Successor Liability for Defective Products: A Tort Exception to a Corporate Rule

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SUCCESSOR LIABILITY FOR DEFECTIVE PRODUCTS: A TORT EXCEPTION TO A CORPORATE RULE

"The general rule, which is well settled, is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and [product] liabilities of the transferor."1 In limited circumstances, exceptions to the general rule warrant recovery against a successor.2 These exceptions are often construed narrowly, however, causing the general rule to govern.3 The result is frequently a remediless complainant. To redress this situation, some courts have broadly interpreted the applicability of the exceptions4 or have created new exceptions that essentially consume the rule.5

Where an exception is broadly construed or a new exception is applied, a successor company may incur expenses greater than those bargained for as a result of unanticipated liability for tort judgments. As the transferor has generally contracted to retain such tort liability, it has, in effect, received a windfall profit. Where retrospectively broad interpretation of successor liability law, on the other hand, seeks to foster a tort claimant's recovery, the efficiency of business planning is minimized. The tenuousness of successor liability law has resulted from sporadically flexible interpretation of the exceptions6 and fortuitous implementation of new exceptions.7 Prospec-

1. 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (1973 ed.).
tive modification of the general rule of nonliability to the successor is thus necessary to achieve equity for the parties involved.

This note proposes such a modification of the rule. The first section reviews the development of products liability law and the strict liability trend. The following section discusses successor liability and illustrates the centrally important interplay of tort and corporate principles in that area. The analysis treats traditional exceptions, recent case developments that broadly construe them, and the development of new exceptions—primarily the product-line concept, which applies strict liability to determine successor liability. The last section proposes a legislative approach, balancing corporate and tort principles in a manner designed to promote uniformity and certainty in the successor liability area.

PRODUCT LIABILITY DEVELOPMENT

Historically, responsibility for defective products was based in contract: Where there was no privity of contract between plaintiff and defendant, there could be no recovery. To avoid this frequently harsh result, the courts began to develop exceptions to the privity rule.

Prior to MacPherson v. Buick Motor Co., exceptions to the privity requirement were made only when a product was either imminently or inherently dangerous. Judge Cardozo, however, extended the exceptions to include any product “reasonably certain to place life and limb in peril when negligently made.” More than


While the need for uniformity in the products liability area has prompted the United States Department of Commerce to draft a Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as UPLA], the Act does not deal with successor liability. Perhaps this reflects a view that successor liability should not be governed by tort law. Tort law considerations are, however, essential to the proposal suggested in this note, see infra notes 192-95 and accompanying text. Tort law considerations have also been utilized by courts, see infra text accompanying notes 124-26, 137-51. For a critical analysis of the UPLA, see Twerkski & Weinstein, A Critique of the Uniform Product Liability Law—A Rush to Judgment, 28 Drake L. Rev. 221 (1979).

Detailed historical analysis of products liability law is beyond the scope of this note. For the classic treatment, see Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966).


Prosser, The Assault Upon the Citadel, supra note 9, at 1100.

217 N.Y. 382, 111 N.E. 1050 (1916).

Id. at 386-89, 111 N.E. at 1052-53.

Id. at 389, 111 N.E. at 1053. The defective product in MacPherson was an automo-
forty years later, in the landmark case of *Henningsen v. Bloomfield Motors, Inc.* the New Jersey Supreme Court circumvented the confines of privity by manipulating the concept of warranty. The court held that an implied warranty extends to any foreseeable user of a product despite lack of privity between the user and the product seller.

The formal limitations of contract law were completely disregarded for the first time in the much noted California case of *Greenman v. Yuba Power Products, Inc.*, which applied strict tort liability in a product liability action. The plaintiff in *Greenman* was injured when a piece of wood flew out from beneath a defectively designed power tool. His injury occurred despite plaintiff's proper use of the product. Although the court noted the express warranty in the brochure, warranty was not the basis of liability. Instead, the court developed a rule of strict products liability, holding that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." Numerous courts and the American Law Institute followed

16. There is an implied warranty that a product is "reasonably fit for the general purpose for which it is manufactured and sold." *Id.* at 370, 161 A.2d at 76 (citations omitted). If a product does not satisfy this representation, an action for breach of warranty exists. U.C.C. § 2-314 (1978).
17. 32 N.J. 413, 161 A.2d at 100. The injured plaintiff in *Henningsen*, the wife of the purchaser of the defective automobile, was considered a foreseeable user.
19. *Id.* at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698.
20. *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.
21. *Id.* at 62, 377 P.2d at 901, 27 Cal. Rptr. at 701.
22. *Id.*, 377 P.2d at 900, 27 Cal. Rptr. at 700.
   Special Liability of Seller of Product for Physical Harm to the User or Consumer
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
      (a) the seller is engaged in the business of selling such a product, and
      (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
   (2) The rule stated in Subsection (1) applies although
Greenman's lead and adopted strict tort products liability.

In Greenman, strict tort liability was imposed “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 powerless to protect themselves.”

Since Greenman, numerous other justifications have been advanced for the imposition of strict liability. These are generally divisible into four categories:

1. **Avoidable consumer reliance on manufacturers.**—Because consumers are often incapable of identifying or protecting themselves against risks, they must rely on a manufacturer's expertise for protection. Accordingly, a manufacturer induces consumer reliance when holding out a product as an item of quality.

2. **Manufacturer’s economic advantage.**—The manufacturer often has superior ability to spread costs of injury through society by raising product prices. Furthermore, strict liability has been rationalized as a necessary cost of doing business, automatically assumed when manufacturing activity begins.

3. **Deterrence of defective products.**—The ease of making out a strict liability claim, along with the potential of realizing huge judgments, is thought to induce manufacturer scrutiny of product safety.

Under a strict liability test the plaintiff's burden of proof is lessened since § 402A(2)(a) eliminates the need for plaintiff to prove fault.

25. 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.


27. See, e.g., Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

28. See Scandinavian Airlines Sys. v. United Aircraft Corp., 601 F.2d 425, 428 (9th Cir. 1979) (applying California law) (strict liability not applied where commercial plaintiff, capable of inspecting for defects, did not require strict liability protection).

29. See Greenman, 59 Cal. 2d at 64, 377 P.2d at 900, 27 Cal. Rptr. at 700.


31. Montgomery & Owen, supra note 26, at 809-10.


33. Scandinavian Airlines Sys. v. United Aircraft Corp., 601 F.2d 425, 429 (9th Cir.
(4) fairness.—Unfamiliarity with manufacturing operations is often thought to make a plaintiff's burden of proof improperly difficult in negligence cases.\textsuperscript{34}

Although the concept of strict products liability is widely utilized,\textsuperscript{35} its limits are uncertain.\textsuperscript{36} A Commerce Department report suggests that a few courts have stretched the doctrine to provide recovery for persons who prove injury from a product regardless of any proof of actual defect.\textsuperscript{37} Haphazard and liberal use of strict liability has spurred the Department of Commerce to draft the Uniform Products Liability Act (UPLA)\textsuperscript{38} to promote stability in governing law, in product liability insurance rates, and in consumer protection.\textsuperscript{39}

In numerous ways the UPLA exemplifies a restrained approach to products liability.\textsuperscript{40} Rather than imposing strict liability in all cases of product defect, the UPLA limits the doctrine to those cases involving either a manufacturing defect or a breach of an express warranty.\textsuperscript{41} Because a manufacturing defect is, by definition, an aberration of an intended product design, it occurs only infrequently.\textsuperscript{42} The UPLA justifies applying strict liability to manufacturing defects and warranty violations by asserting that insurance systems can absorb the cost of injuries from such claims.\textsuperscript{43} Additional justification

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\item[34.] Id.
\item[35.] See discussion supra note 23.
\item[36.] Owen, Rethinking the Policies of Strict Products Liability, 33 Vand. L. Rev. 681, 683 (1980).
\item[38.] UPLA, supra note 8, 44 Fed. Reg. 62,714.
\item[39.] Introduction to id., 44 Fed. Reg. at 62,714.
\item[41.] UPLA, supra note 8, § 104, 44 Fed. Reg. at 62,721. For a view that this distinction is improper, see Twerski & Weinstein, supra note 8, at 224-30.
\item[42.] Henderson, Judicial Review of Manufacturers’ Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531, 1543 (1973).
\item[43.] UPLA, supra note 8, § 104 analysis, 44 Fed. Reg. at 62,722.
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is found in the violation of consumer expectation.\(^{44}\)

UPLA imposes liability on a fault basis, however, for cases involving design defects—where the defect is part of the intended design—\(^{46}\) or in cases of inadequate warning by a manufacturer.\(^{46}\) A fault standard must also be satisfied where suit is brought against a nonmanufacturer seller.\(^{47}\) Applying such a fault standard is at variance with most case law\(^{48}\) and the Restatement,\(^{49}\) which impose strict liability in all product liability suits regardless of the type of defect. The UPLA justifies this difference by considering negligence a sufficient deterrent to the production of defectively designed products: Substantial economic risk occurs when each item manufactured according to the design may subject a defendant to liability. A manufacturing defect, in contrast, seldom occurs. To deter a lesser risk of defect, then, strict liability must be imposed.\(^{50}\) Furthermore, in a spirit of restraint, the UPLA explicitly rejects the notion that tort law is a compensation system;\(^{51}\) liability is not to be imposed unless injury is accompanied by fault.

Perhaps, even if the UPLA is not enacted by state legislatures, its reasoning will persuade the courts to restrict their application of strict products liability.\(^{52}\) In light of the possible trend toward re-

\(^{44}\) Id. This justification satisfies UPLA policies of consumer protection and stable insurance rates. See supra text accompanying note 39.

\(^{45}\) Henderson, supra note 42, at 1543.


\(^{47}\) Id.


\(^{49}\) Restatement (Second) of Torts § 402A (1965). For the text of this section, see supra note 24.

\(^{50}\) UPLA, supra note 8, § 104 analysis, 44 Fed. Reg. at 62,722. This rationale satisfies UPLA policies of consumer protection and stable insurance rates. See supra text accompanying note 39. Although deterring defective products has been a cornerstone of strict liability, see supra text accompanying notes 32-33, the UPLA fails to consider whether any of the other popular justifications of strict liability, see supra text accompanying notes 27-31, are satisfied by its application of a negligence standard to design defects an inadequate warnings.

\(^{51}\) Introduction to UPLA, supra note 8, 44 Fed. Reg. at 62,715.

straint in the use of strict liability in the products area generally, courts should also consider limiting or eliminating strict liability in successor liability cases.

PRODUCTS LIABILITY OF A SUCCESSOR CORPORATION

The doctrine of strict liability has only recently been used to impose liability on a successor corporation for the defective products of its predecessor. Both historically and at present the prevalent approach is to analyze successor liability in terms of continuation of ownership interest between predecessor and successor. Since the mere purchase of assets generally does not give rise to an ownership interest in the predecessor, the general rule of law does not lead to liability for a successor. Judicially recognized exceptions to the general rule call for liability when:

1. the purchaser expressly or impliedly agrees to assume such debts;
2. the transaction amounts to a consolidation or merger of the seller and purchaser;
3. the purchasing corporation is merely a continuation of the selling corporation; or
4. the transaction is entered into fraudulently in order to escape liability for such debts.

Although the first and fourth exceptions are clear on their face, the terms and rationale of the second and third require explanation. A

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(citing UPLA for definition of defective product); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 297, 305 n.28, 294 N.W.2d 437, 456, 460 n.28 (1980) (citing UPLA as support for awarding punitive damages in product liability actions).

Federal Trade Commission Chairman James C. Miller III apparently advocates limited liability: "'Imperfect products' should be available . . . because consumers have 'different preferences for defect avoidance.' . . . Those who have a low aversion to risk—relative to money—will be more likely to purchase cheap, unreliable products." N.Y. Times, Oct. 27, 1981, at A1, col. 5.

53. See infra notes 138, 147-49 and accompanying text.


merger exists where the predecessor and successor unite and only the successor survives, whereas a consolidation of corporations causes an entirely new corporation to emerge. A continuation is found where the successor is comprised primarily or entirely of the constituent elements of the predecessor.

The second and third exceptions yield successor liability because more than a mere sale of assets has occurred: In the case of merger, consolidation, or continuation, a semblance of ownership interest is created. "[T]he corporate entity is left substantially intact," and, therefore, retains its own liabilities. The two salient characteristics of these exceptions are continuity of operation and ownership, and prompt dissolution by the predecessor.

ANALYSIS OF THE TRADITIONAL EXCEPTIONS: NARROW CONSTRUCTION

In *Kloberdanz v. Joy Manufacturing Co.*, the defendant purchased the assets and liabilities of a company for adequate cash consideration. The sale allowed the defendant to continue the manufacturing operations of its predecessor. As a consequence of the sale, the predecessor ceased manufacturing but did not dissolve or liquidate until ten months later. During this period the predecessor invested the sale proceeds and engaged in a leasing business. Approximately six years after the sale of assets, the plaintiff was injured by a machine that had been manufactured ten years earlier by

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62. *Id.* Despite the facial change of corporate form resulting from a consolidation, the new corporation still consists of the same ownership elements, and the original corporation is thus considered substantially intact.
64. For a discussion of the broad interpretations of the traditional exceptions, see *infra* text accompanying notes 97-120.
66. *Id.* at 820.
67. See *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 570, 264 A.2d 98, 106 (Law Div. 1970) (holding that "[w]hen one company purchases all the assets of another, it is to be expected that the purchasing corporation will continue the operations of the former, but this does not by itself render the purchaser liable for the obligations of the former"), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (App. Div. 1972). *But see* Ramirez v. Amstead Indus., Inc., 86 N.J. 332, 357, 431 A.2d 811, 824 (1981) (overruling *McKee* insofar as it applies to tort actions).
68. 288 F. Supp. at 819.
Plaintiff argued that the exceptions to the rule of nonliability of a successor were applicable. The court, following the rationale of other courts in similar cases, negated de facto merger and consolidation claims. The court determined that the predecessor and successor remained totally separate before and after the sale, despite defendant's continuation of the predecessor's manufacturing operations. The evidentiary support for the court's conclusion was the predecessor's continued existence after the sale, lack of predecessor interest in the successor, and the use of the predecessor's name only as a trademark. The continuation exception was not satisfied because there was no common ownership interest in stock, and the corporations had no common directors or stockholders. The successor, therefore, did not serve merely as a "new hat" for the seller.

In Shannon v. Samuel Langston Co., the court found successor liability where stock in the successor was the consideration in an asset sale. Upon the transferor's dissolution and liquidation, the consideration, which was not required for satisfaction of seller's debts, was distributed to the transferor's shareholders. The shareholders thus became a constituent of the successor, a factor which, in conjunction with transferor's rapid dissolution, commonality in operation, management and employees, and assumption of all debts necessary for continued business operations, allowed the court to find

69. Id. at 820.
71. 288 F. Supp. at 821.
72. In other words, there was no continuation of the predecessor (as required for a merger), nor did a new corporation emerge after the sale. See H. HENN, supra note 59, § 346, at 713.
73. 288 F. Supp. at 821.
74. Id.
77. Id. at 799, 801. Where stock received as consideration for an asset sale is distributed to the shareholders of the transferor company, however, the transferee is liable for transferor debts on the theory that consideration is inadequate and the sale is constructively fraudulent as to the seller's creditors. This is because the purchaser must have knowledge that such a transaction prevents the seller's creditors' collection of their receivables. W. FLETCHER, supra note 8, § 7127, at 205. Shannon, therefore, demonstrates that even where a stock transfer cannot be considered fraudulent—stock having been set aside for creditors—a stock transfer can represent commonality of interest between seller and purchaser. Stock in the purchaser can also be considered a valuable asset. See infra note 99 and accompanying text.
liability under the de facto merger exception.\textsuperscript{78}

*Shannon* demonstrates the tenuousness of the distinction between the de facto merger and continuation exceptions. Although the court characterized the transaction as a de facto merger,\textsuperscript{79} the same facts would support a finding that the successor was only a "new hat" for the transferor. Regardless of the label given the exception, the dominant elements in each are continuity of operation and ownership, and prompt dissolution of the predecessor.\textsuperscript{80}

*Shannon* also demonstrates judicial antagonism toward the general rule of nonliability as it affects tort cases. In dicta, the court noted that "solvent corporations, going concerns, should not be permitted to discharge their liabilities to injured persons simply by shuffling paper and manipulating corporate entities;"\textsuperscript{81} and that "the seller and purchaser corporation will not both be able to profit by cutting off liability for damages to battered and maimed people."\textsuperscript{82}

Such dissatisfaction with the general rule of nonliability for successors in tort actions is directly attributable to the rule's corporate law foundation.\textsuperscript{83} Both the rule and its exceptions were designed to protect the interests of corporate creditors, other corporate entities,\textsuperscript{84} and shareholders,\textsuperscript{85} rather than the needs of tort claimants.

The rule of successor nonliability does not impede a nontort claimant's recovery, because the predecessor is more likely to be available for such a suit. A creditor's claim is by its very nature discernible before a sale, allowing him to sue promptly upon notification of dissolution.\textsuperscript{86} If the predecessor does not dissolve, the plain-
tiff-creditor maintains the cause of action directly against the transferor. Thus a successor's shield against liability under the general rule has little effect on the corporate creditor.

A tort claimant, unlike a creditor, is greatly affected by the successor's shield because his or her cause of action does not accrue until the time of injury, which is often long after a sale of assets.\(^8\) There is a greater probability, therefore, that a corporation will already be insolvent or have dissolved by the time a tort suit can be brought. The likelihood of recovery is thus correspondingly diminished.\(^8\)

Two procedures—trust funds and abatement statutes—may partially overcome obstacles to recovery against a successor. They are of more utility, however, to creditors than to tort claimants, who are paradoxically more in need of help. The trust fund theory provides that after consideration is received for an asset sale, known creditors are satisfied first. Remaining funds are then distributed to shareholders and constructively held in trust for the benefit of unpaid creditors.\(^8\) The trust fund theory is feeble because, with the passage of time, which is the crucial distinction between tort and nontort plaintiffs, it becomes more onerous to locate and recover from individual shareholders.\(^9\) Recovery may also be achieved under an applicable abatement statute, under which the time for abatement of claims is delayed for a specified period, during which funds must be kept available to satisfy potential claims.\(^9\) The “catch 22” of this solution as it affects tort claimants is that only claims known at the time of dissolution are protected.\(^9\) The current state of the law is particularly distressing because the tort plaintiff should have a superior right to judgment. Unlike a creditor, a tort claimant does not bargain for nonpayment, nor does he or she profit from assump-

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\(^8\) In Kloberdanz, for instance, see supra text accompanying notes 65-69, the plaintiff was injured six years after the sale of assets by a product manufactured four years before the sale.


\(^9\) Note, supra note 63, at 342. The details and utility of the trust fund theory are beyond the scope of this note; for a full discussion of this area, see Wallach, supra note 88.

\(^9\) Note, supra note 63, at 343.

\(^9\) E.g., N.J. STAT. ANN. § 14a:12-9(f) (West 1969) (providing two year abatement period for claims that existed prior to dissolution).

\(^9\) Id; Note, supra note 63 at 343.
tion of the risk of nonpayment.93

In light of the formidable task faced by tort plaintiffs seeking recovery against a predecessor,94 the rule of successor nonliability may be viewed as offensive as it pertains to tort claimants. Where judges have been ill at ease in this situation, it appears that they have either masked their dismay through manipulation of established exceptions,95 or have constructed new judicial exceptions to compensate for inadequacies in existing law.96

ANALYSIS OF THE TRADITIONAL EXCEPTIONS: BROAD CONSTRUCTION

In Knapp v. North American Rockwell Corp.,97 the successor purchased substantially all of a company’s assets for a stock consideration and assumed its nontort liabilities. While the contract called for the seller’s dissolution as soon as possible after the distribution of the stock to its shareholders, the predecessor continued to exist for eighteen months.98 The court conceded that these facts did not technically comply with the de facto merger or continuation requirements since the predecessor maintained a separate existence for eighteen months after the sale and possessed valuable assets—the successor’s stock99—which could be used to satisfy tort and business claimants.100 Nevertheless, the court held the successor liable for plaintiff’s injuries under the de facto merger exception.101 Unwilling to allow the predecessor’s brief and insubstantial existence to prevent plaintiff’s recovery,102 and refusing to be limited by what it termed

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94. For discussion of the difficulty in pursuing a predecessor corporation, see supra text accompanying notes 87-92.
95. For discussion of broad application of traditional exceptions, see infra text accompanying notes 97-120.
96. For discussion of new judicial answers to successor liability, see infra text accompanying notes 121-53.
98. Id. at 363-64, 369.
99. Id. at 367. Because the corporation received the stock (as opposed to direct transfer of stock to the seller’s shareholders, which would cause the corporation to become a mere shell), the stock consideration could have been considered a valuable asset. See id. at 366; supra note 77.
100. 506 F.2d at 367.
101. Id. at 370.
102. Id. at 368-69.
"a mere procrustean application of formalities," the court imposed liability based on a public policy of loss-spreading.

The opinion reflects the court's search for fault on the part of the successor. Perhaps the court strained for additional justification because of the liberty it assumed in applying the de facto merger exception. While liability was found under principles of corporate law, the rationale of the decision sounded in tort. Fault was found in contract requirements of dissolution, restraint of competition, and inhibition of the predecessor's use of its remaining assets. These requirements in effect prevented the seller from remaining financially viable and satisfying claims. The court also considered the expeditious dissolution of the seller, as well as the failure to assign the predecessor's products liability insurance policy.

_Cyr v. B. Offen & Co._ exemplifies another manipulation of the traditional exceptions. The predecessor's employees, who purchased the assets and good will of the business, were required to operate it in the same manner as the transferor. The court recognized that there was a good-faith, arms-length sale, as well as a total change in ownership, a situation not constituting a mere continuation. Nevertheless, liability was imposed because the same employees, product, plant, supervision, and name were used, making the sale "one where facial and substantive continuity were the essence of the bargain." The court held that this facade of continuity invoked the mere-continuation exception, which had previously applied only to continuity of ownership interest rather than continuity of business operations. The court justified this departure from traditional corporate law by noting that the case involved

103. _Id._ at 369.

104. _Id._ at 367. The seller was not allowed to sell the stock in the successor that it received as consideration; furthermore, the seller was unable to invest this asset for profit. _Id._


107. 501 F.2d 1145 (1st Cir. 1974) (applying New Hampshire law).

108. _Id._ at 1151.

109. _Id._ at 1151-52.

110. For discussion of the mere-continuation exception, see _supra_ text accompanying notes 63, 74-75.

111. _Id._ at 1154.

112. _Id._ at 1152.

113. _Id._ at 1154.

114. _See supra_ text accompanying note 74.
tort liability rather than corporate debts.\textsuperscript{116}

Other factors specific to \textit{Cyr} may have influenced the court's extension of the rule. The injury was caused by a machine that the predecessor had serviced and that the defendant continued to service.\textsuperscript{116} The possibility that the successor was negligent in not detecting and warning against the machine's defect\textsuperscript{117} may have inclined the court to overstate the law, even though defendant's duty to warn was not an issue given to the jury.\textsuperscript{118} Furthermore, as the corporation's employees were the same before and after the sale, the original wrongdoers remained part of the successor: "If as a group the same employees continue, without pause to produce the same products in the same plant, with the same supervision, the ownership of the entity which maintains essentially the same name cannot be the sole controlling determinant of liability."\textsuperscript{119} Thus, liability might have attached for the employees' original wrong, rather than for the corporate continuity presented as the basis of the holding.\textsuperscript{120}

\textbf{ADOPTION OF A NEW TEST OF SUCCESSOR LIABILITY: CONTINUITY OF ENTERPRISE}

In \textit{Turner v. Bituminous Casualty Co.},\textsuperscript{121} the defendant made a cash purchase of the predecessor's business as a going concern, including its assets, good will, and trade name. The predecessor subsequently dissolved and liquidated.\textsuperscript{122} Rather than analyzing the issue of liability in terms of the traditional exceptions, the court followed the general trend in products liability\textsuperscript{123} and held that successor liability for products manufactured by a predecessor is a matter of tort rather than corporate law.\textsuperscript{124} To facilitate its use of tort law, the court developed a new exception to the general rule of nonliability: continuity of enterprises.\textsuperscript{125} The facts of the case were held to pre-
sent a prima facie case of continuity of enterprise in that:

1) The seller corporation, . . . apparently, [retained] key personnel, assets, general business operations, and even the [predecessor's] name.

2) The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of consideration received from the buying corporation.

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 to the world as the effective continuation of the seller corporation. 126

Although the continuity-of-enterprise test is supported in the opinion by tort policy, its factual analysis was clothed in corporate rather than tort terms. The result is a decision laced with irreconcilable law.

The first branch of the Turner test delineates the elements of continuity of enterprise. Yet, rather than analyzing the tort significance of maintaining the same personnel, assets, trade name, and business operation, the court justifies these elements solely through its criticism of corporate law. The court reasoned that the successor receives the same assets whether cash or stock is the consideration paid to the seller. Since a de facto merger can be found when stock is transferred, the court determined that the cash form of the consideration should be irrelevant. 127 Recognizing that stock consideration is traditionally required because it represents the commonality of interest necessary to impose the de facto merger exception, the court criticized this common interest as "more symbolic than real." 128 It reasoned that stockholders at the time of manufacture are likely to be different from those at the time of sale. 129 The first element is, therefore, both contrary to corporate law principles and unsupported by the court in tort terms.

The second branch—transferor liquidation—was stated as a bare factual conclusion. Here however, the court might successfully

126. Id. at 424, 244 N.W.2d at 884.
127. Id. at 422, 244 N.W.2d at 880. Contra W. FLETCHER, supra note 1, § 7127 (form of the consideration of utmost concern).
128. 397 Mich. at 422, 244 N.W.2d at 880.
129. Exception to this generalization would be made in the case of a close corporation. See H. HENN, supra note 59, § 260, at 515 (shareholders of close corporation generally contract to exclude others from becoming shareholders). In a close corporation, therefore, shareholders are likely to be the same at the time of manufacture and the time of sale of assets.
have utilized a most potent tort principle—causation—as a component of its test. Although a mere sale of assets does not necessarily cause a predecessor’s dissolution and liquidation, when a contract requires dissolution the defendant-successor is both the cause in fact and the proximate cause of the plaintiff’s lack of remedy against the predecessor.

The assumption of liabilities necessary to continuance of a business, the third branch of the continuity of enterprise test, is a notion well grounded in corporate law tests of successor liability. The court did not attempt to integrate this principle with tort doctrine.

The fourth branch—defendant successor holding itself out as a continuation of the predecessor—is premised on the theory that “[o]ne who *puts out* as his own product a chattel manufactured by another is subject to . . . liability as though he were its manufacturer.” Although consistent with tort doctrine, the court failed to analyze the substantive reality behind the concept. The traditional basis of liability is the falsity of the representation inducing the sale of a defective product. Thus, although the application of tort law to successor liability is conceptually justifiable, the Turner court failed to devise a meritorious tort test.

**Another Attempt to Impose Liability on a Successor Corporation: The Product-Line Theory**

In reaction to the inadequacy of the general rule of successor liability and its exceptions, the California Supreme Court in *Ray v. Alad Corp.* instituted a tort concept of successor liability—the product-line theory. The facts of *Alad* are similar to those of other

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130. *See* W. Prosser, supra note 23, § 41, at 236. For discussion of control as an element of successor liability in the proposed test, see infra text accompanying notes 203-07.

131. W. Fletcher, supra note 1, § 7083, at 107; *see also* Tucker v. Paxson Mach. Co., 645 F.2d 620, 621 (8th Cir. 1981) (sale of assets did not cause seller’s dissolution where predecessor engaged in another business after sale).

132. Even if the sale results in the seller’s dissolution, the successor may not have been the proximate cause even if it were the cause in fact. *See* W. Prosser, supra note 23, § 41, at 236.


134. 397 Mich. at 426, 144 N.W.2d at 882 (emphasis added) (citing Restatement (Second) of Torts § 400 (1965)).

135. *See* Restatement (Second) of Torts § 402A (liability imposed on product seller). For the text of this section, see supra note 24.

136. For a detailed analysis of Turner’s strengths and weaknesses, see Note, supra note 63, at 370-87.


138. *Id.* at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582. Other courts have subsequently
successor liability cases: The defendant purchased the plant, equipment, inventory, trade name, and good will of the predecessor for adequate cash consideration.\textsuperscript{139} The contract called for prompt dissolution of the predecessor and a restrictive covenant\textsuperscript{140} and the predecessor complied by dissolving within two months of the sale.\textsuperscript{141} Approximately six months later the plaintiff was injured by a ladder manufactured and sold by the predecessor.\textsuperscript{142} After acquiring the predecessor's assets, the defendant continued manufacturing the same product line without significant disruption,\textsuperscript{143} employing some of the predecessor's workers and soliciting many of its customers.\textsuperscript{144} The successor also held itself out to be the predecessor.\textsuperscript{145} Yet, even though the successor substantially continued the activities of the predecessor, the court determined that none of the traditional exceptions for successor liability were satisfied.\textsuperscript{146}

Despite the inapplicability of the corporate law exceptions, liability was imposed. The court held that where a party "acquires a manufacturing business and continues the output of its line of products under the circumstances here presented [it] 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."\textsuperscript{147} The court found that the public policy behind strict


\textsuperscript{140} 19 Cal. 3d at 24, 560 P.2d at 5, 136 Cal. Rptr. at 576. As in Knapp v. North Am. Rockwell Corp., 506 F.2d, 361, 370 (3d Cir. 1974) (applying Pennsylvania law), \textit{cert. denied}, 421 U.S. 965 (1975), the successor in \textit{Alad} did not purchase the predecessor's unexpired insurance policy. The opinion does not indicate whether the insurance, if assigned, would have indemnified the successor.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.} at 25-26, 560 P.2d at 5-6, 136 Cal. Rptr. at 576-77.

\textsuperscript{143} \textit{Id.} at 27, 560 P.2d at 6, 136 Cal. Rptr. at 577.

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.} at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578. There was adequate consideration, no fraud, and no continuity of ownership interest.

\textsuperscript{147} \textit{Id.} at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.
liability mandated freedom from successor liability restraints. To justify its finding the defendant liable, the Alad court employed a three-tier test:

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

The court determined that these concerns must necessarily take precedence over the free availability and transferability of capital, which is the fundamental advantage of the nonliability rule.

Several weaknesses inhere in the product-line rule as expounded in Alad and adopted by other courts: (1) its unjustified application of strict tort liability to successor corporations; (2) its ambiguity in defining exactly what constitutes the same product line; (3) its imperfect justification for imposing liability.

Strict liability and successor corporations.—The apparent weakness of the product-line exception sounding in strict liability is that the successor has not put the defective article into commerce as strict product liability mandates. In addition, even if the successor causes the destruction of plaintiff's remedy, such a situation may

148. For a discussion of this policy, see Montgomery & Owen, supra note 26.
149. 19 Cal. 3d at 30-31, 560 P.2d at 8-9, 136 Cal. Rptr. at 579-80. The court reasoned that the public policy behind labor law allowed certain shackles of successor liability law to be unhinged: Where a successor acquires a going concern, it becomes mandatory for the successor to succeed to the predecessor's federal obligations to employees and their bargaining representatives. Similarly, policies of strict tort liability call for the spillover of this freedom in the area of products liability of the successor for defects in the predecessor's products. Id.
150. Id. at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580.
151. Id. at 25, 560 P.2d at 5, 136 Cal. Rptr. at 576.
154. The successor might be the cause in fact of destruction of plaintiff's remedy in that but for the sale of assets the predecessor would still be viable. Such a finding is insufficient, however, because proximate cause is required. W. PROSSER, supra note 23, § 41, at 236. For a discussion of the possible significance of a successor's destruction of plaintiff's remedy against the predecessor, see infra text accompanying notes 203-07.
not be the proximate cause\textsuperscript{155} of plaintiff’s injury.\textsuperscript{156}

The corporate stranger which purchases some or all of the assets of a corporation bears no closer relationship to a defective product produced by that predecessor than does any other company in the industry which is producing the same product. Indeed, most of the policies advanced by the courts in support of the rule of expanded liability would be more efficiently advanced by placing liability on the entire industry rather than on the good faith purchaser alone. No court has ever suggested such a result.\textsuperscript{157}

Rather than addressing the lack of normal tort causation inherent in strict liability doctrine, the court supports its test with strict liability policy—particularly the cost-spreading ability of a successor corporation that continues the same product as the predecessor.\textsuperscript{158} In light of a possible conservative trend in the application and definition of strict products liability,\textsuperscript{159} the mere existence of similar policy concerns does not warrant the imposition of strict tort liability on a successor. As tort law is not merely a compensation system, successor liability should not be dictated by a successor’s deep pocket.

What constitutes the product line?—The second area of difficulty in \textit{Alad} is determining how literally the court intended its same-product-line standard. It refers to testimony labeling the defective product “as ‘an old’ model manufactured by [the predecessor].”\textsuperscript{160} At least one court has interpreted \textit{Alad} as mandating continuation of the same model.\textsuperscript{161} The \textit{Alad} court notes that the predecessor and successor used “identical ‘extrusion plans’ . . . for producing the aluminum components of the ladders.”\textsuperscript{162} Assuming that the product defect was the aluminum component, the same

\begin{itemize}
  \item[\textsuperscript{155}] Proximate cause and cause in fact are among the cornerstones of tort law. W. PROSSER, supra note 23, § 41, at 236.
  \item[\textsuperscript{156}] But cf. Note, Expanding the Products Liability of Successor Corporations, 27 HASTINGS L.J. 1305, 1327 (1976) (respondeat superior rationale supports successor liability because of successor’s ability to maximize profit and spread cost). This analogy seems inexact, however, since respondeat superior includes the concepts of master’s ability to control the servant’s acts and the master’s role in causing the servant’s acts, neither of which is present in the successor liability context. For a discussion of respondent superior, see W. PROSSER, supra note 23, § 69, at 459.
  \item[\textsuperscript{157}] Woody v. Combustion Eng’g, 463 F. Supp. 817, 820 (E.D. Tenn. 1978).
  \item[\textsuperscript{158}] 19 Cal. 3d at 30-31, 560 P.2d at 8, 136 Cal. Rptr. at 579-80.
  \item[\textsuperscript{159}] See supra text accompanying notes 34-44.
  \item[\textsuperscript{160}] 19 Cal. 3d at 26, 560 P.2d at 5, 136 Cal. Rptr. 576.
  \item[\textsuperscript{161}] See Gee v. Tenneco, 615 F.2d 857, 864-65 (9th Cir. 1980) (applying California law).
  \item[\textsuperscript{162}] 19 Cal. 3d at 27, 560 P.2d at 6, 136 Cal. Rptr. at 577.
\end{itemize}
product line could mean the same product defect.

Despite the Alad court’s admonition that its product-line rule applied only in the “narrow circumstances presented,” Rawlings v. D.M. Oliver, Inc. held that a successor was liable under the rule regardless of successor’s alleged elimination of the particular line of products that injured the plaintiff. Perhaps the Alad court intended the same product line to mean only the continuation of a basic type of goods. The ambiguity of Alad extends beyond the mere enumeration of the type of factual situations that triggered application of the product-line rule. The meaning and scope of the phrase necessarily affect the soundness of both the rule itself and its justification.

Justifications for product line liability.—Assuming the court imposed liability because the defendant continued to produce the same product as the predecessor, the court’s reasoning that the successor could spread risk is convincing. In such a situation, the successor would possess the same information as did the predecessor, enabling assessment of product safety and, ultimately, spreading of risk. This, the court determined, fosters a successor’s ability to obtain adequate insurance or effectively pass costs on to consumers. If in contrast, the defect was the result of a discontinued design, the ability to gauge risks would diminish. Mere production of ladders can hardly impart knowledge to a successor of risks associated with an obsolete model. Furthermore, it seems unjust to impose liability

163. Id. at 25, 560 P.2d at 5, 136 Cal. Rptr. at 576.
165. “[M]anufacturing activity by its very nature involves modification of a product line or elimination of an unprofitable item. . . . The general business continued by the manufacturer and its ability to spread these costs must be considered and not merely whether a specific line of products was discontinued.” Id. at 901, 159 Cal. Rptr. at 124-25.
166. Risk-spreading is the second tier of the Alad court's justification. 19 Cal. 3d at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580.
167. The opinion mentions that the successor's knowledge of past operations enables it to estimate potential claims on past products. Id. at 33, 560 P. 2d at 10, 136 Cal. Rptr. at 581. See Ramirez v. Amstead Indus., 86 N.J. 332, 352, 431 A.2d 811, 821-22 (1981). But see Rawlings, 97 Cal. App. 3d at 901, 159 Cal. Rptr. at 124.
168. 19 Cal. App. 3d at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581. This rationale ignores the frequent difficulty in obtaining product liability insurance and/or remaining a solvent business while passing on costs that consumers may be unwilling to bear. The UPLA was proposed because of the difficulty businesses have in obtaining and affording products liability insurance. See Senate Select Comm. on Small Business, Annual Report, S. Rep. No. 629, 95th Cong., 2d Sess. 167-71 (1978). Cf. Ramirez v. Amstead Indus., Inc., 86 N.J. 332, 353, 431 A.2d 811, 822 (noting that imposition of liability may effect owner's ability to sell a business).
on a successor who chose not to continue a specific product line that proved to be defective. 169

Liability may have been imposed in Alad, however, based on the pure economics of risk-spreading. 170 By acquiring the resources and the same type of consumers as the predecessor, costs of injury could be distributed among future buyers. 171 A successor's ability to perceive risks (by producing the same product) and allocate present cost is thus immaterial, a view that is apparent in the recent product-line decision of Ramirez v. Amstead Industries, Inc. 172 Although briefly considering the successor's ability to perceive and avoid risks, the court more pointedly addressed the successor's ability to spread costs. 173 Even if risk assessment is Alad's rationale, Ramirez demonstrates that deep-pocket notions have persisted. 174

In Alad, the destruction of the plaintiff's remedy against the original manufacturer was considered on essential justification for liability. 175 This rationale is weak considering that the plaintiff would be remediless if the predecessor had happened to dissolve and scatter its assets rather than selling them to a successor. 176 Perhaps this problem inspired one court to state, in rejecting the product-line rule, that a case must be decided on "reasoned legal principles rather than upon the fortuitous circumstance of a solvent defendant." 177

169. See Note, supra note 156, at 1330.
170. The opinion discusses the successor's possession of resources available to remunerate injured product users. 19 Cal. 3d at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581.
172. 86 N.J. 332, 431 A.2d 811 (1981). In Ramirez the successor purchased for cash substantially all the predecessor's assets and continued, without significant interruption, the same manufacturing operations. The court found that the successor could be liable under a Turner mere-continuation analysis; nevertheless, it determined that it was more appropriate to look to the successor's continuation of the actual manufacturing operation—the product-line exception—rather than to continuity of the corporate entity. Id. at 347, 431 A.2d at 818-19.
173. Id. at 351, 431 A.2d at 821-22.
174. See also Rawlings, 97 Cal. App. 3d at 901, 159 Cal. Rptr. at 124-25 (defective product discontinued). The imposition of cost-spreading responsibility has been uniformly justified by the third tier of Alad's rationale—a successor deriving benefits through holding itself out as the predecessor necessitates its assuming the corresponding burdens. E.g., Gee v. Tennessco, 615 F.2d 857, 864 (9th Cir. 1980); Rawlings, 97 Cal. App. at 901, 159 Cal. Rptr. at 124 (1979); Ramirez, 86 N.J. at 352, 431 A.2d at 822.
175. 19 Cal. 3d at 31, 560 P.2d at 9, 126 Cal. Rptr. at 580.
176. Woody v. Combustion Eng'g., 463 F. Supp. 817, 821 (E.D. Tenn. 1978). There is concern that if liability is imposed more frequently on a successor, asset sales will decrease. The net effect, therefore, would still be a remediless plaintiff. See infra text accompanying note 202.
The *Alad* test, when scrutinized, calls for more than the fortuitous chance of availability of the successor and unavailability of the predecessor. According to *Alad*, the destruction of the plaintiff's remedy must be *caused* by the successor's acquisition of the predecessor's business.\(^{178}\) Because the sale of assets is not equivalent to a dissolution of the seller,\(^{179}\) it should not automatically satisfy *Alad's* requirements of destruction of plaintiff's remedy.\(^{180}\) In *Alad*, the successor did cause the predecessor's unavailability because the contract called for both the dissolution of the predecessor and a restrictive covenant.\(^{181}\) Destruction of a party's remedy is not, however, a tortious act in itself.\(^{182}\)

It is unclear how the narrow facts of *Alad* will influence other courts in construing the causation requirement of unavailability. In *Rawlings v. D.M. Oliver Inc.*\(^{183}\), the court refused to limit the product line to an "*Alad clone."*\(^{184}\) *Rawlings* departs from *Alad* in holding the successor liable despite the possibility of recovery from another solvent successor.

Cases applying the product-line rule, or the traditional exceptions, sometimes rely in part on the successor's acquisition of the seller's good will\(^{185}\) as a basis of imposing liability.\(^{186}\) The premise here is that when a buyer acquires a reputable going concern he benefits from its good will; correspondingly, he must assume the burdens

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178. 19 Cal. 3d at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580.
179. For the various implications of an asset sale, see infra note 204.
180. Furthermore, even if the predecessor does dissolve as a result of the sale, the plaintiff may still theoretically have a remedy against a predecessor. In reality, however, this is often not practical. See supra text accompanying notes 84-87.
182. For a suggestion of circumstances that could give rise to a successor's duty to compensate a plaintiff, see infra notes 192-95 and accompanying text.
184. *Id.* at 900, 159 Cal. Rptr. at 124; *see also* Nieves v. Bruno Sherman Corp., 86 N.J. 361, 371, 431 A.2d 826, 831 (1981) (liability can be imposed on intermediate successor corporation even where successor is viable and continues to produce same product line as defective product).
185. Good will includes the predecessor's reputation and the successor's public representation of the predecessor's continued existence. See Ramirez, 86 N.J. at 352, 431 A.2d at 822.
of potential liability as did the predecessor.\textsuperscript{187} This focus is shortsighted, since the acquisition of benefits does not and should not necessitate assumption of all burdens. The successor is not legally bound to assume the predecessor's role.\textsuperscript{188} Furthermore, the use of a trade name and good will will not always benefit the successor, who in fact takes such a risk in bargaining. The successor's reputation may be damaged by product failure, when it buys a product line within which the predecessor produced manufacturing defects,\textsuperscript{189} or when it does not purchase a product line that is later found defective. Thus, the successor may not always benefit from the purchase of good will as courts have assumed.\textsuperscript{190} Additionally, the predecessor's continued liability is presumably reflected in a higher purchase price. If a successor were to assume liabilities, the consideration the predecessor received would correspondingly decrease. A successor good faith purchaser for value held liable for unbargained for tort claims is confronted with an uncalculated and unexpected expense.\textsuperscript{191} The benefits the successor receives thus may not be as great as they initially appear. The argument that reaping benefits necessitates assuming burdens is not viable when unsupported by legal doctrine or specific facts in a case.

Although the product-line rule is troublesome, the principle of imposing tort liability is meritorious. There are situations where a successor legitimately can and should be found liable based on tort law; strict liability, however, should not be utilized. A rule can be developed that facilitates both tort and corporate law interests.

**Proposed Exception to the General Rule of Nonliability of a Successor**

(1) Where the sale of assets of a predecessor's corporation causes the predecessor's dissolution, whether it be (a) a requirement

\textsuperscript{187} Alad, 19 Cal. 3d at 34-35, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82.
\textsuperscript{188} "An assets transaction is attractive because it may be made relatively free from unknown liabilities. . . . A merger, consolidation, or stock purchase subjects the buyer to unknown liabilities. . . ." \textit{The Lawyer's Basic Corporate Practice Manual} § 912 (ALI 1970).
\textsuperscript{189} UPLA, supra note 8, § 104 analysis, 44 Fed. Reg. at 62,722.
\textsuperscript{190} Woody v. Combustion Eng'g, 463 F. Supp. 817, 821 (E.D. Tenn. 1978).
\textsuperscript{191} Cf. Ramirez, 86 N.J. at 359-60, 431 A.2d at 825-26 (Schreiber, J., concurring) (strict liability should not be applied retrospectively because of adverse economic consequences on successor). A predecessor, who originally bore this liability, receives windfall profits when liability is avoided.
of the contract, or (b) the foreseeable result of the contract; and where the defective product has been (a) designed defectively by the predecessor and (b) continued by the successor in substantially the same form, the successor is liable for the injury proximately caused by the product manufactured by the predecessor.

(2) Where the successor (a) ceases to produce a product, and (b) does so because of actual knowledge of its defective design, the successor is liable for injury proximately caused by the product if, under the circumstances, a reasonable effort is not made to warn all foreseeable product users. This proposal would be most effective if instituted through legislation because the element of prospectiveness would then be satisfied. In this regard, some uncertainty in successor liability law would be eliminated, and the current problem of inefficient business planning obviated. In addition, prospectiveness would enhance the tort claimant's chance of recovery because a successor that would be liable under the proposed rule would have the same duty as did the manufacturer of the product to procure insurance and to keep

192. The successor should know that the sale will result in dissolution: (1) if it is stated by the predecessor; (2) if consideration given must be used to satisfy creditors of an ailing corporation; (3) if a restrictive covenant stifles the predecessor so as to make any future business venture unlikely; or (4) if the temporary continued existence is as a mere shell with only negligible assets.

193. A design defect "conforms to the intended design" and is distinguishable from a manufacturing defect. The latter "does not conform in some significant aspect to the intended design, nor does it conform to the great majority of products manufactured in accordance with that design." Henderson, supra note 36, at 1543. A factual analysis of what constitutes a design defect and a manufacturing defect is beyond the scope of this note. For a review of this area, see id.; Wade, On Product "Design Defects" and Their Actionability, 33 Vand. L. Rev. 551 (1980).

194. The defect must remain notwithstanding any product changes for this provision to apply.

195. This provision may be optional because liability for breach of a duty to warn has, to date, been given only cursory attention. See infra notes 221-33 and accompanying text.

196. The legislative medium has often been suggested. E.g., Leannais v. Cincinnati, Inc., 565 F.2d 437, 441 (7th Cir. 1977) (applying Wisconsin law); Note, supra note 56, at 110; Introduction to UPLA, supra note 8, 44 Fed. Reg. at 62,714.


198. See Turner v. Bituminous Casualty Co., 397 Mich. 406, 428, 244 N.W.2d 873, 883 (1976). Knowledge of prospective liability facilitates business planning in that the worth of a business is, at least in part, contingent on its potential liabilities. Accordingly, the probability of a windfall to either predecessor or successor is lessened. See supra text accompanying note 191.

funds available to satisfy adverse judgments. The proposed test thus considers the interests of both parties involved in successor suits—the injured individual and the corporation.

A greater number of asset sales, however, might produce liability under the proposed test than under the traditional exceptions. Thus, one disadvantage of the proposed test might be that corporations anticipating a lower purchase price where liability could be imposed on a successor may choose piecemeal divestiture as opposed to a sale of assets to one buyer.

As will be discussed, the rule advocates a fault standard for imposing liability. The successor is primarily liable for injury caused by a product manufactured by its predecessor because the successor has caused the predecessor’s dissolution. Although merely causing dissolution does not satisfy tort notions of causation, dissolution gives rise to a successor’s duty to assume potential tort liabilities under the proposed test. Fault is found in the successor’s continued production of a defective product. If, on the other hand, the successor has discontinued the manufacture of a defective product, fault will be found only in cases of inadequate warning.

Although an asset sale may result in a predecessor’s dissolution, liability attaches under this test only if the contract provisions cause the predecessor’s dissolution. This approach differs significantly from one that imposes liability based merely upon

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200. Turner v. Bituminous Casualty Co., 397 Mich. 406, 428, 244 N.W.2d 873, 883. A successor that was aware of potential liability at the time of a contract for the sale of assets is likely to have paid less consideration than if the sale were governed by the traditional rule of nonliability. Therefore, the successor is more likely to have greater resources available with which to satisfy a judgment.

201. In successor liability cases, courts have not distinguished between manufacturing defects and design defects for purposes of imposing liability. Hypothetical application of the proposed test to already decided cases, therefore, is not possible.


204. A sale of assets does not automatically cause dissolution. See W. Fletcher, supra note 1, § 7083, at 107. For instance, a predecessor may have utilized the consideration received for other business activities. There is no dissolution in this situation, nor is the predecessor existing as a mere shell. In time, however, the predecessor may independently decide to dissolve irrespective of any relationship with the successor, thus negating the finding of liability under the proposed rule. If subsequent dissolution were fraudulent (with the knowledge of or foreseeable by the successor), then justification for liability is in harmony with the proposed exception.
plaintiff's need for an economically viable defendant. Dissolution must be either a provision of the contract of sale or its foreseeable result. A successor is thus on notice that a plaintiff cannot realistically seek satisfaction from the original manufacturer, and can no longer assert that the predecessor was to retain tort liability. Such an argument would indicate lack of good faith in a purchase. foreseeable dissolution under the proposed test, therefore, gives rise to a successor duty to assume tort liabilities when bargaining to purchase assets. Although negotiating for tort liabilities would increase the complexity of an asset sale, it would lead to a more accurate valuation of assets and allow a plaintiff to recover.

Liability would not be imposed on a successor unless a plaintiff's injury could be traced to a product defectively designed by the predecessor and manufactured in the same defective form by the successor, the fault of which lies in its continued production of a defective product. Although successor liability cases have mentioned design defects, such defects have not been directly related to the imposition of liability. Because a successor is in a position to assess risks and defects inherent in a defectively designed product, it has the same duty as any other manufacturer to evaluate its product safety. This would have the beneficial effect of stimulating product improvement by the successor. The ability to assess risk under the proposed rule is therefore distinguishable from Ramirez' use of the concept because here, product improvement rather than cost spread-


208. Id.

209. See Note, supra note 169, at 1332 (fault to be inferred from continued production of a defective product). In imposing liability on a successor, however, it is necessary to distinguish between manufacturing and design defects. See infra note 215 and accompanying text.


ing is the desired goal.\textsuperscript{214}

It is important to differentiate between the manufacture and the design of a defective product as they particularly affect successor liability under the proposed test. Where a manufacturing defect causes injury to a plaintiff, the injury is the result of the predecessor’s manufacturing activity. The successor purchased a nondefective product design, and has no special ability to assess defects in prior manufacturing activity based on its own production of a nondefective product.\textsuperscript{215} No liability inheres under the proposed test, therefore, when a manufacturing defect causes injury.

A final justification for liability is the successor’s continued placement of a defectively designed product on the market. By this activity a successor impliedly represents that a product remains reasonably safe and is of good quality. Such behavior induces consumer reliance.\textsuperscript{216} Courts generally take one of two views concerning the effect of market presence on liability. One relies on the successor’s holding itself out to be the predecessor: The successor is estopped from denying this representation and becomes liable.\textsuperscript{217} The other interpretation is that continued market presence of a going concern yields the benefit of good will and correspondingly should include the disadvantage of its burdens.\textsuperscript{218}

Where a successor continues to manufacture a defectively designed product, it is liable under the proposed test. The situation might arise, however, that once a defect becomes known to a successor, it discontinues manufacture of the product. Because this precludes the inference of a representation of product safety and consumer reliance, a legislature or court might find it desirable to end the successor’s responsibility for the product. Yet, a duty to warn would still not be exceedingly burdensome.\textsuperscript{219}

\textsuperscript{214} Ramirez v. Amstead Indus., Inc., 86 N.J. 332, 352, 431 A.2d 811, 822 (1981). Although cost-speading is advantageous, it should be an incidental benefit rather than the basis for imposing liability.

\textsuperscript{215} See UPLA, supra note 8, § 104 analysis, 44 Fed. Reg. at 62,722-23; supra note 169.

\textsuperscript{216} See Montgomery & Owen, supra note 26, at 809 (consumer-reliance rationale of utmost importance for imposing strict liability on successor).

\textsuperscript{217} See Cyr v. B. Offen & Co., 501 F.2d 1145, 1153 (1st Cir. 1974) (applying New Hampshire law) (successor's holding itself out to be predecessor necessarily fetters successor's usual freedom from liability).


\textsuperscript{219} See, e.g., Travis v. Harris Corp., 565 F.2d 443, 448-49 (7th Cir. 1977); Leannais v. Cincinnati, Inc., 565 F.2d 437, 441-43 (7th Cir. 1977); Shane v. Hobam, Inc., 332 F. Supp.
A successor's duty to warn was considered in *Shane v. Hoban Inc.* where the successor purchased the assets of a corporation, held itself out to be the predecessor, and continued to market the same product line. Partial summary judgment on the issue of liability was granted to the defendant, as the general rule of nonliability to a successor was determined to be controlling. Defendant's motion was denied, however, insofar as it pertained to the question of defendant's negligence in failing to warn of a defective product. There were triable issues of fact, the court held, concerning successor's service contract on the defective machine and the successor's acquired or actual knowledge of defect. The defendant could be considered a Good Samaritan, who would have no duty to warn. The court noted that close scrutiny of the facts was necessary because plaintiff's claim for a duty to warn was "treading on uncharted precedential seas."

Cases indicate that nexus between the injured party and the successor is of the utmost concern. Analysis focuses on a service relation between the parties, knowledge of a defect, and knowledge of the location of a product. Generally, where there is no service relationship, skepticism regarding the feasibility of discharging a duty to warn prevents the imposition of liability. This hesitancy is warranted if one mistakenly assumes that the duty to warn always requires a direct warning. Surely where no service contract

526, 529-31 (E.D. Pa. 1971); Nieves v. Bruno Sherman Corp., 86 N.J. 361, 372-73, 431 A.2d 826, 832 (1981); see also Bell, *The Manufacturer's Duty to Notify of Subsequent Safety Improvements*, 33 St. L. Rev. 1087, 1090 (1981) (proposed duty on manufacturer to warn of product's safety developments justified on basis of manufacturer's access to information concerning product dangers). Accordingly, a successor's duty to warn is justifiable because the successor acquires the requisite information base when it produces similar products.

221. Id. at 529-30.
222. Id. at 530.
223. Id.
224. Id.
225. Id.
228. *See* Travis v. Harris Corp., 565 F.2d 443, 449 (7th Cir. 1977): "Absent knowledge of defects, nothing is known to warn against."
229. "Absent knowledge of the location of a machine, there is no known entity to warn."
exists it would be burdensome to seek out all potential owners of a defective product. This alone should not, however, stop the court from imposing a duty to warn in all cases.

The product seller's duty to warn should be governed by what is reasonable under the circumstances.231 Accordingly, a successor's discharge of duty can be effective if it satisfies reasonableness standards.232 Where a service contract has been assumed by the successor, it is reasonable to contact the owner of a product. Where this is not the case, perhaps advertising in a trade journal likely to reach product users is all that should be necessary. Labels put on a successor's product after the defect has been corrected could put product users on notice.233 The most liberal procedure would be the addition to the successor's product line of obvious safety devices, which could serve as an implicit warning. The vast degree of flexibility possible in discharging the duty to warn justifies imposing the duty on a successor.

CONCLUSION

Successor liability law is in a tenuous state. The general rule does not call for liability unless specific conditions are satisfied. Even if a business transaction is planned according to this rule, an exception may be uniquely construed by the court to result in the successor's liability. This unfairly burdens successors who have not bargained or planned for such liability. Where the plaintiff would ordinarily be remediless under the general rule, he or she is often made whole by stretching the rule's exceptions. Continued insensitivity to tort claimants is due to the rule's corporate law foundation.

Yet the application of tort law is more suitable for determining liability of a successor for product liability. Corporate concerns could be satisfied if a tort exception is known to apply in advance of business dealings. Fairness in a new tort exception can be achieved by requiring a successor's causative role in the predecessor's dissolution. Fault can be found in the successor's continued production of a defectively designed product. At the very least, a duty to warn should

231. W. Prosser, supra note 23, § 96, at 646-47.
232. Cf. Fed. R. Civ. P. 4(d)-(e) (service of process varies according to practicality, e.g., depending on circumstances, defendant may be served personally or by general notice in newspaper). Persons who must be warned of product defects are analogous to those who are unknown beneficiaries of a large trust fund: both are difficult to ascertain and reach.
233. See W. Prosser, supra note 23, § 96, at 646-47.
be imposed on a successor that knows a product is defective, even if the successor does not continue to produce the product.

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