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Successor Liability Strictly Applied: Ramifications of Recent Environmental Cleanup Opinion Could Prove Catastrophic to Commerce Unless Overturned by Third Circuit Court of Appeals

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I. Introduction

On September 27, 1993, the United States commenced an action under § 107(a) of the Comprehensive Environmental Response Compensation and Liability Act[1] (CERCLA) for remediation of a contaminated site known as the Keystone Landfill in Pennsylvania. The suit was filed against eleven potentially responsible parties, including Keystone Sanitation Company Incorporated (hereinafter "Keystone") and eight original generator defendants.[2] The original generator defendants also filed a third-party complaint against Waste Management of Pennsylvania, Incorporated (WMPA) claiming that WMPA succeeded to the liabilities of Keystone as owner and operator of the Keystone Landfill.

The Middle District of Pennsylvania, in an opinion by Chief Judge Sylvia H. Rambo, ruled that WMPA was liable as a successor for cleanup costs at a landfill site even though it never owned the landfill.[3] WMPA has asked a federal judge to certify for interlocutory appeal her ruling holding the company liable for its predecessor's environmental liabilities. Considering another recent decision from the Third Circuit Court of Appeals that dealt with similar

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1. *Comprehensive Environmental Response Compensation and Liability Act*, 42 U.S.C. §§ 9601-9675.

2. The original Generator Defendants subsequently instituted a Third-Party Action against approximately 180 Third-Party Defendants for response costs pursuant to section 107(a) of CERCLA, as well as contribution costs under section 113 (f). United States v. Keystone Sanitation Co., No. 1:CV-93-1482, 1996 U.S. Dist. LEXIS 13651 (M.D. Pa. Aug. 22, 1996).

3. 1996 U.S. Dist. LEXIS 13651.

facts, Judge Rambo's decision will likely be overturned.[4] In doing so, the Third Circuit will make it clear that the language of the contract itself, and not a particular court's approach to solving pollution problems, will govern the shape of any possible future legal action.[5]

II. Background of *U.S. v. Keystone Sanitation Co.*

From 1969 until 1990, Keystone operated as a family-run waste collection, hauling and disposal business. Kenneth and Anna Noel were its sole shareholders, officers and directors.[6] The Noels owned the real property upon which the landfill was located, which was adjacent to their home.[7] Keystone leased the landfill site from the Noels.[8]

The Environmental Protection Agency (EPA) listed the landfill as a Superfund site in 1987.[9] In March 1990, Eric Sentz, WMPA's controller, contacted the Noels about purchasing Keystone.[10] One month later, Keystone ceased operating the landfill. On June 18, 1991, WMPA and Keystone entered into an "Agreement for the Exchange of Stock of Waste Management Inc. for Certain of the Assets of Keystone Sanitation Company Inc.".[11] Specifically

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4. *See* SmithKline Beecham Corp. v. Rohm and Haas Co., 89 F.3d 154 (3d Cir. 1996). The *SmithKline* case was decided under New Jersey state law at approximately the same time as *Keystone*. In *SmithKline*, the court of appeals, faced with virtually the same facts as those at issue in *Keystone*, decided to uphold the parties' contractual intent. Therefore, the court refused to compel the successor corporation to indemnify the predecessor where such liability was specifically excluded in the parties' agreement. The two cases are so strikingly similar that if *Keystone* is not overruled on appeal, it would appear to be for no other reason than the fact that New Jersey and Pennsylvania law were construed in a polar fashion.

5. Such a uniform approach is necessary in order to promote the alienability of property and encourage commerce. At the same time, the environment will be in no way jeopardized. Current federal legislation provides ample protection by ensuring that polluters pay for the cost of cleaning up the damage they have caused. The position of this comment is simply that those that do not cause the actual damage should not be the ones to shoulder the majority of the cleanup costs.

6. *Keystone*, 1996 U.S. Dist. LEXIS 13651 at *4.

7. *Id.*

8. *Id.*

9. The EPA has since estimated the final cost of cleaning up the Keystone Landfill to be approximately $ 11.9 million. *Id.* at *5.

10. WMPA purchased Keystone's assets with Waste Management stock valued at $ 3.1 million. *Id.*

11. *Keystone*, 1996 U.S. Dist. LEXIS 13651. at *5. Note that the "Agreement for the Exchange of Stock of Waste Management Inc. for Certain of the Assets of Keystone Sanitation Company Inc." will hereinafter be referred to as "Agreement".

excluded from the acquisition were Keystone's landfill-related assets and liabilities.[12] The Agreement included a clause in which Keystone and the Noels resolved to indemnify WMPA for any of its acts or omissions relating to the operation or ownership of the landfill.[13]

In the recent Middle District litigation *United States v. Keystone Sanitation Co.*, the generator defendants maintained that despite WMPA's attempt to label the purchase as a sale of assets, WMPA acquired Keystone's business and should be held liable as Keystone's successor.[14] Conversely, WMPA argues that it obtained certain of Keystone's hauling assets unrelated to the landfill long after the landfill ceased operating and, therefore, it could not be held liable as the successor to Keystone's landfill-related liability.

The parties contended that in ruling on the issue of WMPA's successor liability, Chief Judge Rambo had to determine the underlying basis for Keystone's liability.[15] WMPA argued that it could not be held responsible for Keystone's liability as an owner of the landfill because Keystone never owned the real property on which the landfill was located. In response, the generator defendants asserted that as Keystone's successor, WMPA was jointly and severally liable for Keystone's entire liability at the landfill.

The judge found that the issue of whether Keystone would ultimately be held liable as owner, operator or transporter was irrelevant if WMPA was determined to be Keystone's corporate successor.[16] If WMPA were Keystone's corporate successor, WMPA would be liable for Keystone's CERCLA liability regardless of the basis upon which Keystone was ultimately held liable. Chief Judge Rambo explained that this was consistent with the general principles of corporate successor liability where a corporation that has merged or consolidated with its predecessor is deemed liable for the debts and liabilities of the former company regardless of the

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12. *Id.*

13. *Id.* at *8.

14. "If the court concludes that [WMPA] is Keystone's corporate successor, [WMPA] will be liable for Keystone's CERCLA liability regardless of the basis upon which Keystone is ultimately determined liable." *Id.* at *9.

15. *Id.* Such an explanation is hardly satisfying. As discussed throughout this comment, there is a serious question as to whether WMPA was really a "successor" to Keystone at all. Moreover, any rule that imposes what is in essence strict liability must be called into question regarding its soundness and ability to be equitable.

16. *Id.* at *11, *citing* Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 308 (3d Cir. 1985), *cert. denied*, 474 U.S. 980.

basis upon which those liabilities were imposed.[17]

The judge found that generally a corporation does not succeed to the liabilities of its predecessor merely by purchasing its assets.[18] However, there are four exceptions to the nonliability rule: (1) the purchaser assumes the obligations of the transferor; (2) the transaction is a consolidation or de facto merger; (3) the purchasing corporation is merely a continuation of the transferor; and (4) the transaction is fraudulently entered into for the purpose of escaping liability.[19] The judge ruled that the de facto merger doctrine and an expanded version of the mere continuation doctrine, known as the substantial continuity theory, applied and, thus, concluded that WMPA was Keystone's successor.[20]

Chief Judge Rambo explained that the de facto merger doctrine has been used by courts in a CERCLA context to impose liability on corporations when the parties have obtained all the results of a merger without complying with the statutory requirements for a de jure merger.[21] The mere continuation doctrine requires "identity of officers, directors and stock between the selling and purchasing corporations."[22] According to the judge, courts have developed a broadened "mere continuation test," called "substantial continuity," in contexts "where the public policy vindicated by recovery from the implicated assets is paramount to that supported by the traditional rules delimiting successor liability."[23] The judge noted that the application of the continuity of enterprise theory was appropriate where a purchaser had knowledge that the seller had incurred potential CERCLA liability.[24]

The judge found that WMPA hired "nearly all" of Keystone's

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17. *Keystone*, U.S. Dist. LEXIS 13651, at *11.

18. "The court finds that under either test, [WMPA] is liable as Keystone's successor." *Id.* at *12.

19. *Id.* at *13.

20. *Id.* at *14-15.

21. *Id.* at *15.

22. *Id.* at *14.

23. *Keystone*, U.S. Dist. LEXIS 13651, at *15. Chief Judge Rambo seems to give great weight to the fact that WMPA had the option to hire former Keystone employees if it desired to do so. The fact remains, that in actuality, only a small number of Keystone employees remained with WMPA after the transaction was completed. Furthermore, it simply does not make good policy to penalize WMPA for retaining skilled employees in order to enhance its substantial investment.

24. *Id.* at *16. WMPA is in business to make a profit. This would have been substantially more difficult if WMPA did not retain Keystone's former customers by servicing them in generally the same manner in which they had grown accustomed. Besides, there were only a limited number of customers available and only a limited number of methods of trash collecting.

former employees and purchased all of Keystone's operating assets.[25] In addition, the judge found that after the acquisition, WMPA retained most of Keystone's former customers and incorporated Keystone's former operations into its own operations.[26] Furthermore, she noted that WMPA affixed its signs and logos to the acquired vehicles and painted them with WMPA's burgundy color.[27] The judge also found that WMPA provided the same product or service that Keystone had provided prior to the sale - waste collection and hauling.[28] Finally, the judge determined that WMPA assumed all of Keystone's ordinary business obligations and successfully provided uninterrupted service to Keystone's customers.[29]

Boiled down to its essence, the court's ruling holds WMPA liable under CERCLA as the owner and operator of the Keystone Sanitation Landfill Site (Site) solely by virtue of its purchase, of certain hauling assets of Keystone even though the purchased assets were unrelated to the Site and the sale occurred more than one year after the Site was closed. Such liability was imposed on WMPA although the Generator Defendants were the primary source of the waste disposed of at the Site. WMPA never owned or operated the Site and WMPA expressly excluded, after full and fair negotiations, all landfill-related assets and liabilities from its transaction with Keystone.

Furthermore, the Generator Defendants suffered no prejudice as a result of the sale of Keystone's hauling assets to WMPA. If anything, Keystone's transaction with WMPA for full and fair consideration in 1991, at a time when Keystone was losing money, put Keystone (which remains an existing operation), in a better financial position to satisfy any judgments.

III. Analysis of *United States v. Keystone Sanitation Co.*

This Comment contends that the court's ruling contradicts Third Circuit precedent on successor liability. Moreover, the decision circumvents long-standing policies of corporate law and CERCLA for no other reason than to obtain an unwarranted

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25. *Id.* at *18.
26. *Id.* at *20-21. As previously touched on in note 24, under this reasoning, it appears that WMPA would have to turn its trash collecting business into something completely different in order to escape liability.
27. *Id.* at *22.
28. *Id.* at *23.
29. *Keystone*, U.S. Dist. LEXIS 13651, at *23.

windfall from WMPA which had no connection to the ownership or operation of the Site.

A. Neither Keystone Nor WMPA Ever Owned The Site, Thus Precluding The Imposition Of "Owner" Liability On WMPA As The Alleged Successor Of Keystone

The court seemed to conveniently overlook the fact that WMPA never owned the Site.[30] Even Keystone, who owned various landfill-related assets, including bulldozers and backhoes, never owned the Site.[31] The Site was and continues to be owned by the Noels.[32] Since neither WMPA nor Keystone held legal title to the property and legal ownership is the touchstone of "owner" liability under § 107(a)(1) of CERCLA,[33] WMPA should not have been held liable as an "owner" of the site and the alleged successor of Keystone.

B. As A Threshold Matter Of Law, WMPA's Acquisition Of Only Keystone's Hauling-Related Assets Cannot Justify Or Support The Imposition Of Liability On WMPA As An Operator Of The Site

Because the court could not reach the deep pockets of WMPA by using the owner liability provisions of CERCLA, it relied on the much weaker theory of "operator" liability. To its credit, the court correctly started from the proposition that liability does not generally pass from one corporation to another in the absence of a statutory merger or consolidation.[34] Pursuant to the established doctrine of merger or consolidation, where one corporation purchases the assets of another, the purchasing corporation generally does not become liable for the debts and liabilities of the transferor.[35] Instead, only in four very limited circumstances[36] may successor liability be imposed upon a company that acquires

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30. Statement of Material Facts in Support of Waste Management of Pennsylvania, Inc.'s Motion for Summary Judgment on the Issue of Successor Liability at ¶ 2, ¶ 34, United States v. Keystone Sanitation Co., 1:CV93-1482, U.S. Dist. LEXIS 13651 (M.D. Pa. Aug. 22, 1996) [hereinafter Facts].

31. *Id.* at ¶ 1, ¶ 2, ¶ 30.

32. *Id.* at ¶ 2.

33. 42 U.S.C. § 9607 (a)(1). *See* Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1277 (E.D. Pa. 1994).

34. *See e.g.*, Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

35. Polius v. Clark Equip. Co., 802 F.2d 75, 77-78 (3d Cir. 1986).

36. *Id.*

"all of the assets" of another company.[37]

Under Third Circuit precedents, other relevant case law under CERCLA, and the strong public policy arguments underlying these cases, the four exceptions to the doctrine of "successor non-liability" in asset acquisitions should not have been considered. Consideration of the exceptions only would be appropriate had WMPA acquired "all of the assets" of Keystone. Since the assets associated with the very liability at issue in this case were specifically excluded from the transaction, and WMPA had no connection with the operation of the Site or any landfill-related asset, the court should not have applied the exceptions.

A brief review of the undisputed facts in *Keystone* reveals that WMPA had a complete lack of connection to or responsibility for the landfill-related assets of Keystone. Interestingly, WMPA considered, but decided against, purchasing the Site from the Noels in 1986 while the Site was still an operating landfill.[38] In 1990, Keystone ceased operations and closed the site.[39] In 1991, WMPA and Keystone entered into negotiations regarding the sale of only Keystone's hauling assets. Keystone and WMPA did not engage in any negotiations regarding the sale of the closed landfill or any landfill-related assets.[40]

Indeed, as a corporate policy in the late 1980s and early 1990s, WMPA divided its acquisition representatives into two teams: one team devoted solely to acquiring landfills and the other team devoted solely to acquiring hauling assets. The WMPA employees who negotiated with Keystone in 1991 were part of the "hauling assets" acquisition team and as such had no authority to acquire any landfill assets from Keystone.[41]

Most significantly, the unambiguous language of the Agreement makes it clear that WMPA was not acquiring any of Keystone's assets or liabilities associated with the Site(nor the Site itself, which was owned by the Noels). Section 1.2 of the Agreement is entitled "Excluded Assets," and specifically excludes from the transaction, *inter alia*, all the landfill-related assets which are listed on Exhibit 1.2(f) of the Agreement.[42]

Section 1.4 of the Agreement, entitled "Excluded Liabilities,"

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37. *See Smith Land*, 851 F.2d at 91; *Polius* 802 F.2d at 77-78.
38. *See* Facts, *supra* note 30, at ¶ 3, ¶ 6.
39. *Id.* at ¶ 3.
40. *Id.* at ¶ 7, ¶ 10, ¶ 30, ¶ 34.
41. *See* Facts, *supra* note 30, at ¶ 7.
42. *Id.* at ¶ 30.

further provides:

> Purchaser shall have no responsibility whatsoever with respect to the following liabilities, contracts, commitments and other obligations of the Seller or the Owners (the "Excluded Liabilities"):
>
> (e) any and all obligations related to the *ownership, operation, use or possession of any landfill owned, operated, used* or in the possession of the Seller, Owner or Adams Sanitation (emphasis added).[43]

Thus, according to the explicit terms of the Agreement, WMPA did not purchase or have responsibility for any landfill-related assets.[44] Put another way, the parties explicitly contemplated that WMPA be absolved of any and all liability for remediation of the Site.

In *Leo v. Kerr-McGee Chemical Corp.*,[45] the Third Circuit squarely addressed the issue whether, the purchaser of certain assets of a corporation can be held liable as a successor for damages resulting from the transferor's operations at a contaminated facility that the purchaser never acquired.[46] The facts of *Kerr-McGee* are strikingly similar to the facts in the *Keystone* case. The Third Circuit's rationale for its holding is equally applicable and should have controlled the result in *Keystone*.

Kerr-McGee acquired all the assets of its competitor, Welsbach Incandescent Light Company, a gas mantle business which operated a facility in Gloucester City, New Jersey. Subsequent to the acquisition, Kerr-McGee (like WMPA) moved the acquired assets to its own plant at another location. Like WMPA, Kerr-McGee did not acquire the transferor's facility. Several years after the asset acquisition, residents living in the vicinity of the Gloucester City facility brought toxic tort claims against Kerr-McGee arising from environmental contamination at the Gloucester City facility where the gas mantle production had taken place before the acquisition.

The Third Circuit held in *Kerr-McGee* that Kerr-McGee could not be saddled with toxic tort liability because it did not acquire the facility or the land upon which it was located and, thus, had no

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43. In section 4.5 (a) of the Agreement, Keystone and the Noels further agreed to indemnify and hold harmless WMPA from and against any liabilities arising from the Excluded Liabilities and Keystone's and the Noels' "use, possession, ownership or operation of any landfill." *Id.* at ¶¶ 36-38.

44. *Id.* at ¶ 30, ¶ 34, ¶¶ 36-38.

45. 37 F.3d 96 (3d Cir. 1994).

46. *Id.*

involvement with the creation of the hazardous condition. The Third Circuit stated that Kerr-McGee should not be liable as a successor because "*Kerr-McGee never owned, controlled or engaged in activities on the [contaminated property].*"[47]

In *Kerr-McGee*, the Third Circuit specifically refused to extend the "product line exception" to impose liability on an asset purchaser.[48] The "product line" doctrine, goes well beyond the four recognized exceptions to the general rule of non-liability in asset acquisitions. One court explained the underlying policy supporting the application of the "product line" doctrine: "the inherent unfairness of forcing an injured consumer to bear the cost of injury justifies an exceptional extension of traditional successor liability rules."[49] In light of the Third Circuit's unwillingness in *Kerr-McGee* to impose successor liability under this expanded exception to the general rule of non-liability in asset acquisitions, even where the "innocent consumer" had no recourse against the dissolved asset transferor, it is clear that the Third Circuit should have applied the traditional and more restrictive federal successor liability rules found in CERCLA in *Keystone*. Furthermore, since the asset transferor (Keystone) still exists as a viable entity, imposing successor liability on WMPA was even more inappropriate.

The rationale of *Kerr-McGee* has also been applied in other successor liability cases under CERCLA.[50] In *City Environmental v. U.S. Chemical Co.*, U.S. Chemical Company engaged in the business of solvent reclamation at its facility located in Michigan (known as the Calahan property) from which it occasionally transported wastes to an off-site disposal facility known as Metamora Landfill.[51] In 1990, City Environmental purchased U.S. Chemical's assets, including the Calahan property, customer lists and goodwill.[52] However, the asset purchase agreement specifically stated that City Environmental did not assume any liability for any waste that U.S. Chemical disposed of at the Metamora landfill.[53]

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47. *Id.* at 102 (emphasis added).
48. *Id.* at 99-100.
49. United States v. Atlas Minerals and Chem. Inc., No. 91-5118, 1995 U.S. Dist. LEXIS 13097, at *255 n.31 (E.D. Pa. Aug. 22, 1995) (*Atlas III*).
50. *See* City Envtl., Inc. v. U.S. Chem Co., 814 F. Supp. 624 (E.D. Mich. 1993), *aff'd*, 43 F.3d 224 (6th Cir. 1994).
51. *Id.* at 626. Note that hereinafter U.S. Chemical Company will be referred to as U.S. Chemical.
52. *Id.* at 626-27.
53. *Id.* at 628.

Subsequent to the transaction, however, City Environmental notified U.S. Chemical's customers that it would continue to operate at the Calahan property, maintain all of U.S. Chemical's former employees, and service all of U.S. Chemical's former customers.[54] At the same time, a group of potentially responsible parties at the Metamora Landfill notified City Environmental that they would be looking to City Environmental to pay U.S. Chemical's share of liability at the Metamora site, which they estimated to be $5.3 million.[55] City Environmental sought a declaratory judgment that it was not liable as the successor to U.S. Chemical.[56]

The Eastern District of Michigan held that City Environmental was not the successor to U.S. Chemical's off-site liabilities because, *inter alia*, City Environmental had no nexus to the Metamora Landfill and under CERCLA it was not "Congress's intent that persons having nothing whatsoever to do with hazardous waste dumping should become liable for cleanup costs."[57]

The court specifically rejected the defendant's argument that despite its lack of nexus to the Metamora Landfill it would be bad policy to let City Environmental "cherry pick" assets and leave behind liabilities.[58] The Court held:

> [T]o accept Defendants' all encompassing "policy" argument would dramatically undercut *the important public policy of alienability of property*. A prospective purchaser would, under Defendant's theory, always and forever remain liable for the toxic substance liability of any company, of any size, that has ever in the past, disposed of, treated or used toxic substances in any phase of its operations. Needless to say, it would be virtually impossible to predict or project with any degree of accuracy such a company's contingent CERCLA liabilities, and this uncertainty would, almost certainly, *make the sale of the company highly unlikely*.[59]

In many respects the holding in *City Environmental* is much broader than the decision in *Kerr-McGee* because the asset purchaser acquired the selling company's real property and had actual knowledge of the selling company's off-site liability. Even

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54. *Id.* at 627.
55. *City Envtl.*, 814 F. Supp. at 630. This is well in excess of the $720,000 purchase price. *See id.* at 627.
56. *Id.* at 625.
57. *Id.* at 638.
58. *Id.* at 639.
59. *City Envtl.*, 814 F. Supp. at 639-40 n.31 (emphasis added).

under those circumstances, however, the court was unwilling to hold an asset purchaser responsible for the liability of the selling company because the asset purchaser had no nexus with the liability and the Agreement excluded the liability from the transaction.

The holdings of *Kerr-McGee* and *City Environmental* embrace the policy considerations that are consistent with the doctrine of successor liability generally, and CERCLA liability specifically, as interpreted by the Third Circuit. First,[60] a primary motivating force behind the general rule of non-liability in asset transfers is the "important public policy of alienability of property."[61] Therefore, any divergence from the general rule that an asset purchaser does not assume the liabilities of the selling corporation would create uncertainties in the business world. In turn, the uncertainties would detrimentally impinge upon the free alienability of corporate assets.[62] More importantly, for an analysis of *Keystone*, the Third Circuit in *Polius* further noted that:

> Another consequence that must be faced is that few opportunities would exist for the financially troubled company that wishes to cease business but has had its assets devalued by the extension of successor liability.
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> A company that cannot locate a buyer for all of its assets at a favorable price may be forced to sell its property piecemeal at a less advantageous figure."[63]

Despite this clear public policy agreement, Chief Judge Rambo imposed CERCLA's rule of successor liability on an asset purchaser with no connection or responsibility for a known environmental liability of a selling company. Such a ruling makes it impossible to contract for the exclusion of liabilities (and all assets relating to those liabilities) from the transaction. Rather, the rule set forth by Chief Judge Rambo, eviscerated the important public policy of free alienability of property. For example, WMPA (like any rational business entity) would not have acquired Keystone's hauling assets for only $3.1 million if it had anticipated that it would acquire Keystone's operator liability, which exceeds $10 million.[64] Clearly, such a decision is untenable. Indeed, WMPA representatives

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60. *See supra* text and accompanying notes 1-27.
61. *City Envtl.*, 814 F. Supp. at 639.
62. *Polius* 802 F.2d at 78, 83.
63. *Id.* at 83. *See also Kerr-McGee*, 37 F.3d at 100; North America v. United States, C.A. No. 92-7458, 94-0662, 1995 U.S. Dist. LEXIS 18268, *22-23 (E.D. Pa. Dec. 7, 1995).
64. *See* Facts, *supra* note 30, at ¶ 34, ¶ 36, ¶ 37.

testified that WMPA acquired neither substantial, contingent liabilities nor liabilities that would exceed the value of the purchase price.[65] Accordingly, from this writer's perspective, if such a rule on successor liability is affirmed on appeal, it would sound a death knell for asset acquisitions.

WMPA acquired Keystone's hauling-related assets after the Site was closed and Keystone's hauling operations began to lose money. Therefore, under this new rule of liability, Keystone would have been left with the unthinkable choice of either continuing to lose money and diminishing the net worth of the corporation, or selling its hauling-related assets piecemeal for far less than it received from WMPA. In either scenario, the alienability of property would be impeded. Additionally, both Keystone and any creditors of Keystone[66] would be severely prejudiced by the diminished value of the company. The net result of the successor liability rule asserted by the Middle District of Pennsylvania is that assets will not be sold or purchased, which is the exact concern addressed in the cases cited above.

Second, courts equally recognize that certain protections are necessary to prevent the abuse of corporate formalities by those who would improperly avoid corporate obligations and thereby prejudice creditors or "innocent consumers."[67] As the Court in *Mexico Feed* stated: "[E]xceptions to the traditional rule that mere asset purchasers are not liable as successors developed to prevent corporate *evasions of debt through transactional technicalities*."[68]

The corollary to this policy is that where the selling corporation remains an existing viable defendant with assets approximating those prior to the asset sale, it is unwarranted and inappropriate to impose successor liability on the asset purchaser.[69]

In the current litigation, the Noels and Keystone are still defendants to the action and possess valuable assets.[70] Furthermore, WMPA paid fair market value for the hauling assets acquired

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65. *Id.* at ¶ 36.

66. The Generator Defendants are included within the category of any creditors of Keystone.

67. *Polius*, 802 F.2d at 78.

68. United States v. Mexico Feed and Seed Co., 980 F.2d 478, 487 (8th Cir. 1992) (citation omitted) (emphasis added).

69. *Kerr-McGee* 37 F.3d at 99-109. *See also* LaFountain v. Webb Industries Corp., 951 F.2d 544, 547-48 (3d Cir. 1991).

70. In fact, the Generator Defendants had gone to great lengths during the trial to ensure that the substantial assets (that have been established as part of the record) of Keystone and the Noels are preserved to satisfy any judgment.

from Keystone, thereby leaving the Generator Defendants and other potential creditors of Keystone no worse off at a minimum than they would have been absent the asset sale.[71] Under these circumstances, the Generator Defendants, as creditors of Keystone, suffered no prejudice as a result of the asset transfer. Yet, they have been given a windfall since the court imposed a judgment on WMPA that exceeded the fair market value that WMPA paid for Keystone's hauling assets.

Third, the courts also have recognized that the imposition of liability on those entities who receive the "[b]enefits from the use of the pollutant as well as savings resulting from the failure to use non-hazardous disposal methods, [rather than the tax-paying public]" is a primary objective of successor liability under CERCLA.[72] In short, the ultimate goal is to make the polluter pay for its environmental wrongs.[73] Successor liability under CERCLA, however, should not be imposed on a corporation that bears no responsibility for the contamination where the public will not be required to bear the costs of remediation and responsible parties are available to incur these costs.[74]

In *Keystone*, both the Noels and Keystone are available to defend this action and in possession of substantial assets. Furthermore, the Generator Defendants and Fourth-Party Defendants in this action (which total nearly 700 parties) also are available to satisfy any judgment. It is extremely unlikely that under any set of circumstances the tax-paying public will be required to incur any costs associated with the Site. Moreover, to impose successor liability on WMPA as the operator of the Site, where WMPA had no connection to the operation of the Site or any landfill-related assets or activities, would allow those who are actually responsible for the use and operation of the Site (the Generator Defendants) to improperly minimize their own liability. Such a result would directly contradict CERCLA's "polluter pays" policy.

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71. Facts at ¶¶ 42-43.

72. Smith Land & Improvement Corp. v. Celotex Corp., 857 F.2d 86, 91-92 (3d Cir. 1988), *cert. denied* 488 U.S. 1029 (1989).

73. *See, e.g.*, United States v. Atlas Minerals and Chems. Inc., 824 F. Supp. 46, 50 (E.D. Pa. 1993) (*Atlas I*).

74. *See* Chicago Cutlery, Inc. v. Hurlin, Inc., No. C-93-527-JD, 1994 U.S. Dist. LEXIS 16017, at *5-8 (D.N.H. Oct. 31, 1994); *City Envtl.* 814 F. Supp. 638.

C. *Even Under The Four Limited Exceptions To The General Rule That An Asset Purchaser Does Not Succeed To A Selling Corporation's Liabilities WMPA Cannot Be Found To Be A Successor To Keystone*

The legal precedents discussed above should have precluded the district court from holding WMPA liable for the cleanup costs of the Site that WMPA never acquired or operated. However, even if the Third Circuit Court of Appeals overlooks these issues as the district court did and mechanically applies the four limited exceptions to the "traditional rule" that an asset purchaser does not succeed to the liabilities of the selling corporation to the facts of this case, such an analysis would inexorably lead to the conclusion that WMPA should not be held liable on the theory of successor liability in this case.

The four limited exceptions to the traditional rule that an asset purchaser does not succeed to a selling corporations liabilities are:

1. The purchaser expressly or impliedly agrees to assume the seller's obligations;
2. the transaction amounts to a consolidation or de facto merger;
3. the purchaser is a mere continuation of the seller; or
4. the transaction is fraudulent to avoid obligations.[75]

Consistent with the strong public policies regarding the general rule of successor non-liability,[76] these four limited exceptions were tailored narrowly to apply only in those special circumstances where there is either a (1) prior relationship, "substantial ties," a "nexus," or a "cozy deal" between the sellers and the buyers intended to permit the sellers, by legal technicalities, to avoid their responsibilities to existing creditors; and (2) where the asset purchase, represents a merger of the two companies in substance, if not in form, complete with continuity of officers, directors, management, shareholders, and business operations.[77] In contrast, successor liability is rarely found in an arms-length transaction between competitors, especially where a larger corporation acquires assets of

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75. Elf Atochem North America v. United States, C.A. No. 92-7458, 94-0662, 1995 U.S. Dist. LEXIS 18258, *8 (citations omitted). *See also, Polius*, 802 F.2d at 78.

76. *See supra* note 33 and accompanying text.

77. *Mexico Feed*, 980 F.2d at 489-90; *Elf Atochem*, 1995 U.S. Dist. LEXIS 18258, at *22-24.

a smaller company.[78]

Since the Agreement between WMPA and Keystone was an arms-length, negotiated transaction between competitors, WMPA should not be held liable under any one of these four limited exceptions.

1. WMPA did not assume Keystone's liabilities.—The first exception clearly does not apply because the Agreement between WMPA and Keystone not only expressly *excludes* any and all liabilities associated with the Site, but also requires Keystone to indemnify WMPA for any such liabilities.[79] Under these circumstances, WMPA cannot be said to have "expressly or impliedly" agreed to assume Keystone's liabilities for the Site.

2. WMPA did not enter into the Agreement fraudulently.—The Generator Defendants have the burden of proving their allegation that the WMPA/Keystone asset acquisition was fraudulent by clear and convincing evidence.[80] To meet this burden, the Generator Defendants must establish that WMPA did not pay "reasonable equivalent value" for the assets acquired from Keystone.[81]

The evidence in this case demonstrates that WMPA paid fair market value for the assets it acquired from its competitor, Keystone, in an arms-length, negotiated transaction.[82] Indeed, the accountants for Keystone and the WMPA representatives who negotiated and approved the deal all testified that the consideration paid was fair and reasonable and that from WMPA's perspective, the expected rate of return on the investment from the transaction was at best within the "normal" to "moderate" range for that type of deal.[83]

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78. *Elf Atochem*, 1995 U.S. Dist. LEXIS 18258, at *22-24.

79. *See* Facts, *supra* note 30, at ¶¶ 36-38.

80. Wittekamp v. Gulf & Western, Inc., 991 F.2d 1137, 1142 (3d Cir. 1993) *cert. denied*, 114 S. Ct. 309 (1993); Mellon Bank Corp., v. First Union Real Estate, 951 F.2d 1399, 1409 (3d Cir. 1991); Loughlin v. McConnel, 201 Pa. Super. 180, 191 A.2d 921, 923 (1963).

81. Voest-Alpine Trading USA Corp. V. Vantage Steel Corp., 919 F.2d 206, 213 (3d Cir. 1990) (applying Repealed 39 P.S. §§ 351-63); United States v. Gleneagles Inv. Co., 565 F. Supp. 556, 573 (M.D. Pa. 1983) (same); 12 PA. CON. STAT. ANN. §§ 5101-5110 (1993) (the recodified *Uniform Fraudulent Conveyance Act* "substitutes 'reasonably equivalent value' for 'fair consideration.'" 12 PA. CONN. STAT. ANN. § 5104, comt. 2).

82. *See* Facts, *supra* note 30, at ¶ 19, ¶¶ 39-42, ¶ 44.

83. The Generator Defendants concede that the asset transfer was for more than fair market value. *See* Generator Defendants' Response to WMPA's Interrogatories on the Issue of Successor Liability, Response to interrogatory No.

Furthermore, there is no evidence that WMPA engaged in any actions subsequent to the transaction designed to enable the Noels or Keystone to avoid any liabilities. Any such actions by WMPA would have been prejudicial to WMPA since Keystone and the Noels had agreed to indemnify WMPA for any liabilities at the Site. Finally, the Generator Defendants (as creditors to Keystone) suffered no prejudice as a result of the Agreement. In sum, the Generator Defendants are unable to prove fraud by clear and convincing evidence. Simply stated, no fraud occurred in this transaction.

3. The transaction between WMPA and Keystone was not a de facto merger.—As its name suggests, the de facto merger doctrine is intended to apply only where the purchasing and selling companies merge "in fact" without the formality of a "de jure" statutory merger.[84]

Consistent with this principle, the de facto merger exception to the general rule has four required elements:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of *management, personnel, physical location, assets* and general business operations.
> (2) There is a *continuity of shareholders* . . . so that they become a *constituent* part of the purchasing corporation.
> (3) The seller corporation ceases its ordinary business operations, *liquidates,* and dissolves as soon as legally and practically possible.
> (4) The purchasing corporation assumes those obligations of the seller ordinarily necessary *for the uninterrupted continuation of normal business operations of the seller corporation.*[85]

The Generator Defendants could not have met their burden of proof on any of these elements. Yet, oddly enough, the district court chose to expand this limited exception to the general rule in order to hold WMPA liable.

1, United States v. Keystone Sanitation Co., 1:CV93-1482, 1996 U.S. Dist. LEXIS 13651 (M.D. Pa. Aug. 22, 1996). Keystone's assets as of December 31, 1990 totaled $ 3,046,982; purchase price was $3,100,000. *Id.* at ¶¶ 11-12, ¶¶ 39-42.

84. In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1015, 1017 (D. Mass. 1989). *See also* Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 310-11 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985).

85. *Philadelphia Elec.*, 762 F.2d at 310 (citations and internal quotation marks omitted) (emphasis added).

a. WMPA was not a continuation of the Keystone hauling enterprise.—Chief Judge Rambo sided with the Generator Defendants' claim that after WMPA's acquisition of Keystone's hauling assets, WMPA merely continued to operate the Keystone business as if it were a "stand alone" division of WMPA. To the contrary, WMPA, which was a direct competitor of Keystone, prior to the asset acquisition, acquired Keystone's hauling assets for the express purposes of increasing its own existing customer base in the same geographic area and creating efficiencies and economies of scale within WMPA's larger, preexisting operations.[86] Consistent with these goals, WMPA did not acquire Keystone's assets and employees between its own York and Community Refuse divisions. This standard process is known as a "tuck-in."[87]

Indeed, WMPA created a written blueprint for the "tuck-in" entitled "Keystone Acquisition Conversion Plan" that specifically identified the tasks to be completed, the personnel to complete the tasks and the completion dates in an effort to ensure that the former Keystone assets were fully, promptly and efficiently integrated into WMPA.[88] Pursuant to this Conversion Plan, and within one month of the transaction, the former Keystone trucks were no longer housed at the old Keystone garage, and the former Keystone employees were no longer reporting to the Keystone facility.[89] WMPA utilized the garage and office at the Keystone facility for less than a month after the transaction merely to prepare Keystone's hauling assets for dispersal between its own operations.[90]

WMPA divided the Keystone fleet of trucks, containers and customer list between its York and Community Refuse divisions.[91] Many containers and some trucks acquired from Keystone were removed from service.[92] Those trucks and containers that remained in service had their signs and logos changed. This process of converting to the WMPA logo began within days of the acquisition and required not only a substantial color change from Keystone's former green and white to Waste Management's

86. *See* Facts, *supra* note 30, at ¶ 4, ¶ 9, ¶ 11, ¶ 13, ¶ 44, ¶¶ 46-47, ¶¶ 62-63.
87. *Id.* at ¶ 9, ¶¶ 45-49.
88. *Id.* at ¶ 48.
89. *Id.* at ¶ 48, ¶¶ 55-56.
90. *Id.* at ¶ 45, ¶ 56.
91. *Id.* at ¶ 45, ¶ 47, ¶ 56.
92. *See* Facts, *supra* note 30, at ¶ 13.

burgundy color but also required a change in logo as well.[93] Further, WMPA did not acquire Keystone's office equipment and, in fact, manually entered each of the acquired Keystone customers into the York and Community Refuse billing systems, rather than use Keystone's billing equipment.[94] In addition, WMPA changed the refuse "pick-up" routes used by Keystone, increased its fees for transportation services, and entered into written service contracts with former Keystone customers, a practice not utilized by Keystone.[95]

There also was no continuity of management. Kenneth Noel, Anna Noel and Billy Bryant managed Keystone's operations prior to the time of the asset acquisition. Mr. and Mrs. Noel owned the landfill, owned the stock of Keystone and were involved in the management of Keystone.[96] After the acquisition, Mr. and Mrs. Noel were not employed by WMPA.[97] While the Noels were paid by WMPA pursuant to the terms of a consultation agreement, the evidence in the record shows that the Noels were consulted on fewer than ten occasions, all of which occurred in the first several weeks after the transaction.[98] Moreover the use of the consultation agreement with the Noels as opposed to an employment agreement is in itself strong evidence of the absence of continuity between WMPA and Keystone. Where WMPA intends to continue the operations of a company as a "stand alone" concern, WMPA typically enters employment contracts with the management of the company whose assets are acquired. In contrast, where the acquired assets are "tucked-in" and WMPA already has managers in place, a consulting agreement, like the Noels' is offered.[99]

For 18 years prior to the sale of assets to WMPA, Billy Bryant worked for Keystone as its general manager.[100] Bryant's job responsibilities included determining routes, assigning work for employees, hiring and firing, complying with environmental laws and generally supervising all of the day-to-day aspects of Keystone's hauling and landfill business. Subsequent to the acquisition, Mr. Bryant was employed by WMPA-York only as a sales representative, where he had no managerial or operational responsibilities.

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93. *Id.* at ¶ 59, ¶ 60.
94. *Id.* at ¶ 61, ¶ 78.
95. *Id.* at ¶ 63, ¶ 75, ¶ 77.
96. *Id.* at ¶ 2, ¶ 50.
97. *Id.* at ¶ 50.
98. *See* Facts, *supra* note 30, at ¶ 50.
99. *Id.*
100. *Id.* at ¶ 51.

Mr. Bryant no longer handled routes, rates, work rules, environmental compliance, billing or employee supervision.[101] These jobs were performed by Jim Hiltner and Jon Yinger, managers of WMPA's York and Community Refuse operations, between which WMPA divided the Keystone hauling assets.[102] Within six months, Billy Bryant was assigned to a new geographic region, and within nine months after the Agreement, Mr. Bryant left Waste Management's employ.[103]

With respect to personnel, the majority of Keystone's employees were hired on a probationary basis by either WMPA-York or Community Refuse. The Noels requested that they be hired, and they were a convenient source of experienced labor for WMPA.[104] These employees were nonetheless required to complete appropriate paperwork, exams, and training before being hired on a regular basis.[105] The terms and conditions of employment for the employees varied between WMPA divisions and as between those divisions and Keystone.[106] Many former Keystone employees never joined WMPA. Of those who did join, many left WMPA within a month, and more than sixty-five percent of the former Keystone employees had left WMPA within a year.[107] Those who remained were promptly integrated into the larger preexisting WMPA operations.[108]

In sum, very soon after the acquisition, it became clear that this was strictly a WMPA business, run by WMPA management, out of WMPA locations and according to WMPA policies and procedures. There was no continuity of business operations between Keystone and WMPA's York and Community Refuse divisions.

If an acquiring corporation or purchasing company is forced by the courts to fire all the employees it gains in an asset acquisition in order to avoid the deal being labeled a "merger," then the courts have created bad public policy. Companies should be encouraged to work at deals that promote stability in both the new business and within the community where that business is located. Such a noble goal can best be accomplished by the acquiring company retaining as many employees of the selling company as possible without fear

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101. *Id.* at ¶¶ 52-53.
102. *Id.* at ¶ 45.
103. Mr. Bryant was relocated out of state in Baltimore, Maryland. *Id.* at ¶ 53.
104. *See* Facts, *supra* note 30, at ¶¶ 65-66.
105. *Id.* at ¶ 67, ¶ 70, ¶ 71.
106. *Id.* at ¶¶ 73-74.
107. *Id.* at ¶ 67, ¶ 69.
108. *Id.* at ¶ 68, ¶ 70, ¶¶ 72-73.

of recourse from the courts.

b. The Generator Defendants did not establish continuity of shareholders.—One hallmark of a de facto merger is that shareholders of the merged company become shareholders of the acquiring company.[109] For a de facto merger, the shareholders of the seller corporation ultimately must become a "constituent part of the purchasing corporation."[110] The Keystone shareholders (the Noels) simply cannot be said to have at any time become constituent shareholders of WMPA as a result of the agreement.

First, WMPA acquired Keystone's hauling assets in exchange for 72,339 shares of Waste Management, Inc. (WMI) stock.[111] For this reason alone, neither Keystone nor the Noels ever held any stock of WMPA.[112]

Second, the agreement expressly contemplates that Keystone, not the Noels, would receive the WMI stock, thereby eliminating any continuity of stock between the Noels and any entity related to WMPA.

Third, of the 72,339 shares of WMI acquired by Keystone, 30,000 shares were sold publicly and, more than a year after the transaction, 4,380 shares were sold collectively to Mr. and Mrs. Noel.[113] Therefore, even assuming that for purposes of a de facto merger, ownership of WMI stock relevant to WMPA, the Noels received only 4,380 shares of WMI stock (or .0009% of WMI's outstanding 494,915,659 shares) more than one year after the transaction. These undisputed facts clearly reveal that Keystone's shareholders, the Noels, by their own devices and not pursuant to the Agreement, only received an infinitesimal number of the shares issued to Keystone and consequently did not become a constituent part of WMPA.

c. Keystone is an existing corporation that never dissolved.—Keystone continues to exist as a corporate entity, is a party to this action, and continues to hold valuable stock and tangible assets. Additionally, in 1995 Keystone advertised and sold

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109. HRW Sys., Inc., v. Wash. Gas Light Co., 823 F. Supp. 318, 331, 335 (D. Md. 1993).

110. *Philadelphia Elec.*, 762 F.2d at 310.

111. At the time of the transaction, WMPA was a wholly-owned subsidiary of Waste Management of North America, Inc., which in turn was a wholly-owned subsidiary of WMI. *See* Facts, *supra* note 30, at ¶ 26, ¶ 28.

112. *Id.* at ¶¶ 27-28.

113. *Id.* at ¶ 28.

at auction certain of its landfill-related equipment (for $ 170,000), the proceeds of which remain in the company.[114]

Furthermore, Keystone continues to hold itself out to the general public as an ongoing business operation and as a direct competitor of WMPA. In the September 1995 issue of a trade publication for environmental and technology-related business, Keystone placed an advertisement under the heading "Landfills" listing Kenneth Noel as the contact person and Keystone's telephone number.[115] WMPA is separately listed immediately below as a competitor to Keystone. For these reasons, it is indisputable that Keystone did not "liquidate" or "dissolve as soon as legally and practicably possible," but instead continues to exist as a corporate entity.

d. WMPA did not assume all of Keystone's usual business obligations.—WMPA did not assume all of Keystone's usual business obligations. To the contrary, WMPA did not acquire any business obligations relating to the Site or any landfill-related assets. Although WMPA's divisions certainly endeavored to continue hauling waste from Keystone's former customers, WMPA did not pay the same office, garage, vehicle, and landfill disposal expenses as Keystone.[116]

Thus, for all of the above outlined reasons, the Agreement between WMPA and Keystone was not a de facto merger.

4. WMPA is not a "mere continuation" of Keystone.—The "mere continuation" doctrine is intended to impose liability in those limited situations where the owners or principals of one corporation transfer all of the corporation's assets, "lock, stock and barrel," to another corporation owned by the same individuals, in order to improperly avoid liability. The "traditional mere continuation doctrine encompasses the situation where one corporation sells its assets to another *corporation with the same people owning both corporations*."[117] "[A] corporation is not to be considered the continuation of a predecessor unless, after the transfer of assets, only *one corporation remains, and there is an identity of stock,*

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114. *Id.* at ¶ 30.
115. *Id.* at ¶ 44.
116. *Id.* at ¶ 3, ¶ 13, ¶ 47, ¶¶ 55-56, ¶¶ 63-64, ¶ 67.
117. City Envtl. Inc., v. United States Chem. Co., 814 F. Supp. 624, 635 (E.D. Mich. 1993), *aff'd* 43 F.3d 224 (6th Cir. 1994) (internal quotes and citations omitted) (emphasis in the original).

stockholders and directors between the two corporations."[118]

WMPA is not a mere continuation of Keystone. Keystone still exists as a corporate entity and continues to be owned by its sole shareholders, Mr. and Mrs. Noel. Therefore, more than one company remains. Furthermore, unlike the de facto merger doctrine which requires the selling shareholders to become a "constituent" part of the purchaser, the mere "continuation" doctrine requires that there be a substantial identity between the stock and the stockholders of the selling and purchasing corporations. As set forth more fully above,[119] there is no identity of stock or stockholders between WMPA, Keystone and the Noels.[120] Finally, no directors or officers of WMPA are also directors or officers of Keystone.[121]

D. The "Continuity Of Enterprise" Exception To The General Rule That An Asset Purchaser Does Not Succeed To The Liabilities Of The Selling Corporation Has Been Rejected In The Third Circuit And Is Inapplicable

Since none of the traditional exceptions apply, Chief Judge Rambo, at the urging of the Generator Defendants, applied the so-called "continuity of enterprise" or "substantial continuity" exception to the general rule that an asset purchaser does not succeed to the liabilities of the selling corporation. WMPA correctly contended that the "continuity of enterprise" exception constituted an unwarranted, broad liberalization of the four limited "traditional" exceptions and has been expressly rejected by the Third Circuit.[122] Assuming *arguendo*, that even if the exception was recognized, it should not have been applied in *Keystone* where the asset purchase was an arms-length transaction between competitors.[123]

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118. United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992) (emphasis added).

119. *See* text and accompanying notes 111-15.

120. *See, e.g.*, Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1265 (9th Cir. 1990) (court noted that shareholders of selling corporation owned no more than 2.5% of the reserve shares of acquiring corporation and therefore found that there was no continuity of shareholders or ownership); HRW Sys., Inc. v. Wash. Gas Light Co., 823, F. Supp. 318, 331-32 (D. Md. 1993).

121. *See* Facts, *supra* note 30, at ¶ 50.

122. *Atlas I*, 824 F. Supp. 46, 49-50 (E.D. Pa. 1993).

123. Since the "continuity of enterprise" test is not the law of this Circuit and would apply to WMPA even assuming it was, under the facts discussed *supra* at notes 3-27, WMPA should not have been held liable as a successor under this discredited exception.

In *Smith Land*, the Third Circuit held that "successor liability under *traditional* concepts"[124] should be applied in CERCLA contribution actions. Significantly, in adopting the "traditional" concept of successor liability in CERCLA actions, the Third Circuit did not adopt the "continuity of enterprise" theory. "It was never intended that this new approach would replace the traditional test."[125] In *Polius*, the Third Circuit went so far as to "conclude that this continuity of enterprise theory, adopted by a minority of jurisdictions, is an *unsound exception to the general rule* of corporate successor liability."[126] In *Polius*, the Third Circuit further explained that:

> [W]e also reject 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. To the extent that the continuity of enterprise approach reaches beyond the traditional exceptions, it violated the established principle of corporate liability grounded on the continued existence of that entity.[127]

In short, for the very same policy reasons underlying the general rule of successor non-liability, the Third Circuit has rejected the "continuity of enterprise" exception.

Assuming *arguendo*, that the continuity of enterprise exception applies to a CERCLA action brought in the Third Circuit, every court to consider the issue has held that this exception applies only in defined circumstances that do not exist in *Keystone*. Specifically, in *Mexico Feed*, the Eighth Circuit held that the "continuity of enterprise" exception should only be applied to ensure that a party who is, in fact, responsible for contamination is held financially accountable. The Eighth Circuit explained: "[i]n the CERCLA context, the imposition of successor liability under the "substantial continuation" test is justified by a showing that in substance, if not in form, the successor is a responsible party."[128]

In *Atlas I*, the Eastern District of Pennsylvania similarly explained:

> It was never intended that this new approach would replace

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124. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).
125. *Atlas I*, 824 F. Supp at 50.
126. *Polius*, 802 F.2d at 75 (emphasis added).
127. *Id.* at 82-83.
128. *Mexico Feed*, 980 F.2d at 488.

> the traditional test. Instead, the 'continuity of enterprise' theory should be applied only when the application of traditional corporate law principles would frustrate the remedial goals of CERCLA, namely to have *responsible* parties contribute to the cleanup costs.[129]

Consistent with these principles, the courts which apply the continuity of enterprise doctrine have found that successor liability arose only where there was some "cozy deal where responsible parties merely change the form of ownership" rather than an arm's-length transaction between competitors."[130]

In the context of *Keystone*, the "continuity of enterprise" exception simply does not apply. The "responsible" owner/operators, namely the Noels and Keystone, are defendants in this action and possess substantial assets. Additionally, the approximately 700 other parties to this action who disposed of or transported waste to the Site are equally available to contribute to the cleanup. WMPA, in contrast, has never owned, operated or controlled the Site and therefore cannot be said to be "responsible" for the "owner and/or operator" share of the liability associated with the Site. In addition, WMPA was and still is an unrelated competitor of Keystone that acquired certain of Keystone's assets in a negotiated arm's-length transaction for fair market value rather than in a "cozy insider deal." Accordingly, application of the broad "continuity of enterprise" test was inappropriate.[131]

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129. *Atlas I*, 824 F. Supp. at 50 (emphasis in original) (citations omitted).

130. *Elf Atochem*, 1995 U.S. Dist. LEXIS 18258 at *22-24 (citations and internal quotation marks omitted); United States v. Atlas Minerals and Chemicals, Inc., No. 91-5118, 1993 U.S. Dist. LEXIS 16578 at *10-11 (E.D. Pa. Nov. 22, 1993) (*Atlas II*) (must find "substantial and continuous ties between seller and buyer corporations.") (citations omitted); *See, e.g.*, Carolina Transformer, 978 F.2d 832 (acquiring corporation was owned by family members of sole shareholder of selling corporation); United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990) (top three employees - general manager, general sales manager and plant manager - bought out their corporate employer); Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261 (E.D. Pa. 1994) (the entire staff of the seller, including its management, was retained by the new owner, and the former owner continued to run the business as in the past with only a few minor restrictions on his power).

131. Equally, there is no basis for holding WMPA responsible for the "owner and/or operator" liability associated with the Site on equitable grounds. *Atlas III*, 1995 U.S. Dist. LEXIS 13097 at *264-66 (equitable allocation of liability appropriate where after the acquisition purchaser continued to operate seller's facility to the same off-site disposal location). *Atlas III* is inconsistent with the traditional rule of successor liability under CERCLA in the Third Circuit. Moreover, the undisputed facts established that after the acquisition, WMPA did not continue Keystone's operation at the Site, which had been closed for more than a year before the sale.

IV. Conclusion

Every law student that passes through the legal education system of this country is bombarded with innumerable concepts that are more often than not complex and daunting. However, by the end of the rigorous first year, most soon-to-be attorneys have ingrained into their memories some key concepts that will probably never be forgotten. Among these truths is the fact that contracts are governed by the intent of the parties and that the alienability of property is a crucial and cherished right in our society.

Unfortunately, The *Keystone* decision, flies in the face of both of these basic, fundamental principals. If what our learned professors are teaching us is the truth, then the Third Circuit Court of Appeals must overturn this decision.

Merrick J. Benn