United States v. General Battery Corp.: The Third Circuit Applies Federal Common Law Rather Than State Law To Determine Successor Liability Under CERCLA, Despite Opposing Results in Other Circuits—But Are the Splitting Circuits Really Just Splitting Hairs?

I. INTRODUCTION

Beginning in the 1930s, the Price Battery Corporation manufactured lead acid batteries at its plant in eastern Pennsylvania.[1] The battery business produced waste material, which Price Battery disposed of in and around Hamburg, Pennsylvania.[2] This disposal went unnoticed until 1992, when the United States Environmental Protection Agency (EPA) found two of Price Battery's disposal sites.[3] These sites contained elevated levels of lead, and the United States spent millions of dollars to remove the contaminated soil.[4]

The EPA determined that Price Battery was responsible and sought reimbursement under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[5] However, Price Battery was defunct, having been acquired in 1966 by the General Battery Corporation.[6] In turn, Exide Corporation acquired General Battery in 2000.[7] Because it could not sue Price Battery directly, the EPA filed suit against Exide as a successor in interest to Price Battery.[8] Exide

1. United States v. Gen. Battery Corp., 423 F.3d 294, 296 (3d Cir. 2005).
2. *Id.*
3. *Id.*; *see* Darrin Youker, *Residents Await Word on Lead Cleanup: It's Been 14 Years Since Contamination Was Found in Laureldale and Muhlenberg Township, but a Decision Has Yet To Be Made on Whether To Clean Up 283 Affected Properties*, READING EAGLE (Pennsylvania), Aug. 13, 2006, at B1 (specifying the neighborhoods where contamination was found and noting the continuing effects).
4. *Gen. Battery*, 423 F.3d at 296.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

acknowledged its status as a successor to General Battery, but it disputed the allegation that General Battery was a successor to Price Battery.[9]

The district court, on cross-motions for summary judgment, held that General Battery was a successor to Price Battery and was responsible under CERCLA for cleanup costs.[10] The district court found the continuity of location, assets, operations, contracts, and other elements between General Battery and Price Battery indicated that the two corporations had engaged in a "de facto merger."[11]

On appeal, the United States Court of Appeals for the Third Circuit grappled with two issues. First, should the court apply a uniform federal rule regarding CERCLA successor liability, rather than state law, to determine successor liability?[12] Second, does the applicable law dictate that General Battery and Exide are successors in interest to Price Battery?[13] Affirming the district court, the Third Circuit *held* that it would apply the uniform federal rule on successor liability under CERCLA, and under that rule, General Battery and Exide were successors in interest, to the Price Battery Corporation. *United States v. General Battery Corp.*, 423 F.3d 294, 309 (3d Cir. 2005).

II. BACKGROUND

In 1980, Congress enacted CERCLA to respond to serious environmental and health risks posed by industrial pollution.[14] Specifically, Congress designed the statute to provide cleanup of hazardous waste sites and spills.[15] When the federal government spends money to clean the sites, the government holds the responsible parties, also known as "covered persons," accountable for all costs the government incurs.[16] CERCLA does not list a successor corporation—a corporation that follows another in ownership or control of property[17]—as a covered person under the statute.[18] Many courts find this unsurprising, as CERCLA was "a hastily conceived and briefly debated piece of legislation."[19]

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9. *Id.*
10. *Id.* at 297.
11. *Id.*
12. *Id.* at 298.
13. *Id.*
14. United States v. Bestfoods, 524 U.S. 51, 55 (1998).
15. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1241 (6th Cir. 1991).
16. 42 U.S.C. § 9607(a) (2000).
17. BLACK'S LAW DICTIONARY 1473 (8th ed. 2004) (defining "successor in interest").
18. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988).
19. *Id.*; *see* United States v. Gen. Battery Corp., 423 F.3d 294, 298 (3d Cir. 2005); N. Shore Gas Co. v. Salomon, Inc., 152 F.3d 642, 649 (7th Cir. 1998); City of Phoenix v. Garbage

However, CERCLA has incorporated successor liability by implication. CERCLA defines "person" to include corporations and other business organizations.[20] In turn, federal law defines "company," when used to refer to corporations, to include the words "successors and assigns of such company or association."[21] Thus, "CERCLA incorporates common law principles of indirect liability, including successor liability."[22] This implicit recognition has led the circuit courts to hold unanimously that successor liability exists under CERCLA.[23] Unanimity was predictable, considering that corporate successor liability is a long-standing concept that existed at common law.[24]

What is far from unanimous, however, is how the circuits have answered the choice of law question—because CERCLA does not specifically address successor liability, should federal courts use federal common law to determine whether an entity is a successor to a responsible party, or should courts use state law?[25] At the heart of the question is a central tension: state corporation laws favor limited liability while CERCLA favors broad remedial goals in order to achieve its objectives.[26] In other words, states wish to limit liability for corporations that do business within their borders; the federal government under CERCLA wishes to hold accountable as many parties as possible.[27]

The United States Supreme Court has long held in opposition of federal common law. In 1938, the Supreme Court decided *Erie Railroad v. Tompkins*.[28] In *Erie*, the Court recognized the federal statute that stated, "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at Common Law of the United

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Servs. Co., 827 F. Supp. 600, 602 (D. Ariz. 1993). In fact, the final version of the act was created by a Senate committee that had to fashion a last-minute compromise so that the statute would pass. United States v. A & F Materials Co., 578 F. Supp. 1249, 1253 (D.C. Ill. 1984).

20. United States v. Cal. Transformer Co., 978 F.2d 832, 837 (4th Cir. 1992).

21. *See* 1 U.S.C. § 5 (2000).

22. *Gen. Battery*, 423 F.3d at 298.

23. *See id.* at 298 n.3 (noting that several federal circuit cases have recognized successor liability under CERCLA).

24. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *467-69).

25. *Compare Gen. Battery*, 423 F.3d at 304 (applying the uniform federal rule of successor liability), *with* United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) (applying state law).

26. *See* Bradford C. Mank, *Should State Corporate Law Define Successor Liability?: The Demise of CERCLA's Federal Common Law*, 68 U. CIN. L. REV. 1157, 1160 (2000).

27. *See id.*

28. 304 U.S. 64 (1938).

States, in cases where they apply."[29] Because Congress had directed the use of state law in civil actions, the Court ruled that federal courts sitting in diversity must apply the states' statutory and common law rather than a federal common law.[30] In so ruling, the Court "overturned a century of federal court experimentation in common lawmaking."[31]

However, when the question of federal common law arose in the context of CERCLA, not all circuits chose to follow the basic holding of *Erie*. The Third Circuit was one of the first courts to address the question under CERCLA.[32] In *Smith Land & Improvement Corp. v. Celotex Corp.*, the Third Circuit held that a uniform federal rule should govern the question.[33] CERCLA's legislative history, though meager, supported this decision.[34] Further, the Third Circuit focused on uniformity—without national uniformity, "CERCLA aims may be evaded easily by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability."[35] Five years after *Smith Land*, the Third Circuit reaffirmed the application of federal common law under CERCLA, though in a slightly different context.[36]

In the meantime, more circuits had joined the discussion. In *United States v. Carolina Transformer Co.*, the United States Court of Appeals for the Fourth Circuit joined with the Third and held that federal common law should apply to determine successor liability.[37] The Fourth Circuit likewise considered the notion of national uniformity, noting that even a legitimate resort to state law could enable a successor to escape liability for response costs.[38] Additionally, *Carolina Transformer*

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29. *Id.* at 71 (quoting 28 U.S.C. § 725 (1932)).

30. Gregory C. Sisk & Jerry L. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After* O'Melveny & Myers, 16 VA. ENVTL. L.J. 505, 553 (1997).

31. *Id.*

32. *See* Smith Land v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988).

33. *See id.*

34. *Id.* A case in the United States District Court for the Southern District of Ohio highlighted House Proceedings in which Representative James Florio, one of CERCLA's sponsors, stated, "To insure the development of a uniform rule of law, and to discourage business dealing 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." *See* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 807 (S.D. Ohio 1983). The Third Circuit cited this decision as authority for its legislative history analysis. *See Smith Land*, 851 F.2d at 91.

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

36. *See* Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1225 (3d Cir. 1993) (applying federal common law, rather than state law, to determine whether corporate veil-piercing was justified under CERCLA).

37. *See* 978 F.2d 832, 837-38 (4th Cir. 1992).

38. *Id.* at 837.

discussed what the federal common law on successor liability actually was.[39] The Fourth Circuit recognized the general rule under federal and state law that a corporation that acquires the assets of another corporation does not also acquire its liabilities unless one of four common exceptions is met: "(1) the successor expressly or impliedly 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."[40] The Fourth Circuit recognized that some federal courts have modified the "mere continuation" exception into a slightly broader concept called the "substantial continuity" or "continuity of enterprise" theory.[41] While the "mere continuation" theory focuses on an identity of stock, stockholders, and directors between the two companies, "continuity of enterprise" focuses on a continuation of the same employees, production facilities, location, product, name, assets, and general business operations.[42] The Fourth Circuit decided it would apply the "continuity of enterprise" theory and held that the corporation involved in the lawsuit was a successor to the original polluter.[43]

Shortly after *Carolina Transformer*, the United States Court of Appeals for the Eighth Circuit also weighed in, recognizing in dicta that federal common law was "probably" the correct law to apply.[44] Although neither party raised the question of federal or state law, the Eighth Circuit nevertheless felt that "considering the national application of CERCLA and fairness to similarly situated parties, the district court was probably correct in applying federal law."[45]

However, concurrent with the choice and implementation of federal common law in these circuits, other circuit courts were adopting the opposite concept, that state law should apply to the question of successor liability. In 1991, the United States Court of Appeals for the Sixth Circuit decided *Anspec Co. v. Johnson Controls, Inc.*[46] In that case, the Sixth Circuit refused to employ federal common law, opting instead for the state law of Michigan.[47] Federal courts can only fashion a federal

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39. *See id.* at 838. The *Smith Land* court did not examine the common law itself, presumably because the district court had not addressed the issue of successor liability, and the Third Circuit was simply remanding the suit to the lower court for adjudication of that issue.

40. *Id.*

41. *See id.*

42. *Id.*

43. *Id.* at 838, 841.

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

45. *Id.*

46. 922 F.2d 1240 (6th Cir. 1991).

47. *See id.* at 1248.

common law when Congress drafted a statute "with a broad brush" and left it to the courts to give meaning to the statute, or when a federal rule is necessary to protect uniquely federal interests.[48]

The concurrence in *Anspec* explained the situation with even more clarity.[49] If state law is adequate to achieve the federal interest, then courts have no need to develop a federal common law to decide these cases under CERCLA.[50] Furthermore, "the law in the fifty states on corporate dissolution and successor liability is largely uniform," and thus there is little need for federal common law.[51]

After *Anspec*, the argument in favor of state law picked up more steam because of two Supreme Court decisions handed down in 1994 and 1997.[52] In these cases, regarding the federal banking statutes, the Court cautioned against the creation and use of a federal common law to respond to ambiguities and gaps in federal statutes, except for "few and restricted" instances when common law is necessary.[53] Only a significant conflict between a federal policy or interest and state law will authorize the development of a common law.[54]

The next year, the United States Court of Appeals for the Ninth Circuit used those Supreme Court decisions and several other rationales to indicate a preference for state law, but ultimately decided that the result under state or federal common law was the same.[55] In *Atchison, Topeka, & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, the Ninth Circuit found that a corporate litigant was not a successor under the "mere continuation" theory.[56] CERCLA successor liability was not one of the "few and restricted" cases that justified the implementation of federal common law.[57]

Then, the Ninth Circuit engaged in a step-by-step critique of the other circuits' arguments in favor of common law. First, the legislative history cited in *Smith Land* actually supported the use of common law to

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48. *Id.* at 1245.
49. *See id.* at 1248-51 (Kennedy, J., concurring).
50. *Id.* at 1249.
51. *Id.*
52. *See* Atherton v. FDIC, 519 U.S. 213, 218 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994).
53. *See O'Melveny & Myers*, 512 U.S. at 87.
54. *Id.* For a discussion on the impact of these decisions, see Sisk & Anderson, *supra* note 30, at 510 ("*O'Melveny & Myers* signals the dawn of a new day for federal common law, or more accurately, the setting of the sun on federal common law under CERCLA.").
55. *See* Atchison, Topeka, & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1998).
56. *See id.*
57. *Id.* at 362.

decide issues of CERCLA joint and several liability rather than successor liability.[58] Second, the formation of corporations and the liability that results from successor corporations are traditionally the province of state law.[59] Third and perhaps most importantly, the proponents of federal common law failed to explain the need for national uniformity, especially considering that state laws on successor liability are largely the same.[60] "The argued 'need' for uniformity thus stems not from disarray among the various states, but from the alleged need for a more expansive view of successor liability than state law currently provides—in other words, the notion that state law on this issue is inadequate for CERCLA's purposes."[61] After this review, the Ninth Circuit found that federal common law and California state law on successor liability were the same.[62] However, the Ninth Circuit only made that determination after it refused to employ the broader "substantial continuity" theory and applied the general "mere continuation" exception.[63]

In 2001, the United States Court of Appeals for the First Circuit encountered the issue.[64] Yet another Supreme Court case had been decided in interim, and the First Circuit cited that decision to justify the use of state law.[65] In *United States v. Bestfoods*, the Supreme Court faced the issue of whether a parent corporation could be held liable under CERCLA for the polluting facility operated by its subsidiary.[66] Though the Court did not directly address successor liability, it stated that "CERCLA is thus like many another congressional enactment[s] 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.'"[67] In the First Circuit case, *United States v. Davis*, the court cited *Bestfoods* for its conclusion that "there must be a specific, concrete federal policy or interest that is compromised by the application of state law" before courts can create a federal common law.[68] Because no evidence showed that state law would frustrate any such policy or

58. *Id.*
59. *Id.* at 363.
60. *Id.*
61. *Id.*
62. *See id.* at 364.
63. *See id.*
64. United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001).
65. *Id.* at 54-55.
66. 524 U.S. 51, 55 (1998).
67. *Id.* at 63.
68. 261 F.3d at 54 (citing *Atchison*, 159 F.3d at 363-64).

interest, the court applied Connecticut's "mere continuation" test to impose successor liability on the corporate litigant.[69]

III. THE COURT'S DECISION

In the noted case, the Third Circuit once again faced the issue of successor liability under CERCLA. However, unlike the situation in 1988 when it decided *Smith Land*, the court now faced a circuit split on the issue and Supreme Court precedent that warned against the creation of federal common law in most situations.[70] In *General Battery*, the court encountered two issues: the threshold issue, whether to apply a uniform federal rule on successor liability or the law of a particular state; and the second issue, whether Exide Corporation and General Battery Corporation were liable as a successor in interest.[71]

The court began its discussion of the threshold issue with a review of prior Third Circuit decisions, including most notably *Smith Land*.[72] The court reviewed *Smith Land*'s holding that CERCLA successor liability is a matter of uniform federal law, and its rationale that legislative history and national uniformity dictate such a result.[73] Then, the court arrived at the pivotal question: do the Supreme Court rulings handed down after *Smith Land* effectively overrule its holding?[74] The answer was no—the Supreme Court decisions were not binding on the question of successor liability, and therefore *Smith Land* was still the law of the circuit.[75]

As for the decisions in *O'Melveny & Myers v. FDIC*[76] and *Atherton v. FDIC*,[77] the two Supreme Court cases relied upon by the Ninth Circuit in *Atchison*,[78] the court found that the specific holdings only blocked a federal common law for federal banking statutes; thus, the CERCLA-specific holding in *Smith Land* was still good law.[79] As for the *Bestfoods* decision, the court noted that the Supreme Court explicitly declined to decide the issue of successor liability, and thus it could not have acted to undermine *Smith Land*.[80] Moreover, *Bestfoods* actually supported a

69. *See id.* at 54-55.
70. *See* discussion *supra* Part II.
71. 423 F.3d 294, 298 (3d Cir. 2005).
72. *See id.*
73. *See id.*
74. *See id.* at 299.
75. *See id.* at 300-01.
76. 512 U.S. 79 (1994).
77. 519 U.S. 213 (1997).
78. 159 F.3d 358, 362 (9th Cir. 1998).
79. *Gen. Battery*, 423 F.3d at 300-01.
80. *See id.* at 300.

uniform federal rule,[81] despite the warning in *Bestfoods* that CERCLA, like many federal statutes, does not expressly allow state corporate law to be replaced solely because a plaintiff's cause of action is premised upon federal law.[82] The court recognized that *Bestfoods* looked to "hornbook" principles of indirect corporate liability rather than the law of a particular state, and thus the Supreme Court's decision was more in line with the concept of a uniform federal rule than state law.[83]

After maneuvering through *Bestfoods*, the court cited other Supreme Court decisions that upheld the design of federal common law.[84] Those cases upheld federal common law in order to provide a uniform interpretation of certain terms used in other federal statutes.[85] That same thinking should apply here, felt the court, because CERCLA needed a uniform federal definition of "successor corporation."[86]

The court then examined several other rationales for supporting *Smith Land*, some familiar and some previously unstated. First, though determinations of successor liability involve corporate and tort law—areas which are generally left to states to govern—it does not automatically follow that courts should use the state law to supply the federal rule of decision; indeed, one objective of CERCLA is nationwide applicability, and the courts have struggled to answer the choice of law question cohesively.[87] Second, though the laws of the fifty states appear homogeneous on the issue, "this uniformity is less apparent when the general standards are applied in specific cases."[88] The court acknowledged the Ninth Circuit's critique in *Atchison* that the state and federal laws on successor liability do not have a large variance.[89] However, the court disagreed, offering the facts of *General Battery* itself as an illustration of how different states' laws can yield opposing results.[90] The specific question in *General Battery*—whether a corporate acquisition through a mix of cash and stock would trigger the de facto merger exception—is treated differently under the laws of New Jersey and New York.[91] The court "doubt[ed] Congress intended to incorporate

81. *Id.*
82. 524 U.S. 51, 63 (1998).
83. *See Gen. Battery*, 423 F.3d at 300.
84. *See id.*
85. *See id.*
86. *See id.*
87. *Id.*
88. *Id.* at 301.
89. *See id.* at 301-02.
90. *See id.* at 302.
91. *Id.*

such variations under a comprehensive federal liability statute.'"[92] Third, a majority standard allowed for predictability under CERCLA.[93] Finally, uncertainties that would result from varying state laws could generate more CERCLA litigation and more transaction costs, things which the statute seeks to minimize.[94] Thus, "the general doctrine of successor liability in operation in most states"—the same doctrine set forth by the court almost twenty years before in *Smith Land*—was still the law of the Third Circuit.[95]

The court ended its discussion of the threshold issue with a brief discussion on verbiage. The court distinguished between the creation of common law and statutory interpretation.[96] Though ambiguous federal statutes do not immediately authorize the creation of federal common law, not every statutory gap must be filled by state law.[97] Here, where CERCLA is intended to have a uniform application across the United States, the "uniform interpretation of an undefined term in a federal liability statute 'is not free-wheeling common-law rulemaking,' but rather 'filling a statutory gap, a standard office of interpretation.'"[98] In other words, strictly speaking, the court did not consider itself engaged in common law rulemaking simply because it used a uniform federal rule to define "successor corporation" under CERCLA.[99] The decision was merely an exercise in statutory interpretation.[100]

Having decided what rule of law to use, the court reached the actual issue of whether Exide and General Battery were successors in interest to Price Battery.[101] The court applied the same "general rule" used in *Carolina Transformer*, that corporations acquiring another corporation's assets do not acquire its liabilities unless one of the four common exceptions is applicable.[102] The facts of this case only implicated de facto merger, so the court limited its analysis to that exception.[103]

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92. *Id.*
93. *Id.* at 303.
94. *Id.*
95. *See id.* at 304 (citing Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988)).
96. *See id.*
97. *Id.*
98. *Id.* at 305.
99. *See id.*
100. *Id.*
101. *Id.*
102. *See id.*; *see also* United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992).
103. *Gen. Battery*, 423 F.3d at 305.

The majority rule on de facto mergers uses a four-factor test to decide whether a merger has in fact taken place.[104] The exception will apply when:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations. (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation. (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible. (4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.[105]

With the first prong, the continuity of enterprise, the court found that "[i]n every operational respect—from management and employees to location and assets to products and general business operations—General Battery continued the Price Battery enterprise."[106]

The second prong, continuity of ownership, was not as cut and dry.[107] General Battery had paid for the acquisition of Price Battery with almost three million dollars in cash and one million dollars in General Battery stock.[108] Exide argued that, in a largely cash sale, the continuity of ownership was lacking because the former owner of Price Battery had only a small percentage of the General Battery stock and therefore little authority to make decisions as an owner.[109] However, the court rejected that argument because the case law had not made a distinction in regards to sales made largely in exchange for cash.[110] "[O]nly some continuity of ownership is required."[111]

The third and fourth elements garnered little attention by the court.[112] Price Battery had ceased operations and dissolved as soon as possible after the acquisition.[113] Though Price Battery continued certain management and operations independently of General Battery, the most important factor was that Price Battery had ceased ordinary business

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104. *Id.* (citing Jansen v. Packaging Corp. of Am., 123 F.3d 490, 507 (7th Cir. 1997)).
105. *Id.*
106. *Id.* at 306.
107. *Id.*
108. *Id.*
109. *Id.*
110. *See id.* at 307.
111. *Id.*
112. *Id.* at 307-08.
113. *Id.* at 307.

operations.[114] Regarding the fourth element, the purchase agreement between the two corporations explicitly established that General Battery would assume all of Price Battery's obligations.[115] Thus, because all four factors tipped in favor of a de facto merger, the court held that General Battery and Exide were responsible for Price Battery's CERCLA liability.[116]

As a final but important point, the court rejected the use of the "substantial continuity" theory as a basis for successor liability under CERCLA.[117] Because the theory eliminated certain elements of the de facto merger analysis, it essentially created a rule that was different from the generally accepted rule in most states.[118] "Substantial continuity" was inconsistent with *Bestfoods*, which held that CERCLA did not abandon the fundamental principles of indirect liability at work in most states.[119] Thus, just as the *Atchison* court rejected substantial continuity as an expansion of the "mere continuation" exception, the court rejected the same theory as an expansion of the de facto merger exception.[120]

IV. ANALYSIS

For some, *General Battery* is an unexpected development in the area of CERCLA successor liability, despite the fact that using a uniform federal rule had long been the law of the Third Circuit. One commentator believed that after *O'Melveny* and *Bestfoods*, courts would be forced to implement state law to govern the issue.[121] *General Battery* proved them wrong, though the court was careful to explain that it had engaged in statutory interpretation, not common law rulemaking. Reviewing the decision, one is hard-pressed to say that *General Battery* was wrong to reaffirm a uniform federal rule for CERCLA successor liability—the circuits split almost evenly on the choice of law question, and the Supreme Court has never spoken directly to the issue. However, the overarching principles of the Supreme Court decisions, and some flawed reasoning on the part of the Third Circuit, may at least call the *General Battery* decision into question.

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114. *Id.* at 308.
115. *Id.*
116. *Id.* at 309.
117. *Id.*
118. *Id.*
119. *Id.*
120. *See id.*
121. *See* Sisk & Anderson, *supra* note 30, at 510 ("*O'Melveny & Myers* signals the dawn of a new day for federal common law, or more accurately, the setting of the sun on federal common law under CERCLA.").

Since the days of *Erie*, the Supreme Court has long disfavored federal common law. *Erie* was the impetus for the Court's decisions in *O'Melveny* and *Atherton*.[122] Citing *Erie* for the proposition that there is no federal common law, *O'Melveny* rejected any notion that federal common law would govern the particular situation under the federal banking statutes.[123] The Court spoke with concise and forceful language, refusing to analyze the argument in favor of common law with any great depth because "it [wa]s so plainly wrong."[124]

However, *General Battery* was correct in pointing out that the Supreme Court has not invalidated federal common law altogether, nor has it spoken specifically to CERCLA successor liability. The Third Circuit used these facts as justification that *O'Melveny* did not overrule its "CERCLA-specific" holding in *Smith Land*.[125] The problem with this argument is that, although the Supreme Court did not expand its ruling beyond the banking statutes, there is no good reason to think that CERCLA is any different than the federal banking statutes. *General Battery* stressed a need for uniformity under CERCLA, but it did not explain why CERCLA was unique in its need for uniformity or why the banking statutes—and all other statutes, for that matter—do not require the same uniformity. The banking statutes certainly would benefit from uniform interpretation, as well, but the Supreme Court made no mention of that factor in striking down a federal common law of banking statutes. Likewise, the predictability and lower transaction costs that *General Battery* sought to protect with a uniform federal rule are just as desirable for the banking statutes, yet the Supreme Court made no mention of those factors, either. Additionally, the court failed to consider whether state law actually frustrated any of CERCLA's stated objectives. By not explaining the need for uniformity and by not showing that state law would upset the federal policy animating CERCLA, the court failed to overcome the Supreme Court's presumption against federal common law.[126]

Furthermore, the court's distinction between making federal common law under CERCLA and interpreting a statute is faulty. Because the Supreme Court had allowed federal common law to determine the uniform application of certain statutory terms, the Third

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122. *See* 512 U.S. 79, 83 (1994); 519 U.S. 213, 217 (1997).

123. *See* 512 U.S. at 83.

124. *See id.* at 83.

125. *See Gen. Battery*, 423 F.3d at 300.

126. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979) (creating a test for determining when federal common law is proper).

Circuit found that the same logic applied here where the courts were defining "successor corporation."[127] However, as the dissent points out, the term "successor corporation" does not exist under CERCLA.[128] The court was "confronted with a matter in an otherwise detailed federal statutory scheme, not a mere need to attach meaning to a term of art employed but not defined by Congress."[129] It would seem that the court, by stating that it was defining a term when, in fact, the term is not mentioned in the statute, misunderstood the distinction between interpretation and rulemaking.[130]

Even if the reasoning of *General Battery* is questionable, a simple question remains—does the choice between federal and state law really matter? Consider the following passage from one commentator, written before the *General Battery* decision:

> Before a federal court takes the audacious step of crossing the line from adjudication to lawmaking, the court should at least be certain that this passage is crucial to the outcome of the litigation. Although the mere fact that adoption of a novel and expansive rule would alter the result is hardly sufficient in itself to justify formulation of a federal common law, a court should not even contemplate such a move unless the matter is unavoidably placed before it. Unfortunately, the three circuit decisions adopting federal common law for successor liability under CERCLA in the years preceding [*O'Melveny*] overreached unnecessarily, in that the same results in those cases could have been comfortably attained on traditional state law grounds.[131]

If the federal courts applying the federal common law could reach the same result with state law, what's all the fuss about? The Ninth Circuit recognized this in *Atchison* when it wrote that a uniform federal rule might be justified if state law varied widely on the issue of successor liability.[132] "This is not the case, however, as 'the law in the fifty states on corporate dissolution and successor liability is largely uniform.'"[133] *General Battery* itself takes notice of this concept by adopting "the general doctrine of successor liability in operation in most states."[134] Yet, the Third Circuit worried that allowing the law of a particular state to

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127. *See Gen. Battery*, 423 F.3d at 305.

128. *Id.* at 311 n.14 (Rendell, J., concurring in part and dissenting in part).

129. *Id.*

130. *See* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991) ("[O]f course, the line separating statutory interpretation and judicial lawmaking is not always clear and sharp.").

131. Sisk & Anderson, *supra* note 30, at 532-33.

132. *See* 159 F.3d 358, 363 (9th Cir. 1998).

133. *Id.* (citing *Anspec*, 922 F.2d at 1249).

134. *Id.*

apply could result in lopsided results in those states where successor liability laws are narrowly tailored. This concern reflects the central tension discussed earlier—in the effort to limit CERCLA liability for corporations, states may adopt laws that limit liability in certain situations, namely successors in interest.

However, as the Ninth Circuit pointed out, this is an invalid concern.[135] Though states have an interest in fostering business within their borders, they also have an interest in ensuring that successor corporations are held liable, as well. "[S]uccessor liability rules were, after all, developed to address much more than environmental liability. It is unrealistic to think that a state would alter general corporate law principles to become a peculiarly hospitable haven for polluters."[136]

Now, if given the chance, the Third Circuit might respond that states have no need to alter their successor liability laws to achieve this goal. The laws in some states are old and established in this area, and those laws provide a very narrow version of successor liability. However, in *General Battery* itself, the court cited only one situation, in which New York and New Jersey differed on the question of whether a small percentage of equity created a de facto merger, as an example of how some states' laws were too narrow. The court either could not find more examples or simply chose not to give any more. Nevertheless, the court attempts to support a major point of analysis with just one example. Furthermore, even if conflicts do exist on the relatively subordinate issues of small equity amounts or cash-stock hybrid acquisitions, these conflicts surely do not defeat CERCLA's ultimate objectives of comprehensive environmental cleanup.

There is another rebuttal to the idea that both state and federal common law are the same. The federal common law is indeed broader than the state law because common law recognizes the "substantial continuity" theory rather than the more narrow "mere continuation" theory.[137] The broader standard allowed courts under CERCLA to hold liable more parties than it could under the "mere continuation" theory.[138] One commentator noted that an example was *Carolina Transformer*, where "only the substantial continuity approach would enable the EPA to reach a successor corporation."[139] However, both Atchison and General Battery have overruled the substantial continuity theory in regards to

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135. *Id.*
136. *Id.* at 364.
137. Mank, *supra* note 26, at 1197.
138. *See Atchison*, 159 F.3d at 364.
139. *See* Mank, *supra* note 26, at 1197.

mere continuation and de facto merger, respectively. Atchison and General Battery are the more recent circuit decisions, so it appears that the courts are moving away from the theory of "substantial continuity." By doing so, they are moving towards homogeneity between federal and state law.

V. CONCLUSION

Considering the Third Circuit's *Smith Land* precedent, differing opinions in other appellate courts, and implications—but not explicit holdings—from the Supreme Court, one should not be surprised by the conclusion in *General Battery*. The Third Circuit probably wanted to uphold a seventeen-year-old precedent that had allowed deeper pockets to fund environmental cleanup. This is a noble objective. However, the court used analysis that would potentially support a body of federal common law for every federal statute in existence, and then tried to couch its actions as defining a CERCLA term that does not exist. Perhaps this analytical shortcoming is unimportant—as the substantial continuity exception is phased out, the federal common law and state law are becoming one and the same. In other words, all the arguing among the courts may simply be a waste of breath.

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