The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law

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THE CONTINUITY OF THE ENTERPRISE DOCTRINE: CORPORATE SUCCESSORSHIP IN UNITED STATES LAW

Phillip I. Blumberg*

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I. INTRODUCTION

Legal problems arising in connection with the sale or fusion of business enterprises have led over the years to the emergence and widespread acceptance in U.S. law of a body of jurisprudence concerned with "successor liability." In carefully circumscribed areas, the courts have regularly applied a series of doctrines of law that impose liability upon one juridical entity acquiring the assets (as distinct from the stock) of a business that was previously conducted by another juridical entity for the obligations of the "predecessor." These doctrines, based on traditional contract law, corporate law, and equitable jurisprudential principles, are long established and present almost no controversial questions.  

In the past half century however, a dramatic change has occurred in this area of law heretofore dominated by doctrines resting on formalistic and conceptual foundations. Two unrelated factors of great jurisprudential

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1. The de facto merger doctrine, expanding the traditional statutory merger exception, represents the only area of controversy. For further discussion, see infra note 7 and accompanying text.
significance have led to the development of two innovative doctrines of successorship liability with functional and pragmatic rather than conceptual roots. These innovative doctrines, which would expand the scope of liability well beyond the traditional doctrines, have emerged as a result of the exploding concepts of strict liability in tort law and the sharply increased concern for effective implementation of statutory regulatory programs.

These new doctrines, focusing on the economic realities of the enterprise rather than on the corporate entity, are the "continuity of the enterprise" and "the product line" doctrines. In a number of jurisdictions, courts have relied on these doctrines to impose successor liability in product liability cases, including application to related issues such as the amenability of a product liability defendant to jurisdiction. In addition, courts have used the continuity of the enterprise doctrine to broaden widely the outer bounds of statutory liability under numerous major federal remedial statutes ranging from labor, employment, and environmental matters to the Racketeer Influenced and Corrupt Organizations Act (RICO) and tax matters.

While the product line doctrine represents only a manifestation of the enormously expanded sweep of U.S. product liability law, the continuity of the enterprise doctrine cannot be explained solely by reference to changing concepts of tort law. Continuity of the enterprise has received a much wider range of application and must be recognized as the development of a new doctrine of relational law resting on enterprise principles. As such, it has significant jurisprudential implications. However, it should be understood at the outset that the doctrine has won only mixed acceptance in U.S. law, even in the areas of its greatest success. Thus, the continuity of the enterprise doctrine is still a minority doctrine in product liability law and still highly controversial for purposes of environmental laws such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Furthermore, except for RICO, the labor laws, and the tax laws, the doctrine has not significantly penetrated other areas of statutory law.

While the doctrine has won its greatest acceptance in labor relations law and in other labor areas, such as antidiscrimination law, factory safety, and wages and hours limitations, this triumph of relational law, in effect, occurred decades ago. For forty years, the National Labor Relations Board (NLRB) has applied, and the courts have accepted, enterprise principles for many purposes of the National Labor Relations Act (NLRA) under the "single employer" or "integrated enterprise" standard. The NLRB standards substantially overlap the continuity of the enterprise doctrine. The recent evolution of the doctrine in product liability law and in major areas of U.S. statutory law merely builds upon this impressive foundation derived from this development of long ago.
II. TRADITIONAL SUCCESSORSHIP LAW

Under traditional corporation law, a corporation (the "successor") that acquires the manufacturing facilities of another corporation (the "predecessor") generally does not become liable for any of the liabilities of the predecessor arising prior to the transfer. Product liability is no exception. Under traditional corporation law, a purchaser who acquires a corporate business through the purchase of its assets normally will not become liable for the predecessor’s obligations even though acquisition of the very same business through the purchase of its stock would have left the liability unimpaired. Under traditional law, the use of a different form for accomplishing the acquisition of a business leads to a different legal result insofar as creditors and other third parties are concerned even though the economic posture of the purchaser and the business remain substantially unchanged.

With courts still enthralled by nineteenth-century formalistic jurisprudence and focusing solely on the fact that the successor through the purchase of assets is considered a different juridical entity, insulation from liability results inexorably from application of entity concepts of law. Given this preoccupation with legal forms, these courts simply ignore the most obvious economic realities, such as the fact that in many cases, the same enterprise or business may be involved with little or no change, except ownership.

There are five exceptions to this rigid conceptual standard, insulating a party acquiring a business through acquisition of all its assets rather than its stock from liability for the pre-acquisition obligations of the business.


3. See Turner v. Bituminous Cas. Co., 397 Mich. 406, 422-31, 244 N.W.2d 873, 878-84 (1976). "[I]t seems both unfair and unbelievable that a corporate combination or acquisition decision would be principally or exclusively made on the basis of cutting off the contingent right to sue of a products liability victim." Id. at 880.

4. See generally 15 FLETCHER ET AL., supra note 2, § 7122. A successor’s liability for the debts of the predecessor arising before the acquisition must be distinguished from its liability arising from its own conduct after acquisition based on its own conduct with respect to pre-acquisition product purchasers. Thus, under traditional negligence principles, the successor may come under a duty to warn of defects of its predecessor’s products as a result
These generally accepted exceptions are as follows:

1. **Under Contract Law:** where the successor agrees, either expressly or impliedly, to assume the liabilities of the predecessor;\(^5\)

2. **Under Corporation Law:** where the transaction is accomplished through a merger or consolidation of the acquired and acquiring corporations, as a result of which the surviving company becomes liable by operation of law.\(^6\) In numerous jurisdictions, the merger law has been broadened under the doctrine of "de facto merger" to include those sales of assets that leave the parties in much the same position as if a formal merger had taken place;\(^7\)


5. Several recent cases have been concerned with whether successor corporation liability arose as a result of contractual obligations between the parties. Kessinger v. Grefco, Inc., 875 F.2d 153, 153 (7th Cir. 1989) (finding contractual assumption of liability under Pennsylvania or Illinois law); Florom v. Elliott Mfg., 867 F.2d 570, 576, reh'g denied, 879 F.2d 801 (10th Cir. 1989) (denying summary judgment because post-agreement conduct of the parties, including payment of liability insurance premiums by the successor company, presented a material issue of fact of whether it had contractually assumed liabilities); Grugan v. BBC Brown Boveri, Inc., 729 F. Supp. 1080, 1081 (E.D. Pa. 1990) (finding contractual assumption of liability under Pennsylvania law); Earl v. Priority Key Servs., Inc., 232 Neb. 584, 441 N.W.2d 610 (1989) (successor held liable on contract under Nebraska law).


7. Where one corporation is absorbed by another through the acquisition of assets for stock distributed to the shareholders of the seller, the surviving corporation may become liable under the de facto merger doctrine for the debts of the predecessor corporation in the same manner as if a statutory merger had occurred. The doctrine rests on the following elements: continuity of the business, continuity of shareholders, cessation of operation and dissolution of the seller as soon as possible, assumption by the buyer of obligations necessary for the uninterrupted continuation of the business, and the distribution of the successor's stock to shareholders of the predecessor. See ALI, 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 1.38 cmt.a, at 41-44 (1994); 15 FLETCHER ET AL., supra note 2, §§ 7045.10, 7127; see also Arnold Graphics Indus., Inc. v. Independent Agent Ctr., Inc., 775 F.2d 38, 42 (2d Cir. 1985) (stating that there is "no requirement that all of the events are necessary . . . at the same time"); Blizzard v. National R.R. Passenger Corp., 831 F. Supp. 544, 544 (E.D. Va. 1993) (Virginia law) (no de facto merger without sale or transfer of stock); East Prairie R-2 Sch. Dist. v. U.S. Gypsum Co., 813 F. Supp. 1396, 1396 (E.D. Mo. 1993) (Missouri law) (no de facto merger without substantially similar ownership or control); Howard v. APAC-Georgia, Inc., 192 Ga. App. 49, 383 S.E.2d 617, 617 (1989) (no de facto merger without continuing identity of shareholders).

Some jurisdictions do not recognize the doctrine. See, e.g., Texas Bus. Corp. Act, TEX. REV. CIV. STAT. ANN. art. 5.10, § B (West 1980); Hariton v. Arco Elecs., Inc., 41 Del. Ch. 74, 188 A.2d 123 (Del. 1963); Director of Bureau of Labor Standards v. Diamond Brands,
(3) **Under Equitable Jurisprudence (Fraud):** where the transaction is a fraudulent attempt to escape liability for the obligations of the predecessor;\(^8\)

(4) **Under Equitable Jurisdiction (Sham):** where there are only negligible differences between the predecessor and successor companies and their shareholders and management; this is often described as the "mere continuation" doctrine;\(^9\) and

(5) **Under Fraudulent Transfer Doctrines:** where the assets have been transferred without reasonably adequate consideration, leaving insufficient assets in dissolution for the payment of existing liabilities.\(^10\)

Successor liability under the traditional doctrines has received wide application throughout the law. Although the various theories are prominent in product liability law, they have been applied in entirely unrelated areas as well. Thus, in reliance on the generally accepted traditional doctrines, successor liability has been widely applied not only in product liability law, but in other areas of tort liability,\(^11\) in contracts,\(^12\) and in statutory liability, including environmental laws,\(^13\) occupational safety,\(^14\) and labor and

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\(^{9}\) See Grand Labs., Inc. v. Midcon Labs, 32 F.3d 1277, 1283 (8th Cir. 1994).


\(^{13}\) See, e.g., Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991) (universally accepted principles of private corporate successorship law applicable to
employment matters.\textsuperscript{15} It is the newer innovative doctrine — the continuity of the enterprise doctrine — that is struggling for recognition in numerous areas of the law. The other innovative doctrine — the product line doctrine — has received very little attention outside of the product liability area.

The established exceptions of successor liability, resting on fundamental principles of contract law, venerable aspects of statutory law, including the corporation and fraudulent transfer laws, and equitable intervention to disregard legal consequences arising from fraud or sham transactions, are unchallenged and require no comment. However, it is useful to review briefly at the onset that aspect of equitable intervention known as the mere continuation doctrine because of its relationship to the innovative continuity of the enterprise doctrine.

\section*{III. EQUITABLE PRINCIPLES AND THE MERE CONTINUATION DOCTRINE}

The mere continuation exception rests on the conclusion that the purported transfer is only a manipulation of corporate forms without a sufficient change in substantive relationships to justify a change in legal duties. Principles of equitable jurisprudence intervene to prevent a change in legal obligations as a result of a transaction that is essentially a sham. The doctrine, accordingly, is applicable only where the successor has the same stockholders as the predecessor and conducts the same business with the same management, facilities, employees, products, and trade names. There is a common economic and entrepreneurial identity in this transaction.\textsuperscript{16} Although in form a transfer from one corporation to another has occurred, the transaction is little more than a shuffling of corporate forms, lacking any fundamental change with independent significance.

Thus, the doctrine "focuses on the continuation of management and ownership between the predecessor and successor corporations."\textsuperscript{17} "The key element . . . is a common identity of the officers, directors and

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\textsuperscript{14} See AM. LAW PROD. LIAB., supra note 2, § 7.14.

\textsuperscript{15} See Grand Labs., 32 F.3d at 1283.
stockholders in the selling and purchasing corporations." The same principals who previously had conducted a business through one controlled corporation must be conducting the same business through a different controlled corporation. Even when a formal change in management and ownership has occurred, the mere continuation doctrine will still apply where the change is deemed a sham, for example, where the directors and shareholders of the successor are relatives of the directors and shareholders of the predecessor.

Even if otherwise applicable, successorship liability will not be imposed under this doctrine unless two other essential elements are established. First, application of successor liability depends on the lack of availability of a remedy against the predecessor; the doctrine is not available where the predecessor is still in existence. Second, a transfer of the assets of the business must have taken place. Thus, even where an alleged successor has the same shareholders, same name, and conducts a related business, there can be no successor liability where there has been no transfer of the predecessor’s assets or continuation of its manufacturing activities. In applying the mere continuation doctrine, courts have rejected the “totality of the circumstances” standard and instead have insisted that all of the necessary elements must be established.

With the explosive development of product liability law, numerous cases have made it plain that application of successor liability under cases meeting the requirements of the mere continuation doctrine is essential to implement the underlying policies of tort law. This should be done, notwithstanding the manipulation of corporate forms in an attempt to achieve insulation from pre-


19. E.g., Bud Antle, 758 F.2d at 1458 (Georgia law); Weaver, 730 F.2d at 547 (Iowa law); Tucker, 645 F.2d at 625-26 (Missouri law); see Grand Labs., 32 F.3d at 1283 (Iowa law).


23. See, e.g., Diaz, 707 F. Supp. at 97; Asher, 659 So. 2d at 598.
existing liabilities by relying on the rigid acceptance of the separate juridical existence of separate corporations under traditional corporation law.24

Building on the foundation of the mere continuation doctrine, some courts have greatly expanded it to include cases in which there was no continuity of stock, stockholders, or directors. They have done so through two innovative alternative theories: the product line theory and the continuity of the enterprise theory. While each of these theories has been adopted by a number of jurisdictions, the courts are divided, and these doctrines remain highly controversial. These new doctrines are reviewed in the following sections.

IV. SUCCESSORSHIP IN PRODUCT LIABILITY LAW

A. The Product Line Doctrine

Unlike the continuity of the enterprise doctrine, as reviewed below, 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.25 "[A] party which acquires a manufacturing business and continues the output of its line of products . . . 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."26

Although the product line doctrine has been adopted in California, New Jersey, Pennsylvania, and Washington,27 it has been rejected by most


27. AM. LAW PROD. LIAB., supra note 2, § 7.27; see, e.g., Conway v. White Trucks, 885 F.2d 90, 97 (3d Cir. 1989); Ray, 560 P.2d at 3; Kaminski v. Western MacArthur Co., 175 Cal. App. 3d 445, 220 Cal. Rptr. 895 (1985) (applicable to distributors as well as manufacturers);
jurisdictions\textsuperscript{28} and remains a highly controversial minority view. Most jurisdictions reject any expansion of successorship liability beyond the confined limits of the traditional exceptions to the classic doctrine. In addition, these jurisdictions that have been ready to broaden the traditional law seem to prefer to rely on the “continuation of the enterprise” doctrine instead of the product line doctrine.\textsuperscript{29} The product line doctrine is not apt to win any new converts.\textsuperscript{30}

The California Supreme Court first formulated and applied the product line doctrine in its path-breaking opinion in Ray v. Alad.\textsuperscript{31} The court justified the theory by reference to three factors:\textsuperscript{32} (1) the destruction of the plaintiff’s remedies against the predecessor, which was caused by the transaction;\textsuperscript{33} (2) the successor’s ability to spread the risk;\textsuperscript{34} (3) the fairness of requiring the successor to assume the burden of the predecessor’s defective products along with the advantage of the goodwill being exploited through the continued operation of the business.\textsuperscript{35} The court noted that “[t]he purpose of the rule of strict tort liability ‘is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are


28. See AM. LAW PROD. LIAB., supra note 2, § 7.27 n.95 (collecting the cases and listing more than 24 states as rejecting the doctrine); see, e.g., Florom, 867 F.2d at 570 (Colorado law); Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir. 1986) (Virgin Islands law); Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977) (Indiana law); Leannais, 565 F.2d at 437 (Wisconsin law); DeLapp, 417 N.W.2d at 219 (Iowa law); Guzman v. MRM/ELGIN, 409 Mass. 563, 567 N.E.2d 929 (1991); Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989); Young v. Fulton Iron Works Co., 709 S.W.2d 927 (Mo. Ct. App. 1986); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D. 1984); Flaugher v. Cone Automatic Mach. Co., 30 Ohio St. 3d 60, 507 N.E.2d 331 (1987); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515 (S.D. 1986).


32. Id. at 8-9.
33. Id. at 9.
34. Id.
35. Id.
powerless to protect themselves.’” Subsequently, some courts have broadened the scope of the doctrine by not requiring that a remedy against the predecessor be unavailable.

The imposition of liability under the product line theory is an attempt to expand even further the concepts of enterprise liability in product liability law. Along with product liability law generally, the product line theory is still another example of relational law applying enterprise principles. However, the jurisdictions accepting the doctrine have done so only in product liability matters; as noted, the doctrine has not attracted further acceptance. Accordingly, it should be regarded as a subset of product liability law, with only limited significance for other areas of the law.

B. The Continuity of the Enterprise Doctrine

Building on the traditional mere continuation exception, the continuity of the enterprise doctrine is an expansive doctrine, which would enforce liability in the successorship area by focusing on the continuity of the business without requiring continuity of the shareholders and management. It is an innovative doctrine of enterprise liability and relational law; so long as the same business is involved, the liabilities of a business run with the business, notwithstanding a change in ownership. The doctrine emerged in response to a perceived need for the further expansion of available remedies in product liability law. It also reflects the growing emergence of enterprise principles in U.S. commercial law in general. Like the product line

36. Id. at 8 (quoting Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1963)).
38. E.g., Grand Labs., 32 F.3d at 1283; Florom, 867 F.2d at 578. Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (1980) (New Jersey Spill Act) (alternate holding), appears to be an exception.
39. The continuity of the enterprise doctrine also has been termed the “substantial continuity” doctrine, the “continuing business enterprise” doctrine, and the “substantial continuation” doctrine. These terms are entirely interchangeable. This article will use “the continuity of the enterprise.”
doctrine, the continuity of the enterprise doctrine is highly controversial. Adopted for common-law product liability purposes by a limited number of jurisdictions, including Alabama, Michigan, Mississippi, and Ohio, it has been rejected in most jurisdictions. The continuity of the enterprise doctrine is the most advanced stage in the evolution of strict liability concepts in product liability law. It was first heralded in *Cyr v. B. Offen & Co.*, a decision of the Court of Appeals for the First Circuit, applying New Hampshire law. In *Turner v. Bituminous Casualty Co.*, the Supreme Court of Michigan launched the doctrine as a new exception resting firmly on its own footing. The court looked upon the doctrine as a component of product liability law rather than of corporate law that gave rise to a cause of action "where the totality of the transaction demonstrates a basic continuity of... [an unchanged] enterprise." The

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42. *See, e.g.*, Florom, 867 F.2d at 570 (Colorado Law); *Polius*, 802 F.2d at 75 (Virgin Islands law); *Weaver*, 730 F.2d at 547 (Iowa law); Nissen Corp. v. Miller, 323 Md. 613, 630, 594 A.2d 564, 572 (Ct. App. 1991); Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 310, 376 N.W.2d 820, 829 (1985).

The *RESTATMENT (THIRD) OF THE LAW OF TORTS: PRODUCT LIABILITY § 15 (Proposed Final Draft 1997)*, which has been approved by the American Law Institute membership, rejects the doctrine for the courts, concluding the problem was better resolved by legislation than judicial decision.

43. *Cyr*, 501 F.2d at 1145.

44. *Turner*, 244 N.W.2d at 873. *Turner* followed a similar decision in *Cyr*, 501 F.2d at 1145, which also relied on the policy reasons for strict liability in tort to go beyond the mere continuation doctrine and find successor liability although continuity of ownership was lacking. *Turner*, 244 N.W.2d at 881.

45. *Turner*, 244 N.W.2d at 873.
court relied on four elements as essential for the imposition of liability under the doctrine:

1) There was basic continuity of the enterprise . . . including . . . key personnel, assets, general business operations, and . . . name.
2) The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of consideration . . . .
3) The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the normal business operations of the seller corporation.
4) The purchasing corporation held itself out . . . as the effective continuation of the seller corporation.46

While mere continuation emphatically requires continuity of management and shareholders, the continuity of the enterprise exception eliminates this element entirely and focuses on the continuation of business operations. This doctrine builds on the traditional and more limited mere continuation exception by imposing successor liability in reliance on substantial economic identity between the business operations of the successor and predecessor corporations.

Unlike the mere continuation doctrine in which all elements are essential for application, the continuity of the enterprise doctrine typically relies on the totality of the circumstances, focusing on elements such as the use of the same employees, facilities, location, products, and trade name, as well as the successor holding itself out as a continuation of the previous enterprise.47

Thus, the continuity of the enterprise doctrine represents an unusual form of enterprise law. Much like covenants running with the land in real property law, under the doctrine, the liabilities of the business run along with the business even when the business is conducted by a successor juridical entity that lacks any ownership or management links to the predecessor.

Enterprise liability under the continuity of the enterprise doctrine of successor liability presents novel features. Unlike under enterprise liability that binds parent and subsidiary corporations, the parties are not linked by the existence of common equity ownership. Unlike under enterprise liability that binds franchisor and franchisee, or licensor and licensee, or principal and agent, the parties are not linked by contract or consent in a continuing relationship. Unlike both of these areas, the doctrine does not involve a

46. Id. at 883-84. Other decisions adopting the theory have generally followed Turner to the point of quoting its standards in haec verba. See, e.g., Pietz v. Orthopedic Equip. Co., 562 So. 2d 152 (Ala. 1989); Turner v. Wean United, Inc., 531 So. 2d 827, 830 (Ala. 1987).
dominant and a subservient party under the former's control, collectively conducting integrated fragments of a common enterprise. It is a unique development of enterprise liability in which the legal obligations of one juridical entity are imposed on a completely independent juridical entity, linked only by their successive roles in conducting the same economic enterprise. In the jurisdictions and areas of the law in which the doctrine has been accepted, it represents an additional example of importance in illustrating the acceptance of enterprise doctrines in U.S. law.

Seeking to provide an equitable solution to the problems presented by product injuries to workers and consumers, this theory, like the product line doctrine, had its roots in tort law.\textsuperscript{48} The continuing evolution of the doctrine, however, did not stop there. Successor liability, through application of the continuity of the enterprise doctrine, has not been confined to product liability. Although some courts in jurisdictions that have accepted the doctrine have limited its application to product liability matters,\textsuperscript{49} others have refused to do so. Similarly, many federal courts, proceeding as a matter of federal common law, have relied widely on the doctrine in imposing successor liability under environmental laws.\textsuperscript{50} Accordingly, unlike the product line doctrine, the continuity of the enterprise doctrine cannot be dismissed as simply another manifestation of the explosive growth of strict liability in product liability law.

In brief, this innovative doctrine represents the impatience of some courts, in the face of powerful public pressures, with businesses that manipulate the corporate structure in an effort to obtain insulation from liability under traditional principles of corporation law. For example, in Bonee v. L & M Construction Chemicals, the court stated in blunt terms: "Because the policy in products liability cases is to spread among society the risk of loss from defective products, the traditional corporation law rule was irrelevant."\textsuperscript{51}

\begin{itemize}
  \item \textsuperscript{48} See Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc., 13 F.3d 69, 73 n.2 (3d Cir. 1993); Polius, 802 F.2d at 78-79; Turner, 244 N.W.2d at 877-78.
  \item \textsuperscript{49} E.g., City Management Corp. v. U.S. Chem. Co., 43 F.3d 244, 252 (6th Cir. 1994) (not available under CERCLA); Grand Labs., 32 F.3d at 1283-84 (not available in action alleging misappropriation of trade secrets).
  \item \textsuperscript{50} See cases cited infra notes 115-17. Other courts have refused to do so. See cases cited infra notes 127-30.
  \item \textsuperscript{51} Bonee, 518 F. Supp. at 380 (continuation of the enterprise).
\end{itemize}

The irrelevance of corporation law principles was eloquently stated in Ramirez, 86 N.J. at 341, 431 A.2d at 815-16 (product line):

[T]he traditional corporate approach has been sharply criticized as being inconsistent with the rapidly developing principles of strict liability in tort and unresponsive to the legitimate interests of the products liability plaintiff. Courts have come to recognize that the traditional rule of nonliability was developed not in response to the interests of parties to products liability actions, but rather to protect the rights
V. THE CONTINUITY OF THE ENTERPRISE DOCTRINE: CONDITIONS FOR APPLICATION

Reflecting the radical nature of the continuity of the enterprise doctrine of successor liability overriding traditional principles of corporation law, the courts adopting the doctrine typically have attempted to restrict its application to situations in which the plight of the injured party is most compelling. In a manner of speaking, the doctrine is strong medicine to be used only *in extremis* when the law would otherwise be unable to provide any remedy to an innocent victim.

In its original formulation of the doctrine, the *Turner* decision identified four significant factors. As noted, these four elements are: the basic continuity of the business as a matter of economic reality; the liquidation and dissolution of the seller; the buyer's assumption of the seller's obligations necessary for the conduct of continued operations; and the buyer holding itself out as the effective continuation of the seller. Subsequently, some of the courts accepting the new doctrine restricted its application by introducing two other major limitations: the unavailability of a remedy against the predecessor caused by the acquisition and the completeness of the transfer of the predecessor's assets.

The courts applying the doctrine have insisted on such limitations for application of the doctrine in varying degrees, depending on both the jurisdiction in question and the area of law involved. The standards for product liability are more demanding than those for purposes of statutory law; and in statutory law, the standards appear more demanding under some statutory programs than others. In sum, the doctrine takes on different shapes in order to implement more effectively the underlying purposes of the law in the particular area under consideration.

There is still another area of complexity to consider. Within various areas of subject matter, the courts are not uniform in their application of the doctrine. The courts divided on the question of whether the existence of each of the elements identified by *Turner* and the other courts in their use of

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of commercial creditors and dissenting stockholders following corporate acquisitions, as well as to determine successor corporation liability for tax assessments and contractual obligations of the predecessor.

*Id.; see also Terry*, 527 F. Supp. at 134; *Turner*, 244 N.W.2d at 877-78.

52. *Turner*, 244 N.W.2d at 879.

53. *Id.* Alabama cases have indicated that holding out, by itself, may be sufficient. *E.g.*, Matrix-Churchill v. Springsteen, 461 So. 2d 782, 788-89 (Ala. 1984); *Andrews*, 369 So. 2d at 785.


55. Compare cases cited *infra* notes 69-71.
the doctrine is necessary for its application. A number of cases adopting the doctrine for product liability purposes have so held.\textsuperscript{56} In this respect, these decisions reach the same view as many other courts in applying the traditional mere continuation doctrine.\textsuperscript{57}

Other courts applying the continuation of the enterprise doctrine are not in agreement with this view. In sharp contrast, they have concluded that successorship liability under the continuity of the enterprise doctrine rests on the totality of the circumstances. While such courts take each of the factors thus identified into account, at the end of the day, they hold that liability may be imposed even if one or more of the factors is lacking.\textsuperscript{58} Thus, even a Michigan court has read \textit{Turner} flexibly, stating that "continuity [of the business] alone is the test."\textsuperscript{59}

This discussion is confined to the application of the doctrine in product liability matters. As will be reviewed \textit{infra}, very different standards apply with respect to the elements required for application of the continuity of the enterprise doctrine under antidiscrimination and environmental statutes.

### A. Unavailability of Remedy Against Predecessor

The various doctrines of successorship liability exhibit interesting differences concerning whether the unavailability of a remedy against the predecessor company is a prerequisite for relief against the successor. These variations in outcome reflect, in part, the particular doctrine being applied and in part, the area of law under consideration. There is no clear doctrinal rule available.

The traditional mere continuation remedy appears to be the most severe doctrine. In applying this doctrine to impose successorship liability, the courts have widely held that the unavailability of an effective remedy against the selling company was an essential condition for the imposition of liability against the buyer. The seller must be out of business, without assets, and not amenable to service. A cause of action against the successor must constitute the only available remedy for the injured victim.\textsuperscript{60} For these courts, the

\textsuperscript{56} E.g., \textit{Asher}, 659 So. 2d at 598.

\textsuperscript{57} See cases cited \textit{supra} note 23 (establishing that all the necessary elements must be established for the mere continuation doctrine to apply).


\textsuperscript{59} \textit{Haney}, 279 N.W.2d at 546 (asset acquisition for cash) (stating that requirements in \textit{Turner} are only a guideline); see \textit{Trimper v. Bruno Sherman Corp.}, 436 F. Supp. 349 (E.D. Mich. 1977).

\textsuperscript{60} For application of the mere continuance doctrine see, e.g., \textit{Santa Maria v. Owens-Illinois, Inc.}, 808 F.2d 848, 859 (1st Cir. 1986) (New York law); \textit{Tucker}, 645 F.2d at 623
successorship remedy under the mere continuation doctrine is available only to avoid a systemic failure of the law which would otherwise deny an injured party any remedy against anyone.

The product line decisions are oddly divided. Some courts have restricted application of the product line doctrine even more severely than do the courts applying the mere continuation doctrine. These courts have held that dissolution or other unavailability of the seller must have been caused by the buyer's acquisition rather than by some extraneous cause. Thus, in several cases, the Court of Appeals for the Ninth Circuit, under California law, has restricted application of the product line theory by requiring an essential causal relationship between the unavailability of a remedy and the acquisition by the successor company. Other courts, however, have required only that the asset sale contributed to the destruction of the victim's remedies.

(Missouri law); Travis, 565 F.2d at 443 (Indiana law); Weaver, 562 F. Supp. at 860; McCarthy v. Litton Indus., Inc., 410 Mass. 15, 570 N.E.2d 1008, 1009 (1991); see Diaz, 707 F. Supp. at 100 (New York law). In Diaz, the court imposed liability under the de factor merger doctrine after holding the availability of a remedy against the predecessor prevented application of liability under the mere continuation doctrine. Id. at 97, 100.

For application of the product line doctrine, see, e.g., LaFountain v. Webb Indus. Corp., 951 F.2d 544, 548 (3d Cir. 1991) (Pennsylvania law) (holding that the lack of remedy against predecessor required for product line liability was not established); Conway v. White Trucks, 885 F.2d at 90 (3d Cir. 1989) (Pennsylvania law); Santa Maria, 808 F.2d at 848; Diaz, 707 F. Supp. at 97 (applying New York law to deny liability of second successor based on product line theory where the first successor was available and liable under the mere continuation theory); Ray v. Alad Corp., 560 P.2d 3, 9 (Cal. 1977); Nieves v. Bruno Sherman Corp., 86 N.J. 361, 431 A.2d 826 (1981); In re Thorotrast Cases, 26 Phila. 479 (Pa. C.P. 1994); see also AM. LAW PROD. LIAB., supra note 2, §§ 7.28-.29; cf. Proposed Model Uniform Product Liability Act § 105(C) (1978) (nonmanufacturers strictly liable where manufacturers are beyond jurisdiction, and insolvent, or the plaintiffs otherwise are unable to enforce judgment against them).


62. See, e.g., Nelson 778 F.2d at 537-38 (finding that bankruptcy, not the purchase of the product line, destroyed the plaintiff's remedies and therefore, the product line doctrine is not available); Stewart v. Telex Communications, Inc., 1 Cal. App. 4th 190, 199, 1 Cal. Rptr. 2d 669, 676 (1991) (holding that the corporate purchaser of most of debtor manufacturer's assets is not liable as successor for injuries, absent a causal connection between the purchase and the destruction of remedies against the debtor). But see Kline, 745 F.2d at 1220; Goncalves v. Wire Techn. & Mach., 253 N.J. Super. 327, 601 A.2d 780, 783 (Law Div. Oct. 25, 1991) (purchase of significant portion of the manufacturer's assets in Chapter 7 or Chapter 11 bankruptcy proceedings "causes" destruction of plaintiff's remedies against original manufacturer and the corporate purchaser is liable as successor).

63. Kline, 745 F.2d at 1220; In re Related Asbestos Cases, 578 F. Supp. at 92-93; Nieves, 431 A.2d at 826.
A minority of jurisdictions follow a different course. They have recognized successor liability under the product line doctrine even when the predecessor company was available to be sued by the plaintiff.  

Courts applying the continuity of the enterprise doctrine appear to be the most expansive. Where this doctrine has been accepted, the courts have widely upheld the imposition of liability although a remedy against the predecessor was still available. A few courts, however, still find unavailability of a remedy essential for the application of this doctrine.

The experience in applying successorship doctrines in statutory matters also is mixed. In some statutory areas, including the antidiscrimination statutes, the courts have disagreed on whether the unavailability of a remedy against the predecessor is essential for successorship relief under the statute. However, numerous courts have asserted that the "totality" of the circumstances should govern and that no particular factor, including unavailability of another remedy, is essential.

The area of environmental law is a clear exception. For a successorship remedy under the environmental laws, the totality of the circumstances standard prevails. Most courts have held that the need for implementation of the underlying statutory policies and objectives of CERCLA requires the application of the continuity of the enterprise doctrine, even where not all of the factors specified by Turner for successorship for product liability purposes had been established.

64. For application of the product line doctrine, see, e.g., Trimper, 436 F. Supp. at 350; Haney, 279 N.W.2d at 546 (stating that "[t]he availability of . . . transferor . . . is simply a factor"); Nieves, 431 A.2d at 826 (predecessor and successor jointly liable); Tift v. Forage King Indus., Inc., 108 Wis. 2d 72, 322 N.W.2d 14 (1982); see Phillips, supra note 25, at 928-29. But see Roe, supra note 2, at 1589 n.77.


In addition, the courts imposing successorship liability on cases involving the sale of a division have implicitly rejected dissolution of the transferor as a condition. See Trimper, 436 F. Supp. at 349; Haney, 279 N.W.2d at 544.  


66. E.g., LaFountain, 951 F.2d at 544 (Pennsylvania law).


A final note. Intervening insolvency presents a conflict between the underlying state tort law policies and national bankruptcy policies, raising the issue of federal preemption. This is discussed infra in part XIII.

B. Extent of Transfer and Use of Transferred Assets

The courts also divide over the extent to which the assets of a predecessor's business must have been transferred in order to bring into play the modern continuity of the enterprise and product line doctrines, as well as the traditional de facto merger and mere continuation doctrines.

Some courts, thus, require that substantially all assets must be transferred. In their view, this element is simply another aspect of the requirement that for successorship to occur, an acquisition must eliminate the availability of any remedy from the predecessor. Other courts have held that the transfer of the assets of a single division of the predecessor suffices where the defective product is produced by that division. However, the courts in general are divided on the issue. Similarly, disagreement also has arisen as to whether continuance in the general line of business suffices if the successor no longer produces the precise line of products that caused injury to the plaintiff.

In Louisiana-Pacific Corp. v. ASARCO, Inc., a case arising under CERCLA, the Court of Appeals for the Ninth Circuit held that the successorship doctrine was inapplicable where the transferred assets are integrated into the purchaser's former operations rather than used to conduct a business substantially identical to that conducted by the seller.

C. Assumption of Other Liabilities

The acquiring corporation's assumption of the liabilities of the predecessor corporation "ordinarily necessary for the continuation of normal business operations" is another element emphasized in Turner. Other courts

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70. See Hall, 692 P.2d at 792.
73. 909 F.2d 1260, 1266 (9th Cir. 1990).
74. Turner, 244 N.W.2d at 884.
applying the product line\textsuperscript{75} and the continuity of the enterprise\textsuperscript{76} doctrines for product liability purposes also have referred to this element. No product liability decision, however, appears to have rejected liability simply because this element has not been satisfied. Nor does this element appear to play any role in the consideration of statutory successor liability in statutory law.

D. Absence of an Arm's-Length Transaction

Where the transfer is between related parties or otherwise does not appear to have taken place at arm's length, and particularly where such a transfer does not involve the successor's payment of equivalent consideration for the assets, the bona fides of the transaction become questionable. In the fraudulent transfer area, for example, such characteristics are accepted as badges of fraud.\textsuperscript{77} The presence of such suspicious elements is a powerful factor in furthering the imposition of successor liability and dilutes the impact of doctrinal limitations that might otherwise be decisive.\textsuperscript{78} As one commentator has suggested, application of successorship liability under such circumstances merely offsets the economic advantage of the purchaser's having paid less than fair value for the business.\textsuperscript{79}

Although the questionable circumstances of such "insider" transactions facilitate the imposition of successorship liability, it is clear that such factors are not a requirement for the imposition of successorship liability under the continuity of the enterprise doctrine. The continuity doctrine has received wide application imposing successor liability on unrelated purchasers who have acquired a business in arm's-length transactions involving payment of full value.

E. The Successor Holding Itself Out as the Predecessor's Successor

The successor's actions in holding itself out as the continuation of the predecessor in its operation of the acquired business was one of the four factors listed in Turner as contributing to the continuity of the enterprise

\textsuperscript{75} Asher, 659 So. 2d at 598; Turner v. Wean, 531 So. 2d 827, 827 (Ala. 1988) ("strong indicator" of continuity).

\textsuperscript{76} Trimper, 436 F. Supp. at 350; Andrews, 369 So. 2d at 785-86; Powers, 287 N.W.2d at 412.


\textsuperscript{78} Cf. Ray, 560 P.2d at 3 (product line doctrine).

\textsuperscript{79} See Green, supra note 30, at 906-07.
continuity of the enterprise doctrine. Other decisions have similarly given this element emphasis as an important factor in the imposition of liability. However, no other court has suggested that it is an indispensable factor, and at least one court has expressly held that it is not an essential factor.

VI. THE CONTINUITY OF THE ENTERPRISE DOCTRINE IN COMMON LAW MATTERS GENERALLY

Public concern about the availability of legal remedies to the numerous U.S. consumers and workers injured by dangerously defective products has provided the pressures necessary for the creation of expanded remedies in product liability law. These pressures do not exist in other common law areas, and accordingly, the question arises as to the validity of the application of doctrines that were developed in response to concerns arising from product liability to other common law areas.

The limited success of the continuity of the enterprise doctrine illustrates the general reluctance of the courts to go beyond traditional concepts of remedy. In the last analysis, the courts accepting the doctrine have done so because of the public pressure and the need for recognition of the remedy in order to achieve effective implementation of the underlying policies and objectives of the law in the area. This helps explain the widespread acceptance of the continuity doctrine in areas of statutory law such as the environmental statutes and its emergence in a number of jurisdictions in product liability matters.

Tort matters that do not involve product liability and contract matters are very different. They do not present the same public pressures for creation of a remedy. Thus, numerous courts have stated that the continuity of the enterprise doctrine applies only to product liability issues.

Traditional concepts of successorship apply generally throughout the law, including contract law and tort matters not involving product liability.

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80. Turner, 244 N.W.2d at 882-83.
82. E.g., Pelc, 314 N.W.2d at 619.
83. E.g., City Management, 43 F.3d at 244 (CERCLA); Grand Labs., 32 F.3d at 1283 (misappropriation of trade secrets); Welco Indus., Inc. v. Applied Co., 67 Ohio St. 3d 344, 617 N.E.2d 1129, 1133 (1993) (contract).
This is sound because traditional standards, such as an express or implied assumption of liabilities, or fraud, or merger (or de facto merger), or mere continuation, rest on the successor's own acts, or because the merger statute so contemplates.

In contrast, the modern doctrines that expand successor liability concepts, such as the continuity of the enterprise and product line doctrines, rest not on contract or statutory edict but on the strength of the pressures on the common law to provide a remedy. Among other factors, this turns on the interrelation of the parties in the succeeding conduct of the business and its impact on third parties. Liability, if it exists under these doctrines, rests on status not on contract or sovereign statutory command.

In contract matters, there are no urgent, public considerations pressing the courts to supplement the remedies traditionally available to the plaintiff. Thus, in *Welco Industries, Inc. v. Applied Companies*, the leading case in this area, the Supreme Court of Ohio expressly rejected application of the continuity of the enterprise doctrine to contract matters. Pointing out that the decisions adopting the doctrine (or its sister concept the product line doctrine) had emphasized that they were necessary to do justice in product liability matters. The Ohio court concluded:

> However valid the justifications for expanding the liability of successor corporations in products liability cases, those justifications do not apply here. Unlike tort law, which is guided largely by public policy consideration, contract law looks primarily to the intentions of the parties. . . . To expand the mere-continuation exception to a contractual claim would virtually negate the difference between an asset purchase and a stock purchase . . . [and] unnecessarily chill the marketplace of corporate acquisitions.  

There is only the most limited authority to the contrary. In an alternative holding, a bankruptcy court imposed contract liability under the continuity of the enterprise doctrine on a successor corporation. In affirming on other grounds, the district court expressly stated that it was not ruling on the continuity of the enterprise holding. This limited reference appears to be

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86. *Welco Indus.*, 617 N.E.2d at 1133 (citation omitted). Two dissenting judges would have applied the continuity of the enterprise doctrines to issues of corporate, contract, and tax law without requiring dissolution of the predecessor corporation. *Id.* at 1135-36.


88. *Id.* at 591.
the only decision supporting the conclusion that successorship under these innovative theories extends to contract matters.

By contractual provision, the predecessor and successor may agree that between themselves, the successor shall not be liable for the predecessor's debts. Imposition of liability for contract debts upon the successor through application of the continuity of the enterprise doctrine, at best, gives rise to a third-party beneficiary action by the successor against the predecessor. In some jurisdictions such a remedy is simply unavailable. Even where it may be available, however, the imposition of successor liability in contract matters would move the risk of collectability against the predecessor from the creditor, who bargained to accept it, to the successor, who bargained to shield itself from such risks. What is the justification?

There appear to be none, except where the bona fide nature of the transaction between the predecessor and the successor is suspect. In a contract matter, this would seem to be governed by the fraudulent transfer laws. Except in cases where the predecessor-transferor has not received reasonably equivalent consideration and is insolvent or has a reasonably small capital after the transaction, the creditor has no complaint. In brief, an extension of the doctrine to contract matters is difficult to sustain.

The special liability concepts developed in product liability matters have not been applied in other tort matters. Only one decision has apparently considered the matter. In a recent decision, Grand Laboratories, Inc. v. Midcon Labs, the Court of Appeals for the Sixth Circuit flatly asserted that the continuation of the enterprise doctrine had no application outside of product liability matters. It rejected the doctrine's application in a case involving the alleged misappropriation of trade secrets. Another court of appeals also made the same general assertion in refusing to apply Michigan continuity law for CERCLA successorship purposes.

Although traditional doctrines of successorship liability have been widely applied throughout the law, including common law areas such as contract and tort matters generally, modern expansive doctrines, such as the product line and continuity of the enterprise doctrines, have not been accepted in common law controversies aside from product liability matters. Statutory law is somewhat different. The continuity of the enterprise doctrine has won wide recognition in the implementation of a significant number of federal regulatory programs.

89. Grand Labs., 32 F.3d at 1283 (citing Antle, 758 F.2d at 1458 n.1).
90. Id.
91. City Management, 43 F.3d at 244.
VII. THE CONTINUITY OF THE ENTERPRISE DOCTRINE IN STATUTORY LAW GENERALLY

As noted, traditional successorship doctrines apply throughout statutory law as well as common law. Relying on the traditional successorship, courts have imposed statutory liability on successor corporations in statutory areas as diverse as antitrust law, RICO, and federal customs laws.

The continuity of the enterprise and the product line doctrines are concepts created to deal with the special problems presented by product liability matters. Thus far, these doctrines have played no role at all in statutory matters other than those dealing with environmental problems. However, in the application of labor relations, employment, and antidiscrimination statutes, administrative agencies and the courts have developed the “integrated enterprise” doctrine, which dramatically expands the scope of these regulatory programs. This doctrine, remarkably similar to the continuity of the enterprise doctrine, also has been applied in successorship matters, thereby fully realizing the successorship objectives of the latter doctrine.

VIII. THE CONTINUITY OF THE ENTERPRISE DOCTRINE IN ENVIRONMENTAL LAW

A. Introduction

CERCLA, as amended and supplemented, enacts an extensive regulatory program controlling all aspects of hazardous waste generation, transportation, and disposal. It also establishes a Superfund to finance environmental improvements at hazardous waste sites. Environmental law, particularly the cleanup provisions of CERCLA, has been widely litigated and has become the subject of extensive commentary. Much of the litigation has involved whether and under what circumstances such statutory terms as

"operator" or "owner" may be construed as the basis for the imposition of liability on one affiliated corporation of a corporate group for the statutory obligations of another. Another highly disputed area of more particular relevance is the issue of successor liability.

Courts considering these and other CERCLA issues generally have agreed on the need for an "expansive construction of remedial environmental statutes." They have warned that "[t]he statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided." Thus, there is general agreement on the need for the "broad" and "liberal" interpretation of the statute. This philosophical outlook has encouraged the courts to accept an expansive view toward the role of successorship in the implementation of the underlying objectives of environmental laws.

B. Choice of Law

Notwithstanding the draconian features of the CERCLA program, the courts have widely agreed that the statute contemplates successor liability. Application of successorship liability with reliance on traditional successorship doctrines is widespread. In addition, numerous cases have upheld

97. See generally BLUMBERG, GENERAL STATUTORY LAW, supra note 40, at ch. 18.
101. See, e.g., Schiavone v. Pearce, 79 F.3d 248, 249 (2d Cir. 1996); Carolina Transformer, 978 F.2d at 837-38 (stating that "since CERCLA is a remedial statute, its provisions should be construed broadly to avoid frustrating the legislative purpose"); Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); State v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985).
CERCLA successorship liability under the more controversial continuity of the enterprise doctrine.  

Choice of law to determine successor liability becomes the threshold issue, an issue that is often crucial in determining the outcome of the litigation. Although there is still some vigorous disagreement, the courts generally agree that federal common law, not state law, governs CERCLA successorship issues. These courts have agreed that the need for "broad" implementation of the statute, emphasized in CERCLA decisions, requires the development of a uniform, federal common law to control the application of statutory liability in cases of successorship. Thus, one court has termed CERCLA a "national solution to a nationwide problem ... [requiring] a uniform federal rule for liability." The Court of Appeals for the Sixth Circuit disagrees and continues to hold that state law, not federal law, governs successorship issues. Some isolated courts have followed suit.

The emphasis on federal law almost inevitably means that the underlying objectives and policies of CERCLA will play a central role in decisions on successorship as well as on underlying liability issues, thereby creating significant pressure for an expansive construction of the outer bounds of statutory liability. As one court stated:

In CERCLA, courts have fashioned their own doctrines to impose liability on successor corporations in order to overcome the statute's shortcomings in addressing such issue. These doctrines were created in order to prevent corporations from evading liability through

103. See cases cited infra notes 115-17, 120-23.
106. E.g., City Management, 43 F.3d at 250 (applying Michigan law); Anspec, 922 F.2d at 1248.
changes of ownership when there is a buy-out, a merger or asset purchase. ¹⁰⁸

In an early statement of policy, the Environmental Protection Agency (EPA) made its position clear, calling for the imposition of successor liability on purchasers who conduct substantially the same business operations as the seller, without regard to the doctrinal requirements applicable in other legal areas. ¹⁰⁹ In this favorable context for decision, courts applying federal common law concepts have most often gone on to accept the continuity of the enterprise doctrine and have substantially widened the scope of CERCLA successorship liability.

Choice of state law leads to a very different result, depending on whether traditional doctrines or the continuity of the enterprise doctrine is involved. The state courts generally have accepted the traditional successorship doctrines. Application of state law to CERCLA matters, accordingly, does not present a major issue so long as the requirements of traditional successorship doctrines can be satisfied. ¹¹⁰ However, where traditional doctrines are inapplicable, and CERCLA successorship liability rests, if at all, on the application of the continuity of the enterprise doctrine, choice of law may be crucial. Continuity of the enterprise is a minority doctrine in state law, even in product liability matters. Thus, in most cases, choice of state law automatically prevents the application of the continuity doctrine as a basis for imposition of liability in contrast to choice of federal common law, which widely recognizes the innovative doctrine. ¹¹¹

There is a further hurdle for courts that look to state law. Even if the state in question is one of the few applying the continuity of the enterprise doctrine for product liability purposes so that the state law barriers to application of the doctrine do not arise, an obstacle remains. The court must go further and decide whether under such state law, the continuity doctrine is confined to product liability matters, or whether it also has broader application to matters such as CERCLA. If the court concludes that even where accepted, the continuity doctrine is restricted to product liability matters, choice of state law effectively bars the imposition of CERCLA


¹⁰⁹. See Smith Land, 851 F.2d at 91 n.2 (citing COURTNEY M. PRICE, EPA, MEMO: LIABILITY OF CORPORATE SHAREHOLDERS AND SUCCESSOR CORPORATIONS UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (June 13, 1984)).

¹¹⁰. See Anspec, 922 F.2d at 1245 (finding that “universally accepted principle[s] of private corporate” successorship law are applicable to CERCLA).

successor liability. The decision in *City Management Corp. v. U.S. Chemical Co.* illustrates the nigh-impenetrable barriers of state law. In *City Management*, the Court of Appeals for the Sixth Circuit, applying the law of Michigan, which is one of the leading jurisdictions applying the continuity of the enterprise doctrine, held that its use in Michigan was limited to product liability matters and, accordingly, that it was unavailable for CERCLA purposes.\(^{112}\)

### C. Successorship Liability

In business transfers involving asset purchases in which an unrelated purchaser neither has continuity of ownership with the seller nor expressly assumes CERCLA liabilities, successor liability for CERCLA purposes must rest, if available at all, on the continuity of the enterprise doctrine.\(^{113}\) Numerous cases have attempted to deal with this issue. As mentioned, with the EPA early advocating enterprise liability, this issue is highly controversial and vigorously litigated. The courts are divided, and the ultimate outcome is not entirely clear.

Unlike the antidiscrimination and employment statutes, in which the courts have uniformly adopted the enterprise principles applied in the labor relations area through the "integrated enterprise" doctrine, there is no long-established jurisprudence in a related statute that provides guidance for the courts in environmental matters. As courts have recognized, labor law doctrines are irrelevant in the application of successor liability for environmental or other nonlabor purposes. The statutory objectives are very different, and the labor law doctrines give central place to factors such as centralized control of labor relation matters, which are wholly irrelevant for environmental and other nonlabor statutory concerns.\(^{114}\)

Where courts have applied federal common law, they have generally gone on to recognize the continuity of the enterprise doctrine and to invoke it in support of the imposition of statutory liability on purchasers of businesses with contaminated sites. The Courts of Appeal for the Fourth and Eighth Circuits have approved the doctrine.\(^{115}\) Numerous district

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113. The other nontraditional successorship doctrine, that is, the product line doctrine, has ceased to attract additional converts. For a lone exception under New Jersey law, see Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (1980) (N.J. Spill Act) (alternate holding).

114. *See Light*, *supra* note 98, at 80-83 (analyzing precedents under federal labor law).

115. *Mexico Feed & Seed*, 980 F.2d at 487; *Carolina Transformer*, 978 F.2d at 837.

Although in *Smith Land*, 851 F.2d at 86, the Court of Appeals of the Third Circuit approved the application of successorship as a basis for CERCLA liability, it has yet to act on the continuity of the enterprise theory. *See Stearns & Foster Bedding Co. v. Franklin*
In the process, the continuity of the enterprise doctrine has taken on somewhat different dimensions for purposes of environmental law than its formulation in product liability law, from where the doctrine emerged and from which it has been borrowed. In the environmental area, "the continuity of the enterprise is a more eclectic doctrine" resting on "the totality of the circumstances," whereas in product liability law, it has well-defined doctrinal requirements.

For example, when the Michigan Supreme Court first formulated the continuity doctrine for product liability purposes, it carefully identified four factors required for the imposition of liability. In addition to continuity of the business, they included the liquidation and dissolution of the seller; the purchaser's assumption of the "obligations of the seller ordinarily necessary for [conduct] . . . of the normal business operations"; and the purchaser holding itself out as the "effective continuation of the seller."

Although some subsequent courts have viewed these as guidelines and have applied a totality standard in product liability cases, not all have done so.

The totality of the circumstances standard as employed in the CERCLA decisions is quite different. In imposing CERCLA successor liability under the continuity of the enterprise doctrine in Carolina Transformer, the Court of Appeals for the Fourth Circuit identified the various factors to be considered. These included: the same employees, supervisory personnel, production facilities in the same location, product, and trade name; continuity of assets; continuity of general business operations; and the successor holding itself out as the continuation of the previous enterprise.

In Mexico Feed & Seed, the Court of Appeals for the Eighth Circuit similarly upheld the continuity of the enterprise standard for CERCLA successorship purposes. While accepting the factors enumerated in Carolina Transformer, the Mexico Feed & Seed decision included additional factors: whether the case involved any effort to continue the business while avoiding

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118. Turner, 244 N.W.2d at 883-84.

119. Carolina Transformer, 978 F.2d at 838.

120. Id.; see Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175 (5th Cir. 1985).
existing or potential environmental liability; whether the purchaser had any knowledge of CERCLA liabilities; and whether there were substantial ties between the purchasing and selling corporations.\textsuperscript{121}

The factors specified in Carolina Transformer and Mexico Feed \& Seed are much more comprehensive and detailed than the factors specified for product liability purposes by Turner. Moreover, unlike in Turner, not all must be established for CERCLA successorship liability.\textsuperscript{122} For Carolina Transformer and Mexico Feed \& Seed, as well as for most of the lower courts, the totality standard prevails. The readiness of the courts to apply a totality standard for CERCLA purposes stands in contrast to their application of some of the traditional doctrines in other areas of the law where all elements of those doctrines must be established in most jurisdictions.\textsuperscript{123}

Although it superficially appears that an impressive weight of authority supports application of the continuity of the enterprise doctrine for CERCLA matters, this may be an illusion. The supporting authority is, in fact, weaker than it appears. Some of the courts applying the concept have relied, at least in part, on other features such as a linkage between the successor and predecessor companies,\textsuperscript{124} which suggests that traditional mere continuation might have been applied instead. Other courts adopting the continuity doctrine have conditioned it upon the successor's knowledge of potential CERCLA liability.\textsuperscript{125} Still other statements are no more than dictum with the courts expressing support for application of the doctrine, but for decisional purposes, finding the doctrine inapplicable on the facts of the case.\textsuperscript{126}

A minority of the courts have rejected the use of the continuity of the enterprise doctrine for CERCLA purposes. These include the Courts of

\textsuperscript{121} 980 F.2d at 489-90.
\textsuperscript{122} E.g., Peirce, 1995 U.S. Dist. LEXIS 4042, at *8-9; Atlantic Richfield, 847 F. Supp. at 1287.
\textsuperscript{123} Cf. In re Acushnet River, 712 F. Supp. at 1015 ("No one of these factors is either necessary or sufficient."); and N. Storonske Cooperage, 174 B.R. at 382; with State of New York v. Panex Indus., Inc., No. 94-CV-04000(H), 1996 U.S. Dist. LEXIS 9418, at *28 (W.D.N.Y. June 21, 1996) (stating that all factors are required).
\textsuperscript{124} E.g., Carolina Transformer, 978 F.2d at 840-41; N. Storonske Cooperage, 174 B.R. at 366.
Appeal for the Sixth Circuit, applying Michigan law,\textsuperscript{127} and a number of district courts.\textsuperscript{128} Some courts applying state law have reached the same conclusion.\textsuperscript{129} After noting that the continuity of the enterprise doctrine is a minority view in product liability matters, some of these court decisions, such as the Sixth Circuit decision in \textit{City Management}, have emphasized that even where accepted, it is applicable only to product liability matters and accordingly, inapplicable to CERCLA successorship matters.\textsuperscript{130}

\textit{City Management} arose in Michigan, a leading state in applying the continuity of the enterprise doctrine. The Court of Appeals for the Sixth Circuit held that successor liability under CERCLA was determined by state corporation law, not federal common law, and accordingly held that Michigan law, not federal common law, governed CERCLA successorship liability. However, it went on to hold that the Michigan continuity doctrine was restricted to product liability.\textsuperscript{131} The court relied on the statements in \textit{Turner}, the Michigan decision that had introduced the doctrine, emphasizing the product liability dimensions of the case\textsuperscript{132} and the fact that other Michigan decisions had thus far applied the doctrine only in product liability cases.\textsuperscript{133} Although couched in terms of Michigan law, the court left no doubt of its view that the continuity of the enterprise doctrine was inapplicable to CERCLA matters, even if federal common law had been applicable. It also relied on decisions outside of Michigan to support its result. In so doing, the court rejected the decision of its lower court and the decisions of other lower courts in its circuit that had held the continuity of the enterprise standard applicable to CERCLA successor liability, and it termed them "erroneous."\textsuperscript{134}

As illustrated by \textit{City Management}, the choice of state law is generally decisive. As noted, only a few states have adopted the continuity of the enterprise doctrine for product liability purposes. Further, as \textit{City Management} demonstrates, even in these states accepting the doctrine for product

\begin{itemize}
\item \textsuperscript{127} \textit{City Management}, 43 F.3d at 244 (Michigan law).
\item \textsuperscript{130} \textit{City Management}, 43 F.3d at 244. \textit{But cf.} \textit{In re Catfish Antitrust Litig.}, 908 F. Supp. at 412 (Alabama continuity doctrine applied to antitrust).
\item \textsuperscript{131} \textit{City Management}, 43 F.3d at 244; see \textit{Anspec}, 922 F.2d at 1247.
\item \textsuperscript{132} \textit{Turner}, 244 N.W.2d at 878-84.
\item \textsuperscript{133} \textit{See City Management}, 43 F.3d at 252-53; \textit{Turner}, 244 N.W.2d at 877.
\item \textsuperscript{134} \textit{City Management}, 43 F.3d at 252 n.12 (stating that \textit{Charter Township of Oshtemo}, 876 F. Supp. 934, and \textit{Distler}, 741 F. Supp. at 643, were decided erroneously).
\end{itemize}
liability purposes, the state doctrine may be construed to apply to product liability matters only. In either event, successor liability under CERCLA becomes feasible in such jurisdictions only under the traditional successorship doctrines.

D. Essential Elements for Application Under CERCLA

Notwithstanding the totality of the circumstances standard widely adopted in the CERCLA cases, some courts have identified certain elements as essential for application of the continuity doctrine. These include notice to the successor of potential statutory liability and attempted avoidance of liability; the absence of a remedy against the predecessor; the extent of the transferred assets; and the use of the transferred assets in the continued conduct of the predecessor’s business.

Notice. The need for notice of potential CERCLA liability has been characterized as an essential element by a number of courts. One court refused to apply the continuation of the enterprise doctrine, notwithstanding continuity of location, employees, and customers, where there had been no hint of knowledge of CERCLA liability or proof of any intent to avoid it. Another court concluded that successor liability “is rarely found” when a purchaser has no knowledge of potential CERCLA liability. Other courts have not gone as far, concluding that although this factor is relevant, it is not essential.

Absence of other remedy. A number of courts have emphasized that imposition of successor liability under the continuity of the enterprise doctrine is appropriate only where a remedy against the predecessor is not available. Others have expressly rejected this contention asserting that it would gravely weaken the implementation of the CERCLA statutory remedy.

Assets transferred and their use. Some CERCLA cases have contended that the continuity doctrine is applicable only when substantially all the assets of the predecessor have been transferred to the alleged successor.

135. E.g., Louisiana-Pacific, 909 F.2d at 1265-66; ELF, 908 F. Supp. at 279; Vermont Am., 871 F. Supp. at 318; Anderson, 1993 U.S. Dist. LEXIS 4846, at *23; Atlas Minerals & Chems., 824 F. Supp. at 50; see Mexico Feed & Seed, 980 F.2d. at 489.
137. See ELF, 908 F. Supp. at 277.
139. E.g., Diaz, 707 F. Supp. at 97; cf. City Management, 43 F.3d at 244.
140. E.g., N. Storonske Cooperage, 174 B.R. at 384.
However, for common law purposes, some courts have been ready to look at the business in terms of the various divisions through which it conducts its business and have concluded that transfer of all the assets of a particular division would suffice. Other courts have refused to do so in cases where the predecessor not only retained a significant part of its preexisting assets, but also continued in operation rather than liquidating and dissolving.

The use to which assets are put after acquisition may constitute still another limitation on the use of the continuity of the enterprise doctrine. One court has refused to apply the doctrine where the assets acquired were not employed by the acquiring company as an integrated whole for the continued operation of the business formerly conducted by its predecessor.

Arm's-length nature of the transaction. Where the sale of the business is at fair value, determined in an arm's-length negotiation, courts find it more difficult to impose successorship liability. However, where the transaction is between related parties and the successor acquires the business at less than fair value, the courts are more ready to impose liability.

IX. THE CONTINUITY OF THE ENTERPRISE DOCTRINE IN LABOR RELATIONS, ANTIDISCRIMINATION, AND EMPLOYMENT LAW

A. Introduction

Under doctrines such as the integrated enterprise doctrine, used for determining a "single employer," and the labor "alter ego" doctrine, formulated by the NLRB and accepted by the courts, the regulation of labor relations under the NLRA is governed by enterprise principles. Although
the NLRB plays no role in the other federal employment statutes, courts generally have applied the same enterprise principles that prevail under the NLRA to the administration of other federal employment regulatory programs. These include such matters as employment discrimination, wages and hours, equal pay, occupational safety, and shutdown and closing notice.\textsuperscript{147} Except for labor contract litigation under the Taft-Hartley Act, enterprise principles, generally prevail throughout U.S. federal labor and employment law. This broad acceptance of enterprise principles also includes successor liability.\textsuperscript{148}

In the labor and employment area, successorship rests on the continuity of the enterprise, with successorship concepts expressed in terms of the enterprise doctrines developed in this area, such as the integrated enterprise doctrine and the special labor law alter ego doctrine.\textsuperscript{149} Although formulated somewhat differently for labor regulatory purposes, the integrated enterprise doctrine, closely resembles the continuity of the enterprise doctrine as applied in product liability law and in statutory areas such as environmental law.

B. Labor Relations Law

Forty years ago, the NLRB formulated the “integrated enterprise” standard for determining when separate concerns would be treated as a “single employer” under the NLRA regulatory program for purposes such as jurisdiction, determination of the bargaining unit, the existence of a duty to bargain, and secondary boycotts. Application of the standard depends on four factors: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. While none of the factors is essential, it is plain that integrated operations and centralized control of labor relations are the most important. After its formulation by the NRLB, the doctrine was readily accepted by the

\textsuperscript{147} These federal statutes will be referred to collectively as the “labor and employment” statutes.

\textsuperscript{148} See Steinbach v. Hubbard, 51 F.3d 843, 845 (9th Cir. 1995) (referring to the NRLB integrated enterprise standard and stating that the “federal common law successorship doctrine . . . now extends to almost every employment law statute”); see also BLUMBERG, GENERAL STATUTORY LAW, supra note 40, \S\S 13.02, 13.03, 13.08-.10, 13.13.

\textsuperscript{149} The labor law alter ego doctrine is very different from its counterpart in corporation law. See BLUMBERG, GENERAL STATUTORY LAW, supra note 40, \S 13.13.
Supreme Court, and it has governed labor law ever since.\textsuperscript{150}

In its first stage of development when it resembled the mere continuation doctrine, the integrated enterprise standard included successorship liability where the companies were interrelated. Early on, the federal courts inquired "[w]hether there was . . . a true change of ownership . . . or merely a disguised continuance of the old employer."\textsuperscript{151} Liability was imposed where there was "substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership."\textsuperscript{152} Under such circumstances, affiliated or related successor entities acquiring a business or utilizing the labor force, equipment, or other elements of the predecessor company became liable for the labor obligations of the predecessor, including obligations under preexisting collective bargaining agreements or obligations to bargain.\textsuperscript{153}

The application of enterprise principles in labor successorship cases was reinforced by the development of the closely related labor doctrine of alter ego liability. While this doctrine substantially overlaps the integrated enterprise standard, the courts apply it only where the successor has been found to represent an attempt to evade the obligations of an affiliated predecessor under the labor acts.\textsuperscript{154} Unlike the integrated enterprise standard, it depends in significant part on the predecessor's own conduct and motivation and therefore, does not present the same interesting dependence on status and relational law as that presented by the integrated enterprise and continuity of the enterprise doctrines.

The imposition of successorship liability in reliance on such enterprise principles has not been confined to matters arising under the NLRA but also has arisen in actions under section 301 of the LMRA to enforce a predecessor's obligation to make pension fund contributions as contained in a collective bargaining agreement.\textsuperscript{155} Where there had been no change in


\textsuperscript{151} Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942); see NLRB v. Herman Bros. Pet Supply, Inc. 325 F.2d 68, 69 (6th Cir. 1963).

\textsuperscript{152} Cf. Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419 (2d Cir. 1984).


\textsuperscript{154} E.g., Southport Petroleum, 315 U.S. at 106; Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982); see BLUMBERG, GENERAL STATUTORY LAW, supra note 40, § 13.13.

ownership and the successor "controlled the same assets and conducted the same businesses from the same facilities . . . [and where] [t]he same employees were employed in the same jobs and under the same working conditions," Robbins v. Newman held a successor-controlled corporation liable for the pension fund obligations of its predecessor controlling shareholder.156 Without inquiry into such subjective factors as intent to evade, the court imposed liability in reliance on successorship doctrines derived from labor law generally.157 A case under the Employee Retirement Insurance Security Act (ERISA) has similarly imposed pension fund contribution liability on a successor affiliate.158

With the emphatic recognition of successor liability for labor relations law purposes in cases involving affiliated corporations or other continuity of ownership, the enterprise principles of "single employer" and "integrated enterprise" were soon extended to include transfers of businesses that did not involve any continuity of proprietary interest.159 This is its second stage of development, closely resembling the continuity of the enterprise doctrine. Thus, in a leading case, NLRB v. Burns International Security Services,160 the Supreme Court upheld successor liability under the NLRA for collective bargaining purposes where an unrelated successor acquired a business in the market without continuity of ownership.

Successorship liability for unrelated successors, however, differs in one important respect from liability for affiliated successors. Where there is no continuity of ownership, the courts impose an obligation to bargain, but do not bind the successor to the terms of the predecessor's labor agreement, as is the case for an affiliated successor.161

The integrated enterprise doctrine as applied for labor relations purposes, including successor liability, has been uniformly extended to other areas of federal labor and employment law.162 Although the labor doctrines have been used as analogies both in product liability163 and CERCLA decisions,
they are not very helpful because they relate so intimately to the particular problems presented by the collective bargaining process and the federal labor policies seeking to encourage and reinforce it.\textsuperscript{164}

C. \textit{Antidiscrimination Employment Law}

Employment antidiscrimination cases under Title VII of the Civil Rights Act of 1964 and the Age Discrimination Enforcement Act have followed labor relations cases in determining successorship liability for a predecessor's discriminatory acts when a company, affiliated or unaffiliated, acquires a business or utilizes the labor force, equipment, or other elements of another affiliate within the group or of an unrelated party.\textsuperscript{165} Successor liability under this theory also has been applied under the antidiscrimination statutes against trade unions in their own role as employers.\textsuperscript{166}

Successorship liability under the antidiscrimination statutes depends on factors such as

1) whether the successor company had notice of the charge [of discriminatory conduct], 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.\textsuperscript{167}

These factors comprise the totality of the circumstances standard in this area of law.\textsuperscript{168}

\textsuperscript{164} See Light, supra note 98, at 80-83.
\textsuperscript{165} E.g., Criswell, 868 F.2d at 1095; Musikiwamba v. Essi, Inc., 760 F.2d 740 (7th Cir. 1985); Bates v. Pacific Maritime Ass'n, 744 F.2d 705 (9th Cir. 1984); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1090 (6th Cir. 1974) (finding cases applying "successor doctrine to remedy unfair labor practices are applicable equally to remedy unfair employment practices in violation of Title VII"); EEOC v. Local 638, 700 F. Supp. 739 (S.D.N.Y. 1988); see also cases cited infra notes 169-171.
\textsuperscript{167} MacMillan Bloedel Containers, 503 F.2d at 1094 (citations omitted).
\textsuperscript{168} See Slack v. Havens, 522 F.2d 1091, 1094-95 (9th Cir. 1975); MacMillan Bloedel Containers, 503 F.2d at 1094; cf. Rabidue v. Osceola Beef Co., 805 F.2d 611, 616 (6th Cir. 1986); Wiggins v. Spector Freight Sys., Inc., 583 F.2d 882 (6th Cir. 1978).
Where such factors are present, the courts have upheld application of the continuity doctrine and imposition of successor statutory liability even where the successor was an unrelated concern without continuity of ownership.\textsuperscript{169} Courts have agreed that a successor employer may be bound by a consent decree in an employment antidiscrimination action against its predecessor where the successor used the same plant, work force, supervisory personnel, and machinery, notwithstanding the absence of any continuity of ownership.\textsuperscript{170}

D. Miscellaneous Employment Statutes

The successorship concepts adopted for purposes of the labor relations laws have been widely applied to areas of federal labor employment law other than labor relations and antidiscrimination. These areas include the Fair Labor Standards Act of 1938 (FLSA), governing wages and hours,\textsuperscript{171} the Equal Pay Act,\textsuperscript{172} ERISA,\textsuperscript{173} and the Mine Safety & Health Act.\textsuperscript{174} Notwithstanding the variations in statutory objectives, no discernable difference in application of the underlying doctrine is apparent as one moves from one labor employment statute to another, except in two respects. Application in the antidiscrimination area appears restricted to cases where the successor has some notice of the liability and where no remedy is available against the predecessor. Cases under the other statutes also have been concerned with these elements.\textsuperscript{175}

E. Restrictions on Imposition of Successorship Liability Under the Labor Laws

In the labor area, the courts have vigorously applied concepts of successorship liability in implementation of the "national policies underlying

\textsuperscript{169} E.g., Criswell, 868 F.2d at 1095; see Baker, 6 F.3d at 636-39.

\textsuperscript{170} See Bates, 744 F.2d at 709-10; Huguley v. General Motors Corp., 67 F.3d 129, 133 (6th Cir. 1995) (except where precluded by contractual terms of the consent decree).


\textsuperscript{172} 29 U.S.C. § 206(d)(1); e.g., Rabidue, 805 F.2d at 617.


\textsuperscript{174} Secretary of Labor v. Mullins, 888 F.3d 1448 (D.C. Cir. 1989).

\textsuperscript{175} Compare environmental law decisions cited supra notes 136-41.
the statute at issue." However, in viewing the doctrine as one arising in equity, courts have made an effort to balance this important factor with a recognition that "fairness is a prime consideration" in the application of the doctrine. Thus, however widely applied in the labor context, the outer boundary of successorship liability is not without restrictions. Some courts imposing successor liability for violations of labor or employment statutes on an unrelated successor have introduced significant limitations on application of the doctrine. In Criswell v. Delta Air Lines, for example, the Court of Appeals for the Ninth Circuit held that successorship liability under the antidiscrimination laws depended on the existence of two elements in addition to the orthodox aspects of the typical continued enterprise reviewed above: notice on the part of the successor of the predecessor's obligations; and the inability of the plaintiff to obtain relief directly from the predecessor.

Lack of availability of remedy against the predecessor. Like the Ninth Circuit Court of Appeals in Criswell, the Seventh Circuit Court of Appeals held in Musikiwamba v. ESSI, Inc. that "it would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser when the predecessor is fully capable of providing relief." Notice to successor of existence of claim. As in Criswell, other courts have held that successorship liability is inapplicable where no charges of discrimination were pending on acquisition, and the acquiring company was unaware of outstanding grievances. All courts, however, do not agree. At least one court has concluded that although notice is a factor to be considered, it is not essential. These decisions indicate that successorship liability in antidiscrimination matters that involve unrelated corporations has assumed a significantly more restrictive form than it has in environmental matters, and it may be emerging as more restrictive in other labor areas.

176. Steinbach, 51 F.3d at 846; cf. Howard Johnson Co. v. Detroit Local Jt. Exec. Bd. Hotel & Restaurant Employees & Bartenders Int'l Union, 417 U.S. 249 (1974). The Court stated that the question of successorship liability needed to be balanced with the interests of the parties. Id. at 262-63 n.9.
177. Steinbach, 51 F.3d at 846 (quoting Criswell, 868 F.2d at 1094).
178. Criswell, 868 F.2d at 1094.
179. Id.; see also Steinbach, 51 F.3d at 843.
180. Criswell, 868 F.2d at 1094; see also Steinbach, 51 F.3d at 843; Musikiwamba, 760 F.2d at 750; Bates, 744 F.2d at 709-10.
182. E.g., Rabidue, 805 F.2d at 616; Bates, 744 F.2d at 709-10 (Title VII); Wiggins, 583 F.2d at 886.
Whether other courts will adopt such a restrictive policy for labor purposes remains to be seen.

X. THE CONTINUITY OF THE ENTERPRISE DOCTRINE IN OTHER STATUTORY LAW

Traditional successorship doctrines have been routinely applied to impose liability under statutes other than those in the labor employment and environmental areas. However, the imposition of successor liability under the continuity of the enterprise doctrine in these other statutory areas has been relatively infrequent. Examples may be found, however, in federal statutory areas such as the antitrust acts, RICO, and the tax laws, as well as under related state statutes.

Notwithstanding the lack of any continuity of ownership, a federal district court, applying Alabama law, imposed successor liability for the predecessor’s pre-acquisition violations of the Clayton Act, resting on the continuity of the enterprise doctrine.\(^\text{184}\) It did so even though “there is no evidence” in the purchase contract that the successor “expressly agreed” to assume the liability of the predecessor that the plaintiffs sought.\(^\text{185}\) Instead of regarding the issue as one of successorship for purposes of enforcement of a federal statute, the court regarded the issue as one of contract law and turned to state law, in this case Alabama law.\(^\text{186}\) Like Michigan, Alabama is one of a minority of jurisdictions applying the continuity of the enterprise doctrine in product liability cases. After reviewing Alabama decisions that had applied the continuity of the enterprise doctrine in product liability matters, including decisions with an absence of continuity of ownership, the court held that the Alabama continuity of the enterprise law also applied to antitrust litigation.\(^\text{187}\) Accordingly, the court upheld the complaint against the successor under the Sherman Act.\(^\text{188}\)

Successor liability has been held applicable in the enforcement of RICO.\(^\text{189}\) However, one court has observed that “successor liability should be found only sparingly and in extreme cases due to the requirement that RICO liability only attaches to knowing affirmatively willing participants.”\(^\text{190}\)

The concept of successorship based on relational principles plays an

\(^{184}\text{ In re Catfish Antitrust Litig.}, 908 F. Supp. at 412.  
^{185}\text{ Id.}  
^{186}\text{ Id. at 411-13.}  
^{187}\text{ Id. at 413.}  
^{188}\text{ Id. at 404-05.}  
^{190}\text{ Rodriguez, 777 F. Supp. at 1064 (citation omitted).}
important role in tax law where it provides essential flexibility in the implementation of the objectives of the revenue statutes, as well as preventing evasion through corporate manipulation. Successorship doctrines are particularly prominent in areas of tax law such as tax loss carryovers. In *Libson Shops v. Koehler*, the Supreme Court rejected a formalistic approach and upheld the use by a successor corporation of the tax loss carryovers of its sixteen predecessors.  

In the absence of statutory provision, the Court said that offset was possible "only to the extent that this [offsetting] income is derived from the operation of substantially the same business." Numerous states faced with the same problem have similarly recognized successorship in their own construction of comparable provisions in their tax laws. In these cases, the successors were surviving corporations that preserved the same corporate identity after statutory merger; there was continuity of ownership as well.

Section 6901 of the Internal Revenue Code provides for the assessment and collection of income tax liabilities from transferees of delinquent taxpayers. The Regulations define transferees to include "the successor of a corporation." However, application of these provisions has been limited to cases involving transfers for less than a fair consideration, which failed to leave equivalent value available for payment of the tax liability. In any event, the IRS must exhaust its remedies against the taxpayer before it may pursue the transferee, except where the taxpayer is insolvent or otherwise unable to satisfy the liability. Although section 6901 has been held applicable to the surviving corporation after a statutory merger or consolidation, it does not appear to have been applied to other types of successorship, traditional or innovational.

Maine is one state that has expanded traditional concepts of successor liability in statutory construction. A Maine statute in the employment area provides for successorship liability relying on concepts of enterprise liability.

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196. *E.g.*, Reid Ice Cream Corp. v. Commissioner, 59 F.2d 189 (2d Cir. 1932).
197. *E.g.*, Wire Wheel Corp. v. Commissioner, 16 B.T.A. 737, aff'd 46 F.2d 1013 (2d Cir. 1931).
198. *E.g.*, A.D. Saenger, 38 B.T.A. 1295 (1932); see Oswego Falls Corp., 26 B.T.A. 60, aff'd, 71 F.2d 673 (2d Cir. 1934) (enforcing direct liability while deferring transferee liability for proof of uncollectability from primary taxpayer).
The Maine Employment Security Law, dealing with unemployment insurance, expressly provides for successorship statutory liability on the acquisition of an “organization, trade or business” without reference to any continuity of ownership. The Maine Supreme Court held that the successorship provision applied when the business had been acquired “in toto” even though goodwill had not been transferred and the business had been integrated into the successor’s business, not conducted separately. The Maine Supreme Court also has applied a continuity of the enterprise standard in implementation of the unemployment provisions even though the alleged successor did not acquire the business directly from the predecessor.

XI. SUCCESSORSHIP AS SUPPORTING AMENABILITY TO JURISDICTION

A. Successorship and Jurisdiction

Numerous federal courts, imposing successor liability under the traditional doctrines, have stated that successorship status also may serve as a basis for jurisdictional purposes and satisfy constitutional standards. These situations have typically arisen in cases involving diversity of citizenship jurisdiction with only an isolated decision involving a federal question. State courts similarly have relied on successorship in finding

199. ME. REV. STAT. ANN. tit. 26, §§ 1043(9)(B), 1228 (West 1996).
201. Janet M. Sing, Inc. v. Maine Dep’t of Labor, 492 A.2d 892, 895 (Me. 1985).

203. See Mesiti, 739 F. Supp. at 57 for an exception resting on federal question jurisdiction.
a defendant amenable to their jurisdiction.\textsuperscript{204}

Relying on traditional successorship doctrines, these courts have upheld the propriety of asserting \textit{in personam} jurisdiction over a successor without other contacts with the jurisdiction in reliance on the contacts of the predecessor to the jurisdiction. They have done so in cases involving product liability,\textsuperscript{205} tort (other than product liability),\textsuperscript{206} contracts,\textsuperscript{207} federal environmental law,\textsuperscript{208} and state statutory law.\textsuperscript{209} They also have done so in successorship cases resting on assumption of liabilities\textsuperscript{210} or statutory merger.\textsuperscript{211} They have indicated a readiness to do so in successorship cases involving the de facto merger\textsuperscript{212} and the mere continuation theory,\textsuperscript{213} although thus far no case appears to have so held. The doctrine has not yet been applied in cases involving either the continuity of the enterprise or product line doctrines. While much of the authority is only dicta, a significant number of the cases dealing with successorship arising from assumption of liabilities or statutory merger have, in fact, held that successorship will support jurisdiction.\textsuperscript{214}

Whatever the nature of successorship doctrine, many courts seem to have


\textsuperscript{205} E.g., Williams, 927 F.2d at 1128 (Oklahoma law); Neagos, 791 F. Supp. at 682; Crawford Harbor Assocs., 661 F. Supp. at 880 (Virginia law); Cole, 562 F. Supp. at 179; Bruns, 204 Cal. App. 3d at 876; BCE Dev. Properties, 538 So. 2d at 529; Armour Handcrafts, 99 A.D.2d at 521.

\textsuperscript{206} E.g., City of Richmond, 918 F.2d at 438 (Virginia law); Duris, 684 F.2d at 352; Mesiti, 739 F. Supp. at 57; Goffe, 605 F. Supp. at 1154.

\textsuperscript{207} E.g., Inter-Americas Ins., 757 F. Supp. at 1213; Goffe, 605 F. Supp. at 1154; see Explosives Corp., 615 F. Supp. at 364; Maryland Nat'l Bank, 240 F. Supp. at 777; Armour Handcrafts, 99 A.D.2d at 521.

\textsuperscript{208} E.g., Mesiti, 739 F. Supp. at 57.

\textsuperscript{209} E.g., Bowers, 690 F. Supp. at 349 (Pennsylvania Wage Payment and Collection Act).

\textsuperscript{210} E.g., City of Richmond, 918 F.2d at 438 (Virginia law); Explosives Corp., 615 F. Supp. at 364; Bruns, 204 Cal. App. 3d at 876; see also Inter-Americas Ins., 757 F. Supp. at 1213; Bowers, 690 F. Supp. at 349 (successorship available under traditional doctrines generally).

\textsuperscript{211} E.g., Duris, 684 F.2d at 352; Inter-Americas Ins., 757 F. Supp. at 1213; Bowers, 690 F. Supp. at 349 (successorship available under traditional doctrines generally); Goffe, 605 F. Supp. at 1154; Cole, 562 F. Supp. at 179; Maryland Nat'l Bank, 240 F. Supp. at 777; Armour Handcrafts, 99 A.D.2d at 521.

\textsuperscript{212} See Inter-Americas Ins., 757 F. Supp. at 1213; Bowers, 690 F. Supp. at 349 (successorship available under traditional doctrines generally).

\textsuperscript{213} E.g., Explosives Corp., 615 F. Supp. at 364; see also Inter-Americas Ins., 757 F. Supp. at 1213; Bowers, 690 F. Supp. at 349 (ready to find jurisdiction by attribution of successorship under any of the traditional doctrines).

\textsuperscript{214} E.g., City of Richmond, 918 F.2d at 451 (Virginia law) (statutory merger); Mesiti, 739 F. Supp. at 57; Maryland Nat'l Bank, 240 F. Supp. 57; Bruns, 204 Cal. App. 3d at 876 (assumption); Armour Handcrafts, 99 A.D. 2d at 521 (statutory merger).
assumed that if "any theory" of successorship is recognized, it will provide the basis for jurisdiction over the successor. As one court observed: "the practical feature of any theory of corporate successor liability . . . is that the consequences of the predecessor's acts are visited upon the successor. If the successor is to stand thus in the place of the predecessor, it must do so for all purposes, including personal jurisdiction." This approach is unfortunate; it assumes the answer. When the concepts shaping the substantive law are seized upon unquestioningly to provide jurisdiction as well, the question that remains unanswered is whether such attribution is constitutional. This is unacceptable.

**B. Constitutionality of the Assertion of Jurisdiction Resting on Attribution Based on Successorship**

Many courts have recognized that while attribution of contacts from predecessor to successor may bring the successor within the pertinent long-arm statute that provides the basis for specific jurisdiction, the issue of constitutionality remains. However, with a rare exception, these courts have confined consideration of constitutional issues to the relationship of the predecessor to the forum. They have not addressed the more difficult question of the constitutionality of the assertion of jurisdiction over the successor based entirely on its successorship status arising from its relation to the predecessor.

Only in *Inter-Americas Insurance Corp. v. Xycor Systems*, has a court seriously examined whether successorship determined to be applicable for substantive purposes also would satisfy constitutional standards. *Inter-Americas Insurance Corp.* involved a complex series of corporate transactions and restructuring, with the defendant's successorship status resting on its assumption of the liability of its predecessor, an intermediate transferee that in turn had assumed the liabilities of the party originally responsible. Under such circumstances, a district court held that the secondary assumption did not satisfy the "minimum contacts" standard. The court concluded that it was "too attenuated" to lead the defendant reasonably to expect being subject to the jurisdiction of the forum.

Despite their near unanimous acceptance of the principle, thus far, almost all of the courts have failed seriously to consider, whether attribution of the

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215. See *Inter-Americas Ins.*, 757 F. Supp. at 1213 ("substantial connection" with forum lacking on the facts) for an exception.
218. Id.
219. Id. at 1220.
220. Id.
predecessor’s contacts to the successor for jurisdictional, as well as substantive, purposes satisfies constitutional standards and whether the successorship theory relied on makes any difference. Such a consideration is overdue. Although various successorship theories lead to the substantive outcome, they rest on widely different jurisprudential foundations. These fundamental differences in their origin create different problems in determining the constitutionality of the attribution of jurisdiction based on successorship status. Each theory must, accordingly, be analyzed separately.

**Merger.** Under the traditional theories of successorship resting on statutory merger or *de facto* merger, successor liability arises because the predecessor’s juridical identity, with all its rights and duties, has been incorporated into the juridical identity of the surviving corporation. This is the result of corporate fusion and serves for all legal purposes. It is very different from other forms of successorship that involve the attribution of the rights or duties of one juridical entity to another for the special purposes of the litigation at hand. Consequently, the attribution of jurisdiction in cases of statutory merger or de facto merger should not present any constitutional issues.

**Mere continuation.** This theory of successorship applies to those cases where neither ownership nor economic realities have changed in the reemergence of the predecessor’s business in the form of the successor. Successorship theory treats the transfer as an illusory shuffling of corporate forms without substantive significance or change in the juridical entity. This very much resembles the attribution of jurisdiction in reliance on traditional “piercing the veil jurisprudence.” The courts agree that jurisdiction over a subsidiary (or parent) corporation will provide the basis for the assertion of jurisdiction over its parent (or subsidiary) corporation if the interrelationship between the two is so intertwined as to satisfy “piercing” requirements. For the purposes of the litigation, the two related corporations are treated as one juridical unit. So long as the party being subjected to jurisdiction through piercing the veil has its own day in court in which to challenge its “alter ego” status, no constitutional question arises.

The fusion of the juridical identities of predecessor and successor provides a ready justification to support the constitutionality of the assertion of in personam jurisdiction based on successorship under the merger and

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221. Successorship’s as a consequence of statutory or “de facto” merger is the result of “universally accepted principle[s] of private corporation law.” Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991).

222. See Blumberg, Procedural Problems, supra note 40, at chs. 3-5.


mere continuation theories. This crucial element is entirely lacking under the other traditional theories, that is, those relying on express or implied assumption, or the inequitable or unlawful conduct of the successor under state corporate distribution or insolvency law. In these cases, the predecessor and successor are not the same juridical entities. Some other basis for constitutionality must be found.

Equity jurisprudence. Assertion of successorship status under principles of equity jurisprudence rests on the traditional power of the equity courts to prevent frauds or to deny legal consequences to sham transactions. As in the piercing the veil cases, equitable intervention exists to protect the court's jurisdiction and prevent subversion of the legal system. The assertion of jurisdiction rests on the inherent power of equity courts to restrain fraud. Thus, it has been suggested that the rationale for asserting jurisdiction based on successorship is that it is necessary to prevent a corporation from fleeing the jurisdiction and changing its name in order to avoid a long-arm assertion of jurisdiction. Assertion of jurisdiction is constitutional so long as the party being subjected to jurisdiction has had a hearing. 225

Assumption of liabilities. Successorship arises wherever the successor has expressly or by implication assumed the liabilities of the predecessor, including the obligation asserted by the plaintiff. The successor's legal obligations flow from contract not relational law, and there does not appear to be any basis for distinguishing this manifestation of contract law from jurisdictional problems in other contract cases. One thing should be clear. The mere fact of the existence of successorship for substantive purposes under this theory does not provide an automatic basis for the assertion of jurisdiction any more than it does in any other contract case. Serious constitutional questions, therefore, arise.

In a case seeking to apply successorship doctrines in a contract action, an Alabama court, seeking to justify the assertion of jurisdiction over a foreign corporation without other links to the forum because of the foreign corporation's assumption of the liabilities of a domestic corporation, has offered an explanation. 226 226 It asserted that an assumption cannot deprive the other contracting parties of the jurisdictional benefits obtained from the contract. 227 However much this may support the continued assertion of jurisdiction over the predecessor corporation, it is questionable whether this argument has any application to the successor.

The assumption undertaking, itself, may well provide a basis for the assertion of direct, not attributive, jurisdiction over the successor. Long-arm

225. See City of Richmond, 918 F.2d at 454 (Virginia law); Inter-Americas Ins., 757 F. Supp. at 1213.
227. Id.
statutes typically provide for assertion of jurisdiction over out-of-state contracting parties under certain circumstances, which the facts of the particular case may satisfy. Thus, in the closely related area of corporate contractual guaranties, a number of courts have concluded that the undertaking of a guaranty is sufficient to provide the basis for the constitutional assertion of long-arm jurisdiction by the state in which the debtor is located over an out-of-state guarantor without other links to the forum. However, other courts have rejected this contention.\(^2\)

*Modern innovative doctrines.* When one moves from the traditional successorship doctrines to the modern continuity of the enterprise and product line doctrines, none of the above foundations for attribution of jurisdiction are available. If the relationship between successor and predecessor is legally recognized for substantive purposes, and the predecessor's obligations are attributed to the successor, does that also mean that the predecessor's contacts with the forum also are attributed to the successor for purposes of satisfying the constitutional prerequisites for assertion of jurisdiction? No case, thus far, has actually asserted jurisdiction based on attribution of jurisdiction in reliance on either the product line or continuity of the enterprise doctrines.

The assertion of jurisdiction in this manner without discussion of the lurking constitutional problems presents an important problem with the courts appearing to forge into new jurisprudential ground. The policy considerations leading to attribution of substantive liability are very different from those involved in determining whether the assertion of constitutionality is constitutional. Some other foundation, if available, must be found.

The relationship between the predecessor corporation and the forum dramatically affects this problem. Thus, if the predecessor's assets that were acquired by the successor are located in the forum, these would readily provide the basis for assertion of direct, not attributive, jurisdiction over the successor. Where, however, the forum's jurisdiction over the predecessor rests on factors unrelated to the assets transferred to the successor, such as the predecessor's state of incorporation or qualification to do business, the assertion of jurisdiction as a derivative consequence of the relationship would push the application of relational law to its furthest extreme. It would present serious questions under the Due Process provisions of the Fourteenth Amendment that have not yet been answered.

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XII. SUCCESSORSHIP LIABILITY AND INTRAGROUP TORT LIABILITY

Most of the cases considering the imposition of intragroup liability in connection with the successor liability of a group affiliate give no indication that the involvement of the components of a corporate group makes any difference in the approach or the outcome. Thus, in the cases that have arisen, the courts, with one exception, have uniformly refused to impose liability on a parent corporation for the successor liability that was being imposed on its subsidiary.

In Matrix-Churchill v. Springsteen, the Supreme Court of Alabama imposed successor product liability on a subsidiary corporation that continued to manufacture a product line under its predecessor’s name. At the same time, it refused to impose liability upon the parent of the successor subsidiary where the subsidiary operated as a separate business. In Bonee v. L & M Construction Chemicals, the court upheld a product liability complaint stating a cause of action against a subsidiary as a successor corporation under the continuity of the enterprise theory. This court also refused to impose intragroup tort liability on the parent corporation simply on the basis of the plaintiff’s allegations of the parent’s 100% stock ownership of the successor subsidiary and the existence of interlocking directors.

More recently, Elmer v. Tenneco Resins, Inc. involved a product liability complaint against a parent and a subsidiary for successor liability of the subsidiary, allegedly arising from an implied assumption of liabilities. The court refused to dismiss the complaint against the parent where the parent had negotiated the acquisition of the predecessor manufacturing company, the subsidiary had no assets other than the right to receive the predecessor’s assets, and the parent and subsidiary had some common officers and directors. However, the court rejected imposition of liability under the mere continuation doctrine.

In Turner v. Wean United, Inc., the plaintiff sought to impose successor liability on a sister corporation of the predecessor manufacturer under the continuity of the enterprise standard. In holding that the doctrine was inapplicable on the facts, the court dismissed the fact that sister subsidiaries

229. Matrix-Churchill, 461 So. 2d at 782.
230. Id. at 788.
232. Id. at 383.
234. Id. at 542.
235. Id.
236. 531 So. 2d 827 (Ala. 1988).
were involved.\textsuperscript{237} The court stated that the existence of common control, however relevant for imposition of intragroup liability in reliance on "piercing the veil" or the de facto merger doctrine, was irrelevant for consideration of continuity of the enterprise successor liability.\textsuperscript{238}

Similarly, in \textit{Schnoor v. Deitchler}, the Supreme Court of Iowa held that the existence of a parent-subsidiary relationship in a product liability litigation did not expand the exposure to liability.\textsuperscript{239} As in other areas, liability could be imposed on the parent for the product liability of its subsidiary only upon satisfaction of all the requirements of piercing the veil.\textsuperscript{240}

In \textit{Diaz v. South Bend Lathe Co.}, a parent acquired a business and subsequently transferred it to a subsidiary.\textsuperscript{241} The parent was held a successor company to the seller in reliance on the concept of de facto merger.\textsuperscript{242} In a product liability case, the plaintiff sued the subsidiary.\textsuperscript{243} The court dismissed the complaint.\textsuperscript{244} It held that the subsidiary was not subject to successorship liability as well as the parent where the parent was still in business, thereby presenting an available remedy for the plaintiff.\textsuperscript{245}

Several commentators have suggested that, as a stratagem to limit successor liability, acquiring corporations should accomplish acquisitions through subsidiaries rather than directly.\textsuperscript{246} The usefulness of this suggestion is supported by the overwhelming rejection of successor liability in the foregoing cases.\textsuperscript{247} The question remains, however, whether in the future entity law and the limited exception provided by rigorous traditional piercing jurisprudence will withstand the urgent pressures to provide the injured plaintiff with a remedy in product liability matters or pressures of the government in its effort to achieve full implementation of the underlying policies and objectives of remedial statutory programs such as CERCLA. As

\begin{footnotes}
\item[237] \textit{Id.} at 831.
\item[238] \textit{Id.} at 827.
\item[239] 482 N.W.2d 913 (Iowa 1992).
\item[240] \textit{Id.}
\item[242] \textit{Id.} at 102.
\item[243] \textit{Id.} at 100.
\item[244] \textit{Id.} at 104.
\item[245] \textit{Id.} at 103.
\item[247] But cf. Electric Power Bd. v. St. Joseph Valley Structural Steel Corp., 691 S.W.2d 522, 527 (Tenn. 1985) (imposing intragroup tort liability and noting that subsidiary was separately incorporated to insulate the parent from product liability).
\end{footnotes}
is evident, such pressures have been responsible for the growth of successor liability doctrines in the first place.

It should be obvious that successor liability will apply to transactions between related corporations as well as between unrelated sellers and purchasers. Thus, in Neal v. Carey Canadian Mines, Ltd., the court imposed successor liability on one subsidiary that had continued the asbestos mining business of another subsidiary within the same group. In Schmoll v. ACANDS, Inc., a district court similarly imposed successor product liability on a new holding company emerging from a corporate reconstruction, in which lucrative nonasbestos-related activities were spun off to another group affiliate while the remaining asbestos-related assets were sold to another corporation. The court invoked traditional "piercing the veil jurisprudence" to disregard such corporate restructuring in attempting to avoid liability. The traditional successorship doctrines have been widely applied in cases involving intragroup transfers. In a suit to recover CERCLA costs, the court held that where a court has acquired jurisdiction and venue over the predecessor corporation, it retained jurisdiction and venue over the successor in order to prevent evasion of judgments by corporate manipulation.

XIII. SUCCESSORSHIP LIABILITY AND BANKRUPTCY LAW

A creditor's assertion of a claim against a successorship corporation in the bankruptcy proceedings of the predecessor presents interesting questions of choice of law and statutory preemption in the federal system. Under bankruptcy principles, the bankruptcy court must turn to applicable state law in order to determine the validity of a claim and the existence of the property interests of the debtor estate. This reference to state law inevitably

249. 703 F. Supp. 868, 874 (D. Or. 1988); see In re Silicone Gel Breast Implants Prods. Liab. Litig., 837 F. Supp. 1123, 1126-27 (N.D. Ala. 1993) (holding company subject to suit for liabilities of predecessor company that through a merger became part of one of the holding company's subsidiaries, notwithstanding the holding company's transfer of liabilities to subsidiary).
250. Schmoll, 703 F. Supp. at 874.
253. For determination of the existence of property interests, federal courts turn to state law. E.g., United States v. Durham Lumber Co., 363 U.S. 522 (1960) (tax); Commissioner v. Stern, 357 U.S. 39 (1958); United States v. Bess, 357 U.S. 51 (1958); Wolfe v. United States, 798 F.2d 1241 (9th Cir. 1986), amended, 806 F.2d 1410 (9th Cir. 1986); AvcoDelta Corp. Can. Ltd. v. United States, 540 F.2d 258 (7th Cir. 1976); see also BLUMBERG, SUBSTANTIVE COMMON LAW PROBLEMS, supra note 40, § 24.05.
includes state concepts of successorship liability.

However, the bankruptcy law generally preempts state law insofar as implementation of plans of reorganization and other post-petition judicially approved dispositions of the debtor’s assets are concerned. Among other matters, this means that the bankruptcy court may bar any assertion of successor liability against the judicially approved transferee, such as the purchaser of the assets of a debtor at a foreclosure sale or the reorganized corporation emerging from a bankruptcy reorganization proceeding.254 Similarly, a bankruptcy court has the power to provide that a purchaser shall take control free of successor liability under the preexisting collective bargaining agreements of the debtor.255 However, the mere fact that the transfer of assets was pursuant to the bankruptcy sale does not “absolutely preclude” successor liability.256

With the confirmation of the reorganization plan, however, the bankruptcy court loses its jurisdiction over the reorganized debtor. Accordingly, a purchaser of the debtor’s assets will be subject to any successor liability for claims arising after confirmation.257 Whether such preemption is confined to reorganization proceedings is not entirely clear. The federal courts have divided.258 The courts, refusing to recognize successorship liability under such circumstances, have been motivated by pragmatic as well as doctrinal considerations. They have been unwilling to recognize such successorship liability because of the concern that recognition under these circumstances would force down the price receivable by the bankrupt estate from the sale of the debtor’s assets and thus, undermine the priorities of the bankruptcy code. At least one state court has held that unlike bankruptcy reorganization procedures, a bankruptcy plan of liquidation does not give rise to preemption.259

In addition to the treatment of successorship in bankruptcy, the bankruptcy proceedings have an impact on subsequent common law actions seeking to assert successorship status on the transferee of the debtor’s assets.


256. See Chicago Truck Drivers, Helpers, & Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 48 (7th Cir. 1995) [hereinafter Chicago Truck Drivers Pension].


258. See Reed, supra note 252, at 671.

259. Wilkerson, 237 N.J. Super. at 567. But see Chicago Truck Drivers Pension, 59 F.3d at 51 (holding that bankruptcy sale does not absolutely preclude successor liability).
For those courts emphasizing not only the unavailability of a remedy against the predecessor but also the causal relationship between transferee's purchase and the liquidation and dissolution of the predecessor, the fact that the transfer and the dissolution of the debtor occurred as part of the intervening bankruptcy proceedings eliminates the necessary causal relation. As noted, for such courts, this bars successorship liability.\footnote{260}

The doctrinal conditions for application of successor liability under a particular doctrine form a final barrier to sales after bankruptcy has intervened. Thus, a California court held that liability under the product line doctrine could not be imposed upon the purchaser of a debtor-manufacturer's assets from a bankruptcy trustee.\footnote{261} The court noted that the acquisition after bankruptcy had not caused the destruction of the worker's remedy.\footnote{262}

XIV. CONCLUSION

Successor liability from its early roots in corporation law has emerged to become a major aspect of product liability law. The problems associated with an increasingly complex and technologically advanced industrial society have presented powerful pressures. In response, two innovative, judicial doctrines have expanded the outer perimeters of the traditional doctrines of successorship law applied throughout U.S. jurisprudence. These doctrines resting on principles of relational law are the product line doctrine and the continuity of the enterprise doctrine.

While originally formulated in connection with product liability matters, the continuity doctrine, in particular, appears to be outgrowing its origins in tort law and has spread to other areas. It has been prominently applied in areas of statutory law, particularly for purposes of labor relations, antidiscrimination, and employment laws through its variant, the integrated enterprise doctrine and for CERCLA as well. In addition, it has been widely applied in determining the amenability of a successor to the assertion of jurisdiction based on the contacts of the predecessor.

Thus, successor liability is already a prominent feature in product liability, labor and employment statutory law, environmental law, and amenability to jurisdiction. Although the process of expanding successor liability in this manner to other areas is in its early stages, the number of cases that have made use of the doctrine across the full spectrum of U.S. law is already impressive. The doctrine may no longer be viewed solely as an

\footnote{260} See Nelson v. Tiffany Indus., Inc., 778 F.2d 533, 538 (9th Cir. 1985); White Motor, 75 B.R. at 944.


\footnote{262} Id. at 200.
aspect of product liability law. It clearly has won acceptance in other areas. However, the implications are still mixed.

Although some aspects of the imposition of successor liability may be readily understood as the application of traditional principles of law, the imposition of successor liability under such circumstances as those involved in the continuity of the enterprise theory appears to reflect a significant jurisprudential development. The responsibility of such a successor corporation for acts of its predecessor that have given rise to common law or statutory liability cannot be explained by traditional doctrines of corporation law or equity jurisprudence. It does not rest on the contract, consent, or act of the successor. It arises out of the successor's economic role in conducting the same business supported by so many of the same physical and human instrumentalities that a substantial economic identity exists between the two. Liability follows the business, and the successor is liable because of its status as the continuing operator of the business, which under its predecessor was responsible for the plaintiff's loss or statutory violation. This is another illustration of the growing acceptance of relational law in commercial areas.

The continuity of the enterprise doctrine has gained a wide area of acceptance in U.S. law, but this acceptance has been limited to special areas where public pressure to provide a remedy for victims is particularly strong. Product liability and statutory liability, particularly under the labor relations, antidiscrimination, and employment statutes and CERCLA, are the very best examples of areas where it has been applied. However, even in these areas, the continuity doctrine has not won general acceptance. In product liability, it remains a minority doctrine. Although the continuity of the enterprise doctrine in the form of the integrated enterprise concept has been generally accepted for purposes of labor relations, antidiscrimination, and employment law, CERCLA presents a somewhat different picture. While the continuity doctrine has been adopted by a majority of courts for purposes of successor liability under CERCLA, it remains highly controversial, with a vigorous minority of the courts rejecting its application. Other areas of acceptance are very limited.

The significant adoption of successorship as the basis for the attribution of legal rights and responsibility in numerous areas of common and statutory law from one party to a related party is an important example of another area in which U.S. law has embraced enterprise principles and a jurisprudence that rests on relational law. However, when one moves from the traditional types of successorship status to the modern concepts, expanding the outer

263. Readers are reminded that while the doctrines have won acceptance in numerous jurisdictions, they been rejected in many others and unmistakably represent the minority view.
boundaries of liability to include cases lacking continuity of ownership, the picture changes. The mixed success of the product line and continuity of the enterprise doctrines, even in those areas in which the courts would be most inclined to be receptive, demonstrates that the continued expansion of the doctrines in the foreseeable future is open to question.