fast time bar is a matter of repose, very similar in character to a statute of limitations.[180] Such time bar limitations are matters appropriately within the purview of the legislature.[181]

Moreover, it should be noted that Amsted was *not* precluded from making this argument at trial on the merits. Amsted should, and indeed probably will, argue at trial that the machine press involved in this incident had exceeded its "protracted safe use."[182] A manufacturer

ing strict products liability as the reason for holding that the corporate successor assumes the predecessor's liability for injuries caused by defective products. *See* Ray v. Alad Corp., 19 Cal. 3d at 31-34, 136 Cal. Rptr. at 580-82, 560 P.2d at 9-11; Ramirez v. Amsted Indus., Inc., 86 N.J. at 349-53, 431 A.2d at 820-22.

Furthermore, *Nguyen*, as well as other Illinois Appellate Court decisions that have rejected the product line approach, conducts an oversimplified analysis of the public policies underlying strict products liability. *See, e.g.*, Freeman v. White Way Sign & Maintenance Co., 82 Ill. App. 3d 884, 403 N.E.2d 495 (1980); Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979). Hopefully, a more thorough analysis can be done in the future, to give the basis of the product line approach the attention it is entitled.

180. Statutes of repose are sometimes enacted by state legislatures and are based upon the notion "that no one can make products that last forever, and that after a product had had time to wear out, the manufacturer should not be liable. Thus, the goal is to shield manufacturers from claims arising many years after the product enters the market." Note, *Product Liability Reform Proposals In Washington—A Public Policy Analysis*, 4 U.P.S. L. REV. 143, 168 (1980) (footnotes omitted). Typically, "[a] statute of repose is a fixed limitation period running from the date of manufacture or the date of entry of the product into the market, whereas a statute of limitations requires the plaintiff to initiate suit within a given period after the claim accrued." *Id.* at 167-68 (footnotes omitted). *See also* Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663 (1978).

181. As the Appellate Court in *Ramirez* pointed out, approximately seventeen states have already adopted statutes of repose which operate as a time bar limitation relating to product liability claims. 171 N.J. Super. 261, 277 n.2, 408 A.2d 818, 827 n.2 (1979).

182. The "protracted safe use" of a product is sometimes referred to as the "prolonged safe use." *See* Pryor v. Lee C. Moore Corp., 262 F.2d 673, 675 (10th Cir. 1958). This concept, very simply stated, means that "[t]here is no duty upon a manufacturer to furnish a machine that will not wear out." Auld v. Sears, Roebuck & Co., 261 App. Div. 918, 918, 25 N.Y.S.2d 491, 493 (1981), *aff'd per curiam*, 288 N.Y. 515, 41 N.E.2d 927 (1942), and is based upon Prosser's comments that:

> If the chattel is in good condition when it is sold, the seller is not responsible when it undergoes subsequent changes, or wears out. The more lapse of time since the sale by the defendant, during which there has been continued safe use of the product, is always relevant, as indicating that the seller was not responsible for the defect. There have been occasional cases in which, upon the particular facts, it has been held to be conclusive. It is, however, quite certain that neither long continued lapse of time nor changes in ownership will be sufficient in themselves to defeat recovery when there is clear evidence of an original defect in the thing sold.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 96 (3d ed. 1964) (footnotes omitted). Thus,

is not liable for injuries caused by a defective product that has exceeded its protracted safe use. Therefore, although the defendant's argument may not lack merit, it is being raised at an inappropriate stage of the litigation.[183]

Retroactive Decision-making

The *Ramirez* court met the defendant's reliance contentions head-on. Even though there may have been reasonable, even justifiable, reliance by Amsted on the existing status of the law, it would not be enough to deny the plaintiff his right to recover against the successor corporation. The court's resolution of this matter was clearly warranted in light of the policies underlying strict products liability. The public policies were much too strong to justify a contrary ruling.

By far the most unusual aspect of *Ramirez* was the manner in which the court gave its ruling a retroactive effect.[184] The decision was to be applied retroactively in two ways. First, the holding would apply to those cases challenging the traditional rule which were also in progress as of the date of the superior court's decision.[185] Second, the decision was held to cover any injuries arising out of previously defectively manufactured products, if the accident occurred after the above date. Essentially, the court was treating its holding as if it had been handed down on the same date as the Appellate Division's decision and applied prospectively therefrom. Such an application is highly unusual and deserves some explanation.[186]

the "prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of the factual issue whether the negligent manufacture proximately caused the harm." Pryor v. Lee C. Moore Corp., 262 F.2d 673, 675 (10th Cir. 1958). *See also* Mickle v. Blackmon, 252 S.C. 202, 237-38, 166 S.E.2d 173, 187 (1969).

183. The *Ramirez* court seems to have considered both Amsted's "twice removed status" as well as the 28 year time span to fall within the category of a "repose matter." This is apparent from the court's failure to scrutinize each of these factors separately. *See* 86 N.J. at 355, 431 A.2d at 823.

184. *See supra* note 135 for a discussion of the types of litigants that can be affected by a retroactive decision. The *Ramirez* decision was retroactively applied to both future litigants and to the parties to the litigation. *See infra* text accompanying notes 182-83. *See also* 86 N.J. at 357, 431 A.2d at 824.

185. November 15, 1979.

186. There are basically four ways in which a court will apply an overruling decision:

1. purely prospectively, giving the new rule effect in future cases only;
2. partially retroactively, giving the new rule effect on the parties to the overruling decision and on future cases only;
3. generally retroactively, giving the new rule effect on all cases not barred by statutes of limitations or jurisdictional rules for timely appeal;
4. retroactively as in (3) above, but not allowing the rule to govern cases terminated by judgment or verdict before the filing of the overruling decision.

Legal Method, supra note 154, at 835. *See also* Annot., 10 A.L.R.3d 1371, 1397 (1966). The *Ramirez* decision appears to be a hybrid of either category number three or four.

The court obviously was impressed with the unfairness of the traditional rule with respect to products liability claims. Products liability plaintiffs have been denied a remedy far too long. The traditional rule had developed totally without reference to products liability law. Moreover, the public policies underlying strict products liability were not without force. These policies clearly reflected society's mandate that the injured party should never have been denied this cause of action, at least since the introduction of the concept of strict products liability.[187] Therefore, it would appear that if this decision were given a full retroactive effect, it would only be defeated by New Jersey's statute of limitations.[188]

However, the court did not overzealously approach these outer bounds on the issue of retroactivity.[189] Perhaps the court was once again concerned with the prospect of being characterized as "anti-business." At any rate, it is fair to infer that the court tried to strike a balance between the legitimate interests of business and the overwhelming public policies in favor of the products liability plaintiff. Thus, the court reached a sort of "middle ground" between these competing concerns and arrived at the November 15, 1979 cutoff date. Since this was the date of the Appellate Court decision, no business would be heard to say that it was not aware of the change in New Jersey law. Under these circumstances, and according to the court's reasoning, successor corporations had been given considerable time to obtain insurance to cover these "contingent liabilities."[190]

The concurring opinion raised important equitable considerations in regard to retroactivity. In response to these considerations, Justice Schreiber suggested that the court respect those contracts entered into

187. In a similar manner the New Jersey Supreme Court reflected society's changing demands long ago in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 380, 161 A.2d 69, 81 (1960), wherein the court stated:

> where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in position to either control the danger or make an equitable distribution of the losses when they do occur.

188. New Jersey has a two year statute of limitations for all personal injury actions. N.J. STAT. ANN. § 2A:14-2 (West 1952).

189. Justice Traynor reflected that appellate judges have sometimes acted overzealously as "champions of supposed good causes." At the time he warned that in overruling case precedent judges should act cautiously and that the common law should change and develop at the "pace of a tortoise." *See Traynor, supra* note 10, at 263-64, 276.

190. Although, as noted previously, the small businessman does not, in reality, have the opportunity to protect himself against these contingent liabilities. *See supra* note 161 and accompanying text.

before November 15, 1979. This suggestion contradicted the basic holding in *Ramirez*. The responsibility of a corporate successor for the defective products of its predecessor is based upon tort law, not contract law. For this reason, the contracts between the two corporations should have had no impact upon whether successor liability was expanded. In the same manner, these contracts should not have had an effect upon the retroactivity of the decision. Furthermore, to adopt the concurring opinion's approach could lead to outrageous results. For example, it is conceivable that a plaintiff could be injured by a predecessor's defective product twenty or even fifty years from now.[191] Yet, this same plaintiff would be barred from recovery because the successor entered into a purchase contract with his predecessor prior to November 15, 1979. Such a result would be manifestly inconsistent with the *Ramirez* holding.

RETROACTIVE DECISION-MAKING: AN APPROPRIATE VEHICLE IN SUCCESSOR LIABILITY

The opinion in *Ramirez* carefully analyzed the public policies underlying strict products liability. This analysis proved fruitful, as the court had a wealth of legal ammunition to effect a retroactive ruling. As a result, the justifications employed by the court do not seem strained or lacking in merit. The court has broken new ground, and has done so cautiously.[192] The *Ramirez* decision adds sweeping changes in the law of successor liability, but these changes have not gone too far.[193]

The retroactive application of the new rule in *Ramirez* is entirely consistent with the court's ultimate conclusion. Courts often consider several factors in determining whether to apply a new rule retroactively.[194] The most important consideration is whether the purpose of the rule would be furthered by the retroactive application of a decision. As Justice Traynor has said:

> It would be better to keep the focus on the purpose of the new rule in analyzing the issue of retroactivity. . . . The most rational determinant for not only the issue of retroactivity, but its radius as well, is thus the purpose of the new rule. A determinant of such powerful

191. This consideration carries even more weight in light of the fact that New Jersey's legislature has not enacted a statute of repose.

192. *See Traynor, supra* note 10, at 262-64, 276-79, for a discussion of the rationale behind the necessary caution judges should exercise in overruling case precedent.

193. This consideration is especially true in *Ramirez*, for "[i]t is one thing to announce a sweeping new rule, and quite another to sweep clean with it." *Id.* at 282.

194. *See Legal Method, supra* note 154, at 838-43.

> relevance should stand preeminent, well apart from peripheral factors.[195]

Given the importance of the purpose of the new rule, it is clear that the *Ramirez* decision was correctly applied in a retroactive fashion. The purpose of strict products liability

> "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers . . . rather than by the injured persons who are powerless to protect themselves." However, the rule "does not rest on the analysis of the financial strength or bargaining power of the parties to the particular action. It rests, rather on the proposition that "[T]he cost of an injury . . . may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." Thus, "the paramount policy to be promoted by the rule is the protection of otherwise defenseless victims from manufacturing defects and the *spreading throughout society* of the cost of compensating them."[196]

A retroactive decision in this case, without question, furthers the purpose of compensating injured parties since it attempts to reach as many potential plaintiffs as is possible. Furthermore, the manufacturer's ability to absorb costs and spread them throughout society is a major premise of the concept of strict liability. A retroactive ruling furthers the purpose of spreading those costs instead of pinning them upon the defenseless and sometimes penniless victim. For these reasons, the retroactive decision in *Ramirez* was more than completely justified.

The *Ramirez* decision will undoubtedly have a favorable impact on the credibility of the product line approach in *Ray v. Alad Corp.*[197] Along these lines, a shadow of doubt has been cast upon the "mere continuation" approach in *Turner v. Bituminous Casualty Co.*[198] Far more importantly, *Ramirez* was a rigorous exercise in judicial decision-making that could, perhaps, add vitality to retroactive overruling in the products area. Furthermore, the court addressed certain issues in regard to successor liability that had not been examined before. In this respect, the decision has undoubtedly made the prospect of "change" in corporate successor liability less difficult or drastic.

195. *Traynor, supra* note 10, at 279.

196. Ray v. Alad Corp., 19 Cal. 3d at 30-31, 136 Cal. Rptr. at 579, 560 P.2d at 8 (citations omitted) (emphasis in original).

197. *See supra* text accompanying notes 113-23.

198. *See supra* text accompanying notes 105-12.

CONCLUSION

The *Ramirez* court joined ranks with a number of other courts recognizing that the traditional rule of corporate successor liability is inherently unfair to products liability plaintiffs. The old rule, although it was an accurate response to business concerns, is not responsive to the policies underlying strict liability. For this reason, the court felt that successor accountability should be dealt with in an entirely different manner, independent of corporate law. The foundation should be one in tort law, and the focus should be on the product. Specifically, the *Ramirez* decision adopted the "product line exception" and rejected the "mere continuation" approach of *Turner*.

In addition, the court in *Ramirez* endeavored to respond to some very difficult questions that go with such an abrupt change in the law. The court was not persuaded by claims of unfairness to small businesses, nor was it persuaded by arguments that are appropriately made on the merits of the case. Perhaps most significantly, the *Ramirez* court molded its decision in a retrospective fashion to further the purposes of strict products liability. In this respect, the decision was an edifying example of retroactive judicial decisionmaking, one that will undoubtedly be looked upon favorably and followed by many courts.

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