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A POLICY ANALYSIS OF A SUCCESSOR CORPORATION'S LIABILITY FOR ITS PREDECESSOR'S DEFECTIVE PRODUCTS WHEN THE SUCCESSOR HAS ACQUIRED THE PREDECESSOR'S ASSETS FOR CASH

The issue of whether a successor corporation may be held liable for injuries caused by a defective product sold by its predecessor corporation generally has been decided by applying traditional corporate law which focuses on the type of corporate acquisition between the predecessor and successor.¹ If the acquisition is through a cash purchase of the predecessor's assets, rather than through a merger, consolidation, or stock purchase, the traditional corporate law holds that the successor is not liable for any liabilities of the predecessor.² However, this traditional corporate law is subject to four exceptions where the successor is held liable for its predecessor's defective products.³

The traditional corporate law presents an obstacle for the products liability plaintiff seeking compensation for his or her injuries. A plaintiff might have no recovery if the predecessor corporation has dissolved and the statutory abatement period has passed, unless the plaintiff may recover from the successor corporation.⁴

Many courts realize that this tension exists between corporate law and products liability plaintiffs. Some courts have created new rules to enable the plaintiff to recover, either by expanding the traditional law⁵ or by creating new rules.⁶ However, the justifications given for these new rules are not fully analyzed by those courts.

This Comment begins with the background of traditional corporate law as related to the issue of the successor's assumption of its predecessor's liabilities. Part II gives a short introduction to the policies behind strict liability. Next, Part III discusses the holdings of several courts that have tried to alter the traditional corporate law in order to satisfy products liability law. Wisconsin's stance in this area is briefly mentioned. Part IV analyzes the strict products liability rationales used to justify successor liability. Part V concludes this Comment with an analysis of the strict products liability ra-

1. See *infra* notes 12-41 and accompanying text.

2. See *infra* notes 12-17 and accompanying text.

3. See *infra* notes 18-41 and accompanying text.

4. See *infra* notes 7-11 and accompanying text.

5. See *infra* notes 51-79 and accompanying text.

6. See *infra* notes 80-91 and accompanying text.

tionales as applied to the various theories of successor liability. Finally, it is recommended that courts adopt either the "duty to warn theory" or the "bona fide purchaser solution" when presented with an issue of successor liability.

I. CORPORATE LAW AND ITS EFFECT ON PRODUCTS LIABILITY CLAIMS

A. *The Effect of Corporate Dissolution on Creditor's Claims*

A corporation's capacity to be sued under common law ended when the corporation legally dissolved.⁷ Today, jurisdictions have abatement statutes which cause a corporation to exist for a definite time period after dissolution for certain purposes, including the purpose of being sued.⁸ However, these statutes do not have provisions for contingent claims based on the possibility of being injured from defective products of the dissolved corporation.⁹ Hence, if the corporation dissolves and the statutory abatement period passes, all subsequent creditors' claims are generally barred.

If a corporation dissolves, the disposition of the corporate assets determines the potential success of a products liability plaintiff. If the corporation dissolves by distributing its assets among its shareholders, no claim may be brought after the statutory abatement period has expired.¹⁰ However, if another corporation "acquires control" of the dissolved corporation's assets, then depending upon the type of acquisition between the two corporations, the products liability plaintiff might be able to bring suit against the successor.¹¹

7. 16A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS sec. 8113 (rev. perm. ed. 1979).

8. 15 *Id.* at sec. 8166; *see also* DEL. CODE ANN. tit. 8, sec. 278 (1983); REVISED MODEL BUSINESS CORP. ACT sec. 14.07(c) (1984); WIS. STAT. sec. 180.787 (1985-86).

It has been said that because of these abatement statutes, the complete dissolution of a corporation does not take place until the end of the dissolution period. *Abercrombie v. United Light & Power Co.*, 7 F. Supp. 530, 542 (D. Md. 1934).

The corporation might exist even past the abatement period if litigation commenced prior to the expiration of that period is still alive, although new suits cannot be commenced after the statutory period. *See* DEL. CODE ANN. tit. 8, sec. 278 (1983).

9. Walach, *Products Liability; A Remedy in Search of a Defendant — The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 MO. L. REV. 321, 325 (1976).

10. Juenger & Schulman, *Assets Sales and Products Liability*, 22 WAYNE L. REV. 39, 41 n.9 (1975).

11. *See infra* notes 12-17 and accompanying text; *See generally* Yamin, *The Achilles Heel of the Takeover: Nature and Scope of Successor Corporation Products Liability in Asset Acquisitions*, 7 HARV. J.L. & PUB. POL'Y 185, 212-14 (1984).

B. Types of Corporate Acquisition and Its Effect on Successor Liability

There are three major types of corporate acquisition: (1) statutory merger or consolidation; (2) purchase of the acquired corporation's stock; and (3) cash purchase of the acquired corporation's assets.¹² The effect of corporate acquisition depends upon which type of acquisition is used.

A statutory merger or consolidation is an acquisition which satisfies the requirements of the state's applicable merger or consolidation statutes. If the corporate acquisition is by statutory merger or consolidation,¹³ it usually results in the surviving corporation assuming the liabilities of the predecessors.¹⁴

If the corporate acquisition is through the purchase of the acquired corporation's stock, the acquiring corporation does not "directly" assume the liabilities of the acquired corporation.¹⁵ However, this does not present a problem to the products liability plaintiff because the acquired corporation is actually a subsidiary of the acquiring corporation, and as a subsidiary it has its own separate legal identity which can be sued.¹⁶ Thus, the sale of the predecessor's stock has no real effect on a plaintiff's ability to sue the acquired corporation.

If the corporate acquisition is through a cash purchase of the acquired corporation's assets, the general rule is that the successor corporation does not assume the present or contingent liabilities that belong to the selling

12. See generally B. Fox & E. Fox, 13A BUSINESS ORGANIZATIONS secs. 23.01-23.04 (1986); Yamin, *supra* note 11, at 213-14.

13. A merger occurs when one corporation absorbs another. The absorbing corporation retains its name and corporate identity, with the addition of the absorbed corporation's capital, franchises, and powers. The absorbed corporation ceases to exist. See 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS sec. 7041; WIS. STAT. secs. 180.67(1) & (2) (1985-86).

14. 15 W. FLETCHER, *supra* note 13, at secs. 7118, 7121; see, e.g., WIS. STAT. sec. 180.67(5) (1985-86) ("Such surviving or new corporation [shall be] liable for all the liabilities and obligations of each of the corporations so merged or consolidated . . ."); see also REVISED MODEL BUSINESS CORP. ACT sec. 11.06 (1984). As to the effect in Delaware and New York, see A. HOFFMAN, ISRAELS ON CORPORATE PRACTICE sec. 13.19 (4th ed. 1983).

It has been said that surviving or consolidating corporations are "heirs" to the liabilities that would have belonged to the merged or consolidated corporations. C. SCHARF, ACQUISITIONS, MERGERS, SALES AND TAKEOVERS 3, 4 (1971).

15. Yamin, *supra* note 11, at 213-14. However, there is an indirect assumption because the acquired corporation is still existing and still is subject to liability. Hence, the acquiring corporation is indirectly liable up to the extent of its investment in the acquired corporation.

16. *Id.* at 214.

corporation.¹⁷ This type of transaction is the primary focus of this Comment.

C. *Exceptions to the Rule of Nonassumption of Liabilities*

There are four well-recognized exceptions¹⁸ to the rule of nonassumption of liabilities when a successor corporation purchases the assets of another corporation: (1) when the acquiring corporation expressly or impliedly agrees to assume the selling corporation's liability; (2) when the transaction is entered into fraudulently to escape liability for such obligations; (3) when the transaction amounts to a merger or a consolidation of the purchaser and seller corporations (a "de facto" merger); or (4) when the purchaser corporation is merely a continuation of the seller corporation.

The first exception, an express or implied agreement to assume the liabilities, is fairly straightforward. Often, whether a court finds an express or implied assumption of liabilities depends upon the interpretation of the purchase agreement between the predecessor and the successor.¹⁹ If the language concerning the liabilities assumed by the successor in the purchase agreement is vague, unclear, or too broad, courts find an implied assumption of liability for defective products.²⁰ In order to be certain that the successor has not made an implied assumption of all liabilities, it is best if the written agreement explicitly states that there is no assumption of future products liability.²¹

17. For a complete collection of cases invoking this rule, see 15 W. FLETCHER, *supra* note 13, at sec. 7122 n.1.

Recent cases which have involved this general rule include *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 460 N.E.2d 895 (1984); *Hall v. Armstrong Cork, Inc.*, 103 Wash. 2d 258, 692 P.2d 787 (1984); *Fish v. Amsted Indus., Inc.*, 126 Wis. 2d 293, 376 N.W.2d 820 (1985).

This rule also applies to once-removed corporate successors. See generally *Goucher v. Parmac, Inc.*, 694 P.2d 953 (Okla. App. 1984); *Hall*, 103 Wash. 2d 258, 692 P.2d 787.

18. For a full citation list of cases applying individual exceptions, see Note, *Torts — Products Liability — Successor Corporation Strictly Liable for Defective Products Manufactured by the Predecessor Corporation*, 27 VILL. L. REV. 411, 413-15 (1982).

19. See generally 15 W. FLETCHER, *supra* note 13, at secs. 7112, 7114-15, 7124.

20. See *Yamin*, *supra* note 11, at 213-14; Note, *supra* note 18, at 413-15; see, e.g., *Bouton v. Litton Indus., Inc.*, 423 F.2d 643, 652 (3d Cir. 1970) (broad liability language in agreement); *Bippus v. Norton Co.*, 437 F. Supp. 104, 107 (E.D. Pa. 1977) (unclear liability language in agreement).

21. Agreeing to assume liabilities incurred in the "normal course of business" has been held as an assumption of future products liability. See, e.g., *Bouton*, 423 F.2d at 652; *Bippus*, 437 F. Supp. at 106; *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, —, 264 A.2d 98, 106 (1970), *aff'd*, 118 N.J. Super. 480, 288 A.2d 585 (1972). But see *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1153-54 (1st Cir. 1974) (stated in dicta that specific language excluding the assumption of tort liabilities by the successor did not bind third parties with product liability suits, rather, it only allowed the successor the right to seek indemnification from the seller).

The second exception, a fraudulent transaction, is also straightforward. Fraudulent transactions are generally found when there is inadequate consideration.²² A transaction is also found fraudulent if the consideration is paid directly to the predecessor's shareholder, or if the successor knows of the predecessor's intent to default on its corporate debts.²³ However, the fraudulent transaction exception is usually not successfully invoked by products liability plaintiffs.²⁴

The third exception to the general rule of nonassumption of liability in asset-for-cash sales, the de facto merger, produces the same automatic assumption of liabilities as a statutory merger,²⁵ even though the transaction purports only to be a sale and the formal statutory requirements have not been met.²⁶ The elements of a de facto merger were set out by a federal district court in *Shannon v. Samuel Langston Company*.²⁷ In summary, these elements are:

- (1) continuity of shareholders or ownership resulting from the use of the successor's stock as payment, rather than the use of cash;²⁸

22. 15 W. FLETCHER, *supra* note 13, at sec. 7125; *see, e.g.*, *Enos v. Picacho Gold Mining Co.*, 56 Cal. App. 2d 765, 133 P.2d 663 (1943); *Economy Ref. & Serv. Co. v. Royal Nat'l Bank*, 20 Cal. App. 3d 434, 97 Cal. Rptr. 706 (1971); *Avery v. Safeway Cab, Transfer & Storage Co.*, 148 Kan. 321, 80 P.2d 1099 (1938). *But see McKee*, 109 N.J. Super. at ___, 264 A.2d at 58-59 (inadequate consideration is a separate and distinct exception to the general rule).

23. Note, *Products Liability: Developments in the Rule of Successor Liability for Products Related Injuries*, 12 U. MICH. J.L. REF. 338, 351 (1979).

24. *See, e.g.*, *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817, 821 (D. Colo. 1968) (valuable consideration and no trace of fraud); *Reina v. Gingerale Corp.*, 472 So. 2d 530 (Fla. App. 1985) (allegations insufficient to support a finding of fraud).

25. *See supra* note 14 and accompanying text.

26. *See, e.g.*, *Knapp v. North Am. Rockwell Corp.* 506 F.2d 361, 365 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 800-01 (W.D. Mich. 1974); *Bazan v. Kux Mach. Co.*, 358 F. Supp. 1250, 1251-52 (E.D. Wis. 1973); *Schwartz v. McGraw-Edison Co.*, 14 Cal. App. 3d 767, 780-81, 92 Cal. Rptr. 776, 783-84 (1971); *State ex. rel. Donahue v. Perkins & Will Architects, Inc.*, 90 Ill. App. 3d 349, 352, 413 N.E.2d 29, 31-32 (1980); *see also* W. PAINTER, *BUSINESS PLANNING* 662 (1975).

27. 379 F. Supp. 797, 801 (W.D. Mich. 1974).

28. If the sale is for cash, the transaction generally will not be deemed a de facto merger, and therefore, the traditional rule of nonassumption of liability will apply. *See, e.g.*, *Tucker v. Paxson Mach. Co.*, 645 F.2d 620, 622 (8th Cir. 1981).

The rationale behind this element is that if the consideration for the predecessor's assets is cash, then at all times the predecessor and successor are distinct and separate corporate entities. Without any common and continuing ownership, the successor corporation cannot be held liable for decisions of the predecessor made before the asset acquisition. *See McKee*, 109 N.J. Super. at 566, 264 A.2d at 104.

- (2) requirement in the asset purchase agreement that the predecessor corporation dissolve as soon as possible following the sale closing date;²⁹
- (3) continuation of the predecessor's enterprise; and
- (4) assumption by the successor of the liabilities necessary to carry on the seller's normal business operations.³⁰

The imposition of assumption of liabilities is a fair result when these elements are met because "[t]he two corporations are no longer strangers after the asset sale — they are, in effect, merged" into one corporation.³¹

The last exception to nonassumption of liabilities in an asset acquisition, the "mere continuation,"³² is an equitable doctrine developed mainly to protect creditors' claims against the predecessor corporation.³³ This exception is "problematic of application . . . because it has never been quite clear just in what sense a corporation must continue in order to trigger the exception."³⁴ However, certain key elements of the exception can be distilled from case law: (1) continuity of common management, officers, directors; (2) continuity of common shareholders (i.e., the consideration paid to the predecessor was stock of the successor); and (3) only one corporation in

29. The rationale behind this element is that by requiring the predecessor to dissolve, the successor is deemed to have deprived creditors of a remedy against the predecessor. See *Ramirez v. Amsted Indus.*, 86 N.J. 332, 348, 431 A.2d 811, 820 (1981).

Even if all of the elements of a de facto merger exist, except that the predecessor has not dissolved, but rather is a wholly-owned subsidiary stripped of all its assets and operated as a mere instrumentality of the successor-parent, the parent will be held responsible for the liability of the subsidiary by piercing the subsidiary's corporate veil. See *Kelly v. American Precision Indus., Inc.*, 438 So. 2d 29 (Fla. App. 1983).

30. The *Shannon* court found that the successor had purchased the predecessor's assets solely with its own stock. *Shannon*, 379 F. Supp. at 801. Also, the successor had continued the predecessor's manufacturing and sales operations, while the predecessor immediately dissolved by distributing the successor's stock (which was received as consideration for the sale) to its shareholders. *Id.* Hence, the court found the transaction to be a de facto merger, and therefore the successor corporation was held liable for the defective products sold by the predecessor. *Id.*

31. *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, ___, 244 N.W.2d 873, 891-92 (1976) (Coleman, J., dissenting); see also *Grant-Howard Assoc. v. General Housewares Corp.*, 115 Misc.2d 704, 454 N.Y.S.2d 521 (1982) (the key factor in finding a de facto merger is how closely the acquiring corporation structurally resembles the acquired corporation).

For a more extensive treatment of de facto mergers, see Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. REV. 906, 912-23 (1983).

32. See 15 W. FLETCHER, *supra* note 13, at sec. 7122 (in the cases where this exception applies, in essence it is in the nature of a corporate reorganization, rather than just a sale); see generally *Groover v. West Coast Shipping Co.*, 479 F. Supp. 950 (S.D.N.Y. 1979); *State ex rel. Donahue v. Perkins & Will Architects, Inc.*, 90 Ill. App. 3d 349, 413 N.E.2d 29 (1980); *J. F. Anderson Lumber Co. v. Myers*, 296 Minn. 33, 206 N.W.2d 365, 369 (1973).

33. See generally *Arthur Elevator Co. v. Grove*, 236 N.W.2d 383, 391 (Iowa 1975); 15 W. FLETCHER, *supra* note 13, at sec. 7122.

34. *Yamin*, *supra* note 11, at 226.

existence after the sale of the assets.³⁵ In essence, the policy behind this exception is the same as that behind the de facto merger exception in that a corporation should not be able to avoid liabilities merely due to a change in its form or name.³⁶ Both exceptions concern a situation where two corporations combine as one final corporation.

The prior discussion shows that the traditional rule of nonassumption of liabilities by the successor corporation in an asset acquisition, and its exceptions, developed to protect the creditors of the predecessor and to protect the successor from unknown or contingent liability.³⁷ Under the traditional rule, the successor knows under what circumstances it assumes liability claims against the predecessor. The rule promotes the free alienability of corporate assets in a manner similar to the bona fide purchaser (BFP) rule of property law. The BFP rule holds that a good faith purchaser, who is without notice of prior claims on the property and pays adequate consideration, will not be held liable for any prior or contingent claims related to that property.³⁸ In short, the BFP rule promotes not only the free alienability of

35. *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985) (no continuation of management or ownership); *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690 (1st Cir. 1984) (no continuity of shareholders); *Matrix-Churchill v. Springsteen*, 461 So. 2d 782, 788 (Ala. 1984) (no "mere continuation" because predecessor did not dissolve); *Bullington v. Union Tool Corp.*, 254 Ga. 283, ___, 328 S.E.2d 726, 728 (1985) (no continuity of ownership when assets are sold for cash); *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 460 N.E.2d 895 (1984) (absent continuity of stock ownership, a finding of continuation is not warranted); *Young v. Fulton Iron Works Co.*, 709 S.W.2d 927, 940-41 (Mo. Ct. App. 1986) (no continuation found where predecessor continued to manufacture and sell over \$1/2 million worth of machines for over one year after the sale of part of its assets to defendant); *Timmerman v. American Trencher, Inc.*, 220 Neb. 175, 368 N.W.2d 502 (1985) (commonality of both stock ownership and management); *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 464 N.Y.S.2d 437, 451 N.E.2d 195 (1983) (mere continuation exception requires extinguishment of predecessor, and continuity of management, key personnel, and physical location).

36. See *Arthur Elevator Co.*, 236 N.W.2d at 391-93.

Both the mere continuation and de facto merger exceptions are similar because they both require the elements of continuity of operation and ownership, and the existence of only one corporation after the sale. The only real distinction appears to be that mere continuation requires continuity of management, while the de facto merger exception does not. For this reason, it has been suggested that these two exceptions are, in essence, one exception. See generally Phillips, *supra* note 31; Note, *Liability of a Successor Corporation for Products Defectively Manufactured by a Predecessor*, 62 NEB. L. REV. 408, 413-16 (1983); see also *Menacho v. Adamson United Co.*, 420 F. Supp. 128, 133 (D.N.J. 1976); Shannon, 379 F. Supp. at 801.

37. Yamin, *supra* note 11, at 206-13; Comment, *A Search for the Outer Limits to Successor Corporation Liability for Defective Products of Predecessors*, 51 U. CIN. L. REV. 117, 128 (1982) [hereinafter *Outer Limits*]; Comment, *Choice-of-Law in Minnesota Corporate Successor Products Liability: Which Rule is the "Better Rule"?*, 8 HAMLINE L. REV. 373, 376 (1985).

38. For a good analysis of the bona fide purchaser rules as related to successor liability, see Yamin, *supra* note 11, at 206-08.

corporate assets, but also "predictability in corporate transactions" and "mobility in the business and economic world in general."³⁹

The problem with the policies supporting the traditional rule is that they developed prior to the advent of modern products liability law and thus do not take into effect the policy behind strict products liability.⁴⁰ The policy reasons behind strict products liability favor the injured plaintiff, which obviously conflicts with traditional corporate law that favors protection of the corporate environment.⁴¹

II. EMPHASIS & POLICY CONSIDERATIONS OF PRODUCTS LIABILITY LAW

The fundamental policy of all tort law is to shift the economic burden of an injury away from the injured person on to someone else who more fairly deserves to bear the burden.⁴² The plaintiff in a strict products liability suit has a relaxed standard of proof because he or she need not prove the negligence of the manufacturer.⁴³ Rather, the plaintiff need only prove that: (1) the manufacturer is engaged in the business of manufacturing and selling the product; (2) the product was defective or dangerous when it left the manufacturer's control; and (3) the defect or danger was the cause of the plaintiff's injury.⁴⁴ This lesser standard of proof is based on several policies, including:

39. *Id.* at 207.

40. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY sec. 2.06(2) (1982); Hill, *Products Liability of a Successor Corporation — Acquisition of "Bad Will" with Good Will*, 23 IDEA J.L. & TECH. 9, 10 (1982); see also *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 443 (7th Cir. 1977) (Fairchild, C.J., concurring in part, dissenting in part); *Ramirez v. Amsted Indus.*, 86 N.J. 332, —, 431 A.2d 811, 815-16 (1981) (traditional rule was developed not in response to the interests of products liability parties, but rather to protect the interests of commercial creditors and dissenting shareholders); *Fish*, 126 Wis. 2d at 303, 376 N.W.2d at 825.

Several decisions invoking the general rule date back more than 75 years, well before the development of products liability law. See, e.g., *Pennison v. Chicago, M. & St. P. Ry. Co.*, 93 Wis. 344, 67 N.W. 702 (1896).

41. See *supra* notes 37-39 and accompanying text.

42. See W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS sec. 1, at 6 (5th ed. 1984) [Hereinafter "PROSSER ON TORTS"].

43. See generally *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 55, 59-60 (1967); 1 L. FRUMER & M. FRIEDMAN, *supra* note 40, sec. 3; PROSSER ON TORTS, *supra* note 42, sec. 103.

In fact, whether the manufacturer was negligent is irrelevant. See RESTATEMENT (SECOND) OF TORTS sec. 402A(2)(a) (1965) (seller of defective product liable even if seller exercised due care).

44. RESTATEMENT (SECOND) OF TORTS sec. 402A(2)(a) (1965). Specifically, Section 402A provides:

- A. The consumer finds it too difficult to prove negligence against the manufacturer.
- B. Strict liability provides an effective and necessary incentive to manufacturers to make their products as safe as possible.
- C. The manufacturer is in a better position to protect against harm, by insuring against liability for it, and, by adding the cost of insurance to the price of his product, to pass the loss on to the general public.
- D. By placing the product on the market, the seller represents to the public that it is fit; and he intends and expects that it will be purchased and consumed in reliance upon that representation.
- E. The costs of accidents should be placed on the party best able to determine whether there are means to prevent that accident.⁴⁵

In essence, these policy rationales favor a shifting of the burden of the harm due to defective products away from the injured consumer and on to a business manufacturer.⁴⁶ Such policies directly conflict with traditional corporate principles which favor the nonassumption of contingent liabilities by a successor corporation in an asset acquisition.

This conflict was recognized by the California Supreme Court in *Greenman v. Yuba Power Products*.⁴⁷ That court stated that traditional corporate

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- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
 - (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

Note that, although the plaintiff need not prove any negligence on the manufacturer's part, strict products liability is not absolute liability. This is because the plaintiff must prove that the product was defective and because the defendant has several possible affirmative defenses, such as assumption of risk or misuse of the product. P. RHEINGOLD & S. BIRNBAUM, *PRODUCT LIABILITY: LAW, PRACTICE, SCIENCE* 3 (2d ed. 1975).

45. W. PROSSER, J. WADE, V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 764-65 (7th ed. 1982).

46. For a more in-depth analysis of the policies behind products liability suits as related to successor liability issues, see Nielsen, *Liability of Successor Corporations*, 32 *FED'N INS. COUNS. Q.* 63, 70-71 (1981) (argues that purpose behind strict products liability law is to ensure that the costs of products, as to society as a whole, is properly reflected in the cost of products which cause harm); *Outer Limits*, *supra* note 37, at 120-22 nn. 18-26, 129; Prosser, *Strict Liability to the Consumer*, 69 *YALE L.J.* 1099, 1114-24 (1960) (good discussion of the general policy behind strict liability).

47. 59 Cal. 2d 57, ___, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

rules based on the needs of corporate transactions cannot be used on the issue of a manufacturer's liability for defective products "unless those rules also serve the purposes for which such liability is imposed."⁴⁸ Under this reasoning, it appears that the traditional rule of nonassumption of liability (developed to protect creditors and the successor corporation and to promote free alienability of corporate assets)⁴⁹ should not be applied to cases dealing with a successor corporation's strict products liability, because that rule does not serve the purposes of strict products liability doctrine.⁵⁰ Perhaps it is because of such a conflict that several courts have attempted either to expand the traditional rule exceptions or create new law in this area.

III. CASES CHANGING THE TRADITIONAL EXCEPTIONS OF NONASSUMPTION

A. *Expansion of the Mere Continuation and De Facto Merger Exceptions to the Traditional Rule of Nonassumption of Liabilities*

*Cyr v. B. Offen & Co.*⁵¹ is one of the first cases to recognize the problem of holding a successor corporation liable for defective products of its predecessor as one of tort law rather than strictly corporate law.⁵² Under the facts in that case, the court imposed successor liability by expanding the continuation exception.⁵³

In *Cyr*, key employees of the predecessor formed a corporation to purchase the assets of the predecessor following the death of the predecessor's sole proprietor.⁵⁴ The new owners did not notify customers of the predecessor that there was a new company, and the new owners advertised as an on-going, forty year old business.⁵⁵ The successor corporation continued to produce the same product previously manufactured by the old company.⁵⁶ Subsequently, two employees of a printing company were injured

48. *Id.*

49. See *supra* notes 37-39 and accompanying text.

50. See *supra* note 44.

51. 501 F.2d 1145 (1st Cir. 1974) (applying New Hampshire law).

52. See *id.* at 1153.

53. See *supra* notes 32-36 and accompanying text.

54. *Cyr*, 501 F.2d at 1151. Thus, there was no continuity of ownership as required under the mere continuation exception. See *supra* text accompanying note 35.

55. *Cyr*, 501 F.2d at 1151-52. The court stated the problem as being that "[o]n the one hand we face the problem of the buyer, who thinks it is purchasing a known set of assets and liabilities. On the other, we face users of a product who are not conscious of any change in responsibility on the part of the manufacturer." *Id.* at 1152.

56. *Id.* at 1151.

by a defective printing press manufactured by the predecessor.⁵⁷ The court found the successor strictly liable for the defective printing press, even though there was no continuity of ownership as required under the mere continuation exception.⁵⁸ This expanded rule was prompted by tort and products liability policy, evidenced by the *Cyr* court's emphasis that: (1) manufacturers rather than consumers should bear the risks inherent in producing goods;⁵⁹ (2) the successor can calculate and insure against risks which accompany the acquisition of the predecessor's manufacturing enterprise;⁶⁰ (3) the successor is in the position to improve on the predecessor's design of the product;⁶¹ and (4) the successor has profited from the predecessor's accumulated goodwill which the products have earned.⁶² Other courts have similarly relaxed the traditional requirements to the exceptions of nonassumption of the predecessor's liability in order to satisfy the plaintiff's claim.⁶³

Federal cases such as *Cyr* have made substantial changes by expanding the assumption of liabilities by a successor corporation. According to the

57. *Id.* at 1148.

58. *Id.* at 1153-54. The court stated that "ownership of the entity which maintains essentially the same name will not be the sole controlling determinant of liability." *Id.* at 1154.

59. *See infra* note 62. *But see infra* notes 147-55 and accompanying text in that the risk-spreading rationale is generally not valid, especially in successor liability cases.

60. *See infra* note 62. *But see infra* notes 147-55.

61. *See infra* note 62. *But see infra* notes 209-11 and accompanying text in that a successor will have the incentive to improve the design of its products even without liability for its predecessor's defective products.

62. Specifically, the *Cyr* court stated:

The very existence of strict liability for manufacturers implies a basic judgment that the hazards of predicting and insuring for risk from defective products are better borne by the manufacturer than by the consumer. The manufacturer's successor, carrying over the experience and expertise of the manufacturer, is likewise in a better position than the consumer to gauge the risks and the costs of meeting them. The successor knows the product, is as able to calculate the risk of defects as the predecessor, is in position to insure therefor and reflect such cost in sale negotiations, and is the only entity capable of improving the quality of the product. . . . [I]n the most real sense [the successor] is profiting from an [sic] exploiting all of the accumulated good will which the products have earned, both in its outward representations of continuity and in its internal adherence to the same line of equipment.

Cyr, 501 F.2d at 1154.

63. *See, e.g.,* Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974) (dissolution of the predecessor is not a necessary element, but rather only a factor); Dawejko v. Jorgensen Steel Co., 290 Pa. Super. 15, ___, 434 A.2d 106, 107-08 (1981) (broadened the requirement that dissolution of the predecessor be "as soon as practicable" to "within a reasonable time" if the asset-selling corporation is more shell than substance).

rule of *Erie Railroad Co. v. Tompkins*,⁶⁴ however, federal courts sitting in diversity, such as the *Cyr* court, are limited to established state law. This means that the issue of successor liability is controlled by the traditional rules unless the particular state's courts or legislature change the substantive law.⁶⁵ The discussion of the next two cases illustrates such a change.⁶⁶

In *Turner v. Bituminous Casualty Co.*,⁶⁷ the Michigan Supreme Court expanded the scope of the mere continuation and de facto merger exceptions by holding a successor corporation liable for its predecessor's defective products, even though the successor purchased the predecessor's assets for cash.⁶⁸ In *Turner*, the allegedly defective machine was manufactured in 1903 by "Old Sheridan."⁶⁹ In 1964, Old Sheridan was purchased for cash by Harris Intertype Corporation through a newly formed subsidiary, New Sheridan.⁷⁰ Old Sheridan immediately dissolved.⁷¹ In 1968, Turner's employer purchased the machine secondhand.⁷²

The *Turner* court began its analysis by stating that the case was "a products liability case first and foremost."⁷³ The court then reasoned that the traditional corporate rule of nonassumption of liability had developed to protect creditors and shareholders, rather than products liability plaintiffs. The court further reasoned that this rule was "not applicable to meeting the substantially different problems associated with products liability."⁷⁴ The court cited language in the California Supreme Court decision of *Ray v. Alad Corp.*,⁷⁵ indicating that a break from corporate law is proper when the strict liability of successor corporations is at issue.⁷⁶ Despite this strong language that tort law should apply, the *Turner* court curiously remained within the traditional corporate law framework in its holding. The court created a four-part expanded continuation exception.⁷⁷ This exception holds irrelevant whether the purchase of the predecessor's assets was for

64. 304 U.S. 64 (1938). Essentially, *Erie* held that when a federal court sits in diversity it must apply only the law of the appropriate jurisdiction as interpreted by that jurisdiction's highest court.

65. *Id.*

66. See, e.g., *infra* notes 67-91 and accompanying text.

67. 397 Mich. 406, 244 N.W.2d 873 (1976).

68. *Id.* at ___, 244 N.W.2d at 883.

69. *Id.* at ___, 244 N.W.2d at 875.

70. *Id.*

71. *Id.* at ___, 244 N.W.2d at 875-76.

72. *Id.* at ___, 244 N.W.2d at 875.

73. *Id.* at ___, 244 N.W.2d at 877.

74. *Id.* at ___, 244 N.W.2d at 881.

75. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

76. *Turner*, 397 Mich. at ___, 244 N.W.2d at 880-81.

77. The *Turner* elements are:

cash rather than for its own stock.⁷⁸ Thus, while eliminating the traditional emphasis on stock or continuity of ownership, the *Turner* court remained focused on the overall process of the corporation's succession.⁷⁹

B. The Product Line Exception of Ray v. Alad Corp.

The California Supreme Court broke away from the traditional corporate law analysis of successor liability by creating the "product line" exception in *Ray v. Alad Corp.*⁸⁰ In *Ray*, the defendant corporation paid cash for the predecessor's plant, equipment, inventory, trade name, and goodwill, and continued to manufacture the same line of ladders under the same brand name.⁸¹ The defendant-successor used the same equipment, designs, and personnel as the predecessor had used.⁸² Although the predecessor dissolved, there was no outward indication of any ownership change.⁸³ Subsequently, the plaintiff was injured by a defective ladder manufactured by the predecessor.⁸⁴ The *Ray* court refused to adopt the *Cyr* expansion to the traditional exceptions⁸⁵ because to do so would set an undesirable precedent for assessing liabilities to creditors outside of a strict products liability context.⁸⁶ The court believed that strict liability is a unique problem in dealing

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- (1) There was basic continuity of the enterprise of the seller corporation, including, apparently, a retention of key personnel, assets, general business operations, and even the [predecessor's] name.
 - (2) The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of consideration received from the buying corporation.
 - (3) The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the normal business operations of the seller corporation.
 - (4) The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.

Id. at ___, 244 N.W.2d at 883-84.

78. Contrast the nonrequirement of ownership continuity to the de facto merger and continuation exceptions of the traditional rule, which both require a continuity of ownership between the predecessor and successor or, in other words, payment to the predecessor in the successor's stock. See *supra* text accompanying notes 25-36.

79. See generally *supra* note 77; *Turner*, 397 Mich. at ___, 244 N.W.2d at 883-84.

80. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

81. *Id.* at 26, 560 P.2d at 5-6, 136 Cal. Rptr. at 576-77.

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

83. *Id.* at 27-28, 560 P.2d at 6-7, 136 Cal. Rptr. at 577-78.

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

85. The *Cyr* expansion holds that there need be no continuity of ownership, so it is irrelevant whether the consideration paid to the predecessor by the successor for its assets is stock or cash. See *supra* notes 51-66 and accompanying text.

86. *Ray*, 19 Cal. 3d at 30, 560 P.2d at 8, 136 Cal. Rptr. at 579.

with a successor corporation and, therefore, deserves special consideration.⁸⁷

The *Ray* court gave this area "special consideration" by developing a new rule applicable when dealing with strict products liability of a successor corporation. The court held that a corporation "which acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects . . . of the same product line previously manufactured and distributed by the entity from which the business was acquired."⁸⁸ The court offered three justifications for this rule:

- (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the [form of the] successor's acquisition of the business;
- (2) the successor's ability to assume the original manufacturer's risk-spreading rule; and
- (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business.⁸⁹

The *Ray* court further noted that adoption of the product line exception promotes the policies of strict products liability. It also promotes the protection of defenseless victims from defective products and the placement of the risks and costs of compensating those victims on the manufacturer and society.⁹⁰ The *Ray* court's focus turned away from the traditional corporate law analysis favoring nonassumption of liabilities to a products liability analysis offering increased protection to the injured plaintiff.⁹¹

C. *The Wisconsin Approach in Fish v. Amsted Industries, Inc.*

Prior to the 1985 case of *Fish v. Amsted Industries, Inc.*,⁹² it was uncertain how the Wisconsin Supreme Court would decide the issue of a successor's liability for defective products manufactured by the predecessor corporation in cases where the successor purchased the predecessor's assets

87. *Id.*

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

89. *Id.* at 31, 560 P.2d at 8-9, 136 Cal. Rptr. at 579-80.

90. *Id.* at 30-31, 560 P.2d at 8, 136 Cal. Rptr. at 579.

91. See generally *supra* notes 42-50 and accompanying text.

This "product line" exception has gained limited acceptance, being adopted only in three other states. See *Ramirez v. Amsted Indus.*, 86 N.J. 332, 431 A.2d 811 (1981); *Dawejko*, 290 Pa. Super. 15, 434 A.2d 106; *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984).

92. 126 Wis. 2d 293, 376 N.W.2d 820 (1985).

for cash.⁹³ In the 1982 case of *Cody v. Sheboygan Machine Co.*,⁹⁴ the Wisconsin Supreme Court failed to explicitly define the "identity" required between the predecessor and successor in order to hold the successor corporation liable for its predecessor's defective products.⁹⁵ The *Cody* court placed heavy, if not complete, emphasis on the lack of product line continuity in not finding liability on the defendant successor corporation.⁹⁶ The *Cody* court's rationale is close to that in the *Ray* holding,⁹⁷ giving the appearance that Wisconsin moved away from the traditional application of corporate law toward the tort-based applications of *Turner* and *Ray*.⁹⁸

Three years after *Cody*, the Wisconsin Supreme Court decided *Fish v. Amsted Industries, Inc.*⁹⁹ In *Fish*, the successor corporation purchased its predecessor's assets with cash and expressly refused to assume any product liability claims against the predecessor. The *Fish* court made it clear that Wisconsin adheres only to the existing corporate rules and, therefore, denied the plaintiff's product liability claim because of the express refusal in the asset acquisition to assume any such claims. The *Fish* court further stated that "[i]dentity refers to identity of ownership, not identity of product line,"¹⁰⁰ clearing up any doubts arising from *Cody*, particularly concerning whether Wisconsin would adopt the product line rule. In refuting

93. As will be explained, the court did not make itself clear in its two decisions in this area in 1982. For the distinction of the consideration being cash rather than stock, see *supra* note 28.

94. 108 Wis. 2d 105, 321 N.W.2d 142 (1982).

95. *Id.* at 107, 321 N.W.2d at 143. *Cody* was the companion case to *Tift v. Forage King Indus., Inc.*, 108 Wis. 2d 72, 322 N.W.2d 14 (1982). The *Tift* decision held that the test of liability was one of "identity" between the successor and predecessor. *Tift*, 108 Wis. 2d at 75-80, 322 N.W.2d at 15-17.

96. 108 Wis. 2d at 107, 321 N.W.2d at 143. The *Cody* court also justified its decision in *Tift* by emphasizing product line continuity. *Id.* at 106-07, 321 N.W.2d at 143.

97. See generally *supra* notes 80-91 and accompanying text.

98. See generally *Griggs v. Capitol Mach. Works, Inc.*, 690 S.W.2d 287 (Tex. Ct. App. 1985), *appeal denied per curiam*, 701 S.W.2d 238 (Tex. 1985); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, —, 689 P.2d 368, 386 (1984) (the court states that Wisconsin in *Tift* has chosen to follow the *Turner* mere continuation approach); *Tift*, 108 Wis. 2d at 83, 322 N.W.2d at 19 (Callow, J., dissenting) (states that the majority has reached its decision by "[i]ncorrectly applying well-established intercorporate principles. . ."); Grove, *Successor Products Liability: Wisconsin's Approach in Tift v. Forage King Industries, Inc.*, 55 WIS. BAR BULL. 17 (October 1982) (Grove concludes that even though the court states that it is applying traditional corporate law, in fact Wisconsin has probably adopted a product line exception).

For an interesting analysis and prediction of how Wisconsin would decide the successor liability issue when faced with it, see Comment, *Extension of Strict Tort Liability to Successor Corporations*, 61 MARQ. L. REV. 595 (1978) (based on prior Wisconsin decisions, the author concludes that Wisconsin will adopt the product line rule).

99. 126 Wis. 2d 293, 376 N.W.2d 820 (1985).

100. *Id.* at 301, 376 N.W.2d at 824.

the three policy reasons behind *Ray*,¹⁰¹ the court made it clear that it would not adopt the *Ray* or *Turner* rules.¹⁰²

IV. ADDITIONAL THEORIES OF SUCCESSOR LIABILITY

A. *The Emerging Duty to Warn*

The duty to warn imposes liability on a successor corporation for breach of its own duty of care¹⁰³ rather than for acts of its predecessor as to the continuity of enterprise and the product line doctrines.¹⁰⁴ A part of the rationale for imposing the duty on the successor to warn about defects in its predecessor's products is because the successor benefits from the predecessor's goodwill and customer contacts, and also because the successor represents itself to be the same enterprise as the predecessor.¹⁰⁵ Additionally, because the successor is in the best position to discover pre-existing defects, it has the duty to test and improve its predecessor's product.¹⁰⁶

Courts generally require that two prerequisites be met before invoking the duty to warn on the successor:¹⁰⁷ (1) it must be shown that the successor knew or should have known of the defect; and (2) there must be some special relationship between the successor and the purchasers of the predecessor's products. As to the first requirement, the successor has a duty to warn if it has actual knowledge of defects in the predecessor's products.¹⁰⁸ Whether the successor should have known of defects in its predecessor's products is purely a question of fact.¹⁰⁹ Factors which the courts consider include: sufficient contact between the successor corporation and purchas-

101. See *supra* text accompanying note 89.

102. See *Fish*, 126 Wis. 2d at 304-10, 376 N.W.2d at 825-28.

Note that *Fish* was a four-to-three decision. *Id.* at 294, 376 N.W.2d at 820. This close decision, as well as prior Wisconsin case law, suggests that Wisconsin would adopt a tort-based rule if an appropriate one were developed. See generally *Grove*, *supra* note 98; Comment, *supra* note 98.

103. See Sardell, *Products Liability and Successor Responsibility for Defects*, 6 CORP. L. REV. 82, 84 (1983); Note, *Intermediate and Successor Corporations Strictly Liable Under Product Line Standard*, 12 SETON HALL L. REV. 327, 350 (1982).

104. See generally *supra* notes 67-91 and accompanying text.

105. *Gee v. Tenneco, Inc.*, 615 F.2d 857, 866 (9th Cir. 1980).

106. See *Gee*, 615 F.2d at 865-66; see also *Shane v. Hobam, Inc.*, 332 F. Supp. 526 (E.D. Pa. 1971). This duty to warn is imposed on the successor because its control over the product enables it to have power to prevent harm from a pre-existing defect in the product. *Shane*, 332 F. Supp. at 530.

107. See generally *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 442 (7th Cir. 1977) (applying Wisconsin law).

108. *Travis v. Harris Corp.*, 565 F.2d 443, 449 (7th Cir. 1977).

109. See, e.g., *Shane*, 332 F. Supp. at 530-31; *Downtowner, Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118, 125 (N.D. 1984) (only when there is no genuine fact issue as to imputed knowledge is summary judgment appropriate).

ers of the predecessor's goods;¹¹⁰ remoteness in time between the predecessor-manufacturer and the defendant-successor;¹¹¹ and geographical remoteness between the predecessor and successor.¹¹² As to the second requirement, that of a special relationship in order to impose a duty to warn, courts generally require a "continuation" by the successor of the relationship which the predecessor had with any of its particular customers.¹¹³ This continuation is usually evidenced by the successor taking over the predecessor's service contracts, actually servicing the products, and knowing the product owners' identity and location.¹¹⁴ Courts have favorably adopted a duty to warn even when they have refused to adopt the *Ray* and *Turner* doctrines.¹¹⁵

110. See, e.g., *Jacobs v. Lakewood Aircraft Serv.*, 512 F. Supp. 176, 186 (E.D. Pa. 1981) (contacts between purchasers of the predecessor's goods and the successor corporation were insufficient to impute knowledge of defects on the successor); *Travis*, 565 F.2d at 448-49; *Gee*, 615 F.2d at 866; *Gonzalez v. Rock Wool Eng'g & Equip. Co.*, 117 Ill. App. 3d 435, 453 N.E.2d 792 (1983); *Radziul v. Hooper, Inc.*, 125 Misc. 2d 362, 479 N.Y.S.2d 324 (1984).

111. See, e.g., *Tucker v. Paxson Mach. Co.*, 645 F.2d 620, 626-27 (8th Cir. 1981) (no imputation of knowledge because the defendant successor company was too far remote from the predecessor due to many successor-purchasers between the defendant and the original predecessor's sale of its assets).

112. See *Jacobs*, 512 F. Supp. at 178.

113. See, e.g., *Gee*, 615 F.2d at 866. The emphasis on this "continuation" seems to be the successor's ability to control the product, as evidenced by a continuation of business relationships between the successor corporation and the predecessor's customers. See *Jacobs*, 512 F. Supp. at 186; *Sardell*, *supra* note 103, at 84.

114. *Tucker*, 645 F.2d at 626; see generally *Leannais*, 565 F.2d at 442; *Gee*, 615 F.2d at 866; *Travis*, 565 F.2d at 449; *Jacobs*, 512 F.2d at 185; *Gonzalez*, 117 Ill. App. 3d 435, 453 N.E.2d 792 (1983); *Stratton v. Garvey Int'l, Inc.*, 9 Kan. App. 2d 254, 676 P.2d 1290, 1295 (1984); *Radziul*, 125 Misc. 2d 362, 479 N.Y.S.2d 324 (1984); *Ostrowski v. Hydra-Tool Corp.*, 479 A.2d 126, 128 (Vt. 1984) (citing *Travis*).

The focus in deciding whether there is a sufficient relationship between the successor and purchasers of the predecessor's goods on which to invoke a duty to warn has been upon the actual or potential economic advantage to the successor corporation. See *Radziul*, 125 Misc. 2d at —, 479 N.Y.S.2d at 326-27.

It has also been said that there is no exhaustive list of factors which the courts can consider to find a sufficient relationship. Rather, the courts appear to use a risk/benefit analysis to see if it is fair to impose the duty to warn. See *Downtowner, Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 117, 125 (N.D. 1984).

115. See, e.g., *Leannais*, 565 F.2d at 441-43 (although the court refused to adopt the product line rule, it raised the possibility that defendant's succession to predecessor's service contracts provided a "sufficient nexus to establish a duty to warn"); *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 451 N.E.2d 195, 464 N.Y.S.2d 437 (1983) (the court upheld the lower court's dismissal of plaintiff's claims based upon the modern theories of successor liability, but reversed and remanded with respect to the lower court's summary judgment against the plaintiff based upon a duty to warn theory).

B. *The Bona Fide Purchaser Solution*

A final alternative to the adoption of the *Cyr*, *Turner*, or *Ray* exceptions¹¹⁶ is an expansion of the bona fide purchaser doctrine¹¹⁷ to the issue of the asset-purchasing successor's assumption of products liability for defective products sold by its predecessor. Under such an expansion, the successor is not held liable if it purchased the predecessor's assets in good faith without notice of any existing or potential defects of the predecessor's products.¹¹⁸ On the other hand, if the successor knew or should have known of the existing or potential defects in its predecessor's products, the successor is held liable for the product liability claims. Whether the successor knew or should have known of defects in its predecessor's product is purely a question of fact.¹¹⁹ Factors which the courts might consider to impute knowledge include: predecessor's liability record; predecessor's insurance premiums as compared to similarly-situated corporations; and data as to the predecessor's quality control or design safety. If a reasonable investigation of these factors does not result in any basis for imputing knowledge, the successor should be able to enter into the transaction free of liability for its predecessor's products.¹²⁰ As will be seen, this is a fair result because it generally satisfies the principles of tort law¹²¹ as well as the traditional corporate law policies of promoting the free alienability of corporate assets.¹²²

116. See generally *supra* notes 51-102 and accompanying text.

117. See *supra* notes 38-40 and accompanying text.

118. For applications of the bona fide purchaser doctrine as applied to commercial transactions, see Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U.L. REV. 811, 813-15 (1979); Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

119. This requirement of some knowledge would be similar to that which is required to impose a duty to warn on the successor. See *supra* text accompanying notes 108-09.

120. See generally J. CRIBBETT, *PRINCIPLES OF THE LAW OF PROPERTY* 187-88, 286-89 (1975) (bona fide purchaser (BFP) rules as related to real estate transactions); Gilmore, *supra* note 118, at 1057 (the bona fide purchaser is protected so that "commercial transactions may be engaged in without elaborate investigation of property rights and in reliance on the possession of property by one who offers it for sale").

121. See *infra* notes 234-44 and accompanying text.

122. See *supra* notes 37-39 and accompanying text.

The BFP expansion will also ease the uncertainty (as to the appropriate rule) that now exists in jurisdictions that have not yet changed the traditional rule of nonassumption of the predecessor's liability. See Hoffman, *Products Liability for Successor Corporations: A Break from Tradition*, 49 U. COLO. L. REV. 357, 369-70 (1978); Note, *Products Liability — Corporations — Asset Sales and Successor Liability*, 44 TENN. L. REV. 905, 916 (1977).

V. ANALYSIS OF STRICT PRODUCTS LIABILITY RATIONALES USED TO JUSTIFY SUCCESSOR LIABILITY

A. Introduction

A number of various strict products liability rationales are used to justify the imposition of strict products liability on a successor corporation which, through a cash purchase, acquires the assets of another corporation for cash. The *Cyr*¹²³ and *Ray*¹²⁴ courts both expounded on some of these policy rationales, which include: (1) the successor has the ability to assume the predecessor-manufacturer's risk-spreading role because it may insure against the risk of injury and pass those costs on to the consuming public, while the consumer is basically helpless;¹²⁵ (2) the successor is the entity that should be responsible for improvements in the product's quality and safety¹²⁶ because liability serves as a deterrent against the manufacture of unsafe products;¹²⁷ (3) the manufacturer-predecessor has an active role in

123. See *supra* notes 51-66 and accompanying text.

124. See *supra* notes 80-91 and accompanying text.

125. See *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1154 (1st Cir. 1974); *Ray v. Alad Corp.*, 19 Cal. 3d 22, 30, 560 P.2d 3, 8-9, 136 Cal. Rptr. 574, 579-80 (1977); see also *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, ___, 431 A.2d 811, 817, 820-21 (1981); *Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, ___, 434 A.2d 106, 109 (1981); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, ___, 689 P.2d 368, 387 (1984); *Fish v. Amsted Indus., Inc.*, 126 Wis. 2d 293, 315-16 (1985) (Abrahamson, J., dissenting).

See *supra* note 62 for the *Cyr* court's excellent explanation of the rationale behind the risk-spreading rule. But see *infra* notes 146-47 and accompanying text in that the risk-spreading rationale is not a sufficient justification for imposing liability on a manufacturer nor on a successor corporation.

For more on this risk-spreading rule as applied in products liability cases, see *Bachner v. Pearson*, 479 P.2d 319, 328 (Alaska 1970); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, ___, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); *Francioni v. Gibsonia Truck Corp.*, 472 Pa. 362, ___, 372 A.2d 736, 739 (1977); *Hoven v. Kelbe*, 79 Wis. 2d 444, 468, 256 N.W.2d 379, 391 (1977). See also *Furrow, Defective Mental Treatment: A Proposal for the Application of Strict Liability to Psychiatric Services*, 58 B.U.L. REV. 391, 414-15 (1978). But see *Sachs, Negligence or Strict Product Liability: Is there Really a Difference in Law or Economics?*, 8 GA. J. INT'L & COMP. L. 259, 271-73 (1978); *infra* notes 147-56 and accompanying text (risk-spreading rationale is not a valid justification).

126. See *Cyr*, 501 F.2d at 1154. The *Cyr* court stated that "[t]he manufacturer's successor, carrying over the experience and expertise of the manufacturer, is . . . in a better position . . . to gauge the risks The successor knows the product [and] is as able to calculate the risk of defects as the predecessor. . . ." *Cyr*, 501 F.2d 1154; see also *Ray*, 19 Cal. 3d at ___, 560 P.2d at 9, 136 Cal. Rptr. at 579; *Ramirez*, 86 N.J. at ___, 431 A.2d at 822; *Dawejko*, 290 Pa. Super. at ___, 434 A.2d at 108 (citations omitted); *Martin*, 102 Wash. 2d at ___, 689 P.2d at 386. (citations omitted).

127. See *Fish*, 126 Wis. 2d at 316, 376 N.W.2d at 831 (Abrahamson, J., dissenting). Justice Abrahamson also suggested that liability might encourage the successor to improve the product. *Id.* at 317, 376 N.W.2d at 832 (Abrahamson, J., dissenting). This suggestion is incorrect, however, because a corporation would always have the incentive to improve its own products in order to avoid liability for its own defective products, regardless of any successor liability.

causing the plaintiff's harm by placing the product in the stream of commerce;¹²⁸ and (4) the manufacturer-predecessor impliedly represents the product's safety by placing the product into the stream of commerce, and that representation is violated with a defective product.¹²⁹ An additional rationale, which is not behind strict products liability in general, but rather, is related only to strict products liability in successor liability cases, is that the successor profits from the predecessor's goodwill from those products.¹³⁰

A problem occurs with these policy rationales, however, since determining whether to impose strict liability on a successor corporation, courts should determine which combinations of rationales are sufficient to justify successor liability. The courts should also determine the importance of the rationales as an element of imposing liability. Courts generally fail to make such determinations, as illustrated by *Cyr*.¹³¹ In *Cyr*, the court first stated that there were three rationales which support imposing liability on the successor: (1) the successor should bear the costs of the plaintiff's injuries because it can calculate and insure against the risks of defective products;¹³² (2) the successor is able to improve upon the product and, therefore, liability serves as a deterrent to others;¹³³ and (3) that the successor profits from

128. The predecessor had an active role in causing the plaintiff's harm because the defective product was placed into the stream of commerce by the predecessor, irrespective of whether it was negligent. See *supra* notes 43-45 and accompanying text. But see *infra* notes 188-90 & 201-05 and accompanying text for the proposition that in some cases successor liability is not supported by the causation rationale.

129. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, ___, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

In short, "[b]y placing the product on the market, the seller represents to the public that it is fit; and he intends and expects that it will be purchased and consumed in reliance upon that representation." W. PROSSER, V. SCHWARTZ, CASES AND MATERIAL ON TORTS 765 (7th ed. 1982).

130. *Cyr*, 501 F.2d at 1154 (the successor profits from "the accumulated good will which the products have earned, both in its outward representations of continuity and in its internal adherence to the same line of equipment"); *Ray*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582 (successor liability "causes the one who takes the benefit [to] bear the burden"); *Ramirez*, 86 N.J. at 431, 431 A.2d at 822 (successor liability is "justified as a burden necessarily attached to its enjoyment of [its predecessor's] trade name, good will and the continuation of an established manufacturing enterprise"); *Martin*, 102 Wash. 2d at ___, 689 P.2d at 388 ("[t]he benefit of being able to take over a going concern . . . is necessarily burdened with potential products liability").

These conclusory assertions stated by the four courts above fail to analyze whether it is the successor or, more likely, the predecessor who actually receives the benefit of good will from the sale of the predecessor's products. See *infra* notes 141-46 and accompanying text.

131. 501 F.2d 1145 (1st Cir. 1974); see generally *supra* notes 51-66 and accompanying text.

132. *Cyr*, 501 F.2d at 1154.

133. *Id.*

the predecessor's goodwill.¹³⁴ The *Cyr* court found the successor liable even though the successor neither introduced the product into the stream of commerce, nor made an implied representation of the product's quality or safety.¹³⁵ The court, although mentioning these last two factors, failed to state why they were insignificant to its decision.¹³⁶ An analysis of these two rationales might have resulted in the court finding nonliability rather than liability.¹³⁷

An analysis of the various expansions in the area of successor liability¹³⁸ requires that the four policy rationales of strict liability, which the *Cyr* court mentioned,¹³⁹ be examined for their importance in successor strict products liability development. These policy rationales must then be analyzed as to whether they support the various alternatives of successor liability.¹⁴⁰ This Comment will engage in such an analysis, but first, it will be shown that the justification of imposing successor liability is not a valid basis for liability because the successor allegedly profits from its predecessor's goodwill.

B. Analysis of the Goodwill Justification

Several courts have conclusively stated that successor liability is equitable because the successor profits from the goodwill accumulated by the predecessor in the predecessor's sales of its products.¹⁴¹ These courts fail to realize that any profits went to the predecessor who sold the product and not to the successor.¹⁴² The successor actually paid for the predecessor's goodwill and reputation for excellence in the asset acquisition price.¹⁴³ That reputation is tarnished whenever defective products manufactured by the predecessor are discovered, lowering the value of the goodwill paid for by the successor.¹⁴⁴ Additionally, if the successor is held liable for defective products sold by its predecessor, it is being forced to pay twice for the pred-

134. *Id.*

135. *Id.*

136. *See id.*; *see also Ray*, 19 Cal. 3d at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581 (emphasizing risk-spreading rule, while ignoring the other factors).

137. *See generally infra* notes 197-212 and accompanying text.

138. *See supra* notes 51-91 & 103-22 and accompanying text.

139. *See supra* text accompanying notes 125-29.

140. *See infra* notes 182-244 and accompanying text.

141. *See supra* note 130 and accompanying text.

142. *Woody v. Combustion Eng'g, Inc.*, 463 F. Supp. 817, 821 (E. D. Tenn. 1978); *Martin*, 102 Wash. 2d at ___, 689 P.2d at 392 (Pearson, J., concurring in part, dissenting in part).

143. *Tift*, 108 Wis. 2d 72, 99, 322 N.W.2d 14, 26 (Callow, J., dissenting).

144. *Woody*, 463 F. Supp. at 821.

cessor's goodwill.¹⁴⁵ In essence, successor liability denies the successor the benefit of its bargain because: first, it forces the successor to pay more for its predecessor's goodwill than was agreed to in its asset acquisition agreement;¹⁴⁶ and second, the successor may no longer rely on the reputation of the predecessor established by manufacturing and selling those products. The goodwill rationale is rarely a sufficient justification for imposing successor liability because the successor does not profit from the predecessor's goodwill and the successor loses the value of the predecessor's reputation for excellence when defective products of the predecessor are discovered.

C. Analysis of the Risk-Spreading Role

The rationale that the successor corporation is in a better position to calculate the risks and spread the costs is rarely a sufficient justification for imposing strict products liability on the successor corporation for defective products of its predecessor. First, there appears to be no case law under the theory of strict products liability which makes the plaintiff's recovery dependent upon whether the plaintiff or defendant is in a better position to spread the cost of the harm.¹⁴⁷ Although the cases infer that the successor corporation is in a good position to absorb the cost, in reality the imposition of successor liability could severely cripple industries which are comprised mostly of small corporations.¹⁴⁸ This potential industry-crippling effect becomes apparent when it is realized that insurance for defects caused by a predecessor's product is becoming increasingly difficult to obtain and, even if obtainable, its cost is usually prohibitive.¹⁴⁹

145. *Manh Hung Nguyen v. Johnson Mach. & Press Corp.*, 104 Ill. App. 3d 1141, __, 433 N.E.2d 1104, 1112 (1982); *Martin*, 102 Wash. 2d at __, 689 P.2d at 392 (Pearson, J., concurring in part, dissenting in part); *Fish*, 126 Wis. 2d at 309, 376 N.W.2d at 828 (1985); *Tift*, 108 Wis. 2d at 99, 322 N.W.2d at 26 (Callow, J., dissenting).

146. *Manh Hung Nguyen*, 104 Ill. App. 3d at __, 433 N.E.2d at 1112.

147. The North Dakota Supreme Court stated that "in most strict liability cases, the ability or inability of the defendant to bear the costs of that liability will not prevent liability. The defendant has violated a duty and should be made liable for the violation." *Downtowner, Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118, 124 (N.D. 1984) (quoting *Manh Hung Nguyen*, 104 Ill. App. 3d at __, 433 N.E.2d at 1111).

148. *Bernard v. Kee Mfg. Co.*, 409 So. 2d 1047, 1049-50 (Fla. 1982); *Manh Hung Nguyen*, 104 Ill. App. 3d at __, 433 N.E.2d at 1111; *Ramirez*, 86 N.J. 322, __, 431 A.2d 811, 826 (1981) (Schreiber, J., concurring); *Ostrowski*, 144 Vt. at __, 479 A.2d at 127; *Tift*, 108 Wis. 2d at 96-97, 322 N.W.2d at 25 (Callow, J. dissenting); see also Comment, *Products Liability and Successor Corporation: Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance*, 13 U.C. DAVIS L. REV. 1000 (1980); Comment, *The Federal Government and the Product Liability Problem: From Task-Force Investigation to Decisions by the Administration*, 47 U. CIN. L. REV. 573 (1978).

149. See *Tift*, 108 Wis. 2d at 95-96, 322 N.W.2d at 24 (Callow, J., dissenting) (citing *Ramirez*, 86 N.J. at 360, 431 A.2d at 826 (Schreiber, J., concurring)) (quoting *Products Liability Insurance*:

The second reason why the risk-spreading role rationale fails to justify successor liability is that if cost-spreading is truly a goal, it would be more efficiently met through some system of social insurance.¹⁵⁰ Social insurance would be more efficient in cost-spreading than our tort system, because social insurance simplifies the plaintiff's burden of proof to merely that of proving the extent of its accidental injuries. Also, social insurance ensures the cost of injuries is spread evenly throughout society, rather than just among defendants in the current tort system.¹⁵¹

A third reason why the risk-spreading rationale fails as a justification for successor liability is that it conflicts with the role of deterrence in our tort system.¹⁵² If cost-spreading is maximized through a form of social or industry-wide insurance,¹⁵³ manufacturers have no direct financial deterrent to the production of defective products since the manufacturer's payments for such insurance are independent of any accidents caused by their products.¹⁵⁴ It is because of this lack of a deterrent, as well as the unavaila-

Hearing Before the Subcommittee on Capital, Investment, and Business of The House Committee on Small Business, 95th Cong., 1st Sess. 4 (1977) (testimony of Charles W. Whalen, Jr.); REPORT ON THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 6 (1986) (businesses have severe problems in the "availability of insurance, affordability of insurance coverage, and adequacy of coverage"), H. Rep. No. 190, 97th Cong., 1st Sess. 24 (1981) (reprinted in 1981 U.S. CODE CONG. & ADMIN. NEWS 1432); *Product Liability Risk Retention Act: Hearings on H.R. 2120 Before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce*, 97th Cong., 1st Sess. 9-11 (1981) (reprinted in 1981 U.S. CODE CONG. & ADMIN. NEWS 1437-40).

Contrast the difficulty today in obtaining products liability insurance to the fact that about ten to fifteen years ago, products liability insurance was a "casual extra, often offered to major customers free of charge as a special inducement for capturing other lines of business." R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 4 (1980).

For a general review of insurance for products liability, see G. SULLIVAN, PRODUCTS LIABILITY: WHO NEEDS IT? 125-68 (1979).

150. Social insurance has been recommended as a means to solve the successor liability problem. See, e.g., Schwartz, *Products Liability and No-Fault Insurance: Can One Live Without the Other?*, 12 FORUM 130 (1976-77); Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L. REV. 86, 110 (1975); Note, *Products Liability for Successor Corporations: A Break from Tradition*, 49 U. COLO. L. REV. 357, 375 (1978).

151. See generally E. BERNZWEIG, BY ACCIDENT NOT DESIGN: THE CASE FOR COMPREHENSIVE INJURY REPARATIONS (1980). A social insurance program probably is not currently feasible in the United States, although other countries had success with such programs. *Id.* at 191-209.

152. See *infra* notes 156-67 and accompanying text; see also G. CALABRESI, THE COSTS OF ACCIDENTS 94 (1970).

153. See, e.g., Risk Retention Act of 1981, 15 U.S.C. secs. 3901-02 (permits the formation of risk retention groups within an industry to insure and spread the products liability of its members).

154. See G. CALABRESI, *supra* note 152, at 64-65.

bility of products liability insurance,¹⁵⁵ that the risk-spreading role rationale is generally not a sufficient justification to impose successor liability.

D. Analysis of the Deterrence Factor

General deterrence in tort law plays the role of reducing accidents by making "activities more expensive, and thereby less attractive to the extent of the accident costs they cause."¹⁵⁶ The idea of this general deterrence is to charge the party manufacturing the goods with the costs of the accidents their goods cause, resulting in accident costs becoming a cost of manufacturing, like labor and material costs.¹⁵⁷ If manufacturers know they will be liable for the costs of accidents their products cause, the deterrence theory encourages manufacturers to make safer products in order to avoid the extra costs of accidents.¹⁵⁸ The end result of this theory is that manufacturers will make safer products whenever it is cheaper than paying the costs of accidents caused by their products.¹⁵⁹ A final element of the general deterrence theory is that the party to be charged with the costs of accidents should be the one who can "avoid the accident costs most cheaply through some safety measures or otherwise."¹⁶⁰

The deterrence rationale is a sufficient justification for imposing liability in our tort system even though it is shown that this rationale does not support all of the successor liability theories.¹⁶¹ When a manufacturer is held strictly liable for its defective products, it is deterred from selling products with high accident costs and will, therefore, have an incentive to improve its products.¹⁶² Courts generally will not impose liability if the deterrence ra-

155. See *supra* notes 148-49 and accompanying text.

156. G. CALABRESI, *supra* note 152, at 26.

157. See *id.* at 70.

Requiring the successor to be liable ensures that the costs of product injuries are treated "as a cost of . . . doing business, thus assuring that . . . enterprises willfully 'pay their way' " in society. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980). Imposing the costs of product injuries as a cost of doing business encourages all economically efficient safety improvements. See also *infra* text accompanying note 158.

Requiring the successor to be liable for defective products of its predecessor also serves as a deterrent against the manufacture of defective products in another way: the predecessor will probably receive a lower consideration in the sale of its assets if its successor is going to be liable for the predecessor's defective products. Therefore, in order to increase the value of its assets, the predecessor has the incentive not to produce defective products. However, this rationale is not considered to be sufficient justification. See *infra* notes 194-96 and accompanying text.

158. See G. CALABRESI, *supra* note 152, at 73.

159. For an example of when it might be cheaper to assume the costs of accidents that one causes as compared to implementing safety precautions see *id.* at 73-75.

160. See *id.* at 135.

161. See *infra* notes 191-96 & 206-12 and accompanying text.

162. See *supra* text accompanying notes 157-59.

tionale is not supported in a particular case. This is evidenced by the fact that the manufacturer is not held liable for injuries involving its product if: (1) there is an unforeseeable alteration of the product which causes the harm or accident;¹⁶³ (2) the product is unforeseeably misused or abnormally used;¹⁶⁴ (3) the plaintiff assumes the inherent risk of the product;¹⁶⁵ or (4) if the plaintiff does not heed a warning about the product's danger.¹⁶⁶ In those situations where liability is not imposed, it is perhaps due to the fact that the deterrence rationale is not supported since someone other than the manufacturer, usually the product user or consumer, is best able to implement some type of safety measure more cheaply. This analysis shows that liability for product-caused injuries should not be imposed upon the manufacturer unless the deterrence rationale is applicable.

E. Analysis of the Causation Factor

Strict liability may have a relaxed standard of proof because the plaintiff need not prove negligence of the manufacturer,¹⁶⁷ but some type of causation or responsibility linking the manufacturer to the harm must still exist. Liability should not be placed on a manufacturer unless it has created the risk and caused the injury by its defective products.¹⁶⁸ Manufacturers are not held liable for product-related injuries to which the manufacturers have no connection or any responsibility to rectify.¹⁶⁹ Rather, under strict products liability, manufacturers should be held liable only if the product's de-

163. See generally Cartwright, *Effect of Alteration of the Product; Furnishing of Safety Devices as an Option or Accessory; and Statute of Limitations in Products Cases*, 1 S. METH. U. PRODS. LIAB. INST. sec. 8.02 (V. Walkowiak ed. 1980).

164. See generally Sales, *Assumption of the Risk and Misuse in Strict Tort Liability — Prelude to Comparative Fault*, 1 S. METH. U. PRODS. LIAB. INST. sec. 9.04 (V. Walkowiak ed. 1980).

Cases related to this issue include: *Peterson v. Parke Davis & Co.*, 705 P.2d 1001, 1003 (Colo. App. 1985) (misuse is any type of use or conduct which is improper in light of qualities and characteristics of the product itself); *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 345 (Wyo. 1986) (no liability for injuries caused by unforeseeable alterations in the product rather than by original defects).

165. See generally Sales, *supra* note 164, at sec. 9.03; see, e.g., *Clark v. Rogers*, 137 Ill. App. 3d 591, ___, 484 N.E.2d 867, 869-70 (1985) (assumption of risk is found when the plaintiff voluntarily chooses to encounter a known, unreasonable risk associated with a product).

166. See generally Downing, *Duty to Warn in Product Liability Cases*, 1 S. METH. U. PRODS. LIAB. INST. sec. 6.01 (V. Walkowiak ed. 1980).

167. See *supra* notes 43-45 and accompanying text.

168. See Fegan, *Successor Corporations and Strict Liability in Tort — A Convergence of Two Opposing Doctrines*, 69 ILL. B.J. 142, 153 (1980).

169. See generally PROSSER ON TORTS, *supra* note 42, secs. 97-102, at 690-712.

fective or dangerous condition was present when it left the manufacturer's control.¹⁷⁰

It may be argued that causation is a weak rationale behind strict products liability doctrine because often retailers, distributors, and wholesalers are held liable for the sale of a defective product, even though they did not manufacture it.¹⁷¹ However, although causation may be weak in such cases, it is still present.* Even though retailers, distributors, and wholesalers are not the original cause of the defect,¹⁷² they are still a cause of the plaintiff's harm since their failure to discover the defect and remove the product from the stream of commerce resulted in the defective product reaching the plaintiff.¹⁷³ Even though there need not be a strong causal link between the defendant and the plaintiff's harm, strict products liability still requires some form of causation.¹⁷⁴

Causation is also important to strict products liability in that it serves as some indication as to which entity should be held liable in order to further the deterrence rationale.¹⁷⁵ The entities which cause people harm are most likely to be the parties best able to respond to liability for injuries, because such entities may take safety measures to eliminate any risk of causing harm. Also, if the causation rationale supports the deterrence rationale in a given case, then imposing liability on a manufacturer conforms with the goal of justice in our tort system.¹⁷⁶ Causation is certainly an important factor to consider when imposing products liability on an entity.

170. See RESTATEMENT (SECOND) OF TORTS sec. 402A(1) (1965). For the specific wording of Section 402A, see *supra* note 44.

171. For examples of cases where a retailer or distributor have been held liable even though they did not manufacture the product, see *Wilkinson v. Bay Shore Lumber Co.*, 182 Cal. App. 3d 594, 600-02, 227 Cal. Rptr. 327, 331 (1986) (strict liability for a defectively manufactured product also applies to retailers, wholesalers, and distributors who sell that product); *American White Cross Laboratories, Inc. v. Continental Ins. Co.*, 202 N.J. Super. 372, ___, 495 A.2d 152, 155-56 (1985) (distributor and retailer strictly liable even if good is prepackaged and is merely passed along to the consumer).

172. The original cause of the defect is generally the fault of the manufacturer because it made the defective product.

173. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, ___, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899-900 (1964); see also *American White Cross Laboratories*, 202 N.J. Super. at ___, 495 A.2d at 155-56 (distributors and retailers are "merely conduits in the stream of commerce which ends at the ultimate consumer").

174. See *Woody v. Combustion Eng'g*, 463 F. Supp. 817, 820 (E.D. Tenn. 1978) ("even in product liability cases a manufacturer is responsible only for its own actions.").

175. See generally *supra* notes 156-66 and accompanying text.

176. For a brief discussion of justice as a difficult-to-define goal, see G. CALABRESI, *supra* note 152, at 24-26.

F. Analysis of the Representation Factor

The final rationale used to justify strict products liability is that the manufacturer impliedly represents that a product is safe by placing it into the stream of commerce, and that this representation is violated when a product is defective.¹⁷⁷ Whether a product is to be considered defective often hinges upon the manufacturer's representations as to that product and the expectations of a reasonable consumer or user.¹⁷⁸ Thus, it has been held that strict products liability is not appropriate when there is no implied representation of safety, such as when the defect is so obvious or so inherent in the nature of the product that a reasonable person would not believe it to be safe.¹⁷⁹ However, liability should not be denied just because there is no breach of implied representation of safety since the manufacturer is often the entity best able to implement some type of cost-efficient safety measures.¹⁸⁰ Hence, although the implied representation rationale often supports strict products liability, it is not always a necessary factor if liability in a certain case is supported by the causation or deterrence rationales.¹⁸¹

VI. ANALYSIS OF STRICT PRODUCTS LIABILITY RATIONALES AS
APPLIED TO THE ALTERNATIVE THEORIES
OF SUCCESSOR LIABILITY

*A. Analysis of the Expanded Mere Continuation and
De Facto Merger Exceptions*

The expansion of the mere continuation¹⁸² and de facto merger¹⁸³ exceptions have led to imposing strict products liability on the successor cor-

177. See *supra* note 129 and accompanying text.

178. See RESTATEMENT (SECOND) OF TORTS sec. 402A comment g (1965) (a product is defective when it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him"); see, e.g., *Readenour v. Marion Power Shovel*, 149 Ariz. 442, ___, 719 P.2d 1058, 1063 (1986); *Taylor v. Gerry's Ridgewood, Inc.*, 141 Ill. App. 3d 780, ___, 490 N.E.2d 987, 991 (1986) (product is defective when it fails to perform in a manner reasonably to be expected); *Reichelt v. Johns-Manville Corp.*, 42 Wash. App. 620, ___, 712 P.2d 881, 885 (1986).

179. See, e.g., *Smith v. Hub Mfg., Inc.*, 634 F. Supp. 1505, 1508 (N.D.N.Y. 1986); *Nichols v. Westfield Indus., Ltd.*, 380 N.W.2d 392, 401 (Iowa 1985); *Pettis v. Nalco Chem. Co.*, 150 Mich. App. 294, ___, 388 N.W.2d 343, 348 (1986); *Minneapolis Soc'y of Fine Arts v. Parker-Klein Assoc. Architects, Inc.*, 354 N.W.2d 816, 821 (Minn. 1984).

180. See Twerski, *From Defect to Cause to Comparative Fault — Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 305-16 (1977).

181. Conversely, note the idea that the manufacturer is the one best able to implement cost-efficient safety measures is important to the causation and deterrence rationales. See generally *supra* notes 156-76 and accompanying text. It would appear that the implied representation factor by itself is not a sufficient justification for imposing strict products liability. See Twerski, *supra* note 180, at 305-16.

182. See *supra* notes 32-36 and accompanying text.

poration even though there is no commonality or continuation of ownership between the predecessor and the successor corporation.¹⁸⁴ This expansion of not requiring commonality of ownership is not supported by the original rationales behind the two exceptions when commonality was required, namely: (1) successor liability in a de facto merger case is equitable because continuity of shareholders means that the successor and predecessor corporations are "no longer strangers" because they have become one corporation, with the shareholders of the predecessor now shareholders of the successor;¹⁸⁵ and (2) successor liability in a mere continuation case is equitable because the presence of commonality of shareholders means that the predecessor and the successor are really one entity with merely a name change separating the two.¹⁸⁶ Hence, shareholder continuity has been an important factor for justifying successor liability before the expansion of the exceptions because, with such commonality or continuity present, the successor corporation is merely a changed outer shell of the predecessor.¹⁸⁷

The causation factor does not support successor liability if there is no continuity of ownership. Without ownership continuity, the predecessor and successor corporations are two distinct corporate entities. It is not the successor that manufactured the defective product and participated in the original chain of sale — it is the predecessor, an entity entirely distinct from its successor.¹⁸⁸ The causation rationale is not supported because, without ownership continuity, it is the predecessor, not the successor, who causes

183. See *supra* notes 25-31.

184. See, e.g., *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1153-54 (1st Cir. 1974).

185. *Turner*, 397 Mich. at ___, 244 N.W.2d at 891-92; see also *supra* note 31 and accompanying text.

186. *Arthur Elevator Co. v. Grove*, 236 N.W.2d 383, 391-93 (Iowa 1975); see also *supra* note 36 and accompanying text.

187. The Illinois Supreme Court has stated that shareholder continuity is probably the most important element in finding successor liability:

The 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.

Manh Hung Nguyen v. Johnson Mach. & Press Corp., 104 Ill. App. 3d 1141, ___, 433 N.E.2d 1104, 1110 (1982).

188. See *Bernard v. Kee Mfg. Co.*, 409 So. 2d 1047, 1050 (Fla. 1982); *Domine v. Fulton Iron Works*, 76 Ill. App. 3d 253, ___, 395 N.E.2d 19, 23 (1979); *Jones v. Johnson Mach. & Press Co.*, 211 Neb. 724, 320 N.W.2d 481, 484 (1982); *Downtowner, Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118, 123 (N.D. 1984); *Ostrowski v. Hydra-Tool Corp.*, 144 Vt. 305, 479 A.2d 126, 127 (1984); *Fish v. Amsted Indus., Inc.*, 126 Wis. 2d 293, 307, 376 N.W.2d 820, 827 (1985).

the manufacture and sale of the defective product.¹⁸⁹ Similarly, the implied representation rationale is not supported without ownership continuity because the successor does not solicit the defective product, nor does it make any type of representation as to the product's safety.¹⁹⁰

The deterrence rationale has little support for imposition of successor liability in cases where there is no continuity of ownership. If the predecessor in such cases is viewed as a distinct corporate entity, successor liability results in charging a party other than the manufacturer of the good with the costs of accidents caused by defective products.¹⁹¹ This conflicts with the fact that, even in cases where the manufacturer is not held liable, courts do not search for another defendant to be held liable.¹⁹² Rather, the plaintiff's claim must pass or fail against the original sellers or manufacturers of the good.¹⁹³

The only support for successor liability in cases without stockholder continuity is that if the successor knows it will be liable for defective products of its predecessor, the purchase price of the predecessor's assets reflects this potential liability. Successor liability serves as a deterrent in such cases because the predecessor has the incentive not to manufacture or sell defective products, so that the successor maximizes the value of its assets when it decides to sell them.¹⁹⁴ However, because liability would be imposed on the successor without it being the cause of the defective product,¹⁹⁵ such liabil-

189. The district court in *Woody v. Combustion Eng'g, Inc.*, 463 F. Supp. 817 (E. D. Tenn. 1978), had an interesting analysis as to why successor liability is inappropriate when there is no continuity of ownership:

The corporate stranger which purchases some or all of the assets of a corporation bears no closer relationship to a defective product produced by that predecessor than does any other company in the industry which is producing the same product. . . . Thus, while the manufacturer is not "at fault" in the sense that it is negligent, it is held personally responsible for the level of safety which it has selected. This responsibility cannot idly be cast upon a stranger to the production process. Responsibility for production decisions should remain with the party which made them. For this reason an entire industry is not held liable for the defective products of one company. For the same reason, a simple purchaser of assets should not be liable for the defective products of its predecessor.

Id. at 820-21; see also PROSSER ON TORTS, *supra* note 42, secs. 97-102, at 690-712 (purpose of strict liability has never been to expose manufacturers to liability for injuries with which they have no connection).

190. See cases cited in note 189.

191. This fails the principle that the party manufacturing defective goods should be charged with the costs of accidents caused by those products. See *supra* notes 156-59 and accompanying text.

192. See generally *supra* notes 163-66 and accompanying text.

193. *Id.*

194. See *supra* note 157.

195. See *supra* notes 188-90 and accompanying text.

ity does not conform with the notions of tort justice.¹⁹⁶ The result is that since neither the causation, the implied representation, nor the deterrence rationales strongly support successor liability in cases where there is no continuity of ownership, liability should not be imposed under the expanded continuation or the de facto merger exceptions.

B. *Analysis of the Ray Product Line Exception*

The product line exception of *Ray v. Alad Corp.*¹⁹⁷ ignores the business aspects of the corporate acquisition by holding that a corporation which "acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the previous business was acquired."¹⁹⁸ By ignoring the corporate aspects of successor liability¹⁹⁹ and concentrating instead on whether the successor manufactures the same product line as its predecessor, the *Ray* court developed a rule inconsistent with the major rationales of strict products liability.²⁰⁰

First, the causation rationale does not support the *Ray* rule. The product line rule imposes liability without analyzing how closely related the successor and predecessor corporations are as to their entity structure, such as commonality of shareholders, same management and officers, assumed liabilities, etc.²⁰¹ Ignoring these factors makes the product line rule similar to the expanded continuation exceptions²⁰² in that liability may be imposed on the successor corporation even though it is an entity distinct from the predecessor.²⁰³ In cases under the product line rule, where there is no commonality of ownership between the predecessor and successor, successor

196. See *supra* note 176 and accompanying text.

197. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

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

199. Examples of successor liability rules that look at the relatedness of the predecessor and successor corporations include the de facto merger and mere continuation exceptions to the general rule of nonassumption of liabilities. See *supra* notes 25-36 and accompanying text. These two exceptions place heavy emphasis on stockholder continuity, a factor which the product line exception does not consider.

200. See *supra* notes 123-81 and accompanying text. The *Ray* court set out three justifications that it believed supported its rule. See *supra* text accompanying note 89. These justifications generally have been attacked by many courts. See, e.g., cases cited in note 89. For a well-reasoned commentary attacking the *Ray* justifications, see Comment, *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, 1421-28 (1982).

201. See *supra* text accompanying note 89.

202. See *supra* notes 51-79 and accompanying text.

203. See *supra* notes 188-89 and accompanying text.

liability results in holding an entity liable which is not the cause of the defective product because it is the predecessor, not the successor, who manufactured and sold the defective product.²⁰⁴ The causation rationale does not support the product line rule because the rule is too broad and might impose liability in cases where the successor was not a cause of the defective product. Similarly, the representation rationale often will support the product line rule because the rule's overbreadth results in imposing liability where, without stockholder continuity, it cannot be said that the successor impliedly represented that the predecessor's products were safe.²⁰⁵

Second, the deterrence rationale provides little support for the product line exception. It must be noted again that the product line exception in some cases may impose liability on a successor corporation where there is no continuity of ownership.²⁰⁶ In such cases the successor is an entity distinct from the predecessor and, therefore, holding the successor liable will result in charging the costs of accidents caused by defective products to a party other than the manufacturer of the goods.²⁰⁷ This result conflicts with the deterrence theory which seeks to charge the manufacturer, or any corporate entity closely related to it in form, with its accident costs. In this manner, the deterrence theory encourages the manufacturer to take safety measures to improve its products in order to eliminate the risks of causing harm.²⁰⁸

The *Ray* court's focus on continuation of the predecessor's product line in order to deter a manufacturer from making unsafe products is similarly not supported under the deterrence rationale. Successor liability is supported only if the successor's liability for its predecessor's defective products is somehow reduced due to improvements it makes in the predecessor's defective product line. Without this type of extra incentive to make its products safer, the product line exception is unnecessary since a successor will always have an incentive to improve its products, knowing it is liable for injuries caused by any defective product it manufactures. The only beneficial aspect of successor liability under the product line approach is that the

204. *Id.* For an interesting analysis of why successor liability is inappropriate in cases where stockholder continuity is lacking, see the quote from *Woody v. Combustion Eng'g, Inc.*, 463 F. Supp. 817, 820-21 (E.D. Tenn 1978) set out in note 189.

205. The lack of ownership continuity is also the reason why the implied representation rationale does not support the expanded de facto and mere continuation exceptions. See *supra* note 190 and accompanying text.

206. See *supra* notes 201-03 and accompanying text.

207. See *supra* notes 201-04 and accompanying text.

208. See *supra* notes 175-76 and accompanying text. This is also similar to the deficiency of the expanded mere continuation and de facto merger exceptions. See *supra* notes 191-93 and accompanying text.

successor may receive more information about the defects in its predecessor's products²⁰⁹ and the costs of injuries caused by those defects due to lawsuits being brought against it for its predecessor's products.²¹⁰ However, whether the information the successor receives would dramatically increase under product line liability is questionable because the successor always has the incentive to seek such information in order to avoid liability for its own defective products. It follows that the product line exception is not necessary as an incentive to the successor to seek information necessary to avoid liability for its own defective products, nor is it necessary to give the successor incentive to improve the safety of its own product line.²¹¹

The only support for successor liability under the product line rule is when the successor's knowledge that it will be held liable for the continued production of its predecessor's line causes the purchase price of the predecessor's assets to reflect this potential liability. The potential of such a low sales price gives the predecessor the incentive not to manufacture defective products in order to maximize its asset value. However, as under the analysis of the expanded de facto merger or mere continuation exceptions, liability would be imposed without the successor's fault; such liability offends the notions of tort justice.²¹² Because neither the causation, the implied representation, nor the deterrence rationale provide strong support for the *Ray* product line rule, successor liability should not be imposed under that rule.

C. *Analysis of the Successor's Duty to Warn*

An emerging theory of successor liability is to impose on a successor corporation a duty to warn owners of its predecessor's potentially defective products, if two factors exist: (1) the successor knows or should know of defects in its predecessor's products, and (2) some type of special relationship exists between the successor corporation and the owners of products manufactured by the successor's predecessor.²¹³ Courts have been more willing to find successor liability under a breach of duty to warn than under

209. This information will help the successor improve the safety of any particular product line.

210. This information will help the successor decide whether it can cost-efficiently improve the safety of any particular product line. See *supra* text accompanying notes 156-58.

211. For the same reasons, the rationale that the successor is in the best position to improve upon the safety design of the predecessor's product is not a valid rationale to support successor liability under the expanded de facto merger or mere continuation exceptions.

212. For a discussion of this issue in the context of the de facto merger and mere continuation exceptions, see *supra* notes 190-96 and accompanying text.

213. See *supra* notes 107-14 and accompanying text for a detailed discussion of the elements of the duty to warn. Note that it is essentially the special relationship between the successor corporation and the product owner that creates this duty.

the product line rule,²¹⁴ the expanded de facto merger, and the mere continuation exception.²¹⁵ The main reason for this growing acceptance of the successor's duty to warn is that the theory sanctions a successor corporation for breach of its own duty of care, rather than for its predecessor's breach of a duty.²¹⁶

The successor's duty to warn also has support from the rationales behind strict products liability. The first rationale, causation, justifies successor liability even though the successor does not manufacture the defective product. Its knowledge of the defect and its special relationship to the owner of the product²¹⁷ puts it in a position to rectify the risk of harm, or at least warn about the product's defect.²¹⁸ In cases where the plaintiff's harm may have been prevented by a warning from the successor because of its relationship to the plaintiff, it may be said that the successor's failure to warn was a cause of the plaintiff's harm.²¹⁹ Certainly, such causation is stronger than that in the widely accepted cases where a distributor or a retailer is held strictly liable.²²⁰

The deterrence rationale also supports successor liability under the duty to warn theory. Although under this theory there is no deterrence against the production of defective products,²²¹ there is a deterrence against *not* warning product owners of defects in their products, which ultimately results in safer products.²²² The deterrence rationale also supports the duty

214. See *supra* notes 80-91 and accompanying text for a basic discussion of the product line rule.

215. See *supra* notes 51-79 and accompanying text for a basic discussion of how two courts have expanded the traditional exceptions to the corporate rule of nonassumption of liabilities.

216. The expanded traditional exceptions and the product line rule impose liability on a successor corporation even though the successor was not necessarily a cause of either the product's defectiveness or of the plaintiff's harm. See *supra* notes 188-90 & 201-05 and accompanying text.

217. See *supra* notes 113-15 and accompanying text.

218. Strict products liability seeks to hold a manufacturer liable only when it causes the injury by manufacturing a defective product, or when it had some type of responsibility to rectify the defect, which might include the duty to warn. See *supra* text accompanying note 169.

219. The successor was a cause of plaintiff's harm because the plaintiff might not have been injured but for the failure to warn.

220. See *supra* notes 172-74 and accompanying text. The causation factor is generally weak when a distributor or retailer had no reason to know of the product's defect. The causation factor is stronger in the duty to warn theory because in addition to the requirement of the successor having actual or imputed knowledge of the defect, the successor must also have some special relationship to the product owner. Hence, the successor is held liable under the duty to warn theory only in cases where it clearly had the opportunity to prevent the plaintiff's harm by warning the product owner of the defects.

221. See *supra* notes 157-59 and accompanying text which explain that the deterrence rationale seeks to prevent the manufacture of defective products.

222. This statement first assumes that it will be cheaper for successors to give warnings to the product owners, rather than pay the costs of accidents caused by their predecessor's defective

to warn theory in that if the successor has actual or implied knowledge of the product's defect and has a special relationship to the plaintiff,²²³ then its ability to give a direct warning to the product owner means that it is the entity which can most effectively avoid the costs of accidents created by the product.

The implied representation rationale supports liability under a duty to warn only when there is a commonality or a continuity of identity between the predecessor and successor, as in cases of a statutory merger or consolidation, a de facto merger, or a mere continuation.²²⁴ In such cases, the successor is considered as being the predecessor in a changed form,²²⁵ and, therefore, it can be said that the predecessor, now the successor, did impliedly represent that the product was safe by placing it into the stream of commerce. However, even though the implied representation rationale might not justify successor liability in all cases under the duty to warn, it is not an overriding factor resulting in denied liability, because the causation and deterrence rationales so strongly support liability.²²⁶ Overall, the rationales behind strict products liability support imposing liability under the duty to warn theory.

D. Analysis of the Bona Fide Purchaser Solution

Expansion of the bona fide purchaser (BFP) doctrine²²⁷ to successor liability issues results in holding a successor corporation liable for defective products of its predecessor only if it knew or should have known of those defective products. Under this rule, corporations may no longer manipulate the form of their corporate acquisitions in an attempt to avoid the predecessor's potential strict products liability.²²⁸ This may put a damper on some corporate acquisitions. However, the rule is consistent with general corporate law policies which seek to protect the successor corporations from unknown liabilities in order to promote free alienability and stable

products. See *supra* note 159 and accompanying text. The second assumption is that the product owners will have the incentive to heed the warnings about their defective products.

223. See *supra* text accompanying note 114 for the factors of this special relationship.

224. See *supra* note 12-14, 25-31, 32-36, and accompanying text.

225. See *supra* notes 12-14, 25-36, 185-90 & 200-05 and accompanying text.

226. See *supra* notes 217-24 and accompanying text.

227. See *supra* notes 37-39 & 116-22 and accompanying text.

228. See *supra* notes 12-17 for the various types of corporate acquisition and their effect on successor liability. Note that if the acquisition is by a cash purchase of the predecessor's assets, then through careful planning the successor might avoid liability for its predecessor's defective products.

predictability in corporate acquisitions, since under the rule there is liability only for known liabilities.²²⁹

Successor liability under the BFP doctrine also has support from the causation rationale of strict products liability. It is true that in many cases the successor did not place the defective product into the stream of commerce.²³⁰ Yet, the successor's knowledge²³¹ of defects in its predecessor's products and knowledge that the predecessor would probably dissolve after its asset sale²³² may be said to be a cause in the plaintiff's inability to recover from the predecessor. Although this is not the type of causation normally thought of in tort law,²³³ certainly it is not that much of a departure from traditional causation in light of the fact that today's tort law often imposes liability on distributors and retailers even though they had no reason to know that products they purchased, and subsequently resold, were defective.²³⁴

Successor liability under the BFP rule also finds some support under the deterrence rationale. Although the purpose behind the deterrence rationale is the prevention of the manufacture of defective products, under the BFP theory the deterrence is the prevention of the manipulation of the structure of an asset acquisition for the sole purpose of avoiding products liability claims. This in turn guarantees that some protection is offered to future products liability plaintiffs, because the successor will ensure that the predecessor provides for potential products liability claims arising out of the

229. See *supra* notes 37-39 and accompanying text.

230. The successor should be considered as a cause only if there is a continuity or commonality of identity between the predecessor and the successor. See generally *supra* notes 13-36, 188-90 & 201-04 and accompanying text.

231. The knowledge may be actual or imputed.

232. Issues of successor liability generally arise because the predecessor is a corporation which has dissolved and is no longer capable of being sued. See *supra* notes 7-11 and accompanying text. However, in some cases the predecessor might not be a corporation, but rather a sole proprietor who is still alive and can still be held liable for its defective products. See, e.g., *Lemire v. Garrard Drugs*, 95 Mich. App. 520, 291 N.W.2d 103 (1980) (successor not liable because sole proprietor was still alive); *Tift v. Forage King Indus., Inc.*, 108 Wis. 2d 72, 322 N.W.2d 14 (1982).

233. Generally, one thinks of cause as being a contributing factor to plaintiff's harm, not to his inability to recover for that harm. See generally PROSSER ON TORTS, *supra* note 42, sec. 41, at 263-68.

234. However, causation under the bona fide purchaser (BFP) rule is probably not as strong as under the duty to warn theory, where, due to the successor's special relationship to the product owner, it can be said that the successor's failure to warn is a cause of the plaintiff's harm. See *id.*

predecessor's defects for which the successor may be held liable.²³⁵ Hence, although the BFP rule does not directly deter the manufacture of defective products, at least it deters conduct that results in a destruction of the claims of future products liability plaintiffs.²³⁶ Successor liability may justly be imposed under the BFP solution because it is supported by the causation and deterrence rationales,²³⁷ although not as strongly supported as in the duty to warn theory.²³⁸

VII. CONCLUSION

The products liability plaintiff seeking compensation from a successor corporation for defective products sold by the predecessor corporation is generally barred from recovery if the successor corporation acquired the predecessor's assets through a cash purchase. Recent courts, recognizing the conflict between products liability law and traditional corporate law, have developed new rules to hold the successor liable for its predecessor's defective products, even though the successor purchased the predecessor's

235. Assuming the successor uses ordinary care in its investigation into potential defects in its predecessor's products, the successor will be liable only for defects it actually knows about. See generally *supra* notes 118-20 and accompanying text.

The predecessor might provide for future claims by lowering the price of its assets to reflect the future costs of product liability claims, by setting up a contingency fund which will pay for future claims, or by purchasing insurance to cover the costs of future claims. These possible solutions are often linked to other alternatives that are offered to solve the problems surrounding successor liability. See, e.g., Roe, *Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559 (1984) (offers various solutions, including special insurance and allowing a bankruptcy-type court to handle the predecessor's asset sale so as to provide for fair consideration in light of potential product liability); Comment, *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 (1982) (offers various solutions, including requiring the predecessor to obtain insurance to cover a period after its dissolution); Comment, *supra* note 148, at — (promotes legislation to make products liability insurance more easily attainable); see also Comment, *The Inconsistencies and Confusion of Successor Corporation Liability in Product Liability Claims: Should Iowa Adopt a New Approach?*, 34 DRAKE L. REV. 161, 191-94 (1984-85) (offers an interesting "comparative responsibility approach").

236. Note that under the BFP rule the predecessor might be deterred from manufacturing defective products knowing that the successor purchasing its assets will be liable for claims arising out of known defects in the predecessor's products. Normally this type of deterrence is deemed unjust unless the successor is a cause of the defect. See *supra* notes 194-96 & 212 and accompanying text. However, it might be deemed fair under the BFP rule because the successor can be said to be partially at fault. See *supra* notes 230-34 and accompanying text.

237. The analysis of the implied representation rationale as a justification for the BFP rule would follow the analysis as it relates to the duty to warn theory. See *supra* notes 224-26 and accompanying text. The analysis is not repeated here because the implied representation rationale would only apply in certain cases, and because it is not too important of a rationale. See *id.*

238. See generally *supra* notes 213-30 and accompanying text.

assets for cash. These rules, which include the expanded mere continuation, expanded de facto merger and the *Ray* product line, are not supported by the major rationales behind strict products liability, specifically, causation, deterrence and implied representation.²³⁹

Two new theories of successor liability are supported by the rationales behind strict products liability: (1) the successor's duty to warn; and (2) the bona fide purchaser (BFP) solution. These two new successor liability rules satisfy the policies behind both corporate law and strict products liability law. This means that the injured plaintiff, as well as the defendant successor corporation, are more fairly treated. Courts faced with the issue of successor liability should adopt either the duty to warn theory, which imposes on the successor a duty to warn owners of its predecessor's products of defects if a special relationship exists, or the BFP solution, which imposes liability on the successor if it knew or should have known of its predecessor's defective products. Adoption of either of these rules results in fair treatment to all parties concerned, a result which has escaped most successor liability cases.

TIMOTHY J. MURPHY

239. These rules are also justified because the successor corporation allegedly profits from its predecessor's goodwill. However, this justification is not sufficient for imposing successor liability. See *supra* notes 141-46 and accompanying text.

