Changes in the Ownership of Hazardous Waste Disposal Sites: Original and Successor Liability

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I. INTRODUCTION

A. The Hazardous Waste Problem

Just as the major ecological issues of the 1960s and 1970s involved air and water quality, the environmental focus of the 1980s and 1990s should be hazardous waste pollution throughout America. With the dawning of the 1980s, this nation's continuing fight against environmental degradation has spread into a completely new theatre of war, and recent battlefields named Love Canal, New York and Times Beach, Missouri are now silent memorials to America's early losses to improperly disposed chemical wastes. But the skirmishes have only just begun. The number of casualties from exposure to harmful pollutants is expected to rise in the future along with an increase in personal injury legal claims that some authorities say within ten years will keep lawyers busier than products liabilities claims will keep them.2 The Department of Justice and the Environmental Protection Agency have termed the improper disposal of hazardous wastes generated by private industry the "most serious environmental problem of the day."3 One expert even warns that "the potential dangers toxic wastes pose to the country's land, water, air, public health and economy are second only

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1. While definitions of hazardous wastes vary widely in state legislation, generally they include any wastes "posing a present or potential hazard to human health because of toxicity, nondegradability, persistence in nature or susceptibility to biological magnification." W. ROGERS, ENVIRONMENTAL LAW § 6.10, at 689 n.1 (1977) (citing S. 1086 and H.R. 4873, 93d Cong., 1st Sess. § 3(4) (1973), the proposed Hazardous Waste Management Act of 1973).


to the threat of nuclear war."^4

The risk of harm from hazardous waste is particularly frightening because it is impossible to determine what the short and long-term effects of the myriad chemical mixtures which fill the dump sites around the country will be or how many sites actually exist. Some experts estimate that in as many as 50,000 dumps nationwide toxic chemicals may be found and that America's industrial parks contain dangerous wastes in 180,000 open pits, ponds and lagoons.^5 The EPA estimates that U.S. businesses of all sizes generate some forty-six million tons of toxic wastes a year, ninety percent of which is disposed of improperly.^6

The dump sites of Wisconsin unfortunately mirror the national picture. The statistics are alarming. According to some estimates, hazardous wastes in this state are generated at the rate of 500,000 tons per year.^7 Some sources suggest that of all the hazardous waste generated in Wisconsin in 1979 only twenty percent was deposited in disposal areas designed to take this kind of refuse. ^8 Although it is difficult to accurately determine the number of abandoned waste sites throughout Wisconsin,^9 it is estimated that there may be up to 4,000 within state boundaries.^10 Of the approximately 1,200 landfill sites currently licensed by the Wisconsin Department of Natural Resources - Bureau of Solid Waste Management, only three of these sites are licensed to accept hazardous wastes.^11 However, as of January 25, 1983, even these three were no longer accepting hazardous wastes.

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5. Id. See also Quade, supra note 2, at 149; Note, supra note 3, at 950 & n.6.
9. Harrington, supra note 7, at 223.
Thus, at present there is not a single hazardous waste disposal facility operating in Wisconsin.\textsuperscript{12}

The wastes deposited in dump sites present a serious danger to nearby residents. Toxic chemicals not only threaten the people and animals who come into direct physical contact with them but they also contaminate groundwater, pose fire hazards, poison vegetation and emit noxious fumes. The contamination of groundwater, which is often a source of drinking water, is especially serious because it may lead to the gradual undetected poisoning of an entire community which shares the polluted water supply. Furthermore, the purification of groundwater after contamination by toxic wastes is extremely difficult, if not impossible, to accomplish by artificial means. Even if the natural cleansing process is allowed to work, it may take thousands of years for a contaminated aquifer to flush itself of pollutants.

\textbf{B. Legal Issues}

As the threat of hazardous wastes spreads across the nation, so too do the economic pressures on small businesses, and especially those which produce, handle or dispose of hazardous wastes. When the industrial climate becomes more onerous these waste-related businesses are subject to changes in ownership and liquidation or sale of their property. In this manner, the tainted real property of a failing hazardous waste producer or disposer may, either by accident or deceit, become the bargain plat for a new housing development,\textsuperscript{13} crop or pasture land for livestock, or the site of a new elementary school or playground. Subsequent injury resulting from the use of, or association with, this contaminated land may lead to litigation wherein difficult legal questions will arise. These questions include determination of the causation or source of the injury, computation of damages including the future consequences of the injury,

\textsuperscript{12} Harrington, \textit{supra} note 7, at 223 n.4 (citing Hirsch, \textit{Franklin Landfill to End Handling of Toxic Wastes}, Milwaukee J., Jan. 25, 1983, at Local News Page 1, col. 5).

\textsuperscript{13} One couple in Cleveland, Ohio, began digging a foundation for a new backyard barbeque grill. They uncovered more than 5,000 pounds of radioactive waste materials. Quade, \textit{supra} note 2, at 149.
and allocation of liability among successive owners of the disposal site.

The allocation of liability among successive owners of a disposal site is one of the most troublesome waste issues encountered in the courts.\textsuperscript{14} Such allocation involves difficult questions because the degree of participation in the disposal action and knowledge of each owner varies and frequently the most culpable party has disappeared or become insolvent.\textsuperscript{15}

In cases involving successive owners of contaminated property, there are two forms of liability which may be imposed upon a current landowner. The first is the original liability of the current landowner for the wrongful acts committed while possessing the land. The second is the liability of the current landowner for the wrongful acts of a predecessor in title to the same property. This latter type is termed successor liability. Although both types of liability may exist in a particular case, they do not necessarily follow one another. The rules for the establishment of each are separate and distinct. These rules are well established in the common law of all American jurisdictions. However, some confusion between the two may be encountered in the typical hazardous waste contamination case when the plaintiff seeks to establish both types of liability. Further questions may also arise when state or federal statutes are encountered which modify the common-law rules that establish both types of liability.

This comment seeks to dissipate the confusion among these two forms of liability and the statutory modifications. First, the two principal methods of establishing abatement and damage liability of a party associated with a hazardous waste site are presented. Both the state and federal statutory remedies and the common law of nuisance are discussed. Second, the traditional rule of corporate successor nonliability and four exceptions to this rule are explained. The analysis continues with a consideration of how both

\textsuperscript{14} Mott, supra note 6, at 413. See also Note, Inactive or Abandoned Hazardous Waste Disposal Sites: Coping with a Costly Past, 53 S. Cal. L. Rev. 1709, 1710-11 (1980).

\textsuperscript{15} Mott, supra note 6, at 413.
successorship and nuisance law may combine to cause a transferee of contaminated property to become liable not only for the post-transfer damages of the existing nuisance, but also for pre-transfer nuisance damages arising from the acts of the transferor as predecessor in title. Next, the development of the relationship between these two forms of liability in Wisconsin hazardous waste cases is considered. Finally, the analysis presents several specific federal and state statutes which either modify or supplant the common-law rules of nuisance and successor liability.\textsuperscript{16}

II. Theories By Which Injured Parties May Sue

There are five bases for the imposition of liability on the owners and operators of a disposal site for cleanup costs and personal injury damages. They include statutory provisions, common-law negligence, trespass, strict liability and, most frequently, nuisance. With the exception of statutory provisions, all of these causes of action are subject to common-law standards for the allocation of liability between prior and current owners of waste disposal sites.\textsuperscript{17}

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\textsuperscript{17} Mott, supra note 6, at 413.
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Although all five bases are available, this analysis will consider only the statutory and nuisance approaches as these are most frequently utilized in hazardous waste cases. Because most plaintiffs choose to rely on negligence for claims of injury from exposure to hazardous wastes only in conjunction with other bases of liability, negligence will not be discussed separately. Likewise, trespass theory will not be discussed because it has not been a notably successful approach in establishing liability in pollution cases. Finally, although all states have established strict liability for harm caused by certain activities, few decisions based on strict liability are reported which directly involve parties responsible for hazardous industrial wastes. Therefore, strict liability theory will also not be analyzed in relation to the topic of successor liability in hazardous waste cases.

A. Statutory Bases of Liability

Several federal statutes underlie the U.S. Government's enforcement actions for the abatement and cleanup of inactive waste disposal sites. These include the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("Superfund"), the Resource Conservation and Recovery Act's imminent hazard section 7003, the Clean Water Act, the Refuse Act of 1899, the Safe Drinking Water Act, the Clean Air Act, and the Toxic Substances Con-
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trol Act, and the Hazardous Materials Transportation Act. Some writers suggest that while as many as twenty federal statutes regulate solid wastes, only five have a significant impact on hazardous waste disposal and none provide for the compensation of hazardous waste victims. These five statutes generally offer a private citizen only the right to sue for enforcement of the statutory provisions. Only in a few limited situations do the statutes authorize compensation for cleanup costs.

The problems hazardous wastes pose to the environment and the public have been recognized by most states. Consequently, many states have enacted statutes intended to prevent the discharge of toxic chemicals or to provide for rapid cleanup of accidental toxic spills. Virtually all state legislatures have attempted through hazardous substance control acts, solid waste management acts and environmental quality laws, to regulate hazardous waste facilities, allocate responsibility of spill costs, and provide for the state’s recovery of damages. However, very few state legislatures have addressed the question of recovery by private plaintiffs for waste-related personal injury damages including damages caused by illness resulting from waste discharges. Among the states which have considered the problem and enacted remedial statutes, three different approaches are used.

The first and most common statutory approach provides that the state legislation does not deny private plaintiffs the right to sue polluters through common law or other statutory remedies. These statutes also grant the attorney general or other state official the right to represent the state in a suit for

29. Note, supra note 3, at 952 & n.9 (citing W. ROGERS, ENVIRONMENTAL LAW § 6.10, at 691 (1977)). See also Note, supra note 14, at 1719.
31. 301(e) Report, supra note 18, Part 2, at 131.
32. Id. See also id., Part 1, at 60, for a detailed discussion of these statutes.
33. Id., Part 2, at 131.
34. Id.
35. Id.
36. Id. at 132.
recovery of pollution-caused damages it has incurred. However, while this type of statute gives the state the power to collect damages for the discharge of a hazardous substance, a private plaintiff has merely the existing statutory and common-law remedies.

The second type of statute provides funds for the emergency cleanup of a hazardous waste spill or leak. However, the use of these funds is restricted to containing, removing or mitigating the hazardous chemical discharge and its effects. Private injury or damage claims upon the emergency spill response funds are not expressly allowed. Thirteen states have statutory provisions concerning the financial responsibility of operators of toxic chemical dump sites. However, six of these statutes are only concerned with the operator's funds for maintenance, operation, closure or perpetual care and do not address funds which are needed to cover liability for injury or property damage.

Finally, a number of states have attempted to assist an injured plaintiff by enacting provisions which provide for strict liability, joint and several liability or a presumption of causation. But even statutes which help a plaintiff on some

37. Id.
40. 301(e) Report, supra note 18, Part 2, at 133.
41. Id.
42. Id. at 134.
43. Id. at 131.
issues fail to provide needed assistance on others and therefore may still be considered inadequate.\textsuperscript{44}

While several state and federal environmental statutes provide for civil or criminal actions against those who violate statutory or regulatory standards,\textsuperscript{45} statutory provisions allowing for recovery of property damage by private plaintiffs are rare.\textsuperscript{46} Even more uncommon are statutory provisions which provide recovery for personal injury to private plaintiffs.\textsuperscript{47} At least five states have established private statutory causes of action for personal injury resulting from hazardous waste.\textsuperscript{48} A recent example of such legislation is the Minnesota Environmental Response and Liability Act (MERLA) enacted in 1983.\textsuperscript{49} This Act will be discussed in detail in part IV.\textsuperscript{50}

Unfortunately, Wisconsin has not yet adopted any statutory scheme similar to Minnesota’s Environmental Response and Liability Act to deal comprehensively with questions of liability and compensation for hazardous waste damages. Wisconsin’s existing statutory provisions for waste abatement, cleanup, and liability are contained in Chapter 144 which concerns water, sewage, refuse, mining, and air pollution and Chapter 107 which deals with mining and metal recovery. These chapters contain the Wisconsin Hazardous Waste Management Act\textsuperscript{51} and the Wisconsin Metallic Mining Reclamation Act.\textsuperscript{52} Several other sections included in these chapters deal with the liability of mining companies

\begin{itemize}
\item \textsuperscript{44} Id. at 132.
\item \textsuperscript{45} 301(e) Report, \textit{supra} note 18, Part I, at 57 & n.82.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. at 57 & n.83.
\item \textsuperscript{48} Id. at 60 & n.96 (citing Alaska, North Carolina, North Dakota and Rhode Island as being the “only four states (which) have created private statutory causes of action for personal injury due to hazardous wastes”). \textit{But see} Minnesota Environmental Response and Liability Act, MINN. STAT. ANN. \S 115B.01-.24 (West Supp. 1984).
\item \textsuperscript{50} \textit{See infra} notes 207-20 and accompanying text.
\item \textsuperscript{51} WIS. STAT. \S\S 144.60-.74 (1981-82). \textit{See also} WIS. STAT. \S 144.76-.79 (1981-82).
\item \textsuperscript{52} WIS. STAT. \S\S 144.80-.94 (1981-82).
\end{itemize}
and changes in ownership of mining sites,\textsuperscript{53} the transfer of responsibility for ownership of a hazardous waste facility,\textsuperscript{54} financial responsibility after the sale of a hazardous waste facility,\textsuperscript{55} and emergency cleanup funds for hazardous waste spills.\textsuperscript{56}

\textbf{B. The Nuisance Theory of Liability}

Plaintiffs in groundwater contamination cases have been more successful when relying on the nuisance theory of liability than on either trespass or negligence theories.\textsuperscript{57} One authority has commented on the reason for the relatively greater success and importance of nuisance theory to environmental law:

The deepest doctrinal roots of modern environmental law are found in principles of nuisance. . . . There is simply no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse. . . . Nuisance actions have challenged virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation— the operation of landfills, incinerators, sewage treatment facilities, activities at chemical plants, . . . and a host of other manufacturing activities. . . . Nuisance theory and case law is the common law backbone of modern environmental and energy law.\textsuperscript{58}

Other writers suggest that the success of the private nuisance theory partially lies in its protection of the use and enjoyment of one's land from substantial interference and its concern for the right of the injured party rather than focusing on the unreasonableness of the defendant's conduct.\textsuperscript{59} Yet other observers believe that only relatively minor disputes between isolated neighbors are effectively solved by the doctrine of private nuisance and that it loses its effectiveness in providing remedies in large scale hazardous waste

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\item \textsuperscript{53} Wis. Stat. §§ 107.32-.35 (1981-82).
\item \textsuperscript{54} Wis. Stat. § 144.442 (1981-82).
\item \textsuperscript{55} Wis. Stat. § 144.443(10) (1981-82).
\item \textsuperscript{56} Wis. Stat. § 144.76(6) (1981-82).
\item \textsuperscript{57} Note, supra note 14, at 1720.
\item \textsuperscript{58} W. Rogers, \textit{Environmental Law} § 2.1, at 100 (1977).
\item \textsuperscript{59} Note, supra note 14, at 1720 & n.81.
\end{itemize}
and pollution cases. Nevertheless, a public nuisance, which is the substantial and "unreasonable interference with a right common to the general public," could also apply in conjunction with private nuisance law to large scale hazardous waste cases. In fact, public nuisance law would seem to have more application in instances of major groundwater contamination where the wastes adversely affect one or more communities that rely on the affected aquifer.

Because nuisance theory appears to be the most frequently used successful basis for liability in hazardous waste litigation today, it deserves close scrutiny, particularly with respect to its relationship to traditional rules of successorship liability. This requires an understanding of the traditional rule of corporate successor liability and of how successorship liability law does not impose liability on a successor to property for a predecessor's pre-transfer nuisance damages unless there exists evidence of the assumption of such liability, a merger with or continuation of the predecessor in title, or fraud.

1. Liability of Owners of Land for Nuisance

It is appropriate to briefly consider the circumstances which may result in the imposition of nuisance liability on the owner of property. These circumstances are important for they dictate whether the original liability of the predecessor in title and of the successor in title will arise in the first instance.

For the purpose of establishing liability, it is of no consequence whether the previous or succeeding owner of a hazardous waste site was a corporation or a natural person. It is well established that both corporations and natural persons are liable to the same degree for the creation or maintenance of a nuisance by themselves or their agents. Therefore, although most of the following discussion is set in the context of corporate waste land acquisitions and corporate liability, the general rules of law espoused below apply with equal

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weight to the situation wherein a private natural person purchases waste land.

At common law, the owner of land had the primary obligation to keep the premises from becoming a nuisance. This duty and obligation arose out of the traditional legal maxim: "So use your property as not to injure the rights of another."\(^63\) This rule has been interpreted to mean that an owner or occupier of property must utilize land in a manner that will not be a nuisance to other owners and occupiers of property in the same community. Some decisions have broadly held that whatever disturbs or annoys a landowner in the free use, possession, or enjoyment of the property or which makes its ordinary use or occupation physically uncomfortable, may become a nuisance and may be restrained.\(^64\) Although this obligation and duty still exists, the general rule now seems to be that a landowner is not liable, merely because he or she holds the title to property, for the consequences of a private nuisance upon it which the owner did not create.\(^65\) In other words, "[o]ne who is not responsible for the creation of a private nuisance cannot be held liable for its subsequent maintenance merely because he has become the owner of it."\(^66\) There are, however, a few exceptions to this rule.\(^67\)

The question of liability for damage caused by the defective condition of property depends upon whether the defendant was in control of the property, either through ownership or possession, when the damage occurred.\(^68\) Control is the crucial factor in determining liability and it is possible that

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64. See, e.g., Henderson v. Sullivan, 159 F. 46, 49 (6th Cir. 1908); Huddleston v. Burnett, 172 Ark. 216, —, 287 S.W. 1013, 1013 (1926); Palm Corp. v. Walters, 148 Fla. 527, —, 4 So. 2d 696, 699 (1941); Bohan v. Port Jervis Gas-Light Co., 122 N.Y. 18, —, 25 N.E. 246, 247 (1890).
67. See infra notes 181-205 and accompanying text.
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one might own land on which a nuisance occurs, but not be liable because he or she did not have control of the property.

Although actions for nuisance and actions founded on negligence have distinct elements, it is difficult at times to distinguish between them. 69 In either type of action there must be a breach of a duty on the part of the defendant before an action will lie. 70 The breach of duty in a nuisance action against a landowner or another person may consist of creating a dump and filling it with noxious substances which contaminate the streams and nearby water. 71 The fact of land ownership by the defendant is of no real importance in this context, since liability may also result from the commission of these same polluting acts by a lessee, licensee or trespasser. 72 The basis of liability in such cases flows from the acts resulting in the creation or maintenance of the nuisance and does not depend upon the ownership of the premises on which it is located. 73

2. The Law of Nuisance in Wisconsin

Although a thorough discussion of the intricacies of Wisconsin nuisance law is beyond the scope of this comment, a few general points warrant mention. 74 Nuisances in Wisconsin may be either public or private in nature. 75 A private nuisance is an “unreasonable interference with the interests of an individual in the use or enjoyment of land.” 76 A public nuisance in Wisconsin is generally described as conduct which interferes with the comfortable enjoyment of life and property by a considerable number of persons or an entire

70. Id.
72. Id. at 216.
74. See generally P. Peshek, Ground Water Law for Wisconsin, Environmental Law for the General Practitioner at 30-33 (Seminar Materials, State Bar of Wisconsin, ATS-CLE Division) (July 1983); Wis. STAT. §§ 823.01-.22 (1981-82).
community. However, a recent decision by the Wisconsin Supreme Court requires a complex analysis involving six factors to be considered for the finding of a public nuisance. It is also noteworthy that in Wisconsin a nuisance may simultaneously be both public and private in character since "[a] public nuisance which causes a particular injury to an individual, different in kind and degree from that suffered by the public constitutes a private nuisance." An action to recover damages from a nuisance and to abate a nuisance is based on ownership of the affected property. One who does not own property cannot bring a nuisance action against another.

Two early hazardous waste cases in Wisconsin illustrate how both a private and a municipal corporation in this state may be held liable for engaging in acts which amount to a nuisance. In each case the Wisconsin Supreme Court considered the corporate entity to be no different than the private citizen who engages in some form of polluting activity. *Price v. Oakfield Highland Creamery Co.* illustrates this principle in the context of an early Wisconsin industrial waste nuisance case. In *Price* the supreme court enjoined a creamery from causing offensive waste matter it produced to percolate through the soil thereby entering the plaintiff's well and destroying its usefulness. The waste also flowed through the plaintiff's property causing injury to the soil and pasture land. In finding for the plaintiff the court said: "If a man chooses to put filth on his own land he must take care not to let it escape onto his neighbor's land." The court held that "[t]he defendant should be perpetually enjoined from causing filth to flow upon the plaintiff's premises, either

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81. 87 Wis. 536, 58 N.W. 1039 (1894).

82. *Id.* at 540, 58 N.W. at 1040.

83. *Id.* at 542, 58 N.W. at 1041.
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directly, by percolation, or otherwise."84

Winchell v. City of Waukesha85 involved the waste pollution of a river by the city's sewage system. In Winchell the supreme court stated that, like any other corporation, a municipal corporation is no more exempt from the liability resulting from its public or private nuisances than a private individual.86 Thus, it is clear that any corporation under Wisconsin's nuisance law may be liable for the creation or maintenance of a nuisance which "endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property."87

III. WHO CAN BE SUED: ORIGINAL AND SUCCESSOR TORT LIABILITY

A. The Traditional Rule of Successorship Liability and its Exceptions

Commercial enterprises, and especially those involving hazardous wastes, do not remain static in an environment of expanding scientific knowledge, ecological controversy, and adverse economic conditions. The ownership of such enterprises may change hands through the use of a number of different devices.88 Depending upon the manner selected to facilitate the transfer of ownership, the liability of the previous owner of the business for past torts may or may not pass on to the succeeding owner.89

A well-settled traditional rule of corporate law90 holds that a business organization receiving all or a substantial part of the assets transferred from another entity, either through a sale of the prior business or otherwise, is not liable for the liabilities and debts of the transferor.91 In other

84. Id. at 543, 58 N.W. at 1041.
85. 110 Wis. 101, 85 N.W. 668 (1901).
86. Id. at 110, 85 N.W. at 670-71.
88. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 5.06[1], at 70.58 (1983).
89. Id.
90. Id. at § 5.06[2].
words, the buyer or successor company is not liable for the seller's obligations and liabilities merely because of its succession in ownership of the previous company's property. This general rule applies to tort liabilities as well as to breach of contract cases.\(^\text{92}\)

The four exceptions to this general rule are equally well established. An express or implied agreement to assume another company's debts or obligations will render a successor company liable.\(^\text{93}\) So too will a finding that there was a merger or consolidation of the previous and succeeding organizations.\(^\text{94}\) A determination that "the purchasing company was a mere continuation of the selling company" will also impose liability on the purchasing company.\(^\text{95}\) Finally, if the asset transfer is entered into fraudulently in order to allow the selling corporation to escape liability for its debts and obligations, the purchasing corporation will likewise have liability imposed upon it.\(^\text{96}\)

The traditional rule regarding nonliability of a successor corporation after a transfer of purchased assets and its four exceptions were succinctly stated in *McKee v. Harris-Seybold Co.*\(^\text{97}\)

It is the general rule that where one company sells or otherwise transfers all its assets to another company the latter is not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortious conduct, except where: (1) the purchaser expressly or impliedly agrees to assume such debts; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction is entered into fraudulently in order to escape liability for such debts. . . . A fifth exception, sometimes incorporated as an element of one of the above exceptions, is the absence of adequate consideration for the sale or transfer.\(^\text{98}\)

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93. *Id.* § 7122 at 189, 194-95 nn.7-8.
94. *Id.* at 196-98 n.9.
95. *Id.* at 198-200 n.11.
96. *Id.* at 198 n.10.
98. *Id.* at 561, 264 A.2d at 101-02.
The traditional rule of corporate successor liability with its exceptions and the law of nuisance liability are inseparably linked in any discussion of hazardous waste successor liability because nuisance theory is the primary basis for a finding of any hazardous waste tort liability. These two distinct areas of corporate and tort law interface at the point where questions of liability for past, present and future abatement and damages are to be decided. As the next several sections will explain, while the adoption and continuance of a nuisance will establish the liability of the party in control of the property for post-transfer nuisance damages, the applicability of one or more of these four exceptions to the traditional doctrine of corporate successor liability may additionally render that party liable for the pre-transfer damages of the predecessor's nuisance as well. These earlier damages for which the successor gains liability may even predate the successor's very existence.

B. Nuisance Liability for Transferors of Land and Successors in Title

A significant number of nuisance cases across the country have dealt with successive ownership liability. Thus, a meaningful guide to the resolution of the questions concerning successor liability in hazardous waste cases lies in the wealth of case law concerning common-law nuisances.\(^9\)

The following analysis surveys the law on this topic across the United States. Specific attention is then directed to Wisconsin's treatment of these general rules.

When the creator of a nuisance parts with the property on which the nuisance exists he or she does not necessarily also part with the liability for the post-sale damages from the nuisance.\(^10\) The Restatement (Second) of Torts states the general rule that a vendor of land is liable, under negligence or nuisance theory, to those injured from an artificial condition created or allowed to remain on the land, just until the

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transferee's liability becomes fixed.\textsuperscript{101} This fixing of the transferee's liability occurs when the purchaser receives notice to abate the nuisance,\textsuperscript{102} or has had a reasonable opportunity through prompt inspection to discover the nuisance and remedy it.\textsuperscript{103} The creator of a nuisance may still be held liable for the abatement of a hazardous waste site at least for a reasonable period after transfer of the land, regardless of the liability of subsequent owners.\textsuperscript{104} The court in \textit{Sarnicandro v. Lake Developers, Inc.}\textsuperscript{105} explained this result as follows:

[Where the vendor creates a situation which interferes with the rights of the public or with the use or enjoyment of adjoining lands . . . (and) where the land is transferred in such a condition that it involves an unreasonable risk of harm to those outside the premises, the vendor has been held liable on the theory of a public or a private nuisance, at least for a reasonable length of time after he has parted with possession.\textsuperscript{106}]

However, according to at least one commentator, courts are reluctant to impose liability even after a reasonable time on current, nonpolluting owners because of the great costs associated with abating the problems created by the leakage of chemicals from underground dump sites.\textsuperscript{107} The prevailing approach now appears to be that courts will primarily consider factors other than ownership in determining who should bear liability for the contamination.\textsuperscript{108} In actions involving private litigants, this trend would allow a succeeding landowner to be relieved of liability if he or she did not know of the earlier waste disposal on the land.\textsuperscript{109} It is even possible that the vendor's nondisclosure of these conditions may create a cause of action against the vendor himself.\textsuperscript{110}

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\item[101.] \textbf{Restatement (Second) of Torts} §§ 366, 373 (1965) and §§ 839, 840A (1977), analyzed in \textit{301(e) Report, supra} note 18, Part 1, at 32.
\item[102.] \textit{See, e.g.}, Pillsbury \textit{v. Moore}, 44 Me. 154, 157 (1857); \textit{Brown v. St. Louis-S.F. Ry. Co.}, 268 S.W. 678, 680 (Mo. 1925).
\item[103.] \textit{See, e.g.}, \textit{Pharm v. Lituchy}, 283 N.Y. 130, 132, 27 N.E.2d 811, 812 (1940).
\item[104.] Mott, \textit{supra} note 6, at 415 \& n.225.
\item[106.] \textit{Id.} at 481, 151 A.2d at 51.
\item[107.] \textit{301(e) Report, supra} note 18, Part 2, at 86.
\item[108.] \textit{301(e) Report, supra} note 18, Part 1, at 32.
\item[109.] \textit{Id.}
\item[110.] Mott, \textit{supra} note 6, at 414.
\end{enumerate}
However, sometimes a failure to take reasonable steps to abate a known nuisance may render an otherwise innocent purchaser liable for the nuisance.\textsuperscript{111} Knowledge of the nuisance may be inferred from the reduced price paid for the property which reflects the impaired condition of the land.\textsuperscript{112}

There are a number of recent cases in which courts have imposed liability on previous landowners and waste generators who were responsible for harmful waste disposal on their land.\textsuperscript{113} In these cases a government entity served as the plaintiff in either an enforcement action or civil action for the recovery of cleanup costs.\textsuperscript{114} It was generally held that the liability of subsequent landowners is limited unless they had accepted or associated themselves with the creation or maintenance of the harmful conditions on the property.\textsuperscript{115} Thus, one who actively continues a nuisance is just as liable as the party who first created it\textsuperscript{116} and all who participate in the creation or maintenance of the nuisance are liable to third persons for injuries resulting from it.\textsuperscript{117}

\textsuperscript{111} Id. at 414 & n.223.
\textsuperscript{112} Id. at 414-15 & n.224.
\textsuperscript{113} 301(e) Report, supra note 18, Part 1, at 32-33 (citing Appendix C, id., Part 2, at 84-95, which discusses the following cases: Merrick v. Murphy, 83 Misc. 2d 39, 371 N.Y.S.2d 97 (Sup. Ct. 1975) (The New York Supreme Court allowed a cause of action against the former owner of land who had negligently created a dangerous condition on his land and then sold the land. The court's holding was based on two principles: (1) a person who creates an inherently dangerous condition upon real property bears the same responsibility for any injuries or damage resulting therefrom as would the manufacturer of an inherently dangerous or defective chattel, and (2) legal responsibility under these circumstances does not depend upon ownership or possession of the property either at the time the act of negligence or the injury occurs.); Department of Environ. Pro. v. Exxon Corp., 151 N.J. Super. 464, 376 A.2d 1339 (1977) (The former owner's affirmative actions were considered more important than the mere ownership of the land where the former owner was found liable, even after he transferred the land, for creating a nuisance by dumping oil onto adjoining property.); New Jersey v. Ventron, No. C-2996-75 (Super. Ct., Ch. Div. Bergen Co., Aug. 27, 1979), aff'd, modified and remanded, 182 N.J. Super. 210 (App. Div. 1981) (The court found three successive owners of a mercury processing plant jointly and severally liable for past leaks that contaminated groundwater while a fourth nonpolluting party presently owned the plant)).
\textsuperscript{114} 301(e) Report, supra note 18, Part 1 at 32.
\textsuperscript{115} Id. at 33.
Another basis for the liability of a new owner of land is that he or she permitted or authorized the creation of a nuisance by some person for whose action he or she is responsible.\(^{118}\) Such responsibility commonly arises in the context of a principal-agent relationship.

Other cases hold that where the transferee enters into a covenant with the transferor to continue a nuisance condition for the transferor's benefit, the transferor's liability is likewise certain.\(^{119}\) However, when a creator of a nuisance transfers control of the land in such a way that there is no inference that the transferor authorized or profited from the continuance of the nuisance, his or her responsibility for it may cease.\(^{120}\)

Most jurisdictions hold that one does not continue a nuisance erected by another simply by failing to abate or remove it.\(^{121}\) Thus, active participation in the continuance of the nuisance or evidence of its adoption from some positive act is required for liability to attach.\(^{122}\) If affirmative conduct of the defendant is necessary for the continuance, and no statute exists that expressly provides for recovery,\(^{123}\) many plaintiffs in hazardous waste cases will be unable to recover against current landowners. At least eight states have enacted statutes which impose liability upon a subsequent landowner.\(^{124}\) California's provision contains language typical of this kind of legislation: \(^{125}\) "Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, caused by a former owner, is liable therefore in the same manner as the one who first created it."\(^{126}\)

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120. Id. at 251.
121. See generally Restatement (Second) of Torts § 373 (1963-64).
123. 301(e) Report, supra note 18, Part 1, at 33.
124. Id.
125. Id.
HAZARDOUS WASTE

The courts have generally interpreted these statutes as imposing liability upon the current landowner even if he or she did not create the nuisance or contribute to it. However, early cases dealing with these statutes frequently required that the successive owner had both notice of the condition upon the land and had "failed to abate the nuisance in response to a specific request." The most troublesome question concerning the fixing of the purchaser's liability appears to be whether or not an injured party must give the purchaser notice that the nuisance exists and demand its abatement. Some courts hold that in the absence of prior notice or a request by the injured party that a nuisance be abated, a grantee is not liable for allowing a nuisance to remain or continue. Others have criticized this rule and have insisted that notice is unnecessary provided that the purchaser has actual knowledge of the injury resulting from the nuisance. Recent case law may limit the liability of a subsequent landowner even after there was notice where there existed no statute imposing such liability.

C. Wisconsin's Treatment of the Successorship Doctrine

There are a number of early nuisance cases in Wisconsin that established and developed the law of successorship liability and the law pertaining to liability for hazardous waste.

127. 301(e) Report, supra note 18, Part 1, at 33.
128. Id.
contamination. A few of these cases confront both issues. The cases presented below illustrate how the Wisconsin courts have treated these two issues over the years. The older cases will be considered first. They will be followed by a comparison between the successorship rule as employed in early hazardous waste contamination cases and a recent decision which expanded the successorship liability rule in Wisconsin to its present form.

An early water pollution case, *Greene v. Nunnemacher*,\(^\text{134}\) established some of the fundamental principles of successorship liability for nuisance actions in Wisconsin. The plaintiff, who owned land along a river, alleged that the defendant's distillery, stable and hog farm, located about a mile and half upstream, corrupted and putrified the river flowing through his land and penetrated the banks of the river causing great injury to all in the vicinity and especially to the plaintiff and his family.\(^\text{135}\) The polluting distillery and farm were owned by Jacob Nunnemacher, but three other tenants successively resided on the property and maintained these two operations.\(^\text{136}\) Since Jacob was the owner of the property including the distillery and farm, the court determined that he was liable for having created and maintained the nuisance which contaminated the river and the plaintiff's land. The court also considered the liability of the non-owner tenants who at different times operated the polluting distillery and farm. The court found that these tenants were also liable for maintaining the nuisance during their respective tenancies but said that it was clear that a tenant cannot be held liable for damages sustained before and after the period of the tenancy.\(^\text{137}\) As a result, the court ruled that each tenant should not be held liable for damages caused by the owner, Jacob, before the commencement of their term, nor should they be held liable for the nuisances caused by other tenants in which they were not connected.\(^\text{138}\)

A question which arises is whether Jacob's liability would have ceased upon his sale of the property. Certainly

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\(\text{134. 36 Wis. 50 (1874).}\)
\(\text{135. *Id.* at 56.}\)
\(\text{136. *Id.* at 52.}\)
\(\text{137. *Id.* at 58.}\)
\(\text{138. *Id.* at 59.}\)
businesses involved in hazardous waste dumping on their own property would be inclined to avoid potential liability for waste damages by transferring the property if their responsibility for the land could be severed in that way. This question was answered in the case of *Lohmiller v. The Indian Ford Water-Power Co.* In *Lohmiller* the court held that an owner of property containing a nuisance who conveyed it "with covenants of warranty" is regarded as maintaining this nuisance by the covenants just as one who rents out property with a nuisance is regarded as maintaining the nuisance by receiving rent for the property. In either case the former owner or lessor will be liable.

The Wisconsin Supreme Court has considered more nuisance cases involving transferee liability than transferor liability. The well-settled general rule in Wisconsin transferee cases is that in an action for damages resulting from the erection or continuance of a nuisance, it is sufficient to show that the injury was either caused by the authority of the defendants or that they continued it after acquiring title to the land. Likewise, in *Brown v. Milwaukee Terminal Ry. Co.*, the court stated that one who maintains a nuisance created by another is just as liable for the injuries sustained from it "as if he had himself created the danger in the first place." This liability of an owner or occupier of the land containing a nuisance results not because of ownership or occupancy, but because of the failure to abate the nuisance.

Another early case, *Slight v. Gutzlaff*, established the rule in Wisconsin that a lessee or grantee who continues a nuisance erected by the lessor or grantor must first be given notice to reform or abate the nuisance before he or she may be found liable for its abatement and damages. The court

139. 51 Wis. 683, 8 N.W. 587 (1881).
140. *Id.* at 689, 8 N.W. at 588.
141. *Id.*
142. Cobb v. Smith, 38 Wis. 21, 33 (1875).
143. 199 Wis. 575, 224 N.W. 748, *aff'd on rehearing*, 227 N.W. 385 (1929).
144. *Id.* at 590, 227 N.W. at 386.
145. *Id.*
146. 35 Wis. 675 (1874).
147. *Id.* at 677.
explained that such a rule is just and reasonable in that it did no wrong to the party injured while it protected "the lessee or grantee from surprise and hardship." 148

As more is learned about the hazards of toxic industrial wastes, there can be no doubt businesses will seek to dramatically reduce or completely halt their waste dumping activity in the hope that this will save them from exposure to hazardous waste damage claims. While such a course may reduce a disposer's potential liability arising from present and future dumping, it will not affect that party's possible liability for past waste dumping under nuisance law. Should the disposer cease the waste dumping activity which contributed to a nuisance prior to the commencement of a nuisance action, he or she would not escape liability for existing damages. This rule was stated in Kamke v. Clark,149 a case which involved the dumping of the defendant brewery's garbage and other putrid refuse material on the property of another defendant who owned the dumpsite.150 Even though the brewery had stopped its dumping activities prior to the commencement of the plaintiff's suit, the court held that its acts contributed to produce a nuisance which continued to exist as of the date the plaintiff began his suit.151

In most cases, the contamination of land and groundwater by hazardous waste presents a problem that will persist for a substantial period of time. The potential for harm to a party injured by the waste may include injury from the past, present and future effects of the contaminants. The future injuries may be extensive and could exist for many years. The Wisconsin courts initially refused to grant recovery for future damages in nuisance cases, but later modified that ruling. Stadler v. Grieben152, a stockyard odor and noise nuisance case, illustrates the original position of the courts which required subsequent actions for the recovery of these damages as they accrued.

148. Id.
149. 268 Wis. 465, 478, 67 N.W.2d 841, 847 (1955).
150. Id. at 466–67, 67 N.W.2d at 842.
151. Id. at 478, 67 N.W.2d at 847.
152. 61 Wis. 500, 21 N.W. 629 (1884).
In *Stadler* the court held that once a suit was commenced, the plaintiff could only recover for damages that had accrued up to that point. The court explained that because every continuance of a nuisance is, under the law, a new nuisance, a continuance of the nuisance after the time of the verdict is a new cause of action. Therefore the damages that accrue after the verdict must be recovered in a subsequent action.\(^{153}\)

However, the court reversed this position in the industrial waste contamination case of *Anstee v. Monroe Light & Fuel Co.*\(^{154}\) In *Anstee* the supreme court found that the lower court had properly assessed damages for future as well as past injury to the soil and well of the plaintiff harmed by the defendant's refuse. The injury was caused by the percolation through the plaintiff's soil of large quantities of oily industrial waste. This waste was deposited by the defendant in a section of an abandoned sewer on the plaintiff's premises.\(^{155}\) The court based its decision regarding damages on the fact that no further recurrence of the nuisance was likely and that this assessment of damages was the only way the plaintiff could be made whole in one action for the losses he experienced through the nuisance committed by the defendant.\(^{156}\) Thus it appears that *Anstee* presents a withdrawal from the harsh rule of *Stadler*, allowing past and future damages to be recoverable when the continuance of the nuisance or a new cause of action is unlikely. The court in *Anstee* also seemed to give weight to the savings which may be derived through the resolution of the damages issue in one action.

The traditional rule of successor liability would hold a transferee of the transferor's assets liable for the latter's tortious conduct only if: (1) the purchaser agrees to assume the obligation; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to

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153. *Id.* at 505, 21 N.W. at 632. *But cf.*: *Karns v. Allen, 135 Wis. 48, 59, 115 N.W. 357, 361 (1908).*
154. 171 Wis. 291, 177 N.W. 26 (1920).
155. *Id.* at 292, 177 N.W. at 26.
156. *Id.* at 294, 177 N.W. at 27.
escape liability for such debts. A transferee will always be liable for those damages resulting from post-transfer continuance of a nuisance already created. But only through the application of one of these four exceptions can liability be established for the pre-transfer damages resulting from the predecessor's maintenance of a nuisance.

In early Wisconsin successor liability cases, only the first of these exceptions to the general rule was considered by the courts. The courts appeared to look only for the express assumption of a predecessor's liability.

An early Wisconsin nuisance case which illustrates this point is *Karns v. Allen*. This case involved two defendants, Nathan and Charles W. Allen who, acting as co-partners, constructed a dam across a creek. Three years later the property and the dam were sold by these defendant co-partners to the corporate defendant N.R. Allen's Sons Company, a company in which the co-partners served as president and vice president. The plaintiffs lived across the creek near the dam and brought a nuisance action for abatement, damages and general relief due to the flooding of their property and obstruction of the creek due to the dam. After the sale of the property and dam to the corporation, the company remained in possession of the land and maintained the dam as the co-partners had previously. In considering the corporation's liability for the nuisance of the predecessors in title, the supreme court stated:

> The dam having been constructed and maintained by the defendants Nathan and Charles W. Allen up to the time of the sale to the defendant corporation, and there being no proof of assumption of liability by defendant corporation, we find nothing in the record which would justify a judgment for damages against the corporation accruing in consequence of such nuisance before the sale.

However, the court recognized that after the sale the original defendants, now acting as officers of the purchasing corporation, maintained the dam in substantially the same manner.

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157. See supra note 98 and accompanying text.
158. 135 Wis. 48, 115 N.W. 357 (1908).
159. Id. at 49-50, 115 N.W. at 358.
160. Id. at 55, 115 N.W. at 360 (emphasis added).
as they had before the sale.\textsuperscript{161} Thus, the court found that the two individual defendants were personally liable for the entire unapportioned nuisance damages, assessed from the time of the construction of the dam to the time of the trial.\textsuperscript{162} Furthermore, the court found that the judgment for abatement was properly awarded against all the defendants including the individual officers and the defendant corporation.\textsuperscript{163}

The \textit{Karns} case illustrates that successor liability law in Wisconsin as of 1908 had not developed to the point at which the remaining three exceptions to the general rule currently recognized were acknowledged by the court.\textsuperscript{164} It appears likely that by the current standards, the transaction between the defendant co-partners, Nathan and Charles Allen, and the defendant corporation with Nathan and Charles as the two principal officers, might be considered to fit into any one of the three additional exceptions. For example, this transaction could be construed as either a consolidation or merger of the seller and purchaser, a manifestation of the mere continuation of the selling business entity or, at least a fraudulent transaction entered into in order to escape liability for the co-partners' debts or nuisance damages. Had the court considered \textit{Karns} under today's four complete exceptions to the successor liability rule, it is probable that the defendant corporation would not have escaped liability for the nuisance damages.

The \textit{Karns} case is an example of how a court must consider both the rules of nuisance liability and the traditional corporate law doctrine of successor liability. Additionally, it represents an early stage in the development of the traditional successor liability rule. Gradually all four exceptions to the general rule of successor nonliability have been recognized by courts throughout the country.

Federal courts accepted the traditional rule and its four

\textsuperscript{161} Id.
\textsuperscript{162} Id. at 59, 115 N.W. at 361.
\textsuperscript{163} Id.
\textsuperscript{164} \textit{But cf. infra} note 171 and accompanying text.
exceptions in several cases which arose in Wisconsin.\textsuperscript{165} Although these decisions assumed that the traditional rule was followed in Wisconsin state courts, no Wisconsin Supreme Court cases existed to support this assumption.\textsuperscript{166} It was not until the Wisconsin Court of Appeals decision in \textit{Tift v. Forage King Industries, Inc.}\textsuperscript{167} that all four exceptions to the traditional rule of corporate successor liability were expressly adopted in Wisconsin. In \textit{Tift}, a decision arising out of a products liability action, the court of appeals followed the lead of federal and state courts across the country which have adopted the rule, but admitted that the extent of the applicability of some of these exceptions was questionable because the Wisconsin Supreme Court had not yet ruled on the issue.\textsuperscript{168}

The Wisconsin Supreme Court received the opportunity to do so when it heard the same case on appeal in 1982.\textsuperscript{169} The court noted that the trial court in \textit{Tift} had relied on the traditional successorship rule as set forth in the federal court decision from the Seventh Circuit in \textit{Leannais v. Cincinnati, Inc.}\textsuperscript{170}

In \textit{Tift} the Supreme Court of Wisconsin adopted the general rule with its four exceptions, and expanded its applicability by stating:

We hold as a matter of law that the rule and its exceptions are applicable, irrespective of whether a prior organization was a corporation or a different form of business organization.

It should be emphasized that the corporate rule that exempts a successor company from the liabilities of its predecessor when it has purchased the assets of the predecessor is subject to the four exceptions recited in \textit{Leannais} . . .

\textsuperscript{165} See \textit{Leannais v. Cincinnati, Inc.}, 565 F.2d 437, 439 (7th Cir. 1977); \textit{Forest Laboratories, Inc. v. Pillsbury Co.}, 452 F.2d 621, 625 (7th Cir. 1971); \textit{Bazan v. Kux Machine Co.}, 358 F. Supp. 1250, 1251 (E.D. Wis. 1973).

\textsuperscript{166} See \textit{Leannais v. Cincinnati, Inc.}, 565 F.2d 437, 443 (7th Cir. 1977) (Chief Justice Fairchild, dissenting in part, recognized that there were as of that time no decisions by the Wisconsin courts applying the successorship rules of federal cases).

\textsuperscript{167} 102 Wis. 2d 327, 306 N.W.2d 289 (Ct App. 1981).

\textsuperscript{168} Id. at 330 & n.4, 306 N.W.2d at 290-91 & 291 n.4.

\textsuperscript{169} \textit{Tift v. Forage King Industries, Inc.}, 108 Wis. 2d 72, 322 N.W.2d 14 (1982).

\textsuperscript{170} 565 F.2d 437, 439 (7th Cir. 1977) (cited in \textit{Tift v. Forage King Industries, Inc.}, 108 Wis. 2d at 75-76, 322 N.W.2d at 15).
This language represents an expansion of the applicability of the general rule as it was adopted by the Wisconsin Court of Appeals. Both the trial court and the court of appeals found the general rule and its exceptions not applicable in Tift because the predecessor was a sole proprietorship. Therefore the court of appeals ruled that the successor entity "could not be a successor corporation to the original manufacturer, because the original manufacturer was not a corporation." However, the supreme court concluded "that the responsibility of a subsequent business organization, irrespective of the nature of either the predecessor or successor, proprietorship, partnership, or corporation, cannot be facilely dismissed on the basis of the semantics of the rule." The court also emphasized how, in a products liability case like Tift, the "fixing of liability on the subsequent manufacturer of the product line does not necessarily exonerate the prior manufacturer of the defective product." The court stated that the present business organization may have the right of indemnity against the prior manufacturer. Tift stressed that a plaintiff may seek recourse against either the current or previous manufacturer of the defective product. Because Tift was a products liability case and not a hazardous waste contamination case, it is not certain that the precise holdings in Tift will apply in all future toxic tort cases. But it appears likely that the court's general use of the term "liabilities" in its adoption of the general rule includes liabilities in cases involving successive ownership of contaminated real property and injured neighbors of the property. However, it is often difficult or impossible to either locate the predecessor in title or sue the bankrupt or dissolved corporation.

Thus, the plaintiff seeking compensation in a hazardous waste case may have no choice but to sue only the transferee.
of the contaminated property. This transferee would be found liable for the pre-transfer nuisances of its predecessor in title if any one of the four exceptions adopted in \textit{Tift} would apply. In addition, the transferee would gain liability for the post-sale nuisance damages through the adoption and continuance of the predecessor's nuisance.

\textbf{IV. STATUTORY THEORIES APPLIED TO HAZARDOUS WASTE LIABILITY}

Unfortunately, to date there are few decisions on the issue of successorship liability in hazardous waste cases. However, these few cases, and also several secondary sources,\textsuperscript{178} discuss this matter in some detail. While the law still appears to be unsettled in this area, these opinions may foreshadow the future direction of the courts.

\textit{A. Modification of the Common Law by Federal Statutes}

In keeping with the early common law,\textsuperscript{179} the rule today is that mere ownership of a hazardous waste dump site, without notice and continuation of the nuisance, is not sufficient to establish liability for post-purchase environmental damage.\textsuperscript{180} However, as with all common-law rules, this traditional successorship doctrine may be superseded by controlling legislation. There are two federal acts which some courts have relied upon to avoid the effects of the traditional corporate successorship and nuisance rules. They are the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("Superfund")\textsuperscript{181} and the

\textsuperscript{178} See generally Mott, supra note 6; Practicing Law Institute, \textit{HAZARDOUS WASTE LITIGATION} (1982) [hereinafter cited as \textit{HAZARDOUS WASTE LITIGATION}]. See also 301(e) Report, supra note 18, Parts 1 & 2.

\textsuperscript{179} See supra notes 62-73 and accompanying text.


\textsuperscript{181} 42 U.S.C. §§ 9601-9657 (Supp. IV 1980).
Resource Conservation and Recovery Act (RCRA). When interpreting these Acts to impose liability on waste site owners, courts place more emphasis on the public policy implications of their decisions than on the great weight of common-law authority which may demand a contrary result. While the common law in most cases would hold an innocent purchaser of a dump site nuisance free from liability where there was no active continuance or positive adoption of the nuisance by the innocent purchaser, these statutes have been interpreted by the courts to impose liability in such cases.

One example of how the RCRA's section 7003 has been used to accomplish the circumvention of the common-law successorship rule is provided in United States v. Price. The defendants in this case included the purchasers of property several years after waste dumping on the purchased land had ceased. After being named as defendants by the government in a section 7003 hazardous waste abatement claim, these defendants filed a motion for summary judgment on the grounds that they were not liable under the statute. The defendants argued that they were never actively involved in the dumping on the property and that they did not know that chemical wastes had been dumped there until several years after the dumping had ceased. In denying the summary judgment motion, the court noted that the waste "disposal" which triggers section 7003 of the Act need not be active in the sense of recent intentional dumping. Rather, the court said that those who purchase hazardous waste property and fail to rectify the condition contribute passively to the waste disposal, "merely by virtue of their studied indifference to the hazardous condition that now exists." The Price court interpreted section 7003 as having an extremely broad statutory

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185. 523 F. Supp. at 1069.
186. Id. at 1070.
187. Id. at 1073.
188. A passive contribution may occur through the leaking of the wastes from a source of pollution.
189. 523 F. Supp. at 1073.
definition of "disposal" intended to encompass both the passive leaking of contaminants from a landfill as well as the active dumping of contaminants on a landfill.\(^{190}\) The court also cited United States v. Vertac Chemical Corp.\(^{191}\) as supporting the proposition that ownership imposes responsibility for hazardous conditions on one's land.\(^{192}\) The rationale for the Price court's imposition of liability on these "innocent" purchasers was stated as follows:

Admittedly, the [Partnership] defendants did not create that hazardous condition. Nonetheless, they were aware, at the time they purchased the property, that it had been used as a landfill. As sophisticated investors, they had a duty to investigate the actual conditions that existed on the property or take it as it was. They deliberately chose the latter course. Moreover, they became aware in the summer of 1979 that toxic chemicals had been dumped at the landfill, but they have done nothing to abate the hazardous condition that exists. Under these circumstances, the [Partnership] defendants may be held responsible to stop the continued leaking of contaminants from the site.\(^{193}\)

The court relied on the legislative history of the act in its determination that Congress intended the "contributing to" disposal phrase of section 7003 to be interpreted broadly. The legislative intent was the basis for the court's departure from the principle established in some jurisdictions that one does not continue a nuisance erected by another simply by failing to abate or remove it.\(^{194}\) However, the court did cite section 3004(b)\(^{195}\) as a limitation on a subsequent owner's

\(^{190}\) Id. at 1073-74. See also Mott, supra note 6, at 408.


\(^{192}\) Price, 523 F. Supp. at 1073.

\(^{193}\) Id.


\(^{195}\) 42 U.S.C. § 6934(b) (Supp. IV 1980) provides:

(b) Previous owners and operators In the case of any facility or site not in operation at the time a determination is made under subsection (a) of this section with respect to the facility or site, if the Administrator finds that the owner of such facility or site could not reasonably be expected to have actual knowledge of the presence of hazardous waste at such facility or site and of its potential for release, he may issue an order requiring the most recent previous owner or operator of such facility or site who could reasonably be expected to have
liability where the owner "could not reasonably be expected to have actual knowledge of the presence of hazardous waste at such facility and of its potential for release." 196

Similarly, United States v. Waste Industries 197 involved "innocent" owners of a disposal site who leased it for use as a government-approved landfill. Their property was then returned to them in a contaminated condition which amounted to a nuisance. In contrast to the theory followed in early Wisconsin law, 198 the court found that the owners were not liable for the tenant's use and nuisance during the term of the lease. 199 However, the owners were considered by the court to be liable as current owners and occupiers of the property with a continuing nuisance once they had regained the exclusive right to use the property after it reverted back to them. 200 Thus, just by the mere ownership of a property containing a dump site nuisance, the defendants were liable for the nuisance.

A different result was reached in New Jersey Department of Environmental Protection v. Ventron Corp., 201 which involved the purchase by innocent parties of property contaminated by hazardous mercury wastes. The purchasers constructed a containment system to prevent contaminants from being discharged or leaked from the site. The trial court credited the mitigation action taken by the purchasers as resulting in the prevention of groundwater contamination from the mercury. While the appellate court found that a statutory and common-law nuisance existed, it said the overall dangerous and toxic condition of the site was not proximately caused in any substantial way by the purchasers. 202 Thus, unlike the Price and Waste Industries defendants, the
purchasers in *Ventron* eliminated any prospective contribution by them to the hazard by acting to abate the discharges from the time they gained title to the property.\(^2^\)

"Superfund" represents another major exception to the general common-law rule of nonliability for mere ownership. The specific language of section 107,\(^2^\) which directly provides for the liability of an owner of a dump site "facility"\(^2^\) regardless of responsibility for the contamination, is completely contrary to traditional rules. This inconsistency probably results from a view that public policy values the imposition of liability upon an identifiable, though arguably innocent, owner more than a finding of owner nonliability which might leave no deep pocket to compensate an injured party. Because the traditional rule would hold in some cases

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\(^2^\) See 182 N.J. Super. at _, 440 A.2d at 459. See also *Hazardous Waste Litigation*, supra note 178, at 37-38.

\(^2^\) 42 U.S.C. § 9607 (Supp. IV 1980) provides:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

\(^2^\) 42 U.S.C. § 9601(9) (Supp. IV 1980) provides:

"Facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.
that the only possible defendant is not liable for damages and thus the injured party is left without any relief, the Superfund approach to "mere ownership" liability was a practical solution to the problem. Such a practical law suit under Superfund could then be used to impose liability on an innocent purchaser of waste property who had absolutely no idea that there was any hazardous waste deposited on the property. Although there are few reported cases to date implementing this section 107 of the Act, it may be expected that in the future more plaintiffs will rely on this approach to avoid the common-law successorship rules that may possibly deny them a judgment against the only possible defendant — the innocent owner of the property.

B. Modification of the Common Law by State Statutes

While it is said that almost every state has adopted some kind of scheme to regulate hazardous wastes, all aspects of liability are treated completely in only a few states. Minnesota recently has become one of these few with the enactment of its own environmental response and liability act. In contrast with the federal Superfund Act (CERCLA), Minnesota's new statute (MERLA) contains major differences with regard to persons liable for the cleanup of the hazardous wastes and for compensable damages. Generally, under Minnesota's statute "a person is responsible for a release or the threatened release of hazardous substances, pollutants or contaminants from a facility provided the person is a generator, transporter, owner or operator of the facility." CERCLA places liability only on those who owned or operated the facility during the time of either the original disposal or the subsequent waste release, thereby ignoring owners during the intervening period between these two points. However, this liability gap for interim owners is eliminated by MERLA's definition of responsible persons as all those who owned the facility whenever the hazardous substance "was

located in or on the facility." Nevertheless, the liability of all landowners under MERLA may be limited by an "innocent landowner" exclusion which is missing from CERCLA. MERLA provides liability for the landowner only if he or she engages in five specific kinds of conduct. In this way MERLA's innocent-landowner exclusion makes the statute similar to the common law of nuisance. By common law the landowner would be liable if he or she created the nuisance or allowed its creation, and a buyer of land with an existing nuisance would be liable only if he or she continued the nuisance and took some positive act demonstrating an adoption of the existing conditions.

Also, unlike CERCLA, MERLA directly addresses liability for personal injury and economic loss by providing that any person who is responsible for the release of a hazardous substance from a facility is strictly liable, both jointly and severally, for injuries to personal property. One commentator notes that this includes "relocation costs, loss of

211. MINN. STAT. ANN. § 115B.03, subd. 3, (West Supp. 1984) provides:

Owner of real property. An owner of real property is not a person responsible for the release or threatened release of a hazardous substance from a facility in or on the property unless that person:

(a) was engaged in the business of generating, transporting, storing, treating, or disposing of a hazardous substance at the facility or disposing of waste at the facility, or knowingly permitted others to engage in such a business at the facility;

(b) knowingly permitted any person to make regular use of the facility for disposal of waste;

(c) knowingly permitted any person to use the facility for disposal of a hazardous substance;

(d) knew or reasonably should have known that a hazardous substance was located in or on the facility at the time right, title, or interest in the property was first acquired by the person and engaged in conduct by which he associated himself with the release;

(e) took action which significantly contributed to the release after he knew or reasonably should have known that a hazardous substance was located in or on the facility.
212. See Espel, supra note 49, at 411-12 & nn.31 & 33 (citing in part RESTATEMENT (SECOND) OF TORTS §§ 838, 839 (1977)).
213. Espel, supra note 49, at 422.
214. Id. at 424 & n.108 (citing MINN. STAT. ANN. § 115B.05 subd. 1 (West Supp. 1984)).
use of real or personal property, loss of past or future income and the loss of profits resulting from injury to, the destruction of, or the loss of real or personal property without regard to the ownership of the property."215 MERLA also allows for the recovery of damages for death, personal injury or disease, loss of past or future income, loss of earning capacity and damages for pain and suffering including physical impairment.216 There is, however, no provision allowing for the recovery of punitive damages.217

Unlike Minnesota, Wisconsin has not yet enacted any comprehensive statute covering cleanup and civil tort liability for inactive and active hazardous waste sites, waste generators and waste handlers. Although a few statutes concern the transfer of responsibility of ownership of hazardous waste facilities218 and the financial responsibility requirements necessary in the sale of a hazardous waste facility,219 no thorough statutory scheme exists in the nature of Minnesota’s MERLA. One Wisconsin statute concerning the liability of mining companies provides that a “company is liable for damages for mining-related injuries . . . regardless of any change in the nature of the ownership of the interests in the prospecting or mining site, refinery or smelter held by the mining company and regardless of any reorganization, merger, consolidation or liquidation affecting the mining company.”220 However, while this could provide a statutory basis for a hazardous waste injury claim in Wisconsin, it obviously limits its use only to hazardous waste claims originating from mining operations.

States like Wisconsin will undoubtedly feel pressure to address the need for a comprehensive environmental response and liability act and may be inclined to consider Minnesota’s as an example. However, one commentator feels that MERLA represents a collection of compromises, inconsistencies and ambiguities that may discourage its use.

216. Id. (citing MINN. STAT. § 116B.05, subd. 1).
as a credible model for legislative efforts in other states.\textsuperscript{221}

V. Conclusion

As litigation increases in the area of toxic waste, plaintiffs will increasingly look to the common law for theoretical foundations on which to base their claims. While the few federal and state statutes controlling the disposition and liability for these hazardous substances will certainly become the focal point of many future law suits, the lack of any statutory remedies for the injured plaintiff insures that the common law of torts, and especially that of nuisance, will be the mainstay of most successful legal arguments for relief.

The traditional rule of corporate successor liability, together with its four exceptions, appears to be solidly established in Wisconsin and throughout the United States. A succeeding corporation will be held liable for the damages from the nuisance or other toxic torts of its predecessor only if it falls within one of the four exceptions to the traditional rule of nonliability. In addition, the successor may be liable for the post-sale damages that result from a nuisance already on the property by adopting and continuing this nuisance of the former corporation. In some such cases, responsibility may be imposed for future damages as well. In other words, a separate and unrelated corporation that in good faith succeeds to a substantial portion of a former corporation's assets will not be liable for the toxic waste damages caused by the former without a specific assumption of this liability by agreement. Also, in Wisconsin and in many other jurisdictions, mere ownership per se, without notice and continuation of a waste site nuisance already on the land, will not impose liability for post-purchase damages. Rather, in many courts the acts of adoption and continuance of a dump site nuisance by failure to abate it upon request are required for liability.

Notwithstanding these general rules, there is no doubt that as the growing problem of harmful waste causes even more widespread increases in human suffering and economic hardship, public policy will play a greater role in determina-

\textsuperscript{221} Espel, \textit{supra} note 49, at 407.
tions of liability. It seems unlikely that the courts and the state legislatures will leave a severely injured individual or community completely devoid of any chance of recovery while a healthy successor protects its pocket through the traditional rules. The enormity of the waste problem, and the severe lack of information on the location, origin, content and effects of these chemical wastes across the nation, may lead future courts toward a gradual renunciation of the traditional successorship doctrine so well established in corporate and tort law. Thus, the current statutory responses of RCRA and CERCLA which impose "mere ownership" liability may gain more support in the state courts and legislatures at the expense of the traditional rules. While the precise statutory approaches may vary significantly, states may eventually follow Minnesota's lead and enact their own legislation to establish liability and compensation. However, at present it is still necessary to give close consideration to the traditional common-law rules whenever a state court case involves a victim compensation claim arising from a hazardous waste disposal site.

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