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FEDERAL COMMON LAW OR STATE LAW?: THE NINTH CIRCUIT TAKES ON SUCCESSOR LIABILITY UNDER CERCLA IN ATCHISON, TOPEKA & SANTA FE RAILWAY CO. v. BROWN & BRYANT, INC.

I. INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)1 in response to mounting concern over toxic waste in America.2 One of the primary functions of CERCLA is to assign liability for cleanup costs incurred as a result of improperly managed chemical waste sites.3 A significant gap "in CERCLA's liability scheme arises where the right to recovery created by the Act confronts state law governing business entities," such as corporations.4 In light of that gap, federal courts have grappled with the question of whether they should apply federal common law or state law in the area of corporate successor liability under CERCLA.5

The United States Supreme Court has cautioned that the controversies federal law governs "do not inevitably require resort to uniform federal rules."6 In fact, federal common law may only dis-
place state law if the court finds that "there is a 'significant conflict between some federal policy or interest and the use of state law.'"7

The Ninth Circuit confronted this issue in Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.,8 when the court was asked to exercise its powers under federal common law to expand successor corporate liability under CERCLA.9 After finding that such expansion was not permissible in light of recent Supreme Court decisions, the Ninth Circuit held that the parameters of corporate successor liability under CERCLA were to be dictated by California state law.10 This Note addresses the question of whether federal courts should assume common law making authority or instead elect to apply state law rules to corporate successor liability under CERCLA. Part II of this note examines both the development of corporate successor liability under CERCLA as well as relevant Supreme Court decisions that address whether courts should adopt state law or fashion a nationwide federal rule when confronted with controversies in which federal law governs.11 Part III reviews the facts of Atchison.12 Part IV provides an analysis of the Ninth Circuit's decision in Atchison.13 Finally, Part V investigates the impact Atchison will have on CERCLA's dual goals of deterrence and public health protection.14

II. BACKGROUND

A. CERCLA's Purpose and Liability Structure

When Congress enacted CERCLA in 1980 it had two well-defined goals in mind.15 First, Congress sought to protect the public health and the environment by facilitating the prompt cleanup of

8. 132 F.3d 1295 (9th Cir. 1997).
10. See id. at 1301. For an analysis of the Ninth Circuit's holding in Atchison, see infra notes 94-178 and accompanying text.
11. For a discussion of the development of corporate successor liability under CERCLA, see infra notes 15-52 and accompanying text.
12. For a discussion of the facts of Atchison, see infra notes 73-93 and accompanying text.
13. For a discussion of the Ninth Circuit's reasoning and analysis in Atchison, see infra notes 94-178 and accompanying text.
14. For a discussion of the impact of the Ninth Circuit's decision in Atchison on CERCLA's dual goals of deterrence and public health protection, see infra notes 179-91 and accompanying text.
15. See Layfield, supra note 3, at 1240.
hazardous waste disposal sights. Second, Congress hoped that CERCLA would deter irresponsible management of hazardous materials.

CERCLA's detailed liability structure is the mechanism through which these two goals are sought to be achieved. Under CERCLA, "[l]iability . . . is triggered when there is a release, a threatened release, or a disposal of a hazardous substance into the environment." The strict liability provisions of CERCLA apply to four categories of parties: (1) persons presently owning or operating a polluting facility, unless they meet the requirements for attaining "innocent purchaser status;" (2) persons owning or operating a polluting facility at the time of disposal of a hazardous waste; (3) persons arranging for disposal, treatment, or transport of wastes (including waste generators); and (4) persons accepting wastes for transport to disposal or treatment facilities. Defendants can avoid

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16. See id. at 1240-41.
17. See id. at 1241. CERCLA also established a Hazardous Substance Response Fund (Superfund) which reimburses government or private parties for costs associated with hazardous waste cleanup when the responsible parties either cannot be located or fail to begin their own cleanup actions. See Barbara J. Gulino, A Right of Contribution Under CERCLA: The Case for Federal Common Law, 71 CORNELL L. REV. 668, 669 (1986) (discussing purpose and effectiveness of Superfund).
18. See Gulino, supra note 17, at 668. Section 107 of CERCLA contains its liability scheme. See Layfield, supra note 2, at 1241. One commentator stated: Section 107 identifies potentially responsible parties (PRPs), indicates to whom and for what costs those parties are potentially responsible, and sets out the very limited defenses available to PRPs. Section 107 establishes four categories of PRPs: past owners, present owners, generators, and transporters. With respect to a facility from which there is a release or threat of release of a hazardous substance, PRPs include past owners and operators of the facility, present owners and operators of the facility, generators of hazardous substances that went into the facility, and transporters of hazardous substances to the facility. In addition, parties that owned or operated a facility at any time when hazardous substances were disposed of at a facility are PRPs.
20. See CERCLA, § 107(a), 42 U.S.C. § 9607(a). Section 107(a) provides in relevant part:
   (a) Covered persons; scope; recoverable costs and damages; interest rate; 'comparable maturity' date.
   Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –
   (1) the owner and operator of a vessel or a facility,
   (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
   (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration
liability only by proving that an act of God, act of war, or act of a third party caused the damage. These four categories "indicate

vessel owned or operated by another party or entity containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release, and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this section, the term 'comparable maturity' shall be determined with reference to the date on which interest accruing under this subsection commences.

Id.

21. See id. § 107(b), 42 U.S.C. § 9607(b). Section 107(b) provides:

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by –

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration that characteristics of such hazardous substance, in light of all relevant facts or circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

Id.
Congress's intent to cast a broad net of liability across all parties associated with hazardous sites. 22

B. Corporate Liability Under CERCLA

CERCLA imposes liability on any “person” who owned or operated a facility at the time of disposal of hazardous waste. 23 CERCLA defines “person” as including “corporations.” 24 Although CERCLA does not define “corporation,” courts have consistently found that successor corporations are “persons” for the purpose of CERCLA liability. 25

C. Corporate Successorship Law

The purpose of corporate successor liability is to prevent corporations from evading their liabilities by changing ownership through buy outs and mergers. 26 Thus, changes in the ownership of a corporation’s stock will not affect the rights and obligations of the corporation itself. 27 The corporation will survive as an entity, separate and distinct from its shareholders, even if another corporation buys all of its stock. 28

22. Clarke, supra note 2, at 1305.
24. See id. Section 101 defines “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” Id. § 101(21), 42 U.S.C. § 9601(21).
25. See, e.g., United States v. Mexico Feed & Seed Co., Inc., 980 F.2d 478 (8th Cir. 1992); Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990); Smith Land & Improvement Corp. v. Celotex, 851 F.2d 86 (3d Cir. 1988).

Federal courts have found that this interpretation is consistent with CERCLA’s essential purposes:

When including corporations within that set of entities which must bear the cost of cleaning up the hazardous conditions they have created, Congress could not have intended that those corporations be enabled to evade their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities. It would serve little purpose to include corporations responsible for hazardous waste sites, but not their corporate successors, within the class of “covered persons.” Even in cases of good faith, a bona-fide successor reaps the economic benefits of its predecessor’s use of hazardous disposal methods, and, as the recipient of those benefits, is also responsible for the costs of those benefits. Thus, a review of the purpose of CERCLA further enforces our initial determination that successor corporations are subsumed within the plain meaning of the term “corporation.”

Mexico Feed & Seed Co., Inc., 980 F.2d at 487.

26. See Anspec, 922 F.2d at 1246.
27. See Smith Land, 851 F.2d at 91.
28. See id. Describing the vitality of a corporation, the Smith Land court stated, “[a]ll the individual members that have existed from the foundation to the pres-
Under the traditional rules of successor liability, asset purchasers are not liable as successors unless one of the following four exceptions apply:

1. the purchasing corporation expressly or impliedly agrees to assume the liability;
2. the transaction amounts to a "de facto" consolidation or merger;
3. the purchasing corporation is merely a continuation of the selling corporation; or
4. the transaction was fraudulently entered into in order to escape liability.

As corporate successors have been found to fall within CERCLA's ambit of liability, courts have also found that CERCLA incorporates these traditional exceptions "to prevent corporate successors from adroitly slipping off the hook."

D. Federal Common Law or State Law Approach to Successor Corporate Liability Under CERCLA?

1. The Development of the Law and a Split Among the Circuits

In enacting CERCLA, Congress failed to provide a guide for resolution of successor liability questions. Congress thereby left

ent time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant." Id. (quoting 1 W. Blackstone, Commentaries 467-69).

29. Louisiana-Pacific, 909 F.2d at 1263. These exceptions have historically developed for the purpose of preventing fraud. See Sisk & Anderson, supra note 5, at 514. The exceptions, therefore, are narrow in scope. See id. at 514. For example, when applying the mere continuation exception, courts attempt to distinguish a bona fide sale of assets between two separate corporations and a fraudulent reorganization by a single entity. See id. Therefore, when determining whether the mere continuation exception applies, the important factor "is not whether the business operations of the seller are carried on by a new enterprise, but whether the corporate identity remains the same due to a continuation of the same ownership and management." Id. Similarly, courts will only recognize the "de facto" merger exception when an ownership merger between two corporations occurs through an exchange of stock for the assets purchased. See id. Without this exchange of stock, the two corporate entities would "remain distinct and intact." Id. Finally, the fraudulent transfer exception only applies "when the party asserting the purchaser's liability as a corporate successor can establish by clear and convincing evidence that inadequate consideration was paid for the selling corporation's assets." Id. at 514-15. This exception is merely an application of the law of fraudulent conveyances. See id. at 515.

30. Mexico Feed & Seed, 980 F.2d at 487. The Mexico Feed & Seed court stated that "[a]ny . . . result [other than incorporation] would thwart CERCLA's essential purpose of holding responsible parties liable for clean up costs." Id.

31. See Clark, supra note 2, at 1308.
those questions to the federal courts. The courts have either developed a federal common law of successor liability under CERCLA or deferred to the forum states' laws. The Third Circuit was the first court of appeals to endorse the federal common law standard for successor liability in CERCLA contribution actions. In Smith Land & Improvement Corp. v. Celotex Corp., the Third Circuit held that "[t]he meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement [CERCLA]." The Third Circuit supported its holding by highlighting the need for national uniformity to prevent potentially responsible parties (PRPs) from arranging "a merger or consolidation under the laws of particular states which unduly restrict successor liability." Further, the court asserted that the general doctrine of successor liability, which is in operation in most states, should guide the court in developing federal common law in this area.

Two years later, in Louisiana-Pacific Corp. v. Asarco, the Ninth Circuit applied the Third Circuit's reasoning in the context of an asset sale. The Louisiana-Pacific court accepted the rationale that "successor liability under CERCLA [was] governed by federal law"

32. See id.
33. See id.
34. See Smith Land & Improvement Corp. v. Celotex, 851 F.2d 86 (3d Cir. 1988). See also, Sisk & Anderson, supra note 5, at 1267 (noting Third Circuit was first circuit to endorse federal common law in this area).
35. 851 F.2d 86 (3d Cir. 1988).
36. Id. at 91. Smith Land & Improvement Corporation (Smith Land) owned a tract of land which had previously been contaminated with waste containing asbestos. See id. at 87. After EPA informed Smith Land that it must abate the hazard pursuant to CERCLA, Smith Land corrected the condition at a cost of $218,945.44. See id. Smith Land then notified the defendants that it intended to seek indemnification. See id. at 88. Smith Land contended that the defendants were corporate successors to the company who had created the asbestos waste. See id. The Third Circuit applied federal common law of successor liability in holding that "Congress intended to impose successor liability on corporations which either have merged with or have consolidated with a corporation that is a responsible party as defined in [CERCLA]." Id. at 92. The Third Circuit remanded the case to the district court for consideration of the question of successor liability. See id.
37. Id. at 92.
38. See id. Specifically, the Smith Land court stated, "[t]he general doctrine of successor liability in operation in most states should guide the court's decision rather than the excessively narrow statutes which might apply in only a few states." Id.
39. 909 F.2d 1260 (9th Cir. 1990).
40. See id. at 1262-63. Asarco operated a copper smelter which produced a byproduct called "slag," a hard rock-like substance. See id. at 1262. Industrial Mineral Products (IMP) sold the slag to several businesses, including Louisiana-Pacific, from the early 1970s until March 1985, at which time the copper smelter ceased its operations. See id. Nine months after IMP stopped selling the slag, it sold its assets to L-Bar. See id. Government agencies then asserted that the slag caused heavy
and that traditional rules of successor liability in operation in most states should govern. 41 The Ninth Circuit found that a uniform national rule was necessary because state laws that unduly limit successor liability might frustrate CERCLA's purposes. 42 The Ninth Circuit also stated that application of such state laws would eliminate the Environmental Protection Agency's (EPA) "ability to seek reimbursement from responsible parties for cleaning up a hazardous waste site." 43

Similarly, the Fourth Circuit, in United States v. Carolina Transformer Co., 44 agreed that courts "must consider traditional and evolving principles of federal common law" when adopting rules of successor liability. 45 Relying on Smith Land and Louisiana-Pacific, the Fourth Circuit found that national interests in both the uniform enforcement of CERCLA and the prevention of liability evasion under state law mandated the adoption of a uniform federal notion of successor liability in appropriate circumstances. 46

The Eighth Circuit, in United States v. Mexico Feed & Seed Co., Inc., 47 declined to decide the federal common law issue. 48 In dicta, however, the Eighth Circuit acknowledged that in considering CERCLA's national application and fairness to parties that are similarly situated, "the district court was probably correct in applying federal law." 49

In contrast, the Sixth Circuit, in Anspec Co. v. Johnson Controls, Inc., 50 held that it was not necessary to fashion a federal common law rule regarding CERCLA successor liability and applied state law metals to leach into the groundwater and soil. See id. In response, a substantial environmental cleanup was initiated. See id.

Louisiana-Pacific sued Asarco under CERCLA, asserting that Asarco "was liable for the costs of cleaning up and abating the release of the hazardous substances." Id. Subsequently, Asarco sued L-Bar as a successor in interest to IMP. See id. Arguing that it was not the successor to IMP and therefore could not be liable for IMP's actions under CERCLA, L-Bar moved for summary judgment. See id.

41. Id. at 1262-63.
42. See id. at 1263 n.2.
43. Id.
44. 978 F.2d 832 (4th Cir. 1992).
45. Id. at 837-38 (quoting United States v. Monsanto, 858 F.2d 160, 171 (4th Cir. 1988)).
46. See id. at 838. The court then went on to adopt, as the federal rule, the broader deviation of the "mere continuation" exception known as the "continuing business enterprise" exception. Id.
47. 980 F.2d 478 (8th Cir. 1992).
48. See id. at 487 n.9.
49. Id.
50. 922 F.2d 1240 (6th Cir. 1991).
to the question. Judge Kennedy, writing more thoroughly on the issue in his concurrence, stated that "[n]either the language nor the legislative history of CERCLA provide a basis for concluding that the creation of a uniform federal common law rule of successorship liability was intended." 52

2. The Supreme Court Speaks on the Application of Federal Common Law

In United States v. Kimbell Foods, Inc., 53 the Court articulated the classic test for determining whether, in the absence of a federal statutory standard, judicial development of a uniform federal rule or adoption of a state law as the rule of decision is appropriate. 54 The

51. See id. at 1245. The Anspec court stated:
We reach the same result as the Third Circuit in Smith Land (CERCLA makes a successor corporation liable where there has been a formal merger) and as the Ninth Circuit in Louisiana-Pacific (the statute would make a successor corporation liable where all the conditions of a de facto merger are present). We reach this determination from our construction of § 9607(a) in its context within CERCLA, however, and find that it is not necessary to fashion a federal common law rule. Rather, construing the statute in light of a universally accepted principle of private corporation law, we conclude that Congress included successor corporations within the description of entities that are potentially liable under CERCLA for cleanup costs. That is to say, when Congress wrote "corporation" in CERCLA it intended to include a successor corporation.

Id. The Anspec court then instructed the district court to "follow Michigan law in its application of successor liability and, if the further development of the record requires it, of corporate parent liability." Id. at 1248.

52. Id. Judge Kennedy stated:
First, while CERCLA is an important environmental statute, I perceive no need for a uniform federal rule to determine whether a corporation exists or can be held vicariously liable under CERCLA. I am not convinced that such issues "by their nature are and must be uniform in character throughout the Nation." It is true that the United States has some interest in this area, since in some cases it may be possible that only application of vicarious liability will allow recovery of response costs. It is also true that states may differ amongst themselves in some respects in this area. However, without a showing that state law is inadequate to achieve the federal interest, "we discern no imperative need to develop a general body of federal common law to decide cases such as this."

Id. at 1249.


54. See Sisk & Anderson, supra note 5, at 529. In United States v. Kimbell Foods, Inc., the Court held that a uniform federal rule of absolute priority favoring the Small Business Administration (SBA) was unnecessary. See Kimbell, 440 U.S. at 726. The Kimbell Foods Court found that the applicable state law "furnish[ed] convenient solutions" that did not hinder the administration of SBA's program. Id. at 729 (quoting United States v. Standard Oil Co., 332 U.S. 301, 309 (1947)). The Court further noted that SBA, by its own regulations, is required to follow state law in its commercial lending practices and that to reject state law in determining the validity or priority of liens would wreak havoc on the commercial community. See id. at 730-31.
Court cautioned that controversies which federal law governs "do not inevitably require resort to uniform federal rules." Instead, the Court stated, "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' The Court set forth three factors to guide courts in making this determination: (1) whether there is a need for a nationally uniform body of law; (2) whether application of state law would frustrate important federal policy; and (3) whether a federal rule would impact on existing relationships under state law.

The Court clarified the *Kimbell Foods* test in *O'Melveny & Myers v. FDIC,* where it held that judicial creation of a federal rule of decision is warranted only in "extraordinary cases." In *O'Melveny & Myers*, the Court addressed the question of whether, in a suit the Federal Deposit Insurance Corporation (FDIC) brought, federal law or state law governed the tort liability of lawyers. The Court

55. *Id.* at 727-28.
56. *Id.* at 728 (quoting United States v. Standard Oil Co., 332 U.S. 301, 310 (1947)).
57. *See id.* at 728-29. The three circuit court decisions which adopted a federal common law rule for corporate successor liability under CERCLA (*Smith Farm*, *Louisiana-Pacific*, and *Mexico Feed & Seed*) did not mention or apply this test. *See Sisk & Anderson, supra* note 4, at 530. In her concurrence in *Anspec*, Judge Kennedy stated, "[i]nexplicably, neither the Third Circuit in [*Smith Land*]... nor the Ninth Circuit in [*Louisiana-Pacific*], mentioned the [*Kimbell Foods*] test. Both of these courts concluded, almost without analysis, that a federal common law of successor liability was required by CERCLA." *Anspec*, 922 F.2d 1240, 1249 n.5 (Kennedy, J., concurring). Although it did not mention the *Kimbell Foods* test, the Ninth Circuit, in *Louisiana-Pacific*, did address the first two concerns of the test in a footnote when it stated that: 1) there was a need for national uniformity in the successor liability area, and 2) state law could frustrate CERCLA's purposes if the state law unduly limited successor liability. *See Louisiana-Pacific Corp. v. Asarco*, 909 F.2d 1260, 1263 n.2 (9th Cir. 1990).
59. *See id.* at 89.
60. *See id.* at 80-81. In *O'Melveny & Myers*, the Federal Deposit Insurance Corporation (FDIC), in its capacity as receiver for a failed savings and loan corporation, brought an action against the corporation's former legal counsel on the grounds of professional malpractice and breach of fiduciary duty. *See id.* at 81-82. In its previous representation of the savings and loan corporation in two real estate offerings, the law firm of O'Melveny & Myers failed to inquire into the institution's financial status. *See id.* After FDIC took control of the savings and loan as receiver, investors demanded refunds and alleged they had been deceived in those real estate syndications. *See id.* at 82. FDIC sought recovery against O'Melveny & Myers for the losses suffered by the institution by reason of its liability to those investors. *See id.* at 80-82.

O'Melveny & Myers moved for summary judgment on the ground that, under California state law, a corporate officer's knowledge of the improper conduct is imputed to the corporation and, because FDIC "stood in the shoes" of the institu-
first rejected FDIC's argument that the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) provided support for displacing state law.61 The Court reasoned that in light of FIRREA's explicit preemption of state law in certain instances, it could not imply displacement of state law.62

The Court then addressed the issue of when federal interests do, in fact, constitute grounds for displacement of state law.63 The Court stated that displacement is appropriate only in "extraordinary" cases in which "there is a significant conflict between some federal policy or interest and the use of state law."64 Specifically, the Court noted that the goal of ensuring maximum FDIC recovery in cases involving tort liability of lawyers did not suffice to warrant the displacement of state law.65 The Court concluded that the issue involved in O'Melveny & Myers was "not one of those extraordinary

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61. See id. at 85-86.
62. See id. at 86-87. The O'Melveny & Myers Court stated:
   Respondent argues that the Financial Institutions Reform, Recovery, and Enforcement Act [FIRREA] should be read as a nonexclusive grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law; and that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the courts' authority to promulgate such common law. This argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver . . . . Inclusio unius, exclusio alterius. It is hard to avoid the conclusion that [FIRREA] places the FDIC in the shoes of the insolvent [Savings & Loan], to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional federal common-law exceptions is not to supplement this scheme, but to alter it.

   Id.

63. See O'Melveny & Myers, 512 U.S. at 87.
64. Id. The O'Melveny & Myers Court stated that a significant conflict between some federal policy or interest and the use of state law was a "precondition for recognition of a federal rule of decision." Id. The Court then found that the respondent had failed to identify such a conflict. See id. at 87-88. The Court stated that even the most generic "and lightly invoked" federal interest, the interest in uniformity, was not present in this case. See id. at 88. Instead, the Court concluded that "the rules of decision at issue [in this case] do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred." Id.

65. See id. at 88 (rejecting argument that it should apply federal common law because application of state law depletes deposit insurance fund).
cases in which the judicial creation of a federal rule of decision [was] warranted.'

In *Atherton v. FDIC*, the court again considered the question of whether courts should look to state law, federal common law, or a FIRREA provision, in the context of determining the standard of care for federal bank officers and directors. In *Atherton*, the Court considered if the use of state law would conflict with a federal policy or interest to such a degree that the creation of a federal common law rule would be appropriate.

After examining several federal interests, the Court concluded that the use of state law would neither significantly conflict with nor threaten any of those interests. The Court explained that "[t]he federal need [in this case] is far weaker than was present in what the Court has called the 'few and restricted instances'... in which this Court has created a federal common law." Thus, the Court declined to create a new federal common law rule, and concluded

66. *Id.* at 89.
68. See *id.* at 215-16. In *Atherton*, the Court declined to apply federal common law in a suit FDIC brought as receiver for a federally chartered and federally insured bank. See *id.* at 217-26. FDIC sued the bank's directors and officers for negligence and argued that a federal common law standard should govern the standard of care. See *id.* at 216-17.
69. See *id.* at 218 (explaining, "when courts decide to fashion rules of federal common law, 'the guarding principle is that a significant conflict between some federal policy or interest and the use of state law... must be specifically shown.'") (quoting *Wallis v. Pan Amer. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).
70. See *id.* at 225. The *Atherton* Court rejected several arguments set forth in support of FDIC's contention that there existed sufficient federal interests. See *id.* at 217-26. First, the Court rejected FDIC's argument that a uniform standard should govern federally chartered banks and that "'[s]uper-imposing state standards of fiduciary responsibility over standards developed by a federal chartering authority would upset the balance that a federal chartering authority may strike.' " *Id.* at 219-20. Important to the *Atherton* Court's reasoning was that FDIC insures an equal number of state chartered and federally chartered banks, and that "a federal standard that increases uniformity among the former would increase disparity among the latter." *Id.* at 220. Furthermore, "[o]ur Nation's banking system has thrived despite disparities in matters of corporate governance." *Id.*
71. *Id.* (quoting Milwaukee v. Illinois, 451 U.S. 304, 313 (1981)).
that "[t]here is no federal common law that would create a general standard of care applicable to this case."72

III. Facts

In Atchison, the Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Transportation Company (the Railroads) leased property to Brown and Bryant, Incorporated (Brown & Bryant), an agricultural chemical company.73 Brown & Bryant, a family enterprise whose sole shareholder was John Brown, operated an agricultural chemical business on the Railroads' property and on adjacent property it owned.74 In the mid-1980s, California and federal environmental agencies began investigating the properties because of soil contamination.75 After contamination was discovered, Brown & Bryant was ordered to cleanup the properties.76 When Brown & Bryant was unable to complete cleanup activities on its own, EPA issued an administrative order requiring the Railroads, as owners of parts of the contaminated sites, to undertake remedial measures.77

Brown & Bryant sold its business in 1988 after it became evident that it could not afford to comply with EPA's cleanup orders.78 PureGro, a competitor of Brown & Bryant, purchased approximately one-half of Brown & Bryant's equipment.79 The Equipment Sale Agreement into which they entered specified that Brown & Bryant should not construe PureGro's purchase of the equipment as a purchase of its business and that Brown & Bryant should not consider PureGro a de jure or de facto successor to Brown & Bryant.80

In a separate agreement, PureGro bought tanks and trailers from John Brown that Brown & Bryant had used, but that Brown

72. Atherton, 519 U.S. at 674.
73. See Atchison, 132 F.3d at 1297.
74. See id.
75. See id.
76. See id.
77. See id.
78. See Atchison, 132 F.3d at 1297.
79. See id. Brown & Bryant retained a broker who had the property appraised. See id. PureGro then bought the equipment at the appraised value. See id.
80. See id. This Equipment Sale Agreement conditioned the transaction on obtaining a release from EPA and the California Department of Health which would absolve PureGro from any environmental liability. See id. Ultimately, this release was not available. See id. PureGro, however, decided to close the deal anyway. See id.
and his ex-wife owned individually.\textsuperscript{81} Finally, in a consulting agreement between PureGro and Brown, PureGro retained Brown to assist in acquiring and maintaining prior Brown & Bryant customers and to help in soliciting new business for PureGro.\textsuperscript{82}

PureGro employed about sixty percent of the employees who worked at Brown & Bryant in 1988.\textsuperscript{83} Neither Brown nor any of the Brown & Bryant employees were given stock ownership or management positions in PureGro.\textsuperscript{84}

After Brown & Bryant and PureGro completed all transactions, PureGro took over Brown & Bryant's phone numbers.\textsuperscript{85} In addition, Brown also sent a letter to his customers explaining that he had accepted a position with PureGro and that PureGro would "'employ our personnel, lease our equipment and service your account in the tradition you have come to expect.'"\textsuperscript{86}

The Railroads, seeking private cost recovery, contribution and declaratory relief under CERCLA and numerous state claims, sued PureGro as Brown & Bryant's successor-in-interest.\textsuperscript{87} The Railroads contended that PureGro was liable under either the fraudulently entered transaction exception or a broader deviation of the mere continuation exception which is sometimes referred to as the substantial continuation or the continuing business enterprise exception.\textsuperscript{88} Arguing that the court in \textit{Louisiana-Pacific} intentionally left

\textsuperscript{81. See id. PureGro also paid the appraised value for this equipment. See id. at 1298.}

\textsuperscript{82. See id.}

\textsuperscript{83. See Atchison, 132 F.3d at 1298. PureGro hired all of Brown & Bryant's Pest Control Advisors (PCAs). See id. PCAs "work closely with farmers and develop a close client relationship, so that most farmers buy their chemicals from the retailer with whom the PCA is affiliated." Id.}

\textsuperscript{84. See id. PureGro did not acquire any interest in Brown & Bryant's existing contracts or accounts. See id.}

\textsuperscript{85. See id.}

\textsuperscript{86. Id. The local newspaper also printed an article entitled, "Brown and Bryant, PureGro join." Id. A picture of Brown and PureGro's president shaking hands in front of two trucks bearing the logos of Brown & Bryant and PureGro accompanied the article. See id.}

\textsuperscript{87. See id.}

\textsuperscript{88. See Atchison, 132 F.3d at 1298-99. In \textit{Louisiana-Pacific}, the plaintiff-appellant argued that "in keeping with the purposes of CERCLA, [the Ninth Circuit] should adopt a more expansive version of the mere continuation exception, known as the continuing business enterprise exception." Louisiana-Pacific Corp. v. Asarco, 909 F.2d 1260, 1265 (9th Cir. 1990). When applying this exception, courts look at several factors, including: 1) continuity of employees, supervisory personnel and physical location; 2) production of the same product; 3) retention of the same name; 4) continuity of general business operations; and 5) purchaser holding itself out as a continuation of the seller. See id. at n.7 (citing Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175 (5th Cir. 1985)).
open the availability of this broader exception, the Railroads noted that the Ninth Circuit had not yet adopted the exception.\textsuperscript{89} Thus, reasoning that the continuing business enterprise exception should encompass PureGro as a successor in interest to Brown & Bryant, the Railroads asked the \textit{Atchison} court to exercise its powers under federal common law and expand CERCLA liability by adopting that exception.\textsuperscript{90}

The district court granted summary judgment to PureGro on the continuing business enterprise exception after finding, as a matter of law, that the exception was inapplicable to the facts of this case.\textsuperscript{91} The district court also granted summary judgment to PureGro on the fraudulent transaction exception holding that there was "no evidence that PureGro purchased [Brown & Bryant's] 'clean' assets for insufficient consideration."\textsuperscript{92} On appeal, after finding that state law provided the rule of decision regarding successor liability under CERCLA, the Ninth Circuit held that there was no need for a federal common law and affirmed the district court's grant of summary judgment in favor of PureGro.\textsuperscript{93}

IV. NARRATIVE ANALYSIS

A. Revisiting \textit{Louisiana-Pacific}

The Ninth Circuit began its analysis in \textit{Atchison} by determining that the Supreme Court's decisions in \textit{O'Melveny & Myers} and \textit{Atherton} called into question the \textit{Louisiana-Pacific} court's decision to create a set of federal rules for successor liability under CERCLA.\textsuperscript{94} The Ninth Circuit found that these two decisions stand for the

\begin{itemize}
  \item \textsuperscript{89} See \textit{Atchison}, 132 F.3d at 1299 (citing \textit{Louisiana-Pacific}, 909 F.2d at 1266).
  \item \textsuperscript{90} See \textit{id.}
  \item \textsuperscript{91} See \textit{id.} at 1298.
  \item \textsuperscript{92} \textit{Id.}
  \item \textsuperscript{93} See \textit{Atchison}, 132 F.3d at 1297.
  \item \textsuperscript{94} See \textit{id.} at 1299. For a discussion of the Supreme Court's decision in \textit{O'Melveny & Myers}, see \textit{supra} notes 58-66 and accompanying text. For a discussion of the Ninth Circuit's decision in \textit{Atherton}, see \textit{supra} notes 67-72 and accompanying text.
\end{itemize}
proposition that judicially created federal rules of decision should support state law only under "few and restricted" circumstances.95 Further, the Ninth Circuit stated that O'Melveny & Myers and Atherton set forth a heavy burden that a party, attempting to show the need for uniformity or that state rules conflict with federal policy, must overcome.96 The Atchison court asserted that the Court had "rejected many of the very arguments that Louisiana-Pacific accepted in deciding [that] CERCLA necessitated a set of uniform federal rules of successor liability."97

The Ninth Circuit then examined the Louisiana-Pacific court's conclusion that CERCLA's relevant legislative history indicated that Congress expected federal courts to develop a federal common law to supplement the statute.98 Although CERCLA's legislative history supports federal common law governance of joint and several liability under CERCLA, Louisiana-Pacific recognized that Congress did not specifically address the issue of successor liability under CERCLA.99 Therefore, the Atchison court found that pursuant to the Court's holding in O'Melveny & Myers, when a court is dealing with a "comprehensive and detailed" federal statute, it should "presume that matters left unaddressed in [the statute] are subject to state law."100

In light of CERCLA's absence of a clear mandate that the federal courts develop standards for successor liability, the Atchison

95. See id. (citing Atherton v. FDIC, 519 U.S. 213, 218 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)). The Ninth Circuit stated that although statutes other than CERCLA were involved in both O'Melveny & Myers and Atherton, "the underlying analysis [was] applicable in any situation in which it [was] necessary to determine whether state law should be supplanted by [federal law]." Id.

96. See id.

97. Id. The Ninth Circuit recognized that the existence of a federal statute did not mandate that federal courts create uniform federal rules. See id. Further, it stated, "'[f]requently, state rules of decision will furnish an appropriate and convenient measure of the governing federal law.'" Id. (quoting Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1457-58 (9th Cir. 1986)).

98. See Atchison, 132 F.3d at 1299. For a discussion of CERCLA's legislative history, see infra notes 136-42 and accompanying text.

99. See id. at 1299-1300 (citing Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990)).

100. Id. at 1300 (citing O'Melveny & Myers, 512 U.S. at 85).
court applied the *Kimbell Foods* test as clarified by the Court in *O'Melveny & Myers* and *Atherton*. According to the *Atchison* court, the *Louisiana-Pacific* court found that the need for national uniformity mandated the development of federal rules for successor liability. However, the *Atchison* court pointed to the Court's statement in *Atherton* that merely "'[t]o invoke the concept of uniformity . . . is not to prove its need.""

In applying the first prong of the *Kimbell Foods* test, the *Atchison* court found that there was no real explanation of the need for uniformity in the area of successor liability because "'the law in the fifty states on corporate dissolution and successor liability is largely uniform.'" The *Atchison* court concluded that since the law is uniform throughout the country, the argued need for uniformity stems from the notion that state successor liability law is inadequate for CERCLA's purposes.

The *Atchison* court then turned to *O'Melveny & Myers* and *Atherton* under which a pre-requisite to the adoption of a federal rule of decision is the existence of a significant conflict between a federal policy or interest and the use of state law. The Ninth Circuit described the conflict as "a 'precondition' to fashioning federal common law rules." The *Atchison* court stated that *O'Melveny & Myers* and *Atherton* require more than speculation to demonstrate such a conflict. Specifically, there must be a "'concrete federal policy or interest that is compromised' by the application of state law." As there was no such conflict in *Louisiana-Pacific*, insufficient grounds existed for the development of a federal rule of decision in that case.

In applying the second prong of the *Kimbell Foods* test, the Ninth Circuit determined that there was no evidence that the applic
cation of state corporation law would frustrate CERCLA's dual objectives of providing a mechanism for cleaning up hazardous waste sites and imposing cleanup costs on responsible parties.\textsuperscript{111} First, the \textit{Atchison} court recognized that no states' corporate laws would provide a haven for liable companies.\textsuperscript{112} Second, there was no indication that states would alter their existing successor liability rules in an attempt to attract corporate business.\textsuperscript{113}

The \textit{Atchison} court also addressed the Railroads' remaining justification for the creation of a new and more expansive federal rule.\textsuperscript{114} Specifically, the Railroads asserted that such a rule would "enrich the fund" by imposing liability on more asset purchasers.\textsuperscript{115} Turning once again to \textit{O'Melveny \& Myers}, the court found "these 'more money' arguments [to be] unavailing."\textsuperscript{116}

The Ninth Circuit concluded its analysis of \textit{O'Melveny \& Myers} and \textit{Atherton} by holding that those decisions "squarely refute the wisdom of fashioning a federal common law on this issue."\textsuperscript{117} Thus, the court overruled its holding in \textit{Louisiana-Pacific} and found that California state law provided the rule of decision for corporate successor liability.\textsuperscript{118} Further, because California, like most states, does not recognize the substantial continuation exception, the \textit{Atchison} court held that the exception failed to provide a basis for PureGro's liability.\textsuperscript{119} Consequently, the \textit{Atchison} court held that the district

\begin{itemize}
  \item \textsuperscript{111} See id. For a discussion of the objectives of CERCLA, see \textit{supra} notes 15-22 and accompanying text.
  \item \textsuperscript{112} See id.
  \item \textsuperscript{113} See \textit{Atchison}, 132 F.3d at 1301. Judge Kennedy addressed this concern in her concurrence in \textit{Anspec}.
  \item Any fears that states will engage in a "race to the bottom" in their effort to attract corporate business and enact laws that limit vicarious liability are in my opinion groundless. States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and the EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination. I see no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters. \textit{Anspec Co. v. Johnson Controls, Inc.}, 922 F.2d 1240, 1250 (6th Cir. 1991)).
  \item \textsuperscript{114} See \textit{Atchison}, 132 F.3d at 1301.
  \item \textsuperscript{115} See id. For a discussion of the "enrich the fund" justification, see \textit{infra} notes 155-55 and accompanying text.
  \item \textsuperscript{116} Id. (quoting \textit{O'Melveny \& Myers v. FDIC}, 512 U.S. 79, 88 (1994)). \textit{See also} \textit{O'Melveny \& Myers}, 512 U.S. at 88 (finding "there is no federal policy that the fund should always win" and that cases "have previously rejected 'more money' arguments").
  \item \textsuperscript{117} \textit{Atchison}, 132 F.3d at 1301.
  \item \textsuperscript{118} See id.
  \item \textsuperscript{119} See id. (citing \textit{Phillips v. Cooper Lab., Inc.}, 215 Cal. App. 3d 1648 (1989) (holding California did not recognize "substantial continuation" exception)).
\end{itemize}
court properly granted PureGro summary judgment on this issue.\textsuperscript{120}

The \textit{Atchison} court illustrated that if it had applied federal common law, it would have reached the same conclusion because the Ninth Circuit would not have adopted the substantial continuation exception.\textsuperscript{121} Noting that \textit{Louisiana-Pacific} recognized that "the traditional rules of successor liability in operation in most states' should determine the limits of CERCLA successor liability,"\textsuperscript{122} the court re-emphasized that those traditional rules sufficed to satisfy CERCLA's dual objectives.\textsuperscript{123} The \textit{Atchison} court also noted that in cases where courts found asset purchasers liable under the substantial continuation exception, the asset purchaser would have likely already been liable under the traditional exceptions.\textsuperscript{124}

\textsuperscript{120}. See \textit{Atchison}, 132 F.3d at 1302.

\textsuperscript{121}. See \textit{id}. at 1301. The Ninth Circuit stated, "[a]lthough we determine that state law dictates the parameters of successor liability under CERCLA, we would reach the same result under federal common law that California has reached under state law, because we would not adopt the 'substantial continuation' exception in this circuit." \textit{Id}.

\textsuperscript{122}. \textit{Id}. (quoting \textit{Louisiana-Pacific} Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990)). The court also cited \textit{John S. Boyd Co. v. Boston Gas Co.}, 992 F.2d 401 (1st Cir. 1993), as a case which identified four traditional exceptions to non-liability of asset purchasers. See \textit{Atchison}, 132 F.2d at 1301. In \textit{Boyd}, the First Circuit recognized four traditional exceptions: "when the buyer agrees to assume liability; when a consolidation or De Facto merger occurs; when the buyer is merely a continuation of the seller; and when the transaction is a fraud to escape liability." \textit{Boyd}, 992 F.2d at 408. These are essentially the same exceptions the Ninth Circuit recognized in \textit{Louisiana-Pacific}. For a discussion of these four exceptions, see \textit{supra} note 29 and accompanying text.

\textsuperscript{123}. See \textit{Atchison}, 132 F.3d at 1301.

\textsuperscript{124}. See \textit{id}. The court stated:

Furthermore, we believe altering the traditional "mere continuation" exception to encompass the broader "substantial continuation" exception adds little in the end. In the cases in which the broader exception has been applied to hold an asset purchaser liable, there has almost always been some fraudulent intent and collusion present, in which case the purchaser would have likely already been liable under another traditional exception-the fraudulently-entered transaction exception.

\textit{Id}. at 1301-02. For a history of cases in which the purchaser would have likely been liable under the fraudulently-entered transaction exception, see \textit{United States v. Carolina Transformer Co.}, 978 F.2d 832, 839-41 (4th Cir. 1992) (finding children of seller's owner were sole shareholders in purchase, giving "unmistakable impression that the transfer . . . was part of an effort to continue the business in all material respects yet avoid the environmental liability"); \textit{United States v. Distler}, 741 F. Supp. 643, 646-47 (W.D. Ky. 1990) (key employees of seller formed new purchasing corporation); \textit{cf}. \textit{Oner II, Inc. v. EPA}, 597 F.2d 184, 186-87 (9th Cir. 1979) (imposing liability under FIFRA where new corporation was apparently formed for very purpose of purchasing assets and carrying on operations of environmentally-burdened corporation). \textit{But see Kleen Laundry & Dry Cleaning Services, Inc. v. Total Waste Mgmt. Corp.}, 817 F. Supp. 225, 231 (D.N.H. 1993) (no evidence of collusion or fraud, but court imposed successor liability where pur-
Finally, after concluding that state law dictated the parameters of successor liability under CERCLA and that PureGro was not liable under the substantial continuation exception, the Ninth Circuit examined whether there was liability under the traditional fraudulently-entered transaction exception. After finding that the Railroads failed to create a genuine issue of fact on this exception, the Atchison court affirmed the district court's grant of summary judgment.

V. CRITICAL ANALYSIS

A. Three Supreme Court Decisions Mandated the Ninth Circuit's Holding in Atchison

In light of the Court's decisions in Kimbell Foods, O'Melveny & Myers and Atherton, the Ninth Circuit was correct in holding that state law provides the rule of decision for corporate successor liability under CERCLA. Since CERCLA does not direct federal courts to develop standards for successor liability, one must consider the

chaser assumed seller's customers and serviced them without interruption with same drivers and trucks under new name).

125. See Atchison, 132 F.3d at 1302. The Ninth Circuit also noted, "as with the 'mere continuation' exception, the formulation of the fraudulently-entered transaction exception is identical under California law or the 'federal common law' of this circuit." Id.

126. See id. at 1302-03. The Atchison court stated that "[u]nder traditional fraudulent conveyance law, the sufficiency of the consideration given for the sale also plays a large factor in determining whether the sale was fraudulent." Id. at 1302. Although PureGro knew about Brown & Bryant's environmental problems and therefore only bought "'clean' assets," the court found that the sale did not provide Brown & Bryant with a means of escaping liability. See id. at 1301. The Atchison court stated:

[Brown & Bryant] had insufficient assets to cover its liability even before the sale—indeed, this fact was the catalyst for the sale. Nor does the record suggest that there was any intent on behalf of the purchaser or seller to construct the sale solely to circumvent CERCLA liability. Moreover, PureGro paid the appraised value for each item, and the Railroads did not present any evidence suggesting that the appraisal was inaccurate.

Id.

The Railroads also argued that an issue of fact regarding the fraudulent transaction exception was established because PureGro acquired Brown & Bryant's goodwill without paying any consideration. See id. After examining the record, the Atchison court disagreed:

[N]inety percent of the time, clients follow PCAs, and PureGro merely offered employment to PCAs that would be out of work when [Brown & Bryant] closed its doors. No agreement between PureGro and [Brown & Bryant] required PureGro to employ the PCAs. The fact that PureGro managed to sign the PCAs (and thus gain their attenant business) rather than allowing a competitor to employ them is not relevant to the fraudulent transaction issue.

Id.
three factors set forth in *Kimbell Foods* and clarified by the Court in *O'Melveny & Myers* and *Atherton* to determine whether to apply federal common law or state law.\(^{127}\) Those factors include: 1) whether there is a need for a nationally uniform body of law; 2) whether application of state law would frustrate important federal policy; and 3) whether a federal rule would impact existing relationships under state law.\(^{128}\)

First, because courts can properly decide the question of corporate successor liability under CERCLA by considering state law, there is no need for a uniform federal law.\(^{129}\) State law already imposes liability on truly responsible successor corporations through established rules of successorship.\(^{130}\) If state law did widely vary on the issue of successor liability, there would be a need for a uniform federal rule.\(^{131}\) However, "the law in the fifty states on corporate dissolution and successor liability is largely uniform."\(^{132}\)

Proponents of a uniform federal rule in this area present several arguments that counter the Ninth Circuit's holding in *Atchison*. One argument is that incorporating state law would permit the laws of a particular forum state to affect or diminish the availability of cleanup funds.\(^{133}\) However, "[n]o court or commentator has iden-

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127. See id. at 1299 (stating that "[i]f there is no ‘congressional directive,’ then a court should turn to the three part test articulated in [Kimbell Foods]”).
129. See Sisk & Anderson, supra note 4, at 565.
130. See id. at 573. In contrast to the difficulties the adoption of a federal common law rule present, "[t]he traditional rules of corporate successor liability prevailing in the states ‘produce a desirable balance between the interest in compensating [those with claims against the predecessor], and the interest of fairness involved in shielding a successor corporation from the fallout created by its predecessor’s acts.’" Id. (quoting G. William Joyner III, Comment, Beyond Budd Tire: Examining Corporate Successor Liability in North Carolina, 30 Wake Forest L. Rev. 889, 890 (1995)).
131. See Atchison, 132 F.3d at 1300.
132. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1249 (6th Cir. 1991)(Kennedy, J., concurring). Judge Kennedy stated: As the United States itself acknowledges, the law in the fifty states on corporate dissolution and successor liability is largely uniform. For example, all states agree that the surviving corporation in a statutory merger assumes the debts and liabilities of the constituent corporations. And all states have statutes providing for post-dissolution liability of corporations for liabilities existing prior to dissolution.
133. See Clarke, supra note 2, at 1312. One commentator has stated that there are three reasons why a uniform federal rule in the area of corporate successor liability under CERCLA is necessary. See id. First, "[i]ncorporating the laws of forum states . . . would subject the strong federal interest in enforcement of CERCLA's national remedial program, as well as the federal financial interest in prompt recovery of response costs and replenishment of the Superfund, to the vagaries of several different bodies of law." Id. Second, the laws of the forum state
tified any state as providing a safe haven for companies liable under CERCLA by allowing them to fraudulently shield their assets." 134 Thus, state law does not impose any obstacle to the consistent enforcement of CERCLA. 135

An additional argument in favor of a uniform federal rule is based on CERCLA’s legislative history which supports the development of a uniform rule of successor liability. 136 Representative James Florio, CERCLA’s primary congressional sponsor, noted that “[t]o insure the development of a uniform rule of law, and to discourage business dealings in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal Common law in this area.” 137 The Third Circuit relied upon this argument in Smith Land when it stated that district courts “must consider national uniformity” to prevent certain states’ unduly restrictive successor liability laws from frustrating CERCLA’s goals. 138

There is nothing on CERCLA’s face, however, hinting that Congress intended to displace state corporation law. 139 The absence of support in either CERCLA’s text or authoritative committee reports outweights the personal conclusions of one member of

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135. See id. at 565. Two commentators note that at least one scholar has argued that “states varying approaches to successor liability, combined with conflict-of-law issues, creates uncertainty.” Id. at n.384 (citing Layfield, supra note 3, at 1248-49).
136. See Clarke, supra note 2, at 1312; Smith Land & Improvement Corp. v. Celotex, 851 F.2d 86, 91 (3d Cir. 1988).
137. 126 CONG. REC. 31,965 (1980).
138. See Smith Land, 851 F.2d at 92.
139. See Sisk & Anderson, supra note 5, at 525. Two commentators state: Beyond the Act’s definition of “person” as including “corporation,” CERCLA is silent. Congress deliberately chose a term, “corporation,” that describes a state-created legal entity, and thus presumably anticipated that the organic state law shaping corporations would apply to matters involving the corporate form. As Judge Kennedy of the Sixth Circuit wrote in rejecting federal common law for corporate successor liability under CERCLA, “[a]ll [corporations] are artificial creations, wholly dependent on state law for their existence. Those state laws define their powers, rights and liabilities, prescribe their procedures, govern their continued existence, and define the terms upon which mergers may occur and the effect to be given to mergers.” Id. at 525-26 (quoting Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1248 (6th Cir. 1991) (Kennedy, J., concurring)).
Congress, even if he sponsored the statute. Additionally, the actual subject matter of the passage from the legislative floor debate was on joint and several liability. As this piece of legislative history does not mention the legal status of corporations, it is irrelevant to the analysis of successor liability under CERCLA.

Thus, as the Ninth Circuit noted, the argued “need” for uniformity cannot stem from disarray among the various states. It must instead stem “from the alleged need for a more expansive view of successor liability than state law currently provides.” This implicates the second factor of the Kimbell Foods test; namely, whether application of state law would frustrate or conflict with specific objectives of federal programs.

The Court in O'Melveny & Myers stated that there must be a “significant conflict between some federal policy or interest and the use of state law” before a court can recognize a federal rule of decision. In Atherton, the Court stated that such a conflict was a “pre-condition” to fashioning federal common law rules. There is no evidence that application of state corporation law will frustrate the objectives of CERCLA in imposing liability upon those who are responsible for contamination.

The Kimbell Foods court refused to accept “generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests].” Those who support the fashioning of a federal common law in this area claim that states might adopt corporation laws that unduly limit successor lia-

142. See Sisk & Anderson, supra note 5, at 529.
143. See Atchison, 132 F.3d at 1300.
144. Id.
145. See United States v. Kimbell Foods, Inc. 440 U.S. 715, 727-28 (1979). In Atchison, the court concluded that the “need” for uniformity was due to “the notion that state law on this issue is inadequate for CERCLA’s purposes.” Atchison, 132 F.3d at 1300.
bility in a "race to the bottom" to attract corporate clients. As the Ninth Circuit noted in Atchison, "[s]uccessor liability rules were, after all, developed to address much more than environmental liability. It is unrealistic to think that a state would alter general corporate law principles to become a peculiarly hospitable haven for polluters."

Considering that states already have established laws to prevent corporations from avoiding liability, the remaining argument in favor of the development of a new federal rule "is to 'enrich the fund' by imposing liability on more asset purchasers." The idea that establishing broader successorship rules under CERCLA will enlarge the pool of parties available to pay cleanup costs has intrigued some federal courts. The Court in O'Melveny & Myers, however, specifically rejected this "more money argument."

Finally, although the Atchison court did not address the third prong of the Kimbell Foods test, the application of a federal rule

150. See Atchison, 132 F.3d at 1301; Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J. concurring). For a discussion of Judge Kennedy's views on the "race to the bottom" theory, see supra note 113 and accompanying text.

151. See Sisk & Anderson, supra note 5, at 568 (noting that states have interest in prevention of environmental contamination).

152. Atchison, 132 F.3d at 1301. Two commentators have summarized the "race to the bottom" argument as follows:

States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and the EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination. I see no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters.

Sisk & Anderson, supra note 5, at 568 (citing Anspec, 922 F.2d at 1250 (Kennedy, J., concurring)).

153. Atchison, 132 F.3d at 1301.

154. See Sisk & Anderson, supra note 5, at 569.

155. Id. In O'Melveny & Myers, FDIC contended that federal common law was necessary to ensure private, rather than taxpayer, funding of bank bailouts. See O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994). In response to the contention that state law rules might limit liability of private parties and thus deplete the deposit insurance fund, the O'Melveny & Myers Court stated:

[W]hat respondent must mean by "depletion" is simply the foregoing of any money which, under any conceivable legal rules, might accrue to the fund. That is a broad principle indeed, which would support not just elimination of the defense at issue here, but judicial creation of new, "federal-common-law" causes of action to enrich the fund. Of course we have no authority to do that, because there is no federal policy that the fund should always win. Our cases have previously rejected "more money" arguments remarkably similar to the one made here.

Id. at 88.
might disrupt commercial relationships predicated on state law.\textsuperscript{156} Prior to Congress’s enactment of CERCLA, corporations negotiated numerous acquisitions and asset purchases.\textsuperscript{157} As two commentators have suggested, “[t]he interposition of a new federal common-law rule would upset settled expectations and unfairly deprive commercial actors of their justified reliance on state law governing corporations, mergers, transfer of liabilities, etc.”\textsuperscript{158} The consequences of expanding successor liability beyond the traditional rules of state law would affect buyers, sellers, shareholders, lenders, suppliers, and customers of the corporate entities.\textsuperscript{159}

Congress, not the courts, should determine whether to create far-reaching exceptions to the traditional rule of non-liability for asset purchasers.\textsuperscript{160} As the Court stated in \textit{O'Melveny & Myers}, “[w]ithin the federal system, at least, we have decided that the function of weighing and appraising ‘is more appropriately for those

\begin{itemize}
  \item \textsuperscript{156} See Sisk & Anderson, supra note 5, at 571. Two commentators cite a passage from \textit{Kimbell Foods} in support of their conclusion that a federal common law would interfere with commercial relationships and transactions. \textit{See id.} The passage they cite reads, “[b]ecause the ultimate consequences of altering settled commercial practices are so difficult to foresee, we hesitate to create new uncertainties, in the absence of careful legislative deliberation.” United States v. Kimbell Foods, Inc., 440 U.S. 715, 739-40 (1979).
  \item \textsuperscript{157} See Sisk & Anderson, supra note 5, at 571.
  \item \textsuperscript{158} See \textit{id.} at 571-72.
  \item \textsuperscript{159} See \textit{id.} In addition, “the creation of federal common law in this area will create uncertainty in future commercial transactions.” \textit{Id.} (citing Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring)). Two commentators state:

  [T]he current state of federal common law on corporate successor liability is unsettled and therefore unsettling. Parties structuring business transactions thus cannot know what the “federal common law” in a particular district or circuit will require and how it may differ from the state law that will continue to govern all other aspects of the transaction. Ad hoc creation of federal common law would introduce paralyzing uncertainty. Commerce would be slowed. Like any unknown or contingent liability on the part of a selling business, the unstable state of the law here would “raise the prospect of stymied business transfers, with assets caged in the hands of a demoralized and disabled management that is unable to sell its operations to a higher-valuing and perhaps more capable user.” \textit{Id.} at 572-73 (quoting Mark J. Roe, \textit{Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability}, 70 VA. L. REV. 1559, 1561 (1984)).
  \item \textsuperscript{160} See \textit{id.} at 574. See also Leannais v. Cincinnati, Inc., 565 F.2d 437, 441 (7th Cir. 1977). The \textit{Leannais} court stated, “courts are ill-equipped . . . to balance equities among future plaintiffs and defendants. Such forays can result in wide-ranging ramifications on society, the contemplation of which is precluded by the exigencies of deciding a particular case presented on a limited record developed by present parties.” \textit{Id.} at 441.
\end{itemize}
who write the laws, rather than for those who interpret them."

Unless Congress acts upon this question, successor liability under CERCLA should be governed by state corporation law.


The Rules of Decision Act (the Act) sets forth the sources of the rules of decision which must be applied by federal courts in civil actions. The Act provides, "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." In *Erie Railroad v. Tompkins*, the Court held that a federal district court sitting in diversity of citizenship jurisdiction must apply both the statutory and the common law rules of the state in which it sits.

Although courts most often apply the Rules of Decision Act in diversity actions, its application is not limited to that context. The Act's plain language mandates a presumption that the "laws of the several states" govern in "civil actions in the courts of the United States" unless a federal statute, treaty, or constitutional provision "otherwise require[s] or provide[s]." Thus, this directive

166. 304 U.S. 64 (1938).
167. See id. at 69-80. See also Sisk & Anderson, *supra* note 5, at 554. The Court in *Erie* stated:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or general, be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

*Erie*, 304 U.S. at 78.
169. *Id.*
applies not only in diversity of citizenship cases, but in all federal court cases. 170

Two commentators have suggested the following:

Although judicial adoption of a federal rule occasionally may be justified when there is an unavoidable conflict between state law and federal statutory policy, “federal courts [should be] scrupulous about confining such lawmaking to cases where it is truly necessary either to oust state law or to supplement federal law in order to protect specifically intended federal policies.” 171

Additionally, courts should be wary of creating federal common law when they are asked to shape fundamental policy, especially when that policy would interfere with a matter of traditional state concern. 172

Federal law has been established and remains in areas of the law where either no other source of law is available or unique federal concerns mandate a uniform legal standard. 173 Thus, federal law governs several areas, including admiralty law, international relations, federal government contract law, and the enforcement of collective bargaining agreements between labor unions and employers. 174 Federal governance in these areas is, however, the exception to the general rule that state law is to be applied in federal court cases. 175

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170. See id. Two commentators, arguing that the Rules of Decision precludes the creation of federal common law of successor liability under CERCLA, state: The Erie Court itself did not limit its holding to diversity cases, stating that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State” and further denying the existence of a “federal general common law.” Not incidentally, the Supreme Court in its recent decision in O’Melveny & Myers v. FDIC began its analysis of whether to formulate a federal common-law rule with the foundational Erie doctrine that “[t]here is no federal general common law.” Id. at 554 (quoting Erie, 304 U.S. at 78).

171. Id. at 557 (quoting Merrill, supra note 164, at 28-29).

172. See Sisk and Anderson, supra note 5, at 557 (arguing separation of powers principles preclude courts’ formulation of federal common law).

173. See id.

174. See id.

175. See id. The Supreme Court has stated: [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United

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Corporate successor liability does not share the attributes of those areas of law requiring a uniform legal standard. As two commentators have stated, "CERCLA uses the adorned and undefined term 'corporation,' thus failing to suggest any reference other than that creature of state law, as defined by state law." The presumption of state law, therefore, as codified in the Rules of Decision Act, "stands unrebutted" in the context of CERCLA.

VI. IMPACT

The Ninth Circuit's decision in Atchison to refrain from expanding successor corporate liability under CERCLA is consistent with the statute's dual objectives of protecting the public health by abating the releases, or threatened releases, of hazardous substances and discouraging irresponsible handling of hazardous materials by imposing costs on individuals or entities that cause such hazards. Not only would an expansion of successor liability fail to increase the recovery of cleanup costs, but it could also actually impair EPA's ability to protect public health. Similarly, expanded liability would destroy the deterrent effect of response costs. At the other extreme, however, overly protective state successor liability laws would frustrate CERCLA's goals by preventing cost recovery and shielding responsible parties. Thus, neither of these approaches would serve CERCLA's goals. Only the middle ground of well established traditional successor liability is justified.

States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.


176. See Sisk & Anderson, supra note 5, at 557.

177. Id. at 558-59. Two commentators state, "[t]he sovereign interests of the United States are not intimately involved, nor are relations among the various states or with foreign nations." Id.

178. Id. at 555-59.

179. For a discussion of CERCLA's purpose and liability structure, see infra notes 15-22 and accompanying text.

180. See Layfield, supra note 3, at 1252-62, 1270 (proposing several models supporting argument that expanded successor liability negatively impacts CERCLA's goal of protecting public health).

181. See id.

182. See id. at 1271 (arguing that stricter standards of successor liability would impair EPA's ability to "collect response costs by potentially shielding those who caused the harm.").

183. See id.

184. See id.
The application of existing state law is preferable to the creation of new federal common law.\textsuperscript{185} State law, which has evolved over many years and is frequently codified in statutes, is well developed and can be easily discoverable and applicable.\textsuperscript{186} In contrast, "the creation of new federal common law is a difficult, open-ended, and long term task."\textsuperscript{187} If courts were to begin creating new federal common law, they would bear the burden of fashioning rules appropriate to the circumstances that each element of corporation law would bring with it.\textsuperscript{188}

As two commentators have stated, "[c]reation of a federal rule, as opposed to incorporating a ready-made and fully fleshed out body of state law, would, during the development of that federal rule, leave parties very uncertain about what rule governed."\textsuperscript{189} Unless federal courts follow the same course as the Ninth Circuit did in \textit{Atchison} by deferring to state law as the rule of decision, each CERCLA case involving corporate successor liability would warrant both an additional articulation of a governing test as well as further weighing and refinement of governing factors.\textsuperscript{190} This would defeat the goal of uniformity and perpetuate the disunity in the federal courts.\textsuperscript{191}

\textit{David E. Dopf}

\begin{itemize}
\item \textsuperscript{185} See Sisk & Anderson, supra note 5, at 565.
\item \textsuperscript{186} See id.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} See id. Two commentators suggest that the application of federal common law in the area of corporate successor liability under CERCLA has proven to be ineffective:
\begin{quote}
Rather than promoting uniformity, the result has been a Tower of Babel, with a singularly unmusical cacophony of voices and the inharmonious noise of conflicting policies. Among those federal courts assuming common-law powers, there are disturbing conflicts and uncertainties over a myriad of critical issues that typically would be decided under existing state law.
\end{quote}
\item Id. at 566.
\item \textsuperscript{189} Sisk & Anderson, supra note 5, at 567.
\item \textsuperscript{190} See id.
\item \textsuperscript{191} See id.
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