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Teresa Stewart

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# Cover Your Assets! Expanding Successor Liability Under CERCLA

*United States v. Distler*<sup>1</sup>

## INTRODUCTION

The equation is simple: increasingly large numbers of hazardous waste sites, plus increasingly large price tags on their cleanup, plus heightened concern for the environment and the federal budget equals corporate anxiety. In particular, corporations which have purchased tainted assets—assets associated with the seller's production or disposal of hazardous wastes—are nervous. Their purchases could render them liable for skyrocketing cleanup costs. Courts no longer hesitate to apply the traditional doctrine of successor liability to CERCLA. In fact, *United States v. Distler*<sup>2</sup> strains at the limitations of this doctrine. It posits a new doctrine and paves the way for ever-expanding successor liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

## I. FACTS AND HOLDING

*United States v. Distler* elucidates how doctrines of successor liability perform in the context of CERCLA. In *Distler*, the Angell Manufacturing Corporation moved to dismiss a claim under section 107 of CERCLA.<sup>3</sup> Angell's predecessor had contracted to transport and dispose of hazardous waste at two sites.<sup>4</sup> The government sought response costs for their cleanup;

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1. 741 F. Supp. 637 (W.D. Ky. 1990).

2. *Id.*

3. CERCLA § 107 provides, in part, that

1) the owner and operator of a . . . facility, [and]

2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for—

A) all costs of . . . remedial action incurred by the United States Government or a State . . . [and]

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

42 U.S.C. § 9607(a) (1988).

4. *Distler*, 741 F. Supp. at 638.

Angell argued that no valid claim could be asserted against it as a successor to the offending corporation.<sup>5</sup>

To answer Angell's motion, the court had to decide two issues: first, whether CERCLA allowed successor liability; and second, how it should be imposed. Not surprisingly, the court found that CERCLA implicitly provides for successor liability.<sup>6</sup> The second question, however, met with a more startling answer. Under the traditional rule of successor liability, a corporation is not liable for the acts of its predecessors unless at least one of four possible exceptions has been met.<sup>7</sup> Because of Angell's particular corporate history, none was met.<sup>8</sup> Angell would have avoided liability entirely.<sup>9</sup>

At the government's behest, however, the court invoked a relatively new theory in an even newer context. The court applied an expansive products liability rule of successor liability: the continuity of the enterprise exception.<sup>10</sup> Under the rule, the United States had certainly stated a valid claim. The court held that Angell could well have succeeded to CERCLA liability because Angell was substantially the same business enterprise as its predecessor.<sup>11</sup>

## II. LEGAL HISTORY

The *Distler* decision depends on the interplay of three different legal histories: the traditional rule of successor liability; the products liability rule of successor liability; and CERCLA's scope of liability.

### A. *The Traditional Rule of Successor Liability*

The traditional rule stipulates that a corporation purchasing the assets of another does not succeed to the seller's liabilities—with four exceptions.<sup>12</sup> Liability will be imposed: 1) when the successor expressly or impliedly agrees to assume the liabilities of the predecessor;<sup>13</sup> 2) when the transaction

5. *Id.* at 639.

6. *Id.* at 640; see *infra* notes 34-41 and accompanying text.

7. See *infra* notes 12-16 and accompanying text.

8. See *infra* notes 16, 52 and accompanying text.

9. *Distler*, 741 F. Supp. at 641.

10. *Id.* at 642-43; see *infra* notes 24-30 and accompanying text for discussion of this exception.

11. *Distler*, 741 F. Supp. at 643.

12. See generally W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS*, § 7122 (rev. perm. ed. 1983); see also *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 343 (8th Cir. 1988).

13. This exception is governed strictly by contract interpretation principles. See,

may be considered a de facto merger;<sup>14</sup> 3) when the successor may be considered a "mere continuation" of the predecessor;<sup>15</sup> or 4) when the transaction was fraudulent.<sup>16</sup>

e.g., *Swayze v. A.O. Smith Corp.*, 694 F. Supp. 619 (E.D. Ark. 1988); *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834 (S.D.N.Y. 1977); *Adams v. General Dynamics Corp.*, 405 F. Supp. 1020 (N.D. Cal. 1975); *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817 (D. Colo. 1968).

For this exception applied in the CERCLA context, see, for example, *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985); *Keller v. Clark Equip. Co.*, 715 F.2d 1280 (8th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D. S.C. 1984), *aff'd sub nom United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 409 U.S. 1106 (1989).

14. This exception depends on determining whether a merger has occurred. Generally, courts look to four factors to determine whether two companies have become one as a result of an asset transfer:

- 1) Continuation of the seller's enterprise: including continuity of management, personnel, physical location, and general business operation;
- 2) Continuation of ownership, resulting from purchasing the assets with shares of stock;
- 3) Dissolution of the seller corporation;
- 4) Assumption by the purchaser of those obligations of the seller necessary for normal business operations to continue.

*Philadelphia Elec. Co. v. Hercules, Inc.*, 587 F. Supp. 144, 151 (E.D. Pa. 1984), *rev'd*, 762 F.2d 303 (1985).

See, e.g., *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977); *Armour-Dial, Inc. v. Alkar Eng'r Corp.*, 469 F. Supp. 1198 (E.D. Wisc. 1979); *Howard v. APAC-Georgia, Inc.*, 192 Ga. App. 49, 383 S.E.2d 617 (1989); *Good v. Lackawanna Leather Co.*, 96 N.J. Super. 439, 233 A.2d 201 (1967); *Uni-Com Northwest Ltd. v. Argus Publishing Co.*, 47 Wash. App. 787, 737 P.2d 304 (1987).

For this exception applied in the CERCLA context, see *In re Acushnet River and New Bedford Harbor*, 712 F. Supp. 1010 (D. Mass. 1989); *United States v. Vertac Chem. Corp.*, 671 F. Supp. 595 (E.D. Ark. 1987), *vacated*, 855 F.2d 856 (8th Cir. 1988).

15. See *infra* notes 17-21 and accompanying text.

16. This exception is actually a part of each of the other exceptions. That is, the function of the general rule of successor nonliability is to insure that those attempting to evade liability and defraud others are held liable. See generally W. FLETCHER, *supra* note 12, § 7125; 19 AM. JUR. 2D, *Corporations*, §§ 2707, 2716 (1989). See, e.g., *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690 (1st Cir. 1984); *Explosives Corp. v. Garlan Enters. Corp.*, 615 F. Supp. 364 (D. P.R. 1985), *cause dismissed*, 782 F.2d 1023 (1st Cir. 1985). See also Comment, *Successor Liability in Corporate Acquisitions—An Examination of Attempts to Limit the Use of the De Facto Merger Doctrine*, 46 J. AIR L. & COM. 483, 496 (1981).

Of particular importance in understanding *Distler* is the "mere continuation" exception.<sup>17</sup> This exception holds liable a corporation attempting to "reorganize" its way out of liability, that is, transferring its assets to protect them from those with claims against them.<sup>18</sup> One oft-cited case explains that where the successor corporation is merely a "new hat" for the predecessor, releasing the successor from liability "would amount to fraud."<sup>19</sup> In order to discern these "new hatters" courts have relied on four factors: 1) common identity of officers, directors, and shareholders; 2) continuity of business operations: same products, employees, contracts, equipment and location; 3) dissolution of selling corporation; and 4) inadequacy of consideration received for the assets.<sup>20</sup>

These factors embody the exception's function: to prevent fraud. They distinguish *bona fide* sales between separate organizations from fraudulent reorganizations of the same corporation.<sup>21</sup>

17. The mere continuation exception is the only traditional exception seriously at issue in *Distler*. A *de facto* merger is not a possibility because the transaction was not between two separate corporate entities that became one. The successor was created solely for the purpose of acquiring assets of the predecessor.

No evidence suggests that the transaction was made to defraud creditors of the predecessor—so the exception for fraud would not apply. Furthermore, the contract for the asset transfer expressly limited the liability to certain specified items not including hazardous waste cleanup. Hence, the assumption exception would not apply.

18. An early Missouri case explains the nature of a mere continuation:

The thing which we pronounce unconscionable is an arrangement by which one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence and place itself practically beyond the reach of creditors, and this without assuming its liabilities.

*Hibernia Ins. Co. v. St. Louis & New Orleans Transp. Co.*, 13 F. 516, 519 (E.D. Mo. 1882).

19. *Baltimore Luggage Co. v. Holtzman*, 80 Md. App. 282, 297, 562 A.2d 1286, 1293 (1989), *cert. denied*, 318 Md. 323, 568 A.2d 28 (1989).

20. *Id.* at 298-99, 562 A.2d at 1294.

21. The most important factor is "common identity." This criterion indicates to courts that those controlling the selling corporation also control the buying corporation. This control greatly increases the chances that the assets were transferred to shield them from liability. Most courts agree that there can be no mere continuation without this factor. *See, e.g., H.J. Baker & Bro., Inc. v. Organics, Inc.*, 554 A.2d 196 (R.I. 1989); *Cashar v. Redford*, 28 Wash. App. 394, 624 P.2d 194 (1981).

The second factor, continuity of business operations, is some indication of a corporation selling to itself, but is not dispositive of this exception. *See, e.g., Carstedt v. Grindelndland*, 406 N.W.2d 39 (Minn. App. 1987).

The third factor, dissolution of seller, is significant insofar as it suggests a completed plan to defraud creditors. If a predecessor is not able to satisfy its debt,

### B. *The Products Liability Rule of Successor Liability*

Concerns that the scope of the traditional rule was too narrow prompted some courts to enlarge it in the arena of products liability. Two new exceptions emerged: the products line and the continuity of the enterprise exceptions.

*Ray v. Alad Corp.*<sup>22</sup> first fashioned the products line exception. The rule provides for sweeping liability: a corporation continuing its predecessor's product line under the same name and with no outwardly visible signs of the change in ownership may be strictly liable for claims made against the predecessor's products.<sup>23</sup>

*Cyr v. B. Offen & Co.*<sup>24</sup> and *Turner v. Bituminous Casualty Co.*<sup>25</sup> are the seminal cases for the continuity of the enterprise exception. This exception overlaps the former because both take into account a continued product line.<sup>26</sup> Continuity of the enterprise, however, considers other factors as well, and is considered less severe.<sup>27</sup> In essence, this exception creates an addendum to the mere continuation exception under the traditional rule. The addendum consists of several additional criteria which may qualify a successor corporation for liability.<sup>28</sup> No one factor is dispositive.

courts are more likely to find successor liability. See, e.g., *Forest Laboratories, Inc. v. Pillsbury Co.*, 452 F.2d 621 (7th Cir. 1971); *Groover v. West Coast Shipping Co., Inc.*, 479 F. Supp. 950 (S.D.N.Y. 1979); *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834 (S.D.N.Y. 1977).

The fourth factor, inadequate consideration, obviously frames this exception as one designed to prevent fraud. See, e.g., *Carstedt v. Grindeland*, 406 N.W.2d 39 (Minn. Ct. App. 1987); *Uni-Com Northwest, Ltd. v. Argus Publishing Co.*, 47 Wash. App. 787, 737 P.2d 304 (1987). It also points to the origins of the mere continuation exception itself; this exception grew out of the general rule of successor liability for fraud. See *Blair v. St. Louis H. & K.R. Co.*, 22 F. 36 (E.D. Mo. 1884) (mere continuation case where court applied a *bona fide* purchaser analysis to determine if transfer defrauded creditors).

22. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

23. *Id.* at 31, 560 P.2d at 9, 136 Cal. Rptr. at 581. See generally Note, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L.J. 677 (1983); Note, *Expanding the Product Liability of Successor Corporations*, 27 HASTINGS L. REV. 1305 (1976).

24. 501 F.2d 1145 (1st Cir. 1974). See Note, *Cyr v. B. Offen & Co.: Liability of Business Transferees for Product Injuries*, 27 ME. L. REV. 305 (1975).

25. 397 Mich. 406, 244 N.W.2d 873 (1976).

26. See *supra* note 22 and accompanying text.

27. See *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 175 (5th Cir. 1985).

28. The additional factors occur when the successor: 1) retains the same employees; 2) retains the same supervisory personnel; 3) retains the same production

Paradoxically, the continuity of the enterprise exception does not simply add to the mere continuation exception. Its additions substantively alter the traditional exception. The additions change the function from preventing transfers that "would amount to fraud" to assisting the risk-spreading role of strict liability.<sup>29</sup> Thus, under this products liability rule, it is possible for arms' length asset transfers made in good faith to result in liability for the successor.<sup>30</sup>

### C. CERCLA's Scope of Liability

Courts are quick to note CERCLA's "well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory legislative history."<sup>31</sup> CERCLA's guidelines for liability bolster such notoriety. The Act renders four categories of "persons" jointly and severally liable for the cleanup costs of waste sites.<sup>32</sup> The definition of "persons" is far from explicit. The statute

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facilities in the same location; 4) continues producing the same products; 5) retains the same name; 6) maintains continuity of asserts and general business operations; and 7) holds itself out to the public as the continuation of the previous corporation. *Id.*

29. A comparison of cases is helpful. *Jackson v. Diamond T. Trucking Co.*, 100 N.J. Super. 186, 241 A.2d 471 (1968), provides a classic example of liability under the mere continuation exception. In *Jackson*, a plaintiff sued a successor corporation to collect a workers' compensation judgment. *Id.* at 190, 241 A.2d at 474. The successor had received \$100,000 of assets for nominal consideration. *Id.* at 189, 241 A.2d at 473. Both successor and predecessor shared the same president, director and principal stockholder. *Id.* at 196, 241 A.2d at 477. Furthermore, the successor continued the same business operations. *Id.* at 196-97, 241 A.2d at 477. The court held the successor liable because the transaction amounted to evasion of liability by a seller becoming its own purchaser. *Id.* at 198, 241 A.2d at 478.

*Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168 (5th Cir. 1985), on the other hand, represents the typical continuity of the enterprise case. In *Mozingo*, a corporation acquired certain assets with adequate consideration and continued manufacturing with those assets. The successor had a "substantial degree" of common stockholders with the predecessor, and had some management "intimately involved" with both operations. *Id.* at 176. The connection between the two corporations, however, was not as close as in *Jackson*. The successor was certainly not a mere continuation of its predecessor. The transaction did not amount to fraud. Yet the court imposed liability under the continuity of the enterprise theory because "[the successor] was in the same position as [the predecessor] to assume the risk-spreading function which is the underpinning of strict liability." *Id.* Both products liability exceptions embrace this policy.

30. *See, e.g., Trimper v. Bruno-Sherman Corp.*, 436 F. Supp. 349 (E.D. Mich. 1977); *Holloway v. John E. Smith's Sons Co.*, 432 F. Supp. 454 (D. S.C. 1977); *Rivers v. Stihl, Inc.*, 434 So. 2d 766 (Ala. 1983).

31. *United States v. Mottolo*, 605 F. Supp. 898, 902 (D. N.H. 1985).

32. 42 U.S.C. § 9607(a) (1986).

includes "corporations" in the definition but is silent as to whether "successor corporations" are also included.<sup>33</sup>

Despite the "aura of uncertainty"<sup>34</sup> surrounding successor liability in CERCLA, courts have spoken with virtual unanimity to this issue; they rely on several grounds to invoke the doctrine of successor liability. First, the sparse legislative history of CERCLA reveals that more specific terms of liability were deleted.<sup>35</sup> Therefore, many courts reason, "Congress expected the courts to develop a federal common law to supplement the statute."<sup>36</sup> Second, a federal common law insures consistent results across states with inconsistent statutes of successor liability.<sup>37</sup> Third, the Act "leaves no doubt that Congress intended the burden to fall on [taxpayers] only when the responsible parties lack the wherewithal to meet their obligations."<sup>38</sup> Such intent supports choosing a successor corporation over the taxpayer to bear the costs. Fourth, the Act is designed to provide a remedy, and should not be interpreted to frustrate this design.<sup>39</sup> And finally, the same concerns that called for the doctrine of successor liability in the tort context apply to the CERCLA context: without the doctrine responsibility could easily be evaded.<sup>40</sup>

For some or all of these reasons, all courts but one have held the doctrine of successor liability applicable under CERCLA.<sup>41</sup>

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33. 42 U.S.C. § 9601(21) (1980).

34. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

35. 126 CONG. REC. S14964, S15004, H11787, H11799; 126 CONG. REC. H9465 (daily ed. Sept. 23, 1980) (remarks of Rep. Madigan); 126 CONG. REC. H9466 (daily ed. Sept. 23, 1990) (remarks of Rep. Stockman). See *United States v. Chem-Dyne Corp.* 572 F. Supp. 802, 808 (S.D. Ohio 1983).

36. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

37. See *United States v. Bliss*, 667 F. Supp. 1298, 1308 n.8 (E.D. Mo. 1987).

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

39. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985).

40. *Smith Land*, 851 F.2d at 91-92.

41. See *Anspec Company, Inc. v. Johnson Controls, Inc.*, 734 F. Supp. 793 (E.D. Mich. 1989) (court declined to impose successor liability because CERCLA did not provide specifically for it), *appeal dismissed*, 891 F.2d 289 (6th Cir. 1989).



## III. THE INSTANT DECISION

Again, in order to impose liability, the *Distler* court had to do two things: first, decide that CERCLA allowed successor liability; and second, decide how to apply such liability to the instant case.

The first task was simple. The court aligned itself with the majority, as represented by *Smith Land & Improvement Corp. v. Celotex Corp.*,<sup>42</sup> and reiterated several of the justifications for applying the doctrine of successor liability in the CERCLA context. In particular the court emphasized that CERCLA's remedial goals should not be frustrated in any way, and responsible parties rather than taxpayers should bear the burden of cleanup.<sup>43</sup>

The court next tackled how to apply the doctrine. Analysis of the second inquiry requires a brief history of the defendant corporation. Several professional corporate liquidators formed the Angell Manufacturing Corporation, "Angell-2," in order to purchase a division of another corporation, "Angell-1."<sup>44</sup> It was Angell-1 which contracted for the disposal of hazardous wastes.<sup>45</sup> After the purchase, Angell-2 continued the same product line—metal name plates used by electronic manufacturers—with minimal changes.<sup>46</sup>

Three years later, three employees of Angell-2 formed a new corporation, "Angell," which assumed the name of the original company after acquiring substantially all the assets of Angell-2.<sup>47</sup> Angell-2 then dissolved.<sup>48</sup> Importantly, no shareholders or directors of Angell-2 became shareholders or directors of Angell.<sup>49</sup> Angell employed the same products, however, and served the same customers as its predecessor for three to four years.<sup>50</sup>

The only traditional exception seriously at issue was the mere continuation exception.<sup>51</sup> Because there was no common identity of stockholders and directors, however, no mere continuation could be said to exist.<sup>52</sup> Nevertheless, the court noted that this result would "clearly be victory of form over substance and contrary to congressional intent that producers of hazardous

42. *Distler*, 741 F. Supp. at 639.

43. *Id.* at 640.

44. *Id.* at 639.

45. *Id.* at 638.

46. *Id.* at 639.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. See *supra* note 17.

52. *Distler*, 741 F. Supp. at 642.

substances be held liable for improper disposal of those substances under CERCLA."<sup>53</sup> It did not mention whether consideration was adequate. The court relied on language from *Smith Land's* call for increased successor liability. The following passage provides the crux of the instant decision:

Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost. Benefits from the use of the pollutant as well as savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, its successors, and their respective stockholders and accrued only indirectly, if at all, to the general public. We believe it in line with the thrust of the legislation to permit—if not require—successor liability under traditional concepts.<sup>54</sup>

The court's interpretation of this holding is its most revealing passage. Despite *Smith Land's* explicit intent "to permit—if not require—successor liability under traditional concepts,"<sup>55</sup> *Distler* asserts that its "overall message . . . is that courts applying the doctrine of successor liability in CERCLA cases are to apply it in such a fashion as to further the goals of the Act whether that be done by applying the traditional rule or some variation."<sup>56</sup>

To explain, the court reasons that the "word 'traditional' fails to negate the rationale of the rest of the passage that the courts should apply the doctrine so as to further CERCLA's policy of holding responsible parties liable."<sup>57</sup> The court advocates a "common sense" approach rather than an "overly restricted look at the corporate transfer" to determine liability.<sup>58</sup> To do otherwise might conflict with remedial goals, it warns.<sup>59</sup> Hence, the court liberates itself of the restrictions of the traditional rule.

After this liberation, the court adopts the continuity of the enterprise exception as a more acceptable rule.<sup>60</sup> Importantly, it does not suggest that this is the only appropriate variation. Liability should be imposed without regard to the traditional limitations of the doctrine to meet the remedial goals of CERCLA.<sup>61</sup> It leaves unanswered the question of what "some variation" might include. The court does not suggest that the continuity of the enterprise

53. *Id.* at 643.

54. *Id.* at 641 (citing *Smith Land*, 851 F.2d at 91-92).

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

56. *Distler*, 741 F. Supp. at 641 (emphasis added).

57. *Id.* at 642 n.4.

58. *Id.*

59. *Id.* at 642.

60. *Id.*

61. *Id.*

rule provides a new limitation on liability beyond which courts should not go. Instead, it adopts an ends-justifies-means approach. The question of how to impose liability must remain focused on one objective: that corporations answer for proper disposal of hazardous waste.<sup>62</sup>

Unfortunately, there is little legal analysis. The court does not discuss how the criteria of this new exception are met. The opinion ends with the denial of Angell's 12(b)(6) motion and the suggestion that the corporation may well be liable as a continued enterprise of its successor.<sup>63</sup> Even though it had added different customers and long since discontinued the same product line, equipment, and raw materials, it could be liable for its predecessor's acts.<sup>64</sup> The court explained that Angell's "change of production through a natural response to market conditions does not change the fact that at the time of transfer the companies were virtually identical."<sup>65</sup> As such, under the products line exception, the successor should bear virtually identical liabilities—including costs of the hazardous waste cleanup.<sup>66</sup>

#### IV. COMMENT

Few will be surprised that the rules of successor liability under CERCLA are evolving to hold liable increasingly large circles of parties. The Office of Technology Assessment places the number of hazardous waste sites at 300,000.<sup>67</sup> Cleanup costs for these sites have been estimated at \$500 billion dollars.<sup>68</sup> With the current budgetary woes, these numbers pressure courts to create new ways to hold corporations liable and avoid further burdening taxpayers. Perhaps, however, this pressure is producing bad law—or at least law that needs substantial refinement. Successor corporations are not the only parties with cause to be anxious about expanding successor liability. Proponents of CERCLA may find their goals undermined by it.

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62. *Id.* The court stated, "The issue is, rather, one of [CERCLA law]: does a manufacturer's responsibility for its [hazardous waste] survive a change in ownership, where the manufacturing business, as such, maintains its identity and continues to operate as before at the same old stand." *Id.* (quoting *Ray v. Alad Corp.*, 55 Cal. App. 3d 855, 857, 127 Cal. Rptr. 817, 819-20 (1976), *vacated*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977)).

63. *Id.*

64. *Distler*, 741 F. Supp. at 642.

65. *Id.*

66. *Id.*

67. See OFFICE OF TECHNOLOGY ASSESSMENT, SUPERFUND STRATEGY 14 (1985). This number includes municipal and industrial landfills.

68. See OFFICE OF TECHNOLOGY ASSESSMENT, ASSESSING CONTRACTOR USE IN SUPERFUND 1 & n.1 (1989).

The significance of *Distler* goes beyond the invocation of a products liability rule. *Distler* hints that successor liability doctrines continue to expand to insure response cost reimbursement. The opinion injects even more uncertainty in an already uncertain area of the law.

By refusing to commit to either the traditional doctrine of successor liability or a single variation, the court ignores a fundamental goal of CERCLA: uniformity of law.<sup>69</sup> A primary reason to impose a federal common law standard of successor liability was to avoid "[t]he possibility of varying [state] standards of successor liability and the resulting inconsistent results under CERCLA."<sup>70</sup> This same problem of inconsistency exists when federal courts are allowed to apply "some variation" to the rules of successor liability. As explained by one critic, "variation allows circumvention and creates confusion. Therefore, to be efficacious, courts must impose CERCLA successor liability through a uniform common law standard."<sup>71</sup> Ample precedent under the traditional rules would expedite this uniformity. The common law could be fleshed out efficiently by merely adopting it.

Even assuming the court intended to condone only the products liability exception, corporations should remain anxious. When the court shifted from the traditional to the products paradigm of successor liability, it implicitly shifted its rationale for imposing successor liability. The court became less concerned with transactions that might amount to fraud, and more concerned with the risk-spreading functions of the successor.<sup>72</sup> Simply, the court took a substantial step toward holding corporations liable merely because they can pay and collect, and not because they are wrongdoers.

The actual results of this risk-spreading function may be counter-productive for CERCLA. The "common sense" approach adopted by *Distler* liberates the courts from restrictive applications of liability, but simultaneously releases any element of predictability by which corporations may structure their activities. The result is almost certainly a chilling effect on asset transfers. As transferred assets increase a corporation's risk of liability, they decrease in value.

Many courts rejected the products liability rules of successor liability for exactly this reason. As explained by one court, "The economy as a whole suffers . . . since corporate acquisitions are discouraged due to business planners' fears of being held so liable. Furthermore, the marketability of ongoing corporations is diminished, perhaps forcing sellers into the undesir-

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69. See *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987).

70. *Id.* at 1308 n.8.

71. Note, *CERCLA, Successor Liability, and the Federal Common Law: Responding to an Uncertain Standard*, 68 TEX L. REV. 1237, 1265 (1990).

72. See *supra* notes 24-30 and accompanying text.

able process of liquidation proceedings.<sup>73</sup> If *Distler* expands liability beyond products liability boundaries then this economic effect increases. If so, this liability actually undermines CERCLA's goals of reimbursed costs. It is impossible to collect response costs from a corporation which no longer exists; it is, at best, difficult to collect from a bankrupt.<sup>74</sup>

Expanded liability may also undermine CERCLA's goal of preventing further improper hazardous waste disposal. CERCLA allows defendant corporations to join or seek indemnification from other potentially liable parties.<sup>75</sup> *Distler's* expanded liability would allow more parties to be joined.<sup>76</sup> Some absurd situations ensue: the same tainted asset, if sold several times, could invoke liability for a single act several times over. The generator of hazardous waste could actually decrease its share of the cost by maximizing the number of other parties. According to one critic, this scheme "necessarily destroys the deterrent value of response costs—response costs become an ordinary risk of doing business."<sup>77</sup>

Many courts justify following assets with liability on the grounds that the successor receives the benefits from the predecessor's improper disposal.<sup>78</sup> In fact, one rationale for the products liability rule is that it more fairly imposes a burden on the successor which exploits the good will of its predecessor.<sup>79</sup> In the CERCLA context, one court explains that "equities favor successor liability . . . [b]ecause it is the successor corporations who have benefitted from any polluting practices of their predecessor."<sup>80</sup> *Distler* directly quotes *Smith Land's* version of this argument that "benefits from use of the pollutant[s] as well as savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, [and] its successors."<sup>81</sup> This reasoning ignores the fact that if a successor pays adequate consideration for the assets then it has not been benefitted. The

73. *Bernard v. Kee Mfg. Co.*, 409 So. 2d 1047, 1049-50 (Fla. 1982).

74. See generally *Bernstein & Squire, Bankruptcy Escape from Cleanup Duties Limited*, LEGAL TIMES, Feb. 24, 1986, at 30.

75. 42 U.S.C. § 9613(f)(1) (1988).

76. CERCLA provides that "[a]ny person may seek contribution from any other person who is liable . . . under section 9607(a)." *Id.* In addition, a person "who has resolved its liability to the United States . . . for some or all of a response action . . . in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement." *Id.* § 9613(f)(3)(B).

77. See Note, *supra* note 71, at 1263.

78. See *supra* notes 53-54 and accompanying text.

79. See, e.g., *Ray v. Alad Corp.*, 19 Cal. 3d 22, 31, 560 P.2d 3, 9, 136 Cal.Rptr. 574, 581 (1977).

80. *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446, 1459 (W.D. Mich. 1988).

81. *Distler*, 741 F. Supp. at 641 (quoting from *Smith Land*, 851 F.2d at 91-92).

predecessor alone receives the benefit. The amount paid replaces the assets, so that the interests of those collecting from the predecessor are not impaired.

Only where the predecessor does not pay full value or continues the successor's practice do the "savings resulting from the failure to use non-hazardous disposal"<sup>82</sup> inure to the successor's benefit. In either case traditional rules provide adequate recourse. If the predecessor does not pay full value then the transaction satisfies the mere continuation exception or the fraudulent transaction exception. Where the corporation produces its own benefits by continuing to improperly dispose of hazardous waste, no successor doctrine is necessary to hold it liable.

Perhaps viewing *Distler* as seminal rather than finished yields a more palatable result. The case provides a pivotal moment in the history of CERCLA liability; it provides courts with the opportunity to examine the successor issue without restrictions, then to reconstruct them as needed. *Distler's* place in the legal history confirms this interpretation.

An earlier case, *Kelley v. Thomas Solvent Co.*,<sup>83</sup> provided fertile ground for the growth of *Distler*. In *Kelley*, the asset-purchasing corporation had the same sole shareholder, president, treasurer, and director as the seller.<sup>84</sup> Furthermore, the purchaser did not pay adequate consideration for the assets.<sup>85</sup> Evidence suggested the transfer was designed to protect them from a groundwater contamination suit.<sup>86</sup> Clearly the facts of the case satisfied all the mere continuation criteria.<sup>87</sup> Yet, the court discussed only the common identity criterion and still imposed liability.<sup>88</sup> It noted that

the historical basis for imposing successor liability is founded upon the principles of equity that seek to prevent creditors of the original corporation from being left without a remedy while the corporation escapes responsibility by transferring its assets into a new form. . . . [Yet] [t]he court also believes that the equities favor successor liabilities here, as in other successor liability contexts, because it is the successor corporations who have benefitted from any polluting practices of their predecessor.<sup>89</sup>

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82. *Id.*

83. 725 F. Supp. 1446 (W.D. Mich. 1988).

84. *Id.* at 1451.

85. *Id.*

86. *Id.* at 1449-50.

87. *Id.* at 1458.

88. *Id.* at 1458.

89. *Id.* at 1459.

The limited consideration of the mere continuation factors coupled with the invocation of "principles of equity" gives a tacit blessing to expanding liability. The court unlocks the door that *Distler* then throws wide open.

A subsequent case, *Louisiana-Pacific Corp. v. Asarco*,<sup>90</sup> may be viewed as closing the door a bit. It reimposes certain limitations on *Distler*. In *Asarco*, the court had to address whether successor liability existed where no traditional exceptions were met.<sup>91</sup> The third party plaintiff, seeking indemnification, asked the court to apply the continuity of the enterprise exception to the third party defendant. The court declined—although it refused to rule out the exception in all situations.<sup>92</sup> It distinguished the instant case from a case where the exception might be appropriate based on two notions: actual production of the hazardous substance, and notice of the liability.<sup>93</sup>

According to *Asarco*, merely purchasing tainted assets was not enough. A corporation must be an actual generator of such waste to be liable. It must continue producing the waste.<sup>94</sup> This restriction limits the drastic results foreshadowed by *Distler* where the deterrent effect of CERCLA liability would actually be undermined by holding liable all parties with tainted assets, rather than just those who generated the waste.<sup>95</sup>

The court also relied on a previous decision, *Oner II v. E.P.A.*,<sup>96</sup> to explain another limitation on liability. In *Oner* the court affirmed E.P.A.'s authority to extend liability to successors.<sup>97</sup> Liability was deemed appropriate because both successor and predecessor shared the same president. Hence, the successor had notice of an outstanding debt to the E.P.A.<sup>98</sup> The court reapplied this notice criteria in the context of *Asarco*. In *Asarco* the predecessor "did not have actual notice of [the successor's] potential liability."<sup>99</sup> This was not an attempt to evade liability because "[a]t the time of the asset sale, [the successor] had not been identified as a potentially responsible party."<sup>100</sup> The notice criterion reintroduces a notion of the traditional rules of successor liability: it holds liable parties who know of

90. 909 F.2d 1260 (9th Cir. 1990).

91. *Id.*

92. *Id.* at 1265.

93. *Id.* at 1265-66.

94. *Id.* at 1266.

95. See *supra* notes 75-78 and accompanying text.

96. 597 F.2d 184 (9th Cir. 1989).

97. *Id.*

98. *Id.* at 186.

99. *Asarco*, 909 F.2d at 1265.

100. *Id.* at 1265-66.

liability and attempt to transfer out of it. It reintroduces the traditional notion of imposing liability where the transfer "amount[s] to fraud."<sup>101</sup>

## V. CONCLUSION

Exactly where *Asarco* leaves the *Distler* decision is speculative. It raises at least as many questions as it answers. For example, it is unclear whether notice would be relevant when the transfer of tainted assets occurred before CERCLA was passed, or whether a successor would still escape liability when the actual generator is no longer in existence.

The juxtaposition of the two cases, however, provides insight into the future of successor liability cases under CERCLA. No longer are courts solely concerned with avoiding the fraudulent effect of asset transfers. Principles of equity must be factored in. Liability is based on some combination of two rationales: preventing corporate sleight of hand from hiding assets from liability, and spreading risks. Corporations may no longer depend on *bona fide*, arms' length transfers to insulate them from liability. Courts are increasingly willing to call upon principles of equity to supplement the traditional rules.

It is unclear how far the risk-spreading rationale will goad courts into imposing liability. The rules of applying it, however, may be counterproductive to CERCLA's goals of reimbursement and deterrence. Even-handed enforcement will be impossible until the courts can agree on a rule. Furthermore, the chilling effect on asset transfers caused by greatly increasing the risk of liability may make collecting from fiscally-sound corporations difficult. Likewise, if generators of hazardous waste are able to decrease their liability by joining parties which purchased their tainted assets, then effective deterrence is undercut. Courts should be reminded that these problems solve themselves under the traditional doctrine.

TERESA STEWART

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101. See *supra* notes 19-21 and accompanying text.



