

## NOTES

### SUCCESSOR LIABILITY FOR PUNITIVE DAMAGES: BREAKING THE CORPORATE RULE

The topic of successor products liability engenders much debate.<sup>1</sup> Similarly, the case law and commentary concerning the availability of punitive damages in the products liability context is exhaustive.<sup>2</sup> Only a handful of state courts, however, have addressed the issue of whether a successor corporation<sup>3</sup> may be liable for punitive damages.<sup>4</sup>

The few courts that have addressed this issue merely have extended either of two theories of successor products liability, developed in the context of compensatory damages,<sup>5</sup> to the growing number of punitive damages claims:<sup>6</sup> the continuity-of-enterprise theory<sup>7</sup> and the product-

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1. See *infra* notes 12-123 and accompanying text.

2. See *infra* notes 124-37 and accompanying text.

3. A purchasing entity qualifies as a "successor corporation" if it acquires all or substantially all of the manufacturing assets of the selling entity. See *Reed v. Armstrong Cork Co.*, 577 F. Supp. 246, 248 (E.D. Ark. 1983). A company that merely participates in a partial purchase of a dissolving firm's assets upon bankruptcy liquidation, for example, would not trigger the various theories discussed in this Note. See *infra* notes 12, 13, and 114 and accompanying text.

4. See *infra* notes 138-86 and accompanying text.

5. Traditionally, compensatory damages were intended to compensate the injured party for the injury sustained, and nothing more. PROSSER AND KEETON ON TORTS 7 (W.P. Keeton 5th ed. 1984). Today, however, compensatory damages have expanded to include a wide spectrum of actual and ethereal injuries, including mental anguish, pain and suffering, loss of society, loss of consortium, emotional trauma, and other metaphysical injuries. *Id.* at 54-66. This growth has led some commentators to call for the abolition of punitive damages. Critics argue that punitive damages overcompensate a plaintiff. See, e.g., Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished*, in DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES (D. Hirsch & J. Poulos eds. 1969); Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984). Cf. Owen, *Punitive Damages in the Products Liability Litigations*, 74 MICH. L. REV. 1257, 1295-99 (1976) (punitive damages serve a compensatory function by reimbursing plaintiff for the costs of the lawsuit).

6. In addition to compensatory damages, punitive, or exemplary, damages are assessed to punish a defendant who commits an aggravated or outrageous act of misconduct against a plaintiff and to deter similar behavior in the future. See RESTATEMENT (SECOND) OF TORTS § 908(1) & comment a (1979). See also *infra* notes 124-30 and accompanying text.

Prior to 1976, jury awards for punitive damages in products liability cases had been upheld in only three instances at the appellate level: *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975) (\$100,000), *cert. denied*, 424 U.S. 913 (1976); *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (\$250,000 as remitted by trial court); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970) (\$10,000). Today, however, such awards are becoming the rule rather than the exception. See *Moore v. Remington*

line theory.<sup>8</sup> These theories represent two different means that courts have adopted<sup>9</sup> to achieve the same end—reconciling the inherent conflict between the corporate law of acquisitions and tort-based products liability law. The traditional corporate approach to successor liability seeks to promote certainty at the point of the acquisition by eliminating responsibility in the purchasing corporation (the successor) for the liabilities of the purchased corporation (the predecessor).<sup>10</sup> This rule affords little protection to the products liability plaintiff who purchases prior to the corporate transaction, but whose claim may not arise until several years after the transaction.<sup>11</sup> The continuity theory affords relief to the inno-

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Arms Co., 100 Ill. App. 3d 1102, 1114, 427 N.E.2d 608, 616-17 (1982) (“[t]he tide has . . . turned: judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded”). For an exhaustive list of recent cases considering punitive damages in products liability cases, see Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 5 n.28 (1982).

7. Under the continuity-of-enterprise theory, the courts may find liability when there is continuity of management, business operations, and shareholders between the new and pre-existing corporations. See *infra* notes 58-80 and accompanying text.

8. Under this theory, which relies upon principles of tort law, the successor corporation is liable when it continues the product line of the predecessor. See *infra* notes 81-123 and accompanying text.

9. Some courts have refused to alter the status quo's traditional corporate rule of liability absent a legislative mandate. The Seventh Circuit has stated that

grave risks arise from court adoption of policy considerations to effect a change in a law so fundamental to the interdependent economic segments of a complex society. Whether the mounting costs of such change can be absorbed by insurance, whether product liability costs may grow so high in one state as to encourage business emigration, whether the relationship of workmen's compensation laws to product liability laws should be adjusted, and whether the many other economic and social effects of such an exception can be justified, are questions difficult to answer by analysis of the facts of a particular case and, it would appear, are more amenable to legislative investigation and determination.

*Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 440-41 n.7 (7th Cir. 1977). See also *Floram v. Elliott Mfg.*, 867 F.2d 570 (10th Cir. 1989) (no legislative intent to abrogate traditional rule); *Bernard v. Kee Mfg. Co.*, 394 So. 2d 552 (Fla. 1981) (declining to adopt product-line theory absent state legislation).

10. See *infra* notes 12-23.

11. The pertinent statute of limitations will depend on the theory of plaintiff's claim. Products liability actions fall into three categories: negligence, implied warranty, and strict liability. As contract principles generally will govern an implied warranty claim, the statute begins to run at the point of sale. See P. SHERMAN, *PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER* 275 (1981). Under a negligence or strict liability theory, the statute of limitations does not begin to run until the injury occurs or manifests itself. *Id.* Thus, a manufacturer potentially could be liable 20, 30, or 40 years into the future. See, e.g., *Menacho v. Adamson United Co.*, 420 F. Supp. 128 (D.N.J. 1976) (injury occurred 53 years after manufacture). Some commentators have suggested implementing a statute of repose. See Comment, *Limiting Liability: Product Liability and a Statute of Repose*, 32 BAYLOR L. REV. 137, 142 (1980). Under a statute of repose, the time within which a claim could be brought would begin to run from either the date of manufacture or the date of sale rather than the

cent plaintiff by allowing the exceptions to the traditional corporate rule of nonliability; the product-line theory, on the other hand, provides relief by relying on principles of tort law.

This Note examines the extension of the continuity and product-line theories to impose punitive damages for products liability on a successor corporation. Part I reviews the history and underlying policies of the traditional corporate approach and its exceptions. Part II examines the development of the product-line theory. Part III analyzes the added dimension punitive damages awards impose on the question of successor liability, emphasizing the approaches used by the courts to impose liability. Part IV concludes that neither the continuity-of-enterprise theory nor the product-line theory justifies awarding punitive damages against a successor corporation. Accordingly, Part IV proposes an alternative theory of liability for punitive damages that properly focuses on the conduct of the purchasing entity, rather than the nexus between the predecessor and the successor.

## I. THE TRADITIONAL CORPORATE APPROACH

Under the traditional corporate rule, a corporation that purchases the assets of another corporation for cash<sup>12</sup> does not succeed to the liabilities

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date of injury. *Id.* at 143. The period is usually much longer than a statute of limitations. The Uniform Products Liability Act, for example, recommends 12 years in the products liability context. UNIF. PRODUCTS LIABILITY ACT § 110(B).

12. Because the cash-for-assets transaction has created much controversy as well as the bulk of products liability litigation, it serves as the focus of this Note. However, there are two other types of acquisitions of which the reader should be aware: the statutory merger and the stock purchase transaction. A statutory merger requires the filing of statutorily prescribed documents and the exchange of the assets of the target company for stock in the surviving enterprise. This form of acquisition protects target shareholders in the form of voting and appraisal rights. However, the acquirer succeeds to all debts of the target, including unknown contingent tort liabilities. *See, e.g.*, MODEL BUSINESS CORP. ACT § 76 (1979); DEL. CODE ANN. tit. 8, § 259 (1983); N.Y. BUS. CORP. LAW § 906 (McKinney 1986).

In a stock purchase, the acquiring corporation purchases the target's stock rather than buying its assets directly. If there are dissenting target shareholders, the buyer need only obtain a majority of the stock and then execute a cash-out merger. In a cash-out merger, the minority shareholders must tender their shares, their only remedy being the right to request an appraisal to determine the fair value of the shares. Thus, the target becomes a wholly-owned subsidiary of the buyer. The parent-subsidiary relationship shields the purchaser from liabilities, except to the extent of its stock holdings. If creditors or future tort claimants deplete the assets of the target, the purchaser suffers only to the extent that he has overpaid for the shares because he did not know of the bidder's liabilities that he acquired with the shares. L. SOLOMON, CORPORATE ACQUISITIONS, MERGERS, AND DIVESTITURES § 70, at 480.7 (1983).

of the acquired corporation.<sup>13</sup> Furthermore, the selling enterprise can liquidate without provision for unknown contingent claims<sup>14</sup> and the former shareholders cannot later be charged with those claims except to the extent of their liquidation distribution.<sup>15</sup> Courts have developed four exceptions to this stringent rule as a means of protecting the rights of commercial creditors<sup>16</sup> and minority shareholders.<sup>17</sup> Thus, the purchaser in a cash-for-assets transfer may incur the liabilities of the transferor if one of the following conditions is met: (1) the transaction amounts to a consolidation or merger (de facto merger exception);<sup>18</sup> (2) the purchasing

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13. For a collection of cases invoking the general rule, see 15 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 7122, at 190 n.1 (1983).

14. R. GILSON, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 1095-1141 (1986). State law requires only that known debts must either be paid or adequately provided for as a condition of dissolution. See, e.g., CAL. CORP. CODE § 1905 (Supp. 1990). In addition, most states have postdissolution statutes that allow creditors to assert claims within a fixed period of time after the company dissolves. However, the relatively short statutory period—usually two or three years—provides virtually no protection to the products liability claimant whose claim may not arise for several years. See, e.g., MODEL BUSINESS CORP. ACT § 105 (1979); DEL. CODE ANN. tit. 8, § 278 (Supp. 1988); MASS. GEN. LAWS ANN. ch. 156B, § 102 (West Supp. 1989).

15. Some commentators have argued that the corporate predecessor and its shareholders should bear the risk of loss because they placed the product in the stream of commerce and directly benefitted from the profits derived from the sale of the defective product. See, e.g., Aylward & Aylward, *Successor Liability for Defective Products—Misplaced Responsibility*, 13 STETSON L. REV. 555 (1984). While this may be true on a theoretical level, most courts and commentators have rejected the argument because it is impossible to implement on a practical level. First, no relief may be available if the statutorily prescribed period has expired. See *supra* note 11. Second, identifying and tracing funds to numerous shareholders may be an insurmountable task. See R. GILSON, *supra* note 14, at 1125; Comment, *Continuing Corporate Existence for Post Dissolution Claims: The Defective Products Dilemma*, 13 PAC. L.J. 1227 (1982).

16. The rationale underlying the rule of nonliability is that the claims of ordinary business creditors are ascertainable at the time of sale and are reflected accordingly in the purchase price. Thus, commercial creditors are protected as long as consideration is adequate. See Note, *Imposing Strict Liability upon a Successor Corporation for the Defective Products of Its Corporate Predecessor: Proposed Alternatives to the Product Line Theory of Liability*, 23 B.C.L. REV. 1397, 1399 (1982) [hereinafter Note, *Proposed Alternatives*]; Note, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L.J. 677, 683 (1983) [hereinafter Note, *A Policy Analysis*].

17. In a statutory merger, shareholders of both companies must approve the merger by a majority vote and the selling shareholders are accorded appraisal rights. See *supra* note 12. In a cash-for-assets transaction the selling shareholders lose these rights. *Id.* Often, the purchaser will purchase a majority of the shares and then will instigate a cash-out merger with the sole purpose of eliminating the minority shareholders who have no remedy but appraisal. *Id.* The de facto merger doctrine developed in order to protect these rights. See *Appelstein v. United Bd. & Carton Corp.*, 60 N.J. Super. 333, 349-53, 159 A.2d 146, 155-56, *aff'd mem.*, 33 N.J. 72, 161 A.2d 474 (1960) (finding merger or consolidation in order to ensure dissenting shareholders their appraisal rights); R. GILSON, *supra* note 14, at 1099-1109.

18. See *infra* notes 24-46 and accompanying text. A consolidation differs from a merger in that both combining entities disappear, forming a completely new enterprise. L. SOLOMON, *supra* note

corporation is a mere continuation<sup>19</sup> of the seller (continuation exception); (3) the purchaser expressly or impliedly agrees to assume such debts; or (4) the transaction is fraudulently executed for the purpose of escaping liability.<sup>20</sup> Despite the original purpose of these exceptions, courts readily have applied them to the products liability arena in order to protect innocent product users.<sup>21</sup> For relevant purposes, a successor will face strict liability<sup>22</sup> for injuries caused by the predecessor's product if either the de facto merger exception or the continuation exception applies.<sup>23</sup>

### A. *De Facto Merger Doctrine*

A formal statutory merger contemplates the absorption of one corporation into another with the former losing its existence as a separate corporate entity.<sup>24</sup> Corporate statutes require the surviving corporation to succeed to all liabilities of the target.<sup>25</sup>

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12, § 70, at 460-61. For the purpose of this Note, the distinction is not important because the essential element, that only one enterprise survives, is present in either case.

19. See *infra* notes 47-57 and accompanying text.

20. See, e.g., *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977); *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817, 820 (D. Colo. 1968).

21. See *infra* notes 24-80 and accompanying text.

22. Plaintiffs generally assert one of three theories in a products liability case: negligence, breach of implied warranty, or strict liability. Because the first two theories are premised on conduct at the time of manufacture and sale, they do not impose liability on a successor and are therefore beyond the scope of this Note. See, e.g., *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977) (action premised on negligence); *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974) (negligence action); *Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535 (D. Del. 1988) (breach of implied warranty); *Pattelli v. Questor Corp.*, No. 79-C3311, slip op. (N.D. Ill. Mar. 11, 1982) (implied warranty).

23. For the purpose of this Note, the other two exceptions are not relevant. The third exception turns on the language of the contract or other agreement of sale and does not depend on the form of the corporate acquisition. Compare *Bouton v. Litton Indus.*, 423 F.2d 643 (3d Cir. 1970) (finding an implied agreement to assume future tort claims) with *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817 (D. Colo. 1968) (finding no express or implied assumption of liability when contract specifically excluded liability for transferor's torts).

The fourth exception, involving fraudulent transfers, rarely has been invoked in products liability cases. The typical case arises when the sale was not made in good faith, as evidenced by inadequate consideration. See *Wolff v. Shreveport Gas, Elec. Light & Power Co.*, 138 La. 743, 70 So. 789 (1916) (consideration of \$1,000 deemed bad faith). Furthermore, this Note is premised on the notion of an arm's length bargain in which the successor is "innocent" of any wrongdoing. The essence of the successor liability problem is that one of two innocent parties, the successor corporation or the plaintiff, must bear the burden of the predecessor's mistake. The dilemma disappears if one party is in some way culpable.

24. See *supra* notes 12, 17.

25. See *supra* note 12.

The parties can achieve substantially the same result without the statutorily imposed liability by varying the transaction's structure. For example, in a purchase of assets, the consideration paid may consist of both cash and stock,<sup>26</sup> or the target company may continue to exist for a period of time following the acquisition.<sup>27</sup> To avoid unjust results in such cases,<sup>28</sup> courts have developed a de facto merger doctrine, applying it when the transaction sufficiently resembles a de jure merger.<sup>29</sup> Courts have also used the de facto merger doctrine to impose tort liability on the successor.<sup>30</sup>

The modern test for a de facto merger in the context of compensatory damages first emerged in *Shannon v. Samuel Langston Co.*,<sup>31</sup> a federal diversity action decided under New Jersey law.<sup>32</sup> The transaction in *Shannon*, while labeled a purchase of assets, closely resembled a statutory merger—the consideration consisted only of stock and the target dis-

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26. Cf. L. SOLOMON, *supra* note 12, § 74, at 655.2; *infra* note 33 and accompanying text.

27. See *infra* notes 38-40 and accompanying text.

28. For example unfairness lies in the treatment of minority shareholders of the purchasing company. In a statutory merger under most states' corporate law, minority shareholders of both participating companies receive appraisal rights and other protections from abusive tactics. See, e.g., MODEL BUS. CORP. ACT § 13.02(a)(1) (1979) (giving shareholders of an involved corporation the right to dissent and receive fair payment in the event of a formal merger); N.Y. BUSINESS CORP. LAW § 910(a)(1)(A) (McKinney 1986) (same). Where the transaction is not a statutory merger, only the seller's minority shareholders receive these protections. See, e.g., MODEL BUS. CORP. ACT § 13.02(a)(3) (1979) (giving shareholders of a corporation selling all or substantially all of its assets outside the regular course of business the right to dissent and receive fair payment); N.Y. BUS. CORP. LAW § 910(a)(1)(B) (McKinney 1986) (same). Thus, when the court finds a corporate acquisition sufficiently similar to a merger, it can guarantee both groups of minority shareholders protection through the de facto merger doctrine. See generally Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. REV. 906, 909-10.

29. See, e.g., *Ramirez v. Amsted Indus.*, 86 N.J. 332, 341, 431 A.2d 811, 815-16 (1981) (describing the de facto merger exception). See generally Phillips, *supra* note 28, at 909-10.

30. See *Aylward & Aylward*, *supra* note 15, at 558.

31. 379 F. Supp. 797 (W.D. Mich. 1974).

32. *Id.* at 798-99. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) requires federal courts in diversity jurisdictions to apply state law. Thus, the choice-of-law principles of the forum state will govern. Courts have adopted three approaches with respect to successor liability. In some states the law of the place of incorporation governs the initial tort liability; the law of the forum state then determines whether punitive damages are justified. *Krull v. Celotex Corp.*, 611 F. Supp. 146 (N.D. Ill. 1985). In other jurisdictions, the law of the state of incorporation determines whether a merger has occurred and the law of the place where the tort occurred governs the consequences of the merger. *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 439 A.2d 1337 (1985). Finally, in some states, the law of the state whose tort law would otherwise govern decides all issues. *Hanon v. Johns-Manville Sales Corp.*, 599 F. Supp. 376 (N.D. Iowa 1984). See generally *Duca v. Raymark Indus.*, No. 84-0587, slip. op. at 4 (E.D. Pa. Nov. 6, 1986).

solved soon after the consummation of the deal.<sup>33</sup> The court considered four factors relevant to finding a de facto merger.<sup>34</sup> First, the court required a continuity of stockholder interest.<sup>35</sup> The court distinguished in this respect a cash transaction from a stock transaction. In a cash merger, the parties are “strangers before the sale and continue[] to remain strangers after the sale,” while in a stock transaction, the shareholders become a constituent part of the surviving entity.<sup>36</sup> Although the consideration in *Shannon* consisted exclusively of stock, other courts have indicated that a combined stock/cash acquisition may constitute a de facto merger if the stock element predominates.<sup>37</sup>

Second, the *Shannon* court gave considerable weight to the fact that the acquired company ceased its ordinary business operations, liquidated, and dissolved as soon as “legally and practically possible.”<sup>38</sup> The rationale underlying this factor is that the successor deprives the creditor of a remedy by causing the acquired manufacturer’s dissolution.<sup>39</sup> Subsequent decisions indicate that the amount of time before formal dissolution is not the sole consideration for this factor.<sup>40</sup> The *Shannon* court mentioned, but did not elaborate on, two additional considerations. The

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33. *Shannon*, 379 F. Supp. at 799.

34. *Id.* at 801 (citing *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 264 A.2d 98 (N.J. Super. Ct. Law Div. 1970)).

35. *Id.* at 801.

36. *Id.*

37. In *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 264 A.2d 98 (N.J. Super. Ct. Law Div. 1970), the acquiring corporation purchased assets of the target in exchange for \$2 million in cash and 5,500 shares of the purchaser’s common stock. The *McKee* court concluded that no merger occurred because the stock element was nominal relative to the total consideration. *Id.* at 567, 264 A.2d at 105. It is unclear, however, whether equal amounts of stock and cash would suffice or whether the stock element must clearly predominate so that the cash element is nominal. Another interesting aspect of this problem, which most courts overlook, is the proportion of the purchaser’s stock that the target company’s shareholders acquire. If the amount of stock acquired is minimal, the nexus between the two companies is arguably tenuous.

38. 379 F. Supp. at 801.

39. See Note, *Proposed Alternatives*, *supra* note 16, at 1402.

40. In *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975), the court found a de facto merger even though the predecessor continued to exist for 18 months after the transfer and four months after plaintiff’s injury. *Id.* at 367-69. Defendant, North American Rockwell (Rockwell), purchased substantially all of the assets of the predecessor, Textile-Machine Works (TMW), including its name, in exchange for Rockwell stock one year before plaintiff was injured. *Id.* at 363. The Rockwell stock represented the sole asset of TMW. *Id.* at 367-69. The court deemed the stock valueless because TMW could not sell it on the open market. Rather, TMW was required to distribute the Rockwell stock to its shareholders upon dissolution. *Id.* The court concluded that the predecessor was a mere shell because it was contractually bound to dissolve, it had ceased doing business, and its assets were insubstantial. *Id.* at 367-69.

court first looked for evidence of a nexus between the purchasing and selling entities beyond common shareholders.<sup>41</sup> Such evidence might include the continuity of management, personnel, physical location, assets, and general business operations.<sup>42</sup> The court also considered the extent to which the acquiring corporation assumed the liabilities and obligations necessary to the normal operation of the acquired business.<sup>43</sup> The court's discussion of these two factors suggests that a clear nexus between the purchaser and the acquirer as well as assumption of liabilities further would support a finding of a de facto merger.<sup>44</sup>

The *Shannon* opinion indicates that public policy concerns support the four-prong test for finding a de facto merger.<sup>45</sup> In particular, the court noted that a purchaser who receives the benefits of a going concern must also assume the costs ordinarily borne by the going concern.<sup>46</sup>

### B. *Mere Continuation Exception*

Another path courts use to find successor liability despite the traditional corporate approach is the mere continuation exception. This exception requires continuity of management, business operations, and shareholders in an existing or newly created corporation.<sup>47</sup> Unlike a merger, which by definition involves two corporate entities,<sup>48</sup> the mere continuation exception can encompass a change in ownership in a single enterprise.<sup>49</sup>

In *Cyr v. B. Offen & Co.*,<sup>50</sup> plaintiff brought suit to recover for an injury caused by a machine manufactured by B. Offen & Co., a sole pro-

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41. *Shannon*, 379 F. Supp. at 801.

42. *Id.*

43. *Id.*

44. *Id.*

45. 379 F. Supp. at 802. *Accord Knapp*, 506 F.2d at 369.

46. 379 F. Supp. at 802. According to the court, such a rule would not impose "artificial restraints" upon corporations. *Id.* Rather, it merely forces the buyer and seller to adjust the sale price to reflect potential liability. *Id.*

47. *See, e.g., Knapp*, 506 F.2d at 367-69; *Forest Laboratories, Inc. v. Pillsbury Co.*, 452 F.2d 621 (7th Cir. 1971); *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817 (D. Colo. 1968). *See generally* Note, *Proposed Alternatives*, *supra* note 16; Note, *The Extension of Products Liability to Corporate Asset Transferees—An Assault on Another Citadel*, 10 *LOY. L.A.L. REV.* 584, 600-01 (1977); Comment, *Expanding the Products Liability of Successor Corporations*, 27 *HASTINGS L.J.* 1305, 1315 (1976).

48. *See supra* note 12.

49. *See infra* notes 50-52 and accompanying text. *But cf. Lemire v. Garrard Drugs*, 95 Mich. App. 520, 291 N.W.2d 103 (1980) (rejecting continuity test where predecessor was sole proprietor).

50. 501 F.2d 1145 (1st Cir. 1974).



prietorship. Upon the sole proprietor's death, a group of key employees purchased the proprietor's interest and continued the business in the same manner and under the same name.<sup>51</sup> The court found that the corporation through which the employees operated the company had merely donned a "new hat," and held the successor liable.<sup>52</sup>

For all practical purposes, the de facto merger and mere continuation exceptions are nearly indistinguishable. Under the continuation exception, courts essentially rely on the de facto merger elements, particularly emphasizing the commonality of shareholder interest.<sup>53</sup> Because courts effectively have blurred the distinction between the de facto merger and mere continuation exceptions, either label might reach the same result on the same facts.

Although the results under both tests are often identical,<sup>54</sup> the *Cyr* court's rationale notably differs from the *Shannon* court's reasoning. Whereas the *Shannon* court relied on corporate law principles to support a finding of successor liability,<sup>55</sup> the First Circuit in *Cyr* supported its decision by reference to the four traditional tort justifications for strict products liability: (1) the manufacturer is better able to bear the costs than is the consumer; (2) the manufacturer placed the product in the stream of commerce; (3) the manufacturer implicitly represented the product's safety by placing it in commerce; and (4) the manufacturer

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51. *Id.* at 1151. Employees purchased 70% of the stock and an outside financier purchased the remaining 30%. *Id.* Because the consideration was necessarily cash (as the purchasers had no stock to give), the court in *Cyr* actually adopted the expanded continuity approach of *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976), discussed *infra* notes 58-80 and accompanying text.

52. *Cyr*, 501 F.2d at 1151.

53. *See, e.g.*, *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 460 N.E.2d 895 (1984) (merger exception is inseparable from continuation exception); *Ramirez v. Amsted Indus.*, 86 N.J. 332, 431 A.2d 811 (1981) (if commonality of management or *ownership* cannot be shown, there is no continuation of the seller's enterprise).

54. *See Green*, 122 Ill. App. 3d 204, 460 N.E.2d 895 (merger exception and continuation exception inseparable). Other courts found neither the merger nor the continuation exception applicable. *See Travis v. Harris*, 565 F.2d 443 (7th Cir. 1977); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977) (no carryover of management or owners, so no exception found); *Domine v. Fulton Iron Works*, 76 Ill. App. 3d 253, 395 N.E.2d 19 (1979) (no exception where purchasing corporation purchased only some assets of selling corporation which continues under another name); *Hamaker v. Kenwel-Jackson Mach.*, 387 N.W.2d 515 (S.D. 1986) (no exception where no stock in successor transferred, no management carryover, and business development in different direction); *Fish v. Amsted*, 126 Wis. 2d 293, 376 N.W.2d 820 (1985) (no exception if key elements of commonality of officers, directors and shareholders not found).

55. *See supra* notes 31-46 and accompanying text.

stands in the best position to improve the product's quality.<sup>56</sup> The *Cyr* court concluded that the first and fourth rationales applied with equal force to a successor corporation because the successor inherits the experience and expertise of the original manufacturer.<sup>57</sup>

### C. *The Expanded Continuity-of-Enterprise Theory*

In *Turner v. Bituminous Casualty Co.*,<sup>58</sup> the Supreme Court of Michigan substantially expanded the de facto merger and continuation exceptions by eliminating the continuity-of-ownership requirement.<sup>59</sup> The plaintiff in *Turner* sought to recover for an injury caused by a power press manufactured by T.W. & C.B. Sheridan Company (Old Sheridan).<sup>60</sup> After the sale of the press, but prior to the accident, Harris Inter-type Corporation (Harris) purchased the entire business, goodwill, name, and assets of Old Sheridan for cash.<sup>61</sup> Harris set up a subsidiary (New Sheridan) to accept the assets of Old Sheridan.<sup>62</sup> Old Sheridan dissolved four days after the parties consummated the deal, and New Sheridan remained a wholly owned subsidiary of Harris.<sup>63</sup> Several years later, New Sheridan formally merged with and became a division of Harris.<sup>64</sup> The trial court declined to hold Harris or New Sheridan liable for the defective power press because neither party manufactured, sold, or distributed the product.<sup>65</sup>

The Supreme Court of Michigan reversed, relying on both the continuity factors enunciated in *Shannon*<sup>66</sup> and the strict liability principles set forth in *Cyr*.<sup>67</sup> First, the *Turner* court distinguished *Shannon*, noting the absence of stock as consideration.<sup>68</sup> The court, however, did not find

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56. *Cyr*, 501 F.2d at 1154. See P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, TORT AND ACCIDENT LAW 555-63 (2d ed. 1983).

57. 501 F.2d at 1154.

58. 397 Mich. 406, 244 N.W.2d 873 (1976).

59. *Id.* at 413, 244 N.W.2d at 880.

60. *Id.* at 408, 244 N.W.2d at 875.

61. *Id.*

62. *Id.*

63. *Id.* at 408, 244 N.W.2d at 875-76.

64. *Id.* at 408, 244 N.W.2d at 876.

65. *Id.* at 409, 244 N.W.2d at 876. The trial court granted defendant's motion for summary judgment. *Id.* The court of appeals denied leave of appeal and the supreme court granted leave. *Id.*

66. 397 Mich. at 420-24, 244 N.W. 2d at 879-80. See *supra* notes 34-44 and accompanying text.

67. 397 Mich. at 417, 244 N.W.2d at 884. See *supra* notes 56-57 and accompanying text.

68. 397 Mich. at 413, 244 N.W.2d at 879-80. See *supra* notes 35-37 and accompanying text (discussing the *Shannon* court's concentration on stockholder continuity).

the absence of stock dispositive when the remaining three factors are present.<sup>69</sup> The court reasoned that, because the target shareholders' proportionate share in the successor is often small, commonality of shareholders may be minimal.<sup>70</sup> Furthermore, the court noted that the actual owners at the time of manufacture may differ substantially from those at the time of sale of the assets.<sup>71</sup> Finally, according to the *Turner* court, if the original manufacturer no longer exists, the plaintiff has no remedy, regardless of the form of the acquisition.<sup>72</sup>

Relying on the First Circuit's opinion in *Cyr*,<sup>73</sup> the *Turner* court analyzed successor liability in light of the four traditional justifications for strict liability.<sup>74</sup> The court noted that "[t]his is a products liability case first and foremost."<sup>75</sup> Similar to the First Circuit, the *Turner* court found that the successor is the best cost-bearer<sup>76</sup> and is the only entity

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69. 397 Mich. at 416, 244 N.W.2d at 883. The court provided several reasons to support its conclusion. See *infra* notes 70-72 and accompanying text. But the court arguably overlooked the most persuasive rationale for eliminating stock ownership in the products liability context: the different needs for protection of minority shareholders and tort claimants. See R. GILSON, *supra* note 14, at 1100; Phillips, *supra* note 28, at 912-14. One judge described the fundamental differences between the parties:

Although a transaction should be scrutinized to protect both shareholders and tort claimants, a court should search for somewhat different attributes of merger for purposes of imposing liability. This difference in relevant attributes stems from the distinct relationships to the corporation of the persons whom the legislature has sought to protect. While dissenting shareholders need protection against alteration of their investment rights, tort claimants need protection against attempts by ongoing businesses to avoid liability through transfer of their operations to another legal entity.

*Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361, 371 (3d Cir. 1974) (Rosen, J., concurring). Thus, in the context of appraisal rights and other merger protections, the shareholder should have the opportunity to terminate his investment and obtain the value of his shares whenever a merger alters the fundamental relationship among the shareholders or between the shareholder and the corporation. See *Farris v. Glen Alden Corp.*, 393 Pa. 427, 433, 143 A.2d 25, 29 (1958). The de facto merger doctrine achieves this goal by extending appraisal rights to shareholders of both the selling and buying entities. See *supra* notes 28-29 and accompanying text. The need for shareholder continuity is not apparent in the products liability context. See Phillips, *supra* note 28, at 914.

70. 397 Mich. at 413, 244 N.W.2d at 880.

71. *Id.*

72. *Id.* at 412, 244 N.W.2d at 878. The court also noted that the form of the acquisition is irrelevant from the perspective of the purchasing corporation as well as the plaintiff. *Id.* Once the selling corporation disappears, the successor loses its only source of indemnity, regardless of the label affixed to the original transaction. *Id.* This observation, however, appears to circumvent the issue at hand. If the successor corporation does not incur liability, the right to indemnification never arises.

73. See *supra* notes 54-57 and accompanying text.

74. 397 Mich. at 425, 244 N.W.2d at 881.

75. *Id.* at 416, 244 N.W.2d at 877.

76. *Id.* at 425, 244 N.W.2d at 881.

capable of improving the product.<sup>77</sup> Thus, the *Turner* court imposed liability even though two of the criteria were not satisfied: the successor neither launched the product into the stream of commerce nor made any representation of safety.<sup>78</sup> Despite this reliance on products liability principles, the *Turner* court, like the *Shannon* court,<sup>79</sup> structured its opinion as an exception to corporate law principles. The tort principles announced in *Cyr* thus served merely as policy justifications for modifying the *Shannon* continuity test.<sup>80</sup>

## II. THE PRODUCT-LINE APPROACH

### A. *Ray v. Alad and Strict Tort Liability*

In *Ray v. Alad*,<sup>81</sup> the Supreme Court of California abandoned corporate law principles and adopted an approach predicated solely upon strict tort liability.<sup>82</sup> Under the product-line theory set forth in *Alad*, the successor is liable if it continues the involved product line of the predecessor, regardless of the form of the corporate acquisition.<sup>83</sup> The product-line theory responds to two primary criticisms of the traditional corporate

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77. *Id.*

78. *Id.* Some commentators have suggested that, although the condition of the product is the essential focus in strict liability, the manufacturer is "culpable" to the extent that it placed the product in the stream of commerce and represented it to be safe. See *infra* notes 134-35 and accompanying text. The court in *Turner* glossed over these two elements in concluding that the successor's exploitation of accumulated goodwill and outward manifestations of continuity suffice. 397 Mich. at 425, 244 N.W.2d. at 881.

One commentator contends that *Turner's* expanded continuity theory does not fulfill the deterrence function of strict liability. See Note, *A Policy Analysis*, *supra* note 16, at 701. *Turner* instead rests solely on the cost-spreading rationale. *Id.* at 695. The author concludes that if cost spreading is the only goal of successor liability, a form of social insurance would provide a more efficient solution. *Id.* Similarly, the court in *Woody v. Combustion Eng'g, Inc.*, 463 F. Supp. 817, 820 (E.D. Tenn. 1978) suggested that industry-wide liability would provide a more efficient means of fostering the policies of successor liability.

79. *Shannon*, 379 F. Supp. at 801. See *supra* notes 31-46 and accompanying text.

80. The court made clear that it was proposing an expanded version of the traditional corporate rule, rather than a new theory based solely on tort principles. According to the court, "[c]ontinuity is the purpose, continuity is the watch word, continuity is the fact." 397 Mich. at 426, 244 N.W.2d at 882. In addition to the usual requirements of internal continuity—products, management, personnel, etc.—the court stressed external continuity. The court stated that "[j]ustice would be offended if a corporation which holds itself out as a particular company for the purpose of sales, would not be estopped from denying that it is that company for the purpose of determining products liability." *Id.* For a criticism of this holding-out aspect of *Turner*, see Phillips, *supra* note 28, at 919-20.

81. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1974).

82. *Id.* at 25, 560 P.2d at 5, 136 Cal. Rptr. at 576.

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

approach. First, the rigid corporate rule and exceptions overemphasize the form of the acquisition, rather than concentrating on the transaction's substance or practical effect.<sup>84</sup> The stock/cash distinction of the de facto merger exception<sup>85</sup> represents one example of this shortcoming.<sup>86</sup> Second, the narrow scope of liability under the corporate approach does not fulfill the primary goal of products liability—protecting the innocent product user.<sup>87</sup>

In *Alad*, the defendant (Alad II) purchased the assets of its predecessor (Alad I) for cash.<sup>88</sup> These assets included the inventory, plant, equipment, designs, and all rights to the trade name and goodwill of Alad I.<sup>89</sup> Alad II continued to manufacture the same line of ladders under the Alad name, employed the same factory personnel, and solicited customers through the same sales representatives.<sup>90</sup> The Supreme Court of California first determined that these facts triggered neither the de facto merger nor the continuation exceptions.<sup>91</sup> The court further noted that a rule of nonliability promoted the free availability and transferability of capital.<sup>92</sup> Nevertheless, the *Alad* court concluded that protection of the injured product user outweighed any advantages of nonliability and thus

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84. See, e.g., *Ramirez v. Amsted Indus.*, 86 N.J. 332, 336, 431 A.2d 811, 816 (1981) (narrow application of the traditional rule is "inconsistent with the developing principles of strict liability and unresponsive to the interests of persons injured by defective products").

85. See *supra* notes 18, 26-29, 35-37 and accompanying text.

86. Once one presumes that strict liability rules in the products liability context developed to protect the innocent purchaser without regard to the manufacturer's culpability, it appears inconsistent to make recovery in a successor liability case turn on whether cash or stock was paid in the unrelated corporate acquisition.

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

88. 19 Cal. 3d at 24, 560 P.2d at 5, 136 Cal. Rptr. at 576. Plaintiff alleged that he fell from a defective ladder in the laundry room of the University of California at Los Angeles. Thus, he also named the University of California Regents as defendants based on their control of the laundry room and the ladder.

89. *Id.* The sale did not include Alad I's cash, receivables, unexpired insurance, or prepaid expenses.

90. *Id.* at 25, 560 P.2d at 5, 136 Cal. Rptr. at 577. The court emphasized that there were no outward manifestations of a change in management on printed materials except for a redesign of the company logo on letterheads and labels. Representatives were not instructed to notify customers of the changes. *Id.* See also *Korzetz v. Amsted Indus.*, 472 F. Supp. 1326 (E.D. Mich. 1979) (emphasizing that the "world of the marketplace continued to see and rely on the [predecessor's] name").

91. 19 Cal. 3d at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578. The acquisition did not constitute a merger because of the cash consideration. Moreover, the mere continuation exception did not apply because none of the retained individuals were officers, directors, or stockholders, even though Alad II hired several Alad I employees at the production level.

92. *Id.* at 25, 560 P.2d at 5, 136 Cal. Rptr. at 576.

adopted a new exception.<sup>93</sup>

The *Alad* court provided three justifications for holding the successor corporation strictly liable. First, the court recognized that the acquisition and subsequent dissolution of Alad I effectively destroyed the plaintiff's remedies against the original manufacturer.<sup>94</sup> The court noted the practical difficulties of tracing funds to former stockholders and directors<sup>95</sup> and suggested that Alad I's insurance would not cover postacquisition injuries.<sup>96</sup>

The *Alad* court also found that Alad II was equally capable of estimating the risks of future tort claims and obtaining insurance as the original manufacturer.<sup>97</sup> Alad II had access to various resources, including manufacturing designs, the continued employment of factory personnel, and the consulting services of Alad I's former general manager.

Finally, the court reasoned that a successor who takes the benefit of goodwill also must bear the burden of any ensuing "bad will."<sup>98</sup> The

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93. *Id.* In carving out a tort exception to the general principles of successor liability, the court drew an analogy to labor law. In the labor context, the United States Supreme Court refused to give controlling weight to the form of the acquisition if such an application contravened the underlying policies of the labor law. See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 257 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182 n.5 (1973).

94. 19 Cal. 3d at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580.

95. See *supra* note 15 and accompanying text.

96. 19 Cal. 3d at 32, 560 P.2d at 10, 136 Cal. Rptr. at 581. The trial record did not disclose whether Alad I was insured. *Id.* Most products liability insurance policies, however, cover accidents on an "occurrence basis." Note, *A Policy Analysis*, *supra* note 16, at 686 n.64. Only injuries occurring during the policy period, rather than those caused by products manufactured during the policy period, are covered. *Id.* Thus, Alad I's insurance would not cover postacquisition injuries.

97. 19 Cal. 3d at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581. Arguably, both the original manufacturer and the successor face the same problems inherent in this area of insurance. First, insurers generally write short-term policies of approximately two years, but retain the option of increasing the premium or dropping the policy altogether at that time. Note, *A Policy Analysis*, *supra* note 16, at 686 n.64. Furthermore, because products liability insurance rates are set on a countrywide basis (unlike medical malpractice, automobile, and other standard lines of liability), either party faces the risk of an across-the-board increase in premiums. For example, between 1970 and 1977, the average increase in products liability insurance was 944.6%. *Id.*

However, the successor does bear any additional risks that are specific to its company. The nature of its business may preclude it completely from obtaining insurance. Approximately 21.6% of businesses seeking insurance were unable to obtain it at any price. *Products Liability Insurance: Hearings Before the Subcomm. on Capital Investment and Business Opportunities of the House Comm. on Small Businesses*, 95th Cong., 1st Sess. 4 (1977).

98. 19 Cal. 3d at 34, 560 P.2d at 10, 136 Cal. Rptr. at 581. The court also suggested that imposition of successor liability precluded the predecessor from obtaining a windfall in the form of an enhanced purchase price. One commentator has coined the term "internalization" to describe this rationale. See R. GILSON, *supra* note 14, at 1125. The internalization theory assumes that the parties are in an equal bargaining position. If this assumption is met, then it makes no difference

court noted that Alad II had held itself out to potential customers as the same enterprise as its predecessor.<sup>99</sup> Allowing successor liability not only equitably balances the successor's gain from the predecessor's goodwill, it prevents the predecessor from realizing a windfall.<sup>100</sup> Thus, the *Alad* court effectively denied the successor corporation a better position than its predecessor.

## B. Reaction to Alad

### 1. Courts Adopting the Alad Doctrine

Most courts have been reluctant to follow California's lead.<sup>101</sup> In fact, only New Jersey,<sup>102</sup> Pennsylvania,<sup>103</sup> and Washington<sup>104</sup> have expressly adopted *Alad*'s landmark rule.

The *Alad* court's failure to define clearly the boundaries of its product-line doctrine may have provided subsequent courts the impetus to interpret the doctrine broadly.<sup>105</sup> In *Nieves v. Bruno Sherman Corp.*,<sup>106</sup> the

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upon which party liability is imposed because the parties will reallocate the burden by contract in the most efficient way. This theory, when taken to its ultimate conclusion, leads to absolute successor liability, a position that no court has embraced.

99. 19 Cal. 3d at 30, 560 P.2d at 11, 136 Cal. Rptr. at 582.

100. *Id.* The California court envisioned the windfall arising from a finding of nonliability for two reasons: the reflection of this absence of liability in the purchase price of the company, and the benefit to the dissolved predecessor of no subsequent responsibility for its defective products. *Id.*

101. See *infra* notes 116-23 and accompanying text.

102. *Ramirez v. Amsted Indus.*, 86 N.J. 332, 431 A.2d 811 (1981).

103. *Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 17, 434 A.2d 106, 109 (1981).

104. *Hall v. Armstrong*, 103 Wash. 2d 258, 260, 692 P.2d 787, 791 (1984).

105. The court purported to limit its holding to the "circumstances . . . presented." 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582. Because the relevant facts in *Turner* and *Alad* are identical, some commentators have suggested that the opinion can be construed as requiring the *Turner* continuity factors in addition to product-line continuity. See, e.g., Note, *A Policy Analysis, supra* note 16, at 680 n.25. This position is clearly erroneous. The product-line approach seeks to expand the available remedies for the injured plaintiff, not add another obstacle to recovery. See *Alad*, 19 Cal. 3d at 28-29, 560 P.2d at 7, 136 Cal. Rptr. at 578 ("If [the continuity or de facto merger exceptions] were determinative of Alad II's liability to plaintiff it would require us to affirm the summary judgment [for defendant]."). See also *Ramirez v. Amsted Indus.*, 86 N.J. 332, 431 A.2d 811 (1981) (construing *Alad* to require only product-line continuity and not the enterprise continuity of *Turner*).

106. 86 N.J. 361, 431 A.2d 826 (1981). The acquisition in *Nieves* involved the Old Sheridan-Harris/New Sheridan transaction discussed in *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976). See *supra* notes 60-64. Prior to the injury in *Nieves*, however, Harris sold the assets and goodwill relating to the press line to Bruno-Sherman. These assets included historical data, business records, customer correspondence, trade secrets, designs, and equipment. Bruno used its own plant to continue production. Harris continued a different product line. *Id.* at 366, 431 A.2d at 829.

New Jersey Supreme Court held that the product-line rule encompasses all viable intermediate successors, not just the current producer.<sup>107</sup> As the New Jersey court reasoned, the *Alad* court "was concerned not as much with the availability of one particular viable successor as it was with the unavailability of the original manufacturer by reason of its divestiture of assets and dissolution."<sup>108</sup> The court reached this conclusion despite an indemnification agreement between the two successor corporations, contending that it was incumbent upon the defendant successors to allocate the liability between themselves.<sup>109</sup>

The California Court of Appeals expanded *Alad*'s product-line theory in *Rawlings v. D.M. Oliver, Inc.*<sup>110</sup> In that case, the court invoked the product-line theory against a successor who never manufactured or distributed the product line that caused the injury, but continued the same general line of business.<sup>111</sup> The *Rawlings* court emphasized that the successor enjoyed the effect of its predecessor's goodwill and trade name on its remaining products.<sup>112</sup> In *Savini v. Kent Machine Works*,<sup>113</sup> however, the United States District Court for the Eastern District of Pennsylvania refused to hold liable a defendant corporation that purchased its prede-

107. *Id.*

108. *Id.* at 370, 431 A.2d at 831. The *Nieves* court found that the intermediate successor, Harris, played an integral role in destroying plaintiff's remedy against the original manufacturer. Thus, Harris should not escape liability merely because the injury did not occur while Harris was manufacturing the product.

109. *Id.* at 371, 431 A.2d at 832. This rule comports with traditional contract principles, which provide that an indemnification agreement is binding only upon the parties thereto. Therefore, the rights of the product user, a nonparty to the contract, cannot be affected.

110. 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (Cal. Ct. App. 1979). Plaintiff in *Rawlings* was injured by a kelp dryer. The dryer was custom made to the purchaser's specifications by Warren Industrial Sheet Metal. *Id.* at 894, 159 Cal. Rptr. at 120. Defendant, David Oliver, purchased the assets and goodwill of the business; however, the original owners retained the land and buildings, granting Oliver only a leasehold interest. *Id.* at 898, 159 Cal. Rptr. at 122.

111. *Id.* at 896-97, 159 Cal. Rptr. at 121-22. Oliver claimed that, while he used his predecessor's name and carried on the business in the same manner, he discontinued any custom-made orders, such as the one causing the injury. *Id.* at 898, 159 Cal. Rptr. at 121. Accepting these facts *arguendo*, the court nevertheless found liability based on *Alad*. *Id.* at 899-902, 159 Cal. Rptr. at 123-25. *But see* *George v. Parke-Davis*, 107 Wash. 2d 584, 733 P.2d 507 (1987) (plaintiff not required to rely on product-line rule in order to recover).

112. *Rawlings*, 97 Cal. App. 3d at 897, 159 Cal. Rptr. at 124-25. *See also* *Gee v. Tenneco, Inc.*, 615 F.2d 857, 864-65 (9th Cir. 1980) (absent *Alad*'s fundamental requirement that successor receive benefit of continuation of predecessor's business and goodwill, it is unfair to impose successor liability).

113. 525 F. Supp. 711 (E.D. Pa. 1981).



cessor's trade name and goodwill, but few of the predecessor's assets.<sup>114</sup> The defendant sold a different type of product, using only the original trade name.<sup>115</sup> Thus, continuation of the predecessor's business and enjoyment of its goodwill are significant elements under the product-line theory, although neither factor standing alone is dispositive.

## 2. Courts Rejecting the Theory

Courts in at least fifteen states have expressly rejected the product-line theory,<sup>116</sup> questioning the three policy rationales enunciated in *Alad*.<sup>117</sup> They reason that the predecessor derived the benefit of profits from the sale of the defective goods.<sup>118</sup> When a product proves defective after the successor has purchased the assets, trade name, and goodwill of its predecessor, the successor is deprived of the only benefit of its bargain—the predecessor's goodwill.<sup>119</sup> Consequently, the seller receives a windfall because the purchase price at the time of the acquisition did not reflect

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114. *Id.* at 721-22. The assets purchased by the successor included blueprint and file cabinets, a gear cutter, machine parts, and a set of old rolls. *Id.* at 714.

115. The defendant substituted different ink rolls for those produced by the defendant under the trade name. *Id.* at 714. The court limited the product-line exception to cases in which the successor corporation acquires "all or substantially all the manufacturing assets . . . and undertakes essentially the same manufacturing operation." *Id.* at 721-22 (citations omitted).

116. *Florum v. Elliott Mfg.*, 867 F.2d 570, 579 (10th Cir. 1989) (applying Colorado law); *Page v. Gulf Oil Co.*, 812 F.2d 249 (5th Cir. 1987) (applying Louisiana law); *Tucker v. Paxson Mach. Co.*, 645 F.2d 620, 625 (8th Cir. 1981) (applying Missouri law); *Rhynes v. Branick Mfg. 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 law); *Andrew's v. John E. Smith's Sons Co.*, 369 So. 2d 781, 785 (Ala. 1979); *Bernard v. Kee Mfg. Co.*, 394 So. 2d 552, 555 (Fla. Dist. Ct. App. 1981); *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 460 N.E.2d 895, 900-01 (1984); *De Lapp v. Xtraman, Inc.*, 417 N.W.2d 219 (Iowa 1987); *Niccum v. Hydra-Tool Corp.*, 43 N.W.2d 96 (Minn. 1989); *Simoneau v. South Bend Lathe, Inc.*, 130 N.H. 466, 469-70, 543 A.2d 407, 407 (1988); *Hamaker v. Kenwel-Jackson Mach.*, 387 N.W.2d 515 (S.D. 1986); *Ostrowski v. Hydra-Tool Corp.*, 144 Vt. 305, 308, 479 A.2d 126, 127 (1984); *Fish v. Amsted Indus.*, 126 Wis. 2d 293, 310, 376 N.W.2d 820, 821 (1985).

117. *Ray v. Alad*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1974). See *supra* notes 81-100 and accompanying text.

118. See, e.g., *Florum v. Elliott Mfg.*, 867 F.2d 570 (10th Cir. 1989); *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir. 1977).

119. *Woody v. Combustion Eng'g, Inc.*, 463 F. Supp. 817 (E.D. Tenn. 1978). In *Woody*, defendant purchased the assets of one of several divisions of the predecessor, *Keasby & Mattison Co.* (*Keasby*), including its goodwill and trade name. *Id.* at 819. More than one corporation purchased the *Keasby* goodwill and trade name. Defendant used the name for one year. *Id.* The court rejected the product-line theory, reasoning that the successor lost the primary benefit of its bargain. *Id.* at 821. Because it could derive no benefit from past sales, *Keasby's* reputation constituted the primary consideration for the bargain. *Id.*

the seller's unknown liabilities.<sup>120</sup>

Furthermore, courts rejecting the product-line theory contend that, in addition to the cost-spreading function, another goal of strict liability is to encourage manufacturers to take greater care in designing, manufacturing, and marketing products.<sup>121</sup> To support their view, these courts cite traditional strict liability principles, which hold only members of the original marketing chain liable.<sup>122</sup> Finally, critics of the product-line theory conclude that a plaintiff's lack of an alternative remedy does not, by itself, justify successor liability; rather, it merely constitutes a "restatement of the problem."<sup>123</sup>

### III. SUCCESSOR LIABILITY FOR PUNITIVE DAMAGES

#### A. History of Punitive Damages

Punitive damages awards pervade the modern tort system,<sup>124</sup> despite the erosion of their historical antecedents,<sup>125</sup> their alleged infringement

120. See *supra* notes 98-100 and accompanying text. Additionally, the original manufacturer would be unjustly enriched to the extent that it failed to incorporate the costs of safety procedures and research into the price of its product. Thus, a reckless manufacturer may be able to gain an unfair advantage over its more socially responsible competitors. *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 47 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981).

121. *Ellithorpe v. Ford Motor Co.*, 503 S.W.2d 516, 521 (Tenn. 1973). Accordingly, the *Woody* court held that a successor, who had no ability to monitor or improve the product's safety during manufacturing, could not be held responsible for the predecessor's defective product. 463 F. Supp. at 821.

122. The successor, who did not create the risk of harm and who made no representation of safety to the public, clearly does not come within the scope of the rule. Advocates of the product-line theory, however, concede this point. See *supra* note 78 and accompanying text.

123. See, e.g., *Florum v. Elliott Mfg.*, 867 F.2d 570, 581 (10th Cir. 1989) (lack of remedy for plaintiff no answer to question whether state law should adopt product-line exception).

124. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2, at 7-15 (5th ed. 1984).

125. The doctrine of punitive damages has its origins in the ancient civil law. The statutory remedy of multiple awards found in the following ancient systems represent the earliest precursors to modern punitive damages theory: Code of Hammurabi, 2000 B.C.; Hittite Law, 1400 B.C.; Hindu Code of Manu, 200 B.C. See generally G. DRIVER & J. MILES, *THE BABYLONIAN LAWS* 500-01 (1952); K. REDDEN, *PUNITIVE DAMAGES* § 2.2(A)(1) (1980).

The English common law proffered three justifications for the doctrine: (1) to justify otherwise excessive jury verdicts, see *Townsend v. Hughes*, 86 Eng.Rep. 994 (C.P. 1649); (2) to cover noncompensable injuries, especially ethereal injuries such as hurt feelings, humiliation, mental anguish and embarrassment, see *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S.W. 351, 353 (1885) (citing English scholars); and (3) to fill voids in criminal sanctions, see *Fay v. Parker*, 53 N.H. 342, 381-97 (1873) (citing excerpts from numerous English judicial opinions). See generally Comment, *Punitive Damages Awards in Strict Products Liability Litigation: The Doctrine, the Debate, the Defenses*, 42 OHIO ST. L.J. 771, 774-76 (1981) [hereinafter Comment, *Doctrine, Debate, Defenses*].

The punitive damages doctrine has been sharply criticized. See *Sales & Cole*, *supra* note 5 (arguing

on the criminal law,<sup>126</sup> and their great potential for abuse.<sup>127</sup> Punishment of the wrongdoer for past conduct and deterrence of similar future conduct—both by the involved tortfeasor and others—form the modern bases of punitive liability.<sup>128</sup> These dual rationales comport with the historical development of the doctrine. State laws have predicated these exemplary awards solely on the egregious conduct of the tortfeasor<sup>129</sup>

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in favor of "relegating this legal dinosaur to an era that long since has passed"). See also Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975); Duffy, *supra* note 5 (calling for the abolition of the doctrine).

126. Punitive damages have been characterized as an anomaly in the civil law. As one court queried:

How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant?

Fay v. Parker, 53 N.H. 342, 382 (1873). See also Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 CALIF. L. REV. 408 (1967). The principal concern of the critics is the imposition of punishment without the procedural and constitutional safeguards of a criminal trial. In rebuttal, commentators argue that the consequences of tort and criminal actions are not analogous. For example, a civil trial results in no loss of liberty or stigma. Comment, *Doctrine, Debate, Defenses*, *supra* note 125, at 780.

127. Juries have potentially limitless discretion in awarding punitive damages. Furthermore, juries tend to be more sympathetic toward the innocent consumer than the large corporation with the deep pocket. See generally Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 690-709 (1983). One commentator has proposed a damage cap of either: (1) double the compensatory damages (analogous to antitrust treble damages); (2) litigation costs plus \$10,000; or (3) a ceiling of \$1 million per plaintiff. Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 119 (1982).

128. The majority of jurisdictions has adopted the dual rationales of punishment and deterrence. J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES LAW AND PRACTICE* § 4.14, at 15-16 n.1 (1985) (citing cases and statutes from 36 states and the District of Columbia). One state, Delaware, seeks primarily to punish. See, e.g., *Malcolm v. Little*, 295 A.2d 711, 714 (Del. 1972) ("Punitive or exemplary damages are allowed not by way of recompense for injury, but as punishment to the tortfeasor.") (citation omitted). Some states also cite general deterrence as a primary goal. See, e.g., *Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 154 (Iowa 1979) ("Exemplary damages are awarded as punishment and as a deterrent to the wrongdoer and others."); *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 113, 229 S.E.2d 297, 302 (1976) (punishment and deterrence are underlying policies). Some states seek to deter both the specific tortfeasor and others. See, e.g., *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281, 289 (8th Cir. 1984) (applying Missouri law); *Frick v. Abell*, 198 Colo. 508, 511, 602 P.2d 852, 853 (1979). Other states seek to deter only the particular tortfeasor. See, e.g., *Acheson v. Shafter*, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971); *National Gypsum Co. v. Wammock*, 256 Ga. 803, 353 S.E.2d 809 (1987).

129. The language used to describe such egregious conduct differs from state to state. See, e.g., CAL. CIV. CODE § 3294(a) (West Supp. 1990) (requiring oppression, fraud, or malice, express or implied, for breach of noncontractual obligation); FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1990) (requiring willful, wanton, or gross misconduct); MINN. STAT. ANN. § 549.20 (West 1988) (requiring "clear and convincing evidence that the acts of the defendant show a willful indifference

and have not imposed punitive damages vicariously.<sup>130</sup> Thus, the personal fault of the defendant represents the cornerstone of punitive liability.

### *B. Punitive Damages and Products Liability*

The entry of punitive damages into the realm of products liability has engendered much debate. At first blush, the fault-based focus of punitive damages appears directly to contradict the no-fault doctrine of strict liability.<sup>131</sup> Because of this apparent inconsistency, many courts invoking the strict liability approach to impose compensatory damages have hesitated to apply the same approach in the context of punitive damages.<sup>132</sup> This reluctance likely stems from the differing rationales underlying each damage award. The primary goal of compensatory damages is to reimburse individuals for injuries; the primary objectives of punitive damages, on the other hand, are to punish the wrongdoer and deter similar future conduct.<sup>133</sup> The public policy of protecting innocent tort victims justifies the awarding of compensatory damages regardless of fault. But awarding punitive damages without fault—as is impliedly the case with strict liability—undermines the very objectives of the award.

Courts and commentators have proffered two theories that dispel this apparent incompatibility. Under the first theory, fault is implicit in the creation of a defective product.<sup>134</sup> The culpability of the manufacturer stems from its placing into the stream of commerce a product that fails to meet applicable safety standards.<sup>135</sup> The second theory recommends a two-tiered inquiry.<sup>136</sup> Upon a finding of strict liability, the plaintiff may make a supplementary showing of the conduct required to support an

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to the rights or safety of others”); OR. REV. STAT. § 30-925(1) (1988) (requiring wanton disregard for health, safety, and welfare of others).

130. In an agency relationship, however, a corporation may be held vicariously liable for the wanton misconduct of all employees acting within the general scope of their employment. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 7 (5th ed. 1984). A minority of jurisdictions has adopted the complicity rule, which requires a showing that a high-level employee ordered, participated in, or ratified the misconduct. See Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 221 (1960).

131. See Comment, *Doctrine, Debate, Defenses*, *supra* note 125, at 781-82.

132. See *infra* note 138.

133. See *infra* note 173 and accompanying text (*Brotherton* court’s justification of compensatory and punitive damages).

134. Comment, *Doctrine, Debate, and Defenses*, *supra* note 125, at 781-82.

135. *Id.*

136. *Id.*

award of additional damages.<sup>137</sup>

### C. Successor Corporation Liability for Punitive Damages

Despite some reservations,<sup>138</sup> most jurisdictions have approved punitive damages in the products liability context.<sup>139</sup> Few courts, however, have decided whether a successor corporation may be liable for punitive damages. A recent series of cases involving the asbestos products of the now-defunct Phillip Carey Manufacturing Company constitutes the bulk of litigation in this area.<sup>140</sup> The identity of facts,<sup>141</sup> similar procedural posture,<sup>142</sup> and nationwide scope of these cases make this line of cases an excellent vehicle for extrapolating the various state approaches to successor corporation liability for punitive damages.

Phillip Carey Manufacturing Company (Carey) had engaged in the manufacturing and mining of various asbestos products from 1906 until 1970, when it ceased to exist pursuant to a merger agreement with Briggs

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137. *Id.* See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 7 (4th ed. 1971).

138. In *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), Judge Friendly expressed three concerns regarding the imposition of punitive damages against a large drug manufacturer exposed to an unlimited number of claims. First, the court perceived the "gravest difficulty" in managing such a multiplicity of suits to avoid overkill. *Id.* at 839. Courts and commentators have proffered various solutions for this problem. See *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 384-85, 387, 391, 396 (E.D. Pa. 1982) (allowing court to grant a request for remittitur); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 282-84, 294 N.W.2d 437, 459-61 (1980) (allowing jury to consider past and potential future liability); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 52 (1982) (suggesting that jury determine propriety of an award of punitive damages; amount to be left to judge's discretion).

Second, manufacturers ultimately will pass on the costs—whether resulting from high insurance premiums or an actual damage award—to consumers in the form of increased price or decreased quality. 378 F.2d at 841. *But cf.* Comment, *Doctrine, Debate, Defenses*, *supra* note 125, at 784 (competitive market restrains manufacturer from passing on all costs).

Third, innocent shareholders are punished as a result of fewer earnings distributions or the depressed market value of their stock. 378 F.2d at 841. In an extreme case, the shareholders may suffer a total loss of investment if the company goes bankrupt. Most commentators consider this result the risk inherent in investment and a means of encouraging shareholders to exercise greater control. See *Wangen*, 97 Wis. 2d at 291, 294 N.W.2d at 453-54. *But see* Jones, *Corporate Governance: Who Controls the Large Corporations?*, 30 HASTINGS L.J. 1261, 1263 (1979) (pointing out the divorce of shareholder ownership from control and the marked trend toward management control).

139. See Comment, *Doctrine, Debate, Defenses*, *supra* note 125, at 793 (listing states that have considered punitive damages awards in the strict liability context).

140. See *infra* notes 143-53 and accompanying text.

141. Unless otherwise noted, all cases discussed herein involve the acquisition described *infra* notes 143-53 and accompanying text.

142. In each case, the defendant successor corporation raised either a motion in limine or a motion for summary judgment on the issue of punitive damages. The denial of either motion merely sends the issue to the jury; it does not assume an ultimate award of damages.

Manufacturing Company (Briggs).<sup>143</sup> Prior to the merger, Carey produced insulation that led to plaintiffs' injuries.<sup>144</sup> Briggs succeeded to all of Carey's assets and liabilities, changed its name to Panacon, and continued the roofing and insulation operations through a "Phillip Carey" division.<sup>145</sup> Shortly thereafter, the defendant, Celotex, purchased a majority of Panacon's stock for cash and then executed a cash-out merger in order to obtain the remaining shares; Panacon ceased to exist.<sup>146</sup>

Celotex's Phillip Carey division discontinued the manufacture of the insulation products that injured plaintiffs. However, it distributed the remaining line of such products under the same brand name with warning labels attached.<sup>147</sup> Celotex retained some of Panacon's employees, including at least one officer.<sup>148</sup> Plaintiffs sought punitive damages from Celotex, basing their claim on the predecessor's failure to reveal knowledge of the health risks posed by exposure to asbestos.<sup>149</sup>

Given the disagreement over the appropriate test for compensatory damages,<sup>150</sup> it is not surprising that the results reached by different forums in these cases vary with respect to punitive damages as well. First, two fundamentally different viewpoints have emerged with respect to the treatment of statutory mergers such as the one in question.<sup>151</sup> In addition, although some courts have agreed on the inappropriateness of the product-line theory in the context of punitive damages,<sup>152</sup> they have reached no consensus regarding the proper application of a continuity-of-enterprise or identity test.<sup>153</sup>

### 1. Statutory Merger

One approach, applied by the Supreme Court of Florida in *Celotex Corp. v. Picket*,<sup>154</sup> views a statutory merger as the vehicle for imposing both compensatory and punitive damages.<sup>155</sup> In *Picket*, the court held

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143. See, e.g., *In re Related Asbestos Cases*, 566 F. Supp. 818, 820 (N.D. Cal. 1983).

144. See, e.g., *id.* at 820.

145. *Id.*

146. For a definition of a cash-out merger, see *supra* note 12.

147. *Sheppard v. A.C. & S. Co.*, 484 A.2d 521, 524 (Del. Super. Ct. 1984).

148. *Id.* at 524.

149. *Id.*

150. See *supra* notes 12-23 and accompanying text.

151. See *infra* notes 154-65 and accompanying text.

152. See *infra* notes 166-72 and accompanying text.

153. See *infra* notes 174-79 and accompanying text.

154. 490 So. 2d 35, 38 (Fla. 1986).

155. See also *Marks v. Minnesota Mining & Mfg. Co.*, 187 Cal. App. 3d 1429, 232 Cal. Rptr.

that a successor may be liable for punitive damages whenever its successorship is the product of a statutory merger.<sup>156</sup> The court reasoned that, following a merger, the surviving entity “cannot . . . disclaim its lineage.”<sup>157</sup>

The *Picket* court found no justification for treating punitive damages liability differently from any other contingent liability.<sup>158</sup> Moreover, the court contended that its decision fulfilled the two primary goals of punitive damages—punishment and deterrence.<sup>159</sup> According to the court, such a rule punishes the “present [legal] embodiment” of the entity whose conduct gave rise to the injury.<sup>160</sup> The threat of punitive damages also deters potential buyers from seeking to acquire companies that have engaged in reckless behavior, forcing acquisition candidates to behave according to acceptable standards.<sup>161</sup>

## 2. Two-Step Approach

In contrast to the *Picket* court’s statutory merger approach, the Superior Court of New Jersey adopted a two-step approach in *Brotherton v. Celotex Corp.*<sup>162</sup> Under this test, the finding of a statutory merger merely satisfies a necessary predicate for the imposition of punitive damages; it does not alone impose liability.<sup>163</sup> An independent test—either the con-

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594 (Cal. Ct. App. 1986) (transfer of liabilities includes punitive damages where all indicia of merger are present).

156. *Accord* *Duca v. Raymark Indus.*, No. 84-0587, slip op. at 4 (E.D. Pa. Nov. 7, 1986) (statutory merger transfers liability for punitives, even absent continuity of ownership or management); *Krull v. Celotex Corp.*, 611 F. Supp. 146, 148-49 (N.D. Ill. 1985) (defendant who failed to note fundamental difference between merger and asset purchase is responsible for liability resulting from merger); *Hanlon v. Johns-Manville Sales Corp.*, 599 F. Supp. 376, 378 (N.D. Iowa 1984).

157. *Pickett*, 490 So. 2d at 38.

158. *Id.* at 37-38.

159. *Id.* at 38.

160. *Id.*

161. *Id.* Thus, the court was concerned with deterring only the individual tortfeasor and not similarly situated companies. The court analogized the role of the potential buyer in monitoring corporate conduct to that of the shareholders. The court’s position, however, appears rather tenuous. It is doubtful that the threat of successor liability will have a very strong impact at the time of manufacture, as the potential buyer might not even have contemplated acquisition or the manufacturer a sale. Furthermore, neither the predecessor nor a potential buyer may learn of a potential defect until long after the acquisition. Most courts prefer to premise liability on general deterrence. *See supra* note 128.

162. 202 N.J. Super. 148, 493 A.2d 1337 (N.J. Super. Ct. Law Div. 1985).

163. *Id.* at 155, 493 A.2d at 1340. The court did not state this position explicitly; however, the court’s reasoning supports this interpretation. The court first stated that a statutory merger is sufficient to transfer all obligations of the predecessor. However, the court devoted most of its opinion to

tinuity-of-enterprise or the product-line theory—then determines whether punitive damages are appropriate.<sup>164</sup> Under the *Brotherton* court's two-step approach, therefore, a statutory merger provides a sound basis for compensatory liability, but serves only as a prerequisite for an award of punitive damages under traditional tort principles.<sup>165</sup>

*a. Continuity of Enterprise*

Courts employing the two-step test of *Brotherton* almost uniformly have rejected the *Alad* product-line theory<sup>166</sup> in favor of the continuity-of-enterprise theory for determining the propriety of punitive damages.<sup>167</sup> In *In re Related Asbestos Cases*,<sup>168</sup> the United States District Court for the Northern District of California concluded that “the justifications underlying successor liability for compensatory damages articulated in *Ray v. Alad* simply are not present [when punitive damages are sought].”<sup>169</sup> In particular, the court noted the possibility of a windfall to the plaintiff,<sup>170</sup> the potential depletion of the successor's assets,<sup>171</sup> and the successor's inability to assume a risk-spreading role.<sup>172</sup> The continuity

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discussing the “appropriateness of punitive damages,” concluding that “punitive damages [are] not appropriate in all situations where compensatory damages [are] awarded . . . .” *Id.* at 156, 493 A.2d at 1341. This language indicates that a statutory merger transfers merely compensatory liability to a successor, thus making punitive damages *available*. A different test then determines whether punitive damages are *appropriate*. See *infra* notes 164-86 and accompanying text.

164. *Brotherton*, 202 N.J. Super. at 157-59, 493 A.2d at 1342-43.

165. See *supra* note 128 and accompanying text.

166. One court has accepted the product-line theory in the punitive damages context. See *Oliver v. GAF Corp.*, No. 83-4208, slip. op. (E.D. Pa. July 17, 1985). A few courts afford special treatment to the statutory merger. See *supra* notes 154-61 and accompanying text.

167. See, e.g., *Duca v. Raymark Indus.*, No. 84-0587, slip op. at 6 (E.D. Pa. Nov. 7, 1986); *In re Related Asbestos Cases*, 566 F. Supp. 818 (N.D. Calif. 1983); *Brotherton v. Celotex*, 202 N.J. Super. 148, 156, 493 A.2d 1337, 1341 (N.J. Super. Ct. Law Div. 1985); *Martin v. Johns-Manville Corp.*, 322 Pa. Super. 348, 469 A.2d 655 (1983). Interestingly, all of these states—New Jersey, Pennsylvania and California—have adopted the *Alad* product-line theory in the compensatory damages context. See *supra* notes 102-04.

168. 566 F. Supp. 818 (N.D. Cal. 1983).

169. *Id.* at 822.

170. *Id.* Because the plaintiff is not entitled to punitive damages as a matter of right, he arguably reaps a windfall to the extent that his recovery exceeds the actual harm suffered. K. REDDEN, PUNITIVE DAMAGES § 3.4(A) (1980). Justifying this windfall, some commentators view punitive damages as a means of compensating the plaintiff for attorney's fees. Because the first plaintiff takes the greatest risks and incurs the highest transaction costs, he arguably deserves an increased award. See Comment, *Doctrine, Debate, Defenses*, *supra* note 125, at 786.

171. 566 F. Supp. at 822. Large awards to initial plaintiffs could deplete assets of the successor and deprive future claimants of compensatory damages to which they are entitled.

172. *Id.* With respect to compensatory damages, the predecessor and successor are in virtually



theory, on the other hand, better comports with the primary goals of punitive damages by focusing on the identity of the two corporations.<sup>173</sup>

*b. Continuity of Personnel*

Courts adhering to the line of reasoning in *Asbestos Cases* purport to apply the *Turner* test<sup>174</sup> in the punitive damages context.<sup>175</sup> Several courts, however, have significantly altered the test by focusing almost exclusively on one factor—the continuity of personnel.<sup>176</sup> In *Brotherton*, for example, the court found that evidence of the existence of one common employee with personal knowledge of the predecessor's potential liability was sufficient to defeat the successor corporation's motion for summary judgment.<sup>177</sup> Similarly, the *Asbestos Cases* court rejected the

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the same position to spread the risk by obtaining insurance or passing the costs on to consumers. *See supra* note 97. However, the successor will be unable to obtain insurance coverage for punitive damages in the majority of jurisdictions. In these jurisdictions, public policy dictates that the wrongdoer should not be able to insure against wrongful acts that merit exemplary awards. *See* *Dorsey v. Continental Casualty Co.*, 730 F.2d 675 (11th Cir. 1984); *Northwestern Nat'l Ins. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *City of Prods. Corp. v. Globe Indem. Co.*, 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (Cal. Ct. App. 1979); *Brown v. Westen Casualty & Ins. Co.*, 484 P.2d 1252 (Colo. App. 1971); *Hartford Accident & Indem. Co. v. United States Concrete Pipe Co.*, 369 So. 2d 451 (Fla. Dist. Ct. App. 1979); *Guaranty Abstract & Title Co. v. Interstate Fire & Casualty Co.*, 228 Kan. 532, 618 P.2d 1195 (1980).

Courts in other jurisdictions allow insurance coverage by refusing to interject public policy concerns into a private contract between the insured and insurer. *See, e.g.*, *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *First Nat'l Bank of St. Mary's v. Fidelity Ins. & Deposit Co.*, 283 Md. 228, 389 A.2d 359 (1978); *Anthony v. Frith*, 394 So. 2d 867 (Miss. 1981); *Harrell v. Traveler's Indem. Co.*, 279 Or. 199, 567 P.2d 1013 (1977); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964); *Hensley v. Erie Ins. Co.*, 168 W. Va. 172, 283 S.E.2d 227 (1981).

173. The *Brotherton* opinion concluded that the distinct purposes of the two theories allow them to operate coextensively:

The product line theory is designed to liberalize recovery for plaintiffs left remediless against a defunct corporation. This aim is consistent with the rationale behind compensatory damages, which is to reimburse individuals for losses sustained . . . The continuation test fulfills a different function. This test allows punitive damages to be assessed against a successor where it shares certain similarities with its predecessor. By creating an identity requirement, the continuation test furthers the primary objectives of punitive damages, i.e., punishment of the wrongdoer and deterrence of similar conduct in the future.

202 N.J. Super. at 158-59, 493 A.2d at 1342 (citations omitted).

174. *See supra* notes 58-80.

175. *See, e.g.*, *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337 (N.J. Super. Ct. Law Div. 1985).

176. *In re Related Asbestos Cases*, 566 F. Supp. 818, 823-24 (N.D. Cal. 1983); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 160, 493 A.2d 1337, 1342-43 (N.J. Super. Ct. Law Div. 1985); *Martin v. Johns-Manville Corp.*, 322 Pa. Super. 348, 370-72, 469 A.2d 655, 666-67 (1983).

177. 202 N.J. Super. at 159-60, 493 A.2d at 1342-43. The court distinguished *Asbestos Cases*, in which a U.S. district court held that plaintiff's allegation that Lewis Pechstein, a former employee of

plaintiff's mere continuation theory in the absence of a showing that the successor continued to employ culpable and responsible officers of the predecessor.<sup>178</sup> Critics argue that an approach that focuses on continuity of personnel ignores the nature of a corporation as a separate legal entity.<sup>179</sup>

*c. Successor's Conduct as a Defense*

One court has suggested another alteration of the traditional compensatory damages test by recognizing the successor corporation's conduct as either a complete defense or a mitigating factor. The Sixth Circuit in *Drayton v. Jiffee Chemical Corp.*<sup>180</sup> first recognized the possibility of a defense based on a change in corporate ownership.<sup>181</sup> In that case, the plaintiff brought an action seeking damages for injuries caused by the successor corporation's liquid drain cleaner.<sup>182</sup> The court reasoned that improving industry practices negated the deterrent function of punitive damages.<sup>183</sup> Furthermore, the new management had purged itself of pre-existing misconduct, thus eliminating the punitive function of exemplary damages.<sup>184</sup>

Other courts have taken a successor's conduct into account by finding that the successor corporation has an independent duty to warn.<sup>185</sup> Nev-

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Carey, was elected secretary of Celotex did not create a genuine issue of material fact on the identity issue. See *Asbestos Cases*, 566 F. Supp. at 823. In *Brotherton*, however, plaintiff proffered additional evidence linking Pechstein to the culpable conduct. Pechstein had hired Dr. Mancuso, a medical consultant, to advise the company on the relationship between asbestos and cancer. *Brotherton*, 202 N.J. Super. at 160, 493 A.2d at 1343. Pechstein discharged Mancuso after receiving findings unfavorable to the company. *Id.*

178. *Asbestos Cases*, 566 F. Supp. at 823. Another court has suggested that the "quality, as well as quantity" of overlapping personnel might play an integral role in the analysis. *Martin v. Johns-Manville Corp.*, 322 Pa. Super. 348, 372 n.22, 469 A.2d 655, 667 n.22 (1983).

179. *Duca v. Raymark Indus.*, No. 84-0587, slip. op. at 4 (E.D. Pa. Nov. 7, 1986). That court noted that, even in the absence of an acquisition, the same corporate personnel who made the decisions at the time of exposure most likely were not still with the company, or even alive, at the time of suit, given the lag time between exposure and litigation. *Id.* Moreover, the *Duca* court reasoned, liability fulfills the primary goal of punitive damages—general deterrence—regardless of changes in personnel within the offending corporation. *Id.* But see *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 353, 365 (6th Cir. 1978) (punishment is primary goal of punitive damages, general deterrence is secondary).

180. 591 F.2d 352 (6th Cir. 1978).

181. *Id.* at 366.

182. *Id.*

183. *Id.*

184. *Id.*

185. In dictum, the court in *Nieves v. Bruno Sherman Corp.*, 86 N.J. 361, 431 A.2d 826 (1981),

ertheless, courts disagree with respect to the role that a successor's conduct should play.<sup>186</sup>

#### IV. PROPOSAL

A few courts purportedly have settled the issue of punitive damages against a successor corporation for products liability.<sup>187</sup> These courts essentially have presumed the propriety of punitive damages under the circumstances by focusing solely on the determination of which test should apply.<sup>188</sup> In doing so, they have effectively circumvented the central question: Are punitive damages in fact appropriate in this context? A second fundamental flaw in this line of cases is the assumption that the court must choose between either the product-line or continuity-of-enterprise theory.<sup>189</sup>

The courts properly have concluded that the product-line theory does not justify the imposition of punitive damages.<sup>190</sup> Three of the four traditional justifications for strict liability are not implicated in the punitive damages context.<sup>191</sup> The fourth—the greater ability to absorb the

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also alluded to an independent ground of liability arising from a duty to update the product and warn of known dangers. *Id.* at 369, 431 A.2d at 832. Other courts have suggested a possible duty to warn in dictum as well. The mere continuation of the predecessor's name and the acquisition of goodwill will not, standing alone, give rise to a duty. *Travis v. Harris Corp.*, 565 F.2d 443, 448 (7th Cir. 1977). Factors to consider include: succession to service contracts, coverage of a particular machine under service contract, knowledge of the defects, and knowledge of the location of the owner or machine. *Id.* at 449. *See also* *Leannais v. Cincinnatti*, 565 F.2d 437 (7th Cir. 1977). Thus, the duty stems from the establishment of a relationship between the successor and the customers of the predecessor, rather than the nexus between the two entities. *Polius v. Clark Equip. Co.*, 802 F.2d 75, 84 (3d Cir. 1986); *Monzingo v. Corrett Mfg. Co.*, 752 F.2d 168, 177 & n.12 (5th Cir. 1985).

186. *Compare In re Related Asbestos Cases*, 566 F. Supp. 818, 824 (N.D. Cal. 1983) (citing lack of evidence that defendant perpetuated the conduct in denying punitive damages) *with* *Martin v. Johns-Manville Corp.*, 322 Pa. Super. 348, 372, 469 A.2d 655, 667 (1983) (fact that successor does not continue product line or cures defect does not exonerate it). One commentator would allow the acquisition alone to mitigate the amount of any damages award. *See Comment, Doctrine, Debate, Defenses, supra* note 125, at 790-92 (corporate acquisition can be used to mitigate amount of award only and should not be a per se defense).

187. *See supra* notes 155, 162.

188. *See supra* notes 166-78 and accompanying text.

189. In *Duca*, the United States District Court for the Eastern District of Pennsylvania perceived this problem: "The parties have briefed the issue as though we must choose between the product-line test . . . and the degree of identity test . . . We disagree." *Duca v. Raymark Indus.*, No. 84-0587, slip. op. at 5 (E.D. Pa. Nov. 7, 1986) (citations omitted). This proposal resolves the problem by adopting a test that does not distinguish between the different tests for finding compensatory liability in successor products liability cases. *See infra* notes 200-17 and accompanying text.

190. *See supra* notes 166-71 and accompanying text.

191. *See supra* note 56 and accompanying text (punitive damage justifications). The successor

costs—does not alone provide a sufficient basis for imposing exemplary damages. Unlike compensatory damages, the primary goal of exemplary damages is to punish and deter, not to compensate the victim.

As a result, most courts have focused on the continuity-of-enterprise test, as did the court in *Brotherton*.<sup>192</sup> While the continuity-of-enterprise theory may better comport with punitive damages than the product-line theory,<sup>193</sup> its policy justifications also begin to deteriorate in the punitive damages context. First, the argument that the successor has deprived the tort claimant of his remedy against the original manufacturer<sup>194</sup> loses strength once the plaintiff has collected compensatory damages. Second, some courts treat the acquisition as a contract, deciding that the purchaser who receives the benefits of a going concern also must bear its burdens.<sup>195</sup> While manufacturers should anticipate compensatory damages for products liability in the ordinary course of business, punitive damages—premised on unknown conduct of the predecessor—arguably extend beyond the scope of the bargained-for agreement.<sup>196</sup>

The continuity theory<sup>197</sup> is also inapposite in the punitive damages context for some of the same reasons that invalidate the product-line the-

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did not place the defective product in the stream of commerce, nor did it impliedly represent the product's safety. Both of these actions occurred at the point of manufacture. One could argue that the third justification—the ability to improve the product or cure the defect—applies equally to the successor and the predecessor. A necessary predicate, however, is that the successor must first be put on notice of the defect before this duty is triggered. *See Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348, 384 (Cal. Ct. App. 1981) (noting manufacturer's knowledge of the defect as an element of punitive damages finding in products liability).

192. *See supra* notes 175-78 and accompanying text.

193. *See supra* notes 166-73 and accompanying text.

194. *See supra* notes 38-40 and accompanying text. Some critics might argue that the successor deprived the plaintiff of his sole remedy by causing the dissolution, and that this deprivation constitutes sufficient "fault" to incur punitive damages. *Cf. Knapp v. North American Rockwell Corp.*, 506 F.2d 361, 369-70 (1974) (describing successor's causation of predecessor dissolution in culpatory language). Even accepting this reasoning *arguendo*, a court should recall that the purpose of punitive damages in tort liability is to punish the defendant for malfeasance that causes the injury, not for wrongdoing that denies the remedy.

195. *See supra* notes 45-46 and accompanying text.

196. To ignore this distinction is to argue that the successor-to-be must take unknown, and likely hidden, malfeasance by the predecessor into account during bargaining. *But cf. Celotex Corp. v. Picket*, 490 So. 2d 35, 38 (Fla. 1986), *supra* notes 154-58 and accompanying text (treating damages as any other contingent liability).

197. Courts imposing punitive liability do not state clearly whether they are relying on the traditional corporate rule, *see supra* notes 12-15 and accompanying text, or the expanded *Turner* approach, *see supra* notes 58-59 and accompanying text. However, because they do not focus on the commonality of shareholder interests, these courts implicitly adopt the *Turner* rule. *See, e.g., Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337 (N.J. Super. Ct. Law Div. 1985).

ory. Because the notion of fault is critical to a finding of punitive liability, courts must not forget that principles of strict liability form the undergirdings of both theories.<sup>198</sup> Furthermore, the nexus between the predecessor and the successor required by the continuity theory<sup>199</sup> essentially serves the same purpose as the successor's continuation of a product line for the purposes of punitive damages: providing evidence of knowledge of the alleged misconduct. Neither test alone, therefore, provides the requisite degree of fault for punitive liability.

*Brotherton* and its progeny have taken a step in the right direction by requiring a two-step inquiry.<sup>200</sup> A de jure or de facto merger<sup>201</sup> serves the same function in the corporate law as a finding of strict liability in tort law. Mergers present sufficient policy grounds to confer compensatory liability as a matter of law, with no further culpability requirement.<sup>202</sup> Similarly, strict liability automatically imposes liability without a finding of fault.<sup>203</sup> Neither theory alone suggests a proper basis for imposing successor punitive damages liability.

The *Brotherton* holding represents only a start, however; the adopted test contains a problem in each of its two steps. In the first step, the court specifically required a statutory merger to invoke succession of punitive damages.<sup>204</sup> Yet many courts have already decided that successor liability can follow from de facto mergers or other continuity principles.<sup>205</sup> Little differentiates the statutory from the de facto merger that would affect the assessment of punitive damages.<sup>206</sup>

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198. Cf. *supra* notes 74-78, 94-100. Courts should look beyond the "corporate" and "tort" labels attached to the two theories. Instead, they must recognize the need for an extra step, one that involves some element of fault.

199. See *supra* notes 41-46 and accompanying text.

200. See *supra* notes 161-64 and accompanying text.

201. The *Brotherton* court actually required a de jure, or statutory, merger. However, this proposal will argue that the distinction between de jure and de facto mergers has no relevance to the punitive damages inquiry. See *infra* notes 204-06 and accompanying text.

202. That a merger saddles the successor with ordinary debt liability of the predecessor seems hardly open to question. Otherwise, a company could eliminate any debt simply by merging with another company. Compensatory damage liability based on strict product liability presents a tougher question—due to the successor's freedom from even the implied culpability inherent in placing the product in the market. Nevertheless, courts generally have found that sufficient benefit flows to the successor from the predecessor's market exploitation to justify the imposition of successor liability here as well. See *supra* notes 98-100 and accompanying text.

203. See *supra* note 131.

204. *Brotherton v. Celotex*, 202 N.J. Super. 148, 154-55, 493 A.2d 1337, 1340 (N.J. Super. Ct. Law Div. 1985).

205. See *supra* notes 24-80 and accompanying text.

206. The *Brotherton* court suggested the one potential distinction: "By executing [this statutory

The *Brotherton* second step fails in addressing only further aspects of similarity between the predecessor and the successor. It improperly focuses on the continuity of culpable personnel.<sup>207</sup> Although this requirement strives to fulfill the punishment and deterrent functions of punitive damages,<sup>208</sup> it ignores the true legal nature of the corporate entity, as exacerbated by the inevitable lag time that typifies products liability litigation.<sup>209</sup> Courts instead should require a supplemental showing of aggravating conduct in order to justify punitive damages in either case.<sup>210</sup>

The essence of the successor liability problem is that one of two innocent parties must bear costs of a harmful product manufactured by a wrongdoer who no longer exists. While public policy mandates a bending of the rigid corporate rule in order to compensate innocent tort victims adequately, the rationales behind the exceptions fail to justify the imposition of punitive liability.<sup>211</sup> Because a successor corporation derives liability from the pre-acquisition conduct of its predecessor, successorship should not serve as the sole basis for exemplary damages.

Rather, courts should premise liability on the successor's postacquisition conduct. The imposition of punitive damages on a successor corporation should require evidence that the successor perpetuated the predecessor's misconduct. Alternatively, courts should impose liability when a successor had actual knowledge of a defect,<sup>212</sup> but concealed it rather than curing it or issuing a warning. To the extent that the successor-predecessor relationship is a source of such knowledge, it is relevant to a finding of liability. The proposed theory, however, emphasizes the relationship between the successor corporation and its predecessor's customers.<sup>213</sup> Thus, evidence establishing a link between the successor and

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merger, the successor] became statutorily bound to absorb all the liabilities of [the predecessor], including any potential claims for punitive damages." 202 N.J. Super at 154, 493 A.2d at 1339. That court nonetheless did not find the distinction sufficient; if it had, it would have needed no second test of continuity. It must have assumed that even the statutory requirement of assuming liabilities did not include punitive product liabilities.

207. See *supra* notes 175-79 and accompanying text.

208. Most courts justify liability on the basis of general deterrence. See *supra* notes 127, 178 and accompanying text. Thus, there is arguably no need for continuity between the enterprises because the primary tortfeasor is not the party the court seeks to deter.

209. See *supra* notes 10, 142 and accompanying text.

210. See *supra* notes 134-37 and accompanying text (understanding of fault in simple products liability punitive damages cases).

211. See *supra* notes 134-36 and accompanying text.

212. See *supra* note 185-86.

213. Because the focus is no longer on the nexus between the selling and buying corporation, the mere continuation of the business and acquisition of goodwill will not suffice for punitive damages

the predecessor's customers is significant. Such indicia may include: honoring warranties; assuming service contracts, particularly with respect to the defective product; using the predecessor's customer lists to market the same or similar products; and failing to warn a known customer of a danger.<sup>214</sup>

A theory focusing on the successor's "culpability" would have led to substantially different results than under the product-line and continuity theories. For example, a successor that purges itself of the predecessor's misconduct will not incur punitive liability even though it continues the same product line. Alternatively, a successor that discontinues the product still may incur liability for intentionally concealing the predecessor's wrongdoing.<sup>215</sup> Furthermore, the mere fact that an acquisition meets the requirements of the continuity theory will not suffice. Under the facts of *Brotherton*,<sup>216</sup> the defendant would have been exonerated, despite the overlap of culpable personnel, because it sold the predecessor's product with a warning label attached.

A further benefit accrues from this culpability inquiry: it dispenses with *Brotherton's* restrictive first step.<sup>217</sup> Courts should be less reluctant to assess punitive damages to any successor entity from whom successor compensatory damages are available when an extra culpability requirement is added. This movement in turn will eliminate the statutory merger anomaly from *Brotherton's* first step.

By shifting the focus of the inquiry to the fault of the successor, rather than to some derivative test, this proposal accommodates the corporate law's quest for certainty. Furthermore, it comports with traditional tort principles and the goals of punitive damages.

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liability. See *supra* note 86. This theory would, for example, alter the result in *Rawlings v. D.M. Oliver, Inc.*, 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (Cal. Ct. App. 1979). See *supra* notes 89-91 and accompanying text.

214. See *supra* notes 185-86 and accompanying text.

215. The proposal would impose liability in such a case given the existence of other elements leading to a finding of compensatory damage liability. See *supra* notes 204-06 and accompanying text.

216. *Brotherton v. Celotex*, 202 N.J. Super. 148, 493 A.2d 1337 (N.J. Super. Ct. Law Div. 1985). See *supra* notes 143-49, 162-65, and accompanying text.

217. The *Brotherton* court's first step required a formal statutory merger. This proposal criticizes such a strict test. See *supra* notes 204-06 and accompanying text.

