provide for monetary damages to groups or individuals who are injured by detrimental federal actions: prophylactic relief is the sole remedy available.[92] Finally, a court's refusal to enjoin action which is already underway[93] conceivably could encourage recalcitrant agencies to delay completion of the NEPA review to the point where reevaluation of the action is no longer practicable.[94]

As a result of the court's decision in *MPIRG,* a federal agency acting in the Eighth Circuit must prepare an EIS in conjunction with any proposed action which might have a significant environmental impact, and its failure to do so should cause the cessation of any work on the project pending the completion of the statement. The cost to the agency in terms of delaying actions until their environmental effects have been studied is readily offset by the benefit inuring to the public from the rigorous enforcement of NEPA.

JUDITH SCOLNICK

Corporations—Successor's Tort Liability for Acts or Omissions of Predecessor—*Cyr v. B. Offen & Co.* [1]—Plaintiff appellees, Cyr and the administrator of the estate of Couture, sought damages for personal injuries and wrongful death against the defendant, B. Offen & Co., Inc., on theories of negligence and strict liability.[2] These actions arose out of an accident which occurred at the Rumford Press in Concord, New Hampshire on October 29, 1969. The head pressman suggested that Cyr and Couture clean the drying ovens that were attached to the press. Cyr and Couture entered the ovens, placed flammable cleaning solvents near the gas burners, and set to work.[3] The head pressman, not realizing that Cyr and Couture had entered the ovens, increased the speed of the press. The operation of the press was inextricably tied to the working of the ovens. When the press attained a certain speed, the oven driers automatically activated. This could be avoided by pushing a saferun button; however, this safety measure was not used.[4] As a result of

contemplates a suspension of commitments." Stop H-3 Ass'n v. Volpe, 3 ELR 20130, 20131 (D. Hawaii 1972).

[92] See 5 U.S.C. §§ 702, 705 (1970). Cf. Canal Auth. v. Callaway, 489 F.2d 567, 578 (5th Cir. 1974).

[93] This was the situation in *MPIRG.* 498 F.2d at 1318.

[94] This consideration is more relevant where the project is one which has a definite termination date, rather than a project which continues indefinitely.

[1] 501 F.2d 1145 (1st Cir. 1974).

[2] B. Offen & Co., Inc. was a codefendant with R. Hoe & Co., the manufacturer of the press. Hoe frequently chose Offen ovens to make up the total package of equipment to be supplied to the purchaser. Id. at 1149 n.3. Hereinafter the B. Offen & Co., Inc. will be referred to as "the successor" and the B. Offen Company as "the predecessor."

[3] Id. at 1148.

[4] Id.

the increased press speed, the gas-fired burners within the oven ignited and the flammable solvent exploded, seriously injuring Cyr and resulting in Couture's death. The plaintiffs sought damages on the theories of negligence and strict liability on the ground that the absence of a fail-safe mechanism was a defect in the design of the ovens.[5]

The defendant, B. Offen & Co., Inc., was not a legal entity when the ovens were sold to the Rumford Press in 1959. The ovens were designed, manufactured, and sold by B. Offen Company,[6] a sole proprietorship owned by Bernard Offen.[7] Bernard Offen died in 1962 and his estate contracted to sell the assets of the company in January 1963 to the defendant B. Offen & Co., Inc. The stockholders of this successor corporation were a group of employees of the predecessor and an outside financier.[8] The sales agreement, executed between the estate of Offen and the defendant, provided that the defendant would acquire an assignment of the lease of real estate, the goodwill of the B. Offen Company, and the right to use the tradename "Offen."[9] The agreement also contained an express exclusion of any liability for tortious acts committed prior to 1962.[10]

At the trial, the successor-defendant moved to dismiss, and subsequently moved for summary judgment and a directed verdict.[11] The successor argued: (1) that since it did not come into existence until January 1963, there existed in 1959 no legal relationship between it and the plaintiff which could lead to a finding of fault and liability;[12] and (2) that there was a valid express exclusion of any assumption of tort liability in the agreement of sale.[13] The federal district court denied the motion to dismiss and the subsequent motions, ruling that the jury could find the defendant liable for the torts of its predecessor.[14] In *Cyr v. B. Offen & Co.*, the United States Court of Appeals for the First Circuit affirmed the

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[5] Id. at 1149.

[6] The dryers were sold as a component of a printing press manufactured by R. Hoe & Co., Inc. Id. at 1149 n.3.

[7] Bernard Offen started doing business in 1928 as B. Offen & Co. Brief for Appellant at 5, Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974) [hereinafter cited as Brief for Appellant].

[8] Seventy percent of the stock was held by the employees, while thirty percent was held by the outside financier. 501 F.2d at 1151.

[9] Brief for Appellant, supra note 7, at 6.

[10] The agreement provided that the purchaser would assume "liability for all costs of any kind or nature incurred on or after January 16, 1963 on Old Dryer and Service Contracts, . . . but excluding specifically liability for costs incurred in tort." 501 F.2d at 1151.

[11] Id.

[12] Brief for Appellant, supra note 7, at 13.

[13] Id. at 12.

[14] Federal jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332 (1970). The jury returned verdicts for each plaintiff on both counts, against both R. Hoe Co., Inc. and B. Offen Co., Inc. in the amount of $45,000 in negligence and $60,000 in strict liability. 501 F.2d at 1149. The court of appeals in *Offen* reduced the recovery in strict liability to $45,000. Id. at 1150.

district court. Applying New Hampshire substantive law, the court HELD: where there is sufficient similarity and continuity between the predecessor and successor, the successor is not immune from liability for the torts of the predecessor.[15]

The general rule, known as the successorship doctrine, is that a successor corporation is not liable for the torts of its predecessor.[16] An exception to this rule traditionally exists where the successor corporation is a mere continuation of the predecessor.[17] The *Offen* court, while recognizing the general rule, and acknowledging that the facts presented did not fulfill the requirements of the continuity exception,[18] formulated new criteria to determine what is meant by "continuity" for the purposes of imposing tort liability upon a successor corporation. The court justified its finding of continuity on the basis of the policy underlying the law of products liability.[19]

This note will present an analysis of the disposition of the issue of continuity by the court in *Offen*. First, the factors utilized by the court in determining continuity will be examined. Then, the policy considerations relied upon by the court to justify the imposition of tort liability upon the successor corporation will be scrutinized. It will be contended that the court's rationale does not support the result reached, and that the decision in *Offen*, if followed, will impose inhibitory and unpredictable burdens on the commercial transfer of assets.

It is the general rule that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor.[20] Notwithstanding the proliferation of products liability litigation and the resultant legal literature on the subject, neither the courts nor the legal scholars have considered in depth the extent of the legal liability of a successor corporation for the torts of its predecessor.

The continuity exception to the general rule against tort liability of successors has been developed by case law[21] and has been applied

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[15] 501 F.2d at 1155.

[16] 15 W. Fletcher, Cyclopedia of Corporations §§ 7122-23, at 188-98 (rev. vol. 1973); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968) (applying the general rule under California law).

[17] Abeken v. United States, 26 F. Supp. 170 (E.D. Mo. 1939).

[18] 501 F.2d at 1151. Exceptions have been recognized where there has been: (1) express or implied agreement, Erhard v. Boone State Bank, 65 F.2d 48 (8th Cir. 1933); (2) consolidation or merger, West Tex. Ref. & Dev. Co. v. Commissioner, 68 F.2d 77 (10th Cir. 1933); (3) a finding that the successor is a mere continuation of the predecessor, Abeken v. United States, 26 F. Supp. 170 (E.D. Mo. 1939); and (4) fraud, International Ass'n of Machinists v. Shawnee Indus., Inc., 224 F. Supp. 347 (W.D. Okla. 1963).

[19] 501 F.2d at 1153-54. See text at notes 80-90 supra.

[20] Id. at 1152.

[21] E.g., Bishop v. Dura-Lite Mfg. Co., 489 F.2d 710 (6th Cir. 1973); West Tex. Ref. & Dev. Co. v. Commissioner, 68 F.2d 77 (10th Cir. 1933). The continuity exception refers principally to a "reorganization" of the original corporation, such as occasionally is accomplished under Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 501-676 (1970). 19 Am. Jur. Corporations §§ 1546, 1550 at 922-23, 926-27 (1965).

only where the successor corporation is merely a reorganization of the predecessor, that is, "merely a 'new hat' for the seller."[22] Although this standard was developed in a tax case,[23] it has been applied to many cases involving liability for many types of acts and transactions of the predecessor,[24] and to cases where the predecessor is a proprietorship or partnership.[25] Recent cases have failed to impose tort liability upon the successor where there is no evidence of continuity of ownership or management and thus no basis for applying the exception to the general rule.[26] In *Chadwick v. Air Reduction Co.*,[27] a suit was brought against a dissolved corporation and a successor which had purchased the assets of the dissolved corporation without an agreement to assume the dissolved corporation's liabilities. The district court affirmed the rule that when one company sells all of its assets to another company, the latter is not liable for the torts of the transferor.[28] The rule of successor's non-liability was also affirmed in *McKee v. Harris-Seybold Co.*,[29] where the court held that the purchaser of the assets of the manufacturer of a paper cutting machine did not expressly or impliedly assume liabilities of the manufacturer and was not liable for injuries sustained by the use of a machine manufactured prior to the sale of the business.[30] Thus, in determining whether to impose liability upon a successor for a predecessor's tort, courts have accorded substantial weight to the contractual arrangements regarding tort liability in the transfer agreement.

In *Offen*, the court found these prior cases recognizing a continuity exception distinguishable, however, because the rule of successor non-liability had evolved in the context of tax assessment.[31] On this basis, the court justified its development of a different test of continuity in negligence cases. Yet, several negligence decisions have dealt directly with the issue of defining continuity for the

[22] McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 570, 264 A.2d 98, 106 (1970).

[23] West Tex. Ref. & Dev. Co. v. Commissioner, 68 F.2d 77 (10th Cir. 1933).

[24] E.g., Copease Mfg. Co. v. Cormac Photocopy Corp., 242 F. Supp. 993 (S.D.N.Y. 1965) (patent infringement claim); Pierce v. Riverside Mortgage Sec. Co., 25 Cal. App. 2d 248, 77 F.2d 226 (1938) (liability for fraud of predecessor); Bergman & Lefkow Ins. Agency v. Flash Cab Co., 110 Ill. App. 2d 415, 249 N.E.2d 729 (1969) (court held contract liability was assumed where the assets of the predecessor were owned and controlled by the same people); McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 264 A.2d 98 (1970) (liability for machine defectively manufactured); American Hosp. & Life Ins. Co. v. Kunkel, 71 N.M. 164, 376 P.2d 956 (1962) (liability on notes of assumed corporation).

[25] E.g., In Re Johnson-Hart Co., 34 F.2d 183 (D. Minn. 1929); Abeken v. United States, 26 F. Supp. 170 (E.D. Mo. 1939).

[26] E.g., Copease Mfg. Co. v. Cormac Photocopy Corp., 242 F. Supp. 993 (S.D.N.Y. 1965); Chadwick v. Air Reduction Co., 239 F. Supp. 247 (N.D. Ohio 1965); Bill Hodges Truck Co. v. Williams, 470 P.2d 310 (Okla. 1970).

[27] 239 F. Supp. 247 (N.D. Ohio 1965).

[28] Id. at 250.

[29] 109 N.J. Super. 555, 264 A.2d 98 (1970).

[30] Id. at 570, 264 A.2d at 106.

[31] 501 F.2d at 1152 (distinguishing West Tex. Ref. & Dev. Co. v. Commissioner, 68 F.2d 77 (10th Cir. 1933)).

purpose of imposing tort liability upon the successor. In *Kloberdanz v. Joy Manufacturing Co.*,[32] the court stated:

> [N]or can the buyer be said to be a mere continuation of the seller. The seller continued to exist after the sale for eight months, and there was no common identity of stock, directors, officers or stockholders between Joy and the seller. This exception covers a reorganization of a corporation.[33]

The court in *McKee*[34] also dealt with the continuity exception and found that for tort liability to attach, the purchasing corporation must represent merely a "new hat" for the seller.[35]

Offen did not present a factual setting appropriate for the application of the continuity exception to the rule of successor nonliability, as that exception has been defined in prior decisions. In *Offen,* it clearly appeared that both the ownership and management of the successor were entirely different from those of the predecessor.[36] The successor was further distinguished from its predecessor by its expansion of the products line to include electronic controls, moisture applicators, chill water systems and other equipment in addition to the dryer and oven equipment.[37]

Unable to place the facts of the case at bar within the traditional exception, the court chose to formulate new indicia to determine continuity.[38] The inquiry of the court focused upon the "factors to look to in order to determine whether there is sufficient continuity to warrant continued obligation."[39] Initially the court drew an analogy to the field of labor law, where successor corporations, in certain situations, have been held bound by the undertakings of their predecessors.[40] The court relied upon the method of analysis utilized in the labor cases—sifting through specific facts to find continuity.

In *John Wiley & Sons v. Livingston,*[41] the Supreme Court held that rights of employees under a collective bargaining agreement are not automatically lost by the disappearance of the employer through

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[32] 288 F. Supp. 817 (D. Colo. 1968).

[33] Id. at 821.

[34] 109 N.J. Super. 555, 264 A.2d 98 (1970).

[35] Id. at 570, 264 A.2d at 106.

[36] 501 F.2d at 1151.

[37] Brief for Appellant, supra note 7, at 8.

[38] 501 F.2d at 1152.

[39] Id.

[40] Id. at 1152-53, (discussing Howard Johnson Co. v. Hotel & Restaurant Employees, 417 U.S. 249 (1974); NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272 (1972); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964)).

[41] 376 U.S. 543 (1964). Respondent labor union brought an action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970), to compel arbitration under a collective bargaining agreement executed by a company which the petitioner acquired by merger.

a merger, since the successor employer may be required to arbitrate with the union.[42] The Court, in *NLRB v. Burns International Security Services, Inc.*,[43] however, withdrew from *Wiley* by limiting the nature of the obligation of the successor. In *Burns* the Court recognized that "although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them."[44]

The Supreme Court has recently retreated even further from the *Wiley* decision. In *Howard Johnson Co., v. Hotel & Restaurant Employees,*[45] the Court held that a successor was not required to arbitrate with the union where there was not substantial continuity in the work force of the successor and the seller, and where there had been no express or implied assumption of the agreement to arbitrate on the part of the successor.[46] The utilization of this method of analysis in these cases has severely limited the applicability of the *Wiley* result to other fact situations.

It is submitted that *Wiley* can be distinguished from *Offen.* The *Wiley* decision was based on the key role of arbitration in effectuating national labor policy.[47] Concededly, the policies underlying the law of products liability may similarly support the result reached in *Offen.* However, *Wiley* arose as the result of a merger.[48] There is little question that the present state of the law provides for a successor's tort liability after a merger.[49] In contrast, *Offen* involved a sale of assets, as opposed to a merger. Furthermore, the facts in *Wiley* indicate that the union clearly asserted its rights under the agreement both before and after the merger.[50] In *Offen,* the successor at the time of the sale had no premonition, notice, or means of

[42] 376 U.S. at 548.

[43] 406 U.S. 272 (1972). Wackenhut Corp., a company that had provided plant protection for a Lockheed Aircraft Service Co. factory, had entered into a collective bargaining agreement with the United Plant Guard Workers. When Wackenhut's service contract expired, it was succeeded by Burns International Security Services, which knew of the existing collective bargaining agreement. Burns refused to recognize the UPG and refused to honor the collective bargaining agreement. Id. at 274-75.

[44] Id. at 284.

[45] 417 U.S. 249 (1974). Petitioner purchased the assets of a restaurant and motor lodge under an agreement whereby the sellers, who had been operating the enterprises under franchises from petitioner, retained the real property and leased it to petitioner. The petitioner expressly did not assume any of the seller's obligations, including those under any collective bargaining agreement. Id. at 251.

[46] Id. at 264.

[47] 376 U.S. at 549.

[48] Id. at 545.

[49] See, e.g., Pierce v. Riverside Mortgage Sec. Co., 25 Cal. App. 2d 248, 77 P.2d 226 (1938); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968); Wanless v. Peabody Coal Co., 294 Ill. App. 401, 13 N.E.2d 996 (1938). Furthermore, the *Wiley* decision was rendered against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation. 376 U.S. at 547, applying N.Y. Stock Corp. Law § 90 (McKinney 1951).

[50] 376 U.S. at 550.

assessing what potential causes of action might be brought against it due to the actions or omissions of the predecessor; nor was any claim ever made, prior to the accident, that the dryers were defectively designed and manufactured.[51] Finally, labor agreements are written contractual agreements which parties are aware of at the time of a sale of assets. Unlike labor contract claims, tort claims are not based on prior written agreements, and a successor is not able to estimate at the time of sale what the basis of a future claim might be. Not only is *Wiley* distinguishable on the facts, but the Court in *Wiley* indicated the limited nature of the decision and speculated that the result might be different if there had not been substantial continuity of identity due to the merger, or if the union had failed to make its claims known.[52] Thus the limited nature of the *Wiley* decision and its narrow applicability to other fact situations support careful scrutiny of the facts utilized by the court in *Offen* to find continuity.

The first factor to which the *Offen* court attached significance in determining continuity was the extent of the obligations assumed by the successor in the language of the sales agreement. The agreement provided in pertinent part that the purchaser would "(i) cause the Offen Business to be operated continuously . . . (ii) cause the Offen Business to be operated substantially in accordance with the same business practices and policies as are being employed by Offen at the date of the agreement."[53] However, rather than being persuasive as to whether there was a continuation of the same organization, a more reasonable interpretation of this language may be that it represented an attempt to provide a protection device for the estate of Bernard Offen which, according to the sales agreement, was to be paid over a period of nine years.[54]

The second factor emphasized by the court in determining continuity was that the nature of the business remained substantially similar.[55] However, it is to be expected that when one company purchases all the assets of another, the purchasing corporation will continue the operations of the former.[56] This should not in itself render the purchaser liable for the obligations of the former.[57] For example, in *McKee v. Harris-Seybold Co.*, it was stated:

> [t]he lands, buildings, machinery and tradenames were sold, and it is apparent that the purchaser intended to make use of all these in the manufacture of the same type of product. . . . [T]here is no evidence of continuity of management. . . . [T]here was also no continuity of stockholder investment . . . . For liability to attach, the pur-

[51] Brief for Appellant, supra note 7, at 7, 18, 26.
[52] 376 U.S. at 551.
[53] 501 F.2d at 1151.
[54] Id.
[55] Id.
[56] McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 570, 264 A.2d 98, 106 (1970).
[57] Id.

> chasing corporation must represent merely a "new hat" for the seller.[58]

It would be an unusual situation for one company to purchase all of the seller's assets and facilities and then drastically alter the nature of the business. This determinant of continuity utilized by the court in *Offen* would be applicable to most agreements for the purchase of assets.

A third factor considered by the court was the successor's failure to notify third parties of the change in ownership. Reasoning that this failure induced reliance by third parties on the assumption that there was merely a continuation of the same business, the court concluded that the failure to notify should be a significant factor in a determination of continuity for the purpose of imposing liability.[59] Although notification would have informed potential third parties of the change in ownership, it is doubtful that it would have had any practical effect on the behavior of the parties previous to the time of the accident. Notification of a transaction that occurred in 1963 would have had little influence on the behavior of the parties up to the time of the 1969 accident. The importance of notification in contractual relationships is not necessarily applicable to tort law. In *Offen,* the court stressed the importance of notification beyond its practical usefulness.

The substantial continuity of the work force was the final factor relied upon by the court.[60] However, the criterion of continuity of employees, which has served as a basis for imposing labor law obligations upon the successor, is not necessarily relevant to the issue of successor tort liability. The court intimates that it was the retained employees who were responsible for the faulty design;[61] but the record is clear that Bernard Offen, rather than his employees, designed the ovens.[62] Even if the facts did establish the responsibility of the employees for the defective design, it is certainly questionable whether the burden of liability should be imposed on the successor for torts his present employees may have committed during their employment by the predecessor. Continuity of workforce as a factor in determining continuity for the purpose of imposing liability should bear less weight in cases involving tort claims than it does in cases involving labor agreements.

A factor in determining continuity which has been significant in other cases, and which may have been influential in the *Offen* decision, although not specifically dealt with by the court, is the

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[58] Id.

[59] 501 F.2d at 1153.

[60] Id. at 1154.

[61] Id.

[62] "Ben Offen . . . was considered to be the sales force, director of engineering and supervisor of every other function of a company of some ten employees. . . . Ben Offen personally handled each job, including supervision of the drawings." Brief for Appellant at 5, Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974) [hereinafter cited as Brief for Appellant].

viability of the predecessor to compensate the injured parties.[63] At the time the action in the instant case was brought by the plaintiffs, the estate of Bernard Offen was closed,[64] thus prohibiting the plaintiffs from seeking recovery against it. Although there are instances where liability has not been imposed on the successor even when the predecessor was no longer existent,[65] some cases have stressed the viability of the predecessor when refusing to impose liability on the successor.[66] In *Chadwick v. Air Reduction Co.*,[67] where the successor was held not liable, the court construed Ohio statutory law[68] as extending the viability of dissolved corporations for the purpose of suit, thereby not foreclosing the plaintiff's claim against the predecessor.[69] In *Pierce v. Riverside Mortgage Securities Co.*,[70] a successor corporation was found not to be liable to the plaintiff for the predecessor's fraud where the successor had paid a sum to the predecessor which was more than sufficient to liquidate the plaintiff's claim against the latter.[71] Moreover, in *Kloberdanz v. Joy Manufacturing Co.*,[72] where the predecessor had been dissolved, liability was not imposed upon either the successor or the predecessor. However, the court noted that the emphasis should be placed on whether there was a bona fide sale involving the payment of money enabling the predecessor to respond to actions.[73]

The predecessor's viability is usually examined in a determination of whether the successor or the predecessor should be held liable. In *Offen,* as in the cases involving labor agreements, the choice presented was between providing relief through the successor or providing no relief at all, as the predecessor could not be reached. Thus, the nonviability of Bernard Offen's estate to the injured plaintiffs appeared to have provided the court with the impetus to redefine continuity in a much more flexible manner in order to reach the "deep pocket" of the successor and, thereby to provide relief to the plaintiffs.

It would seem that the same arguments that justify termination

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[63] E.g., Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968).

[64] Brief for Appellant, supra note 62, at 8.

[65] Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817, 821 (D. Colo. 1968); Chadwick v. Air Reduction Co., 239 F. Supp. 247, 250 (N.D. Ohio 1965).

[66] Copease Mfg. Co. v. Cormac Photocopy Corp., 242 F. Supp. 993, 1013 (S.D.N.Y. 1965); Pierce v. Riverside Mortgage Sec. Co., 25 Cal. App. 2d 248, 256, 77 P.2d 226, 230 (1938).

[67] 239 F. Supp. 247 (N.D. Ohio 1965).

[68] Ohio Rev. Code Ann. § 1701.88(B) (1971).

[69] 239 F. Supp. at 251.

[70] 25 Cal. App. 2d 248, 77 P.2d 226 (1938).

[71] Id. at 257, 77 P.2d at 230.

[72] 288 F. Supp. 817 (D. Colo. 1968). This case arose out of an accident that occurred at an oil drilling rig. The plaintiff sought damages on a products liability theory. Although named defendants included Web-Wilson, Inc., the manufacturer of the allegedly defective part, and Joy Manufacturing Company, the successor to Web-Wilson, Web-Wilson had been dissolved. Id. at 818.

[73] Id. at 820-21.

of liability upon dissolution are applicable to a predecessor corporation which has sold its assets. The practical need to provide for the termination of liability upon dissolution of a corporation has been recognized in various jurisdictions[74] including New Hampshire.[75] The compromise drawn between compensating injured persons and settling the affairs of a dissolved corporation is necessary. If the predecessor had liquidated rather than sold the business, the plaintiffs would not have a viable defendant as the accident occurred beyond the statutory period of liability. Imposing such obligations on the successor places on it a burden which a dissolved predecessor would not have to bear. The Supreme Court in *NLRB v. Burns International Security Services, Inc.*[76] recognized the unfair burden that was attached to a flexible expansion of the successor doctrine: "The consequences of the application of the successor doctrine . . . has been that the successor employer has been subjected to certain burdens or obligations to which a similarly situated employer who was not a successor would not be subject."[77] It would appear to be clear that the search for a deep pocket cannot go unchecked to the point where no preexisting relationship between the plaintiff and the defendant is required. "In the absence of a transfer of assets without adequate consideration, the alternative basis for the decision, appearing to rest on continuity of business, name, and management alone, is not, we think, sufficient basis for holding a transferee liable for the debts of a transferor"[78] If followed, the *Offer* decision, which deviates from the predictability of established doctrine and imposes heavy burdens on successor corporations,[79] will have an inhibitory impact on the commercial transfer of assets.

In resolving the issue of continuity the court in *Offen* recognized the competing policies of protecting both successor corporate entities which rely upon the assumption of a known set of liabilities, and users of products who are not conscious of any change in the manufacturer's responsibility.[80] However, the First Circuit found the former policy less compelling. The court justified the treatment of the successor as a continuation of the predecessor proprietorship on the ground that certain considerations which underlie the doctrine of liability of a manufacturer for damage and personal injury

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[74] See Henn & Alexander, Effect of Corporate Dissolution on Product Liability Claims, 56 Cornell L. Rev. 865, 887-88 (1971).

[75] See N.H. Rev. Stat. Ann. ch. 294, § 98 (1955), which provides in part: "Any corporation dissolved . . . shall nevertheless continue as a body corporate for the term of three years for the purpose of prosecuting and defending suits . . . ."

[76] 406 U.S. 272 (1972).

[77] Id. at 300.

[78] J.F. Anderson Lumber Co. v. Myers, 296 Minn. 33, 40, 206 N.W. 2d 365, 370 (1973).

[79] The standard of conduct required for protection according to the *Offen* rationale might include the following burdens: inspection and perfection of all products produced by the predecessor; high costs of insurance; the inability to offer positions to the employees of the predecessor; and the inability to use the tradename.

[80] 501 F.2d at 1152-53.

caused by defective products are also pertinent to the liability of the successor of the manufacturer.[81] To determine whether there are sufficient reasons for extending successor liability to product liability claims, the rationale for the application of the successorship doctrine must be viewed in light of the policy considerations underlying products liability.

The criteria for the application of both the general rule of successor nonliability and the merger, fraud and contractual exceptions to that rule indicate that the doctrine is based upon a policy of not burdening the new corporation with the liabilities of its predecessor. The continuity exception is consistent with this policy, as the successor is not viewed as a new entity. The courts have applied a clearly defined standard requiring "reorganization of the same entity" to find continuity, not a mere similarity determined by a combination of factors.[82]

The opinion of the court in *Offen* recognized several rationales underlying the imposition of strict liability upon a manufacturer: (1) the manufacturer is generally able to protect itself and bear the costs, while the consumer is frequently helpless; (2) it is the manufacturer who has launched the product into the channels of trade;[83] (3) it is the manufacturer who has violated the representation of safety implicit in putting the product into the stream of commerce; (4) the manufacturer is the source of potential improvement in the product's quality; and (5) the negligence, if any, is that of the employees of the manufacturer.[84] However, the court recognized that certain of the above rationales are not applicable to a successor corporation.[85] Yet, the decision to impose strict liability appears to be justifiable only when all of the above reasons are present. This is especially true in the absence of any control of, or relationship with, the product at the time it was entered into the stream of commerce. The imposition of strict liability does not appear to be justified in the case of a defendant corporation who neither designed, manufactured, assembled, sold, warranted or controlled the product. Although the application of products liability has never been keyed to the fault of the manufacturer, there remains the essential link of control and responsibility of the manufacturer, seller or other persons actively participating in placing the product into the stream of commerce and profiting from the ultimate purchase of the prod-

[81] Id.

[82] Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968); Pierce v. Riverside Mortgage Sec. Co., 25 Cal. App. 2d 248, 77 P.2d 226 (1938); McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 264 A.2d 98 (1970). See text at notes 53-62, supra.

[83] See Greenman v. Yuba Power Prod. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[84] 501 F.2d at 1154.

[85] The court specifically recognized that the second and third rationales were not applicable. Id. As to the fourth rationale, the question might be raised as to whether a successor corporation should be under an obligation to inspect and evaluate all products previously manufactured by its predecessor.

uct.[86] In *Offen,* the new corporation had neither controlled nor profited from the product, and the only reason for subjecting it to products liability appears to have been its deep pocket.

The *Offen* decision is based on the assumption that the successor is in a position to insure himself.[87] This assumption is not necessarily valid. In the case of a predecessor, such as the B. Offen Company, which had been in operation for many years and produced ovens now operating on several continents,[88] it is probably unlikely that an underwriter would insure the successor. Even if it is possible for a successor corporation to procure liability insurance,[89] it is unlikely that it will be at a reasonable cost, thus putting successor organizations at a competitive disadvantage as compared to non-successor organizations operating in the same market.

Although the purpose of imposing strict liability is to create a broader and more widely available basis of recovery, the basis has always been linked to a seller or manufacturer. "At the very least there should be a feeling that the defendant has done or omitted to do something which justifies blaming him for the ensuing injury."[90] In searching for a deep pocket the courts are concerned with the mass of consumers unable to protect themselves. But in extending this doctrine by the imposition of strict liability upon a successor, the need to be fair to the successor manufacturer, as well as to the injured parties, cannot be overlooked. If, through the *Offen* decision, the theory of tort liability is broadened beyond those who had actual control of and responsibility for the distribution of the product, to apply to subsequent purchasers of the assets of that corporation, then the principle of fairness, with respect to corporations, has been abandoned to afford compensation to the injured user. Utilizing a standard of "sufficient factors of similarity" to reach the deep pocket of a corporation who had neither responsibility for nor control over the product establishes a burdensome precedent.

Prior to the decision in *Offen,* the standard for continuity was predictable.[91] In *Kloberdanz,* continuity was not found where there was no common identity of stock, directors, officers or stockholders

[86] Prosser, Handbook of the Law of Torts § 75, at 494-95 (4th ed. 1971).

[87] 501 F.2d at 1154.

[88] Brief for the Appellant, supra note 62, at 5.

[89] The Offen Corporation was insured; however, the insurance was predicated on the assumption that the Offen Corporation would not be liable for the torts of its predecessor. Interview with Joseph Devan, Attorney for Appellant, in Manchester, New Hampshire, Sept. 30, 1974.

[90] See Comment, 20 Syracuse L. Rev. 924 (1969).

[91] Continuity means reorganization. As the court in J.F. Anderson Lumber Co. v. Myers, 296 Minn. 33, 206 N.W. 2d 365 (1973), stated:

> The mere fact that a purchasing corporation is "carrying the same business" as the selling corporation is not sufficient to make the purchasing corporation liable for the debts of the selling corporation. The purchasing corporation in the instant case was not a continuation of the selling corporation within the meaning of the exception to the general rule.

Id. at 38-39, 206 N.W. 2d at 369.

between the two corporations.[92] In *McKee,* where the lands, buildings, machinery, and tradenames were all transferred to the successor who continued to manufacture the same type of product, the court found no liability since there was no evidence of continuity of management or ownership.[93]

Competent business decisions are made daily in matters involving the acquisition of commercial interests. Where unknown or contingent liabilities may exist it is essential to a sound commercial decision that the law pertinent to the assumption of a predecessor corporation's liabilities be clear and predictable. The *Offen* decision, by utilizing a "sufficient similiar factors" approach in determining continuity, provides little guidance as to what course of conduct should be undertaken by a potential transferee. The standard of conduct required for protection might be the inspection and perfection of past products of the predecessor;[94] the inability to offer positions to the employees of the predecessor; and the inability to use the tradename so as not to be in any way related to the goodwill of the predecessor. If followed, this deviation from the predictability of past corporate liability doctrine will have an inhibitory impact on the commercial transfers of assets.

MICHAEL A. DEANGELIS

Employment Discrimination—Age Discrimination in Employment Act of 1967—Bona Fide Occupational Qualification—*Hodgson v. Greyhound Lines, Inc.*[1]—The Secretary of Labor[2] brought suit against Greyhound Lines, Inc. (Greyhound), the nation's largest intercity bus carrier,[3] alleging that Greyhound's policy of refusing to accept applications for the position of intercity bus driver from persons thirty-five years of age and older[4] violated the Age Discrimination in Employment Act (ADEA or Act).[5] Specifically, the

[92] 288 F. Supp. at 821.

[93] 109 N.J. Super. at 570, 264 A.2d at 106.

[94] The Offen Company had been operating since 1928 and had produced hundreds of products which were located on several continents. Brief for Appellant, supra note 62 at 5. In Chadwick v. Air Reduction Co., 239 F. Supp. 247 (N.D. Ohio 1965), the court found that even when the successor knew that the predecessor had put a negligently designed device into the channels of commerce it was under no duty to warn third parties. Id. at 250.

[1] 499 F.2d 859 (7th Cir. 1974), cert. denied, — S. Ct. — (1975).

[2] The Secretary of Labor has the authority to enforce compliance with the ADEA. 29 U.S.C. § 216 (Supp. 1975); 29 U.S.C. § 626 (Supp. 1974).

[3] Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230, 232 (N.D. Ill. 1973).

[4] 499 F.2d at 860. Although Greyhound refuses to accept applications for the position of intercity bus driver from persons over 35, the Age Discrimination in Employment Act of 1967 (ADEA) applies only to individuals between the ages of 40 and 65. 29 U.S.C. § 631 (Supp. 1974). Thus, plaintiffs between 35 and 40 presumably would still be subject to discrimination on the basis of age even if Greyhound's request for a BFOQ was denied.

[5] 29 U.S.C. §§ 621 et seq. (Supp. 1974). For a discussion of the Act in general, see