

The Federal Common Law of Successor Liability and the Foreign Corrupt Practices Act

Taylor J. Phillips

Repository Citation

Taylor J. Phillips, *The Federal Common Law of Successor Liability and the Foreign Corrupt Practices Act*, 6 Wm. & Mary Bus. L. Rev. 89 (2015), <http://scholarship.law.wm.edu/wmblr/vol6/iss1/4>

THE FEDERAL COMMON LAW OF SUCCESSOR LIABILITY AND THE FOREIGN CORRUPT PRACTICES ACT

TAYLOR J. PHILLIPS*

ABSTRACT

In recent years, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have vigorously enforced the Foreign Corrupt Practices Act (FCPA). The FCPA prohibits bribery of foreign government officials, and the statute provides for significant civil and criminal sanctions. Settling and remediating violations can cost corporate defendants millions, with several corporate enforcement actions exceeding \$100 million in sanctions. Moreover, enforcement actions related to the FCPA often are not brought until many years after the alleged violations.

Because the massive potential liabilities associated with an FCPA violation may not manifest themselves until years after the violation occurred, prospective corporate acquirers have become acutely sensitive to the risk of “buying” an FCPA liability during a merger or an acquisition. Traditionally, an acquirer could avoid liabilities of the seller by structuring the acquisition as an asset purchase. Under the law of most U.S. jurisdictions, a court will not usually look beyond the allocation of liabilities in an asset purchase agreement, even when the acquirer purchases substantially all of the assets of the seller.

Despite this general rule, even asset purchase agreements cannot contract around certain liabilities that arise from federal law. In several cases, the Supreme Court and federal appellate courts have imposed liability on good faith, arm’s-length asset purchasers through the federal common law of successor liability.

In the FCPA context, there is no precedent directly on point. Influential guidance from the DOJ and SEC, however, emphasizes “successor liability” enforcement actions while failing to distinguish between companies that are “successors” by reason of a merger and “successors” by reason of an asset

* Associate, Bass, Berry & Sims PLC; J.D. 2007, University of Virginia; B.A. 2003, College of William and Mary. The author thanks Cecil VanDevender, Kerrin Wolf, and Victor Ludwig for their comments; Wallace Dietz and John Kelly for their support; and Meghan Phillips for her ideas, her edits, and her patience. This Article does not necessarily reflect the views of Bass Berry or its clients.

purchase.¹ This silence by enforcers may lead overly conservative acquirers to abandon transactions out of an unfounded (but understandable) fear of being held liable for the violations of the seller, even when acquisitions would be socially and economically beneficial and likely could be accomplished without FCPA successor liability through an asset purchase.²

This Article concludes that asset purchasers typically cannot be held civilly liable for the pre-acquisition FCPA violations of sellers because the rule of decision for successor liability in FCPA cases is determined by state, not federal law, and the law of most states does not impose successor liability on arm's-length asset purchasers. This conclusion is even stronger with respect to criminal FCPA liability because the remedial policy rationales that underlie expansive civil successor liability doctrines are not present in criminal law.

¹ See Criminal Division of the U.S. Department of Justice and Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 28 (Nov. 4, 2012) [hereinafter *Resource Guide*], available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

² The lack of clarity from enforcers appears to have led a number of large law firms to assert, in publicly available articles, newsletters, and presentations, that an asset purchaser can be liable for the FCPA violations of a seller. These conclusions may have been influenced by the United States Sentencing Guidelines Manual, which implies that criminal history transfers when one company purchases the ongoing business of another through an asset purchase. See U.S. Sentencing Guidelines Manual § 8C2.5 cmt. n.6 (2013).

TABLE OF CONTENTS

I. THE FOREIGN CORRUPT PRACTICES ACT	92
<i>A. The Foreign Corrupt Practices Act Generally</i>	92
<i>B. Recent Developments in FCPA Enforcement</i>	95
<i>C. Mergers, Acquisitions, and the FCPA</i>	98
II. SUCCESSOR NONLIABILITY AND ITS EXCEPTIONS	102
<i>A. Traditional Common Law of the States</i>	102
<i>B. The Substantial Continuity Exception</i>	105
III. FEDERAL COMMON LAW AND CIVIL SUCCESSOR LIABILITY UNDER THE FCPA	107
<i>A. Do Federal Courts Have the Authority to Create a Common Law of Successor Liability Under the FCPA?</i>	108
<i>B. What is the Content of the Federal Common Law?</i>	110
1. <i>Kimbell Foods and Subsequent Supreme Court Cases</i>	110
2. <i>The Circuits' Analyses of Successor Liability Under Federal Statutes</i>	113
<i>a. CERCLA</i>	113
<i>b. Federal Labor and Employment Laws</i>	115
<i>c. Enforcement of Patent Judgments</i>	117
3. <i>The Application of Kimbell Foods to Successor Liability Under the FCPA</i>	118
<i>a. Uniformity</i>	119
<i>b. Frustration of Federal Law</i>	120
<i>c. Disruption of Commercial Relationships</i>	124
4. <i>In the Wake of Bestfoods, Does the Kimbell Foods Analysis Matter?</i>	125
IV. FEDERAL COMMON LAW AND CRIMINAL SUCCESSOR LIABILITY UNDER THE FCPA	127
<i>A. Brief Review of the Law of Criminal Successor Liability</i>	127
<i>B. Finding a Rule of Decision for a Federal Criminal Common Law of Successor Liability</i>	130
<i>C. A State Law Alternative to Dixon</i>	132
CONCLUSION	134

I. THE FOREIGN CORRUPT PRACTICES ACT

A. The Foreign Corrupt Practices Act Generally

The FCPA, codified as part of the Securities Exchange Act of 1934 (the “Exchange Act”), includes anti-bribery provisions and accounting provisions. The anti-bribery provisions prohibit corruptly offering anything of value to a foreign government official for the purpose of influencing the official to assist the offeror in the obtaining or retaining of business.³

Companies that are “issuers” within the meaning of the Exchange Act also must comply with the accounting provisions of the FCPA.⁴ The books-and-records provisions of the FCPA require issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁵ Issuers are also required to maintain a system of internal compliance controls that “provide[] reasonable assurances that transactions are executed in accordance” with generally accepted accounting principles.⁶ Collectively, the books-and-records and internal controls provisions are referred to as the accounting provisions.

The FCPA is enforced by the DOJ and the SEC.⁷ The DOJ handles criminal enforcement, as well as civil enforcement against non-issuer companies and their officers, directors, employees, and agents.⁸ The SEC is authorized to bring civil suits against issuers and their officers, directors, employees, and agents.⁹

The DOJ and SEC can seek devastating sanctions for FCPA violations. For individuals, sanctions for violating the anti-bribery provisions can include imprisonment of up to five years and fines of up to \$100,000 per violation.¹⁰ For companies, anti-bribery sanctions may result in fines of up to \$2,000,000 per violation.¹¹ Under the Alternative Fines Act, courts can

³ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012).

⁴ *See id.* § 78c(a)(8) (defining “issuer”).

⁵ *Id.* § 78m(b)(2)(A).

⁶ *Id.* § 78m(b)(2)(B).

⁷ There is no private right of action under the FCPA. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1024 (6th Cir. 1990).

⁸ *Resource Guide*, *supra* note 1, at 4.

⁹ *Resource Guide*, *supra* note 1, at 4–5.

¹⁰ §§ 78ff(c)(2)(A), 78dd-2(g)(2)(A). A willful violation of the accounting provisions can result in a fine of \$5,000,000 and imprisonment up to twenty years. § 78ff(a).

¹¹ §§ 78ff(c)(1)(A), 78dd-2(g)(1)(A). A willful violation of the accounting provisions can result in a fine of \$25,000,000. § 78ff(a).

impose penalties equal to twice the benefit gained by the defendant in making the improper payment.¹² Furthermore, although the statute of limitations for a substantive violation of the FCPA is five years,¹³ the government has used numerous methods to extend the time in which it can prosecute an FCPA-related offense,¹⁴ resulting in defendants being penalized for conduct many years from the date of the alleged violation.¹⁵

Although the FCPA does not create a private right of action, companies often face more than just the fines and penalties assessed by the government.¹⁶ Collateral consequences of an FCPA conviction may include denial of export privileges and debarment from doing business with the United States government.¹⁷ In the wake of disclosing FCPA investigations, public companies frequently suffer stock drops and concomitant shareholder suits.¹⁸

Additionally, the professional fees and costs associated with an FCPA investigation may be just as significant as the fines and penalties themselves. For example, in the largest FCPA settlement in history, Siemens resolved alleged FCPA violations for \$800 million.¹⁹ In addition to paying \$800 million to the U.S. Treasury, Siemens paid its attorneys, accountants, and other professionals \$1 billion in fees and costs related to the investigation, including \$100 million for document review alone.²⁰ The staggering

¹² 18 U.S.C. § 3571(d) (2012).

¹³ See *SEC v. Straub*, 921 F. Supp. 2d 244, 259 (S.D.N.Y. 2013) (applying 28 U.S.C. § 2462's catchall five year statute of limitations in an FCPA case).

¹⁴ See, e.g., 18 U.S.C. § 3292 (2012) (permitting a court to toll the statute of limitations for up to three years if the government meets certain conditions, including requesting information from a foreign government). Also, charging conspiracy—a continuing offense—permits the government to bring charges within five years of the last overt act committed in furtherance of the conspiracy. See *Fiswick v. United States*, 329 U.S. 211, 227 (1946).

¹⁵ See, e.g., Deferred Prosecution Agreement at ¶4, *United States v. Total, S.A.*, No. 1:13-cr-239 (E.D. Va. May 29, 2013) (noting that “most of the underlying conduct occurred in the 1990s and early 2000s,” more than a decade before the criminal information was filed).

¹⁶ See O'Melveny & Myers LLP, *FOREIGN CORRUPT PRACTICES ACT: AN O'MELVENY HANDBOOK* 26–28 (6th ed. 2009), available at http://www.omm.com/files/upload/OMelvenyMyers_Sixth_Edition_FCPA_Handbook.pdf.

¹⁷ See 22 C.F.R. §§ 126.7(a)(3)–(4), 120.27(a)(6) (2014); 48 C.F.R. § 9.406-2 (2013).

¹⁸ See Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L.J. 1217, 1223–27 (2012).

¹⁹ Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J. (Oct. 2, 2012), <http://online.wsj.com/news/articles/SB10000872396390443862604578028462294611352>.

²⁰ Nathan Vardi, *Feds Charge Former Siemens Executives with Bribery*, FORBES (Dec. 13, 2011, 12:28 PM), <http://www.forbes.com/sites/nathanvardi/2011/12/13/feds-charge-former-siemens-executives-with-bribery/>; Palazzolo, *supra* note 19.

level of professional fees incurred during FCPA investigations is driven partly by the multijurisdictional nature of anti-corruption investigations. By definition, an alleged anti-bribery offense involves conduct related to another country, and thus often requires the retention of professionals in multiple jurisdictions.²¹ Furthermore, upon discovering a potential FCPA violation in one jurisdiction, questionable payments in other jurisdictions or business units may be identified.²² As the investigation expands to other jurisdictions—and sometimes other jurisdictions’ enforcement authorities—costs go up.²³

The high stakes and high costs often lead corporate defendants to resolve alleged FCPA violations out of court.²⁴ In addition to the monetary cost of a settlement, however, defendants may continue to face significant consequences. As part of negotiated resolutions, the government sometimes requires corporate defendants to retain monitors for one to three years after the resolutions.²⁵ A monitor typically has access to corporate books,

²¹ *Resource Guide*, *supra* note 1, at 19.

²² *See, e.g.*, Wal-Mart Stores, Inc., Quarterly Report (Form 10-Q) 15 (Sept. 5, 2013) (“The Audit Committee ... is conducting an internal investigation into, among other things, alleged violations of the [FCPA] ... in connection with foreign subsidiaries, including Wal-Mart de México Inquiries or investigations regarding allegations of potential FCPA violations have been commenced in a number of foreign markets where the Company operates, including, but not limited to, Brazil, China[,] and India.”); Embraer S.A., Report of Foreign Private Issuer (Form 6-K) 9 (Mar. 13, 2013) (“We received a subpoena from the SEC in September, 2010 In response to this SEC-issued subpoena and associated inquiries into the possibility of non-compliance with [FCPA], we retained outside counsel to conduct an internal investigation on transactions carried out in three specific countries. Further, the Company has voluntarily expanded the scope of the internal investigation to include two additional countries”).

²³ *See, e.g.*, Diebold, Inc., Current Report (Form 8-K) 6 (Feb. 14, 2011) (“As previously disclosed, Diebold is conducting a global internal review of its compliance with the U.S. Foreign Corrupt Practices Act (FCPA) As a result of the internal review progressing to more complex operations located in broader geographies, as well as complying with requests from regulators, costs associated with the FCPA review increased substantially in the fourth quarter.”).

²⁴ *See Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 2 (2010) (written testimony of Andrew Weissmann) [hereinafter Weissmann Testimony], available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf> (“Commercial organizations are rarely positioned to litigate an FCPA enforcement action to its conclusion and the risk of serious jail time for individual defendants has led most to plead.”).

²⁵ *See generally* F. Joseph Warin, Michael S. Diamant, & Veronica S. Root, *Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321 (2011).

records, and employees, and reports directly to the government.²⁶ The defendant, of course, is obligated to pay the monitor's professional fees.²⁷

B. Recent Developments in FCPA Enforcement

Although the FCPA was enacted in 1977, enforcement has exploded in the past ten years.²⁸ As touted by the DOJ, nine of the top ten resolutions (by settlement value) were reached between 2009 and 2013.²⁹ By 2010, FCPA fines comprised *half* of all DOJ Criminal Division penalties.³⁰ In 2013, the chief of the DOJ's FCPA unit said, "[w]e have more prosecutors today than we ever have. More agents today than we ever have. We have a greater caseload today than we ever have."³¹ The aggressive enforcement of the FCPA has spanned the administrations of both George W. Bush and Barack Obama,³² absent legislative or judicial intervention, it appears to be a permanent part of the business law landscape.

²⁶ See *id.* at 353–54 (“Because the monitor is independent, actively reviews the company’s practices, and reports to the government, the monitor might discover and reveal previously undisclosed wrongdoing. Any such wrongdoing may or may not be FCPA related, but if found by a monitor, it can lead to further scrutiny by the government and additional penalties.”).

²⁷ See *id.* at 371–72 (noting the importance of negotiating a budget with the monitor “to prevent the engagement from becoming the proverbial ‘grave train.’”).

²⁸ See generally Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 247–53 (2010) (collecting enforcement actions); see also *The Accomplishments of the U.S. Department of Justice 2001–2009*, U.S. DEP’T OF JUSTICE 31 (2009), available at <http://www.justice.gov/opa/documents/doj-accomplishments.pdf> (“[T]he Department brought more FCPA prosecutions in [2005–2009] than in all of the previous 26 years dating back to passage of the FCPA statute in 1977.”).

²⁹ *Accomplishments Under the Leadership of Attorney General Eric Holder*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/accomplishments/> (last visited Nov. 19, 2014) (“Since 2009, the Department has entered into more than 50 corporate resolutions, including nine of the 10 largest resolutions ever in terms of penalties, resulting in approximately \$2.63 billion in monetary penalties.”).

³⁰ *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 2 (2011) [hereinafter June 14, 2011 Hearing], available at http://judiciary.house.gov/_files/hearings/printers/112th/112-47_66886.PDF.

³¹ Gibson, Dunn & Crutcher LLP, 2013 MID-YEAR FCPA UPDATE (Gibson, Dunn & Crutcher LLP Publications, Wash. D.C.), July 8, 2013, at 20, available at <http://www.gibsondunn.com/publications/Documents/2013-Mid-Year-FCPA-Update.pdf> (citing Charles Duross, *Remarks at the 27th Annual Nat’l Institute on White Collar Crime* (Mar. 7, 2013)).

³² See Shearman & Sterling LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 2–6 (Shearman & Sterling

With the frequency of enforcement increasing so dramatically, one might expect FCPA case law to develop at a parallel pace. That has not happened. As noted above, the devastating consequences of FCPA violations have led many corporate targets to resolve potential liability out of court.³³ Companies “commonly prefer to pay huge penalties through deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs) rather than actually litigate the dispute under the public eye.”³⁴

Even the co-director of the SEC’s Division of Enforcement has acknowledged that the frequency of these settlements has resulted in a dearth of precedent interpreting the FCPA.³⁵ This lack of precedent, in turn, results in corporate conduct being preemptively shaped as much by the enforcement positions of the DOJ and SEC as by legislation, regulation, or judicial decisions.³⁶ In an attempt to read the prosecutorial tea leaves, companies often look to past enforcement actions of the DOJ and SEC. As a representative for criminal defense attorneys described it in her 2011 testimony to the House of Representatives, “[b]ecause there has been so little judicial scrutiny of FCPA enforcement theories, right now the FCPA essentially means whatever the DOJ and SEC says it means.”³⁷

LLP, N.Y.C., N.Y., 2014), available at <http://www.shearman.com/~media/Files/Services/FCPA/2014/FCPADigestTPFCPA010614.pdf>.

³³ See Weissmann Testimony, *supra* note 24, at 3 n.8.

³⁴ R. Zachary Torres-Fowler, *Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration*, 52 VA. J. INT’L L. 995, 1007 (2012).

³⁵ See Andrew Ceresney, Co-Director of the Division of Enforcement, Sec. & Exch. Comm’n, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370540392284#.UpJ61MSsim4> (“[C]ases against individuals have also fleshed out some important areas of FCPA law, which—as many of you know—is not well developed.”).

³⁶ See *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 18 (2013) [hereinafter Terwilliger Testimony] (statement of fmr. Deputy Att’y Gen. George J. Terwilliger, III), available at http://judiciary.house.gov/_cache/files/e886416b-82d6-43f9-8d5d-68c44fc590cd/113-44-81464.pdf (“[B]ecause the FCPA is largely enforced exclusively by the Department of Justice and Securities Exchange Commission, beyond the scrutiny of judicial oversight, enforcement is dependent largely on prosecutorial discretion”); June 14, 2011 Hearing, *supra* note 30, at 2 (“The result is a shortage of court decisions determining the limits of the law. Companies must then analyze cases prosecuted by the Justice Department and the settlements reached to determine how to do business in foreign markets.”).

³⁷ *Foreign Corrupt Practices Act: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 46 (2011) (testimony of Shana-Tara Regon, Dir. While Collar Crime Policy, Nat’l Ass’n of Criminal Def. Lawyers), available at http://judiciary.house.gov/_files/hearings/printers/112th/112-47_66886.pdf; Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 909–10 (2010).

Unlike virtually every other federal criminal statute, however, the FCPA contains a mechanism through which U.S. companies and individuals may seek advisory opinions from the DOJ—the Opinion Procedure.³⁸ The Opinion Procedure allows companies to disclose prospective conduct to the DOJ.³⁹ Upon receipt of all relevant facts regarding the prospective conduct, the DOJ issues a publicly available release opining as to whether the prospective conduct would violate the anti-bribery provisions of the FCPA.⁴⁰ Although Opinion Procedure releases are not binding on the DOJ with respect to anyone other than the requestor, they have become an additional source of guidance for companies.⁴¹ As a matter of discretion, the SEC also honors the DOJ’s Opinion Procedure releases.⁴² Unfortunately, the Opinion Procedure has been used infrequently.⁴³

Given the limited use of the Opinion Procedure and the lack of judicial precedent, the private bar⁴⁴ and the industry⁴⁵ have testified to Congress that the FCPA should be reformed to clarify its ambiguities. Perhaps in an attempt to forestall legislative changes, the DOJ and SEC released a 120-page *Resource Guide to the U.S. Foreign Corrupt Practices Act* in November 2012 (the “Resource Guide”).⁴⁶ The Resource Guide describes itself as “an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities.”⁴⁷

³⁸ 15 U.S.C. §§ 78dd-1(e), 78dd-2(e) (2012); 28 C.F.R. §§ 80.1–80.16 (2013).

³⁹ *Resource Guide*, *supra* note 1, at 86.

⁴⁰ 28 C.F.R. § 80.8 (2013).

⁴¹ *Resource Guide*, *supra* note 1, at 87 (“In order to provide non-binding guidance to the business community, DOJ makes versions of its opinions publicly available on its website.”).

⁴² *Resource Guide*, *supra* note 1, at 119 n.398.

⁴³ In the thirty-four years since the first release under the Review Procedure (a predecessor to the Opinion Procedure), the DOJ has issued only sixty-one releases—less than one every six months. Even in the last decade of vigorous FCPA enforcement, the DOJ has issued only twenty-two releases. See U.S. DEP’T OF JUSTICE CRIMINAL DIV., *Review Procedure Releases*, <http://www.justice.gov/criminal/fraud/fcpa/review/> (last visited Nov. 19, 2014); U.S. DEP’T OF JUSTICE CRIMINAL DIV., *Opinion Procedure Releases*, <http://www.justice.gov/criminal/fraud/fcpa/opinion/> (last visited Nov. 19, 2014).

⁴⁴ See Terwilliger Testimony, *supra* note 36, at 18–19.

⁴⁵ See *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 20 (2011) [hereinafter Mukasey Testimony] (testimony of fmr. Att’y Gen. Michael B. Mukasey), available at http://judiciary.house.gov/_files/hearings/printers/112th/112-47_66886.PDF; Andrew Weissmann and Alixandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. CHAMBER INST. FOR LEGAL REFORM 11 (Oct. 2010), <http://openairblog.files.wordpress.com/2011/10/us-chamber-of-comm-amending-the-fcpa.pdf>; Weissmann Testimony, *supra* note 24, at 4.

⁴⁶ See generally *Resource Guide*, *supra* note 1.

⁴⁷ *Id.* (foreword by Lanny A. Breuer and Robert S. Khuzami).

It “addresses a wide variety of topics, including ... what constitute[s] proper and improper gifts, travel and entertainment expenses ... how successor liability applies in the mergers and acquisitions context ... and the different types of civil and criminal resolutions available in the FCPA context.”⁴⁸ The business community has responded with guarded appreciation, while continuing to press for additional clarification on the enforcement positions of the DOJ and SEC with respect to issues such as corporate criminal liability, parent-subsidary liability, and successor liability.⁴⁹

C. Mergers, Acquisitions, and the FCPA

In a 2003 Opinion Procedure release, the DOJ first suggested that an acquiring company could be liable for the pre-acquisition FCPA violations of the acquired company.⁵⁰ Subsequent cases confirmed the DOJ and SEC’s willingness to bring FCPA enforcement actions against buyers predicated on the pre-acquisition conduct of targets.⁵¹

For example, in the \$900 million merger between a subsidiary of General Electric Company (GE) and InVision Technologies Inc. (InVision), an internal investigation during due diligence revealed potential violations of the FCPA.⁵² The conduct was self-disclosed to the DOJ and SEC, which eventually settled with InVision for \$800,000 and \$500,000, respectively.⁵³ The DOJ also required InVision to retain a compliance monitor.⁵⁴ Moreover, although the DOJ did not charge GE, it required GE to enter into an NPA, pursuant to which GE agreed to continue InVision as “a separate legal entity subject to investigation and prosecution” for the duration of InVision’s obligations to the DOJ.⁵⁵ Notably, the DOJ stated that “in consideration” for GE’s cooperation, incorporation of the merged InVision subsidiary into GE’s compliance program, and other consideration, the DOJ would “not

⁴⁸ *Id.*

⁴⁹ See Letter from the U.S. Chamber of Commerce to Hon. Lanny A. Breuer and George S. Canellos 1, 3–5 (Feb. 19, 2013), available at http://www.ethic-intelligence.com/images/documents/legislation_reference_texts/2013_Coalition_Letter_to_DOJ_and_SEC_re_Guidance.pdf (regarding FCPA Resource Guide).

⁵⁰ U.S. DEPT. OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW OPINION PROCEDURE RELEASE 03-01 (Jan. 15, 2003), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf>.

⁵¹ See generally Grimm, *supra* note 28, at 305–22 (collecting cases).

⁵² *Id.* at 309.

⁵³ *Id.* at 310–11.

⁵⁴ *Id.* at 310.

⁵⁵ Non-Prosecution Agreement at ¶ 2, *In re InVision Techs.*, (Dec. 3, 2004), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/invision-tech/12-03-04invision-tech-agree-ge.pdf>.

prosecute GE or any successor or subsidiary ... under the FCPA.”⁵⁶ Of course, this strongly implies that, but for the NPA, the DOJ could have filed charges against GE.

Another frequently cited example of FCPA liability following an acquisition is the purchase of Latin Node, Inc. (Latin Node) by eLandia International, Inc. (eLandia).⁵⁷ In 2007, eLandia acquired Latin Node through a stock purchase with Latin Node’s parent.⁵⁸ After the transaction closed, eLandia quickly discovered and disclosed potentially corrupt payments made by Latin Node to government officials before the acquisition.⁵⁹ Notwithstanding the intervening acquisition and eLandia’s cooperation, however, the DOJ required eLandia’s new subsidiary to plead guilty to violating the FCPA.⁶⁰ In exchange for Latin Node’s guilty plea, the DOJ agreed not to file “additional criminal charges against Defendant ... or its parent corporation ... eLandia International, Inc.”⁶¹ eLandia also agreed to provide the funds necessary to pay Latin Node’s fine.⁶² On a practical level, the FCPA liabilities caused eLandia to write off its investment and discontinue Latin Node’s operations.⁶³

Finally, in a matter that predated the Resource Guide, a wholly owned subsidiary of Watts Water Technologies, Inc. (Watts Water) acquired the business of Changsha Valve, a Chinese company, through an asset purchase.⁶⁴ Prior to the acquisition, Changsha Valve purportedly maintained a “sales incentive policy,” pursuant to which it allegedly made improper payments to employees of Chinese instrumentalities.⁶⁵ The subsidiary of Watts Water allegedly continued these practices after acquiring the assets of Changsha Valve.⁶⁶

After Watts Water discovered and self-disclosed the potential FCPA violations, the SEC brought an enforcement action against Watts Water for its post-acquisition conduct, but not for the pre-acquisition conduct.⁶⁷ The

⁵⁶ *Id.*

⁵⁷ Information at 10–11, *United States v. Latin Node, Inc.*, No. 1:09-cr-20239-PCH, 2009 WL 1423436 (S.D. Fla. Mar. 24, 2009).

⁵⁸ eLandia International, Inc., Quarterly Report (Form 10-Q) 12–13 (Aug. 20, 2007).

⁵⁹ Information, *United States v. Latin Node, Inc.*, *supra* note 57, at 2–3.

⁶⁰ Plea Agreement at 1, *United States v. Latin Node, Inc.*, No. 1:09-cr-20239-PCH (S.D. Fla. Apr. 3, 2009).

⁶¹ *Id.* at 4.

⁶² *Id.* at 3.

⁶³ eLandia International, Inc., Annual Report (Form 10-K) 22–23 (Apr. 1, 2009).

⁶⁴ *See* Watts Water Tech., Inc., Quarterly Report (Form 10-Q) 18 (Nov. 7, 2011).

⁶⁵ *In re* Watts Water Tech., Inc. and Leesen Chang, SEC Admin. Proceeding File No. 3-14585, 2, 4 (Oct. 13, 2011).

⁶⁶ *Id.* at 3–4.

⁶⁷ *Id.* at 7.

DOJ apparently declined to bring any enforcement action.⁶⁸ There is no evidence that Changsha Valve was subject to the FCPA, however, and thus its pre-acquisition conduct could not give rise to liability, regardless of the acquisition structure.⁶⁹

After Watts Water self-disclosed the potential violations, however, it agreed to sell its subsidiary that owned the Changsha Valve assets to another company. That company then sold the Changsha Valve assets to China Valves Technology, Inc. (China Valves).⁷⁰ The SEC subsequently sent a letter with the following request to China Valves:

You have indicated that there is no agreement with [Watts Water] regarding the investigation into possible improper payments to foreign government officials by employees of Changsha Valve. Therefore, please confirm and revise your future filings, beginning with your Form 10-Q for the period ended June 30, 2011, to indicate, if true, that *you have assumed full responsibility for any potential liabilities that may arise as a result of this matter.*⁷¹

On its face, the SEC's letter would seem to indicate that the SEC asked China Valves to confirm that it would have successor liability in connection with the Changsha Valve transaction—indeed, that is what China Valves confirmed.⁷² On September 29, 2014, however, the SEC filed a complaint against China Valves based in part on its failure to disclose that the intermediate entity in the transaction with Watt Water was merely a “straw man” created by China Valves to disguise the transaction.⁷³

In light of some of these cases, the call to reform the FCPA identified successor liability as an issue of paramount concern. For example, in former Attorney General Michael Mukasey's congressional testimony, he stated that

⁶⁸ *Id.* at 7–8.

⁶⁹ See *Resource Guide*, *supra* note 1, at 28 (“Successor liability does not, however, create liability where none existed before. For example, if an issuer were to acquire a foreign company that was not previously subject to the FCPA's jurisdiction, the mere acquisition of that foreign company would not retroactively create FCPA liability for the acquiring issuer.”).

⁷⁰ *In re China Valves Tech. Sec. Litig.*, 2013 U.S. Dist. LEXIS 15017, at *5–6 (S.D.N.Y. Oct. 21, 2013).

⁷¹ Letter from Rufus Decker, SEC Div. of Corporate Fin. Accounting Branch Chief, to Jianbao Wang, Chief Exec. Officer of China Valves Tech, Inc. (June 22, 2011) (on file with SEC) (emphasis added), *available at* <http://www.sec.gov/Archives/edgar/data/1080360/000000000011038326/filename1.pdf>.

⁷² China Valves responded that it would “have successor liability to assume full responsibility for any potential liabilities.” Letter from Jianbao Wang, Chief Exec. Officer of China Valves Tech. Inc., to Rufus Decker, SEC Div. of Corporate Fin. Accounting Branch Chief (July 12, 2011) (on file with SEC), *available at* <http://www.sec.gov/Archives/edgar/data/1080360/000120445911001877/filename1.htm>.

⁷³ Complaint, *SEC v. China Valves Tech., Inc.*, No. 1:14-cv-01630 (D.D.C. Sept. 29, 2014).

criminal successor liability under the FCPA “is at odds with the basic principles and goals of criminal law, including punishing only culpable conduct or deterring offending behavior.”⁷⁴ Given this conflict, former Deputy Attorney General George Terwilliger proposed to Congress a “repose of post-acquisition due diligence,” pursuant to which an acquirer could investigate and disclose to the government any pre-acquisition violations, in exchange for immunity from penalty.⁷⁵ Andrew Weissmann, a former DOJ prosecutor testifying on behalf of the U.S. Chamber of Commerce,⁷⁶ noted some of the issues touched upon in this Article (including the intersection of federal and state successor liability law) before requesting that Congress place “clear parameters for ... successor liability under the FCPA”⁷⁷

As noted above, the Resource Guide appears to have been promulgated in response to pressures from the private bar and industry to clarify the government’s enforcement positions.⁷⁸ With respect to successor liability, the Resource Guide states generally that “just as with any other statute, DOJ and SEC look to principles of ... successor liability in evaluating corporate liability.”⁷⁹ Curiously, however, the Resource Guide continues to opine that “[a]s a general legal matter, when a company ... acquires another company, the successor company assumes the predecessor company’s liabilities.”⁸⁰ As discussed in the next section of this Article, the default rule for asset purchases is successor nonliability.⁸¹ Thus, the Resource Guide’s lack of specificity regarding asset purchases may leave its readers with the misimpression that *any* acquisition structure necessarily results in the assumption of FCPA liabilities by the acquiring company.

⁷⁴ See Mukasey Testimony, *supra* note 45, at 30.

⁷⁵ See Terwilliger Testimony, *supra* note 36, at 19.

⁷⁶ See *Andrew Weissmann Appointed as FBI’s General Counsel*, FBI (Oct. 26, 2011), available at <http://www.fbi.gov/news/pressrel/press-releases/andrew-weissmann-appointed-as-fbis-general-counsel> (announcing Weissmann’s appointment to be the General Counsel to the FBI, which investigates potential FCPA violations).

⁷⁷ Weissmann Testimony, *supra* note 24, at 12.

⁷⁸ See generally *Assistant Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the Foreign Corrupt Practices Act*, U.S. DEP’T OF JUSTICE, Nov. 8, 2011, available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html> (discussing lobbying efforts of U.S. Chamber of Commerce and others, and noting that “in 2012, in what I hope will be a useful and transparent aid, we expect to release detailed new guidance on the Act’s criminal and civil enforcement provisions”).

⁷⁹ *Resource Guide*, *supra* note 1, at 27; see also Philip Urofsky, Hee Won (Marina) Moon & Jennifer Rimm, *The Fallacies of Reform*, 73 OHIO ST. L.J. 1145, 1175 (2012) (“[T]he government, applying traditional liability theories, has taken the position that a mere change in ownership does not extinguish liability.”).

⁸⁰ *Resource Guide*, *supra* note 1, at 28.

⁸¹ George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. REV. 9, 11 (2007); see *infra* Part II.

II. SUCCESSOR NONLIABILITY AND ITS EXCEPTIONS

The text of the FCPA does not provide for successor liability, which means that if it is to apply, the doctrine must be derived from elsewhere. As discussed below, federal common law is the most likely vector for the application of successor liability doctrines. But before addressing how successor liability may apply through the federal common law, it is important to review what successor liability is and what it is not.

A. *Traditional Common Law of the States*

Pursuant to the laws of virtually every U.S. jurisdiction, a company that acquires the assets of another generally does not assume the liabilities.⁸² The policy rationales for the rule of nonliability are straightforward. First, the nonliability rule appeals to fundamental notions of fairness: “[n]o person should be bound by contractual obligations that they have not voluntarily assumed. Similarly, no person should be liable for torts they did not commit.”⁸³ Second, a rule of nonliability increases certainty in the marketplace and recognizes the importance of the free alienability of property; in contrast, a broad rule of successor liability would have a “chilling effect on potential purchasers who might acquire the assets of a foreclosed business and find themselves liable for debts they never intended to assume.”⁸⁴

Notwithstanding the general rule of successor nonliability, courts traditionally have recognized exceptions when:

- the acquirer expressly or impliedly assumes the liability;
- the transaction is an attempt to fraudulently evade liability;
- the acquiring company’s business constitutes a “mere continuation” of the seller’s business; or
- the transaction amounts to a de facto merger.⁸⁵

⁸² WILLIAM M. FLETCHER ET. AL, FLETCHER CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 7122, (rev. vol. 2008); Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 463 (2004) (“This rule of non-liability for asset acquisitions arose out of the *bona fide* purchaser rule, and was designed to promote the free alienability of property and to enhance the efficiency of commercial transactions.” (citation omitted)).

⁸³ John H. Matheson, *Successor Liability*, 96 MINN. L. REV. 371, 381 (2011).

⁸⁴ *Glentel, Inc. v. Wireless Ventures, LLC*, 362 F. Supp. 2d 992, 1003 (N.D. Ind. 2005) (citation omitted).

⁸⁵ Matheson, *supra* note 83, at 383; *see, e.g.*, *Excel Energy, Inc. v. Cannelton Sales Co.*, 337 Fed. App’x 480, 484 (6th Cir. 2009) (applying Kentucky law of successor nonliability and noting that it recognized these four exceptions); *Patin v. Thoroughbred Power Boats*,

One scholar has noted that all of the traditional exceptions (other than assumption of liability) are simply different iterations of the same concern: that a company's owners will use manipulations of the corporate form to defraud creditors.⁸⁶ For clarity, however, all four exceptions are discussed briefly below.

The first "exception"—express or implied assumption of liabilities—simply restates hornbook contract principles and thus is not an exception at all.⁸⁷ When an asset purchase agreement provides that the purchaser will assume certain liabilities, the purchaser naturally will be responsible for those liabilities.⁸⁸ Relatedly, "[c]ourts generally find purchasers have impliedly assumed liabilities when 'the conduct or representations relied upon ... evidence an intention on the part of the purchasing company to assume the old corporation's liabilities in whole or in part.'"⁸⁹ For either branch of this "exception" to apply, however, the purchaser must intend to assume the liabilities.

The second exception, fraud, is also straightforward. When a company fraudulently transfers its assets to avoid its creditors, courts will ignore the transaction and hold the successor liable for the company's debts.⁹⁰ For the fraud exception to apply, typically the defendants must have deceived the plaintiff.⁹¹

The "mere continuation" and "de facto merger" exceptions are closely related.⁹² Although the formulations vary slightly by jurisdiction, they

294 F.3d 640, 649 (5th Cir. 2002) (noting that Florida follows general rule of successor nonliability, but "recognizes all four of the traditionally-accepted exceptions"); *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 934 P.2d 715, 720 (Wash. Ct. App. 1997) (noting that though "[t]he general rule in Washington is that a corporation purchasing the assets of another is not liable for the seller's debts," these four exceptions apply).

⁸⁶ See Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745, 769 (2003) ("[T]he list of traditional factors for a finding of *de facto* merger or mere continuation describes a transfer and a transferee that have no purpose but to defraud creditors.") (citation omitted).

⁸⁷ Matheson, *supra* note 83, at 384.

⁸⁸ FLETCHER, *supra* note 82.

⁸⁹ Matheson, *supra* note 83, at 386.

⁹⁰ *Id.* at 384.

⁹¹ See, e.g., *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 215 F.3d 182, 192 (1st Cir. 2000) ("We have found no evidence of misrepresentation or deceit by the defendants that either induced [their creditor] to act contrary to his best interests or fail to take action that could have resulted in the payment of all or a part of the commissions due.")

⁹² *Greenway Ctr., Inc. v. Essex Ins. Co.*, 369 Fed. App'x 348, 352 (3d Cir. 2010) (noting that "courts treat *de facto* merger and [mere] continuation identically"); *Douglas v. Stamco*, 363 Fed. App'x 100, 102 (2d Cir. 2010) ("[T]he *de facto* merger and mere continuation exceptions ... are often regarded as so similar as to be considered a single exception.") (citation omitted).

typically involve elements or factors similar to the following: (1) continuity of shareholders and ownership, management, personnel, physical location, and business operations; (2) whether sufficient consideration was given, particularly whether stock was given in exchange; (3) whether the predecessor ceased business operations and was dissolved shortly after the new company was formed; (4) whether the successor company paid any outstanding debts on behalf of the previous company in order to continue business without interruption; (5) the buyer's intent or purpose when the new company was formed; and (6) whether the successor held itself out to the public as a continuation of the previous company.⁹³

These exceptions “embod[y] a policy that corporations should not be able to avoid liability by simply changing their form or name.”⁹⁴ In short, the mere continuation and de facto merger exceptions effectively allow a creditor to rely on objective indicators of fraudulent intent to avoid liability, rather than being forced to prove such intent pursuant to the fraud exception.⁹⁵ Critically, however, both exceptions generally require continuity of ownership between the seller and the purchaser.⁹⁶

⁹³ *Dixstar v. GenTec Equip.*, No. 3:02CV-45-H, 2004 U.S. Dist. LEXIS 7201, at *12 (W.D. Ky. Feb. 11, 2004) (*accord.* *Excel Energy, Inc. v. Cannelton Sales Co.*, 337 Fed. App'x 480, 484 (6th Cir. 2009)) (collecting cases).

⁹⁴ *Matheson*, *supra* note 83, at 392. This, of course, is the policy in the context of tort and contract liabilities. The de facto merger doctrine originated not as a means to secure compensation for injured third parties, but to protect dissenting shareholders' rights when controlling shareholders would attempt to effect a merger without the dissenters' approvals. *See Hariton v. Arco Elecs.*, 182 A.2d 22, 24–25 (Del. Ch. 1962).

⁹⁵ *See Reilly*, *supra* note 86, at 769; *see also Ed Peters Jewelry Co.*, 215 F.3d at 190 (calling the mere continuation exception “circumstantial”). Also note that the mere continuation and de facto merger exceptions arguably are not subject to the particularity requirement of Federal Rule of Civil Procedure 9(b) that is applicable to the fraud exception. *See Cargo Partner AG v. Albatrans Inc.*, 207 F. Supp. 2d 86, 114 (S.D.N.Y. 2002) (stating that fraud exception argument would fail on 9(b) grounds, but not applying 9(b) to de facto merger exception analysis).

⁹⁶ *See C.T. Charlton & Assocs. v. Thule, Inc.*, 541 Fed. App'x 549, 554 (6th Cir. 2013) (“Under the ‘mere continuity’ exception, courts will look to the totality of the circumstances but only if the ‘indispensable’ requirements of common ownership and a transfer of substantially all assets are met first.”) (citation omitted); *Cargo Partner*, 207 F. Supp. 2d at 104 (“[M]y research discloses no case (in New York or other jurisdictions) in which a court has found a de facto merger without at least some degree of ownership continuity—except in the area of products liability (and the other tort areas mentioned ... below) where some courts have justified new or expanded exceptions on special policy grounds.”); *see also Patin v. Thoroughbred Power Boats*, 294 F.3d 640, 650 (5th Cir. 2002) (“In other words, a ‘mere continuation of business’ will be found where the purchasing corporation is merely a ‘new hat’ for the seller with the same or similar management and ownership.”); *Weaver v. Nash Int'l, Inc.*, 730 F.2d 547, 548 (8th Cir. 1984) (declining to find successor liability without unity of ownership).

B. The Substantial Continuity Exception

In addition to the four traditional exceptions, however, some courts have recognized other exceptions to the general rule of successor nonliability. In particular, a few courts have recognized a “substantial continuity” exception, sometimes referred to as the “continuity of enterprise” exception. The exception is often traced to *Turner v. Bituminous Casualty Co.*, a Michigan products liability case.⁹⁷ In *Turner*, the Michigan Supreme Court jettisoned the traditional requirement of continuity of ownership from the mere continuation exception, and held that the elements were simply:

- (1) [B]asic continuity of the *enterprise* of the seller corporation, including, apparently, a retention of key personnel, assets, general business operations, and even the [seller’s] name.
- (2) The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of consideration received from the buying corporation.
- (3) The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary or the continuation of the normal business operations of the seller corporation.
- (4) The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.⁹⁸

Thus, in contrast to the mere continuation and de facto merger exceptions, “commonality of ownership is not required.”⁹⁹ “[W]hereas the mere continuation test asks whether there is a continuation of the *corporate entity* of the seller, the continuity of enterprise test sets a lower standard ... by focusing on whether there was a continuation of the seller’s business *operations*.”¹⁰⁰

Perhaps cognizant of the criticism that the expansive exception would likely receive, the *Turner* court took pains to limit its decision to the products liability context.¹⁰¹ And, upon revisiting the substantial continuity

⁹⁷ 244 N.W.2d 873, 881–82 (Mich. 1976).

⁹⁸ *Id.* at 883–84 (emphasis added).

⁹⁹ *Einhorn v. ML Ruberton Const. Co.*, 632 F. 3d 89, 99 (3d Cir. 2011).

¹⁰⁰ Matheson, *supra* note 83, at 396.

¹⁰¹ *Turner*, 244 N.W.2d at 877–78, 884 (“This is a products liability case first and foremost [The general rule of nonliability] developed not in response to products liability problems The above-listed evidence makes out a prima facie case of continuation of corporate responsibility for products liability.”). For criticism of the substantial continuity test, see, e.g., Reilly, *supra* note 86, at 789 (“Courts who have imposed successor liability under one of the continuity-based theories described above have not satisfactorily explained why, in a particular case, the interest of the plaintiff creditor should prevail over that of the transferee.”); FLETCHER, *supra* note 82, at § 7123.06; see also *Glentel, Inc. v. Wireless Ventures, LLC*, 362 F. Supp. 2d 992, 1003 (N.D. Ind. 2005); *Gallenberg Equip., Inc. v. Agromac Int’l, Inc.*, 10 F. Supp. 2d 1050, 1055 (E.D. Wis. 1998).

exception for the first time in more than two decades, the Michigan Supreme Court limited its holding again, concluding that when the “predecessor [is] available for recourse ... the continuity of enterprise theory of successor liability is inapplicable.”¹⁰² Subsequent formulations by federal courts have added an additional requirement: that the acquirer knows of the liability prior to the acquisition.¹⁰³

Even with these limitations, however, the exception has not gained widespread acceptance at the state level.¹⁰⁴ Additionally, even those courts that have adopted the substantial continuity exception have recognized that its primary policy rationale is to facilitate compensation for innocent victims—a remedial purpose not present in the punitive context of FCPA enforcement.¹⁰⁵

¹⁰² *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 508 (Mich. 1999).

¹⁰³ *See, e.g., United States ex rel. Fisher v. Network Software Assocs., Inc.*, 180 F. Supp. 2d 192, 195 (D.D.C. 2002) (quoting *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 747–48 (7th Cir. 1994), for the proposition that there are two prongs to successor liability under the substantial continuity exception: “The first is that the successor had notice of the claim before the acquisition.... The second condition is that there be substantial continuity in the operation of the business before and after the sale”). Like Michigan, some circuits also require that the seller be unable to provide adequate relief. *See, e.g., Einhorn*, 632 F. 3d at 95. As noted *infra*, the federal substantial continuity exception may not have the same origins as the state law exception of the same name, although that has not stopped some federal courts from citing *Turner’s* formulation of the exception. *See infra* note 169.

¹⁰⁴ *See* Lea J. Heffernan, *Application of the Remedial Purpose Canon to CERCLA Successor Liability Issues after United States v. Bestfoods: Why State Corporate Law Should Be Applied in Circuits Encompassing Substantial Continuity Exception States*, 30 N. ILL. UNIV. L. REV. 387, 401 (2010) (“Five of the fifty states have expanded the traditional ‘mere continuation’ exception in order to focus on continuity of business or enterprise, rather than continuity of the predecessor corporation”); *see, e.g., Tabor v. Metal Ware Corp.*, 168 P.3d 814, 817 (Utah 2007) (“We decline to adopt ... the continuity of enterprise exception because we believe that the four exceptions to the traditional rule provide adequate protection to consumers. We note that if the legislature believes the existing exceptions inadequately protect consumers, it may wish to create additional statutory protections.”); *Hamaker v. Kenwel-Jackson Mach., Inc.*, 387 N.W.2d 515, 519 (S.D. 1986) (“[W]e are not persuaded to follow *Turner* in this case where none of the owners, officers or stockholders were the same”); *Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820, 829 (Wis. 1985) (“We decline to adopt the ‘expanded continuation’ exception to nonliability”). Delaware, often considered to be at the vanguard of corporate law, has not recognized the substantial continuity exception. *See Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 540–42 (D. Del. 1988) (noting that Delaware recognizes the four traditional exceptions and that, for mere continuation, it requires continuity of the same corporate entity); *Stayton v. Clariant Corp.*, No. K05C-05-042, 2013 Del. Super. LEXIS 466, at *13 (Del. Super. Ct. Aug. 13, 2013) (stating that Delaware recognizes the four traditional exceptions to successor nonliability).

¹⁰⁵ *See Foster*, 597 N.W.2d at 511 (“The underlying rationale for the *Turner* Court’s decision to disregard traditional corporate law principles was to provide a source of recovery for injured plaintiffs.”).

Notwithstanding the fact that very few states have adopted the substantial continuity exception—and that even Michigan has limited it to cases involving products liability and employment discrimination¹⁰⁶—federal courts have adopted the substantial continuity exception in other discrete federal law contexts. Courts have frequently discussed the exception in federal labor and employment disputes and suits arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹⁰⁷ though the vitality of its application to CERCLA suits is doubtful.¹⁰⁸ No court has considered whether it applies to actions under the FCPA, however.¹⁰⁹

III. FEDERAL COMMON LAW AND CIVIL SUCCESSOR LIABILITY UNDER THE FCPA

The text of the FCPA does not specifically provide for successor liability.¹¹⁰ Therefore, either successor liability is unavailable because Congress did not provide for it in the statute, or some variety of common law addresses the congressional omission. The introduction to any discussion of federal common law is obliged to invoke Justice Brandeis's famous statement in *Erie Railroad Co. v. Tompkins*: "There is no federal general common law."¹¹¹ If

¹⁰⁶ See *C.T. Charlton & Assocs. v. Thule, Inc.*, No. 12-2619, 541 Fed. App'x 549, 552 (6th Cir. 2013).

¹⁰⁷ See *Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763, 764 (7th Cir. 2013) ("[W]hen liability is based on a violation of a federal statute relating to labor relations or employment, a federal common law standard of successor liability is applied that is more favorable to plaintiffs than most state-law standards to which the court might otherwise look."); *New York v. Nat'l Serv. Indust., Inc.*, 460 F.3d 201, 207 (2d Cir. 2006) (noting circuit split on successor liability test for CERCLA).

¹⁰⁸ See generally *infra* Part III; see, e.g., *Nat'l Serv. Indust., Inc.*, 460 F.3d at 215 (abandoning its precedent which had applied substantial continuity exception to CERCLA claims).

¹⁰⁹ *Grimm*, *supra* note 28, at 281.

¹¹⁰ *Cf. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452–53 (2002) ("Where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act that give the option of attaching liability to 'successors' and 'successors in interest.'").

¹¹¹ 304 U.S. 64, 78 (1938). Authors have noted that there is no good definition of federal common law. See, e.g., Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 589 (2006) ("The Supreme Court has been unsuccessful in offering either an inclusive definition or a theory of federal common law. Indeed it has never really tried."). For the purposes of this Article, I use "federal common law" as the Court used it in the *Atherton v. FDIC*: "a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but rather to the judicial 'creation' of a special federal rule of decision." 519 U.S. 213, 218 (1997) (citation omitted).

that maxim held true in every case, the omission of successor liability from the text of the FCPA would be dispositive of the issue.¹¹²

A well-known line of post-*Erie* cases, usually traced to *Clearfield Trust Co. v. United States*,¹¹³ has demonstrated that federal courts can, and do, develop federal common law in certain circumstances. There are two stages to determining whether and how federal courts should apply federal common law.¹¹⁴ First, does the court have the authority to create federal common law?¹¹⁵ Second, assuming the court has the authority to create federal common law, how should it exercise its discretion to do so?¹¹⁶

A. Do Federal Courts Have the Authority to Create a Common Law of Successor Liability Under the FCPA?

Federal courts may fashion rules of decision when they are granted express or implied authority to do so by the Constitution, treaties, or Congress,¹¹⁷ or when the cases fall within narrow enclaves defined by the Supreme Court.¹¹⁸

¹¹² Arguably, when a law makes no mention of successor liability, common law is necessary to fill not one, but two separate gaps. For statutes that include a reference to “successors” as potentially liable parties, common law may be necessary to give content to the term. *See, e.g., Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1236 (11th Cir. 2005) (citation omitted) (“Under [the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)], ‘employer’ is defined to include a ‘successor in interest’ to a plaintiff’s previous employer USERRA does not, however, define ‘successor in interest.’”); *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 780 (9th Cir. 2010) (noting that the Family and Medical Leave Act (FMLA) imposes liability on “successors in interest,” but “[t]he FMLA does not define the term ‘successor in interest.’”). This may be closer to traditional statutory interpretation than true federal common law, however.

For laws that do not even include a reference to “successors,” resorting to common law is necessary not merely to give content to a statutory term, but also to provide the entire theory of liability. For example, CERCLA imposes liability only on “persons,” a term which is defined to include corporations, but which does not explicitly include corporate successors. 42 U.S.C. § 9601(20)–(21) (2012). Nonetheless, as discussed in more detail later, the circuits have applied federal common law to provide the theory of successor liability in CERCLA cases (although they have disagreed at times on the test for successor liability). *See infra* notes 152–54. Accordingly, this Article assumes that a court could apply common law not only to define the contours of successor liability under the FCPA, but also to provide the theory of liability itself, notwithstanding the fact that the FCPA does not explicitly include “successors” in its text.

¹¹³ 318 U.S. 363 (1943).

¹¹⁴ *See* Tidmarsh & Murray, *supra* note 111, at 647.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Accord* *Texas Indust., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642–43 (1981); *see, e.g., Labor Management Relations Act*, 29 U.S.C. § 185(a) (2012); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 450–51 (1957).

¹¹⁸ *See* Tidmarsh & Murray, *supra* note 111, at 593.

The FCPA contains no express grant of authority to develop federal common law, and the mere “vesting of jurisdiction ... does not in and of itself give rise to authority to formulate federal common law ... nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts.”¹¹⁹ Authority to develop a federal common law of successor liability also is not impliedly granted because there is no support in the legislative history for such a grant.¹²⁰

In addition to constitutional and congressional grants of authority, the Supreme Court has recognized “enclaves” of federal common law in which the federal courts may establish a federal rule of decision.¹²¹ Although these enclaves are “few and restricted,”¹²² they include cases involving “the rights and obligations of the United States,”¹²³ government contractor liability,¹²⁴ “interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations,”¹²⁵ admiralty,¹²⁶ and claim

¹¹⁹ *Texas Indust., Inc.*, 451 U.S. at 640–41 (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973)).

¹²⁰ Congress and the President intended the 1998 amendments to the FCPA to bring the United States into compliance with its treaty obligations under the Organization for Economic Cooperation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”). See Comm. on Commerce, International Anti-Bribery and Fair Competition Act of 1998, H.R. Rep. No. 105-802, at 9 (1998); Comm. on Banking, Housing & Urban Affairs, International Anti-Bribery Act of 1998, S. Rep. No. 105-277, at 1 (1998); William J. Clinton, Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 Weekly Comp. Pres. Doc. 2290 (Nov. 10, 1998). The OECD Convention required its signatories to enact laws prohibiting bribery of foreign government officials. See Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions pmbl., Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1, 4. Notably, however, the OECD Convention was silent on successor liability. See generally *id.* Accordingly, even assuming the reference to the OECD Convention in the legislative history of the 1998 amendments could be sufficient to allow a court to rely upon international law, it provides no illumination as to issues of successor liability.

¹²¹ Some authors have expressed doubt about whether the “enclave” theory of federal common law is still viable. See, e.g., Tidmarsh & Murray, *supra* note 111, at 614. Reconciling the theories of courts’ federal common law power is well beyond the scope of this Article.

¹²² *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

¹²³ *Texas Indust., Inc.*, 451 U.S. at 641 (1981) (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)).

¹²⁴ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 500 (1987).

¹²⁵ *Texas Indust., Inc.*, 451 U.S. at 641 (citing *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)).

¹²⁶ *Texas Indust., Inc.*, 451 U.S. at 641 (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963)).

preclusion for federal judgments in diversity cases.¹²⁷ Cases brought under the FCPA arguably fit within either the enclave for suits involving “the rights and obligations of the United States” or the enclave for disputes implicating “our relations with foreign nations.”¹²⁸

B. What is the Content of the Federal Common Law?

Assuming that a court has the *power* to fashion federal common law, there is still a question as to how the court should decide the *content* of that common law. As the Supreme Court has stated, “the existence of related federal statutes does not automatically show that Congress intended courts to dictate the content of federal common law rules, for ‘Congress acts ... against the background of the total *corpus juris* of the states ...’”¹²⁹ Potential sources for the content of the federal common law include: (1) the law of a particular state; (2) the law of the majority of states; or (3) analogy to similar federal common law decisions.¹³⁰

1. Kimbell Foods and Subsequent Supreme Court Cases

In *United States v. Kimbell Foods, Inc.*, the Supreme Court established a three-part test to determine when federal common law should displace state law: “(1) whether the federal program, by its very nature, required uniformity; (2) whether application of state law would frustrate specific objectives of the federal program; and (3) whether application of uniform federal law would disrupt existing commercial relations predicated on state law.”¹³¹ Applying this test, the *Kimbell Foods* court concluded that it should incorporate state law to decide whether contractual liens arising

¹²⁷ *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001).

¹²⁸ See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 938 (2012) (tracing legislative history and stating, “[F]oreign policy was the primary policy concern from the discovered foreign corporate payments which motivated Congress to act. However, foreign policy was not the sole reason motivating Congress. The legislative record also evidences that congressional motivation was sparked by a post-Watergate morality, economic perceptions, and global leadership.”). For the purposes of the Article, I assume that courts have the authority to develop a federal common law of successor liability under the FCPA.

¹²⁹ *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

¹³⁰ See, e.g., Caleb Nelson, *The Persistence of the General Law*, 106 COLUM. L. REV. 503, 533–34 (2006). There is a circuit split concerning CERCLA successor liability discussed later. See Griffith & Goutman, *infra* note 151.

¹³¹ *United States v. Gen. Battery Corp.*, 423 F.3d 294, 299 (3d Cir. 2005) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–29 (1979)).

from federal loan programs took precedence over private liens.¹³² A string of Supreme Court opinions in the 1990s elaborated on the *Kimbell Foods* test and strongly indicated that lower courts should be wary of displacing state law.

In *Kamen v. Kemper Financial Services, Inc.*, the Supreme Court held that in a derivative action under the Investment Company Act of 1940, the law governing any demand futility exception should be drawn from the law of the state of incorporation.¹³³ After quickly concluding that federal common law applied, the Court stated:

It does not follow, however, that the content of such a rule must be wholly the product of a federal court's own devising. Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards ... or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand¹³⁴

The Court also emphasized that “[t]he presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards Corporation law is one such area.”¹³⁵

Three years later, in *O’Melveny & Myers v. FDIC*, the Court emphasized that the second *Kimbell Foods* factor—conflict between state and federal law—was a necessary condition for the application of federal common law.¹³⁶ Indeed, the Court stated, “[o]ur cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision.”¹³⁷ The *O’Melveny* court also gave short shrift to uniformity concerns, calling them the “most generic (and lightly invoked) of alleged federal interests.”¹³⁸

In *Atherton v. FDIC*, the Court reinforced its statement in *O’Melveny* that conflict is a “precondition” to federal law supplanting that of the states.¹³⁹ Reading *Atherton* and *O’Melveny* together, the absence of a bona

¹³² *Kimbell Foods*, 440 U.S. at 740.

¹³³ 500 U.S. 90, 108 (1991).

¹³⁴ *Kamen*, 500 U.S. at 98 (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67; *Boyle v. United Tech. Corp.*, 487 U.S. 500, 511–12 (1988); *DelCostello v. Teamsters*, 462 U.S. 151, 169–72 (1983)).

¹³⁵ *Kamen*, 500 U.S. at 98 (citations omitted).

¹³⁶ 512 U.S. 79, 87 (1994).

¹³⁷ *Id.* at 87 (citation omitted).

¹³⁸ *Id.* at 88.

¹³⁹ *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (citations omitted).

fide conflict between the state and federal jurisprudence means that a federal court should not apply federal common law merely because application of state law risks inconsistent judgments.¹⁴⁰ The *Atherton* court again derided “generalized pleas for uniformity,”¹⁴¹ stating that “[t]o invoke the concept of uniformity ... is not to prove its need.”¹⁴²

Finally, in 1998, the Court indicated that it would take a dim view of the creation of a federal common law of corporate liability.¹⁴³ Specifically, in *United States v. Bestfoods*, the Court considered a parent company’s liability under CERCLA for its subsidiary’s operations.¹⁴⁴ In addition to analyzing direct liability, the Court decided whether the parent could be held responsible on the basis of the subsidiary’s conduct.¹⁴⁵ Despite scholarly criticism of parent nonliability, the *Bestfoods* court wrote that “nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible.”¹⁴⁶ Importantly, the Court stated:

CERCLA is thus like many another congressional enactment in giving no indication that “the entire corpus of state corporation law is to be replaced simply because a plaintiff’s cause of action is based upon a federal statute,” ... and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that “[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.”¹⁴⁷

The Court also recognized the disagreement over whether courts should borrow state law or instead create a federal common law of veil piercing, but it did not address the divergence because no party had raised the issue.¹⁴⁸

¹⁴⁰ Interestingly, the *O’Melveny* Court also wrote that “California law, not federal law, governs the imputation of knowledge to corporate victims of alleged negligence, and that is so whether or not California chooses to follow the majority rule.” *O’Melveny*, 512 U.S. at 84–85. The application of respondeat superior as a basis for corporate liability is one of the issues frequently cited by FCPA reformers. *See, e.g.*, Mukasey Testimony, *supra* note 45, at 19 (“A company can ... be held liable for violations committed by rogue employees, agents or subsidiaries even if the company has a state-of-the-art FCPA compliance program.”). An analysis of the choice of law for that issue is beyond the scope of this Article, but *O’Melveny* certainly points in the direction of state law.

¹⁴¹ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979).

¹⁴² *Atherton*, 519 U.S. at 220 (citations omitted).

¹⁴³ *United States v. Bestfoods*, 524 U.S. 51 (1998).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 55.

¹⁴⁶ *Id.* at 62 (citation omitted).

¹⁴⁷ *Id.* at 63 (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979) and *United States v. Texas*, 507 U.S. 529, 534 (1993), respectively).

¹⁴⁸ *Id.* at 63 n.9. Veil-piercing doctrines often are relevant in corporate FCPA enforcement actions as well, but discussion of those doctrines is beyond the scope of this Article.

2. *The Circuits' Analyses of Successor Liability Under Federal Statutes*

In the aftermath of *Kimbell Foods*, the circuit courts have grappled with the federal common law of successor liability in matters as diverse as CERCLA, federal labor and employment laws, and the enforcement of patent infringement judgments.¹⁴⁹ Although any analysis of civil successor liability under the FCPA requires an independent application of the *Kimbell Foods* test, the circuits' analyses of successor liability in these other contexts is instructive.

a. *CERCLA*

CERCLA is “not a model of legislative draftsmanship,” yet it carries the potential for enormous liability.¹⁵⁰ Thus, it is perhaps unsurprising that litigants, courts, and commentators have fiercely debated the relevant law for successor liability in the context of CERCLA.¹⁵¹ Litigation over the federal common law of successor liability—and whether it includes the substantial continuity exception—led to a circuit split and significant scholarly commentary.¹⁵²

Prior to *Bestfoods*, “the Second, Fourth, and Ninth Circuit Courts of Appeals held, the Eighth Circuit Court of Appeals assumed, and the Third Circuit Court of Appeals suggested that federal courts should develop a uniform federal common law of successor liability for CERCLA.”¹⁵³ In

¹⁴⁹ Although it is not a circuit opinion, it is worth noting that the Western District of Washington recently recognized that the *Kimbell Foods* analysis is necessary to determine successor liability under the federal False Claims Act (FCA). See *United States ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058, 1066 (W.D. Wash. 2012) (citations omitted) (incorporating state law and rejecting substantial continuity exception because “[plaintiff] makes no argument for why the four traditional [state-law] exceptions do not adequately protect the FCA’s goal of preventing fraud on the government, beyond generically asserting that ‘the FCA is designed to serve a broad, remedial interest in preventing fraud against the federal government’”).

¹⁵⁰ *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986).

¹⁵¹ See Rodney B. Griffith & Thomas M. Goutman, *A Hiccup in Federal Common Law Jurisprudence: Bestfoods and the Supreme Court’s Restraints on Development of Federal Rules of Corporate Liability*, 14 U. MIAMI BUS. L. REV. 359, 394–95 (2006); Rosenberg, *supra* note 82; Matt Sieving, *Rising Phoenix-like from the Ashes: An Argument for Expanded Corporate Successor Liability under CERCLA*, 35 ECOLOGY L.Q. 427 (2008); Michael Carter, Comment, *Successor Liability Under CERCLA: It’s Time to Fully Embrace State Law*, 156 UNIV. PA. L. REV. 767 (2008).

¹⁵² See Griffith & Goutman, *supra* note 151, at 394–95.

¹⁵³ *Id.* (citing *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 581–619 (2d Cir. 1996), *overruled by* *New York v. Nat’l Servs. Indus., Inc.*, 352 F.3d 682 (2d Cir. 2003); *United States*

contrast, the Sixth and Eleventh Circuits adopted state law to provide the framework for analyzing asset purchasers' CERCLA liability.¹⁵⁴

Beginning in 1998, however, some courts reconsidered the creation and content of a federal common law of CERCLA successor liability.¹⁵⁵ For example, the First Circuit, which addressed the issue for the first time only after *Bestfoods*, concluded that the state law of successor liability applied.¹⁵⁶

Furthermore, in *United States v. General Battery Corp.*, the Third Circuit held that although federal common law still applied to successor liability under CERCLA after *Bestfoods*, the *content* of the common law was “the general doctrine of successor liability in operation in most states.”¹⁵⁷ Thus, because the general doctrine of successor liability in most states does not include the substantial continuity exception, the Third Circuit declined an invitation to adopt it.¹⁵⁸ Relatedly, in *New York v. National Services Industries Inc.*, the Second Circuit overruled its pre-*Bestfoods* decision applying the substantial continuity exception, because the exception is not part of the general federal common law.¹⁵⁹ In *Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, the Ninth Circuit also overruled its pre-*Bestfoods* decision applying the substantial continuity exception to CERCLA claims, because the substantial continuity exception is not the traditional rule in most states.¹⁶⁰ Even the Eighth Circuit has acknowledged that the exception was cast in doubt by *Bestfoods*.¹⁶¹

v. Carolina Transformer Co., 978 F.2d 832, 837–38 (4th Cir. 1992); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 486–87 (8th Cir. 1992); *Louisiana-Pacific Corp. v. Asarco*, 909 F.2d 1260, 1262–64 (9th Cir. 1990), *overruled by* *Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc.*, 159 F.3d 358 (9th Cir. 1997); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 90–92 (3rd Cir. 1988)). In *North Shore Gas Co. v. Salomon Inc.*, the Seventh Circuit applied federal common law based upon the parties' mutual use of it in their briefs, but it specifically reserved judgment as to the issue. 152 F.3d 642, 650–51 (7th Cir. 1998).

¹⁵⁴ *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501–02 (11th Cir. 1996) (applying state law to question of successor liability for a limited liability partnership); *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251–52 (6th Cir. 1994) (applying Michigan law and distinguishing *Turner* as limited to products liability cases).

¹⁵⁵ See *United States v. Gen. Battery Corp.*, 423 F.3d 294 (3d Cir. 2005); *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001).

¹⁵⁶ *Davis*, 261 F.3d at 53–54.

¹⁵⁷ 423 F.3d at 298 (citing *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989)).

¹⁵⁸ *Id.* at 309.

¹⁵⁹ 352 F.3d 682, 685 (2d Cir. 2003). Later in the same dispute, then-Judge Sotomayor suggested even more strongly that *Kimbell Foods* required incorporation of the state law of successor liability. See *New York v. Nat'l Serv. Indus.*, 460 F.3d 201, 208–09 (2d Cir. 2006).

¹⁶⁰ 159 F.3d 358, 364 (9th Cir. 1998).

¹⁶¹ *K.C.1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007). The Eighth Circuit found it unnecessary to overrule its prior precedent in light of *Bestfoods*

Although these post-*Bestfoods* opinions used different reasoning, virtually all of them led to the same result—the substantial continuity exception is inapplicable to CERCLA successor liability. Although observers have critiqued the variety of the circuits’ reasoning, they generally have agreed with the result.¹⁶²

b. Federal Labor and Employment Laws

In several pre-*Kimbell Foods* cases, the Supreme Court adopted the substantial continuity exception (or an exception very similar to it) for successor liability under section 301 of the Labor Management Relations Act and the National Labor Relations Act.¹⁶³ In so doing, the Supreme Court emphasized the potential for conflict with the express statutory purpose of labor peace if expansive successor liability was *not* applicable.¹⁶⁴ Circuit courts have adopted this reasoning to apply the substantial continuity exception to other federal labor and employment statutes including Title VII,¹⁶⁵ ERISA,¹⁶⁶ the Railway Labor Act,¹⁶⁷ the Age Discrimination

because even assuming the substantial continuity exception was still viable, the plaintiff in *K.C. 1986* could not establish successor liability. *Id.* at 1024–25. The Fourth Circuit has not directly addressed the substantial continuity exception in a CERCLA case after *Bestfoods*, though it has given the faintest indication that the exception may no longer be good law. *See PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 173 (4th Cir. 2013). Under CERCLA, successor corporations may be liable for the actions of their predecessors. However, as at common law, a corporation that acquires the assets of another corporation typically does not acquire its liabilities, unless: “(1) the successor expressly or impliedly agrees to assume the liabilities of the predecessor; (2) the transaction may be considered a *de facto* merger; (3) the successor may be considered a ‘mere continuation’ of the predecessor; or (4) the transaction is fraudulent In the past, we have also recognized successor liability where ‘substantial continuity’ exists between a predecessor and successor corporation.” *Id.* (citations omitted).

¹⁶² *See* Rosenberg, *supra* note 82, at 455–56 (“CERCLA’s silence regarding asset purchaser liability ... should receive similar treatment to that given parent corporations in *Bestfoods*—Congress’ silence should be dispositive and federal courts should defer to state corporation law rules.” (citation omitted)); Carter, *supra* note 151. *But see* Sieving, *supra* note 151.

¹⁶³ *See* *Howard Johnson Co., v. Hotel Emps.*, 417 U.S. 249, 259–64 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184–85 (1973).

¹⁶⁴ *See* *Howard Johnson Co.*, 417 U.S. at 259–64; *Golden State Bottling Co.*, 414 U.S. at 184–85.

¹⁶⁵ *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1090–91 (6th Cir. 1974).

¹⁶⁶ *Einhorn v. ML Ruberton Const. Co.*, 632 F.3d 89, 96–100 (3d Cir. 2011); *Upholsterers’ Int’l Union Pension Fund v. Artistic Furniture*, 920 F.2d 1323, 1327–28 (7th Cir. 1990).

¹⁶⁷ *Bhd. of Locomotive Eng’rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (1st Cir. 2000).

in Employment Act,¹⁶⁸ the Family and Medical Leave Act,¹⁶⁹ and the Fair Labor Standards Act.¹⁷⁰

In one of the most recent of these cases, *Teed v. Thomas & Betts Power Solutions, L.L.C.*, Judge Posner went so far as to say that “successor liability is appropriate in suits to enforce federal labor or employment laws—even when the successor disclaimed liability when it acquired the assets in question—unless there are good reasons to withhold such liability.”¹⁷¹ Arguably, this is an even stronger formulation of the federal law of successor liability than the “traditional” substantial continuity exception.¹⁷² One page later, however, Judge Posner cast doubt on the entire enterprise of federal common law successor liability:

There are better arguments against having a federal standard for labor and employment cases, besides the general objections to multifactor tests that we noted earlier: applying a judge-made standard amounts to judicial amendment of the statutes to which it’s applied by adding a remedy that Congress has not authorized; implied remedies (that is, remedies added by judges to the remedies specified in statutes) have become disfavored; and borrowing state common law, especially a common law principle uniform across the states, to fill gaps in federal statutes is an attractive alternative to creating federal common law, an alternative the Supreme Court adopted for example in *United States v. Bestfoods* ... in regard to the liability of a corporation under the Superfund law for a subsidiary’s violations.¹⁷³

Unfortunately, the defendant in *Teed* failed to raise these “better arguments,” and therefore the opinion did not further explore them.¹⁷⁴ Given Judge Posner’s strong suggestion that such arguments may be successful, however, it is likely that subsequent labor and employment defendants *will* raise these arguments. As with CERCLA, courts may follow the suggestion in *Bestfoods* and reject the use of common law to create successor

¹⁶⁸ *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 747–48 (7th Cir. 1994). In *G-K-G*, the Seventh Circuit hinted that application of federal common law might not be appropriate, but applied it anyway because the “defendants d[id] not challenge that application.” *Id.* at 748 (“The reason for this special federal common law doctrine of successor liability—this departure from the more limited approach of the common law generally—is a little elusive, especially in a case such as this in which the actual violator is fully answerable for the consequences of the violation.”). *Id.* at 748.

¹⁶⁹ *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 781 (9th Cir. 2010).

¹⁷⁰ *Teed v. Thomas & Betts Power Solutions, L.L.C.*, 711 F.3d 763, 766–68 (7th Cir. 2013).

¹⁷¹ *Id.* at 766.

¹⁷² Note, however, the many potentially “good reasons to withhold such liability” cited in *Teed*. *Id.* at 766.

¹⁷³ *Id.* at 767 (citation omitted).

¹⁷⁴ *Id.*

liability for violations of federal labor and employment laws (or, at a minimum, the circuits may incorporate the state law of successor liability to fill the content of federal common law).

Alternatively, two circuits have considered successor liability in labor and employment cases to be *sui generis* such that application of state corporation law would always be inappropriate.¹⁷⁵ In *Cobb v. Contract Transport, Inc.*,¹⁷⁶ the Sixth Circuit held that “[s]uccessor liability under the [Family and Medical Leave Act] ... derives from labor law, not corporate law Labor cases, whose holdings were later applied to Title VII cases, apply an equitable, policy driven approach to successor liability that has very little connection to the concept of successor liability in corporate law.”¹⁷⁷ The Ninth Circuit followed *Cobb*: “The inquiry is not merely whether the new employer is a ‘successor’ in the strict corporate-law sense of the term. The successorship inquiry in the labor-law context is much broader.”¹⁷⁸

Even in this view of the doctrine, however, successor liability in labor and employment cases is cabined by the peculiar policies underlying the field.¹⁷⁹ Thus, this conception of successor liability in labor and employment cases is not analogous to the other formulations of successor liability discussed in this Article—including successor liability under the FCPA.

c. Enforcement of Patent Judgments

The Sixth Circuit is the only circuit to have analyzed successor liability in the context of the federal patent regime.¹⁸⁰ In *Mickowski v. Visi-Trak Worldwide, LLC*,¹⁸¹ the plaintiff obtained a multi-million dollar patent infringement judgment against Visi-Trak Corporation (VTC). Visi-Trak

¹⁷⁵ See *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770 (9th Cir. 2010); *Cobb v. Contract Transport, Inc.*, 452 F.3d 543 (6th Cir. 2006).

¹⁷⁶ 452 F.3d at 551.

¹⁷⁷ *Id.*

¹⁷⁸ *Sullivan*, 623 F.3d at 781.

¹⁷⁹ See *New York v. Nat’l Servs. Indus.*, 352 F.3d 682, 686 (2d Cir. 2003) (“Within federal law, the substantial continuity doctrine is well established in the area of labor law However, the labor law cases are particular to the labor law context and therefore have not been and cannot easily be extended to other areas of federal common law.” (citation omitted)). The unique origin of the substantial continuity exception in federal labor law has not prevented some courts from blurring its distinction from the state law substantial continuity exception. See, e.g., *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996) (“[A]n approach quite similar to that used in *Turner [v. Bituminous Casualty Co.]*, 24 N.W.2d 873, 883 (Mich. 1976) is the one we follow in determining successor liability” under CERCLA).

¹⁸⁰ See *Mickowski v. Visi-Track Worldwide, LLC*, 415 F.3d 501, 509, 511 (6th Cir. 2005).

¹⁸¹ *Id.* at 516.

Worldwide, LLC (Visi-Trak Worldwide) subsequently bought substantially all of VTC's assets, and the plaintiff brought suit to enforce his patent judgment against Visi-Trak Worldwide pursuant to the substantial continuity exception to successor liability.¹⁸² Visi-Trak Worldwide wisely advanced two arguments against liability: (1) the "substantial continuity" exception was not part of the federal common law; and (2) in any event, Ohio law, not federal common law, applied to the enforcement of patent judgments and Ohio only recognized the traditional four exceptions to successor nonliability.¹⁸³

The Sixth Circuit agreed with both of these arguments. After reviewing *Atherton*, the Sixth Circuit effectively held that the plaintiff could not establish conflict, the *sine qua non* of the *Kimbell Foods* test: "the mere fact that the 'substantial continuity' test of federal common law is more encompassing than the 'mere continuation' test of state common law does not demonstrate a 'significant conflict between some federal policy or interest and the use of state law.'"¹⁸⁴ The Sixth Circuit's opinion also cabined the substantial continuity exception to labor and employment law:

Because federal patent laws do not speak to the issue of successor liability, there is little basis to abrogate the general rule derived from state common law that substantial continuity is insufficient to impose liability. The substantial continuity test has gained widespread acceptance only in the narrow areas of labor law, employment discrimination law, and pension benefit litigation.¹⁸⁵

3. *The Application of Kimbell Foods to Successor Liability Under the FCPA*

As described above, federal courts have become increasingly skeptical about creating a federal rule of successor liability where a statute is silent. Scholars are mostly in accord with the courts.¹⁸⁶ With these decisions and views in mind, the next step is to apply the three *Kimbell Foods* factors to

¹⁸² *Id.*

¹⁸³ *Id.* at 509–10.

¹⁸⁴ *Id.* at 511–12 (quoting *Atherton v. Federal Deposit Insurance Corp.*, 519 U.S. 213 (1997)).

¹⁸⁵ *Id.* at 515; *see also* *Storage & Office Sys., LLC v. United States*, 490 F. Supp. 2d 955, 963 (S.D. Ind. 2007) (stating that "[t]he government's theory of successor liability is grounded in labor law decisions and appears to have little or no application outside of the employment context.").

¹⁸⁶ *See, e.g.*, Nelson, *supra* note 130, at 558 ("Under the approach taken by most states, an entity that buys a corporation's assets in good faith will be liable either for all of the corporation's debts or for none of them. If a federal statute says nothing about successor liability, courts should hesitate before inferring that it departs from this general principle.") (footnotes omitted).

common law successor liability under the FCPA: “(1) whether the [FCPA], by its very nature, required uniformity; (2) whether application of state law would frustrate specific objectives of the [FCPA]; and (3) whether application of uniform federal law would disrupt existing commercial relations predicated on state law.”¹⁸⁷

a. Uniformity

Concerns about uniformity essentially ask the court to consider the potential benefits of a uniform law. In the case of successor liability, a uniform law would benefit buyers and sellers of assets. Asset purchasers and sellers would know which test for successor liability applied to their transactions and could appropriately allocate risks (or simply forgo transactions).¹⁸⁸ The relevant inquiry under *Kimbell Foods*, however, is whether the *federal program* requires uniformity, not whether uniformity would have some benefits to private actors.¹⁸⁹ Additionally, simply easing federal enforcers’ litigation costs and research is insufficient to establish a need for uniformity.¹⁹⁰

Furthermore, the adoption of a universal rule may not meaningfully enhance certainty at all. In *Kamen*, the Supreme Court rejected a universal demand rule for derivative suits in part because such a rule would necessitate judicial review “somewhere down the road,” before the board of directors could appreciate the true effect of a demand.¹⁹¹ Similarly, in the successor liability context, imposition of the “substantial continuity” exception may *decrease* certainty.¹⁹² Under the traditional exceptions to successor liability,

¹⁸⁷ *United States v. Gen. Battery Corp.*, 423 F.3d 294, 299 (3d Cir. 2005) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–29 (1979)).

¹⁸⁸ *But see New York v. Nat’l Servs. Indus.*, 352 F.3d 682, 688 (2d Cir. 2003) (Leval, J., concurring) (“It would be quite mistaken to view these instances as involving the use of a pre-existing [substantial continuity] test of clear, well-understood contours, which courts have plugged into first one, then another statutory scheme. To the contrary, in the case of each statutory scheme, the courts, perceiving the inadequacy of the common law rules to support the objectives of the particular statute, have groped case by case toward a new standard, sometimes following the lead of the administrative agency charged with front-line administration of the statute.”).

¹⁸⁹ *Kimbell Foods*, 440 U.S. at 728–29.

¹⁹⁰ *See O’Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994) (“Uniformity of law might facilitate the FDIC’s nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of [these] ordinary consequences qualified as an identifiable federal interest, we would be awash in ‘federal common-law’ rules.”); *see also Redwing Carriers v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996) (“Adopting a uniform rule would, perhaps, expedite enforcement of CERCLA by decreasing uncertainty in assessing liability under the statute. But this argument could be made for adopting a uniform rule in the context of just about any federal statute.”).

¹⁹¹ *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 105 (1991).

¹⁹² *Redwing*, 94 F.3d at 1501.

a bona fide, arm's-length purchaser can be relatively certain that it will not be held to have assumed FCPA liability merely by acquiring assets.¹⁹³ Under the “substantial continuity” exception, however, the acquirer would need to hold its breath for judicial review of whether, within the definition of the FCPA, it “knew” of the liability prior to the purchase.¹⁹⁴

Finally, it is not clear that the uniformity of state laws is even the appropriate question. The Second Circuit has stated that “variations in rules among states do not prove a need for uniformity ‘as long as the applicable standard is applied evenhandedly to particular disputes.’”¹⁹⁵

In sum, the uniformity factor does not weigh in favor of a purely federal rule of FCPA successor liability.¹⁹⁶ Even if it did, it would carry little weight, as uniformity is “the most generic (and lightly invoked)” of the *Kimbell Foods* prongs.¹⁹⁷

b. Frustration of Federal Law

As an initial matter, the mere fact that the FCPA is a federal statute does not mean that a federal rule of decision should apply to issues of

¹⁹³ Grimm, *supra* note 28, at 283–84.

¹⁹⁴ Consider, in particular, the situation of a purchaser which conducts extensive due diligence, but does not uncover the liability until after closing. Because knowledge can be inferred from circumstances, the government may argue that the diligence is evidence of knowledge. *See id.* at 290 (“[M]erely being a ‘substantial continuation’ can lead to an inference of the acquirer’s knowledge of the seller’s wrongdoing, such that liability moves with the assets, even if *actual* knowledge is absent The danger is heightened in cases where even the most thorough due diligence may not reveal wrongdoing cloaked in secrecy—such as violations of the export control laws or the FCPA.” (footnotes omitted)); *see also* Upholsters’ Int’l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323, 1329–30 (7th Cir. 1990) (applying the substantial continuity exception and reversing summary judgment in favor of defendant in part because seller’s employee with knowledge of liability “had at least one meeting and a number of phone conversations with [buyer’s] officials before the acquisition took place, and that ‘questions about the company’ were discussed”). This is particularly problematic in the FCPA context, where there is a broad statutory definition of knowledge. *See* 15 U.S.C. §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B) (2012) (“When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstances does not exist.”).

¹⁹⁵ Marsh v. Rosenbloom, 499 F.3d 165, 182–83 (2d Cir. 2007) (quoting Wilson v. Omaha Indian Tribe, 442 U.S. 653, 673 (1979)).

¹⁹⁶ In an oft-cited CERCLA case involving successor liability, the United States acknowledged in an amicus brief to the Sixth Circuit that, “the law in the fifty states on corporate dissolution and successor liability is largely uniform.” *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1249 (6th Cir. 1991) (Kennedy, J., concurring).

¹⁹⁷ O’Melveny & Myers v. FDIC, 512 U.S. 79, 88 (1994).

successor liability: “The existence of a complex federal statutory scheme does not automatically show that Congress intended to fill its gaps with rules of federal common law.”¹⁹⁸ Instead, for a federal law of successor liability to apply, the incorporation of state law must frustrate the purpose of the FCPA.¹⁹⁹

One argument is that a muscular view of successor liability encourages would-be acquirers to voluntarily disclose more FCPA violations to the government. For example, in *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, Professors Kennedy and Danielsen endorse an Opinion Procedure release in which an acquirer agreed to self-report pre-acquisition FCPA violations that it discovered after the transaction closed.²⁰⁰ The DOJ and SEC also touted this Opinion Procedure release in the Resource Guide.²⁰¹ This paradigm effectively constricts acquirers to root out and disclose FCPA violations of potential targets.²⁰² In light of the pressure to voluntarily report pre-acquisition violations, an expansive doctrine of successor liability might result in more violations being brought to the attention of the government.

Showing that expansive successor liability arguably could *further* congressional intent is not the same thing as showing that state law *conflicts* with a specific federal objective, however.²⁰³ As one commentator has said

¹⁹⁸ *Marsh*, 499 F.3d at 178–81 (applying state common law of veil-piercing to CERCLA litigation).

¹⁹⁹ *Cf. Redwing Carriers v. Saraland Apts.*, 94 F.3d 1489, 1502 (11th Cir. 1996) (“CERCLA, however, does not purport to be a source of partnership law. Thus, CERCLA does not require that federal law displace state laws governing the liability of limited partners unless these laws permit action prohibited by the Act, or unless ‘their application would be inconsistent with the federal policy underlying the cause of action.’”).

²⁰⁰ David Kennedy & Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, OPEN SOCIETY FOUNDATIONS 55 (2011), available at <http://www.harvardiglp.org/wp-content/uploads/The-Foreign-Corrupt-Practices-FINAL.pdf>.

²⁰¹ *Resource Guide*, *supra* note 1, at 86–87; U.S. DEP’T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW OPINION PROCEDURE RELEASE 08-02 (June 13, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf>.

²⁰² Grimm, *supra* note 28, at 325–28.

²⁰³ One of the classic cases on “conflict” is *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988). In *Boyle*, the plaintiff sought to impose state law “defective design” liability against government contractors responsible for designing military equipment. An existing federal law, 28 U.S.C.A. § 1346 (2013), specified that the government could not be held liable for discretionary functions (such as equipment design). *Id.* at 511. The Court held that permitting the plaintiff’s claim would frustrate § 1346, because permitting design liability against government contractors would “directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.” *Id.*

in the CERCLA context, the purported conflict “can only be about the desire to apply the broader substantial continuity standard to reach more corporate successors than can be held liable under state law as it stands. The motivation is therefore a concern of *inadequacy*, not conflict.”²⁰⁴

Mere inadequacy is insufficient to find conflict in the FCPA context as well. For example, a judicially created private right of action might also result in more FCPA violations being brought to the attention of the DOJ and SEC, but the Sixth Circuit has rejected an implied private right of action under the FCPA and the government does not contend otherwise.²⁰⁵ Similarly, the fact that the government might uncover more FCPA violations if federal courts adopt the substantial continuity exception is no reason to find “conflict” between the FCPA and the traditional exceptions of state law. As the Sixth Circuit stated in *Mickowski*, the mere fact that a plaintiff can bring more suits under the substantial continuity exception than the traditional state rule is insufficient to show a conflict between state and federal policy.²⁰⁶

Next, analyses of the “conflict” factor sometimes discuss the threat of a “race to the bottom” amongst the states if state law is applied.²⁰⁷ In other words, incorporating state law theoretically could prompt corporations to flee to the states that have only the traditional exceptions, in an effort to limit their FCPA successor liability. Of course, as the Ninth Circuit has stated regarding CERCLA successor liability, “[i]t is unrealistic to think that a state would alter general corporate law principles to become a peculiarly hospitable haven for polluters.”²⁰⁸ It is equally unrealistic to think that a state would alter its general corporate law principles to accommodate

at 507. *Boyle* represents a true conflict between state and federal law. In contrast, applying the state law of successor liability does not directly affect the interests of the United States. As described above, narrow exceptions may result in fewer cases being disclosed to the government, but application of those exceptions does not prevent the DOJ or SEC from pursuing the culpable parties (namely, the seller and its employees and agents).

²⁰⁴ Stephanie A. Rotter, *Making it a Federal Issue*, 83 ST. JOHN’S L. REV. 427, 458–59 (2009).

²⁰⁵ See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1028–29 (6th Cir. 1990); *Resource Guide*, *supra* note 1, at 105 n.21 (“There is no private right of action under the FCPA.”).

²⁰⁶ See *Mickowski v. Visi-Track Worldwide, LLC*, 415 F.3d 501, 511–12 (6th Cir. 2005); see also *Marsh v. Rosenbloom*, 499 F.3d 165, 183 (2d Cir. 2007) (“[I]n *O’Melveny* the Supreme Court ‘rejected the view that the government is entitled to an expansive federal common law standard just because the government would win more often’....” (quoting Bradford C. Mank, *Should State Corporate Law Define Successor Liability?: The Demise of CERCLA’s Federal Common Law*, 68 U. CIN. L. REV. 1157, 1159 (2000)).

²⁰⁷ See, e.g., *Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant*, 159 F.3d 358, 363–64 (9th Cir. 1998).

²⁰⁸ *Id.* at 364.

corrupt companies. Indeed, some states have enacted laws criminalizing both public *and* private sector bribery—a step even more aggressive than the FCPA’s prohibition against bribing foreign government officials.²⁰⁹ Any company relocating to such a state to avoid corruption liability would be unpleasantly surprised.

Finally, understanding successor liability in terms of the traditionally narrow exceptions does not deter acquirers from conducting due diligence nor from integrating acquired companies into the acquirers’ compliance programs. Because of post-acquisition liability (not to mention the importance of appropriately valuing potential assets), buyers are incentivized to uncover any contracts, products, relationships, and lines of business that might be predicated on bribery (and thus likely must be terminated).²¹⁰ Similarly, because buyers are liable for the post-acquisition violations of the acquired business line, they are still incentivized to swiftly incorporate the targets into the acquirers’ compliance programs.²¹¹ Accordingly, even in the absence of an expanded notion of successor liability, acquirers have strong incentives to continue engaging in due diligence and compliance measures.²¹²

In fact, an aggressive doctrine of successor liability might *contradict* congressional intent. In *Lamb v. Phillip Morris, Inc.*, the Sixth Circuit reviewed the legislative history of the FCPA and concluded that the existence of the Opinion Procedure “clearly evinces a preference for compliance in lieu of prosecution,” and “the introduction of private plaintiffs interested solely in *post-violation enforcement, rather than pre-violation compliance*, most assuredly would hinder congressional efforts to protect companies and their employees concerned about FCPA liability.”²¹³ With respect to successor liability, a “white hat” company may be deterred from buying an FCPA violator, stopping the corrupt conduct, and integrating the target into the acquirer’s robust compliance program.²¹⁴ Deterring such acquisitions with the threat of indictment would conflict with the congressional preference for “compliance in lieu of prosecution.”²¹⁵

²⁰⁹ See, e.g., DEL. CODE ANN. tit. 11, § 881 (West 2014); CAL. PENAL CODE § 641.3 (West 2014); TEX. PENAL CODE ANN. § 32.43 (West 2013); N.Y. PENAL LAW §§ 180.00, 180.03 (McKinney 2014).

²¹⁰ See *Resource Guide*, *supra* note 1, at 28 (“[D]ue diligence helps an acquiring company accurately value the target company.”).

²¹¹ Grimm, *supra* note 28, at 250–52.

²¹² Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability on Asset Purchasers*, 4 ENVTL. LAW. 435, 454–55 (1998).

²¹³ 915 F.2d 1024, 1029–30 (6th Cir. 1990) (emphasis added).

²¹⁴ See Grimm, *supra* note 28, at 298.

²¹⁵ It is not only Congress that has stated a preference for compliance; DOJ officials have acknowledged the same priority. See, e.g., *Deputy Attorney General James M. Cole*

c. Disruption of Commercial Relationships

Companies intentionally select their states of incorporation to provide greater certainty and predictability to their corporate law issues.²¹⁶ Thus, “[t]he displacement of state law is particularly disfavored in the area of corporate law, because business decisions typically proceed in reliance on the applicable state standards.”²¹⁷ Indeed, *Kimbell Foods* recognized that, “[i]n structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved.”²¹⁸

Similarly, in mergers and acquisitions, the parties justifiably assume that traditional successor liability law will apply to transferred assets. Applying piecemeal successor liability law—for example, state law for tort liability, federal law for FCPA liabilities—would disrupt these assumptions.

Some may argue that the introduction of the substantial continuity exception would result in the seller’s potential FCPA liability being priced into the deal. The ultimate costs of FCPA resolutions are notoriously difficult to estimate *ex ante*, however. Commentators have described the trouble that companies have in estimating their *own* liabilities when considering a self-disclosure to the government.²¹⁹ In the merger and acquisition context, this uncertainty is exacerbated by the asymmetry in the parties’ information, leading to a potential windfall for the culpable seller.²²⁰ Leaving FCPA liability with the selling company—and, of course, the individuals responsible—allows for a more efficient and just allocation of risk.²²¹

Speaks at the Foreign Corrupt Practices Act Conference, U.S. DEP’T OF JUSTICE, Nov. 19, 2013, available at <http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html> (“We prefer prevention to prosecution and we want companies to successfully recognize and resist demands for bribes and to comply with the law.”).

²¹⁶ See *Cort v. Ash*, 422 US 66, 84 (1975) (“Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”).

²¹⁷ *United States v. Gen. Battery Corp.*, 423 F.3d 294, 299 (3d Cir. 2005) (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 105, 111 (1991)).

²¹⁸ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739 (1979).

²¹⁹ See Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. 393, 394–95, 406, 417, 425 (2011) (surveying negotiated FCPA resolutions from 2002–2009 and concluding, “there is a great deal of variation in the amount of penalties that companies face when they voluntarily disclose FCPA violations.”).

²²⁰ Grimm, *supra* note 28, at 296–99

²²¹ See *New York v. Nat’l Servs. Indus.*, 352 F.3d 682, 694 (2d Cir. 2003) (Leval, J., concurring) (“A rule of successor liability that threatened good-faith buyers with huge, unpredictable liability would also impose serious systemic costs on the economy. Such a

In principle, a buyer could insure itself against FCPA risk, or cause the seller to purchase such insurance for the buyer. Reflecting the massive and unpredictable nature of FCPA liability, however, the few FCPA-specific insurance products explicitly exclude coverage for successor liability.²²² Indemnification and escrow provisions theoretically could be used to allocate the parties' risk, but the process of setting the ceiling for such provisions would be susceptible to the same price-setting problems seen in estimating the liability.²²³ Moreover, the sensitivity of such provisions may result in the parties walking away from deals that would otherwise be socially beneficial.²²⁴

4. *In the Wake of Bestfoods, Does the Kimbell Foods Analysis Matter?*

Each of the *Kimbell Foods* factors points towards the application of state law as the rule of decision for any federal common law of successor liability under the FCPA. Even assuming that they did not, however, it likely would not change the substance of the ultimate rule of decision. There are three potential sources of law for federal common law: (1) the law of a particular state; (2) the law of the majority of the states; or (3) analogy to other federal common law.²²⁵ In a case involving successor liability under the FCPA, however, each of these sources of law likely would have the same content.

First, assume that the *Kimbell Foods* test militates in favor of the incorporation of state law—what would be the result? In one of the earliest

rule would depress the price purchasers would be willing to pay for assets, as buyers would risk acquiring massive hidden liability.”).

²²² See Charles E. Leasure II, *Insurance for FCPA Investigations*, BLOOMBERG LAW, Feb. 28, 2012, <http://about.bloomberglaw.com/practitioner-contributions/insurance-for-fcpa-investigations/>.

²²³ See *Nat'l Servs. Indus.*, 352 F.3d at 694 (Leval, J., concurring) (“Nor is the unfairness that would result from the imposition of such capricious, arbitrary liabilities on innocent good faith purchasers nullified by the theoretical availability of insurance [A]n arbitrary and unfair imposition of a substantial liability on a blameless party is no less unfair or arbitrary (although less drastic) when its impact is dispersed by the insurance mechanism among numerous blameless parties.”).

²²⁴ The Titan/Lockheed matter is a frequently cited example of potential FCPA liabilities torpedoing a deal. The government's enforcement actions against The Titan Corporation (Titan) arose from the company's agreement to be purchased by Lockheed Martin Corporation (Lockheed). After Lockheed's due diligence uncovered potential FCPA liabilities, it caused Titan to self-disclose its violations to the government before Lockheed terminated the transaction “rather than subject[ing] itself to potential liability” for Titan's violations. See Grimm, *supra* note 28, at 306.

²²⁵ See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 886–87 (1986) (discussing mainstream academic thoughts on the sources of federal common law).

CERCLA successor liability cases, *City Management Corp. v. U.S. Chemical Co.*, the Sixth Circuit applied the law of the state of incorporation of the “plaintiff and [defendant]” to the successor liability analysis.²²⁶ Taking a slightly different tack in *United States v. Davis*, the First Circuit applied the law of the state specified in the asset purchase agreement because the parties assumed it would control.²²⁷ Apparently, the Sixth and First Circuits would apply the law of a particular state, and, as previously discussed, most states recognize only the traditional four exceptions to successor nonliability.²²⁸

Next, assume that the *Kimbell Foods* test indicates that a uniform federal common law applies. In *New York v. National Services Industries*, the Second Circuit concluded that federal common law applied, but held that “the substantial continuity doctrine is not part of general federal common law.”²²⁹ Even *United States v. General Battery Corp.*, with its full-throated defense of a uniform federal standard, stated—almost off-handedly—that “*Bestfoods* held that CERCLA does not, *sub silentio*, abrogate fundamental common law principles of indirect corporate liability.”²³⁰ Accordingly, “substantial continuity” is untenable as a basis for successor liability under CERCLA.²³¹ And, as noted by the Sixth Circuit, there is a good argument that the substantial continuity exception is limited to labor and employment cases and thus is not part of any general federal common law of successor liability, to the extent such a thing exists.²³² Accordingly, even under a “uniform federal common law,” a federal court likely would not apply the substantial continuity exception to successor liability under the FCPA.²³³

Finally, perhaps neither the law of a particular state nor a standalone federal common law should provide the rule of decision. In *Atchison, Topeka & Santa Fe Railway v. Brown & Bryant*, the Ninth Circuit abstained from deciding whether state or federal common law applied because, even under federal common law, the content would have been derived from the “traditional rules of successor liability in operation in most states.”²³⁴

²²⁶ 43 F.3d 244, 250 (6th Cir. 1994).

²²⁷ 261 F.3d 1, 54 (1st Cir. 2001).

²²⁸ See *Excel Energy, Inc. v. Cannelton Sales Co.*, 337 Fed. App'x 480, 484 (6th Cir. 2009) (discussing the four exceptions to successor nonliability in Kentucky); see also *Patin v. Thoroughbred Power Boats*, 294 F.3d 640, 649 (5th Cir. 2002) (noting that Florida follows the general rule of successor nonliability); *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 934 P.2d 715, 720 (Wash. Ct. App. 1997) (explaining that in Washington “a corporation purchasing the assets for another is not liable for the seller’s debts”).

²²⁹ *New York v. Natl. Serv. Indust., Inc.*, 352 F.3d 682, 687 (2d Cir. 2003).

²³⁰ *United States v. Gen. Battery Corp.*, 423 F.3d 294, 309 (3d Cir. 2005).

²³¹ *Id.* (citing *United States v. Bestfoods*, 524 U.S. 51, 63–64 (1998)).

²³² *Mickowski v. Visi-Track Worldwide, LLC*, 415 F.3d 501, 515 (6th Cir. 2005).

²³³ *Griffith & Goutman*, *supra* note 151, at 368.

²³⁴ 159 F.3d 358, 364 (9th Cir. 1998).

Because the “substantial continuity” exception is not the traditional rule of successor liability in most states, the Ninth Circuit rejected its application.²³⁵ Thus, if the rule of decision for successor liability under the FCPA comes from the general common law of the states, the substantial continuity exception would be inapplicable.

In sum, regardless of how the *Kimbell Foods* test comes out, the result will almost always be the same for arm’s-length asset purchasers: no substantial continuity exception, and thus no liability.

IV. FEDERAL COMMON LAW AND CRIMINAL SUCCESSOR LIABILITY UNDER THE FCPA

Even if an asset purchaser has no civil successor liability for the seller’s violations of the FCPA, criminal successor liability poses an even greater threat. As with civil successor liability, the text of the FCPA does not provide for criminal successor liability.²³⁶ Assuming the rule of lenity applies, courts should not use federal common law to create liability where Congress has not provided for it explicitly.²³⁷

As many have noted, however, it cannot be assumed that the rule of lenity will apply, even when a statute arguably is ambiguous or unclear.²³⁸ Thus, the rule of lenity may not reassure asset purchasers that a court would not create and apply a common law of criminal successor liability. If it is likely that a court would fashion a criminal common law of successor liability for asset purchasers, the question again remains—what would the content of that federal common law be?

A. Brief Review of the Law of Criminal Successor Liability

There is one published federal case that includes a passing reference to criminal successor liability for an asset purchaser, although the decision is devoid of analysis. In *United States v. Ashland Oil, Inc.*, the government brought criminal Sherman Act charges against Ashland Oil, Inc. (AO) and

²³⁵ *Id.*

²³⁶ See Resource Guide, *supra* note 1, at 28.

²³⁷ Cf. *United States v. Kozminski*, 487 U.S. 931, 946 (1988) (concluding that, because Congress did not explicitly provide for concept of psychological coercion to be included in definition of “involuntary servitude,” rule of lenity mandated that defendants could not be convicted on such a basis); *United States v. Bodmer*, 342 F. Supp. 2d 176, 189 (S.D.N.Y. 2004) (dismissing FCPA count based on rule of lenity).

²³⁸ See generally Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 346 (1994) (“Judicial enforcement of lenity is notoriously sporadic and unpredictable.”).

its wholly owned subsidiary, Ashland-Warren, Inc. (AWI).²³⁹ In 1968, AO began operating a particular business line within its own company.²⁴⁰ In July 1977, the business line engaged in a “massive, ongoing bidrigging conspiracy.”²⁴¹

In October 1977, AO transferred the assets and liabilities of the business line to its wholly owned subsidiary, AWI.²⁴² Approximately two years later, indictments were returned against both AO and AWI.²⁴³ AWI—the subsidiary and asset purchaser—pleaded guilty.²⁴⁴ *Ashland Oil* involves AO’s subsequent motion to dismiss its indictment on double jeopardy grounds.²⁴⁵ Unfortunately, there is no discussion of the basis for AWI’s guilty plea.²⁴⁶ Based on the facts described in the order, however, AWI likely could have been held liable under either the express assumption or mere continuation exceptions to successor nonliability—assuming that such exceptions apply in the criminal context.²⁴⁷ Accordingly, even *Ashland Oil* does not support the imposition of criminal liability on a bona fide, arm’s-length asset purchaser.²⁴⁸

In short, there are no cases decided by federal courts that meaningfully analyze criminal successor liability for arm’s-length asset purchasers, and the Resource Guide does not provide any cases supporting such a doctrine.²⁴⁹

²³⁹ 537 F. Supp. 427, 428 (M.D. Tenn. 1982).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 429.

²⁴³ *Id.* at 428–29.

²⁴⁴ *Id.* at 428.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 427–29.

²⁴⁷ *Id.* at 430–31.

²⁴⁸ See also *United States v. Carter*, 311 F.2d 934, 937–38 (6th Cir. 1963). In *Carter*, the Sixth Circuit considered the corporate criminal liability of a parent company and subsidiary, where the acts giving rise to liability occurred before the parent company acquired all the assets of the subsidiary. The *Carter* court reversed the conviction of the parent and concluded that the parent’s “acquisition [of its subsidiary] would not make it chargeable, as a principal, for a crime previously committed by” its subsidiary or an employee of its subsidiary. *Id.* at 941. Unfortunately, the Sixth Circuit did not clearly specify whether the parent’s acquisition of its subsidiary’s assets was accomplished pursuant to an asset purchase or a statutory merger.

²⁴⁹ See *Resource Guide*, *supra* note 1, at 28 (collecting examples of criminal successor liability for mergers, but not for asset purchases); Order Denying Respondents’ Motion for Summary Decision, *In re Sigma-Aldrich Bus. Holdings, Inc.*, No. 01-BXA-06 (U.S. Dep’t of Commerce Bureau of Indus. & Sec. Aug. 29, 2002), available at https://www.bis.doc.gov/enforcement/casesummaries/sigma_aldrich_alj_decision_02.pdf. *Sigma-Aldrich*, an international trade regulations case, is occasionally cited as a potential analogy for criminal asset purchaser liability in the FCPA context. In *Sigma-Aldrich*, an administrative law judge used the federal rules of construction in 1 U.S.C. §§ 1, 5 (2012), to conclude that the Export

This absence of criminal successor liability analysis comports with an understanding of successor liability as a doctrine that is fundamentally remedial, not punitive.²⁵⁰ Proponents of civil successor liability often argue that, absent imposition of successor liability, plaintiffs will be left without a remedy for injuries that they have suffered.²⁵¹ Theoretically, an innocent asset purchaser is better able to mitigate its losses than a consumer injured by a defective product. In criminal cases, however, this remedial policy carries less weight because criminal law is fundamentally punitive.²⁵² Thus, it is perhaps unsurprising that federal courts have not imposed criminal successor liability on asset purchasers.²⁵³

Administration Regulations's reference to "person" included corporate successors, including asset purchasers.

For a thorough deconstruction of the *Sigma-Aldrich* order's analysis, see Aaron Xavier Fellmeth, *Cure Without a Disease: The Emerging Doctrine of Successor Liability in International Trade Regulation*, 31 YALE J. INT'L L. 127, 145–49 (2006). As Professor Fellmeth points out, a subsequent Supreme Court decision cast serious doubt on the use of the federal rules of construction in the manner in which they apparently were used in *Sigma-Aldrich*. See *id.* at 149 (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002)). Indeed, one of the few cases applying 1 U.S.C. § 5 to successor liability has been overruled. See *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518–19 (2d Cir. 1996) (*overruled as stated in New York v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682, 683 (2d Cir. 2003)); see also Nelson, *supra* note 130, at 558 (2006) (criticizing the use of 1 U.S.C. § 5 in the manner it was employed in *Sigma-Aldrich*). Additionally, the government does not mention (much less rely upon) *Sigma-Aldrich* in the Resource Guide as a basis for FCPA successor liability.

²⁵⁰ See, e.g., *United States v. Midwest Generation, LLC*, 781 F. Supp. 2d 677, 688 (N.D. Ill. 2011) (holding that the punitive and "quasi-criminal" provisions of the federal Clean Air Act precluded application of successor liability for an asset purchaser); *EEOC v. Nichols Gas & Oil, Inc.*, 688 F. Supp. 2d 193, 204 (W.D.N.Y. 2010) ("The Court is aware of only a few reported cases dealing with the issue of punitive damages in Title VII actions involving successor liability, and all of them indicate that such damages are not appropriate against an innocent successor."). But see, *EEOC v. Steven T. Cox, Inc.*, No. 3:99-1184, 2002 U.S. Dist. LEXIS 27160, at *1 (M.D. Tenn. July 19, 2002) ("Successor liability includes liability for punitive damages, so long as punitive damages would be appropriate.").

²⁵¹ Matheson, *supra* note 83, at 407 ("A frequent justification courts use to support successor liability is that manufacturers possess superior ability to bear the cost of injuries resulting from product defects.").

²⁵² See Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 427 (2007) ("Criminal law, after all, is reserved for conduct that we find so repugnant as to warrant the severest sanction. The goals of the criminal law are to deter and punish such conduct."). This is particularly true in FCPA prosecutions, where money collected by the DOJ is rarely used to compensate victims. See William Jacobson, *FCPA Fines: Where Does All the Money Go?*, TRACE BLOG (Feb. 13, 2009), <http://traceblog.org/2009/02/13/fcpa-fines-where-does-all-the-money-go/> ("In reality, all of the fine money collected by the DOJ and the disgorgement and penalties assessed by the SEC go right to the U.S. Treasury.").

²⁵³ Imposing criminal successor liability also could conflict with the fundamental criminal requirements of *mens rea* and *actus reus*. See Weissmann & Newman, *supra* note 252, at 422 ("The current hornbook rule is that a corporation is liable for the actions of its

The mere fact that no federal court has ever analyzed criminal successor liability does not, however, mean that prosecutors would not assert that it exists. In principle, prosecutors could argue that federal common law provides for a theory of liability in criminal cases. As set forth below, however, even assuming that the traditional, limited exceptions to successor nonliability could be applied through federal common law, it is unlikely that a court would hold an asset purchaser criminally liable pursuant to the more expansive, substantial continuity exception.

B. Finding a Rule of Decision for a Federal Criminal Common Law of Successor Liability

Just as every discussion of federal civil common law begins with *Erie*, every discussion of federal criminal common law begins with *United States v. Hudson & Goodwin*, in which the Supreme Court stated: “Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases ... is not within their implied powers.”²⁵⁴ But *Hudson & Goodwin*’s prohibition against federal criminal common law has held up about as well as *Erie*’s.²⁵⁵ Even assuming that it is within a court’s power to fashion a criminal common law of successor liability, the court must then select the appropriate rule of decision.

As with civil common law, one could imagine the rule being provided by a particular state’s law, by the law of the majority of the states, or by a

agents whenever such agents act within the scope of their employment and at least in part to benefit the corporation.”); *cf. Polius v. Clark Equip. Co.*, 802 F.2d 75, 81 (3d Cir. 1986) (rejecting the substantial continuity exception in a civil case because it “brush[es] aside th[e] bedrock requirement” of a causal relationship between a defendant’s acts and a plaintiff’s injury thus “impos[ing] liability on entities which in fact had no connection with the acts causing injury” (*accord. Baker’s Carpet Gallery, Inc. v. Mohawk Indus., Inc.*, 942 F. Supp. 1464, 1472 (N.D. Ga. 1996))). With respect to mens rea, it would be odd to effectively impute an agent’s state of mind to transferred assets—even assets such as goodwill and brand—rather than to a specific corporate entity. Of course, this oddity is already present in civil successor liability cases where the cause of action includes an intent element.

²⁵⁴ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *see also* Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1277 (2010) (“If ‘federal general common law’ is unjustified in the civil law realm, it is even more unjustified in the criminal law context. All courts—not only federal courts—are obliged to show restraint in the interpretation and application of criminal codes.”).

²⁵⁵ *See* Lisa Kern Griffin, *Adaptation and Resiliency in Legal Systems: The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1827 (2011) (“Numerous scholars of criminal law have explained, however, that courts necessarily add meaning to criminal statutes, and that the refrain against interstitial lawmaking relies on a ‘truth so partial that it is nearly a lie.’” (quoting Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 471 (1996))).

true federal common law. Unlike the civil common law guideposts provided by the Supreme Court in *Kimbell Foods*, *O'Melveny*, *Atherton*, *Bestfoods*, and other cases, the Court has not extensively discussed the origins for the rule of decision in federal criminal common law issues, though a relatively recent opinion provides at least some insight on the Court's views.²⁵⁶

In *Dixon v. United States*, the petitioner was convicted of purchasing firearms while under indictment for a felony, in violation of the Omnibus Crime Control and Safe Streets Act (the "Safe Streets Act").²⁵⁷ At trial, the petitioner asserted the defense of duress.²⁵⁸ The Safe Streets Act did not provide for such a defense, however, and there is no other federal statute that defines or even establishes the duress defense.²⁵⁹ The government acknowledged that the Safe Streets Act was subject to a common law duress defense, but argued that the petitioner had the burden of proof, as is consistent with the common law of affirmative defenses.²⁶⁰ The petitioner argued that the government should bear the burden of proof.²⁶¹

Writing for the majority, Justice Stevens concluded that, in the face of congressional silence, federal courts look to the common law as it existed at the time of the statute:

Even though the Safe Streets Act does not mention the defense of duress, we can safely assume that the 1968 Congress was familiar with both the long-established common-law rule and the rule applied in *McKelvey v. United States*²⁶² and that it would have expected federal courts to apply a similar approach to any affirmative defense that might be asserted as a justification or excuse for violating the new law.²⁶³

²⁵⁶ *Dixon v. United States*, 548 U.S. 1 (2006).

²⁵⁷ *Id.* at 3.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Brief for United States at 10–11, *Dixon v. United States*, 548 U.S. 1 (2006) (No. 05-7053) ("Because the concept of a duress defense is deeply rooted in the common law, it represents a background principle that may be read into federal criminal statutes absent a contrary congressional intent But consistent with the common law and its underlying policies, a defendant must bear the risk of non-persuasion of the issue of duress by establishing that defense by a preponderance of the evidence."). Indeed, the government also argued that recognizing common-law defenses is "at least in some tension with the Court's longstanding refusal to recognize common-law crimes," and that the "invitations to depart from the common-law nature of affirmative defenses should be viewed with skepticism." *Id.* at 15 n. 9. So too should invitations to depart from common law theories of liability.

²⁶¹ *Dixon*, 548 U.S. at 6.

²⁶² 260 U.S. 353, 357 (1922).

²⁶³ *Dixon*, 548 U.S. at 13.

In short, the *Dixon* majority looked directly to the federal common law as it existed at the time the statute was passed, without reference to subsequent developments.²⁶⁴

Application of the *Dixon* rule to criminal successor liability under the FCPA would result in the recognition of, at most, only the traditional exceptions to successor liability. As an initial matter, it is not clear that there was *any* federal common law rule of criminal liability for asset purchasers at the time of the passage of the FCPA.²⁶⁵ Even assuming that Congress believed that the “long-established common-law” exceptions to *civil* successor non-liability were equally applicable in criminal statutes, the substantial continuity exception and other modern innovations were not established fixtures of the common law at the time the FCPA was enacted in 1977. As previously discussed, the substantial continuity exception was a deviation largely restricted to federal labor and employment cases, as well as certain state law products liability cases.²⁶⁶ Thus, even assuming that there is a criminal common law of successor liability under the FCPA, the substantial continuity exception is not part of the doctrine.

C. A State Law Alternative to Dixon

Applying the *Dixon* rule to successor liability feels awkward, however. Because corporations are inherently creatures of state law, it seems odd to

²⁶⁴ This was not the only approach the Court considered. In Justice Kennedy’s concurrence, he allowed for developments in federal common law, stating that courts can “assume that Congress would not want to foreclose the courts from consulting ... newer sources and considering innovative arguments in resolving issues not confronted in the statute and not within the likely purview of Congress when it enacted the criminal prohibition applicable in the particular case.” *Id.* at 17 (Kennedy, J., concurring). Justice Breyer’s dissent—which obviously reached a different result than the majority—applied a rule similar to Justice Kennedy’s concurrence: “Congress’ silence typically means that Congress expected the courts to develop burden rules governing affirmative defenses as they have done in the past, by beginning with the common law and taking full account of the subsequent need for that law to evolve through judicial practice informed by reason and experience.” *Id.* at 20 (Breyer, J., dissenting). Justice Alito provided yet another possibility in his concurrence: that common law rules that are not specifically addressed by Congress “remain where they were when Congress began enacting federal criminal statutes.” *Id.* at 20 (Alito, J., concurring). Clearly, however, none of these approaches looked to state law for the rule of decision.

²⁶⁵ See *supra* Part IV.

²⁶⁶ See *C.T. Charlton & Assocs. v. Thule, Inc.*, No. 12-2619, 2013 U.S. App. LEXIS 20393, at *5–6 (6th Cir. Sept. 30, 2013) (explaining that the substantial continuity exception applies in a state law products liability context); see also *Teed v. Thomas & Betts*, 711 F.3d 763, 764 (7th Cir. 2013) (explaining that when a case concerns a violation of a federal labor law or an employment statute, “a federal common law standard of successor liability is applied”).

assess corporations' susceptibility to criminal indictment without reference to the laws of the jurisdictions that establish them. Also, applying a purely federal rule to the criminal common law analysis could, at least in theory, create inconsistent results between civil and criminal actions brought pursuant to the same statute if state law supplies the rule of decision for civil common law analysis.²⁶⁷

Furthermore, applying state law as the rule of decision for criminal successor liability would be consistent with the approach taken by most of the merger cases cited by the DOJ and the SEC in the Resource Guide²⁶⁸:

- In *United States v. Melrose Distillers, Inc.*, the Supreme Court looked to Maryland law to conclude that dissolved entities still “existed” within the meaning of the Sherman Act and thus could not escape criminal liability for their pre-dissolution conduct.²⁶⁹
- In *United States v. Polizzi*, the Ninth Circuit incorporated New York law for the definition of “corporation” when considering the criminal liability of a resulting post-merger entity for the pre-merger conduct of one of the merged entities.²⁷⁰
- In *United States v. Mobile Materials, Inc.*, the Tenth Circuit used Oklahoma law to conclude that a merged entity had “sufficient vitality to corporate life following dissolution to subject the corporation to criminal prosecution.”²⁷¹
- In *United States v. Shields Rubber*, the Western District of Pennsylvania looked to Pennsylvania law when considering the criminal liability of a merged entity.²⁷²

²⁶⁷ See *United States v. Cigarette Merchs. Ass'n*, 136 F. Supp. 214, 217 (S.D.N.Y. 1955) (holding that merged corporation could be liable both criminally and civilly because, in part, limiting its liability to civil suits “would result in anomalous situations”); cf. *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013) (“A single statute with civil and criminal applications receives a single interpretation.”).

²⁶⁸ *Resource Guide*, *supra* note 1, at 28.

²⁶⁹ 359 U.S. 271, 272 (1959); cf. *United States v. Johns-Manville Corp.*, 237 F. Supp. 885, 892 (E.D. Pa. 1964) (holding that an asset purchaser could not be held liable civilly under a successor liability theory for the seller’s alleged Sherman Act violations). In *Johns-Manville Corp.*, the government brought a parallel criminal action, which named the seller and its parent company, but not the buyer. *Id.* at 888.

²⁷⁰ 500 F.2d 856, 906–09 (9th Cir. 1974) (“We turn to the New York law to determine the effect of the merger in this case.”).

²⁷¹ 776 F.2d 1476, 1479 (10th Cir. 1985).

²⁷² 732 F. Supp. 569, 571–72 (W.D. Pa. 1989) (“Shields Rubber merged ... into Shields Rubber II, and pursuant to 15 P.S. § 1907, Shields Rubber II remains liable for

In the final case cited in the Resource Guide, *United States v. Alamo Bank of Texas*, the Fifth Circuit considered whether a national banking entity that merged into a state banking entity continued to exist for purposes of corporate criminal liability.²⁷³ The Fifth Circuit concluded that federal, not state, law applied, but *Alamo Bank* cited directly to an applicable federal banking statute, 12 U.S.C. § 214b, to determine congressional intent:

The franchise of a national banking association as a national banking association shall automatically terminate when its conversion into or its merger or consolidation with a State bank under a State charter is consummated and *the resulting State bank shall be considered the same business and corporate entity as the national banking association*²⁷⁴

Thus, *Alamo Bank* simply stands for the uncontroversial proposition that where Congress speaks clearly, it can create successor liability.

In sum, federal courts have already shown a preference for referring to state law when analyzing the criminal successor liability for merged entities. Additionally, using state law as the rule of decision for a federal criminal common law could reduce the risk of inconsistent results where civil common law also points to state law—such as for FCPA successor liability. (Again, this assumes that there is *any* applicable doctrine of criminal successor liability for asset purchasers.)

In the end, however, choice of law likely does not matter to asset purchasers. Regardless of whether a court could select state law to supply the rule of decision or, under *Dixon*, is required to apply federal common law as it existed in 1977, at most, only the traditional exceptions to successor non-liability will apply.²⁷⁵ Accordingly, under either regime, an arm's-length asset purchaser likely has no liability for the pre-acquisition criminal conduct of a seller.

CONCLUSION

Although a court probably would not find an asset purchaser liable for the pre-acquisition FCPA violations of the seller, the Resource Guide contains no such assurances. By failing to specifically address asset purchases in the Resource Guide, the DOJ and SEC seem to imply that, regardless of

all the liabilities including criminal liability, of the merged Shields Rubber Corporation.” (emphasis added)).

²⁷³ 880 F.2d 828, 829 (5th Cir. 1989).

²⁷⁴ *Id.* at 829 (citing 12 U.S.C. § 214b).

²⁷⁵ *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 649 (5th Cir. 2002).

how the acquirer structures the transaction, it cannot ensure that the seller's FCPA civil and criminal liabilities will not transfer.²⁷⁶

Of course, the enforcers' silence on the successor liability of asset purchasers may simply be because they have not had an appropriate opportunity to address the issue. Fortunately, that can be addressed easily through the FCPA's unique mechanism for seeking advisory opinions from the DOJ. An acquirer considering purchasing assets from another company that is subject to the FCPA can submit an Opinion Procedure request asking the DOJ whether it would be liable for any pre-acquisition violations of the seller.

Understandably, prospective buyers may be hesitant to disclose potential FCPA violations discovered during due diligence. Luckily, an acquirer need not wait for such a discovery prior to requesting an Opinion Procedure release, because the DOJ has already demonstrated a willingness to promulgate Opinion Procedure releases which show no evidence of a target having violated the FCPA. For example, the government frequently cites Opinion Procedure release 08-02 as a model for exemplary FCPA due diligence and integration procedures in the acquisition context.²⁷⁷ The release does not indicate that the requesting company had any evidence that the target had actually violated the FCPA.²⁷⁸ To the contrary, the acquirer in Opinion Procedure release 08-02 specifically advised the DOJ that it could conduct only very limited due diligence on the target.²⁷⁹ Nonetheless, the DOJ provided an opinion regarding the transaction. Thus, it appears that the DOJ should be willing to opine on the effect of an asset purchase structure on the potential successor liability of the acquirer, even in the absence of facts that suggest an FCPA violation by the seller.

Setting aside the legal analysis of this Article, as a matter of policy, the government's ability to enforce the FCPA would not be undermined if its enforcement position included a general rule of successor nonliability for asset purchasers. First, the government's ability to bring enforcement actions against culpable individuals is, of course, unaffected by the rules of successor liability. Second, the government often will have the option of bringing an enforcement action against the seller, even if the seller has

²⁷⁶ Note, however, that the Resource Guide acknowledges that “[w]hether successor liability applies to a particular corporate transaction depends on the facts and the applicable state, federal, and foreign law.” *Resource Guide*, *supra* note 1, at 28. Making room for state—and even foreign—law seems to admit that reference to federal law is insufficient.

²⁷⁷ *Id.* at 29, 32, 62; FOREIGN CORRUPT PRACTICES ACT REVIEW OPINION PROCEDURE RELEASE 08-02, *supra* note 201.

²⁷⁸ FOREIGN CORRUPT PRACTICES ACT REVIEW OPINION PROCEDURE RELEASE 08-02, *supra* note 201.

²⁷⁹ *Id.*

dissolved.²⁸⁰ Finally, even under the traditional rule of successor nonliability, purchasers will be incentivized to conduct due diligence and end corrupt practices, in order to prevent the corrupt activity from continuing after the acquisition closes. In short, the policies underlying the FCPA would not be hindered significantly by adhering to a rule of successor nonliability for asset purchasers. Moreover, if the DOJ acknowledged such a rule in an Opinion Procedure release, it would provide meaningful reassurance and guidance to many U.S. companies as the pace of cross-border mergers and acquisitions quickens.

²⁸⁰ In *Melrose Distillers, Inc. v. United States*, the Supreme Court upheld the indictment of a dissolved entity by relying on a Delaware statute which provided that dissolved corporations are amenable to suit for three years after dissolution. 359 U.S. 271, 274 (1959).