

**Appendix to George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*,
6 FLA. ST. BUS. L. REV. 9 (2007), last update completed April 10, 2008.**

This appendix represents the author’s attempt to explain the characteristics of each of the judge-made forms of successor liability in the jurisdictions listed. These presentations should be thought of as a set of “field notes” as they are often based on sketchy, brief observations of the doctrines in jurisdictions where the reported case law is thin or where the state supreme court has not spoken. As the story of *Cyr v. Offen in New Hampshire* shows, at times, long standing assumptions about the doctrine can be quickly reversed or undermined.

This appendix is updated annually to track the state of the law in this field. Please note that while the author and editors are cognizant of the formalities of the blue-book form, we have chosen to abandon the use of “Id.”, in order avoid confusion between different versions of the document.

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Alabama

Alabama recognizes the four traditional exceptions and the continuity of enterprise exception to the general rule of successor non-liability in asset purchases.¹

Alabama: The Express or Implied Assumption Exception

The Alabama courts appear to have not defined a test for the express or implied assumption exception other than a review of the asset purchase agreement at issue for evidence of an express assumption of liabilities.² The courts, however, appear sometimes to confuse the application of Alabama's predominate exception, continuation of enterprise, with the express assumption exception and treat express assumption as a relevant factor in analyzing the continuity of enterprise exception.³

¹ See, e.g., *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781 (Ala. 1979) (stating that liability extends to the successor corporation “[where] (1) there is an express agreement to assume the obligations of the transferor, (2) the transaction amounts to a *de facto* merger or consolidation of the two companies, (3) the transaction is a fraudulent attempt to escape liability, or (4) the transferee corporation is a mere continuation of the transferor” and “this court adopted a basic ‘continuity of enterprise’ test regarding the issue of transferee liability derived from *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873 (Mich. 1976)”); see also *Extermitech, Inc. v. Glasscock, Inc.*, 951 So.2d 689 (Ala. 2006); *Peralta v. WHM Tool Group, Inc.*, 2005 U.S. Dist. LEXIS 41755 (E.D.N.Y. Aug. 18, 2005); *New York v. Nat'l Serv. Indus., Inc.*, 380 F. Supp. 2d 122 (E.D.N.Y. 2005); *Perception, Inc. v. Silicon Video, Inc.*, 423 F. Supp. 2d 722 (E.D. Mich. 2006); *Kemper v. Saline Lectronics*, 366 F. Supp. 2d 550 (N.D. Ohio 2005); *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 112 P.3d 1082 (Nev. 2005); *Matter of Seventh Jud. Dist. Asbestos Litig.*, 788 N.Y.S.2d (2005); *Mohammadpour v. Thomas*, 2005 Ohio 3853 (Ohio Ct. App. 2005); *Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213 (S.C. 2005); *Gladstone v. Stuart Cinemas, Inc.*, 878 A.2d 214 (Vt. 2005).

² *Matrix-Churchill v. Springsteen*, 461 So. 2d 782, 788 (Ala. 1984) (stating that “the record does not disclose any express agreement between [the successor and predecessor] whereby the former was to assume the obligations of [the later] . . .”).

³ *Turner v. Wean United*, 531 So. 2d 827, 831 (Ala. 1988) (“The third factor to be considered is whether [the successor] expressly assumed the liabilities of [the predecessor]” and “[a]n assumption of liability would be a strong indicator of continuity of enterprise, and its absence here tends to indicate the contrary”); *Rivers v. Stihl*, 434 So.

The Alabama courts have also rejected the implied assumption exception to the extent that a successor could be held liable for the predecessor's liabilities where "the purchasing corporation purchased unfilled customer orders, purchase orders, and vender commitments for the selling corporation."⁴

Alabama: The Fraud Exception

Similar to the assumption exception, the Alabama courts will review the record for evidence of fraud, without applying any specific test.⁵

Alabama: The De Facto Merger Exception

Alabama has not developed a specific test for the *de facto* merger exception and its courts have somewhat combined the *de facto* merger exception with the continuity of enterprise exception.⁶ In *Matrix-Churchill v. Springsteen*, for example, the court stated that, in finding that an asset purchase was a *de facto* merger, "the trial court doubtless was applying the 'basic continuity of enterprise' test adopted by the Court in *Andrews v. John E. Smith's Sons Co.*, 369 So.2d 781, 785 (Ala. 1979), derived from *Turner v. Bituminous Casualty Co.*, 244 N.W.2d 873 (Mich. 1976) . . ."⁷ The court then cited *Turner's* three "guidelines" for continuity of enterprise in resolving whether the "trial court's finding of a *de facto* merger between [the predecessor] and [the successor] supported the facts."⁸ After applying the three *Turner* guidelines, the court further blurred the distinction between the exceptions:

2d 766, 772 (Ala. 1983) (After applying the continuity of enterprise exception, the court stated, "Another factor . . . militates in favor of the imposition of liability on [the successor]. Here, [the successor] expressly assumed liabilities arising out of [the predecessor's sales of the products that the successor purchased].").

⁴ *Asher v. KCS Int'l*, 659 So. 2d 598, 600-01 (Ala. 1994) (citing *Brown v. Economy Baler Co.*, 599 So. 2d 1, 3 (Ala. 1992) and *Turner v. Wean United, Inc.*, 531 So. 2d 827, 831 (Ala. 1988)); see also *Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213 (S.C. 2005); *Gladstone v. Stuart Cinemas, Inc.*, 878 A.2d 214 (2005).

⁵ *Matrix-Churchill*, 461 So. 2d at 788 (stating that "the record does not disclose . . . any facts justifying the conclusion that [the predecessor's] purchase of [the predecessor's] stock was 'a fraudulent attempt to escape liability'").

⁶ See, e.g., *Matrix-Churchill v. Springsteen*, 461 So. 2d 782, 786-88 (Ala. 1984).

⁷ *Matrix-Churchill v. Springsteen*, 461 So. 2d 782, 787 (Ala. 1984).

⁸ *Matrix-Churchill v. Springsteen*, 461 So. 2d 782, 787 (Ala. 1984)

Accordingly, there was no "continuity of enterprise" by [the successor] in its purchase of [the predecessor] in 1969, under *Andrews, supra*, and *Rivers, supra*. What is shown by the record is that [the successor] purchased 99.7% of [the predecessor's] stock in 1969 and continued to operate it as a separate company. By purchasing substantially all of that stock, [the successor] did not effect a consolidation or merger which could be construed as an implied assumption of [the predecessor's] obligations.

Matrix-Churchill v. Springsteen, 461 So. 2d 782, 787-88 (Ala. 1984).

Alabama: The Continuity of Enterprise Exception

The Alabama court explicitly adopted the continuity of enterprise exception in *Andrews v. John E. Smith's Sons Co.*,⁹ and adopted the *Turner v. Bituminous Casualty* factors as a set of required elements each of which must be found in order to impose successor liability:

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 [seller's] name.

The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of consideration received from the buying corporation.

The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the normal business of the seller corporation.

The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.¹⁰

Alabama: The Mere Continuation Exception

The Alabama courts appear to blur the distinctions between the mere continuation and continuity of enterprise exceptions and apply the same test for each. To prove that a successor is a mere continuation of its predecessor, the plaintiff must prove that there is

⁹ 369 So. 2d 781, 785 (Ala. 1979).

¹⁰ *Turner v. Wean United, Inc.*, 531 So.2d 827, 830 (Ala. 1988) (quoting *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883-84 (Mich. 1976)); *Asher v. KCS Int'l, Inc.*, 659 So. 2d 598, 599-600 (Ala. 1995) (*Turner* factors are required elements for successor liability).

substantial evidence of each of the continuity of enterprise factors.¹¹

The Alabama courts have alluded to a separate mere continuation exception at times, but have not articulated a distinct test for it. In *Matrix-Churchill v. Springsteen*, the court stated the necessity of continuity of ownership under the mere continuation exception, but did not apply mere continuation as a separate exception from continuity of enterprise:

“[T]he test [of a "mere continuation"] is not the continuation of the business operation but the continuation of the corporate identity.’ The indicia of ‘continuation’ are a common identity of stock, directors, and stockholders *and the existence of only one corporation at the completion of the transfer . . .*” 461 So. 2d 782, 788 (Ala. 1984). (Quoting *Travis v. Harris Corp.*, 565 F.2d 443, 447 (7th Cir. 1977).

The Alabama Supreme Court revisited the mere continuation exception in *Parrett Trucking, Inc. v. Telecom Solutions, Inc.*¹² There the court explored more closely the prong of the mere continuation exception requiring the predecessor corporation be dissolved. The trial court in that case had held that where a predecessor corporation had no remaining assets, did not pay any taxes and was in the process of dissolution, but still made filings with the Alabama secretary of state as required by law, that the predecessor had “for all practical purposes dissolved.” The Alabama Supreme Court reversed, stating “That [the predecessor] is ‘for all practical purposes dissolved,’ as [plaintiff] states in its brief, or ‘effectively dissolved,’ as the trial court found in its order, is insufficient. There must be evidence of dissolution.”¹³

Alaska

In the 2001 *Savage Arms* case, the Supreme Court of Alaska adopted two species of successor liability: mere continuation and continuity of enterprise.¹⁴

¹¹ *Asher v. KCS Int’l, Inc.*, 659 So. 2d 598, 599-600 (Ala. 1995); *Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213 (S.C. 2005).

¹² 2008 WL 400438 (Ala. Feb. 15, 2008)

¹³ *Parrett Trucking, Inc. v. Telecom Solutions, Inc.*, 2008 WL 400438, *8 (Ala. Feb. 15, 2008)

¹⁴ *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55-58 (Alaska 2001); *see also Berg Chilling Sys. v. Hull Corp.*, 435 F.3d 455 (3d Cir. 2006); *US v. General Battery Corp.*, 423 F.3d 294 (3d Cir. 2005); *Manumitted Cos. v. Tesoro Alaska Co.*, 2006 U.S. Dist. LEXIS 57658 (D. Alaska Aug. 16, 2006); *CNA Ins. Co. v. Lightle*, 364 F. Supp. 2d 1068 (D. Alaska 2005); *Rountree v. Ching Feng Blinds Indus. Co., Ltd.*, 393 F. Supp. 2d 942 (D. Alaska 2005); *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 112 P.3d 1082 (Nev. 2005); *Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213 (S.C. 2005).

Alaska: The Mere Continuation Exception

In *Savage Arms*, the court adopted the “traditional” mere continuation exception.¹⁵ The court stated, “The primary elements of the ‘mere continuation’ exception include use by the buyer of the seller’s name, location, and employees, and a common identity of stockholders and directors.”¹⁶

Alaska: The Continuity of Enterprise Exception

The *Savage Arms* court listed the “key factors” under the continuity of enterprise exception: “(1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity.”¹⁷

The court then stated: “This is a limited exception that looks past the identity of shareholders and directors, and focuses on whether the business itself has been transferred as an ongoing concern.”¹⁸

Before it expressly adopted the continuity of the enterprise exception, the *Savage Arms* court reviewed multiple policy justifications that weigh *against* the exception and discounted each.¹⁹ The court then recognized that “this new rule will also have the effect of encouraging existing corporations to produce safer products, in keeping with the public policy goals that underlie product liability law generally.”²⁰ The court also was concerned with the possibility that the traditional exceptions do not encourage the shareholders of the predecessor firm to manufacture safe products:

Without successor liability, the original shareholders can receive full compensation for the current value of the firm, without sharing the burden caused by any defective products manufactured before the sale. The rule we announce today will give manufacturing corporations additional incentives to market non-defective products, in order to maximize the corporations’ market value in event

¹⁵ *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001)

¹⁶ *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001)

¹⁷ *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001)

¹⁸ *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55 (Alaska 2001)

¹⁹ *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 56-58 (Alaska 2001)

²⁰ *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 58 (Alaska 2001)

of sale.²¹

In essence, the Alaska Supreme Court appears to have been interested in forcing the predecessor corporation to internalize the potential externalities associated with defective products and reflect those liabilities in its market price.

Arizona

In *Winsor v. Glasswerks PHX, L.L.C.*, the Arizona Court of Appeals expressly recognized the four traditional exceptions to the general rule of successor non-liability and expressly rejected the continuity of enterprise and product line exceptions.²² Thus, the Arizona courts impose liability on a successor corporation for the predecessor's defective product where:

- (1) there is an express or implied agreement of assumption,
- (2) the transaction amounts to a consolidation or merger of the two corporations,
- (3) the purchasing corporation is a mere continuation [or reincarnation] of the seller, or
- (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.²³

After it listed the various policy considerations in favor of and in opposition to the continuity of enterprise and product line exceptions, the court deferred to the legislature:

We find it unnecessary to discuss in detail the competing policy concerns involved in modifying Arizona's successor liability laws. It is clear to us, regardless of the relative merits of both the present rule and the proposed exceptions, that this issue is best left to the legislature.²⁴

The court then buttressed its decision to defer to the legislature with four policy considerations: "(i). The Core Issue is One of Policy for the Legislature"; "(ii)

²¹ *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 58 (Alaska 2001)

²² 63 P.3d 1040, 1044-1050 (Ariz. Ct. App. 2003).

²³ *Winsor v. Glasswerks PHX, L.L.C.*, 63 P.3d 1040, 1044-50 (Ariz. Ct. App. 2003) (quoting *A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co.*, 836 P.2d 1034, 1039 (Ariz. Ct. App. 1992)); *Miller v. Hehlen*, 104 P.3d 193 (Ariz. Ct. App. 2005); *Collins v. Kohlbert & Co.*, 325 B.R. 417 (Bankr. D. Ariz. 2005).

²⁴ *Winsor v. Glasswerks PHX, L.L.C.*, 63 P.3d 1040, 1047 (Ariz. Ct. App. 2003)

Predictability in our Commerce”; “(iii). The Proposed Exceptions Modify or Minimize Fundamental Principles of Tort Liability”; and “(iv). Our Present Rule Allows for Liability Against Certain Successor Corporations.”²⁵ The Arizona courts have not developed any tests for the express/implied assumption, *de facto* merger, or fraud exceptions.

Arizona: The Mere Continuation Exception

Under Arizona law, the mere continuation test is based on evaluating the presence and relative strength of certain “factors,” not all of which need be present for liability to result. The *Teeters* court stated, “A crucial factor in determining if a successor corporation is mere continuation or reincarnation of a predecessor corporation is whether there is a substantial similarity in the ownership and control of the two corporations (e.g., identical directors, officers, stockholders, goods and services, and location).”²⁶ Arizona, like California, also requires proof of “insufficient consideration running from the new company to the old.”²⁷

Arkansas

The Arkansas courts recognize the general rule of successor non-liability for asset sales²⁸ and recognize, at least implicitly, the four traditional exceptions.²⁹ Arkansas has apparently not defined a test for any of the exceptions in a reported decision.

California

California recognizes the four traditional exceptions to the general rule of successor non-liability in asset purchases.³⁰ In addition, California is responsible for

²⁵ *Winsor v. Glasswerks PHX, L.L.C.*, 63 P.3d 1040, 1047-50 (Ariz. Ct. App. 2003)

²⁶ *Teeters*, 836 P.2d at 1039-40.

²⁷ *Teeters*, 836 P.2d at 1039-40 (citing multiple California decisions).

²⁸ *Ford Motor Co. v. Nuckolls*, 894 S.W.2d 897, 903 (Ark. 1995) (citing *Fort Smith Refrigeration & Equip. Co. v. Ferguson*, 230 S.W.2d 943 (Ark. 1950)).

²⁹ *Ford Motor Co. v. Nuckolls*, 894 S.W.2d 897, 903 (Ark. 1995) (citing *Swayze v. A.O. Smith Corp.*, 694 F. Supp. 619, 622 (E.D. Ark. 1988)).

³⁰ *Ray v. Alad*, 560 P.2d 3 (Cal. 1977); *CenterPoint Energy, Inc. v. Superior Court*, 69 Cal.Rptr.3d 202, 218 (Cal.Ct. App. 2007); *In re Graphics Processing Units Antitrust Litigation*, 2007 WL 2875686 at *18 (N.D. Cal. 2007); *Butler v. Adoption Media, LLC*, 486 F.Supp.2d 1022 (N.D. Cal. 2007); *Rachford v. Air Line Pilots Ass’n, Int’l*, 2006 U.S. Dist. LEXIS 44070 (N.D. Cal. 2006); *Orthotec, LLC v. REO SpineLine, LLC*, 438 F. Supp. 2d 1122 (C.D. Cal. 2006); *Healy v. MCI WorldCom Network Serv.*,

creating the product line exception.³¹ California courts have not offered any extensive analysis of the express or implied assumption exception and have not addressed the fraud exception in any detail.

California: The Express or Implied Assumption Exception

California courts have not analyzed the express or implied assumption in any detail. California courts do list this exception among the traditional four.³² By 2003, the California Supreme Court dealt with the assumption exception in a more perfunctory fashion, stating, “there are *three* situations in which a buyer of corporate assets may be liable for the torts of its predecessor, notwithstanding the purchaser’s failure to assume liability by contract . . .”³³

California: The De Facto Merger Exception

The California Supreme Court has noted the situations in which the *de facto* merger exception generally applies:

[The *de facto* merger exception] has been invoked where one corporation takes all of another’s assets without providing any consideration that could be made available to meet claims of the other’s creditors ([*Malone v. Red Top Cab. Co.*, 16 Cal. App. 2d 268, 272-74, 60 P.2d 543 (1936)]) or where the consideration consists wholly of shares of the purchaser’s stock which are promptly distributed to the seller’s shareholders in conjunction with the seller’s liquidation ([*Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801 (W.D. Mich. 1974)]).³⁴

The California Court of Appeal has stated a five factor test to determine “whether a

2006 U.S. Dist. LEXIS 446 (E.D. Cal. 2006); *McCaffrey v. Brobeck, Phleger & Harrison, LLP*, 2005 U.S. Dist. LEXIS 40327 (N.D. Cal. 2005); *Easyriders, Inc. v. Bayview Commer Leasing*, 2006 Bankr. LEXIS 2445 (Bankr. C.D. Cal. 2006); *see also Henkel Corp. v. Hartford Acc. & Indem. Co.*, 62 P.3d 69, 73 (Cal. 2003); *ZBORAY v. SECTORBASE*, 2005 Cal. App. Unpub. LEXIS 8600; *Rodgers v. Sargent Controls & Aerospace*, 38 Cal.Rptr.3d 528 (Cal. Ct. App. 2006)(previous rulings on successor liability not binding in subsequent actions under *res judicata*/collateral estoppel absent exception such as privity)

³¹ *Ray*, 560 P.2d at 11.

³² *See, e.g., Ray*, 560 P.2d at 7.

³³ *Henkel*, 62 P.3d at 73.

³⁴ *Ray*, 560 P.2d at 7 (internal citations omitted).

transaction cast in the form of an asset sale achieves the same practical result as a merger”:

(1) was the consideration paid for the assets solely stock of the purchaser or its parent; (2) did the purchaser continue the same enterprise after the sale; (3) did the shareholders of the seller become shareholders of the purchaser; (4) did the seller liquidate; and (5) did the buyer assume the liabilities necessary to carry on the business of the seller?³⁵

The California Supreme Court has not addressed this five factor *de facto* merger test.

California: The Mere Continuation Exception

In *Ray*, the California Supreme Court stated:

California decisions holding that a corporation acquiring the assets of another corporation is the latter’s mere continuation and therefore liable for its debts have imposed such liability only upon a showing of one or both of the following factual elements: (1) no adequate consideration was given for the predecessor corporation’s assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations.³⁶

Subsequent California decisions have noted that both elements must be present to impose liability³⁷ even when a successor holds itself out as being a continuation of the predecessor.³⁸ Furthermore, the California Supreme Court has made it clear that ‘the

³⁵ *CenterPoint Energy*, 69 Cal.Rptr.3d at 219; *Marks v. Minnesota Mining & Mfg. Co.*, 232 Cal. Rptr. 594, 598 (Cal. Ct. App. 1986); *Orthotec, LLC v. REO SpineLine, LLC*, 438 F. Supp. 2d 1122 (C.D. Cal. 2006).

³⁶ *Ray*, 560 P.2d at 7.

³⁷ *See Beatrice Co. v. State Bd. of Equalization*, 863 P.2d 683, 690 (Cal. 1993); *Gladstone v. Stuart Cinemas, Inc.*, 878 A.2d 214 (Vt. 2005); *Franklin v. USX Corp.*, 105 Cal.Rptr.2d 11, 627 (Cal. Ct. App. 2001) (noting that all of the opinions cited in *Ray* in support of its test for mere continuation “involved the payment of inadequate cash consideration, and some also involved near complete identity of ownership, management or directorship after the transfer”); *Orthotec, LLC v. REO SpineLine, LLC*, 438 F. Supp. 2d 1122 (C.D. Cal. 2006); *McCaffrey v. Brobeck, Phleger & Harrison, LLP*, 2005 U.S. Dist. LEXIS 40327 (N.D. Cal. 2005); *Easyriders, Inc. v. Bayview Commer. Leasing*, 2006 Bankr. LEXIS 2445 (Bankr. C.D. Cal. 2006); *Annuityzone.com, Inc. v. Indep. Advantage Financial & Ins. Serv., Inc.*, 2005 WL 1745393 (Cal. Ct. App. 2001)(Unreported case. Not for publication)

³⁸ *Maloney v. Am. Pharm. Co.*, 255 Cal.Rptr. 1, (Cal Ct. App. 1988);

mere continuation' doctrine does not apply 'when recourse to the debtor corporation is available and the two corporations have separate identities.'³⁹

California: The Product Line Exception

In 1977, the Supreme Court of California imposed liability on a successor corporation for an injury sustained by a plaintiff who fell from a ladder manufactured by the predecessor corporation.⁴⁰ The *Ray* court based liability on a new exception, the "product line" exception. The California product line exception rests on three policy justifications:

Justification for imposing strict liability upon a Successor to a manufacturer under the circumstances here presented rests upon (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.⁴¹

These justifications have generally been treated by California courts as elements.⁴² In 2003, the California Supreme Court implicitly affirmed this treatment by the lower courts, referring to the "conditions" of *Ray*.⁴³

1. The First Condition of Ray

Under the first condition of *Ray*, the successor's acquisition of the business must

Annuityzone.com, Inc., 2005 WL 1745393 at *5-*6 (Cal. Ct. App. 2001).

³⁹ *Henkel*, 62 P.3d at 73 (quoting *Beatrice*, 863 P.2d at 690); *Nash-De Camp Co. v. Nakata Farms, Inc.*, 2006 WL 539569 (Cal.Ct.App. 2006)(Unreported case. Not for publication).

⁴⁰ *Ray*, 560 P.2d at 11.

⁴¹ *Ray*, 560 P.2d at 9.

⁴² See, e.g. *Chaknova v. Wilbur-Ellis Co.*, 81 Cal. Rptr. 2d 871, 876 (Cal. Ct. App. 1999) (referring to the "three criteria" of *Ray*); *Stewart v. Telex Commc'ns., Inc.*, 1 Cal. Rptr. 2d 669, 672-73 (Cal. Ct. App. 1991) (referring to the *Ray* "considerations"); *Lundell v. Sidney Mach. Tool Co.*, 236 Cal. Rptr. 70, 73 (Cal. Ct. App. 1987) (referring to *Ray*'s "three-prong test"); *Peterson MFG. Co. v. Titan Int'l., Inc.*, 2005 WL 1971260 (Cal. App. Dep't Super. Ct. 2005).

⁴³ *Henkel Corp.*, 62 P.2d at 73.

cause the virtual destruction of the plaintiff's remedies against the predecessor.⁴⁴ Courts applying the first condition consistently require some level of causation.⁴⁵ In *Henkel*, the California Supreme Court concluded that the first condition of *Ray* was not met where "there are no grounds for claiming that [the predecessor] was destroyed by the . . . sale of its . . . business to [the successor]."⁴⁶ Where a successor corporation exercised complete control over the predecessor and "could have at any time forced [the predecessor] into bankruptcy," the California Court of Appeals held that the causation element was satisfied, despite the fact that the successor did not expressly require the dissolution of the predecessor.⁴⁷ The court held that the successor's financial and managerial control over the predecessor "at least substantially contributed to the absence of [the predecessor] from the recovery pool of product liability plaintiffs."⁴⁸ Where a corporation bought an asbestos product line from a predecessor, the predecessor remained in business for fifteen months after the sale, and the successor played no role in the predecessor's decision to resolve, the causation or substantial contribution requirement was not met.⁴⁹ "To be liable, the predecessor must have 'played some role in curtailing or destroying the [plaintiff's] remedies.'"⁵⁰

The causation requirement in the first condition of *Ray* has been analyzed several times in the context of bankruptcy sales. In the bankruptcy context, a successor who purchases assets at a bankruptcy sale is not considered the cause of a plaintiff's lack of remedy against the predecessor. The Ninth Circuit articulated this general principle in *Nelson v. Tiffany Industries, Inc.*⁵¹ In *Nelson*, the predecessor manufactured grain

⁴⁴ *Ray*, 560 P.2d at 9.

⁴⁵ See, e.g., *Stewart v. Telex Commc'ns, Inc.*, 1 Cal. Rptr. 2d 669 (Cal. Ct. App. 1991).

⁴⁶ *Henkel Corp.*, 62 P.3d at 74 (citing *Chaknova*, 81 Cal. Rptr. 2d 871).

⁴⁷ *Kaminski v. Western MacArthur Co.*, 220 Cal. Rptr. 895 (Cal. Ct. App. 1985); see *Phillips v. Cooper Labs., Inc.*, 264 Cal. Rptr. 311, 316 (Cal. Ct. App. 1989) (relying on the *Kaminski* rationale for the first condition of *Ray*).

⁴⁸ *Kaminski v. Western MacArthur Co.*, 220 Cal. Rptr. 895, 903 (Cal. Ct. App. 1985).

⁴⁹ *Chaknova*, 81 Cal. Rptr. 2d at 876-77.

⁵⁰ *Lundell*, 236 Cal. Rptr. at 74 (quoting *Kaminski*, 220 Cal. Rptr. at 902); see also *Kline v. Johns-Mansville*, 745 F.2d 1217, 1220 (9th Cir. 1984) (Ninth Circuit concluding that *Ray* "require[s] that the asset sale contribute to the destruction of plaintiffs' remedies.").

⁵¹ 778 F.2d 533, 537 (9th Cir. 1985).

augers. Four years after manufacturing the auger in question, the predecessor filed a voluntary petition under Chapter 11. The successor purchased all of the predecessor's assets in a bankruptcy court-approved sale.⁵² The court stated:

It is our view that the California Supreme Court's decision in *Ray* does not apply where there is a good faith dissolution in bankruptcy which is not intended to avoid future tort claims against the predecessor. Under such circumstances, the successor corporation has not contributed to or caused the destruction of the plaintiff's remedies.⁵³

The court remanded the case to the district court because the record did not specify whether the district court "considered the evidence offered by the plaintiff for the purpose of showing that [the predecessor] filed its petition pursuant to a collusive agreement with [the successor]."⁵⁴ The appellate court went on to note, "If the evidence shows that [the successor] induced [the predecessor] to file for bankruptcy to avoid future tort liability, the *Ray* exception to the general rule would be applicable."⁵⁵

In *Stewart*, the California Court of Appeals addressed successor products liability for a predecessor's defective antenna.⁵⁶ The court noted that "the sole distinction between *Alad* and the present case is that [the successor] purchased [the predecessor] through the intermediary of the bankruptcy courts [] rather than directly."⁵⁷ The court noted that *Kaminski* found successor liability where a successor "substantially contributed" to the demise of the predecessor, but stated, "[n]evertheless, some causal connection between the succession and the destruction of the plaintiff's remedy must be shown."⁵⁸ The court went on to discuss the balance between products liability policy and corporate needs of limiting risk exposure, concluding:

It is the element of causation, however, that tips the balance in favor of imposing successor liability. The traditional corporate rule of nonliability is only counterbalanced by the policies of strict liability when acquisition by the successor, and not some [other] event or act, virtually destroys the ability of the

⁵² *Nelson v. Tiffany Industries, Inc.*, 778 F.2d 533, 537 (9th Cir. 1985).

⁵³ *Nelson v. Tiffany Industries, Inc.*, 778 F.2d 533, 538 (9th Cir. 1985).

⁵⁴ *Nelson v. Tiffany Industries, Inc.*, 778 F.2d 533, 537 (9th Cir. 1985).

⁵⁵ *Nelson v. Tiffany Industries, Inc.*, 778 F.2d 533, 537 (9th Cir. 1985).

⁵⁶ *See Stewart*, 1 Cal. Rptr. 2d 669.

⁵⁷ *Stewart*, 1 Cal. Rptr. 2d 669, 673.

⁵⁸ *Stewart*, 1 Cal. Rptr. 2d 669, 675.

plaintiff to seek redress from the manufacturer of the defective product.⁵⁹

The *Telex* court, finding “no showing of causation here in the voluntary bankruptcy of [the predecessor], nor any showing it was a mere subterfuge to avoid the holding of Alad,” held that the product line exception did not apply.⁶⁰

Thus, both California and 9th Circuit precedent demonstrate a continued causation requirement in applying the first condition of *Ray*. Though *Kaminski* ostensibly relaxed the causation requirement, some level of causation, at least the predecessor’s “substantial contribution” to the destruction of the plaintiff’s remedies, is required. Cases addressing successor liability following a bankruptcy sale suggest that a successor who buys assets from a predecessor in a bankruptcy sale will not be liable for the predecessor’s products liability absent collusion or subterfuge.⁶¹

2. The Second Condition of Ray

Under the second condition from *Ray*, the court must consider “the successor’s ability to assume the original manufacturer’s risk-spreading role.”⁶² In *Ray*, this condition was met because both physical assets as well as “know-how” in the form of manufacturing designs, continuing personnel, and consulting services from the predecessor’s general manager gave the successor “virtually the same capacity as [the predecessor] to estimate the risks of claims for injuries from defects in previously manufactured ladders for purposes of obtaining insurance coverage or planning self-insurance.”⁶³

3. The Third Condition of Ray

⁵⁹ *Stewart*, 1 Cal. Rptr. 2d 669, 675. (quoting *Hall v. Armstrong Cork, Inc.*, 692 P.2d 787, 792 (Wash. 1984); see also *Optimer Int’l, Inc. v. Bellevue, LLC*, 2006 Wash. App. LEXIS 1683 (Wash. Ct. App. 2006); *Creech v. AGCO Corp.*, 138 P.3d 623 (2006); *Desert Ice, Inc. v. Pac. Northwest Amateur Hockey Ass’n*, 2005 Wash. App. LEXIS 2052 (Wash. Ct. App. 2005)).

⁶⁰ *Stewart*, 1 Cal. Rptr. 2d 669, 676.

⁶¹ See PATRICK A. MURPHY, CREDITOR’S RIGHTS IN BANKRUPTCY § 7:5 (2d ed. 2004) (the author cites the following cases applying California law: *Nelson v. Tiffany Indust., Inc.*, 778 F.2d 533 (9th Cir. 1985); *Doctor John’s, Inc. v. City of Roy*, 2006 U.S. App. LEXIS 25299 (10th Cir. Utah 2006); *Simmons v. Mark Lift Indus. Inc.*, 622 S.E.2d 213 (S.C. 2005); *Kline v. Johns-Mansville*, 745 F.2d 1217 (9th Cir. 1984); *Stewart v. Telax Commc’ns., Inc.*, 1 Cal. Rptr. 2d 669 (Cal. Ct. App. 1991).

⁶² *Ray*, 560 P.2d 3 at 9.

⁶³ *Ray*, 560 P.2d 3 at 10,

The third condition of *Ray* requires the court to consider “the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer’s good will being enjoyed by the successor in the continued operation of the business.”⁶⁴ The *Ray* court noted the successor’s “deliberate albeit legitimate exploitation of [the predecessor’s] established reputation as a going concern manufacturing a specific product line,” the substantial benefit the successor received from this, and the fundamental fairness of requiring the burden of potential liability to pass along with the benefits exploited.⁶⁵ The court further stated that the imposition of liability served the dual goals of requiring the one who receives the benefit to take the burden and precluding a windfall to a predecessor who was paid more by a successor to avoid successor liability and then promptly liquidated.⁶⁶ This final condition of fundamental fairness results in a very fact specific analysis.

California: Personal Jurisdiction of Successor Corporations

“In a case raising liability issues, a California court will have personal jurisdiction over a successor company if: (1) the court would have had personal jurisdiction over the predecessor, and (2) the successor company effectively assumed the subject liabilities of the predecessor.”⁶⁷

Colorado

The Colorado courts recognize the general rule of successor non-liability and the four traditional exceptions.⁶⁸ The *Johnston* court expressly rejected the product-line and continuity of enterprise exceptions after examining the relevant public policy issues espoused by other courts that have adopted one or both of those exceptions.⁶⁹

⁶⁴ *Ray*, 560 P.2d 3 at 9.

⁶⁵ *Ray*, 560 P.2d 3, 10-11.

⁶⁶ *Ray*, 560 P.2d 3 at 11.

⁶⁷ *CenterPoint Energy*, 69 Cal.Rptr.3d at 218.

⁶⁸ *Johnston v. Amstead Indus., Inc.*, 830 P.2d 1141, 1142-43 (Colo. Ct. App. 1992) (citing *Ruiz v. ExCello Corp.*, 653 P.2d 415 (Colo. Ct. App. 1982)); *see also Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213 (S.C. 2005); *CMCB Enters. v. Ferguson*, 114 P.3d 90 (Colo. Ct. App. 2005).

⁶⁹ *Johnston*, 830 P.2d at 1143-47.

Colorado: The Mere Continuation Exception

In *Alcan Aluminum Corp., Metal Goods Division v. Electronic Metal Products*, the Colorado Court of Appeals identified the test for the mere continuation exception:

The “mere continuation exception” applies when there is a continuation of directors and management, shareholder interest, and, in some cases, inadequate consideration. *Nissen Corp. v. Miller*, 323 Md. 613, 594 A.2d 564 (1991). Thus, the test for determining whether this exception applies focuses on whether the purchasing corporation is, in effect, a continuation of the selling corporation, and not whether there is a continuation of the seller’s business operation.⁷⁰

Colorado: The De Facto Merger Exception

Colorado courts have not announced a test for the *de facto* merger exception. The *Johnston* court, in discussing the merits of the continuity of enterprise exception, acknowledged that continuity of shareholders is probably the most essential element of the test.⁷¹ Based on the *Johnston* court’s assertion, the Tenth Circuit Court of Appeals, interpreting Colorado law, stated that Colorado applied the following *de facto* merger test:

Under Colorado law, a *de facto* merger may exist if there is evidence suggesting (1) continuity of management, personnel, physical location, assets, and business operations; (2) continuity of shareholders; (3) cessation of the seller's business and liquidation of its assets; (4) assumption by the purchaser of those liabilities of the seller necessary to continue uninterrupted the seller's former business operations.⁷²

Furthermore, “[t]he absorbing corporation receives the added capital and franchise of the merged corporation and holds itself out to the world as continuing the business of the seller.”⁷³ The *Stamm* decision, however, was an unpublished decision; the Federal Reporter designation in the citation is to a “Table of Decisions without Reported Opinions” volume of the Reporter. It is unclear whether the Colorado state courts will follow an unpublished decision by the federal courts.

⁷⁰ 837 P.2d 282, 283 (Colo. Ct. App. 1992); *CMCB Enters.*, 114 P.3d 90.

⁷¹ 830 P.2d at 1146-47.

⁷² *Cohig & Assocs., Inc. v. Stamm*, 149 F.3d 1190, (10th Cir. June 10, 1998).

⁷³ *Cohig & Assocs., Inc. v. Stamm*, 149 F.3d 1190, (10th Cir. June 10, 1998).

Colorado: The Express/Implied Assumption and Fraud Exceptions

Colorado courts have not announced tests for the express/implied assumption or fraud exceptions.

Connecticut

In *Chamlink Corp. v. Merritt Extruder Corp.*⁷⁴ The Appellate Court of Connecticut adopted the four exceptions to the traditional rule of non-liability following a corporate asset purchase.

“The mere transfer of the assets of one corporation to another corporation or individual generally does not make the latter liable for the debts or liabilities of the first corporation except where the purchaser expressly or impliedly agrees to assume the obligations, the purchaser is merely a continuation of the selling corporation, [the companies merged] or the transaction is entered into fraudulently to escape liability.”⁷⁵

The *Chamlink* court also considered the Continuity of Enterprise exception as an alternative to the common law mere continuation exception, but did not expressly accept the doctrine because it was not applicable to the facts of the case.⁷⁶ There one unpublished Superior Court decisions prior to *Chamlink* that recognizes the product line exception.⁷⁷

Connecticut: The Express or Implied Assumption Exception

The one Connecticut decision that specifically addressed the express/implied assumption exception looked to the language of the asset purchase agreement to determine if the successor assumed the predecessor’s liabilities.⁷⁸

⁷⁴ *Chamlink Corp. v. Merritt Extruder Corp.*, 899 A.2d 90, 93 (Conn. App. Ct. 2006).

⁷⁵ *Chamlink Corp. v. Merritt Extruder Corp.*, 899 A.2d 90, 93 (Conn. App. Ct. 2006).

⁷⁶ *Chamlink Corp. v. Merritt Extruder Corp.*, 899 A.2d 90, 93 (Conn. App. Ct. 2006).

⁷⁷ *Sullivan v. A.W. Flint Co.*, 1996 WL 469716, at *1 (Conn. Super. Ct. 1996)

⁷⁸ *Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp.*, 2002 WL 1610037 at *7 (Conn. Super. Ct. 2002).

Connecticut: The Mere Continuation Exception

The *Chamlink*⁷⁹ court stated a simple three element test for common law mere continuation: “Under the common law mere continuation theory, successor liability attaches when the plaintiff demonstrates the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations.”⁸⁰ This test replaces a multi-factor balancing test previously used by several district courts.⁸¹

Connecticut: The Continuity of Enterprise Exception

The Appellate Court of Connecticut in *Chamlink*⁸² expressed the Continuity of Enterprise Exception as a potential alternative to the traditional test for Mere Continuation.

Under the “continuity of enterprise” theory, a mere continuation exists “if the successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers.”⁸³

In a footnote following this test the courts stated that “[b]ecause it is clear under both [the traditional mere continuation theory and the continuity of enterprise theory] that Merritt Extruder Connecticut is not a mere continuation of Merritt Davis, we need not adopt one theory over the other at this time.”⁸⁴ This leaves it an open question whether Connecticut has actually adopted the Continuity of Enterprise theory or if they intend to potentially replace the mere continuation theory with the continuity of enterprise theory if given the proper set of facts.

Connecticut: The De Facto Merger Exception

⁷⁹ 899 A.2d at 93.

⁸⁰ 899 A.2d at 93.

⁸¹ *Sav. Bank of Manchester v. Daly*, 2004 WL 3130581 at *1 (Conn. Super. Dec. 23, 2004); *Collins v. Olin Corp.*, 434 F.Supp.2d 97 (D. Conn. 2006). It should be noted however, that some courts have continued to use the multi-factor balancing test after *Chamlink*. See *Mavel v. Scan-Optics, Inc.*, 509 F.Supp.2d 183, 189 (D. Conn. 2007).

⁸² 899 A.2d at 93.

⁸³ 899 A.2d at 93.

⁸⁴ 899 A.2d at 93.

The courts have not developed a test for *de facto* merger that differs from the factor-based mere continuation test used by Connecticut superior courts prior to the *Chamlink* decision⁸⁵. The factor based balancing test consists of four non-dispositive factors:

(1) whether there is a continuity of management, personnel, physical location, assets and general business operations; (2) whether there is a continuity of shareholders; (3) whether the [predecessor] ceased its ordinary business operations, liquidates, and dissolves; and (4) whether [the successor] assumed those liabilities and obligations of [the predecessor] ordinarily necessary for the uninterrupted continuation of normal business operations of [the predecessor]. [See] *Peglar & Associates, Inc.* [2002 WL 1610037 (Conn. Super. June 19, 2002)].⁸⁶

“Not every one of these indicia must be established, however, but the court should apply a balancing test.”⁸⁷

Connecticut: The Fraud Exception

The Fraud exception in Connecticut is regulated by its Uniform Fraudulent Transfers act found at Conn. Gen. Stat. § 52-552e (2005).⁸⁸

Connecticut: The Product Line Exception

The *Sullivan* decision provides the only insight on Connecticut’s version of the product line exception as no Connecticut court since has applied the product line exception. *Sullivan* listed the following requirements of the product line exception:

“(1) the transferee has acquired substantially all the transferor’s assets, leaving no more than a corporate shell (2) the transferee is holding itself out to the general public as a continuation of the transferor by producing the same product line under a similar name (3) the transferee is benefiting from the Goodwill of the transferor.”⁸⁹

⁸⁵ *Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp.*, 2002 WL 1610037 at *7 (Conn. Super. Ct. 2002).

⁸⁶ *Sav. Bank of Manchester v. Daly*, 2004 WL 3130581 at *1 (Conn. Super. Dec. 23, 2004); *Collins v. Olin Corp.*, 434 F.Supp.2d 97 (D. Conn. 2006).

⁸⁷ *Sav. Bank of Manchester v. Daly*, 2004 WL 3130581 at *1 (Conn. Super. Dec. 23, 2004); *Collins v. Olin Corp.*, 434 F.Supp.2d 97 (D. Conn. 2006).

⁸⁸ *S. Conn. Gas Co. v. Waterview of Bridgeport Ass'n.*, 2006 WL 1681005 at *3 (Conn. Super. Ct. 2006).

⁸⁹ 1996 WL 469716 at *6 (internal citations omitted).

The court agreed with the policy justifications of the product line exception but stated, “[T]he acceptance of the product line theory in order to effectuate the goals sought to be achieved by the imposition of strict liability in the first place does not mean it should be liberally applied.”⁹⁰ In support of its view that the product line exception should be narrowly applied, the court recognized the requirement that the successor corporation must cause the destruction of the plaintiff’s remedy.⁹¹ If the plaintiff can proceed against the predecessor, the product line exception does not apply.⁹²

Delaware

A Federal District Court decision provides the most comprehensive discussion of Delaware successor liability law. In *Elmer v. Tenneco Resins, Inc.*, the District of Delaware adopted the traditional exceptions to successor non-liability and then explained, in some detail, the contours of the express/implied assumption and mere continuation exceptions.⁹³ An unreported decision by the Delaware Superior Court cited the *Elmer* decision with approval and did not adopt any of the expanded exceptions to the general rule of successor non-liability.⁹⁴

Delaware: The Express or Implied Assumption Exception

Based on the *Elmer* decision, the Delaware courts will review the language of the asset purchase agreement to determine if there was an express or implied assumption of liabilities. In the *Elmer* case, the purchasing corporation expressly assumed, subject to certain conditions, all liabilities of the seller that existed at the closing date.⁹⁵ “One of the conditions was that [the seller] provide a complete listing of its absolute or contingent liabilities and pending or threatened claims or litigation.”⁹⁶ The purchaser/successor argued that it was not liable to the plaintiff because the schedules attached to the asset

⁹⁰ 1996 WL 469716 at *8.

⁹¹ 1996 WL 469716 at *8.

⁹² 1996 WL 469716 at *8.

⁹³ 698 F. Supp. 535 (D. Del. 1988). See also *In re Safety-Kleen Corp.*, 380 B.R. 716, 739-40 (Bankr. D. Del., 2008)

⁹⁴ *In re Asbestos Litig.*, 1994 WL 89643, at *3 (Del. Super. Feb. 04, 1994).

⁹⁵ 698 F. Supp. at 541.

⁹⁶ 698 F. Supp. at 541.

purchase did not list the seller's potential liability for the manufacture of the product that injured the plaintiff.⁹⁷

The court, in denying summary judgment to the purchaser, stated, "While it seems clear that there was no express assumption of this liability, the Court finds that there is a question whether [the purchaser] impliedly assumed any [product] liability of [the seller]."⁹⁸ The court based its conclusion on the fact that "[the purchaser] agreed to assume 'all . . . liabilities of [the seller] . . . whether contingent or otherwise . . . exist[ing] at the Closing Date.'"⁹⁹ The court reasoned that the asset purchase agreement was contradictory in that one section expressly rejected all liabilities not listed but another section expressly assumed all liabilities.

Delaware: The Mere Continuation Exception

Delaware employs a narrowly construed mere continuation exception. The *Elmer* court stated that the test is based on whether the former corporation is "the same legal entity" as the latter corporation:

In order to recover under this theory in Delaware, it must appear that the former corporation is the same legal entity as the latter; that is, "it must be the same legal person, having a continued existence under a new name." *Fountain*, slip op. at 8. The test is not the continuation of the business operation, but rather the continuation of the corporate entity."¹⁰⁰

The *Asbestos Litigation* decision also indicates that continuity of ownership may be a threshold requirement for a finding of mere continuation: "[U]nder this theory, it must be established that the transaction . . . was an arm's length transaction and not simply a change of corporate name and that [the successor] has different owners than [the predecessor]."¹⁰¹

Delaware: The De Facto Merger and Fraud Exceptions

⁹⁷ 698 F. Supp. at 541.

⁹⁸ 698 F. Supp. at 541.

⁹⁹ 698 F. Supp. at 541.

¹⁰⁰ *Id.* (quoting *Fountain v. Colonial Chevrolet Co.*, 1988 WL 40019, slip op. at *7 (Del. Super. April 13, 1988); *Morgan v. Powe Timber Co.*, 367 F. Supp. 2d 1032 (S.D. Miss. 2005)).

¹⁰¹ 1994 WL 89643 at *4.

There are no cases under Delaware law that explain the *de facto* merger or fraud exceptions.

District of Columbia

The District of Columbia recognizes the four traditional exceptions to the general rule of successor non-liability.¹⁰² *Bingham* is the only D.C. court decision that addresses successor liability. The *Bingham* court only elaborated on the mere continuation exception and did not address the other three.

District of Columbia: The Mere Continuation Exception

The *Bingham* court did not apply a specific test for the mere continuation exception. The court analyzed the facts of the case according to a non-exclusive list of factors.¹⁰³ Although the court stated that “common identity of officers, directors, and stockholders in the purchasing and selling corporations” is “a key element,” the existence of common directors did not dispose of the issue.¹⁰⁴ The court did note, however, that the key inquiry is whether there is a continuation of the entity and not the business operations of the predecessor.¹⁰⁵

Florida

Florida has adopted the four traditional exceptions to the general rule of successor non-liability and expressly rejected the continuity of enterprise and product-line exceptions.¹⁰⁶ It also appears to have collapsed the *de facto* merger and mere continuation exceptions into one exception at least in the view of one court of appeal.¹⁰⁷

¹⁰² *Bingham v. Goldberg. Marchesano. Kohlman. Inc.*, 637 A.2d 81, 89-90 (D.C. Cir. 1994) (see also *Reese Bros., Inc. v. U.S. Postal Serv.*, 477 F.Supp.2d 31,40-41 (D.D.C. 2007).

¹⁰³ 637 A.2d at 91-92.

¹⁰⁴ 637 A.2d at 91.

¹⁰⁵ 637 A.2d at 92.

¹⁰⁶ *Bernard v. Kee Mfg. Co., Inc.*, 409 So. 2d 1047, 1049-51 (Fla. 1982); *Gary Brown & Associates, Inc. v. Ashdon, Inc.*, 2008 WL 612672 at *4 (11th Cir. March 26, 2008); *Miller v. R.J. Reynolds Tobacco Co., Inc.*, 502 F.Supp.2d 1265, 1269 (S.D. Fla. 2007); *Jones v. Honeywell Intern., Inc.*, 385 F. Supp. 2d 1268 (M.D. Fla. 2005); *Graef v. Hegedus*, 698 So.2d 655 (Fla. Dist. Ct. App. 1997); *In re Metro Sewer Services, Inc.*, 374 B.R. 316 (Bankr. M.D. Fla. 2007).

¹⁰⁷ *Lab. Corp. of Am. v. Prof'l Recovery Network*, 813 So. 2d 266 (Fla. Dist.

Florida: The De Facto Merger Exception

Florida courts have applied the following test for a *de facto* merger, which requires continuity of ownership:

A *de facto* merger has been found where one corporation is absorbed by another, but without compliance with statutory requirements for a merger: To find a *de facto* merger there must be a continuity of the selling corporation evidenced by the same management, personnel, assets and physical location; a continuity of the stockholders, accomplished by paying for the acquired corporation with shares of stock; a dissolution of the selling corporation; and assumption of the liabilities.¹⁰⁸

Florida: The Mere Continuation Exception

In Florida, the mere continuation exception is based primarily on continuity of officers, directors, and stockholders.

The “purchasing corporation is merely a ‘new hat’ for the seller, with the same or similar entity or ownership.” The key element of a continuation is a common identity of the officers, directors and stockholders in the selling and purchasing corporation. The change is in form, but not in substance.¹⁰⁹

Besides the control requirements and conclusory statements regarding the evidence of continuation, Florida courts have stated that a successor is a continuation of the predecessor when it has “the same assets, management, personnel, stockholders, location, equipment, and clients.”¹¹⁰ The court found sufficient evidence to impose liability based on the mere continuation exception where the following facts were present:

The old [Professional Association] ceased rendering medical services shortly after the judgment was entered against it. The next day the baton was passed to the new P.A. which commenced full operations. It provided the same type of medical

Ct. App. 2002).

¹⁰⁸ *Amjad Munim, M.D., P.A. v. Azar*, 648 So.2d 145, 153-54 (Fla. Dist. Ct. App. 1994); *Carnes v. Fender*, 936 So. 2d 11 (Fla. Dist. Ct. App. 2006). *See also Lab. Corp. of Am. v. Prof'l Recovery Network*, 813 So. 2d 266, 269-70 (Fla. Dist. Ct. App. 2002); *Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Florida, Inc.*, 832 So.2d 810, 814 (Fla. Dist. Ct. App. 2002).

¹⁰⁹ *Azar*, 648 So. 2d at 154 (citing *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir.) (en banc), *reh'g denied*, 765 F.2d 154 (1985))(citations omitted).

¹¹⁰ *Searchay*, 707 So. 2d at 960; *see also Azar*, 648 So. 2d at 154.

services in the same office with the same files, patients, nurses, clerical help, office manager and the same major player, Dr. Munim-the sole stockholder in and president of each P.A.¹¹¹

Florida: The Fraud Exception

The Florida courts have not developed or adopted a test for fraud that is specific to the issue of successor liability. At least one court, however, imposed liability on a successor corporation based on the doctrine of fraudulent transfers, but then continued its analysis and held that the successor was also liable under common law successor liability principles.¹¹² In Florida, therefore, the fraud exception may not have utility based on the related legal principles governing fraudulent conveyances.

Florida: The Express or Implied Assumption Exception

There are few Florida cases that directly address the express or implied assumption exceptions. One, however, expressly recognizes the effectiveness of disclaimers of successor liability in an asset purchase agreement. *Krogen Express Yachts, LLC v. Nobili*, 2007 Fla. App. LEXIS 61, 3-4 (Fla. 4th DCA 2007).

Georgia

The Georgia courts have expressly adopted the traditional exception to the general rule of successor non-liability and implicitly accepted the product line exception.¹¹³

Georgia: The De Facto Merger Exception

Under Georgia law, the following four factors must be present for the *de facto* merger exception to apply:

(1) There is continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.

¹¹¹ *Amjad Munim, M.D., P.A. v. Azar*, 648 So.2d 145, 153 (Fla. Dist. Ct. App. 1994)

¹¹² *Azar*, 648 So. 2d at 152-155.

¹¹³ *See Farmex, Inc. v. Wainwright*, 501 S.E.2d 802, 804 (Ga. 1998) (holding that the product-line exception was not applicable because the purchaser did not continue to manufacture the product that injured the plaintiff after the asset purchase); *Bullington v. Union Tool Corp.*, 328 S.E.2d 726, 728 (Ga. 1985) (rejecting the continuity of enterprise exception but holding that the facts presented would not satisfy the product-line exception).

(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.¹¹⁴

This test represents the “traditional” *de facto* merger exception.

Georgia: Mere Continuation

Under Georgia law, the mere continuation exception is based on multiple factors, but there must be continuity of ownership:

[T]his court held that "(w)here, after one half of the capital stock of a corporation, which belongs to one person, who owns the entire capital stock, is acquired by new stockholders, and all the new stockholders apply for articles of incorporation, and become incorporated for the same objects and purposes under a charter creating a new corporation having in effect the same name, which takes over the entire assets and business of the old corporation, as well as its stockholders, who become stockholders of the new corporation, and operates the new corporation in the same place and in the same manner in which the old corporation was operated, and becomes liable for the debts of the old corporation, the new corporation, by reason of such identity of name, objects, assets, and stockholders, is but a continuance of the old corporation, and the new corporation is liable for the debts and obligations of the old corporation."¹¹⁵

¹¹⁴ *Perimeter Realty v. GAPI, Inc.*, 533 S.E.2d 136, 145-46 (Ga. Ct. App. 2000); *Amend v. 485 Props.*, 627 S.E.2d 565 (Ga. 2006); *Killearn Partners, Inc. v. Southeast Props.*, 611 S.E.2d 26 (Ga. 2005); *First Support Services, Inc. v. Trevino*, 655 S.E.2d 627, 630 (Ga. Ct. App. 2007); *Jonas v. Jonas*, 633 S.E.2d 544 (Ga. Ct. App. 2006); *Douglas v. Bigley*, 628 S.E.2d 199 (Ga. Ct. App. 2006); *In re Schoolcraft*, 617 S.E.2d 241 (Ga. Ct. App. 2005); *Tidikis v. Network for Med. Communs. & Research, LLC*, 619 S.E.2d 481 (Ga. Ct. App. 2005); *Steele v. Atlanta Maternal-Fetal Med., P.C.*, 610 S.E.2d 546 (Ga. Ct. App. 2005); *Bridge Capital Investors II v. Small*, 144 Fed. Appx. 762 (11th Cir. 2005); *Amend v. 485 Props., LLC*, 401 F.3d 1255 (11th Cir. 2005).

¹¹⁵ *Ney-Copeland & Assocs., Inc. v. Tag Poly Bags, Inc.*, 267 S.E.2d 862, 862-63 (Ga. Ct. App. 1980) (quoting *Johnson-Battle Lumber Co. v. Emanuel Lumber Co.*, 126 S.E. 861 (Ga. Ct. App. 1925)).

Based on the *Johnson-Battle* decision, the Georgia Supreme Court has stated, “the common law continuation theory has been applied where there was some identity of ownership.”¹¹⁶ The *Bullington* court expressly rejected the continuity of enterprise exception based on the fact that Georgia courts have traditionally required continuity of ownership.¹¹⁷ Subsequent Georgia decisions have developed the following test: The successor corporation is liable for the debts of the predecessor if “there is a substantial identity of ownership and a complete identity of the objects, assets, shareholders, and directors as between the purchasing corporation and the selling company.”¹¹⁸ The *Perimeter Realty* court clarified that each element must be present because it refused to impose liability where there was not complete identity of assets.¹¹⁹

Georgia: The Fraud Exception

There are no cases under Georgia law that explain the characteristics of the fraud exception.

Georgia: The Express or Implied Assumption Exception

Whether a successor corporation assumed the liabilities of the predecessor corporation depends on the language of the parties’ asset purchase agreement.¹²⁰ The Georgia courts have not applied the assumption exception based on the post-purchase conduct of the parties; the exception is based on the terms of the agreement.

Hawaii

Hawaii is one of several jurisdictions that include a fifth exception in its formulation of the traditional exceptions to the general rule of successor non-liability:

- there is an express or implied assumption of liability;
- the transaction amounts to a consolidation or merger;

¹¹⁶ *Bullington*, 328 S.E.2d at 727.

¹¹⁷ *Bullington*, 328 S.E.2d at 728.

¹¹⁸ *Perimeter Realty*, 533 S.E.2d at 145. (citing *Davis v. Concord Commercial Corp.*, 434 S.E. 2d 571 (Ga. Ct. App. 1993))

¹¹⁹ *Perimeter Realty*, 533 S.E.2d at 145

¹²⁰ See *Gwinnett Hosp. Sys., Inc. v. Massey*, 469 S.E.2d 729, 731 (Ga. Ct. App. 1996).

- the transaction was fraudulent;

- *some of the elements of a purchase in good faith were lacking, as where the transfer was without consideration and the creditors of the transferor were not provided for;*

- the transferee corporation was a mere continuation or reincarnation of the old corporation.¹²¹

The Hawaii courts have not established or applied tests for any of the “traditional” exceptions.

Idaho

Idaho has long recognized both assumption of liabilities and fraud as successor liability doctrines.¹²² It also recognizes successor liability in the case of a “reorganization”, which appears to be a melding of mere continuation, continuity of enterprise, and de facto merger.¹²³ Given, however, that the most recent Idaho case law is almost 100 years old and the law in this area in general has developed over this course of time, it is most safe to say what Idaho has recognized in the past and not interpret that as defining the current state of the law or what the Idaho Supreme Court would announce as law today or tomorrow.

Idaho has a state constitutional provision that prevents the legislature from allowing “the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor . . .”¹²⁴ This would seem to prevent or severely limit the legislature’s ability to pass anti-successor liability laws concerning juridical entities.¹²⁵

¹²¹ *Evanston Ins. Co. v. Luko*, 783 P.2d 293, 295-96 (Haw. Ct. App. 1989) (emphasis added).

¹²² *Anderson v. War Eagle Consol. Min. Co.*, 72 P. 671 (Idaho 1933) (rejecting a rough continuity theory premised on commonality of management and stock ownership in successor and predecessor).

¹²³ *Seymour v. Boise Co., Ltd.*, 132 P. 427 (Idaho 1913); *see also Moore v. Boise Land & Orchard Co.*, 173 P. 117 (Idaho 1918).

¹²⁴ IDAHO CONST. art. XI, § 15.

¹²⁵ *Towle v. Great Shoshone & Twin Falls Water Power Co.*, 232 F. 733 (D. Idaho 1916), *aff’d sub nom. American Waterworks & Elec. Co. v. Towle*, 245 F. 706 (9th Cir. 1917) (personal injury judgment against predecessor becomes a lien against the franchise and property of the corporation in the hands of a successor).

Illinois

Illinois courts recognize only the four traditional exceptions to the general rule of successor non-liability.¹²⁶ The Illinois courts have consistently rejected the product line exception.¹²⁷

Illinois: The Mere Continuation Exception

Under Illinois law, continuity of ownership is a threshold requirement of the mere continuation exception but it is unclear what other factors are relevant.¹²⁸ The *Vernon* court held that a corporation or partnership that purchases the assets of a sole proprietorship where the proprietor is deceased cannot possibly be a continuation of the former business because the sole proprietor's death means that there is no continuity of ownership.¹²⁹ The dissent in *Vernon* argued that continuity of ownership should be only one of several factors that the court considers under the mere continuity exception.¹³⁰ The Seventh Circuit Court of Appeals has held, citing *Vernon*, that successor liability may lie under the mere continuation exception even if the predecessor has not dissolved.¹³¹

¹²⁶ *Vernon v. Schuster*, 688 N.E.2d 1172, 1175-76 (Ill. 1997); *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 476 F.Supp.2d 913 (N.D. Ill. 2007); *Muniz v. Rexnord*, 2006 WL 3210463 at *3 (N.D. Ill. 2006); *Consol. Servs. and Const., Inc. v. S.R. McGuire*, 854 N.E.2d 715, 720 (Ill. App. Ct. 2006); *MacDonald v. Hinton*, 836 N.E.2d 893 (Ill. App. Ct. 2005); *Flanders v. Cal. Coastal Cmty., Inc.*, 828 N.E.2d 793, 798 (Ill. App. Ct. 2005); *Chatham Surgicore, Ltd. v. Health Care Serv. Corp.*, 826 N.E.2d 970 (Ill. App. Ct. 2005); *Brandon v. Anesthesia & Pain Mgmt. Assocs.*, 419 F.3d 594 (7th Cir. 2005);

¹²⁷ *Nilsson v. Cont'l Mach. Mfg. Co.*, 621 N.E.2d 1032, 1035 (Ill. App. Ct. 1993); *see also Green v. Firestone Tire & Rubber Co., Inc.*, 460 N.E.2d 895, 901 (Ill. App. Ct. 1984) (refusing to adopt the rationale of the *Turner* line of cases but confusing the *Turner* continuity of enterprise exception with the product line).

¹²⁸ *Vernon*, 688 N.E.2d at 1176; *Joseph Huber Brewing Co., Inc. v. Pamado, Inc.*, 2006 WL 2583719, *11-*13 (N.D. Ill. 2006).

¹²⁹ *Vernon*, 688 N.E.2d at 1176.

¹³⁰ *Vernon*, 688 N.E.2d at 1178.

¹³¹ *Brandon v. Anesthesia & Pain Mgmt. Assocs. Ltd.*, 419 F.3d 594, 598-99

Illinois: The De Facto Merger Exception

The Illinois Court of Appeals noted that, like the mere continuation exception, a prerequisite for imposing liability under the *de facto* merger exception is continuity of ownership.¹³² The court noted that the mere continuation and *de facto* merger exceptions are similar but apply in different circumstances: the former applies where no corporation existed before the asset purchase and the latter involves the combination of two existing corporations.¹³³ Besides stating this obvious difference between the exceptions, the *Nilsson* court provided no guidance on the contours of the *de facto* merger exception.

In another decision by the Illinois Court of Appeals, the court stated the following elements of a *de facto* merger:

- “(1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets and general business operations.
- (2) There is 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.”¹³⁴

A later decision by the Court of Appeals affirmed that all four elements are required for a showing of *de facto* merger.¹³⁵

(7th Cir. 2005) (finding that the predecessor was being preserved in a “ghostly existence” by the successor precisely to defeat a finding of continuity for successor liability purposes).

¹³² *Nilsson*, 621 N.E.2d at 1035.

¹³³ *Nilsson*, 621 N.E.2d at 1034.

¹³⁴ *Myers v. Putzmeister, Inc.*, 596 N.E.2d 754, 756 (Ill. App. Ct. 1992) (internal citations omitted); *Brandon v. Anesthesia & Pain Mgmt. Assocs.*, 419 F.3d 594 (7th Cir. 2005); *Gray v. Mundelein Coll.*, 695 N.E.2d 1379, 1388 (Ill. App. Ct. 1998).

¹³⁵ *Gray*, 695 N.E.2d at 1388

Illinois: The Express/Implied Assumption Exception

In determining whether the successor corporation assumed the liabilities of the predecessor, the Illinois courts “are nevertheless governed by the express provisions of the written document which dictates the agreement between the parties.”¹³⁶

Illinois: The Fraud Exception

Illinois courts have not developed a test for the fraud exception. However, the *Myers* court held that there was no evidence of fraud in the transaction *sub judice* “notwithstanding the disparity between the value of the predecessor’s debts and assets.”¹³⁷ Under Illinois law, it is not necessary to demonstrate the existence of a majority of the 11 badges of fraud listed in the fraudulent conveyance statute.¹³⁸

Indiana

The Indiana courts recognize the four traditional exceptions to the general rule of successor non-liability.¹³⁹ Indiana’s articulation of the fraud exception differs slightly from other jurisdictions. In Indiana, the fraud exception is based on evidence of “a fraudulent sale of assets done for the purpose of escaping liability.”¹⁴⁰ Also, Indiana mandates that the predecessor corporation dissolve before a court can impose liability on the successor under any of the exceptions.¹⁴¹

¹³⁶ *Myers*, 596 N.E.2d at 756.

¹³⁷ *Myers v. Putzmeister, Inc.*, 596 N.E.2d 754, 756 (Ill. App. Ct. 1992)

¹³⁸ *Brandon*, 419 F.3d at 594.

¹³⁹ *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1233 (Ind. 1994); *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130 (Ind. 2006); *Brant v. Krilich*, 835 N.E.2d 582 (Ind. Ct. App. 2005); *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150 (Ind. Ct. App. 2005); *Coleman v. Vukovich*, 825 N.E.2d 397 (Ind. Ct. App. 2005); *Rodriguez v. Tech Credit Union Corp.*, 824 N.E.2d 442, 447 (Ind. Ct. App. 2005); *Storage and Office Systems, LLC v. U.S.*, 490 F.Supp.2d 955 (S.D. Ind. 2007); *United Consumers Club, Inc. v. Bledsoe*, 441 F. Supp. 2d 967 (N.D. Ind. 2006); *Smith v. Biomet, Inc.*, 384 F. Supp. 2d 1241 (N.D. Ind. 2005); *Elec. Specialties, Inc. v. Siemens Bldg. Techs., Inc.*, 837 N.E.2d 1052 (Ind. Ct. App. 2005); *see also Glentel v. Wireless Ventures LLC*, 362 F.Supp. 2d 992 (N.D. Ind. 2005) (holding that asset sale conducted as UCC foreclosure does not insulate purchaser from successor liability)

¹⁴⁰ *Winkler*, 638 N.E. 2d at 1233.

¹⁴¹ *Guerrero v. Allison Engine Co.*, 725 N.E.2d 479, 483 (Ind. Ct. App. 2000) (citing *Winkler*, 638 N.E.2d at 1233).

Although the Indiana courts have not adopted expressly either the continuity of enterprise or product line exceptions, the *Guerrero* court, after discussing the supporting and opposing policies of the product line exception, stated, “The product line exception *may* be an appropriate means by which to balance the seemingly juxtaposed concepts of strict liability under the Indiana Product Liability Act, and freedom of contract - long supported by common law, as well as both state and federal constitutions.”¹⁴² The *Guerrero* court did not adopt the product line exception based on the facts presented because the successor corporation did not cause the destruction of the plaintiffs remedy (i.e., the predecessor was still in existence at the time of the suit).¹⁴³ The court, therefore, declined to adopt the product line exception because it would not aid the plaintiff *sub judice*: “the inequities which would warrant our full consideration of this proposed fifth exception to successor non-liability under Indiana law are not present.”¹⁴⁴ Based on the *Guerrero* court’s favorable treatment of the product-line exception, the Indiana Court of Appeals probably will adopt the product line exception when it is presented with the appropriate factual record. The *Guerrero* court’s approval of the product line exception directly contradicts *Hernandez v. Johnson Press Corp.*, which expressly rejected the product line exception on the theory that the legislature, not the courts, is the appropriate forum to resolve policy concerns related to expanded successor liability.

Indiana: The Express or Implied Assumption Exception

No Indiana decision has defined a test for the express or implied assumption exception. The courts appear to review the language of the applicable contract without considering extrinsic evidence of an implied assumption.¹⁴⁵

Indiana: The Fraud Exception

There are no cases that address the fraud exception to the general rule of successor non-liability. In *Winkler*, the court made the following conclusory statement without explaining its analysis: “[T]here is no evidence of fraud in the transaction.”¹⁴⁶

¹⁴² *Guerrero*, 725 N.E.2d at 487 (emphasis in original).

¹⁴³ *Guerrero*, 725 N.E.2d at 487

¹⁴⁴ *Guerrero*, 725 N.E.2d at 487

¹⁴⁵ *See, e.g., Winkler*, 638 N.E.2d at 1233.

¹⁴⁶ *Winkler*, 638 N.E.2d at 1233; *See also Gorski v. DRR, Inc.*, 801 N.E.2d 642, 647 (Ind. Ct. App. 2003).

Indiana: The De Facto Merger Exception

In *Sorenson v. Allied Products Corp.*, the most recent Indiana decision that explains the contours of the *de facto* merger exception, the Court of Appeals stated that the following are “criteria for establishing a *de facto* merger”:

(1) continuity of ownership; (2) continuity of management, personnel, and physical operation, (3) cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; and (4) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor.¹⁴⁷

The *Sorenson* court characterized the four “criteria” as factors, not elements, and analyzed each under the presented facts, which at least implies that no single factor is dispositive under the four-factor test for *de facto* merger.¹⁴⁸ The *Sorenson* court, however, relies on a decision by the Court of Appeals for the Seventh Circuit in its discussion of the *de facto* merger exception.¹⁴⁹ In the Seventh Circuit decision, the court stated, “Absent a transfer of stock, the nature and consequences of a transaction are not those of a merger.”¹⁵⁰ The *Travis* court, therefore, appears to imply that the *de facto* merger exception requires continuity of ownership. The *Sorenson* court did not reconcile the discrepancy between its analysis and the *Travis* court’s requirement that stock must be transferred before the *de facto* merger exception will apply. In a 2005 case, *Rodriguez v. Tech Credit Union Corp.*¹⁵¹, the court of appeals generally stated that “[s]uccessor in assets liability, under these exceptions, takes place only when the predecessor corporation no longer exists, such as when a corporation dissolves or liquidates in bankruptcy.”¹⁵² The court stated this while applying the *de facto* merger exception, but it is unclear whether they were requiring this element for just the *de facto* merger exception or for all four successor liability exceptions.

Indiana: The Mere Continuation Exception

¹⁴⁷ 706 N.E.2d 1097, 1100 (Ind. Ct. App. 1999) (citing *Hernandez v. Johnson Press Corp.*, 388 N.E.2d 778, 780 (Ind. Ct. App. 1979) (applying the four “criteria” but not expressly adopting the four criteria test as the law of Indiana)).

¹⁴⁸ 706 N.E.2d at 1100

¹⁴⁹ 706 N.E.2d at 1100

¹⁵⁰ *Travis v. Harris Corp.*, 565 F.2d 443, 447 (7th Cir. 1977) (applying Indiana law); *Kemper v. Saline Lectronics*, 366 F. Supp. 2d 550, (N.D. Ohio 2005); *Glentel, Inc. v. Wireless Ventures, LLC*, 362 F. Supp. 2d 992 (N.D. Ind. 2005); *Gamez v. Country Cottage Care & Rehab.*, 377 F. Supp. 2d 1103 (D.N.M. 2005).

¹⁵¹ 824 N.E.2d 442, 447 (Ind. Ct. App. 2005).

¹⁵² 824 N.E.2d at 447.

The *Sorenson* court also explained the mere continuation exception as it is applied under Indiana law:

The test for a mere continuation of the sellers (sic) business is not the continuation of the business operation, but rather the continuation of the corporate entity. An *indication* that the corporate entity has been continued is a common identity of stock, directors, and stockholders and the existence of only one corporation at the completion of the transfer.¹⁵³

The *Sorenson* court unfortunately used the term “indication” in defining the factors relevant to the mere continuation exception. Therefore, it is unclear whether or not complete identity of “stock, directors, and stockholders” is necessary before the court will apply the mere continuation exception.

Iowa

Iowa courts recognize four exceptions to the general rule of successor non-liability: express or implied assumption, fraud, consolidation or merger, and mere continuation.¹⁵⁴ The Iowa Supreme Court expressly rejected the product line exception on the basis that it is inconsistent with Iowa’s laws regarding strict liability in tort, which imposes liability only on the manufacturer or seller of a defective product.¹⁵⁵ Furthermore, the Iowa court expressly declined to expand the mere continuation exception based on the *Cyr* and *Turner* decisions.¹⁵⁶

Iowa: The Express or Implied Assumption Exception

¹⁵³ *Sorenson*, 706 N.E. 2d at 1100 (emphasis added) (citing *Travis*, 565 F.2d at 447).

¹⁵⁴ *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 751-52 (Iowa 2002); *Meyer v. IBP, Inc.*, 710 N.W.2d 213 (Iowa 2006); *Nixon v. State*, 704 N.W.2d 643 (Iowa 2005); *GE v. Iowa State Bd. of Tax Review*, 702 N.W.2d 485 (Iowa 2005); *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328 (Iowa 2005); *Murillo v. IBP, Inc.*, 720 N.W.2d 195, (Iowa Ct. App. 2006); *Pancratz v. Monsanto Co.*, 547 N.W. 2d 198 (Iowa 1996).

¹⁵⁵ *Delapp v. Xtraman, Inc.*, 417 N.W.2d 219, 222 (Iowa 1987).

¹⁵⁶ *Pancratz*, 547 N.W.2d at 201 (“[W]e made plain in *Delapp* that we did not believe strict liability policies would be furthered by imposing liability on a successor corporation that was without fault in creating the defective product. [citations omitted] We have never applied the mere continuation exception where the buying and selling corporations had different owners.”).

Where a corporation purchases some of the seller's assets and assumes only limited liabilities, "[the Iowa courts] have said there is no successor-in-interest liability."¹⁵⁷ The Iowa courts have not explained the plaintiff's burden of proof in demonstrating an express or implied assumption of liabilities by the purchasing corporation.

Iowa: The Mere Continuation Exception

Under Iowa's mere continuation exception, "the controlling factor is whether the transferor continues to own and control the new corporation."¹⁵⁸ In *Pancrantz*, the court stated, "The mere continuation exception, as traditionally applied, focuses on continuation of the *corporate entity*."¹⁵⁹ Furthermore, "[t]he exception has no application without proof of continuity of management and ownership between the predecessor and successor corporations."¹⁶⁰ The *Pancrantz* court also examined the new and expanded versions of the continuation exception that originated in the *Cyr* and *Turner* decisions.¹⁶¹ In response to the plaintiff's request that the court adopt one of the "totality of the circumstances" approaches to the continuation exception, the court stated, "[w]e, however, find no departure in our cases from the traditional formulation of the rule. Nor do we believe public policy would be served by such an expansion of the 'mere continuation' exception."¹⁶²

Iowa: The Fraud Exception

One Iowa decision¹⁶³ stands for the proposition that "parties cannot circumvent the mere continuation exception by inserting relatives as sham owners and directors of a new company that is in substance the predecessor."¹⁶⁴ The facts in *Chambers* were

¹⁵⁷ *Grundmeyer*, 649 N.W.2d at 751 (citing *Delapp*, 417 N.W.2d at 220).

¹⁵⁸ *Grundmeyer*, 649 N.W.2d at 752.

¹⁵⁹ 547 N.W.2d at 201.

¹⁶⁰ 547 N.W.2d at 201.

¹⁶¹ 547 N.W.2d at 201.

¹⁶² 547 N.W.2d at 201.

¹⁶³ *C. Mac Chambers Co., Inc. v. Iowa Tae Kwon Do Acad., Inc.*, 412 N.W.2d 593 (Iowa 1987); *Niver v. Travelers Indem. Co.*, 430 F. Supp. 2d 852 (N.D. Iowa 2006); *Williams v. Sec. Nat'l Bank*, 358 F. Supp. 2d 782 (N.D. Iowa 2005); *Varboncoeur v. State Farm Fire & Cas. Co.*, 356 F. Supp. 2d 935 (S.D. Iowa 2005).

¹⁶⁴ *Pancrantz v. Monsanto Co.*, 547 N.W.2d 198, 202 (Iowa 1996) (quoting *Grand Lab., Inc. v. Midcon Lab.*, 32 F.3d 1277, 1283 (8th Cir. 1994)).

unusual; a father, the sole owner of a corporation, formed a new corporation and transferred all of his businesses' assets into the newly-formed corporation. His son was the sole shareholder and director, but the father continued to manage the business.¹⁶⁵ The *Pancrantz* court stated that, although the *Chambers* court imposed liability on a successor corporation under the mere continuation exception, "in retrospect the holding perhaps better exemplifies the fraud exception, not the mere continuation exception, to the general rule of nonliability."¹⁶⁶ The *Pancrantz* court held that the *Chambers* decision does not indicate that Iowa courts do not require continuity of ownership under the mere continuation exception.¹⁶⁷

Kansas

The Kansas courts apply the four traditional exceptions to the general rule of successor non-liability.¹⁶⁸ However, unlike other "traditional" rule jurisdictions, Kansas does not require continuity of ownership under the mere continuation exception.¹⁶⁹

The Supreme Court of Kansas applied a narrowly construed form of the mere continuation exception as early as 1938, without classifying the exception.¹⁷⁰ Although the court did not name the exception explicitly, the Kansas Supreme Court adopted the "traditional rule" two years earlier in *Mank v. S. Kansas Stage Lines Co.*¹⁷¹ The *Avery* court held that where certain facts were presented, the effect of a transaction was fraudulent, without regard to the intent of the parties involved in the transaction:

Sometimes this sort of conduct on the part of corporations whereby one acquires all the assets of another is characterized as fraudulent. But it may not be intentionally so; perhaps no intentional fraud inhered in this transfer. But where

¹⁶⁵ 547 N.W.2d at 202.

¹⁶⁶ 547 N.W.2d at 202.

¹⁶⁷ 547 N.W.2d at 202.

¹⁶⁸ *Gillespie v. Seymour*, 876 P.2d 193, 200 (Kan. Ct. App. 1994) (quoting *Comstock v. Great Lakes Distrib. Co.*, 496 P.2d 1308 (Kan. 1972)); *Equity Asset Corp. v. B/E Aero., Inc.*, 388 F. Supp. 2d 1305 (D. Kan. 2005); see also *Stratton v. Garvey Int'l, Inc.*, 676 P.2d 1290, 1298 (Kan. Ct. App. 1984) (discussing the merits of the product-line exception but refusing to apply it because "Kansas adheres to the traditional majority rule of successor nonliability").

¹⁶⁹ *Stratton*, 676 P.2d at 1299.

¹⁷⁰ *Avery v. Safeway Transfer & Storage Co.*, 80 P.2d 1099, 1101 (Kan. 1938).

¹⁷¹ 56 P.2d 71 (Kan. 1936).

the transfer of assets strips a debtor corporation of all its assets, and disables the corporation from earning money to pay its debts, resources to which they may look for the payment of their due, the net result is in legal effect a fraud; and the courts will subject the transferee to liability for the satisfaction of claims against the corporation whose assets it has absorbed.¹⁷²

The *Avery* court, therefore, subjected the transferee to liability based on the going concern value of the purchased assets. Unlike other jurisdictions that imposed liability under similar circumstances, which limited the creditor's recovery to the liquidation value of the predecessor's assets at the time of the transfer (e.g., California), the Kansas courts imposed liability based on the asset's going concern value and held the successor liable for the predecessor's debts without limitation.

Kansas: The Express or Implied Assumption Liability

There appear to be no Kansas cases that define a test for or discuss the contours of the express or implied assumption exception.

Kansas: The Mere Continuation Exception

Under Kansas law, the courts use a five element test for mere continuation: “(1) transfer of corporate assets (2) for less than adequate consideration (3) to another corporation which continued the business operation of the transferor (4) when both corporations had at least one common officer or director who was in fact instrumental in the transfer . . . and (5) the transfer rendered the transferor incapable for paying its creditor's claims because it was dissolved in either fact or law.”¹⁷³

If there is a party whom the creditor can sue, then the mere continuation exception does not apply, even if the party is judgment proof.¹⁷⁴

Kansas: The De Facto Merger Exception

The Kansas courts have not developed a test for the *de facto* merger exception. In *Comstock*, the Supreme Court of Kansas defined the terms “consolidation” and “merger” by reference to *Fletcher*, and disposed of the merger issue by concluding that the

¹⁷² *Avery*, 80 P.2d at 1101.

¹⁷³ *Gillespie v. Seymour*, 876 P.2d 193, 200 (Kan. Ct. App. 1994) (quoting *Stratton v. Garvey Int'l, Inc.*, 676 P.2d 1290 (Kan. Ct. App. 1984)).

¹⁷⁴ *Gillespie v. Seymour*, 876 P.2d 193, 200 (Kan. Ct. App. 1994) (refusing to impose successor liability against the successor because the claimant sued a partner of the predecessor).

successor had no direct dealing with the predecessor; the successor acquired its interest from intervening purchasers of the predecessor's assets.¹⁷⁵

Kansas: The Fraud Exception

In *Comstock*, the Supreme Court of Kansas held that “[t]he incorporation of [the successor] in 1965, and the subsequent bona fide acquisition of some [of the predecessor’s] property after foreclosure and sale, cannot serve as a premise for a claim of fraud.”¹⁷⁶

Kentucky

Kentucky recognizes the general rule of successor non-liability and the four traditional exceptions.¹⁷⁷ Based on the *Pearson* case, the Kentucky courts have narrowly construed each of the exceptions.¹⁷⁸ Furthermore, the *Pearson* court expressly rejected the product-line exception.¹⁷⁹

The *Pearson* court cited a 1920 decision by the Supreme Court of Kentucky as the “seminal” case dealing with successor liability.¹⁸⁰ In *American Railway Express Co. v. Commonwealth*, the court determined that the purchaser of a railroad company’s assets was liable to the predecessor’s pre-sale creditors.¹⁸¹ The court reviewed a number of early cases involving successor liability before it articulated a “rule” that would apply to cases where the sole consideration that the purchasing corporation provides the seller for its assets is stock in the purchasing corporation:

¹⁷⁵ 496 P.2d at 1311.

¹⁷⁶ 496 P.2d at 1312.

¹⁷⁷ *Pearson v. Nat’l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002); *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364 (Ky. 2005); *Cabinet for Families & Children v. Cummings*, 163 S.W.3d 425 (Ky. 2005); *Parker v. Henry A. Petter Supply Co.*, 165 S.W.3d 474 (Ky. Ct. App. 2005).

¹⁷⁸ See, e.g., *Parker v. Henry A. Petter Supply Co.*, 165 S.W.3d 474, 479 (Ky. Ct. App. 2005).

¹⁷⁹ *Pearson*, 90 S.W.3d at 53.

¹⁸⁰ *Pearson*, 90 S.W.3db at 49.

¹⁸¹ 228 S.W. 433, 442 (Ky. 1920).

[W]hen one corporation, foreign or domestic, takes over the business and property of another that had in this state sufficient tangible property subject to execution to satisfy all its debts in this state, and pays for the property so taken over in nothing more than its stock, it becomes liable to state creditors of the selling corporation to the extent of the value of the property it has received in the sale, although the selling corporation may retain its corporate entity for the purpose of winding up its affairs, and have in some other state property that might be subjected to the payment of its debts; and this upon the ground that such a sale is constructively fraudulent.¹⁸²

The court also indicated that stock for asset transactions are “constructively fraudulent” as to the predecessor’s creditors:

[W]hen the selling corporation disposes of all its property and takes for it shares of stock in the purchasing corporation, and both the buyer and seller refuse to pay the debts of the seller, it is perfectly plain that the rights of creditors of the seller have been prejudiced by the sale; as to them the sale is constructively fraudulent, and for this reason courts will hold the purchasing corporation liable for the debts of the selling one.¹⁸³

Thus, the *American Railway* case indicates that the exceptions to the general rule of successor non-liability were derived from notions of fraud.

Kentucky: The Express or Implied Assumption Exception

In *Pearson*, the court reviewed the language of the relevant asset purchase agreement and concluded that the successor did not assume the predecessor’s pre-closing tort liabilities.¹⁸⁴ Even though the successor expressly assumed certain liabilities that existed on the closing date and the contract did not specifically address pre-closing tort liabilities, the court found that the successor did not impliedly assume pre-closing tort liabilities.¹⁸⁵

Kentucky: The De Facto Merger Exception

Without defining a specific test for the *de facto* merger exception, the Kentucky court indicated that liability would not be imposed on a successor that purchases assets

¹⁸² 228 S.W. at 442.

¹⁸³ 228 S.W. at 441.

¹⁸⁴ 90 S.W.3d at 50.

¹⁸⁵ 90 S.W.3d at 50.

“essentially” through a bankruptcy sale.¹⁸⁶ Furthermore, the court indicated that continuity of shareholders, management, or other indicia of merger or consolidation is necessary before the *de facto* merger exception will apply.¹⁸⁷

Kentucky: The Mere Continuation Exception

Based on the *Pearson* court’s interpretation of the mere continuation exception, there must be “shareholders or management” to produce continuation sufficient to impose liability on the purchasing corporation.¹⁸⁸ The court, however, did not specify if continuity of ownership *and* control is necessary. Basically, the court did not define a specific test for the exception. The court relied on “a reading of the purchase and sale agreement, together with the fact that the sale was essentially a bankruptcy sale” in finding that the purchaser did not assume the liabilities of the seller.¹⁸⁹

Kentucky: The Fraud Exception

The court did not address the fraud exception because the plaintiff in *Pearson* conceded that “no fraud exists in this case.”¹⁹⁰

Louisiana

The Louisiana appellate courts in recent years have expressly refused to “set forth any ultimate test of successor firm liability” although they appear to have accepted the traditional forms of the doctrine.¹⁹¹ In *Bourque v. Lehmann Lathe, Inc.*, the court discussed with apparent approval: (1) express or implied assumption, (2) fraud, and (3) *de facto* merger and mere continuation, although it found that none of these doctrines

¹⁸⁶ 90 S.W.3d at 51.

¹⁸⁷ 90 S.W.3d at 51.

¹⁸⁸ *Id.*; *Parker v. Henry A. Petter Supply Co.*, 165 S.W.3d 474, 479 (Ky. Ct. App. 2005).

¹⁸⁹ *Pearson v. Nat’l Feeding Systems, Inc.*, 90 S.W.3d 46 (Ky. 2002); *Parker v. Henry A. Petter Supply Co.*, 165 S.W.3d 474, 479 (Ky. Ct. App. 2005).

¹⁹⁰ *Pearson v. Nat’l Feeding Systems, Inc.*, 90 S.W.3d 46, 53 (Ky. 2002).

¹⁹¹ *Bourque v. Lehmann Lathe Inc.*, 476 So. 2d 1125, 1127 (La. Ct. App. 1985); *see also Wolff v. Shreveport Gas, Electric Light & Power Co.*, 70 So. 789 (La. 1916) (fraudulent schemes to escape liability through sale of a company’s assets to a newly formed corporation following an explosion).

applied to the tort claim at issue in the case.¹⁹² The same decision expressly refused to accept or reject the product line theory of California's *Ray v. Alad*.¹⁹³

Louisiana: The Express or Implied Assumption Exceptions

In discussing the express or implied assumption form of successor liability in the context of a tort claim for injuries from a defective lathe, the *Bourque* court stated that this form of successor liability:

is premised upon the concept that a voluntary sale of all assets includes, or should include, negotiations as to the transfer of all aspects of the corporate balance sheet. The parties to the sale are free to bargain, and potential liability is certainly one of the factors that rational businessmen include in the negotiations of such sales.¹⁹⁴

Interestingly, in more recent cases involving *contract-based or tax claims*, the Louisiana court of appeal has been far less accommodating or approving of successor liability, although it has not expressly disavowed the doctrine, merely finding it inapplicable on the facts of the cases before it due to the perceived separate nature of the defendants involved.¹⁹⁵

Louisiana: The Fraud Exception

Based on *Wolff v. Shreveport Gas*¹⁹⁶, a 1916 decision from the Supreme Court of Louisiana, the courts will impose successor liability when there is evidence of fraud in the transaction.¹⁹⁷ The *Wolff* court relied on the trust fund doctrine in finding that the

¹⁹² *Bourque*, 476 So. 2d at 1126.

¹⁹³ *Bourque*, 476 So. 2d at 1128.

¹⁹⁴ *Bourque*, 476 So. 2d at 1127.

¹⁹⁵ *TLC Novelty Company, Inc. v. Perino's Inc.*, 881 So. 2d 1267 (La. Ct. App. 2004) (contract claim for breach of video game contracts with the first Perino's bar not assertable against the second and third bars of the same name separately incorporated by the same owner, each managed by her son); *Morrison v. C.A. Guidry Produce*, 856 So.2d 1222 (La. Ct. App. 2003) (State's tax claim not assertable against company not found to be a successor of the taxpayer under *Wolff v. Shreveport Gas, Electric Light & Power Co.*, 70 So. 789 (La. 1916)); *See also, Central Business Forms, Inc. v. N-Sure Systems, Inc.*, 540 So.2d. 1029 (La. Ct. App. 1989).

¹⁹⁶ *Wolff v. Shreveport Gas, Electric Light & Power Co.*, 70 So. 789 (La. 1916).

¹⁹⁷ *Roddy v. NORCO Local 4-750, Oil, Chem., & Atomic Workers Int'l Union*, 359 So. 2d 957, 960 (La. 1978) (quoting *Wolff v. Shreveport Gas, Elec. Light & Power Co.*, 70

surviving corporation is liable to the predecessor's creditors if the transaction was entered into fraudulently.¹⁹⁸

Louisiana: The Continuation Exception

Louisiana's continuation doctrine does not fit precisely into any of the traditional exceptions to successor non-liability. However, based on the *Wolff* court's description of the transactions that may give rise to liability, the continuation doctrine appears to give effect to the traditional *de facto* merger doctrine. This conclusion is buttressed by the fact that Louisiana courts require continuity of shareholders before they will impose liability on a purchasing corporation, which indicates that Louisiana courts follow the more traditional approach to successor liability rather than the more expansive approach represented by the Continuity of Enterprise or Product Line doctrines, which do not require this continuity of ownership.

The *Wolff* continuation doctrine applies to consolidations, mergers, continuations, and *de facto* mergers. The *Wolff* court summarized the four general categories of business reorganizations that may produce a "continuation":

The first of such groups comprehends consolidations proper, where all the constituent companies cease to exist and a new one comes into being; the second, cases of merger proper, in which one of the corporate parties ceases to exist while the other continues. The third group comprehends cases where a new corporation is, either in law or in point of fact, the reincarnation of an old one. To the fourth group belong those transactions whereby a corporation, although continuing to exist *de jure*, is in fact merged in another, which, by acquiring its assets and business, has left of the other only its corporate shell.¹⁹⁹

The Louisiana Supreme Court later explained in a 1960 case that the continuation doctrine is only available where there is continuity of ownership between the selling and purchasing corporations:

[T]he "continuation" doctrine of the *Wolff* case can be invoked only when it is shown that the major stockholders of the selling corporation also have a substantial or almost

So. 789, 794 (La. 1916); *G-I Holdings, Inc. v. Bennet (In re G-I Holdings, Inc.)*, 380 F. Supp. 2d 469 (D.N.J. 2005)); *Hollowell v. Orleans Reg'l Hosp. LLC*, 27 F.3d 379, 390 (5th Cir. 2000) (emphasizing the difference between the fraud exception and the continuation exception).

¹⁹⁸ *Wolff v. Shreveport Gas, Elec. Light & Power Co.*, 70 So. 789, 794 (La. 1916).

¹⁹⁹ *Wolff*, 70 So. at 794.

identical interest in the purchasing corporation, for, otherwise, there would be no premise for concluding that the new corporation is a reincarnation of the old.²⁰⁰

This case, however, appears not to be subsequently cited and may be classified as “disapproved by neglect.” Even though the Supreme Court of Louisiana requires continuity of ownership before imposing liability under the “continuation” doctrine, the Fifth Circuit Court of Appeals developed a test for Louisiana’s continuation doctrine based on a list of non-dispositive factors, one of which is continuity of ownership.²⁰¹ Federal courts, purportedly applying Louisiana law, have used this multi-factor test, which does not require continuity of ownership, even though the Louisiana State Supreme Court appears to clearly require continuity of ownership before liability will be imposed under the continuation doctrine.²⁰²

The most recent cases to consider the continuation doctrine have, as noted above, done so in the context of *non-tort* claims. In those cases, the court rejected application of the doctrine to the facts at hand, finding the requisite separateness between the entities to deny successor liability, but did not find that the doctrine was not viable in Louisiana on a showing of proper facts. In *Morrison v. C.A. Guidry Produce*,²⁰³ after discussing the *Wolff* case from 1916, the court rejected the state’s claim for back taxes as asserted against a new corporation owned by a shareholder of the predecessor:

The issue before us is whether House of Quality is a “successor corporation” who has assumed the assets of Guidry Produce and has become solidarily liable for its debts. House of Quality’s sole shareholder is Vivian Guidry, who was a shareholder in Guidry Produce. Although it uses the same land and buildings, it rents these assets, it does not own them. House of Quality has many of the same customers as Guidry Produce. However, House of Quality has purchased new and separate equipment to operate the business. Considering the evidence as a whole, we agree with the trial court that House of Quality is not a successor corporation²⁰⁴

²⁰⁰ *Nat’l Sur. Corp. v. Pope Park, Inc.*, 121 So. 2d 240, 243 (La. 1960).

²⁰¹ *See Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1175 (5th Cir. 1992) (relying on *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174 (5th Cir. 1985); *Action Mfg. Co. v. Simon Wrecking Co.*, 387 F. Supp. 2d 439 (E.D. Pa. 2005); *Ennis v. Loiseau*, 164 S.W.3d 698 (Tex. App. 2005)).

²⁰² *See, e.g., Hollowell v. Orleans Reg’l Hosp. LLC*, 217 F.3d 379, 390 (5th Cir. 2000).

²⁰³ 856 So. 2d 1222 (La. Ct. App. 2003).

²⁰⁴ 856 So. 2d at 1228-29.

Similarly, in *TLC Novelty Company, Inc. v. Perino's Inc.*,²⁰⁵ the court rejected a breach of contract claim that was valid as against corporation that operated a seafood market and delicatessen that was asserted against a separate corporation operating a bar and grill businesses under the same or substantially similar name. Although all three entities in the Perino's corporate family were owned by the same person and managed by her son, the court respected the separate nature of the corporate entities:

These were separate legal entities, all conducting their respective businesses simultaneously. There were separate bank accounts, licenses, and alcohol permits. We find that Perino's II was not a successor to Perino's I, nor a reincarnation of Perino's I and that the two businesses did not compromise a single business enterprise.²⁰⁶

This suggests, to this author at least, that at least in cases involving non-tort claims, businesses that are separately structured and observe corporate formalities and maintain separateness of their operations and assets, successor liability will not be an easy doctrine to apply in Louisiana courts.²⁰⁷ The same rule, however, may not be applicable to the tort claims of involuntary creditors, and the *Wolff* case remains good law from the Louisiana Supreme Court, allowing imposition of successor liability upon an entity that purchases substantially all the assets of a business and continues its operations.²⁰⁸

Louisiana: The Mere Continuation Exception

There are no reported decisions in Louisiana regarding the continuity of enterprise doctrine. However, in *Russell v. SunAmerica Sec., Inc.*²⁰⁹ the Fifth Circuit Court of

²⁰⁵ 881 So. 2d 1267 (La. Ct. App. 2004).

²⁰⁶ 881 So. 2d at 1267.

²⁰⁷ See, *In Re: Scully's Aluminum Crafts, Inc.*, 352 B.R. 783 (Bankr. W.D. La. 2006) (breaking boat dealer up into separate companies for manufacturing, sales, and a third entity which owned all assets and leased to other two was not considered a continuation for purposes of successor liability); *TLC Novelty Company, Inc.*, 881 So. 2d 1267; *Morrison v. C.A. Guidry Produce*, 856 So. 2d 1222 (La. Ct. App. 2003); *Central Bus. Forms, Inc. v. N-Sure Systems, Inc.*, 540 So.2d 1029 (La. Ct. App. 1989)

²⁰⁸ See, *Doskey v. Herbert*, 645 So.2d 674 (La. Ct. App. 1994) (Failure to perform on a pest control contract caused plaintiff's home to suffer termite damage. Corporate purchaser considered successor where damage occurred out of breached contract in effect at time of purchase.); *Roddy v. NORCO Local 4-750, Oil, Chem., & Atomic Workers Int'l Union*, 359 So. 2d 957, 960 (La. 1978); *But see, LaBlanc v. Adams*, 510 So.2d 678 (La. Ct. App. 1987) (Tort suit arising out of a car accident where corporation found not to be a successor); *Bourque v. Lehmann Lathe Inc.*, 476 So. 2d 1125, 1127 (La. Ct. App. 1985).

²⁰⁹ 962 F.2d 1169, 1175 (5th Cir. 1992)

Appeals used the eight factor Continuity of Enterprise test found in *Mozingo v. Correct Manufacturing Corp.*²¹⁰ as their test for the Louisiana Continuation doctrine. Other district courts in Louisiana have followed Russell in using this test, strangely labeling it “mere continuation,” but it appears that no state courts have done so.²¹¹ This demonstrates the fluidity of successor liability doctrines and how difficult it can become to label the different exceptions as the lines between them continue to blur.

Maine

Under Maine law, a corporation that purchases the assets of another business will be held liable for the debts of its predecessor only if it expressly assumes the debts, there is a statutory provision that imposes liability, or the sale is not a “bona fide, arm’s length transaction”:

[A]bsent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm’s-length transaction is not liable for the debts or liabilities of the transferor corporation.²¹²

The *Diamond Brands* case involved an employer’s statutory duty to provide severance pay to all employees that worked with the firm for more than three years.²¹³ Aggrieved employees argued that they were entitled to severance pay because they worked for more than three years for the defendant if the court included the time that they worked for the defendant’s predecessor.²¹⁴ The court, relying on the plain language of the statute, concluded that the successor corporation was not required to pay severance to the plaintiffs because the court would not impose successor-in-interest liability on the defendant.²¹⁵ Note, however, that the court rejected plaintiff’s argument that the defendant was liable as a successor because it was a mere continuation of the seller on the ground that plaintiff had not established facts on this issue. It appears not to have stated that mere continuation was not recognized as a successor liability doctrine in Maine.²¹⁶

²¹⁰ 752 F.2d 168, 175 (5th Cir. 1985) (applying Mississippi law).

²¹¹ *Hollowell v. Orleans Reg’l Hosp. LLC*, 217 F.3d 379, 390 (5th Cir. 2000).

²¹² *Dir. of Bureau of Labor Standards v. Diamond Brands, Inc.*, 588 A.2d 734, 736 (Me. 1991).

²¹³ 588 A.2d at 736.

²¹⁴ 588 A.2d at 736.

²¹⁵ 588 A.2d at 737.

²¹⁶ *Id.* at n5; *but see Janet M. Sing, Inc. v. Maine Dept. of Labor*, 492 A.2d 892 (Me. 1985) (discussing statutory employer continuation liability under 26 MRSA sec. 1228).

The First Circuit Court of Appeals applied the *Diamond Brands* rule to a case involving potential successor liability in a tort suit.²¹⁷ The Court of Appeals chastised the plaintiff for his failure to certify the successor liability issue to the state court.²¹⁸ The court stated, “[i]t is not the role of the federal courts to ‘question the policy choices of states whose law we apply.’”²¹⁹ However, the Federal District Court, citing *Diamond Brands*, has stated that “[u]nder Maine’s common law, a corporation may be liable for the debts of its predecessor if the new corporation is a ‘mere continuation’ of the predecessor or if the transaction was undertaken with a fraudulent intent to escape liability.”²²⁰

Maryland

The Maryland Court of Appeals (Maryland’s highest court) adopted the “the general rule of nonliability of a successor corporation, with its four traditional exceptions.”²²¹ The *Nissen* court recognized that the express assumption and *de facto* merger exceptions were codified in Maryland’s Corporations Statutes and the fraud exception was codified in Maryland’s Fraudulent Conveyance Act.²²² The court concluded that the mere continuation is based on sound policy.²²³

The *Nissen* court expressly rejected the continuity of enterprise exception.²²⁴ While discussing the policy rationale of the continuity of enterprise exception, the court stated, “[i]t seems patently unfair to require [a party that bears ‘no blame in bringing the product and user together’] to bear the cost of unassumed and untemplated products

²¹⁷ *Jordan v. Hawker Dayton Corp.*, 62 F.3d 29, 32 (1st Cir. 1995); *Douglas v. York County*, 433 F.3d 143 (1st Cir. 2005); *see also Saco River Tel. & Tel. Co. v. Shooshan Jackson, Inc.*, 826 F.Supp. 580, 583 (D. Me. 1993).

²¹⁸ 62 F.3d at 32.

²¹⁹ 62 F.3d at 32. (internal citation omitted).

²²⁰ *Ramirez v. DeCoster*, 194 F.R.D. 348, 366 n.33 (D.Me. 2000) (citing *Diamond Brands*, 588 A.2d at 736 n.5); *Hoffman v. Applicators Sales & Serv.*, 366 F. Supp. 2d 177 (D. Me. 2005).

²²¹ *Nissen Corp. v. Miller*, 594 A.2d 564, 566 (Md. 1991).

²²² *Nissen Corp. v. Miller*, 594 A.2d 564, 566 (Md. 1991).

²²³ *Nissen Corp. v. Miller*, 594 A.2d 564, 566 (Md. 1991)(citing *Baltimore Luggage v. Holtzman*, 562 A.2d 1286, 1293 (Md. 1989)).

²²⁴ 594 A.2d at 570.

liability claims primarily because it is still in business and is perceived as a 'deep pocket.'²²⁵

Maryland: The Express or Implied Assumption Exceptions

The Maryland courts look to the language of the asset purchase agreement to determine if the purchasing corporation expressly assumed the liabilities of the seller.²²⁶ Unlike most jurisdictions, Maryland has acknowledged a standard, based on *Fletcher*, to determine if the purchaser impliedly assumed the liabilities of the seller:

In order for a promise to be implied on the part of a corporation to pay the debts of another corporation, the conduct or representations relied upon by the party asserting liability must indicate an intention of the buyer to pay the debts of the seller. The presence of such an intention depends on the facts and circumstances of each case.²²⁷

The *Baltimore Luggage* court, applying this test, held that a purchasing corporation did not impliedly assume an employment contract where the purchaser continued to pay the employee salary and report his earnings on a W-2 because the purchaser deducted these payments from the amount that the purchaser paid for the seller's assets.²²⁸

Maryland: The Mere Continuation Exception

The *Baltimore Luggage* court also provided a test for whether a purchasing corporation is merely a continuation of the seller:

[A] successor corporation may be liable for the debts of its predecessor if certain indicia are met. The indicia of continuation are:

"common officers, directors, and stockholders; and only one corporation in existence after the completion of the sale of assets. While the two foregoing factors are traditionally indications of a continuing corporation, neither is essential. Other factors such as continuation of the seller's business practices and policies and the sufficiency of consideration running to the seller corporation in light of the assets being sold may also be considered. To find that continuity exists merely because there was common management and ownership without

²²⁵ 594 A.2d at 569.

²²⁶ *Baltimore Luggage v. Holtzman*, 562 A.2d 1286 (Md. 1989).

²²⁷ *Baltimore Luggage v. Holtzman*, 562 A.2d 1286, 1292 (Md. 1989).

²²⁸ 562 A.2d at 1286.

considering other factors is to disregard the separate identities of the corporation without the necessary considerations that justify such an action."²²⁹

In *Baltimore Luggage*, the trial court held that the purchaser was a mere continuation of the seller based on evidence that the purchaser continued to use the trade name of the seller and held itself out as the seller so that persons dealing with the purchaser would not know that the corporations changed.²³⁰ The Court of Special Appeals reversed because there was no continuity of ownership between the corporations, the seller remained in existence, and there was sufficient consideration for the assets.²³¹

In a later Court of Appeals decision, the court analyzed the facts of the case *sub judice* under a continuation test adopted by Rhode Island, without expressly endorsing the test.²³² The Rhode Island test was based on five non-dispositive factors:

“(1) there is a transfer of corporate assets; (2) there is less than adequate consideration; (3) the new company continues the business of the transferor; (4) both companies have at least one common officer or director who is instrumental in the transfer; (5) the transfer renders the transferor incapable of paying its creditors because it is dissolved either in fact or by law.”²³³

It is important to note that neither mere continuation test applied by the Maryland courts requires continuity of ownership. The *Baltimore Luggage* court, however, noted that mere continuation applies where “the purchasing corporation maintains the same or similar management and ownership but wears a ‘new hat.’”²³⁴ In discussing the four traditional exceptions, the *Nissen* court cited this quote from *Baltimore Luggage* with approval.²³⁵ Based on the current case law, it is hard to tell what degree of continuity is actually required before a court will impose liability based on the mere continuation exception.

Maryland: The De Facto Merger Exception

²²⁹ 562 A.2d at 1293 (quoting 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* '7122 (rev. perm. ed. 1983)).

²³⁰ 562 A.2d at 1294.

²³¹ 562 A.2d at 1294.

²³² *Acad. of IRM v. LVI Envtl. Servs., Inc.*, 687 A.2d 669, 680 (Md. 1997).

²³³ 687 A.2d at 680 (quoting *H.J. Baker & Bros., Inc. v. Organics, Inc.*, 554 A.2d 196, 205 (R.I. 1989)).

²³⁴ *Baltimore Luggage*, 562 A.2d at 1293.

²³⁵ *Nissen Corp.*, 594 A.2d at 566.

As the *Nissen* court indicated, the *de facto* merger exception is codified in Maryland's Corporation Statute. Although the Maryland Annotated Code does not use *de facto* merger language, the Code does provide that the surviving entity in a merger situation is liable for the debts of the predecessor and does not specify that such liability only extends to statutory mergers.²³⁶ The courts have not yet defined a test for what constitutes a *de facto* merger.

Maryland: The Fraud Exception

As the *Nissen* court stated, the fraud exception is embodied in the Maryland Uniform Fraudulent Conveyance Act.²³⁷ There are no Maryland cases that apply the fraud exception to the general rule of successor non-liability, so there is no way to determine how the statute will be applied in the context of business assets sales.

Massachusetts

Massachusetts “follow[s] the traditional corporate law principle that the liabilities of a selling predecessor corporation are not imposed upon the successor corporation which purchases its assets, unless [one of the four traditional exceptions applies].”²³⁸ The *Guzman* court also expressly rejected the product line exception; the court deferred to the legislature because adopting the product line exception is a matter of social policy.²³⁹

Massachusetts: The Express or Implied Assumption Exception

Courts determine whether a purchasing corporation expressly or impliedly assumes the liabilities of the selling corporation by looking at the language of the relevant contracts.²⁴⁰

Massachusetts: The De Facto Merger Exception

²³⁶ MD. CODE ANN., *Corporations and Associations* § 3-114(e)(1) (1998).

²³⁷ 594 A.2d at 567.

²³⁸ *Milliken Co. v. Duro Textiles, LLC*, 19 Mass. L. Rptr. 509 (Mass. Super. 2005) (collecting authorities); *Guzman v. MRM/Elgin*, 567 N.E.2d 929, 931 (Mass. 1991); *Carreiro v. Rhodes Gill and Co., Ltd.*, 68 F.3d 1443, 1447 (1st Cir. 1995); *JSB Indus., Inc. v. Nexus Payroll Servs., Inc.*, 463 F.Supp.2d 103, 109 (D. Mass. 2006).

²³⁹ *Guzman*, 567 N.E.2d at 933.

²⁴⁰ *Scott v. NG U.S. I, Inc.*, 854 N.E.2d 981, 992 (Mass. App. Ct. 2006); *Goguen v. Textron Inc.*, 476 F.Supp.2d 5, 12 (D. Mass.2007).

In *Cargill, Inc. v. Beaver Coal & Oil Co.*, the Supreme Court of Massachusetts outlined a factor-based test for the *de facto* merger exception:

The factors that courts generally consider in determining whether to characterize an asset sale as a *de facto* merger are whether (1) there is a continuation of the enterprise of the seller corporation so that there is continuity of management, personnel, physical location, assets, and general business operations; whether (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; whether (3) the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and whether (4) the purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. [citation omitted]. No single factor is necessary or sufficient to establish a *de facto* merger.²⁴¹

Thus, under Massachusetts law, continuity of ownership is not a threshold requirement for a finding of *de facto* merger, however, “[I]n determining whether a *de facto* merger has occurred, courts pay particular attention to the continuation of management, officers, directors and shareholders.”²⁴² Imposition “of successor liability does not depend on the status of a particular creditor as secured or unsecured” or on the solvency or insolvency of the predecessor; “rather, the analysis focuses on whether one company has become another for purposes of its corporate debt.”²⁴³

Cargill allows for a finding of *de facto* merger when stock is only part of the value exchanged in the deal. However, so far no Massachusetts court has ever found a *de facto* merger when no stock exchange has taken place, and one federal court interpreting Massachusetts law has expressly rejected such an argument. The same court similarly rejected the proposition that the *de facto* merger doctrine might be invoked absent shareholder continuity²⁴⁴

Massachusetts: The Mere Continuation Exception

The Massachusetts courts have not developed a test for the mere continuation

²⁴¹ 676 N.E.2d 815, 818 (Mass. 1997); *Goguen*, 476 F.Supp.2d at 12-14; *JSB Indus., Inc.*, 463 F.Supp.2d at 109-10; *Scott*, 854 N.E.2d at 991.

²⁴² *Cargill, Inc.*, 676 N.E.2d at 818.

²⁴³ *Milliken Co. v. Duro Textiles, LLC*, 19 Mass. L. Rptr. 509 (Mass. Super. 2005)

²⁴⁴ *Goguen*, 476 F.Supp.2d at 13.

exception. Based on Massachusetts' factor-based test for *de facto* merger, which does not require continuity of ownership, a United States District Court decision, observed, “the distinction between the [*de facto* merger and mere continuation] exceptions seems more apparent than real.”²⁴⁵ Furthermore, “the *de facto* merger exception subsumes the continuation exception.”²⁴⁶

Massachusetts: The Fraud Exception

There are no reported cases in Massachusetts applying the fraud exception. In *Milliken & Company v. Duro Textiles, LLC*²⁴⁷ the court discussed the fraud exception as applied in Delaware and observed the need for the plaintiff to show that their harm was caused by the transfer, then a foreclosure sale. This is reminiscent of the destruction of other remedy requirements that is often part of the continuity doctrines. Also, a Massachusetts District Court case, *JSB Industries, Inc.*²⁴⁸, said that the lack of a showing of inadequate consideration was significant to the negation of allegations of fraud, and that court cited cases from various jurisdictions which give element based fraud tests²⁴⁹

Massachusetts: The Continuity of Enterprise Exception

The Massachusetts Supreme Court in *McCarthy v. Litton Indus., Inc.*²⁵⁰ applied the Continuity of Enterprise Exception using all four of the *Turner* considerations as elements. The court decided that neither the Mere Continuation nor the Continuity of Enterprise exceptions were applicable with the given facts, and therefore declined to adopt the Continuity of Enterprise doctrine at that time.²⁵¹ While the court did not expressly state whether they would adopt the Continuity of Enterprise Exception if given the proper set of facts, they did state in a footnote that the exception was a minority view among other states.²⁵²

²⁴⁵ *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PB Pollution*, 712 F. Supp. 1010, 1019 (D. Mass. 1989); *Goguen*, 476 F.Supp.2d at 14-15; *McCarthy v. Litton Indus., Inc.*, 570 N.E.2d 1008, 1012-13 (Mass. 1991); *Scott*, 854 N.E.2d at 991.

²⁴⁶ *Scott v. NG U.S. 1, Inc.*, 854 N.E.2d 981 (Mass. Ct. App. 2006)

²⁴⁷ 19 Mass. L. Rep. 509 (2005).

²⁴⁸ 463 F.Supp.2d at 110-11.

²⁴⁹ 463 F.Supp.2d at 110-11.

²⁵⁰ 570 N.E.2d 1008, 1013 (Mass. 1991).

²⁵¹ 570 N.E.2d at 1013

²⁵² 570 N.E.2d at 1013.

Michigan

Michigan recognizes five exceptions to the general rule of non-liability (the traditional four plus “where some of the elements of a purchase in good faith [are] lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for”).²⁵³ Most importantly, Michigan expanded the continuation exception to what has become known as the “continuity of enterprise” exception.²⁵⁴

Michigan: The Express/Implied Assumption Exception

Michigan recognizes express or implied assumption of liabilities as an exception to the general rule of successor nonliability.²⁵⁵ The Michigan Court of Appeals has, at least on one occasion, concluded that, where the facts and circumstances surrounding a purchase agreement as well as a deposition of the successor’s vice-president, suggest the possibility of implied assumption, summary judgment for the successor is inappropriate.²⁵⁶

Michigan: The Fraud Exception

“The general rule of nonliability holds except where the transaction is fraudulent as to creditors of the transferor. The creditors may then follow the property to the transferee. Indicia of fraud may be inadequate consideration paid to the transferor, and/or lack of good faith.”²⁵⁷

²⁵³ See *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 509-510 (Mich. 1999) (the *Turner* court recognized only the four traditional exceptions at the time it expanded the “mere continuation” exception); *Starks v. Mich. Welding Specialists, Inc.*, 722 N.W.2d 888 (Mich. 2006); *Jeffrey v. Rapid American Corp.*, 529 N.W.2d 644 (Mich. 1995); *Perceptron, Inc. v. Silicon Video, Inc.*, 423 F. Supp. 2d 722 (E.D. Mich. 2006). See *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 886 (Mich. 1976); *Ferguson v. Glaze*, 2008 WL 314544 (Mich. Ct. App. Feb. 5, 2008); *Glidden v. Thompson & Hawley Funeral Home*, 2006 WL 2033979 at *3 (Mich. Ct. App. 2006); *Clerc v. Chippewa County War Mem’l. Hosp.*, 721 N.W.2d 177 (Mich. 2006); *Elezovic v. Ford Motor Co.*, 697 N.W.2d 851 (Mich. 2005).

²⁵⁴ See *Turner*, 244 N.W. 2d at 883

²⁵⁵ See *Foster*, 597 N.W.2d at 509-10.

²⁵⁶ *Safeco Ins. Co. v. Pontiac Plastics & Supply Co.*, 2000 WL 33538535, at *3 (Mich. Ct. App. Jan. 21, 2000).

²⁵⁷ *Turner*, 244 N.W.2d at 886-87.

Both the fraud and mere continuation exceptions share the element of inadequacy of consideration. The Michigan Court of Appeals addressed a district court's application of the fraud exception in *Gougeon Bros., Inc. v. Phoenix Resins, Inc.*²⁵⁸ In reviewing the district court's holding of successor liability, the court stated:

The trial court held that plaintiff demonstrated that defendant was subject to successor liability because the sale of Matrix' [the predecessor] assets was a fraudulent transfer designed to defraud Matrix' creditors and because defendant was a mere continuation of Matrix. To support this holding, the court made the following findings of fact: defendant bought Matrix' assets for \$3,000, while Matrix' sales had exceeded \$115,000; the same two persons were equal shareholders of both Matrix and defendant; defendant conducts business at same [sic] address as did Matrix; and defendant notified Matrix' distributors that MAS epoxy was now one of defendant's products, that defendant would pay any currently owed invoices, and that the distributors should continue to use Matrix literature until the new literature was available. . . . These findings demonstrate, at least, that defendant is a mere continuation of Matrix.²⁵⁹

Implicit in this holding is that the threshold for mere continuation may be lower than the threshold for fraud.

Michigan: The De Facto Merger Exception

The *Turner* court, while most interested in fashioning the continuity of enterprise exception, cited *Shannon v. Samuel Langston Co.*²⁶⁰ for the requirements of *de facto* merger:

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

²⁵⁸ 2000 WL 33534582, at *2 (Mich. Ct. App. Feb. 8, 2000).

²⁵⁹ 2000 WL 33534582, at *2.

²⁶⁰ 379 F. Supp. 797 (W.D. Mich. 1974)

(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.²⁶¹

The *Turner* court also stated that the merger result (the applicability of all four factors) is necessary to find a *de facto* merger.²⁶²

Michigan: The Mere Continuation Exception

As noted by the dissent in *Turner*, the mere continuation exception is “the most confused of the four exceptions.”²⁶³ “[T]he exception seems to encompass the situation where one corporation sells its assets to another corporation with the same people owning both corporations.”²⁶⁴

Michigan: The Continuity of Enterprise Exception

The *Turner* court expanded the mere continuation exception, essentially by removing commonality of shareholders requirement from the *de facto* merger test. Thus, the court stated the test for continuity of enterprise:

Turner held that a prima facie case of continuity of enterprise exists where the plaintiff establishes the following facts: (1) there is continuation of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation; (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily

²⁶¹ *Turner*, 244 N.W.2d at 891; see also *Craig v. Oakwood Hosp.*, 684 N.W.2d 296, 314-15 (Mass. 2004) (holding there was no *de facto* merger “simply because. . .the purchasing corporation paid cash, not stock”); *Tassos Epicurean Cuisine, Inc. v. Triad Bus. Solutions, Inc.*, 2007 WL 956745 at *9 (E.D. Mich.).

²⁶² *Turner*, 244 N.W.2d at 892 (“The general results of a merger are that the acquired corporation ceases to exist, the acquiring corporation takes over the entire operation of the acquired corporation and shareholders of the acquired corporation become shareholders of the acquiring corporation . . . If the merger result is not achieved, the *de facto* merger doctrine is not the prescription.”).

²⁶³ *Turner*, 244 N.W.2d at 892.

²⁶⁴ *Turner*, 244 N.W.2d at 892.

necessary for the uninterrupted continuation of normal business operations of the selling corporation. *Turner* identified as an additional principle relevant to determining successor liability, whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation.”²⁶⁵

Finally, *Foster* concluded that the test in *Turner* only applies “when the transferor is no longer viable and capable of being sued.”²⁶⁶

Minnesota

“Minnesota follows the traditional approach to corporate successor liability.”²⁶⁷ In addition to the four traditional exceptions, “[a]nother exception, that is sometimes incorporated as an element of one of the [traditional] four exceptions, is the absence of adequate consideration for the sale or transfer.”²⁶⁸

Minnesota: The Mere Continuation Exception

The Minnesota Court of Appeals has listed factors to be considered in making a determination of mere continuation:

In determining whether one corporation is a continuation of another, the test is whether there is a continuation of the corporate entity of the transferor not whether there is a continuation of the transferor’s business operations.

The traditional indications of “continuation” are: common officers, directors, and shareholders; and only one corporation in existence after the completion of the sale of assets. Other factors such as continuation of the seller’s business practices

²⁶⁵ *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 510 (Mich. 1999) (citing *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883 (Mich. 1976)).

²⁶⁶ *Foster*, 597 N.W.2d at 511.

²⁶⁷ *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 98 (Minn. 1989); *Dunn v. National Beverage Corp.*, 729 N.W.2d 637 (Minn. Ct. App. 2007) (Review granted June 19, 2007); *P.I.M.L., Inc. v. Fashion Links, LLC*, 428 F. Supp. 2d 961 (D. Minn. 2006); *Sweeter v. Power Indus., Inc.*, 2006 WL 2865329 at *3 (Minn. Ct. App. 2006).

²⁶⁸ *Huray v. Fournier NC Programming, Inc.*, No. C9-02-1852, 2003 WL 21151772, at *3 (Minn. Ct. App. May 20, 2003) (quoting *Niccum*, 438 N.W.2d at 369. The court, in referring to the “four traditional exceptions” was referring to agreed upon assumption, *de facto* or *de jure* merger, mere continuation, and fraud). See generally Michael T. Kafka, *Corporate Successor Liability in Minnesota and Other Jurisdictions: A Legal Landscape Where Even Purchasers of Assets should Tread with Caution*, 26 HAMLINE L. REV. 1 (2002).

and polices and the sufficiency of the consideration running to the seller corporation in light of the assets being sold may also be considered. To find that continuity exists merely because there was common management and ownership without considering other factors is to disregard the separate identities of the corporation without the necessary considerations that justify such an action.²⁶⁹

Minnesota: The Fraud Exception

Minnesota's successor liability fraud exception is governed by the Minnesota fraudulent transfers act found at Minn. Stat. Ann. § 513.44.270

Mississippi

Mississippi recognizes the four traditional exceptions to the general rule of successor nonliability.²⁷¹ In addition to the four traditional exceptions, Mississippi has adopted a variation of the "continuity of enterprise" exception and accepts the product line theory as a viable basis for recovery.²⁷²

Mississippi: The Continuity of Enterprise Exception

[Continuity of enterprise] considers the traditional [mere continuation] factors as well as other factors such as: (1) retention of the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same physical 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.²⁷³

This test is applicable where the "successor takes on the identity of the predecessor

²⁶⁹ 2003 WL 21151772 at *4.

²⁷⁰ *Sweeter*, 2006 WL 2865329 at *4

²⁷¹ See *Paradise Corp. v. Amerihost Dev., Inc.*, 848 So.2d 177, 179 (Miss. 2003).

²⁷² 848 So.2d at 180 (continuity of enterprise); *Huff v. Shopsmith, Inc.*, 786 So. 2d 383, 388 (Miss. 2001); *Gregory ex rel. Gregory v. Central Sec. Life Ins. Co.*, 953 So.2d 233, 238 (Miss. 2007) (acknowledging that *Huff* had accepted the product-line exception); *Stanley v. Mississippi State Pilots of Gulfport, Inc.*, 951 So.2d 535, 540 (Miss. 2006).

²⁷³ *Paradise*, 848 So.2d at 180; *Stanley*, 951 So.2d at 540.

company in every way except taking responsibility for the predecessor's debts."²⁷⁴ The *Paradise* court took its lead from the Fifth Circuit in *Mozingo v. Correct Mfg. Corp.*,²⁷⁵ which made it clear that the continuity of enterprise test adds more factors but does not treat the common ownership factor as dispositive.

Mississippi: The Product Line Theory

Mississippi's enunciation of the product line theory is succinct:

. . . . under the product line theory, successor corporations which undertake the manufacture of the same products as the predecessor are liable for injuries caused by the defects in that product and inherit the liabilities associated with the product even if sold and manufactured by the predecessor corporation. . . . [C]ertain elements must be present to subject a successor corporation to liability for the products of a predecessor. The successor must produce the same product under a similar name, have acquired substantially all of the predecessor's assets leaving no more than a corporate shell, hold itself out to the public as a mere continuation of the predecessor, and benefit from the goodwill of the predecessor.²⁷⁶

Mississippi: The Fraud Exception

The Mississippi Supreme court has stated in *Stanley*²⁷⁷ that whether a transaction is fraudulent for the purposes of successor liability is determined by the newly created Mississippi Uniform Fraudulent Transfers Act, Miss. Code Ann. 15-3-101 through Miss. Code Ann. 15-3-121.²⁷⁸

Missouri

Missouri follows the general rule of successor liability and recognizes the four traditional exceptions.²⁷⁹ The Missouri Court of Appeals has addressed the extension of successor liability by adoption of either the continuity of enterprise or product line

²⁷⁴ *Paradise*, 848 So.2d at 180.

²⁷⁵ 752 F.2d 168 (5th Cir. 1985).

²⁷⁶ *Huff*, 786 So.2d at 387-88; *Gregory ex rel. Gregory*, 953 So.2d at 238.

²⁷⁷ 951 So.2d 535, 540 (Miss. 2006).

²⁷⁸ *Stanley*, 951 So.2d at 540.

²⁷⁹ *Chem. Design, Inc. v. Am. Standard, Inc.*, 847 S.W.2d 488, 491 (Mo. Ct. App. 1993).

exceptions, ultimately deciding not to extend successor liability.²⁸⁰

Missouri: The Fraud Exception

In general, Missouri seems to treat fraud claims as those where actual fraud is demonstrated, and considers “continuation” and *de facto* merger exceptions as a species of constructive fraud.²⁸¹

Missouri: The Express/Implied Assumption Exception

Missouri courts have not analyzed the express/implied assumption exception to the general rule of successor nonliability.

Missouri: The Mere Continuation Exception

In *Chemical Design*, the Missouri Court of Appeals cited *Young v. Fulton Iron Works Co.*,²⁸² for the proposition that “in the absence of common incorporators, directors, officers, or shareholders between the selling and purchasing corporations, the latter could not be held to be a ‘mere continuation’ of the former.”²⁸³ However, in 2001, the Missouri Court of Appeals stated, “Missouri case law strongly leans toward to the view that a lack of identity of officers, directors, and shareholders *does not preclude* a finding of corporate continuation, but that such identity is merely one factor in making this determination.”²⁸⁴ The court went on to state that, “[i]n Missouri, identity of the officers, directors, and shareholders for both corporations (although a substantial factor) is not a precursor to invocation of the ‘corporate continuation’ doctrine. . . . [A]lthough the ‘identity’ factor is a ‘key’ element to be considered, the lack thereof (standing alone) does not mandate reversal of [a trial court’s judgment finding mere continuation where

²⁸⁰ 847 S.W.2d at 491 (“[C]ourts in Missouri have not seen fit to depart from the traditional distinction between corporate mergers or the sale and purchase of outstanding stock of a corporation, whereby preexisting corporate liabilities also pass to the surviving corporation or to the purchaser, and the sale and purchase of corporate assets which eliminates successor liability.”).

²⁸¹ See *Ingram v. Prairie Block Coal Co.*, 5 S.W.2d 413, 416-17 (Mo. 1928); see also *Sweeney v. Heap O’Brien Mining Co.*, 186 S.W. 739 (Mo. Ct. App. 1916).

²⁸² 709 S.W.2d 927 (Mo. Ct. App. 1986).

²⁸³ 847 S.W.2d at 493

²⁸⁴ *Roper Elec. Co. v. Quality Castings, Inc.*, 60 S.W.3d 708, 711 (Mo. Ct. App. 2001); *Sundance Rehabilitation Corp. v. New Vision Care Assocs. II, Inc.*, 2006 WL 2850556 at *2 (W.D. Mo. 2006); *Boycom Cable Vision, Inc. v. Howe*, 2006 WL 2727984 at *5 (E.D. Mo. 2006).

there was no continuity of ownership].”²⁸⁵

Missouri: The De Facto Merger Exception

According to the Missouri Court of Appeals:

The elements of a *de facto* merger are: (1) a continuation of management and personnel and general business operations; (2) a continuity of shareholders resulting from the purchasing corporation paying for the assets with shares of its own stock so the selling corporation stockholders become a constituent part of the purchasing corporation; (3) the seller corporation ceasing ordinary business operation and dissolving as soon as possible; (4) the purchasing corporation assuming those obligations necessary to continue normal, ordinary business operations. . . . It is not necessary to find all the elements to find a *de facto* merger.²⁸⁶

(In *Harashe*, however the court found that the facts at bar satisfied all of the elements).

Montana

Montana does not appear to have addressed the issue of successor liability in a published opinion.

Nebraska

The Supreme Court of Nebraska has addressed successor liability at least three times: twice in the context of products liability and once in the context of successor liability for contracts.²⁸⁷ In *Jones v. Johnson Mach. & Press Co.*, the Nebraska Supreme Court first adopted the traditional rule of successor nonliability in asset sales except for the four traditional exceptions.²⁸⁸ The court next noted that some courts “have developed

²⁸⁵ *Roper Elec. Co. v. Quality Castings, Inc.*, 60 S.W.3d 708, 711 (Mo. Ct. App. 2001).

²⁸⁶ *Harashe v. Flinkote Co.*, 848 S.W.2d 506, 509 (Mo. Ct. App. 1993) (citing FLETCHER CYC CORP ' 7124.20 (Perm. Ed.)).

²⁸⁷ See *Jones v. Johnson Mach. & Press Co.*, 320 N.W.2d 481 (Neb. 1982) (successor products liability action based on an allegedly defective punch press); *Timmerman v. Am. Trencher, Inc.*, 368 N.W.2d 502 (Neb. 1985) (successor products liability action based on an allegedly defective drop hammer); *Earl v. Priority Key Servs., Inc.*, 441 N.W.2d 610 (Neb. 1989) (successor liability action based on contractual relationship with predecessor).

²⁸⁸ *Jones*, 320 N.W.2d at 483.

and applied a theory in products liability cases which imposes liability on successor corporations without regard to the ‘niceties’ of corporate transfers where the successor acquires and continues the predecessor’s business in an essentially unchanged manner.”²⁸⁹ The court noted three different “theories” used to “expand the focus of legal liability:” *de facto* merger (citing *Shannon v. Samuel Langston Co.*,²⁹⁰ continuity of enterprise (citing *Turner v. Bituminous Cas. Co.*),²⁹¹ and the product-line exception (citing *Ray v. Alad Corp.*²⁹²).²⁹³ The court decided not to depart from the traditional rule (in any of the above listed manners) under the facts of the present case; however, the court’s choice strongly suggests that they intended not to adopt any of these exceptions to the traditional rule.²⁹⁴

Nebraska: The Mere Continuation Exception

In *Timmerman*, the Nebraska Supreme Court undertook an analysis of the factors necessary for the mere continuation exception, a task which had not been undertaken in *Jones*.²⁹⁵ Continuing the business operations of a predecessor, by itself is not enough to constitute mere continuation.²⁹⁶ “[A] commonality of officers, directors, or stockholders is an important consideration in determining whether a purchasing corporation is but a continuation of the corporate entity of a selling corporation.²⁹⁷ The *Timmerman* court also looked back to an early Nebraska case, *Douglas Printing Co. v. Over*,²⁹⁸ and found two factors considered in the continuation analysis: “[1][T]here was commonality of

²⁸⁹ *Jones*, 320 N.W.2d at 484.

²⁹⁰ 379 F. Supp. 797 (W.D. Mich. 1974).

²⁹¹ 244 N.W.2d 873 (Mich. 1976).

²⁹² 560 P.2d 3 (Cal. 1977).

²⁹³ *Jones*, 320 N.W.2d at 483.

²⁹⁴ *Jones*, 320 N.W.2d at 484.

²⁹⁵ *Timmerman*, 368 N.W.2d at 506.

²⁹⁶ *Timmerman*, 368 N.W.2d at 505 (“The mere fact that the purchaser continues the operations of the seller does not of itself render the purchaser liable for the obligations of the seller; in order to impose liability on the purchaser, it must be shown that the purchaser represents “merely a ‘new hat’ for the seller” (quoting *Armour-Dial, Inc. v. Alkar Engineering Corp.*, 469 F. Supp. 1198, 1201 (E.D. Wis. 1979)).

²⁹⁷ *Timmerman*, 368 N.W.2d at 506 (citations omitted).

²⁹⁸ 95 N.W. 656 (Neb. 1903).

both ownership and leadership between the selling and purchasing corporations, and . . . [2] creation of the purchasing corporation simply became a means of refinancing a major secured debt of the selling corporation.”²⁹⁹

In the context of contractual successor liability, the Nebraska Supreme Court found a successor to be liable for contractual obligations of its predecessor where the parties described their relationship to customers and employees as a merger (even though it was an asset purchase), the business continued to provide the same service at the same address to the same customers with the same employees, and the predecessor virtually went out of business.³⁰⁰

Nevada

In 2005, the Nevada Supreme Court reaffirmed its adherence to the traditional four exceptions to the general rule of successor non-liability in asset purchases and declined to adopt the continuity of enterprise exception in the negligence context.³⁰¹ The court stated: “[w]e will leave the consideration of this exception in CERCLA and products liability claims for another day.”³⁰² It is difficult to predict whether the Nevada Supreme Court would adopt the continuity of enterprise exception. The court noted that “[c]ourts have adopted the expanded doctrine in the limited circumstance of products liability because they recognized that sound public policy favors the protection of the public against dangerous products.”³⁰³ However it also stated: we are persuaded by the fact that “[t]he trend in other jurisdictions appears to be away from the expansion of successor liability” and “in favor of retaining the traditional rule on non-liability.”³⁰⁴

The court set forth this test for de factor merger: “(1) whether there is a continuation of the enterprise, (2) whether there is a continuity of shareholders, (3) whether the seller corporation ceased its ordinary business operations, and (4) whether the purchasing corporation assumed the seller's obligations.”³⁰⁵ It noted that “some

²⁹⁹ *Timmerman*, 368 N.W.2d at 506.

³⁰⁰ *Earl*, 441 N.W.2d at 613-14.

³⁰¹ *Village Builders 96, L.P. v. U.S. Labs., Inc.*, 112 P.3d 1082, 1087, 1091 (Nev. 2005).

³⁰² 112 P.3d at 1091.

³⁰³ 112 P.3d at 1091

³⁰⁴ 112 P.3d at 1091 (quoting *MBII v. PSI*, 89 Cal.Rptr.2d 778, 781 (Cal. Ct. App. 1999)

³⁰⁵ 112 P.3d at 1087.

courts give great weight to the question of whether the consideration given by the seller consists of shares of the seller's own stock” but concluded that the factors should be weighed equally, and therefore no single factor is “either necessary or sufficient to establish a de facto merger.”³⁰⁶ The court stated “This approach is more reasonable because it properly balances the successor corporation's rights to be free from liabilities incurred by its predecessor, with the important interest involved in ensuring that ongoing businesses are not able to avoid liability by transferring their assets to another corporation that continues to operate profitably as virtually the same entity.”³⁰⁷

In applying the mere continuation exception the court noted that “one federal district court has opined that ‘[t]he gravamen of the “mere continuation” exception is the continuation of corporate control and ownership, rather than continuation of business operations.’ Many courts have likewise concluded that the key inquiry in resolving this issue is whether there exists a continuation of the corporate entity. We agree.”³⁰⁸

New Hampshire

New Hampshire courts follow the general rule of successor nonliability for asset purchasers and recognize the four traditional exceptions: express or implied assumption, *de facto* merger, mere continuation, and fraud.³⁰⁹ The New Hampshire Supreme Court has expressly rejected the product-line exception and other “risk spreading” doctrines (including the continuity of enterprise exception).³¹⁰ The court has also stated

³⁰⁶ 112 P.3d at 1087 (quoting *Kleen Laundry I*, 817 F.Supp. at 230-31 (quoting, in turn, *In re Acushnet River & New Bedford Harbor*, 712 F.Supp. 1010, 1015 (D.Mass.1989); *Action Mfg. Co. v. Simon Wrecking Co.*, 428 F. Supp. 2d 288 (E.D. Pa. 2006); *Telxon Corp. v. Smart Media of Del., Inc.*, 2005 Ohio 4931 (Ohio Ct. App. 2005)).

³⁰⁷ 112 P.3d at 1088.

³⁰⁸ 112 P.3d at 1091-92 (quoting *East Prairie R-2 School Dist. v. U.S. Gypsum Co.*, 813 F.Supp. 1396, 1400 (E.D.Mo. 1993)); *Berg Chilling Sys. v. Hull Corp.*, 435 F.3d 455 (3d Cir. 2006).

³⁰⁹ See *Bielagus v. Emre of New Hampshire Corp.*, 826 A.2d 559, 564 (N.H. 2003); *Thompson v. C&C Research & Dev. LLC*, 898 A.2d 495 (N.H. 2006).

³¹⁰ See *Bielagus*, 826 A.2d 559; *Simoneau v. South Bend Lathe, Inc.*, 543 A.2d 407 (N.H. 1988); see also *Appeal of SAU#16 Coop. Sch. Bd.*, 103, 719 A.2d 613, 617 (N.H. 1998) (using federal successor liability standard); *Russell v. Philip D. Moran, Inc.*, 449 A.2d 1208, 1209-10 (N.H. 1982) (contractual indemnification and warranty claims could be viable under a theory of successor liability); *Zimmerman v. Suissevale, Inc.*, 438 A.2d 290, 292 (N.H. 1981) (successor liability under stock purchase agreement).

unequivocally that *Cyr v. B. Offen & Co., Inc.*,³¹¹ does not represent a valid interpretation of New Hampshire law.³¹²

The New Hampshire Supreme Court has described the *de facto* merger drawing on language from a Florida State Court: “The bottom-line question is whether each entity has run its own race, or whether there has been a relay-style passing of the baton from one to the other.”³¹³ Under this theory, *de facto* mergers will be found when a company is completely absorbed into a successor via an asset sale, and the company continues its operations by “maintaining the same managements, personnel, assets, location and stockholders,” yet leaves the predecessor’s creditors otherwise without a remedy.³¹⁴ The court listed four factors to consider noting that the second is often the one that tips the scales:

McKee appears to no longer be good precedent for application of the mere continuation and *de facto* merger doctrines.³¹⁵ The later *Wilson* court cited *McKee* for its statement of the law in this regard, but states that the *McKee* court’s application of the doctrines was too narrow, limited, and harsh.³¹⁶ The right approach, according to *Wilson*, is to evaluate the “continuity of management, personnel, physical location, assets and general business operations; continuity of shareholders since the purchasing corporation pays with its stock; seller ceases operations and dissolves; assumption of obligations necessary for the uninterrupted continuation of normal business operations,” to determine whether a successor corporation is the result of a *de facto* merger or a mere continuation.³¹⁷

Wilson rejected the “extremely limited” view set forth in *McKee*, and decided to embrace the more modern and fair-minded approach, in which:

³¹¹ 501 F.2d 1145 (1st Cir. 1974).

³¹² *Bielagus v. EMRE*, 826 A.2d 559, 569 (N.H. 2003)

³¹³ 826 A.2d at 565 (quoting *300 Pine Island v. Stephen L. Cohen*, 547 So. 2d 255, 256 (Fla. Dist. Ct. App. 1989)); *Thompson v. C&C Research & Dev. LLC*, 898 A.2d 495 (N.H. 2006); *J.G.M.C.J. Corp. v. C.L.A.S.S., Inc.*, 924 A.2d 400 at 405 (N.H. 2007).

³¹⁴ *Bielagus*, 826 A.2d 559; *J.G.M.C.J. Corp.*, 924 A.2d 400 at 405-06.

³¹⁵ *Wilson v. Fare Well Corp.*, 356 A.2d 458 (N.H. 1976); *J.G.M.C.J. Corp.*, 924 A.2d 400 at 405.

³¹⁶ *Wilson*, 356 A.2d at 493; *J.G.M.C.J. Corp.*, 924 A.2d 400 at 405.

³¹⁷ 356 A.2d 458 at 489; *J.G.M.C.J. Corp.*, 924 A.2d 400 at 405; *Thompson v. C & C Research and Development, LLC.*, 898 A.2d 495, 501 (N.H. 2006).

[T]he most relevant factor is the degree to which the predecessor's business entity remains intact. The more a corporation physically resembles its predecessor, and the more reasonable it is to hold the successor fully responsible. In this way, the innocent, injured consumer is protected without the possibility of being left without a remedy due to the subsequent corporate history of the manufacturer.³¹⁸

In *Wilson*, there were two predecessor companies. The court found a *de facto* merger as to one predecessor, and a continuation as to the other. Thus, *Wilson*, appears to reflect an expansion of those doctrines in New Hampshire.

This conclusion may be undermined, however, by the New Hampshire Supreme Court's rejection of *Cyr v. B. Offen & Co., Inc.*,³¹⁹ which had embraced the notion of risk spreading as a justification for expanding successor liability with the continuity doctrines.³²⁰ *Wilson* was based, in part, on the holding of *Cyr*.³²¹ Thus, although the mere continuation and *de facto* merger doctrines are the law of New Hampshire, their scope in application is unclear at best.³²²

The Supreme Court has also taken some pains to define "mere continuation" which it recognizes as being very similar to *de facto* merger.³²³ In New Hampshire, mere continuation requires both continuity of ownership and control in the form of shareholders and directors as well as the dissolution of the predecessor after the sale.³²⁴ Adequacy of consideration and good faith may also be considered as factors in determining whether a "mere continuation" exists.

New Jersey

New Jersey courts recognize the four traditional exceptions to the general rule of corporate successor nonliability, as well as a "fifth exception, sometimes incorporated as

³¹⁸ 356 A.2d 458 at 490.

³¹⁹ 501 F.2d 1145 (1st Cir. 1974).

³²⁰ *Bielagus v. FMRE*, 826 A.2d 559, 569 (N.H. 2003); *Simoneau v. South Bend Lathe*, 543 A.2d 407, 409 (N.H. 1988).

³²¹ *Wilson*, 140 N.J. Super. 476, 487 (1976).

³²² *Bielagus v. FMRE*, 826 A.2d 559, 565.

³²³ *Bielagus*, 826 A.2d 559.

³²⁴ *Bielagus*, 826 A.2d 559.

an element of one of the above exceptions, . . . the absence of adequate consideration for the sale or transfer.”³²⁵ In 1981, the New Jersey Supreme Court also adopted the product-line exception.³²⁶ In doing so, the court stated it “has long recognized the significance of the social policy of risk-spreading in establishing the manufacturer’s duty to the product user under the rapidly expanding principles of strict liability in tort.”³²⁷

New Jersey: The Express or Implied Assumption Exception

New Jersey courts have not extensively analyzed the express or implied assumption exception to the general rule of corporate successor nonliability. In *McKee*, the New Jersey Supreme Court, Law Division, approached assumption using a traditional contracts analysis, beginning with the propositions:

A contract must be construed as a whole and the language employed must be given its ordinary meaning, in the absence of anything to show that the language was used in a different sense. Provisions of a contract must be interpreted, if possible, so as to give effect to the general purpose and intention of the parties.³²⁸

Applying these general rules of construction, the court went on to conclude that the purchase agreement in question did not include any express assumption by the purchasing corporation.³²⁹

New Jersey: The Fraud Exception

Similarly to the express or implied assumption exception, New Jersey courts have

³²⁵ *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 815 (N.J. 1981) (quoting *McKee v. Harris-Seybold Co.*, 264 A.2d 98 (N.J. Super. Ct. Law Div. 1970)); *G-I Holdings, Inc. v. Bennet*, 380 F. Supp. 2d 469 (D.N.J. 2005).

³²⁶ 431 A.2d at 825. (“[W]e hold that where one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.”)

³²⁷ 431 A.2d at 820; *but see Jenkins v. Anderson Mach. Sys., Inc.*, 2002 WL 31398172 (N.J. Super. Ct. App. Div. August 1, 2002) (unpublished opinion holding no successor liability based on operation of similar business at predecessor’s location under similar name when successor had not acquired assets of predecessor).

³²⁸ 264 A.2d at 102.

³²⁹ 264 A.2d at 102.

not offered much analysis of the fraud exception. In *McKee*, the court quickly dealt with both the fraud and inadequate consideration exceptions.³³⁰ While some jurisdictions have concluded that inadequacy of consideration is the primary element of fraud, the *McKee* court, though discussing both together, kept them analytically separate. The court quoted *West Texas Refining & Dev. Co. v. Comm’r of Internal Revenue*,³³¹ stating:

It is equally well settled when the sale is a bona fide transaction, and the selling corporation receives money to pay its debts, or property that may be subjected to the payment of its debts and liabilities, equal to the fair value of the property conveyed by it, the purchasing corporation will not, in the absence of a contract obligation or actual fraud of some substantial character, be held responsible for the debts or liabilities of the selling corporation.³³²

New Jersey: The Mere Continuation and De Facto Merger Exceptions

New Jersey decisions from the early 1970’s list factors for *de facto* merger, such as “transfer or sale of all assets, exchange of stocks, change of ownership whereby stockholders, officers and creditors go to the surviving corporation, and assumption of a variety of liabilities pursuant to previously negotiated agreements.”³³³ Elements for mere continuation include “use of the same name, at the same location, with the same employees and common identity of stockholders and directors.”³³⁴ In *McKee v. Harris-Seybold Co.*, a New Jersey superior court stated that continuity of interest was a necessary, threshold requirement for mere continuation.³³⁵ By 1991, one superior court listed the *factors* to be considered for mere continuation as “less than adequate consideration, common directorships or management, and whether the transaction rendered the predecessor entity incapable of satisfying its liabilities”³³⁶ By 1997, a

³³⁰ 264 A.2d at 106-07. Although *McKee* has been overruled or severely qualified by *Wilson v. Fare Well Corp.*, 356 A.2d 458, 464 (N.J. Super. Ct. Law Div. 1976) with regard to *de facto* merger and mere continuation, it appears to remain good law in the areas of express or implied assumption of liabilities and the fraud exception.

³³¹ 68 F.2d 77 (10th Cir. 1933).

³³² 264 A.2d at 107.

³³³ *Wilson v. Fare Well Corp.*, 356 A.2d 458, 464 (N.J. Super. Ct. Law Div. 1976).

³³⁴ 356 A.2d at 464.

³³⁵ 264 A.2d 98 (N.J. Law Div. 1970) (“For liability to attach, the purchasing corporation must represent merely a ‘new hat’ for the seller.”).

³³⁶ *Russell-Stanley Corp. v. Plant Indus., Inc.*, 595 A.2d 534, 548 (N.J. Super.

superior court noted, “[b]ecause [the mere continuation and *de facto* merger] exceptions to the general rule of non-liability tend to overlap, with much of the same evidence being relevant to each determination, these exceptions are often treated in unison.”³³⁷ The court then listed the factors to be considered for both the mere continuation and *de facto* merger exceptions:

In determining whether a particular transaction amounts to a *de facto* consolidation or mere continuation, most courts consider four factors: (i) continuity of management, personnel, physical location, assets, and general business operations; (ii) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (iii) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (iv) continuity of ownership/shareholders.³³⁸

“Not all of these factors needed be present for a *de facto* merger or continuation to have occurred.”³³⁹ When the plaintiff in the case contended that both the mere continuation and *de facto* merger exceptions were inapplicable because there was no continuity of ownership, the court stated, “[the plaintiff’s] reliance on *McKee* for the proposition that a *de facto* merger is precluded where the predecessor corporation receives no ownership interest in the successor corporation, omits consideration of the more modern view of New Jersey law as no longer requiring continuity of shareholder interest.”³⁴⁰ Applying the factors listed above, the court concluded: “[b]ased on the foregoing facts, it appears that the intent of the asset purchase transaction was to effectuate a merger of the two firms. This transaction resulted in nothing more than a change of hat for Burke, thus constituting a mere continuation of the predecessor’s business.”³⁴¹

McKee is not unquestioned precedent for the proper application of the mere

Ct. Ch. Div. 1991).

³³⁷ *Woodrick v. Jack J. Burke Real Estate, Inc.*, 703 A.2d 306, 312 (N.J. Super. Ct. App. Div. 1997); *City of East Orange v. Kynor*, 893 A.2d 46 (N.J. Super. Ct. App. Div. 2006).

³³⁸ *Woodrick*, 703 A.2d at 312 (quoting *Glynwed, Inc. v. Plastimatic, Inc.*, 869 F.Supp. 265, 276 (D.N.J. 1994) (applying New Jersey law on the issue of corporate successor liability)).

³³⁹ *Woodrick*, 703 A.2d at 312; *Marsdale v. Port Liberte Partners*, 2007 WL 92666 at *5 (N.J. Super. Ct. App Div.); *Berg Chilling Systems, Inc.*, 435 F.3d at 462-63.

³⁴⁰ *Woodrick*, 703 A.2d at 313.

³⁴¹ 703 A.2d at 314.

continuation and de facto merger doctrines.³⁴² The later *Wilson* court cited *McKee* for its statement of the law in this regard, but stated that the *McKee* court's application of the doctrines was too narrow, limited, and harsh.³⁴³

The right approach, according to *Wilson*, is to evaluate the "continuity of management, personnel, physical location, assets and general business operations; continuity of shareholders since the purchasing corporation pays with its stock; seller ceases operations and dissolves; assumption of obligations necessary for the uninterrupted continuation of normal business operations," to determine whether a successor corporation is the result of a *de facto* merger or a mere continuation.³⁴⁴

Wilson rejected the "extremely limited" view set forth in *McKee*, and decided to embrace the more modern and fair-minded approach, in which:

[T]he most relevant factor is the degree to which the predecessor's business entity remains intact. The more a corporation physically resembles its predecessor, and the more reasonable it is to hold the successor fully responsible. In this way, the innocent, injured consumer is protected without the possibility of being left without a remedy due to the subsequent corporate history of the manufacturer.³⁴⁵

In *Wilson*, there were two predecessor companies. The court found a *de facto* merger as to one predecessor, and a continuation as to the other. Thus, *Wilson*, appears to reflect an expansion of those doctrines in New Jersey.

New Jersey: The Product Line Exception

In *Ramirez*,³⁴⁶ the Supreme Court of New Jersey substantially adopted the product line analysis as articulated by the California Supreme Court in *Ray*. The *Ramirez* court applied the same "three-fold justification" applied by the *Ray* court. 431 A.2d at 820 (The three policy justifications from *Ray* are "(1) The virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued

³⁴² *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476 (1976).

³⁴³ 140 N.J. Super at 493.

³⁴⁴ 356 A.2d 458 at 489.

³⁴⁵ 356 A.2d 458 at 490.

³⁴⁶ 431 A.2d at 819.

operation of the business.”). New Jersey’s application of the product line exception differs most sharply from California’s application of the exception in that New Jersey does not impose the same strict causation requirement under the first prong of *Ray*.³⁴⁷ In addressing the question of whether the product line exception might apply to assets purchased at a bankruptcy sale, the court opined, “[w]e share the instinctive reaction of those who hesitate to apply the product-line exception to a successor at a bankruptcy sale. At first glance, to apply the doctrine to one who could be contemplating the purchase of assets free and clear of any predecessor liability seems unfair. That concern turns out to be unfounded.”³⁴⁸ In justifying its departure from California’s more strict application of the product line exception, the New Jersey Supreme Court noted, “[u]ltimately, the question is whether the imposition of a duty on the successor to respond to the complaints of its predecessor’s customers is fair, when the successor trades on the loyalty of those customers.”³⁴⁹

On the *same day* that the New Jersey Supreme Court decided *Ramirez*,³⁵⁰ it also decided *Nieves v. Bruno Sherman Corp*³⁵¹ in which it held that the product line exception should be extended to include intermediate successor corporations. The court justified this action by saying that the intermediate corporation had contributed to the destruction of plaintiffs’ remedy against the original manufacturer and that the company “became ‘an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.’”³⁵² This theory was used again in 1998 in the case of *Class v. Am. Roller Die Corp.*³⁵³ In both the *Nieves* and the *Class* cases one of the key factors in the courts decision is that the intermediate companies expressly retained liability for products sold prior to the asset sale when they were liquidating the product line. This leaves the question open as to whether intermediate successor corporations would be liable under the product line theory if the companies they sold to

³⁴⁷ *LeFever v. K.P. Hovnanian Enter., Inc.*, 734 A.2d 290, 298-99 (N.J. 1999) (“We believe, however, that the California court has focused on the first justification for the product-line exception, specifically, that strict liability is appropriate when the successor’s acquisition of the business has virtually destroyed the plaintiff’s remedies, to the exclusion of the more dominant themes.”).

³⁴⁸ 734 A.2d at 300.

³⁴⁹ 734 A.2d at 301.

³⁵⁰ 431 A.2d 811

³⁵¹ *Nieves v. Bruno Sherman Corp.*, 431 A.2d 826, 831 (N.J. 1981).

³⁵² *Nieves*, 431 A.2d at 831 (quoting *Ray v. Alad*, 560 P.2d 3, 11 (Cal. 1977)).

³⁵³ *Class v. Am. Roller Die Corp.*, 705 A.2d 390 (N.J. Super. Ct. App. Div. 1998).

were to assume all liability as part of the sale.³⁵⁴

The appellate court in *Class* went on to determine how fault should be apportioned between multiple successor corporations.³⁵⁵ The court determined that the best method to use would be the Market Share method and to impose this method by apportioning fault based on number of units produced by each successor corporation.³⁵⁶ The court stated that this method most comports with the policy reasons used to justify the imposition of product line successor liability in the first place namely each successor corporation is liable for the amount of good will and benefit obtained from their respective use of the original producers product line.³⁵⁷ The court then went on to point out that data was not available on the number of products sold by each corporation in this case. It then decided that in absence of data on number of units produced the court will apportion fault based on the number of years each company actually produced the product.³⁵⁸ The court admitted that this is not the ideal situation but it was the best it could do under the circumstances.³⁵⁹

The *Class*³⁶⁰ trial court also had analyzed the affect of the Product Line exception on companies who might purchase a product line through an asset sale, but then never actually produce anything from it. The court decided that such a company would not be liable through the product line exception because it didn't actually receive any benefit from the assets or good will which was the hallmark of the *Ramirez* rationale for imposing liability.³⁶¹ The *Class* appellate court did not review this determination because it was not contested by the parties.³⁶²

The New Jersey Supreme Court in *Mettinger v. Globe Slicing Mach. Co.*³⁶³

³⁵⁴ *Nieves*, 431 A.2d at 831-832.; *Class v. Am. Roller Die Corp.*, 683 A.2d 595, 599 (N.J. Super. Ct. Law Div. 1996) (published trial court decision affirmed without further comment by *Class*, 705 A.2d 390 on issue of whether successor liability applies).

³⁵⁵ *Class*, 705 A.2d at 394-396.

³⁵⁶ 705 A.2d at 394

³⁵⁷ 705 A.2d at 395

³⁵⁸ 705 A.2d at 394-95.

³⁵⁹ 705 A.2d at 396.

³⁶⁰ 683 A.2d 595 (N.J. Super. Ct. Law Div. 1996).

³⁶¹ *Class*, 683 A.2d at 606.

³⁶² *Class*, 705 A.2d at 393 n.1.

decided the question of whether a defendant distributor or retailer could use the product line exception to seek indemnification from a corporate successor (normally, absent an asset sale, in N.J. a distributor can seek such indemnification against a manufacturer³⁶⁴). Traditionally the product line exception was meant to help plaintiffs recover in products liability suits.³⁶⁵ However, the court in *Mettinger* decided to expand the Product Line exception to include defendant distributors and retailers.³⁶⁶ It concluded that, even though the principle purpose of the Product-Line exception was to provide a remedy to victims, applying the product line exception to the defendant distributor seeking indemnification from the successor manufacturer furthered the purpose “of spreading the risk to society at large for the costs of injuries from defective products”.³⁶⁷ The court went on to state that:

“Public policy requires that having received the substantial benefits of the continuing manufacturing enterprise, the successor corporation should also be made to bear the burden of the operating costs that other established business operations must ordinarily bear.” Ordinarily, the manufacturer must bear the cost of indemnifying entities lower in the chain of distribution for injuries caused by defects in its products. Therefore, the successor manufacturer also must bear that cost.³⁶⁸

New Mexico

New Mexico first addressed the issue of successor liability in 1941, when the New Mexico Supreme Court adopted the traditional approach in *Pankey v. Hot Springs Nat. Bank*,³⁶⁹ The Supreme Court of New Mexico did not address successor liability in

³⁶³ 709 A.2d 779 (N.J. 1998)

³⁶⁴ 709 A.2d at 783

³⁶⁵ *See Hill v. Trailmobile, Inc.*, 412 Pa.Super. 320, 603 A.2d 602 (1992).

³⁶⁶ *Mettinger*, 709 A.2d at 783.

³⁶⁷ *Mettinger*, 709 A.2d at 785 (quoting *Ray v. Alad*, 560 P.2d 3, 11 (Cal. 1977)).

³⁶⁸ *Mettinger*, 709 A.2d at 785 (citations omitted) (quoting *Ray v. Alad*, 560 P.2d 3, 11 (Cal. 1977)).

³⁶⁹ 119 P.2d 636, 640 (N.M. 1941) (“The general rule is that where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor To this general rule there are four well recognized exceptions, under which the purchasing corporation becomes liable for the debts and liabilities of the selling corporation. (1) Where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporations; (3) where the purchasing corporation is

the context of products liability until 1997.³⁷⁰ In *Garcia*, the only traditional exception possibly applicable was the mere continuation exception.³⁷¹ However, the court noted that “[t]he ‘key element of a “continuation” is a common identity of officers, directors and stockholders in the selling and purchasing corporations.’³⁷² Thus, the mere continuation exception ‘has no application without proof of continuity of management and ownership between the predecessor and successor corporations.’”³⁷³ The *Garcia* court, finding the mere continuation exception inapplicable, adopted the product-line exception as articulated in *Ray v. Alad*.³⁷⁴

New York

The law of successor liability in New York appears unsettled in several key areas.³⁷⁵ In general, New York courts recognize the four traditional exceptions to the general rule of nonliability for asset purchasers.³⁷⁶ The Court of Appeals in *Semenetz* expressly rejected the product line exception, an issue which had previously split the Appellate division.³⁷⁷ The *Semenetz* court made no decision on the continuity of enterprise exception, but several intermediate appellate courts in New York have adopted it.³⁷⁸

merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts. . . .” (quoting *West Texas Refining & Dev. V. Comm’r of Int. Rev.*, 68 F.2d 77, 81 (10th Cir. 1933)).

³⁷⁰ See *Garcia v. Coe Mfg. Co.*, 933 P.2d 243, 247 (N.M. 1997).

³⁷¹ *Garcia v. Coe Mfg. Co.*, 933 P.2d 243, 246 (N.M. 1997).

³⁷² *Garcia v. Coe Mfg. Co.*, 933 P.2d 243, 247 (N.M. 1997).

³⁷³ *Garcia v. Coe Mfg. Co.*, 933 P.2d 243, 247 (N.M. 1997).

³⁷⁴ *Garcia v. Coe Mfg. Co.*, 933 P.2d 243, 248 (N.M. 1997).

³⁷⁵ *In re Seventh Judicial Dist. Asbestos Litig.*, 788 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005).

³⁷⁶ *Schumacher v. Richards Shear Co., Inc.*, 451 N.E.2d 195, 198 (N.Y. 1983); *Semenetz v. Sherling & Walden, Inc.*, 851 N.E.2d 1170 (N.Y. 2006); *I & G Lexington L.L.C. v. Ayers Serota Associates, Inc.*, 836 N.Y.S.2d 39 (N.Y. App. Div. 2007); *Morales v. City of New York*, 849 N.Y.S.2d 406, 408-9 (N.Y. Supp. 2007).

³⁷⁷ *Semenetz v. Sherling & Walden, Inc.*, 851 N.E.2d 1170, 1173-75 (N.Y. 2006); *New York v. National Services Industries, Inc.*, 460 F.3d 201, 214 (2d Cir. 2006); *Colon v. Multi-Pak Corp.*, 477 F.Supp.2d 620, 627 (S.D.N.Y. 2007).

³⁷⁸ See, e.g., *Salvati v. Blaw-Knox Food & Chem. Equip., Inc.*, 497 N.Y.S.2d

New York: The Express/Implied Assumption Exception

New York courts recognize the express or implied assumption exception to the general rule of nonliability. In the few cases which have addressed this exception, courts have looked at the language of the purchase agreement to determine whether the successor has expressly assumed any liabilities of the predecessor.³⁷⁹

New York: The Fraud Exception

While New York courts recognize the exception to the general rule of nonliability for asset purchasers where “the transaction is entered into fraudulently to escape [tort] obligations”,³⁸⁰ no New York decision has analyzed the contours of the fraud exception.

New York: The De Facto Merger Exception

One of the traditional exceptions to the general rule of nonliability exists where there has been a “consolidation or merger of seller and purchaser.”³⁸¹ A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a ‘*de*

242, 247 (N.Y. Sup. Ct. 1985) (adopting the continuity of enterprise exception as articulated in *Turner*); *Hart v. Bruno Mach. Corp.*, 679 N.Y.S.2d 740, 742 (N.Y. App. Div. 1998); *Semenetz v. Sherling & Walden, Inc.*, 851 N.E.2d 1170 (N.Y. 2006); *In re Seventh Judicial Dist. Asbestos Litig.*, 788 N.Y.S.2d at 579; *Semenetz v. Sherling & Walden, Inc.*, 801 N.Y.S.2d 78 (N.Y. 2005); *Buja v. KCI Konecranes Intern. PLC.*, 815 N.Y.S.2d 412 (N.Y. Sup. Ct. 2006).

³⁷⁹ See, e.g., *Hartford Acc. & Indem. Co., Inc. v. Canron, Inc.*, 373 N.E.2d 364, 364-65 (N.Y. 1977) (finding no express or implied assumption by a successor in a purchase agreement); *Valenta Enters., Inc. v. Columbia Gas of New York, Inc.*, 455 N.Y.S.2d 996, 998 (N.Y. App. Div. 1982) (finding neither express assumption of liability nor anything “presented to the court which would warrant a finding of implied commitment to assume such responsibilities.”); *Emrich v. Kroner*, 434 N.Y.S.2d 491, 492 (N.Y. App. Div. 1980) (finding that, “from the terms of the purchase agreement . . . [the successor] agreed to assume the tort liability of [the predecessor] arising out of incidents occurring after the closing date.”); *In re Parmalat Securities Litigation*, 493 F.Supp.2d 723 at 730 (S.D.N.Y. 2007) (finding successor corporation liable when they had assumed “all debts” of the predecessor over the objections of the successor that they did not assume the “acts” of the predecessor. “[T]he issue is not the assumption of *acts*. It is the assumption of *liability for those acts*.”).

³⁸⁰ *Schumacher v. Richards Shear Co.*, 451 N.E.2d 195, 198 (1983).

³⁸¹ *Schumacher*, 451 N.E.2d at 195.

facto merger, even if the parties chose not to effect a formal merger.”³⁸² In analyzing whether a *de facto* merger has occurred, the following factors are considered:

(1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer’s assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller’s business; and (4) continuity of management, personnel, physical location, assets and general business operation.³⁸³

While not all of these factors necessarily need be present for a finding of *de facto* merger,³⁸⁴ in some cases the Appellate Division has acknowledged that continuity of ownership is “the essence of a merger” and is an indispensable element to a finding of *de facto* merger, essentially making it a threshold question.³⁸⁵

New York: The Continuity of Enterprise Exception

At least one New York Supreme Court has adopted the continuity of enterprise

³⁸² *In re New York City Asbestos Litig.*, 789 N.Y.S.2d 484, 486 (N.Y. App. Div. 2005).

³⁸³ *In re New York City Asbestos Litig.*, 789 N.Y.S.2d at 486; *see also* *Sweatland v. Park Corp.*, 587 N.Y.S.2d 54, 56 (N.Y. App. Div. 1992); *New York v. National Service Industries, Inc.*, 460 F.3d 201 (2d Cir. 2006); *Washington Mut. Bank, F.A. v. SIB Mortg. Corp.*, 801 N.Y.S. 2d 821 (N.Y. App. Div. 2005); *Buja v. KCI Konecranes Intern. PLC.*, 815 N.Y.S.2d 412 (N.Y. Sup. Ct. 2006); *In re Seventh Judicial Dist. Asbestos Litig.*, 788 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005); *Crowley v. VisionMaker, LLC*, 512 F.Supp.2d 144 (S.D.N.Y. 2007); *Riverside Marketing, LLC v. Signaturecard, Inc.*, 425 F.Supp.2d 523, 535 (S.D.N.Y. 2006); *Colon v. Multi-Pak Corp.*, 477 F.Supp.2d 620, 626 (S.D.N.Y. 2007).

³⁸⁴ *In re New York City Asbestos Litig.*, 789 N.Y.S.2d at 486. (citing *Fitzgerald v. Fahnestock & Co.*, 730 N.Y.S.2d 70 (N.Y. App. Div. 2001)); *In re Seventh District Asbestos Litig.*, 788 N.Y.S.2d at 583; *Kretzmer v. Firesafe Products Corp.*, 805 N.Y.S.2d 340 (N.Y. App. Div. 2005); *Washington Mut. Bank, F.A. v. SIB Mortg. Corp.*, 801 N.Y.S.2d 821 (N.Y. App. Div. 2005); *Buja v. KCI Konecranes Intern. PLC.*, 815 N.Y.S.2d 412 (N.Y. Sup. Ct. 2006); *New York v. National Service Industries, Inc.*, 380 F.Supp.2d 122 (E.D.N.Y. 2005).

³⁸⁵ *In re New York City Asbestos Litig.*, 789 N.Y.S.2d at 486-87; *Buja v. KCI Konecranes Intern. PLC.*, 815 N.Y.S.2d 412, 415 (N.Y. Sup. Ct. 2006); *Colon v. Multi-Pak Corp.*, 477 F.Supp.2d 620, 626 (S.D.N.Y. 2007); *New York v. National Service Industries, Inc.*, 460 F.3d at 213-14 (declining to certify the question to the court of appeals); *Riverside Marketing, LLC*, 425 F.Supp.2d at 536; *Care Environmental Corp. v. M2 Technologies, Inc.*, 2006 WL 148913 at *11 (E.D.N.Y. 2006).

exception as articulated in *Turner*.³⁸⁶ The court adopted the three criteria test of *Turner*: “[1] whether there was a continuation of the enterprise of the original entity; [2] whether the original entity ceased its ordinary business operations and dissolved promptly after the transaction; [3] and whether the purchasing entity assumed those liabilities and obligations of the seller normally required for an uninterrupted continuation of the seller’s operation.”³⁸⁷ Interestingly, the court’s application of *Turner* does not seem to require a destruction of the plaintiff’s remedies in order to satisfy the second prong of the continuity of enterprise test.³⁸⁸ In applying *Turner*’s second prong, the court stated, “[i]n the first sale, of course, [the predecessor] did not dissolve promptly, but continued on, in some form, for several years. What seems to be of greatest importance, however, is that it was completely out of the coffee granulizer business.”³⁸⁹ This application of *Turner* (without the destruction of remedy requirement) begins to look more like a *Turner-Ray* hybrid.

Not all New York courts have adopted the continuity of enterprise exception. Most importantly, the Court of Appeals of New York has not addressed this exception since it expressly decided not to adopt it in *Schumacher*. Additionally, in 1984, the Supreme Court of Monroe County noted that *Schumacher* refused to adopt the continuity of enterprise exception.³⁹⁰

New York: Jurisdiction over Successor Corporations

One interesting question which has arisen in New York is whether a successor corporation can be subject to personal jurisdiction under New York’s long arm statute. At least one federal court has answered in the affirmative³⁹¹

North Carolina

North Carolina courts follow the traditional approach to successor liability, recognizing the four traditional exceptions to the general rule of corporate successor nonliability.³⁹² Interestingly, the *Budd* court also noted:

³⁸⁶ *Salvati v. Blaw-Knox Food & Chem. Equip., Inc.*, 497 N.Y.S.2d 242,247 (N.Y. Sup. 1985).

³⁸⁷ 497 N.Y.S.2d at 243 (citing *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 879 (Mich. 1976)).

³⁸⁸ 497 N.Y.S.2d at 242.

³⁸⁹ 497 N.Y.S.2d at 242.

³⁹⁰ *Radziul v. Hooper, Inc.*, 479 N.Y.S.2d 324, 326 (N.Y. Sup. Ct. 1984).

³⁹¹ *Hughes v. BCI Intern. Holdings, Inc.*, 452 F.Supp.2d 290 (S.D.N.Y. 2006)

³⁹² *See G.P. Publications, Inc. v. Quebecor Printing Co. St. Paul, Inc.*, 481

Some cases cite inadequate consideration for the purchase, or a lack of some of the elements of a good faith purchaser for value, as a separate exception, . . . although those are generally considered only as additional factors in determining whether the transaction was for the purpose of avoiding creditors' claims, . . . or whether the new corporation is a mere continuation of the old one.³⁹³

In 1993, the North Carolina Court of Appeals returned to the factors of "inadequate consideration" and "lack of some of the elements of a good faith purchaser for value" in *L.J. Best Furniture Distributors, Inc. v. Cap. Delivery Serv., Inc.*,³⁹⁴ stating:

In North Carolina, "[a] corporation which purchases all, or substantially all, of the assets of another corporation is generally not liable for the old corporation's debts or liabilities" . . . The purchasing corporation may become liable, however, for the old corporation's debts where the transfer of assets was done for the purpose of defrauding the corporation's creditors or where the purchasing corporation is a 'mere continuation' of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers. In determining whether the purchasing corporation is a "mere continuation" of the old corporation, factors such as inadequate consideration for the purchase, or a lack of some of the elements of a good faith purchaser for value may be considered.

From this analysis, it appears that the mere continuation requires, as a threshold matter, that the predecessor and successor have "some of the same shareholders, directors, and officers." Once this threshold is met, the other listed factors may be considered. This construction of mere continuation would also be consistent with the test as outlined in *Budd*.

The North Carolina Court of Appeals muddied the water, however, in *G.P. Publications, Inc.*,³⁹⁵ as it outlined the test for mere continuation:

A review of the case law reveals that North Carolina follows the traditional approach to the "mere continuation" theory. . . . This jurisdiction also considers two factors in addition to the issue of continuity of ownership: (1) inadequate consideration for the purchase; and (2) lack of some of the elements of a good

S.E.2d 674, 679 (N.C. Ct. App. 1997); *Budd Tire Corp. v. Pierce Tire Co.*, 370 S.E.2d 267, 269 (N.C. Ct. App. 1988).

³⁹³ *Budd*, 370 S.E.2d at 269.

³⁹⁴ *L.J. Best Furniture Distributors, Inc., vs. Capital Delivery Service, Inc.*, 432 S.E.2d 437, 440 (N.C. Ct. App. 1993).

³⁹⁵ *G.P. Publications, Inc.*, 481 S.E.2d at 680.

faith purchaser for value. In fact, a purchaser conceivably could be found to be the corporate successor of the selling corporation even though there is no continuity of ownership.

The court supported this final statement with a citation to *L.J. Best Furniture Distributors*.³⁹⁶ If this last sentence is read to mean that a purchaser could conceivably be found to be a “mere continuation” of the selling corporation, then the continuity of ownership/control would no longer be a threshold requirement (i.e. a necessary element) of “mere continuation.” Such a test would be a striking departure from the traditional test for mere continuation, and makes it difficult to understand why the *G.P. Publications* court would begin this analysis by stating that “North Carolina follows the traditional approach to the ‘mere continuation’ theory.”³⁹⁷ The court, however, stated that the purchaser could be the “corporate successor” not the “mere continuation” of the selling corporation. Following the traditional approach, this theory of successor liability (based on lack of adequacy of consideration and a lack of some of the elements of a good faith purchaser for value) would fit neatly under the fraud exception, not the mere continuation exception. Indeed, the *L.J. Best Furniture* case dealt exclusively with the fraud and mere continuation exceptions.

North Dakota

North Dakota follows the traditional rule of corporate successor nonliability, subject to the four traditional exceptions.³⁹⁸ In *Downtowner*, the Supreme Court of North Dakota analyzed the expanded approaches to successor liability found in *Turner* and *Ray*. After extensive analysis, the court stated:

[W]hen the issue is whether successor corporations should assume the liability of their predecessors, and the primary justification for the assumption is the successors’ ability to bear the costs, then before the successors should be required to bear the costs we must be sure they can do so. Legislatures and not courts are in a much better position to determine the issue. . . . We therefore conclude that the established principles pertaining to the liability of a cash purchaser of assets are applicable to products liability cases.³⁹⁹

Ohio

³⁹⁶ 432 S.E.2d at 437.

³⁹⁷ *G.P. Publications, Inc.*, 481 S.E.2d at 680.

³⁹⁸ See *Downtowner, Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118, 121 (N.D. 1984); *Drayton Grain Processors v. NE Foods, Inc.*, 2007 U.S. Dist. LEXIS 24565 (D. N.D.).

³⁹⁹ *Downtowner, Inc.*, 347 N.W.2d at 124-25.

The Supreme Court of Ohio has addressed separately the issue of successor liability in the context of product liability and contract claims. In *Flaughner v. Cone Automatic Machine Co.*, the court recognized only the four traditional exceptions to the general rule of successor non-liability in the context of product liability claims.⁴⁰⁰ In *Welco Industries, Inc. v. Applied Cos.*, the Supreme Court of Ohio refused to expand the traditional exceptions or adopt the continuity of enterprise exception in the context of contract liabilities.⁴⁰¹ The *Flaughner* court also declined to adopt the product line exception, concluding that the legislature should make major policy decisions.⁴⁰²

An interesting issue which has arisen regarding Ohio successor liability law is whether one must plead the doctrine of successor liability in a complaint in order to pursue the theory at later stages of litigation. One federal court interpreting Ohio law has held that this is not necessary.⁴⁰³

Ohio: The Express or Implied Assumption Exception

The courts look to the language of the purchase agreement in determining the extent to which a purchaser assumed the liabilities of the seller.⁴⁰⁴ If the court cannot determine, based on the “four corners of the contract,” whether the successor assumed the liabilities of the predecessor, the fact-finder must resolve any ambiguities in the contract.⁴⁰⁵

Ohio: The De Facto Merger Exception

The *Welco* court listed the “hallmarks” of a *de facto* merger:

(1) the continuation of the previous business activity and corporate personnel, (2) a continuity of shareholders resulting from a sale of assets in exchange for stock, (3) the immediate or rapid dissolution of the predecessor corporation, and (4) the assumption by the purchasing corporation of all liabilities and obligations

⁴⁰⁰ 507 N.E.2d 331, 336 (Ohio 1987).

⁴⁰¹ 617 N.E.2d 1129, 1133 (Ohio 1993).

⁴⁰² 507 N.E.2d at 337.

⁴⁰³ “[A] plaintiff must put the defendant on notice that the plaintiff is pursuing a theory of successor liability in order to further pursue it at trial. Notice, not specific pleading, is the standard.” *Kennedy v. City of Zanesville, OH*, 505 F.Supp.2d 456, 481 (S.D. Ohio 2007)

⁴⁰⁴ See *Welco*, 617 N.E.2d at 1134; *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 130-31 (Ohio 2006); *Dobbelaere v. Cosco, Inc.*, 697 N.E.2d 1016, 1022 (Ohio Ct. App. 1997).

⁴⁰⁵ *Davis v. Loopco Indus., Inc.*, 609 N.E.2d 144, 145 (Ohio 1993).

ordinarily necessary to continue the predecessor's business operations.⁴⁰⁶

The court also indicated that a “transfer of assets for stock is the sine qua non of [*de facto*] merger.”⁴⁰⁷ Even though the court initially listed them as hallmarks, the court later implied that the four listed characteristics are “elements.”⁴⁰⁸ Subsequent decisions by the Ohio Court of Appeals indicate that all four elements must be present before a successor can be held liable under the *de facto* merger exception.⁴⁰⁹ However, Ohio courts will liberally construe the need for rapid dissolution to include situations where predecessor survives but retains too few assets to satisfy creditors.⁴¹⁰

Ohio: The Mere Continuation Exception

The *Flaughner* court discussed the narrow and broad constructions of the mere continuation exception but did not adopt either approach.⁴¹¹ The major distinction between the two approaches, according to *Flaughner*, is that one focuses on the continuation of the entity and the other focuses on the continuation of the business operation. The court stated, “It is obvious that even the expanded view of continuity has no application under these facts.”⁴¹² The court, therefore, did not adopt either approach explicitly.

⁴⁰⁶ 617 N.E.2d at 1134. *See also Kennedy v. City of Zanesville, OH*, 505 F.Supp.2d 456, 476-80 (S.D. Ohio 2007) Noting: “[T]he fourth factor does not examine if the specific liability in question was transferred; rather, the fourth factor asks whether the predecessor company transferred to the successor company the ‘liabilities ordinarily necessary to continue’ regular business operations.” This analysis keeps *De Facto* merger doctrine conceptually distinct from the Assumption of Liabilities doctrine.

⁴⁰⁷ 617 N.E.2d at 1134.

⁴⁰⁸ 617 N.E.2d at 1134.

⁴⁰⁹ *Howell v. Atlantic-Meece, Inc.*, 2002 WL 857685 at * 3 (Ohio Ct. App. Apr. 26, 2002); *Mohammadpour v. Thomas*, 2005 WL 1793515 at *2 (Ohio Ct. App. 2005). *But see Kennedy v. City of Zanesville, OH*, 505 F.Supp.2d 456, 476 (S.D. Ohio 2007) stating “It is not a requirement that all four factors be present for a court to find that a *de facto* merger occurred.”

⁴¹⁰ *Pottschmidt v. Klosterman*, 865 N.E.2d 111, 119 (Ohio Ct. App. 2006)

⁴¹¹ *Flaughner v. Cone Automatic Mach. Co.*, 507 N.E.2d 331, 336 (Ohio 1987).

⁴¹² 507 N.E.2d at 336.

The *Welco* court explicitly refused to expand the mere continuation exception and required continuity of ownership as a threshold finding, but limited its holding to contract-related actions.⁴¹³ In the same year that the court issued the *Welco* decision, it was presented with a “certified question presented by the appellate court” asking “whether [*Flaughner*] adopted the traditional test or the expanded test to determine whether a successor corporation is a mere continuation of a predecessor corporation.”⁴¹⁴ Unfortunately, the court declined to answer the certified question.⁴¹⁵

Without any clear guidance from the Supreme Court, the Ohio Court of Appeals has struggled with applying the mere continuation exception. In *Aluminum Line Products Co. v. Brad Smith Roofing Co.*, a case involving contract-related injuries, the court quoted *Flaughner* for the proposition that “the basis of [the mere continuation theory] is the continuation of the corporate entity, not the business operation, after the transaction.”⁴¹⁶ The court cited the following example of such a transaction: “when ‘one corporation sells its assets to another corporation with the same people owning both corporations. Thus, the acquiring corporation is just a new hat for, or reincarnation of, the acquired corporation.’”⁴¹⁷ The court did not provide a test for the exception, however, except to say that “inadequacy of consideration is one of the indicia of mere continuation.”⁴¹⁸

In *Howell*, a case based on product liability, the court reached a different result because it applied the *Welco* decision, which rejected the expanded mere continuation test.⁴¹⁹ There, the court held that the successor was not a mere continuation of the predecessor because there was no continuity of ownership, a prerequisite of the mere continuation exception under the “traditional rule that the *Welco* court preserved.”⁴²⁰

⁴¹³ 617 N.E.2d at 1133; *Mandalaywala v. Omnitech Electronics, Inc.*, 2006 WL 1556773 at *7-*8 (Ohio Ct. App. 2006).

⁴¹⁴ *Davis v. Loopco Indus., Inc.*, 609 N.E.2d 144, 145 (Ohio 1993).

⁴¹⁵ 609 N.E.2d at 145.

⁴¹⁶ 671 N.E.2d 1343, 1355 (Ohio Ct. App. 1996).

⁴¹⁷ 671 N.E.2d at 1355 (quoting *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 892 (Mich. 1976)); *Pottschmidt*, 865 N.E.2d at 120 .

⁴¹⁸ *Aluminum Line Products Co.*, 671 N.E.2d at 1355-56.

⁴¹⁹ *Howell v. Atlantic-Meeco, Inc.*, 2002 WL 857685 at *4 (Ohio Ct. App. Apr. 26, 2002).

⁴²⁰ *Howell*, 2002 WL 857685 at *4. See also *Auvil v. Ferragon Corp.*, 2005 WL 2386638 (Ohio Court. App. Sept. 29, 2005) (citing to *Flaughner* for the mere continuation elements applicable in Ohio); *Per-Co, Ltd. v. Great Lakes Factors, Inc.*,

Basically, the Ohio Supreme Court has failed to define a test for the mere continuation exception, even though they have had ample opportunity to do so. Without direct guidance from the Supreme Court, the Court of Appeals apparently blurs the distinction between contract and tort cases that the *Welco* court emphasized. Thus, there is no well-defined test for the mere continuation exception under Ohio law.

Ohio: The Fraud Exception

Under Ohio law, indicia of fraud include lack of consideration and good faith.⁴²¹

Oklahoma

Oklahoma follows the traditional approach to successor liability, recognizing the four traditional exceptions to the general rule of successor nonliability.⁴²² Under the mere continuation exception, “[t]he test is not the continuation of the business operation, but the continuation of the corporate entity.”⁴²³ However, the court noted, “the mere *de jure existence* of the seller corporation after the sale is not conclusive; the existence must be shown to be a *de facto existence*.”⁴²⁴ Interestingly, the court cited to *Kloberdanz v. Joy Manufacturing Co.*,⁴²⁵ where a court found no mere continuation where the seller continued to exist and there was “no common identity of stock, directors, officers or stockholders” between the seller and buyer.⁴²⁶ Though the court did not state the factors considered for the mere continuation exception, presumably, the two factors addressed in the Colorado case—continued existence of the seller and common identity of stock, directors, officers or stockholders—are appropriate for consideration in Oklahoma. In the case at bar, there were not sufficient findings of fact to determine whether a mere continuation existed.

In 1985, the Oklahoma Court of Appeals addressed the product-line exception,

2007 WL 1235668 at *9 (N.D. Ohio 2007).

⁴²¹ *Welco Indus., Inc. v. Applied Cos.*, 617 N.E.2d 1129, 1134 (Ohio 1993); *Howell*, 2002 WL 857685 at * 3.

⁴²² *See Pulis v. U. S. Elec. Tool Co.*, 561 P.2d 68, 69 (Okla. 1977); *Coline Oil Corp. v. State*, 88 P.2d 897, 898 (Okla. 1939).

⁴²³ *Pulis*, 561 P.2d at 71.

⁴²⁴ *Pulis*, 561 P.2d at 71.

⁴²⁵ 288 F.Supp. 817 (D. Colo. 1968).

⁴²⁶ 288 F.Supp. at 821.

concluding that the rationale articulated by the Oklahoma Supreme Court in *Pulis*, that “[t]he test is not the continuation of the business operation, but the continuation of the corporate entity,” foreclosed any possibility of adopting the product-line exception.⁴²⁷

Oregon

The Supreme Court of Oregon noted the general rule of successor nonliability and its four traditional exceptions in *Erickson v. Grande Ronde Lumber Co.*⁴²⁸ In this case, the court addressed whether a successor corporation had assumed liabilities for services rendered to its predecessor.⁴²⁹ The other three exceptions to the general rule were not analyzed. In 2000, the Court of Appeals of Oregon addressed successor liability where a purchasing corporation had been ordered to reinstate a worker injured while working for the selling corporation.⁴³⁰ The court noted the general rule and four traditional exceptions, and then held that the consolidation or merger exception did not give rise to successor liability because—among other things—the predecessor company continued to exist and the predecessor and successor companies had completely different ownership and management.⁴³¹ The Bureau of Labor Industries advanced a flexible nine-factor analysis similar to the continuity of enterprise factors set out in *Mozingo v. Correct Manufacturing Corp.*⁴³² However, the court did not address whether this test applied.⁴³³

Oregon has explicitly declined to extend the rules of successor liability to include the products line exception. In *Dahlke v. Cascade Acoustics, Inc.*⁴³⁴, a case involving the alleged successor to an asbestos manufacturer, the Oregon Court of Appeals noted [In previous cases] we explained that, apart from the four exceptions [to successor liability] “[i]t has long been the general rule in Oregon that, when one corporation purchases all of the assets of another corporation, the purchasing corporation does *not* become liable for the debts and liabilities of the selling corporation.” Plaintiff’s proposed modification of successor liability would require us to depart from that established rule.

⁴²⁷ *Goucher v. Parmac, Inc.*, 694 P.2d 953, 954 (Okla. Ct. App. 1985).

⁴²⁸ 92 P.2d 170, 174 (Or. 1939).

⁴²⁹ 92 P.2d 170 at 174.

⁴³⁰ *Tyree Oil, Inc. v. Bureau of Labor and Indus.*, 7 P.3d 571 (Or. Ct. App. 2000).

⁴³¹ 7 P.3d at 574.

⁴³² 752 F.2d 168 (5th Cir. 1985).

⁴³³ 752 F.2d 168, *See also XDP, Inc. v. Watumull Props. Corp.*, 2004 WL 1103023, at *19 (D. Or. May 14, 2004) (applying the nine-factor continuity of enterprise test listed in *Tyree Oil* in denying summary judgment on successor liability issue).

⁴³⁴ 171 P.3d 992, 997 (Or. Ct. App. 2007)

Moreover, liability for defective products-asbestos-related products, in particular-is a subject that the legislature has addressed by statute. *See* ORS 30.900 to 30.927.

Pennsylvania

Pennsylvania recognizes six species of successor liability for corporate asset purchasers:

- (1) the purchaser expressly or impliedly agrees to assume such obligation;
- (2) the transaction amounts to a consolidation or merger;
- (3) the purchasing corporation is merely a continuation of the selling corporation;
- (4) the transaction is fraudulently entered into to escape liability;
- (5) the transfer was not made for adequate consideration and provisions were not made for the creditors of the transferor;
- (6) the product line exception of *Ray v. Alad*.⁴³⁵

Pennsylvania courts decided to adopt the product line exception rather than expand the traditional exceptions.⁴³⁶

Pennsylvania: The Mere Continuation and De Facto Merger Exceptions

Most Pennsylvania courts note that, under Pennsylvania law, the mere continuation and *de facto* merger exceptions are interrelated if not completely conflated.⁴³⁷ “[A] mere continuation occurs where ‘a new corporation is formed to

⁴³⁵ *In re Thorotrast Cases*, 26 Phila. Co. Rptr. 479, 488-89, 1994 WL 1251120 (Pa. Com. Pl. 1994); *Adani Exports Ltd. v. AMCI Corp.*, 2006 WL 1785707, *2 (W.D. Pa. 2006); *In re Total Containment, Inc.*, 335 B.R. 589, 618 (Bankr. E.D. Pa. 2005).

⁴³⁶ *Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106, 111 (Pa. Super. Ct. 1981) (“It is perhaps only a matter of style how one proceeds. One may retain the traditional exceptions but expand their boundaries, so that ‘merger’ or ‘continuation’ are held to include cases they once would not have included. Or one may adopt a new exception, such as the product-line exception. We believe it better to adopt a new exception.”); *Cont’l Ins. Co. v. Schneider, Inc.*, 873 A.2d 1286 (Pa. 2005).

⁴³⁷ *Lavelle v. Lavco, Inc.*, 555 A.2d 218, 227 (Pa. Super. Ct. 1989) (applying the *de facto* merger exception, but stating that “[e]mployment of the mere continuation

acquire the assets of an extant corporation, which then ceases to exist.”⁴³⁸ “The primary elements of the continuation exception are identity of the officers, directors, or shareholders, and the existence of a single corporation following the transfer.”⁴³⁹ The factors to consider for *de facto* merger are “(1) continuity of ownership; (2) cessation of the ordinary business by, and dissolution of, the predecessor as soon as practicable; (3) assumption by the successor of liabilities ordinarily necessary for uninterrupted continuation of the business; and (4) continuity of the management, personnel, physical location, and the general business operation.”⁴⁴⁰ Not all of the *de facto* merger factors must be present for the exception to apply.⁴⁴¹

Since mere continuation traditionally requires “common identity of officers, directors and stock between the selling and purchasing corporations,”⁴⁴² and since Pennsylvania treats the *de facto* merger factors as nondispositive,⁴⁴³ there may be an open question as to whether commonality of ownership is a threshold requirement for *de*

theory of liability would not alter our resolution of the issue since the two theories are difficult to distinguish”); *Atlas Tool Co. v. Comm’r*, 614 F.2d 860, 871 (3d Cir. 1980) (“As is illustrated by the *de facto* merger cases, that exception is interrelated to the second exception for continuity”); *United States v. General Battery Corp.*, 423 F.3d 294, 307 (3d Cir. 2005); *Fiber-Lite Corp. v. Molded Acoustical Prods. of Easton, Inc.*, 186 B.R. 603, 608 (E.D. Pa. 1994) (noting that “the continuity exception which Fiber-Lite contended applied is actually subsumed by the *de facto* merger exception”); *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455 (3d Cir. 2006).

⁴³⁸ *Cont’l Ins. Co. v. Schneider, Inc.*, 810 A.2d 127, 134 (Pa. Super. Ct. 2002); see also *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (3d Cir. 2006).

⁴³⁹ *Cont’l Ins. Co.*, 810 A.2d at 134-35 (citations omitted); *Berg Chilling Systems, Inc.*, 435 F.3d at 468-69.

⁴⁴⁰ *Cont’l Ins. Co.*, 810 A.2d at 135 (citations omitted); *Berg Chilling Systems, Inc.*, 435 F.3d at 468-69; *Chicago Title Ins. Co. v. Lexington & Concord Search and Abstract, LLC.*, 2007 WL 1118322, *9 (E.D. Pa. 2007); *In re Asousa Partnership*, 2006 WL 1997426, *8 (Bankr.E.D.Pa. 2006); *In re Total Containment, Inc.*, 335 B.R. at 617.

⁴⁴¹ *Cont’l Ins. Co.*, 810 A.2d at 134 (citations omitted); *Berg Chilling Systems, Inc.*, 435 F.3d at 468-69; *Chicago Title Ins. Co. v. Lexington & Concord Search and Abstract, LLC.*, 2007 WL 1118322, *9 (E.D. Pa. 2007); *In re Asousa Partnership*, 2006 WL 1997426, *8 (Bankr.E.D.Pa. 2006); *In re Total Containment, Inc.*, 335 B.R. at 617.

⁴⁴² *Dawejko v. Jorgenson Steel Co.*, 434 A.2d 106, 108 (Pa. Super. Ct. 1981).

⁴⁴³ See *Cont’l Ins. Co.*, 810 A.2d at 135.

facto merger.⁴⁴⁴ It appears that as soon as mere continuation is subsumed into *de facto* merger, commonality of ownership is reduced to a considered factor instead of a required element.

Pennsylvania: The Product Line Exception

In 1981, the Superior Court of Pennsylvania adopted the product line exception.⁴⁴⁵ The court was careful to keep the product line exception from being too restrictive.⁴⁴⁶ In essence, the court adopted the New Jersey product line exception over that applied by California courts:

We also believe it better not to phrase the new exception too tightly. Given its philosophical origin, it should be phrased in general terms, so that in any particular case the court may consider whether it is just to impose liability on the successor corporation. The various factors identified in the several cases discussed above will always be pertinent—for example, whether the successor corporation advertised itself as an ongoing enterprise, *Cyr v. B. Offen & Co.* []; or whether it maintained the same product, name, personnel, property, and clients, *Turner v. Bituminous Casualty Co.* []; or whether it acquired the predecessor corporation's name and good will, and required the predecessor to dissolve, *Knapp v. North American Rockwell Corp.* []. Also, it will always be useful to consider whether the three-part test stated in *Ray v. Alad Corp.* [] has been met. The exception will more likely realize its reason for being, however, if such details are not made part of its formulation. The formulation of the court in *Ramirez v. Amsted Industries, Inc.* [] is well-put, and we adopt it.⁴⁴⁷

Interestingly, Pennsylvania courts have “tightened” the phrasing of the product line exception in subsequent decisions. In *Pizio v. Johns-Manville Corp.*, the Court of Common Pleas of Pennsylvania concluded that the product line exception requires, as a threshold matter, the successor to acquire all or substantially all of the predecessor’s assets.⁴⁴⁸ In *Hill v. Trailmobile, Inc.*,⁴⁴⁹ the Pennsylvania Superior Court recast the three

⁴⁴⁴ *Berg Chilling Systems, Inc.*, 435 F.3d at 469.

⁴⁴⁵ *Dawejko*, 434 A.2d at 111.

⁴⁴⁶ *Dawejko*, 434 A.2d at 111.. See also *Kradel v. Fox River Tractor Co.*, 308 F.3d 328, 331 (3d Cir. 2002); *Takacs v. Cyril Bath Co.*, 2006 WL 840350, *3-*4 (W.D. Pa. 2006).

⁴⁴⁷ *Dawejko*, 434 A.2d at 111.

⁴⁴⁸ 9 Phila. Co. Rptr. 447, 452 (Pa. Com. Pl. 1983) (“An examination of the relevant case law reveals that the purpose of the product line exception is to afford a claimant an opportunity to bring a products liability action against a successor corporation where his or her rights against the predecessor corporation have been essentially extinguished either *de jure*, through dissolution of the predecessor, or *de facto*,

Ray factors as requirements.⁴⁵⁰ Soon thereafter, the Court of Common Pleas of Pennsylvania subsequently stated that “the sale of the product line must cause the virtual destruction of the plaintiffs’ remedies If a business goes on for years profitably after the product line is sold and goes bankrupt for other reasons, the sale of the product line for adequate consideration did not ‘cause’ the destruction of the remedy.”⁴⁵¹

The Supreme Court of Pennsylvania has not addressed the issue of product line successor liability, thus leaving the lower courts to determine the contours of successor liability in Pennsylvania.⁴⁵²

Rhode Island

Rhode Island courts have not analyzed the doctrine of corporate successor liability in great detail. Indeed, the Supreme Court of Rhode Island “has only recognized one of [the] four exceptions, the ‘mere continuation’ exception.”⁴⁵³ One superior court has applied the *de facto* merger exception, *Richmond Ready-Mix*, 2004 WL 877595, and two other superior courts have noted the four traditional exceptions to the general rule of successor nonliability.⁴⁵⁴ The *Asea* court briefly discussed the express assumption

through sale of all or substantially all of the assets of the predecessor.”).

⁴⁴⁹ 603 A.2d 602 (Pa. Super. Ct. 1992).

⁴⁵⁰ 603 A.2d 602.; *Kradel*, 308 F.3d at 332; *Dillman v. Indiana Rolls Inc.*, 2004 WL 2491772 at *299-*300 (Pa. Com. Pl. 2004); *Griffiths v. Knoedler Mfg. Inc.*, 2004 WL 3321079 at *188-*189 (Pa. Com. Pl. 2004).

⁴⁵¹ *In re Thorotrast Cases*, 26 Phila. Co. Rptr. 479, 504 (Pa. Com. Pl. 1994); *see also Kradel*, 308 F.3d at 332 (“It is thus clear that the inability to recover from an original manufacturer is a prerequisite in Pennsylvania to the use of the product line exception”).

⁴⁵² *See In re Thorotrast Cases*, 26 Phila. Co. Rptr. at 507 (noting the absence of a Supreme Court ruling or legislative action in regard to product line successor liability and a “caused the virtual destruction of plaintiff’s remedies” requirement).

⁴⁵³ *Richmond Ready-Mix v. Atlantic Concrete Forms, Inc.*, 2004 WL 877595, at *8 (R.I. Sup. Ct. April 21, 2004) (citing *Cranston Dressed Meat Co. v. Packers Outlet Co.*, 190 A. 29 (R.I. 1937); *see also H.J. Baker & Bro. v. Organics, Inc.*, 554 A.2d 196, 205 (R.I. 1989) (“Generally, a company that purchases the assets of another is not liable for the debts of the transferor company. . . . An exception to this rule is made in a situation in which the new company ‘is merely a continuation or a reorganization of another, and the business or property of the old corporation has practically been absorbed by the new’”).

⁴⁵⁴ *Angell v. Parrillo*, 1986 WL 716005, at *1 (R.I. Sup. Ct. Feb. 14, 1986)

exception, looking at the language of the asset purchase agreement to decide that there was no express assumption of liability, and it examined the mere continuation exception in detail.⁴⁵⁵ Interestingly, the *Angell* court discussed (albeit briefly) the product-line exception, concluding that the doctrine was inapplicable because the predecessor did not dissolve subsequent to the asset purchase.⁴⁵⁶

Rhode Island: The Mere Continuation Exception

The Rhode Island Supreme Court cited *Jackson v. Diamond T. Trucking Co.*,⁴⁵⁷ for the following “five persuasive criteria for finding a ‘continuing’ entity”:

(1) there is a transfer of corporate assets; (2) there is less than adequate consideration; (3) the new company continues the business of the transferor; (4) both companies have at least one common officer or director who is instrumental in the transfer; and (5) the transfer renders the transferor incapable of paying its creditors because it is dissolved either in fact or by law.⁴⁵⁸

The court went on to note that “[o]ther courts have examined criteria such as the common identity of officers, directors, and stockholders, . . . and the continued use of the same office space and service to the same client base.”⁴⁵⁹ The court went on to consider all of these factors in establishing that a successor was indeed the mere continuation of its predecessor.⁴⁶⁰ The *Asae* court, when analyzing the mere continuation exception, noted that it “does not necessarily disagree” that all five factors are not required, but it then went on to stress the importance of the less than adequate consideration factor finally stating that “in this case, the Plaintiffs’ claim cannot be maintained without at least some showing that less than adequate consideration was paid”.⁴⁶¹

(citing *Leannais v. Cincinnati, Inc.* 565 F.2d 437 (7th Cir. 1977) for the four traditional exceptions) ; *Asea Brown Boveri, S.A. v. Alcoa Fujikura, Ltd.*, 2007 R.I. Super. LEXIS 59 at *46-*58 (2007).

⁴⁵⁵ *Asea Brown Boveri, S.A.*, 2007 R.I. Super. LEXIS 59 at *51-*58.

⁴⁵⁶ *Angell*, 1986 WL 716005, at *1.

⁴⁵⁷ 241 A.2d 471, 477 (N.J. Sup. Ct. 1968).

⁴⁵⁸ *H.J. Baker & Bros.*, 554 A.2d at 205.

⁴⁵⁹ *H.J. Baker & Bros.*, 554 A.2d at 205. (citations omitted).

⁴⁶⁰ *H.J. Baker & Bros.*, 554 A.2d at 205.

⁴⁶¹ *Asea Brown Boveri, S.A.*, 2007 R.I. Super. LEXIS 59 at *57.

Rhode Island: The De Facto Merger Exception

One Rhode Island Superior Court has applied the *de facto* merger exception, ultimately concluding that successor liability did not exist under the facts of the particular case.⁴⁶² The court listed the following four factors for the *de facto* merger exception:

[1] [t]here is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operation;

[2] [t]here 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] [t]he seller corporation ceases its ordinary business operations, liquidates, or dissolves as soon as legally and practically possible;

[4] [t]he purchasing corporation assumes the obligations of the seller ordinarily necessary for uninterrupted continuation of normal business operations of the seller corporation.⁴⁶³

South Carolina

In a 1924 decision, the Supreme Court of South Carolina adopted the traditional exceptions to the general rule of successor non-liability.⁴⁶⁴ In 1977 The Federal District Court for the District of South Carolina, although ostensibly applying South Carolina law, applied the expanded exception to successor non-liability developed in *Cyr*.⁴⁶⁵ Recently though, the South Carolina Supreme Court confirmed that its “opinion in *Brown* sets forth the proper test to determine in a products liability action whether there is successor liability of a company which purchases the assets of an unrelated company.⁴⁶⁶ In doing so, the court stated that the *Holloway* court did not establish a new test of

⁴⁶² *Richmond Ready-Mix*, 2004 WL 877595 at *10.

⁴⁶³ *Richmond Ready-Mix*, 2004 WL 877595 at *10 (quoting *Kleen Laundry & Dry Cleaning Serv., Inc. v. Total Waste Mgmt.*, 817 F. Supp. 225, 230-31 (D. N.H. 1993).

⁴⁶⁴ *Brown v. Am. Ry. Express Co.*, 123 S.E. 97, 98 (S.C. 1924).

⁴⁶⁵ *Holloway v. John E. Smith's Sons Co.*, 432 F. Supp. 454, 456 (D.S.C. 1977).

⁴⁶⁶ *Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213, 215 (S.C. 2005).

successor liability, but rather applied the mere continuation exception.⁴⁶⁷

South Dakota

South Dakota recognizes the four traditional exceptions to the general rule of corporate nonliability for asset purchases.⁴⁶⁸

South Dakota: The De Facto Merger Exception

“When the seller corporation retains its existence while parting with its assets, a ‘de facto merger’ may be found if the consideration given by the purchaser corporation is shares of its own stock.”⁴⁶⁹

South Dakota: The Mere Continuation Exception

In *Hamaker*, the Supreme Court of South Dakota analyzed the reasoning of *Turner*, ultimately concluding that it would not follow this expanded approach to continuity.⁴⁷⁰

South Dakota: The Product Line Exception

South Dakota has expressly rejected the product line exception, following North Dakota’s reasoning that imposing liability in such cases would amount to liability without duty and would thus not comport with their understanding of strict liability in tort.⁴⁷¹

⁴⁶⁷ 622 S.E.2d at 215.

⁴⁶⁸ See *Hamaker v. Kenwel-Jackson Mach., Inc.*, 387 N.W.2d 515, 518 (S.D. 1986); *McMillin v. Mueller*, 695 N.W.2d 217 (S.D. 2005); see also *Parker v. Western Dakota Insurors*, 605 N.W.2d 181, 184-85 (S.D. 2000); *Global Polymer Industries, Inc. v. C & A Plus, Inc.*, 2006 WL 3743845 at *2 (D.S.D. 2006).

⁴⁶⁹ *Hamaker*, 387 N.W.2d at 518.

⁴⁷⁰ 387 N.W.2d at 519

[W]e are not persuaded to follow *Turner* in this case where none of the owners, officers or stockholders were the same, where Kenwel-Jackson expressly contracted not to assume any of Kenwel’s liabilities, where Kenwel-Jackson’s business developed in a different direction relative to product line and customers and especially where the notcher in question was neither designed, manufactured nor sold by the successor corporation.

⁴⁷¹ 387 N.W.2d at 519

Tennessee

Tennessee has not yet addressed the issue of successor liability in the products liability arena, and therefore has not considered successor liability as it relates to strict tort liability. The Tennessee Court of Appeals has addressed successor liability in the contracts context twice.⁴⁷² At least in the contracts context, the Tennessee Court of Appeals has applied the traditional rule of successor liability, allowing for the four traditional exceptions.⁴⁷³

Texas

Texas does not recognize the four long standing species of successor liability. Rather, the Texas legislature has set the rule for successor liability in asset purchases by statute in a legislative reversal of a court of appeals decision to impose the doctrine. *See* TEX. BUS. CORP. ACT ANN. art. 5.10B (Vernon 1980).

In 1977, the Texas Court of Appeals applied the *de facto* merger doctrine in *Western Resources Life Insurance Co. v. Gerhardt*, 553 S.W.2d 783 (Tex. App. 1977). In its first session following the *Gerhardt* decision, the Texas legislature passed art. 5.10(B), which states:

A disposition of any, all, or substantially all, of the property and assets of a corporation, whether or not it requires the special authorization of the shareholders of the corporation affected under Section A of this article:

(1) is not considered to be a merger or conversion pursuant to this Act or otherwise; and

(2) except as otherwise expressly provided by another statute, does not make the acquiring corporation, foreign corporation, or other entity, responsible or liable for any liability or obligation of the selling corporation that the acquiring corporation did not expressly assume.

As noted in *Mudgett v. Paxson Mach. Co.*,⁴⁷⁴ “the purpose of [the statute was] to

⁴⁷² *See Hopewell Baptist Church v. Southeast Window Mfg. Co.*, 2001 WL 708850, at *4 (Tenn. Ct. App. June 25, 2001); *Gas Plus of Anderson County, Inc. v. Arowood*, 1994 WL 465797 (Tenn. Ct. App. Aug. 30, 1994).

⁴⁷³ *Hopewell Baptist Church*, 2001 WL 708850, at *4 (“[The traditional rule] was cited with approval in an unreported decision of this Court in *Gas Plus of Anderson County, Inc. v. Arowood*, 1994 WL 465797, No 03A01-9311-CH-00406 (Tenn. Ct. App., Aug. 30, 1994). We will, therefore, apply this ‘traditional rule.’”); *Great Am. Ins. Co. v. Potter*, 2006 WL 2854386 at *3 (E.D. Tenn. 2006).

⁴⁷⁴ 709 S.W.2d 755, 758 (Tex. App. 1986).

preclude the application of *de facto* merger in any sale, lease, exchange or other disposition of all or substantially all the property and assets of a corporation.”⁴⁷⁵ The *Mudgett* court also rejected the mere continuation exception, stating “[t]he ‘mere continuation’ doctrine is an even more liberal means of imposing liability upon the acquiring corporation in a purchase of assets transaction than is the *de facto* merger doctrine. Certainly if the *de facto* merger doctrine is contrary to the public policy of our state, so must be the mere continuation doctrine.”⁴⁷⁶ Later, in *Shapolsky v. Brewton*⁴⁷⁷ the court also rejected the fraud exception reaffirming that Texas only acknowledged the single exception to the non-liability rule.⁴⁷⁸ As noted by the Texas Court of Appeals in *Lockheed Martin Corp. v. Gordon*,⁴⁷⁹ “Texas strongly embraces the non-liability rule. To impose liability for a predecessor’s torts, the successor corporation must have expressly assumed liability.” In drawing a sharp comparison, the court noted, “Delaware and Maryland recognize all four exceptions to the rule of non-liability by case law. The Business Corporation Act controls in Texas.”⁴⁸⁰

Utah

Utah adheres to the traditional approach to successor liability.⁴⁸¹ The *de facto*

⁴⁷⁵ 709 S.W.2d at 785 (quoting TEX. BUS. CORP. ACT. ANN. art. 5.10 comment).

⁴⁷⁶ 709 S.W.2d at 785. *But see Griggs v. Cap. Mach. Works, Inc.*, 690 S.W.2d 287 (Tex. App. 1985) (The court did not expressly reject the mere continuation doctrine; the court did, however reject the product-line exception); *First Professionals Ins. Co., Inc. v. Heart & Vascular Institute of Texas*, 182 S.W.3d 6 (Tex. App. 2005).

⁴⁷⁷ 56 S.W.3d 120 (Tex. App. 2001)

⁴⁷⁸ 56 S.W.3d at 137-39

⁴⁷⁹ 16 S.W.3d 127, 139 (Tex. Ct. App. 2000).

⁴⁸⁰ 16 S.W.3d at 134 (citations omitted). *See also C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W. 3d 768, 780-81 (Tex. App. 2004); *SMI Realty Management Corp. v. Underwriters at Lloyd's, London*, 179 S.W.3d 619 (Tex. App. 2005); *SAS & Associates, Inc. v. Home Marketing Servicing, Inc.*, 168 S.W.3d 296 (Tex. App. 2005); *ASEP USA, Inc. v. Cole*, 199 S.W.3d 369 (Tex. App. 2006); *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145 (Tex. App. 2005); *Taylor Elec. Services, Inc. v. Armstrong Elec. Supply Co.*, 167 S.W.3d 522 (Tex. App. 2005); *KMG Kanal-Muller-Gruppe Deutschland GmbH & Co. KG v. Davis*, 175 S.W.3d 379 (Tex. App. 2005); *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230 (Tex. App. 2005); *See, Sitaram v. Aetna U.S. Healthcare of North Tex., Inc.*, 152 S.W.3d 817, 826 (Tex. App. 2001).

⁴⁸¹ *Decius v. Action Collection Serv., Inc.*, 105 P.3d 956, 958-59 (Utah Ct. App. 2005); *Tabor v. Metal Ware Corp.*, 182 Fed.Appx. 774 (10th Cir. 2006); *Macris &*

merger exception “considers whether the business operations and management continued and requires that the buyer paid for the asset purchase with its own stock.”⁴⁸² The mere continuation exception “considers not whether the ‘business operation[s]’ continued, but whether the ‘corporate entity’ continued . . . ‘A continuation demands “a common identity of stock, directors, and stockholders and the existence of only one corporation at the completion of the transfer””⁴⁸³ These formulations of the *de facto* merger and mere continuation exceptions demonstrate that Utah indeed remains true to the traditional approach.

The *Decius* court considered the “continuity of enterprise” exception, concluding that it did not apply in the case at bar.⁴⁸⁴ (“Plaintiffs argue that . . . alternately, we should apply Michigan’s *Turner* expansion of the mere continuation doctrine. We are spared the need to determine which law should apply in this case because [the successor] would not be liable under either.”). The court did, however, suggest its opinion of the policy justifications underlying the expansion of successor liability, stating: “While the notion of spreading costs exclusively on the basis of relative wealth holds a certain Marxist charm, ‘the legislature is in a better position to make [such a] broad public policy decision[.]’”⁴⁸⁵

Despite this treatment of a suggested expansion to successor liability doctrine the 10th Circuit Court of Appeals certified a question to the Utah Supreme Court asking for clarification as to whether it would choose to extend the current successor liability doctrine to include a product line exception.⁴⁸⁶ The Utah Supreme Court subsequently declined to extend the rules of successor liability stating: “In our view, the general rule of successor nonliability, together with the four exceptions provided . . . affords adequate protection to consumers, and we accordingly decline to expand the exceptions.”⁴⁸⁷ The Court did however adopt the position of the Restatement (Third) of Torts, which imposes on successor a duty to warn.

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable. . . is subject to liability for harm to persons or property caused by the successor’s failure to warn of a risk created by

Assocs., Inc. v. Neways, Inc., 986 P.2d 748, 752 (Utah Ct. App. 1999), *aff’d*, 16 P.3d 1214 (Utah 2000).

⁴⁸² *Decius*, 105 P.3d at 959 (citations omitted).

⁴⁸³ 105 P.3d at 959 (citations omitted).

⁴⁸⁴ 105 P.3d at 959

⁴⁸⁵ 105 P.3d at 960.

⁴⁸⁶ *Tabor v. Metal Ware Corp.*, 182 Fed.Appx. 774, 776-77 (10th Cir. 2006); *Tabor v. Metal Ware Corp.*, 168 P.3d 814 (Utah 2007).

⁴⁸⁷ *Tabor v. Metal Ware Corp.*, 168 P.3d 814, 8817 (Utah 2007).

a product sold or distributed by the predecessor if:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and

(2) a reasonable person in the position of the successor would provide a warning.

(b) A reasonable person in the position of the successor would provide a warning if:

(1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.⁴⁸⁸

The Utah Supreme Court thus answered the certified question and left the determination as to whether this duty had been satisfied to the federal courts.

Vermont

In 2005, the Vermont Supreme Court had the opportunity to restate its position on successor liability in *Gladstone v. Stuart Cinemas, Inc.*⁴⁸⁹ The court began by reciting the traditional rule of non-liability in asset sales, unless one of five traditional accepted exceptions apply: (1) express or implied assumption, (2) de facto merger or consolidation, (3) mere continuation, (4) a fraudulent scheme to avoid liability, or (5) inadequate consideration for the sale.⁴⁹⁰ (Interestingly, the court appears to have thus split the traditional fraud analysis into two types, actual fraud and constructive fraud, the later of which appears to have only one element, inadequate consideration, rather than the more common two alternative element approach of the Uniform Fraudulent Transfer Act).⁴⁹¹

⁴⁸⁸ *Tabor v. Metal Ware Corp.*, 168 P.3d 814, 818 (Utah 2007).

⁴⁸⁹ 878 A.2d 214 (Vt. 2005).

⁴⁹⁰ 878 A.2d at 220.

⁴⁹¹ *See, e.g.*, 11 U.S.C. § 348 (2006) (UFTA as enacted as part of the Bankruptcy Code).

The court noted that in *Ostrowski v. Hydra-Tool Corp.*,⁴⁹² it had declined to adopt either the continuity of enterprises or product line doctrines because the successor did not create the risk of harm or benefit from the proceeds of the product's sale, did not invite the product's use or make any safety representations, and could not enhance the safety of the product given that it had already been released into the market.⁴⁹³ It then turned to *Cab-Tek, Inc. v. EBM, Inc.*,⁴⁹⁴ which addressed the distinction between consolidation and *de facto* merger. Consolidation occurs when the "combining corporations are dissolved and lose their identity in a new corporate entity."⁴⁹⁵ *De facto* merger occurs where a corporation (1) takes control of all of the assets of another corporation, (2) without consideration, and (3) the predecessor corporation ceases to function.⁴⁹⁶ In other words, no asset purchase is required for a *de facto* merger in Vermont.

The court then announced the contours of the mere continuation doctrine. The test, said the court, focuses on continuation of the corporate entity, not its business.⁴⁹⁷ Traditional indicators or factors for a finding of continuation are a commonality of officers, directors, and shareholders and the existence of only one corporation after the sale is complete.⁴⁹⁸ Although these are traditional indicators, they are not requirements.⁴⁹⁹ *De facto* merger, on the other hand, focuses on the absorption of one corporation's business by another, and its traditional indicators include similarity of assets, locations, managements, personnel, shareholders, and business practices.⁵⁰⁰ Inadequacy of consideration may also be present.⁵⁰¹

⁴⁹² 479 A.2d 126 (Vt. 1984).

⁴⁹³ *Gladstone v. Stuart Cinemas, Inc.*, 878 A.2d 214, 220 (Vt. 2005) (citing *Ostrowski*, 479 A.2d at 127).

⁴⁹⁴ 571 A.2d 671 (Vt. 1990).

⁴⁹⁵ *Gladstone*, 878 A.2d at 220-21 (citing *Cab-Tek, Inc. v. E.B.M., Inc.*, 571 A.2d 671, 672 (Vt. 1990)).

⁴⁹⁶ *Gladstone*, 878 A.2d at 221

⁴⁹⁷ *Gladstone*, 878 A.2d at 222.

⁴⁹⁸ *Gladstone*, 878 A.2d at 222.

⁴⁹⁹ *Gladstone*, 878 A.2d at 222.

⁵⁰⁰ *Gladstone*, 878 A.2d at 222.

⁵⁰¹ *Gladstone*, 878 A.2d at 222

The *Gladstone* court then returned to the mere continuation doctrine and then considered its factors in declining order of significance: (1) continuity of ownership and management, (2) whether only the successor corporation survived, although survival as a mere shell or for a short period is not significant, (3) inadequate consideration, (4) similarity of the business operated by the successor to that of the predecessor, and (5) continuation of business practices, including how the company holds itself out to the public.⁵⁰² The court went on to additionally consider whether or not recognition of the transfer as being free and clear of liabilities would work a fraud on creditors through a breach of the fiduciary duty that corporations and their directors owe to creditors of insolvent corporations on those operating in the zone of insolvency.⁵⁰³

Virginia

Virginia follows the traditional rule of successor liability and recognizes only the four traditional exceptions.⁵⁰⁴ Virginia has declined to adopt either the product line exception or the “expanded mere continuation” exception, primarily because Virginia has not adopted the doctrine of strict liability and these exceptions are based upon that doctrine.⁵⁰⁵ Virginia courts have not applied the fraud and *de facto* merger exceptions.

Virginia: The Express or Implied Assumption Exception

The Virginia Court of Appeals has found implied assumption of liabilities in the context of worker’s compensation case where the conduct of the successor evidenced the intention to assume the role of predecessor.⁵⁰⁶

⁵⁰² *Gladstone*, 878 A.2d at 222-23

⁵⁰³ *Gladstone*, 878 A.2d at 224.

⁵⁰⁴ *Harris v. T.I., Inc.*, 413 S.E.2d 605, 609 (Va. 1992)

In order to hold a purchasing corporation liable for the obligations of the selling corporation, it must appear that (1) the purchasing corporation expressly or impliedly agreed to assume such liabilities, (2) the circumstances surrounding the transaction warrant a finding that there was a consolidation or *de facto* merger of the two corporations, (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction is fraudulent in fact.

(citing *Pepper v. Dixie Splint Coal Co.*, 181 S.E. 406, 410 (Va. 1935); *Peoples Nat’l Bank v. Morris*, 148 S.E. 828, 829 (Va. 1929)); *Fuisz v. Lynch*, 147 Fed.Appx. 319 (4th Cir. 2005); *Bizmark, Inc. v. Air Products, Inc.*, 427 F.Supp.2d 680 (W.D. Va. 2006).

⁵⁰⁵ *Harris*, 413 S.E.2d at 609-10.

⁵⁰⁶ *States Roofing Corp. v. Bush Constr. Corp.*, 426 S.E.2d 124, (Vir. Ct. App. 1993) (Where a successor-subcontractor purchased the “equipment, trade accounts

Virginia: The Mere Continuation Exception

“A common identity of the officers, directors, and stockholders in the selling and purchasing corporations is the key element of a “continuation.”⁵⁰⁷ An additional inquiry is whether “the purchase of all the assets of a corporation is a bona fide, arm’s-length transaction.”⁵⁰⁸ In such a case, the mere continuation exception does not apply.⁵⁰⁹

Virginia: De Facto Merger Exception

Virginia district and circuit courts have used the four traditional factors in deciding if there is a *de facto* merger: (1) continuity of enterprise (management, personnel, physical location, assets, and general business operations); (2) continuity of ownership (shareholders); (3) prompt cessation of operations by seller; and (4) assumption of obligations of seller necessary for continuation of business.⁵¹⁰ The *Augusta* circuit court described these as factors without further explanation (all four were present in cases fact pattern), but the prior district courts cited by *Augusta* had described them as elements with continuity of ownership being the most important leaving this an open question.⁵¹¹

receivable, contract rights and inventory” of a predecessor-subcontractor but did not assume any of its liabilities or obligations; the successor-subcontractor informed the contractor that it was going to continue work on the predecessor-subcontractor’s jobs; and the successor-subcontractor notified the sub-subcontractor to continue work, the successor-subcontractor was the “statutory employer” of an employee of the sub-subcontractor as a successor to the predecessor-subcontractor).

⁵⁰⁷ *Harris*, 413 S.E.2d at 609; *Bizmark, Inc.*, 427 Fsupp.2d at 694; *In re Meredith*, 357 B.R. 374, 381 (Bankr. E.D. Va. 2006).

⁵⁰⁸ *Harris*, 413 S.E.2d at 609; *Bizmark, Inc.*, 427 Fsupp.2d at 694; *In re Meredith*, 357 B.R. at 381.

⁵⁰⁹ *Harris*, 413 S.E.2d at 609; *see Ozberkmen v. Cap. Asset Mgmt., Inc.*, 1992 WL 884672, at *3 (Vir. Cir. Ct. May 14, 1992) (“Common identity of the officers, directors, and stockholders in the selling and purchasing corporation is the key element of a “continuation.”” The Court will also look at whether the acquisition was [an] arms-length transaction.” (citations omitted)); *In re Twin B. Auto Parts, Inc.*, 271 B.R. 71, 84 (Bankr. E.D. Va. 2001); *See also Bizmark, Inc. v. Air Products, Inc.*, 2005 WL 2931963 (W.D. Va. 2005); *Bizmark, Inc.*, 427 Fsupp.2d at 694; *In re Meredith*, 357 B.R. at 381.

⁵¹⁰ *Augusta Lumber Co., Inc. v. Broad Run*, 71 Va. Cir. 326, *2 (2006); *Blizzard v. Nat’l R.R. Passenger Corp.*, 831 F.Supp. 544, 547 (E.D.Va 1993); *Crawford harbor Associates v. Blake Const. Co.*, 661 F.Supp. 880, 884 (E.D. Va. 1987).

⁵¹¹ *Augusta Lumber Co., Inc.*, 71 Va. Cir. 326 at *2 (citing *Blizzard*, 831

Washington

Washington recognizes the traditional four exceptions to the general rule of non-liability in asset purchases as well as the product line exception.⁵¹² The Washington Supreme Court noted that the adoption of the product line exception was preferable to expanding the mere continuation exception,⁵¹³ a rule “designed for other purposes.”⁵¹⁴

Washington: The Express or Implied Assumption Exception

In 1954, the Supreme Court of Washington addressed this exception, citing to a treatise for the following proposition:

[U]nless the corporation has expressly assumed the debts and obligations of its predecessor, its liability, if it exists at all, must arise by implication or presumption, out of the facts and circumstances attending the incorporation, and the acquisition by the corporation of the assets and property of the firm or association, and it is quite obvious that these must be peculiar to each case and are very seldom exactly the same in any two cases. *The corporation, of course, would not be liable on the partnership obligations where no showing is made that it either expressly or impliedly assumed them.*⁵¹⁵

An express assumption of liability by the successor corporation is

F.Supp. at 547; *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 (11th Cir. 1985)); *Crawford Harbor Assocs.*, 661 F.Supp. at 884.

⁵¹² See *Hall v. Armstrong Cork, Inc.*, 692 P.2d 787, 789-90 (Wash. 1984) (“The general rule in Washington is that a corporation purchasing the assets of another corporation does not, by reason of the purchase of assets, become liable for the debts and liabilities of the selling corporation, except where: (1) the purchaser expressly or impliedly agrees to assume liability; (2) the purchase is a *de facto* merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability.” (citations omitted)). In addition, the Washington Supreme Court has adopted the product line exception. *Id* at 790. (“Rather than expanding the mere continuation exception founded on corporate law principles, we adopted the ‘product line rule’ of liability as developed by the California Supreme Court . . .”); *Creech v. Agco Corp.*, 138 P.3d 623, 624 (Wash Ct. App. 2006).

⁵¹³ *Martin v. Abbott Labs.*, 689 P.2d 386, 389 (Wash. 1984).

⁵¹⁴ 689 P.2d at 389.

⁵¹⁵ 689 P.2d at 386. See also *Mill & Logging Supply Co. v. West Tenino Lumber Co.*, 265 P.2d 807, 812 (Wash. 1954) (quoting WILLIAM MEADE FLECHER ET AL., 8 FLETCHER CYCLOPEDIA CORPORATIONS 393, § 4012 (perm. ed., rev. vol. 1999)).

determined from the fair meaning of the language in the contract.⁵¹⁶

Washington: The Fraud Exception

No Washington court states a definitive test for the fraud exception. One appellate court noted, “The different common law tests for applying for this exception include: (1) a showing of fraud or actions otherwise lacking good faith, (2) insufficient consideration for the assets, and (3) predecessor left unable to respond to creditor's claims.”⁵¹⁷ In applying the fraud exception, the court concluded the test was met where the successor was created for the “sole purpose” of hindering the predecessor’s creditors.⁵¹⁸

Washington: The De Facto Merger Exception

Washington courts have not stated a definitive test for *de facto* merger. One Washington appellate court did list at least one key element of a *de facto* merger: “In addition to other requirements (*see* 15 W. Fletcher, *supra* at s 7155; 19 Am.Jur.2d, *supra*, § 1502), such a union can only be found when the consideration given to the selling corporation for its assets is shares of the purchasing corporation's stock, rather than cash. The rationale behind this requirement is that liability should be imposed on the purchaser only in cases where the seller's stockholders [] retain an ownership interest in the business operations.”⁵¹⁹

Washington: The Mere Continuation Exception

In Washington, some appellate courts require a plaintiff to establish three factors in order to prove that a successor is a mere continuation of a predecessor:

(1) a common identity of the officers, directors, and stockholders between the companies; (2) that the new company gave inadequate consideration for the assets transferred; and (3) a transfer of all or substantially all of the old company’s

⁵¹⁶ *OptimerIntern., Inc. v. Bellevue, L.L.C.*, 134 Wash.App 1027 (2006); *Creech v. AGCO Corp.*, 132 Wash.App. 1052 (2006)

⁵¹⁷ *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 934 P.2d 715, 721 (Wash. Ct. App. 1997) (citing Robert C. Manlowe, Note, *Successor Liability in Washington: Products Liability--Meisel v. M & N Modern Hydraulic Press Company*, 6 U. PUGET SOUND L. REV. 323, 331 n.37 (1983)), *aff'd*, 959 P.2d 1052, 1056-60 (Wash. 1998) (affirming Appellate Court on the issue of Fraudulent Transfer).

⁵¹⁸ *Eagle Pacific Ins Co.*, 959 P.2d at 1059-60; *Long v. Home Health Services of Puget Sound, Inc.*, 719 P.2d 178, 181 (Wash. App 1986).

⁵¹⁹ *Cashar v. Redford*, 624 P.2d 194, 196 (Wash. Ct. App., 1981).

assets.⁵²⁰

Other appellate courts only require the first two elements to prove that a successor is a mere continuation of its predecessor.⁵²¹

Washington: The Product Line Exception

In Washington, a court applying the product line exception is required: (1) to determine whether the transferee has acquired substantially all the transferor's assets, leaving no more than a mere corporate shell; (2) to determine whether the transferee is holding itself out to the general public as a continuation of the transferor by producing the same product line under a similar name; and (3) to determine whether the transferee is benefiting from the goodwill of the transferor.⁵²²

Much like California, Washington requires the successor, in some manner, to cause the destruction of a plaintiff's remedies to satisfy the first element of the product line test.⁵²³ Although Washington courts have not expressly addressed the application of the second element, the *Hall* court addressed the application of the third element, stating, "[t]he goodwill transfer contemplated by the product line rule is that associated with the predecessor business entity, not that associated with individual products."⁵²⁴

West Virginia

⁵²⁰ *Rondoni v. Pac. Fleet & Lease Sales, Inc.*, 1999 WL 674584, at *2 (Wash. Ct. App. June 1, 1999).

⁵²¹ *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 934 P.2d 715, 721 n.1 (Wash. Ct. App. 1997) (stating that only the first two factors are necessary for mere continuation and refusing to adopt a "two out of three" test--the court noted that the third factor was more properly considered under the fraud exception); *Long*, 719 P.2d at 181.

⁵²² *Hall*, 692 P.2d at 790 (citing *Abbot Labs.*, 689 P.2d at 387); *see also George v. Parker Davis*, 733 P.2d 507, 510 (Wash. 1987) (for the exception to apply, the successor must continue to manufacture the specific type of product).

⁵²³ *Hall*, 692 P.2d at 792 ("A key premise of the product line exception is that successor liability is only appropriate when the successor corporation by its acquisition actually played some role in curtailing or destroying the claimants' remedies."); *see also Stewart v. Telex Comm., Inc.*, 1 Cal. Rptr. 2d 669, 675 (Cal. Ct. App. 1991) ("[S]ome causal connection between the succession and the destruction of the plaintiff's remedy must be shown").

⁵²⁴ *Hall*, 692 P.2d at 792 (citing *Abbot Labs.*, 689 P.2d at 388-89).

West Virginia apparently follows the traditional approach to successor liability, listing the following exceptions to the general rule:

A successor corporation can be liable for the debts and obligations of a predecessor corporation if there was an express or implied assumption of liability, if the transaction was fraudulent, or if some element of the transaction was not made in good faith. Successor liability will also attach in a consolidation or merger under W. Va. Code 31-1-37(a)(5) (1974). Finally, such liability will also result where the successor corporation is a mere continuation or reincarnation of its predecessor.⁵²⁵

Wisconsin

Wisconsin follows the traditional approach to successor liability, adopting the four traditional exceptions to the general rule and expressly declining to adopt the product line exception or the “expanded continuation” exception (continuity of enterprise) adopted by *Turner v. Bituminous Cas. Co.*⁵²⁶

Wisconsin: The Express or Implied Assumption Exception

Wisconsin recognizes express or implied assumption of liabilities as one way a successor may be liable for the liabilities of its predecessor.⁵²⁷ “The first exception under *Fish* requires an express or implied *assumption* of liabilities, not an express exclusion of liabilities.”⁵²⁸ The *Columbia Propane* court noted the importance of not blurring “the

⁵²⁵ *In re State*, 454 S.E.2d 413, 424-25 (W. Va. 1994); *Roney v. Gencorp*, 431 F.Supp.2d 622, 632 (S.D.W. Va. 2006); *Ware v. Howell*, 614 S.E.2d 464 (W. Va. 2005); *Pipemasters, Inc. v. Putnam County Com'n*, 625 S.E.2d 274 (W. Va. 2005); *see also Davis v. Celotex Corp.*, 420 S.E.2d 557 (W.Va. 1992).

⁵²⁶ 244 N.W.2d 873 (Mich. 1976). *See also Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820, 829 (Wis. 1982) (stating, *inter alia*, in regard to the product line exception, “[i]f the liability of successor corporations is to be expanded, we conclude that such changes should be promulgated by the legislature,” and in regard to the *Turner* exception, “we decline to adopt the ‘expanded continuation’ exception to nonliability for the same reasons that we declined to adopt the product line exception.”); *Red Arrow Prods. Co. v. Employers Ins. of Wausau*, 607 N.W.2d 294, 299-300 (Wis. Ct. App. 2000).

⁵²⁷ *See Fish*, 376 N.W.2d at 823.

⁵²⁸ *Columbia Propane, L.P. v. Wisconsin Gas Co.*, 661 N.W.2d 776, 785 (Wis. 2003) (citing *Fish*, 376 N.W.2d at 823); *Shovers v. Shovers*, 718 N.W.2d 130 (Wis. Ct. App. 2006); *Bindl v. Next Level Communications, Inc.*, 709 N.W.2d 112 (Wis. Ct. App. 2005); *Chibardun Telephone Co-op., Inc. v. CenturyTel Wireless of Wisconsin RSA No. 1, LLC*, 699 N.W.2d 253 (Wis. Ct. App. 2005); *Bertha v. Remy Intern., Inc.*, 414 F.Supp.2d 869 (E.D. Wis. 2006); *Deputy v. Lehman Bros., Inc.*, 374 F.Supp.2d 695 (E.D.

well-established and fundamental distinction between an asset purchase and a stock purchase.”⁵²⁹

Wisconsin: The De Facto Merger Exception

The Wisconsin Court of Appeals has identified four factors used to determine whether an asset purchase constitutes a *de facto* merger:

(1) the assets of the seller corporation are acquired with shares of the stock in the buy corporation, resulting in a continuity of shareholders; (2) the seller ceases operations and dissolves soon after the sale; (3) the buyer continues the enterprise of the seller corporation so that there is a continuity of management, employees, business location, assets and general business operations; and (4) the buyer assumes those liabilities of the seller necessary for the uninterrupted continuation of normal business operations.⁵³⁰

Although not every factor need be present, “[t]he key element in determining whether a [] de facto [sic] merger has occurred is that the transfer of ownership was for stock in the successor corporation rather than cash.”⁵³¹

Wisconsin: The Mere Continuation Exception

“In determining if the successor is the ‘continuation’ of the seller corporation, the key element ‘is a common identity of the officers, directors and stockholders in the selling and purchasing corporations.’”⁵³² Although the Wisconsin Supreme Court muddied the waters in *Tift v. Forage King Industries, Inc.*,⁵³³ by referring to tests of “identity,” the *Fish* court buttressed the key element of mere continuation by stating that in the context of *Tift*, “[i]dentity refers to identity of ownership, not identity of product

Wis. 2005); *ConFold Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952 (7th Cir. 2006).

⁵²⁹ *Columbia Propane, L.P.*, 66 N.W.2d at 785.

⁵³⁰ *Schawk, Inc. v. City Brewing Co., LLC*, 662 N.W.2d 679, (Wis. Ct. App. 2003) (citing *Sedbrook v. Zimmerman Design Group, Ltd.*, 526 N.W.2d 758 (Wis. Ct. App. 1994)).

⁵³¹ *Fish*, 376 N.W.2d at 824.

⁵³² *Fish*, 376 N.W.2d at 824.; see also *Smith v. Meadows*, 60 F.Supp.2d 911, 917-18 (E.D. Wis. 1999).

⁵³³ 322 N.W.2d 14, 17-18 (Wis. 1982).

line.”⁵³⁴

Wyoming

Wyoming courts do not appear to have addressed successor liability in a published opinion.

The U.S. Virgin Islands

In 1985, the District Court of the Virgin Islands adopted the four traditional exceptions to the general rule of successor nonliability and has also adopted the continuity of enterprise exception, citing, among other cases, *Korzetz v. Amsted Industries, Inc.*,⁵³⁵ and *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873 (Mich. 1976), for the guidelines.⁵³⁶ The court expressly rejected the product line theory, concluding it was a minority rule and not the “modern trend.”⁵³⁷ The Third Circuit Court of Appeals agreed with the District Court’s decision to reject the product line exception, but rejected its adoption of the continuity of enterprise exception stating “[t]o the extent the continuity of enterprise approach reaches beyond the traditional exceptions, it violates the established principle of corporate liability grounded on the continued existence of that entity.”⁵³⁸

Guam

Courts in Guam do not appear to have addressed the issue of successor liability in a published decision.

The Northern Mariana Islands

Courts in the Northern Mariana Islands do not appear to have addressed the issue of successor liability in a reported opinion.

Puerto Rico

Puerto Rico has on several occasions addressed the issue of successor liability and has adopted the traditional exceptions. Successor corporations are not liable for the debts

⁵³⁴ *Fish*, 376 N.W.2d at 824.

⁵³⁵ 472 F. Supp. 136 (E.D. Mich. 1979).

⁵³⁶ *Polius v. Clark Equip. Co.*, 608 F. Supp. 1541, 1545 (D.V.I. 1985); *rev’d* 802 F.2d 75 (3d. Cir. 1986).

⁵³⁷ 608 F. Supp. at 1545..

⁵³⁸ *Polius*, 802 F.2d at 83.

or acts of the predecessor corporation except: (1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) when the purchaser corporation is merely a continuation of the seller corporation; or (4) when the transaction is entered into fraudulently to escape liability for such obligations.⁵³⁹ The cases on point do not address whether Puerto Rico recognizes the Product Line Exception.

⁵³⁹ *Maldonado v. Valsyn S.A.*, 434 F.Supp.2d 90, 92 (D.P.R. 2006); *Carballo-Rodriguez v. Clark Equipment Co.*, 147 F.Supp.2d 63, 65 (D.P.R. 2001)(citing *Carreiro v. Rhodes Gill and Co., Ltd.*, 68 F.3d 1443, 1447 (1st Cir. 1995)); *Ricardo Cruz Distributors, Inc. v. Pace Setter, Inc.*, 931 F.Supp. 106, 110 (D.P.R. 1996); *Explosives Corp. of America v. Garlam Enterprises Corp.*, 615 F.Supp. 364, 367 (D.P.R. 1985)