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Susan M. Girard

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Casenotes

AN EXPANSION OF CORPORATE SUCCESSOR LIABILITY UNDER CERCLA: UNITED STATES v. DISTLER

I. INTRODUCTION

On March 25, 1988, the United States government commenced two actions against Angell Manufacturing Corporation (Angell II), a successor corporation, pursuant to section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The government sought to recover past, present and future CERCLA costs incurred in response to the cleanup of hazardous substances at properties then owned by Angell II and previously owned by Donald Distler. In response, Angell II filed a motion to dismiss the actions claiming that it was not a proper party for the suits.

In United States v. Distler, the United States District Court for the Western District of Kentucky addressed the issue of corporate successor liability under CERCLA section 107(a)(3) which defines persons liable for response costs incurred in the cleanup of haz-

2. Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides in pertinent part: “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” shall be liable for costs of cleaning up the hazardous substances. 42 U.S.C. § 9607(a)(3) (1986) (emphasis added). For a general discussion of CERCLA, see infra notes 49-70 and accompanying text.
3. The actions concerned two separate properties: one action sought to recover response costs incurred by the United States at a farm in Jefferson County, Kentucky; the other action sought to recover response costs incurred at an abandoned brickyard in Hardin County, Kentucky. See Supplemental Response Brief for Plaintiff at 1, United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990) (No. C88-0200 L(J)). Donald Distler and Kentucky Liquid Recycling had previously operated the properties. See Brief for Defendant at 1, United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990) (No. C88-0200 L(A) & C88-0201 L(A)). The government alleged that the materials deposited at the two locations were “hazardous substances” within the meaning of CERCLA and that Angell Manufacturing Company had contracted with Donald Distler and Kentucky Liquid Recycling to transport and dispose of the hazardous substances. See Response Brief for Plaintiff at 2, United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990) (No. C88-0200 L(A) & C88-0201 L(A)). In addition, the government alleged that the two locations in dispute were “facilities” as defined under CERCLA. Id.
ardous waste sites.\(^5\) The case is one of first impression as to the application of the appropriate doctrine of successor liability in a CERCLA context and represents an expansion of liability under CERCLA.\(^6\)

In *Distler*, the court denied Angell II's motion to dismiss the government's claim for response costs finding Angell II liable under CERCLA section 107(a)(3) as a successor corporation.\(^7\) The court applied a version of the doctrine of successor liability which extended liability under CERCLA to include successor corporations which are not expressly covered by the statute.\(^8\) The court imposed successor liability in an attempt to further CERCLA's remedial purpose.\(^9\)

This Note analyzes the *Distler* decision in light of recent trends in the courts toward expanding corporate successor liability in the area of asset acquisitions.\(^10\) In addition, this Note examines the failure of courts to develop a consistent doctrine to be applied uniformly to all asset purchases. This inconsistency causes successor liability to be one of the most significant unresolved issues under CERCLA due to its potential for affecting every situation in which hazardous assets have been transferred. Finally, this Note contends that it is the responsibility of Congress to explicitly define the boundaries of successor liability under CERCLA in order to avoid further confusion among courts in in-

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5. *Id.* For statutory language of CERCLA section 107(a)(3), see *supra* note 2.

6. *Id.* at 641. *But see* United States v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D.N.C. 1989) (applied continuity of business enterprise exception in situation where successor had knowledge of potential liability, but failed to address rationale behind application of expanded doctrine of successor liability). For a discussion of continuity of business enterprise exception, see *infra* notes 46-48 and accompanying text.


8. *Id.* at 643. The traditional doctrine of successor liability imposes liability on the purchaser of assets only to the extent of liabilities expressly assumed by the purchaser. *Id.* An exception to this rule applies when the purchasing corporation is, in essence, the same corporation as that of its predecessor. *Id.* *Distler* expanded the application of this "mere continuation" exception by imposing liability under the continuity of business enterprise exception and, in doing so, disposed of the necessity of requiring a continuity of shareholder interest. *Id.*

9. *Id.* The court stated that "[a]lthough a majority of jurisdictions may presently adhere to [traditional] constructions of the doctrine of successor liability, where to do so would conflict with Congressional intent, [this] court is bound to seek an application which would avoid such conflict." *Id.*

10. For a discussion of the development of the expansion of corporate successor liability, see *infra* notes 28-48 and accompanying text.
terpreting which persons are accountable under CERCLA and in order to ensure that the remedial policies underlying the statute are advanced.

II. THE HISTORICAL DEVELOPMENT OF THE DOCTRINE OF SUCCESSOR LIABILITY

This section will discuss the common law or traditional doctrine of successor liability along with its exceptions. Specifically, this section will cover the "mere continuation" exception and the more liberal "continuity of business enterprise" exception.

A. Traditional Doctrine of Corporate Successor Liability

The doctrine of corporate successor liability has developed from traditional common law principles on the assumption that a corporation is an entity which is separate and distinct from its shareholders. Therefore, changes in ownership of a corporation's stock do not affect the obligations of the corporation itself.

Under common law, the liability of a successor corporation is invariably dependent upon the type of transaction contemplated by the corporation and its successors. Generally, when one cor-

11. For a discussion of the common law doctrine of successor liability and its accompanying exceptions, see infra notes 13-23 and accompanying text.

12. For a discussion of the mere continuation exception and continuity of business enterprise exception, see infra notes 24-48 and accompanying text.

13. Smith Land & Improvement Corp. v. Celotex, 851 F.2d 86 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989). Successor liability is a deeply rooted principle of common law. Id. In Smith Land, the court emphasized the continuity of existence that is inherent in the corporate entity. The court stated in pertinent part:

[A]ll the individual members that have existed from the foundation to the present time, or that shall 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 parties which compose it are changing every instant.

Id. at 91. 1 W. BLACKSTONE, COMMENTARIES 467-69 (quoting Polius v. Clark Equip. Co., 802 F.2d 75, 77 (5th Cir. 1986)). For a further discussion of Smith Land, see infra notes 83-88 and accompanying text.


15. See generally 19 AM. JUR. 2d Corporations §§ 2704-2705 (1986); 15 W. FLEETHER, Cyclopedia of the Law of Private Corporations §§ 7122-7123 (rev. perm. ed. 1983 & Supp. 1990) [hereinafter FLEETHER]; Annotation, Similarity of Ownership or Control as Basis for Charging Corporation Acquiring Assets of Another with Liability for Former Owner's Debts, 49 A.L.R.3d 881, 883 (1973). A corporation can transfer ownership through a sale of its stock, a sale of its assets, a merger, or a consolidation with another entity. FLEETHER § 7122. Generally, when a sale of stock, a merger, or a consolidation occurs, the original corporate entity
poration purchases the assets of another, that corporation is accountable only to the extent of the liabilities expressly assumed in the acquisition agreement. This general rule is based upon the premise that when one corporation sells its assets, it transfers an interest distinct from that of the corporate entity itself. The rationale for the rule is to protect a bona fide purchaser from liabilities caused by a predecessor corporation of which the bona fide purchaser was unaware at the time of acquisition.

This common law rule of nonliability, however, is subject to four exceptions. The exceptions apply (1) when there has been an express or implied assumption of liability by the purchasing corporation; (2) when the transaction amounts to an actual or remains substantially intact. For example, the liabilities of the previous ownership form are retained in the new corporate entity. By contrast, however, when a sale of assets occurs, only those liabilities expressly assumed are transferred over to the new corporate entity. A merger occurs when one of the combining entities remains in existence; a consolidation occurs when a new entity is borne out of the combination of two or more entities.

16. Fletcher, supra note 15, § 7122, at 232 ("factual conclusion that the transferee corporation is a continuation of the transferor corporation does not inexorably lead to the legal conclusion that the transferee is therefore liable for the transferor's obligations").

17. Id.

18. Id. ("[I]f a corporation goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability.") (emphasis added). The general rule of nonliability is also used as a device to protect the rights of commercial creditors. Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 815-16 (N.J. 1981). The court held that "courts have come to recognize that the traditional rule of nonliability was developed . . . to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions, as well as to determine successor corporation liability for tax assessments and contractual obligations of the predecessor."


Courts have also recognized a fifth exception, the product line exception. See, e.g., Ray v. Alad Corp., 560 P.2d 3, 11 (Cal. 1977) ("party which acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired"); Fletcher, supra note 15, § 7123.07, at 278-80. The products line exception has been adopted in only a few states. See Brief for Defendant at 22 (No. C88-0200 L(A) & C88-0201 L(A)). See, e.g., Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977); Ramirez v. Amsted Indus., Inc., 431 A.2d 11 (N.J. 1981); Dawejko v. Jorgensen Steel Co., 434 A.2d 106 (Pa. Super. 1981). Most courts, however, have expressly declined to follow this exception. See Brief for Defendant at 22 (No. C88-0200 L(A) & C88-0201 L(A)).

20. This exception applies where the successor's conduct represents an intention to pay the predecessor's debt. Fletcher, supra note 15, §§ 7114-7115, 7122. See also Louisiana-Pacific Corp. v. Asarco, 909 F.2d 1260, 1264 (9th Cir. 1990); Goldstein v. Gardner, 444 F. Supp. 581, 583 (N.D. Ill. 1978) ("buyer of
de facto merger;\(^2\) (3) when there is evidence that the transfer was fraudulent or lacking in good faith;\(^2\) or (4) when the transferee corporation is, in reality, a mere continuation of the transferor.\(^2\)

B. The Mere Continuation Exception

A mere continuation of the transferor exists when there is a continuation of officers, directors, stockholders and general business operations between the selling and purchasing corporations with only one corporation remaining after the transaction is completed.\(^2\) A successor corporation falls within the purview of this exception if after the transfer of assets, the identity of the stock, stockholders and directors remains constant.\(^2\) The extent of this exception has been defined by courts.\(^2\) In particular, some assets can avoid implied assumption of liabilities by enumerating liabilities assumed and explicitly excluding assumption of liabilities not enumerated”).

\(^2\) See generally FLETCHER, supra note 15, § 7122, at 232. This exception, however, only pertains when the assets of the predecessor corporation are transferred for shares of stock.

A merger occurs when one company acquires another company resulting in one corporate entity. Id. A de facto merger occurs when the substance of the agreement results in a merger, regardless of title put on it by the merging corporations. See In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 712 F. Supp. 1010, 1014-15 (D. Mass. 1989). The de facto merger doctrine is a judicial doctrine created for avoiding inequities. Id. at 1015. The doctrine is most often employed in relation to shareholder voting and appraisal rights. Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 877 (Mich. 1976).

Courts have recognized de facto mergers when:

(1) there is a continuation of the enterprise of the seller in terms of continuity of management, personnel, physical location, assets, and operations;

(2) there is a continuity of shareholders;

(3) the seller ceases operations, liquidates, and dissolves as soon as legally and practically possible; and

(4) the purchasing corporation assumes the obligations of the seller necessary for uninterrupted continuation of business operations.


\(^2\) Id. at 1015. The doctrine is most often employed in relation to shareholder voting and appraisal rights. Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 877 (Mich. 1976).

A mere continuation occurs when the successor corporation retains the same officers, directors, and stock and only one corporation remains after the sale of assets. Id. For a discussion of the mere continuation exception, see infra notes 24-26 and accompanying text.

\(^2\) Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977). Under the mere continuation exception, a successor corporation is liable when it is, in essence, the same corporate entity as that of its predecessor. Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 174-75 (5th Cir. 1985).

\(^2\) Mozingo, 752 F.2d at 174-75.

\(^2\) See, e.g., id. at 174-75. Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977); Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977); Turner v. Bituminous
courts have broadened the scope of liability under the exception, creating a more expansive exception; the continuity of business enterprise exception.27

C. Expansion of Corporate Successor Liability

In the area of products liability, the application of the traditional doctrine of corporate successor liability has led some courts to loosen the criteria needed to fall within the boundaries of the exceptions to the doctrine in order to avoid an otherwise harsh or unjust result.28 Indeed, the mere continuation exception has been expanded by certain courts to include an element of public policy.29 Other courts have broadened liability by abandoning the traditional rule of nonliability altogether and have established successor liability based upon a continuation of the predecessor’s business operations.30 In these instances, liability

Casualty Co., 244 N.W.2d 873 (Mich. 1976). The Ray court held that in order to find that a corporation which acquires the assets of another corporation is a mere continuation of its predecessor and therefore impose liability upon the purchaser for the predecessor's debts, a showing of one of the following elements must be made: "(1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of the unsecured creditors; [or] (2) one or more persons were officers, directors or stockholders of both corporations.” 560 P.2d at 7.


The Turner court held that:

to the injured persons the problem of recovery is substantially the same, no matter what corporate process led to transfer of the first corporation and/or its assets. . . . [T]he injured person has the same problem, so long as the first corporation in each case legally and/or practically becomes defunct. [H]e has no place to turn except to the second corporation. Therefore, as to the injured person, distinctions between types of corporate transfers are wholly unmeaningful.


29. See, e.g., Turner, 244 N.W.2d at 881-82; Cyr, 501 F.2d at 1154. In Cyr, the court noted that under the facts of the case the mere continuation exception did not apply. Id. However, the court extended the mere continuation exception stressing the following policy reasons for imposing successor liability in tort: that “(1) the manufacturer is better able to protect itself and bear the costs while the consumer is helpless; . . . and (4) the manufacturer is the instrumentality to look to for improvement of the product’s quality.” Cyr, 501 F.2d at 1154.

30. See, e.g., Ramirez, 431 A.2d at 818; Ray, 560 P.2d at 10. In Ramirez, the court developed a test to determine successor liability for injuries caused by defects in products manufactured and distributed by a predecessor corporation. 431 A.2d at 812. The court stated in pertinent part:
attaches to a successor who acquires all or substantially all of the assets of its predecessor and continues essentially the same manufacturing operations.\textsuperscript{31} Since such an approach does not require that continuity of officers and directors be maintained, continuity of ownership need not exist for liability to be imposed.\textsuperscript{32}

The court in \textit{Turner v. Bituminous Casualty Co.}\textsuperscript{33} imposed liability by relaxing the criteria needed to fall within the mere continuation exception.\textsuperscript{34} \textit{Turner} involved an injury caused by a press manufactured and sold by a predecessor corporation as part of a cash sale.\textsuperscript{35} Because the assets were acquired for cash, there was no continuity of shareholder interest involved in the transaction.\textsuperscript{36} Accordingly, the court did not find the successor liable under the mere continuation exception.\textsuperscript{37} The court, however, expanded the “mere continuation” exception to include a sale of assets for cash.\textsuperscript{38} The court emphasized the continuity of the en-

\begin{quote}
[W]here one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.
\end{quote}

\textit{Id.} at 825. The court developed this standard based upon public policy considerations. \textit{Id.} The court held that the successor benefitted from the use of the predecessor’s name, reputation, established customer list, and accumulated goodwill and, therefore, should bear the burdens of continuity. \textit{Id.}

\textsuperscript{31} Ramirez, 431 A.2d at 824-25.

\textsuperscript{32} \textit{Id.} at 819. The \textit{Ramirez} court held that “the focus in cases involving corporate successor liability for injuries caused by defective products should be on the successor’s continuation of the actual manufacturing operations and not on commonality of ownership and management between the predecessor’s and successor’s corporate entities. . . .” \textit{Id.} (footnotes omitted).

\textsuperscript{33} \textit{Turner}, 244 N.W.2d at 874.

\textsuperscript{34} \textit{Id.} at 874-75.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id.} The court stated that the difference between a stock transaction and a cash transaction is that in a stock transaction there is a commonality of ownership. \textit{Id.} at 879.

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.} at 883. The court adopted the rule that in the sale of corporate assets for cash, the following criteria shall be guidelines in establishing whether there is a continuity between the predecessor and successor corporations: (1) whether “[t]here is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations;” (2) whether “[t]he seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible;” and (3) whether “[t]he purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.” \textit{Id.} at 879, 883.

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} Id.

\textsuperscript{34} Id.

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} Id.
enterprise and looked at the consideration paid as only one element in the determination of "whether there existed a sufficient nexus between the successor and predecessor corporations to establish liability." 39

A similar continuity of business operations approach has been employed in cases involving statutory violations. 40 The Supreme Court has refused to be constrained by the traditional rule of successor liability when to do so would conflict with public policy. 41 In Golden State Bottling Co. v. N.L.R.B., 42 the Supreme Court held a successor to an employer corporation liable for the reinstatement of an employee with backpay. 43 The successor in this case had acquired the corporation with the knowledge that its predecessor had illegally discharged the employee. 44 The Court balanced the conflicting interests of the successor corporation, the discharged employee, and the general public, finding the interests of the public and employee could be served with a minimal cost to the successor. 45

D. Continuity of Business Enterprise Exception under CERCLA

Under CERCLA, some courts have recognized a liberal version of the "mere continuation" exception, referred to as the "continuity of business enterprise" exception or "substantial continuity" exception. 46 This liberalized exception, unlike a strict "mere continuation" exception, does not require that there be a

39. Id. at 880.
40. Fletcher, supra note 15, § 7122. See, e.g., Howard Johnson Co. v. Hotel & Restaurant Employees, 417 U.S. 249 (1974); Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 182 n.5 (1973) ("so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served.").
42. 414 U.S. 168 (1973).
43. Id. at 181-85.
44. Id. The successor had not committed the unfair labor practice itself but continued its predecessor's business without a substantial change in operation or personnel. Id.
45. Id. at 185. The Court held that "[a]voidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees . . . and protection for the victimized employee — all important policies subserved by the National Labor Relations Act . . . — are achieved at a relatively minimal cost to the bona fide successor." Id.
46. See, e.g., Louisiana-Pacific Corp. v. Asarco, 909 F.2d 1260, 1265 (9th Cir. 1990); Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175 (5th Cir. 1985); Cyr v. B. Offen & Co., 501 F.2d 1145, 1153-54 (1st Cir. 1974).
continuation of stock, stockholders and directors. Rather, a determination that a transferee corporation falls within the continuity of business enterprise exception involves a weighing of the following factors: (1) whether the successor retains the same employees, the same supervisory personnel, and the same production facilities; (2) whether it produces the same products; (3) whether it retains the same name; (4) whether it maintains continuity of assets and general business operations; and (5) whether the successor corporation holds itself out to the public as a continuation of the previous corporation.

III. CORPORATE SUCCESSOR LIABILITY UNDER CERCLA

A. Liability under CERCLA

CERCLA was passed in 1980 to provide the federal government with means to cleanup hazardous waste sites which pose threats to public health and the environment. CERCLA authorizes the government to respond to the cleanup of leaking and inactive or abandoned hazardous sites and to respond to hazardous waste spills. The government may use designated resources under the Superfund for the cleanup of hazardous waste sites that were improperly managed and to induce voluntary responses to cleanup hazardous sites. See 5 U.S.C.C.A.N. 6119, 6119-20 (1980). CERCLA, 42 U.S.C. § 9601, was enacted in December 1980 for the following purpose:

[To initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive waste disposal sites . . . and to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous waste.]

Anspec, 922 F.2d at 1242 (citations omitted).

47. Louisiana-Pacific, 909 F.2d at 1265.
48. Id. at 1265 n.7; See also Moxingo, 752 F.2d at 175.
49. Act of Dec. 11, 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended 42 U.S.C. §§ 9601-9657 (1982 & Supp. IV 1986)). CERCLA's predecessor, the Resource Conservation and Recovery Act (RCRA), allowed the government to force cleanup of hazardous waste sites only when the site was considered an imminent danger to the public health or environment. Id. It could not, however, force a cleanup of inactive waste sites. Id.
50. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1241 (6th Cir. 1991). CERCLA was enacted to provide speedy cleanup responses to hazardous waste sites that were improperly managed and to induce voluntary responses to cleanup hazardous sites. See 5 U.S.C.C.A.N. 6119, 6119-20 (1980). CERCLA, 42 U.S.C. § 9601, was enacted in December 1980 for the following purpose:

[T]o initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive waste disposal sites . . . [and] primarily to facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous waste.

Anspec, 922 F.2d at 1242 (citations omitted).

51. 42 U.S.C. § 9604 (1986); 26 U.S.C. § 9507(a) (1986). CERCLA established the Hazardous Substance Response Trust Fund (Superfund), which was reauthorized in the 1986 amendments to CERCLA, to provide resources which the federal government may use to cleanup hazardous waste sites in those instances where there is no responsible party. 26 U.S.C. § 9507(a) (added by Pub. Law No. 99-499 Oct. 17, 1986). The funds for the Superfund are provided from general federal revenues and from excise taxes on petroleum, chemical products and certain corporations. Id. The Superfund is used primarily when no respon-
waste. The government, under its response authority, may sue any responsible party for reimbursement costs and may seek injunctive relief in order to force responsible parties to cleanup sites that represent a substantial and imminent danger to public health or welfare. The government is therefore able to respond instantly and seek reimbursement at a later less critical time.

In order to establish liability under CERCLA, the government must prove that: (1) the site in question is a "facility;" there has been a release or threatened release of a hazardous substance; response costs have been incurred; and there is a responsible party. Once these elements have been established, strict liability may be imposed upon the defendant.

Often there exist numerous parties which have contributed to the pollution of a hazardous site. Under such circumstances,
CERCLA authorizes the federal and state governments to seek reimbursement of response costs from any responsible party.\textsuperscript{61} Generally, cleanup costs are borne by either the entity which contributed to the harm caused by the hazardous substance (the "responsible party") or the government through the federal funds provided for under the Superfund and, therefore, ultimately by the taxpayer.\textsuperscript{62} Determining which party is responsible is often an overwhelmingly difficult procedure since many of the hazardous sites were formed decades ago by corporations that have changed their corporate ownership or simply no longer exist in any form whatsoever.\textsuperscript{63}

Responsible parties are defined under CERCLA section 107 to include current owners and operators of hazardous waste facilities or vessels,\textsuperscript{64} past owners and operators at the time of disposal of hazardous waste facilities,\textsuperscript{65} persons who arrange for the disposal or treatment of hazardous substances owned or possessed by such person, and any person who accepts or accepted hazardous substances for transport and incurs response costs.\textsuperscript{66} Therefore, section 107 includes both producers of hazardous substances and non-producers who have arranged for their disposal or transport.\textsuperscript{67} The term "person" is further defined under CERCLA section 101(21) to include a corporation.\textsuperscript{68}

\begin{itemize}
  \item \textsuperscript{62} Smith Land, 851 F.2d at 92. For a discussion of funds available under the Superfund, see supra note 50.
  \item \textsuperscript{64} 42 U.S.C. § 9607(a)(1) (1980). Current owners or operators are strictly liable for the cleanup of hazardous waste even if the release or threatened release was not a result of their actions. See New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).
  \item \textsuperscript{65} 42 U.S.C. § 9607(a)(2) (1986). Prior owners and operators are liable under CERCLA if hazardous substances were disposed of while they were the owners. See Shore Realty, 759 F.2d at 1044.
  \item \textsuperscript{68} 42 U.S.C. § 9601(21). For statutory language of CERCLA section 107(a)(3), see supra note 2.

The term "person" is defined under section 101(21) to include an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States government, State, municipality, commission,
CERCLA fails, however, to explicitly state whether a successor corporation is a "person" for purposes of liability under the Act. As a result, courts have concluded that Congress was indefinite as to the extent of successor liability under CERCLA and therefore have attempted to expand CERCLA liability to include successor corporations based upon the intent of its drafters.

B. Corporate Successor Liability under CERCLA

The traditional rule of corporate successor liability under CERCLA follows the common law rule of nonliability and has adopted its exceptions. The traditional rule of nonliability provides, in general, that a corporation which purchases the assets of another corporation does not succeed to the liabilities of the transferor corporation. The emerging trend of law indicates that the majority of states apply a looser construction of CERCLA section 107(a)(3) in an attempt to further the drafter's interpretation of CERCLA's objectives.

The drafters of CERCLA intended to seek reimbursement from "responsible parties" and their successors because both benefitted from use of the hazardous substance. The successor, for instance, may have obtained economic benefits because the assets purchased by the successor do not reflect their true value.

69. United States v. Bliss, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987). CERCLA section 9601 does not define the term "corporation" or "association" as used in the subchapter and in this regard is textually incomplete. See Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1246-47 (6th Cir. 1991). See supra note 68 for definition of "person".


71. Smith Land, 851 F.2d at 92.

72. Id. For a discussion of the traditional rule and its exceptions, see supra notes 13-23 and accompanying text.


74. 42 U.S.C. § 9607(a)(1)-(4). For a discussion of responsible parties, see supra notes 64-70 and accompanying text.

75. Smith Land, 851 F.2d at 92.

Implicit in the value of these assets are potential cleanup costs from hazardous substances which were a result of producing the predecessor's goods. In contrast, the general public benefits only indirectly, if at all, from the use of the hazardous substances.

Furthermore, some courts have concluded that when a federal statute is ambiguous or silent, courts should develop national uniform rules to protect overriding federal interests. Because Congress, in enacting CERCLA, failed to address successor liability, courts have looked to principles of corporate law to develop a federal common law to supplement CERCLA. The development of such federal common law ensures the federal interest of prohibiting businesses from escaping liability by locating in states with less stringent laws. Therefore, courts having recognized that strict adherence to CERCLA may conflict with the remedial policies underlying the statute, have responded by interpreting CERCLA in a flexible manner.

C. Recent Caselaw Discussing the Exceptions to the Traditional Doctrine of Corporate Successor Liability

In Smith Land & Improvement Corp. v. Celotex, the Court of Appeals for the Third Circuit held the general doctrine of corporate successor liability applicable in CERCLA contribution claims. In Smith Land, the purchaser of land sought contribu-

77. Id.
78. Smith Land, 851 F.2d at 92.
81. United States v. Bliss, Nos. 84-2086C(1), 87-1558C(1), 84-1148C(1), and 84-2092C(1) (E.D. Mo. Sept. 27, 1988).
82. See Smith Land, 851 F.2d at 92. A strict adherence to CERCLA may cut off the government's ability to seek reimbursement from responsible parties for the cleanup of hazardous waste sites and, accordingly, my result in great expense to the taxpayer. Id. See also In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 712 F. Supp. 1010 (D. Mass. 1989); United States v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D.N.C. 1989).
83. Smith Land, 851 F.2d at 92.
84. Id.
tion from the previous owner for expenses incurred in the cleanup of hazardous waste on the premises.\textsuperscript{85} The court found that successor liability was appropriate in order to prevent avoidance of liability due to a mere change in ownership.\textsuperscript{86} The court looked to Congressional intent in developing its decision.\textsuperscript{87} The court held that it “must consider national uniformity” and should follow “[t]he general doctrine of successor liability in operation in most states . . . rather than the excessively narrow statutes which might apply in only a few states.”\textsuperscript{88}

The rationale for the holding in \textit{Smith Land} was followed by the Ninth Circuit in \textit{Louisiana-Pacific Corp. v. Asarco, Inc.}\textsuperscript{89} \textit{Louisiana-Pacific} involved an asset purchase transaction in which the court recognized an expanded version of the mere continuation exception under CERCLA.\textsuperscript{90} In \textit{Louisiana-Pacific}, an action was brought for recovery of costs for the cleanup of hazardous substances.\textsuperscript{91} The court determined that successor liability was applicable under CERCLA in the context of an asset purchase.\textsuperscript{92} The court held that successor liability is controlled by federal common law.\textsuperscript{93} In applying federal common law, however, the court concluded that the successor was not liable because it did not meet the requirements of the traditional rule of successor liability or any of its exceptions.\textsuperscript{94} Specifically, the court noted that there had been no exchange of stock between the predecessor corporation and the successor corporation.\textsuperscript{95} Accordingly, the court held that there was not sufficient evidence to find that the

\begin{itemize}
\item \textsuperscript{85} \textit{Id.} at 88-89.

\item \textsuperscript{86} \textit{Id.} at 91.

\item \textsuperscript{87} \textit{Id.} at 91-92.

\item \textsuperscript{88} \textit{Id.} at 92.

\item \textsuperscript{89} 909 F.2d 1260 (9th Cir. 1990).

\item \textsuperscript{90} \textit{Id.} at 1265-66.

\item \textsuperscript{91} \textit{Id.} at 1262.

\item \textsuperscript{92} \textit{Id.} at 1262-63. For a discussion of \textit{Smith Land}, see \textit{supra} notes 83-88 and accompanying text.

\item \textsuperscript{93} \textit{Id.}

\item \textsuperscript{94} 909 F.2d at 1264-66. The court first applied the de facto merger exception, finding this exception was not met because there was no continuity of shareholders. \textit{Id.} at 1264-65. The successor acquired the corporation with cash, a promissory note, and the payment of some of the predecessor's debts. No stock, however, was involved. \textit{Id.} The court then applied the continuity of business enterprise exception finding the exception inapplicable because the successor corporation did not have actual notice of the predecessor's potential CERCLA liability and the successor did not continue in the successor's "slag" business. \textit{Id.} at 1265-66. The predecessor had produced a by-product named "slag" which had reacted with another substance requiring substantial governmental cleanup. \textit{Id.} at 1262.

\item \textsuperscript{95} \textit{Id.} at 1265.
\end{itemize}
asset purchase was a de facto merger. Further, the court addressed the successor's potential liability under the continuity of business enterprise exception. The court refused, however, to address whether this expansive version of the mere continuation exception was an appropriate standard under CERCLA.

In *Sylvester Bros. Dev. Co. v. Burlington N.R.R.*, the District Court of Minnesota held that a purchaser of the assets of a corporation could not itself be held liable under CERCLA on the theory that the successor corporation was a mere continuation of its predecessor. The court refused to adopt the continuity of business enterprise version of the mere continuation exception. Rather, the court applied the traditional mere continuation exception finding the successor corporation could not be held liable because there had been no continuation of stock, stockholders or directors. The court further noted that such an expansive version of the traditional doctrine was inappropriate because under the traditional doctrine of successor liability CERCLA's remedial purposes would not be frustrated. Recovery in this instance could be obtained from the dissolved corporations and corporate officers and employees who were responsible for the decisions respecting the hazardous substances.

96. *Id.* at 1265-66. For a discussion of the de facto merger exception, see *supra* note 21 and accompanying text.

97. *Id.* For a discussion of the continuity of business enterprise exception, see *supra* notes 46-48 and accompanying text.

98. *Id.* at 1266. The court, in a footnote, stated that when applying the continuity of business enterprise exception courts shall look at several elements such as a continuity of employees, supervisory personnel and physical location; production of the same product; retention of the same name; continuity of general business operations; and whether the purchaser is holding itself out as a continuation of the seller. *Id.* at 1265 n.7. The court further stated that it need not decide whether to adopt this exception because it was inapplicable to the facts at issue. *Id.* at 1265.


100. *Id.* at 448. The court held that the successor could only be held liable under the mere continuation theory if there was a continuity of shareholders. *Id.*

101. *Id.* at 449.

102. *Id.*

103. *Id.* The court held that the majority of jurisdictions apply the traditional doctrine of successor liability along with the traditional four exceptions. *Id.* The court further stated that in the minority of jurisdictions where the continuity of business enterprise exception is applied, it is only “applied in situations where a rigid application of the majority rule would produce an inequitable outcome or frustrate a statutory purpose.” *Id.*

104. 772 F. Supp. at 449.
IV. United States v. Distler

In Distler, the government sought contribution for response costs incurred in the cleanup of hazardous waste sites previously owned by Angell Manufacturing Company.105 The dispute ensued over who was responsible for the improper disposal of hazardous substances which the government and Angell Manufacturing Company had contracted to clean up in 1976.106

In 1979, Ang Manufacturing Company (Ang) was formed to purchase the assets of Angell Manufacturing Company (Angell).107 An asset purchase agreement was entered into by Ang to purchase substantially all of the assets of Angell.108 Ang purchased the equipment, inventory, and physical plant and assumed only those liabilities specified in the contract.109 The liabilities contracted for, however, did not include CERCLA violations.110 Ang subsequently changed its name to the Angell Manufacturing Corporation (Angell II), and to the outside world appeared to be the same corporation as its predecessor, Angell.111

The United States District Court for the Western District of Kentucky denied Angell II’s motion to dismiss the government’s claim. The court determined that the government had asserted a valid cause of action against Angell II as a successor corporation.112 The court, following the principles of Smith Land, determined that the doctrine of successor liability was applicable under CERCLA section 107(a)(3).113 The court concluded that Congress intended the courts to develop common law to supplement sections 101 and 107 of CERCLA which define “persons” or “corporations” liable for response costs.114 Additionally, the court held that successor liability furthers CERCLA’s remedial purpose by holding responsible parties accountable for hazard-

106. Id. at 638.
107. Id. at 638-39.
108. Id. Angell later dissolved and distributed the remaining assets to its shareholders. Id.
109. Id.
112. Id. at 643.
113. Id. at 640. For facts and reasoning of Smith Land, see supra notes 83-88 and accompanying text.
ous waste cleanup. 115

Once the court determined that the doctrine of successor liability was applicable, the court then had to determine which version of the doctrine of successor liability to apply: the mere continuation exception (traditional doctrine) or an expanded version of the mere continuation exception (the continuity of business enterprise exception). 116 The court looked to Smith Land for guidance and found that courts should apply successor liability in a way that furthers the goals of CERCLA. 117

The court first applied the traditional doctrine (mere continuation exception) and determined that Angell II would not be liable under this theory because there had been no identity of shareholders or directors involved. 118 The court then applied an expanded version of the mere continuation exception and found Angell II liable as Angell’s successor. 119

The court determined that the successor corporation was a mere continuation of the transferor because it retained essentially the same employees and management, operated out of the same plant, produced the same products, held itself out to the public as the same company, retained the same operating assets, and succeeded to all liabilities necessary to prevent the interruption of the daily business operations. 120 The court held that an expanded version of the traditional doctrine was necessary to advance CERCLA’s objectives noting that “[t]o permit Angell [II] to avoid liability in this case would clearly be a victory of form over substance and contrary to congressional intent. . . .” 121

V. Analysis

Distler represents an expansion of liability under CERCLA.

115. Id. The court held “that the common law doctrine of successor liability fulfills CERCLA’s remedial purpose by making responsible parties rather than taxpayers liable for hazardous waste clean up.” Id. For a discussion of CERCLA’s objectives, see supra notes 49-50 and accompanying text.


117. Id.

118. Id. at 642. The transaction was an asset acquisition which necessarily did not involve a transfer of stock. Id. Despite the fact that management remained essentially the same, Angell’s officers and directors had changed. Id. For a discussion of mere continuation exception, see supra notes 24-26 and accompanying text.

119. Id. at 642-43. For a discussion of the expanded version of the mere continuation exception, see supra notes 46-48 and accompanying text.

120. Id. at 643.

121. 741 F. Supp. at 643.
The court found the successor corporation liable not under traditional common law principles of corporate successor liability, but under an expanded version of the traditional common law. The court extended liability beyond the express language of CERCLA to further the drafters’ intent to provide for successor liability which operates to prevent corporations from avoiding responsibility through a mere change in ownership.

It is suggested that the court’s basis for imposing liability was rational. A corporation which is in essence a continuation of its predecessor should not be permitted to avoid liability by selecting a state which applies a more restrictive view of the traditional rule of successor liability. However, as sound as this reasoning may be, it is submitted that a strict reading of CERCLA would not permit such an outcome.

Congressional intent may be helpful in guiding a court’s decision, but should not be dispositive. It is submitted that the legislators set forth in section 107 of CERCLA those parties who should sustain response costs and, therefore, only those parties should be held accountable.

Furthermore, applying traditional common law principles of corporate successor liability and its exceptions to the facts of Distler would not result in finding the defendant liable. The court

122. Id. For a discussion of the expanded version of the mere continuation exception, see supra notes 46-48 and accompanying text. For a discussion of CERCLA’s objectives, see supra notes 49-50 and accompanying text.
123. Id.
124. For a discussion of the court’s reasoning, see supra notes 113-17 and accompanying text.
125. For a discussion of the development of national uniform federal rules to prohibit corporations from purposefully escaping liability, see supra notes 79-82 and accompanying text.
127. For a discussion of responsible parties under CERCLA, see supra notes 64-70 and accompanying text.
128. Distler, 741 F. Supp. at 642. In Distler, the successor did not expressly or impliedly assume the predecessor’s CERCLA liability and therefore did not fall under the first exception. See Brief for Defendant at 3, United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990) (No. C88-0200 L(A) & C88–0201 L(A)). In addition, the transaction involved a purchase of stock for cash, causing the de facto merger exception to be inapplicable. 741 F. Supp. at 642. The third exception fails because there was no evidence of a fraudulent purpose. See Brief for Plaintiff at 20, United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990) (No. C88-0200 L(A) & C88–0201 L(A)). Finally, the mere continuation exception is inapplicable because there was no continuity of shareholder interest; the predecessor’s shareholders and directors did not become shareholders or directors of the successor. 741 F. Supp. at 642. For a discussion of the four exceptions, see supra notes 19-23 and accompanying text.
was able to impose liability only by expanding upon one of the traditional exceptions, the "mere continuation" exception.\textsuperscript{129}

Additionally, it is submitted that CERCLA's policies are advanced without imposing successor corporate liability. Under the statute, the owner or operator of the property is potentially liable, the actual polluter is potentially liable, and successor corporations are potentially liable to the extent they are polluters, owners or operators.\textsuperscript{130} Where a potentially liable party does not exist, the Superfund is available as a source of funds for cleanup.\textsuperscript{131}

\section*{VI. Impact}

Developing environmental cleanup law through litigation has led to inconsistent results, leaving the law unsettled as to the application of successor liability in CERCLA cases. The recent decision in Distler, which expands the doctrine of corporate successor liability, only adds to the already existing confusion concerning which parties are accountable under CERCLA.

Added to this confusion is the fact that predecessor corporations often dissolve, become insolvent, or change their corporate form and are often incapable of assuming response costs.\textsuperscript{132} As a result, most courts impose liability on the purchaser of the hazardous assets.\textsuperscript{133}

The indefiniteness of the law places a higher risk upon a purchasing corporation. As a result of Distler, the purchasing corporation will be compelled to perform an extensive study of the potential acquiree corporation to determine whether it is potentially liable under CERCLA. The increased cost of performing an environmental audit, combined with the increased risk implicit in the transaction stemming from the indefinite state of the law, may prohibit the potential purchasing corporation from acquiring the assets of another corporation. On the other hand, if the law is more clearly defined, the risk will be determined more easily. Because the risk will become quantifiable, it can be a negotiable factor in the overall purchase price of the assets of the acquiree.

\textsuperscript{129} 741 F. Supp. at 642-43.
\textsuperscript{130} For discussion of the responsible parties under CERCLA, see supra notes 64-70 and accompanying text.
\textsuperscript{131} For a discussion of the Superfund, see supra note 50 and accompanying text.
\textsuperscript{133} Id. By placing liability on successors, courts can eliminate the problem of collecting judgments against insolvent prior owners. Id.
corporation.\textsuperscript{134} The purchasing corporation, therefore, can make an informed decision when acquiring the assets of another corporation. Accordingly, the successor corporation will be better prepared to bear its share of the cleanup costs.

Successor liability as defined in \textit{Distler}, therefore, imposes great responsibility upon successor corporations who lack information and financial resources to solve problems created by their predecessors. Thus, Congress must clearly define a successor's potential liability in order to avoid further confusion and in order to ensure private contributions to the cost of cleanup.

Susan M. Girard

\textsuperscript{134} Compare Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 882-83 (Mich 1976). The court stated that in the area of products liability, once corporations are aware of their potential successor liability, then they can prepare for it. \textit{Id.} at 883. For instance, the successor may acquire products liability insurance, provide for indemnification agreements or escrow accounts or negotiate a lower purchase price. \textit{Id.} The court stated "[n]egotiations may be complex, but, with familiarity, they should become a normal part of business transactions." \textit{Id.}