
Get the Lead Out: Innocent Successor Corporations Responsibility Under CERCLA – *United States v. General Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005).

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I. INTRODUCTION

In *United States v. General Battery Corp., Inc.*,¹ the Third Circuit examined the rule of successor liability as it applies to gaps in the remedial Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) statute.² The court determined that a uniform federal rule was preferable to the existing state law in filling gaps in CERCLA, even though Pennsylvania law would have achieved the exact same result. The court found that under the federal rule, a successor corporation can be held liable for environmental cleanup costs under the “de facto merger” exception to the general rule of successor non-liability even

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¹ 423 F.3d 294 (3d Cir. 2005).

² 42 U.S.C. §§ 9601-9675 (2000 & Supp. 2002).

though the \$6.5 million remediation costs were not anticipated during the negotiations between the predecessor and successor corporations. In doing so, the Third Circuit concluded that CERCLA's remedial nature required that all parties who are potentially responsible for creating the contamination, no matter how remotely and tenuously they are connected to the environmental hazard, were liable for cleanup costs.

II. PRIOR LAW

Since *Erie Railroad Company v. Tompkins*,³ courts have struggled with Justice Brandeis' declaration that "[t]here is no federal general common law."⁴ *Erie* left unresolved the question of how to fill the gaps in federal statutes when they do not speak specifically to the issue at hand. When Congress passed the CERCLA statute⁵, it left numerous gaps in the legislation.⁶ Ever since, courts have struggled with the *Erie* problem of how to fill CERCLA's gaps.⁷

A. The United States Supreme Court's Approach to CERCLA Gap-Filling

To attempt to resolve the problem of how to fill the gaps in CERCLA, the United States Supreme Court has focused on the policy reasons behind its passage, commenting, "[a]s its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites."⁸ The Court has discussed the remedial purpose of CERCLA, stating that the statute requires that those responsible for contaminating a site should be responsible for the costs of cleanup.⁹ Furthermore, the Court determined that to achieve this goal, Congress created a federal cause of action under CERCLA.¹⁰ Moreover, the Court found that Congress intended the application of CERCLA to be broad, commenting, "[t]he remedy that Congress felt it needed in

³ 304 U.S. 64 (1938).

⁴ *Id.* at 78.

⁵ §§ 9601-9675.

⁶ See *Exxon Corp. v. Hunt*, 475 U.S. 355, 370-74 (1986) (CERCLA preempts special state tax cleanup funds). Specifically, the Supreme Court has noted that certain sections of CERCLA are not "model[s] of legislative draftsmanship. . . . [Certain wording] is at best inartful [sic] and at worst redundant." *Id.* at 363.

⁷ The *Erie* problem arises because state and federal courts exercise overlapping jurisdiction. The doctrine is designed to prevent undesirable forum shopping so that a federal court sitting in diversity will only apply federal rules if they are either procedural or in limited substantive contexts. The doctrine applies only when the plaintiff did not bring suit in federal court for the sole purpose of the benefits of its more favorable substantive law. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 221-57 (Aspen Publishers, 6th ed. 2004). See also Irving Younger, *What Happened in Erie*, 56 Tex. L. Rev. 1011 (1978); EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA*, 295-302, (New Haven, 2000).

⁸ *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994).

⁹ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) *overruled on other grounds* by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996) (citations omitted). Specifically, the Court stated, "CERCLA both provides a mechanism for cleaning up hazardous waste sites . . . and imposes the costs of the cleanup on those responsible for the contamination." *Id.*

¹⁰ 511 U.S. at 818-20. The Court states, "although § 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs, that cause of action is not explicitly set out in the text of the statute." *Id.* The Syllabus to the case notes that a cause of action was read into the CERCLA statute in numerous District Court cases. *Id.* at 809.

CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.”¹¹

One of the crucial gaps in CERCLA is the application of its provisions to those who are indirectly liable for environmental contamination. In its most in-depth discussion of CERCLA’s gaps to date, the Supreme Court side-stepped the issue of what source of law is used to fill those gaps.¹² The Court noted the central conflict in the application of statutory gap-filling, finding that some jurisdictions chose to apply state law to fill gaps while others use a uniform federal rule.¹³ However, after noting numerous contrasting viewpoints on the issue, the Court determined that the issue of selecting the source of law to fill the gap in CERCLA was not before them in the instant matter because the parties had not challenged the Sixth Circuit’s holding that there was no derivative liability.¹⁴ In sum, the Supreme Court has not provided a clear-cut rule on what source of law should be used to fill the statutory gaps in CERCLA.

B. The United States Supreme Court’s Approach to Gap-Filling of Other Remedial Statutes

Nonetheless, when broadening the inquiry to other remedial statutes, the Court’s clearest pronouncement on gap-filling law to date came in *United States v. Kimbell Foods, Inc.*¹⁵ where the Court concluded that gap-filling is a fact-specific inquiry.¹⁶ While *Kimbell Foods* did not provide any comprehensible bright-line rule or standard to apply for statutory gap-filling, it did provide a number of considerations relevant to the determination of which source of law to use.¹⁷

More recently, in *O’Melveny & Myers v. Federal Deposit Insurance Co.*¹⁸, the Court clarified its position on the choice of applying a uniform federal rule or state law, stating that the “few and restricted” cases for application of a special federal rule were “limited to situations where there is a ‘significant conflict between some federal policy or interest and the use of state law.’ . . . Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision.”¹⁹ Three years later, in *Atherton v. Federal Deposit Insurance Corp.*,²⁰ the

¹¹ 491 U.S. at 21.

¹² *United States v. Bestfoods*, 524 U.S. 51, 63 n.9 (1998) (presenting arguments concerning whether CERCLA incorporates common law veil piercing doctrine).

¹³ *Id.* Specifically, the Court commented, “[t]here is significant disagreement among courts and commentators over whether, in enforcing CERCLA’s indirect liability, courts should borrow state law, or instead apply a federal common law.” *Id.*

¹⁴ *Id.*

¹⁵ 440 U.S. 715 (1979).

¹⁶ *Id.* at 728. Moreover, the Court held that “[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy ‘dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.’” *Id.* (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947)).

¹⁷ *Id.* at 728-29.

¹⁸ 512 U.S. 79 (1994).

¹⁹ *O’Melveny*, 512 U.S. at 87 (California law applied to fill the gaps in the federal Financial Institutions Reform, Recovery, and Enforcement Act) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); citing *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 508 (1988); *Kimbell Foods*, 440 U.S. at 728).

Court further confirmed its position on the limited use of federal common law gap-filling, stating “[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts.”²¹

Nonetheless, another recent Supreme Court decision²² suggests that the application of federal common law may not be such a rare occurrence and that the application of *O’Melveny & Myers* and *Atherton* is appropriately limited to gap filling under the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989 (FIRREA)²³ and not other remedial federal statutes. The Court held that Congress’ specific instruction was to interpret Title VII of the Civil Rights Act of 1964²⁴ based on traditional agency principles, concluding that “a uniform and predictable standard must be established as a matter of federal law. We rely ‘on the general common law of agency, rather than on the law of any particular State to give meaning to these terms.’ . . . The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction.”²⁵ In this way, the problem of gap-filling for remedial statutes remains unresolved by the Supreme Court with some cases requiring the application of a uniform federal rule and others allowing state common-law gap-filling.²⁶

C. The Third Circuit’s Approach to CERCLA Gap-Filling

With no clear Supreme Court precedent on how to fill gaps under CERCLA, the Third Circuit has held that the so-called “federal common law” dictates how gaps in successor liability are to be filled under CERCLA.²⁷ In *Smith Land*, the court determined that “national uniformity” dictated the utilization of a standardized federal rule of successor liability under CERCLA.²⁸ Seeking to avoid the unequal application of differing state laws to similarly situated defendants, the Third Circuit went on to conclude that a uniform federal rule was desirable, stating “[t]he general doctrine of successor liability in operation in most states should guide the court’s decision rather than the excessively narrow statutes which might apply in only a few states.”²⁹ Moreover, the Third Circuit later reaffirmed its central holding in *Smith*

²⁰ 519 U.S. 213 (1997).

²¹ *Id.* at 218 (declining to impose a federal common law standard of care for officers under the Financial Institutions, Reform, Recovery, and Enforcement Act) (quoting *Wallis*, 384 U.S. at 68).

²² *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (holding that an employer is subject to federal agency principles and vicarious liability under Title VII for the hostile work environment created by its supervisor).

²³ Pub. L. No. 101-73, 103 Stat. 183.

²⁴ 42 U.S.C. §§ 2000e-2000e(17) (2005).

²⁵ *Ellerth*, 524 U.S. at 754-55 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)).

²⁶ Perhaps the only generally applicable rule that can be distilled from the Court’s otherwise conflicting holding in *Kimbell Foods* is that the choice of which gap-filling law to apply is a highly fact-specific inquiry.

²⁷ *See Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988) (holding that corporations that have merged or consolidated with “responsible parties” are liable as successors under CERCLA).

²⁸ *Id.* The court held, “[i]n resolving the successor liability issues here, the district court must consider national uniformity; otherwise, CERCLA aims may be evaded easily by a responsible party’s choice to arrange a merger or consolidation under the law of particular states which unduly restrict successor liability.” *Id.*

²⁹ *Id.*

Land that a federal common law rule should be used to fill other statutory gaps in CERCLA.³⁰ The court stated that there was a “federal interest in uniformity in the application of CERCLA [and therefore] it is federal common law, and not state law, which governs when corporate-veil piercing is justified under CERCLA.”³¹

More generally, the Third Circuit has incorporated the *Kimbell Foods* test for determining whether to apply a federal common law rule or the applicable state law.³² Specifically, the court has detailed a three pronged test that it has synthesized from the uncertain Supreme Court holding in *Kimbell Foods*. The court held that the rule for choice of gap-filling authority is a three-part inquiry, asking, “first, whether the nature of the federal program requires national uniformity; second, whether the application of state law would frustrate specific objectives of the federal program; and third, whether the application of the federal law would disrupt commercial relationships predicated on state law.”³³ This three-pronged approach mirrors the application of the unclear *Kimbell Foods* test in all of the Federal Circuits.³⁴

D. Other Jurisdictions’ Approaches to Filling Statutory Gaps

Other jurisdictions are mixed in their interpretations of whether CERCLA’s objectives are better met by supplanting state law with a federal common law rule. The Ninth Circuit, for example, agreed with the Third Circuit’s reasoning in *Smith Land*, and found that national uniformity dictates that courts’ application of “the traditional rules of successor liability in operation in most states.”³⁵ The court found that the application of state law would frustrate CERCLA’s purpose and thus lead to the undesirable forum shopping that *Erie* sought to avoid.³⁶

Nonetheless, the Ninth Circuit, in *Atchison*,³⁷ later reversed its position based on the Supreme Court’s test in *O’Melveny* and therefore found that *O’Melveny*’s central holding was not merely limited to filling gaps in the FIRREA.³⁸ Instead, the court found that *O’Melveny* dictates that courts should only apply federal common law where the state law would frustrate the federal policy.³⁹ Moreover, the Ninth Circuit found that state laws will never be contrary to the policy motivating CERCLA, finding “[n]o state provides a haven for liable companies. Nor is there reason to think that states will alter their existing successor liability rules in a ‘race to the

³⁰ See *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) (CERCLA incorporates federal common law rule of corporate veil piercing).

³¹ *Id.* (citing *Kimbell Foods*, 440 U.S. 715).

³² See *Fed. Deposit Ins. Corp. v. Blue Rock Shopping Ctr., Inc.*, 766 F.2d 744, 747-48 (3d Cir. 1985) (federal law should fill gaps in Federal Deposit Insurance Act) (citing *Kimbell Foods*, 440 U.S. at 728-29); See also *Adams v. Madison Realty & Dev., Inc.*, 937 F.2d 845, 856 (3d Cir. 1991) (citing *Blue Rock*, 766 F.2d at 748; *Kimbell Foods*, 440 U.S. at 728-29).

³³ *Blue Rock*, 766 F.2d at 748.

³⁴ See e.g. *North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642 (7th Cir. 1998); *Resolution Trust Corp. v. Maplewood Inv.*, 31 F.3d 1276 (4th Cir. 1994); *McCall Stock Farms v. United States*, 14 F.3d 1562 (Fed. Cir. 1993); *Fed. Deposit Ins. Corp. v. Aetna Casualty & Surety Co.*, 947 F.2d 196 (6th Cir. 1991).

³⁵ *Louisiana-Pacific Corp. v. Ascaro, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990).

³⁶ *Id.* at 1263, n.2.

³⁷ *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358 (9th Cir. 1998).

³⁸ See *Id.* (federal rule of “substantial continuation” exception not applied to railroad because state laws prevent bad forum shopping under *Erie*).

³⁹ *Id.* at 363-64.

bottom' to attract corporate businesses."⁴⁰ Ultimately, however, the *Atchison* court determined that it did not need to decide which law would govern CERCLA's gaps because they "would reach the same result under federal common law" as state law.⁴¹ This approach has been followed by only a handful of federal circuits.⁴²

The First Circuit has held that the application of state law under CERCLA in the successor liability context is not hostile to the federal policy.⁴³ Specifically, the court held that the application of Connecticut law would not frustrate any federal objective because Connecticut's "mere continuation" exception comported with the objectives of CERCLA.⁴⁴

E. Successor Non-Liability and its Exceptions

Regardless of the confusion over which source of law should be used to fill the gaps in CERCLA, the successor liability rules of most state and federal jurisdictions are sufficiently similar to "[t]he general doctrine of successor liability in operation in most states."⁴⁵ It is a general principle of corporate law that "where one company sells or transfers all of its assets, the second entity does not become liable for the debts and liabilities, including torts, of the transferor."⁴⁶ However, courts have noted that there are four "generally recognized" exceptions to the non-liability of the purchaser.⁴⁷ The transferee "may be liable where: (1) it assumes liability; (2) the transaction amounts to a consolidation or merger ["de facto merger"]; (3) the transaction is fraudulent and intended to provide an escape from liability; or (4) the purchasing corporation is a mere continuation of the selling company."⁴⁸

For the first exception, the assumption of liability to be satisfied, the purchaser's intent to assume the liability for the instant issue must be clear and unequivocal.⁴⁹ However, an express assumption of liability is not likely to be common under CERCLA.⁵⁰

Alternatively, the second test, the "de facto merger" exception, is the basis for a majority of the successor liability cases brought under CERCLA. The "de facto merger" exception has four elements. A party is held liable where:

- (1) There is a continuation of the enterprise of the seller

⁴⁰ *Id.* at 364 (Kennedy, J. concurring) (citing *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991)).

⁴¹ *Id.* at 364.

⁴² *See, e.g.* *Mickowski v. Visi-Trak Worldwide, LLC*, 415 F.3d 501 (6th Cir. 2005); *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001); *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819 (D.C. Cir. 2001).

⁴³ *United States v. Davis*, 261 F.3d 1, 53-54 (1st Cir. 2001).

⁴⁴ *Id.*

⁴⁵ *Smith Land*, 851 F.2d at 92.

⁴⁶ *Polius v. Clark Equipment Co.*, 802 F.2d 75, 77 (3d Cir. 1986) (citing 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 7122 (Perm.Ed. 1983)).

⁴⁷ *Polius*, 802 F.2d at 78.

⁴⁸ *Id.* (citing *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 308-09 (3d Cir. 1985); *Knapp v. North American Rockwell Corp.*, 506 F.2d 361, 363-64 (3d Cir. 1974)).

⁴⁹ *See Thomeier v. Rhône-Poulenc, Inc.*, 928 F.Supp. 548, 552-53 (W.D. Pa. 1996).

⁵⁰ As it is unlikely that a purchasing corporation would specifically allocate the risk of cleanup of sites, which may or may not be subsequently determined "contaminated" by the Environmental Protection Agency, the assumption of liability test has a very limited application under CERCLA.

corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.

(2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.

(3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.⁵¹

The Third Circuit has adopted this four-pronged test for the “de facto merger” exception to successor non-liability.⁵²

The third exception to non-liability, a fraudulent intent to escape liability, is also not likely common under CERCLA for the same reasons that the express assumption of liability exception is not common.⁵³

Courts treat the fourth exception to the general rule of successor liability, the “mere continuation” exception, as tied up with the “de facto merger” exception.⁵⁴ The elements required to satisfy the “mere continuation” exception are identical to those required by the “de facto merger” exception.⁵⁵ Moreover, some courts have treated the “mere continuation” and “de facto merger” exceptions together as one exception⁵⁶ because “[m]uch the same evidence is relevant to each determination.”⁵⁷ In fact, it has been noted that “[de facto] merger and [mere] continuation tend to overlap. Consequently, ‘no criteria can be identified that distinguish them in any useful manner.’”⁵⁸ Nonetheless, a “de facto merger” can be distinguished from a “mere continuation” in that the former exists between a selling corporation and a buying corporation, while the latter “accomplishes . . . something in the nature of a corporate reorganization, rather than a mere sale.”⁵⁹

Finally, a minority of jurisdictions have found a fifth exception to the general non-liability rule for successor corporations, the so-called “substantial continuity”

⁵¹ Keller v. Clark Equip. Co., 715 F.2d 1280, 1291 (8th Cir. 1983).

⁵² See *Polius*, 802 F.2d at 79 n.4.

⁵³ It is unlikely that purchasers of corporations will purposely acquire the transferor in such a way to appear to be a successor and therefore avoid potential future applications of a remedial statute that will be determined by a third party administrative agency. The connection is too remote to be applied in the CERCLA context.

⁵⁴ See *Portfolio Fin. Servicing Co. ex rel. Jacom Computer Services, Inc. v. Sharemax.com, Inc.*, 334 F. Supp. 2d 620, 625 (D.N.J. 2004).

⁵⁵ *Id.*

⁵⁶ See, e.g., *Glynwed, Inc. v. Plastimatic, Inc.*, 869 F. Supp. 265, 275 (D.N.J. 1994).

⁵⁷ *Luxliner P.L. Exp. Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 73 (3d Cir. 1993).

⁵⁸ *Lumbard v. Maglia, Inc.*, 621 F. Supp. 1529, 1535 (S.D.N.Y. 1985) (quoting J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. Rev. 906, 909 (1983)).

⁵⁹ *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977).

exception.⁶⁰ “Substantial continuity” is essentially the same as the “de facto merger” or “mere continuation” standards without the second element, the “continuity of ownership” requirement.⁶¹ In *Davis*, the First Circuit denied application of the “substantial continuation” test for successor liability because Connecticut law did not contain such a test.⁶² However, the court found that the “mere continuation” test was the correct test to apply to the CERCLA context, and thus did not need to address the application of the “substantial continuation” test.⁶³ Moreover, courts have limited the “substantial continuity” exception to labor law and product liability cases, and have specifically declined to apply it to successor corporations under CERCLA because it is inconsistent with the *Bestfoods* doctrine.⁶⁴

III. FACTS AND PROCEDURAL HISTORY

In *United States v. General Battery Corp., Inc.*,⁶⁵ the Third Circuit considered successor liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).⁶⁶

Price Battery Corporation (Price Battery), a Pennsylvania corporation, manufactured lead-acid batteries in Hamburg, Pennsylvania from the late 1920s until General Battery Corporation (General Battery) purchased the corporation from Price Battery’s sole shareholder, William F. Price, Sr. (Price) in February 1966.⁶⁷ While in operation, Price Battery was responsible for the disposal of old battery casings while reusing the lead plates from old batteries.⁶⁸ In exchange for his stock in Price

⁶⁰ See, e.g., *New York v. Nat’l Services Indus., Inc.*, 352 F.3d 682 (2d Cir. 2003) (Because of the Supreme Court’s decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), in the context of CERCLA, the substantial continuity rule for successor liability adopted in *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518-19 (2d Cir. 1996), is no longer good law.); *Betkoski*, 99 F.3d at 518-19; *City Mgmt. Corp. v. United States Chem. Co., Inc.*, 43 F.3d 244 (6th Cir. 1994); *United States v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478 (8th Cir. 1992).

⁶¹ *Nat’l Services Indus.*, 352 F.3d at 686. However, some courts have articulated different elements for deciding successor liability under the “substantial continuity” test, including, “(1) retention of the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the successor holds itself out as the continuation of the previous enterprise.” *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992).

⁶² 261 F.3d at 53-54.

⁶³ *Id.*

⁶⁴ *Nat’l Services Indus.*, 352 F.3d at 686-87. See also *Davis*, 261 F.3d at 53; *Atchison*, 159 F.3d at 358.

⁶⁵ 423 F.3d 294 (3d Cir. 2005).

⁶⁶ 42 U.S.C. § 9601 (2000 & Supp. II 2002).

⁶⁷ *General Battery*, 423 F.3d at 296. In his majority opinion, Chief Judge Scirica notes that Price Battery was in operation “[f]rom the 1930s through 1966”. *Id.* However, a search of the Pennsylvania Department of State’s Corporation Bureau (<http://www.dos.state.pa.us/corps/site/default.asp>) reveals that Price Battery filed Articles of Amendment to their non-profit status on June 3, 1929. This suggests that General Battery was in operation before the 1930s.

⁶⁸ The customary method of disposing of old batteries was to crush them to extract the lead and then dump the casings. Associated Press, Pa.: *EPA Tests 400 Hamburg-Area Properties for Lead*, REALTOR MAGAZINE ONLINE, Nov. 8, 2002, available at <http://www.realtormag.com/rmodaily.nsf/d930f593a85e1a1486256ca800627f1d/7bd6004e067be67e86256c6b0067a61b?OpenDocument> (last visited June 22, 2006). Furthermore, Price Battery used two different methods of waste disposal during its lifetime. The Eastern District of Pennsylvania’s unpublished opinion in this same matter specifically details the processes used by Price Battery for waste disposal.

Battery, General Battery offered Price “\$2.95 million in cash, 100,000 shares of General Battery stock [valued at approximately \$1 million], and a seat on General [Battery]’s board of directors.”⁶⁹

In addition to acquiring Price Battery’s assets, the contract between General Battery and Price included provisions for General Battery to assume Price Battery’s contractual obligations and liabilities, as well as indemnification for non-tort claims due to Price Battery’s operations.⁷⁰ Furthermore, General Battery retained a number of Price Battery’s officers and employees in their positions after the acquisition.⁷¹

Until the early 1960s, Price employees brought used batteries back to the Hamburg Plant, split them open, and re-used the lead plates in the plant’s smelter. The junk battery casings, each often containing a paste of lead residue, were not re-used. Price employees dumped these battery casings at various locations in and around Hamburg. Price also made these battery casings available for members of the community to pick up for themselves and use as landfill. During this time until 1961, Price also contracted with Blue Mountain Coal Company . . . to crush the junk battery casings with a bulldozer after they were dumped in and around Hamburg, and to dump slag (waste leftover from the smelting operations) at the same locations.

United States v. Exide Corp., No. 00-CV-3057, 2002 WL 319940, at *1 (E.D. Pa. Feb. 27, 2002). However, towards the end of its lifetime, Price Battery changed its disposal method.

Beginning in the early 1960s, . . . [i]nstead of breaking the junk batteries itself, Price contracted with Brown’s Battery . . . to do so. Brown’s used a shear that sliced off the tops of the batteries in order to remove the lead plates for re-use. After the tops were removed, Brown’s shipped not only the lead plates, but the casing battery tops (which also contained re-usable quantities of lead) back to Price. Price crushed the battery tops, removed the lead pieces, and then gave away the remaining battery casing pieces as landfill. Price then re-used both the lead plates and the lead pieces removed from the battery tops in its smelter.

Id.

⁶⁹ *General Battery*, 423 F.3d at 296. Chief Judge Scirica takes care to point out that the 100,000 shares that Price received from General Battery represented 4.537% of General Battery’s outstanding stock which was comparable to the percentages held at the time of Price Battery’s acquisition by General Battery’s co-founders, W.A. Shea (5.12%) and H.J. Nozensky (4.44%). *Id.* at 296-97. Furthermore, it is noted that Price Battery sold its long-term assets to “a nonprofit development organization” for \$1.8 million, who leased the battery manufacturing plant to General Battery from 1966 to 1978, at which point they sold it to General Battery for \$1.00. *Id.* at 296 n.1.

⁷⁰ 423 F.3d 294 at 297. Specifically, General Battery promised to “pay, perform and discharge the debts, obligations, contracts and liabilities” that were present on Price Battery’s balance sheet on the purchase date. Agreement between Price Battery and General Battery, February 11, 1966. Furthermore, General Battery agreed to “indemnify and save harmless Price [Battery]” for “all other liabilities of any kind or character . . . unless unknown to Price [Battery] . . . arising out of the operation of the business of Price [Battery] or its subsidiaries in the normal course prior to January 1, 1966.” *Id.*

⁷¹ Among those kept by General Battery were Price Battery’s president, executive vice president, vice president of manufacturing, the plant superintendent, middle managers, union employees, office personnel, and sales force. 423 F.3d 294 at 297. The Eastern District’s opinion provides more information on General Battery’s retention of Price Battery’s employees.

[T]he principal upper-level management figures at Price [Battery] were all employed by General [Battery] at various capacities after the sale. Some of these managers continued to have some responsibility for the Hamburg Plant . . . William Price, Sr., the Chairman of the Board at Price [Battery], was employed as a consultant and named to the Board of Directors of General [Battery], as well as its Executive Committee, although he was not involved with the day-to-day management of the Hamburg Plant after the transaction. William Price, Jr., the President of Price [Battery], came to be employed as an officer of General [Battery], although . . . without significant administrative duties. Saul Dershwin, Price [Battery]’s Executive Vice President, and Robert Restrepo, the Vice President for Manufacturing of Price [Battery], both became officers of General [Battery] with some responsibility for all General [Battery] plants, including the Hamburg Plant. Dershwin also became a member of General [Battery]’s Board of Directors. . . . Mid-level management remained basically the same, as Warren Werley continued to serve in a significant capacity at the Hamburg Plant. . . . Personnel continuity at the lower levels was even greater. The sales personnel were retained. Additionally, union members and other hourly workers were kept on. Ralph Mengel, the Hamburg Plant’s Traffic Manager in charge of

Following the transaction, General Battery continued manufacturing batteries at the Price plant using the same process and continued Price Battery's relationships with both customers and suppliers.⁷² In 2000, General Battery merged with Exide Corporation (Exide).⁷³

As part of the transaction, Price agreed to change the name of his corporation to Price Investment Company (Price Investment).⁷⁴ Pending an independent audit of Price Battery's assets and liabilities, Price Investment, under the terms of the agreement between Price and General Battery, was to remain in business for a year without operations.⁷⁵ Should Price Battery successfully pass the audit, it was to immediately dissolve. In February 1967, Price Investment filed for corporate dissolution.⁷⁶

In 1992, the Environmental Protection Agency discovered that Price Battery's waste disposal sites, then owned by General Battery, contained elevated levels of lead and that remedial action was necessary to protect human health.⁷⁷ However, the

transporting batteries to customers, stated in an affidavit that General [Battery] kept the same employees and management personnel. Robert Schock, a member of the steelworker's union who worked at the plant's smelter, stated in an affidavit that he and his fellow union members continued to work at the plant, under the same supervisors. Finally, Miriam Woerner, who worked in Personnel, stated in an affidavit that no major changes in personnel at the Hamburg Plant were made after the sale.

2002 WL 319940 at *6-*7.

⁷² 423 F.3d 294 at 297. The Eastern District's opinion points out the unique factual circumstances surrounding the transfer of Price Battery's Hamburg Plant. General Battery did not acquire the Plant itself, but instead rented the land from a third party. The court explained,

On February 11, 1966, the real property and Hamburg Plant were sold by Price [Battery] to the Greater Berks County Development Fund, . . . an organization which exists to arrange for low-interest loans, tax credits and development assistance for qualified businesses. The Fund then entered into a mortgage agreement with American Bank & Trust Co. of Pennsylvania, and leased the Hamburg Plant to General [Battery]. General [Battery] then effectively made the mortgage payments on the property until 1978, when the deed was transferred to it for a nominal sum.

2002 WL 319940 at *7. Notwithstanding the fact that General Battery did not own the property that the United States sought to hold General Battery liable for cleaning up, the court viewed this as a sham transaction that did not reflect the true economic nature of the transaction, stating, "as a practical matter, all of Price [Battery]'s assets were transferred to General [Battery] as part of the transaction between the companies, and all the assets continued to be part of the ongoing business. *Id.*

⁷³ 423 F.3d 294 at 297.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Environmental Protection Agency, "HRS Documentation Record – Price Battery", August 24, 2004, available at <http://www.epa.gov/superfund/sites/docrec/pdoc1723.pdf>. The Eastern District's opinion provides more clarity on the history of the EPA's involvement at the Hamburg Lead Superfund Site in Berks County, Pennsylvania.

In August 1993, the U.S. Department of Environmental Protection (EPA) performed a removal assessment of two sites near Hamburg—referred to as "the Fieldhouse" and "the Playground"—where Price [Battery] dumped broken battery casings and where it now observed such casings. Levels of lead well above allowable amounts were found at both sites. EPA performed a removal action from August 1994 to August 1995 at the Fieldhouse and the Playground. In connection with the removal action, EPA discovered three additional sites at which Price [Battery] had dumped broken battery casings and that now contain levels of lead above EPA's removal action level. On September 28, 2000, EPA Region III approved the re-start of the removal action to remedy soil erosion due to heightened concern about these hazardous substances in residential areas where children play. As of this date, EPA is still acting at these five sites and is investigating further sites in and around Hamburg where battery casings battery casings [sic] may have been dumped.

2002 WL 319940 at *2.

EPA waited until 2002 to record a “removal assessment (RA) trip report” against the then Exide-owned property.⁷⁸ In that year, the EPA hired the Agency for Toxic Substances and Disease Registry to perform a health consultation of the Price Battery facility.⁷⁹ The Agency determined that the facility posed a public health hazard.⁸⁰ Furthermore, from November 2002 to May 2003, the EPA’s Region 3 Superfund Technical Assistance and Response Team (START) collected soil samples from the Price Battery facility and determined that they were contaminated with lead.⁸¹ The EPA began remedial action and has completed the lead removal.⁸²

On June 15, 2000, the United States brought suit in the Eastern District of Pennsylvania against Exide as successor in interest to Price Battery. The United States alleged that Exide was liable under CERCLA for the costs of “removal of contaminated soil and the installation of a remedial ‘cap’ at the [Price Battery disposal] properties.”⁸³ Both parties moved for summary judgment. The District Court denied Exide’s motion and granted the United States’ motion holding that General Battery had engaged in a “de facto merger” with Price Battery because of “the continuity of location, assets, products, operations, management, employees, contracts, and shareholders between Price Battery and General Battery” as well as “the subsequent liquidation and dissolution of Price Battery.”⁸⁴ The stipulated damages for the remedial costs under CERCLA were \$6.5 million.⁸⁵ The Third Circuit granted Exide’s appeal as to their successor liability under CERCLA.

IV. THE COURT’S ANALYSIS

The Third Circuit divided its inquiry into two parts: whether state law or “federal common law” should fill the gap in the CERCLA statute as to successor liability⁸⁶; and whether the Price Battery / General Battery transaction amounted to a “de facto merger,” so that Exide would be held liable as a successor in interest for the cost of remediation.⁸⁷

In the first part of its analysis, the court sought to determine whether gaps that exist in the CERCLA statute should be filled with Pennsylvania law or “a uniform rule of successor liability”, the so-called “federal common law”.⁸⁸ The Third Circuit announced that this was the “threshold issue on appeal.”⁸⁹ The court next noted that CERCLA is a “‘sweeping’ federal remedial statute” and, as such, should be broadly construed to make certain that all of those who are “potentially responsible for

⁷⁸ “HRS Documentation Record – Price Battery,” *supra* note 77, at 14.

⁷⁹ *Id.* at 16

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ 423 F.3d 294 at 296.

⁸⁴ *Id.* at 297.

⁸⁵ *Id.*

⁸⁶ *Id.* at 297-305.

⁸⁷ *Id.* at 305-308.

⁸⁸ *Id.* at 297-305. This idea harkens back to the pronouncement that “[t]here is no general federal common law.” *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938).

⁸⁹ 423 F.3d at 298.

hazardous-waste contamination . . . be forced to contribute to the costs of cleanup.”⁹⁰

Keeping in mind this wide breadth of the application of CERCLA, the court looked to its own precedents⁹¹ to determine that there was a genuine need for “national uniformity” and therefore a consistent federal rule was needed.⁹² After declaring that the Supreme Court had not addressed successor liability under CERCLA, the Third Circuit presented the three-pronged *Kimbell Foods*⁹³ test of which law to choose when there are statutory gaps.⁹⁴ These are, “(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 relationships predicated on state law.”⁹⁵

The court then addressed Exide’s contention that the Supreme Court in *O’Melveny*⁹⁶ had eroded the Third Circuit’s precedents because it had “cautioned against the unwarranted displacement of state law.”⁹⁷ The Third Circuit reasoned that this reasoning was inapposite because CERCLA creates its own federal cause of action.⁹⁸ Furthermore, the court noted that recent Supreme Court decisions⁹⁹ had indicated that gaps in the statutory language should be filled with federal common law and that a state-by-state determination of liability conflicts with the objectives of CERCLA.¹⁰⁰ Moreover, the court noted with particularity the minutiae of different standards used in different jurisdictions, and advocated that that lack of uniformity was reason enough for using a set federal standard.¹⁰¹

Exide next pointed to the First Circuit’s holding in *Davis*¹⁰² that state law should be used to fill gaps unless it is “hostile” to the policy reasons behind CERCLA.¹⁰³ Furthermore, the First Circuit held that states would have an incentive to conform their laws to the federal standards because no state would wish to become a “hospitable haven for polluters.”¹⁰⁴ Dismissing this notion, the Third Circuit held that applying state successor liability standards would lead to increases in both the amount of litigation brought under CERCLA and transaction costs.¹⁰⁵ Moreover, applying state law conflicts with the dual policy reasons behind the passage CERCLA of encouraging both early settlement of lawsuits and redevelopment of

⁹⁰ *Id.* at 297-98 (quoting *United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998)).

⁹¹ *Smith Land & Improvement, Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993).

⁹² 423 F.3d at 298-99.

⁹³ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

⁹⁴ 423 F.3d at 299.

⁹⁵ *Kimbell Foods*, 440 U.S. 715 at 728-729.

⁹⁶ *O’Melveny & Myers v. FDIC*, 512 U.S. 79 (1994).

⁹⁷ 423 F.3d at 300.

⁹⁸ *Id.*

⁹⁹ *United States v. Bestfoods*, 525 U.S. 51 (1998); *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440 (2003).

¹⁰⁰ 423 F.3d at 300.

¹⁰¹ *Id.* at 301 n.5.

¹⁰² *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001).

¹⁰³ 423 F.3d at 303.

¹⁰⁴ *Atchison, Topeka, and Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 364 (9th Cir. 1997).

¹⁰⁵ 423 F.3d at 303.

previously contaminated land.¹⁰⁶

Thus, the Third Circuit determined that the elements of the *Kimbell Foods* test had been satisfied so that national uniformity was required and “the general doctrine of successor liability in operation in most states”,¹⁰⁷ the so-called “federal common law” was the appropriate standard to use so as not to conflict with the policy concerns that motivated CERCLA.¹⁰⁸

After deciding to use this federal rule, the court then moved on to determining what standard of liability to apply to Exide.¹⁰⁹ The court noted four exceptions to the general rule that corporations who acquire business entities are not liable for the latter’s obligations.¹¹⁰ Specifically, “[t]he purchaser may be liable where: (1) it assumes liability; (2) the transaction amounts to a consolidation or merger; (3) the transaction is fraudulent and intended to provide an escape from liability; or (4) the purchasing corporation is a mere continuation of the selling company.”¹¹¹

Without any discussion of the other possible exceptions, the court settled on the second exception, announcing that “[t]his case involves the ‘de facto merger’ exception” to the general rule of non-liability.¹¹² The “de facto merger” exception has four elements: (1) continuation of the business enterprise; (2) continuity of shareholders; (3) the seller corporation ceases operations; and (4) the purchasing corporation assumes the seller’s obligations.¹¹³

The Third Circuit found that because General Battery purchased all of Price Battery’s assets as well as continuing production of batteries in the former Price Battery manufacturing plant, General Battery continued the business enterprise of Price Battery.¹¹⁴ Furthermore, General Battery had continued Price Battery’s relationships with both Price Battery’s previous suppliers and customers.¹¹⁵

The court then moved on to the question of the continuity of shareholders, which it found to be a much closer question. Turning to secondary sources for clarification,¹¹⁶ the Third Circuit determined that the continuity element is satisfied when shareholders of the seller corporation “retain some ownership interest in their assets.”¹¹⁷ While noting the difference in mixed cash and stock ownership standards in different jurisdictions,¹¹⁸ the court determined that the ownership interest is

¹⁰⁶ *Id.* (citing *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 206 (3d Cir. 2003); *United States v. DiBiase*, 45 F.3d 541, 545-46 (1st Cir. 1995)).

¹⁰⁷ *Smith Land*, 851 F.2d at 92.

¹⁰⁸ 423 F.3d at 303.

¹⁰⁹ *Id.* at 305-08.

¹¹⁰ *Id.* at 305.

¹¹¹ *Id.* (citing 15 William Meade Fletcher et. Al., *Fletcher Cyclopedia of the Law of Private Corporations* § 7122, at 227-48 (perm.ed., rev.vol. 1999)).

¹¹² 423 F.3d at 305.

¹¹³ *Id.* (citing *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1457-58 (11th Cir. 1985); *Keller v. Clark Equip. Co.*, 715 F.2d 1280, 1291 (8th Cir. 1983); 15 Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 7124.20, at 302).

¹¹⁴ 423 F.3d at 305-06.

¹¹⁵ *Id.*

¹¹⁶ Marie T. Reilly, *Making Sense of Successor Liability*, 31 Hofstra L. Rev. 745 (2003); Mark J. Roe, *Mergers, Acquisitions and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 Va. L. Rev. 1559 (1984).

¹¹⁷ 423 F.3d at 306-07.

¹¹⁸ *Id.* at 307, n.9-10.

fulfilled when the previous owners become a “constituent part” of the purchasing corporation by “retaining some ongoing interest” in that company’s assets.¹¹⁹ By receiving 100,000 shares of stock, thus putting his equity on the same level as co-founders, Price became a “constituent part” of General Battery.¹²⁰

The Third Circuit found that the third element of “de facto merger” was also satisfied despite Price Battery remaining in business for a year after the acquisition under the name Price Investment.¹²¹ The court remarked that the agreement that Price Battery cease manufacturing operations, sell off its assets, and change its name “is more characteristic of a merger than an asset purchase.”¹²² Despite its name change, Price Investment was a mere “corporate shell” that would be dissolved pending the final settlement of the acquisition agreement and could not continue manufacturing batteries because it had sold that ability to General Battery.¹²³ In essence, the seller had ceased all operations.

Under the fourth prong of the “de facto merger” exception, the court held that General Battery’s agreement to assume Price Battery’s obligations for non-tort liability satisfied this element.¹²⁴ The court determined that the agreement was “ordinarily necessary for the uninterrupted continuation of normal business operations.”¹²⁵

The Third Circuit then briefly addressed Exide’s concern that the parties had not contemplated remediation liability under CERCLA when General Battery acquired Price Battery and therefore they should not be held liable.¹²⁶ The court quickly dismissed this concern by articulating that the parties knew of the “de facto merger” elements when they made the agreement, and even if they did not, CERCLA imposes liability for remediation even if the parties to a contract did not bargain for such liability.¹²⁷

Finally, the court concluded its analysis by turning to the alternative holding of the District Court that Exide was liable for the remediation under the “substantial continuity” theory of successor liability because General Battery essentially acted as a continuation of Price Battery.¹²⁸ However, the Third Circuit remarked that this doctrine had not been widely recognized and was also inconsistent with the

¹¹⁹ *Id.* at 307. The Third Circuit did not specifically address how they would determine whether Price Battery had enough of an “ongoing interest” in General Battery to satisfy this element. The court did note that jurisdictions varied widely on the application of this standard, and often the percentages of cash and stock transacted made a large difference in determining whether the purchaser had an “ongoing interest.” *Id.* at 307 n.9. The court also noted that the amount of equity that the seller receives in the buyer is not, in and of itself, uniform enough in all jurisdictions to create a bright-line rule. *Id.* at 307 n.10.

¹²⁰ *Id.* at 307.

¹²¹ *Id.* at 307-08.

¹²² *Id.* at 308. This language is aimed at dealing with the distinction made by the *Ladjevardian* court between the “de facto merger” exception and the “mere continuation” exception. *Supra*, n.59.

¹²³ *Id.*

¹²⁴ 423 F.3d at 308.

¹²⁵ *Id.* In this way, the Third Circuit merged the requirements of the first and fourth prongs of the “de facto merger” standard. Essentially, the court in circular logic found that because General Battery had assumed those Price Battery operations that were integral to the continuation of the business so that they could continue operating.

¹²⁶ *Id.* at 308-09.

¹²⁷ *Id.*

¹²⁸ *Id.* at 309.

Bestfoods Supreme Court precedent as they had applied it because “substantial continuity” is not an exception in operation in most states.¹²⁹ Therefore, the court held, “‘substantial continuity’ is untenable as a basis for successor liability under CERCLA.”¹³⁰

Judge Rendell filed a concurring and dissenting opinion. She agreed with the central holding of the majority that Exide was liable as a successor in interest because of the “de facto merger.”¹³¹ Nonetheless, Judge Rendell argued that gaps in the federal statute should be filled with state law rather than the “federal common law.”¹³² In furtherance of this point, Judge Rendell pointed to a lengthy discussion in the *O’Melveny* case,¹³³ which the majority had cited as inapposite, to illustrate that the Supreme Court has shown a pattern of preference for state law gap filling over creation of “federal common law.”¹³⁴ Moreover, Judge Rendell argued that the Third Circuit should only create a federal rule if Pennsylvania law would clearly undermine the policy reasons motivating CERCLA.¹³⁵ Furthermore, Judge Rendell dwelled on the notion that “uniformity for uniformity’s sake” is not a sound policy reason for applying federal common law to fill gaps in statutes.¹³⁶ Moreover, she argued, uniformity in application was clearly not a factor in CERCLA’s passage.¹³⁷ Judge Rendell concluded the opinion by suggesting that the debate between applying state law or “federal common law” to the gaps found in CERCLA is not even relevant to the facts of the instant case because Pennsylvania law was essentially the same as the “federal common law” rule announced by the majority, and would achieve the same result.¹³⁸

V. PERSONAL ANALYSIS

In *United States v. General Battery Corp., Inc.*,¹³⁹ the Third Circuit departed from traditional canons of statutory construction when it chose to apply a uniform federal rule over state law. Essentially, the court determined that because the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)¹⁴⁰ is essentially a remedial statute,¹⁴¹ the need for uniformity trumps any other interests. However, a uniform application of the law under CERCLA does not comport with Congress’s stated objectives motivating the passage of that statute and

¹²⁹ 423 F.3d at 309 (citing *Bestfoods*, 524 U.S. 51 (1998)).

¹³⁰ *Id.*

¹³¹ *Id.* (Rendell, J., concurring and dissenting).

¹³² *Id.* at 309-10.

¹³³ *O’Melveny & Myers v. FDIC*, 512 U.S. 79 (1994).

¹³⁴ 423 F.3d at 310 (Rendell, J., concurring and dissenting).

¹³⁵ *Id.* at 310-13.

¹³⁶ *Id.* at 313.

¹³⁷ *Id.*

¹³⁸ *Id.* at 317.

¹³⁹ 423 F.3d 294 (3d Cir. 2005).

¹⁴⁰ 42 U.S.C. § 9601 (2002).

¹⁴¹ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) *overruled on other grounds* (citations omitted). The Court stated, “CERCLA both provides a mechanism for cleaning up hazardous-waste sites, 42 U.S.C. §§ 9604, 9606 (1982 ed. and Supp. IV), and imposes the costs of the cleanup on those responsible for the contamination, § 9607. Two general terms, among others, describe those who may be liable under CERCLA for the costs of remedial action: ‘persons’ and ‘owners or operators.’ § 9607(a).” *Id.*

cuts contrary to Congress's silent desire to allow state common law rules of successor liability to outweigh uniformity. Furthermore, the Third Circuit overstepped its authority from both legal and policy perspectives.

A. The Third Circuit's Choice to Apply "Federal Common Law"

The Third Circuit's determination that CERCLA requires uniformity is unnecessarily narrow. In fact, Exide countered this requirement by its suggested application of *O'Melveny*¹⁴² and *Davis*.¹⁴³ The court dismissed *O'Melveny* as not relevant to the determination of how to fill gaps in statutes because it limited *O'Melveny* to the financial context and not appropriate to CERCLA. The court determined that CERCLA's remedial nature enjoys some special advantage over other federal statutes because it necessitates uniformity in application. However, the court did not advance any other reasons why the uniformity was necessary, leading Judge Rendell in her concurrence and dissent to comment that "[t]o say that the need for uniformity is the articulated federal policy supplying the rationale for creating federal common law is to put the analytic rabbit in the hat, so to speak."¹⁴⁴ In this way, Judge Rendell emphasizes that if uniformity was a federal policy goal, then all federal statutes would necessitate a federal rule, making state common law obsolete whenever a federal statute was involved.

Furthermore, uniformity itself cannot be a reason for uniformity. As Judge Rendell observed, the majority's reasoning was circular.¹⁴⁵ There is no compelling federal need to implement this standard uniformly. The policy reasons motivating CERCLA will not be frustrated if certain successor corporations in one state are punished while similarly situated successor corporations in other states are not because the articulated goal of CERCLA is to ensure that "everyone who is potentially responsible for hazardous-waste contamination . . . be forced to contribute to the costs of cleanup."¹⁴⁶ The definition of those who are potentially responsible for the contamination will vary from state to state, and successor corporations are likely to be cognizant of the applicable state laws before engaging in their transaction. These state-by-state variations have been in place for years and therefore to apply a federal rule in this situation would serve only to upset the legitimate expectations of the parties when they entered into the transaction.

Moreover, Judge Rendell's dissent indicates that uniformity cannot be "the single animating principle" behind federal statutes because "resort would never be had to state law assuming some variation as among the different laws."¹⁴⁷ In this way, following the Third Circuit's majority opinion, gaps in all remedial federal statutes must only be filled by federal common law. Moreover, to extend it further, the court is implying that a federal rule is the only solution for gap-filling of all federal statutes, thus effectively abrogating the motivating principles of the *Erie* doctrine. Furthermore, Judge Rendell's statement indicates her opinion that the majority has

¹⁴² *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79 (1994).

¹⁴³ *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001).

¹⁴⁴ 423 F.3d at 317 (Rendell, J., concurring and dissenting).

¹⁴⁵ *Id.*

¹⁴⁶ 491 U.S. at 21.

¹⁴⁷ 423 F.3d at 317 (Rendell, J., concurring and dissenting).

frustrated the canon of statutory construction that courts should not make law whenever possible, which they clearly did here, as the same result would have been reached under Pennsylvania state law. In this way, the court made law by deciding that an *Erie* analysis was necessary.

In a striking departure from Supreme Court precedent, the Third Circuit distinguished *O'Melveny* as being only applicable to the banking context and not extended to gap-filling procedures for all federal statutes. Furthermore, the Third Circuit also ignored Supreme Court dictum that a federal standard should only be applied if Congress makes its intention to upset the balance of power "unmistakably clear in the language of the statute."¹⁴⁸ The application of a federal rule should only be in an extraordinary case where Congress has made a specific statement about their intention to upset the federal and state balance of power.¹⁴⁹ Clearly Congress did not make such a statement in either the CERCLA statute itself or its legislative history. This important federalism principle, that states retain the power unless Congress explicitly adopts a law requiring abrogation of state law, is fundamental to the interplay between Congressional and Judicial powers. In this way, gaps under federal statutes should be filled with state law unless Congress specifically states that it wishes for a uniform standard to apply. This balance is undermined by the Third Circuit's insistence on applying a uniform federal standard. If the court instead adopted Judge Rendell's viewpoint of using state law, they would have achieved exactly the same result without having to upset fundamental principles of federalism.

Moreover, this is a situation where the Third Circuit is making law, rather than applying existing rules, because deciding the case under state law would have achieved the same result. In fact, in its decision to use "[t]he general doctrine of successor liability in operation in most states",¹⁵⁰ the Court has applied the exact same successor liability principles under a federal rule as it would have if it had chosen to apply Pennsylvania law. In fact, the Third Circuit used Pennsylvania's definitions of the four exceptions to successor non-liability to articulate the principle.¹⁵¹ In this way, the first part of the court's majority opinion amounts to little more than dicta attempting to stretch the application of CERCLA to cases beyond its jurisdiction. In fact, the standards for the exceptions to the general rule of successor non-liability are the same in all of the states that the Third Circuit has jurisdiction in, Pennsylvania, New Jersey,¹⁵² and Delaware.¹⁵³ By doing this, the court has extended itself beyond its appropriate authority.¹⁵⁴

¹⁴⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (the Federal Age Discrimination in Employment Act does not supercede Missouri's establishment of qualifications for judges as Congress did not clearly state its intention to upset the balance of state and federal powers).

¹⁴⁹ *O'Melveny*, 512 U.S. at 89.

¹⁵⁰ *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988).

¹⁵¹ See *SmithKline Beecham Corp. v. Rohm and Haas Co.*, 89 F.3d 154, 162 n.6 (3d Cir. 1996) (citing *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir. 1985) (applying Pennsylvania law)).

¹⁵² *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 342 (N.J. 1981) (citing *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555 (N.J. Super. 1970)).

¹⁵³ *In re Asbestos Litig. (Bell)*, 517 A.2d 697, 699-700 (Del. Super. 1986).

¹⁵⁴ As discussed above, the exceptions to successor non-liability vary somewhat from state to state. However, because there is no variability between the states within the Third Circuit's jurisdiction on the exceptions to successor non-liability, the court has thereby encroached on the jurisdiction of other Circuit

Furthermore, the Third Circuit's rationale that CERCLA is a remedial statute and thus requires uniform application of a federal standard, cuts against the weight of cases that dictate that the remedial nature of statutes is not sufficient reason for a federal rule.¹⁵⁵ Aside from the banking context,¹⁵⁶ Federal courts have found state law applicable to fill gaps in claims filed under the Federal Employees Health Benefits Act (FEHBA),¹⁵⁷ the bankruptcy context,¹⁵⁸ and the Employee Retirement Income Security Act (ERISA).¹⁵⁹ Because they declined to use similar gap-filling techniques to those employed by other federal courts in applying state law to holes in remedial statutes, the Third Circuit has essentially created its own law that is applicable only to CERCLA.

Moreover, the court's determination that the federal common law rule should mirror "[t]he general doctrine of successor liability in operation in most states",¹⁶⁰ raises another set of problematic issues. The Third Circuit's pronouncement fundamentally abrogates the law in operation in a minority of states. By choosing a uniform application of successor liability law in the CERCLA context, the court suggests that those states that do not subscribe to the majority of states' viewpoints necessarily have inferior successor liability laws.¹⁶¹ This, in fact, is not the case. Some jurisdictions have adopted a broader definition of successor liability by including the "substantial continuity" doctrine as a fifth exception to the general rule of successor non-liability.¹⁶² In many ways, this expansion of liability by some jurisdictions allows for more parties to be held liable for the prior company's actions, and this extension comports well with CERCLA's motivating objective of compelling "everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup."¹⁶³

It is important to note, however, that the sole reason that the *General Battery* court decided not to use the "substantial continuity" test was because it had not been used in a majority of states. As above, it is clear that the "substantial continuity" exception is an expansion of successor liability into an area that would follow the stated objectives of CERCLA.¹⁶⁴ In this way, the Third Circuit prioritized the need

courts.

¹⁵⁵ See *O'Melveny*, 512 U.S. 79; *Atherton*, 519 U.S. 213; *Davis*, 261 F.3d 1.

¹⁵⁶ *O'Melveny*, 512 U.S. 79.

¹⁵⁷ 5 U.S.C. §§ 8901-8914 (2000). See *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005) (New York law should be applied to fill gaps in the FEHBA).

¹⁵⁸ See *Mickowski v. Visi-Trak Worldwide, LLC*, 413 F.3d 501 (6th Cir. 2005) (Ohio law governs successor liability claim even though a federal bankruptcy statute was applied).

¹⁵⁹ 29 U.S.C. §§ 1001-1461 (2000). See *Gerosa v. Savasta & Co., Inc.*, 329 F.3d 317 (2d Cir. 2003).

¹⁶⁰ *Id.*

¹⁶¹ By selecting a federal rule, the Third Circuit has usurped contracting parties' legitimate expectations when entering into a contract. In an acquisition context, both parties are presumably sophisticated and know (or should know) of the particular state successor liability laws. If a uniform federal standard is applied, these sophisticated parties are not protected by the state law that they chose to contract under.

¹⁶² See, e.g. *New York v. Nat'l Service Indus., Inc.*, 352 F.3d 682, 686-87 (2d Cir. 2003) (Congress' preemption of state law under ERISA is only based on "principles developed on evolution of the law of trusts." All other ERISA gap-filling should be done with state law).

¹⁶³ *Union Gas Co.*, 491 U.S. at 21.

¹⁶⁴ Using the "substantial continuity" analysis, Exide would clearly be held liable for the cleanup costs. As discussed above, substantial continuity is essentially the same as the "de facto merger" or "mere continuation" exceptions absent the "continuity of ownership" requiring. As the Third Circuit admitted, the "continuity of ownership" prong of the de facto merger was a close question. However, eliminating

for uniform application of CERCLA over the need to hold liable all of those who were potentially responsible for creating the environmental hazard in the first place. In this way, the court has incorrectly held that Congress's stated objective for passing CERCLA is significantly less important than the need for uniformity, a goal not specifically expressed by Congress.¹⁶⁵ In fact, as Judge Rendell suggests in her dissent, uniformity is likely not something that Congress chose to focus on when it passed CERCLA.¹⁶⁶ Essentially, Congress had the ability to require a uniform standard of application of CERCLA, and chose not to do so. By refusing to insist on uniformity, Congress implicitly has authorized state law to be applied to gap-filling.

B. Policy Reasons for Accepting Exide's Arguments

CERCLA is a remedial statute and thus should be read broadly. Nonetheless, the Third Circuit has read CERCLA too broadly in this context because it is imputing liability to Exide well beyond what was bargained for between General Battery and Price Battery. Furthermore, the 2000 merger of General Battery into Exide adds another layer of abstraction that complicates this matter. If the negotiators of the agreement between Price Battery and General Battery in 1966 could not have contemplated the potential future costs of cleanup, it is impractical that those negotiating the Exide/General Battery deal thirty-four years later would believe that they were assuming this liability.

Exide argued to the Third Circuit that finding them liable for the environmental cleanup falls beyond the nature of the transaction between Price Battery and General Battery.¹⁶⁷ A finding of liability would go beyond their "legitimate expectations . . . during negotiation and sale"¹⁶⁸ and therefore is not what the parties contracted for.

The Third Circuit dismissed this argument for two reasons. First, the court stated that the parties knew of the de facto merger standard under *Pennsylvania* law when they contracted in 1966.¹⁶⁹ Moreover, the court held that the federal standard "tracks" the Pennsylvania rule.¹⁷⁰ It is fundamental to this case that the Third Circuit cited the Pennsylvania standard of de facto merger as applicable. This citation to state common law either undermines the entire first part of their holding that a federal common law rule is applicable, or if the federal standard is applicable, it undermines their holding that the parties knew what they were contracting for. In either case, the court has rendered part of their holding meaningless. If the parties knew the standard under Pennsylvania law, they surely should not be expected to

that requirement, the court's analysis of the remaining three prongs of the de facto merger standard shows that the General Battery / Price Battery transaction would clearly have satisfied the substantial continuity exception. This is evidenced by the Eastern District of Pennsylvania's alternative holding that Exide could be held liable under the substantial continuity doctrine. 2002 WL 319940 at *10-*12. On the other hand, using the alternative elements for substantial continuity provided by the Carolina Transformer court, *supra* note 61, the General Battery / Price Battery transaction would fail on three of its elements: retention of the same production facilities in the same location; retention of the same name; and whether the successor holds itself out as the continuation of the previous enterprise.

¹⁶⁵ See H.R. REP. NO. 96-1016(I), pt. 1, at 18-20 (1980); H.R. REP. NO. 96-172(II), at 11 (1979).

¹⁶⁶ 423 F.3d at 309-13 (Rendell, J., concurring and dissenting).

¹⁶⁷ 423 F.3d at 308.

¹⁶⁸ *Polius*, 802 F.2d at 83.

¹⁶⁹ 423 F.3d at 308-09.

¹⁷⁰ *Id.* at 308.

know a federal standard that had not been defined as of 1966.¹⁷¹

The second reason that the Third Circuit presented for its rejection of Exide's argument that CERCLA liability is not part of what General Battery bargained for in its acquisition of Price Battery was that the CERCLA statute does not concern itself with the expectations of the parties at the time of contracting.¹⁷² This holding is based on to the remedial nature of CERCLA combined with CERCLA's express purpose of punishing all those who are potentially responsible for creating the contamination as expressed above. Nonetheless, the contract between Price Battery and General Battery specifically allocated the risk of tort claims. General Battery purposely accepted liability for all of Price Battery's *non-tort* claims as part of the agreement. In this way, both Price Battery and General Battery had generally discussed and bargained for the situation that eventually arose, and General Battery chose not to assume that liability. Nevertheless, it is important to point out that this was not done to merely get around CERCLA¹⁷³ or the Pennsylvania laws of successor liability. General Battery merely proposed the conditions upon which it was willing to purchase Price Battery in a mixed cash/stock transaction, and Price Battery accepted those terms. In fact, this transaction was more in accord with the traditional rule of successor non-liability because neither Price Battery had no "ongoing interest" in General Battery.¹⁷⁴ The Price/Price Battery/General Battery transaction was legally structured in such a way to take advantage of the successor non-liability doctrine in effect in Pennsylvania. Subjecting Exide to liability serves to undermine the legitimate expectations of the parties at the time of contracting.

Nevertheless, CERCLA clearly seeks to abrogate the expectations of the parties if it is determined that they were potentially responsible for creating the environmental hazard. One argument not considered by the Third Circuit is that the equitable doctrine of laches would prevent the United States from exacting liability from Exide. CERCLA specifically provides a list of defenses to the liability provided by its purview in certain limited circumstances.¹⁷⁵ The unresolved question in

¹⁷¹ In fact, *General Battery*, and to a lesser extent *Smith Land*, were the first indications that successor corporations would be liable under a uniform federal standard of successor liability under CERCLA. Both *General Battery* (2005) and *Smith Land* (1988) were decided well after the Price Battery/General Battery transaction of 1966. In fact, CERCLA itself was not enacted until 1980, fourteen years after the initial transaction. However, as will be discussed *infra*, Congress intended CERCLA to have a retrospective application for remedial reasons.

¹⁷² 423 F.3d at 308-09.

¹⁷³ General Battery and Price Battery could not have possibly structured their transaction for the sole purpose of avoiding CERCLA's purview as CERCLA did not exist in 1966.

¹⁷⁴ In fact, Price Battery had no interest in General Battery at all. Price himself received stock and a board position, but the company did not retain any interest. 423 F.3d at 296.

¹⁷⁵ 42 U.S.C. § 9607(b) Defenses specifically states:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a

fashioning equitable remedies is whether this list is exhaustive or an application of *ejusdem generis*. Federal courts have generally held that laches is not an appropriate defense to CERCLA liability because CERCLA itself provides for “only a few, very limited defenses.”¹⁷⁶

On the other hand, one acceptable defense under CERCLA is that the action is barred by the statute’s imposed three year statute of limitations from the time of the Environmental Protection Agency’s discovery of the contamination.¹⁷⁷ The EPA initially learned of environmental contamination of two of Price Battery’s waste battery disposal sites in 1992, but did not bring suit in the Eastern District of Pennsylvania until June 15, 2000. While the EPA continued to find more waste disposal sites with elevated levels of lead, Exide, at most, should only be held liable for those sites that were discovered to be contaminated after June 15, 1997. Neither the District Court nor the Third Circuit’s opinions reference this limitation.

C. Future Implications of the *General Battery* Decision

The central holding of *United States v. General Battery Corp., Inc.*,¹⁷⁸ is clear: because of CERCLA’s nature as a remedial statute, successor corporations are more likely to be punished for the environmental contamination by their predecessors than ordinary successors. In this way, the Third Circuit has essentially created a fifth exception to the general rule of successor non-liability. By broadening liability well beyond that anticipated by and bargained for between the parties, the court has upset centuries of established contract doctrine. When Price Battery and General Battery were contemplating their transactions, they did not expect that the enactment of an environmental cleanup statute would potentially cost General Battery \$6.5 million. Moreover, General Battery explicitly refused to assume that risk by accepting liability for all of Price Battery’s non-tort damages. To extend the rule to such an extreme serves only to frustrate the fundamental contract concept of the mirror-image rule.¹⁷⁹

Additionally, the Third Circuit has overstepped its jurisdictional purview by requiring the application of a uniform federal rule rather than existing state law. In

preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or (4) any combination of the foregoing paragraphs.

Id.

¹⁷⁶ See *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1518, n.15 (10th Cir. 1991) (CERCLA defenses are limited); *City of Wichita, Kansas v. Trustees of APCO Oil Corp. Liquidating Trust*, 306 F.Supp.2d 1040, 1096-97 (D. Kan. 2003) (declining to accept laches as a defense to CERCLA liability).

¹⁷⁷ 42 U.S.C. § 9613(g)(1)(A).

¹⁷⁸ 423 F.3d 294 (3d Cir. 2005).

¹⁷⁹ The Supreme Court of Minnesota has described the mirror-image rule as “[a]n offer of a bargain by one person to another imposes no obligation upon the former, unless it is accepted by the latter according to the terms on which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same is agreed to by the party who made it. Where the negotiations are by letters, they will constitute no agreement unless the answer to the offer is a simple acceptance, without the introduction of any new term.” *Langellier v. Shaefer*, 36 Minn. 361, 363 (1887). In this way, Price Battery’s mirror image acceptance of General Battery’s offer of acquisition specifically did not contemplate liability for non-tort damages. Imposing liability would essentially compel General Battery to add words into the contract that they did not bargain for.

this way, the decision further upsets notions of contract law. When General Battery, a sophisticated contracting party, was negotiating for the acquisition of Price Battery, it negotiated subject to Pennsylvania's contract laws, not some abstract notion of federal common law, or majority rule, that was created by courts forty years after the fact. In terms of equity, Exide should only be held liable under Pennsylvania law, if at all.

Moreover, there is the complicating situation in this matter that Exide serves as the successor in interest to General Battery. Exide did not participate in the negotiations in any way with Price Battery. While successors in interest do assume all of the rights and obligations of their predecessors, it is impractical and unrealistic to find that Exide assumed General Battery's assumption of liability that General Battery specifically excluded from its acquisition in 1966. Even if a court determines, as the Third Circuit did, that General Battery should have been aware that it could be held responsible for environmental contamination, it does not logically follow that Exide assumed that liability as well when it became a successor in interest to General Battery. General Battery operated under the assumption that it was not responsible for Price Battery's tort damages. This belief was central to the nature of the transaction between General Battery and Exide. Had General Battery disclosed that it had an additional \$6.5 million liability on its balance sheet, its acquisition cost by Exide would logically be \$6.5 million lower. In this way, the Third Circuit is punishing an innocent (or at least ignorant) party.

In this same vein, while the Third Circuit superficially determined that Exide is liable for the cleanup costs because the motivating purpose of CERCLA was to punish all those who are potentially responsible for creating the environmental hazard in the first place, the court is struggling with where to allocate the risk of loss. Between two innocent parties, the United States and Exide, the Third Circuit has determined that it would rather Exide bear the costs of cleanup because it had some relationship, albeit tenuous, with the original polluter, rather than the United States taxpayers. However, in doing so, the court has implicitly raised the cost of corporate transactions for all future corporate transactions.

Essentially, the Third Circuit's decision compels acquiring corporations to perform more due diligence than is usually required in merger situations. Not only will successor corporations have to look at their predecessor's financial statements and management structure, but also, under this new General Battery rule, acquirers must also research to find out if their predecessor has created environmental contamination (by both the current standards as well as potential future standards) and determine how much that contamination could cost them in the future. Moreover, corporations such as Exide that acquire businesses that have previously merged with potential contaminating corporations, the result becomes absurd, as they will have to determine whether the original acquirer performed this enhanced due diligence when it acquired the original predecessor company. If it did not, the cost of doing complicated corporate transactions will likely skyrocket.

The Third Circuit conceded that is tenuous at best whether the General Battery / Price Battery transaction amounted to a *de facto* merger.¹⁸⁰ Extending liability to Exide on this fragile foundation is both inequitable and impracticable. By holding

¹⁸⁰ *Id.* at 306.

Exide liable for the cost of the lead remediation, the court has essentially imposed a \$6.5 million closing cost on Exide for closing the transaction. Not only did Exide not bargain for this assumption of liability, it was not given the chance to do so as it was merely negotiating for the acquisition of General Battery which it assumed was not responsible for the liability it had not specifically assumed in its acquisition of Price Battery.

VI. CONCLUSION

In *United States v. General Battery Corp., Inc.*,¹⁸¹ the Third Circuit departed from the majority of federal circuits by holding that a uniform federal rule of successor liability was desirable under the remedial CERCLA statute. In doing so, the court determined that the federal rule was essentially the same as the law of successor liability in operation in Pennsylvania. By interpreting the statute in this way, the Third Circuit created an exception to the general rule of successor non-liability for corporations that acquire businesses which would have been responsible for the environmental cleanup. Essentially, the court held that if the predecessor company was found liable for remediation costs, then the successor company will be held liable as well, regardless of traditional notions of successor liability. In doing so, the court disturbed centuries of contract doctrine and fundamental equity principles. Therefore, potential successor corporations now have to figure in the prospective future costs of environmental cleanup into their acquisition costs.

Exide petitioned the Third Circuit for an en banc rehearing of this case, which was denied on November 4, 2005.¹⁸² Exide had ninety days from that date to appeal to the United States Supreme Court.¹⁸³ On January 20, 2006, the Supreme Court issued an Order extending the time period for Exide to file a petition for writ of certiorari until April 3, 2006.¹⁸⁴ On March 31, 2006, Exide filed their petition for writ of certiorari.¹⁸⁵ The Supreme Court denied *certiorari* on October 2, 2006.¹⁸⁶

¹⁸¹ 423 F.3d 294 (3d Cir. 2005).

¹⁸² Third Circuit Docket, *United States v. General Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005) (No. 03-3515)

¹⁸³ 28 U.S.C. §2101(c) (2002). Ninety days from November 4, 2005 was February 2, 2006.

¹⁸⁴ Third Circuit Docket, *United States v. General Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005) (No. 03-3515)

¹⁸⁵ United States Supreme Court Docket, *Exide Technologies v. United States*, (No. 05-1269).

¹⁸⁶ *Id.*