2011

Successor Liability

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Article

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INTRODUCTION

The phrase mergers and acquisitions, or M&A for short, signifies both the business activity of growing (or divesting) corporate operations and the legal rules surrounding that activity. One typical acquisition technique is the purchase of business assets by one company from another. Indeed, General Motors and Chrysler utilized this transactional structure in their bankruptcy reorganization following the recent global financial crisis, with the United States Government as a part owner of the purchasing entities.[1] Asset sales transactions have various benefits, one of which is that the purchaser presumptively does not assume any of the seller's liabilities as part of the purchase transaction. With respect to this ability to purchase assets without also assuming liabilities, the Supreme Court declared over 120 years ago that "[t]his doctrine is so familiar that it is surprising that any other can be supposed to exist."[2]

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1. For contrasting views on the propriety of the use of a bankruptcy sale of assets in this context, compare Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of* Chrysler *and* GM, 2010 U. ILL. L. REV. 1375, 1376 (stating that the very core of bankruptcy law is being destroyed), with Stephen J. Lubben, *No Big Deal: The* GM *and* Chrysler *Cases in Context*, 83 AM. BANKR. L.J. 531, 532 (2009) (illustrating how the cases and their structure "are entirely within the mainstream of chapter 11 practice").

2. Fogg v. Blair, 133 U.S. 534, 538 (1890); *see* 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 7122 (perm. ed., rev. vol. 2008) [hereinafter FLETCHER ET AL.] ("The general rule, which is well settled, is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor.").

Let's take a simple example on a personal level. Assume that you have a substantial physical asset, a car worth roughly $10,000. You also have a thirty-six month unsecured installment loan obligation to a bank that you incurred to purchase the car. The loan has a $9000 balance. I want to buy your car and I pay you $9500 for it. I now own a car and I am $9500 poorer, and you have $9500 in cash to pay off a $9000 loan. This appears to be a good deal for both of us.

However, what if you fail to pay back the bank? Additionally, what if the week before you sold me the car, you hit and injured a pedestrian while driving the car? After I buy your car, the pedestrian sues for one million dollars in damages. Could the bank collect from me for the $9000 loan obligation? Could the injured pedestrian hold me liable for one million dollars? Of course not.[3]

The answers to those questions may be quite different today when one company acquires the business assets of another company. In terms of our hypothetical car purchase, the acquiring company may be saddled with the bank loan, the pedestrian claim, or both, irrespective of the fact that the purchaser and seller explicitly agree, that the purchaser was only buying an asset (the car) and not assuming any liabilities. I say that the answer *may* be different because of the uncertain state of the law of successor liability, which would be called upon to impose liability on the purchasing company in this context. Even more extraordinarily, the potential liability of the purchaser is not limited by the value of what it obtained from the selling company, or even the overall value of the seller's total business. Rather, the purchaser's total business is at risk. To use our car purchase hypothetical, even if your assets available to satisfy the bank and pedestrian claims were only $20,000, under modern successor liability law as applied to businesses, if I have assets of $500,000, then all of my assets (and indeed my financial viability) are at risk to satisfy the claims found to be related to my acquisition of your car.

Successor liability law is mostly composed of state common law case-by-case decisions. These decisions fundamentally seek to balance two competing, and often conflicting, policy goals: to

3. If I knew that I would be liable for your loan, I certainly would not pay you $9500 for your car. More likely, I would offer you around $500. If I knew I might be subject to potentially catastrophic tort liability because of the purchase, such as liability for the injured pedestrian claim, I likely would not buy the car at all.

provide a necessary remedy to injured parties, often tort claimants, and to provide transactional clarity and certainty for business parties engaged in fundamental corporate transactions.[4] As it has developed to date, however, successor liability law is so varied and unpredictable that it is not only a trap for the unwary,[5] but a trap for the very wary, as well. Transactional asset-acquisition planning today faces the worst of all possible worlds: uncertainty as to whether successor liability applies, together with an enormous range of potentially applicable monetary liabilities that may be brought on an asset-purchasing entity after the transaction is completed. Potentially deserving claimants are forced to litigate to see if they can convince a court to apply some variation of successor liability theory.[6] Courts effectively are asked to, and sometimes do, rewrite the business deal after the fact and impose a liability allocation regime that the transacting parties would never have negotiated in the first place. More than a century of common law experimentation has resulted in the "doctrinal morass and high degree of uncertainty that now surround successor liability."[7]

This Article proposes a simple and efficient statutory solution to the problem of successor liability, providing a remedy to injured claimants while identifying for the business parties certainty as to apportionment of potential liabilities. Part I explains the basic acquisition strategies in the M&A arena, highlighting the fundamental legal differences that may support use of one over the other. Part II explores the development of successor liability, from nonliability through the explosion of liability brought on by the development of products liability and strict-liability doctrines, to the current doctrinal disarray.

4. "Little effort is made to satisfy two policy goals: compensating plaintiffs as if the damage-causing business had not terminated; and preventing the rule of successor liability from otherwise reducing the free transferability of firms or their assets." Mark J. Roe, *Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559, 1561–62 (1984).

5. Flaugher v. Cone Automatic Mach. Co., 507 N.E.2d 331, 337 (Ohio 1987) ("The adoption of the product line theory [of successor liability] . . . cast[s] a potentially devastating burden on business transfers and would convert sales of corporate assets into traps for the unwary.").

6. The current "liberal successor liability law" system "virtually mandates that the plaintiff use substantial resources to identify the appropriate defendant." Michael D. Green, *Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants*, 72 CORNELL L. REV. 17, 45 (1986).

7. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1885 n.15 (1991).

This Part also explains that the current haphazard application of variant threads of successor liability doctrine leaves business parties with no ability to predict, prepare, or effectively negotiate an asset acquisition transaction. Proposed policy rationales for expansive successor liability and potential remedies for the existing situation are considered in Part III. This Part explains why these proposals do not meet the important competing goals of maximum relief for deserving claimants and transactional certainty for business parties in asset acquisition transactions. Part IV presents an effective solution to be implemented as a federal statute, which calls for an automatic transfer of liabilities from the divesting company to the acquiring company in the event of a transfer of substantially all assets, but provides for no unassumed transfer of liabilities otherwise. The time is ripe to provide clarity and uniformity to guide the actions of parties to potential business transactions as well as those who would seek to pursue remedial claims against them.

I. MERGER AND ACQUISITION STRUCTURES

M&A transactions are among the most complex in the business and legal world, often calling into play issues of corporate law, securities law, taxation, antitrust law, labor and employment law, and environmental law, just to mention a few. Nevertheless, the basic structure of these transactions is not so varied. Typically, an acquiring company will seek to acquire a target company by one of three transaction structures: a purchase of stock, a merger, or a purchase of assets.[8]

Using a stock-acquisition structure, the acquiring company purchases all, or at least a controlling interest in, the target company's voting stock directly from the target's shareholders. If the target company is privately held with only a few shareholders, the transaction may be a straightforward stock-acquisition agreement in one or a series of transactions.[9] If the

8. What follows is a highly simplified discussion of these alternative transaction structures, but it is all that is necessary for the present purposes. A more fulsome discussion can be obtained by consulting 1 LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 1.02 (2011). The classic discussion of these issues is found in JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS 75–138 (1975).

9. *See, e.g.*, Tess Stynes, *Live Nation Buys Artist Agency*, WALL ST. J., Feb. 7, 2007, http://online.wsj.com/article/SB100014240527487044222045761 30050245362060.html; Susan Wojcicki, *We've Officially Acquired AdMob!*,

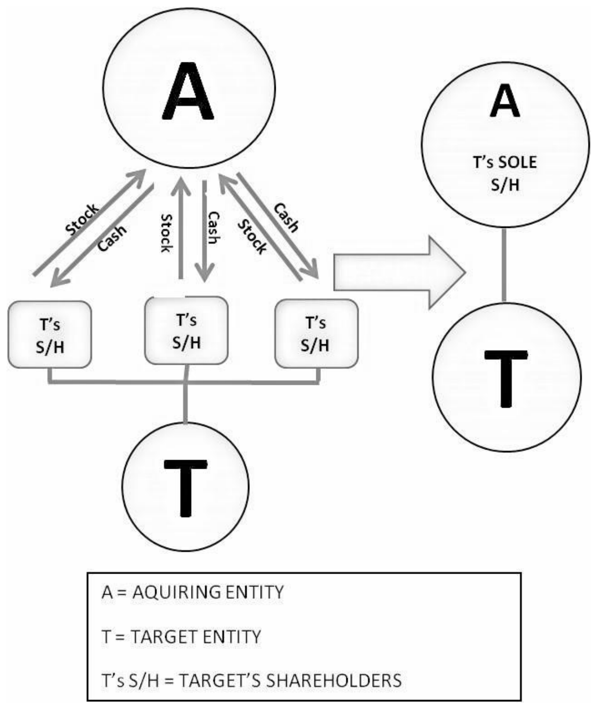
stock of the target company is publicly traded, the acquisition is usually made by means of a tender offer, that is, a publicly announced offer to buy the stock of the various public shareholders.[10] With either a private or public company target, the acquisition currency can be cash or acquiring company stock (or some of each) and the acquisition can take place quickly.[11] No vote of the board of directors or the shareholders of the target is required. The stock acquisition structure and its result look like Figure 1.

Figure 1: Stock Acquisition Transaction

OFFICIAL GOOGLE BLOG (May 27, 2010, 1:04 PM), http://googleblog.blogspot.com/2010/05/weve-officially-acquired-admob.html.

10. Catherine Yeager Livingston et al., *Acquisitions Utilizing Tender Offers in Today's Market*, FULBRIGHT & JAWORSKI L.L.P. (Aug. 10, 2010), http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=4590&site_id=494&detail=yes ("The popularity of tender offers increased after the Securities and Exchange Commission's amendments to the 'all holders/best price rule' in 2007, and the increased use of tender offers continues through 2010.").

11. "A tender offer can be completed in as few as 20 business days from the launch of the tender offer. This is three to four times faster than a traditional merger could be completed . . . ." *Id.* Although a tender offer can result from a negotiated acquisition, it is also the usual vehicle of choice in a hostile acquisition since the acquirer can go above management's head and directly to the shareholders to get control. *See* John H. Matheson & Jon R. Norberg, *Hostile Share Acquisitions and Corporate Governance: A Framework for Evaluating Antitakeover Activities*, 47 U. PITT. L. REV. 407, 409–15 (1986).



Assuming all of the stock of the target is acquired, the target becomes a wholly owned subsidiary of the acquiring company. This means that the acquiring company effectively acquires all of the assets and all of the liabilities of the target.[12] These assets and liabilities, however, are partitioned in the subsidiary. If the target's liabilities ultimately exceed its assets and income-producing capacity, the subsidiary goes bankrupt and the acquisition becomes worthless. The bad news in a stock acquisition is that the investment may ultimately be worth nothing; the good news is that, absent a piercing of the subsidiary's corporate veil,[13] the other assets of the parent are not at risk and the viability of the parent is not threatened.

12. *See, e.g.*, SCI Minn. Funeral Serv., Inc. v. Washburn-McReavy Funeral Corp., 795 N.W.2d 855, 864 (Minn. 2011) ("In the context of a stock sale agreement, the law presumes that all assets and liabilities transfer with the stock.").

13. For a discussion and empirical analysis of piercing in the parent-subsidiary context, see John H. Matheson, *The Modern Law of Corporate*

One significant disadvantage of the stock-acquisition transaction is its voluntary nature. Since the sale of stock is a voluntary transaction, no shareholder is forced to sell its shares. The acquiring company might not secure sufficient shares to gain control and might be left with a situation where there are minority shareholders.[14] This could inhibit the freedom of the acquiring company to manipulate the operations and assets of the target for its purposes, since the minority shareholders may feel that they are being ignored or that the acquiring company is engaged in self-dealing transactions. These tensions and potential claims may make the stock acquisition method less than ideal in some circumstances.[15]

A second acquisition structure is the merger. A merger occurs when two business entities combine to produce a single entity (the "surviving" entity) pursuant to a merger plan.[16] Unlike a stock acquisition, a merger is a corporate transaction; that is, it typically requires the approval of both the target and the acquirer's board of directors and an affirmative vote of the shareholders of each entity.[17] If one business decides to acquire

Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context, 87 N.C. L. REV. 1091 (2009).

14. A related drawback may occur when the target is a publicly held corporation. If the potential acquirer announces a tender offer for the target's shares, other potential acquirers are signaled that a valuable potential acquisition opportunity has been identified. This may spur a bidding war where the original interested acquirer loses out.

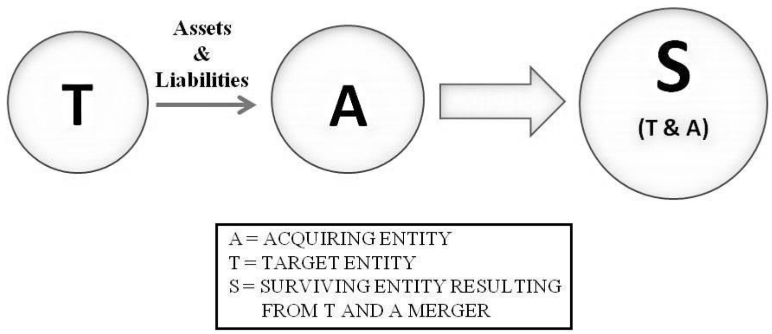
15. For a discussion of the difficulties courts have had in reviewing actions of majority shareholders as part of corporate control, see John H. Matheson & R. Kevin Maler, *A Simple Statutory Solution to Minority Oppression in the Closely Held Business*, 91 MINN. L. REV. 657, 660 (2007), *reprinted in* 49 CORP. PRAC. COMMENTATOR 421 (2007). These problems can be minimized if a majority of the target's stock is acquired and the acquiring company engages in a second-step squeeze-out merger of the minority shareholders.

16. Mergers can be direct or indirect, depending upon the presence of a subsidiary. *See, e.g.*, DEL. CODE ANN. tit. 8, § 251(g) (1983). When a corporation is merged directly into the acquiring corporation, only the acquiring corporation survives the merger. *Id.* With "triangular" mergers, a corporation merges with a newly formed subsidiary of the acquiring corporation, and the surviving corporation becomes a subsidiary of the acquiring corporation. *Id.* A transaction constitutes a "merger" regardless of whether the corporation surviving the merger is a previously existing operating corporation or is a new corporation formed solely for the purpose of accomplishing the merger. *Id.*

17. While this is true in almost all circumstances for the target corporation, the acquirer can often avoid a shareholder vote by creating a shell subsidiary to merge with the target company in what is often referred to as a triangular merger. *See, e.g.*, FREUND, *supra* note 8, at 78–79 ("In recent years, transactions involving the use of S, a wholly-owned subsidiary of P[arent], have become officially sanctioned under both corporate and tax law and have

another company through direct absorption, a two-party merger takes place. The acquiring entity gives the existing owners of the target company cash, stock, or other property in order to acquire the target company. The merger transaction looks like Figure 2.

Figure 2: Merger Transaction



When a merger becomes effective, a number of significant changes occur simultaneously. Primarily, only one of the two companies, the surviving entity, continues in existence, combining the separate existences of the constituent organizations—the two businesses legally become one.[18] As a result, the surviv-

proven extremely popular. For example, if P prefers that T not be merged directly into P (perhaps there are liabilities that P chooses not to assume directly), P can create S as its wholly-owned subsidiary and then cause T to be merged into S.").

18. *See, e.g.*, tit. 8, § 259 ("(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and

ing entity has all of the privileges, powers, property, rights, and other interests of each of the constituent entities. More significantly for the current context, the surviving entity becomes legally responsible for all liabilities and obligations of each of the constituent organizations, and all claims or proceedings against a constituent company may be pursued against the surviving entity.[19] Therefore, quite literally, the assets and liabilities of the constituent organizations become merged into, and the responsibility of, the surviving entity. To continue with our automobile and loan sales transaction analogy posited earlier, in a merger, the surviving entity gets the car, the loan, and the injured pedestrian tort liability.

Given that a merger necessarily results in acquisition of all of the liabilities as well as the assets of the target entity, businesses seeking to make acquisitions sometimes seek an alternative transactional structure that allows selectivity with respect to the liabilities assumed.[20] This alternative structure is

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the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it." (emphasis added)); MODEL BUS. CORP. ACT § 11.07 (2011) ("(a) When a merger becomes effective: (1) the corporation or eligible entity that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be; (2) *the separate existence of every corporation or eligible entity that is merged into the survivor ceases*; (3) all property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment; (4) all liabilities of each corporation or eligible entity that is merged into the survivor are vested in the survivor . . . ." (emphasis added)).

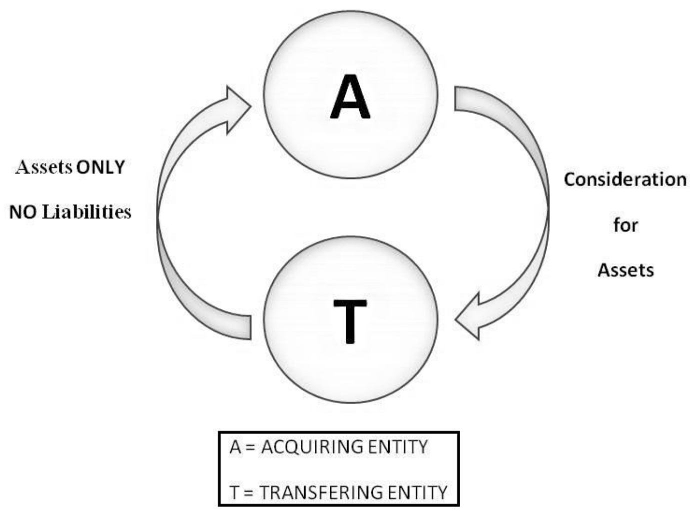
19. *See, e.g.*, tit. 8, § 259 ("[A]ll debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."); MODEL BUS. CORP. ACT § 11.07 ("[A]ll liabilities of each corporation or eligible entity that is merged into the survivor are vested in the survivor.").

20. There are certainly other reasons to prefer one form of acquisition structure over another. For example, taxation consequences can form one of the driving forces behind the chosen form of acquisition. An asset acquisition may be tax favorable for the acquirer.

> This transaction is most favorable to the buyer, who can record the acquired assets at their FMV [fair market value] (which is usually an increase from the seller's tax basis), thereby yielding more depreciation to use as a tax shield. This also results in a smaller gain if the buyer subsequently sells the assets.

the asset acquisition or transfer. In an asset acquisition, the two constituent organizations exchange operational assets for cash or other consideration, but do not merge and do not become a single entity. Each business starts as a separate entity, and each business survives as a distinct entity with its own separate existence after the asset acquisition. An asset transfer between two businesses looks like Figure 3.

Figure 3: Asset Acquisition Transaction



Legally, the distinction between a merger and an asset transfer is monumental.[21] With the former, the acquiring entity has no choice in selecting among the target's assets and liabilities. The acquirer succeeds to the amalgam of the two original entities. With the latter, however, the acquiring entity can selectively choose which assets and which, if any, liabilities it wants to acquire. In terms discussed earlier, the acquiring enti-

STEVEN M. BRAGG, MERGERS & ACQUISITIONS 253 (2009).

Additional reasons for using the acquisition structure as compared to the merger structure include that (1) the acquisition consideration flows to the divesting company for its use and not to its shareholders, and (2) an acquisition of assets usually does not require approval of the acquiring company's shareholders, whereas a merger usually does.

21. *See generally* ROBERT C. CLARK, CORPORATE LAW 401–61 (1986) (describing and discussing the respective differences in legal consequences between the "polar cases" of merger and asset sales as "two relatively clear cases that have rather different characteristics and consequences").

ty can take the car without acquiring any obligation for the loan or the pedestrian's tort claim. Moreover, even if some liabilities are assumed as part of an asset-transfer transaction, the specific obligations assumed can be specifically identified and priced. That is, the consideration paid for the acquired assets (and possibly liabilities) will reflect the basket of items acquired. Therefore, at least from the liability minimization perspective, an asset acquisition is a much more favorable transactional acquisition structure than a merger. Additionally, there is clarity and seeming certainty as to what is being acquired, allowing for an informed determination of the price to be paid.

II. THE EVOLUTION OF SUCCESSOR LIABILITY

Basic notions of contract and tort law form the bedrock foundation for traditional successor nonliability in asset acquisitions. No person should be bound by contractual obligations that they have not voluntarily assumed.[22] Similarly, no person should be liable for torts they did not commit.[23]

The viability of this traditional rule of successor nonliability in the world of modern business transactions flows fundamentally from the need to secure the free alienability of corporate assets.[24] This principle, in turn, encompasses two corollary policies: (1) the successor to ownership of assets should be protected from unassumed liabilities of the predecessor,[25] and (2) the rule of successor nonliability promotes predictability in cor-

22. *See* George L. Lenard, Note, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L.J. 677, 683–84 (1983) (discussing how "no one should be bound by an agreement to which he is not a party" and "a successor's nonliability is supported by the fact that he was not at fault").

23. *See* Roe, *supra* note 4, at 1560–61 ("The rationales for denying successor liability are straightforward: the successor is not at fault; liability will not deter misbehavior; compensation must be from the wrongdoer and not from an innocent third party . . . .").

24. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 cmt. a (1998) ("[T]he general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital."); Lenard, *supra* note 22, at 684 ("A final argument for the traditional rule is that successor nonliability promotes the free alienability and transferability of corporate assets.").

25. *See* David Morris Phillips, *Products Liability of Successor Corporations: A Corporate and Commercial Law Perspective*, 11 HOFSTRA L. REV. 249, 258 (1982) (discussing the fairness of the creditor-protection argument in applying traditional successor liability).

porate transactions.[26] The relationship between these interdependent principles has been explained as follows:

> Under the well-settled rule of corporate law, where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts, of the transferor. . . .
>
> The successor rule was designed for the corporate contractual world where it functions well. It protects creditors and dissenting shareholders, and facilitates determination of tax responsibilities, while promoting free alienability of business assets.[27]

Nevertheless, the concept of preserving limited liability for the purchasing entity can be subject to significant strain.[28] Tensions are particularly acute when the selling entity distributes the proceeds of its sale of assets to its shareholders and

26. *See* Sharon L. Cloud, Note, *Purchase of Assets and Successor Liability: A Necessarily Arbitrary Limit*, 11 DEL. J. CORP. L. 791, 793 (1986) ("Another side of this issue is the need for predictability in the law of successor liability for corporations planning business expansion. Facing potentially unlimited and unpredictable exposure for future products liability claims which they had no part in creating forces companies interested in acquisitions to reconsider. Corporations for sale face a correspondingly shrinking market. In purely economic terms, the free flow of assets to their most efficient uses is severely impaired if there is no way to know at the outset how much an acquisition will truly cost." (citations omitted)); *see also* Timothy J. Murphy, Comment, *A Policy Analysis of a Successor Corporation's Liability for Its Predecessor's Defective Products When the Successor Has Acquired the Predecessor's Assets for Cash*, 71 MARQ. L. REV. 815, 821–22 (1988) (making reference to predictability in corporate transactions in the context of a free alienability of corporate assets discussion).

27. Polius v. Clark Equip. Co., 802 F.2d 75, 77–78 (3d Cir. 1986); *see also* Cloud, *supra* note 26, at 795 ("[Traditional successor liability's] purpose was to 'promote predictability in corporate transactions, free availability of capital and mobility in the business and economic world in general.'" (citation omitted)).

28. Since January 1, 2010, more than 500 reported federal and state cases have dealt with some element of successor liability. Westlaw search of "ALLCASES" database using term: ["successor liability"] on October 14, 2011. This Article does not address those situations where federal or state legislation specifically mandates or negates successor liability. Compare environmental-cleanup liability under CERCLA for any owner or operator of property, 42 U.S.C. § 9607(a) (2006), with sales in bankruptcy "free and clear" of claims, 11 U.S.C. § 363(f) (2006), and MINN. STAT. § 302A.661, subdiv. 4 (2010) ("The transferee is liable for the debts, obligations, and liabilities of the transferor only to the extent provided in the contract or agreement between the transferee and the transferor or to the extent provided by this chapter or other statutes of this state . . . . The transferee shall not be liable solely because it is deemed to be a continuation of the transferor."). Where no statute applies to define the contours of successor liability doctrine, federal or state common law applies. *See, e.g.*, Einhorn v. M.L. Ruberton Constr. Co., 632 F.3d 89, 96–97 (3d Cir. 2011).

then dissolves.[29] Especially when claims against the dissolving entity relate to latent product or drug defects that do not manifest themselves until much later, claimants may find that there are no readily accessible assets to compensate for their injuries.[30] These claimants then appear as appealing plaintiffs in search of an alternative pocket to pay damages.[31]

A. TRADITIONAL EXCEPTIONS TO SUCCESSOR NONLIABILITY

The concept that a purchase of assets is not a purchase of liabilities, while well-recognized in corporate acquisition transactions,[32] was never monolithic. Imposing liability on the purchaser of assets has long been subject to four traditional exceptions: (1) the transaction is a fraudulent effort to avoid liabilities of the predecessor, (2) the successor expressly or impliedly assumes the obligations of the predecessor, (3) the transaction is a de facto merger, or (4) the successor is a mere continuation of the predecessor.[33] Several of these exceptions, however, even in their traditional form, have evolved to bring tremendous uncertainty to an otherwise voluntary transactional allocation of liabilities between two businesses.[34]

29. *See* Cloud, *supra* note 26, at 803.

30. *See id.* at 793, 803.

31. *See id.* at 793.

32. *See* Fogg v. Blair, 133 U.S. 534, 541 (1890) ("That [trust fund] doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence.").

33. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1998). The discussion that follows in Parts II.A. and B. may be somewhat simplified from a full-blown breakdown of theories and their permutations, as well as the variations between and among the states as to adoption of those theories. The analysis here is what is necessary for the purpose of this Article. For an expansive exploration of the minutiae of variations and adoptions, see generally George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9 (2007).

34. *See* Berg Chilling Sys., Inc. v. Hull Corp., 435 F.3d 455, 461–64 (3d Cir. 2006) (noting differences between New Jersey and Pennsylvania successor liability law, stating that "[w]hile the basic tenet of successor liability law is based in corporate law, the exceptions span a loose substantive continuum from contract to corporate to tort law"). An additional area of variation comes when the federal courts decide successor-liability issues as a matter of federal common law. *See, e.g.*, Einhorn v. M.L. Ruberton Constr. Co., 632 F.3d 89, 94 (3d Cir. 2011) ("Federal courts beginning with *Golden State* have developed a federal common law successorship doctrine imposing liability upon successors

1. Fraud or Fraudulent Conveyance

The first exception to successor nonliability is not unusual. Fraud generally will taint the result of any transaction. In the context of asset transfers, this exception applies where the transaction is fraudulently entered into by a corporation to evade liability for debts.[35] Fraud determinations generally are relatively straightforward and can be viewed as an application or offshoot of the general rule prohibiting fraudulent transfers. For example, a successor will be held liable where a showing is made that the successor corporation was created for the sole purpose of evading the predecessor's creditors,[36] or where the consideration for the transfer was inadequate or fictitious.[37]

2. Agreed Assumption of Liabilities

One of the attractive features of an asset sale is that the purchasing corporation can presumptively pick and choose what it wants to take. So the second traditional exception to successor nonliability really is not an exception at all.[38] That is,

beyond the confines of the common law rule when necessary to protect important employment-related policies."); Prince v. Kids Ark Learning Ctr., LLC, 622 F.3d 992 (8th Cir. 2010) (applying a nine-factor test for successor liability for sexual harassment under Title VII). *See generally* Wendy B. Davis, *De Facto Merger, Federal Common Law, and Erie: Constitutional Issues in Successor Liability,* 2008 COLUM. BUS. L. REV. 529 (discussing federal-state constitutional problems).

35. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 cmt. e ("*Fraudulent transfer in order to avoid debts or liabilities.* Subsection (b) incorporates by reference the relevant state law governing fraudulent conveyances and transfers. In contexts other than successor products liability, fraudulent transfers can be set aside on behalf of existing creditors of the transferor. In this context, fraudulent transfers provide a basis for holding successors liable to post-transfer tort plaintiffs. The fact that general creditors are pursuing remedies against the transferee does not prevent tort plaintiffs from pursuing remedies under Subsection (b). What constitutes a fraudulent conveyance or transfer is determined by reference to applicable state law.").

36. Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 934 P.2d 715, 722 (Wash. Ct. App. 1997), *aff'd*, 959 P.2d 1052, 1060 (Wash. 1998); Schmoll v. ACandS, Inc., 703 F. Supp. 868, 875 (D. Or. 1988), *aff'd*, 977 F.2d 499, 499 (9th Cir. 1992).

37. *Eagle Pac. Ins. Co.*, 934 P.2d at 722.

38. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 cmt. d ("*Agreement for successor to assume liability.* When the successor agrees to assume liabilities for defective products sold by its predecessor, liability is imposed . . . in accordance with the terms of the agreement. As a general matter, contract law governs the application of this exception. Courts have interpreted general statements that the successor agrees to assume the liabilities of the predecessor to include products liability claims even though the agreement makes no specific mention of products liability. However, assumption of prod-

if the purchasing party contractually assumes liabilities from the seller, then it has chosen to be liable and presumptively has paid less for the assets acquired.

An express assumption of liability is fairly easy to spot in the asset-acquisition contract.[39] Typically, existing contracts of a selling company are expressly assumed in the purchase documents so that the business can continue in an uninterrupted manner.[40] Existing liabilities of a selling company may or may not be assumed, but unwanted or contingent liabilities are typically avoided through the use of clauses expressly accepting or disclaiming any assumption.[41]

ucts liability is not implied by the successor's assumption of specific duties with regard to product service or replacement."); s*ee, e.g.*, Kessinger v. Grefco, Inc., 875 F.2d 153, 155 (7th Cir. 1989), *reh'g denied*, No. 88-3025, 1989 U.S. App. LEXIS 11712 (7th Cir. 1989) (finding express assumption of liabilities). As ideally applied, this exception "requires an express or implied *assumption* of liabilities, not an express exclusion of liabilities." Columbia Propane, L.P. v. Wis. Gas Co., 661 N.W.2d 776, 785 (Wis. 2003) (citing Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 823 (Wis. 1985)). Drafters can take some comfort in the fact that courts have said that "[u]nless the words used by the parties to express their agreement are found to be ambiguous in some material respect, the court should give them legal effect according to their plain, ordinary and popular meaning." Florom v. Elliott Mfg., 867 F.2d 570, 575 (10th Cir. 1989); *cf.* Grugan v. BBC Brown Boveri, Inc., 729 F. Supp. 1080, 1091 (E.D. Pa. 1990) (finding that the language of the contract was broad enough to include contingent tort liability of seller).

39. *See, e.g.*, Feinberg v. RM Acquisition, LLC, 629 F.3d 671, 676 (7th Cir. 2011) (finding that contract did not provide for assumption of liabilities); Am. Standard, Inc. v. OakFabco, Inc., 927 N.E.2d 1056, 1058–59 (N.Y. 2010) (finding a contractual assumption of tort liabilities). For a discussion of this contractual liability allocations process, see Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements,* 50 WM. & MARY L. REV. 2007, 2035–50, 2070–91 (2009).

40. *See* David W. Pollak*, Successor Liability in Asset Acquisitions*, *in* ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY, 133, 141 (PLI Corp. L. & Practice, Course Handbook Ser. No. B-1742, 2009) ("The purchasing corporation will normally assume certain liabilities necessary to the uninterrupted conduct of the business.").

41. Miller, *supra* note 39, at 2089–90 ("This leaves, as the kinds of risk typically allocated by MAC Conditions to the party itself, all risks other than those systematic, indicator, and agreement risks shifted under MAC Exceptions. The most obvious of these are the risks associated with the ordinary business operations of the party—the kinds of negative events that, in the ordinary course of operating the business, can be expected to occur from time to time, including those that, although known, are remote. In reported MAC litigations and in MAC disputes between merger partners that have become public, the events to which parties have in fact pointed when declaring MACs have often been particularly severe adverse events of the kinds that can be expected to occur in the party's business—for example, loss of important customers or sales due to competitive pressures, cyclical down turns in the business,

Whether a purchasing company assumes the liabilities or debts of the seller in satisfaction of the assumption exception depends on the particular language used in the purchase agreement and other surrounding circumstances, such as the purchaser's conduct.[42] Express assumption of some liabilities does not imply assumption of all liabilities; but, in determining if there has been an implied assumption, a reviewing court will draw upon general principles of contract interpretation and the objective theory of the contract.[43] Courts generally find purchasers to have impliedly assumed liabilities when "the conduct or representations relied upon . . . evidence an intention on the part of the purchasing company to assume the old corporation's liabilities in whole or in part."[44] What constitutes a sufficient manifestation varies by jurisdiction, but purchasers assuming even one contract or obligation outside of those specified in the asset purchase agreement may assume the risk of being found to have impliedly assumed all of the predecessor's contingent liabilities.[45]

More fundamentally, in addition to the uncertainties engendered by the courts' ability to interpret the terms of the asset acquisition contract, even an express and clear denial of liabilities may be to no avail when it comes to tort or product liability claims as opposed to contract obligations.[46] Courts may

large tort liabilities arising from the company's operations, problems rolling out new information and accounting systems, *and product defects along with resulting recalls and product liabilities claims*." (emphasis added) (footnotes omitted)).

42. *See* Safeco Ins. Co. v. Pontiac Plastics & Supply Co., No. 214079, 2000 WL 33538535, at *3 (Mich. Ct. App. Jan. 21, 2000).

43. *See id.* Application of the assumption of the liability exception based on the explicit language of the agreement gives the purchaser a greater degree of certainty than application based on extraneous circumstances. *See* Kuney, *supra* note 33, at 23–24 (distinguishing between application of the express or implied assumption of liability exception based on language of the contract versus application focusing on conduct or representation).

44. FLETCHER ET AL., *supra* note 2, § 7124.

45. *See, e.g.*, Carlos R. Leffler, Inc. v. Hutter, 696 A.2d 157, 160–61 (Pa. Super. Ct. 1997) (finding the fact that the purchaser did not expressly agree to assume seller's obligations was immaterial where performance of expressly assumed obligations leads to reasonable belief that all were assumed).

46. With respect to contract obligations, precise drafting may be effective. For example, the fact that the defendant expressly denied liability not only of claims resulting from breach of contract, but also for any claims specifically "arising in connection" with plaintiff's breach of contract made this exception inapplicable in this Minnesota case. Source One Enters., LLC v. CDC Acquisition Corp., No. Civ. 02-4925(PAM/RLE), 2004 WL 1453529, at *3 (D. Minn. June 24, 2004); *see also* Fernandez v. Spar Tek Indus., Inc., C.A. No. 0:06-

simply conclude that, although the parties to the asset-acquisition agreement have allocated liabilities between themselves, this allocation "is not dispositive" as to third party tort or product liability claims.[47] If courts do not allow the parties to allocate these risks so as to bind non-parties, then the concept of successor nonliability is substantially weakened, creating unfortunate transactional value uncertainty.[48]

3. De Facto Merger

In a standard statutory merger, as discussed previously, the purchaser assumes all of the debts and liabilities of the seller by operation of law.[49] The third exception courts have used to impose successor liability in an asset acquisition is found in cases where the court determines that the asset sale amounts to a de facto merger of the buyer and seller.[50] This exception extends liability to a successor when a reviewing court finds that the sale has mimicked the end result of a merger except for the assumption of liability.[51] As traditionally applied, a transaction

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3252-CMC, 2008 WL 2403647, at *4 (D.S.C. June 10, 2008) (determining that the exception did not apply when the purchase agreement included an express provision denying any assumption of the seller's contractual or other liability); Glidden v. Thompson & Hawley Funeral Home, No. 259887, 261002, 2006 WL 2033979, at *4 (Mich. Ct. App. July 20, 2006) (indicating that absent clear evidence in the record to the contrary, language in the contract expressly denying liabilities controls).

47. Lucas v. Dorsey Corp., 609 N.E.2d 1191, 1201 (Ind. Ct. App. 1993) ("The fact that Dorsey and its predecessor, Daro, had an agreement whereby Dorsey was not to assume Daro's liabilities is not dispositive."); *see also* Cyr v. B. Offen & Co., 501 F.2d 1145, 1152–54 (1st Cir. 1974) (purchase agreement exonerating purchaser not determinative of third party rights); Vernon Fire & Cas. Ins. Co. v. Graham, 336 N.E.2d 829, 832 (Ind. Ct. App. 1975) (exculpatory provision in contract ineffective to exonerate persons from liability to one not party to agreement).

48. *See* Roe, *supra* note 4, at 1561 ("Concerns over successor liability may already be affecting, and possibly stymieing, asset sales.").

49. *See* Michael Carter, *Successor Liability Under CERCLA: It's Time to Fully Embrace State Law*, 156 U. PA. L. REV. 767, 776–77 (2008) (explaining that the aspect of limited liability of an asset sale makes the structure potentially more favorable than either a statutory merger or a purchase of a controlling interest in the target company's stock); *supra* note 28 and accompanying text.

50. It appears that the first time that the United States Supreme Court used this term and applied this concept was in a taxation case, *Helvering v. Pennsylvania Water & Power Co.* 306 U.S. 522, 529 (1939). The earliest explicit state court reference to the de facto-merger doctrine in a successor liability context probably is *Jennings Neff & Co. v. Crystal Ice Co.* 159 S.W. 1088, 1089 (Tenn. 1913).

51. *See* Carter, *supra* note 49, at 778–79.

structured as an asset sale may be deemed by a court to be a de facto merger, despite the lack of a formal statutory merger, if all of the following factors are present:

> (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption by the purchaser of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets, and general business operation.[52]

As an initial matter, the de facto-merger concept contradicts the corporate doctrine of "independent legal significance."[53] This doctrine states that transactions accomplished under one set of corporate statutory provisions, like those governing an asset purchase and sale, will not be tested under other statutory provisions, such as those applicable to a merger.[54] Each set of provisions and each way of structuring the transaction has its own independent legal significance. Nevertheless, even Delaware, known as a bastion of pro-corporate legislation and court decisions,[55] accepts the traditional successor liability exceptions, including de facto merger.[56]

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52. New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 209 (2d Cir. 2006); *see also* Payne v. Saberhagen Holdings, Inc., 190 P.3d 102, 107–08 (Wash. Ct. App. 2008); FLETCHER ET AL., *supra* note 2, § 7124.20.

53. *See* Applebaum v. Avaya, Inc., 812 A.2d 880, 892 n.47 (Del. 2002) ("[T]he general theory of the Delaware Corporation Law that action taken pursuant to the authority of the various sections of that law constitute acts of independent legal significance and their validity is not dependent on other sections of the Act." (quoting Langfelder v. Universal Lab., Inc., 68 F. Supp. 209, 211 (D. Del. 1946), *aff'd*, 163 F.2d 804 (3d Cir. 1947))).

54. *See, e.g.*, Elliott Assocs., L.P. v. Avatex Corp., 715 A.2d 843, 847–49 (1998) (accomplishing transaction by merger without a class vote of shareholders valid despite the requirement of a class vote if the transaction had been accomplished by way of an amendment to the certificate of incorporation).

55. The Delaware courts have rejected the de facto-merger doctrine when sought to be used not to impose liability but rather to provide shareholders with dissent and appraisal rights. *See* Hariton v. Arco Elecs., Inc., 182 A.2d 22, 27–28 (Del. Ch. 1962) (relying on the independent legal significance doctrine), *aff'd*, 188 A.2d 123 (Del. 1963). *See generally* Philip S. Garon, Michael A. Stanchfield & John H. Matheson, *Challenging Delaware's Desirability as a Haven for Incorporation,* 32 WM. MITCHELL L. REV. 769, 771 (2006) (comparing "Delaware corporate law and jurisprudence primarily to one jurisdiction, Minnesota").

56. Ross v. DESA Holdings Corp., No. 05C-05-013 MMJ, 2008 WL 4899226, at *3–4 (Del. Super. Ct. Sept. 30, 2008) ("The Delaware Court's defining of this issue is all together appropriate because the applicable law to which the capable Delaware Court will apply the facts is Delaware law, not federal law. Delaware courts recognize successor liability as a viable legal theory and, as well, that there are exceptions to the general principle that purchasers of assets do not succeed to a seller's liability. . . . In Delaware,

More troubling is the fact that different jurisdictions have created various tests for evaluating whether an asset sale amounts to a de facto merger. Some states have strict element-based tests that require an affirmative showing on each of a number of factors,[57] while others use a less-formal list of non-dispositive factors and make determinations based on the totality of the circumstances.[58] That is, although initially applicable to a relatively narrow set of circumstances, several jurisdictions have retooled their de facto-merger analysis to allow successor liability to reach a broader range of transactions.

More fundamentally, some courts expanded the exception by lessening the requirements for finding a de facto merger. In *Knapp v. North American Rockwell Corp.*, for example, the Third Circuit Court of Appeals disregarded the traditional de facto-merger requirement that selling corporations dissolve after the asset sale.[59] The court analyzed the transfer in terms of the policies underlying strict product liability and noted that, although the predecessor corporation continued to exist for over

when one company sells or otherwise transfers all of its assets to another company, the buyer generally is not responsible for the seller's liabilities, including claims arising out of the seller's tortious conduct. In limited situations, where avoidance of liability would be unjust, exceptions may apply to enable transfer of liability to the seller. Exceptions include: (1) the buyer's assumption of liability; (2) defacto merger or consolidation; (3) mere continuation of the predecessor under a different name; or (4) fraud." (footnotes omitted)).

57. *See, e.g.*, *Nat'l Serv. Indus.*, 460 F.3d at 213 (stating all four factors must be present to find de facto-merger successor liability); Perimeter Realty v. GAPI, Inc., 533 S.E.2d 136, 145–46 (Ga. Ct. App. 2000); Myers v. Putzmeister, Inc., 596 N.E.2d 754, 756 (Ill. App. Ct. 1992); Howell v. Atlantic-Meeco, Inc., No. 01CA0084, 2002 WL 857685, at *3 (Ohio Ct. App. Apr. 26, 2002). Vermont only requires evidence of three elements. *See* CAB-TEK, Inc. v. E.B.M., Inc., 571 A.2d 671, 672 (Vt. 1990) (stating de facto merger occurs where a corporation (1) takes control of all of the assets of another corporation, (2) without consideration, and (3) the predecessor ceases to function).

58. Cargill, Inc. v. Beaver Coal & Oil Co., 676 N.E.2d 815, 819 (Mass. 1997) (noting that although continuity of ownership is not a threshold requirement, "[i]n determining whether a de facto merger has occurred, courts pay particular attention to the continuation of management, officers, directors and shareholders"); Harashe v. Flintkote Co., 848 S.W.2d 506, 509 (Mo. Ct. App. 1993) (listing the four traditional elements but noting, "[i]t is not necessary to find all the elements to find a de facto merger" (emphasis omitted)); Richmond Ready-Mix v. Atl. Concrete Forms, Inc., No. Civ.A. 92-0960, 2004 WL 877595, at *9–10 (R.I. Apr. 21, 2004).

59. Knapp v. N. Am. Rockwell Corp., 506 F.2d 361, 368–70 (3d Cir. 1974); *see also* Brooks v. Specialty Minerals, Inc., No. 08-cv-30233-MAP, 2011 U.S. Dist. LEXIS 13597, at *17 (D. Mass. Feb. 10, 2011) (holding that the de facto-merger "doctrine has no applicability where, as here, the original manufacturer remains in existence to respond in tort for its alleged negligence").

a year after the sale, the State had a strong policy interest in resolving issues related to products liability with a flexible approach:

> because of the complexities of modern corporate reorganizations, it is no longer helpful to consider an individual transaction in the abstract and solely by reference to the various elements therein determine whether it is a 'merger' or a 'sale'. Instead, to determine properly the nature of a corporate transaction, we must refer not only to all the provisions of the agreement, but also to the consequences of the transaction and to the purposes of the provisions of the corporation law said to be applicable.[60]

A similar rationale was applied by the Eastern District of New York in *Diaz v. South Bend Lathe Inc.* when it held the transaction in question amounted to a de facto merger even though the parties had not exchanged any stock.[61] Although the sale was an all-cash transaction, the court nevertheless found that evidence of the assumption of the predecessor's manufacturing contracts, the dissolution of the predecessor, and a continuity of management, personnel, and facilities amounted to a de facto merger.[62] The court held that by purchasing the predecessor's "whole . . . asset package" the successor had "simply incorporated—or merged—[the predecessor's] ongoing business into that of its own . . . ."[63] The *Knapp* and *Diaz* decisions il-

60. *Knapp*, 506 F.2d at 368 (quoting Farris v. Glen Alden Corp., 143 A.2d 25, 28 (Pa. 1958)); *accord* Milliken & Co. v. Duro Textiles, LLC, 887 N.E.2d 244 (Mass. 2008).

61. Diaz v. S. Bend Lathe Inc., 707 F. Supp. 97, 101 (E.D.N.Y. 1989). *Contra Nat'l Serv. Indus.*, 460 F.3d at 215 (requiring continuity of ownership under de facto-merger exception).

62. *Diaz*, 707 F. Supp. at 101–03.

63. *Id.* at 102. Generally, the continuity of ownership factor will not be satisfied when there is a cash for asset sale. In *Payne v. Saberhagen Holdings, Inc.*, the court did not impose liability under the de facto-merger doctrine because there was no continuity of ownership between the predecessor and successor corporations. 190 P.3d 102, 108 (Wash. Ct. App. 2008). The court explained that the continuity of ownership element is present only when the ownership before the merger and after the merger is the same. It explained that when there is a "mere asset purchase for cash," there is no continuity of ownership. *Id.* Under similar facts, an Illinois court also declined to impose liability under the de facto-merger doctrine. Manh Hung Nguyen v. Johnson Mach. & Press Corp., 433 N.E.2d 1104, 1106–07 (Ill. App. Ct. 1982). The court explained that there was no continuity of ownership since the assets were purchased with cash rather than stock. *Id.* But, it is important to note that the court looked to the "four factors" as requirements that all must be met rather than a balancing test. *Id.* This approach is different from other courts that use the factors, but do not necessarily require all factors be present to find a de facto merger. *See generally* MacCleery v. T.S.S. Retail Corp., 882 F. Supp. 13, 16 (D.N.H. 1994) (applying New Hampshire law); Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136, 143 (E.D. Mich. 1979); FLETCHER ET AL., *supra* note 2,

lustrate how the once well-defined de facto-merger exception can be wholly transformed by the mere addition or subtraction of a single factor in the liability inquiry. It is through processes similar to those applied in *Knapp* and *Diaz* that traditional exceptions have been transformed into amorphous standards that are no longer confined to those cases in which the parties seek to obfuscate liability.

4. Mere Continuation

Closely related to the traditional de facto-merger exception is the mere-continuation exception.[64] This fourth exception, like the exception for de facto mergers, embodies a policy that corporations should not be able to avoid liability by simply changing their form or name.[65] The mere-continuation exception focuses on what happens after the sale and ignores the type of consideration used. This exception imposes liability when there is merely a reorganization.[66] Liability is imposed when the purchasing corporation "is merely a 'new hat' for the seller."[67] The

§ 7124.20 n.5 (citing Atlas Tool Co. v. Comm'r of Internal Revenue, 614 F.2d 860 (3d Cir. 1980)).

64. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12, cmt. b (1998) ("Subsections (c)[de facto merger] and (d)[mere continuation] deal with successors that, in a real sense, did produce and distribute the product that caused the harm, though in a somewhat different organizational form. Subsection (c) deals with the transferor corporation that merges by law or in fact into the transferee, typically with no substantial change in corporate management or ownership. Subsection (d) concerns the transfer of corporate assets in the context of a transaction involving only a change in organizational form. In both these situations, liability for harm caused by defective products distributed previously should be imposed on the business entity that emerges from the transaction. In substance, if not in form, the post-transfer entity distributed the defective products and should be held responsible for them. If mere changes in form were allowed to control substance, corporations intending to continue operations could periodically wash themselves clean of potential liability at practically zero cost, in sham transactions, and thereby unreasonably undermine incentives for producers and distributors to invest in product safety and unfairly deny tort plaintiffs adequate remedies when defective products later cause harm."); *see also Milliken*, 887 N.E.2d at 254 n.15 ("The terms 'de facto merger' and 'mere continuation' are often used by courts interchangeably.").

65. Murphy, *supra* note 26, at 821 (noting that the de facto-merger exception and the mere-continuation exception are arguably the same exception because the only difference is that the de facto-merger exception does not require continuity of management).

66. *See* McCarthy v. Litton Indus., Inc., 570 N.E.2d 1008, 1012 (Mass. 1991) (citing FLETCHER ET AL., *supra* note 2, § 7122 n.15 and cases).

67. *McCarthy*, 570 N.E.2d at 1012 (quoting Bud Antle, Inc. v. E. Foods, Inc., 758 F.2d 1451, 1458 (11th Cir. 1985)); *accord* Funai Elec. Co. v. Daewoo Elecs. Corp., 616 F.3d 1357, 1382 (Fed. Cir. 2010) (imposing liability for

underlying theory of imposing liability is that "in substance if not in form, the purchasing corporation is the same company as the selling corporation."[68]

When determining if there has been a mere continuation of the seller, the courts frequently focus on factors such as: (1) the continued use of the seller's name, facilities, and employees, (2) common identity of the stockholders[69] or management of the buyer and the seller,[70] and (3) whether only one corporation is in existence after the sale of assets.[71] Courts are inconsistent in their application of these factors[72] to determine whether the successor has a "substantial similarity" to its predecessor.[73] When only one corporation exists after the asset transfer, however, a court typically takes it as evidence that the successor is substantially the same as its predecessor.[74]

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patent infringement based on mere-continuation theory of successor as "simply a 'new hat'").

68. *McCarthy*, 570 N.E.2d at 1012; *accord* Warne Invs., Ltd. v. Higgins, 195 P.3d 645, 650 (Ariz. Ct. App. 2008) (imposing liability when there is a change in form, but not in substance because "if [a] corporation goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability").

69. *See* Weaver v. Nash Int'l, 730 F.2d 547, 548 (8th Cir. 1984) (refusing to impose successor liability due to an absence of this factor).

70. *See* Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 55–58 (Alaska 2001); Paradise Corp. v. Amerihost Dev., Inc., 848 So. 2d 177, 180 (Miss. 2003); Lamb v. Leroy Corp., 454 P.2d 24, 27–28 (Nev. 1969); Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 110–11 (Pa. Super. Ct. 1981).

71. Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977).

72. *See, e.g.*, Icon Health & Fitness, Inc. v. Fisher-Price, Inc., No. 1:08-CV-10 TS, 2011 U.S. Dist. LEXIS 17340, at *5 (D. Utah Feb. 21, 2011) (quoting Decius v. Action Collection Serv., Inc., 105 P.3d 956, 959 (Utah Ct. App. 2004) (recognizing only "two requirements for proving that a corporation is a mere continuation of a prior corporation: '(1) only one corporation remains after the transfer of assets is complete, and (2) a common identity of stocks, stockholders, and directors between the two corporations.'")), *summary judgment granted*, 2011 U.S. Dist. LEXIS 42408 (D. Utah Apr. 18, 2011).

73. A.R. Teeters & Assoc., Inc. v. Eastman Kodak Co., 836 P.2d 1034, 1039–40 (Ariz. Ct. App. 1992); *see also* Vernon v. Schuster, 688 N.E.2d 1172, 1176 (Ill. 1997) (emphasizing that "the test used in the majority of jurisdictions is whether there is a continuation of the *corporate entity of the seller*—not whether there is a continuation of the *seller's business operation* . . . ."); Balt. Luggage Co. v. Holtzman, 562 A.2d 1286, 1294 (Md. Ct. Spec. App. 1989); Tift v. Forage King Indus., Inc., 322 N.W.2d 14, 17–18 (Wis. 1982).

74. *Compare Tift*, 322 N.W.2d at 17–18 (finding that the sale of the business resulted in liability for the purchasing company since it replaced the seller), *with* McCarthy v. Litton Indus., Inc., 570 N.E.2d 1008, 1013 (Mass. 1991) (stating necessary existence of only one corporation was not accomplished since the seller continued to exist after the sale, so the Massachusetts Supreme Court did not impose liability under the mere-continuation exception).

Historically, mere similarity would not be enough to impose liability on a successor corporation under the mere-continuation exception.[75] That is, because of the close resemblance to the de facto-merger exception, mere continuation was traditionally applied in limited circumstances where the successor was materially identical to the predecessor.[76] Although it played a somewhat diminished role in the historic application of successor liability, the continuation concept has been a foundational concept for the evolution in the field of successor liability.

B. EXPANSION OF SUCCESSOR LIABILITY

The traditional exceptions to the principle of successor non-liability developed as part of corporate law jurisprudence and were primarily directed toward issues of liability for debts and obligations that were contractual in nature.[77] Judicial expansions of the last half century have drastically changed the scope

75. In *Teeters*, an Arizona appellate court declined to impose liability under the mere-continuation exception even though the successor corporation was similar to its predecessor. 836 P.2d at 1039–40. The successor corporation was similar to the predecessor "in that it had identical directors, officers, and shareholders." *Id.* at 1040. However, the court found it persuasive that the operations of the successor corporation were different than its predecessor since: (1) it operated out of the owner's home rather than the predecessor's location; (2) it offered only one product, rather than the full line of services offered by the predecessor; and (3) there was a change of ownership between the two corporations. *Id.* Likewise, the Ohio Supreme Court held that a successor corporation that bought assets, hired several employees, and sold several product lines from the predecessor corporation could not be held liable under the mere-continuation exception. Aluminum Line Prods. Co. v. Brad Smith Roofing Co., 671 N.E.2d 1343, 1356 (Ohio Ct. App. 1996) (citing Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1134 (Ohio 1993)) ("Merely sharing the same physical plant, employees and continuing to market some products of SMI by ERA is not sufficient to establish liability under the mere-continuation theory.").

76. *See, e.g.*, Elmer v. Tenneco Resins, Inc., 698 F. Supp. 535, 542 (D. Del. 1988) ("The test is not the continuation of the business operation, but rather the continuation of the corporate entity."); Stratton v. Garvey Int'l, Inc., 676 P.2d 1290, 1294 (Kan. Ct. App. 1984) (finding no successor liability); Brotherton v. Celotex Corp., 493 A.2d 1337, 1341 (N.J. Super. Ct. Law Div. 1985) (requiring a finding of direct responsibility of at least some of the same shareholders to impose successor liability).

77. Pollak*, supra* note 40, at 143; *Farris v. Glen Alden Corp.* is considered to be the seminal de facto merger case in the United States. 143 A.2d 25 (Pa. 1958). The court developed the theory as a way of providing dissenters' rights for stockholders dissatisfied with corporate deals that were structured to avoid statutory dissenters' rights.

and applicability of the successor liability doctrine.[78] This was caused by the rise of products liability law and the concept of strict liability in tort placing increased pressure on courts to develop new avenues to give injured plaintiffs redress.[79]

Spurred by results deemed by many to be inequitable, judges in the 1970s began to erode the perceived rigidity of the traditional exceptions and fashion new remedies they believed to be more just.[80] Some jurisdictions found the restrictiveness of the traditional successor nonliability rule especially objectionable when juxtaposed with the concept of strict products liability that was then "charming the nation's courts."[81] Judicial expansion of the traditional exceptions has continued, and new exceptions have been produced, each with "sub-species"[82] and spinoffs of their own. The expansive evolution in the field has been the cause for much confusion and consternation.[83]

Imagine, for example, a situation in which Hot Pants Corp. produces and sells men's apparel. Hot Pants is known for manufacturing "Sizzlers," a line of baggy jeans that are popular in the Northeast. Hot Pants agrees to sell its assets to Just-for-Her, a nationwide women's retailer, which agrees to purchase all of Hot Pants's assets, the rights to all products, and technology, for cash. In return, Hot Pants agrees to retain all liabilities arising from products it manufactured prior to the transfer. Hot Pants distributes the proceeds of the sale to its stockhold-

78. *See generally* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 462 (1985) (noting dramatic changes to products liability law during this period); William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 791–94 (1966) (characterizing the expansion of products liability as "rapid" and "explos[ive]"); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1251–54 (1974) (discussing the development and expansion of the products liability doctrine through case law).

79. Pollak, *supra* note 40, at 143 (describing this development as placing "conceptual strain" on the courts).

80. *See* Richard L. Cupp, Jr. & Christopher L. Frost, *Successor Liability for Defective Products: A Redesign Ongoing*, 72 BROOK. L. REV. 1173, 1174–77 (2007) (explaining the common law evolution of expanded successor liability theories).

81. Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 848.

82. Kuney, *supra* note 33, at 12.

83. *Compare* Green, *supra* note 6, at 20–21 (arguing that the judicial expansion of successor liability has made the doctrine impractical), *with* Kuney, *supra* note 33, at 11–15 (arguing that the original intent of the doctrine was malleable and efforts to preserve judicial discretion in the area are warranted).

ers and then dissolves. After the sale, Just-for-Her continues to manufacture Sizzlers jeans under the same name. The manufacturing continues to be done in the same facility, and Just-for-Her retains most of Hot Pants's employees and management. The Sizzlers manufactured after sale are identical in every physical characteristic to those previously manufactured by Hot Pants. A year later, Consumer Carl is injured by a pair of Sizzlers when they burst into flames as a result of defective fire-proofing during manufacturing. Carl's pants were manufactured by Hot Pants and sold prior to Just-for-Her purchasing Hot Pants's assets.

Analyzing this hypothetical under the traditional exceptions, Consumer Carl would likely not be able to recover damages for his injuries even though Just-for-Her has continued to sell the same product, manufactured in the same facility, by the same people as the one that injured him. There is no fraud or assumption of liabilities, and there is no continued ownership of the surviving entity by the selling corporation's shareholders, as traditionally may be required under a de facto-merger or mere-continuation analysis. Faced with the limitations of the traditional exceptions on one hand, and a solvent successor and insolvent predecessor on the other, modern courts developed what have been referred to as the "liberal,"[84] or "less restrictive,"[85] alternative theories of successor liability to increase redressability for injured consumers.[86]

1. The Continuity of Enterprise Exception

The first of the less restrictive avenues to successor liability to evolve was the continuity of enterprise exception.[87] As its name suggests, "[i]t developed as an expansion of the traditional 'mere continuation' exception."[88] The two tests are very similar, with an important difference in focus: whereas the mere continuation asks whether there is a continuation of the *corpo-*

84. Green, *supra* note 6, at 18.

85. Note, *Successor Liability, Mass Tort, and Mandatory-Litigation Class Action*, 118 HARV. L. REV. 2357, 2360 (2005) (explaining the development of the new successor liability exceptions).

86. *See* Michael B. Dorff, *Selling the Same Asset Twice: Towards a New Exception to Corporate Successor Liability Rules*, 73 TEMP. L. REV. 717, 724–25 (2000) (explaining the causes and effects of the expansion in successor liability).

87. *See* Pollak, *supra* note 40, at 143–45 (examining the historical development of successor liability expansion).

88. Cupp, *supra* note 81.

rate entity of the seller, the continuity of enterprise test sets a lower standard and thus makes liability easier to achieve by focusing on whether there was a continuation of the *seller's business operations*.[89] The continuity of enterprise approach provides for the predecessor's liability to pass to the successor if the court, based on the totality of the transaction, finds that the successor is so similar to the predecessor that it is in effect continuing the predecessor's enterprise.[90] As stated by one commentator, "[t]he continuity of the enterprise doctrine is the most advanced stage in the evolution of strict liability concepts in product liability law."[91]

Articulated for the first time by the Michigan Supreme Court in *Turner v. Bituminous Casualty Co.*,[92] the continuity of enterprise exception marked an abrupt shift in the successor liability framework "by focusing on the continuity of the business without requiring continuity of the shareholders and management."[93] In *Turner*, the court sought to differentiate its analysis from the corporate law origins of successor liability and said that the traditional rule was "not applicable to meeting the substantially different problems associated with products liability."[94] The court explained that under the circumstances of the transfer at issue in the case, if the consideration used had been stock rather than cash, the de facto-merger exception would apply.[95] This distinction, the court concluded, was insufficient to insulate the predecessor from liability.[96]

The court strained to characterize its holding as rooted in tort rather than corporate law, but ultimately relied on traditional successor liability indicators to reach its holding.[97] The *Turner* court used four primary elements to reach its decision, namely whether: (1) there was continuity of management, personnel, assets, facilities, and operations; (2) the predecessor dissolves or ceases its ordinary course of business soon after the sale; (3) the successor assumes the predecessor's liabilities to the extent necessary to continue its business without interrup-

89. *See id.* at 848–49.

90. *See id.*

91. Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 FLA. J. INT'L L. 365, 376 (1996).

92. 244 N.W.2d 873, 881–82 (Mich. 1976).

93. Blumberg, *supra* note 91, at 375.

94. *Turner*, 244 N.W.2d at 878.

95. *Id.* at 879–81.

96. *Id.*

97. *Id.* at 883–84 (describing factors).

tion; and (4) the successor holds itself out as a continuation of the predecessor to the public.[98] Subsequent decisions analyzing asset sales under the continuity of the enterprise approach have reduced the factors necessary to demonstrate the exception to the first three cited by the court in *Turner*.[99]

Although the continuity of enterprise theory has not achieved the wider acceptance of the product-line exception discussed below, several states have endorsed its application.[100] In 2001, for example, the Alaska Supreme Court in *Savage Arms, Inc. v. Western Auto Supply Co.*, expressly adopted the continuity of enterprise approach when it held a successor corporation liable for a defective rifle manufactured by the corporation from which it bought assets.[101] Conversely, a number of states have expressly rejected the theory. The Minnesota Supreme Court, for example, in *Niccum v. Hydra Tool Corp.*, refused to adopt the exception, basing its decision in large part on the successor's absence of responsibility for the defective product.[102] Other jurisdictions have applied a similar logic in rejecting the exception.[103] Generally, these courts have declined to expand liability on the grounds that beyond the traditional exceptions, successors should not be forced to bear liability for products they did not create, place into the market, hold themselves out as having produced, or directly profit from.[104]

2. The Product-Line Exception

Around the same time the Michigan Supreme Court decided *Turner*, the California Supreme Court was also struggling

98. *Id.*

99. *See, e.g.*, Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 510 (Mich. 1999) (applying a three-pronged *Turner* test).

100. *See* Cupp & Frost, *supra* note 80, at 1177 n.19 (identifying Alabama, Michigan, Mississippi, New Hampshire, Ohio and South Carolina as "following the continuity of enterprise approach").

101. 18 P.3d 49, 55–58 (Alaska 2001).

102. 438 N.W.2d 96, 99 (Minn. 1989); *accord* Simoneau v. S. Bend Lathe, Inc., 543 A.2d 407, 408–09 (N.H. 1988) (explaining that, under New Hampshire law, a plaintiff must prove a manufacturer's responsibility in a strict liability claim).

103. In addition to Minnesota, Arkansas, Colorado, Delaware, Indiana, Iowa, Illinois, Kentucky, Maryland, Missouri, Nebraska, New York, North Dakota, South Dakota, Vermont, Virginia, and Wisconsin have all rejected the continuity of enterprise exception. *See* Pollak, *supra* note 40, at 144–45 (cataloguing cases).

104. *See, e.g.*, *Niccum*, 438 N.W.2d at 99 (explaining that any profit the successor would receive from the predecessor's actions would be indirect).

to break free from the traditional corporate law framework of successor liability. In 1977, the California court did so by creating the "product line exception" in *Ray v. Alad*.[105] The successor in *Ray* purchased the seller's physical plant, inventory, manufacturing equipment, trade name, and goodwill. The successor continued to manufacture the predecessor's ladders under the same product name and employed the predecessor's former employees to do so.[106] Subsequent to the asset sale, the plaintiff was injured by a defect caused by the predecessor's manufacturing.[107]

Like the Michigan court in *Turner*, the *Ray* decision portrayed the products liability area of successor liability as sui generis.[108] Giving "special consideration"[109] to the underlying policy concerns that face claimants injured by defective products after a corporation has dissolved, the court concluded that "a party which acquires a manufacturing business and continues the output of its line of products under [circumstances like those in *Ray*] . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired."[110] That is, "[u]nlike the continuity of the enterprise doctrine, . . . the product line doctrine focuses on the continuity of the products manufactured by the successor corporation with those of the predecessor rather than on continuity of the operations of the business as a whole."[111]

The *Ray* court offered three justifications for imposing strict liability in the case:

> (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading rule, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.[112]

The *Ray* court's hope was that the increased risk of liability the product-line approach imposed on purchasers would pro-

105. 560 P.2d 3, 5 (Cal. 1977).
106. *Id.*
107. *Id.*
108. *Id.* at 8–11.
109. Murphy, *supra* note 26, at 828 (internal quotation marks omitted).
110. *Ray*, 560 P.2d at 11.
111. Blumberg, *supra* note 91, at 373.
112. *Ray*, 560 P.2d at 8–9.

vide incentives for corporations to produce safer products and protect "otherwise defenseless victims" of defective products.[113] Nevertheless, there is no doubt that the purpose of the product-line exception is purely compensatory in nature.[114]

Several jurisdictions adopted the product-line approach in the wake of the *Ray* court's decision.[115] Some courts, like the Pennsylvania Superior Court, for example, believed that it was best not to place language that was too restricting on its formulation of the product-line exception, "so that in any particular case the court may consider whether it is just to impose liability on the successor corporation."[116] This open-ended reservation of authority is not typical among jurisdictions adopting the product-line exception, but it demonstrates the willingness of some courts to impose liability based on equity balancing principles.

* * *

So where does all of this lead? While arguably a laudable example of judicial equity balancing, the patchwork system of successor liability that has resulted is both illogical and inefficient. The simple fact is that there has not been a consensus on any of the theories of successor liability, liberal or otherwise, and the doctrinal diversity across the country presents a major hazard for any prospective asset purchaser.[117] Asset purchasers are now forced to guess at judicial outcomes due to inconsistent and conflicting rules, all while facing the potential imposition of

113. *Id.* at 10 (citing Price v. Shell Oil Co., 466 P.2d 722, 726 (Cal. 1970)).

114. Roe, *supra* note 4, at 1561 ("Although the cases considering successor liability often refer to tort deterrence, the judicial inquiry may be a thinly veiled effort to compensate the plaintiff as if the predecessor firm had not disappeared.").

115. *See* Indem. Ins. Co. of N. Am. v. Gross-Given Mfg. Co., No. 08-3, 2009 WL 2959825, at *4 (E.D. Pa. Sept. 16, 2009); Ramirez v. Amsted Indus., Inc., 431 A.2d. 811, 811 (N.J. 1981); Martin v. Abbott Labs., 689 P.2d 368, 388 (Wash. 1984) (en banc); Cupp & Frost, *supra* note 80, at 1177 n.20 (identifying California, Connecticut, New Jersey, New Mexico, Pennsylvania and Washington as states that follow the product-line approach).

116. Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 111 (Pa. Super. Ct. 1981).

117. Based on the ongoing development of the law, some courts struggle when determining if the transaction at issue implicates successor liability concepts at all. *See, e.g.*, Excel Energy, Inc. v. Cannelton Sales Co., 337 Fed. App'x 480, 484–87 (6th Cir. 2009); Tredit Tire & Wheel Co., Inc. v. Regency Conversions, LLC, 636 F. Supp. 2d 598, 603 (E.D. Mich. 2009); Gen. Elec. Capital Corp. v. MHPG, Inc., No. 030833B, 2006 WL 2560314, at *5–6 (Mass. July 27, 2006).

crippling damage awards. The result is a system in which asset sellers may collect windfalls at the expense of purchasers who are left footing the bill for injury claims they had no part in creating.

C. Conflicts of Law Complications

Corporate law issues are usually governed by the internal affairs doctrine, "a long-standing choice of law principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—the state of incorporation."[118] This principle serves to protect corporations from conflicting demands, and to provide certainty and predictability.[119]

If the issue only affects a person as a "member of the corporation (i.e., shareholder, director, president or officer)," it will fall under the internal affairs doctrine.[120] The internal affairs doctrine allows corporations to create a structure that provides predictability in choice of law, and permits them to choose the

118. VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1112 (Del. 2005); *accord* State Farm Mut. Auto. Ins. Co. v. Superior Court, 8 Cal. Rptr. 3d 56, 64 (Ct. App. 2003) (citing Edgar v. MITE Corp., 457 U.S. 624, 645 (1982)); McDermott Inc. v. Lewis, 531 A.2d 206, 216 (Del. 1987). A comment in the Restatement (Second) of Conflict of Laws § 302 provides:

> Application of the local law of the state of incorporation will usually be supported by those choice-of-law factors favoring the needs of the interstate and international systems, certainty, predictability and uniformity of result, protection of the justified expectations of the parties and ease in the application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. e (1971); *see also* § 303 cmt. d (stressing the importance of the uniform treatment of shareholders).

119. 9 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4223.50 (perm. ed., rev. vol. 2008). In *CTS Corp. v. Dynamics Corp. of America*, the United States Supreme Court stated that it is "an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." 481 U.S. 69, 91 (1987). The Court also recognized that "[a] State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs." *Id.*

120. 17 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 8429 (perm. ed., rev. vol. 2006). The internal affairs governed by the doctrine can include incorporation, adoption of by-laws, issuance of shares, the holding of directors and shareholders' meetings, the declaration and payment of dividends and other distributions, charter amendments, mergers, consolidations, and reorganizations, the reclassification of shares and the purchase and redemption by the corporation of outstanding shares of its own stock. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 302 cmt. a.

state with laws most favorable in the areas considered important.[121] Unfortunately for both the clarity of a potential claimant and the certainty of business parties to an asset-transfer transaction, the internal affairs doctrine generally does not apply to successor liability claims:

> The fact [that] the successor corporation was incorporated in Delaware does not control. While the law of the state of incorporation may determine issues relating to the internal affairs of a corporation, different principles apply where the rights of third parties external to the corporation are at issue.[122]

1. Successor Liability Choice of Law Doctrines

Choice of law doctrine interacts with successor liability issues when at least one party to a sale or injury is located in a different state—for example, when a Minnesota corporation purchases assets from a California corporation, and an Iowa user is then injured by a product that the California corporation produced prior to the sale. The question of which state's law will apply becomes an issue largely because of the variations in elements of the traditional successor liability exceptions and the unequal adoption of the expanded exceptions for successor liability. If there were consistent laws regarding successor liability, it would not matter which state's law applied. However, depending on which state's law is chosen, a company incorporated in a state that has not adopted an expanded form of the traditional exceptions or the new exceptions could be subject to liability.

There are three basic approaches courts have taken to the choice of law question: they have applied contract choice of law principles,[123] tort choice of law principles,[124] or a mix of the two.[125] Contract choice of law doctrine generally allows for the most predictable outcome from the corporation's perspective.[126]

121. *VantagePoint*, 871 A.2d at 1113 ("By providing certainty and predictability, the internal affairs doctrine protects the justified expectations of the parties with interests in the corporation.").

122. Cooper Indus., LLC v. City of S. Bend, 899 N.E.2d 1274, 1290 (Ind. 2009).

123. *E.g.,* Binder v. Bristol-Myers Squibb, Co., 184 F. Supp. 2d 762, 768 (N.D. Ill. 2001).

124. *E.g.,* Webb v. Rodgers Mach. Mfg. Co., 75 F.2d 368, 374 (5th Cir. 1985).

125. *E.g.,* White v. Cone-Blanchard Corp., 217 F. Supp. 2d 767, 770 (E.D. Tex. 2002).

126. *See* Standal v. Armstrong Cork Co., 356 N.W.2d 380, 382 (Minn. Ct. App. 1985).

The corporation is actively involved in the contract that determines where they are liable, and is able to structure that contract to avoid liability in areas that it finds especially worrisome.[127] Under contract choice of law principles, some courts have looked to a choice of law clause in a purchase agreement as a way of determining which state's law applies.[128]

The main issue with application of contract choice of law doctrines is that the injured party in a successor liability suit is not usually a party to the contract.[129] Generally speaking, a person cannot be held responsible for a contract to which they were not a party.[130] Following a contract choice of law doctrine subjects the injured party to terms of a contract they did not sign, and courts typically will not adopt such an approach.[131]

In contrast, the vast majority of courts have applied tort choice of law principles in successor liability suits, looking to the state with the most significant relationship to the inci-

127. *See id.* (discussing how the two parties to the contract expressly provided that Pennsylvania law should apply, and therefore, the choice of Pennsylvania law would be consistent with the expectations of the parties).

128. *See* John Q. Hammons Hotels, Inc., v. Acorn Window Sys., Inc., No. C01-0151, 2003 WL 21397710, at *5 (N.D. Iowa Feb. 11, 2003); *Binder*, 184 F. Supp. 2d at 768; Lockheed Martin Corp. v. Gordon, 16 S.W.3d 127, 133 (Tex. App. 2000). There is also some authority for looking to the state of incorporation, Carriero v. Rhodes Gill & Co., No. CIV.A. 91-10515-RGS, 1995 WL 866092, at *2 (D. Mass. Jan. 13, 1995) (applying Massachusetts choice of law rules to apply Rhode Island law under the "most significant relationship" test), or looking to where the transfer of assets occurred, *id.* at *3. In 1997, a Kansas court held that Colorado law applied in a medical malpractice recovery suit, based on the Kansas rule that "the liability of a dissolved predecessor corporation and its successor is governed by the law of the jurisdiction where the predecessor was formed and where the transfer of its stock and assets took place." St. Francis Reg'l Med. Ctr., Inc. v. Critical Care, Inc., 997 F. Supp. 1413, 1436–37 (D. Kan. 1997); *accord In re* Asbestos Litig. (Bell), 517 A.2d 697, 698 (Del. Super. Ct. 1986) (applying Delaware contract choice of law rules to apply Pennsylvania law); *Standal*, 356 N.W.2d at 382 (applying Minnesota contract choice of law rules to apply Pennsylvania law based on consistency and an interest in compensating the victims).

129. Litarowich v. Wiederkehr, 405 A.2d 874, 876 (N.J. Super. Ct. Law Div. 1979).

130. *See* Gold'n Plump Poultry, Inc. v. Simmons Eng'g Co., 805 F.2d 1312, 1318 (8th Cir. 1986) ("Under general contract (non-U.C.C.) law . . . [s]trangers to a contract acquire no rights [or obligations] under the contract.").

131. *See, e.g.*, *Litarowich*, 405 A.2d at 878 ("Predictability in corporate transactions may be desirable. But, it does not weigh heavy against the need for a meaningful remedy for an injured person . . . ."); *see also* KLING & NUGENT, *supra* note 8, § 15.04 ("The Buyer's counsel needs to be knowledgeable with respect to the areas in which transferee or successor liability is imposed since no expression of the parties to the contrary will eliminate this liability from being assumed by the Buyer.").

dent.[132] Under this test, most courts have held that the state of injury has the most significant relationship,[133] but there are courts that have held that the state of the asset transaction controls[134] or even that the state of incorporation does.[135] While the *situs* of the asset transaction and state of incorporation are controlled by the corporation, the most significant relationship test looks to the state of injury, over which the companies involved have little or no control.

Since a corporation has little control over the location of the injury, which is often the place the court deems to have the most significant relationship to the claim, this is the least predictable situation for corporations.[136] Even if the law were settled that the place of the injury would govern, this is still a situation over which the purchasing corporation has no control. However, looking to the place of injury does allow the injured party to take advantage of any additional successor liability doctrines their chosen state has adopted.

As a final bit of confusion, some courts have stated that they will use contract choice of law principles in certain situations and tort choice of law principles in others.[137] These courts

132. *See, e.g.*, Webb v. Rodgers Mach. Mfg. Co., 750 F.2d 368, 374 (5th Cir. 1985) (applying Texas choice of law rules to apply California law under "most significant relationship" test); Hickman v. Thomas C. Thompson Co., 592 F. Supp. 1282, 1286 (D. Colo. 1984) (applying Colorado choice of law rules to apply Colorado law under the "most significant contacts" test); Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 54 (Alaska 2001) (applying Alaska choice of law rules to apply Alaska law under "most significant relationship" test); Young v. Fulton Iron Works Co., 709 S.W.2d 927, 936 (Mo. Ct. App. 1986) (applying Missouri choice of law to apply Missouri law under "most significant relationship" test); *Litarowich*, 405 A.2d at 876–78 (applying New Jersey choice of law to apply New Jersey law under "most significant contacts" test); Payne v. Saberhagen Holdings, Inc., 190 P.3d 102, 109 (Wash. Ct. App. 2008) (applying Washington law based on the "most significant relationship" test).

133. *See, e.g.*, Roll v. Tracor, Inc., 140 F. Supp. 2d 1073, 1079 (D. Nev. 2001) (applying New York choice of law to apply New York law); Giraldi v. Sears, Roebuck & Co., 687 F. Supp. 987, 990 (D. Md. 1988). In 1984, a district court in Colorado looked to the state of the injury, following Colorado torts choice of law rules, when a product manufactured by an Illinois corporation who had sold their assets to another Illinois corporation injured a Colorado resident in Colorado. *Hickman*, 592 F. Supp. at 1286.

134. Shannon v. Samuel Langston Co., 379 F. Supp. 797, 800 (W.D. Mich. 1974).

135. Carriero v. Rhodes Gill & Co., No. CIV.A. 91-105-RGS, 1995 WL 866092, at *2 (D. Mass. Jan. 13, 1995).

136. Barron v. Kane & Roach, Inc., 398 N.E.2d 244, 246 (Ill. App. Ct. 1979) (applying Illinois tort laws based on the state of the injury and domicile of the injured party).

137. *See, e.g.*, White v. Cone-Blanchard Corp., 217 F. Supp. 2d 767, 770

have differed in their methodology; some use both contract and tort choice of law within the same case,[138] while others use contract choice of law to decide when there is a contractual choice of law clause, but default to tort choice of law in its absence.[139] As an example of the latter situation, in 2000, a Texas court held that Delaware law would apply in a class action suit for silica-related injuries, based on a valid choice of law provision, but that if there wasn't one, the law of the state with the most significant relationship to the law at issue would apply.[140]

2. Res Ipsa Loquitor: Amsted Industries

The lack of predictability in successor liability choice of law is poignantly illustrated by a series of cases involving power presses manufactured by the Johnson Machine and Press Company. Johnson started manufacturing these power presses sometime in 1948 or 1949.[141] In 1956, Bontrager acquired the assets and liabilities of Johnson Machine and Press Company, and continued manufacturing presses under the Johnson name until 1962.[142] Bontrager retained a single share of Johnson stock, although Johnson did not transact any business after its acquisition.[143] In 1962, Amsted Industries purchased all of Bontrager's assets, including the share of Johnson stock and continued to manufacture the Johnson presses until 1975, when it sold that part of the business to LWE, Inc.[144] Johnson was dissolved in 1965.[145] Bontrager continued to exist until 1964, though it did not transact any business after the sale of

(E.D. Tex. 2002).

138. *Id.* at 767.

139. John Q. Hammons Hotels, Inc. v. Acorn Window Sys., Inc., No. C01-0151, 2003 WL 21397710, at *4 (N.D. Iowa Feb. 11, 2003) (applying Iowa choice of law based on the "most significant relationship" test, *but* would apply contractual choice of law if there was one).

140. Lockheed Martin Corp. v. Gordon, 16 S.W.3d 127, 133–34 (Tex. Ct. App. 2000). In cases where a court uses both choice of law doctrines within the same case the distinction may rest on the different types of claims made, as in another Texas decision where the court looked at the "most significant relationship" test for each count, holding that the contract had the most significant relationship to the issue of liability. *White*, 217 F. Supp. 2d at 770–71.

141. Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 814 (N.J. 1981).

142. Ortiz v. S. Bend Lathe, Inc., 120 Cal. Rptr. 556, 557–58 (Ct. App. 1975).

143. *Ramirez*, 431 A.2d at 814.

144. Verhein v. S. Bend Lathe, Inc., 598 F.2d 1061, 1062 (7th Cir. 1979).

145. *Ramirez*, 431 A.2d at 815.

assets to Amsted.[146]

Since its sale of the press business to LWE, Amsted Industries has litigated the issue of successor liability thirteen times based on claims by plaintiffs as to injuries caused by products *that Amsted did not manufacture or sell*.[147] It has litigated the cases in California, Colorado, Illinois (twice), Michigan, New Jersey, Nebraska, New Hampshire, New York, Ohio (twice) and Wisconsin (twice). Amsted has won ten cases and lost three—with the losses occurring once under *Turner*'s continuity of enterprise exception,[148] once under *Ray*'s product-line exception,[149] and once under the de facto-merger exception.[150]

These examples simply highlight the irrationality of the current successor liability regime. Generally speaking, corporations are able to structure their transactions so as to limit, or at least predict, the extent of their liability. However, in successor liability cases there is a distinctly noncohesive body of law. Depending on the state in which a plaintiff sues, the corporation could find its contractual choice of law claim honored, a more corporation friendly set of laws applied than the one in their state of incorporation, or a distinctly less friendly set of laws. In any event, there is no way to know in advance which result will occur.

III. POLICY ISSUES AND IMPERFECT PARTIAL SOLUTIONS

In a very real sense the battle over successor liability is over. That is, courts will impose successor liability when they deem it equitable.[151] The real problem is the uncertainty of its

146. Manh Hung Nguyen v. Johnson Mach. & Press Corp., 433 N.E.2d 1104, 1106 (Ill. App. Ct. 1982).

147. *Verhein*, 598 F.2d at 1061; Diaz v. S. Bend Lathe, Inc., 707 F. Supp. 97 (E.D.N.Y. 1989); Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136 (E.D. Mich. 1979); *Ortiz*, 120 Cal. Rptr. at 556; Johnston v. Amsted Indus., Inc., 830 P.2d 1141 (Colo. App. 1992); *Manh Hung Nguyen*, 433 N.E.2d at 1104; Hernandez v. Johnson Press Corp., 388 N.E.2d 778 (Ill. App. Ct. 1979); Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481 (Neb. 1982); Simoneau v. S. Bend Lathe, Inc., 543 A.2d 407 (N.H. 1988); McGaw v. S. Bend Lathe, Inc., 598 N.E.2d 18 (Ohio Ct. App. 1991); Burr v. S. Bend Lathe, Inc., 480 N.E.2d 105 (Ohio Ct. App. 1984); *Ramirez*, 431 A.2d at 811; Fish v. Amsted Indus., Inc., 376 N.W.2d 820 (Wis. 1985).

148. *Korzetz*, 472 F. Supp. at 143–44.

149. *Ramirez*, 431 A.2d at 812, 818–20.

150. *Diaz*, 707 F. Supp. at 102.

151. This may be a classic example of the situation where "hard cases make bad law." N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes,

application in any particular case, both for the putative plaintiff and the prospective defendant. This uncertainty creates unnecessary transaction costs that benefit no one. Still, various arguments have been proffered for the allowance and then the expansion of successor liability.[152] It is important to pause and consider the validity of these arguments, particularly as they might inform the best solution to the "doctrinal morass and high degree of uncertainty that now surround successor liability."[153] Before addressing solutions, then, this Part will briefly address three of the most common proffered rationales offered in support of expansive successor liability: risk spreading, deterrence, and defendant's contribution to claimant's loss of remedy.[154]

A. ARGUMENTS IN FAVOR OF EXPANDED LIABILITY

A frequent justification courts use to support successor liability is that manufacturers possess superior ability to bear the cost of injuries resulting from product defects.[155] This argument

J., dissenting).

152. *See, e.g.*, Hansmann & Kraakman, *supra* note 7, at 1879–82 (noting the debate between proponents of limited and unlimited liability).

153. *Id.* at 1885 n.15.

154. Not all rationales need be addressed. Some successor liability is necessary as based on fraud. To the extent that exceptions to the general limitation on liability are simply species of liability based upon fraud, it is argued, extensions of liability are warranted so long as they are responses to transactional obfuscation. *See, e.g.*, Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745, 748–49 (2003) (introducing a fraud-based interpretation of the successor liability system). To the extent that successor liability redresses fraud, no one disagrees with its application. However, modern applications of the theory are well beyond the boundaries of traditional fraud.

Other proffered theories are untenable as mere conclusions. Some commentators have found that expansive successor liability is rooted in "an inherently equitable notion that, in certain instances, the purchaser must take the bad (the liabilities) with the good (the assets)." Kuney, *supra* note 33, at 12. Some commentators have asserted that the liability arises out of an interest in the property itself. This view posits that the liability is "akin to an in rem interest that is said to 'run with the land.'" Kuney, *supra* note 33, at 12 (quoting David Grey Carlson, *Successor Liability in Bankruptcy in Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Product Liability, and Toxic Waste Clean Up*, 50 LAW & CONTEMP. PROBS. 119, 124 (1987)). This is less an argument than it is a conclusion. There is nothing persuasive about the analogy by itself.

155. *See, e.g.*, Cyr v. B. Offen & Co., Inc., 501 F.2d 1145, 1154 (1st Cir. 1974) ("The very existence of strict liability for manufacturers implies a basic judgment that the hazards of predicting and insuring for risk from defective products are better borne by the manufacturer than by the consumer."); Turn-

fails for several reasons. While perhaps more able to financially bear the cost than the injured consumer, successors are not the source of the injury from which the costs flowed.[156] The successor is not the producer of the injurious product, and although simply affixing liability to any manufacturer might arguably provide for cost bearing by the more 'able' party, attaching liability solely based on the successor's ability to pay, or their proximity to the true culprit, is illogical.[157]

Indeed, if placing liability on manufacturers generally is the goal, there is a multitude of potentially superior alternatives that could provide greater protection for consumers and more diffuse risk for producers. Creating a government-run, public-funded trust, for example, would provide resources for damage awards that could far exceed those of any successor.[158] This type of social insurance would guarantee that the costs of injuries are distributed evenly throughout society.[159] Such a system would allow for costs to be spread over time and not limit them to defendants presently situated in the current tort system.[160] Thus, risk-spreading on a case-by-case basis is not a persuasive rationale for successor liability.

A second argument for expansive successor liability is that by requiring successors to absorb liability for their predeces-

er v. Bituminous Cas. Co., 244 N.W.2d 873, 883 (Mich. 1976) (noting the ability of corporations to "make suitable preparations" after becoming aware of the possibility of successor products liability).

156. *See* Carol A. Rogala, Comment, *Nontraditional Successor Product Liability: Should Society Be Forced to Pay the Cost?*, 68 U. DET. L. REV. 37, 52–53 (1990) ("The predominant arguments against expanding successor liability rest on the separate and distinct identities of the successor corporation and the predecessor corporation, who manufactured the product and placed it in the stream of commerce.").

157. *See id.*

158. *See* Green, *supra* note 6, at 31 ("A universal, publicly funded compensation system would far better achieve maximum spreading."); *see also* Murphy, *supra* note 26, at 836 ("Although the cases infer that the successor corporation is in a good position to absorb the cost, in reality the imposition of successor liability could severely cripple industries which are comprised mostly of small corporations.").

159. Murphy, *supra* note 26, at 837.

160. *Id.* ("If cost-spreading is maximized through a form of social or industry-wide insurance, manufacturers have no direct financial deterrent to the production of defective products since the manufacturer's payments for such insurance are independent of any accidents caused by their products."); *see also* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 94 (1970) (noting the tension "between achieving the desired degree of primary accident cost reduction through general deterrence and minimizing the secondary costs of accidents through perfect loss spreading").

sor's defective products, asset sellers will be incentivized to produce better products.[161] There is no question that tort law serves an important deterrent function in society by making harmful "activities more expensive, and thereby less attractive to the extent of the accident costs they cause."[162] In general terms, the deterrence rationale is well supported in the products liability and manufacturing contexts, but it wanes when applied to successor corporations.[163]

The deterrence rationale is premised on the idea that because injuries stemming from defective products represent costs to successors, asset prices will be forced down as the risk of latent defects grows.[164] It is argued that when producers are forced to bear the cost of the injuries their products cause, or to devalue their assets in a sale because of the risk of future claims, manufacturers will produce safer products to maximize value.[165] Ultimately, it is thought, producers will manufacture safer products so long as the cost to do so does not exceed the costs of the injuries their products cause.[166]

While perfectly supportable for application to predecessor-manufacturers, the deterrence rationale is less convincing when applied to successors.[167] First, because injury prevention procedures are implemented only so long as their costs remain below the cost of liability, it is axiomatic that, to maximize safety measures, responsibility for these procedures should be borne by "the one who can 'avoid the accident costs most cheaply through some safety measures or otherwise.'"[168] The successor has had no part in creating the injurious product and has

161. Murphy, *supra* note 26, at 838.

162. *Id.* (quoting CALABRESI, *supra* note 160, at 26).

163. *Id.* (noting that "deterrence rationale is a sufficient justification for imposing liability in our tort system even though it is shown that this rationale does not support all of the successor liability theories").

164. *Cf. id.* at 838 n.157 ("Requiring the successor to be liable for defective products of its predecessor also serves as a deterrent against the manufacture of defective products . . . [T]he predecessor will probably receive a lower consideration in the sale of its assets if its successor is going to be liable for the predecessor's defective products. Therefore, in order to increase the value of its assets, the predecessor has the incentive not to produce defective products.").

165. *See id.* ("If manufacturers know they will be liable for the costs of accidents their products cause, the deterrence theory encourages manufacturers to make safer products in order to avoid the extra costs of accidents.").

166. *Id.*

167. *See supra* note 163 and accompanying text.

168. Murphy, *supra* note 26, at 838 (quoting CALABRESI, *supra* note 160, at 135).

no ability to limit future injuries resulting from prior defects.[169] By using the successor as a conduit in an attempt to pass the cost of injuries through to the predecessor, current successor liability law fails to force the full cost of claimants' injuries to be borne by defective manufacturers.[170]

Moreover, there is no reason to think that the risk premium that buyers would demand would be any greater than the liability cost that the defective products represented to the seller before the asset sale, and there is certainly no reason to think that the seller would be willing to discount its assets below that level. The cost of the spread between the purchaser's risk premium and the seller's true liability cost would be absorbed by the successor when, in fact, it is the predecessor that is in a superior position to deter the creation of the cost.[171] Thus, there is no reason to think that potential successor liability would impose any greater incentive on manufacturers to produce safe products than would normally exist. The deterrence rationale is essentially double-deterring the predecessor, or as economists describe, it is creating a "safety overincentive."[172]

A third argument for imposing liability on successors in asset sales is that but for the purchaser bringing about the extinction of the primary tortfeasor, the plaintiff would be able to recover.[173] This argument has the benefit of addressing the real issue in asset transfers: the dissolution of the predecessor.[174] As a preliminary matter, it must be noted that, despite many courts using language suggesting the contrary, an asset purchase does not destroy a plaintiff's remedies against a prede-

169. *See* Green, *supra* note 6, at 35 ("[I]mposing liability on an entity that by definition did not contribute to a product's design or manufacture quite obviously cannot further this deterrence function.").

170. *See id.* at 36 (noting that products liability law, in order to properly allocate costs, must operate such that "the entity that had the opportunity to take safety measures—the predecessor—should bear the costs of product-related injuries").

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

172. Green, *supra* note 6, at 36. In this scenario, a purchaser would bear not only the cost of liability associated with its own products, but also those of its predecessor. The only remedial safety measure available to the successor is removing the predecessor's product line from its business, because, quite obviously, whatever defective product may be the source of the future liability has already been produced. *See id.* at 47–49 (discussing piecemeal acquisition strategy and the advantage of dissolution-restricting statutes).

173. *Id.* at 32.

174. *Id.*

cessor.[175] Rather, it is the predecessor's dissolution that ends a long-tail plaintiff's recourse against the predecessor.[176] While the asset purchaser may facilitate the predecessor's dissolution by providing it with increased liquidity and assets that are more readily transferrable to stockholders, the fact of the sale alone does not force the predecessor to cease its business operations.

B. PROPOSED REMEDIES FOR THE CURRENT CHAOS

Successor liability, at bottom, is a judicial construction that has developed in response to perceived inadequacies of the corporate form and limited liability generally.[177] The central weakness in the system is that the beneficiaries of the true offender, the stockholders of the predecessor-manufacturer, are insulated by the limited liability provided by the corporate form.[178] That long-tail plaintiffs cannot recover from the stockholders of a dissolved manufacturer, however, is in conflict with the limited liability afforded corporate stockholders, not with the acquisition of assets by the acquiring (successor) corporation.

Using the hypothetical above, imagine that Hot Pants were owned by three parties, each with an equal number of shares in the company. This time, however, they decide not to sell their assets, but merely to dissolve and distribute the assets of the business equally among themselves. Consumer Carl suffers the same injuries as he did before, but, alas, there is no one to sue.[179] Absent a successor in interest, there is no money to fund Carl's damage award.

175. *Id.* at 32–33; *see also* Ray v. Alad Corp., 560 P.2d 3, 10 (Cal. 1977) (citing the destruction of a product liability plaintiff's remedy as a justification for expanded liability for the successor).

176. Green, *supra* note 6, at 33 (identifying dissolution and liquidation statutes as the "forces" that lead to a plaintiff's inability to recover from a predecessor).

177. *See* Cupp, *supra* note 81 ("In response [to tension between expansive and restrictive liability], a significant minority of courts tinkered with the traditional corporate law rule by adopting one of two less restrictive approaches to successor liability."); Green, *supra* note 6, at 19 (noting that many courts and commentators view successor liability as representative of an inherent tension between policies underlying products liability and traditional corporate law).

178. *Cf.* Green, *supra* note 6, at 59 ("The law should not allow corporations to cease operations in a manner that frustrates claims of legitimate creditors. Most corporate creditors are protected either by statutes or contractual provisions bargained for during the existence of the corporate debtor.").

179. This example assumes that the corporation was not dissolved in an attempt to avoid liability.

This example demonstrates well that the true theoretical issue of successor liability lies not in whether or not a successor should be liable for the torts of a predecessor, but in answering the normative question of how much protection from liability stockholders should be afforded in the event of dissolution. If the aim of successor liability law is to use the successor as a conduit to transfer injuries from plaintiffs to predecessors, it would be theoretically more effective to create legislative rules permitting plaintiffs to seek damages from the predecessor's stockholders directly. To be sure, corporate law statutes that permit distributions of the proceeds of asset sales without either providing for funds to be set aside to compensate future claimants, or for clawback provisions, play a far more significant role than asset-purchasing successors in inhibiting redress for plaintiffs.

So what is to be done? Some commentators, seeing what they perceive to be a runaway horse imposing random liability under the modern successor liability doctrines, wistfully have called for a return to the original, narrow exceptions to successor liability.[180] Indeed, this is the position taken in the Third Restatement of Torts.[181] The provision on successor liability only allows avoidance of the presumption of nonliability when one of the four traditional exceptions is satisfied. As for expansive theories of liability, the comments to the Restatement counsel against going there:

> As courts have recognized, it would be difficult, and often impossible, to implement and administer a liability rule that attempted to limit post-transfer plaintiffs' rights to an aggregate amount equal to the net value of the predecessor before transfer. Tort judgments are imposed independently of one another, in various jurisdictions; no central authority exists to assure that, in the aggregate, tort judgments do not exceed a predetermined total amount. Thus, the expanded successor liability rules in a minority of states, not limited to time-of-transfer net value, replace one risk of injustice—that the assets transfer may unfairly reduce plaintiffs' recoveries in cases that do not satisfy the traditional exceptions (reflected in Subsections (a) through (d))—with another, possibly greater, injustice: that the transfer may give tort plaintiffs a windfall at the expense of companies who engage in asset transfers and, in turn, at the expense of the consuming public.[182]

180. *See, e.g.*, Richard A. Epstein, *Imperfect Liability Regimes: Individual and Corporate Issues,* 53 S.C. L. REV. 1153, 1167–70 (2002); Rogala, *supra* note 156, at 38, 51–54, 71–72.

181. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1998).

182. *Id.* cmt. b, at 210–11.

The problem with this view is that it is both too late and too little. It is too late because jurisdictions representing a substantial portion of the populace of the United States have already adopted some form of the expanded successor liability theories.[183] It is also too little because, as we have seen, even the traditional exceptions have been expanded. Moreover, given the conflicts of law issues, the variation between and among the states as to application of even the traditional exceptions makes predicting the imposition of successor liability nearly impossible. Going back is not an option and, even if it was, the uncertainty there makes it a less than desirable place to be.

Another approach has been taken by the drafters of the American Bar Association's Model Business Corporation Act, who have been wrestling with the issue of successor liability since 1950. The Revised Model Business Corporation Act (RMBCA) currently serves as the foundation and framework for the corporate laws of thirty-one states.[184] When the RMBCA was adopted in 1984, it recognized the need to expand the remedies available to post-dissolution claims:

> Earlier versions of the Model Act did not recognize the serious problem created by possible claims that might arise long after the dissolution process was completed and the corporate assets distributed to shareholders. . . . The problems raised by these claims are intractable. . . . In some circumstances successor liability theories have been applied to allow plaintiffs incurring post-dissolution injuries to bring suit against the person that acquired the corporate assets. Some courts have refused to broaden these doctrines, particularly when the purchaser of the corporate assets has not continued the business of the dissolved corporation. In these cases, the remedy of the plaintiff is limited to claims against the dissolved corporation and its shareholders receiving assets pursuant to the dissolution.[185]

The remedy adopted was to expand from two years to five years the time period in which claims could be asserted against the shareholders of a dissolved corporation for recovery of the amounts distributed.[186] However, this lengthy time period, during which distributed assets are at risk of being recalled, proved unsatisfactory. In 2000, the RMBCA was once again

183. *See* Cupp & Frost, *supra* note 80, at 1178 (confirming earlier conclusions and clarifying that at least "forty-three percent of the population resided in the thirteen states that had adopted one of the less restrictive approaches. . . . [T]he less restrictive approaches were likely being applied in more lawsuits than was the traditional approach").

184. *See* MODEL BUS. CORP. ACT, intro. note at ix (2011).

185. *Id.* § 14.07 official cmt., at 14-65 to -66.

186. *Id.* cmt. hist. background, at 14-68.

amended to change the period of shareholder liability to three years after dissolution, which is where it stands now.[187]

The result of this vacillation was predictable. Fourteen jurisdictions have the current three-year limitations period, fourteen have the original two-year period, thirteen have the interim five-year period, and two jurisdictions have a four-year period; the remainder have no explicit limitations period, and "instead, the underlying cause of action dictates the corresponding statute of limitations . . . ."[188] More fundamentally, the RMBCA solution does not address the problem of successor liability directly. That is, whatever time period is used for claims against a dissolving corporation or its shareholders, the RMBCA does not say that suit within the specified period is the exclusive remedy of injured claimants. Rather, at the end of whatever period is specified, claimants will still try to impose liability on the successor corporation since the remedy against the selling corporation and its shareholders is no longer available. The courts will then once again face the same question of whether to impose successor liability.[189]

There are other variations on the same theme of holding

187. For the text of the relevant amendment, see Committee on Corporate Laws, *Changes in the Model Business Corporation Act—Dissolution,* 55 BUS. LAW. 1227, 1227 (2000). The proposed amendments were adopted on September 24, 2000. Committee on Corporate Laws, *Changes in the Model Business Corporation Act Pertaining to Dissolution—Final Adoption*, 56 BUS. LAW. 83, 83 (2000).

188. MODEL BUS. CORP. ACT § 14.07 cmt. statutory comparison, at 14-70 (2011).

189. A related approach is a dissolution-restricting statute, at least one geared toward product liability claimants. *See* Green, *supra* note 6 and accompanying text. This approach would preclude dissolution or distribution of assets to shareholders until it has made "adequate provision[s] for postdissolution products liability claims." *Id.* at 50–51. Such provisions may take one of three forms: (1) purchase of products liability insurance; (2) transfer of "liability for future products liability claims to the purchaser of the corporation's assets"; or (3) use of any other method that protects those asserting postdissolution products liability claims." *Id.* at 51. The positive aspect of this proposal is that at least it expressly states that successors are not liable for their predecessor products unless they explicitly agreed to such liability. *Id.* at 54–55. However, as with the RMBCA approach, preventing dissolution is not an acceptable solution because it prohibits the valid distribution of corporate assets to shareholders. Obviously missing is a reference to a statute of limitations. Moreover, the proposed conditions to dissolution, such as insurance, are impractical. For a discussion of both the RMBCA approach and the Green approach, see David B. Hunt, Case Note, *Tort Law—Towards a Legislative Solution to the Successor Products Liability Dilemma*—Niccum *v.* Hydra Tool Corp.*, 438 N.W.2d 96 (Minn. 1989)*, 16 WM. MITCHELL L. REV. 581, 597–602 (1990).

the selling corporation and its shareholders liable.[190] For example, one proposal would employ a two-step process for imposing liability on successors.[191] If "the predecessor does not remain intact or the parties fail to arrange for insurance sufficient to satisfy claims in an amount equal to the full value of the assets [step 1] . . . [then] the successor would be 'tagged' with liability [step 2]."[192] This solution was posed in light of the failures of others to satisfy policy goals of both products liability and corporate law principles.[193] However, the author also readily admits that "[o]ne cannot count on the availability of fairly-priced insurance, and it is thus inadequate as an exclusive alternative to successor liability."[194] If that is true, then it seems reasonable to skip the first step, including its significant transaction costs, and move directly to tag the purchaser with unlimited successor liability.

IV. A SIMPLE STATUTORY SOLUTION TO SUCCESSOR LIABILITY

The Supreme Court in 1890, referring to the concept of successor liability, stated simply that "[s]uch a doctrine has no existence."[195] The twelve decades that have passed since have seen the growth of business, of technology, and of the wide-

190. One particularly extreme proposal is to hold the seller corporation's shareholders to unlimited liability for the liabilities of the seller. *See* Hansmann & Kraakman, *supra* note 7. Although theoretically interesting, such a wholesale rejection of the concept of limited liability will never happen. For other suggested proposals, Sharon L. Cloud provides a listing of proposed solutions, with little discussion, including: (1) contracting for protection from unknown future claims; (2) assignment of the seller's rights under the policy or be named an additional insured; (3) having the seller establish an escrow account against future claims; (4) getting a shareholder agreement to indemnify a buyer for subsequent claims; (5) bona fide purchaser exception; (6) rebuttable presumption of absolute liability; (7) combination of trust fund doctrine and deferred abatement statutes; (8) expansion of bankruptcy law; (9) RMBCA approach. Cloud, *supra* note 26, at 816–17.

191. *See* Roe, *supra* note 4, at 1597–98.

192. *Id.* at 1598.

193. *Id.* at 1563 (concluding that "each alternative fails to satisfy one or more aspects of our two policy goals" of compensation and predictability).

194. *Id.* at 1592.

195. Fogg v. Blair, 133 U.S. 534, 541 (1890) ("That [trust fund] doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence.").

spread harm that defective products or operations can bring to a great multitude of people. Sometimes these defects and the resulting harms do not readily appear until decades after the product's widespread use. The development of successor liability doctrine has indicated a desire of the courts to find ways to compensate injured parties in these modern circumstances. This predilection has resulted in expansion of the traditional exceptions to successor nonliability, as well as the creation of new exceptions. In specific, discrete areas of statutory regulation, such as environmental cleanup liability, the rule of nonliability has been discarded completely. Indeed, today it may be safer and more realistic for companies purchasing business assets to presume successor liability than to assume the contrary.[196]

Returning to the main goals to be accomplished in this arena can serve to signal the best resolution for the current patchwork of doctrines and the resulting randomness of the imposition of liability. One primary goal is remedial—compensation for injured parties. The other primary goal is predictability—business parties need to know when liability will be imposed so that they can negotiate for an efficient transfer of resources without fear that the transaction will be judicially restructured by an ad hoc imposition of successor liability. The optimal answer must provide compensation to victims and clarity to the business parties.

The answer proposed here is an automatic transfer of selling company liability to the purchasing company in a sale of substantially all of the assets of the seller. That is, as is the result of a merger under existing corporate law,[197] a sale of substantially all of the assets of a corporate entity should impose liability on the purchasing entity for the full extent of the seller's liabilities.

196. 1 SAMUEL C. THOMPSON, JR., MERGERS, ACQUISITIONS AND TENDER OFFERS § 2:9.2(G)(1), at 2-70 (Practising Law Inst. 2011) ("As an economic matter, the fundamental difference between a stock purchase agreement and an asset acquisition agreement is that in the asset acquisition, certain liabilities can be left behind with the target. However, if the acquirer is forced to assume certain undesired liabilities of the target under a successor liability principle, then the transaction would be, to that extent, converted economically into a stock acquisition and the benefit of the asset acquisition is lost.").

197. For a discussion on the effects of a merger on the liability of the constituent companies, see *supra* notes 18–19 and accompanying text. Although this proposal would impose liability on the purchasing entity in the same manner as a statutory merger, there are still reasons to prefer the asset purchase transaction structure to a merger. *See supra* note 20.

This result accomplishes both of the primary goals in the successor liability dilemma. As to the compensation goal, if the financial value of the purchasing company is available to satisfy both known and unknown claims of the selling entity, compensation for claimants of the seller will be maximized. In addition, since this liability will be automatic and without exception, claimants avoid the existing wasteful necessity to litigate over the possible application of one of the various exceptions to non-successor liability.

As to clarity and predictability for the business parties, if asset purchasing companies know in advance that they will be liable for the obligations of the selling company, negotiations for the value of the assets of the selling company could focus on these actual and potential liabilities. Purchasers would have an incentive to scour the operations and obligations of the seller to determine, to the extent possible, the type and extent of the liabilities to be assumed. The asset-transfer transaction could then be rationally priced by negotiation between the seller and buyer.

In return for the potentially greater liability assumed by the purchasing company, this company has the certainty of knowing the extent of its potential liabilities. In addition, by limiting the transfer of liabilities to situations where there has been a sale of all or substantially all of the assets of the seller, the purchasing company avoids potential liability under piecemeal theories of successor liability, such as the product-line exception, at least to the extent that this theory has been applied where there is a transfer of less than substantially all of the selling company's assets.

In order to concretely test this proposal, it is necessary to craft a model successor liability statute. Let's start with the underlying transaction, a sale of assets. Under existing corporate law in all states, a sale of all or substantially all of the assets of any company is a fundamental corporate event. It is a regulated corporate transaction that gives rise to certain procedural requirements and approval mechanisms. A sale of all assets of a company requires an affirmative vote of the board of directors, an affirmative vote of the shareholders of the company, and often gives rise to dissent and appraisal rights on behalf of dissenting shareholders.[198] The requirement of share-

198. Although not important to the current analysis, not all states grant dissent and appraisal rights in connection with a sale of substantially all the assets of a corporation. *Compare* MODEL BUS. CORP. ACT § 13.02(a) (2011)

holder approval identifies this transaction as an important one in the life of a company. In the terms of the RMBCA:

> **§ 12.02. Shareholder Approval of Certain Dispositions**
>
> (a) A sale, lease, exchange, or other disposition of assets, other than a disposition described in section 12.01 [a pledge or sale in the ordinary course of business or distribution to shareholders], requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity. If a corporation retains a business activity that represented at least 25 percent of total assets at the end of the most recently completed fiscal year, and 25 percent of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, in each case of the corporation and its subsidiaries on a consolidated basis, the corporation will conclusively be deemed to have retained a significant continuing business activity.[199]

One of the substantial benefits of the RMBCA formulation is its determination to set a specific numerical guideline for when an asset seller is not disposing of all or substantially all of its assets.[200] If twenty-five percent in value is retained by the transferring entity, the procedural requirements and shareholder approval are not necessary.

In order to make the proposed successor liability statute effective to transfer liabilities to the purchaser, an additional provision mirroring the result in a merger is needed. Under the existing law of all states, the effect of a merger is to combine all of the assets and the liabilities in acquiring entity. In the terms of the RMBCA:

> **§ 11.07. Effect of Merger or Share Exchange**
>
> (a) When a merger becomes effective:
>
> (1) the corporation or eligible entity that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be; . . .
>
> (3) all property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survi-

(providing for dissent and appraisal rights in an asset transfer), *with* DEL. CODE ANN. tit. 8, § 262 (2010) (providing for these rights only in a merger).

199. MODEL BUS. CORP. ACT § 12.02(a).

200. Some state corporate laws leave the issue of what is "all or substantially all" of a corporation's assets undefined, resulting in unfortunate and sometimes indeterminate litigation. *See, e.g.*, tit. 8, § 271. For a discussion of the problems this vague phrase can cause, see Garon, Stanchfield & Matheson, *supra* note 55, at 833–38.

vor is vested in the survivor without reversion or impairment;

(4) all liabilities of each corporation or eligible entity that is merged into the survivor are vested in the survivor;[201]

Combining these provisions together and modifying the language to govern asset transfers, the model successor liability statute looks like this:

Model Successor Liability Statute

Shareholder Approval of Certain Dispositions; Successor Liability.

(a) A sale, lease, exchange, or other disposition of assets, other than a disposition described in section 12.01 [a pledge or sale in the ordinary course of business or distribution to shareholders], requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity. If a corporation retains a business activity that represented at least 25 percent of total assets at the end of the most recently completed fiscal year, and 25 percent of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, in each case of the corporation and its subsidiaries on a consolidated basis, the corporation will conclusively be deemed to have retained a significant continuing business activity.

(b) When a disposition of assets becomes effective, all liabilities of the corporation making the disposition of assets are vested in the acquiring corporation without reversion or impairment.

This is a good start but it is not optimal. While this statute would be appropriate if proposed as a model or uniform statute for adoption by individual states, that would leave to the states the choice whether such adoption is appropriate. In this context, where a major part of the problem is variation in successor liability doctrine and application among the states, leaving the adoption to state choice is ill-advised. Over a century of experience has shown that this is an area of the law where diversity is not a positive factor and allowing the states to be laboratories for the ongoing evolution of legal doctrine would be a mistake. Rather, a federal statute is necessary to provide uniformity to this area of the law. In addition, since each state has its own corporate procedural and voting requirements in connection with a disposition of assets, the federal statute need not address those aspects of the transaction and can focus solely on successor liability.

201. MODEL BUS. CORP. ACT § 11.07(a).

In addition, to be completely effective, the federal successor liability statute must preempt state successor liability law in all its permutations.[202] That is, as the tradeoff for assuming the liabilities of the transferor company, the acquiring company should know that it will not have to litigate over other successor liability claims.[203] Primary among these preempted claims might be those currently pursued under the product-line or continuity of enterprise exceptions. As modified, the model federal successor liability statute would look like this:

Federal Successor Liability Statute

Effect of Disposition of Assets; Successor Liability.

> (a) A sale, lease, exchange, or other disposition of assets, other than a pledge or sale in the ordinary course of business or distribution to shareholders, is governed by the provisions of subsection (b), if the disposition would leave the transferring corporation without a significant continuing business activity. If a corporation retains a business activity that represented at least 25 percent of total assets at the end of the most recently completed fiscal year, and 25 percent of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, in each case of the corporation and its subsidiaries on a consolidated basis, the corporation will conclusively be deemed to have retained a significant continuing business activity.
>
> (b) When a disposition of assets described in the first sentence of subsection (a) becomes effective, all liabilities of the corporation making the disposition are vested in the acquiring corporation.
>
> (c) Except as provided in subsection (b) and except for any additional liability expressly assumed by the acquiring corporation in the acquisition agreement, no disposition of assets will impose any liability on the acquiring corporation for the liabilities of the transferor.
>
> (d) All federal and state common law theories of successor liability, including de facto merger, mere continuation, continuity of enter-

202. The federal statute also would preempt the federal common law successor liability theories that have evolved in enforcement of several federal statutes where successor liability is not explicitly addressed.

203. Following the guideline of the RMBCA, these preempted claims would include those where the selling corporation "retains a business activity that represented at least 25 percent of total assets at the end of the most recently completed fiscal year, and 25 percent of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year." MODEL BUS. CORP. ACT § 12.02(a). Therefore, acquisition of less than 75 percent of a selling corporation's assets would impose no successor liability.

> prise, product-line theory, or otherwise, are preempted in full and do not exist as a basis of liability under federal or state law.

This proposed federal successor liability statute balances the need for compensation with the need for certainty by bringing clarity to the successor liability arena. Subsection (b) provides that, when a company acquires all or substantially all of the assets of another company, putative plaintiffs are given a clear statutory basis to seek redress for their injuries against the purchasing company. There is no more need for inefficient litigation over whether liability will attach, irrespective of whether the claims sound in contract or tort.[204] Claimants are free to assert their claims against the full range of assets owned by the acquiring company.

Acquiring companies, on the other hand, would now assume liabilities identical to those that they would acquire if the transaction had been structured as a statutory merger.[205] For this potential increase in liability, they receive certain significant benefits. First and foremost, acquisition transactions for all of a company's assets can be negotiated with the knowledge that liabilities will follow assets. The uncertainty of which liabilities will stay and which will attach to the acquirer is gone,

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204. In addition to the benefits of reduced costs for asset purchasers, the savings in litigation costs that would be achieved under the proposed model would be significant. The current "[l]iberal successor liability law" system "virtually mandates that the plaintiff use substantial resources to identify the appropriate defendant." Green, *supra* note 6.

205. The most significant problem with the proposed statute is the same problem that faces all acquiring companies in a merger situation, that is, whether or not they can accurately predict potential liability costs. The result of a negative answer may be that the acquisition simply does not take place. The high cost of accurate risk assessment would be out of reach for many small manufacturing corporations, which, relying on expert testimony, the Florida Supreme Court found to "comprise ninety percent of the nation's manufacturing enterprises." Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1050 (Fla. 1982).

> If small manufacturing corporations liquidate rather than transfer ownership, the chances that the corporations will be replaced by other successful small corporations are decreased. As a result, there will be fewer small manufacturers and the larger more centralized manufacturers will increase their production to meet the demands of the marketplace.

Id. As a result, imposing liability on purchasers of productive assets impedes the free alienability of corporate assets, thereby discouraging stockholder investment of capital. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 cmt. b (1998).

as is the useless litigation to determine that issue. Second, subsection (c) provides that the only liability imposed on the acquirer is that which is expressly provided in subsection (b) or accepted as part of the acquisition documents. All federal or state common law successor liability claims are explicitly preempted under subsection (d). Quite simply, the acquiring corporation is told: If you acquire substantially all of the assets of another company, you also absorb all of its liabilities; if you acquire only a portion of the assets of another company, your liability with respect to those assets is limited to any that you assume as part of the acquisition transaction.

CONCLUSION

It is common ground that the existing menagerie of successor liability law is unacceptable. Courts apply ever-shifting rules of law without consistent reasoning. As a result, those companies engaging in corporate transactions are left in the precarious and inefficient position of forecasting the result of corporate acquisitions with little guidance. It is worth considering, therefore, the seemingly unnecessary time, money, and commitment that are spent on litigation between two parties, claimant and successor, that have nothing to do with one another besides their common association with the now-defunct manufacturer of a defective product. If legislation is adopted creating a system that is consistent with the principles of this Article, that is, compensation and clarity, both parties would be better off. To be sure, the stockholders of dissolved corporations would be worse off because they often would receive fewer proceeds in the event of an asset sale, but it is with them that the cost of defective products and other preexisting liabilities should lie.

The proposed successor liability legislation provides equi table risk-spreading among differently situated market participants and society at large. While judicial attempts to balance the competing interests of an asset sale may be commendable, implementing a clear liability standard serves to alleviate the inequity produced by the chaotic developments of the common law system. The proposed statute succeeds in this effort by providing a clear remedy to injured claimants. It also means that the transferring company may be held financially responsible for the damage it caused as part of the negotiations surrounding the asset sale process, while simultaneously providing purchasers with increased predictability and certainty as to their potential liabilities.