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GEORGE W. KUNEY*

I. INTRODUCTION

In 1983 the late Professor Jerry J. Phillips of the University of Tennessee College of Law published his article *Product Line Continuity and Successor Corporation Liability* in the *New York University Law Review*.[1] In that piece, Professor Phillips advocated an expanded version of the de facto merger successor liability doctrine in product liability suits. In doing so, he argued that, because several of the criteria for determining whether a sale of corporate assets constitutes a de facto merger are irrelevant to the policies underlying product liability law, we should adopt a product line theory that holds successors liable for the product defects of their predecessors when they have purchased a seller's business.[2] In the process, he encouraged expansion and consolidation of the mere continuation, continuity of enterprise, and product line theories advanced in *Cyr v. B. Offen & Co.*,[3] *Turner v. Bituminous Casualty Co.*,[4] and *Ray v. Alad Corp.*,[5] respectively.

Professor Phillips reasoned that a requirement that the predecessor dissolve in order to activate the de facto merger or product line theories of successor liability is contrary to the goals the doctrines should accomplish.[6] He advocated collapsing the product line and de facto merger doctrines into a single doctrine—"product line continuity"—featuring a multiplicity of factors, no one of which would be dispositive.[7] From his perspective, the touchstone of successor liability is "whether the purchaser has paid for intangible items having what might be described as ongoing business value."[8] If the potential successor purchases "this value, it buys product line continuity

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1. Jerry J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. REV. 906 (1983).
2. *Id.* at 906, 929.
3. 501 F.2d 1145, 1152-53 (1st Cir. 1974).
4. 244 N.W.2d 873, 879 (Mich. 1976).
5. 560 P.2d 3, 11 (Cal. 1977).
6. Phillips, *supra* note 1, at 915.
7. *Id.* at 920-21.
8. *Id.* at 921.

[liability]; if it does not, then it buys only assets."[9] In other words, the successor takes the bad with the good. Thus, the purchaser can determine whether it will buy the business and, if so, whether it will discount the purchase price and attempt to obtain insurance or other sources of funding or support to cover the potential liability of future successor products liability claims.[10]

Professor Phillips' arguments remain as sound today as they were in 1983. The purchasing corporation has control over the form of the transaction as well as the opportunity in due diligence to ferret out evidence of potential exposure to liability and to adjust its price and insurance coverage to compensate.[11] The risk of future claims is not unlike other risks—it is susceptible to analysis, forecast, and allocation by contract.[12]

Be that as it may, the corporate-supremacy-over-tort-policy camp appears in many jurisdictions to have beaten back the product line or continuity of enterprise theory on three fronts. On the first front, in the state courts, the policies that underlie product line decisions like *Cyr*, *Turner*, and *Ray* have been treated as ironclad required elements rather than policy considerations or non-dispositive factors.[13] On the second front, in the *Restatement (Third) of Torts: Products Liability*,[14] the "restaters" appear to have overemphasized or "overcounted" the jurisdictions that have rejected more expansive successor liability doctrines.[15] Thus, the *Restatement (Third)* provides continued cover and support for the first front in the campaign against successor liability. Finally, on the third front, in what may appear to be an unlikely forum to find protections for potential successors, the bankruptcy courts (and the merger and acquisitions professionals that have come to inhabit them)[16] have developed a sale free and clear of claims and interests process that insulates, or at least appears to insulate, from successor liability

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9. *Id.*

10. *See id.* at 925; *see generally* GARY M. LAWRENCE, DUE DILIGENCE IN BUSINESS TRANSACTIONS §§ 14.01 et seq. (2003) (discussing due diligence with respect to insurance and liability coverage).

11. *See* LAWRENCE, *supra* note 10, §§ 1.01-.03 (identifying one goal of due diligence as transaction evaluation and determination of fair price).

12. *See* Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 57 (Alaska 2001) (discussing use of insurance and adjustment of purchase price to allocate risk of successor liability claims); *see generally* CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU § 2.2.3 (2002) (discussing use of representations to allocate risk of veracity of certain facts).

13. *See infra* Part V.

14. RESTATEMENT (THIRD) OF TORTS (1997).

15. Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 852-58.

16. *See generally* George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 33 n.66 (2004) (noting use of bankruptcy proceedings as venues for merger and acquisition activities).

those who purchase business assets as a going concern from a bankruptcy estate.[17] The limits of this bankruptcy sale free and clear technique are not entirely clear, and the question of barring future claims that were unknowable at the time of the sale presents no small problem.[18]

It is not fair or accurate, however, to say that the expansion of tort recovery to include successor liability based upon a broad product line or continuity of enterprise theory is all but dead. Its rise in the late 1970s and early 1980s has slowed or remained static in a number of jurisdictions to reflect the interests of corporate law.[19] A substantial minority of jurisdictions, however, have not followed this trend.[20] A number of well-reasoned opinions reject corporate law's ascendency over tort's strict liability principles.[21] The rationale behind these decisions is not, however, what Professor Phillips had in mind. Rather than a notion of enterprise or "take the good with the bad" liability, the decisions that support continuity of enterprise or product line liability appear to do so on the basis of spreading risk to afford plaintiffs a remedy that they otherwise would not have.[22]

It is probably no accident that the campaign to identify a shift away from tort liability has occurred as the mass of the United States population known as the Baby Boom generation has aged, identifying less with those who are likely to be injured by capital and more with capital itself. Thus, the perceived enlightened self-interest of this demographic dictates that limitation of corporate liability policy should be on the rise and that expanded, no-fault tort liability, founded upon doctrines like risk-shifting and the low cost insurer, should be in the decline.

The balance of this piece describes the fate of the *Cyr*, *Turner*, and *Ray* product line and continuity of enterprise theories in their home jurisdictions[23] as well as the reception these perceived expansions of successor liability

17. *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235 (2002) (collecting cases and discussing expansive interpretation of the word "interest" in section 363(f) to include "claims" and thus allowing preplan bankruptcy sales to insulate purchasers from unsecured claims including tort claims); *see also* Jo Ann J. Brighton, *How Free is "Free and Clear"?*, 21 AM. BANKR. INST. J. 1, 41-43 (2002).

18. Brighton, *supra* note 17, at 41-43.

19. Cupp, *supra* note 15, at 850.

20. *Id.* at 851, 857 & n.73.

21. David W. Pollack, *Successor Liability in Asset Acquisitions*, *in* ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 255, 274 (David W. Pollak & John F. Seegal eds., 2003) (expressing optimism in view of the fact that continuity of enterprise and product line theories have recently received favorable treatment in some courts).

22. *See, e.g.*, Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 55-58 (Alaska 2001).

23. *See infra* Parts II-IV. *Cyr* was a First Circuit Court of Appeals decision based upon New Hampshire law. Cyr v. B. Offen & Co., 501 F.2d 1145, 1150 (1st Cir. 1974). Thus, New Hampshire is treated as its "home" jurisdiction. *Turner* is a Michigan decision and *Ray* is a California decision.

received in other jurisdictions to show what has happened in the intervening twenty-odd years since publication of Professor Phillips' article and, perhaps more importantly, what has not.[24] Determining where to draw the line to allow for successor liability and whether corporate principles of separate identity and limitation of liability should predominate over tort principles of risk-spreading and the need to protect consumers and workers from dangerous products is essentially a result-oriented decision informed by one's political and economic views. The same applies to whether bankruptcy sales can or should be free and clear of existing and future tort claims.[25] The answer depends upon which side of the debate one stands.

This makes it, ideally, a decision for state and federal legislatures rather than the courts; however, legislatures, by and large, have not acted to resolve the matter.[26] This failure to act leaves it to the courts to address the applicable policy arguments while attempting to do substantial justice and balance the rights of involuntary creditors (tort victims) against capital's desire for certainty, limited liability, and the ability to efficiently allocate risk.[27] There is no easy, universal, principled solution to be found in the advocacy system, but presently that may be all that we have.

II. *TURNER V. BITUMINOUS CASUALTY CO.*

In 1976 the Michigan Supreme Court expanded the four traditional categories of successor liability and in so doing, adopted a "continuity of enterprise" theory of successor liability.[28] The court stated

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24. *See infra* Part V.

25. *See* Kuney, *supra* note 17, at 268 n.125.

26. The Supreme Court of Alaska addressed whether the matter should be left to the legislature by stating:

> Some commentators, including the Restatement authors, reason that legislatures are better situated than courts to define the parameters of successor liability. But we think this is an appropriate subject for judicial decision because it is directly related to products liability law, a doctrinal road long traveled by courts. For example, the four traditional exceptions were created by the courts. There is also some suggestion that legislation in other states has failed to address these problems. We see no reason to await legislation before addressing this issue.

Savage Arms, 18 P.3d at 58. In 2002 the Attorney General of Alaska recommended the veto of a legislative attempt to reject the continuity of enterprise doctrine of successor liability and reverse the *Savage Arms* decision of the Alaska Supreme Court. Op. Alaska Att'y Gen. (June 11, 2002), 2002 Alas. AG LEXIS 20, at *1-2. *But see* TEX. BUS. CORP. ACT ANN. art. 5.10B (Vernon 2003) (rejecting successor liability in reaction to *Western Resources Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783 (Tex. Civ. App. 1977), which had adopted the de facto merger doctrine).

27. *Savage Arms*, 18 P.3d at 55-58.

28. Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 879 (Mich. 1976).

> the rule that in the sale of corporate assets for cash, the first, third and fourth criteria set forth in the *Shannon* quotation [developed] from *McKee* shall be guidelines to establish whether there is continuity between the transferee and the transferor corporations. If there is such continuity, then the transferee must accept the liability with the benefits.[29]

The first, third, and fourth criteria cited from *Shannon/McKee* are three of the four traditional elements of the de facto merger exception:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.
>
> . . .
>
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
>
> (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.[30]

In its analysis of the case before it, the *Turner* court also stated:

> Because this is a products liability case, however, there is a second aspect of continuity which must also be considered. Where the successor corporation represents itself either affirmatively or, by omitting to do otherwise, as in effect a continuation of the original manufacturing enterprise, a strong indication of continuity is established.[31]

Thus, the plaintiff in *Turner* was able to prove a prima facie case of "continuation of corporate responsibility for products liability" by showing:

> (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 [seller'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.

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29. *Id.* at 883 (citing Shannon v. Samuel Langston Co., 379 F. Supp. 797, 801 (W.D. Mich. 1974); McKee v. Harris-Seybold Co., 264 A.2d 98, 103-05 (N.J. Super. Ct. App. Div. 1970)).

30. *Id.* at 879 (quoting *Shannon*, 379 F. Supp. at 801).

31. *Id.* at 882.

(4) The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.[32]

The Michigan Supreme Court did not address the limits of the continuity of enterprise exception or whether the legal standard was comprised of a set of required elements or non-dispositive factors, not all of which would be required in order for liability to attach, until 1999 in *Foster v. Cone-Blanchard Machine Co.*[33] In the interim, the court cited *Turner* in three decisions, none of which clarified the key *Turner* holding.[34] One appellate court decision between *Turner* and *Foster* concluded that satisfying the fourth consideration in *Turner* (the purchasing corporation's holding itself out as a continuation of the selling corporation) was not sufficient for a finding of successor liability where the first three considerations were not met.[35]

In *Foster*, a plaintiff injured while operating a feed screw machine sued the corporate successor after receiving a $500,000 settlement from the predecessor corporation.[36] The court held that "because [the] predecessor was available for recourse as witnessed by [the] plaintiff's negotiated settlement with the predecessor for $500,000, the continuity of enterprise theory of successor liability [was] inapplicable."[37] Thus, the *Foster* court resolved two issues left open in *Turner*. First, the Michigan appellate decisions prior to *Foster* had cited *Turner* for the proposition that the continuity of enterprise test was comprised of four factors, following the four factors enumerated in the *Turner* court's holding rather than the three factors listed in its rule.[38] The

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32. *Id.* at 883-84.

33. 597 N.W.2d 506 (Mich. 1999).

34. Jeffrey v. Rapid Am. Corp., 529 N.W.2d 644, 656 (Mich. 1995) (citing *Turner* for the proposition that corporate law principles should not be rigidly applied in products liability cases); Stevens v. McLouth Steel Prods. Corp., 446 N.W.2d 95, 98 (Mich. 1989) (citing *Turner* as a case in which the Michigan Supreme Court discussed the doctrine of successor liability in the context of a products liability suit); Langley v. Harris Corp., 321 N.W.2d 662, 664-66 (Mich. 1982) (citing *Turner* for the proposition "that an acquiring corporation may be held liable for products liability claims arising from activities of its predecessor corporation" under a continuity of enterprise theory, but then holding that the *Turner* rationale will not allow a corporation to seek indemnity from the plaintiff's employer in a products liability suit).

35. Pelc v. Bendix Mach. Tool Corp., 314 N.W.2d 614, 617, 620 (Mich. Ct. App. 1981) (holding that in a case in which a successor corporation had purchased only 8% of the assets of another corporation in a bankruptcy sale and did not meet the first three criteria of *Turner* but held itself out as a continuation of the liquidating corporation, the mere continuation test was not satisfied). The court noted that to impose successor liability in such circumstances would effectively be an adoption of the broader "product line" exception. *Id.* at 620.

36. *Foster*, 597 N.W.2d at 508.

37. *Id.*

38. State Farm Fire & Cas. Ins. Co. v. Pitney Bowes Mgmt. Servs., Inc., No. 205164, 1999 WL 33451719, at *1 (Mich. Ct. App. Apr. 2, 1999); Fenton Area Pub. Sch. v. Sorensen-Gross Constr. Co., 335 N.W.2d 221, 225-26 (Mich. Ct. App. 1983); *Pelc*, 314 N.W.2d at 618; Lemire v. Garrard Drugs, 291 N.W.2d 103, 105 (Mich. Ct. App. 1980); Powers v. Baker-

Foster court clarified that, in fact, the *Turner* rule is comprised of three required elements:

> *Turner* held that a prima facie case of continuity of enterprise exists where the plaintiff establishes the following facts: (1) there is continuation of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation; (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the selling corporation. *Turner* identified as an additional principle relevant to determining successor liability, whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation.[39]

In a footnote, the court recognized the relationship between the three necessary elements for continuity of enterprise and the fourth "separate and relevant inquiry":[40]

> This principle has been called the fourth guideline of the *Turner* continuity of enterprise analysis. However, we note that a truer reading of *Turner* suggests that the first three guidelines were intended to complete the continuity [of] enterprise inquiry where there is a sale of corporate assets. *Turner* went on to identify as a separate and relevant inquiry whether a purchasing corporation holds itself out as the effective continuation of the seller.[41]

Thus, in view of *Foster*, a plaintiff alleging successor liability under the continuity of enterprise exception has the burden of producing evidence sufficient to satisfy only the three articulated elements.[42]

Second, the *Foster* court held that the "'continuity of enterprise' doctrine applies only when the transferor is no longer viable and capable of being sued."[43] The court interpreted the underlying rationale of *Turner* as seeking "to provide a source of recovery for injured plaintiffs."[44] In his dissent, Justice Brickley disagreed with the majority as to the underlying rationale of *Turner*, arguing that the *Turner* court expanded liability based on the successor corporation's enjoyment of "certain continuing benefits":

Perkins, Inc., 285 N.W.2d 402, 404-06 (Mich. Ct. App. 1979).

39. *Foster*, 597 N.W.2d at 510.

40. *Id.* at 510 n.6.

41. *Id.*

42. *See* Meram v. Clark Ref. & Mktg., Inc., No. 221342, 2001 WL 1606883, at *2 n.4 (Mich. Ct. App. Dec. 14, 2001).

43. *Foster*, 597 N.W.2d at 511.

44. *Id.*

> [T]he test in *Turner* is designed to determine whether the company (or "enterprise") involved in the lawsuit is essentially the same company that was allegedly negligent in designing or manufacturing the offending product.
>
> . . . .
>
> We explained that the policy basis of this "continuity of the enterprise" requirement "'is that the enterprise, the going concern, ought to bear the liability for the damages done by its defective products.'" We also reasoned that such an enterprise enjoys certain continuing benefits, such as goodwill and expertise, and therefore must also accept continuing responsibility for the costs that the enterprise has imposed on society through its negligence.[45]

Therefore, the *Foster* majority relies upon the policy of providing the plaintiff with a recovery as the fundamental basis for extending successor liability under *Turner*, whereas the minority, adopting Professor Phillips' "bad with good" approach, would impose successor liability when the successor enjoys the continuing benefits of the enterprise.

The dissent notwithstanding, the *Foster* decision appears to return Michigan law to its state immediately after *Turner* was decided, recognizing continuity of enterprise as a doctrine of successor liability having three requisite elements. To the extent that intervening decisions had narrowed *Turner* by adding a fourth factor (namely, whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation), that revision of the doctrine appears to have been reversed.

III. *RAY V. ALAD CORP.*: STATIC AFTER TWO DECADES

A. The Genesis of the "Product Line" Exception: Ray v. Alad Corp.

It is a mistake to read too much into a name. The "product line" exception to the general rule of no successor liability originated in California with *Ray v. Alad Corp.*[46] In that case, the Supreme Court of California imposed liability on the successor for an injury sustained by a plaintiff when he fell off of a ladder manufactured by the predecessor.[47] The court concluded that none of the traditional successor liability doctrines applied[48] and that successor liability was appropriate in the particular circumstances, stating:

> We therefore conclude that a party which acquires a manufacturing business and continues the output of its line of products *under the circumstances here presented* assumes strict tort liability for defects in units of the same product

45. *Id.* at 513-14 (Brickley, J., dissenting) (citation omitted) (quoting Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 876 (Mich. 1976)).

46. 560 P.2d 3 (Cal. 1977).

47. *Id.* at 4-5.

48. *Id.* at 7-8.

> line previously manufactured and distributed by the entity from which the business was acquired.[49]

The term "product line" does not refer to the mere purchase of one or many of the predecessor's product lines. Rather, it refers to the purchase of the predecessor's *manufacturing business* and *continued production of the predecessor's product line*. As such, it resembles what in other jurisdictions is termed "continuity of enterprise" successor liability.[50]

The policy justifications articulated by the *Ray* court for imposing successor products liability were an important component of its analysis:

> Justification for imposing strict liability upon a *successor* to a manufacturer under the circumstances here presented rests upon (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading [role], 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 good will being enjoyed by the successor in the continued operation of the business.[51]

California appellate courts, as well as other courts applying the product line test, refer to these three policy justifications set forth in *Ray* in different ways; but generally, they all treat these justifications as elements—that is, as requirements.[52] In *Henkel Corp. v. Hartford Accident & Indemnity Co.*,[53] the California Supreme Court recently referred to the policy justifications of *Ray* as "conditions."[54]

1. The First Condition of *Ray*: Destruction of Plaintiff's Remedies

Under the first, and most significant, condition of *Ray*, the successor's acquisition of the business must cause the virtual destruction of the plaintiff's remedies against the predecessor in order for successor liability to be imposed.[55] In *Ray*, as part of the sales transaction, the predecessor agreed "to

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49. *Id.* at 11 (emphasis added).

50. *See, e.g.*, Cyr v. B. Offen & Co., 501 F.2d 1145, 1152 (1st Cir. 1974); *Turner*, 244 N.W.2d at 879, 883.

51. *Ray*, 560 P.2d at 8-9.

52. *See, e.g.*, Chaknova v. Wilbur-Ellis Co., 81 Cal. Rptr. 2d 871, 876 (Cal. Ct. App. 1999) (referring to the "three criteria" of *Ray*); *see also* Stewart v. Telex Communications, Inc., 1 Cal. Rptr. 2d 669, 672-73 (Cal. Ct. App. 1991) (referring to the *Ray* "considerations"); Lundell v. Sidney Mach. Tool Co., 236 Cal. Rptr. 70, 73 (Cal. Ct. App. 1987) (referring to *Ray's* "three-prong test").

53. 62 P.3d 69 (Cal. 2003).

54. *Id.* at 73.

55. *Ray*, 560 P.2d at 9.

dissolve its corporate existence as soon as practical"[56] and actually did dissolve within two months after the sale "in accordance with the purchase agreement."[57] The court held that the transaction "depriv[ed the] plaintiff of redress against the [predecessor],"[58] contrasting the facts of the case before it with those in *Schwartz v. McGraw-Edison Co.*,[59] in which the predecessor remained "a going concern for a substantial period following [the plaintiff's] injury."[60]

In applying this first *Ray* condition, courts consistently have required some level of causation—that is, the acquisition of the business must cause or substantially contribute to the destruction of the plaintiff's remedies.[61] Thus, the Supreme Court of California concluded in *Henkel* that the first condition of *Ray* was not met because "there [were] no grounds for claiming that [the predecessor] was destroyed by the . . . sale of its . . . business to [the successor]."[62]

In instances in which a successor corporation exercised complete control over the predecessor and "could have at any time forced [the predecessor] into bankruptcy," however, the causation element has been found to be satisfied, despite the fact that the successor did not expressly require the dissolution of the predecessor.[63] The court in *Kaminski v. Western MacArthur Co.*[64] held that the successor's financial and managerial control over the predecessor "at least substantially contributed to the absence of [the predecessor] from the recovery pool of product liability plaintiffs."[65]

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56. *Id.* at 6.
57. *Id.* at 9.
58. *Id.* at 10.
59. 92 Cal. Rptr. 776 (Cal. Ct. App. 1971).
60. *Ray*, 560 P.2d at 10 n.6.
61. *See, e.g.*, Chaknova v. Wilbur-Ellis Co., 81 Cal. Rptr. 2d 871, 876-77 (Cal. Ct. App. 1999) (holding that the successor could not be held liable because the causation or substantial contribution requirement was not met when the successor bought the assets from the predecessor, an asbestos manufacturer; the predecessor remained in business for fifteen months after the sale; and the successor played no role in the predecessor's decision to dissolve); Stewart v. Telex Communications, Inc., 1 Cal. Rptr. 2d 669, 675 (Cal. Ct. App. 1991) ("'The traditional corporate rule of nonliability is . . . counterbalanced by the policies of strict liability [only] when acquisition by the successor, and not some [other] event or act, virtually destroys the ability of the plaintiff to seek redress from the manufacturer of the defective product.'" (alteration in original) (quoting Hall v. Armstrong Cork, Inc., 692 P.2d 787, 792 (Wash. 1984))); Kaminski v. W. MacArthur Co., 220 Cal. Rptr. 895, 903 (Cal. Ct. App. 1985) (imposing successor liability when the successor's financial and managerial control over the predecessor "at least substantially contributed" to the destruction of the plaintiff's remedies).
62. Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 74 (Cal. 2003) (citing *Chaknova*, 81 Cal. Rptr. 2d at 871).
63. *Kaminski*, 220 Cal. Rptr. at 903; *see also* Phillips v. Cooper Labs., Inc., 264 Cal. Rptr. 311 (Cal. Ct. App. 1989) (relying on the *Kaminski* rationale for the first condition of *Ray*).
64. 220 Cal. Rptr. 895 (Cal. Ct. App. 1985).
65. *Id.* at 903; *see also* Kline v. Johns-Manville, 745 F.2d 1217, 1220 (9th Cir. 1984)

The causation requirement in the first condition of *Ray* has been analyzed several times in the context of bankruptcy sales. In the bankruptcy context, a successor who merely purchases assets at a bankruptcy sale is not considered the cause of a plaintiff's lack of remedy against the predecessor. The Ninth Circuit Court of Appeals articulated this general principle in *Nelson v. Tiffany Industries, Inc.*[66] In *Nelson*, the predecessor manufactured grain augers.[67] Four years after manufacturing the auger in question, the predecessor filed a voluntary petition under Chapter 11, and the successor purchased all of the predecessor's assets in a bankruptcy court approved sale.[68] The court declined to impose successor liability, stating:

> It is our view that the California Supreme Court's decision in *Ray* does not apply where there is a good faith dissolution in bankruptcy which is not intended to avoid future tort claims against the predecessor. Under such circumstances, the successor corporation has not contributed to or caused the destruction of the plaintiff's remedies.[69]

The Ninth Circuit remanded the case to the district court because the record did not specify whether the district court "considered the evidence offered by the plaintiff for the purpose of showing that [the predecessor] filed its petition pursuant to a collusive agreement with [the successor]."[70] The appellate court went on to note, however, that "[i]f the evidence shows that [the successor] induced [the predecessor] to file for bankruptcy to avoid future tort liability, the *Ray* exception to the general rule would be applicable."[71]

In *Stewart v. Telex Communications, Inc.*,[72] the California Court of Appeal addressed successor products liability for a bankrupt predecessor's defective antenna.[73] The court noted that "the sole distinction between [*Ray*] and the present case is that '[the successor] purchased [the predecessor] through the intermediary of the bankruptcy courts[] rather than directly.'"[74] The court noted that *Kaminski* found successor liability in a case in which a successor "substantially contributed" to the demise of the predecessor, but stated, "Nevertheless, some causal connection between the succession and the

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(concluding that *Ray* "requir[es] that the asset sale contribute to the destruction of the plaintiffs' remedies"); Lundell v. Sidney Mach. Tool Co., 236 Cal. Rptr. 70, 75 (Cal. Ct. App. 1987) ("[T]o be liable, [the successor] must have 'played some role in curtailing or destroying the [plaintiff's] remedies.'" (quoting *Kaminski*, 220 Cal. Rptr. at 895)).

66. 778 F.2d 533, 537 (9th Cir. 1985).

67. *Id.*

68. *Id.*

69. *Id.* at 538.

70. *Id.*

71. *Id.*

72. 1 Cal. Rptr. 2d 669 (Cal. Ct. App. 1991).

73. *Id.* at 670.

74. *Id.* at 673 (third alteration in original).

destruction of the plaintiff's remedy must be shown."[75] The court proceeded to discuss the balance between products liability policy and corporate needs of limiting risk exposure, concluding:

> "It is the element of causation . . . that tips the balance in favor of imposing successor liability. The traditional corporate rule of nonliability is only counterbalanced by the policies of strict liability when acquisition by the successor, and not some [other] event or act, virtually destroys the ability of the plaintiff to seek redress from the manufacturer of the defective product."[76]

The *Stewart* court, finding "no showing of causation . . . in the voluntary bankruptcy of [the predecessor], nor any showing it was a mere subterfuge to avoid the holding of [*Ray*]," held that the product line exception did not apply.[77]

Thus, both California and Ninth Circuit precedent demonstrate a continued causation requirement in applying the first condition of *Ray*. Though *Kaminski* ostensibly relaxed the causation requirement, some level of causation, at least the predecessor's "substantial contribution" to the destruction of the plaintiff's remedies, is required. As stated above, this first condition is the most significant in the *Ray v. Alad Corp.* analysis. My research has not disclosed a single case in which successor liability was denied after a finding by the court that the successor had caused or substantially contributed to the destruction of the plaintiff's remedies.

2. The Second Condition of *Ray*: Successor's Ability to Spread the Risk

Even if the first condition of *Ray* fails, courts often still examine the second condition—"the successor's ability to assume the original manufacturer's risk-spreading [role]."[78] The court in *Ray* concluded that this condition was met because both physical assets as well as "know-how," in the form of manufacturing designs, continuing personnel, and consulting services from the predecessor's general manager, gave the successor "virtually the same capacity as [the predecessor] to estimate the risks of claims for injuries from defects in previously manufactured ladders for purposes of obtaining insurance coverage or planning self-insurance."[79] In determining whether the successor has the requisite "ability to assume the [predecessor's] risk-spreading [role],"[80] courts often first compare and contrast the facts of the case before them with those in *Ray*.[81] In addition, however, subsequent cases have

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75. *Id.* at 675.
76. *Id.* (quoting Hall v. Armstrong Cork, Inc., 692 P.2d 787, 792 (Wash. 1984)).
77. *Id.* at 676.
78. Ray v. Alad Corp., 560 P.2d 3, 9 (Cal. 1977).
79. *Id.* at 10.
80. *Id.* at 9.
81. *See, e.g.*, Kline v. Johns-Manville, 745 F.2d 1217, 1220 (9th Cir. 1984); Chaknova

relied upon or cited *Rawlings v. D.M. Oliver, Inc.*[82] while injecting into the risk-spreading analysis what has come to be recognized as a "fairness" factor, blurring the separate nature of the second and third conditions of *Ray*.[83]

3. The Third Condition of *Ray*: Fairness

The court in *Ray v. Alad Corp.* stated that the third justification for imposing liability on the successor "rests upon . . . the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business."[84] The court concluded:

> [T]he imposition upon [the successor] of liability for injuries from [the predecessor's] defective products is fair and equitable in view of [the successor's] acquisition of [the predecessor's] trade name, good will, and customer lists[;] its continuing to produce the same line of ladders[;] and its holding itself out to potential customers as the same enterprise.[85]

In other words, the acquisition of goodwill may carry attendant burdens, such as liability for product defects. Like the dissent in *Foster v. Cone-Blanchard Machine Co.*, this consideration from the original *Ray* doctrine seems to fit well with Professor Phillips' "bad with good" rationale. But the focus of the fairness analysis in the third condition of *Ray* appears to have since shifted.

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v. Wilbur-Ellis Co., 81 Cal. Rptr. 2d 871, 877 (Cal. Ct. App. 1999); Rosales v. Thermex-Thermatron, Inc., 78 Cal. Rptr. 2d 861, 865-66 (Cal. Ct. App. 1998); Lundell v. Sidney Mach. Tool Co., 236 Cal. Rptr. 70, 75-76 (Cal. Ct. App. 1987); Rawlings v. D.M. Oliver, Inc., 159 Cal. Rptr. 119, 123-24 (Cal. Ct. App. 1979).

82. 159 Cal. Rptr. 119 (Cal. Ct. App. 1979).

83. *See Chaknova*, 81 Cal. Rptr. 2d at 877 (noting in its discussion of the second risk-spreading prong that "the *Rawlings* court rested its imposition of liability on '[f]undamental fairness . . . through a balancing of the rights of the injured party against the rights of those engaged in business, *including the latter's reasonable commercial expectations*'" (emphasis added in *Chaknova*) (quoting *Rawlings*, 159 Cal. Rptr. at 124)); *see also Lundell*, 236 Cal. Rptr. at 76. Citing *Rawlings*, the *Lundell* court stated:

> It is one thing to impose risk-spreading analysis and liability upon a major corporation with valuable assets, many product lines, high volume, and great resources available to pay for insurance. It is quite another to impose risk-spreading analysis and a level of liability on a tiny sole proprietorship, which liability may exceed the proprietorship's net assets.

Id. at 76.

84. *Ray*, 560 P.2d at 9.

85. *Id.* at 10-11 (noting also that the successor's "deliberate albeit legitimate exploitation of [the predecessor's] established reputation as a going concern manufacturing a specific product line gave [the successor] a substantial benefit which its predecessor could not have enjoyed without the burden of potential liability for injuries from previously manufactured units").

Courts now are apt to examine whether the imposition of liability upon the successor would be "fair" in general or fair to the successor.[86] Thus, the third prong, which began as a justification for imposing successor liability, is now often used as an additional reason for *not* imposing liability.[87]

B. Product Line Successor Liability Is Limited to Strict Liability

Plaintiffs in several instances have attempted to extend the product line exception in *Ray* beyond strict products liability to successor liability for acts of negligence.[88] In these cases, however, California appellate courts have limited the product line exception to strict tort liability. Though courts have noted the practical reality that plaintiffs harmed by corporate negligence are not significantly different than plaintiffs harmed by defective products, those courts have noted that *Ray* was limited to the circumstances of that case, and the applicable circumstances require strict tort liability.[89]

C. Ray v. Alad Corp. *and Product Line Successor Liability: A Final Note*

If one were looking for the points where the product line successor liability "door" stood open the widest in California, the starting point would be *Rawlings v. D.M. Oliver, Inc.*[90] The *Rawlings* court noted that *Ray* "should not be construed so narrowly as to create an exclusive exception to the general rule for successor liability permitting a similar result only in [a *Ray*] clone."[91] The *Rawlings* court had no problem applying strict liability in the case of a custom-made kelp dryer and found no substantive difference in whether a predecessor was a corporation or a sole proprietorship.[92] While in *Ray* the plaintiff was injured six months after the predecessor was dissolved and in *Rawlings* the injury from the kelp dryer occurred three months before the successor purchased the business, the court found this irrelevant in applying *Ray*.[93] However, the court in *Lundell v. Sidney Machine Tool Co.*[94] declined to impose successor liability,[95] noting that the successor was a "tiny sole

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86. *See Chaknova*, 81 Cal. Rptr. 2d at 878.

87. *See, e.g.*, Kline v. Johns-Manville, 745 F.2d 1217, 1221 (9th Cir. 1984); *Chaknova*, 81 Cal. Rptr. 2d at 878; *Lundell*, 236 Cal. Rptr. at 77-78.

88. *See, e.g.*, Franklin v. USX Corp., 105 Cal. Rptr. 2d 11, 20 (Cal. Ct. App. 2001); Monarch Bay II v. Prof'l Serv. Indus., 89 Cal. Rptr. 2d 778, 778 (Cal. Ct. App. 1999); Maloney v. Am. Pharm. Co., 255 Cal. Rptr. 1, 4-5 (Cal. Ct. App. 1988).

89. *See Monarch Bay II*, 89 Cal. Rptr. 2d at 780.

90. 159 Cal. Rptr. 119 (Cal. Ct. App. 1979).

91. *Id.* at 124.

92. *Id.* at 120, 124.

93. *Id.* at 123 ("The timeliness of [the plaintiff's] action is governed solely by the applicable statute of limitations and not whether she was injured before or after the sale.").

94. 236 Cal. Rptr. 70 (Cal. Ct. App. 1987).

95. *Id.* at 76-77.

proprietorship"[96] and that the case was "factually distinguishable from *Ray*."[97] Moreover, subsequent cases also have cited *Rawlings* when adding a "fairness to the successor" factor to the risk-spreading analysis set out in *Ray*.[98]

As noted above, the causation requirement was relaxed in *Kaminski* and shifted from a strict requirement to a "substantial contribution" requirement.[99] This articulation of the required causation is repeated in *Chaknova* and echoed again in *Stewart*. However, the *Stewart* court noted that

> "this causation requirement is not a strict one, and sufficient causation will be found as long as the successor played some role in curtailing or destroying plaintiff's remedies . . . . Thus, when a successor [as in *Kaminski*] forces a corporation to dissolve by exercising its financial power as a creditor and its right to dictate policy to the directors of the corporation, sufficient causation exists."[100]

"Nevertheless," the court continued, "some causal connection between the succession and the destruction of the plaintiff's remedy must be shown."[101] Thus, *Kaminski*'s relaxation of the causation requirement generally has been limited to its facts.

An example of the product line door closing a bit from *Rawlings* and *Kaminski* may be found in *Monarch Bay II v. Professional Service Industries, Inc.*,[102] in which the court addressed whether the product line exception should be extended to cases involving corporate negligence.[103] After refusing to extend the product line test, the court stated:

> The trend in other jurisdictions appears to be away from expansion of successor liability. Although the product line exception was adopted by a number of courts following the *Ray* opinion, "recent cases from a variety of states have rejected the product line exception in favor of retaining the traditional rule on non-liability."
>
> The *Ray* court clearly intended the product line exception to be limited to the circumstances presented in that case, and we decline to extend the rationale to other circumstances.[104]

Thus, at least in California, *Ray* is neither the pro-successor liability

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96. *Id.* at 76.
97. *Id.* at 74.
98. *See supra* note 83.
99. Kaminski v. W. MacArthur Co., 220 Cal. Rptr. 895, 903 (Cal. Ct. App. 1985).
100. Stewart v. Telex Communications, Inc., 1 Cal. Rptr. 2d 669, 675 (Cal. Ct. App. 1991) (citation omitted) (quoting COTCHETT & CARTWRIGHT, CAL. PRODUCT LIABILITY ACTIONS § 2.14[5] (rev. ed. 1991)).
101. *Id.*
102. 89 Cal. Rptr. 2d 778 (Cal. Ct. App. 1999).
103. *Id.* at 778.
104. *Id.* at 781 (citation omitted).

panacea nor the threat that some alarmists have made it out to be. It remains good law, but to the extent it lives on, it is largely confined to its particular set of facts.[105] Thus, despite the statements to the contrary in *Rawlings*,[106] it appears that successor liability based on the product line exception will generally only be imposed on *Ray v. Alad Corp.* clones or near-clones.

IV. *CYR V. B. OFFEN & CO.*: THE FIRST CIRCUIT'S WRONG GUESS

In *Cyr v. B. Offen & Co.*,[107] the First Circuit Court of Appeals addressed a products liability case involving successor liability under New Hampshire law.[108] The district court had imposed successor liability, "ruling that the jury could find [the successor] liable for whatever torts its predecessor may have committed."[109]

The court of appeals emphasized certain facts in affirming the district court and holding that successor liability was appropriate. Key employees of the predecessor—a sole proprietorship manufacturing press driers—along with a single outside financier formed a corporation to buy all of the assets of the predecessor upon the death of the sole proprietor.[110] The asset purchase agreement obligated the successor to "'(i) cause the Offen Business to be operated continuously . . . [and] (ii) cause the Offen Business to be operated substantially in accordance with the same business practices and policies as [were] being employed by Offen at the date of the agreement.'"[111] Furthermore, "[t]he purchase of good will and contract obligations was central

105. In *Rosales v. Thermex-Thermatron, Inc.*, 78 Cal. Rptr. 2d 861 (Cal. Ct. App. 1998), the court approved imposing successor liability after determining that (1) the sale of assets to the successor virtually destroyed the plaintiff's remedy against the predecessor because the purchase price was paid to another entity to which the predecessor owed money and after the sale the predecessor "had no assets and was not capable of settling its debt to anyone," and "did not even have a bank account"; (2) the successor had the ability to assume the predecessor's risk-spreading role because, as in *Ray*, the successor "obtained the physical plant and manufacturing equipment of its predecessor," "obtained its predecessor's knowledge of the business," and "[t]he new corporation's owners were employees of the [predecessor]"; and (3) it was fair to impose liability on the successor because it continued to benefit from the predecessor's goodwill, use a name similar to the predecessor and its subsidiaries, and use the predecessor's customer lists. *Id.* at 865-66. *Compare Rosales*, 78 Cal. Rptr. 2d at 861, *with* Chaknova v. Wilbur-Ellis Co., 81 Cal. Rptr. 2d 871, 876 (Cal. Ct. App. 1999) (holding "that the circumstances of the [case before it] differ[ed] in significant respect from *Ray v. Alad* and [did] not satisfy the three criteria enunciated therein"), *and* Lundell v. Sidney Mach. Tool Co., 236 Cal. Rptr. 70, 74 (Cal. Ct. App. 1987) (concluding that its case was "factually distinguishable from *Ray*, and [did] not satisfy the three criteria which *Ray* required").

106. Rawlings v. D.M. Oliver, Inc., 159 Cal. Rptr. 119, 124 (Cal. Ct. App. 1979).

107. 501 F.2d 1145 (1st Cir. 1974).

108. *Id.* at 1150.

109. *Id.* at 1151.

110. *Id.*

111. *Id.* (quoting the asset purchase agreement).

to the agreement."[112] The successor "continued to service and renovate old dryers."[113] Additionally, "[n]o notice was given to known customers of B. Offen Company that a new or different business was beginning."[114] The successor "advertised itself as an ongoing enterprise" and "continued to produce the same kind of product in essentially the same way."[115]

The court noted that New Hampshire law did not provide any specific guidance on the issue of successor liability.[116] After addressing the four traditional exceptions to the general rule of successor nonliability for asset purchasers, the court listed five policy justifications for imposing strict liability on a manufacturer:

> (1) the manufacturer is better able to protect itself and bear the costs while the consumer is helpless; (2) it is the manufacturer which has launched the product into the channels of trade; (3) it is the manufacturer which has violated the representation of safety implicit in putting the product into the stream of commerce; . . . (4) the manufacturer is the instrumentality to look to for improvement of the product's quality[;] . . . [and (5)] the more traditional reason for imposing liability on a corporation for tortuous injuries, the negligence of its employees.[117]

The court then concluded that these policy justifications applied equally to a corporate successor,[118] holding, "Whatever may be the outer limit of liability on a successor, the district court did not err in refusing to rule as a matter of law that [the successor] was immune from liability."[119] *Cyr*, thus, fit squarely into Professor Phillips' "take the bad with the good" theory of successor liability.

Only two subsequent First Circuit decisions have addressed the ruling in *Cyr* regarding successor liability. In *Dayton v. Peck, Stow & Wilcox Co.*,[120] the First Circuit Court of Appeals, interpreting Massachusetts law,[121] explicitly limited *Cyr* to its facts.[122] The *Dayton* court recognized that the "*Cyr* decision has been viewed as an 'improvisation' on the theme of the 'mere continuation' exception but it has not altered the key in which the theme is treated."[123] In 1987 the First Circuit, again interpreting

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 1154.
118. *Id.*
119. *Id.*
120. 739 F.2d 690 (1st Cir. 1984).
121. *Id.* at 691.
122. *Id.* at 693-94 ("The district court was correct in distinguishing *Cyr* on its facts . . . .").
123. *Id.* at 693 (citation omitted).

Massachusetts law, cited *Cyr* for the general proposition that "where there is overall continuity in the operation of a business, products liability can be imposed on a successor corporation which did not exist on the date of manufacture."[124] The *Allied* court, however, was not confronted with the issue presented in *Cyr*—imposition of liability on a successor corporation.[125] Rather, the court was focused on whether the successor had sufficient notice of claims against its predecessor so that an amended complaint related back to the date of the initial filing of the complaint.[126] As a result, the *Allied* court's reference to *Cyr* may be considered dicta. The First Circuit has not otherwise addressed or expanded its holding in *Cyr*.

Although the *Cyr* court purported to apply New Hampshire law when imposing successor liability, subsequent Supreme Court of New Hampshire decisions have flatly rejected *Cyr*'s imposition of successor liability based on the risk-spreading policy of strict liability.[127] Consequently, the Supreme Court of New Hampshire has explicitly rejected the "continuity of enterprise" exception, along with any other extension of successor liability based on risk-spreading.[128] First limited to its facts by its originating court and then flatly rejected by the highest court of the state whose law it purported to state, *Cyr* can safely be pronounced dead in its home jurisdiction.

V. OTHER STATES' ACCEPTANCE OR REJECTION OF THE CONTINUITY OF ENTERPRISE THEORIES OF SUCCESSOR LIABILITY

Courts in twelve states outside New Hampshire have cited *Cyr* favorably, generally adopting either the product line or continuity of enterprise exceptions to successor liability.[129] Courts in six other states have cited *Cyr*

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124. Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 814 F.2d 32, 33, 36 (1st Cir. 1987).

125. *Id.* at 36.

126. *Id.*

127. Bielagus v. EMRE of N.H. Corp., 826 A.2d 559, 569 (N.H. 2003) ("[I]n products liability cases, we consistently have rejected the doctrine of 'risk-spreading' upon which the 'substantial continuity' theory is based. . . . We join the majority of jurisdictions which adhere to the traditional 'mere continuation' exception to the prohibition against successor liability."); Simoneau v. S. Bend Lathe, Inc., 543 A.2d 407, 409 (N.H. 1988) (citing *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 845-46 (N.H. 1978) for the proposition that "to the extent *Cyr* does suggest that we embrace risk spreading, it is no longer a valid interpretation of New Hampshire law").

128. *Bielagus*, 826 A.2d at 569. The Supreme Court of New Hampshire also has rejected *Cyr*'s conclusion that the New Hampshire comparative negligence statute applies in strict liability cases. In *Thibault*, it held "that the comparative negligence statute does not apply to strict liability cases because it is confined by its terms to actions for negligence. However, strict liability is a judicially created doctrine, to which the principle of comparative causation will be applied as hereinafter described." *Thibault*, 395 A.2d at 848 (citation omitted).

129. **Alabama:** Matrix-Churchill v. Springsteen, 461 So. 2d 782, 786-87 (Ala. 1984)

with ambivalence.[130] Nine states, generally those adhering strictly to the traditional rule of successor nonliability, treat *Cyr* with disfavor.[131]

(noting that the Alabama Supreme Court adopted the continuity of enterprise doctrine in *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 785 (Ala. 1979)). **California:** Rawlings v. D.M. Oliver, Inc., 159 Cal. Rptr. 119, 124 (Cal. Ct. App. 1979); Ray v. Alad Corp., 560 P.2d 3, 8, 11 (Cal. 1977) (creating the product line exception). **Connecticut:** A.G. Assocs. of Newington Britain v. Parafati, No. CVN0041808NE, 2002 WL 1162890, at *3 (Conn. Super. Ct. Apr. 11, 2002) (applying the continuity of enterprise exception). **Delaware:** Sheppard v. A.C. & S. Co., 484 A.2d 521, 525 (Del. Super. Ct. 1984). **Georgia:** Farmex, Inc. v. Wainwright, 501 S.E.2d 802, 804 (Ga. 1998) (implicitly adopting the product line exception). **Kansas:** Stratton v. Garvey Int'l, Inc., 676 P.2d 1290, 1298-99 (Kan. Ct. App. 1984) (citing *Cyr* and performing a continuity of enterprise analysis). **Massachusetts:** Cargill, Inc. v. Beaver Coal & Oil Co., 676 N.E.2d 815, 819 (Mass. 1997) (citing *Cyr* for the proposition that "there is no requirement that there be complete shareholder identity between the seller and a buyer before corporate successor liability will attach"). **Michigan:** Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 881-82 (Mich. 1976) (creating the continuity of enterprise exception). **New Jersey:** Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 816, 825 (N.J. 1981) (adopting the product line exception). **New Mexico:** Garcia v. Coe Mfg. Co., 933 P.2d 243, 247-50 (N.M. 1997) (discussing the underlying policies examined in *Cyr* before adopting the product line exception). **Pennsylvania:** Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 110 (Pa. Super. Ct. 1981) (citing *Cyr* with approval and adopting the product line exception). **Washington:** Martin v. Abbott Labs., 689 P.2d 368, 385-88 (Wash. 1984) (citing *Cyr* and adopting the product line exception).

130. **Indiana:** Lucas v. Dorsey Corp., 609 N.E.2d 1191, 1201 (Ind. Ct. App. 1993) (citing *Cyr* for the proposition that express rejection of a predecessor's liability is not dispositive of the successor liability issue). **New York:** Schumacher v. Richards Shear Co., 451 N.E.2d 195, 198 (N.Y. 1983) (citing *Cyr* for the proposition that the predecessor corporation must be extinguished before liability will be imposed on a successor). **North Carolina:** Budd Tire Corp. v. Pierce Tire Co., 370 S.E.2d 267, 269 (N.C. Ct. App. 1988) (citing *Cyr* for the proposition that "inadequate consideration for the purchase, or a lack of some of the elements of a good faith purchaser for value" is a separate exception to the general rule of successor nonliability, but not expressly rejecting or adopting this position). **South Dakota:** Groseth Int'l, Inc. v. Tenneco, Inc., 410 N.W.2d 159, 175 (S.D. 1987) (citing *Cyr* for the traditional exceptions). **Texas:** Hunter v. Fort Worth Capital Corp., 620 S.W.2d 547, 556 (Tex. 1981) (citing *Cyr* for the mere continuation exception without explaining the test). **Wisconsin:** Tift v. Forage King Indus., Inc., 322 N.W.2d 14, 19, 27 (Wis. 1982) (including a critique by the dissent of the *Cyr* rationale after the majority had imposed liability under the traditional exceptions).

131. **Arizona:** Winsor v. Glasswerks PHX, L.L.C., 63 P.3d 1040, 1047 (Ariz. Ct. App. 2003) (deferring to the legislature on successor liability). **Colorado:** Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1146 (Colo. Ct. App. 1992) (rejecting both the product line and continuity of enterprise exceptions). **Florida:** Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1049 (Fla. 1982) (refusing to adopt the continuity of enterprise exception). **Illinois:** Green v. Firestone Tire & Rubber Co., 460 N.E.2d 895, 899 (Ill. App. Ct. 1984) (holding that the plaintiff's reliance on *Cyr* was unfounded because continuation in Illinois requires continuity of stock ownership); State *ex rel.* Donahue v. Perkins & Will Architects, Inc., 413 N.E.2d 29, 33 (Ill. App. Ct. 1980). **Iowa:** Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996)

VI. CONCLUSION

The bottom line of the analysis, then, is that we have not come that far from where we were when Professor Phillips published his article in 1983. *Turner* and *Ray* have been largely confined to their facts in their home jurisdictions, and *Cyr* has been rejected by the state whose law it construed. To the extent that continuity of enterprise or product line continuity theories of successor liability have been adopted, they have been adopted on the basis of a risk-spreading policy rather than Professor Phillips' "ongoing business value" or "take the bad with the good" rationale. But the so-called demise of continuity of enterprise and product line theories has been overstated by the pundits and the *Restatement*. The conflict between tort and corporate law in this area is far from over. The battle is being waged in state courts, federal courts, and, notably, the federal bankruptcy courts. It is too soon to tell whether the continuity doctrines of successor liability will die, survive, or thrive, and if the latter, whether notions of risk-spreading, ongoing business value, or some other policy will provide the basis for that outcome.

(citing *Cyr* and then holding that Iowa is a "traditional" state). **Maryland:** Nissen Corp. v. Miller, 594 A.2d 564, 571, 573 (Md. 1991) (expressly rejecting any extension of the traditional rule). **New Hampshire:** Bielagus v. EMRE of N.H. Corp., 826 A.2d 559, 569 (N.H. 2003); Simoneau v. S. Bend Lathe, Inc., 543 A.2d 407, 409 (N.H. 1988) (stating that, to the extent *Cyr* adopted risk-spreading, it was not a valid interpretation of New Hampshire law). **North Dakota:** Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 124-25 (N.D. 1984) (citing *Cyr* for the proposition that costs from products liability should be "borne by those best able to gauge the risks of those costs, protect against them, and pass the costs on to the consumer," but holding that any extension of the traditional doctrine of successor liability should be undertaken by the legislature). **Ohio:** Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1133 (Ohio 1993) (recognizing that Ohio courts do not expand the traditional exceptions in tort or contract cases). **Virginia:** Harris v. T.P., Inc., 413 S.E.2d 605, 609 (Va. 1992) (expressly rejecting the "product line exception" and the "expanded mere continuation exception").