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ARTICLES

Successor Liability for Defective Products: A Redesign Ongoing

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Christopher L. Frost^{††}

As noted by Plutarch, “[T]ime [is] the wisest counselor of all.”¹ It teaches lessons. It also proves predictions—including predictions about evolution of the law—to be on the mark or errant. The American Law Institute’s treatment of successor corporate liability in the *Restatement (Third) of Torts: Products Liability*,² completed in 1997, relied heavily on predictions in setting its proposed standard. The *Restatement (Third)* sought, among other things, to address the circumstances under which a successor corporation should be liable for defective products sold by a predecessor corporation. It made the controversial prediction that the “continuity of enterprise” and “product line” approaches (hereafter sometimes referred to as “the less restrictive approaches”) to determining the liability of successor corporations for products liability claims are dead to growth, and it asserted that these approaches have been rejected by “a substantial majority of courts.”³

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¹ 1 PLUTARCH, PLUTARCH’S LIVES 218 (Arthur Hugh Clough ed., John Dryden trans., Random House 2001).

² RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1997).

³ *Id.* § 12 cmt. b, Reporters’ Notes (“[A]fter an early spurt of cases in the late 1970s and early 1980s arguing for more expansive liability, courts have refused to

The nine years that have followed the *Restatement (Third)*'s predictions about successor products liability have not been kind to them. Rather than a substantial majority rejecting the less restrictive approaches, courts that have firmly taken a position are in reality quite divided regarding an appropriate approach.⁴ The judicial landscape on this issue remains varied, with some courts recently adopting one or both of the less restrictive approaches, some courts recently adopting the more restrictive "traditional approach," and some courts remaining undecided regarding an appropriate approach.

The *Restatement (Third)* supports the traditional approach to corporate successor liability for products liability claims. The traditional approach provides that an injured consumer cannot sue the successor unless one of the following exceptions applies:

- (1) The successor's acquisition of the predecessor was accompanied by an agreement for the successor to assume such liability;
- (2) the acquisition resulted from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor;
- (3) the acquisition constituted a continuation or merger with the predecessor; or
- (4) the acquisition resulted in the successor becoming a mere continuation of the predecessor.⁵

Critics assert that the traditional approach's restrictiveness inappropriately shifts risk from the corporation to the consumer, who is much less able to bear that risk.⁶ Numerous courts have adopted the less restrictive continuity of enterprise approach and/or the product line approach in response to that concern.

impose liability unless the plaintiff is able to come within the four traditional exceptions.").

⁴ See *infra* notes 35-125.

⁵ See 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (perm. ed., rev. vol. 1999).

⁶ See, e.g., *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1154 (1st Cir. 1974) (finding the policy reasons underlying strict liability of a manufacturer applicable to cases involving successor corporations); *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 825 (N.J. 1981) (holding that the social policy of products liability warrants expansion of the traditional corporate rule); *Ray v. Alad Corp.*, 560 P.2d 3, 8-9 (Cal. 1977) (justifying expansion of successor liability on the basis of strict liability principles); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 880 (Mich. 1976) (stating that strict liability principles should govern over those of corporate law).

The continuity of enterprise approach imposes liability on a successor corporation if the court concludes that the successor is sufficiently similar to the predecessor that it is in essence continuing the predecessor's enterprise. In making this determination, courts look to a broad range of factors, including whether there is continuity of management, personnel, assets, facilities, and operations;⁷ whether the predecessor dissolves as soon as practicable after the sale;⁸ whether the business enterprise continues uninterrupted by the transfer;⁹ and whether the successor holds itself out to the consuming public as a continuing enterprise.¹⁰ Continuity of shareholders is an important factor under the continuity of enterprise approach, but courts may find a continuing enterprise even when the predecessor's assets were sold to new shareholders,¹¹ and even when the assets were sold for cash rather than for stock in the successor corporation.¹² The continuity of enterprise approach does not require that the

⁷ See *Turner*, 244 N.W.2d at 883-84.

⁸ See *id.* at 884.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See Phillip I. Blumberg, *The Continuity of Enterprise Doctrine: Corporate Successorship in United States Law*, 10 FLA. J. INT'L L. 365, 375 (1996) (stating that while the mere continuation exception requires a continuity of shareholders, 'continuity of enterprise' focuses on a basic continuity of the business); Michael D. Green, *Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants*, 72 CORNELL L. REV. 17, 25 (1986) (stating that courts using the expanded continuation approach can find liability although there was a change in ownership); Howard L. Shecter, *Selected Risk Issues in Merger and Acquisition Transactions*, 51 U. MIAMI L. REV. 719, 725 (1997) (explaining that 'continuity of enterprise' has its roots in the mere continuation exception); Timothy J. Murphy, Comment, *A Policy Analysis of a Successor Corporation's Liability for its Predecessor's Defective Products when the Successor has Acquired the Predecessor's Assets for Cash*, 71 MARQ. L. REV. 815, 824-27 (1988) (discussing the expansion of the mere continuation and de facto merger exceptions through case law).

¹² A sale of assets for cash will not transfer liability under the traditional approach absent an agreement to assume such liability or a fraudulent conveyance. See Murphy, *supra* note 11, at 817-18. For a successor corporation to be held liable under either the de facto merger or mere continuation exceptions to the traditional rule, the shareholders of both entities must be the same. See *id.* at 819-21. In the case of a de facto merger, the successor corporation must acquire its predecessor's assets with shares of its own stock. See *id.* at 819; see also *Pancrantz v. Monsanto Co.*, 547 N.W.2d 198, 202 (Iowa 1996) (holding successor corporation not liable as mere continuation where there was no evidence of continuity of shareholders); *Harris v. T.I., Inc.*, 413 S.E.2d 605, 609 (Va. 1992) (same); Green, *supra* note 11, at 23 (noting that courts that have expanded successor liability have eliminated the stock for consideration requirement of de facto merger and mere continuation exceptions); Michael D. Kristofco, Comment, *Successor Liability: The Debate over the Continuity of Enterprise Exception in Ohio is Really No Debate at All*, 21 OHIO N.U. L. REV. 297, 301 (1994) (listing continuity of shareholders as one of four factors necessary for a de facto merger).

successor continue selling the same product line as the predecessor, although selling the same product line is a factor that supports finding a continuing enterprise.¹³

The product line approach imposes liability when the successor continues to market a product line previously sold by the predecessor.¹⁴ It differs from the continuity of enterprise approach by not requiring that the successor purchase the predecessor business as a going concern for liability to attach. Instead, it requires that the successor continue selling a product line sold by the predecessor.¹⁵

It is these two approaches that the *Restatement (Third)* in 1997 labeled “unfair and socially wasteful,” and dismissed as a “small minority” that is the subject of “overwhelming judicial rejection.”¹⁶

¹³ See *Polius v. Clark Equip. Co.*, 802 F.2d 75, 81-82 (3d Cir. 1986) (noting that a successor corporation may still be liable under a ‘continuity of enterprise’ exception if it continues some, but not all, of the manufacturing activities of its predecessor); George L. Lenard, Note, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L.J. 677, 704 (1983) (distinguishing the continuity of enterprise approach from product line rule on the basis that under the former, a successor may be held liable where it did not continue the product line, but merely “uses the predecessor’s name or trademark”).

¹⁴ See Dick Hoffman, Note, *Products Liability for Successor Corporations: A Break from Tradition*, 49 U. COLO. L. REV. 357, 357 (1978) (tracing notable cases from the 1970s leading to the expansion of corporate successor liability); Roberta L. Schuhalter, Note, *Successor Liability for Defective Products: A Tort Exception to a Corporate Rule*, 10 HOFSTRA L. REV. 831, 846-47 & nn.130-46 (1982) (same); see also Carol A. Rogala, Comment, *Nontraditional Successor Product Liability: Should Society Be Forced to Pay the Cost?*, 68 U. DET. L. REV. 37, 49-50 (1990) (“[A] party which acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired.” (quoting *Ray v. Alad Corp.*, 560 P.2d 3, 11 (Cal. 1977))); Shecter, *supra* note 11, at 726 (same).

¹⁵ See, e.g., Dorit F. Kressel, *Successor Liability in Products Liability Litigation: Modern Judicial Response to Traditional Corporate Rules*, 4 PROD. LIAB. L.J. 211, 221 (1993) (explaining that the method of the corporate acquisition is not relevant under the product line exception); Murphy, *supra* note 11, at 844 (stating that the product line exception disregards the business aspects of an acquisition, instead focusing on whether the successor continues output of the same product line); Mike Steenson, *A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability*, 24 WM. MITCHELL L. REV. 1, 78 (1998) (explaining that under the product line exception, liability will attach regardless of how the predecessor was acquired). *But see, e.g., Rawlings v. D.M. Oliver, Inc.*, 159 Cal. Rptr. 119, 124-25 (Ct. App. 1979) (imposing liability under the product line exception although the successor did not continue identical product line); *Pacius v. Thermtroll Corp.*, 611 A.2d 15, 158 (N.J. Super. Ct. Law Div. 1992) (holding the successor corporation liable under the product line exception where it did not continue to manufacture the product line).

¹⁶ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 & cmt. b, Reporters’ Notes (1997).

In 1999, one of this article's authors tested the *Restatement (Third)*'s pronouncements in a law review article entitled *Redesigning Successor Liability*.¹⁷ The article examined the frequency of, and purpose behind, courts' application of the traditional versus less restrictive approaches to corporate successor liability in products liability cases. *Redesigning Successor Liability* revealed that the less restrictive approaches are not subject to "overwhelming judicial rejection," nor are they even a "small minority." To the contrary, as of 1999, eighteen states had adopted the traditional approach,¹⁸ and thirteen had adopted the continuity of enterprise approach¹⁹ or the product line approach.²⁰

¹⁷ Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. Rev. 845 (1999).

¹⁸ See *id.* at 853 & n.41. The count included states that adopted the traditional approach through either state supreme court decisions, lower court decisions, or federal court decisions attempting to apply state law. The eighteen states applying the traditional approach at that time include Arkansas (*Swayze v. A.O. Smith Corp.*, 694 F. Supp. 619, 622-24 (E.D. Ark. 1988) (applying Arkansas law)); Colorado (*Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141, 1142 (Colo. Ct. App. 1992)); Florida (*Bernard v. Kee Mfg. Co.*, 409 So. 2d 1047, 1048 (Fla. 1982)); Illinois (*Nilsson v. Cont'l Mach. Mfg. Co.*, 621 N.E.2d 1032, 1034-35 (Ill. App. Ct. 1993)); Iowa (*Pancratz v. Monsanto Co.*, 547 N.W.2d 198, 201 (Iowa 1996)); Kentucky (*Conn v. Fales Div. of Mathewson Corp.*, 835 F.2d 145, 148 (6th Cir. 1987) (applying Kentucky law)); Maryland (*Nissen Corp. v. Miller*, 594 A.2d 564, 573 (Md. 1991)); Minnesota (*Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 97 (Minn. 1989)); Missouri (*Chem. Design, Inc. v. Am. Standard, Inc.*, 847 S.W.2d 488, 493 (Mo. Ct. App. 1993)); Nebraska (*Jones v. Johnson Mach. & Press Co.*, 320 N.W.2d 481, 484 (Neb. 1982)); North Carolina (*Budd Tire Corp. v. Pierce Tire Co.*, 370 S.E.2d 267, 269 (N.C. Ct. App. 1988)); North Dakota (*Downtowner v. Acrometal Prods.*, 347 N.W.2d 118, 124-25 (N.D. 1984)); Oklahoma (*Pulis v. U.S. Elec. Tool Co.*, 561 P.2d 68, 69 (Okla. 1977)); Texas (*Mudgett v. Paxson Mach. Co.*, 709 S.W.2d 755, 758-59 (Tex. Ct. App. 1986)); Vermont (*Ostrowski v. Hydra-Tool Corp.*, 479 A.2d 126, 127 (Vt. 1984)); Virginia (*Harris v. T.I., Inc.*, 413 S.E.2d 605, 609-10 (Va. 1992)); West Virginia (*Davis v. Celotex Corp.*, 420 S.E.2d 557, 563 (W. Va. 1992)); and Wisconsin (*Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820, 821, 829 (Wis. 1985)).

¹⁹ States following the continuity of enterprise approach at that time included Alabama (*Asher v. KCS Int'l, Inc.*, 659 So. 2d 598, 599-600 (Ala. 1995)); Michigan (*Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 881-82 (Mich. 1976)); Mississippi (*Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174-76 (5th Cir. 1985) (applying Mississippi law)); New Hampshire (*Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1152-54 (1st Cir. 1974) (applying New Hampshire law)); Ohio (*Flaughner v. Cone Automatic Mach. Co.*, 507 N.E.2d 331, 334 (Ohio 1987)); and South Carolina (*Holloway v. John E. Smith's Sons Co.*, 432 F. Supp. 454, 455 (D.S.C. 1977) (applying South Carolina law)).

²⁰ States following the product line approach at that time included California (*Ray v. Alad Corp.*, 560 P.2d 3, 10 (Cal. 1977)); Connecticut (*Sullivan v. A.W. Flint Co.*, No. CV 920339263, 1996 WL 469716, at *7, *8 (Conn. Super. Ct. Aug. 5, 1996); *Kennedy v. Oshkosh Truck Corp.*, No. CV92 0510394S, 1995 WL 27400, at *2, *4 (Conn. Super. Ct. Jan. 18, 1995); *Copperthite v. Pytlik*, No. 59053, 1992 WL 209660, at *4 (Conn. Super. Ct. Aug. 25, 1992)); New Jersey (*Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 817 (N.J. 1981)); New Mexico (*Garcia v. Coe Mfg. Co.*, 933 P.2d 243, 248-50 (N.M. 1997)); Pennsylvania (*Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106, 110 (Pa.

Demographically, the eighteen states that had adopted the traditional approach represented only thirty-eight percent of the United States population,²¹ while forty-three percent of the population resided in the thirteen states that had adopted one of the less restrictive approaches.²² Despite the *Restatement (Third)*'s death pronouncement, the less restrictive approaches were likely being applied in more lawsuits than was the traditional approach.²³

Redesigning Successor Liability also rejected the *Restatement (Third)*'s assertion that the less restrictive approaches are socially wasteful and unfair. *Redesigning Successor Liability* argued, to the contrary, that the continuity of enterprise and product line approaches more effectively channel responsibility for products liability back to the predecessor corporation than does the traditional approach because they force successor corporations to consider the projected cost of the predecessor's products liability at the time the successor purchases the predecessor.²⁴ The article suggested that successor corporations often could minimize their risks by purchasing relatively inexpensive insurance.²⁵ It further advocated that the less restrictive approaches are more fair and efficient because successor corporations are more able to predict, prevent, or absorb a loss due to a defective product.²⁶

In 2001, the Alaska Supreme Court embraced much of *Redesigning Successor Liability*'s analysis in adopting the

Super. Ct. 1981)); and Washington (*Martin v. Abbott Labs.*, 689 P.2d 368, 388 (Wash. 1984)). New York courts at the time held the successor liable if it sold the same product line sold by the predecessor or if it fell within the continuity of enterprise approach. See, e.g., *McCaffrey v. Weaver Jack Corp.*, No. CV 89-3910, 1992 WL 266923, at *2 (E.D.N.Y. Sept. 29, 1992) (suggesting that New York has accepted continuity of enterprise); *Rothstein v. Tenn. Gas Pipeline Co.*, 664 N.Y.S.2d 213, 220-21 (Sup. Ct. 1997) (adopting the product line exception); *Salvati v. Blaw-Knox Food & Chem. Equip., Inc.*, 497 N.Y.S.2d 242, 247 (Sup. Ct. 1985) (adopting continuity of enterprise). For a discussion of New York's current approach, see *infra* notes 99-114 and accompanying text.

²¹ Approximately 100 million people reside in the eighteen states following the traditional approach. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 28 (1997), available at http://www.census.gov/prod/www/statistical-abstract-1995_2000.html (Population Table No. 26).

²² Of the 265 million people residing in the United States as of 1996, 113 million lived in the thirteen states following one of the less restrictive approaches. See *id.*

²³ See Cupp, *supra* note 17, at 856 & n.70.

²⁴ See *id.* at 845.

²⁵ See *id.* at 867.

²⁶ See *id.*

continuity of enterprise approach.²⁷ Referring to the article's "channeling back" argument, the court reasoned that the continuity of enterprise approach would "have the effect of encouraging existing corporations to produce safer products, in keeping with the public policy goals that underlie product liability law generally."²⁸ The court agreed that firms can protect themselves by negotiating a rational purchase price that reflects the potential successor liabilities, and by purchasing insurance where appropriate.²⁹

Thoughtful academic debate has followed the article's publication. In 2002, University of Chicago Professor Richard Epstein published a law review article expressing concern that adoption of the less restrictive approaches may not in fact "channel back" responsibility as asserted by *Redesigning Successor Liability*, but may instead lead corporations to liquidate or sell off assets piecemeal rather than sell to successors. According to Professor Epstein:

What is overlooked in Professor Cupp's channeling argument is the possibility that the increased liability will result in scrubbing the transaction. . . . One possible way to defeat all products liability claims against successors is through a piecemeal disposition of the company. Astute corporate owners could decide to sell off bits and pieces of the assets to different buyers, engage in partial liquidations or dividends to current shareholders, and then finally liquidate the rest.³⁰

University of South Carolina Professor Marie T. Reilly agreed with Epstein's concerns in a 2003 law review article, opining that "Cupp's model of the transferee as the least cost insurer of creditors' loss misses an important limitation on the transferee's capacity to channel or internalize creditors' risk of loss to the debtor."³¹ Both Epstein and Reilly also questioned *Redesigning Successor Liability's* assessment of insurance availability, arguing in effect that in cases of unknowable claims, insurance is not a realistic option, so the monetary burden will simply be shifted onto the transferee corporation.³²

²⁷ See *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 nn.26 & 28, 56 n.35, 57 nn.40 & 42, 58 nn.49 & 53-55 (Alaska 2001).

²⁸ *Id.* at 58 n.49.

²⁹ *Id.* at 57.

³⁰ Richard A. Epstein, *Imperfect Liability Regimes: Individual and Corporate Issues*, 53 S.C. L. REV. 1153, 1170 (2002).

³¹ Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745, 790 (2003).

³² See *infra* notes 131-45 and accompanying text.

This article addresses those responses and re-tests *Redesigning Successor Liability's* original theories and arguments. Part I discusses courts' rulings on successor liability since the publication of *Redesigning Successor Liability*. The part provides an updated analysis of states' current positions on successor liability and concludes that, contrary to the *Restatement (Third)*'s death predictions, courts continue to be split regarding the less restrictive approaches. Some jurisdictions are newly adopting them, and others are newly rejecting them.

Part II re-visits *Redesigning Successor Liability's* original arguments regarding the efficacy of the less restrictive approaches, and responds to the arguments' critics. The part discusses how the primary criticism leveled—that the less restrictive approaches unfairly impute liability where the risks were unknowable—appears to be flawed. As recognized in the *Restatement (Third)*, courts generally decline to assign liability based on imputed knowledge in products liability cases.³³ Indeed, the scholars who developed the theory of imputed knowledge of risks in strict liability—Dean John Wade and Dean Page Keeton—later in their careers both repudiated their creation.³⁴ This part also discusses how, in any event, truly unknowable risks are rare. Part III concludes that the continuity of enterprise and product line theories are neither dead to growth nor the subject of overwhelming judicial

³³ See, e.g., *Brown v. Superior Court*, 751 P.2d 470, 480 (Cal. 1988) (“While some decisions apply strict liability principles to such a [failure to warn] defect by holding that it is irrelevant whether the manufacturer knew of the danger or should have known, . . . most jurisdictions hold to the contrary. That is, liability is conditioned on the actual or constructive knowledge of the risk by the manufacturer as of the time the product was sold or distributed.”); *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 557 (Cal. 1987) (“[W]e hereby adopt the requirement, as propounded by the Restatement Second of Torts and acknowledged by the lower courts of this state and the majority of jurisdictions, that knowledge or knowability is a component of strict liability for failure to warn.”). *But see Johnson v. Raybestos Manhattan, Inc.*, 740 P.2d 548, 549 (Haw. 1987) (“It is clear, therefore, that in a strict products liability action, the issue of whether the seller knew or reasonably should have known of the dangers inherent in his or her product is irrelevant to the issue of liability.”); *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1147 (Mont. 1997) (holding that “knowledge of any undiscovered or undiscoverable dangers should be imputed to the manufacturer,” although recognizing that a number of jurisdictions have held otherwise).

³⁴ See W. Page Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 MO. L. REV. 579, 586-87 (1980); John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 764 (1983) (“I now would be inclined to think that there is no longer any particular value in using the assumed-knowledge language.”).

rejection, and that despite critics' concerns, these approaches continue to promote sound public policy.

I. A REDESIGN ONGOING: CONTINUING DIVISION IN THE NEW MILLENNIUM

A. *Jurisdictions Recently Adopting One or Both of the Less Restrictive Approaches*

Contrary to the *Restatement (Third)*'s predictions, the new millennium has seen no developing consensus on approaches to successor products liability. Some jurisdictions taking a clear position on the issue for the first time in the new millennium have adopted one or both of the less restrictive approaches. For example, in 2001, four years after the *Restatement (Third)* pronounced the product line and continuity of enterprise approaches dead to growth, the Alaska Supreme Court in *Savage Arms, Inc. v. Western Auto Supply Co.* adopted and firmly supported the continuity of enterprise approach.³⁵

Savage Arms involved a lawsuit against the successor to the manufacturer of a defective rifle. Jack Taylor sued Savage Industries after Taylor's son was injured by a defective rifle originally manufactured by the company.³⁶ Taylor later amended the suit to add Western Auto Supply Company, which had bought the rifle and sold it to a retail store in Maine.³⁷ Western Auto then brought a third-party claim for indemnity against Savage Arms, Inc., a corporation that had purchased assets of Savage Industries.³⁸ After Western Auto settled with Taylor, the trial court granted summary judgment in favor of Western Auto against Savage Arms, "holding Savage Arms liable as 'the legal successor to Savage Industries, Inc.'"³⁹

Savage Arms petitioned the Alaska Supreme Court for review.⁴⁰ The court granted the petition and framed the issue as follows: whether "a corporation that purchases assets of the manufacturer of a rifle sold in Alaska [could] be held liable for

³⁵ 18 P.3d 49, 58 (Alaska 2001) ("We therefore adopt the 'continuity of enterprise' exception to the general rule of nonliability for corporate successors.").

³⁶ *Id.* at 51.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 52.

⁴⁰ *Id.*

personal injury caused in Alaska by a defect in the rifle?”⁴¹ In addressing this issue, the Alaska Supreme Court formally adopted the continuity of enterprise approach to successor liability.⁴²

The court referred extensively to *Redesigning Successor Liability* in adopting the approach, citing it seven times in a nine page opinion.⁴³ Referencing the article, the court reasoned that the continuity of enterprise approach encourages “existing corporations to produce safer products.”⁴⁴ The court also adopted the article’s reasoning that the approach “will give manufacturing corporations additional incentives to market non-defective products, in order to maximize the corporations’ market value in event of sale.”⁴⁵

Again citing to *Redesigning Successor Liability*, the court debunked the potential counterargument that the continuity of enterprise approach would “discourage large-scale transfers so long as anticipated successor liabilities do not exceed the value of the corporation’s accumulated goodwill.”⁴⁶ Instead, the court concluded that the purchasing corporation will merely take the potential liability into account in determining purchase price and insurance coverage.⁴⁷ The court also rejected the *Restatement (Third)*’s assumption that the continuity of enterprise approach results in a windfall for claimants, noting that recovery for legitimate injuries is not a windfall.⁴⁸ Finally, the court discounted the argument that successor liability conflicts with maximizing bankruptcy estates, reasoning that bankruptcy creditors do not deserve priority over injured tort claimants.⁴⁹ Although the court ultimately reversed the summary judgment order and remanded the case to the trial court, it did so to allow the trial court to consider “the ‘mere continuation’ and ‘continuity of enterprise’ exceptions in the context of this case.”⁵⁰

⁴¹ *Savage Arms*, 18 P.3d at 52.

⁴² *Id.* at 55.

⁴³ *Id.* at 55 n.26, 57 nn.40 & 42, 58 nn.49 & 53-55.

⁴⁴ *Id.* at 58.

⁴⁵ *Id.*

⁴⁶ *Id.* at 56-57.

⁴⁷ *Savage Arms*, 18 P.3d at 57-58.

⁴⁸ *Id.*

⁴⁹ *Id.* at 57.

⁵⁰ *Id.* at 58 (an additional reason for the court’s reversal was the existence of unresolved factual issues).

The Alaska Supreme Court addressed the product line approach in the same opinion.⁵¹ Although the court declined to reach the issue of whether it would adopt the product line approach due to the particular facts of the case before it, the court left that door open: “Our decision today does not preclude further consideration of this [product line] exception in an appropriate case.”⁵²

The continuity of enterprise approach appears likely to remain the law for some time in Alaska. In 2002, Alaska Attorney General Bruce Botelho wrote an opinion letter to Alaska Governor Tony Knowles regarding a legislative bill designed “to reject the continuity of enterprise exception to the doctrine of successor liability adopted in [*Savage Arms*].”⁵³ Attorney General Botelho recommended that the bill be vetoed.⁵⁴ The Attorney General’s opinion cited, among other things, the legitimacy of the *Savage Arms* opinion, and the interest in maintaining a remedy for injured plaintiffs:

From a policy perspective, we think that the balance established by the *Savage Arms* court is more appropriate than that established by the Products Liability Restatement as codified in the bill. We think that the modest expansion of the scope of successor liability announced by the *Savage Arms* court was a legitimate decision by the court and do not think it should be disturbed. This decision will help to ensure that injured plaintiffs have a viable remedy when companies that sold defective products sell their assets and liquidate.⁵⁵

Ultimately, the bill attacking *Savage Arms* did not pass, and the continuity of enterprise approach remains good law in Alaska.⁵⁶

In 2001, the same year Alaska adopted the continuity of enterprise approach, Mississippi adopted the product line approach to successor liability.⁵⁷ In *Huff v. Shopsmith, Inc.*, Huff filed suit against Shopsmith, among others, for injuries she suffered due to an allegedly defective “Mark V” power

⁵¹ *Id.* at 55.

⁵² *Id.* at 55 n.25.

⁵³ Letter from Bruce M. Botelho, Alaska Attorney Gen., to Tony Knowles, Governor of Alaska (June 11, 2002), available at <http://www.law.state.ak.us/pdf/opinions/883020095.pdf>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ The bill appears to have died in the House Judiciary Committee. See H.B. 13, 23d Leg., 1st Sess (Alaska 2003).

⁵⁷ *Huff v. Shopsmith, Inc.*, 786 So. 2d 383, 388 (Miss. 2001) (“[W]e view the product line theory as a viable basis for recovery.”).

tool.⁵⁸ Huff alleged that Shopsmith was liable as the successor corporation of the tool's manufacturer.⁵⁹ After summary judgment was entered in favor of Shopsmith,⁶⁰ Huff urged the Mississippi Supreme Court on appeal to adopt the product line approach.⁶¹ Ultimately, the court viewed the product line theory as a viable basis for recovery.⁶² As to Huff's claim, however, the court recognized that the facts of the particular case did not meet the product line approach's requirements.⁶³

Two years later, in *Paradise Corp. v. Amerihost Dev., Inc.*, the Mississippi Supreme Court noted that the product line approach is premised on: (1) the successor corporation's superior position to assume the obligation of risk-spreading, and (2) "the idea of estoppel and principles of fairness that a corporation that benefits from the goodwill of a predecessor's product should also bear the burden of liabilities attached to the product as well."⁶⁴ In that same 2003 opinion, the court adopted the continuity of enterprise approach, not in the context of products liability, but rather with respect to "debts owed by the predecessor when the successor takes on the identity of the predecessor company in every way except taking responsibility for the predecessor's debts."⁶⁵ The court did not dispute, however, the Fifth Circuit's application of the continuity of enterprise approach in *Mozingo v. Correct Mfg. Corp.*, a products liability case involving Mississippi law.⁶⁶ Indeed, *Paradise Corp.* cites to the *Mozingo* opinion for law on corporate successor liability, including the continuity of enterprise approach.⁶⁷

Although no Connecticut appellate courts have yet ruled on the issue, a Connecticut Superior Court in 1999 adopted the product line approach in the context of a successor products liability claim arising from injuries sustained from a fall from

⁵⁸ *Id.* at 385.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 387.

⁶² *Id.* at 388.

⁶³ *Huff*, 786 So. 2d at 388.

⁶⁴ 848 So. 2d 177, 180 (Miss. 2003) (citing *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 175 (5th Cir. 1985)).

⁶⁵ *Id.* at 180-81.

⁶⁶ *See* 752 F.2d 168, 174-76 (5th Cir. 1985) (recognizing a lack of clear authority from Mississippi on corporate successor liability, but holding that the district court did not err by instructing the jury on continuity of enterprise).

⁶⁷ *See Paradise Corp.*, 848 So. 2d at 179-80 (citing *Mozingo*, 752 F.2d at 174-75)).

an allegedly defective ladder.⁶⁸ In *Pastorick v. Lyn-Lad Truck Racks, Inc.*, the court, in the context of an appeal from the granting of a motion for summary judgment, addressed whether a successor corporation could be held liable when it neither manufactured nor sold an allegedly defective ladder.⁶⁹

In finding that the successor corporation could be held liable despite having neither manufactured nor sold the ladder,⁷⁰ the court adopted the product line approach but remanded in order to determine whether the requirements of this approach had been satisfied.⁷¹ The court reasoned that, as a policy matter, successor liability “is a continuation of the basic principle that between an injured consumer and a business entity the latter is best able to absorb and to pass off to, the body of customers, the general public, through pricing, the cost of personal injury sustained by ordinary citizens.”⁷² Otherwise, “the injured party has no defense to the risk of non-compensation from a voluntarily defunct seller.”⁷³

The *Savage Arms*, *Huff*, and *Pastorick* opinions demonstrate that in the new millennium the product line and continuity of enterprise approaches are neither dead to growth nor the subject of overwhelming judicial rejection. On the

⁶⁸ *Pastorick v. Lyn-Lad Truck Racks, Inc.*, No. CV 960562426S, 1999 WL 608674, at *2 (Conn. Super. Ct. Aug. 3, 1999) (unpublished). Three Connecticut lower courts had already adopted the same approach. See *Sullivan v. A.W. Flint Co.*, No. CV 920339263, 1996 WL 469716, at *7-8 (Conn. Super. Ct. Aug 5, 1996); *Kennedy v. Oshkosh Truck Corp.*, No. CV92 0510394S, 1995 WL 27400, at *2, *4 (Conn. Super. Ct. Jan. 18, 1995); *Copperthite v. Pytlik*, No. 59053, 1992 WL 209660, at *4 (Conn. Super. Ct. Aug. 25, 1992). At least one other Connecticut Superior Court has recognized the product line approach without explicitly adopting it. See *Sizer v. Goss Int'l*, No. CV030825035, 2005 WL 1023244 at *1 (Conn. Super. Ct. Mar. 31, 2005) (“Connecticut courts have recognized, however, an exception to the general rule referred to as the ‘product line continuation’ exception to successor liability.”).

⁶⁹ *Pastorick*, 1999 WL 608674 at *1.

⁷⁰ *Id.* (“The defendant moves for summary judgment. Its position is that it did not sell the product nor did it manufacturer the product. There appears to be no controversy as to manufacture and sale, as the complaint clearly reveals that the manufacturer and original seller was A.W. Flint Company.”).

⁷¹ *Id.* at *1-2 (“Although no Connecticut appeals court has specifically dealt with the ‘product line continuation’ avenue of liability, this court is of the opinion that there is a sound legal basis for the application of the product line continuation theory of liability in this State. . . . It is not clear as to whether the defendant continued to produce the same product line as did the Flint Company.”).

⁷² *Id.* at *2.

⁷³ *Id.* at *3.

contrary, courts continue to adopt⁷⁴ and apply⁷⁵ the less restrictive approaches to successor liability cases.

Other courts also may be headed that direction, but have not yet committed. For example, an Indiana appellate court addressed the pros and cons of the product line approach in *Guerrero v. Allison Engine Co.*⁷⁶ The court went so far as to state that “[t]he product line exception *may* be an appropriate means by which to balance the seemingly juxtaposed concepts of strict liability under the Indiana Product Liability Act, and freedom of contract—long supported by common law, as well as both state and federal constitutions.”⁷⁷ However, the court stopped short of adopting the product line approach because the specific factual circumstances before the court did not justify imposition of successor liability.⁷⁸ Tellingly, at least one Indiana court has since cited *Guerrero* for the proposition that “Indiana recognizes the product line successor theory of liability in products liability cases under certain circumstances.”⁷⁹ Professor George Kuney recently predicted that “[b]ased on the *Guerrero* court’s favorable treatment of the product line exception, the Indiana Court of Appeals probably will adopt the product line exception when it is presented with the appropriate factual record.”⁸⁰

South Dakota is another example of a jurisdiction that may at some point move toward the less restrictive approaches. In a non-products liability case, in which the court analyzed only one of the traditional approaches to successor liability, the South Dakota Supreme Court acknowledged that successor liability in products liability cases had expanded, and noted the reasons why this expansion had occurred:

⁷⁴ See *Huff v. Shoppsmith, Inc.*, 786 So. 2d 383, 388 (Miss. 2001); *Savage Arms, Inc. v. Western Auto Supply*, 18 P.3d 49, 58 (Alaska 2000); *Pastorick*, 1999 WL 608674, at *2.

⁷⁵ The last six years have seen various courts that had previously adopted the “continuity of enterprise” or “product line” approach continue to acknowledge or apply one or both of these less restrictive approaches. See, e.g., *Dillman v. Indiana Rolls, Inc.*, 67 Pa. D. & C.4th 294, 301 (Pa. Com. Pl. 2004) (“The foregoing facts, as well as the entire record developed in this case, clearly bring Park squarely within the product line exception.”).

⁷⁶ 725 N.E.2d 479, 483-87 (Ind. App. 2000).

⁷⁷ *Id.* at 487.

⁷⁸ *Id.*

⁷⁹ *P.R. Mallory & Co., v. American States Ins. Co.*, No. 54C01-0005-CP-00156, 2004 WL 1737489, at *6 (Ind. Cir. Ct. Jul. 29, 2004).

⁸⁰ George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. REV. (forthcoming 2007) (manuscript at 97), available at <http://www.corpgovcenter.org/Research2006/SuccessKun2006.pdf>.

All these exceptions . . . have, however, undergone some expansion under the law of products liability. Strict liability in tort for defective products applies regardless of negligence or privity. Liability for defective products rests on the need to compensate eligible plaintiffs; thus, the burden of economic loss is shifted not just to the manufacturer of the defective product, but also at times to the successor manufacturer who by purchasing assets from the predecessor is able to continue making the same or similar products.⁸¹

Georgia may also be a candidate for formally adopting one of the less restrictive approaches. Professor Kuney recently described a 1998 Georgia case not included in *Redesigning Successor Liability's* jurisdiction count as evidence that Georgia has “implicitly accepted the product line exception.”⁸² Finally, in 2001, a federal district court hinted

⁸¹ Parker v. Western Dakota Insurors, Inc., 605 N.W.2d 181, 185 (S.D. 2000). The Parker case was one involving a contract dispute, so the court did not have the opportunity to rule on the viability of the less restrictive approaches in a products liability context. *See id.* (“Yet, these strict liability concepts created for the protection of injured persons do not have the same expansive application in a purely contractual dispute. In this case, we deal only with the interpretation of contracts to decide whether by purchasing assets Western Dakota became responsible for First American’s liability to its employee.”).

⁸² Kuney, *supra* note 80 (manuscript at 90). Professor Kuney’s article provides a laudably thorough state-by-state analysis of general (i.e., not segregating products liability cases in his analysis) successor liability rulings. Although his interpretations of state’s positions are in most instances supportive of the count developed in this article and in *Redesigning Successor Liability*, with a few cases the interpretations differ. For example, Professor Kuney follows the *Restatement (Third)* in counting Massachusetts and Ohio as jurisdictions following the traditional approach, whereas this article counts them as jurisdictions that have not firmly committed to any particular approach. These jurisdictions’ approaches are discussed in *Redesigning Successor Liability* as follows:

Regarding Massachusetts, the *Restatement (Third)* cites *Guzman v. MRM/Elgin*, 567 N.E.2d 929 (Mass. 1991), as adopting the traditional approach. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIABILITY § 12 cmt. c, Reporters’ Notes (1997), Reporters’ Notes. However, *Guzman* only rejected the product line approach, 567 N.E.2d at 929-30, and did not address the continuity of enterprise approach. In *McCarthy v. Litton Industries Inc.*, 570 N.E.2d 1008, 1013 (Mass. 1991), a later case not cited by the *Restatement (Third)*, the Massachusetts Supreme Judicial Court discussed the continuity of enterprise approach, but stated that the facts before the court did not require it to adopt or reject the approach.

Regarding Ohio, the *Restatement (Third)* cites *Welco Industries Inc. v. Applied Co.*, 617 N.E.2d 1129 (Ohio 1993), as adopting the traditional approach. *See* RESTATEMENT (THIRD) § 12 cmt. c, Reporters’ Notes. However, in *Welco*, the Ohio Supreme Court actually appears receptive to use of the continuity of enterprise approach in products liability cases. *See* 617 N.E.2d at 1133 (“However valid the justifications for expanding the liability of successor corporations in products liability cases, [they] do not apply here.”). The court noted that the facts before it in *Welco* did not involve products liability, and the court rejected use of the continuity of enterprise approach in

that Nevada may follow California's lead on issues regarding successor liability (which presumably would include adoption of the product line approach, although the approach was not discussed in the opinion).⁸³ In 2005, the Nevada Supreme Court, in a non-products liability negligence case, expressly left open the question of whether it would adopt the continuity of enterprise approach in a products liability case.⁸⁴ However, the decision, *Village Builders 96, L.P. v. U.S. Laboratories*, expressed some concern about potential expansion.⁸⁵ It cited a California case that referred to a 1998 Practicing Law Institute article arguing that the trend was against expansion.⁸⁶ As demonstrated in *Redesigning Successor Liability* a year later, in 1999, in reality there has not been a trend against expansion in cases involving products liability claims.⁸⁷

This confusion about trend directions may result to some extent from analyses combining product liability cases and cases not involving products issues. Obviously the product line approach would not be nearly as compelling in successor liability cases not involving defective products, and thus combining products liability cases and other successor liability cases adds a number of situations in which one of the two major expansive approaches is not generally even considered, much less rejected. Further, products liability cases have aspects that may make the less restrictive approaches more

breach of contract cases as opposed to products liability cases. *See id.* In an earlier case, the Ohio Supreme Court rejected the product line approach in a products liability case, but appeared receptive to the continuity of enterprise approach. *Flaughner v. Cone Automatic Mach. Co.*, 507 N.E.2d 331, 336-37 (Ohio 1987) (discussing continuity of enterprise, but finding it not applicable under the facts of the case). In 1992, an Ohio court interpreted *Flaughner* as having adopted the continuity of enterprise approach. *See Davis v. Loopco Indus.*, No. 59594, 1992 WL 2590, at *3 (Ohio Ct. App. Jan. 9, 1992) ("We . . . find that the *Flaughner* court adopted the expanded test.").

Cupp, *supra* note 17, at 853 n.42.

⁸³ *Roll v. Tracor, Inc.*, 140 F. Supp. 2d 1073, 1082 (D. Nev. 2001) ("In Nevada the State Supreme Court has not had occasion to consider the issue of successor liability. It is reasonable to expect, however, that in a torts case the Nevada Supreme Court would follow the lead of the California Supreme Court on this issue, because in the area of products liability the Nevada Court has adopted nearly every holding of the California Court.").

⁸⁴ *Village Builders 96, L.P. v. U.S. Labs., Inc.*, 112 P.3d 1082, 1091 (Nev. 2005).

⁸⁵ *Id.*

⁸⁶ *Id.* (quoting *Monarch Bay II v. Prof'l Serv. Indus., Inc.*, 89 Cal. Rptr. 2d 778, 781 (1999), which cites Pollak, *Successor Liability in Asset Acquisitions in Acquiring or Selling the Privately Held Company*, PRAC. L. INST. 77, 99, 101 (1998)).

⁸⁷ *See* Cupp, *supra* note 17, at 852-58.

attractive to some jurisdictions than they are in non-products cases—for example, liability without fault is typically extended to products cases but not to most other types of cases that may involve successor liability.

In addition to new jurisdictions explicitly adopting or favorably citing one or both of the less restrictive approaches to successor liability, the last six years have seen at least one court applying a continuity of enterprise approach, but disguised under the name of the more traditional “mere continuation” theory.⁸⁸ In *Roper Elec. Co. v. Quality Castings, Inc.*, a Missouri appellate court recognized that “identity of the officers, directors, and shareholders for both corporations (although a substantial factor) is not a precursor to invocation of the ‘corporate continuation’ doctrine.”⁸⁹ However, in concluding that the successor corporation was a corporate continuation of the predecessor, the Missouri court looked to factors sounding more in “continuity of enterprise,” including, among other things, the fact that the successor “continued the exact same business using the same equipment and had the same customers as [the predecessor], but never notified them of the change, utilized the same trade name . . . took over the works in progress of [the predecessor], collected the accounts receivable, operated in the same location, and had the same phone number as [the predecessor].”⁹⁰

Tellingly, the *Roper* court held that a lack of continuity of ownership is not necessary to a finding of “mere continuation,” despite the fact that the lack of continuity of ownership is what classically differentiates the continuity of enterprise approach from the “mere continuation” theory.⁹¹ By

⁸⁸ *Roper Elec. Co. v. Quality Castings, Inc.*, 60 S.W.3d 708, 711 (Mo. Ct. App. 2001).

⁸⁹ *Id.* at 712.

⁹⁰ *Id.* at 713.

⁹¹ See, e.g., *Winsor v. Glasswerks PHX, LLC*, 63 P.3d 1040, 1046 (Ariz. Ct. App. 2003) (“The focus of the continuity of enterprise exception is to expand the traditional ‘mere continuation’ exception that is part of the general rule. The traditional ‘mere continuation’ exception applies ‘only when there is a common identity of officers, directors and stock between the selling and purchasing corporations, and only one corporation after the transfer.’”); *Pancrantz v. Monsanto Co.*, 547 N.W.2d 198, 201 (Iowa 1996) (“Under the expanded approach to the mere continuation exception, the focus is on the continuity of the seller’s *business operation* and not the continuity of its management and ownership.”); see also *Nilsson v. Cont’l Mach. Mfg. Co.*, 251 621 N.E.2d 1032, 1034 (Ill. App. Ct. 1993) (refusing to recognize the “mere continuation” approach where no continuity of ownership, including continuity of stock ownership existed). Other jurisdictions requiring continuity of shareholders for application of the “mere continuation” approach include Colorado (*CMCB Enter. v. Ferguson*, 114 P.3d 90

looking instead to factors such as the continuing business operations, the Missouri court has, in essence, adopted a continuity of enterprise theory. This may not come as a surprise, as other courts have recognized the potential among courts to take such an approach. As stated by the Third Circuit in *Philadelphia Elec. Co. v. Hercules, Inc.*, “One may retain the traditional exceptions but expand their boundaries, so that ‘merger’ or ‘continuation’ are held to include cases they once would not have included.”⁹²

Although *Roper* is not a products liability case, but rather a suit for payment of services, the court did not limit the holding to service contract cases.⁹³ The court even relied on a successor products liability case to support its holding.⁹⁴ That products liability case, *Ray v. Alad Corp.*, is the case most commonly cited as spawning one of the less restrictive approaches, the product line approach.⁹⁵

Whether Missouri will ultimately follow its pronouncements in *Roper* in a products liability context remains to be seen. For now, the authors do not count Missouri

(Colo. 2005) (“The mere continuation exception applies when there is a continuation of directors, management, and shareholder interest and, in some cases, inadequate consideration.”); Illinois (*Vernon v. Schuster*, 688 N.E.2d 1172, 1176 (Ill. 1997) (“[T]he majority of courts considering this exception emphasize a common identity of officers, directors, and stock between the selling and purchasing corporation as the key element of a ‘continuation.’”) (quoting *Tucker v. Paxton Mach. Co.*, 645 F.2d 620, 625-26 (8th Cir. 1981))); New Mexico (*Garcia v. Coe Mfg., Inc.*, 933 P.2d 243, 247 (N.M. 1997) (“Generally, a continuation of the transferor corporation occurs where there is (1) a continuity of directors, officers, and shareholders; (2) continued existence of only one corporation after sale of the assets; and (3) inadequate consideration for the sale of the assets.”)); Ohio (*McGaw v. S. Bend Lathe, Inc.*, 598 N.E.2d 18 (Ohio Ct. App. 1991) (“An asset purchase is subject to the legal consequences of a merger under the de facto merger exception if: (1) there is a continuation of the enterprise of the seller in terms of continuity of management, personnel, physical location, assets, and operations; (2) there is a continuity of shareholders, accomplished by payment for the assets with shares of stock; (3) the seller ceases operations, liquidates, and dissolves as soon as legally and practically possible; and (4) the purchasing corporation assumes the obligations of the seller necessary for the uninterrupted continuation of business operations.”)); and Utah (*Decius v. Action Collection Svc., Inc.*, 105 P.3d 956, 959 (Utah Ct. App. 2004) (noting in an employment discrimination case that “the ‘mere continuation,’ considers not whether the ‘business operations’ continued, but whether the ‘corporate entity’ continued. . . . A continuation demands ‘a common identity of stock, directors, and stockholders and the existence of only one corporation at the completion of the transfer’”)).

⁹² *Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 312 (3d Cir. 1985) (negligence and nuisance environmental cleanup lawsuit).

⁹³ See, e.g., *Roper*, 60 S.W.3d at 712.

⁹⁴ *Id.* (citing *Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977)).

⁹⁵ See *Nilsson v. Cont'l Mach. Mfg. Co.*, 621 N.E.2d 1032, 1035 (Ill. App. Ct. 1993) (recognizing that the product line approach was “first espoused by the California Supreme Court in *Ray*”).

as having adopted the continuity of enterprise approach. Time will tell, however, if Missouri continues to reject the continuity of enterprise by name, but applies it in principle through an expanded “mere continuation” test. Time will also tell if other courts follow suit.⁹⁶

As addressed below, New York recently rejected the product line approach.⁹⁷ However, a New York court also recently hinted at overlap between the traditional approach and the less restrictive continuity of enterprise approach. In the case *In re Seventh Judicial Dist. Asbestos Litigation*, a New York Supreme Court noted: “Assuming that the exception, under *Schumacher*, pertaining to merger and consolidation would encompass ‘de facto merger,’ and further that there is no one factor, including continuity of ownership, which is determinative on that issue, there is very little, if any, distinction between the exceptions of ‘continuity of enterprise’ and consolidation and merger.”⁹⁸

B. Jurisdictions Recently Rejecting One or More of the Less Restrictive Approaches

Although not all courts addressing the issue of corporate successor liability in the last six years have adopted the continuity of enterprise or products line approaches, those courts for the first time rejecting either of these approaches in favor of the traditional approach in products liability cases have been few. The most prominent of the few jurisdictions rejecting one of the less restrictive successor liability approaches for the first time in the new millennium is New York. In *Semenetz v. Sherling & Walden, Inc.*, the Court of Appeals of New York expressly declined to address the viability of the continuity of enterprise approach under the facts of the case at hand, but it rejected the product line approach.⁹⁹

⁹⁶ The United States Court of Appeals for the Tenth Circuit recently certified to the Utah Supreme Court the questions of whether the product line and/or continuity of enterprise approaches apply in Utah. *Tabor v. The Metal Ware Corp.*, Nos. 05-4155 and 05-4156, 2006 U.S. App. LEXIS 14793, at *2 (10th Cir. May 26, 2006).

⁹⁷ See *infra* notes 99-114 and accompanying text.

⁹⁸ *In re Seventh Judicial Dist. Asbestos Litig.*, 788 N.Y.S.2d 579, 583 (Sup. Ct. 2005). There are other examples of the fluidity of the different approaches. See, e.g., *Gladstone v. Stuart Cinemas, Inc.*, 878 A.2d 214, 221-22 n.4 (Vt. 2005) (in a case to collect a debt, recognizing that “[a]s they have evolved, there is little difference between the de facto merger exception and the mere continuation exception. . . . We view the name of the exception as unimportant.” (citations omitted)).

⁹⁹ 851 N.E.2d 1170 (N.Y. 2006).

Semenetz involved an Alabama corporation selling an allegedly defective and injury-causing sawmill to Semenetz Lumber Mill, Inc.¹⁰⁰ After the accident but before the plaintiff commenced a products liability action, the Alabama corporation sold most of its assets to a successor corporation with an express waiver of all liabilities.¹⁰¹ The successor corporation moved for summary judgment, asserting, among other things, that successor liability should not apply.¹⁰² When the motion eventually reached New York's high court, it declined to follow the line of lower New York cases supporting the product line approach, and it rejected the doctrine.¹⁰³

The court's rejection of the product line approach was based largely on apparent misperceptions. One is that the product line approach threatens "economic annihilation for small businesses [b]ecause [they] have limited assets."¹⁰⁴ In reaching this conclusion, the court neglected to note that, as addressed below, liability may be channeled back to the predecessor corporation through a lower purchase price discounted by the amount needed to purchase insurance against foreseeable risks, and that insurance protection appears to be readily available for successor liability lawsuits.¹⁰⁵

The court also cited the *Restatement (Third)*'s argument that "adoption of the 'product line' exception would mark 'a radical change from existing law implicating complex economic considerations best left to be addressed by the Legislature.'"¹⁰⁶ This reasoning is misguided for several reasons. First, as described in *Redesigning Successor Liability*, the *Restatement (Third)* was simply wrong in its assertion that only a small minority of jurisdictions follow one or both of the less restrictive approaches.¹⁰⁷ Rather, the number of jurisdictions adopting one or both of the less restrictive approaches is in the same ballpark as the number of jurisdictions following the

¹⁰⁰ *Id.* at 1171.

¹⁰¹ *Id.* at 1171-72.

¹⁰² *Id.* at 1172.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *Bernard v. Kee Mfg. Co.*, 409 So. 2d 1047, 1049 (Fla. 1982)).

¹⁰⁵ See *infra* notes 190-91 and accompanying text.

¹⁰⁶ *Semenetz*, 851 N.E.2d at 1175 (quoting *City of New York v. Pfizer & Co.*, 260 A.D.2d 174, 176 (N.Y. App. 1999) (citing RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 cmt. 6 & Reporters' Note)).

¹⁰⁷ See *Cupp*, *supra* note 17, at 852-58; see also *supra* notes 17-23 and accompanying text.

restrictive traditional approach.¹⁰⁸ Thus, it is not a “radical departure” to utilize the product line approach, and there appears to be no evidence that the product line approach has caused significant problems for small (or large) businesses in California, Pennsylvania, New Jersey, Washington, or any of the other often-sizable jurisdictions that utilize the approach.

Further, the leave-it-to-the-legislature argument, while wise in many other contexts, represents particularly bad public policy in this context. For more than thirty years legislatures have failed to heed calls for effective and fair statutory approaches to successor liability.¹⁰⁹ A significant factor in the failure of legislation is the “race to the bottom” motivation inherent in potential successor liability laws. As noted in *Redesigning Successor Liability*:

Unless almost all states enact effective legislation, corporate managers determined to dissolve and to eliminate tort liability for future products liability claims could simply reincorporate in another state that does not provide effective protection for long-tail claimants. They could then dissolve in the more business-friendly state, avoiding future liability. Individual states that enact legislation adequately protecting victims of defective products would risk chasing away businesses to other states. . . . The pressure to race to the bottom to favor corporations might be even greater in legislation not involving dissolution.¹¹⁰

Further, while the business community has effective lobbying ability, “[t]he lobby for long-tail . . . claimants is exceedingly weak.”¹¹¹ The problem of an absence of successor liability, if thought about at all, would likely appear technical and complex to the average consumer, and thus potential defective product victims are politically unlikely to clamor for fair laws.¹¹² Finally, it is important to note that the traditional approach to successor liability is a common law creation of the courts, not the legislatures.¹¹³ Courts are less likely to intrude upon legislative authority when reversing harmful public policy consequences caused by their own common law creations.

Thus, New York’s rationale for its rejection of the product line approach is questionable. It is worth noting again

¹⁰⁸ See *supra* notes 17-23 and accompanying text.

¹⁰⁹ See Cupp, *supra* note 17, at 879-81.

¹¹⁰ *Id.* at 881-82 (citations omitted).

¹¹¹ Green, *supra* note 11, at 59.

¹¹² See Cupp, *supra* note 17, at 883.

¹¹³ See *id.* at 877-78.

that the Court of Appeals declined to decide whether the continuity of enterprise approach will be adopted in New York, because the plaintiff did not rely upon continuity of enterprise in her appeal.¹¹⁴ However, based on its reasoning in rejecting the product line approach, the future of continuity of enterprise in New York is questionable as well.

In addition to New York, the Kentucky Supreme Court refused to adopt the product line approach in 2002, but it did not consider the continuity of enterprise approach.¹¹⁵ The next year, the New Hampshire Supreme Court indicated that it would not recognize the continuity of enterprise approach.¹¹⁶ Since 1999, only these courts have in published state appellate or federal decisions considered and for the first time clearly rejected either the product line or continuity of enterprise approach in favor of the traditional approach to successor liability in products liability cases.¹¹⁷ Of these states, Kentucky was already considered by many—including the *Restatement (Third)*¹¹⁸—to have rejected the less restrictive approaches based on a 1987 Sixth Circuit opinion applying Kentucky law.¹¹⁹

The number of states that have for the first time clearly adopted the product line or continuity of enterprise approach in the new millennium is about the same as the number that have adopted the traditional approach for the first time. Although Professor Richard Epstein opposes the trend, he agrees that

¹¹⁴ *Semenetz v. Sherling & Walden, Inc.*, 851 N.E.2d 1170, 1173 n.2 (N.Y. 2006).

¹¹⁵ *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 52 (Ky. 2002).

¹¹⁶ *Bielagus v. EMRE of New Hampshire Corp.*, 826 A.2d 559, 568-69 (N.H. 2003). The *Bielagus* case regarded debts owed on a promissory note, but the court noted that the continuity of enterprise approach would not apply in tort (including products liability) or contract cases. *See id.*

¹¹⁷ In 2003, an Arizona appellate court declined to apply the continuity of enterprise and product line approaches, but rather deferred to the state legislature to determine whether the less restrictive approaches would become part of the fabric of Arizona law. *See Winsor v. Glasswerks PHX, L.L.C.*, 63 P.3d 1040, 1046-48 (Ariz. Ct. App. 2003). In 2005, the South Carolina Supreme Court applied the traditional factors in determining successor liability, but did not consider (and therefore did not reject) the less restrictive approaches. *See Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213, 215 (S.C. 2005); *id.* at 216-17 (Burnett, J., dissenting). Interestingly, South Carolina passed a statute in 2006 limiting successor liability in asbestos litigation to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. S.C. CODE ANN. § 15-81-140 (Cum. Supp. 2006).

¹¹⁸ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 cmt. c. (1997).

¹¹⁹ *See Conn v. Fales Div. of Mathewson Corp.*, 835 F.2d 145 (6th Cir. 1987) (applying Kentucky law).

jurisdictions continue to adopt the less restrictive approaches.¹²⁰

An updated count of jurisdictions applying the different approaches confirms that the judicial landscape remains varied. As of mid-2006, nineteen states have clearly adopted the traditional approach to determining successor products liability.¹²¹ Twelve states have unequivocally adopted either the continuity of enterprise and/or the product line approach.¹²² Five of these states follow the continuity of enterprise approach.¹²³ Six states follow the product line approach.¹²⁴ One

¹²⁰ Epstein, *supra* note 30, at 1168-69 (referring to “the [growing] minority of cases that take one of two less restrictive positions on successor liability”); *see also Proof of Facts* § 2, 46 AM. JUR. PROOF OF FACTS 2D (2004) (“[I]t appears that the number of jurisdictions adopting an expanded version of the “mere continuation” approach is increasing.”).

¹²¹ The count includes states that adopted the traditional approach through either state supreme court decisions, lower court decisions, or federal court decisions attempting to apply state law. The count includes New Hampshire, even though the pertinent case was not a products liability case, based on the court’s indicating it was rejecting the continuity of enterprise approach even in products liability cases. That being said, the nineteen states include Arkansas (*Swayze v. A.O. Smith Corp.*, 694 F. Supp. 619, 622-24 (E.D. Ark. 1988) (applying Arkansas law)); Colorado (*Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141, 1142-43, 1146-47 (Colo. Ct. App. 1992)); Florida (*Bernard v. Kee Mfg. Co.*, 409 So. 2d 1047, 1049, 1051 (Fla. 1982)); Illinois (*Nilsson v. Cont’l Mach. Mfg. Co.*, 621 N.E.2d 1032, 1034-35 (Ill. App. Ct. 1993)); Iowa (*Pancratz v. Monsanto Co.*, 547 N.W.2d 198, 199-202 (Iowa 1996)); Kentucky (*Conn.*, 835 F.2d at 146; *Pearson ex rel. Trent v. Nat’l Feeding Sys., Inc.*, 90 S.W.3d 46, 52 (Ky. 2002)); Maryland (*Nissen Corp. v. Miller*, 594 A.2d 564, 573 (Md. 1991)); Minnesota (*Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 98-100 (Minn. 1989)); Missouri (*Chem. Design, Inc. v. Am. Standard, Inc.*, 847 S.W.2d 488, 491-93 (Mo. Ct. App. 1993)); Nebraska (*Jones v. Johnson Mach. & Press Co.*, 320 N.W.2d 481, 483-84 (Neb. 1982)); New Hampshire (*Bielagus*, 826 A.2d at 568-69 (rejecting continuity of enterprise), *Simoneau v. S. Bend Lathe, Inc.*, 543 A.2d 407, 407 (N.H. 1988) (rejecting product line approach)); North Carolina (*Budd Tire Corp. v. Pierce Tire Co.*, 370 S.E.2d 267, 269-70 (N.C. Ct. App. 1988)); North Dakota (*Downtowner Inc. v. Acrometal Prods.*, 347 N.W.2d 118, 121, 124-25 (N.D. 1984)); Oklahoma (*Pulis v. U.S. Elec. Tool Co.*, 561 P.2d 68, 69-71 (Okla. 1977)); Texas (*Mudgett v. Paxson Mach. Co.*, 709 S.W.2d 755, 758-59 (Tex. Ct. App. 1986)); Vermont (*Ostrowski v. Hydra-Tool Corp.*, 479 A.2d 126, 127 (Vt. 1984)); Virginia (*Harris v. T.I., Inc.*, 413 S.E.2d 605, 609-10 (Va. 1992)); West Virginia (*Davis v. Celotex Corp.*, 420 S.E.2d 557, 562-63 (W. Va. 1992)); and Wisconsin (*Fish v. Amsted Indus.*, 376 N.W.2d 820, 823, 825 (Wis. 1985)).

¹²² Again, the count includes states that adopted the less restrictive approaches through either state supreme court decisions, lower court decisions, or federal court decisions attempting to apply state law. For a listing of the states, see *infra* notes 123-25 and accompanying text.

¹²³ States following the continuity of enterprise approach include Alabama (*Asher v. KCS Int’l, Inc.*, 659 So. 2d 598, 600 (Ala. 1995)); Alaska (*Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 58 (Alaska 2001)); Michigan (*Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 881-82 (Mich. 1976)); Ohio (*Flaughner v. Cone Automatic Mach. Co.*, 507 N.E.2d 331, 334 (Ohio 1987)); and South Carolina (*Holloway v. John E. Smith’s Sons Co.*, 432 F. Supp. 454, 455 (D.S.C. 1977) (applying South Carolina law)).

¹²⁴ States following the product line approach include California (*Ray v. Alad Corp.*, 560 P.2d 3, 11 (Cal. 1977)); New Jersey (*Ramirez v. Amsted Indus., Inc.* 431 A.2d

state now follows both the continuity of enterprise and product line approaches.¹²⁵

II. ANALYZING THE EFFECTIVENESS OF SUCCESSOR LIABILITY IN CHANNELING RESPONSIBILITY BACK TO THE MANUFACTURER

A. *Channeling Responsibility: The Less Restrictive Approaches*

The continuing use of the less restrictive approaches serves the interests of corrective justice and public policy. *Redesigning Successor Liability* posited that the continuity of enterprise and product line approaches more effectively channel responsibility for products liability back to the predecessor corporation than does the traditional approach.¹²⁶ The article asserted that the less restrictive approaches do so by forcing successor corporations to consider the projected cost of the predecessor's products liability at the time the successor purchases the predecessor.¹²⁷ If a successor corporation has reason to believe it may sustain products liability costs related to the predecessor's product, it will offer less money in the transaction and may use the savings to purchase appropriate

811, 817 (N.J. 1981)); New Mexico (*Garcia v. Coe Mfg. Co.*, 933 P.2d 243, 248-50 (N.M. 1997)); Pennsylvania (*Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106, 110 (Pa. Super. Ct. 1981)); and Washington (*Martin v. Abbott Labs.*, 689 P.2d 368, 388 (Wash. 1984)). Four separate Connecticut lower courts have applied the product line exception. See *Pastorick v. Lyn-Lad Truck Racks, Inc.*, No. CV 960562426S, 1999 WL 608674, at *2 (Conn. Super. Ct. Aug. 3, 1999); *Sullivan v. A.W. Flint Co.*, No. CV 920339263, 1996 WL 469716, at *7, *8 (Conn. Super. Ct. Aug. 5, 1996); *Kennedy v. Oshkosh Truck Corp.*, No. CV 920510394S, 1995 WL 27400, at *2, *4 (Conn. Super. Ct. Jan. 18, 1995); *Copperthite v. Pytlik*, No. 59053, 1992 WL 209660, at *4 (Conn. Super. Ct. Aug. 25, 1992).

¹²⁵ This state is Mississippi (*Huff v. Shopsmith, Inc.*, 786 So. 2d 383, 388 (Miss. 2001) (product line); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174-76 (5th Cir. 1985) (continuity of enterprise)). New York's current status regarding continuity of enterprise is unclear. As addressed above, it has clearly rejected the product line approach. See *supra* notes 99-114 and accompanying text. Its lower courts have made mixed and inconsistent rulings on continuity of enterprise, and thus the status of the doctrine is unclear. For examples of lower New York courts holding the successor liable if it is selling the same product line sold by the predecessor or if it falls within the continuity of enterprise approach, see *McCaffrey v. Weaver Jack Corp.*, No. CV 89-3910, 1992 WL 266923, at *2 (E.D.N.Y. Sept. 29, 1992); *Salvati v. Blaw-Knox Food & Chem. Equip., Inc.*, 497 N.Y.S.2d 242, 247 (Sup. Ct. 1985) (adopting continuity of enterprise). However, as addressed above, *Semenetz* casts doubt on the future of continuity of enterprise in New York even though it expressly declined to address the issue under the facts before it. See *supra* notes 99-114 and accompanying text.

¹²⁶ See Cupp, *supra* note 17, at 861, 863, 867, 895-96.

¹²⁷ *Id.* at 861-63.

insurance against potential successor liability. Thus, the responsible predecessor will ultimately, and appropriately, bear most of the cost.

The article further advocated that the less restrictive approaches are fairer and more efficient than the traditional approach because “[p]roduct consumers may be less able than successor corporations to plan for the possibility of loss following a predecessor’s dissolution and may have less ability to protect themselves from such loss.”¹²⁸ The potential successor, on the other hand, “is [often] in as good or better a position as the predecessor manufacturer to determine whether products made by the predecessor are defective and will lead to liability if the successor chooses to purchase the predecessor’s assets.”¹²⁹ Although *Redesigning Successor Liability* recognized that allowing more successor liability through application of the less restrictive approaches does place an additional burden on successor corporations to pay for defective products that they did not make or sell, “[t]he burden of successor liability is mitigated by the existence of readily available and relatively inexpensive insurance.”¹³⁰

B. *The Counterarguments*

In *Imperfect Liability Regimes*,¹³¹ Professor Richard Epstein argued that the possibility that liability concerns might scrub transactions is “overlooked in Professor Cupp’s channeling argument.”¹³² In the 2002 article, Epstein asserted that adopting the less restrictive approaches may lead corporations, for financial reasons and to avoid risk, to liquidate or sell off assets piecemeal rather than sell to successors when the value of potential legal claims against a corporation exceeds its market value.¹³³ This, Epstein argued, may result in a “relentless strategy of fragmentation [that will] destroy the going concern value of the business.”¹³⁴ It may also, in Professor Epstein’s estimation, make it difficult for a future plaintiff to locate the appropriate defendants, and tort

¹²⁸ *Id.* at 867.

¹²⁹ *Id.* at 867-68.

¹³⁰ *Id.* at 870.

¹³¹ Epstein, *supra* note 30.

¹³² *Id.* at 1170.

¹³³ *Id.*

¹³⁴ *Id.* at 1170.

claimants may often find it impossible to recover anything.¹³⁵ On the other hand, removing successor liability, while also limiting a tort claimant's ability to recover, "at least preserves the going concern value of the business."¹³⁶

Dismissing an argument that insurance could dissuade liquidation or at least protect claimants in the event of liquidation, Epstein cited to administration and foreseeability issues.¹³⁷ Epstein argued that in many cases buyers will not be able "to estimate this long tail of the initial exposure,"¹³⁸ and that, in any event, it is not possible to adequately insure when "neither buyers nor sellers of such businesses had any awareness of the implicit products liability risk."¹³⁹ He cites asbestos, DES, and lead paint as illustrations of situations where the risk was originally unknowable.¹⁴⁰ On the flip side, companies would be engaging in "expensive transactions to respond to a nonexistent risk."¹⁴¹

Professor Reilly echoed Professor Epstein's concerns about unknowable risks in her 2003 article entitled *Making Sense of Successor Liability*.¹⁴² Professor Reilly argued that "Cupp's model of the transferee as the least cost insurer of creditors' loss misses an important limitation on the transferee's capacity to channel or internalize creditors' risk of loss to the debtor."¹⁴³ She asserted that *Redesigning Successor Liability's* channeling-back argument for imposing the less restrictive approaches to successor liability "does not consider the hard case where neither the transferor nor transferee could have known either the magnitude or the probability of loss from future claims against the transferor."¹⁴⁴ On the insurance point, Professor Reilly argues that unknowable risks are "by

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Epstein, *supra* note 30, at 1171-73.

¹³⁸ *Id.* at 1172-73.

¹³⁹ *Id.* at 1173.

¹⁴⁰ *Id.* at 1172-73 ("The one point that is clear about each and every one of these transactions [lead pigment, asbestos, DES] is that neither buyers nor sellers of such businesses had any awareness of the implicit products liability risk at the time these early corporate transactions took place.").

¹⁴¹ *Id.* at 1172.

¹⁴² Reilly, *supra* note 31, at 783-84.

¹⁴³ *Id.* at 790.

¹⁴⁴ *Id.*

definition” not insurable, and there is therefore no incentive to internalize loss.¹⁴⁵

C. *A Response: Killing Again the Ghost of Imputed Liability for Unforeseeable Risks*

Professor Epstein’s and Professor Reilly’s critiques of the less restrictive approaches fail to consider how courts address products liability claims involving truly unforeseeable risks. Their concern that the less restrictive approaches to successor liability will in many cases unfairly saddle corporations with liability that was unforeseeable at the time assets were transferred seems to rely at least in part on a misguided assumption—that courts generally are willing to impute knowledge of risks where those risks were not reasonably knowable at the time of manufacture or sale. To the contrary, courts typically refuse to assign liability based on imputed knowledge in products liability cases.¹⁴⁶ Rather, most courts will only allow liability where the seller (i.e., the predecessor corporation) knew or should have known of the

¹⁴⁵ *Id.* Reilly also argues a fraud-based theory that “judicial rhetoric that elevates continuity as a fraud-free justification for successor liability is the risk of unpredictable, and potentially huge, transferee liability.” *Id.* at 791. Although “huge” transferee liability may in fact occur, the size of the verdict in and of itself does not make the invocation of the less restrictive approaches unfair, particularly when one considers that the transferee corporation will be able to withstand a large verdict better than an individual products liability plaintiff can withstand a tragic injury with no recourse. As for the argument that the liability will be unpredictable, there is no indication that history demonstrates any more unpredictability in these cases than in those where fraud-based or other traditional approaches have been applied.

¹⁴⁶ See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. m (1997) (“Recognizing the convergence of the theories of negligence and strict liability in design cases, the commentators have argued that, for strict liability to be of any consequence in such cases, knowledge of risks that were unknowable at the time of marketing should be imputed to manufacturers. This, however, the courts have consistently failed to do.” (quoting 4 FINAL REPORT OF THE LEGAL STUDY, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY 109-10 (1977))); *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 557 (Cal. 1991) (“[W]e hereby adopt the requirement, as propounded by the *Restatement Second of Torts* and acknowledged by the lower courts of this state and the majority of jurisdictions, that knowledge or knowability is a component of strict liability for failure to warn.”); *Brown v. Superior Court*, 751 P.2d 470, 480 (Cal. 1988) (“[L]iability is conditioned on the actual or constructive knowledge of the risk by the manufacturer as of the time the product was sold or distributed.”); *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) (“[W]e have refused in the past to impose a duty upon manufacturers to warn of unknowable dangers.”); *Feldman v. Lederle Labs.*, 479 A.2d 374, 386 (N.J. 1984) (“Similarly, as to warnings, generally conduct should be measured by knowledge at the time the manufacturer distributed the product. Did the defendant know, or should he have known, of the danger, given the scientific, technological, and other information available when the product was distributed; or, in other words, did he have actual or constructive knowledge of the danger?”).

product's risks when the product was sold.¹⁴⁷ This is true whether the claims are based on design defect or failure to warn—in manufacturing flaw cases, knowledge of risks is of limited relevance under strict liability, and in any event the scope of liability for manufacturing defects tends to be significantly narrower than that of design and warning claims since manufacturing defect claims typically involve only a sole defective product rather than an entire product line.¹⁴⁸ As recently noted by Professor David Owen, “The ghost of the Wade-Keeton test [an often-used title for the practice of imposing liability for unknowable risks] continues to haunt judicial halls, but its time has come and gone.”¹⁴⁹

The *Restatement (Third)* recognizes and strongly supports the judicial rejection of imposing responsibility for unknowable risks: “Although there is language in some cases which appears to indicate a leaning toward imputation of knowledge of unknowable risks upon the manufacturer, the overwhelming majority of courts have evaluated the product on the basis of what dangers could have been known at the time of marketing.”¹⁵⁰ The *Restatement (Third)* concludes: “Given the criticism that has been leveled against the imputation of knowledge doctrine and the relatively thin judicial support for it, it is here rejected as a doctrinal matter.”¹⁵¹

The *Restatement (Third)*'s rejection of imputing knowledge of unknowable risks reflects the views of numerous scholars. Several writers have debunked the idea that courts typically do or should apply liability where risks are unforeseeable at the time of sale.¹⁵² Even the scholars who

¹⁴⁷ See *supra* note 146.

¹⁴⁸ *Id.*

¹⁴⁹ DAVID G. OWEN, PRODUCTS LIABILITY LAW 534 (2005).

¹⁵⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. m (1997) (also recognizing that the doctrine of imputed knowledge “has not worn well with time” and has “little support” where it “significantly affects defendants’ liabilities”).

¹⁵¹ *Id.*

¹⁵² See, e.g., 1 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY 500 (3d ed. 2000) (“At least one state legislature has abolished the judicial adoption of the Wade-Keeton test, and one wonders at its staying power around the nation. Although the ghost of the Wade-Keeton test continues to haunt judicial halls, its time has come and gone.”); DAVID G. OWEN ET AL., PRODUCTS LIABILITY AND SAFETY 545 (3d ed. 1996) [hereinafter PRODUCTS LIABILITY AND SAFETY] (“As the notion of true ‘strict’ products liability has been sliding into disfavor in design and warnings cases in recent years, the Wade-Keeton test has declined as well.”); Michael D. Green, *Negligence = Economic Efficiency: Doubts* 75 TEX. L. REV. 1605, 1632 (1997) (“Keeton’s advocacy for imputed knowledge had its apogee in 1982 when the New Jersey Supreme Court accepted it in *Beshada v. Johns-Manville Products Corp.*, but it retains little vitality today.”); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in*

initially proposed the concept of imputed knowledge, Deans John Wade and Page Keeton,¹⁵³ later in their careers disavowed the oft-criticized and seldom-applied doctrine.¹⁵⁴ Dean Wade, in particular, emphasized that he did not intend the “assumed-knowledge” language to be taken completely literally: “Indeed, I now would be inclined to think that there is no longer any particular value in using the assumed-knowledge language. . . . It always had overtones of fiction, and, like all fictions, it can create difficulties if taken literally.”¹⁵⁵

The trend away from imputed knowledge appears to be well-grounded. Strict liability was not created as a means of imposing absolute liability, and imputing knowledge of unknowable risks often leads to results at or near the line of absolute liability.¹⁵⁶ This is particularly true in failure to warn cases, where warnings are generally quite inexpensive to

Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. REV. 265, 274 (1990) (“If we assume, under the fairness view, that a basic postulate of legal duty is that the conduct the law seeks to induce is capable of being performed and, as a corollary, that the law eschews imposing duties to perform impossible tasks, then imposing liability for failure to warn of unknowable risks is grossly unfair. . . . A rule that penalizes longevity and contradicts fundamental rules of risk spreading by asking the impossible of manufacturers is counterproductive and likely headed for oblivion.”); Aaron D. Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REFORM 575, 607 (1985) (concluding that most courts claiming to apply strict products liability “are not prepared to impose liability for information that the defendant could not have reasonably foreseen at the time of distribution”); Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1206 n.76 (1992) (discussing courts’ refusal to impose upon manufacturers knowledge of all dangers in product, whether they were unknowable at time of marketing or not); Charles C. Marvel, Annotation, *Strict Products Liability: Liability for Failure to Warn as Dependent on Defendant’s Knowledge of Danger*, 33 A.L.R. 4th 368 §2 (1984) (“Often citing [RESTATEMENT OF TORTS § 40A cmt. j], the courts for the most part, in jurisdictions generally espousing the doctrine of strict products liability (when a negligence theory is applied, there is no question that actual or constructive knowledge is an essential element), hold that liability based upon a failure to warn users of a product’s inherently dangerous quality or characteristic may be imposed only where the manufacturer, distributor, or seller, as the case may be, had actual or constructive knowledge of the dangerous quality or characteristic.”).

¹⁵³ See Page Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1335 (1966); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834-35 (1973).

¹⁵⁴ See Keeton, *supra* note 34, at 595 (stating that “a product’s design should normally be measured in terms of whether or not it was feasible to do a better job in the light of the technology that was available at the time” of manufacture); Wade, *supra* note 34, at 764 (stating that the value of the imputed knowledge doctrine “was in explaining the concept of strict liability when it was new by clearly contrasting it with negligence in which the defendant’s actual culpability in failing to learn of the dangerousness of the product had to be shown”).

¹⁵⁵ Wade, *supra* note 34, at 764.

¹⁵⁶ See, e.g., Victor E. Schwartz, *The Death of “Super Strict Liability”*: *Common Sense Returns to Tort Law*, 27 GONZ. L. REV. 179, 179-80 (1991).

provide.¹⁵⁷ As one commentator has recognized, “[i]t is poor public policy to demand that product manufacturers make their products safer than is technologically possible, or demand that manufacturers warn of unknowable risks. Such ‘super strict liability’ discourages manufacturers from developing and marketing new products, thereby depriving consumers of desirable goods.”¹⁵⁸ Additionally, scholars have noted the inherent inequities in a system founded on requiring performance of impossible duties.¹⁵⁹

Further, clearly unknowable risks are relatively rare.¹⁶⁰ This is in part due to the standard courts apply in holding manufacturers to the knowledge of experts in the field.¹⁶¹ In that capacity, “manufacturers must keep abreast of scientific knowledge, discoveries, and advances, and are presumed to know what is imparted thereby.”¹⁶² What the manufacturer actually knew is not the issue, but rather what the manufacturer could have discovered by fulfilling its obligations as an expert.¹⁶³ Under this standard, sellers generally are

¹⁵⁷ See Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 888 (2002).

¹⁵⁸ See Schwartz, *supra* note 156, at 180.

¹⁵⁹ See, e.g., Henderson & Twerski, *supra* note 152, at 274 (“If we assume, under the fairness view, that a basic postulate of legal duty is that the conduct the law seeks to induce is capable of being performed and, as a corollary, that the law eschews imposing duties to perform impossible tasks, then imposing liability for failure to warn of unknowable risks is grossly unfair. . . . A rule that penalizes longevity and contradicts fundamental rules of risk spreading by asking the impossible of manufacturers is counterproductive and likely headed for oblivion.”).

¹⁶⁰ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. m, Reporters’ Note (1997) (quoting 4 FINAL REPORT OF THE LEGAL STUDY, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY 109-10 (1977)); see also Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, The Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOK. L. REV. 889, 898 (2005) (recognizing that the “original tests for defect did not deal explicitly with the problem presented by liability for dangers that were unknowable at the time the product was manufactured”).

¹⁶¹ See, e.g., *Feldman v. Lederle Labs.*, 479 A.2d 374, 386 (N.J. 1984) (“Further, a manufacturer is held to the standard of an expert in the field.”).

¹⁶² 63A AM. JUR. 2D *Products Liability* § 1140 (2004); see also *Klem v. E.I. Dupont De Nemours Co.*, 19 F.3d 997, 1001-02 (5th Cir. 1994); *George v. Celotex Corp.*, 914 F.2d 26, 28 (2d Cir. 1990).

¹⁶³ See, e.g., *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 461 (5th Cir. 1985) (“*Borel* holds all manufacturers to the knowledge and skill of an expert. They are obliged to keep abreast of any scientific discoveries and are presumed to know the results of all such advances. Moreover, they each bear the duty to fully test their products to uncover all scientifically discoverable dangers before the products are sold.”); see also *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 559 (Cal. 1991) (“[T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product.”).

accountable for risks associated with their products even without applying an imputed knowledge approach.

Asbestos litigation—relied upon by Professor Epstein in his critique of the less restrictive approaches as an example of a potentially unknowable risk¹⁶⁴—in actuality provides an illustration of the rarity of clearly unknowable risks. Many experts and courts now agree that the asbestos industry was in fact aware of the risks well before they stopped marketing the product.¹⁶⁵ This fits the too-familiar practice of manufacturers asserting that they were not aware of a risk, but being found by courts to have in fact known about it, or that they should have known about it.¹⁶⁶

Professor Epstein also cites DES and lead paint as examples of cases where successor liability possibly could not be factored into a business sale price due to unknowable risks.¹⁶⁷ However, as with asbestos litigation, in these cases, plaintiffs generally have only been allowed to go forward when courts have found that the manufacturer knew or should have known of the risk.¹⁶⁸ Again, courts have generally rejected the

¹⁶⁴ See Epstein, *supra* note 30, at 1165-66.

¹⁶⁵ See *Brown & Root, Inc. v. Moore*, 92 S.W.3d 848, 856 (Tex. App. 2002) (holding that decedent's estate was entitled to exemplary damages because "evidence was raised that Brown & Root had subjective knowledge of the risks associated with asbestos but acted with conscious indifference to the rights of the workers at Lone Star Steel" during the period of 1977-1985); see also *Dartez*, 765 F.2d at 461 ("If the dangers of asbestos were known to Johns-Manville at the time of Dartez's exposure, then the same risks were scientifically discoverable by other asbestos corporations. Therefore, the testimony of the medical director of the industry's largest member is relevant to plaintiff's attempt to meet the evidentiary burden defined by *Borel*.").

¹⁶⁶ Cigarette industry executives' 1994 testimony before Congress that nicotine is not addictive provides a particularly egregious illustration. See *Nearly 50 Years of Conflict Over Role of Smoking in Health*, THE BALTIMORE SUN, July 15, 2000, at 6A.

¹⁶⁷ See Epstein, *supra* note 30, at 1165.

¹⁶⁸ See, e.g., *McMahon v. Eli Lilly & Co.*, 774 F.2d 830, 835 (7th Cir. 1985) (DES case: "Under Illinois precedent, to prevail on a failure to warn claim, a plaintiff must show 'that the manufacturer knew or should have known of the danger presented by the use or consumption of the product' and that the manufacturer did not warn of the product's 'dangerous propensities.'") (citation omitted); *Brown v. Superior Court*, 751 P.2d 470, 481 (Cal. 1988) (DES case: "Thus, we disagree with plaintiff's assertion that defendants should be held liable for failing to warn the physician who prescribed DES to plaintiff's mother of alleged defects in the drug that were neither known by defendants nor scientifically knowable at the time the drug was distributed."); *Grover v. Eli Lilly & Co.*, 591 N.E.2d 696, 700 (Ohio 1992) (DES case: "The manufacturer does not breach its duty to warn—in negligence, in strict liability for breach of warranty, or in strict liability in tort—until the company knew or should have known of a particular risk through the exercise of ordinary care."). Cf. David P. Swenson, "Market Share Recovery for Risk" as a Preemptive Remedy for Childhood Lead Poisoning, 11 LAW & INEQ. 585, 592 (1993) ("Property owners who sue paint manufacturers must prove the manufacturers knew or should have known of the danger inherent in lead paint used in

imputed knowledge approach in cases where risks were truly unknowable.¹⁶⁹ And in the DES and lead paint cases, again similar to asbestos litigation and indeed most claims of unknowable risks, imputed knowledge may not even be needed, as arguments now exist that the manufacturers in fact knew or should have known of the risks inherent in those products when sales were being made.¹⁷⁰ Asbestos, DES, and lead paint cases help to disprove the notion that cases are generally proceeding despite the unforeseeability of risks. Rather, in most instances, judgments are only permitted or upheld when courts find that the product risks involved were at least reasonably knowable.

An argument may be asserted that even if manufacturers need to have been aware of some level of product danger to be liable, perhaps they may not have been aware of the amount of money that would have to spend in litigation, settlements, and judgments associated with the product risk they knew or should have known about.¹⁷¹ However, this amounts to a criticism of tort law in general rather than a specific criticism of successor liability. Manufacturers of defective products, and indeed all tort defendants, are liable to all foreseeable plaintiffs for all foreseeable harm caused by their tortious acts or failures to act.¹⁷² Challenges in knowing just how much the damages will

residences and that by continuing to market lead paint they breached a duty to foreseeable victims.”)

¹⁶⁹ See *supra* note 146 and accompanying text.

¹⁷⁰ See, e.g., *McMahon*, 774 F.2d at 835-36 (“There was sufficient evidence from which a jury could reasonably have found that in 1955 Lilly knew or should have known that DES might cause reproductive abnormalities, such as prematurity, in the female offspring of women exposed to DES during pregnancy.”); *Grover*, 591 N.E.2d at 702, 703 (Resnick, J., dissenting) (“In light of the foregoing there can be no question that pharmaceutical companies should have known the dangers of this drug. If in the 1930s and 1940s the manufacturers of DES knew or should have known of the reproductive system defects in the animal fetus exposed to DES, how then is it not foreseeable that this might mean abnormalities in the human fetus’ reproductive system? In other words, it would appear that DES manufacturers knew or should have known that the human fetus exposed *in utero* might have a defect in the female reproductive system. Additionally, is it not then foreseeable that that female fetus would at some point seek to employ the defective reproductive system? The answer must be a resounding ‘yes.’”); *Thomas v. Mallett*, 701 N.W.2d 523, 558 (Wis. 2005) (discussing in depth the scientific documentation of the risks of lead poisoning and concluding that “[m]any of the individual defendants or their predecessors-in-interest did more than simply contribute to a risk; they knew of the harm white lead carbonate pigments caused and continued production and promotion of the pigment notwithstanding that knowledge”).

¹⁷¹ See Epstein, *supra* note 30, at 1170.

¹⁷² See generally *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

total are not a novelty reserved for successor liability claims, and criticism based on such challenges is not persuasive. If tort liability were only allowed in personal injury cases where the amount of potential damages is clearly knowable, very few personal injury cases would ever be permitted. Further, “[i]n back of the tort system is an insurance system,” and insurance actuaries routinely factor in potential liability variables when setting tort insurance rates.¹⁷³ Indeed, for the relatively brief times when liability insurance “crises” were widely heralded, arguments have been made that the problems related more to unwise pricing practices by the insurance industry than to an unpredictable tort system.¹⁷⁴

In addition to addressing unforeseeability of risks, Professor Epstein also raises the hypothetical situation where new theories of liability arise, and the seller is not able to predict that they would arise.¹⁷⁵ However, that type of situation would be quite rare—efforts at new causes of action impacting large numbers of products cases do not succeed very often in products liability’s maturing landscape (described by Professor Owen as the “graying” of products liability).¹⁷⁶ Indeed, Epstein’s primary example—the novel use of public nuisance theories for gun liability¹⁷⁷—does not appear to be catching on in the courts. With limited exception, courts are unwilling to impose liability on gun manufacturers for public nuisance.¹⁷⁸ The courts recognize that doing so would

¹⁷³ VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE & SCHWARTZ’S TORTS 2 (11th ed. 2005).

¹⁷⁴ See PRODUCTS LIABILITY AND SAFETY, *supra* note 152, at 1093-96.

¹⁷⁵ Epstein, *supra* note 30, at 1172-73.

¹⁷⁶ See *infra* note 185 and accompanying text.

¹⁷⁷ See Epstein, *supra* note 30, at 1173.

¹⁷⁸ See, e.g., Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 764 (2003) (“To date, litigation against gun manufacturers has yielded the vast majority of legal opinions addressing the legal viability of the public nuisance theory of recovery in the context of mass products liability. In most cases, courts dismiss these public nuisance claims . . .”); see also Frank J. Vandall, *A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill*, 38 AKRON L. REV. 113, 117 (2005) (“Strict liability and negligent design, as well as public nuisance and fraud claims, have been rejected. The recent victories by the gun manufacturers in both design defect and damage to cities, suggest that widespread immunity is unnecessary at this time.”). Some of the cases rejecting public nuisance claims against gun manufacturers include: *District of Columbia v. Beretta U.S.A. Corp.*, 872 A.2d 633 (D.C. 2005) (en banc) (rejecting public nuisance claims against gun manufacturers and distributors); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001) (applying New Jersey law); *Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993) (applying North Dakota law); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000) (applying Pennsylvania law) (“One way in which the role of public nuisance law

improperly “loosen the tort from the traditional moorings of duty, proximate causation, foreseeability, and remoteness.”¹⁷⁹

Further, when courts do not dismiss nuisance cases against gun manufacturers at the pleading stages, some of those cases do not even involve products liability claims. Rather, the allegations may be for “affirmative conduct on the part of manufacturers and distributors that fosters an illegal secondary gun market that interfered with the public right to safety”¹⁸⁰—claims involving risks most would agree are not unknowable, since they allege affirmative misconduct. And even courts that allow public nuisance claims based on products liability-like allegations to proceed beyond the pleading stages still require or at least recognize proof of foreseeability.¹⁸¹

The resistance to public lawsuits against gun manufacturers, however, is simply one example of a developing trend to limit products liability. Change in products liability law has been slowing down, and the spirit of radical expansion has been replaced with a more middle-of-the-road mentality.¹⁸² The recent expansion of asbestos liability raised as a possible rejoinder to this point by Professor Epstein has not been so much an expansion of legal theory by courts as an expansion of targeted defendants by plaintiffs’ lawyers, with the targeting based on stream-of-distribution liability rules that predate the cessation of asbestos sales, and the rules of joint and several

has been restricted is the refusal to apply the tort in the context of injuries caused by defective product design and distribution.”); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004).

¹⁷⁹ *Beretta U.S.A. Corp.*, 872 A.2d at 646.

¹⁸⁰ *See, e.g., Iletto v. Glock Inc.*, 349 F.3d 1191, 1211 n.26 (9th Cir. 2003) (applying California law) (“Plaintiff’s nuisance claim, however, is not about the manufacture or distribution of a defective or properly functioning product. Notably, plaintiffs do not allege a product defect but rather allege affirmative conduct [such as oversaturation of the market] on the part of manufacturers and distributors that fosters an illegal secondary gun market that interfered with the public right to safety.”).

¹⁸¹ *See, e.g., White v. Smith & Wesson*, 97 F. Supp. 2d 816, 830 (N.D. Ohio 2000) (applying Ohio law) (“Plaintiffs’ nuisance claims will likely rise or fall with their negligence claims.”); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002) (municipality stated a claim for public nuisance against gun manufacturer when “the complaint clearly alleged both intentional and negligent misconduct on appellees’ part. For example, Paragraph 119 of the complaint alleged that defendants ‘intentionally and recklessly market, distribute and sell handguns that defendants know, or reasonably should know, will be obtained by persons with criminal purposes.’”).

¹⁸² *See Epstein, supra note 30, at 1173.*

liability that are much older yet.¹⁸³ This is not at all an argument that the expansion of asbestos liability is societally beneficial or appropriate (indeed, one of this article's authors has been and remains strongly critical of the expansion),¹⁸⁴ but rather that current cases are based primarily on legal doctrines that existed when many or most of the product sales currently at issue in asbestos litigation took place.

Professor David Owen describes the slowing down of products liability evolution in *The Graying of Products Liability*:

In recent years, however, the law in this area has been evolving more toward middle ground and compromise, away from the starker approaches of its youth. The evolution of products liability law, mirrored in the new *Restatement*, thus may be viewed as a progression from the blacks and whites of early years to a modern blend of boring grays—'reasonable,' perhaps, from a variety of perspectives, but devoid of the lively clash of claims of right and wrong that marked the early years.¹⁸⁵

For better or worse, in most areas of products liability, courts and legislatures are in general quite selective in expanding substantive liability rules, further minimizing Professor Epstein's concern. Hypothetical and unlikely concerns that doctrine may some day dramatically expand (with no evidence of such doctrinal expansion on the horizon) should not derail an approach to liability that provides the most desirable results in real cases.

Analyzing whether the sky will fall if courts adopt the less restrictive approaches to successor liability does not require hypothesizing. As discussed above, one or more of the less restrictive approaches are in effect in several large states.¹⁸⁶ If the approaches were to cause the sky to fall, it should already be doing so in California and in many other parts of the nation. Significantly, little if any evidence exists of any outcry that the less restrictive successor liability rules are actually causing dissolutions or piecemeal asset sales.¹⁸⁷ To the

¹⁸³ See generally Richard L. Cupp, Jr. *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint & Several Liability*, 31 PEPP. L. REV. 203 (2003).

¹⁸⁴ *Id.*

¹⁸⁵ David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1243 (1994).

¹⁸⁶ See *supra* notes 35-125 and accompanying text.

¹⁸⁷ Cf. *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 56 (Alaska 2001) ("But we have not been referred to any evidence that adopting this modern 'continuity

contrary, some advisors have even counseled companies to seek to prevent predecessor corporation dissolutions as a way of avoiding successor liability, at least under the merger and consolidation theories of successor liability.¹⁸⁸ Thus, the situation “on the ground” seems to be another practical endorsement of the less restrictive approaches. A ready insurance market is presently covering successor liability claims, providing protection to successor corporations concerned about inheriting liability.¹⁸⁹ According to an expert in the field, businesses purchasing predecessor corporations or product lines presenting the greatest risks of products liability are, appropriately, the most likely to invest in successor products liability insurance.¹⁹⁰

III. CONCLUSION

Courts’ struggle over whether to apply the traditional approach or one of the less restrictive approaches to successor liability is ongoing. Cases in recent years have demonstrated that the less restrictive approaches are continuing to find new jurisdictional homes, and are neither dead to growth nor the subject of overwhelming judicial rejection as asserted by the *Restatement (Third)*.¹⁹¹ However, other recent decisions rejecting one or more of the less restrictive approaches show

of enterprise’ exception (or the marginally more popular ‘product line’ exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales.”); *Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213, 221-22 (S.C. 2005) (Burnett, J., dissenting) (“I reject as speculative and unfounded the argument that holding a successor liable in a product liability action will damage business interests or prompt rash decisions by corporations. Terex has not cited, nor have I found, any studies or evidence demonstrating that the view I propose would inhibit asset-based transactions, lead to increased piecemeal sales, or discourage large-scale transfers. Potential legal liability often is a factor every responsible corporation must consider; however, it is not the driving or primary force behind every decision. Successors contracting for an asset transfer in a free market, when they intend to continue the basic enterprise, will negotiate a price which reflects the fair market value of the transfer, taking heed of the risk of future claims.”).

¹⁸⁸ Robert M. Folger & Rob Witwer, *Buying, Selling, and Combining Businesses Under the Colorado Business Corporation Act*, 33 COLO. LAW. 73, 77 (Nov. 2004) (“Acquirers seeking to avoid successor liability may wish to take steps (through a covenant or other binding obligation) to prevent the immediate post-sale dissolution of the Seller.”).

¹⁸⁹ Telephone interview with Jeff Brown, Credit Union Project Manager, The Chubb Corporation, in Warren, N.J. (July 26, 2006).

¹⁹⁰ *Id.*

¹⁹¹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 cmt. b, Reporters’ Note (1997).

that none of the approaches—traditional or less restrictive—are on the verge of achieving dominance.

Although none of the approaches are currently dominant, the less restrictive approaches are better. Someone has to lose when an innocent consumer is injured by a defective product and only an innocent successor corporation is available as a defendant. The difference between the innocent consumer and the innocent successor corporation is that the successor corporation has a means by which to protect itself and channel responsibility back to the responsible predecessor corporation through a discounted purchase price if the less restrictive approaches are applied. Under the traditional approach, the consumer—the only party with no realistic options for shifting responsibility to the party that caused the harm—generally bears the entire loss alone.

Recent academic criticisms that the less restrictive approaches unfairly saddle successor businesses with unforeseeable risks ring hollow, as courts, supported by the mainstream of scholars, reject applying even strict liability when risks are truly unforeseeable (which are in any event unusual situations). Calls to abandon improvements to the court-made traditional approach to the legislatures are unconvincing in light of more than thirty years of legislative failure to enact meaningful reform. Legislatures' race-to-the-bottom incentive to leave consumers unprotected in product defect cases involving successor corporations, along with the lack of an effective consumer lobby to address issues that are decidedly unfriendly to sound-bite politics, leave no reason to expect that effective legislative reform is anywhere on the horizon. The less restrictive approaches best serve corrective justice and public policy; courts engaged in the ongoing judicial redesign of successor liability should embrace them.