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Who Should Pay Cleanup Costs? The Federal Response to Corporate Successor Liability Under CERCLA

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WHO SHOULD PAY CLEANUP COSTS—THE
FEDERAL RESPONSE TO CORPORATE SUCCESSOR
LIABILITY UNDER CERCLA

I. INTRODUCTION

Recently the federal courts examined liability of successor corporations\(^1\) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).\(^2\) These courts have not uniformly imposed successor liability under CERCLA.\(^3\) Instead, some courts have adopted the common law approach of corporate successor liability,\(^4\) while others have found corporate successor liability inapplicable.\(^5\)

The decision to impose liability on successor corporations carries significant economic consequences. For example, substantial financial liability may be imposed upon an acquiring corporation despite the fact that at the time of acquisition, the acquirer was unaware of the contamination. More importantly, in light of the current state of the federal budget, the government cannot finance the millions of dollars necessary to clean up hazardous waste sites.

This comment addresses the division of authority on this issue by looking at cases on both sides of the successor liability issue. The comment first examines CERCLA's provisions and

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\(^1\) Successor corporation “generally means another corporation which, through amalgamation, consolidation or other legal succession, becomes invested with rights and assumes burdens of first corporation.” Black's Law Dictionary 1431 (6th ed. 1990).


\(^5\) See, e.g., Anspec Co. v. Johnson Controls, 734 F. Supp. 793, rev'd, 922 F.2d 1240 (1991). The recent reversal of Anspec does not negate its importance in this area. The reasoning of the district court remains an available alternative to another court deciding the successor liability issue. See also infra note 153.
its legislative history on liability. The common law approach to corporate successor liability and the cases which have adopted this traditional rule and its variations under CERCLA are also described. Next, the comment evaluates the minority position which views successor liability as inapplicable to CERCLA. Additionally, the comment summarizes the Environmental Protection Agency’s (EPA) position on successor liability and CERCLA. Finally, the comment analyzes these various positions and proposes a solution to the dilemma in the form of a rewritten CERCLA section on liability. The new section combines the EPA’s position with some of the common law rules into a succinct and broad imposition of liability on successor corporations.

II. BACKGROUND

A. Corporate Successor Liability and CERCLA

1. The Current Federal Statutory Provision

a. Section 9607(a)

The section of CERCLA relevant to this discussion is 9607(a). This section lists the parties liable for hazardous substance clean up costs. Those parties are limited to past and present owners and operators of hazardous waste facilities, parties who arranged for the transportation of hazardous substances, and the generators of hazardous substances.

6. See infra text accompanying notes 12-27.
7. See infra text accompanying notes 28-152.
8. See infra text accompanying notes 153-66.
9. See infra text accompanying notes 168-78.
10. See infra text accompanying notes 179-248.
11. See infra text accompanying notes 249-51.
13. Id.
14. Id. The statute in full states: Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
   (1) the owner and operator of a vessel or a facility,
   (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
   (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or
b. Successor Liability and CERCLA's Legislative History

CERCLA does not expressly provide for corporate successor liability.\textsuperscript{15} Instead, the courts have imposed liability by relying on the statute's legislative history.\textsuperscript{16} Although CERCLA's legislative history is inadequate on many points, statements in the Congressional Record provide evidence in favor of imposing successor liability under CERCLA.\textsuperscript{17}

The Congressional Record states: "It is the intent of the Committee in this legislation to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."\textsuperscript{18} CERCLA was established to possessed by such person, by any other party or entity, at any facility or incineration vessel owned and operated by another party or entity and containing such hazardous substances, and

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

Id.

16. See infra notes 28-40 and accompanying text. In addition to the legislative history there is the historical argument for imposition of successor liability under CERCLA:

The historical basis for imposing successor liability is founded upon principles of equity that seek to prevent creditors of the original corporation from being left without a remedy while the corporation escapes responsibility by transferring its assets into a new form. There is no reason why a corporation should escape liability for the costs that their pollution imposes on society. Where federal law assigns responsibility for restitution costs, principles of equity support leaving a remedy available for the government on behalf of society.
18. H.R. Rep. No. 1016, supra note 2. The legislative history has been drawn upon by the courts in their efforts to resolve the successor liability dilemma. For example, it was stated that:

Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.
clean up polluted sites around the country. It imposes clean up liability upon responsible parties with a federal trust fund as a back-up.\textsuperscript{19}

CERCLA's goal is to provide Superfund\textsuperscript{20} to finance environmental clean up projects when responsible parties refuse to do so, are insolvent, or have dissolved.\textsuperscript{21} However, using Superfund to pay the costs of a clean up is a last resort. Congress' intent in enacting the statute was to impose liability upon successor corporations.

Senator Jennings Randolph\textsuperscript{22} stated: "It [was] intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law."\textsuperscript{23} As an example, he pointed to the joint and several liability concept which was not mentioned in CERCLA.\textsuperscript{24} Despite its omission, joint tortfeasor liability is imposed under common law or as codified by statutes.\textsuperscript{25}

CERCLA liability was also "intended to give access to the 'deep pockets' of whatever company has the money to pay regardless of the degree of liability."\textsuperscript{26} Liability may be im-


Congressional intent supports the conclusion that when choosing between the taxpayers or a successor corporation, the successor should bear the cost. Benefits from use of the pollution as well as savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, its successors, and their respective stockholders and accrued only indirectly, if at all, to the general public. H.R. REP. NO. 1016, supra note 2.

20. "Superfund" is a term used to describe the money the government has set aside to finance the clean up of hazardous waste sites. 42 U.S.C. § 9507 (1988).
22. Senator Randolph is a Democrat from West Virginia.
24. Id.
25. Id.

The Act views response liability as a remedial, rather than a punitive, measure whose primary aim is to correct the hazardous condition. Just as there is liability for ordinary torts or contractual claims, the obligation to take necessary steps to protect the public should be imposed on a successor corporation.

The costs associated with clean up must be absorbed somewhere. Congress has emphasized funding by responsible parties, but if
posed on all parties regardless of how remotely they are connected to the waste. Ultimately, in imposing clean up liability "the issue is one of fundamental fairness."{27}

2. The Common Law Approach

Under the common law, a rule developed that in an asset purchase a successor corporation was not liable for the actions of its predecessor.{28} An asset purchase occurs when "one corporation buys all of the assets of another."{29} If acquisition is by statutory merger,{30} consolidation,{31} or any of the other exceptions discussed below,{32} liability is imposed.

they cannot be ascertained or cannot pay the sums necessary, federal monies may be used.

Expenses can be borne by two sources: the entities which had a specific role in the production or continuation of the hazardous condition, or the taxpayers through federal funds. CERCLA leaves no doubt that Congress intended the burden to fall on the latter only when the responsible parties lacked the wherewithal to meet their obligations.

Id.

30. A "merger means the absorption of one corporation by another; in which the latter retains its name and corporate identity with the added capital, franchises and powers of the merged corporation. It is the uniting of two or more corporations by the transfer of property to one of them, which continues in existence, the others being merged into it." 15 WILLIAM M. FLETCHER, ENCYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7041 (perm. ed. rev. vol. 1990). See also Kemos, Inc. v. Bader, 545 F.2d 913 (5th Cir. 1977) (merger is the absorption of one corporation into another); Knapp v. North American Rockwell Corp., 506 F.2d 361, 365 (3rd Cir. 1974) ("A merger of two corporations contemplates that one will be absorbed by the other and go out of existence, but the absorbing corporation will remain.").
31. Consolidation is a "combination by agreement between two or more corporations of the same or different states, under authority of law, by which their rights, franchises, privileges and property are united, and become the rights, franchises, privileges and property of a single corporation, composed generally, although not necessarily, of the stockholders of the original corporations." Fletcher, supra note 30, § 7041. See also Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968) (definition of consolidation and general rules regarding successor liability); Atlantic & G.R.R. Co. v. Georgia, 98 U.S. 359 (1878) (consolidation dissolves the original companies and creates a new corporation).
32. See infra notes 36-37 and accompanying text.
There are various policy reasons behind this rule of non-liability. An important judicial concern when imposing successor liability is the protection of dissenting shareholders and creditors. Additionally, the alienability of corporate assets and the proper assessment of taxes are other areas the courts believe should be protected.

There are exceptions to this general rule regarding asset purchases. Liability is imposed if: “(1) [t]he purchasing corporation expressly or impliedly agree[d] to assume the liability; (2) [t]he transaction amount[ed] to a de facto consolidation or merger; (3) [t]he purchasing corporation is merely a continuation of the selling corporation; or (4) [t]he transaction was fraudulently entered into in order to escape liability.” Neither the general rule nor its exceptions are mentioned in CERCLA’s liability provisions.

As noted, the statute’s text does not address corporate successor liability and the question has been heavily litigated. Many courts rely on the decision in Smith Land & Improvement

33. Polius v. Clark Equip. Co., 802 F.2d 75, 78 (3rd Cir. 1986) (where a construction worker who was hurt while operating a crane sued the corporate buyer of the crane manufacturer’s assets to recover for injuries received).
34. Id. See also Jerry J. Phillips, Product Line Continuity and Successor Corporation Liability, 58 N.Y.U. L. Rev. 906, 909 (1983). Creditors lose if a corporation’s liabilities disappear after a merger, or other corporate consolidation. If those liabilities disappear in successor situations, the corporation has incentive to merge or otherwise consolidate and avoid its debts. Dissenting shareholders lose appraisal rights in de facto merger or consolidation in the absence of successor liability. Ramirez v. Amsted Indus., 431 A.2d 811, 815-16 (N.J. 1981).
35. Polius, 802 F.2d at 78. If a corporation knows it will be liable for a predecessor’s actions, it will carefully evaluate any acquisition decisions. Corporations will have greater difficulty raising capital by asset sales, mergers, etc. if successor liability looms overhead.
36. “Under the de facto merger doctrine, even though the particular combination or transaction may be otherwise labeled by the parties, it may in legal effect be a merger or consolidation so as to confer upon dissenting shareholders the right to receive cash payments for their shares.” Fletcher, supra note 30, § 7045.10. See also Arnold Graphics Indus. v. Independent Agent Center, 775 F.2d 38, 42 (1985). “A de facto merger occurs where one corporation is absorbed by another, but without compliance with the statutory requirements for a merger.” Id.
37. Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990). Asarco owned a copper smelter in Washington which produced a by-product called slag. This by-product was sold by an intermediary to Louisiana-Pacific and subsequently leached into the groundwater and soil. Asarco sued Louisiana-Pacific and L-Bar, the successor to the intermediary, under CERCLA to recover clean up costs. Id. at 1262.
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Corp. v. Celotex Corp.\textsuperscript{38} when adopting successor liability under CERCLA.\textsuperscript{39} Smith Land discussed successor liability in the context of a consolidation or merger, either of which is a traditional area of application for successor liability under common law.\textsuperscript{40}

3. The Adoption of the Common Law Approach
   a. Merger and Consolidation

The traditional areas of liability for successor corporations are merger and consolidation;\textsuperscript{39} Smith Land adopted this premise as a basis for liability in CERCLA causes of action.\textsuperscript{42} In Smith Land, the plaintiff owned a piece of polluted land.\textsuperscript{43} The plaintiff cleaned the site pursuant to an agreement with the Environmental Protection Agency (EPA) and subsequently sued the defendants as corporate successors to the company which polluted and then sold them the land.\textsuperscript{44}

The court began its discussion of corporate successor liability under CERCLA with a general observation. It stated that "[c]hanges in ownership of a corporation's stock will not affect the rights and obligations of the company itself. The corporation survives as an entity separate and distinct from its shareholders even if all the stock is purchased by another corporation."\textsuperscript{45}

The court believed it lacked authority for its position under CERCLA because the statute was "hastily conceived and briefly debated."\textsuperscript{46} Many important issues were not addressed

\textsuperscript{38} 851 F.2d 86 (3rd Cir. 1988).
\textsuperscript{40} 851 F.2d at 91. As Blackstone stated, "all the individual embers that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parties which compose it are changing every instant." 1 WILLIAM BLACKSTONE, COMMENTARIES *467-69, quoted in Polius v. Clarke Equip. Co., 802 F.2d 75, 77 (3rd Cir. 1986).
\textsuperscript{41} Smith Land, 851 F.2d at 91.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 87.
\textsuperscript{44} Id. at 87-88.
\textsuperscript{45} Id. at 91.
\textsuperscript{46} Id. That is, because the statute was passed in late November and early December of 1980, Congress was in a hurry to enact some type of environmental
in the legislation\textsuperscript{47} and, to impose liability, the court filled in \textit{CERCLA}'s "blanks" on this issue. The fact successor liability was left out did not preclude its imposition.

The court in \textit{Smith Land} also focused upon the remedial purpose of \textit{CERCLA}.\textsuperscript{48} This policy requires clean up obligations to be placed on some private party,\textsuperscript{49} preferably the one responsible for the pollution. If the responsible party lacks the funds, then the federal government will pay.\textsuperscript{50}

According to \textit{Smith Land}, when financing is available from either the successor corporation or the public, the former should be chosen.\textsuperscript{51} This is the rational choice because the successor receives greater benefit from the polluting activities than does the public. The predecessor corporation benefits because manufacturing processes which cause pollution generally are cheaper to implement than technologically advanced methods. Additionally, in the case of hazardous waste dumping, the costs of storing toxics in sealed containers in monitored landfills is more expensive than carting metal drums off to the riverbed for "storage." These savings to the original corporation make it cheaper for the successor to acquire; the costs of monitoring landfills or implementing pollution controls are not included in the purchase price, as they would be if the corporation performed those activities. The predecessor corporation benefits from the pollution-causing production methods or realized savings from improper disposal and so its successor also benefits.\textsuperscript{52} The public, on the other hand, nei-

\begin{footnotesize}
\textsuperscript{47} Id. Issues which were not addressed in \textit{CERCLA} include corporate successor liability and whether or not a federal common law should be developed to supplement the statute's explicit provisions. \textit{Id.}

\textsuperscript{48} Id. "The Act views response liability as a remedial, rather than a punitive, measure whose primary aim is to correct the hazardous condition. Just as there is liability for ordinary torts or contractual claims, the obligation to take necessary steps to protect the public should be imposed on a successor corporation." \textit{Id.}

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} Id. at 91-92. See also 42 U.S.C. § 9611(a) (1991) describing the "Superfund" from which the government will use to pay the response costs of cleaning up hazardous waste sites. For example, the President shall use the money in the Fund for "1) Payment of governmental response costs incurred." \textit{Id.}

\textsuperscript{51} Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3rd Cir. 1988). See also \textit{Oner II}, Inc. v. EPA, 597 F.2d 184 (9th Cir. 1979).

\textsuperscript{52} \textit{Smith Land}, 851 F.2d at 92. See also \textit{Oner II}, Inc. v. EPA, 597 F.2d 184
\end{footnotesize}
ther created the pollution nor derived any benefit from these practices.

The Smith Land majority was persuaded by the fact that "[i]n general, when two corporations merge pursuant to statutory provisions, liabilities become the responsibility of the surviving company."53 When one corporation "ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former, at least to the extent of the property and assets received."54

In corporate consolidations, the court reasoned that liability was appropriate because "unless otherwise provided by statute, the new company assumes the debts and liabilities of the constituent companies."55 It is logical to then apply liability through these basic principles of merger and consolidation to suits against corporate successors under CERCLA.

The court in Smith Land did not address potential corporate liability in an asset purchase.56 It also did not detail the four exceptions to liability under the common law, i.e. the "de facto" merger,57 express58 or implied assumption of liability,59

(9th Cir. 1979).

53. Smith Land, 851 F.2d at 91.
54. Id.
55. Id.
56. Traditionally there was no liability for a successor corporation in an asset purchase. Id.
57. "Under the de facto merger doctrine, even though the particular combination or transaction may be otherwise labeled by the parties, it may, in the legal effect be a merger or consolidation so as to confer upon dissenting shareholders the right to receive cash payments for their shares." FLETCHER, supra note 30, § 7045.10.
58. "Where the assumption agreement [to assume debts and liabilities] is based on a valuable consideration, and the receipt of the property of the other company is a sufficient consideration, the company assuming such debts or liabilities becomes liable, provided, it seems, there has been an acceptance of, or acquiescence in, the agreement by the creditors of the corporation which was originally indebted." FLETCHER, supra note 30, § 7114. See also Pierce v. United States, 255 U.S. 398, 403 (1921); Krull v. Celotex Corp., 611 F. Supp. 146 (N.D. Ill. 1985).
59. Implied liability may arise in special circumstances, "where a corporation purchases the property and franchises of another company, including property for which the latter was under an obligation to pay, and to which it could acquire no right without payment... [T]he conduct or representations relied upon must show an intention." FLETCHER, supra note 30, § 7124. See also Araserv, Inc. v. Bay State Harness Horse Racing & Breeding Ass'n., 437 F. Supp. 1083 (D. Mass. 1977) (implied liability is found if the facts or circumstances show an assumption of the predecessor's obligations).
mere continuation and fraud exceptions. These exceptions were developed by later cases adopting the common law position.

b. Asset Purchases

Following the principles in Smith Land, the United States District Court, in Louisiana-Pacific Corp. v. Asarco, Inc., adopted the common law rule imposing liability upon successor corporations undertaking an asset purchase. Under the common law, asset purchasers were not subject to liability as successor corporations. The court, after considering the issue of corporate successor liability under CERCLA, reiterated this general premise. In Asarco, the defendant impleaded the successor to the company that marketed its waste—waste which was the basis of Asarco's CERCLA problem.

The majority opinion applied the common law rule of successor liability and found the third party defendant not liable. In doing so, the court concluded that general successor liability analysis was applicable to an asset sale and the "traditional rules of successor liability in operation in most


61. If the transfer is a fraud upon the creditors of the predecessor corporation, the claims transfer to the successor. FLETCHER, supra note 30, § 7125. See also Lombard v. Maglia, Inc., 621 F. Supp. 1529 (S.D. N.Y. 1985). "[T]he creditors defrauded by the transfer may, in equity, follow the property into the hands of the new corporation, and subject it to the satisfaction of their claims, or hold the new corporation liable to the extent of its value." FLETCHER, supra note 30, § 7125.


63. 909 F.2d 1260 (9th Cir. 1990).

64. Id. at 1263.

65. Id. Unless, of course, one of the four exceptions applies. See also supra notes 57-62 and accompanying text.

66. Asarco, 909 F.2d at 1263.

67. Id. at 1262.

68. Id. at 1263, 1266.
states should govern." Accordingly, the rule of non-liability for asset purchases applied.70

Asset purchasers are possibly not held liable because they merely bought the pieces of a dissolved corporation. The acquiring corporation is buying part of an entity which no longer exists in any form. In contrast, successor liability is found where the successor combines with, and becomes part of, the predecessor corporation.

The successor liability theory seeks to impose responsibility where it is equitable to do so.71 The four exceptions72 to non-liability serve to impose financial obligations on guilty corporations striving to avoid them. The next part of this discussion concerns the four exceptions to non-liability of asset purchasers as successors.

c. Exceptions to Non-Liability

1) Assumption of Liability

The United States district court in United States v. Chrysler Corp.73 built upon the principles of CERCLA successor liability established by previous federal court interpretations of state law.74 The decision also examined whether or not liability was assumed by the successor corporation.75

In Chrysler, defendants Knotts and Harvey formed a corporation to haul garbage and operate a school bus service.76 To dispose of the waste it was transporting under the haulage

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69. Id. at 1263.
70. Id.
71. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3rd Cir. 1988).
72. See infra text accompanying notes 73-152.
73. United States v. Chrysler Corp., 31 Env't Rep. Cas. (BNA) 1997 (D. Del. Aug. 28, 1990). Harvey and Knotts began a partnership which hauled garbage and operated a bus service. They also purchased a site (the basis of the CERCLA liability) on which they could dispose of the commercial waste they were hauling. The partnership was incorporated, and later personal difficulties resulted in an agreement splitting the businesses. Knotts, Inc. was formed and then acquired the bus service in exchange for 100% of its stock. Harvey & Knotts, Inc. then exchanged Knotts, Inc. stock for all Harvey & Knotts stock owned by the Knotts family. Id. at 1998.
74. Id. at 2006.
75. Id. at 2000-01.
76. Id. at 1998-99.
contracts, the corporation purchased a tract of land.\textsuperscript{77} In a later stock exchange agreement the original corporation was bought out by the successor company, Knotts.\textsuperscript{78} CERCLA liability flowed from the original corporation to the successor corporation because of pollution on the land where the dumping occurred.\textsuperscript{79}

The court in \textit{Chrysler} noted that the same concerns relevant to the "common law liability of a corporation for the torts of its predecessor are equally applicable to the assessment of responsibility for clean-up costs under CERCLA."\textsuperscript{80} \textit{Chrysler} then adopted the judge-made successor liability rule for CERCLA causes of action.\textsuperscript{81} The court stated that although "CERCLA does not directly address the issue of corporate successor liability . . . the scant legislative history indicates that Congress relied upon the courts to articulate a federal common law to supplement the statute."\textsuperscript{82} The court also examined whether or not there was an assumption of liability by Knotts, the successor, for the acts of Harvey \& Knotts, the predecessor.\textsuperscript{83}

The court scrutinized the agreement creating Knotts, specifically the phrase stating that "the operating expenses or liabilities pending legal action or any cause of action . . . arising prior to settlement shall be divided."\textsuperscript{84} It held this statement was an express assumption of liability by Knotts for any suits brought against Harvey \& Knotts,\textsuperscript{85} and found Knotts liable under CERCLA for the dumping of Harvey \& Knotts.\textsuperscript{86}

As \textit{Chrysler} shows, determining whether a corporation expressly or impliedly assumes liability is an issue of contract interpretation.\textsuperscript{87} On the other hand, the cases considering \textit{de}

\begin{itemize}
\item \textsuperscript{77} \textit{Id.} at 1998.
\item \textsuperscript{78} \textit{Id.} All of this occurred because of personal tension between the individuals Harvey and Knotts. \textit{Id.}
\item \textsuperscript{79} \textit{Id.} at 2003.
\item \textsuperscript{80} \textit{Id.} at 2001 n.21.
\item \textsuperscript{81} \textit{Id.} at 2001.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.} at 2002-03.
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.} at 2004.
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{See supra} note 59.
\end{itemize}
facto mergers present a more difficult determination because of the many factors involved.88

2) De Facto Merger

The United States District Court in American National Can Co. v. Kerr Glass Manufacturing90 was persuaded by the decisions in Smith Land and Asarco.91 By adopting another exception and allowing the imposition of successor liability, the court continued the trend begun by the decision of Smith Land.91 In National Can, the third party defendant, Armstrong, acquired Whitall Tatum in a stock exchange. Armstrong then transferred Whitall Tatum's assets to itself and dissolved Whitall Tatum.92 Defendant Kerr sued Armstrong as successor to Whitall Tatum for Whitall Tatum's dumping at a site Kerr bought from Armstrong. Armstrong had acquired it in the transaction with Whitall Tatum.93 The court addressed whether or not the acquisition of Whitall Tatum was a de facto merger.94 In deciding this issue, it determined a de facto merger exists if:

(1) there is a continuation of the enterprise of the seller in terms of continuity of management, personnel, physical location, assets and operations;
(2) there is continuity of shareholders;95
(3) the seller ceases operations, liquidates, and dissolves as soon as legally and practically possible; and
(4) the purchasing corporation assumes the obligations of the seller necessary for uninterrupted continuation

88. De facto consolidation is subsumed by the de facto merger exception. This is because "[w]here a particular corporate combination is in legal effect a merger or consolidation . . . such transaction is a de facto merger." Fletcher, supra note 30, § 7045.10.
90. Id. at *15-*16.
91. Id. at *92.
92. Id. at *11.
93. Id.
94. Id. at *18.
95. A continuity of shareholders results when the "purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholder of the selling corporation so that they become a constituent part of the purchasing corporation." Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F. Supp. 1010, 1015 (D. Mass. 1989).
of business operations. The purpose of the de facto merger exception in imposing liability is to "minimize unfairness to the successor." Minimizing unfairness is important because, generally, a successor corporation does not foresee liability for the predecessor's environmental mishaps.

The court also noted that the predecessor and successor corporations maintained common shareholders. Since the successor corporation continues the same business as the predecessor, and CERCLA liability arises from hazardous waste disposal, the predecessor's dissolution means the successor remains to accept responsibility.

In essence, the de facto merger doctrine is a "device for avoiding injustice when a merger has been called something else." For example, a corporation may tailor the merger to look like an asset purchase so as to avoid successor liability.

96. American Nat'l Can Co. v. Kerr Glass Mfg., No. 89-C0168, 1990 U.S. Dist. LEXIS 10999, at *18 (N.D. Ill. Aug. 20, 1990). See also Mell J. Branch-Roy, Corporate Successor Liability for Environmental and Toxic Tort Claims Part I, 19 COLO. LAW. 867, 868 (1990) [hereinafter Toxic Tort I] where it was written that "[a] key factor to buttress a finding of de facto merger for successor liability is a transfer of stock as consideration. A finding of de facto merger is inconsequential where the assets are sold for cash, the relationship of the shareholders to their respective corporations remains unchanged and there is an absence of continuity of shareholders."

97. 712 F. Supp. at 1015.


100. Id.

A de facto merger requires continuity of shareholders, meaning the successor in a de facto merger is owned in part by the same people who owned the predecessor. In addition, in order to accomplish a de facto merger, the successor must continue the same enterprise as its predecessor. Ostensibly, CERCLA liability arises because the enterprise was involved in the disposal of hazardous waste. Since the predecessor necessarily dissolves as a result of the merger, only the successor remains to accept responsibility for the predecessor's environmental misuse.

Id. (citations omitted).

This is unfair to the injured parties who would otherwise receive relief under the imposition of common law successor liability. If one of the requirements is not met, the *de facto* merger exception does not apply.\textsuperscript{102} This procedural difficulty led to the development of the mere continuation exception\textsuperscript{103} as an easily applicable alternative to the *de facto* merger test.\textsuperscript{104}

3) **Mere Continuation**

Under the mere continuation theory, courts look at a ""number of factors to analyze whether the purchasing corporation is simply a "new hat" [a new name] for the seller.""\textsuperscript{105} The court in *Kelley v. Thomas Solvent Co.*\textsuperscript{106} employed this doctrine to impose corporate successor liability under CERCLA. This case applied the mere continuation exception on grounds independent of those in the Third Circuit's decision in *Smith Land*.

In *Thomas Solvent*, the corporate defendant distributed and transported industrial solvents.\textsuperscript{107} Two sites owned by the company were found by the EPA to have groundwater contamination;\textsuperscript{108} Thomas Solvent then reorganized its corporate structure and formed several "spinoff" corporations.\textsuperscript{109}

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\textsuperscript{102} Id. at *18.

\textsuperscript{103} Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F. Supp. 1010, 1019 n.15 (D.C. Mass. 1989). The court noted the *de facto* merger exception incorporates the mere continuation exception. "The key element of a "continuation" is a common identity of the officers, directors, and shareholders in the selling and purchasing corporations . . . . For a *de facto* merger to occur, there must be continuity of the successor and predecessor corporations." Id. (citations omitted).

\textsuperscript{104} See *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990); *United States v. Carolina Transformer*, 739 F. Supp. 1030 (E.D. N.C. 1989).


The distinction may lie in the fact that a *de facto* merger may be found when the corporation buys the assets of another; to invoke the continuity of enterprise doctrine, there need not be two corporations involved in the beginning. Rather, one enterprise may dissolve and another spring up to take over the business. See *Tift v. Forage King Indus.*, 322 N.W.2d 72 (Wis. 1982).


\textsuperscript{107} Id. at 1448.

\textsuperscript{108} Id.

\textsuperscript{109} Id. at 1450. In this case a "spinoff" corporation was the creation of several small corporations which divided and took over the business operations of
The majority of Thomas Solvent's assets were transferred to the spinoff corporations, significantly decreasing the original corporation's assets. The value of assets received by each new corporation greatly exceeded the value of the liabilities each assumed. In analyzing the mere continuation doctrine and its relevance to Thomas Solvent, the court stated that "[i]f the new corporation is simply a continuation of the old one, a claimant may successfully pursue the new corporation for satisfaction of a debt or judgment."

The indicia of mere continuation include "a common identity of officers, directors and stockholders between the selling and purchasing corporations." The court found mere continuation existed in Thomas Solvent because one individual, Richard Thomas, owned 100 per cent of the stock of all the corporations, each board consisted of common directors, and there was a continuity of staff. The spinoff corporations operated substantially the same business, and provided the same products and services as Thomas Solvent Co. Additionally, when Thomas Solvent closed its operations some of the employees were transferred to the payroll of the spinoff corporations.

The court in Thomas Solvent noted "the policy reasons supporting the doctrine of successor liability militate in favor" of its application where mere continuation is found. "[T]here are unpaid liabilities for environmental damage left with a corporate shell quite unable to make restitution."

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the original corporation. Id.

110. Id. For example, Thomas Solvent's federal income tax returns showed in 1982 its total assets dropped from $3,190,053 to $620,842. In addition, the retained earnings were reduced by $1,228,719. Id.

111. Id. For example, "Thomas Solvent-Detroit received assets of $1,025,435 and retained earnings of $608,959 while assuming liabilities of $577,877. Thomas Solvent-Muskegon received assets of $348,505 and retained earnings of $174,245 while assuming liabilities of $154,160. Thomas Solvent-Indiana received assets of $443,832 and retained earnings of $281,468 while assuming liabilities of $142,264." Id.

112. Id. at 1458.
113. Id.
114. Id.
115. Id. at 1458-59.
116. Id. at 1459.
117. Id.
The court concluded that "[t]here is no reason why a corporation should escape liability for costs that their pollution imposes on society." Equitable principles demand an available remedy for the government to pursue against responsible parties on society's behalf.

A majority of the court believed successor liability was favored under CERCLA "because it is the successor corporations who have benefited from any polluting practices of their predecessor." Thomas Solvent also decided the imposition of broad liability was desirable because "it shifts remedial cleanup costs to the parties responsible for creating the hazard; it creates incentives for safer practices; and it encourages defendants to locate and implead other responsible parties." In light of the factual circumstances surrounding the spinoff corporations and equitable considerations, the court applied successor liability.

Two derivative theories of the mere continuation doctrine grew out of the decision in Thomas Solvent. Specifically, United States v. Carolina Transformer Co. looked at the substantial continuity exception, while Louisiana-Pacific Corp. v. Asarco, Inc. examined the continuing business enterprise exception.

a) **Substantial Continuity Exception**

The federal district court in Carolina Transformer strayed from the path forged by Smith Land and its progeny. Applying a new exception to successor non-liability, the court in Carolina Transformer opened the door wider to allow greater corporate liability for environmental misuse.

118. *Id.*
120. *Id.* See also text accompanying notes 51-52.
121. "[A]pplying the successor liability doctrine to prevent shrinking the area of potential liability is a practice that is in accord with the practice of courts that have interpreted CERCLA actions broadly in favor of the government." Thomas Solvent, 725 F. Supp. at 1459.
122. *Id.*
123. *Id.* at 1458.
125. This case was already discussed as an asset purchase, see supra text accompanying notes 63-72.
Defendant Carolina Transformer repaired and sold rebuilt electrical transformers. FayTranCo was incorporated by an officer and director of Carolina Transformer and another employee. FayTranCo also repaired and rebuilt transformers using many Carolina employees. After FayTranCo incorporated, Carolina moved its operation to FayTranCo offices and the "[o]fficers, directors and employees of Carolina Transformer became officers, directors, and employees of FayTranCo." The customers of each company were the same and the books of the two companies were kept as one.

The court in Carolina Transformer applied the substantial continuity test to find liability. Substantial continuity is found to exist when affirmative responses are given to the following queries: "Whether the business of both employers was the same, whether the employees of the new company were doing the same job, and whether the new company produced the same product for essentially the same customers."

The court found that FayTranCo continued Carolina Transformer's business operations and hired Carolina Transformer employees to do the same jobs "earning the same wages and maintaining the same accrued leave time," and therefore imposed liability. FayTranCo was held responsible for Carolina Transformer's CERCLA response costs.

126. 739 F. Supp. at 1033.
127. Id. at 1033-34.
128. Id. at 1033.
129. Id. at 1034.
130. Id.
131. "If there is 'substantial continuity['] between a successor corporation and its predecessor, the successor can be bound by the acts of the predecessor." Id. at 1039.
132. Id.
133. Id.
134. Id.
b) Continuing Business Enterprise Exception

As noted earlier, Louisiana-Pacific Corp. v. Asarco, Inc.\textsuperscript{137} applied common law successor liability rules in an asset purchase context. Another aspect of Asarco dealt with the court's refusal to follow a proposed exception to successor non-liability.\textsuperscript{138} Defendant Asarco argued the court should adopt and apply the continuing business enterprise exception to the third-party defendant.\textsuperscript{139}

Asarco had impleaded L-Bar as a third-party defendant as the successor to Industrial Mineral Products (IMP), which had improperly marketed Asarco's waste.\textsuperscript{140} The court noted the continuing business enterprise exception but declined to apply it in lieu of mere continuation.\textsuperscript{141}

The elements of the defendant's proposed continuing business enterprise test were: "1) continuity of employees, supervisory personnel and physical location; 2) production of the same product; 3) retention of the same name; 4) continuity of general business operations; [and] 5) purchaser holding itself out as a continuation of the seller."\textsuperscript{142} Asarco did not decide whether the continuing business enterprise test constituted an additional exception to the rule of non-liability. The court was ambivalent because it believed the new doctrine was not relevant to the controversy before it.\textsuperscript{143} Continuing busi-

\textsuperscript{136} See supra text accompanying notes 63-72.
\textsuperscript{137} 909 F.2d 1260 (9th Cir. 1990).
\textsuperscript{138} Id. at 1265.
\textsuperscript{139} Id. The continuing business enterprise exception is a more expansive version of mere continuation because the same directors and officers are not required. The Ninth Circuit applied the continuing business enterprise test in Oner II v. United States EPA, 597 F.2d 184 (9th Cir. 1979), because Oner II (the successor) was formed to buy the assets of a corporation liable under an environmental statute. Oner II engaged in the same business of distributing pesticides and maintained the same employees. Asarco, 909 F.2d at 1265.
\textsuperscript{140} Asarco, 909 F. 2d at 1262.
\textsuperscript{141} Id. at 1265-66.
\textsuperscript{142} Id. at 1265 n.7 (citing Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175 (5th Cir. 1985)).
\textsuperscript{143} Id. at 1265. The court distinguished Asarco from a previous case, Oner II v. United States EPA, 597 F.2d 184 (9th Cir. 1979), which followed the continuing business enterprise exception. The most important difference was that in Asarco, L-Bar did not continue IMP's waste business. Asarco, 909 F.2d at 1265. Thus, this exception still could be applied to corporate successor liability under CERCLA—the court did not foreclose its adoption in the right circumstances.
ness enterprise liability has not yet been imposed as an exception, unlike the next theory, fraud.

4) Fraud

The final exception to non-liability for corporate successors under the common law is fraud. This exception focuses on fraudulent transfers undertaken to avoid creditors. "A fraudulent conveyance may impose successor liability when the parties to the transaction do not exercise good faith." The transaction is presumptively valid if a purchasing corporation receives a transfer of assets in good faith and pays full consideration. The parties must prove that "the transaction was made in good faith and for value."

No cases have specifically applied the fraud exception under CERCLA. However, the decision in Thomas Solvent comes closest to the exception. When the reorganization of Thomas Solvent created the spinoff corporations, one reason given for the activity was "concerns about potential environmental liability." However, the court did not discuss the fraud exception or the potential liability under this theory. The court believed the mere continuation doctrine to be the strongest justification for imposing CERCLA liability.

144. Fletcher, supra note 30, § 7125. "[T]he creditors defrauded by the transfer may, in equity, follow the property into the hands of the new corporation, and subject it to the satisfaction of their claims, or hold the new corporation liable to the extent of its value." Fletcher, supra note 30, § 7125. See also Allied Indus. Int'l v. AGFA-Gevaert, 688 F. Supp. 1516 (S.D. Fla. 1988); Peterson v. Harville, 445 F. Supp. 16 (D. Or. 1977) (for the rule of non-liability to apply there needs to be good faith and fair consideration).


147. Toxic Tort II, supra note 145, at 1086. See also Wabash, St. Louis & Pac. Ry. v. Ham, 114 U.S. 587 (1885) (corporations can only relieve their property from debts by sale or transfer in good faith and for a full consideration).


150. The court had already ruled against Thomas Solvent under the Michigan Fraudulent Conveyance Act § 566.17 because it inferred fraudulent intent from the circumstances surrounding the conveyances. Id. at 1456. Mich. Comp. Laws Ann. § 566.17 (West 1967).

The above cases examined the adoption and application of the common law to CERCLA. The following case is an example of the minority position of non-liability under CERCLA for corporate successors.¹⁵²

III. REJECTION OF CORPORATE SUCCESSOR LIABILITY UNDER CERCLA

In *Anspec Co. v. Johnson Controls*,¹⁵³ the United States District Court held that the application of common law corporate successor liability to CERCLA cases was incorrect. The plaintiff bought property from Ultraspherics, which had previously polluted the soil.¹⁵⁴ After the sale, Ultraspherics and another corporation merged and Ultraspherics became the surviving corporation.¹⁵⁵ Anspec sued Ultraspherics to recover the costs of cleaning up the polluted site.¹⁵⁶

The court noted that although successor liability may be desirable, the decision to impose it should be left to Congress.¹⁵⁷ Under CERCLA, liability is limited to generators, transporters, and past and present owners or operators of haz-

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¹⁵³. 734 F. Supp. 793. (E.D. Mich. 1989), *rev'd*, 922 F.2d 1240 (1991). Although the Sixth Circuit Court of Appeals recently reversed *Anspec*, deciding to follow successor liability under *Smith Land*, that does not negate the importance of the district court's reasoning and decision. The analysis and conclusion of the district court could readily be adopted by the jurisdictions yet to decide the successor liability issue. *See supra* note 5. The Sixth Circuit decision also opened up additional issues for corporate CERCLA liability. The court stated: "If they are parent corporations rather than successors, there are legal issues not presented in this appeal which the district court must address." *Anspec*, 922 F.2d at 1247.

¹⁵⁴. *Anspec*, 922 F.2d at 793-94.

¹⁵⁵. A "surviving corporation" is found when one corporation is absorbed by another and the former dissolves while the existence of the latter continues on with the rights, etc. of the former in addition to its own. Fletcher, *supra* note 30, § 7082. *See also* Brown v. E.W. Bliss Co., 818 F.2d 1405 (8th Cir. 1987); Engel v. Teleprompter Corp., 703 F.2d 127 (5th Cir. 1983) (the absorbing corporation which remains is the survivor); Parra v. Production Mach. Co., 611 F. Supp. 221 (E.D. N.Y. 1985) (discussing the mere continuation exception and the circumstances surrounding a surviving corporation); Vulcan Materials Co. v. United States, 308 F. Supp. 53 (N.D. Ala. 1969).


¹⁵⁷. *Id.* at 793

¹⁵⁸. *Id.* at 796.
ardous substances. "Successor corporations are not listed as one of the potentially responsible parties under CERCLA" and liability does not follow a corporation to its successor.

On the basis of the statutory omission, the district court in Anspec held the changes in the original Ultraspherics made the successor Ultraspherics not liable. The court believed CERCLA's goals were obtainable without successor liability. "The owner and/or operator of the property is potentially liable, the actual polluter is liable and successor corporations, to the extent they are polluters or owners or operators, are still potentially liable. Where a potentially liable party does not exist, the Superfund is used to finance the clean up." The court decided only Congress could change the list of potentially liable parties. This is because Congress alone can adequately investigate and statutorily impose successor liability. The division between the courts' decisions does not end with Anspec. Between the polarized camps of Smith Land and Anspec lies the position of the EPA.

IV. THE EPA APPROACH TO CERCLA SUCCESSOR LIABILITY

The EPA determined that successor liability applies under a theory of continuity of business operations. In a memorandum by Courtney Price, Assistant Administrator for Enforcement and Compliance Monitoring, the EPA outlined its position on corporate successor liability. Potential corporate

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159. Id. at 795. See also 42 U.S.C. § 9607 (1988).
160. Anspec, 734 F. Supp. at 795. No relevant changes were made to CERCLA in this area during the 1986 amendments when Congress had opportunity to do so. Id.
161. Id. at 796.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
168. Memorandum of Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, United States Environmental Protection Agency (June 13, 1984) (on file with the SANTA CLARA LAW REVIEW) [hereinafter Memorandum].
successor liability is found where a corporation, as a prior owner or operator of a hazardous waste site, transfers corporate ownership to another entity.\textsuperscript{169} If this occurs, the issue becomes whether or not the predecessor’s hazardous waste liability was also transferred.\textsuperscript{170}

Price’s memorandum outlined the common law doctrine of successor liability\textsuperscript{171} and then advanced a new approach. Liability under the new approach, focusing on the continuity of business operations, is imposed if the “new corporation continues substantially the same business operations as the selling corporation.”\textsuperscript{172} Price noted this theory is adopted in product liability cases because application of the traditional rules imposes harsh and inequitable results upon plaintiffs.\textsuperscript{173} That premise also makes the theory pertinent to CERCLA cases.

To impose liability under the EPA’s plan, a successor corporation must acquire the predecessor’s assets and continue the same basic business operations as the predecessor; continuity of ownership is not required.\textsuperscript{174} The memorandum proposed that the EPA use continuity of business operations as an exception to non-liability in addition to the traditional exemptions.\textsuperscript{175}

As the cases above indicate, some jurisdictions have adopted the traditional rules\textsuperscript{176} while at least one court has held no liability should be imposed upon corporate successors.\textsuperscript{177} Between these two positions lies the plan proposed by the EPA, modifying the common law.\textsuperscript{178}

\begin{itemize}
\item \textsuperscript{169} Id. at 10.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id. at 11-13.
\item \textsuperscript{172} Id. at 11.
\item \textsuperscript{173} Id. at 12-13. This approach was adopted in order to provide an “adequate remedy and protect injured consumers.” Id. at 13.
\item \textsuperscript{174} Id. at 14. According to Price, the disregard of continuity of ownership differentiates this doctrine from the “de facto” and “mere continuation” exceptions. Id.
\item \textsuperscript{175} Id. at 16. Recall that the traditional exceptions are: (1) implied/express assumption of liability; (2) de facto merger; (3) mere continuation; and (4) fraud.
\item \textsuperscript{176} See Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3rd Cir. 1988).
\item \textsuperscript{178} See Memorandum, supra note 168.
\end{itemize}
V. ANALYSIS

When imposing successor liability, the courts in the above cases discussed CERCLA's legislative history. Many courts determined CERCLA's purpose to be remedial and assumed that Congress "forgot" to include successor liability in the statute. The courts superimposed the common law doctrine onto the existing CERCLA framework.

Examining the text of CERCLA section 9607, nothing indicates that Congress intended the imposition of successor liability. The statute lists potentially responsible parties (PRPs), including past and present owners and operators, generators of hazardous waste and transporters. This list is explicit and was not amended by the Superfund Amendments and Reauthorization Act of 1986 to include successor liability. However, the legislative history of CERCLA, and the inferences that can be drawn from it, justify the imposition of successor liability. Congress intended CERCLA to require parties responsible for creating hazardous waste to provide payment for clean up, rather than burdening those injured by the pollution with the cost.

These policies, and others noted above, are potent rationale weighing in favor of adopting successor liability as a CERCLA general rule. Part of the congressional debate on CERCLA focused on how to enact a comprehensive liability statute placing the financial obligations of clean up on the parties who mismanaged their hazardous substances. The goal

180. Id.
181. See supra note 14.
182. 42 U.S.C. § 9607(a) (1988) (transporter liability is subject to a limitation that the site must be selected by the person transporting the hazardous substance).
187. See supra text accompanying notes 15-27.
188. H.R. REP. No. 1016, supra note 2. The goal of the legislation was "to provide the beginning of an equitable solution to the environmental and health
was imposing liability widely and equitably, while not allowing corporations to elude responsibility for the problems they created.

This balancing of equities weighs the interests of the party injured by the hazardous substances against those of the polluters. In these circumstances, Congress believed the injured party should prevail. CERCLA’s drafters intended to rely upon responsible corporate deep pockets for future clean up costs and to use Superfund as a last resort. This policy, together with Senator Randolph’s statement regarding the retention of the common law for CERCLA lawsuits as discussed above, favors the imposition of successor liability under CERCLA.

The majority of the courts examining this issue have agreed and adopted successor liability for CERCLA cases. The case most vociferous in its approval, as well as in its interpretation of the legislative history, was Smith Land. To reach its decision, the court in Smith Land made major inferences regarding congressional intent. The court extrapolated successor liability from an absence of statutory language to the contrary. It believed successor liability was not included in the statute because CERCLA was quickly put together during the last days of Congress. This reasoning is reinforced by the general and documented congressional belief that the responsible parties should pay recovery costs. Additional support for this position is found in the premise that the government and injured parties should not bear the burdens of the mistakes (or intentions) of polluters.

problems created by decades of reckless and irresponsible disposal of chemical wastes.” H.R. REP. NO. 1016, supra note 2.

189. H.R. REP. NO. 1016, supra note 2. This is especially apparent due to Congress’ attempt to include as many involved parties as possible in the group of PRPs. (This is readily seen in the statute itself.) Almost anyone having anything to do with the hazardous substances is liable for cleanup costs.

190. H.R. REP. NO. 1016, supra note 2. The legislation is “intended to give access to the ‘deep pockets’ of whatever company has the money to pay regardless of the degree of culpability.” H.R. REP. No. 1016, supra note 2.


192. See supra text accompanying note 23.


In applying this general intent, it is a short step to adopt common law successor liability for CERCLA cases. The majority of jurisdictions have followed Smith Land and taken that step, but there has not been uniform application of the common law. In Smith Land, the court derived responsibility for successor corporations from general statements of Congress and considerations of equity. The idea of fairness, which led to the court's decision, suggested that the taxpayer should not bear the burden while the successor corporation received the benefit of the predecessor's polluting. In its imposition of successor liability, Smith Land discussed its application in a limited factual context.

The court reiterated the common law principles of liability in a statutory merger or consolidation. The fact that a merger or consolidation occurred under statutory authority made the imposition of liability easier for the court to accept; it was merely an assumption of responsibility by the surviving corporation and no more.

Although the court in Smith Land did not cite any direct precedent imposing successor liability in a federal suit under section 9607, the holding bears out the intent of Congress and the important consideration of fundamental fairness. This concept of fairness, when applied in connection with CERCLA's remedial purpose, results in a potent combination.

When Congress enacted CERCLA, it intended the government to provide back-up support to private, responsible parties. Allowing corporations which have merged or consolidated pursuant to statute to escape liability thrusts the govern-

196. This is obviously the feeling guiding the court in Smith Land. See Smith Land, 851 F.2d at 91.
197. Id. This rationale is demonstrated by the court's notation that the benefits of the pollution went to the successor through its predecessor and the public did not really benefit at all. Id. at 92.
198. H.R. REP. NO. 1016, supra note 2. "This fund is to be used to . . . clean up abandoned hazardous waste sites when the company or companies responsible for creating the problem either no longer exist, cannot be identified or lack the financial resources to clean up their own messes." Id.
199. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3rd Cir. 1988).
200. Id.
201. See supra note 2.
ment to the forefront of parties bearing response costs. This shift should only occur if the responsible party cannot pay under any circumstances. In a merger or consolidation, the responsible party generally possesses the means to pay.

Generally, in a merger or consolidation the old corporation has been consumed by the new one and the primary business operations of the old continue. The old corporation continues to exist, but under the guise of a new name or board of directors. It is not unjust, therefore, to make the new corporation liable for the consequences of the pollution of the old.

On the contrary, the new corporation directly acceded to the benefits the former enjoyed, such as cost savings resulting from improper disposal. The acquiring corporation likely purchased the former business at a lower cost due to the absence of elaborate and expensive pollution control systems. By assuming these potential “benefits,” the new corporation also accepts the risks.

Proponents of the contrary position believe the successor does not accept these risks; the Anspec court’s decision was based on strict statutory construction. Section 9607 does not provide a foundation for successor liability and so the court declined to apply the common law rule.

A strict reading of section 9607(a) overlooks the policy behind CERCLA and the proper role of the federal government. The Anspec court approached CERCLA with the belief that response costs can be adequately recovered from the other categories of PRPs. However, if there are no other available PRPs, then the federal government is left to pay the clean up costs. The result in Anspec provides successor corporations with an easy escape—a polluter can merge with another corporation and not incur liability for CERCLA response costs.

The Anspec court assumed Superfund will provide an unending source of federal money to finance hazardous substance clean ups. This is unrealistic. Superfund is not a bottomless well of funding; rather, it must be continually replenished.

203. See supra text accompanying notes 41-45.
205. Generators, transporters and past and present owners and operators.
by Congress.\textsuperscript{207} Superfund is designed to provide an alternative to private party funding and should be tapped only in the absence of an identifiable responsible party.\textsuperscript{208} In light of the increasing number of polluted sites and limited federal resources, the "Super" fund will provide only a fraction of all the funding necessary.\textsuperscript{209}

The \textit{Smith Land} court adopted the common law successor liability rule for modern environmental clean up problems. From this, the federal courts are now embroiled in disputes over the application of the rule's exceptions.\textsuperscript{210} Although a majority of courts have followed \textit{Smith Land}, its adoption has not been universal.\textsuperscript{211}

The common law rule the court imposed in \textit{Smith Land} results in non-liability for a corporate successor in an asset purchase.\textsuperscript{212} The court in \textit{Asarco} reached this conclusion from its application of the common law principles discussed in \textit{Smith Land}.\textsuperscript{213} It is contrary to CERCLA's remedial ideals to allow any PRP to escape liability in this manner.

\textsuperscript{207} 42 U.S.C. \S 9631(b)(1) (1982). This section states in full:

There are hereby appropriated, out of any money in the Treasury not otherwise appropriated, to the Response Trust Fund [Superfund] amounts determined by the Secretary of the Treasury . . . to be equivalent to—

(A) the amounts received in the Treasury under section 4611 or 4661 of title 26,

(B) the amounts recovered on behalf of the Response Trust Fund under this chapter,

(C) all moneys recovered or collected under section 1321(b)(6)(B) of title 33,

(D) penalties assessed under subchapter I of this chapter, and

(E) punitive damages under section 9607(c)(3) of this title.

\textit{Id.}

\textsuperscript{208} For example, if all PRPs have declared bankruptcy.

\textsuperscript{209} For example, in 1984 the "estimated cost of cleaning 1,800 sites 'could run as high as $11.4 billion' in 1983 constant dollars, in addition to the $1.6 billion authorized for the [Superfund . . .]." 14 Env't Rep. 7275 (BNA Feb. 3, 1984) (quoting \textit{SUPERFUND TASK FORCE REPORT, EPA SUPERFUND TASK FORCE} (1983)).

\textsuperscript{210} This is readily observed in the mere continuation exception. Some courts have developed similar theories, \textit{i.e.}, the continuing business enterprise exception, etc.

\textsuperscript{211} For example, it was not adopted by the district court in \textit{Anspec}. \textit{Anspec}, 784 F. Supp at 795, rev'd, 922 F.2d 1240 (1991). \textit{See supra} notes 5 and 153.

\textsuperscript{212} Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990).

\textsuperscript{213} \textit{Id.}
For example, in an asset purchase, the new company buys out the old polluter and the same rationales which guided the imposition of liability in a merger or consolidation apply once more. The buyer likely paid a lower price for the polluting company than if the corporation had practiced environmentally conscious policies. The courts have left a loophole which, in the interest of the environment, must be closed. Asset purchases are only one of the areas where the problems of imposing liability lie.

Other problems arise due to the contract interpretations which courts must engage in to find an express or implied assumption of liability. Courts must examine contract provisions to find language indicating an assumption of liability in an asset purchase. Utilizing this exception to non-liability leads courts into the thicket of parole evidence. It also creates potential findings of liability where none exists, so as to impose it on a deserving party.

This element of unfairness is minimized in the *de facto* merger exception. Under this doctrine the courts examine an array of factors to determine if the new corporation is merely the same wolf now dressed in sheep's clothing. The test requires continuity in virtually all facets of the corporation, cessation and liquidation of the seller, and assumption of business obligations by the buyer.

*National Can* adopted the general rule and applied the *de facto* merger exception. The continuity of business operations requirements, along with the dissolution of the predecessor, convinced the court the successor should be liable. The four prongs of the *de facto* merger test provide an equitable basis on which to impose liability.

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215. The parole evidence rule is "[t]he rule which excludes evidence of prior or contemporaneous oral agreements which would vary a written contract." *Ballew's Law Dictionary* 914 (3d ed. 1969).
216. *See supra* text accompanying notes 89-104.
218. *Id.* at *25.
219. *Id.*
220. *See supra* notes 95-96 and accompanying text.
This test determines if a merger has actually occurred despite the label the parties have attached to the transaction. If the stockholders, management, personnel, assets and business location remain the same and there is a liquidation and assumption of contractual obligations, then liability is warranted. This exception is in line with CERCLA's basic remedial principles. Although the "real" PRP has dissolved, its essence, and hence its liability, continue in the "new" corporation.

This is also true for the "mere continuation" exception. The mere continuation theory applies liability if the same basic officers, directors and shareholders are present in the new corporation as were in the old. The court in Thomas Solvent found mere continuation to be a well-balanced remedy supported by the belief that corporations should not evade liability for the clean up costs resulting from their actions. Nor should society be forced to bear the brunt of those costs.

Thomas Solvent also viewed successor liability as an opportunity to promote prevention. If successors are faced with the prospect of liability for the predecessor's actions following a merger, there is incentive to avoid polluting. This factor could weigh heavily in corporate decisions on environmental practices.

As noted earlier, courts have not applied mere continuation consistently. The exception has spawned the substantial continuity and continuing business enterprise exceptions. Substantial continuity is found, and liability imposed, if the business remains the same, the employees stay in the same positions and the same product is produced and bought by the same customers. The court in Carolina Transformer applied this test because the continuity of shareholders be-

222. Id.
223. Id. See also supra note 118 and accompanying text.
227. See supra text accompanying notes 124-43.
tween the predecessor, Carolina Transformer, and the successor, FayTranCo, needed to satisfy the mere continuation doctrine was missing.229

The substantial continuity test is easier to satisfy because there are no requirements regarding continuity of officers, directors and shareholders.230 It imposes liability in the asset purchase of a corporation when the employees and business operations of the selling corporation are retained.231

Business operations were also the focus of the defendant’s proposed continuing business enterprise test in Asarco.232 There are only two differences between the continuing business enterprise and substantial continuity tests. The former test includes the elements of the substantial continuity test but also requires the company name to remain the same and the successor to hold itself out as the predecessor.233 Thus, the continuing business enterprise test is more difficult to apply than substantial continuity because of these two additional requirements.234 Like substantial continuity, there is no need to show a continuation of officers, directors or shareholders. Therefore, the continuing business enterprise exception adds little to the already established rules.

The court in Asarco neither adopted the proposed test nor discounted it as a viable alternative. The court decided the doctrine was not relevant to the facts before it235 and the test awaits application by a court in the appropriate circumstances.

Mere continuation evolved further under the EPA approach to successor liability. The EPA’s proposed continuity of business operations formula deletes the continuity of ownership requirement found in mere continuation. The two prongs of the test are: (1) the acquisition of assets and (2) maintenance of essentially the same business operations.236 If both

229. Id. at 1033. Dewey Strother owned 100% of Carolina Transformer and his son and daughter each owned 50% of FayTranCo. Id.
230. Recall that in Carolina Transformer there was a continuity of directors and officers. Id. at 1034.
231. Id. at 1039.
232. Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1265 n.7 (9th Cir. 1990).
233. Id.
234. See supra text accompanying notes 124-43.
235. Asarco, 909 F.2d at 1265.
236. Memorandum, supra note 168, at 14.
of these occur, liability is immediate.\textsuperscript{237} This approach is similar to the substantial continuity test in its elimination of the need for continuity of ownership.\textsuperscript{238}

The continuing business enterprise proposal in \textit{Asarco} is also similar to the EPA's approach. However, the \textit{Asarco} test added elements which defeat the exception's purpose. For example, the necessity of retaining the same name allows many corporations to elude liability by a mere name change.\textsuperscript{239} The EPA test is easier to prove than either the substantial continuity or continuing business enterprise doctrines because of its less complicated requirements. The EPA test is also less complex than the \textit{de facto} merger test.\textsuperscript{240} Under the EPA test, a continuation of corporate ownership is irrelevant, whereas it is a necessary element to the \textit{de facto} merger test.\textsuperscript{241}

The EPA's continuity of business operations theory applies responsibility if the buying corporation continues the same basic business as the selling corporation.\textsuperscript{242} This theory liberally imposes CERCLA liability and fulfills CERCLA's remedial purpose. It also places the government in its supplemental role to private polluters. Imposing liability under the EPA's test is attractive because, as seen with the other theories, the new corporation acquired the benefits of the predecessor's polluting—benefits which continue after acquisition.\textsuperscript{243}

The complexity created by the outgrowths of the mere continuation exception is countered by the simplicity of the fraud doctrine. Courts impose liability for fraud when a con-

\textsuperscript{237} Memorandum, \textit{supra} note 168, at 14.
\textsuperscript{238} Memorandum, \textit{supra} note 168, at 14.
\textsuperscript{239} \textit{Louisiana-Pacific Corp. v. Asarco, Inc.}, 909 F.2d 1260, 1265 n.7 (9th Cir. 1990).
\textsuperscript{240} Memorandum, \textit{supra} note 168, at 10.
\textsuperscript{241} Memorandum, \textit{supra} note 168, at 10. Recall that continuity of ownership is required for both the tests in \textit{Asarco} and \textit{Carolina Transformer}.
\textsuperscript{242} Memorandum, \textit{supra} note 168, at 10. One example of continuing the same basic business operations is the case when the old corporation sold chocolate chip cookies and the new sells only chocolate chips.
\textsuperscript{243} This is clarified by the following hypothetical: Assume that when Nicetry, Inc. acquired Waste Co. it did so at a price reflecting Waste's savings from its polluting activities. As Nicetry carries on the same business operations as Waste, it continues to benefit from the lower costs of Waste's dumping or inadequately containing hazardous waste. This savings results even if Nicetry has nothing to do with Waste's operations, but acquires it merely for investment purposes. By virtue of a lower purchase price, the benefit passes along to the successor corporation.
veyance has occurred to avoid creditors.\textsuperscript{244} If a successor can prove the corporate conveyance occurred in good faith and for value, a presumption of validity attaches.\textsuperscript{245}

The difficulty with the fraud exception lies in proving the fraudulent conveyance. The bad faith requirement applies a subjective test to corporate boards of directors that is difficult to prove absent specific statements or board resolutions.\textsuperscript{246} The problem is difficult, but not always insurmountable.

In \textit{Thomas Solvent} the proof problem was overcome and the court could have imposed liability under the fraud exception.\textsuperscript{247} This is because immediately preceding the fraudulent creation of several spinoff corporations one of the directors expressed concern about avoiding possible environmental liability.\textsuperscript{248} In most cases such overt admissions would not be found. As the CERCLA liability net drifts wider, corporations will be more circumspect and liability more difficult to attach.

VI. PROPOSAL

The application of the common law doctrine is unwieldy and has yet to be universally accepted. The exceptions continue to evolve to the point where they almost overshadow the rule. A simple and equitable solution, reflecting congressional intent in enacting CERCLA, is needed. Fulfilling congressional intent requires all corporations, no matter what their form (\textit{i.e.} predecessor or successor), to be responsible for the environmental hazards they create.

The EPA continuity of business operations test provides an answer to this dilemma. It is a simple and ready rule for the courts to apply.\textsuperscript{249} The test is also equitable to both corporations and taxpayers. If a corporation is acquired and its business operations ceased entirely or are drastically altered, then liability is not imposed. Additionally, if a corporation is pur-

\footnotesize{\textsuperscript{244} See Toxic Tort II, supra note 145, at 1086.\
\textsuperscript{245} See Toxic Tort II, supra note 145, at 1086.\
\textsuperscript{246} See supra text accompanying notes at 144-47.\
\textsuperscript{247} See supra notes 109-12 and accompanying text. Fraud was also proven against Thomas Solvent for their attempt to defraud creditors by creating the spin-off corporations. See Kelley v. Thomas Solvent Co., 725 F. Supp. 1446, 1457 (W.D. Mich. 1988).\
\textsuperscript{248} Thomas Solvent, 725 F. Supp. at 1449.\
\textsuperscript{249} See supra text accompanying notes 167-78.}
chased and continues as it was prior to acquisition, the taxpayers will not bear the costs of the successor's gains.

In addition to the EPA test, liability should continue to be imposed if a merger or consolidation occurs as in Smith Land. Merger or consolidation liability is included because the result of such a corporate combination is a benefit to the new corporation gained through the old's irresponsible environmental policies. In this way, CERCLA's reach is widened to include corporate parties who change form through asset purchases, mergers and consolidations.

An amendment to CERCLA would implement this rule. Subdivision (a)(5), added to section 9607, would read:

(a)(5) any corporation that merges or has merged, consolidates or has consolidated, acquires or has acquired the assets of and carries on substantially the same business operations as the selling corporation, one of the parties listed above, shall be liable for—

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

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

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

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.\textsuperscript{250}

The rest of the statute would not change. Potential forms of liability would also remain the same.\textsuperscript{251} An amendment to CERCLA would cure the statutory construction problem faced by the district court in Anspec and provide a workable rule while spreading liability to the responsible parties. There would be specific statutory guidance, which the court in Anspec


\textsuperscript{251} Successor corporations will be liable for: "(A) all costs of removal or remedial action incurred by the United States . . . ; (B) any other necessary costs of response incurred by any other person . . . ; (C) damages for injury to, destruction of, or loss of natural resources . . . ; and (D) the costs of any health assessment or health effects study." 42 U.S.C. § 9607 (1988).
thought was lacking. Congress will have spoken on the issue and included some corporate successors in the group of PRPs. The new section also would encourage corporations to reformulate their environmental practices to avoid successor liability. A corporation must plan for the future. If a successor corporation is aware it may be held liable for its predecessor’s environmental costs, it may be deterred from its plans to merge with the predecessor. This will create major stumbling blocks for businesses. To avoid these obstacles, corporations will be environmentally conscious to remain attractive to potential business developments. If the proposed section 9607(a) were implemented, corporations would be required to think environmentally to remain open to future business activities.

VII. CONCLUSION

To cope with CERCLA’s lack of statutory guidance on corporate successor liability, courts have chosen to follow several routes. One route draws upon the common law rule of successor liability and imposes liability if the potentially responsible party has merged or consolidated. Under this rule liability is not imposed if the corporation was acquired by an asset sale, unless one of the four exceptions (fraud, mere continuation, de facto merger or assumption of liability) applies. One court has adopted a substantial continuity exception, while another has considered a continuing business enterprise exception to the rule of non-liability.

Yet another court has decided to strictly construe CERCLA and not impose liability under the common law rules. Furthermore, the EPA has developed its own position on successor liability. The EPA test applies the common law rules and liability if the new corporation continues the business operations of the old.

To remedy the division among the federal courts, and to promote congressional intent and CERCLA’s remedial goals, liability should be imposed on successor corporations.
CERCLA should be amended to impose liability on successor corporations arising from mergers, consolidations and asset sales which continue the same basic business operations of the predecessor corporations.

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