

IMPOSING STRICT LIABILITY UPON A SUCCESSOR CORPORATION FOR THE DEFECTIVE PRODUCTS OF ITS CORPORATE PREDECESSOR: PROPOSED ALTERNATIVES TO THE PRODUCT LINE THEORY OF LIABILITY

Traditionally, corporate law has governed the question whether a successor corporation which purchases the assets of a dissolving predecessor corporation will be held strictly liable for injuries caused by defects in the predecessor's products.¹ Plaintiffs injured by the predecessor's products typically will seek to recover from the successor corporation. Because the predecessor usually is no longer in existence, the successor corporation is the only entity with assets capable of satisfying the plaintiff's demand.² Under traditional corporate law principles, unless the successor expressly assumes liability for the predecessor's obligations, plaintiffs injured by the predecessor's products can recover only in narrow circumstances.³ Recently, however, in *Ray v. Alad Corporation*⁴ and *Ramirez v. Amsted Industries, Inc.*,⁵ the supreme courts of California and New Jersey have abandoned the narrow confines of corporate law to hold successor corporations strictly liable in tort for injuries caused by the predecessor's products when the successor corporation continues to manufacture the same line of products as its predecessor.⁶ Under this so-called product line theory of liability or product line approach, a successor corporation can be held liable for injuries caused by its predecessor's defective products even though it did not manufacture or sell the defective product to the plaintiff, and even though it employs manufacturing methods which are safe by comparison to those employed by its predecessor.⁷

This note will argue that the product line theory of liability unjustifiably imposes liability on successor corporations because it ignores the method and extent of the corporate transfer.⁸ A more appropriate solution to the problem of

¹ For a collection of cases invoking the general rule, see 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 n.1 (1973).

² See, e.g., *Ray v. Alad Corp.*, 19 Cal. 3d 22, 31-32, 560 P.2d 3, 9, 136 Cal. Rptr. 574, 580 (1977). Plaintiff also might seek recovery from the successor where he is unable to obtain service of process upon the continuing predecessor corporation. See, e.g., *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 784 (Ala. 1979).

³ See discussion of traditional exceptions *infra* notes 15-40 and accompanying text.

⁴ 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

⁵ 86 N.J. 332, 431 A.2d 811 (1981).

⁶ *Id.* at 358, 431 A.2d at 825; *Ray v. Alad Corp.*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.

⁷ In neither *Ray* nor *Ramirez* did the court discuss whether knowledge of defects in the products of the predecessor was required before liability would attach or whether liability would be imposed on the successor for injuries caused by defects in products of the predecessor where the successor increases its safety measures. The only apparent prerequisite to holding the successor liable for defects in products of the predecessor is that the successor continue the same product line. *Ray v. Alad Corp.*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582; *Ramirez v. Amsted Industries*, 86 N.J. at 358, 431 A.2d at 825.

⁸ There are basically three methods of transferring the corporate ownership of a business: (1) sale of stock by stockholders of the transferor corporation to the transferee corpora-

successor corporation tort liability lies in expanding upon the traditional corporate law approach. By expanding the corporate law approach, both corporate law and the law of strict products liability may be used to determine when a successor corporation should be held liable for defects in the products of the predecessor. In order to evaluate the merits of expanding the traditional corporate rules, this note will begin by examining the policies underlying the corporate law and strict liability doctrines. In section I the traditional corporate approach to successor corporation tort liability will be examined. Emphasis will be placed on exceptions to the general rule which does not impose liability on the successor for defects in products of the predecessor and on the imposition of strict liability under the traditional corporate approach. The section will conclude with a discussion of the limitations of the approach. Section II will examine the product line theory of corporate successor liability. Cases developing the product line approach will be discussed, and the policies advanced by the courts in support of the approach will be isolated. In section III, cases rejecting the product line theory will be discussed. The reasoning of these courts, that the policy rationales underlying the product line approach do not justify the drastic change which adoption of the approach entails, will be detailed. Finally, section IV will evaluate the policies behind the various approaches to successor corporation tort liability. A theory of liability which would combine an expansion of traditional corporate law principles with a statute of repose⁹ and an insurance requirement, under which the successor corporation must provide insurance for a certain time period to cover injuries caused by defects in products of the predecessor which occur after the asset transfer, will be proposed. Its effectiveness and advantages will then be analyzed.

I. THE TRADITIONAL CORPORATE APPROACH

The traditional rules for imposing liability on a corporate successor for the defective products of its predecessor were derived from the commercial law governing the rights of creditors of a predecessor corporation when it sold its business.¹⁰ Under commercial law principles, the purchase of corporate assets

tion; (2) purchase of the transferor corporation's assets by the transferee corporation; and (3) merger or consolidation of the two corporations. Note, *The Extension of Product Liability to Corporate Asset Transferees — An Assault on Another Citadel*, 10 LOYOLA L.A. L. REV. 584, 585 (1977) [hereinafter cited as Note, *Extension of Product Liability*]. Courts generally look at the transaction as a whole rather than at the name ascribed to it by the parties to the transfer to determine the type of transfer. See *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 484, 356 A.2d 458, 463 (1976). For a further discussion of merger and consolidation, see *infra* notes 21-23.

⁹ Under a statute of repose, the time within which a claim could be brought against sellers of defective products would begin to run at the date of purchase of the product rather than at the time of injury. Comment, *Limiting Liability: Product Liability and a Statute of Repose*, 32 BAYLOR L. REV. 137, 143 (1980) [hereinafter cited as Comment, *Statute of Repose*]. No claim could be brought for injuries which result from defects in the product after the statutory period. *Id.* For a discussion of how such a statute would operate in the predecessor/successor context, see *infra* notes 250-55 and accompanying text.

¹⁰ Note, *Cyr v. B. Offen & Co.: Liability of Business Transferees for Product Injuries*, 27

is insufficient per se to impose responsibility on the purchaser for the seller's debts and liabilities.¹¹ The rationale underlying this rule is that claims of business creditors normally are ascertainable at the time of sale and can be considered by the parties in fixing the sale price.¹² Since creditors of the predecessor generally could reach the proceeds of the sale in a suit against the predecessor, creditors lose nothing when they are denied recovery from the successor corporation.¹³ Corporate dissolution statutes protect creditors of the predecessor by providing for satisfaction of the predecessor's debts prior to distribution of the sales proceeds to shareholders of the predecessor corporation.¹⁴ Since the courts considered that creditors of the predecessor possessed an adequate remedy against it, no liability was imposed on the successor corporation.

A. *Exceptions to the Rule of Non-Liability*

Courts recognized that the commercial law rule which denied creditors of the predecessor corporation recourse against the successor corporation did not adequately protect such creditors in all cases.¹⁵ Hence, several exceptions to the general commercial law rule of non-liability for the corporate successor were developed under corporate law. Under these corporate law exceptions, a successor corporation is responsible for the debts and liabilities of its predecessor if: (1) the successor corporation expressly or impliedly agreed to assume them;¹⁶ (2) the successor/predecessor transaction amounts to a consolidation or merger of the two corporations;¹⁷ (3) the successor corporation is a mere continuation of the predecessor;¹⁸ or (4) the predecessor's transfer of assets to the successor corporation was fraudulent in that the only purpose of

MAINE L. REV. 305, 308-09 (1975) [hereinafter cited as Note, *Liability of Business Transferees*]; Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L. REV. 86, 95 (1975) [hereinafter cited as Note, *Assumption of Products Liability*].

¹¹ See, e.g., *Gee v. Tenneco, Inc.*, 615 F.2d 857, 863 (9th Cir. 1980).

¹² Note, *Products Liability for Successor Corporations: A Break from Tradition*, 49 U. COLO. L. REV. 357, 359 (1978) [hereinafter cited as Note, *A Break from Tradition*]. Such claims would not be considered, however, if the assets were sold without an assumption of liabilities. *Id.* at 359 n.15. In the product liability context, of course, claims arising from future injuries caused by defects in products of the predecessor which have not occurred until after the asset transfer, are not ascertainable at the time of transfer. Note, *Liability of Business Transferees*, *supra* note 10, at 310.

¹³ See generally Note, *Assumption of Products Liability*, *supra* note 10, at 95.

¹⁴ See Juenger & Schulman, *Asset Sales and Products Liability*, 22 WAYNE L. REV. 39, 40-41 (1975).

¹⁵ Note, *A Break from Tradition*, *supra* note 12, at 360.

¹⁶ See, e.g., *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 561, 264 A.2d 98, 101 (1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (1972). "[A]n implied agreement is one where the conduct of the parties with reference to the subject matter is such as to induce the belief that they intended to do that which their acts indicate they have done." *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 438-39, 59 S.W. 284, 285 (1900).

¹⁷ See, e.g., *Kloberdanz v. Joy Manufacturing Co.*, 288 F. Supp. 817, 820 (D. Colo. 1968).

¹⁸ See, e.g., *Barron v. Kane & Roach, Inc.*, 79 Ill. App. 3d 44, 47, 389 N.E.2d 244, 246 (1979).

the transfer was to allow the predecessor to escape liability for its debts.¹⁹ The assumption of liability and fraud exceptions are clear and simple to apply because they do not involve consideration of the extent of the corporate asset transfer. For purposes of analyzing when a corporate successor may properly be held responsible for defects in products of its predecessor, therefore, only the merger and continuation exceptions need be further analyzed.²⁰

The "merger or consolidation"²¹ exception, which imposes liability on the successor for debts of the predecessor because the predecessor is absorbed by the successor, has been invoked frequently to hold a successor corporation liable for the debts of its corporate predecessor. This exception covers statutory

¹⁹ See, e.g., *Bernard v. Kee Manufacturing Co.*, 394 So. 2d 552, 553 (Fla. Dist. Ct. App. 1981).

²⁰ The rationale of the first exception, where the successor expressly or impliedly assumes the predecessor's liabilities, is clear. If the purchaser contracts with the seller to assume outstanding liabilities, the courts will enforce the obligation. Note, *A Break from Tradition*, *supra* note 12, at 360.

Problems of contract interpretation occur when two separate clauses appear to offer conflicting intention on the part of the parties regarding assumption by the successor of the predecessor's liabilities. See, e.g., *Travis v. Harris Corp.*, 565 F.2d 443, 445-46 (7th Cir. 1977). In such cases, the courts generally will invoke the exception only when the language of the purchase agreement indicates that the parties intended all debts and liabilities to be assumed by the successor corporation. See *id.* The court in *Travis* required a finding that the agreement to assume liabilities be "clear and unambiguous." *Id.* at 446. The purchase agreement in *Travis* clearly stated that the successor assumed all debts and liabilities existing on the books and records of the predecessor at the closing date. *Id.* In *Travis*, because the product liability claim was not reflected on the books or records, the successor was not held liable for defective products of the predecessor under this first exception. *Id.*

Creditors seek to invoke the fourth exception, fraud in the original transaction, to recover from the successor corporation where the transfer or assets may be deemed improper by the law. The various improprieties that have been characterized by courts as fraudulent transfers are discussed in Annot., 49 A.L.R.3d 881, 884-99 (1973). This exception, designed to protect creditors, is based on the doctrine of discouraging fraudulent conveyances. The doctrine of discouraging fraudulent conveyances holds that:

[t]ransfers of all of the assets of a person or corporation in straitened circumstances, without fair consideration, to a corporation having substantially the same ownership, by which the just claims of creditors are defeated, are of such fraudulent nature that the new corporation may be held to the debt of the old.

Economy Refining & Service Co. v. Royal National Bank, 20 Cal. App. 3d 434, 439, 97 Cal. Rptr. 706, 710 (1971). A transfer may be characterized as fraudulent under this exception where there is evidence that the successor knew the predecessor was attempting to escape liability for its debts. Annot., 49 A.L.R.3d at 884-87. In most cases, transfers for inadequate consideration will be set aside as fraudulent since inadequate consideration is evidence of fraudulent intention to escape liability. See *id.* at 890-95.

²¹ The parties in a merger contemplate that one corporation will be absorbed by the other and go out of existence with the absorbing corporation remaining in existence. See, e.g., *Knapp v. North American Rockwell Corp.*, 506 F.2d 361, 365 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *Kloberdanz v. Joy Manufacturing Co.*, 288 F. Supp. 817, 821 (D. Colo. 1968). In a consolidation, a new corporation is formed, with the combining corporations dissolving and losing their separate identities as corporations. *Id.* For the purposes of this note, there is no difference between a merger and a consolidation. Hence, the term "merger" will be used to refer to both kinds of corporate combinations.

mergers²² and "de facto" mergers.²³ In a statutory merger, the successor acquires the predecessor's stock.²⁴ In return, the predecessor's shareholders generally receive no consideration, or the consideration they do receive consists wholly of shares of the successor's stock.²⁵ As a result of such stock transfers, the predecessor is absorbed by the successor corporation. Responsibility for the predecessor's debts and liabilities is imposed on the successor in this situation because the successor is viewed as a continuation of the predecessor.²⁶ If the requirements of a statutory merger are met, the successor corporation is liable for all claims against the predecessor by its creditors.²⁷

Even if a corporate combination does not comply with the formalities of a statutory merger, a successor corporation still may be held liable for the debts of its predecessor if the combination is deemed to be a de facto merger.²⁸ A major factor in determining whether a de facto merger has occurred is whether the assets of the predecessor were transferred to the successor corporation for shares of stock in the successor or for cash.²⁹ Where the sale is for cash, the traditional rule of non-liability applies and the transaction will not be deemed a de facto merger.³⁰ The rationale underlying this rule is that where the predecessor's assets are purchased for cash, the predecessor and successor remain at all times complete corporate strangers. Absent any common ownership, the successor cannot be held responsible for decisions of the predecessor which were made prior to the successor's control of the predecessor's operations.³¹ A second factor used to determine whether a transaction is a de facto merger is whether the asset purchase agreement requires the predecessor corporation to dissolve

²² A statutory merger requires the filing of statutorily prescribed papers and the exchange of the assets of the transferor for stock in the surviving corporation. See Comment, *Expanding the Products Liability of Successor Corporations*, 27 HASTINGS L. J. 1305, 1314 (1976) [hereinafter cited as Comment, *Successor Corporations*].

²³ A de facto merger can be found where the transaction purports to be only a sale of assets. See, e.g., *Knapp v. North American Rockwell Corp.*, 506 F.2d 361, 365 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975). The formal requirements of the statute, e.g., filing papers and obtaining approval of the required number of shareholders for the sale of assets, are not met in this instance, but the essential nature of the transaction is the same as a statutory merger. Comment, *Successor Corporations*, supra note 22, at 1314-15.

²⁴ See *Ray v. Alad Corp.*, 19 Cal. 3d at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578.

²⁵ See *id.*

²⁶ *Knapp v. North American Rockwell Corp.*, 506 F.2d 361, 365-67 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975).

²⁷ Note, *Extension of Product Liability*, supra note 8, at 598.

²⁸ See *id.*

²⁹ *Ramirez v. Amsted Industries*, 86 N.J. at 342, 431 A.2d at 816. As the rationale for imposing liability in de facto merger cases, courts discussing the stock/cash distinction emphasize the "continuity of stockholder interest" in the successor corporation present where stock is given as consideration for an asset transfer. See, e.g., *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 564, 264 A.2d 98, 103 (1970).

³⁰ *Tucker v. Paxson Machine Co.*, 645 F.2d 620, 622 (8th Cir. 1981).

³¹ See *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 566, 264 A.2d 98, 104 (1970).

within a specified period of time, or as soon as is practicable.³² Under the traditional corporate approach, if a dissolution requirement is included in the asset sale agreement, the successor corporation will be liable for the predecessor's debts.³³ The rationale for this rule is that, by requiring the predecessor to dissolve, the successor is deemed to have deprived creditors of a remedy against the predecessor.³⁴ Accordingly, it has been deemed appropriate to subject the successor corporation to liability in such instances. Whether the merger is statutory or de facto, the purpose of the merger exception to the traditional rule of non-liability for successor corporations is the same. That purpose is to insure that creditors are protected when a transfer results in the predecessor acquiring no consideration capable of satisfying its outstanding debts.

In principle, the courts consider the third corporate law exception to the commercial law rule of non-liability, the continuation exception, to be distinct from the merger exception.³⁵ Under this exception, a successor corporation is liable for the debts of its predecessor when it is a "mere continuation" of the predecessor. Although the rubric used to impose liability under the continuation exception is different than that used under the merger exception, the elements necessary to hold the successor corporation liable for the predecessor's debts are the same.³⁶ Thus under this exception, the successor's continuation of the predecessor's operations does not alone render it liable for the predecessor's obligations.³⁷ Similarly, as with the merger exception, the continuation exception traditionally has been invoked only where stock in the successor corporation was given to shareholders of the predecessor corporation as consideration for the transfer.³⁸ Finally, if the management of the

³² *Knapp v. North American Rockwell Corp.*, 506 F.2d 361, 369 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

³³ *Id.* By requiring the dissolution of the predecessor, the successor prevents the predecessor from undertaking any active operations. *Id.* The successor's actions thus eliminate the ability of plaintiffs to reach the assets of the predecessor since such assets are non-existent at the time of injury.

³⁴ See *Ramirez v. Amsted Industries*, 86 N.J. at 348, 431 A.2d at 820.

³⁵ Note, *Extension of Product Liability*, *supra* note 8, at 600-01; see also Comment, *Successor Corporations*, *supra* note 22, at 1313-15. In principle, a merger involves one corporation absorbing an existing corporation. Under the continuation exception, courts have required continuity in management, business operations and shareholders whether in a new corporation or an existing one. See *id.* at 1315.

³⁶ Note, *A Break from Tradition*, *supra* note 12, at 362.

³⁷ *McKee v. Harris Seybold Co.*, 109 N.J. Super. 555, 570, 264 A.2d 98, 106 (1970). The purchasing corporation must represent merely a "new hat" for the seller in which the predecessor corporation remains substantially the same except for the inclusion of new shareholders. See *id.*

³⁸ *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801-02 (W.D. Mich. 1974). Under the traditional continuation exception, liability depends on:

whether the plaintiff is able to establish that there is continuity in management, shareholders, personnel, physical location, assets and general business operations between selling and purchasing corporations following the asset acquisition. Where the commonality of corporate management or ownership cannot be shown, there is deemed to have been no continuation of the seller's corporate entity.

Ramirez v. Amsted Industries, 86 N.J. at 342, 431 A.2d at 816 (citations omitted).

predecessor is retained by the successor, the court may deem the successor corporation to be a "mere continuation" of the predecessor.³⁹ These elements are similar to those required for a finding of a de facto merger under the merger exception. The rationale for imposing liability on the successor corporation for debts of the predecessor under the continuation exception is the same as that of the merger exception — the protection of creditors.⁴⁰

In sum, corporate law carved out exceptions to the commercial law rule that the purchase of assets by a successor corporation does not render the successor responsible for the liabilities of the predecessor. Of these exceptions, the "merger" and "continuation" exceptions were the most important. In the absence of these exceptions to the general rule of non-liability, creditors would have been unable to collect on outstanding obligations upon the dissolution of the predecessor unless the successor corporation assumed liability for such debts in the sale agreement. In practice, the "merger" and "continuation" exceptions are the same, requiring sale of assets of the predecessor to the successor for stock in the successor corporation. These exceptions became the basis for holding a successor corporation strictly liable in tort for defective products manufactured by its predecessor.

B. *Strict Product Liability Under the Traditional Corporate Approach*

Successor corporations have been held strictly liable in tort⁴¹ for injuries caused by defects in products manufactured by its predecessor when the asset transfer fell under the traditional corporate law exceptions to the commercial law rule of non-liability.⁴² Courts have decided that the reasons which justified allowing the commercial creditor of the predecessor corporation to proceed against its successor also justify allowing the tort claimant injured by the

³⁹ See *Cyr v. B. Offen & Co., Inc.*, 501 F.2d 1145, 1154 (1st Cir. 1974).

⁴⁰ Note, *Products Liability — Corporations — Asset Sales and Successor Liability*, 44 TENN. L. REV. 905, 908 (1977).

⁴¹ Under the doctrine of strict liability in tort, the manufacturer or seller of a defective product may be held liable for injuries caused by such defects regardless of whether the manufacturer was negligent in producing the product. See generally RESTATEMENT (SECOND) OF TORTS § 402A (1965). Prior to adoption of the theory of strict liability, plaintiffs had the difficult burden of proving the manufacturer's negligence. This burden proved to be prohibitive to injured plaintiffs, since the mass production of products made it impossible to locate and establish the cause of the defect. See *McDevitt v. Standard Oil Co. of Texas*, 391 F.2d 364, 370 (5th Cir. 1968). Under the doctrine of strict liability, as adopted by the American Law Institute, the seller of a defective product is liable to the ultimate user of the product for any harm proximately caused by such defects so long as the seller is engaged in the business of selling such products and the product is expected to reach, and actually does reach, the user without having changed substantially from the condition in which it was manufactured or sold. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Exercise of all possible care by the manufacturer in the manufacturing of the product is not a defense to a strict liability claim. *Id.* In applying strict liability, courts often charge sellers with the latest scientific knowledge, discoveries and advances. See, e.g., *Borel v. Fibreboard Paper Products Corporation*, 493 F.2d 1076, 1089 (5th Cir. 1973). The manufacturer's knowledge is relevant in determining whether it knew or should have known of the danger of its products and whether it was negligent in failing to use this knowledge to warn the product user. *Id.*

⁴² See *infra* discussion of cases which follow in text accompanying notes 45-82.

predecessor's defective products to proceed against the successor.⁴³ Thus, under corporate law, a successor corporation may be strictly liable for the defective products of its predecessor if the merger or continuation exceptions apply.⁴⁴

Courts have imposed strict liability under the corporate law exceptions to successor non-liability to hold a successor corporation liable for defective products manufactured by its predecessor. In *Cyr v. B. Offen & Co.*,⁴⁵ the Court of Appeals for the First Circuit, applying New Hampshire law, imposed strict liability on a successor corporation within the confines of the continuation exception. In *Cyr*, one employee was killed and another seriously injured by an allegedly defective printing press manufactured by B. Offen Company, a sole proprietorship.⁴⁶ Prior to the accident, Bernard Offen, the owner, had died,⁴⁷ and the bulk of the stock in the business had been purchased by an employee group.⁴⁸ As a condition of the sale, the parties had agreed to run the business in substantially the same manner as it had been run by the former owner, Bernard Offen.⁴⁹ The *Cyr* court held that the successor corporation was a mere continuation of its predecessor.⁵⁰ Accordingly, the court found that the successor corporation could be held strictly liable for the defective printing press.⁵¹ The court reasoned that since the same employees continued to work under the same supervisors, producing the same products in the same plant under the same name, the company could not be absolved of responsibility simply because ownership of the entity had changed.⁵² Since B. Offen & Co., Inc., the successor, carried over the expertise of the predecessor, B. Offen Company, knew the products which the predecessor had produced, was as able as the predecessor to calculate the risk of defects and was in a position to insure against injuries caused by the predecessor's defective products, the court chose to treat the successor as the manufacturer.⁵³ Accordingly, the New Hampshire strict liability standard was imposed on the successor corporation.

⁴³ See *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 418, 244 N.W.2d 873, 878 (1976).

⁴⁴ See *supra* notes 10-40 and accompanying text.

⁴⁵ 501 F.2d 1145 (1st Cir. 1974).

⁴⁶ *Id.* at 1148.

⁴⁷ *Id.* at 1151.

⁴⁸ *Id.* Thirty percent of the stock was purchased by an outside financier. *Id.*

⁴⁹ *Id.* The contract of sale obligated the purchaser for a nine year period to:
(i) cause the Offen Business to be operated continuously . . . (ii) cause the Offen Business to be operated substantially in accordance with the same business practices and policies as are being employed by Offen at the date of the agreement.

Id.

⁵⁰ *Id.* at 1154.

⁵¹ *Id.* at 1153-54. The court reasoned that "[t]he very existence of strict liability for manufacturers implies a basic judgment that the hazards of predicting and insuring for risk from defective products are better borne by the manufacturer than by the consumer." *Id.* at 1154.

⁵² *Id.*

⁵³ *Id.*

In *Shannon v. Samuel Langston Co.*,⁵⁴ the United States District Court for the Western District of Michigan imposed strict liability upon a successor corporation within the confines of the merger exception. In *Shannon*, the plaintiff was injured by a machine manufactured by a company which had dissolved as required by an asset purchase agreement after selling its assets to the defendant.⁵⁵ The manufacturing enterprise remained substantially unchanged after its acquisition by the defendant.⁵⁶ Shareholders of the predecessor received stock in the defendant-successor corporation as consideration for the asset transfer.⁵⁷ Under these facts, the court found that a de facto merger had occurred.⁵⁸ In applying strict liability to the defendant,⁵⁹ the *Shannon* court reasoned that since the successor had inherited an established going concern, receiving all of the advantages of the predecessor,⁶⁰ public policy required the successor to assume the costs which all other going concerns ordinarily must bear.⁶¹ Continuing, the court stated that corporate entities are artificial beings created by legislative fiat and that they should not be permitted to discharge their liabilities to injured persons simply by manipulating the corporate form.⁶²

In *Turner v. Bituminous Casualty Co.*⁶³ the Supreme Court of Michigan expanded the scope of the continuation and merger exceptions by holding a successor corporation strictly liable for the defective products of its predecessor where the successor had purchased its predecessor's assets for cash.⁶⁴ The plaintiff in *Turner* alleged that he had been injured in a manner similar to the

⁵⁴ 379 F. Supp. 797 (W.D. Mich. 1974).

⁵⁵ *Id.* at 798-99, 801.

⁵⁶ *Id.* at 799.

⁵⁷ Harris Intertype Corporation (Harris), the successor, acquired all the assets of the Samuel M. Langston Company, the predecessor, for shares of Harris stock. *Id.* at 799. The predecessor changed its name and dissolved. *Id.* Harris carried on the business under the name Samuel Langston Company in the same manner as had its predecessor. *Id.* at 799-800.

⁵⁸ *Id.* at 801. The court noted that there "was certainly a continuity of management, personnel, physical location, assets, general business operations, and shareholders." *Id.* In finding that a de facto merger existed in *Shannon*, the court distinguished *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 264 A.2d 98 (1970), and other cases where no de facto merger was found on the ground that the consideration paid by the successor in those cases for the assets of the predecessor was cash. *Id.* at 801-02.

⁵⁹ *Id.* at 801.

⁶⁰ These advantages included "expertise, reputation, established customers, and so forth." *Id.* at 802.

⁶¹ *Id.*

⁶² *Id.* at 802. The court found that Mr. Shannon clearly deserved compensation for his injury if the party responsible for his injury could be found. *Id.* at 802. Shannon was injured by a Samuel Langston Company machine. *Id.* The court found that a going concern should bear the liability for damages done by its defective products. *Id.* Liability for such damages can be regarded as a socially necessary cost of doing business. *Id.* Since the transaction whereby Harris acquired the Langston business was deemed a de facto merger, the court found the successor liable. *Id.* at 802-03.

⁶³ 397 Mich. 406, 244 N.W.2d 873 (1976).

⁶⁴ *Id.* at 342, 244 N.W.2d at 883.

plaintiff in *Shannon*.⁶⁵ The same successor corporation was involved in both cases.⁶⁶ The court stated that the purpose of the successor corporation was to bring the predecessor into its corporate structure as a separate division, but to keep intact the predecessor's own organizational structure and operational practices.⁶⁷ The court, noticing the lack of legislation covering a successor corporation's tort liability, felt compelled to adopt the traditional corporate law approach in order to protect tort claimants.⁶⁸ The court found that when the predecessor corporation becomes "defunct," the same problem of recovery exists for both the commercial creditor and the tort claimant. This is true whether the consideration given by the successor for the corporate transfer is in the form of cash or its stock.⁶⁹ Recognizing that continuity of ownership is an important factor in imposing liability on a successor in an assets for stock acquisition,⁷⁰ the court nonetheless held that the presence of stock as the sole consideration for the transfer was not conclusive on the issue of successor liability.⁷¹ The court reasoned that since the number of shares given to the shareholders of a predecessor in consideration for its assets usually is quite small in comparison to the total number of outstanding shares in the successor, in most acquisitions "the strength of commonality of ownership is quite minimal."⁷² Moreover, the court noted that the shareholders of the predecessor at the time it manufactured the allegedly defective product and the shareholders of the predecessor at the time of the asset sale might be entirely different groups.⁷³ Thus, the court found no reason to treat victims of defects in products manufactured by a predecessor which sold its assets for cash differently from victims injured after a de facto merger where the only consideration paid by the successor consisted of its own stock.⁷⁴ Since "[c]ontinuity [was] the purpose, continuity [was] the watch word, continuity [was] the fact,"⁷⁵ the *Turner* court, following *Cyr*, de-

⁶⁵ *Id.* at 414, 244 N.W.2d at 876. Plaintiff was injured in 1969 by a machine manufactured by the corporate predecessor prior to transfer of assets to the successor. *Id.* at 411-12, 244 N.W.2d at 875.

⁶⁶ For a discussion of the corporate succession history of the corporations involved, see the discussion of *Nieves v. Bruno-Sherman Corp.*, 86 N.J. 361, 431 A.2d 826 (1981), discussed *infra* at note 125.

⁶⁷ 397 Mich. at 426, 244 N.W.2d at 882. The successor argued that "business reality" required it to appear as much as possible like its predecessor in order to best utilize the good will of the predecessor. *Id.* at 425-26, 244 N.W.2d at 882. Thus, the successor maintained similarity of product, personnel and policy of its predecessor. *Id.* at 426, 244 N.W.2d at 882.

⁶⁸ *Id.* at 418, 244 N.W.2d at 878. While the Michigan Legislature had spoken on the problems of creditors and shareholders, it had not yet come to grips with some of the problems of the much newer field of a successor corporation's liability for defects in products of the predecessor. *Id.* Since the question of such liability was one of first impression, the court used the traditional corporate law of successor liability as a guide in determining whether the successor should be liable. *Id.* at 418-20, 244 N.W.2d at 878-79.

⁶⁹ *Id.* at 419, 244 N.W.2d at 878.

⁷⁰ *Id.* at 421-22, 244 N.W.2d at 879-80.

⁷¹ *Id.* at 422-23, 244 N.W.2d at 880.

⁷² *Id.* at 422, 244 N.W.2d at 880.

⁷³ *Id.*

⁷⁴ *Id.* at 423, 244 N.W.2d at 880.

⁷⁵ *Id.* at 426, 244 N.W.2d at 882.

cided to apply the traditional corporate law approach to the tort area to hold the successor strictly liable for the defective product of the predecessor.⁷⁶

Courts thus have applied the traditional corporate law exceptions to the rule of successor non-liability to hold successor corporations strictly liable for defective products of the predecessor. Under the corporate law approach, strict liability is imposed on the successor corporation for defects in products of its predecessor corporation only where the nexus between the predecessor and successor is sufficient to consider the successor to be a continuation of the predecessor and should therefore be called upon to respond to claimant debtors.⁷⁷ The successor corporation's liability thus is based on principles rooted in the law of contract and corporate finance⁷⁸ and the factual substance of the asset transfer. Under this approach, only after a court decides in plaintiff's favor on the corporate issue, in substance holding that the successor is an appropriate defendant, will the court address questions of actual liability.⁷⁹ If, for example, the successor is not found to have been the product of a "de facto" merger, no liability will attach to it for injuries caused by defects in products of the predecessor.⁸⁰ But, where the successor is found to be an appropriate defendant, it becomes the manufacturer for liability purposes and may be held strictly liable for injuries caused by defects in products of the predecessor. This approach has been criticized by some courts in recent years as not keeping pace with the developing principles of strict products liability.⁸¹ These courts stress the needs of persons injured by defective products put into the stream of commerce rather than the form of the asset transfer.⁸²

C. *The Corporate Approach to Successor Tort Liability Criticized*

Holding successor corporations strictly liable for defects in the products of their predecessors only when one of the corporate exceptions applies has been criticized as placing unwarranted emphasis on the form rather than on the practical effect of a particular corporate transaction.⁸³ Traditionally, the de facto merger exception has been held to depend on whether the stockholders of the predecessor corporation have become stockholders of the successor corporation.⁸⁴ No liability has been imposed in substantially the same circumstances where the successor corporation has paid for the acquired assets principally in

⁷⁶ *Id.* at 430, 244 N.W.2d at 883.

⁷⁷ See discussion of the merger and continuation exceptions, *supra* notes 16-40.

⁷⁸ See *id.* Courts generally examine the terms of the sales agreement to determine if a merger has occurred. See, e.g., *Knapp v. North American Rockwell*, 506 F.2d 361, 368-69 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

⁷⁹ Courts first seek to determine whether the defendant-corporation can be considered to be a corporate successor for purposes of assuming liability on behalf of the predecessor. See *Domine v. Fulton Iron Works*, 76 Ill. App. 3d 253, 257, 359 N.E.2d 19, 23 (1979).

⁸⁰ *Id.*

⁸¹ See, e.g., *Ramirez v. Amsted Industries, Inc.*, 86 N.J. at 340, 431 A.2d at 816.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *Travis v. Harris Corp.*, 565 F.2d 443, 447 (7th Cir. 1977); *Shannon v. Samuel*

cash rather than stock.⁸⁵ Likewise, under the continuation exception, liability generally depends on whether a plaintiff is able to establish that there is commonality in corporate management or ownership.⁸⁶ Where this commonality cannot be shown, liability does not attach.⁸⁷ That some corporate successors escape liability on what may be deemed "technicalities" has been accepted by some courts as sufficient justification to depart from the traditional corporate law approach.⁸⁸

Some courts reason further that the narrow scope of liability under the traditional corporate law approach is unresponsive to the interests of persons injured by defective products put into the stream of commerce. These courts stress that the form of the corporate transaction by which the successor corporation acquired the manufacturing assets of its predecessor should not be controlling as to its liability for injuries suffered as a result of defects in the predecessor's product.⁸⁹ Principles of strict liability seek to impose liability on those responsible for placing defective products into the stream of commerce.⁹⁰ Where the manufacturer of a defective product has dissolved, however, an injured person has no place to turn for relief except to the successor corporation.⁹¹ Critics of the traditional corporate approach thus reason that denial of recovery based on the form of the corporate transaction is opposed to the rationale underlying strict liability — that manufacturers owe a duty to users of their products.⁹² As an alternative, some courts have departed from traditional corporate rules of successor liability and have imposed strict liability upon a successor corporation for defects in the products of its predecessor whenever it continues the same line of products.

II. THE PRODUCT LINE APPROACH

Some courts have abandoned the liability limits of traditional corporate law and have held successor corporations liable for injuries caused by defects in products of predecessor corporations merely because it continued the predecessor's product line. The product line approach does not require the court to consider the substance of the asset transfer, an inquiry which is central to the traditional corporate approach. The only question under the product line approach is whether the successor corporation continues to manufacture the

Langston Co., 379 F. Supp. 797, 801 (W.D. Mich. 1974). *But see* Turner v. Bituminous Casualty Co., 397 Mich. 406, 421, 244 N.W.2d 873, 883 (1976).

⁸⁵ *Id.*

⁸⁶ *See* Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977); Freeman v. White Way Sign & Maintenance Co., 82 Ill. App. 3d 884, 894, 403 N.E.2d 495, 502 (1980).

⁸⁷ *Id.*

⁸⁸ *See* Ramirez v. Amsted Industries, Inc., 86 N.J. at 340, 431 A.2d at 816.

⁸⁹ *Id.*

⁹⁰ *See, e.g.,* Domine v. Fulton Iron Works, 76 Ill. App. 3d 253, 258, 395 N.E.2d 19, 23 (1979).

⁹¹ Ramirez v. Amsted Industries, Inc., 86 N.J. at 340, 431 A.2d at 816.

⁹² *Id.*

same line of products as did its predecessor.⁹³ In most cases involving asset or stock transfers, such an inquiry will be resolved easily since, presumably, the successor purchases the predecessor's assets for precisely that reason. By continuing the predecessor's product line, the successor assumes the tort liabilities of the predecessor. Tort principles of strict liability may be invoked regardless of the substance of the asset transfer.⁹⁴ This section will examine the decisions of courts adopting the product line approach and will analyze the policies underlying those decisions.

A. The Leading Cases

California was the first state to depart from the traditional corporate law approach to successor corporation tort liability. In *Ray v. Alad Corporation*,⁹⁵ the California Supreme Court held that a corporation which acquires a manufacturing business and continues to produce the same line of products as did the predecessor corporation assumes strict tort liability for defects in units manufactured and distributed prior to the acquisition. The plaintiff in *Ray* was injured in 1969 by a ladder which had been manufactured by the Alad Corporation (Alad I)⁹⁶ around 1952.⁹⁷ Prior to the plaintiff's injury, but subsequent to his purchase of the ladder, Alad I, in a cash sale, transferred its stock in trade, fixtures, equipment, trade name, inventory, good will and customer lists to Lighting Maintenance Corporation (Lighting).⁹⁸ The new ladder manufacturing enterprise, Alad II, retained the Alad name.⁹⁹ By agreement, Alad I agreed to dissolve as soon as practicable after the transfer.¹⁰⁰ In addition, Alad II retained Alad I's factory personnel, salesmen and sales representatives.¹⁰¹ Customers of Alad I were not informed of the change in corporate ownership.¹⁰² Alad II agreed to assume liability for inventory and supply materials previously ordered by Alad I and to fill Alad I's outstanding customer orders.¹⁰³ The asset sales agreement, however, did not mention

⁹³ See *Ramirez v. Amsted Industries*, 86 N.J. at 358, 431 A.2d at 825.

⁹⁴ *Id.*

⁹⁵ 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

⁹⁶ *Id.* at 24-25, 560 P.2d at 5, 136 Cal. Rptr. at 575-76.

⁹⁷ *Ray v. Alad Corp.*, 127 Cal. Rptr. 817, 818 (Cal. App. 1976).

⁹⁸ *Id.* at 26-27, 560 P.2d at 5-6, 135 Cal. Rptr. at 576-77.

⁹⁹ After acquiring Alad I's assets, Lighting Maintenance Corp. (Lighting) published a certificate of transacting business under the fictitious name of "Alad Co." *Id.* at 27, 560 P.2d at 6, 136 Cal. Rptr. at 377. Meanwhile, a new corporation under the name of "Stern Ladder Company" was formed by Lighting's representatives. *Id.* Stern Ladder Company's name was changed to Alad Corporation (Alad II) after Alad Corporation (Alad I) dissolved. *Id.* Subsequently, Lighting transferred all the assets it had purchased from Alad I to Alad II in exchange for all of Alad II's outstanding stock. *Id.*

¹⁰⁰ *Id.* at 26, 560 P.2d at 6, 136 Cal. Rptr. at 577.

¹⁰¹ *Id.* at 27, 560 P.2d at 6, 136 Cal. Rptr. at 577.

¹⁰² *Id.* at 28, 560 P.2d at 6-7, 136 Cal. Rptr. at 577-78.

¹⁰³ *Id.* at 26, 560 P.2d at 6, 136 Cal. Rptr. at 577. The court determined that this assumption was limited and did not include the assumption of any other liabilities. *Id.* at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578.

potential liability for defective products manufactured by Alad I.¹⁰⁴ Despite the substantial similarities between Alad I and Alad II, the court determined that the exceptions to the traditional rule of successor non-liability were not applicable.¹⁰⁵ Nonetheless, the court imposed strict liability upon the corporate successor, Alad II, for the defects in the ladder manufactured by Alad I.¹⁰⁶ The court held that:

a party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired.¹⁰⁷

Though the court's holding appeared to be limited to the facts of the particular case before it, the *Ray* court felt justified in adopting the product line approach as the law of California.¹⁰⁸

The Supreme Court of New Jersey in *Ramirez v. Amsted Industries, Inc.*¹⁰⁹ accepted the landmark approach of *Ray v. Alad*. The plaintiff in *Ramirez* was injured in 1975 while operating an allegedly defective punch press on the premises of his employer.¹¹⁰ The machine had been manufactured in 1948 or 1949 by Johnson Machine and Press Company (Johnson).¹¹¹ In 1956, Johnson transferred all of its assets and liabilities to Bontrager Construction Company (Bontrager).¹¹² In 1962, the defendant, Amsted Industries, Inc. (Amsted), purchased for cash all of the Bontrager assets, including the Johnson assets and the right to use the Johnson name.¹¹³ Amsted retained all of Bontrager's employees

¹⁰⁴ *Id.* at 26-27, 560 P.2d at 6, 136 Cal. Rptr. at 577.

¹⁰⁵ The court found that there was no express or implied agreement to assume liability for injuries caused by defects in products previously manufactured by Alad I and that there was no indication of fraudulent intent on the part of Alad I to escape liability for Alad I's debts. *Id.* at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578. Further, the court held that the use of cash as consideration for the asset transfer took the case out of the "merger or consolidation" exception. *Id.* at 28-29, 560 P.2d at 7, 136 Cal. Rptr. at 578. Finally, since there was no showing that one or more persons continued as officers, directors or stockholders in the successor, and since adequate consideration was given by the successor for the assets of the predecessor which was available to satisfy outstanding creditor claims against the predecessor, the "continuation" exception was inapplicable. *Id.* at 29, 560 P.2d at 7-8, 136 Cal. Rptr. at 578-79.

¹⁰⁶ *Id.* at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.

¹⁰⁷ *Id.*

¹⁰⁸ The wording "under the circumstances here presented" seems to indicate that the product line approach applies only to cases factually identical to *Ray*. A California court of appeals in *Rawlings v. D. M. Oliver, Inc.*, 97 Cal. Rptr. 119 (1979), however, read the *Ray* holding broadly to encompass situations where the traditional corporate law exceptions do not apply. For a contrary view, see *Johnson v. Marshall and Huschart Machinery Co.*, 66 Ill. App. 3d 766, 768, 384 N.E.2d 141, 143 (1978).

¹⁰⁹ 86 N.J. 332, 431 A.2d 811 (1981).

¹¹⁰ *Id.* at 335, 431 A.2d at 812.

¹¹¹ *Id.* at 335, 431 A.2d at 812-13.

¹¹² *Id.* at 337, 431 A.2d at 814. Johnson conducted no business after its acquisition by Bontrager but Bontrager did retain a single share of Johnson common stock in order to continue the Johnson name in corporate form. *Id.* at 337-38, 431 A.2d at 814.

¹¹³ *Id.* The *Ramirez* court adopted the holding of *Turner v. Bituminous Casualty Co.*,

except for three principals who covenanted not to compete for five years.¹¹⁴ Amsted expressly declined to assume liability for any defective products manufactured by Johnson or Bontrager,¹¹⁵ though it did agree to repair defective products on behalf of Bontrager at Bontrager's cost.¹¹⁶ Bontrager then distributed to its shareholders the cash it received for its assets and dissolved.¹¹⁷

The *Ramirez* court concluded that "Amsted may be held to be the mere continuation of Johnson for the purpose of imposing corporate successor liability for injuries caused by defective Johnson products."¹¹⁸ Nonetheless, the court decided to follow *Ray* and adopt the product line approach for holding corporate successors strictly liable in tort where they continue the same line of products manufactured by their predecessors.¹¹⁹ The holding made plain that the merger or continuation exceptions under the corporate law approach would no longer be the standard for determining successor corporation tort liability in New Jersey.¹²⁰ The court reasoned that New Jersey's social policy of imposing the costs of injuries from defective products on the manufacturing enterprise and the consuming public as a whole rather than on the innocent injured party in particular¹²¹ would best be served by adopting the product line theory of suc-

397 Mich. 406, 430, 244 N.W.2d 873, 883 (1976), in discarding the stock/cash as consideration distinction. See 86 N.J. at 345-47, 431 A.2d at 818-19.

¹¹⁴ *Ramirez v. Amsted Industries*, 86 N.J. at 338, 431 A.2d at 814.

¹¹⁵ *Id.* at 339, 431 A.2d at 814. Because Amsted retained Bontrager employees and assumed repair duties for Bontrager, the court held that Amsted was in a position to gauge the risks of injury and obtain insurance. *Id.* at 352, 431 A.2d at 421-22.

¹¹⁶ *Id.* at 339, 431 A.2d at 814. The purchase agreement did not require Bontrager to dissolve. See *id.* at 338-39 & n.2, 431 A.2d at 814 & n.2. But see discussion *infra* note 117.

¹¹⁷ *Id.* at 338 n.2, 431 A.2d at 814 n.2. The record in *Ramirez* did not reveal the fate of Bontrager. *Id.* The court noted, however, that other courts analyzing the very same corporate transaction,

have determined that Bontrager distributed the cash proceeds of the transaction to its shareholders and dissolved its inert corporate existence not long thereafter. See *Korzetz v. Amsted Industries, Inc.*, 472 F.Supp. [sic] 136, 144 (E.D.Mich. [sic] 1979); *Ortiz v. South Bend Lathe Co.*, 46 Cal.App.2d [sic] 842, 846, 120 Cal.Rptr. [sic] 556, 558 (Dist.Ct.App. [sic] 1975).

Id.

¹¹⁸ *Id.* at 347, 431 A.2d at 818-19. Amsted purchased all of Bontrager's assets, retained all existing Bontrager contracts, maintained inventory supplies in accordance with prior practice, and acquired real property from Bontrager with the stipulation that it be used for continuing operations. *Id.* at 346, 431 A.2d at 818. In so finding, the court relied on *Korzetz v. Amsted Industries*, 472 F. Supp. 136, 144 (E.D. Mich. 1979). Since Amsted was to take on all of Bontrager's employees except for three management level personnel, and since Amsted represented its presses as "Johnson" presses in all its advertising and marketing, the court reasoned that under the traditional corporate law of successor liability, Amsted was a mere continuation of Johnson despite the intervening ownership of Bontrager. *Id.* at 347, 431 A.2d at 818-19. Lack of continuity of shareholders made no difference since the court had eliminated the cash/stock distinction. *Id.* at 347, 431 A.2d at 818-19.

¹¹⁹ *Id.* at 347-48, 431 A.2d at 819.

¹²⁰ *Id.* at 358, 431 A.2d at 824-25.

¹²¹ Rather than the plaintiff absorbing the costs of his injury, such devices as insurance costs and increased product prices would apportion the costs throughout society. See *id.* at 350-51, 431 A.2d at 820-21.

cessor corporation tort liability.¹²² This social policy is especially fostered by this approach where the successor holds itself out to the consuming public as the same enterprise as its predecessor through its use of the predecessor's name.¹²³ Thus, in New Jersey and California, successor corporations are strictly liable for injuries caused by defects in the products of their predecessors where they continue to manufacture the same line of products.¹²⁴

More recent cases in New Jersey and California have expanded the product line approach to successor corporation tort liability. In *Nieves v. Bruno-Sherman Corp.*,¹²⁵ the New Jersey Supreme Court held that an intermediate corporate successor which no longer continues to manufacture the product line may be held liable for the defective products of the original predecessor.¹²⁶ The

¹²² *Id.* at 350, 438 A.2d at 820.

¹²³ *Id.* at 352, 431 A.2d at 822. The court found that Amsted became part of the overall producing and marketing enterprise by acquiring all of the Johnson assets and continuing the established business of manufacturing and selling Johnson presses. *Id.* at 352-53, 431 A.2d at 822.

¹²⁴ *Id.* at 358, 431 A.2d at 825. *Hernandez v. Johnson Press Corporation*, 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979), involved the same problem as *Ramirez*. The Illinois Court of Appeals, however, specifically refused to adopt the product line approach after concluding that no de facto merger had occurred. *Id.* at 667-68, 388 N.E.2d at 780. In *Hernandez*, the plaintiff sought recovery for injuries sustained when his hands were caught in a punch press manufactured by Johnson Press Corporation. *Id.* at 665, 388 N.E.2d at 779. Johnson had dissolved prior to the accident. *Id.* The injury occurred subsequent to a transfer of Johnson assets to Amsted. *Id.* at 665-66, 388 N.E.2d at 779. The court affirmed summary judgment for Amsted based on Amsted's affidavit stating that: (1) Amsted purchased the assets of the corporation not from Johnson but from Bontrager Co., which had purchased the assets from Johnson six years earlier; (2) that Amsted did not at any time assume the liabilities of Johnson; and (3) that Amsted did not manufacture the press in question. *Id.* at 665-66, 388 N.E.2d at 779.

¹²⁵ 86 N.J. 361, 366, 431 A.2d 826, 829 (1981). In *Nieves*, the plaintiff was injured in 1976 by a power press machine manufactured in 1941 by T.W. & C.B. Sheridan Company (Old Sheridan). *Id.* at 365, 431 A.2d at 828. In 1964, Old Sheridan sold its entire manufacturing business, including its good will, trade name and substantially all its other assets to Harris-Intertype Corporation (Harris). *Id.* Included among the assets purchased were all sources of information relating to the Sheridan product line. *Id.* at 366, 431 A.2d at 829. Harris formed a new, wholly owned subsidiary (New Sheridan) to continue the Old Sheridan business operations. *Id.* at 365, 431 A.2d at 828. New Sheridan agreed to assume all debts and liabilities reflected on the books and records of Old Sheridan as of the purchase date. *Id.* In 1972, Harris sold all the assets of New Sheridan to Bruno-Sherman Corporation, including the good will and manufacturing assets related to the Sheridan press line. *Id.* at 366, 431 A.2d at 829. Bruno-Sherman expressly refused to assume any liability or responsibility for injuries caused by defects in products manufactured by Harris or Old Sheridan. *Id.* at 371, 431 A.2d at 832. Harris agreed to maintain insurance to cover any such claims until the closing date. *Id.* The insurance agreement provided that Bruno-Sherman would provide Harris with reasonable assistance in defense of product liability claims arising from defects in products manufactured by Harris prior to closing. *Id.* at 371, 431 A.2d at 832. In return, Harris agreed to provide Bruno-Sherman with reasonable assistance in defense of claims arising from defects in products manufactured by Bruno-Sherman. *Id.* at 372, 431 A.2d at 832. The purchase agreement provided that after the closing date, Bruno-Sherman would purchase insurance to cover claims arising from defects in products of Harris or Old Sheridan if Bruno-Sherman deemed it necessary to do so. *Id.* at 371, 431 A.2d at 832.

¹²⁶ *Id.* at 370, 431 A.2d at 831. Since the defective product was manufactured by Old Sheridan, the court held that either of the two successors could be held responsible for injuries caused by such defects. *Id.* at 373, 431 A.2d at 832.

court reasoned that the underlying purpose of the product line approach is to afford relief where the original manufacturer has dissolved.¹²⁷ The court noted that in applying the product line theory of liability emphasis should be placed on the unavailability of the original manufacturer, rather than on the availability of one viable successor corporation.¹²⁸ Thus, in New Jersey, the original successor cannot escape liability for its predecessor's defective products merely by divesting itself of the original predecessor's product line.¹²⁹

In *Rawlings v. D.M. Oliver, Inc.*,¹³⁰ a California appeals court imposed liability on a successor corporation for defects in the products of its predecessor where the product causing the plaintiff's injury was uniquely manufactured by the predecessor to meet the purchaser's specifications.¹³¹ The court noted that the uniqueness of the order of the predecessor's client did not alter the predecessor's responsibility to market the product safely.¹³² As such, where the predecessor manufactures a product to meet the buyer's specifications, a corporate successor which continues the predecessor's line of products in California may be held strictly liable for defects in that product and all other products within the product line previously manufactured by the predecessor.¹³³

The product line cases make clear that liability will attach to a successor corporation for defects in the products of its predecessor if the successor continues the predecessor's line of products. Under the New Jersey version of the product line approach, the successor corporation cannot avoid liability by subsequent sale of assets and discontinuation of the predecessor's line of products. The remainder of this section will examine the reasoning of the courts which have adopted the product line theory of liability.

¹²⁷ *Id.* at 370-1, 431 A.2d at 831.

¹²⁸ The court noted that emphasis should not be placed on the availability of one particular viable successor. *Id.* at 371, 431 A.2d at 831. Rather, the central question is whether the original manufacturer is unavailable because of dissolution. *Id.* Though Harris subsequently resold the assets, its acquisition of the business of Old Sheridan contributed to the destruction of plaintiff's remedies against the original manufacturer. *Id.*

¹²⁹ *See id.* at 373, 431 A.2d at 832.

¹³⁰ 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979). The plaintiff in *Rawlings* was injured in 1976 by kelp dryers manufactured in 1969 by Warren Industrial Sheet Metal (Warren). *Id.* at 894-95, 159 Cal. Rptr. at 120. The dryers had been manufactured uniquely to meet the purchaser's specifications. *Id.* at 894, 159 Cal. Rptr. at 120. In 1977, David M. Oliver purchased certain assets of Warren, including its good will and all the tools, machinery and equipment connected with the business. *Id.* at 895, 159 Cal. Rptr. at 120. The former proprietors of Warren retained the land and buildings on which the Warren business was located. *Id.* The purchase agreement contained a clause whereby Warren agreed to lease the facilities where the building was located to David M. Oliver. *Id.* at 898, 159 Cal. Rptr. at 122. Later in 1977, the business was incorporated as D. M. Oliver, Inc. (Oliver), doing business under its predecessor's name, Warren Industrial Sheet Metal. *Id.* at 895, 159 Cal. Rptr. at 120. The business was conducted after the closing in the same manner as it previously had been conducted. *Id.* at 898, 159 Cal. Rptr. at 121.

¹³¹ *Id.* at 896-97, 159 Cal. Rptr. at 121-22.

¹³² *Id.*

¹³³ *Id.*

B. Policy Rationale for the Product Line Approach

The *Ray* and *Ramirez* courts concluded that a corporate successor should be liable for the defective products of its predecessor when it continues the same product line as that manufactured by the predecessor.¹³⁴ The courts relied on three policies to support expanding the ambit of corporate successor liability under the product line approach. First, since the successor benefits from the corporate good will of its predecessor, it also should be responsible for the predecessor's defective products.¹³⁵ Second, the successor as a member of the overall marketing enterprise is in a better position than the helpless consumer to gauge the risks of injury and to provide protection from defects in products of the predecessor and therefore should be responsible for such defects.¹³⁶ Third, the injured plaintiff should not be left without a remedy due to the dissolution of the predecessor corporation.¹³⁷ In developing this line of reasoning the *Ray* and *Ramirez* courts relied on the policies underlying the theory of strict liability in tort.¹³⁸

1. Benefit from Corporate Good Will

The *Ray* court believed that imposing liability on a successor corporation under the product line approach was justified because a successor inherits and benefits from its predecessor's good will.¹³⁹ The court emphasized that the successor corporation in *Ray* had used the predecessor's name, good will and customer lists.¹⁴⁰ The court reasoned that since the successor had taken the benefit of the predecessor's name, reputation and other accumulated good will, the successor also should bear the burden of responding to product liability claims against the predecessor.¹⁴¹ In like manner, the *Ramirez* court reasoned that since the successor corporation which continued the Johnson product line had received substantial benefits by exploiting the Johnson name, it therefore should bear the burden of defective products produced by Johnson.¹⁴²

¹³⁴ *Ray v. Alad Corp.*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582; *Ramirez v. Amsted Industries*, 86 N.J. at 358, 431 A.2d at 825.

¹³⁵ *Ray v. Alad Corp.*, 19 Cal. 3d at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580.

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.* at 34, 560 P.2d at 11, 136 Cal. Rptr. at 583; *Ramirez v. Amsted Industries*, 86 N.J. at 358, 431 A.2d at 825.

¹³⁹ *Ray v. Alad Corp.*, 19 Cal. 3d at 34, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82. In its broadest sense, good will is an intangible corporate asset which is attributable to the corporation's reputation. *Spheeris v. Spheeris*, 37 Wis. 2d 497, 504, 155 N.W.2d 130, 135 (1967). More precisely, good will is "that element of value which inheres in the fixed and favorable consideration of customers arising from an established and well-conducted business." *Id.*

¹⁴⁰ *Ray v. Alad Corp.*, 19 Cal. 3d at 34, 560 P.2d at 10, 136 Cal. Rptr. at 581. The court reasoned that by using Alad I's good will, Alad II obtained benefits not only from the assets it had purchased from Alad I, but also from the reputation which Alad I had established while it was in existence. *Id.* at 34, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82. By receiving this additional benefit, Alad II stood in the shoes of Alad I, particularly where Alad I's customers were not informed of any change. *Id.* at 28, 560 P.2d at 6-7, 136 Cal. Rptr. at 577-78.

¹⁴¹ *Id.* at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.

¹⁴² *Ramirez v. Amsted Industries, Inc.*, 86 N.J. at 352, 431 A.2d at 822.

2. Successor's Position to Protect Consumers

In adopting the product line approach, the *Ray* and *Ramirez* courts reasoned that a successor corporation is in a position to absorb the cost of liability for the predecessor's defective products by passing that cost on to new customers in the form of higher prices.¹⁴³ This extra revenue could be used to purchase insurance to cover the risk of injuries caused by the predecessor's defective products.¹⁴⁴ Moreover, by manufacturing the same line of products, the successor carries over the experience and expertise of the original manufacturer.¹⁴⁵ This knowledge of the predecessor's product line is thought to carry with it the expertise to minimize the risks of defects in products of the predecessor currently on the market by warning consumers or providing insurance coverage.¹⁴⁶

3. Lack of an Adequate Alternative Remedy

The third policy justification relied upon by the *Ray* and *Ramirez* courts for adopting the product line approach was that the plaintiff injured by a defective product of a defunct predecessor should not be left without a remedy.¹⁴⁷ In a typical products liability suit against a successor corporation for injuries caused by a defective product of the predecessor, the predecessor corporation has dissolved. Thus, there are no assets of the actual manufacturer for the injured plaintiff to reach. The next logical defendant is the successor corporation which continues to manufacture the same line of products and seeks to benefit from the predecessor's good will. Under the traditional corporate approach, where the corporate law exceptions do not apply, the plaintiff may be left without a remedy. The *Ray* court found this justification particularly compelling.¹⁴⁸ In *Ray*, the predecessor corporation had dissolved.¹⁴⁹ The successor corporation, Alad II, had received the resources that previously had been available to Alad I

¹⁴³ *Ray v. Alad Corp.*, 19 Cal. 3d at 31, 560 P.2d at 9, 136 Cal. 3d at 580; *Ramirez v. Amsted Industries*, 86 N.J. at 354, 431 A.2d at 820.

¹⁴⁴ *Id.* at 354, 431 A.2d at 822-23; *Ray v. Alad Corp.*, 19 Cal. 3d at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580.

¹⁴⁵ See *Ramirez v. Amsted Industries*, 86 N.J. at 352, 431 A.2d at 822. Since the successor manufactures the same product line as the predecessor, it can better gauge the dangers inherent in the product if it is defectively designed or manufactured than can the predecessor's customers. See *id.* at 351-52, 431 A.2d at 821-22. Thus, insurance can be obtained to compensate for injuries caused by defects in products of that line. *Id.* at 352, 354, 431 A.2d at 822, 822-23. Since Amsted Industries retained the facilities and employees of Johnson and purchased its customer lists and manufacturing designs, the court held that it was in the same position as Johnson "to avoid the costs and to spread the risk of accident injuries to users of defective Johnson power presses." *Id.* at 352, 431 A.2d at 822.

¹⁴⁶ *Ramirez v. Amsted Industries*, 86 N.J. at 351, 431 A.2d at 821.

¹⁴⁷ See, e.g., *Ray v. Alad Corp.*, 19 Cal. 3d at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580; *Ramirez v. Amsted Industries*, 86 N.J. at 349-50, 431 A.2d at 820.

¹⁴⁸ *Ray v. Alad Corp.*, 19 Cal. 3d at 31-32, 560 P.2d at 9, 136 Cal. Rptr. at 580.

¹⁴⁹ *Id.* at 27, 560 P.2d at 6, 136 Cal. Rptr. at 577. The court reasoned that the distribution of Alad I's assets to its shareholders made it impossible for the plaintiff to obtain satisfaction of a judgment against Alad I. *Id.* at 31-32, 560 P.2d at 9, 136 Cal. Rptr. at 577.

to meet its responsibilities to persons injured by defects in its products.¹⁵⁰ With the Alad I facilities and sources of information at its disposal, Alad II had virtually the same capacity as did Alad I to estimate for purpose of obtaining insurance the risk of injuries from defects in Alad I products.¹⁵¹ Rather than leave plaintiff without a remedy, the court found it preferable to impose liability on Alad II for the defective product manufactured by Alad I.¹⁵²

Courts which have adopted the product line approach have reasoned that it is fair to impose liability on a successor corporation for defects in the products of its predecessor as long as the successor continues the predecessor's line of products. Reasoning that the successor corporation benefits from the good will of the predecessor, and is in a position to protect persons injured by defective products of the predecessor even after the predecessor has dissolved, such courts have chosen to diverge from the traditional corporate approach rather than leave the injured plaintiff without a remedy. Although it frequently has been urged upon the courts, the product line approach has not always been adopted. Indeed, courts rejecting the product line approach have criticized the reasoning of the courts in *Ray* and *Ramirez*. The following section examines cases which have rejected the product line approach and isolates the policy considerations on which the courts have relied in rejecting the approach.

III. REJECTION OF THE PRODUCT LINE APPROACH

Not all courts having an opportunity to adopt the product line approach have been persuaded by the policy reasons underlying this theory of corporate successor liability. Courts applying the law of nine states which thus far have considered the product line approach have specifically refused to adopt it to make a successor corporation liable for the defective products of its predecessor.¹⁵³ These courts have held that there was not basis in the law of the

¹⁵⁰ *Id.* at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581. In addition to the physical plant and manufacturing equipment, these resources included "the know-how available through the records of manufacturing designs, the continued employment of the factory personnel, and the consulting services of Alad I's general manager." *Id.*

¹⁵¹ *Id.*

¹⁵² *See id.* at 33-34, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82. Since product liability claims which arose after dissolution of the predecessor were not ascertainable at the time of the asset sale, the *Ray* court drew a distinction between traditional corporate law rules and the product line approach it established. Application of the traditional creditor rules in such product liability cases almost inevitably would result in complete denial of redress to such claimants. *Id.* at 32-33, 560 P.2d at 10, 136 Cal. Rptr. at 581. Although some claimants might recover from retailers since retailers are "sellers" for purposes of imposing strict liability, RESTATEMENT (SECOND) OF TORTS § 402A, comment f, the retailer would be cut off from the benefit of rights of indemnification against the manufacturer. *Ray v. Alad Corp.*, 19 Cal. 3d at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581. Rather than leave these parties to bear the burden of the predecessor's defective product, the court reasoned that the successor, who benefits from the good will of the predecessor and who is in a position to gauge the risks and spread the costs of accidents should be held strictly liable. *Id.* at 33-34, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82.

¹⁵³ *Tucker v. Paxson Machine Co.*, 645 F.2d 620, 625 (8th Cir. 1981) (applying Missouri law); *Rhynes v. Branick Manufacturing Corp.*, 629 F.2d 409, 410 (5th Cir. 1980) (ap-

particular jurisdiction in successor corporation tort liability for such a drastic change,¹⁵⁴ or that the question would best be resolved by the state legislature.¹⁵⁵

A. Cases Rejecting the Product Line Approach

In *Domine v. Fulton Iron Works*,¹⁵⁶ the Court of Appeals for the Fifth Circuit in Illinois held that the *Ray* product line approach did not conform to Illinois state law regarding corporate successor liability.¹⁵⁷ In *Domine*, the plaintiff was injured in 1973 by an allegedly defective punch press which had been manufactured in 1947 by Ferracut Corporation (Ferracut).¹⁵⁸ In 1968, the defendant, Fulton Iron Works (Fulton), purchased the Ferracut press product line, including its tradenames, trademarks, and other assets.¹⁵⁹ Ferracut remained in existence as Bridgeton Machine Company (Bridgeton) but covenanted not to compete with Fulton for four years.¹⁶⁰ In denying recovery to the plaintiff, the *Domine* court held that the defendant was not the corporate successor to Ferracut since the latter had continued to exist as a corporate entity.¹⁶¹ The court rejected the product line approach, stressing that Illinois state law allowed the imposition of strict liability only on defendants which *actively* participate in placing the allegedly defective product into the stream of commerce.¹⁶² The

plying Texas law); *Leannais v. Cincinnati, Inc.*, 565 F.2d 427, 441 (7th Cir. 1977) (applying Wisconsin law); *Travis v. Harris Corp.*, 565 F.2d 443, 448 (7th Cir. 1977) (applying Ohio and Indiana laws); *Bernard v. Kee Manufacturing Company, Inc.*, 394 So.2d 552, 553 (Fla. Dist. Ct. App. 1981); *Hernandez v. Johnson Press Corp.*, 70 Ill. App. 3d 664, 669-70, 388 N.E.2d 778, 782 (1979); *Domine v. Fulton Iron Works*, 76 Ill. App. 3d 253, 257, 395 N.E.2d 19, 23 (1979); *Barron v. Kane & Roach, Inc.*, 79 Ill. App. 3d 44, 49, 398 N.E.2d 244, 247 (1979). See also *Woody v. Combustion Engineering, Inc.*, 463 F. Supp. 817, 820-21 (E.D. Tenn. 1978) (applying Pennsylvania law); *Andrews v. John E. Smith's Sons Co.*, 369 So.2d 781, 785 (Ala. 1979); *Johnson v. Marshall & Huschart Machinery Co.*, 66 Ill. App. 3d 766, 770, 384 N.E.2d 141, 144 (1978).

¹⁵⁴ *Tucker v. Paxson Machine Co.*, 645 F.2d 620, 625 (8th Cir. 1981) (applying Missouri law); *Rhynes v. Branick Manufacturing Corp.*, 629 F.2d 409, 410 (5th Cir. 1980) (applying Texas law); *Travis v. Harris Corp.*, 565 F.2d 443, 448 (7th Cir. 1977) (applying Ohio and Indiana laws). See also *Andrews v. John E. Smith's Sons Co.*, 369 So.2d 781, 785 (Ala. 1979); *Domine v. Fulton Iron Works*, 76 Ill. App. 3d 253, 257, 395 N.E.2d 19, 23 (1979).

¹⁵⁵ *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 441 (7th Cir. 1977) (applying Wisconsin law); *Bernard v. Kee Manufacturing Company, Inc.*, 394 So.2d 552, 555 (Fla. Dist. Ct. App. 1981); *Hernandez v. Johnson Press Corp.*, 70 Ill. App. 3d 664, 669-70, 388 N.E.2d 778, 781 (1979).

¹⁵⁶ 76 Ill. App. 3d 253, 395 N.E.2d 19 (1979).

¹⁵⁷ *Id.* at 257, 395 N.E.2d at 23.

¹⁵⁸ *Id.* at 254, 395 N.E.2d at 21.

¹⁵⁹ *Id.* at 255, 395 N.E.2d at 22.

¹⁶⁰ *Id.*, 395 N.E.2d at 21-22.

¹⁶¹ *Id.* at 257, 395 N.E.2d at 23. This fact distinguishes *Domine* from *Ray*. In *Ray*, the predecessor had dissolved. *Ray v. Alad Corp.*, 19 Cal. 3d at 27, 560 P.2d at 6, 136 Cal. Rptr. at 577. It appeared, however, that the *Ray* product line holding was applicable since Fulton continued the output of the line of products of Ferracut. 76 Ill. App. 3d at 255, 395 N.E.2d at 216. Thus, the court felt justified in discussing *Ray* in the context of Illinois law. *Id.* at 257, 395 N.E.2d at 23.

¹⁶² *Id.* In *Peterson v. Lou Bachrodt Chevrolet Co.*, 61 Ill.2d 17, 329 N.E.2d 785 (1975),

court reasoned that defendants such as Fulton, who are not active participants in the original production and marketing of the defective product, may not be held strictly liable for defects in such products.¹⁶³ The court found no justification for imposing liability on a corporation which never represented that the particular press in question was safe, never promoted its use, and never was in a position to exert pressure on the manufacturer to enhance the safety of the press.¹⁶⁴

In *Woody v. Combustion Engineering, Inc.*,¹⁶⁵ a federal district court, applying Pennsylvania law, expressly disagreed with the *Ray* court's "he who takes the benefit should bear the burden" analysis.¹⁶⁶ In *Woody*, Nicolet, Inc. (Nicolet), the successor corporation, purchased most of the assets of Keasby & Mattison Co. (Keasby), the corporate predecessor.¹⁶⁷ Good will was included in the sale.¹⁶⁸ Nicolet retained almost all of the production and middle management employees of Keasby and continued to manufacture the same asbestos products as did Keasby.¹⁶⁹ Keasby agreed to indemnify Nicolet for all liabilities which Nicolet had not expressly assumed.¹⁷⁰ The plaintiff in *Woody* sued Nicolet, alleging that he had been injured by products manufactured by Keasby, which had since dissolved.¹⁷¹ The plaintiff argued that, as the corporate successor of Keasby, Nicolet should bear the responsibility for injuries caused by defects in products manufactured by Keasby.¹⁷² The *Woody* court disagreed, stating that Nicolet had lost the benefit of its bargain.¹⁷³ The court reasoned that since Keasby alone had profited from the sale of the defective

the Illinois Supreme Court specifically refused to impose strict liability upon a defendant who was outside of the original production and marketing chain. *Id.* at 20, 329 N.E.2d at 786. The court held that a used car dealer could not be held strictly liable for the death of a child struck by an allegedly defective automobile sold by the dealer in the absence of allegations that the defects in the automobile existed when it left the control of the manufacturer. *See id.* at 21, 329 N.E.2d at 787.

¹⁶³ 76 Ill. App. 3d at 257, 395 N.E.2d at 23.

¹⁶⁴ *Id.* at 256, 395 N.E.2d at 26.

¹⁶⁵ 463 F. Supp. 817 (E.D. Tenn. 1978).

¹⁶⁶ *Id.* at 821.

¹⁶⁷ *Id.* at 819.

¹⁶⁸ *Id.* At least one other corporation purchased the good will and trade name of Keasby. *Id.* Nicolet used the Keasby trade name for approximately one year. *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* The court found that a paragraph of the purchase agreement providing for this indemnification by Keasby established that the parties did not intend that Nicolet assume liability for defective products manufactured by Keasby. *Id.*

¹⁷¹ *Id.* Keasby did no substantial business between the sale in 1962 and its dissolution in 1967. *Id.*

¹⁷² *Id.* Plaintiff argued that recent cases such as *Knapp v. North American Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975) and *Ray v. Alad Corporation*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977), which expanded the liability of successor corporations in product liability actions for defective products of the predecessor, should be followed rather than traditional corporate law analysis. *See id.* As interpreted by the *Woody* court, these courts argue that the traditional corporate analysis is inappropriate in product liability actions where the focus should be on the injured consumer. *Id.*

¹⁷³ *Id.* at 821.

products, Nicolet's only benefit from the transaction was its potential to profit from use of the Keasby reputation.¹⁷⁴ Revelation of Keasby's past production failures, however, the court reasoned, injured that reputation, depriving Nicolet of the only benefit it had purchased.¹⁷⁵ Since the product line approach imposes liability on a successor corporation for defects in products of its predecessor merely because the successor continues the predecessor's line of products, the *Woody* court rejected the approach.¹⁷⁶

In *Leannais v. Cincinnati, Inc.*,¹⁷⁷ the Court of Appeals for the Seventh Circuit expressly refused to conduct the balancing of policy considerations involved in adopting the product line approach.¹⁷⁸ In *Leannais*, plaintiff was injured by a coil slitter machine which had been manufactured by Forte Equipment Co. (Forte) and sold to the plaintiff's employer in late 1964.¹⁷⁹ In December, 1967, Forte sold its assets to the defendant, Cincinnati, Inc. (Cincinnati), for cash and certain employment agreements.¹⁸⁰ In the purchase agreement, Cincinnati expressly limited its liability for personal injuries caused by products manufactured by Forte to a five year period from the point of the asset transfer and agreed to carry insurance for such claims during that time period.¹⁸¹ More than seven years after closing of the asset transfer,¹⁸² the plaintiff brought suit against Cincinnati, urging the court to hold Cincinnati liable for defects in the Forte products under the product line theory of liability.¹⁸³ In refusing to adopt the *Ray* product line approach, the court held that there was not the "slightest indication" that Wisconsin courts would deviate as far from the long-established corporate law approach as adopting the product line approach would require.¹⁸⁴ An earlier decision by the Wisconsin Supreme Court

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 565 F.2d 437 (7th Cir. 1977).

¹⁷⁸ *Id.* at 441.

¹⁷⁹ *Id.* at 438.

¹⁸⁰ *Id.* The specific employment aspects of the purchase agreement were not noted by the court. The court did note, however, that the "management of Forte was not carried over to Cincinnati. Nor did any shareholder of either corporation become an owner, director, or officer of the other." *Id.* at 440.

¹⁸¹ *Id.* at 438. Paragraph 11(q) of the purchase agreement provided that:

With respect to any claim by a third party, notice of which is given to Forte or Cincinnati within five (5) years of the Closing Date, based on personal injury allegedly caused by Forte Equipment as defined in Paragraph 3(b) above, whether such claims be made against Forte or Cincinnati, Cincinnati shall undertake to obtain, and shall use its best efforts to secure, insurance at its expense against such claims in the amount of Five Hundred Thousand (\$500,000) Dollars

Id. at 438 n.3.

¹⁸² *See id.* at 438-39. This injury occurred approximately five years and four months after the asset sale, or approximately four months after the period in which Cincinnati had assumed liability for personal injury claims arising from defects in products of Forte. *See id.* at 438.

¹⁸³ *Id.* at 440.

¹⁸⁴ *Id.* at 441. The court found judicial machinery to be ill-equipped to make decisions affecting future plaintiffs and defendants. *Id.* Since court decisions are based on a limited record

had declared that whether the policy pronouncements of the supreme court of one state should be imposed on the citizens of another state was a question best handled by the legislature with its comprehensive machinery for public input and debate.¹⁸⁵ Since Wisconsin courts had not yet rendered a decision concerning the product line approach, the *Leannais* court held that the question whether the product line approach should be adopted was one to be handled by the Wisconsin legislature.¹⁸⁶

In *Travis v. Harris Corp.*,¹⁸⁷ the same court which decided *Leannais* held that the "mere continuation of a name and acquisition of good will [from the predecessor] cannot of themselves create a duty to warn [in the successor corporation]."¹⁸⁸ The *Travis* court rejected the product line approach, concluding that there was no basis in the law of Ohio or Indiana for adopting it as an exception to the traditional corporate law rule of successor non-liability for claims against its predecessor.¹⁸⁹ The court reasoned that absent knowledge of the product's defects or of the owner or location of the product, the successor doesn't know what it should warn against,¹⁹⁰ or whom it should warn.¹⁹¹ The *Travis* court affirmed a judgment for the defendant successor corporation because it found that the successor had no knowledge of the particular product manufactured by the predecessor.¹⁹²

In sum, nine courts have rejected the product line approach to corporate successor liability, choosing instead to adhere to the traditional corporate law

developed by the specific parties to the lawsuit, the court reasoned that it could not bind future parties by holding that the product line approach always should prevail. *See id.*

¹⁸⁵ The court referred to a Wisconsin Supreme Court decision, *Holifield v. Setco Industries, Inc.*, 42 Wis.2d 750, 168 N.W.2d 177 (1969).

¹⁸⁶ 565 F.2d at 441. Additionally, the court reasoned that federalism principles prevented it, as a federal court sitting in diversity, from imposing the policy pronouncements of the supreme court of one state upon the citizens of another. *Id.* Thus, the court felt that it was not at liberty to adopt the product line approach to impose liability on a Wisconsin citizen. *Id.*

¹⁸⁷ 565 F.2d 443 (7th Cir. 1977).

¹⁸⁸ *Id.* at 448.

¹⁸⁹ *Id.* The court noted that there was no basis in the law of Ohio or Indiana on which it could hold either *Harris* or *Bruno-Sherman* liable under the product line theory. *Id.* The *Travis* court did note, however, that a successor might acquire the original manufacturer's duty to warn of product defects. *See id.* at 449. The court stated that, under traditional tort law principles, "a duty to warn arises when a relationship exists between him upon whom the duty falls and the dangerous situation to be warned against." *Id.* at 448.

¹⁹⁰ *Id.* at 449. According to the court, factors which may be used in determining the presence of a nexus between the successor and predecessor corporations sufficient to create a duty to warn include: (1) succession to a predecessor's service contracts, (2) coverage under a service contract of the particular product which caused the injury, (3) actual service of that product by the successor, and (4) the successor's knowledge of the defects in the product and of the location or owner of that product. *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* There was no service contract under which *Harris* or *New Sheridan* would have been informed of the particular machine in question. *Id.* Though a *New Sheridan* serviceman had visited the prior owner of the machine in 1968, the visit was made in response to a call from that owner. *Id.* The court reasoned that, despite being the corporate successor to the manufacturer, *New Sheridan* was in the shoes of any service organization which might have been called

rules of successor liability. These courts have found that the applicable state law contained no basis for the drastic change in corporate successor liability which the adoption of the product line approach would entail. In rejecting the product line approach, these courts have strongly attacked the policies of the courts favoring adoption of the approach.

B. Policy Rationale of the Cases Rejecting the Product Line

The policy arguments advanced by the court in *Ray* to support the product line approach have been criticized by other state and federal courts. In refusing to adopt the product line approach, these courts do not agree that successor corporations benefit from the good will of predecessors or that the successors are in a position to protect consumers from defects in products of predecessors. According to these courts, that successors continue to manufacture the line of products of their predecessors is insufficient to provide plaintiffs with a remedy against the successors.

1. Good Will Analysis Criticized

Courts rejecting the product line approach have reasoned that the receipt of business good will is not a sufficient justification per se for imposing liability on a successor corporation for the defective products of its predecessor. These courts have reasoned that the revelation of past production failures deprives the successor of the benefit of its purchase of the successor's good will.¹⁹³ The court in *Woody* reasoned that a successor corporation has an interest in the good will and tradename of its predecessor since the successor relies on the predecessor's reputation for excellence in production when the successor markets its products.¹⁹⁴ That reputation for excellence is tarnished, however, whenever defective products manufactured by the predecessor are uncovered.¹⁹⁵ In essence, if the successor must respond to claims of plaintiffs injured by defects in products of the predecessor, the successor is deprived of the only benefit it has purchased because the successor can no longer rely on the reputation of the predecessor established by those products.¹⁹⁶ It is the predecessor, not the successor corporation, which benefitted by receiving profits from the sale of the defective

upon to repair the machine. *Id.* Thus, the serviceman's visit to the prior owner was inadequate to create such a relationship between New Sheridan and the subsequent owner of the machine (plaintiff's employer) which would give rise to a duty to warn the owner of the product's defects. *Id.*

¹⁹³ See discussion of *Woody v. Combustion Engineering* in text *supra* notes 165-76 and accompanying text.

¹⁹⁴ 463 F. Supp. at 821.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* The court reasoned that since the successor only profits from products it markets after the corporate transfer, the only benefit it receives from products sold by the predecessor is good will. See *id.* When the predecessor's products subsequently prove to be defective, that benefit is lost. *Id.*

product which caused harm to the plaintiff.¹⁹⁷ Additionally, the predecessor, not the successor, received the profits from sales of products which, though similarly defective, did not cause harm.¹⁹⁸ The court concluded that imposing liability on a successor corporation, where it has received little or no benefit from its predecessor's defective product, would greatly burden business transfers and would turn ordinary business transactions into traps for unwary successor corporations.¹⁹⁹

2. Successor's Position to Protect Consumer Analysis Criticized

Courts rejecting the product line approach also have criticized the second policy underlying the doctrine, that the successor corporation is in a position to protect consumers from defects in products of the predecessor.²⁰⁰ These courts have maintained that the successor was not in such a position and that imposition of strict liability on it for defects in the predecessor's products where the traditional corporate law exceptions do not apply is not justified.²⁰¹ Indeed, where the corporate exceptions do not apply, principles of strict liability mandate that the successor not be liable.²⁰² The *Domine* court noted that it is not the corporate successor which creates the risk of harm from an allegedly defective product manufactured by the predecessor.²⁰³ A successor corporation has had no contact with its predecessor's products, and, therefore, has not been part of the original marketing chain.²⁰⁴ The successor did not invite the injured plaintiff to use the product, did not represent to him or to the public that it was safe, and was in no position to exert any pressure on the manufacturer to enhance

¹⁹⁷ *Id.* This benefit takes the form of profits on sales of products. *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* The court noted that "[i]t is a fortuity that a predecessor corporation does not dissolve or scatter its assets, in which case no recovery would be possible, rather than sell large portions of its assets to a particular successor." *Id.* Thus, to hold the successor liable for the plaintiff's injury because it has greater resources than the plaintiff on which to draw to absorb the loss, would impose a penalty on the successor which the successor could not foresee when it agreed to purchase the predecessor's assets. *See id.* Holding a successor liable in such circumstances could have the effect of permitting the predecessor to escape liability when it dissolves at a later time although it continues operations after discontinuing the product line. In practice, the predecessor will be charged with responsibility for defects in products it produced if the predecessor continues to function. *See Woody v. Combustion Engineering, Inc.*, 463 F. Supp. at 822. If the predecessor later decides to discontinue its other operations such that it no longer continues to function at all, however, it follows that the successor, who purchased the product line while the predecessor was able to be held liable for defects in its own products, will be held liable for such defects under the product line approach since the successor continues products of the same line as the predecessor. An example of a case which may occur while the predecessor still exists is where plaintiff cannot effect service of process on the predecessor but the forum court can assert jurisdiction over the successor. In such cases, the successor will be forced to seek indemnification from the predecessor.

²⁰⁰ *See, e.g.*, 76 Ill. App. 3d at 258, 395 N.E.2d at 23.

²⁰¹ *Id.*

²⁰² *See id.*

²⁰³ 76 Ill. App. 3d at 258, 395 N.E.2d at 23.

²⁰⁴ *Id.* at 257, 395 N.E.2d at 23.

the product's safety.²⁰⁵ Under traditional strict liability principles, only members of the original marketing chain may be held strictly liable for defects in products in that chain.²⁰⁶ A successor corporation which merely continues to manufacture similar products is not part of the marketing chain of the predecessor's defective products.²⁰⁷ Thus, *Hernandez, Domine* and similar cases have refused to impose strict liability for injuries caused by defects in the predecessor's products where the traditional corporate law exceptions did not apply.²⁰⁸

The court in *Woody* expanded this reasoning when it concluded that imposing liability on the successor when it merely continued to manufacture products similar to those made by the predecessor would be as unjust as imposing liability on a competitor of the original manufacturer.²⁰⁹ One reason strict liability is imposed on manufacturers is to encourage them to take greater care in designing and manufacturing products.²¹⁰ The court in *Woody* noted that entire industries are not held liable in products liability cases because manufacturers are held responsible only for their own actions²¹¹ and for the level of safety they have selected.²¹² The *Woody* court therefore concluded that a corporate stranger²¹³ which purchased the predecessor's assets would not be held responsible for the predecessor's defective products where it had no ability at the time the product was manufactured to improve its safety.²¹⁴ To the *Woody* court, holding a corporate stranger responsible for its predecessor's defective products would be comparable to placing liability on the entire industry. Indeed, the court argued that the policies sought to be fostered by the *Ray* court in support of the product line approach to corporate successor liability would be more efficiently fostered by placing liability on the entire industry rather than on the successor alone.²¹⁵

3. Lack of Alternative Remedy Criticized

Courts rejecting the product line theory of liability have found unpersuasive the argument that merely because a successor continues to manufacture its predecessor's line of products, the successor should compensate plain-

²⁰⁵ *Id.* at 258, 395 N.E.2d at 23.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *supra* notes 164 and 176 and accompanying text.

²⁰⁹ See 463 F. Supp. at 820.

²¹⁰ *Ellithorpe v. Ford Motor Co.*, 503 S.W.2d 516, 521 (Tenn. 1973).

²¹¹ *Woody v. Combustion Engineering*, 463 F. Supp. at 820.

²¹² *Id.* at 821.

²¹³ For the purposes of this note, a "corporate stranger" is a successor corporation which is sued for injuries caused by defects in a product manufactured by the predecessor, but which does not fit within the traditional corporate law exceptions.

²¹⁴ See *id.* at 821. The court held that a successor which has merely purchased the assets of the predecessor should not be liable for the defective products of the predecessor since it was a stranger to the production process. See *id.*

²¹⁵ *Id.* at 820.

tiffs for injuries caused by defects in products of the dissolved predecessor. The *Woody* court reasoned that while all such plaintiffs may deserve compensation, such a charitable instinct is insufficient to justify holding liable a successor corporation merely in order to insure that the wealthier party is burdened.²¹⁶ Consistent with strict liability, in order to be liable, the defendant must have been part of the original marketing chain of the defective product, and thereby able to protect potential plaintiffs.²¹⁷ The *Woody* court reasoned further that to hold a successor corporation liable for defects in its predecessor's products is unjustified since it "is a fortuity that a predecessor corporation does not dissolve or scatter its assets, in which case no recovery would be possible, rather than sell large portions of its assets to a particular successor."²¹⁸ *Woody* concludes that a successor corporation should not be held liable for defects in products of its predecessor merely because the predecessor has dissolved.²¹⁹

Courts rejecting the product line approach have disagreed with the policy bases offered by courts which have adopted the approach to successor corporation tort liability. These courts have reasoned that a successor corporation does not always benefit from the predecessor's good will and is not always in a position to protect consumers from the predecessor's defective products. This disagreement over the underlying policies of the product line approach to successor corporation tort liability has led to the present conflict among the courts over the appropriate scope of such liability. To resolve the conflict over the merits of the product line approach, the courts should adopt an approach which best meets the underlying principles of both strict tort liability and corporate law. The remainder of this note will examine how such an approach might operate and how the conflict over the scope of successor corporation tort liability might be settled.

IV. AN EXPANDED CORPORATE LAW AND REPOSE APPROACH

Under strict liability principles, liability is imposed on the party responsible for creating the product defect. Neither the product line approach nor the traditional corporate approach apply this liability adequately in the context of successor corporation tort liability. On the one hand, the product line approach, in failing to properly consider corporate law, imposes strict liability on successor corporations which merely continue to manufacture the predecessor's line of products. The corporate approach, on the other hand, fails to assign liability in some instances to successor corporations which in effect absorb the predecessor corporation which has manufactured the defective product. A better approach than both of these would be to expand the corporate approach to successor corporation tort liability to encompass situations

²¹⁶ 463 F. Supp. at 821.

²¹⁷ See 76 Ill. App. 3d at 357-58, 395 N.E.2d at 23.

²¹⁸ 463 F. Supp. at 821.

²¹⁹ *Id.*

where it is reasonable to impose liability on a successor because of its close connection with the predecessor's manufacturing enterprise. Under the expanded approach, if the asset transfer falls within one of the recognized exceptions to the traditional corporate law approach as it currently exists or as expanded, the successor would be liable for defects in products of the predecessor whether the asset transfer to the successor was in consideration of cash or stock in the successor. In addition, the traditional exceptions will be expanded such that they are broadly construed to apply where the successor in effect absorbs the predecessor. In addition, to expand the corporate law approach, one of the parties to each corporate asset transfer should be required to carry insurance for a statutory period to pay for claims brought by consumers injured by defects in products of the predecessor which occur after the predecessor has dissolved. Such a requirement could provide added protection for all parties involved. Successor corporations would know with certainty whether they will be liable for defects in products of the predecessor at the time of the asset transfer and for how long a period. Plaintiffs then will be assured that a predecessor corporation will be solvent if his injury occurs within the statutory period. Thus, if the plaintiff proves the product was defective, a remedy for his injury will be assured. This section will begin with an evaluation of the product line policy analysis. After concluding that this line of analysis does not justify holding successor corporations strictly liable for defects in products of the predecessor, an alternative to the product line approach will be presented. This alternative approach will be tested against the same policy considerations.

A. *Evaluation of the Product Line Policy Analysis*

It is submitted that the rationale of the product line cases does not justify holding a successor corporation strictly liable for injuries caused by defects in products of the predecessor where the only connection between the predecessor and the successor is that the successor continues to manufacture the same line of products which caused the plaintiff's injury. The only benefit received by a successor corporation from products produced and sold by its predecessor is its potential to profit from the predecessor's good will. That benefit is lost, however, when defects in those products are discovered. Since the successor only profits from products it markets after the corporate transfer, the only benefit it received from products sold by the predecessor was the now tainted good will. Additionally, a successor corporation is in no position to guard against dangers in products of its predecessor where the successor receives no knowledge of such products. Thus, imposition of strict liability on successor corporations under the product line approach is unjustified.

The *Ray* court stated that receipt and use of a corporate predecessor's good will is sufficient to justify imposing strict liability on the corporate successor for injuries caused by defects in products of the predecessor.²²⁰ This analysis of the

²²⁰ See, e.g., *Woody v. Combustion Engineering*, 463 F. Supp. at 821.

effect on the successor of the predecessor's good will, however, is flawed. Public knowledge that the product is defective denies the successor of the benefit of the good will it has purchased.²²¹ A successor corporation suffers reputational damage whenever products manufactured by its predecessor prove to be defective.²²² Purchasers of similar products manufactured by the successor may attribute to the successor the defective products of its predecessor even though the successor had no part in producing the particular defective unit.²²³ Since the successor received no profits from the product which actually caused the plaintiff's injury, it actually is harmed when persons are injured by defects in such products.²²⁴ This harm is sufficient. No additional liability should be imposed. Receipt and use of the predecessor's good will thus is not per se insufficient to justify imposing strict liability upon the successor for defective products of the predecessor.²²⁵

In addition to the good will analysis, courts adopting the product line approach also have emphasized that the successor corporation was in a position to protect the plaintiff either by preventing the defect or by warning users of the product of the potential for injury.²²⁶ This reasoning also is flawed. The successor corporation is not part of the original production and marketing chain. Therefore, it does not have knowledge to warn consumers of, or protect them from, the defective product and thus cannot guard against the risk of injury. Strict liability is premised on a party's ability to improve the product's safety while the product is in its hands.²²⁷ Since the defective product never was in the hands of the successor, strict liability principles do not apply. Holding the successor corporation liable for injuries caused by products manufactured often decades earlier by a predecessor corporation simply because the successor later acquired the right to manufacture similar products should bind the successor for mistakes it was in no position to correct.²²⁸ Where the merger or continuation exception applies, however, the successor was in a position to correct defects.

The inequity of holding a successor corporation strictly liable for defective products of the predecessor under the product line approach is apparent where the successor has no ability to warn users of the defective product because in-

²²¹ *See id.*

²²² *See id.*

²²³ *See id.* That purchasers of the successor's products attribute defects in the predecessor's products to the successor follows where there is no attempt to inform customers of the predecessor of the change in corporate ownership. Where it is apparent that a new corporation continues the product line of the predecessor, this result will probably not occur.

²²⁴ *See id.*

²²⁵ *Domine v. Fulton Iron Works*, 76 Ill. App. 3d at 257, 395 N.E.2d at 23.

²²⁶ *Id.* at 357, 395 N.E.2d at 23.

²²⁷ *See, e.g., Crowe v. Public Building Commission*, 74 Ill. 2d 10, 13-14, 383 N.E.2d 951, 952.

²²⁸ *Domine v. Fulton Iron Works*, 76 Ill. App. 3d at 357-58, 395 N.E.2d at 23. The *Woody* court noted that such a result would be the same as holding an entire industry liable for the defective products of one company. 463 F. Supp. at 820-21.

formation and records of the predecessor's products were not transferred. Although neither the *Ray* nor the *Ramirez* courts discussed explicitly whether knowledge on the part of the successor of the current owners regarding the predecessor's products should be a prerequisite to imposing liability on the successor for defects in those products, the basic rationale of the product line approach does not require knowledge as a precondition to liability.²²⁹ In many cases, however, the allegedly defective product was manufactured years or even decades earlier and the assets of the actual manufacturer have been transferred many times.²³⁰ In such cases, expecting successors to warn of potential defects in such products is unreasonable.²³¹

Finally, proponents of the product line theory assert that plaintiffs injured by defective products of the predecessor should not be left remediless simply because the predecessor has dissolved.²³² While it is unjust to deny the plaintiff a remedy, it would be more unjust to impose liability on an innocent successor corporation which had no contact with and received no benefits from the defective product which injured the plaintiff. That the product line approach operates to assign liability based in part on the subsequent history of the predecessor-manufacturer leads to further inequities where the policy of providing a plaintiff with a remedy is elevated above all other considerations.²³³ For example, the predecessor usually will have dissolved and the plaintiff will argue that the dissolution of the predecessor justifies imposing liability on the successor. The product line approach could result in some corporate successors being held liable while others fortuitously escape liability solely on the basis of the subsequent history of the predecessor corporation.²³⁴ If the predecessor does not dissolve, the successor will escape liability.²³⁵ If prior to dissolution the predecessor decides to sell its assets to various purchasers so that no single purchaser continues to manufacture the product line of the predecessor, there will be no "successor," and no recovery at all is possible.²³⁶ If the successor purchases substantially all of the predecessor's assets or those of an entire product line and the successor does not require dissolution of the predecessor, the successor will be held liable under the product line approach if the predecessor later decides to dissolve on its own initiative.²³⁷ Thus, while plaintiffs may

²²⁹ In both cases, it was sufficient that the successor corporation continued the line of products of the predecessor. See discussion of *Ray* and *Ramirez* *supra* notes 95-124 and accompanying text.

²³⁰ See, e.g., the product history in *Nieves v. Bruno Sherman Corporation*, 86 N.J. at 365-66, 431 A.2d at 828-29.

²³¹ *Travis v. Harris Corp.*, 565 F.2d at 449.

²³² See *supra* note 148.

²³³ *Woody v. Combustion Engineering*, 463 F. Supp. at 821.

²³⁴ *Id.*

²³⁵ In such cases, the successor can seek indemnity from the predecessor corporation which manufactured the defective product. See *Hales v. Green Colonial, Inc.*, 402 F. Supp. 738, 741 (W.D. Mo. 1975).

²³⁶ *Woody v. Combustion Engineering*, 463 F. Supp. at 821.

²³⁷ See *id.* When a sale of assets originally is consummated, the predecessor's existence

deserve a remedy, mandating relief from successor corporations merely because they continue to manufacture a defunct predecessor's line of products assigns liability at random rather than on principles of strict liability. The product line approach should therefore not be adopted. Rather, liability should turn on whether the expanded corporate law exceptions apply. Where they are applicable, the nexus between the successor and predecessor corporations is close enough that imposition of liability on the successor for defects in products of the predecessor is justified.

In summary, the product line approach is inconsistent with principles of strict liability and corporate law. Under this theory, liability is imposed randomly, based on whether the predecessor corporation is in existence at the time a plaintiff injured by its product brings suit. If the predecessor corporation has dissolved, the product line approach provides injured plaintiffs with a new defendant so long as the successor corporation continues to manufacture the same line of products as did the predecessor. The successor becomes a defendant under the product line approach even though it may have been in no position to correct, or warn the plaintiff of, defects in products of the predecessor. The successor corporation's use of the predecessor's reputation does not justify imposition of such liability since the appearance of defects in products of the predecessor injures that reputation, harming the successor. Thus, courts which have rejected the product line approach are correct because imposing liability on the successor merely to provide an otherwise remediless plaintiff with a remedy operates unjustly.

B. The Corporate Approach Evaluated

The traditional corporate law approach permits successor corporations to escape liability for defects in the predecessor's products based on what might be considered a "formality." If the successor purchases the predecessor's assets for cash, rather than transferring stock in the successor corporation to the predecessor corporation, no liability will attach even though the cash purchase is in all other ways identical to the stock purchase. In this situation, assuming the merger or continuation exceptions otherwise apply, the successor corporation can properly be called upon to respond for injuries caused by defects in products of the predecessor because, through the asset transfer, the successor in effect became the predecessor. Thus, the successor is as able as the predecessor to gauge the risks of injury to consumers and to provide protection whether the consideration paid by the successor for the predecessor's assets was cash or stock.

Neither the traditional corporate law approach nor the product line approach strikes an adequate balance between the competing interests of granting injured plaintiffs a remedy and holding a successor liable for defects in products of its predecessor which it could have anticipated. The product line approach leans too far toward providing plaintiffs a remedy without considering whether the successor corporation is a proper defendant. The traditional corporate law

approach, in contrast, denies plaintiffs a remedy where the successor would be a proper defendant were it not for technicalities in the form of the asset transfer.

C. *A Proposed Alternative*

It is submitted that a better approach to the issue of successor corporation tort liability would be to expand the corporate approach to hold successor corporations liable where the connection between the successor and the predecessor is close enough that holding the successor liable for injuries caused by defects in the products of the predecessor is justified. The connection is close enough where the traditional merger or continuation exceptions would apply irrespective of stockholder continuity between the two corporations. Under this approach, when the merger or continuation exception would apply if it were not for the presence of cash as consideration for the asset transfer, a successor corporation may properly be called upon to assume liability for the defective products of its predecessor. Additionally, the parties to an asset transfer should be required to make allowances for injuries caused by defects in the products of the predecessor corporation for an statutorily defined period after the closing date by providing for insurance to cover claims which arise from defects in products of the predecessor within that period. This requirement insures the predecessor's solvency if injuries occur as a result of defects in its products which occur after the asset transfer and would thus protect plaintiffs injured by the predecessor's products where the merger or continuation exceptions did not apply. The proposed alternative approach would eliminate the unduly restrictive shareholder commonality requirements and focus on the practical effect of the corporate transaction rather than its form. By requiring that insurance be carried by the successor or predecessor or both for a statutory period, an equitable remedy can be derived which is fair both to the successor corporation and to those injured by defective products of the predecessor.

1. Expanding the Corporate Law Exceptions

The traditional corporate law approach establishes a flat rule that if a successor corporation buys the assets of a predecessor and cash is the medium of consideration, the successor will not be liable for the debts of its predecessor. Thus, the corporate law approach requires commonality of ownership between the predecessor and its successor as a condition to successor liability.²³⁸ No other difference is apparent between a successor where cash, on the one hand, and a successor where stock, on the other hand, is the consideration given for the asset transfer.²³⁹ Since stock has no relevance to a corporation's ability to

provides the successor with protection in the form of indemnification. See *supra* note 233 and accompanying text. When the predecessor has dissolved, however, the plaintiff seeks to hold liable a viable successor which continues the product line of the predecessor. See *Ramirez v. Amsted Industries*, 86 N.J. at 351, 431 A.2d at 821.

²³⁸ *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 570, 264 A.2d 98, 106 (1970).

²³⁹ *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 8-1-02 (W.D. Mich. 1974).

gauge the risks of injury or to warn users of defects in products, the requirement that there be commonality of shareholders before liability attaches to a successor corporation for defects in products of the predecessor should be eliminated. Rather, a plaintiff should have to prove only that the successor is a continuation of the same enterprise of the predecessor, regardless whether stock in the successor corporation was the sole consideration for transfer of assets. Under this approach, a new category of plaintiffs will be able to recover from the successor for injuries caused by defects in the predecessor's products. Under this alternative, liability would be proper as under the merger or continuation exceptions where: (1) the successor continues the predecessor's enterprise, (2) the predecessor dissolves either as required by the purchase agreement or as a result of the asset sale, and (3) the successor assumes those liabilities and operations necessary for the uninterrupted continuation of the predecessor's normal business operations.²⁴⁰ Where these three factors exist, the successor corporation is in a position to protect users of the predecessor's product from, or warn them of, defects in those products. If these prerequisites to a finding of merger or continuation of the predecessor are met, liability should attach to the successor for defective products of the predecessor whether the consideration given by the successor for the predecessor's assets is shares of the successor's stock or cash.

The first requirements for successor liability under the proposed approach is that the successor "continue" the predecessor's enterprise. Continuity between the successor and the predecessor in management, personnel, manufacturing assets and general business operations must exist before the successor may be considered a proper defendant.²⁴¹ If these indicia of continuity are present, it is reasonable to impose liability on the successor corporation for the defective products of its predecessor since the only change in the manufacturing operation is the corporate ownership. It is management, however, that typically makes the daily business decisions of a corporation.²⁴² If the same management team continues to direct the same employees in the same business operations in the same plant, the successor can be considered to have been in as good a position as was the predecessor to gauge the risks of injury from the predecessor's defective products. The successor, knowing the predecessor's enterprise and the potential for injury from defects in design or manufacture in products previously manufactured by the predecessor thus is in a position to build a better product and is in a position to warn users of such product defects.²⁴³ Additionally, the successor corporation can calculate the risk of injury from the predecessor's products and can protect itself by obtaining insurance to cover injuries caused by defects in such products. Under this ap-

²⁴⁰ See *infra* notes 241-49 and accompanying text.

²⁴¹ See *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801 (W.D. Mich. 1974).

²⁴² 5 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2096 (1976).

²⁴³ See *Cyr v. B. Offen & Co.*, 501 F.2d at 1154.

proach, plaintiffs properly may seek recovery from the successor corporation. While thus granting plaintiffs a remedy if the other two conditions are also met, the successor is not unduly burdened with the predecessor's responsibility to protect product users from injury.

The second requirement for liability under the proposed standard, is that the predecessor must cease its ordinary business operations, liquidate, and dissolve. Currently, dissolution of the predecessor at some later date may result in the imposition of liability on the unsuspecting corporate successor.²⁴⁴ Under the proposed standard of liability, the dissolution of the predecessor must have been required by the successor pursuant to the asset purchase agreement or it must occur because the agreement left the predecessor no ability to conduct business without violating a non-competition clause in the purchase agreement.²⁴⁵ This standard recognizes that by causing the predecessor corporation to liquidate, the successor corporation ultimately is responsible for depriving injured plaintiffs of a remedy against the predecessor. It will not suffice under this standard for the predecessor to discontinue the line of products which caused the plaintiff's injury but continue in other areas of business. Plaintiffs in such circumstances should continue to have a remedy against the actual manufacturer of the defective product.²⁴⁶ If only one product line were transferred to the successor and the predecessor continued to conduct business in other areas, the subsequent dissolution of the predecessor's remaining business lines in a transaction unrelated to the successor's asset acquisition would not cause liability to attach to the successor for injuries caused by defects in products of the predecessor which the successor continued to manufacture.²⁴⁷ In such a situation, the successor does not deprive the plaintiff of the proper defendant. If, on the other hand, the predecessor continues to exist as a corporate entity in name only conducting no business operations, liability properly may be imposed on the successor since its purchase of the predecessor's assets in effect brought about the predecessor's dissolution.²⁴⁸

The final requirement for successor liability under the proposed approach is that the successor assume those liabilities and obligations of the predecessor which ordinarily are necessary for the uninterrupted continuation of the predecessor's normal business operations.²⁴⁹ Satisfaction of this requirement indicates that the successor corporation seeks to step into the shoes of the

²⁴⁴ See *Turner v. Bituminous Casualty Co.*, 397 Mich. at 421, 244 N.W.2d at 883.

²⁴⁵ If the predecessor conducts no business after the asset transfer, the predecessor's dissolution years later should be presumed to have occurred because of the asset transfer.

²⁴⁶ Under present tort liability rules, if the successor is sued, the predecessor corporation ultimately may be held liable for defects in its products through indemnification. *Hales v. Green Colonial, Inc.*, 402 F. Supp. 738, 741 (W.D. Mo. 1975).

²⁴⁷ In such a case, since neither the successor nor the predecessor has assets which may be reached by the plaintiff, an additional remedy is proposed.

²⁴⁸ Thus, under the proposed approach, the parties to a corporate transfer may not circumvent liability by merely continuing the existence of a non-functioning corporate shell.

²⁴⁹ Assumption by the successor of (1) liability for inventory and supply materials

predecessor corporation by honoring its prior commitments. By assuming the predecessor's ordinary obligations, the successor gives notice to customers of the predecessor that they may continue their dealings with the successor as though there had been no change in ownership of the manufacturing business and that the successor corporation stands by the products of its predecessor. Like the first two requirements for successor liability, this requirement insures that there is a sufficient connection between the successor corporation and its predecessor to justify imposing liability on the successor for defects in products of the predecessor.

This expanded corporate law approach to successor corporation tort liability will not always provide a remedy to plaintiffs injured by defects in the products of predecessor corporations. For example, a predecessor corporation may sell its assets to many corporations, leaving no corporate "successor". Similarly, the terms of a purchase agreement may not require a corporate predecessor to dissolve upon the closing of the transaction. Likewise, a successor corporation may not assume the ordinary obligations and liabilities of its predecessor under the expanded corporate law approach. In all cases where the expanded corporate law approach does not apply, a plaintiff would be remediless if he brought suit after the predecessor corporation had dissolved. Therefore, an additional remedy must be derived to protect plaintiffs injured by defects in the products of defunct predecessor corporations. That remedy is a statute of repose tied to an insurance requirement.

2. Statute of Repose and Insurance Requirement

In some corporate transfers, the sale agreement will provide that one party will carry insurance for a certain period of time to cover outstanding product liability claims against the corporate predecessor.²⁵⁰ In others, however, the agreement will be silent as to such potential liability or the successor explicitly will refuse to assume liability for injuries caused by defects in the products of the predecessor.²⁵¹ In the absence of an express contractual undertaking by the predecessor to provide an insurance fund from which to pay claims for injuries caused by its defective products, when the predecessor dissolves, it will escape liability for injuries caused by its defective products. In the absence of such an undertaking by the predecessor, either the consumer will be left without a remedy or the successor will be required to pay damages on behalf of the culpable predecessor. A dilemma exists as to which innocent party will be required to absorb the costs of the plaintiff's injuries.

One solution to this dilemma is to coordinate a statute of repose²⁵² with a

previously ordered by the predecessor, (2) debts owed by the predecessor to creditors, or (3) contracts or purchase orders for products to be manufactured through use of the transferred assets, will suffice to meet this test.

²⁵⁰ See, e.g., *Leannais v. Cincinnati, Inc.*, 565 F.2d at 438.

²⁵¹ *Travis v. Harris Corp.*, 565 F.2d at 445-46.

²⁵² A statute of repose "is a legislative enactment which prescribes the period within

requirement that the predecessor or the successor or both carry insurance for a certain number of years after the asset transfer if the expanded corporate law exceptions do not apply to cover claims which might arise from defects in the predecessor's product.²⁵³ Under this approach, a successor corporation would be the proper defendant where the plaintiff is injured by a defective product of the predecessor only when the expanded corporate law exceptions apply. If the expanded corporate law exceptions do not apply to a successor corporation, the successor would escape liability for injuries caused by defects in the predecessor's products. In such a case, the predecessor would be the proper defendant, and the proceeds of the insurance would be used to satisfy a judgment against the predecessor. Since the statute of repose and insurance requirement seeks to insure that the consummation of an asset transfer does not deprive plaintiffs of a remedy, failure of the successor and the predecessor to carry insurance where the expanded corporate law exceptions do not apply would sustain a judgment against the successor corporation as though it were the predecessor. The successor in such cases would be treated as the manufacturer of the specific defective product because it was responsible for the predecessor's dissolution and because it failed to follow statutorily prescribed insurance requirements.

which actions may arise and be brought upon certain claims." Comment, *Statute of Repose*, *supra* note 9, at 143.

²⁵³ At least one court has recommended that the state legislature seriously consider such a statute. See *Kozlowski v. John E. Smith's Sons Co.*, 87 Wis. 2d 882, 992-94, 275 N.W.2d 915, 924-25 (1979). See also *Leannais v. Cincinnati, Inc.*, 565 F.2d at 441. Legislatures should be given responsibility for determining the specific aspects of such a statute since they are in a position to weigh the effects on society of such a requirement. These aspects include such considerations as the number of years the insurance must be carried, the types of products to be covered by the statute, and the enforcement procedures or civil remedies that should be available. Because of variations in the useful life of products on the market, the legislature should be flexible in establishing the length of the statutory requirement for different types of products. See generally Comment, *Statutes of Repose in Products Liability: The Assault Upon the Citadel of Strict Liability*, 23 S.D. L. REV., 149, 177 (1978). The requirement should be longer for products such as industrial machinery which have very long useful lives, than that for less durable products. Injuries from industrial machinery often occur years or even decades after less durable products would have been discarded. See, e.g., *Nieves v. Bruno-Sherman Corp.*, 86 N.J. at 365, 431 A.2d at 828.

A reasonable time limit for products with latent defects would be eight to ten years. Comment, *Statute of Repose*, *supra* note 9 at 145. Statistics have shown that only a relatively small percentage of product liability claims have occurred after that period. *The Devils in the Product Liability Laws*, BUSINESS WEEK, Feb. 12, 1979 at 75. "Many products with long lives, especially capital goods such as presses used in manufacturing, may cause injuries decades after they are first sold. . . . Data from the ISO [Insurance Services Office] closed-claims survey show that 'some 4% of the bodily injury claims have not occurred 8 years after the date of manufacture of the machine involved.'" *Id.* States which currently have general statutes of repose, under which the manufacturer is no longer liable for injuries caused by defects in its products, generally set the time limit from 6 to 12 years. See, e.g., S.D. COMP. LAWS ANN. § 15-2-12.1 (1981 Supp.); R.I. GEN. LAWS, § 9-1-13 (1981 Supp.); ARIZ. REV. STAT. ANN. § 12-551 (1982); IND. CODE ANN. § 34-4-20A-5 (Burns Supp. 1981); NEB. REV. STAT. § 25-224 (1979); FLA. STAT. ANN. § 95.031(2) (West Supp. 1981). Eight to ten years is probably within the time range which should relieve both manufacturers and sellers from claims which arise long after the product is sold while not overly burdening consumers by leaving them remediless. See Comment, *Statute of Repose*, *supra* note 9, at 145.

The statute of repose and insurance requirement will impose liability more fairly upon successor corporations. If the expanded corporate law exceptions apply, the successor corporation will be able to foresee the possibility of strict liability for such injuries and protect itself by obtaining insurance. The successor can thus spread the costs of injuries from the predecessor's defective products to society as a whole in the form of higher prices.²⁵⁴ If the expanded corporate law exceptions do not apply, the successor corporation will not be a proper defendant to an action for injuries caused by the predecessor's defective products. Thus, where the expanded corporate law exceptions do not apply, the successor corporation will receive the same treatment as a competitor of the predecessor who, similarly, had no contact with the predecessor's defective product. The successor, of course, would be responsible for products it manufactured after the asset sale.

The statute of repose and insurance requirement provides an acceptable remedy to plaintiffs injured by defective products of the predecessor. If the expanded corporate law exceptions apply to a successor corporation, the plaintiff may properly bring suit against it even if the statutory period has expired. If the expanded corporate law exceptions do not apply, the insurance proceeds insure that the plaintiff in an action against the predecessor within the statutory period will be compensated for his injuries. Statistics have indicated that most plaintiffs will be injured within the statutory period.²⁵⁵ The ability of plaintiffs to recover the insurance proceeds would be guaranteed if he meets his burden of proof under the appropriate state variation of strict liability that he was injured by a defective product of the predecessor.

Under the proposed expanded corporate law and repose approach, some plaintiffs will still be left without a remedy. The incidence of remediless plaintiffs, however, will be greatly reduced. Only where the expanded corporate law exceptions do not apply and where the statutory period has passed will plaintiffs injured by defects in products of the predecessor be unable to obtain the satisfaction of a judgment. The remainder of this note will evaluate the effectiveness of the proposed alternatives.

D. *Evaluation of the Expanded Corporate Law and Repose Approach*

Combining a statute of repose and insurance requirement with an expansion of the traditional corporate law approach to successor corporation tort liability satisfies the policies articulated in *Ray* and *Ramirez* without the disadvantages of the product line approach. Rather than imposing upon the successor the full burden of injuries caused by defects in the products of a defunct predecessor, the expanded corporate law and repose approach strikes a balance

²⁵⁴ The successor might decide to arrange for the continuation of the predecessor's product liability insurance, adjusting the purchase price of the predecessor's assets to take the projected premium into account. See *Shannon v. Samuel Langston Co.*, 379 F. Supp 797, 802 (W.D. Mich. 1974).

²⁵⁵ See *supra* note 253.

between the competing interests of providing a remedy for plaintiffs and not unduly burdening innocent successor corporations. This approach strikes this balance by allowing recovery from the successor only under circumstances where it is reasonable to treat the successor as the predecessor for purposes of liability. Where it is unreasonable to do so because the successor does not fall within one of the expanded corporate law exceptions, the plaintiffs still may recover in most circumstances under the statute of repose insurance requirement by suing the defunct predecessor and receiving the insurance proceeds. The costs of the insurance will be spread throughout society in the form of higher prices.

The expanded corporate law and repose approach is consistent with the policies which influenced the development of the product line approach. The courts in *Ray* and *Ramirez* would place responsibility for the predecessor's defective products on the successor because those courts determined that the successor was in a position to gauge the risks of injury from those products and to protect consumers.²⁵⁶ Since production methods and managerial decisions may differ once the manufacturer's assets have been transferred, however, the successor is not always in a position to protect plaintiffs against injury from defects in products of the predecessor. The successor may have little or no knowledge of the risky manufacturing processes carried on by the predecessor. Yet, the product line approach expects the successor to protect the user of the product from such risks. Under the expanded corporate law and repose approach, where the corporate successor continues the predecessor's business as substantially the same corporation, it no longer can use the paper excuse that no stock was transferred. As long as there is continuity of the enterprise, dissolution of the predecessor which is related to the asset transfer, and assumption of the predecessor's ordinary business obligations by the successor, the successor fairly can be called upon to answer for product defects of the predecessor. When these requirements have been satisfied, the only real difference between the predecessor and successor is the ownership of the latter. This difference is insubstantial because corporate shareholders do not make the day-to-day business decisions of the corporation. Business operations and production decisions remain substantially the same after the transfer. In addition, where continuity between predecessor and successor is established, the successor can be held to have been in a position to have gauged the risks of injury from defects in products of the predecessor. Since the successor's employees carry over their knowledge of the predecessor's products, the successor properly will be held responsible for failing to provide protection in the form of insurance or warn the consumer of the risk of injury from defects in products of the predecessor. Where the successor is not in such a position, the expanded corpo-

²⁵⁶ *Ray v. Alad Corp.*, 19 Cal. 3d at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581; *Ramirez v. Amsted Industries*, 86 N.J. at 352, 431 A.2d at 821-22.

rate law and repose approach avoids the inequitable result of imposing full liability on the successor for defects in the predecessor's products.

That some plaintiffs will be left without a remedy under the expanded corporate law and repose approach is a possibility. The class of such plaintiffs, however, would be fairly small. All plaintiffs injured by defects in products of the predecessor would be permitted recovery from the predecessor (and, consequently, from the insurance proceeds) if the injury occurred within a certain number of years and they could sustain the burden of proving that they were injured by a product which was defective when it left the hands of the predecessor-manufacturer. Only those persons injured after the statutory period has expired and where the expanded corporate law exceptions do not apply to the successor corporation would be denied recovery from either the predecessor or the successor. While the length of the repose period may arbitrarily deprive some plaintiffs of relief, that arbitrariness is justified by the innocence of the successor corporation. Successor corporations should not be required to bear the liability for their corporate predecessors' defective products into the indefinite future. The repose period seeks to strike a balance between providing plaintiffs with a remedy and the need to protect innocent successor corporations from unreasonable liability burdens. The expanded corporate law and repose approach makes departure from corporate law through adoption of the product line approach unnecessary by providing relief for plaintiffs without unduly imposing liability on successor corporations.

CONCLUSION

Under traditional corporate law rules, the purchase of corporate assets is insufficient per se to impose responsibility on the successor corporation for the predecessor's debts and liabilities. Under recognized exceptions to the non-liability rule, a successor corporation is responsible for the debts and liabilities of its predecessor if: (1) the successor expressly or impliedly agrees to assume them; (2) the transaction amounts to a consolidation or merger of the two corporations; (3) the successor corporation is a mere continuation of the predecessor; or (4) the predecessor's transfer of assets to the successor corporation is for the fraudulent purpose of escaping liability for its debts. Some courts have found this approach to successor corporation liability too restrictive because it allows some successor corporations to escape liability for its predecessor's obligations on the basis of mere technicalities in the form of the corporate transaction. These courts have departed from the traditional corporate law rules in products liability cases to hold a successor corporation liable for defects in the predecessor's products as long as the successor continues the predecessor's line of products. These courts have reasoned that the successor should bear the costs of injuries caused by its predecessor's products because it was in a position to gauge the risk of, and protect users from, defects in prod-

ucts of the predecessor, and because the successor benefits from the predecessor's good will. Many courts which have considered the product line approach, however, specifically have refused to adopt it. These courts have relied instead on traditional corporate law principles to hold a successor corporation liable for defects in the products of its predecessor.

The product line approach unjustifiably imposes liability on successor corporations by ignoring the method and extent of the corporate transfer. The approach assumes that a successor corporation always is a proper party to defend the actions of its predecessor where the predecessor has dissolved. It holds successor corporations liable when the predecessor has dissolved, but not when the predecessor still is a viable defendant. The approach therefore assigns liability randomly, without considering whether the successor corporation was in a position to protect users from, or warn them of, defects in the predecessor's products.

Expanding the traditional corporate approach and adopting a statute of repose and an insurance requirement would offer a superior alternative to the product line approach. Under the approach, successors would be liable for defects in products of the predecessor regardless of the method of payment as long as the traditional corporate exceptions were otherwise satisfied. This expanded corporate law approach would be responsive to the policies underlying the product line approach without unfairly burdening successor corporations. In addition, a statute of repose insurance requirement would provide plaintiffs with a remedy if the expanded corporate approach alone proves insufficient to meet the plaintiffs' needs. This approach balances more equitably than the product line approach the needs of persons injured by the predecessor's defective products with the need to prevent the imposition of unjustifiable burdens on unwary successor corporations.

WILLIAM J. HUDAK, JR.