

1-1-1985

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John C. Solomon

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Recommended Citation

John C. Solomon, *SUCCESSOR CORPORATE LIABILITY FOR IMPROPER DISPOSAL OF HAZARDOUS WASTE*, 7 W. New Eng. L. Rev. 909 (1985), <http://digitalcommons.law.wne.edu/lawreview/vol7/iss4/3>

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SUCCESSOR CORPORATE LIABILITY FOR IMPROPER DISPOSAL OF HAZARDOUS WASTE

I. INTRODUCTION

Improper disposal of hazardous waste promises to be an enormous source of corporate liability. Between thirty and fifty thousand improperly managed hazardous waste disposal sites currently exist in the country.¹ Estimates of the cost of cleaning up these dumpsites range between 7² and 44 billion dollars.³ In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act, which says that companies responsible for generating hazardous wastes found at existing dumpsites must pay for the cost of cleaning them up.⁴ It seems inevitable, however, that some of the responsible companies will no longer be in existence and available for suit. This comment will discuss the question of whether a company which buys substantially all of the assets of a corporation which produced hazardous waste which was improperly disposed of should be held liable for the cost of cleaning up its predecessor's⁵ wastes. Recent cases in which successor corporations⁶ have been held liable for defective products manufactured by their predecessors will be drawn on.

II. PRODUCTS LIABILITY

A. *The Traditional Rule*

Traditional corporate law says that when one corporation sells all or substantially all of its assets to another corporation, the successor corporation is not responsible for the debts and liabilities of its prede-

1. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983).

2. S. REP. NO. 848, 96th Cong., 2nd Sess. 2 (1980).

3. 126 CONG. REC. H9177 (daily ed. Sept. 19, 1980) (statement of Rep. Railsback).

4. 42 U.S.C. § 9607(a) (1982). The Act also imposes liability on transportors of hazardous substances and on owners and operators of disposal facilities. *Id.*

5. For purposes of this comment a predecessor corporation is a corporation that sells substantially all of the assets used in the manufacture of a line of products. *Cf.* BLACK'S LAW DICTIONARY 1060 (5th ed. 1979) [hereinafter cited as BLACK'S].

6. For purposes of this comment a successor corporation is a corporation which buys from an existing enterprise substantially all of the assets used in the manufacture of a line of products. *Cf.* BLACK'S, *supra* note 5, at 1283.

cessor, including those arising out of the latter's tortious conduct.⁷ Two reasons exist for limiting the purchaser's liability: to facilitate the flow of capital by providing the buyer with certainty;⁸ and to support the property law principle that a purchaser who has no notice of prior claims and gives adequate consideration gets clear title.⁹

There are four generally recognized exceptions to this rule. The purchasing corporation may be held responsible for the liabilities of its predecessor if (1) it expressly or impliedly agrees to assume them; (2) the transaction is actually a consolidation or merger of the two companies; (3) the purchaser is a mere continuation of the seller; or (4) the purpose of the transaction was fraudulently to escape responsibility for the seller's liabilities.¹⁰ The traditional rule does not, however, make any provision for claims that arise subsequent to the transfer.¹¹

Products liability is one situation in which claims can arise against a corporation that has sold all of its assets, and is either defunct or nothing more than an assetless paper shell. Until recently, people injured by products manufactured by a company that no longer existed often found themselves left without a remedy. They would not be able to recover from the company that bought out the original manufacturer unless the transaction fell into one of the above-mentioned categories.¹² Some courts have recently begun to address the problem either by expanding the traditional exceptions to the non-liability rule¹³ or by holding the traditional rule inapplicable to products liabil-

7. *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 551, 561, 264 A.2d 98, 101 (Law Div. 1970).

8. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 25, 560 P.2d 3, 5, 136 Cal. Rptr. 574, 576 (1977).

9. Note, *Liability of a Successor Corporation for Products Defectively Manufactured by a Predecessor*, 62 NEB. L. REV. 408, 411 (1983); Comment, *The Product Line Theory of Corporate Successor Products Liability: An Evaluation After Ramirez v. Amsted Industries, Inc.*, 35 RUTGERS L. REV. 389, 393 (1983).

10. *E.g. Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 340-41, 431 A.2d 811, 815 (1981).

11. The precise time at which a claim arises is often difficult to determine, since injury, knowledge, and suit do not occur simultaneously. For purposes of this discussion, however, a claim can be considered to have arisen prior to the transfer whenever the selling corporation was unaware of the claim at the time of the sale.

12. *McKee v. Harris-Seybold Co.*, 109 N.J. Super 555, 561, 264 A.2d 98, 101 (Law Div. 1970); *Ortiz v. South Bend Lathe*, 46 Cal. App. 3d 842, 846, 120 Cal. Rptr. 556, 558 (1975). They might still be able to recover from a retail or wholesale seller of the product, RESTATEMENT (SECOND) OF TORTS § 402A (1977), but in that case the middleman is deprived of its action over against the manufacturer. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 33, 560 P.2d 3, 10, 136 Cal. Rptr. 574, 581 (1977). In either case the manufacturer avoids the consequences of its tortious behavior.

13. *E.g. Cyr v. B. Offen & Co., Inc.*, 501 F.2d 1145 (1st Cir. 1974) (expanding the mere continuation exception); *Knapp v. North American Rockwell Corp.*, 506 F.2d 361

ity claims.¹⁴

Two justifications exist for the imposition of liability on the successor. First, it furthers the policies behind the imposition of strict products liability.¹⁵ Second, the successor's action in buying all the predecessor's assets destroyed the plaintiff's chance of recovering from the predecessor. The courts that have held successor corporations liable have favored the first justification.¹⁶

B. *Strict Products Liability*

The imposition of strict products liability attempts to achieve two goals: to reduce the likelihood of injury by fixing responsibility for it on the party in the best position to prevent it;¹⁷ and to mitigate the potentially "overwhelming misfortune to the person injured" by placing liability on the party in a position to distribute the cost of the injury among all users of the product.¹⁸ Put differently, the purpose of strict products liability is to force the manufacturer to internalize and spread throughout society the risk of injury due to defective products. If, however, the manufacturer of a defective product can escape liability for the injury by selling its assets and distributing the proceeds to its shareholders, then it will not have internalized the risk, and these goals will not be achieved.

Preventing evasion of the goals of strict products liability necessitates preventing the manufacturer from liquidating and distributing its assets without making any provision for products liability claims that may arise in the future. This could be accomplished by requiring manufacturing corporations that intend to dissolve themselves either to

(3rd Cir. 1974), *cert. denied*, 421 U.S. 965 (1975) (expanding the de facto merger exception).

14. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976); *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811 (1981); *Dowejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (1981).

15. *See infra* text accompanying notes 17-18.

16. The holdings of both *Ramirez* and *Ray* impose liability only when the successor continues the manufacturing operation of the predecessor. Neither holding, however, specifically requires that the successor be responsible for the destruction of the plaintiff's remedy against the predecessor. *Ray*, 19 Cal. 3d at 22, 560 P.2d at 11, 136 Cal. Rptr. at 582; *Ramirez*, 86 N.J. at 358, 431 A.2d at 825. *See infra* text accompanying notes 22-26.

17. Strict liability should be imposed on the party "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." Calabresi and Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. J. 1055, 1060 (1972).

18. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

purchase products liability insurance for a specified number of years or to leave some assets which could be reached if a claim were to arise.¹⁹ Only the legislature, however, could implement this approach.²⁰

An alternative way to prevent a corporation from escaping its responsibility by selling its assets is to hold the purchaser of the assets liable. As long as the purchaser knows that it is also acquiring any potential liability,²¹ the estimated amount of liability being transferred will reduce the purchase price. The potential cost of injuries then remains internalized with the predecessor.

The California Supreme Court in *Ray v. Alad Corp.*²² and the New Jersey Supreme Court in *Ramirez v. Amsted Industries, Inc.*²³ applied this approach. The *Ray* court held that

a party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented 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.²⁴

The *Ramirez* court similarly held²⁵

that where one corporation acquires all or substantially all the manufacturing assets of another corporation . . . and undertakes essentially the same manufacturing operation . . . [it will be] . . . strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation²⁶

Both courts relied on two rationales: first, the successor's ability to take on the predecessor's risk-spreading role; and second, the fairness of requiring the successor to assume responsibility for the predecessor's defective products. The courts treated the responsibility as a

19. Because promoting the transferability of capital is also a legitimate concern, the period for which the predecessor must remain responsible could be limited.

20. The Illinois Appellate Court, while refusing to impose liability on a successor corporation, suggested that the legislature bears the responsibility of dealing with the problem. *Nguyen v. Johnson Mach. & Press Corp.*, 104 Ill. App. 3d 1141, 1151, 433 N.E.2d 1104, 1112 (1982).

21. In most cases discussed here the successor had no knowledge of potential liability. For a discussion of the problems with retroactive application of the rule, see *infra* notes 28-31 and accompanying text.

22. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

23. *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811 (1981).

24. *Ray*, 19 Cal. 3d at 22, 560 P.2d at 11, 136 Cal. Rptr. at 582.

25. There is, however, one important difference which will be discussed below in the text accompanying notes 34-35.

26. *Ramirez*, 86 N.J. at 358, 431 A.2d at 825.

burden attached to the good will which the successor bought.²⁷ The opinions would be more persuasive, however, if the courts had focused on the predecessor and argued that it must be prevented from escaping liability, instead of focusing on the successor and attempting to explain why it should be liable. The objective is to force the predecessor to internalize the cost of injuries due to defective products. Imposing liability on the successor simply constitutes one way of achieving that result.

Imposing liability on the successor as a way of forcing the predecessor to internalize the cost works only if the successor knows of the potential liability at the time of the acquisition. Otherwise the purchase price will not be reduced in accordance with the assumption of liability and the predecessor will still have avoided its responsibility. It is also harsh to hold the successor liable if it had no notice of its potential liability when it made the acquisition.²⁸

One justification for retroactive application of successor liability was offered in *Cyr v. B. Offen & Co., Inc.*²⁹ “[T]his kind of surprise is endemic in a system where legal principles are applied case by case and is no more an injustice than was the retroactive application of the strict liability doctrine” when it was first imposed.³⁰ In *Ramirez* the New Jersey court made the product line rule retroactive to suits in progress as of November 15, 1979, the date of the Appellate Division decision that the court upheld. Although the court agreed that purchasing corporations could reasonably have relied on the previous rule of non-liability, it concluded that those who had exercised the initiative to challenge the rule should be rewarded by having their claims upheld.³¹

27. *Ray*, 19 Cal. 3d at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580; *Ramirez*, 86 N.J. at 349, 431 A.2d at 820.

28. Subrogating the successor to the plaintiff's claim against the original manufacturer might remove some of the unfairness. Although by hypothesis the original manufacturer is not available for suit, the claim may not be entirely worthless. New Jersey's corporate dissolution statute allows “a creditor who shows good cause for not having previously filed his claim” to proceed against the dissolved corporation's shareholders. N.J. STAT. ANN. § 14A: 12-13 (West Supp. 1984-85). If the injury occurred after the dissolution, a products liability plaintiff would certainly have good cause for not bringing his claim earlier. But locating and collecting from scattered individual shareholders could be very difficult.

29. 501 F.2d 1145 (1st Cir. 1974).

30. *Id.* at 1154.

31. *Ramirez*, 86 N.J. at 357, 431 A.2d at 824. Judge Schreiber, concurring, disagreed. He believed that fairness to the purchasing corporation required that the rule should apply only when the acquisition took place after November 15, 1979, the date of the Appellate Division decision in *Ramirez*. *Id.* at 361, 431 A.2d at 826 (Schreiber, J., concurring).

The justifications for retroactive application of successor liability offered by the *Cyr* and *Ramirez* courts are not based on any culpability on the part of the successor corporation and, therefore, are not particularly persuasive. There is, however, a second rationale for the imposition of successor liability. It is arguable that by participating in a transaction which it knew would cause future plaintiffs to be deprived of a remedy, the successor has acted culpably. If culpability on the part of the successor can be established, then retroactive imposition of liability is less harsh, particularly because the alternative is to leave an innocent victim without a remedy.

C. Destruction of Remedy

The second rationale for holding a successor corporation liable for its predecessor's defective products recognizes the successor's responsibility for destroying the plaintiff's chance of recovering from the predecessor. Both the *Ray* and *Ramirez* courts stated that the defendants destroyed the plaintiff's remedy against the original manufacturer by acquiring the predecessor's assets³² and both courts say that this is part of the justification for the imposition of liability.³³ One important difference, however, exists between the two opinions. The holding in *Ramirez* does not explicitly make responsibility for the plaintiff's loss of remedy a prerequisite to the imposition of liability on the successor.³⁴ The holding in *Ray* does not mention destruction of remedy either, but it leaves room for inclusion of the concept because the court limited the holding to "the circumstances here presented."³⁵ It is, therefore, not clear whether California would hold a successor corporation liable if it were not responsible for the plaintiff's loss of remedy. It is clear, however, that New Jersey will. *Nieves v. Bruno Sherman Corp.*,³⁶ a companion case to *Ramirez*, illustrated the court's willingness.

Plaintiff Nieves lost his arm when it was crushed by a die-cutting press manufactured by the Sheridan Company. Twelve years earlier, Sheridan had dissolved itself after having sold substantially all of its

32. *Ray*, 19 Cal. 3d at 31-32, 560 P.2d at 9, 136 Cal. Rptr. at 580; *Ramirez*, 86 N.J. at 350, 431 A.2d at 820.

33. *Ray*, 19 Cal. 3d at 31, 560 P.2d at 8-9, 136 Cal. Rptr. at 579-80; *Ramirez*, 86 N.J. at 349, 431 A.2d at 820.

34. *Ramirez*, 86 N.J. at 358, 431 A.2d at 825. The holding is quoted above in text accompanying note 26.

35. *Ray*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582. The holding is quoted above in text accompanying note 24.

36. 86 N.J. 361, 431 A.2d 826 (1981).

assets to Harris-Intertype Corp., which continued the same manufacturing operation. Four years before Nieves' accident, Harris sold all the assets used in the manufacture of the presses to Bruno Sherman Corp., which in turn continued to manufacture the same line of presses. Harris, however, remained in existence and continued to manufacture other products.³⁷ The plaintiff sought to recover from both Harris and Bruno Sherman.³⁸

Applying the *Ramirez* analysis, the court found that Bruno Sherman enjoyed the benefit of Sheridan's goodwill³⁹ and that it had Sheridan's capacity to estimate the risks due to its defective products and to bear the costs of minimizing or avoiding those accidents.⁴⁰ The court found Bruno Sherman liable,⁴¹ even though it had not in any way reduced the plaintiff's chance of recovering for his injuries. The corporation from which it had acquired the manufacturing assets remained viable and available for suit.⁴²

The New Jersey Supreme Court recognizes that it is a pioneer in "advancing the principle of enterprise liability and the philosophy of spreading [throughout society] the cost of injuries from defective products."⁴³ It is, therefore, not surprising for it to rule that the policies underlying strict products liability constitute a sufficient justification for the imposition of liability on a successor corporation. More conservative courts, however, may refuse to find liability unless the plaintiffs establish a sufficient connection between the defendant's actions and their harm.⁴⁴ Plaintiffs may be able to satisfy this nexus requirement by showing that the defendant was a party to a transaction that it had reason to know would deprive future plaintiffs of remedies.⁴⁵

In the acquisition of a manufacturing enterprise, the buyer knows

37. *Id.* at 365-66, 431 A.2d at 828-29.

38. *Id.* at 366, 431 A.2d at 829.

39. *Id.* at 368-69, 431 A.2d at 830.

40. *Id.* at 369, 431 A.2d at 830-31.

41. *Id.* at 368, 431 A.2d at 830.

42. *Id.* at 364, 431 A.2d at 828. The court held that Harris should also be liable because it was part of the overall enterprise "that should bear the cost of injuries resulting from defective products." *Id.* at 371, 431 A.2d at 831. The court left the division of liability between the two defendants to the terms of the purchase and sale agreement. *Id.* at 372, 431 A.2d at 832.

43. *Ramirez*, 86 N.J. at 336-37, 431 A.2d at 813.

44. Phillips, *Products liability of Successor Corporations: A Corporate and Commercial Law Perspective*, 11 HOFSTRA L. REV. 249, 272 (1982). Recent cases refusing to hold a successor corporation liable include: *Nguyen v. Johnson Mach. & Press Corp.*, 104 Ill. App. 3d 1141, 1151, 433 N.E.2d 1104, 1112 (1982); *Jones v. Johnson Mach. & Press Corp.*, 211 Neb. 724, 729-30, 320 N.W.2d 481, 484 (1982); *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 245, 451 N.E.2d 195, 198, 464 N.Y.S.2d 437, 440.

45. Phillips, *supra* note 44, at 272.

the nature of the products that the seller has put into the stream of commerce and so should also know if products liability claims are likely to arise. The buyer generally would also know whether the seller would be available and able to satisfy those claims. Frequently the purchase and sale agreement requires the seller to dissolve after the sale.⁴⁶ If the successor corporation knows that claims will arise, and knows that the assets it is acquiring constitute the only assets available to satisfy those claims, then it is not harsh to hold the successor responsible for them.

The traditional rule of corporate law⁴⁷ should be modified so that whenever the successor knowingly eliminates the possibility of recovery from its predecessor, it assumes liability for claims that will foreseeably arise against the predecessor. The suggested modification would simply expand the fourth exception to the traditional rule of non-liability, which says that the successor will be liable if the purpose of the transaction was fraudulently to escape responsibility for the seller's liabilities.⁴⁸ Many successor corporations may not be liable under the traditional formulation of the exception, however, because the parties made the transaction for business reasons and not for the purpose of escaping liability for defective products.

The proposed rule expands the exception to cover not only the situation in which the purpose of the transaction was to escape liability but also the situation in which the purchaser should have been aware at the time of the transaction that as a side effect of the transaction the selling corporation would escape a foreseeable liability. Imposing the proposed rule retroactively represents less harshness than the plight of the victim left without a remedy. The loss should fall on the party who shoulders greater culpability. A corporation that knowingly deprives a person of a remedy for a foreseeable claim bears some culpability whereas a victim assumes none.

One limitation, however, should be placed on the liability of the successor corporation. The value of the assets acquired in the transaction should mark its maximum liability. If a predecessor's assets before the transfer would have been insufficient to satisfy the claim,

46. The transaction at issue in *Ray* included a dissolution provision. *Ray*, 19 Cal. 3d at 26, 560 P.2d at 6, 136 Cal. Rptr. at 577.

47. See *supra* text accompanying notes 7-11.

48. See *supra* note 10 and accompanying text. The purpose test represents a basic principle of fraudulent conveyance law. "Every conveyance made . . . with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors." MASS. GEN. LAWS ANN. ch. 109A, § 7 (West 1958).

then the successor is not the cause of the plaintiff's inability to recover. If liability were imposed regardless of the extent of the predecessor's assets, some viable businesses will be forced to liquidate because no one would be willing to buy them.⁴⁹ Limiting the purchaser's liability to the value of the assets received in the acquisition would eliminate this restriction on transferability without reducing any future plaintiff's chance of recovering. Since the value of the predecessor's assets limits the extent of any recovery from it, logic requires that recovery from the successor should be subject to the same limits. Just as the successor should not be allowed to destroy a future plaintiff's chances of recovery, it should not be required to increase them.⁵⁰

III. HAZARDOUS WASTE

A. PSC Resources

Although *Ray* and *Ramirez* only held successor corporations responsible for their predecessor's defective products,⁵¹ one commentator, Kadens, has said that the real significance of the cases extending liability for defective products to successor corporations may be the "future assist rendered to a wide host of special creditors."⁵² His prediction came true in *New Jersey Department of Transportation v. PSC Resources*.⁵³

In 1973, defendant PSC Resources purchased 100% of the stock of the Diamond Head Refining Co., Inc. PSC then transferred all of Diamond Head's assets to itself and dissolved Diamond Head. Diamond Head had operated a waste oil reprocessing facility which discharged oily wastes, sludge, and contaminated waste water into a nearby body of water. PSC continued to operate the facility and continued the practice of discharging the waste. In 1977, plaintiff Department of Transportation began construction of a highway. In order to do so, it had to clean up the sludge and contaminated water created by the defendant's facility. The cost of cleanup approached five million dollars.⁵⁴ The court found that the policy rationale for the imposition of strict liability in a defective product action equally applied under the present circumstances. Quoting the opinion of the Appellate Divi-

49. Whenever the estimated potential liability of a company exceeds its value as a going concern, it will be impossible to sell the company.

50. Cf. Phillips, *supra* note 44, at 271.

51. See *supra* notes 21-23 and accompanying text.

52. Kadens, *Practitioner's Guide to Treatment of Seller's Products Liabilities in Assets Acquisitions*, 10 U. TOL. L. REV. 1, 45 (1978).

53. 175 N.J. Super. 447, 419 A.2d 1151 (Law Div. 1980).

54. *Id.* at 450-52, 419 A.2d at 1152-53.

sion in *Ramirez*,⁵⁵ the court held that "where 'the successor corporation acquires all or substantially all the assets of the predecessor corporation for cash and continues essentially the same operation as the predecessor corporation' . . . the successor incurs liability for the damages resulting from any discharge of hazardous substances by its predecessor."⁵⁶

By adopting the *Ramirez* approach, the court based its decision on the principle underlying strict liability: that costs associated with an enterprise should be borne by those in a position to minimize the harm and spread whatever cost remains among the users of the product.⁵⁷ This policy applies as strongly to hazardous waste disposal as it does to products liability. Just as the manufacturer of a product can best ensure its safety, the generator of hazardous waste can best insure proper disposal. The generator is also in a position to spread the costs among the users of the product of which the waste is a by-product. This policy will be frustrated, however, if the generator can escape liability by selling its assets and distributing the proceeds among its shareholders.

The second justification for imposing liability on a successor corporation, the conscious destruction of a future plaintiff's remedy against the predecessor, may not be as strong as to liability for hazardous waste as for defective products. Liability for improper disposal of hazardous waste did not present a major issue until recently.⁵⁸ A successor's lack of knowledge that claims were likely to arise weakens the justification for holding it responsible because it destroyed the plaintiff's remedy. The situation may be different, however, for more recent acquisitions.

The destruction of remedy justification may not be essential in jurisdictions such as New Jersey that favor the theory of enterprise liability.⁵⁹ More conservative courts, however, may refuse to find liability unless the successor knowingly deprived future plaintiffs of a remedy.⁶⁰ The extent to which more conservative courts will hold successor corporations liable may, therefore, depend on the extent to

55. The New Jersey Supreme Court's decision had not yet been published.

56. *PSC Resources*, 175 N.J. Super at 467, 419 A.2d at 1162 (quoting *Ramirez v. Amsted Industries, Inc.*, 171 N.J. Super. 261, 278, 408 A.2d 818, 827 (App. Div., 1979)).

57. See *supra* notes 17-18 and accompanying text.

58. The Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC § 9601-657 (1982) (enacted in 1980).

59. See *supra* note 43 and accompanying text.

60. See *supra* notes 44-45 and accompanying text.

which those courts believe that the successors should have been aware of the likelihood of future claims.

B. Chem-Dyne

Another factor, however, might weigh in favor of holding successor corporations liable: the imposition of joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁶¹ In *United States v. Chem-Dyne Corp.*,⁶² the district court held that CERCLA does provide for joint and several liability.⁶³ The government sued twenty-four defendants who allegedly contributed to the same waste disposal site. The defendants moved for an early determination that they were not jointly and severally liable for the clean-up costs.⁶⁴ The district court found that CERCLA's language was ambiguous as to whether joint and several liability should apply and then looked to the Act's legislative history to decide the question.⁶⁵ A sponsor, Senator Randolph, said that "we have deleted any reference to joint and several liability, relying on common law principles to determine when parties would be severally liable."⁶⁶ Although it recognized that in some situations the deletion of language from a statute "strongly militates against a judgment that Congress intended a result that it expressly declined to enact,"⁶⁷ the Chem-Dyne court said that "[t]he term joint and several liability was deleted from the express language of the statute in order to avoid its universal application to inappropriate circumstances."⁶⁸ The court decided that the legislature intended that common law principles should be followed when deciding whether a particular defendant would be held jointly and severally liable under CERCLA.⁶⁹

The court then faced the question of whether it should apply the law of the forum state or if there should be a federally created uniform law. The court quoted Representative Florio, who had said that "[t]o insure the development of a uniform rule of law, and to discourage

61. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 29607 (1982).

62. 572 F. Supp. 802 (S.D. Ohio 1983).

63. *Id.* at 808.

64. *Id.* at 804.

65. *Id.* at 805.

66. 126 CONG. REC. S14964 (daily ed. Nov. 24, 1980) (statement of Senator Randolph).

67. *Chem-Dyne*, 572 F. Supp. at 807-08 (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)).

68. *Chem-Dyne*, 572 F. Supp. at 810.

69. *Id.* at 808.

business dealing in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area."⁷⁰ The court recognized that *Erie v. Tompkins*⁷¹ removed the federal court's power to create federal general common law but said that "the power to fashion federal specialized common law remains untouched when it is 'necessary to protect uniquely federal interests.'"⁷²

Having decided that a uniform federal rule should apply, the court proceeded to define it. The court followed the approach of the Restatement (Second) of Torts, which bases the decision of whether two or more defendants responsible for a single harm are both liable for the entire amount of damage on whether the harm is divisible. If the harm is not divisible, then the Restatement holds each defendant jointly and severally liable. Only if there is a reasonable basis on which responsibility for the harm can be apportioned between the two defendants will each be liable only for its own share.⁷³

It may often be very difficult for a defendant to show that the harm caused by the various contributors to a hazardous waste disposal site is divisible. Even if records showing the volume of waste dumped by each defendant are available, uncertainties will still remain about the toxicity and migratory potential of the various substances.⁷⁴ At the dumpsite at issue in *Chem-Dyne*, it was not clear which of the wastes had contaminated the groundwater.⁷⁵ Further complications arise because chemicals can react with each other to form new and more toxic substances.⁷⁶ In addition, each defendant has the burden of proof as to apportionment,⁷⁷ so defendants will likely often lose on this question.

If defendants are not able to show that the harm is divisible, then each contributor to a particular dumpsite can be held liable for the entire cost of cleaning it up. If one contributor has transferred its assets and is no longer available for suit, then either the successor corporation or the other contributors must pay the defunct corporation's share of the costs. Faced with this choice, a court may decide that the successor corporation should bear the burden.

70. *Id.* at 809 (quoting 126 CONG. REC. H11787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio)).

71. 304 U.S. 64 (1938).

72. *Chem-Dyne*, 572 F. Supp. at 808 (citations omitted).

73. *Id.* at 810; RESTATEMENT (SECOND) OF TORTS §§ 433A, 881 (1976).

74. *Chem-Dyne*, 572 F. Supp. at 811.

75. *Id.*

76. *Id.* at 805-06.

77. *Id.* at 810.

In order to choose between imposing liability on a successor corporation or on another contributor, two questions must be answered: first, which potential defendant is more at fault; second, which approach better serves the purpose of preventing this type of harm and spreading the cost of any harm that does occur throughout users of the product of which the waste is a by-product. CERCLA provides for liability without fault,⁷⁸ so a defendant held jointly and severally liable for the cost of cleaning up an entire dumpsite has not necessarily acted culpably. The successor corporation might also be innocent, if it had not had reason to know that its acquisition would destroy a future plaintiff's chance of recovery. If neither defendant is at fault, then the decision must be made on the basis of policy.

Both joint and several liability and successor corporation liability achieve the effect of imposing liability on an enterprise as a whole. Joint and several liability, however, spreads the burden to many more potential defendants. All producers of hazardous waste would then share liability. Successor liability, on the other hand, confines liability to the same type of manufacturing enterprise. If one purpose of strict liability is to internalize costs by making each type of industry pay for the damage it causes,⁷⁹ then the more narrow successor liability approach should be preferred. Only if a successor corporation cannot be found should other contributors to the same dumpsite be forced to assume the cost. If it is applied prospectively, a rule imposing liability on the successor would clearly be preferable since no unfairness would accrue to the successor and the clean up cost would remain internalized with the predecessor.⁸⁰

IV. CONCLUSION

Two approaches can be taken to justify the imposition of liability on a successor corporation for torts of its predecessor. The first is that if the successor discounts the price it is willing to pay for the predecessor's assets in accordance with the potential liability, then the costs

78. 42 U.S.C. § 9601(32) (1982) says that the standard of liability for CERCLA follows that of 33 U.S.C. § 1321. 33 U.S.C. § 1321(f)(1) (1982) provides that except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party . . . such owner or operator . . . shall be liable . . . for the actual costs incurred . . . for the removal

“At the time of CERCLA's enactment, this section had been interpreted to impose a strict liability standard.” *Chem-Dyne*, 572 F. Supp. at 805.

79. See *supra* note 17 and accompanying text.

80. See *supra* note 21 and accompanying text.

associated with the predecessor's activities will remain internalized with the predecessor. Retroactive application is explained as a necessary result in a system in which rules develop on a case by case basis. The second explanation for successor liability is that the successor corporation is responsible for destroying the plaintiff's chance of recovering from the predecessor.

The first rationale applies as strongly to liability for improper disposal of hazardous waste as it does to products liability. The second rationale may not apply as strongly to hazardous waste disposal because the successor may not have had reason to expect that a claim would arise against the predecessor. A third reason exists, however, for applying successor liability to hazardous waste disposal: it may be preferable to hold a successor corporation liable rather than to force other contributors to the same dumpsite to pay a dissolved corporation's share of the clean up cost.

John C. Solomon