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Product Line and Continuity of Enterprise Theories of Corporate Successor Liability under CERCLA

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"PRODUCT LINE" AND "CONTINUITY OF ENTERPRISE" THEORIES OF CORPORATE SUCCESSOR LIABILITY UNDER CERCLA

*Alfred R. Light**

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund),[1] was called a welfare and relief act for lawyers, even before its enactment.[2] One of the legal lacunae in which resides untold billable hours has been the search for the deep pocket to pay for or perform reme-

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1. 42 U.S.C. §§ 9601-9675 (1988).

2. 126 CONG. REC. H11792 (daily ed. Dec. 3, 1980), *reprinted* in 1 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) ["Legis. Hist."], 97th Cong., 2d Sess. 788-89 (1983); *see also* 132 CONG. REC. H9573 (daily ed. Oct. 8, 1986) (remarks of Rep. Snyder).

dial actions which the United States Environmental Protection Agency (EPA) selects for contaminated facilities within the Superfund program.[3]

Under CERCLA, the conventional potentially responsible party (PRP) search begins with the past and present owners and operators of a contaminated facility, the generators of the waste disposed of there, and any transporters who may have selected the facility for disposal.[4] Where the disposal occurred decades ago, dead ends are common. The residents or businesses who by happenstance now own the old plant site may have limited assets. The former operator may be dissolved or defunct – and its equity distributed to stockholders decades ago. Other generators or transporters may not even be implicated because the operators disposed of their own wastes at their own facility.

For example, a number of contaminated sites which have made their way into the Superfund universe first became contaminated in the early twentieth century before natural gas and electricity were widely available.[5] Utilities then sometimes gasified coal for illumination; a byproduct of gasification was "coal tar." This material, now deemed hazardous under the statute, was variously disposed, often at the generating facility. Over the years, such facilities often were bought and sold, subdivided and used for many purposes. The utility may have become defunct or sold its gas operations after electricity became the fuel of choice. In short, the tracks of those entities factually responsible for the contamination dissipated.

How may the PRP search then continue? A corporation which has completely wound down and distributed its assets usually cannot be held liable.[6] Such a corporation no longer has the capacity to be sued. The environmental prosecutor's answer often is to search for the new owners of the old assets of the unreachable (yet liable) company. The search for a nexus between the defendant and the facility becomes a search for a nexus between the defendant and a PRP who once had a nexus to the facility. Given the difficulty, indeed probable impossibility, of following the equity once a business had "cashed out," the prosecutor follows the sold assets and seeks to impose successor liability on that entity.

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3. Many CERCLA cases provide descriptions of the CERCLA enforcement regime. *E.g.*, United States v. Aceto Agricultural Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989); United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988); Solid States Circuits, Inc. v. EPA, 812 F.2d 383 (8th Cir. 1987).

4. *See generally* U.S. ENVT'L PROTECTION AGENCY, PRP SEARCH SUPPLEMENTAL GUIDANCE FOR SITES IN THE SUPERFUND REMEDIAL PROGRAM, (June 29, 1989) (OSWER Directive No. 9834. 3-2a), at 13 *reprinted in* American Bar Association, Hazardous Waste and Superfund 89, 107 (1990) (advising search manager to consult with Assistant Regional Counsel when confronted with bankruptcy, dissolution, or successorship situation).

5. *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) (plant operated until 1950); Allied Corp. v. Frola, 730 F. Supp. 626 (D.N.J. 1990); Chesapeake Utils. Corp. v. American Home Assurance Co., 704 F. Supp. 551 (D. Del. 1989) (coal plant operated from 1907-1950); United States v. Reilly Tar & Chem. Co., 606 F. Supp. 412 (D. Minn. 1985) (plant in operation 1917-1972). This author has been told confidentially of one Superfund site where "coal tar" contamination dates back before the "Late Unpleasantness" of 1861-65. Since the Federal Army actually operated the site (on southern soil) during a portion of that conflict, the United States itself may be a PRP.

6. *See* Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448 (9th Cir. 1987) (corporation dissolved nine years before CERCLA's enactment cannot be sued in contribution); United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990) (no CERCLA cause of action against dissolved company); *but see* United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1498 (D. Utah 1987) (cause of action available where dissolved company's "funeral still going on").

This article describes the EPA's attempt to develop a legal basis for imposing liability on asset purchasers. Part II introduces CERCLA and describes how the EPA in the 1980's deliberately sought in CERCLA litigation to build upon novel doctrines which had developed under product liability law.[7] The personal injury plaintiffs' bar preceded the environmental prosecutor in the quest to expand corporate successor liability.

Part III analyzes the two related doctrines which have developed in the law of product liability, product line and continuity of enterprise, and their potential relevance to the CERCLA context.[8] The vast majority of American jurisdictions have rejected these doctrines in the context of product liability. Many of the reasons offered by the various jurisdictions have considerable force for CERCLA. Precedents under federal statutes in other policy areas, upon some of which the government has relied, also do not indicate application of the expansive doctrines under CERCLA.

Part IV enumerates three separate approaches to the successor issue which the United States has taken in CERCLA litigation, based on three briefs.[9] The Department of Justice (DOJ) seems less inclined today than in earlier years to rely on the product line and continuity of enterprise theories. In the absence of further congressional guidance, it is concluded that courts should limit successor liability under CERCLA to better established bases with reference to appropriate state law principles.[10]

II. CERCLA AND SUCCESSOR LIABILITY

A. *Text and Legislative History*

Successor liability is a form of vicarious liability in that the person held responsible did not perform, desire, or directly benefit from the act causing the harm.[11] CERCLA, however, is intended to impose new strict liability for the cleanup of hazardous waste sites on those who "created the risk."[12] Thus, over the past several years the federal courts have had to struggle with the question of whether, and if so to what extent, the statute imposes liability on corporations which acquire the stock or assets of corporations liable under the statute.[13]

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7. *See infra* notes 11-23 and accompanying text.

8. *See infra* notes 24-151 and accompanying text.

9. *See infra* notes 152-66 and accompanying text.

10. *See infra* notes 167-77 and accompanying text.

11. *See* Semerano, *Toward an Optimal System of Successor Liability for Hazardous Waste*, 6 STAN. ENVTL. L.J. 226 (1986-87).

12. S. REP. No. 848, 96th Cong., 2d Sess. 34 (1980), *reprinted in* 1 Legis. Hist. at 308, 341 (1983).

13. There is now a considerable body of secondary literature on successor liability under CERCLA. Articles in the Stanford Environmental Law Journal in 1986-87 make a number of arguments useful to defendants. *See* 6 STAN. ENVTL. L.J. (1986-87). A recently published article, Squire, Ingram & Frost, *Corporate Successor Liability Under CERCLA: Who's Next?* 43 SW. L.J. 887 (1990) is, perhaps unintentionally, rather plaintiff-oriented because it hypothesizes a developing adherence to the product line/continuity of enterprise theories which has not, in fact, developed. *Id.* at 905-08 ("more states may adopt the more expansive rules so that it may be possible to argue that they are the generally accepted rules").

CERCLA § 107(a) identifies four limited categories of persons who are potentially liable under the statute – facility owners and operators, past owners or operators at the time of disposal, and certain generators and transporters of hazardous substances.[14] The Senate Committee on Environment and Public Works, which devised the four categories of potentially liable parties found in CERCLA § 107(a), explained its approach to liability as a "method of allocating resources through choice in the market place" by imposing the costs of injuries on "the activities which caused them."[15] Since the liability of the present owner and operator was already in existence and did not need extended explanation in 1980, the exclusive focus of the committee's report is its justification for imposing new strict liability on generators, transporters, and disposers of waste, *i.e.*, those who "created the risk."

Several courts have adopted a "plain meaning" reading of CERCLA § 107(a), concluding that the language of this section expressly defines and limits liability.[16] Past owners of sites where no disposal took place during their ownership are not liable.[17] An intermediate possessor of hazardous substances who did not arrange for their disposal is not liable as a generator.[18] A supplier of hazardous substances who designs and builds a facility and trains its operators is not liable as an owner or operator of the facility.[19]

B. EPA Memorandum

The EPA announced a policy on corporate successor liability under CERCLA in a 1984 Agency memorandum.[20] The Agency's policy is to hold a successor corporation liable for the liabilities of its predecessor corporation if the successor acquires assets of the predecessor and continues substantially the same business operations as the predecessor. The EPA contends that public policy considerations and the legislative history of CERCLA justify the expansion of successor corporation liability. In addition, the Department of Justice has pressed the EPA's

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14. 42 U.S.C. § 9607(a)(1)-(4) (1988).

15. S. REP. No. 848, 96th Cong., 2d Sess. 34, *reprinted in* 1 Legis. Hist. 308, 341.

16. Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990) ("If Congress wanted to extend liability to parent corporations, it could have done so, and it remains free to do so."); Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988) ("To the point that courts could achieve more of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits.").

17. United States v. Conservation Chem. Co., 619 F. Supp. 162, 253-54 (W.D. Mo. 1985) (citing Cadillac Fairview Cal. Inc. v. Dow Chem. Co., 24 Envtl. L. Rep. (Envtl. L. Inst.) 20376 (C.D. Cal. 1984), *rev'd on other grounds*, 840 F.2d 691 (9th Cir. 1988)).

18. Allied Towing Corp. v. Great E. Petroleum Corp., 642 F. Supp. 1339, 1349-50 (E.D. Va. 1986).

19. *Edward Hines Lumber Co.*, 861 F.2d at 156-58.

20. EPA Memorandum from Courtney Price, Assistant Administrator for Enforcement and Compliance Monitoring, *Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*, 11 (June 13, 1984) [hereinafter cited as EPA Memorandum].

views in CERCLA litigation.[21] Although unnecessary to the holding that corporate successor liability applies under CERCLA, the Third Circuit referred to the EPA memorandum.[22] In more recent briefs, the DOJ has included a footnote attempting to bootstrap the EPA's memorandum to an agency legal position entitled to deference under the *Chevron* doctrine.[23]

The EPA memorandum acknowledges that corporate non-successor liability is the rule, generally subject to four traditional exceptions in corporate law. Most of the memorandum's discussion, however, focuses on two additional exceptions, not so well-established, which have appeared in a small number of American jurisdictions but which the EPA contends should apply in CERCLA cases. These non-traditional exceptions are called (1) product line and (2) continuity of enterprise. The remainder of this article focuses on these novel theories of successor liability which the EPA and the DOJ have advanced in CERCLA cases.

III. The Unusual Exceptions to Corporate Non-successor Liability

The general rule is that "where one company sells or otherwise transfers all its assets to another company, the transferee is not liable for the debts and liabilities of the transferor."[24] This principle of corporate law is accepted by the majority of

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21. *E.g.* United States v. Allied Chem. Corp., No. C-83-5898 (D.D. Cal., *brief filed* Mar. 12, 1987). While the DOJ pressed its product line and continuity of enterprise theories in 1984-87, some of its more recent briefs suggest a more moderate, incremental approach. This may be partially explained by what has happened to several of the precedents cited in the DOJ's 1987 brief. *See* United States v. Allied Chem. Corp., No. C-83-5896 (C.D. Cal., brief filed Mar. 12, 1987). One of the leading continuity of enterprise opinions, cited frequently in the DOJ's *Allied* brief, is Cyr v. B. Offen & Co., Inc., 501 F.2d 1145 (1st Cir. 1974). In this opinion, the First Circuit in a diversity case was "predicting" the views of the New Hampshire Supreme Court on the theory. The New Hampshire Supreme Court subsequently rejected the approach, in effect abrogating the First Circuit's opinion. Simoneau v. South Bend Lathe, Inc., 130 N.H. 466, 543 A.2d 407 (N.H. 1988); *see* Conway v. White Trucks, 885 F.2d 90 n.2 (3d Cir. 1989) ("*Cyr* is no longer good law in light of the New Hampshire Supreme Court's express rejection of its reasoning."). The DOJ in its *Allied* brief also cited a federal district court in Pennsylvania applying Pennsylvania law on the product line theory. This court subsequently reversed itself in the same case. The Court of Appeals for the Third Circuit has affirmed the latter holding. *See* Conway v. White Trucks, 639 F. Supp. 160 (M.D. Pa. 1986), *rev'd*, 692 F. Supp. 442 (M.D. Pa. 1988), *aff'd*, 885 F.2d 90 (3d Cir. 1989). Finally, the DOJ in its *Allied* brief cited a 1984 federal district court diversity opinion interpreting Colorado law which followed the *Ray* product line analysis. Hickman v. Thomas C. Thompson Co., 592 F. Supp. 1282, 1284 (D. Colo. 1984). The Tenth Circuit last year expressly rejected this district court's view of Colorado law and disapproved the product line approach. Florom v. Elliot Mfg., 867 F.2d 570 (10th Cir. 1989), *reh'g. denied*, 879 F.2d 801 (10th Cir. 1989).

Apparently, the author of Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 Geo. Wash. L. Rev. 1300 (1990) overlooked this subsequent case law. The article cites the *Cyr* and *Hickman* cases as if they were still good law (*id.* at 1317 n.140) for the proposition that "several courts have adopted liberalized successor liability principles in strict product liability cases." *Id.* at 1317. More seriously, while citing the minority of product liability cases endorsing the product line and continuity of enterprise theories, this Note ignores entirely the overwhelming majority of decisions expressly rejecting them and their rationales.

22. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 n.2 (3d Cir. 1988).

23. *See* Anspec v. Johnson Controls, Inc., No. 89-2393 (6th Cir. filed Mar. 12, 1990). Under the doctrine of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), an agency's interpretation of its own enabling statute is entitled to substantial deference where the statutory language is not clear.

24. Andrews v. John E. Smith's Sons Co., 369 So. 2d 781, 785 (Ala. 1979).

American jurisdictions.[25] Equally well accepted are four exceptions to this general rule. By virtue of those exceptions, a purchasing company may be liable for the debts and liabilities of the selling corporation if any of the following four circumstances exist: (1) the transferee agrees to assume such debts or liabilities; (2) there is a statutory or de facto consolidation of the two corporations; (3) the transferee is found to be merely a continuation of the selling corporation; or (4) the transaction was fraudulent in fact.[26]

A. Product Line Exception

The "product-line" exception to these generally accepted rules was created by the California Supreme Court in *Ray v. Alad Corp.*[27] Following this approach, a successor that continues to manufacture the same type of article as its predecessor becomes liable "for defects in units of the same product line previously manufactured" by the predecessor.[28] This product line exception imposes liability where traditional corporate law does not.[29]

The *Ray* court found this result consistent with the theory of strict liability in tort and justified by the following factors:

> (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business agreement required the predecessor to dissolve its corporate existence; (2) the successor's ability to assume the original manufacturer's risk-spreading role; and (3) the fairness of requiring the successor to assume a responsibility for défective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business.[30]

1. Rejection of the Product Line Approach

The judicial reception to *Ray* has not been enthusiastic, as evidenced by the fact that there appear to be only three jurisdictions, other than California, which have

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25. *See, e.g.*, Andrews v. John E. Smith's Sons Co., 369 So. 2d 781, 785 (Ala. 1979); Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1049 (Fla. 1982); Bullington v. Union Tool Corp., 254 Ga. 283, 284, 328 S.E.2d 726, 727 (1985); Gonzales v. Rock Wool Eng'g & Equip. Co., 117 Ill. App. 3d 435, 438-39, 453 N.E.2d 792, 795 (1983); Arthur Elevator Co. v. Grove, 236 N.W.2d 383, 391 (Iowa 1975); Comstock v. Great Lakes Distrib. Co., 209 Kan. 306, 310, 496 P.2d 1308, 1311 (1972); Trenkner, *Products Liability: Liability of Successor Corporation for Injury or Damage Caused by Product Issued by Predecessor*, 66 A.L.R.3d 824, 827 (1975).

26. *See, e.g.*, *Andrews*, 369 So. 2d at 785; *Bernard*, 409 So. 2d at 1049; *Bullington*, 254 Ga. at 284, 328 S.E.2d at 727; *Gonzales*, 117 Ill. App. 3d at 439, 453 N.E.2d at 795; Luedecke v. Des Moines Cabinet Co., 140 Iowa 223, 226, 118 N.W., 456, 457 (1908); *Comstock*, 209 Kan. at 310, 496 P.2d at 1311; Flaugher v. Cone Automatic Mach. Co., 30 Ohio St. 3d 60, 62, 507 N.E.2d 331, 334 (1987).

27. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

28. 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.

29. *See* Note, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L.J. 677, 678-82 (1983); Note, *Postdissolution Product Claims and the Emerging Role of Successor Liability*, 64 VA. L. REV. 861, 876-78 (1978).

30. *Ray*, at 31, 560 P.2d at 9, 136 Cal. Rptr. at 581-82; *see* DeLapp v. Xtraman, Inc., 417 N.W.2d 219 (Iowa 1987).

adopted the product line exception as their law.[31] The clear majority of courts which have squarely addressed the issue have declined the invitation to adopt the exception.[32] Federal courts applying the law of states which have not squarely addressed the question have been equally reluctant to adopt the doctrine.[33]

Courts that have opted not to incorporate the product line exception into their jurisprudence have generally been persuaded by one or more of three rationales: (1) the exception is inconsistent with elementary products liability principles, and strict liability principles in particular, because it results in an imposition of liability without a corresponding duty;[34] (2) the exception threatens small successor businesses with economic annihilation because of the difficulty involved in obtaining insurance for defects in a predecessor's product (*i.e.*, the risk spreading justification is invalid);[35] and (3) the exception is essentially a radical change in the principles of corporate law and, as such, should be left to legislative action.[36] Although sometimes differing in their primary rationale for rejecting the product line exception, these courts uniformly find the logic of *Ray* unpersuasive.[37]

In *Polius v. Clark Equipment Co.*,[38] the Third Circuit addressed the product line issue in its capacity as the Supreme Court of the Virgin Islands.[39] In rejecting the product line exception, this court made reference to all three of the generally used explanations for its rejection. Attacking "inconsistencies in the arguments" of

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31. *See* Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 431 A.2d 811 (1981); Dawejko v. Jorgensen Steel Co., 290 Pa. Super. 15, 434 A.2d 106 (1981); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984). Although a panel of the Pennsylvania Superior Court adopted the product line theory, relying on the need to provide recovery for victims, the Pennsylvania Supreme Court has not yet passed on the issue. Conway v. White Truck, 885 F.2d 90, 94 (3d Cir. 1989); *Polius*, 802 F.2d at 79. *See* Light, *Liability and the Corporate Form Under the Environmental Laws*, 17 CHEMICAL WASTE LITIGATION 199 (Jan. 1989).

32. *See Bernard*, 409 So. 2d at 1049-51; Bullington v. Union Tool Corp., 254 Ga. 283, 285, 328 S.E. 2d 726, 728 (1985); *Gonzales*, 117 Ill. App. 3d at 440, 453 N.E.2d at 796; Miller v. Nissen Corp., 83 Md. App. 448, 575 A.2d 758, 762 (1990); Pelc v. Bendix Mach. Tool Corp., 111 Mich. App. 343, 355-56, 314 N.W.2d 614, 620 (1981); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 100 (Minn. 1989); Young v. Fulton Iron Works Co., 709 S.W.2d 927, 940 (Mo. Ct. App. 1986); Jones v. Johnson Mach. & Press Co., 211 Neb. 724, 729-30, 320 N.W.2d 481, 484 (1982); Simoneau v. South Bend Lathe, Inc., 130 N.H. 466, 543 A.2d 407, 408 (1988); Schumacher v. Richards Shear, Co., 59 N.Y.2d 239, 246-47, 451 N.E.2d 195, 198-99, 464 N.Y.S.2d 437, 440-41 (1983); Downtowner, Inc. v. Acrometal Prods. Inc., 347 N.W. 2d 118, 123-25 (N.D. 1984); *Flaugher*, 30 Ohio St. at 66-67, 507 N.E.2d at 337; Goucher v. Parmac, Inc., 694 P.2d 953, 954 (Okla. Ct. App. 1985); Hamaker v. Kenwel-Jackson Mach. Inc., 387 N.W.2d 515, 520-21 (S.D. 1986); Griggs v. Capitol Mach. Works, Inc., 690 S.W.2d 287, 291-94 (Tex. Ct. App. 1985); Ostrowski v. Hydra-Tool Corp., 144 Vt. 305, 307-08, 479 A.2d 126, 127 (1984); Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 303-11, 376 N.W.2d 820, 826-29 (1985). *See also* Southwest Distrib. Co. v. Olympia Brewing Co., 90 N.M. 502, 565 P.2d 1019 (1977).

33. *E.g.*, Florom v. Elliott Mfg., 867 F.2d 570 (10th Cir. 1989) (applying Colorado law); Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145 (6th Cir. 1987) (applying Kentucky law); Tucker v. Paxson Mach. Co., 645 F.2d 620 (8th Cir. 1981) (applying Missouri law); Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 728 F. Supp. 1506 (D. Or. 1990) (applying Oregon law); Giraldi v. Sears, Roebuck & Co., 687 F. Supp. 987 (D. Md. 1988) (apply Maryland law); Fehl v. S.W.C. Corp., 433 F. Supp. 939 (D. Del. 1977) (applying Delaware law).

34. *E.g.*, *Downtowner, Inc.*, 347 N.W.2d at 123; Manh Hung Nguyen v. Johnson Mach. & Press Corp., 104 Ill. App. 3d 1141, 1146-51, 433 N.E.2d 1104, 1108-10 (1982).

35. *E.g.*, *Bernard*, 409 So.2d at 1049-50.

36. *E.g.*, *Flaugher*, 30 Ohio St. at 66-67, 507 N.E.2d at 337; *cf. Miller*, 83 Md. App. 448, 575 A.2d 758.

37. *See Niccum*, 438 N.W.2d at 100; *DeLapp*, 417 N.W.2d 219, 220-21 (Iowa 1987).

38. 802 F.2d 75 (3d Cir. 1986).

39. *Id.* at 79-80.

those advocating the product line exception, the court first explained that elimination of proof of negligence in product liability claims under Restatement (Second) of Torts § 402A "does not logically support expansion of liability against successor corporations merely because the primary tortfeasor is no longer available to pay the judgment."[40] The Restatement requires the plaintiff to prove that the manufacturer caused the injury.

Second, the court noted that the notion of "risk spreading" had little to do with the special circumstances of product liability suits. Instead, when viewed in the successor liability context, the "real difference" between product liability and other cases is the likely "length of time which may elapse between the precipitating act and the plaintiff's injury."[41] The Third Circuit attributed the product line courts' failure to discuss this real difference to their probable "reluctance to explore the troublesome question of appropriate statutes of repose in products liability cases, a question within the traditional legislative sphere."[42] In other words, the Third Circuit suggested that the legislature was better capable of addressing the "real" problem directly through modification of the statutes of repose than the court could through creation of successor liability. The court also noted that whether "state corporate dissolution requirements should be modified to require adequate provision for compensating creditors whose claims have not yet accrued," a more general solution to the same problem was also "of that type [which] must necessarily be undertaken by the legislature, not the courts."[43]

More fundamentally, the Third Circuit objected to the product line exception because it fails to sufficiently honor the traditional tort law requirement of causation. Without a requirement for proof of causation, strict liability's objective of deterrence is not furthered.[44] The court finally noted the potential unavailability of insurance to cover a company's liability for a predecessor's product defects.[45]

2. Narrow Application of the Product Line Approach

In the few jurisdictions which have adopted some version of the product line theory, courts applying the doctrine have narrowed its scope.[46] For example, the Third Circuit applying Pennsylvania's version of the theory recently held that the doctrine applies only where there has been "the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition."[47] In other words, there would be no successor liability under the theory

40. *Id.* at 80.
41. *Id.*
42. *Id.* at 81.
43. *Id.*
44. *Id.* at 81-82 (citations omitted).
45. *Id.* at 82.
46. Cases since *Ray* have noted that the application of the product line exception requires a balancing of the risk shifting principle against the fault principle which underlies all tort law. *See* Bourque v. Lehmann Lathe, Inc., 476 So. 2d 1125, 1129 (La. Ct. App.), *writ denied*, 479 So. 2d 362 (La. 1985); Hall v. Armstrong Cork, Inc., 103 Wash. 2d 258, 262-64, 692 P.2d 787, 791-92 (1984) (en banc).
47. Conway v. White Trucks, 885 F.2d 90, 97 (3d Cir. 1989).

where the plaintiff failed to make any effort to assert his potentially available remedies in bankruptcy or in a pending lawsuit against the original manufacturer. This prerequisite is based on the *Ray* requirement that the asset transfer must have caused the destruction of plaintiff's remedy.[48]

The Ninth Circuit, interpreting California tort law, determined that for the *Ray* exception to apply, the asset sale to the successor must "contribute to the destruction of the plaintiffs' remedies."[49] Thus, it held that the product line exception did not apply when the predecessor corporation sold one of its lines to a successor but continued in business until its bankruptcy years later. Similarly, in *Nelson v. Tiffany Industries, Inc.*,[50] the Ninth Circuit predicted that California would not permit successor liability even after the predecessor totally dissolved following bankruptcy proceedings, and the sale of its entire assets to the successor followed the bankruptcy proceedings.[51] In both cases, the essential element of causation was missing since the successor's purchase of the product line did not cause the predecessor to dissolve or deprive the plaintiffs of a source of recovery.[52] In *Nelson,* the Ninth Circuit explained that "it was [the predecessor's] bankruptcy and not [the alleged successor's] subsequent purchase of the assets that destroyed [the plaintiff's] remedies."[53]

The Washington Supreme Court, which has explicitly adopted the *Ray* formulation of the product line exception,[54] held that the exception does not apply where a sale of less than all the predecessor's assets occurs because the purchasing company cannot be deemed to have caused the destruction of plaintiff's remedy.[55] New Jersey, the only state other than California and Washington whose Supreme Court has adopted the product line exception, has also recognized the importance of the total destruction of plaintiff's remedy against the predecessor as a prerequisite for application of the product line doctrine.[56]

B. *Continuity of Enterprise Exception*

1. The *Turner* Decision

Another deviation from traditional corporate successor liability doctrines emerged from *Turner v. Bituminous Casualty Co.*,[57] where the Michigan Supreme Court expanded the traditional exceptions to increase a successor's exposure in

48. *See* Santa Maria v. Owens-Illinois, Inc., 808 F.2d 848, 859 (1st Cir. 1986) (it is "crystal clear" under *Turner* or *Ray* that deprivation of plaintiff's remedy must have occurred by virtue of the asset transfer).

49. Kline v. Johns-Manville, 745 F.2d 1217, 1220 (9th Cir. 1984).

50. 778 F.2d 533 (9th Cir. 1985).

51. *Id.* at 538.

52. *Conway,* 885 F.2d at 95.

53. 778 F.2d at 537.

54. *See Martin,* 102 Wash. 2d 581, 616, 689 P.2d 368, 388.

55. *See Hall,* 103 Wash. 2d 258, 266, 692 P.2d 787, 792 (1984) (product line exception justified by lack of meaningful remedy caused by the successor's acquisition and destruction of the predecessor).

56. *See Conway,* 885 F.2d at 95-96; *Ramirez,* 86 N.J. at 350, 431 A.2d at 820; Holloway v. State, 237 N.J. Super. 71, 77, 566 A.2d 1177, 1180 (1989).

57. 397 Mich. 406, 244 N.W.2d 873 (1976).

products liability cases. The court reasoned that whether the corporate transaction was an acquisition of assets for cash or a more traditional form of merger was irrelevant from the standpoint of the injured party.

Applying that rationale, the court found a continuity of enterprise where the successor had retained key personnel, assets, and general business operations, as well as the company name, and had assumed liabilities and obligations of the seller ordinarily necessary for normal business operations. Furthermore, in *Turner* the successor held itself out to the world as an effective continuation of the seller, which had ceased operations and dissolved soon after the sale. The court identified the following elements as "guidelines" for establishing the requisite continuity:

> (1) basic continuity of the seller's enterprise, through management, personnel, physical location, assets, and general business operations; (2) dissolution of the seller soon after the sale; (3) assumption of the seller's liabilities and obligations ordinarily necessary for the uninterrupted continuation of normal business operations; and (4) holding itself out to the world as the continuation of the seller.[58]

Cases interpreting *Turner* clarify that it merely requires that the totality of a transaction demonstrate basic enterprise continuity; every criterion need not be present.[59]

The principal difference between *Turner*'s continuity of enterprise and the traditional mere continuation theory is that the former does not require shareholder continuity. The case for a requirement of stockholder continuity rests on the premise that since a corporation's fortunes ultimately affect its shareholders they should not continue to enjoy the profits of their enterprise following its merger into another company while escaping the predecessor's pre-merger liabilities.[60]

Under the mere continuation rule, "the test is not the continuation of the business operation but the continuation of the corporate entity."[61] A continuation demands "a common identity of stock, directors, and stockholders and the existence of only one corporation at the completion of the transfer."[62] In fact, a number of

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58. 397 Mich. at 430, 244 N.W.2d at 882. *See* Polius v. Clark Equip. Co., 802 F.2d 75, 79 n.4 (3d Cir. 1986).

59. *See, e.g.*, Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136, 143-44 (E.D. Mich. 1979); Haney v. Bendix Corp,, 88 Mich. App. 747, 750-51, 279 N.W.2d 544, 546 (1979) (applying sliding scale analysis).

60. *See Manh Hung Nguyen*, Ill. App. 3d 1141, 433 N.E.2d 1104, 1110 (1986); *see also* Louisiana Pac. Corp. v. ASARCO, Inc., 909 F.2d 1260, 1264-65 (9th Cir. 1990) (stockholder continuity required to establish de facto merger under CERCLA).

61. Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977), *quoting* National Dairy Prods. Corp. v. Borden Co., 363 F. Supp. 978, 980 (E.D. Wis. 1973). *Accord* Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1458, *citing* Fehl v. S.W.C. Corp., 433 F. Supp. 939, 945 (D. Del. 1977), *reh'g denied*, 765 F.2d 154 (11th Cir. 1985).

62. *Travis*, 565 F.2d at 447. *Accord Polius*, 802 F.2d at 84 (Mansmann, J., dissenting); *Bud Antle, Inc.*, 758 F.2d at 1459; Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175 & n.10 (5th Cir. 1985); Dayton v. Peck, Stow & Wilcox Co., 739 F.2d 690, 693 (1st Cir. 1984); Tucker v. Paxson Mach. Co., 645 F.2d 620, 625-26 (8th Cir. 1981); L. FUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 2.06 [2][c] (1989). The *Turner* dissent argued that the analysis should focus, not on the continuation of the business operation, but on the continuation of the corporate entity. Moreover, the plaintiff was in the same situation as any other claimant with a judgment against a corporation that had simply dissolved, leaving nothing behind.

courts have viewed the identity of shareholders as the "ultimate justification" for successor corporation liability.[63]

Turner observes, however:

> The proportionate number of shares paid out by the acquiring corporation may be very small in a corporate assets purchase, and usually is, so that the strength of commonality of ownership is quite minimal. The continuity of shareholders is apt to be a paper one, more symbolic than real. The actual owners of shares at the time of manufacture of the alleged defective product and the actual owners at the time of sale of the corporation assets may be entirely different individuals.[64]

One irony is that *Turner* and its progeny use this observation as a reason not to require continuity of shareholders in holding a "successor" corporation liable. *Lack* of cost internalization in traditional corporate merger situations becomes a reason why an expansion to other "successors" is acceptable.

In a sense, the *Turner* theory is narrower than product line doctrine because it contemplates *consideration* of such factors as similarity in the ownership and management of the predecessor and successor entities.[65] The relative importance of the factors set forth in *Turner* is difficult to determine because courts emphasize their evaluation of the "totality of the transaction" in deciding whether "the transaction preponderates in favor of imposing successor liability."[66]

Some decisions finding continuity based successor liability emphasize whether the successor has held itself out to the public as the predecessor, *i.e.* to benefit from the predecessor's goodwill.[67] The question is whether the transaction made it possible for the successor to continue the "illusion" of continuation of the enterprise.[68] In this sense, continuity of enterprise doctrine has been analogized to estoppel. The successor holding itself out as the predecessor is said to be estopped from denying that fact.[69] Holding oneself out as the predecessor, however, is neither a necessary nor a sufficient condition to establish successorship.[70]

The factor of whether the predecessor is available to sue is of similar significance. Although *Turner* seems to require that the transferor eventually become

63. *Manh Hung Nguyen*, 104 Ill. App. 3d at 1149, 433 N.E.2d at 1110. *See Bud Antle, Inc.*, 758 F.2d at 1458-59; *Dayton*, 739 F.2d at 693; *Tucker*, 645 F.2d at 625-26 & n.15; *Travis*, 565 F.2d 443 at 447; *see also* Florom v. Elliott Mfg. Co., 629 F. Supp. 1145, *aff'd*, 867 F.2d 570 (10th Cir. 1989); Parson v. Roper Whitney Inc., 586 F. Supp. 1447 (W.D. Wis. 1984); Armour-Dial, Inc. v. Alkar Eng'g Corp., 469 F. Supp. 1198 (E.D. Wis. 1979); Woody v. Combustion Eng'g, Inc., 463 F. Supp. 817 (E.D. Tenn. 1978); Bernard v. Kee Mfg. Co. Inc., 409 So. 2d 1047 (Ala. 1982); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D. 1984); Fish v. Amsted Indus. Inc., 126 Wis. 2d 293, 376 N.W.2d 820 (1985).

64. Turner v. Bitumnious Casualty Co., 397 Mich. 406, 422, 244 N.W.2d 873, 880.

65. *See* Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 346-48, 431 A.2d 811, 819 (1981) (contrasting *Turner* continuity and *Ray* product line approaches).

66. Pelc v. Bendix Mach. Tool Corp., 111 Mich. App. 343, 314 N.W.2d 614, 619 (1981).

67. Andrews v. John E. Smith's Sons Co., 369 So.2d 781, 785-86 (Ala. 1979) (applying *Turner* approach by analogy to Alabama's Extended Manufacturer's statute); Powers v. Baker-Perkins, Inc., 92 Mich. App. 645, 667, 285 N.W.2d 402, 412 (1979).

68. Trimper v. Harris Corp., 441 F. Supp. 346, 347 (E.D. Mich. 1977).

69. *Andrews*, 369 So. 2d at 785-86.

70. *Pelc*, 111 Mich. App. at 355, 314 N.W.2d at 619.

defunct,[71] a transferee may be liable notwithstanding the fact that the transferor continues to exist but operates in other fields.[72] The availability of a transferor corporation is simply a factor in determining continuity and is not an individual prerequisite to imposition of continuity based successor liability.[73]

2. Rejection of the *Turner* Approach

Many of the same courts which considered and rejected the product line approach have also rejected the *Turner* approach.[74] As recently explained by the Minnesota Supreme Court, these courts have rejected *Turner* for three basic reasons: (1) the successor corporation did not create the risk by placing the defective product into the market; (2) any profit realized on the product is only received in a remote way; and (3) the successor has not represented to the public the safety of the predecessor's product.[75]

The Supreme Court of Nebraska summarized its reasons for rejecting *Turner* as follows:

> To paraphrase the language of several courts, the corporate assets purchaser, as a successor of the manufacturer of a defective product, cannot be said to have created the risk of a product manufactured by its predecessor, and, except in a very remote way, does not realize the profit for the sale of a predecessor's product. Generally speaking, the successor corporation has neither invited use of its predecessor's product nor represented to the public that the product is safe and suitable for use . . .
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> . . . .
>
> Ordinarily, strict liability for defective products has not been imposed upon a defendant corporation without some responsibility for having created or perpetuated the defect. The question of whether or not strict liability in tort policy should be substantially altered by also changing established principles of corporate succession transactions involves broad public policy issues which are more appropriately left to legislative determination.[76]

The Supreme Court of Vermont articulated the same rationale as follows:

> In our view, the arguments in support of the general rule are more persuasive: the

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71. Turner v. Bituminous Casualty Co., 397 Mich. 406, 425-27, 244 N.W.2d 873, 883 (1976).

72. Trimper v. Bruno-Sherman Corp., 436 F. Supp. 349, 350 (E.D. Mich. 1977).

73. Haney v. Bendix Corp., 88 Mich. App. 747, 751, 279 N.W.2d 544, 545-46 (1979).

74. Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341, 343 (8th Cir. 1988) (applying Missouri law); Conn v. Fales Div. of Mathewson Corp., 835 F.2d at 145, 147 (6th Cir. 1987) (applying Kentucky law); Polius v. Clark Equip. Co., 802 F.2d 75, 82 (3d Cir. 1986) (applying law of the Virgin Islands); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 99 (Minnesota 1989) (applying Minnesota law); Jones v. Johnson Mach. & Press Co., 211 Neb. 724, 729-30, 320 N.W.2d 481, 484 (1982) (applying Nebraska law); Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 246-47, 451 N.E.2d 195, 198, 464 N.Y.S.2d 437, 440 (1983) (applying New York law); Downtowner, Inc. v. Acrometal Prods. Inc., 347 N.W.2d 118, 124-25 (N.D. 1984) (applying North Dakota law); Hamaker v. Kenwell Jackson Mach. Inc., 387 N.W.2d at 519 (applying South Dakota law); Ostrowski v. Hydra-Tool Corp., 144 Vt. 305, 307-08, 479 A.2d 126, 127 (1984) (applying Vermont law); Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 300-08, 376 N.W.2d 820, 824-25 (1985) (applying Wisconsin law); *but see* Miller v. Nissen Corp., 83 Md. App. 448, 575 A.2d 758 (rejecting product line theory and risk spreading rationale but accepting an expanded "substantial continuation" exception to corporate successor non-liability).

75. *Niccum*, 438 N.W.2d at 99.

76. *Jones*, 320 N.W.2d at 484.

successor corporation did not create the risk or receive any benefit from the proceeds of the sale; it did not invite or solicit its use or make any representations as to its safety; it is in no position to enhance the safety of a product already on the market, and finally, we view the theories urged by plaintiff as a potential economic threat to small businesses.[77]

In *Polius*, the Third Circuit also rejected "the continuity of enterprise theory because it too proposes an ill-considered extension of liability to an entity having no causal relationship with the harm."[78] It explained:

> The minority doctrines' exclusive focus on the needs of the products liability plaintiff encourages courts to overlook the equally valid arguments of the business world. Predictability is vital in the corporate field. Unforeseeable alterations in successor liability principles complicate transfers and necessarily increase transaction costs . . . . Major economic decisions, critical to society, are best made in a climate of relative certainty and reasonable predictability . . . .
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> . . . .
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> In short, the district court's justification approximates a rule of law that assesses liability against a motorist because he would be indemnified by an insurance carrier and not because of his wrongful act. Such a profound change in tort law is appropriately the subject of legislation, not judicial fiat.[79]

C. *Analysis of the Theories Under CERCLA*

The EPA's memorandum is essentially a litigation position and, as such, does not address the limitations of the product line or continuity of enterprise theories of corporate successor liability discussed above.

1. The Courts

Some courts have found it unnecessary to address, or have refused to adopt, the EPA's novel approaches. In an unpublished order, a California district court in *United States v. Stringfellow* in 1984 refused to extend the product line theory to corporate successor liability under CERCLA as a matter of law.[80] The court found no authority in California or in the Ninth Circuit extending the product line theory beyond products liability cases.[81] In addition, the court stated that the fac-

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77. *Ostrowski*, 479 A.2d at 127.

78. 802 F.2d at 82; *but see Miller*, 575 A.2d at 761 n.3 (accepting the view of the dissent in *Polius* that the continuity of enterprise doctrine is "tacitly extant" in the strict liability regime of RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

79. 802 F.2d at 83. In *Polius*, it was not even clear whether the continuity of enterprise theory would impose liability. The successor did not purchase all of the predecessor's assets, or even most of them. No continuity of officers existed after the sale and no stock was used in payment. At the time of the accident, the successor was no longer manufacturing the product at issue and had not held itself out to the world as a continuation of the predecessor. The successor had also specifically disclaimed responsibility for product claims.

80. United States v. Stringfellow, No. CV-83-2501-MML (C.D. Cal. Feb. 21, 1984) (cited in Barnard, *EPA's Policy of Corporate Successor Liability Under CERCLA*, 6 STAN. ENVTL. L.J. 78, n.135 (1986-87) (order denying motion and cross-motion for summary judgment) (in 1971, the successor purchased the assets of the predecessor, a manufacturer of lead who had shipped hazardous wastes to the Stringfellow site). *Id.* at 1-2.

81. *Id.* at 4.

tors motivating the *Ray* court to extend corporate successor liability in the products liability area, such as the plaintiff's loss of a remedy and the successor's ability to spread the risk, were not compelling in this CERCLA action.[82] Although the court refused to hold the successor liable under the product line theory, it did not preclude the imposition of successor liability under either the implied or express assumption of liabilities exception or the mere continuation exception to the traditional rule.[83] In 1987, the United States once again advocated the product line approach in a United States District Court in California. In *United States v. Allied Chemical Corp.*,[84] the district court again refused to adopt the product line theory in an unpublished order.

Two more recent cases have been more favorable to the government. In late 1989, a North Carolina district court adopted what it called a "substantial continuity" test for determination of successor liability.[85] Citing a key federal labor law precedent, the court determined substantial continuity with reference to the following factors: "whether the business of both employers was the same, whether the employees of the new company were doing the same job, and whether the new company produced the same product for essentially the same customers."[86] The result in the case might well have been the same upon application of a more traditional mere continuation test, however, since the stockholders of the successor were the predecessor owner's children and the predecessor owner maintained actual control of the successor.[87]

Early this year, another federal district court agreed with the government's argument in *United States v. Distler.*[88] The *Distler* court apparently agreed that broad successor liability promotes cost internalization, stating:

> The company retained essentially the same employees and management. The company operated out of the same physical facilities and produced the same product line after the transfer as before. The company held itself out to the public as the same company, retained the same operating assets and succeeded to all liabilities necessary for the orderly transition of ownership and to prevent the interruption of the daily business operation.[89]

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82. *Id.* at 5. The district court reasoned that:

> [W]ithout successor liability, plaintiff would have no remedy. In the instant case, plaintiffs have sued thirty other defendants. Second, plaintiffs allege that, like the successor in Alad, Quemetco [the successor here] can 'spread the cost of liability, by passing on the cost as price increases to lead customers. However, the declaration . . . states that 'since the price Quemetco receives for the lead . . . is determined by world markets, Quemetco cannot increase the price of lead it sells to recover any amounts it is forced to pay to clean up the Site.'

Id.

83. *Id.* at 3-4.

84. No. C-83-5898 (C.D. Cal. 1987).

85. United States v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D. N.C. 1989).

86. *Id.* at 1039.

87. *Id.*

88. 741 F. Supp. 637 (W.D. Ky. 1990).

89. *Id.* at 643.

The pendulum swung against the government in late August in a Delaware district court.[90] There, the United States pressed its continuity of enterprise theory in a situation where the mere continuation approach favored the defendant. That is, there was no continuity of shareholders or directors between the "predecessor" and the acquiring company. Relying on cases which had rejected the *Turner* approach,[91] the court found that "it would be an undue expansion of this [mere continuation] exception" to find successor liability in the absence of such continuity.[92] In September, a Minnesota district court similarly declined the invitation to adopt what it termed "the continuing business enterprise version of the mere continuation exception," noting that the theory remains a minority position in the United States.[93]

The other CERCLA cases to mention the product line or continuity of enterprise theories have not seen the need to analyze the theories in detail because of the particular facts in those specific cases.[94] For example, in July of this year, the Ninth Circuit mentioned the continuity of enterprise approach in *Louisiana Pacific Corp. v. ASARCO, Inc.*[95] Without deciding whether the approach might ever be applied under CERCLA, it decided that two prerequisites of the theory were not present in the case before it. First, the alleged successor had no notice of the predecessor's potential CERCLA liability when it concluded its assets purchase.[96] Second, the successor had not continued the business which had resulted in the disposal at issue.[97] In these respects, the case was unlike the Ninth Circuit's previous decision in *Oner II, Inc. v. United States Environmental Protection Agency*,[98]

90. United States v. Chrysler Corp., 1990 U.S. Dist. (D. Del. Aug. 28, 1990) (LEXIS 11506).

91. *E.g.*, *id.* at *19 (citing Tucker v. Paxson Mach. Co., 645 F.2d 620, 625-26 (8th Cir. 1981)).

92. *Id.*

93. Sylvester Bros. Dev. Co. v. Burlington N.R.R., 1990 U.S. Dist. *11 (D. Minn. Sept. 11, 1990) (LEXIS 15115).

94. *See, e.g.*, Oner II, Inc. v. EPA, 597 F.2d 184 (9th Cir. 1979); New Jersey D.O.T. v. P.S.C. Resources, 175 N.J. Super. 447, 450, 419 A.2d 1151, 1152 (N.J. Super. Ct. Law Div. 1980).

95. 909 F.2d 1260 (9th Cir. 1990) (unnecessary to address product line theory since it was not raised by parties below; unnecessary to address business continuity theory since it would not apply on facts of case).

96. *Id.* at 1265-66. In late October, the district court in United States v. Western Processing Co., 1990 U.S. Dist. (W.D. Wash. Oct. 30, 1990) (LEXIS 16256), on a motion for summary judgment refused to dismiss a CERCLA claim based on a substantial continuation theory. It noted that the Ninth Circuit in *Louisiana Pac.* did not expressly reject the theory and that "this court has not rejected the 'product line' or 'continuing business enterprise' exceptions." 1990 U.S. Dist. LEXIS at *4. The court thought it "highly likely" that the purported successor had "knowledge of possible liabilities associated with hazardous waste disposal" relevant under the Ninth Circuit's test. *Id.* at *5. While noting that the Ninth Circuit had "concluded that the traditional rules of successor liability in operation in most states should govern, . . . it nevertheless found the "substantial continuity" or "continuing business enterprise" and product line tests "viable in the CERCLA context." *Id.* at *2. The court apparently failed to recognize that the continuity of enterprise and product line exceptions are not viable in most states.

97. *Id.* at 1266.

98. 597 F.2d 184 (9th Cir. 1979). The recent Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, *supra* note 21, argues strongly that the logic of *Oner* should be applied directly to EPA's enforcement of CERCLA. *Id.* at 1333. The Note fails to point out that the Ninth Circuit which authored *Oner*, distinguished that case from the CERCLA situation in Louisiana Pac. v. Asarco. Presumably, this August 1990 Note went to press before the July 1990 *Louisiana Pac.* decision was available; *but see* United States v. Western Processing Co., 1990 U.S. Dist. (W.D. Wash. Oct. 30, 1990) (LEXIS 16256) (endorsing "substantial continuity" theory despite *Louisiana Pac.*).

in which the court had found successor liability under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), another environmental statute.

In August, an Illinois federal district court refused to grant summary judgment on a de facto merger theory under relevant state law doctrines. The defendant conceded all elements of a de facto merger except for continuity of the enterprise and presented issues of fact regarding whether it had substantially continued the business operations of the predecessor. Instead, it argued that it had expanded and changed such operations, including the elimination of the predecessor's distinctive marks on the product. Based on these disputed issues, the court denied plaintiff's motion for summary judgment on liability.[99] In November, another Illinois federal district court apparently assumed that Illinois corporate successor liability principles governed under CERCLA and dismissed claims against a purported successor without discussion of the product line or continuity of enterprise theories.[100]

Finally just as this article was going to press in early 1991, the Sixth Circuit decided *Anspec Co. v. Johnson Controls, Inc.*[101] Rejecting both the district court's ruling that successor liability could never be imposed under CERCLA and the government's call for a uniform federal common law of successor liability under the statute, the Sixth Circuit instructed the lower court to apply Michigan law on the issue. In a concurring opinion, Judge Kennedy explained why application of non-uniform state law principles should be favored over a judicially-created uniform federal common law.[102] The Sixth Circuit did not have occasion, however, to discuss the novel product line or continuity of enterprise theories in this corporate merger case.

2. Commentators

Commentators have argued that the weaknesses of the rationales supporting the product line and continuity of enterprise exceptions, such as those discussed above, carry over to the environmental area. They have also offered additional reasons why the approaches are not appropriate to CERCLA liability.[103] First, it is argued that corporate successors have not created the risk of environmental harm under CERCLA and do not benefit from the predecessor's previous waste disposal practices. A successor is normally not in a position to lessen the danger of environmental problems attributable to the predecessor's hazardous waste disposal because the predecessor's conduct has been completed. If the successor it-

99. American Can Co. v. Kerr Mfg. Co., 1990 U.S. Dist. LEXIS 11417 (N.D. Ill. Aug. 30, 1990), *rev'g*, American Can Co. v. Kerr Mfg. Co., 1990 U.S. Dist. (N.D. Ill. Aug. 20, 1990) (LEXIS 10999).

100. GNB Inc. v. Gould, Inc., 1990 U.S. Dist. (N.D. Ill. Nov. 30, 1990) (LEXIS 16172).

101. 922 F.2d 1240 (6th Cir. 1991).

102. *Id.* at *9.

103. *See* Barnard, *EPA's Policy of Corporate Successor Liability Under CERCLA*, 6 STAN. ENVTL. L.J. 78 (1986-87).

self contributed to the hazardous waste problem, then it would face independent liability as a responsible party under CERCLA § 107(a).[104]

In addition, extending corporate successor liability under CERCLA is inconsistent with the policy justifications outlined in *Ray.* First of all, the EPA is not without a remedy because of the corporate transfer of assets. CERCLA specifically provides for a fund to cover situations where there are no liable parties under the Act or where reimbursement from liable parties is inadequate. As between an entirely innocent successor and the Superfund, paid for in the main by the oil, petrochemical, and other industry,[105] it seems more equitable and consistent with the purpose of making the "polluters" pay to have the congressionally designated class of polluters pay, rather than someone unrelated to the risk.

Secondly, corporate successors are not likely to be able to obtain insurance at a reasonable cost to cover the CERCLA risk because the risk may involve the hidden environmental liabilities of its predecessor.[106] Finally, the successor often does not benefit from any of the predecessor's goodwill or reputation not accounted for in the purchase price. The goodwill derives from customer lists, not the offending conduct. A retroactive application of corporate successor liability could be inequitable in this situation.

Commentators have also argued that Congress, not the judiciary, should be the body to address changes to categories of potentially responsible parties under CERCLA:

> Congress is able to determine, through investigation and debate, which groups have contributed to the hazardous waste problem and deserve responsibility for the resulting cleanup costs. Congress can study the societal and economic impacts that would result from the imposition of liability on additional parties. Courts, on the other hand, do not have the resources to conduct the necessary investigation, debate and

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104. 42 U.S.C. § 9607(a) (1988). Some commentators unthinkingly have adopted the government's argument that asset purchasers are in a better position to guard against damage than are citizens residing near hazardous waste sites. *E.g.*, Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, *supra* note 21. To the contrary, the neighbors of a hazardous waste site may be in a considerably better position to track down past site users, *e.g.* through past and present site owners, than one who purchases the assets of a business which may have used the site only a few times and then only in a distant past prior to CERCLA's enactment.

105. *See* 26 U.S.C. §§ 4611-12, 4661-62.

106. *See* Comment, *Liability Insurance Coverage for Superfund Claims: A Modest Proposal*, 53 Mo. L. Rev. 290 (1988); Kelley, *Insurance for Environmental Hazards: A Nutshell Summary*, 67 Mich. L.J. 156 (1988); Freeman, *Tort Law Reform: Superfund/RCRA Liability as a Major Cause of the Insurance Crisis*, 21 Tort & Ins. L.J. 517 (1986); *see also* Peters, *Insurance Coverage for Superfund Liability: A Plain Meaning Approach to the Pollution Exclusion Clause*, 27 Washburn L.J. 161 (1987); *but see* Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9 (1986) (arguing that comprehensive general liability policies of the past cover Superfund liabilities).

The recent Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, *supra* note 21, contends that the claim that CERCLA insurance is unavailable "lacks supporting data and ignores other options available to successors, such as self-insurance, cooperative industry insurance, indemnification agreements, and purchase price reductions." *Id.* at 1330 n.247. In fact, it is the Note's assertion which is without supporting data. CERCLA insurance is unavailable. *See* Boeing Co. v. Aetna Casualty & Sur. Co., 113 Wash. 2d 869, 784 P.2d 507, 30 E.R.C. 2001 (1990) (dissenting opinion). The Note is unconvincing. *Cf. id.* at 1329 n.238.

analysis, for a comprehensive determination of which parties should bear liability under CERCLA.[107]

3. Precedents Under Federal Labor Law

Despite the impression which the *Distler* court's use of labor precedents in CERCLA cases may convey, the general rule in labor cases is that a company which purchases a business does not automatically take on the labor obligations of the prior owner. The general rule recognizes that "a potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision."[108] In articulating its "successorship doctrine" in labor cases, the Supreme Court has determined that the Labor Management Relations Act of 1947 (LMRA)[109] mandates a judicial laissez-faire approach so that the concessions made by the parties to a labor agreement will correspond to their relative economic strengths, *i.e.*, "economic power realities."[110]

The Supreme Court's general unwillingness to bind a successor company to its predecessor's collective bargaining agreement as a matter of law led to the proliferation of successorship clauses in labor agreements, in which labor and management expressly agree by contract that any successor will be subject to the terms of the collective bargaining agreement. In *Howard Johnson Co. v. Detroit Local Joint Executive Board*,[111] the Court was confronted with but did not reach the question of whether the parties to a labor contract may alter successorship liability by express agreement. Instead, it found that Howard Johnson had no obligation to arbitrate because there was not sufficient continuity of identity between the work forces of the predecessor and the successor.[112] The Court held that a successor employer is not liable unless it is a "true" successor, a factual determination turning upon a variety of factors, and most especially upon whether the new employer retains a majority of its predecessor's employees.[113]

The Supreme Court's willingness to itself develop a special substantive successorship doctrine in the area of labor law rests upon the Court's understanding of Congress' special delegation of authority to it in this area. Congress recognized collective bargaining as a special body of law in its enactment of LMPA § 301 in 1947.[114] Section 301 provides the federal courts with jurisdiction over cases involving a breach of a collective bargaining agreement. In *Textile Workers Union v. Lincoln Mills*,[115] the Court interpreted the federal courts' jurisdictional grant to en-

107. Barnard, 6 STAN. ENVTL. L.J. at 102.
108. NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 287-88 (1972).
109. 29 U.S.C. § 141-197 (1988).
110. 406 U.S. at 288.
111. 417 U.S. 249 (1974).
112. *Id.* at 262 n.9, 264-65.
113. *Id.* at 263-64.
114. 29 U.S.C. § 185 (1980).
115. 353 U.S. 448 (1957).

compass the power to fashion a federal substantive law.[116] State law is preempted where it fails to promote national labor policy as interpreted by the federal courts.[117] Thus, in *John Wiley & Sons v. Livingston*[118] the Court found itself free to ignore state contract principles and required an employer to comply with the arbitration provision in a predecessor's collective bargaining agreement:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract . . . . [I]t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate.[119]

Ironically, however, in the landmark *Burns* decision the Supreme Court distinguished *Wiley* in part on the grounds that *Wiley* was decided against a background of state law which held the surviving entity in a merger liable for the obligation of the predecessor.[120] In *Golden State Bottling Co. v. NLRB,*[121] the Court clarified that successorship cases are characterized by a "refusal to adopt a mode of analysis requiring the Board to distinguish among mergers, consolidations, and purchases of assets."[122] Thus, it upheld the NLRB's issuance of a reinstatement and backpay order against a bona fide successor that did not itself commit the unfair labor practice. The Court stated:

> When a new employer . . . has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor's labor policies.[123]

The Court continues to use continuity of enterprise language to articulate its successorship doctrine in labor cases. The most recent articulation of its successor liability test is found in *Fall River Dyeing & Finishing Corp. v. NLRB:*[124]

> This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." Hence, the focus is on whether there is "substantial continuity" between the enterprises. Under this approach, the Board examines a number of factors: whether the

116. *Id.* at 456-57.
117. *Id.* at 457.
118. 376 U.S. 543 (1964).
119. 376 U.S. at 550.
120. *Burns,* 406 U.S. at 286.
121. 414 U.S. 168 (1973).
122. *Id.* at 182 n.5.
123. *Id.* at 184.
124. 482 U.S. 27 (1987).

> business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. In conducting the analysis, the Board keeps in mind the question whether "those employees who have been retained will understandably view their job situations as essentially unaltered."[125]

In the labor context, the Supreme Court thus has clearly rejected prerequisites to successor liability necessary under the more traditional state law tests.[126]

In expanding successor liability in the product liability context, the California Supreme Court in *Ray v. Alad Corp.*[127] rationalized its innovation in part based on an analogy to Supreme Court labor law cases. It summarized its analogy as follows:

> Although giving substantial weight to the general rules of state law making succession to the liabilities of an acquired going business dependent on the form and circumstances of the acquisition, the [Supreme] [C]ourt refuses to be bound by these rules where their application would unduly thwart the public policies underlying the applicable labor law.[128]

The labor analogy is useful to the United States in its advocacy of an expansive successor liability rule under CERCLA for several reasons. First, the cases are general precedents for the proposition that federal courts may create substantive legal rules of decision to foster the underlying policies of a federal statute. Second, they are precedents for a federal successorship rule which may depart from state law. Finally, the labor successorship rule refuses to find determinative the lack of stockholder continuity between the predecessor and successor. Instead, the labor analysis is a totality of the circumstances approach which is reminiscent of Michigan's *Turner* continuity of enterprise approach in product liability cases. The fact that *Oner II, Inc. v. EPA*[129] referred to these labor precedents in establishing successor liability under another environmental statute (FIFRA)[130] and the *Distler* court's relied on a continuity of enterprise approach demonstrate this utility.

Nevertheless, the government's labor analogy in the final analysis is not persuasive. First, the federal courts' authority to manufacture federal common law in the

125. *Id.* at 43 (citations omitted).

126. In *Fall River Dyeing*, the Court held:

> [I]n light of the general continuity between Sterlingwale and petitioner from the perspective of the employees, we do not find determinative the differences between the two enterprises cited by petitioner. Petitioner's change in marketing and sales appears to have had no effect on the employer-employee relationship. That petitioner did not assume Sterlingwale's liabilities or trade name also is not sufficient to outweigh the other factors. Moreover, the mere reduction in petitioner's size, in comparison to that of Sterlingwale does not change the nature of the company so as to defeat the employees' expectations in continued representation by their union.

Id. at 46 n.11. (citations omitted).

127. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

128. 19 Cal. 3d at 31, 560 P.2d at 8, 136 Cal. Rptr. at 579 (citing *Howard Johnson*).

129. 597 F.2d 184 (9th Cir. 1979).

130. 7 U.S.C. §§ 136 (1988).

labor area is *sui generis*. The jurisdictional provisions of LMRA specify federal court authority in interpreting collective bargaining agreements. There is no such express authority in CERCLA with respect to expanding the categories of potentially responsible persons in section 107. The *Burns* court distinguished *Wiley* in part based on the specific provisions of the labor statute which applied in the two cases.[131] Similarly in CERCLA, the scope of potentially liable persons, governed by limiting statutory language, is distinguished from other CERCLA liability issues, where Congress desired that the federal courts develop the applicable principles, *i.e.* the joint and several standard.[132]

Second, there is no support in CERCLA's language or legislative history for the proposition that Congress intended there to be a departure from applicable state law doctrines on successorship. The labor cases' emphasis on not disrupting the settled expectations of employees might even be read to indicate the contrary, a general emphasis on not disrupting commercial expectations which are based on state law successorship principles.[133] In the labor area, the Supreme Court has acted to preserve expectations which would otherwise be disrupted by the sale of an ongoing business. In the CERCLA area, the government is asking for a retroactive abrogation of business arrangements, which would disrupt rather than continue settled expectations.

Finally, the labor cases should be distinguished on the merits. The government argues that the underlying policies of CERCLA of risk spreading and cost internalization would be fostered by a broad successor liability rule. The rationales provided in the above cases criticizing the product line and continuity of enterprise rules in the product liability area apply. In the CERCLA context, successor liability would not lead to risk spreading and cost internalization, *e.g.*, because of lack of insurance and lack of nexus between the liable party and the harm respectively.

4. Precedents Under Federal Tax Law

The Supreme Court has held that some questions of federal tax law, left unanswered by the Internal Revenue Code, are to be resolved according to state law, while other issues are to be decided by federal common law. State law governs

131. *Burns*, 406 U.S. at 286.

132. *E.g.*, contrast the "plain meaning" cases discussed *supra* notes 17-19 and accompanying text with United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983) regarding congressional intent on joint and several liability under CERCLA.

133. *Compare* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986) (following relevant state law principles in interpreting releases and indemnity agreements under CERCLA) *with* United States v. Kimbell Foods, 440 U.S. 715 (1979) (in the absence of some clear statutory indication as to whether Congress intended federal judges to develop their own rules or to incorporate State law where a federal statute is implicated, a court must decide whether formulating a federal rule would be appropriate by determining (1) whether the issue requires a "nationally uniform body of law," (2) whether application of State law would frustrate specific objectives of federal programs, and (3) whether application of a federal rule would disrupt commercial relationships predicated on state law.

whether there is a property interest,[134] what is the legal nature of the interest,[135] and who owns it,[136] but federal law governs what property is subject to[137] or exempt from[138] federal levy, and federal common law determines the relative priority of federal and state liens asserted against the property.[139]

The closest analogue to the successor liability issue in federal tax law probably is Internal Revenue Code section 6901(a)(1)(A), which refers generally to "transferee liability."[140] In *Commissioner v. Stern*,[141] the Court declined to develop federal decisional law to define substantive federal tax liability under the predecessor of section 6901, section 311 of the Internal Revenue Code of 1939. Instead, the Court construed section 311 to be a purely procedural statute providing a new procedure by which the government could collect taxes from persons to whom a taxpayer's assets had been transferred, when that person was already liable.[142] The

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134. Commissioner v. Stern, 357 U.S. 39 (1958); United States v. Bess, 357 U.S. 51 (1958); United States v Durham Lumber Co., 363 U.S. 522 (1960).

135. Aquilino v. United States, 363 U.S. 509 (1960).

136. The provisions of the 1954 Internal Revenue Code (26 U.S.C. §§ 1 & 3) imposing a tax on the taxable income "of every individual" were construed in United States v. Mitchell, 403 U.S. 190 (1971), to impose federal income tax liability on the basis of ownership of the income, but state law was held controlling in determining ownership. Turning to Louisiana law, the court ruled that a married woman domiciled in Louisiana is personally liable for federal income tax on half the community income realized during the existence of the community, despite the exercise of her statutory right of exoneration, because she has an immediate vested ownership in half of the community income.

137. *Bess*, 357 U.S. 51 (1958).

138. *Mitchell*, 403 U.S. 190 (1971).

139. United States v. Equitable Life Assurance Soc'y, 384 U.S. 323 (1966); United States v. Pioneer Am. Ins. Co., 374 U.S. 84 (1963), *conformed to* 236 Ark 897, 370 S.W.2d 445 (1963); Aquilino v. United States, 363 U.S. 509 (1960); United States v. Scovil, 348 U.S. 218 (1955); United States v. Acri, 348 U.S. 211 (1955); United States v. City of New Britain, 347 U.S. 81 (1954); United States v. Security Trust & Sav. Bank, 340 U.S. 47 (1950); Illinois *ex rel.* Gordon v. Campbell, 329 U.S. 362 (1946); United States v. Waddill, Holland & Flinn, Inc., 323 U.S. 353 (1945). *See* Ludington, *Annotation: The Supreme Court and the Post-Erie Federal Common Law*, 31 L. Ed. 2d 1006 (1971).

140. The section provides in relevant part:

> (a) Method of collection.
>
> The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:
>
> (1) Income, estate, and gift taxes.
>
> (A) Transferees. The liability, at law or in equity, of transferee of property –
>
> (i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes),
>
> (ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes), or
>
> (iii) of a donor in the case of a tax imposed by chapter 12 (relating to gift taxes),
>
> in respect of the tax imposed by subtitle A or B.

26 U.S.C. § 6901 (1988).

141. 357 U.S. 39 (1958).

142. The court said that uniformity is not always the federal policy, as exemplified by the applicability of state law under § 70 of the Bankruptcy Act to determine what property of the bankrupt has been transferred in fraud of creditors; that a federal decisional law displacing state statutes as determinative of liability under § 311 would be a sharp break with the past; that Congress was aware of the use of state law when enacting the predecessor of § 311, but disclaimed any intention to make a change; that in diversity cases, the federal courts must apply state decisional law in defining state-created rights, obligations, and duties; and that since the federal courts no longer formulate a body of federal decisional law for the larger field of creditors' rights in diversity cases, any such effort for the small field of actions by the government as a creditor would be necessarily episodic. Consequently, the court ruled, the government's substantive rights against the beneficiary of a Kentucky taxpayer's life insurance policies, for the taxpayer's unpaid income tax deficiencies, were precisely those which other creditors would have under Kentucky law. *Id.* at 42-47. *See also* H. REP. No. 356 (Part 1), 69th Cong., 1st Sess. 43-45 (1926).

governing substantive law is the applicable state law. This remains the governing principle.[143]

Federal tax law thus suggests that in the absence of statutory language to the contrary courts should follow applicable state law principles in construing a federal statute such as CERCLA.[144] Both schemes involve situations in which the sovereign sues private persons for monetary relief.

D. Legislative Alternatives to Successor Liability

A major argument advanced against judicial relaxation of corporate successor liability standards is that the matter is more appropriately resolved by the legislature rather than the judiciary.[145] This raises the question of whether there are possible legislative solutions to the unavailable predecessor problem which are preferable to broad corporate successor liability. Interestingly, the most recent revision of the Model Business Corporation Act (1984) directly confronts the problem of claims which may arise after dissolution of a corporation.

The Act creates two classes of claims, known and unknown. Known claims are "normal" claims which can be handled routinely. Unknown claims are contingent liabilities and claims based on events occurring after dissolution.[146] Any such claim is barred unless the claimant commences a proceeding to enforce the claim within five years after publication in a newspaper of notice of dissolution.[147] The revision addresses the latent claim problem by providing for a special five-year limitation on claims against dissolved corporations.[148]

One commentator has advanced several arguments to support the conclusion that the Model Business Corporation Act approach is superior to the expanded successor liability approaches of *Turner* and *Ray* in serving the relevant goals of corporate and products liability law.[149]

> First, the prolonged survival of remedy solution of section 14.07 is said to be a fairer rule, inasmuch as it imposes liability only when the defendant corporation is the en-

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143. *See* Edelson v. Commissioner, 829 F.2d 828 (9th Cir. 1987); Ewart v. Commissioner, 814 F.2d 321 (6th Cir. 1987); Illinois Masonic Home v. Commissioner, 93 T.C. 15 (1989). The Internal Revenue Service Manual Handbook simply states:

> In the event of a corporate merger or consolidation, the successor corporation often takes all the assets and assumes all the liabilities of the old corporations. There is nothing improper in this, but such a move does not in any way prejudice the rights of the United States against the corporation which ceases to exist. If such rights of the United States are not recognized, collection from the successor corporation can be effected by the same means as discussed with respect to stockholders.

HB 57(16)0 (11)(25)1.2 Successor Corporations.

144. *See* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1460 (9th Cir. 1989). However, the need for uniformity in CERCLA's liability regime might indicate a "middle of the road" uniform interpretation for CERCLA rather than blind adherence to otherwise applicable state law. *See* Louisiana Pac. Corp. v. ASARCO, Inc., 909 F.2d 1260 (9th Cir. 1990) (distinguishing *Mardan*).

145. *See supra* notes 36, 79, 103 and accompanying text.

146. REVISED MODEL BUSINESS CORPORATION ACT § 14.06 (1984).

147. *Id.* at § 14.07.

148. Some commentators have argued strongly that the Model Business Corporation Act approach is far preferable to corporate successor liability. *See* Connolly, *The Post-Dissolution Products Liability Claim Problem: A Statutory Versus a Judicial Solution*, 38 SYRACUSE L. REV. 1279 (1987).

149. *Id.*

tity that manufactured the defective product. The successor liability rules, in contrast, impose liability even where the defendant corporation neither caused the plaintiff's injury nor had an opportunity to shift the burden of the liability to the party that is at fault, the predecessor corporation. Second, the survival of remedy provision is more consistent with the corporation goal of facilitating asset transferability. The survival of remedy solution never attaches successor liability to an asset transfer unless the transferee voluntarily assumes successor liability as part of an asset transaction. Under the expanded successor liability approach, however, a corporation must sometimes choose between completing an asset transfer to which successor liability might attach as a matter of law, and foregoing the asset transfer completely.[150]

Another commentator advocates a further revision to the Model Business Corporation Act to provide an alternative method to ensure that the predecessor bears its products liability burden. This article urges enactment of a statute further limiting the ability of corporations to place their assets beyond the reach of products claimants injured long after a product was manufactured and sold (long-tail products claimants). It accomplishes this by "clearly stating that the liability belongs to the predecessor and that the predecessor must make adequate provision for that liability before dissolution and distribution. The statute unequivocally imposes liability on the predecessor unless the successor expressly agrees to assume the predecessor's liability."[151]

Both commentators counsel that courts should avoid the *Ray* or *Turner* expanded successor liability rules, which do not adequately serve the goals of product liability or corporate law. Instead, they suggest that courts should urge their legislatures to adopt the prolonged survival of remedy approach, the best available solution to the problem of post-dissolution product liability claims. Congress might consider an analogous scheme for relief in the CERCLA context, which would make considerably more economic sense than the imposition of a broad expansion of successor liability on asset purchasers.

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150. *Id.* at 1315-16.

151. Some authorities suggest that:

> [S]tatutory dissolution provisions do not preempt the common law trust fund theory, which permits creditors to recover from shareholders to the extent that shareholders receive distributions in dissolution from a corporation. The trust fund theory, however, probably provides little practical relief to the long-tail products claimant. In all but the most closely held corporations, the difficulties and expense of identifying shareholders and prosecuting multiple suits against them present insuperable barriers to utilizing this remedy.

Green, *Successor Liability: The Superiority of Statutory Reform to Protect Product Liability Claimants*, 72 CORNELL L. REV. 17, 55 (1986). Of course, if the successor corporation is the shareholder of the predecessor at dissolution, there is continuity of shareholders between the predecessor and the successor, and the successor is probably liable under the mere continuation doctrine, eliminating the need to worry about the trust fund approach.

See also Conynham, *Robbing the Corporate Grave: CERCLA Liability, Rule 17(b), and Post-dissolution Capacity To Be Sued*, 17 B.C. ENVT'L AFF. L. REV. 855 (1990) (advocating statutory amendment to provide for CERCLA right of action against dissolved Corporation); Note, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131 (1989).

IV. Strategies for Expanding Successor Liability

A. *The* C & P II *Approach*

In *United States v. Allied Chemical Corp.*,[152] the United States filed a lengthy memorandum in opposition to a defendant's motion for summary judgment and in support of its own cross-motion for partial summary judgment on liability, in which it laid out its views as to why the product line and continuity of enterprise theories of successor corporation liability should be applied under CERCLA. In this brief, the DOJ leads off with its argument for the more advanced business continuity theories and then moves to fallback arguments which make reference to more traditional successor liability concepts.

In the *Allied* case, the government sued under CERCLA for cleanup of the Nichols Road facility in Pittsburg, California. According to the government, ESI Chemicals, Inc. (ESI), which had purchased all the stock of Chemical & Pigment Co. (C & P I) in 1979, sold "substantially all" of ESI's assets to a new Chemical & Pigment Co. (C & P II) for cash "as part of the settlement between ESI and the Royal Bank of Canada for payment of the debts of ESI and its parent . . . ." in 1983. The cash, approximately $878,000 was paid over to the bank. The assets included the real estate on which the Nichols Road facility was located, all of the personal property at the facility, a contract with a sales distributor of the plant's products, and accounts payable. The sole shareholder of C & P II, O.E. Cooper, had been the principal shareholder and officer of C & P I prior to its acquisition by ESI. Everett Harris had been the general manager of the Nichols Road facility since 1963, both during the times at which Cooper owned the operating corporation and during the time which ESI had owned it. In 1987, ESI technically still existed under California law as a "dormant corporation."

As the government notes at page thirty-eight of its forty-one page memorandum, C & P II appears to be in the class of persons directly liable under CERCLA § 107(a)(1), the present owner and operator of the chemical plant.[153] In light of this reality, it is difficult to understand why the government perceived a need to press its successor theories in this case, other than that the facility was in California, the state which had adopted the product line approach in *Ray*.[154] The government's memorandum obliquely suggests that the government's theory might be based upon some need to hold C & P II liable for the disposal activities of C & P I.[155]

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152. No. C-83-5898JPV (C.D. Cal., *brief filed* Mar. 12, 1987). The court in Allied ruled against the government on its novel successorship theories. *See supra* note 88 and accompanying text.

153. The Government also alleges that disposal of hazardous substances had taken place since C & P II acquired the facility in 1983, making C & P II also responsible as a person owning or operating the facility at the time of disposal under CERCLA § 107(a)(2). Brief, at 39. A footnote on the same page suggests, however, that there may have been some weakness in the Government's factual proof of such disposal. Brief, at 39 n. ***.

154. Possibly the Government (the Navy, which operated an adjoining Naval Weapons Station) had incurred substantial response costs prior to C & P II's acquisition of the facility in 1983.

155. Brief, at 2, 39.

In any event, the government's *Allied* brief orders its arguments from the most advanced theory of successor liability to the narrowest. Thus, it begins with an argument for the creation of a broad uniform federal business continuity rule based on the underlying purposes of CERCLA. The analogies here are to the Supreme Court's labor cases and a two-page Ninth Circuit opinion citing the labor cases and finding successor liability applicable under FIFRA to "facilitate enforcement" of that Act.[156] The argument also rests on analogies to the state product line cases in California, New Jersey, and Washington, and to a lesser extent to Michigan's *Turner* continuity of enterprise opinion.[157]

The substance of the government's argument for a uniform federal "business continuity" rule is found in a single paragraph without references:

> If liability is imposed where buyers continue the business they purchase (for example, through continuity in personnel, products, management, equipment, customers and goodwill), they will then be on notice of the need to evaluate the environmental practices of their predecessors. Encouraging such an evaluation will assure that a company's selling price reflects the presence or absence of environmental problems, and forward the goal of Congress that the costs of properly disposing of hazardous substances be internalized by businesses.[158]

The remainder of the government's brief (1) recasts this same argument as applicable California law under *Ray* in the event the Court should decide to follow state law rather than a uniform federal rule,[159] (2) argues that there are disputed issues of material fact in the case under traditional successor theories (e.g., assumption of liability, de facto merger, and mere continuation),[160] and (3) contends that defendant's summary judgment motion is premature and fails to promote judicial economy since the government's direct liability theories would remain even if summary judgment were granted on the traditional successor theories.[161]

B. The Syntex *Approach*

In 1988, the government followed a different successor liability strategy in the important *Times Beach* case in the Eastern District of Missouri. There it attempted to expand successor liability in its pursuit of Syntex (U.S.A.), Inc. without resort to the novel, discredited doctrines described above. The government

156. Brief, at 13-15.
157. Brief, at 16-19.
158. Brief, at 21-22.
159. Brief, at 23-26.
160. Brief, at 27-37.
161. Brief, at 37-40.

filed a motion for partial summary judgment on liability which is still pending.[162] In this unusual case, the government sued Syntex (U.S.A.), Inc., the holding company parent, along with its subsidiary, Syntex Agribusiness, Inc. In a 1985 ruling, the district court ruled that Syntex (U.S.A.), Inc. had a normal parent/subsidiary relationship with Syntex Agribusiness, Inc. and refused to pierce the corporate veil under CERCLA.[163]

In the 1969 acquisition at issue, Hoffman-Taff never transferred any of its assets to Syntex (U.S.A.). Syntex (U.S.A.) entered into an initial agreement with Hoffman-Taff, but before the transaction was closed Syntex (U.S.A.) transferred its interest in the agreement to a new subsidiary it had formed, Syntex Agribusiness, Inc. – the classic "reverse subsidiary merger." Hoffman-Taff sold and transferred its assets to Agribusiness, and only Agribusiness.[164]

The government's 1988 theory, however, argues that Syntex (U.S.A.) was a successor to Hoffman-Taff under several "traditional" successor theories. First, the government argues that Syntex (U.S.A.) *assumed the liabilities* of Hoffman-Taff, based on (1) an SEC 20-K filing which included the assets of Hoffman-Taff in a consolidated financial statement of Syntex Corporation, the Panamanian parent of Syntex (U.S.A.); and (2) an IRS ruling letter which referred to Syntex (U.S.A.) as the acquiring company rather than Syntex Agribusiness, Inc. Second, the government argues that Syntex (U.S.A.) and Hoffman-Taff had a de facto merger because (1) Hoffman-Taff management, personnel, physical location, assets, and general business operations continued after the acquisition; (2) Hoffman-Taff was purchased with shares of Syntex Corporation stock; (3) Hoffman-Taff was dissolved after its admitted successor, Agribusiness, was formed; and (4) Syntex (U.S.A.) arranged for the transfer of assets and liabilities of Hoffman-Taff to its new subsidiary Agribusiness.

Third, the government argues that Syntex (U.S.A.) was a *mere continuation* of Hoffman-Taff based on (1) selected excerpts from a Syntex executive's speech to employees at the Hoffman-Taff facility; (2) the activities of a Syntex (U.S.A.) consultant sent to Hoffman-Taff to study Hoffman-Taff in anticipation of the acquisition; and (3) the review by a Syntex (U.S.A.) lawyer of two agreements between Hoffman-Taff and a company to which Hoffman-Taff proposed to lease space and to sell equipment in its Missouri plant.

Thus, without resort to the language and concepts of the product line or continuity of enterprise approaches, DOJ attempted to radically alter the limitations of

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162. United States v. Bliss, No. 84-0200-C(1), Memorandum of Points and Authorities in Support of Motion of the United States of America for Partial Summary Judgment on Liability Against Syntex (U.S.A.), Inc. and Syntex Agribusiness, Inc. (E.D. Mo. *brief filed* Jul. 20, 1988). The description of the Government's legal theories in its motion for summary judgment are taken from Light, *Liability and the Corporate Form Under the Environmental Laws,* 17 CHEMICAL WASTE LITIGATION REP. 199 (Jan. 1989). The court apparently never needed to rule on the government's motion since its claims were compromised. *See* United States v. Bliss133 F.R.D. 559 (E.D. Mo. 1990) (dioxin dispute settled with EPA and Syntex Agribusiness, Inc. splitting the work and an estimated $200 million in cleanup costs).

163. United States v. Bliss, 108 F.R.D. 127 (E.D. Mo. 1985).

164. Syntex Agribusiness did not contest that it was a successor to Hoffman-Taff under Missouri law.

liability incident to state corporate law. Even though Syntex (U.S.A.) carefully had structured the acquisition to preserve Hoffman-Taff as a separate company, the government sought to expose the assets of the entire Syntex family of corporations to the liabilities of the newly-acquired company. It sought to find significance for successor liability in "facts" which until this case carried little or no significance on the issue. If this "successor" theory were to be adopted, there will be no need for the government to engage a "corporate veil" analysis, or even a product line or continuity of enterprise theory, to establish stockholder liability in most cases. Virtually any company which has acquired the stock or the assets of an ongoing enterprise may have unknowingly subjected its entire portfolio of holdings to the liabilities of the acquired company. The government's approach to expansion of successor liability in *Syntex* disguises radical alternations in corporate legal doctrines in the clothing of the "traditional" exceptions to corporate successor non-liability: assumption of liability, de facto merger, and mere continuation.

C. The Johnson Controls *Approach*

A recent statement of the government is its amicus brief on behalf of the appellants in *Anspec v. Johnson Controls, Inc.*[165] In this case, Anspec Company and Hugh Montgomery (Anspec) brought a CERCLA action to recover the costs of certain cleanup actions they incurred upon direction of the Michigan Department of Natural Resources. Anspec sued four companies, only one of which—Ultraspherics, was alleged to have been responsible for disposal activities at the site. There was no allegation that Anspec obtained, or even sought, indemnification, representations, or warranties from Ultraspherics regarding liabilities relating to any past activities or conditions at the site.

Several years after Anspec purchased the site from Ultraspherics, Hoover Universal, Inc. acquired Ultraspherics. Johnson Controls, Inc. (JCI) later acquired Hoover Universal, Inc. Thereafter, plaintiffs alleged that Ultraspherics merged into Hoover Group. Plaintiffs thus "believe" that JCI owns Hoover Universal, which owns Hoover Group, the corporate successor to Ultraspherics. In an unusual ruling for CERCLA cases, the district court dismissed the plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6). It looked to the plain language of CERCLA § 107(a), which identifies the persons liable under the Act, to dismiss the claims against JCI, Hoover Universal, and Hoover Group. In denying plaintiffs' motion for reconsideration and instead granting entry of final judgment permitting appeal, the alternative relief plaintiffs requested, the court also determined that Ultraspherics "no longer existed" under applicable law. Having dismissed the federal claims against all the defendants prior to trial, it dismissed the pendent state claims.

Based on the government's "parent-successor" liability theories asserted in the *Times Beach* case, one might have expected the government in *Anspec* to have argued for a similar approach to hold JCI liable. As amicus curiae, however, the

165. 922 F.2d 1240 (6th Cir. 1991).

United States admittedly was not as intimately familiar with the facts regarding the acquisitions at issue in the *Anspec* case. Moreover, the trial court appeared to have dismissed both JCI and its subsidiaries on the sole grounds that no successor liability exists under CERCLA. Although plaintiffs identified parent company liability as an issue presented on appeal, it appears that the district court never reached the question.

In light of this peculiar procedural posture, and perhaps for other strategic reasons, the government in its amicus brief chose to address the narrow issue of whether corporate successor liability under CERCLA may exist after a statutory merger pursuant to applicable state law. While the government presented an argument that a uniform federal rule should govern successor liability issues under the statute, it expressly noted that the court did not have to determine the outer bounds of the concept in the case before it. Except for a cryptic footnote allusion to the EPA Memorandum, there are no direct or indirect references to the *Ray* product line or *Turner* continuity of enterprise approaches in the government's *Anspec* brief.

The brief is similar to earlier offerings in the references to CERCLA's "remedial nature" and "its goals and purposes" in the argument for a uniform federal rule on successor liability. The government again argues that the objectives of CERCLA might be frustrated because successors will have less incentive to clean up hazardous waste. They urge successor liability in order to encourage "companies . . . to evaluate the environmental practices of corporations with whom they propose to merge."[166] In eschewing the need for the Sixth Circuit to address the question of the outer limits of successor liability under CERCLA, however, the government in *Anspec* has adopted a strategy quite different from that followed in *Allied* because the government has based its argument on the broad remedial purposes of CERCLA instead of on the novel exceptions to the successor liability rules. The Sixth Circuit accordingly did not address the novel product line and continuity of enterprise theories in its opinion in the case in early 1991. It refused, however, even to accept the government's more limited call for a uniform federal common law approach, opting instead for incorporation of applicable state law under the Supreme Court's *Kimbell Foods* doctrine.[167]

V. CONCLUSION

In 1984, the EPA laid out an advanced litigation position for expanding the contours of successor liability under CERCLA from that available under well-recognized doctrines.[168] It set forth novel approaches which at that time had been recognized only in a small number of American jurisdictions. Since 1984, however, the novel doctrines upon which the EPA then relied – product line and conti-

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166. Amicus Brief for the United States of America, at 28, Anspec v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991) (No. 89-2393).

167. Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1247-48.

168. *See supra* notes 20-23 and accompanying text.

nuity of enterprise—have been expressly rejected in a large number of American jurisdictions, including several United States courts of appeal, and by a number of commentators.[169]

The reasons for this rejection are persuasive and applicable to CERCLA. First, the imposition of liability on asset purchasers in the absence of traditional prerequisites such as stockholder continuity violates CERCLA's policy of imposing costs on those who created the risks.[170] Second, the retroactive creation of such liability will not spread the risk because corporate successors will not be able to obtain insurance for or otherwise anticipate such hidden liabilities.[171] These uncertainties may also discourage otherwise desirable transfers of assets. Third, this liability represents such a marked departure from established precepts of corporate successor liability that it would be inappropriate for the courts to create it in the absence of more express congressional direction.[172]

Features of CERCLA which distinguish it from the product liability situation also counsel against these theories' application in the environmental context. First, where a company continues to use a waste disposal site of its "predecessor," it is directly liable under CERCLA and there is no need for a successor rule.[173] Second, where no PRPs can be sued, the Superfund is available to pay costs; there is no need to have the successor as a last resort.[174] Finally, the reasonable expectations of the parties would be disrupted, not preserved, if retroactive liability is imposed by judicial interpretation of CERCLA, unlike the collective bargaining agreements situation under federal labor law.[175] The more appropriate federal analogy, found in "transferee" rules under the federal tax law, is to follow established state law principles in the absence of an express contrary congressional directive.[176]

The policy problem which product line/continuity of enterprise doctrine seeks to address, the absence of an available and solvent predecessor, may be addressed more appropriately and efficiently by the legislature, e.g., through legislative rules regarding the effect of dissolution on CERCLA liability.[177] An analysis of recent government briefs suggests that even the prosecutors have become more reluctant to rely on these novel successor doctrines where opportunities under more established principles seem available.[178] Courts should not adopt these novel approaches in most cases and instead, in the absence of further congressional guid-

169. *See supra* notes 31-45, 74-79 and accompanying text.

170. *See supra* notes 95-104 and accompanying text.

171. *See supra* notes 105-06 and accompanying text.

172. *See supra* notes 36, 79, 103, 145 and accompanying text.

173. *See supra* notes 95-97.

174. *Id.*

175. *See supra* notes 131-33 and accompanying text.

176. *See supra* notes 140-44 and accompanying text.

177. *See supra* notes 145-51 and accompanying text.

178. *See supra* notes 152-56 and accompanying text.

ance, should limit CERCLA to traditional bases for corporate successor liability under relevant state law principles.