Corporate Successor Liability for Punitive Damages in Products Liability Litigation

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CORPORATE SUCCESSOR LIABILITY FOR PUNITIVE DAMAGES IN PRODUCTS LIABILITY LITIGATION

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I. INTRODUCTION

Can the policies and purposes underlying the law of punitive damages, products liability, and corporate successor liability be reconciled in the wake of numerous products liability claims against corporation successors? This Note explores the theories and policies behind these fields of law and attempts to reconcile the imposition of punitive damages on successor corporations in products liability litigation. Several themes recur throughout this Note and emerge as the primary theories upon which courts base successor liability for punitive damages. If the purposes for liability of successor corporations coincide with the purposes for assessing punitive damages, courts are justified in holding successor corporations liable for punitive damages.

II. PUNITIVE DAMAGES

A. Punitive Damages Defined

Punitive damages are imposed on parties who act with outrageous or malicious motive\(^1\) and are awarded in addition to

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1. In Restatement (Second) of Torts § 908 (1977), punitive damages are defined as follows:

   (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

   (2) Punitive damages may be awarded for conduct that is outrageous, be-
compensatory or nominal damages. Although some jurisdictions prohibit the use of punitive damages and others limit their use to particular circumstances, punitive damages nevertheless evolved into a viable means for plaintiffs to secure recovery in addition to the recovery they otherwise would receive.

B. Purposes of Punitive Damages

1. Compensatory Function

Historically, courts viewed punitive damages as additional compensation to injured plaintiffs and based this view on the notion that actual damages in tort actions did not provide full compensation to accident victims. Although the compensatory

cause of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

See also W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9-10 (5th ed. 1984) [hereinafter PROSSER & KEETON] (punitives assessed in situations of aggravation, outrage, spite, malice, and fraudulent or evil motive); Sales, The Emergence of Punitive Damages in Products Liability Actions: A Further Assault on the Citadel, 14 ST. MARY'S L.J. 351 (1983) ("Socially unacceptable conduct that significantly exceeds mere negligence is the quintessential element."). Id. at 365.


7. See id. at 67-68.
function of punitive damages has been discounted, punitive damages nonetheless play an important compensatory role. They act to “restore the plaintiff’s emotional equilibrium” and to “restore the plaintiff to the financial position he occupied prior to the injury by providing a fund for the payment of litigation expenses.”

2. Retributive Function

Punitive damage awards are used to punish one who has committed a wrongful act. Several objectives are met by this retributive function including the plaintiff’s satisfaction in seeing the defendant suffer, the maintenance of societal morals and legal standards disfavoring misconduct, the rewarding of law-abiders, and the reformation of law-breakers.

3. Maintaining the Public Order

The law enforcement function of punitive damages is somewhat related to the retributive function. Public order is preserved by providing a vengeful plaintiff a means of recovery through civil litigation when he may otherwise choose to pursue


10. See Owen, supra note 9, at 1296.

11. Id. at 1297.


13. See Owen, supra note 9, at 1279.

14. See id. at 1280-81.

15. See id. at 1281.

16. See id.
unlawful measures of restitution. This prospective windfall award, in addition to compensation for losses, motivates plaintiffs to press their claims. Thus, “misconduct is increasingly punished and deterred.”

4. Deterrence of Future Egregious Conduct

The award of punitive damages is a mechanism for deterring wrongful conduct, either generally, with respect to the public, or specifically, with respect to the conduct of particular individuals. The culpable party is used as an example to others, resulting in the deterrence of similar conduct. Although some courts maintain that compensatory damages alone are a sufficient deterrent, other courts hold that additional sanctions are needed to discourage tortious conduct. The effectiveness of punishment in deterring misconduct is a source of constant study and debate. Effectiveness is dependent on three factors: (1) the wrongdoer must know the conduct is proscribed and punishable; (2) he must be able to alter his conduct to avoid

17. See Ausness, supra note 6, at 70.
18. See Owen, supra note 9, at 1287.
19. Id.
20. See Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982) (stating that under Ohio law the deterrence sought by punitive damages is general, not specific); see also Spaeth v. Union Oil Co., 762 F.2d 865 (10th Cir. 1985) (court held the purpose of an Oklahoma statute is to punish the defendant and set an example for the public), cert denied, 476 U.S. 1104 (1986); Universal City Studios, Inc. v. Nintendo Co., 615 F. Supp. 838 (S.D.N.Y. 1985) (court held that under Ohio law, deterrence is general and not specific), cert. denied, 479 U.S. 987 (1986).
21. See Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn.) (holding that punitive damages were unnecessary to punish the defendant and to deter the corporation from future misconduct), cert. denied, 449 U.S. 921 (1980).
24. See Owen, supra note 9, at 1283.
punishment; and (3) he must desire to alter his conduct to avoid punishment. If the plaintiff establishes these factors, the court is likely to impose punitive damages to deter future wrongful conduct.

C. Punitive Damages in Products Liability Litigation

Courts only recently have used punitive damages in the context of products liability, but their use has expanded considerably since 1977. In advocation of expanding the use of punitive damages, Professor Owen stated:

A legal tool is needed that will help to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool.

Despite the increased use of punitives, critics question the propriety of their use in products liability contexts. First, critics assert that the costs incurred by manufacturers of defective products will be passed on to consumers in the form of higher prices. Second, critics fear that overkill will exhaust the capital assets of corporations faced with unlimited claims. Finally, in-

25. See id.
28. Owen, supra note 9, at 1259-60.
30. See Ausness, supra note 6, at 12-13.
surance covering punitive damages often is limited or unavailable; therefore, many innocent shareholders may lose their investments because of the sins of management.\textsuperscript{32}

Critics also assert that punitive damages violate the guarantees of due process, the commerce clause, and the right to protection against double jeopardy and cruel and unusual punishment under the United States Constitution.\textsuperscript{33} These factors, coupled with the inherent incompatibility of punitive damages with the tort theories behind strict liability,\textsuperscript{34} comprise a strong opposition to punitive damage awards against manufacturers of defective products.

The most recent reservations about punitive damages arise in the context of mass tort litigation.\textsuperscript{35} Opponents of the imposition of punitive damages on mass tort defendants argue that the nature of a single plaintiff's underlying compensatory claim and the possibility of multiple defendants seeking compensation for the same injuries make punitive damages "inapropos and insu-

\textsuperscript{32} Ausness, supra note 6, at 83. See generally Comment, Punitive Damages Insurance: Why Some Courts Take the Smart Out of "Smart Money," 40 U. Miami L. Rev. 979 (1986) (analysis of the tensions between the doctrines of punitive damages and insurance).


\textsuperscript{34} Strict liability has no-fault underpinnings. See Ausness, supra note 6, at 47. The focus normally is on the condition of the product rather than the conduct of the supplier-defendant. See Note, Recognizing Products Liability Claims at Dissolution: The Compatibility of Corporate and Tort Law Principles, 87 Colum. L. Rev. 1048 (1987).

portable” in strict tort liability actions. Opponents fear that each plaintiff could recover an excessive award of punitive damages and, contrary to public policy, bankrupt the defendant. Multiplicity of suits for damages resulting from a single product of a particular design line, opponents argue, is contrary to the purposes punitive damages should serve.

These criticisms have not gone unanswered, and many commentators assert convincing counterarguments and suggestions for reform. Common suggestions include increasing the availability of products liability insurance, using remittitur more liberally, and instructing the jury of other awards that were made under similar circumstances.

In reconciling the theories behind punitive damages and strict liability, one commentator suggested that an objective decision about the manufacturer’s state of mind should be made and that punitive damages only should be imposed against the manufacturer if its conduct reflects a flagrant indifference to public safety. This approach considers both the individual wrongdoer’s mental state of malice or recklessness and the focus of strict liability on the condition of the product.

As a counterargument to the proposition that innocent

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36. Sales, supra note 1, at 388.
37. See id. at 370. But see Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980) (the need for punitive damages is as real as the danger of multiple awards).
38. See, e.g., Comment, Punitive Damages in Products Liability Cases, 16 SANTA CLARA L. REV. 895 (1976).
41. See, e.g., Ausness, supra note 6, at 98. The defendant’s expense in satisfying other punitive damage claims is a relevant factor that may be introduced at trial. See RESTATEMENT (SECOND) OF TORTS § 908 comment e (1977).
42. See Owen, supra note 9, at 1268-71.
43. Professor Owen contends that the incompatibility argument has “superficial appeal” but cannot withstand analysis. See id. at 1269-70.
shareholders will suffer because of management misconduct,"\textsuperscript{44} the court in \textit{Martin v. Johns-Manville Corp.}\textsuperscript{45} observed that shareholders elect management and the board of directors.\textsuperscript{46} Accordingly, shareholders can withdraw their investments, deter managerial misconduct, and change questionable company policies.\textsuperscript{47}

In response to the fear of overkill, which may not be as serious as critics suggest,\textsuperscript{48} commentators suggest changes in trial procedure,\textsuperscript{49} limitations on the size of individual awards,\textsuperscript{50} limitations on the aggregate liability with a single punitive damage award,\textsuperscript{51} and the use of a punitive damage class action.\textsuperscript{52}

Both opponents and proponents of the use of punitive damages in products liability litigation have strong arguments supporting their respective positions. Whether adopting the view

\begin{footnotesize}
\textsuperscript{44} See Roginsky v. Richardson-Merrel, Inc., 378 F.2d 832, 841 (2d Cir. 1967).
\textsuperscript{46} See id. at 368-69, 469 A.2d at 664; see also Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. 1982) ("Punitive damage awards are a risk that accompanies investment . . . .")
\textsuperscript{47} See \textit{Martin}, 322 Pa. Super. at 368-69, 469 A.2d at 664. The court in \textit{Moran}, 691 F.2d 811, maintained that punitive damages are a risk that accompanies investment and that "[i]nvestors may typically place their money where they choose and withdraw it when they wish. The prospect of ultimate liability . . . may encourage investors to entrust their capital to the most responsible concerns." \textit{Id.} at 817.
\textsuperscript{49} See Ausness, \textit{supra} note 6, at 93. Ausness' suggestions include requiring a higher standard of proof, as required for criminal sanctions, trial bifurcation, and judicial assessment of punitive damage awards.
\textsuperscript{50} See id. at 96.
\textsuperscript{51} See id. at 98.
\textsuperscript{52} See id. at 100. Ausness proposes that the punitive damages class action is the best measure for reform. See also Mullinex, \textit{Class Resolution of the Mass - Tort Case: A Proposed Federal Procedure Act}, 64 Tex. L. Rev. 1039, 1045-46 (1986) (proposal for federal mass-tort procedure act based on three premises: (1) act achieves economies of time, effort, and expense without sacrificing procedural fairness; (2) procedural reform must take place before substantive reform will be accomplished; and (3) the difference between mass-accident cases embraced by Fed. R. Civ. P. 23 and mass-tort lawsuits requires special attention); Note, \textit{The Punitive Damages Class Action: A Solution to the Problem of Multiple Punishment}, 1984 U. Ill. L. Rev. 153 (advocating that class action is best device for administering punitive damages). For a detailed analysis of enforcement of the law through "private attorneys general" and its use in mass tort litigation, see Coffee, \textit{Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions}, 86 Colum. L. Rev. 669 (1986).
\end{footnotesize}
that punitive damages are inappropriate in products liability or advocating the imposition of punitives on culpable manufacturers, one must consider the policies and purposes served by both theories. If all factors pertinent to both are met and the goals of each are furthered, the result will be desirable and fair.53

III. CORPORATE SUCCESSOR LIABILITY

A. Corporate Liability

Corporations, like individuals, can be held responsible for wrongful conduct.54 Although the culpable conduct actually is committed by an individual within the corporation, the corporate entity is held liable.55 Beyond liability for compensatory damages, a corporate entity is held liable to injured parties for punitive damages on two theories: the complicity rule and vicarious liability.56 Under the complicity rule, shareholders are considered innocent parties, and the corporation is held liable for the intentions and actions of high-level officials.57 Conversely, a corporation is held vicariously liable for the wanton acts of its officers, agents, and employees if those persons acted within the scope of their employment.58 Several courts maintain that in order to impose liability for punitive damages on a corporation, some indication must exist that the employee obtained direction from the corporation or a managerial employee or that the cor-

53. Owen, supra note 9, at 1299.
54. See Pierce v. United States, 255 U.S. 398 (1921). Corporate liability includes the known and ascertained rights of creditors as well as the unknown or anticipatory rights of unidentified persons, for example, potential products liability claimants.
56. See Ketterling, A Proposal for the Proper Use of Punitive Damages Against a Successor, 11 J. CORP. LAW 765, 769 (1986); Sales, supra note 1, at 367.
57. Restatement (Second) of Torts § 909 (1979) allows recovery of punitive damages against a principal or master when: (a) the principal authorized the action; (b) the principal recklessly employed an unqualified agent; (c) the agent functioned and occupied the status of manager; or (d) the principal adopted the action as his own. See O'Donnell v. K-Mart Corp., 100 A.D.2d 488, 474 N.Y.S.2d 344 (1984); Sardell, Corporate Liability for Punitive Damages, 8 CORP. L. REV. 184 (Spring 1985).
58. See Restatement (Second) of Agency § 217c (1958); Ketterling, supra note 56, at 770.

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poration committed, directed, or ratified the intentional act.\textsuperscript{59}

In the context of products liability litigation, vicarious liability is more justifiable than the complicity rule because the company that put the product in the stream of commerce and profits from its distribution is best able to foresee harm and is in the best position to lessen the product’s potential for harm. Since both high- and low-level officials are held vicariously accountable for their misconduct, “[t]he deterrent effect of punitive damages would be increased significantly . . . [and] could then be expected to result in participation of upper-level officials in all stages of product design and safety.”\textsuperscript{60}

B. Corporate Successor Liability

1. General Rule of Nonliability and Exceptions

Although corporations undoubtedly are held responsible for wrongful conduct, the general rule regarding successor corporations is that no liability of the predecessor is imposed on the successor unless one of the following exceptions is met:\textsuperscript{61}

(1) [T]he successor enters into an express or implied agreement to assume the predecessor’s liability;\textsuperscript{62}

(2) the transaction amounts to a merger or consolidation;\textsuperscript{63}


\textsuperscript{60} Ketterling, supra note 56, at 770. See also Note, Assumption of Products Liability in Corporate Acquisitions, 55 B.U.L. Rev. 86, 89 (1975).

\textsuperscript{61} The issue is whether an arm’s length purchaser of assets should be held responsible for products previously manufactured and sold by the corporation transferring its assets. See Schulman, Commentary: Successor Corporation Liability and the Inadequacy of the Product Line Continuity Approach, 28 Corp. Prac. Commentator 588 (1986), published originally in 31 WAYNE L. Rev. 135 (1984); Annotation, Products Liability: Liability of Successor Corporation for Injury or Damage Caused by Product Issued by Predecessor, 66 A.L.R.3d 824 (1975).


(3) the successor is a mere continuation or reincarnation of its predecessor; or
(4) the transaction was the result of a fraudulent or bad faith transfer of assets.

Clearly, liability is justified when there is an express or implied agreement and when a fraudulent transaction has occurred. Conversely, the merger and mere continuation exceptions have generated extensive litigation because of the difficulty in distinguishing a pure asset acquisition from a merger, consolidation, mere continuation, or reincarnation.

The procedures for effectuating mergers and consolidations are statutory. A merger occurs when one corporation absorbs one or more other corporations with one entity surviving, and the shares of the original corporation are converted as provided by the merger agreement. Various objectives — such as recapitalization, elimination of minority shareholders, and alteration of the articles of incorporation — may be accomplished through merger. Consolidation occurs when two corporations dissolve

64. See Jackson v. Diamond T. Trucking Co., 100 N.J. Super. 186, 196, 241 A.2d 471, 477 (Ct. Law Div. 1968) (elements relevant to whether the corporation was mere continuation include: "(1) transfer of corporate assets (2) for less than adequate consideration (3) to another corporation which continued the business operation of the transferor (4) when both corporations had at least one common officer or director who was in fact instrumental in the transfer . . . and (5) the transfer rendered the transferor incapable of paying its creditors' claims" because it was either factually or legally dissolved); Jones v. Eppler, 266 P.2d 451 (Okla. 1953).

65. See Wolff v. Shreveport Gas, Elec. Light & Power Co., 138 La. 743, 70 So. 789 (1916) (court held that gas company's acquisition of all assets, but no liabilities, of another gas company for $1000 consideration was not a good faith transfer).


69. See Garrett, Merger Meets the Common Law, 63 TEX. L. REV. 1509, 1511-12 (1985). Once a merger has occurred, the surviving entity assumes all liabilities of each corporation that was a party to the merger, and "a proceeding pending against any cor-
and a new corporation is created. A mere continuation or reincarnation of the predecessor closely resembles a merger except that a mere continuation embraces a sale of assets.

Due to the common characteristics of these four methods of corporate acquisition, commentators have argued that the form of the acquisition is not dispositive of whether a successor should be held liable. Other courts have held organizational form to be the determinative factor. The majority of jurisdictions, nevertheless, have used these exceptions to determine corporate successor liability.

2. Corporate Theories

Courts that have imposed liability based on the method of acquisition and organizational form use a corporate law approach. These courts employ the traditional corporate exceptions stated above, and many have adopted expanded versions of successor liability.

First, corporations may be held liable on a statutory merger...
theory, which results when statutory elements are satisfied. In these mergers, statutes outline the assumption of debts, obligations, and liabilities, and the successors have difficulty denying an assumption of those liabilities.

Second, courts use the de facto merger doctrine as a mechanism for imposing liability on a successor. The case most often cited for this doctrine, Farris v. Glen Alden Corp., held that a transaction that closely resembles a merger but did not conform to statutory merger requirements nevertheless may be subject to the legal consequences of a merger. The elements that constitute a de facto merger are:

1. stockholder continuity;
2. payment by the buyer in its shares of stock rather than in cash;
3. dissolution of the asset seller;
4. assumption of the ordinary debts of the seller by the buyer; and
5. continuation of the business.

Courts have imposed liability using the de facto theory even when the transaction was in the form of an asset purchase. The

78. Id. at 438, 143 A.2d 30-31.
80. In Knapp v. North Am. Rockwell Corp., 506 F.2d 361, 370 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975), the court held that even though the transaction was structured as a sale of assets, the selling corporation was required to dissolve as soon as possible. Policy considerations required the transaction to be treated as a merger since the purchaser was best able to bear the burden of tort liability. See also Shannon v. Samuel Langston Co., 379 F. Supp. 797 (W.D. Mich. 1974) (de facto merger present when there was a continuation of enterprise, a continuation of shareholders, the seller had ceased doing business and liquidated, and the buyer had assumed liabilities necessary for the uninterrupted continuation of normal operations); Troupiansky v. Henry Disston & Sons, Inc., 151 F. Supp. 609 (E.D. Pa. 1957) (de facto merger occurred when one corporation dissolved and became a division of another corporation); Marks v. Autocar Co., 153 F. Supp. 768 (E.D. Pa. 1954) (de facto merger occurred when one corporation dissolved and transferred its assets, goodwill, and right to use its name to another corporation); Rath v. Rath Packing Co., 257 Iowa 1277, 136 N.W.2d 410 (1965) (merger occurred although parties called it something else); Applestein v. United Bd. & Carton Corp., 60 N.J. Super. 333, 159 A.2d 146 (Ct. Ch. Div.) (court held that it will look behind formal designations to determine if a transaction is actually a merger), aff'd, 33 N.J. 72, 161 A.2d 474 (1960), But see Hariton v. Arco Elecs., Inc., 41 Del. Ch. 74, 188 A.2d 123 (1963) (rejection of the de facto merger doctrine).

Several courts have recognized the validity of the de facto merger doctrine, but the facts of their particular cases did not warrant imposition of liability based on the doc-
de facto merger doctrine encompasses several elements common to the other methods of imposing liability on successors, but is solely distinguished by the sale of the corporation in exchange for stock.\textsuperscript{81} Thus, the reasons justifying liability in statutory mergers also apply to de facto mergers.\textsuperscript{82}

The final theory is the extension of the traditional mere continuation exception.\textsuperscript{83} \textit{Cyr v. B. Offen & Co.}\textsuperscript{84} often is cited as the first case to expand the mere continuation theory because the court imposed liability although the defendant corporation explicitly excluded assumption of the business' tort liabilities.\textsuperscript{85} In \textit{Turner v. Bituminous Casualty Co.}\textsuperscript{86} the court also applied liability to a purchasing corporation that continued the business it purchased under the appearance of being the same company.\textsuperscript{87}

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\textsuperscript{82} The de facto merger and the continuation exception also overlap to the extent that they often are treated as one general exception to the nonliability rule. See Phillips, \textit{Product Line Continuity and Successor Corporation Liability}, 58 N.Y.U.L. Rev. 906, 909 (1983).

\textsuperscript{83} See Wallach, \textit{A Remedy in Search of a Defendant — The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims}, 41 Mo. L. Rev. 321, 337 n.62 (1976), for cases discussing continuity of ownership.

\textsuperscript{84} 501 F.2d 1145 (1st Cir. 1974).

\textsuperscript{85} Accord Korzetz v. Amsted Indus., 472 F. Supp. 136 (E.D. Mich. 1979) (strong evidence of continuity of enterprise embraced in the stipulation of the transfer that reality was to be used for continued operations and that the successor was to make necessary efforts to employ transferor's employees; it made no difference that the predecessor continued to exist for two years after the sale but only mattered that predecessor eventually became defunct); Andrews v. John E. Smith's Sons Co., 369 So. 2d 781 ( Ala. 1979) (none of the exceptions applied to impose liability, but court suggested that when there is a basic continuity of enterprise between the designer and manufacturer of a product and the successor, the successor may be estopped from denying product's liability for injuries sustained to the user, despite successor's agreement with the predecessor that it would not be liable).

\textsuperscript{86} 397 Mich. 406, 244 N.W.2d 873 (1976).

\textsuperscript{87} See also Haney v. Bendix Corp., 88 Mich. App. 747, 279 N.W.2d 544 (1979) (court held because the transferee corporation received the assets of the transferor corporation and took over most of its operations, sufficient continuity existed to attach successor liability).
Despite the efforts of some courts to expand liability by extending the continuation exception, several courts maintain that the traditional exceptions to the rule of nonliability are the only means by which a plaintiff can recover against a successor corporation.

3. Tort Theories

Two tort theories have emerged as methods of expanding successor liability: the product-line approach and subsequent duty to warn. The product-line approach established in Ray v. Alad Corp., which is referred to as a "special departure" from the traditional rule, has been the least accepted of the nonliability exceptions. The most common reason advanced by courts declining to accept the product-line theory is that legislatures, not courts, should decide to enact an additional exception to the

88. See, e.g., Tift v. Forage King Indus., 108 Wis. 2d 72, 322 N.W.2d 14 (1982) (mere continuation exception applied to corporate successor of a sole proprietorship when defendant was substantially the same as the original manufacturer); Department of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (Ct. Law Div. 1980).


90. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). To justify strict tort liability against the successor, the Ray court gave the following policy reasons:

(1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business,

(2) the successor's ability to assume the original manufacturer's risk-spreading role, and

(3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.

Id. at 31, 560 P.2d at 8-9, 136 Cal. Rptr. at 379-80.

91. Heitland, supra note 66, at 491.

general nonliability rule. The court in *Flaugher v. Cone Automatic Machine Co.* rejected the product-line approach for two other reasons: the potentially devastating burden it would place on business transfers and the creation of traps for the unwary. Despite these arguments against adopting this theory, a few courts have justified its prescription, and one court even has extended its application by holding a successor liable even though it did not continue to manufacture the identical line of products.

A final tort theory is that a subsequent duty to warn exists for successor corporations that allegedly had knowledge of the defective product upon acquiring the predecessor and continued a relationship with the customers of the predecessor. The extent of the relationship necessary to establish a duty to warn requires a lesser degree of continuity than is required under the


94. 30 Ohio St. 3d 60, 507 N.E.2d 331 (1987).

95. See id. at 66, 507 N.E.2d at 337.


corporate theories.\textsuperscript{100} The relationship "must be more than casual and must have a consequential basis connected with the predecessor."\textsuperscript{101} Moreover, the successor must derive some economic benefit from the assumption of service contracts. The relationship otherwise will be deemed too tenuous and casual to impose on the successor an independent duty to warn.\textsuperscript{102} Besides the contractual assumption of services, the duty to warn may be derived from control of the instrumentality — the business that produced the defective product.\textsuperscript{103} If the knowledge and continuity of relationship elements are satisfied, the successor will have a duty to warn, and the justifications for imposing a duty on the successor are substantially similar to those policies justifying the product-line and mere continuation approaches.\textsuperscript{104} 

4. Justifications for Expanding Corporate Successor Liability

Several justifications exist for expanding both manufacturer and successor liability for defective products. The policy reasons for imposing strict liability on the manufacturers of defective products, generally, are:

(1) the manufacturer is best able to detect the flaws in a product it produces and can lessen the potential harm which may result from the product's use;

(2) the manufacturer which puts the product in the stream of commerce derives benefits from its purchase; therefore the manufacturer should bear the burdens which accompany the product as well; and

(3) there is substantial need for consumer protection from


\textsuperscript{101} Stratton, 9 Kan. App. 2d at 259, 676 P.2d at 1294.

\textsuperscript{102} See id. at 261, 676 P.2d at 1296; see also Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir. 1986); Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977) (the mere fact that asset purchaser's employee made service calls to the original owner did not give rise to a duty to warn); Chadwick v. Air Reduction Co., 239 F. Supp. 247 (N.D. Ohio 1965); Emrich v. Kroner, 79 A.D.2d 854, 434 N.Y.S.2d 491 (1980).

\textsuperscript{103} See Phillips, Product Line Continuity and Successor Corporation Liability, 58 N.Y.U. L. Rev. 906, 927 (citing Prosser & Keeton, supra note 1, at 339-43).

\textsuperscript{104} That is, the successor who continues the business knows the product and the operations and is in the best position to remedy the defects or at least warn of the dangers of the products.
harmful products. 105

Policies for holding a successor liable for the harm caused by a predecessor include:

(1) protection and preservation of a remedy for post-dissolution claimants;
(2) unfairness of allowing manufacturers to avoid liability;
(3) the prediction and minimization of the risks of defects is easily borne by the successor corporation; and
(4) the successor is in a better position to obtain insurance to cover the costs of defective products and injuries therefrom. 106

Perhaps the best practical justification for expanding successor liability is the market justification theory, in which the present and future liabilities of the acquired corporation are adequately reflected in the purchase price paid by the successor corporation. 107 Once the buyer becomes a target for the injured claimant, the bargaining process is instituted. At that point the buyer either may walk away from the purchase or estimate the cost of potential liabilities and begin negotiating with the seller. This process places the costs of liability upon the guilty seller, and the purchase price automatically and adequately should reflect the actual liabilities. 108 This market negotiation process, if functioning properly, seems to lead to fair results; its utilization, however, is not free from questions. Estimating future liability and adequately valuing the purchase price to reflect those liabilities is extremely difficult, especially in cases in which a party's injuries will not occur until some time in the future.

The arguments against holding the corporate successor liable include: the successor was not at fault because the predecessor corporation was morally responsible; the imposition of liability on the successor will not deter any misbehavior; and

105. See Note, supra note 60.
106. See Cyr v. B. Offen & Co., 501 F.2d 1145, 1154 (1st Cir. 1974); Ketterling, supra note 56, at 779-80; Schulman, supra note 61, at 592.
107. See Schulman, supra note 61, at 593. Based on the notion that the successor must take the good with the bad, the bad often is characterized as the less-than-fair-market-value purchase price. See, e.g., Nguyen v. Johnson Mach. & Press Corp., 104 Ill. App. 3d 1141, 433 N.E.2d 1104 (1982).
108. Kettering, supra note 56, at 775; Schulman, supra note 61, at 593. If actual liability exceeds the discounted expected liability, the successor paid more for the predecessor than it was worth. For detailed examples, see id. at 776, n. 88.
compensation should come from the actual wrongdoer and not an "innocent" third party. Also, a need exists for finality in awarding damages for claims against corporations so as not to "stymy" the transferability of assets.\textsuperscript{109} The problems in estimating and anticipating future damages, which cause uncertainty and difficulty in valuing the corporate predecessor, create additional doubts concerning the propriety of imposing liability on successors.\textsuperscript{110}

Despite arguments disfavoring corporate successor liability, the policy justifications constitute a strong basis for continuing, if not expanding, successor liability for product-related injuries—at least to the extent of assessing these companies for compensatory damages. The question remaining is whether these policies extend so far as to justify penalizing the successor for a predecessor's wrongdoings in the form of punitive damage liability.

IV. Merging Theories of Successor Liability With the Imposition of Punitive Damages: Are the Policies Behind Each Theory Reconcilable?

An issue confronting courts frequently, primarily in the context of asbestos and other mass tort litigation, is whether traditional successor liability theories can and should be extended to include recovery of punitive damages. Courts will find little precedent that will help them resolve this issue. Nevertheless, because of the influx of mass tort claims, courts can anticipate that this issue will arise more often in the near future.

- A. Theories Upon Which Successors Have Been Held Liable for Punitive Damages

The courts confronted with claims for punitive damages against successors generally have extended traditional theories of successor liability to cover both compensatory and punitive damages.\textsuperscript{111}

\textsuperscript{110} See id. at 1562.
\textsuperscript{111} A few jurisdictions imposed punitive damages on successors without fully justifying their decisions. See, e.g., Investor's Preferred Life Ins. Co. v. Abraham, 375 F.2d...
1. Merger Agreement and Statutory Merger

The clearest situation in which punitives should be imposed on a successor corporation occurs when the successor contractually assumes all liabilities, duties, and obligations of its predecessor. The courts in the Celotex asbestos cases have been fairly consistent, with the exception of cases discussed later, in holding that the acquisition between Celotex Corporation and Panacon amounted to a merger in which the successor contractually assumed all liabilities, including punitive damages claims. In Celotex v. Pickett112 the court held that imposing liability met both the deterrence and punishment purposes of punitive damages.113 Certain cases that preceded Pickett shed further light on the reasons and justifications for allowing punitive recovery. For example, in Krull v. Celotex114 the court reasoned:

Corporations are largely the molders of their own destinies in acquisition transactions: They may buy assets without assuming liabilities, they may buy stock and preserve the acquired company as a subsidiary (insulating the parent from subsidiary liabilities), they may engage in upstream or downstream mergers, they may consolidate — there is no need to ring all the changes with which a knowledgeable corporate practitioner is familiar.115

The court suggested that the buyer is in the best bargaining po-

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112. 490 So. 2d 35 (Fla. 1986) (merger agreement whereby all debts, liabilities, and duties of predecessor were enforceable against successor, coupled with Florida merger statute, Fl. STAT. § 607.231(3) (1983), imposed direct, not vicarious, liability on successor).

113. See id. at 38.

114. 611 F. Supp. 146 (N.D. Ill. 1985) (court held that successor unconditionally assumed all liabilities according to the merger agreement).

115. Id. at 149.
sition and can negotiate and choose the avenue he wishes to pursue, taking into consideration all liabilities that may be attached to the transaction. Thus, when the buyer and seller are dealing at arm’s length and the merger agreement clearly states that the buyer will assume all liabilities, the buyer is treated essentially as a purchaser with notice of present and future claims against the predecessor. Imposing liability for punitive damages merely effectuates the market transaction into which the parties entered.

In *Wall v. Owens Corning Fiberglass Corp.* the successor-defendant argued that punitive damages should not be awarded against it for the transgressions of its predecessor-in-interest. Moreover, he paralleled the award to one against the estate of a deceased wrongdoer. The court held that the transferee corporation could not escape liability for three reasons. First, the corporation expressly or impliedly assumed liability. Second, tort claims include punitive damages. Finally, Texas law permits awards of punitive damages against asbestos manufacturers. Accordingly, the court again held Celotex liable for punitive damages.

Several other courts have imposed liability for punitive damages, using similar reasoning, merely by extending the traditional merger/consolidation/continuation exceptions to allow recovery for punitive damages. For example, in *Hanlon v. Johns-Manville Sales Corp.*, the court held that if the defendant could show that at some point punitive damages were being used merely to compensate the victim and that further awards would not promote the goal of punitive damages, it would recon-

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116. 602 F. Supp. 252 (N.D. Tex. 1985) ("The acquiring corporation cannot accept the good without the bad, absent an unlikely agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo."). Id. at 255.
117. See id. at 255.
118. See id. at 255-56.
119. See id.
121. 599 F. Supp. at 376.
sider the decision.\textsuperscript{122} In all the decisions, the courts considered whether the purposes of punitive damages were furthered by imposing liability; this important consideration must not be overlooked.

2. \textit{Mere Continuation}

The court in \textit{Brotherton v. Celotex Corp.}\textsuperscript{123} used the mere continuation theory,\textsuperscript{124} citing both \textit{Martin v. Johns-Manville Corp.}\textsuperscript{125} and \textit{Wilson v. Fare Well Corp.}\textsuperscript{126} for the provisions underlying each theory. The court held that the \textit{Wilson} continuation test “would assist our courts in striking a fair balance between an individual’s recovery and a corporation’s liability in situations where the actual wrongdoer no longer exists and the successor is sufficiently connected to the culpable conduct.”\textsuperscript{127} The two combined theories furthered the purposes for imposing punitive damages; therefore, courts could use them to determine if punitive damages were recoverable against the successor corporation.\textsuperscript{128}

3. \textit{Degree of Identity}

In \textit{Martin v. Johns-Manville Corp.}\textsuperscript{129} the court held that punitive damages were recoverable if the plaintiff could show “such a degree of identity of the successor with its predecessor as to justify the conclusion that those responsible for the reck-

\textsuperscript{122} See id. at 381.
\textsuperscript{124} See supra notes 83-86 and accompanying text.
\textsuperscript{126} 140 N.J. Super. 476, 356 A.2d 458 (Ct. Law 1976). In \textit{Wilson} the court found both a de facto merger and a complete continuation of the selling corporation’s business for two reasons: (1) the seller sold all its inventory, machinery, patents, buildings, trademarks, and good will; and (2) the buyer paid half the purchase price in stock, assumed most of the seller’s contractual and property liability, and employed all management and personnel.
\textsuperscript{127} \textit{Brotherton}, 202 N.J. Super. at 157, 493 A.2d at 1341.
\textsuperscript{128} \textit{Id.} at 158, 493 A.2d at 1342.
\textsuperscript{129} 322 Pa. Super. 348, 469 A.2d 655 (1983), vacated, 508 Pa. 154, 494 A.2d 1088 (1985). Although \textit{Wilson} has a complicated procedural history and the decision to vacate was based on the insufficiency of evidence to support apportionment of damages, the vacation was with respect to the Superior Court’s affirmance of the trial court’s denial of a new trial. The court remanded the case for a new trial limited to the issue of damages.
less conduct of the predecessor will be punished, and the successor will be deterred from similar conduct.” 130 If a change in corporate identity was not accompanied by a major change in the predecessor’s shareholders, officers, directors, and management, punitives were allowed.131 The court determined that the issue of a sufficient degree of identity must be resolved on a case-by-case basis.132 Following a lengthy discussion of punitive damages in products liability cases, the court responded to the criticisms made by Judge Friendly in Roginsky v. Richardson-Merrell, Inc. 133 and held that allowing punitive damages was proper under the circumstances.134 The manufacturing corporations appealed,135 and the court held that the conduct described by the worker did not demonstrate the culpable mental state necessary to prove conduct that would permit punitive damages.136 The court expressly excluded consideration of the “Superior Court’s treatment of the issue of the circumstances under which a successor corporation may be held liable in punitive damages for outrageous acts of its predecessor.” 137 Therefore, the appellate court left the “degree of identity” standard intact, and that standard continues to be a method for determining successor liability for punitive damages.

Whether courts label the theory a “continuation” or “degree of identity,” the result has been the same: the successor corporation is so similar, if not identical, to its predecessor in terms of corporate composition that the basic identity is virtually unchanged. Since one corporation is merely a “continuation” of the other, the courts have justified imposing punitive damages on either the predecessor or successor if the punishment and deterrence goals are satisfied.

4. De Facto Merger

The court in Marks v. Minnesota Mining & Manufacturing
used the de facto merger theory to allow recovery for punitive damages against a successor that exchanged stock for all of the predecessor's business assets and goodwill. The predecessor agreed to dissolve as soon as possible. The court expressly declined to follow In re Related Asbestos Cases and stated that the form of the acquisition dictated what liabilities descended, not the similarity or continuity of the predecessor's product line. The court listed five questions to consider in determining whether the transaction, cast in the form of a sale of assets, achieved the same practical results as a merger:

(1) Was the consideration paid solely stock of the purchaser or its parent;
(2) did the purchaser continue the same enterprise after the sale;
(3) did the shareholders of the seller become shareholders of the purchaser;
(4) did the seller liquidate;
(5) did the buyer assume the liabilities necessary to carry on the business of the seller?

The court focused on whether the reorganization amounted to a merger. The court disposed of that issue by holding that "all the indicia of a merger [were] present" and presumed punitive damages thereafter.

B. Theories Upon Which Courts Have Denied Recovery of Punitive Damages Against Successors

A minority of jurisdictions have held that punitive damages were not recoverable against a corporate successor. For example, a California court decided a case in favor of Celotex Corporation, the same defendant that was held liable in cases previously

139. See id. at 1434, 232 Cal. Rptr. at 596.
141. See Marks, 187 Cal. App. 3d at 1435, 232 Cal. Rptr. at 597.
142. Id. at 1436, 232 Cal. Rptr. at 598.
143. Id. at 1438, 232 Cal. Rptr. at 599. Both reorganizations were mergers, for all intents and purposes; thus, all liabilities, including punitive damages of the subsidiary, were transferred to the surviving corporation. The court offered no further justification.
discussed. In *In re Related Asbestos Cases* the court chose not "to expand the aegis of punitive damage liability in the context of mass product liability litigation." The court considered the theories that permit the recovery of punitives and held the company not liable.

The court rejected the product-line theory although Celotex continued several of its predecessor's product lines and held that this action did not create an issue of fact to preclude summary judgment on the punitive damages issue. The court distinguished the facts of *Moe v. Transamerica Title Insurance Co.* and reinforced California's restrictive law in identifying the party responsible for the wrong. The court held that Celotex was an ongoing concern and not a continuation of its predecessor for several reasons: it purchased the stock of its predecessor; it continued to operate under its former board and officers; and none of the predecessor-shareholders became shareholders of the successor. The court reasoned that the successor was doing nothing to perpetuate the alleged malicious conduct of the predecessor and, therefore, no award of punitives was warranted.

The court next addressed the agency theory and held that although the successor had retained several of the predecessor's employees, "this fact alone, without evidence of the employee's malicious conduct, without evidence of [the successor's] knowledge thereof, and without evidence that [the successor] was not a separate and distinct corporate entity" did not create an issue of fact concerning ratification of the conduct. Thus, the de-

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144. See supra notes 112-114 and accompanying text.
146. Id. at 823 (emphasis in original).
147. The court stated three theories upon which a successor corporation may be liable for punitive damages:
   (1) under the doctrine of *Ray v. Alad Corp.*, [19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977)];
   (2) under the principles embodied in *Moe v. Transamerica Title Insurance Co.*, [21 Cal. App. 3d 289, 98 Cal. Rptr. 547 (1971)];
   (3) by analogy to section 349(b), that is, on the basis of the principal's knowledge, authorization or ratification of an agent's malicious act.
566 F. Supp. at 821.
148. See id. at 823.
149. 21 Cal. App. 3d 289, 98 Cal. Rptr. 547 (1971).
151. See id.
152. See id. at 824.
153. Id. at 825.
fendant’s motion for summary judgment was granted. 154

In Catasauqua Area School District v. Raymark Industries155 the court based its decision not to allow punitive damage recovery on the plaintiff’s insufficiency of evidence. 156 No evidence existed that any of the predecessor’s asbestos-containing roofing felts were present or installed in the high school. Furthermore, the plaintiff failed to present evidence that asbestos products manufactured by a successor corporation were actually used in repair work. 157 The court held that in deciding a successor’s liability, the threshold consideration is whether the plaintiff’s remedies against the original manufacturer are completely destroyed. 158 Since the predecessor corporation was still a viable corporation and was an active defendant in the litigation, the court held that imposing successor liability was unjustifiable. 159

In Drayton v. Jifee Chemical Corp.160 the successor company immediately improved the injury-causing product. Since the new management demonstrated greater concern for the consuming public, the court refused to award exemplary damages. Because the successor’s efforts were in direct contradiction with the egregious conduct of the predecessor, the court held that the imposition of punitive damages would have had no deterrent value. 161 On appeal the Sixth Circuit affirmed the finding of liability and modified certain damages awards, but left intact the decision not to award punitive damages. 162 Agreeing with the trial judge’s reliance upon improved industry standards, the

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154. See id. at 827.
156. The court granted summary judgment for the predecessor since the plaintiff’s evidence was insufficient to show outrageous conduct in selling its products for use in plaintiff’s schools or in failing to warn him of the dangers. See id. at 70.
157. See id. at 65-67.
158. See id. at 68.
159. See id. at 69. The court stated that the purpose behind the product-line exception was to provide relief to victims who otherwise would have no remedy. The court cited Schweitner v. Consolidated Rail Corp., 65 Bankr. 794 (Bankr. E.D. Pa. 1986), for the premise that when the seller is still viable, “the tort victim has not been deprived of a remedy and there is no need to impose successor liability on another corporation.” Catasauqua, 662 F. Supp. at 69 (citing Schweitner, 65 Bankr. at 803). Moreover, the court explicitly stated that if the seller ceased to exist, the successor would be held liable under either the merger or continuation exceptions to successor nonliability. See id.
161. Id. at 1098.
162. See Drayton, 591 F.2d 352 (6th Cir. 1978).
court concluded that punitive damages were not necessary as a deterrent to future misconduct.163

C. Policies Behind Choosing a Particular Form of Acquisition

Corporate purchasers consider several factors in determining how to structure the purchase of another corporation, reorganize an existing corporation, or form a new corporation. First, purchasers analyze the tax impact of acquiring the corporation. The nature of the consideration paid to the seller or shareholder determines whether a transaction qualifies as a tax-free reorganization or a wholly or partially taxed reorganization.164 Second, purchasers must consider certain corporate law considerations, such as the preservation of the seller’s net operating loss carryover and competing claims of shareholders and creditors whose interest may be affected in the transfer.165 Third, corporate reorganizers must consider the accounting consequences resulting from each type of transaction.166 Finally, reorganizers must assess legal and regulatory considerations.167 By being aware of the various consequences of each transaction, the parties can better prepare the reorganization and prevent any unexpected

163. See id. at 366. Ohio courts rejected Drayton’s interpretation of Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977), for the proposition that a manufacturer is only liable for defects in the design of a product when it was negligent in creating that design. See Birchfield v. International Harvester Co., 726 F.2d 1131 (6th Cir. 1984).


165. See Bangser & Sinanian, supra note 164, at 4.

166. See id.

167. See id. The wrath of securities regulations and the increased attention accorded hostile takeovers and leveraged buyouts has spawned legislative and judicial action. The securities laws are particularly applicable when one of the parties to a transaction is publicly held or when the transaction will include the issuance and distribution of securities. Extensive recording and filing of securities is required. See Securities Act of 1933, 15 U.S.C. § 77a-bbbb (1982); Securities Exchange Act of 1934, 15 U.S.C. § 78a-kk (1982). For a compilation of numerous articles on the subject of mergers and acquisitions, see Mergers and Acquisitions, Nat’l L.J., Feb. 8, 1988, at 21-42.
problems.

All three types of corporate reorganization — statutory merger, the asset acquisition, and the stock acquisition — have similar advantages and disadvantages. One disadvantage is the assumption of liability for legal claims brought, or about to be brought, against the predecessor. If a corporate purchaser's primary motivation is to avoid all liability for present and future products liability claims, the form of transaction might make a difference. Clearly, the surviving corporation in a statutory merger or in a stock acquisition remains liable for all the liabilities and obligations of the enterprise.

Conversely, in a pure asset acquisition the purchaser may limit assumption of liabilities in the acquisition agreement. Still, some possibility exists that a successor will be held liable for the debts and obligations of its predecessor; however, mechanisms for avoiding or minimizing this risk are available. First, the purchaser should use cash for consideration, instead of stock, to avoid imposition of liability because of the de facto merger theory of successor liability. Second, part of the purchase price should be placed in escrow in accordance with statutes governing claims against liquidated corporations. Third, the buyer should require the seller to remain in existence for as long as possible after the sale so that the seller remains a viable source from which debts can be paid. Finally, the buyer should secure indemnity agreements from the seller's shareholders and use non-negotiable promissory notes to evidence any deferred purchase price amounts.

Corporate purchasers and sellers have numerous bargaining tools for achieving the exact type of corporate form they desire and have various methods for minimizing assumption of liability prior to acquisition. Although negotiations may be complex,
"they should become a normal part of business transactions," and suitable preparations can be made to combat the possibility of unanticipated successor liabilities.

D. Methods of Effectuating the Goals of Successor Liability and Punitive Damages

Punishment and deterrence, the objectives of punitive damages, can be achieved only if the predecessor directly or indirectly bears the responsibility for punitive damages. One method of directly punishing the predecessor is a qualified version of the "degree of identity" test. A method of indirectly punishing the predecessor is a "conduit-potential" theory. Finally, a "totality of the circumstances" method, which requires the court to consider evidence on a combination of factors borrowed from various theories of successor liability, advances both the punishment and deterrence goals of punitive damages.

1. Degree of Identity

If the successor shares certain similarities with its predecessor, a court will assess punitive damages against the successor if the plaintiff advances the goals of punishment and deterrence. The degree of identity test "focuses on substance rather than emphasizing form . . . [and] asks whether enough of the predecessor effectively has been absorbed into the successor so that by punishing the successor, in effect, the predecessor is being punished." Ketterling suggests that the "degree of identity" test should be qualified because of the potential for misuse if a court misinterprets the test and holds a successor liable merely because a single culpable individual remains with the successor corporation. The "'[d]egree of identity' should be determined

177. Turner, 397 Mich. at 428, 244 N.W.2d at 883.
178. Id.
179. See Ketterling, supra note 56, at 782.
180. Id.
181. Id. at 783.
183. Ketterling, supra note 56, at 784.
184. See id. at 785 n.162. For example, Ketterling believes misuse was clear in Brotherton v. Celotex Corp., 202 N.J. Super. 148, 493 A.2d 1337 (Ct. Law 1985).
by a consideration of the degree to which shareholders, officers, directors, and management personnel of the predecessor have been incorporated into the corporate entity of the successor." The use of this qualified "degree of identity" test serves the goals of punitive damage liability because the successor is sufficiently identified with the predecessor so that the predecessor is punished. Consequently, "when potential wrongdoers witness the eventual punishment of a former wrongdoer, they will be deterred from such misconduct in the future."

2. Conduit-Potential Test

The conduit-potential test, also proposed by Ketterling, indirectly punishes the predecessor by placing responsibility in the successor to assess the amount of punitive damages possible at the time of purchase and prior to the predecessor's dissolution. In this test the purchase price is discounted by the amount of damages the successor reasonably could have foreseen, thus punishing the predecessor by reducing the amount it otherwise would have received for assets. "Lacking knowledge of its responsibility, the successor should not be held accountable for the predecessor's punitive damage liability." The conduit-potential test serves the objectives of punitive damages if an effective conduit is based on "what amount of punitive damages the successor should have been able to foresee and therefore transfer to the predecessor." The prospective use of the conduit-potential test adequately justifies the imposition of punitive damages on a successor corporation and limits such an im-

185. Ketterling, supra note 56, at 785. This test differs from the original Martin test. That test indicated that a sufficient degree of identity is found when a few shareholders, officers, directors, or management personnel continue in the successor, if those remaining were directly responsible for the misconduct. See Martin, 322 Pa. Super. at 371, 469 A.2d at 667.
186. Ketterling, supra note 56, at 785.
187. Id.
188. Id. at 786.
189. Id.
190. Id.
191. Id. at 787-88. "The plaintiff would bear the burden . . . of show[ing] that the successor may have been or should have been aware of its predecessor's misconduct and the resulting probability of punitive damages. The burden of persuasion then would be on the successor to show what amount, if any, of punitive damage liability it reasonably could have foreseen." Id.
position based on the successor’s good faith and knowledge at the time of acquisition:

It is clear that once corporations considering such transactions become aware of the possibility of successor products liability, they can make suitable preparations. Whether this takes the form of products liability insurance, indemnification agreements or of escrow accounts, or even a deduction from the purchase price is a matter to be considered between the parties. Negotiations may be complex, but, with familiarity, they should become a normal part of business transactions.192

3. Successor Liability for Punitive Damages Based on the Totality of the Circumstances

A final method of effectuating the goals of successor liability and punitive damages considers factors from several different theories: mere continuation, degree of identity, product-line, de facto merger, and conduit-potential. Because many factors of these theories overlap, courts may not need a single distinct method for imposing punitive liability on successors; they could effectively use a totality of the circumstances test.193 Courts should consider factors including, but not limited to:

(1) what “form” of transaction took place;194
(2) to what degree shareholders, officers, directors, and employees of the predecessor were incorporated into the

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   1) whether the successor had notice of the charge;
   2) ability of predecessor to provide relief;
   3) substantial continuation of business operations;
   4) use of the same plant;
   5) substantially the same work force and supervisory personnel;
   6) substantially the same job existing under the same circumstances;
   7) employer used same machines, equipments, methods of production and used similar product.
584 F. Supp. at 424.
194. If the facts clearly establish a merger, versus a pure asset acquisition, then liability is determined by the traditional nonliability rule and its explicit exceptions. See supra notes 61-66 and accompanying text.
successor;\textsuperscript{195}

(3) what business similarities exist between the predecessor and successor, for example, production of the same or similar product, maintenance of the same organizational structure, service to the same or similar customers, use of good will,\textsuperscript{196} and use of similar marketing techniques;\textsuperscript{197}

(4) what purposes and goals the companies to the transaction were attempting to achieve;\textsuperscript{198}

(5) to what extent the purchaser considered liabilities and contingencies during the negotiations process so that the purchase price clearly reflects foreseeable punitive damage liability;\textsuperscript{199}

(6) whether the objectives of punishment and deterrence are served if the court imposes punitive liability on the successor.\textsuperscript{200}

The form of transaction a corporate successor chooses is important in determining liability. In states that have statutes prescribing liability, the form of acquisition may completely dispose of the issue. As discussed previously, a pure asset acquisition

\begin{itemize}
\item \textsuperscript{195} For the elements necessary to determine a sufficient degree of identity, see supra notes 129-37 and accompanying text.
\item \textsuperscript{196} "The good will and trade name do give the successor an interest in the reputation of the predecessor for excellence in production. The revelation of past production failures injures the reputation and deprives the successor of the only benefit it has purchased. Thus, the successor has lost the benefit of its bargain." Woody v. Combustion Eng'g, Inc., 463 F. Supp. 817, 821 (E.D. Tenn. 1978).
\item \textsuperscript{197} This theory considers substantially the same factors as the product-line exception in Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). This theory, however, makes product line one factor among many to consider in determining liability.
\item \textsuperscript{198} If the facts indicate an attempt by the potentially culpable corporation to use some acquisition technique merely to escape liability, the court should consider that bad-faith purpose in determining which corporation should be punished. See Ortiz v. South Bend Lathe, 46 Cal. App. 3d 842, 120 Cal. Rptr. 556 (1975).
\item \textsuperscript{199} This factor encompasses several theories, including the market justification theory, see supra note 107, and the conduit-potential theory, see supra notes 185-89, and the notions of foreseeability, corporate valuation, bona fide purchaser, acquisitions and negotiation. The likelihood of success is greater in negotiated transactions, in which the bidder's exposure to litigation would be reduced. See S. Fraiding, STRUCTURING THE FRIENDLY DEAL 349-62 (1987).
\item \textsuperscript{200} The courts first should consider if the predecessor is still in existence and, if so, whether the predecessor is a viable entity that could bear the burden of punitive damage liability. If both factors are present, a court can best advance the goals of punitives by assessing the predecessor to the extent it has resources. Thereafter, in order to advance the punishment and deterrence goals, a court should hold both the predecessor and successor liable for punitives.
\end{itemize}
may not result in successor liability whereas stock mergers will.

The degree to which the successor incorporates the shareholders, officers, directors, and employees of the predecessor is a relevant factor because courts only will impose punitive liability if the successor can be identified sufficiently with the predecessor. The less a successor changes management and personnel when an acquisition occurs, the less the identity of the predecessor changes. The “transition” from predecessor to successor corporations essentially is a formality and may indicate an effort to avoid liability by the predecessor corporation. This factor effectively indicates whether a successor corporation’s identity has remained virtually unchanged so that punitive damage liability can and should be imposed.

The third factor, business similarities between the predecessor and successor, determines any differences in identity of the two corporations. Again, if the “identities” remain substantially the same, courts should impose punitive damages on the successor.

The goals the companies attempt to achieve reveal whether they consummated the transaction solely to avoid liability. If so, this factor alone is significant in a consideration of all the circumstances. This motive, coupled with one or more of these factors, justifies successor liability.

Prudent corporations consummating a merger or acquisition will consider both punitive and compensatory damages liability in the negotiation process. These corporations often agree to offset the purchase price by the foreseeable liability that courts may impose on the successor because of the predecessor’s past conduct. Courts should not overlook evidence of a negotiation process and the extent the purchase price reflects these liabilities. These factors may reduce or eliminate compensatory and punitive damages if evidence shows that the companies discussed and resolved the liability issue. The courts should examine what damages were foreseeable when this agreement was made and, if the plaintiff suffered damages beyond what the parties foresaw, find the corporations liable for the additional amount.

Finally, the courts obviously should weigh whether the objectives of punishment and deterrence are served if they impose punitive liability on the successors. If punitive damage liability does not punish the successor or deter its wrongful con-
duct, then the courts should not award punitive damages. If actual damages have compensated the plaintiff sufficiently, any effort to find additional liability works against the policies deeply embedded in the law of damages.

By considering each of these factors, as opposed to adopting or rejecting a particular theory of successor liability, courts are better equipped to determine the propriety of imposing punitive liability in a broad spectrum of situations. If substantial weight is given to one factor, a court may justify liability although no other factors exist if the court ultimately punishes the guilty party for his misconduct. Similarly, evidence of the mere existence of each factor taken as a whole may justify liability. Since each factor is important, a totality of the circumstances inquiry better suits the needs of both the injured plaintiff and the corporate defendants.

Presumably, corporations contemplating reorganization are sophisticated bodies capable of structuring the deal to minimize future complications. If the purchase price adequately reflects foreseeable liabilities, a court should absolve the successor from punitive damages. If the parties failed to consider future liabilities at the bargaining table or if the successor could have foreseen liabilities occurring, a court may hold the successor punitively liable. In the absence of information concerning negotiations and purchase-price valuation and if the successor in essence “absorbed” the predecessor, the successor should be liable based on one or more of the factors listed. The argument that the form of the acquisition makes no difference in determining a manufacturer's liability is legitimate. Essentially, advocates of this position argue that if the successor looks like the predecessor and smells like the predecessor — regardless of the form of corporate transaction — and if punitive damages would effectively punish the wrongdoer and deter the successor and other manufacturers similarly situated, punitive damages should be recoverable against successor corporations.

V. CONCLUSION

Punitive damages and successor liability are separate bodies

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201. See supra note 72.
of law and serve separate functions. If one attempts to merge the objectives of punitive damages — punishment and deterrence of wrongful conduct — with the grounds for imposing liability on corporate successors, certain inconsistencies arise. The few courts that have been faced with this combination of two distinct bodies of law employed theories based on factors such as continuity of officers, directors, shareholders, and employees, similarity of product-line, and similarity of business enterprise in general. In adopting these theories, the courts should not exclude one theory, at the expense of overlooking some factor embodied in that theory, that would clearly affect the imposition of liability for punitive damages. By inquiring into the totality of the circumstances on a case-by-case basis, the goals of punishing the guilty party for culpable conduct and deterring future wrongful conduct will be advanced in a fair and justifiable manner.

Lynda G. Wilson