Leo v. Kerr-McGee Chemical Corp.: Recognizing a Need for Congressional Reform in Toxic Tort Actions

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LEO V. KERR-MCGEE CHEMICAL CORP.: RECOGNIZING A NEED FOR CONGRESSIONAL REFORM IN TOXIC TORT ACTIONS

I. INTRODUCTION

Technological advancements that enhance daily life pose great potential risk to human health. Each day, toxic chemicals, the byproducts of common items, are released into the environment. The harm that results from the release of these chemicals is often referred to as an "environmental hazard," "environmental tort," or "toxic tort." Toxic torts, unlike traditional torts such as assault or defamation, are much more subtle in the way they cause harm. Chemicals released into the environment today may take years before the harm is caused or before the harm is realized. This gradual and often less perceived source of harm distinguishes toxic torts from traditional torts, and thus, mandates the development of unique environmental law principles; principles not predicated upon other established areas of the law.

Environmental regulation is often forced to incorporate principles of liability from state corporate law. Such principles may be foreign to the underlying rationales of environmental law. Corporate law was not designed to protect individuals or the environment from injury and, consequently, is a poor conduit to that end. As a result, the fusion of environmental and corporate law principles does not adequately protect society from toxic torts. This commingling of concepts clouds what were once bright lines of corporate liability. Uniformity and predictability, hallmarks of successful corporate planning,\(^1\) guide corporate law in an efficient manner but lead to capricious results when applied in the environmental torts arena.

Leo v. Kerr-McGee Chemical Corp.\(^2\) demonstrates the need for the development of environmental law principles apart from corporate


\(^2\) 37 F.3d 96 (3d Cir. 1994). This suit was originally brought in the Superior Court of New Jersey, but was removed to the United States District Court for the District of New Jersey on the basis of diversity of citizenship. Id. at 98.
law principles. In *Kerr-McGee*, the plaintiffs alleged that their parents' deaths were the result of exposure to thorium and other hazardous substances that were deposited on land owned by a predecessor corporation of the defendant. Although defendant, Kerr-McGee purchased the assets of the predecessor corporation, at no time did it own the contaminated land. Furthermore, the predecessor corporation was dissolved prior to the institution of the lawsuit by the plaintiffs.

The *Kerr-McGee* scenario highlights the flawed legal remedies for toxic torts. A general rule of corporate law dictates that a successor corporation that merely buys the assets of another corporation is not liable for the tortuous actions of its predecessor. Therefore, as a successor, Kerr-McGee could be liable only if a court refused to adhere to this general rule. Kerr-McGee would not have anticipated such judicial action and, in the context of corporate law, such a decision would be unfair. Yet, the alternative of finding Kerr-McGee not liable is also unappealing. Kerr-McGee profited from the reputation of its predecessor which was no longer in existence, but caused immeasurable damage to the plaintiffs. Arguably, Kerr-McGee stands in the shoes of its predecessor and is liable for the predecessor's injurious acts.

Certain ideological precepts of tort law and corporate law conflict. Under tort law, Kerr-McGee was not only the party that benefited from the injuries that plaintiffs suffered, but it was also the party that could most equitably distribute the burdens suffered by plaintiffs. According to this reasoning, Kerr-McGee should be liable. Conversely, under corporate law, such an interrelation between the successor corporation and the predecessor corporation is too attenuated to impose liability. Judicial activism, under the guise of environmental law, has tied these two theories of law together. These efforts produce decisions that neither protect people from toxic torts, nor provide corporations with the predictability necessary to adequately protect themselves from liability.

3. *Id.*
4. *Id.* For a discussion of the transfers involved, see *infra* text accompanying notes 10-17. Significantly, the manufacture of incandescent glass mantles at the New Jersey site which caused contamination ceased with this initial sale. *Id.* at 98.
7. For a further discussion of the incongruous decisions that have resulted from common law decisions regarding successor liability in toxic tort cases, see *infra* notes 88-103.
poses a uniform approach that clearly identifies when liability would attach to a successor corporation. Congress can achieve this goal by establishing a federal cause of action for such "toxic torts." This Note demonstrates the need for a federal cause of action for toxic torts by analyzing the facts and procedural history of the Kerr-McGee decision. In addition, this Note traces the steps taken by the Third Circuit in trying to resolve the issues presented in Kerr-McGee. Special emphasis is given to the effects that the holding of Kerr-McGee and similar cases have had on successor corporation liability. Finally, this Note argues that there is a need for the establishment of a federal cause of action for toxic torts based on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).9

II. FACTS

From the turn of the century until 1940, Welsbach Incandescent Light Company ("Welsbach") maintained and operated a plant in Gloucester City, New Jersey. While manufacturing incandescent gas mantles, Welsbach contaminated the New Jersey site with the radioactive element, thorium. In 1940, Welsbach sold its gas mantle business to an Illinois competitor, the Lindsay Light and Chemical Company ("Lindsay"). Pursuant to the sale, Lindsay acquired Welsbach's outstanding orders, records, formulas, raw materials, inventory, customer lists, gas mantle production line, and the right to use the "Welsbach" name. However, Lindsay never took ownership of any land owned by Welsbach. Subsequently, Kerr-McGee acquired Lindsay. The land in New Jersey, which was the original site of Welsbach, was never acquired by Kerr-McGee. In 1944, Welsbach was dissolved.

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8. For a further discussion of establishment of a Federal cause of action, see infra notes 135-149 and accompanying text.
11. Id.
12. Id.
13. Id.
14. Id.
15. Kerr-McGee, 37 F.3d at 98. In both the district court and the Third Circuit decisions, Kerr-McGee was considered to be standing in the shoes of Lindsay Light and Chemical Company ("Lindsay"). Id.
16. Id.
17. Id.
In 1961, Thomas and Catherine Bekes and their daughters, appellees Elaine Leo and Linda Yoder, moved to a home located near the Welsbach factory in Gloucester City. In December of 1988, Thomas Bekes died of bladder cancer. In March of 1991, the New Jersey Department of Environmental Protection contacted Catherine Bekes and informed her of the high levels of gamma radiation and thorium which existed on her property. As a result, she was forced to relocate. Shortly thereafter, Catherine Bekes also died of bladder cancer. Leo and Yoder sued Kerr-McGee for their parents' death and the potential risk of cancer arising from their exposure to thorium and other waste substances generated and deposited by Welsbach on the Gloucester factory site. Under a theory of strict liability, plaintiffs argued that Kerr-McGee was liable for injuries arising from actions taken by its predecessor corporation.

Kerr-McGee subsequently filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The motion alleged that plaintiffs' complaint failed to state a claim on which relief could be granted because Kerr-McGee never owned the Gloucester City land or factory. The trial court denied the motion and Kerr-McGee moved for an interlocutory appeal, which the Third Circuit granted. The central question before the court was under what circumstances does a successor corporation become liable for the environmental hazards of its predecessor.

18. Id.
19. Id.
21. Id. The New Jersey Spill Compensation Fund acquired the residence. Id.
22. Id.
23. Id.
24. Id. The plaintiffs also sued under theories of negligence and breach of warranty, but the Third Circuit found no support for liability under either theory. Id. at 98 n.1.
26. Id.
27. Id. The court granted this motion pursuant to 28 U.S.C. § 1292(b). This section provides in pertinent part:
When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . .
III. BACKGROUND

A successor corporation that purchases all the assets of a corporation is not liable for the torts of the acquired company merely by virtue of the succession of ownership.\(^{28}\) The nonliability of a successor corporation is often referred to as the general rule of corporate law. However, a successor corporation can be liable for the tortuous actions of its predecessor if there is a high degree of continuity between the successor corporation and its predecessor.\(^{29}\) This theory of successor corporate liability developed as a narrowly applied remedy.\(^{30}\)

There are four universally accepted instances when a remedy for successor corporate liability is appropriate.\(^{31}\) First, a successor corporation may be liable if it either impliedly or expressly consents to accept the liabilities of the selling company.\(^{32}\) Second, liability may attach if the seller fraudulently enters the transaction to evade liability from creditors.\(^{33}\) Third, the successor corporation may be liable if it is merely a continuation of the selling corporation.\(^{34}\) Finally, if the transaction amounts to a de facto consolidation or merger of the selling and purchasing corporation, the successor corporation may be liable.\(^{35}\)


\(^{31}\) Some authorities hold that there is a fifth exception where elements of a purchase in good faith were lacking or the transfer was without consideration. Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 878 n.5 (Mich. 1976).

\(^{32}\) See Gee v. Tenneco, Inc., 615 F.2d 857, 863 (9th Cir. 1980). The purchasing corporation will usually assume certain liabilities necessary to continue the conduct of the business uninterrupted, while unwanted or contingent liabilities will often be avoided through escape clauses in the sales contract that deny responsibility for all liability not expressly assumed. Howard L. Shecter, Acquiring Corporate Assets Without Successor Liability: Is It A Myth?, 1986 Colum. Bus. L. Rev. 137, 139 (1986).

\(^{33}\) See Lamb v. Leroy Corp., 454 P.2d 24 (Nev. 1969). Some commentators note that the second exception is simply an application of the general rule against fraudulent conveyances. Shecter, supra note 32, at 140.

\(^{34}\) Turner, 244 N.W.2d at 892. This exception has historically only been applied in limited circumstances; however, a more liberal variation of this exception has emerged called "continuity of enterprise."

\(^{35}\) See Knapp v. North Am. Rockwell Corp., 506 F.2d 361, 365 (3d Cir. 1974). The theory of de facto merger initially evolved in states like Pennsylvania as a means to provide dissenters' rights for shareholders frustrated by corporate transactions designed to avert statutory dissenters' rights. Shecter, supra note 32, at 139.
The first two situations do not frequently occur. However, the business continuation exception and the de facto consolidation or merger do frequently occur, and are collectively referred to as a de facto merger. The identifying component of a de facto merger is that the purchasing corporation effectively becomes the selling corporation. The sale of a corporation's assets alone is insufficient to trigger a de facto merger; rather, courts traditionally consider several factors in determining if a de facto merger has occurred.

Over time, tort law developed to reflect society's concern for the protection of the consumer and the need for a safer work place. This influence resulted in the adoption of the theory of strict liability. Corporate law, however, bases successor liability on the protection of shareholders and other financial interests. Nevertheless, corporate law was forced to confront the principles of strict liability which were emerging in tort law. Yet, the public policy concerns that are the cornerstone of strict liability are foreign to the rules of corporate law. As strict liability became more entrenched in the judicial framework, the question arose whether the policies underlying strict liability would necessitate a special exception to the general rule of nonliability for a successor corporation. In McKee v.

For a further discussion of the development of the theory of de facto merger, see Shecter, supra note 32, at 159.

36. Phillips, supra note 29, at 908. One commentator noted: "[f]raudulent transfers are rarer, probably because corporate directors do not favor illegal conduct; furthermore, illegal conduct is bad business and is often detectable . . . . A transferee also is unlikely to assume the seller's debts expressly and can easily avoid doing so by carefully drafting the purchase agreement." Id.

37. Id. at 909.

38. See Menacho v. Adamson United Co., 420 F. Supp. 128, 133 (D.N.J. 1976). The court in Menacho noted, "[i]f a corporation continues to exist, or is merged into another, liability is retained. However, the sale of a corporation's assets alone does not contemplate the sale of the corporation's contingent tort liability." Id.

39. Menacho, 420 F. Supp. at 133. The court listed several factors to consider when deciding if a de facto merger had occurred: (1) a continuity of shareholders; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically possible; (3) a continuity of management, personnel, physical location, assets, and general business operation; and (4) the purchasing corporation's assumption of all liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operation of the seller corporation. Id. (citing Shannon v. Langston Co., 379 F. Supp. 797, 801 (W.D. Mich. 1974)).


42. Some courts continued to apply the general rule of corporate nonliability. See Ortiz v. South Bend Lathe, 46 Cal. App. 3d. 842 (1975); McKee v. Harris-Sey-
Harris-Seybold Co., the New Jersey Superior Court held that a successor could not be held liable for the actions of its predecessors. The McKee court took a narrow approach to applying the exceptions to the general rule of corporate law. As a result, some courts have tried to modify corporate law rules to make them more responsive to the strict liability rationales.

The First Circuit addressed the difficulty of applying the general rule of corporate law to a tort action in the case Cyr v. B. Offen & Co. In that case, an employee was injured by a negligently designed printing press manufactured by B. Offen & Company. After the president and sole owner of the company died, the employees bought the business and continued the operation. Subsequently, the plaintiff sought relief from the successor corporation. The issue in Cyr was whether there was sufficient continuity between the predecessor and the successor to apply the de facto merger exception to the general corporate rule. The court ruled that a de facto merger had occurred and that the successor corporation was liable. The holding in Cyr is significant for it expanded the scope of successor liability by not requiring continuity of ownership between the successor and predecessor. Rather, the court in Cyr relied upon the public policy principle that "the hazards of pre-
dicting and insuring for risk from defective products are better borne by the manufacturer than by the consumer." 53

A. Continuity of Enterprise Theory

Despite the holding in Cyr, over time, courts relied less on corporate law principles to settle product liability cases. In Turner v. Bituminous Casualty Co., 54 the Michigan Supreme Court developed the theory of "continuity of enterprise," which emphasized tort theories more than corporate principles. 55 The theory is a special product liability exception to the general rule that an asset purchaser is not liable for the seller's obligations. 56 In the case, the court recognized that the principles developed to protect business creditors and minority shareholders were often insufficient to respond to the needs of product liability plaintiffs. 57 Thus, the continuity of enterprise theory imposes liability if there is a sufficient "continuity of interest" between the transferor and transferee. 58 To determine if such a continuity existed in Turner, the court focused on the actual intent of the successor to assume the liability of its predecessor. 59

B. Product Line Exception

Alternatively, the California Supreme Court articulated what is now referred to as the "product line exception" in the case of Ray v. 53 Id. Other courts have likewise adapted the general rule of corporate law to fit the needs of product liability plaintiffs. In fact, expansion of the general rule of corporate law has spawned two additional theories of corporate liability in product liability cases: the continuation of enterprise and product line exceptions. For a further discussion of the movement away from the general corporate rule on non-liability for successor corporations, see Shecter, supra note 32, at 140.

54. 244 N.W.2d 873 (Mich. 1976).
55. Id.
56. Id.
57. Id. at 878. The court stated that there would have clearly been liability under a de facto merger had the acquisition been made with stock instead of cash. Id. at 883. The court could not find a reason to treat the acquisition of a company for cash any different from stock. Id.
58. Id.
59. Turner, 244 N.W.2d at 878. Thus, liability would be imposed upon the successor if four elements were satisfied:
   (1) A continuity of the outward appearance of the enterprise, its management, personnel, physical plant, assets, and operation; (2) the dissolution of the seller corporation as soon after the transfer of assets as is legally and practically possible; (3) assumption by the transferee of those liabilities and obligations necessary to the uninterrupted continuation of normal business operations; and (4) the purchasing corporation held itself out to the world as the effective continuation of the seller corporation. Id. at 884.

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Similar to the holding in *Turner*, the court in *Ray* abandoned the general rule of corporate law. Instead, the court adopted a policy that reflected the principles underlying strict liability in tort and products law. The court focused on the principles of compensation and cost-spreading to develop a three prong test for successor liability. First, the plaintiff's remedies against the original manufacturer must be virtually destroyed by the successor's acquisition of the business. Second, the successor must assume the original manufacturer's risk-spreading role. Third, a successor's responsibility must be a burden that has attached itself to the original manufacturer's goodwill which has inured to the successor's continued operation of the business. Thus, liability is based on the continuation of the successor to manufacture the product which has caused an injury.

Both the continuity of interest and product line theories are special exceptions to the general rule of corporate law in product liability cases. The continuity of interest exception uses the public policy rationales of strict liability to broaden the scope of corporate successor liability. The product line doctrine, however, uses those same public policy rationales to create an entirely new liability for corporate successors. In *Ramirez v. Amsted Industries*, the Supreme Court of New Jersey accepted the "product line approach" as enunciated in *Ray*. The *Ramirez* case was the foundation upon which

60. 560 P.2d 3 (Cal. 1977). In *Ray*, the plaintiff was injured as a result of a fall from a defective ladder on which he had been working. *Id.* at 4. One year prior to the accident, Alad Corporation ("Alad I") had sold to Lightening Maintenance Corporation all its assets, physical plant, manufacturing equipment, inventories of raw materials and finished goods, trade name, goodwill, and records of manufacturing designs and employment of personnel. *Id.* at 6. As part of the agreement of sale, Alad I agreed to dissolve and help the purchasing corporation form a new corporation called Alad Corporations ("Alad II"). *Id.* The principle stockholders of Alad I agreed not to compete with Alad II for 42 months, and in that period to act as a consultant for Alad II. *Id.* Once in operation, Alad II continued to manufacture the same product as Alad I, using the same equipment and employees, and selling to the same customers. *Id.* at 6. No contractual provisions ever stated that Alad II would assume any of the liabilities of Alad I for defective products made and sold by Alad I prior to the acquisition by Alad II. *Id.* The injured plaintiff in *Ray* sued Alad II on a theory of strict tort liability.

61. *Id.* at 8-9.
62. *Id.* at 9.
63. *Id.*
64. *Id.*
68. *Id.* at 820.

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the New Jersey courts extended liability to successors who continued to manufacture the product line of their predecessor.69

In Ramirez, the plaintiff was injured while operating an allegedly defective power press on the premises of his employer.70 The machine had been manufactured by Johnson Machine and Press Company in 1948 or 1949.71 In 1956, Johnson transferred all of its assets and liabilities to Bontrager Construction Corporation in exchange for Bontrager common stock.72 In 1962, Amsted Industries purchased all of Bontrager's assets, including all of the Johnson assets that Bontrager acquired in 1956, and the right to use the trade name of "Johnson."73 The agreement specifically excluded Amsted's assumption of liability for tort claims arising from defective products manufactured by any predecessor.74 In 1965, the corporate existence of Johnson was dissolved.75 Thereafter, plaintiff brought suit against Amsted seeking to hold it liable as a successor corporation.76

The Ramirez court rejected the general rule of corporate law. Instead, the court adopted the emerging product line exception and found Amsted liable as a successor corporation.77 The defendant in Ramirez advanced three separate arguments against the imposition of successor corporation liability: 1) the imposition of liability would have a crippling effect on the ability of small manufacturers to transfer ownership of its business; 2) the imposition of liability on a defendant, who was the second successor of the manufacturer who placed the product which caused the injury into the stream of commerce twenty eight years ago, would be unfair; and 3) the new

69. Id.
70. Id. at 812.
71. Id. at 812-13.
72. Ramirez, 431 A.2d at 813.
73. Id. at 814.
74. Id.
75. Id. at 815.
76. Id. at 813.
77. Ramirez, 431 A.2d at 820. The court in Ramirez weighed the public policy justifications for strict liability in both Turner and Ray. Id. at 818-19. First, the court reasoned that public policy in Turner was used merely as a justification for broadening the scope of the traditional corporate successor liability. Id. Second, the Ramirez court noted that the court used public policy in Ray to create an entirely new rule of successor liability in products cases. Id. Furthermore, the Ramirez court indicated that Ray focused on the continued manufacturing of the product causing the injury, while in Turner the focus was on the continuation of the actual manufacturing operation. Id. at 818-19. Ultimately, the Ramirez court found the focus of Ray to be more consistent in its application than was Turner. Id. at 819.
standard for liability for successor corporations should be applied only prospectively.78

The court in Ramirez recognized that the defendant's contentions were legitimate concerns.79 The first argument made by Amsted, however, was dismissed by the court according to the social policies underlying the law of products liability.80 Thus, the cost of injuries from defective products would be borne by the manufacturing enterprise rather than the consuming public.81 The opinion of the court also suggested that a successor corporation could protect itself against these liabilities through the purchase of products liability insurance or through the use of full or partial indemnification agreements.82

The court also dismissed Amsted's argument that it would be unfair to impose liability for a predecessor's product manufactured twenty-eight years, and two corporate transactions before, the accident occurred.83 The court reasoned that this argument called for a limitation on the time frame in which a party can bring a cause of action.84 The court determined that this decision should be left for the legislature.85

Finally, the court denied Amsted's argument that a new standard for successor corporate liability should only be applied prospectively.86 The court recognized that Amsted, and its insurance

79. Id. at 822.
80. Id.
81. Id. at 823.
83. Ramirez, 431 A.2d at 823.
84. Id.
85. Id.
86. Id.
carriers, had reasonably relied on the general rule of corporate law, but their reliance was insufficient to deny plaintiff recovery.\textsuperscript{87}

C. Inconsistent Application of Liability Doctrines

The several suits brought against Amsted Industries\textsuperscript{88} illustrates the inconsistent judgments that result from the application of tort and corporate law in products liability cases. The facts in each of these cases are virtually identical.\textsuperscript{89} Amsted was a corporation that purchased another corporation that had, prior to Amsted's ownership, manufactured defective punch presses.\textsuperscript{90} The defective punch presses caused injuries to a number of people who sought to hold Amsted liable.

In 1975, two years before the \textit{Ray} decision,\textsuperscript{91} Amsted Industries was sued as a successor corporation for the defective product manufactured by its predecessor.\textsuperscript{92} In \textit{Ortiz v. South Bend Lathe}, the California Court of Appeals applied the general rule of corporate law and found that there was no successor corporation liability.\textsuperscript{93} However, in \textit{Korzetz v. Amsted Industries},\textsuperscript{94} the district court sitting in Michigan redetermined Amsted's liability.\textsuperscript{95} In \textit{Korzetz}, the district court applied the continuity of interest exception to the general rule of corporate liability and found Amsted liable as a successor.

\textsuperscript{87} \textit{Id.} 823-24. The court noted, "[t]here is a basic justness in recognizing that persons who have exercised the initiative to challenge the existing law should be accorded relief if their claims — not yet resolved when the new rule of law is announced — are ultimately vindicated." \textit{Id.}


\textsuperscript{89} For a discussion of the facts relating to Amsted's liability, see \textit{supra} text accompanying notes 67-87.

\textsuperscript{90} \textit{Ramirez}, 431 A.2d at 811.

\textsuperscript{91} For a discussion of \textit{Ray} v. \textit{Alad Corp.}, see \textit{supra} notes 60-65 and accompanying text.

\textsuperscript{92} \textit{Ortiz} v. \textit{South Bend Lathe}, 46 Cal. App. 3d 842 (Cal. 1975).

\textsuperscript{93} \textit{Id.} at 846 (citing \textit{Pierce v. Riverside Mfg. Sec. Co.}, 77 P.2d 226 (Cal. 1938)). The court held that there was no express or implied assumption of liability in the purchase agreement between defendant and second corporation; there was no fraud; the consideration paid by Amsted was adequate; and there was neither a consolidation or merger to justify a finding of continuation of the predecessor. \textit{Id.} at 847-49.


\textsuperscript{95} \textit{Id.}
corporation.\textsuperscript{96} In the same year, in Hernandez \textit{v.} Johnson Press Corp.,\textsuperscript{97} an Illinois court refused to hold Amsted liable for the defective punch press of the original manufacturer.\textsuperscript{98} In its opinion, the court specifically refused to adopt the product line exception.\textsuperscript{99} Following Hernandez, the New Jersey Supreme Court, in the case of Ramirez, adopted the product line exception and found Amsted liable as a successor corporation.\textsuperscript{100} The most recent decision concerning Amsted's liability was the case of Jones \textit{v.} Johnson Machine and Press Co.\textsuperscript{101} In Jones, the Nebraska Supreme Court rejected both the product line and continuity of enterprise exception, and found Amsted not liable as a successor corporation.\textsuperscript{102} The court reasoned that Amsted did not create the risk of injury and was too far removed from the transaction to have profited from the sale.\textsuperscript{103}

To date, Amsted Industries has been sued as a successor corporation, under the same facts, in five different jurisdictions: California, Michigan, Illinois, New Jersey, and Nebraska.\textsuperscript{104} Due to the various manipulations of corporate and tort law, Amsted has been subjected to liability in two of those jurisdictions. Amsted has lost once under a continuity of enterprise exception and once under a product line exception.\textsuperscript{105}

\begin{footnotes}
\item[96] \textit{Id.} at 143-44. The court noted that in relying on the Michigan decision of Turner \textit{v.} Bituminous Casualty Co., 244 N.W.2d 873 (Mich. 1976), it was not confined to finding each element listed in that case when determining successor liability. \textit{Id.} Rather, the finding that a continuity of enterprise existed would be justified with strong and convincing evidence. \textit{Id.}
\item[97] 388 N.E.2d 778 (Ill. 1979).
\item[98] \textit{Id.}
\item[99] \textit{Id.} at 780.
\item[100] Ramirez, 431 A.2d at 824-25. For a further discussion of Ramirez, see \textit{supra} text accompanying notes 67-87.
\item[101] 320 N.W.2d 481 (Neb. 1982).
\item[102] \textit{Id.} at 484. The court ruled that under the facts there was no justification for departure from the general rule of non-liability for a purchasing corporation except: when the purchasing corporation expressly or impliedly agrees to assume the selling corporation's liability; when the transaction amounts to consolidation or merger of the purchaser and seller corporations; when the purchaser corporation is merely a continuation of the seller corporation; or when the transaction is entered into fraudulently to escape liability for such obligations. \textit{Id.} at 483-84.
\item[103] \textit{Id.} at 484. The court also wrote: "[t]he public policy considerations which motivate imposition of strict liability on those who create risk and obtain profit by placing defective products in the stream of commerce do not necessarily apply equally to successor corporations." \textit{Id.}
\item[104] For a further discussion of the individual holdings within each of these states, see \textit{supra} note 88.
\item[105] Further discontinuity in successor corporation liability may occur as a result of individual choice of law statutes that require application of exceptions not adopted in the forum state. See, \textit{e.g.}, Hickman v. Thomas C. Thompson Co., 592 F. Supp. 1282 (D. Colo. 1984). In Hickman, the plaintiff was injured by a copper enameling product manufactured by defendant in Illinois. \textit{Id.} at 1283. Illinois law
\end{footnotes}
A case that attempts to define the outer limits of successor corporate liability principles in New Jersey is *Leo v. Kerr-McGee Chemical Corp.* In *Kerr-McGee*, the Third Circuit decided whether to extend the *Ramirez* product line exception to impose tort liability on a company that neither polluted New Jersey land nor operated on New Jersey land polluted by others.

IV. *Leo v. Kerr-McGee Chemical Corp.*

A. The Majority Opinion

The Third Circuit in *Kerr-McGee* was faced with a case of first impression. This case involved an environmental tort action brought in federal court on grounds of diversity jurisdiction which confined the federal court to a role of predictor of state law. The court began its discussion by recognizing *Ramirez* as the leading case in New Jersey on the extension of successor corporation liability, but decided that the *Ramirez* rationale did not fit the facts of the case. Specifically, the court found the plaintiffs' injuries to be distinguishable from those in *Ramirez*. In *Kerr-McGee*, the plaintiffs' injuries were not caused by a unit in the product line manufactured first by Welsbach, and then by Kerr-McGee. Rather, the injuries were caused by conditions created by Welsbach's operations on land which it retained control over after the sale to Kerr-McGee.

The court then applied the *Ramirez* analysis in light of this distinction. The Third Circuit determined that the destruction of

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106. *Id.* at 1285. However, Colorado has adopted the product line exception. *Id.* at 1285-86. Through a choice of law analysis, the Colorado court sought to apply its law, and the product line exception, despite the fact that the contract of sale was completed in Illinois and the defendant was a domiciliary of Illinois. *Id.* at 1286.

107. For a further discussion of the facts of *Kerr-McGee*, see *supra* notes 10-27 and accompanying text.


111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Kerr-McGee*, 37 F.3d at 99-101. The court noted: (1) the sale of the enterprise virtually destroyed the injured party's remedy against the original manufacturer; (2) the successor has the ability to assume the original manufacturer's risk-spreading role; and (3) it is fair
an injured party's remedy was a necessary but insufficient basis on
which to attach liability.\textsuperscript{116} The court further noted that New Jersey

case law following \textit{Ramirez} demonstrated that when a selling corpo-
ration remains a viable entity it is unnecessary to impose successor

liability.\textsuperscript{117} In addition, the need for imposing successor liability is

contingent upon the inability of plaintiff to hold the predecessor

liable.\textsuperscript{118} Thus, the court noted that a legally responsible party for

Welsbach's action might have existed.\textsuperscript{119} However, the potential

existence of a culpable party was not used as a basis for refusing to

impose successor liability.\textsuperscript{120}

The court also held that Kerr-McGee could not practically

spread the risk of toxic torts from land it never acquired.\textsuperscript{121} The

imposition of successor liability for toxic torts arising out of a prede-
cessor's operation would subject the product line purchaser to un-

foreseeable liability for an indefinite period of time.\textsuperscript{122} The

impediment that such a holding would pose on commercial trans-

actions led the court to conclude that the Supreme Court of New

Jersey would not hold that a purchaser of a product line acquires its

predecessor's risk spreading role for toxic torts.\textsuperscript{123}

Similarly, the Third Circuit found its holding to be consistent

with the rule followed in New Jersey that a manufacturer cannot be

strictly liable unless there was a defect at the time the product left

the manufacturer's control.\textsuperscript{124} These principles led the court to de-

cide that \textit{Ramirez} liability is "likely to be imposed in most cases, if at

all, for a limited period."\textsuperscript{125} Application of this "time scenario" sug-

gested to the court that it would be unusual for a successor in a

\begin{footnotesize}
\begin{itemize}
  \item to require the successor to assume a responsibility for defective products
  as that responsibility was a burden necessarily attached to the original
  manufacturer's goodwill being enjoyed by the successor in the continued
  operation of the business.
  \end{itemize}
\end{footnotesize}
product line case to be defending an action in the 1990's for a product built in the 1940's.\textsuperscript{126}

Finally, the Third Circuit determined that the good-will acquired by Kerr-McGee through the acquisition of assets did not create liability for the land upon which the predecessor manufactured the product.\textsuperscript{127} The court recognized that Kerr-McGee acquired a gas mantle product line as opposed to the site at which Welsbach manufactured the product.\textsuperscript{128} Thus, the assets Kerr-McGee acquired were too attenuated from the instrumentality that actually caused the harm to impose liability. These distinctions undermine the core of the \textit{Ramirez} analogy and support the Third Circuit's prediction that \textit{Ramirez} would not be extended to cover environmental torts.

In support of its determination, the Third Circuit reviewed its obligation to refrain from partaking in judicial activism when deciding a diversity case.\textsuperscript{129} The Third Circuit concluded that the district court's ruling to extend the strict liability product line doctrine to cover environmental torts should be reversed.\textsuperscript{130}

B. Concurrence

Consistent with the Third Circuit's role as a predictor of state law, Judge Atkins, in a concurring opinion, traced the development of the "product line" exception in New Jersey.\textsuperscript{131} Contrary to the majority decision, Judge Atkins determined that the district court was correct in its extension of the strict liability product line doctrine to the environmental tort arena.\textsuperscript{132} Judge Atkins found significant, the fact that Kerr-McGee purchased from Welsbach its entire product line, patented process, goodwill, inventory, sales, records, and trade name.\textsuperscript{133} Judge Atkins also reasoned that there was a sufficient connection between the product lines of Kerr-McGee and

\begin{itemize}
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id. at 101.
\item \textsuperscript{128} Id. The court further illustrated that the goodwill Kerr-McGee acquired was attached to the gas mantles, not the site where Welsbach manufactured the product. \textit{Id}.
\item \textsuperscript{129} \textit{Kerr-McGee}, 37 F.3d at 101.
\item \textsuperscript{130} Id. The Third Circuit noted that the decision of the district court was premised on "the traditional New Jersey view that if you are injured somebody ought to be liable for it," which is an approach that the Third Circuit rejects. \textit{Id}.
\item \textsuperscript{131} Id. at 102.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\end{itemize}
Welsbach to support the application of the product line exception. 134

Buttressing this conclusion, Judge Atkins distinguished Kerr-McGee from State Department of Environmental Protection v. Exxon Corp. 135 Unlike Kerr-McGee, the successor corporation in Exxon operated a separate business on the land once used by its predecessor. 136 Therefore, Judge Atkins found the situation in Kerr-McGee to be more analogous to Ramirez than Exxon. 137 Kerr-McGee purchased all or substantially all of the manufacturing assets of Welsbach. 138 Additionally, Kerr-McGee continued essentially the same manufacturing process as Welsbach. 139 Consequently, Kerr-McGee should have been strictly liable for any defects in the units or waste produced from the production of the same product line, including waste generated by Welsbach. 140

In addition, Judge Atkins reviewed the policies supporting Ramirez and Ray and found the rationales used in these cases to be equally applicable to Kerr-McGee. 141 First, the plaintiffs’ potential remedy against Welsbach had been totally destroyed through the acquisition of Welsbach by Kerr-McGee. 142 Second, the imposition of liability upon Kerr-McGee was consistent with the public policy of spreading the cost of injuries to a party in a better position to bear the costs. 143 Third, Kerr-McGee could have obtained products liability insurance or entered into a full or partial indemnification or escrow agreement with the selling corporation. 144 The impos-

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134. Kerr-McGee, 37 F.3d at 102.
135. Id. (citing Exxon, 376 A.2d 1339 (N.J. 1977)).
136. Id.
137. Id.
138. Id. Judge Atkins noted that the Kerr-McGee situation would remain analogous to Ramirez even if all the assets were acquired by cash, and Kerr-McGee and its predecessors undertook essentially the same manufacturing operation as Welsbach. Id. Kerr-McGee would be strictly liable for injuries caused by defects in the units or by waste from production of those units of the same product line, even if previously manufactured by Welsbach. Id.
139. Kerr-McGee, 37 F.3d at 102.
140. Id. (citing Ramirez, 431 A.2d at 825).
141. Id. at 103.
142. Id.
143. Id. Judge Atkins supported the cost spreading rationale by noting that “Welsbach transferred to Kerr-McGee the resources that had previously been available to Welsbach for meeting its responsibilities to persons injured by the product line it operated.” Id.
144. Kerr-McGee, 37 F.3d at 103. Judge Atkins noted that Kerr-McGee was a sophisticated party with knowledge of the production of gas mantles and the waste that is generated. Id. Therefore, Kerr-McGee should have been able to gauge the risks associated with its acquisition. Id.
tion of liability upon Kerr-McGee was justified on the grounds that Kerr-McGee had received the benefit of Welsbach's trade name and goodwill.\textsuperscript{145}

Judge Atkins concluded that, in his opinion, the New Jersey Supreme Court would apply the doctrine of strict liability to environmental torts.\textsuperscript{146} Further, Judge Atkins noted that while New Jersey should have a voice in the development of its common law, there was no procedure available to certify such a question to the New Jersey Supreme Court.\textsuperscript{147} In the absence of a method to certify this question to the New Jersey Supreme Court, Judge Atkins felt constrained to apply the law as the New Jersey Supreme Court would were the issue brought before it.\textsuperscript{148} As a result, Judge Atkins reluctantly joined in the majority opinion.\textsuperscript{149}

V. CRITICAL ANALYSIS

The Third Circuit's decision to deny extension of the product line doctrine of liability to include toxic tort cases is consistent with New Jersey precedent. One troublesome aspect of the Kerr-McGee decision is that state common law was used to decide an issue of national importance. Regulation of the environment is an area in which the national government has specifically asserted a significant role. The importance of a unified method of regulating the environment is self-evident. The absence of national regulation will result in unpredictable results based on individual state interpretations of corporate law and tort law. If a corporation cannot accu-

\textsuperscript{145.} Id. In support of his argument, Judge Atkins cited Ramirez for the proposition that public policy mandates that a successor corporation bear the burden of operating costs that other established business operations must ordinarily bear. \textit{Id.} (citing Ramirez, 431 A.2d at 822). The potential cost of liability must be considered when evaluating the worth of a company, and insurance may be taken out to safeguard against any such claims. \textit{Id.}

\textsuperscript{146.} \textit{Id.} at 107.

\textsuperscript{147.} \textit{Id.}

\textsuperscript{148.} \textit{Id.} at 103-104 (citing \textit{City of Phila. Liad Indus. Ass'n}, 994 F.2d 112 (3d Cir. 1993)). The court noted that its role was to restrain itself from imposing its own views and rather interpret and apply the law as the New Jersey Supreme Court would apply the law. \textit{Id.} at 103-104.

\textsuperscript{149.} Kerr-McGee, 37 F.3d at 104. Judge Atkins noted that the result of such a decision may create an atmosphere where state rights may never be vindicated. Primarily, the removal and jurisdictional statutes will be used as a sword to prevent final resolution of a state claim. For example, where a defendant realizes that the state's highest court has not ruled on their specific factual circumstance, but has developed a doctrine that might be adverse to that defendant, then the defendant will most assuredly remove the case to federal court knowing that, on appeal, the circuit court will grant summary judgment in their favor based on \textit{City of Philadelphia}.

\textit{Id.}
rately estimate its liabilities, it cannot adequately plan for the future. Inconsistent decisions are the result of state courts attempting to manipulate corporate law to cover an area that it was not designed to cover. Extension of the special exceptions to the general rule of corporate law into environmental torts will result in unforeseeable results.

Furthermore, the issues raised in *Ramirez* opposing the expansion of successor corporation liability are persuasive in environmental tort actions. The court in *Ramirez* recognized that successor corporate liability for defects of a predecessor's manufacturing would have a crippling effect on business interests. A primary justification for the expansion of successor corporation liability may be that the successor is able to protect itself through the purchase of insurance or indemnification contracts. This rationale, however, is insufficient to impose liability in environmental torts. First, the court in *Ramirez* assumes that the successor will have extensive knowledge of the manufacturing process of the predecessor, and thereby, be able to anticipate liabilities. Even if this assumption is true, the successor corporation would not necessarily have sophisticated knowledge of potential environmental hazards. Therefore, imposition of liability based on the successor's knowledge of the industry would not be fair. Business planners would be hesitant to purchase a company with unforeseen contingent liabilities, possibly forcing smaller businesses into liquidation. Second, as previously noted, it is not clear that insurance could be obtained to protect against defective products or environmental hazards.

Business planning and purchasing insurance would be facilitated under a uniform, stable method of predicting successor corporation liability. A predictable method of determining such liability requires the abandonment of entrenched theories of corporate law and tort law, and the development of a federal cause of action for environmental torts. This can be achieved through Congressional recognition of a private right of action for environmental torts.

A Congressionally created private right of action would allow a plaintiff to state a federal cause of action without reference to antiquated state corporate law principles. There are important distinc-

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150. For a further discussion of the holding in *Ramirez*, see *supra* note 77 and accompanying text.
152. For a further discussion of the difficulty of finding insurance to protect against defective products, see *supra* note 82.
tions between bringing a toxic tort cause of action under federal
to state law. Currently, a cause of action for a toxic
tort is based on corporate law principles that were not designed to
provide a remedy for personal injury cases. The general rule of
corporate law was written for the purpose of protecting minority
shareholders and their financial interests. Extending the principles
of state corporate law beyond their original bounds leads to the
same incongruous results found in the *Amstead* cases noted
above.\(^{153}\)

A private cause of action brought pursuant to a federal statute,
such as CERCLA, would remedy the situation. Unlike state corpo-
rate law, CERCLA was specifically written for the purpose of expe-
diting the cleanup of toxic hazards and making responsible parties
pay for such damage.\(^{154}\) CERCLA would, therefore, serve as a bet-
ter conduit than state corporate law for protecting the interests of
persons hurt as a result of an environmental hazard. Reliance on
this federal statute would provide uniformity in an area of national
interest. The uniformity would additionally allow business planners
to better predict contingent liabilities and purchase insurance to
spread the cost of such risks. The sale price of a business would
then more accurately reflect its true worth and the costs of environ-
mental torts would be more equitably spread throughout society.

Congress did consider providing a private federal cause of ac-
tion to individuals harmed by environmental pollution, prior to the
enactment of CERCLA. On April 2, 1980, Rep. Florio introduced a
toxic waste bill that provided for private recovery for injury to
"property," "economic loss," and most importantly, "personal in-
jury" caused by environmental pollution.\(^{155}\) However, the federal
cause of action for toxic torts became a divisive issue in the House,
and eventually the proposal was stricken from Rep. Florio’s bill.\(^{156}\)

Congress again attempted to provide a private individual with a
federal toxic tort cause of action in Senate bill S1480.\(^{157}\) Senate bill

\(^{153}\) Moreover, numerous state definitions of successor liability, rather than a
single federal statute, leads to forum shopping. For a discussion of the Amsted
cases, see *supra* note 88 and accompanying text.

U.S.C.C.A.N.* 6119, 6119-20. See also Dedham Water Co. v. Cumberland Farms
Dairy Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (holding Congress intended that
those responsible for disposal of chemical poisons bear cost of cleanup).

\(^{155}\) H.R. 7020, 96th Cong., 2d Sess. § 5(a); 126 CONG. REC. 7490 (1980).

\(^{156}\) *Id.*

\(^{157}\) S. 1480, 96th Cong., 1st Sess.; 125 CONG. REC. 17,988-95 (1979). This bill
held a responsible party liable for “all out-of-pocket medical expenses, including
rehabilitation costs, due to personal injury.” *Id.* at 17,991.
S1480 was the leading Senate bill in the legislative process which resulted in the passage of CERCLA. The private recovery provision of S1480 contained two subsections. The first subsection allowed recovery for the cost of remedying the problem, while the second subsection provided recovery for personal injuries. Ultimately, the version of the Senate bill S1480 Congress enacted, in the form of CERCLA, contained only the first subsection. Despite the refusal to enact the second subsection of S1480, some Senators believed that the first subsection incorporated a private right of action for toxic torts. That is, the first subsection as enacted, would provide victims adequate compensation for their injuries. These comments cannot, however, be taken as indicative of a Congressional intent to provide for a private right of action, nor do they allow federal courts to imply such a right. In fact, legislative history on this matter indicates that Congress had no intent to establish a private right of action.


160. Id.


163. See Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). In Touche, the United States Supreme Court refused to infer a private remedy for damages in a complex securities case. Id. at 578. Justice Rehnquist, writing for the majority, overruled the factors previously relied on in Cort v. Ash, 422 U.S. 66 (1975), in determining if a private right of action existed. Id. at 575-76. Rather than relying on the Cort four factor test, the Court held that the power to create a private right is ultimately a question of Congressional intent and not whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law. Id. at 578. See also Thompson v. Thompson, 484 U.S. 174 (1988) (holding that whether to infer private cause of action from federal statute is determined by Congressional intent).


During consideration of CERCLA by the 96th Congress, supporters of the legislation lobbied for provisions granting private rights of action for so-called “toxic torts.” Congress ultimately decided that a need for such provisions had not been demonstrated.

However, it did authorize a study under section 301(e) of CERCLA to resolve the issue of the adequacy of existing legal remedies in this area.
Absent demonstrable Congressional intent, a federal cause of action can only be created through an explicit act of Congress.\textsuperscript{165} Congress should act and recognize a private right of action for toxic torts because the damage from toxic waste treatment and disposal has become a \textit{national} problem. In its debates concerning a private right of action, Congress could not have foreseen the inadequacies of state law remedies to assure compensation for damages from toxic substance releases.\textsuperscript{166} Moreover, the purpose of CERCLA, to make responsible parties pay for the damage they have caused, would be properly served through Congressional recognition of a federal cause of action.\textsuperscript{167} While some analysts have argued that the imposition of a federal cause of action would necessitate the creation of a new body of "Federal common law,"\textsuperscript{168} such a body of federal common law has already developed to facilitate CERCLA's implementation.\textsuperscript{169} Recognizing the need for national uniformity in applying successor corporation liability under CERCLA, one court noted that the general doctrine of successor liability rather than narrow state statutes should guide a court's analysis in this area.\textsuperscript{170}

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\textsuperscript{165} See Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981). The Court in \textit{Texas Indus.} wrote that a private right of action could arise two ways: (1) through the affirmative creation of a right of action by Congress; or (2) through the power of the federal courts to fashion a federal common law. \textit{Id.} at 641-43.

\textsuperscript{166} The last study conducted on the appropriateness of creating a private right of action for toxic torts was done in 1982. \textit{See A Report To Congress In Compliance With Section 301(e) Of The Comprehensive Environmental Response, Compensation, and Liability Act of 1980}, Committee on Environment and Public Works, 96-510 (1982). Because the topic of a private right of action has not been addressed since a brief consideration of it before the House Energy Committee in 1994, "the record before the Congress on this issue remains as it was when CERCLA was enacted." \textit{Hearings, supra} note 164, at 998.


\textsuperscript{168} \textit{Hearings, supra} note 164, at 999.

\textsuperscript{169} \textit{See United States v. Mexico Feed & Seed Co.}, 980 F.2d 478, 487 n.9 (8th Cir. 1992) (holding in dicta that federal law would be appropriate for determining successor corporation liability under CERCLA); \textit{Louisiana-Pacific Corp. v. Asarco}, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (stating successor liability under CERCLA is governed by federal law); \textit{Smith Land & Improvement Corp. v. Celotex Corp.} 851 F.2d 86, 91 (3d Cir. 1988), \textit{cert. denied}, 109 S.Ct. 837 (1989) (same); \textit{Hunt's Generator Comm. v. Babcock & Wilcox Co.}, 863 F. Supp. 879, 882 (E.D. Wis. 1994) (determining successor corporation liability is governed by federal common law).

\textsuperscript{170} \textit{Louisiana-Pacific Corp. v. Asarco}, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990). The Ninth Circuit held that the legislative history of CERCLA demonstrates that Congress intended the courts to develop a federal common law to supplement the statute. \textit{Id.} (citing \textit{United States v. Chem-Dyne Corp.}, 572 F.Supp. 802, 808-09
VI. CONCLUSION

The Third Circuit was correct in its holding in Kerr-McGee because there must be a limit to corporate liability in New Jersey. Kerr-McGee did not have the capacity to acquire the risk spreading role of its predecessor in a toxic tort context. In addition, the goodwill that Kerr-McGee acquired was related to the product line of Welsbach and not to the contaminated site. Therefore, it would be inappropriate for New Jersey to impose liability on a corporation that did not pollute New Jersey land, nor operate on land polluted by others. The fact that Kerr-McGee had deep pockets and could be traced to business dealings with a corporation that did pollute New Jersey land is too attenuated a connection to justify the imposition of liability.

Corporate law liability was originally developed to protect shareholders and their financial interests and is an unwieldy, ineffective means of providing a remedy in environmental cases. Application of corporate law principles in environmental cases results in inconsistent rulings among jurisdictions. Such a system places undue economic burdens on corporate entities that never could have foreseen such liabilities. A better rule would be to adopt a federal right of action for toxic torts based on CERCLA that incorporates federal common law principles.

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(S.D. Ohio 1983). In addition, the court noted that the purpose of CERCLA to impose liability upon responsible parties would be frustrated by the adoption of state law. Id. at n.2. Ultimately, the Ninth Circuit held that a state's law that unduly limited successor liability would cut off the EPA's ability to seek reimbursement. Id.