McGeorge Law Review

Volume 23 | Issue 3 Article 18

1-1-1992

If You Play, You Pay: Unknown Hazards for Successor Corporations under CERCLA

Jacqueline Y. Engel
University of the Pacific; McGeorge School of Law

If You Play, You Pay: Unknown Hazards For Successor Corporations Under CERCLA

INTRODUCTION

In 1979, the United States Environmental Protection Agency (EPA) conducted a survey to determine the number of existing inactive and uncontrolled hazardous waste sites[1] and estimated that as many as 30,000 to 50,000 such sites existed.[2] Of those existing sites, between 1,200 and 2,000 were determined to present serious risks to public health.[3] Further, the EPA estimated that only ten percent of the 77.1 billion pounds of hazardous waste produced

---

1. *See* H.R. REP. No. 96-1016, 96th Cong., 1st Sess., pt. 1, at 18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120 (the EPA survey is referred to within the House Report); 42 U.S.C.A. § 9601(14) (Supp. 1991) (defining hazardous substance by reference to substances designated as hazardous or toxic under the Solid Waste Disposal Act, 42 U.S.C.A. § 6921, the Clean Air Act, 42 U.S.C.A. § 7412, any substance designated pursuant to 33 U.S.C.A. § 1321(b)(2)(A), any element, compound, mixture, solution, or substance designated pursuant to 42 U.S.C.A. § 9602, any toxic pollutant listed under 33 U.S.C.A. § 1317(a), or any imminently hazardous chemical substance or mixture upon which the Administrator of the U.S. Environmental Protection Agency has taken action pursuant to 15 U.S.C.A. § 2606). Hazardous substances do not include petroleum, crude oil, natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel. 42 U.S.C.A. § 9601(14) (Supp. 1991).

2. *See* H.R. REP. No. 510, 96th Cong., 1st Sess., pt. 1, at 18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120 (discussing the EPA survey).

3. *Id.*

each year was disposed of in an environmentally sound manner.[4] The remaining 90 percent resulted in the creation of hazardous waste sites. Between 1977 and 1980, during the 95th and 96th Congresses, the Oversight Subcommittee of the Committee on Interstate and Foreign Commerce identified four characteristics which were common among most hazardous waste sites: (1) Hazardous waste was found in large quantities; (2) unsafe design and disposal methods were widespread; (3) the danger to the environment was substantial; and (4) major health hazards existed.[5]

In the wake of such findings, Congress was forced to take a critical look at existing laws concerning the management of hazardous waste.[6] Recognizing the inadequacies of existing remedial measures dealing with improperly, negligently, and recklessly managed disposal sites, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[7] CERCLA authorizes the federal government to respond[8] to the release[9] or threat of a release of hazardous substances, pollutants, or contaminants[10] into the environment[11] which pose a substantial danger to the public health and welfare.[12] Government responses can be either remedial actions,[13] which generally includes long-term or permanent

4. *Id.* at 21, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 6124.

5. *Id.* at 18-19, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS at 6120-22.

6. *Id.* at 17-18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 6120.

7. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (amended by the Superfund Amendment and Reauthorization Act (SARA), Pub. L. No. 99-499 (1986)) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). *See generally*, Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

8. *See* 42 U.S.C.A. § 9601(25) (Supp. 1991) (definition of respond).

9. *See id.* § 9601(22) (Supp. 1991) (defining release as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching or disposing into the environment).

10. *See id.* § 9601(33) (Supp. 1991) (defining pollutant or contaminant as any element, compound or mixture which may be reasonably anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions or physical deformities after release into the environment).

11. *See id.* § 9601(8) (Supp. 1991) (definition of environment).

12. *Id.* § 9604(a)(1) (Supp. 1991).

13. *See id.* § 9601(24) (Supp. 1991) (definition of remedial action).

containment or disposal programs, or removal efforts designed for short-term cleanup.[14]

Congress, however, clearly did not intend to leave clean up under CERCLA solely in the hands of the federal government.[15] Congress intended that the entities which played a specific role in the production or continuation of the hazardous condition bear the burden of cleaning up hazardous waste sites unless such parties lack the wherewithal to meet their obligations.[16] Thus, Congress created the Superfund to cover clean-up costs only where the site has been abandoned, the responsible parties cannot be found, or private resources are inadequate.[17] The Superfund provides resources for the federal government to clean up unsafe hazardous waste sites through excise taxes on certain chemicals[18] and petroleum products.[19] CERCLA, instead of being a merely regulatory standard-setting statute, allows the EPA, with the authorization of the President, to require the Attorney General of the United States to secure any relief necessary to abate danger or threat of danger of a hazardous substances release.[20]

Although it is clear that Congress intended that CERCLA be remedial in nature, comprehensive legislative history regarding

---

14. *Id.* §§ 9604, 9605, 9607, 9611 (Supp. 1991). *See id.* §§ 9604 (Supp. 1991) (stating that response includes removal and remedial actions taken by the President); 9605 (Supp. 1991) (setting forth the National Contingency Plan which governs cleanup efforts through procedures and standards for responding to releases of hazardous substances); 9607 (Supp. 1991) (allowing the EPA to sue for reimbursement of cleanup costs from any responsible parties it can locate); 9611 (Supp. 1991) (use of the Superfund to cleanup hazardous waste sites and spills). *See also id.* § 9601(23) (Supp. 1991) (definition of removal efforts).

15. *See* State of New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2nd Cir. 1985).

16. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3rd Cir. 1988) (discussing the Superfund notion).

17. *See Shore Realty Corp.*, 759 F.2d at 1041 (discussing the Superfund notion).

18. 26 U.S.C.A. § 4661(a) (1989).

19. *Id.* at § 4611(a) (Supp. 1991).

20. 42 U.S.C.A. § 9606(a) (1983). The district court of the United States in the district in which the threat occurs has jurisdiction to grant the relief that is justified by the public interest and equities of the case. *Id.* The President may also take any other action necessary to protect the environment and the public health and welfare. *Id.* Any person who willfully violates or fails or refuses to comply with any order of the President may be fined up to $25,000 for each day in which the violation occurs. *Id.* § 9606(b)(1) (Supp. 1991). Any person who receives and complies with the terms of any order may petition the President, within 60 days, for reimbursement from the Fund for the reasonable costs of the action, plus interest. *Id.* § 9606(b)(2)(A) (Supp. 1991).

CERCLA is greatly lacking.[21] One court has commented that CERCLA's history reveals as much about the nature of the legislative process as about the nature of the legislation.[22] The version of CERCLA which was passed by Congress and signed into law was an eleventh hour compromise which was developed primarily by Senate leaders and sponsors of an early Senate version of CERCLA.[23] As a result of the haste to pass the CERCLA legislation, the Act does not expressly address several major and important issues. One prominent example is that neither the language, nor the legislative history of CERCLA addresses the issue of successor corporation liability.[24]

Due to the many unanswered questions, CERCLA has been the subject of significant litigation in the years since its passage. This comment will address the applicability of successor liability doctrines under the CERCLA statute, an issue of significant litigation in recent years. Part I of this comment will discuss the traditional background of successor liability.[25] Part II will then consider the modern successor liability doctrines, including the "product-line rule" and the "continuing business enterprise rule."[26] Part III will look at the application of successor liability under CERCLA and recent judicial decisions in this area.[27] Part IV of this comment will address the legal ramifications of the recent judicial decisions applying different successor liability rules.[28] Finally, this comment will advocate future Congressional

---

21. *See* Comment, *Environmental Law-CERCLA Liability-The Doctrine of Corporate Successor Liability is Appropriate in Contribution Claims Under CERCLA, But Caveat Emptor is not Available as a Defense to the Seller of Property in an Action Seeking Contribution for Clean-Up Costs*, 20 RUTGERS L.J. 823 (1989).

22. *See Shore Realty Corp.*, 759 F.2d at 1039. In 1980, while the Senate was considering one version of CERCLA, the House considered and passed another. *Id.*

23. *Id.* at 1040. No committee reports concerning the compromise accompany the Act. *Id.*

24. *See* 42 U.S.C.A. §§ 9601-9657 (1983 & Supp. 1991) (setting forth the CERCLA provisions).

25. *See infra* notes 30-49 and accompanying text.

26. *See infra* notes 50-132 and accompanying text.

27. *See infra* notes 133-207 and accompanying text.

28. *See infra* notes 208-226 and accompanying text.

actions which should be taken to clarify the issue of successor liability under CERCLA.[29]

I. TRADITIONAL RULES OF SUCCESSOR LIABILITY

The primary goal of the common law governing successor liability was to protect the rights of commercial creditors and to ascertain the successor corporation's liabilities for taxes and contractual obligations of its predecessor.[30] Successor liability rules were meant, in large part, to protect a bona fide purchaser from unexpected and unfair liabilities for the debts of its predecessor.[31] Under traditional rules of successor liability, where one company sells or otherwise transfers all its assets to another, the latter is not responsible for the liabilities of the seller unless one of four common law exceptions applies.[32]

The first of these exceptions exists when the purchasing corporation expressly or impliedly agrees to assume the liabilities of the selling corporation.[33] The second exception exists when the sale of a corporation is equivalent to a "de facto" consolidation or merger.[34] A "de facto" merger requires a continuation of the

---

29. *See infra* notes 227-234 and accompanying text.

30. Comment, *EPA's Policy of Corporate Successor Liability Under CERCLA*, 6 STAN. ENVTL. L.J. 78, 86 (1986-87) (citing Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 303, 376 N.W.2d 820, 825 (Wis. Sup. Ct. 1985); N.J. Trans. Dep't. v. P.S.C. Resources, Inc., 175 N.J. Super. 447, 456, 419 A.2d 1151, 1156 (N.J. Super. Ct. Law. Div. 1980)).

31. *Id.* (citing Tucker v. Paxson Mach. Co., 645 F.2d 620, 623 (8th Cir. 1981); Downtowner, Inc. v. Acrometal Prod., Inc., 347 N.W.2d 118, 121 (N.D. Sup. Ct. 1984)).

32. *See, e.g.*, 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (rev. ed. 1983); Louisiana-Pacific Corp. and L-Bar Products, Inc., v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); Gee v. Tenneco, Inc., 615 F.2d 857, 863 (9th Cir. 1980); Ray v. Alad Corp., 19 Cal. 3d 22, 28, 560 P.2d 3, 7, 136 Cal. Rptr. 574, 578 (1977); Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873, 878 n.3 (1976).

33. *See, e.g.*, 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (rev. ed. 1983); Louisiana-Pacific Corp. and L-Bar Products, Inc., v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); Gee v. Tenneco, Inc., 615 F.2d 857, 863 (9th Cir. 1980); Ray v. Alad Corp., 19 Cal. 3d 22, 28, 560 P.2d 3, 7, 136 Cal. Rptr. 574, 578 (1977); Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873, 878 n.3 (1976).

34. *See, e.g.*, 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (rev. ed. 1983); Louisiana-Pacific Corp. and L-Bar Products, Inc., v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); Gee v. Tenneco, Inc., 615 F.2d 857, 863 (9th Cir. 1980); Ray v. Alad Corp., 19 Cal. 3d 22, 28, 560 P.2d 3, 7, 136 Cal. Rptr. 574, 578 (1977); Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873, 878 n.3 (1976).

enterprise of the selling corporation, a continuation of shareholders which results when the purchasing corporation pays for the acquired assets with shares of its own stock, the selling corporation ceases ordinary business operations as soon as legally and practically possible, and the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller.[35]

The third exception exists where there is a continuation of directors and management, shareholder interest, and, in some cases, inadequate consideration paid by the successor corporation.[36] This exception has been termed the "mere continuation exception." Under California case law, a corporation acquiring the assets of another corporation is liable as a "mere continuation" where no adequate consideration was given for the predecessor corporation's creditors or one or more persons were officers, directors, or stockholders of both corporations.[37]

Finally, the fourth exception occurs where the transaction is fraudulent as to creditors of the transferor.[38] Fraud may occur, for example, where inadequate consideration is paid to the transferor, or where there is a lack of good faith surrounding the transaction.[39]

Both the de facto merger exception and the mere continuity exception rest upon the theory that the shareholders of the first

---

35. *See* Polius v. Clark Equipment Co., 802 F.2d 75, 85-86 (3rd Cir. 1986). This exception was applied in *Knapp v. North American Rockwell*, 506 F.2d 361 (3rd Cir. 1974), *cert. denied*, 421 U.S. 965 (1975), to provide relief to a tort victim who could no longer sue the manufacturer because it had dissolved and liquidated after the sale of its assets. *Knapp*, 506 F.2d 367-70.

36. *See* Florom v. Elliott Mfg., 867 F.2d 570, 578 n. 3 (10th Cir. 1989) (citing L.R. FUMER, M.I. FRIEDMAN, PRODUCTS LIABILITY, §§ 2.06[2][c], 2-182, 2-183 (1988)) (stating that the gravamen of the traditional 'mere continuation' exception is the continuation of the corporate entity rather than continuation of the business operation).

37. Ray v. Alad Corp., 19 Cal. 3d 22, 29, 560 P.2d 3, 7, 136 Cal. Rptr. 574, 578 (1977).

38. *See, e.g., Knapp*, 506 F.2d at 364; Louisiana-Pacific Corp. and L-Bar Products Inc., v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); Gee v. Tenneco, Inc., 615 F.2d 857, 863 (9th Cir. 1990); *Ray*, 19 Cal. 3d at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578; Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873, 878 (1976).

39. *See* Comment, *supra* note 30, at 85 (enunciating that the successor is liable for the debts of the successor corporation if the sale is not a bona fide sale for valuable consideration and is not in the usual course of business).

company become shareholders of the second corporation, and a sufficient nexus exists between the successor and predecessor corporations to establish successor liability.[40] However, it is illogical that the successor corporation in a transaction which is structured as a merger or a de facto merger be burdened with liability, while the successor in a cash acquisition of corporate assets is free from such liability.[41] If there are no real business reasons for choosing a cash acquisition of corporate assets, then the only real reason may be to avoid product liability suits.[42] Because corporations may seek to structure transactions as cash acquisitions to avoid liability that would be incurred if the transaction were structured as a merger or de facto merger, the rules of corporate law may work to accomplish a purpose which is not in the public interest.[43] These corporate rules work contrary to public interest by encouraging corporations to structure transactions which will allow the corporations to preclude recovery by injured persons.[44] In order for the party which is responsible for the injury to bear the costs of causing the injury, the courts have developed two more modern rules of corporate successor liability.[45]

Recently, there has been a trend towards recognizing two additional and more expansive successor liability rules: (1) The "product-line" rule[46] and (2) the "continuing business enterprise" rule.[47] These two modern rules were developed in the context of tort cases largely for policy reasons. Although traditional successor liability rules protect the rights of commercial creditors and bona fide purchasers, the purpose behind traditional strict tort

40. Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873, 880 (1976).

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.* (stating that the law is unreasonably geared towards accomplishing a purpose not intended for it or in the public interest).

45. *See infra* notes 53-90 and accompanying text (discussing the "product-line" rule) and notes 91-132 and accompanying text (discussing the "continuing business enterprise" rule).

46. *See* Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). The "product-line rule" was formulated and first discussed in *Ray*.

47. Cyr v. B. Offen & Co., Inc., 501 F.2d 1145 (1st Cir. 1974) (establishing the continuing business enterprise rule); Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873 (1976) (further defining the continuing business enterprise rule).

liability was to protect otherwise defenseless victims and to spread the costs of compensating them throughout society.[48] In light of this tort liability theory, the modern successor liability rules were formulated to compensate the victim where the plaintiff had no viable remedy against the manufacturer, and where the defendant successor corporation had an opportunity to evaluate the risks of production and the ability to pass on the cost of meeting those risks.[49]

II. MODERN SUCCESSOR LIABILITY RULES

The modern "product-line" rule provides that a successor may be liable when it continues to market the product line of the predecessor that caused the harm.[50] The "continuing business enterprise" rule, on the other hand, is generally considered an expanded version of the common law mere continuation doctrine,[51] where the successor corporation may be liable when the business operation is carried over by the successor corporation.[52]

---

48. *See Ray*, 19 Cal. 3d at 30, 560 P.2d at 8, 136 Cal. Rptr. at 579 (citing Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701) (stating that the costs of injuries resulting from defective products should be borne by the manufacturers that put the defective products on the market instead of by the injured people who are powerless to protect themselves).

49. *Id.*

50. *See* Ray v. Alad Corp., 19 Cal. 3d 22, 34, 560 P.2d 3, 11, 136 Cal. Rptr. 574, 582 (holding that a party which acquires a manufacturing business and continues to produce the same line of products assumes strict tort liability for defects in goods manufactured and distributed by the original manufacturer).

51. *See* Louisiana-Pacific Corporation, and L-Bar Products, Inc. v. Asarco, Inc., 909 F.2d 1260, 1265 (9th Cir. 1990) (noting that the expanded version of the mere continuation exception is known as the continuing business enterprise exception).

52. *See* Florom v. Elliott Mfg., 867 F.2d 570, 578 n.3 (10th Cir. 1989) (stating that the gravamen of the traditional mere continuation exception is the continuation of the corporate entity rather than continuation of the business operation).

A. Product-line Rule

The first derivation from the traditional rule of successor liability appeared in the 1977 case of *Ray v. Alad Corp.*[53] where the court announced the creation of the "product-line" rule. In *Ray*, the plaintiff asserted that the defendant, Alad Corporation II, was strictly liable for damages incurred when the plaintiff fell from a defective ladder manufactured by Alad II's predecessor.[54] Prior to the plaintiff's injury, the defendant corporation acquired the business of the ladder's manufacturer, Alad I, through a purchase of Alad I's assets.[55] Alad II neither manufactured nor sold the defective ladder that proximately caused plaintiff's injury. However, there was no outward indication of any change in the ownership of the business to either the creditors or customers.[56]

Alad II continued to utilize Alad I's plant, inventory, equipment, trade name and good will in the manufacture of the same line of ladders under the "Alad" name.[57] Moreover, Alad II continued to use the same equipment, designs, personnel, and sales representatives as did Alad I.[58] Contract provisions for the sale of assets by Alad I to Alad II provided that Lightning Maintenance Corporation (Lightning),[59] Alad II's predecessor, would accept and pay for materials previously ordered by Alad I, that Lightning would fill uncompleted orders taken by Alad I, and that Lighting would hold Alad I harmless for any damages or liability resulting from failure to do so.[60]

---

53. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

54. *Id.* at 24, 560 P.2d at 4-5, 136 Cal. Rptr. at 575-76.

55. *Id.* at 26, 560 P.2d at 5-6, 136 Cal. Rptr. at 576-77. On July 1, 1968, Alad I sold its stock in trade, fixtures, equipment, trade name, inventory and goodwill, as well as its interest in the real property used to manufacture ladders to Lightning Maintenance Corporation. *Id.* As part of the sale transaction, Alad I agreed to dissolve its corporate existence and to assist Lightning Maintenance Corporation in organizing a new corporation under the name of "Alad Corporation." *Id.*

56. *Id.* at 25, 560 P.2d at 5, 136 Cal. Rptr. at 576.

57. *Id.* at 24-25, 560 P.2d at 5, 136 Cal. Rptr. at 576.

58. *Id.* at 25, 560 P.2d at 5, 136 Cal. Rptr. at 576.

59. *See supra* note 55 and accompanying text (explaining that Lightning entered into the sale agreement with Alad I, and later formed a new entity known as "Alad Corporation" (Alad II)).

60. *Ray*, 19 Cal. 3d at 26, 560 P.2d at 6, 136 Cal. Rptr. at 577.

It was undisputed at trial that the ladder involved in the accident was manufactured by Alad I and not Alad II.[61] The defendant, Alad II, moved for summary judgment, raising the issue as to whether there was any factual basis for imposing liability upon Alad II as successor to Alad I's manufacturing business.[62] After the trial court entered summary judgment for Alad II, the plaintiff appealed to the California Supreme Court.[63]

The California Supreme Court recognized that none of the four traditional exceptions to successor non-liability was presented.[64] Specifically, neither an express nor implied agreement to assume liability for injury from defective products manufactured by Alad I existed.[65] Second, there was neither any indication nor contention that the transaction between Alad I and Alad II was made for the fraudulent purpose of escaping liability for Alad I's debts.[66] Third, the court found that the purchase of Alad I's assets did not constitute a merger or a consolidation because the consideration paid was not inadequate.[67] Fourth, the court held that Alad II was not a mere continuation of Alad I because no person was an officer, director or stockholder of both Alad I and Alad II.[68] Therefore, under traditional rules of successor non-liability, a reviewing court would be required to affirm the lower court's grant of summary judgment in favor of the defendant.[69] Nevertheless, the California Supreme Court held that a party which acquires a manufacturing business and continues the output of its line of products, assumes strict tort liability for defects in units of

---

61. *Id.* at 26, 560 P.2d at 5, 136 Cal. Rptr. at 576.

62. *Id.*

63. *Id.* at 25, 560 P.2d at 5, 136 Cal. Rptr. at 576.

64. *Id.* at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578. *See supra* notes 32-44 and accompanying text (discussing the common law exceptions to successor corporation nonliability).

65. *Ray*, 19 Cal. 3d at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578.

66. *Id.*

67. The sole consideration given for Alad I's assets was cash in excess of $207,000. *Id.* at 29, 560 P.2d at 7, 136 Cal. Rptr. at 578. Seventy thousand dollars of this amount was paid when the assets were transferred and a promissory note for nearly $114,000 was issued to Alad I. *Id.*

68. *Id. See supra* notes 36-37 and accompanying text (explaining the "mere continuation" exception to the traditional rule of successor non-liability).

69. *Ray*, 19 Cal. 3d at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578.

the same product line previously manufactured and distributed by the entity from which the business was acquired.[70]

In reaching this somewhat unexpected conclusion, the court considered whether a special departure from those rules was called for by the policies underlying strict liability for defective products.[71] The court noted the approach taken in *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO*[72] where the United States Supreme Court gave substantial weight to the general rules of state law governing succession to the liabilities of an acquired going business,[73] but then refused to be bound by those rules when their application would unduly obstruct the public policies underlying the applicable labor law.[74] Following the decision in *Howard Johnson*, the California Supreme Court in *Ray* recognized that it was necessary to decide whether the policies underlying strict tort liability for defective products called for a special exception to the rule that would normally insulate Alad II, as a successor, from plaintiff's claim.[75]

The California Supreme Court interpreted the function of strict liability as insuring that the costs of injuries resulting from defective products be borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.[76] The court announced that the justification for imposing strict liability upon the successor of a manufacturer under the circumstances of this case rested upon three conditions.[77] The first condition was the destruction of the

---

70. *Id.* at 34, 560 P. 2d at 11, 136 Cal. Rptr. at 582.

71. *Id.* at 30, 560 P. 2d at 8, 136 Cal. Rptr. at 579.

72. 417 U.S. 249 (1974).

73. *Id.* at 257. *See supra* notes 30-49 and accompanying text (discussing the traditional rules of successor liability which were accepted and followed by California).

74. *Ray*, 19 Cal. 3d at 30, 560 P.2d at 8, 136 Cal. Rptr. at 579.

75. *Id.* (citing Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W. 2d 873, 877-78 (1976)).

76. *Ray*, 19 Cal. 3d at 30, 560 P.2d at 8, 136 Cal. Rptr. at 579 (quoting Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963)) (citing the reasons behind imposing strict liability on the manufacturer).

77. *Ray*, 19 Cal. 3d at 31, 560 P.2d at 8-9, 136 Cal. Rptr. at 579-80.

plaintiff's remedies against the original manufacturer.[78] Second, the court recognized the successor's ability to assume the original manufacturer's risk-spreading role.[79] Finally, the fairness of requiring the successor to assume responsibility for the defective products dictated that the successor be held strictly liable.[80]

The *Ray* court reasoned that Alad II had substantially the same capacity as Alad I to estimate the risks of claims for injuries stemming from defective ladders.[81] Furthermore, Alad II had the opportunity to pass on to purchasers of new Alad products the costs of meeting these risks.[82] Immediately upon the purchase of Alad I's assets by Alad II, Alad II was in a position to spread the cost of compensating otherwise defenseless victims of manufacturing defects throughout society because Alad II increased the prices of its products.[83] The court also found that the imposition of liability upon Alad II for injuries caused by Alad I's defective products was fair and equitable in light of Alad II's acquisition of Alad I's trade name, good will and customer lists, its continuation of production of the same ladders, and its holding itself out as the same enterprise.[84] Because Alad II had acquired a manufacturing business and had continued the output of its line of products, Alad II essentially assumed strict tort liability for defects in units of the same product line.[85] By taking over and continuing the established business of producing and distributing Alad ladders, Alad II became an integral part of the overall production and manufacturing, and should therefore bear the cost of injuries resulting from defective products.[86] Thus, the court

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581.
82. *Id.*
83. *Id.* (citing Price v. Shell Oil Co., 2 Cal. 3d 245, 251, 466 P.2d 722, 725-26, 85 Cal. Rptr. 178, 181-82 (1970)); Knapp v. North American Rockwell Corp., 506 F.2d 361, 372-73 (3rd Cir. 1974) (concurring opinion)) (providing that the paramount policy of the strict products liability rule is spreading costs throughout society).
84. *Ray*, 19 Cal. 3d at 34, 560 P.2d at 10, 136 Cal. Rptr. at 581.
85. *Id.* at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.
86. *Id.*

applied its newly formulated "product-line" rule to find liability where previously there was none.

It has been noted that under the product-line theory, a successor that continues to manufacture the same type of articles as its predecessor, under the same name, with no outward indication of any change of ownership of the business, becomes liable for defects in units of the same product line manufactured by the predecessor.[87] Hence, the product line exception imposes liability where traditional law does not.[88] Liability is based upon the premises that the successor corporation is in a position to assume the risk-spreading role assigned to the manufacturer by strict liability theories and that principles of fairness require that a corporation which exploits the goodwill attached to a predecessor's product also bear the burdens attached to the product.[89] In contrast, instead of imposing liability where traditionally there was none, the countervailing modern successor liability exception--the continuing business enterprise rule--is recognized as an alternative which is simply an extension of the traditional rules.[90]

B. The Continuing Business Enterprise Rule

While both the "product-line" and "continuing business enterprise" rules require the continuity of the predecessor's product line, it is the "continuing business enterprise" rule which is viewed as a less radical departure from traditional common law exceptions.[91] Rather than making the existence of a single corporation and identity of stock, stockholders and officers determinative, the "continuing business enterprise" rule considers several other factors.[92] Under the "continuing business

87. Monzingo v. Correct Mfg. Corp., 752 F.2d 168, 175 (5th Cir. 1985).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* The continuing business enterprise rule was developed in *Cyr v. B. Offen & Co., Inc.*, 501 F.2d 1145 (1st Cir. 1974), and *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976). *See infra* notes 103-128 and accompanying text (discussing *Cyr v. B. Offen & Co., Inc.* and *Turner v. Bituminous Cas. Co.*).

enterprise'' rule,[93] courts must weigh a number of factors in determining whether to impose successor liability.[94] Among the factors considered are whether the successor: (1) Hires the same employees; (2) employs the same supervisory personnel; (3) retains the same production facilities in the same location; (4) continues producing the same products; (5) keeps the same name; (6) maintains continuity of assets; (7) continues the same general business operations; and (8) holds itself out to the public as the continuation of the previous corporation.[95] The traditional ''mere continuation'' exception significantly differs from the ''continuing business enterprise'' rule.[96] A mere continuation or reorganization exists where there is a continuation of directors, management, shareholder interest, and in some cases, inadequate consideration.[97] The continuing business enterprise exception, on the other hand, focuses on the continuation of the corporate entity rather than continuation of the business operation.[98] The continuation of such a business entity was found in *Cyr v. B. Offen & Co., Inc.*[99] where there was an arm's-length sale of a business and goodwill with no continuation of shareholder interest.[100] The successor assumed the predecessor's service obligations and contracts, there was no notice to the public of an ownership change, and the successor held itself out as on ongoing enterprise.[101] The First Circuit Court of Appeals concluded that if the same group of employees continue, without pause, to produce the same products in the same plant, with the same supervision, in an entity which maintains essentially the same name, the fact that the ownership of the entity may or may not have changed cannot

93. *See supra* note 90 and accompanying text (explaining that the continuing enterprise rule is an expansion of the mere continuation doctrine of traditional successor liability).

94. United States v. Distler, 741 F. Supp. 637, 642 (W.D. Ky. 1990).

95. *Monzingo*, 752 F.2d at 175.

96. Florom v. Elliott Mfg., 867 F.2d 570, 578 n.3 (10th Cir. 1989).

97. *Id.*

98. *Florom*, 867 F.2d at 578 n. 3 (citing L.R. FUMER, M.I. FRIEDMAN, PRODUCTS LIABILITY, §§ 2.06[2][c], 2-182, 2-183 (1988)). *See supra* notes 36-37.

99. 501 F.2d 1145 (1st Cir. 1974).

100. *Cyr*, 501 F.2d at 1151-53.

101. *Id.*

be the sole determinant of liability.[102] Essentially, the court held that in these circumstances, the successor will be held liable for the acts of its predecessor because they continued the business operation.

The Michigan Supreme Court, in *Turner v. Bituminous Cas. Co.*[103] further developed the "continuing business enterprise" exception by adding to the factors used in the traditional de facto merger exception.[104] In *Turner*, a products liability suit was brought to recover for injuries caused by an allegedly defective power press against the successor of a corporate manufacturer which produced the press.[105] Charles Turner, the plaintiff, was injured by a power press while working at the Seaman Manufacturing Company, and, as a result, both of his hands had to be amputated.[106] Prior to the accident, the manufacturer of the press, T.W. & C.B. Sheridan Company (Old Sheridan), executed a purchase agreement whereby Harris-Intertype Corporation (Harris) was to purchase the entire business, good will, name and assets of the Sheridan Company.[107] Old Sheridan filed a certificate changing its name to Nadirehs, and incorporators acting on behalf of Harris filed a certificate of incorporation under the name T.W. & C.B. Sheridan Company (New Sheridan).[108] Subsequently, Harris designated New Sheridan as its subsidiary to acquire the assets of Old Sheridan.[109] Four days later, Harris paid $6.38 million to Old Sheridan in a sale of corporate assets for cash, and distributed the newly acquired assets to the shareholders of Harris.[110] Concurrently, Old Sheridan was dissolved.[111] The lower appellate court held that Harris and New Sheridan were not responsible for a product which they did not manufacture, sell or

102. *Id.* at 1154.
103. 397 Mich. 406, 244 N.W.2d 873 (1976).
104. *Turner*, 244 N.W.2d at 879-84.
105. *Id.* at 875.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 876.
111. *Id.*

distribute, and for which they neither in fact nor by law assumed legal liability.[112] The Michigan Supreme Court granted leave to appeal following a denial of leave by the Court of Appeals.[113]

Despite the holding of the lower court, the Michigan Supreme Court expanded the traditional exceptions of successor liability to increase a successor's financial vulnerability in products liability cases.[114] The court noted that the lawsuit was, first and foremost, a products liability case.[115] At the time that this case was decided, 1976, the law of products liability was quickly developing, and all the rules had not yet been formulated.[116] To allow this development to continue, various impediments associated with traditional problems were found to be inappropriate for the area of products liability.[117]

The Michigan Supreme Court reasoned that reliance on the traditional rules of successor liability, whereby a purchasing corporation was not liable for obligations of the transferor corporation, was inapposite.[118] The rule of successor non-liability absent an exception was developed largely in the areas of creditors' protection, tax assessments, de facto mergers and shareholder rights, and it was therefore necessary to develop a separate rule for products liability cases occurring after corporate transfers.[119]

It was clear to the court that if the transaction had been a merger or a de facto merger, rather than a sale of corporate assets for cash, the successor corporation would have been liable for the defective products sold by the predecessor under the common law exception.[120] The defendant successor corporation contended that, to avoid crippling the market, it was necessary to insulate cash transactions involving the purchase of assets from the possibility of

---

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 877.
116. *Id.*
117. *Id.*
118. *Id.* at 877-78.
119. *Id.* at 878.
120. *Id.* at 882-83. *See supra* notes 30-49 and accompanying text (explaining successor liability as the result of a merger or de facto merger).

successor liability for defective products.[121] The court, however, found this argument unpersuasive where there was an existing, thriving market in corporate mergers and where the possibility of such liability was already established through the traditional exceptions.[122] The court also rejected the argument of surprise, noting that once corporations considering a sale of assets for cash become aware of the possibility of successor products liability, they can make suitable preparations.[123]

From these findings, the court concluded that in the sale of corporate assets for cash, the courts should consider three criteria as guidelines to establish whether there is continuity between the transferee and the transferor corporations.[124] First, the court looked at whether there is a continuation of the enterprise of the seller corporation so that there is a continuity of management, personnel, physical location, assets, and general business operations.[125] Second, the court focused on whether the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.[126] Third, the court analyzes whether the purchasing corporation assumes the liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.[127] If continuity is established under these guidelines, then the transferee must accept the liability with the benefits under the guise of the continuing business enterprise rule.[128]

Although neither the product-line rule nor the continuing enterprise rule was developed in response to CERCLA liability,

---

121. *Turner*, 244 N.W.2d at 882-83.

122. *Id.*

123. *Id.* at 883. These preparations can take the form of products liability insurance, indemnification agreements, escrow accounts, or a reduction in the purchase price. *Id.*

124. *Id.* These criteria are three of the four requirements of a de facto merger. *Id.*

125. *Id.* at 879 (citing Shannon v. Samuel Langston Co., 379 F. Supp. 797 (W.D. Mich. 1974) and McKee v. Harris-Seybold Co., Div. of Harris-Intertype Corp., 109 N.J. Super. 555, 264 A.2d 98, 103-105 (1970), *aff'd*, 118 N.J. Super. 480, 288 A.2d 585 (1972)) (setting forth the four requirements of a de facto merger).

126. *Turner*, 244 N.W.2d at 879.

127. *Id.*

128. *Id.* at 883-84.

both rules have been considered under CERCLA to fill the legislative gap regarding successor liability.[129] No court has, as of this time, applied the product-line test in the CERCLA context, although it has been recognized as a viable test for CERCLA liability in those states which have accepted the rule.[130] The Ninth Circuit has recently considered the application of the continuing enterprise rule to a CERCLA liability case,[131] and at least one U.S. District Court has affirmatively applied this rule to impose liability upon a successor corporation in the CERCLA context.[132]

III. SUCCESSOR LIABILITY UNDER CERCLA

Currently, there does not appear to be a uniform approach to determining which successor liability rules apply to CERCLA cases.[133] Further, some circuits have declined to accept the "product-line" or "continuing business enterprise" rules as viable

129. *See supra* notes 53-90 and accompanying text (explaining the "product line rule") *and supra* notes 90-128 and accompanying text (explaining the "continuing enterprise rule").

130. *See, e.g.*, United States v. Western Processing Co., Inc., 751 F. Supp. 902, 904 (W.D. Wash 1990). *See also infra* notes 138-185 and accompanying text (discussing the product-line rule as applied in a CERCLA context).

131. *See* Louisiana-Pacific Corp. v. Asarco, Inc., 29 Env't Rep. Cas. (BNA)1450 (1989), *aff'd* 909 F.2d 1260 (9th Cir. 1990); *infra* notes 144-185 and accompanying text (discussing the applicability of the continuing business enterprise rule to CERCLA in the Ninth Circuit).

132. *See* United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990); *infra* notes 144-207 and accompanying text (discussing the application of the continuing business enterprise rule in a CERCLA context).

133. *See, e.g.*, Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3rd Cir. 1988) (ruling that the general doctrine of corporate successor liability is appropriate in CERCLA contribution cases); Standard Equipment, Inc. v. The Boeing Co., No. C84-1129D, slip op. (W.D. Wash. Nov. 20, 1987) (holding that Washington will not apply the product-line rule in CERCLA cases); *Louisiana-Pacific*, 909 F.2d at 1262, 1265-66 (providing that Congress intended successor liability under CERCLA, and the continuing business enterprise rule was not applicable to facts); *Louisiana-Pacific*, 29 Env't Rep. Cas. (BNA) 1450, 1452 (noting that the product-line rule was not argued in that case); *Distler*, 741 F. Supp. at 643 (stating that the continuing business enterprise rule is applicable in CERCLA context); United States v. Western Processing Co., Inc., 751 F. Supp. 902, 904 (W.D. Wash. 1990) (holding that both the product-line rule and continuing business enterprise rule are viable under CERCLA).

theories of successor liability in any context.[134] Of the circuits which accept the newer successor liability rules, one court has simply stated that both tests are viable in the CERCLA context,[135] and another court has stated that although the "product-line" and "continuing business enterprise" rules are applicable under CERCLA, they are not needed to impose liability on a successor corporation in the context of CERCLA.[136] Still other courts have directly applied the "continuing business enterprise" exception when confronted with successor liability in CERCLA cases.[137]

A. The Product-line Rule in CERCLA Cases

In the 1990 case of *United States v. Western Processing Co., Inc.*,[138] the United States District Court in Washington considered the applicability of both the product-line and continuing business enterprise rules to a CERCLA case.[139] In denying Western Processing Co., Inc.'s motion for partial summary judgment on the issue of successor liability, the District Court recognized that the supporting materials submitted by The Boeing Company, a third party plaintiff, indicated a substantial continuation of the previous business sufficient to impose successor liability in the CERCLA contribution action.[140]

The District Court noted that there is support for, and public interest in, an expansive interpretation of successor liability in

---

134. *See, e.g.*, Polius v. Clark Equipment Co., 802 F.2d 75, 83 (3rd Cir. 1986) (stating that the product-line and continuing business exceptions focus exclusively on the needs of the products liability plaintiff and encourage courts to overlook the equally valid arguments of the business world, and the law of successor liability should therefore only be changed by legislation, and not by judicial fiat).

135. United States v. Western Processing Co., Inc., 751 F. Supp. 902, 904 (W.D. Wash 1990).

136. Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991). The universal rule is that "corporation" includes a successor corporation and the drafters of CERCLA intended that "corporation" be given its usual meaning. *Id.* at 1245.

137. *See Distler*, 741 F. Supp. at 642-43 (providing that the reasons supporting the application of the "continuing business enterprise" exception in products liability cases are equally applicable in the context of CERCLA and finding the successor corporation liable under that exception).

138. 751 F. Supp. 902 (W.D. Wash 1990).

139. *Id.* at 904.

140. *Id.*

CERCLA actions.[141] Since CERCLA intends that clean-up costs be shared by responsible parties, a more expansive view of successor liability will foster a more equitable sharing of remediation costs under CERCLA.[142] As such, the court concluded that both the product-line and continuing business enterprise tests are viable in the CERCLA context and declined to reject them.[143]

B. The Continuing Business Enterprise Rule in CERCLA Cases

1. The Continuing Business Enterprise Rule in the Ninth Circuit

On July 3, 1990, the United States Court of Appeals for the Ninth Circuit decided the case of *Louisiana-Pacific Corp. v. Asarco Inc.*[144] In that case, the Ninth Circuit expressly considered the issue of successor liability under CERCLA[145] and affirmed the district court's conclusion that the successor corporation was not liable under the continuing business enterprise exception to successor liability.[146]

In *Louisiana-Pacific*, Industrial Mineral Products, Inc. (IMP) was a Washington corporation which processed and marketed smelter slag[147] from a copper mill operated by Asarco for approximately 80 years.[148] In March of 1985, the copper smelter operated by Asarco ceased operations, and in January 1986, L-Bar

---

141. *Id.* at 905.

142. *Id.*

143. *Id.* at 904. The court also noted that the Ninth Circuit did not reject these exceptions in *Louisiana-Pacific Corp., v. Asarco Inc.*, 909 F.2d 1260 (9th Cir. 1990) but merely declined to decide those issues in that case. United States v. Western Processing Co., Inc., 751 F. Supp. 902, 905 W. D. Wash. 1990). *See infra* notes 144-162 and accompanying text (discussing *Louisiana-Pacific*).

144. 909 F.2d 1260 (9th Cir. 1990).

145. *Id.*

146. *Id.* at 1265-66.

147. Smelter slag is a hard rock-like by-product used as a ballast to stabilize the ground at log sort yards. *Id.* at 1262.

148. Louisiana-Pacific Corp. v. Asarco Inc., 29 Env't Rep. Cas. (BNA) 1450, 1451 (1989), *aff'd* 909 F.2d 1260 (9th Cir. 1990).

entered into a purchase agreement with IMP.[149] L-Bar purchased substantially all of IMP's assets, and hired many of IMP's officers and employees.[150]

L-Bar's payment of $4.5 million included cash, a note, and an assumption of IMP's debts.[151] L-Bar did not, however, reinstate IMP's slag business, never used the equipment at Asarco, and did not purchase IMP's stock or name.[152] The specific terms of the purchase agreement stated that IMP would indemnify L-Bar against any and all claims arising out of the environmental impact of IMP's operations.[153]

IMP sold the slag to several businesses, including Louisiana-Pacific (LP), from the early 1970's until March 1985.[154] LP deposited the slag into the ground of their log yards in order to stabilize that ground.[155] Government agencies now claim that the particular slag used by LP reacted with the acidic wood-waste, causing heavy metals from the slag to penetrate the soil and contaminate the groundwater.[156] As a result, LP's log yards require substantial environmental clean up.[157]

Louisiana-Pacific and the Port of Tacoma sued Asarco under CERCLA, asserting that Asarco was liable for the costs of cleaning

---

149. *Id.*

150. *Id.* The few officers and employees who formerly worked for IMP held different positions with L-Bar. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* Section 11.1 of the purchase agreement provided:

> 11.1 *Indemnification by Seller.* Effective as of the closing date, seller shall indemnify and hold harmless buyer from and against any and all claims, damages, or liabilities (whether or not caused by negligence), including civil or criminal fines, arising out of or relating to any of the following: . . .
>
> (c) any generation, processing, handling, transportation, storage, treatment, or disposal of solid wastes or hazardous wastes by seller including, but not limited to, any of such activities occurring on any of the assets;
>
> (d) any releases by seller (including, but not limited to, any releases as defined under the Comprehensive Environmental Response Compensation and Liability Act of 1980) to the extent occurring or existing prior to closing, including, but not limited to, such releases to land, water (surface waters or ground waters), or into the air; . . . .

Id.

154. *Louisiana-Pacific*, 909 F.2d at 1262.

155. *Id.*

156. *Id.*

157. *Id.*

up and preventing the release of hazardous substances into the groundwater and soil.[158] Asarco named L-Bar as a third-party defendant, seeking contribution or indemnity for clean-up costs in the event it should be found liable.[159] The lower court granted summary judgement for L-Bar and dismissed Asarco's claims against L-Bar with prejudice on the ground that under traditional corporate successor law a corporation purchasing the assets of another corporation does not become liable for the selling corporation's debts.[160]

In a de novo review of the district court's grant of summary judgement, the Ninth Circuit first identified the preliminary issue as whether successor liability is recognized under CERCLA.[161] Recognizing that the language of the CERCLA statute fails to address the crucial issue of corporate successor liability, the court looked to the Third Circuit's interpretation case law to aid its decision making process.[162]

In *Smith Land & Improvement Corp. v. Celotex Corp.*,[163] the Third Circuit recognized that the concerns which have led to a successor corporation's common law liability for the torts of its predecessor are equally applicable to determining responsibility for cleanup costs under CERCLA.[164] Through an analogy to successor corporate liability for ordinary torts and contractual claims, the *Smith Land* court found that adoption of successor

158. *Id.*

159. *Id.* IMP processed and marketed smelter slag from the copper mill operated by Asarco. *Louisiana-Pacific*, 29 Env't Rptr. Cas. (BNA) at 1451.

160. *Louisiana-Pacific*, 29 Env't Rep. Cas. (BNA) at 1453. In L-Bar's motion for summary judgment defendants alleged that L-Bar was not the successor to IMP and could not be liable under CERCLA for IMP's actions. *Id.* at 1450. District Judge Bryan found that there was not a significant difference between federal law and Washington state law, and held that Washington law was applicable in the case. *Id.* at 1452.

161. *Louisiana-Pacific*, 909 F.2d at 1262.

162. *Id.* at 1262-63. *See* 42 U.S.C.A. § 9607 (1983 & Supp. 1991) (setting forth the language of CERCLA); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 837 (1988). CERCLA was hastily conceived and briefly debated and, as a result, failed to address many important issues, including corporate successor liability. *Id.*

163. 851 F.2d 86 (1988).

164. *Id.* at 91. Under CERCLA, response liability is a remedial measure as opposed to a punitive measure. *Id.* The primary aim of the remedial measure is to correct the hazardous condition. *Id.*

corporate liability in the context of the CERCLA statute is consistent with the statutory law's purpose.[165] The underlying purpose of CERCLA, the court stated, was to take necessary steps to protect the public by imposing liability on successor corporations.[166] Therefore, the cleanup costs for CERCLA sites should be absorbed by the successor.[167] The court went on to state that congressional intent supports the conclusion that the successor should bear the cost.[168]

In addition, the Third Circuit stated that the legislative history indicates the congressional expectation that courts are to develop federal common law to supplement the CERCLA statute.[169] The *Smith Land* case indicated that the district court must consider national uniformity when creating federal common law on successor liability; otherwise the goals of CERCLA would be easily evaded by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability.[170] Because federal law is derived from the general doctrines of states, it follows, then, that the general doctrine of successor liability in operation in most states should guide the court's decision.[171] Thus, the court found that Congress did intend to impose successor liability on corporations which have

165. *Id.* at 91-92.

166. *Id.* at 92.

167. *Id.* Cleanup costs must be absorbed by someone, and these expenses can generally be borne by two sources: (1) The entities that had a specific role in producing or maintaining the hazardous condition; or (2) the taxpayers through federal funds. *Id.* at 91-92. It is clear that Congress intended the burden to fall on the taxpayers only when the responsible parties lacked the means to meet their obligations. *Id.*

168. *Id.* at 92.

169. *Id.* at 91. *But see* Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991) (stating it is not necessary to fashion a federal common law rule because Congress intended to include a successor corporation when it used the word "corporation" in the CERCLA statute).

170. *Smith Land*, 851 F.2d at 92.

171. *Id.* The excessively narrow statutes which apply in only a few states should not govern the court's decision when determining successor liability under CERCLA. *Id.*

either merged with or have consolidated with a corporation that is responsible for clean-up costs under CERCLA.[172]

The court in *Louisiana-Pacific* accepted the reasoning and conclusions made in the Third Circuit, and stated that the analysis set forth in *Smith Land* was equally applicable to successor liability in the context of an asset sale.[173] The court thus held that the traditional state rules of successor liability, as they blend to fashion national uniformity and federal law, should govern the CERCLA liability of successor corporations which acquire the assets of its predecessor.[174]

Continuing in its analysis, the court considered whether the de facto merger exception[175] to successor liability applied to the facts of the case.[176] On this issue, the court concluded that the District Court did not err in finding that the asset purchase was not a de facto merger because there was no continuity of shareholders following the sale.[177]

The court next considered the continuing business enterprise exception.[178] In holding that this exception was inapplicable, the court reasoned that L-Bar did not have actual notice of IMP's potential CERCLA liability.[179] At the time of the asset sale IMP had not been identified as a potentially liable party by any state or

---

172. *Id. See* 42 U.S.C.A. § 9607(a) (Supp. 1991) (defining liable parties). *See supra* notes 30-32 and accompanying text (explaining that successor liability is normally imposed where there has been a merger or consolidation of two corporations).

173. *Louisiana-Pacific*, 909 F.2d at 1263.

174. *Id.*

175. *See supra* notes 33-34 and accompanying text (discussing the de facto merger exception to traditional successor non-liability).

176. *Louisiana Pacific*, 909 F.2d at 1265-66. *See* Arnold Graphics Indus. v. Independent Agent Center, Inc., 775 F.2d 38, 42 (2d Cir. 1985) (stating that there must be continuity of stockholders in order to find that a de facto merger has occurred); Dayton v. Peck, Stow & Wilcox Co., 739 F.2d 690, 693 (1st Cir. 1984) (one of the key requirements of the de facto merger doctrine is continuity of shareholders). Since the court went on to consider the de facto merger doctrine, it appears that the common law exceptions are still valid law in addition to the modern successor liability exceptions.

177. *Louisiana-Pacific*, 909 F.2d at 1266.

178. *See supra* notes 144-85 and accompanying text (discussing the modern continuing business enterprise exception); *supra* notes 40-44 and accompanying text (discussing *Turner*, 397 Mich. 406, 244 N.W.2d 873, and the "continuing business enterprise" exception to successor non-liability); *infra* notes 189-205 and accompanying text (explaining *Distler*, 741 F. Supp. 637 (W.D. Ky. 1990) and the "continuing business enterprise" exception to successor non-liability).

179. *Louisiana-Pacific*, 909 F.2d at 1265.

federal agency, and no one had asserted or threatened a claim against IMP for clean-up costs.[180] Further, L-Bar did not continue IMP's slag business.[181] Thus, the court found that the *Louisiana-Pacific* case was distinguishable from cases in which the continuing business enterprise exception was applicable, and therefore declined to decide whether to adopt the continuing business enterprise exception under CERCLA.[182]

The product-line exception was not presented by Asarco; thus, the trial court did not consider the applicability of this exception to CERCLA liability,[183] and the issue was not raised on appeal.[184] The *Louisiana-Pacific* court merely distinguished this case from previous cases applying the "product-line" rule, rather than denouncing the rule, because L-Bar did not continue IMP's operations at the Asarco site.[185] Thus, it appears that the court would have entertained the possibility of product-line approach to successor liability if it had been presented by Asarco.

2. *Specific Application of the Continuing Business Enterprise Rule*

Noting that the United States Supreme Court had used the continuing business enterprise rule when considering successor corporation liability in cases of labor disputes,[186] the District

---

180. *Id.* at 1265-66.

181. *Id.* at 1266. Actually, IMP had ceased its slag business nine months before L-Bar purchased its assets. *Id.*

182. *Id.* at 1265. Since, L-Bar did not continue IMP's slag business, there was no continuing business enterprise with respect to the portion of the business responsible for the hazardous waste. *Id. See* Owner II, Inc. v. Environmental Protection Agency, 597 F.2d 184, 187 (9th Cir. 1979) (applying the continuing business enterprise exception to impose liability upon Owner II, a successor corporation, under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136w (1988), where Owner II had notice of outstanding debts to the EPA and where Owner II was established to continue distributing pesticides as its predecessor had done).

183. *Louisiana-Pacific*, 29 Env't Rep. Cas. (BNA) 1450, 1453.

184. *See generally, Louisiana-Pacific*, 909 F.2d 1260 (9th Cir. 1990).

185. *Louisiana-Pacific*, 29 Env't Rep. Cas. (BNA) 1450, 1453.

186. *See generally*, Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27 (1987); Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974); Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

Court in *United States v. Distler*[187] stated, without further explanation, that the reasons supporting the application of the continuing business enterprise rule in products liability cases were equally applicable in cases involving the liability of a successor corporation for response costs under section 107 of CERCLA.[188]

In *United States v. Distler*, Angell I (referred to as "Angex" by the court) was formed in 1976 to purchase the Angell Manufacturing Division of the Lamson & Sessions Corporation.[189] This division primarily manufactured metallic name plates for producers of consumer electronic products.[190] Angell I continued operating the name plate business, and did little to improve it or change the focus of the product line.[191] In 1979 three key employees of Angell I decided to purchase the company and operate it themselves, forming the Ang Corporation.[192] Each of the three held one-third of Ang's stock, but none of them had owned any Angell I stock.[193] Shortly after Ang was formed, it entered into an asset purchase agreement by which it acquired substantially all of the assets of Angell I, including the equipment, inventory, and physical plants.[194] The agreement specified that Ang (subsequently Angell Manufacturing Corporation or Angell II) assumed only certain liabilities set forth in the contract.[195] Angell I then dissolved and Ang changed its name to Angell Manufacturing Corporation (Angell II).[196] None of Angel I's shareholders or directors became shareholders or directors of Angell II.[197] Following the transfer, the new company issued a formal announcement of the change of ownership on Angell

187. 741 F. Supp. 637 (W.D. Ky. 1990).

188. *Id.* at 643. *See* 42 U.S.C.A. § 9607 (1983 & Supp. 1991) (setting forth CERCLA liability provisions).

189. *Distler*, 741 F. Supp. at 639.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

letterhead.[198] With the exception of three managers, the corporation retained the same employees, continued to produce the same products, served the same customers, and held itself out to the public as the same company.[199]

The predecessor, Angell I had contracted to have hazardous substances transported to certain sites for disposal, and the government instituted an action against the Angell Manufacturing Corporation for response costs incurred in cleaning up those hazardous waste sites.[200] The District Court denied Angell II's motion to dismiss, stating that a valid claim had been asserted against Angell II as a successor corporation.[201]

The court in *Distler*, relying on *Ray v. Alad Corp.*, concluded that the technical differences between a sale of assets, a merger, and a consolidation are irrelevant.[202] In applying the continuing business enterprise rule, the court in *Distler* found that the purchaser retained essentially the same employees and management as did its predecessor, the company operated out of the same physical facilities and produced the same product line after the transfer of ownership, and the company held itself out to the public as the same company, retaining the same operating assets and succeeding to all liabilities necessary for the orderly transition of ownership.[203] In light of these facts, the court reasoned that if the purchaser was permitted to avoid liability, it would be a "victory of form over substance" and would be contrary to the congressional intent that producers of hazardous substances be held liable for improper disposal of those substances under CERCLA.[204] Although the company served a different market at

198. *Id.*

199. *Id.*

200. *Id.* at 638.

201. *Id.*

202. *Id.* at 643. The technical differences between a sale of assets, merger, consolidation, or any other way in which ownership could have been transferred were irrelevant because the issue was one of CERCLA law. *Id.* This issue was whether, under CERCLA, a manufacturer's responsibility for its hazardous waste survived a change in ownership where the business retains its identity and the successor continues to operate in the same manner and in the same place. *Id. See* Ray v. Alad Corp., 55 Cal. App. 3d 855, 127 Cal. Rptr. 817, 821 (1977).

203. *Distler*, 741 F. Supp. at 643.

204. *Id.*

the time of the trial, the change in production responding to evolving market conditions did not change the fact that at the time of the transfer, the predecessor and purchaser were virtually identical, and that under those circumstances, the purchaser, Angell II, succeeded to CERCLA liability.[205]

Courts have consistently held that Congress did intend successor liability under CERCLA.[206] Further, the issue of successor liability under CERCLA is governed by federal law, and the courts must look to other circuits and states in fashioning the law so as to achieve national uniformity.[207] However, it has proven to be virtually impossible to formulate a uniform approach to successor liability under CERCLA in light of the divergent views of many jurisdictions and the EPA.

IV. LEGAL RAMIFICATIONS

The Environmental Protection Agency (EPA) has, like many courts, taken an expansive approach to successor liability under CERCLA. The EPA's policy is to hold successor corporations liable for the acts of its predecessor if the successor acquires the assets of the predecessor and also continues the business operations of the predecessor in substantially the same manner.[208] The EPA's policy, then, applies the product-line rule in the CERCLA context. However, some courts have apparently been less than eager to follow the lead of the EPA.[209]

---

205. *Id.*

206. *See, e.g.*, Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3rd Cir. 1988); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990); United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990); United States v. Western Processing Co., Inc., 751 F. Supp. 902 (W.D. Wash. 1990).

207. *Smith Land*, 851 F.2d at 92.

208. EPA Memorandum, *Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*, Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring (June 13, 1984). *See generally*, Comment, *EPA's Policy of Corporate Successor Liability Under CERCLA*, 6 STAN. ENV'T. L.J. 78 (1986-87) (discussing the EPA's policy on corporate successor liability and concluding that expansion of corporate successor liability is unjustified).

209. *See supra* notes 53-90 and accompanying text (discussing the viability of the product-line rule as applied in the CERCLA context).

At the present time, the future of successor liability under CERCLA in the Ninth Circuit remains uncertain, and it appears only that three judges in the Ninth Circuit have elected to take a relatively conservative approach to CERCLA successor liability by failing to directly decide the issue. In declining to decide which exception to adopt, however, the three-judge panel left the door open to the application of the two modern and expansive successor liability theories.[210]

However, the problems associated with determining which rules should apply to successor liability under CERCLA have not been isolated to the Ninth Circuit. Various courts have interpreted CERCLA differently; some acknowledge that the "product-line" rule is applicable,[211] and others have specifically chosen to apply the "continuing business enterprise" rule.[212] Still others acknowledge that both the "product-line" and "continuing business enterprise" theories are viable, but not needed to find successor liability under CERCLA.[213]

Since the product-line rule represents a radical departure from the traditional corporate successor liability rules,[214] many states have been unwilling to accept it even in the context of strict tort

---

210. The Ninth Circuit found that *Louisiana-Pacific*, 909 F.2d 1260, was distinguishable from cases in which the continuing business enterprise exception was applicable because L-Bar did not have actual notice of IMP's potential CERCLA liability and because L-Bar did not continue IMP's slag business. *See supra* notes 144-62 and accompanying text (discussing *Louisiana-Pacific*).

211. *See* United States v. Western Processing Co. Inc., 751 F. Supp. 902 (W.D. Wash 1990); *supra* notes 138-43 and accompanying text (discussing *United States v. Western Processing Co., Inc.* and the applicability of the product-line rule to CERCLA). *See also* Kline v. Johns-Manville, 745 F.2d 1217, 1219 (1984) (limiting the product-line rule to situations where the plaintiff's remedies against the original manufacturer are destroyed by the successor's acquisition of the business; the successor can assume the risk-spreading ability; and requiring the successor to assume responsibility for defective products is fair in light of the good will being enjoyed by the successor in the continued operation of the business). *But see,* In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1014 n.5 (D. Mass. 1989) (noting the First Circuit has refused to find that the product-line rule has any vitality under Massachusetts law); Florom v. Elliott Manufacturing, 867 F.2d 570 (10th Cir. 1989) (pronouncing that Colorado rejects both the product-line and continuing business enterprise rules as viable successor liability theories).

212. *See Distler*, 741 F. Supp. 637 (W.D. Ky. 1990); *supra* notes 187-205 and accompanying text (discussing *United States v. Distler* and the applicability of the product-line rule to CERCLA).

213. *See* Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991).

214. *See supra* notes 53-90 and accompanying text (discussing the formulation of the product-line rule).

liability.[215] However, if the true intent of Congress in formulating CERCLA was to place the burden of clean-up costs on the government only when the responsible parties lacked the ability to meet their obligations,[216] it rationally follows that the product-line rule should be uniformly applied throughout the nation in the CERCLA context.[217] The government's remedies against the predecessor are destroyed by the successor's acquisition of the business because the predecessor ceases to exist, and the successor is able to assume the risk-spreading capabilities of the predecessor.[218] Under these circumstances, it is fair to require the successor to assume responsibility in light of the continued operation of the business and transferred good-will.[219] In this context, the product-line rule will accentuate congressional intent. Despite this rationale, the application of the product-line rule and the continuing business enterprise rule within a CERCLA context continues to be unclear.

The same rationale can be applied when considering the application of the continuing business enterprise rule in the CERCLA context. Further, because the continuing business enterprise rule is considered a less radical departure from common law rules, it is more widely accepted than the product-line rule in CERCLA cases. The continuing business enterprise rule will also facilitate the Congressional objectives, although it will not result in the implication of successor liability in every case where the successor corporation might conceivably be liable. Thus, in order

---

215. *See, e.g.*, Florom v. Elliott Manufacturing, 867 F.2d 570 (10th Cir. 1989) (explaining that Colorado rejects both the product-line and the continuing business enterprise rules in the context of strict tort liability); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1014 n.5 (D. Mass 1989) (noting that the First Circuit does not recognize that the product-line rule has any vitality under Massachusetts law); City of Philadelphia v. Stepan Chemical Co., 713 F. Supp. 1491, 1495 n.5 (S.D. Ohio 1988) (expressing that the Pennsylvania Supreme Court has yet to decide whether the product-line rule is accepted law in Pennsylvania).

216. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3rd Cir. 1988).

217. *But see* Comment, *supra* note 21, at 100 (stating that the EPA is not without a remedy due to the corporate transfer of assets because CERCLA specifically provides for a fund to cover situations where there are not liable parties under the Act or where reimbursement from liable parties is inadequate).

218. Kline v. Johns-Manville, 745 F.2d 1217, 1219 (9th Cir. 1984).

219. *Id.*

to satisfy congressional intent to the greatest extent, both the product-line and the continuing business enterprise rule or an alternative must necessarily be applied. One such alternative was formulated in the 1991 case of *Anspec Co., Inc. v. Johnson Controls, Inc.*[220]

In *Anspec* the United States Court of Appeals for the Sixth Circuit noted that Congress had provided a list of parties potentially liable for cleanup costs of hazardous waste sites and that corporate successors were not expressly included in any of the categories.[221] Despite this finding, the *Anspec* court concluded that Congress intended to include successor corporations within the description of entities that are potentially liable under CERCLA when it used the term "corporation."[222]

To reach this conclusion, the court reasoned that there is generally a presumption that Congress deliberately omitted a remedy from a statute that contains a comprehensive legislative scheme including an integrated system of procedures for enforcement.[223] However, this presumption does not apply when a court merely interprets a word used in a statute to include one of its commonly accepted components.[224] In the context of this problem, there is a universal rule that "corporation" includes a successor corporation resulting from a merger.[225] Thus, a successor corporation is liable for response costs under CERCLA by the very provisions of the Act.[226]

While most jurisdictions agree that Congress intended to provide for the effective response to hazardous waste sites, and that the costs of such responses be borne by those responsible for

---

220. 922 F.2d 1240 (6th Cir. 1991).

221. *Id. See* 42 U.S.C.A. § 9607(a) (Supp. 1991) (providing that covered persons include the owner and operator of a vessel or facility; any person who at the time of disposal of any hazardous substance owned or operated by any facility at which the hazardous substances were disposed of; any person who by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances; and any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities).

222. *Anspec*, 922 F.2d at 1245.

223. *Id.* at 1246.

224. *Id.*

225. *Id.* at 1247.

226. *Id.*

disposal of chemical poisons, the results of cases involving successor liability under CERCLA are inconsistent. Such inconsistencies may lead to "forum shopping" in the sense that if there is even a remote possibility of CERCLA liability, corporate sales will take place only in those jurisdictions which treat successors most favorably. These jurisdictions will typically be those which do not accept either the "product-line" or "continuing business enterprise" rules and those which find no ambiguity in the cleanup liability provision of CERCLA.

CONCLUSION

Many commentators who are familiar with the Superfund law (CERCLA) say that it was doomed to failure from its inception, largely because of fundamental flaws in the legislation that created it.[227] In light of the confusion and the inconsistencies surrounding successor liability under CERCLA, the ground is set for some clarification. This action may occur either by the Supreme Court granting certiorari to resolve the issue, or by Congress amending the language itself. It is this commentator's opinion that such clarification should be borne by the Legislature.

The Supreme Court should not resolve the issue, because in doing so, the Supreme Court would be required either to impose the more modern corporate successor liability theories upon all states or to reject the viability of those rules. The hesitancy to take such action stems from the general principle that it is within each state's sovereignty to create its own statutory and judicial rules of corporate law.

Further, the Supreme Court is unlikely to interpret the meaning and intent of Congress in light of the comprehensive legislative scheme of CERCLA. If the Supreme Court were to do so, it would be acting as a "superlegislature," a stance it has historically been reluctant to take. Thus, the final, and only viable solution to the problem of whether a successor corporation may be held liable for

227. Frank Viviano, *Billions Spent On Legal Fees; Cleanup Lags*, L.A. DAILY JOURNAL, June 3, 1991, § II, at 1, col. 1.

the acts of its predecessor under CERCLA is for Congress to amend the list of parties potentially liable for cleanup costs to reflect its true intent. Congress is the body best suited to determine, through investigation and debate, which groups have contributed to the hazardous waste problem.[228] Congress can study the societal and economic impacts that would result from the imposition of successor liability on additional parties, therefore Congress should be the body to address the changes to categories of potentially responsible parties under CERCLA.[229]

As previously stated, the problems associated with hazardous waste sites are nationwide. These problems are rapidly becoming a crisis rather than a mere problem.[230] Because the meager history of CERCLA does disclose that the Act was intended to provide for the cleanup of hazardous waste sites nationwide, a uniform national policy should be provided so that the impending crisis may be swiftly and effectively limited. In the absence of successor liability, the government may find that it is left without any practical recourse against polluters where the predecessor corporation has long since disappeared and its shareholders are difficult if not impossible to locate should they be personally liable.[231] Congress should amend the language of CERCLA to *expressly* provide that successor corporations be held liable for the negligent or careless acts of its predecessor in disposing of hazardous substances. However, in light of President Bush's relationship with the manufacturing sector of this country, it is unlikely that he would sign such expansive legislation.

---

228. Comment, *supra* note 21, at 102. Courts do not have the resources to conduct the necessary investigation, debate and analysis to determine which parties should bear liability under CERCLA. *Id.*

229. *Id.*

230. Initially, the Superfund's legislative sponsors estimated that the cleanup would be accomplished in a single five-year program and would cost less than $5 billion. Frank Viviano, *supra* note 227 § II at 1, col. 1. Today, analysts predict that the program could take up to half a century to complete and cost as much as $1 trillion in industry and federal spending. *Id. See*, Semararo, *Toward an Optimal System of Successor Liability for Hazardous Waste Cleanup*, 6 STAN. ENV'T. L.J. 227 (1986-87).

231. In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1014 (D. Mass. 1989).

If Congress is serious about taking remedial actions regarding hazardous waste sites, amendments to the Superfund law are essential. If current projections of Superfund-related expenses are on point, the cost will be a minimum of $2,000 for each American citizen.[232] This cost will most likely be reflected in price increases passed along to consumers on numerous chemical and petroleum-based products.[233] Some analysts and commentators believe that an extensive government bailout will eventually be needed to finish the toxic cleanup and to provide emergency backing for commercial insurance companies which are burdened with extensive Superfund-related liability.[234]

It appears, then, that in this era of tax adversity, the only option which may be available to Congress may be to impose just such a tax upon all individuals, the funds of which would be applied to the cleaning up of the environment. If the environment is to be cleaned up for future generations, this tax would have the same effect upon citizens as would successor corporations' risk-spreading actions of passing on the costs to consumers, and may prove to be an effective means of accomplishing the goals of Congress in this area.

Jacqueline Y. Engel

232. Frank Viviano, *supra* note 227, § II, at 1, col. 1.
233. *Id.*
234. *Id.* Of course, the government bailout would be at direct taxpayer expense. *Id.*