A Taxonomy and Evaluation of Successor Liability

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INTRODUCTION

Successor liability is an exception to the general rule that, when one corporate or other juridical person sells assets to another entity, the assets are transferred free and clear of all but valid liens and security interests. When successor liability is imposed, a creditor or plaintiff with a claim against the seller may assert that claim against, and collect payment from the purchaser.

Historically, successor liability was a flexible doctrine, designed to eliminate the harsh results that could attend strict application of corporate law. Over time, however, as successor liability doctrines evolved, they became in many jurisdictions ossified and lacking in flexibility. As this occurred, corporate lawyers and those who structure transactions learned how to avoid application of successor liability doctrines, rendering the unpaid creditors' claims as externalities,[2] whose cost is born by the creditors or by society, but not by the transferee or transferor. This article examines what has become of various species of non-statutory successor liability with an eye to determining which of these species have retained sufficient flexibility to serve the doctrines' original purpose as well as those which continue to incentivize the parties to assess, allocate, and insure against the claims, those which have become so ossified that they almost invite their own defeat by attorneys of even moderate sophistication.

Successor liability does not consist of just one doctrine or exception to the general corporate rule of non-liability for asset purchasers, but of many. There are two broad groups of successor liability doctrines, those that are judge-made (the "common law" exceptions) and those that are creatures of statute.[3] Both represent a distinct public policy that in certain instances and for certain liabilities, the general rule of non-liability of a successor for a predecessor's debts following an asset sale should not apply. With regard to the judge-made doctrines, some commentators have asserted that they are basically a species of liability based upon fraud.[4] Others

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2 Externality: An effect of one economic agent's actions on another, such that one agent's decisions make another better or worse off by changing their utility or cost. Beneficial effects are positive externalities; harmful ones are negative externalities. www-personal.umich.edu/~alandear/glossary/e.html (last visited May 7, 2006).

3 The descriptive portions of this article present a fairly detailed taxonomy of the species of successor liability that are applicable in United States jurisdictions. This discussion does not discuss statutory successor liability, which is beyond the scope of this article.

4 *See, e.g.* Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745 (2003). Professor Reilly's article argues that basing

have argued that they are based upon an inherently equitable notion that, in certain instances, the purchaser must take the bad (the liabilities) with the good (the assets).[5] Still others, embracing a type of result-oriented formalism, have found that the liability arises out of an interest in the property sold that is akin to an *in rem* interest that is said to "run with the land."[6]

This article examines judge-made successor liability[7] and offers a number of

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successor liability on fraud or fraud-like conduct is different from basing it on a form-over-substance approach. This author disagrees. While "fraud" is a strong word, the first thing that comes to mind to an attorney structuring a transaction that might be challenged as fraudulent or otherwise avoidable is whether or not there are any rigid doctrines of law that can be employed to shelter the transaction from later challenges, often by elevating form over substance. This article argues that the evolution of successor liability toward a set of inflexible standards and the use of anti-successor liability findings of fact and conclusions of law in 11 U.S.C. § 363(f)(2006) sale orders represent just this sort of transactional planning though elevation of form (and forum) over substance. Form over substance can be very alluring to those faced with difficult, otherwise fact-based determinations and opinions. *See, e.g.*, Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of their Franchisees*, 62 WASH. & LEE L. REV. 417 (2005) (proposing that franchisors that take reasonable steps to require franchisees to display a notice indicating the franchise is independently owned and operated and to require franchisees to carry reasonable levels of insurance should be insulated from liability for their franchisee's torts, seemingly without regard to whether or not such insurance is actually in force).

5 *See, e.g.*, Jerry J. Phillips, Symposium: The Passage of Time: The Implications for Product Liability, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. REV. 906 (1983).

6 David Grey Carlson, *Successor Liability in Bankruptcy in some Unifying Themes of Intertemporal Creditor Priorities Created By Running Covenants, Product Liability, and Toxic Waste Clean Up*, 50 LAW & CONTEMP. PROBS. 119 (1987).

7 This article does not address the independent duty to warn that a successor may have when it learns that the predecessor placed defective goods on the market or into the stream of commerce prior to the sale of assets from the predecessor to the successor. This represents another, independent ground of liability upon which to pursue a successor when the liability in question is one caused by a defective product. The independent duty to warn is available as a parallel cause of action to successor liability in the defective product context and there is no need for a plaintiff to elect one theory or the other; both may be

observations. First, our current judge-made successor liability law is a product of the rise of corporate law in the last half of the 19^{th} century and early part of the 20^{th} century. In fact, it appears to have developed because of, and in reaction to the rise of corporate law. It may be better to characterize it as a part of that body of law, much like the "alter ego" or "piercing the corporate veil" doctrines,[8] rather than as a simple creature of tort law, despite it being used as a tool by plaintiffs who are involuntary tort claimants.

Many sources and authorities list four to six basic types of situations in which judge-made successor liability has sometimes been recognized: (1) express or implied assumption, (2) fraud, (3) *de facto* merger, (4) mere continuation, (5) continuity of enterprise, and (6) product line.[9] In fact, the matter is more complicated than that. Each of these species of successor liability has, within it, different sub-species with different standards and variations in the jurisdictions that recognize them. Some use a list of mandatory elements, while others are based on a non-exclusive list of factors and considerations to be weighed and balanced in a "totality of the circumstances" fashion. Some that began as an approach consisting of a flexible list of factors have evolved into one consisting of one or more mandatory elements. In any event, to state that there are only four to six categories is to oversimplify the matter.[10] Even so, this approach has been furthered by the Restatement (Third) of Torts, Products Liability, which seems to have misstated, rather than restated, the law in this area.[11]

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pursued through to judgment.

[8] *See generally* Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 BUS. LAW. 109 (2004).

[9] *See* Savage Arms, Inc. v. Western Auto Supply Co., 18 P.3d 49, 53-54 (Alaska 2001) (discussing varied approaches to determination of whether successor liability was a creature of contract and corporate law or tort law as part of its choice of law analysis and concluding that successor liability is a tort doctrine designed to expand products liability law; collecting cases and other authorities on both sides of the issue).

[10] The variance in states' approaches to successor liability and to the related doctrines of alter ego or piercing the corporate veil is one of the reasons that the federal courts have adopted a uniform federal common law of these subjects under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). 42 U.S.C. §§ 9601-9675 (2005). *See* United States v. General Battery Corp., 423 F.3d 294, 298-301 (3d Cir. 2005) (collecting authorities).

[11] *See infra* notes 138 to 146 and accompanying text.

Even in those jurisdictions that appear to have expanded the number of recognized categories of successor liability, there appears to be a long term trend to limit the applicability of the successor liability doctrines by stating the applicable standard in the form of a bright line rule or set of rules. This trend toward bright line rules threatens the original purpose of successor liability, which was born to serve as a counterbalance to corporate law's limitation-of-liability protections afforded asset purchasers. Like the "alter ego" or "piercing the corporate veil" doctrines, it was originally a set of extremely fact-specific and context-sensitive standards based upon an examination of non-exclusive lists of flexible factors rather than rigid bright line rules.

To serve its original purpose as a safety valve ensuring just results in the face of corporate law's limitations on liability, successor liability should remain more flexible and fluid so that its applications can be adjusted as new forms of transactions are developed and pursued. It is natural for capital to be deployed, harvested, and redeployed in a manner that maximizes the externalities, costs that society, not the invested capital, must bear. It is natural to attempt to separate liabilities from assets whenever possible and to seek to avoid liability by creating negative externalities for existing creditors and future claimants whenever possible. Successor liability stands as a doctrine to regulate or moderate this behavior, and to prevent the dominance of corporate law principles in situations where injustice would result. This, in turn, can force the transferee and transferor to bargain and allocate the risk of unpaid and future claims between themselves.

Development of a bright line standard for successor liability sets the stage for avoiding that liability when asset purchasers are represented by competent counsel. Once a rigid standard or safe-harbor has emerged, the transaction can be structured so that the standard is avoided or the safe-harbor invoked. Successor liability emerged over one hundred years ago in reaction to the rise of insulation of capital from liability under corporate law. Since then there has been a trend toward uniform statements of the successor liability doctrines, and transformation of flexible standards into rigid ones. This trend seems to indicate that corporate law, in the long run, is winning the struggle against these exceptions to the no-liability-for-asset-purchaser rule. Especially in the case of future tort claims, corporate law thus encourages the externalization of these claims. As a result, it is future claimants and society who are left to bear these claims, rather than the parties who benefited from the act that gave rise to them.

Section one of this article examines the emergence of successor liability at the time of the rise of corporate law. Section two details the subspecies of the various judge-made doctrines that exist under the current state of the law. Section three examines the gravitation of the doctrine from a fluid model which is difficult to draft around with confidence, to a rigid one that makes this effort much easier. Section three also examines the use of federal court orders to accomplish what the mere agreements of the parties cannot: preemptive bars of successor liability claims.

The article concludes that the purpose of the doctrine or doctrines was to provide contract and tort creditors with an avenue for recovery in appropriate cases against successor entities, when the predecessor that contracted with them or committed the tort, or the action that later gave rise to the tort, had sold substantially all of its assets and was no longer a viable source of recovery.[12] Its various species acted as a pressure relief valve on the strict limitation of liability created by corporate law and could force the parties to assess and allocate the risk of unpaid claims between them as part of structuring the transaction. The doctrine is in the nature of an "equitable" doctrine insofar as it is invoked when strict application of corporate law would offend the conscience of the court.

In large part, the doctrine remains intact and still serves that purpose. In those jurisdictions, however, that have either adopted tests that contain required elements or refused to accept the continuity doctrines of successor liability, the doctrine has eroded. While failing to adopt the continuity doctrines may be a laudable example of judicial restraint and deference to the legislature's role as the primary law-maker, the courts' conversion of flexible factors to rigid, required elements in generally accepted judge-made doctrine does not appear to serve the aims of equity or justice.[13] Rather, it promotes sharp lawyering based upon an

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[12] Successor liability is not limited, as is sometimes claimed, to the field of product liability claims. Ordinary contract claims and other claims are amenable to recovery through the doctrine. *See* Cab-Tek v. E.B.M., Inc., 153 Vt. 432, 436 (Vt. 1990) (rejecting notion of limit of successor liability to product liability claims).

[13] For an amusing decision highlighting the error of employing factors as elements, *see* Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd., 419 F.3d 594, 599-600 (7th Cir. 2005).

> [T]he district judge may have been confused by the "badges of fraud." This archaic term, an unfortunate legal cliché that can have a mesmerizing force on lawyers and judges, refers to a list of 11 symptoms of fraud . . . . The district judge found that five of the "badges" were present in this case, short of a majority and thus not enough, he thought, to prove fraud. But the symptoms are not addictive. To treat them as such is the equivalent of saying that if there are 11 common symptoms of a serious disease, and a patient has only 5 (a low white corpuscle count, internal bleeding, fever, shortness of breath, and

elevation of form over substance to protect asset purchasers. By doing so, instead of incentivizing the parties to bargain and allocate the risk of these claims between them (or insure against them), it encourages them to structure the transaction to avoid them entirely, leaving the creditors or society with the loss. This article concludes that the species of successor liability that feature non-exclusive lists of factors to be considered are superior to element-based forms of the doctrine in terms of serving its initial goals.

Finally, the article presents a detailed appendix of the leading recent successor liability cases in United States jurisdictions as a guide to which sub-species of the doctrine can be found in which environments. Rather than discussing the doctrine in terms of general and often repeated statements, it makes sense to examine the specific species of successor liability that are recognized in particular jurisdictions. Generalities blur distinctions that individualized analyses reveal. It bears keeping in mind that the state in which an involuntary tort victim resides will often determine where suit can be brought against a successor, what law will apply, and thus what species of successor liability will be available to a plaintiff.

I. What Successor Liability Was Meant to Be

A. The General Rule of No Successor Liability and a Traditional Statement of the Successor Liability Exceptions

The general rule is that a purchaser of assets for fair consideration does not become liable for the seller's liabilities, even when the purchaser purchases substantially all of the assets of the seller.[14] Absent fraudulent transfers, acquisition

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severe nausea) he is not seriously ill.

Id.

[14] *See* Schwartz v. McGraw-Edison Co., 14 Cal. App. 3d 767, 780 (1971) (opinion now flagged by Sheppards as disapproved, which seems an overly negative analysis designed to promote further searching and generation of additional search fees since the California Supreme Court expanded California's recognized categories to include the "product line" exception in Ray v. Alad Corp., 560 P.2d 3, 11 (Cal. 1977)); Husak v. Berkel, Inc., 341 A.2d 174, 176 (Pa. Super. Ct. 1975) ("Ordinarily when one company sells or transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor simply by virtue of its succession to the transferor's property."); Schumacher v. Richards Shear Co., 451 N.E.2d 195, 198 (N.Y. 1983) ("It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor."); Dana Corp. v. LTV Corp., 668 A.2d 752, 756 (Del. Ch. 1995) ([A successor] will be exposed to liability only if a court follows some exception to the traditional rule that a transfer of assets does not pass

of all or substantially all of a company's assets is a necessary but, by itself, insufficient element for a finding of successor liability.[15] Where exceptions to the general rule of no-successor-liability-for-asset-purchasers are accepted, they typically require an additional element over mere acquisition of substantially all the assets of an entity to justify imposition of successor liability.[16] The findings that can constitute the additional element needed to justify imposition of successor liability on an asset purchaser are commonly said to include:

(a) An express or implied assumption of liabilities in the purchase agreement;[17] or

(b) The transfer of assets to the purchaser that is for the fraudulent purpose of escaping liability for the seller's debts;[18] or

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liabilities unless the transferee agrees to assume them."), *aff'd*, 670 A.2d 1337 (Del. 1995) (unpublished table decision).

[15] Acheson v. Falstaff Brewing Corp., 523 F.2d 1327, 1330 (9th Cir. 1975) (finding no successor liability as purchaser had not acquired accounts, customer lists, trade names or goodwill); *see also* McGraw-Edison, 14 Cal. App. 3d at 781 (purchaser who did not acquire substantially all of a business and who paid valuable and adequate consideration was not liable in tort for defective products manufactured by a seller that continued to exist as a separate corporate entity with substantial assets to meet its debts).

[16] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1998) (collecting and discussing authorities), hereinafter the "Product Liability Restatement."

[17] *See, e.g.*, Schwartz v. Pillsbury, Inc., 969 F.2d 840, 845 (9th Cir. 1992) (asset purchaser that acquired franchiser did not expressly or impliedly assume seller's tort liability when acquisition agreement expressly limited obligations assumed to certain specified contracts and agreements of seller); Kessinger v. Grefco, Inc., 875 F.2d 153 (7th Cir. 1989) (asset purchaser impliedly assumed a seller's unforeseen liability for certain tort claims where the purchaser agreed "to pay, perform and discharge all debts, obligations, contracts and liabilities" of the seller); Carlos R. Leffler, Inc. v. Hutter, 696 A.2d 157 (Pa. Super. Ct. 1997) (asset purchaser impliedly assumed a liability where other liabilities were expressly assumed).

[18] *See, e.g.*, Reddy v. Gonzalez, 8 Cal. App. 4th 118, 122 (1992) (under Uniform Fraudulent Transfer Act actual intent and inadequate consideration are alternative requirements for successor liability based upon fraudulent transfer); Schmoll v. ACandS, Inc., 703 F. Supp. 868, 873 (D. Or. 1988) (finding corporate restructuring was undertaken to avoid liabilities from

(c) A transaction amounting to a consolidation or a *de facto* merger;[19] or

(d) A purchasing corporation that is merely a continuation of the seller (in some jurisdictions this has been expanded to include continuity of enterprise);[20] or

(e) Application of the product line exception, imposing liability on an asset purchaser that continued production of the transferor's product line with the assets purchased.[21]

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asbestos claimants and imposing liability on transferee), *aff'd*, 977 F.2d 499 (9th Cir. 1992); *see also* Husak, 341 A.2d at 176 (using inadequate consideration paid as alternative factor implying fraudulent purpose, much like constructive fraudulent conveyance theories of recovery).

19 *See, e.g.,* Marks v. Minn. Mining & Mfg. Co., 187 Cal. App. 3d 1429, 1435-36 (Cal. Ct. App. 1986) (*de facto* merger found where one corporation takes all of another's assets without providing any consideration to meet the claims of the seller's creditors; five factor test for *de facto* merger: (i) consideration paid for the assets solely belonging to the purchaser or its parent; (ii) continues the same enterprise after the sale; (iii) shareholders of the seller corporation become shareholders of the purchaser; (iv) the seller liquidates; and (v) the buyer assumes the liabilities of the seller necessary to carry on the business); Sweatland v. Park Corp., 587 N.Y.S.2d 54, 56 (App. Div. 1992) (*de facto* merger factors include continuity of ownership, liquidation of predecessor, assumption of liabilities needed to carry on the business, and continuity of management, personnel, physical location, assets and general operations); Drug, Inc. v. Hunt, 168 A. 87, 96 (Del. 1933) (where consideration for transfer of assets was stock in transferee and transferee assumed all debts and liabilities of the transferor, there was a *de facto* merger).

20 *See, e.g.*, Stanford Hotel Co. v. M. Schwind Co., 181 P. 780 (Cal. 1919) ("mere continuation" successor liability may lie when: (1) no adequate consideration was given for the acquired assets, and (2) where one or more persons were officers, directors, or stockholders of both corporations); Bostick v. Schall's Brakes & Repairs, Inc., 725 A.2d 1232, 1239 (Pa. Super. Ct. 1999) (reversing summary judgment and remanding for determination of whether successor was established to merely continue the former corporation's operations); Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 882 (Mich. 1976) ("Continuity is the purpose, continuity is the watch word, continuity is the fact.").

21 In the seminal (or ovular) case of Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977), California's courts introduced the product line exception. Since 1977, courts in New Jersey, Pennsylvania, Washington, Mississippi, and New

The first exception, express or implied assumption of liabilities, is fairly straight-forward. It is based, at least in theory, upon the voluntary acts and conduct of the purchaser. Similarly, the second category, fraudulent transfer, is fairly straightforward and the expected result when a court is faced with what amounts to a corporate shell game to escape liability. The balance of the exceptions seem to hover around a common core: They are tests that to one degree or another focus on one or both of (i) some indicia of a fraudulent-transaction-like indicia or (ii) the successor's enjoyment of the benefits of continuing to operate all or part of a predecessor's business as it was operated before the transfer. These are two distinct justifications for successor liability, although the courts do not always clearly distinguish between them when discussing the doctrines.

B. The Origins of Successor Liability in Railroad Failures and Reorganizations

Although the doctrine is older, or at least has its roots in a much earlier time,[22] the failure of many railroads around the turn of the century and their reorganization through asset sales and equity receiverships provides a context in

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Mexico have adopted the product line exception, and those of Ohio, Virginia, Massachusetts, Minnesota, Maine, Connecticut, New Hampshire, Iowa, Texas, Georgia, Kansas, Michigan, Missouri, Nebraska, Oklahoma, Wisconsin, North Dakota, South Dakota, Vermont, Florida, Colorado, Illinois, Oregon, and the District of Columbia have rejected it. *See* Harris v. T.I., Inc., 413 S.E.2d 605 (Va. 1992); Huff v. Shopsmith, Inc., 786 So.2d 383, 388 (Miss. 2001) (recognizing product line theory as a viable basis for recovery); Garcia v. Coe Mfg., Co., 933 P.2d 243, 248 (N.M. 1997) (adopting product line theory from Ray v. Alad); *accord* Dawejko v. Jorgenson Steel Co., 434 A.2d 106 (Pa. Super. Ct. 1981); *accord* Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir. 1995) (Maine); Pesce v. Overhead Door Corp., No. 2-91-CV-00435, 1998 U.S. Dist. LEXIS 20665 (D. Conn. 1998); Griggs v. Capitol Mach. Works, Inc., 690 S.W.2d 287 (Tex. App. 1985); Bullington v. Union Tool Corp., 328 S.E.2d 726 (Ga. 1985); Stratton v. Garvey Int'l, Inc., 676 P.2d 1290 (Kan. Ct. App. 1984); Pelc v. Bendix Mach. Tool Corp., 314 N.W.2d 614 (Mich. Ct. App. 1981); Young v. Fulton Iron Works Co., 709 S.W.2d 927 (Mo. Ct. App. 1986); Jones v. Johnson Mach. and Press. Co. of Elkart, Ind., 320 N.W.2d 481 (Neb. 1982); Goucher v. Parmac, Inc., 694 P.2d 953 (Okla. Ct. App. 1984); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515 (S.D. 1986); *see also* Jeffrey Davis, *Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 AM. BANKR. L.J. 329 (1996) (collecting cases).

[22] *See, e.g.*, Gibson v. Stevens, 49 U.S. 384 (1850).

which to see the first real discussion of successor liability. It also provides examples of when the courts found it prudent to limit the exceptions to the no-liability-assumption-through-purchase-of-assets rule. Claims of successor liability were fact driven. Indeed, depending on the record developed at trial, they might either be sustained or reversed on appeal. For example, in limiting successor liability to cases of intentional assumption of liabilities or fraud, a Colorado court, in reversing the trial court's perhaps-too-liberal instruction on successor liability to the jury, explained:

> The seventh instruction, to the effect that in case the jury should find from the evidence that The Colorado Springs and Interurban Railway Company [the successor] was organized and incorporated for the purpose and with the intention, among other things, of acquiring the property, and thereafter to carry on the business and affairs, of The Colorado Springs Rapid Transit Railway Company [the predecessor], in its place and stead, the verdict should be against both defendants, in case it was in favor of plaintiff, is assigned as error. The Interurban company was not charged with the negligence complained of. The complaint alleged that said company was organized and incorporated in succession to its co-defendant, and, among other things, for the purpose of acquiring its property and to assume its liabilities and obligations; that thereafter it did purchase and take over all the property of its co-defendant, and that, "*by reason thereof"*, it did assume all obligations and liabilities then existing" against said codefendant. The cause was tried upon the theory that because all the property of the selling company was transferred to the purchasing company, therefore and thereby, the latter company actually or impliedly assumed all the obligations and liabilities of the other. . . . The allegations of the complaint and the evidence in support thereof were not sufficient to sustain a judgment against The Colorado Springs and Interurban Railway Company . . . . There is no allegation or proof that the purchasing company expressly agreed to pay or assume the obligations, nor evidence of intention to pay the claim sued upon, but any such intention was expressly denied; nor that the new corporation was merely the old one under a new name. It was alleged and shown that the new company was incorporated for the purpose of not only taking over the property of its codefendant, but for other purposes, among which was the purchase of the property of another and similar railway company, which it did purchase and take over. There was no consolidation under the statute imposing liability. The rule is. . .that, in order that a promise may be implied on the part of a corporation to pay the debts of another corporation, to the property and franchises of which it has succeeded by valid purchase, the conduct relied upon must show such an intention. . . If any ground of liability is alleged

> or disclosed, it is that of fraud, actual or constructive, by which, in respect to the property, the purchasing company may be held liable in equity to creditors of the old corporation, if fraud is shown in the transfer. . . .[23]

Thus, this court made it clear that corporate law anti-successor-liability principles were dominant absent intentional assumption of liability or fraud. The court also intimated that, even with fraud, the action against the successor might be limited to the property that had been transferred, what we would today call a fraudulent conveyance action.[24]

Railroad reorganizations could give rise to successor liability in the right circumstances, however. A South Carolina Supreme Court case from the 1920s reflects a pro-successor- liability attitude when the court was faced with a successor that had, perhaps, issued loose statements that the predecessor's debts would be "taken care of" and then failed to document the transaction so as to achieve that result.[25] When the successor/appellant later stood on its claim of being a newly organized corporation that was not responsible for the predecessor's pre-sale debts, the court rejected this position stating:

> The appellant's position does not appeal to us; it is an attempt to dodge the damages that respondent has sustained by a quirk and technical question of law, and smacks too much of a skin game, and hand stacked and dealt to dealer from the bottom of the deck.
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> . . . .
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> The appellant cannot now at this stage of the case repudiate its liability. By its action it has allowed the Southern Express Company to go out of existence and now proposes to let the respondent whistle for his money, and by its technicality, which would besmirch the character of any honest man, smacks its lips and licks its chops and congratulates itself on its shrewdness in avoiding its payment of a just claim.[26]

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[23] Colorado Springs Rapid Transit Ry. Co. v. Albrecht, 22 Colo. App. 201, 206-208 (1912). (Emphasis added).

[24] *Id.* ("in respect to the property" in the last quarter of the block quote).

[25] Brabham v. So. Express Co., 124 S.C. 157, 117 S.E. 368 (1922).

[26] *Id.* The most recent articulation of successor liability in South Carolina is found in Simmons v. Mark Lift Industries, 622 S.E. 2d 213 (S.C.S.C. 2005), which cites to Brown v. American Ry. Express Co., 128 S.C. 428 (1924),

The Third Circuit, in 1986, drawing on Blackstone's analogy of a corporation to the River Thames which remains the same river although its water and other constituent parts are constantly changing, summarized the law of no-liability-for-asset-purchasers and its four "traditional exceptions" - intentional assumption, consolidation or merger, fraud, and mere continuation – as follows:

> Describing the characteristics of the corporate body, Blackstone wrote that "all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.". . . A corporation whose stock is actively traded on an exchange has a constantly changing ownership; however, that fluctuation does not affect the corporation's liability for its past actions. The same concepts of continuing life and accountability underlie the law governing corporate merger through the purchase of stock. Liability continues because the corporate body itself survives. A different rule applies when one corporation purchases the assets of another. Under the well-settled rule of corporate law, where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts, of the transferor. . .
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> Four generally recognized exceptions qualify this principle of successor nonliability. The purchaser may be liable where: (1) it assumes liability; (2) the transaction amounts to a consolidation or merger; (3) the transaction is fraudulent and intended to provide an escape from liability; or (4) the purchasing corporation is a mere continuation of the selling company. . . . .
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> The successor rule was designed for the corporate contractual world where it functions well. It protects creditors and dissenting shareholders, and facilitates determination of tax responsibilities, while promoting free alienability of business assets. . . The doctrine reflects the general policy that liabilities adhere to and follow the corporate entity. However, when the form of the transfer does not accurately portray substance, the courts will not refrain from deciding that the new organization is simply the older one in another guise. In that instance, the continuation approach articulated by Blackstone remains applicable.[27]

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which in turn, cites to *Brabham*.

[27] Polius v. Clark Equip. Co., 802 F.2d 75, 77-78 (3d Cir. 1986). *See*

The tension is easy to see. On the one hand, purchasing corporations desire some certainty, when acquiring a business through an asset sale that they will not be liable for pre-closing unsecured debt unless it is specifically assumed. This is the whole point of acquisition by asset sale rather than merger.[28] This limitation of liability benefits sellers and their known creditors, too, by driving up the purchase price rather than subjecting the buyer to risks of unknown and, perhaps, unknowable claims that would justify a discount in the purchase price or other transactional adjustment to allocate the risk. On the other hand, the main group negatively affected by the no-liability rule consists of unpaid unsecured creditors and, within that group, the subset of involuntary tort creditors, some of whom may not even know of their claim at the time of the sale and are thus unable to assert it when assets may be available for distribution.[29] For them, it creates negative externalities. A pro-limitation-of-liability inclination continues in corporate law generally today.

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infra notes 156 to 161 and accompanying text discussing how bright-line rules allow careful contract drafting and transactional structuring to elevate form over substance by drafting into a safe harbor or around standard.

[28] *See* MODEL ASSET PURCHASE AGREEMENT xiv - xv (ABA 2001) (An asset purchase "may be the only structure that can be used where a buyer is interested in purchasing only a portion of the company's assets or assuming only some of its liabilities.").

[29] This pro-limitation-of-liability inclination is perhaps at its strongest in the nation's bankruptcy courts, where the chant of "benefit to the estate and its creditors" and the need not to "chill the bidding" is used to justify fast track asset sale transactions that feature the additional protective wrapper of a final federal court order that declares the purchaser free of the claims of the predecessor's claims. *See* George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19 (2005) (describing combinations of statutory changes in the 1979 Bankruptcy Code that have led to the development of a federal unified foreclosure system in the bankruptcy courts); *Let's Make It Official: Adding an Explicit Pre-Plan Sale Process as an Alternative Exit from Chapter 11*, 40 HOUS. L. REV. 1265 (2004) (discussing shortfalls of section 363 sale process as currently required by the Bankruptcy Code and suggesting statutory and rule amendments to address the perceived shortfalls); *Selling a Business in Bankruptcy Court Without a Plan of Reorganization*, 18 CEB CAL. BUS. L. PRACT. 57 (2003) (a brief 'how to' guide); *Misinterpreting Bankruptcy Code § 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235 (2002) (discussing the evolution and doctrinal basis for current section 363 sale practice); *see generally* Listokin Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435 (2004).

Against this background, the next section of this article examines the specific non-statutory species and sub-species of successor liability currently populating American jurisdictions. In each case, the particular theory is described and then critiqued in terms of whether it serves the original purposes of successor liability in ameliorating the otherwise harsh results mandated by strict adherence to corporate law principles.

II. What Successor Liability Has Become

When examined in detail, for purposes of this article, the types of successor liability can be classified into five species, each of which is made up of separate sub-species, some of which are particular to only a single jurisdiction, some of which are found in many, and some of which have been alluded to but not specifically identified in others.[30] The five categories of successor liability species addressed in this article are: (1) Intentional Assumptions of Liabilities, (2) Fraudulent Schemes to Escape Liability, (3) *De Facto* Mergers, (4) The Continuity Exceptions: Mere Continuation and Continuity of Enterprise, and (5) The Product Line Exception. This taxonomy and the sub-species of successor liability recognized in various jurisdictions is summarized in the appendix by jurisdiction.

When examining successor liability, one should keep in mind that there is variance and overlap between the species and their standards in particular jurisdictions, and the label a court uses for its test is not necessarily one with a standardized meaning applicable across jurisdictions. Accordingly, it is dangerous to place too much reliance on a name; substance should always be examined.

A. Intentional (Express or Implied) Assumption of Liabilities

Intentional assumption of liabilities, express or implied, is probably the simplest of the successor liability species. Imposing liability on a successor that by

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[30] Authorities differ on how many categories of successor liability there are. Most seem content with four or five, but at least one identifies nine different theories, including statutory successor liability. *See* MODEL ASSET PURCHASE AGREEMENT WITH COMMENTARY, EXHIBITS, ANCILLARY DOCUMENTS AND APPENDICIES at 144 (ABA 2002) (listing the categories as express or implied agreement to assume, *de facto* merger, mere continuation, fraud, continuity of enterprise, product line, duty to warn, inadequate consideration coupled with failure to make provision for predecessor's creditors, and statutory liability); *see generally* 2 Madden &Owen on Products Liability § 19.6 (West 2000). The point of the taxonomy that follows is to demonstrate that, actually, there are many different sub-groups even within the seven of the ABA's nine categories discussed in this article. The independent duty to warn and statutory successor liability are beyond the scope of this piece.

its actions is shown to have assumed liabilities is essentially an exercise in the realm of contract law, drawing on doctrines of construction and the objective theory of contract.[31]

Because it focuses on the language of the contract and the conduct and communications of the successor, express or implied assumption should be the form of successor liability that is the easiest to avoid by careful transaction structuring and document drafting. That said, creating a record that will not support a finding of assumption of liabilities may be harder to accomplish than it should be given that client representatives often do not refrain from volunteering information or taking actions inconsistent with the client's intent not to assume liability. Further, the tangled web of cross-references and definitions in an asset purchase agreement can trip up lawyers documenting the deal.[32]

Type 1: The Language of the Contract

The first sub-species of intentional assumption is based on the language of the contract. Courts look to the language of the asset purchase agreement to determine whether the purchaser expressly or impliedly agreed to assume liabilities of the successor.[33] This express plain-language approach is a fairly straightforward form of successor liability with the most potential for uncertainty in the area of

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[31] Michael J. Zaino, Bielagus v. EMRE*: New Hampshire Rejects Traditional Test for Corporate Successor Liability Following an Asset Purchase*, 45.N.H. B.J 26 (2004).

[32] *See In re* Eagle-Pitcher Indust., Inc., 255 B.R. 700, 704 (Bankr. S.D. Ohio 2000) (intent of the parties as expressed in the terms of an asset purchase agreement are controlling); *see also* Isaacs v. Westchester Wood Works, Inc., 278 A.D. 2d 184, 185 (N.Y. App. Div. Dept. 1 2000) (applying *ejusdem generis* rule of contract interpretation to construe broad term maturity and confined to items similar to those specifically enumerated).

[33] Matrix-Churchill v. Springsteen, 461 So. 2d 782, 788 (Ala. 1984); Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp., 2002 WL 1610037 at *7 (Conn. Super. June 19, 2002); Gwinnett Hosp. Sys., Inc. v. Massey, 469 S.E.2d 729, 731 (Ga. Ct. App. 1996); Myers v. Putzmeiser, Inc., 596 N.E.2d 754, 756 (Ill. Ct. App. 1992); Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1233 (Ind. 1994); Pearson v. Trent, 90 S.W.3d 46, 50 (Ky. 2002); Scott v. NG U.S. 1, Inc., 2003 WL 22133177, at *9 (Mass. Super. Sept. 3, 2003); McKee v. Harris-Seybold Co., 264 A.2d 98, 102 (N.J. Law Div. 1970); Hartford Acc. & Indem. Co., Inc. v. Canron, Inc., 373 N.E.2d 364, 364-65 (N.Y. 1977); Welco Indus., Inc. v. Applied Companies, 617 N.E.2d 1129, 1134 (Ohio 1993); Erickson v. Grande Ronde Lumber Co., 92 P.2d 170, 174 (Or. 1939).

implied terms of the contract and application of the canons of construction such as *ejusdem generis* to construe potentially conflicting sections of the doctrines.[34]

Type 2: Liability Based on Conduct or Representations

Under a second sub-species of intentional assumption of liabilities, the courts look beyond the language of the contract itself and examine extrinsic factors to determine if the purchaser impliedly assumed the liabilities of the seller.[35] For example, Maryland imposes successor liability where "the conduct or representations relied upon by the party asserting liability . . . indicate an intention of the buyer to pay the debts of the seller."[36] This is reminiscent of the holding in the *Brabham* case from South Carolina quoted in the previous section.[37]

Type 3: Undefined

A substantial number of courts -- representing almost thirty jurisdictions -- have adopted or recited the existence of the express or implied assumption of liabilities doctrine, but appear not to have defined a test or elaborated further in a reported decision.[38] Often this takes the form of reciting, arguably as *dicta*, a

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34 *See* Folger Adam Sec. Inc. v. DeMatteis/MacGregor, J.V., 209 F.3d 252 (3d Cir. 2000).

35 Baltimore Luggage v. Holtzman, 562 A.2d 1286, 1292 (Md. 1989); Safeco Ins. Co. v. Pontiac Plastics & Supply Co., 2000 WL 33538535, at *3 (Mich. Ct. App. Jan. 21, 2000); States Roofing Corp. v. Bush Constr. Corp., 426 S.E.2d 124, (Vir. Ct. App. 1993).

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

37 *See* Brabham note 24, *supra*, at 157and accompanying text.

38 Winsor v. Glasswerks PHX, L.L.C., 63 P.3d 1040, 1044-50 (Ariz. Ct. App. 2003); Ford Motor Co. v. Nuckolls, 894 S.W.2d 897, 903 (Ark. 1995); Henkel Corp. v. Hartford Acc. & Indem. Co., 62 P.3d 69, 73 (Cal. 2003); Johnston v. Amstead Indus., Inc., 830 P.2d 1141, 1142-43 (Colo. Ct. App. 1992); *In re* Asbestos Litigation, 1994 WL 89643, at *3 (Del. Super. 1994); Bingham v. Goldberg. Marchesano. Kohlman. Inc., 637 A.2d 81, 89-90 (D.C. Ct. App. 1994); Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1049 (Fla. 1982); Evanston Ins. Co. v. Luko, 783 P.2d 293, 296-97 (Haw. Ct. App. 1989); Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 751-52 (Iowa 2002); Gillespie v. Seymour, 876 P.2d 193, 200 (Kan. Ct. App. 1994); Dir. of Bureau of Labor Standards v. Diamond Brand, Inc., 588 A.2d 734, 736 (Me. 1991); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989); Paradise Corp. v. Amerihost Dev., Inc.,

version of the "typical" or "traditional" rule of no successor liability and its exceptions, including express or implied assumption, and then moving on to discuss whether liability will lie under a species of the doctrine other than express or implied assumption. For example, the Arizona Court of Appeal, in *Winsor v. Glasswerks PHX, LLC,*[39] stated the four traditional exceptions, including express or implied assumption, and cited to *A.R. Teeters & Assocs. v. Eastman Kodak Co.*,[40] which itself had taken the recitation of four traditional exceptions from two California cases, another Arizona case that had cited a Kentucky case, and cases from Hawaii and Washington State. None of these cases actually concerned liability of a success or based upon express or implied assumption. The *Winsor* court also found support in the Restatement (Third) of Torts: Products Liability § 12 (1998), which announced substantially the same general rule and exceptions.[41]

B. Fraudulent Schemes to Escape Liability

Fraudulent schemes to escape liability by using corporate law limitation-of-liability principles to defeat the legitimate interests of creditors illustrate an example of the need for successor liability to prevent injustice. If a corporation's equity holders, for example, arrange for the company's assets to be sold to a new company

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848 So.2d 177, 179 (Miss. 2003); Chem. Design, Inc. v. American Standard, Inc., 847 S.W.2d 488, 491 (Mo. Ct. App. 1993); Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481, 483 (Neb. 1982); Lamb v. Leroy Corp., 454 P.2d 24, 27-28 (Nev. 1969); Bielagus v. Emre of New Hampshire Corp., 826 A.2d 559, 564 (N.H. 2003); Pankey v. Hot Springs Nat. Bank, 119 P.2d 636, 640 (N.M. 1941); G.P. Publications, Inc. v. Quebecor Printing -- St. Paul, Inc., 481 S.E.2d 674, 679 (N.C. Ct. App. 1997); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 121 (N.D. 1984); Pulis v. U. S. Elec. Tool Co., 561 P.2d 68, 69 (Okla. 1977); *In re* Thorotrast Cases, 26 Phila. Co. Reptr. 479, 488-89 (Pa. Com. Pl. 1994); Brown v. Am. Ry. Express Co., 123 S.E. 97, 98 (S.C. 1924); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D. 1986); Hopewell Baptist Church v. Southeast Window Mfr. Co*, LLC*, 2001 WL 708850 at *4 (Tenn. Ct. App. June 25, 2001); Decius v. Action Collection Serv., Inc., 105 P.3d 956, 958-59 (Utah Ct. App. 2004); Ostrowski v. Hydra-Tool Corp., 479 A.2d 126, 127 (Vt. 1984); Mill & Logging Supply Co. v. West Tenino Lumber Co., 265 P.2d 807, 812 (Wash. 1954); *In re* State, 454 S.E.2d 413, 424-25 (W. Va. 1995); Columbia Propane, L.P. v. Wisconsin Gas Co., 661 N.W.2d 776, 785 (Wis. 2003).

[39] 204 Ariz. 303, 307-08 (Ariz. Ct. App. 2003).

[40] 172 Ariz. 324, 329 (Az. Ct. App. 1992).

[41] *Id.*

in which they also hold an equity or other stake for less value than would be produced if the assets were deployed by the original company in the ordinary course of business, then the legitimate interests and expectations of the company's creditors have been frustrated.[42] By allowing liability to attach to the successor corporation in such instances, the creditors' interests and expectations are respected. The challenge, of course, is defining the standard that separates the fraudulent scheme from the legitimate one.

Type 1: Common Law Fraud or Lack of Good Faith

Some courts review the record for evidence of common law fraud.[43] For example, in *Eagle Pacific Insurance Co. v. Christiansen Motor Yacht Corp.*,[44] the court held that by showing that the successor corporation was created solely to hinder the predecessor's creditors, a fraudulent purpose was established sufficient to impose liability on the successor. The fraudulent purpose doctrine is closely related to the mere continuation doctrine in that the fraudulent scheme is the mere continuation of the business with only a superficial change in legal form to defeat the valid claims of the predecessor's creditors. Both doctrines have similar origins and were, perhaps, originally flexible standards addressing similar situations featuring differently structured transactions.[45]

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42 Causation is a required element of all species of the fraud exception. *See, e.g.*, Milliken & Co. v. Duro Textiles, LLC, 19 MASS. L. REP. 509 (2005) (discussing need for causation, but also that judgment creditors could look to company's long term prospects, not just immediate insolvency).

43 Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 416-17 (Mo. 1928); McKee v. Harris-Seybold Co., 264 A.2d 98, 107 (N.J. Law Div. 1970); Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 934 P.2d 715, 721 (Wash. Ct. App. 1997).

44 *Eagle Pacific*, 934 P.2d at 721 (rejecting trial court's finding of mere continuation successor liability but sustaining successor liability on grounds of actual fraud).

45 *See, e.g.*, Ingram v. Prairie Block Coal Co., 319 Mo. 644, 653 (1928) ("The conclusion is irresistible that the Elmira Coal Company was incorporated for the purpose of complying with the requirements of Missouri law, and it was in fact either a continuation of the Prairie Block Company or a subsidiary corporation. The rule is, that where one corporation purchases the stock and assets of another corporation, and the circumstances are such that the purchasing corporation is a mere continuance of the selling corporation, or that the transaction was fraudulent in fact, the purchasing corporation is *ipso facto* liable for the debts and liabilities of the selling corporation").

Other courts review the facts to determine whether "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 . . . ."[46] Either formulation of the standard appears flexible enough to prevent artful dodging through skillful structuring and drafting, although the record and facts may be manipulated to make proving the case difficult and expensive, as with almost every form of fraud.

Type 2: Statutory Fraud

Maryland determines successor liability for fraud by incorporating the standards of its Uniform Fraudulent Conveyance Act.[47] This would seem to expand fraudulent conveyance liability, which is normally limited to avoidance of the transfer and, thus, recovery of the value of the assets transferred. Successor liability can subject all of the purchaser's assets and insurance to the claims of the predecessor's creditors.

Type 3: Undefined

As is the case with intentional assumption,[48] many courts have adopted or recited the existence of the exception but appear not to have defined a test.[49] It is

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46 Dir. of Bureau of Labor Standards v. Diamond Brands, Inc., 588 A. 2d 734 (Me. 1991) (citing Brennan v. Saco Constr., Inc. 381 A. 2d 656, 662 (Me. 1978) for proposition that "absent fraud, misrepresentation, or intent to circumvent overriding public policy, courts are reluctant to disregard corporation form."). Huray v. Fournier NC Programming, Inc., No. C9-02-1852, 2003 WL 21151772, at *3 (Minn. Ct. App. May 20, 2003); Lamb v. Leroy Corp., 454 P.2d 24, 27-28 (Nev. 1969); McKee v. Harris-Seybold Co., 264 A.2d 98, 107 (N.J. Law Div. 1970); Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1134 (Ohio 1993); *In re* Thorotrast Cases, 26 Phila. Co. Reptr. 479, 488-89 (Pa. Com. Pl. 1994) (limiting the exception to inadequacy of consideration or where provision was not made for creditors of the transferor); Ostrowski v. Hydra-Tool Corp., 479 A.2d 126, 127 (Vt. 1984).

47 Nissen Corp. v. Miller, 594 A.2d 564, 574 (Md. 1991).

48 *See supra* notes 30 to 40 and accompanying text.

49 Winsor v. Glasswerks PHX, L.L.C., 63 P.3d 1040, 1044-1050 (Ariz. Ct. App. 2003); Ford Motor Co. v. Nuckolls, 894 S.W.2d 897, 903 (Ark. 1995); Henkel Corp. v. Hartford Acc. & Indem. Co., 62 P.3d 69, 73 (Cal. 2003); Johnston v. Amstead Indus., Inc., 830 P.2d 1141, 1142-43 (Colo. Ct. App. 1992);

not entirely clear if their comments should be considered dicta. Nor is it clear if these jurisdictions would apply a common law fraud, lack of good faith, statutory fraud, or some other standard to apply to this species of successor liability.

C. *De Facto* Merger

In a *statutory* merger, the successor corporation becomes liable for the predecessor's debts.[50] The *de facto* merger species of successor liability creates the

Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp., 2002 WL 1610037 at *6 (Conn. Super. June 19, 2002); *In re* Asbestos Litigation, 1994 WL 89643, at *3 (Del. Super. 1994); Bingham v. Goldberg. Marchesano. Kohlman. Inc., 637 A.2d 81, 89-90 (D.C. Ct. App. 1994); Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1049 (Fla. 1982); Farmex v. Wainwright, 501 S.E.2d 802, 804 (Ga. 1998); Evanston Ins. Co. v. Luko, 783 P.2d 293, 296-97 (Haw. Ct. App. 1989); Myers v. Putzmeiser, Inc., 596 N.E.2d 754, 756 (Ill. Ct. App. 1992); Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1233 (Ind. 1994); Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 751-52 (Iowa 2002); Comstock v. Great Lakes Distrib. Co., 496 P.2d 1308, 1312 (Kan. 1972); Pearson v. Trent, 90 S.W.3d 46, 51 (Ky. 2002); Wolfe v. Shreveport Gas, Elec. Light & Power Co., 70 So. 789, 794 (La. 1916); Guzman v. MRM/Elgin, 567 N.E.2d 929, 931 (Mass. 1991); Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 886-87 (Mich. 1976) (The *Turner* court noted that fraud might be indicated by inadequate consideration and/or lack of good faith in the transaction; the court did not address other possible indications of fraud.); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989); Paradise Corp. v. Amerihost Dev., Inc., 848 So.2d 177, 179 (Miss. 2003); Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481, 483 (Neb. 1982); Bielagus v. Emre of New Hampshire Corp., 826 A.2d 559, 564 (N.H. 2003); Schumacher v. Richards Shear Co., Inc., 451 N.E.2d 195, 198 (N.Y. 1983); Pankey v. Hot Springs Nat'l Bank, 119 P.2d 636, 640 (N.M. 1941); G.P. Publications, Inc. v. Quebecor Printing – St. Paul, Inc., 481 S.E.2d 674, 679 (N.C. Ct. App. 1997); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 121 (N.D. 1984); Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1134 (Ohio 1993); Pulis v. U. S. Elec. Tool Co., 561 P.2d 68, 69 (Okla. 1977); Erickson v. Grande Ronde Lumber Co., 92 P.2d 170, 174 (Or. 1939); *In re* Thorotrast Cases, 26 Phila. Co. Reptr. 479, 488-89 (Pa. Com. Pl. 1994); Brown v. Am. Ry. Express Co., 123 S.E. 97, 98 (S.C. 1924); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D. 1986); Hopewell Baptist Church v. Southeast Window Mfr. Co, LLC, 2001 WL 708850 at *4 (Tenn. Ct. App. June 25, 2001); Decius v. Action Collection Serv., Inc., 105 P.3d 956, 958-59 (Utah Ct. App. 2004); Ostrowski v. Hydra-Tool Corp., 479 A.2d 126, 127 (Vt. 1984); Harris v. T.I., Inc., 413 S.E.2d 605, 609 (Va. 1992); *In re* State, 454 S.E.2d 413, 424-25 (W. Va. 1995); Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 823 (Wis. 1982).

[50] G. William Joyner, III, *Beyond* Budd Tire*: Examining Successor*

same result in the asset sale context to avoid allowing form to overcome substance. A *de facto* merger, then, allows liability to attach when an asset sale has mimicked the results of a statutory merger except for the continuity of liability. The main difference between the sub-species of *de facto* merger various jurisdictions is how rigid or flexible the test is. In other words, how many required elements must be shown to establish applicability of the doctrine? On one end of the spectrum is the lengthy, mandatory checklist of required elements. On the other, the non-exclusive list of factors to be weighed in a totality of the circumstances fashion.

Type 1: Element-Based Test

Courts applying an element-based *de facto* merger test require a showing of certain required elements. Generally, "[t]o 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."[51] This is a rigid test that allows transactions to be structured so as to avoid exposure to liability. For example, counsel that is aware of the applicability of this sub-species of successor liability is likely to disfavor 100% stock payments in acquisitions of substantially all the assets of a business. He can require that the seller continue to exist and not dissolve post-sale, and arrange for the seller to fund payments to its voluntary, ordinary course of business creditors out of the purchase price to avoid assuming any pre-sale unsecured liabilities. This sort of lawyering, encouraged by the rigid "required elements" approach to *de facto* merger elevates form over substance and undermines successor liability's usefulness as a tool to soften the harsh results that may obtain from strict application of corporate law principles.

Type 2: Threshold Requirement Plus Non-Dispositive Factors

Other courts require a threshold finding of continuity of ownership, and then consider other not-necessarily dispositive factors, including dissolution of the

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Liability in North Carolina, 30 WAKE FOREST L. REV. 889, 894 (1995).

[51] Searchay v. NTS Fort Lauderdale Office Joint Venture, 707 So.2d 958, 960 (Fla. Ct. App. 1998); *see also* Perimeter Realty v. GAPI, Inc., 533 S.E.2d 136, 145-46 (Ga. Ct. App. 2000); Myers v. Putzmeiser, Inc., 596 N.E.2d 754, 756 (Ill. Ct. App. 1992); Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 891 (Mich. 1976); Howell v. Atlantic-Meeco, Inc., 2002 WL 857685 at * 3 (Ohio Ct. App. 2002). Vermont only requires evidence of three elements. CAB-TEK, Inc. v. E.B.M., Inc., 571 A.2d 671, 672 (Vt. 1990) (*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 ceases to function.).

predecessor, continuation of the business, and assumption of the debts of the predecessor necessary to operate the business.[52]

Although more flexible than the pure required element-based approach to *de facto* merger, this hybrid approach suffers from some rigidity because it rests on the touchstone of "ownership," itself a largely illusory concept in the modern corporate world. Under the classical model, the "owners" of the corporation are the common shareholders who are said to "control" the corporation through their power to elect directors and, thus, indirectly, control management. The first criticism of the classical model is that, outside of the small, closely held corporation, most, or at least many, shareholders have no meaningful control or power to elect even one director. More importantly, though, corporate and lending lawyers in the real world have sliced and diced corporate securities and debt interests and instruments with precision and the result has been to increase the control over directors, management, and operations held by debt and preferred stock holders.[53] Further, as modern

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52 Wolff v. Shreveport Gas, Elec. Light & Power Co., 70 So. 789, 794 (La. 1916) (Louisiana has not adopted the *de facto* merger exception per se, but its "continuation doctrine" appears to be the traditional *de facto* merger exception with a requirement of continuity of ownership); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D. 1986) ("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."); Decius v. Action Collection Serv., Inc., 105 P.3d 956, 958-59 (Utah Ct. App. 2004) (requiring "that the buyer paid for the asset purchase with its own stock"); Schawk, Inc. v. City Brewing Co., LLC, 2003 WL 1563767, at *4 (Wis. Ct. App. March 27, 2003) (requiring that consideration for the assets be stock in the purchasing corporation and examining the following four non-dispositive factors: "(1) the assets of the seller corporation are acquired with shares of the stock in the buyer 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").

53 Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, http:ssrn.com/abstract=692023 (March 2005) ("In our essay, we identify this missing lever of corporate governance--the control that creditors exercise through elaborate loan covenants. Bondholders typically can do little until a corporation defaults on a loan payment. Even then, their remedies are limited. Not so with bank debt or debt issued by nonfinancial institutions. These loans, and their volume, now exceed half a trillion dollars a year and come with elaborate covenants covering everything from minimum cash receipts to timely delivery of audited financial statements. When a business trips

corporate law recognizes, the real "owners" of a corporation are the lowest priority debt or interest holders that are supported by value in the corporation. Even directors' duties are aimed at this last residual value class, whether or not it is named "common stock."[54]

Faced with a required element of *de facto* merger like "commonality of ownership," the transactional gambit is to avoid it by providing old equity with something entirely different in the purchasing company. Contingent promissory notes, convertible debt, or, if appropriate, continued employment with salary and preferred stock options would also serve to leave old equity with some skin in the game. And these are the easy, almost transparent solutions. The use of derivative securities and coordinated debt, equity, and workout swaps all achieve the same end. The hybrid approach to *de facto* merger that requires commonality of ownership is fairly easy to address, and avoid, by competent counsel structuring the acquisition.

Type 3: Non-Dispositive Factor Test

Other courts essentially use a completely non-dispositive factor form of the test for *de facto* merger and weigh these factors in light of the totality of the circumstances.[55] This is the most flexible form of *de facto merger* and is not as

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one of the wires in a large loan, the lender is able to exercise de facto control rights--such as replacing the CEO of a company–that shareholders of a public company simply do not have").

[54] *See generally* Gregory Scott Crespi, *Rethinking Corporate Fiduciary Duties: The Inefficiency of the Shareholder Primacy Norm*, 55 SMU L. REV. 141 (2002). The duty shifts from stockholders to other corporate constituents is largely based on the seminal case of Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., 1991 Del. Ch. LEXIS 215 (Del. Ch. Dec. 30, 1991).

[55] Marks v. Minnesota Mining & Mfg. Co., 232 Cal. Rptr. 594, 598 (Cal. Ct. App. 1986) (adding an additional factor to the general test: "was the consideration paid for the assets solely stock of the purchaser or its parent"); Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp., 2002 WL 1610037 at *7 (Conn. Super. June 19, 2002); Sorenson v. Allied Products Corp., 706 N.E.2d 1097, 1100 (Ind. Ct. App. 1999) (Indiana courts acknowledge the four traditional factors but have not clearly expressed whether their *de facto* merger test requires a threshold finding of continuity of shareholders); Cargill, Inc. v. Beaver Coal & Oil Co., 676 N.E.2d 815, 818 (Mass. 1997) (Although continuity of ownership is not a threshold requirement, in determining whether a *de facto* merger has occurred, courts pay particular attention to the continuation of management, officers, directors and shareholders.); Harashe v. Flinkote Co., 848 S.W.2d 506, 509 (Mo. Ct. App. 1993) (listing the four traditional elements but noting, "[i]t is

susceptible to the "draft around." The result is that corporate attorneys and their clients will lack the certainty of a bright line rule or element that they can work to create a safe haven for their transaction.

Type 4: Undefined

Finally, still other courts have adopted or recited the existence of the exception but do not appear to have illustrated its application in their jurisdiction or defined a test.[56]

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not necessary to find all the elements to find a *de facto* merger"); Woodrick v. Jack J. Burke Real Estate, Inc., 703 A.2d 306, 312 (N.J. Super. Ct. App. Div. 1997); *In re* Seventh Judicial Dist. Asbestos Litig., 788 N.Y.S.2d 484, 486 (N.Y. App. Div. 2005); Cont'l Ins. Co. v. Schneider, Inc., 810 A.2d 127, 135 (Pa. Super. Ct. 2002); Richmond Ready-Mix v. Atl. Concrete Forms, Inc., 2004 WL 877595, at *10 (R.I. Super. April 21, 2004).

[56] Matrix-Churchill v. Springsteen, 461 So. 2d 782, 786-88 (Ala. 1984); Winsor v. Glasswerks PHX, L.L.C., P.3d 1040, 1044-50 (Ariz. Ct. App. 2003); Ford Motor Co. v. Nuckolls, 894 S.W.2d 897, 903 (Ark. 1995); Johnston v. Amstead Indus., Inc., 830 P.2d 1141, 1142-43 (Colo. Ct. App. 1992); *In re* Asbestos Litig., 1994 WL 89643, at *3 (Del. Super. Ct. 1994); Bingham v. Goldberg, Marchesano, Kohlman, Inc., 637 A.2d 81, 89-90 (D.C. 1994); Evanston Ins. Co. v. Luko, 783 P.2d 293, 296-97 (Haw. Ct. App. 1989); Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 751-52 (Iowa 2002); Gillespie v. Seymour, 876 P.2d 193, 200 (Kan. Ct. App. 1994); Pearson v. Nat'l Feeding Sys., Inc., 90 S.W.3d 46, 51 (Ky. 2002) (indicating that continuity of shareholders, management, or other indicia of merger or consolidation is necessary before the *de facto* merger exception will apply); Nissen Corp. v. Miller, 594 A.2d 564, 574 (Md. 1991); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989); Paradise Corp. v. Amerihost Dev., Inc., 848 So. 2d 177, 179 (Miss. 2003); Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481, 483 (Neb. 1982); Lamb v. Leroy Corp., 454 P.2d 24, 27-28 (Nev. 1969); Bielagus v. Emre of New Hampshire Corp., 826 A.2d 559, 564 (N.H. 2003); Pankey v. Hot Springs Nat'l Bank, 119 P.2d 636, 640 (N.M. 1941); G.P. Publ'ns, Inc. v. Quebecor Printing, Inc., 481 S.E.2d 674, 679 (N.C. Ct. App. 1997); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 121 (N.D. 1984); Pulis v. U. S. Elec. Tool Co., 561 P.2d 68, 71 (Okla. 1977); Tyree Oil, Inc. v. Bureau of Labor and Indus., 7 P.3d 571, 574 (Or. Ct. App. 2000); Brown v. Am. Ry. Express Co., 123 S.E. 97, 98 (S.C. 1924); Hopewell Baptist Church v. Southeast Window Mfg. Co, 2001 WL 708850, at *4 (Tenn. Ct. App. June 25, 2001); Harris v. T.I., Inc., 413 S.E.2d 605, 609 (Va. 1992); Hall v. Armstrong Cork, Inc., 692 P.2d 787, 789-90 (Wash. 1984); *In re* State, 454 S.E.2d 413, 424-25 (W. Va. 1995).

D. Continuation of the Business: The Continuity Exceptions

An exception with two distinct subcategories permits successor liability when the successor continues the business of the seller: mere continuation and continuity of enterprise. Each has sub-species particular to specific jurisdictions within them. The two share roughly the same indications but continuity of enterprise does not require continuity of shareholders or directors or officers between the predecessor and the successor -- a requirement said to be one of the mere continuation exception's dispositive elements or factors.[57] Courts are not

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[57] REST. 3D TORTS, § 12 cmt. g. (1998); AM. L. PROD. LIAB. 3D § 7:20 (2004). *See, e.g.*, Holloway v. John E. Smith's Sons Co., 432 F. Supp. 454, 456 (D.S.C. 1977) (denying summary judgment to the defendant successor in a products liability suit because (1) the business continued at its same address with virtually all of the previous employees; (2) the successor was responsible for maintenance and repairs on the products sold by the predecessor prior to its sale of assets; (3) the successor continued manufacturing the same or similar products as the predecessor; and (4) the successor held itself out to the public as a business entity under a virtually identical name as its predecessor; not requiring continuity of ownership and control but calling the doctrine applied "mere continuation" anyway.). *See also* Mozingo v. Correct Mfg., 752 F.2d 168, 175 (5th Cir. 1985) (applying Mississippi law and citing *Holloway* and Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974) (upon which *Holloway* relied) as cases following the continuity of enterprise theory); TRAVERS ET AL, AMERICAN LAW OF PRODUCTS LIABILITY 3d § 7:22 (2004) (noting that the court in *Holloway* denied summary judgment to a successor despite a lack of continuity of ownership even though the court treated its ruling as an application of the mere continuation theory); 2 MADDEN & OWEN ON PROD. LIAB. § 19:6, n.25 (3d. ed. 2000) (noting an increasing number of courts have adopted the continuity of enterprise exception including the *Holloway* Court and the Ohio Supreme Court in Flaugher v. Cone Automatic Mach. Co., 507 N.E. 2d 331 (Ohio 1987) (this treatise is authored by David Owen, the Carolina Distinguished Professor of Law at the University of South Carolina); Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 854-55, n.44 (1999) (noting that states following the continuity of enterprise approach include South Carolina (citing *Holloway*), Ohio (citing *Flaugher*), Alabama, Michigan, Mississippi, and New Hampshire (citing *Cyr v. B. Offen*)); Philip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 FLA. J. INT'L L. 365, 375-76 (1996) (collecting cases applying the continuity of enterprise theory, including *Holloway* and *Flaugher*); 30 S.C. JUR. PRODUCTS LIABILITY § 12 (stating the court in *Holloway* denied the successor's motion for summary judgment "where the evidence indicated that the [successor] was a mere continuation of the predecessor corporation"); REST. 3D TORTS § 12 cmt. c (1998) (citing only Alabama, Michigan, and New Hampshire as jurisdictions that have adopted the continuity of enterprise theory).

altogether careful or uniform in labeling which exception they are applying. There appear to be four general sup-species of mere continuation and three of continuity of enterprise. The similarity of these doctrines to those of *de facto* merger is striking.[58]

1. <u>The Four Species of Mere Continuation</u>

<u>Type 1: Element-Based Mere Continuation</u>

For some courts, mere continuation is a conclusion derived from a showing of a set of required elements. For example, "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."[59] Much as with the first type of *de facto* merger where a test comprised of required elements is used, this sub-species of mere continuation is user friendly for corporate lawyers. It provides the bright line certainty needed to have confidence that one has insulated a transaction from this form of successor liability by arranging for potential relocation, change of employees, and a new group of directors and shareholders. Presumably, in most cases, the successor would wish to use the predecessor's trade name and

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[58] Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214, 221-22 (Vt. 2005). Cases from the beginning of the last century in Idaho preserve another term that seems to capture all or part of the *de facto* merger, mere continuation, and continuity of enterprise exceptions: "reorganization." *See infra* notes 274 to 276 and accompanying text.

[59] Asher v. KCS Int'l, Inc., 659 So. 2d 598, 599-600 (Ala. 1995) (using the seminal Turner v. Bituminous Cas. Co., 244 N.W. 873 (Mich. 1976), continuity of enterprise factors as an element-based test for mere continuation, thus perhaps confusing or conflicting the continuity of enterprise and mere continuation exceptions, calling the theory "mere continuation of the enterprise.") *See also* Savage Arms, Inc. v. Western Auto Supply Co., 18 P.3d 49, 55-58 (Alaska 2001); *see also* Gillespie v. Seymour, 876 P.2d 193, 200 (Kan. Ct. App. 1994) (The five elements detailing growth of the more flexible factor-based continuity of enterprise doctrine from the more rigid, element-based mere continuation doctrine are: "(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."); Paradise Corp. v. Amerihost Dev., Inc., 848 So. 2d 177, 179 (Miss. 2003); Lamb v. Leroy Corp., 454 P.2d 24, 27-28 (Nev. 1969); Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 111 (Pa. Super. Ct. 1981); Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 934 P.2d 715, 721 n.1 (Wash. Ct. App. 1997).

goodwill, but if not, that too could be dropped--or not even acquired--to further insulate the transaction from successful attack.

Type 2: Threshold Finding Plus Non-Dispositive Factors Mere Continuation

Another set of jurisdictions approach the mere continuation doctrine by requiring continuity of ownership as a threshold matter. Then they consider other relevant factors on an *ad hoc* basis.[60] As with the *de facto* merger sub-species that

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[60] Alcan Aluminum Corp., Met. Goods Div. v. Elec. Metal Prods., 837 P.2d 282, 283 (Colo. Ct. App. 1992) (requiring "continuation of directors and management, shareholder interest, and, in some cases, inadequate consideration"); *In re* Asbestos Litig., 1994 WL 89643, at *4 (Del. Super. 1994) ("[I]t must be established that the transaction . . . was an arms' length transaction and not simply a change of corporate name and that [the successor] has different owners than [the predecessor]"); Amjad Munim, M.D. v. Avar, 648 So. 2d 145, 154 (Fla. Ct. App. 1994) ("The key element of a continuation is a common identity of the officers, directors and stockholders in the selling and purchasing corporation"); Bullington v. Union Tool Corp., 328 S.E.2d 726, 727 (Ga. 1985); Ney-Copeland & Assocs., Inc. v. Tag Poly Bages, Inc., 267 S.E.2d 862, 862-63 (Ga. Ct. App. 1980); Vernon v. Schuster, 688 N.E.2d 1172, 1176 (Ill. 1997) (requiring continuity of ownership without listing other non-dispositive factors); *Pancrantz v. Monsanto Co.*, 547 N.W.2d 198, 201 (Iowa 1996); Pearson v. Trent, 90 S.W.3d 46, 51 (Ky. 2002) (The court noted that there must be continuity of "shareholders or management" before liability would be imposed, but it did not define the test further); Wolff v. Shreveport Gas, Elec. Light & Power Co., 70 So. 789, 794 (La. 1916) (Louisiana has not adopted the mere continuation exception, but its "continuation doctrine" appears to take cognizance of the mere continuation exception that requires continuity of ownership); Garcia v. Coe Mfr. Co., 933 P.2d 243, 247 (N.M. 1997) ("The 'key element of a "continuation" is a common identity of officers, directors and stockholders in the selling and purchasing corporations'"); G.P. Publications, Inc. v. Quebecor Printing -- St. Paul, Inc., 481 S.E.2d 674, 680 (N.C. Ct. App. 1997) (the court indicated that continuity of ownership may not be necessary under corporate successorship, but did not clarify which exception this analysis would apply to); Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1133 (Ohio 1993) (continuity of ownership is as a threshold requirement but the court expressly limited its holding to contract related actions); Decius v. Action Collection Serv., Inc., 105 P.3d 956, 958-59 (Utah Ct. App. 2004) ("A continuation demands 'a common identity of stock, directors, and stockholders and the existence of only one corporation at the completion of the transfer'"); Harris v. T.I., Inc., 413 S.E.2d 605, 609 (Va. 1992) (requiring continuity of ownership, then adding that an additional inquiry is whether "the purchase of all the assets of a corporation is a bona fide, arm's-length transaction."); Tift v. Forage King Indus., Inc., 322 N.W.2d 14, 17-18

employs a requirement of continuity of ownership as its touchstone (*de facto* merger type 2[61]), lack of this single dispositive element can be understood to provide the key to structuring the transaction to avoid the doctrine. Faced with the threat of this type of mere continuation liability, a change in ownership is critical. If prior owners are to have any interest in the successor entity, such interest should be as employees or creditors, perhaps with notes that are payable based upon contingencies (such as requiring the successor to meet revenue targets, among other things.).

Type 3: Non-Dispositive-Factors Mere Continuation

A number of courts have examined a non-exclusive list of non-dispositive factors in a totality of the circumstances analysis. Typically, commonality of directors, officers, or shareholders; continuation of business practices; dissolution of the predecessor; sufficiency of consideration, and the like.[62] As with the *de facto*

(Wis. 1982) (common identity of officers, directors, and stockholders is a key element for continuation). California courts require, as a threshold matter, inadequacy of consideration; continuity of ownership is a crucial factor. Beatrice Co. v. State Bd. of Equalization, 863 P.2d 683, 690 (Cal. 1993) (requiring a showing of no adequate consideration and some commonality of officers, directors, or stockholders and then considering other factors). Arizona courts require proof of both insufficient consideration and continuity of ownership as a threshold matter. Winsor v. Glasswerks PHX, L.L.C., P.3d 1040, 1039-40 (Ariz. Ct. App. 2003) (requiring proof of insufficient consideration and looking at certain other non-dispositive factors; a crucial (though non-dispositive) factor is "substantial similarity in the ownership and control of the two corporations").

61 *See* notes 51 to 53 *supra* and accompanying text.

62 Bingham v. Goldberg, Marchesano, Kohlman, Inc., 637 A.2d 81, 91-92 (D.C. Ct. App. 1994) (stating that "common identity of officers, directors, and stockholders in the purchasing and selling corporations" is "a key element," though existence of common directors does not dispose of the issue -- the key inquiry is whether there is a continuation of the entity and not the business operations of the predecessor); Huray v. Fournier NC Programming, Inc., No. C9-02-1852, 2003 WL 21151772, at *4 (Minn. Ct. App. May 20, 2003).

> 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 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

merger, this flexible approach is probably superior in terms of allowing the doctrine to operate flexibly as a safety valve to avoid unduly harsh results from the strict application of corporate law. For precisely the same reason, it is the least acceptable approach for those who structure and finance corporate transactions and desire bright line rules and safe harbors.

Type 4: Undefined Mere Continuation

Finally, a number of courts have adopted or recited the existence of the exception but appear not to have specifically defined a test.[63]

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

Id. *See also* Roper Elec. Co. v. Quality Castings, Inc., 60 S.W.3d 708, 711 (Mo. Ct. App. 2001); Timmerman v. American Trencher, Inc., 368 N.W.2d 502, 506 (Neb. 1985) (considering at least two factors: commonality of both ownership and leadership and whether "creation of the purchasing corporation simply became a means of refinancing a major secured debt of the selling corporation"). Connecticut and New Jersey courts treat the four elements of the *de facto* merger test as non-dipositive factors for analyzing mere continuation. Savings Bank of Manchester v. Daly, 2004 WL 3130581 at *1 (Conn. Super. Dec. 23, 2004); Woodrick v. Jack J. Burke Real Estate, Inc., 703 A.2d 306, 312 (N.J. Super. Ct. 1997). Rhode Island and Maryland courts look at "five persuasive criteria:" (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. H.J. Baker & Bro., Inc. v. Orgonics, Inc., 554 A.2d 196, 205 (R.I. 1989); Baltimore Luggage v. Holtzman, 562 A.2d 1286, 1293 (Md. Ct. Spec. App. 1989) (applying the Rhode Island five factor test; an earlier Maryland Court of Appeals decision, Academy of IRM v. LVI Envtl. Servs., Inc., 687 A.2d 669, 680 (Md. Ct. App. 1997), applied a less-developed factor-based test).

[63] Ford Motor Co. v. Nuckolls, 894 S.W.2d 897, 903 (Ark. 1995); Evanston Ins. Co. v. Luko, 783 P.2d 293, 296-97 (Haw. Ct. App. 1989); Sorenson v. Allied Products Co., 706 N.E.2d 1097, 1100 (Ind. Ct. App. 1999) ("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." (emphasis added)); Scott v. NG U.S. 1, 2003 WL 22133177 at *10 (Mass. Super. Sept. 3, 2003) ("The *de facto* merger exception subsumes the continuation exception."); Paradise Co. v. Amerihost Dev., Inc., 848 So.2d 177, 179 (Miss. 2003); Bielagus v. Emre of New Hampshire Corp.,

2. <u>The Two Species of Continuity of Enterprise</u>

Unlike the more traditional and long standing mere continuation exception, the continuity of enterprise theory does not require strict continuity of shareholders or owners (and possibly directors and officers) between the predecessor and the successor, although the degree or extent of continuity of owners, directors and officers is a factor.[64] Further, continuity of enterprise generally does not include the requirement of dissolution of the predecessor upon or soon after the sale, which is often a factor, and sometimes a requirement, in jurisdictions applying the mere continuation doctrine.[65]

A detailed examination of continuity of enterprise in the jurisdictions that have adopted it discloses three sub-species at work. All the variations of the continuity of enterprise exception derive from *Turner v. Bituminous Cas. Co.*[66] Variations in the application of the *Turner* factors create the three sub-species.

In *Turner,* the Michigan Supreme Court expanded the four traditional categories of successor liability, and in so doing, developed a continuity of

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826 A.2d 559, 564 (N.H. 2003); Schumacher v. Richards Shear Co., Inc., 451 N.E.2d 195, 198 (N.Y. 1983); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 121 (N.D. 1984); Davis v. Loopco Indus., Inc., 609 N.E.2d 144, 145 (Ohio 1993) (expressly declining to adopt a test for the mere continuation exception for product liability cases); Pulis v. U. S. Elec. Tool Co., 561 P.2d 68, 71 (Okla. 1977); Erickson v. Grande Ronde Lumber Co., 92 P.2d 170, 174 (Or. 1939); Brown v. Am. Ry. Express Co., 123 S.E. 97, 98 (S.C. 1924); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D. 1986); Hopewell Baptist Church v. Southeast Window Mfr. Co., LLC, 2001 WL 708850 at *4 (Tenn. Ct. App. June 25, 2001); Ostrowski v. Hydra-Tool Co., 479 A.2d 126, 127 (Vt. 1984); *In re* State, 454 S.E.2d 413, 424-25 (W. Va. 1995); Polius v. Clark Equip. Co., 6087 F.Supp. 1541, 1545 (D.V.I. 1985).

64 Mozingo, 752 F.2d at 174-75 (noting that the traditional mere continuation exception requires identity of stockholders, directors and officers); *see also* Savage Arms Inc. v. Western Auto Supply, 18 P.2d 49, 55 (Alaska 2001) (mere continuation theory requires "the existence of identical shareholders").

65 *See, e.g.*, Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 882 (Mich. 1976) (dissolution of the seller soon after the sale one of four enumerated factors indicating continuity of enterprise).

66 244 N.W.2d 873 (Mich. 1976).

enterprise theory of successor liability.[67] The court adopted the rule that, in the sale of corporate assets for cash, three criteria would be the threshold guidelines to establish whether there is continuity of enterprise between the transferee and the transferor corporations. (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) The seller 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 necessary for the interrupted continuation of normal business operations of the seller corporation.[68]

The *Turner* court went on to state that:

> [B]ecause this is a products liability case, however, there is a second aspect on continuity which must also be considered. Where the successor corporation represents itself either affirmatively or, by omitting to do otherwise, as in effect a continuation of the original manufacturing enterprise, a strong indication of continuity is established.[69]

If continuity is established, "then the transferee must accept the liability [ies] with the benefits."[70] Thus, when applying its rule, the *Turner* court stated that the plaintiff had made a prima facie showing of "continuation of corporate responsibility for products liability" by proving: (1) There was basic continuity of the enterprise of the seller corporation, including, a retention of key personnel, assets, general business operations, and even the [corporate] name, (2) The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of consideration received from the buying corporation, (3) The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the normal business operations of the seller corporation, (4) The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.[71]

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[67] *Id.* at 878-879.

[68] *Id.* at 879 (citing McKee v. Harris-Seybold Co., Div. of Harris-Intertype Corp., 264 A.2d 98, 103-105 (1970), *aff'd* 288 A.2d 585 (1972). These are three of the four factors from *McKee* used to determine whether liability will arise under the *de facto* merger form of successor liability.

[69] *Id.* at 882.

[70] *Id.* at 883.

[71] *Id.* at 883-84.

In *Turner* the showings are presented as "guidelines," making it somewhat ambiguous as to whether they were required elements or non-exclusive factors, or if they were to be weighed and balanced.

The Michigan Supreme Court did not address the limits of the continuity of enterprise exception again until 1999 in *Foster v. Cone-Blanchard Mach. Co.*[72] In *Foster*, a plaintiff, injured while operating a feed screw machine, sued the corporate successor after receiving a $500,000 settlement from the predecessor corporation.[73] The court held that "because [the] predecessor was available for recourse as witnessed by plaintiff's negotiated settlement with the predecessor for $500,000, the continuity of enterprise theory of successor liability is inapplicable."[74]

The *Foster* court thus resolved two issues left open in *Turner*. First, the Michigan appellate decisions prior to *Foster* cited *Turner* for the proposition that the

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72 597 N.W.2d 506 (Mich. 1999). In the interim, the court cited *Turner* in three decisions, none of which clarified the key *Turner* holding. Jeffery v. Rapid American Corp., 529 N.W.2d 644, 656 (Mich. 1995) (citing *Turner* for the proposition that corporate law principles should not be rigidly applied in products liability cases); Stevens v. McLough Steel Prods. Corp., 466 N.W.2d 95, 98 (Mich. 1989) (citing *Turner* as a case where the Michigan Supreme Court discussed the doctrine of successor liability in the context of a products liability suit); Langley v. Harris Corp., 321 N.W.2d 662, 664-65 (Mich. 1982) (citing *Turner* for the proposition that an acquiring corporation maybe held liable for products liability claims arising from activities of its predecessor corporation under a continuity of enterprise theory but then holding that the *Turner* rationale will not allow a corporation to seek indemnity from the plaintiff's employer in a products liability suit). One appellate court decision between *Turner* and *Foster* concluded that satisfying the fourth consideration in *Turner* (the purchasing corporation's holding itself out as a continuation of the selling corporation) was not sufficient for a finding of successor liability where the first three considerations were not met. Pelc v. Bendix Mach. Tool Corp., 314 N.W.2d 614, 620 (Mich. Ct. App. 1981) (Where a successor bought only 8% of the assets of another corporation in a bankruptcy sale and did not meet the first three criteria of *Turner* but held itself out as a continuation of the liquidating corporation, the mere continuation test was not satisfied. The court noted that to impose successor liability in such circumstances would effectively be an adoption of the broader "product line exception").

73 597 N.W.2d at 508.

74 *Id.*

continuity of enterprise test was comprised of four elements or factors, following the four items enumerated in the *Turner* court's holding and not the three listed in its announcement of the rule.[75] The *Foster* court clarified that, in fact, only three items are involved in the *Turner* rule, and they are required elements:

> *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 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.[76]

In a footnote, the *Foster* court recognized the relationship between the three necessary elements for continuity of enterprise and the fourth "separate and relevant inquiry" -- whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation:

> This principle has been called the fourth guideline of the *Turner* continuity of enterprise analysis. However, we note that a truer reading of *Turner* suggests that the first three guidelines were intended to complete the continuity of enterprise inquiry where there is a sale of corporate assets. *Turner* went on to identify as a separate and relevant inquiry whether a purchasing corporation holds itself out as the effective continuation of the seller.[77]

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[75] Fenton Area Pub. Sch. v. Sorensen-Gross Constr. Co., 335 N.W.2d 225-26 (Mich. Ct. App. 1983); Lemire v. Garrard Drugs, 291 N.W.2d 103, 105 (Mich. Ct. App. 1980); Powers v. Baker-Perkins, Inc., 285 N.W.2d 402, 406 (Mich. Ct. App. 1979); *Pelc*, 314 N.W.2d at 618; State Farm Fire & Cas. Ins. Co. v. Pitney-Bowes, 1999 WL 33451719, at *1 (Mich. Ct. App. April 2, 1999).

[76] *Foster.* at 510 (emphasis added).

[77] *Id.* at 6.

It is not readily apparent what this "separate and relevant inquiry" is to be used for under *Foster*. Thus, after *Foster*, a plaintiff alleging successor liability under the continuity of enterprise exception must only establish the three articulated elements.[78]

Second, the *Foster* court held that the "'continuity of enterprise' doctrine applies only when the transferor is no longer viable and capable of being sued."[79] The court's interpretation of the underlying rationale of *Turner* was "to provide a source of recovery for injured plaintiffs."[80] According to Justice Brickley, the *Turner* court expanded liability based on the successor's continued enjoyment of "certain continuing benefits": "[T]he test in Turner is designed to determine whether the company (or enterprise)" involved in the lawsuit is essentially the same company that was allegedly negligent in designing or manufacturing the offending product."[81] Furthermore, the dissent stated that, the *Turner* court had explained that the policy basis for the continuity of the enterprise requirement was that "the going concern ought to bear the liability for the damages done by its defective products."[82] "Because the enterprise enjoys continuing benefits, like good will and expertise, it must also accept continuing responsibility for the cost that the enterprise has imposed through negligence."[83]

> Therefore, the majority relies upon the policy of providing plaintiff with a recovery as the fundamental basis for extending successor liability under *Turner* whereas the minority would impose successor liability where the successor enjoys the continuing benefits of the enterprise.[84]

The dissent notwithstanding, the *Foster* decision appears to return Michigan law to its state immediately after *Turner* was decided: continuity of enterprise is a

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78 Meram v. Clark Refining Mktg., Inc., 2001 WL 1606883, at *2 (Mich. Ct. App. Dec. 14, 2001). (quoting *Foster*, 597 N.W.2d 506).

79 *Foster*, 597 N.W.2d at 511.

80 Justice Brickley, in dissent, disagreed with the majority as to the underlying rationale of *Turner.*

81 *Id.* at 513.

82 *Id*. at 514 (citing *Turner*, 244 N.W.2d at 876 (Mich. 1976).

83 *Turner*, 244 N.W.2d 873.

84 *Id.*

recognized doctrine of successor liability and the doctrine has three required elements. To the extent that intervening decisions had narrowed *Turner* with the addition of a fourth factor -- whether the purchasing corporation hold itself out to the world as the effective continuation of the seller corporation -- that revision of the doctrine appears to have been reversed. Further, to the extent that *Turner's* "guidelines" had been considered factors by other courts adopting the continuity of enterprise, the *Foster* court made it clear that it interpreted its own rule as one comprised of elements.

Type 1: Element-based Continuity of Enterprise

Some courts apply the *Turner* factors as elements.[85] As with other, rigid, element-based forms of successor liability, this renders the doctrine susceptible to the "draft around." To defeat the first element, continuation of the seller business with the same management, personnel, assets and location, structuring the transaction to avoid these continuities will do the trick. That, however, is probably an acceptable result. It is this continuity that suggests successor liability is appropriate in some sense; if the constituent parts are at fault in some way, and they continue to operate, then subjecting the new whole of which they are part to liability has some legitimacy. But what of requirements two and three, predecessor cessation of operations and liquidation, and successor assumption of ordinary course of business debts of the predecessor. Both of these required elements can be structured around by requiring the predecessor to remain in existence and to operate some business, perhaps even as a passive investor, with the proceeds of the sale and forcing the predecessor to pay claims against it out of sale proceeds rather than having the successor entity assume them. To allow a successor to escape liability because of a structure that adopts these features is to elevate form over substance.

Type 2: Factor-based Continuity of Enterprise

When continuity of enterprise is defined by a factor-based test lacking required elements, it bears a striking resemblance to factor-based *de facto* merger and factor-based mere continuation. Courts using this test look for evidence of the following key factors: (1) continuity of key personnel, assets, and business

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85 Asher v. KCS Int'l, Inc., 659 So. 2d 598, 599-600 (Ala. 1995); Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 510 (Mich. 1999) (Michigan courts also consider an additional factor: "*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."); Salvati v. Blaw-Knox Food & Chem. Equip., Inc., 497 N.Y.S.2d 242, 247 (N.Y. Spec. Term 1985) (neglecting to cite the fourth "consideration" of *Turner* and relaxing *Turner*'s requirement of prompt dissolution).

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.[86] It is likely that, although sporting different names in different jurisdictions, factor-based *de facto* merger, mere continuation, and continuity of enterprise are, really, the same species of successor liability.

E. The Product Line Exception of *Ray v. Alad*

In *Ray v. Alad*,[87] the California Supreme Court recognized the product line exception to the general rule of successor non-liability. It is a species of liability that is very similar to continuity of enterprise. The court articulated the following "justifications" for imposing liability on a successor corporation:

> (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 goodwill being enjoyed by the successor in the continued operation of the business.[88]

The term "justifications" is somewhat ambiguous as to whether it connotes required elements or non-exclusive factors to be balanced, much like the *Turner* guidelines.

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86 Savage Arms, Inc. v. Western Auto Supply Co., 18 P.3d 49, 55 (Alaska 2001); Paradise Corp. v. Amerihost Dev., Inc., 848 So.2d 177, 180 (Miss. 2003) ("[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.").

87 560 P.2d 3 (Cal. 1977).

88 *Id.* at 9.

Like the Michigan Supreme Court in *Foster,* which revisited *Turner* some years after the original opinion was issued, the California Supreme Court returned to *Ray v. Alad* some years later to "clarify" things. In *Henkel Corp. v. Hartford Acc. & Indemn. Co.*,[89] the California Supreme Court referred to these three justifications as conditions, thus suggesting that they were essential elements under the product line exception. Despite its name, the product line theory of successor liability appears only rarely, if at all, to have been applied in a reported decision to a successor that had acquired merely one of many product lines from the predecessor; in nearly all reported cases, it appears to have been applied to sales of substantially all of a predecessor's assets.[90] In fact, one court has emphasized that the "policy justifications for our adopting the product line rule require the transfer of substantially all of the predecessor's assets to the successor corporation."[91]

The product line doctrine, where accepted, breaks into three distinct sub-species. The first two differ only as to whether *Ray*'s "virtual destruction of the plaintiff's [other] remedies" condition is strictly required in order to permit recovery. The third type is too ambiguously defined to analyze.

Type 1: Causation By Destruction of Other Remedies Requirement

Some courts, including those in California, apply the conditions in *Ray*, including as a requirement that "the virtual destruction of the plaintiff's remedies against the original manufacturer have been caused by the successor's acquisition of the business."[92] This requirement is said to limit the product line doctrine to situations where two sets of facts are present that justify application of the doctrine and imposition of successor liability. First, the product line rule is said to be one of necessity and should only be applied when the successor is the only source of relief

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89 62 P.3d 69, 73 (Cal. 2003).

90 George W. Kuney & Donna C. Looper, *Successor Liability in California*, 20 CEB CAL. BUS. L. PRACT. 50 (2005).

91 Hall v. Armstrong Cork, Inc., 103 Wash. 2d 258, 260 n.1 (1984) (refusing to apply product line test to successor that purchased but one of many asbestos product lines).

92 Ray v. Alad, 560 P.2d 3, 9 (Cal. 1977); Sullivan v. A.W. Flint Co., 1996 Conn. Super. LEXIS 2060, 1996 WL 469716, at *7(Conn. Super. Ct. 1996) (unpublished opinion); *In re* Seventh Judicial District Asbestos Litig., 788 N.Y.S.2d 484, 486 (N.Y. App. Div. 2005); Garcia v. Coe Mfr. Co., 933 P.2d 243, 249 (N.M. 1997); Hall v. Armstrong Cork, Inc., 692 P.2d 787, 790 (Wash. 1984).

for the plaintiff.[93] Second, "elemental fairness demands that there be a causal connection between the successor's acquisition and the unavailability of the predecessor."[94] A sale of substantially all the assets of a business satisfies these twin requirements; sale of a single product line out of many may not.[95] This approach to the product line doctrine renders it virtually identical to type 1 element based continuity of enterprise.[96]

Type 2: No Causation By Destruction of Other Remedies Requirement

Other courts apply the conditions in *Ray* without requiring that the purchasing corporation cause the destruction of the plaintiff's remedy.[97] These courts focus on the necessity of providing recovery for imposing liability on the successor because of its "enjoyment of [the original manufacturer's] trade name, goodwill, and the continuation of an established . . . enterprise.[98] A Pennsylvania court, after examining whether it was better to expand the mere continuation doctrine or adopt the product line doctrine, decided upon the later course and deliberately chose to cast off any remnants of corporate formalism that would attend a required element based test:

> 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

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93 Hall v. Armstrong Cork, Inc., 103 Wash. 2d 258, 264 (1984).

94 *Id.*

95 *See also* Garcia v. Coe Manufacturing Co., 123 N.M. 34 (1997) (adopting *Ray v. Alad* and discussing justifications for product line and continuing enterprise liability).

96 *See* note 84, *supra*.

97 LeFever v. K.P. Hovnanian Enter., Inc., 734 A.2d 290, 298-99 (N.J. 1999); Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 111 (Pa. Super Ct. 1981) (Pennsylvania courts consider the three *Ray* conditions as well as additional factors).

98 LeFever v. K.P. Hovnanian Enterprises, Inc., 160 N.J. 307, 327 (1999)(quoting Mettinger v. Globe Slicing Machine Co., 153 N.J. 371, 384 (1988) (Pollock, J., dissenting)).

pertinent – for example, whether the successor corporation advertised itself as an ongoing enterprise, *Cyr v. B. Offen & Co., supra*; or whether it maintained the same product, name, personnel, property, and clients, *Turner v. Bituminous Casualty Co., supra*; or whether it acquired the predecessor corporation's name and good will, and required the predecessor to dissolve, *Knapp v. North American Rockwell Corp., supra*. Also, it will always be useful to consider whether the three-part test stated in *Ray v. Alad Corp., supra*, has been met. The exception will more likely realize its reason for being, however, if such details are not made part of its formulation.[99]

Type 3: Ambiguous

Georgia and Indiana have both commented upon the product line exception, arguably favorably, without expressly adopting it.[100]

F. Commentary: The Status of the Continuity Doctrines

The continuity doctrines -- continuity of enterprise, product line, and the expansive form of mere continuation -- have much in common and some critical differences that are discussed below.

1. Continuity of Enterprise Liability: Must the Predecessor be Defunct?

One of the main points of difference among those adopting continuity of enterprise is whether the predecessor must have become, in some sense, defunct. *Turner v. Bituminous Casualty Co.*,[101] is the ovular case for the continuity of enterprise theory, and it includes the dissolution of the predecessor as a factor, noting that if the predecessor "legally and factually becomes defunct, [the injured person] has no place to turn for relief except the second corporation."[102] The court

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99 Dawejko v. Jorgensen Steel Co., 290 Pa. Super. 15, 16 (1981).

100 *See* Farmex 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); Guerrero v. Allison Engine Co., 725 N.E.2d 479, 487 (Ind. Ct. App. 2000) (declining to adopt the product line exception because it would not aid the plaintiff in that case because the predecessor corporation continued to exist).

101 244 N.W.2d 879, 883-84.

102 *Turner v. Bituminous Cas. Co.*, 244 N.W.2d at 878.

set forth the following as "guidelines,"[103] in determining whether there is sufficient continuity between the predecessor and the successor:

> (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) *"The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible[;]"*
>
> (3) "The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of the normal business operations of the seller corporation[;]" and
>
> (4) The purchasing corporation [holds] itself out to the world as the effective continuation of the seller corporation.[104]

There is variation within the continuity of enterprise species of successor liability on the point of whether, for liability to attach, the predecessor entity must actually be dissolved in order recover against the predecessor. Some courts allow recovery against the successor without addressing whether or not the predecessor dissolved.[105]

At the other end of the spectrum, some courts have held there can be no successor liability unless the predecessor is completely dissolved (regardless of

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103 *Id.* at 883.

104 *Id.* at 879, 883-84 (emphasis added). This presentation makes the continuity of enterprise exception appear extremely similar to the doctrines of *de facto* merger and the product line exception, at least as originally conceived, the three species of successor liability, especially when one considers their local subspecies in various jurisdictions, may actually represent one broadly defined category of successor liability. *See* note 94 and accompanying text regarding similarity of product line liability to the continuation of the business doctrines.

105 *See Mozingo*, 752 F.2d at 173, 175-76 (products liability action allowed to proceed against successor under continuity of enterprise theory where the successor "split off" from an extant predecessor; applying Mississippi law); *Holloway*, 432 F. Supp. at 454-56 (unclear whether the predecessor ceased operations, liquidated or dissolved).

whether or not it has merely ceased ordinary business operations and exists only as a legal, not a practical, matter).[106]

Other courts consider whether the predecessor remains a viable entity capable of providing relief -- if it is, then there can be no recovery against the successor; if not, then successor liability will lie.[107] While failure of the predecessor to dissolve may not be fatal in every action for continuity of enterprise successor liability, (especially where the predecessor continues as a shell or is otherwise underfunded), the fact that the predecessor remains a viable source for recourse is.[108] This appears to be the most rational approach, in terms of the policies underlying successor liability.[109]

Notably, some opinions that make strong statements regarding the requirement that the predecessor be dissolved -- or that are cited by courts and commentators for that proposition -- are based on cases in which the predecessor was not merely "not dissolved" -- but remained operating and viable.[110] This being

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106 *See* Asher v. KCS Int'l Inc., 659 So.2d 598, 600 (Ala. 1995) (citing Matrix Churchill v. Springsteen, 461 So.2d 782 (Ala. 1984)). If this approach is taken, it is fairly easy for the asset sale transaction to be structured to avoid liability: Simply require that the predecessor remain in existence, even as a corporate shell for some period of time such as 10 or more years to provide protection for the successor and avoid application of the continuity of enterprise doctrine. This would seem to elevate form over substance in order to provide a convenient bright-line rule.

107 *See* Foster v. Cone-Blanchard, 597 N.W.2d 506, 511 (Mich. 2003) (stating the thrust of *Turner* was "to provide a remedy to an injured plaintiff in those cases in which the first corporation legally and/or practically becomes defunct . . .").

108 *See* Knapp v. North American Rockwell Corp., 506 F.2d 361, 369 (3d Cir. 1974).

109 *Turner,* 244 N.W.2d at 878; *Cone-Blanchard*, 597 N.W.2d at 511.

110 *See* Santa Maria v. Owens-Illinois, Inc., 808 F.2d 848, 859 (1st Cir. 1986) (applying New York law, court states that under *Turner* "the injured plaintiff must have been deprived *by the asset transaction* of an effective remedy against the predecessor corporation that actively manufactured the product causing the defect" (emphasis in original) -- in that case, the predecessor continued to operate and "maintain[] a substantial ongoing sales and manufacturing presence . . ."); Diaz v. South Bend Lathe, 707 F. Supp. 97, 102-03 (court notes that continuity of enterprise exception applies, *inter alia*, where the "original entity ceased its ordinary business operations by dissolving

so, it is hard to conclude that dissolution of the predecessor is or should be required.[111] Rather, the focus should be upon whether the predecessor represents a meaningful or substantial source of payment or recovery.

2. Continuity of Enterprise: Does Liability Only Lie If There is No Available Remedy Against the Predecessor Entity?

In a similar vein to whether dissolution of the predecessor is required for liability to attach to the successor, the availability of a remedy against the predecessor has also been held relevant to the continuity of enterprise species of successor liability -- but not a required element. It is the quality of the remedy available from the predecessor that should be evaluated and taken into consideration. Availability of relief against the predecessor is considered relevant because one of the rationales underlying the continuity of enterprise exception is that successor liability should lie where the predecessor becomes defunct, and the injured party "has no place to turn for relief except to the second corporation."[112] Moreover, federal courts in dealing with labor and CERCLA cases apply the similar "substantial continuity" theory of successor liability and also hold that the ability of a creditor or plaintiff to recover against the predecessor is an important factor.[113]

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promptly after the transaction" and holds the doctrine not available because the predecessor "remains in existence" -- there, the predecessor sold its *subsidiary* and the subsidiary's assets, and the court noted the plaintiff was not without a remedy against the predecessor); McCarthy v. Litton Indus., Inc., 570 N.E.2d 1008, 1013 (Mass. 1991) (stating that even if the broader continuing enterprise exception were applied, there would be no successor liability because "dissolution of the predecessor was required" and not met; -- in that case the predecessor continued to operate and manufacture electrical components); Flaugher v. Cone Automatic Mach. Co., 507 N.E.2d 331, 332, 336 (Ohio 1987) (citing *Turner* and stating that cases applying the continuity of enterprise doctrine require the predecessor to be dissolved or liquidated soon after the transfer of assets; there, the predecessor continued after the sale "as an active viable operation").

[111] Judge Posner notes as much in Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd., 419 F.3d 594, 600 (2005), in which the predecessor was being maintained as a "shell in good standing" by the successor precisely to attempt to afford protection from continuity liability.

[112] *Turner*, 244 N.W.2d at 878.

[113] *See* Chicago Truck Drivers v. Tasemkin, Inc., 59 F.3d 48, 51 (7th Cir. 1995) (successor liability for delinquent pension fund payments and withdrawal liability); *see also* Rojas v. TK Communications, Inc., 87 F.3d 745, 750 (5th Cir. 1996) (sexual harassment under Title VII); Central States, Southeast

Finally, the Third Circuit and Pennsylvania district courts have held that under Pennsylvania's product line continuation exception, there can be no successor liability if a potential remedy against the predecessor exits, even the limited remedy afforded by filing a claim in bankruptcy proceedings.[114] There appear to be no cases outside of Pennsylvania or applying other than Pennsylvania law that hold the existence of any "potential" remedy, even if not actual or realized as a practical matter, is required for successor liability. Moreover, it appears that the Third Circuit and Pennsylvania district courts are misconstruing Pennsylvania law. This draconian rule is derived from *Conway*, in which the plaintiff had an *effective* remedy in the bankruptcy proceedings due to available insurance coverage and the existence of a special fund, but did not attempt to file even a late claim when he learned of the bankruptcy proceedings. The *Conway* court held that Pennsylvania law would preclude successor liability because the plaintiff "failed to *make any effort* to assert his potentially available remedies in bankruptcy or a pending lawsuit against the original manufacturer."[115] However, in *LaFountain v. Webb Indus. Corp.* the court interpreted *Conway* to mean that the existence of the right to file a claim against the predecessor in bankruptcy precluded successor liability under Pennsylvania law,[116] and subsequent courts have followed this seemingly erroneous interpretation.

The availability of a remedy against a successor has two disparate and competing components. On the one hand, courts state that successor liability is available only where the predecessor cannot provide a remedy.[117] On the other

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and Southwest Areas Pension Fund v. Wiseway Motor Freight, 2000 WL 1409825 *5 (N.D. Ill. 2000) (pension withdrawal liability); Anderson v. J.A. Interior Applications, Inc., 1998 W.L. 708851 *5 (N.D. Ill. 1998) (successor liability for delinquent employee benefit contributions); Ninth Ave. Remedial Group v. Allis-Chalmers, 195 B.R. 716, 726-27 (court held that the successor is not liable where the predecessor is a viable company capable of providing relief, and under section 363 the successor, whether viable or not, is not liable for any claim that could have been brought during the bankruptcy proceeding).

[114] Zerand-Bernal Group v. Cox, 23 F.3d 159, 163 (3rd Cir. 1994); LaFountain v. Webb Indus. Corp., 951 F.2d 544, 547-48 (3rd Cir. 1991); Forrest v. Beloit Corp., 278 F. Supp. 471, 478 (E.D. Pa. 2003); Shaffer v. South State Mach., Inc., 995 F. Supp. 584, 585-86 (W.D. 1998).

[115] *Conway*, 885 F.2d at 97 (emphasis added).

[116] *LaFountain,* 951 F.2d at 547.

[117] *See e.g.*, Foster v. Cone-Blanchard, 597 N.W.2d at 511.

hand, courts have cautioned against "imposing liability on a successor when a predecessor could have provided no relief whatsoever."[118]

The better approach in terms of required elements or factors for consideration appears to be that the availability of relief against the predecessor is simply a factor, to be considered along with all the other factors and facts of the case.[119] Courts frown on plaintiffs who pursue successor liability claims without attempting to pursue potential remedies against the predecessor, and are likely not to apply the "equitable" successor liability doctrine in these circumstance.[120] This is consistent with the origins of the doctrine as an escape valve for satisfaction of liability that would otherwise be suppressed by general the no-liability-for-asset-purchasers rule.[121]

Similarly, in rejecting the Products Liability Restatement's restrictive approach to successor liability, and adopting the continuity of enterprise species of successor liability, the Supreme Court of Alaska noted:

> the Restatement's analysis defeats the assumptions behind tort law. We assume that meritorious claims will be paid; that they are sometimes not paid due to insolvency does not change that underlying assumption. To characterize as a 'windfall' full recovery for losses caused by product defects unjustly challenges the legitimacy of the injuries suffered.[122]

Thus, the majority, and probably better, approach is that courts should treat the ability to recover against the predecessor as a factor,[123] but not a bar to successor liability. For example, in *Anderson v. J.A. Interior Applications*, a case in which the predecessor was a debtor in an ongoing Chapter 7 case, the court rejected the

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118 Musikwamba v. ESSI, Inc., 760 F.2d 740, 750-51 (7th Cir . 1985) ("unless extraordinary circumstances exist, an injured [party] should not be made worse off by a change in the business. But neither should [he] be made better off . . . .").

119 Chicago Truck Drivers v. Tasemkin, Inc., 59 F.3d at 51.

120 *See, e.g.*, *Conway*, 885 F.2d at 97; Callahan v. Dykeman Elec. Co., 266 F. Supp. 208, 26 (D. Mass. 2003) (failure to file a claim in a receivership); *see also* Central States, et al. v. Wiseway Motor Freight, 2000 WL 1409825 *8.

122 *Savage Arms*, 18 P.2d at 57.

123 *See* Chicago Truck Drivers v. Tasemkin, 59 F.3d at 51.

successor's arguments that the successor liability doctrine did not apply because (1) the plaintiffs might still recover a portion of their claims in the bankruptcy proceedings, and (2) if plaintiffs could not recover anything in the bankruptcy proceedings, then allowing them to proceed against the successor would amount to a windfall.[124] The court noted that the "'continuity' factors" were overwhelming, and in light of the important federal "interest in ensuring that employers maintain properly funded pension plans" successor liability was mandated.[125] In other words, looking at the totality of the circumstances, including a number of factual findings and factors, and weighing the public policy concerns that were implicated, the court imposed liability. This is the essence of the successor liability doctrine as originally conceived: a safety valve that prevents an unjust result caused by strict application of normal corporate law rules.

3. Broad Contraction, Narrow Expansion of the Continuity Doctrines

The continuity doctrines -- continuity of enterprise, product line and the expansive form of mere continuation -- are under attack in a number of jurisdictions. *Cyr v. B. Offen & Co.,*[126] a case that had supported continuity of enterprise's validity in New Hampshire, is no longer good law.[127] In *Simoneau v. South Bend Lathe, Inc.,*[128] the court rejected the product line theory of successor liability[129] because risk spreading was a primary justification for that theory, and the court had denounced risk spreading as a justification for imposing strict liability, maintaining that "strict liability is not a no-fault system of compensation."[130] The court also stated "to the

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124 1998 WL 708851 at *6-7 (citing Chicago Truck Drivers v. Tasemkin, 59 F.3d at 50-51).

125 Anderson v. J.A. Interior Applications, 1998 WL 708851 at *5, 7.

126 501 F.2d 1145.

127 *See* Conway v. White Trucks, 885 F.2d 90, 93 n. 2 (3d Cir. 1989) ("*Cyr* is no longer good law in light of the New Hampshire Supreme Court's express rejection of its reasoning"); *see also* Zerand-Bernal Group, Inc., 23 F.3d 159, 163 (7th Cir 1994) (under Pennsylvania law there is no successor liability where the plaintiff had any remedy against the predecessor, even the limited remedy of filing a claim in bankruptcy).

128 543 A.2d 407, 408-09 (N.H. 1988).

129 *See* notes 86 to 89 and accompanying text.

130 543 A.2d at 409-09 (quoting Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 845-46 (N.H. 1978).

extent *Cyr* . . . does suggest that we embrace risk spreading . . . it is no longer a valid interpretation of New Hampshire law."[131] Then, in *Bieglagus v. Emre,* the New Hampshire Supreme Court continued in this direction and also rejected the continuity of enterprise theory of successor liability based upon its earlier rejection of risk spreading as a basis for imposing strict liability.[132] This position is noteworthy not just because it states the law of New Hampshire, but because *Cyr* was an important case, and courts in 27 other states either accepted the case, considered it with ambivalence, or disapproved of it.[133]

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[131] *Simoneau*, 543 A.2d 409.

[132] Bielagus v. Emre of New Hampshire Corp., 826 A.2d 559, 569, 635 (N.H. 2003). In doing so it denounced Cyr, Kleen Laundry & Dry Cleaning v. Total Waste Mgmt., 817 F. Supp. 225, 231, (D.N.H. 1993) and Kleen Laundry & Dry Cleaning v. Total Waste Mgmt., 867 F. Supp. 1136, 1140 (D.N.H. 1994) to the extent they are cited for the proposition that New Hampshire has adopted the continuing enterprise or substantial continuity theory of successor liability.

[133] Courts in twelve states have cited *Cyr* favorably, generally adopting either the product line or continuity of enterprise exceptions to successor liability. **Alabama** Matrix-Churchill v. Springsteen, 461 So.2d 782, 786-87 (Ala. 1984) (noting that the Alabama Supreme Court adopted the continuity of enterprise doctrine in Andrews v. John E. Smith's Sons Co., 369 So.2d 781 (Ala. 1979)). **California** Rawlings v. D.M. Oliver, Inc., 97 Cal. App. 3d 890, 990 (Cal. Ct. App. 1979); Ray v. Alad, 560 P.2d 3, 8 (Cal. 1977) (creating the product line exception). **Connecticut** A.G. Assocs. Of Newington Britain v. Parafati, 2002 WL 1162890, at *3 (Conn. Super. Ct. April 11, 2002) (applying the continuity of enterprise exception). **Delaware** Sheppard v. A.C. & S.Co., Inc., 484 A.2d 521, 525 (Del. Super. Ct. 1984). **Georgia** Farmex, Inc. v. Wainwright, 501 S.E.2d 802, 804 (Ga. 1998) (implicitly adopting the product line exception). **Kansas** Stratton v. Garvey Int'l, Inc., 676 P.2d 1290, 1298-99 (Kan. Ct. App. 1984) (citing *Cyr* and then performing a continuity of enterprise analysis). **Massachusetts** Cargill, Inc. v. Beaver Coal & Oil Co., 676 N.E.2d 815, 819 (Mass. 1997) (citing *Cyr* for the proposition that "there is no requirement that there be complete shareholder identity between the seller and a buyer before corporate successor liability will attach"). **Michigan** Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 878 (Mich. 1976) (creating the continuity of enterprise exception). **New Jersey** Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 816 (N.J. 1981) (adopting the product line exception). **New Mexico** Garcia v. Coe Mfg. Co., 933 P.2d 243, 247 (N.M. 1997) (discussing the underlying policies examined in *Cyr* before adopting the product line exception). **Pennsylvania** Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 110 (Pa. Super. Ct. 1981) (citing *Cyr* with approval and then adopting the product line exception). **Washington** Martin v. Abbott Labs., 689 P.2d 368, 386-87 (Wash.

1984) (citing *Cyr* and adopting the product line exception).

Courts in six states have cited *Cyr* with ambivalence. **Indiana** Lucas v. Dorsey Corp., 609 N.E.2d 1191, 1201 (Ind. Ct. App. 1993) (citing *Cyr* for the proposition that express rejection of a predecessor's liability is not dispositive of successor liability issue). **New York** Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 245 (1983) (citing *Cyr* for the proposition that the predecessor corporation must "be extinguished" before liability will be imposed on a successor -- NOTE: Other New York decisions not citing *Cyr* have adopted both the product line and continuity of enterprise exceptions). **North Carolina** Budd Tire Corp. v. Pierce Tire Co., 370 S.E.2d 267, 269 (N.C. Ct. App. 1988) (citing *Cyr* for the proposition that "inadequate consideration for the purchase, or a lack of some of the elements of a good faith purchaser for value" is a separate exception to the general rule of successor non-liability, but not expressly rejecting or adopting this position). **South Dakota** Groseth Int'l, Inc. v. Tenneco, Inc., 410 N.W.2d 159, 175 (S.D. 1987) (citing *Cyr* for the traditional exceptions). **Texas** Hunter v. Fort Worth Capital Corp., 620 S.W.2d 547, 556 (Tex. 1981) (citing *Cyr* for the mere continuation exception without explaining the test). **Wisconsin** Tift v. Forage King Indus., Inc., 322 N.W.2d 14, 27 (Wis. 1982) (dissent critiques the *Cyr* rationale after the majority imposes liability under the traditional exceptions).

Courts in nine states, generally those adhering strictly to the traditional rule of successor non-liability, treat *Cyr* with disfavor. **Arizona** Winsor v. Glasswerks PHX, L.L.C., 63 P.3d 1040, 1047 (Ariz. Ct. App. 2003) (deferring to the legislature on successor liability). **Colorado** Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1146 (Colo. Ct. App. 1992) (rejecting both the product line and continuity of enterprise exceptions). **Florida** Bernard v. Kee Mfg. Co., 409 So.2d 1047, 1049 (Fla. 1982) (refusing to adopt the continuity of enterprise exception). **Illinois** Green v. Firestone Tire & Rubber Co., 122 Ill. App. 3d 204, 210 (1984) (holding that plaintiff's reliance on *Cyr* was unfounded because continuation in Illinois requires continuity of stock ownership); State *ex rel.* Donahue v. Perkins & Will Architects, Inc., 413 N.E.2d 29, 33 (Ill. Ct. App. 1980). **Iowa** Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996) (citing *Cyr* and then holding that Iowa is a "traditional" state). **Maryland** Nissen Corp. v. Miller, 594 A.2d 564, 571 (Md. 1991*) (expressly rejecting any* extension of the traditional rule). **New Hampshire** Bielagus v. EMRE of New Hampshire Corp., 826 A.2d 559, 569 (N.H. 2003); Simoneau v. South Bend Lathe, Inc., 543 A.2d 407, 409 (N.H. 1988) (stating that, to the extent *Cyr* adopts risk spreading, it is not a valid interpretation of New Hampshire law). **North Dakota** Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 126 (N.D. 1984) (citing *Cyr* for the proposition that costs from products liability should be "borne by those best able to gauge the risks of those costs, protect against them, and pass the costs on to the consumer," but holding that any extension of the traditional

In opposition to this contractionary trend in the spread of continuity of enterprise, Alaska fairly recently accepted and strongly endorsed the continuity of enterprise theory in the *Savage Arms* case:[134]

> Thus, whereas the traditional "mere continuation" exception depends on the existence of identical shareholders, the "continuity of enterprise" looks beyond that formal requirement and considers the substance of the underlying transaction. The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*, are: (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. 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.
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> We also note that permitting successor liability under the "continuity of enterprise" exception will not discourage large-scale transfers so long as anticipated successor liabilities do not exceed the value of the corporations's accumulated goodwill. Presumably, many corporations will continue to engage in efficient and productive transfers, with the purchasing firm merely factoring into the purchase price the cost of those successor liabilities. When firms contract for an asset transfer where the basic enterprise is to be continued, they negotiate to a price that reflects the fair market value of the transfer, taking heed of the risk of future claims. The purchasing firm will value any potential successor liability claims at least at the incremental cost of obtaining insurance coverage against successor liability for them. Where that insurance is too expensive or is unavailable, negotiations could collapse, and the firm will either

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doctrine of successor liability should be undertaken by the legislature). **Ohio** Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1133 (Ohio 1993) (recognizing that Ohio courts do not expand the traditional exceptions in tort or contract cases). **Virginia** Harris v. T.P., Inc., 413 S.E.2d 605, 609 (Va. 1992) (expressly rejecting the "product line exception" and the "expanded mere continuation exception").

[134] Savage Arms Inc. v. Western Auto Supply, 18 P.3d 49, 55 (Alaska 2001).

> continue to exist (and be subject to liability claims) or liquidate (and future victims will receive no recovery). But in many cases, we would expect selling and purchasing firms simply to negotiate to a rational price that takes account of these potential claims. The posited negative effects on the overall economy are too indeterminate and speculative to outweigh the policy of compensating persons injured by product defects.[135]

Commentators have noted that, in the 1980's, the growth of the product line and continuity of enterprise theories began to wane.[136] Although some are optimistic that the expanded exceptions have recently received favorable treatment by some courts,[137] others recognize that "a number of courts have recently refused to extend traditional principles of successor liability in order to compensate plaintiffs."[138] Regardless of the current state of the law, commentators routinely caution businesses to carefully structure asset sales because the law in many jurisdictions is not settled.[139]

4. The Restatement as Misstatement

The Restatement (Third) of Torts rejected the continuity of enterprise theory of successor liability.[140] The Products Liability Restatement's rejection of the theory -- and the product line theory -- appears premised on the ground that:

> [a] successor is not within the basic liability rule in § 1 of this Restatement: 'one *who sells or distributes* a defective product is subject to liability for harm . . . caused by the defective product.'. . . .When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to

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[135] *Savage Arms, Inc.*, 18 P.3d 49, 55-57 (2001) (internal footnotes and citations omitted).

[136] Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 850 (1998).

[137] *Id.*

[138] David W. Pollack, *Successor Liability in Asset Acquisitions*, 1376 PLI/CORP. 255, 274 (2003).

[139] *Id.* at 288, *see also* Jo Ann J. Brighton, *How Free is "Free and Clear,"* 21 AM. BANKR. INST. J. 1, 42-43 (Sept. 2002).

[140] Products Liability Restatement, §12, cmts. b, g (1998).

> some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.[141]

Professor Owen has stated, "the Products Liability Restatement will play a significant role in helping shape the law of products liability for the twenty-first century" and that restatements "tend to influence significantly the development of the law, especially in where the law is less developed".[142] However, in his treatise on products liability, Owen has also noted that "an increasing number of other courts [in addition to the Michigan Supreme Court in *Turner. . .*] have adopted the continuity of enterprise exception."[143] Moreover, Professor Cupp has pointed out that the Products Liability Restatement "overstates courts' fondness for the traditional approach" to successor liability and understates the number of courts applying the broader continuity of enterprise theory (omitting Ohio and Mississippi).[144] Indeed, the less restrictive continuity of enterprise theory and product line theories are applied in almost as many jurisdictions and probably more actual lawsuits than the traditional approach advocated by the Products Liability Restatement.[145]

The Products Liability Restatement appears to run counter to the approaches of many states at the time of its issuance. Rather than "restating" the law, at least in this area, the Products Liability Restatement appears to have gotten ahead of the state courts and to have announced a position that was not reflective of the state of the law at the time it was adopted, overstating the "trends" in applying the traditional

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[141] Products Liability Restatement, § 12, cmt. a.

[142] David Owen, *Products Liability Law Restated,* 49 S.C. L. REV. 273, 292 (1998).

[143] 2 MADDEN & OWEN ON PROD. LIAB. § 19:6, n. 25.

[144] Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 855-57 (1999); *see also* Savage Arms, Inc. v. Western Auto Supply Co., 18 P.2d at 56-58. Since then, South Carolina has rejected continuity of enterprise even while finding that Bankruptcy Code section 363(f) sales do not preempt state successor liability laws. Simmons v. Mark-Lift Industries, 622 S.E.2d 213, 2005 S.C. LEXIS 307.

[145] *See* Cupp, *Redesigning Successor Liability*, 1999 U. ILL. L. REV. at 856-57, 894 (suggesting therefore, that the predictions of "dire consequences" if the less restrictive approaches broadly applied are outdated).

approach versus the less restrictive continuity exceptions of enterprise and product line theories, and relying on corporate principles to the exclusion of principles underlying tort law.[146] It was, however, cited and relied upon heavily in *Lockheed Martin Corp. v. Gordon*, in which the court stated "Texas strongly endorses the non-liability rule."[147] On the other hand, the Alaska Supreme Court rejected the Restatement (Third) approach in *Savage Arms, Inc. v. Western Auto Supply Co*.[148]

G. Statutory Abolishment - One Last Approach

Texas has adopted a statute that limits successor liability to express assumption and statutory mergers.[149] The statute was passed expressly to legislatively overrule common law successor liability doctrine.[150] While this standard is probably the most efficient to administer in terms of cost – just say "no" – it is inflexible and invites sharp drafting providing little or no recourse to involuntary creditors who have no place at the table when the transactional documents are being prepared.

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[146] *See* Curcio v. Caterpillar, Inc., 543 S.E.2d at 275. *See, e.g.*, Savage Arms, Inc. v. Western Auto Supply Co., 18 P.2D at 56-58; Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 880 (Mich. 1976) (stating that successor liability cases should be "decided on products liability principles rather than simply by reexamining and adjusting corporate law principles); Cupp, *Redesigning Successor Liability*, 1999 U. ILL. L. REV. at 856-57, 894.

[147] 16 S.W.3d 127, 139 (Tex.Ct.App. 2000); *cf.* Peason v. Nat'l Feeding Sys., 90 S.W.3d 46, 51 (Ky. 2002) (stating "See Restatement (Third) of Torts: Products Liability § 12 (1998) for a general review of successor in interest liability"); Holland v. Williams Mountain Coal Co., 256 F.3d 819, 823 (D.C. Cir. 2001) (noting that the "majority" of courts follow the traditional mere continuation rule and citing the Restatement (Third) § 12); City of New York v. Charles Pfizer & Co., Inc., 260 A.R.2d 174, 176 (N.Y.A.D. 1999) ("Were the question open, we would decline to adopt the "product line" approach as a radical change from existing law implicating complex economic considerations better left to the legislature"; citing "Restatement 3d § 12 comment b and not thereto").

[148] 18 P.3d at 56-58; *see also* Lefever v. K. P. Hovnanian Enter. Inc., 734 A.2d 290, 294 (N.J. 1999); Saez v. S & S Corrugated Paper Machinery Co., Inc., 695 A.2d 740, 746-47 (N.J. Super. A.D. 1997).

[149] TEX. BUS. CORP. ACT ANN. art. 5.10B (Vernon 1980).

[150] *See* C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768 (Tx. App. Houston 1st Dist. 2004).

H. So What Is Successor Liability, Really?

1. Is it a Type of Fraudulent Conveyance Liability?

In her article *Making Sense of Successor Liability,*[151] Professor Reilly suggests that the basis of common law forms of the successor liability except for express assumption is to serve the same purpose as fraudulent transfer law: Protecting a predecessor's creditors from the effect of a transfer that, in some sense, defrauds them. In this, she tends toward general agreement with the premises of this article: all forms of successor liability stem from circumstances when the corporate rule of no-liability-for-asset purchasers should not be honored because it is somehow wrong, unjust, or inequitable in a particular case;[152] each individualized doctrine should thus, be comprised of a set of flexible factors that help to define the appropriate case for imposition of liability and prevent sharp lawyering and the draft around from defeating this purpose. Her focus on fraud as the touchstone for liability, however, appears to be too limiting a threshold. Fraud is often alleged but is difficult to prove. It is not the courts that must look for fraud, but for litigants to prove it. This presents a higher, costly barrier to recovery, especially for the class of creditors most in need of the protection of the doctrine: involuntary tort creditors in general and, specifically, future claimants who can take no action to protect themselves from the effects of the transfer.

Further, if actual or constructive fraud is used as the criterion for imposing

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151 31 HOFSTRA L. REV. 745 (2003).

152 To be fair, Professor Reilly would probably *not* characterize herself as being in agreement with this premise, which is here stated more broadly than her position. The author has corresponded about the matter with her. In her article, she explains her view of why certain transfers under certain circumstances are "unfair" to the transferor's creditors by reference to the traditional exceptions to protections for good faith purchasers based upon fraud. She describes "fraud" as including the many ways that a transferee and transferor can collaborate to manipulate an asset transfer to deny creditors' access to assets to satisfy their claims. Her point is that unless the courts first determine the purpose of successor liability, they will not be able to articulate a test or tests that screens for the appropriate circumstances for imposition of liability. In this, she and the author agree. Her article is essentially prescriptive and presents a discussion of successor liability meant to impose liability when it is economically efficient (read: upon the least cost insurer) to do so. This article is more descriptive in its approach and is an attempt to deduce what the courts are doing with the doctrine and what the effects are upon parties engaged in asset sale transaction rather than prescribing improved doctrine.

successor liability, haven't we, in a roundabout way, merely changed the remedy for fraudulent transfers from avoidance of the transfer or recovery of the value transferred to open-ended liability limited only by the successor's (and, importantly, its insurers') ability to pay?[153] If the remedy for fraudulent transfer liability is to be changed, it would be more appropriate to accomplish this directly by modification of the statutes of various jurisdictions (generally based upon the Uniform Fraudulent Transfer Act). Further, fraudulent transfer liability is susceptible to evaluation and elimination through careful structuring and documentation. The use of solvency opinions, expert valuations, the business judgment rule, and, at least in the bankruptcy context, "creative findings of fact and conclusions of law" are enough to plan or draft around successor liability in many cases.

If the goal is to promote economically efficient allocation of risk of loss between the transferee and transferor, then adopting a bright line rule that allows both to structure the transaction to avoid liability seems to fail the test. Such a solution allows the parties to render unpaid claims against the predecessor – including the involuntary tort claims of future claimants – as externalities, to be born by society or the claimants. Absent some form of social insurance mechanism, which is likely to be politically infeasible, then, a better rule is a flexible standard that is resistant to the "draft around." Such as standard leaves the risk where it belongs, on the transferee and transferor and forces them to address and allocate it between them by contract, through the due diligence process, by obtaining private insurance or other credit support (guaranties, letters of credit, escrowed funds, etc.), and by adjusting the purchase price.

2. Is it an *In Rem* Interest in Property?

Successor liability may appear at first blush to be an interest in property and thus be solely and wholly derivative of the predecessor's liability because the liability *appears* to merely follow the property to the purchaser, similar to the way in which servitude running with the land will be enforceable against a successor because of the grant of servitude by the predecessor. In the case of a traditional *in rem* interest that runs with the land, like a servitude, the successor is bound merely because it takes the property from the predecessor and is on actual or constructive notice of the interest. This view has been advanced to support the creation of a trust with the proceeds of the sale that is impressed with the successor claims that would

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[153] Conversely, Professor Epstein has suggested capping successor liability by limiting it "to the extent of the liquidated firm's assets (including, of course, any insurance)" that have been transferred. He suggests that the value of these assets could be subjected to a multiplier or projected rate of return to determine the cap of liability in the future, and admits that "the entire matter is shrouded in difficulty." Richard A. Epstein, Imperfect Liability Regimes: Individual and Corporate Issues, 53 S.C.L. Rev. 1153, 1166-67 (2002).

otherwise follow the assets to the successor.[154] It appears, however, that this is a minority position and an example of result-oriented jurisprudence based upon a legal fiction.

A review of the species of successor liability that act as exceptions to the general rule of no-liability-for-asset-purchasers reveals that an *in rem* characterization is incorrect. Successor liability arises out of the liability of the predecessor -- and is thus "derivative" -- but at the same time requires certain *actions* on the part of the purchaser, *not* merely the purchaser's acquisition of the property itself -- thus it is not "solely derivative." In this it is different from an *in rem* interest that passes automatically with the property.

For example, the successor liability doctrine of express or implied assumption of liability is rooted in the actions of the purchaser: agreeing or appearing to agree to assume liability. That is the additional element required from the successor in order to establish liability. Similarly, when a *de facto* merger is found, or mere continuation of an enterprise justifies imposing successor liability, it is the purchaser's post-sale conduct (in continuing the business in substantially the same form and manner) that is the necessary final element that gives rise to liability. The same is true for successor liability founded upon fraudulent transfer or continued manufacture of a product line. All these successor liability doctrines are grounded upon *a combination* of the liability of the predecessor *plus* the acts or implications from *acts of the purchaser*.

Further revealing the *in personam* and not-solely-and-wholly-derivative nature of successor liability, if the assets are not sold as a unit but are nonfraudulently sold to a variety of purchasers that put them to a variety of uses, successor liability will not lie. The necessary element of continued operation of the business by the successor is missing. In fact, those purchasers are not "successors" at all, they are merely purchasers.

An alternative that is consistent with the continuity of enterprise and product line species of successor liability as well as the more traditional *de facto* merger and

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[154] David Grey Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability, and Toxic-Waste Cleanup,* 50 LAW & CONTEMP. PROBS. 119 (1987) ; *see also* Conway v. White Trucks, 692 F. Supp. 442, 455 n. 9 (M.D. Penn. 1988) (barring non-future claimant successor liability suit for failure to file a claim and summarizing the cited article's position as one that "section 363(f)(5) should be read to permit the foreclosure of future claimants from proceeding against successor corporations where a fund is created to which the future Plaintiffs' ratable share of cash proceeds would be paid.").

mere continuation species is to view successor liability as arising out of *the business* that is conducted with the assets involved. Still, this is conduct of the purchaser. The focus of the inquiry is, again, not solely on the assets themselves, but on what is being done with them and by whom. This is the "take the good with the bad" argument, also phrased in terms of the successor bearing the burden of liability as a quid pro quo to enjoying the goodwill it acquired from the predecessor.[155] Once the purchaser's conduct or the use of the assets to operate a business matches one of the applicable species of successor liability, that liability is not capped at the value of the assets as they are in the case of an *in rem* interest like a lien securing a note or in the case of a fraudulent conveyable. Rather, a successful plaintiff can pursue collection as to all of the successor's non-exempt assets and insurance coverage.

3. Successor Liability Evolved from the Collision of Corporate Law and Contracts and Tort Liability

What, then, is the nature of successor liability? If one steps back and looks at all the common-law doctrines from a bit of a distance, one common thread remains: Each of the enunciated standards seeks to determine if the circumstances warrant overriding the normal, default rule of successor non-liability. If the contract says the successor will be liable, it is fair to enforce the contract. Likewise, if the successor's conduct implies an assumption of the liability, it is fair to enforce the obligation. If the successor was part of a fraudulent scheme to avoid liability, it is fair to allow recovery by the defrauded party by striping it of the normal protections of corporate law. And when there is a *de facto* merger, a consolidation, a continuation of a business or the product line exception's requirements are met, it may be that the successor has to bear the bad with the good in order to enjoy the fruits of the business acquired.[156]

Courts that embrace plaintiffs' entreaties to do substantial justice, that engage in wide-ranging factual analysis as a test for whether to impose successor liability, threaten to deprive the commercial world of the certainty it desires. This is true especially with regard to the continuity doctrines (*de facto* merger, mere continuation, continuity of enterprise, and product line). The notion of courts engaging in wide ranging factual analysis and a mission to do substantial justice is threatening to the certainty desired by the commercial world. But, examining precedent for guidance, attempting to ferret out all claims that may exist in the due diligence process, and providing a contractual mechanism for their payment (a hold

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[155] *See* Jerry J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. Rev. 906 (1983).

[156] George W. Kuney, *Jerry Phillips' Product Line Continuity and Successor Corporation Liability: Where are we Twenty Years Later?*, 72 TENN. L. REV. 777 (2005).

back or adjustment of the purchase price, an escrow, or insurance) seems a small price to pay to afford otherwise injured but uncompensated parties a means of recovery.[157] This is especially so if a jurisdiction were to adopt a rule limiting or eliminating punitive damages or ensuring that the question of successor liability is a matter for the court, not the jury.[158] As the old saying goes, "you pay your money

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157 In a recent article, a commentator on successor liability notes:

> If the transferor is still around with sufficient assets to satisfy the claims, then the successor liability doctrine is unnecessary. Some courts and commentators contend that favoring successor liability claimants over general unsecured creditors in the bankruptcy sale context violates the priority scheme of the federal bankruptcy statute. Yet, claimants seeking to impose successor liability frequently, if not usually, will be among the *disfavored* class of creditors of the transferor. If the court is considering whether an asset purchaser expressly or impliedly agreed to assume certain debts, or whether there was a *de facto* consolidation or merger, or whether the purchaser is a mere continuation of the seller or whether the assets were transferred fraudulently to escape liability, more likely than not the claims of certain favored creditors, i.e., trade creditors and others holding debts incurred in the ordinary course of business, will have been satisfied in order to preserve the good will of the going concern. Indeed, one of the four factors upon which the courts typically rely to determine that the transferee is "a continuation of the enterprise" of the transferor is the "assumption of the ordinary business obligations and liabilities by the successor."

Michael H. Reed, *Successor Liability and Bankruptcy Sales Revisited -- New Paradigms*, ___ BUS. LAW. ___ , ___(2006) (internal footnotes and citations omitted).

158 Although it may seem odd to assess punitive damages against a successor for the wrongs of the predecessor, courts have assessed such damages against successors, holding that if the successor is liable at all, it is liable for all types of damages. *See, e.g.*, Richmond v. Madison Mgmt. Group, 919 F.2d 438 (4th Cir. 1990) (collecting authorities); *see also* Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 106 (D.S.C. 1979) (holding that the purpose of punitive damages is to deter defendants and others from similar conduct in the future). A more moderate approach is not to impose punitive damages on a successor absent a finding of mere continuation, *de facto* merger,

and you take your chances."[159] Why change that rule to benefit capital to the detriment of future claimants that, by their very nature, can do nothing to protect themselves?

III. Loss of Flexibility Promotes the "Draft Around"

Successor liability began as a narrow set of exceptions to the corporate rule of no-liability-in-asset-sale-transactions. The exceptions were extremely fact specific and the generally the result of a flexible, multi-factor analysis. Even when the modern continuity doctrines (continuity of enterprise and product line) were developed, their initial phrasing was in terms of a flexible multi-factor analysis or a set of considerations or principles.

In those jurisdictions that have, by intent or chance, restated or interpreted the doctrines in terms of one or more required elements, competent counsel can often avoid a later finding of successor liability by structuring the transaction so that one or more of the elements is missing. On the mundane level, to avoid a finding that any liabilities have been expressly or impliedly assumed, the purchase documentation would specify exactly what liabilities were being assumed and expressly disclaim assumption of every other liability. Additionally, all purchaser conduct and communications would be screened and, if needed, a boilerplate disclaimer added to make sure that they could not be used to prove an intent to assume liabilities.

But on a more sophisticated level, if the predecessor must be dissolved in order for the mere continuation form of successor liability to lie, then the well advised purchaser is incentivized to bargain for the seller to remain in existence for some predetermined time period and should also provide the proper incentive to the seller, such as a hold back of the purchase price or other consideration, to assure that it will.[160] If necessary, the successor could require the predecessor to remain in

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or, presumably, continuity of enterprise. *See* Lloyds of London v. Pacific Southwest Airlines, 786 F. Supp. 869 (C.D. Cal. 1992). This subject, however, is beyond the scope of this article.

[159] Gardener v. Zulu Soc. Aid & Pleasure Club, Inc., 729 So.2d 675 (La. App. 1999) (The court affirmed a judgment granting defendant's exception of no cause of action in plaintiffs' suit seeking damages for breach of a contract to ride on a float in a Mardi Gras parade. The float became disabled, and plaintiffs took shelter in a church as unruly spectators surrounded the float in search of "throws"—prizes. The court sympathized with plaintiffs' disappointment, but, under the Mardi Gras Parade immunity statute, when it came to Mardi Gras parading, plaintiffs paid their money and they took their chances. Accordingly, the judgment was affirmed.).

[160] This appears to be exactly what had occurred in Brandon v.

some sort of active business using the proceeds of sale rather than distributing them to equity after paying existing creditors. Similarly, if continuity of officers, shareholders or directors is a required element for a continuity doctrine, then the well advised purchaser is incentivized to characterize equity's share in the new entity as debt, perhaps even convertible debt, and to make appropriate changes in management structure. This model can be followed for almost any of the facts that must be shown in jurisdictions that have adopted a required elements approach for successor liability doctrines.[161]

Erecting barriers to a flexible examination of the totality of the circumstances within a multi-factor framework when a claim is later asserted is an invitation to structure transactions in form, rather than substance, to avoid successor liability.[162]

Anesthesia & Pain Mgmt. Assocs., Ltd., 419 F.3d 594 (7th Cir. 2005).

[161] In fact, merger and acquisition professionals have gone farther than this by developing the section 363(f) sale practice in bankruptcy courts. Briefly, the selling company is placed in bankruptcy and an offer to purchase, usually in the form of a fully negotiated purchase agreement, is presented to the debtor and then to creditors, parties in interest, and the court. Notice and an opportunity for another party (which is generally far behind on the learning curve and facing high transaction costs to get up to speed) to overbid is provided. When the sale is approved, counsel for the purchaser (with the cooperation of other represented parties) presents the court with a proposed sale order and a set of proposed findings of fact and conclusions of law. Those documents are signed, with or without modification, by the court. Generally, the proposed conclusions of law state that the purchaser is not a successor to the debtor for purposes of successor liability and the proposed findings of fact negate the required elements and factors of the various successor liability doctrines. This order, if entered without modification, once final after a 10-day-notice-of-appeal period, is binding on all parties in interest nationwide due to the supremacy clause of the federal Constitution. At least one bankruptcy attorney calls it "putting the business through the shower" to wash off the liabilities, known, unknown, contingent, non-contingent, liquidated, unliquidated, disputed, or undisputed, so that it can emerge clean on the other side. *See* George W. Kuney, *Misinterpreting Bankruptcy Code § 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235 (2002) (describing the process and practice).

[162] Yet arms-length 11 U.S.C. section 363 sales should not bring with them the specter of successor liability at all. Michael H. Reed, *Successor Liability Revisited – New Paridigms*, ___ BUS. LAW. __, __ (2006) ("In a forthcoming article, Professor George Kuney is expected to contend that if a bankruptcy sale is at arms-length and properly conducted, successor liability should not lie under non-bankruptcy law. At least with regard to certain categories of successor liability, that probably is correct. If (1) a bankruptcy sale

These structural barriers, then, in turn, foreclose recovery by some deserving plaintiffs that would have benefited from the use of a flexible, totality-of-the-circumstances analysis. It also hampers reasoned development of the law as the structure of transactions changes. In essence, it allows the transferee and transferor to avoid the liability, rendering it an externality to be born by the creditor or society.

Consider, for example, the commonality of control element of the mere continuation species of successor liability. It is generally expressed in terms of a requirement that some or all of the successor's officers, directors, or shareholders have been officers, directors, or shareholders of the predecessor.[163] If this requirement is applied rigidly, it will foreclose liability when, for instance, an insolvent business's secured creditors arrange a sale to a captive acquisition subsidiary in which they hold an ownership interest, directly or indirectly, because, although they controlled the business and the sale, they were "debt holders" of the predecessor and "shareholders" of the successor.[164] But, as the last priority of claimants that was "in the money" in terms of the going concern value of the predecessor, their relationship to the business was more like that of shareholders rather than debtholders, and a well reasoned argument can be made that they should

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to an independent purchaser is adequately documented from the purchaser's perspective (i.e., the asset purchase agreement contains language expressly excluding any assumption of liability and the bankruptcy court order expressly determines that the sale shall be free and clear of successor liability), (2) an appropriate evidentiary record is made and (3) the sale is otherwise proper under the Code and the Federal Rules of Bankruptcy Procedure, there would appear to be little risk that (a) the purchaser would be found to have assumed successor liability, (b) the transaction would be deemed a *de facto* consolidation or merger or (c) the transaction would be found to have been entered into fraudulently to escape liability. Thus, in most cases, the primary risk of *common law* successor liability (as distinguished from successor liability predicated upon a statute) would appear to be instances where, notwithstanding the bankruptcy proceedings, the purchaser later is found to be a "mere continuation" of the seller or the purchaser is found to have "continued the product line" of the seller.") (internal footnotes and citations omitted).

[163] Generally, continuity of enterprise only treats this fact as one of many factors to be considered. *See supra* notes 63 to 85 and accompanying text.

[164] *See, e.g.*, *In re* The Colad Group, 324 B.R. 208 (W.D.N.Y. 2005) (where it appears that a purchaser of secured debt controlled the debtor, caused it to commence a chapter 11 case, move for approval of a chief reorganization officer and a usurious DIP financing package that would all but ensure it of successful bidder status at planned § 363(f) sale of all assets).

be treated as such.[165] Further, what if, as part of a relationship with others in their industry, they arrange to trade off the opportunity to acquire and harvest the value from businesses in this situation, by arranging for the sale to take place to an acquisition subsidiary owned and controlled by a colleague, in exchange for the right to acquire one of the colleague's distressed business/borrowers in the future subject to some "netting" of revenues in the future? Is this sort of indirect retention of the benefits of a business that could, arguably, provide the basis for imposing successor liability? Under a rigid element-based text, or under Professor Reilly's actual fraud standard, cases like this will not be brought. The transaction can be structured to avoid the appearance of a qualifying transaction under either rule.

Adoption of rigid standards or preemptive litigation practices like that discussed in the bankruptcy court context has a powerful narrowing and hampering effect upon the development of successor liability and its evolution to confront new and different transactions and transactional structures. It paves the way for dismissal with prejudice under a defendant's Federal Rule of Civil Procedure 12(b)(6) motion before there can be development of the facts, facts that might indicate successor liability should lie if a flexible, totality of the circumstances analysis were performed. Whether this is good or bad depends on your attitude toward successor liability plaintiffs' relative rights vis-à-vis successor entities, and reasonable minds can differ. Sunlight, however, "is the best disinfectant; electric light the most efficient policeman."[166] Developments that foreclose examination are likely to be breeding grounds for fraud and other inequitable conduct. The apparent narrowing of successor liability applicability even as the number of successor liability species expands should not pass unnoticed, however.

CONCLUSION

This article has attempted to detail some of the history and the current condition of successor liability law in the United States. It concludes that the purpose of the doctrines was to provide contract and tort creditors with an avenue of recovery against a successor entity in appropriate cases, when the predecessor that contracted with them or committed the tort or the action that later gave rise to the tort had sold substantially all of its assets and was no longer a viable source of recovery. Its various species acted as a pressure relief valve on the strict limitation of liability created by corporate law. The doctrine is in the nature of an "equitable"

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165 *See, e.g.*, Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twighlight*, 54 STAN. L. REV. 673, 696 (2003); David A. Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461 (1992); *but see* Lynn M. Lopucki, *The Myth of the Residual Owner: An Empirical Study*, 82 WASH. U. L.Q. 1341 (2004).

166 Louis D. Brandeis, OTHER PEOPLE'S MONEY 62 (1933).

doctrine insofar as it is invoked when strict application of corporate law would offend the conscience of the court. In large part, the doctrine remains intact and still serves that purpose.

The doctrine has eroded, however, in jurisdictions that have adopted tests containing required elements or that have rejected the “continuity” doctrines of successor liability. While failing to adopt the “continuity” doctrines may be a laudable example of judicial restraint and deference to the legislature’s role as the primary law maker, the courts’ conversion of flexible factors to rigid, required elements in generally accepted judge-made doctrine does not appear to serve the aims of equity or justice. Rather, it promotes sharp lawyering based upon an elevation of form over substance to protect asset purchasers.

> Pacific Gaming Technologies (PGT) places VendaTel vending machines in bus stations, truck stops, and other places where people are likely to buy prepaid telephone calling cards. Unlike ordinary vending machines, the VendaTel has a "sweepstakes" feature that pays out money. The VendaTel looks like a slot machine. It acts like a slot machine. It sounds like a slot machine. The trial court nevertheless said that it is not a slot machine. In our view, if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck.[167]

Better, it would appear, is a test that recognizes a duck in whatever disguise its keepers dress it.

APPENDIX

This appendix represents the author’s attempt to explain the characteristics of

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[167] *See* Pieper v. Commercial Underwriters Ins. Co., 59 Cal. App. 4th 1008, 1014 [69 Cal. Rptr. 2d 551] (1997) (“ ‘if it looks like a duck, walks like a duck and quacks like a duck, it's a duck’- not a platypus"); Aetna Cas. & Surety Co. v. Humboldt Loaders, Inc., 202 Cal. App. 3d 921, 929, fn. 5 [249 Cal. Rptr. 175] (1988) (" 'if it looks like a duck, if it walks like a duck and if it quacks like a duck, it should be treated as a duck' "); Provost v. Unger, 752 F. Supp. 716, 721 (E.D. La. 1990) ("if it looks like a duck, walks like a duck, and quacks like a duck, it is a duck"); *In re* North, 128 B.R. 592, 594 (Bankr. D.Vt. 1991) (" 'if it looks like a duck, walks like a duck, and quacks like a duck, it must be a duck' "); Strength v. Alabama Dept. of Finance, 622 So.2d 1283, 1289 (Ala. 1993) (" 'If it looks like a duck, walks like a duck, and quacks like a duck, it must be a duck' "); *compare* Perry v. Robertson, 247 Cal. Rptr. 74 (1988). And so it is with this duck. We reverse. People v. Pacific Gaming Techs., 82 Cal. App. 4th 699 (2004).

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 also published and maintained on the author's website (http://www.law.utk.edu/FACULTY/facultykuney.htm) where it is updated annually to track the state of the law in this field. http:/www.law.utk.edu/FACULTY/APPENDIXkuney.htm.

Alabama

Alabama recognizes the four traditional exceptions and the continuity of enterprise exception to the general rule of successor non-liability in asset purchases.[168]

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.[169] The courts, however,

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[168] *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., 397 Mich. 406, 244 N.W.2d 873 (1976)"); see also Extermitech, Inc. v. Glasscock, Inc., 2006 Ala. LEXIS 192 (Ala. 2006); Peralta v. WMH 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 (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 (2005).

[169] Matrix-Churchill v. Springsteen, 461 So. 2d 782, 788 (Ala. 1984) (stating that "the record does not disclose any express agreement between [the

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.[170]

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."[171]

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.[172]

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.[173] In *Matrix-Churchill v. Springsteen*, for

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successor and predecessor] whereby the former was to assume the obligations of [the later] . . .").

[170] 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. 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].").

[171] 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).

[172] *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'").

[173] *See, e.g.*, *Matrix-Churchill v. Springsteen*, 461 So. 2d 782, 786-88

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.*, 397 Mich. 406, 244 N.W.2d 873 (1976) . . . ."[174] 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."[175] After applying the three *Turner* guidelines, the court further blurred the distinction between the exceptions:

> 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.

Id. at 787-88.

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.*,[176] and adopted the *Turner v. Bituminous Casualty* factors as a set of required elements each of which most 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.

(Ala. 1984).

174 *Id.* at 787.

175 *Id*.

176 369 So. 2d 781, 785 (Ala. 1979).

> 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.[177]

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 substantial evidence of each of the continuity of enterprise factors.[178]

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).

Alaska

In the 2001 *Savage Arms* case a recent decision, the Supreme Court of Alaska adopted two species of successor liability: mere continuation and continuity of enterprise.[179]

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[177] 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).

[178] 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).

[179] Savage Arms, Inc. v. Western 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.

Alaska: The Mere Continuation Exception

In *Savage Arms*, the court adopted the "traditional" mere continuation exception.[180] 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."[181]

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."[182]

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."[183]

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.[184] 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

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Pa. 2006); US v. General Battery Corp., 423 F.3d 294 (3d Cir. Pa. 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); Miller v. Corr. Corp. of Am., 2005 U.S. Dist. LEXIS 17238 (D. Alaska 2005); Vill. Builders 96, L.P. v. U.S. Labs., Inc., 112 P.3d 1082 (2005); Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213 (S.C. 2005).

[180] *Id.* at 55.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.* at 56-58.

generally."[185] 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 of sale.[186]

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.

<u>Arizona</u>

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.[187] 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.[188]

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185 *Id.* at 58.

186 *Id.*

187 63 P.3d 1040, 1044-1050 (Ariz. Ct. App. 2003).

188 *Id.* (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).

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.[189]

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) 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."[190] 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)."[191] Arizona, like California, also requires proof of "'insufficient consideration running from the new company to the old.'"[192]

Arkansas

The Arkansas courts recognize the general rule of successor non-liability for asset sales[193] and recognizes, at least implicitly, the four traditional exceptions.[194]

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189 *Id.* at 1047.

190 *Id.* at 1047-50.

191 *Teeters*, 836 P.2d at 1039-40.

192 *Id.* (citing multiple California decisions).

193 Ford Motor Co. v. Nuckolls, 894 S.W.2d 897, 903 (Ark. 1995)

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.[195] In addition, California is responsible for creating the product line exception.[196] 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.

(citing Fort Smith Refrigeration & Equip. Co. v. Ferguson, 230 S.W.2d 943 (Ark. 1950)); Roberts v. Boyd, 2006 Ark. App. LEXIS 185 (Ark. Ct. App. 2006).

194 *Id.* (citing Swayze v. A.O. Smith Corp., 694 F. Supp. 619, 622 (E.D. Ark. 1988)).

195 Ray v. Alad, 560 P.2d 3 (Cal. 1977); New York v. Nat'l Serv. Indus., 460 F.3d 201 (2d Cir. 2006); Peralta v. WMH Tool Group, Inc., 2005 U.S. Dist. LEXIS 41755 (E.D.N.Y. 2005); New York v. Nat'l Serv. Indus., Inc., 380 F. Supp. 2d 122 (E.D.N.Y. 2005); Berg Chilling Sys. v. Hull Corp., 435 F.3d 455 (3d Cir. Pa. 2006); T v. Cyril Bath Co., 2006 U.S. Dist. LEXIS 13913 (W.D. Pa. 2006); In re Commercial Money Ctr., Inc., 2006 U.S. Dist. LEXIS 25921 (N.D. Ohio 2006); 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., 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); Chamlink Corp. v. Merritt Extruder, 2005 Conn. Super. LEXIS 936 (Conn. Super. Ct. 2005); Vill. Builders 96, L.P. v. U.S. Labs., Inc., 112 P.3d 1082 (2005); Semenetz v. Sherling & Walden, 851 N.E.2d 1170 (2006); Semenetz v. Sherling & Walden, 801 N.Y.S.2d 78 (2005); Buja v. KCI Konecranes Intl. Plc, 815 N.Y.S.2d 412 (2006); Matter of Seventh Jud. Dist. Asbestos Litig., 788 N.Y.S.2d 579 (2005); Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213 (S.C. 2005); Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214 (2005); *see also* Henkel Corp. v. Hartford Acc. & Indem. Co., 62 P.3d 69, 73 (Cal. 2003); Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165 (2d Cir. N.Y. 2006); Elliott Co. v. Liberty Mut. Ins. Co., 434 F. Supp. 2d 483 (N.D. Ohio 2006); Mass. Elec. Co. v. Commercial Union Ins., 2005 Mass. Super. LEXIS 550 (Mass. Super. Ct. 2005).

196 *Ray*, 560 P.2d at 11.

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.[197] 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 . . ."[198]

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 542 (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)]).[199]

One California Court of Appeal has stated a five factor test to determine "whether a 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?[200]

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197 *See, e.g.*, *Ray*, 560 P.2d at 7.

198 *Henkel*, 62 P.3d at 73.

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

200 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).

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.[201]

Subsequent California decisions have noted that both elements must be present to impose liability.[202] Furthermore, the California Supreme Court has made it clear that 'the mere continuation' doctrine does not apply 'when recourse to the debtor corporation is available and the two corporations have separate identities.'[203]

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.[204] The *Ray* court based liability on a new exception, the "product line" exception. The California product line exception

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201 *Ray*, 560 P.2d at 7.

202 *See* Beatrice Co. v. State Bd. of Equalization, 863 P.2d 683, 690 (Cal. 1993); Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214 (2005); Franklin v. USX Corp., 87 Cal. App. 4th 615, 627 (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).

203 *Henkel*, 62 P.3d at 73 (quoting *Beatrice*, 863 P.2d at 690).

204 *Ray*, 560 P.2d at 11.

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.[205]

These justifications have generally been treated by California courts as elements.[206] In 2003, the California Supreme Court implicitly affirmed this treatment by the lower courts, referring to the "conditions" of *Ray.*[207]

1. *The First Condition of Ray*

Under the first condition of *Ray*, the successor's acquisition of the business must cause the virtual destruction of the plaintiff's remedies against the predecessor.[208] Courts applying the first condition consistently require some level of causation.[209] 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]."[210] Where a successor corporation exercised complete control over the predecessor and

205 *Id.* at 9.

206 *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").

207 *Henkel Corp.*, 62 P.2d at 73.

208 *Ray*, 560 P.2d at 9.

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

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

"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.[211] 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."[212] 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.[213] "To be liable, the predecessor must have 'played some role in curtailing or destroying the [plaintiff's] remedies.'"[214]

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.*[215] In *Nelson*, the predecessor manufactured grain 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.[216] 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

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211 Kaminski v. Western MacArthur Co., 220 Cal. Rptr. 895 (Cal. Ct. App. 1985); Ciena Corp. v. Nortel Networks, 2005 U.S. Dist. LEXIS 20095 (E.D. Tex. 2005); *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*).

212 *Id.* at 903.

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

214 *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.").

215 778 F.2d 533, 537 (9th Cir. 1985).

216 *Id.* at 537.

> has not contributed to or caused the destruction of the plaintiff's remedies.[217]

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]."[218] 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."[219]

In *Stewart*, the California Court of Appeals addressed successor products liability for a predecessor's defective antenna.[220] 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."[221] 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."[222] 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 plaintiff to seek redress from the manufacturer of the defective product.[223]

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217 *Id.* at 538.

218 *Id.*

219 *Id.*

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

221 *Id.* at 673.

222 *Id.* at 675.

223 *Id.* (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.

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.[224]

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.[225]

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."[226] 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."[227]

3.*The Third Condition of Ray*

The third condition of *Ray* requires the court to consider "the fairness of

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Northwest Amateur Hockey Ass'n, 2005 Wash. App. LEXIS 2052 (Wash. Ct. App. 2005)).

224 *Id.* at 676.

225 *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. Ap.. 1991).

226 *Ray*, 560 P.2d at 9.

227 *Id.* at 10.

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."[228] 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.[229] 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.[230] This final condition of fundamental fairness results in a very fact specific analysis.

Colorado

The Colorado courts recognize the general rule of successor non-liability and the four traditional exceptions.[231] 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.[232]

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

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228 *Ray*, 560 P.2d at 9.

229 *Id.* at 10-11.

230 *Id.* at 11.

231 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).

232 *Johnston*, 830 P.2d at 1143-47.

not whether there is a continuation of the seller's business operation.[233]

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.[234] 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.[235]

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."[236] 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 the an unpublished decision by the federal courts.

Colorado: The Express/Implied Assumption and Fraud Exceptions

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

Connecticut

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[233] 837 P.2d 282, 283 (Colo. Ct. App. 1992).

[234] 830 P.2d at 1146-47.

[235] Cohig & Assocs., Inc. v. Stamm, 149 F.3d 1190, 1998 WL 339472, at *4 (10th Cir. June 10, 1998).

[236] *Id*.

The Federal District Court for Connecticut articulated the four traditional exceptions in 1989.[237] Neither the Connecticut Supreme Court nor the Court of Appeals has addressed the issue of successor liability under Connecticut law in a published decision. There are a few unpublished Superior Court decisions that recognize the general rule with its four traditional exceptions as well as the product line exception.[238] The *Sullivan* court expressly rejected the continuity of enterprise exception.[239]

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.[240]

Connecticut: The Mere Continuation Exception

In Connecticut, the courts apply a balancing test for the mere continuation exception, which is based on four non-dispositive factors:

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237 Ricciardello v. J.W. Grant & Co., 717 F. Supp. 56, 57-58 (D. Conn. 1989); *see also* Collins v. Olin Corp., 434 F. Supp. 2d 97 (D. Conn. 2006); Infra-Metals, Co. v. Topper & Griggs Group, Inc., 2005 U.S. Dist. LEXIS 31385 (D. Conn. 2005); S. Conn. Gas Co. v. Waterview of Bridgeport Ass'n, 2006 Conn. Super. LEXIS 1640 (2006); Chamlink Corp. v. Merritt Extruder, 2005 Conn. Super. LEXIS 936 (2005); Sizer v. Goss Int'l, 2005 Conn. Super. LEXIS 810 (2005).

238 Lynch v. Infinity Outdoor, Inc., 2003 WL 21213708, at *2 (Conn. Super. May 7, 2003); S. Connecticut Gas Co. v. Waterview of Bridgeport Ass'n., Inc., 2006 WL 1681005, *1 (2006); Collins v. Olin Corp., 434 F. Supp.2d 97 (D. Conn. 2006); Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp., 2002 WL 1610037 at *6, 32 Conn. L. Rptr. 359 (Conn. Super. June 19, 2002); Collins v. Olin Corp., 434 F. Supp. 2d 97 (D. Conn. 2006); Infra-Metals, Co. v. Topper & Griggs Group, Inc., 2005 WL 3211385, *2 (D. Conn. 2005); Sullivan v. A.W. Flint Co., 1996 WL 469716, at *1 (Conn. Super. Ct. 1996); Collins v. Olin Corp., 434 F. Supp.2d 97 (D. Conn. 2006); Chamlink Corp. v. Merritt Extruder, 2005 WL 1097311, *2 (Conn. Super. 2005); Sizer v. Goss Intern., 2005 WL 1023244, *2 (Conn. Super. 2005). *See also* Infra-Metals Co. v. Topper & Griggs Group, Inc., 2005 WL 3211385 (D. Conn. Nov. 30, 2005) (discussing Connecticut successor liability law).

239 *Sullivan*, 1996 WL at *6.

240 *Peglar*, 2002 WL 1610037 at *7.

> (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)]. "Not every one of these indica must be established, however, but the court should apply a balancing test." *Id.*[241]

Connecticut: The De Facto Merger Exception

The Connecticut Superior courts have noted that Connecticut's mere continuation exception "'in effect takes cognizance of what may be called *de facto* (sic) merger.'"[242] The courts, therefore, have not developed a test for *de facto* merger that differs from the factor-based mere continuation test. In fact, one court that applied the mere continuation test did so under the following heading: "IV. *De Facto Successorship*."[243] The Connecticut Superior Courts, therefore, use the successor liability buzzwords interchangeably, which is not surprising based on the fact that Connecticut's test for mere continuation is essentially a "non-dispositive factor" form of the traditional *de facto* merger test. By removing the continuity requirement of the *de facto* merger exception, the Connecticut Superior Court rendered meaningless any distinction between the two exceptions.

Connecticut: The Fraud Exception

There are no cases in Connecticut that address the fraud exception.

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:

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241 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).

242 Peglar & Assocs., Inc., 2002 WL 1610037 at *7.

243 *Id.* at *6.

> "(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."[244]

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."[245] 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.[246] If the plaintiff can proceed against the predecessor, the product line exception does not apply.[247]

<u>Delaware</u>

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.[248] 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.[249]

<u>Delaware: The Express or Implied Assumption Exception</u>

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

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244 1996 WL 469716 at *6 (internal citations omitted).

245 *Id.* at *8.

246 *Id.*

247 *Id.*

248 698 F. Supp. 535 (D. Del. 1988).

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

assumed, subject to certain conditions, all liabilities of the seller that existed at the closing date.[250] "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."[251] The purchaser/successor argued that it was not liable to the plaintiff because the schedules attached to the asset purchase did not list the seller's potential liability for the manufacture of the product that injured the plaintiff.[252]

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]."[253] 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.'"[254] 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." *Id.*[255]

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[250] 698 F. Supp. at 541.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *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)).

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]."[256]

Delaware: The De Facto Merger and Fraud Exceptions

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.[257] *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.[258] 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.[259] 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.[260]

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256 1994 WL 89643 at *4.

257 Bingham v. Goldberg. Marchesano. Kohlman. Inc., 637 A.2d 81, 89-90 (D.C. Cir. 1994) (*see also* Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1456 (11th Cir. 1985); U.S. v. General Battery Corp., Inc., 423 F.3d 294 (3d Cir. Pa. 2005); CMCB Enterprises, Inc. v. Ferguson, 114 P.3d 90 (Colo. App. 2005); Brandon v. Anesthesia & Pain Management Assocs, Ltd, 419 F.3d 594 (2005).

258 637 A.2d at 91-92.

259 *Id.* at 91.

260 *Id.* at 92.

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.[261] 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.[262]

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.[263]

Florida: The Mere Continuation Exception

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

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261 Bernard v. Kee Mfg. Co., Inc., 409 So. 2d 1047, 1049-51 (Fla. 1982); Jones v. Honeywell Intern., Inc., 385 F. Supp. 2d 1268 (M.D. Fla. 2005); Semenetz v. Sherling & Walden, Inc., 851 N.E.2d 1170 (2006); New York v. Nat'l Service Industries, Inc., 460 F.3d 201 (2006); Simmons v. Mark Lift Industries, Inc., 622 S.E.2d 213 (2005).

262 Lab. Corp. of Am. v. Prof'l Recovery Network, 813 So. 2d 266 (Fla. 5th D.C.A. 2002); Inquiry Concerning a Judge (Renke), 933 So. 2d 482 (Fla. 2006).

263 Amjad Munim, M.D., P.A. v. Azar, 648 So.2d 145, 153-54 (Fla. 4th DCA 1994); Carnes v. Fender, 936 So. 2d 11 (Fla. Dist. Ct. App. 4th 2006). *See also* Lab. Corp. of Am. v. Prof'l Recovery Network, 813 So. 2d 266, 269-70 (Fla. 5th DCA 2002); Inquiry Concerning a Judge (Renke), 933 So. 2d 482 (Fla. 2006).

> The "purchasing corporation is merely a 'new hat' for the seller, with the same or similar entity or ownership." *Id.* The key element of a continuation is a common identity of the officers, directors and stockholders in the selling and purchasing corporation. *Id.* The change is in form, but not in substance.[264]

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."[265] 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 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. *Id.*

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.[266] 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 no Florida cases that directly address the express or implied assumption exceptions.

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264 *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)).

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

266 *Azar*, 648 So. 2d at 152-155.

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.[267]

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.
>
> (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.[268]

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[267] *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).

[268] 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 (2006); Killearn Partners, Inc. v. Southeast Props., 611 S.E.2d 26 (2005); Jonas v. Jonas, 633 S.E.2d 544 (2006); Douglas v. Bigley, 628 S.E.2d 199 (2006); In re Schoolcraft, 617 S.E.2d 241 (2005); Tidikis v. Network for Med. Communs. & Research, LLC, 619 S.E.2d 481 (2005); Steele v. Atlanta Maternal-Fetal Med., P.C., 610 S.E.2d 546 (2005); Bridge Capital Investors II v. Small, 144 Fed. Appx. 762 (2005); Amend v. 485 Props., LLC, 401 F.3d 1255 (11th Cir. Ga. 2005).

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."[269]

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."[270] The *Bullington* court expressly rejected the continuity of enterprise exception based on the fact that Georgia courts have traditionally required continuity of ownership.[271] 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."[272] The *Perimeter Realty* court clarified that each element must be present

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269 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).

270 *Bullington*, 328 S.E.2d at 727.

271 *Id*. at 728.

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

because it refused to impose liability where there was not complete identity of assets.[273]

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.[274] 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;

– 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.[275]

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273 *Id.*

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

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

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.[276] It does, however, recognize successor liability in the case of a "reorganization", which appears to be a melding of mere continuation, continuity of enterprise, and de facto merger.[277] 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 o the lessor or grantor . . ."[278] This would seem to prevent or severely limit the legislatures ability to pass anti-successor liability laws concerning juridical entities.[279]

Illinois

Illinois courts recognize only the four traditional exceptions to the general rule of successor non-liability.[280] The Illinois courts have consistently rejected the product line exception.[281]

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276 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).

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

278 IDAHO CONST. art. XI, § 15.

279 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).

280 Vernon v. Schuster, 688 N.E.2d 1172, 1175-76 (Ill. 1997); MacDonald v. Hinton, 836 N.E.2d 893 (2005); Flanders v. Cal. Coastal Cmtys., Inc., 828 N.E.2d 793 (2005); Chatham Surgicore, Ltd. v. Health Care Serv. Corp., 826 N.E.2d 970 (2005); Brandon v. Anesthesia & Pain Mgmt. Assocs., 419 F.3d 594

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.[282] 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.[283] 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.[284] 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.[285]

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.[286] 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

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(2005); Monticello Ins. Co. v. Dion, 836 N.E.2d 1112 (2005); Gladstone v. Stuart Cinemas, Inc., 878 S.2d 214 (2005); Flanders v. California Coastal Cmtys., Inc., 828 N.E. 2d 793, 798 (Ill. App. Ct. 2005).

281 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).

282 *Vernon*, 688 N.E.2d at 1176.

283 *Id.*

284 *Id.* at 1178.

285 Brandon v. Anesthesia & Pain Mgmt. Assocs. Ltd., 419 F.3d 594, 598-99 (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).

286 *Nilsson*, 621 N.E.2d at 1035.

involves the combination of two existing corporations.[287] 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 corporations assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation."[288]

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."[289]

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*

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[287] *Id.* at 1034.

[288] 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. Ill. 2005).

[289] *Id.*.

"notwithstanding the disparity between the value of the predecessor's debts and assets."[290] 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.[291]

Indiana

The Indiana courts recognize the four traditional exceptions to the general rule of successor non-liability.[292] 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."[293] Also, Indiana mandates that the predecessor corporation dissolve before a court can impose liability on the successor under any of the exceptions.[294]

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

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290 *Id*.

291 *Brandon*, 419 F.3d at 594.

292 Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1233 (Ind. 1994); Trail v. Boys & Girls Clubs of Northwest 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); Calvary Temple Church, Inc. v. Paino, 827 N.E.2d 125 (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 (2005); United Consumers Club, Inc. v. Bledsoe, 441 F. Supp. 2d 967 (2006); Smith v. Biomet, Inc., 384 F. Supp. 2d 1241 (2005); Glentel, Inc. v. Wireless Ventures, LLC, 362 F. Supp. 2d 992 (2005); Rodriguez v. Tech Credit Corp., 824 N.E. 2d 442, 447 (Ind. Ct. App. 2005); Elec. Specialties, Inc. v. Siemens Bldg. Techs., Inc., 837 N.E.2d 1052 (2005); Kelley v. Tanoos, 840 N.E.2d 342 (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); Cont'l Ins. Co. v. Schneider, Inc., 873 A.2d 1286 (2005).

293 *Winkler*, 638 N.E. 2d at 1233.

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

federal constitutions."[295] 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).[296] 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."[297] 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.[298]

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."[299]

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":

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

295 *Id.*

297 *Id.*

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

299 *Id.*

> (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.[300]

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.[301] 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.[302] 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."[303] 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.

Indiana: The Mere Continuation Exception

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

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300 706 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)).

301 *Id.*

302 *Id.*

303 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).

> and the existence of only one corporation at the completion of the transfer.[304]

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.

<u>Iowa</u>

Iowa courts recognize four exceptions to the general rule of successor non-liability: express or implied assumption, fraud, consolidation or merger, and mere continuation.[305] 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.[306] Furthermore, the Iowa court expressly declined to expand the mere continuation exception based on the *Cyr* and *Turner* decisions.[307]

<u>Iowa: The Express or Implied Assumption Exception</u>

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."[308] The Iowa courts have not explained the plaintiff's burden of proof in

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

305 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).

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

307 Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996) ("[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.").

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

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."[309] In *Pancrantz*, the court stated, "The mere continuation exception, as traditionally applied, focuses on continuation of the *corporate entity*."[310] Furthermore, "[t]he exception has no application without proof of continuity of management and ownership between the predecessor and successor corporations."[311] The *Pancrantz* court also examined the new and expanded versions of the continuation exception that originated in the *Cyr* and *Turner* decisions.[312] 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."[313]

Iowa: The Fraud Exception

One Iowa decision,[314] 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.'"[315] The facts

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[309] *Id.* at 752.

[310] 547 N.W.2d at 201.

[311] *Id.*

[312] *Id.*

[313] *Id.*

[314] 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).

[315] *Pancratz*, 547 N.W.2d at 202 (quoting Grand Lab., Inc. v. Midcon Lab., 32 F.3d 1277, 1283 (8th Cir. 1994)); Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214 (2005).

in *Chambers* were 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.[316] 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."[317] 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.[318]

Kansas

The Kansas courts apply the four traditional exceptions to the general rule of successor non-liability.[319] However, unlike other "traditional" rule jurisdictions, Kansas does not require continuity of ownership under the mere continuation exception.[320]

The Supreme Court of Kansas applied a narrowly construed form of the mere continuation exception as early as 1938, without classifying the exception.[321] 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.*[322] The *Avery* court held that where certain facts were presented, the effect of a

316 *Id.*

317 *Id.*

318 *Id.*

319 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").

320 *Stratton*, 676 P.2d at 1299.

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

322 56 P.2d 71 (Kan. 1936).

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 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.[323]

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."[324]

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.[325]

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[323] *Avery,* 80 P.2d at 1101.

[324] 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)).

[325] *Id.* (refusing to impose successor liability against the successor because the claimant sued a partner of the predecessor).

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 successor had no direct dealing with the predecessor; the successor acquired its interest from intervening purchasers of the predecessor's assets.[326]

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."[327]

Kentucky

Kentucky recognizes the general rule of successor non-liability and the four traditional exceptions.[328] Based on the *Pearson* case, the Kentucky courts have narrowly construed each of the exceptions.[329] Furthermore, the *Pearson* court expressly rejected the product-line exception.[330]

The *Pearson* court cited a 1920 decision by the Supreme Court of Kentucky as the "seminal" case dealing with successor liability.[331] 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.[332] The court

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[326] 496 P.2d at 1311.

[327] 496 P.2d at 1312.

[328] 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).

[329] *See, e.g.*, Parker v. Henry A. Petter Supply Co., 165 S.W.3d 474, 479 (2005).

[330] *Pearson*, 90 S.W.3d at 53.

[331] *Id.* at 49.

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:

> [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.[333]

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.[334]

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.[335] Even though the successor expressly assumed certain liabilities that existed on the closing date and the contract did not specifically

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[332] 228 S.W. 433, 442 (Ky. 1920).

[333] *Id.*

[334] *Id.* at 441.

[335] 90 S.W.3d at 50.

address pre-closing tort liabilities, the court found that the successor did not impliedly assume pre-closing tort liabilities.[336]

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 "essentially" through a bankruptcy sale.[337] 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.[338]

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.[339] 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.[340]

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."[341]

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

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336 *Id.*

337 *Id.* at 51.

338 *Id.*

339 *Id.*

340 *Id.*

341 *Id.*

accepted the traditional forms of the doctrine.[342] Expressed are a series of three examples: (1) express or implied assumption, (2) fraud, and (3) *de facto* merger and mere continuation.[343] Based on a 1916 decision by the Supreme Court of Louisiana, the courts will impose liability under the "continuation doctrine" when there is evidence of fraud in the transaction.[344] No reported decision has adopted the product line or continuity of enterprise doctrine.

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.[345]

The *Wolff* court relied on the trust fund doctrine in finding that the surviving corporation is liable to the predecessor's creditors if the transaction was entered into fraudulently.[346]

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

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342 *Id*. at 1127.

343 *See* Bourque v. Lehmann Lathe Inc., 476 So. 2d 1125, 1126 (La. Ct. App. 1985).

344 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 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)).

345 *Wolff*, 70 So. at 794.

346 *Id.*

> [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 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.[347]

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.[348] *Russell*, a Mississippi case, applied a test developed by the Mississippi courts, which does not require continuity of ownership.[349] Federal courts, applying Louisiana law, have used the *Russell* test, even though Louisiana state law clearly requires continuity of ownership before liability will be imposed under the continuation doctrine.[350] However, it does not appear that *National Cur. Corp.* has been cited by any court.

Louisiana's continuation doctrine does not fit precisely into any of the traditional exceptions to successor non-liability. 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 (the forth enumerated *Wolff* transaction) and mere continuation exceptions (the third enumerated *Wolff* transactions). 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.

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

348 *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. Miss. 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 (2005)); Liberto v. D.F. Stauffer Biscuit Co., 441 F.3d 318 (5th Cir. Tex. 2006); A&F Props., LLC v. Madison County Bd. of Supervisors, 414 F. Supp. 2d 618 (S.D. Miss. 2005); Harrison v. Chandler-Sampson Ins., Inc., 891 So. 2d 224 (Miss. 2005).

349 *Id.* at 1176

350 *See, e.g.*, Hollowell v. Orleans Reg'l Hosp. LLC, 27 F.3d 379, 390 (5th Cir. LA. 2000).

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.[351]

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.[352] 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.[353] 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.[354] 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.[355]

The First Circuit Court of Appeals applied the *Diamond Brands* rule to a case involving potential successor liability in a tort suit.[356] The Court of Appeals

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

352 *Id.*

353 *Id.*

354 *Id.* at 737.

355 *Id.* at n5.

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

chastised the plaintiff for his failure to certify the successor liability issue to the state court.[357] The court stated, "[i]t is not the role of the federal courts to 'question the policy choices of states whose law we apply.'"[358] 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."[359]

Maryland

The Maryland Court of Appeals (Maryland's highest court) adopted the "general rule of nonliability of a successor corporation, with its four well-recognized traditional exceptions."[360] 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.[361] The court concluded that the mere continuation is based on sound policy.[362]

The *Nissen* court expressly rejected the continuity of enterprise exception.[363] 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 uncontemplated products liability claims primarily because it is still in business and is perceived as a 'deep pocket.'"[364]

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357 *Id.*

358 *Id.* (internal citation omitted).

359 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).

360 Nissen Corp. v. Miller, 594 A.2d 564, 574 (Md. 1991); Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213, (S.C. 2005).

361 *Id.* at 566.

362 *Id.* (citing Baltimore Luggage v. Holtzman, 562 A.2d 1286, 1293 (Md. 1989); Brandon v. Anesthesia & Pain Mgmt. Assocs., 419 F.3d 594 (7th Cir. Ill. 2005); Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214 (2005)).

363 *Id.* at 570.

364 *Id.* at 569.

Maryland: The Express or Implied Assumption Exceptions

The Maryland courts look to the language of the asset purchase agreement to determine in the purchasing corporation expressly assumed the liabilities of the seller.[365] 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.[366]

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.[367]

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:
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> "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 considering other factors is to disregard the

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365 Baltimore Luggage, 562 A.2d at 1292.

366 *Id.*

367 *Id.*

separate identities of the corporation without the necessary considerations that justify such an action."[368]

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.[369] 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.[370]

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.[371] 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."[372]

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.'"[373] In discussing the four traditional exceptions, the *Nissen* court cited this quote from

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368 *Id.* at 1293 (quoting 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §7122 (rev. perm. ed. 1983)).

369 *Id.* at 1294.

370 *Id.*

371 Acad. of IRM v. LVI Envtl. Servs., Inc., 687 A.2d 669, 680 (Md. 1997); Rita Ann Distribs. v. Brown Drug Co., 841 N.E.2d 400 (Ohio Ct. App. 2005).

372 *Id.* (quoting H.J. Baker & Bros., Inc. v. Orgonics, Inc., 554 A.2d 196, 205 (R.I. 1989)).

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

Baltimore Luggage with approval.[374] 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

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.[375] 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.[376] 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]."[377] 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.[378]

Massachusetts: The Express or Implied Assumption Exception

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374 *Nissen Corp.,* 594 A.2d at 566.

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

376 594 A.2d at 567.

377 Milliken Co. v. Duro Textiles, LLC*,* 19 Mass. L. Rep. 509 (Mass. Super. 2005) (collecting authorities); Guzman v. MRM/Elgin, 567 N.E.2d 929, 931 (Mass. 1991).

378 *Guzman*, 567 N.E.2d at 933.

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.[379]

Massachusetts: The De Facto Merger Exception

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.[380]

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."[381] 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."[382]

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379 Scott v. NG U.S. 1, Inc., 16 Mass. L. Rep. 666; 2003 WL 22133177 at *9 (Mass. Super. 2003); Morgan v. Powe Timber Co., 367 F. Supp. 2d 1032 (2005).

380 676 N.E.2d 815, 818 (Mass. 1997).

381 *Id.*

382 Milliken & Co. v. Duro Textiles, LLC, 19 Mass. L. Rep. 509 (2005).

Massachusetts: The Mere Continuation Exception

The Massachusetts courts have not developed a test for the mere continuation exception. Based on Massachusetts' factor-based test for *de facto* merger, which does not require continuity of ownership, the Massachusetts Superior Court, quoting a United States District Court decision, observed, "'the distinction between the [*de facto* merger and mere continuation] exceptions seems more apparent than real.'"[383] Furthermore, "'the *de facto* merger exception subsumes the continuation exception.'"[384]

Massachusetts: The Fraud Exception

There are no reported cases in Massachusetts applying the fraud exception. In *Milliken & Company v. Duro Textiles, LLC*, 19 Mass. L. Rep. 509 (2005), 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.

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").[385] Most importantly, Michigan expanded the

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383 Scott v. NG U.S. 1, Inc., 2003 WL 22133177 at *10 (Mass. Super. Sept. 3, 2003) (quoting *In re* Acushnet River & New Bedford Harbor Proceedings re Alleged PB Pollution, 712 F. Supp. 1010, 1019 (D. Mass. 1989); Action Mfg. Co. v. Simon Wrecking Co., 428 F. Supp. 2d 288 (E.D. Pa. 2006); Vill. Builders 96, L.P. v. U.S. Labs., Inc., 112 P.3d 1082 (2005); Telxon Corp. v. Smart Media of Del., Inc., 2005 Ohio 4931 (2005)).

384 *Id.*

385 *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., 711 N.W.2d 741 (2006); Perceptron, 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). *See* Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 886 (Mich. 1976); Clerc v. Chippewa County War Mem. Hosp., 721 N.W.2d 177 (Mich. 2006); Elezovic v. Ford Motor Co., 697

continuation exception to what has become known as the "continuity of enterprise" exception. *See Turner*, 244 N.W.2d at 883.

Michigan: The Express/Implied Assumption Exception

Michigan recognizes express or implied assumption of liabilities as an exception to the general rule of successor nonliability.[386] 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.[387]

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."[388]

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.*[389] 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

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N.W.2d 851 (2005); Dively v. William Beaumont Hosp., 696 N.W.2d 709 (2005); Garg v. Macomb County Cmty. Mental Health Servs., 696 N.W.2d 646 (2005); Laporte v. William Beaumont Hosp., 694 N.W.2d 757 (2005); Devault v. Pornpichit 695 N.W.2d 65 (2005).

[386] *See Foster*, 597 N.W.2d at 509-10.

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

[388] *Turner*, 244 N.W.2d at 886-87.

[389] 2000 WL 33534582, at *2 (Mich. Ct. App. Feb. 8, 2000).

> 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.[390]

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.*, 379 F. Supp. 797 (W.D. Mich. 1974) for the elements 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.
>
> (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.[391]

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[390] *Id.*

[391] *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).

The *Turner* court also stated that the merger result (the applicability of all four factors) is necessary to find a *de facto* merger.[392]

Michigan: The Mere Continuation Exception

As noted by the *Turner* court, the mere continuation exception is "the most confused of the four exceptions."[393] "[T]he exception seems to encompass the situation where one corporation sells its assets to another corporation with the same people owning both corporations."[394]

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 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."[395]

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392 *Id.* 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.").

393 *Id.*

394 *Id.*

395 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.

Finally, *Foster* concludes that the test in *Turner* only applies "when the transferor is no longer viable and capable of being sued."[396]

Minnesota

"Minnesota follows the traditional approach to corporate successor liability."[397] 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.'"[398] The only exception that has been addressed with any detail is the mere continuation exception.

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

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1976); Starks v. Mich. Welding Specialists, Inc., 711 N.W.2d 741 (2006); Perceptron, 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).

396 *Foster*, 597 N.W.2d at 511.

397 Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989); P.I.M.L., Inc. v. Fashion Links, LLC, 428 F. Supp. 2d 961 (2006); Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213 (S.C. 2005); Ballard Sq. Condo. v. Dynasty Constr., 108 P.3d 818 (2005).

398 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; Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214 (2005). *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).

> after the completion of the sale of assets. * * * Other factors such as continuation of the seller's business practices 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.[399]

Mississippi

Mississippi recognizes the four traditional exceptions to the general rule of successor nonliability.[400] In addition to the four traditional exceptions, Mississippi has adopted a variation of the "continuity of enterprise" exception.[401]

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.[402]

This test is applicable where the "successor takes on the identity of the predecessor company in every way except taking responsibility for the predecessor's debts."[403] The *Paradise* court took its lead from the Fifth Circuit in *Mozingo v. Correct Mfg. Corp.*,[404] which made it clear that the continuity of enterprise test adds more factors but does not treat the common ownership factor as dispositive.

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[399] *Id.* at *4.

[400] *See* Paradise Corp. v. Amerihost Dev., Inc., 848 So.2d 177, 179 (Miss. 2003); Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214 (2005).

[401] *Id.* at 180.

[402] *Paradise*, 848 So.2d at 180.

[403] *Id.*

[404] 752 F.2d 168 (5th Cir. 1985).

Missouri

Missouri follows the general rule of successor liability and recognizes the four traditional exceptions.[405] The Missouri Court of Appeals has addressed the extension of successor liability by adoption of either the continuity of enterprise or product line exceptions, ultimately deciding not to extend successor liability.[406]

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.[407]

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.*,[408] 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." 847 S.W.2d at 493. 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

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

406 *Id.* ("[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.").

407 *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).

408 709 S.W.2d 927 (Mo. Ct. App. 1986).

identity is merely one factor in making this determination."[409] 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 there was no continuity of ownership]."[410]

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.[411]

"It is not necessary to find all the elements to find a *de facto* merger." *Id.* (In *Harashe*, however the court found that the facts at bar satisfied all of the elements).

Montana

Montana appears to have not 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

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

410 *Id.*

411 Harashe v. Flinkote Co., 848 S.W.2d 506, 509 (Mo. Ct. App. 1993) (citing FLETCHER CYC CORP § 7124.20 (Perm. Ed.)); Vill. Builders 96, L.P. v. U.S. Labs., Inc., 112 P.3d 1082 (2005).

successor liability for contracts.[412] 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.[413] The court next noted that some courts "have developed 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."[414] The court noted three different "theories" used to "expand the focus of legal liability:" *de facto* merger (citing *Shannon v. Samuel Langston Co.*,[415] continuity of enterprise (citing *Turner v. Bituminous Cas. Co.)*,[416] and the product-line exception (citing *Ray v. Alad Corp.*[417]).[418] 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.[419]

<u>*Nebraska: The Mere Continuation Exception*</u>

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*.[420] Continuing the business operations of a predecessor, by

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[412] *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); Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213 (S.C. 2005).

[413] *Jones*, 320 N.W.2d at 483.

[414] *Id.* at 484.

[415] 379 F. Supp. 797 (W.D. Mich. 1974).

[416] 244 N.W.2d 873 (Mich. 1976).

[417] 560 P.2d 3 (Cal. 1977).

[418] *Jones*, 320 N.W.2d at 483.

[419] *Id.* at 484.

[420] *Timmerman*, 368 N.W.2d at 506.

itself is not enough to constitute mere continuation.[421] "[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.[422] The *Timmerman* court also looked back to an early Nebraska case, *Douglas Printing Co. v. Over*,[423] and found two factors considered in the continuation analysis: "[1][T]here was commonality of 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."[424]

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.[425]

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.[426] The court stated: "We will leave the consideration of this exception in CERCLA and products liability claims for another day."[427] It is

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421 *Id.* 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)).

422 *Id.* at 506 (citations omitted).

423 95 N.W. 656 (1903).

424 *Id.*

425 *Earl*, 441 N.W.2d at 613-14.

426 Village Builders 96, L.P. v. U.S. Labs., Inc*.,* 112 P.3d 1082, 1087, 1091 (Nev. 2005); New York v. Nat'l Serv. Indus., 460 F.3d 201 (2d Cir. 2006).

427 *Id.*

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."[428] 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."[429]

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."[430] It noted that "some 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.' ""[431] 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."[432]

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

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[428] *Id.* at 1091

[429] *Id.* (quoting MBII v. PSI*,* 75 Cal.App.4th 1213, 89 Cal.Rptr.2d 778, 781 (1999); Vill. Builders 96, L.P. v. U.S. Labs., Inc., 112 P.3d 1082 (2005)).

[430] *Id.* at 1087.

[431] *Id.* (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); Scott v. NG US 1, Inc., 67 Mass. App. Ct. 474 (2006); Vill. Builders 96, L.P. v. U.S. Labs., Inc., 112 P.3d 1082 (2005); Telxon Corp. v. Smart Media of Del., Inc., 2005 Ohio 4931 (Ohio Ct. App.2005)).

[432] *Id.* at 1088.

resolving this issue is whether there exists a continuation of the corporate entity. We agree."[433]

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.[434] The New Hampshire Supreme Court has expressly rejected the product-line exception and other "risk spreading" doctrines (including the continuity of enterprise exception).[435] The court has also stated unequivocally that *Cyr v. B. Offen & Co., Inc.*,[436] does not represent a valid interpretation of New Hampshire law.[437]

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.[438] Under this theory, d*e facto* mergers

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433 *Id.* 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. Pa. 2006); Vill. Builders 96, L.P. v. U.S. Labs., Inc., 112 P.3d 1082 (2005)).

424 *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); Vill. Builders 96, L.P. v. U.S. Labs., Inc., 112 P.3d 1082 (2005).

435 *See Id.*; Simoneau v. South Bend Lathe, Inc., 543 A.2d 407 (N.H. 1988); In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 379 F. Supp. 2d 348 (S.D.N.Y. 2005), Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213 (S.C. 2005); *see also* Appeal of SAU#16 Coop. Sch. Bd., 143 N.H. 97, 103, 719 A.2d 613 (1998) (using federal successor liability standard); Russell v. Philip D. Moran, Inc., 122 N.H. 708, 710-11, 449 A.2d 1208 (1982) (contractual indemnification and warranty claims could be viable under a theory of successor liability); Zimmerman v. Suissevale, Inc., 121 N.H. 1051, 1054-55, 438 A.2d 290 (1981) (successor liability under stock purchase agreement).

436 501 F.2d 1145 (1st Cir. 1974).

437 *Bielagus*, 826 A.2d at 569.

438 Bielagus v. EMRE, 149 N.H. 635, 641, 826 A.2d 559, 565 (2003) (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.

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.[439] 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.[440] 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.[441]
> 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.[442]
>
> *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

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2006).

[439] *Id.*

[440] Wilson v. Fare Well Corp., 140 N.J. Super. 476 (1976); United States v. General Battery Corp., 423 F.3d 294 (3d Cir. Pa. 2005).

[441] *Id.* at 493.

[442] 356 A.2d 458 at 489.

of being left without a remedy due to the subsequent corporate history of the manufacturer.[443]

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.

This conclusion may be undermined, however, by the New Hampshire Supreme Court's rejection of *Cyr v. B. Offen & Co., Inc.*,[444] which had embraced the notion of risk spreading as a justification for expanding successor liability with the continuity doctrines.[445] *Wilson* was based, in part, on the holding of *Cyr*.[446] Thus, although the mere continuation and de facto merger doctrines are the law of New Jersey, their scope in application is unclear at best.[447]

The Supreme Court has also taken some pains to define "mere continuation"– which it recognizes as being very similar to *de facto* merger.[448] 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.[449] 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

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443 356 A.2d 458 at 490.

444 501 F.2d 1145 (1st Cir. 1974).

445 Bielagus v. FMRE, 149 N.H. 635, 646 (2003); Simoneau v. South Bend Lathe, 130 N.H. 466, 470 (1988); In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 379 F. Supp. 2d 348 (S.D.N.Y. 2005); Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213 (S.C. 2005) .

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

447 Bielagus v. FMRE, 149 N.H. 635, 642.

448 *Id.*

449 *Id.*

incorporated as an element of one of the above exceptions, . . . the absence of adequate consideration for the sale or transfer.'"[450] In 1981, the New Jersey Supreme Court also adopted the product-line exception.[451] In doing so, the court stated it "has ling 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.[452]

<u>*New Jersey: The Express or Implied Assumption Exception*</u>

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.[453]

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[450] 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); United States v. General Battery Corp., 423 F.3d 294 (3d Cir. Pa. 2005); Perceptron, Inc. v. Silicon Video, Inc., 423 F. Supp. 2d 722 (E.D. Mich. 2006)); Berg Chilling Sys. v. Hull Corp., 435 F.3d 455 (3d Cir. Pa. 2006); G-I Holdings, Inc. v. Bennet, 380 F. Supp. 2d 469 (D.N.J. 2005); Gross v. Trustees of Columbia Univ. in City of N.Y., 816 N.Y.S.2d 695 (2006); Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213 (S.C. 2005).

[451] *Id.* 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.")

[452] *Id.* at 820; *but see* Anderson Mach. Sales v. Anderson Mach. Sys., Inc., 2002 WL 31398172 (N.J. Superior Ct. 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).

[453] 264 A.2d at 102. Although *McKee* has been overruled or severely qualified by Wilson v. Fare Well Corp., 356 A.2d 458, 464 (N.J. Sup. Ct. 1976) with regard to *de facto* merger and mere continuation, it appears to remain good

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.[454]

New Jersey: The Fraud Exception

Similarly to the express or implied assumption exception, New Jersey courts have not offered much analysis of the fraud exception. In *McKee*, the court quickly dealt with both the fraud and inadequate consideration exceptions.[455] 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*,[456] 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.[457]

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

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law in the areas of express or implied assumption of liabilities and the fraud exception.

[454] *Id.*

[455] *Id.* at 106-07. Although *McKee* has been overruled or severely qualified by *Wilson v. Fare Well Corp.*, 356 A.2d 458, 464 (N.J. Sup. Ct. 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; U.S. v. General Battery Corp., Inc., 423 F.3d 294 (2005).

[456] 68 F.2d 77 (10th Cir. 1933).

[457] *Id.* at 107.

assumption of a variety of liabilities pursuant to previously negotiated agreements.[458] 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."[459] In *McKee v. Harris-Seybold Co.*, a New Jersey superior court stated that continuity of interest was a necessary, threshold requirement for mere continuation.[460] 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 . . . ."[461] By 1997, a 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."[462] 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.[463]

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458 Wilson v. Fare Well Corp., 356 A.2d 458, 464 (N.J. Sup. Ct. 1976).

459 *Id.*

460 264 A.2d 98 (N.J. Law Div. 1970) ("For liability to attach, the purchasing corporation must represent merely a 'new hat' for the seller.").

461 Russell-Stanley Corp. v. Plant Indus., Inc., 595 A.2d 534, 548 (N.J. Sup. Ct. 1991).

462 Woodrick v. Jack J. Burke Real Estate, Inc., 703 A.2d 306, 312 (N.J. Sup. Ct. 1997); Berg Chilling Systems, Inc. v. Hull Corp., 435 F.3d 455 (2006); U.S. v. General Battery Corp., Inc., 423 F.3d 294 (2005); New York v. National Service Industries, Inc., 380 F.Supp.2d 122 (E.D.N.Y. 2005); City of East Orange v. Kynor, 893 A.2d 46 (2006).

463 *Id.* (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); Glentel, Inc. v. Wireless Ventures, LLC, 362 F.Supp.2d 992 (2005);

"Not all of these factors needed be present for a *de facto* merger or continuation to have occurred."[464] 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."[465] Applying the factors listed above, the court concluded: "Based 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."[466]

McKee is not unquestioned precedent for the proper application of the mere continuation and de facto merger doctrines.[467] 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.[468]

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.[469]

Wilson rejected the "extremely limited" view set forth in *McKee*, and decided

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Continental Ins. Co. v. Schneider, Inc., 873 A.2d 1286 (Pa. 2005); Berg Chilling Systems, Inc. v. Hull Corp., 435 F.3d 455 (2006); U.S. v. General Battery Corp., Inc., 423 F.3d 294 (2005); Kemper v. Saline Lectronics, 366 F.Supp.2d 550 (2005)).

464 *Id.*

465 *Id.* at 313.

466 *Id.* at 314.

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

468 *Id.* at 493.

469 356 A.2d 458 at 489.

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.[470]

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*,[471] 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. *Id.* 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 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.*[472] 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

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470 356 A.2d 458 at 490.

471 431 A.2d at 819.

472 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."); Gross v. Trustees of Columbia University In City of New York, 816 N.Y.S.2d 695 (2006); Simmons v. Mark Lift Industries, Inc., 622 S.E.2d 213 (2005).

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."[473] 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."[474]

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*,[475] The Supreme Court of New Mexico did not address successor liability in the context of products liability until 1997.[476] In *Garcia*, the only traditional exception possibly applicable was the mere continuation exception.[477] 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.'[478] Thus, the mere continuation exception 'has no application without

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[473] *Id.* at 300.

[474] *Id.* at 301.

[475] 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 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.); Village Builders 96, L.P. v. U.S. Laboratories, Inc., 112 P.3d 1082 (2005)).

[476] *See* Garcia v. Coe Mfg. Co., 933 P.2d 243, 247 (N.M. 1997); Simmons v. Mark Lift Industries, Inc., 622 S.E.2d 213 (2005) .

[477] *Id.*

[478] Leannais v. Cincinnati, Inc., 565 F.2d 437, 440 (7th Cir. 1977); Village Builders 96, L.P. v. U.S. Laboratories, Inc., 112 P.3d 1082 (2005).

proof of continuity of management and ownership between the predecessor and successor corporations.' *Pancratz v. Monsanto Co.*, 547 N.W.2d 198, 201 (Iowa 1996)."[479] The *Garcia* court, finding the mere continuation exception inapplicable, adopted the product-line exception as articulated in *Ray v. Alad*.[480]

New York

The law of successor liability in New York appears unsettled in several key areas.[481] In general, New York courts recognize the four traditional exceptions to the general rule of nonliability for asset purchasers.[482] The Court of Appeals of New York has not expressly adopted either the continuity of enterprise or product line exceptions;[483] however, intermediate appellate courts in New York have adopted both.[484]

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

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479 *Id.*

480 *Id.* at 249.

481 *In re* Seventh Judicial Dist. Asbestos Litig., 788 N.Y.S.D. 2d 579 (N.Y. Supp. 2005).

482 Schumacher v. Richards Shear Co., Inc., 451 N.E.2d 195, 198 (N.Y. 1983); Semenetz v. Sherling & Walden, Inc., 818 N.Y.S.2d 819 (2006); Village Builders 96, L.P. v. U.S. Laboratories, Inc., 112 P.3d 1082 (2005); Simmons v. Mark Lift Industries, Inc., 622 S.E.2d 213 (2005) .

483 *See id.*

484 *See, e.g.*, Salvati v. Blaw-Knox Food & Chem. Equip., Inc., 497 N.Y.S.2d 242, 247 (N.Y. Spec. Term 1985) (adopting the continuity of enterprise exception as articulated in *Turner*); In re Seventh Judicial Dist. Asbestos Litigation, 788 N.Y.S.2d 579 (2005); Hart v. Bruno Mach. Corp., 679 N.Y.S.2d 740, 742 (N.Y. App. Div. 1998) (applying the product line exception); Semenetz v. Sherling & Walden, Inc., 818 N.Y.S.2d 819 (2006); In re Seventh Judicial Dist. Asbestos Litigation, 788 N.Y.S.2d 579 (2005); Semenetz v. Sherling & Walden, Inc., 21 A.D.3d 1138 (2005); Buja v. KCI Konecranes Intern. Plc., 815 N.Y.S.2d 412 (2006); U.S. v. General Battery Corp., Inc., 423 F.3d 294 (2005) .

predecessor.[485]

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." *See Schumacher*,[486] 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."[487] A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a '*de facto* merger, even if the parties chose not to effect a formal merger."[488] 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.[489]

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485 *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.").

486 451 N.E.2d at 198.

487 *See Schumacher*, 451 N.E.2d 195.

488 *In re* Seventh District Asbestos Litig., 788 N.Y.S.2d at 486.

489 *Id.*; *see* 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 (2006); Washington Mut. Bank, F.A. v. SIB Mortg. Corp., 801 N.Y.S.2d 821 (2005);

Not all of these factors necessarily need be present for a finding of *de facto* merger.[490]

<u>New York: The Product Line Exception</u>

The Court of Appeals of New York analyzed both the product line and continuity of enterprise exceptions in *Schumacher*, ultimately stating "[w]e do not adopt the rule of either case but note that both are factually distinguishable in any event. 451 N.E.2d at 198. This language has "resulted in a debate and some disagreement as to whether or not the Court of Appeals has rejected the two additional exception, or simply found the two exceptions inapplicable to the facts in that case."[491] The Supreme Court, Appellate Division, Third Department has adopted the product line exception,[492] while the First Department has not.[493] No Court of Appeals of New York decision has resolved this split in the lower courts.

<u>New York: The Continuity of Enterprise Exception</u>

Buja v. KCI Konecranes Intern. Plc., 815 N.Y.S.2d 412 (2006); Village Builders 96, L.P. v. U.S. Laboratories, Inc., 112 P.3d 1082 (2005); In re New York City Asbestos Litigation, 789 N.Y.S.2d 484 (2005); Riverside Marketing, LLC v. Signaturecard, Inc., 425 F.Supp.2d 523, 535 (S.D.N.Y. 2006).

490 *In re* Seventh District Asbestos Litig., 788 N.Y.S.2d at 486. (citing Fitzgerald v. Fahnestock & Co., 730 N.Y.S.2d 70 (N.Y. App. Div. 2001)); In re New York City Asbestos Litigation, 789 N.Y.S.2d 484 (2005); Kretzmer v. Firesafe Products Corp., 805 N.Y.S.2d 340 (2005); Washington Mut. Bank, F.A. v. SIB Mortg. Corp., 801 N.Y.S.2d 821 (2005); Buja v. KCI Konecranes Intern. Plc., 815 N.Y.S.2d 412 (2006); In re Nazi Era Cases Against German Defendants Litigation, 153 Fed.Appx. 819 (2005); New York v. National Service Industries, Inc., 380 F.Supp.2d 122 (2005).

491 *In re* Seventh Judicial District Asbestos Litig., 788 N.Y.S.2d 484, 486 (N.Y. App. Div. 2005).

492 *See Hart*, 679 N.Y.S.2d at 742.

493 City of New York v. Charles Pfizer & Co., Inc., 688 N.Y.S.2d 23, 25 (N.Y. App. Div. 1999) ("We decline to follow the Third Department in adopting the 'product line' theory of successor's liability as adopted in certain other jurisdictions . . . We understand the Court of Appeals to have rejected this theory in Schumacher v. Richards Shear Co., 451 N.E.2d 195."); AT & S Transp., LLC v. Odyssey Logistics & Technology Corp., 803 N.Y.S.2d 118 (2005).

At least one New York Supreme Court has adopted the continuity of enterprise exception as articulated in *Turner*.[494] 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."[495] 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.[496] 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."[497] 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.[498]

<u>North Carolina</u>

North Carolina courts follow the traditional approach to successor liability, recognizing the four traditional exceptions to the general rule of corporate successor nonliability.[499] Interestingly, the *Budd* court also noted:

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494 Salvati v. Blaw-Knox Food & Chem. Equip., Inc., 497 N.Y.S.2d at 247.

495 *Id.* at 628-29 (citing Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 879 (Mich. 1976)).

496 *Id.* at 242.

497 *Id.*

498 *Radziul v. Hooper, Inc.*, 479 N.Y.S.2d 324, 326 (N.Y. Gen. Term 1984).

499 *See* G.P. Publications, Inc. v. Quebecor Printing—St. Paul, Inc., 481 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); Glentel, Inc. v. Wireless Ventures, LLC, 362 F.Supp.2d 992 (2005); Continental Ins. Co. v. Schneider, Inc., 873

> 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.[500]

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.*,[501] 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.*,[502] as it outlined the test for mere continuation:

> A review of the case law reveals that North Carolina follows the

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A.2d 1286 (2005) .

[500] 370 S.E.2d at 269.

[501] 432 S.E.2d 437, 440 (N.C. Ct. App. 1993).

[502] 481 S.E.2d at 680.

> 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 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*.[503] 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.'"[504] 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.

<u>North Dakota</u>

North Dakota follows the traditional rule of corporate successor nonliability, subject to the four traditional exceptions.[505] 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

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503 432 S.E.2d 437.

504 481 S.E.2d at 680.

505 *See* Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 121 (N.D. 1984).

of assets are applicable to products liability cases.[506]

Ohio

The Supreme Court of Ohio has addressed separately the issue of successor liability in the context of product liability and contract claims. In *Flaugher 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.[507] In *Welco Indus., Inc. v. Applied Companies*, the Supreme Court refused to expand the traditional exceptions or adopt the continuity of enterprise exception in the context of contract liabilities.[508] The *Flaugher* court also declined to adopt the product line exception concluding that the legislature should make major policy decisions.[509]

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.[510] 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.[511]

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 ordinarily

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

507 507 N.E.2d 331, 336 (Ohio 1987).

508 617 N.E.2d 1129, 1133 (Ohio 1993).

509 507 N.E.2d at 337.

510 *See Welco*, 617 N.E.2d at 1134.

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

necessary to continue the predecessor's business operations.[512]

The court also indicated that a "transfer of assets for stock is the *sine qua non* of [*de facto*] merger."[513] Even though the court initially listed them as hallmarks, the court later implied that the four listed characteristics are "elements."[514] 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.[515]

Ohio: The Mere Continuation Exception

The *Flaugher* court discussed the narrow and broad constructions of the mere continuation exception but did not adopt either approach.[516] The major distinction between the two approaches, according to *Flaugher*, 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."[517] The court, therefore, did not adopt either approach explicitly.

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.[518] 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 [*Flaughter*] adopted the traditional test or the expanded test to determine whether a successor corporation is a mere continuation of a predecessor corporation."[519] Unfortunately, the court declined to answer the certified question.[520]

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512 617 N.E.2d at 1134.

513 *Id.*

514 *Id.*

515 Howell v. Atlantic-Meeco, Inc., 2002 WL 857685 at * 3 (Ohio Ct. App. 2002).

516 507 N.E.2d at 336.

517 *Id.*

518 617 N.E.2d at 1133.

519 *Davis*, 609 N.E.2d at 145.

520 *Id.*

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 *Flaugher* 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.'"[521] 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.'"[522] 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."[523]

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.[524] 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."[525]

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

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521 671 N.E.2d 1343, 1355 (Ohio Ct. App. 1996).

522 *Id.* (quoting Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 892 (Mich. 1976)).

523 *Id.*

524 2002 WL 857685 at *4.

525 *Id. See also* Auvil v. Ferragon, 2005 Ohio 5129 (Ohio App. 2005) (citing to *Flaughter* for the mere continuation elements applicable in Ohio).

faith.[526]

Oklahoma

Oklahoma follows the traditional approach to successor liability, recognizing the four traditional exceptions to the general rule of successor nonliability.[527] Under the mere continuation exception, "[t]he test is not the continuation of the business operation, but the continuation of the corporate entity."[528] 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."[529] Interestingly, the court cited to *Kloberdanz v. Joy Mfr. Co.*,[530] 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.[531] 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 identify 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, 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.[532]

Oregon

The Supreme Court of Oregon noted the general rule of successor

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526 *Welco*, 617 N.E.2d at 1134; *Howell*, 2002 WL 857685 at * 3.

527 *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).

528 *Pulis*, 561 P.2d at 71.

529 *Id.*

530 288 F.Supp. 817 (D. Colo. 1968).

521 *Id.*

532 Groucher v. Parmac, Inc., 694 P.2d 953, 954 (Okla. Ct. App. 1985).

nonliability and its four traditional exceptions in *Erickson v. Grande Ronde Lumber Co.*[533] In this case, the court addressed whether a successor corporation had assumed liabilities for services rendered to its predecessor.[534] 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.[535] The court noted the general rule and four traditional exceptions, 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.[536] The Bureau of Labor Industries advanced a flexible nine-factor analysis similar to the continuity of enterprise factors set out in *Mozingo v. Correct Mfg. Corp.*[537] However, the court did not address whether this test applied.[538]

<u>Pennsylvania</u>

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

> (1) the purchaser expressly or impliedly agrees to assume such obligation;
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> (2) the transaction amounts to a consolidation or merger;
>
> (3) the purchasing corporation is merely a continuation of the selling corporation;
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> (4) the transaction is fraudulently entered into to escape liability;

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[533] 92 P.2d 170, 174 (Or. 1939).

[534] *Id.*

[535] Tyree Oil v. Bureau of Labor and Indus., 7 P.3d 571 (Or. Ct. App. 2000).

[536] *Id.* at 574.

[537] 752 F.2d 168 (5^{th} Cir. 1985).

[538] *Id., see* XDP, Inc. v. Watumull Props. Corp., 2004 WL 1103023 (D. Or. 2004) (applying the nine-factor continuity of enterprise test listed in *Tyree Oil* in denying summary judgment on successor liability issue).

(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.[539]

Pennsylvania courts decided to adopt the product line exception rather than expand the traditional exceptions.[540]

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.[541] "[A] mere continuation occurs where 'a new corporation is formed to acquire the assets of an extant corporation, which then ceases to exist.'"[542] "The

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539 *In re* Thorotrast Cases, 26 Phila. Co. Rptr. 479, 488-89, 1994 W.L. 1251120 (Pa. Com. Pl. 1994); Morgan v. Powe Timber Co., 367 F.Supp.2d 1032 (2005).

540 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."); Continental Ins. Co. v. Schneider, Inc., 873 A.2d 1286 (2005).

541 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 theory of liability would not alter our resolution of the issue since the two theories are difficult to distinguish"); Atlas Tool Co., Inc. v. C.I.R., 614 F.2d 860, 871 (3rd Cir. 1980) ("As is illustrated by the *de facto* merger cases, that exception is interrelated to the second exception for continuity."); U.S. v. General Battery Corp., Inc., 423 F.3d 294, 307 (2005); Village Builders 96, L.P. v. U.S. Laboratories, Inc., 112 P.3d 1082 (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 Systems, Inc. v. Hull Corp., 435 F.3d 455 (2006); Glentel, Inc. v. Wireless Ventures, LLC, 362 F.Supp.2d 992 (2005) .

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

primary elements of the continuation exception are identity of the officers, directors, or shareholders, and the existence of a single corporation following the transfer."[543] 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."[544] Not all of the *de facto* merger factors must be present for the exception to apply.[545]

Since mere continuation traditionally requires "common identity of officers, directors and stock between the selling and purchasing corporations,"[546] and since Pennsylvania treats the *de facto* merger factors as nondispositive,[547] there may be an open question as to whether commonality of ownership is a threshold requirement for *de facto* merger. 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.[548] The court was careful to keep the product line exception from being too restrictive.[549] 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

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543 *Id.* at 134-35 (citations omitted).

544 *Id.* at 135.

545 *Id.*

546 *Dawejko*, 434 A.2d at 108.

547 *See Continental Ins. Co.*, 810 A.2d at 135.

548 *Dawejko*, 434 A.2d at 111.

549 *Id.*. *See also* Kradel v. Fox Tractor Co., 308 F.3d 328, 331 (3d Cir. 2002); In re OODC, LLC, 321 B.R. 128 (2005); Simmons v. Mark Lift Industries, Inc., 622 S.E.2d 213 (2005) .

> 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.[550]

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.[551] In *Hill v. Trailmobile, Inc.,*[552] the Pennsylvania Superior Court "recast the three *Ray* factors as requirements."[553] Soon thereafter, the Court of Common Pleas of Pennsylvania has 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."[554]

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550 *Id.*

551 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*, through sale of all or substantially all of the assets of the predecessor.").

552 60 A.2d 602 (Pa. Super. 1992).

553 *Kradel*, 308 F.3d at 332.

554 *In re Thorotrast Cases*, 26 Phila. Co. Rptr. at 504; *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").

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.[555]

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."[556] One superior court has applied the *de facto* merger exception, *Richmond Ready-Mix*, 2004 WL 877595, and another superior court has noted the four traditional exceptions to the general rule of successor nonliability, *Angell v. Parrillo*, 1986 WL 716005, at *1 (R.I. Sup. Ct. Feb. 14, 1986) (citing *Leannais v. Cincinnati, Inc.* 565 F.2d 437 (7th Cir. 1977) for the four traditional exceptions). Interestingly, this superior 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.[557]

Rhode Island: The Mere Continuation Exception

The Rhode Island Supreme Court cited *Jackson v. Diamond T. Trucking Co.*,[558] for the following "five persuasive criteria for finding a 'continuing' entity":

(1) there is a transfer of corporate assets; (2) there is less than

555 *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 destruction of plaintiff's remedy" requirement).

556 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., 57 R.I. 345, 348 (R.I. 1937); *see also* H.J. Baker & Bro., Inc. v. Orgonics, 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 . . ..").

557 Richmond Ready-Mix at *2.

558 241 A.2d 471, 477 (N.J. Sup. Ct. 1968).

> 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.[559]

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."[560] The court went on to consider all of these factors in establishing that a successor was indeed the mere continuation of its predecessor.[561]

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.[562] 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

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559 *H.J. Baker & Bros., Inc.*, 554 A.2d at 206.

560 *Id.* (citations omitted).

561 *Id.*

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

normal business operations of the seller corporation.[563]

South Carolina

In a 1924 decision, the Supreme Court of South Carolina adopted the traditional exceptions to the general rule of successor non-liability.[564] 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*.[565] 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.[566] In doing so, the court stated that the *Holloway* court did not establish a new test of successor liability, but rather applied the mere continuation exception.[567]

South Dakota

South Dakota recognizes the four traditional exceptions to the general rule of corporate nonliability for asset purchases.[568]

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."[569]

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563 *Id.* (quoting Kleen Laundry & Dry Cleaning Serv., Inc. v. Total Waste Mgmt., 817 F. Supp. 225, 230-31 (D. N.H. 1993).

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

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

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

567 *Id.* at 215 n.1.

568 *See* Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D. 1986); McMillin v. Mueller, 695 N.W.2d 217 (2005); Village Builders 96, L.P. v. U.S. Laboratories, Inc., 112 P.3d 1082 (2005); *see also* Parker v. Western Dakota Insurors, 605 N.W.2d 181, 184-85 (S.D. 2000)..

569 *Hamaker*, 387 N.W.2d at 518.

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.[570]

South Dakota: The Product Line Exception

South Carolina 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.[571]

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.[572] 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.[573]

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570 *Id.* 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.

571 *Id.*

572 *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).

573 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.'").

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.*,[574] "the purpose of [the statute was] to *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."[575] 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."[576] As noted by the Texas Court of Appeals in *Lockheed Martin Corp. v.*

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[574] 709 S.W.2d 755, 758 (Tex. App. 1986).

[575] *Id.* (quoting TEX. BUS. CORP. ACT. ANN. art. 5.10 comment).

[576] *Id. 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 &

Gordon,[577] "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."[578]

Utah

Utah adheres to the traditional approach to successor liability.[579] The *de facto* merger exception "considers whether the business operations and management continued and requires that the buyer paid for the asset purchase with its own stock."[580] 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"'"[581] 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.[582] ("Plaintiffs argue that . . . alternately, we should apply Michigan's *Turner* expansion of the mere continuation

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Vascular Institute of Texas, 182 S.W.3d 6 (2005).

577 16 S.W.3d 127, 139 (Tex. Ct. App. 2000).

578 *Id.* 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 (2005); 5 SAS & Associates, Inc. v. Home Marketing Servicing, Inc., 168 S.W.3d 296 (2005); ASEP USA, Inc. v. Cole, 199 S.W.3d 369 (2006); Beverick v. Koch Power, Inc., 186 S.W.3d 145 (2005); Taylor Elec. Services, Inc. v. Armstrong Elec. Supply Co., 167 S.W.3d 522 (2005); KMG Kanal-Muller-Gruppe Deutschland GmbH & Co. KG v. Davis, 175 S.W.3d 379 (2005); SunBridge Healthcare Corp. v. Penny, 160 S.W.3d 230 (2005).

579 Decius v. Action Collection Serv., Inc., 105 P.3d 956, 958-59 (Utah Ct. App. 2004); Tabor v. Metal Ware Corp., 182 Fed.Appx. 774 (2006).

580 *Id.* at 959 (citations omitted).

581 *Id.* (citations omitted).

582 *Id.*

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[].'"[583]

Vermont

In 2005, the Vermont Supreme Court had the opportunity to restate its position on successor liability in *Gladstone v. Stuart Cinemas, Inc*.[584] 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 consideration, (4) a fraudulent scheme to avoid liability, or (5) inadequate consideration for the sale.[585] (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).[586]

The court noted that in *Ostrowski v. Hydra-Tool Corp*.,[587] 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.[588] It then turned to *Cab-Tek, Inc. v. EBM, Inc.*,[589] which addressed the distinction between consolidation and *de facto* merger.[590]

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583 *Id.* at 960.

584 878 A.2d 214 (Vt. 2005).

585 *Id.* at 220.

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

587 479 A.2d 126 (Vt. 1984).

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

589 571 A.2d 671 (Vt. 1990).

590 Id

Consolidation occurs when the "combining corporations are dissolved and lose their identity in a new corporate entity."[591] *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.[592] In other words, no asset purchase is required for a *de facto* merger in Vermont.[593]

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.[594] 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.[595] Although these are traditional indicators, they are not requirements.[596] *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.[597] Inadequacy of consideration may also be present.[598]

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.[599] The court went on to additionally consider whether or not recognition of the transfer as being free and clear of liabilities would work a

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

592 *Gladstone*, 878 A.2d at 221

593 *Id*
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594 *Id.* at 222.

595 *Id.*

596 *Id.*

597 *Id.*

598 *Gladstone*, 878 A.2d at 222

599 *Id.* at 222-23

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.[600]

Virginia

Virginia follows the traditional rule of successor liability and recognizes only the four traditional exceptions.[601] 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.[602] 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.[603]

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[600] *Id.* at 224.

[601] 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 (2005); Bizmark, Inc. v. Air Products, Inc., 427 F.Supp.2d 680 (2006).

[602] *Id.* at 609-10.

[603] 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 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

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."[604] An additional inquiry is whether "the purchase of all the assets of a corporation is a bona fide, arm's-length transaction."[605] In such a case, the mere continuation exception does not apply.[606]

Washington

Washington recognizes the traditional four exceptions to the general rule of non-liability in asset purchases as well as the product line exception.[607] The Washington Supreme Court noted that the adoption of the product line exception

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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).

604 *Harris*, 413 S.E.2d at 609.

605 593 *Id.*

606 594 *Id.*; *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 (2001); *See also* Bizmark, Inc. v. Air Products, Inc., 2005 WL 2931963 (W.D. Va. 2005).

607 *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 (2006) .

was preferable to expanding the mere continuation exception,[608] a rule "designed for other purposes."[609]

Washington: The Express or Implied Assumption Exception

No recent Washington case has addressed the express/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*.[610]

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."[611] 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.[612]

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

609 *Id.*

610 *Id.* 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)).

611 Eagle Pac. Ins. Co., 934 P.2d at 721 (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)).

612 *Id.*

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."[613]

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 assets.[614]

Other appellate courts only require the first two elements to prove that a successor is a mere continuation of its predecessor.[615]

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

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[613] Cashar v. Redford, 624 P.2d 194, 196 (Wash. Ct. App., 1981).

[614] Rendoni v. Pac. Fleet & Lease Sales, Inc., 1999 WL 674584, at *2 (Wash. Ct. App. June 1, 1999).

[615] 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).

> same product line under a similar name; and (3) to determine whether the transferee is benefiting from the goodwill of the transferor.[616]

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.[617] 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."[618]

<u>West Virginia</u>

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.[619]

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616 *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).

617 *Id.* 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").

618 *Id.* at 792 (citing *Abbot Labs.*, 689 P.2d at 388-89).

619 *In re* State, 454 S.E.2d 413, 424-25 (W. Va. 1994); Roney v. Gencorp, 431 F.Supp.2d 622, 632 (2006); Ware v. Howell, 614 S.E.2d 464 (2005); Pipemasters, Inc. v. Putnam County Com'n, 625 S.E.2d 274 (2005); State v. Dinger, 624 S.E.2d 572 (2005); Price v. Charleston Area Medical Center, Inc., 619 S.E.2d 176 (2005); *see also* Davis v. Celotex Corp., 420 5.E.2d 557 (W.Va.

Wisconsin

Wisconsin follows the traditional approach to successor liability, adopting the four traditional exceptions to the general rule and expressly declined to adopt the product line exception or the "expanded continuation" exception (continuity of enterprise) adopted by *Turner v. Bituminous Cas. Co.*[620]

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.[621] "The first exception under *Fish* requires an express or implied *assumption* of liabilities, not an express exclusion of liabilities."[622] The *Columbia Propane* court noted the importance of not blurring "the well-established and fundamental distinction between an asset purchase and a stock purchase."[623]

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:

1992).

620 244 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.").

621 *See Fish*, 376 N.W.2d at 823.

622 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 (2006); Bindl v. Next Level Communications, Inc., 709 N.W.2d 112 (2005); Chibardun Telephone Co-op., Inc. v. CenturyTel Wireless of Wisconsin RSA No. 1, LLC, 699 N.W.2d 253 (2005); Bertha v. Remy Intern., Inc., 414 F.Supp.2d 869 (2006); Deputy v. Lehman Bros., Inc., 374 F.Supp.2d 695 (2005); ConFold Pacific, Inc. v. Polaris Industries, Inc., 433 F.3d 952 (2006).

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

> (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.[624]

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."[625]

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.'"[626] Although the Wisconsin Supreme Court muddied the waters in *Tift v. Forage King Industries, Inc.*,[627] 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 line."[628]

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

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624 Schawk, Inc. v. City Brewing Co., LLC, 263 Wis. 2d 432, (Wis. Ct. App. 2003) (citing Sedbrook v. Zimmerman Design Group, Ltd., 526 N.W.2d 758 (Wis. Ct. App. 1994)).

625 *Fish*, 376 N.W.2d at 824.

626 *Id.*; *see also* Smith v. Meadows, 60 F.Supp.2d 911, 917-18 (E.D. Wis. 1999).

627 322 N.W.2d 14, 17-18 (Wis. 1982).

628 *Fish*, 376 N.W.2d at 824.

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.*,[629] and *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873 (Mich. 1976), for the guidelines.[630] The court expressly rejected the product line theory, concluding it was a minority rule and not the "modern trend."[631] 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."[632]

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.

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[629] 472 F. Supp. 136 (E.D. Mich. 1979).

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

[631] *Id.*

[632] *Polius,* 802 F.2d at 83.