Analysis&Perspective

Under the strict liability provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, asset purchasers can face liability for a predecessor's environmental contamination. In this piece, attorneys Gaines Gwathmey III, and William J. O'Brien discuss corporate successor liability under CERCLA, and suggest ways to minimize the likelihood of exposure to such liability.

Minimizing the Likelihood of Corporate Successor Liability Under CERCLA

GAINES GWATHMEY III AND WILLIAM J. O'BRIEN

A business, such as a manufacturing company, that has historically handled hazardous materials and generated hazardous wastes presents a problem for a potential purchaser: how to protect the purchaser and the acquired business from potential environmental liabilities associated with historic operations of the business.

Purchasers seeking protection from liabilities associated with the seller's previous operation of the business customarily acquire business assets rather than the stock of the operating corporation. Such purchasers rely upon the traditional principle of corporate law that an asset purchaser does not assume the liabilities of a corporate seller.

There are recognized exceptions to this limitation of liability, referred to generally as successor liability. Asset purchasers typically view these successor liability exceptions as narrow and related to fraud or intentional avoidance of creditors by the seller through manipulation of the corporate form. Consequently, in an arm's length transaction, asset purchasers typically are not concerned by the issue of successor liability.

Successor liability merits heightened concern, however, in the environmental context, where exceptions to the principle of limited liability for an asset purchaser have undergone a contested and ill-defined expansion.

A potentially far-reaching extension of successor liability has developed in certain federal circuits with respect to liability pursuant to the Comprehensive Environmental Response, Compensation and Liability Act[1] (CERCLA) for historic environmental contamination arising out of the operations of the asset seller.

Furthermore, CERCLA's broad liability scheme can result in a surprising extension of the traditional successor liability exceptions. This memorandum analyzes the elements of the traditional and novel theories of successor liability in the context of CERCLA liability for historic environmental contamination.

There is no clear set of standards that asset purchasers may apply to determine whether they will be subject to successor liability pursuant to CERCLA. Instead, each claim of successor liability is likely to turn upon a detailed consideration of the facts relating to the relevant transaction and the relationship between the purchaser and seller.

There are, however, certain factors that courts considering the question have typically considered relevant in evaluating successor liability claims. Attention to these factors by an asset purchaser is likely to reduce the likelihood of CERCLA successor liability.

We conclude this memorandum with certain practical recommendations, based on these factors, that an asset purchaser may wish to consider implementing in order to decrease the risk that it will be subject to CERCLA successor liability for the historical environmental liabilities of the seller.

CERCLA's Liability Scheme. CERCLA was enacted to facilitate the prompt cleanup of abandoned and inactive hazardous waste disposal sites by making responsible parties liable for the costs of cleaning up such sites.[2] One of the legislative purposes of CERCLA has been described as insuring that "those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created."[3]

To accomplish this goal, CERCLA imposes retroactive, strict joint and several liability for the costs of investigation and cleanup of contaminated properties

Gaines Gwathmey III is head of the environmental law group at Paul, Weiss, Rifkind, Wharton & Garrison in New York, dividing his practice between environmental litigation and advice to financial sector clients in the mergers and acquisitions area. William J. O'Brien is counsel in the firm's environmental law group, focusing on environmental aspects of corporate mergers and acquisitions, financings, and securities offerings. He can be reached at wobrien@paulweiss.com.

[1] 42 U.S.C. § 9601 *et seq.*

[2] G.C. Sisk and J.L. Anderson, "The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O'Melveny & Myers" 16 Va. Envtl. L. J. 505, 511 (Summer 1997).

[3] *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991).

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upon four categories of "persons": (1) current owners and operators of a contaminated property; (2) owners and operators of the property when the contamination occurred; (3) arrangers for the transportation, disposal or treatment of the hazardous substances causing the contamination; and (4) transporters of such hazardous substances to the contaminated property.[4]

CERCLA's definition of "persons" includes, inter alia, corporations.[5] In the context of successor liability, the term corporation "embraces the words 'successors and assigns of such company'. . . ." [6] Therefore, CERCLA liability extends to corporate successors of liable persons.

Successor Liability in Corporate Law. CERCLA does not, by its terms, abrogate the traditional protections afforded asset purchasers. It is an established principle of corporate law that a purchaser of all or substantially all of the assets of a corporation does not by operation of law assume the liabilities of the corporate seller.[7]

Courts have recognized the successor liability exception to this principle, pursuant to which the purchaser is vicariously liable for the debts and liabilities of the seller, in the following circumstances:

- The purchaser expressly or impliedly agrees to assume the debts or liabilities of the seller;
- The transaction amounts to a de facto merger or consolidation;
- The purchaser is a mere continuation of the seller; or
- The transaction is an effort to fraudulently avoid liability.[8]

These exceptions were originally developed from equitable principles by courts seeking to "prevent creditors of the original corporation from being left without a remedy while the corporation escapes into a new form." [9] These exceptions have been characterized as an effort to balance the "equitable end of preserving responsibility of a true corporate successor [and prevention of fraud] . . . against the goal of promoting the free transferability of assets in a dynamic economy through a general rule of non-liability for the bona fide purchaser." [10]

Application of Successor Liability to CERCLA. Courts have found the same equitable principles and the four successor liability exceptions applicable in the CERCLA context.[11]

Certain courts have also recognized a fifth, broader exception to the principle of limited liability for an asset purchaser in the CERCLA context. This is known as the "continuity of enterprise" or "substantial continuation" exception. Other courts have rejected this exception. The exception remains controversial.

The following discussion addresses the application in the CERCLA context of the traditional successor liability exceptions and the substantial continuation exception.

Agreement to Assume Liabilities. An exception to the normal liability treatment of asset purchasers has been recognized where an asset purchaser expressly or impliedly agrees to assume the liabilities of the corporate seller.

Express or implied assumption of environmental liabilities, including CERCLA liabilities, may be found in indemnity provisions, covenants or assumption of liability clauses in a contract to purchase assets. In determining whether environmental liabilities have been expressly or impliedly assumed, courts use general principles of contractual interpretation.[12]

If a contract provides that a purchaser expressly assumes all of the seller's liabilities relating to the acquired business, and the agreement is found to be clear and unambiguous, the purchaser typically will be found to have assumed all unknown CERCLA liabilities arising out of the business.[13]

De Facto Merger. Where there is a statutory merger, in which one company is subsumed into another and only the acquiring company exists thereafter (or a consolidation, where two companies form a third company, dissolving themselves), state law mandates that the successor (or surviving) company assume the debts and liabilities of the predecessor by operation of law.[14]

Under the de facto merger exception to the principle of limited liability for an asset purchaser, a court will look beyond the form of an asset sale to determine whether there has in substance been a merger (or consolidation).[15] Where a court finds a merger in substance, the successor may be held liable for the debts and liabilities of the predecessor.

Relevant criteria in analyzing whether a de facto merger or consolidation has occurred in the CERCLA context include the following:

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[4] 42 U.S.C. § 9607(a).

[5] 42 U.S.C. 9601(21).

[6] *B.F. Goodrich v. Betkowski*, 99 F.3d 505, 518 (2nd Circ. 1996), *cert. denied*, 524 U.S. 926 (1998).

[7] *Chicago Truck Drivers, Helpers and Warehouse Workers Pension Fund v. Tasemkin Inc.*, 59 F.3d 48, 49 (7th Cir. 1995); 15 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (Perm. Ed. 1990).

[8] *U.S. v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992); *U.S. v. Mexico Feed & Seed Co. Inc.*, 980 F.2d 478, 487 (8th Cir. 1992); *Louisiana-Pacific Corp. v. Asarco Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990); *Philadelphia Elec. Co. v. Hercules Inc.*, 762 F.2d 303, 308-309 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985); *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 651 (7th Cir. 1998).

[9] *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446, 1459 (W.D. Mich. 1988).

[10] G.S. Sisk and J.L. Anderson, "The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O'Melveny & Myers," 16 Va. Envtl. L.J. 505 (Summer 1997), at 508.

[11] *Anspec Co. v. Johnson Controls Inc.*, *supra*, 922 F.2d at 1245; *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d. Cir. 1988), *cert. denied*, 488 U.S. 1029 (1988) ("Congressional intent [in CERCLA] supports the conclusion that, when choosing between taxpayers or a successor corporation, the successor should bear the costs.").

[12] *See, e.g. U.S. v. Chrysler Corp.*, 31 E.R.C. 1997 (D. Del. 1990).

[13] *Aluminum Company of America v. Beazer East Inc.*, 124 F.3d 551, 565 (3rd Cir. 1997); *U.S. v. Iron Mountain Mines Inc.*, 987 F. Supp. 1233, 1240-41 (E.D. Cal. 1997).

[14] *See, e.g.*, N.Y. Bus. Corp. Law § 906(b)(3); Del. Code Ann. tit. 8, § 259.

[15] *See In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1010, 1015 (D. Mass. 1989).

- Continuation of enterprise of seller (continuity of management, personnel, physical location, assets and general business operations);
- Continuity of ownership of purchaser and seller;
- Dissolution of the seller as soon as possible after the transaction; and
- Purchaser's assumption of the obligations of seller necessary for uninterrupted operation of the business.[16]

In the CERCLA context, most jurisdictions have found continuity of ownership to be a necessary element to the de facto merger exception.[17] However, several courts have found the de facto merger exception applicable in the CERCLA context in the absence of continuity of ownership.[18]

Mere Continuation of Seller. The "mere continuation" exception to the insulation of an asset purchaser from liabilities of the asset seller applies where the asset purchaser appears to be a reorganized version of the predecessor corporation, rather than a distinct corporate entity. It resembles the de facto merger exception.

In the CERCLA context, as in other contexts, relevant factors in determining whether the purchaser is a mere continuation of the seller include the following:

- Common ownership of purchaser and seller;
- Common identity of officers and directors;
- Similar control of hiring and function of officers, directors and stock;
- One corporation survives after transfer of assets; and
- Inadequate consideration for the assets.[19]

The key factors, required by most courts, in proving that a purchaser is a mere continuation of a seller for the purpose of determining CERCLA liability are the continuity of ownership and the continuity of officers and directors of the seller and purchaser.[20]

Fraud. The fraudulent transfer exception looks to state fraudulent transfer statutes in determining whether successor liability should be imposed.[21] These statutes seek to address asset transfers entered into with the intent to defraud, hinder or delay creditors or stockholders of the predecessor company.[22]

In the context of CERCLA liability, as in other contexts, in applying relevant state law, courts have determined whether a transaction is fraudulent by reference to several factors, including whether the transferor was insolvent at the time of transfer, whether the consideration paid was inadequate, and whether the transferor was inadequately capitalized.[23] A key consideration in applying this exception to CERCLA liabilities is whether the governmental agency or third party seeking recovery has standing to bring a claim; that is, whether the governmental agency or third party is a "creditor" who has a "claim" under the applicable state law.[24]

Substantial Continuation. The "continuity of enterprise," or "substantial continuation," theory of successor liability is the most expansive and controversial theory of recovery available to plaintiffs seeking to impose successor liability. The federal circuit courts which have taken up the substantial continuation exception are split in their assessment of whether it is available to claimants under CERCLA.

The split has focused on the question of whether, in the context of evaluating a claim of successor liability, CERCLA requires development of a federal common law of successor liability (including the substantial continuation exception), or the application of the relevant state law (typically not including the substantial continuation exception).[25]

The Second, Third, Fourth and Eighth Circuits applied a federal common law of successor liability and, with the exception of the Third Circuit, which did not reach the question, went on to adopt the substantial continuation exception.[26] A number of district court decisions in the Third Circuit have also adopted the substantial continuation exception.[27]

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[16] *North Shore Gas Co. v. Salomon, supra*, 152 F.3d at 652-653; *Louisiana-Pacific Corp. v. Asarco Inc., supra*, 909 F.2d at 1264; *New York v. Westwood-Squibb Pharmaceutical Co. Inc.*, 62 F. Supp. 2d 1035, 1040 (W.D.N.Y. 1999); *Cytec Industries Inc. v. B.F. Goodrich Corp.*, 196 F. Supp. 2d 644, 657 (S.D. Ohio 2002).

[17] *Dayton v. Peck, Stow and Wilcox Co.*, 739 F.2d 690, 693 (1st Cir. 1984); *The Ekotek Site PRP Committee v. Self*, 948 F. Supp. 994, 1002 (D. Utah 1996); *U.S. v. Atlas Minerals and Chemicals Inc.*, 1995 U.S. Dist. LEXIS 13097 (E.D.Pa.), at *257-260; *Sylvester Bros. Dev. Co. v. Burlington Northern R.R.*, 772 F. Supp. 443, 448 (D. Minn. 1990).

[18] *U.S. v. Keystone Sanitation Co. Inc.*, 1996 U.S. Dist. LEXIS 1365 (M.D. Pa.) at *13-14; *New York v. N. Storonske Cooperage Company Inc.*, 174 B.R. 366, 385 (N.D.N.Y.1994); *HRW Systems Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 334 (D. Md. 1993) (No one factor, including continuity of ownership, necessary to prove de facto merger).

[19] *City Management Corp. v. U.S. Chemical Co.*, 43 F.3d 244, 251 (6th Cir. 1994); *North Shore Gas v. Salomon, supra*, 152 F.3d at 654; *Kelley v. Thomas Solvent, supra*, 725 F. Supp. at 1458.

[20] *U.S. v. Carolina Transformer Co., supra*, 978 F.2d at 838; *Andritz Sprout-Bauer Inc. v. Beazer East Inc.*, 12 F. Supp. 2d 391, 404 (M.D. Pa. 1998).

[21] *See City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1491 (E.D. Pa. 1989); *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446 (W.D. Mich. 1988); *U.S. v. Vertac Chem. Corp.*, 671 F. Supp. 595 (E.D. Ark. 1987).

[22] 15 *Fletcher, Cyclopedia of the Law of Private Corporations* § 7125 (Perm. Ed. 1990). *See e.g., Kelley v. Thomas Solvent Co., supra*, 725 F. Supp at 1453; *U.S. v. Vertac Chem. Corp., supra*, 671 F. Supp. at 617.

[23] *See generally, Kelley v. Thomas Solvent Co., supra; U.S. v. Vertac Chem. Corp. supra.*

[24] *See Kelley v. Thomas Solvent Co., supra*, 725 F. Supp at 1456 (Governmental agency is creditor upon incurring response costs).

[25] The test for determining whether a uniform federal rule of decision should be developed or state law should be adopted as the rule of decision was set forth by the Supreme Court in *U.S. v. Kimbell Foods Inc.*, 440 U.S. 715, 728-729 (1979): (1) Is there a need for national uniformity in the rule of decision, (2) Does the application of state law conflict with federal statutory objections; and (3) How would a federal rule of decision impact existing relationships based on state law.

[26] *B.F. Goodrich v. Betkowski, supra*, 99 F.3d at 518, *Smith Land & Improvement Corp. v. Celotex Corp., supra*, 851 F.2d at 91-92; *U.S. v. Carolina Transformer Co., supra*, 978 F. 2d at 838-841; *U.S. v. Mexico Feed & Seed Co., supra*, 980 F.2d at 488.

[27] *Pennsylvania v. Concept Sciences Inc.*, 2002 U.S. Dist. LEXIS 23590 (E.D. Pa. 2002), at *5-6; *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1285 (E.D. Pa. 1994); *U.S. v. Exide Corporation*, 2002 U.S. Dist. LEXIS 3303 (E.D. Pa.), at *15-16.

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The First, Sixth and Ninth Circuits found the development of a federal common law unnecessary, applied the relevant state law of successor liability and, like most states, rejected the substantial continuation exception.[28]

The Eighth Circuit has stated that, "in the CERCLA context, the imposition of successor liability under the 'substantial continuation' test is justified by a showing that in substance, if not in form, the successor is a responsible party. The cases imposing 'substantial continuation' successorship have correctly focused on preventing those responsible for the wastes from evading liability through the structure of subsequent transactions."[29]

It is particularly likely that a court will apply the substantial continuation exception in "situations where a party shifts all environmental liability–existing and potential–onto a corporate shell that is left either with 'dirty assets' or . . . no assets at all."[30]

The substantial continuation theory, in the environmental context, thus can be seen as a vehicle for furthering the legislative intent of CERCLA that "those responsible for the production and disposal of the waste" bear the cost of the harm created by the hazardous waste.[31]

In applying the substantial continuation exception, courts have considered various of the following factors relevant to the existence of successor liability:

- Continuity of employees, directors and officers, supervisory personnel and physical location;
- Continuity of assets and general business operations;
- Continuity of business address, office, phone number and customers;
- Manufacture of same product;
- Retention of name;
- Purchaser holding itself out as continuation of seller;
- Activity that resulted in contamination continues after sale of assets;
- Purchaser had knowledge or notice of potential liability or substantial ties with seller;
- Purchaser was not previously in same business as seller;
- Transaction was not arms length; and
- Absence of other responsible parties from whom damages could be recovered.[32]

In essence, the focus of the substantial continuation exception is "on the identity between the **operations** of the selling and purchasing corporations."[33] Courts have looked to the totality of the transaction in applying the substantial continuation exception, and it has not been necessary that every factor be present for a court to apply the substantial continuity test.

Courts applying the substantial continuation exception have varied in the degree of emphasis on the purchaser's knowledge or notice of the potential liability and the existence of substantial ties between the purchaser and seller as factors in the analysis. Certain courts have found the purchaser's knowledge or notice of the potential liability at issue at the time of the transaction a prerequisite to the substantial continuation exception.[34]

At least one court has required "a casual link between the CERCLA defendant and the environmental harm," as well as knowledge of the potential liability and substantial ties with the seller as a prerequisite of the substantial continuation exception.[35] Several courts have required either knowledge or notice of the potential liability at issue at the time of the transaction or substantial ties with the seller before applying the substantial continuation exception.[36]

On the other hand, a number of courts have specifically rejected the requirement of knowledge or notice of the potential liability, treating it instead merely as a relevant factor in the substantial continuation analysis, and found the substantial continuation exception applicable in the absence of such knowledge or notice.[37]

The U.S. Environmental Protection Agency has taken the internal position that it will aggressively assert the substantial continuation theory of successor liability, with the traditional exceptions as alternative bases of support, in seeking recovery from successor corporations pursuant to CERCLA.[38]

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[28] *U.S. v. Davis*, 261 F.3d 1. 54 (1st Cir. 2001); *City Management Corp. v. U.S. Chemical Co. Inc., supra*, 43 F.3d at 250; *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant Inc.*, 159 F.3d 358, 364 (9th Cir. 1997) (No need to apply federal common law to achieve uniformity because state law did not vary widely or to protect a federal policy or interest because none were compromised by the use of state law.)

[29] *U.S. v. Mexico Feed & Seed Co., supra*, 980 F.2d at 487-88.

[30] *Horsehead Industries Inc. v. Zinc Corporation of America*, 1996 U.S. Dist. LEXIS 22493 (N.D. Okla.), at 55. *See also New York v. N. Storonske Cooperage Company Inc., supra*, 174 B.R. at 381.

[31] *Anspec Co. Inc. v. Johnson Controls Inc., supra*, 922 F.2d at 1247.

[32] *See, e.g., U.S. v. Carolina Transformer, supra*, 978 F.2d at 838; *U.S. v. Mexico Feed & Seed Co., supra*, 980 F.2d at 488 (8th Cir. 1992); *New York v. National Services Industries Inc.*, 134 F. Supp. 2d 275, 277-278 (E.D.N.Y. 2001); *Pennsylvania v. Concept Sciences Inc., supra* at *9; *Atlantic Richfield Co. v. Blosenski, supra*, 847 F. Supp. at 1284; *U.S. v. Western Processing*, 751 F. Supp. 902, 905 (W.D. Wash. 1990); *U.S. v. Peirce*, 1995 U.S. Dist. LEXIS 4042 (N.D.N.Y.), at *3-4 (N.D.N.Y. 1995); *Arizona v. Esco*, 1997 U.S. Dist. LEXIS 5511(D. Ariz.), at *6-7; *Anderson v. City of Minnetonka*, 1993 U.S. Dist. LEXIS 4846 (D. Minn.), at *21-24.

[33] *Arizona v. Esco., supra*, at *6 (emphasis supplied).

[34] *Ninth Avenue Remedial Group v. Allis-Chalmers Corporation*, 195 B.R. 716 (N.D. Indiana 1996); *New York v. Panex Industries Inc.*, 1996 U.S. Dist. LEXIS 9418, a5 *33 (W.D.N.Y. 1996); *U.S. v. Atlas Minerals & Chemicals Inc.*, 824 F. Supp. 46, 50-51 (E.D. Pa 1993); *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1287 n. 26 (E.D. Pa. 1994) (Substantial continuity exception applicable where purchaser knew or should have known after reasonable investigation of Seller's potential liability).

[35] *U.S. v. Atlas Minerals and Chemical Inc.*, 824 F. Supp. 46, 51 (E.D. Pa. 1993).

[36] *U.S. v. Mexico Feed and Seed Co., supra*, 980 F.2d at 489-90. *U.S. v. Vermont American Corp.*, 871 F. Supp. 318, 323 (W.D. Mich. 1994).

[37] *Arizona v. Esco, supra*, at *7-8; *Gould Inc. v. A&M Battery & Tire Service*, 950 F. Supp. 653, 657-60 (M.D. Pa 1997); *U.S. v. Exide Corp., supra*, at *38-39; *Kleen Laundry & Dry Cleaning Services Inc. v. Total Waste Management Inc.*, 867 F. Supp. 1136, 1144 (D.N.H. 1994); *Chesapeake and Potomac Telephone Co. of Virgina v. Peck Iron & Metal Co.*, 814 F. Supp. 1266, 1268-69 (E.D. Va. 1992); *U.S. v. Peirce, supra*, at *7; *Washington v. U.S.*, 930 F. Supp 474, 482 (W.D. Wash. 1996).

[38] Memorandum from Courtney M. Price, EPA assistant administrator for Solid Waste and Emergency Response, "Liabil-

Courts applying the substantial continuation exception appear to have done so with the intent of frustrating a perceived "effort to continue the business of the former corporation yet avoid its existing or potential . . . environmental liability." [39]

This exception, however, has grown so broad in its application that it would impose CERCLA liability for historic offsite waste disposal by the selling corporation upon a purchaser of assets at arm's length that continued the same business, but not the operations that generated the waste,[40] and had no continuity of officer, directors or shareholders and no prior knowledge of the environmental liability. Clearly, the substantial continuation exception has outgrown its original purpose and should be a source of concern for asset purchasers.[41]

Recommendations

In the CERCLA context, significant areas of uncertainty obscure the successor liability landscape, making navigation of this landscape difficult for the asset purchaser. Will a claim of successor liability be brought against the asset purchaser in a federal court that has adopted a federal rule of decision for successor liability questions under CERCLA and applies the substantial continuation exception? If the substantial continuation exception is applied, will purchaser's knowledge or notice of seller's CERCLA liability or purchaser's "substantial ties" thereto be a prerequisite of liability? Even if the federal court adopts the relevant state's law of successor liability, will the court apply the de facto merger exception or the mere continuation exception without requiring continuity of ownership of the seller and purchaser?

Even when the applicable successor liability standard is known, uncertainty remains. As the application of the various successor liability exceptions is highly fact-specific, it cannot be predicted with certainty how a court will weigh the facts.

Therefore, it is not possible to identify specific measures that asset purchasers can take to definitively immunize themselves from the asset seller's CERCLA liabilities.

One can expect that the likelihood that EPA will seek to impose an asset seller's CERCLA obligations on an asset purchaser will increase with the difficulty of recovering from the asset seller or other potential responsible parties.

In this uncertain environment, the prudent asset purchaser would be well advised to proceed carefully, take whatever steps are feasible to clarify the arm's-length nature of the transaction and address all known (and unknown) environmental issues in the purchase agreement.

Asset purchasers may wish to consider the following measures, where feasible, in furtherance of the objective of lessening the likelihood of being liable for the CERCLA liabilities of the asset seller:

- Provide clearly in the purchase agreement that seller's known and unknown environmental liabilities remain with seller and consider requiring that seller make some financial provision for such liabilities.
- If feasible, clearly identify the new operating entity as distinct and independent from the seller.
- Do not install officers, directors and supervisory personnel of asset seller in the same roles in the new operating entity.
- Do not pay for the assets, in whole or in part, in stock of the purchaser.
- Where appropriate, change locations, employees and aspects of management and manufacturing operations.
- Require the asset seller to maintain its corporate existence and a minimum net worth for at least a defined period after the sale.
- Where appropriate, change the business address, the office location and the phone number.
- Do not adopt the corporate or trade name of the asset purchaser.[42]

While there is no formula for approaching an asset purchase that will guarantee that the purchaser will not be subject to successor liability for CERCLA liabilities of the asset seller, implementation of the above measures can be relied upon to minimize to the extent practical the likelihood of such successor liability.

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ity of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation and Liability Act," at 16 (June 13, 1984).

[39] *U.S. v. Carolina Transformer Co., supra*, 978 F.2d at 838.

[40] *See, e.g., New York v. National Services Industries Inc., supra*, 134 F. Supp. 2d at 280 (Successor owner of dry cleaning business which no longer used contaminant at issue (trichloroethylene) liable as successor for offsite disposal of waste under substantial continuation theory).

[41] The purchase of assets from a corporation with potential environmental liabilities associated with its historic operations can occur in the context of a bankruptcy proceeding involving the seller. U.S. bankruptcy law allows the sale of assets by a debtor, during an ongoing case pursuant to 11 U.S.C. § 363(f), free and clear of any interests in such assets, or pursuant to a plan of reorganization pursuant to 11 U.S.C. § 1129, free and clean of claims and interests in such assets. Courts have determined that these provisions allow the sale of assets by a debtor free and clear of certain potential liabilities under CERCLA. A bankruptcy court will discharge a CERCLA claim if it could have been a claim in bankruptcy against the debtor, but if the claim arose after consummation of the bankruptcy proceedings, the bankruptcy court does not have the power to discharge the claim and an asset purchaser takes subject to any such claims. *Ninth Avenue Remedial Group v. Allis-Chalmers Corporation*, 195 B.R. 716, 731-32 (N.D. Indiana 1996). The key to determining when a CERCLA claim arose and therefore whether it can be discharged in bankruptcy "is the knowledge or foreseeability [of the claim] by the potential CERCLA claimant." *Id.* at 733. Notice is an essential part of this knowledge or foreseeability. Before discharging a claim pursuant to either of these provisions, courts have required that "the claimant had notice of the bankruptcy or a chance to participate in the bankruptcy by filing a proof of claim." Seife, Rosenblatt, *supra*, at p. 5.

[42] A purchaser of assets in bankruptcy would also be well advised to consider the following steps in connection with the asset sale to minimize the possibility of successor liability: (i) insert notice of the sale of assets and the bankruptcy case not just in local newspapers but in national and trade newspapers and journals; (ii) incorporate the sale in a reorganization plan, even if it is a Section 363 sale; (iii) request that the bankruptcy court retains jurisdiction over all disputes related to the asset sale; (iv) add a provision to the asset purchase agreement by which the seller indemnifies the purchaser against liabilities not specifically assumed; (v) seek an injunction from the bankruptcy court preventing creditors of the debtor from suing the purchaser; and (vi) seek to require the debtor to set up a trust fund for unknown future claims. Seife and Rosenblatt, *supra*, at pp. 10-11.

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