

5-1-2010

Application of the Remedial Purpose Canon to CERCLA Successor Liability Issues after United States v. Bestfoods: Why State Corporate Law Should Be Applied in Circuits Encompassing Substantial Continuity Exception States

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Suggested Citation

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Application of the Remedial Purpose Canon to CERCLA Successor Liability Issues After *United States v. Bestfoods*: Why State Corporate Law Should Be Applied in Circuits Encompassing Substantial Continuity Exception States

LEA J. HEFFERNAN*

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I. INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ to address the pressing issue of how to deal with past and present improper hazardous waste disposal and the effects thereof.² CERCLA is unique among federal environmental statutes because of its backward-looking and tort-like structure.³ Rather than creating rules which regulate industry's behavior prospectively, CERCLA focuses on repairing past harms and allocating the costs of cleanup efforts to responsible parties.⁴ Congress designed CERCLA such that a substantial

1. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9606-9630 (2000).

2. See *Artesian Water Co. v. Gov't of New Castle County*, 659 F. Supp. 1269, 1276 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); see also Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 272 (1996).

3. See WILLIAM MURRAY TABB & LINDA A. MALONE, ENVIRONMENTAL LAW: CASES AND MATERIALS 637 (1992) (explaining that CERCLA is unlike most other federal environmental statutes because, rather than attempting to set standards for prospective industry compliance, CERCLA utilizes a tort-like, backward-looking structure in order to achieve expedited remediation of hazardous waste sites); see also Watson, *supra* note 2, at 286.

4. See *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1269-1270 (3d Cir. 1993) (observing that the purpose of the Resource Conservation and Recovery Act (RCRA) is regulatory while CERCLA's purpose is primarily remedial), *overruled on other grounds by United States v. E.I. duPont de Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 263 n.19 (3d Cir. 1992) (noting that CERCLA is remedial while RCRA is regulatory); *B.F. Goodrich Co. v. Murtha (Murtha II)*, 958 F.2d 1192, 1202 (2d Cir. 1992) (reasoning that "RCRA is preventative; CERCLA is curative"); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041 (2d Cir. 1985) (comparing CERCLA to the Clean Air Act); TABB & MALONE, *supra* note 3, at 637; see also Watson, *supra* note 2, at 286.

sum of money has been set aside in a trust fund, reserved for future remediation efforts.⁵ The Environmental Protection Agency (EPA), however, only uses money from this “superfund” as a fallback source of financing when responsible parties cannot be identified or have claimed bankruptcy.⁶ Whenever possible, the EPA exercises its authority to identify responsible parties and command them, through the issuance of an administrative order or injunctive relief, to remediate a contaminated site at their own expense.⁷ Both individuals and corporations are subject to liability under CERCLA⁸ and all responsible parties are joint and severally liable for indivisible cleanup costs.⁹

CERCLA’s unique structure is the natural result of Congress attempting to deal with very serious and immediate threats to public health and the environment.¹⁰ CERCLA’s preeminent purpose was to minimize adverse impacts on the environment and public health resulting from years of improper hazardous waste disposal.¹¹

Although CERCLA’s purposes and goals were made explicitly clear, Congress failed to fully identify the standards that courts should invoke to achieve those goals.¹² For example, Congress failed to identify, with any level of specificity, what parties would be liable for cost recovery actions under CERCLA.¹³ Despite CERCLA’s level of ambiguity on the issue, the federal courts have unanimously determined that successor corporations—

5. Internal Revenue Code, 26 U.S.C. § 9507 (2000).

6. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9622 (2000).

7. *Id.* § 9606 (naming potentially responsible “persons” under CERCLA); *id.* § 9601(21) (defining “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity,” or government entity).

8. *Id.* § 9607.

9. *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506-08 (6th Cir. 1989).

10. *See Artesian Water Co. v. Gov’t of New Castle County*, 659 F. Supp. 1269, 1276 (D. Del. 1987); *Watson, supra* note 2, at 272. For further background on CERCLA’s enactment history, see *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039 (2d Cir. 1985), *Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1172-76 (D.S.C. 1992), and *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1111-12 (D. Minn. 1982).

11. *See* S. REP. NO. 96-848, at 56 (1980) (asserting that the primary purpose for response authority authorized by Senate Bill 1480 is protection of health, welfare, and environment); *see also* *Watson, supra* note 2, at 272.

12. *See Rhodes*, 833 F. Supp. at 1174.

13. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(21) (2000). CERCLA defines a responsible “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity,” or government entity. *Id.* Therefore, the text of CERCLA does not expressly list corporate successors as potentially responsible parties or as parties responsible for response costs under the subcategory of “person.” *See* Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 460-61 (2004).

those that follow a predecessor corporation in ownership or control of property¹⁴—should be liable under CERCLA.¹⁵ The level of liability that courts should impose on those successor corporations, however, is still under debate.¹⁶

Several United States Courts of Appeals remain split regarding whether state corporate law or a federal common law should be applied when determining issues of successor liability under CERCLA.¹⁷ Those who support the creation and application of a federal common law argue that there is a need for national uniformity on this issue, which can only be achieved through the blanket application of a federal common law throughout the country.¹⁸ On the other hand, those who advocate for the application of state corporate law argue that the need for uniformity has already been satisfied because states throughout the nation have developed substantially

14. BLACK'S LAW DICTIONARY 1473 (8th ed. 2004) (defining "successor in interest").

15. See *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 649 (7th Cir. 1998); *infra* notes 196-213 and accompanying text; see also Rosenberg, *supra* note 13, at 461.

16. The majority of United States Circuit Courts of Appeal have acknowledged or taken part in the debate over whether federal common law or state corporate law should be used to determine the breadth of successor liability under CERCLA. See, e.g., *K.C. 1986 L.P. v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007); *New York v. Nat'l Serv. Indus., Inc. (Nat'l Serv. Indus. II)*, 460 F.3d 201, 206 (2d Cir. 2006); *United States v. Gen. Battery Corp.*, 423 F.3d 294 (3d Cir. 2005); *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc. (Atchison II)*, 159 F.3d 358, 363-64 (9th Cir. 1998); *N. Shore Gas*, 152 F.3d at 650-51; *Redwing Carriers, Inc., v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1246 (6th Cir. 1991).

17. See *Reade Mfg.*, 472 F.3d at 1022 (applying federal common law); *Nat'l Serv. Indus. II*, 460 F.3d at 206 (acknowledging the debate but withholding judgment as to which should be applied); *Gen. Battery*, 423 F.3d at 303-04 (applying federal common law); *Davis*, 261 F.3d at 54 (applying state corporate law); *Atchison II*, 159 F.3d at 363 (applying state corporate law); *N. Shore Gas*, 152 F.3d at 650-51 (acknowledging the debate but refusing to pick a side); *Redwing*, 94 F.3d at 1501 (applying state corporate law); *Carolina Transformer*, 978 F.2d at 837 (applying federal common law); *Anspec*, 922 F.2d at 1248 (applying state corporate law); *infra* notes 138-161.

18. See *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) (citing need for national uniformity as factor which supports the application of a federal standard); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988) ("[T]he district court must consider national uniformity; otherwise, CERCLA aims may be evaded easily by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability."); see also Jay W. Warren, Comment, *The Choice of Law Issue for Corporate Successor Liability Under CERCLA in North Shore Gas Company v. Salomon, Inc.: Another Opinion Sidesteps the Issue*, 16 J. NAT. RESOURCES & ENVTL. L. 321, 326 (2001-2002).

uniform corporate law standards for determining issues of successor liability.¹⁹

To further complicate the issue, the relationship between state corporate law and federal common law has been in flux for years.²⁰ State corporate law is substantially uniform throughout the country, with only a few exceptional outliers.²¹ Generally, states have found that successor corporations are *not liable* for the actions of predecessor corporations from which they have purchased assets.²² Nevertheless, states have developed a number of exceptions to this doctrine of asset purchaser non-liability in order to prevent savvy corporations from escaping liability through fraudulent transactions.²³ Nearly all states have adopted the four traditional exceptions to the doctrine of asset purchaser non-liability, which are (1) the purchasing corporation expressly or impliedly agrees to assume the liability, (2) the transaction amounts to a de facto consolidation or merger, (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction was fraudulently entered into to escape liability.²⁴ A majority of states throughout the country ("Majority States") have limited their corporate law to include only these four traditional exceptions.²⁵ A minority number of states ("Fifth Exception States") have adopted an additional fifth

19. See *Atchison, Topeka, and Santa Fe Ry. Co. v. Brown & Bryant, Inc.* (*Atchison I*), 132 F.3d 1295, 1300 (9th Cir. 1997), *amended and superseded by Atchison II*, 159 F.3d 358; see also *Anspec*, 922 F.2d at 1249; Warren, *supra* note 18, at 326; *infra* notes 77-87 and accompanying text.

20. See *Reade Mfg.*, 472 F.3d at 1022; *New York v. Nat'l Serv. Indus. (Nat'l Serv. Indus. I)*, 352 F.3d 682, 685-87 (2d Cir. 2003); Rosenberg, *supra* note 18, at 430, 467-68.

21. See 10 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* §§ 4880, 4892.75 (perm. ed. rev. vol. 2001) (providing outline of corporate law standards adopted by each state). The majority of states have uniformly adopted the four traditional exceptions to the doctrine of asset purchaser non-liability. *Id.*; see also Rosenberg, *supra* note 13, at 463.

22. See 15 WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 7122, 27 (perm. ed. rev. vol. 1992); see also Rosenberg, *supra* note 13, at 463.

23. *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990); see *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 651-54 (7th Cir. 1998); see also Rosenberg, *supra* note 13, at 464.

24. *Louisiana-Pacific*, 909 F.2d at 1263; see *N. Shore Gas*, 152 F.3d at 651; see also Rosenberg, *supra* note 13, at 464.

25. See *Nissen Corp. v. Miller*, 594 A.2d 564, 573 (Md. 1991); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99 (Minn. 1989); *Downtown, Inc. v. Acromental Prods., Inc.*, 347 N.W.2d 118, 124 (N.D. 1984); see also *Farmex, Inc. v. Wainwright*, 501 S.E.2d 802, 804 (Ga. 1998); *Schumacher v. Richards Shear Co.*, 451 N.E.2d 195, 198 (N.Y. 1983); *Hamaker v. Kenwel-Jackson Mach., Inc.*, 387 N.W.2d 515, 519 (S.D. 1986); *Fish v. Amsted Indus.*, 376 N.W.2d 820, 829 (Wis. 1985) (refusing to incorporate the substantial continuity exception, therein referred to as the "continuity of enterprise" exception, into state corporate law).

exception to the doctrine of asset purchaser non-liability.²⁶ This fifth exception, the substantial continuity exception,²⁷ serves to impose liability when there is substantial continuity between the predecessor and successor corporations, even when no continuity of ownership or shareholders exists.²⁸

While state corporate law has remained substantially uniform over the years, federal common law has been in flux.²⁹ When federal common law was first created for the issue of successor liability under CERCLA, it included the four traditional exceptions to the doctrine of asset purchaser non-liability, *as well as* the substantial continuity exception.³⁰ The Supreme Court's 1998 opinion in *United States v. Bestfoods*, however, suggested that the Court preferred the application of state corporate law over the creation of a general federal common law.³¹ Subsequent to this holding, many federal courts have applied a less expansive federal common law which has been limited to include *only* the four traditional exceptions to the doctrine of asset purchaser non-liability.³²

26. See *Kaeser & Blair, Inc. v. Willens*, 845 F. Supp. 1228, 1233 (N.D. Ill. 1993) (applying Illinois state law); *City Envtl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 637-38 (E.D. Mich. 1993) (applying state law and explicitly finding the substantial continuity exception applicable to CERCLA contexts); *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 785-86 (Ala. 1979); *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001); *Hoppa v. Schermerhorn & Co.*, 630 N.E.2d 1042, 1046 (Ill. App. Ct. 1994); *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 508 (Mich. 1999); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 882 (Mich. 1976); see also 10 FLETCHER ET AL., *supra* note 21, § 4892.75.

27. The "substantial continuity exception" is also referred to as the "continuity of enterprise exception" within some literature. See, e.g., JOHN MATTIONI ET AL., PENNSYLVANIA ENVIRONMENTAL LAW HANDBOOK 359 (5th ed. 1997).

28. See *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); see also *Rosenberg*, *supra* note 13, at 466.

29. See *infra* note 125-136. Compare *Carolina Transformer*, 978 F.2d at 838, 841 (holding in 1992, before *United States v. Bestfoods*, that the federal common law included the four traditional exceptions to the doctrine of asset purchaser non-liability *as well as* the substantial continuity exception), with *New York v. Nat'l Serv. Indus. (Nat'l Serv. Indus. I)*, 352 F.3d 682, 685-87 (2d Cir. 2003) (holding, after *Bestfoods*, that the federal common law no longer includes the substantial continuity exception), and *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc. (Atchison II)*, 159 F.3d 358, 364 (9th Cir. 1998) (excluding the substantial continuity exception from the federal common law). But see *K.C.1986 L.P. v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007) (refusing to rule on whether the substantial continuity exception should be applied in CERCLA cases after *Bestfoods*, but stating "there may yet be contexts in which the substantial continuity test could survive").

30. See *Carolina Transformer*, 978 F.2d at 838, 841.

31. See *United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (citing *Burks v. Lasker*, 441 U.S. 471, 478 (1979)); see also *Rosenberg*, *supra* note 13, at 431.

32. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87 (holding, after *United States v. Bestfoods*, that the federal common law no longer includes the substantial continuity exception); *Atchison II*, 159 F.3d at 364 (excluding the substantial continuity exception from the federal common law). But see *Reade Mfg.*, 472 F.3d at 1022 (refusing to rule on whether the substantial continuity exception should be applied in CERCLA cases after *United States v.*

The remedial purpose canon is a doctrine that has been consistently applied to CERCLA and other remedial statutes to provide guidance on proper judicial interpretation.³³ The remedial purpose canon, dating back to early sixteenth-century England, dictates that statutes with inherently remedial purposes shall be afforded liberal and expansive interpretation by the courts so as to properly effectuate Congress's remedial intent.³⁴ Federal courts throughout the United States have consistently determined that the remedial purpose canon is properly invoked within the CERCLA context.³⁵ Specifically, the remedial purpose canon has been frequently applied to issues determining liability in CERCLA cases.³⁶

It is true that the application of current federal common law imposes substantially the same level of liability on successor corporations, as does the application of Majority States' corporate law;³⁷ however, the state corporate law in Fifth Exception States imposes liability on a broader array of potentially responsible parties than does current federal common law through the application of the substantial continuity exception.³⁸ The reme-

Bestfoods, but stating that "there may yet be contexts in which the substantial continuity test could survive").

33. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-45 (1994) (observing that Federal Employers' Liability Act has "humanitarian purposes"); *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 628 (1978) (applying remedial purpose canon to Death on the High Seas Act after finding that statute was, by its nature, "ameliorative"); *Falk v. Brennan*, 414 U.S. 190, 205 n.3 (1973) (citing House Report which noted House approval of judicial invocation of remedial purpose canon and characterized the Fair Labor Standards Act as remedial and humanitarian); *N. Sec. Co. v. United States*, 193 U.S. 197, 359 (1904) (finding that the Sherman Act was established for the good of the public); *B.F. Goodrich Co. v. Murtha (Murtha II)*, 958 F.2d 1192, 1198, 1206 (2d Cir. 1992) (applying the remedial purpose canon in a CERCLA context); see also *Watson*, *supra* note 2, at 238.

34. See *Heydon's Case*, (1584) 76 Eng. Rep. 637, 638, (K.B.); 1 WILLIAM BLACKSTONE, COMMENTARIES *86; see also *Watson*, *supra* note 2, at 230.

35. See, e.g., *Murtha II*, 958 F.2d at 1198; *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990); *Atl. Richfield Co. v. Blosenski*, 847 F. Supp. 1261 (E.D. Pa. 1994); see also *Watson*, *supra* note 2, at 271.

36. See, e.g., *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992) (holding that successor corporations are subject to CERCLA liability provisions); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990) (finding parent corporations susceptible to liability under the statutory provisions of "owners" and "operators"); *Kelley v. E.I. duPont de Nemours & Co.*, 786 F. Supp. 1268, 1277 (E.D. Mich. 1992), *aff'd*, 17 F.3d 836, 840-44 (6th Cir. 1994) (broadly interpreting the statute of limitations applicable to CERCLA cost recovery actions); see *infra* notes 220-23, 226-36 and accompanying text; see also *Watson*, *supra* note 2, at 279-85.

37. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; *Nissen Corp. v. Miller*, 594 A.2d 564, 573 (Md. 1991); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99 (Minn. 1989); *Downtowner, Inc. v. Acrometal Prods, Inc.*, 347 N.W.2d 118, 124 (N.D. 1984); 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11.

38. See *Kaeser & Blair, Inc. v. Willens*, 845 F. Supp. 1228, 1233 (N.D. Ill. 1993); *City Envtl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 637-38 (E.D. Mich. 1993); *Andrews*

dial purpose canon, therefore, suggests that the application of state corporate law in Fifth Exception States is the most appropriate measure for effectuating Congress's remedial intent.³⁹

Part II of this article identifies the root of the problem, namely that Congress did not specify whether successor liability should be included within CERCLA's liability provisions and, if so, what standards should be used to decide those issues. Part III discusses the choice of law issue, with particular attention to the legal authority possessed by federal courts to create general federal common law, the policy arguments for and against the application of a federal common law, the status of state corporate law throughout the country, and the status of federal common law both before and after *United States v. Bestfoods*. Part IV identifies which federal circuits have decided for the application of a federal common law, which circuits have decided against it, and which circuits have declined the opportunity to address the issue up until this point. Part V provides a description of the remedial purpose canon and the basis for its application. Part VI outlines CERCLA's remedial purpose and legislative history. Part VII provides examples of how the remedial purpose canon has been consistently applied within the CERCLA context. Part VIII argues that proper application of the remedial purpose canon to the CERCLA choice of law issue commands that circuits encompassing Fifth Exception States apply state corporate law on successor liability issues. Part IX applies this argument to the United States Court of Appeals for the Seventh Circuit and discusses the implications.

II. DEFINING THE PROBLEM: A LACK OF SPECIFICITY ESTABLISHING LIABILITY STANDARDS UNDER CERCLA

While Congress clearly identified the motivations behind CERCLA's enactment,⁴⁰ it failed to identify the specific legal standards that courts should invoke in order to achieve CERCLA's remedial goals.⁴¹ CERCLA's lack of clear standards can be attributed to its rushed enactment in the few remaining days of both the Ninety-sixth Congress and the Carter Admini-

v. John E. Smith's Sons Co., 369 So. 2d 781, 785-86 (Ala. 1979); *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001); *Hoppa v. Schermerhorn & Co.*, 630 N.E.2d 1042, 1046 (Ill. 1994); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 882 (Mich. 1976).

39. See *Kaeser*, 845 F. Supp. at 1233; *City Envtl.*, 814 F. Supp. at 637-38; *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Turner*, 244 N.W.2d at 882; see also *Watson*, *supra* note 2, at 230; *infra* notes 282-92.

40. See S. REP. NO. 96-848, at 56 (1980) (asserting that the "paramount purpose" for S.1480 response authority is protection of health, welfare, and environment); Michael P. Healy, *Judicial Review and CERCLA Response Actions: Interpretative Strategies in the Face of Plain Meaning*, 17 HARV. ENVTL. L. REV. 1, 42 (1993); see also *Watson*, *supra* note 2, at 272.

41. See *Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1174 (D.S.C. 1992).

stration.⁴² In its effort to expediently enact CERCLA, Congress left many terms and provisions of the statute unspecified and undefined.⁴³ For example, Congress failed to define—with any level of specificity—who “responsible parties” would be under CERCLA and whether those parties included successors in interest.⁴⁴ Despite Congress’s failure to specify whether CERCLA would encompass the doctrine of successor liability, the federal courts have universally found that CERCLA’s remedial purpose supports a broad application of liability principles.⁴⁵ Specifically, the courts have decided that to deny the application of successor liability in CERCLA contexts would be contrary to the purposes of the statute.⁴⁶ Without a doctrine of successor liability, corporations could escape CERCLA liability by formally dissolving and subsequently reforming under a different corporate structure, free from their former liabilities.⁴⁷ Furthermore, federal courts have determined that, even assuming good faith, successor corporations are likely to have inherited the derivative economic benefits of their predecessors’ poor disposal practices and, as recipients of these benefits, they should be made to pay the costs associated with them.⁴⁸

42. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039-42 (2d Cir. 1985); *Rhodes*, 833 F. Supp. at 1172-76; *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111-12 (D. Minn. 1982); see also *Watson*, *supra* note 2, at 272.

43. See *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1246 (6th Cir. 1991) (“[Section 9607(a)] may be considered textually incomplete in the sense that it fails to spell out in so many words the universally accepted rule that a reference to liability of corporations includes successors—a rule that we conclude Congress intended to apply to the definition it used.”); see also *Rosenberg*, *supra* note 13, at 459.

44. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(21) (2000). CERCLA defines a responsible “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity,” or government entity. *Id.* Therefore, the text of CERCLA does not expressly list corporate successors as potentially responsible parties or as parties responsible for response costs under the subcategory of “person”; see also *Rosenberg*, *supra* note 13, at 460-61.

45. See *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 649 (7th Cir. 1998); *infra* notes 196-213 and accompanying text; see also *Rosenberg*, *supra* note 13, at 461.

46. See *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486 (8th Cir. 1992) (stating that corporate successor liability is such an essential element of corporate doctrine that Congress would have had to explicitly excluded successor corporations if it did not want them included under the liability provisions of CERCLA); *Anspec*, 922 F.2d at 1247 (holding that invoking the doctrine of successor liability furthers CERCLA’s two primary goals of providing swift remediation and allocating those costs to responsible parties); see also *Rosenberg*, *supra* note 13, at 461-62.

47. *Mex. Feed & Seed*, 980 F.2d at 487; see also *Rosenberg*, *supra* note 13, at 462.

48. See *Mex. Feed & Seed*, 980 F.2d at 487.

III. THE CHOICE OF LAW PROBLEM

After the courts determined that the doctrine of successor liability would apply to CERCLA, the only remaining question was whether federal courts should invoke the applicable state corporate law or fashion their own federal common law to decide issues of successor liability.⁴⁹

A. STANDARDS DEFINING THE DISCRETION OF FEDERAL COURTS TO CREATE FEDERAL COMMON LAW

Although state court judges are permitted to create common law, separation of powers and federalism doctrines limit the authority of federal courts to do the same.⁵⁰ The Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins* established the principle that federal courts are courts of limited jurisdiction, and shall not create general federal common law in the context of diversity jurisdiction.⁵¹ The Supreme Court has taken a similar position against the adoption of a general federal common law in federal question jurisdiction cases as well.⁵²

Despite the general principle that federal courts are not courts of general jurisdiction, the Supreme Court has found limited circumstances in which it would be appropriate for federal courts to create federal common

49. See *K.C.1986 L.P. v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007); *New York v. Nat'l Serv. Indus., Inc. (Nat'l Serv. Indus. I)*, 460 F.3d 201, 206 (2d Cir. 2006); *United States v. Gen. Battery Corp.*, 423 F.3d 294 (3d Cir. 2005); *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc. (Atchison II)*, 159 F.3d 358, 363 (9th Cir. 1998); *N. Shore Gas*, 152 F.3d at 650-51; *Redwing Carriers, Inc., v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992).

50. See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981); see also Rosenberg, *supra* note 13, at 425-26.

51. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); see also Rosenberg, *supra* note 13, at 426.

52. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979) (holding that general federal common law should only be created in instances where: (1) uniform application of the federal program is necessary to effectuate its purpose, (2) application of a state rule would frustrate the federal program's objectives, and (3) the application of a uniform federal rule of decision would not disrupt existing relationships based on state law); see also Rosenberg, *supra* note 13, at 429.

law.⁵³ One such situation is when federal courts create common law in order to fill gaps in legislation and thereby carry out congressional imperatives.⁵⁴

In *United States v. Kimbell Foods, Inc.*, the Supreme Court held in 1979 that “federal courts must fill the interstices of federal legislation according to their own standards,” in the absence of a congressionally mandated rule.⁵⁵ In doing so, the Court reasoned, federal courts were free either to absorb state rules or to create their own set of distinctly federal rules.⁵⁶ The Court further provided that federal courts should decide which of these two alternative options to exercise by undergoing a three-part balancing test that included consideration of (1) whether the federal program required nationally uniform application in order to effectuate its purpose, (2) whether the application of state law would frustrate the federal program’s objectives, and (3) whether the application of a uniform federal rule of decision would disrupt existing relationships based upon state law.⁵⁷

B. POLICY ARGUMENTS FOR AND AGAINST CREATING A FEDERAL COMMON LAW

It is clear that United States circuit courts have been split over whether to apply federal common law or state corporate law to determine successor liability under CERCLA.⁵⁸ There are strong policy arguments on each side of the issue which have been debated for years.⁵⁹

53. See *Texas Indus.*, 451 U.S. at 641. The Court has identified the following areas as being appropriate for the creation of federal common law rules: (1) federal proprietary interests, (2) international relations, (3) admiralty, (4) interstate disputes, (5) interstate pollution, and (6) enforcement of constitutional rights. *Id.*; see also Rosenberg, *supra* note 13, at 426-27.

54. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); see also Rosenberg, *supra* note 13, at 427.

55. *Kimbell*, 440 U.S. at 727 (internal quotations omitted); see also Rosenberg, *supra* note 13, at 428-29.

56. See *Kimbell*, 440 U.S. at 728-29; see also Rosenberg, *supra* note 13, at 429.

57. See *Kimbell*, 440 U.S. at 728-29.

58. See *K.C.1986 L.P. v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007); *United States v. Gen. Battery Corp.*, 423 F.3d 294, 298-304 (3d Cir. 2005); *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc. (Atchison II)*, 159 F.3d 358, 363 (9th Cir. 1998); *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 650-51 (7th Cir. 1998); *Redwing Carriers, Inc., v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1248 (6th Cir. 1991).

59. See *N. Shore Gas*, 152 F.3d at 650; *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993); *Louisiana-Pacific Corp. v. Asarco*, 909 F.2d 1260, 1263 n.2 (9th Cir. 1990); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988).

Advocates for a federal common law believe that there is a need for federal statutes to be uniformly applied across the nation.⁶⁰ CERCLA is an important example of a federal statute requiring uniform application. The EPA must rely on uniform and consistent decisions throughout the nation in order to anticipate the likely outcome and determine whether it should bring suits against successors in interest.⁶¹ Likewise, corporations deserve a certain level of predictability so that they may anticipate what their potential liability will be when purchasing assets from another corporation.⁶² In short, proponents of the federal common law believe that a nationally uniform standard is the only way to accomplish the goals of CERCLA in a meaningful and efficient way.⁶³

Supporters of federal common law also argue that allowing individual states to create their own distinct rules of liability would disrupt the uniformity that is so crucial to CERCLA's purpose.⁶⁴ Furthermore, they assert that such specific standards could entice individual jurisdictions to enact more lenient standards, leaving companies within their borders less exposed to CERCLA liability.⁶⁵ They are also concerned that, by lowering its standards, a state may very well entice more business into its borders.⁶⁶ Furthermore, advocates of a federal common law argue that the complexities of choosing a standard of law would only be further complicated by individual jurisdictions having different theories of law.⁶⁷ In the case of independent state standards for successor liability, the traditional choice of law question would complicate cases, fill up court dockets, cause confusion for parties involved, and diminish the level of predictability that is so important.⁶⁸ This conflict is exemplified by the United States Court of Appeals for the Seventh Circuit's 1998 decision in *North Shore Gas Co. v. Salomon, Inc.*⁶⁹ There, the court's decision to apply one of two potentially applicable state

60. See *Louisiana-Pacific*, 909 F.2d at 1263 n.2 (discussing the need for national uniformity and the threat that application of state law may frustrate CERCLA's purposes); Bradford C. Mank, *Should State Corporate Law Define Successor Liability?: The Demise of CERCLA's Federal Common Law*, 68 U. CIN. L. REV. 1157, 1175 (2000).

61. See *Louisiana-Pacific*, 909 F.2d at 1263 n.2; see also Warren, *supra* note 18, at 326.

62. See *Louisiana-Pacific*, 909 F.2d at 1263 n.2.

63. See *Lansford-Coaldale*, 4 F.3d at 1225; *Louisiana-Pacific*, 909 F.2d at 1263 n.2; *Smith Land*, 851 F.2d at 92; see also Warren, *supra* note 18, at 326.

64. See *Louisiana-Pacific*, 909 F.2d at 1263 n.2; *Smith Land*, 851 F.2d at 92; see also Warren, *supra* note 18, at 326.

65. See *Smith Land*, 851 F.2d at 92.

66. See *Louisiana-Pacific*, 909 F.2d at 1263 n.2; *Smith Land*, 851 F.2d at 92.

67. See *Lansford-Coaldale*, 4 F.3d at 1225; *Louisiana-Pacific*, 909 F.2d at 1263 n.2; *Smith Land*, 851 F.2d at 92.

68. See *Lansford-Coaldale*, 4 F.3d at 1225; *Louisiana-Pacific*, 909 F.2d at 1263 n.2; *Smith Land*, 851 F.2d at 92.

69. See 152 F.3d 642, 650 (7th Cir. 1998).

laws—that of the state of incorporation or that of the state encompassing the polluted site—might have had an impact on the ultimate outcome in the case.⁷⁰

Although the principles of efficiency and fairness appear to favor the application of a federal common law theory, many courts have found that the doctrines of separation of powers and federalism demand the application of state corporate law.⁷¹ Advocates for the application of state law point out that CERCLA lacks a textual provision pertaining to successor liability and, therefore, the issue ought to be left for the states to decide at their own discretion.⁷² This would leave each state to decide individually whether to favor businesses by lowering liability standards or whether to favor the environment by increasing corporate exposure to CERCLA liability.⁷³

Moreover, those who advocate the application of state law point to the fact that state corporate law on successor liability is largely uniform across the nation.⁷⁴ These proponents contend that if the only reason to create a federal common law is to guarantee uniformity, then this need is negated by the fact that state law is already significantly uniform.⁷⁵

C. THE STATUS OF STATE LAW ON SUCCESSOR LIABILITY

States across the nation have adopted surprisingly uniform standards for determining successor liability.⁷⁶ For example, most jurisdictions have held that merged corporations remain liable for the debts of predecessor corporations because they have theoretically benefited from the earlier cost-

70. See *id.*; see also Warren, *supra* note 18, at 326.

71. See *N. Shore Gas*, 152 F.3d at 650 (citing *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1248 (6th Cir. 1991)); *Atchison, Topeka, and Santa Fe Ry. Co. v. Brown & Bryant, Inc. (Atchison I)*, 132 F.3d 1295, 1300-01 (9th Cir. 1997), *amended and superseded by Atchison II*, 159 F.3d 358 (9th Cir. 1998); see also Warren, *supra* note 18, at 326.

72. See Jessica Demonte, *The Impact of United States v. Bestfoods on Parent Liability Under CERCLA: When a Door is Closed, Look for an Open Window*, 61 OHIO ST. L.J. 443, 476 (2000); see also Warren, *supra* note 18, at 326.

73. See NICHOLAS P. CHEREMISINOFF & MADELYN L. GRAFFIA, ENVIRONMENTAL AND HEALTH & SAFETY MANAGEMENT: A GUIDE TO COMPLIANCE 29 (1995) (observing that “enforcement attitudes” differ across states); Demonte, *supra* note 72, at 479; see also Warren, *supra* note 18, at 326.

74. See *Atchison I*, 132 F.3d at 1300; *infra* notes 77-87 and accompanying text; see also *Anspec*, 922 F.2d at 1249 (Kennedy, J., concurring); Warren, *supra* note 18, at 326.

75. See *Atchison I*, 132 F.3d at 1300; *infra* notes 77-87 and accompanying text; see also Warren, *supra* note 18, at 326.

76. See 10 FLETCHER ET AL., *supra* note 21, § 4892.75 (outlining corporate law standards adopted by each state). The majority of states have uniformly adopted the four traditional exceptions to the doctrine of asset purchaser non-liability. *Id.*; see also Rosenberg, *supra* note 13, at 463.

cutting actions.⁷⁷ The vast majority of states, however, have adopted an important exception to this general rule of successor liability.⁷⁸ The doctrine of asset purchaser non-liability provides that when "one company . . . transfers *all its assets* to another company, the latter is *not liable* for the debts and liabilities of the transferor."⁷⁹ States have established surprisingly uniform corporate law exceptions to this doctrine of asset purchaser non-liability in order to prevent companies from fraudulently evading liability.⁸⁰ The four consistently recognized exceptions impose successor liability on corporations when: (1) the purchasing corporation expressly or impliedly agrees to assume the liability, (2) the transaction amounts to a de facto consolidation or merger, (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction was fraudulently entered into to escape liability.⁸¹

A handful of states have created additional exceptions to the general rule of asset purchaser non-liability.⁸² The most significant fifth exception to the doctrine of asset purchaser non-liability is the "substantial continuity" exception.⁸³ The substantial continuity exception imposes successor liability whenever the successor corporation's business operations retain substantial continuity with those of its predecessor, regardless of whether there is continuity of ownership.⁸⁴ The substantial continuity exception acts as an ex-

77. See, e.g., *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 882 (Mich. 1976); see also Rosenberg, *supra* note 13, at 463.

78. See 15 FLETCHER, *supra* note 22, § 7122; see also *A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co.*, 836 P.2d 1034, 1039 (Ariz. Ct. App. 1992); *Ruiz v. ExCello Corp.*, 653 P.2d 415, 416 (Colo. App. 1982); *DeLapp v. Xtraman, Inc.*, 417 N.W.2d 219, 220 (Iowa 1987); *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 556 (Tex. 1981); Rosenberg, *supra* note 13, at 463.

79. Rosenberg, *supra* note 13, at 463; see 15 FLETCHER, *supra* note 22, § 7122.

80. See *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 651-654 (7th Cir. 1998); *Louisiana-Pacific Corp. v. Asarco*, 909 F.2d 1260, 1263 (9th Cir. 1990); see also Rosenberg, *supra* note 13, at 464.

81. *Louisiana-Pacific*, 909 F.2d at 1263; see *N. Shore Gas*, 152 F.3d at 651; *Phillips v. Cooper Labs., Inc.*, 264 Cal. Rptr. 311, 314 (Cal. Ct. App. 1989); see also Rosenberg, *supra* note 13, at 464.

82. See *Kaeser & Blair, Inc. v. Willens*, 845 F. Supp. 1228, 1233 (N.D. Ill. 1993); *City Env'tl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 637-38 (E.D. Mich. 1993); *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 786 (Ala. 1979); *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001); *Hoppa v. Schermerhorn & Co.*, 630 N.E.2d 1042, 1046 (Ill. App. Ct. 1994); *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 508 (Mich. 1999); *Turner*, 244 N.W.2d at 882; see also Rosenberg, *supra* note 13, at 465.

83. See Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability on Asset Purchasers*, 4 ENVTL. LAW. 435, 451-52 (1998); see also Rosenberg, *supra* note 13, at 465.

84. See *United States v. Carolina Transformer*, 978 F.2d 832, 838 (4th Cir. 1992); see also Rosenberg, *supra* note 13, at 466.

pansion of the mere continuation exception by no longer requiring a continuity of shareholders in order for liability to be carried over to the successor corporation.⁸⁵ The result of the substantial continuity exception is that it significantly increases purchasers' exposure to liability by subjecting them to liability even where they do not share common shareholders or ownership with the predecessor corporation.⁸⁶

1. *States Adopting the "Substantial Continuity" Exception ("Fifth Exception States")*

Five of the fifty states have expanded the traditional "mere continuation" exception in order to focus on continuity of business or enterprise, rather than continuity of the predecessor corporation.⁸⁷ Of these five states, four have either left the issue of whether the exception should be applied in a CERCLA context open or explicitly endorsed such an application.⁸⁸ Only one has explicitly denied the application of the substantial continuity exception within the CERCLA context.⁸⁹

In 1979, in *Andrews v. John E. Smith's Sons Co.*, the Supreme Court of Alabama adopted the substantial continuity exception.⁹⁰ In this products liability case, the court found that where there is a basic continuity between companies, the successor in interest is "estopped from denying liability to innocent third parties."⁹¹ Similarly, the Supreme Court of Alaska in *Savage Arms, Inc. v. Western Auto Supply Co.* adopted the substantial continuity

85. See Memorandum from EPA, Courtney Price, Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 11-16 (June 13, 1984), reprinted in *ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY* 265-80 (PLI 1986); see also Mank, *supra* note 60, at 1166.

86. See *Carolina Transformer*, 978 F.2d at 838; see also Rosenberg, *supra* note 13, at 466.

87. See *Kaeser*, 845 F. Supp. at 1233; *City Envtl.*, 814 F. Supp. at 637-38 (finding explicitly that the substantial continuity exception applicable to CERCLA contexts); *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Foster*, 597 N.W.2d at 508; *Turner*, 244 N.W.2d at 882; see also 10 FLETCHER ET AL., *supra* note 21, § 4892.75.

88. See *Kaeser*, 845 F. Supp. at 1233; *City Envtl.*, 814 F. Supp. at 637-38 (applying the substantial continuity exception to the CERCLA context in Michigan). *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Foster*, 597 N.W.2d at 508; *Turner*, 244 N.W.2d at 882; *Hill v. Trailmobile, Inc.*, 603 A.2d 602, 606 (Pa. Super. Ct. 1992) (adopting the product line exception, which is substantially similar to the substantial continuity exception).

89. *Action Mfg. Co. v. Simon Wrecking Co.*, 387 F. Supp. 2d 439, 459 (E.D. Pa. 2005).

90. See 369 So. 2d at 785-86.

91. See *id.* at 786.

exception in the context of a products liability case in 2001.⁹² The court held that the need to protect innocent third parties from dangers created by predecessor corporations outweighed the potentially detrimental economic impacts of adopting such a rigid standard.⁹³ The court also stated that its primary motivation for adopting the substantial continuity exception was to provide incentives for corporations to adopt responsible practices.⁹⁴

Illinois also adopted the substantial continuity exception in both the personal injury and corporate contract contexts.⁹⁵ In 1994, in *Hoppa v. Schermerhorn & Co.*, the Appellate Court of Illinois found that there was sufficient continuity between the two corporations to warrant the imposition of liability on the successor corporation.⁹⁶ The court focused its decision on the fact that the new corporation “conducted business from the same address using the same telephone number[,] managed the same property[,] employed the same staff[,] and maintained the same bank accounts” as the predecessor corporation.⁹⁷ Thus, the court’s analysis strongly supports the application of the substantial continuity exception in Illinois.⁹⁸

Additionally, while applying Illinois state law, the United States District Court for the Northern District of Illinois held in 1993, in *Kaeser & Blair, Inc. v. Willens*, that liability could be applied to a corporation that was found to be in privity of contract with a predecessor corporation, but did not necessarily share its name, location, or shareholders.⁹⁹ The court therefore applied the substantial continuity exception in assigning liability even where the formalized title and shareholder makeup of the two corporations did not remain the same.¹⁰⁰

Michigan also adopted the substantial continuity exception in two products liability cases.¹⁰¹ The Supreme Court of Michigan, in *Turner v. Bituminous Casualty Co.*, first adopted the substantial continuity exception in 1976.¹⁰² The court ultimately held that the application of the substantial

92. See 18 P.3d at 55.

93. See *id.* at 57.

94. See *id.*

95. See *Kaeser & Blair, Inc. v. Willens*, 845 F. Supp. 1228, 1232-33 (N.D. Ill. 1993); *Hoppa v. Schermerhorn & Co.*, 630 N.E.2d 1042, 1046 (Ill. App. Ct. 1994).

96. See 630 N.E.2d at 1046.

97. See *id.*

98. See *id.*

99. See 845 F. Supp. at 1233 (citing *Terminal Freezers, Inc. v. Roberts Frozen Foods, Inc.*, 354 N.E.2d 904, 908-09 (Ill. App. Ct. 1976)) (noting that a successor corporation, which performs essentially the same functions as its predecessor under a different name, is subject to the same contractual obligations as its predecessor).

100. See *id.*

101. See *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 508 (Mich. 1999); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 882 (Mich. 1976).

102. See 244 N.W.2d at 882.

continuity exception commanded that the successor be liable for injuries sustained using products produced and sold by the predecessor corporation.¹⁰³ The Supreme Court of Michigan once again acknowledged its adoption of the substantial continuity standard in 1999 in *Foster v. Cone-Blanchard Machine Co.*¹⁰⁴

Additionally, in 1993 the United States District Court for the Eastern District of Michigan in *City Environmental, Inc. v. U.S. Chemical Co.*, while invoking Michigan state law, explicitly applied the substantial continuity exception to the CERCLA context.¹⁰⁵ The court, after analyzing decisions by several other courts, ultimately determined that the substantial continuity exception was appropriately applied to the CERCLA context.¹⁰⁶ The application of the exception was justified, the court held, because the intended result was to prevent waste-producing corporations from avoiding liability through the strategic structuring of corporate transactions.¹⁰⁷

Finally, the Superior Court of Pennsylvania in *Hill v. Trailmobile, Inc.* invoked a product-line successor liability exception, which is significantly similar to the substantial continuity exception in 1992.¹⁰⁸ Nevertheless, in 2005, the United States District Court for the Eastern District of Pennsylvania, while applying Pennsylvania state law, held in *Action Manufacturing Co. v. Simon Wrecking Co.* that the substantial continuity theory was not valid in the CERCLA context.¹⁰⁹ The court cited other circuits' unwillingness to apply the substantial continuity exception in the CERCLA context¹¹⁰ and the *United States v. Bestfoods*¹¹¹ decision—discussed below—as indications that the substantial continuity exception should not be applied in the CERCLA context.¹¹² Therefore, the substantial continuity exception is not applicable to CERCLA contexts under Pennsylvania state law.¹¹³

2. States Refusing to Adopt the Substantial Continuity Exception

Although some states have embraced the principles of a substantial continuity doctrine, the majority of states that have considered it have re-

103. See *id.*

104. See 597 N.W.2d at 508.

105. See *City Envtl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 637-38 (E.D. Mich. 1993).

106. See *id.*

107. See *id.*

108. See *Hill v. Trailmobile, Inc.*, 603 A.2d 602, 603 (Pa. Super. Ct. 1992).

109. See 387 F. Supp. 2d 439, 459 (E.D. Pa. 2005).

110. See *id.* at 452.

111. See *infra* notes 129-136 and accompanying text.

112. See *Action Mfg. Co.*, 387 F. Supp. 2d at 453.

113. See *id.* at 459.

fused to adopt it.¹¹⁴ These states have provided a variety of reasons for refusing to incorporate the substantial continuity exception into the common law.¹¹⁵

In 1991, in *Nissen Corp. v. Miller*, the Maryland Court of Appeals refused to incorporate the substantial continuity exception into Maryland corporate law.¹¹⁶ The court expressed its hesitancy to impose liability without fault, and explained that this concern could not be offset by the policy motivations behind the adoption of the substantial continuity exception.¹¹⁷

Similarly, the Supreme Court of Minnesota in *Niccum v. Hydra Tool Corp.* held that liability should not be imposed on successor corporations through the application of the substantial continuity exception in 1989.¹¹⁸ In this opinion, the court noted that two of the most persuasive arguments against the application of a substantial continuity exception are that: (1) successor corporations should not be held liable for risks which they have not themselves created, and (2) any economic benefit that successor corporations might have gained through the actions of their predecessors is attenuated and remote.¹¹⁹ The Supreme Court of Nebraska, in *Jones v. Johnson Machine & Press Co.*, referenced these same arguments when deciding not to invoke the substantial continuity exception in 1982.¹²⁰

Other courts have cited more traditional reasons for refusing to absorb the substantial continuity exception into state law.¹²¹ In 1984, the Supreme Court of North Dakota, in *Downtowner, Inc. v. Acrometal Products, Inc.*, held that the policy reasons behind the substantial continuity doctrine were not significant enough to warrant such a substantial change to the traditional corporate law.¹²² Elaborating on this point, the court noted that invok-

114. See 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11 (citing to cases where the continuity of enterprise exception has been considered and rejected by Georgia, Maryland, Minnesota, Nebraska, New York, North Dakota, South Dakota, Vermont, and Wisconsin).

115. See *Nissen Corp. v. Miller*, 594 A.2d 564, 573 (Md. 1991); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99 (Minn. 1989); *Downtowner, Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118, 124 (N.D. 1984); see also *Farmex, Inc. v. Wainwright*, 501 S.E.2d 802, 804 (Ga. 1998); *Schumacher v. Richards Shear Co.*, 451 N.E.2d 195, 198 (N.Y. 1983); *Hamaker v. Kenwel-Jackson Mach., Inc.*, 387 N.W.2d 515, 519 (S.D. 1986); *Fish v. Amsted Indus.*, 376 N.W.2d 820, 829 (Wis. 1985) (refusing to incorporate the substantial continuity exception, therein referred to as the "expanded continuation" exception, into state corporate law).

116. See 594 A.2d at 573.

117. See *id.* at 574.

118. See 438 N.W.2d at 99.

119. See *id.*

120. See 320 N.W.2d 481, 484 (Neb. 1982).

121. See *Downtowner, Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118, 124 (N.D. 1984).

122. See *id.* at 124.

ing the exception would adjust the corporate law such that potential liability would not dissolve with a corporation, but would travel with the corporate assets to successor corporations.¹²³ Although successor corporations may be subject to remote economic benefits resulting from their predecessor's earlier infractions, the court was unwilling to counteract such benefits by substantially changing the traditional common law.¹²⁴

D. FEDERAL COMMON LAW ON SUCCESSOR LIABILITY AND THE IMPACT OF *UNITED STATES V. BESTFOODS*

The unique federal common law developed for the determination of successor liability in the CERCLA context has reflected many of the same principles found in state corporate law.¹²⁵ Federal courts applying federal common law ("Federal Common Law Circuits") initially interpreted it to include the four traditional state law exceptions, *as well as* the substantial continuity exception to the asset purchaser non-liability doctrine.¹²⁶ The incorporation of the substantial continuity exception into federal common law gave CERCLA a more expansive and inclusive standard of liability than would be applied in states that only encompassed the traditional four exceptions. Federal Common Law Circuits included the substantial continuity exception because it significantly furthered CERCLA's remedial goals.¹²⁷ More specifically, the substantial continuity exception supported CERCLA's objectives because: (1) it satisfied the need for a nationally uniform standard; and (2) it prevented corporations from avoiding successor liability through conveyance loopholes, which would have restricted the allocation of remediation costs to responsible parties.¹²⁸

In 1998, the United States Supreme Court in *United States v. Bestfoods* addressed the issue of when a parent corporation could be held liable under CERCLA for the actions of its subsidiary.¹²⁹ Although the case turned on the issue of *parent* liability, the Court impliedly stated its position on more general standards of liability within a lengthy footnote.¹³⁰ In the footnote, the Court refused to explicitly state a preference for the application of either

123. See *id.* at 123.

124. See *id.* at 123-24.

125. See *United States v. Carolina Transformer*, 978 F.2d 832, 838 (4th Cir. 1992).

126. See *id.* at 838, 841.

127. See Schnapf, *supra* note 83, at 439; see also Rosenberg, *supra* note 13, at 467-68.

128. See *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 650 (7th Cir. 1998) (citing *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988)); see also Rosenberg, *supra* note 13, at 467-68.

129. See 524 U.S. 51, 63-64 (1998); see also Mank, *supra* note 60, at 1159; Rosenberg, *supra* note 13, at 430.

130. See *Bestfoods*, 524 U.S. at 63-64 n.9; Mank, *supra* note 60, at 1159.

state or federal law within the successor liability context.¹³¹ Nevertheless, the Court declared that federal courts should not use gaps in CERCLA as a foundation for rejecting traditional corporate law principles.¹³² Thus, Justice Souter, who wrote the *Bestfoods* opinion, strongly suggested—but did not explicitly confirm—that traditional state corporate law (encompassing only the four traditional exceptions to the doctrine of asset purchaser non-liability) should be applied in determining indirect or derivative liability.¹³³

Many federal common law circuits have taken the *Bestfoods* holding as an indication of the Supreme Court's policy of judicial restraint and its preference for state law application in the absence of an alternate federal statutory directive or a conflict with federal law.¹³⁴ These circuits have, in recent cases, refused to apply the substantial continuity exception as part of the federal common law as a result of this holding.¹³⁵ Rather, they have opted to apply only the four traditional exceptions to the asset purchaser non-liability doctrine that have been adopted in the majority of state jurisdictions.¹³⁶

IV. CIRCUIT CHOICE-OF-LAW DECISIONS

Not surprisingly, the majority of circuits have issued decisions indicating where they stand in the choice-of-law debate.¹³⁷ The following is a brief overview of the respective positions that federal courts have taken on the CERCLA choice-of-law issue.

131. See *Bestfoods*, 524 U.S. at 63-64 n.9; Mank, *supra* note 60, at 1159.

132. See *Bestfoods*, 524 U.S. at 63; Mank, *supra* note 60, at 1159.

133. See *Bestfoods*, 524 U.S. at 63 (citing *Burks v. Lasker*, 441 U.S. 471, 478 (1979)); see also Rosenberg, *supra* note 13, at 431.

134. See *New York v. Nat'l Serv. Indus.*, (*Nat'l Serv. Indus. I*) 352 F.3d 682, 685-86 (2d Cir. 2003).

135. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc.* (*Atchison II*), 159 F.3d 358, 364 (9th Cir. 1998). *But see* *K.C.1986 L.P. v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007) (refusing to rule on whether the substantial continuity exception should be applied in CERCLA cases after *Bestfoods*, but stating that "there may yet be contexts in which the substantial continuity test could survive").

136. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364.

137. See, e.g., *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *Atchison II*, 159 F.3d at 363-64; *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 650-51 (7th Cir. 1998); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996); *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 253 (6th Cir. 1994); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1248 (6th Cir. 1991).

A. CIRCUITS THAT USE STATE LAW TO DETERMINE SUCCESSOR LIABILITY

In 1991, in *Anspec Co. v. Johnson Controls, Inc.*, the United States Court of Appeals for the Sixth Circuit decided that state law should govern the question of successor liability under CERCLA.¹³⁸ The court held that federal courts can only create federal common law when Congress has drafted a statute with general language, thereby leaving the courts with the responsibility of giving meaning to the statute, or when a federal rule is needed to protect uniquely federal interests.¹³⁹

The concurring opinion in *Anspec* also shed light on the reasons that the court preferred the application of state law over that of a general federal common law.¹⁴⁰ In his concurrence, Judge Kennedy explained that since state law was adequate to achieve the federal interest, there was no need to develop a federal common law to determine successor liability under CERCLA.¹⁴¹ Furthermore, the court stated that the predominantly uniform state law on successor liability and corporate dissolution extinguished the need for a federal common law on those issues.¹⁴²

The number of circuits adopting a position favoring the application of state corporate law increased after *Anspec* because the Supreme Court passed down several decisions which suggested that courts should default to state law in the absence of some unique federal purpose.¹⁴³

In 2001, the United States Court of Appeals for the First Circuit in *United States v. Davis* decided that the application of state law would not significantly interfere with CERCLA's fundamental purpose.¹⁴⁴ The court therefore held that federal courts should invoke state corporate law to determine successor liability issues under CERCLA.¹⁴⁵ In its discussion of the

138. See *Anspec*, 922 F.2d at 1248.

139. See *id.* at 1245; Philip G. Watson, *United States v. General Battery Corp.: The Third Circuit Applies Federal Common Law Rather Than State Law to Determine Successor Liability Under CERCLA, Despite Opposing Results in Other Circuits—But are the Splitting Circuits Really Just Splitting Hairs?*, 20 TUL. ENVTL. L.J. 219, 223-24 (2006).

140. See *Anspec*, 922 F.2d at 1248-51 (Kennedy, J., concurring); see also Watson, *supra* note 139, at 224.

141. See *Anspec*, 922 F.2d at 1249.

142. *Id.*

143. See *United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (suggesting the Court's preference for the application of state corporate law rather than federal common law); *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (holding that, absent a significant conflict between federal interest and the application of state law, courts must refrain from establishing general federal common law); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (restricting the creation of general federal common law to situations where: (1) there is a uniquely federal interest at stake, and (2) the application of state law would conflict with the federal policy or interest in question); see also Watson, *supra* note 139, at 224.

144. See *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001).

145. See *id.*

issue, the court elaborated that it was hesitant to act contrary to the Supreme Court's position that federal courts should resolve gaps or silences within federal statutes by invoking state law.¹⁴⁶

Similarly, in 1996, the United States Court of Appeals for the Eleventh Circuit determined in *Redwing Carriers, Inc. v. Saraland Apartments* that the creation of a federal common law on the issue of CERCLA successor liability was unnecessary.¹⁴⁷ The court held that, since there was no indication that state law was inadequate to achieve the goals of CERCLA, there was no imperative need to create a federal common law on the issue.¹⁴⁸

In 1998, in *Atchison, Topeka, & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, the United States Court of Appeals for the Ninth Circuit held that federal common law should encompass state corporate law principles.¹⁴⁹ In the opinion, the court explained that it saw no need for a nationally uniform successor liability standard since state law already determines whom EPA may pursue for compensation in many other instances.¹⁵⁰

B. CIRCUITS THAT USE FEDERAL COMMON LAW TO DETERMINE SUCCESSOR LIABILITY

In 2005, in *United States v. General Battery Corp.*, the United States Court of Appeals for the Third Circuit held that successor liability issues under CERCLA should be resolved through the application of a uniform federal common law.¹⁵¹ The court reasoned that no Supreme Court decision, including *Bestfoods*, had explicitly prohibited the application of federal common law to CERCLA corporate successor liability contexts.¹⁵² On the contrary, the Third Circuit articulated a *Bestfoods* interpretation which, it felt, implicitly *endorsed* the creation and application of a federal common law.¹⁵³ The Third Circuit interpreted the Supreme Court's application of hornbook principles, rather than Michigan state law, in deciding the *Bestfoods* case as an indication that CERCLA liability issues should not be resolved through the application of state law.¹⁵⁴ The court also emphasized that "a more uniform and predictable federal liability standard corresponds

146. See *id.* at 53.

147. See *Redwing Carriers, Inc., v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996).

148. See *id.* (citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979)).

149. See 159 F.3d 358, 363-64 (9th Cir. 1997).

150. See *id.* at 363.

151. See 423 F.3d 294, 303-04 (3d Cir. 2005).

152. See *id.*

153. See *id.* at 300.

154. See *id.*

with specific CERCLA objectives by encouraging settlements and facilitating a more liquid market in corporate and 'brownfield' assets."¹⁵⁵

In 1992, in *United States v. Carolina Transformer Co.*, the United States Court of Appeals for the Fourth Circuit held that the "national interest in the uniform enforcement of CERCLA and the same interest in preventing evasion by a responsible party" compel the creation of a federal common law.¹⁵⁶

Finally, the Eighth Circuit has suggested in dicta that CERCLA successor liability questions are "probably" best resolved with the application of a federal common law.¹⁵⁷ The court buttressed this statement with arguments about the need for uniform CERCLA standards and the fairness which would result from the invocation of a federal common law.¹⁵⁸ In 2007, in *K.C. 1986 Limited Partnership v. Reade Manufacturing*, the United States Court of Appeals for the Eighth Circuit reasserted its previous affirmations towards the creation and application of a federal common law.¹⁵⁹ Once again, however, the statements endorsing the application of a federal common law were made in dicta, as the vertical choice-of-law issue was not outcome-determinate within the specific fact pattern.¹⁶⁰

C. CIRCUITS THAT HAVE NOT WEIGHED IN

Although many circuits have weighed in on the great choice-of-law debate, others have succeeded in sidestepping the issue for the time being.¹⁶¹ For example, in 1998 in *North Shore Gas Co. v. Salomon, Inc.* the United States Court of Appeals for the Seventh Circuit discussed the choice-of-law issue, but refused to explicitly take a side.¹⁶² The court, recognizing its authority to identify and employ the proper form of governing law, abstained from addressing the issue because it was not briefed on appeal.¹⁶³ As a result, the court upheld the district court's application of the federal common law to the immediate case, despite leaving room for the application of state law in subsequent cases where the issue was properly before the court.¹⁶⁴ Interestingly, the court also refused to decide whether

155. *Id.* at 302.

156. 978 F.2d 832, 837 (4th Cir. 1992).

157. *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 487 n.9 (8th Cir. 1992).

158. *See id.* at 487.

159. *See* 472 F.3d 1009, 1022 (8th Cir. 2007).

160. *See id.* at 1025 n.4.

161. *See* *New York v. Nat'l Serv. Indus. (Nat'l Serv. Indus. II)*, 460 F.3d 201, 206 (2d Cir. 2006); *N. Shore Gas v. Salomon Inc.*, 152 F.3d 642, 650-51 (7th Cir. 1998).

162. *See* 152 F.3d at 650-51.

163. *See id.*

164. *See id.*

the substantial continuity exception should be applied under the federal common law after the *Bestfoods* decision.¹⁶⁵

Similarly, in 2006, in *New York v. National Service Industries, Inc.*, the United States Court of Appeals for the Second Circuit averted the issue by finding that the plaintiff's claim would fail regardless of whether state or federal standards were applied.¹⁶⁶ The court had previously held, in 1997, that federal common law should be applied to CERCLA successor liability issues.¹⁶⁷ Nevertheless, the court's justification for invoking the federal common law, that the application of inflexible state laws would undermine the goals of CERCLA, was implicitly overruled in *Bestfoods*.¹⁶⁸ As a result, the Second Circuit recognized the need for a new choice-of-law decision based on different rationale than had motivated the previous decision.¹⁶⁹ Although suggesting that the application of state law would not be unduly restrictive to the purposes of CERCLA, the court refrained from issuing a choice-of-law decision, instead opting to wait for a case in which the issue would be outcome determinative.¹⁷⁰

Thus, the various courts of appeal have revealed the complexity of this vertical choice of law issue through their various holdings, which have been anything but uniform throughout the nation.¹⁷¹ The First, Sixth, Ninth, and Eleventh Circuits have held that state corporate law should be applied to determine successor liability under CERCLA.¹⁷² On the other hand, the Third, Fourth, and Eighth Circuits have held that federal common law should resolve these liability issues.¹⁷³ Moreover, the Second and Seventh Circuits have explicitly avoided resolving the issue until it is properly before them at a later date.¹⁷⁴

165. See *id.* at 654 n.8 (holding that parties had waived the substantial continuity exception argument by failing to raise it in district court and, as such, the court need not address that issue at this time); *United States v. Bestfoods*, 524 U.S. 51 (1998).

166. See *New York v. Nat'l Serv. Indus.*, (*Nat'l Serv. Indus. II*) 460 F.3d 201, 206 (2d Cir. 2006).

167. See *B.F. Goodrich v. Betkoski*, 112 F.3d 88, 91 (2d Cir. 1997).

168. See *Nat'l Serv. Ind. II*, 460 F.3d at 207.

169. See *id.*

170. See *id.* at 209.

171. See *supra* notes 138-71 and accompanying text.

172. See *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *Atchison, Topeka, and Santa Fe Ry. Co. v. Brown & Bryant, Inc.* (*Atchison II*), 159 F.3d 358, 363-64 (9th Cir. 1998); *Redwing Carriers, Inc., v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1246 (6th Cir. 1991).

173. See *United States v. Gen. Battery Corp.*, 423 F.3d 294, 303-304 (3d Cir. 2005); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992); *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 487 n.9 (8th Cir. 1992).

174. See *New York v. Nat'l Serv. Indus.* (*Nat'l Serv. Indus. II*), 460 F.3d 201, 206 (2d Cir. 2006); *N. Shore Gas v. Salomon Inc.*, 152 F.3d 642, 650-51 (7th Cir. 1998).

V. THE REMEDIAL PURPOSE CANON

The remedial purpose canon has its origins in sixteenth-century English history, a time when statutory law was used almost exclusively to correct discrepancies or gaps in the common law.¹⁷⁵ The “mischief rule” of *Heydon’s Case* provided the basic foundation upon which the remedial purpose canon was later built.¹⁷⁶ By categorizing remedial statutes as a legislative remedy to defects in the common law, the court concluded that liberal interpretations of such statutes would provide the desirable result of undermining the mischief created within that common law.¹⁷⁷ Thus, the mischief rule endorsed the principle that statutes possessing a remedial purpose should be granted liberal and expansive interpretations by the courts in order to effectuate legislative intent.¹⁷⁸

The remedial purpose canon and its endorsement of expansive judicial interpretation were adopted by “American jurists and commentators in the nineteenth and early twentieth centuries.”¹⁷⁹ Over the years, statutory law has become increasingly prevalent in the American legal system, and the remedial purpose canon has evolved as a result.¹⁸⁰ Rather than assuming that nearly all statutes have been created to remedy defects in the common law, courts are now more selective in determining what statutes have a truly “remedial” purpose.¹⁸¹ Most courts have interpreted the term “remedial” to

175. See *Heydon’s Case*, (1584) 76 Eng. Rep. 637, 638 (K.B.) (stating that statutes were enacted to deal with “mischief[s] and defect[s] for which the common law did not provide”); see also *Watson*, *supra* note 2, at 229.

176. See *Heydon’s Case*, 76 Eng. Rep. at 638; 1 BLACKSTONE, *supra* note 34, at *86 (observing that statutes are “either declaratory of the common law, or remedial of some defects therein.”) Although Blackstone did not include the remedial purpose canon in his list of ten “rules to be observed with regard to the construction of statutes,” he did state that statutes against frauds should be “liberally and beneficially expounded.” *Id.* at *87-88. Edward Christian, an annotator from Cambridge University, made the connection between Blackstone’s encouragement of liberal interpretation of statutes against frauds and the same expansive interpretation as applied to the more generalized remedial purpose canon. *Id.* at *88 n.19; see Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583-84 (1989-90); see also *Watson*, *supra* note 2, at 230.

177. See *Heydon’s Case*, 76 Eng. Rep. at 638; 1 BLACKSTONE, *supra* note 34, at *86; see also *Watson*, *supra* note 2, at 230.

178. See *Heydon’s Case*, 76 Eng. Rep. at 638; 1 BLACKSTONE, *supra* note 34, at *86; see also *Watson*, *supra* note 2, at 230.

179. See William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 806-08 (1985); see also *Watson*, *supra* note 2, at 230.

180. See 3 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 60.02, at 60 (4th ed. 1986) (noting that courts have limited the term “remedial” to those statutes which do not impose criminal or other harsh penalties and to those statutes which are procedural in nature); see also *Watson*, *supra* note 2, at 232-33.

181. See 3 SINGER, *supra* note 180, at 60; see also *Watson*, *supra* note 2, at 233.

be limited to two categories of legislation: (1) that which is not penal or criminal in nature; and (2) that which is procedural in nature, and therefore does not affect substantive rights.¹⁸²

Beyond these limitations, courts frequently apply the remedial purpose canon to legislation that is designed to protect public health¹⁸³ and safety.¹⁸⁴ In order to make the determination of whether the remedial purpose canon would be properly applied to a particular statute, courts often look to the intrinsic nature of legislative materials and the principal theme behind their construction.¹⁸⁵ If a statute promotes the public good by establishing necessary standards, protecting vulnerable classes of people, or invoking any other method for promoting a benefit to the general welfare, then courts are likely to consider it remedial by its very nature.¹⁸⁶ Courts are likely to apply such statutes expansively in accord with the remedial purpose canon.¹⁸⁷

Courts will also look at the statute's legislative history to determine whether it fits the definition of "remedial" for the purposes of applying the remedial purpose canon.¹⁸⁸ By critically examining the context surrounding

182. See 3 SINGER, *supra* note 180, at 60; see also Watson, *supra* note 2, at 233.

183. See, e.g., *United States v. Bacto-Unidisk*, 394 U.S. 784, 798-99 (1969) (Federal Food, Drug, and Cosmetic Act); *United States v. W.R. Grace & Co.*, 429 F.3d 1224 (9th Cir. 2005) (CERCLA); *United States v. E.I. Dupont De Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005) (CERCLA); *Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 782 (8th Cir. 1991) (Perishable Agricultural Commodities Act); see also Watson, *supra* note 2, at 238.

184. See, e.g., *Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74, 83 (1942) (Motor Carrier Act); *United States v. Chi., Burlington & Quincy R.R.*, 237 U.S. 410, 413 (1915) (Safety Appliance Act); *Ass'n of Mex.-Am. Educators v. California*, 231 F.3d 572 (9th Cir. 2000) (Civil Rights Act of 1964); see Watson, *supra* note 2, at 238.

185. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-45 (1994) (observing that Federal Employers' Liability Act has "humanitarian purposes"); *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 628 (1978) (applying remedial purpose canon to Death on the High Seas Act after finding that statute was, by its nature, "ameliorative"); *Falk v. Brennan*, 414 U.S. 190, 205 n.3 (1973) (citing House Report that noted House approval of judicial invocation of remedial purpose canon and characterized the Fair Labor Standards Act as remedial and humanitarian); *N. Sec. Co. v. United States*, 193 U.S. 197, 359 (1904) (finding that the Sherman Act was established for the good of the public); see also Watson, *supra* note 2, at 238.

186. See *N. Sec. Co.*, 193 U.S. at 359 (invoking the remedial purpose canon on the grounds that it is "for the good of the public" (quoting *People v. Bartow*, 6 Cow. 290 (1826))); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 102 (1990) (Stevens, J., dissenting and concurring) (applying remedial purpose canon in order to protect persons subject to employment discrimination); *St. Marys Sewer Pipe Co. v. Dir. of the U.S. Bureau of Mines*, 262 F.2d 378, 381 (3d Cir. 1959) (invoking remedial purpose canon with regard to Federal Coal Mine Safety Act because of its humane purpose); see also Watson, *supra* note 2, at 238-39.

187. See *Heydon's Case*, (1584) 76 Eng. Rep. 637, 638 (K.B.); 1 BLACKSTONE, *supra* note 34, at *86; see also Watson, *supra* note 2, at 230.

188. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 387 n.85 (1982) (citing statement by conferees that statute "is remedial legislation designed

the enactment of a bill, what the text of the statute actually puts forth, and how specific or incomplete the structure of the final statute is, courts can often infer the level of flexibility that the legislature intended them to apply to a particular statute.¹⁸⁹ Therefore, the transitory meaning of “remedial” is found somewhere entangled within the purpose, text, structure, and legislative history of a statute.¹⁹⁰

VI. CERCLA’S REMEDIAL PURPOSE AS EVIDENCED BY LEGISLATIVE HISTORY

Enacted in December of 1980, CERCLA was created to address threats posed to public health and the environment resulting from years of improper hazardous waste disposal.¹⁹¹ The legislature’s primary goal in enacting CERCLA was to protect public health and the environment from the harms associated with exposure to hazardous substances.¹⁹² This primary goal can be broken down into two separate elements: (1) providing for expedient remediation of hazardous waste sites, and (2) allocating the costs of such cleanup to responsible parties.¹⁹³ In order to ensure prompt remediation of contaminated sites, Congress created a pool of money, which has

to correct certain abuses which Congress found to exist”); see also H.R. REP. NO. 102-40, pt. 1, at 87 (1991) (“For more than a century, it has been a widely accepted principle of American law that remedial statutes, such as civil rights law, are to be broadly construed.”); Watson, *supra* note 2, at 239.

189. See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 708 n.48 (1987) (explaining that Judge Richard Posner favors judicial lawmaking when Congress has implicitly delegated to the courts the authority to fill in statutory gaps); Eric Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 651 (1987) (asserting that intentional ambiguity may be implicit delegation to court of power to make judicial law); see also Watson, *supra* note 2, at 239-40.

190. See *Merrill Lynch*, 456 U.S. at 387 n.85; H.R. REP. NO. 102-40, pt. 1, at 87-88 (1991); see also Eskridge & Frickey, *supra* note 189, at 708 n.48; Lane, *supra* note 189, at 651; Watson, *supra* note 2, at 239-40.

191. *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1276 (D. Del. 1987), *aff’d by*, 851 F.2d 643 (3d Cir. 1988); see Watson, *supra* note 2, at 272. For further background on CERCLA’s enactment history, see *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039-42 (2d Cir. 1985), *Rhodes v. Darlington*, 833 F. Supp. 1163, 1172-76 (D.S.C. 1992), and *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1111-12 (D. Minn. 1982).

192. See S. REP. NO. 96-848, at 56 (1980) (asserting that the primary purpose for response authority authorized by Senate Bill 1480 is protection of health, welfare, and environment); see also Watson, *supra* note 2, at 272.

193. See *United States v. Witco Corp. (Murtha I)*, 865 F. Supp. 245, 247 (E.D. Pa. 1994); see also *B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 94 (D. Conn. 1988) (listing prompt cleanup and allocation of costs to responsible parties as “twin goals of CERCLA”); Watson, *supra* note 2, at 273.

become known as a "Superfund," from which the EPA can withdraw funds to finance cleanup efforts.¹⁹⁴ Once the EPA has neutralized a site, CERCLA also empowers it to take legal action against all potentially responsible parties (PRPs) to compensate the government for its expenses and thereby replenish the Superfund.¹⁹⁵

Federal district and appellate courts have applied the remedial purpose canon to CERCLA cases with great consistency.¹⁹⁶ CERCLA's remedial purpose of neutralizing potentially harmful contaminated sites and forcing responsible parties, rather than the public, to fund remediation efforts, serves as the primary justification for courts to interpret the statute broadly.¹⁹⁷ The remedial purpose canon has been applied to CERCLA cases far more often than it has to cases involving other environmental statutes.¹⁹⁸ The reason for this is likely because CERCLA, unlike many federal environmental statutes, is not inherently regulatory or restrictive; rather, CERCLA is remedial.¹⁹⁹ Whereas other statutes, such as the Clean Air Act and the Resource Conservation and Recovery Act are regulatory in nature, CERCLA has a clear focus on addressing existing harms, rather than creating regulations to prevent them.²⁰⁰

In addition to CERCLA's intrinsically remedial nature, the statute's legislative history further supports the popular opinion that expansive inter-

194. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601(11), 9611 (1994); Mank, *supra* note 60, at 1161.

195. See 42 U.S.C. §§ 9601(11), 9611 (1994); Mank, *supra* note 60, at 1161.

196. See, e.g., B.F. Goodrich Co. v. Murtha (*Murtha II*), 958 F.2d 1192 (2d Cir. 1992); Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313 (11th Cir. 1990); Atl. Richfield Co. v. Blosenski, 847 F. Supp. 1261 (E.D. Pa. 1994); see Watson, *supra* note 2, at 271.

197. See United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986); see also Watson, *supra* note 2, at 286.

198. See *Ne. Pharm.*, 810 F.2d at 733 (holding that the unique backward-looking nature of CERCLA was primary reason for characterizing it as "overwhelmingly remedial"); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041 (2d Cir. 1985) (noting that "CERCLA is not a regulatory standard-setting statute such as the Clean Air Act"); see also Watson, *supra* note 2, at 286-87.

199. See TABB & MALONE, *supra* note 3, at 637 (explaining that CERCLA is unlike most other federal environmental statutes because, rather than attempting to set standards for prospective industry compliance, CERCLA utilizes a tort-like, backward-looking structure in order to achieve expedited remediation of hazardous waste sites); see also Watson, *supra* note 2, at 286.

200. *Shore Realty*, 759 F.2d at 1041 (comparing CERCLA to the Clean Air Act); see *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1269-70 (3d Cir. 1993) (observing that RCRA's purpose is regulatory while CERCLA's purpose is primarily remedial); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 263 n.19 (3d Cir. 1992) (noting that CERCLA is remedial while RCRA is regulatory); *Murtha II*, 958 F.2d at 1202 (reasoning that "RCRA is preventative; CERCLA is curative"); TABB & MALONE, *supra* note 3, at 637; see also Watson, *supra* note 2, at 286.

pretation is warranted under the remedial purpose canon.²⁰¹ CERCLA was created by combining three separate, yet somewhat overlapping, bills that were under consideration in the waning days of the Carter Administration.²⁰² Because of CERCLA's hurried enactment, Congress did not create a committee report on the final version.²⁰³ As a result, CERCLA's legislative history must be gathered from that of the three proposed bills which were ultimately molded into CERCLA's final form.²⁰⁴

A House Report accompanying one of these bills referenced the problems posed by improper hazardous waste disposal practices and the insufficiency of existing law to properly address them.²⁰⁵ Several federal courts have subsequently cited this House Report to further substantiate their holdings that CERCLA is an intrinsically remedial statute.²⁰⁶ Another persuasive element of CERCLA's legislative history is that Senate Bill 1408, which was ultimately incorporated into CERCLA, was explicitly referred to as a "remedial statute" within its legislative report.²⁰⁷ Although certain substantive elements of these bills were adjusted or removed during the process of combining them into one cohesive statute, their remedial purposes remained a fundamental element of the final product.²⁰⁸ Therefore, courts looking at CERCLA's legislative history for guidance have consistently found that it has a fundamentally remedial purpose which warrants broad judicial interpretation in favor of imposing liability.²⁰⁹

201. See *United States v. Fleet Factors Corp. (Fleet Factors III)*, 821 F. Supp. 707, 712 (S.D. Ga. 1993) (concluding, based on CERCLA's legislative history, that "CERCLA is a comprehensive remedial statute"); H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119-6125 (stating in House Report on bill H.R. 7020—one of the three bills which eventually combined to create the CERCLA statute—the need for legislation addressing improper hazardous waste disposal practices and the inadequacy of existing law to properly control it); S. REP. NO. 96-848, at 36, 37 (1980) (characterizing the legislation as "remedial" in Senate Report on bill S. 1280—one of the three bills which eventually combined to create the CERCLA statute); see also *Watson*, *supra* note 2, at 286.

202. See *Shore Realty*, 759 F.2d at 1039-42; *Rhodes v. Darlington*, 833 F. Supp. 1163, 1172-76 (D.S.C. 1992); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111-12 (D. Minn. 1982); see also *Watson*, *supra* note 2, at 290.

203. See *Rhodes*, 833 F. Supp. at 1174; see also *Watson*, *supra* note 2, at 272.

204. See *Rhodes*, 833 F. Supp. at 1174 (noting that CERCLA was the end product of the "blending of three separate bills" and that there was no committee report on the final version of the Act because of its "eleventh-hour" enactment); see also *Watson*, *supra* note 2, at 290.

205. H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119; see *Watson*, *supra* note 2, at 290.

206. See *Fleet Factors III*, 821 F. Supp. at 712; *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380-82 (8th Cir. 1989); *Watson*, *supra* note 2, at 290.

207. S. REP. NO. 96-848, at 36, 37 (1980); see *Watson*, *supra* note 2, at 290.

208. See 126 Cong. Rec. 31965 (Dec. 3, 1980) (statement of Rep. Florio).

209. See *United States v. Fleet Factors Corp. (Fleet Factors II)*, 819 F. Supp. 1079, 1083-84 (S.D. Ga. 1993); see also *Watson*, *supra* note 2, at 291.

VII. CONSISTENT APPLICATION OF THE REMEDIAL PURPOSE CANON TO CERCLA CASES

The frequency with which federal district and appellate courts have applied the remedial purpose canon to CERCLA cases is remarkable.²¹⁰ CERCLA's overarching remedial purpose—that of protecting public health and safety—has motivated these courts to interpret its textual provisions broadly in a number of different contexts.²¹¹

In particular, courts have liberally construed CERCLA provisions related to the breadth of EPA's delegated investigative power,²¹² the requisite conditions to authorize the presidentially issued administrative orders,²¹³ the scope of review courts should apply to EPA's cleanup orders,²¹⁴ and the procedural obstacles applied to private cost recovery actions.²¹⁵

Courts have also applied the remedial purpose canon with great ferocity in the context of determining PRPs and levels of liability.²¹⁶ In order

210. See, e.g., *B.F. Goodrich Co. v. Murtha (Murtha II)*, 958 F.2d 1192, 1206 (2d Cir. 1992); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990); *Atl. Richfield Co. v. Blosenski*, 847 F. Supp. 1261 (E.D. Pa. 1994); see also *Watson*, *supra* note 2, at 271.

211. See *Watson*, *supra* note 2, at 271; *infra* notes 213-16 and accompanying text.

212. See *N.J. Dep't of Env'tl. Prot. v. Briar Lake Dev. Corp.*, 736 F. Supp. 62, 66 (D.N.J. 1990) (holding that state agency need not show irreparable injury to get an access order for property abutting a landfill in order to complete landfill remediation because "CERCLA is a remedial statute which must be liberally construed"); *Watson*, *supra* note 2, at 274; see also *United States v. Charles George Trucking Co.*, 682 F. Supp. 1260, 1268 (D. Mass. 1988) (holding that government need not issue administrative order before seeking access order from courts because such a requirement would hinder Congress's effort to ensure expedient remediation).

213. See *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 192 (W.D. Mo. 1985) (interpreting "endangerment" liberally by finding that it: (1) includes not only actual harm, but also threatened and potential harms; (2) may be "imminent and substantial" even if not immediate or an emergency; and (3) may be "imminent" if all factors giving rise to it are present, even if resulting harm may not be realized for years); *Watson*, *supra* note 2, at 275.

214. See, e.g., *Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289, 292-96 (6th Cir. 1991) (finding that section 113(h) of CERCLA prevents pre-enforcement review of constitutional challenges); *United States v. Cordova Chem. Co.*, 750 F. Supp. 832, 836 (W.D. Mich. 1990) ("Allowing challenges to EPA actions prior to their implementation [would be] contrary to the central function of the Act."); see also *Watson*, *supra* note 2, at 276.

215. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("[T]he notice provisions of the original section 112(a) [do] not apply to private cost recovery actions initiated pursuant to section 107 . . ."); *Idaho v. Bunker Hill Co.*, 634 F. Supp. 800, 804-05 (D. Colo. 1985) (holding that a private party seeking cost recovery under section 112(a) of CERCLA need not comply with the 60 day waiting period found in section 112(a)); *Watson*, *supra* note 2, at 277.

216. See, e.g., *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992) (holding that successor corporations are subject to CERCLA liability provisions);

to impose CERCLA liability on another party, a plaintiff must first establish that the individual or corporate defendant falls within one of the categories of PRPs described in section 107(a).²¹⁷ In addition, the plaintiff is burdened with showing that there was a disposal of hazardous substances at a facility which resulted in a release or threatened release of hazardous materials into the environment which, in turn, caused the plaintiff to incur response costs.²¹⁸

The courts have most often invoked the remedial purpose canon when broadly construing the elements of CERCLA liability.²¹⁹ For example, courts have consistently applied the remedial purpose canon in broadly interpreting the terms “disposal,”²²⁰ “hazardous substances,”²²¹ “facility,”²²²

United States v. Kayser-Roth Corp., 910 F.2d 24, 26-27 (1st Cir. 1990) (finding parent corporations susceptible to liability under the statutory provisions of “owners” and “operators”); Kelley v. E.I. duPont de Nemours & Co., 786 F. Supp. 1268, 1277 (E.D. Mich. 1992), *aff’d* by, 17 F.3d 836, 840-44 (6th Cir. 1994) (broadly interpreting the statute of limitations applicable to CERCLA cost recovery actions); *see also* Watson, *supra* note 2, at 279-85; *infra* notes 220-23, 226-36 and accompanying text.

217. The four categories of liability listed under section 107(a) are:

- (1) the owner and operator of a vessel or facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9607(a)(1)-(4) (2002); *see also* Watson, *supra* note 2, at 280.

218. 42 U.S.C. § 9607(a) (2002); *see* Watson, *supra* note 2, at 279.

219. *See* Watson, *supra* note 2, at 279-85; *infra* notes 220-23 and accompanying text.

220. *See, e.g.*, Catellus Dev. Corp. v. United States, 34 F.3d 748, 751-52 (9th Cir. 1994); New York v. Almy Bros., Inc., 866 F. Supp. 668, 674-77 (N.D.N.Y. 1994); CPC Int’l, Inc. v. Aerojet-Gen. Corp. (CPC Int’l II), 777 F. Supp. 549, 571, 576 (W.D. Mich. 1991), *rev’d in part sub nom* United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997); *see also* Watson, *supra* note 2, at 280.

221. *See, e.g.*, Arizona v. Motorola, Inc. 774 F. Supp. 566, 573 (D. Ariz. 1991); New York v. Exxon Corp. (Exxon II), 766 F. Supp. 177, 184-85 (S.D.N.Y. 1991); New York v. Exxon Corp. (Exxon I), 744 F. Supp. 474, 487 (S.D.N.Y. 1990); *see also* Watson, *supra* note 2, at 280.

and "release."²²³ The liberal interpretation of such key terms has effectively broadened the scope of liability under CERCLA and thereby effectuated its remedial purpose to a greater extent.²²⁴

Perhaps even more importantly, courts have expansively interpreted the four categories of PRPs that may be subject to CERCLA liability.²²⁵ For example, courts have expansively interpreted the terms "owners" and "operators"—the PRP categories discussed in sections 107(a)(1) and (2)—to include parent corporations,²²⁶ successor corporations,²²⁷ dissolved corporations,²²⁸ lending institutions,²²⁹ trustees,²³⁰ lessees and sublessors,²³¹ governments and government agencies,²³² shareholders, officers, and direc-

222. See, e.g., *Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 679 (4th Cir. 1995) (holding that publicly owned treatment works are included within the term "facilities"); see also *Watson*, *supra* note 2, at 280.

223. See, e.g., *Kamb v. U.S. Coast Guard*, 869 F. Supp. 793, 798 (N.D. Cal. 1994); *Kowalski v. Goodyear Tire & Rubber Co.*, 841 F. Supp. 104, 108 (W.D.N.Y. 1994); *Rhodes v. Darlington*, 833 F. Supp. 1163, 1178 (D.S.C. 1992); *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528, 1536 (E.D. Cal. 1992); see also *Watson*, *supra* note 2, at 280.

224. See *United States v. Seymour Recycling Corp.*, 679 F. Supp. 859, 865 (S.D. Ind. 1987) (holding that section 113(j)'s limitation on judicial review of EPA's remedy selection to administrative record "serve[s] the overall purpose of CERCLA as a remedial statute designed by Congress to give the federal government 'the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal'" (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986))); see also *Watson*, *supra* note 2, at 277-78.

225. See *infra* notes 226-36 and accompanying text; see also *Watson*, *supra* note 2, at 280-81.

226. See, e.g., *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990); *In re Tutu Wells Contamination Litig.*, 846 F. Supp. 1243, 1270-71 (D.V.I. 1993); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 352-54 (D.N.J. 1991); see also *Watson*, *supra* note 2, at 281.

227. See, e.g., *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836-38 (4th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245-47 (6th Cir. 1991); see also *Watson*, *supra* note 2, at 281.

228. See, e.g., *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1150-53 (N.D. Fla. 1994); *AM Props. Corp. v. GTE Prods. Corp.*, 844 F. Supp. 1007, 1011-12 (D.N.J. 1994); *In re Tutu Wells*, 846 F. Supp. at 1275-78; *United States v. SCA Servs., Inc.*, 837 F. Supp. 946, 952-55 (N.D. Ind. 1993); *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1494-99 (D. Utah 1987); see also *Watson*, *supra* note 2, at 281.

229. See, e.g., *United States v. Fleet Factors Corp. (Fleet Factors I)*, 901 F.2d 1550, 1557 (11th Cir. 1990); see *Watson*, *supra* note 2, at 281.

230. See, e.g., *United States v. Burns*, No. C-88-94-L, 1988 WL 242553 at *1-2 (D.N.H. Sept. 12, 1988); see also *Watson*, *supra* note 2, at 281.

231. See, e.g., *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1330-34 (S.D.N.Y. 1992); see also *Watson*, *supra* note 2, at 281.

232. See, e.g., *FMC Corp. v. Dep't of Commerce*, 29 F.3d 833, 838-46 (3d Cir. 1994); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198-99 (2d Cir. 1992) (*Murtha II*); *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 731 F. Supp. 783, 787-91 (W.D. Mich. 1989) (*CPC Int'l I*); see also *Watson*, *supra* note 2, at 281.

tors,²³³ and deceased individuals.²³⁴ The courts have also used the remedial purpose canon as justification for broadly interpreting the other two categories of PRPs, “arranger[s]”²³⁵ and “transporter[s],”²³⁶ discussed in sections 107(a)(3) and (4), respectively.

Furthermore, courts have narrowly interpreted the defenses to liability referenced in section 107(b) of CERCLA, stating that limiting the scope of these defenses will better “effectuate the statute’s broad remedial purposes.”²³⁷

While narrowly construing provisions that provide an opportunity to escape from CERCLA liability, courts have simultaneously endorsed an expansive view of what response costs may be recoverable under CERCLA.²³⁸ Courts have held that broadly interpreting the statute of limitations applicable to a cost recovery action under CERCLA is “mindful of Congress’s intent that those responsible for the creation of hazardous waste sites bear the cost of clean-up of those sites.”²³⁹ Moreover, the courts have held that requiring plaintiffs to demonstrate “strict” compliance with the requirements of the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”)²⁴⁰ would frustrate CERCLA’s remedial purpose of

233. See, e.g., *Truck Components Inc. v. Beatrice Co.*, No. 94 C 3228, 1994 WL 520939 at *2-3 (N.D. Ill. Sep. 21, 1994); *Columbia River Serv. Corp. v. Gilman*, 751 F. Supp. 1448, 1453-54 (W.D. Wash. 1990); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1554, 1560-63 (W.D. Mich. 1989); see also *Watson*, *supra* note 2, at 281.

234. See, e.g., *United States v. Martell*, 887 F. Supp. 1183, 1188 (N.D. Ind. 1995); *North Carolina v. Peele*, 876 F. Supp. 733, 743 (E.D.N.C. 1995); *Steego Corp. v. Ravenal*, 830 F. Supp. 42, 46-48 (D. Mass. 1993); *Bowen Eng’g v. Estate of Reeve*, 799 F. Supp. 467, 474-75 (D.N.J. 1992), *aff’d by*, 19 F.3d 642 (3d Cir. 1994); see also *Watson*, *supra* note 2, at 281.

235. See, e.g., *Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 565 n.4 (9th Cir. 1994); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380-82 (8th Cir. 1989); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743-44 (8th Cir. 1986); *United States v. TIC Inv. Corp.*, 866 F. Supp. 1173, 1179 (N.D. Iowa 1994); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1138-40 (N.D. Fla. 1994); *KN Energy, Inc. v. Rockwell Int’l Corp.*, 840 F. Supp. 95, 98 (D. Colo. 1993); see also *Watson*, *supra* note 2, at 282.

236. See, e.g., *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 95 (3d Cir. 1994); *New York v. SCA Servs., Inc.*, 844 F. Supp. 926, 927-29 (S.D.N.Y. 1994); see also *Watson*, *supra* note 2, at 282.

237. *Reichhold Chems., Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1129 (N.D. Fla. 1995); *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528, 1539 (E.D. Cal. 1992); see also *Watson*, *supra* note 2, at 282.

238. See, e.g., *Hatco Corp. v. W.R. Grace & Co.—Conn.*, 801 F. Supp. 1309, 1332-33 (D.N.J. 1992), *vacated*, 59 F.3d 400 (3d Cir. 1995); *Amcast Indus. Corp. v. Detrex Corp.*, 779 F. Supp. 1519, 1537-38 (N.D. Ind. 1991); see also *Watson*, *supra* note 2, at 283-84.

239. *Kelley v. E.I. duPont de Nemours & Co.*, 786 F. Supp. 1268, 1277 (E.D. Mich. 1992), *aff’d by*, 17 F.3d 836, 840-44 (6th Cir. 1994); see also *Watson*, *supra* note 2, at 284.

240. 40 C.F.R. § 300.1 (1995).

encouraging expeditious cleanup and allocating those costs to PRPs.²⁴¹ Instead, courts have held that plaintiffs need only demonstrate “substantial” compliance with NCP requirements in order to recover cleanup costs under CERCLA.²⁴²

Finally, courts have liberally construed the kinds of recoverable costs for which plaintiffs may be reimbursed, including not only direct cleanup costs, but also investigatory costs, indirect costs, prejudgment interest, and governmental oversight costs.²⁴³ In sum, federal courts have overwhelmingly endorsed the application of the remedial purpose canon to CERCLA cases and, when feasible, used this application to extend the liability provisions to their broadest extent so as to encompass the greatest amount of responsible parties.²⁴⁴

VIII. IN FURTHERANCE OF THE REMEDIAL PURPOSE CANON, FEDERAL CIRCUITS ENCOMPASSING FIFTH EXCEPTION STATES SHOULD APPLY STATE LAW IN THE CERCLA LIABILITY CONTEXT

Through proper application of the remedial purpose canon, courts should afford CERCLA liability provisions the most liberal interpretation possible.²⁴⁵ In so doing, federal circuits must consider the breadth of potential liability under both state corporate law and post-*Bestfoods* federal common law.²⁴⁶ While Fifth Exception States continue to incorporate the

241. *Hatco*, 801 F. Supp. at 1332-33 (invoking remedial purpose canon to buttress finding that substantial compliance with NCP is sufficient); *Amcast*, 779 F. Supp. at 1537-38 (holding that a liberal interpretation of CERCLA’s public participation requirements was appropriate due to its remedial nature); see also *Watson*, *supra* note 2, at 284. *But see* *Channel Master Satellite Sys., Inc. v. JFD Elec. Corp.*, 748 F. Supp. 373, 382-94 (E.D.N.C. 1990) (applying more liberal “substantial compliance” standard, but nevertheless finding a lack of compliance with NCP and declining cost recovery as a result).

242. *Hatco*, 801 F. Supp. at 1332-33; *Amcast*, 779 F. Supp. at 1537-38; see also *Watson*, *supra* note 2, at 284.

243. See, e.g., *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1502-03 (6th Cir. 1989) (permitting recovery of indirect costs); *United States v. Lowe*, 864 F. Supp. 628, 631-32 (S.D. Tex. 1994) (permitting recovery of oversight costs); *HRW Sys., Inc. v. Wash. Gas & Light Co.*, 823 F. Supp. 318, 342-43 (D. Md. 1993) (permitting recovery of investigatory expenses); see also *Watson*, *supra* note 2, at 285.

244. See *Watson*, *supra* note 2, at 279; *supra* notes 199-202, 205-15.

245. See, e.g., *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, (8th Cir. 1992); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836-38 (4th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245-47 (6th Cir. 1991); see also *Watson*, *supra* note 2, at 280, 281.

246. The majority of United States Courts of Appeals have recognized the need for courts to choose between the application of state corporate law and federal common law. See, e.g., *United States v. Davis*, 261 F.3d 1, 53-54 (1st Cir. 2001); *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc. (Atchison II)*, 159 F.3d 358, 363-64 (9th Cir. 1998); *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 650 (7th Cir. 1998); *Redwing*

substantial continuity exception into their corporate law,²⁴⁷ the federal common law has been limited so as to include merely the four traditional exceptions to the doctrine of asset purchaser non-liability.²⁴⁸ Therefore, those circuits which encompass one or more Fifth Exception States should invoke state corporate law, rather than federal common law, when resolving issues of corporate successor liability under CERCLA.²⁴⁹

A. POST *UNITED STATES V. BESTFOODS*, THE APPLICATION OF STATE CORPORATE LAW IMPOSES SUBSTANTIALLY THE SAME OR MORE LIABILITY ON DEFENDANTS THAN DOES THE APPLICATION OF FEDERAL COMMON LAW

The comparative relationship between state corporate law and federal common law has been in flux since the issue of determining successor liability under CERCLA first arose.²⁵⁰ When the federal common law was first created, it included the liberal substantial continuity exception to the doctrine of asset purchaser non-liability, which had been accepted by only a few states throughout the country.²⁵¹ Meanwhile, the corporate law within Majority States had almost uniformly been limited to the adoption of the four traditional exceptions.²⁵² At this time, application of the federal com-

Carriers, Inc., v. Saraland Apartments, 94 F.3d 1489, 1501 (11th Cir. 1996); City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 253 (6th Cir. 1994); *Ansper*, 922 F.2d at 1248.

247. See *Kaeser & Blair, Inc. v. Willens*, 845 F. Supp. 1228, 1233 (N.D. Ill. 1993); *City Envtl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 637-38 (E.D. Mich. 1993) (explicitly finding the substantial continuity exception applicable to CERCLA contexts); *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 785-86 (Ala. 1979); *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001); *Hoppa v. Schermerhorn & Co.*, 630 N.E.2d 1042, 1046 (Ill. App. Ct. 1994); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 882 (Mich. 1976).

248. See *New York v. Nat'l Serv. Indus., Inc. (Nat'l Serv. Indus. I)*, 352 F.3d 682, 685-87 (2d Cir. 2003); *Atchison II*, 159 F.3d at 364.

249. See H.R. Rep. No. 102-40, pt. 1, at 87 (1991) ("For more than a century, it has been a widely accepted principle of American law that remedial statutes . . . are to be broadly construed."). Fifth Exception States invoke the substantial continuity exception in addition to the four traditional exceptions to asset purchaser non-liability. See *City Envtl.*, 814 F. Supp. at 637-38; *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Kaeser*, 845 F. Supp. at 1233; *Turner*, 244 N.W.2d at 882. On the contrary, the post-*Bestfoods* federal common law on successor liability is limited to the four traditional exceptions to asset purchaser non-liability. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364.

250. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364 (holding that federal law only includes the four traditional exceptions to the doctrine of asset purchase non-liability); see also *Rosenberg*, *supra* note 13 at 430, 467-68.

251. See *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); see also *Rosenberg*, *supra* note 13, at 467-68.

252. See *Nissen Corp. v. Miller*, 594 A.2d 564, 573 (Md. 1991); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99 (Minn. 1989); *Downtowner, Inc. v. Acrometal Prods., Inc.*,

mon law would have resulted in assigning liability to a broader array of PRPs than would have the application of Majority States' corporate law.²⁵³ On the other hand, the application of federal common law would have yielded substantially the same result as would the application of Fifth Exception States' corporate law.²⁵⁴ Thus, the federal common law at this time embodied the most liberal and expansive interpretation of CERCLA's liability provisions that could be applied.²⁵⁵ Of course, the corporate law found in Fifth Exception States was equally liberal but much more limited in its scope of application due to its containment within the jurisdictions of a mere four states.²⁵⁶ As a result, many courts opted for the application of the federal common law as a means to extend a broad scope over CERCLA's liability provisions and to have these liberal principles universally applied throughout the nation.²⁵⁷

Following the Supreme Court's holding in *United States v. Bestfoods*, however, the comparative relationship between federal common law and state corporate law underwent a major metamorphosis.²⁵⁸ Several federal courts interpreted *Bestfoods* as an indication that the federal common law should consist only of traditional corporate liability standards.²⁵⁹ As a re-

347 N.W.2d 118, 124 (N.D. 1984); *see also* *Farmex, Inc. v. Wainwright*, 501 S.E.2d 802, 804 (Ga. 1998); *Schumacher v. Richards Shear Co.*, 451 N.E.2d 195, 198 (N.Y. 1983); *Hamaker v. Kenwel-Jackson Mach., Inc.*, 387 N.W.2d 515, 519 (S.D. 1986); *Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820, 829 (Wis. 1985) (refusing to incorporate the substantial continuity exception, therein referred to as the "continuity of enterprise" exception, into state corporate law); 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11.

253. *See Nissen*, 594 A.2d at 573; *Niccum*, 438 N.W.2d at 99; *Downtowner*, 347 N.W.2d at 124; *see also* *Rosenberg*, *supra* note 13, at 467-68.

254. *See* *Rosenberg*, *supra* note 13, at 467-68; *supra* notes 75-85 and accompanying text.

255. *See Carolina Transformer*, 978 F.2d at 837-38 (holding that the federal common law at this time encompassed the four traditional exceptions *as well as* the substantial continuity exception to asset purchaser non-liability); 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11 (revealing that forty-six states have refused to include the substantial continuity exception in their state corporate law as applied to the CERCLA context); *see also* *Rosenberg*, *supra* note 13, at 467-68.

256. Only four states have invoked the substantial continuity exception, in addition to the traditional four exceptions, within the CERCLA context. *See infra* notes 75-85 and accompanying text.

257. *See* *K.C.1986 L.P. v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007); *United States v. Gen. Battery Corp.*, 423 F.3d 294, 298-304 (3d Cir. 2005); *Carolina Transformer*, 978 F.2d at 837.

258. *See* *New York v. Nat'l Serv. Indus. Inc. (Nat'l Serv. I)*, 352 F.3d 682, 685-87 (2d Cir. 2003); *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc. (Atchison II)*, 159 F.3d 358, 364 (9th Cir. 1998).

259. *See* *Nat'l Serv. Indus. I*, 352 F.3d at 685-86; *Atchison II*, 159 F.3d at 364; *Nissen Corp. v. Miller*, 594 A.2d 564, 573 (Md. 1991); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99 (Minn. 1989); *Downtowner Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118, 124 (N.D. 1984); 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11.

sult, federal circuits have subsequently applied a less liberal version of the federal common law by eliminating the substantial continuity exception and applying only the four traditional exceptions that have been adopted in majority states.²⁶⁰

The *Bestfoods* decision and its effect on the substance of the federal common law have essentially turned the tables on the implications of applying state or federal common law.²⁶¹ Now, the application of federal common law yields essentially the same level of liability as would result from the application of Majority State corporate law.²⁶² Furthermore, the only circumstance in which a more expansive form of CERCLA liability will be achieved, through the application of the substantial continuity exception, is where the corporate law of Fifth Exception States can be applied.²⁶³ Simply put, the application of federal common law to CERCLA liability issues assures a narrower scope of liability limited to the four traditional exceptions.²⁶⁴ Alternatively, the invocation of state corporate law to liability issues provides substantially the same level of liability as federal common law would in Majority States²⁶⁵ and a greater breadth of liability when applied in Fifth Exception States.²⁶⁶ Hence, the application of state corporate law necessarily imposes substantially the same²⁶⁷ or possibly more liberal²⁶⁸ standards for liability in the CERCLA context.

260. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364.

261. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364.

262. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; *Nissen*, 594 A.2d at 573; *Niccum*, 438 N.W.2d at 99; *Downtownner*, 347 N.W.2d at 124; 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11; see also Rosenberg, *supra* note 13, at 430.

263. See *Kaesar & Blair, Inc. v. Willens*, 845 F. Supp. 1228, 1233 (N.D. Ill. 1993); *City Envtl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 637-38 (E.D. Mich. 1993) (explicitly finding the substantial continuity exception applicable to CERCLA contexts); *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 785-86 (Ala. 1979); *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001); *Hoppa v. Schermerhorn & Co.*, 630 N.E.2d 1042, 1046 (Ill. App. Ct. 1994); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 882 (Mich. 1976).

264. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; see also Rosenberg, *supra* note 13, at 430.

265. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; *Nissen*, 594 A.2d at 573; *Niccum*, 438 N.W.2d at 99; *Downtownner*, 347 N.W.2d at 124; 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11; see also Rosenberg, *supra* note 13, at 430.

266. See *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Kaesar*, 845 F. Supp. at 1233; *Turner*, 244 N.W. 2d at 882; *City Envtl.*, 814 F. Supp. at 637-38.

267. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; *Nissen*, 594 A.2d at 573; *Niccum*, 438 N.W.2d at 99; *Downtownner*, 347 N.W.2d at 124; 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11; see also Rosenberg, *supra* note 13 at 430.

268. See *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Kaesar*, 845 F. Supp. at 1233; *Turner*, 244 N.W. 2d at 882; *City Envtl.*, 814 F. Supp. at 637-38.

B. COURTS SHOULD INVOKE THE REMEDIAL PURPOSE CANON WHEN DECIDING WHETHER TO APPLY FEDERAL OR STATE LAW TO CERCLA LIABILITY QUESTIONS

Federal courts have frequently applied the remedial purpose canon to CERCLA cases throughout its history.²⁶⁹ It is not difficult to ascertain the reason for this consistent application once one has investigated the purpose and history behind CERCLA.²⁷⁰

CERCLA's twin goals of expedient remediation and allocation of those costs to responsible parties are inherently remedial.²⁷¹ CERCLA's purposes fit perfectly within the intended application of the remedial purpose canon, which was created to give a more liberal effect to those statutes that possess a remedial purpose.²⁷² CERCLA's legislative history also endorses the application of the remedial purpose doctrine by revealing Congress's intent to have the statute liberally applied.²⁷³ All three bills that were ultimately combined to create CERCLA possessed a remedial purpose which was explicitly highlighted by Congress within the bills' legislative history.²⁷⁴ Furthermore, Congress left many portions of the statute unsettled, such as which standards of liability should be applied under CERCLA.²⁷⁵ Such gaps in the statute suggest that Congress did not want to limit the breadth of CERCLA's application by the use of restrictive lan-

269. See, e.g., *B.F. Goodrich Co. v. Murtha (Murtha II)*, 958 F.2d 1192 (2d Cir. 1992); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990); *Atl. Richfield Co. v. Blosenski*, 847 F. Supp. 1261 (E.D. Pa. 1994); see also *Watson*, *supra* note 2, at 271; *supra* notes 212-16, 226-36 and accompanying text.

270. See *supra* notes 191-95, 197, 205-09 and accompanying text.

271. See, e.g., *Murtha II*, 958 F.2d 1192; *Fla. Power*, 893 F.2d 1313; *Atl. Richfield*, 847 F. Supp. 1261; see *United States v. Witco Corp.*, 865 F. Supp. 245, 247 (E.D. Pa. 1994); *supra* notes 212-16 and accompanying text; see also *B.F. Goodrich Co. v. Murtha (Murtha I)*, 697 F. Supp. 89, 94 (D. Conn. 1988) (listing prompt cleanup and allocation of costs to responsible parties as "twin goals of CERCLA"); *Watson*, *supra* note 2, at 271, 273.

272. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986); see also *Watson*, *supra* note 2, at 286.

273. See H.R. REP. NO. 96-1016, pt. 1, at 17 (1980); S. REP. NO. 96-848, at 36-37 (1980); see also *Watson*, *supra* note 2, at 290.

274. See H.R. REP. NO. 96-1016, pt. 1, at 17 (1980); S. REP. NO. 96-848, at 36-37 (1980); see also *Watson*, *supra* note 2, at 290.

275. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(21) (2000). CERCLA defines a responsible "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity," or government entity. *Id.* Therefore, the text of CERCLA does not expressly list corporate successors as potentially responsible parties or as parties responsible for response costs under the subcategory of "person." See *Rosenberg*, *supra* note 13, at 460-61.

guage, but rather intended that the courts afford it expansive interpretation and application as cases arose.²⁷⁶

Therefore, courts should follow the precedent before them and continue to apply the remedial purpose canon to CERCLA cases.²⁷⁷ The purpose, structure, and legislative history of the statute dictate that a liberal interpretation be given to the statute.²⁷⁸ In fact, the need for expansive interpretations of CERCLA liability issues is just as important, if not more so, today as it was when CERCLA was first enacted.²⁷⁹ As informed corporate lawyers have provided their clients with loophole measures to avoid liability provisions, it becomes even more necessary for courts to broadly impose liability on responsible parties.²⁸⁰ Therefore, it is not only appropriate, but also imperative, that courts apply the remedial purpose canon to CERCLA liability cases now and in the future.²⁸¹

C. THE REMEDIAL PURPOSE CANON, PROPERLY APPLIED, COMPELS FEDERAL CIRCUITS ENCOMPASSING FIFTH EXCEPTION STATES TO APPLY STATE LAW

Proper application of the remedial purpose canon demands that federal courts apply the choice of law that will result in the exercise of the broadest possible liability standards.²⁸² After the *Bestfoods* decision, the application of federal common law no longer had the effect of broadening CERCLA's

276. See Eskridge & Frickey, *supra* note 189, at 708 n.48 (explaining that Judge Richard Posner favors judicial lawmaking when Congress has implicitly delegated to the courts the authority to fill in statutory gaps); Lane, *supra* note 189, at 651 (asserting that intentional ambiguity may be implicit delegation to court of power to make judicial law); see also Watson, *supra* note 2, at 239-40.

277. See, e.g., *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992) (holding that successor corporations are subject to CERCLA liability provisions); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991) (finding parent corporations susceptible to liability under the statutory provisions of "owners" and "operators"); *Kelley ex. rel. State of Mich. v. E.I. duPont de Nemours & Co.*, 786 F. Supp. 1268, 1277 (E.D. Mich. 1992), *aff'd*, 17 F.3d 836, 840-44 (6th Cir. 1994) (broadly interpreting the statute of limitations applicable to CERCLA cost recovery actions); see also Watson, *supra* note 2, at 279-85; *supra* notes 220-23, 226-36 and accompanying text.

278. See H.R. REP. NO. 96-1016, pt. 1, at 17 (1980); S. REP. NO. 96-848, at 36-37 (1980); see also Watson, *supra* note 2, at 271-72, 290.

279. See *Mex. Feed & Seed*, 980 F.2d at 487; see also Rosenberg, *supra* note 13, at 432, 462.

280. See *Mex. Feed & Seed*, 980 F.2d at 487; see also Rosenberg, *supra* note 13, at 432, 462.

281. See *Mex. Feed & Seed*, 980 F.2d at 487; see also Rosenberg, *supra* note 13, at 432, 462.

282. See, e.g., *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836-38 (4th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 125-476 (6th Cir. 1991); see also Watson, *supra* note 2, at 280-81.

scope of liability through the invocation of the substantial continuity exception.²⁸³ In fact, the application of federal common law today would effectively *limit* the breadth of liability that would have otherwise been achieved through the application of state corporate law in Fifth Exception States.²⁸⁴ Even when applied in Majority States, the federal common law would be ineffective in providing a more expansive set of CERCLA liability standards.²⁸⁵ Therefore, the remedial purpose canon can only be realized through the application of state corporate law in Fifth Exception States.²⁸⁶

The choice between federal common law and state corporate law becomes moot in circuits that consist exclusively of Majority States.²⁸⁷ In those circuits, application of either choice of law would result in substantially the same liability standard—that of the four traditional exceptions.²⁸⁸ However, those circuits that encompass Fifth Exception States can only truly effectuate the remedial purpose canon through the application of state corporate law.²⁸⁹ To do so would effectively broaden the level of CERCLA liability in those Fifth Exception States within its jurisdiction²⁹⁰ and leave,

283. See *New York v. Nat'l Serv. Indus., Inc. (Nat'l Serv. Indus. I)*, 352 F.3d 682, 685-87 (2d Cir. 2003); *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc. (Atchison II)*, 159 F.3d 358, 364 (9th Cir. 1998).

284. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; *Kaesler & Blair, Inc. v. Willens*, 845 F. Supp. 1228, 1233 (N.D. Ill. 1993); *City Env'tl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 637-38 (E.D. Mich. 1993); *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 785-86 (Ala. 1979); *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001); *Hoppa v. Schermerhorn & Co.*, 630 N.E.2d 1042, 1046 (Ill. App. Ct. 1994); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 882 (Mich. 1976).

285. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; *Nissen Corp. v. Miller*, 594 A.2d 564, 573 (Md. 1991); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99 (Minn. 1989); *Downtowner, Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118, 124 (N.D. 1984); 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11.

286. *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Kaesler*, 845 F. Supp. at 1233; *Turner*, 244 N.W.2d at 882; *City Env'tl.*, 814 F. Supp. at 637-38; see also *Watson*, *supra* note 2, at 230.

287. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; *Nissen*, 594 A.2d at 573; *Niccum*, 438 N.W.2d at 99; *Downtowner*, 347 N.W.2d at 124; 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11; *Rosenberg*, *supra* note 13 at 430.

288. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; *Nissen*, 594 A.2d at 573; *Niccum*, 438 N.W.2d at 99; *Downtowner*, 347 N.W.2d at 124; 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11; see also *Rosenberg*, *supra* note 13, at 430.

289. *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Kaesler*, 845 F. Supp. at 1233; *Turner*, 244 N.W.2d at 882; *City Env'tl.*, 814 F. Supp. at 637-38; see also *Watson*, *supra* note 2, at 230.

290. See *Kaesler*, 845 F. Supp. at 1233; *City Env'tl.*, 814 F. Supp. at 637-38; *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Turner*, 244 N.W.2d at 882.

but not limit, the current level of liability applied in Majority States.²⁹¹ Thus, circuits which encompass Fifth Exception States should, in furtherance of the remedial purpose canon, invoke state corporate law for the resolution of CERCLA liability issues.²⁹²

IX. APPLICATION: WHAT THIS MEANS FOR THE SEVENTH CIRCUIT

The United States Court of Appeals for the Seventh Circuit encompasses the states of Illinois, Indiana, and Wisconsin. Illinois has incorporated the substantial continuity exception into its state personal injury and corporate contract laws.²⁹³ Thus, the application of the federal common law in the Seventh Circuit would effectively limit the breadth of successor liability in Illinois by circumventing the application of the substantial continuity exception that would have otherwise applied under state law.²⁹⁴ The Seventh Circuit has issued a decision in which it discusses the choice of law question, but issues no determinative position on the issue.²⁹⁵ Nonetheless, the Seventh Circuit should issue a choice-of-law decision by following the long line of precedent that provides for the application of the remedial purpose canon to CERCLA liability issues.²⁹⁶

If the Seventh Circuit chooses to apply the federal common law, the four traditional exceptions will be the only standards for invoking successor liability in all three states.²⁹⁷ Alternatively, if the Seventh Circuit applies state corporate law in each respective state, then the four traditional exceptions will be employed in all three states; however, liability would be ex-

291. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364; *Nissen*, 594 A.2d at 573; *Niccum*, 438 N.W.2d at 99; *Downtowner*, 347 N.W.2d at 124; 10 FLETCHER ET AL., *supra* note 21, § 4892.75 n.11; see also Rosenberg, *supra* note 13, at 430.

292. See *Kaeser*, 845 F. Supp. at 1233; *City Envtl.*, 814 F. Supp. at 637-38; *Andrews*, 369 So. 2d at 785-86; *Savage Arms*, 18 P.3d at 55; *Hoppa*, 630 N.E.2d at 1046; *Turner*, 244 N.W.2d at 882; see also *Watson*, *supra* note 2, at 230.

293. See *Kaeser*, 845 F. Supp. at 1233; *Hoppa*, 630 N.E.2d at 1046.

294. See *Kaeser*, 845 F. Supp. at 1233; *Hoppa*, 630 N.E.2d at 1046; see also Rosenberg, *supra* note 13, at 430.

295. *N. Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 650-51 (7th Cir. 1998).

296. See, e.g., *Kelley ex. rel. State of Mich. v. E.I. duPont de Nemours & Co.*, 786 F. Supp. 1268, 1277 (E.D. Mich. 1992), *aff'd*, 17 F.3d 836, 840-44 (6th Cir. 1994) (interpreting the statute of limitations applicable to CERCLA cost recovery actions broadly); *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992) (holding that successor corporations are subject to CERCLA liability provisions); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990) (finding parent corporations susceptible to liability under the statutory provisions of "owners" and "operators"); see also *Watson*, *supra* note 2, at 279-85; *supra* notes 220-23, 226-36 and accompanying text.

297. See *New York v. Nat'l Serv. Indus., Inc. (Nat'l Serv. Indus. I)*, 352 F.3d 682, 685-87 (2d Cir. 2003); *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc. (Atchison II)*, 159 F.3d 358, 364 (9th Cir. 1998); see also Rosenberg, *supra* note 13, at 430.

panded within Illinois, where the substantial continuity exception would also be incorporated.²⁹⁸ In weighing the implications of applying each choice of law against their consistency with the remedial purpose canon, it becomes clear that applying state corporate law throughout the circuit would best effectuate Congress's remedial intent.²⁹⁹ Therefore, the Seventh Circuit should hold that corporate successor liability issues arising under CERCLA are best resolved through the invocation of state corporate law principles.³⁰⁰

X. CONCLUSION

The remedial purpose canon arose out of a desire to fully effectuate the benefits of legislation designed to correct social, political, legal, and environmental wrongs. CERCLA, created to protect innocent people from the harmful dangers associated with exposure to hazardous waste substances, is the embodiment of a remedial statute. Therefore, CERCLA's provisions, especially those allocating financial costs to responsible parties, should be subject to broad interpretation and given the most expansive application possible. Those circuits that encompass fifth exception states within their jurisdiction are faced with the opportunity to give CERCLA liability provisions a liberal application. By choosing to apply state corporate law in the context of CERCLA successor liability, these circuits will be effectuating the broadest possible application of liability available at this time. To do otherwise and apply federal common law would only serve to limit the CERCLA liability provisions to the four traditional exceptions. Therefore, circuit courts encompassing the Fifth Exception States, such as the Seventh Circuit, should invoke state corporate law to resolve issues of CERCLA successor liability so as to include the broader substantial liability continuity exception wherever possible.

298. See *Kaeser*, 845 F. Supp. at 1233; *Hoppa*, 630 N.E.2d at 1046; see also *Rosenberg*, *supra* note 13, at 430.

299. See H.R. REP. NO. 102-40, pt. 1, at 87 (1991) ("For more than a century, it has been a widely accepted principle of American law that remedial statutes . . . are to be broadly construed."). Fifth Exception States invoke the substantial continuity exception in addition to the four traditional exceptions to asset purchaser non-liability. See *Kaeser*, 845 F. Supp. at 1233; *City Envtl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 637-38 (E.D. Mich. 1993); *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 785-86 (Ala. 1979); *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001); *Hoppa*, 630 N.E.2d at 1046; *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 882 (Mich. 1976). On the contrary, the post-*Bestfoods* federal common law on successor liability is limited to the four traditional exceptions to asset purchaser non-liability. See *Nat'l Serv. Indus. I*, 352 F.3d at 685-87; *Atchison II*, 159 F.3d at 364.

300. See *Kaeser*, 845 F. Supp. at 1233; *Hoppa*, 630 N.E.2d at 1046; see also *Rosenberg*, *supra* note 13, at 430; *Watson*, *supra* note 2, at 230, 272.