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# IT'S THEIR BODY OF LAW; LET THEM DO WHAT THEY WANT: THE SUPREME COURT'S LIKELIHOOD OF RULING THAT STATE LAW SHOULD DETERMINE CERCLA LIABILITY FOR SUCCESSOR CORPORATIONS IN ASSET SALES

## INTRODUCTION

In 2005, the Third Circuit reinvigorated a circuit split regarding whether state or federal law should determine successor liability for asset sales under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>1</sup> To appreciate the impact of this decision, consider a hypothetical based on *The Simpsons*.<sup>2</sup> This long-running animated series takes place in the fictional city of Springfield, located somewhere close to Shelbyville and Capitol City, in a state whose name has never been mentioned.<sup>3</sup> In Springfield, Homer Simpson works as a safety inspector at the Springfield Nuclear Power Plant,<sup>4</sup> which is owned by the “evil overlord” Charles Montgomery Burns.<sup>5</sup> Suppose that after eating dozens of doughnuts one day, Homer carelessly falls asleep at the controls and fails to notice a substantial amount of radioactive waste seep into the soil at the plant.<sup>6</sup> A few weeks later, Mr. Burns finally decides to retire and move to an unknown location after selling the Springfield plant to a corporation, aptly named Nuclear Successor Corporation.<sup>7</sup> Several months later, the Environmental Protection Agency (EPA) discovers

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1. *United States v. Gen. Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005). CERCLA is codified at 42 U.S.C. §§ 9601–9675 (2000).

2. *The Simpsons* (FOX Broadcasting Company).

3. Wikipedia, Springfield (The Simpsons), [http://en.wikipedia.org/wiki/Springfield\\_\(The\\_Simpsons\)](http://en.wikipedia.org/wiki/Springfield_(The_Simpsons)) (last visited Nov. 21, 2006).

4. The Simpsons, Homer J. Simpson, <http://www.thesimpsons.com/characters/home.htm> (last visited Nov. 21, 2006).

5. The Simpsons, Charles Montgomery Burns, <http://www.thesimpsons.com/characters/home.htm> (last visited Nov. 21, 2006).

6. *Cf. Gen. Battery*, 423 F.3d at 296–97, 305–09 (finding a successor corporation liable where it acquired a small, privately-held battery manufacturer which had contributed to lead contamination because the acquisition constituted a de facto merger).

7. *Id.*

the radioactive spill and cleans up the mess pursuant to a federal statute.<sup>8</sup>

After the cleanup, assume that the EPA decides to seek reimbursement for Homer's oversight as provided by the same federal statute.<sup>9</sup> With Mr. Burns gone, the EPA could target the vast resources of Nuclear Successor Corporation.<sup>10</sup> However, the EPA will first have to know whether state corporate law or a federal uniform rule will determine if it can sue Nuclear Successor Corporation.<sup>11</sup> Currently, the answer to this question depends on the circuit in which this fictional city of Springfield is located.<sup>12</sup> If the town is Springfield, Massachusetts, then the law of Massachusetts will control.<sup>13</sup> However, if it is Springfield, New Jersey, then a national uniform rule would determine Nuclear Successor Corporation's liability.<sup>14</sup> Thus, until the United States Supreme Court decides whether state or federal law should determine whether Nuclear Successor Corporation may be liable for Homer's act, or until *The Simpsons* reveals which state Springfield is located in, the EPA's question will remain unanswered.<sup>15</sup> While this hypothetical may seem silly, the problem that it illustrates is real, and it is one on which the circuits are split.<sup>16</sup> Should state law or federal law determine a successor corporation's liability under CERCLA?<sup>17</sup>

8. See *infra* text accompanying notes 24–25.

9. See *infra* text accompanying note 25.

10. See *Gen. Battery*, 423 F.3d at 298 n.3 (noting that “[t]he courts of appeals that have addressed the issue are unanimous in recognizing successor liability under CERCLA.”).

11. See discussion *infra* Part III.

12. See discussion *infra* Part III.

13. The First Circuit has held that state law should determine successor liability. *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001) (noting “[w]e have concluded that the majority rule is to apply state law ‘so long as it is not hostile to the federal interests animating CERCLA,’ and have applied Massachusetts contracts law to determine an issue of successor liability” (quoting *John S. Boyd Co., Inc. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993))).

14. The Third Circuit has held that a uniform federal standard is appropriate to determine CERCLA successor liability. *Gen. Battery*, 423 F.3d at 303–04.

15. *New York v. Nat’l Serv. Indus.*, 460 F.3d 201, 207–08 (2d Cir. 2006) (noting the current circuit split on whether successor liability should be determined by state law or a national uniform standard).

16. For example, the First, Sixth, Ninth, and Eleventh circuits have held that state law determines CERCLA liability for successor corporation. However, the Third and Fourth circuits have held that a national, uniform rule should determine such liability. *Id.* at 208.

17. See *id.*

This Note will discuss the choice of law issue surrounding the imposition of successor liability under CERCLA. Part I provides background on the statute and the different approaches that jurisdictions use to impose successor liability.<sup>18</sup> Next, Part II analyzes the influential Supreme Court decisions regarding choice of law, which have provided the necessary framework for approaching the issue at hand.<sup>19</sup> Part III then applies these prior Supreme Court decisions to CERCLA and successor liability and concludes that if presented with the issue the Supreme Court will hold that state law should impose such liability.<sup>20</sup>

## I. BACKGROUND

### A. *A Brief Overview of CERCLA*

In 1980, the United States Congress passed CERCLA.<sup>21</sup> The statute “was designed ‘to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws.’”<sup>22</sup> Its purpose was “to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.”<sup>23</sup>

CERCLA primarily concerns emergency responses to spills and the cleanup of leaking sites, which are either inactive or abandoned,<sup>24</sup> and it provides the federal government with various remedies.<sup>25</sup> For instance, the statute established the Superfund, which provides the necessary money for cleanups when the responsible party cannot be

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18. See discussion *infra* Part I.

19. See discussion *infra* Part II.

20. See discussion *infra* Part III.

21. 34 AM. JUR. 3D *Proof of Facts* § 2 (1995).

22. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (quoting FREDERICK ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984)).

23. *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1241 (6th Cir. 1991) (quoting *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989)).

24. *Shore Realty*, 759 F.2d at 1040.

25. *Id.* at 1041.

identified or if private resources are insufficient.<sup>26</sup> Further, CERCLA permits the issuance of injunctions to force parties to clean up spills, or the EPA may cleanup a site and then sue the responsible party for reimbursement for the costs.<sup>27</sup> Thus, CERCLA seeks “to ensure that ‘everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.’”<sup>28</sup> Accordingly, CERCLA litigation has focused primarily on who should pay for the cost of cleanup at these sites, and within these disputes, parties have argued intensely over the liability of successor corporations.<sup>29</sup>

### *B. The CERCLA Cause of Action*

“[A]ny ‘person’ who owned or operated a facility at the time of disposal of hazardous waste” is liable under CERCLA.<sup>30</sup> For purposes of this liability, a corporation is a person.<sup>31</sup> A CERCLA cause of action has five elements:

- (1) the site is a facility; (2) there has been a release or threatened release of hazardous substances from that facility; (3) the defendant is within one of the four categories of covered persons; (4) U.S. EPA has incurred costs in responding to the release; and (5) those costs are consistent with the National Contingency Plan

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In addition, CERCLA provides for strict liability.<sup>33</sup> Accordingly, the government does not have to prove that a corporation was

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26. *Anspec*, 922 F.2d at 1242.

27. *Shore Realty*, 759 F.2d at 1041.

28. *United States v. Gen. Battery Corp.*, 423 F.3d 294, 297–98 (3d Cir. 2005) (quoting *United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998)).

29. 34 AM. JUR. 3D *Proof of Facts* § 2 (1995).

30. *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992) (citing 42 U.S.C. §§ 9607 (a)(2) (1988)).

31. *Id.* (citing 42 U.S.C. § 9601 (1988)).

32. 68 AM. JUR. *Trials* § 13 (1998) (citing *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985)).

33. 34 AM. JUR. 3D *Proof of Facts* § 2 (1995).

negligent or even caused the release.<sup>34</sup> Rather, it must show only “that a hazardous substance was ‘released’ at the site.”<sup>35</sup>

### C. Successor Liability

Because CERCLA was a quickly passed “eleventh hour compromise,”<sup>36</sup> the statute was not clearly or precisely drafted, and “successor liability is one of its puzzles.”<sup>37</sup> As a result, courts have been forced to define many of the CERCLA provisions.<sup>38</sup> For example, while the statute does not expressly provide that successor corporations may be liable for their predecessor corporations, courts have unanimously inferred that CERCLA provides for such liability.<sup>39</sup> Successor liability is a universally accepted legal doctrine<sup>40</sup> that imposes the liabilities of a parent corporation on its successor corporation in a merger.<sup>41</sup> However, in an asset sale, a successor corporation will ordinarily not assume the liabilities of the company that sold its assets.<sup>42</sup> Nonetheless, this rule of precluding liability does have “universally recognized exceptions.”<sup>43</sup> These four general exceptions impose liability when: “(1) the successor expressly or impliedly

34. *Id.*

35. *Id.*

36. 68 AM. JUR. *Trials* § 1 (1998) (quoting *Shore Realty*, 759 F.2d at 1040); see also *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988) (noting “[i]t is not surprising that, as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues, including corporate successor liability.”).

37. *United States v. Gen. Battery Corp.*, 423 F.3d 294, 298 (3d Cir. 2005).

38. 68 AM. JUR. *Trials* § 1 (1998).

39. See *Gen. Battery*, 423 F.3d at 298 n.3 (noting that “[t]he courts of appeals that have addressed the issue are unanimous in recognizing successor liability under CERCLA.”); see also *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992) (holding that CERCLA encompasses successor liability because the statute imposes liability on any person who owned or operated a facility at the time of disposal, and person is defined by the statute).

40. See *Anspec Co. v. Johnson Controls, Inc.* 922 F.2d 1240, 1246 (6th Cir. 1991) (noting “counsel for the defendants agreed that so far as he knew, all jurisdictions recognize the doctrine of successor corporate liability. The universal acceptance of this rule cannot be gainsaid.”).

41. STEPHEN M. BAINBRIDGE, *MERGERS AND ACQUISITIONS* § 4.3, at 160 (2003); see also ROBERT W. HAMILTON & JONATHAN R. MACEY, *CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES* 306 (9th ed. 2005).

42. *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992); BAINBRIDGE, *supra* note 41.

43. 14 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 6769, at 368 (perm. ed., rev. vol. 2003).

agrees to assume the liabilities of the predecessor; (2) the transaction may be considered a de facto merger; (3) the successor may be considered a 'mere continuation' of the predecessor; or (4) the transaction is fraudulent."<sup>44</sup>

In fact, the Third Circuit, which held that a federal uniform standard should determine CERCLA liability, specifically recognized these exceptions to non-liability for acquiring corporations.<sup>45</sup> Moreover, a few states employ "more expansive but far less universally recognized exceptions, such as the 'continuity of enterprise' exception."<sup>46</sup> This test "focus[es] more on continuation of the business enterprise rather than on continuation of the corporate entity."<sup>47</sup> The continuity of enterprise exception considers various factors, including:

(1) retention of the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the successor holds itself out as the continuation of the previous enterprise.<sup>48</sup>

However, despite these differences between the traditional and more expansive exceptions providing for successor liability in asset sales, the end result pertaining to liability is sometimes not substantially different.<sup>49</sup>

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44. *Carolina Transformer*, 978 F.2d at 838.

45. *United States v. Gen. Battery Corp.*, 423 F.3d 294, 303–06 (3d Cir. 2005).

46. FLETCHER, *supra* note 43.

47. *Id.* at 369.

48. *Carolina Transformer*, 978 F.2d at 838.

49. FLETCHER, *supra* note 43.

### D. *The Conflict in Law*

In addition to its failure to specify criteria for successor liability, CERCLA also fails to expressly provide whether state law or a uniform national rule should determine whether a successor corporation is liable in an asset sale.<sup>50</sup> This omission has led to an unresolved choice of law issue.<sup>51</sup> Because corporations are formed under state law, state law has traditionally governed their formation, dissolution, and continuing liability.<sup>52</sup> In fact, “[n]o principle of corporation law and practice is more firmly established than a State’s authority to regulate [its] domestic corporations . . . .”<sup>53</sup> A state’s power to create and define a corporation necessarily encompasses the determination of what constitutes a succession to or continuation of that corporation, as the corporation’s “very existence and attributes are a product of [that state’s] law.”<sup>54</sup> Further, courts are particularly reluctant to displace state law with federal rules “because business decisions typically proceed in reliance on the applicable state standards.”<sup>55</sup>

Despite this reliance on state law, CERCLA is a federal statute that specifically provides for a corporation’s liability.<sup>56</sup> “Consequently, the rights and liabilities created by CERCLA are governed by federal law. The Supreme Court has cautioned, however, that controversies governed by federal law ‘do not inevitably require resort to uniform federal rules.’”<sup>57</sup> Accordingly, should federal law, which provides the EPA with a cause of action against corporations under CERCLA,

50. See discussion *infra* Part III.

51. See *United States v. Gen. Battery Corp.*, 423 F.3d 294, 298–99 (3d Cir. 2005).

52. See *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 363 (9th Cir. 1998).

53. Gregory C. Sisk & Jerry L. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O’Melveny & Meyers*, 16 VA. ENVTL. L.J. 505, 552–53 (1997) (quoting *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 91 (1987)).

54. *Id.*

55. *Gen. Battery*, 423 F.3d at 299.

56. See *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1500–01 (11th Cir. 1996) (holding that state partnership law determines a limited partner’s liability under CERCLA “[a]bsent a showing that state partnership law is inadequate to achieve the goals of CERCLA . . . .”) (citations omitted).

57. *Id.* at 1500 (citations omitted).



override state law, which creates and governs corporations, to define when successor corporations may be liable for their parents?

## II. PAINTING THE BACKDROP: THE SUPREME COURT'S APPLICABLE CHOICE OF LAW JURISPRUDENCE

Besides not expressly providing for successor liability, CERCLA fails to state whether state law or a uniform national rule should determine whether a successor corporation is liable in an asset sale.<sup>58</sup> While the Supreme Court has not addressed whether state law or a uniform national rule should determine CERCLA liability for successor corporations, it has addressed applicable choice of law issues involving other ambiguous federal statutes.<sup>59</sup>

### A. *The Presumption of State Law in the Absence of a Clear Congressional Directive*

When determining whether a federal statute displaces state law, the Supreme Court will “not contradict an explicit federal statutory provision.”<sup>60</sup> However, the Court has consistently held that when Congress fails to explicitly provide for this displacement in comprehensive and detailed statutes, it will presume that the unaddressed matters should be left to state law.<sup>61</sup> The Court has reasoned that Congress, rather than courts, should decide where to displace state law because “Congress acts . . . against the background of the total *corpus juris* of the states. . . .”<sup>62</sup> Ruling otherwise would create additional “federal common law,” which would not supplement but alter the statutory scheme in place.<sup>63</sup> Accordingly, if a federal statute lacks a clear congressional directive, state law will be presumed, and the Court will weigh certain factors to determine

58. See *supra* text accompanying notes 13–17; discussion *infra* Part III.

59. See *Gen. Battery*, 423 F.3d at 299.

60. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

61. *Id.*

62. *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (citations omitted).

63. *O'Melveny*, 512 U.S. at 87.

whether displacement of state law is appropriate.<sup>64</sup> These factors have become known as the *Kimbell Foods* test.<sup>65</sup>

*B. A Test is Born: The Kimbell Foods Approach to Conflict in Law*

In *United States v. Kimbell Foods, Inc.*,<sup>66</sup> the Supreme Court considered whether the contractual liens of federal loan programs took precedence over private liens when the federal statutes that authorized these federal programs failed to specify priority rules.<sup>67</sup> The Court held “absent a congressional directive, the relative priority of private liens and consensual liens arising from these Government lending programs is to be determined under nondiscriminatory state laws.”<sup>68</sup> It refused to create a national uniform standard because the state’s priority laws “furnish[ed] convenient solutions in no way inconsistent with adequate protection of the federal interest[s].”<sup>69</sup> The Court noted that where a statute does not provide for the applicable law, “[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy ‘dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.’”<sup>70</sup>

Moreover, the Court considered three factors to determine which law to apply.<sup>71</sup> First, “[u]ndoubtedly, federal programs that ‘by their nature are and must be uniform in character throughout the Nation’ necessitate formulation of controlling federal rules.”<sup>72</sup> Second, courts should consider “whether application of state law would frustrate specific objectives of the federal programs.”<sup>73</sup> Third, courts “must

64. See *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 363 (9th Cir. 1998).

65. *Id.*

66. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

67. *Id.* at 718.

68. *Id.* at 740.

69. *Id.* at 729 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 309 (1947)).

70. *Id.* at 728 (quoting *Standard Oil*, 332 U.S. at 310).

71. *Id.*

72. *Kimbell*, 440 U.S. at 728 (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966)).

73. *Id.*

consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.”<sup>74</sup>

Since *Kimbell Foods*, the Supreme Court has consistently applied this three-factor test to determine whether a national uniform rule should be applied to disputes that would otherwise be governed by state law.<sup>75</sup> Likewise, lower courts have applied this test to resolve whether a federal rule should govern corporate liability, including a successor corporation’s CERCLA liability resulting from an asset sale.<sup>76</sup> However, their analyses have led to different conclusions, thereby creating the current circuit split as to whether state law or federal law should determine CERCLA successor liability for asset sales.<sup>77</sup>

### *C. A Few Good Instances: The Supreme Court’s Reluctance to Displace State Law*

In 1994, the Supreme Court affirmatively reemphasized its prior reluctance to displace state law in *O’Melveny & Myers v. FDIC*.<sup>78</sup> In *O’Melveny*, the Court held that a uniform federal rule would not be justified to determine whether knowledge of a bank’s fraudulent conduct should be imputed to the FDIC.<sup>79</sup> Pursuant to a federal statute, the FDIC, which was the insurer of a bank, became the bank’s receiver upon its insolvency, and thus succeeded to all of the bank’s “rights, titles, powers and privileges.”<sup>80</sup> This particular bank had engaged in various fraudulent activities, which prompted investors in a real estate syndication to demand refunds from the FDIC.<sup>81</sup> Consequently, the FDIC brought state claims of professional

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74. *Id.* at 729.

75. See discussion *infra* Part II.C.

76. See discussion *infra* Part III.

77. See discussion *infra* Part III. Compare *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001) (holding that state law determines CERCLA liability), with *United States v. Gen. Battery Corp.*, 423 F.3d 294 (3d Cir. 2005) (holding that federal rule determines CERCLA liability).

78. *O’Melveny & Myers v. FDIC*, 512 U.S. 79 (1994).

79. *Id.* at 85.

80. *Id.* at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(i) (1988)).

81. *Id.* at 82.

negligence and breach of fiduciary duty against the law firm that had represented the bank.<sup>82</sup> However, under California law “any defense good against the original party is good against the receiver,” so the firm argued that the bank’s knowledge of the fraudulent conduct should have been imputed to the FDIC.<sup>83</sup> The FDIC responded that a national uniform rule to decide the validity of the imputation of knowledge defense was appropriate because of the high federal interest implicated in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).<sup>84</sup>

The Court held that a national rule was unwarranted, and it noted that such cases were “few and restricted”<sup>85</sup> and “limited to situations where there is a ‘significant conflict between some federal policy or interest and the use of state law.’”<sup>86</sup> The FDIC’s argument failed because it “identified *no* significant conflict with an identifiable federal policy or interest.”<sup>87</sup>

Nearly three years after *O’Melveny*, in *Atherton v. FDIC*, the Supreme Court faced another choice of law issue concerning the same federal statute and the FDIC.<sup>88</sup> Again, the Court emphasized the need to show an identifiable federal interest that specifically conflicts with state law in order to justify a uniform federal rule.<sup>89</sup> The FDIC sued the directors of a bank for gross negligence, simple negligence, and breaches of fiduciary duty.<sup>90</sup> The bank had made “various bad development, construction, and business acquisition loans.”<sup>91</sup> However, FIRREA only provided the FDIC with “gross negligence” causes of action.<sup>92</sup> The defendants argued that because the statute only provided for liability based on “gross negligence or more

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82. *Id.*

83. *Id.* at 86 (quoting *FDIC v. O’Melveny & Myers*, 969 F.2d 744, 751 (9th Cir. 1992)).

84. *O’Melveny*, 512 U.S. at 86.

85. *Id.* at 87 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

86. *Id.* (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

87. *Id.* at 88.

88. *Atherton v. FDIC*, 519 U.S. 213 (1997).

89. *Id.* at 218–19.

90. *Id.* at 216.

91. *Id.*

92. *Id.*

seriously culpable conduct, the statute intended to forbid actions based upon less seriously culpable conduct, such as . . . simple negligence.”<sup>93</sup> However, the Court held that the federal statute sets the floor, and so state law establishes the requisite standards of care for corporate officers, provided they are stricter than the federal statute.<sup>94</sup>

In sum, *Kimbell Foods*, and its application in *O'Melveny and Atherton*, has provided the framework for determining whether state law or a uniform federal rule should define a party's liability under a federal statute.<sup>95</sup> While the circuits consistently apply this framework to resolve CERCLA liability for successor corporations in asset sales, their applications have differed and so have their results.<sup>96</sup> Therefore, when confronted with this issue, the Supreme Court will likely apply this framework and finally decide which application is correct.<sup>97</sup>

### III. KEEP YOUR HANDS OFF THEIR BODY OF LAW: THE SUPREME COURT'S LIKELY CONCLUSION THAT STATE LAW SHOULD CONTROL CERCLA SUCCESSOR LIABILITY ARISING FROM ASSET SALES

In applying the *Kimbell Foods* test, the circuits are split as to whether state law applies or whether a uniform national rule should be developed to determine successor liability under CERCLA for asset sale transactions.<sup>98</sup> The “majority rule [amongst the circuits who have considered the issue] is to apply state law ‘so long as it is not hostile to the federal interests animating CERCLA’ . . . .”<sup>99</sup> Nonetheless, the split persists, and the Supreme Court should decide which law applies, so that the EPA will know whom to sue and corporations will know the extent of their environmental liability. If

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93. *Id.*

94. *Atherton*, 519 U.S. at 216.

95. See *supra* text accompanying notes 61–95.

96. See discussion *infra* Part III.

97. See discussion *supra* Part II.

98. See generally *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 207–08 (2d Cir. 2006).

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

the Court finally confronts this issue, the *Kimbell Foods* test suggests that it will likely rule that state law should apply.<sup>100</sup>

### A. *The Absence of a Clear Congressional Directive*

When deciding whether state law or a federal rule should apply, courts should first see “whether Congress intended federal judges to develop their own rules or to incorporate state law.”<sup>101</sup> If there is no congressional directive, then a court should use the *Kimbell* three-part test.<sup>102</sup> Supporters claim that a quote by CERCLA’s primary congressional sponsor provides such a directive.<sup>103</sup> Former Representative James Florio stated, “[t]o insure the development of law, and to discourage business dealings in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area.”<sup>104</sup>

However, while CERCLA’s sponsor voiced support for a national uniform standard, “[t]he personal conclusions of one member of Congress, even a sponsor, are not owed weight in the absence of any support in the statutory text or authoritative committee reports.”<sup>105</sup> In the alternative, if this “meager legislative history” manifested Congress’s intent to impose a national uniform rule for successor liability,<sup>106</sup> this legislative history is insufficient to overcome the

100. See discussion *supra* Part II.

101. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir. 1998) (quoting *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457–58 (9th Cir. 1986)).

102. See *id.* at 362–63.

103. David C. Clarke, Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300, 1312 (1990) (quoting 126 CONG. REC. 31,965 (1980)).

104. *Id.*

105. *Sisk & Anderson*, *supra* note 53, at 528 (citing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921), which states that legislative debates are “expressive of the views and motives of individual members . . . and hence may not be resorted to . . . in ascertaining the meaning and purpose of the lawmaking body,” and *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), which notes that “ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history.”).

106. *Louisiana-Pacific Corp. v. Asarco Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990) (“The meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement the statute.”) (agreeing with and quoting *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988)).

*O'Melveny* presumption that unaddressed matters in comprehensive and detailed federal statutes are subject to state law.<sup>107</sup> After the Supreme Court decision in *O'Melveny*, the Ninth Circuit recognized this principle by abrogating its prior decision in *Louisiana-Pacific Corp. v. Asarco, Inc.*<sup>108</sup> More specifically in *Atchison*, the court noted that *Louisiana Pacific* "recognized that Congress did not address the particular issue of successor liability under CERCLA."<sup>109</sup>

## B. Applying the Kimbell Foods Test

### 1. Whether the Federal Program Requires Uniformity

The goal of CERCLA is to address "inactive or abandoned disposal sites that contain hazardous substances, and pose the greatest risk to public health and the environment."<sup>110</sup> Proponents of the national uniform standard claim that this strong national interest satisfies the first factor of the *Kimbell Foods* test.<sup>111</sup> "With respect to the first factor, uniformity in enforcement of CERCLA is necessary and appropriate in light of the important—perhaps critical—national problems that CERCLA addresses."<sup>112</sup> "CERCLA presents a national solution to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection."<sup>113</sup>

In addition, proponents of the federal rule argue that state law "would subject the strong federal interest in enforcement of CERCLA's national remedial program, as well as the federal financial interest in prompt recovery of response costs and replenishment of the Superfund, to the vagaries of several different

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107. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362, *abrogating Louisiana-Pacific*, 909 F.2d 1260.

108. *Id.*

109. *Id.*

110. 68 AM. JUR. *Trials* § 1 (1998).

111. Clarke, *supra* note 103, at 1311–12.

112. *Id.* (citations omitted).

113. *Id.* at 1312 (quoting *In re Acushnet River & New Bedford Harbor*, 675 F. Supp. 22, 31 (D. Mass. 1987)).

bodies of law.”<sup>114</sup> Consequently, states could affect and even diminish the federal funds, which are necessary to ensure timely and effective clean up of these hazardous sites not only in their own state, but also in other states.<sup>115</sup> Moreover, “enforcement of CERCLA is especially necessary because hazardous sites often present problems and dangers that cross state lines and demand remedial attention at the federal level.”<sup>116</sup>

Uniform federal rule proponents also claim that the creation of such a rule would be consistent with Supreme Court decisions that have declined to fill statutory gaps with common law principles rather than state law.<sup>117</sup> In *United States v. General Battery*, the Third Circuit analogized the necessity of a national uniform standard for CERCLA successor liability to the Supreme Court’s requirement of uniform federal definitions for “employee” and “agent” under the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964.<sup>118</sup> The court also emphasized that these Supreme Court federal common law rules were decided after *O’Melveny* and *Atherton*.<sup>119</sup> “[T]he resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction,’ not the free-wheeling creation of federal common law.”<sup>120</sup>

Indeed, the Supreme Court’s prior application of general corporate law may indicate a reluctance to rely on state law.<sup>121</sup> In *General Battery*, the Third Circuit noted that the Supreme Court “explicitly declined to resolve the circuit split on whether CERCLA borrows a particular state’s law of indirect corporate liability.”<sup>122</sup> “If anything, *Bestfoods* cuts in favor of a uniform federal standard. *Bestfoods* applied ‘fundamental’ and ‘hornbook’ principles of indirect corporate

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114. *Id.* at 1312 (citations omitted).

115. *Id.*

116. *Id.*

117. See *United States v. Gen. Battery Corp.*, 423 F.3d 294, 300 (3d Cir. 2005).

118. *Id.* (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–55 (1998)).

119. *Id.* at 304–05.

120. *Id.* at 300 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755 (1998)).

121. See *id.*

122. *Id.*



liability, not the law of any particular state.”<sup>123</sup> This application is particularly significant because the Court of Appeals had applied Michigan law, but the Supreme Court declined to, opting to discuss common law principles of corporate veil-piercing.<sup>124</sup> “The Court’s reliance on the general standard is a different matter than borrowing the law of a particular state.”<sup>125</sup>

Nonetheless, while *General Battery* relies on the lack of discussion of state law in *Bestfoods* to support its federal uniform rule, it ignores an important statement in *Bestfoods*.<sup>126</sup> “CERCLA is . . . like many another congressional enactment [sic] in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff’s cause of action is based upon a federal statute.”<sup>127</sup> Further, The Rules of Decision Act provides that “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States.”<sup>128</sup> Moreover, “state rules of decision will furnish an appropriate and convenient measure of the governing federal law.”<sup>129</sup>

In addition, “[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated

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123. *United States v. Gen. Battery Corp.*, 423 F.3d 294, 300 (3d Cir. 2005) (citing *United States v. Bestfoods*, 524 U.S. 51, 61–62 (1998)). In *Bestfoods*, the United States Supreme Court held that a parent corporation may be liable under CERCLA for its subsidiary’s actions only when the corporate veil may be pierced. *Bestfoods*, 524 U.S. at 62–63. While the Court noted that a corporation may be indirectly liable for the actions of another corporation, it did not rule whether state law or uniform federal rule should determine whether the corporate veil had been pierced. *Id.* at n.9. The Court recognized the “significant disagreement among courts and commentators” regarding which law to apply, but declined to answer the question because none of the parties challenged the Sixth Circuit’s holding that the respondents had not incurred derivative liability. *Id.* As a result, the choice of law question was not presented in the case, and so the Court “[did] not address it further.” *Id.*

124. *Gen. Battery*, 423 F.3d at 300.

125. *Id.*

126. *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001) (quoting *Bestfoods*, 524 U.S. at 63).

127. *Id.*

128. 28 U.S.C. § 1652 (2000); *Sisk & Anderson*, *supra* note 53, at 508–09 (quoting 28 U.S.C. § 1652 (1994)).

129. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir. 1998) (quoting *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457–58 (9th Cir. 1986)).

from democratic pressures, but by the people through their elected representatives in Congress.”<sup>130</sup> The Supreme Court has also noted that “[t]he presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships in the expectation that their rights would be governed by state-law standards. . . . Corporate law is one such area.”<sup>131</sup> Furthermore, parties seeking judicial imposition of a federal uniform standard bear heavy burdens “in proving the need for uniformity or proving that state rules conflict with federal policy.”<sup>132</sup>

In addition, the Supreme Court’s explicit “statements in *Bestfoods* and *O’Melveny* demonstrate that to justify the creation of a federal rule, ‘there must be a specific, concrete federal policy or interest that is compromised by the application of state law.’”<sup>133</sup> Further, *Kimbell Foods* and *O’Melveny* suggest that “[t]o invoke the concept of ‘uniformity’ . . . is not to prove its need.”<sup>134</sup> Efficiency does not constitute such an identifiable and specific interest.<sup>135</sup> The Supreme Court has stated:

That Congress has not chosen the most comprehensive or efficient method of attacking the problem of hazardous substance discharges, however, is no reason to depart from the language of the statute. Moreover, while we agree with New Jersey that the overall purpose of a statute is a useful referent when trying to

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130. Sisk & Anderson, *supra* note 53, at 508 (citing *Milwaukee v. Illinois*, 451 U.S. 304, 312–13 (1981)).

131. *New York v. Nat’l Serv. Indus., Inc.*, 460 F.3d 201, 208 (2d Cir. 2006) (quoting *Kamen v. Kemper Fin. Services*, 500 U.S. 90, 98 (1991)).

132. *Atchison*, 159 F.3d at 362.

133. *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001) (finding no conflict in the application of state law and the statute’s federal interest). “Although *O’Melveny* and *Atherton* involve a different federal statute [than CERCLA], the underlying analysis is applicable in any situation in which it is necessary to determine whether state law should be supplanted by judicially created federal rules of decision.” *Atchison*, 159 F.3d at 362.

134. *Atherton v. FDIC*, 519 U.S. 213, 220 (1997).

135. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 371–72 (1986) (holding that legislative history was inadequate to allow CERCLA to reimburse state fund expenditures for all state government cleanup efforts).

decipher ambiguous statutory language, remedying the Nation's toxic waste problems as effectively as possible was not the sole policy choice reflected in CERCLA.<sup>136</sup>

The Supreme Court also stated in *O'Melveny* that "[u]niformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of [these] ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules."<sup>137</sup>

Further, the Court noted that "there is no federal policy that the fund should always win. Our cases have previously rejected 'more money' arguments."<sup>138</sup> Accordingly, while a uniform national rule for imposing CERCLA liability may simplify its litigation and reduce uncertainty as to the applicable rule of law, this effect likely will not constitute a qualified identifiable interest.<sup>139</sup>

## 2. *Frustration of Specific Objectives of the Federal Program*

Proponents of the uniform national standard claim that the application of state law "would frustrate the specific health, safety, and environmental objectives of the statute. The hazardous waste problem that CERCLA addresses is widely recognized as posing a serious and imminent threat to public health and the national environment."<sup>140</sup> If there were no uniform national standard, then "CERCLA aims [could] 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."<sup>141</sup>

However, this assertion relies on the two premises that states will be motivated to undermine the enforcement of CERCLA and that

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136. *Id.*

137. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994).

138. *Id.*

139. *See id.*

140. Clarke, *supra* note 103, at 1314.

141. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988).

states will significantly differ in their imposition of successor liability.<sup>142</sup> In fact, “[n]o state provides a haven for liable companies . . . [and] [i]t is unrealistic to think that a state would alter general corporate law to become a peculiarly hospitable haven for polluters.”<sup>143</sup> Judge Cornelia Kennedy of the Sixth Circuit noted:

Any fears that states will engage in a “race to the bottom” in their effort to attract corporate business and enact laws that limit vicarious liability are in my opinion groundless. States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and the EPA and they share a complimentary interest with the United States in the enforcement of laws like CERCLA that are used to remedy environmental contamination. I see no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters.<sup>144</sup>

Even the Third Circuit, which has imposed a national uniform standard, specifically agreed that “[a]s a general matter . . . it is unlikely that states would attempt to immunize their corporations from CERCLA liability.”<sup>145</sup> Rather, the Third Circuit reasoned that the federal interests of reducing transaction costs would be frustrated.<sup>146</sup> The court explained, “incorporating variable and uncertain state successor liability standards would increase significantly CERCLA litigation and transaction costs—in conflict with the statutory interests embodied in 42 U.S.C. § 9622, which aims to encourage early settlements, and § 9607(r), which aims to facilitate a

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142. See *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1502 (11th Cir. 1996) (stating that “[w]e do not foresee states enacting more protective statutes in an effort to defeat CERCLA’s goal of having the polluter pay.”).

143. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir. 1998).

144. *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring).

145. *United States v. Gen. Battery Corp.*, 423 F.3d 294, 303 (3d Cir. 2005).

146. *Id.*

liquid market in [transferring and redeveloping contaminated property].”<sup>147</sup>

In the alternative, if states did create overly lenient laws that would shield successor corporations from CERCLA liability, the Supreme Court has held that “specific state rules that are unreasonable, aberrant, or hostile to federal interests will not be applied.”<sup>148</sup> Therefore, “[a]dequate means are thus available to insure the protection of the federal interests protected by CERCLA without creating a federal common law of corporations.”<sup>149</sup>

Aside from this lack of motivation for states to create pollution-friendly havens for corporations, their laws regarding successor liability are largely uniform.<sup>150</sup> “If state law varied widely on the issue of successor liability, perhaps the need for a uniform federal rule would be more apparent. This is not the case, however, as ‘the law in the fifty states on corporate dissolution and successor liability is largely uniform.’”<sup>151</sup> Nonetheless, in *General Battery*, the Third Circuit noted the different approaches to successor liability, stating that:

[A]lthough the general doctrine of successor liability is “largely uniform” under state law, this uniformity is less apparent when the general standards are applied in specific cases. Beneath a veneer of uniformity, the “entire issue of successor liability . . . is dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake.”<sup>152</sup>

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147. *Id.*

148. *Anspec*, 922 F.2d at 1250 (Kennedy, J., concurring) (citing *Burks v. Lasker*, 441 U.S. 471, 479 (1979)).

149. *Id.*

150. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 363 (9th Cir. 1998).

151. *Id.* (quoting *Anspec*, 922 F.2d at 1249 (Kennedy, J. concurring)).

152. *United States v. Gen. Battery Corp.*, 423 F.3d 294, 301–02 (3d Cir. 2005) (citations omitted) (finding that “[s]tate law does vary substantially on the issue of successor liability, and its unpredictability counsels in favor of CERCLA uniformity.”).

However, different approaches to successor liability do not necessarily yield different results.<sup>153</sup> The United States even admitted that successor liability is largely uniform amongst the fifty states in an amicus curiae brief filed with the Ninth Circuit in support of a federal uniform rule.<sup>154</sup> Further, the uniform federal rule, which the Third Circuit has adopted and the Ninth Circuit has abrogated, consisted of the same four traditional exceptions found in a majority of states that permit successor liability.<sup>155</sup> Accordingly, this federal rule “mirror[ed] the traditional successor liability rules of most states . . . .”<sup>156</sup>

### 3. *Disruption to Commercial Relationships Created by State Law*

Proponents of the national uniform standard believe that “it is unclear whether a uniformed federal rule of successor liability in CERCLA action ‘would disrupt commercial relationships predicated on state law.’”<sup>157</sup> While a federal rule would obviously affect business transactions traditionally governed by state law, this effect would depend on the substance of the law rather than its mere existence.<sup>158</sup> In addition, these proponents claim that most state successor laws are conservative, which would limit the federal government’s ability to reach the assets of former potentially responsible parties, replenish the superfund, and devote recovered funds to new cleanup projects.<sup>159</sup>

Even if the federal rule was more liberal in permitting successor liability than most state common law rules, the principal effects of such a federal rule on commercial relationships would be

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153. See FLETCHER ET AL., *supra* note 43.

154. *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring).

155. See generally *Atchison*, 159 F.3d at 361; *Gen. Battery*, 423 F.3d at 303–04.

156. *Atchison*, 159 F.3d at 362.

157. *Clarke*, *supra* note 103, at 1313 (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979)).

158. *Id.*

159. *Id.* at 1313–14.

increased diligence among successors in evaluating the hazardous activities of their predecessors and inclusion by successors of strong indemnification provisions in purchase agreements.<sup>160</sup>

The proponents of the national uniform standard concede that such a rule would limit the ability of states to protect successor corporations by freedom of contract or corporate veil law.<sup>161</sup> They contend that these effects are “outweighed by the congressionally recognized need to enforce uniformly a national remedial program implicating important federal rights and interests.”<sup>162</sup> However, the Third Circuit formulated its federal common law principle in accordance with the majority of the states, and so this law affords the “proper respect to commercial relationships predicated on the majority [of] state law[s].”<sup>163</sup>

Nevertheless, parties have relied on their state’s corporate law in conducting their transactions.<sup>164</sup> The Sixth Circuit noted that “[t]he prices paid by the buyers to the sellers in those transactions undoubtedly reflect[, in part, the parties’ understanding concerning who retained the seller’s liabilities.”<sup>165</sup> In addition, commentators note that “[c]orporations negotiated numerous acquisitions and asset purchases long before CERCLA was enacted and, even afterward, continued to structure such transactions in reliance on state law.”<sup>166</sup> This reliance would prove particularly disruptive to commercial relationships because CERCLA provides for retroactive liability as well.<sup>167</sup> Consequently, a federal rule would “upset settled expectations and unfairly deprive commercial actors of their justified reliance on state law governing corporations, mergers, [and] transfer

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160. *Id.*

161. *Id.* at 1314.

162. *Id.*

163. *United States v. Gen. Battery Corp.*, 423 F.3d 294, 304 (3d Cir. 2005).

164. *See, e.g., Ansprock Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring).

165. *Id.*

166. *Sisk & Anderson*, *supra* note 53, at 571.

167. *Id.* at n.419.

of liabilities . . . .”<sup>168</sup> In addition, besides affecting buyers and sellers, this change would unfairly affect lenders, suppliers, shareholders, and customers.<sup>169</sup>

Further, the creation of a federal rule will create uncertainty in future transactions and may provide a different answer for CERCLA liability than other liabilities.<sup>170</sup> In fact, this uncertainty could actually chill the sale of assets from financially instable corporations, thereby reducing private revenue, which could have been used to finance cleanups.<sup>171</sup>

### CONCLUSION

Because CERCLA was a quickly passed “eleventh hour compromise,”<sup>172</sup> courts have been forced to define many of the statute’s provisions.<sup>173</sup> In addition, because CERCLA is a federal statute governing corporations, which are state creatures,<sup>174</sup> courts have been faced with the question of whether to apply state law or create a uniform federal rule to determine if a successor corporation should be liable for its predecessor in an asset sale.<sup>175</sup>

If the Supreme Court is faced with which law to apply, it will likely apply state law because there is no clear congressional directive,<sup>176</sup> and the *Kimbell Foods* test does not support a national uniform standard.<sup>177</sup> While CERCLA’s sponsor stated that the bill provided for the development of federal common law, this notion is not further substantiated by any statutory text or committee reports.<sup>178</sup> Further, even if this statement manifested congressional intent, it is

168. *Id.* at 571–72.

169. *Id.* at 572.

170. *Anspec*, 922 F.2d at 1250–1251 (Kennedy, J., concurring).

171. Sisk & Anderson, *supra* note 53, at 572.

172. 68 AM. JUR. *Trials* § 1 (1998).

173. *Id.*

174. See Sisk & Anderson, *supra* note 53, at 552–53 (citing *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1248–49 (6th Cir. 1991)).

175. *E.g.*, *New York v. Nat’l Serv. Indus., Inc.*, 460 F.3d 201 (2d Cir. 2006).

176. See discussion *supra* Part III.A.

177. See discussion *supra* Part III.B.

178. See discussion *supra* Part III.A.



insufficient to overcome the *O'Melveny* presumption that unaddressed matters in complex federal statutes are left for the states.<sup>179</sup> Accordingly, the Supreme Court will likely have to apply the *Kimbell Foods* test.<sup>180</sup>

First, the enforcement of CERCLA has no need for national uniformity in determining successor liability.<sup>181</sup> CERCLA gives no indication that state law should be displaced, and displacement is the traditional role of Congress—not the courts.<sup>182</sup> The presumption of state law is particularly strong when private parties have entered into legal relationships.<sup>183</sup> Therefore, there is no specific identifiable federal interest of CERCLA that conflicts with state law on successor corporate liability.<sup>184</sup>

Second, there is no frustration of a federal interest in applying state law, because most states' laws regarding corporate successor liability are already consistent.<sup>185</sup> No states currently provide havens for polluting corporations and most likely never will.<sup>186</sup> However, if a state were to create such a haven, the Supreme Court will not apply state rules that are unreasonable or hostile to federal interests.<sup>187</sup> In addition, some of the uniform federal rules that have been created to provide for successor liability under CERCLA are the same rules that a majority of states use anyway.<sup>188</sup>

Finally, the imposition of a federal standard may disrupt commercial relationships that have been predicated on state commercial law.<sup>189</sup> While the federal uniform rule may mirror many of the states' successor liability rules it would affect those states which have different rules.<sup>190</sup> Consequently, new law would be

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179. *See id.*

180. *See id.*

181. *See discussion supra* Part III.B.1.

182. *See id.*

183. *See id.*

184. *See id.*

185. *See discussion supra* Part III.B.2.

186. *See id.*

187. *See id.*

188. *See id.*

189. *See discussion supra* Part III.B.3.

190. *See id.*

imposed on the parties to transactions in these minority states, even though they entered these transactions understanding their state's former law on each party's liability and not a federal common law.<sup>191</sup> Such a change would also create uncertainty and may even require a different liability regime for CERCLA than other corporate liabilities.<sup>192</sup>

Therefore, after considering the lack of congressional directive in CERCLA and applying the *Kimbell Foods* test, the Supreme Court will likely hold that CERCLA successor liability claims in asset sales will be governed by state law. Accordingly, the EPA will finally know whom it can sue, and corporations will finally know what they are liable for.

*John A. Sugg*

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191. *See id.*

192. *See id.*

