Following Form: Corporate Succession and Liability Insurance

Adam F. Scales

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Adam F. Scales, Following Form: Corporate Succession and Liability Insurance, 60 DePaul L. Rev. 573 (2011)
Available at: https://via.library.depaul.edu/law-review/vol60/iss2/14

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, cmcclure@depaul.edu.
FOLLOWING FORM: CORPORATE SUCCESSION AND LIABILITY INSURANCE

Adam F. Scales*

The ship wherein Theseus and the youth of Athens returned had thirty oars, and was preserved by the Athenians . . . for they took away the old planks as they decayed, putting in new and stronger timber in their place, insomuch that this ship became a standing example among the philosophers, for the logical question of things that grow; one side holding that the ship remained the same, and the other contending that it was not . . . .

Plutarch, Theseus

INTRODUCTION

Legal systems do not always play well with one another. A body of law developed over centuries carves channels of thought into the worldview of its enthusiasts. When its tenets conflict with those of another, the body of law tends to comprehend the problem entirely within its own well-defined norms. Why should the norms of another system obtrude?

The other system may be no more charitable. If it is a newer one, the urge is to abandon the dead-hand grip of a past unresponsive to modern conditions. An older system may perceive no remit to unsettle the wisdom of the ages.

Convinced of their respective and essential rectitude, different systems may offer entirely different answers to the same question. Each answer appears correct, given the norms of the system being asked to respond. When they intersect, however, the law ought to be capable of articulating rules that do not turn on which system the judge had in mind that day. Rather than a game of jurisprudential musical chairs

* Associate Professor of Law, Washington and Lee University. I am grateful to Joe Ulrich, Tom Baker, Sean Griffith, Jeff Stempel, and Andrew Gold for their thoughtful comments on drafts of this piece. David Millon labored tirelessly (though perhaps unsuccessfully) to help me understand the mysteries of corporate law. I benefited greatly from workshops hosted by the UC Hastings faculty and the Rutgers School of Law in Camden, New Jersey. It was an honor to present this work at the Clifford Symposium.


573
that inevitably leaves one or more systems out, legal rules should pro-
vide a place at the table for all.

Corporate succession offers the interplay of three substantial sys-
tems of law: (1) corporate law, which seeks to direct capital efficiently
by channeling risks as private actors see fit; (2) tort law, which allo-
cates injury costs retroactively; and (3) an insurance law system, which
distributes the costs of accidents across time and space. This descrip-
tion has been written to underscore some essential similarities across
these bodies of law. However, problems arise precisely because each
system manages uncertainty differently, with varying degrees of re-
gard for its neighbors. Sometimes, high fences make good neighbors,
but not here.

II. The Problem

Corporations regularly engage in tortious conduct, ranging from
mere inadvertence to unconscionable venality. The tort system allo-
cates responsibility accordingly, imposing liability for damages. Often
that liability is satisfied by a matching obligation of the corporation’s
liability insurer, which typically must defend the corporate policy-
holder as well. Most of the time, this is an abstractly interesting but
unremarkable exercise. But every now and then, the participants col-
lide because of features unique to each.

Corporations last indefinitely, but they rarely retain the same struc-
ture indefinitely. Mutability is one of the signature characteristics of
capital organization, and a company may be reorganized for a host of
reasons, including operational efficiency, tax considerations, or risk
management.

Liability insurance policies often possess their own pseudo-indefi-
nite character. Although policies have definite time limits on cover-
age, that coverage may be triggered by events that are only perceived
decades later. This “occurrence-based” characteristic is extremely
valuable to policyholders, though it can be a source of chagrin for in-
surers. The chagrin stems from the eccentricities of liability law which
is of course the raison d’être for liability insurance.

Tort law has changed dramatically since the middle of the twentieth
century. Liability has been expanded (in kind and degree) in ways
that were unforeseeable when many insurance policies were written.

2. 1 International Risk Management Institute, Commercial Liability Insurance
Rev. 1, 7 (1987).
Together with liability insurance law's focus on when an injury occurred (as distinct from when the injury became legally cognizable), it is not unusual for insurers (and their policyholders) to awaken to liabilities that would have been merely the stuff of bad dreams decades earlier. Two types of tort claims share this characteristic to a high degree: product liability and environmental harms. Car accidents and slip-and-fall cases rarely present this difficulty.

This difficulty can be managed, but it is complicated by the above-described tendency of corporations to change form. Environmental and product harms recognized decades after commission will likely reveal substantial alterations in the nature of the firm that created them. Indeed, the firm may no longer exist—at least not in a form to which both liability and insurance coverage are easily imputed.

This dynamic is illustrated by Henkel Corporation v. Hartford Accident and Indemnity, a 2003 decision of the California Supreme Court. Henkel was a watershed; it revealed the complex tensions between different bodies of law that had been obscured by patchwork treatment and occasional judicial pronouncement. From one perspective—the obviously enlightened view of the insurance professoriate—Henkel appears to be completely wrong. Reflection suggests, however, that it is merely mostly wrong. Understanding why requires tracing its doctrinal and conceptual antecedents to discover and validate the competing values that collide in such cases. Then, we may chart an appropriate course for Theseus' ship.

III. Henkel

In the late 1970s, Union Carbide purchased all the stock of Amchem and merged with it. Amchem became a wholly owned subsidiary of Union Carbide. Union Carbide formed a second subsidiary, transferring to the subsidiary all of the assets and liabilities relating to Amchem's metal-treating business. By convention, we may now refer to Amchem No. 1 (which retained an agricultural chemicals business) and Amchem No. 2. Amchem No. 1—the asbestos-encrusted husk of the original firm—was purchased by Rhone-Poulenc. No. 2 was purchased by and merged into the Henkel Corporation.

Corporate acquisitions are frequently followed by heartburn, and this came in the form of lawsuits by a group of Lockheed employees who alleged exposure to Amchem-produced toxic chemicals during
the course of their employment. The employees sued Rhone, as one of the apparent successors to Amchem, and Henkel, which was the most obvious candidate as the successor to Amchem No. 2. Henkel turned to Hartford, which had in simpler times insured the original Amchem. Henkel claimed that as successor to Amchem’s liabilities (there was no suggestion of misconduct by Henkel itself, or in its Amchem incarnation after acquisition) it was entitled to a defense and indemnity from Hartford. Hartford thought differently, and the California Supreme Court agreed.7

Cases such as Henkel require consideration of the structure of corporation law, particularly as it relates to shareholder immunity and mergers and acquisitions. This leads to a small but essential corner of torts relating to “successor liability.” Together, they provide the backdrop for the insurance contract to operate and for different theories of insurance interpretation. Simply put, is insurance law for contracting parties who should be free to do as they wish? Or is liability insurance law substantially geared towards the interests of tort claimants, who are realistically the likeliest beneficiaries of coverage? Leah Wortham once suggested that insurance was “[t]oo [i]mportant to be [l]eft to the [a]ctuaries;”8 here we may ask if it is too important to be left to mergers and acquisitions lawyers.

IV. CORPORATE IDENTITY AND LIABILITY

A discussion of corporate law inevitably begins with the question, “What is a corporation?”9 Obviously, it is a means for aggregating capital and directing production. But “means” are not the same as “meaning.” Different answers have emerged over the centuries.10 Dominant for now is the view that a corporation is a nexus of contracts among labor, capital, and management.11 A corporation is less a thing than a place—a street corner where mutually interested parties arrange to meet and conduct their business. When that business is concluded and the parties go their separate ways, we know we are

---

7. See Henkel, 62 P.3d at 76.
guilty of misplaced concretion when we point to the empty street cor-
ner and say that it is the corporation.

Essential to this perspective is the perhaps counterintuitive realiza-
tion that the elements of the corporation are not, in and of them-
selfs, the corporation. This is evident enough if one is thinking about
a low-level employee. And one probably would not regard the sup-
pliers of materials to the corporation to be the corporation. But con-
sider management and shareholders. These appear to the untrained
eye to be decent proxies for the corporation itself. But that is the
untrained perspective. Ownership is not identity, and—in large cor-
porations, at least—it does not presuppose operational control.

Although not essential to the concept of the corporation, sharehold-
ers have enjoyed a limited liability that emerged gradually during the
nineteenth century. Liability is limited in that shareholders risk only
the amount of their investments in enterprises that fail, default on
debt, or incur tort liability. The obvious rationale for this is the en-
couragement of risk-taking and enterprise, which corporate law
presumes will be suboptimal given a rule requiring shareholders to
internalize the losses as well as the gains from joint activity. A less
obvious and perhaps more compelling justification focuses on the
mechanics of capital formation. Without shareholder immunity, the
value of shares rises or falls depending on the wealth of their owners.
In a deep, active market for shares, such information would be nearly
impossible to obtain and integrate into share prices that fluctuate after
every transfer. This would itself eliminate the possibility of a deep
market for shareholding and inhibit firms from aggregating the capital
necessary for their operations. This rationale does not apply to
closely held firms and may not describe the functioning of modern
holding companies. Its continued grip may simply be one of the bet-

12. This intuition must be qualified by the observation that the acts of even low-level employ-
ees can usually be attributed to the organization through vicarious liability. See, e.g., JOHN C.P.
GOLDBERG & BENJAMIN ZIPIRUSKY, TORTS 58 (2010). This is a perfectly sensible rule, but it is
more a convenient convention for pretermittng disputes over agency and ensuring compensa-
tion for tort victims rather than a conclusion of legal identity between the employee and the
firm.

13. See Phillip I. Blumberg, Limited Liability and Corporate Groups, 11 J. CORP. L. 573, 576
(1986).


15. See Stephen M. Bainbridge, Abolishing Veil Piercing (unpublished manuscript 2000),

ter illustrations of “preservation-through-transformation,” but it is powerful and penetrates deeply into the structure of corporate law.

It is a rationale that syncs up neatly with the rules governing liability for corporate successors or, to be more accurate, the limited exceptions to the default rule of non-liability. “Corporate succession” is a term made imprecise by the variety of elements within a predecessor to which a putative successor might lay claim. The default position of corporate law is that a succession amounting to less than a formal merger (which is generally governed by statute) does not ordinarily impose upon the successor the debts, including tort obligations, of the predecessor. The stock of the predecessor may be acquired; physical and incorporeal assets may be transferred; debt may be issued that yields the incidents of ownership. What is required for potential liabilities to transfer as well is the kind of additional “x-factor” to which corporate law is often allergic: (1) the successor agrees to assume the predecessor’s debts and liabilities; (2) the transfer is a de facto merger in which the parties have merely arranged a form that evades the statutory requirements yet have in substance united their operations; (3) the successor is a “mere continuation” of the predecessor (again, this rests on the conclusion that form and substance have parted ways); and (4) the succession was designed for the purpose of defrauding creditors.

There is much to say about these rules, but notice that they serve corporate law’s interest in limiting shareholder liability to the amount invested. That is, absent special circumstances, a financial obligation of the predecessor—a claim that might very well be “underwater” because of the predecessor’s inability to pay it—does not automatically become more valuable because of the fortuity of acquisition by a richer, more solvent firm. Corporations in distress yet possessing valuable assets can, with planning, rinse from those assets the liabilities they have generated and transfer them to productive use in another’s hands. This is, of course, an uncharitable description. Consider another: the separation of the corporation into its constituent parts permits efficient use of assets, despite their temporary location within a larger, tort-generating organization. Restricting liability to cases in which the corporate form has only nominally changed (that is,


19. A direct merger or consolidation would have this effect, which is precisely why such transactions are typically conducted through subsidiaries.
the "successor" has a relationship of identity with the "predecessor"), or has been "abused," is consistent with this efficiency norm.

V. INSURANCE AND IDENTITY

Before returning to Henkel, we must sketch the relationship between a liability insurer and its corporate policyholder. All insurance contracts transfer risk among contracting parties, each of which may be regarded as a proxy for others in the risk-distributive chain. To work well, insurance requires, in Ken Abraham's timeless phrase, a "special sort of uncertainty." 20 We must know that misfortune will strike with some regularity, but we cannot know precisely when. Ideally, one would like to know "how much?" That is, given the known and unknown risks of loss, what are the boundaries that define liability? The policyholder is in most cases transferring a sum certain to achieve this limitation. The insurer in theory can specify the upper limit with precision, and the vast majority of contracts purport to do so. But insurance policies written decades ago did not specifically contemplate tort system-level developments that augured poorly for judicial recognition of the boundaries insurers had thought settled long ago.

A central specification is that coverage extends only to the policyholder actually described in the policy. Although insurers and commentators sometimes suggest a little more discrimination than actual underwriting practices reflect, the fact is that the insurer has agreed to bear a set of risks tied to a particular policyholder. Should that policyholder change, the risks would seem to change as well. If the policy benefits were nonetheless transferred, this would create a situation where, at best, an interloper is permitted to reap without toil. Worse, an insurer might be responsible for risks it did not and could not have foreseen. While neither of these developments in isolation might destabilize the insurance system, they would put substantial pressure on the pervasive notion that insurance is essentially a private contractual undertaking. As we shall see, that is not the only notion that pervades insurance law.

Returning to Henkel, the sundering of Amchem21 into Amchem No. 1 and Amchem No. 2 was accompanied by a transfer of all "assets, liabilities and goodwill utilized in its metalworking chemical activities."22 This was accepted, unsurprisingly, by Amchem No. 2's newly

21. By its own hand, though one guided surely by Union Carbide.
formed board of directors. Interestingly, this was the moment Henkel lost the case. For although this agreement explicitly transferred contingent tort liabilities, the Henkel court would rule that the liabilities did not transfer by "operation of law." That is, neither the exceptions described above nor their California variants imposed successor liability on Amchem No. 2 independently of the contractual allocation. As Henkel succeeded to No. 2, it succeeded to its liabilities by its explicit choice, not by default.

This is an important constraint on the meaning of "succession." Successor liability is thus defined by the norms of corporate law—specifically the contracts transacting parties have struck—rather than those of tort law. The successor is determined by one set of the incidents of the corporation—ownership interests—rather than others, such as its activities. When Judge Cardozo gently untied product liability from privity, he rejected the idea that the obligation to the consumer grew "out of contract and nothing else." Instead, the source of the obligation was "the law," by which he meant the law of torts. By contrast, the default rule of corporate succession locates the source of putative successors' tort obligations in the law of contracts.

The first upshot of this move is the interesting result that the most obviously tort-relevant assets (those in the chemicals business) are targeted for liability only by the fortuity of the parties' risk allocation choices. The risks of that business have no independent significance in evaluating the insurance picture. The possibility that liability insurance coverage should be complementary to actual tort liability was considered by a plainly skeptical majority in Henkel, but sidestepped, because the liability here was contractually assumed rather than imposed directly by the law of torts. At this point, the claims of the liability system are submerged under the rubric of corporate law.

23. See id.
24. Actually, little is "explicit" in the generic reference to all "assets and liabilities" that often represents the extent of delineation between the predecessor and successor firms. Determining what the transacting parties intend is half the problem. The other half involves determining what they should intend. See id. at 71–72.
25. Id. at 73.
26. California recognizes another exception to the default rule of non-liability. A successor that continues marketing a predecessor's products may be liable (in a products-liability case) if the succession resulted in the "virtual destruction" of a plaintiff's remedies. Id. In California, this would be satisfied only if the predecessor (1) dissolved or was left insolvent or (2) did not hold liability insurance, as such insurance survives dissolution. Id.
28. Id.
29. See Henkel, 62 P.3d at 73.
30. This is not necessarily wrong. It makes sense for different bodies of law to rely on the competences of one system, rather than permitting each system to reinvent the wheel (reshaping
But in another move, the *Henkel* court inadvertently elevated one vision of insurance law (the contract model) over both torts and corporate law. If chemicals "liabilities" are transferable by contract, what is the scope of the "assets" thus transferred? Do they include assets such as liability insurance policies—assets that would seem particularly relevant to such a transaction? Although I will explain why the matter is not free from doubt, let us assume this was indeed the parties’ intention. The *Henkel* court ruled this irrelevant because Amchem No. 1 had no authority to transfer this particular asset to No. 2.\(^{31}\)

**VI. INSURANCE AND ASSIGNMENT**

Insurance contracts typically contain language expressly barring assignment of the policy by its holder to another without the consent of the insurer.\(^{32}\) Insurers have an obvious interest in ensuring that the "risk reasonably to be perceived defines the duty to be obeyed," to borrow a convenient phrase.\(^{33}\) Unauthorized transfers could in theory permit less risky policyholders to sell insurance rights to more risky non-policyholders. In exchange for a fee less than the premium by an insurer—if insurance for the risky actor was available at all—the risky actor would enjoy a protection for which it has not fully paid. On the other side of the policy would rest, uneasily, an insurer responsible for a risk it has not agreed to bear.

Anti-assignment provisions are at their most persuasive under such circumstances, but these circumstances were not fully present in *Henkel*. Again, while skeptically describing Henkel's claim that assignment would not harm the insurer here, the court was content merely to observe that there were two exceptions to a general rule vindicating anti-assignment language and neither was applicable.\(^{34}\) Thus, neither Amchem No. 2 nor Henkel could benefit from the effort to transfer all chemical business assets of Amchem No. 1.

This analysis thus elevates one aspect of contractual freedom—the insurer’s limitation on assignment—over a second: the ability of cor-

\[^{31}\text{See Henkel, 62 P.3d at 74–75.}\]
\[^{33}\text{Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928).}\]
\[^{34}\text{Henkel, 62 P.3d at 76.}\]
porate actors to allocate property, including intangible property, to such uses as they see fit.35

Henkel has invited considerable commentary, some academic, much of it from the professional community of corporate and insurance lawyers. While the latter category has been unusually informative, it has characteristically tended to reflect rather well the advocacy positions easily identified with its various authors.36

Academic dissent from Henkel has come primarily from Professors Tom Baker and Jeffrey Stempel, who level heavy criticism from the standpoint of the structure of liability policies and a close examination of the unfortunate incentives Henkel creates.37 There is considerable merit in these critiques, and I largely concur with them. However, the Henkel problem is more complex than I initially thought; I am no longer certain, as I suspect most insurance professors were, that the Henkel problem is easily solved merely by appealing to the policies that underlie modern insurance law.

By deciding the case as it did, the Henkel court dealt with the problem of liability insurance for corporate succession atomistically. The opinion reflects an incompletely rationalized approach, partly because it reaches some wrong conclusions on the discrete problems before it, but more importantly because it treated them discretely. It is something of a three-way collision between the system norms sketched above rather than a pas de trois mediating their respective competences. And while ballet may be an unrealistic goal given the intrinsically messy and divergent legal processes at work, Henkel’s missteps offer nothing but room for improvement. To understand whether a predecessor’s liability insurance should be available to a corporate

---

35. Whether the insurance “asset” is alienable typically turns on whether the insurer’s obligation has emerged from the indefiniteness of risk and hardened into reality. This tracks the distinction between pre-loss and post-loss transfers of insurance rights. Once a loss has occurred, an assignment would not ordinarily “materially” increase or change the insurer’s duties within the meaning of Sections 317 and 322 of the Restatement (Second) of Contracts. See Restatement (Second) of Contracts §§ 317, 322 (1981).


successor, it is useful to consider what these three systems have in common. Quite a bit, it turns out, but their different structures and methods have tended to obscure this. Each can be understood as a system for disciplining and allocating risk but with particular regard for the identity of those risks and their bearers.

VII. Wrongdoing and Products Liability

It is interesting that the body of law ostensibly at the heart of the *Henkel* decision—the law of torts—was virtually ignored by the court. Because the *Henkel* problem simply would not exist in the absence of tort law—and, indeed, is sharpened by the contours of the particular tort law we have—we may begin here.

There is no single rationale for the tort system. Readers of John Goldberg’s wonderfully accessible survey of modern tort theory will likely appreciate how the operation structure and meaning of that system have evolved over time. Tort law embraces historical and technological developments and changing social mores; it fits itself to contemporaneous notions of democracy—notions that have changed since the arrival of the “modern” tort system in the mid-nineteenth century. Efforts to reduce its aims to a few simple and unswerving rules founder, as do some of the more elaborately wrought accounts of the system’s goals. A Rorschach test if ever one there were, the tort system embraces enough contradictions to reflect whatever the viewer wishes to see in it. It is useful, then, to recognize that the tort system serves many functions, though it has often emphasized one or more modes of thought throughout its history.

I find it useful to think of torts as a two-track mechanism for regulating and distributing risk, on the one hand, and righting wrongs on the other. Which is to say, I find it useful for now to ignore features of the tort system that complicate this simple picture. (This perspective is utterly congenial to the open textures of the tort system, which is generally convinced it can have the best of both worlds at all times.) Although successor liability insurance is a potential problem for any enterprise, it is particularly problematic for product manufacturers. And because products-liability law stands at the summit of tort law’s aspirations and embodies most of its flaws and contradictions, this is the image of the tort system that should guide us.

Owing to the apparent failure of contract law to discipline product manufacturers, tort law in the mid-twentieth century stepped into the

39. See id.
breach. Tort law rests on notions of moral wrongdoing. Ideally, liability is matched to those who have acted wrongly regarding the rights of others. And the amount of liability is, in a well-functioning system, conveniently tailored to the losses suffered as a result of that wrongdoing. The result is a restoration of the previous order. And, as a kind of karmic benefit, this process indirectly disciplines future wrongdoers by providing a cautionary tale of the wages of wrongdoing.

Law and economics recasts this story somewhat; the discipline could be primary, and attention to the delicate sensibilities of our moral intuitions merely a harmless salve harvested from the offshoots of an efficient system for internalization. What is important here is that this is essentially what strict products liability did, albeit imperfectly. The problem was not simply the failure of contract law, but the failure of a negligence-based tort law. Contracts were not useful in disciplining product manufacturers because those same manufacturers wrote the contracts that governed their liability. Extra-contractual norms of tort, while attractive in theory, did not then possess the institutional confidence to discern wrongdoing in very subtle, if ultimately tragic, departures from optimum product design and delivery.

The solution, offered by the Restatement (Second) of Torts § 402A, may well be described as a "highly successful effort at obfuscation.” By combining features of both contract and tort, the architects of § 402A created a hybrid strict products liability.

The second half of the twentieth century saw the apparent decline in moral reasoning as a guide to tort liability. This was accompanied by more expressly instrumentalist reasoning, courtesy of law and economics. It was unnecessary as well as wasteful and muddleheaded to speak of product manufacturers as having “wronged” disappointed purchasers. Indeed, to some extent, consumers themselves could be understood as a necessary and morally equivalent (which is to say, largely morally irrelevant) link in a chain that resulted, unfortunately, in accident costs from time to time.


42. Indeed, it appears to have actually been so described by Professors Henderson and Twer-ski, though they cannot recall precisely where. See E-mail from Lyndsey Clark, Administrative Assistant, Cornell Law School, to Adam Scales, author (Apr. 13, 2009, 10:38 EST) (on file with the DePaul Law Review).
The products-liability system could thus resemble a default system of insurance. Unlike a system for voluntary contribution (and selection of risk), the tort system automatically provided potentially unlimited coverage for such items as medical expense, pain and suffering, emotional loss, and property damage. This was the "policy." The "premiums" for this coverage, which tort law rarely permitted consumers to decline, were automatically collected by the prudent manufacturer as an unacknowledged item within the cost of the product. The "risk pool" consisted of all the product's consumers, and the beauty of this was that accident costs would be borne by those who had created them: initially, the inadequately performing manufacturer; secondarily, the risk-bearing public whose desire for the product had in some sense created the risk as well.

Naturally, such a system would generate feedback in the form of liability, which could be moderated by ever-wiser product design and purchasing decisions. Although the system would never be self-executing, broad construction of the term "defective" would ensure that the product choices would be forced to reckon with the wide swath of harms that are regretfully an unavoidable incident of a risk-infested society.

The above description, stripped to the essence of what a system of strict liability is thought to require, has little to say about justice. Beyond a certain distaste for the inefficiency of suboptimal investments in care, the strict liability system as courts and torts scholars in the 1950s began to re-imagine it was not conventionally about right and wrong. In theory, liability could be distributed on an insurance-based rationale: a risk exists, and here are the parties the system has selected to bear it.

Even to offer this synopsis with the reservations accorded to broad generalizations is to invite ridicule. Few courts and scholars today maintain that a system of tort law devoid of moral considerations is conceptually stable or desirable. But for a time, this seemed both possible and desirable—indeed, an improvement over the fractured processes of common law negligence. Thus, while time and experience would unveil the impossibility of severing moral judgment entirely from tort law (even if the exact specifications of those judgments could be determined), the defects of the system have become evident.
could in fact shift over time), the products-liability system strove to fulfill the aspirations of a doctrine "pridefully fashioned and nurtured" by (ironically, in hindsight) the California Supreme Court and other leaders of the strict liability revolution.

VIII. Identity, Liability, and Time

A. A Torts Story

The conceptual difficulty of coordinating corporate law and the liability system is illustrated by the diethylstilbestrol (DES) cases. For several decades, over two hundred manufacturers separately marketed diethylstilbestrol to pregnant women for control of nausea and other complications. In the 1970s, the Food and Drug Administration realized that DES use caused uterine tumors in daughters born to women taking the drug. In a twist that would have endeared DES cases to tort professors even without subsequent doctrinal developments, these tumors were not detectable until the victims hit puberty, ensuring that this would present a classic problem of long-tailed liability.

That problem was complicated by the failure (inconceivable by the standards of modern pharmaceutical economics) to patent DES, which led to the multiplicity of manufacturers. The passage of time (complicating individualized determinations of responsibility), the manifestly shoddy commitment to women's health, and an almost uniquely sympathetic plaintiff population led a number of courts to fashion creative approaches to causation. And the most creative of these was market-share liability.


47. This will be remembered as the dark day when this court, which heroically took the lead in originating the doctrine of products liability and steadfastly resisted efforts to inject concepts of negligence into the newly designed tort inexplicably turned 180 degrees and beat a hasty retreat almost back to square one. The pure concept of products liability so pridefully fashioned and nurtured by this court for the past decade and a half is reduced to a shambles. Daly v. Gen. Motors Corp., 575 P.2d 1162, 1181 (Cal. 1978) (Mosk, J., dissenting) (citations omitted) (criticizing application of comparative fault rules to strict products-liability cases).


50. This story, which I thought I knew well, is given new life in Anita Bernstein, Hymowitz v. Eli Lilly and Co.: Markets of Mothers, in TORTS STORIES 151 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).
It is probably no accident that this creativity flowered at the peak of the tort system’s period of self-confidence—the late 1970s and early 1980s. A system devoted to the refinement of human behavior and a restless search for justice without undue regard for form—the essence of the amorphous “reasonableness” standard—is unlikely to be long deterred by matters of procedure. By and large, market-share liability has been confined to the unique facts of the DES cases. These cases are of course interesting for their willingness to decouple liability from wrongdoing across a set of wrongdoers. But that is not how I wish to use them here. We think of market-share liability as a mechanism for attributing responsibility across “horizontal” wrongdoers—a group of bad actors who act roughly at the same time with respect to any particular tort claim. But consider retelling the DES story as a tale of “vertical” wrongdoing.

One of the most striking aspects of the DES cases is the imposition of liability on companies that, due to intervening corporate successions, were not really the same companies that had marketed DES to the plaintiffs. The connection was even more attenuated where the defendant purchased a company that itself had succeeded to an actual DES manufacturer. Of course, some DES defendants were, nominally, manufacturers themselves, but not in a sense easily fitted to the ideals of the liability system. Most of the principals, managers, researchers, and marketers were retired or dead. Stockholders had undoubtedly been cycled for hundreds of “generations,” making it extremely unlikely that liability would be matched to critical periods of ownership.

In itself, this confounds the aspirations of both strict and negligence-based liability. To the extent that liability is intended to signal and deter inadequate conduct, DES liability resembles the background radiation detectable as the vestiges of some cosmic event eons ago. Few managers in the 1980s and 1990s would have perceived the lessons of DES liability in terms more useful than, “Don’t market DES without adequate testing during the 1950s.” It would appear to have little relevance to the potential lapses in marketing of the blockbuster drugs then under development. In other words, DES liability


promises deterrence in the most general of ways—namely, that there exists a liability system which, given enough time and an unusually influential student note, may track your corporate descendants down decades later. This is unlikely to stimulate much reflection.

Interestingly, the same is true for the other side of the coin. The risk-spreading rationale behind strict liability posits that the manufacturer will serve as a conduit, channeling liabilities to those presumably uninjured consumers who benefited from a poorly designed product. That they indeed benefit as a class is clear, because most people will not be injured by any but the most palpably worthless products. The uninjured consumer thus pays an artificially low price; it reflects neither design changes that would prevent injuries to others nor the costs of those injuries. Strict liability corrects this, but only in theory.

To see why, imagine a defective lawnmower. The mower omits warnings as to proper placement of the user’s hands or lacks a guard that would keep those hands well away from danger. Strict liability transfers liability from unfortunate users to purchasers of lawnmowers generally. But this will never actually happen. Even a relatively speedy tort system (we obviously speak hypothetically) will eventually channel liability only to those who purchase lawnmowers years later. The original purchasers, oblivious to the potential for hand injuries, pay the price uncorrected by tort liability. And by the time the liability channel is open, new purchasers will often be selecting products that differ from their antecedents. At the low end, the relevant flaws may have been corrected (undoubtedly making room for flaws yet to be discovered). Or newfangled lawnmowers may bear only a slight relationship to previous models.

54. See Bernstein, supra note 33, at 165-66 (describing the evolution of a Fordham Law Review student note developing market-share apportionment, subsequently relied upon by the California Supreme Court in Sindell).

55. It is tempting to suggest that the “insurance premium” implicit in the exercise of tort law will become an explicit transfer between the manufacturer and its liability insurer. That is, won’t early lawnmower purchasers be forced to internalize the cost of product hazards through higher prices, even though those risks may not materialize for years? The answer is yes and no. In time—though not as quickly or linearly as liability-creating courts supposed—insurance products evolved to deal with newly created liability risks. See Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, at 152-63 (2008). However, for many products, particularly new ones, insurers can merely guess at the expected loss history. It takes decades of experience for, say, robotic lawnmowers to exhibit loss characteristics that permit them to be clearly distinguished from “lawnmowers” or “home power tools” or similar general categories. And by the time that experience is earned, manufacturers will have likely incorporated new technologies that confound reliance on existing data. I do not suggest that the task is impossible—perhaps a rough justice could be achieved over time—but strict liability proponents tended to assume that it was easier than proved to be the case.
This is also true of DES defendants. By the 1980s and 1990s, when market-share liability cleared the way for substantial payouts to DES victims, there were no longer any DES purchasers among whom liability might be distributed. And, there would not have been many original DES stockholders, whose holdings would in a just world have been diminished by the expected value of liabilities. Who remained? Producers and consumers of anti-depressants, cholesterol-lowering medication, impotence drugs, and the myriad inventions of modern pharmacology. It is obviously impossible for these parties to spread the risks of 1950s misconduct in the conventional sense of horizontal risk distribution in which all share in a “community of fate.”

It will be obvious that these situations likewise severely complicate the tort system’s generalized aspiration to identify and sanction wrongdoing. The period of experimentation with faultless liability that began in the 1960s gradually gave way to the realization that wrongdoing remains central to tort law, regardless of the precise language used to describe it. It is central because, untethered to notions such as fault (even broad notions), liability cannot be described, contained, or adjudicated in a principled manner. Fault can be redefined—what is “wrongful” on the part of a corporate actor today is certainly a different and broader concept from what was “wrongful” fifty years ago. But something like “fault” lies beneath the fog of words surrounding strict liability.

What does it mean to say that a defendant in 2010 acted “wrongfully” fifty years earlier? The question is subtle. It does not simply refer to changing standards of conduct, although that is itself an interesting and worthy question to pursue. Instead, it asks whether the defendant presently before us is the same actor whose conduct we wish to examine. Statutes of limitation aside, we rarely consider this question in the case of individuals. As moving as we may find testimony about how the individual has changed, perhaps in response to the very acts for which we seek punishment, such changes are irrele-

56. This critique could be applied to a variety of long-tailed claims, but DES liability puts the matter poignantly.
57. Of course, the later manufacturers and consumers are part of a “vertical,” or temporal risk distribution chain. This possibility, a feature of the products-liability system that only emerged over time, underscores the importance of insurance arrangements that survive successive iterations of products, corporate defendants, and consumers.
58. See Owen, supra note 46, at 1253.
60. See Owen, supra note 46, at 1253.
61. Not a day goes by I don’t feel regret, not because I’m in here or because you think I should. I look back on the way I was then, a young stupid kid who committed that
vant to the question of liability or guilt; they may at most be taken into account at the punishment stage.

The notion of responsibility at the heart of tort law rests fundamentally on the implicit assumption that liability ought to be matched to the wrongdoer. The assumption is so basic that it rarely requires thought, let alone explication. Therefore, it tends to receive attention only at the margins of liability law. Whether the issue is market-share apportionment, joint and several liability, or vicarious responsibility, these are usually treated as minor tweaks or interpretive conventions to a rule that is rarely challenged. And for the vast majority of cases, there is no reason to challenge it. A case may pose questions about the precise fit between the actor's conduct and the injury, or even about the rules used to instantiate liability. We may, of course, wonder about identity in the conventional sense: whether the defendant before the court—as opposed to someone else who might be nearby—actually “did it.” But the unacknowledged premise is that we can easily demonstrate that the relationship between the wrongdoer and the liability owner is one of essential identity.

That central assumption was challenged by the way tort law evolved in the 1960s, though fittingly, it took some time for this challenge to manifest itself. Many aspects of tort law are “polycentric,” to borrow from Professors Henderson and Twerski.62 For example, the architects of comparative fault imagined that the result of reform would be the simple elimination of “false negatives” generated by a liability system that purported to exclude recovery where plaintiffs were even trivially at fault. Reform did indeed do so. Reformers did not appreciate, however, that comparative fault would tend to draw in evermore marginal cases along with the deserving ones wrongly excluded by a contributory fault regime.63 This altered the mix of cases presented to the tort system and over time altered the meaning of “fault” in significant ways. Previously, a minor contributor to an accident—the imperfectly constant gardener responsible for trimming hedges near a busy intersection, perhaps—would have been “invisible” to a tort system accustomed to making only rough, binary judgments about liability. But once the grammar of tort was expanded to
permit construction of claims involving small percentages of fault, courts were freed to explore what "fault" writ small might look like.

Products liability exhibits something similar for two reasons that are particularly relevant to product and environmental claims. First, such claims often take a long time to mature and present themselves. As I assure my students, the legal system will be dealing with asbestos liabilities for most of their careers, even though domestic asbestos use dropped to nearly zero over thirty years ago. Moreover, the system for evaluating that liability has changed remarkably—not just in the relatively short span since 1965, but over the course of more than a century in some cases. That is itself interesting, but more important is that this long-tail effect exposes something interesting about virtually all products-liability defendants: they are corporations. And corporations change over time.

This possibility, which hardens into certainty given enough time, is uneasily accounted for by tort law. If one emphasizes the instrumentalist, loss-spreading rationale of strict liability, it will often be difficult to distinguish the channel selected by the tort system (the firm in its present incarnation selling products bearing perhaps a slight relationship to the defective ones and sold to a different generation of consumers) from other equally plausible risk-bearing candidates. Although firms, like individuals, can learn from their mistakes, they are as likely to simply evolve away from those mistakes, changing structure in response to significant tort exposure. The liability-insulating character of those structures makes tort deterrence less plausible than would be ideal.

These points possess even greater force if one imagines the tort system as a vehicle for righting wrongs, declaring moral responsibility, and giving victims the opportunity to face those who harmed them.

64. Relatedly, the system will do so in the context of insurance policies written decades ago, before asbestos risks were well understood by the liability system.
65. "This case presents something of a time capsule in that nineteenth century technology polluting twentieth century properties will have significant twenty first century financial ramifications." Consol. Edison Co. v. Allstate Ins. Co., 774 N.E.2d 687, 688 (N.Y. 2002) (considering claims first brought in 1995 against insurers writing coverage from 1936–1986 for pollution occurring from 1873–1933). Incidentally, this polluting activity was undertaken by the policyholder’s "corporate predecessors." Id.
66. See Mark J. Roe, Corporate Strategic Reaction to Mass Tort, 72 Va. L. Rev. 1 (1986). Roe suggests plausible reasons why firms may find liability-spurred evolution—perhaps one should say "intelligent design"—more difficult than I suggest. Simply put, the incentives of the relevant actors within the firm cause the existing structure (instead of a bankruptcy liquidation) to be "sticky." In the context of Roe’s example—an identifiable mass tort—he is probably correct. However, many products-liability claims are slow-moving, and will accordingly permit less dramatic reorganizations that nonetheless leave contingent tort creditors with few remedies.
By the time liability strikes, many of those who acted or gained wrongfully will be gone. This will be true even without substantial changes in the corporation's form. Even if one invests the corporate form with the moral agency we demand of natural persons, the firm responding to long-tailed liabilities can say, with a wink that is one part Proteus, one part Shaggy, "It wasn't me."

In sum, just as strict liability proponents miscalculated the availability and responsiveness of the liability insurance system to the new tort regime, they did not adequately prepare for the mutations of corporate law—a law entwined with the overwhelming majority of products-liability cases. When the problem arose in force, tort law was forced to cast about for a solution. It found one to borrow, and improvised further, but the results have been uneven.

IX. Successor Liability: The Exception Within a Rule

A. Contract Origins and Limitations

Successor liability is one of those problems that seems as if it should have been solved by now. For one thing, it is relatively unusual for a tort claim to be derailed on the basis that it is properly addressed to a predecessor. Most tort claims do not have long tails. However, there is a significant body of case law on the subject. And there has been significant commentary, though this has tended to arise when the issue is percolating. I suspect that the issue has attracted less attention than other seemingly minor debates within tort law for two reasons: tort academics know relatively little about corporate law, and corporate law is generally unconcerned with the vagaries of torts. This sentiment expresses itself fully in the general disregard corporate law has for the norms of the tort system. Regrettably, the feeling is mutual.


68. SHAGGY, IT WASN’T ME (Geffen Records 2000).

69. See Abraham, supra note 55, at 160–62 (describing the misplaced assumption by judges that newly created product liabilities would fit neatly into an extant liability insurance system).

70. By the late 1970s, products-liability cases were maturing enough to implicate successor liability issues; after the 2003 Henkel decision, the insurance question was placed firmly on the table as well.

71. In thinking aloud about this with a corporate law scholar, I was struck by his remark that tort liability simply is not a significant feature of corporate transactions most of the time. I had suggested that it was odd one could read Barbarians at the Gate (the definitive account of the RJR–Nabisco leveraged buyout of the 1980s) and find no evidence that parties were pricing in
The structure of the corporation—its very genius—permits the functional aggregation but legal segregation of many of the functions incident to industry. For our purposes, the most relevant of these are the actors who are liable, the assets with which those liabilities might be satisfied, and the metaphysical location of that liability. We place to one side, for now, the role of liability insurance.

Few firms are organized, one presumes, with the goal of creating tort liability. But all firms must expect to incur liabilities in the course of business; incorporation allows those liabilities to be cabined within the firm (and whatever assets it possesses). And the assets available to satisfy those liabilities may be drained away in the form of perfectly innocuous dividend payments or other distributions to shareholders. This method can be optimized with the creation of subsidiaries devoted particularly to debt- or liability-generating activities.\footnote{See Lynn M. LoPucki, \textit{The Death of Liability}, 106 \textit{Yale L.J.} 1, 20–23 (1996).}

There is nothing inherently wrong with this. It is in fact one of the signal virtues of corporate law. Risk-taking is encouraged (by limiting downside risk), and capital may be directed with ever greater granularity as the distinctive competence of individual units becomes clear. Whether limited liability optimally balances the need for risk-taking with the potential harm of externalities does not appear to be a question that can be answered empirically.\footnote{Accord David Millon, \textit{Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability}, 56 \textit{Emory L.J.} 1305, 1317 (2007).} What is clear, however, is the tension between limited liability and tort law.

Tort liability is premised on the idea that responsibility for wrongdoing can be directed toward someone able to pay despite the occasional insolvency (or liability insurance "damage cap").\footnote{Most tort settlements are governed by the extent of available insurance coverage rather than simply an abstract calculation of the expected outcome of a case. In products-liability cases, this dynamic still holds true, but is qualified by the size of the firm (and not all products cases involve corporate behemoths) and whether the liability is a historical one (in which the insurance policy may be all that remains).} This works well most of the time in the case of corporate actors, who have incentives to remain sufficiently liquid to make routine tort judgments as collectible as routine debt payments.\footnote{See James J. White, \textit{Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability}, 107 \textit{Yale L.J.} 1363 (1998).} But, when push comes to shove and an outsized liability looms on the horizon, corporate law

potential tort liabilities. Even twenty years ago, this would not have been an insignificant concern for a tobacco company. However, as an insurance professor, I should have known better: liability costs account for a tiny portion of firm revenues most of the time. The broader significance of my colleague's observation was that the world does not, in fact, revolve around the liability system—much as the system's enthusiasts, and detractors, might suggest otherwise.
offers opportunities for the reorganization of assets away from liability, a kind of reverse phototrophy.

Contract creditors have a number of tools with which to protect themselves from defaulting corporations. They can demand security and higher rates of interest. Or they can purchase insurance products (such as the the now infamous credit-default swap) that can mitigate the risks that the insulation afforded by the corporate firm will tempt counterparties to default. There is widespread agreement on this point, which incidentally may justify a bankruptcy regime that nudges contract creditors toward self-protection, although there is room for doubt.76

It is therefore ironic that the rules that govern imposition of liability upon corporate successors reflect the need to protect contract creditors, not tort claimants. They can be and have been stretched to include tort claimants, but the fit is uneven for reasons owing to their origin in corporate law rather than tort.77 Successor liability has been described as a “[t]ort [e]xception to a [c]orporate [r]ule.”78 A better formulation would be a tort exception within a corporate rule.

Corporate successions can assume an infinite variety of forms. Henkel, surprisingly, involved a relatively straightforward series of transactions. Simplifying, if a purchaser and seller wish to structure a transaction in which the purchaser alone will carry on the essential functions of the seller, there are two principal routes79 that can be said to result in a “succession.” First, the parties could agree to a statutory merger. Relatedly, the parties could effect a de facto merger, which evades the statutory requirement of due process for minority shareholders. This device has been appropriated for use by creditors who would be frustrated if the ongoing functions did not amount to a true succession.80 Under either scenario, the successor is the predecessor: it succeeds by law to all that the predecessor possessed or owed to others. In a world governed solely by formal mergers, the law of torts

76. See Millon, supra note 73, at 1318–24 (summarizing research suggesting endowment effects from limited liability may produce net subsidy for firms, notwithstanding contract creditors' presumed ability to bargain to a pre-limitation equilibrium).
79. I describe broad pathways only; the specifics of triangular mergers, reverse triangular mergers, and similarly geometric operations on the corporate form are unnecessary to consider here. For a helpful illustration of these fascinating elevations of form over substance, see Binder v. Bristol-Myers Squibb, Co., 184 F. Supp. 2d 762, 771–72 (N.D. Ill. 2001).
80. See Schuhalter, supra note 78, at 840.
would be relatively indifferent to the precise form contracting parties wish to assume. Curiously, insurance law would be similarly indifferent, and this indifference comes at the price of conceptual consistency once more complicated transactions are considered.

B. Assets and Liability

But precisely because mergers inevitably bring the bad with the good, parties find it attractive to separate the two, leading to the alternative route. This is the modestly named mechanism of the "asset purchase." If the putative successor merely purchases the assets of the "predecessor," there is no identity between the parties, and thus liability does not automatically flow from one to the other. Assets, after all, are not persons, even within the generous fiction of corporate existence. Thus they cannot be invested with the encumbrances that attach to legal personality.

Like a number of liability questions that arise from the corporate form, this will often be of trivial import. No one supposes that a warehouse—one of hundreds, for example—owned by a trucking firm ought to carry with it the stain of its owner's torts, thus preventing it from being taken free and clear in an arm's-length transaction. Such discrete sales rarely implicate tort system concerns. However, asset-purchase agreements are a common vehicle for transferring the lion's share, if not the entirety, of a firm to one or more purchasers, particularly in closely held firms. This includes the physical plant, goodwill, intellectual property, and so forth. Even the employees will often continue doing the exact same work, just under a different corporate umbrella. Without a rule imposing liability, the assets would flow in one direction, while the liability drained away. The asset sale thus represents the corporate liability form of "regulatory arbitrage," in which economically identical transactions are varied trivially so that they may be characterized under a less burdensome regulatory regime (mergers that transfer liability automatically versus asset sales that do

81. That is, tort law is as well served by the application of de facto merger doctrine as contract law. And because the doctrine is a creature of corporate law (rather than a tort-oriented exception engrafted upon it), there is no real conflict among the systems here. Of course, a merger effected in order to evade liability—by excavating the value of the firm en route to its relocation into the hands of another—is a matter of concern for the tort system. That concern is met, inadequately, by the doctrine of fraudulent conveyance.

82. See infra Parts XII, XIII.

83. See Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 45 (2d Cir. 2003) (applying New York law). A successor corporation could be an existing firm, or a newly created one. In practice, it tends to be a newly created subsidiary of an existing firm. In either case, merger extinguishes the predecessor as a separate entity, but does not extinguish its liabilities and entitlements—these are the elements to which the new firm succeeds.
Flexibility is a desirable feature of corporate law, but competing claims counsel careful policing of the substance-form border. Successor liability law attempts to do so.

Successor liability doctrine considers whether the asset sale (or other transaction) conveys characteristics of the predecessor sufficient to impute its identity to the putative successor. Sometimes the imputation formally considers the attributes of identity, looking toward the continuity of key personnel and shareholders. In the products context that concerns us most, some courts have examined whether the successor continued the same line of products—usually, the line which the plaintiff now claims is defective—and therefore may fairly be answerable for the predecessor's torts. At the bottom of these inquiries is the often unstated assumption that there exists an entity to which moral blame should attach, and corporate law legerdemain should not delay the imposition of responsibility: somewhere underneath all this paper lies the wrongdoer.

The merger-centric variants of successor liability at least fit well conceptually with corporate law. Liability following a former merger is easy to digest. Even de facto merger (a creature of corporate law originally designed to protect shareholders) and "merge continuation" theories may be understood as reflecting the resistance of any body of law to evasion of its own norms. But product line continuity is dif-

84. The "mere continuation" exception to successor non-liability examines the extent to which the old firm is simply doing business in a new form. Many of these considerations are intramural to the transaction—the disposition of assets and business operations, for example—while others include incidents external to the transaction, such as whether the successor "holds itself out" as the continuation of the predecessor. Smith v. Grattan Family Enters. L.L.C., No. 08-CV-14314, 2009 WL 536454, at *7 n.4 (E.D. Mich. Mar. 3, 2009). Such representational conduct is often required for a business to continue under a different name. And it creates, at least among contract creditors, an expectation of financial responsibility notwithstanding intramural changes.


87. In gracious comments given at the Symposium presentation of this Article, Professor Andrew Gold gently suggested that the de facto merger doctrine is not as beloved within corporate law as I might imagine. He suggests that the "independent legal significance" test described in Hariton v. Arco Electronics, Inc. 188 A.2d 123, 125 (Del. 1963), which is more respectful of transactional form, is more widely accepted. See Jeff Goetz, Note, A Dissent Dampened by Timing: How the Stock Market Exception Systematically Deprives Public Shareholders of Fair Value, 15 FORDHAM J. CORP. & FIN. L. 771, 780 n.29 (2010) (describing widespread rejection of de facto merger doctrine in favor of the independent significance test). This suggestion is well taken, but this doctrine does not appear to have shaped the emergence of successor liability law. Cf. Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 887–92 (Mich. 1976) (Coleman, J., dissenting) (urging rejection of imposition of successor liability via de facto merger doctrine). However, the revital-
different. It focuses on activities—tort-generating activities—and imputes to them a legal personality that is separate from, and can thus survive the dissolution of, the corporation itself.88 This is a congenial outcome for the risk-regulation/distribution dimension of the tort system. Broadened liability offers greater assurance of compensation for victims, supports deterrence, and attempts to channel liabilities to risk creators and their enablers.

It is less obvious that the wrongdoing/recourse dimension of tort liability is served. Tort justice across the expanse of time may offer, on reflection, little satisfaction for those supporting the idea of naming and shaming one’s wrongdoers. However, I suspect that just as tort instrumentalists were less concerned with sedulously attending to “right” and “wrong” with respect to accident risks, corrective justice theorists—who are certainly concerned with right and wrong—do not appear to have focused attention on a law that attaches meaning to tort-generating activities that themselves have no identity within corporate law.89

88. "[L]iberal successor liability was fashioned . . . in which the courts reified the liability as being imposed on a product line or business operation. Of course, liability can only be imposed on people . . . ." Michael D. Green, Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal, 87 Nw. U. L. Rev. 897, 910 n.72 (1993). Professor Green's point is, as always, well-taken. However, two observations become relevant when considering the corporate-liability complex as a whole. First, this reification is precisely the kind of move one would expect from a liability system, particularly one evolving fitfully towards the decoupling of liability from moral agents. A system that examines the content of a product's character—rather than its creator—is likely to find independent meaning in that creation wherever it looks. Secondly, liability insurance law also reifies entities that corporate law would otherwise deprive of existence. Liability insurance is typically available to unincorporated divisions of a firm, as well as dissolved corporations. These liability-system responses may be inelegant (and seemingly misdirected from the corporate-law perspective), but there is something to be learned from the fact that the liability system has found them necessary to make.

89. The issues of justice and identity across time have received attention in the reparations context, but claims against a present government for the sins of its previous iterations implicate more complex considerations than corporate succession. Even with respect to reparations claims against long-lived corporations, the problem of reparations is bigger than corporate law or tort. Reparations claims implicate foundational questions about legal institutions, questions that are severely complicated by the enormous passage of time—a span that is essentially unknown in the liability system's capacity to match wrongdoing and liability. By comparison, long-tailed products and environmental claims are relatively simple, and presently comprehended within existing liability law. In short, while resolving the tensions created by adjudicating tort liabilities across decades of corporate reorganization may be instructive in thinking about reparations claims, it cannot resolve the unique problems of reparations.
C. The Underlying Tension

Two phenomena complicate the picture further. The first is that as products liability became formally—though never completely—unmoored from moral fault, courts were asked to extend liability to ever-wider circles of potentially responsible parties. Imposing liability on an informal successor to a firm that manufactured a defective product decades earlier is a wide circle indeed. And just as tort law’s growth phase was coming to a close, courts were faced with the task of imposing long-tailed liabilities on firms that were merely shadows of their former incarnations. Courts were often reluctant to do so, and I suggest that, as occurred at other “stopping points” across the broad frontier of strict liability, courts could not fundamentally exorcise the specter of moral fault from their deliberations here. In short, widespread liability for successors seemed unfair precisely because there appeared to be an insufficient identity between the (bad) predecessor and the (innocent) successor.

The other phenomenon is more interesting. Successor liability gives corporate law headaches for the same reason that veil-piercing gives corporate law scholars headaches. It is so untidy and freakish. Successful piercing efforts are “[l]ike lightning . . . rare, severe, and unprincipled.” The factors employed by courts in these cases amount to nothing more than an “unweighted laundry list.” Piercing, like successor liability, often turns on “rarely defined” notions such as “injustice” and “unfairness.” Successor liability, as sporadically practiced, reflects “vague [and] untestable pronouncements,” suggesting a “boundless” liability on asset values without due regard for “the delicate balance of risk and reward among claimants against an enterprise.” The many factors that govern veil piercing—Professor Bainbridge counts “[n]o fewer than 20 separate (albeit overlapping)

---

90. For example, although relatively few companies manufactured asbestos, claims have been brought against approximately 8,400 companies, each bearing some relationship, however attenuated, to the asbestos exposures of millions of claimants.
93. Millon, supra note 73, at 1330.
94. See, e.g., Bainbridge, supra note 15, at 36–47 (deploying every conceivable synonym for judicial imprecision while criticizing the “highly fact-specific” rules governing veil piercing).
95. Marie T. Reilly, Making Sense of Successor Liability, 31 Hofstra L. Rev. 745, 789–94 (2003). Reilly suggests that a properly tailored fraudulent conveyance theory is a superior basis for successor liability than the continuity-based theories I have described.
factors, many of which have multiple sub-factors”96—conspire to “keep[ ] people in the dark about the legal consequences of their acts”; results often seem conclusory and based on the court’s instinctive reaction to the morality of the defendant’s conduct.97

I could go on, but by now it should be obvious what these observations are really about: the tort system.

These criticisms have the virtue of being somewhat true. It is easier in retrospect to determine how a particular defendant fell into liability trouble than it is to predict in advance whether it will. Corporate law’s structural critique of tort law reflects the divergent ways in which they settle their respective functions of channel risk.

Corporate transactions are undertaken to redistribute the risks and rewards of corporate activity. Just as incorporation itself rests on the edifice of legal separation among the constituents of the firm, reorganizations—whether they be mergers, spinoffs, or partial asset sales—require a level of certainty for transacting parties to be confident that the law will attach to their efforts their intended meaning. This is an entirely prospective analysis. Potential liabilities, which are nearly always incipient for any risk-generating organization, can be relocated to structures that are either best fitted to handle them or are simply far removed from prized assets. The goal of such planning is to bend liabilities around the structures the parties create.

Tort law works in precisely the opposite fashion. It is retroactive, attaching meaning to terms struck in the past. Although there are standards throughout tort law, voluntary transactions such as corporate reorganizations depend on rules. One might gently suggest that liability-evading strategies imply a more robust remit for the wide-ranging processes of the common law. But it is unsurprising that corporate actors—in many ways the true constituency of corporate law—would not see things that way.98 Instead of the privately held desires of transacting parties, tort law reflects public norms. Doctrinally, it is the very inverse of the typical liability-channeling reorganization, which is relatively indifferent to externalities (such as the possible uncollectibility of tort creditors’ claims); tort law, even in its noneconomic formulations, imposes a broad responsibility for the consequences of action. The processes of tort law are incremental; the system continuously assimilates information to refashion itself. This is

98. See, e.g., Bainbridge, supra note 15.
truly a strength of the system, but the open texture of tort standards will often resemble the articulation of post facto rules.

It would be a mistake to describe the collision between corporate and tort law as one between an impenetrable object and an irresistible force (and difficult to determine which is which). But the precise means for coordinating the two systems' aims and methods has never been satisfactorily articulated. From the corporate law perspective, nothing (short of fraud, perhaps) should inhibit the unhindered movement of capital, and tort liability can be a significant hindrance indeed. 99 From the torts perspective, the concept of the corporate form itself is suspect; how can a system of civil recourse possibly respect a body of law designed to evade reckoning wherever it is possible (and, we are told, efficient) to do so?

An irony of this disagreement is that tort and corporate law seem equally convinced of their powers to wipe clean the slate of decisions taken previously. The ability to direct assets away from liability attests to corporate law's ability to provide a bankruptcy-like "fresh start" to operations stained by potential liabilities. Likewise, the tort system is accustomed to examining transactions from the perspective of omniscience; it offers few specifics to warn the wrongdoer at the time of decision. By the time of trial, the system inevitably glances sideways to see how things actually turned out. Moreover, tort law acts serially; as Peter Schuck has observed, it possesses a low degree of "corrigibility." A risk-balancing decision may pass muster with a dozen different courts, until the defendant's luck runs out somewhere in West Virginia. For both tort and corporate law, each day is a new one.

These fundamental differences underscore why tort law has sought to make successor liability law more tort-like, by considering factors such as fairness and risk-spreading 100 even as it has been criticized for being insufficiently respectful of the corporate form. Corporate law's occasional acquiescences are frequently ill-suited to meet the needs of the tort system. For example, the "fraudulent conveyance" exception

99. And just as tort law wishes corporate law would be more like tort, corporate law's pervasive efficiency concerns, while empirically unverifiable, are frustrated by the messy processes of tort. I believe this is why tort problems receive so little conscientious attention from corporate law scholars. At bottom, coordinating between a tidy corporate law and its structural antithesis may seem a trivial use of time. Surely, most corporate law enthusiasts appear to feel, this problem would simply go away if people would self-insure for their injuries, thus eliminating the necessity of the tort system. A number of tort scholars would agree—though for different reasons. But the social meaning of tort law is not efficiency alone.

to successor non-liability is largely a dead letter from the torts perspective. It will be the rare tort creditor who arrives at corporate headquarters with a judgment on which the ink has not yet dried, only to find it “under new management.” It is expensive to evade marginal tort liabilities, and relatively few claims are sufficient to render a firm insolvent. If a firm is badly run and has accrued contingent (and unknown) tort claims prior to the transfer of assets elsewhere, the plaintiff’s problem is not that he has been defrauded. His problem is that he was harmed by a poorly run company that subsequently went out of business.

Tort law rarely stands still when the blood of innocents is spilled. This led the tort system towards assets to which it could pin some kind of animating personality (in this case, wrongdoing). But, having defined “wrongdoing” down, on paper at least, this move was vulnerable to instrumentalist critiques. One such critique took the form of decisions denying successor liability on the ground that the goals of strict liability would not thereby be served. If strict liability was necessary to internalize accident costs in the producer, that goal was thwarted by the fact that the producer was no longer in existence. Accordingly, the costs could not be distributed to the product’s consumers.

This suggestion recalls the DES problem sketched above. The practical—as opposed to theoretical—constraints on targeted risk spreading are real, but they are often just as real absent a corporate reorganization. They are implicated by any long-tailed claim. Denying liability on this ground, however, overlooks what Michael Green has labeled the “channel[ing] function” of successor liability. By imposing liability on the successor, would-be predecessors know that they will be unable to rinse the stain of their tortious conduct from assets they may transfer in the future.

---

101. Id. at 888 (“The fraud exception may be ripe for use to expand plaintiffs’ recovery. However, thus far efforts by plaintiffs to utilize the fraud exception have been rare, and successful use of the exception has been rarer yet. One reason may be that the intent element for fraud is perceived as difficult to prove in the context of corporate asset acquisitions.”).

102. See Alfred R. Light, “Product Line” and “Continuity of Enterprise” Theories of Corporate Successor Liability Under CERCLA, 11 Miss. Coll. L. Rev. 63, 74–75 & n.74 (1990) (collecting cases rejecting successor liability on the grounds that the successor neither created the risk nor profited from it).


104. The Polius court, while rejecting successor liability, thoughtfully observed that the question could be recharacterized as one of determining an appropriate statute of repose. See id.

105. Green, supra note 88, at 913–18.

106. See Cupp, supra note 100, at 860–61.
beit in a second-best way) with both the deterrence and risk-spreading rationales.

Successor liability is a problematic doctrine. From the torts perspective, its contours are often ill-fitted to the needs of tort claimants. From the corporate law perspective, its occasionally tort-flavored character and application threaten to undo expectations that may have been created in good faith. This "sporadically flexible" doctrine is a partial and uncertain abrogation of one of the central characteristics of corporate law: limited liability. This Article cannot resolve the disagreement between corporate and tort law (and scholars). Instead, it simply observes that the tort system would have to invent something like successor liability (and veil-piercing) if those concepts did not already exist. It is no accident that the most contested aspects of these doctrines reflect norms (like fairness), activities (manufacturing defective products), and a mode of decision (fact-specific, highly contextualized) that are familiar to tort law. At the risk of undue (and possibly trans-species) anthropomorphizing, it is unrealistic for corporate law to expect tort law to simply roll over and play dead. However, one must admit that unlimited justice in the uneven light of the tort system is not the only result that right-thinking people could possibly devise.

107. See Schuhalter, supra note 78, at 831.

108. Indeed, other tort doctrines similarly tiptoe over the border with corporate law. A significant body of case law recognizes that one who acquires a business via succession or asset sale may be liable for failing to provide a post-sale warning regarding the risks of a predecessor's products. This view has been carried forward without objection in Restatement (Third) of Torts: Products Liability § 13 (1998). This is surprising given the Restatement's skepticism of asset-based successor liability expressed in Section 12, governing successor liability generally (and rejecting the product-line exception). If a putative successor truly has nothing to do with a product risk, which rejecting courts frequently suggest, then it is as much a stranger to the risk when it is simply expressed a slightly different way, as in post-sale duties. Cf. Elmer v. Tenneco Resins, Inc., 698 F. Supp. 535, 543 (D. Del. 1988) (declining to treat a successor's post-acquisition failure to warn differently from successor liability for pre-acquisition lapses).

Another incursion is the "apparent manufacturer" doctrine, by which A is held liable for product defects to the same extent as actual manufacturer B, when the product is "held out" to the public as A's. In a number of cases in which firms have used subsidiaries and trademark licensing agreements to market products while evading liability for their defects, courts have used the doctrine to attribute liability, in effect, piercing the corporate veil without saying so explicitly. See, e.g., Torres v. Goodyear Tire & Rubber Co., 901 F.2d 750 (9th Cir. 1990); McCloud v. Goodyear Dunlop Tires N. Am., Ltd., No. 04-1118, 2006 WL 3627654 (C.D. Ill. Dec. 11, 2006). This doctrine is also carried forward in Section 14 of the Products Restatement. Although liability for licensors is restricted to those who substantially participate in the marketing or design or distribution of a product, creative liability-channeling organizations are neither inexpensive nor easy to implement without the combined competencies of the organization as a whole. See Roe, supra note 66, at 36-37.
X. Towards Complementarity

A. Corporate Form and Responsibility

To explore how the distinctive competences of these two systems might yet be mediated by a third, a useful point of departure is supplied by David Millon. Millon recently explored the issue of veil-piercing, and concluded that neither absolute limited liability nor the particular contours of veil-piercing doctrine were defensible.\(^{109}\) Reconceptualizing the issue as a policy decision to ensure financial responsibility, he suggests "[t]ailoring limited liability so as to create a de facto reasonable insurance requirement."\(^{110}\) Similarly, Michael Green has suggested dealing with the basic problem of successor liability with a legislatively imposed requirement for the successor to obtain insurance coverage.\(^{111}\)

Millon recognizes that determining the meaning of such a requirement ex post (and I presume, ex ante) might be difficult. He suggests the problem may be more theoretical than practical.\(^{112}\) I am not so sure. A reasonable insurance requirement would presumably disregard the rational limits on insurance purchases implied by limited shareholder liability. That is, shareholders would ordinarily be unlikely to demand insurance in excess of their maximum potential loss—the value of their shares. Such a requirement can be described, with a nod to Professor Keeton,\(^{113}\) as a requirement to purchase insurance without regard to the “limits” of shareholder exposure. For small firms, this will work a substantial change. A taxi company—not just the rather clever sort Millon describes in his article\(^ {114}\)—with a $100,000 investment would rationally insure to some amount below

---

109. See generally Millon, supra note 73, at 1305.
110. Id. at 1376.
111. See Michael D. Green, Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants, 72 CORNELL L. REV. 17 (1986). Legislatures, perhaps responding rationally to the collective action advantages enjoyed by manufacturing firms and insurers (rather than contingent tort claimants) have not demonstrated their superiority to common law by rising to Green’s suggestions. See Cupp & Frost, supra note 91, at 1193 (observing absence of legislative action despite thirty years of commentary, and attributing this in part to a “race to the bottom” in which states have few incentives to make their liability laws less hospitable to industry).
112. Millon, supra note 73, at 1375.
114. The lowly hack has long been a staple of veil-piercing discussion. See Bainbridge, supra note 15, at 5 (reciting the “classic case” of Walkovsky v. Carlton, 223 N.E.2d 6 (N.Y. 1966)). Walkovsky involved a pedestrian hit by a taxi operated by one of ten firms controlled by a single shareholder, each carrying minimum liability insurance. Id.
that. Applying the Millon–Keeton rule, the company may be required to purchase some multiple of this amount to account for maximum potential taxi casualties. There is no obviously correct answer to this problem. Industry practice—governed by the enfeebled and varied requirements of state financial responsibility laws—is likely one of severe underinsurance.

The problem could be attacked empirically, but there are limitations there, too. Accident claim compensation is almost invariably governed by liability insurance limits. Although tort liability is not formally bound to such limits, the difficulties of collecting assets from the defendant apart from the insurance mean that, as a practical matter, insurance policy limits are the tort reform that counts. Thus, even if one decided to require insurance for taxi drivers at the level implied by the average taxicab injury settlement, that figure already entails the private decision of the company to forego higher limits. One could borrow from tort reform statutes which reflect legislative judgments about reasonable compensation; such limits, despite their flaws, would capture a substantial percentage of liability events. And perhaps that is the best that can be said for numerical limits on tort compensation: judgments in excess of the typical cap ($250,000–$500,000 is a common range) ought to occur relatively rarely. A reasonable insurance requirement that captures all but infrequent events sounds workable but requires further study.

Perhaps Professors Millon, Green, and I can undertake such a study in the future. For now, it is enough to ask what this idea might mean for successor liability and extant insurance coverage. An aspect of successor liability that is troublesome from the perspectives of both corporate law and torts is the potential for horizontal inequality. Consider the following example: Corporations ABC and XYZ produce nearly identical widgets, equally defective in design. ABC’s poor management consigns it to bankruptcy, where future tort creditors are

---

115. This approach would govern equally well the arrangements required of firms with high market capitalizations. Even in these asset-depressed times, publicly traded firms often have valuations far in excess of any available liability limits. A “reasonable” insurance requirement looks only to the scope of foreseeable risks, not the firm’s actual value. True, that value may be accessible given sufficient motivation, but a partial abrogation of limited liability will eliminate that motivation in all but the most extraordinary cases.

116. Ohio, for example, requires motorists to carry $12,500 of liability insurance per injury claimant (up to two). Ohio Rev. Code Ann. § 4509.51(B) (LexisNexis 1995).


118. See generally Ronen Avraham, Database of State Tort Law Reforms (Northwestern Law & Econ. Research Paper No. 06-08, 2010).
likely to receive nothing.119 XYZ fares somewhat better and is acquired by a highly solvent firm. Unwisely, the "angel" firm merges directly with XYZ, or takes its assets in a manner susceptible to the "sporadically flexible" power of successor liability.

A plaintiff suing ABC will be frustrated; a plaintiff suing New XYZ will receive full value for his claim. It is odd that effective liability turns not on the fortunes of enterprise—which seems an issue somewhat beyond the reach of private law—but on the law itself.120 Could insurance be the answer?

B. Liability Insurance and Liability: The Complementarity Norm

Insurance would seem to be the ideal mediator between the demands of the corporate form and the tort system. Among many other things, insurance is the means by which the promises of the past are given substance and translated across time to the present. Unfortunately, courts have at times treated insurance as a kind of all-purpose tool capable of dealing with whatever tort problem that needs solving.121 In addition to the implicit reliance on insurance as a mechanism for risk spreading, courts have explicitly treated the actual or presumed availability of liability insurance as a factor in deciding particular categories of liability.122

---


120. Limiting successor liability to the pre-acquisition value of the predecessor (the acquired firm) would avoid this concern. However, tort judgments are not formally coordinated; there is no central clearinghouse that might keep a running total of succession claims, cutting them off (somehow) when the pre-acquisition value is reached. PRODUCTS RESTATEMENT, supra note 108, at 210–11. The reporters suggest, following Green, the purchase of a "bond or other security" at the time of transaction could ameliorate this concern (as well as the concern under present law that some plaintiffs will receive windfalls, and some transactions be unfairly penalized, due to the particular form the acquisition takes. Id. at 217. This sounds a lot like liability insurance. While such a view is consistent with this Article, the focus here is on existing coverage, rather than coverage originating with an acquisition.

121. An outstanding exploration of this point that should give even the most determined complementarians pause is found in John A. Siliciano, Corporate Behavior and the Social Efficiency of Tort Law, 85 MICH. L. REV. 1820 (1985).

122. See, e.g., Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring) ("Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless
It turns out that this treatment reveals why insurance law is uniquely positioned to deal with some aspects of successor liability. Like products liability, the exact nature of insurance law is often a matter of highly successful obfuscation. Its origins lie in contract, and it still takes the form of contract law, but it was one of the first categories of contract to drown in a sea of tort. Not only is insurance law highly susceptible to recharacterization in tort, but in the liability context, the insurance promise has taken on the coloration of the tort system.

Ken Abraham has described some of the ways in which insurance and tort law have come to rely on one another. He offers several examples of what may be called descriptive complementarity; the shape of a particular tort liability has historically been influenced by expectations about the nature of the insurance system; in turn, insurance law is subtly bent around the outline of liability. I would like to extend this idea to make the case for normative complementarity: insurance contracts should be construed so as to harmonize with the underlying liabilities to which they relate. The reach of such a principle is not obvious, so let me explain what it does and does not mean.

It does not mean that coverage should attach to liability without regard for the essential functions of insurance contracts. Those contracts determine basic questions of eligibility (for example, premium-paying policyholders); the broad outlines of covered events (property damage or bodily injury), methods for allocating losses temporally (for example, claims-made versus occurrence-based coverage) and among relevant parties (other insurers and self-insurance mechanisms); and exclusions that either segment insurance markets or resolve lingering questions of scope.

one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”); Kelly v. Gwinnell, 476 A.2d 1219, 1225 n.9 (N.J. 1984) (“But the critical issue here is not whether the homeowner can pass the cost on or must bear it himself, but whether tort law should be used to spread the risk over a large segment of society through the device of insurance rather than imposing the entire risk on the innocent victim of drunken driving.”).


124. See 1 Jeffrey W. Stempel, Stempel on Insurance Contracts § 3.01 (3d ed. 2011) (noting the decline of classical contract theory in favor of “equitable, case specific, and subjective interpretation and even the utilization of tort-related concepts”).


But normative complementarity does provide guidance for determining the extent of ambiguity and the reasonableness of what are typically post facto expectations of policyholders. Complementarity also suggests when judges should abandon the pretense of finding ambiguity and acknowledge the deft use of a blue pencil to shape an insurance contract around the materialization of the risk for which it was structured. Actual tort liabilities, rather than hyper-fine hermeneutics or judges’ entirely unempirical suppositions regarding the expectations of consumers,127 ought to define the scope of insurance rights where those rights are inadequately specified in a transaction. And those liabilities may trump even well-specified allocations that unjustifiably frustrate the effective functioning of the liability system.

In essence, complementarity requires liability coverage to be molded with reference to the underlying tort liability to which it refers. Subject to the considerable constraints of factors such as market segmentation, policyholder choice regarding the extent of coverage, and insurers’ desire to lessen moral hazard, liability coverage should be coordinated with liability. Complementarity may be the answer to the long-simmering problem of defining the appropriate reach of exclusionary provisions in insurance contracts; in the realms of accident insurance, property damage, and liability coverage, insurers have slowly carved out the marrow of protection in ways that serve no purpose other than insurers’ general desire to pay less.128

Complementarity as an interpretive and regulatory ideal rests on two principal arguments, one of which can be extended to deal with successor liabilities. Although mediated by contract, liability insurance law is a creature of the tort system—the other half, in Abraham’s perfect phrasing, of “a binary star.”129 Because ours is indeed a largely judgment-proof society,130 effective liability is generally governed by the available insurance coverage.

Courts have varied in the candor with which they acknowledge this fact. And they have, as I suggest above, at times treated insurance

---


128. In previous work, I have identified this pattern with respect to exclusions from first-party accident policies, and the anti-concurrent causation feature of modern home insurance. In a future article, I will examine insurers’ efforts to limit coverage for emotional distress, even as such damages have become increasingly conventional within tort law.

129. ABRAHAM, supra note 125, at 1.

like a magic ointment that could be rubbed into the wounds of an innocent, seemingly deserving plaintiff. Despite occasional excesses,\textsuperscript{131} it is right (and honest) that courts recognize tort plaintiffs as stakeholders in what appears on the surface to be a dispute between parties who have contracted over insurance. After all, when effective liabilities are dramatically scaled upwards—whether by judicial variance of coverage limitations or imposition of bad faith liability—these liabilities rarely redound directly to the benefit of the policyholder. If the policyholder is an individual, his insolvency (or judgment-immunity) was ensured the moment the tort was completed; if the policyholder is a corporation, a substantial tort judgment may obscure the benefit of enhanced insurance coverage precisely because shareholder liability is limited. (The most “creative” interpretations of insurance contracts, as well as the typical bad faith judgment, rarely embrace large and sophisticated policyholders.)

Although it is abstractly inelegant that some plaintiffs (those fortunate enough to be injured by policyholders with ambiguous contracts issued by unconscionable insurers) will recover more than others, this is little different from the inequality that arises from the fact that some defendants have insurance and others do not.\textsuperscript{132} Tort liability alone is an insufficient basis for creating liability coverage—and this, in fact, rarely happens; but it is an appropriate mold for shaping coverage. To do so is simply to vindicate the interests of the party whom all understand is the true beneficiary of the insurance contract: the tort victim.

A second, broader rationale also looks to the contours of the tort system. The insurance promise has value precisely because it is meant to endure the periodic expansion of tort liability and the occasionally unpredictable character of its imposition.

Insurers’ institutional knowledge of liability insurers lies at the heart of that promise. For all but the most sophisticated policyholders—

\textsuperscript{131} See, e.g., Rusthoven v. Commercial Standard Ins. Co., 387 N.W.2d 642 644–45 (Minn. 1986) (creatively seizing upon ambiguity in an uninsured motorist policy to find that the policyholder reasonably expected coverage sixty-seven times greater than the coverage for which it paid).

\textsuperscript{132} This otherwise uninteresting observation captures a larger truth explored in this Article: discrete disciplines within the legal system cannot solve every problem that is comprehensible as a problem within the norms of each discipline. Tort law cannot run roughshod over every principle of corporate or insurance jurisprudence in the name of fulfilling its remit to right wrongs. Nor can corporate law—in an enlightened system of law—assert itself without regard to the aims of its fellow systems. Insurance law’s contract origins must not obscure the immense, pan-jurisprudential functions that have been located in the insuring enterprise. These normative claims, which may also be classed under the rubric of “complementarity,” are supported by the observation that the legal system has never treated these bodies of law completely discretely.
ers, liability insurance is more than an unusually structured savings account. The insurer promises and the policyholder relies on its expertise in tort litigation. Expertise is more than the ability to summarize the basic rules of tort liability and defense. After all, many policyholders will abstractly understand that they ought to conform themselves to the requirements of reasonable care. Liability insurance is valuable because insurers are uniquely positioned to aggregate and sift through liability data, which is merely the definition of underwriting, and identify emergent patterns of claiming. As they stand astride both claims departments generating raw data and tort law courts synthesizing bits of that data into liability rules, insurers are well-suited to comprehend and distribute tort system uncertainty. This is the uncertainty that surrounds the timing and contours of emergent liabilities. Put another way, insurance manages the risk of changes in the identity of tort claims.

Insurers can respond in several ways to these new patterns. Most optimistically, they can guide policyholder conduct in ways that minimize losses. From a societal standpoint, this is preferable to insurers' occasionally preferred method of reducing their losses via policy exclusions for newer types of claims without regard to any characteristics that would imply that well-informed parties to the insurance contract would bargain for exclusion.

When prevention fails, distribution of losses is of course the classic mechanism for ameliorating the effects. Here, the focus is on the distribution of those losses across time and among "generations" of policyholders (or, in some cases, among temporal iterations of the same policyholder). Implicit in the normative complementarity ideal is the likelihood that claiming patterns will be imperfectly anticipated at the time the insurance bargain is struck. Of course, this can work in both directions. A purchaser of an occurrence-based policy in 1960 would have likely underpaid relative to the emerging liabilities of the years ahead.134 However, in 1985, a similar purchaser would not only be buying at the top of an insurance market hardened significantly by those new liabilities but would ultimately "receive" less indemnity—in 2010, for example—as those liabilities receded along with the tort system that began about that time to fall out of favor. The value of the


134. Even Jeffrey Stempel grudgingly acknowledges that "[t]he magnitude and longevity of the asbestos problem undoubtedly caught the insurance industry by surprise." Stempel, supra note 37, at 352–53. Stempel maintains, however, that the marketing and structure of liability policies fairly attribute the risks of such developments to insurance companies. Id. And Stempel will be no doubt surprised to learn that I grudgingly agree.
insurance promise is thus shaped over time by the currents of liability law. If this sounds familiar, it should; it is an insurance-side variation on the DES problem described earlier.

Complementarity supplies a rationale for holding insurers accountable for the promises of the past despite the interesting metaphysics of corporate reorganizations. Instantiating this principle will require coordination among insurance, tort, and corporate law. But it is a principle that serves equitably the divergent norms of these systems. And insurance is comfortably situated at their intersection. Theseus’ ship may evolve one plank at a time until it is wholly new; insurance is the promise that binds the planks together.

C. Shifting Masks, Stable Risks

Insurers argue (and some courts have agreed) that extending coverage to corporate successors ties the insurer to a bargain it never made and to a party with whom it has never dealt. Yet this argument elevates the corporate fiction of separate personality beyond reality. Successor liability attempts, often indirectly, to understand whether the entity is properly identified with the wrongdoer. Liability insurance contracts depend vitally on the stability of that identity across time; that is, the risk imposed would diverge from the risk undertaken if the identity of the policyholder changed. However, in many cases, this is not the problem insurers suggest.

Consider an insured corporation whose shares are purchased outright by another. To lend specificity to this example, imagine Rupert Murdoch (rather than Carlos Slim) was the billionaire who rescued the New York Times from its dire straits. Gradually increasing his holdings (strangely unnoticed by Fox News), Murdoch assumes complete ownership of the New York Times Company (NYT). Is it the same company? Yes, it is. The NYT’s liability insurer remains answerable for claims that arose under prior ownership. Indeed, it will remain liable for claims arising during the remainder of the policy period. The insurer could cancel or re-underwrite coverage. But this would be prospective only.

New NYT is undoubtedly in a position, as a tort defendant, to influence the disposition of pre-acquisition claims, as surely as newly installed management of a forward-merged company is. But this is irrelevant; the liability risks of pre-acquisition conduct are entirely un-

135. See, e.g., Foggan & Lavin, supra note 36, at 6, 10.
changed. The rights of the insurer to control settlement and direct the defense remain an effective tool for disciplining a policyholder who acts to exacerbate liabilities.

Thinking about the successor liability problem this way suggests that insurers are not actually fearful of increased liabilities resulting from corporate reorganization. If so, they would regularly protest any substantial changes in corporate control. In fact, insurers have occasionally sought to distance themselves from policyholders that formally merged into successors. These efforts have been unsuccessful. A merger or consolidation does not create new liabilities, nor does it enhance existing ones. Tort liability is largely exogenous to post-occurrence changes in corporate ownership. To deny coverage entirely, or perversely limit it to a party that is not going to be sued for the risk insured, vindicates neither the expectations of the insurer nor those of the parties to the merger. Instead, it merely permits the insurer to reap the gains from writing premiums for risks that entirely unrelated corporate transactions have providently directed away from the insurer’s door. The question courts should ask is whether the relevant expectations change dramatically when the “succession” is informal. The answer is that they usually do not, but when they do, the answer is to accommodate them, with each system doing what it does best.

XI. Henkel Reconsidered, Slightly

I wrote earlier that the Henkel problem was more complicated than I originally realized. The Henkel approach is to elevate a standard anti-assignment provision of insurance contracts over the interests of transacting parties and the tort system. Anti-assignment is in no way a bargained-for provision in the context of corporate succession, if ever. Let us assume that Justice Moreno was correct in his dissent, and that there is no sound basis for enforcing assignment restrictions absent practical (not theoretical) prejudice to the insurer. Reading the fair

---

137. See Waldron & Stanton, supra note 36, 392–94.
138. Insurers’ true concern is simply that they will be held responsible for the bargains they struck long ago. Given the complications of successor liability doctrine, and the frequent effective prerequisite of insurance coverage, the true coverage windfall occurs where insurance rights are not transferred along with their associated liabilities. Without transfer, the liability policy is a dead letter, its longstanding promise fortuitously unopened for want of a current address.
139. Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 79–80 (Cal. 2003) (Moreno, J., dissenting). The Henkel majority’s position rests on a controversial idea, and its immediate contradiction. Henkel determined that assignability of insurance policy rights turns on whether the rights have been fixed—“reduced to a sum of money due or to become due.” Id. at 77 (majority opinion). Only then, the majority concluded, is the right a “chose in action” that may be transferred. As Justice Moreno pointed out, a chose in action need not be so “fixed” at
number of pre-\textit{Henkel} decisions analyzing coverage issues in the shadow, one is struck by the pattern of incomplete specification of insurance rights.\textsuperscript{140}

\textbf{XII. Categories of Transfer Intentions}

One would think the specification of insurance asset transfers would be crystal clear. And they certainly would, if torts and insurance professors rather than skilled corporate lawyers drafted them. There are four possible variations on this theme: (1) the policy is transferred with the consent of the insurer; (2) the parties intend the policy to transfer, and believe a transfer of "\textit{all assets} and liabilities" does so; (3) the parties are content to let sleeping dogs lie undisturbed, for now; and (4) the purported transferor intends to retain the coverage.

The only possibility that may be safely eliminated is Category 1. There is little evidence that insurers are willing to extend coverage that effectively revives long-tailed liability claims for consideration that successors would actually be willing to pay. A long-tailed event is insurable, even if losses seem certain. However, it is no longer insura-

\textsuperscript{140} See Joseph W. Hovermill & Angela N. Whittaker, \textit{Without Consent: Establishing a Corporate Successor's Rights to the Predecessor's Insurance Coverage}, 37 \textit{TORT \& INS. L.J.} 105 (2001). The authors note the "incomplete or completely absent \{insurance\} documentation" that often attends "incomplete or completely absent transaction documentation." \textit{Id.} at 105. Transactions—which themselves may predate the emergence of long-tailed liabilities—often include vague and contradictory provisions relating to insurance. For example, one reported transaction provided that the transferee was to receive "'all of the \{predecessor's\} assets,' including, 'all contracts . . . insurance policies . . . and other binding contracts.'" \textit{Id.} at 116--17 (alterations in original) (quoting N. Ins. Co. of N.Y. v. Allied Mut. Ins. Co., 955 F.2d 1353, 1357 (9th Cir. 1992)). This seems clear enough as a statement of intent. Unfortunately, a separate provision excluded any contract assets that required consent for assignment. The vast majority of insurance contracts do.
ble at the price available before losses were known (and the tort system stood ready to redeem them). A retrospective premium could be determined, but apart from the timing and ultimate size of the loss, there is no longer a “risk” to speak of. That is, the premium price would equal the cost of liabilities incurred but not reported, and that is unlikely to be a price anyone is willing to pay.\footnote{141}{This has been described as a “claims-made insurance premium on top of [an] occurrence premium.” Baker et al., supra note 37, at 9.}

Moreover, selling someone a product which has already been paid for is at best a challenging proposition. The transacting parties may hope that the policy will transfer but are reluctant to secure a formal agreement from the insurer, lest the price be confiscatory (as it surely would, for firms with a recognized, if contingent tort exposure). I have found no instances in which parties have sought and an insurer has agreed to assignment of a policy in the face of a large impending exposure.\footnote{142}{Of course, such transactions would be unlikely to generate disputes.}

Again, the price of assignment is unlikely to be a modest administrative fee, but instead a retrospectively underwritten premium.\footnote{143}{Also known as an “M&A Premium.” Id. at 11. Unusual insurance arrangements are available, such as “loss mitigation insurance,” which can be tailored to fit within or replace existing insurance policies that a succession might reveal to be inadequate. See Tobias Insurance Group, Inc., Understanding the Role of Loss Mitigation Insurance, 1 RISK MONITOR 1, available at http://www.tobias.com/NEWSLETTERS/04July_RM.pdf. A favorite is the impishly named “sleep easy” policy suggested as a transaction planning tool by Howard Schechter in the 1980s. See Schechter, supra note 18, at 149. In a vivid illustration of tort law’s capacity for unearthing implausible connections, Mr. Schechter’s daughter Julie dramatically portrayed the sufferings of Helen Palisgraf as a student in my torts class many years later.}

In \textit{Henkel}, for example, the liability picture at the time of transaction in the late 1970s was a lot different than it had been during the early years of Amchem’s operations. Indeed, this changed picture was likely one of the reasons for the transaction itself.

Regarding Category 2, if the transacting parties contemplate the transfer of insurance, then treating insurance coverage as an inalienable asset tied to a particular organizational form frustrates those expectations. As Tom Baker has argued, such a rule will channel transacting parties towards organizational forms that may be less efficient for tax or business reasons simply to accommodate the objections of insurers.\footnote{144}{Baker, supra note 117, at 21–23.} Formal mergers and other transfers of corporate control implicate the exact same concerns as less direct examples of succession. But formal mergers avoid the reach of anti-assignment language because the successor \textit{is} the predecessor. There is little to justify this elevation of form over substance: the only “detriment” to the insurer is that it must actually perform its obligations; transacting

\[\text{FOLLOWING FORM}\]
parties (and presumably society as a whole) would be deprived of the benefits of efficient organizational structures. And tort claimants will in some circumstances be deprived of the most practical avenue of recovery for valid claims.

Applying the complementarity principle is consistent with the implicit recognition that the law is skeptical of claims that corporate identity, and all of its incidents, are mutable without restriction. Corporate law confirms this via de facto merger doctrine. Tort law reinforces this with successor liability rules, some resembling de facto merger doctrine and others reflecting tort's special interest in imposing liability on wrongdoers and "wrong" products. Even insurance law recognizes this with its careful non-application of assignment provisions to formally merged (yet operationally distinct) firms. This recognition requires liability insurers to provide coverage for corporate wrongdoing that they have insured, notwithstanding post-wrongdoing changes in the corporate form. In this sense, coverage should follow liability by operation of law.

Category 4 signals that transferors of corporate assets may not be indifferent to the disposition of insurance assets. Insurance coverage is tied to firms, not directly to their activities. This tracks tort law (liability is usually imposed on persons, not their assets), but the incomplete complementarity between tort and corporate law complicates the picture.

Consider a firm (creatively named "Firm") that engages in three activities. Firm manufactures children's toys consisting of colorful bags of broken glass. Second, it sells a profitable line of insulating products containing a recently discovered miracle fiber, dysbestos. Finally, incident to these marketing activities, Firm's factories produce large amounts of waste that it stores in vast, porous holding ponds. The firm is insured by Acme Casualty Company (Acme), which generously indemnifies for "all liabilities arising from Your business."

145. Recall the trucking firm warehouse example. Inanimate objects can appear to possess (or at least define) liability under the law (such as maritime, or In rem proceedings), but this is the exception. Prior to a successful tort claim, no plaintiff could prevail against a warehouse or even isolate a defendant's warehouse as having especial significance for his claim. Corporate law does not permit the segregation of assets according to their relevance to tort actions (nor, it should be said, does remedies law). The tension between corporate law and tort can be thought of as a question of priority: tort claims against a corporation do not ordinarily create priorities in favor of the claimant for ownership of tort-relevant assets. Successor liability reflects an awkward effort to place tort claimants in a position similar to what they would have enjoyed absent succession, and in the products-liability context, this explains why successor liability is unusually tied to tort-relevant assets. It thus resembles a tort-flavored form of equitable subordination.
Firm's risk managers conclude that dysbestos poses a long-term liability risk and decide to exit the business. The managers believe that the broken glass business is strong, and liabilities are reasonably well-controlled by the newly revitalized doctrine of assumption of risk. They are unaware of the environmental issues. The firm decides to decouple its fate from that of dysbestos by creating a subsidiary, Dysbestos, Inc., and transferring to it "all dysbestos-related assets and liabilities." That subsidiary is then merged with a separate firm, FoolCo. FoolCo subsequently asks Acme to indemnify and defend it for occurrences during the period Acme insured the original Firm.

There are several interesting things here. It is easy to assume that transacting parties will bargain over the allocation of tort liability. That assumption is unrealistic in several categories of transactions. It is unrealistic here with respect to the creation of the subsidiary. Like the *Henkel* case, this is not an arm's-length transaction. Accepting liability was an offer the whole-cloth subsidiary in *Henkel* could not refuse. It is thus unlikely that Amchem No. 2 paid a claim-discounted price for Amchem's chemicals business. After all, the one provision that might be safely expected if such bargaining were actually occurring would be a clear specification of the liability insurance policy rights. That did not happen in *Henkel*.

The second transfer of the new subsidiary (into FoolCo) is an arm's length transaction. But effective bargaining is clouded on two fronts. First, these examples assume that the transferor remains in business and is effectively suable. However, many reorganizations involve the dissolution of the predecessor. Indeed, in some jurisdictions, this is a requirement for the imposition of successor liability. A dissolved corporation can sometimes be revived, but it is generally impractical to do because the assets have been distributed and it is too costly to track down individual shareholders. The upshot is that if dissolution is in the plan, there is less reason for the transferor and the transferee to discount the purchase price to account for contingent pre-acquisition liabilities; the predecessor will be gone, and the successor will often not be liable. In fact, non-liability is an excellent reason to structure a transfer so as to ensure dissolution—a potentially strategic rather than an efficient outcome.

146. Interestingly enough, neither dissolution nor bankruptcy of the corporate policyholder relieve liability insurers of their responsibilities. See *Commercial Liability Insurance*, supra note 2, § 4. This standard CGL provision, required in many states, recognizes that "liability insurance functions not only to protect insureds from the financial consequences of their negligence but also to protect the victims of that negligence—those who have been injured and to whom damages are owed." *Id.*
This shades into the second cloud. Successor liability is pretty muddled, much like its cousin, veil-piercing. Apart from the “promise” exception to successor non-liability,147 predicting exactly when the successor retains enough of the identity of the predecessor to qualify under the de facto merger or continuation of enterprise exceptions is difficult. Even the tort-friendly “product line” exception is easier to describe in theory than to apply in practice, and the contours of its acceptance vary widely.148 And fraudulent conveyance law will often be unavailing for long-tail tort claimants; the statistical likelihood that there will be claims at some point in the future will not sustain a finding of undercapitalization. Finally, there is no mechanism for making such inquiries with respect to every non-bankruptcy dissolution and transfer of assets.149 Thus, bargaining over the rights to existing policies associated with such liabilities may be difficult here.

However, my hypothetical and Henkel involve firms that remain in existence.150 And those firms need insurance coverage. Amchem could have been sued not only for torts arising from the chemicals business it had divested but also those arising from its other operations. The hypothetical firm above can expect to be a defendant in cases arising from its broken glass operations. And, unknown for

147. The “promise” exception to successor nonliability is problematic for another reason. Potential tort creditors may indeed have expectations about firms’ financial responsibility. A purchaser of a GM automobile expects that his warranty (including those that describe personal injury claims) will be honored years later and until recently would not have considered the possibility of insolvency. However, consumer expectations are rarely tied to specific reorganizations, most of which occur without tort creditors having any awareness of them whatsoever. This is particularly true for long-tailed products-liability claims involving third parties to the underlying sale (as with DES claims). Although the fact that a transferee has voluntarily accepted liability is interesting, it is not a rationale that has much to do with a wrongdoing-recourse rationale for tort liability. Like de facto merger, it is a doctrine that fits more easily into a framework for dealing with contract creditors, who may forbear intervention into a liability-extinguishing reorganization in exchange for a “personal” guarantee—that of the transferee.


149. A model for doing so is suggested in a recent student Note, Successor Liability, Mass Tort and Mandatory-Litigation Class Actions, 118 Harv. L. Rev. 2357, 2367–74 (2005). This idea has some appeal, but I cannot imagine how it could be implemented.

150. Although existing “predecessors” may be expected to point fingers at the inanimate operations they have divested to their “successors,” the predecessors remain liable as a matter of tort law. In such cases—there will be many—insurers will not receive a windfall under the Henkel approach (although the other complications remain). Whether the typical reorganization leaves a suable predecessor in existence is an empirical question beyond this Article’s scope. I suspect that insurers have made their own determination: If that answer is “No,” objection to transfer is a convenient mode of post-claim underwriting. If the answer is “Yes,” then the objection may reflect insurers’ view that, while their liability may be unavoidable, succession is a headache they don’t need.
now, it will be a defendant for its environmental harms. Recall that occurrence-based coverage can be “activated” decades after the underlying wrong took place. A transferor that remained in business—any business—might very well wish to retain coverage while washing its hands of the liabilities that the coverage would otherwise comprehend.

In retrospect, this could explain why insurance asset dispositions are often inadequately specified in corporate transactions, as in Category 3. The parties wish to avoid the unpleasant news that an insurer refuses assignment, which would explicitly inject liability considerations that might otherwise be ignored. The transferor is happy to ignore this, in the hopes that it will retain coverage that may be needed for other operations later. The transferee may ignore the issue because the transferee’s agents are interested primarily in a rent-generating transaction and will be absent by the time the check arrives. And one must not overlook the capacity of corporate actors for genuine optimism, particularly with respect to contingent, long-tailed tort claims which are characteristic of product and environmental liabilities.

This problem, like successor liability itself, can be thought of as one of priorities: which liability-generating entities—and by extension, which classes of tort claimants—are entitled to insurance assets following a reorganization, and in which order? Moreover, should the transacting parties be permitted to vary that default order? My answer is that the insurance should follow the liability, unless clearly specified otherwise—with a catch.

XIII. Determining Insurance Priorities

A. Henkel: An Administratively Easy Case

In relatively straightforward transactions, there are a limited number of candidates for insurance priority. Recalling Professor’s Mil-lon’s idea of a reasonable insurance provision, a court should construe asset transfers that result in tort liability to include a share of available insurance coverage. The amount of that share turns, rather simply, on the order in which tort claims are presented. Insurance policies typically contain limits on the number of covered occurrences (roughly, accidents) as well as an overall dollar limit. Successor liability insurance doctrine should merely recreate the outcome to be expected where a firm incurs liabilities for diverse operations without the complication of succession. If the hypothetical firm above were sued for dysbestos, broken glass, and environmental harms (assume coverage does not vary by activity or claim type), then the available insurance
could be exhausted by the plaintiffs who are fortunate to present and resolve their claims the earliest.

Similarly, if FoolCo incurs mounting dysbestos claims, while Firm incurs relatively modest broken glass claims, it is possible that FoolCo's liability will exhaust the underlying insurance while broken glass claims are still ripening. Naturally, there will be nothing left by the time the EPA inquires into Firm's holding ponds. There is nothing anomalous in this outcome, given the absence of an unlimited insurance requirement for all actors. It is exactly what would occur without the complication of succession.

Suppose Firm, consistent with its risk-management plan, wishes to retain all the extant liability coverage. Although it appears that plaintiffs are at times willing to focus their fire on successors rather than predecessors who remain liable ("assumption of liability" agreements are misnamed where there is a suable predecessor; they are essentially indemnification agreements), the Firm has doubts about FoolCo's viability; it reasons that there is a non-trivial chance it may yet be responsible for dysbestos liabilities. And of course, it is concerned about non-dysbestos exposure.

Contrary to my initial view of Henkel, this is a legitimate strategy. It would be a mistake to assume that parties to a corporate reorganization could never devise something superior to a default rule of matching the original insurance to the liability. Perhaps in a soft market, the successor could obtain "tail" coverage at an attractive price. Or, the ceded operations may be so profitable that they can sustain foreseeable patterns of tort claims without the use of insurance. And the possibility of genuine bargaining cannot be ignored with respect to arm's-length transactions.

Therefore, parties should be free to specify whether historic insurance arrangements remain with the transferor or follow the liability to the transferee, subject to a requirement that the transferor may retain the insurance only if the transfer provides an economically equivalent guarantee of financial responsibility.\textsuperscript{151} If that guarantee is later determined not to have been economically equivalent at the time of the transaction, then the default rule applies.\textsuperscript{152}

\textsuperscript{151} A retrospectively rated liability "tail" would be ideal, but—AIG's unfortunate experience with credit-default swaps aside—one cannot exclude the possibility of more creative arrangements. Their specification must await another day.

\textsuperscript{152} Realistically, it is often going to be difficult to assess the equivalence of creative risk arrangements before it is too late—that is, before the "real" insurance arrangements are exhausted by post-acquisition defense and payment of pre-acquisition claims. And just as it would obviously be inequitable for an insurer to pay a second time on an exhausted policy, it would be equally unfair for the transferor to pay if the exhaustion was inevitable. Insufficient transaction-
The simplest approach is for successors to automatically be treated as “additional insureds” with respect to pre-acquisition occurrences only. Where there are multiple insureds (the members of a household, for example, or commercial tenants designated as additional insureds under a lessor’s policy), the available insurance is exhausted on a first-come, first-serve basis. The proposed restriction here to pre-acquisition occurrences reflects the fact that most reported successor insurance disputes involve historic coverages that remain available decades later simply because they were written on an occurrence basis. There is obviously no obligation on the part of the predecessor (or insurer) to ensure coverage for post-acquisition occurrences. Determining the timing and number of occurrences is a fascinating branch of insurance law, and there is no reason to suppose that such disputes among predecessors and successors will be any more or less difficult.

In practice, alternatives other than the additional insured designation may be difficult for parties to arrange. I suspect that the easiest course will be one of negotiation with the existing insurer that is now bound firmly to the risk, planks notwithstanding. Liable under the default rule specified above, the insurer may find it convenient to provide additional amounts of coverage for a reasonable premium, or agree to allocate available coverage in ways the parties think ideal but which this default rule declines to permit without the insurer’s consent. More than anything, this alternative may simply illuminate the ways in which all parties may bargain in the shadow of a default rule often fitted imperfectly to any given transaction.

B. Glidden Co.: An Administrably Difficult Case

In 2006, the Ohio Supreme Court considered a pair of cases involving successor insurance. One involved a relatively simple transaction, quite similar to Henkel. The other is a potential nightmare for professors who purport to discern “underlying structures” across liability and corporate law, comprehended within a few simple rules.

related insurance arrangements would not, in such a case, be a cause of harm to the successor (or tort plaintiffs). The transferor may be released from liabilities in excess of its guarantee if it can demonstrate actual exhaustion (for example, by the on-going environmental harms in the “Firm” example above) was inevitable.

153. This approach would satisfy the default rule as well, and likewise ensure that insurance-funded tort recoveries enjoy the same priority they would absent succession.

In *Pilkington North America, Inc. v. Travelers Casualty and Surety Co.*, the Ohio Supreme Court took a step and a half away from *Henkel*. In 1986, Pilkington Brothers acquired the assets and liabilities of a glass-manufacturing business from Libbey-Owens-Ford, operating it as a subsidiary named LOF Glass, Inc., which was eventually renamed Pilkington North America. Libbey remained in businesses unrelated to glass manufacturing. When Pilkington was targeted for environmental liabilities arising from LOF's pre-merger operations, it sought coverage from Libbey's insurers.

The court first rejected *Henkel*'s strained definition of "chose in action," holding that it arose with the underlying occurrence itself, not the realization of a certain claim. Second, it ruled that a liability policy's indemnity rights were accordingly alienable, notwithstanding anti-assignment language. However, the parties stipulated that the transaction had not done so. Finally, the court held that where successor liability is imposed under the "promise" exception—that is, via contract—insurance coverage does not automatically arise by operation of law. *Pilkington* thus permits transacting parties to transfer...
some, but not all of the liability insurance rights that might be implicated by contractually defined form of successor liability. This, at least, is progress, as it confirms that transferors have the power, vis-à-vis their insurers, to transfer some insurance rights to liability transferees. However, it does not account for the possibility, detailed earlier, that the parties may bargain strategically to the detriment of tort claimants, leaving a transferee without sufficient insurance assets to match its inherited liabilities. Moreover, *Pilkington* rests on the view, which will often be unrealistic, that the transacting parties are “bargaining” at all.

If the general problem of successor insurance is that of Theseus’ ship, *Glidden Co. v. Lumbermens Mutual Casualty Co.* is a transactional depiction of Theseus in the Labyrinth.

At the heart of the “tortuous corporate history” recounted was a classic long-tailed liability. The original Glidden manufactured lead paint. In 1967, it merged into SCM, which carried Glidden’s operations forward in one division or subsidiary after another (along with similar but distinct business and product lines) until 1986. Just before that time, SCM created a wholly owned subsidiary, transferring thereto its domestic paints operations. At relevant times, Glidden and SCM were separately insured by different liability policies.

Control of SCM was acquired by a subsidiary of Hanson. Hanson then liquidated the subsidiary and distributed SCM stock to twenty separate Hanson subsidiaries evocatively described as the “fan companies.” Later in 1986, the set of businesses in which the outline of the former Glidden could be glimpsed was transferred to one of the fan companies, No. 6. Hanson then sold No. 6 to ICI, at which point it was rechristened Glidden II. Hanson and ICI agreed that while Hanson would retain ownership of all its insurance policies (in truth, the policies once issued to Glidden and SCM), a side agree-
ment apparently provided that Hanson would grant ICI the benefit of any insurance policies triggered by preacquisition activities. Subsequent decantation ensued for both Glidden (finally, Glidden III) and SCM.173 Two decades after it had precipitated out of this tangle, Glidden III sought coverage under the policies issued to its apparent predecessors.

Glidden Co. was decided on the same day as Pilkington; the decision largely rests on the rules there articulated and the meaning of the side agreement.174 Under Pilkington—as in Henkel—successor liability assumed by contract cannot be a basis for transfer of insurance assets by operation of law.175 With respect to the side agreement, the court observed that Hanson did not directly own the insurance assets; they resided at the time of Glidden II’s creation in a separate Hanson subsidiary, SCM.176 Although, under Pilkington, SCM would have had the power notwithstanding anti-assignment language to transfer the right to indemnity, SCM did not in fact do so, and the Glidden Co. court declined to treat SCM as a mere puppet of Hanson in order to vindicate Hanson’s promise to ICI–Glidden.177

The sheer complexity of Glidden Co.’s corporate history gives pause. Few reorganizations may be as complicated in such a short span (many of the events abbreviated above took place in a single year). But given enough time, a great many corporate policyholders will mutate beyond recognition. And underlying this Article is the idea that there will be time, given the structure of occurrence-based liability policies. Should an insurer be required, like Kafka’s messenger, to wade through an endless sea of personality to deliver its promise to the true addressee?178

And how many addressees might there be? Part of the Henkel rationale for denying coverage was the fear that insurers might be required to defend original policyholders and their successors. Now, that was not an actual problem in Henkel, because the plaintiffs voluntarily dismissed the predecessor, having apparently satisfied themselves that the real (pre-acquisition) wrongdoer had taken the form of the successor.179 In another case, perhaps, a plaintiff might proceed against both firms. In addition to multiplying the physical costs of

173. Id.
174. Id. at 109.
175. See Pilkington, 861 N.E.2d at 138.
176. Id. at 129.
177. Glidden, 861 N.E.2d at 120.
defense, such cases present potential ethical challenges, as successors and predecessors seek to blame one another. In long-tailed claims such as toxic torts, this is a genuine possibility. Although the precise structures used in the Glidden–SCM reorganizations seem to avoid it, it requires little imagination to see the possibility of a “fan” of twenty or more successors. I believe this is why the Ohio court was unable to clearly state whether the duty to defend was alienable as a chose in action, as was the duty to indemnify.

A priori, assuring financial responsibility to tort victims says little about the allocation of defense costs. And insurers have a facially appealing concern that multiparty transfers materially change the risks the insurers have agreed to undertake. However, the complementarity principle urged by this Article balances the interests of all actors in the liability system. Severing the duty to defend from the duty to indemnify does harm to each of the constituencies served by successor liability law, including insurers’ own interests. Ohio should have completed its second step away from Henkel.

As an eloquent dissent in Pilkington observed, “[t]he operation of law theory offers the simplest, cleanest solution” to the insurance problems created by corporate restructurings. The liability system—which is to say, litigants, insurers, and the norms of these interdependent systems—are well served by the long-standing link between defense and indemnity. The policyholder obtains the benefit of the insurer’s litigation expertise. Even for long-tailed liabilities that are “new” for the lately arrived successor, insurers can moderate loss exposure whenever they know more about claim patterns than the policyholder, which will be often. The complication of succession does not diminish the indemnitor’s interest in controlling litigation so as to prevent opportunistic settlement or litigation behavior by the indemnitee. And although it is perhaps unfortunate that historic liability policies did not link defense costs to the insurer’s aggregate re-

---

180. They could each be liable under the “product line” theory if they continued to manufacture, perhaps with separate territories or licensing variations, the predecessor’s products; under the “continuity of enterprise” view, they might be liable if the predecessor’s personnel and trademarks were distributed among them. Finally, each could promise to assume the predecessor’s liabilities. However, the characteristic use of indirect subsidiaries in the Glidden transactions eliminated these possibilities.

181. See Glidden, 861 N.E.2d at 120. The trial judge in Glidden suggested that a duty to defend the multiple “fan companies” was the “logical extension” of Glidden’s coverage theory. See Glidden Co. v. Lumbermens Mut. Cas. Co., Nos. 409039 & 411388, 2002 WL 34236384 (Ohio Ct. of Common Pleas, May 8, 2002).

182. Glidden, 861 N.E.2d at 120 (Pfeifer, J., dissenting).
sponsibilities to its policyholders,¹⁸³ this is not a problem that ought to be resolved on the fortuitous selection of one form of reorganization over another.

Moreover, coordinating defense and indemnity serves the legitimate interests of transacting parties. Sundering the two introduces unnecessary uncertainty into corporate reorganizations. By cabining the alienability of part of the liability insurance asset, the Pilkington approach undermines the efficiencies that corporate restructurings aim to uncover. Might transacting parties desire to allocate indemnity to one and a defense to the other? Perhaps, but this would suggest the kind of fraudulent transfer that is condemned by successor liability law. And it is difficult to see why an insurer might desire such an arrangement.

The specter of the hydra-headed successor suggested by Glidden is answered by the fact that insurers are already subject to the diverging claims of the firm as it evolves. As the DES example suggests, there will be many iterations of a firm throughout its history; cycles of shareholders (some who may be controlling) and formal mergers already subject the liability insurer’s responsibilities to the internal workings of the firm. While this Article favors a slightly broadened concept of succession for liability purposes, liability insurance already presupposes many of the corporate changes that are certain to occur over time.¹⁸⁴ These changes may create material differences in liability risk going forward, but these are not the liabilities at issue in successor insurance cases.

The potential for ethical conflict exists, but liability insurers and corporate policyholders are already substantially adverse in much of tort litigation; I am not sure this potential complication fundamentally worsens that dynamic. Moreover, it will in many instances resemble the conflict that arises when insurers seek to impute occurrences to periods when the policyholder was insured by another firm, or to periods when the policyholder held less, possibly non-existent coverage.

¹⁸³. That is, older insurance policies did not specify that defense expenditures by the insurer would be credited against the policy limits; in many long-tailed products-liability claims, the duty to defend has proven far more valuable than the often modest underlying limits thought sufficient in an earlier era.

¹⁸⁴. The point is well made by Jeffrey Stempel. Tracing the drafting history of the standard Commercial General Liability policy, he notes,

Insurers appear to have regarded [automatic expansion of liability coverage to reflect acquisitions and other operational changes] as the natural corollary to the comprehensive nature of the CGL policy, which was marketed as broad coverage designed to allay policyholder concerns regarding the need to purchase other, particularized liability policies.

Stempel, supra note 37, at 412.
That conflict is real, not theoretical; we do not ignore it by depriving insurers of the right to prove themselves out of non-coverage. Nor should the law deprive successors of coverage essential to the operations they have acquired simply because some cases will be difficult.

Ironically, the easiest solution to this potential problem might be to tie successor liability more firmly to considerations relevant to tort law rather than to the law of corporations. Tort-relevant assets and operations may be unlikely to be scattered as broadly as the creativity of corporate lawyers theoretically permits. But that would elevate the norms of one system over another; complementarity does otherwise.\textsuperscript{185}

XIV. Conclusion

The riddle of Theseus’ ship asks whether identity is continuity of substance or essence. The law governing corporate succession and insurance must account for its course along the river Thames,\textsuperscript{186} while observing the constraints imposed by co-equal bodies of law. A healthy regard for one’s neighbors—complementarity—requires the law to coordinate among these systems, containing elements which are frustratingly indifferent to one another. Specifically, the divergent ways the systems manage the uncertainty of future tort liabilities should be constrained by their inescapable interdependence. Linking liability insurance to the wrongs discernible through the tangle of corporate restructuring balances the essential character of each system, and the legitimate needs of its constituencies, with those of the others. Ultimately, complementarity merely recognizes that no law is an island, entire of itself.\textsuperscript{187}

\textsuperscript{185} It is interesting to observe that although succeeding to the name and business of Glidden, Glidden III is not considered a successor. From the opinion, it is unclear whether any entity is a successor, under Ohio law, to the liability of Glidden. \textit{Glidden}, 861 N.E.2d at 120. The trial opinion was skeptical; amazingly, this issue was not even briefed. This is in fact consistent with the traditional corporate law rule, a rule that if left unvarnished is fundamentally at odds with the perspective of the tort system.

\textsuperscript{186} “But when united into a corporation, they and their successors . . . are but one person in law, a person that never dies; in like manner as the River Thames is still the same river, though the parts which compose it are changing every instant.” \textsc{The Student's Blackstone} 102–03 (Robert Malcolm & Napier Kerr eds., 1885).

\textsuperscript{187} Cf. John Donne, \textit{Devotions upon Emergent Occasions} 86–87 (Anthony Raspa ed., 1987). In insurance argot, a liability policy is said to “follow form” to another when its provisions are unspecified, and rely on the second policy for their terms.