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The doctrine of strict products liability is a fast developing area of tort law under which a manufacturer of a defective product may be held strictly responsible for injury to the users of that product. Greater sophistication in marketing techniques and manufactured goods, coupled with the consumers' lack of expertise in determining the fitness of goods, have led courts to embrace the doctrine to provide consumers special protection in the marketplace.

Strict products liability has been widely adopted, resulting in expanded manufacturer liability. A recurring problem in this area, however, stems from the nature of a products liability claim. The plaintiff's claim may not arise for many years following the manufacture and sale of the defective product. During that time, control of the manufacturer of the product may have been transferred to a

2. The most widely accepted form of manufacturer liability is § 402 A(1) of the RESTATEMENT (SECOND) OF TORTS (1965):
   § 402 A Special Liability of Seller of Product for Physical Harm to User or Consumer. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

   Section 402 A has been adopted in 26 jurisdictions. W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 2 n.41 (1979). Under the strict products liability doctrine, a manufacturer or any other person or entity in the chain of distribution of the product may be held liable for injury to a person resulting from contact with the product if the product is shown to have been defective and that the defect caused his injury or damage. Id. at § 21. In addition to the manufacturer of the product, those in the chain of distribution may include the wholesaler, the retailer, and component part manufacturers. Certifying agencies may also be liable. Id. at §§ 34-38.


successor corporation.

The method used to effectuate this transfer often determines whether liability will be imposed on the successor. Under corporate law, if the transfer of control takes the form of a statutory merger, consolidation, or a purchase of the stock of the predecessor, the successor is automatically subject to suit for injuries caused by products marketed by the predecessor. If, however, the transfer was structured as a cash purchase of the predecessor's assets by the successor, the plaintiff may be denied recovery against the successor, thereby impeding the special protection provided to consumers by the strict liability doctrine. In such cases, the issue is whether a company, having purchased for cash the assets of another company and having continued its business, will be responsible for injuries caused by a defective product manufactured and sold by its predecessor when the predecessor has ceased to exist.

Although courts have broadened the class of defendants who may be liable for product-related injuries, such parties are generally one of the links in the chain of distribution of the product which caused the injury. Because a successor corporation is not technically within this chain, courts have been reluctant, until recently, to expand liability to include successors. Injured plain-

7. If a merger or consolidation is undertaken, liability is assumed by the surviving entity pursuant to statute. See, e.g., FLA. STAT. § 607.231 (1979); ABA-ALI MODEL BUS. CORP. ACT. §§ 71, 72 (rev. ed. 1976) (hereinafter MBCA). A merger occurs when one corporation absorbs another, with the shareholders of the disappearing corporation receiving shares in the surviving entity in exchange for their outstanding shares. MBCA § 71. A consolidation is effected when the component corporations dissolve and an entirely new corporation is specially organized to receive their assets. The shareholders of the dissolving corporations trade their shares for shares in the new corporation. Id. § 72. When stock is acquired the original seller of the defective product continues to exist and is subject to suit brought by an injured party. See also Wallach, Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims, 41 Mo. L. Rev. 321, 335 (1976).
8. A transfer of control achieved through asset purchase is simpler to accomplish than is a statutory merger, consolidation, or a stock purchase because the procedural formalities are avoided. A plan of merger must be incorporated into articles of merger approved by a majority of shareholders, which must be delivered to and approved by the Secretary of State. See FLA. STAT. §§ 607.214, .221, .224 (1979).

With a sale of assets, only a majority of the shareholders of the selling corporation need approve, and thus only dissenting shareholders of the selling corporation are provided statutory appraisal rights. See FLA. STAT. §§ 607.241, .244, .247 (1979).
9. See Developments in the Rule, supra note 5, at 350. A sale of assets does not require the dissolution of the transferor, which may continue to exist and be subject to liability for product-related injury. See note 18 infra.
10. 2 L. FRUMER & M. FRIEDMAN, supra note 6, at § 16A[4][b][vi-vii].
11. Id.
tiffs, however, often look to successor corporations as their only source of recovery. This note will first examine the principles of corporate law underlying the reluctance to expand liability to successors and will then focus on new rules which modify these corporate principles to reflect product liability policies.

The issue of successor products liability following a cash for assets transaction was reached by a Florida court for the first time in *Bernard v. Kee Manufacturing Co.* In *Bernard*, the plaintiff received injuries in 1976 while operating a lawnmower manufactured and sold in 1967 by the defendant corporation's predecessor, Flechas J. Kee d/b/a Kee Manufacturing, Inc. In 1972, individuals having no prior interest in Kee's business formed Kee Manufacturing Company, Inc. New Kee then purchased for cash the assets and business of Mr. Kee, without contractually assuming any of old Kee's liability. After the sale, Mr. Kee retired, retaining no interest in the new company.

New Kee continued to manufacture lawnmowers at the plant used by its predecessor, retaining some of Mr. Kee's non-management staff. The brand name of Kee Mowers and the predecessor's customer list continued to be used, the company's logo remained much the same, and new Kee's sales brochures stated that it had been manufacturing lawnmowers since 1948, thereby giving little or no indication that a new company had taken over. New Kee also continued to supply parts for mowers manufactured by old Kee, although it discontinued the model of lawnmower that injured the plaintiff.

In the plaintiff's action against new Kee, the trial court granted the defendant corporation a final summary judgment. On appeal, the Second District Court of Appeal held that new Kee's tort liability would be determined by established principles of corporate law regarding a successor's liability for the debts of its predecessor.

Under these principles, a bona fide purchaser of corporate assets

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12. 394 So. 2d 552 (Fla. 2d Dist. Ct. App. 1981). Successor liability in this context was raised in *Kinsler v. Rohm Tool Corp.*, 386 So. 2d 1280 (Fla. 3d Dist. Ct. App. 1980). The court in *Kinsler*, however, found it unnecessary to reach the issue of successor liability because the predecessor corporation was still a viable on-going entity, amenable to personal service and financially responsible. *Id.* at 1281.

13. 394 So. 2d at 553.

14. *Id.*

15. In addition to the suit against new Kee, the plaintiff in *Bernard* maintained a separate suit against Mr. Kee and the retailer which had sold the lawnmower.

16. 394 So. 2d at 555.
for adequate consideration is not liable, by operation of law, for debts of the transferor unless such debts are contractually assumed. 17 Because the selling company need not be dissolved following a sale of its assets, it survives the transfer and remains primarily responsible for liabilities not expressly assumed by the purchaser in the sale agreement. 18 This nonassumption rule was developed for creditor-debtor relationships, and it has produced acceptable results in that area. Creditor claims are determinable at the time of sale and can be considered in setting a sale price. Consequently, the proceeds of the sale should be available to satisfy creditor judgments against the transferor. Because creditors will generally be protected, liability for the predecessor’s debts is not imposed on the successor in a sale. 19

This rule of nonassumption, however, has not protected creditors in all instances. As a result, the scope of the rule has been limited by four judicially-created exceptions. 20 Notwithstanding the nonassumption rule, a purchaser of assets for cash may be held responsible for the liabilities of its predecessor where (1) the purchaser expressly or impliedly agrees to pay the debts of the seller; 21 (2) the transaction is a de facto merger or consolidation; 22 (3) the


20. 15 W. FLETCHER, supra note 17, at § 7122.


purchaser is essentially a continuation of the seller; or (4) the sale is a fraudulent attempt to escape liability for the predecessor’s debts. Each of these exceptions is applicable to a successor corporation’s products liability when the nonassumption rule has been invoked to determine such liability.

The first and fourth exceptions are of little value to persons injured by the predecessor’s product after the sale of assets to the successor. Findings of implied assumption and fraud can only be made where liabilities are known to the parties at the time of the transfer, with the result that there can be no implied assumption or fraud where the product-related injury follows the sale.

Consequently, when liabilities are not known at the time of the transfer, the de facto merger and continuation of the business exceptions provide products liability plaintiffs their only means of recovery where the nonassumption rule has been invoked. Neither of these theories turns on whether the contingent tort liability was assumed or foreseeable at the time of sale. Instead, the applicability of either will generally depend on whether the predecessor has been absorbed into the successor and whether continuity of ownership is present. In a sale of assets in exchange for the stock of the successor, courts have found a de facto merger where the successor continues the predecessor’s business operation, and where the dissolution of the predecessor and the distribution of the successor’s stock to the predecessor’s shareholders occur promptly after the sale. De facto merger has not been found,

of assets was held to be a de facto merger).

25. The rationales underlying the first and fourth exceptions are clear. At base, neither can be considered an exception at all. Under the first exception, where the successor has expressly agreed to pay the debts of the predecessor, the successor will be bound by its agreement, negating the effect of the nonassumption rule. Products Liability for Successor Corporations, supra note 19, at 360. The fourth exception is most commonly applied to set aside as fraudulent transfers based on inadequate consideration. See, e.g., Wolff v. Shreveport Gas, Elec. Light & Power Co., 70 So. 789 (La. 1916).
30. Id. at 801. In Shannon the defendant successor corporation exchanged shares of its own stock for the assets of its predecessor, which dissolved following distribution of the stock to its shareholders. The plaintiff was allowed to recover in its products liability suit
however, where cash, rather than stock, was the consideration for the sale because no continuity of ownership follows a cash sale. Nor has a de facto merger been found where the predecessor corporation did not dissolve until more than a year after the transfer so that it could not be found to have been absorbed into the successor.

In its basic form, the mere continuation exception will apply to changes in the corporate entity, such as a recapitalization, a change in name, or a change in the state of incorporation. The exception has also been applied in cases where there is continuity of business operation, management, directors, officers, and shareholders between the predecessor and the successor, and where the predecessor dissolves following the transfer of assets. In those cases involving two corporate entities, application of the mere continuation exception will do nothing more than duplicate the de facto merger exception.

Applying the traditional corporate rule of nonassumption of liabilities and its four exceptions, the district court in Bernard found no tort liability on the part of new Kee. Under these established principles of corporate law, new Kee was not liable to the products liability plaintiff because (1) new Kee had not expressly or impliedly assumed any of Mr. Kee's debts or obligations; (2) no statutory consolidation or merger had occurred, and the transaction could not be characterized as a de facto merger because Mr. Kee did not receive stock in consideration for the sale; (3) the requisites of continuity were absent because the sale resulted in a complete change in the ownership and management of the corporation; and (4) there was no suggestion of any attempt to escape liability for the predecessor's debts. In effect, the injured plaintiff was denied recovery against new Kee because the cash for assets transac-

against the successor, with the court invoking the general rule of nonassumption but finding the de facto merger exception applicable where (1) there is a continuation of the enterprise of the predecessor; (2) there is a continuity of shareholders interest; (3) the predecessor ceases its ordinary operations and dissolves as soon as legally and practically possible; and (4) the successor corporation assumes those liabilities of the seller that are ordinarily necessary for the continued operation of the business.

31. See, e.g., Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968). In Kloberdanz, the court also held that while there was continuity of business operations, no de facto merger could be found where the transferor and transferee continued to exist following the transfer of assets. Id. at 822.


33. 264 A.2d at 105-06.

34. 394 So. 2d at 555.
tion between new Kee and its predecessor did not fall within any of the relatively narrow exceptions to the nonassumption rule.

The court's decision in *Bernard* represents an exercise in judicial restraint. In recent years, some courts have broadened the traditional exceptions to the nonassumption rule to allow recovery for product-related injuries against successor corporations. These courts, recognizing that the nonassumption rule evolved in the corporate context to protect successors from unassumed liability, have found the rule inappropriate for the products liability setting. These courts believe that the nonassumption rule undermines the products liability policy of placing the burden of loss on the party most able to bear the loss (the corporation) by spreading the risk. The court in *Bernard*, however, strictly applied the nonassumption rule and its narrow exceptions, declining to expand successor liability beyond its traditional scope. The fact that a defective product was involved did not lead the court to rethink or expand upon the previously recognized exceptions in its application of corporate concepts to the plaintiff's products liability suit. Any expansion of successor liability, the court held, should be the responsibility of the legislature.

In this respect, the court recognized the impact that judicial activism might have. Corporate policy demands established rules of liability which can be relied on in planning and accomplishing corporate acquisitions. The nonassumption rule protects successors that have purchased assets in reliance on the applicability of the rule of liability assumption. It also safeguards the ability of purchasing corporations to estimate correctly the costs of acquiring assets and to plan the terms of sale. The ability of parties in future corporate sales to estimate accurately the costs of acquiring assets and to set the terms of sale would have been hampered if the *Bernard* court had chosen to expand successor liability.


36. 1 L. FRUMER & M. FRIEDMAN, supra note 6, at § 5.06[3].


38. 394 So. 2d at 555.


40. *See Note, Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L.
importantly, such an expansion would exacerbate the problems of the increasing costs of product liability litigation and the unavailability of insurance, especially for small successor corporations. These problems in turn could result in the demise of many small corporations and have a chilling effect on the commercial transfer of assets.

The Bernard decision is commendable to the extent that the court recognized the business community's need for predictability in commercial transactions and the undesirable ramifications of a judicial change in the rules of successor liability. The critical weakness in the decision, however, is the court's almost singular focus on corporate principles in determining successor liability for product-related injuries.

The nonassumption rule and its four exceptions were developed not in response to products liability problems, but in the areas of creditor protection, tax assessments, and shareholder rights. Although these rules adequately protect the interests of the parties for which they were designed, cases such as Bernard demonstrate that the traditional corporate principles do not adequately protect the interests of the products liability plaintiff.


41. Developments in the Rule, supra note 5, at 394. For an indepth study of the insurance aspects of successor liability, see Products Liability and Successor Corporations: Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance, 13 U. Cal. D.L. Rev. 1000, 1024-33 (1980) [hereinafter cited as Protecting the Product User]. The author argues that reform of insurance law to readily provide insurance to successor corporations must follow any expansion of successor liability. Id. at 1024. Citing Products Liability Insurance: Hearings Before the Subcomm. on Capital, Investment and Business Opportunities, of the House Comm. on Small Business, 95th Cong., 1st Sess., (Part 1) (1977), the author reports that products liability insurance was unavailable to 21.6% of the businesses seeking to obtain such insurance and that the average increase in premiums from 1970 to mid-1977 was 944.6%. Protecting the Product User, supra, at 1024-25 nn. 91-93, Legislative reform of insurance laws to impose mandatory insurance pooling requirements to compel insurers to underwrite certain risks is recommended to deal with these insurance problems. Another suggested approach is the legislative encouragement of captive insurers. Id. at 1030-31 and accompanying notes.


44. Products Liability for Successor Corporations, supra note 19, at 360-61.

Successor liability for product-related injuries is not simply a question of corporate law, for these corporate principles must be balanced against the principles underlying strict products liability. As one commentator has noted, any rule developed for determining successor liability must be one which accommodates both consumer and business interests. Consumers suffering product-related injuries must be provided a means of recovery. At the same time, the law must continue to recognize the need of the business community to control the effects of commercial transactions and anticipate future costs. Application of the nonassumption rule and its narrow exceptions to products liability cases like *Bernard* prevents the necessary accommodation of these interests.

Judicial attempts to achieve this balance in other jurisdictions have taken two forms. To provide the required protection to consumers, some courts, working within the framework of the nonassumption rule, have altered the traditional scope of the de facto merger and mere continuation exceptions. In *Knapp v. North American Rockwell Corp.* the Third Circuit Court of Appeals, pursuant to Pennsylvania law, found a de facto merger and allowed the plaintiff to recover even though the transferor continued to exist for eighteen months after an asset for stock sale, having assets to satisfy the plaintiff's claim. Looking to the substance of the transfer, the court noted that "questions of an injured party's right to seek recovery are to be resolved by an analysis of public policy considerations rather than by a mere procrustean application of formalities." Although an essential element of de facto merger—the prompt dissolution of the transferor—was missing, the court concluded that formalities should not deny the plaintiff's claim and that social policies supported by Pennsylvania courts permitted a finding of de facto merger. The result in *Knapp* is a disregard of the separateness of the transferor and transferee, a long-standing distinction between an asset sale and a merger.

The decision of the First Circuit Court of Appeals in *Cyr v. B.*

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46. *Developments in the Rule, supra* note 5, at 369.
47. 506 F.2d 361 (3d Cir. 1974). In *Knapp* the plaintiff was injured by a defective paper cutter made by TMW, whose assets were purchased by Rockwell in exchange for Rockwell stock. Following the sale, TMW continued to exist for eighteen months, although the sale agreement provided for its dissolution.
48. *Id.* at 368, 369.
49. *Id.* at 369.
50. *Id.*
51. *Id.* at 370.
52. *Developments in the Rule, supra* note 5, at 364.
Offen & Co.,53 expanding the mere continuation exception to a cash sale of assets, is significant for its balance of corporate and tort principles. The court held that "where tort liability is concerned, we should look to factors relevant to the specific claim and not be bound by the factors that control where other debts and liabilities are concerned."54 Looking to the policies holding original manufacturers liable for product-related injuries, the court found them to apply equally to a successor that manufactured the same line of equipment as its predecessor.55 Further, finding continuity of the business to be the essence of the sale agreement, the court in Cyr held the successor liable to the plaintiff for an injury caused by a product manufactured by its predecessor.56 In so holding, the Cyr decision modified the mere continuation exception by discounting the element of continuity of ownership.57

Such decisions bring consumer interests more into balance. The balance on the business side is disrupted, however, because continued use of the nonassumption rule with sporadic alteration of its existing exceptions as determined by the facts of each case makes the imposition of liability unpredictable.58 Such a process would no more achieve a balance of consumer and business interests than did the strict application of the nonassumption rule and its exceptions in Bernard. New rules which are responsive to the problems of products liability plaintiffs and which provide a comprehensive and unified approach to successor liability are essential and must be considered.

53. 501 F.2d 1145 (1st Cir. 1974) (applying New Hampshire law). In Cyr the plaintiff was injured by a drying oven on a printing press, which had been manufactured prior to a sale of the predecessor. The successor corporation was owned by employees of the predecessor, who assumed the prior obligations and purchased the good will and contract obligations of the predecessor. The corporation's name remained much the same, and no notice was given to the public that new ownership had taken over the corporation. The facts, consequently, are similar to those in Bernard. Id.
54. Id. at 1153.
55. Id. at 1154. The court noted four policy justifications for imposing liability on the original manufacturer:

(1) [T]he manufacturer is better able to protect itself and bear the costs while the consumer is helpless; (2) it is the manufacturer which has launched the product into the channels of trade; (3) it is the manufacturer which has violated the representation of safety implicit in putting the product into the stream of commerce; and (4) the manufacturer is the instrumentality to look to for improvement of the product's quality.

Id.
56. Id.
57. 1 L. FRUMER & M. FRIEDMAN, supra note 6, at § 5.06[3].
58. Developments in the Rule, supra note 5, at 369.
Other courts have moved beyond the traditional framework of the nonassumption rule and its four exceptions by creating special rules for determining successor liability. The Michigan and California Supreme Courts have created other exceptions to the nonassumption rule; the Michigan court establishing an "enterprise continuity" rule and the California court developing a "products line" theory. Both exceptions are applicable only to products liability issues.

In *Turner v. Bituminous Casualty Co.* the Michigan court adopted a products liability approach to successor liability. Establishing its enterprise continuity rule, the court focused on the de facto merger exception, inquiring whether there is a legally sufficient difference between an acquisition made through the transfer of some of the successor's stock and a cash purchase, justifying products liability recovery following the former, but not the latter transaction. Dispensing with the traditional requirement of de facto merger—payment with stock of the purchasing corporation—the court observed that, for the injured plaintiff, the problem of recovery is the same whether the acquisition was a statutory merger, a de facto merger, or a cash purchase. Further, regardless of the form of the transaction, the predecessor and successor corporations have the same need for an accurate assessment of the risk of future liabilities in computing an appropriate sale price. Consequently, although the commonality of ownership between the predecessor and successor resulting from stock for assets transactions provides a sufficient nexus to establish successor liability, the Michigan court held that the lack of commonality following a cash transaction should not be conclusive in precluding successor liability. Accordingly, the court held that continuity of the enterprise rather than commonality of ownership should be the prime consid-

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61. 244 N.W.2d 873 (Mich. 1976). In *Turner*, the plaintiff was injured by a defective power press manufactured by "Old Sheridan." Five years before the plaintiff's injury, Old Sheridan's goodwill, name, assets, and property were sold to New Sheridan, a subsidiary of Harris-Intertype Corp. formed to accept the assets of New Sheridan. Following the sale, Old Sheridan dissolved. *Id.* at 875-76.
62. *Id.* at 877.
63. *Id.* at 879.
64. *Id.* at 878.
65. *Id.* at 880.
eration in determining successor liability.\textsuperscript{66}

In the products liability context, the court noted that enterprise continuity is influenced by two factors: first, the extent to which the successor has assumed the ability of the predecessor to calculate the risks of defects and to insure against such risks; and second, the extent to which the successor profits from the goodwill of the predecessor through its outward representation of continuity.\textsuperscript{67} From this framework, the \textit{Turner} court, rather than attempt to fit its decision within either the de facto merger or mere continuation exceptions, set forth a special test for determining successor liability for product-related injuries. Under the \textit{Turner} test, a prima facie case of enterprise continuity sufficient to impose successor liability can be made on a showing of (1) continuity of the outward appearance of the enterprise, its management, personnel, physical plant, assets, and general business operations; (2) the prompt dissolution of the predecessor following the transfer of assets; and (3) an assumption of those liabilities and obligations necessary to the uninterrupted continuation of normal business operations.\textsuperscript{68}

By relying on continuity of enterprise concepts and rejecting the commonality of ownership requirements of de facto merger, the \textit{Turner} court sought to develop a rule that would lead to "common result[s]" in successor liability actions regardless of the form of the acquisition.\textsuperscript{69} Although the court's decision focused on product liability concepts, its enterprise continuity rule is expressed in corporate law language.\textsuperscript{70} Consequently, the physical characteristics of

\textsuperscript{66} Id. at 882. The court in \textit{Turner} held that "[c]ontinuity is the purpose, continuity is the watch word, continuity is the fact." Id. Further, the court noted that "[i]t is this continuity that makes business sense. It is the consideration for the whole deal." Id. at 883. Finally, the court injected an estoppel argument into these continuity concepts:

Where the successor corporation represents itself either affirmatively or, by omitting to do otherwise, as in effect a continuation of the original manufacturing enterprise, a strong indication of continuity is established. Justice would be offended if a corporation which holds itself out as a particular company for the purpose of sales, would not be estopped from denying that it is that company for the purpose of determining products liability.

\textit{Id.} at 882.

\textsuperscript{67} Id. at 881 (following \textit{Cyr v. B. Offen & Co.}, 501 F.2d 1145 (1st Cir. 1974)).

\textsuperscript{68} The court in \textit{Turner} did not list these elements in its decision, instead referring to the first, third, and fourth elements of the \textit{Shannon} test for determining de facto merger. \textit{Id.} at 883. These elements are set out in \textit{Shannon v. Samuel Langston Co.}, 379 F. Supp. 797, 801 (W.D. Mich. 1974). The second element of the \textit{Shannon} test, not used by the \textit{Turner} court in establishing its test of successor liability, concerned continuity of shareholders resulting from a stock for assets transaction. \textit{Id.} at 801.

\textsuperscript{69} 244 N.W.2d at 880.

\textsuperscript{70} 1 \textit{L. Frumer & M. Friedman}, supra note 6, at \S 5.06[3].
the business (i.e., the continuity of the business' outward appearance) remain critical, as they do in those decisions working within the framework of the nonassumption rule and its exceptions.\textsuperscript{71}

Products liability is imposed on manufacturers because they are in a position to anticipate risks, guard against harm, absorb the costs of injury, and distribute such costs among the public as a cost of doing business.\textsuperscript{72} The physical characteristics of the business are irrelevant under these products liability policies. It is the product, not the corporate structure, that is important, because it is generally the product that is in the public eye rather than the manufacturer.\textsuperscript{73}

The enterprise continuity rule fails to invoke the products liability concepts on which the Turner court relied, producing consequences that may be at odds with the policies supporting the court's adoption of the rule. The products liability plaintiff may still be unable to recover against the successor corporation if all the elements of enterprise continuity are not present.\textsuperscript{74}

Further, where an asset purchase has been made and the elements of continuity are present, the Turner rule would make the successor liable for all subsequent product-related injuries. Liability would attach even where the product which caused the injury was discontinued before or at the time of the transfer of control. Such a result is inconsistent with the principles underlying both the Turner decision and the strict products liability doctrine. If the successor has not produced the product, it has not benefitted from any goodwill generated by the product. Thus, an important element in continuity is missing. While the successor may be in a better position than the injured plaintiff to absorb the costs of product-related injuries, the successor that discontinues the type of product that caused the injury will never have received a benefit against which the cost of the injury can be offset.\textsuperscript{75}

The only rule for successor liability in products liability cases to successfully accommodate business and consumer interests is the one set forth by the California Supreme Court in Ray v. Alad Corp.\textsuperscript{76} In Ray the California court was faced with a case that did

\textsuperscript{71} Developments in the Rule, supra note 5, at 374.
\textsuperscript{72} W. KIMBLE & R. LESHER, supra note 2, at § 2.
\textsuperscript{73} Developments in the Rule, supra note 5, at 374-75.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} 136 Cal. Rptr. 574 (Cal. 1977). In Ray, Alad I sold for cash its assets, trade name, and goodwill to Alad II, a subsidiary of another corporation formed for the purpose of suc-
not fit into any of the four traditional exceptions to the nonassumption rule. The court specifically rejected any general modification of the traditional exceptions to avoid broader liability than intended for successors. Instead, it created a new exception to the rule that is based on the policies that underlie the strict products liability doctrine. The court noted that the purpose of the doctrine "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." The doctrine holds that consumers should not bear the risk of injury because such risks can be insured by the manufacturer, with the costs distributed to the public.

Based on this reasoning, and the observation that the traditional exceptions to the nonassumption rule were not created to deal with the problems of products liability plaintiffs, the court held it was fair and equitable to extend strict liability to a successor where (1) the plaintiff would have no viable remedy against the predecessor; (2) the successor, at the time of sale, was able to measure the risks of injury from products manufactured by the predecessor; and (3) the successor benefits from the goodwill associated with the predecessor so that responsibility for defective products can fairly attach to the successor.

ceeding Alad I. Following the sale, Alad I dissolved. The plaintiff was injured subsequent to the sale, having fallen from a ladder produced by the predecessor. The only provisions for assumption of liability by the successor were that Alad II pay for materials ordered by Alad I prior to sale and to fill Alad I's uncompleted orders. Id. at 576-77.

77. Id. at 579.
78. Id. (quoting Greenman v. Yuba Power Prods. Inc., 27 Cal. Rptr. 697, 701 (Cal. 1963)).
79. 136 Cal. Rptr. at 579 (citing Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (concurring opinion)).
80. 136 Cal. Rptr. at 580. In Ray, the injury occurred after the dissolution of the predecessor. The court noted that even if the plaintiff were to obtain a judgment against the dissolved and assetless predecessor, he would have great difficulty in receiving satisfaction for the judgment against the predecessor's former directors or stockholders. Id. Further, the court observed that the products liability insurance of a company that is no longer in business would not likely be a source of compensation for injury caused by a product manufactured by the predecessor. Id. at 581. Because the injured plaintiff's claim is one which is generally not capable of being known at the time of sale, there is a greater likelihood of a complete denial of redress for product-related injuries. Id.
81. The court noted that the successor used the predecessor's physical plant, manufacturing equipment, manufacturing designs, and the consulting services of the predecessor's general manager. Consequently, the successor had the same capacity as its predecessor "to estimate the risks of claims for injuries from defects in previously manufactured ladders for purposes of obtaining insurance." Id.
82. The court held that extending liability to successors in the position of Alad II causes
The California rule as announced in *Ray* holds a successor corporation primarily responsible for injuries caused by defects in units of a particular product line manufactured and distributed by the predecessor where the successor continues to produce the product that caused injury. Unlike the *Turner* rule, the "product line" rule in *Ray* is consistent with the policies underlying strict products liability. If the product which caused the injury is discontinued and not produced by the successor, no benefit will have been derived from the product by the successor, and under the California rule no liability on the part of the successor will attach. The product line aspect of the California rule recognizes the business interest in controlling the effects of commercial transactions and anticipating costs. If the successor continues the product line of the predecessor, liability will attach with no problems of inconsistent application or interpretation of the four exceptions to the nonassumption rule or the broader liability of the enterprise continuity rule of *Turner*.

In creating the product line exception, the *Ray* court provided protection for the class of products liability plaintiffs affected by corporate transfers. At the same time, the court avoided broad changes in existing rules which remain appropriate for the corporate context. The end result of *Ray* is the needed accommodation

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the one who takes the benefit to know the risk. The benefit includes acquisition of the predecessor's trade name, good will, customer lists, continuation of the product line, and holding out as the same enterprise. Such imposition is fair and equitable as to the successor, and it precludes a windfall to the predecessor who may have received an enhanced price from the successor reflecting the absence of successor liability or who may have avoided liability by dissolving. *Id.* at 581-82.

83. *Id.* at 582. Applications of the *Ray* rule to the facts of *Bernard* might still leave the injured plaintiff unprotected because of new Kee's discontinuance of the lawnmower that had injured the plaintiff. In *Rawlings v. D.M. Oliver, Inc.*, 159 Cal. Rptr. 119, 124 (Ct. App. 1979), however, the court noted that manufacturing by its very nature involves modification of a product line or elimination of an unprofitable product. Therefore, the continuance of a specific product line cannot be controlling.

For a discussion of methods which might be used to avoid a transfer of liability following the *Ray* decision, see *Protecting the Product User*, supra, note 41 at 1012-24.

84. The court in *Ray* did not give its rule the "product line" name. Instead, the court in *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 440-41 (7th Cir. 1977), coined the term.

85. 1 L. FRUMER & M. FRIEDMAN, supra note 6, at § 5.06[4].
of consumer and business interests.86

Use of the traditional rule of nonassumption in successor products liability cases is alive and well in most jurisdictions, including Florida. Under these rules of corporate law, the parties to a corporate asset sale may prevent assumption of liability for product-related injuries by expressly rejecting assumption in the sale contract and structuring the transaction to avoid the appearance of a de facto merger or mere continuation. Consequently, determining successor liability on the basis of the nonassumption rule will usually deny a plaintiff redress for injury caused by a defective product manufactured by the corporate predecessor.87

Such a denial of recovery to injured plaintiffs is inconsistent with Florida's adoption of strict products liability.88 Because the application of corporate law principles restricts the protection afforded by the strict products liability doctrine without a sound legal rationale, new rules of successor liability must be established which are appropriate to the products liability area. Any rule adopted in Florida, however, must be one which accommodates both business and consumer interests. The "products line" theory set forth in Ray best accomplishes this result.

The adoption of a new rule for determining successor liability should be left to the legislature, for as the court in Bernard noted, "such broad public policy issues are best handled by legislatures with their comprehensive machinery for public input and debate."89 Some commentators have stated that adoption of any rule expanding successor liability would require a corresponding modification of insurance law to make products liability insurance more available to successor corporations.90 Without these modifications,
rules expanding successor liability would be undermined. In Ray, liability was transferred to the successor on the assumption that the corporation could insure itself against the risk of successor liability. If insurance is unavailable to the successor, the parties to an acquisition will plan the sale to avoid assumption of products liability or will liquidate the seller to accomplish the same result. Products liability plaintiffs would then remain unprotected. Only the legislature is equipped to make the changes necessary to prevent this consequence of the unavailability of liability insurance to small corporations.

If the Florida Legislature accepts the Bernard court's invitation to consider the issue of successor products liability, and adopts the "product line" theory developed by the California Supreme Court in Ray, making the necessary changes in other laws, the State of Florida will achieve the best accommodation of consumer and business interests yet devised. Until that time, despite Florida's adoption of the strict products liability doctrine, some injured consumers will have no remedy where their injury occurs following an asset sale for cash.

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In the 1979-1980 legislative session in California several bills aimed at reducing the number and costs of products liability suits were proposed. None were passed. See id. at 1026 n.100.

91. Id. at 1024.
92. Id.
93. Id. at 1030-32.