

2000

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Recommended Citation

Mank, Bradford, "Should State Corporate Law Define Successor Liability - The Demise of CERCLA's Federal Common Law" (2000). *Faculty Articles and Other Publications*. Paper 270.
http://scholarship.law.uc.edu/fac_pubs/270

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SHOULD STATE CORPORATE LAW DEFINE SUCCESSOR LIABILITY?: THE DEMISE OF CERCLA'S FEDERAL COMMON LAW

Bradford C. Mank*

I. INTRODUCTION

During the 1980s and early 1990s, a series of decisions broadly interpreting the liability provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)¹ appeared destined to transform corporate law practice.² CERCLA does not directly address successor liability, but the statute's complex and contradictory legislative history arguably implies that Congress wanted federal courts to apply broad liability principles to achieve the statute's fundamental remedial goal of making polluters and their successors pay for cleaning up hazardous substances.³ Notably, a number of courts rejected state corporate law principles that usually limit the liability of successor corporations and instead adopted expansive federal common law standards to make successor corporations liable under CERCLA.⁴ Courts applying a federal common law of successor liability argued that their approach would

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1. See Pub. L. No. 95-510, 95 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1994)) [hereinafter CERCLA].

2. See generally Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259 (1992).

3. See *infra* note 27 and accompanying text.

4. Compare *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996) (applying federal common law of successor liability in CERCLA case), *denying petition for reh'g*, 112 F.3d 88 (2d Cir. 1997) and *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992) (same) and *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992) (same) and *Louisiana-Pacific Corp. v. Asarco Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990) (same) and *Smith Land & Improvement Corp. v. Celotex*, 851 F.2d 86, 91 (3d Cir. 1988) (same) with *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362-65 (9th Cir. 1998) (arguing in dicta state law should govern corporate successor liability in CERCLA cases and not federal common law) and *Anspec Co. v. Johnson Controls Inc.*, 922 F.2d 1240, 1245-47 (6th Cir. 1991) (applying state law of successor liability in CERCLA case and expressly rejecting use of federal common law). See also Vincent E. Gentile, *Should State or Federal Common Law Determine CERCLA Successor Liability?*, 21 MERGERS & ACQUISITIONS L. REP. (BNA) 708 (May 31, 1999) (arguing state law is not displaced by federal common law in area of corporate successor liability); Gregory C. Sisk & Jerry L. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O'Melveny & Myers*, 16 VA. ENVTL. L.J. 505, 522-24 (1997) (same); David E. Dopf, *Federal Common Law or State Law?: The Ninth Circuit Takes on Successor Liability Under CERCLA in Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 10 VILL. ENVTL. L.J. 171 (1999) (same).

achieve greater national uniformity and avoid the danger of state laws that supposedly unduly limited the liability of successor corporations.⁵ Additionally, while some courts adopting a federal common law standard for successor liability applied the "mere continuation" doctrine used in most states, other courts have endorsed the expansive "substantial continuity" doctrine (also called the "continuity of enterprise" exception) applied in a minority of states because it better serves CERCLA's broad remedial goals.⁶ On the other hand, the United States Court of Appeals for the Sixth Circuit rejected the use of federal common law in this area because it concluded that state successor liability principles generally did not interfere with CERCLA's basic liability requirements.⁷

Much of the controversy about whether courts should apply a federal common law of successor liability or follow state law depends on the broader principle of when it is appropriate for federal courts to use federal common law standards to displace state law.⁸ Before 1994, there was a plausible argument for applying federal common law to successor liability issues. In 1979, the Supreme Court in *United States v. Kimbell Foods* developed a three-part test for determining whether to use federal common law in lieu of state law.⁹ The first two portions of the test, whether the issue in question required a nationally uniform body of law and whether applying state law would interfere with important federal policies, arguably supported a federal common law of successor liability that would be both more uniform and more readily achieve CERCLA's broad liability goals.¹⁰ The third test, whether using federal common law would interfere with existing commercial relationships based on state law, was ignored by most courts addressing the liability of successor corporations under CERCLA.¹¹ The third prong of *Kimbell* suggested that it may be inappropriate to apply federal common law standards if corporate successors had relied upon limited successor liability doctrines in state law.¹² Most federal courts placed more emphasis on the need for national uniformity and achieving CERCLA's remedial goals, and, therefore, applied federal common law standards of successor liability in CERCLA cases.

5. See *infra* notes 81, 115-19 and accompanying text.

6. See *infra* notes 60-62, 71 and accompanying text.

7. See *infra* notes 161, 165-71, 168, 180 and accompanying text.

8. See discussion *infra* Part III.

9. See *infra* notes 88-92 and accompanying text.

10. See *id.*

11. See *id.*

12. See *id.*

However, in 1994, the Supreme Court, in *O'Melveny & Myers v. FDIC*,¹³ clarified the authority of federal courts to establish common law that displaces state law by limiting its use to situations where "there is a 'significant conflict between some federal policy or interest and the use of state law.'"¹⁴ In 1998, the United States Court of Appeals for the Ninth Circuit concluded in dicta that a federal common law of successor liability for CERCLA was clearly inconsistent with the reasoning in *O'Melveny*.¹⁵ First, the mere continuity approach to successor liability used in most states does not so "significantly conflict" with CERCLA to justify the extraordinary remedy of displacing state law.¹⁶ Additionally, *O'Melveny* rejected the view that the government is entitled to an expansive federal common law standard just because the government would win more often.¹⁷ Nevertheless, the United States Court of Appeals for the Second Circuit has endorsed a federal common law of successor liability for CERCLA despite *O'Melveny*.¹⁸

In 1998, the Supreme Court in *United States v. Bestfoods*,¹⁹ addressed when a parent corporation may be liable under CERCLA for the conduct of a subsidiary. In a long footnote, the Court observed that it did not want to decide the controversial issue of whether state law or federal common law should determine the standards for piercing the corporate veil.²⁰ However, *Bestfoods* clearly stated that lower courts should not use gaps or silence in CERCLA as a basis for rejecting fundamental corporate law principles.²¹ The unmistakable message of *Bestfoods* is that CERCLA's general remedial purposes are not a basis for re-writing the basic doctrines of corporate law.

Because most states follow traditional corporate law precepts, *Bestfoods* suggests that courts should generally apply state successor liability rules in CERCLA cases rather than use federal common law to impose the minority substantial continuity rule.²² In the absence of specific statutory authority, courts may not use CERCLA's general goal of

13. 512 U.S. 79 (1994).

14. *Id.* at 87 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

15. See *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362-65 (9th Cir. 1998) (arguing in dicta that state law should govern corporate successor liability in CERCLA cases and not federal common law); *infra* notes 208-19, 263 and accompanying text.

16. See *infra* notes 147-161 and accompanying text.

17. See *infra* notes 217-18 and accompanying text.

18. See *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996) (applying federal common law of successor liability in CERCLA case), *denying petition for reh'g*, 112 F.3d 88 (2d Cir. 1997); *infra* notes 226-235 and accompanying text.

19. 118 S. Ct. 1876 (1998).

20. See *id.* at 1885 n.9.

21. See *infra* notes 239, 250 and accompanying text.

22. See *infra* notes 238-39, 242, 252-56 and accompanying text.

making polluters pay to effectuate a revolution in corporate law liability principles.

For environmentalists who favor CERCLA's broad remedial goals, the Supreme Court's increasingly restrictive approach to federal common law principles and its support for traditional corporate law doctrine is likely disappointing. However, state successor liability principles do generally prevent corporations from using sham transactions to escape CERCLA liability.²³ There is no evidence that states are engaging in a "race-to-the-bottom" to weaken successor liability principles to protect corporations from CERCLA liability.²⁴ Thus, while corporate law's preference for limited corporate liability is theoretically at odds with CERCLA's broad remedial goals, the demise of a federal common law of successor liability is likely to have little impact in most CERCLA cases.²⁵

II. SUCCESSOR LIABILITY UNDER CERCLA

A. CERCLA's Basic Structure

In 1980, Congress enacted CERCLA to address the growing problem of abandoned hazardous waste disposal sites, including the infamous Love Canal burial ground located in a residential neighborhood.²⁶ The main goals of the statute are to expedite the cleanup of waste disposal facilities and to force those responsible to pay.²⁷ CERCLA is primarily a remedial statute that looks backward to force those responsible for past dumping to pay for the cost of cleaning up the waste.²⁸ Courts have

23. See *infra* notes 47-60 and accompanying text.

24. See *infra* notes 169, 219 and accompanying text.

25. See cases cited *infra* note 81.

26. See *United States v. Bestfoods*, 118 S. Ct. 1876, 1881 (1998); Michael D. Green, *Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal*, 87 NW. U. L. REV. 897, 900 (1993); Bradford C. Mank, *The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?*, 19 B.C. ENVTL. AFF. L. REV. 239, 243 (1991) [hereinafter Mank, *Dragon*]; Curtis J. Busby, Note & Comment, *Asset Purchases as Potentially Responsible Parties under Superfund*, 12 BYUJ. PUB. L. 351, 352 (1998); Jacqueline Y. Engel, *If You Play, You Pay: Unknown Hazards for Successor Corporations Under CERCLA*, 23 PAC. L.J. 1317, 1317-18 (1992).

27. See S. REP. NO. 96-848, reprinted in 1980 U.S.C.C.A.N. 6119; *Bestfoods*, 118 S. Ct. at 1882; *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) ("CERCLA... imposes the costs of the cleanup on those responsible for the contamination."); Green, *supra* note 26, at 901-03; Mank, *Dragon*, *supra* note 26, at 243-44; Sisk & Anderson, *supra* note 4, at 511; Busby, *supra* note 26, at 352; Dopf, *supra* note 4, at 172-73; L. De-Wayne Layfield, *CERCLA Successor Liability, and the Federal Common Law: Responding to an Uncertain Legal Standard*, 68 TEX. L. REV. 1237, 1240-41 (1990); Christopher J. Neumann, Comment, *Successor Liability And CERCLA: The Runaway Doctrine of Continuity of Enterprise*, 27 ENVTL. L. 1373, 1378-79 (1997).

28. See Oswald & Schipani, *supra* note 2, at 264-65; Lucia Ann Silecchia, *Pinning the Blame & Piercing the Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and*

often justified their expansive reading of CERCLA's liability provisions by relying on the statute's broad remedial goals.²⁹ To address "orphan" sites where it is impossible to find responsible parties who can pay for a cleanup, Congress established a public Superfund financed by taxes on producers of toxic chemicals to pay for the Environmental Protection Agency's (EPA) cleanups if it is impossible to locate those responsible. However, because money in the Superfund is always limited, the EPA tries whenever possible to make responsible parties reimburse the fund for any cleanup expenses.³⁰

CERCLA imposes liability on four broad categories of potentially responsible parties (PRPs): (1) persons presently owning or operating a contaminated facility; (2) persons that owned or operated a contaminated facility at the time of disposal of a hazardous substance; (3) persons arranging for disposal, treatment, or transport of hazardous substances; and (4) those persons that transport hazardous substances to disposal or treatment facilities.³¹ These four classes of PRPs may be liable whenever "there is a release, a threatened release, or a disposal of a hazardous substance into the environment."³² While CERCLA does not directly establish liability standards, courts have generally read the statute to impose strict³³ and retroactive³⁴ liability on any potentially responsible party. Furthermore, courts have interpreted the statute to

a *Proposal for Legislative Reform*, 67 FORDHAM L. REV. 115, 124, 128-29 n.65 (1998).

29. See Silecchia, *supra* note 28, at 128-29 n.65 (citing cases and commentators favoring broad remedial reading of CERCLA); see generally Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 204 & *passim* (1996) (discussing whether broad remedial reading of CERCLA is appropriate).

30. See CERCLA, 42 U.S.C. §§ 9601(11), 9611 (1994); Richard G. Dennis, *Liability of Officers, Directors and Stockholders Under CERCLA: The Case for Adopting State Law*, 36 VILL. L. REV. 1367, 1372-73 (1991); Green, *supra* note 26, at 901-02; Silecchia, *supra* note 28, at 125.

31. See CERCLA, § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (1994) (defining liability of past and present owners of properties or vessels contaminated with hazardous substances, as well as transporters and those who arranged for disposal); Dennis, *supra* note 30, at 1370-71; Oswald & Schipani, *supra* note 2, at 268-69; Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability on Asset Purchasers*, 4 ENVTL. LAW. 435, 441-42 (1998); Busby, *supra* note 26, at 352; Dopf, *supra* note 4, at 173-74 n.20; Layfield, *supra* note 27, at 1242-43.

32. *United States v. CDMG Realty Co.*, 96 F.3d 706, 712 (3d Cir. 1996); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1242 (6th Cir. 1991); Layfield, *supra* note 27, at 1241; Schnapf, *supra* note 31, at 442-43; Sisk & Anderson, *supra* note 4, at 511; Dopf, *supra* note 4, at 172-73.

33. See CERCLA, 42 U.S.C. § 9601(32) (1994) (stating that courts should apply the same standard of liability found in section 311 of the Federal Water Pollution Control Act, which courts have interpreted to provide strict liability under both statutes despite the absence of specific statutory language); 33 U.S.C. § 1321 (1994); *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); Silecchia, *supra* note 28, at 128 n.64; Amanda L. Prebble, Casenote, *Corporate Law Confines to Parental Liability Under CERCLA: United States v. Bestfoods, 118 S. Ct. 1876 (1998)*, 67 U. CIN. L. REV. 1357, 1362-63 n.55.

34. See *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986); Prebble, *supra* note 33, at 1363 n.57.

authorize, but not require, the imposition of joint and several liability.³⁵ Some courts have allowed PRPs to avoid joint and several liability if they can establish that the harm at a site is capable of apportionment, but the burden in a section 107 cost recovery action under CERCLA is usually on the defendants to prove the divisibility of the harm and that there is an appropriate manner in which to apportion damages.³⁶

Most defenses to CERCLA liability are limited to exceptional circumstances in which contamination was caused by an act of God, act of war, or act of a third party caused the damage.³⁷ Under the statute, an owner who purchased property without knowing that it was contaminated may claim to be an "innocent owner," but only if the purchaser conducted an appropriate inquiry such as an environmental audit before purchasing the property.³⁸ Additionally, in 1996, Congress enacted legislation providing qualified liability protection for lenders who do not become involved in the management of a facility to encourage lenders to finance development of possibly contaminated properties.³⁹

B. Corporate Liability Under CERCLA

Every federal court of appeals to consider the issue has concluded that successor corporations may be liable under CERCLA.⁴⁰ CERCLA imposes liability on any "person" who owned or operated a facility at

35. See *United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995); Busby, *supra* note 26, at 352-53; Neumann, *supra* note 27, at 1379; Gulino, *infra* note 94, at 673-74 (citing CERCLA cases decided in 1983 and 1984 imposing joint and several liability).

36. See *Colorado & Eastern R.R. Co.*, 50 F.3d at 1535; Schnapf, *supra* note 31, at 443. In a section 113 contribution action, a responsible party generally has the burden of establishing the liability of other guilty parties. See CERCLA, 42 U.S.C. § 9613(f) (1994); *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998).

37. See CERCLA, § 107(b), 42 U.S.C. § 9607(b)(1)-(3); Oswald & Schipani, *supra* note 2, at 266; Dopf, *supra* note 4, at 174 n.21.

38. See CERCLA, 42 U.S.C. § 9601(35)(A), (B); ASTM Standards on Environmental Site Assessments for Commercial Real Estate, E 1527-97, Third Edition; Oswald & Schipani, *supra* note 2, at 266-67; Brian C. Walsh, *Seeding the Brownfields: A Proposed Statute Limiting Environmental Liability for Prospective Purchasers*, 34 HARV. J. ON LEGIS. 191, 197 (1997).

39. See CERCLA, 42 U.S.C. § 9601(20)(A) ("The term 'owner or operator' ...does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."); § 9601(20)(E) (limiting lender liability); William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 14 (1997).

40. See *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992); *Anspec Co. v. Johnson Controls Inc.*, 922 F.2d 1240, 1245-47 (6th Cir. 1991) *Louisiana-Pacific Corp. v. Asarco Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990); *Smith Land & Improvement Corp. v. Celotex*, 851 F.2d 86, 91 (3d Cir. 1988); Schnapf, *supra* note 31, at 454-56; Sisk & Anderson, *supra* note 4, at 512 n.47; Dopf, *supra* note 4, at 175 n.25.

the time of disposal of hazardous waste.⁴¹ CERCLA defines "person" as including "corporations."⁴² Although CERCLA does not define "corporation," successor liability is such a well understood principle of corporate law that courts have concluded that Congress must have assumed that the term "corporation" includes successor corporations.⁴³

For instance, the United States Code generally defines the words "company or association" to include "successors and assigns."⁴⁴ Accordingly, the term "corporation" in CERCLA presumably applies to any organization that is so defined by relevant state laws, including successor corporations.⁴⁵

Furthermore, successor liability furthers CERCLA's goal of making polluters pay. Because they benefited from the economic successes of their predecessors, successor corporations should bear the costs for any harms resulting from hazardous waste disposal by the predecessor.⁴⁶

C. Basic Principles of Corporate Successor Liability

1. The Majority View: The Mere Continuation Doctrine

Under the common law, to promote the free alienability of property, a bona fide purchaser of corporate assets that pays reasonable value and acquires them in good faith is usually not liable for the selling corporation's debts.⁴⁷ Because many state statutes impose a statute of

41. See CERCLA, § 107(a), 42 U.S.C. § 9607(a); Sisk & Anderson, *supra* note 4, at 511.

42. CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA, § 101(21), 42 U.S.C. § 9601(21); Sisk & Anderson, *supra* note 4, at 511; Dopf, *supra* note 4, at 175.

43. See *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518 (2d Cir. 1996) (stating that "federal law provides a rule of construction that when the word 'company' or 'association' is used, it 'embrace[s] the words 'successors[sic] and assigns of such company or association.'"); *Mexico Feed & Seed*, 980 F.2d at 486 ("Congress must have considered the word 'corporation' [in CERCLA] to inherently include corporate successors."); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245-47 (6th Cir. 1991) (holding CERCLA applies to successor corporations, as defined by state law); Schnapf, *supra* note 31, at 455-56; Sisk & Anderson, *supra* note 4, at 512 n.47, 526.

44. See 1 U.S.C. § 5 (1994); Schnapf, *supra* note 31, at 456; Sisk & Anderson, *supra* note 4, at 512 n.47.

45. See Schnapf, *supra* note 31, at 456; Sisk & Anderson, *supra* note 4, at 512; Dopf, *supra* note 4, at 175.

46. See, e.g., *Mexico Feed & Seed*, 980 F.2d at 487; *Louisiana-Pacific Co. v. Asarco, Inc.*, 909 F.2d 1260, 1262 (9th Cir. 1990); *Smith Land & Improvement Corp. v. Celotex*, 851 F.2d 86, 92 (3d Cir. 1988); Schnapf, *supra* note 31, at 456; Dopf, *supra* note 4, at 175-76.

47. See *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 124 F.3d 252, 266 (1st Cir. 1997); Schnapf, *supra* note 31, at 443-44; Sisk & Anderson, *supra* note 4, at 512-15; Busby, *supra* note 26, at 354; Neumann, *supra* note 27, at 1380.

limitations for post-dissolution claims against a dissolved corporation of between one and five years,⁴⁸ if the predecessor corporation dissolves after an asset sale, it may become impossible for a future litigant to sue the predecessor.⁴⁹ However, to prevent corporations from using the corporate form fraudulently to escape their liabilities, the mere continuity doctrine imposes successor liability and thus protects creditors of the selling corporation in four circumstances:⁵⁰

- (1) the purchasing corporation expressly or impliedly agrees to assume the prior company's liabilities;⁵¹
- (2) the transaction is essentially a "de facto" consolidation or merger;⁵²
- (3) the purchasing corporation is merely a continuation of the selling corporation;⁵³ or
- (4) the transaction was a fraudulent attempt to escape liability.⁵⁴

48. See MODEL BUS. CORP. ACT § 14.07 and official comment (1997) (recommending a five-year statute of limitations for claims against dissolved corporations); Richard L. Cupp, *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 880 n.202-204 (1999) (listing statutes of limitations for post-dissolution in many states); Green, *supra* note 26, at 905-06.

49. There is a split regarding whether a CERCLA plaintiff may sue a corporation that is validly dissolved under state law. Compare *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995) (holding CERCLA does not preempt state statute limiting time to sue dissolved corporation) and *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987) (same) with *Burlington Northern & Santa Fe Ry. Co. v. Consol. Fibers, Inc.*, 7 F. Supp. 2d 822, 826-28 (N.D. Tex. 1998) (holding CERCLA preempts state statute limiting time to sue dissolved corporation) and *Town of Oyster Bay v. Occidental Chem. Corp.*, 987 F. Supp. 182, 199-200 (E.D.N.Y. 1997) (same) and *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1495-96 (D. Utah 1987) (same). See generally Joel R. Burcat & Craig P. Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders Under CERCLA*, 50 BUS. LAW. 1273 (1995). Additionally, some courts that allow suits against a dissolved corporation would not allow such a suit where the dissolved corporation has distributed all corporate assets at the time of the suit. See *Burlington Northern*, 7 F. Supp. 2d at 828 (CERCLA plaintiff may sue "dead" dissolved corporation, but not "dead and buried" dissolved corporation that has already distributed its assets); *Sharon*, 681 F. Supp. at 1498-99 (same); but see *Canadyne-Georgia Corp. v. Cleveland*, 72 F.Supp.2d 1373, 1381-84 (M.D. Ga. 1999) (former owner may be held liable under act even if properly dissolved under state law and it has already distributed its assets; that defendant may be judgment proof does not affect its capacity to be sued).

50. See *Louisiana-Pacific Corp. v. Asarco Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990); Schnapf, *supra* note 31, at 444; Sisk & Anderson, *supra* note 4, at 514-15; Busby, *supra* note 26, at 354-58; Neumann, *supra* note 27, at 1380.

51. See *Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551, 555 (3d Cir. 1997) (holding asset purchaser expressly assumed predecessor's CERCLA liabilities); *Louisiana-Pacific*, 909 F.2d at 1263-64 (stating "the question of implied assumption of liability [by an asset purchaser] is a fact specific question"); Schnapf, *supra* note 31, at 445-46; Busby, *supra* note 26, at 354-55.

52. See *Louisiana-Pacific*, 909 F.2d at 1262-65 (stating that continuity of shareholders is essential in determining whether transaction represents de-facto merger); Schnapf, *supra* note 31, at 446-47; Busby, *supra* note 26, at 356; Engel, *supra* note 26, at 1321-22.

53. See *City Management Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251 (6th Cir. 1994); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992); Schnapf, *supra* note 31, at 447-48; Busby, *supra* note 26, at 357-58; Engel, *supra* note 26, at 1322.

54. See *City Management Corp.*, 43 F.3d at 249-54 (finding transaction was not fraudulent where

Because the main purpose of these mere continuity exceptions is to prevent fraud rather than to always protect creditors, courts have narrowly interpreted the exceptions to situations in which it is fairly clear that a corporate reorganization is used to defraud creditors rather than serve other legitimate interests.⁵⁵ Accordingly, courts apply the mere continuation rule only to circumstances in which the purchaser is virtually identical to the seller.⁵⁶ Under the mere continuity standard there must be an identity of stock ownership interests, stockholders, officers and directors between the purchasing and selling corporation so that the sole purpose of the sale appears to be escaping prior liability.⁵⁷ Under the mere continuation test, the purchaser is not liable as a successor corporation if the ownership interests are different even if it maintains the same or similar business operations.⁵⁸ Likewise, the fraudulent transfer exception applies only when a creditor of the seller can demonstrate by clear and convincing evidence that inadequate consideration was paid by the purchaser for the selling corporation's assets.⁵⁹

In determining CERCLA liability, courts have applied these four customary exceptions to prevent selling corporations from evading their liabilities through changes in corporate stock ownership that are essentially fraudulent or do not alter the selling corporation's fundamental form.⁶⁰ The controversial issue is whether, under CERCLA, courts should go beyond these four exceptions.

purchaser paid \$720,000 for assets valued at \$1 million); Schnapf, *supra* note 31, at 447; Busby, *supra* note 26, at 357; Engel, *supra* note 26, at 1322.

55. See Schnapf, *supra* note 31, at 444; Sisk & Anderson, *supra* note 4, at 514-15; Engel, *supra* note 26, at 1323; Layfield, *supra* note 27, at 1247.

56. See Sisk & Anderson, *supra* note 4, at 514-15.

57. See *City Management Corp.*, 43 F.3d at 251; *Carolina Transformer Co.*, 978 F.2d at 838 ("[Under] the 'mere continuation' exception . . . a corporation is not to be considered the continuation of a predecessor unless, after the transfer of assets, only one corporation remains, and there is an identity of stock, stockholders, and directors between the two corporations."); Gentile, *supra* note 4, at 710; Schnapf, *supra* note 31, at 444; Sisk & Anderson, *supra* note 4, at 514-15; Busby, *supra* note 26, at 357-58; Engel, *supra* note 26, at 1322-23.

58. See *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 654 (7th Cir. 1998); *Carstedt v. Grindeland*, 406 N.W.2d 39, 41 (Minn. Ct. App. 1987) (holding that even though the purchasing corporation used the same equipment, location, and operations, there was no mere continuation where the ownership changed); Gentile, *supra* note 4, at 710; Sisk & Anderson, *supra* note 4, at 514 n.58.

59. See *City Envtl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 641-42 (E.D. Mich. 1993) (applying Michigan law), *aff'd*, 43 F.3d 244 (6th Cir. 1994); Sisk & Anderson, *supra* note 4, at 514-15; Engel, *supra* note 26, at 1322-23.

60. See *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1244-47 (6th Cir. 1991); *Smith Land & Improvement Corp. v. Celotex*, 851 F.2d 86, 91 (3d Cir. 1988).

2. The Minority Approach: The Substantial Continuity and "Product-Line" Rules

Since 1984, the EPA has sought to convince courts to adopt a federal common law standard for successor liability that goes beyond the traditional four exceptions under the continuity of enterprise test to reach successors "if the new corporation continues substantially the same business operations as the [predecessor] corporation."⁶¹ The EPA's 1984 memorandum on successor liability cites decisions from the minority of state courts that have abandoned the traditional mere continuity rule to impose liability based on either the "product-line exception" or substantial continuity ("continuity of enterprise" exception) tests.⁶² In particular, the agency favorably discussed a New Jersey trial court decision that had extended the product liability exemption to environmental torts and had imposed strict liability on a successor corporation for present and previous discharges.⁶³ The memorandum concluded that the agency should, as part of its overall litigation strategy, seek to convince courts to adopt the substantial continuity doctrine in CERCLA cases.⁶⁴

a. Product-Line Exception

Because the four traditional exemptions under the mere continuity rule often prevented plaintiffs in tort suits from suing a successor corporation that substantially continued the same business, a few states have developed a "product-line exception" that finds successor liability

61. EPA Memorandum from Courtney Price, Assistant Administrator for Enforcement and Compliance Monitoring, Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 11-16 (June 13, 1984) [hereinafter EPA Memorandum]. See also Green, *supra* note 26, at 910-11; Alfred R. Light, "Product Line" and "Continuity of Enterprise" Theories of Corporate Successor Liability Under CERCLA, 11 MISS. C. L. REV. 63, 66-67 (1990); Kathryn A. Barnard, *EPA's Policy of Corporate Successor Liability Under CERCLA*, 6 STAN. ENVTL. L.J. 78, 78-79, 84-85, 103-04 (1986/1987); David C. Clarke, Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300, 1332-33 (1990); Neumann, *supra* note 27, at 1376, 1380.

62. See EPA Memorandum, *supra* note 61, at 11-16; Green, *supra* note 26, at 910-11; Light, *supra* note 61, at 67; Barnard, *supra* note 61, at 78-79, 84-85, 103-04; Clarke, *supra* note 61, at 1332-33; Neumann, *supra* note 27, at 1376, 1380.

63. See *Department of Transp. v. PSC Resources, Inc.*, 419 A.2d 1151 (N.J. Super. Ct. Law Div. 1980); EPA Memorandum, *supra* note 61, at 13-15 (discussing *Department of Transportation v. PSC Resources, Inc.*, 419 A.2d 1151 (N.J. Super. Ct. Law Div. 1980)); Clarke, *supra* note 61, at 1320-21 (same); but see Barnard, *supra* note 61, at 103-04 (arguing that *PSC Resources* is poor precedent because it was decided before CERCLA's enactment and that its rationale is largely unnecessary in light of CERCLA).

64. See EPA Memorandum, *supra* note 61, at 11-16; Green, *supra* note 26, at 910-11; Neumann, *supra* note 27, at 1376, 1380.

on the part of a corporation if it continues manufacturing a defective line of products initially produced by the selling entity, but only if it is impossible to sue the predecessor corporation.⁶⁵ As a matter of public policy, courts adopting the "product-line exception" have argued that it is necessary to protect injured consumers who otherwise could not recover.⁶⁶

However, a substantial majority of states have rejected the "product-line" exception to successor liability for several reasons: (1) because the corporate successor has not created the risk of injury from the predecessor's sale of defective products; (2) because the successor only remotely benefits from the predecessor's sale of a defective product; and (3) because the danger that a product-line exception will discourage the acquisition of corporate assets.⁶⁷

Furthermore, a number of commentators have argued that it is inappropriate to apply the "product-line exception" to CERCLA cases because other responsible parties or the Superfund itself are available to provide an adequate remedy, and the successor usually did not create any of the environmental harm at issue.⁶⁸ Additionally, imposing liability on companies that continue manufacturing a defective product is more likely to serve deterrent purposes whereas successor liability in the CERCLA context often provides no deterrent function because all of the disposal may have occurred before the asset purchase.⁶⁹ Moreover, it is far more difficult for asset purchasers to estimate the potential for CERCLA liability than in the products liability context because there are many uncertainties about the location and condition

65. See *Ray v. Alad Corp.*, 560 P.2d 3, 9-10 (Cal. 1977); *Raimirez v. Amsted Indus., Inc.*, 431 A.2d 811, 819 (N.J. 1981); *Garcia v. Coc Mfg. Co.*, 933 P.2d 243, 248-50 (N.M. 1997); *Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106, 110 (Pa. Super. Ct. 1981); *Martin v. Abbott Labs.*, 689 P.2d 368, 388 (Wash. 1984); *Cupp*, *supra* note 48, at 854 n.45; *Green*, *supra* note 26, at 906, 908-09; *Light*, *supra* note 61, at 68; *Barnard*, *supra* note 61, at 88-93; *Clarke*, *supra* note 61, at 1318-19.

66. See *Ray v. Alad Corp.*, 560 P.2d at 9; *DeLapp v. Xtraman, Inc.*, 417 N.W.2d 219, 221 (Iowa 1987); *Cupp*, *supra* note 48, at 854 n.45; *Green*, *supra* note 26, at 906, 908-09; *Light*, *supra* note 61, at 68; *Schnapf*, *supra* note 31, at 449-50; *Sisk & Anderson*, *supra* note 4, at 513-14 n.54; *Barnard*, *supra* note 61, at 94; *Busby*, *supra* note 26, at 371-72; *Clarke*, *supra* note 61, at 1319; *Engel*, *supra* note 26, at 1324-29.

67. See *Polius v. Clark Equip. Co.*, 802 F.2d 75, 80-81 (3d Cir. 1986) (applying law of Virgin Islands); *DeLapp v. Xtraman, Inc.*, 417 N.W.2d 219, 221 (Iowa 1987) (citing cases); *Green*, *supra* note 26, at 909, 913-14; *Light*, *supra* note 61, at 69-70 n.32; *Schnapf*, *supra* note 31, at 450-51 n.69; *Sisk & Anderson*, *supra* note 4, at 513-14 n.54; *Barnard*, *supra* note 61, at 94-100; *Busby*, *supra* note 26, at 371-73.

68. See *City Management Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251-53 (6th Cir. 1994); *Cupp*, *supra* note 48, at 864-66; *Green*, *supra* note 26, at 908-36; *Sisk & Anderson*, *supra* note 4, at 513-14 n.54; *Barnard*, *supra* note 61, at 100-102; *Busby*, *supra* note 26, at 371-73; *Layfield*, *supra* note 27, at 1250-51; but see *United States v. Western Processing Co.*, 751 F. Supp. 902, 904-06 (W.D. Wash. 1990) (rejecting motion for partial summary judgment on issue of successor liability and recognizing "product-line" theory of liability is "viable" under CERCLA); *Engel*, *supra* note 26, at 1333-36 (discussing possible use of "product-line" liability in CERCLA context).

69. See *Green*, *supra* note 26, at 922-23, 930-31; *Layfield*, *supra* note 27, at 1250-52.

of wastes and the allocation of cleanup costs varies widely depending on the number of parties at a given site.⁷⁰

b. Substantial Continuity or Continuity of Enterprise Exception

Additionally, a minority of states have entirely abandoned the mere continuation rule and now impose successor liability whenever the purchaser's business operations retain substantial continuity with those of the seller even if there is a significant change in ownership.⁷¹ In applying the substantial continuity test, which is sometimes referred to as the "continuity of enterprise" exception, courts have balanced several factors in deciding if there is substantial congruity between purchaser and seller. For instance, courts have examined whether the purchasers produced the same product in the same location; possessed the same employees, assets, name, production facilities, or managers; or presented itself as a continuance of the seller.⁷² A court may find a substantial continuity of enterprise as long as some of these factors are present.⁷³ In particular, some courts have emphasized whether the successor publicly represented itself as a continuation of the seller.⁷⁴

However, the overwhelming majority of jurisdictions have rejected the substantial continuity test for several reasons: (1) the successor corporation did not create the risk or liability at issue; (2) the successor did not warrant the safety of the product to the public; and (3) the successor did not profit from the activity in question.⁷⁵

70. See Green, *supra* note 26, at 926-28.

71. See, e.g., *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992); *Asher v. KCS Int'l, Inc.*, 659 So. 2d 598, 600 (Ala. 1995); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883-84 (Mich. 1976); *Kelly v. Kercher Machine Works Inc.*, 910 F. Supp. 30 (D.N.H. 1995) (applying New Hampshire law); *Cupp*, *supra* note 43, at 854 n.44; *Gentile*, *supra* note 4, at 710; *Light*, *supra* note 61, at 72-73; *Schnapf*, *supra* note 31, at 451-53; *Sisk & Anderson*, *supra* note 4, at 516-17; *Engel*, *supra* note 26, at 1329-33; *Neumann*, *supra* note 27, at 1381-82.

72. See *United States v. Mexico Feed and Seed Co.*, 980 F.2d 478, 488 n.10 (8th Cir. 1992); *Carolina Transformer Co.*, 978 F.2d at 838; *Gentile*, *supra* note 4, at 710; *Light*, *supra* note 61, at 72-73; *Schnapf*, *supra* note 31, at 452-53; *Sisk & Anderson*, *supra* note 4, at 516-17; *Engel*, *supra* note 26, at 1330; *Neumann*, *supra* note 27, at 1382.

73. See *Light*, *supra* note 61, at 72-73; *Schnapf*, *supra* note 31, at 453; *Sisk & Anderson*, *supra* note 4, at 516-17.

74. See *Trimper v. Harris Corp.*, 441 F. Supp. 346, 347 (E.D. Mich. 1977); *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 785 (Ala. 1979); *Light*, *supra* note 61, at 73; *Schnapf*, *supra* note 31, at 453.

75. See *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 343-44 (8th Cir. 1988) (applying Missouri law); *Polius v. Clark Equip. Co.*, 802 F.2d 75, 82 (3d Cir. 1986) (applying law of Virgin Islands); *Pancratz v. Monsanto Co.*, 547 N.W.2d 198, 201-02 (Iowa 1996); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99 (Minn. 1989); *Light*, *supra* note 61, at 74-75; *Schnapf*, *supra* note 31, at 454; *Sisk & Anderson*, *supra* note 4, at 515-16.

Moreover, several commentators have argued that applying the substantial continuity doctrine in the context of CERCLA is especially inappropriate because the successor did not usually create the contamination risk, it may be possible to pursue the dissolved corporation⁷⁶ or its former employees who were responsible for disposing of the hazardous substance, or that the Superfund provides an adequate remedy.⁷⁷ However, at least one commentator who generally opposes adopting the substantial continuity doctrine in CERCLA cases would impose such liability if the predecessor is unavailable and the successor was aware of the liability.⁷⁸

III. THE BATTLE OVER SUCCESSOR CORPORATE LIABILITY UNDER CERCLA: FEDERAL COMMON LAW OR STATE LAW?

While courts agree that corporate successors may be liable under CERCLA,⁷⁹ they are divided about whether to follow state law or federal common law. For example, the Sixth Circuit has applied state corporate law in deciding successor liability.⁸⁰ However, from 1988 to 1993, the majority of federal courts addressing the issue adopted a federal common law liability standard for successor liability.⁸¹ Those courts generally argued that it was necessary to apply a federal common law standard to prevent restrictive state laws on successor liability from interfering with CERCLA's broad remedial goals and to achieve a nationally uniform approach to liability under the statute.⁸² Nevertheless, courts adopting a federal common law approach are

76. There is a split in the courts regarding whether a CERCLA plaintiff may sue a dissolved corporation. See *supra* note 49.

77. See Green, *supra* note 26, at 920-22 (arguing substantial continuity test should be used in CERCLA cases only if predecessor is unavailable and successor was aware of liability); Light, *supra* note 61, at 79 (arguing substantial continuity test should not be used in CERCLA cases); but see Schnapf, *supra* note 31, at 457-59 (discussing and disagreeing with criticisms of substantial continuity test in CERCLA cases); Watson, *supra* note 29 at 293-94.

78. See Green, *supra* note 26, at 920-22 (arguing substantial continuity test should be used in CERCLA cases only if predecessor is unavailable and successor was aware of liability).

79. See Sisk & Anderson, *supra* note 4, at 514-15; *infra* note 81 and accompanying text.

80. See *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991); *infra* note 131 and accompanying text.

81. See *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992) (observing that "even legitimate resort to state law" may constitute an "evasion by a responsible party" of CERCLA's remedial goals); *Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt. Corp.*, 817 F. Supp. 225, 233 (D.N.H. 1993) (stating state corporate law doctrine limiting successor liability does not "further the goals of CERCLA"); *United States v. Western Processing Co.*, 751 F. Supp. 902, 905 (W.D. Wash. 1990) (rejecting state corporate law rules for successor liability because a "more expansive view of successor liability under CERCLA fosters a more equitable sharing of remediation costs"); Sisk & Anderson, *supra* note 4, at 515-16.

82. See *Louisiana-Pacific Corp.* *infra* note 119, at 1263 and accompanying text.

divided on whether to follow the mere continuation rule used in a majority of states or the more expansive substantial continuity standard.⁸³ A number of federal courts seeking to serve CERCLA's broad remedial goals have been attracted by the substantial continuity doctrine despite its clear minority status.⁸⁴

A. Kimbell's Three-Part Test for Federal Common Law

In 1979, the Supreme Court, in *United States v. Kimbell Foods, Inc.*,⁸⁵ enunciated a three-part test for determining whether courts should create a federal common law standard in the absence of an explicit federal statutory standard: (1) whether the question at issue requires a nationally uniform body of law; (2) whether application of state law would frustrate important federal policies or programs; and (3) whether a federal rule would interfere with existing commercial relationships based on state law.⁸⁶ The Court cautioned that courts should not invariably "resort to uniform federal rules."⁸⁷

The Supreme Court probably intended the *Kimbell* test to limit the creation of federal common law rules.⁸⁸ However, courts favoring the creation of a federal common law have focused on the first two *Kimbell* factors, but have often ignored the third prong regarding whether adopting a federal common law approach will disrupt existing commercial relationships based on state law.⁸⁹

B. Federal Common Law and CERCLA

Since CERCLA was enacted in 1980, there has been controversy about whether Congress intended courts to apply federal common law

83. See *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1286 (E.D. Pa. 1994) (stating "that CERCLA's broad remedial goals will be served by application of the substantial continuity test to determine successor liability of an asset purchaser"); Sisk & Anderson, *supra* note 4, at 515-16.

84. See *infra* note 125 and accompanying text.

85. 440 U.S. 715 (1979).

86. See *id.* at 728-29; Dennis, *supra* note 30, at 1441-42; Sisk & Anderson, *supra* note 4, at 519; Amy E. Aydelott, Comment, "CERCLAING" the Issues: Making Sense of Contractual Liability Under CERCLA, 3 VILL. ENVTL. L.J. 347, 359-60 (1992).

87. 440 U.S. at 728.

88. Sisk & Anderson, *supra* note 4, at 519.

89. See, e.g., *Kleen Laundry & Dry Cleaning v. Total Waste Management*, 876 F. Supp. 1136, 1141 (D.N.H. 1994); Gentile, *supra* note 4, at 711; Sisk & Anderson, *supra* note 4, at 571 (arguing federal common law rule of successor liability interferes with commercial relations under state law in violation of *Kimbell*'s third prong); see generally Dennis, *supra* note 30, at 1443-1512 (questioning claims of courts that uniform federal rule is necessary for CERCLA and arguing that adoption of federal common law rule may disrupt commercial relationships under state law).

principles to fill the gaps in the statute.⁹⁰ Proponents of using common law principles generally argue that such an approach will serve CERCLA's broad remedial purposes of making those responsible for waste disposal pay for cleanup costs whenever possible and limiting expenditure of the public Superfund money.⁹¹ Because CERCLA's text and legislative history is poorly written and contradictory, there is considerable uncertainty about whether and when Congress intended courts to use common law doctrines to interpret the statute's meaning.⁹²

There is some evidence that Congress intended courts to use common law to fill the gaps in CERCLA and to address the statute's broad remedial purposes.⁹³ One of the three bills that eventually led to CERCLA explicitly referred to joint and several liability, but that provision was deleted in the final version of the statute.⁹⁴ During the legislative debates about CERCLA, some members of Congress argued that if the bill was enacted courts should follow common law principles of joint and several liability even though explicit references to such liability had been removed from the statute's text to win over wavering votes.⁹⁵ However, Senator Helms argued that the compromise bill foreclosed joint and several liability.⁹⁶

90. Compare John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1444-45 (1997) (doubting Congress anticipated courts using federal common law to interpret CERCLA: "The development of a CERCLA common law, strongly influenced by CERCLA's general purposes, is not as inevitable as Watson suggests."), with Watson, *supra* note 29, at 291-94 (arguing Congress anticipated courts using federal common law to interpret CERCLA).

91. See Watson, *supra* note 29, at 293-94.

92. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986); Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 7-8 COLUM. J. ENVTL. L. 1, 1 (1982); Mank, *Dragon*, *supra* note 26, at 243; Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. 34, 36 n.7 (1993); Sisk & Anderson, *supra* note 4, at 526 n.131; see generally H.R. REP. NO. 96-1016, pt. 1, at 1, *reprinted in* 1980 U.S.C.C.A.N. 6119 (legislative history of CERCLA); Nagle, *supra* note 90, at 1406-12 (arguing it is difficult to interpret CERCLA because statutory language and legislative history are vague and often contradictory).

93. See Watson, *supra* note 29, at 291-94.

94. See H.R. 7020, 96th Cong. § 3071(a)(1)(D) (1980); Silecchia, *supra* note 28, at 128 n.63; Barbara J. Gulino, Note, *A Right of Contribution Under CERCLA: The Case for Federal Common Law*, 71 CORNELL L. REV. 668, 672-73 (1986).

95. See 126 CONG. REC. S30,932 (1980) (statement of Sen. Randolph) (stating that "we have deleted any reference to joint and several liability, relying on common-law principles to determine when parties should be severally liable," and that "issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law," and that an "example is joint and several liability"); 126 CONG. REC. H31,965 (1980) (statement of Rep. Florio) (concluding that CERCLA imposes strict and joint and several liability as determined by common law principles); Watson, *supra* note 29, at 293 n.387; Gulino, *supra* note 94, at 671-73 (discussing legislative history of CERCLA's treatment of joint and several liability); but see Sisk & Anderson, *supra* note 4, at 527-28 n.136 (arguing Representative Randolph simply supported use of "common law" in context of joint and several liability and never advocated general use of federal common law).

96. See 126 CONG. REC. S30,972 (1980) (statement of Sen. Helms); Gulino, *supra* note 94, at 673.

In *United States v. Chem-Dyne Corp.*,⁹⁷ a federal district court in the Southern District of Ohio adopted a federal common law approach to determining liability under CERCLA. The district court extensively discussed CERCLA's legislative history to support the view that Congress intended that courts use common law principles, including joint and several liability, to interpret the statutory gaps in CERCLA.⁹⁸ For example, Representative Florio, a sponsor of the legislation that became CERCLA, had explicitly argued that federal courts should apply federal common law to determine liability under CERCLA:

The liability provisions of this bill do not refer to the terms strict, joint and several liability I have concluded that despite the absence of these specific terms, the strict liability standard already approved by this body is preserved. Issues of joint and several liability not resolved by this shall be governed by traditional and evolving principles of common law. The terms joint and several have been deleted with the intent that the liability of joint tortfeasors be determined under common or previous statutory law. . . .

To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in this area.⁹⁹

The district court in *Chem-Dyne* acknowledged that the deletion of the term joint and several liability from the final version of a bill would normally preclude courts from interpreting a statute to include that approach, but argued that CERCLA was an exceptional case because Congress deleted the language so that courts would not impose it in every case.¹⁰⁰ *Chem-Dyne* concluded that a federal common law liability standard for CERCLA was consistent with *Kimbell's* three-part test because of the need for national uniformity and the need to protect the United States' interest in receiving reimbursement under the statute.¹⁰¹ However, many commentators have argued that *Chem-Dyne* inappropriately relied upon remarks in the legislative history, even by sponsors of CERCLA, that are an insufficient basis to displace state law with federal common law when such views are not found in the statute or an official committee report that the statute refers to as binding.¹⁰²

97. 572 F. Supp. 802 (S.D. Ohio 1983).

98. See *id.* at 805-08.

99. *Id.* at 807 (citing 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio)).

100. *Id.* at 807-08. See also Gulino, *supra* note 94, at 673-74 (citing CERCLA cases decided in 1983 and 1984 imposing joint and several liability).

101. *Id.* at 808-09 (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 728 (1979)); Aydelott, *supra* note 81, at 363.

102. See *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980)

In 1986, Congress implicitly ratified *Chem-Dyne's* approach to liability by adopting the Superfund Amendments and Reauthorization Act (SARA), which amended CERCLA to include an explicit statutory right for potentially responsible parties to seek contribution from one another.¹⁰³ Because contribution actions enable one tortfeasor to seek reimbursement from others jointly responsible for the harm, SARA's explicit recognition of contribution actions implicitly ratified joint and several liability under CERCLA, although the precise contours of joint and several liability remained unclear.¹⁰⁴ SARA implicitly ratified judicial decisions imposing expansive joint and several liability on potentially responsible parties and the goal of making the polluter pay.¹⁰⁵ However, it is uncertain whether Congress' implicit approval of joint and several liability was a general endorsement of courts using federal common law to interpret CERCLA.

There are a number of arguments against using federal common law to address uncertainties in CERCLA. First, there is some evidence in the statute's legislative history that Congress did *not* anticipate that federal common law would play a significant part in interpreting CERCLA. Notably, one of the statute's primary authors—then-Representative, now-Vice President Gore—stated, during the legislative debate about the limitations period for bringing suit under the statute, that state courts rarely employ federal common law and hence that it was “improbable” that courts would use federal common law to interpret CERCLA.¹⁰⁶ Additionally, most of the congressional discussion of the common law was arguably concerned with the use of state common law rather than federal common law.¹⁰⁷ Furthermore, it is not clear that Congress realized, when it enacted CERCLA in 1980, how many gaps there were in the statute and hence that many members anticipated the need for federal common law.¹⁰⁸ In *Citizens Elec. Corp. v.*

(“[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history.”); Sisk & Anderson, *supra* note 4, at 526-28.

103. See H.R. REP. NO. 99-253, § 74 (1986) reprinted in 1986 U.S.C.A.N. 2835, 2856; Niecko v. Emro Mktg. Co., 769 F. Supp. 973, 987 (E.D. Mich. 1991); Aydelott, *supra* note 86, at 363.

104. See Sisk & Anderson, *supra* note 4, at 528.

105. See Mank, *Dragon*, *supra* note 26, at 244-45; Richard H. Mays, *Settlements with SARA: A Comprehensive Review of Settlement Procedures Under the Superfund Amendments and Reauthorization Act*, 17 ENVTL. L. REP. (ENVTL. L. INST.) 10101-02 n.12 (Apr. 1987).

106. See 126 CONG. REC. H24,343 (1980) (statement of Rep. Gore); *accord id.* at H24,345 (statement of Rep. Gore) (observing that cases using federal common law “are infrequent and the precedents too disjointed to have a significant impact”); Nagle, *supra* note 90, at 1444 n.204; Sisk & Anderson, *supra* note 4, at 527-28 n.136.

107. See Nagle, *supra* note 90, at 1444; Sisk & Anderson, *supra* note 4, at 527-28 n.136 (arguing Representative Randolph simply supported use of “common law” in context of joint and several liability and never advocated general use of federal common law).

108. See Nagle, *supra* note 90, at 1443-44.

Bituminous Fire & Marine Ins. Co.,¹⁰⁹ the Seventh Circuit, in an opinion authored by Judge Easterbrook, refused to apply federal common law to the question of corporate dissolution because there was insufficient evidence that Congress intended courts to use federal common law to interpret CERCLA.¹¹⁰ Nevertheless, most judges have been attracted by federal common law standards as a way to facilitate CERCLA's remedial purposes.

C. A Federal Common Law of Successor Liability

1. Justifying a Federal Common Law of Successor Liability

In the wake of *Chem-Dyne* and SARA's implicit ratification of a common law of strict and joint and several liability, many federal courts were receptive to the argument that federal common law should govern the law of successor liability. In 1988, the Third Circuit, in *Smith Land & Improvement Corp. v. Celotex Corp.*,¹¹¹ was the first court of appeals to adopt a federal common law standard for successor liability in a CERCLA case. Acknowledging that neither the statute nor the legislative history specifically addressed successor liability, the Third Circuit fell back on the general principle that Congress wanted federal courts to use federal common law to address gaps in the statute. Citing *Chem-Dyne*, the Third Circuit in *Smith Land* held that "[t]he meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement [CERCLA]."¹¹²

Surprisingly, the Third Circuit did not even mention *Kimbell's* three-part test.¹¹³ Indirectly, the court followed *Kimbell's* first two prongs.¹¹⁴ First, the Third Circuit justified its implementation of a federal common law standard by contending that a nationally uniform test was needed to prevent responsible parties from using "a merger or consolidation

109. 68 F.3d 1016 (7th Cir. 1995).

110. See *id.* at 1019; Nagle, *supra* note 90, at 1443-45.

111. 851 F.2d 86 (3d Cir. 1988).

112. *Smith Land*, 851 F.2d at 91-92; Sisk & Anderson, *supra* note 4, at 527; Dopf, *supra* note 4, at 177.

113. The Third, Eighth and Ninth Circuits all failed to cite *Kimbell*. See *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1249 n.5 (Kennedy, J., concurring) ("[I]nexplicably, neither the Third Circuit in [*Smith Land*] . . . nor the Ninth Circuit in [*Louisiana-Pacific*], mentioned the [*Kimbell*] test. Both of those courts concluded, almost without analysis, that a federal common law of successor liability was required by CERCLA."); Sisk & Anderson, *supra* note 4, at 530 (observing that three circuit court decisions which adopted a federal common law rule for corporate successor liability under CERCLA (*Smith Land*, *Louisiana-Pacific*, and *Mexico Feed & Seed*) did not mention or apply *Kimbell* test); Dopf, *supra* note 4, at 180 n.57.

114. See Sisk & Anderson, *supra* note 4, at 529-30.

under the laws of particular states which unduly restrict successor liability."¹¹⁵ Second, the court argued that a federal common law based on the "general doctrine of successor liability in operation in most states" was needed because of the danger that "a few states" could apply "excessively narrow statutes" that might interfere with CERCLA's goal of making responsible parties, including successor corporations, pay instead of taxpayers.¹¹⁶

In 1990, the Ninth Circuit, in *Louisiana-Pacific Corp. v. Asarco, Inc.*,¹¹⁷ quoted and agreed with *Smith Land* that Congress intended courts to develop a federal common law to supplement CERCLA.¹¹⁸ Relying on *Smith Land*, the *Louisiana-Pacific* court argued that a federal common law of successor liability was needed to promote national uniformity in construing CERCLA and to prevent unduly restrictive state law from interfering with CERCLA's liability scheme.¹¹⁹ If a state law unduly limited the EPA's authority to seek reimbursement from a successor corporation, then CERCLA's goal of imposing cleanup costs on those parties responsible for the contamination might be frustrated and these expenses would be borne by the taxpayer, contrary to the statute's purposes.¹²⁰

2. A Federal Common Law Based on the Mere Continuity Doctrine

In *Smith Land*, the Third Circuit adopted a federal common law standard but limited the scope of that standard by concluding that the mere continuity successor liability test followed in the majority of jurisdictions should set the standard for federal law.¹²¹ The *Smith Land* court stated, "[t]he general doctrine of successor liability in operation in most states should guide the court's decision rather than the excessively narrow statutes which might apply in only a few states."¹²²

In *Louisiana-Pacific*, the Ninth Circuit also held that the "the traditional rules of successor liability in operation in most states should

115. *Smith Land*, 851 F.2d at 92.

116. *Id.*

117. 909 F.2d 1260 (9th Cir. 1990).

118. *Id.* at 1263, 1265-66 (quoting *Smith Land*, 851 F.2d at 92) ("the meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement the [CERCLA] statute").

119. See *Louisiana-Pacific Corp. v. Asarco*, 909 F.2d 1260, 1263 n.2 (9th Cir. 1990); Sisk & Anderson, *supra* note 4, at 530.

120. See *Louisiana-Pacific*, 909 F.2d at 1263 n.2; Sisk & Anderson, *supra* note 4, at 530.

121. See *Smith Land & Improvement Corp. v. Celotex*, 851 F.2d 86 (3d Cir. 1988); see also Sisk & Anderson, *supra* note 4, at 522 (observing Third Circuit was first circuit to endorse federal common law in this area).

122. *Smith Land*, 851 F.2d at 92.

govern," or in other words, that the four exceptions under the mere continuity rule set the standard for federal common law.¹²³ Asarco failed to raise the fifth exception known as the product-line exception and so the Ninth Circuit declined to consider it.¹²⁴ Asarco did argue that the court should adopt the broader substantial continuity approach, but the court did not address the issue because it concluded that the successor had not continued the business.¹²⁵

3. A Federal Common Law Based on the Substantial Continuity Doctrine

Subsequently, however, other federal courts have gone beyond the majority mere continuity doctrine and have instead adopted the minority substantial continuity rule as the standard for a federal common law of successor liability.¹²⁶ They have rejected the mere continuation rule by arguing that it makes it too easy for corporations otherwise liable under CERCLA to use corporate restructuring to avoid liability.¹²⁷

In 1990, the United States District Court for the Western District of Kentucky, in *United States v. Distler*,¹²⁸ was one of the first courts to adopt the substantial continuity doctrine as the standard for federal common law principles of successor liability.¹²⁹ Because the successor corporation was comprised of the same managers, initially produced the same products, and served the same customers as the predecessor, the court found that there was a substantial continuity and held the successor liable under CERCLA for the predecessor's disposal of wastes.¹³⁰

123. *Louisiana-Pacific*, 909 F.2d at 1263.

124. *See id.*

125. *See id.* at 1265-66.

126. *See* B.F. Goodrich v. Betkoski, 99 F.3d 505, 515 (2d Cir. 1996); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 488 n.10 (8th Cir. 1992); *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1286 (E.D. Pa. 1994) (stating "that CERCLA's broad remedial goals will be served by application of the substantial continuity test to determine successor liability of an asset purchaser"); *Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt. Corp.*, 817 F. Supp. 225, 233 (D.N.H. 1993) (stating that mere continuity rule for successor liability under state law does not "further the goals of CERCLA"); *United States v. Western Processing Co.*, 751 F. Supp. 902, 905 (W.D. Wash. 1990) (invoking federal common law rule based on substantial continuity doctrine because a "more expansive view of successor liability under CERCLA fosters a more equitable sharing of remediation costs"); *United States v. Distler*, 741 F. Supp. 637, 642-43 (W.D. Ky. 1990); Sisk & Anderson, *supra* note 4, at 516 n.65; Busby, *supra* note 26, at 358-60.

127. *See Mexico Feed and Seed*, 980 F.2d at 488-89; Sisk & Anderson, *supra* note 4, at 516 n.65; Busby, *supra* note 26, at 358-60.

128. *Distler I*, 741 F. Supp. 637 (W.D. Ky. 1990).

129. *See id.* at 642-43; Schnapf, *supra* note 31, at 462-63; Clarke, *supra* note 56, at 1321-24.

130. *Distler I*, 741 F. Supp. at 643.

However, after the Sixth Circuit in a different case rejected the substantial continuity doctrine and held that state law governed successor liability under CERCLA,¹³¹ the district court reconsidered and vacated its prior decision.¹³²

In 1992, the Fourth Circuit, in *United States v. Carolina Transformer Co.*,¹³³ citing *Smith Land* and *Louisiana-Pacific*,¹³⁴ concluded that courts should interpret CERCLA to impose successor liability to achieve its goals of national uniformity and to prevent responsible parties from using lax state laws to avoid liability.¹³⁵ In adopting successor liability under CERCLA, the Fourth Circuit stated that courts "must consider traditional and evolving principles of federal common law."¹³⁶

The Fourth Circuit, in *Carolina Transformer* squarely faced the issue of whether to follow North Carolina's mere continuation rule or instead to adopt the broader substantial continuity test used in a minority of other jurisdictions as the standard for the federal common law.¹³⁷ Under North Carolina's mere continuity test for successor liability, the purchaser, FayTransCo, would not be liable because its ownership interests were different from the seller, Carolina Transformer.¹³⁸ The District Court in *Carolina Transformer* adopted the multifactor substantial continuity test rather than the mere continuity doctrine.¹³⁹ The Fourth Circuit adopted the substantial continuity approach in large part because "the record as a whole leaves the unmistakable impression that the transfer of the Carolina Transformer business to FayTranCo was part of an effort to continue the business in all material respects yet avoid the environmental liability . . ."¹⁴⁰

131. *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991); see *infra* note 161 and accompanying text.

132. See *Distler II*, 865 F. Supp. 398, 400-01 (W.D. Ky. 1991); Gentile, *supra* note 4, at 711-12; Schnapf, *supra* note 31, at 463 n.146. Because Ohio was the state of incorporation of both the seller and purchaser, the district court on reconsideration vacated its earlier decision and applied Ohio's mere continuity" approach to successor liability and concluded that the purchaser was not liable because there was not sufficient identity of ownership between the seller and purchaser. See *Distler II*, 865 F. Supp. at 400-01.

133. 978 F.2d 832 (4th Cir. 1992).

134. 978 F.2d 832 (4th Cir. 1992).

135. See *id.* at 838.

136. *Id.* at 837-38 (quoting *United States v. Monsanto*, 858 F.2d 160, 171 (4th Cir. 1988)).

137. See *Carolina Transformer*, at 837-38; Gentile, *supra* note 4, at 710-11 (stating *Carolina Transformer* applied "substantial continuity" approach that went beyond North Carolina law, which follows mere continuity test); Sisk & Anderson, *supra* note 4, at 523.

138. See *Carolina Transformer*, 978 F.2d at 838; Gentile, *supra* note 4, at 710-11.

139. *Carolina Transformer*, 978 F.2d at 838.

140. *Id.* at 841.

In 1992, the Eighth Circuit, in *United States v. Mexico Feed and Seed*,¹⁴¹ agreed with other courts of appeals that successor corporations are potentially liable under CERCLA to prevent evasion of liability through sham corporate transactions and because even good faith successors have enjoyed the benefits of their predecessor's disposal of waste.¹⁴² While the Eighth Circuit did not address whether courts should use a state law or federal common law standard for successor liability, the court suggested that the district court below was "probably correct" in applying federal law because of "the national application of CERCLA and fairness to similarly situated parties."¹⁴³ Additionally, the court stated that "CERCLA must also incorporate the [four] traditional doctrines developed to prevent corporate successors from adroitly slipping off the hook."¹⁴⁴

In *Mexico Feed and Seed*, the district court initially applied the substantial continuity test.¹⁴⁵ After favorably discussing cases applying that approach, the Eighth Circuit stated that cases imposing the substantial continuity doctrine have "correctly focused on preventing those responsible for the wastes from evading liability through the structure of subsequent transactions."¹⁴⁶ However, the court concluded that the substantial continuity rule did not apply because the successor corporation included assets from another corporation and was not merely a replica of the predecessor's operations with a different corporate name.¹⁴⁷ Nevertheless, in dicta, the *Mexico Feed* court suggested that the expansive substantial continuity test was needed to insure that responsible parties did not escape their liability.¹⁴⁸

a. Federal Labor Law and the Substantial Continuity Doctrine

To justify their application of the broad substantial continuity rule as the federal common law standard for determining successor liability under CERCLA, both the *Carolina Transformer* and *Mexico Feed and Seed* courts referred to the Supreme Court's use of an expansive substantial continuation or "continuity of enterprise" test in a series of labor

141. 980 F.2d 478 (8th Cir. 1992).

142. See *id.* at 486-87 ("Congress could not have intended that those corporations be enabled to evade their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of former liabilities."); Busby, *supra* note 26, at 360.

143. *Id.* at 487 n.9.

144. *Id.* at 487.

145. *Id.* at 487.

146. *Id.* at 488.

147. See *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 489-90 (8th Cir. 1992).

148. See *id.* at 488-89; Busby, *supra* note 26, at 360.

relations cases.¹⁴⁹ In *Golden State Bottling Co. v. NLRB*,¹⁵⁰ the Supreme Court held that an employer's liability under the National Labor Relations Act (NLRA)¹⁵¹ for wrongful discharge of an employee extended to a new entity that had continued the business enterprise and retained the same unit of employees. The Court argued that the substantial continuation was fair because the purchaser was aware of the pending labor issues when it bought the company and could seek a lower price to address any liability resulting from pending unfair labor practice charges. Several courts have relied on *Golden State* and subsequent cases to justify the substantial continuation doctrine in CERCLA successor liability cases.¹⁵²

However, several courts and commentators have persuasively argued that it is inappropriate to apply *Golden State's* "substantial continuity" doctrine to CERCLA. Federal courts clearly have the power to create federal common law in the labor area because the NLRA is an area governed exclusively by federal law.¹⁵³ Under the Labor Management Relations Act of 1947 (LMRA),¹⁵⁴ the Supreme Court has specifically recognized the power of federal courts to fashion federal common law and preempt state law.¹⁵⁵ By contrast, CERCLA does not preempt parallel or more stringent state hazardous waste and cleanup laws.¹⁵⁶

149. See *Mexico Feed and Seed*, 980 F.2d at 487-89 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973)); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)); Sisk & Anderson, *supra* note 4, at 517-522; Busby, *supra* note 26, at 370-71.

150. 414 U.S. 168 (1973); Sisk & Anderson, *supra* note 4, at 517-522; Busby, *supra* note 26, at 370-71; see also *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 45 (1987) (holding that successor employer continuing operations is liable for predecessor's federal labor law violations).

151. 29 U.S.C. §§ 141-197 (1994); Sisk & Anderson, *supra* note 4, at 517-522.

152. See, e.g., *Mexico Feed & Seed*, 980 F.2d at 487-89; *Washington v. United States*, 930 F. Supp. 474, 478 (W.D. Wash. 1996); *United States v. Western Processing Co.*, 751 F. Supp. 902, 905 (W.D. Wash. 1990); *United States v. Distler*, 741 F. Supp. 637, 642-43 (W.D. Ky. 1990); see also B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir. 1996) (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)); *Carolina Transformer*, 978 F.2d at 838 (same); Sisk & Anderson, *supra* note 4, at 517-522.

153. See *City Management Corp. v. U.S. Chemical Co.*, 43 F.3d 244, 253 (6th Cir. 1994); Light, *supra* note 61, at 82-83; Schnapf, *supra* note 31, at 458 n.125; Sisk & Anderson, *supra* note 4, at 517-522.

154. 29 U.S.C. § 141-197 (1994).

155. See *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); Light, *supra* note 61, at 80-82.

156. See Light, *supra* note 61, at 83; Schnapf, *supra* note 31, at 458 n.125; Sisk & Anderson, *supra* note 4, at 517-522; see generally 42 U.S.C. § 9614 (1994) (a) (CERCLA does not preempt state law), (b) (multiple recovery of same costs not allowed under both state and federal law). See, e.g., 415 ILL. COMP. STAT. ANN. 5/22-2; MASS. ANN. LAWS ch. 21E, §§ 1-18 (Law Co-op 1999); N.C. GEN. STAT. §§ 130A-310 to -310.13; Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 267-68 (1997) (at least forty-five states have statutes similar to CERCLA).

b. Does the Substantial Continuity Doctrine Require a Successor to Have Knowledge or a Causal Relationship with the Predecessor Disposal Activities?

Courts have divided about whether the successor must have had knowledge of the predecessor's potential environmental liabilities under CERCLA in order to apply the substantial continuity test for successor liability. Several courts, including both the Eighth Circuit in *Mexico Feed* and the Ninth Circuit in *Louisiana-Pacific*, have argued that it is inappropriate to apply the expansive substantial continuity test for successor liability if the successor had no knowledge of its predecessor's potential CERCLA liability for its disposal activities.¹⁵⁷ *Mexico Seed* and some district courts have suggested that this knowledge requirement should be read broadly to include successors that should have known of the seller's potential liability, but chose to be willfully blind.¹⁵⁸ However, some lower federal courts applying the substantial continuity test have argued that a successor's lack of knowledge should not bar liability because CERCLA's legislative purpose is to reach all private parties that have benefited from disposal activities.¹⁵⁹

157. See *Mexico Feed & Seed*, 980 F.2d at 489-90 (finding no liability under CERCLA where successor had no knowledge of predecessors' disposal activities); *Louisiana-Pacific v. Asarco*, 909 F.2d 1260, 1265-66 (9th Cir. 1990) (finding no liability under CERCLA where successor "did not have actual notice of [predecessor's] potential CERCLA liability" and successor did not continue slag business); *New York v. Panex Ind., Inc.*, No. 94-CV-0400E(H), 1996 WL 378172, at *8 (W.D.N.Y. June 24, 1996) (holding substantial continuity test "is significantly limited to instances where the circumstances indicate that the asset purchaser had actual notice or knowledge of the potential CERCLA liability" (citing *Mexico Feed & Seed*)); *United States v. Atlas Minerals & Chems., Inc.*, 824 F. Supp. 46, 50 (E.D. Pa. 1993) (stating purpose of substantial continuity test is to avoid "strategic behavior by corporate actors who know of or anticipate CERCLA problems"); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 812 F. Supp. 124, 129 (N.D. Ill. 1993) (holding substantial continuity test requires that successor have knowledge of predecessor's potential CERCLA liability); Gentile, *supra* note 4, at 710; Schnapf, *supra* note 31, at 470-71, 476-80; Sisk & Anderson, *supra* note 4, at 566-67 n.393 (listing cases); but see *Gould, Inc. v. A & M Battery and Tire Serv.*, 950 F. Supp. 653, 659-60 (M.D. Pa. 1997) (agreeing with *United States v. Peirce*, Nos. 83-CV-1623, 91-CV-0039, 92-CV-0562, 1995 WL 356017, at *3 (N.D.N.Y. Feb. 21, 1995) that *Mexico Feed & Seed* did not limit substantial continuity test to cases where purchaser had knowledge or substantial ties to seller).

158. See *Mexico Feed & Seed*, 980 F.2d at 489-90 ("Nor is this a case of willful blindness."); *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1287 n.26 (E.D. Pa. 1994) (suggesting in dicta that "it may be proper to reserve substantial continuity successor liability for a purchaser who should have known after reasonable investigation of the seller's liability;" however, issue was irrelevant because successor did have knowledge of such liability); *Atlas Minerals*, 824 F. Supp. at 50 (quoting *Mexico Feed & Seed*, 980 F.2d at 489-90).

159. See *Arizona v. ESCO*, No. Civ. 93-0937, 1997 WL 259520, at *2 (D. Ariz. Mar. 26, 1997) (holding successor could be liable under CERCLA even where it had no knowledge of predecessors' disposal activities); *Gould, Inc. v. A & M Battery and Tire Serv.*, 950 F. Supp. 653, 659-60 (M.D. Pa. 1997); *Washington v. United States*, 930 F. Supp. 474, 482 (W.D. Wash. 1996) ("The idea that a successor must have knowledge of a potential for CERCLA liability before liability may attach to it, is illogical considering CERCLA's policies of strict liability and retroactive liability."); *United States v. Peirce*, No. 83-CV-1623, 1995 WL 356017, at *3 (N.D.N.Y. Feb. 21, 1995) (stating that knowledge of potential CERCLA liability by successor is "merely additional factor[] to be considered" in determining where to

Additionally, courts have divided about whether there must be a causal relationship between the successor and the environmental harm in order to apply the substantial continuity test for successor liability under CERCLA.¹⁶⁰ This issue usually arises where the predecessor had stopped using the disposal site before the successor's purchase of the corporate assets and the issue is whether the successor is liable for the waste generated prior to the purchase.¹⁶¹

D. Courts Adopting the State Law of Corporate Successorship

Before the Supreme Court's *O'Melveny & Myers* decision in 1994, only a minority of federal courts chose to follow state law in deciding corporate successor liability under CERCLA. In 1991, the Sixth Circuit, in *Anspec Co. v. Johnson Controls, Inc.*,¹⁶² held that successor corporations are potentially liable under CERCLA because Congress intended that the definition of "corporation" include successor corporations.¹⁶³ The majority opinion stated that the district court on remand should follow Michigan law in determining successor liability.¹⁶⁴

In her concurring opinion, Judge Kennedy, agreed with the majority that Michigan's law of successor liability should apply, but stated that she wrote separately to address the issue in more depth. While federal law ultimately determines CERCLA liability, state law governs the creation and legal status of corporations and therefore the law of the state of incorporation should determine the liability of successor corporations, "unless the application of that law would conflict with federal policy."¹⁶⁵

Under *Kimbell's* three-part test, she concluded that state corporate law was ordinarily consistent with CERCLA and that there was usually no need to displace state law with federal common law in determining

apply substantial continuity test); Schnapf, *supra* note 31, at 471-76; Sisk & Anderson, *supra* note 4, at 566-67 n.393 (listing cases);

160. Compare *United States v. Vermont Am. Corp.*, 871 F. Supp. 318 (W.D. Mich. 1994) (finding no CERCLA liability under substantial continuity test where purchaser did not know of predecessor's disposal activities and had no responsibility for disposal activities that ceased five years prior to the purchase) and *Atlas Minerals*, 824 F. Supp. at 48-52 (requiring "causal link between CERCLA defendant and the environmental harm"), with *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1286 (E.D. Pa. 1994) (imposing CERCLA liability under substantial continuity doctrine even though no causal link between successor and disposal activities); see Schnapf, *supra* note 31, at 480-84; Sisk & Anderson, *supra* note 4, at 566-67 n.394 (listing cases); Neumann, *supra* note 27, at 1402-04..

161. See Schnapf, *supra* note 31, at 480-84.

162. 922 F.2d 1240 (6th Cir. 1991).

163. *Id.* at 1245-47.

164. See *id.* at 1248.

165. See *id.* at 1248 (Kennedy, J., concurring).

successor liability.¹⁶⁶ Under *Kimbell's* first prong, she concluded that it was not essential to have a uniform federal common law of successor liability to achieve CERCLA's goals because state corporate laws on successor liability were already relatively uniform.¹⁶⁷ Furthermore, she found that "[n]either the language nor the legislative history of CERCLA provides a basis for concluding that the creation of a uniform federal common law rule of successorship liability was intended."¹⁶⁸ Under *Kimbell's* second prong, she argued that there was no evidence that applying state successor liability laws would significantly interfere with CERCLA's policies; the fact that a uniform federal common law might be somewhat more convenient was not enough under *Kimbell* to justify displacing state law.¹⁶⁹ Any fear that states might weaken their successor liability laws in the future—"a race to the bottom"—was groundless because states have strong interests in protecting their citizens and natural resources.¹⁷⁰ Under *Kimbell's* third prong, she argued that adopting a federal common law rule would disrupt existing commercial law relationships founded on existing state corporate successor liability laws.¹⁷¹ Accordingly, under *Kimbell's* three prongs, she argued that state successor liability laws should determine liability under CERCLA.

In 1994, the Sixth Circuit, in *City Management Corp. v. U.S. Chemical Co.*,¹⁷² followed *Anspec's* holding that under CERCLA the liability of successor corporations is determined by state corporation law and not by federal common law.¹⁷³ In construing state law, the Sixth Circuit concluded that Michigan courts applied the traditional mere continuity rule, except in products liability cases, where at least one Michigan Supreme Court case had used the broader substantial continuity approach.¹⁷⁴ Because Michigan courts apply the substantial continuity approach only in products liability cases, *City Management* held that it was inapplicable in CERCLA cases and, therefore, that the district court had erred in applying that doctrine.¹⁷⁵

In 1993, the First Circuit, in *John S. Boyd v. Boston Gas*, may have implicitly followed Massachusetts' mere continuity rule for determining

166. See *id.* at 1249 (Kennedy, J., concurring).

167. See *id.* (Kennedy, J., concurring).

168. *Id.* at 1248 (Kennedy, J., concurring). See also *id.* at 1251 (Kennedy, J., concurring).

169. See *id.* at 1250 (Kennedy, J., concurring).

170. See *id.* (Kennedy, J., concurring).

171. See *id.* at 1250-51 (Kennedy, J., concurring).

172. 43 F.3d 244 (6th Cir. 1994).

173. *Id.* at 250-51, 253.

174. *Id.* at 251-53 (discussing *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 877-84 (Mich. 1976)).

175. *Id.* at 252-53.

successor liability under CERCLA.¹⁷⁶ *Boyd* cited an earlier First Circuit decision applying Massachusetts' mere continuity successor liability rule in a diversity of citizenship case.¹⁷⁷ *Boyd* stated that a successor corporation could be liable under CERCLA only if it fit within the four exceptions of the mere continuity doctrine, but did not explicitly address whether it was following state law or using a federal common law standard based on the majority mere continuity rule.¹⁷⁸

E. Under Kimbell the Arguments for State Successor Law Are Stronger

While most federal courts addressing the issue of successor liability between 1988 and 1993 invoked federal common law principles, Judge Kennedy's concurring opinion in *Anspec*, arguing for use of state corporate law was the most persuasive of all the CERCLA decisions addressing successor liability because she explicitly and carefully addressed *Kimbell's* three-pronged test.¹⁷⁹ Several cases favoring a federal common law of successor liability had argued that a nationally uniform approach was needed under CERCLA, but Judge Kennedy showed that that contention is weak because state corporate law in this area is already relatively uniform.¹⁸⁰ Additionally, she pointed out that cases favoring a federal common law of successor liability failed to provide any real evidence that any state's law of successor liability was so restrictive that it was likely to interfere with CERCLA's purposes.¹⁸¹ Furthermore, proponents of a federal common law of successor liability typically failed to address *Kimbell's* third prong—whether such an approach would interfere with contractual relations under state law.¹⁸²

The best argument for a federal common law of successor liability is that it would advance CERCLA's broad remedial purpose of making responsible parties pay and that successor corporations should pay because they have benefited economically from their predecessor's waste disposal activities.¹⁸³ While CERCLA's text and legislative history are notoriously murky, there is some support for applying the broad

176. See *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408-09 (1st Cir. 1993); Sisk & Anderson, *supra* note 4, at 524 n.113.

177. See *Boyd*, 992 F.2d at 408 (citing *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 692 (1st Cir. 1984)); Sisk & Anderson, *supra* note 4, at 524 n.113.

178. See *Boyd*, 992 F.2d at 408 (citing *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 692 (1st Cir. 1984)); Sisk & Anderson, *supra* note 4, at 524 n.113.

179. See *supra* note 161 and accompanying text.

180. See *Smith Land*, *supra* note 111; *Louisiana-Pacific Corp.*, *supra* note 112 and accompanying text.

181. See *id.*

182. See *Smith Land*, *supra* note 111.

183. See *supra* notes 27-29 and accompanying text.

remedial purposes approach.¹⁸⁴ *Kimbell's* three-part test is arguably loose enough to justify the use of federal common law to advance broad remedial purposes because it is not clear under its second prong to what extent a state law must interfere with a federal law to justify displacing state law with federal common law.¹⁸⁵

There are some additional reasons for questioning a federal common law of successor liability. In some areas of corporate and contract law, federal courts have usually applied state law principles rather than federal common law.¹⁸⁶ That raises the question of whether courts are consistent in applying federal common law to some areas of CERCLA, but not others. For example, many courts, including the Ninth Circuit, in a case decided prior to *Louisiana-Pacific*, have followed state law to decide whether a CERCLA claim may be filed against a dissolved corporation.¹⁸⁷ In *Louisiana-Pacific*, the Ninth Circuit attempted in a footnote to distinguish the earlier case by arguing that it had addressed the "capacity to be sued" and that its decision was different from a case dealing with the "imposition of liability."¹⁸⁸ However, the capacity to be sued affects the potential for CERCLA liability; therefore, it is not immediately obvious why successor liability is so different that it must be decided by federal common law rather than by state law.¹⁸⁹

Similarly, many courts use state law to interpret contractual releases of CERCLA liability that affect private contribution actions.¹⁹⁰ The Ninth Circuit in *Louisiana-Pacific* argued that uniformity was not necessary in the contractual release context, but was required in the corporate successorship context to enhance the "ability to seek reimbursement from responsible parties for cleaning up a hazardous waste site"¹⁹¹ Yet, corporate successor liability also often affects contribution among private responsible parties, and thus some

184. See Watson, *supra* note 29, at 293-94; *supra* note 29 and accompanying text.

185. See *supra* notes 85-87 and accompanying text.

186. See Sisk & Anderson, *supra* note 4, at 530-32.

187. See *Levin Metals Corp. v. Parr- Richmond Terminal Co.*, 817 F.2d 1448 (9th Cir. 1987) (holding CERCLA does not allow suit of corporation validly dissolved under California law); Sisk & Anderson, *supra* note 4, at 530-32; *supra* notes 161, 171, 175 and accompanying text.

188. *Louisiana-Pacific v. Asarco*, 909 F.2d 1260, 1263 n.1 (9th Cir. 1990) (discussing *Levin Metals Corp.*, 817 F.2d 1448).

189. Sisk & Anderson, *supra* note 4, at 531.

190. See *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993) (applying state law to interpret contractual release under CERCLA); *Olin Corp. v. Consol. Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993) (same); *United States v. Hardage*, 985 F.2d 1427, 1433 & n.2 (10th Cir. 1993) (same); *Mardan Corp. v. C.G.C. Music Corp., Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986) (same); Sisk & Anderson, *supra* note 4, at 531; see generally Aydelott, *supra* note 86, at 369-72 (discussing *Mardan* line of cases applying state law to contractual releases).

191. 909 F.2d at 1263 n.2.

commentators have contended that state law should decide successor liability if state law determines liability under release contracts.¹⁹²

Despite the fact that most federal courts addressing the issue of successor liability between 1988 and 1993 invoked federal common law principles, the intellectual rationale for displacing state corporate law was relatively weak. Beginning in 1994, the Supreme Court demolished the few remaining arguments for applying federal common law in this area.

IV. THE SUPREME COURT RESTRICTS THE FEDERAL COMMON LAW

In 1994, a unanimous Supreme Court, in *O'Melveny & Myers v. FDIC*,¹⁹³ clarified the *Kimbell Foods* test by stating that courts should use federal common law to displace state law only in "extraordinary" cases in which "there is a significant conflict between some federal policy or interest in the use of state law."¹⁹⁴ In *O'Melveny*, the Court rejected the Federal Deposit Insurance Corporation's (FDIC) argument that federal law governed the tort liability of a former corporate legal counsel accused of professional malpractice and breach of fiduciary duty against a savings and loan institution that the FDIC had taken over as receiver.¹⁹⁵ Because the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) explicitly preempted state law in other areas, the Court refused to find that FIRREA implicitly displaced state tort liability rules.¹⁹⁶

The Court emphasized that "cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.'"¹⁹⁷ The Court stated that "a significant conflict between some federal policy or interest and the use of state law" was a "precondition for recognition of a federal rule of decision." The Court specifically rejected several grounds that are often cited by federal courts to justify use of federal common law to determine successor liability. First, *O'Melveny* stated that the advantages of uniformity and convenience alone are not enough to justify adopting federal common law rules.¹⁹⁸ Accordingly, *O'Melveny* is inconsistent with cases that justified a federal common law of

192. See Sisk & Anderson, *supra* note 4, at 531.

193. 512 U.S. 79 (1994).

194. *Id.* at 87-89.

195. See *id.* at 80-83.

196. See *id.* at 85-87.

197. *Id.* at 87.

198. 512 U.S. at 88.

successor liability because it would promote national uniformity or convenience for the EPA.

Additionally, the mere fact that a federal common law rule would enable a federal agency to win litigation more often and thus protect the federal deposit insurance fund is not enough of a justification to displace state law with a federal common law rule.¹⁹⁹ *O'Melveny* stated: "[t]here is no federal policy that the fund should always win. Our cases have previously rejected 'more money' arguments remarkably similar to the one made here." Accordingly, *O'Melveny* is at odds with prior cases that have argued a federal common law of successor liability is needed to protect the federal Superfund. The Court concluded that the issue involved in *O'Melveny* was "not one of those extraordinary cases in which the judicial creation of a federal rule of decision [was] warranted."²⁰⁰

In 1997, the Supreme Court, in *Atherton v. FDIC*,²⁰¹ again rejected the creation of federal common law in a suit by the FDIC under FIRREA to address the standard of care for federal bank officers and directors.²⁰² While there were clearly differences between state and federal law regarding the liability of bank officers, these differences alone did not prove that there was such a serious conflict that federal law must displace state law because "our Nation's banking system has thrived despite [state law] disparities in matters of corporation governance."²⁰³ Again, as it had in *O'Melveny*, the Court emphasized that "[t]o invoke the concept of 'uniformity' . . . is not to prove its need."²⁰⁴

The Supreme Court's strong rejections of federal common law in both *O'Melveny* and *Atherton* casts grave doubts on cases that invoked the need for national uniformity in CERCLA cases to justify a federal common law of successor liability. While a uniform federal standard would be somewhat more efficient for the EPA to enforce than a series of different state standards, state successor liability law is relatively uniform.²⁰⁵ The mere continuity rule is the overwhelming majority

199. See *id.* (rejecting FDIC's contention that federal common law standard was needed to prevent state law from diminishing deposit insurance fund); Sisk & Anderson, *supra* note 4, at 533.

200. *Id.* at 89.

201. 519 U.S. 213 (1997).

202. See *id.* at 215-17.

203. *Id.* at 220. See also *id.* at 218 (explaining, "when courts decide to fashion rules of federal common law, 'the guarding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must be specifically shown'" (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966))).

204. *Id.* at 220.

205. See *infra* notes 215-16 and accompanying text.

rule.²⁰⁶ Accordingly, it is difficult to argue that state law is so inconsistent that a federal standard of successor liability is needed.

Additionally, *O'Melveny* clearly rejected the "more money" argument of the FDIC and concluded that the goal of safeguarding the federal deposit insurance fund is not enough of a justification to displace state law with a federal common law rule.²⁰⁷ Although a federal common law based on the substantial continuity approach would yield more money to the Superfund, federal courts may not displace state law merely because federal agencies would win more often and increase the federal treasury. After *O'Melveny* and *Atherton*, the national uniformity and efficiency arguments used to justify a federal common law on successor liability in CERCLA cases no longer appear to be valid.²⁰⁸

V. RETURNING TO A STATE LAW OF SUCCESSOR LIABILITY AFTER *O'MELVENY* AND *ATHERTON*?

A. Courts Rejecting Federal Common Law

1. The Ninth Circuit Retreats from the Federal Common Law

In 1997, the Ninth Circuit, in *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant, Inc.*,²⁰⁹ overruled its prior decision in *Louisiana-Pacific* that had established a federal common law of corporate successor liability.²¹⁰ The *Atchison* court concluded that *O'Melveny* and *Atherton* "squarely refute the wisdom of fashioning a federal common law on this issue."²¹¹ Accordingly, *Atchison* relied on the California law of corporate successor liability.²¹²

However, the Ninth Circuit issued an amended decision in *Atchison* that replaced its earlier opinion.²¹³ Because *Louisiana-Pacific* had relied upon the same mere continuation approach to successor liability used in California as the basis of federal common law, the *Atchison* court concluded that it did not need to decide either the issue of whether to use a federal common law approach or whether *Louisiana-Pacific*

206. *See id.*

207. 512 U.S. 79, 88 (1994) (rejecting argument that it should apply federal common law because application of state law depletes deposit insurance fund).

208. *See Sisk & Anderson, supra* note 4, at 538-43.

209. 132 F.3d 1295 (9th Cir. 1997).

210. *See Dopf, supra* note 4, at 185-90.

211. *Atchison*, 132 F.3d at 1301.

212. *See id.*

213. 159 F.3d 358 (9th Cir. 1998) (amending and replacing 132 F.3d 1295).

remained good law, because it would reach the same result under either state or federal common law.²¹⁴ Nevertheless, the amended *Atchison* opinion continued to "doubt" whether *Louisiana-Pacific's* justification for creating a federal common law was valid in light of *O'Melveny* and *Atherton*.

First, the amended *Atchison* opinion questioned *Louisiana-Pacific's* argument that federal rules of successor liability are justified by a "need for national uniformity."²¹⁵ The amended *Atchison* opinion argued that this national uniformity argument was weak because state law is already largely uniform on issues of successor liability, following the mere continuity rule.²¹⁶ Indeed, the amended opinion observed that federal courts that have attempted to create a federal common law have produced a far less certain body of law, especially because some courts have sought to adopt the minority substantial continuity theory as the basis for federal common law.²¹⁷

According to the amended *Atchison* opinion, the only real rationale for a federal common law is the desire to impose a broader substantial continuity theory in place of the majority mere continuity rule so that the EPA and the Superfund prevail more often.²¹⁸ However, *O'Melveny* clearly rejected the "more money argument."²¹⁹ After *O'Melveny* and *Atherton*, a court may create a federal common law standard only if state law would seriously conflict with federal objectives. The amended *Atchison* opinion found no basis for concluding that state successor liability law significantly interferes with federal law. It argued that no state "provides a haven for liable companies" and that there is no "reason to think that states will alter their existing successor liability rules in a 'race to the bottom' to attract corporate business."²²⁰ Thus, the amended *Atchison* opinion virtually demolished the arguments for a federal common law of successor liability in *Louisiana-Pacific*, but did not have to actually overrule that prior case.

214. *Id.* at 363-64.

215. *Id.* at 362 (quoting and questioning *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 n.2 (9th Cir. 1990)).

216. *Id.* at 362.

217. *Id.* at 362-63 n.5.

218. *Id.* at 363.

219. See *supra* note 103 and accompanying text.

220. *Atchison*, 159 F.3d at 364.

2. Redwing Carriers

In 1996, the Eleventh Circuit, in *Redwing Carriers Inc. v. Saraland Apts.*,²²¹ held that the CERCLA liability of limited partners should be determined by state law and not by federal common law standards.²²² Agreeing with Judge Kennedy's concurring opinion in *Anspec Co., Inc. v. Johnson Controls, Inc.*,²²³ that federal common law was not needed to prevent states from using lax corporate successor liability standards to establish "safe havens for polluters,"²²⁴ the Eleventh Circuit stated that her views pertained "with equal force in the context of state partnership rules governing the liability of limited partners."²²⁵ Accordingly, it is likely that the Eleventh Circuit would also reject the use of federal common law to determine corporate successor liability.²²⁶

B. The Second Circuit Still Invokes Federal Common Law

Conversely, in 1996, the Second Circuit in *B.F. Goodrich v. Betkoski*,²²⁷ adopted the substantial continuity approach as the federal common law standard for corporate successor liability because that expansive doctrine "is more consistent with the Act's goals" and is "superior to the older and more inflexible 'identity' rule."²²⁸ The Second Circuit did not fully articulate why CERCLA's goals require the substantial continuity rule, but the case emphasized that prior decisions in that and other circuits had concluded that CERCLA is a "broad remedial statute."²²⁹ However, in its initial opinion, the Second Circuit in *B.F. Goodrich* did not even cite *O'Melveny* or *Kimbell*.²³⁰

Because the court failed to address these Supreme Court decisions, the losing parties petitioned the Second Circuit for a rehearing of the case.²³¹ In reviewing the petition for a rehearing, the Second Circuit in a brief opinion quoted the three-part *Kimbell* test and then quoted *O'Melveny*'s clarification that use of federal common law is justified only

221. 94 F.3d 1489 (11th Cir. 1996).

222. See *id.* at 1499-1502.

223. 922 F.2d 1240 (6th Cir. 1991).

224. See *id.* at 1248-51 (Kennedy, J., concurring); *Redwing Carriers*, 94 F.3d at 1501-02; Sisk & Anderson, *supra* note 4, at 549.

225. *Redwing Carriers*, 94 F.3d at 1501-02; Sisk & Anderson, *supra* note 4, at 549.

226. See Sisk & Anderson, *supra* note 4, at 549.

227. 99 F.3d 505 (2d Cir. 1996).

228. *Id.* at 519; Sisk & Anderson, *supra* note 4, at 550.

229. *B.F. Goodrich*, 99 F.3d at 514 (quoting *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2d Cir. 1992)).

230. See *id.* at 518-20; Sisk & Anderson, *supra* note 4, at 550.

231. See Sisk & Anderson, *supra* note 4, at 550.

where there is a "significant conflict" between federal law and use of state law.²³² The Second Circuit contended that its prior decision was not inconsistent with these Supreme Court cases. Because *O'Melveny* had seriously questioned cases that simply relied on a national uniformity rationale for using federal common law,²³³ the Second Circuit argued that it had not impermissibly relied on the convenience of national uniformity rather than a real conflict between CERCLA and state corporate law. "Although we noted the desirability of uniformity in the CERCLA context, our primary reason for adopting a federal common law rule was our concern that allowing state rules such as the inflexible and easily evaded 'identity' rule to control the question of successor liability would defeat the goals of CERCLA."²³⁴ The Court argued that its decision to apply federal common law in this area was consistent with the three-part *Kimbell* test because "there is a significant need for a uniform rule, allowing lenient state law rules to control would defeat federal policy, and we perceive no danger that our decision to adopt a federal rule of 'substantial continuity' will unduly upset existing corporate relationships."²³⁵ However, the Second Circuit failed to address similarities between the FDIC's more money argument in *O'Melveny* and the court's argument that CERCLA's broad remedial purposes required an expansive federal common law test.²³⁶

VI. *BESTFOODS*

A. *Bestfoods Restricts Derivative Liability for Corporate Parents*

In 1998, the Supreme Court, in *United States v. Bestfoods*,²³⁷ addressed whether a parent corporation could be derivatively liable under CERCLA simply because it participated in or exercised control over the operations of a subsidiary that was liable under the statute. The Court did not decide the issue of whether courts should use federal common law or state law to determine parental liability under CERCLA.²³⁸ However, the Court strongly stated that courts should not use CERCLA's general remedial purposes as a basis for rejecting traditional

232. See *B.F. Goodrich v. Betkoski*, 112 F.3d 88, 90-91 (2d Cir. 1997) (denying petition for rehearing); Sisk & Anderson, *supra* note 4, at 550.

233. See *supra* note 197 and accompanying text.

234. *B.F. Goodrich*, 112 F.3d at 91.

235. *Id.*; Sisk & Anderson, *supra* note 4, at 550.

236. See *B.F. Goodrich*, 112 F.3d at 90-91; Sisk & Anderson, *supra* note 4, at 550-51.

237. 118 S. Ct. 1876 (1998).

238. See Silecchia, *supra* note 28, at 123.

corporate law principles. The Court's strong preference for fundamental corporate law doctrine suggests that it prefers following state law, although its approach could be reconciled with a narrow federal common law that follows the corporate law in most states. In light of *Bestfoods*, there is no basis for a federal common law of parental corporation liability that is dramatically broader than traditional corporate liability doctrines such as piercing the corporate veil.

In *Bestfoods*, the Court, in a unanimous decision written by Justice Souter, emphasized that nothing in CERCLA suggests that Congress intended to reject fundamental corporate law principles. The Court first observed that it is a "general principle of corporation law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries" merely because it controls stock ownership.²³⁹ The Court then pointed out that "nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible."²⁴⁰ In light of CERCLA's failure to address the scope of corporate liability, a court must presume that Congress intended to leave traditional common-law notions of corporate liability in place. The Court stated that "the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'"²⁴¹ While the Court did not directly address the issue, *Bestfoods* suggests that CERCLA's implicit remedial purposes are an insufficient justification to reject fundamental corporate law principles because only explicit statutory language is enough to preempt such basic legal doctrines.

Under established common-law principles of corporate law, a parent corporation's corporate veil may be pierced and the shareholder of a parent company may be held liable for a subsidiary corporation's conduct "when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf."²⁴² Again, the Court emphasized that CERCLA did not purport to change basic principles of veil piercing. The Court stated: "[n]othing in CERCLA purports to rewrite this well-settled rule, either."²⁴³

239. *Bestfoods*, 118 S. Ct. at 1884.

240. *Id.* at 1885.

241. *Id.* (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

242. *Id.*

243. *Id.*

In *Bestfoods*, the Court explicitly stated it was not addressing whether corporate derivative liability under CERCLA should be decided by state law or by federal common law. In a long footnote, the Court cited conflicting cases on this issue, noting that "there is significant disagreement . . . over whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing."²⁴⁴ The Court found that "the question is not presented in this case" because none of the parties had argued that the choice of state as opposed to federal law would affect the parent's derivative liability.²⁴⁵ Thus, the Court did not directly address the issue of whether courts should apply state or federal rules of parental liability.²⁴⁶

In *Bestfoods*, the Court did hold that a corporation may be liable under CERCLA if it violates express provisions in the statute. While restricting the possible derivative liability of parent corporations to traditional corporate law principles of veil piercing, the Court stated that a parent corporation may incur direct "operator" liability if it actually manages, directs or conducts operations of the subsidiary's facility that are closely related to pollution producing or waste control activities of the subsidiary because such conduct creates liability under the statute's express provisions.²⁴⁷ Under CERCLA, an "operator" is defined as a person, including a corporation, which manages, directs, or conducts operations specifically related to pollution, including the leakage or disposal of hazardous substances.²⁴⁸

Nevertheless, in determining whether the parent's actions were enough to create such direct liability, the Court criticized the District Court below for failing to recognize that it was appropriate under established corporate law principles for directors and officers of the parent to also serve as directors and officers of the subsidiary without automatically incurring liability under CERCLA.²⁴⁹ According to the Supreme Court, the District Court had "erroneously, if unintentionally, treated CERCLA as though it displaced or fundamentally altered common law standards of limited liability."²⁵⁰ The Court rejected the imposition of a "relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability" because "such a rule does not arise from

244. *Id.* at 1885 n.9.

245. *Id.*

246. See Silecchia, *supra* note 28, at 123.

247. *Bestfoods*, 118 S. Ct. at 1886.

248. See CERCLA, § 107(a)(2), 42 U.S.C.A. § 9607(a)(2).

249. *Bestfoods*, 118 S. Ct. at 1888-89.

250. *Id.* at 1889.

congressional silence, and CERCLA's silence is dispositive."²⁵¹ Instead, courts should examine established "norms of corporate behavior (undisturbed by any CERCLA provision) [as] crucial reference points" in deciding whether a parental officer's oversight of a subsidiary create liability under the statute because these activities "are eccentric under accepted norms of parental oversight of a subsidiary's facility."²⁵²

B. Does Bestfoods Imply that State Corporate Law Is the Norm?

Although the Court in *Bestfoods* expressly left open the question of whether lower courts interpreting CERCLA should look to traditional state corporate law norms rather than federal common law for accepted principles governing parental supervision of subsidiaries, some commentators have suggested that the Court implied this interpretation.²⁵³ The general rule is that state common-law principles apply unless a federal statute explicitly addresses an issue.²⁵⁴ CERCLA is silent about the scope of corporate liability beyond listing corporations as within the scope of potentially liable parties.²⁵⁵ While it mainly referred to "fundamental" or "common law" principles of corporate law rather than explicitly stating that state corporate law governed the issue of parental liability,²⁵⁶ the Court suggested in one sentence that courts should normally follow state law when it stated: "CERCLA is thus like many another congressional enactment in giving no indication 'that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.'"²⁵⁷ Because state corporate law is relatively uniform,²⁵⁸ the Court's frequent references in *Bestfoods* to "fundamental" or "common law" corporate law principles arguably implies that federal courts should normally defer to state corporate law standards unless a state's corporate law significantly interferes with a federal statute's explicit provisions.

251. *Id.*

252. *Id.*

253. See George C. Hopkins, *United States v. Bestfoods: The U.S. Supreme Court Sets New Limits on the Direct Liability of Parent Corporations for Polluting Acts of Subsidiaries*, 29 ENVTL. L. REP. (News & Analysis) 10545-49 (Sept. 1999); Gentile, *supra* note 4, at 709 (observing "throughout its decision the Court repeatedly deferred to state corporation law principles").

254. See *Bestfoods*, 118 S. Ct. at 1884-1886 (citing *United States v. Texas*, 507 U.S. 529, 534 (1993) ("[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law") (internal quotation marks omitted)).

255. See *supra* notes 1, 29-34 and accompanying text.

256. See *Bestfoods*, 118 S. Ct. at 1884-1886; *supra* notes 1, 29-34 and accompanying text.

257. *Bestfoods*, 118 S. Ct. at 1885 (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979)); Gentile, *supra* note 4, at 709.

258. See *supra* notes 215-16 and accompanying text.

C. Does Bestfoods Suggest a Limited Federal Common Law Based on Majority State Law?

On the other hand, *Bestfoods* may have implicitly adopted a federal common law standard of corporate liability based on the majority rule in most jurisdictions rather than the law in each state. Arguably, the reasoning in *Bestfoods* is consistent with cases such as *Smith Land* that adopted a federal common law standard based on the majority mere continuity theory of successor liability.²⁵⁹ For example, the Supreme Court did not cite any Michigan law regarding corporate veil piercing even though both the court of appeals and district court had discussed Michigan corporate law doctrine.²⁶⁰ Rather, the Court emphasized "traditional standards and expectations" regarding corporate law in most jurisdictions.²⁶¹ The Court could have simply stated that courts should follow state corporate law, but instead emphasized that CERCLA implicit liability goals do not displace "fundamental" or "common-law principles" of corporate law.²⁶²

Even if *Bestfoods* implies that federal courts should generally follow state corporate law rather than create their own federal common law, there is still an argument that federal courts should refuse to enforce state law that significantly undermines or subverts CERCLA's foundations.²⁶³ Accordingly, if a state totally eliminated established exceptions that subject successor corporations to liability if they are in mere continuity with their predecessor, a federal court would be justified in refusing to follow aberrant state law that would allow corporations to use essentially "sham" transactions to escape CERCLA liability.

In light of its emphasis on using "fundamental" or "common law" principles of corporate law, the spirit of *Bestfoods* is strongly inconsistent with cases that attempt to create an expansive federal common law standard based on the minority substantial continuity theory of successor liability. Furthermore, even if *Bestfoods* suggests that federal courts may look to basic corporate law principles in fashioning a very limited federal common law, in most cases state law would provide the same answer. For example, in *Atchison*, the Ninth Circuit did not ultimately have to decide the issue of federal common law or state law because the result

259. See *supra* note 133 and accompanying text.

260. See Gentile, *supra* note 4, at 709.

261. *Bestfoods*, 118 S. Ct. at 1889. See also Gentile, *supra* note 4, at 709.

262. *Bestfoods*, 118 S. Ct. at 1885-89; Gentile, *supra* note 4, at 709.

263. See generally Gentile, *supra* note 4, at 709, 711, 713 (discussing when federal common law may need to preempt state law that follows minority approach).

was the same under both California law and the federal common law standard of mere continuity used in *Louisiana-Pacific*.²⁶⁴

VII. CONCLUSION

A series of federal court decisions broadly construed liability under CERCLA to achieve the statute's broad remedial goals notwithstanding the absence of specific statutory support.²⁶⁵ For example, *Chem-Dyne* concluded that Congress intended joint and several liability to apply in most cases despite the fact that the statute's sponsors deleted a specific textual provision supporting that approach to win over wavering votes.²⁶⁶ In particular, the CERCLA juggernaut threatened to sweep aside traditional corporate law doctrines regarding the liability of successor corporations.²⁶⁷ To fulfill CERCLA's broad remedial purposes and to provide national uniformity, most courts addressing the issue between 1988 and 1993 rejected state law and instead sought to create a federal common law of successor liability.²⁶⁸ *Kimbell's* three-part test is sufficiently vague and elastic that there is a reasonable argument that the need for a nationally uniform doctrine of successor liability justifies using federal common law.²⁶⁹ However, Judge Kennedy's concurring opinion in *Anspec* provided stronger and more persuasive reasons for following state corporate laws governing successor liability because they are relatively uniform and do not interfere with CERCLA's purposes.²⁷⁰

O'Melveny and *Atherton* clarified *Kimbell* by making it clear that courts should invoke federal common law only when state law seriously interferes with a federal statute and not merely when federal common law is more convenient.²⁷¹ It is not enough that a federal agency would win more often under a federal common law standard or that national uniformity under CERCLA is more convenient.²⁷² In light of *O'Melveny* and *Atherton*, the Ninth Circuit strongly suggested that state corporate law should apply in deciding successor liability.²⁷³ However, the Second

264. See *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 363-64 (9th Cir. 1998) (amending and replacing 132 F.3d 1295).

265. See *supra* notes 112, 118 and accompanying text.

266. See *supra* note 98 and accompanying text.

267. See *supra* notes 118-21 and accompanying text.

268. See *supra* notes 112, 122, 134 and accompanying text.

269. See *supra* note 133 and accompanying text.

270. See *supra* note 164 and accompanying text.

271. See *supra* notes 193, 199 and accompanying text.

272. See *supra* notes 197, 203 and accompanying text.

273. See *supra* note 204 and accompanying text.

Circuit managed to evade even *O'Melveny's* restrictive approach to the use of federal common law because the court thought that a federal common law adopting the substantial continuity doctrine would best serve CERCLA's remedial purposes and avoid the supposed danger of state laws that might protect successors using sham transactions to avoid CERCLA liability.²⁷⁴

While it did not directly decide the question of whether state corporate law or federal common law should supply the standard of parental company liability for subsidiaries, *Bestfoods* strongly argued that fundamental corporate law principles should govern where CERCLA is silent.²⁷⁵ At most, *Bestfoods* might tolerate a federal common law based on traditional common-law principles of corporate law or the rule followed in the majority of states.²⁷⁶ *Bestfoods* strongly implied that there is no basis for radically changing corporate law just to meet CERCLA's broad purposes when the statute is silent about a particular liability issue.²⁷⁷ Thus, *Bestfoods* signaled the end of the view that CERCLA is an exceptional statute that trumps normal corporate law principles. Instead, courts should presume that fundamental rules of corporate law apply unless there is a clear indication in CERCLA that Congress intended otherwise.

As a general rule, courts should apply the relevant state law of corporate successorship.²⁷⁸ First, there is no evidence that Congress intended CERCLA to displace state corporate law in general or successor liability rules in particular. Second, there is not a significant conflict between state laws governing successor liability and CERCLA. State laws in this area are relatively uniform.²⁷⁹ Indeed, state corporate successor rules are far more uniform than the cacophony of different federal common law approaches devised by various federal courts.²⁸⁰ Furthermore, a federal common law approach would potentially interfere with existing commercial relationships based on limited successor liability.²⁸¹

274. See *supra* note 227 and accompanying text.

275. See *supra* note 240 and accompanying text.

276. See *supra* notes 238-39 and accompanying text.

277. See *supra* note 250 and accompanying text.

278. Assuming state law furnishes the rule of decision for successor liability, there may be questions about which state's law should govern. For example, should a federal court apply the law of the state in which a corporation is incorporated or where a disposal facility is located? See *Gentile, supra* note 4, at 711-13. These issues are beyond the scope of this article.

279. See *supra* notes 238-40 and accompanying text.

280. See *supra* note 4 and accompanying text.

281. See *supra* note 170 and accompanying text.

While a federal common law based on the substantial continuity doctrine would better serve CERCLA's broad remedial goals, it is unlikely that following state successor liability principles will significantly interfere with the EPA's implementation of CERCLA.²⁸² First, in many cases, federal courts have used the majority mere continuity rule to hold a successor liable under CERCLA without needing to invoke the substantial continuity doctrine.²⁸³ On the other hand, in a few cases such as *Carolina Transformer*, only the substantial continuity approach would enable the EPA to reach a successor corporation, but in many of these cases it may be possible to sue other potentially responsible parties.²⁸⁴ While the agency would prefer that courts adopt federal common law based on the substantial continuity doctrine,²⁸⁵ the EPA has never presented evidence that using the mere continuity doctrine poses a serious problem in a large number of CERCLA cases. Second, as Judge Kennedy argued in *Ansper*, there is no evidence that states are engaging in a "race-to-the-bottom" to weaken successor liability principles to protect corporations from CERCLA liability.²⁸⁶ Because CERCLA affects only a tiny portion of all cases involving successor liability and some firms would be liable even under more relaxed successor liability principles, it is unlikely that states would dramatically change their successor liability standards to allow any corporation to use successor corporations to shield them from liability in a wide variety of different contexts just to protect a few firms from CERCLA liability. Furthermore, Judge Kennedy pointed out that states have a countervailing interest in protecting their environmental and natural resources.²⁸⁷ It is improbable that states will engage in a "race to the bottom" to weaken the rules of successor liability just to help those few companies affected by CERCLA.

Furthermore, CERCLA's practical significance is waning. In 1986, the EPA added 170 new sites to the National Priorities List (NPL), which are the sites with the worst contamination problems, and then included 99 more in 1987.²⁸⁸ By contrast, the agency added eleven new NPL sites in 1997 and seventeen in 1998.²⁸⁹ A former high-level agency official

282. See *supra* note 120, 169 and accompanying text.

283. See *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 363-64 (9th Cir. 1998) (amending and replacing 132 F.3d 1295).

284. See *id.*

285. See *id.*

286. See *supra* note 169 and accompanying text.

287. See *Atchison*, 159 F.3d at 363-64.

288. See Judith Jacobs, *Former EPA Official Clay Sees Program Winding Down, With Greater Role for States*, 30 ENV'T REP. (BNA) 1325, 1325 (Nov. 19, 1999).

289. See *id.*

has predicted that the superfund program "will wind down in the next 10 years to a program whose chief function is emergency response."²⁹⁰ Thus, ten years from now, there are likely to be fewer successor liability cases under CERCLA.

During the 1980s and early 1990s, a number of decisions used CERCLA's broad remedial purposes to reject fundamental corporate law principles such as successor liability.²⁹¹ In *O'Melveny and Atherton*, the Supreme Court reined in expansive use of federal common law by emphasizing that neither the desire for national uniformity nor "more money" for the federal treasury were enough to preempt state law.²⁹² Courts may invoke federal common law only where state law significantly interferes with a federal statute. *Bestfoods* made it clear that CERCLA's implicit purposes are not enough to displace fundamental corporate law principles.²⁹³ Thus, corporate law's preference for limited liability is no longer threatened by CERCLA's broad remedial purposes.

290. See *id.* (quoting Don Clay, EPA Assistant Administrator for solid waste and emergency response from 1989 to 1993).

291. See *supra* notes 97, 111, 117, 126, 133, 140 and accompanying text.

292. See *supra* notes 197, 203, 206 and accompanying text.

293. See *supra* note 240 and accompanying text.