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Tort Law—Towards a Legislative Solution to the Successor Products Liability Dilemma—Niccum v. Hydra Tool Corp., 438 N.W.2D 96 (Minn. 1989)

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CASE NOTE

**Tort Law—Towards a Legislative Solution to the Successor Products Liability Dilemma—Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989)**

In *Niccum v. Hydra Tool Corp.*, the Minnesota Supreme Court was faced with a head-on collision between traditional principles of corporate law and strict products liability. The issue was whether an injured plaintiff, who was otherwise without a remedy, should be allowed to recover against a corporate successor which had neither manufactured the injury-causing product nor introduced it into the stream of commerce.

In a decision with far-reaching implications for business and product liability plaintiffs, the supreme court in *Niccum* declined to expand the “mere continuation” exception to successor corporate liability and rejected the controversial “product line” theory as a radical departure from the principles of corporate law. Further, the court held that a successor corporation has no independent duty to warn of harms allegedly caused by defects in a predecessor’s product.

This Case Note maintains that the court reached the only decision it could under the Minnesota Business Corporations Act (MBCA). But because the decision produces harsh results for product liability plaintiffs, the author concludes that the legislature should modify the MBCA so as to provide such plaintiffs with a limited, yet needed remedy.

**History of the Law Involved**

In resolving the issue of strict liability for successor corporations, most courts have applied corporate as opposed to tort law principles. Under corporate law, “[t]he traditional . . . rule is that the acquiring corporation (‘the successor’) is not liable for the debts and

1. 438 N.W.2d 96 (Minn. 1989).
2. Id. at 99, 100.
3. Id. at 101.
liabilities of the acquired corporation ('the predecessor')."\textsuperscript{5} However, successor liability may vary depending upon the type of corporate acquisition involved.\textsuperscript{6}

There are four widely recognized exceptions to the traditional corporate law rule. The exceptions include: 1) the purchaser expressly or impliedly agrees to assume such debts; 2) the transaction amounts to a consolidation or merger of the corporation; 3) the purchasing corporation is "merely a continuation" of the selling corporation; or 4) the transaction is entered into fraudulently in order to escape liability.\textsuperscript{7}

\textsuperscript{5} Note, \textit{Products Liability of Successor Corporations: A Policy Analysis}, 58 \textit{Ind. L.J.} 677 (1983). The traditional test developed within the context of corporate, contract and property law. It provided a balanced means of facilitating corporate acquisitions and promoting the transferability of capital while protecting the interests of commercial creditors. By protecting both the creditors of the predecessor and protecting the successor from unknown or contingent liability, the rule offered fair and equitable treatment to parties involved in corporate acquisitions. \textit{Id.} at 683.


\textsuperscript{6} See 2 B. Fox & E. Fox, \textit{Corporate Acquisitions and Mergers} §§ 23.01–04 (1986). There are three major types of corporate acquisition: 1) statutory merger or consolidation; 2) purchase of the acquired corporation's stock; and 3) cash purchase of the acquired corporation's assets. \textit{Id.; see also} 15 W. FLETCHER, \textit{Cyclopedia of the Law of Private Corporations} §§ 7041, 7118, 7121 (rev. perm. ed. 1983). If the corporate acquisition is the result of a statutory merger or consolidation, the surviving corporation will usually be held to have assumed the liabilities of its predecessor, which ceases to exist. 15 W. FLETCHER, \textit{supra}, at § 7121.


As Yamin indicates, however, there is an indirect assumption of liability because the acquired corporation is still in existence and subject to liability. \textit{Id.} Because the acquired corporation remains a subsidiary of the acquiring corporation with its own legal identity, it remains subject to suit. Thus, the sale of the predecessor's stock has no real effect on a product liability plaintiff's ability to sue the acquired corporation. \textit{Id.} at 214.

If the corporate acquisition is through a cash purchase of the acquired corporation's assets, the general rule is that the successor corporation does not assume the present or contingent liabilities of the predecessor. For a complete collection of cases invoking this rule, see 15 W. FLETCHER, \textit{supra}, at § 7122 n.1. As will be seen, it is this general rule which the mere continuation and product line exceptions seek to modify. (\textit{Niccum} involved a cash purchase of the Wisconsin Equipment Corporation's assets by a wholly-owned subsidiary of the Hydra Tool Corporation.)

\textsuperscript{7} For a list of cases applying individual exceptions, see Recent Developments, \textit{Torts—Products Liability—Successor Corporation Strictly Liable for Defective Products Manufactured by the Predecessor Corporation—Ramirez v. Amsted Industries, Inc. (N.J. 1981), 27
The traditional rule was developed prior to the advent of modern products liability law.\textsuperscript{8} As a result, it fails to consider the interests of consumers injured by defective corporate products.\textsuperscript{9} Consequently, the rule's emphasis on successor non-liability contradicts strict liability theory which favors shifting the costs associated with defective products from injured consumers to manufacturers.\textsuperscript{10}


\textsuperscript{9} Id. at 815. In particular, the traditional corporate law rule poses problems for products liability plaintiffs seeking compensation for their injuries. A plaintiff may be left without a remedy if the predecessor corporation has dissolved and no recovery is possible against the successor corporation.


A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

\ldots [T]he refusal to permit the manufacturer to define the scope of its own responsibility for defective products \ldots [makes it] clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

\ldots The purpose of such liability 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.

\ldots "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."

\textit{Id.} at 62-64, 377 P.2d at 900-01, 27 Cal. Rptr. at 700-01 (1963) (citations omitted) (emphasis supplied).

In \textit{Escola v. Coca Cola Bottling Co.}, 24 Cal. 2d 453, 150 P.2d 436 (1944), and later in \textit{Greenman}, Justice Traynor addressed the reasons for imposing strict products liability on manufacturers. The first reason is that manufacturers are better able to anticipate and protect themselves against product defects than consumers because manufacturers can purchase insurance and spread the cost to the public in the form of higher prices. \textit{Escola}, 24 Cal. 2d at 461-62, 150 P.2d at 440-41 (Traynor, J., concurring). The second reason emphasizes the manufacturer's causal role in causing the injury by virtue of having placed the product in the stream of commerce. \textit{Id.} at 462, 150 P.2d at 441 (Traynor, J., concurring). The third reason protects consumer expectations based on their reliance on the manufacturer's express or implied representations regarding product quality. \textit{Id.} at 463, 150 P.2d at 443 (Traynor, J., concurring).

The Restatement formulation largely follows the reasons enunciated by Justice Traynor for imposing strict products liability on manufacturers. Section 402A of the Restatement provides as follows:

\textit{§ 402A. SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER.}

(1) One who sells any product in a defective condition unreasonably dan-
To overcome this problem, plaintiffs have sought to expand the "mere continuation" exception, as well as add an additional "product line" exception to those discussed above.11

THE MERE CONTINUATION EXCEPTION

Products liability plaintiffs have urged the courts to expand the mere continuation exception to focus more on the continuity of the business operation than on the existence of a particular corporate entity.12 Although the Michigan Supreme Court adopted this approach in \textit{Turner v. Bituminous Casualty Co.},13 it remains the only state

gerous 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 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.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product or entered into any contractual relation with the seller.

\textbf{Restatement (Second) of Torts § 402A (1966).}

For additional information on the development of products liability theory, see W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on the Law of Torts § 1, at 6 (5th ed. 1984).

11. \textit{See Comment, supra} note 8, at 815.

12. This is diametrically opposed to the traditional corporate law origins of the exception which emphasize the continuity of the corporate entity rather than its business operations. \textit{See Sell, supra} note 4, at 68. Proponents of expanding the mere continuation exception argue that the traditional approach within a products liability context places unwarranted emphasis on the form of a particular corporate transaction which, to the consumer, is largely irrelevant. \textit{Id.} at 76-78. "[T]he new corporate entity is literally a mere continuation of the old as far as the consumer is concerned. The consumer had no control over the corporate structure/ownership charge [sic], and ought not be penalized because of it." Appellant's Brief at 11, Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989). "Thus, by virtue of the formalities of corporate transfer and the quirks of corporate law, all liability for product defects [is] contracted away. The protection of the consumer, the very heart of product liability law, [is] effectively eliminated." \textit{Id.} at 11.

13. 397 Mich. 406, 244 N.W.2d 873 (1976). \textit{Turner} expanded the mere continuation exception, holding that successor liability will follow "where the totality of the transaction demonstrates a basic continuity of the enterprise." \textit{Id.} at 429-30, 244 N.W.2d at 883-84. \textit{Turner} is unique because, contrary to the general rule, it held a successor corporation liable for its predecessor's defective product even though the successor purchased the predecessor's assets for cash.

Under the continuity of enterprise rule adopted in \textit{Turner}, the following four factors make out a prima facie case of successor liability:

1) There was a basic continuity of the enterprise of the seller corporation, including, apparently, a retention of key personnel, assets, general business operations, and even the [predecessor's] name.

2) The seller corporation ceased ordinary business operations, liquidated,
to have done so.\textsuperscript{14}

THE PRODUCT LINE EXCEPTION

The California Supreme Court adopted the product line exception in \textit{Ray v. Alad Corp.}\textsuperscript{15} Under this theory, a successor corporation which continues to manufacture a predecessor's product line "assumes strict tort liability for defects in units of the same product line

\begin{itemize}
  \item[3] The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the normal business operations of the seller corporation.
  \item[4] The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.
\end{itemize}

\textit{Id.; see also} \textit{Cyr v. B. Offen & Co.,} 501 F.2d 1145 (1st Cir. 1974) (applying New Hampshire law).

\textbullet\textsuperscript{14} Eight states—Kentucky, Missouri, Nebraska, New York, North Dakota, South Dakota, Vermont and Wisconsin—have all declined to expand the mere continuation exception. See \textit{Wallace v. Dorsey Trailers Southeast, Inc.}, 849 F.2d 341, 343 (8th Cir. 1988) (court declining to expand mere continuation exception because company did not purchase all of acquired company's assets, employees were retained under new employment contracts, and no common identity was found to exist between the two companies); \textit{Conn v. Fales Div. of Mathewson Corp.}, 835 F.2d 145, 147 (6th Cir. 1987) (although Kentucky has adopted statutory products liability, court found that the courts in Kentucky have not adopted the "complete line of production" rule); \textit{Jones v. Johnson Mach. & Press Co.}, 211 Neb. 724, 729, 320 N.W.2d 481, 484 (1982) (court declined to expand traditional rule, holding that the question of whether strict liability in tort should be altered is a question for the legislature); \textit{Schumacher v. Richards Shear Co.}, 59 N.Y.2d 239, 245, 451 N.E.2d 195, 198, 464 N.Y.S.2d 437, 440 (1983) (in order to have "mere continuation" the predecessor company must be extinguished, but in this case the predecessor had survived); \textit{Downtowner, Inc. v. Acrometal Products, Inc.}, 347 N.W.2d 118, 122 (N.D. 1984) (court found that mere continuation rule would serve to frustrate the policies behind strict products liability theory); \textit{Hamaker v. Kenwel-Jackson Mach., Inc.}, 387 N.W.2d 515, 519 (S.D. 1986) (The court declined to expand the mere continuation exception where corporate officers were not the same, where there was an express contract not to assume any of the predecessor's liabilities, and where the defective product was not manufactured or sold by the successor corporation. The court held that the mere cash purchase of a predecessor corporation does not constitute a continuation by the successor.); \textit{Ostrowski v. Hydra-Tool Corp.}, 144 Vt. 305, 308, 479 A.2d 126, 127 (1984) (court declined to expand mere continuation exception because it represents a threat to small businesses); \textit{Fish v. Amsted Indus., Inc.}, 126 Wis. 2d 293, 312, 376 N.W.2d 820, 829 (1985) (court declined to expand mere continuation exception, finding that such changes should be made by the legislature).

\textbullet\textsuperscript{15} 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). In \textit{Ray}, the California Supreme Court gave a three-point rationale for its ruling: (1) the plaintiff's lack of remedy against the original manufacturer; (2) the successor's ability to assume the predecessor's risk spreading role by means of insurance and increasing product costs; and (3) essential fairness in requiring a successor who benefits from a predecessor's goodwill to bear the predecessor's products liability costs. \textit{Id.} at 31, 560 P.2d at 5, 136 Cal. Rptr. at 579.
While New Jersey, Pennsylvania and Washington have also adopted the product line exception, many other states have not.  

MINNESOTA LAW  

Minnesota follows the traditional corporate law rule of successor non-liability. In J.F. Anderson Lumber Co. v. Myers, the Minnesota Supreme Court held that there is no corporate successor liability where one corporation sells or transfers its assets to another corporation unless one of the four traditional exceptions applies. The
court's decision in *J.F. Anderson* was buttressed by the state legislature in 1981 through the passage of the Minnesota Business Corporations Act. The MBCA provides:

The transferee is liable for the debts, obligations, and liabilities of the transferor only to the extent provided in the contract or agreement between the transferee and transferor or to the extent provided by this chapter or other statutes of this state.

The reporter's notes to this section clearly indicate that the legislation was intended to minimize transferee "exposure to product liability claims for items manufactured by the transferor."

Because *J.F. Anderson* concerned a mechanics lien rather than a products liability claim, Minnesota courts did not officially rule on the mere continuation exception within a products liability context until 1988. In that year, a Minnesota federal district court in *Everest v. American Transportation Corp.* explicitly declined to extend the mere continuation exception, noting that "Minnesota courts have indicated that the *J.F. Anderson* standard also applies to product liability claims."

The Minnesota Court of Appeals first encountered the product line exception in *Standal v. Armstrong Cork Co.* However, *Standal* did not determine whether the product-line rule would be adopted in Minnesota. Instead, the court merely followed a straight choice of law analysis holding a successor corporation liable under Penn-
sylvania’s product-line rule. As Standal did not determine which state followed the "best rule of law," Minnesota’s position on the product line exception remained unclear until the ruling of the Minnesota Supreme Court in Niccum v. Hydra Tool Corp.

**Niccum v. Hydra Tool Corp.**

In 1985, Michael Niccum lost part of his right hand at work while operating a press brake. Upon learning that the original manufacturer of the press brake had gone out of business, Niccum brought suit against Hydra Tool Corporation.

The press brake that injured Niccum had been designed by the Wisconsin Machine Corporation (WMC). In February 1973, WMC sold the press brake design and patent to the Wisconsin Equipment Corporation (WEC). In May 1973, WEC manufactured and sold the press brake, which ultimately injured Niccum, to Alloy Hard Facing & Engineering Co. Exactly who owned and operated the machine after Alloy is unknown, but it was later purchased by Niccum's employer, A & D Fabricating Co. Following the manufacture and sale of the press brake, WEC was acquired by HTC, Inc., a subsidiary of Hydra Tool Corporation. HTC, Inc. and WEC

27. *Id.* at 388. In *Standal*, a Minnesota construction worker brought a products liability action against a Pennsylvania manufacturer for injuries sustained from exposure to asbestos insulation made by the manufacturer’s predecessor. After discussing the technical aspects of choice of law analysis, the court noted that application of Pennsylvania law would further predictability and "further Minnesota's interest in providing compensation for resident tort victims." *Id.* at 382-83.


29. 438 N.W.2d 96 (Minn. 1989).
30. *Id.* at 97.
31. *Id.* at 96-97. Hydra Tool Corporation was the corporate successor to the original manufacturer. The suit was filed on December 5, 1986.
32. *Id.*
33. *Id.* WMC dissolved soon afterward in December 1973.
34. *Id.* Alloy was located in Minneapolis, Minnesota.
35. *Id.*
36. *Id.* at 98. HTC, Inc., a wholly owned subsidiary of Hydra Tool Corporation, was created in 1977 for the sole purpose of purchasing WEC. Appellant’s Brief at 5, Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989). WEC was acquired by HTC, Inc. on July 22, 1977. *Id.* HTC’s officers were nearly identical to those of Hydra Tool. *Id.* at 6. Prior to the acquisition, the newly incorporated Hydra Tool Corporation had no experience in product manufacturing. Its sole activity was the
signed a purchase agreement on July 22, 1977.\textsuperscript{37}

The parties expressly provided in the purchase agreement that HTC, Inc. "would assume no liability for injuries caused by WEC products already on the market."\textsuperscript{38} WEC explicitly agreed to retain any "unknown" liability.\textsuperscript{39} However, immediately after the sale, WEC dissolved.\textsuperscript{40}

In 1986, Michael Niccum filed a complaint against Hydra Tool Corporation seeking damages for the injury to his right hand.\textsuperscript{41} Hydra Tool moved for summary judgment, arguing that as a corporate successor to the manufacturer of the press brake it was not liable for injuries caused by a predecessor's product.\textsuperscript{42} The trial court granted Hydra Tool's motion for summary judgment, after concluding that Minnesota does not recognize a "mere continuation" or "product line" exception to the general limitation on corporate successor preparation of a factory to begin the manufacture of hydraulic press brakes, sheers and presses. Actual manufacturing commenced with the asset shift from WEC via HTC in early 1978. \textit{Id.}

\textsuperscript{37} \textit{Niccum}, 438 N.W.2d at 98. The purchase agreement contemplated a cash sale involving virtually all WEC assets, including the land, building, inventory, contracts, customer lists, accounts receivable, patents, trademarks, and "goodwill." \textit{Id.} Files and servicing records on each machine sold by WEC, including a file on the machine at issue, were also part of the transfer. \textit{Id.}

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.} The officers of WEC executed a Statement of Intent to Dissolve concurrent with the closing of the sale. Appellant's Brief at 6, Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989). Filing and recording of the dissolution statement was completed October 3, 1977, resulting in WEC being legally dissolved on that date. \textit{Id.} No provisions were made by either party to the transaction for any type of bond to cover "unknown" liability. \textit{Id.} Respondent clarified in its brief that: under the terms of the purchase agreement, WEC had the \textit{option} of dissolving after the execution of the purchase agreement. However, Hydra Tool Corporation had no knowledge of whether WEC would dissolve following the transaction... Moreover, even though WEC did dissolve in 1977, Hydra Tool Corporation was not aware of the dissolution. Respondent's Brief at 1, Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989) (citations omitted) (emphasis in original).

HTC, Inc. continued to manufacture press brakes of the WEC design at the WEC plant in Wisconsin for three months after the sale. \textit{See} Appellant's Brief at 6. During those three months, HTC manufactured approximately sixteen machines and marketed them under the Hydra Tool name. \textit{Id.} HTC then dissolved and its assets were acquired by Hydra Tool as contemplated by the purchase agreement. \textit{Id.} Hydra Tool subsequently moved its production operations to Greenwood, Mississippi, and manufactured mechanical press brakes there for approximately one year. \textit{Niccum}, 438 N.W.2d at 98.

\textsuperscript{41} \textit{Niccum}, 438 N.W.2d at 97. Plaintiff's complaint was filed on December 5, 1986.

\textsuperscript{42} \textit{Id.} In response, plaintiff brought a cross-motion for summary judgment on the issue of successor liability. Plaintiff also introduced a motion to amend his complaint to add a claim directly against Hydra Tool for failure to warn of a defective product. \textit{Id.}
liability.43

On appeal, the Minnesota Supreme Court recognized the intent of
the legislature "to limit any further extension of successor liability
beyond the traditional exceptions already provided in J.F. Ander-
son."44 Accordingly, the court reaffirmed the traditional limitations
on successor liability and refused to accept either the expanded mere
continuation exception or the product line exception.45

In rejecting the mere continuation exception, the court was per-
suaded by arguments emphasizing that the successor corporation
had not placed the defective product on the market, had received
little, if any, profit from the product and had not represented the
safety of its predecessor's product to the public.46

With respect to the product line exception, the supreme court
agreed with those courts which have dismissed it as "inconsistent
with elementary products liability principles."47 The court agreed
that the exception "threatens small successor businesses with eco-
nomic annihilation because of the difficulty involved in obtaining in-
urance for defects in a predecessor's product .... ."48 As a result,
the court concluded that such a "radical change" in the principles of
corporate law was better left to the legislature.49

In addition, the court rejected Niccum's argument that Hodder v.

43. Id. Further, the court held that under Minnesota law there is no direct cause
of action against a successor corporation for failure to warn users of defects in a
predecessor corporation's product. Id.
44. Id. at 99.
45. Id. at 99–100.
46. See id. at 99. In rejecting the expansion of the mere continuation theory, the
court held to J.F. Anderson's narrow interpretation of the third traditional exception.
See supra note 20 and accompanying text for a statement of the four exceptions. The
supreme court in J.F. Anderson stated that the third or "mere continuation" exception
"refers principally to a 'reorganization' of the original corporation, such as is accom-
plished occasionally under Chapter X of the Bankruptcy Act, 11 U.S.C.A. §§ 501 to
676, and perhaps under other state statutory devices." J.F. Anderson Lumber Co. v.
Myers, 296 Minn. 33, 38, 206 N.W.2d 365, 369 (1973) (citing 15 W. Fletcher, supra
note 6, at §§ 7122, 7200). The court in J.F. Anderson also observed that "[t]he mere fact
that a purchasing corporation is 'carrying on the same business' as the selling corporation is
efficient to make the purchasing corporation liable for the debts of the selling corporation." Id. at
38–39, 206 N.W.2d at 369 (emphasis supplied).
47. Niccum, 438 N.W.2d at 99–100 n.2. The court further noted that the excep-
tion is particularly inconsistent with strict liability principles since it imposes liability
without a corresponding duty. Id. at 100.
48. Id.
49. Id.; see also Note, Imposing Strict Liability Upon a Successor Corporation for the Defec-
tive Products of Its Corporate Predecessor: Proposed Alternatives to the Product Line Theory of
Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants, 72 COR-
NELL L. REV. 17 (1986).
Goodyear Tire & Rubber Co. created an independent duty for successor corporations "to warn of a defective, unreasonably dangerous product." The court stated that the duty to warn in Hodder was imposed upon subsidiary corporations, not successor corporations. Consequently, the court considered whether the facts of the case justified the imposition of a duty to warn on successor corporations. As Hydra did not service any of the press brakes manufactured by WEC and neither knew of any defects in the product nor the location of the machine at the time Niccum was injured, the court concluded that Hydra had no duty to warn.

ANALYSIS

While the supreme court's decision in Niccum is consistent with the Minnesota Business Corporations Act, it nonetheless produces harsh results for plaintiffs in successor liability cases. Such plaintiffs appear doubly disadvantaged as their injuries tend to be more severe than those suffered in products liability cases and their remedies

50. 426 N.W.2d 826 (Minn. 1988).
51. Niccum, 438 N.W.2d at 100.
52. Id. The court distinguished the present case from Hodder after finding that the two cases dealt with "different issues." Id. "Hodder involved the manufacture of defective tire rims (K-rims) by Goodyear. Motor Wheel Corporation was a wholly-owned subsidiary of Goodyear and handled the marketing of the K-rim, although it was not involved in their manufacture." Id. The court found that "Hodder differs from the present matter because Motor Wheel was a subsidiary of the manufacturer, Goodyear, while Hydra Tool is merely a successor to Wisconsin Equipment Corporation." Id. The court noted that it had "specifically limited the duty to warn imposed in Hodder to the facts of that case involving a subsidiary corporation." Id.
53. The court used the test set out in Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977) to determine whether Hydra Tool had incurred a duty to warn. The United States Court of Appeals for the Seventh Circuit suggested in Travis that in determining whether a duty to warn should be imposed on a successor corporation:

Succession to a predecessor's service contracts, coverage of the particular machine under a service contract, service of that machine by the purchaser corporation, a purchaser corporation's knowledge of defects and of the location or owner of that machine, are factors which may be considered in determining the presence of a nexus or relationship effective to create a duty to warn.

Id. at 449.
54. Niccum, 438 N.W.2d at 100-01. The court also noted that Hydra Tool neither succeeded to any of WEC's service contracts nor used the customer lists supplied by WEC. Id.
55. While Minnesota plaintiffs may still recover under Standal choice of law cases, this fact is of little comfort since few states have adopted either the mere continuation or the product line exceptions. See supra notes 12-18 and accompanying text.
56. See Green, supra note 49, at 19 (citing INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 81 (1977)). There is some evidence suggesting that "injuries suffered by plaintiffs in successor liability cases tend to be more serious than those suffered in all product liability cases." Id. According to the insurance survey cited by Green, "[a]s the time
more limited than commercial creditors.\textsuperscript{57} This situation is unacceptable and in need of redress.

While a variety of remedies have been proposed,\textsuperscript{58} debate has centered on the merits of judicial versus legislative reform.\textsuperscript{59} Advocates for judicial reform support the expanded successor liability rules of \textit{Ray} and \textit{Turner} which hold successor corporations liable for plaintiff's injuries.\textsuperscript{60} In contrast, advocates of legislative reform seek to hold the predecessor liable by revising corporate continuance statutes to extend the predecessor's existence for litigation purposes beyond dissolution.\textsuperscript{61}

\begin{footnotesize}
\begin{enumerate}
\item from manufacture to injury increases, the amount paid also tends to increase." \textit{Id.} at 19 n.11. Thus, although 2.8\% of injured parties make claims that involve at least a 10-year gap from manufacture to injury, they receive 6.6\% of the total payments. \textit{Id.}
\item See Green, \textit{supra} note 49, at 19–20 n.16. Green lists seven different remedies which provide protection for creditors of a corporation reorganizing or transferring its assets.
\item Indemnity agreements, escrow accounts and liability insurance are the most frequently discussed remedies. See, \textit{e.g.}, Note, \textit{The Post-Dissolution Products Liability Claim Problem: A Statutory Versus a Judicial Solution}, 38 \textit{SYRACUSE L. REV.} 1279, 1309 & n.177 (1987). The commentator points out:
\begin{quote}
Under an escrow account scheme, the transferee would negotiate with the transferor to have part of the proceeds from the asset purchase put in an escrow account with a neutral party... [On the other hand, an] indemnity provision would require the transferor to compensate the transferee for any liability it incurs as a result of the transferor's defective products.
\end{quote}
\textit{Id.} at 1309. Indemnity agreements may either be open-ended or provide for a fixed ceiling. \textit{Id.} at 1309 n.179.


60. See \textit{supra} notes 13–17 and accompanying text.

61. See Note, \textit{supra} note 59, at 1290. "At common law, a dissolved corporation could not be sued, and all causes of action against it abated." \textit{Id.} To ameliorate this harsh result, states enacted corporate continuance statutes to continue the existence of a dissolved corporation for certain purposes. \textit{Id.} Under corporate continuance statutes, designated claims are said to "survive" the corporation's dissolution and are able to be brought against the dissolved corporation during the post-dissolution pe-
\end{enumerate}
\end{footnotesize}
The solution proposed by each side is derived from their own particular view of the problem. Advocates for judicial reform view the issue as one of compensation. They contend plaintiffs are left without a remedy because product liability claims mature late and occur in a highly fluid market in which corporate acquisitions are often structured so as to avoid liability. Given the capacity of the successor corporation to serve as an effective substitute for compensation purposes, advocates for judicial reform favor modification of the traditional corporate rule to expand successor liability.62

Advocates for legislative reform, on the other hand, view the issue as one of causation.63 They contend that since the predecessor placed the defective product on the market, the predecessor rather than its corporate successor must be held liable for any resulting injuries.64 The chief obstacle to this solution is potential dissolution of the predecessor65 coupled with permissive state dissolution and liquidation statutes which allow corporations to avoid any obligation for products liability injuries.66

The argument for judicial reform is unpersuasive. Both the mere continuation exception and the product line exception expand successor corporate liability in violation of strict liability theory.67 Tra-
ditionally, under strict liability theory only members of the original marketing chain are held liable for injuries caused by defective products.\textsuperscript{68} But, the successor corporation is not part of the original marketing chain, having neither manufactured the defective product nor profited from its sale. Since the successor did not create the risk of harm, place the product in the stream of commerce, or represent or warrant its safety, it seems anomalous to hold it liable for any resulting injuries.\textsuperscript{69}

To impose liability on an entity that has not contributed to an injury simply to provide a remedy for a plaintiff is unjust from the standpoint of corporate, property and products liability law.\textsuperscript{70} Further, the court relied on the express language of section 402A of the Restatement (Second) of Torts to discount expansion of successor liability. The court emphasized that “the theory of the section is to make \textit{one who sells} a product subject to liability for physical harm \textit{thereby caused} to the ultimate consumer or user.” Id. at 292 (emphasis in original). The court further noted that causation arises out of “circumstances and events \textit{preceding a plaintiff’s injury} as are within the defendant’s \textit{exclusive ability to control}.” Id. (emphasis in original) (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 5 comment a (1965)). The court reasoned that this limitation prevented the imposition of strict liability upon a successor under the product line theory. The rationale of the product line theory “assuredly cannot find a juridical basis in the theory of products-liability . . . for that theory . . . and the underlying ‘social policies[ ]’ expressly \textit{disclaim} imposing a duty upon one who has no ability to control the circumstances and events which preceded a specific plaintiff’s injury.” Id. (emphasis in original).

See Sell, supra note 4, at 81. Sell notes that prior to Ray “[a]ll of the previous products liability cases had one crucial fact in common: the party held liable either manufactured or distributed the defective product.” Id.

\textsuperscript{69} Id. Sell comments: “This results in an entity that had no control over the manufacture or distribution of the defective product answering for the injury thereby caused. One can reasonably question the fairness or justice of such result.” Id. at 81.

\textsuperscript{70} From a corporate law perspective, requiring a successor corporation to compensate an injured plaintiff for damage caused by a predecessor’s product imposes an unfair penalty on the successor which could not be foreseen at the time the acquisition was consummated. See Woody v. Combustion Eng’g, Inc., 463 F. Supp. 817, 820–21 (E.D. Tenn. 1978). Such liability is especially unfair to the successor corporation’s customers who must bear not only the successor’s costs but also those of the original manufacturer. Id.

Holding a successor corporation liable for an injury caused by a predecessor’s product is also unjust under property law where the successor’s position has frequently been likened to that of the bona fide purchaser. The bona fide purchaser rule holds that a good faith purchaser, who is without notice of prior claims on the property and pays adequate consideration, will not be held liable for any prior or contingent claims related to that property. See Sell, supra note 4, at 81. For a discussion of the bona fide purchaser doctrine regarding real property sales, see J. Cri-bett & C. Johnson, \textit{PRINCIPLES OF THE LAW OF PROPERTY} 227–28 (3d ed. 1989). For a good analysis of the bona fide purchaser rule as related to successor liability, see Yamin, supra note 6, at 206–14. For a discussion on the differences between the bona fide purchaser situation and the successor products liability issue, see Note, supra note 5, at 685 & n.59.

From a products liability perspective, imposing liability on the successor which
ther, extending successor corporate liability in such cases would produce inconsistent results. Some corporate successors would be held liable, while others would escape liability only because of the subsequent history of the predecessor corporation. Even if this were not so, however, extending liability to successor corporations is not likely to facilitate the goal of plaintiff compensation because of potential chilling effects on corporate transfers.

Judicial extension of successor products liability would have a depressing effect on corporate acquisitions as it “makes it almost impossible . . . to determine an accurate purchase price for the corporation being acquired.” Small businesses, in particular, would be negatively affected. Under such conditions, business

played no role in the manufacture of the defective product is as unjust as imposing liability on a competitor of the original producer. See Woody, 463 F. Supp. at 820. The court noted in Woody that entire industries are not held liable in products liability cases because manufacturers are held responsible only for their own actions, including the level of safety they have selected. Id. at 820–21. Thus a corporate stranger which purchases the predecessor’s assets should not be held responsible for the predecessor’s defective products since it had no ability at the time the product was manufactured to improve its safety. Id. at 821.

71. See Woody, 463 F. Supp. at 821.

72. See Note, supra note 49, at 1427. Drawing upon Woody, the commentator notes that “[i]f the predecessor does not dissolve, the successor will escape liability. If prior to dissolution the predecessor decides to sell its assets to various purchasers so that no single purchaser continues to manufacture the product line of the predecessor, there will be no ‘successor,’ and no recovery at all is possible.” Id. at 1427 (citing Woody v. Combustion Eng’g, Inc., 463 F. Supp. 817, 821 (E.D. Tenn. 1978)).

73. See Note, supra note 59, at 1307–11. The commentator also notes that the extent of a plaintiff’s compensation under the Ray and Turner tests depends upon how consistently the courts construe these rather technical tests. As a result, he observes that expanded successor liability tests may “leave products liability claimants as remediless as did the non-assumption rule of successor corporations which they supplanted.” Id. at 1301. For a discussion of how the courts have construed the Ray and Turner tests, see id. at 1301–07.

74. Sell, supra note 4, at 79. Sell states that the purchase price must be determined by “some educated guess on the liability expenses that will arise from defective products that may have been manufactured by the predecessor.” Id. at 80.

Empirical evidence suggests that expansion of successor corporate liability may have a devastating effect in Minnesota. Expanded successor liability rules have a depressing effect on asset transfers. See supra note 73 and accompanying text. In 1984, Minnesota corporations were involved in a record number of corporate mergers, consolidations and other forms of division, product line and asset acquisition. See Novak, Additions to the Preyroll, 16 CORP. REP. MINN. 37, 37 (Feb. 1985). Novak reports a “record-shattering” 321 transactions in 1984 involving Minnesota companies, up 269% over the 87 transactions which took place in 1979. “As in each of the previous five years, Minnesota firms were net acquirers, not sellers, of companies and assets.” Id. Expansion of successor corporate liability would potentially reduce the number of transactions taking place in Minnesota.

transfers could easily become "traps for the unwary" where an acquiring corporation pays a substantial sum only to acquire the "potentially enormous" unknown products liability of its predecessor.

By endangering the financial viability of the acquiring corporation, successor liability proposals could cripple the very class of defendants upon which plaintiffs' compensation depends. Corporations concerned about successor liability may refrain from making asset transfers altogether, thereby forcing corporations seeking to dissolve to liquidate their assets. Consequently, no corporate successor would be left for an injured plaintiff to sue.

Successor liability proposals ultimately force the courts to choose between two innocent parties. To hold for the plaintiff, the court must hold a good faith corporate purchaser liable. To hold for the successor, the court must leave an innocent plaintiff without any practical remedy. To untie this Gordian knot requires society to recognize the false dichotomy presented by either of these options and to search for other alternatives.

In contrast to judicial reform, legislative reform proposals are concerned with the plight of small businesses. Small businesses are more threatened than larger corporations by potential liability for injuries caused by a predecessor's product. "Personal injuries frequently give rise to hundreds of thousands of dollars in damages." Thus, small businesses are truly faced with "economic annihilation" where a predecessor's product produces multiple lawsuits. In 1980, "small manufacturing corporations comprised ninety percent of the nation's manufacturing enterprises." One of the considerations which led to the rejection of the product line exception in Woody was that the court did not want to see ordinary business transfers become "traps for unwary successor corporations." A commentator has made a different but nonetheless fascinating point. While examining the decision of the New Jersey Supreme Court in Ramirez the commentator asserts the seemingly outlandish proposition that extending the scope of products liability laws to assure successor liability will ultimately benefit manufacturers and insurers, not consumers. The commentator asserts that this result is likely because Ramirez and related decisions diminish the incentive for safety which is implicit in products liability law. Instead, successor corporations are encouraged to raise prices in order to cover the costs of insurance and litigation awards. Consumers must then bear higher prices, more dangerous products, and "an increased tendency to view product liability laws as purely compensatory in purpose."
sistent with strict tort liability, solidly grounded in causation theory and fair, because they provide plaintiffs with a remedy obtained against the entity at fault—the predecessor corporation. Since the predecessor manufactured the defective product and placed it in the stream of commerce, the predecessor should bear the responsibility of compensating injured plaintiffs. However, in Minnesota and many other states, a predecessor may escape liability through permissive corporate dissolution and liquidation statutes. By implicitly sanctioning such corporate disappearing acts, these statutes leave plaintiffs with only the successor to sue. Indeed, the absence of the predecessor "has compelled the courts to expand the exceptions to the corporate law rule." A superior approach would be to change present law to require the predecessor to provide compensation for potential future injured plaintiffs prior to dissolution.

PREDECESSOR LIABILITY THROUGH LEGISLATIVE REFORM

Two recent legislative reform proposals would allow a plaintiff’s products liability claim to survive the dissolution of the predecessor corporation. Both the 1984 Revised Model Business Corporations Act (RMBCA) and a prototype dissolution-restricting statute advocated by University of Iowa Professor Michael Green would achieve this objective.

As Green states, "[u]ntil its revision in 1984, the Model Business Corporation Act made no provision for claims arising after dissolution and imposed a two year limitation on pre-dissolution claims." In recognition of the problems faced by products liability plaintiffs and other long-tail claimants, the drafters of the 1984 RMBCA modified the Act to allow post-dissolution claims against a dissolved corporation. The 1984 version achieves this goal by extending the limitations period on claims against dissolved corporations to five years. The extension of the limitations period virtually eliminates the distinction between pre- and post-dissolution claims.

Under the RMBCA approach, "dissolution does not terminate the
corporate existence . . . .". Rather, it initiates the process of winding up the corporation's affairs, including liquidation of its assets and discharge of its liabilities. Claims against dissolved corporations are of two types, known and unknown. Known claims from conventional creditors can be readily discharged. Unknown claims, which frequently include products liability claims, may be enforced against the dissolved corporation in one of two ways. If the dissolved corporation retains any undistributed assets, a claim may be brought against it. If all assets have been liquidated, a claimant may, with limitations, bring an action against former shareholders. Dissolved corporations and their shareholders remain open to suit for all claims under the RMBCA for five years after publication of the dissolution notice. Thereafter, all claims are barred.

Green's proposed alternative, while compatible with the RMBCA, is more specifically targeted to products liability plain-

known and unknown claims against a dissolved corporation, including claims based on events that occur after the dissolution of the corporation. See also Green, supra note 49, at 49.

91. RMBCA § 14.05 official comment.
92. See id.
93. See RMBCA § 14.06 (governing known claims against dissolved corporation) and § 14.07 (governing unknown claims against dissolved corporation).
94. See RMBCA § 14.06 and official comment. These claims are "known" in the sense that the corporation has knowledge of them at the time of dissolution. The comment adds that a claim may be known even if unliquidated.
95. See RMBCA § 14.07(c) and § 14.06 (official comment). Unknown claims are recognizable by the fact that they are based on events that occur after the dissolution of the corporation. Accordingly, because such claims mature after dissolution, the corporation is said to be without "knowledge" of them.
96. See RMBCA § 14.07(d).
97. See RMBCA § 14.07(d)(1). Whether a dissolving corporation must set aside funds for unknown or contingent claims prior to liquidating and distributing corporate assets is unclear. Section 14.05(a)(3) generally requires a dissolved corporation to "discharg[e] or make provision for discharging its liabilities." While this language could be liberally construed to encompass contingent claims, the comments appear to suggest otherwise. Specifically, the comment to § 14.06 provides that:

Even though the directors are not trustees of the assets of a dissolved corporation . . . . they must discharge or make provision for discharging all of the corporation's known liabilities before distributing the remaining assets to the shareholders.

This construction seems most in line with the statute's intent, since it does not otherwise preclude the corporation from dissolving or from distributing its assets until the end of the five year liability period for unknown claims.

98. See RMBCA § 14.07(d)(2).
99. See RMBCA § 14.07(c).
100. Id.
101. See Green, supra note 49, at 50 n.151. Green notes that, as drafted, his model "statute can easily be incorporated into the Model Business Corporation Act or a similar statute." Id. Under his model, §§ 14.06 and 14.07 of the Model Business Corporations Act would be preempted. Id.
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tiffs and manufacturers.\textsuperscript{102} Green’s approach precludes a manufacturing corporation from dissolving or distributing its assets to shareholders “until [it] has made adequate provision for postdissolution [sic] products liability claims.”\textsuperscript{103}

Under Green’s proposal, a manufacturer seeking to dissolve may provide for post-dissolution products liability claims in any of three different ways. A manufacturer may: (1) purchase products liability insurance; (2) transfer “liability for future products liability claims to the purchaser of the corporation’s assets;” or (3) use any other method that protects “those asserting postdissolution [sic] products liability claims.”\textsuperscript{104} To make “adequate” provision for post-dissolution products liability claims, a manufacturer’s insurance coverage or other assets must be equal to or greater than the corporation’s net current value at the time of dissolution, including “the value of any prior distributions made to shareholders in contemplation of dissolution.”\textsuperscript{105}

In certain limited circumstances, Green’s proposal allows a dissolving corporation to seek judicial modification of its obligation to provide for post-dissolution products liability claims.\textsuperscript{106} However, Green would penalize any corporate officer or director for recommending, voting for, or assenting to a distribution or dissolution which fails to conform to the requirements discussed above, or which is otherwise in bad faith.\textsuperscript{107} Such officers and directors would be deemed to have violated their fiduciary responsibilities to the corporation and would be “personally liable to any postdissolution [sic] products liability claimant to the same extent that the corporation would have been liable had it not dissolved.”\textsuperscript{108}

Finally, Green's model statute expressly provides that an acquiring corporation is not liable for claims relating to products manufactured or sold by its predecessor prior to acquisition unless it explic-
ity agreed to accept such liability.109

Both the 1984 Revised Model Business Corporations Act and Green's model statute are superior to judicial reform proposals contained in such decisions as Ray and Turner. Both the RMBCA and Green's model statute are consistent with strict liability theory because they impose liability on the entity which introduced the defective product into the stream of commerce.110 Both proposals recognize post-dissolution products liability plaintiffs as legitimate corporate creditors.111 Moreover, meritorious claimants under either approach gain a statutory remedy which survives corporate dissolution and is more certain than the judicial approach.112 Most importantly, however, this remedy is fair because it is obtained against the entity at fault: the predecessor corporation.113 By holding the original producer of the defective product liable, manufacturers are encouraged to make safer products, thus deterring negligent behavior.114

Beyond benefiting products liability claimants, both the RMBCA and Green's proposal attempt to preserve the corporate law goal of facilitating asset transfers.115 Under either approach, successor liability does not attach unless the acquiring corporation voluntarily assumes it as part of the asset transfer.116 As a result, most asset

109. See id. at 54–55.
110. See Aylward & Aylward, supra note 59, at 582; see also Sell, supra note 4, at 81. Both proposals impliedly or expressly impose liability on the predecessor corporation. Such liability is implied under RMBCA 14.07(c) whereas it is explicit in Green's proposal. See Green, supra note 49, at 54–55.
111. See RMBCA § 14.07(c); Green, supra note 49, at 50–51.
112. See Note, supra note 49, at 1427 (pointing out the likelihood of inconsistent results under the product line approach). Both § 14.07 of the RMBCA and Green's model statute are likely to be more certain as neither approach depends upon the willingness of the successor corporation to assume the predecessor's liability.
113. See Aylward & Aylward, supra note 59, at 582.
114. See Note, supra note 59, at 1315.
115. Under the RMBCA, the claims of injured products liability claimants are allowed to survive corporate dissolution for a five year period. But the corporation need not "provide for" such claims at dissolution by holding up liquidation or distribution of corporate assets or by delaying dissolution in anticipation of such claims. See supra note 97.
116. Under Green's approach, post-dissolution products liability claimants receive the certainty that claims are provided for prior to corporate dissolution or asset distribution. See Green, supra note 49, at 50–51. A successor corporation receives statutory assurances that the acquisition of assets from a predecessor corporation does not subject it to liability for claims relating to products manufactured or sold by the predecessor prior to the acquisition. Id.
117. See Note, supra note 59, at 1312. The commentator states: "A transferee under the section 14.07 survival of remedy provision . . . would only incur successor liability when the asset transfer is incidental to the transferor's dissolution, and the transferee agrees to assume liability." Id. (citing RMBCA § 14.05(a)(3)). Green states that his "statute unequivocally im-
transfers probably would not give rise to successor liability.\textsuperscript{117} Because both model statutes hold the predecessor responsible for any unknown products liability, would-be corporate successors will have fewer concerns about acquiring predecessor’s assets.

Neither the RMBCA nor Green’s proposal, however, is capable of solving all of the problems which arise in successor liability cases. For example, an injured plaintiff is still left without a remedy under either approach when the dissolving predecessor is an unincorporated manufacturer which operated as a sole proprietorship or as a partnership.\textsuperscript{118} Further, each approach has its own shortcomings.

The major problem with the RMBCA approach is its method of claim enforcement.\textsuperscript{119} To the extent that a corporation is not required to “provide” for unknown claims at dissolution,\textsuperscript{120} the likelihood of recovery by claimants narrows considerably. While claimants may pursue claims against undistributed corporate assets,\textsuperscript{121} it is unlikely that any assets will remain. Dissolving corporations will have every incentive to liquidate and distribute corporate assets before further claims become “known.” As a result, a claimant’s only remaining remedy is to sue the shareholders of the dissolved corporation.\textsuperscript{122} Obstacles to compensation under this option are legion since recovery depends upon a claimant’s ability to find and join enough shareholders to make the effort worthwhile.\textsuperscript{123}

Green’s proposal, while specifically tailored to provide products liability plaintiffs with a remedy, does not explain why this class of plaintiffs merits special compensation.\textsuperscript{124} Further, while Green seeks to guarantee compensation to meritorious claimants, any recovery is made tenuous at best given the probable negative effects of his proposal on corporate asset transfers.\textsuperscript{125} Green’s plan contemplates that in many asset sales, the successor will assume the predecessor’s

\textsuperscript{117} See Green, supra note 49, at 55.
\textsuperscript{118} See Note, supra note 59, at 1312.
\textsuperscript{119} See supra notes 91–100 and accompanying text.
\textsuperscript{120} See supra note 95.
\textsuperscript{121} See RMBCA § 14.07(d)(1).
\textsuperscript{122} See RMBCA § 14.07(d)(2).
\textsuperscript{123} While the task of identifying and locating former shareholders and tracing their share of the dissolved corporation’s assets is difficult enough where there are few shareholders, it may be impossible where numerous shareholders are involved. Moreover, RMBCA § 14.07(d)(2) limits the liability of individual shareholders even in cases where they can be found.
\textsuperscript{124} Professor Michael Steenson of William Mitchell College of Law is strongly critical of such proposals on this account and his concerns are echoed in the dissent in Turner v. Bituminous Casualty Co., 397 Mich. 406, 431–61, 244 N.W.2d 873, 884–98 (1976).
\textsuperscript{125} See supra notes 79–81 and accompanying text.
liabilities as a term of the acquisition. But where the predecessor's unknown liability may be substantial, it will be difficult for the parties to agree on a purchase price. If so, the outstanding liability may deter the would-be purchaser altogether. This problem is exacerbated under Green's approach since he provides no statute of limitations period to limit a predecessor's liability. Instead, liability is open-ended for both the predecessor and any potential corporate successor. As previously noted, such chilling effects on corporate transfers could have an equally chilling effect on plaintiff compensation.

**Minnesota Should Adopt the RMBCA Approach**

Given a choice between the two legislative proposals, Minnesota should follow the 1984 RMBCA approach. Compared to Green's proposal, the RMBCA represents the better compromise between the injured plaintiff's need for compensation and a corporation's legitimate need for certainty and predictability during the dissolution process.

Clearly, the RMBCA approach has many advantages. While providing a remedy for products liability plaintiffs, the RMBCA makes no distinction between the post-dissolution claims of these plaintiffs and other tort or non-tort claimants. Given its more general nature, the RMBCA escapes the special compensation problem evident in Green's proposal while having the breadth to address other successor liability issues.

Also, for reasons already discussed, the RMBCA provides more protection for legitimate corporate interests. While post-dissolution plaintiffs are given a remedy, that remedy is limited. This is appropriate because the number of future injured claimants is not presently known. In all likelihood, the number of future claimants may be small. If so, then it would be especially inappropriate to provide a sweeping remedy of the sort which Green envisions.

Furthermore, the RMBCA's five-year cut-off period for unknown claims contains benefits for both plaintiffs and dissolving corporations. Plaintiffs would benefit since research shows that the vast majority of products liability claims accrue within five years of the manufacturer's dissolution. In fact, "according to one study, 97.3 percent of all products involved in products liability suits were

126. See Green, supra note 49, at 55.
127. See supra notes 73–81 and accompanying text.
128. See supra notes 78–81 and accompanying text.
129. For a discussion of other areas in which the successor liability issue has arisen, see Green, supra note 49, at 58 n.167.
130. See supra notes 99–100, 127 and accompanying text.
131. See Note, supra note 59, at 1312. Irrespective of whether a legislature found
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Purchased within six years of the plaintiff's injury."132 Dissolving corporations would also benefit under the RMBCA as its five-year limitation on claims operates, for all practical purposes, as a statute of repose.133

As good as the RMBCA is, however, it should be improved in at least one significant respect. Section 14.05(a)(3) should be amended to require that a dissolving corporation "discharge its known liabilities and make provisions for discharging its unknown liabilities prior to making any distributions to shareholders." The RMBCA should not prescribe how this is to be done. Rather, corporations should be allowed to set aside funds for contingent liabilities, purchase products liability insurance or take other measures as they see fit.134 But to the extent that injured claimants represent legitimate corporate creditors, their interests should take precedence over those of the five-year period to be excessive or minimal, it could always adjust the period to whatever it desired. Id. at 1313-14.

132. Id. at 1312.


"Many products with long lives, especially capital goods such as presses used in manufacturing, may cause injuries decades after they are first sold... Data from the ISO [Insurance Services Office] closed-claims survey show that 'some 4% of bodily injury claims, involving 10% of ultimate payment dollars, still have not occurred eight years after the date of manufacture' of the machine involved."

The Devils in the Product Liability Laws, BUSINESS WEEK, Feb. 12, 1979, at 75 (citation omitted).

134. See Aylward & Aylward, supra note 59, at 588. The Aylwands observe that maintaining products liability insurance during the statutory period would benefit both shareholders and potential claimants. "Continuing the insurance would allow the corporation to complete its liquidation promptly and alleviate any contingent liability of the shareholders. In addition, claimants would have access to a fund from which judgments could be satisfied." Id.; see supra notes 104-105 and accompanying text.
CONCLUSION

Though consistent with the Minnesota Business Corporations Act, the decision of the Minnesota Supreme Court in *Niccum v. Hydra Tool Corp.* produces harsh results for plaintiffs in successor liability cases. To remedy that problem, both judicial and legislative remedies have been proposed.

Judicial remedies seeking to extend strict liability theory to successor corporations are unjust, incompatible with traditional products liability theory, and unlikely to lead to plaintiff compensation because of their devastating effects on corporate transfers. In contrast, legislative remedies, such as the 1984 Revised Model Business Corporations Act, justifiably hold predecessor manufacturers liable for defective products, promote deterrence, and provide injured plaintiffs with a needed source of recovery without placing overly burdensome costs on asset transfers.

Accordingly, the Minnesota legislature should revise the Minnesota version of the Business Corporations Act in accordance with the *RMBCA* to fashion a limited, but necessary, remedy to meet the legitimate needs of these plaintiffs.

*David B. Hunt*

135. As Green has stated, "[t]he law should not allow corporations to cease operations in a manner that frustrates claims of legitimate creditors." Green, *supra* note 49, at 59.

136. 438 N.W.2d 96 (Minn. 1989).

137. Revising the Minnesota Business Corporation Act in accordance with the 1984 Revised Model Business Corporation Act would not be difficult. In order to do so only the following changes would have to be made. First, Minnesota Statutes § 302A.551 would be amended to preclude distributions to shareholders until the dissolved corporation "discharges its known liabilities and makes provisions for discharging its unknown liabilities." A similar amendment may be required under § 302A.725, subdivision 3.

Second, Minnesota Statutes § 302A.723 would be revised to parallel the provisions of RMBCA § 14.05, with the proviso that RMBCA § 14.05(a)(3) should be changed to read: "discharging its known liabilities and making provisions for discharging its unknown liabilities."

Third, Minnesota Statutes § 302A.729 would be retitled as "Known Claims Against Dissolved Corporation" and rewritten to parallel the provision of RMBCA § 14.06.

Fourth, a new section, would be added and entitled "Unknown Claims Against Dissolved Corporation." The text of this section should parallel that of RMBCA § 14.07 which provides for notice requirements to unknown claimants and provides that such claims will be barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication of newspaper notice. Most importantly, the section should expressly authorize...
claims by "claimants whose claims are contingent or based on an event occurring after the effective date of dissolution."

Fifth, Minnesota Statutes § 302A.733, subdivision 1(a) would be amended to read as follows: "The payment of claims of all known or unknown creditors and claimants has been made or provided for."

And sixth, Minnesota Statutes § 302A.763, subdivision 1 would be amended to read as follows: "In an involuntary or supervised voluntary dissolution after the costs and expenses of the proceedings and all known and unknown debts, obligations, and liabilities of the corporation have been paid or discharged . . . the court shall enter a decree dissolving the corporation."
Eighth Circuit Issue

The Court of Appeals for the Eighth Circuit

Top Row (left to right): Judge Frank J. Magill, Judge Pasco M. Bowman, Judge George G. Fagg, Judge Roger L. Wollman, and Judge C. Arlen Beam

Bottom Row: Judge Richard S. Arnold, Judge Gerald W. Heaney (has taken senior status), Chief Judge Donald P. Lay, Judge Theodore McMillian, and Judge John R. Gibson.