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# Asset Purchases, Successor Liability, and Insurance Coverage: Does the Tail Always Follow the Dog

Albert Bates Jr. IV

*Babst, Calland, Clements, and Zomnir*


D. Matthew Jameson III

*Babst, Calland, Clements, and Zomnir*

Bren J. Pomponio

*Babst, Calland, Clements, and Zomnir*

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# ASSET PURCHASES, SUCCESSOR LIABILITY, AND INSURANCE COVERAGE: DOES THE TAIL ALWAYS FOLLOW THE DOG?

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*Albert Bates, Jr. IV\**  
*D. Matthew Jameson III\*\**  
*Bren J. Pomponio\*\*\**

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\* B.A., 1983, Washington and Jefferson College; M.B.A., 1987, Vanderbilt University, Owen Graduate School of Management; J.D., 1987, Vanderbilt University School of Law. Mr. Bates is a shareholder in the Litigation Group of Babst, Calland, Clements & Zomnir, P.C., Pittsburgh, Pennsylvania. His practice focuses on complex environmental, commercial, and construction litigation and arbitration matters, primarily for large industrial and manufacturing clients. Mr. Bates served as lead counsel for North River Insurance Company in *Koppers Indus., Inc. v. North River Ins. Co.*, No. 94-1706 (W.D. Pa. Mar. 5, 1996), *aff'd*, 103 F.3d 113 (3d Cir. 1996) (unpublished disposition) [hereinafter *North River*].

\*\* B.A., 1988, Pennsylvania State University; J.D., with honors, 1992, Rutgers University School of Law – Camden. Mr. Jameson is an associate in the Litigation Group of Babst, Calland, Clements, and Zomnir, P.C., Pittsburgh, Pennsylvania. He has focused his practice on complex environmental, commercial, and construction litigation matters. Mr. Jameson served as “second-chair” counsel for North River Insurance Company in *North River*.

\*\*\* B.A., 1992, The University of Georgia; J.D., with honors, 1998, West Virginia University College of Law; Managing Editor, *West Virginia Law Review*, volume 100. Mr. Pomponio is currently a law clerk for United States District Judge Joseph R. Goodwin. His contributions to this Article were in large part due to the support and resources provided by the law firm Babst, Calland, Clements & Zomnir during his clerkship with the firm in the summer of 1997. This author extends his sincere appreciation to the firm for allowing him this opportunity.

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## I. INTRODUCTION

You are contacted by a rather irate in-house counsel for a long-standing client of your firm, and he is looking for answers to the following questions: Why is his company being sued for the cleanup of hazardous substances that were disposed of long before the company ever bought the property? Why may the company still be sued even though, as he interprets the purchase agreement, all environmental liabilities for historically disposed waste, including liability pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),<sup>1</sup> were retained by the prior owner of the property? Why does his company have to foot the bill simply because it is financially stable and has a "deep pocket?" Why isn't the predecessor providing his company with defense and indemnification pursuant to the purchase agreement? Is there any potential insurance coverage available to his company? Is there any potential insurance coverage available to his company through policies issued to any of the prior owners?

As the tirade subsides, you advise the client that the terms of a contract were at one time sacrosanct in all jurisdictions, but now creative lawyers try to manipulate the law of successor liability to circumvent the arrangements agreed to by the parties.<sup>2</sup> In the area of product liability claims by personally injured plaintiffs, some states have expanded traditional successorship notions and, as a result, successor corporations may sometimes find themselves saddled with liabilities that they did not anticipate at the time they purchased the assets of a business.<sup>3</sup> More recently, a few courts have applied expansive successorship doctrines to cases involving environmental liabilities, including those arising under

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<sup>1</sup> 42 U.S.C. § 9601-9675 (1994).

<sup>2</sup> See, e.g., *United States v. Keystone Sanitation Co.*, No. 1:CV-93-1482, 1996 U.S. Dist. LEXIS 1365, at \*31 (M.D. Pa. Aug. 22, 1996).

<sup>3</sup> See, e.g., *Ray v. Alad Corp.*, 560 P.2d 3, 8 (Cal. 1977).

CERCLA.<sup>4</sup> You also advise the client that you remember reading an advance sheet indicating that when successor corporations are subject to judicially-imposed liability despite provisions to the contrary in the purchase agreement, contractual language has been overlooked by courts on occasion to allow a successor corporation to access insurance policies issued to a predecessor that were specifically retained under the purchase agreement by the predecessor corporation.<sup>5</sup> Lastly, you advise the client that given the complexity and novelty of the issues involved, significant legal research will be required before responding further on these issues.

This Article explores the limited circumstances under which some courts have permitted insurance coverage to follow the liability rather than the policy holder. The Article provides an analytical framework in which to consider issues relating to the transfer of insurance coverage to a successor corporation as a matter of law. Part II of this Article discusses the recent case *Koppers Industries, Inc. v. North River Insurance Company*,<sup>6</sup> which illustrates the application of these principles in the context of a commercial product liability claim. *North River* serves as a logical example of how the manner of succession to a particular liability may be critical to a court in determining whether the current owner is entitled to an interest in insurance policies issued to, and specifically retained by, a predecessor. Part III briefly outlines the traditional doctrine of successor liability, its expansion in certain states in the context of product liability claims, and the manner in which some courts have applied expansive successorship doctrines to environmental cases. Part IV of this Article discusses the limited circumstances under which courts have granted a successor an interest in insurance policies issued to a predecessor corporation. Part V concludes by discussing several issues that remain unresolved in this developing area of the law.

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<sup>4</sup> See *infra* Part III.B.

<sup>5</sup> See, e.g., *Northern Ins. Co. of New York v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1358 (9th Cir. 1992); *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 151 (D.N.H. 1994).

<sup>6</sup> *North River*, No. 941706 (W.D. Pa. Mar. 5, 1996), *aff'd*, 103 F.3d 113 (3d Cir. 1996) (unpublished table decision) [hereinafter *North River*].

## II. *KOPPERS INDUSTRIES, INC. v. NORTH RIVER INSURANCE COMPANY*

Real-life facts with real dollars at stake for real clients often present factual situations that have more twists and turns than law school exams. Consider the following factual scenario from the *North River* case.<sup>7</sup>

It all started with coal that was mined from deep beneath the ground, washed in a jig, and loaded in railcars or barges for shipment to a coke plant. At the coke plant, the coal was baked in a coke oven in the absence of oxygen at over 2000 degrees Fahrenheit for a day, more or less. The incandescent coke, now almost pure carbon, was “pushed” from the ovens and “quenched” with a water and ammonia liquor mixture to cool the coke. The coke generated in the process was shipped to an iron plant, where coke, iron ore, and limestone are combined in mammoth blast furnaces to produce pig iron, the elemental foundation of the iron and steel industry.

The manufacture of coke also generated many valuable coal by-products, such as coal tar. Typically, the crude coal tar from the coking process was stored and shipped from the coke plant by pipeline, railcar, or tanker truck to a tar refining plant. At the tar plant, the crude coal tar was refined into various materials used for highway construction, roofing supplies, waterproofing applications, wood treating applications, or a variety of other important industrial purposes. One of the specific roofing materials manufactured at some tar plants was coal tar roofing pitch or “bitumen.” Coal tar bitumen was the product at the core of the litigation underlying the *North River* case.

Koppers Company, Inc. (“KCI”) produced coal tar bitumen, which was used in the construction of a large, flat roof for an automobile assembly plant in Tennessee. The roof was enormous, with enough surface area to cover thirty football fields. The “built-up” roof at issue was constructed with Owens-Corning Fiberglas (“OCF”) roofing felts by an authorized OCF contractor.<sup>8</sup> In general terms, KCI supplied the bitumen, OCF supplied all other materials and labor, and OCF issued a twenty-year warranty on the roof to the automobile manufacturer.

<sup>7</sup> As set forth above, authors Bates and Jameson were counsel for North River Insurance Company in the *North River* case.

<sup>8</sup> In roofing parlance, the enormous flat roof is a “built-up” roof. The roofing membrane is generally comprised of alternating layers of roofing felt, heavy fabric impregnated with asphalt or bitumen. The OCF felts at issue had been impregnated with asphalt, a petroleum derivative. A layer of bitumen is spread on the roof followed by a layer of felt, then more bitumen and more felt until four layers of felt have been installed. More bitumen is then poured on top of these built-up layers, followed by covering the entire roof with a layer of stone aggregate. Built-up roofs are widely used for industrial and heavy commercial purposes, which require flat roofs, and coal tar is the traditional bitumen of choice because of its “self-healing” properties. In other words, if cracks in the flat roof develop, the coal tar remains viscous and with the aid of gravity will seal or patch the crack thereby remaining water tight.

The underlying litigation arose because the roof that was installed at the automobile assembly plant allegedly leaked. There were a myriad of potential causes of the leaks, including defective workmanship, defective felts, defective bitumen, a reaction between the asphalt in the felts and the coal tar bitumen, and a host of other potential causes. However, because it had issued a guarantee on the roof, OCF replaced the entire roof, which cost millions of dollars.

The takeover boom of the 1980s hit KCI in 1988. Following a hostile takeover, the tar division and certain other assets and liabilities of KCI were sold to a newly formed corporation, Koppers Industries, Inc. ("KII").<sup>9</sup> KII continued to sell a variety of tar products, including coal tar bitumen. KCI<sup>10</sup> continued to operate certain business units and also managed the liabilities that it retained after the divestitures. Consequently, OCF filed suit against both KCI and KII, alleging that the coal tar bitumen was a defective product and asserting a variety of product-liability related causes of action.<sup>11</sup>

The asset purchase agreement pursuant to which KII acquired certain assets and liabilities of KCI ("APA") contained an arbitration clause which mandated that all disputes arising out of or relating to the agreement be settled by arbitration. Consequently, instead of the parties filing cross-claims against one another in the OCF Action, KII filed an arbitration demand against KCI, alleging that KCI contractually retained responsibility for the types of claims presented in the OCF Action. A lengthy arbitration proceeding concluded that KII had contractually assumed responsibility for claims of the type being asserted by OCF. Accordingly, the liabilities at issue in the OCF Action were the contractual responsibility of KII, pursuant to the APA.

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<sup>9</sup> Joint Stipulations of Fact, *North River*, No. 94-1706 (W.D. Pa. Mar. 5, 1996) [hereinafter *Joint Stipulations of Fact*]. The facts set forth in the next two paragraphs are taken from the document entitled, *Joint Stipulations of Fact*, filed by counsel for KII and North River in the district court proceedings on or about June 9, 1995.

<sup>10</sup> After the hostile takeover and the divestiture of other business units, the name of KCI changed. Those transactions and the name changes are not germane to this discussion, and are therefore omitted.

<sup>11</sup> OCF commenced an action in the United States District Court for the Northern District of Ohio (Docket No. 90-CV-7226) and an action in the Court of Common Pleas for Lucas County, Ohio (Docket No. CI90-1622) relating to the same facts and circumstances, but naming different corporate entities as defendants. The state court action was stayed pending the resolution of the federal lawsuit. As used herein, the term, "OCF Action" will refer collectively to the federal and state court lawsuits. In addition, the OCF Action also sought recovery of damages for a number of other built-up roofs which OCF guaranteed and which were constructed by an OCF authorized contractor with OCF felts and other products and KCI/KII coal tar bitumen.

Following the arbitration but during the pendency of the OCF Action, KII commenced the *North River* case, seeking defense and indemnity under insurance policies issued to KCI for the liabilities at issue in the OCF Action. KII alleged that insurance had been purchased to protect KCI from product liability claims, including those related to coal tar bitumen, and that KII was entitled to access any insurance that might potentially respond to the assumed liabilities. KCI, however, contended that it was sole owner of the policies, and that its insurance policies afforded it protection against a wide variety of retained liabilities. Any recovery of insurance proceeds by KII would diminish the policy limits available to KCI. Further, KCI contended that it specifically retained the insurance policies under the APA. North River Insurance Company's position was very simple – in addition to a variety of policy defenses which may be available, KII did not have any legally cognizable interest in the policies.

The court in *North River* permitted the parties to submit the following threshold coverage issue for resolution on stipulated facts, holding the balance of the case in abeyance:

Assuming solely for purposes of the . . . summary judgment and partial summary judgment motions that coverage is afforded under the subject North River Policies for some or all of the OCF Action, may KII recover under the North River Policies, which were issued to KCI before the December 28, 1988 Asset Purchase Agreement between KCI and KII?<sup>12</sup>

The district court found that under Pennsylvania law, KII did not obtain an interest in the insurance policies issued to KCI by way of contract,<sup>13</sup> and the circumstances did not warrant transferring an interest in the policies to KII by matter of law.<sup>14</sup> In summary, the district court concluded:

[T]he Court finds that KII and KCI negotiated a detailed purchase and sale agreement, and the terms of that agreement demonstrate the parties' intent that KCI, . . . would retain its rights under North River's insurance policies. No basis exists for this Court to alter the contractual bargain that KII has made. Accordingly, this Court

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<sup>12</sup> *Joint Stipulations of Fact*, *supra* note 9, at 1. Further, it should be noted that KII brought the action against North River. KCI later intervened in the action.

<sup>13</sup> Memorandum Opinion at 6, *North River*, No. 94-9706.

<sup>14</sup> *Id.* at 10.

will grant defendant North River's motion for summary judgment, the Court having found that KII has no cognizable interest, either as a matter of contract or as a matter of law, in the North River policies that were issued to KCI.<sup>15</sup>

During the pendency of the *North River* appeal to the United States Court of Appeals for the Third Circuit, the jury in the OCF Action returned a verdict in favor of OCF and against KII in the amount of \$9,815,133 in compensatory damages and \$500,000 in punitive damages.<sup>16</sup> The jury also awarded OCF its reasonable attorney fees and costs.<sup>17</sup> Thereafter, following full briefing and oral argument, the Third Circuit affirmed the lower court decision in the *North River* case.<sup>18</sup>

The *North River* case presents a logical framework for the consideration of how the manner of succession to a particular liability may be a critical factor in determining entitlement to an interest in insurance policies issued to a former owner of assets, including real property. The first inquiry is whether the purchaser assumed the liability as a matter of contract, or whether the court imposed the particular liability upon the purchaser as a matter of law. The answer to this inquiry is related to, but not necessarily determinative of, the second line of inquiry: whether there exists a basis, either as a matter of contractual agreement or as matter of law rooted in public policy, to grant the successor a legally cognizable interest in insurance policies that were issued to and paid for by a predecessor company.

The *North River* case also serves as an illustration of the complexity of the law of successorship, and the significant financial impact of its consequences. While the amount at stake in *North River* exceeded \$10,000,000, claims in insurance coverage litigation relating to historical environmental contamination often run into the hundreds of millions of dollars. As a consequence, the law of successorship, and its interface with traditional contract law, federal statutory schemes such as CERCLA, and fundamental insurance law principles, will be pushed to their outer boundaries as creative lawyers seek to find "deep pockets," either by expanding the breadth of successorship law or by questioning traditional

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<sup>15</sup> *Id.* at 16-17.

<sup>16</sup> *OCF Action*, No. 3:90CV7226, Special Verdict (April 3, 1996).

<sup>17</sup> *Id.* A judgment was entered upon the Special Verdict. *See id.*, Judgment in a Civil Case (April 4, 1996).

<sup>18</sup> *Koppers Indus. Inc. v. North River Ins. Co.*, 103 F.3d 113 (3d Cir. 1996) (unpublished table decision).



notions of contract law to enlarge the universe of persons who have an insurable interest in a policy.<sup>19</sup>

The analysis that follows is set forth in two steps. First, under what circumstances may liabilities resulting from activities that occurred prior to the acquisition of a business be imposed upon a purchaser? This question is examined in greater detail in the next Part. Second, assuming that certain pre-purchase liabilities are imposed upon a buyer, either as a matter of contract or as a matter of law, under what circumstances have some courts given the purchaser an insurable interest in insurance policies issued to a predecessor? This question is examined in greater detail in Part IV.

### III. SUCCESSOR LIABILITY

#### A. *Successor Liability*

##### 1. Traditional Exceptions

“The general rule, which is well settled, is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor.”<sup>20</sup> As is the case with most general rules of law, however, this rule has some exceptions. Specifically, there are four traditional exceptions to the general rule of non-liability for successor corporations:

1. *Contractual Assumption of Liabilities*: Under this exception, the successor corporation must have either expressly or impliedly assumed the liabilities at issue pursuant to the contractual agreement which created the successor corporation.
2. *Merger (express or de facto)*: Under this exception, the successor corporation must be a merged version of the predecessor and successor corporations.

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<sup>19</sup> See Stephen F. Baicker-McKee, *American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert: A New Line of Defense for Parent Corporations*, 27 *Envtl. L. Rep. (Envtl. L. Inst.)* 10450, 10450 (1997) (“Parties facing large environmental liabilities are trolling for solvent defendants with an increasingly wide net.”).

<sup>20</sup> See 15 WILLIAM M. FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 7122 (per. ed. rev. vol. 1990).

3. *Mere Continuation*: Under this exception, the successor corporation must be a mere continuation or reincarnation of the predecessor corporation.
4. *Fraud*: Under this exception, the successor corporation may be held liable for the predecessor's liabilities if the transaction is conducted merely to escape liability.<sup>21</sup>

These four traditional exceptions are widely recognized and fairly well defined. As a result, parties can structure a business transaction to allocate liabilities related to historical operations among themselves, and allow the purchase price to reflect the agreed-upon allocation of liabilities. Until the expansion of successor liability in the 1970s and 1980s,<sup>22</sup> which will be discussed in the next section, parties to an asset purchase agreement enjoyed a reasonable degree of security in the fact that liabilities would follow the provisions in the asset purchase agreement or other instrument of sale.

## 2. Expansion of Successor Liability

In the mid 1970s to 1980s, some states began to recognize further exceptions that expanded successor liability, primarily in the area of personal injury product liability claims.<sup>23</sup> Specifically, two additional exceptions were adopted in

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<sup>21</sup> *Id.*; See generally Michael D. Kristofco, Comment, *Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio is Really No Debate at All*, 21 OHIO N.U.L. REV. 297 (1994).

<sup>22</sup> Michael D. Green, *Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal*, 87 NW. U. L. REV. 897, 903 (1993).

<sup>23</sup> Green, *supra* note 22, at 903. The expansion in successor liability was primarily in response to situations where an injured plaintiff's claim had been extinguished through corporate transactions. *Id.* Especially in the case of latent, or long-tail product liability claims, claimants found that their claims were vanishing due to the frequent corporate reorganizations of the 1970s and 1980s. See generally *id.*

The expansion of successor liability has generated some debate. Proponents of expanding successor liability justify expansion on the grounds that the successor relies on the predecessor's good will; the successor is in the best position to warn of defects in the predecessor's products; the successor is a conduit by which a court can transfer liability to the predecessor via the asset purchase agreement; and the successor corporation is in a better position to bear the loss because it may spread the cost among a greater number of people. See FLETCHER, *supra* note 20, § 7123.05; Green, *supra* note 22, at 906; Mark J. Roe, *Mergers Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559, 1559-60 (1984). On the other hand, successor liability opponents cite their own grounds for limiting successor liability: the successor is not at fault; the

a minority of jurisdictions: the “continuity of enterprise” exception<sup>24</sup> and the “product-line” exception.<sup>25</sup> Under the continuity of enterprise exception, a successor corporation may be subject to successor liability if the totality of the transaction demonstrates that the successor corporation is basically a continuation of the predecessor’s enterprise.<sup>26</sup> The difference between the traditional mere continuation doctrine and the continuity of enterprise exception is that the former focuses on a continuity of shareholders, and the later focuses on the continuity of the business.<sup>27</sup> The product-line exception may apply when a successor corporation purchases substantially all of the assets from which the product liability claim

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successor cannot enhance the safety of the predecessor’s products; there is no deterrence for misbehavior; and the imposition of excess liabilities stifles the transferability of assets. See FLETCHER, *supra* note 20 § 7123.05; Roe, *supra*, at 1560.

<sup>24</sup> The continuity of enterprise exceptions has been adopted in Alabama, Michigan, Mississippi, and South Carolina. Kristofco, *supra* note 21, at 307 (citing cases).

<sup>25</sup> The highest courts of only three states have embraced the product-line exception for successor corporations: California, New Jersey, and Washington. See *Conway v. White Trucks*, 885 F.2d 90, 94-95 (3d Cir. 1989); *Ray v. Alad Corp.*, 560 P.2d 3, 11 (Cal. 1977); *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 822 (N.J. 1981); *Martin v. Abbott Labs.*, 689 P.2d 368, 388 (Wash. 1984); Alfred R. Light, “Product Line” and “Continuity of Enterprise” Theories of Corporate Successor Liability Under CERCLA, 11 MISS. C. L. REV. 63, 71 (1990).

<sup>26</sup> See Kristofco, *supra* note 21, at 302 (quoting *Turner v. Bituminous Casualty Co.*, 244 N.W.2d 873, 892 (Mich. 1976)).

<sup>27</sup> See Light, *supra* note 25, at 72. The continuity of enterprise rule was first introduced by the Michigan Supreme Court in *Turner v. Bituminous Casualty Co.*, 244 N.W.2d 873 (Mich. 1976). The court provided four factors to evaluate whether a continuity of enterprise existed: (1) when the management, personnel, location, assets, and operations continues as it had for the predecessor; (2) when the predecessor corporation dissolves after the sale; (3) when the successor corporation assumes the predecessor’s liabilities in order to facilitate the transfer and continuation of business operations; and (4) when the successor corporation holds itself out to be a continuation of the predecessor’s enterprise. See *Turner*, 244 N.W.2d. at 879, 882; see also *Polius v. Clark Equip. Co.*, 802 F.2d 75, 79 n.4 (3d Cir. 1986); Light, *supra* note 25, at 72.

arises.<sup>28</sup> Both exceptions may impose liability as a matter of law irrespective of the provisions allocating liability in the asset purchase agreement.

One of the themes behind the expansion of successor liability was sympathy for the personally injured product liability claimant.<sup>29</sup> The courts that have adopted the “product-line” and “continuity of enterprise” exceptions have found, as a matter of public policy, that an injured plaintiff’s product liability claim should not be defeated by corporate re-structuring.<sup>30</sup> Someone should be made to pay for the plaintiff’s injury. Further, it is significant to consider that product liability plaintiffs are not parties to the corporate transaction giving rise to the liability and are therefore unable to protect their interests during the transaction. Thus, the policy considerations supporting the expansion of the successor liability doctrine are rooted in traditional tort and strict liability concepts. In jurisdictions that adopt the “product-line” and “continuity of enterprise” exceptions, the liabilities assigned by the parties in the asset purchase have been disrupted when the interests of an independent third party are affected by the agreement.<sup>31</sup>

#### B. *Application of Product liability Successorship Doctrines to CERCLA Cases*

Given the magnitude of the investigation and remediation costs in CERCLA cases, parties have recently attempted to apply expansive successorship doctrines to CERCLA liability issues, causing courts to balance the competing interests of finding viable companies to pay for environmental investigation and remediation of historically disposed waste and upholding the sanctity of the written contract and

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<sup>28</sup> The product-line exception was originally adopted by the California Supreme Court in *Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977). The *Ray* court stated that “[t]he paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them.” *Id.* at 8 (quoting *Price v. Shell Oil Co.*, 466 P.2d 722, 725 (Cal. 1976)). Generally, the exception has three requirements: (1) the successor corporation must acquire substantially all of the predecessor’s assets, “leaving no more than a corporate shell remaining;” (2) the successor corporation must hold itself out to the public as a continuation of the predecessor; and (3) the successor corporation must benefit from the good will of the predecessor. FLETCHER, *supra* note 20, § 7132.07.

<sup>29</sup> Green, *supra* note 22, at 909.

<sup>30</sup> See generally *Turner*, 244 N.W.2d at 878-79.

<sup>31</sup> One commentator noted that the trend in expanding successor liability from the 1980s “fizzled” in the 1990s. See Green, *supra* note 22, at 909. However, despite this downtrend and the fact that the product-line and continuity of enterprise exceptions have been adopted in only a few jurisdictions, parties must consider the possible impact of judicially-imposed liability when structuring purchase agreements.

other well-established principles that are protective of the corporate form and traditional corporate law.<sup>32</sup> The two cases of *Smithkline Beecham Corp.*

<sup>32</sup> As an example, there is activity in the United States Supreme Court with respect to the extent to which a parent corporation may be held liable for environmental contamination resulting from a subsidiary's activities, and the extent to which a shareholder may be held liable for environmental contamination resulting from a corporation's activities. The Supreme Court has granted *certiorari* in *United States v. CPC Int'l, Inc.*, 118 S. Ct. 621 (1997), *sub. nom. below, United States v. Cordova Chem. Corp.*, 113 F.3d 572 (6th Cir. 1997) (*en banc*). In *Cordova*, a seven to five vote of the members of the Sixth Circuit Court of Appeals held that a parent corporation which owns 100% of a subsidiary may only be held liable for environmental contamination resulting from a subsidiary's activities when the requirements necessary to pierce the corporate veil are met. *Cordova*, 113 F.3d at 580.

In other words, under the circumstances of this case, whether the parent will be liable as an operator depends upon whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amounts to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary. Whether the circumstances in this case warrant piercing a corporate veil will be determined by state law.

*Id.* See also *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990) (applying a similar "piercing the corporate veil" test). After issuing its decision in *Cordova*, the Court of Appeals for the Sixth Circuit also addressed whether a sole shareholder may be held liable as an operator under CERCLA. See *Donahey v. Bogle*, 129 F.3d 838 (6th Cir. 1997) (*en banc*), *pet. for cert. filed*, 66 U.S.L.W. 3475 (U.S. Jan. 9 1998) (No. 97-1163). In *Donahey*, the court concluded that a stockholder is not liable as an operator under CERCLA unless circumstances justify piercing the corporate veil. *Id.* at 843. *Cf. Riverside Market Dev. Corp. v. Int'l Bldg. Products, Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (explaining that individual officers and shareholder may be directly liable as operators under CERCLA when they actively participate in the conduct; and distinguishing this from the derivative liability that results from piercing the corporate veil).

Other courts of appeals have applied less onerous standards to the question of when a parent corporation may be liable for environmental contamination resulting from a subsidiary's activities, or when a shareholder may be held liable for contamination resulting from a corporation's activities. In the parent-subsidiary context, four courts of appeals have imposed CERCLA operator liability upon parent corporations by virtue of their active participation in and exercise of active control over the operations of their subsidiaries. See *Schiavone v. Pearce*, 79 F.3d 248, 255 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1220-25 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990). These courts have subjected parent corporations to direct liability based on their actual involvement in the operation of a subsidiary's facility.

In addition to the decisions of those courts, the Eighth and Ninth Circuits have indicated in *dicta* that a parent corporation may be held liable as an operator based on its control over a subsidiary's facility. See *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1091 (8th Cir. 1995); *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590 n.8 (1996) *opinion supplemented on other grounds*, 95 F.3d 1156 (9th Cir. 1996). The Seventh and Tenth Circuits have similarly resolved the analogous issue of whether individual corporate officers may be liable under CERCLA by applying a standard based on personal participation and actual control. See *Sydney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993). The Fourth Circuit has adopted a more expansive standard of operator liability, indicating that the mere "authority to control the facility" is sufficient for establishing operator liability. See *Nurad*,

*v. Rohm and Haas Co.*<sup>33</sup> and *United States v. Keystone Sanitation Co., Inc.*<sup>34</sup> present contrasting approaches to this issue. In *Keystone Sanitation*, the court judicially imposed CERCLA liability contrary to the express provisions in an asset purchase agreement.<sup>35</sup> In *Smithkline Beecham*, the court refused to shift liabilities that already had been assigned between the parties by contract.<sup>36</sup> Whether a court uses the expansive successor liability approach of *Keystone Sanitation* or the more economics-based approach of *Smithkline Beecham* may affect the issue of whether that court will transfer insurance coverage to a successor corporation, contrary to the provisions of the asset purchase agreement.

In *Smithkline Beecham*, the plaintiff, Smithkline Beecham, purchased the assets of Whitmoyer Laboratories from Rohm and Haas.<sup>37</sup> Rohm and Haas had purchased Whitmoyer from a predecessor corporation.<sup>38</sup> Whitmoyer Laboratories discharged hazardous substances into the environment during both Smithkline Beecham's and Rohm and Haas' ownership. However, most of the contamination occurred prior to Rohm and Haas' ownership.<sup>39</sup> In the asset purchase agreement between Smithkline Beecham and Rohm and Haas, Rohm and Haas agreed to indemnify Smithkline Beecham for liabilities arising out of "operation of the Business."<sup>40</sup> Rohm and Haas argued that the indemnification covered only

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*Inc. v. William E. Hooper & Sons, Co.*, 966 F.2d 837, 842 (4th Cir. 1992). The Petitioner's Brief in *United States v. CPC Int'l, Inc.*, No. 97-454, available in 1998 WL 25589 (U.S. Jan. 23, 1998) provides further amplification on these issues and the holdings in these cases.

As one commentator has put it, "[p]arties facing large environmental liabilities are trolling for solvent defendants with an increasingly wide net . . . [and] [p]arent corporations are one category of defendants that is more and more frequently being snared." Baicker-McKee, *supra* note 19, at 10450. The point is that the search for the proverbial deep pocket widens as the cumulative magnitude of the claims expands.

<sup>33</sup> 89 F.3d 154 (3d Cir. 1996).

<sup>34</sup> No. 1:CV-93-1482, 1996 U.S. Dist. LEXIS 13651 (M.D. Pa. Aug. 22, 1996).

<sup>35</sup> *Id.* at \*33.

<sup>36</sup> *Smithkline Beecham*, 89 F.3d at 164.

<sup>37</sup> *Id.* at 156.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 157.

liabilities arising during the time in which it owned Whitmoyer.<sup>41</sup> The district court did not resolve the scope of the indemnification and instead ruled that Rohm and Haas succeeded to the environmental liabilities arising before its ownership under the *de facto* merger doctrine.<sup>42</sup> The Third Circuit reversed the district court's decision.<sup>43</sup>

The Third Circuit reasoned that Smithkline Beecham and Rohm and Haas had an opportunity to allocate liabilities through the asset purchase agreement.<sup>44</sup> Because the indemnification expressly excluded liabilities that arose before Rohm and Haas' ownership, the court concluded that the parties had allocated such liabilities to Smithkline Beecham.<sup>45</sup> The court refused to impose successor liability on Rohm and Haas to the extent that it would contravene the provisions of the asset purchase agreement: "[W]here two sophisticated corporations drafted an indemnification provision that excluded the liabilities of a predecessor corporation, we will not use the *de facto* merger doctrine to circumvent the parties' objective intent."<sup>46</sup> The *Smithkline Beecham* court's holding reflects an Adam Smith, Posner-type approach, where the express intent of the parties is not disturbed by judicially imposing expansive principles of successor liability contrary to the provisions specifically allocating the liabilities in the asset purchase agreement.<sup>47</sup>

<sup>41</sup> *Id.* at 158.

<sup>42</sup> *Id.* at 162-64.

<sup>43</sup> *Id.* at 164.

<sup>44</sup> *Id.* at 163. The court stated, "the *de facto* merger doctrine will not shift environmental liabilities where the parties were in a position to protect themselves through a contractual provision." *Id.*

<sup>45</sup> *Id.* at 162.

<sup>46</sup> *Id.* at 163.

<sup>47</sup> The Third Circuit took a similar approach in *Alcoa v. Beazer East, Inc.*, 124 F.3d 551 (3d Cir. 1997). In *Alcoa*, the district court concluded that Beazer was liable as a successor because it characterized the business transaction that occurred in 1954 as a *de facto* merger. *Id.* at 555. The Third Circuit began its analysis with the proposition that "[a]lthough CERCLA is silent on the matter of successor liability, we have held that the same general rule of successor non-liability and the same exceptions to that rule, apply in the CERCLA context." *Id.* at 565 (citations omitted). Compare *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), *on reh'g*, 112 F.3d 88, 90 (1997), *petition for cert. pending*, 66 U.S.L.W. 3137 (U.S. July 23, 1997) (No. 97-241) (holding that federal common law governs the question of successor liability under CERCLA); with *Green*, *supra* note 22, at 911 (noting that both the EPA and United States Department of Justice have taken the position that federal courts should utilize federal common law to apply liberal theories of successor liability to CERCLA cases).

In *Keystone Sanitation*, the United States District Court for the Middle District of Pennsylvania employed expansive successorship doctrine to judicially impose CERCLA liability despite the express provisions of an asset purchase agreement.<sup>48</sup> Keystone Sanitation owned a landfill that the EPA placed on the National Priorities List (“NPL”).<sup>49</sup> The United States then pursued an action under CERCLA against Keystone Sanitation.<sup>50</sup> Keystone Sanitation in turn sought contribution from 180 third parties, including Waste Management, who might have been partly responsible for the contamination.<sup>51</sup> Waste Management was joined because it had purchased the assets of Keystone Sanitation after the landfill was placed on the NPL.<sup>52</sup> Knowing of the potential CERCLA liability, Waste Management insisted on including a broad indemnification provision in the asset purchase agreement.<sup>53</sup>

The *Keystone Sanitation* court declared that it must look beyond the agreement of the parties to ascertain the true nature of the transaction.<sup>54</sup> Looking to the facts, the court concluded that under both a *de facto* merger analysis and a continuity of enterprise analysis, Waste Management succeeded to the liabilities of Keystone Sanitation.<sup>55</sup> The court claimed that the *de factor* merger doctrine would

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Next, the court noted that if a purchaser expressly or impliedly assumes the liabilities of the transferor, the first of the traditional exceptions, the court need not “address the possible application of the *de facto* merger doctrine to this case because a more direct route to demonstrating . . . successor liability is apparent.” *Alcoa*, 124 F.3d at 565.

<sup>48</sup> United States v. Keystone Sanitation Co., No.1:Cv-93-1482, 1996 U.S. Dist LEXIS 13651, at \*28 (M.D. Pa. Aug. 22 1996).

<sup>49</sup> *Id.* at \*26.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at \*33. “The court’s use of the *de facto* merger doctrine is consistent with its obligation to ascertain the true nature of the transaction between the parties, despite their attempts to label the sale an asset purchase.” *Id.* at \*32.

<sup>55</sup> *Id.* at \*32. Waste Management also argued that imposing liability on Waste Management would “contravene CERCLA’s remedial purpose,” which is to “encourage clean-up by any responsible party.” *Id.* at \*34 (quoting *Smithkline Beecham Corp. V. Rohm and Haas Co.*, 89 F.3d 154 (3d Cir. 1996)). The court dismissed this argument, claiming that Waste Management should be a responsible



be meaningless if the parties could avoid its application by labeling a *de facto* merger an asset purchase.<sup>56</sup> Hence, despite the express indemnification provisions in the asset purchase agreement, the court allowed Keystone to include Waste Management as potentially liable for the environmental costs associated with the Keystone landfill.<sup>57</sup> Unlike the *Smithkline Beecham* court, the *Keystone Sanitation* court weighed the remedial purposes of CERCLA over the intent of the contracting parties.<sup>58</sup>

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party because it “reap[ed] the economic benefits of its predecessor’s use of hazardous disposal methods and, as the recipient of those benefits, is responsible for the cost of those benefits.” *Id.* at \*34 (internal quotes omitted) (quoting *United States v. Mexico Feed and Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992)). It is unclear whether Waste Management reaped any economic benefit from Keystone Sanitation’s “hazardous disposal methods.” Presumably, Keystone Sanitation’s retention of CERCLA liabilities was reflected in the purchase price: Waste Management likely paid more for the assets and indemnification than it would have to simply absorb Keystone’s liabilities. Thus, if Waste Management were held liable for clean-up costs, Keystone Sanitation would incur a windfall by benefitting from a higher purchase price and also potentially escaping liability.

However, the response to this argument is that application of the *de facto* merger doctrine will always contravene the express arrangements between the parties. The court addressed any potential windfall that Keystone Sanitation may acquire. The court stated that because the successor liability doctrines are “equitable in nature,” Keystone Sanitation would be primarily liable for clean-up costs. *Id.* at \*44 (citing *Acushnet Co. v. Coaters, Inc.*, 948 F. Supp. 128, 139 (D. Mass. 1996)). Again, however, the response to this position is it may not be wholly satisfactory to charge a party liable under CERCLA with the caveat that its liability may never translate into actual damages. The pressure to settle and the enormous litigation costs associated with a determination that a party is liable argues against a court deferring to a determination of liability under CERCLA. *See Acushnet Co. v. Coaters, Inc.*, 948 F. Supp. 128, 139 (D. Mass. 1996) (explaining the “economic realities” of complex environmental litigation).

<sup>56</sup> *Keystone Sanitation*, 1996 U.S. Dist LEXIS 13651, at \*33. “To permit parties to a *de facto* merger to exclude the transfer of certain enumerated liabilities would defeat the purpose of applying the doctrine in the first instance.” *Id.* at \*34.

<sup>57</sup> *Id.* at \*36.

<sup>58</sup> The *Keystone Sanitation* court did address the apparent conflict with Third Circuit precedent. *Id.* at \*32. The court essentially made a factual distinction between the two cases, asserting that *Smithkline Beecham* “does not preclude courts from finding the existence of a *de facto* merger in the presence of a liability exclusion clause in an agreement of sale.” *Id.* at \*33-34. The court explained that if it had determined that the sale was simply a purchase of assets, then Waste Management would not be liable under CERCLA. *Id.* at \*32-33. Waste Management’s counsel disagreed with the district court’s analysis, claiming that “the court has basically said that there is no way to protect yourself against liability from a company if you buy their assets and customer list” and that the court ignored Third Circuit precedent. *Corporate Successor Ruling ‘Very Negative,’ Vastly Expands Liability, Defense Lawyer Says*, 11 Toxic L. Rep. (BNA) 432 (Sept. 11, 1996) [hereinafter *Corporate Successor Ruling*]. An environmental attorney commenting on the *Keystone Sanitation* opinion stated that the court’s approach is consistent with the “practical concerns of the courts in getting everybody around

The question of whether a court will apply expansive product liability successorship doctrines to CERCLA cases, despite the clear language of an asset purchase agreement, can have an enormous impact on a corporation's bottom line. Consequently, if expansive successorship theories are applied to CERCLA cases, successors may seek to pass the costs on to others, including the predecessor's insurers. The next section will discuss the limited circumstances under which courts have transferred insurance coverage issued to a predecessor to a successor under the theory that insurance coverage follows the liability, not necessarily the policyholder.

#### IV. EXPANSIVE SUCCESSOR LIABILITY AND INSURANCE COVERAGE

A logical framework for consideration of the circumstances under which an asset purchaser may be entitled to an interest in an insurance policy issued to a predecessor begins with consideration of the manner of succession to that liability. The initial inquiry is whether the purchaser assumed the liability as a matter of contract, or whether a court imposed the liability on the purchaser as a matter of law, presumably for a public policy objective. Logic indicates that this inquiry, while not necessarily determinative, would be highly instructive as to whether a successor is entitled to proceeds from an insurance policy issued to a predecessor. For example, in the context of a merger, the successor assumes all the liabilities of the predecessor but also inherits all the benefits of insurance policies issued to the predecessor. In an asset purchase, logic and traditional contract principles leads one to conclude that if a purchaser expressly assumes a liability in the purchase agreement, and the predecessor retains all rights and interests in any insurance policies that may respond to those liabilities, then the purchaser is self-insured with respect to the assumed liability.<sup>59</sup> If the contract governs the manner of succession to a liability, then logic dictates that the contract likewise governs the parties' respective entitlement to an interest in the insurance policies of the predecessor. Logic also leads to the conclusion that if a court disregards the contractual allocation of liabilities in an asset purchase and judicially imposes a liability upon a purchaser, the purchaser may also have a right to access policies of insurance issued to its predecessor despite contractual language to the contrary.

In this era where some jurisdictions expansively apply successorship principles in product liability and other contexts, while others follow a more traditional, conservative approach, a court may or may not reach the logical result.

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the settlement table prior to any adjudication on the merits" in landfill cases. *Corporate Successor Ruling, supra*, at 433.

<sup>59</sup> See, e.g., *North River*, No. 94-1706, at 3-8 (W.D. Pa. Mar. 5, 1996).

Equity has been known, on occasion, to outweigh logic.<sup>60</sup> The following discussion analyzes the limited circumstances under which courts have permitted successors to obtain access to insurance policies issued to a predecessor.

#### A. *Northern Insurance*

In *Northern Insurance Co. of New York v. Allied Mutual Insurance Co.*,<sup>61</sup> the Ninth Circuit held that a the court imposes liabilities on a successor as a matter of law under the product-line exception, then the successor is entitled to insurance coverage related to those liabilities under policies issued to the predecessor. The dispute in *Northern Insurance* arose when Dawn Howard brought a product liability claim against the makers of California Coolers alleging that Dawn Howard's ingestion of California Coolers during her pregnancy resulted in birth defects to her child.

Brown-Forman Corporation purchased "substantially all" of the assets of California Coolers through an asset purchase agreement two years after the birth of the Howards' injured child.<sup>62</sup> Pursuant to the terms of the asset purchase agreement: (1) the predecessor contractually retained liability for and agreed to indemnify the successor against any product liability claims arising from the predecessor's pre-sale claims; and, (2) the successor did not contractually assume any obligation for pre-sale claims. Two years after the purchase, the Howards filed suit against Brown-Forman. Brown-Forman subsequently tendered the claim to its insurer, Northern Insurance. Northern Insurance, in turn, requested contribution for defense costs from California Cooler's insurer, Allied Mutual.<sup>63</sup> Eventually, the Howards voluntarily dismissed their claim. Northern Insurance then instituted a contribution action against Allied Mutual for the costs associated with the defense of the Howards' claim. The district court held that Brown-Forman was entitled to defense costs under the Allied Mutual policies by operation of law. On appeal, the Ninth Circuit affirmed the lower court's holding.

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<sup>60</sup> As lawyers have been saying for years, "[if] the facts are against you, argue the law. If the law is against you, argue the facts. If both the facts and the law are against you, obfuscate!" Anon.

<sup>61</sup> 955 F.2d 1353 (9th Cir. 1992). The case description contained in the following two paragraphs is taken from *Northern Ins.*, 955 F.2d 1355-58.

<sup>62</sup> In fact, one court and two scholars have equated the *Northern Insurance* transaction with a merger. See *Texaco A/S, S.A. v. Commercial Ins. Co.*, No. 90 Civ. 2722, 1995 WL 628997 (S.D.N.Y. Oct. 26, 1995); BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES, § 19.02 (1994).

<sup>63</sup> *Northern Ins.*, 955 F.2d at 1356.

In arriving at its decision, the Ninth Circuit first determined whether the insurance policies had transferred to Brown-Forman by contract, finding that the insurance policy was specifically excluded from the assets transferred to Brown-Forman in the asset purchase agreement.<sup>64</sup> The court next considered whether the right to defense costs under the Allied Mutual policies transferred by operation of law.<sup>65</sup>

The district court had found that the right to indemnity under the Allied Mutual policy transferred together with the liability imposed under the product-line rule of successor liability.<sup>66</sup> The district court reasoned that because the liability under the product-line rule transfers to the successor corporation irrespective of the arrangements in the assets purchase agreement,<sup>67</sup> then the right to indemnity under the non-transferred insurance policies ought to transfer as well.<sup>68</sup> However, on appeal the issue in *Northern Insurance* was Brown-Forman's right to defense costs,

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<sup>64</sup> *Id.* In the asset purchase agreement, the parties transferred all the assets of California Cooler, except those assets specifically excluded in the section "Excluded Assets." *Id.* Among the excluded assets were "any contracts that require consent to assign." *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* The *Northern Insurance* case was a diversity action and apparently California and Washington were the two states whose law might apply. *See generally id.* Both California and Washington observe the product-line exception, *see supra* note 25, so the choice of law question was not an issue. It is interesting to note, however, the court stated that California and Washington apply the product-line exception, "like many other jurisdictions." *Id.* On the contrary, only one other jurisdiction applies the rule: New Jersey. *See supra* note 25.

<sup>67</sup> California Cooler expressly retained all the liabilities after the transfer. *Id.* at 1355-56. Additionally, California Cooler agreed to indemnify for all claims arising from the liabilities. *Id.*

<sup>68</sup> *Id.* at 1357.

not indemnity.<sup>69</sup> Relying in part on an Eighth Circuit decision,<sup>70</sup> the *Northern Insurance* court concluded that Allied Mutual's exposure to risk was not significantly inflated by requiring it to defend claims that arose from the pre-sale conduct of California Cooler.<sup>71</sup> Thus, the court concluded "that the benefits of Allied's policies, including the right to a defense, transferred by operation of law

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<sup>69</sup> See *id.* The *Northern Insurance* court noted that the right to indemnity under the Allied policy was not precisely the issue. See *id.* Because the Howards never obtained a judgment, there was no need for indemnity, *per se.* See *id.* What was at issue in *Northern Insurance* was the right to defense costs. *Id.* However, the proposition that *Northern Insurance* is usually cited for is the maxim that the indemnity follows the liability rather than the policy holder. See, e.g., *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 151 (D.N.H. 1994). The *Northern Insurance* court seems to adopt this fairly controversial concept as if it is a given. See generally *Northern Ins.*, 955 F.2d at 1357. Essentially, the court asked, given that the successor is entitled to the right to indemnity under the policy, should the successor also be entitled further to defense costs? *Id.* Thus, the *Northern Insurance* court ultimately focused on whether Brown-Forman was entitled to defense costs, seemingly under the assumption that it was clearly entitled to the right to indemnity under the policies. See generally *id.* at 1358.

<sup>70</sup> *Ocean Accident & Guar. Corp. v. Southwestern Bell Tel. Co.* 100 F.2d 441 (8th Cir. 1939). *Ocean Accident* dealt with the assignability of insurance policies when the policies contained non-assignment provisions. *Id.* at 443. The *Ocean Accident* court reasoned that if the claim arose from pre-sale activity, then the purpose for a non-assignable provision was meaningless. *Id.* at 445; *Northern Ins.*, 955 F.2d at 1358.

The idea behind ignoring non-assignable provisions in such cases is that the liability arises before the sale of the assets; therefore the insurer's risk is not increased, because without the sale, it would have had to cover the occurrence anyway. *Ocean Accident*, 100 F.2d at 446; see also *Northern Ins.*, 955 F.2d at 1358. The assignment of the rights under the policy is in essence a "chase in action," similar to the right to a claim or debt. *Ocean Accident*, 100 F.2d at 446. The holder of the policy is not transferring the entire policy, but the right to collect on a particular claim. A chase in action is akin to assigning a debt to another party. The insured is entitled to payment under the policy because an occurrence triggering the policy occurs prior to the transfer, and the insured simply assigns this right to collect to another party. *Id.* By characterizing the claim as a "chase in action," the assignee is able to collect under the claim despite any provisions in the policy restricting the transfer of the policy. When the predecessor transfers its assets to the successor, the predecessor already is entitled to the proceeds from its policies. As a result, the right to collect the proceeds transfers to the successor with the rest of the assets rather than the policy itself.

<sup>71</sup> *Northern Ins.*, 955 F.2d at 1358. Allied Mutual argued that its exposure to risk did increase because the cost of defending a client was affected in part by the particular characteristics of the client. *Id.* The court dismissed this argument, stating that the insurer would experience increased cost only if there was a lack of cooperation on the part of the insured. *Id.* Because cooperation is a condition precedent under the policy, if the insured refused to cooperate, it would not be entitled to indemnity under the insurance policy. *Id.*

to Brown-Forman when Brown-Forman purchased substantially all of California Cooler's assets."<sup>72</sup>

*Northern Insurance* has been cited by courts and litigants alike for the proposition that when liabilities transfer by operation of law, insurance coverage correspondingly transfers by operation of law.<sup>73</sup> One view of *Northern Insurance* is that the court created an equitable rule to correspond to the sometimes harsh application of traditional contract principles. For example, some argue that because Allied Mutual agreed to cover liabilities arising during a specific time period, the fortuitous event of Brown-Forman purchasing California Cooler should not entitle Allied to the windfall of not having to insure an occurrence that it received premiums to cover.<sup>74</sup> In addition, as a policy matter, assigning the insurance coverage to the party who assumes product-line liability arguably facilitates the injured plaintiff's ability to recover damages. Proponents of the *Northern Insurance* decision would cite such arguments to support the court's holding.

However, there are alternative interpretations of the *Northern Insurance* holding. First, the issue in *Northern Insurance* was whether Brown-Forman was entitled to defense costs *in addition* to indemnity.<sup>75</sup> Essentially, the court's inquiry was focused on whether the defense costs increased Allied Mutual's exposure to risk, not whether the policies were transferred by operation of law.<sup>76</sup> The *Northern Insurance* court at no time discussed the merits of a rule that insurance coverage follows the liability by operation of law. Rather, the court simply accepts without

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., *B.S.B. Diversified Co. v. Am. Motorists Ins. Co.*, 947 F. Supp. 1476, 1481 (W.D. Wash. 1996); cf. *General Refractories Co. v. Travelers Ins. Co.*, Nos. CIV. A. 88-2167, CIV. A. 88-250, available in 1995 WL 634451 (E.D. Pa. Oct. 27, 1995); *Quemetco Inc. v. Pacific Auto. Ins. Co.*, 29 Cal. Rptr. 2d 627, 629 (Cal. Ct. App. 1994) (criticizing *Northern Insurance* to the extent that the Ninth Circuit purported to be applying California law, and declining to extend the rule to claims arising from environmental liability).

<sup>74</sup> See *General Refractories*, 1995 WL 634451, at \*5 n.10 (addressing the windfall argument).

<sup>75</sup> See *Northern Ins.*, 955 F.2d at 1357.

<sup>76</sup> See generally *id.* at 1358. Indeed, the court's entire discussion centers around Allied Mutual's potentially increased exposure to risk. See *id.* After discussing the holding in *Ocean Accident*, the court states, "The Ocean Accident court did not limit its holding to the right to indemnity. It held that Southwestern Bell was entitled to all the rights under the policy, including the right to a defense." *Id.* (citing *Ocean Accident & Guar. Corp. v. Bell Tel. Co.*, 100 F.2d 441, 445 (8th Cir. 1939)).

discussion the district court's determination that "this right to indemnity followed the liability rather than the policy itself."<sup>77</sup>

Second, the *Northern Insurance* can be seen as a limited holding that applies only to the factual situation presented in that case. In *Northern Insurance*, Brown-Forman was entitled to indemnity under the asset purchase agreement.<sup>78</sup> Hence, the insurance benefits followed the party that was entitled to indemnity, in that case Brown-Forman rather than California Cooler. In situations where the successor does not have a right to indemnity, *Northern Insurance* may not apply. Likewise, the case would not seem logically to apply to circumstances where a party assumes liability in contract, rather than through an application of the product-line exception.<sup>79</sup> Thus, a change in the facts of *Northern Insurance* could potentially change the result the court reached.<sup>80</sup>

In addition to these varying interpretations of the *Northern Insurance* holding, the precedential value of this case may also be in question. In the Ninth Circuit, California appellate courts have refused to apply its principles to other factual circumstances,<sup>81</sup> and have rejected the Ninth Circuit's reasoning outright.<sup>82</sup> On the other hand, the decision has been embraced by a district court applying Washington law.<sup>83</sup>

<sup>77</sup> *Id.* at 1357.

<sup>78</sup> *Id.* at 1355. An asset purchase agreement will typically contain cross-indemnification provisions, where the seller will agree to indemnify the purchaser for all liabilities not transferred to the purchaser, and the purchaser will indemnify the seller for all liabilities transferred to the purchaser. In *Northern Insurance*, California Cooler retained all the liabilities, and therefore the product liability was not a contractually assumed liability. *Id.* Thus, Brown-Forman was entitled to indemnity from California Cooler for any judgment arising from the non-assumed liability.

<sup>79</sup> See Memorandum Opinion at 16, *North River*, No. 94-9706 (W.D. Pa. Mach 5, 1996).

<sup>80</sup> See *General Refractories Co. v. Travelers Ins. Co.*, Nos. CIV. A. 88-2167, CIV. A. 88-250, available in 1995 WL 634451, at \*6 n.14 (E.D. Pa. Oct. 27, 1995) (opining that in *Northern Insurance* "if the liability would not have transferred by operation of law, the Court believes, therefore, that the rights to the insurance coverage would not have been transferred by operation of law").

<sup>81</sup> See *Quemetco Inc. v. Pacific Auto. Ins. Co.*, 29 Cal. Rptr. 2d 627, 629-30 (Cal. Ct. App. 1994).

<sup>82</sup> See *General Accident Ins. Co. v. Superior Court of Alameda County*, 64 Cal Rptr. 2d at 785 (Cal. Ct. App. 1997).

<sup>83</sup> See *B.S.B. Diversified Co. v. Am. Motorists Ins. Co.*, 947 F. Supp. 1476, 1481 (W.D. Wash. 1996).

These concerns are especially important when the holding of *Northern Insurance* is applied to factual situations different from the facts of that case. For instance, in the *North River* case discussed earlier, the court found that when KII assumed the liabilities pursuant to the asset purchase agreement, insurance coverage did not correspondingly apply by operation of law.<sup>84</sup> Similarly, parties that rely on the policy reasons behind *Northern Insurance* in an environmental liability setting must thoroughly contemplate whether those principles apply. The following section explores the applicability of the expansive successorship doctrines set forth in *Northern Insurance* in the context of liability under CERCLA.

### B. *Expansive Successorship Doctrines and Insurance Coverage Under CERCLA*

The leading case that applied the principles of *Northern Insurance* in an environmental context is *Total Waste Management Corporation v. Commercial Union Insurance*.<sup>85</sup> *Total Waste Management* arose when Kleen Laundry and Dry

<sup>84</sup> Memorandum Opinion at 16, *North River*, No. 94-9706. The *Northern Insurance* court also did not consider the impact of transferring insurance coverage on the holder of the policy. This is because in *Northern Insurance* the predecessor corporation, California Cooler, presumably was no longer viable. One of the conditions of applying the product-line exception is that the predecessor corporation must no longer be viable. See, e.g., *Leo v. Kerr-McGee Chem. Corp.*, 37 F.3d 96, 99-100 (3d Cir. 1994) (“[I]f the selling corporation remains a viable entity able to respond in damages to the injured party, a successor acquiring a product line will not be liable for injuries caused by the predecessor’s product . . .”) (citing *Lapollo v. General Electric Co.*, 664 F. Supp. 178 (D.N.J. 1987)). The destruction of the injured plaintiff’s claim against the predecessor corporation is one of the basic reasons for imposing successor liability in the first place. However, even though the predecessor corporation may no longer be viable, another corporation may be the present holder of the policy and may have an interest in the benefits of the policy.

For instance, in *Northern Insurance* if California Cooler remained viable after the sale to Brown-Forman, and another corporation – say, Corporation X – subsequently purchased the remainder of California Cooler’s assets, including the insurance policy with Allied Mutual, then Corporation X would be the holder of the policy. If California Cooler subsequently went bankrupt, California Cooler would no longer be viable, but Corporation X would have an interest in the policy, an interest that it paid for in the asset purchase agreement. If the benefits under the policy were transferred to Brown-Forman, Corporation X would lose the benefits of the insurance policy through no fault of its own. The question then becomes, between these two corporations, who is entitled to the insurance coverage, provided that each has a legitimate right to its benefits? On the one hand, Brown-Forman may be entitled to the benefits because it assumed liabilities contrary to the asset purchase agreement. On the other hand, the insurance policy is an asset, see *Nat’l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. City Saving F.S.B.*, 28 F.3d 376, 384 (3d Cir. 1994), and Brown-Forman would be acquiring by judicial fiat – at the expense of Corporation X – what it could not obtain in contract negotiations. Thus, when there is a viable corporation presently holding the insurance policy, the holding of *Northern Insurance* is less instructive.

<sup>85</sup> 857 F. Supp. 140 (D.N.H. 1994).



Cleaning Services sought contribution from Total Waste Management for costs it incurred when responding to releases of hazardous substances.<sup>86</sup> After the district court determined that Total Waste Management potentially was a successor to the liabilities of various parties that contributed to the release of hazardous substances,<sup>87</sup> Total Waste Management filed a declaratory action to determine whether it was entitled to coverage for the clean-up costs under various insurance policies.<sup>88</sup>

In the underlying action, *Kleen Laundry & Dry Cleaning Services, Inc. v. Total Waste Management Corp.*,<sup>89</sup> the plaintiff alleged that Total Waste Management was a potentially responsible party under CERCLA as the successor in interest to three other companies, including George West and Sons (“George West”). Total Waste Management moved for summary judgment arguing, *inter alia*, that as a matter of law it was not a successor to George West.

The court began its successor liability analysis in *Kleen* by noting that under the “settled common-law rule,” a successor does not assume liabilities of a predecessor unless (1) the successor contractually assumes the liabilities, (2) the transaction is a “de facto merger,” (3) the successor may be considered a “mere continuation” of the predecessor, or, (4) the transaction was fraudulent.<sup>90</sup> The plaintiff contended that Total Waste Management was the successor to George West based on either the “de facto merger” or “mere continuation” exceptions to the general rule of non-liability for successor corporations. After reviewing the requirements of these exceptions, the court addressed the remedial policy considerations behind CERCLA, and concluded, “[S]trict adherence to the parochial requirements [of the de facto merger and mere continuation exceptions] in CERCLA cases may in some instances conflict with the remedial policies underlying [CERCLA]. Therefore, the court will adopt a ‘common sense rather than an overly restricted look at the corporate transfer.’”<sup>91</sup> The court, therefore,

<sup>86</sup> *Id.* at 142; *see also* *Kleen Laundry & Dry Cleaning Services, Inc. v. Total Waste Management Corp.*, 817 F. Supp. 225 (D.N.H. 1993).

<sup>87</sup> *Kleen Laundry*, 817 F. Supp. at 234.

<sup>88</sup> *Total Waste Management*, 857 F. Supp. at 142.

<sup>89</sup> 817 F. Supp. 225 (D.N.H. 1993). Both *Total Waste Management* and *Kleen Laundry* were decided by Judge DeClerico.

<sup>90</sup> *Id.* at 229 (citations omitted).

<sup>91</sup> *Kleen Laundry*, 817 F. Supp. at 233 (citing *United States v. Distler*, 741 F. Supp. 637, 642 (W.D. Ky. 1990)).

concluded that there was a genuine issue of fact as to whether ““in substance, if not in form,” [Total Waste Management] is liable as the successor corporation to George West.”<sup>92</sup>

While Total Waste Management’s summary judgment motion was pending in *Kleen*, Total Waste Management filed a separate declaratory judgment action claiming that if it succeeded to the liabilities of George West,<sup>93</sup> it should also succeed to the rights of George West under insurance policies issued to George West.<sup>94</sup> To determine whether Total Waste Management was entitled to the benefits of George West’s policies, the court referred back to the district court’s earlier determination that Total Waste Management could be liable as a “successor corporation.”<sup>95</sup> In response to Total Waste Management’s claim, George West’s insurance company, Maine Bonding, argued that the rule from *Northern Insurance* should not be applied to its case for two reasons.<sup>96</sup> First, Maine Bonding argued that Total Waste Management was not a successor in liability and therefore was not entitled to George West’s insurance policies.<sup>97</sup> The *Total Waste Management* court rejected this argument, asserting that the *Kleen Laundry* court had already determined that Total Waste Management could be liable under the *de facto* merger doctrine.<sup>98</sup> Second, Maine Bonding claimed that the principles underlying the

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<sup>92</sup> *Kleen Laundry*, 817 F. Supp. at 234 (citing *Mexico Feed and Seed Co.*, 980 F.2d 478, 488 (8th Cir. 1992)).

<sup>93</sup> The *Kleen Laundry* court found that Total Waste Management may be a successor in liability to George West. *Kleen Laundry*, 817 F. Supp. at 234.

<sup>94</sup> *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 150 (D.N.H. 1994).

<sup>95</sup> *Id.* at 152 (citing *Kleen Laundry*, 817 F. Supp. at 234).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* In discussing *Northern Insurance*, the *Total Waste Management* court concluded, “a material issue of fact exists as to whether TWM’s [Total Waste Management’s] purchase of certain assets from George West [the predecessor] is really the purchase of George West’s entire business and as a result, TWM is a corporate successor to George West.” *Id.* In *Kleen Laundry*, the court did not actually find that Total Waste Management was a successor to George West, only that a genuine issue of material fact existed whether the transaction was actually a *de facto* merger. See *Kleen Laundry*, 817 F. Supp. at 232-33. Total Waste Management argued that there could not be a *de facto* merger because George West continued as a separate corporate entity after the transaction, retaining some of its assets and all of its liabilities. *Id.* One can only speculate what the transaction between Total Waste Management and George West looked like, but it is likely that Total Waste Management took all of

decision were exclusive to product liability claims, and therefore should not be applied in the environmental context.<sup>99</sup> The *Total Waste Management* court spent little time making the leap and applied *Northern Insurance* to environmental cases.<sup>100</sup> The court stated, “the court finds the Ninth Circuit’s reasoning is persuasive authority in deciding whether a potential corporate successor is entitled to coverage under its predecessor’s insurance policy for a risk occurring before the transfer of assets.”<sup>101</sup>

The Western District of Washington also applied the *Northern Insurance* rule in an environmental context in *B.S.B. Diversified Co., Inc. v. American Motorists Insurance Co.*<sup>102</sup> In this case, B.S.B. Diversified (“BSB”) purchased the assets of Criton Technologies (“Criton”).<sup>103</sup> In the asset purchase agreement, BSB agreed to assume all of Criton’s liabilities.<sup>104</sup> After the purchase, property formerly held by Criton became the source of environmental liability.<sup>105</sup> BSB tried then to access the insurance policies issued to Criton that potentially responded to the environmental liabilities.<sup>106</sup> The insurance companies argued that BSB had no

the valuable assets, and left the liabilities and the least valuable assets with George West. By taking all the valuable portions of the business and leaving all the liabilities and valueless assets with George West, the court could have determined that a *de facto* merger took place, despite George West’s continued corporate existence.

<sup>99</sup> *Total Waste Management*, 857 F. Supp. at 152.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*; accord *Texaco v. Commercial Ins. Co. of Newark*, No. 90 CIV. 2722 (JFK), available in 1995 WL 628997, at \*6 (S.D.N.Y. 1995). In *Texaco*, the court applied the rule from *Northern Insurance* to a merger situation rather than a product-line situation. *Id.* The court actually characterized *Northern Insurance* as holding “that the surviving corporation of a corporate merger is entitled to insurance coverage under policies issued to the merger corporation for claims arising out of the pre-acquisition activities of the merged corporation.” *Id.* (emphasis added). The *Texaco* court focused on whether the insurer’s risk is increased by allowing the merged corporation to access a policy. *Id.* The court used the discussion in *Northern Insurance* to justify the transfer of a policy to the merged corporation despite an anti-assignment clause in the policy. *Id.*

<sup>102</sup> 947 F. Supp. 1476 (W.D. Wash. 1996).

<sup>103</sup> *Id.* at 1478.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Actually, the policies were issued to Criton’s predecessor. *Id.* at 1479. However, the insurers conceded that the policies transferred from Criton’s predecessor to Criton. *Id.*

insurable interest in the policies: BSB neither acquired an interest in the policies as a matter of contract nor by operation of law.<sup>107</sup> The court rejected the insurance companies' first contention, finding that the policies were assigned to BSB as a matter of contract in the asset purchase agreement.<sup>108</sup> However, instead of deciding the case on that issue alone, the court stated that in the alternative, the policies also transferred by operation of law.<sup>109</sup> The court stated, "this Court would extend the holding in *Northern Insurance* to a successor responsible for environmental cleanup where the events creating liability occurred prior to the transfer of liability."<sup>110</sup>

While both *B.S.B. Diversified* and *Total Waste Management* purport to apply the rule from *Northern Insurance*, both cases represent an expansion of the *Northern Insurance* holding. *Total Waste Management* expands *Northern Insurance* from the product liability area to environmental liabilities.<sup>111</sup> By applying *Northern Insurance* to a completely different set of facts and a different statutory scheme, *Total Waste Management* arguably expands the *Northern Insurance* holding. Most notably, in *Total Waste Management* there was not a third party tort victim, yet the court still analogized CERCLA liability to product liability and applied the rule from *Northern Insurance*.

Arguably, there are similar policy concerns in both *Northern Insurance* and *Total Waste Management* – both cases transferred insurance when the successor corporation was assigned liability contrary to the provisions of the asset purchase agreement.<sup>112</sup> However, the *B.S.B. Diversified* court arguably expanded the *Northern Insurance* holding much further. In *B.S.B. Diversified*, the successor corporation contractually assumed the underlying liability.<sup>113</sup> Thus, the environmental liability at issue was not judicially imposed on BSB as it was on

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1480.

<sup>109</sup> *Id.* at 1481.

<sup>110</sup> *Id.*

<sup>111</sup> *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 152 (D.N.H. 1994).

<sup>112</sup> Compare *Northern Ins. Co. of New York v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1355-56 (9th Cir. 1992) and *Total Waste Management*, 857 F. Supp. at 142-43.

<sup>113</sup> *B.S.B. Diversified*, 947 F. Supp. at 1478.

Total Waste Management.<sup>114</sup> The liability transferred as the parties had contractually agreed in *B.S.B. Diversified*.<sup>115</sup> The suggestion in *B.S.B. Diversified* that the insurance policies would be transferred as a matter of law when the liability is imposed certainly would be an extension of the *Northern Insurance* holding.<sup>116</sup>

Furthermore, BSB was in a position to protect itself from the liability during the asset purchase transaction.<sup>117</sup> When the court indicated that it would unravel this agreement, it seemingly ignored the fact that the parties should have negotiated the issue *ex ante* in the asset purchase agreement. Thus, when the court indicated that the insurance policies could transfer by operation of law, it was disregarding the negotiation of two sophisticated parties, bargaining at arms length.

In *North River*, the district court reached a result opposite to *B.S.B. Diversified*.<sup>118</sup> Instead, in recognition of freedom of contract, the court held the parties to the contractual arrangement they had agreed upon pursuant to the asset purchase agreement.<sup>119</sup> KII had agreed to assume the liability but did not bargain for the insurance policies to cover the potential liability.<sup>120</sup> The court did not choose to take proceeds from insurance policies from their holder and transfer them to KII.<sup>121</sup>

*North River* and *B.S.B. Diversified* represent two completely different approaches to the issue of insurance coverage and successor liability.<sup>122</sup> The extent

<sup>114</sup> Compare *B.S.B. Diversified*, 947 F. Supp. at 1478 and *Total Waste Management*, 857 F. Supp. at 152.

<sup>115</sup> See generally *B.S.B. Diversified*, 947 F. Supp. at 1478-79.

<sup>116</sup> See generally *id.* at 1478. To be accurate, the court also found that the policies transferred by contract. *Id.* at 1480. However, the court found in the alternative that the policies transferred by operation of law. For the court to find that the policies transferred by operation of law, it had to assume, for the sake of argument, that the policies did *not* transfer contractually. Thus, the discrete issue whether the policies transfer by operation of law necessarily assumes that the parties did not transfer the policies via the asset purchase agreement.

<sup>117</sup> See generally *id.*

<sup>118</sup> Compare Memorandum Opinion at 17, *North River*, No. 94-1706 (W.D. Pa. Mar. 5, 1996) and *B.S.B. Diversified*, 947 F. Supp. at 1481.

<sup>119</sup> Memorandum Opinion at 17, *North River*, No. 94-1706.

<sup>120</sup> *Id.* at 8.

<sup>121</sup> *Id.* at 16.

<sup>122</sup> Compare *id.* at 16 and *B.S.B. Diversified*, 947 F. Supp. at 1481.

to which the involvement and viability of the predecessor was an unspoken factor to the courts is unknown. In *North River*, the court considered the interest of KCI, the holder of the policy.<sup>123</sup> In *B.S.B. Diversified*, the court never considered the impact of transferring an insurance policy from a party that valued the policy as an asset.<sup>124</sup> Indeed, Criton was not even a party to the action.<sup>125</sup> But in *North River*, KCI, which had an interest in the insurance policy, intervened as an interested party.<sup>126</sup> Thus, from a practical standpoint, if a corporation holding the insurance policy remains viable, the dynamics of transferring the policy may change. If the policy holder is no longer engaged in a business or managing historical liabilities that may be insured under the policy, courts may equitably, but perhaps illogically, be more willing to transfer the policy. However, if a viable corporation is holding the insurance policy, then a court may be less likely to undo the arrangement between the parties and allow the successor an unbargained-for benefit of access to the predecessor's insurance policies.

Aside from considering the interests of a viable corporation that presently holds the insurance policies, courts may decline to apply the *Northern Insurance* rationale altogether.<sup>127</sup> For instance, in *Quemetco Inc. v. Pacific Automobile Insurance Co.*<sup>128</sup> the California Court of Appeals declined to apply *Northern Insurance* to environmental liability.<sup>129</sup> *Quemetco* arose when Quemetco Inc. ("Quemetco") sought indemnity from several insurers that had issued insurance policies to Western Lead Products Company ("Western Lead").<sup>130</sup> Western Lead

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<sup>123</sup> See generally Memorandum Opinion at 16-17, *North River*, No. 94-1706.

<sup>124</sup> See *B.S.B. Diversified*, 947 F. Supp. at 1481.

<sup>125</sup> See generally *id.* at 1477.

<sup>126</sup> See generally Memorandum Opinion at 4, *North River*, No. 94-1706. If KII was able to access KCI's insurance policies, the amount of coverage available to respond to KCI's claims would be reduced. See *General Refractories Co. v. Travelers Ins. Co.*, Nos. CIV. A. 88-2167, CIV. A. 88-250, available in 1995 WL 634451, at \*5 (E.D. Pa. Oct. 27, 1995) ("Since Great Lakes continued it[s] operations after the sale of the GLCC entities, any transfer of insurance rights would have effectively reduced, at Great Lakes' expense, the coverage available for the continued operations.").

<sup>127</sup> See, e.g., *General Accident Ins. Co. v. Superior Court of Alameda County*, 64 Cal Rptr. 2d 781, 785 (Cal. Ct. App. 1997).

<sup>128</sup> 29 Cal. Rptr. 2d 627 (Cal. Ct. App. 1994).

<sup>129</sup> *Id.* at 632.

<sup>130</sup> *Id.* at 628. Quemetco purchased a portion of Western Lead's assets. *Id.* at 627.

had shipped hazardous wastes to the Stringfellow Acid Pits in Glen Avon, California.<sup>131</sup> Quemetco, among others, was sued under CERCLA and various state laws for the contamination of the Stringfellow Pits.<sup>132</sup>

The *Quemetco* court criticized the Ninth Circuit's characterization of California law in *Northern Insurance*.<sup>133</sup> However, rather than rejecting *Northern Insurance* outright, the majority in *Quemetco* chose instead to distinguish *Northern Insurance*.<sup>134</sup> The court noted that the product liability in *Northern Insurance* transferred by operation of law to the successor corporation Brown-Forman.<sup>135</sup> The court then distinguished *Quemetco* by stating that because CERCLA had not been passed when Quemetco purchased the assets of Western Lead, the CERCLA liability could not have "passed as a matter of law . . . as no such liability existed at that time."<sup>136</sup> The court then held that "the product-line successor liability rule should not be applied to transfer the insurance policy from [Western Lead] to [Quemetco] as a matter of law."<sup>137</sup>

The *Quemetco* court seized on the portion of *Northern Insurance* that discussed the transfer of insurance policies notwithstanding anti-assignment provisions.<sup>138</sup> The *Quemetco* court reasoned that because CERCLA had not been

<sup>131</sup> *Id.* at 628.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 629-30. The court claimed that the Ninth Circuit failed to consider two relevant cases, which should have provided guidance to the court in *Northern Insurance*. *Id.*

<sup>134</sup> *See generally id.* at 631.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See generally id.* The *Northern Insurance* court relied on an Eighth Circuit decision that held insurance coverage transferred despite an anti-assignment provision in the policy. *See Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1357-1358 (9th Cir. 1992); *see also Ocean Accident & Guar. Corp. v. Southwestern Bell Tel. Co.*, 100 F.2d 441, 446 (8th Cir. 1939). The Eighth Circuit reasoned that the liability arose prior to the transfer, and therefore the predecessor had a right to the insurance benefits before the transfer. *See Ocean Accident*, 100 F.2d at 446. Consequently, the benefits under the policies transferred as a "chase in action" rather than the policy itself transferring to the successor corporation. *Ocean Accident*, 100 F.2d at 446. *See also supra* note 70.

passed into law, the “chose in action”<sup>139</sup> did not transfer at the time of the asset sale.<sup>140</sup> Thus, the *Quemetco* court held that the rule from *Northern Insurance* should not be expanded from product liability cases to apply to claims that arise under CERCLA.<sup>141</sup>

The majority decision received sharp criticism from the dissent in *Quemetco*.<sup>142</sup> The dissent rejected the majority’s reason for distinguishing *Quemetco* from *Northern Insurance*: “What is relevant is whether the predecessor’s acts occurred before the sale, not whether they matured into cognizable causes of

<sup>139</sup> *Ocean Accident*, 100 F.2d at 446. See *supra* note 70 for further discussion of a “chose in action.”

<sup>140</sup> *Quemetco*, 29 Cal. Rptr. 2d at 631. The court did not discuss whether the insurer’s risk would increase if the policies were transferred by operation of law. The only attention the court paid to the insurer’s increased risk was in the context of the rationale behind consent to assign provisions. See *id.* at 632; but see Delmar R. Ehrich & Michael A. Ponto, *Insurance Coverage for Corporate Successors Under CERCLA*, 7 ENVTL. CLAIMS J. 125, 130-32 (1994) (claiming that the *Quemetco* court rested part of its holding on the fact that the insurer would be faced with increased risk).

*Northern Insurance* was primarily based on the idea that the insurer’s risk is not enlarged by making it cover liabilities that it already contracted to cover. See generally *Northern Ins.*, 955 F.2d at 1358. Courts have already decided that general comprehensive liability policies cover CERCLA liability. See, e.g., *B.S.B. Diversified*, 947 F. Supp. at 1479 (citing *Boeing Co. v. Aetna Casualty & Sur. Co.*, 784 P.2d 507 (Wash. 1990)). Consequently, one can argue that the insurance company’s risk is not increased by transferring the benefits under the policies when successor liability is applied under CERCLA – at least no more than it would be in the product liability area. The *Quemetco* court did not respond to this argument nor explain whether applying the rule from *Northern Insurance* in the environmental context would increase the insurer’s risk more than it would in the product liability area.

<sup>141</sup> *Quemetco*, 29 Cal. Rptr. 2d at 631. *Quemetco* interjects a temporal aspect into the inquiry whether insurance coverage transfers when successor liability is imposed under CERCLA. The court held that because CERCLA was not law at the time of the transfer, no liability could have passed to *Quemetco*. *Id.* The decision leaves the door open for future situations where the asset purchase occurred after the passage of CERCLA.

The dissent from *Quemetco* characterized the majority decision as an outright rejection of *Northern Insurance*. See *id.* at 632. However, the majority opinion seems careful to avoid directly criticizing the Ninth Circuit. See generally *id.* at 629-31. The consequence of this cordial approach is that the decision is open to an interpretation that insurance coverage may be transferred if successor liability is imposed under CERCLA and the asset purchase occurred after CERCLA was signed into law. See generally *id.* at 631; but see *General Accident Ins. Co. v. Superior Court of Alameda County*, 64 Cal Rptr. 2d 781, 788 (Cal. Ct. App. 1997) (rejecting *Northern Insurance* because “[t]he law can impose tort liability on a successor corporate entity; it cannot impose a contractual insurance relationship between an insurer and a stranger to the insurance contract”). The *General Accident* case is a recent California Court of Appeals decision and may more accurately reflect California law on the subject; although, *General Accident* was decided by a different appellate district than was *Quemetco*.

<sup>142</sup> See *Quemetco*, 29 Cal. Rptr. 2d at 632.



action before that time.”<sup>143</sup> Like the court in *Northern Insurance*, the dissent in *Quemetco* focused on whether the insurer’s risk is increased by transferring the coverage to the successor corporation.<sup>144</sup> At the end of its discussion, the dissent concluded that *Northern Insurance* was rightly decided and that the principle that “insurance benefits follow liability in ‘successor liability’ situations by operation of law [and] . . . this principle applies to all ‘successor liability’ situations[,] not just ‘product liability cases’ . . . .”<sup>145</sup>

*Total Waste Management, B.S.B. Diversified*, and *Quemetco* all represent varying approaches to the issue of transferring insurance coverage by operation of law when product liability successorship doctrines are applied to CERCLA liabilities.<sup>146</sup> *B.S.B. Diversified* is the most liberal application of the *Northern Insurance* rule, transferring the insurance coverage to the successor corporation despite the fact that the successor corporation contractually assumed the

<sup>143</sup> *Id.* at 635.

<sup>144</sup> See generally *id.* at 633-35. The dissent reconciled the two cases that the majority claimed *Northern Insurance* failed to consider. *Id.* at 632-33. One of the opinions cited by the majority was authored by the dissenting judge. *Id.* at 632. The first case, *Oliver Machinery Co. v. United States Fidelity & Guar. Co.*, 232 Cal. Rptr. 691 (Cal. Ct. App. 1986), the dissent argued, was not on-point because it discussed the construction of the term “additional insured” in an insurance policy and did not decide whether insurance coverage transfers by operation of law. *Quemetco*, 29 Cal. Rptr. 2d at 633. The second case, *Penasquitos Inc. v. Superior Court*, 812 P.2d 154 (Cal. 1991), held that a plaintiff may maintain a cause of action against a dissolved corporation, and further that the dissolved corporation’s insurance company may be required to defend the claim. *Quemetco*, 29 Cal. Rptr. 2d at 633. The dissent argued that the *Penasquitos* decision could actually be construed to support the plaintiff’s position in *Quemetco*. *Id.* The dissent claimed that “there is no inequity in requiring the predecessor corporation’s insurer to cover the successor corporation for harm the predecessor caused while in control of the operation.” *Id.* at 633. Thus, the dissent claimed that neither of the two cases cited by the majority undermined the *Northern Insurance* holding. *Id.*

<sup>145</sup> *Quemetco*, 29 Cal. Rptr. 2d at 636.

<sup>146</sup> Compare *B.S.B. Diversified Co., Inc. v. Am. Motorists Ins. Co.*, 947 F. Supp. 1476, 1481 (D.C. Cir. 1996) (holding that insurance benefits follow liability rather than the holder of the policy despite the contractual assumption of liability by the successor corporation); *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 151 (D.N.H. 1994) (holding that when liability is judicially imposed on a successor corporation contrary to the asset purchase agreement, the successor corporation is entitled to the benefits of the predecessor corporation’s insurance policies) and *Quemetco*, 29 Cal. Rptr. 2d at 631 (declining to transfer the benefits of an insurance policy to the successor corporation when the asset purchase agreement does not transfer the policies to the successor corporation). See also *EM Indus. Inc. v. Birmingham Fire Ins. Co. of Pennsylvania*, 529 N.Y.S.2d 121, 123 (N.Y. App. Div. 1988) (finding that the successor corporation was entitled to insurance benefits when it bought the “business and properties” from the predecessor corporation).

liabilities.<sup>147</sup> *Total Waste Management* is closer, in a factual context, to the decision in *Northern Insurance*: in both cases the liability was imposed on the successor corporation contrary to the express provisions of the asset purchase agreement.<sup>148</sup> Finally, in *Quemetco*, the court seemingly rejects the premise that insurance coverage follows the liability rather than the holder of the policy when the policy is not expressly transferred in the asset purchase agreement.<sup>149</sup>

The cases discussed above do not focus on any of the distinctions between CERCLA claims and product liability claims, seeming to suggest that the analysis from *Northern Insurance* either (1) may be applied equally in an environmental case<sup>150</sup> or (2) may be rejected based on its fundamental principle that the policy follows the liability, with very little attention paid to the underlying policy differences between CERCLA and product liability claims.<sup>151</sup> Courts have yet to identify the differing policy considerations behind product liability and CERCLA claims in supporting or rejecting the transfer of insurance coverage to corporations found to be successors to liability under product liability successorship doctrines. Some argue that the policy considerations behind the two types of claims suggests that the issue should be considered similarly, while others claim that the policy considerations underlying the two types of claims are very different. In many respects, the similarity or difference is dependent upon the facts of the case and one's point of view. Should fundamental contract principles be eroded to find a "deep pocket" to make whole a personally injured plaintiff? Should corporate restructuring be permitted to leave an injured party without any recourse? Should courts be in the business of rewriting contracts to protect parties that failed to receive those protections as part of the negotiating process? Do the astronomical amounts at stake in environmental insurance coverage cases alter the equitable

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<sup>147</sup> See generally *B.S.B. Diversified*, 947 F. Supp. at 1481.

<sup>148</sup> Compare *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1358 (9th Cir. 1992) and *Total Waste Management*, 857 F. Supp. at 152.

<sup>149</sup> See *Quemetco*, 29 Cal. Rptr. 2d at 631; see also *General Accident Ins. Co. v. Superior Court of Alameda County*, 64 Cal. Rptr. 2d 781, 788 (Cal. Ct. App. 1997).

<sup>150</sup> See *Total Waste Management*, 857 F. Supp. at 151.

<sup>151</sup> Admittedly, the *Quemetco* court claimed that the *Northern Insurance* decision did not apply to CERCLA claims. *Quemetco*, 29 Cal. Rptr. 2d at 631. However, as suggested by the dissent in *Quemetco*, it seems that the majority's decision was based on a fundamental disagreement with the conclusion reached in *Northern Insurance*, not on any obvious distinction between CERCLA and product liability claims with respect to the transfer of insurance coverage. See generally *id.* at 631. Moreover, the only difference the majority noted was that CERCLA was not enacted at the time of the asset transfer. *Id.*

considerations? Should successorship issues be handled differently depending upon the type of plaintiff and the involvement of the plaintiff in the business relationship giving rise to the successorship claim? Will the business climate be adversely affected if uncertainty creeps into the validity of the allocation of liabilities and assets among the buyer and seller to an asset purchase agreements? Logic may yield one answer to these and similar questions, while public policy, practicality, and the facts and equities of a particular case may yield another.

## V. UNRESOLVED ISSUES

This Part discusses some of the issues which remain unresolved as courts continue to struggle with these complex and novel questions. Specifically, this Part discusses the following: (1) the structuring of asset purchase agreements, (2) “equitable arguments” that may be presented in litigation regarding these issues, and (3) insurance issues.

### A. *Structuring Asset Purchase Agreements*

In light of the cases discussed above wherein courts have arguably “re-written” asset purchase agreements and allowed a successor corporation to access the predecessor’s insurance policies, parties to asset purchase agreements may not enjoy the security that liabilities and the insurance benefits will remain with the parties as agreed to in the asset purchase agreement.<sup>152</sup> Outlined below are some ways in which purchasers and sellers involved in asset purchase agreements may react to this increasing uncertainty.

Purchasers may demand access to any insurance policies that correspond to the liabilities that the purchaser is contractually assuming. Conversely, if purchasers are not able to obtain the predecessor corporation’s insurance policies in the asset purchase, purchasers may attempt independently to acquire insurance coverage for CERCLA liabilities arising from historical operations of predecessor corporations.<sup>153</sup> In other words, as purchasers become cognizant of the results of

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<sup>152</sup> See, e.g., *Northern Ins.*, 955 F.2d at 1358; *B.S.B. Diversified*, 947 F. Supp. at 1481.

<sup>153</sup> One commentator claims that such insurance coverage is impossible to attain: “An attorney in the Underwriting Department of one of the leading firms selling these policies had never heard of the concept of environmental insurance coverage specifically for a predecessor’s operations.” Green, *supra* note 22, at 928-29 n.158 (citing Telephone Interview with James Goodman, Division Attorney, Pollution Department, Commerce and Industry Insurance Company (Sept. 1, 1992)). Today, however, in the era of Brownfields Redevelopment Programs, environmental insurance for historical operations is available in the marketplace. In fact, the United States Environmental Protection Agency (“USEPA”) has recently issued the results of a survey of eight major insurance companies that offer

cases such as *Northern Insurance* and realize that asset purchase agreements may not necessarily fully define the scope of their successor liability, they may increasingly look to the insurance industry for protection from financial uncertainty.

If expansive concepts of successor liability are imposed under CERCLA, sellers may become acutely concerned that their insurance policies will be depleted by the successor corporation. Indeed, sellers can be stung by the transfer of insurance policies under *Northern Insurance*.<sup>154</sup> Usually, the seller potentially faces one of two situations. In the first, the asset purchase agreement transfers the liabilities to the purchasing corporation, but does not correspondingly transfer the insurance policies. In these situations, unless the transaction is carefully structured, some courts may transfer the policies to the successor corporation contrary to the agreement.<sup>155</sup> An alternative approach for sellers in this situation is to work with the insurance carriers to add the successor as an additional named insured to their policies for adequate consideration, rather than facing the possibility that a court may transfer the benefits of the policies with no consideration at all to the predecessor.<sup>156</sup> In the second situation, the liabilities are retained by the seller, but a court nonetheless judicially imposes successor liability on the purchasing

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environmental plans. The results generally indicate that insurance is available and is being purchased, typically on a site by site basis, often as part of a Brownfields Redevelopment Strategy. See USEPA, Office of Solid Waste and Emergency Response, *Potential Insurance Products for Brownfields Cleanup and Redevelopment*, EPA Publication 500-F-97-106 (April 1997) (available at <<http://www.epa.gov/swerosps/bf/html-doc/insurance.htm>> (visited April 10, 1998)).

<sup>154</sup> “[A]ny transfer of insurance rights would have effectively reduced, at [the seller’s] expense, the coverage available for the continued operations.” *General Refractories Co. Inc. v. Travelers Ins. Co.*, Nos. CIV. A. 88-2167, CIV. A. 88-250, available in 1995 WL 634451, at \*5 (E.D. Pa. Oct. 27, 1995).

<sup>155</sup> See, e.g., *B.S.B. Diversified*, 947 F. Supp. at 1481; *contra* Memorandum Opinion at 17, *North River*, No. 94-1706 (W.D. Pa. Mar. 5, 1996); *General Refractories*, 1995 WL 634451, at \*5.

<sup>156</sup> The holding from *B.S.B. Diversified* may place the seller corporation in a precarious position with respect to transferring insurance policies when the parties are negotiating the asset purchase agreement. See generally *B.S.B. Diversified*, 947 F. Supp. at 1481 (transferring insurance policies to a successor corporation contrary to the asset purchase agreement). If the purchaser knows that a court is going to ignore the asset purchase agreement and transfer insurance policies whenever successor liability is imposed – contractually or otherwise – why would the purchaser agree to exchange any consideration for the policy? Thus, the seller is not in an equal bargaining position if the holding from *B.S.B. Diversified* is the settled law of the jurisdiction. However, the holdings of *B.S.B. Diversified* and other like cases are not at all settled law. Furthermore, because contracts are designed to avoid future litigation, purchasers may not be willing to leave the status of the insurance policies to the outcome of future litigation. Finally, purchasers that count on insurance policies to be judicially transferred without adequate consideration will also have to subtract the cost of litigating the claim against both the predecessor corporation and the insurance company.

corporation.<sup>157</sup> When a court judicially imposes successor liability under CERCLA, some courts may correspondingly transfer the insurance benefits to the successor corporation.<sup>158</sup> However, in the reported decisions to date, courts have only imposed successor liability when the predecessor corporation is no longer viable.<sup>159</sup>

From the perspective of the parties negotiating the asset purchase agreement, the threat of expansive successor liability under CERCLA and the uncertain status of corresponding insurance policies makes an asset acquisition less final than the parties desire.<sup>160</sup> Insurance products may be available to alleviate these concerns, but purchase of those products increases the costs of the transaction. Consequently, the considerations discussed above will often factor into the negotiation, drafting, and due diligence of an asset acquisition on the part of both sellers and purchasers.

### B. *Litigation Issues: Equitable Arguments*

Based on the divergent holdings of the few courts that have thus far addressed the issue, there is a split of authority as to whether, and when, a successor may access a predecessor's insurance coverage. For example, some courts may use liability as a benchmark: the party who assumes the liability also is entitled to the benefits of the general comprehensive liability policy.<sup>161</sup> Other courts may rely primarily on the contractual stipulations between the parties contained within the four corners of the asset purchase agreement.<sup>162</sup>

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<sup>157</sup> See, e.g., *Kleen Laundry & Dry Cleaning Serv., Inc. v. Total Waste Management Corp.*, 817 F. Supp. 225, 234 (D.N.H. 1993).

<sup>158</sup> See *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 152 (D.N.H. 1994).

<sup>159</sup> See *Leo v. Kerr-McGee Chem. Corp.*, 37 F.3d 96, 99-100 (3d Cir. 1994).

<sup>160</sup> Compare *Total Waste Management*, 857 F. Supp at 152 (transferring the benefits of insurance policies after successor liability had been imposed under CERCLA) with *Quemetco Inc. v. Pacific Automobile Ins. Co.*, 29 Cal. Rptr. 2d 627, 632 (Cal. Ct. App. 1994) (declining to transfer insurance policies once successor liability had been imposed under CERCLA).

<sup>161</sup> See, e.g., *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1357 (9th Cir. 1992) ("This right to indemnity followed the liability rather than the policy itself.").

<sup>162</sup> See, e.g., *General Refractories Co. Inc. v. Travelers Ins. Co.*, Nos. CIV. A. 88-2167, CIV. A. 88-250, available in 1995 WL 634451, at \*7 (E.D. Pa. Oct. 27, 1995) ("If . . . a purchase and sale agreement is used, the contractual terms negotiated by the parties will typically govern . . .").

Ultimately, however, when the reasoning behind these cases is analyzed, courts appear to be taking an equitable approach to resolving these issues. For example, courts have considered some of the following factors, among others: (1) whether the liability is judicially imposed or contractually assumed;<sup>163</sup> (2) whether the parties had the opportunity to protect themselves contractually;<sup>164</sup> (3) whether a viable corporation has a present interest in the policies;<sup>165</sup> and (4) whether transferring the insurance policy makes recovery easier for an innocent injured party.<sup>166</sup> If this “equitable analysis” is actually occurring, courts may, in the long-run, be better served by expressly stating that there is no “bright-line” test for the transferring of insurance. In the meantime, while logic may yield one result, the facts and equities of a particular case may yield another, and clear rules of law in this area will be illusory.

One interpretation of *Northern Insurance* is that the transfer of insurance coverage by “operation of law” in that case was really an equitable solution to soften the harsh application of product-line successor liability. Consequently, if a court judicially imposes CERCLA liability on its successor corporation, the successor may argue that in fairness it also ought to be entitled to the predecessor’s insurance coverage. This argument holds its greatest force when the holder of the policy (the predecessor) is no longer a viable corporation:<sup>167</sup> the fact that no one else can access the benefits of the insurance policy, coupled with the fact that the purchaser has incurred, arguably unfairly, CERCLA liability contrary to the asset purchase agreement, presents a situation where courts may find that the purchaser is entitled to equitable relief. Furthermore, the successor may argue that (1) the insurer’s risk is not increased by transferring the policy because the insurer is only

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<sup>163</sup> See Memorandum Opinion at 16, *North River*, No. 94-1706 (W.D. Pa. Mar. 5, 1996); *Total Waste Management*, 857 F. Supp. at 151.

<sup>164</sup> *Smithkline Beecham Corp. v. Rohm and Haas Co.*, 89 F.3d 154, 163 (3d Cir. 1996).

<sup>165</sup> See *supra* note 84.

<sup>166</sup> As a practical matter, if a court knows that a successor corporation cannot afford the cost of environmental clean-up under CERCLA, it may be more likely to transfer the insurance policies to fund the clean-up. Especially if the court sits in the jurisdiction where the environmental contamination occurred, a court may choose to consider the economic realities of getting the site clean over the analytical consistency of transferring insurance coverage to parties that are not entitled to the coverage.

<sup>167</sup> See generally *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1355-56 (9th Cir. 1992); see also *supra* note 84.

required to cover one occurrence,<sup>168</sup> and (2) the insurance company will gain a windfall if the policies do not transfer because it is relieved of its obligation to cover an occurrence that it received premiums to cover.<sup>169</sup>

The successor's "equitable" argument, however, has far less force when the predecessor corporation remains viable.<sup>170</sup> When the predecessor is a viable corporation whose insurance coverage would be depleted, the successor must convince the court that its interest in the policy outweighs the interest of the holder of the policy. No reported decision to date has specifically transferred insurance policies to a successor corporation at the expense of a viable predecessor corporation.<sup>171</sup>

The predecessor may also make equitable arguments in attempting to prevent the transfer of insurance policies to the purchaser.<sup>172</sup> For example, predecessor corporations may argue that the insurance policy is an asset with financial worth to the seller.<sup>173</sup> The predecessor may further argue that to transfer the policy to the purchaser would be to give the purchaser assets that it did not pay for, and give the purchaser a benefit of a bargain that it did not achieve through the contract negotiations for the purchase of the assets.<sup>174</sup>

<sup>168</sup> See *Total Waste Management*, 857 F. Supp. at 153 (stating that the policy at issue should transfer to the successor corporation because the insurer's "risk is therefore no greater than when the policy 'covers only the risk it evaluated when it wrote the policy.'") (quoting *Northern Ins.*, 955 F.2d at 1358).

<sup>169</sup> But see *General Refractories Co. Inc. v. Travelers Ins. Co.*, Nos. CIV. A. 88-2167, CIV. A. 88-250, available in 1995 WL 634451, at \*5 n.10 (rejecting a windfall argument made by a purchaser who contractually assumed the liabilities).

<sup>170</sup> See Memorandum Opinion at 17, *North River*, No. 94-1706 (W.D. Pa. Mar. 5, 1996); *General Accident Ins. Co. v. Superior Court of Alameda County*, 64 Cal. Rptr. 2d 781, 788 (Cal. Ct. App. 1997).

<sup>171</sup> See Memorandum Opinion at 17, *North River*, No. 94-1706; *General Refractories*, 1995 WL 634451 at \*5.

<sup>172</sup> Typically, predecessors in asset purchase agreements will initially argue freedom of contract principles in attempting to block the potential transfer of insurance policies contrary to the terms of an asset purchase agreement. See *General Refractories*, 1995 WL 634451, at \*7 ("If . . . a purchase and sale agreement is used, the contractual terms negotiated by the parties will typically govern the transfer of specific rights and liabilities. This is particularly true where . . . the transferor remains in existence after the sale.").

<sup>173</sup> See *National Union Fire Ins. Co. v. City Savings, F.S.B.*, 28 F.3d 376, 384 (3d Cir. 1994).

<sup>174</sup> See *General Refractories*, 1995 WL 634451, at \*5.

### C. Insurance Issues

Insurance companies hold a unique position when defending claims brought by successor corporations trying to access insurance policies issued to the predecessor corporation after liability has been imposed under CERCLA. Logic would dictate that one of the relevant considerations, but by no means the only consideration, should be whether the predecessor corporation remains viable.

Insurance companies faced with a declaratory judgment action by a successor corporation trying to access the policies of the non-viable predecessor corporation may argue that their risk is increased by requiring them to cover liabilities of a myriad of successor corporations.<sup>175</sup> After all, in many of the mega-mergers of the 1980s, individual business units of the predecessor were often divested to individual purchasers, some of whom have spun those units off again, yielding scores of potential “successors.” Insurers may also argue that *Northern Insurance* is not sound public policy – particularly when the underlying business transaction is more complex than that presented in *California Coolers*<sup>176</sup> – because to transfer the policies to a successor would give the benefits of a policy to an entity that did not pay for it.<sup>177</sup> For example, in *North River*, North River was able to argue that an insurance policy may be viewed as an asset, and if the asset is taken from the predecessor, the successor would enjoy benefits it could not achieve in contract to the financial detriment of the predecessor.<sup>178</sup> To be sure, considering the equitable factors, a court may lean more heavily in the insurer’s favor when the insurance company is asserting the interests of the holder of the policy in addition to its own interests.

When there is no viable corporation presently holding the insurance policy, insurance companies may be susceptible to a windfall argument, *i.e.*, the insurance

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<sup>175</sup> See *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F. 2d 1353, 1358 (9th Cir. 1992); *B.S.B. Diversified Co., Inc. v. Am. Motorists Ins. Co.*, 947 F. Supp. 1476, 1481 (D.C. Cir. 1996); *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 151 (D.N.H. 1994) (all rejecting this argument).

<sup>176</sup> See *General Accident Ins. Co. v. Superior Court of Alameda County*, 64 Cal. Rptr. 2d 781, 788 (Cal. Ct. App. 1997) (“[A] transfer by operation of law is a violation of the basic principles of contract and is also bad public policy . . . . Under the [*Northern Insurance* rule], an insurer which was never a party to an insurance contract can be held liable to an ‘insured’ that has never paid a premium or been subjected to an underwriting analysis.”).

<sup>177</sup> See *id.* (“[The law] cannot impose a contractual insurance relationship between an insurer and a stranger to the insurance contract.”).

<sup>178</sup> See generally Memorandum Opinion at 16, *North River*, No. 94-1706 (W.D. Pa. Mar. 5, 1996).



company is essentially receiving a windfall by not having to cover an occurrence that it has contracted to cover.<sup>179</sup> Some courts have rejected the windfall argument and held that an insurance policy should not be transferred by operation of law even when this might apply;<sup>180</sup> however, the insurance company must overcome the fact that a defunct predecessor holds the benefits from a policy that is fully paid for, but due to corporate restructuring, no one can ever access the policies. The situation obviously becomes more complex where there are scores of potential successors. Nevertheless, while the insurer may have persuasive legal arguments based in contract,<sup>181</sup> it may not enjoy the equitable advantage that in the end could be the deciding factor in some courts.<sup>182</sup>

## VI. CONCLUSION

Courts have taken two distinct approaches in deciding whether insurance policies may be judicially transferred from a predecessor to a successor corporation once successor liability has been imposed under CERCLA. In one camp, courts uphold the sanctity of the contract negotiated by the parties to the business transaction.<sup>183</sup> In the other camp, courts have transferred insurance coverage as an equitable solution to the judicial imposition of successor liability as a matter of public policy and contrary to the terms of the asset purchase agreement.<sup>184</sup> In the end, the results of the few courts deciding these issues to date may well have depended upon the facts and equities of the particular case, and the judicial demeanor of the court: is the court likely to take an Adam Smith, Posner-type "freedom of contract" approach or is the court likely to formulate an equitable solution based on various policy considerations?<sup>185</sup> When advising clients with

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<sup>179</sup> See *General Refractories*, 1995 WL 634451, at \*5 n.10.

<sup>180</sup> See generally *General Accident*, 64 Cal. Rptr. 2d at 788.

<sup>181</sup> See *General Accident*, 64 Cal. Rptr. 2d at 785 ("An insured-insurer relationship is a matter of contract.").

<sup>182</sup> See generally *United States v. Keystone Sanitation Co.*, No. 1:CV-93-1482, 1996 U.S. Dist. LEXIS 1365, at \*44 (M.D. Pa. Aug. 22, 1996).

<sup>183</sup> See *General Refractories*, 1995 WL 634451, at \*5.

<sup>184</sup> See *Total Waste Management Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 151 (D.N.H. 1994).

<sup>185</sup> Compare, e.g., *Smithkline Beecham Corp. v. Rohm and Haas Co.*, 89 F.3d 154, 164 (3d Cir. 1996) and *Keystone Sanitation*, 1996 U.S. Dist. LEXIS 13561, at \*33.

**respect to these issues, be mindful that while logic may yield one result, the facts and equities of a particular case may well yield another.**

