

SUCCESSOR CORPORATION PRODUCTS LIABILITY—SIX OR MORE CHARACTERS IN SEARCH OF AN AUTHOR

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I. INTRODUCTION

The United States Third Circuit Court of Appeals recently described the state of successor corporation products liability as “caught up in the swirling cross currents of products liability and corporate successor responsibility.”¹ Indeed it is. What is the key—or what should be the key—to successor liability? A host of apparently relevant factors moil around: shareholder continuity; officer or director continuity; continuity of employees or of key personnel; continuation of the same product line, including design, blueprints, logo, trade name, goodwill, corporate name and plant location; dissolution of the predecessor; and the successor holding itself out as essentially a continuation of the predecessor. A sub-current of litigation also exists regarding the duty of the successor corporation or entity, *B*, to warn or take other remedial action concerning products manufactured or sold by the predecessor entity, *A*, whether or not *B* is considered the legal or de facto successor of *A*.

One can attribute a large part of the uncertainty in this area to the inability of courts to settle on a policy rationale for imposing successor liability. A number of courts have expressed concern about the possible adverse effect of successor liability on small corporations. Other courts are concerned about the apparent inequity of imposing liability on a successor that did not make the product in question and, therefore, did not cause the injury. They are further troubled by the perceived absence of any deterrent value in placing liability on a corporation that did not manufacture the offending product and thus could not have prevented the injury. Still other courts have difficulty applying the doctrine when *B* does not purchase all the assets of *A*, when *A* continues in existence after

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1. *Polius v. Clark Equip. Co.*, 802 F.2d 75 (3d Cir. 1986).

an asset purchase by *B*, or when *B* purchases *A*'s assets in a bankruptcy sale. These last concerns evidence a desire to find some kind of fault on the part of *B* for making suit against *A* impractical, as well as concerns about continuity between *A* and *B*.

Luigi Pirandello, in his play *Six Characters In Search Of An Author*,² presents the dilemma of six characters created by an author who refuses to write the play in which they can act out their roles. The characters go to a play manager and ask him to write their play for them, yet they insist on providing the script, even down to the minutest detail of stage props and voice intonation. Ironically, the author, in spite of his protestations, is the creator of each of the six characters, and they are only as real as he makes them. In an introduction to his collection of plays of Pirandello, Eric Bentley writes, "[t]his is the place to remember to how large an extent form is meaning."³

In trying to write the successor corporation products liability drama, courts must face more than six characters, all clamoring to be heard, and all trying to shape the play by their own conception of continuity. In Pirandello's play, one character, the Son, tries to remain uninvolved in the writing of the script. Yet the Father says of the Son: "He says he doesn't come into the affair, whereas he is really the hinge of the whole action."⁴ That linchpin character in successor corporation liability has yet to be identified clearly and rationalized by the courts. How that character is defined, however, depends on the questions we ask and deem important. Are we concerned about deterrence, causation, certainty in the law, economics, or something else? The answer, of course, varies depending on which question one asks and the importance one assigns it.

Probably the underlying explanation for imposing products liability on a successor corporation is what I have elsewhere described as the cloning or "look-alike" rationale.⁵ To a large extent, as Bentley reminds us,⁶

2. L. PIRANDELLO, *Six Characters in Search of an Author*, in *NAKED MASKS: FIVE PLAYS BY LUIGI PIRANDELLO* 211-276 (E. Bentley ed. 1952).

3. Bentley, *NAKED MASKS: FIVE PLAYS BY LUIGI PIRANDELLO* (E. Bentley ed. 1952) at xxii.

4. L. PIRANDELLO, *supra* note 2, at 234.

5. Phillips, *Reply: Product Line Continuity As The Basis For Successor Corporation Liability*, 31 WAYNE L. REV. 149, 152 (1984). The business continuity theory proposed by the author asserts that a successor should be held liable for its predecessor's torts when the predecessor's business is "deemed metamorphosed into" the successor's business. *Id.* at 152. Under this proposal, a predecessor's business is effectively continued for purposes of imposing successor liability when the successor "clones" the predecessor after the purchase. *Id.* at 151-52.

The Father in *Six Characters* has a ready reply for the above explanation: "Phrases! Isn't anyone consoled when faced with a trouble or fact he doesn't understand, by a word, some simple word,

form is meaning. Our task as lawyers—in this area as in others—is to determine the form we wish to give to meaning. Explanations, and criticisms, are ready at hand for any form chosen. The best form, however, will be the one that seems most in keeping with both felt traditions and the current needs of our times.⁷

My own predilection is still for the cloning, or look-alike, approach. Regrettably, in this area as in others no bright line rule seems practical. The basic concerns of tort law, causation and deterrence, cannot, however, be ignored. It may be that the linchpin in these concerns is the continuing duty to warn or to take other remedial action—a duty that this area of products liability has so far largely ignored.

II. CURRENT TRENDS IN THE LAW

When *B* purchases the business of *A*, *B* can be held liable for injuries caused by defective products sold by *A* before the business purchase, even though the injuries do not occur until after the purchase. This liability can arise by an agreement between *B* and *A* to assume such liabilities, or as the result of a fraudulent transfer of assets from *A* to *B* in an attempt to avoid the creditors of *A*, but these situations rarely occur.⁸ More commonly, liability is imposed based on findings of (1) a continuation of *A*'s business by *B*, (2) the dissolution of *A* as soon as reasonably practicable after the sale of the business to *B*, (3) the assumption by *B* of the obligations of *A* necessary for the normal operation of the business, and (4) *B*'s holding itself out to the public as continuing the business originally owned by *A*.⁹

Factors (1) and (4) can be collapsed into a single consideration, because if *B* continues the business of *A* it inherently holds itself out as doing so, and conversely no effective holding out occurs in the absence of

which tells us nothing and yet calms us?" Nonetheless, the Father's remarks are in response to the Son's sneering at a phrase, "the Demon of Experiment," which is central to the Father's and the author's concept of reality. L. PIRANDELLO, *supra* note 2, at 222, 234. Compare *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.").

6 Bentley, *supra* note 3 and accompanying text.

7. "The process by which society accomodates to change without abandoning its fundamental structure is what we mean by law." G. GILMORE, *THE AGES OF AMERICAN LAW* 14 (1977).

8. See Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. REV. 906, 908 (1983).

9. *Shannon v. Samuel Langston Co.*, 379 F. Supp 797, 801 (W.D. Mich. 1974) (citing *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 561, 264 A.2d 98, 103-05 (1970)). *Accord Menacho v. Adamson United Co.*, 420 F. Supp. 128, 133 (D.N.J. 1976).

such a business continuation.¹⁰ The third factor, assumption of ordinary business obligations, seems never to be determinative. The courts would probably treat continuation of *A*'s business by *B* without the assumption of *A*'s normal business obligations as a business transfer for inadequate consideration, thus giving rise to the imposition of successor liability.¹¹ Litigation today centers on the first two factors, whether *B* is continuing the business of *A*, and whether *A* has dissolved as soon as practicable after the business transfer. Commentary today has also focused, erroneously, on providing escapes for small corporations from successor liability. This Article discusses each of these trends in turn below.

A. Business Continuation

The list of items that determine whether there is a business continuation, or de facto merger,¹² is extensive and includes covenants not to compete and acquisition of assets, inventory, equipment, plant, trade names, trademarks, logos, goodwill, designs, blueprints, and customer lists.¹³ Successor liability does not turn on the presence or absence of any

10. In *Pelc v. Bendix Machine Corp.*, 111 Mich. App. 343, 314 N.W.2d 614 (1981), the court found no basis for imposing successor liability when *B* purchased less than eight percent of *A*'s bankrupt estate, *B* did not cause the bankruptcy, and virtually no employee continuity existed. Although *B* "did hold itself out to the world as the effective continuation" of *A* by name, advertising, and other factors, "none of the cases have justified the imposition of liability solely upon this one factor." 111 Mich. App. at 354, 314 N.W.2d at 619.

11. See *Ray v. Alad Corp.*, 19 Cal. 3d 22, 29, 560 P.2d 3, 7, 136 Cal. Rptr. 574, 578 (1977).

12. The de facto merger exception, which results in liability for the successor corporation, is much akin to the business continuation exception. Under both, the successor *B* is liable for the predecessor's debts when *B* "effectively has become the selling corporation by acquiring not only [*A*'s] assets but also its entire business." Phillips, *supra* note 8, at 909. When a de facto merger occurs the effect is the same as when a de jure merger occurs: the purchasing corporation becomes "unquestionably" liable for the predecessor's debts. *Id.* at 907.

13. Continuity of business enterprise includes "retention of key personnel, assets, general business, and trade name." *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 612, 689 P.2d 368, 386 (1984). The court in *Hickman v. Thomas C. Thompson Co.*, 592 F. Supp 1282, 1283, 1285 (D. Colo. 1984), found product line continuity where *B* purchased all the assets of *A* except cash, accounts receivable, and intangible personal property; key management employees of *A* stayed with *B* for one year after the acquisition "to assist in the transition of the business"; and *B* held itself out "to potential customers as the same enterprise manufacturing the same product. . . ." In *Holloway v. John E. Smith's Sons Co.*, 432 F. supp. 454 (D.S.C. 1977), the court denied *B*'s motion for summary judgment where plaintiff's evidence showed that *B* continued *A*'s business at the same address with virtually the same employees, manufactured the same or similar products, and held itself out to the public under a name virtually identical to that of *A*. In *Trimper v. Bruno-Sherman Corp.*, 436 F. Supp. 349, 350 (E.D. Mich. 1977), the court imposed successor liability where the sale

included good will, historical data, business records, external correspondence with customers, trade secrets, patents, trademarks, designs, patterns, jigs, fixtures, and equipment which relate solely to the manufacture or sale of die cutting presses. The seller was re-

one or more of these items, and drawing a bright line in this regard is impractical.¹⁴

Additional factors that some courts consider determinative are whether there is (a) shareholder continuity, (b) officer or director continuity, and (c) key personnel and employee continuity between *A* and *B*.¹⁵ It is difficult to see why some courts consider these factors essential to successor liability, and the combination of these factors necessary to impose successor liability is unclear.¹⁶ Specifically, courts have not clari-

quired to forward to the buyer all inquiries relating to such business for a period of five (5) years. The contract of sale also included a ten-year non-competition clause; provided for training of the buyer's employees and for providing technical assistance; and anticipated that for a period of up to five (5) years presses manufactured by the buyer could contain the following name: "Sheridan Die Cutting Press manufactured by Bruno-Sherman Corporation."

In *Savini v. Kent Machine Works, Inc.*, 525 F. Supp. 711 (E.D. Pa. 1981), the court refused to impose successor liability where *B* acquired only the trademark and trade name of *A*. In *LaPollo v. General Elec. Co.*, 664 F. Supp. 178 (D.N.J. 1987), on the other hand, successor liability was not imposed because *B* was prohibited from using *A*'s trademarks and trade names for more than six months after the business purchase. The court held in the alternative that successor liability was inappropriate because *A* continued in existence after the business sale to *B*.

In *Turner v. Wean United, Inc.*, PROD. LIAB. REP. (CCH) ¶ 11, 937 (Ala. Sup. Ct. 1988), the court held that a successor corporation is not liable under continuity of enterprise where production of the product by the successor "was in a different location, under a different trade name, and by a different work force."

14. The court in *Korzetz v. Amsted Indus., Inc.*, 472 F. Supp. 136, 143 (E.D. Mich. 1979), noted the three criteria established in *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 430, 244 N.W.2d 873, 879 (1976), for determining successor enterprise liability: (1) continuity of management and business; (2) cessation of operations and dissolution by the seller as soon as legally and practically possible; and (3) assumption by the purchaser of those liabilities and obligations of the seller ordinarily necessary for the normal continuation of seller's business. These criteria, said the *Korzetz* court, are not "ironclad elements." Rather, they "are only guidelines." The fact, therefore, "that the transferor is not dissolved immediately or does not assume all liabilities necessary for uninterrupted continuation of normal business operations, does not conclusively establish discontinuity of interest when there is other strong and convincing evidence of continuity of enterprise." 472 F. Supp. at 143-44. See also *Amader v. Pittsburgh Corning Corp.*, 546 F. Supp. 1033, 1036 (E.D. Pa. 1982) (in determining successor liability the criteria should not be construed "too tightly").

15. *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 343 (8th Cir. 1988) (no successor liability because, among other reasons, "there was no common identity of incorporators, officers, directors, or stockholders"). Accord *Santa Maria v. Owens-Illinois, Inc.*, 808 F.2d 848 (1st Cir. 1986); *Tucker v. Paxson Machine Co.*, 645 F.2d 620 (8th Cir. 1981) (successor liability requires continuity of shareholders and management); *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797 (W.D. Mich. 1974) (continuity of shareholders and management required).

16. *Florum v. Elliott Mfg. Co.*, 629 F. Supp. 1145, 1149 (D. Colo. 1986) (successor liability based on continuity of enterprise not applied where there was "no common identity of stock, directors, offices, or stockholders"; the fact that the successor "did retain the existing employees but not the management" was insufficient for purposes of continuity); *Bonee v. L & M Constr. Chem.*, 518 F. Supp. 375 (M.D. Tenn. 1981) (successor liability imposed where there was continuity of three top officers, although apparently there was no stockholder continuity); *Andrews v. John E. Smith's Sons*

fied whether there must be both shareholder and officer/director continuity, whether there must be a continuity of both officers and directors, and whether key personnel or employee continuity or both is a necessary or an alternative criterion. Moreover, the decisions do not delineate exactly how much shareholder, officer, director, key personnel, or employee continuity is required.

Apart from the questions of uncertainty associated with shareholder and employee continuity, it is particularly unclear why courts consider these factors essential to successor liability when neither adds significantly to business continuity in the first place. Under traditional corporate law, in a de jure merger between *A* and *B* the resulting corporation is liable for the debts of the predecessor corporations.¹⁷ Further, in some circumstances, although it does not comply with the formal statutory procedures, a transaction will produce a de facto merger in which the resulting corporation acquires the liabilities of the predecessors.¹⁸ Traditionally, a court would find a de facto merger or the mere continuation of enterprise when the assets of *A* were exchanged for the stock of *B*.¹⁹ However, this exchange is no longer typically required as a condition for de jure merger, and an exchange of assets for cash instead of stock is widely held to be sufficient to effectuate such a merger.²⁰ As a result of this change in law, there is no apparent reason why a court should still

Co., 369 So. 2d 781, 785 (Ala. 1979) (successor liability where *B* manufactured the same products as *A* using "the same people in the same place" and holding itself out as a continuation of *A*); Bourque v. Lehmann Lathe, Inc., 476 So. 2d 1125, 1127, (La. App. 1985) (for successor liability there must normally be continuity of "shareholders, directors, officers, or even employees" common to both for predecessor and the successor business); Simoneau v. South Bend Lathe, Inc., 543 A.2d 407, 408 (N.H. 1988) (successor liability not imposed where, although *B* continued manufacturing *A*'s product "using substantially the same facility, employees, assets, and middle-level management personnel" that *A* had, there was no continuity of "shareholders, directors, or officers" between *A* and *B*); Burr v. South Bend Lathe, Inc., 18 Ohio App. 3d 19, 22, 480 N.E.2d 105, 108 (Ohio Ct. App. 1984) (no successor liability where "there was no mixture of officers or stockholders") (quoting Ortiz v. South Bend Lathe, 46 Cal. App. 3d 842, 847-48, 120 Cal. Rptr. 556, 558 (1975)); Pulis v. U.S. Elec. Tool Co., 561 P.2d 68, 71 (Okla. 1977) (successor liability requires "common identity of stock, directors, officers or stockholders") (quoting Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817, 821 (Colo. 1968)); Hamaker v. Kenwel-Jackson Mech., Inc., 387 N.W.2d 515, 519 (S.D. 1986) (no successor liability because no continuity of "owners, officers or stockholders" and *B*'s business developed along a different line from that of *A*'s).

17. Phillips, *supra* note 8, at 907.

18. *Id.*

19. *Id.* at 912.

20. *Id.* at 914. Nor is stockholder continuity typically required as a condition for successor products liability. See Polius v. Clark Equip. Co., 802 F.2d 75, 86-88 (3d Cir. 1986) (Mansmann, C.J., concurring in part and dissenting in part).

require a stock exchange before determining that the successor corporation is liable under the de facto merger exception for products sold by the predecessor. The key to successor liability is business continuity. However, shareholder continuity does not materially add to business continuity whether stockholder continuity exists in the predecessor, the successor, or between predecessor and successor. Corporate stockholders come and go, but the business of the corporation remains entirely unaffected by such changes. In addition, the doctrine of successor liability is not limited to corporate successors, although its application usually arises in a corporate context.²¹ If the successor is a noncorporate enterprise, there can be no exchange of stock in the successor for assets of the predecessor because the successor has no stock, yet the successor may be held liable for products sold by the predecessor.

According to one commentator, stockholder continuity "is probably the most important element of the de facto merger exception."²² The "justification" for this exception is that

[t]he shareholders are the ones who ultimately enjoy the profits and suffer the losses of the corporation, and the shareholders of one corporation should not be able to move as a group to another corporation, enjoy the continuing profits of the same business the corporation performed before merger, but escape all possible losses that accumulated before merger.²³

This statement, however, is not a justification for requiring stockholder continuity as a condition to imposing successor liability. Rather, it is merely a statement of the effect of mergers on persons who do in fact acquire stock of the successor. This effect occurs whether those persons were stockholders in the predecessor, in another corporation, or in no corporation at all prior to their stock acquisition.

The second factor deemed relevant by courts, the requirement of personnel continuity, appears facially more relevant to the issue of business continuity, if one assumes that *B* is more likely to carry on substantially the same business of *A* where the employees of *B* after the acquisition are the same as the employees of *A* before the acquisition. Indeed, one reason for corporate acquisition may be to acquire needed expertise, repre-

21. See *Tift v. Forage King Industries, Inc.*, 108 Wis. 2d 72, 322 N.W.2d 14 (1982) (successor liability imposed even though predecessor was a sole proprietorship that continued in existence after the business transfer).

22. Note, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L. J. 677, 699 (1983).

23. *Id.* at 699 n.124 (quoting *Nguyen v. Johnson Mach. & Press Corp.*, 104 Ill. App. 3d 1141, 1148, 433 N.E.2d 1104, 1110 (1982)).

sented by employee knowledge and skill.²⁴

The problem with this analysis—as with the issue of stockholder continuity—is that in actual practice there is no necessary or even likely correlation between employee continuity and business continuity. Business reasons for the acquisition may not require employee continuity if, for example, the needed expertise lies with the employees of *B*, rather than with those of *A*. The likelihood, if any, of business continuity occurring as the result of employee continuity would seem to depend on whether the predecessor employees controlled the business of the successor, although nothing in the cases suggests that such control is a necessary element of the employee continuity issue. Although the usual purpose of an acquisition resulting in successor liability is to enable the successor to carry on and benefit from the predecessor's business, employee continuity does not ensure business continuity; the employees of *A* may change the business of *A*, and the employees of *B* may continue the business of *A* whether or not *B* acquires any employees of *A*. If some degree of employee continuity aids the effectuation of business continuity, well and good; but certainly one is not a necessary or even a likely condition of the other. Employees come and go, just as do stockholders, but the same business can clearly continue without regard to such comings and goings.

B. Destruction of Remedy

Courts almost universally require that *A* dissolve as soon as practicable after selling its business to *B*, as a condition for imposing liability on *B* for injuries caused by defective products sold by *A*.²⁵ The California Supreme Court in *Ray v. Alad Corp.* stated the predominant reason for this requirement: *B*, through acquisition of *A*'s business followed by the dissolution of *A*, has caused the destruction of the claimant's remedy against *A* and should therefore fairly be held liable for causing such destruction.²⁶ This rationale seems heavily imbued with the idea that *B*, by causing the destruction of *A*, is at fault for so doing.

The analysis is flawed, however, because courts impose successor liability whether or not dissolution of *A* is a condition of the business purchase agreement between *A* and *B*. If *B* does not require *A*'s dissolu-

24. *Id.* at 685 n.61.

25. Comment, *An Evaluation of the Product Line Theory of Successor Liability*, 32 ST. LOUIS U.L.J. 219, 231 (1987).

26. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 33, 560 P.2d 3, 10, 136 Cal. Rptr. 574, 581 (1977).

tion, which nevertheless occurs, *B* should not be held responsible for causing the dissolution or, consequently, for the destruction of the claimant's remedy against *A*. If *A* decides to dissolve after selling its business to *B*, that decision is not in any meaningful way caused by the purchase by *B*, and certainly *B* is not at fault for making a lawful purchase of business assets that is intended to further the general business economy.²⁷

Several recent cases deal with the successor liability of a corporation, *B*, that purchases the business of *A* in a bankruptcy proceeding of *A*. Most courts have held that *B* is not liable in this situation for products sold by *A*, and they often reach this result by reasoning that *B* did not cause the destruction of *A* because *B*'s purchase did not cause the bankruptcy.²⁸

The better rationale for the bankruptcy situations is that given by the court in the case of *In re White Motor Credit Corp.*²⁹ The court said that no successor liability attaches for business units purchased in bankruptcy, because the prospect of such liability "would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability. This negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy Code."³⁰ Therefore, the court enjoined a products liability claimant from pursuing its products claim in state court against the purchaser of the bankrupt's assets.

Judicial insistence that *A* be dissolved before successor liability is imposed on *B* probably stems from a basic concern about the fairness of holding *B* liable at all, because *B* did not make the offending product and, therefore, did not cause and could not have prevented the claimant's injury. This attitude reflects the similar bias in some quarters against holding the nonmanufacturing products seller strictly liable except in those situations where the manufacturer is not subject to liability.³¹ In the suc-

27. Phillips, *supra* note 8, at 916-17.

28. *Nelson v. Tiffany Indus., Inc.*, 778 F.2d 533 (9th Cir. 1985); *In re Related Asbestos Cases*, 578 F. Supp. 91 (N.D. Cal 1983). See Comment, *supra* note 25, at 233-34.

29. 75 Bankr. 944 (N.D. Ohio 1987).

30. *Id.* at 951.

31. *E.g.*, DEL. CODE ANN. tit. 18, § 7001 (1987); MD. CTS. AND JUDICIAL PLEADINGS CODE ANN § 5-311 (1982); MINN. STAT. ANN. § 544.41 (West 1978); N.D. CENT. CODE § 93,517 (1987); OHIO REV. CODE ANN. § 2307.78 (Anderson 1988); TENN. CODE ANN. § 29-28-106 (1978); WASH. REV. CODE § 7.72.030 (1981).

cessor context the concern about fairness may be even greater than in the nonmanufacturing seller context because the latter, though not at fault, may at least be seen as a cause of the injury by promoting the product in the chain of distribution.

Assuming that it is more fair to hold *B* strictly liable when *A* is unavailable for suit than when *A* is available, why should unavailability turn on the mechanical question of whether or not *A* has dissolved? The real issue should be whether or not *A* can satisfy a judgment against it. If *A* cannot, it may as well be nonexistent as far as the claimant is concerned. Why should not the claimant's attorney, moreover, be permitted to make this complex tactical decision of whom to sue? Any margin of error in this regard can be corrected through a claim for contribution or indemnity by *B* against *A*. The risks of additional costs from such claims for contribution or indemnity are probably outweighed by the risks of claimant or judicial error regarding the ability of *A* to pay in the first instance.

Questions of causation and responsibility on the part of *B* also deserve attention. If *B* cannot reasonably be considered responsible for the claimant's injury, it should not be held liable regardless of *A*'s availability for suit.

Questions of cause-in-fact, divorced from the issue of responsibility, tend to be abstract, approaching the metaphysical. Courts and commentators speak of causation in the general products liability context in a "stream of commerce" metaphor, with the manufacturer or seller described as the one who put the product in that stream.³² In fact, of course, the consumer, the advertiser, and the transportation agent may be just as influential as the manufacturer in marketing a product but these others are typically not held directly liable for product injuries. Clearly, therefore, an analysis in terms of pure cause is not particularly helpful, either in products liability generally or successor liability specifically.

If a court can fairly attribute responsibility to *B*, then cause-in-fact ceases to be a major separate problem. Responsibility in the context of strict liability, moreover, is defined more broadly than in terms of a duty of care. The preceding discussion indicates, however, that this responsi-

32. *Davis v. Gibson Products Co.*, 505 S.W.2d 682 (Tex. Civ. App. 1973); Baynard, *Should Strict Products Liability Apply to the Sale of Electricity?*, 55 TENN. L. REV. 317, 324 (1988).

bility cannot be satisfied by *B*'s destruction of the claimant's remedy against *A*.

The underlying rationale for holding *B* liable for products sold by *A* is that *B*, by buying and operating the business of *A*, has somehow "stepped into the shoes" of, or "become," *A*. These metamorphic concepts apply to *B* whether or not *A* continues to exist.

The transfer of identity from *A* to *B* is defined in a variety of ways. Courts describe the transfer in "holding-out" terms, whereby *B* induces the public to believe that it is operating substantially the same business as *A*.³³ Courts sometimes state that *B* receives the benefit of *A*'s goodwill, or business identity.³⁴ The concept of benefit in this context should not be perceived strictly in economic terms. Such a narrow conception has led some commentators to question why *B* should be made to pay for goodwill twice—at the time of the business purchase, and later in products liability—or why *B* should be made in any event to pay more for goodwill than the parties bargained for.³⁵ The better conception of goodwill in this context is more closely akin to the cost-of-doing-business rationale used as a fundamental explanation for imposing products liability on product sellers generally.³⁶ In a nonproducts context, this concept resembles the marriage oath, whereby one spouse agrees to take the other in sickness and in health.

A concern related to the continued existence of *A* after a business purchase by *B* is whether *B* should be held liable when it purchases only one of several lines of business from *A*.³⁷ This situation involves not only

33. *Hickman v. Thomas C., Thompson Co.*, 592 F. Supp. 1282, 1285 (D. Colo. 1984); *Jacobs v. Lakewood Aircraft Serv., Inc.*, 512 F. Supp. 176, 184 (E.D. Pa. 1981).

34. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 34, 560 P.2d 3, 10, 136 Cal. Rptr. 574, 581 (1977).

35. Green, *Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants*, 72 CORNELL L. REV. 17, 29 (1986); Murphy, *A Policy Analysis of a Successor Corporation's Liability for Its Predecessor's Products When the Successor Has Acquired the Predecessor's Assets for Cash*, 71 MARQ. L. REV. 815, 835-36 (1988); Note, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L.J. 677, 689 n.79 (1983).

36. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

37. *Kline v. Johns Manville*, 745 F.2d 1217 (9th Cir. 1984) (no successor liability where *B* purchased only one product line, did not use *A*'s name, *A* stayed in business for 20 years thereafter before filing for bankruptcy, and *B* stopped making the product approximately 10 years before plaintiff's suit); *Smith v. Navistar Int'l Transp. Corp.*, 687 F. Supp. 201 (D. Md. 1988) (no successor liability where *B* purchased only one division constituting five percent of the total operations of *A*, which remained in existence); *Conway v. White Tracks*, 697 F. Supp. 442 (M.D. Pa. 1988) (no liability where *B* acquired only one product line of *A* through bankruptcy proceedings); *In re Related Asbestos Cases*, 578 F. Supp. 91 (N.D. Cal. 1983) (no successor liability where *B* purchased one "out

a continuation of *A* after the purchase, but also a transaction in which *B* does not purchase substantially all the assets of *A*. This situation should present no additional analytical problem beyond *A*'s continued existence. One can view a corporation with several lines of business as a group of corporations. Indeed, in this situation the separate lines of business can be incorporated separately as subsidiaries of another corporation. Whether or not the separate corporation form is used for different lines of business, *B*'s purchase of one of those lines is in fact a purchase of a separate business.

C. The Small Corporation and The Economic Burden of Successor Liability

Several courts and commentators have raised doubts about the economic feasibility of imposing successor liability on small corporations—however “small” is defined in this context.³⁸ It has been said that about ninety percent of American enterprises consists of “small” corporations, and that these entities lack the ability to shoulder effectively successor liability, particularly at a time when products liability insurance in many areas has become unaffordable or unavailable.³⁹

The argument for protecting small business from this economic burden cuts too far, however. The products liability and insurance burden for small corporations should be no more onerous in a successor liability context than it is for small corporations generally—unless one can conclude that corporate takeovers typically result in the sale of more dangerous products than those produced by *B* prior to the takeover. No evidence supports the existence of such a greater danger generally. If, on the other hand, such evidence did exist, it would argue in favor of successor liability and against such dangerous takeovers; no social benefit results from encouraging dangerous-product takeovers. Product

of hundreds” of *A*'s products and *A* continued to exist for 20 years thereafter before filing for bankruptcy); *Hall v. Armstrong Cork, Inc.*, 103 Wash. 2d 258, 692 P.2d 787 (1984) (no successor liability where *B* purchased one product line, *A* later bankrupted, and *B* did not hold itself out as the continuation of *A* and did not purchase *A*'s name or goodwill).

38. *Polius v. Clark Equip. Co.*, 802 F.2d 75 (3d Cir. 1986); *Lundell v. Sidney Mach. Tool Co.*, 190 Cal. App. 3d 1546, 236 Cal. Rptr. 70 (1987); *Ostrowski v. Hydra-Tool Corp.*, 144 Vt. 305, 479 A.2d 126 (1984); Schiff, *Products Liability and Successor Corporations: Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance*, 13 U.C. DAVIS L. REV. 1000 (1980).

39. *Polius v. Clark Equip. Co.*, 802 F.2d 75, 81 (3d Cir. 1986); *Fish v. Amsted Industries, Inc.*, 126 Wis.2d 293, 308 n.1, 376 N.W.2d 820, 827 & n.1 (1985).

innovation and development may result in greater liability exposure than status quo production, but again this phenomenon is not unique to business acquisitions. There is no evidence, moreover, that successor liability tends to fall more on small corporations than on large ones in this country. The reality may be just the other way around.

Developing a meaningful definition of a small corporation for purposes of determining liability in the successor context is difficult. Currently, definitions vary.⁴⁰ The United States Small Business Act defines a small business as "one which is independently owned and operated and which is not dominant in its field of operation."⁴¹ A determination of dominance in this context must certainly be problematic, involving questions of geographic and temporal domination. This definition would presumably exclude, moreover, a small and nondominant corporation that is owned by another such corporation.

Other definitions consider the number of employees, the amount of assets, and the business volume of the corporation.⁴² In addition to raising difficult questions of the interrelation of these three factors, the definitions suffer from a mechanical rigidity that is inappropriate in the context of determining successor liability.

Putting aside the difficulty of defining the small corporation, the judicial and academic concern in this regard is apparently based on the dual premise first, that small corporations are more desirable than large ones and should therefore be given special economic incentives in the context of products liability, and second, that small corporations cannot reasonably accommodate successor products liability exposure. The first prong presents complex economic policy questions unsuitable for judicial resolution. The second prong is based only on conjecture, and is subject to serious doubt now that the so-called "insurance crisis" seems to be abating.⁴³

Although small enterprises may hold a special place in the hearts of American citizenry, that same citizenry surely expects its enterprises to pay their way. If a company cannot afford to operate—because of the costs of insurance, of raw materials, of wages, or for other reasons—then

40. Schiff, *supra* note 38, at 1002 n.10.

41. 15 U.S.C. § 632 (1986).

42. Schiff, *supra* note 38, at 1002 n.10.

43. Vandall, *Our Product Liability System: An Efficient Solution to a Complex Problem*, 64 DEN. U.L. REV. 703, 706 (1988).

it is probably better socially, as well as economically, that that company not operate.

III. POST-ACQUISITION REMEDIAL DUTIES

A number of courts have recognized a duty on the part of *B*, when acquiring the business of *A*, to warn *A*'s former customers of dangers associated with the use of *A*'s products. They have imposed this duty regardless of whether *B*'s acquisition of *A*'s business is deemed to give rise to successor liability under the principles previously discussed.⁴⁴

When, however, a court would not impose successor corporation liability—because of lack of shareholder or employee continuity, because of the continued existence of *A* after the acquisition, or otherwise—then this duty to warn has been narrowly defined. To find liability courts usually require either that *B* accede to the service contracts of *A*, or that *B* actually undertake to service *A*'s former customers. In addition, before *B* can be held liable courts require that *B* have actual knowledge of the location and danger of a product that was sold by *A* and is subject to service by *B*.⁴⁵

The reason this duty thus far has been so narrowly defined is unclear. In the context of products law generally, the post-sale duty of a products seller may be generally to warn the buyer about unreasonable dangers of which the seller either knows or should know, without regard to whether the seller is under any contractual or other duty to service the product.⁴⁶ If a warning is likely to be inadequate, then the seller may have a duty to take other reasonable measures such as the repair of the product, with or

44. See *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 451 N.E.2d 195, 464 N.Y.S.2d 437 (1983). See also *Murphy*, *supra* note 35, at 846-50 (advocating expanded use against successor corporations of a post-sale duty to warn).

45. *Tucker v. Paxson Mach. Co.*, 645 F.2d 620 (8th Cir. 1981) (duty to warn if *B* succeeds to *A*'s service contracts, the product that injures plaintiff is covered by such a contract, *B* has serviced the product, and *B* knows of the defect and location of the product); *La Pollo v. General Elec. Co.*, 664 F. Supp. 178 (D.N.J. 1987) (duty to warn may arise based on service contract and *B*'s knowledge of the defect and product location, though no actual service of the product by *B* has occurred). In *Downtowner, Inc. v. Acrometal Products, Inc.*, 347 N.W.2d 118 (N.D. 1984), the court said a duty to warn can arise where *B* acquires *A*'s service contracts, the product that injures plaintiff is covered by such a contract, and *B* knows the location and owner of the product. This list, the court noted, is not exhaustive, because "the courts appear to have employed a risk/benefit analysis to determine whether it would be just to impose such a duty." *Id.* at 125.

46. *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 84 (8th Cir. 1967); *Cover v. Cohen*, 461 N.E.2d 864, 871-72 (N.Y. App. 1984); W. KIMBLE & R. LESHER, *PRODUCTS LIABILITY* § 205 (1979).

without charge.⁴⁷

Perhaps courts have narrowly defined *B*'s post-acquisition duty where *B* does not succeed to *A*'s general liability for products because they do not perceive a basis for imposing such a duty. The basis is readily apparent, however, in the special relation between *A* and *B* and between *B* and *A*'s products.⁴⁸ That courts impose any duty to warn at all demonstrates that a basis for a broader duty exists. The remaining question is why the post-acquisition duty should not extend to match the duty to warn as it exists in products law generally, and as it presumably exists where *B* accedes to *A*'s products liability through a business acquisition.

Thus far, courts have defined the post-sale duty to take remedial measures in terms of reasonable care, and not in terms of strict liability.⁴⁹ This restricted definition may make little difference to courts that define the general products liability duty to warn in terms of due care.⁵⁰ For those courts that treat the warning duty in strict liability terms,⁵¹ it may be a small step to extend that liability to post-sale duties as well.

There are a number of advantages to broadening the post-acquisition remedial duty of *B*. The imposition of such a duty obviates difficult questions of accrual associated with statutes of limitations and statutes of repose, because this duty is a continuing one that should toll these statutes.⁵² It also eliminates or simplifies difficult questions that sometimes arise in tracing a defect to the date of manufacture and sale.⁵³ A post-sale duty can presumably arise to correct defects even though they never existed at the time of sale.

47. *Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311 (7th Cir. 1983); *Balido v. Improved Machinery, Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972). *But see* *Leannais v. Cincinnati, Inc.*, 480 F. Supp. 286 (E.D. Wis. 1979) (successor corporation had duty to warn product owners after it became aware of danger, but no "affirmative duty to conduct and develop safety programs for machines it did not design or manufacture," because such a duty "would be too burdensome").

48. *See* RESTATEMENT (SECOND) OF TORTS § 388 (1965).

49. *E.g.*, *Bly v. Otis Elevator Co.*, 713 F.2d 1040 (4th Cir. 1983) (under Virginia law successor manufacturer may be liable on negligence theory for failing to warn consumer of dangerous products when failure to warn is unreasonable).

50. *See* J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 212-13 (3d ed. 1988).

51. *See id.*

52. *Brown v. Merrow Machine Co.*, 411 F. Supp. 1162 (D. Conn. 1976). *But see* *Wilson v. Dake Corp.*, 497 F. Supp. 1339, 1340 (E.D. Tenn. 1980) (Tennessee statute of limitations began to run at time plaintiff purchased defective machine and barred suit despite continuing duty of manufacturer to warn).

53. Typically, plaintiff must show that the defect existed when the product left defendant's control. *Scanlon v. General Motors Corp.*, 65 N.J. 582, 326 A.2d 673 (1974). But this requirement should be obviated where a post-sale duty on the part of the defendant arises.

Perhaps most important in this regard is that expansion of *B*'s post-acquisition remedial duties provides a traditional and widely accepted basis for attaching responsibility to *B* for products sold by *A*. It also provides a basis for bridging the gap between business acquisitions that generally give rise to successor liability and those that do not. If the post-acquisition remedial duty is substantially the same in both these situations, then reasons for distinguishing the situations become even less persuasive.

IV. OTHER LIABILITY-PREVENTION DEVICES

In addition to warning of or correcting problems in *A*'s products, there are other ways that *B*, on acquiring *A*'s business, can act to eliminate or curtail its liability for products sold by *A* before the acquisition. It may be practical to obtain indemnity agreements from key stockholders of *A*.⁵⁴ Alternatively, it may be possible to establish an escrow fund to cover potential liability for products sold by *A*. *B* may be able to negotiate a price reduction for the purchase of the business that roughly reflects anticipated successor products liability exposure. *B* also has the option of placing the business acquisition in a subsidiary corporation. This latter device will not protect the subsidiary from potential successor liability, but it will cap *B*'s exposure for such liability to the extent of the subsidiary's net worth. If, however, *B* purchases adequate products liability insurance to cover successor exposure, then no apparent reason exists to establish a subsidiary to limit such exposure.

Another method likely to avoid successor liability is for *B* to substantially change the product line or business after its acquisition from *A*.⁵⁵ To the extent that the business is purchased for the very purpose of capitalizing on its historic reputation, this approach provides no attraction for *B*. On the other hand, *B* should recognize that if it intends to capitalize on *A*'s historic business, it must also be prepared to assume the products liability associated with that business.

Hard questions remain where *B* acquires and continues *A*'s business

54. Most states substantially restrict common law and statutory remedies against the stockholders of a dissolved corporation. See *Pacific Scene, Inc. v. Penasquitos, Inc.*, 250 Cal. Rptr. 651 (1988).

55. See *Santa Maria v. Owens-Illinois, Inc.*, 808 F.2d 848 (1st Cir. 1986); *Lundell v. Sidney Mach. Tool Co.*, 236 Cal. Rptr. 70 (Cal. App. 1987); *Hamaker v. Kenwel-Jackson Mach., Inc.*, 387 N.W.2d 515 (S.D. 1986).

for a period of time, and then substantially changes that business.⁵⁶ What should be done with *A*'s products claims that arise after such a change? Absent a statutory determination of the length of time of operation necessary to impose successor liability, the issue should be determined by the same broad standards of reasonableness that are used to assess successor business continuation in the first instance. If *B* buys *A*'s business and moves as quickly as is practical to convert it to a new business, successor liability probably should not attach. On the other hand, if *B* continues *A*'s business for a substantial period before making such a changeover, the court should impose liability.

V. CONCLUSION

It does not seem feasible to fix a bright-line rule for determining successor corporation liability. The issue turns on the broad question of whether *B* reasonably can be considered to have substantially continued *A*'s business for a significant period of time after acquiring that business. Probably most business persons can make this judgment call fairly well. The presence or absence of shareholder or employee continuity between *A* and *B* does not materially aid this determination. Nor does the question of whether *A* continues to exist in some legal form after the business acquisition by *B*.

A good deal of the line drawing in this area probably can be reduced by expanding *B*'s post-acquisition remedial duties with regard to *A*'s product. Such an expansion would lessen the concern about the basis for holding *B* responsible for products sold by *A*. *B* can of course take other preventive measures besides post-acquisition remediation—measures ranging from escrow and indemnity agreements, price negotiation, and establishment of a corporate subsidiary for operating the acquired business, to substantial change of the business itself—to ensure that *B* will not be considered as continuing the operation of that business.

Just as Pirandello as an author found it necessary to conceptualize the six characters in search of an author if his play were to take form, so the courts must provide meaningful and persuasive conceptions for imposing successor corporation products liability. The reason for producing such

56. Compare *Kline v. Johns-Manville*, 745 F.2d 1217 (9th Cir. 1984) (successor not liable in suit in which it made the product for about 10 years and then stopped making the product approximately 10 years before plaintiff's injury) with *Nieves v. Bruno Sherman Corp.*, 86 N.J. 361, 431 A.2d 826 (1981) (successor liable where it made product for about eight years and then sold the product line about four years before plaintiff's injury).

conceptions is apparent. Corporate concepts aside, a business successor often so closely resembles a predecessor that it seems fair to treat them as the same enterprise. The courts should place greater trust than they have to date in the good judgment of the factfinder to make common sense determinations of that character resemblance.