Rising Phoenix-Like from the Ashes: An Argument for Expanded Corporate Successor Liability under CERCLA

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Despite the failure of Congress to explicitly provide for corporate successor liability in CERCLA, circuit courts have held that Congress did not intend to allow corporations to "evade their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities." The circuits are divided, however, as to when a company nominally reorganized but continuing its predecessor's line of business inherits also the predecessor's liability. This Note examines the case law surrounding one exception to the common law rule against successor liability and argues for expanded corporate successor liability as a means to encourage voluntary remediation by successor corporations.

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INTRODUCTION

Although Congress did not include a provision regarding corporate successor liability when it enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),1 circuit courts have held that Congress did not intend to allow corporations to “evade their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities.”2 Instead, the circuit courts have uniformly read corporate successor liability into CERCLA,3 adopting the common law rule that corporate successor liability attaches only in four circumstances.4 Disagreement between the circuits persists, however, regarding the proper standard against which to evaluate the third exception—where

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3. See, e.g., id. See also New York v. Nat’l Serv. Indus., 460 F.3d 201, 206 (2nd Cir. 2006); United States v. Gen. Battery Corp., 423 F.3d 294, 298 n.3 (3d Cir. 2005) (“The courts of appeals that have addressed the issue are unanimous in recognizing successor liability under CERCLA.”).
4. The general rule of corporate successorship accepted in most states is non-liability for acquiring corporations, with the following exceptions: the purchaser may be liable where (1) it assumes liability; (2) the transaction amounts to a consolidation or merger; (3) the transaction is fraudulent and intended to provide an escape from liability; or (4) the purchasing corporation is a mere continuation of the selling company. Gen. Battery Corp., 423 F.3d at 305.
liability attaches to purchasing corporations that are a mere continuation of the selling corporation. While several of the courts of appeals have adhered to the traditional "mere continuation" formulation, others have adopted a broader test—the "substantial continuation standard."\footnote{See Mex. Feed & Seed Co., 980 F.2d at 478.}

The circuit court split began in 1992 when the Eighth Circuit adopted the "substantial continuation standard," previously invoked in products liability and unfair labor violation suits, to determine corporate successor liability in a CERCLA case.\footnote{Id. at 488.} Six years later, the Supreme Court addressed the issue obliquely in \textit{United States v. Bestfoods},\footnote{United States v. Bestfoods, 524 U.S. 51 (1998).} a corporate veil-piercing action, but expressly declined to settle the matter.\footnote{Id. at 64 n.9.}

Despite the Court's deliberate avoidance of the issue, in the wake of \textit{Bestfoods} some lower courts have declared the death of the substantial continuation standard.\footnote{See, e.g., United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001).} The Eighth Circuit, however, appears determined to keep the substantial continuation test alive. In \textit{K.C.1986 Ltd. Partnership v. Reade Manufacturing},\footnote{K.C.1986 Ltd. Partnership v. Reade Mfg, 472 F.3d 1009 (8th Cir. 2007).} the Eighth Circuit asserted that "there may yet be contexts in which the substantial continuation test could survive" after the \textit{Bestfoods} decision.\footnote{Id. at 1022.} Although the court declined to expressly adopt either formulation as the controlling standard for the circuit, it tacitly endorsed the substantial continuation test when it dismissed the claim for failing to satisfy even that broader standard.

In response to the persisting uncertainty regarding the proper standard for successor liability under CERCLA, this Note will review the landscape as it currently exists and consider which standard should be adopted in light of the policy goals of CERCLA. Given the stakes involved, it is crucial that the disagreement be settled to better allow the players in complex commercial transactions of "brownfields"\footnote{A "brownfield" is a property, "the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." 42 U.S.C. § 9601(39)(A) (2006).} to assess their liabilities. I conclude that substantial continuation is the better standard because it would increase the incentive for voluntary remediation by owners of contaminated lands.

\footnotesize{5. See Mex. Feed & Seed Co., 980 F.2d at 478.}
\footnotesize{6. Id. at 488.}
\footnotesize{8. Id. at 64 n.9.}
\footnotesize{9. See, e.g., United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001).}
\footnotesize{10. K.C.1986 Ltd. Partnership v. Reade Mfg, 472 F.3d 1009 (8th Cir. 2007).}
\footnotesize{11. Id. at 1022.}

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I. CERCLA HISTORY, LIABILITY, RECOVERY MECHANISMS AND POLICIES

A. Love Canal and the Hasty Enactment Of CERCLA

CERCLA was enacted in 1980, largely in response to the Love Canal disaster. Love Canal was initially envisioned as a planned community near Niagara, New York, but was instead converted to a municipal and industrial landfill in 1920, then sold to Hooker Chemical in 1947. Between 1947 and 1952, Hooker buried roughly 22,000 tons of toxic waste in the earth. Hooker then sold the land to the city of Niagara Falls in exchange for one dollar and an indemnification clause purporting to absolve Hooker Chemical for any liability arising from the site.

The transaction was not a good deal for the city. By 1978, the residents of the community later built on the site began experiencing serious health problems, including miscarriages, cancer, and birth defects. Later that year, President Carter declared a State of Emergency, began evacuating residents, and authorized the use of federal funds to begin to clean up the ground contamination.

CERCLA was “hastily assembled” in response to the public outcry over Love Canal. It was “an eleventh-hour compromise... passed in the Senate with only days remaining in a lame-duck session, and [sent] to the House for an up-or-down vote.” As a result, “CERCLA is not a paradigm of clarity or precision,” and has been frequently criticized for its “inartful drafting and numerous ambiguities attributable to its precipitous passage.”

B. Remediation of Hazardous Sites under CERCLA

CERCLA requires the President to publish a National Contingency Plan (NCP) that specifies mechanisms for discovery, investigation, evaluation and remediation of hazardous substances, and requires an annual evaluation of the
priority level of each known “Superfund” site for inclusion on the National Priorities List (NPL).\(^{23}\)

CERCLA contains three mechanisms through which remediation may be conducted and paid for: (1) EPA may remediate of its own volition and seek recovery from potentially responsibly parties (PRPs);\(^{24}\) (2) EPA may order PRPs to conduct remedial actions at their own expense; or (3) private parties may undertake remediation of their own accord and seek reimbursement for their expenses from a federal fund and from CERCLA-defined responsible parties.\(^{25}\)

1. **Voluntary Private Remediation**

The first option for remediation of hazardous sites under CERCLA is voluntary private remediation. The NCP provides that “any person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant, or contaminant.”\(^{26}\) A private party remediation is considered “consistent with the NCP” if it is in “substantial compliance” with the applicable requirements” of the Plan, and “result[s] in CERCLA-quality cleanup.”\(^{27}\) The “applicable requirements” include standards for worker safety, reporting and cost documentation, as well as a provision for a public notice of the intended actions and an opportunity for public comment before implementation.\(^{28}\) Failure to comply with these requirements precludes a private party from seeking contribution from other PRPs.\(^{29}\)

2. **Government-Mandated Remediation**

Second, a contaminated site may be remediated under CERCLA under government-mandated remediation. Under section 104(a), the President may order EPA to take remedial or preventative action at any site where a there has been a release of a hazardous substance, or when he finds the threat of a release which may pose a danger to human health or welfare.\(^{30}\)

Alternatively, under section 106, the President may require the Attorney General to “secure such relief as may be necessary to abate such danger or threat” if he determines that an actual or threatened release poses an “imminent or substantial endangerment to the public health or welfare or the

\(^{23}\) 42 U.S.C. § 9605(a)–(c).
\(^{24}\) “Potentially responsible party” and “PRP” are not used in CERCLA, but rather are terms of art used by courts and the federal Environmental Protection Agency (“EPA”) to refer to parties that potentially bear some liability for the contamination of a site.” E.I. Dupont De Nemours & Co. v. United States, 460 F.3d 515, 519 n.2 (3d Cir. 2006).
\(^{26}\) 40 C.F.R. § 300.700(a) (2008).
\(^{27}\) Id. § 300.700(c)(3)(i).
\(^{28}\) Id. § 300.700(c)(5)–(6).
\(^{29}\) Carson Harbor Vill., Ltd. v. County of L.A., 433 F.3d 1260, 1266 (9th Cir. 2006).
A district court is then authorized to "grant such relief as the public interest and the equities of the case may require." The owner or operator of the site, or "any other responsible party," may conduct remediation when it is determined that it will be done "properly and promptly."

3. Obtaining Superfund Reimbursement for Remediation Expenses

With the enactment of CERCLA, Congress also established what is commonly known as the Superfund, a federally maintained fund to cover the expenses associated with remediating contaminated sites. Although any party who received and complied with an abatement order may petition for reimbursement for their costs incurred in conjunction with that order from Superfund, reimbursement is only permitted in two instances. First, parties that can demonstrate that they are not a responsible party under section 107(a) may obtain reimbursement for costs that were reasonable in light of the order. Second, responsible parties, as defined by section 107(a), may receive reimbursement upon making an affirmative showing that the President's selection of the response action was "arbitrary and capricious or was otherwise not in accordance with law."

C. "Covered Persons" Who Bear Liability for Remediation

CERCLA specifies four categories of "covered persons" who are potentially liable for expenses related to the abatement of contamination. These include "the owner or operator of a facility or vessel" and "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." These parties may be held responsible for "all costs of removal or remedial action incurred by the United States . . . not inconsistent with the national contingency plan . . . [and] any other necessary costs of response incurred by any other person consistent with the national contingency plan." Courts view the divergent language regarding consistency with the NCP as "the statute's way of relaxing the burden of proof for governmental entities as opposed to private parties."

The burden of proof rests with the defendant when attempting to evade liability.
for government-incurred expenses under section 107(a)(4)(A), but with the plaintiff when seeking contribution under section 107(a)(4)(B).

1. The Right to Contribution amongst Private Parties

   In addition to the potential to recover from Superfund under section 106(b), CERCLA contains two additional methods through which parties who have borne the costs of remediating contaminated sites may be reimbursed. First, responsible parties are liable under section 107(a)(4)(B) to “any other person” for “any . . . necessary costs of response incurred . . . consistent with the national contingency plan.” Second, any person may seek contribution from a liable or potentially liable party, as defined by section 107(a), under section 113(f)(1). Parties who have entered into approved settlement agreements with the United States are protected from such actions for contribution, but may nevertheless seek recovery from non-settling parties under this section.

   Six years after its enactment, in 1986 Congress substantially amended CERCLA with the Superfund Amendments and Reauthorization Act (SARA). One of the most significant modifications was the addition of section 113, which provides an explicit right to contribution among potentially responsible parties (PRPs) for expenses incurred conducting private remedial efforts. Prior to the SARA amendments, courts had recognized an implicit right to contribution under section 107(a)(4)(B), but the specifics of the right

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41. United States v. E.I. DuPont de Nemours & Co., 432 F.3d 161, 178 (3d Cir. 2005) (en banc) ("EPA response costs are presumed consistent with the National Contingency Plan unless a responsible party overcomes this presumption by establishing . . . the EPA acted arbitrarily and capriciously in choosing the response action.").

42. Carson Harbor Vill., Ltd. v. County of L.A., 433 F.3d 1260, 1265 (9th Cir. 2006) ("[P]rivate parties have the burden of proving that cleanup costs associated with remedial actions are consistent with the National Contingency Plan to recover those cleanup costs under CERCLA.").

43. See 42 U.S.C. §§ 9607(a), 9613(f).

44. Id. § 9607(a)(4)(B).


48. 42 U.S.C. § §9613(f). § 9613(f) provides that

Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or section 107(a) . . . . Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

Id. § 9613(f)(1).
were unclear. The SARA amendments were an attempt to "clarify and confirm" the right to contribution under CERCLA.

Far from vindicating the predictions that the new provision would "remove[] any doubt as to the right of contribution," the SARA amendments actually increased the controversy surrounding the proper mechanism through which a PRP could obtain reimbursement from other responsible parties. Initially, courts held that sections 107(a) and 113(f) were "complimentary (but not really 'overlapping')." Innocent parties could recover their expenses under section 107(a) on the basis of strict joint and several liability, but were limited to recovery for expenses incurred complying with government-mandated remediation. Under section 113(f), responsible parties were permitted only equitable contribution from other PRPs, but were permitted to seek to recover costs incurred either voluntarily or for those resulting from government-ordered remediation.

Early jurisprudence discussing contribution actions under section 107(a) and 113(f) was thrown into turmoil in later litigation, however, as a result of the seemingly contradictory terms contained in section 113(f). That section instructs parties that they may sue for contribution only "during or following any civil action under section 106 or under section 107(a)," but also that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107." The judicial response to this apparent contradiction is discussed later in Part IV.B.2.b.

III. CORPORATE SUCCESSOR LIABILITY UNDER CERCLA

Although there is no mention of corporate successor liability in CERCLA, courts have long held that Congress intended to include such liability in the statute. Because such liability had to be judicially inferred, corporate successor liability under CERCLA is, "strictly speaking ... federal common law." As with all such matters, courts must "giv[e] content to that law" by

49. In re Reading Co., 115 F.3d 1111, 1119 (3d. Cir. 1997) ("[U]ntil the passage of SARA in 1986, the judicially-created expansion of § 107(a)(4)(B) served as the sole means by which parties could obtain contribution.").

50. United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100 (1st Cir. 1994) (citing S. REP. No. 11, 99th Cong., 1st Sess. 44 (1985)).


52. E.I. Dupont De Nemours & Co. v. United States, 460 F.3d 515, 523 (3d Cir. 2006).

53. Id.

54. Id.


56. See, e.g., United States v. Gen. Battery Corp., 423 F.3d 294, 298 n.3 (3d Cir. 2005) ("[T]he courts of appeals that have addressed the issue are unanimous in recognizing successor liability under CERCLA."). See also United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487 (8th Cir. 1992) ("Congress must have considered the word 'corporation' to inherently include corporate successors.").

deciding "whether to adopt state law or fashion a nationwide federal rule."58 Facing this decision, the circuit courts have adopted state law governing successor liability, holding that corporate successor liability does not attach unless one of four exceptions applies.59 These exceptions are: (1) the purchasing corporation expressly or impliedly agrees to assume the responsibility; (2) the transaction amounts to a "de facto" consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction was fraudulently entered into in order to escape liability.60

Despite the consensus regarding this overarching principle, the courts disagree as to the proper formulation of the third exception: some circuits employ the traditional "mere continuation" formulation, while others have adopted the broader test known as the "substantial continuation" standard.61

A. The Competing Formulations

The traditional mere continuation test "emphasizes an identity of officers, directors, and stock between the selling and purchasing corporations" in order to determine whether the purchasing corporation is merely a continuation of the selling corporation.62 Although courts have at times considered additional factors,63 the "key element" to this test is a finding that the officers, directors, and stock structure of both corporations involved remain absolutely unchanged.64 Essentially, the mere continuation test asks if "the new entity is 'simply a new hat for the seller.'"65

In contrast to mere continuation, the substantial continuation standard is a "more flexible" test for determining successor liability.66 The substantial continuation test "evolved from the 'mere continuation' test in contexts where the public policy" served by recovery is "paramount to that supported by the

58. Id. at 206 (internal citations omitted).
59. Id. at 209; Mickowski v. Visi-Trak Worldwide, LLC, 415 F.3d 501, 509 (9th Cir. 2005); N. Shore Gas Co. v. Salomon Inc., 152 F.3d 642, 651 (7th Cir. 1998).
60. Nat'l Serv. Indus., 460 F.3d at 209.
63. Other factors considered include continuity of ownership and operation, (General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1084 (7th Cir. 1997)), whether the selling corporation dissolved after the sale, (United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992)), and whether a "fair price" was paid for the assets exchanged, (Allied Corp. v. Acme Solvents Reclaiming, Inc., 812 F. Supp. 124, 129 (N.D. Ill. 1993)).
traditional rule[]."\(^{67}\) Courts applying this test have reasoned that successor liability is "justified by a showing that in substance, if not in form, the successor is a responsible party."\(^{68}\)

The substantial continuation test considers a larger number of factors than the mere continuation test, including:

1. retention of the same employees;
2. retention of the same supervisory personnel;
3. retention of the same production facilities in the same location;
4. production of the same product;
5. retention of the same name;
6. continuity of assets;
7. continuity of general business operations;
8. whether the successor holds itself out as the continuation of the previous enterprise.\(^{69}\)

Additionally, inquiry into "whether the transfer to the successor corporation was an attempt to avoid CERCLA liability . . . and whether the successor had knowledge of the unremedied contamination" is "integral" to determining successor liability under the substantial continuation test.\(^{70}\)

**B. The Choice between Mere and Substantial Continuation**

Underlying the dispute over the proper standard for successor liability under CERCLA is the fundamental question of when, in the absence of an explicit statutory mandate, federal courts should create new federal common law rather than adopting existing state laws. The controlling Supreme Court case, *United States v. Kimbell Foods, Inc.*,\(^{71}\) outlined a three-part test: courts are to consider (1) whether the federal program, "by [its] very nature . . . must be uniform in character throughout the Nation;" (2) whether existing state law would "frustrate specific objectives" of the program; and (3) "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law."\(^{72}\) Evaluating the relative importance of these factors, the Supreme Court explained that, "to invoke the concept of 'uniformity' . . . is not to prove its need," and that the second two factors should control the decision to a large extent.\(^{73}\)

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67. *Mex. Feed & Seed Co.*, 980 F.2d at 487.
68. *Id.* at 488.
70. *K.C.1986 Ltd. P'ship v. Reade Mfg*, 472 F.3d 1009, 1022 (8th Cir. 2007). *See also Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 812 F. Supp. 124, 129 (N.D. Ill. 1993) ("[Substantial continuation] only applies when it has been shown that the asset purchaser has knowledge of the potential liability and responsibility for that liability.").
72. *Id.* at 728–29.
C. Early Case Law Concerning Substantial Continuation

The substantial continuation test was first used as the standard for judging the “mere continuation” exception in the Supreme Court case *Golden State Bottling Co. v. NLRB*, a suit arising from alleged violations of the National Labor Relations Act. Affirming a decision binding a successor corporation to an injunction levied against its predecessor, the Court held that “a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the . . . enterprise which was the locus of the [violation], may be considered in privity with its predecessor.” The Court considered the successor’s knowledge to be vital, because it allowed the potential liability to be “reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller’s [violations].”

In 1992, two circuit courts utilized the substantial continuation test to determine successor liability under CERCLA. In *United States v. Carolina Transformer Co.*, the Fourth Circuit upheld the imposition of liability on a corporate successor after finding that the successor corporation continued the business operations of its predecessor, retained the same employees and managers, produced essentially the same products and procedures, and served the same customers. In *United States v. Mexico Feed & Seed Co., Inc.*, the Eighth Circuit declined to impose successor liability after applying the substantial continuation test. The court justified adopting the broader test by citing *Carolina Transformer* and another case, where the successor corporation would have escaped liability under the more stringent mere continuation test. The court emphasized that these were situations in which “the purposes of CERCLA would have been thwarted” had the traditional test been applied. In both of the cases cited, individuals previously employed by the selling company comprised the purchasing company and had acquired the predecessor corporation with knowledge of the unremediated contamination.

In 1997, five years after the Fourth and Eighth Circuits adopted the substantial continuation test, the Ninth Circuit declined to do so. In *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant, Inc.*, the court applied the *Kimbell Foods* framework, concluding that CERCLA did not warrant the adoption of federal common law to determine successor liability. Evaluating

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75. *Id.* at 180.
76. *Id.* at 185.
78. *Id.* at 838.
the need for national uniformity, the court noted that state law in the fifty states is “largely uniform,” and that “[n]o state provides a haven for liable companies.”\textsuperscript{83} Moreover, the court expressed doubts as to the practical ramifications of adopting the substantial continuation standard, noting that when liability was imposed under that standard, “there has usually been some fraudulent intent . . . in which case the purchaser would have likely been liable under another traditional exception.”\textsuperscript{84}

\textbf{D. The Bestfoods Decision}

Six years after \textit{Carolina Transformer} and \textit{Mexico Feed & Seed}, and one year after \textit{Brown & Bryant}, the Supreme Court addressed the propriety of creating federal common law for a related issue, corporate veil piercing under CERCLA. In \textit{United States v. Bestfoods},\textsuperscript{85} the Court considered a CERCLA action in which the plaintiff sought to recover against a parent corporation for contamination caused by one of its subsidiaries. Although the Court noted the “significant disagreement among courts and commentators” over whether state law or newly created federal common law should govern veil-piercing actions under CERCLA, it expressly declined to decide the matter.\textsuperscript{86} However, the Court acknowledged in dicta that lower courts have found persuasive that CERCLA is “like many another congressional enactment in giving no indication that ‘the entire corpus of state corporation law is to be replaced simply because a plaintiff’s cause of action is based upon a federal statute.’”\textsuperscript{87} Significantly, the Court nowhere mentioned the \textit{Kimbell Foods} framework.\textsuperscript{88} Although this decision did not address corporate successor liability, the Court’s discussion regarding whether to create federal common law for corporate veil piercing under CERCLA has been influential on lower courts grappling with the related debate regarding the propriety of the federal common law standard for corporate successor liability, the substantial continuation standard.

Given that the Court expressly declined to address the question, it is not surprising that circuit courts remain in disagreement regarding the continued viability of the substantial continuation test. Some circuits have held that \textit{Bestfoods} decided the matter against the creation of federal common law, and

\begin{itemize}
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.} at 364.
\item \textsuperscript{86} \textit{Id.} at 64 n.9. \textit{See also} \textit{United States v. Gen. Battery Corp., Inc.}, 423 F.3d 294, 300 (2006) (noting that \textit{Bestfoods} “explicitly declined to resolve the circuit split on whether CERCLA borrows a particular state’s law of indirect corporate liability,” and does not suggest that uniform successor liability standards are inappropriate).
\item \textsuperscript{87} \textit{Bestfoods}, 524 U.S. at 63 (quoting \textit{United States v. Texas}, 507 U.S. 529, 534 (1993)).
\item \textsuperscript{88} The Court’s failure to address the \textit{Kimbell Foods} factors suggests that the Justices may not have fully appreciated the significance that the lower courts would attach to these seemingly off-handed comments.
\end{itemize}
thereby tolled a death knoll for substantial continuation.\textsuperscript{89} Other courts appear unpersuaded by this interpretation and have continued to employ the substantial continuation test.\textsuperscript{90} Indeed, even in circuits that ostensibly interpret \textit{Bestfoods} to have decided that CERCLA does not permit the creation of federal law, courts nevertheless frequently analyze the issue under the \textit{Kimbell Foods} framework, belying a continuing uncertainty of \textit{Bestfoods}' ramifications.\textsuperscript{91}

\section*{E. K.C.1986 and the Viability of the Substantial Continuation Standard}

The Eighth's Circuit's decision in \textit{K.C.1986} added an interesting wrinkle to the debate surrounding the substantial continuation test by explicitly referencing the test's potential continued viability, despite other circuits interpreting \textit{Bestfoods} as putting the matter to rest.

The dispute in \textit{K.C.1986} arose from the successive ownership of an herbicide production facility in Kansas City, Missouri. A corporation known as Habco, which contaminated the property, originally owned the land and assets. In 1986, Habco dissolved, separating the land from the operating assets and selling the two to different parties. The operating assets were initially sold to a newly formed company, Habco-Loram. Donald Horne, the primary shareholder of Habco, functioned as president of Habco-Loram for one year after the sale, but was not a stockholder. Although the business was moved to a new location, Habco-Loram's operations and customers were essentially identical to those of Habco. In 1998, Habco-Loram conveyed all of its assets to Horne, who formed Habco International, Inc. Habco International's operations were essentially the same as those of the original Habco, but, like Habco-Loram, it did not own the land on which the business was conducted. The DeAngelo brothers later purchased Habco International, and remained the owners of the production facility until the commencement of the suit that gave rise to the Eighth Circuit appeal.

At the time Habco dissolved, the contaminated land on which the manufacturing plant had previously stood was transferred to a holding

\textsuperscript{89} See \textit{New York v. Nat'l Servs. Indus., Inc.}, 352 F.3d 682, 685 (2003) ("[W]e take from \textit{Bestfoods} the principle that when determining whether liability under CERCLA passes from one corporation to another, we must apply common law rules and not create CERCLA-specific rules."); \textit{United States v. Davis}, 261 F.3d 1, 54 (1st Cir. 2001) (holding that \textit{Bestfoods} "left little room for the creation of a federal rule of liability under" CERCLA).


\textsuperscript{91} See, \textit{e.g.}, \textit{United States v. Davis}, 261 F.3d 1, 54 (1st Cir. 2001) (noting that \textit{Bestfoods} "left little room for the creation of a federal rule of liability under" CERCLA, but continuing, "[w]e see no evidence that application of state law to the facts of this case would frustrate any federal objective. ... [t]he "mere continuation" test thus is the correct test for determining successor liability").
company, K.C.1986 Limited Partnership, formed by Donald Home expressly for the purpose of taking title to the land. Home immediately began proceedings to sell the land, hiring an environmental consultant to perform testing at the site. It was at this point that the contamination was discovered, and EPA soon declared the property a Superfund site. The owner (at this point a company named Borax) admitted CERCLA liability and filed cross-claims for contribution against the various parties associated with the land and assets, including the DeAngelo brothers.

*K.C.1986* concerns, among other issues, the DeAngelo brothers’ claim that the chain of successor liability was severed by the sale of assets from Habco to Habco-Loram. On appeal before the Eighth Circuit, the DeAngelo brothers argued that the trial court erred by applying the broader substantial continuation test of successor liability rather than the traditional mere continuation test. Although the Eighth Circuit agreed that the DeAngelo brothers could not be held liable as successors in interest to Habco, the court declined to rule on the proper test for determining successor liability. The court cited decisions from other circuits holding that the substantial continuation test was inapplicable after *Bestfoods,* but did not go so far as to decide the same for the Eighth Circuit. Rather, the court stated that “the continuing viability of the substantial continuation theory . . . has been seriously questioned . . . [but] there may yet be contexts in which [it] could survive.” In light of this uncertainty, the court held that it “need not decide” the fate of the substantial liability test because the facts of the case at bar were insufficient to justify imposing liability on the DeAngelo brothers under either standard.

Evaluating the facts of the matter under the substantial continuation test, the court noted that “the record reflects no dispute over the fact that the sale of the operating assets . . . was a bona fide, arm’s length transaction,” and that there was no evidence of an attempt to circumvent CERCLA liability or knowledge of the contamination by the purchaser. Although it acknowledged that the case was “complicated, to say the least,” by Donald Home’s equitable ownership of the successor corporations to the original Habco, the court held that the lack of fraudulent intent to circumvent CERCLA and the bona fide, arm’s length nature of the transfer were controlling. Therefore, corporate

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93. Id.
94. Id. at 1022 (citing United States v. Gen. Battery Corp., 423 F.3d 294, 309 (3d Cir. 2005) (holding substantial continuation is untenable as a basis for successor liability under CERCLA); New York v. Nat’l Servs. Indus., 352 F.3d 682, 687 (2d Cir. 2003) (concluding that the substantial continuation doctrine is not part of traditional corporation common law and thus should not be used to determine CERCLA liability following *Bestfoods*); United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) (noting that to justify the creation of a federal rule, there must be a specific, concrete federal policy or interest that is compromised by application of state law)).
96. Id.
97. Id.
successor liability did not run after the sale of the site. Because the chain of successor liability was broken with that sale, liability did not pass to the current owners of the site merely because the purchaser had later transferred the site back to one of the parties initially responsible for the contamination after the purchaser went out of business.

Although the court did not impose liability on the DeAngelo brothers based on the substantial continuation test, the decision is nevertheless significant because it again asserts the possible viability of the standard for assessing successor corporate liability under CERCLA. While the court acknowledged the potentially limited practical import that the adoption of this broader standard might have, citing Brown & Bryant, it is nevertheless important to consider what standard federal courts should employ when determining successor liability under CERCLA.

IV. CERCLA'S POLICY OBJECTIVES AND THE SUBSTANTIAL CONTINUATION STANDARD

Because CERCLA itself does not mention corporate successor liability, courts have determined the appropriate standard for assessing such liability with little concrete information regarding Congress's intent. Plainly, as there is no explicit statutory provision relating to the subject, the text of the statute is not determinative. There are, however, some indications within the statute that Congress envisioned the creation of an expansive federal common law, at least in actions for contribution.

Perhaps in recognition that the statute as originally enacted failed to address the issue, Congress added the right to contribution through the SARA amendments in 1986, providing that actions for contribution under section 113 "shall be governed by Federal law." This phrase is repeated twice in this section; first in the general provision regarding the right to sue for contribution, and again in the provision relating to the protection afforded to parties who have settled with the government. These oblique mentions of "federal law," however, have not proved persuasive to courts, which have almost uniformly applied the three-part test outlined in Kimbell Foods to determine whether it is appropriate to fashion a uniform federal common law rather than adopting the law of the state from which the action arises.

Despite the frequent application of the Kimbell Foods test to the issue of successor liability under CERCLA, courts have not reached a consensus on the result of that test. Therefore, a survey of the relevant jurisprudence on the subject is helpful to discern which conclusions, if any, seem generally agreed

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98. Id. at 1024.
99. Id. ("[T]he secured assets did not become magically re-entangled with the contaminated property... by reason of [the purchaser's] business failure.").
101. See id. § 113(f)(1), (f)(3)(c).
upon. This survey leads me to draw conclusions as to the relative merits of the mere continuation test and the substantial continuation test.

A. The First Kimbell Foods Factor: Does CERCLA Inherently Require National Uniformity?

The first Kimbell Foods factor asks whether a statute, "by [its] very nature . . . must be uniform in character throughout the Nation."102 While the Court in Kimbell Foods failed to provide any guidance as to the importance of any factor relative to the other considerations, subsequent decisions have made clear that this factor is necessary, but not sufficient, for the establishment of a federal common law.103

The Kimbell Foods decision also lacked guidance regarding indicia of a need for national uniformity. As previously noted, CERCLA contains oblique references to "federal law," but does not provide a standard for assessing corporate successor liability. While some courts have found these references illuminating, none have found them persuasive. Courts, therefore, have frequently examined CERCLA's legislative history.

At the outset, it bears repeating that CERCLA was a "hastily assembled" "eleventh-hour compromise . . . passed in the Senate with only days remaining in a lame-duck session, and [sent] to the House for an up-or-down vote."104 As such, there is scant legislative history available to shed light on congressional intent regarding successor liability, if one can ascribe any such intent to Congress at all. One court, frustrated by the lack of clarifying information, declared that "[a]ny inquiry into CERCLA's legislative history is somewhat of a snark hunt. Like other courts that have examined the legislative history, we have found few truly relevant documents."105 Nevertheless, CERCLA's legislative history does contain some relevant commentary, indicating congressional preference for national uniformity.

During debate in the House of Representatives, Representative Florio,106 who sponsored CERCLA for House consideration, commented that, "[t]o insure the development of a uniform rule of law, and discourage business dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal..."
common law." Representative Florio's comments indicate his concern, echoed by many courts, that, lacking a uniform federal law, states might commence a "race to the bottom," enacting progressively more lenient liability laws in an effort to entice businesses to locate within their borders. Stated succinctly, Florio argued that a "liability standard which varies in the different forum states would undermine the policies of the statute by encouraging illegal dumping in states with lax liability laws."¹⁰⁷

Some courts were unpersuaded by this argument, countering that "the law in the fifty states on . . . successor liability is largely uniform."¹⁰⁸ These courts argue that the passages in CERCLA's legislative history that suggest that the states may engage in a race to the bottom actually concern a different unresolved issue: whether responsible party liability under CERCLA would be joint and several, or several only.¹¹⁰

As an alternative to this theoretical inquiry into the ramifications of a non-uniform standard, some courts have found it relevant to look at the practical effects that uniform standards have actually had on federal programs. For example, in Atherton v. FDIC, the Supreme Court stated that "our Nation's banking system has thrived despite . . . divergent state law" regarding corporate governance standards, and therefore held that there was no need for federal uniformity.¹¹¹ On the other hand, even a cursory inquiry into the success of CERCLA indicates that the system has not "thrived" under the current liability regime—there are currently 1,255 sites listed on the National Priorities List, as well as 60 proposed additions.¹¹² As of 2005, EPA found that one out of every four U.S. citizens lives within a three-mile radius of a listed Superfund site.¹¹³

At least one commentator has focused the inquiry on the need for uniformity more narrowly—arguing not only that a uniform rule would be superior, but that it is necessary because of the "current jumble of varied state law remedies" for contribution actions after voluntary remediation.¹¹⁴

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¹⁰⁸. Id.


¹¹⁰. Atchison Ry., 159 F.3d at 362. Some legal commentators have attacked the idea of an environmental race to the bottom more broadly, arguing that practical difficulties present significant hurdles to empirical demonstrations of such a race, and that because states must simultaneously address concerns such as citizen safety and welfare, this argument has been overstated in environmental literature. See Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. REV. 1210 (1992).


Given the lack of a definitive standard against which to judge CERCLA's need for a uniform standard of liability and the relative unimportance of this factor in the final Kimbell Foods analysis, courts should be reluctant to dismiss this inquiry after considering only the first step. Although some have expressed doubt regarding the validity of "race to the bottom" arguments, it is apparent that CERCLA has not "thrived" with the "current jumble of varied state law remedies." The Kimbell Foods analysis should therefore proceed to consideration of the remaining two factors.


Although the first factor in the Kimbell Foods test is a necessary condition for the creation of federal common law in the absence of a statutory mandate to do so, a string of court decisions applying the Kimbell Foods test have established the primacy of the second inquiry—whether using existing state law would frustrate a specific federal policy. Indeed, inquiry into the existence of such a conflict should receive "paramount consideration" to the other factors. Therefore, while the first factor is a necessary condition for continued consideration of a federal law, it is the existence, or lack thereof, of a conflict between existing state law and specific federal policies that will usually dictate the final outcome.

1. Assessing the Severity of Conflicts

As a threshold matter, one must first determine the severity of conflict required to satisfy the "conflict" factor. Once again, neither Kimbell Foods nor a lower court consensus provides clear guidance on this factor. Analogizing to another unsettled area of law, the Supreme Court recently distinguished between the types of conflicts that justify the creation of federal common law and those which justify federal preemption of existing state law by the legislature. The Court stated that to justify the creation of federal common law, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied." Perhaps in order to retreat somewhat from this seeming open invitation for the courts to engage in judicial

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115. Id.
119. Id. (internal quotations omitted).
legislation, however, the Court continued, "[i]n some cases . . . the entire body of state law applicable to the area conflicts and is replaced by federal rules . . . . In others, the conflict is more narrow, and only particular elements of state law are superseded."

When considered in concert with the oft-cited language of Bestfoods that CERCLA gives "no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute,'" it appears that although courts are not justified in replacing entire swathes of existing state law with new federal laws reflexively, when existing laws conflict with specific federal policies courts may create federal common law to address these conflicts.

2. Conflicts between CERCLA's Policies and Existing State Law

Substantial continuation, as the "broader standard" for determining successor liability, would expand the pool of parties that could potentially be held responsible for the contamination of a superfund site. This would alleviate some of the tension between existing state law and CERCLA's motivating policies by (1) encouraging voluntary remediation, (2) encouraging settlements and avoid litigation, and (3) increasing the liquidity of the market for brownfields.

a. The Current State Law Regime Governing Actions for Contribution under CERCLA

Although "CERCLA was enacted both to provide rapid responses to the nationwide threats posed by the 30,000–50,000 improperly managed hazardous waste sites in this country as well as to induce voluntary responses to those sites," it contained no explicit mechanisms for contribution between PRPs when it was enacted. Thus, there was no guarantee that a party who voluntarily remediated contamination would be able to receive contribution from other PRPs. Courts nevertheless permitted contribution between PRPs, citing the implied right to contribution found in section 107(a). The scope of the liability of PRPs in actions for contribution, however, remained uncertain.

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120. Id. at 508.
123. The Eighth Circuit's suggestion that substantial continuation remains potentially viable arose in a suit concerning a responsible party seeking contribution from another potentially responsible party. Id. at 1015. Consideration of the conflicts between existing state law and CERCLA's motivating policies, therefore, will be largely focused on the interaction between the traditional mere continuation standard and CERCLA policies relating to contribution.
125. See, e.g., Chem-Dyne Corp., 572 F. Supp. at 810.
While responsible parties were held jointly and severally liable to the government for remediation expenses, courts refused to extend joint and several liability to actions for contribution between PRPs. Thus, while private parties were permitted to voluntarily remediate contaminated sites and obtain pro-rata contribution from other PRPs, early court decisions provided no incentive to do so because there was no guarantee that parties who incurred expenses in excess of their equitable share would be able to recover full reimbursement from other PRPs. Under this scheme, the owners of contaminated properties were likely to simply wait for the government to initiate remediation and take their chances in the apportionment of costs from subsequent litigation, rather than voluntarily remediate themselves.

In 1986, Congress amended CERCLA with the SARA amendments, which added an explicit right of contribution between PRPs in section 113(f). The SARA amendments, however, failed to clarify how courts were to implement this right. One issue left unresolved was the appropriate scope of recovery under sections 107(a) and 113(f). Reasoning that because section 107(a) allowed the government to impose joint and several liability on PRPs, the Second Circuit held in Bedford Affiliates v. Sills that parties who were themselves liable under section 107(a) could only bring a section 113(f) claim to recover costs in excess of its pro rata share. Similarly, in New Castle County v. Halliburton NUS Corp. the Third Circuit held that it would be unfair for a liable claimant seeking contribution to impose joint and several liability under section 107(a), and restricted contribution claims to several liability under section 113(f). Although one circuit suggested that innocent owners could recover under joint and several liability standard of section 107(a), this was explicitly rejected by other circuits.

126. Id. at 809–10.
127. In fact, owners faced a Catch-22 of sorts, facing a high probability of bearing costs in excess of their equitable share regardless of their action or inaction: efficiency demands dictated that although the government might have a viable claim against many previous owners of a site, as the most easily identifiable party the current owner was the most likely target for a government-initiated suit for contribution for the government’s remediation expenses. See Aronovsky, supra note 114, at 20–21.

[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [CERCLA § 107(a)] of this title, during or following any civil action under section 9606 [CERCLA § 106] of this title or under section 9607(a) [CERCLA § 107(a)] of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 [CERCLA § 106] of this title or section 9607 [CERCLA § 107] of this title.

Id. § 9613(f)(1).
131. See Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994); Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1240 (7th Cir. 1997) (holding that a section 107(a)(4)(B) claim
Another unresolved question remained after the SARA amendments—what to make of the seemingly contradictory language of section 113(f), which appeared to restrict the right to contribution to parties facing existing civil action under section 106 or 107, while at the same time stating "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 [CERCLA § 106] of this title or section 9607 [CERCLA § 107] of this title." For over a decade, courts struggled to decide how these two seemingly contradictory clauses could be reconciled but generally recognized a right to contribution in the absence of a government-initiated suit under sections 106 or 107. By the mid-1990s, it “became common for parties to perform cleanups voluntarily and then bring contribution actions under Section 113(f) to recover their response costs from other PRPs.” It appeared, therefore, that the motivating concerns behind the SARA amendments had been effectuated.

In 2004, the Supreme Court changed the game. In *Cooper Industries v. Aviall Services*, the Court held that responsible parties could not seek contribution under section 113(f) unless the party had already been sued by the government under either section 106 or 107. This decision “undermined two decades of lower federal court decisions holding that a PRP could bring such a contribution action under CERCLA and that such an action was the only cleanup cost remedy available to a PRP under CERCLA.” In doing so, the Court substantially diminished the likelihood of voluntary remediation, as responsible parties could no longer initiate remediation of their own accord and later seek contribution from other responsible parties.

In 2007, the Supreme Court again upset the status quo in *United States v. Atlantic Research Corp.* In a unanimous decision based on a strict textual reading of section 107, the Court held that the clause “any other person” in section 107(a)(4)(B) means “anyone except the United States, a State, or an Indian tribe.” Therefore the owner of a contaminated site may voluntarily remediate in accordance with the National Contingency Plan and then sue any other PRP for contribution. This decision marked a substantial departure from prior jurisprudence on CERCLA liability, as the Court acknowledged that their decision meant that even parties who had settled with the government (and imposes joint and several liability and may be maintained by current landowner in lieu of section 113(f) contribution claim if current owner did not add contamination to site).

132. See Western Properties Service Corp. v. Shell Oil Co., 358 F.3d 678, 689 (9th Cir. 2004); Bedford Affiliates v. Sills, 156 F.3d 416, 424 (2d Cir. 1998) (allowing innocent owner to sue under 107(a) “would carve out judicially an additional defense that Congress itself chose not to create”).


138. *Id.* at 2336.
were thus protected from contribution actions under section 113(f)) were potentially liable to other PRPs in actions under section 107(a).\footnote{Id. at 2339.}

b. Encouraging Voluntary Remediation

_Atlantic Research Corp._ will have a significant effect on the ability of parties to engage in voluntary remediation and receive contribution from other PRPs. First, it opens the door to remediation before the government brings suit under sections 106 or 107. Perhaps more significantly, however, courts will apply joint and several liability to actions for contribution under 107(a), but will apply only several liability to section 113 actions. Further, the burden of proof with respect to the divisibility or indivisibility of the contamination (which, in turn, dictates if a party is jointly and severally liable or merely liable for his pro-rata share) shifts from the plaintiff, who bears it under section 113(f), to the defendant in an action under 107(a).\footnote{See generally Aronovsky, supra note 114, at 25–26.} Together, these differences make section 107(a) a much more attractive avenue for obtaining contribution from other PRPs after voluntary remediation than section 113(f).

Given that the decision in _Atlantic Research Corp._ proceeded on purely textualist grounds and was joined unanimously by the justices of the Court, it appears that CERCLA embodies a strict preference for voluntary remediation over other abatement mechanisms. This is confirmed by the explicit acknowledgement that “[t]he settlement bar does not by its terms protect against cost-recovery liability under § 107(a).”\footnote{Atl. Research Corp., 127 S. Ct. at 2339.} The continued viability of voluntary remediation and private allocation of the resulting costs is “essential to cleaning up the nation’s contaminated properties, as government agencies lack the resources to conduct these cleanups themselves or to file tens of thousands of lawsuits compelling private cleanups.”\footnote{Aronovsky, supra note 114, at 3.}

The broader substantial continuation test would better promote the policy of encouraging voluntary remediation because, by increasing the pool of potentially responsible parties, it would increase the number of past owners from whom the current owner of a contaminated site could recover contribution. This would provide a concrete incentive for owners, justifiably concerned by the enormous costs that remediation typically entails, to initiate remediation on their own rather than waiting for the government to mandate remediation and then suing for contribution. Voluntary remediation followed by a section 107 action for contribution allows responsible parties to recover under joint and several liability, thereby assuring they will recover any expenses in excess of their pro rata share. Conversely, waiting for the government to initiate a suit restricts owners’ right to contribution to actions brought under section 113(f), where they are exposed to joint and several
liability to the government but may only recover from other PRPs on a several liability basis. Additionally, as other responsible parties may have already settled with the government and thereby gained immunity contribution actions under section 113(f), owners who choose to forgo voluntary remediation face a substantial threat of bearing costs in excess to their pro-rata share. Given these scenarios, a rational owner facing potential liability under the substantial continuation test has significantly increased incentives to conduct preemptive remediation rather than wait for the government to intervene.

c. Encouraging Voluntary Settlements and Avoiding Litigation

Section 122(a) embodies another CERCLA policy, encouraging PRPs to settle with the government "in order to expedite effective remedial actions and minimize litigation." As the Second Circuit stated in *B.F. Goodrich v. Betkoski*, encouraging settlements "reduce[s] the inefficient expenditure of public funds on lengthy litigation." By some estimates, the costs of litigation can be upwards of 50% of the total amount recovered during contribution actions. Encouraging amicable settlement was a primary motivation behind the 1986 SARA amendments, as Congress sought to avoid litigation.

While adopting the substantial continuation test may potentially increase the number of liability disputes litigated, it could mitigate the actual expense involved in any given action. Parties who will not face liability under the mere continuation exception to the general rule against successor liability may nevertheless face possible suits under the fraudulent transfer exception. The fraudulent transfer exception requires the plaintiff to prove that a fraudulent purpose—the desire to avoid CERCLA liability—motivated a transfer. Adoption of the substantial continuation standard, by contrast, requires only that plaintiffs prove knowledge of unremediated contamination, an easier burden to bear. Therefore, although the substantial continuation standard may increase the number of parties involved in contribution actions, the suits could potentially be more quickly resolved, involve less discovery and decrease the

burden on the courts. Therefore, the effects of adopting the substantial continuation test on litigation expenses are indeterminate at this stage.

Moreover, as discussed in Part IV.B.2.b., the likelihood of the government being party to any given suit decreases under the substantial continuation standard, as private parties are incentivized to remediate voluntarily and seek contribution from other PRPs. So, while the number of actions may increase, the effect on taxpayers may in fact be lessened.

Finally, definitive adoption of any federal standard, be it mere or substantial continuation, would likely reduce litigation costs by eliminating the need to litigate the proper standard to apply. Given that the debate over the proper standard appears alive and well despite over fifteen years of jurisprudence on the subject, clarification of this matter is imperative regardless of the standard chosen.147

d. Facilitating a Liquid Market for Brownfields

It is estimated that there are over 450,000 contaminated properties, or brownfields, in the United States.148 In 2001 Congress passed the Brownfields Revitalization Act,149 amending CERCLA in order to “spur the cleanup, transfer and redevelopment of contaminated land . . . by according bona fide asset purchasers a defense to CERCLA liability.”150 The so-called Bona Fide Purchaser exemption found in section 107(r)(1) provides that, from 2002 forward, a bona fide purchaser “whose potential liability for a release or threatened release is based solely on the purchaser’s being considered to be an owner or operator of a facility shall not be liable” so long as he does not impede the completion of response actions.151 The bona fide purchaser exemption was added to supplement the “innocent owner defense,” which provided little practical protection to owners because of the difficulty of proving compliance with the defense’s requirements.152

147. “We believe that incorporating variable and uncertain state successor liability standards would increase significantly CERCLA litigation and transaction costs – in conflict with the statutory interests embodied in 42 U.S.C. § 9622, which aims to encourage early settlements, and § 9607(r), which aims to facilitate a liquid market in brownfield assets.” United States v. Gen. Battery Corp., 423 F.3d 294, 303 (3d Cir. 2005).

148. EPA, Brownfields and Land Revitalization: About Brownfields, http://www.epa.gov/swerosps/bf/about.htm (last visited July 14, 2008). “Cleaning up and reinvesting in these properties increases local tax bases, facilitates job growth, utilizes existing infrastructure, takes development pressures off of undeveloped, open land, and both improves and protects the environment.” Id.


Although the bona fide purchaser defense has not, to date, been successfully raised as a defense to CERCLA liability, it does "permit a person with actual knowledge to purchase a contaminated facility without becoming liable."\(^{153}\) The substantial continuation test, therefore, should have no impact on the market for brownfield redevelopment because it would not impose liability on purchasers in transactions between unrelated entities conducting an arms-length transaction, even if that party buys with actual knowledge of the contamination.

C. The Third Kimbell Foods Factor: Would Federal Law Disrupt Existing Relationships?

The third *Kimbell Foods* factor asks whether the adoption of federal common law would disrupt existing commercial relationships. It is hard to dispute that changes in the scope of liability under CERCLA have the potential to disrupt existing relationships, given the great expense that remedial efforts typically incur. As one court has stated, the threat of unforeseen alterations in successor liability doctrine "complicate[s] transfers and necessarily increases transaction costs."\(^{154}\) Commentators have also expressed concern that the uncertainty caused by an "unchecked interpretation of CERCLA liability" may instill uncertainty and fear in corporations, which would "unnecessarily diminish the affected industries' contributions to certain basic economic and business functions in society."\(^{155}\) These concerns, however, stem from the potentially disruptive effects of unexpected *changes* in the law rather than from concerns regarding the specific choice of law. Given that the law of successor liability under CERCLA has been unsettled from the statute’s very enactment, clarification in the law should assuage, rather than exacerbate, these concerns.

With respect to the proper choice of law, courts have emphasized that the presumption that state law should fill gaps left in federal statutes is "particularly strong" when private parties have entered legal relationships expecting that their relationship would be governed by state law standards.\(^{156}\) Nonetheless, the validity of this assertion has been questioned in cases where there is a federal interest in the private relationship in question. When "the

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155. Perry E. Wallace, Jr., *Liability of Corporations and Corporate Officers, Directors, and Shareholders under Superfund: Should Corporate and Agency Law Concepts Apply?*, 14 J. CORP. L. 839, 842 (1989). The ramifications of changes in the law are widespread; indeed, in the wake of the *Aviall* decision, one insurance litigation firm noted that the Court's decision would likely impose higher costs not only on PRPs but also on their insurance providers. Bates & Carey, LLP, *Supreme Court Superfund Decision May Impact Insurance Coverage*, http://www.batescarey.com/newsandarticles/superfund.asp (last visited July 14, 2008).
interests of the United States will be directly affected" by the outcome of a
private dispute, the general rule that state law governs private litigation does
not hold. Further, the assertion that courts should not upset private
relationships that were founded on the assumption that state law will govern is
inapplicable to the current debate. Commercial entities can be assumed to be
aware of the debate concerning the scope of successor liability, and thus it is
reasonable to assume that parties entering into "[m]ajor economic decisions," such as significant asset transfers between corporations or the
dissolution of a business, were aware of the potential for liability at the time of
the decision and have already allocated the risk of such liability accordingly.

Courts have expressed concerns about the practical benefits that the
adoption of the substantial continuation test could have, arguing that parties
held liable under substantial continuation are also likely to be liable under the
fraudulent transfer exception. Far from supporting the abandonment of the
substantial continuation standard, this argument supports its adoption because it
is unlikely to cause major disruptions in existing relationships.

In cases where no fraudulent intent exists, however, courts have expressed
concern that the substantial continuation standard may impose liability on a
"good faith buyer of assets, who does all reasonable due diligence, and has no
reason to suspect liability," but who learns too late that the assets "came with a
hidden liability that might vastly exceed their value." This argument, however, fails to recognize that the substantial continuation test provides a
court more discretion than the "inflexible" mere continuation test and the
substantial continuation test's primacy of the purchaser's knowledge.

Any change to the standard of successor liability will disrupt existing
commercial relationships to some extent. This is especially true of an expanded
standard of liability. But corporate successor liability under CERCLA has long
been in a state of flux. Although the adoption of a definitive standard will
necessarily cause some disruption by increasing the number of potentially
responsible parties liable for the cost of remediation, the parties to prior
transactions of contaminated sites are likely to have considered this
contingency and negotiated accordingly. Further, the substantial continuation
standard is a flexible standard, which would allow courts to impose according
to the circumstances of the case, mitigating the potentially disruptive effect this
standard may have.

158. Polius, 802 F.2d at 83.
159. Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir.
1997).
CONCLUSION

While recent decisions have questioned the continuing viability of the substantial continuation standard, it has never been officially discarded, and the Eighth Circuit's recent decision in *K.C. 1986* may indicate a potential revival of the doctrine. Analysis under the *Kimbell Foods* inquiry demonstrates the desirability of formally adopting this standard as the yardstick against which to measure corporate successor liability under CERCLA, an area that has long proven confusing to courts due to the legislature's failure to clearly indicate its intent.

The mere continuation standard frustrates fundamental CERCLA policies by allowing the chain of successor liability to be severed far too easily. This leaves the owners of contaminated lands with no incentive to remediate their property. Adopting the substantial continuation test would promote CERCLA's policy of encouraging voluntary remediation by incentivizing preemptive action by brownfield owners and increasing the number of parties from which contribution may be sought, speed the resolution of disputes by lessening the burden faced by plaintiffs regarding previous owners' fraudulent intent, and would not impede the development of a liquid brownfields market.

Although CERCLA remains a tangled and confusing statute with many areas of uncertainty, the recent Brownfields Revitalization Act indicates a willingness to amend the statute to better promote specific CERCLA policies. Congress should therefore amend CERCLA to specifically incorporate the substantial continuation standard. Without legislative action, the courts should follow the Eighth Circuit's lead and adopt the substantial continuation standard as a uniform federal standard for corporate successor liability under CERCLA. Notwithstanding the potential for disruption of existing commercial relationships, CERCLA demands a uniform standard for corporate successor liability and the substantial continuation standard would best promote the policies Congress sought to further by enacting CERCLA.

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We welcome responses to this Comment. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.