
BNA, INC.

ENVIRONMENT REPORTER

BNA Employee-Owned Since 1947

SUPERFUND

SUCCESSOR LIABILITY

Liability of successor corporations for environmental cleanups under the Comprehensive Environmental Response, Compensation and Liability Act has been questioned in the wake of the Supreme Court's decision in *United States v. Bestfoods*, which limited the degree to which CERCLA liability should displace traditional corporate common law principles in the context of corporate veil piercing. The authors argue that these efforts to curtail successor liability under CERCLA based on *Bestfoods* are misplaced and flout the broad and aggressive goals of the country's leading environmental cleanup statute.

Corporate Successor Liability Law Under CERCLA: The Vitality of the Substantial Continuity Test in Superfund Cleanups

BY JAMES. B. SLAUGHTER, KATHERINE T. GATES & PETER W. LANDRETH

James B. Slaughter is a director of Beveridge & Diamond, P.C. Katherine T. Gates is an associate with Beveridge & Diamond, P.C. Peter W. Landreth was a summer associate with Beveridge & Diamond, P.C. in 2003. The opinions expressed here do not represent those of BNA, which welcomes other points of view.

I. Introduction

Corporate successors plainly are liable under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. In particular, many courts have adopted the substantial continuity test for assessing corporate successor liability under the act.[1] The test, an extension of the

[1] See 1 U.S.C. § 5 ("[t]he word 'company' or 'association,' when used in reference to a corporation, shall be deemed to embrace the words 'successors and assigns of such company or association' in like manner as if these last-named words, or words of similar import, were expressed"); *Anspec Company*

 ISSN 0013-9211

mere continuation basis for finding successor liability, imposes CERCLA liability on an asset purchaser that substantially continues the business of the asset seller. The Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51, 46 ERC 1673 (1998) (29 ER 359, 6/12/98), does not undermine this key component of superfund liability and courts have continued to use the substantial continuity test to compel entities that are fairly deemed successors to participate in the remediation of contaminated sites.

The substantial continuity test developed through courts' practical application of the broad reach of CERCLA liability over its 23-year history. Three federal appeals courts and at least 10 district courts have applied the test under CERCLA, and additional courts have recognized the substantial continuity doctrine without yet formally adopting it. Faced with the challenge of assessing liability for contamination that occurred decades ago, courts have applied the substantial continuity test frequently both before and after *Bestfoods* in order to ensure fair sharing of expensive environmental cleanups. This article demonstrates that the substantial continuity test is consistent with both CERCLA's purposes and common law principles of corporate successor liability.

The text, legislative history, and structure of CERCLA demonstrate that its remedial purposes compel a liberal construction of the statute, including application of federal common law such as the substantial continuity test, to insure that CERCLA's ''polluter pays'' principle is satisfied. The substantial continuity test augments, rather than displaces, traditional corporate law and is in harmony with developing state law of successor liability. The criticisms of the substantial continuity test largely ignore the interplay between federal common law and the goals of CERCLA, as well as the fact that CERCLA—a broad, remedial, retroactive, and no-fault liability statute—often upsets market-based economic expectations more so than any other environmental statute. The substantial continuity test is consistent with and driven by legislative imperatives and gives the fullest effect possible to the statute's corporate liability provisions.

II. CERCLA's Remedial Purposes

Courts have consistently recognized CERCLA's broad remedial purposes and have accordingly construed the act liberally, time and again applying the remedial purpose canon of interpretation. This canon, dictating that remedial statutes shall be liberally construed, has been considered by courts when construing virtually every major federal environmental statute, including the Clean Air Act, the Clean Water Act, the National Environmental Policy Act, and the Resource Conservation and Recovery Act, among others.[2]

Courts construing CERCLA have invoked the canon more often than with respect to any other environmental statute.[3] They have cited the statute's legislative history and structural scheme to support the view that a liberal construction pursuant to CERCLA's broad remedial purposes advances Congress' intent that courts aggressively fill gaps in the statute's text.[4] With this background, the development of the substantial continuity doctrine is particularly appropriate to compel participation in cleanups by the practical successors to long-vanished business entities.

A. An Aggressive Environmental Cleanup Statute

CERCLA was a combination of three separate bills that had been considered over the course of several years, and their combined legislative history demonstrates Congress' awareness of the urgent need for remedial legislation.[5] In the wake of well-publicized reports of historical environmental contamination, legislators realized the inability of existing tort liability and statutory schemes to remediate the harm caused by the improper disposal of hazardous substances.

The House Report accompanying H.R. 7020, a bill proposed to create a ''superfund'' to help finance the cleanup of hazardous waste sites, discussed the need for legislation to remediate the ''tragic consequences of improper[ ], negligent[ ] and reckless[ ] hazardous waste disposal practices'' as well as ''the inadequacy of existing law to properly control [the problem].''[6] An earlier Senate Report also pointed out that ''[e]xisting law with respect to liability and compensation for oil pollution damages and cleanup costs is inconsistent, inadequate, incomplete, inefficient, and inequitable.''[7]

B. Distributing Costs Requires Expansive Liability

With this background of urgency, recognition of the hazards posed by toxic waste sites, and the need for remedial legislation at the time of CERCLA's passage, one overriding purpose emerges from the text and legislative history of the act: to protect human health and the environment from the dangers posed by contaminated dumps and other sites.[8] This ultimate purpose animates CERCLA's two principal remedial goals:

> CERCLA's primary purpose is remedial: to clean up hazardous waste sites. . . . Because it is a remedial statute, CER-

Inc. v. Johnson Controls Inc., 922 F.2d 1240, 1246, 32 ERC 1473 (6th Cir. 1991) (citing 1 U.S.C. § 5 when holding that ''corporation'' as used in CERCLA includes corporate successors).

[2] See Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. L. REV. 199, 230 (1996).

[3] See id. at 262.

[4] See *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 733, 25 ERC 1385 (8th Cir. 1986) *(NEPACCO)* (justifying a liberal construction of CERCLA by concluding that ''the statutory scheme itself is overwhelmingly remedial''); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112, 17 ERC 2110 (D. Minn. 1982) (''CERCLA should be given a broad and liberal construction'' in accordance with Congress' desire for prompt and effective remediation of hazardous waste sites, with responsible parties bearing the costs of the cleanup); see also *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557, 31 ERC 1465 (11th Cir. 1990) (describing CERCLA as ''overwhelmingly remedial'').

[5] H.R. 85, H.R. 7020, and S. 1480.

[6] H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 1, 17-18 (1980). This report was also cited by the Eighth Circuit in *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377, 29 ERC 1529 (8th Cir. 1989), to support its conclusion that CERCLA is an ''overwhelmingly remedial statutory scheme.''

[7] S. Rep. No. 95-427, 19 (1978).

[8] See, e.g., CERCLA § 104(a) (remedial action prompted by release or substantial threat of release of any pollutant or contaminant that would present an imminent and substantial danger to the public health or welfare); S. Rep. No. 96-848 (1980) (stating that the ''paramount purpose'' for response authority provided by S. 1480 is the protection of health, welfare and the environment).

  ER ISSN 0013-9211

> CLA must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the release liable for the costs of the cleanup. In that way, Congress envisioned the EPA's costs would be recouped, the Superfund preserved, and the taxpayers not required to shoulder the financial burden of nationwide cleanup.[9]

The first of these two goals, prompt and efficient cleanup of hazardous waste sites, has been described as the ''the fundamental purpose of CERCLA.'' *United States v. Kramer*, 770 F. Supp. 954, 958 (D.N.J. 1991). Accordingly, Congress granted EPA extensive authority to direct and expedite remediation[10] and courts have upheld EPA's cleanup actions against numerous challenges.[11]

Likewise, Congress and the courts have been clear and unflinching in pursuing CERCLA's other primary goal: imposing the costs of cleanup on those responsible for the contamination.[12] Sen. John Culver (D-Iowa) articulated the polluter pays principle, observing, ''Too often the general taxpayer is asked to pick up the bill for problems he did not create; when costs can be more appropriately allocated to specific economic sectors and consumers, such costs should not be added to the public debt.''[13] The Supreme Court in *Bestfoods* underscored the reach of CERCLA's liability provisions: ''[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.''[14]

Applying this legislative guidance, courts consistently have invoked CERCLA's broad remedial purposes to construe aggressively the act's ''sweeping'' liability provisions and enforce the polluter pays principle. Accordingly, ''owner,'' ''operator,'' and ''arranger'' liability under Section 107(a) can encompass parent corporations, successor corporations, dissolved corporations, lending institutions, and other derivative parties.[15] The Third Circuit in *Smith Land & Improvement Co. v. Celotex Corp.* easily justified the application of CERCLA liability to successors in light of well-established tort- and contract-based liability for successors:

> The concerns that have led to a corporation's common law liability of a corporation for the torts of its predecessor are equally applicable to the assessment of responsibility for clean-up costs under CERCLA. The Act views response liability as a remedial, rather than punitive, measure whose primary aim is to correct the hazardous condition. Just as there is liability for ordinary torts or contractual claims, the obligation to take the necessary steps to protect the public should be imposed on a successor corporation.[16]

Conversely, courts have construed those provisions that limit liability narrowly in order to ensure that CERCLA's remedial polluter pays goal is not frustrated.[17] Moreover, courts have consistently affirmed Congress' intent to impose retroactive liability for cleanup costs given the statute's remedial purposes.[18] The Eighth Circuit, in *NEPACCO*, pointed to CERCLA's backward-looking nature as the chief explanation for its characterization of the statute as ''overwhelmingly remedial and retroactive. . . . In order to be effective, CERCLA must reach past conduct.''[19]

C. Federal Common Law

CERCLA has required the development of federal common law to supplement the well known ambiguities in the statute's text. Courts may formulate federal common law where either a federal rule of decision is ''necessary to protect uniquely federal interests'' or ''Congress has given the courts the power to develop substantive law.''[20] In making this determination, courts must consider whether a statute, its legislative history or its overall regulatory scheme ''suggest[s] that Congress intended courts to have the power to alter or supplement the remedies enacted.'' [21]

Because CERCLA does not speak directly to the issue of successor liability, courts have applied federal common law to insure parties fairly share the burden of expensive cleanups. Numerous courts have concluded that CERCLA's ''legislative history . . . indicates that Congress expected the courts to develop a federal common law to supplement the statute.''[22]

---

[9] *United States v. Witco Corp.*, 865 F. Supp. 245, 247, 39 ERC 1057 (E.D. Pa. 1994).

[10] See CERCLA §§ 104, 106, 107, and 111.

[11] See, e.g., *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 192, 24 ERC 1008 (W.D. Mo. 1985) (the phrase ''imminent and substantial endangerment'' in Section 106 should be given an ''extremely liberal construction'' in order to effectuate the ''beneficent objectives'' of CERCLA).

[12] See, e.g., *Bestfoods*, 524 U.S. at 55–56.

[13] S. Rep. No. 96-848, 72. See also *FMC Corp. v. Dept. of Commerce*, 29 F.3d 833, 843, 38 ERC 1889 (3d Cir. 1994) (noting ''CERCLA's broad remedial purposes'' and citing as ''most important'' CERCLA's ''essential purpose of making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created'').

[14] *Bestfoods*, 524 U.S. at 56, (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21, 29 ERC 1657 (1989) (plurality opinion of Brennan, J.) (emphasis in original).

[15] See *Watson*, supra note 2 at 281 and citations therein.

[16] 851 F.2d 86, 91, 28 ERC 1083, 1087 (3d Cir. 1988).

[17] See, e.g., *Fleet Factors*, 901 F.2d at 1557 (rejecting the lower court's construction of the Section 107(b) ''lender liability'' exemption as ''too permissive,'' holding that ''[i]n order to achieve the 'overwhelmingly remedial' goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability'').

[18] See, e.g., *NEPACCO*, 810 F.2d at 733 (because the statutory scheme is ''overwhelmingly remedial,'' ''CERCLA must reach past conduct'' to be effective).

[19] 810 F.2d at 733.

[20] *Texas Indus. Inc. v. Radcliff Materials Inc.*, 451 U.S. 630, 640 (1981).

[21] Id. See also *United States v. Kimbell Foods Inc.*, 440 U.S. 715, 727–28 (1979).

[22] *Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant Inc.*, 159 F.3d 358, 362, 47 ERC 1690 (9th Cir. 1998) (quoting *Smith Land*, 851 F.2d at 91). See also *Mobay Corp. v. Allied-Signal Inc.*, 761 F. Supp. 345, 350, 32 ERC 1837 (D.N.J. 1991) (''CERCLA's legislative history reveals that Congress intended that the courts should develop federal common law to fill in the gaps in the statute''). *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837–38, 35 ERC 1873 (4th Cir. 1992), also demonstrates how courts have implemented Congress' intent to supplement CERCLA with federal common law:

> In adopting a rule of successor liability in this case we ''must consider traditional and evolving principles of federal common law, which Congress has left to the courts to supply interstitially.'' *United States v. Monsanto*, 858 F.2d 160, 171[, 28 ERC 1177] (4th Cir. 1988). We are reminded that since CERCLA is a remedial statute, its provision should be construed broadly to avoid frustrating the legislative purpose.

As Rep. James Florio (D-N.J.) stated during the final superfund debates:

> [CERCLA] sets forth the classes of persons (for example, owners, operators, generators) who are liable for all costs of removal or remedial action, other necessary costs of response, and damages to natural resources. Rather than announce the standard [of liability], and then cut back on its applicability, this bill refers to section 311 of the Clean Water Act and to *traditional and evolving principles of common law* in determining the liability of such joint tortfeasors. To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in States with more lenient laws, *the bill will encourage the further development of a Federal common law in this area*.[23]

Indeed, CERCLA's text governing contribution claims states that the claims ''shall be governed by Federal law.'' 42 U.S.C. § 9613(f)(1) and (3)(C).

III. The Substantial Continuity Test

The substantial continuity test simply reflects the need to liberally construe CERCLA in order to achieve the act's retroactive and remedial purposes. CERCLA's legislative history and text leave no doubt that the statute anticipates the evolution of common law and that the act's essential public purposes cannot be frustrated by state common law that arguably limits the reach of CERCLA's polluter pays principle.

The substantial continuity test represents a federal common law development that achieves CERCLA's purposes, that is consistent with the Supreme Court's federal common law guidelines, and that is in harmony with existing common law bases for determining successor liability. Courts have recognized the development of the substantial continuity test in labor law and products liability law and have now applied it to CERCLA.

A. Evolution of Corporate Successor Liability Law

The substantial continuity test is a refinement of traditional bases for holding asset purchasers liable for the acts of their predecessors. The common law has long recognized that an asset purchaser succeeds to the liabilities of the asset seller when one of four criteria is met:

- the successor expressly or impliedly agrees to assume them;
- the transaction may be viewed as a de facto merger;
- the transaction is fraudulent; or
- the successor is a mere continuation of the predecessor.[24]

CERCLA's substantial continuity test holds liable the purchasers of businesses that are liable under CERCLA as generators, arrangers, transporters, or owner/operators. It is an equitable test that has been applied by many courts to ensure that functional successors of liable businesses help shoulder the cleanup responsibilities for waste disposal that occurred long ago. Typically, courts have viewed the substantial continuity test as a refinement of the long-extant mere continuation exception.[25] This interpretation is in harmony with the legislative history's guidance that CERCLA liability should be determined by traditional and evolving principles of common law. Because the substantial continuity test is a refinement and not a replacement of the common law, it does not confront the *Bestfoods* prohibition against creating CERCLA-specific rules in derogation of the common law.

Courts applying the substantial continuity test consider a range of factors to determine whether the successor substantially continued the predecessor's enterprise, including:

- retention of the same employees;
- retention of the same supervisory personnel;
- retention of the same production facilities;
- production of the same product or service;
- retention of the same name;
- continuity of assets;
- continuity of general business operations; and
- whether the successor holds itself out as a continuation of the previous enterprise.[26]

No single factor is dispositive; the test is an equitable one, and courts applying it consider the totality of the factors to determine whether or not a business has been substantially continued.[27]

Following this equitable principle, the substantial continuity test adopts a qualitative, not quantitative, perspective when assessing transactions: Its purpose is to ''identify[] transactions where the essential and relevant characteristics of the selling corporation survive the asset sale, and it is therefore equitable to charge the purchaser with the seller's liabilities.''[28]

Mindful of CERCLA's remedial purposes, as well as the obligation to not let traditional common law principles frustrate CERCLA's goals, the Second Circuit in its first *Betkoski* decision (*Betkoski I*) held that ''[b]ecause the substantial continuity test is more consistent with the Act's goals, it is superior to the older and more inflexible 'identity rule'.'' [29] Similarly, the court in *New York v. Westwood-Squibb Pharm. Co.*, ad-

---

The same court also noted that a restrictive view of successor liability ''would not serve the remedial purposes of CERCLA.'' Id. at 840.

[23] 126 Cong. Rec. 31,965 (Dec. 3, 1980) (statement of Rep. Florio) (emphasis added). See also 126 Cong. Rec. 30,932 (Nov. 24, 1980) (statement of Sen. Randolph) (''It is intended that issues of liability not resolved by this act, if any, shall be governed by *traditional and evolving principles of common law*.'') (emphasis added).

[24] WILLIAM MEADE FLETCHER, 14 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 6769 (rev'd ed. 2003) (also recognizing the development of the substantial continuity test under CERCLA).

[25] *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519, 43 ERC 1481 (2d Cir. 1996) (*Betkoski I*), rehearing denied and clarified, *B.F. Goodrich v. Betkoski*, 112 F.3d 88 (2d Cir. 1997) (per curiam) (*Betkoski II*), cert. denied sub nom., *Zollo Drum Co. v. B.F. Goodrich*, 524 U.S. 926, 47 ERC 1352 (1998).

[26] *Betkoski I*, 99 F.3d at 519; *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838, 35 ERC 1873 (4th Cir. 1992).

[27] *Betkoski I*, 99 F.3d at 519. See also *New York v. Westwood-Squibb Pharm. Co.*, 62 F. Supp. 2d 1035, 1039, 49 ERC 1492 (W.D.N.Y. 1999) (holding an asset purchaser liable as a corporate successor when six of the eight factors were satisfied).

[28] *North Shore Gas Co. v. Salomon Inc.,* 152 F.3d 642, 651, 47 ERC 1001 (7th Cir. 1998).

[29] Id. See also *Atlantic Richfield v. Blosenski*, 847 F. Supp. 1261, 1286, 38 ERC 1786 (E.D. Pa. 1994) (concluding that the application of the traditional narrow rules of successor liability would frustrate CERCLA's purposes and held that that act's ''broad remedial goals will be served by application of the substantial continuity test); Cf. *Anspec*, 922 F.2d at 1246, in which

  ER ISSN 0013-9211

dressing *Betkoski I*, explained that the substantial continuity test is ''not . . . an independent fifth exception, but rather . . . the test for determining liability under the more established 'mere continuation' exception.''[30] Application of the substantial continuity test has also been referred to as the broadened mere continuation exception.[31]

In replacing the identity test with the substantial continuity test, the court in *Kleen Laundry* explained this evolution:

> [this] pragmatic approach does not repudiate the factors regularly used to determine questions of corporate successorship under the *de facto* merger or 'mere continuation' exceptions. Rather, the court considers the traditional doctrine in a somewhat more flexible manner in order to promote the broad remedial policies underlying CERCLA.[32]

Other courts have taken the same approach and used the substantial continuity test in place of the identity test to determine if the mere continuation exception applies.[33]

The substantial continuity test also advances essential equitable goals and further vindicates CERCLA by precluding use of asset sales to extinguish environmental liabilities. ''Absent successor liability,'' noted the Second Circuit, ''a predecessor could benefit from the illegal disposal of hazardous substances and later evade responsibility for remediation.''[34] Similarly, the court in *Gould* explained that the policy for applying the broadened mere continuation exception is ''to preclude CERCLA-responsible parties from using corporate formalities to escape liability.''[35] CERCLA contemplates a large universe of responsible parties, and disallowing the substantial continuity test would frustrate the act's goals by providing a safe harbor for transactions to evade successor liability. CERCLA does not merely contemplate but compels adoption of the substantial continuity test.

The substantial continuity test has resulted in findings of successor liability in many scenarios. For example:

- A mining company that purchased the assets of a predecessor mining operation; retained the same production facilities in the same location and producing the same product; continued management and personnel; and continued the use of assets and general business operations, was held liable for its predecessor's disposal of hazardous substances from coal and gas mining operations.[36]
- A waste management company that purchased all trucks, equipment, and customer lists and held itself out as the continuation of a purchased waste oil recycling business was held liable for the predecessor's handling of waste oil.[37]
- A waste hauler that used the same employees, supervisory personnel, and production facilities of the predecessor waste hauler; continued the waste hauling operation with the same assets and with continuity of business operations; continued to use the same name; and held itself out as the continuation of the enterprise, was held liable for hazardous waste dumped at a landfill.[38]

In each of these three examples, the district court cited the importance of advancing CERCLA's broad remedial goals in its application of the substantial continuity test.[39]

Moreover, the substantial continuity test is not unique to CERCLA. It also imposes liability in labor law and products liability situations, where society has determined by either statute or common law that successors must compensate for the harms caused by the acts of their predecessors. For example, the Supreme Court adopted the substantial continuity test for labor law in *Fall River Dyeing & Finishing Corp. v NLRB*. The court examined whether a corporate successor maintained the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produced the same products for the same customers, for the purposes of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq.[40]

Like the policy underlying the application of the test in the CERCLA context, the court's rationale for the adoption of the substantial continuity test in *Fall River Dyeing* was an equitable one; in that case to advance the NLRA's policy goal of ''industrial peace.''[41] The substantial continuity test also has been adopted in the products liability context. A successor corporation may be held liable for injuries caused by its predecessor's products if ''the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise''—regardless

---

the Sixth Circuit, citing 1 U.S.C. § 5, found that it was not necessary to fashion a federal common law rule to determine whether a successor upon formal merger was liable under CERCLA, since the statutory use of ''corporation'' is universally understood to include its successors.

The court went on to state that the remedial nature of CERCLA's scheme required it to interpret the act's provisions broadly, and that it could not interpret CERCLA in a way that would frustrate the statute's legislative purposes. Id. at 1247.

[30] 981 F. Supp. 768, 787, 45 ERC 1856 (W.D.N.Y. 1997).

[31] See, e.g., *Andritz Sprout-Bauer Inc. v. Beazer East Inc.*, 12 F. Supp. 2d 391, 405 (M.D. Pa. 1998).

[32] *Kleen Laundry & Dry Cleaning Servs. Inc. v. Total Waste Mgmt. Inc.*, 867 F. Supp. 1136, 1141 (D.N.H. 1994); see also *North Shore Gas Co.*, 152 F.3d at 654 (applying a flexible hybrid of the de facto merger and mere continuation exceptions).

[33] See *Westwood-Squibb*, 62 F. Supp. 2d at 1039 (stating that the substantial continuity test is superior to the identity test and finding successor liable using substantial continuity); *Andritz*, 12 F. Supp. 2d at 405 (replacing identity test with substantial continuity test and employing this broadened mere continuation exception); *Gould Inc. v. A & M Battery and Tire Serv.*, 950 F. Supp. 653, 657, 44 ERC 1097 (M.D. Pa. 1997) (holding successor liable under the broadened mere continuation exception); *United States v. Keystone Sanitation Co.*, 903 F. Supp. 803, 43 ERC 1404 (M.D. Pa. 1996); *Washington v. United States*, 930 F. Supp. 474, 477 (W.D. Wash. 1996) (holding successor liable under the broadened mere continuation exception).

[34] *Betkoski I*, 99 F. 3d at 519.

[35] *Gould*, 950 F. Supp. at 657 (internal quotations and citation omitted).

[36] *Westwood-Squibb*, 62 F. Supp. 2d at 1039–40.

[37] *Kleen Laundry*, 867 F. Supp. at 1141–42.

[38] *Atlantic Richfield*, 847 F. Supp. at 1289.

[39] See *Westwood-Squibb*, 62 F. Supp. 2d at 1038–39 (quoting *Betkoski I*'s approval of the substantial continuity test in keeping with CERCLA's goals); *Kleen Laundry*, 867 F. Supp. at 1141 (considering ''the traditional doctrine in a somewhat more flexible manner in order to promote the broad remedial policies underlying CERCLA''); *Atlantic Richfield*, 847 F. Supp. at 1285 (''the substantial continuity test is consistent with CERCLA's broad remedial aims'').

[40] 482 U.S. 27, 43 (1987).

[41] Id.

of whether the asset sale is for cash or whether there is continuity of shareholders. *Savage Arms v. Western Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001).[42] Similarly, equitable concerns have spurred the development of the test in products liability law to ensure that plaintiffs are not left without a remedy for their injuries.[43]

B. The Test Is Valid Federal Common Law

The substantial continuity test fulfills the requirements for federal common law set forth by the Supreme Court. The Second Circuit specifically addressed this issue in its second *Betkoski* discussion (*Betkoski II*), repudiating criticism of the test as a violation of the Supreme Court's guidance.[44] The *Betkoski II* court held that applying the substantial continuity test as federal common law is consistent with the criteria set forth in *Kimbell Foods* and refined in *O'Melveny & Meyers v. FDIC*, 512 U.S. 79 (1994). [45] *Kimbell Foods* laid out the factors for determining when it is appropriate to fashion a special federal common law rule:

- whether the issue requires a ''national uniform body of law;''
- whether application of state law would frustrate specific objectives of the federal program; and
- whether ''a federal rule would disrupt commercial relationships predicated on state law.''[46]

O'Melveny supplemented this analysis with the guidance that ''absent a 'significant conflict between some federal policy or interest and the use of state law,' a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule.''[47] The *Betkoski II* court acknowledged the desirability of uniformity in the CERCLA context, but emphasized its concern that allowing permissive and inflexible state law rules like the ''identity'' rule to control the question of successor liability under CERCLA would defeat the act's goals.[48] *Betkoski II* was not the first or the last court to reach the conclusion that the substantial continuity test remains valid under the analysis dictated by the Supreme Court.[49]

While many courts have followed the mandate to fill CERCLA's gaps with federal common law, some commentators have called into question the propriety of developing federal common law independent of state common law, particularly when the federal common law affects traditional common law rules of corporate successor liability. One commentary laments that ''CERCLA has been eroding an ever deepening channel in the law, sparing few traditional limitations on liability,'' and that ''[f]abrication of a new federal common law regime regarding a matter grounded in corporation law would disrupt existing commercial relationships and prove unfair to those who had legitimately relied upon longstanding state law principles.''[50] That analysis, however, fails to address CERCLA's unique remedial purposes and retroactive application, and the implications of these features for the statute's interpretation.

C. The Test Remains Valid Under *Bestfoods*

The Supreme Court's decision in *Bestfoods* does not affect the holdings of the many courts that have concluded that the substantial continuity test is the appropriate legal test for successor liability under CERCLA. *Bestfoods* addressed an issue distinct from those in the substantial continuity cases. The court reviewed the application under CERCLA of veil piercing to a corporate parent for the acts of its subsidiary, whereas courts employing the substantial continuity test assess the liability of a corporate successor for the acts of its predecessor.[51]

Further, the *Bestfoods* holding is limited to the meaning of the term ''operator,'' defined under CERCLA § 107(a)(2), whereas the court in *Betkoski I* was concerned with the more general question of determining what common law successor liability would encompass under CERCLA.[52] The court in *Bestfoods* addressed the problem of an interpretation of CERCLA that abrogated a fundamental, established common law doctrine (piercing the corporate veil), whereas courts like those in *Betkoski I* and *Westwood-Squibb* have applied the substantial continuity test as an extension of the common law.[53]

Though critics also point to the *Bestfoods* decision to argue that the substantial continuity test does not satisfy the requirements for developing federal common law, the Supreme Court in *Bestfoods* did not discuss successor liability under CERCLA, much less the substantial continuity test. Additionally, the Supreme Court expressly declined to address the question of whether federal common law or state law of veil piercing should apply in enforcing CERCLA's indirect liability.[54]

The concern in *Bestfoods* was that adopting the version of parent corporation liability described by the lower court would create a ''relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability.''[55] In contrast, imposing CERCLA liability on a successor corporation under the substantial continuity

---

[42] See also *Turner v. Bituminous Cas. Co.*, 244 N.W. 2d 873 (Mich. 1976) (treating a cash transaction the same as a stock transaction for the purposes of establishing successor liability under the de facto merger exception).

[43] See *Ray v. Alad Corp.*, 560 P.2d 3, 9 (Cal. 1977) (stating the importance of securing a remedy for injured plaintiffs).

[44] 112 F.3d 88.

[45] 112 F.3d at 90-91.

[46] 440 U.S. at 728–29.

[47] *Betkoski II*, 112 F.3d at 91 (quoting *O'Melveny*, 512 U.S. at 87–88).

[48] 112 F.3d at 91.

[49] See, e.g., *New York v. National Servs. Indus.*, 134 F. Supp. 2d 275, 278 (E.D.N.Y. 2001) (considering *Kimbell Foods*, *O'Melveny*, and *Bestfoods*, and holding that substantial continuity remains the law of the circuit). Similarly, the Seventh Circuit analyzed prior Supreme Court decisions and recognized the import of federal common law in determining allocation under CERCLA contribution claims. *Akzo Nobel Coatings Inc. v. Aigner Corp.*, 197 F.3d 302, 306, 49 ERC 1609 (7th Cir. 1999).

[50] Jerry L. Anderson & Gregory R. Sisk, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O'Melveny & Meyers*, 16 VA. ENVTL. L. J. 505, 508 (1997).

[51] Compare *United States v. Bestfoods*, 524 U.S. 51 (1998) with, e.g., *Betkoski I* and *Carolina Transformer*.

[52] *Bestfoods*, 524 U.S. at 58; *Betkoski I*, 99 F.3d at 519.

[53] *Betkoski I*, 99 F.3d at 519; *Westwood-Squibb*, 981 F. Supp. at 787.

[54] Id. at 64 n.9. See also *W.R. Grace & Co.—Conn. v. Zotos Int'l Inc.*, 2000 U.S. Dist. LEXIS 18091, *6 (W.D.N.Y. 2000) (observing that ''the Supreme Court did not hold in *Best Foods* [sic] that state law governed the issue of successor liability in a CERCLA action'').

[55] *Bestfoods*, 524 U.S. at 70.

  ER ISSN 0013-9211

test merely applies a broadened form of the established mere continuation rule, not a CERCLA-specific rule that displaces existing common law.[56]

D. Courts Still Use Substantial Continuity Test

Courts have continued to uphold the validity of the test since the Supreme Court's *Bestfoods* decision and affirmed that *Bestfoods* did not affect the holdings of those courts that had applied the test previously. Courts consider whether to apply the federal common law substantial continuity test or traditional state common law test, recognizing that *Bestfoods* did not address the issue.[57] Since *Bestfoods* was decided at least six district courts have applied the substantial continuity test to determine successor liability under CERCLA, and four other courts, including the Seventh and Ninth circuits, have observed that *Bestfoods* does not bar the application of the test under CERCLA.[58]

E. CERCLA's Goals Outweigh Economic Concerns

Potentially responsible parties under a CERCLA umbrella that incorporates the substantial continuity test of successor liability protest that the application of the test to acquisitions that occurred before CERCLA's enactment in 1980 would unfairly penalize asset purchasers. Critics of the test argue that the imposition of CERCLA liability on the basis of pre-enactment asset sales would result in an unjust penalty to the purchaser and an equally unjust windfall for the seller, since then-unforeseen CERCLA liability could not have been priced into any kind of asset purchase.[59]

This criticism is flawed in light of Congress' intent and CERCLA's goals. The very nature of a retroactive strict liability scheme necessitates the subjugation of economic concerns to the more pressing public health and environmental purposes embodied in CERCLA. While cognizant of budget constraints and the large costs that CERCLA and superfund would impose, Sen. Culver stated that ''we would be pennywise and pound foolish to continue to ignore the problem [of toxic and hazardous waste sumps and spills]. The economic consequences alone, not to mention the effects on the public's health, can be catastrophic.''[60]Culver's statement encapsulates Congress' decision: Cost considerations for businesses are subordinated to the public policy choice to remediate contaminated sites.

Moreover, the feared theoretical economic consequences of broadening corporate successor liability simply have not materialized. Critics have offered no evidence that the application of the substantial continuity test has actually had a chilling effect on asset transactions, or that it has actually increased the number of corporate liquidations or piecemeal breakups as feared.[61]

The critique that the substantial continuity test upsets economic expectations also ignores one of the most basic provisions of CERCLA: retroactive liability irrespective of guilt or knowledge. Congress was fully aware that hazardous wastes had been improperly disposed of in the past (by today's standards) and equally aware that parties at the time of disposal had neither intended nor even understood the harmful nature of their acts. Explaining the background of the problems CERCLA intended to address, EPA Assistant Administrator Thomas Jorling stated,

> Most of the solid wastes, and in particular hazardous wastes, produced in the U.S. in the past have been disposed of using environmentally unsound methods. Given a relative surplus of land, *an economic system which failed to incorporate environmental damages into product costs, and ignorance of what was occurring underground at disposal*

---

[56] See also *United States v. Davis*, in which the First Circuit found that *Bestfoods* confirmed its rule for applying state versus federal common law; that is, to apply state law ''*so long as it is not hostile to the federal interests animating CERCLA*.'' 261 F.3d 1, 54, 53 ERC 1097 (1st Cir. 2001) (quoting *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406, 36 ERC 1737 (1st Cir. 1993) (emphasis added)).

[57] See *Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant*, 159 F.3d 358, 47 ERC 1690 (9th Cir. 1998) (declining to adopt substantial continuity test on other grounds); *North Shore Gas Co.*, 152 F.3d at 651 (reserving question of whether to apply substantial continuity or state law and noting that *Bestfoods* did not decide the analogous question of whether to apply federal common law or state law to corporate veil piercing under CERCLA); *United State v. Exide*, 54 ERC 1618, 2002 WL 319940, *11 (E.D. Pa. 2002) (considering arguments for and against application of substantial continuity before stating that the issue need not be resolved in the case); *New York v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 217, 53 ERC 2177 (N.D.N.Y. 2002) (stating that substantial continuity governs successor liability in the Second Circuit and finding a successor liable using the test); *Bestfoods v. Aerojet-Gen. Corp.*, 173 F. Supp. 2d 729, 758 n.8, 53 ERC 1810 (W.D. Mich. 2001) (the substantial continuity test is inapplicable to CERCLA in the Sixth Circuit due to the Sixth Circuit's opinion in *City Management Corp. v. United States Chemical Co.*, 43 F.3d 244, 39 ERC 1801 (6th Cir. 1994), not due to *Bestfoods*); *Cent. Nat'l Gottesman v. Pemcor Inc.*, 2001 U.S. Dist. LEXIS 16388, at *4 n.5 (E.D. Pa. 2001) (circuit employs the substantial continuity approach to determine successor liability under CERCLA); *Norfolk S. Ry., Co. v. Gee Co.*, 55 ERC 1101, 2001 WL 710116, at *24 (N.D. Ill. 2001) (applying the substantial continuity test to determine successor liability under CERCLA); *New York v. Nat'l Servs. Indus., Inc.*, 134 F. Supp. 2d 275, 278 n.4 (E.D.N.Y. 2001) (rejecting the argument that *Bestfoods* abrogated the substantial continuity test and finding successor liable using the test); *Zotos Int'l*, 2000 WL 1843282, at *6 (recognizing that either federal common law or state law could apply); *New York v. Westwood-Squibb Pharm. Co*, 62 F. Supp. 2d 1035, 1039 (W.D.N.Y. 1999) (finding successor liable using substantial continuity test); *Miami County Incinerator Qualified Trust v. Acme Waste Mgmt. Co.*, 61 F. Supp. 2d 724, 730, 49 ERC 1185 (S.D. Ohio 1999) (the substantial continuity test is inapplicable to CERCLA in the Sixth Circuit due to the Sixth Circuit's *City Mgmt. Corp.* opinion, not due to *Bestfoods*); *Andritz*, 12 F. Supp. 2d at 406 (applying the substantial continuity test to determine successor liability under CERCLA).

[58] See supra, note 56.

[59] See, e.g., Christopher J. Neumann, *Successor Liability & CERCLA: The Runaway Doctrine of Continuity of Enterprise*, 27 ENVTL. L. 1373, 1385–1389 (1997) (arguing that application of the substantial continuity test would have a chilling effect on transactions); Curtis J. Busby, *Asset Purchasers as Potential Responsible Parties Under Superfund*, 12 BYU J. PUB. L. 351, 368–374 (1998) (arguing that the fluidity of asset transfers would be seriously impeded if CERCLA liability attached to mere asset purchases).

[60] S. Rep. No. 96-848. Culver also noted that, at the time, cleanup costs at Love Canal had already cost the state of New York $23 million, when the cost of proper disposal would have been $4 million.

[61] See *Savage Arms Inc. v. Western Auto Supply Co.*, 18 P.3d 49 (Alaska 2001) (discussing the economic realities of applying the substantial continuity test); see also *Turner*, 397 Mich. at 427 (observing that despite the fact that liability unquestionably attaches to successors through formal merger, ''corporate mergers continue to occur even in the face of such contingent obligations'').

sites, past disposal practices have created a large number of situations in which the environment and public health are gravely threatened.[62]

Critics who complain that extending successor liability under the substantial continuity test would impose an unfair penalty on innocent asset purchasers ignore the fact that Congress was cognizant of this past lack of awareness when it enacted CERCLA. Asset purchases made in an economic system that failed to incorporate the costs of environmental damage would obviously not contemplate potential environmental liability; CERCLA's retroactive strict liability scheme demonstrates that Congress understood this past ignorance and enacted CERCLA not to pin guilt or blame, but to impose the costs of those unsound methods on the parties that benefited from them.[63]

Many courts that have applied the substantial continuity test in CERCLA cases have not required the asset purchaser to have had knowledge of potential CERCLA liability at the time of purchase. In doing so, they recognize the incompatibility of such a requirement with the statute's remedial, retroactive liability scheme that precludes and obviates the need for a knowledge requirement. The Second Circuit observed that CERCLA has no causation or scienter requirement because ''a causation requirement makes superfluous the affirmative defenses provided in section 9607(b), each of which carves out from liability an exception based on causation.''[64]

CERCLA's expansive reach has extended liability to industrial contamination that occurred as many as 150 years ago, demonstrating the far-reaching retroactive intent of the statute to impose liability on as wide an array of responsible parties as possible.[65] By the same token, CERCLA's strict liability scheme contemplates the application of a doctrine like the substantial continuity test that extends liability to actors based on responsibility, not guilt or knowledge. Rather, ''the purpose of applying the [substantial continuity] theory is to support the goals of CERCLA and to hold responsible parties liable, not to hold only those who knew of the potential problems liable.''[66]

IV. Conclusion

Holding asset purchasers liable under the substantial continuity test is essential for the fulfillment of CERCLA's policy goals and is consistent with broad principles of corporate liability. Application of the substantial continuity test also corresponds with the consistent judicial fulfillment of Congress' intent that CERCLA be liberally construed to further its remedial purpose—particularly in the context of liability, where Congress' language is broad and sweeping.

The test represents an evolution of the common law, fulfilling Congressional intent and enforcing the polluter pays principle. Courts have recognized this and continue to apply the substantial continuity test as the appropriate test of corporate successor liability under CERCLA, thereby ensuring prompt and equitable cleanups of the nation's most pressing environmental hazards.

---

[62] ''Hazardous & Toxic Waste Disposal'' hearings before the Senate Committee on Environment & Public Works Committee on S. 1341, 96th Cong. (1979) (statement of Thomas C. Jorling, Assistant Administrator Water and Waste Management, Environmental Protection Agency) (emphasis added).

[63] See *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 484, 35 ERC 1761 (8th Cir. 1992); see also 126 Cong. Record S11736 (Aug. 27, 1980) (statement of Sen. Bradley) (''[T]he belief that it is somehow inappropriate for those industries doing business today to help finance a means to protect our society against damages caused by past disposal practices has been rejected by all the congressional committees which have examined the issue carefully'').

[64] *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044, 22 ERC 1625 (2d Cir. 1985).

[65] See, e.g, *Westwood-Squibb*, 62 F. Supp. 2d at 1039–40 (applying the substantial continuity test to hold a successor liable for contamination caused by its predecessors between 1898 and 1925); *United States v. Niagara Mohawk Power Corp.*, 1997 U.S. Dist. LEXIS 21394, *143 (documenting contamination dating back to 1868).

[66] *Gould*, 950 F. Supp. at 659. See also *Exide*, 2002 WL 319940 at *11 (''engrafting [a knowledge requirement] onto the test is inconsistent with the broad remedial goals of [CERCLA]''); *Andritz*, 12 F. Supp. 2d at 405–06 (same); *Washington v. United States*, 930 F. Supp. 474, 482 (W.D. Wa. 1996) (substantial continuity test knowledge requirement is ''illogical'' given CERCLA's strict liability scheme).

  ER ISSN 0013-9211