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TORTS—PRODUCTS LIABILITY—SUCCESSOR CORPORATION STRICTLY LIABLE
FOR DEFECTIVE PRODUCTS MANUFACTURED BY THE
PREDECESSOR CORPORATION.

Ramirez v. Amsted Industries, Inc. (N.J. 1981)

Efrain Ramirez was injured while operating a sixty ton punch press,¹ and subsequently brought suit against Amsted Industries, Inc. (Amsted),² a successor corporation to the original manufacturer of the press, Johnson Machine & Press Company.³ In 1962, Amsted acquired by a purchase agreement all the assets of the intermediate successor, Bontrager, for cash.⁴ In the purchase agreement, Amsted expressly refused to assume liability for any claims arising out of defects in products manufactured by Amsted's predecessors.⁵ On that basis, the defendant moved for and was granted summary judgment.⁶

1. *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 335, 431 A.2d 811, 812-13 (1981). The Johnson Model 5 sixty ton punch press was manufactured by Johnson Machine and Press Company of Elkhart, Indiana, in 1948 or 1949. *Id.* at 335, 431 A.2d at 812-13. The injury occurred on the premises of Ramirez's employer, Zamax Manufacturing Co., in Belleville, New Jersey, on August 18, 1975. *Id.* at 335, 431 A.2d at 812.

2. *Id.* at 335-36, 431 A.2d at 813. In the trial court, Ramirez sought to recover damages from Amsted on theories of negligence, breach of warranty, and strict liability in tort for defective design and manufacturing. *Id.* Plaintiff's complaint also named as defendants various distributors of the Johnson power press; however, all claims against these parties were either settled or dismissed. *Id.* at 336 n.1, 431 A.2d at 813 n.1.

3. *Id.* at 337-38, 431 A.2d at 814. In 1956, Johnson Machine and Press Company transferred all of its assets and liabilities to Bontrager Construction Company. *Id.* at 337, 431 A.2d at 814. Bontrager retained a single share of Johnson common stock in order to continue the Johnson name and corporate form. *Id.* at 338, 431 A.2d at 814. By a purchase agreement dated August 29, 1962, Amsted acquired all of the assets of Bontrager, including the one share of Johnson stock and the manufacturing plant in Elkhart, Indiana, for \$1,200,406 in cash. *Id.*

The Johnson corporation was dissolved in July 1965 pursuant to the Indiana General Corporation Act. *Id.* at 339, 431 A.2d at 815, citing, IND. CODE ANN. § 23-1-1-1 (Burns 1971). From the time of the 1962 purchase from Bontrager until the dissolution of the Johnson corporate shell in 1965, Amsted's officers served as the officers and directors of Johnson. 86 N.J. at 339, 431 A.2d at 815.

4. 86 N.J. at 338, 431 A.2d at 814. For a discussion of the details of the purchase, see note 3 *supra*.

5. 86 N.J. at 338-39, 431 A.2d at 814. The purchase agreement contained an express limitation on the assumption of liability which read: "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, performed and discharged by Seller." *Id.* at 338, 431 A.2d at 814. Further, the agreement stated: "Seller alone shall be responsible, to the extent of the warranties heretofore

On appeal to the Superior Court of New Jersey, the decision of the trial court was reversed.⁷ After granting Amsted's petition for certification,⁸ the Supreme Court of New Jersey affirmed,⁹ holding that a successor corporation which acquires all, or substantially all of the assets of its predecessor for cash, and which continues essentially the same manufacturing operations, is strictly liable for the defective products of its predecessors. *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811 (1981).

The transfer of corporate ownership may be accomplished in one of three ways: 1) merger or consolidation with another corporation; 2) sale of stock to another corporation; or 3) sale of its assets to another corporation.¹⁰ In the first type of transaction, the liability of the

given by Seller to its customers, for all liability for the correction and repair of defects in material or workmanship thereof." *Id.* at 339, 431 A.2d at 814.

6. *Id.* at 336, 431 A.2d at 813. The trial court held 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." *Id.*

7. *Ramirez v. Amsted Indus., Inc.*, 171 N.J. Super. 261, 408 A.2d 818 (Super. Ct. App. Div. 1979), *aff'd*, 86 N.J. 332, 431 A.2d 811 (1981). The Appellate Division of the Superior Court refused to allow Amsted to limit any products liability claims through the use of an exculpatory clause. 171 N.J. Super. at 276, 408 A.2d at 826. The court stated, "we find this attempt at anticipatory exculpation wholly anachronistic in the context of the development of our product liability law." *Id.* at 276, 408 A.2d at 826. The court made an analogy to the automobile manufacturers' disclaimers to limit liability for damages caused by defective products. *Id.*, citing *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

8. 82 N.J. 298, 412 A.2d 804 (1980). For the pertinent rules regarding certification to the Supreme Court of New Jersey to review a final judgment of the Appellate Division, see N.J. Cr. R. 2:12-3 (1969). The rule granting certification states: "Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court." N.J. Cr. R. 2:12-4 (1969).

9. *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811 (1981). In a companion case decided the same day as *Ramirez*, the New Jersey Supreme Court held that both an intermediate and successor corporation would be liable for product liability claims of their predecessor. *Nieves v. Bruno-Sherman Corp.*, 86 N.J. 361, 431 A.2d 826 (1981). For a discussion of *Nieves*, see note 102 and accompanying text *infra*.

10. Note, *Postdissolution Product Claims and the Emerging Rule of Successor Liability*, 64 VA. L. REV. 861, 864 (1978) [hereinafter cited as Note, *Postdissolution Products Claims*]. See also Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L. REV. 86, 92 (1975) [hereinafter cited as Note, *Assumption of Products Liability*]; Note, *Expanding the Products Liability of Successor Corporations*, 27 HASTINGS L.J. 1305, 1308 (1976). See generally Hoffman, *Products Liability for Successor Corporations: A Break from Tradition*, 49 U. COLO. L. REV. 357 (1978); Kadens, *Practitioner's Guide to Treatment of Seller's Products Liability in Assets Acquisitions*, 10 U. TOL. L. REV. 1 (1978).

former corporation will be assumed by the new entity.¹¹ Where there is a sale of a corporation's assets, however, the traditional rule has been that a purchaser for value does not assume the seller's liabilities.¹² The avoidance of liability is the primary reason for the popularity of the sale of assets as a method of corporate transfer.¹³

However, the successor must assume the debts and liabilities of the predecessor corporation in situations where: ¹⁴ 1) the purchasing corporation expressly or impliedly agrees to assume such debts and liabil-

11. See Note, *Postdissolution Product Claims*, *supra* note 10, at 864 n.15. State statutes generally provide for the automatic assumption of all liabilities, known or contingent, by the acquiring corporation when there is a merger. H. BALLANTINE, CORPORATIONS § 280 (rev. ed. 1946). See, e.g., ABA-ALI MODEL BUS. CORP. ACT § 76(e) (2d ed. 1971). A purchasing corporation buying stock in the selling entity assumes the risk of the seller's liabilities to the extent of its interest in the seller. See Schiff, *Products Liability and Successor Corporations: Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance*, 13 U.C.D.L. REV. 1000, 1004-05 (1980); Note, *Assumption of Products Liability*, *supra* note 10, at 93.

12. See *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 561, 264 A.2d 98, 101 (Super. Ct. Law Div. 1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (Super. Ct. App. Div. 1972), *overruled*, *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 493, 356 A.2d 458, 468 (Super. Ct. Law Div. 1976). See also *Menacho v. Adamson United Co.*, 420 F. Supp. 128, 131 (D.N.J. 1976); *N.J. Transp. Dep't v. PSC Resources, Inc.*, 175 N.J. Super. 447, 454, 419 A.2d 1151, 1154 (Super. Ct. Law Div. 1980); *Jackson v. N.J. Manufacturers Ins. Co.*, 166 N.J. Super. 448, 454, 400 A.2d 81, 84 (Super. Ct. App. Div. 1979), *cert. denied*, 81 N.J. 330, 407 A.2d 1204 (1979); *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 484, 356 A.2d 458, 463 (Super. Ct. Law Div. 1976). See generally Note, *Assumption of Products Liability*, *supra* note 10, at 93 where it was noted, "the general rule of non-assumption of liability is interrelated with the rights of creditors to payment in satisfaction of their claims out of corporate assets." *Id.* "Creditors can be paid out of the consideration received from the buyer as long as it is adequate." *Id.* If the seller makes distributions to its shareholders either improperly or pursuant to a dissolution, the creditors, in order to satisfy their claims, can pursue the distributions into the hands of the stockholders. *Id.* at 93-94. Creditors can also seek satisfaction of their claims from a purchaser of the debtor's assets, *but only if* the purchaser paid inadequate consideration or had knowledge of the seller's probable default on its debts. *Id.* at 94.

13. See Note, *Postdissolution Product Claims*, *supra* note 10, at 865. The attractiveness of this feature of a sale of assets has led parties to various kinds of corporate transactions employing complex and sophisticated methods to legally disguise the exact nature of the transfer. *Id.* See also, Wallach, *Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets and Subsequent Dissolution on Products Dissatisfaction Claims*, 41 MO. L. REV. 321, 336 (1976). Avoidance of liability is not the only reason for the popularity of the sale of assets. This form of transfer escapes the other statutory requirements of merger, and allows the parties to devise their own contract without the necessity of according appraisal rights to dissenting stockholders. *Id.* at 336 n.5. Also, fewer stockholders are needed to approve the change. *Id.*

14. See notes 15-20 and accompanying text *infra*.

ities;¹⁵ 2) the transaction amounts to a "de facto" consolidation or merger of the seller and purchaser;¹⁶ 3) the purchasing corporation is a "mere continuation" of the selling corporation,¹⁷ or 4) the transaction is entered into fraudulently in order to escape responsibility for such debts and liabilities.¹⁸ In *McKee v. Harris-Seybold Co.*,¹⁹ the New

15. See *Bouton v. Litton Indus., Inc.*, 424 F.2d 643 (3d Cir. 1970) (purchase agreement expressly assuming numerous liabilities arising in the ordinary course of business, also included the risk of products liability claims). See also *Freeman v. White Way Sign and Maintenance Co.*, 82 Ill. App. 3d 884, 403 N.E.2d 495 (1980) (purchase agreement negated any assumption of responsibility by the successor while the predecessor corporation continued to operate as a separate entity and was available for suit). But see *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817 (D. Colo. 1968) (purchase agreement assumed liabilities for accounts payable, payroll taxes and wages, but the court found no implied assumption of products liabilities since the transfer of tort liabilities was not expressly included in the contract).

16. See *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975). For a discussion of *Knapp*, see notes 23 & 24 and accompanying text *infra*. See also *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 356 A.2d 458 (Super. Ct. Law Div. 1976). The *Wilson* court lists the characteristics to be considered in determining whether a "de facto" merger has taken place. *Id.* at 485, 356 A.2d at 464. These characteristics include a transfer or sale of all assets, an exchange of stocks, a change of ownership whereby the stockholders, officers, and creditors go to the surviving corporation, and the assumption of a variety of liabilities pursuant to previously negotiated agreements. *Id.* One court has summarized a set of characteristics which would constitute a "de facto" merger as follows:

- (1) There is a continuation of the enterprise of the seller corporation so that there is a continuity of management, personnel, physical location, assets, and general business operations.
- (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
- (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
- (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Shannon v. Samuel Langston Co., 379 F. Supp. 797, 801 (W.D. Mich. 1974), citing, *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 563-65, 264 A.2d 98, 103-05 (Super. Ct. Law Div. 1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (Super. Ct. App. Div. 1972), *overruled*, *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 493, 356 A.2d 458, 468 (Super. Ct. Law Div. 1976). The *Shannon* court found that the organization and operation of the original corporation were continued substantially unchanged after the takeover. *Shannon v. Samuel Langston Co.*, 379 F. Supp. at 801. See also *Applestein v. United Board and Carton Corp.*, 60 N.J. Super. 333, 349-50, 159 A.2d 146, 155 (Super. Ct. Ch. Div.), *aff'd*, 33 N.J. 72, 161 A.2d 474 (1960).

17. See, e.g., *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1975); *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976). For a discussion of these cases, see notes 27-33 and accompanying text *infra*.

18. See Note, *Postdissolution Product Claims*, *supra* note 10, at 866 n.24. Plaintiffs in products liability cases who have relied on this exception gen-

Jersey Superior Court referred to a fifth exception which sometimes is incorporated as an element of one of the above exceptions, namely the absence of adequate consideration for the sale or transfer.²⁰

In an effort to make the traditional corporate transfer rules viable in a strict products liability world, courts have modified and expanded the "de facto merger" and "mere continuation" exceptions.²¹ The de facto merger doctrine was expanded by the Third Circuit in *Knapp v. North American Rockwell Corp.*²² In *Knapp*, the court looked beyond the form of the transaction,²³ and assessed the abilities of the plaintiff and the successor corporation to bear the loss, and found the successor corporation liable.²⁴

Courts have not established a uniform test to determine "mere continuation,"²⁵ but generally if the purchaser is in essence a "reincarna-

erally have been unsuccessful. *Id.* See also *Pierce v. Riverside Mortgage Sec. Co.*, 25 Cal. App. 2d 248, 257-58, 77 P.2d 226, 230-31 (1938).

19. 109 N.J. Super. 555, 264 A.2d 98 (Super. Ct. Law Div. 1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (Super. Ct. App. Div. 1972), *overruled*, *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 493, 356 A.2d 458, 468 (Super. Ct. Law Div. 1976).

20. 109 N.J. Super. at 561, 264 A.2d at 102.

21. For a discussion of various approaches to successor liability, see notes 22-33 and accompanying text *infra*. See also, Fegan, *Successor Corporations and Strict Liability in Tort—A Convergence of Two Opposing Doctrines*, 69 ILL. B.J. 142 (1980); Hoffman, *supra* note 10; Schiff, *supra* note 11; Note, *Assumption of Products Liability*, *supra* note 10; Note, *Postdissolution Product Claims*, *supra* note 10.

22. 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

23. 506 F.2d at 363. On the date of injury, two corporations (North American Rockwell and Textile Machine Works (TMW)) existed because the selling corporation (TMW) had not yet dissolved. *Id.* Because one corporation existed in form only, the court ignored the continuation of the vendor corporation after the closing date of the transaction, and found the vendee corporation liable for the defective product of the seller corporation. *Id.* at 368-69.

24. *Id.* at 369-70. The Third Circuit determined that Rockwell was better able to stand the burden of the loss. *Id.* Rockwell, therefore, should not have been permitted to impose the weight of the loss upon a user of an allegedly defective product by delaying the dissolution of TMW. *Id.* See also Note, *Corporations—Products Liability Under the De Facto Merger Doctrine—Knapp v. North American Rockwell Corp.*, 49 TEMP. L.Q. 1014, 1019-20 (1976).

25. Compare *Ozan Lumber Co. v. Davis Sewing Mach. Co.*, 284 F. 161, 165 (D. Del. 1922) (key element is the continuation of the "legal entity") with *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817, 821 (D. Colo. 1968) (key factors are continuity of ownership and management and the prompt dissolution of the seller). See also *Jackson v. Diamond T. Trucking Co.*, 100 N.J. Super. 186, 241 A.2d 471 (Super. Ct. Law Div. 1968). The *Jackson* court posited five elements of mere continuation: 1) a transfer of corporate assets, 2) for less than adequate consideration, 3) to another corporation that continued the business operation of the seller, 4) when both corporations had at least one common director or officer who was instrumental in the transfer, and 5) when the transfer rendered the seller incapable of paying its creditors' claims because it was dissolved either in fact or in law. *Id.* at 196, 241 A.2d at 477.

tion" of the seller, the purchaser will be held responsible for the seller's obligations.²⁶ In *Cyr v. B. Offen & Co.*,²⁷ the First Circuit expanded the mere continuation approach to include situations where the successor corporation appeared to the public to be the same enterprise as the predecessor.²⁸ Relying on the continuity of the entire "business" enterprise, the *Cyr* court determined that liability should be imposed on the successor corporation.²⁹

In *Turner v. Bituminous Casualty Co.*,³⁰ the Michigan Supreme Court developed a special test which was the next step in the "mere continuation" doctrine's development.³¹ For a successor corporation to be liable in a products liability claim, the court held, the totality of the

26. Note, *Assumption of Products Liability*, *supra* note 10, at 100. Courts have been reluctant to expand this exception to facilitate the claims of plaintiffs. *Id.* at 100-01. See, e.g., *Menacho v. Adamson United Co.*, 420 F. Supp. 128, 139 (D.N.J. 1976) (summary judgment granted when factors needed to prove continuation were absent); *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817, 821 (D. Colo. 1968) (in holding for defendant, court found no "mere continuation").

27. 501 F.2d 1145 (1st Cir. 1974).

28. *Id.* at 1151. In the purchase agreement the buyer promised to conduct the business as the predecessor had, and assumed a number of liabilities including the obligation to service the presses already marketed. *Id.* The buyer assumed a name almost identical to that of the predecessor, represented itself through advertising as a forty-year old business, and manufactured the product in essentially the same manner as had its predecessor. *Id.*

In its analysis, the *Cyr* court discussed the overt representations of continuity by the successor:

The dictates of freedom of business decision are less compelling when an ongoing business assumes all other benefits and liabilities of its predecessor, holds itself out to the world as the same enterprise, without notifying known customers, continues to function in the same manner . . . with the same key employees, producing the same product.

Id. at 1153. The court further stated:

The manufacturer's successor, carrying over the experience and expertise of the manufacturer, is likewise in a better position than the consumer to gauge the risks and the costs of meeting them. The successor knows the product, is as able to calculate the risk of defects as the predecessor, is in a position to insure therefor and reflect such cost in sale negotiations, and is the only entity capable of improving the quality of the product.

Id. at 1154.

29. *Id.* The *Cyr* court stated:

[A] corporation itself cannot act. It can conduct its business only through its officers and employees. The negligence of employees in carrying out that business is the responsibility of the corporate body. If as a group the same employees continue, without pause to produce the same products in the same plant, with the same supervision, the ownership of the entity which maintains essentially the same name cannot be the sole controlling determinant of liability.

Id.

30. 397 Mich. 406, 244 N.W.2d 873 (1976).

31. *Id.* at 426, 244 N.W.2d at 882.

transaction must demonstrate a basic continuity in the enterprise.³² The *Turner* court reasoned that there was no distinction between a merger or sale of stock, and a sale of assets for the purpose of a products liability claim.³³

By developing a strict liability approach toward successor corporations, the decision of the California Supreme Court in *Ray v. Alad Corp.*,³⁴ represents a significant departure from traditional corporate rules of successor liability.³⁵ Although the plaintiff's claim in *Ray* did

32. The *Turner* court stated:

Where the successor corporation represents itself either affirmatively or, by omitting to do otherwise, as in effect a continuation of the original manufacturing enterprise, a strong indication of continuity is established. Justice would be offended if a corporation which holds itself out as a particular company for the purpose of sales, would not be estopped from denying that it is that company for the purpose of determining products liability.

Id.

The court relied upon the retention of key personnel, assets, general business operations, and the predecessor's name in finding a basic continuity of enterprise. *Id.* at 430, 244 N.W.2d at 884. See also *Korzetz v. Amsted Indus., Inc.*, 472 F. Supp. 136 (E.D. Mich. 1979) (the *Turner* approach applied to the same line of corporate succession as was present in the *Ramirez* case; finding of strong and convincing evidence of continuity of enterprise lead to holding that Amsted was a mere continuation of its predecessor, Johnson); *Trimper v. Bruno-Sherman Corp.*, 436 F. Supp. 349 (E.D. Mich. 1977) (although *Turner* had included the requirement that the seller dissolve its business operation after transfer, the seller's failure to do so did not avoid the totality of the transaction constituting a basic continuity of the die-cutting press enterprise). For a discussion of *Trimper*, see Note, *Postdissolution Product Claims*, *supra* note 10, at 874.

33. 397 Mich. at 423, 244 N.W.2d at 880. The court recognized that there "is no basis for treating a purchase of corporate assets different from a de facto merger" and urged that "[i]t would make better sense if the law had a common result and allowed products liability recovery in each case." *Id.* The court noted: "While a difference in degree can be established between the continuity arising from a stock transfer as opposed to a cash payment for assets, it is just that, a difference in degree." *Id.* at 429, 244 N.W.2d at 883. The court saw the needs and objectives of the injured party and the corporation as the same whether there was a merger, de facto merger, or sale of assets, as long as the transferor corporation was dissolved. *Id.* The court also noted that "once corporations considering such transactions become aware of the possibility of successor products liability, they can make suitable preparations." *Id.* at 428, 244 N.W.2d at 883.

34. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

35. *Id.* at 30, 560 P.2d at 8, 136 Cal. Rptr. at 579. The California Supreme Court in *Ray* felt that a special departure from the general rule was warranted in light of the significance accorded the policies underlying strict tort liability for the manufacture of defective products. *Id.* The *Ray* court determined that the public policy objectives accomplished by imposing strict products liability on successor corporations were more important than those basic goals of corporate law which were the basis of the traditional rule. *Id.* at 30-31, 560 P.2d at 8, 136 Cal. Rptr. at 579. The traditional rule had been structured within a corporate framework to promote the availability and transferability of capital. *Id.* See Note, *Postdissolution Product Claims*, *supra* note 10, at 877. The significance of the rule in *Ray* is that, instead of relying

not come within one of the four exceptions to the traditional corporate rule for determining successor liability,³⁶ the court fashioned the "product line" approach, and held the successor corporation strictly liable in tort for injuries caused by the defective products of its predecessor.³⁷ Under this approach, if the product line remains intact,³⁸ the successor is charged with liability for injuries caused by the products sold by a predecessor even in the absence of continuity of ownership between predecessor and successor.³⁹

in whole or in part on the corporate framework, the court actually discarded that framework and shaped an exception based on tort law, which was responsive directly to the goals of products liability. *Id.* See Note, *Ray v. Alad: Imposing Liability on the Successor Corporation for the Defective Products of the Predecessor Corporation*, 15 CAL. W.L. REV. 338 (1979) [hereinafter cited as Note, *Ray v. Alad.*]

36. See notes 12-20 and accompanying text *supra*.

37. 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582. Upon acquiring Alad I's plant, equipment, inventory, trade name, and good will, Alad II continued to manufacture the same line of ladders under the "Alad" name, using the same equipment, designs, and personnel and soliciting Alad I's customers through the same sales representatives with no indication of any change in the ownership of the business. *Id.* at 25, 560 P.2d at 5, 136 Cal. Rptr. at 576. The *Ray* court ruled that a party that acquires a business and continues to manufacture the same line of products under circumstances present in *Ray* assumes liability for the predecessor's products. *Id.* at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582. See also Note, *Ray v. Alad*, *supra* note 35, at 340. If the product line remains intact, then successor liability will result even if there is a total absence of continuity of ownership between predecessor and successor. *Id.*

38. Note, *Ray v. Alad*, *supra* note 35, at 340. But see *Dawejko v. Jorgensen Steel Co.*, — Pa. Super. Ct. —, 434 A.2d 106 (1981). The Pennsylvania Superior Court adopted the "product line" approach as another exception to the traditional rule. *Id.* at —, 434 A.2d at 110. The court stated, "[o]ne may retain the traditional exceptions but expand their boundaries, so that merger or continuation are held to include cases they once would not have included. Or one may adopt a new exception such as the product-line exception." *Id.* at —, 434 A.2d at 111. The court did not find strict liability for defective products in every instance where the "product line" remains intact, but instead stated that, "it should be phrased in general terms, so that in any particular case the court may consider whether it is just to impose liability on the successor corporation." *Id.* at —, 434 A.2d at 111 (emphasis added). The court identified various factors which will be pertinent: "whether the successor corporation advertised itself as an ongoing enterprise; or whether it maintained the same product, name, personnel, property, and clients; or whether it acquired the predecessor corporation's name and good will and required the predecessor to dissolve." *Id.* at —, 434 A.2d at 111.

39. See Note, *Ray v. Alad*, *supra* note 35, at 340. The rationale for imposing strict liability upon a successor corporation is based upon three public policy considerations. *Ray v. Alad*, 19 Cal. 3d at 31, 560 P.2d at 8-9, 136 Cal. Rptr. at 580. The California Supreme Court in *Ray* said:

Justification for imposing strict liability upon a successor to a manufacturer under the circumstances here presented rests upon (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2)

In *Leannais v. Cincinnati, Inc.*⁴⁰ and *Travis v. Harris Corp.*⁴¹ the Seventh Circuit refused to extend the type of strict tort liability established in *Ray v. Alad Corp.* to successor corporations, and has retained the traditional rule.⁴² In *Leannais*, the purchase agreement expressly limited the successor's liability for personal injuries caused by a predecessor's products for a period of five years from the closing of the contract, and provided for the use of best efforts by the successor to secure a specific amount of insurance against such claims during that time.⁴³ Since the claim did not arise during that period, the Seventh Circuit would not obligate the successor to insure against liabilities due to the predecessor's products.⁴⁴ In dicta, however, the Seventh Circuit

the successor's ability to assume the original manufacturer's risk-spreading rule, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.

Id. For a further discussion of the policy rationales, see Note, *Ray v. Alad*, *supra* note 35, at 346-48; Hoffman, *supra* note 10, at 368, 371-73. Cf. Rawlings v. D.M. Oliver, Inc., 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979) (the court, in applying the same rationale of *Ray*, extended liability where the injury occurred three months before the successor acquired the business and where it was alleged that the successor had discontinued or at least modified the product line in question).

40. 565 F.2d 437 (7th Cir. 1977).

41. 565 F.2d 443 (7th Cir. 1977).

42. *Leannais v. Cincinnati, Inc.*, 565 F.2d at 439; *Travis v. Harris Corp.*, 565 F.2d at 446. For a discussion of the traditional rule, see notes 12-20 and accompanying text *supra*.

43. 565 F.2d at 438. The machine on which *Leannais* was injured had been manufactured by Forte Equipment Company and sold to Fullerton in late 1964. *Id.* Forte sold its assets to *Cincinnati, Inc.*, for cash and certain employment contracts. *Id.* *Cincinnati, Inc.*, was first notified of *Leannais'* injury more than seven years after the acquisition of Forte's assets. *Id.* at 439.

44. *Id.* at 441. The *Leannais* court, finding the exceptions to the non-liability of asset purchasers too great an imposition on the public, refused to apply *Ray* to preserve a plaintiff's postdissolution claim. *Id.* Applying Wisconsin law, the Seventh Circuit based its refusal on the absence of any decision adopting such an approach to successor liability. *Id.* It also commented on the merits of the *Ray* approach, cautioning that the competing considerations best could be resolved not in the context of a particular case but by legislative action. *Id.* See generally Note, *Limitation of Action: Strict Liability in Tort—The Legislature has Intervened*, 67 ILL. B.J. 214 (1968); Note, *When the Product Ticks: Products Liability and the Statute of Limitations*, 11 IND. L. REV. 693 (1978) [hereinafter cited as *When the Product Ticks*]; Note, *Statutes of Repose in Products Liability: The Assault Upon the Citadel of Strict Liability*, 23 S. DAK. L. REV. 149 (1978) [hereinafter cited as *Statutes of Repose*]; *Kallas Millwork Corp. v. Square D. Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

The *Leannais* court criticized the "adoption of policy consideration to effect a change in a law so fundamental to the interdependent economic segments of a complex society." 565 F.2d at 440 n.7. The dissent noted that Wisconsin had not considered a postdissolution products liability claim since

did establish a duty to warn.⁴⁶

Against this background, the *Ramirez* court⁴⁶ began its discussion with a survey of the pertinent case law.⁴⁷ Although the New Jersey Supreme Court had not previously ruled on successor liability⁴⁸ the court acknowledged that the traditional rule and its exceptions had heretofore been accepted by the lower courts of New Jersey.⁴⁹ The *Ramirez* court concluded, however, that the rule of successor corporation non-liability "is indeed inconsistent with the developing principles of strict products liability and unresponsive to the interests of persons

adopting the theory of strict liability in tort. *Id.* at 443 (Fairchild, C.J., concurring in part, dissenting in part).

45. 565 F.2d at 442. The *Leannais* court determined that the existence of a duty on the part of the successor to warn the past and present purchasers of the defective product, would be determined by factual questions that would be answered on remand. *Id.* Whether the defendants' succession to service contracts would be a sufficient nexus to establish a legal duty to warn could not at that time be determined. *Id.* Factors to be considered would be whether the machine involved was under a service contract, whether defendant had serviced that machine, and whether defendant had knowledge of its predecessor's prior service records. *Id.*

In *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir. 1977) the boundaries of the duty to warn were given further clarification. The court held that the mere purchase of name and good will were not enough to create a duty to warn. *Id.* at 448. It added another factor to those considered in *Leannais*—knowledge of the defect. *Id.* at 449. The *Travis* court stated: "Absent knowledge of defects, nothing is known to warn against. Absent knowledge of the location of a machine, there is no known entity to warn." *Id.* See also *Gee v. Tenneco, Inc.*, 615 F.2d 857 (9th Cir. 1980) (the court would not impose a duty to warn because the record was devoid of evidence of factors which courts have used in determining the existence of such a duty); *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 356 A.2d 458 (Super. Ct. Law Div. 1976). The trial court briefly mentioned, in dicta, the state of the law in the area of a duty to warn on the part of successor corporations. *Id.* at 491-93, 356 A.2d at 467-68.

46. *Ramirez v. Amsted Indus., Inc.*, 86 N.J. at 358, 431 A.2d at 825. Justice Clifford wrote for the majority of the Supreme Court of New Jersey, joined by Justices Sullivan, Pashman, Handler, Schreiber, and Pollock. Justice Schreiber concurred in the result. Chief Justice Wilentz did not participate in the decision.

47. *Id.* at 340-50, 431 A.2d 815-20. The court acknowledged the existence of several approaches to the issue of successor liability in products liability cases, and reviewed the holdings of *McKee*, *Turner*, *Cyr*, *Korzetz*, and *Ray*. *Id.* For a discussion of *McKee*, see text accompanying notes 19 & 20 *supra*. For a discussion of *Turner*, see notes 30-33 and accompanying text *supra*. For a discussion of *Cyr*, see notes 27-29 and accompanying text *supra*. For a discussion of *Korzetz*, see note 32 *supra*. For a discussion of *Ray*, see notes 34-39 and accompanying text *supra*.

48. 86 N.J. at 340, 431 A.2d at 815.

49. *Id.* See, e.g., *Menacho v. Adamson United Co.*, 420 F. Supp. 128 (D.N.J. 1976); *N.J. Transp. Dep't v. PSC Resources Inc.*, 175 N.J. Super. 447 (Super. Ct. Law Div. 1980). For a discussion of the traditional rule and its exceptions, see notes 12-20 and accompanying text *supra*.

injured by defective products in the stream of commerce.”⁵⁰ The court reasoned that the form of corporate transfer should not determine, as it does under the traditional rule, whether the plaintiff can recover.⁵¹ In response to these considerations, the court decided to consider alternative approaches.⁵²

The court first considered, but refused to adopt an expanded “mere continuation” exception as articulated by the Michigan Supreme Court in *Turner*.⁵³ The court saw *Turner* and its progeny as rendering inconsistent results,⁵⁴ because those decisions focused on commonality of ownership and management, instead of on the continuation of the actual manufacturing operation.⁵⁵

The court instead adopted the “product line” approach of *Ray* which imposes strict tort liability for defective products on successor corporations which acquire a manufacturing business and continue the predecessor’s manufacturing operation.⁵⁶ The court reasoned that the

50. 86 N.J. at 342, 431 A.2d at 816. The court refused, therefore, to decide the case on the basis of the traditional rule established in New Jersey by *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 264 A.2d 98 (Super. Ct. Law Div. 1970), *aff’d per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (Super. Ct. App. Div. 1972), *overruled*, *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 493, 356 A.2d 458, 468 (Super. Ct. Law Div. 1976).

51. 86 N.J. at 343, 431 A.2d at 816. In support of this proposition, the *Ramirez* court quoted the Supreme Court of Michigan’s decision in *Turner*:

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 two corporations, or (2) a de facto merger brought 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.

Id., quoting, 397 Mich. at 419, 244 N.W.2d at 878.

52. 86 N.J. at 343, 431 A.2d at 816-17.

53. *Id.* at 347, 431 A.2d at 818-19. For a further discussion of *Turner* and the expanded “mere continuation” exception, see notes 30-33 and accompanying text *supra*. See also Hoffman, *supra* note 10, at 366-68.

Despite the potential for liability under the “mere continuation” exception, the court emphasized that the Appellate Division had actually based its decision not on the *Turner* analysis, but rather on the “product line” theory developed in the *Ray* case. 86 N.J. at 347, 431 A.2d at 819.

54. 86 N.J. at 347-48, 431 A.2d at 819.

55. *Id.*

56. *Id.* The court noted fundamental, practical and analytical differences between *Turner*’s expanded “mere continuation” exception and *Ray*’s “product line approach.” *Id.* The court said, “*Turner* merely broadens the inroads into the traditional principles of corporate successor non-liability expressed in *McKee* and related cases.” *Id.* *Ray*, by contrast, in abandoning the traditional rule altogether, utilizes the policies which underlie strict products liability. *Id.* As a result, the court adopted the *Ray* approach. *Id.* at 348, 431 A.2d at 819, citing, *Ray v. Alad*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.

cost of injuries from defective products should be borne by the manufacturer who benefits from continuing the business enterprise and is able to spread the cost to society at large.⁵⁷

Finally, the *Ramirez* court responded to various contentions raised by Amsted against imposing strict liability on successor corporations.⁵⁸ To Amsted's assertion that it was not responsible for actually placing the defective machine in the stream of commerce,⁵⁹ the court responded that "strict liability for injuries caused by defective products placed into the stream of commerce is an 'enterprise liability', one that continues so long as the defective product is present on the market."⁶⁰ The court posited that the successor has the means available for avoiding the risk of harm caused by its predecessor's defective products, and is in a better position than the consumer to bear the costs of accident avoidance.⁶¹ In response to a claim that imposition of strict liability would have a crippling effect on the ability of small manufacturers to transfer ownership of business assets,⁶² the court said that these business concerns

57. 86 N.J. at 349, 431 A.2d at 820. The court stated that the "plaintiff's potential remedy against Johnson, the original manufacturer . . . , was destroyed by the purchase of Johnson's assets, trade name, and good will, and Johnson's resulting dissolution." *Id.* at 350, 431 A.2d at 820. The court, noting the progressive character of New Jersey decisional law in the products liability area, saw the imposition of successor liability as consistent with the public policy in strict products liability of spreading the cost of injuries from defective products to society at large. *Id.* The court stated "[t]he imposition upon Amsted of responsibility to answer claims of liability for injuries allegedly caused by defective Johnson presses is justified as a burden necessarily attached to its enjoyment of Johnson's trade name, good will and established manufacturing enterprise." *Id.* at 352, 431 A.2d at 822. The court believed that public policy required that the successor corporation which acquires the benefits of continuing the business enterprise should also be made to bear the burden of operating costs that they would ordinarily bear. *Id.* at 352-53, 431 A.2d at 822.

58. *Id.* at 351-58, 431 A.2d at 822-24.

59. *Id.* at 335, 431 A.2d at 812-13. The machine involved was manufactured by Johnson Machine and Press Company in 1948 or 1949, thirteen years prior to Amsted's acquisition of Johnson's assets. *Id.* at 335, 431 A.2d at 812-13.

60. *Id.* at 351, 431 A.2d at 821, quoting, *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 65, 207 A.2d 305, 312 (1965).

61. 86 N.J. at 352, 431 A.2d at 821. The court noted that Amsted had acquired the Johnson trade name, physical plant, manufacturing equipment, inventory, records of manufacturing designs, patents and customer lists, and also continued employment of factory personnel. *Id.* at 352, 431 A.2d at 822. With these facilities and sources of information, the court concluded that Amsted had virtually the same capacity as Johnson to estimate the risks of claims for injuries. *Id.*

62. *Id.* at 353, 431 A.2d at 822. Amsted contended that "[b]usiness planners for prospective purchasing corporations will be hesitant to acquire a potential can of worms that will open with untold contingent products liability claims." *Id.*

should not overshadow the basic social policy of risk spreading.⁶³

Additionally, the court noted that the issue of the time period during which a party may bring suit for an injury arising out of a defective product is properly one for legislative rather than judicial determination.⁶⁴ The majority also rejected Amsted's argument that the new standard of liability should have solely prospective application, and should not be applied in the instant case.⁶⁵

Justice Schreiber filed a concurring opinion in which he agreed with the approach adopted by the majority,⁶⁶ but disagreed with its retroactive application.⁶⁷ Justice Schreiber based his opinion on the fact that Amsted had not placed the defective product in the stream of commerce, and had relied in good faith on the law as it then existed in not planning for the possibility of future liability resulting from a predecessor's defective product.⁶⁸

63. *Id.* at 354, 431 A.2d at 823. The court mentioned that corporate planning has protective devices available to insulate it from the full costs of accidents arising out of defects in the predecessor's products. *Id.* These include adjustments to the purchase price, obtaining products liability insurance, and indemnification or escrow agreements. *Id.* The court concluded that social policy 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.*

64. *Id.* at 355, 431 A.2d at 823. Defendant asserted it was unfair to impose liability for a product manufactured twenty-eight years, and two corporate owners earlier. *Id.* The court drew an analogy to the New Jersey statute of limitations for injuries arising out of defective and unsafe conditions of improvements to real property which provides for a limitation of ten years from the date of the performance or furnishing of the construction services. *Id.* N.J. STAT. ANN. 2A:14-1.1 (West Cum. Supp. 1981-1982). For articles on statutes of repose, see note 44 *supra*.

65. 86 N.J. at 356-57, 431 A.2d at 824. While the court agreed that there was a reasonable basis for reliance by successor corporations on the general rule of nonliability under the *McKee* approach, it believed that the plaintiffs in this case "should not be denied the reward for their efforts and expense in challenging the traditional corporate law principles . . ." *Id.* The court stated, "there is a basic justness in recognizing that persons who have exercised the initiative to challenge the existing law should be accorded relief if their claims—not yet resolved when the new rule of law is announced—are ultimately vindicated." *Id.* The court chose November 15, 1979, the date of the Appellate Division decision, as the date from which the new rule would be applied. *Id.*

66. *Id.* at 358-60, 431 A.2d at 825-26. (Schreiber, J., concurring).

67. *Id.* at 359, 431 A.2d at 825 (Schreiber, J., concurring). Justice Schreiber stated, "[i]t is inequitable to saddle, as the majority does, all previous purchasers of assets, who have not assumed the liabilities arising out of defects of previously manufactured products, with those liabilities when the accident occurs after November 15, 1979." *Id.* Focus should be placed on the date of acquisition by the successor corporation, rather than on the date of the accident. *Id.* at 361, 431 A.2d at 826 (Schreiber, J., concurring).

68. *Id.* at 359-60, 431 A.2d at 825 (Schreiber, J., concurring). Justice Schreiber further noted that injured persons have not been left totally "un-

In analyzing the *Ramirez* decision, it is difficult to justify the court's adoption of strict tort liability for successor corporations. The majority relied heavily on the successor's ability to estimate the risks of claims for injuries from defects in previously manufactured products,⁶⁹ and to pass on the costs of those risks to the purchasers.⁷⁰ Despite the arguments of the court, it is submitted that the purchaser cannot be fully aware, at the time of the sale, of the hidden risks associated with a product line.⁷¹ From the purchaser's perspective, this produces a harsh result because at the time "[w]hen its purchase contract was made, [the successor] had no responsibility for the product, and it in no way contributed to the accident."⁷² Moreover, while a large public corporation

recompensed", citing workers' compensation, and accident and health insurance. *Id.* at 361, 431 A.2d at 826 (Schreiber, J., concurring).

69. *Id.* at 352, 431 A.2d at 822. The majority reasoned that "because the manufacturer transfers to its successor corporation the resources that had previously been available to [the manufacturer] for meeting its responsibilities to persons injured by defects in [products] it had produced, the successor rather than the user of the product is in the better position to bear accident-avoidance costs." *Id.* at 352, 431 A.2d at 821, quoting, *Ray v. Alad*, 19 Cal. 3d at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581 (insertions by the court). The court concluded that "[w]ith these facilities and sources of information, [Amsted] had virtually the same capacity as [Johnson] to estimate the risks of claims for injuries from defects in previously manufactured [presses]." 86 N.J. at 352, 431 A.2d at 822, quoting, *Ray v. Alad*, 19 Cal. at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581 (insertions by the court).

70. 86 N.J. at 350, 431 A.2d at 820. The court stated:

The imposition of successor corporation liability upon Amsted is consistent with the public policy of spreading the risk to society at large for the costs of injuries from defective products. . . . Suffice it to say that this court has long recognized the significance of the social policy of risk-spreading in establishing the manufacturer's duty to the product user under the rapidly expanding principles of strict liability in tort.

Id. Justice Schreiber comments that "it is unfair to impose the economic monetary consequences on the purchaser. Not only has the purchaser paid more than it would have, it has also been deprived of any opportunity for contractually providing for indemnification from the seller or for some other protective device, such as an escrow." *Id.* at 360, 431 A.2d at 826 (Schreiber, J., concurring).

71. See Note, *Ray v. Alad*, *supra* note 35, at 356. The author of the note feels that the general rule of nonliability "promotes transfer of corporate property" and "allows the parties to freely negotiate and correctly determine the value of the transferred property." *Id.* However, the author indicates that in using strict liability for successor corporations, "[t]he parties are forced to bargain with variables that can not be reasonably reflected in the sale price." *Id.* The author further asserts that "the importance of these intangible variables dealing with the future liabilities of the product line depends largely upon the time of the plaintiff's injury and whether the corporate statutes permit a dissolved predecessor corporation to be sued;" two elements usually not considered or known at the time of acquisition by the successor corporation. *Id.* at 357.

72. 86 N.J. at 359, 431 A.2d at 825 (Schreiber, J., concurring).

may be in the position to absorb and pass on the costs involved,⁷³ many corporate transfers involve closely held corporations which are not able to afford the prohibitive costs of products liability insurance and one claim may be sufficient to send the successor into dissolution.⁷⁴

Somewhat more unsettling is the court's cursory treatment of the planning involved in the acquisition of another corporation's assets while providing for successor liability.⁷⁵ The court maintained that adjusting the purchase price, obtaining products liability insurance, and establishing escrow or indemnity agreements would be sufficient to meet the risk of potential liabilities.⁷⁶ It is submitted, however, that the

73. Note, *Ray v. Alad*, *supra* note 35, at 347.

74. *Id.* The author of the Note argues persuasively that close corporations simply do not have the capital to afford the skyrocketing costs of liability insurance. *Id.* The author points out that the average products liability award to an injured plaintiff is nearly \$100,000 and that the significance of this dollar amount can be put into proper perspective by comparing it to the value of total assets in *Ray* (\$200,000 total assets after acquisition, of which over one-half was in the form of an outstanding promissory note, owing to the stockholders of the predecessor corporation). *Id.* at 359 n.127. The author asserts that one products liability claim in this situation is potentially enough to bankrupt a small corporation like *Alad*. *Id.* See also Kadens, *supra* note 10, at 23, where it was stated that there has been a "crisis" in the purchase of products liability insurance for corporations, similar to the medical malpractice insurance crisis of 1975-1976, due to premium costs of products liability insurance rising geometrically. *Id.* See 86 N.J. at 360, 431 A.2d at 826, where Justice Schreiber, concurring, admits that "it is questionable whether purchasers may realistically be able to acquire insurance policies covering them for future accidents caused by defective products made and sold prior to acquisition." *Id.* at 360, 431 A.2d at 826 (Schreiber, J., concurring). Justice Schreiber noted that only 21.6% of those businesses seeking products liability insurance can obtain it. *Id.*, citing, *Products Liability Insurance: Hearings Before the Subcommittee on Capital, Investment, and Business of the House Committee on Small Business*, 95th Cong., 1st Sess. (Part 1) (1977). See also Hoffman, *supra* note 10, at 378; Schiff, *supra* note 11, at 1023; INTERAGENCY TASK FORCE, PRODUCTS LIABILITY: FINAL REPORT OF THE INSURANCE STUDY 2-21 (1977) (Insurance rates for manufacturers increased 340% from 1974 to 1976).

75. 86 N.J. at 354, 431 A.2d at 822-23. The court states: "[a] corporation planning the acquisition of another corporation's manufacturing assets has certain protective devices available to insulate it from the full costs of accidents arising out of defects in its predecessor's products." *Id.* For a discussion of these "protective devices" see note 76 and accompanying text *infra*.

76. 86 N.J. at 354, 431 A.2d at 822-23. The court acknowledged, and quickly dispensed with all of the questions traditionally raised in opposition to the use of these "protective devices" which protect the successor corporation from some of the liability claims of its predecessor:

True, the parties may experience difficulties in calculating a purchase price that fairly reflects the measure of risk of potential liabilities for the predecessor's defective products present in the market at the time of the asset acquisition. Likewise, do we acknowledge that small manufacturing corporations may not find readily available adequate and affordable insurance coverage for liability arising out of injuries caused by the predecessor's defective products. However, these concerns, genuine as they may be, cannot be permitted to overshadow

court is forcing the parties to bargain with variables that cannot reasonably be reflected in the sales price.⁷⁷ Further, it is suggested that the use of an escrow agreement would not be satisfactory to either the purchaser or the seller, as neither party would be able to receive the full benefits of the sale.⁷⁸ Also contrary to the suggestion of the majority,⁷⁹ the use of an indemnity agreement requiring the seller to reimburse the purchaser for money judgments has not been accepted.⁸⁰

It is also contended that the court's reliance on insurance as a remedy for a successor corporation's potential liability is not supported by the realities of the insurance industry.⁸¹ Over the last decade,

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 354, 431 A.2d at 823.

77. See notes 69-71 and accompanying text *supra*.

78. See Schiff, *supra* note 11, at 1022-23. This commentator explains that: [U]nder an indemnity agreement, or as an alternative to indemnity, the purchaser might require that a portion of the purchase price be delivered to a third party stakeholder. The funds would remain in escrow for a stipulated period of time during which the funds could be used to pay judgments rendered against the successor in cases based on the predecessor's faulty products. When the stipulated period lapsed, the remaining funds would go automatically to the seller who could then distribute them among the shareholders of the dissolved corporation.

Id. The author supports the use of escrow agreements because the purchaser can be sure that he is not liable beyond the amount in the account after the stipulated period of time. *Id.* Schiff additionally argues that since the account is controlled by a neutral party, the injured party is more certain of collection. *Id.* For an argument against the use of escrow agreements, see Note, *Ray v. Alad*, *supra* note 35, at 355-56.

79. 86 N.J. at 354, 431 A.2d at 823.

80. See Schiff, *supra* note 11, at 1022. If the seller refuses to insert an open indemnification clause, the purchaser might suggest indemnification with a fixed ceiling. *Id.* Schiff believes that while a fixed ceiling provision does not protect the purchaser against all possible judgments, it will help insulate the company in the first years of production while it establishes new manufacturing procedures and becomes financially stable. *Id.* See *Rawlings v. D. M. Oliver*, 97 Cal. App. 3d 890, 900-01, 159 Cal. Rptr. 119, 124 (1979) in which the court admitted that the predecessor was subject to an indemnity cause of action brought by the successor. *Id.* Nevertheless, the court concluded that the circumstances of the predecessor's continued existence did not guarantee an adequate remedy for the plaintiff and, therefore, justified granting to the plaintiff a cause of action against the successor. *Id.* It noted that the predecessor was a sole proprietorship whose owner died prior to the filing of the plaintiff's suit. *Id.* At this time, the owner's date of death, the period in which the claims were to have been filed, the size, nature, and distribution of his estate were all unknown, creating barriers to the plaintiff's recovery. *Id.*

81. See Hoffman, *supra* note 10, at 375. As recently as 1975, no state had developed a comprehensive legislative insurance scheme for the products lia-

products liability coverage has been on a selective basis, while "costs have risen geometrically."⁸² Further, when insurance has been available to the seller, the coverage has been applied only to claims filed after the acquisition date that occurred prior thereto.⁸³

Given the questionable protection available for corporations who acquire another corporation's assets,⁸⁴ it is submitted that these concerns overshadow the basic social policy of imposing the costs of injuries from defective products on the industry which manufactures them and the consuming public. Furthermore, as suggested by Justice Schreiber,⁸⁵ there are other adequate remedies to protect injured persons from being totally uncompensated.⁸⁶

bility of successor corporations. *Id.* By 1977, at least 39 states had some form of insurance legislation under consideration. *Id.* Hoffman also discusses the insufficiency of prepaid insurance in this area. *Id.* See also Kadens, *supra* note 10, at 23, where the author stated, "whereas ten years ago most businesses carried products liability insurance if there was any real risk of liability, such universality is no longer true," and claimed that the prohibitive costs of insurance premiums have caused a "crisis" in the availability of product liability insurance for successor corporations. *Id.*

82. Kadens, *supra* note 10, at 23 & n.70, citing, SELECT COMMITTEE ON SMALL BUSINESS, 28TH ANN. REPT., ch. 18, IMPACT OF PRODUCT LIABILITY ON SMALL BUSINESS, 167-71, S. REP. NO. 629, 95TH CONG., 1ST SESS. (1977); U.S. DEPT. OF COMMERCE, CONSUMER PRODUCT SAFETY COMMISSION, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT EXECUTIVE SUMMARY, PB-273-200, at xxxv-xxxvii (1977) (culmination of a study ordered in April, 1976, by the Economic Policy Board of the White House in response to increasing concern about rising products liability claims and costly insurance.)

83. See Kadens, *supra* note 10, at 36. Kadens stated that the "buyer must determine whether the 'policy period' (if it has an occurrence policy) or the 'retroactive date' (if it has a claim-made policy) will cover injuries sustained prior to the acquisition date, but not acted upon until after the acquisition." *Id.* This commentator suggests that the buyer may seek to obtain an assignment of seller's rights in seller's policies, or may attempt to have itself named an "additional insured" under seller's continuing policies. *Id.* This latter alternative has two benefits: any loss will not be charged against the buyer by its own insurer as an experienced loss, and conflicts among buyer's and seller's insurers as to primary or joint liability will be avoided. *Id.*

84. See notes 69-83 and accompanying text *supra*.

85. See 86 N.J. at 361, 431 A.2d at 826 (Schreiber, J., concurring).

86. *Id.* Justice Schreiber suggests that "[w]orkers' compensation, accident and health insurance policies, and the liability of the manufacturer's of the defective product insurer are some monetary sources which may be available to compensate the injured plaintiff." *Id.* See also *When the Product Ticks*, *supra* note 44, at 722, quoting, INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY (1977) which said "about one-half of the total of product liability payments for personal injury goes to employees injured on the job and, therefore, presumably already covered by workers' compensation." *Id.* This commentator said that since workers' compensation returns about 70% of the insurance dollar to the injured party, beginning as early as one week after the accident is reported, workers' compensation should be the sole remedy to employees for workplace accidents. *Id.* It is notable that injuries suffered by an employee at his worksite due to a defective product manufactured by a dissolved corporation is only covered by workmen's compensation benefits. *Id.*

The impact of imposing strict liability on successor corporations will be most heavily felt by the small corporations⁸⁷ which are more vulnerable than their larger counterparts to potential liability for injuries caused by a predecessor's product.⁸⁸ Strict liability will decrease the marketability of those small corporations,⁸⁹ perhaps forcing sellers into liquidation proceedings.⁹⁰ A purchase of assets for cash may no longer be desirable,⁹¹ and could arguably discourage business planners from acquiring corporate assets in New Jersey and encourage them to go to a state without such a burdensome strict liability policy.⁹²

Another important question left unresolved by the *Ramirez* decision is the potential for open-ended liability. This issue stems from the court's imposition of strict liability on successor corporations for defects in a predecessor's product manufactured nearly twenty-eight years before the injury occurred.⁹³ A statute of limitation will not alleviate

87. Schiff, *supra* note 11, at 1003. Schiff points out that, currently, small manufacturing corporations comprise 90% of the nation's manufacturing enterprises. *Id.* Schiff refers to the Department of Commerce definition of small business, *i.e.*, "any manufacturing plant that employs 100 persons or fewer, a wholesale establishment with annual sales less than \$200,000, or other business with sales or receipts less than \$400,000 a year." *Id.* at 1002 n.10. For a discussion regarding small corporation's inability to pay sky-rocketing costs of products liability insurance, *see* note 73 *supra*. Schiff also stated that "[m]ost small corporations are unable to secure policies covering liability for injuries caused by the predecessor's products." Schiff, *supra* note 11, at 1005. She suggested that the legislature modify the insurance laws to accommodate the small successor corporation, and argued that until this is done, a small manufacturer must, in an effort to protect his investment, plan carefully to avoid a transfer of liabilities. *Id.* at 1004.

88. Schiff, *supra* note 11, at 1002. Schiff reasoned that small corporations have limited assets, and thus face possible financial destruction should the predecessor's products give rise to multiple personal injury suits. *Id.* Personal injury suits frequently give rise to hundreds of thousands of dollars in damages. *Id.* at 1002 n.11.

89. *Id.* at 1002-03. Schiff argued that "[t]he economy as a whole suffers when small successor corporations lose such cases since corporate acquisitions are discouraged due to business planners' fears of being held so liable." *Id.* These fears diminish the marketability of these small corporations. *Id.*

90. *Id.*

91. *Id.* at 1003 n.12. Selling the assets of an on-going corporation is preferable to a sale of the assets in a liquidation proceeding. *Id.* A sale of assets by a successful on-going business tends to guarantee the successor a degree of security in establishing the business, and to keep waste at a minimum. *Id.* A sale of liquidated assets, by contrast, deprives the new owner of the assets of benefiting from the business relations and procedures previously established by the seller. *Id.* The stability established by the seller is lost, and the successor must start from the beginning with increased risks of business failure. *Id.* In addition, a sale of assets in a liquidation proceeding is often burdensome for the shareholders since buyers must be found for each asset, and sales are made in a piecemeal manner. *Id.*

92. *Id.* at 1003.

93. 86 N.J. at 358, 431 A.2d at 825 (Schreiber, J., concurring).

the successor's open-ended liability, as it would not begin to run until the time the injury occurs.⁹⁴ The successor corporation's expectancy of liability will not be capable of determination at the time that the transfer is made.⁹⁶ Statutes of repose which begin to run when the product is introduced into the stream of commerce have been challenged successfully in some courts on the ground that they violate the constitutional guarantee of equal protection, since some plaintiffs may be barred before their claims even arise.⁹⁶ It is suggested that, as a practical matter, it would be extremely difficult to determine the length of time which should be set in a statute of this nature.⁹⁷

The application of the "product line" approach to successor corporations in *Ramirez*⁹⁸ leaves open the question of whether a successor's

94. See Note, *Ray v. Alad*, *supra* note 35, at 357. The author discussed the problem in relation to California's statute of limitation. *Id.* The New Jersey statute of limitation only provides that, "[e]very action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued." N.J. STAT. ANN. 2A:14-2 (West 1952). See also *Statutes of Repose*, *supra* note 44, at 171. The author maintains that the fact that the statute will not begin to run until the injury accrues "is contrary to the very purpose of the statute designed to relieve the court of the burden of trying 'ancient' claims about 'ancient' products." *Id.*

95. See Note, *Ray v. Alad*, *supra* note 35, at 357-58, which states, "[t]he extent of liability of a successor corporation does not end at a definite time, and therefore cannot be accounted for in the negotiations surrounding a corporate acquisition." *Id.*

96. See *When the Product Ticks*, *supra* note 44, at 717. See also *Kallas Millwork Corp. v. Square D. Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975) (the Wisconsin Supreme Court found such a statute of repose to be barred by a provision in its state constitution which guaranteed a legal remedy for all injuries). But see 86 N.J. at 355-56, 431 A.2d at 823-24. The New Jersey court makes an analogy to a state law which provides a ten year statute of repose for injuries that arise out of a defective or unsafe condition of an improvement, to real property which has been upheld by the New Jersey courts. *Id.* at 355, 431 A.2d at 823. N.J. STAT. ANN. 2A:14-1.1 (West Cum. Supp. 1981-1982). See note 64 and accompanying text *supra*.

97. See *When the Product Ticks*, *supra* note 44, at 718. The commentator noted that "capping liability five years from date of first sale would obviously affect far more products, industries and claims than would a ten year repose provision." *Id.* Consideration has also been given to a "useful life" statute of limitations. *Statutes of Repose*, *supra* note 44, at 177. The determination of useful life would require expert testimony provided by the very manufacturer who placed the product in the market. *Id.* Discounting the manufacturer's bias in determining the useful life, it is difficult to imagine a time period constructive for all or many products, thus presenting a potential series of repose statutes each presenting its own series of problems. *Id.* at 178.

98. See *Schiff*, *supra* note 11, at 1015. But see *Daweiko v. Jorgensen Steel Co.*, — Pa. Super. Ct. —, 434 A.2d 106 (1981). This court identified various factors "so that in any particular case the court may consider whether it is just to impose liability on the successor corporation." *Id.* at —, 434 A.2d 111 (emphasis added). The court has done so as "not to phrase the new exception too tightly." *Id.* at —, 434 A.2d at 111.

change in design of the defective product line of the predecessor,⁹⁹ or its issuance of a manufacturer's warning,¹⁰⁰ would exculpate it from liability. The "product line" approach also leaves unanswered the question of whether the continued existence of the predecessor, often in name only, after the corporate transfer, forecloses successor liability for the predecessor's defective products.¹⁰¹ And finally, the strict liability rationale can be extended to hold those intermediate corporations in a corporate chain of succession liable, together with the successor, for the claims from their predecessor's defective products.¹⁰² By focusing its

99. See *Rawlings v. D. M. Oliver, Inc.*, 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979). The California appeals court found liability to attach under the *Ray* rationale to a successor corporation, even though the successor discontinued the product design responsible for the plaintiff's injury. *Id.* at 901, 159 Cal. Rptr. at 124. Another commentator saw this inducement to change defective product design as a policy reason for adopting strict liability for successor corporation: "[T]he potential for imposition of liability may make the successor alert to defects in the predecessor's product line and encourage him to introduce safety devices and warnings to diminish risks associated with the product's use." Note, *Postdissolution Product Claims*, *supra* note 10, at 863 n.12.

100. See *Statutes of Repose*, *supra* note 44, at 178. The commentator suggested that requiring a manufacturer to place a warning on the product indicating a period of useful life, or cautioning that there may be defective parts might reduce a successor's liability for injury claims from the product. *Id.* It is argued that if such warning were effective ". . . the user would be put on notice that use of the product after the specified time would be at his own peril." *Id.* In this respect, continued use would be comparable to assumption of the risk or, preferably, could be used in apportioning fault under comparative negligence standards. *Id.* The commentator, however, discourages the use of manufacturer's warnings for this purpose, arguing that, like disclaimers, these warnings require the manufacturer to put the user on fair notice and must be agreed to by the user. *Id.*

101. See *Kadens*, *supra* note 10, at 21. *Kadens* reads *Ray* and *Turner* to say that "if a seller elects not to dissolve until several years after closing, a non-assuming assets buyer would not be liable for any of the seller's post-acquisition products liabilities." *Id.* See also Note, *Ray v. Alad*, *supra* note 35, at 350. This author notes that in *Knapp*, despite contractual requirements, the predecessor failed to dissolve until eighteen months after the agreement. *Id.*, citing, *Knapp v. N. Am. Rockwell Corp.*, 506 F.2d at 363. Since the predecessor was in effect a "mere shell," the court ignored its continued existence and found the successor corporation liable for the defective product of the predecessor. *Id.* at 351. See also *Rawlings v. D. M. Oliver, Inc.*, 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979). The court stated that "the injury occurred three months before defendant purchased the business. Rawlings' rights, however, cannot turn on the closing date over the sale of a business over which he had no control. The timeliness of her action is governed solely by the applicable statute of limitations . . ." *Id.* at 900, 159 Cal. Rptr. at 123. The court concluded that "successor liability on the basis of strict products liability may be imposed." *Id.* at 902, 159 Cal. Rptr. at 125. The court leaves the question of the predecessor's liability open by stating, "[w]hether plaintiff has a satisfactory remedy against Mrs. Stubbendieck [the predecessor] remains a triable issue of material fact." *Id.* at 900, 159 Cal. Rptr. at 124 (insertion added).

102. See *Nieves v. Bruno-Sherman Corp.*, 86 N.J. 361, 431 A.2d 826 (1981). The New Jersey Supreme Court held *Harris-Intertype Corporation*, the inter-

attention only on the protection of the plaintiff, the court has failed to recognize the potential economic implications of imposing such liability on the corporations of the State of New Jersey. The cumulative effect of the inherent problems that befall successor corporations should dissuade other jurisdictions from adopting the product line approach, and opening the Pandora's Box of complications that California and now New Jersey have ignored.

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mediate corporation between the predecessor, Old Sheridan, and its successor, Bruno-Sherman, jointly liable for the product liability claims of Nieves resulting from a defective die-cutting power press manufactured by Old Sheridan. *Id.* at 369, 431 A.2d at 831. The court stated that:

The imposition on Bruno-Sherman of potential liability for injuries caused by defects in the Sheridan product line is justified as a fair and equitable burden necessarily attached to the substantial benefit that it enjoyed in the "deliberate albeit legitimate exploitation of [Old Sheridan's] established reputation as a going concern manufacturing a specific product line . . ." Imposition of potential liability on Bruno-Sherman is further justified by its ability to gauge the risks of injury from defects in the Sheridan product line and to bear the accident-avoidance costs.

Id. at 368, 431 A.2d at 830, quoting, *Ray v. Alad*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 581.

In *Nieves*, Harris contended that there was no justification for imposing liability on the intermediate corporation because "there is missing an essential functional prerequisite to the imposition of that liability, namely, the non-availability of a viable manufacturer of the product line against which plaintiff may seek recompense." 86 N.J. at 370, 431 A.2d at 831. Harris also contended that *Ramirez* should be limited to the current, viable manufacturer of the product line at the time of plaintiff's injury and suit. *Id.* Harris noted that the *Ray* court focused on one corporate successor to the product line—the one viable, extant corporation that had succeeded to the manufacturing operation of the original manufacturer. *Id.* The *Nieves* court, however, addressed these contentions by stating:

The reason the *Ray* court focused upon only one corporate successor to the Alad product line is because there was only one viable, extant successor corporation—Alad II. The fact that there are two such successors to Old Sheridan in the present case does not alter the reality that Harris' acquisition of the business assets and manufacturing operation of Old Sheridan contributed to the destruction of the plaintiff's remedies against the original manufacturer. By acquiring the business assets of Old Sheridan and continuing the established operation of manufacturing and selling Sheridan die-cutting products, Harris "became 'an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.'" Harris' prominent role in the overall enterprise of manufacturing Sheridan's die-cutting presses is not to be overlooked merely because the plaintiff's injury did not occur while Harris was actually engaged in the manufacturing operation.

Id. at 371, 431 A.2d at 831 (citations omitted). The *Nieves* court remanded the case to the trial court to make the factual determination of whether Harris had a duty to warn. The Supreme Court of New Jersey implied that it did. *Id.* at 373, 431 A.2d at 822-23.