NOTE

Oops, We Did It Again (or Did We?): *United States v. General Battery Corp.* and Corporate Successor Liability Under CERCLA

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INTRODUCTION

Thirty years ago, Jan and Paul Smith, the owners of We-Clean-For-Less, opened their first dry cleaning store in the Tri-Cities area.[1] The Smiths maintained a successful dry cleaning business for twenty years, eventually expanding to include more than twenty regional stores.[2] Ten years ago, the Smiths decided to sell their company to William Jones, the owner of Tri-Cities Cleaners.[3]

The Smiths sold the company, dry cleaning equipment, cleaning facilities, store name, and logo to Jones.[4] Jones retained the same employees and store policies and allowed the Smiths to maintain their positions on the We-Clean-For-Less board of directors.[5] After the sale of We-Clean-For-Less to Jones, the Environmental Protection Agency ("EPA") conducted soil contamination tests for each store.[6] Unfortunately, test results revealed high levels of the cleaning solvent percholorethylene in the soil.[7] Filing a lawsuit under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the EPA claimed Jones was responsible for cleaning up the contamination.[8] The EPA alleged Jones assumed this responsibility as the corporate successor of We-Clean-For-Less.[9]

After Congress passed CERCLA in 1980, similar lawsuits attempting to establish corporate successor liability under CERCLA emerged.[10]

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[1] This hypothetical is based on facts similar to *United States v. General Battery Corp.*, 423 F.3d 294 (3d Cir. 2005).

[2] *See supra* note 1.

[3] *See supra* note 1.

[4] *See supra* note 1.

[5] *See supra* note 1.

[6] *See supra* note 1.

[7] *See supra* note 1.

[8] *See supra* note 1.

[9] *See supra* note 1.

[10] *See, e.g.*, K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1025 (8th Cir. 2007) (rejecting liability against successor corporation for herbicide blending and packaging); New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 215 (2d Cir. 2006) (holding successor dry cleaning corporation not liable for cleanup under CERCLA); United States v. Gen. Battery Corp., 423 F.3d 294, 296 (3d Cir. 2005) (determining successor liability under CERCLA against battery-producing corporation successor); United States v. Davis, 261 F.3d 1, 14 (1st Cir. 2001) (examining CERCLA successor liability for hazardous waste disposal site in Rhode Island); City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 246, 253 (6th Cir. 1994) (examining successor liability under CERCLA for hazardous waste disposal site in Michigan and finding state law should be used to determine successor liability under CERCLA); John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 404, 406 (1st Cir. 1993) (applying state law to

CERCLA provides little statutory guidance, forcing courts to determine if federal or state law should govern and how to apply liability to these cases.[11] Moreover, the United States Supreme Court has failed to resolve this judicial schism, leading to growing tensions among the circuit courts.[12]

This Note discusses the Third Circuit Court of Appeals's decision to apply federal law and reject the substantial continuity test in a successor liability case.[13] Part I contextualizes the choice-of-law conflict, the circuit court split over applying state or federal law to determine corporate successor liability under CERCLA, and the different successor liability tests.[14] Part II examines the Third Circuit's decision.[15] The court in *United States v. General Battery Corp.* rejected the substantial continuity test and applied federal, not state, law to determine CERCLA corporate successor liability.[16] Part III argues the Third Circuit erred because it failed to apply state law and the substantial continuity test to determine CERCLA corporate successor liability.[17] Therefore, the Supreme Court should overturn *General Battery* and allow courts to apply state law and the substantial continuity test to determine CERCLA corporate successor liability.[18]

I. BACKGROUND

Increased improper hazardous waste disposal generated national concern and spurred Congress to enact CERCLA in 1980.[19] Under

determine CERCLA corporate successor liability for coal and oil gas wastes); United States v. Carolina Transformer Co., 978 F.2d 832, 834, 837 (4th Cir. 1992) (examining CERCLA successor liability for transformer salvage site and favoring application of uniform federal law for successor liability cases under CERCLA); La.-Pac. Corp. v. Arsarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (noting successor liability under CERCLA falls under federal law).

[11] *See* cases cited *supra* note 10.

[12] *See* United States v. Bestfoods, 524 U.S. 51, 64 n.9 (1998) (failing to resolve successor liability issue); *K.C. 1986*, 472 F.3d at 1022 (same); *see also Gen. Battery*, 423 F.3d at 298-99 (noting *Bestfoods* decision suggests circuit courts should apply federal law rather than state law).

[13] *Gen. Battery*, 423 F.3d at 301, 309.

[14] *See* discussion *infra* Part I.

[15] *Gen. Battery*, 423 F.3d at 294; *see* discussion *infra* Part II.

[16] *See* discussion *infra* Part III.

[17] *See* discussion *infra* Part III.

[18] *See* discussion *infra* Part III.A-B.

[19] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (2000); *see* Cooper Indus., Inc. v. Aviall Servs. Inc., 543 U.S. 157, 161-62 (2004) (noting Congress passed CERCLA in 1980); United States v. Bestfoods, 524 U.S. 51, 55 (1998) (stating Congress passed CERCLA to respond to

CERCLA, Congress sought to regulate hazardous waste disposal and determine liability for improper hazardous waste disposal.[20] However, Congress failed to provide clear guidelines to ascertain successor liability for improper hazardous waste disposal.[21] Consequently, courts considering CERCLA claims must decide whether federal or state law applies, and which successor liability test applies to determine corporate successor liability.[22]

"environmental and health risks posed by industrial pollution"); Exxon Corp. v. Hunt, 475 U.S. 355, 359 (1986) (observing that Congress enacted CERCLA to respond to hazardous waste release); Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 826-28 (7th Cir. 2007) (noting "high-profile environmental disasters" including Love Canal incident led Congress to pass CERCLA); *Gen. Battery*, 423 F.3d at 297-98; B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996); Kenneth K. Kilbert, *Successor Liability Under CERCLA: Whither Substantial Continuity?*, 14 PENN ST. ENVTL. L. REV. 1, 3 (2005); Bradford C. Mank, *Should State Corporate Law Define Successor Liability? The Demise of CERCLA's Federal Common Law*, 68 U. CIN. L. REV. 1157, 1160 (2000); Philip G. Watson, Note, United States v. General Battery Corp.*: The Third Circuit Applies Federal Common Law Rather than State Law to Determine Successor Liability Under CERCLA, Despite Opposing Results in Other Circuits — But Are the Splitting Courts Really Just Splitting Hairs?*, 20 TUL. ENVTL. L.J. 219, 220 (2006); *see also* Meghrig v. KFC W. Inc., 516 U.S. 479, 483 (1996) (stating that cleaning up hazardous waste sites and holding parties responsible are CERCLA's two purposes); Key Tronic Corp. v. United States, 511 U.S. 809, 815 (1994) (stating that ordering cleanup of hazardous waste sites and imposing cleanup costs on offending party are CERCLA's two purposes); New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 203 (2d Cir. 2006); Brief for Natural Resources Defense Council, Prof. Craig N. Johnston et al. as Amici Curiae Supporting Respondent, United States v. Atl. Research Corp., 551 U.S. 128 (2007) (No. 06-562), *available at* 37 ENVTL. L. 411, 422 (2007).

[20] *See* sources cited *supra* note 19.

[21] *Gen. Battery*, 423 F.3d at 298; Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 362 (9th Cir. 1998); La.-Pac. Corp. v. Arsarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988).

[22] *See infra* discussion Part I.B-C; *see, e.g.*, *Nat'l Serv.*, 460 F.3d at 206 (applying federal law over state law to determine successor liability under CERCLA); *Gen. Battery*, 423 F.3d at 296, 304 (contending federal law and de facto merger test apply to successor liability cases under CERCLA); United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) (holding state law applies to successor liability cases under CERCLA); *Atchison*, 159 F.3d at 363 (discussing tension between applying state and federal law to determine successor liability for CERCLA); City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 253 (6th Cir. 1994) (applying state law under CERCLA to determine successor liability); John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 406 (1st Cir. 1993) (holding state law should apply to ascertain corporate successor liability under CERCLA); United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487 n.9 (8th Cir. 1992) (noting court favored application of federal law based on CERCLA's "national application and fairness to similarly situated parties"); United States v. Carolina Transformer Co., 978 F.2d 832, 832 (4th Cir. 1992) (favoring application of uniform

A. Comprehensive Environmental Response, Compensation, and Liability Act

Congress enacted CERCLA to combat abandoned hazardous waste sites in the United States.[23] By the late 1970s, severe environmental damage resulting from abandoned hazardous waste disposal sites came to light in Kentucky, Tennessee, Iowa, and New York.[24] Initially, these hazardous waste disposal sites and the environmental and health consequences associated with improper hazardous waste disposal received scant public attention.[25]

Public attention changed with the discovery of an abandoned hazardous waste site in Love Canal, New York, which propelled Congress to pass CERCLA.[26] In the 1930s and 1940s, the City of Niagara Falls and Hooker Plastics and Chemicals Corporation dumped

federal law for successor liability cases under CERCLA); *La.-Pac.*, 909 F.2d at 1263 (ruling federal law applies under CERCLA).

[23] *See* sources cited *supra* note 19.

[24] *See* Carson Harbor Vill. Ltd. v. Unocal Corp., 270 F.3d 863, 886 & n.15 (9th Cir. 2001) (discussing soil and water contamination of 20,000 drums of hazardous material in Kentucky's Valley of the Drums); Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 308-10 (D. Tenn. 1986) (analyzing Velsicol's negligence in burying more than 300,000 drums containing ultrahazardous chemical waste in Tennessee); Lesley Rushton, *Health Hazards and Waste Management*, 68 BRIT. MED. BULL. 183, 187-88 (2003) (discussing hazardous waste contamination in Love Canal, New York); Sandra Zellmer, *A Tale of Two Imperiled Rivers: Reflections from a Post-Katrina World*, 59 FLA. L. REV. 599, 625 (2007) (noting hazardous waste contamination occurred in Love Canal, New York); Katrine MacGregor, Note, Kennecott Utah Copper Corp. v. United States Department of Interior*: The Validity of Interior's Interpretation of "Promulgated" Within the Statute of Limitations Provision of CERCLA*, 83 CORNELL L. REV. 1383, 1384 & n.3 (1998) (noting improper disposal of hazardous waste in Cedar River, Iowa, led to water and soil contamination).

[25] *See* MacGregor, *supra* note 24, at 1383-84.

[26] *See* Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 826-28 (7th Cir. 2007); Morrison Enter. v. McShares Inc., 302 F.3d 1127, 1132 (10th Cir. 2002) (stating Congress enacted CERCLA in response to Love Canal incident); Pub. Serv. Co. v. Gates Rubber Co., 175 F.3d 1177, 1181 (10th Cir. 1999) (noting Congress forged inclusive program to decrease problems created by abandoned hazardous waste disposal sites); United States v. Rohm & Haas Co., 2 F.3d 1265, 1270 (3d Cir. 1993); City of Wichita v. Trs. of APCO Oil Corp. Liquidating Trust, 306 F. Supp. 2d 1040, 1048 (D. Kan. 2004); Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843, 1849 (2007); Jeffrey Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 959 (2006) (claiming CERCLA legislation adapted to Love Canal incident); Rushton, *supra* note 24, at 187-88; Elizabeth A. Weeks, *Gauging the Cost of Loopholes: Health Care Pricing and Medicare Regulation in Post-Enron Era*, 40 WAKE FOREST L. REV. 1215, 1223 (2005); Zellmer, *supra* note 24, at 625.

large amounts of toxic chemicals onto the land.[27] By the 1950s, developers began to build houses, schools, and sewer lines on the contaminated land.[28] In the 1970s, Love Canal residents discovered high levels of chemical contamination in the local water supply, sewers, and soil.[29] This incident focused public attention on the problems of hazardous waste disposal and lead to CERCLA's passage.[30]

Congress achieved three principal objectives in passing CERCLA.[31] First, Congress created uniform requirements for hazardous waste sites.[32] Second, Congress established the Hazardous Substances Trust Fund to finance hazardous waste cleanup.[33] Third, Congress identified potential "persons" liable for improper hazardous waste disposal.[34]

Congress identified four types of CERCLA violators for improper hazardous waste disposal.[35] First, Congress identified current owners or operators of hazardous waste sites as potential violators. [36] Second, Congress extended CERCLA liability to past owners or operators of hazardous waste sites.[37] Third, Congress included generators and transporters of hazardous waste as potential violators.[38] Fourth, Congress extended CERCLA liability to corporations because it

[27] *See Carson Harbor*, 270 F.3d at 886 & n.15 (observing Hooker Chemical and Plastic Corporation discarded hundreds of drums containing chemicals in Love Canal and gave land to Niagara Falls Board of Education); City of Wichita v. Aero Holdings Inc., 177 F. Supp. 2d 1153, 1167 (D. Kan. 2000) (discussing City of Niagara Falls as defendants in Love Canal lawsuit); Allan J. Topol & Rebecca Snow, *An Overview of the Superfund Statute*, *in* SUPERFUND LAW & PROCEDURE § 1.1 & n.10 (2007) (noting developers built school and houses on contaminated land); Rushton, *supra* note 24, at 187-88.

[28] *See* Rushton, *supra* note 24, at 187-88.

[29] *See id.*

[30] *See Metro. Water*, 473 F.3d at 826-27; *Morrison*, 302 F.3d at 1132; *Pub. Serv.*, 175 F.3d at 1181; *Rohm & Haas*, 2 F.3d at 1270; *City of Wichita*, 306 F. Supp. 2d at 1048; Prentice & Spence, *supra* note 26, at 1849; Rachlinski, *supra* note 26, at 959; Rushton, *supra* note 24, at 187-88; Weeks, *supra* note 26, at 1223; Zellmer, *supra* note 24, at 625.

[31] *See* ENVTL. PROT. AGENCY, CERCLA OVERVIEW, http://www.epa.gov/superfund/policy/cercla.htm (last visited Feb. 16, 2009).

[32] *Id.*

[33] 42 U.S.C. § 9611(a) (2000); ENVTL. PROT. AGENCY, *supra* note 31.

[34] ENVTL. PROT. AGENCY, *supra* note 31.

[35] 42 U.S.C. § 9607(a)(1)-(4) (2000); *see* B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996); City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 250 (6th Cir. 1994); Anspec Co. v. Johnson Controls, Inc., 788 F. Supp. 951, 956 (E.D. Mich. 1992); Kilbert, *supra* note 19, at 3.

[36] *See* cases cited *supra* note 35.

[37] *See supra* note 35 and accompanying text.

[38] *See supra* note 35 and accompanying text.

recognized corporations and other business organizations as "persons."[39]

While CERCLA identifies potentially liable parties, it specifically fails to address corporate successor liability for hazardous waste disposal.[40] Thus, no definition of corporate successor liability exists in CERCLA.[41] Despite the absence of statutory guidance, many courts impose corporate successor liability by implying a federal or state law standard.[42] When imposing corporate successor liability, courts must decide whether to apply federal or state law.[43]

[39] 42 U.S.C. § 9601(21) (2000); *see* United States v. Bestfoods, 524 U.S. 51, 56 (1998); United States v. Gen. Battery Corp., 423 F.3d 294, 298 (3d Cir. 2005); *Betkoski*, 99 F.3d at 518; *City Mgmt.*, 43 F.3d at 250; John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 404 (1st Cir. 1993); United States v. Mex. Feed & Seed Co., 980 F.2d 478, 486-87 (8th Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832, 837 (4th Cir. 1992); *Anspec Co.*, 922 F.2d at 956 n.3; Kilbert, *supra* note 19, at 4; Watson, *supra* note 19, at 221; *see also* 1 U.S.C. § 5 (2000) (defining company and association as referring to corporations for assessing successors and assigns of company or association).

[40] *See* cases cited *supra* note 21.

[41] Scholars define corporate successor liability differently. *See* Taylor v. Cont'l Group Change in Control Severance Pay Plan, 933 F.2d 1227, 1234 (3d Cir. 1991) (stating different definitions of successor exist for every legal situation); *In re* New York, S. & W.R. Co., 109 F.2d 988, 993-94 (3d Cir. 1940) (defining successors as corporations formed by merger or combination that assume rights and burdens of original corporation); Rafael v. Hurst Performance, Inc., 793 F. Supp. 116, 118 (D. Md. 1992).

[42] *See* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 206 (2d Cir. 2006) (asserting Congress failed to address successor liability specifically in CERCLA); United States v. W.R. Grace & Co., 429 F.3d 1224, 1240 (9th Cir. 2005) (noting Congress quickly passed CERCLA legislation and CERCLA's legislative history fails to determine legislative intent and successor liability); *Gen. Battery*, 423 F.3d at 298 (concluding CERCLA does not serve as model for legislation-making process and fails to address successor liability); Uniroyal Chem. Co. v. Deltech Corp., 160 F.3d 238, 246 (5th Cir. 1998) (noting CERCLA's quick passage by Congress led to inconsistent and conflicting provisions); *Betkoski*, 99 F.3d at 518 (noting CERCLA contains no successor liability provision); Kilbert, *supra* note 19, at 4 (noting CERCLA fails to discuss successor liability but courts have implied successor liability by merger or purchase); Watson, *supra* note 19, at 221 (discussing judicial implication of successor liability under CERCLA).

[43] *See Gen. Battery*, 423 F.3d at 298; Watson, *supra* note 19, at 221; *see also Nat'l Serv.*, 460 F.3d at 206 (arguing for applying federal law rather than state law to determine successor liability under CERCLA); United States v. Davis, 261 F.3d 1, 53-54 (1st Cir. 2001) (holding state law applies to successor liability cases under CERCLA); Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 363 (9th Cir. 1998) (discussing tension between applying state or federal law to determine CERCLA successor liability); *City Mgmt.*, 43 F.3d at 250 (determining successor liability under CERCLA must use state law); *John S. Boyd*, 992 F.2d at 406 (holding application of state law for corporate successor liability under CERCLA was

B. Circuit Split over the Application of Federal or State Law for Corporate Successor Liability Under CERCLA

Circuit courts disagree whether to apply federal or state law to determine corporate successor liability under CERCLA.[44] While some circuit courts contend state law applies, other circuit courts apply federal law.[45] Furthermore, the Supreme Court's failure to resolve this issue has perpetuated the division among the circuit courts.[46] The Supreme Court's analysis of whether state or federal law applies to federal programs and the parent-subsidiary relationship does, however, provide circuit courts with some guidance in applying state or federal law under CERCLA.[47]

In *United States v. Kimbell Foods*, the Supreme Court established a three-factor test to determine whether federal or state law applies to federal programs.[48] First, courts must determine whether the federal program requires uniformity.[49] Second, courts must determine whether applying state law obstructs the federal program's objectives.[50] Third, courts must ascertain whether state law disrupts commercial relations.[51] Courts apply federal law only if it makes an affirmative finding for all three factors.[52]

Similarly, the Supreme Court in *United States v. Bestfoods* examined whether parent corporations should be liable for a subsidiary's CERCLA violations.[53] The Supreme Court concluded a parent

appropriate); *Carolina Transformer*, 978 F.2d at 837-38 (favoring application of uniform federal law for successor liability cases under CERCLA); La.-Pac. Corp. v. Arsarco Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (ruling federal law applies under CERCLA).

[44] *Compare Nat'l Serv.*, 460 F.3d at 206, *and Carolina Transformer*, 978 F.2d at 837-38, *with City Mgmt.*, 43 F.3d at 250, *and John S. Boyd*, 992 F.2d at 406.

[45] *See* sources cited *supra* note 43.

[46] *See* United States v. Bestfoods, 524 U.S. 51, 63 n.9 (1998).

[47] *See id.* at 63-64 (concluding courts may hold parent corporation liable under CERCLA for subsidiary's actions); United States v. Kimbell Foods, Inc., 440 U.S. 715, 715 (1979) (explaining three-factor test determines whether state or federal law applies to federal programs).

[48] 440 U.S. at 715; *see Gen. Battery*, 423 F.3d at 299 (discussing *Kimbell* three-factor test); Kilbert, *supra* note 19, at 18-19; Mank, *supra* note 19, at 1170.

[49] *Kimbell*, 440 U.S. at 728; *Nat'l Serv.*, 460 F.3d at 207; *Gen. Battery*, 423 F.3d at 299.

[50] *See* cases cited *supra* note 49.

[51] *Kimbell*, 440 U.S. at 728-29; *Nat'l Serv.*, 460 F.3d at 207; *Gen. Battery*, 423 F.3d at 299.

[52] *Kimbell*, 440 U.S. at 728-33; *see Gen. Battery*, 423 F.3d at 299; *In re* Stephens, 149 B.R. 414, 416 & n.4 (Bankr. E.D. Tex. 1992).

[53] 524 U.S. 51, 55 (1998); *see* Am. Heritage Bancorp v. United States, 56 Fed. Cl. 596, 610-11 (Fed. Cl. 2003); Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d 939, 945

corporation's operation of a subsidiary's plant could result in the parent's direct liability.[54] Moreover, a parent corporation could be derivatively liable for its subsidiary's actions or oversights under CERCLA.[55] In determining a parent corporation's liability, the Supreme Court noted CERCLA offers no clear indication whether federal law should supplant state law.[56] Yet, the Supreme Court held no CERCLA-specific rules exist and federal law determines liability under CERCLA.[57]

While *Bestfoods* dealt with subsidiary liability, some circuit courts applied its reasoning to determine corporate successor liability under CERCLA.[58] A majority of circuit courts use a federal law standard to determine corporate successor liability under CERCLA.[59] For example, in the late 1980s, the Third Circuit Court of Appeals first considered the issue of CERCLA corporate successor liability.[60] In *Smith Land & Improvement Corp. v. Celotex Corp.*, the Third Circuit recognized corporate successor liability under CERCLA, absent any specific CERCLA provision.[61] Furthermore, the court held federal law

(S.D. Cal. 2007).

[54] *Bestfoods*, 524 U.S. at 563-64; Stickrath v. Globalstar, Inc., 527 F. Supp. 2d 992, 1002-03 (N.D. Cal. 2007); *see Am. Heritage*, 56 Fed. Cl. at 611.

[55] *Bestfoods*, 524 U.S. at 62-64.

[56] *Id.* at 63 (specifying uncertainty when plaintiff grounds claim for relief on federal statute).

[57] *Id.* at 70; *see* Rodney B. Griffith & Thomas M. Goutman, *A Hiccup in Federal Common Law Jurisprudence:* Sosa, Bestfoods *and the Supreme Court's Restraints on Development of Federal Rules of Corporate Liability*, 14 U. MIAMI BUS. L. REV. 359, 391 (2006).

[58] *See* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 208-09 (2d Cir. 2006) (applying federal law, not CERCLA-specific law, to comply with *Bestfoods* decision); United States v. Gen. Battery Corp., 423 F.3d 294, 298-300 (3d Cir. 2005) (noting *Bestfoods* decision favors federal law application); Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 363 (9th Cir. 1998) (recognizing federal law applies only if conflict between state law and federal interest arises).

[59] *See, e.g.*, *Nat'l Serv.*, 460 F.3d at 206 (concluding federal law applies to CERCLA successor liability cases); United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) (applying federal law if threat to CERCLA's federal interests arises); United States v. Carolina Transformer Co., 978 F.2d 832, 837 (4th Cir. 1992) (using federal law to determine CERCLA successor liability because national interest to apply CERCLA uniformly exists); La.-Pac. Corp. v. Arsarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (concluding congressional intent warrants applying federal law to determine CERCLA successor liability); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (same).

[60] *See Smith Land*, 851 F.2d at 91.

[61] *Id.*

determines corporate successor liability under CERCLA.[62] CERCLA's scant legislative history supported applying federal law to *Celotex* because federal law conformed to CERCLA's objectives to impose liability and ensure cleanup.[63]

However, the Second Circuit Court of Appeals applied federal law narrowly in *New York v. National Service Industry*.[64] The Second Circuit held that under the de facto merger exception an asset-purchasing corporation could not be liable for the seller corporation's CERCLA liabilities.[65] The court noted that only a significant federal interest compelled the use of a federal standard of law.[66] A federal interest in uniformity alone did not suffice.[67]

Some CERCLA provisions that suggest Congress intended to apply federal law to determine CERCLA corporate successor liability support these cases.[68] For instance, settlement and market liquidity provisions included in CERCLA indicate congressional intent to promote CERCLA's remedial objectives.[69] Moreover, to encourage CERCLA's remedial goals, Congress amended CERCLA in 2001 to include the Brownfields Revitalization Act.[70] With this amendment, Congress sought to encourage the sale and redevelopment of contaminated property under CERCLA.[71]

On the other hand, some circuit courts apply state law to determine corporate successor liability under CERCLA.[72] In *John S. Boyd Co. v.*

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[62] *Id.* at 92.

[63] *La.-Pac.*, 909 F.2d at 1263 (noting CERCLA's meager legislative history); *Smith Land*, 851 F.2d at 91-92; Julie Mendel, Note, *CERCLA Section 107: An Examination of Causation*, 40 WASH. U. J. URB. & CONTEMP. L. 83, 83 & n.2 (1991) (citing *Development in the Law — Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1496-98 (1986)) (discussing CERCLA's objectives).

[64] 460 F.3d at 208.

[65] *Id.* at 209 (noting de facto merger exception did not apply because no continuity of ownership existed between buyer and seller).

[66] *Id.* at 208.

[67] *Id.*

[68] *See* 42 U.S.C. §§ 9614(a), 9652(d) (2000).

[69] United States v. Gen. Battery Corp., 423 F.3d 294, 298-304 (3d Cir. 2005); Kilbert, *supra* note 19, at 19; *see* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91-92 (3d Cir. 1988).

[70] *Gen. Battery*, 423 F.3d at 303; *see* Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2356 (providing small businesses with relief under CERCLA).

[71] 42 U.S.C. § 9607(r)(1) (2002); *see Gen. Battery*, 423 F.3d at 303.

[72] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 363 (9th Cir. 1998); City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 250 (6th Cir. 1994); John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 406 (1st Cir. 1993).

Boston Gas Co., the First Circuit Court of Appeals observed a majority of states used state contract law as the substantive rule to determine corporate successor liability.[73] Therefore, the court applied Massachusetts law to assess the transferability of CERCLA liability for waste cleanup because state contract law did not conflict with federal interests under CERCLA.[74]

Similarly, the Sixth Circuit Court of Appeals held state law governs CERCLA liability because state laws create corporations and do not conflict with federal interests.[75] As stated, state law only applies if no conflict exists with federal law and policy.[76] Notwithstanding this choice-of-law disagreement among circuit courts, circuit courts also disagree regarding which successor liability test to use to determine CERCLA corporate successor liability.[77]

C. Corporate Successor Liability Exceptions

In most jurisdictions, federal law does not apply corporate successor liability to a corporation that only acquires another company's assets.[78] Federal law maintains four common law exceptions to this rule.[79] First, a buyer may accept the seller's liabilities explicitly or implicitly.[80]

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[73] *John S. Boyd*, 992 F.2d at 406.

[74] *Id.*

[75] *See* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1248 (6th Cir. 1991).

[76] *Id.*

[77] *See infra* Part I.C.

[78] *See* K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1021 (8th Cir. 2007) (noting general rule that no liability extends to asset-purchasing corporation); New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 204 (2d Cir. 2006) (same); United States v. Gen. Battery Corp., 423 F.3d 294, 305 (3d Cir. 2005) (same); City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 251 (6th Cir. 1994) (same); United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992) (same); Watson, *supra* note 19, at 228; Richard A. Smolen, Case Note, *Get the Lead Out: Innocent Successor Corporations Responsibility Under CERCLA:* United States v. General Battery Corp. Inc., 25 TEMP. J. SCI. TECH & ENVTL. L. 137, 142 (2006).

[79] *See* Tabor v. Metal Ware Corp., 182 F. App'x 774, 776 (10th Cir. 2006) (outlining four exceptions to general nonliability rule for asset-purchasing corporation); *Nat'l Serv.*, 460 F.3d at 205; *Gen. Battery*, 423 F.3d at 305; *In re* Wright Enter., 77 F. App'x 356, 366-67 (6th Cir. 2003); United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487 (8th Cir. 1992); Action Mfg. Co. v. Simon Wrecking Co., 428 F. Supp. 2d 288, 334 (E.D. Pa. 2006); *In re* Acushnet River & New Bedford Harbor Proceedings, 712 F. Supp. 1010, 1014 (D. Mass. 1989); Watson, *supra* note 19, at 223; GOODWIN PROCTOR, JUDICIAL DECISIONS AFTER *BESTFOODS* PROVIDE GUIDANCE FOR STRUCTURING CORPORATE TRANSACTIONS 2-3 (2005), http://www.goodwinprocter.com/~/media/9314C15134D04A2C904F236D22EF1B1D.aspx.

[80] *See* sources cited *supra* note 79.

Second, the buyer may continue the seller's corporation.[81] Third, the seller may engage in a fraudulent transaction.[82] Fourth, a de facto merger may occur.[83] A minority of circuits also apply a fifth exception, the substantial continuity test.[84]

1. Buyer Accepts Seller Liabilities

First, federal law applies liability to an asset-purchasing corporation if the buyer explicitly or implicitly agrees to accept the seller's liabilities.[85] In this transaction, the buyer voluntarily enters into an agreement with the seller.[86] A buyer can enter voluntarily into an agreement with the seller by inserting a clause in the purchase agreement that states that the buyer will assume some or all of the seller's liabilities.[87] Generally, the purchasing corporation will assume those liabilities "necessary to the uninterrupted conduct of business."[88] Moreover, the buyer can avoid unwanted liabilities by including a clause that expressly denies responsibility for any liabilities not expressly assumed in the sales contract.[89] Thus, the buyer's voluntary

[81] *See* sources cited *supra* note 79.

[82] *See* sources cited *supra* note 79.

[83] *See* sources cited *supra* note 79.

[84] *See* B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir. 1996); Mank, *supra* note 19, at 1158. These states contend the substantial continuity test aligns with CERCLA's broad remedial goals. *See Betkoski*, 99 F.3d at 519. *Contra* United States v. Bestfoods, 524 U.S. 51, 63 (1998); *Nat'l Serv.*, 460 F.3d at 204-05; *Gen. Battery*, 423 F.3d at 309.

[85] Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988); Interstate Power Co. v. Kan. City Power & Light Co., 909 F. Supp. 1241, 1278 (N.D. Iowa 1993); Kilbert, *supra* note 19, at 4-5.

[86] George W. Kuney, *Successor Liability*, 55 LA. B.J. 172, 173 (2007); George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 17 (2007) [hereinafter *Taxonomy*]; *see* United States v. First Dakota Nat'l Bank, 137 F.3d 1077, 1080 (8th Cir. 1998).

[87] Joyce G. Mazero et al., *Pieces of the M&A Puzzle: Key Transaction Challenges for the Franchise Lawyer*, 28 FRANCHISE L.J. 79, 117-18 (2008).

[88] David W. Pollak, *Successor Liability in Asset Acquisitions*, *in* ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 153, 161 (Practicing Law Inst. 2008) (noting that buyers often expressly assume seller's existing contracts).

[89] *See id.*; *see also* Michael Carter, *Successor Liability Under CERCLA: It's Time to Fully Embrace State Law*, 156 U. PA. L. REV. 767, 777 (2008) (asserting that buyer's express assumption of some of seller's liabilities does not imply assumption of *all* liabilities; thus, buyer impliedly assumes seller's liabilities if buyer's "conduct or representation show an intention to assume" those obligations).

act automatically results in the buyer's assumption of some or all of the seller's liabilities.[90]

2. Mere Continuation

Second, federal law imposes liability on a buyer merely continuing the selling corporation.[91] To determine whether to impose liability on a buyer, courts examine several factors.[92] These factors are whether the purchasing corporation retains the same employees, uses the same assets and production facilities, produces the same products as the selling corporation, and holds itself out to the public as a continuation of the previous corporation.[93] Moreover, a common identity of officers, directors, and stocks represents a key factor courts use to determine whether a buyer assumes the seller's liability.[94] Consequently, under this exception, courts view the purchasing and selling corporations as the same legal entity.[95]

3. Fraudulent Transaction

Third, federal law extends liability to an asset buyer entering into transactions with the intent to avoid the seller's creditors.[96] Courts

[90] *See* sources cited *supra* note 86.

[91] *See* K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1021 (8th Cir. 2007); New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 205 (2d Cir. 2006); Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623, 630 (11th Cir. 1996) (applying mere continuation test when one corporation absorbs another corporation "as evidenced by . . . [a common] identity of assets, location, management, personnel, and stockholders"); Interstate Power Co. v. Kan. City Power & Light Co., 909 F. Supp. 1241, 1276 (N.D. Iowa 1993); Kilbert, *supra* note 19, at 6.

[92] *See K.C. 1986*, 472 F.3d at 1025 (citing United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001)); Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc., 336 F.3d 801, 804 (8th Cir. 2003); Kilbert, *supra* note 19, at 6.

[93] *See* Kilbert, *supra* note 19, at 6; Ram Sunder & Bea Grossman, *The Importance of Due Diligence in Commercial Transactions: Avoiding CERCLA Liability*, 7 FORDHAM ENVTL. L.J. 351, 368 (1996); Colleen S. Healy & Mark S. Hacker, Comment, *The Importance of Identifying and Allocating Environmental Liabilities in Sale or Purchase of Assets*, 10 VILL. ENVTL. L.J. 91, 98 n.37 (1999); *see also K.C. 1986*, 472 F.3d at 1025; *Med. Shoppe*, 336 F.3d at 804.

[94] *See Med. Shoppe*, 336 F.3d at 804; United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001); United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487 (8th Cir. 1992).

[95] *See* Mickowski v. Visi-Trak WorldWide, LLC, 415 F.3d 501, 510 (6th Cir. 2005); *Mex. Feed*, 980 F.2d at 487; Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1133 (Ohio 1993); Healy & Hacker, *supra* note 92, at 98 n.37 (noting only one corporation remains after asset transfer).

[96] United States v. Gen. Battery Corp., 423 F.3d 294, 305 (3d Cir. 2005); Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 365 (9th

examine the seller's indebtedness and the adequacy of the buyer's consideration to determine whether a fraudulent transaction has occurred.[97] If the buyer enters into the transaction to avoid the seller's financial liabilities, courts force the buyer to assume the seller's liabilities, including CERCLA liability.[98]

4. De Facto Merger

Fourth, federal law holds an asset buyer liable for the seller's liabilities if a de facto merger occurs.[99] Courts apply the de facto merger exception when the buyer and seller structure the asset purchase to resemble an actual merger or consolidation.[100] Courts examine four factors to determine whether a de facto merger occurred.[101] These factors are continuity of the business, continuity of the shareholders, the seller's liquidation and dissolution, and the buyer's continuance of the seller's business obligations.[102] No single factor, however, is determinative of finding a de facto merger.[103]

Courts tend to merge the de facto merger and mere continuation tests because both tests evaluate the same evidence and utilize the

Cir. 1997); Kilbert, *supra* note 19, at 5; *see also* New York v. N. Storonske Cooperage Co., 174 B.R. 366, 390 (Bankr. N.D.N.Y. 1994); Lisa Cope, Comment, *Who Should Pay Cleanup Costs — The Federal Response to Corporate Successor Liability Under CERCLA*, 32 SANTA CLARA L. REV. 539, 570-71 (1992) ("The difficulty with the fraud exception lies in proving the fraudulent conveyance. The bad faith requirement applies a subjective test to corporate boards of directors that is difficult to prove absent specific statements or board resolutions.").

[97] Kilbert, *supra* note 19, at 5; *see Gen. Battery*, 423 F.3d at 305; *Atchison*, 159 F.3d at 365.

[98] Kilbert, *supra* note 19, at 5; *Taxonomy*, *supra* note 86, at 17. *See generally* Per-Co, Ltd. v. Great Lakes Factors, Inc., 509 F. Supp. 2d 642, 653 & n.15 (N.D. Ohio 2007) (discussing application of fraudulent transaction exception for successor liability in Ohio).

[99] K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1021 (8th Cir. 2007); *Gen. Battery*, 423 F.3d at 305; Action Mfg. Co. v. Simon Wrecking Co., 428 F. Supp. 2d 288, 334 (E.D. Pa. 2006).

[100] Berg Chilling Sys., Inc. v. Hull Corp., 435 F.3d 455, 465 (3d Cir. 2006); Kilbert, *supra* note 19, at 5; *see* IBC Mfg. Co. v. Veliscol Chem. Corp., No. 97-5340, 1999 WL 486615, at *3 (6th Cir. July 1, 1999).

[101] *Gen. Battery*, 423 F.3d at 305; Bud Antle, Inc. v. E. Foods, Inc., 758 F.2d 1451, 1457-58 (11th Cir. 1985); Keller v. Clark Equip. Co., 715 F.2d 1280, 1291 (8th Cir. 1983); *In re* Acushnet River & New Bedford Harbor Proceedings, 712 F. Supp. 1010, 1015 (D. Mass 1989); Watson, *supra* note 19, at 229.

[102] *See* sources cited *supra* note 101.

[103] *See* Atlas Tool Co. v. Comm'r, 614 F.2d 860, 870 (3d Cir. 1980); *In re Acushnet*, 712 F. Supp. at 1015; Kilbert, *supra* note 19, at 5-6; *see also Bud Antle*, 758 F.2d at 1457-58.

same elements.[104] However, courts generally apply the de facto merger exception or the mere continuation exception based on the triggering transaction.[105] Accordingly, courts use the mere continuation exception for corporate reorganizations, and they apply the de facto merger exception for transactions between buying and selling corporations.[106]

5. Substantial Continuity Test

Some circuit courts, including the Fourth and Eighth Circuits, recognize the substantial continuity test as a fifth exception under federal law.[107] On its face, the substantial continuity test encompasses the mere continuation exception.[108] Yet, it does not serve as a simple substitute for the mere continuation exception.[109] Courts recognize the substantial continuity test as a separate exception to asset-buyer liability and view this test as an extension of the mere continuation exception.[110]

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[104] *See* Orthotec, LLC v. Reo Spineline, LLC, 438 F. Supp. 2d 1122, 1130-33 (C.D. Cal. 2006) (describing similarity and interchangeableness between two exceptions); Berg Chilling Sys. Inc. v. Hull Corp., No. Civ.A. 00-5075, 2004 WL 1749174, at *4 (E.D. Pa. Aug. 3, 2004) (observing that some courts do not distinguish between two exceptions); Smolen, *supra* note 78, at 143 (noting identical elements for mere continuation and de facto merger exceptions; however stating mere continuation test applies to company reorganizations, not sales).

[105] Smolen, *supra* note 78, at 143; *see* Santa Maria v. Owens-Illinois, Inc., 808 F.2d 848, 860 (1st Cir. 1986) (observing corporate reorganization fulfills mere continuation exception); Kaur v. Royal Arcadia Palace, Inc., No. 05-CV-4725, 2007 WL 4591250, at *9 (E.D.N.Y. Dec. 27, 2007) (citing Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F. Supp. 834, 839 (S.D.N.Y. 1977)) (concluding mere continuation exception applies when corporate reorganization, not sale, occurs); Flexicorps, Inc. v. Benjamin & Williams Debt Collectors, Inc., No. 06 C 3183, 2007 WL 3231425, at *4 (N.D. Ill. Oct. 30, 2007).

[106] *See* cases cited *supra* note 105.

[107] *See* cases cited *supra* note 84.

[108] *See* Mickowski v. Visi-Trak WorldWide, LLC, 415 F.3d 501, 516 (6th Cir. 2005); *Berg Chilling*, 2004 WL 1749174, at *4; Atl. Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1284 & n.22 (E.D. Pa. 1994).

[109] Pfohl Bros. Landfill Site Steering Comm. v. Browning-Ferris, No. 95-CV-956A(F), 2004 WL 941816, at *9 (W.D.N.Y. Jan. 30, 2004); *see Mickowski*, 415 F.3d at 510; Action Mfg. Co. v. Simon Wrecking Co., 387 F. Supp. 2d 439, 449 (E.D. Pa. 2006).

[110] *See e.g.,* K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1022 (8th Cir. 2007) (observing that substantial continuity test is "offshoot" of mere continuation exemption); Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1998) (noting substantial continuity test is broader than mere continuation test); *Action Mfg.*, 387 F. Supp. 2d at 447 (clarifying that substantial continuity test is "expansion" of mere continuation exemption); Carter, *supra* note 89,

Scholars define the substantial continuity test as the buyer's continuation of the seller's business, including assuming all liabilities.[111] To determine whether a substantial continuation between the selling and buying corporations exists, courts developed a list of factors.[112] These factors include the buyer's retention of the same employees, supervisory personnel, facilities, product, assets, and company name.[113] Courts also consider the buyer's continuation of the seller's general business function and the buyer's claim to continue the seller's business to others.[114] Some courts consider actual or potential notice of liability to the buyer as a factor of the substantial continuity test.[115]

Over the past century, courts enlarged the scope of the substantial continuity test.[116] Initially, the National Labor Relations Board

at 781 (contrasting substantial continuity test exception with de facto merger and mere continuity exceptions because substantial continuity test does not require shareholder continuity, but noting that absence of shareholder continuity does not automatically prevent application of substantial continuity test); George W. Kuney, *Jerry Phillips' Product Line Continuity and Successor Corporation Liability: Where Are We Twenty Years Later?*, 72 TENN. L. REV. 777, 780-81 (2005) (noting substantial continuity test represents loosening of de facto merger exception).

[111] *See* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987); United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487-88 (8th Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992); Kilbert, *supra* note 19, at 7.

[112] H. Lowell Brown, *Successor Corporate Criminal Liability: The Emerging Federal Common Law*, 49 ARK. L. REV. 469, 490 (1996); *see K.C. 1986*, 472 F.3d at 1009 (citing *Mex. Feed*, 980 F.2d at 487-88); *Mex. Feed*, 980 F.2d at 487-88; Tex Tin Corp. v. United States, No. G-96-272, 2006 U.S. Dist. LEXIS 26782, at *18 (S.D. Tex. Apr. 25, 2006); Kilbert, *supra* note 19, at 8; Andrew S. Levine, *Will Environmental Successor Liability Impact Your Next Asset Purchase Deal?*, STRADLEY RONON BUS. ADVISOR (2007), http://www.stradley.com/newsletters.php?action=view&id=265.

[113] *See Fall River*, 482 U.S. at 43; *Carolina Transformer*, 978 F.2d at 838; United States v. Distler, 741 F. Supp. 637, 642-43 (W.D. Ky. 1990); Brown, *supra* note 112, at 490; Kilbert, *supra* note 19, at 8; Levine, *supra* note 112.

[114] *See* sources cited *supra* note 113.

[115] *See e.g.,* Cobb v. Contract Transp., Inc., 452 F.3d 543, 554 (6th Cir. 2006) (noting that framework for assessing successor liability in labor law context includes evaluating notice to successor corporation as factor) ; Holland v. Williams Mountain Coal Co., 256 F.3d 819, 821 (D.D.C. 2001) (discussing notice to successor of liability as part of multi-factor analysis); Interstate Power Co. v. Kan. City Power & Light Co., 909 F. Supp. 1241, 1276 (N.D. Iowa 1993) (including notice as part of multifactor substantial continuity test).

[116] *See e.g., Mex. Feed*, 980 F.2d at 487-88 (describing history of judicial expansion of substantial continuity test); *Carolina Transformer*, 978 F.2d at 840-41 (broadening scope to include predecessor's intent to transfer company and avoid CERCLA liability, same salary, leave time, and personal influence of company's single stockholder); Kilbert, *supra* note 19, at 7-10 (same); Mank, *supra* note 19, at 1177-79 (same).

established the substantial continuity test to ascertain successor liability under the National Labor Relations Act.[117] The Supreme Court affirmed the Board's test by applying it to a series of labor and products liability cases.[118]

In the late 1980s and early 1990s, federal courts expanded the scope of the substantial continuity test to include corporate successor liability cases.[119] In *United States v. Mexico Feed and Seed Co.*, the Eighth Circuit applied the test to CERCLA cases.[120] In *United States v. Carolina Transformer Co.*, the Fourth Circuit agreed with this expansion and added additional factors to determine CERCLA corporate successor liability.[121]

Recently, a majority of federal courts abandoned the use of the substantial continuity test in CERCLA cases.[122] The Supreme Court's

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[117] Holland v. Williams Mountain Coal Co., 496 F.3d 670, 675-76 (D.D.C. 2007); Mank, *supra* note 19, at 1179.

[118] *See, e.g.*, *Holland*, 496 F.3d at 675 (observing substantial continuity test emerged from four Supreme Court cases focusing on labor issues); *Mex. Feed*, 980 F.2d at 487-88 (noting test applied in labor relations, environmental regulation, and products liability cases); Griffith & Goutman, *supra* note 57, at 399 (indicating National Labor Relations Board created substantial continuity test to ascertain successor employer's liability under National Labor Relations Act); Kilbert, *supra* note 19, at 7 (discussing how courts created substantial continuity test by expanding mere continuation test to allow employees some relief in labor and product liabilities cases); Levine, *supra* note 112 (noting substantial continuity test arose from several U.S. Supreme Court product liability and labor relation cases). *See generally Fall River*, 482 U.S. at 28-29 (affirming use of substantial continuity test to determine dyeing company's liability); Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973) (determining successor employer liability for employee's back pay using substantial continuity test).

[119] Kilbert, *supra* note 19, at 7; *see Mex. Feed*, 980 F.2d at 488; *Carolina Transformer*, 978 F.2d at 837, 838, 840-41; Atl. Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1286 (E.D. Pa. 1994) (claiming substantial continuity test conforms to CERCLA's remedial objectives).

[120] 980 F.2d at 487-88 (applying substantial continuity test allocates liability to responsible parties for cleanup costs and prevents companies "from evading their liabilities through changes . . . [in] ownership").

[121] *Carolina Transformer*, 978 F.2d at 837, 838, 840-41 (including predecessor's intent to transfer company and avoid CERCLA liability, same salary, leave time, and personal influence of company's single stockholder, as additional factors); *cf. Mex. Feed*, 980 F.2d at 488 (including whether successor had knowledge of contamination); *Atl. Richfield*, 847 F. Supp. at 1287 (adding knowledge and notice as additional factors to determine successor liability).

[122] United States v. Gen. Battery Corp., 423 F.3d 294, 309 & n.12 (3d Cir. 2005); *see* Nat'l Serv. Indus. v. New York, 352 F.3d 682, 687 (2d Cir. 2003) (concluding that "the substantial continuity doctrine is not part of general federal common law and, following *Bestfoods*, should not be used to determine whether a corporation takes on CERCLA liability as the result of an asset purchase").

decision in *Bestfoods* served as the main impetus for this trend.[123] The Court in *Bestfoods* analyzed a parent corporation's liability for a subsidiary's improper hazardous waste disposal.[124] By concluding that federal law governs liability under CERCLA, the court declined to recognize CERCLA-specific rules.[125]

Consequently, some circuit courts interpreted the *Bestfoods* decision as rejecting any CERCLA-specific rules, including the substantial continuity test.[126] These courts consider the substantial continuity test a departure from successor liability under the federal law.[127] For this reason, the First, Second, Third, Sixth, and Ninth Circuit Courts now reject the substantial continuity test.[128] By contrast, the Fourth and Eighth Circuit Courts still use the test.[129] The Fifth, Seventh, Tenth, and the District of Columbia Circuit Courts have not addressed the issue.[130] Understanding the judicial schism between applying federal or state law coupled with which successor liability test to apply under CERCLA raises federalism questions.

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[123] United States v. Bestfoods, 524 U.S. 51, 55 (1998); *see also Gen. Battery*, 423 F.3d at 309; *Nat'l Serv*. 352 F.3d at 683.

[124] *Bestfoods*, 524 U.S. at 54.

[125] *Id.* at 70; Griffith & Goutman, *supra* note 57, at 391.

[126] *See* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 205 (2d Cir. 2006); *Gen. Battery*, 423 F.3d at 300; United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001); Action Mfg. Co. v. Simon Wrecking Co., 387 F. Supp. 2d 439, 445 (E.D. Pa. 2005); Griffith & Goutman, *supra* note 57, at 396; Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331, 346 (2004); Kilbert, *supra* note 19, at 12-13; GOODWIN PROCTOR, *supra* note 79, at 3-4; *see also* Tex Tin Corp. v. United States, No. G-96-272, 2006 U.S. Dist. LEXIS 26782, at *18-19 (S.D. Tex. Apr. 25, 2006).

[127] *See Nat'l Serv.*, 460 F.3d at 201; Griffith & Goutman, *supra* note 57, at 391-92.

[128] *See Nat'l Serv.*, 460 F.3d at 205 (abandoning substantial continuity test as inconsistent with Supreme Court's decision in *Bestfoods*, 524 U.S. at 72); *Gen. Battery*, 423 F.3d at 309 (same); *Davis*, 261 F.3d at 1; Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 358 (9th Cir. 1998) (affirming mere continuation exception cannot expand to include substantial continuity test); City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 252-53 (6th Cir. 1994) (rejecting substantial continuity test because test only applies to products liability cases); *Action Mfg.*, 387 F. Supp. 2d at 448-50; Kilbert, *supra* note 19, at 10.

[129] *See, e.g.,* United States v. Mex. Feed & Seed Co., 980 F.2d 478, 489-90 (8th Cir. 1992) (upholding use of substantial continuity test by Eighth Circuit); United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992) (affirming Fourth Circuit's approval of substantial continuity test); *Action Mfg.*, 387 F. Supp. 2d at 450-55 (observing only Fourth and Eight Circuits have applied substantial continuity test).

[130] Kilbert, *supra* note 19, at 10.

D. Federalism and CERCLA

The Tenth Amendment reserves all power to the states that the U.S. Constitution does not grant to the federal government or ban from the states.[131] Black's Law Dictionary defines "federalism" as the legal relationship and power dynamics among national, regional, and local governments within the federal government.[132] Federalism promotes state sovereignty and encourages the duality of the federal and state governments.[133] Federalism also invests states with the power to regulate and protect people's quality of life.[134]

In *Garcia v. San Antonio Metropolitan Transit Authority*, the U.S. Supreme Court analyzed the relationship between the national and state governments under the Tenth Amendment.[135] The Supreme Court held that the San Antonio Transit Authority must comply with the federal Fair Labor Standards Act's minimum wage and overtime requirements.[136] The Court examined whether applying the Fair Labor Standards Act to state and local governments violated the Tenth Amendment.[137] The Court refused to allow unelected courts to make decisions favoring or rejecting state policies.[138] The Supreme Court held the political process, including Congress and state legislatures,

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[131] U.S. CONST. amend. X.

[132] BLACK'S LAW DICTIONARY 644 (8th ed. 2004); *see also* Fry v. United States, 421 U.S. 542, 556 (1975); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 360 & n.96 (2006). *See generally* Reno v. Condon, 528 U.S. 141, 143 (2000) (discussing relationship between Driver's Privacy Protection Act and scope of federalism under 10th Amendment); Printz v. United States, 521 U.S. 898, 918-19 (1997) (noting 10th Amendment and other provisions in Constitution protect federalism); South Carolina v. Baker, 485 U.S. 505, 511 & n.5 (1988) (referring to 10th Amendment as basis for federalism principles); Brooklyn Legal Serv. Corp. v. Legal Servs. Corp., 462 F.3d 219, 234 (2d Cir. 2006) (providing definition of federalism under 10th Amendment); Benning v. Georgia, 391 F.3d 1299, 1309 (11th Cir. 2004) (ruling Religious Land Use and Institutionalized Persons Act comports with 10th Amendment); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 665 (2007) (noting 10th Amendment serves as most explicit constitutional provision regarding federalism framework).

[133] City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 421 (1978); United States v. Lipscomb, 299 F.3d 303, 361 (5th Cir. 2002) (Smith, J., dissenting).

[134] Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (quoting Medtronic Inc. v. Lohr, 518 U.S. 470, 475 (1996)) (stating states defend protections including all people's lives and well-being); *see* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1873).

[135] 469 U.S. 528, 530 (1985).

[136] *Id.* at 556-57.

[137] *Id.* at 530.

[138] *See id.* at 556-57.

secured states' rights.[139] By allowing state participation in the federal government, the political process, not courts, protected states from the passage of overly burdensome laws.[140]

Congress incorporated similar principles of federalism into CERCLA.[141] Section 9614(a) of CERCLA allows states to impose additional requirements for hazardous waste disposal.[142] Furthermore, § 9652(d) states CERCLA does not supersede any federal or state law, including state law pertaining to hazardous waste disposal.[143] Contextualizing these CERCLA provisions provides the framework to understand the Third Circuit's decision in *United States v. General Battery Corp*.[144]

II. *UNITED STATES V. GENERAL BATTERY CORP.*

The Third Circuit's recent ruling in *United States v. General Battery Corp.* highlights the split among circuit courts.[145] The Third Circuit applied the de facto merger exception and federal law to determine General Battery's liability as a corporate successor.[146] The Third Circuit concluded General Battery retained liability for its seller's improper disposal of battery casings.[147]

A. Factual and Procedural Background

In *General Battery*, the Third Circuit examined General Battery's successor liability for hazardous waste cleanup costs.[148] General Battery bought Price Battery, a Pennsylvania manufacturer of lead acid batteries, from a single shareholder in 1966.[149] General Battery gave this shareholder more than two million dollars in cash, company stock, and a position on General Battery's board of directors.[150] Price Battery transferred its inventory, equipment, contracts, and legal

[139] *Id.*

[140] *Id.* at 550-52.

[141] *See* 42 U.S.C. §§ 9614(a), 9652(d) (2000).

[142] *Id.* § 9614(a).

[143] *Id.* § 9652(d); New Mexico v. Gen. Elec. Co., 467 F.3d 1223, 1243 (10th Cir. 2006).

[144] *See infra* Part II.A-B.

[145] *See* 423 F.3d 294, 294 (3d Cir. 2005).

[146] *Id.* at 302, 305.

[147] *Id.* at 309.

[148] *Id.* at 296.

[149] *Id.*

[150] *Id.*

responsibilities to General Battery.[151] In addition, General Battery retained Price Battery's president, executive vice president, and vice president of manufacturing.[152] In 1992, the EPA discovered high levels of lead at General Battery's waste disposal sites and recommended cleanup to protect human health.[153] As a result of Price Battery's improper disposal of battery casings, the EPA contended that General Battery, as Price Battery's successor, retained liability under CERCLA.[154]

By 2000, General Battery, Price Battery's purchasing corporation, merged with Exide Corporation.[155] Consequently, the United States filed an action against Exide as Price Battery's successor.[156] Nonetheless, General Battery's successor liability under CERCLA remained unclear.[157] The U.S. District Court for the Eastern District of Pennsylvania concluded General Battery was Price Battery's successor.[158] The district court also concluded the continuity of business and liquidation of Price Battery constituted a de facto merger.[159] General Battery, the defendant, challenged the district court's grant of summary judgment for the United States.[160]

B. Holding

The Third Circuit affirmed the district court's grant of summary judgment.[161] The court held federal law determines successor liability under CERCLA.[162] However, by noting a de facto merger occurred, the court rejected the substantial continuity test as a valid way to determine CERCLA corporate successor liability.[163]

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[151] *Id.* at 297.

[152] *Id.*

[153] *Id.* at 296.

[154] *Id.* (noting that parties concede that Exide Corporation is General Battery's successor but raising question of whether General Battery is Price Battery's successor as result of 1966 acquisition).

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at 297.

[159] *Id.*

[160] *Id.* at 296.

[161] *Id.*

[162] *Id.* at 304-05.

[163] *Id.* at 306-07.

The Third Circuit applied federal law to determine corporate successor liability under CERCLA.[164] The court noted state law on successor liability varied greatly resulting in different state interpretations of CERCLA.[165] Multiple interpretations of CERCLA conflict with CERCLA's statutory objectives as a uniform environmental liability statute.[166]

Furthermore, a uniform federal liability standard furthers CERCLA's objectives to encourage settlements and create a corporate and brownfield assets market.[167] The Third Circuit noted varying state successor liability standards actually increased CERCLA litigation and transaction costs.[168] Multiple state standards force courts to interpret CERCLA successor liability issues under a large body of state statutes.[169] Using one source of judicial interpretation, the court reasoned, would reduce litigation costs and expedite remediation.[170]

The Third Circuit then rejected the substantial continuity test to determine corporate successor liability under CERCLA.[171] The court determined that the transaction between Price Battery and General Battery constituted a de facto merger.[172] As discussed, the de facto merger exception serves as a federal law exception that enables courts to hold acquiring corporations liable for their predecessors' actions.[173] The court scrutinized the continuity of enterprise and ownership

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[164] *Id.* at 303-04.

[165] *Id.* at 302.

[166] *Id.*

[167] *Id.* at 302-03; *see* Carter, *supra* note 89, at 795 n.165 (defining brownfield asset market as market in redevelopment of potentially contaminated property); *see also* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified as amended in scattered sections of 42 U.S.C. §§ 9601-22 (2000 & Supp. IV 2004)).

[168] *Gen. Battery*, 423 F.3d at 303.

[169] *Id.* at 302; *see* Thomas Kearns, *An Examination of, and Suggested Revisions to, CERCLA's Provisions Waiving the Federal Government's Sovereign Immunity from Actions Based on State Law*, 5 BUFF. ENVTL. L.J. 17, 73 (1997); *cf.* Susan M. King, *Lenders' Liability for Cleanup Costs*, 18 ENVTL. L. 241, 279-80 (1988) (noting some states have adopted similar state CERCLA programs; but that these programs generally contain stricter penalties and standards than federal program).

[170] *Gen. Battery*, 423 F.3d at 303; *see* Nathan H. Stearns, Comment, *Cleaning up the Mess, or Messing up the Cleanup: Does CERCLA's Jurisdictional Bar (Section 113(h)) Prohibit Citizen Suits Brought Under RCRA* [?], 22 B.C. ENVTL. AFF. L. REV. 49, 59 (1994).

[171] *Gen. Battery*, 423 F.3d at 309 (rejecting substantial continuity test based on other circuit courts' abandonment of test).

[172] *Id.* at 308.

[173] *Id.* at 305.

between the two corporations and concluded both existed.[174] Furthermore, the court determined that Price Battery had terminated its operations and dissolved when General Battery bought out Price Battery's single shareholder.[175] Both companies expressly agreed to transfer Price Battery's contractual obligations to General Battery.[176] Thus, the court concluded that the de facto merger exception applied and held General Battery liable as a corporate successor.

III. ANALYSIS

The Third Circuit erred in applying federal law and rejecting the substantial continuity test to determine General Battery's successor liability under CERCLA.[177] The Third Circuit should have applied state law to honor CERCLA's legislative intent and protect states' rights under federalism principles.[178] Furthermore, regardless of the choice-of-law question, the court should have applied the substantial continuity test.[179] The substantial continuity test provides courts with clear guidelines to determine liability and order remediation.[180] Applying this test still holds General Battery responsible as a successor under CERCLA; however, this test more efficiently determines CERCLA successor liability than other tests.[181]

A. The Third Circuit Should Apply State Law to Preserve Federalism

To preserve the principles of federalism, the Third Circuit should have applied state, not federal, law.[182] In *General Battery*, the court applied federal law to determine General Battery's successor liability under CERCLA.[183] The Third Circuit rejected a state standard of law because the court found that multiple state standards frustrated CERCLA objectives.[184] The court should have applied a state law

[174] *Id.* at 306-07.
[175] *Id.* at 307-08.
[176] *Id.* at 308.
[177] *See infra* Part III.A-B.
[178] *See infra* Part III.A.
[179] *See infra* Part III.A-B.
[180] *See infra* Part III.B-C.
[181] *See infra* Part III.C.
[182] *See infra* Part III.A-B.
[183] United States v. Gen. Battery Corp., 423 F.3d 294, 298 (3d Cir. 2005).
[184] *Id.* at 302.

standard because applying this standard comports with Congress's intent to protect states' rights.[185]

Several CERCLA provisions demonstrate congressional intent to promote federalism over a uniform federal standard.[186] For example, two sections of CERCLA expressly prohibit preempting state law.[187] Under § 9614(a) of CERCLA, states can enact additional limits to CERCLA's requirements for hazardous waste disposal.[188] Moreover, § 9652(d) explicitly prohibits CERCLA from supplanting any federal or state law regarding hazardous waste disposal.[189] While these provisions do not directly apply to successor liability, they demonstrate congressional intent that CERCLA should not preempt state laws for hazardous waste disposal.[190] By including these provisions in CERCLA, Congress sought to protect states' rights and federalism.[191]

Proponents of the Third Circuit's decision claim applying federal law actually comports with CERCLA's objectives.[192] Specific CERCLA provisions suggest congressional intent to use federal law to determine corporate successor liability.[193] For example, Congress included provisions encouraging settlement and market liquidity to promote

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[185] *See* 42 U.S.C. §§ 9614(a), 9652(d) (2000); *see* discussion *infra* notes 186-91 and accompanying text.

[186] New Mexico v. Gen. Elec. Co., 467 F.3d 1223, 1243-44 (10th Cir. 2006) (noting § 9614(a) and § 9652(d) of CERCLA suggest congressional support for protecting states' rights and autonomy existed); *see, e.g.*, Fireman's Fund Ins. v. City of Lodi, 302 F.3d 928, 941-43 (9th Cir. 2002) (observing clauses in CERCLA preserve states' ability to oversee hazardous waste cleanup); United States v. Colorado, 990 F.2d 1565, 1575 (10th Cir. 1993) (concluding Congress intended CERCLA to work with federal and state hazardous waste laws to resolve nation's hazardous waste cleanup problem).

[187] *See* 42 U.S.C. § 9614(a) (affirming each state's right to impose liability for and standards regarding improper hazardous waste disposal); *id.* § 9652(d) (ensuring provisions of this section do not infringe on liabilities under federal and state governments).

[188] *Id.* § 9614(a).

[189] *Id.* § 9652(d).

[190] *Id.* §§ 9614(a), 9652(d).

[191] *See* sources cited *supra* note 187.

[192] United States v. Gen. Battery Corp., 423 F.3d 294, 298 (3d Cir. 2005) (stressing uniformity exists when using federal law and that Congress intended courts to apply federal common law to complement statute); Kilbert, *supra* note 19, at 15. *Contra* Watson, *supra* note 19, at 231 (examining failure of Third Circuit to explain its reasoning for uniformity); Smolen, *supra* note 78, at 152 (analyzing Third Circuit's circular reasoning in applying federal law to ensure uniformity).

[193] *See* 42 U.S.C. § 9622 (2000).

CERCLA's remedial objectives.[194] Congress also included broad categories of responsible parties, proponents argue, because it sought to shift liability and cleanup costs away from taxpayers to responsible parties.[195] Under a federal liability scheme, multiple state successor liability laws create unequal liability standards that conflict with CERCLA's goal to distribute liability equitably.[196]

Arguments for applying federal law fail, however, because the federal system of government discourages preempting states' rights.[197] Mandating the separation of powers among the three branches of government, federalism requires that Congress, not the federal courts, create federal standards.[198] For example, as previously discussed, the Court in *Garcia* held the political process, not courts, should develop federal standards.[199] Judicial recognition of this legislative power

[194] *See id.*; Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 834 (7th Cir. 2007) (suggesting Congress allowed settlements to satisfy its remedial goal of efficient cleanup); Kilbert, *supra* note 19, at 15; William Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution Under CERCLA After* Cooper Industries v. Aviall Services, 18 TUL. ENVTL. L.J. 339, 349-50 (2005) (outlining provisions of Superfund Amendments and Reauthorization Act of 1986 encouraging incentives for early settlements to cleanup).

[195] *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988) (asserting CERCLA distributes cleanup expenses equitably among responsible parties and courts can consider equity on case-by-case basis); Atl. Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1286 (E.D. Pa. 1994) (noting taxpayers or successors may bear cost of cleanup, but congressional intent supports holding successors responsible for cleanup); United States v. Distler, 741 F. Supp. 637, 642 (W.D. Ky. 1990) (observing while taxpayers or successors may share cost of cleanup, congressional intent suggests holding successors responsible for cleanup); Kilbert, *supra* note 19, at 18-19 (contending separate state liability standards frustrate congressional objective to make successors pay for cleanup expenses).

[196] *Gen. Battery*, 423 F.3d at 298-304; Kilbert, *supra* note 19, at 19; *see Smith Land*, 851 F.2d at 91-92; sources cited *supra* note 70.

[197] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 591 (2001) (Stevens, J., concurring in part) (discussing state preemption procedure); Michael Collins, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. ENVTL. AFF. L. REV. 297, 391 (1984); Daniel M. Crane, *Congressional Intent or Good Intentions: The Inference of Private Rights of Action Under the Indian Trade and Intercourse Act*, 63 B.U. L. REV. 853, 908 (1983).

[198] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545-54 (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else — including the judiciary — deems state involvement to be."); Beasley v. Ala. State Univ., 3 F. Supp. 2d 1304, 1315 (M.D. Ala. 1998) (ruling Congress can encourage states to conform with federal standards under federalism); Collins, *supra* note 197, at 391.

[199] *Garcia*, 469 U.S. at 546-47.

reaffirms the Tenth Amendment's balance between state and federal governments and laws.[200] Furthermore, Congress may not preempt state law unless it explicitly provides a specific purpose for federal preemption.[201] As Congress has not done so, the legislative intent of CERCLA to further state law should control.[202]

B. The Third Circuit Should Apply the Substantial Continuity Test Because It Prevents Parties from Structuring Transactions to Escape Liability

In *General Battery*, the Third Circuit should have applied the substantial continuity test to determine corporate successor liability under CERCLA.[203] The Third Circuit, however, concluded a de facto merger occurred.[204] It rejected the substantial continuity test as a method to determine corporate successor liability under CERCLA.[205] Regardless of the choice-of-law question, the court should have applied the substantial continuity test to determine General Battery's successor liability.[206]

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[200] *See id.*

[201] *See* City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 432-33 (2002); Collins, *supra* note 197, at 391 (noting states' powers are not supplanted by any federal act and Congress must specify its purpose and intent to supersede state law); *see also* Sarah W. Rubenstein, Comment, *CERCLA's Contribution to the Federal Brownfields Problem: A Proposal for Federal Reform*, 4 U. CHI. L. SCH. ROUNDTABLE 149, 158 (1997).

[202] *See* sources cited *supra* note 187; *see also* cases cited *supra* note 21.

[203] *See* Allied Corp. v. Acme Solvents Reclaiming Inc., 812 F. Supp. 124, 129 (N.D. Ill. 1993); John Morgan & Nathan Engel, *Best Briefs, Petitioner University of Wisconsin, Madison*, 26 N. KY. L. REV. 493, 513 (1999); Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability Asset on Purchasers*, 4 ENVTL. L. 435, 482 & n.315 (1998); *see also In re* Acushnet River & New Bedford Harbor Proceedings, 712 F. Supp. 1010, 1019 (D. Mass. 1989); Kilbert, *supra* note 19, at 22. *Contra* United States v. Gen. Battery Corp., 423 F.3d 294, 296 (3d Cir. 2005).

[204] *Gen. Battery*, 423 F.3d at 308; Kilbert, *supra* note 19, at 13; Smolen, *supra* note 78, at 137-38; *see* Action Mfg. Co. v. Simon Wrecking Co., 428 F. Supp. 2d 288, 335 (E.D. Pa. 2006).

[205] *Gen. Battery*, 423 F.3d at 309.

[206] *See* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 206 (2d Cir. 2006) (arguing for application of federal law over state law to determine successor liability under CERCLA); *Gen. Battery*, 423 F.3d at 294 (contending federal rule applies to successor liability cases under CERCLA); United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) (holding state law applies to successor liability cases under CERCLA "'as long as it [state law] is not hostile to federal interests'" (quoting John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 406 (1st Cir. 1993))); City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 253 (6th Cir. 1994) (determining successor liability under CERCLA requires using state law); John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 406 (1st

The Third Circuit should have applied the substantial continuity test because this test discourages responsible parties from structuring transactions to escape liability.[207] Structuring transactions to escape CERCLA liability runs counter to the statutory scheme to hold responsible parties liable for improper hazardous waste disposal.[208] Section 9607(a)(4) holds responsible parties liable for remediation costs, injuries resulting from improper hazardous waste, and health risk assessment costs.[209] The substantial continuity test provides structure for courts seeking to impose liability for improper hazardous waste disposal.[210] Courts using the substantial continuity test's factors can examine both the transaction's form and substance to determine CERCLA corporate successor liability.[211]

Critics argue applying the substantial continuity test may threaten innocent buyers.[212] The eight-factor substantial continuity test could lead to the supplanting of the general rule of nonliability for asset buyers for the exception.[213] Buyers routinely purchase a seller's assets and continue the business under new management.[214] To determine liability under the substantial continuity test, however, courts consider routine asset buyers as stock buyers.[215] Consequently, using the substantial continuity test may impose CERCLA liability on innocent

Cir. 1993) (holding state law should apply for corporate successor liability under CERCLA); United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992) (favoring application of uniform federal law for successor liability cases under CERCLA).

[207] *See* cases cited *supra* note 204.

[208] *See* 42 U.S.C. § 9607(a)(4) (2006) (allocating liability for removal action, response costs, damages, and health risk evaluation costs); *id.* § 9613(f)(1) (2000) (allowing parties to seek contribution from liable parties); Morgan & Engel, *supra* note 207, at 513.

[209] § 9607(a)(4)(A-D).

[210] *See* Mank, *supra* note 19, at 1168.

[211] *See* United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487 (8th Cir. 1992); Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt. Corp., 817 F. Supp. 225, 231 (D.N.H. 1993) (citing *Carolina Transformer*, 978 F.2d at 838); Pamela Wu, *Successor Liability in the Seventh Court,* North Shore Gas Co. v. Salomon Inc., 18 TEMP. ENVTL. L. & TECH. J. 233, 250 (2000).

[212] *See* Kilbert, *supra* note 19, at 22 (noting that using substantial continuity test subjects routine asset buyers to potential liability); Schnapf, *supra* note 206, at 499-503 (suggesting invocation of substantial continuity test followed by analysis of innocent buyer defense); *see also* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 205 (2d Cir. 2006) (abandoning substantial continuity test); United States v. Gen. Battery Corp., 423 F.3d 294, 209 (3d Cir. 2005) (rejecting substantial continuity test).

[213] Kilbert, *supra* note 19, at 22.

[214] *See id.*

[215] *See id.*

asset buyers not contributing to or benefiting from a seller's improper hazardous waste disposal.[216] Imposing the substantial continuity test on asset purchases may force buyers to assume liabilities never calculated into their decision or into the price offered to the seller.[217]

Arguments against applying the substantial continuity test fail because the test prevents blanket buyer liability.[218] Under the test, courts examine a buyer's liability as a successor by using a series of judicially created factors.[219] These factors enable courts to evaluate liability on a case-by-case basis.[220] Furthermore, courts consider all the circumstances of a single transaction to determine a buyer's liability as a successor.[221] Evaluating the context of a particular transaction encourages courts to adopt a flexible approach to determine corporate successor liability under CERCLA.[222] This

[216] *See id.*

[217] *See id.*

[218] *See* K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1022 (8th Cir. 2007).

[219] *See* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987); *K.C. 1986*, 472 F.3d at 1021 (citing United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487-88 (8th Cir. 1992)); United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487-88 (8th Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992); Tex Tin Corp. v. United States, No. G-96-272, 2006 U.S. Dist. LEXIS 26782, at *18 (S.D. Tex. Apr. 25, 2006); United States v. Distler, 741 F. Supp. 637, 643 (W.D. Ky. 1990); Brown, *supra* note 112, at 490; Kilbert, *supra* note 19, at 8; Levine, *supra* note 112.

[220] Brown, *supra* note 112, at 490; *see K.C. 1986*, 472 F.3d at 1022 (listing several factors courts can consider to determine successor liability); *Carolina Transformer*, 978 F.2d at 838 (observing courts use and examine various factors to determine successor liability).

[221] Brown, *supra* note 112, at 489-90 (observing courts examine transaction and transaction's effect to determine substantial continuity); *see* Hongkyun Kim, *Is the Korean Soil Environment Conservation Act's Liability Too Severe?: Learning from CERCLA*, 11 ALB. L. ENVTL. OUTLOOK J. 1, 15 & n.78 (2006) (noting courts apply substantial continuity test to entire transaction); *cf. K.C. 1986*, 472 F.3d at 1021 (stating that applying substantial continuity test precludes responsible parties from engaging in subsequent transactions to escape CERCLA liability).

[222] *See Carolina Transformer*, 978 F.2d at 837-38 (applying substantial continuity test as best method to interpret CERCLA broadly and honor legislative intent); Gould, Inc. v. A&M Battery & Tire Serv., 950 F. Supp. 653, 657 (M.D. Pa. 1997); Kleen Laundry & Dry-Cleaning Serv. v. Total Waste Mgmt. Corp., 867 F. Supp. 1136, 1141 (D.N.H. 1994) (claiming substantial continuity test's flexibility promotes CERCLA's remedial policies); Ronald H. Rosenberg, *The Ultimate Independence of Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 505 & n.434 (2004) (observing flexibility of substantial continuity test promotes CERCLA goals to ensure cleanup and encourage uniform application of liability (citing *Carolina Transformer*, 978 F.2d at 837)); Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 316 & n.478 (1996).

flexibility prevents a blanket application of liability against a successor and comports with the statutory framework to determine liability for improper hazardous waste disposal.[223]

C. Applying the Substantial Continuity Test Efficiently Determines Corporate Successor Liability

As a policy matter, if courts apply the substantial continuity test, then they can determine corporate successor liability more efficiently than if they use other successor liability tests.[224] In the present case, applying the substantial continuity test produces the same result as the Third Circuit's de facto merger analysis.[225] Courts should use the substantial continuity test, however, because it more effectively determines CERCLA corporate successor liability.[226] Effectively determining corporate successor liability allows courts to hold parties responsible under CERCLA and promote timely hazardous waste cleanup.[227]

Judicially created tests involving a series of factors allow courts to evaluate cases efficiently and clearly.[228] Courts can use the factors of

[223] *See K.C. 1986*, 472 F.3d at 1022. *See generally* Heather M. Howard, *The Negligent Enablement of Imposter Fraud: A Common-Sense Common Law Claim*, 54 DUKE L.J. 1263, 1283 (2005) (discussing how imposter fraud tort rejects blanket liability); Bradford L. Smith, *The Third Industrial Revolution: Policymaking for the Internet*, 3 COLUM. SCI. & TECH. L. REV. 1, 62 (2001) (imposing blanket liability for intermediaries).

[224] *See infra* notes 226-33 and accompanying text.

[225] United States v. Gen. Battery Corp., 423 F.3d 294, 309 (2005) (holding General Battery liable under de facto merger analysis); *see also* Action Mfg. Co. v. Simon Wrecking Co., 428 F. Supp. 2d 288, 335 (E.D. Pa. 2006) (noting Third Circuit applied de facto merger test despite mere continuation of enterprise); Tex Tin Corp. v. United States, No. G-96-272, 2006 U.S. Dist. LEXIS 26782, at *17 (S.D. Tex. Apr. 25, 2006) (noting Third Circuit adopted de facto merger exception, complying with Supreme Court decision in *Bestfoods*); *In re* Asousa P'ship, Bankr. No. 01-12295DWS, Adversary No. 04-1012, 2006 WL 1997426, at *10-11 (Bankr. E.D. Pa. June 15, 2006).

[226] *See infra* notes 228-31.

[227] *K.C. 1986* 472 F.3d at 1022 (citing Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1998)); *see* Watson, *supra* note 19, at 233.

[228] *See* Musco Sports Lighting, Inc. v. Comm'r, 943 F.2d 906, 908 (8th Cir. 1991) (concluding four-factor test is cost-efficient and effective); BLACK'S, *supra* note 132, at 554 (defining "effective" as action producing result that is clear and unambiguous); *see also* Smith v. City of Jackson, 544 U.S. 228, 228 (2005) (relying on test's factor is reasonable under the Age Discrimination in Employment Act of 1967). *Contra* Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S.Ct. 2652, 2680-81 (2007) (Scalia, J., concurring) (noting district court's five-factor test created vagueness); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150 (1999) (citing Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593 (1993)) (using factor-based test does not provide all-

the substantial continuity test to identify responsible parties under CERCLA based on the facts and circumstances of each case.[229] Unlike tests that focus on a single factor like the mere continuation test, the substantial continuity test allows courts to consider a number of relevant, nonexclusive, factors.[230] Using these factors as a guide to determine corporate successor liability enables courts to focus their judicial resources and order timely cleanup of hazardous waste.[231]

The substantial continuity test allows courts to determine whether the predecessor or the successor corporation retains liability for the improper disposal of hazardous waste.[232] The test's eight factors serve as a guide to assist courts in identifying, categorizing, and determining successor liability characteristics in each unique factual situation.[233] Consequently, this process of identifying and allocating liability to the responsible party allows courts to recognize and order cleanup.[234]

CONCLUSION

In *General Battery*, the Third Circuit erred in holding federal law and the de facto merger exception determined corporate successor liability under CERCLA.[235] First, the Third Circuit should have

inclusive list of factors); Brockie v. Ameripath, Inc., No. 3:06-CV-0185-G, 2007 WL 1187984, at *14 (N.D. Tex. Apr. 23, 2007) (rejecting in-depth analysis of one factor to preserve judicial efficiency).

[229] *See supra* note 227.

[230] *See K.C. 1986*, 472 F.3d at 1022.

[231] *See In re* Jones, 178 F. App'x 662, 664 (9th Cir. 2006) (using four-factor test and determining judicial efficiency); Note, *The Successor Employer's Duty to Arbitrate: A Reconsideration of* John Wiley & Sons, Inc. v. Livingston, 82 HARV. L. REV. 418, 428 (1968). *See generally* Yoav Hammer, *Expressions Which Preclude Rational Processing: The Case for Regulating Non-Informational Advertisements*, 27 WHITTIER L. REV. 435, 473 (2005) (discussing how undefined restriction wastes judicial resources).

[232] *See* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987); United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487-88 (8th Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992); Kilbert, *supra* note 19, at 6-10.

[233] *Fall River*, 482 U.S. at 43; United States v. Distler, 741 F. Supp. 637, 642-43 (W.D. Ky. 1990); Brown, *supra* note 112, at 490; Levine, *supra* note 112; *see Carolina Transformer*, 978 F.2d at 838; Kilbert, *supra* note 19, at 8.

[234] *See* United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001) (stating that construing CERCLA broadly to apply substantial continuity test enables identification of responsible parties); Kilbert, *supra* note 19, at 26-27 (noting that applying substantial continuity test promotes CERCLA's broad remedial goals to hold responsible parties liable for cleanup costs); Mank, *supra* note 19, at 1178.

[235] *See* United States v. Gen. Battery Corp., 423 F.3d 294, 305 (3d Cir. 2005).

applied a state standard.[236] This approach would preserve the principles of federalism and promote states' rights.[237] Second, notwithstanding the choice-of-law question, the Third Circuit should have applied the substantial continuity test because it prevents parties from structuring transactions to escape liability.[238] Third, applying this test allows courts to determine corporate successor liability under CERCLA efficiently and effectively.[239] Therefore, the Supreme Court should overturn *General Battery*.[240] The Court should adopt state law and the substantial continuity test as the appropriate standard to determine CERCLA corporate successor liability.[241]

[236] *See supra* Part III.B-C.
[237] *See supra* Part III.A.
[238] *See supra* Part III.B-C.
[239] *See supra* Part III.C.
[240] *See supra* Part III.A-B.
[241] *See supra* Part III.A-B.