A TAXONOMY AND EVALUATION OF SUCCESSOR LIABILITY (REVISTED)

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I. 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,[1] whose cost is borne 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 purposes, 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.[2] Both represent a

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[1] 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 July 5, 2013.)

[2] 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.

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.[3] Others 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).[4] 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."[5]

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[3] *See, e.g.*, Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745 (2003). Professor Reilly's article argues that basing successor liability on fraud or fraud-like conduct is different from basing it on a form-over-substance approach. *Id.* 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 also, 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).

[4] *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).

[5] David Gray Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created By Running Covenants, Product Liability, and Toxic-Waste Clean Up*, 50 LAW & CONTEMP. PROBS. 119 (1987).

This article examines judge-made successor liability[6] and offers a number of observations. First, our current judge-made successor liability law is a product of the rise of corporate law in the last half of the 19th century and early part of the 20th 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,[7] 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.[8] 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

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[6] This article does not address the independent duty to warn that a successor may have when it learns that the predecessor placed defective goods in 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. This 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 pursued through to judgment.

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

[8] *See* Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 53–54 (Alaska 2001) (discussing varied approaches to determinations 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 law doctrine designed to expand products liability law; collecting cases and other authorities on both sides of the issue).

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.[9] 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.[10]

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 to 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-lines 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, the costs that society, not the invested capital, must bear. It is natural to attempt to separate liabilities 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.

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[9] 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).

[10] *See infra* notes 138–146 and accompanying text.

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 the 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 a federal court order 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.[11] Its various species acted

[11] Successor liability is not limited, as 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., 571 A.2d 671, 673 (Vt. 1990) (rejecting notion of limit of successor liability to product liability claims).

as a pressure relief valve on the strict limitation of liability created by corporate law and could force the parties to structure the transaction. The doctrine is "equitable" in nature 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. However, in those jurisdictions 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.[12] Rather, it promotes sharp lawyering based upon an 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.

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[12] 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 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 severe nausea), he is not seriously ill.

Id. at 600.

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 reveals. 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.

II. 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.[13] Absent fraudulent transfers, acquisition of all or substantially all of a company's assets is a necessary but, by itself, insufficient element for a finding of successor liability.[14] Where exceptions to the general rule of

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[13] *See* Schwartz v. McGraw-Edison Co., 14 Cal. App. 3d 767, 780 (1971) (opinion now flagged by Shepard's 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."); 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 liabilities unless the transferee agrees to assume them."), *aff'd*, 670 A.2d 1337 (Del. Super. Ct. 1995) (unpublished table decision).

[14] 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 Schwartz*, 14 Cal. App. 3d at 781

no-successor-liability-for-asset-purchaser 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.[15] 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;[16] or

(b) The transfer of assets to the purchaser that is for the fraudulent purpose of escaping liability for the seller's debts;[17] or

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(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).

[15] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1998) (collecting and discussing authorities).

[16] *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, 154 (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).

[17] *See, e.g.*, Schmoll v. ACandS, Inc., 703 F. Supp. 868, 873 (D. Or. 1988) (finding corporate restructuring was undertaken to avoid liabilities from asbestos claimants and imposing liability on transferee), *aff'd*, 977 F.2d 499 (9th Cir. 1992); 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); *see also* Husak v. Berkel, Inc., 341 A.2d 174, 176 (Pa. Super. Ct. 1975) (using inadequate consideration paid as alternative factor implying fraudulent purpose, much like construction fraudulent conveyance theories of recovery).

(c) A transaction amounting to a consolidation or a *de facto* merger;[18] 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);[19] 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.[20]

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[18] *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 takers 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); 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); Sweatland v. Park Corp., 587 N.Y.S. 2d 54, 56 (N.Y. 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).

[19] *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); 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."); 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).

[20] 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 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);

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 scenario or (ii) the successor's enjoyment of the benefits of continuing to operate the business essentially as it was 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,[21] the failure of many railroads around the turn of the century and their reorganization through asset sales and equity receiverships

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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 Corp.); *accord* Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir. 1995); Pesce v. Overhead Door Corp., No. 2-91CV0435 JCH, 1998 WL 34347661 (D. Conn. Aug. 21, 1998); 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. & Press. Co. of Elkart, Ind., 320 N.W.2d 481 (Neb. 1982); Goucher v. Parmac, Inc., 694 P.2d 953 (Okla. Ct. App. 1984); Dawejko v. Jorgenson Steel Co., 434 A.2d 106 (Pa. Super. Ct. 1981); Griggs v. Capitol Mach. Works, Inc., 690 S.W.2d 287 (Tex. App. 1985); 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). New York also rejected the "product line" exception in Semenetz v. Sherling & Walden, Inc., 851 N.E.2d 1170 (N.Y. 2006), see RICHARD E. KAYE, AM. L. PROD. LIAB. 3d § 7:27 (updated February 2013) and 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7123.30 (rev. perm. ed. 1983) (updated September 2012) for a list of states that have accepted or rejected this exception.

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

provides a context in 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 effort. 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 & 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 . . . .[22]

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.[23]

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.[24] 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

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[22] Colorado Springs Rapid Transit Ry. Co. v. Albrecht, 22 Colo. App. 201, 206–08 (1912) (emphasis added).

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

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

> 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.[25]

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 ever 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

[25] *Id.* The most recent articulation of successor liability in South Carolina is found in Walton v. Mazda of Rock Hill, 657 S.E.2d 67 (S.C. 2008) (citing Simmons v. Mark Lift Indus., 622 S.E.2d 213 (S.C. 2005); Brown v. Am. Ry. Express Co., 123 S.E. 97 (S.C. 1924), which in turn, cites to *Brabham*)).

> 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.[26]

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.[27] 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.[28] For them, it creates negative externalities. A pro-

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[26] Polius v. Clark Equip. Co., 802 F.2d 75, 77–78 (3d Cir. 1986); *see infra* notes 156–61 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 standards.

[27] *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.").

[28] 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); George W. Kuney, *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); George W. Kuney, *Misinterpreting Bankruptcy*

limitation-of-liability inclination continues in corporate law generally today.

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 purposed of successor liability in ameliorating the otherwise harsh results mandated by strict adherence to corporate law principles.

III. 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.[29] 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

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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* Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435 (2004).

[29] 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 DAVID G. OWEN & M. STUART MADDEN, MADDEN & OWEN ON PRODUCT LIABILITY § 19:6 (3d ed. 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 its piece.

recognized in various jurisdictions are 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 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.[30]

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.[31]

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[30] 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).

[31] *See In re* Eagle-Pitcher Indus., 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. 2000) (applying *ejusdem generis* rule of contract interpretation to construe broad term maturity and confined to items similar to those specifically enumerated).

1. 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 agreement to determine whether the purchaser expressly or impliedly agreed to assume liabilities of the successor.[32] This express plain-language approach is a fairly straightforward form of successor liability with the most potential for uncertainty in the area of implied terms of the contract and application of the canons of construction such as *ejusdem generis* to construe potentially conflicting sections of the doctrine.[33]

2. 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.[34] 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

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[32] Matrix-Churchill v. Springsteen, 461 So. 2d 782, 788 (Ala. 1984); Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp., No. X05CV970160824S, 2002 WL 1610037, at *7 (Conn. Super. Ct. June 19, 2002); Gwinnett Hosp. Sys., Inc. v. Massey, 469 S.E.2d 729, 731 (Ga. Ct. App. 1996); Myers v. Putzmeister, Inc., 596 N.E.2d 754, 756 (Ill. App. Ct. 1992); Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1233 (Ind. 1994); Pearson *ex rel.* Trent v. Nat'l Feeding Sys., Inc., 90 S.W.3d 46, 50 (Ky. 2002); Scott v. NG U.S. 1, Inc., No. 023898BLS, 2003 WL 22133177, at *9 (Mass. Super. Ct. Sept. 3, 2003); McKee v. Harris-Seybold Co., 264 A.2d 98, 102 (N.J. Super. Ct. 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).

[33] *See* Folger Adam Sec., Inc. v. DeMatteis/MacGregor, J.V., 209 F.3d 252, 258 (3d Cir. 2000).

[34] *See* Baltimore Luggage v. Holtzman, 562 A.2d 1286, 1292 (Md. Ct. Spec. App. 1989); Safeco Ins. Co. v. Pontiac Plastics & Supply Co., No. 214079, 2000 WL 33538535, at *3 (Mich. Ct. App. Jan. 21, 2000); States Roofing Corp. v. Bush Constr. Corp., 426 S.E.2d 124, 127 (Va. Ct. App. 1993).

the debts of the seller."[35] This is reminiscent of the holding in the *Brabham* case from South Carolina quoted in the previous section.[36]

3. 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.[37] Often this adoption

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[35] *Baltimore Luggage*, 562 A.2d at 1292.

[36] *See* Brabham v. So. Express Co., 117 S.E. 368 (S.C. 1922).

[37] Winsor v. Glasswerks, PHX, LLC, 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 Litig., No. 92C-10-100, 1994 WL 89643, at *3 (Del. Super. Ct. Feb. 4, 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. 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., 848 So. 2d 177, 179 (Miss. 2003); Chem. Design, Inc. v. Am. 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. Publ'ns., 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. Se. Window Mfg. Co., No. E2000-02699-COA-R3-CV, 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. W. Tenino Lumber Co., 265 P.2d 807, 812 (Wash. 1954); *In re* State Pub. Bldg. Asbestos Litig., 454 S.E.2d 413, 424–25 (W.Va. 1994); Columbia Propane, L.P. v. Wisconsin Gas Co., 661 N.W.2d 776, 785 (Wis. 2003).

takes the form of reciting, arguably as *dicta*, a 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, in *Winsor v. Glasswerks PHX, LLC*,[38] the Arizona Court of Appeal stated the four traditional exceptions, including express or implied assumption, and cited to *A.R. Teeters & Assocs. v. Eastman Kodak Co.*,[39] 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 successor 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.[40]

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 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 interest and expectations of the company's creditors have been frustrated.[41] By allowing liability to

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[38] 63 P.3d 1040, 1044 (Ariz. Ct. App. 2003).

[39] 836 P.2d 1034, 1039 (Ariz. Ct. App. 1992).

[40] *Winsor*, 63 P.3d at 1045; *Id.*

[41] "Causation is a required element of all species of the fraud exception." George Kuney, *SUCCESSOR LIABILITY IN ILLINOIS: When Can Creditors and Tort Victims Sue the Buyer of a Business for the Debts and Torts of the Seller?*, 96 ILL. B.J. 148 n.11 (2008) (citing Milliken & Co. v. Duro Textiles, LLC, 887 N.E.2d 244 (Mass. 2008) (discussing need for causation, but also that judgment creditors could look to company's long term prospects, not just immediate

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.

1. Type 1: Common Law Fraud or Lack of Good Faith

Some courts review the record for evidence of common law fraud.[42] For example, in *Eagle Pacific Insurance Co. v. Christensen Motor Yacht Corp.*[43] the court held that the successor corporation was created solely to hinder the predecessor's creditors, and 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.[44]

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insolvency, saying "[the creditor] was deprived of the opportunity to wait and see whether [predecessor]'s business, now being conducted by [the successor], turned around financially to where it was able to repay its debt obligations.")).

[42] Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 416–17 (Mo. 1928); McKee v. Harris-Seybold Co., Div. of Harris-Intertype Corp., 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).

[43] Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 934 P.2d 715, 721 (Wash. Ct. App. 1997) (rejecting trial court's finding of mere continuation successor liability but sustaining successor liability on grounds of actual fraud).

[44] *See, e.g.*, *Ingram*, 5 S.W.2d at 417.

> The conclusion is irresistible that the Elmira Coal Company was incorporated for the purpose of complying with the requirements of the 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 a mere continuance of the selling corporation . . . [it is] *ipso facto* liable for the debts and liabilities of the selling corporation.

Id. at 416.

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 . . . [.]"[45] 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 is the case with almost every form of fraud.

2. Type 2: Statutory Fraud

Maryland determines successor liability for fraud by incorporating the standards of its Uniform Fraudulent Conveyance Act.[46] This inclusion 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.

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[45] Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 510-11 (Mich. 1999) (quoting 19 Am Jur 2d, Corporations, § 1546, pp. 922-924; Malone v. Red Top Cab Co., 16 Cal.App.2d 268, 273, 60 P.2d 543 (1936)) (also citing Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 878 n. 3 (Mich. 1976) (quoting Schwartz v. McGraw-Edison Co., 14 Cal.App.3d 767, 92 Cal.Rptr. 776 (1971))) (other citations omitted); Dir. of Bureau of Labor Standards v. Diamond Brands, Inc., 588 A.2d 734, 736 n.5 (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, court[s] [are] reluctant to disregard corporation form."); *see* Huray v. Fournier MC 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, No. 1135, 1994 WL 1251120 (Pa. Com. Pl. Jan. 13, 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).

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

3. Type 3: Undefined

As is the case with intentional assumption,[47] many courts have adopted or recited the existence of the exception but appear not to have defined a test.[48] It is not entirely clear if their comments should be

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[47] *See supra* notes 30–40 and accompanying text.

[48] 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. Hardford 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); Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp., No. X05CV970160824S, 2002 WL 1610037, at *6 (Conn. Super. Ct. June 19, 2002); *In re* Asbestos Litig., No. 92C-10-100, 1994 WL 89643, at *3 (Del. Super Ct. Feb. 4, 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 Inc. 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. App. Ct. 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 *ex rel.* Trent v. Nat'l Feeding Sys., 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) (noting 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. Amrihost 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. Publ'ns. 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., 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. Se. Window Mfg. Co., No. E2000-02699-COA-R3-CV, 2001 WL 708850, (Tenn. Ct. App. June 25, 2001); Ostrowski v. Hydra-Tool Corp., 479 A.2d 126, 127 (Vt. 1984); Harris v. T.I., Inc., 413 S.E.2d

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.[49] The *de facto* merger species of successor liability creates the 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 in 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.

1. 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."[50] This is a rigid test that allows

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605, 609 (Va. 1992); *In re* State Pub. Bldg. Asbestos Litig., 454 S.E.2d 413, 424–25 (W. Va. 1994); Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 823 (Wis. 1985).

[49] G. William Joyner, III, *Beyond Budd Tire: Examining Successor Liability in North Carolina*, 30 WAKE FOREST L. REV. 889, 894 (1995).

[50] Serchay v. NTS Fort Lauderdale Office Joint Venture, 707 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998) (quoting Amjad Munim, M.D., P.A. v. Azar, 648 So. 2d 145, 153–54 (Fla. Dist. Ct. App. 1994); *see* Perimeter Realty v. GAPI, Inc., 533 S.E.2d 136, 145–46 (Ga. Ct. App. 2000); Myers v. Putzmeister, Inc., 596 N.E.2d 754, 756 (Ill. App. Ct. 1992); Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 891 (Mich. 1976); Howell v. Atlantic-Meeco, Inc., No. 01CA0084,

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. Counsel 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.

2. 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 predecessor necessary to operate the business.[51]

2002 WL 857685, at *3 (Ohio Ct. App. Apr. 26, 2002). Vermont only requires evidence of three elements. CAB-TEK, Inc. v. E.B.M., Inc., 571 A.2d 671, 672–73 (Vt. 1990) (stating *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).

[51] 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.") (citations omitted); 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., No. 02-1833, 2003 WL 1563767, at *4 (Wis. Ct. App. Mar. 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

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 work 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.[52] Further, as modern 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

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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).

[52] Douglas G. Caird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209, 1211 (2006).

> In our Essay, we explore 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 exceeds half a trillion dollars per year—come with elaborate covenants covering everything from minimum cash receipts to timely delivery of audited financial statements. When a business trips 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.

Id.

at this last residual value class, whether or not it is named "common stock."[53]

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.

3. Type 3: Non-Dispositive Factor Test

Other courts essentially use a completely non-dispositive factor from of the test for *de facto* merger and weigh these factors in light of the totality of the circumstances.[54] This is the most flexible form of *de facto*

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[53] *See generally* Gregory Scott Crespi, *Rethinking Corporate Fiduciary Duties, The Inefficiency of the Shareholder Primacy Norm*, 55 SMU L. REV. 141 (2002). The duty shifting from stockholders to other corporate constituents is largely based on the seminal case of Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns. Corp., Civ. A. No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

[54] 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., No. X05CV970160824S., 2002 WL 1610037, at *7 (Conn. Super. Ct. June 19, 2002); Sorenson v. Allied Prods. 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, 818–19 (Mass. 1997) (noting that 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"); Harache v. Flinkote Co., 848 S.W.2d 506, 509 (Mo. Ct. App. 1993) (listing the four traditional elements but noting, "[i]t is 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*

merger and is not as susceptible to the "draft around." The result is that corporate attorneys and their clients will lack the certainty of a bright-line rule or elements that they can work around to create a safe haven for their transaction.

4. 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.[55]

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re Seventh Judicial Dist. Asbestos Litig., 788 N.Y.S.2d 579, 583 (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., No. Civ. A. 92-0960, 2004 WL 877595, at *10 (R.I. Apr. 21, 2004).

[55] Matrix-Churchill v. Springsteen, 461 So. 2d 782, 786–88 (Ala. 1984); 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); Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1142–43 (Colo. Ct. App. 1992); *In re* Asbestos Litig., No. 92C-10-100, 1994 WL 89643, at *3 (Del. Super. Ct. Feb. 4, 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 *ex rel* Trent 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, 571–72 (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—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, 71 (Okla. 1977); Tyree Oil, Inc. v. Bureau of Labor & Indus., 7 P.3d 571, 573 (Or. Ct. App. 2000); Brown v. Am. Ry. Express Co., 123 S.E. 97, 98 (S.C. 1924); Hopewell Baptist Church v. Se. Window Mfg. Co., No. E2000-02699-COA-R3-CV, 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 Pub. Bldg. Asbestos Litig., 454 S.E.2d 413, 424–25 (W. Va. 1994).

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 it. 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.[56] Courts are not altogether

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[56] RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 12 cmt. g. (AM. LAW INST. (1998)); AM. TRAVERS ET AL., AMERICAN LAW PRODUCTS LIABILITY § 7:20 (3d ed. 2004); *see, e.g.*, Holloway v. John E. Smith's Sons Co., 432 F. Supp. 454, 456 (D. S.C. 1977) (relying on Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974) and 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. Corp., 752 F.2d 168, 175 (5th Cir. 1985) (applying Mississippi law and citing *Holloway* and *Cyr* 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 PRODUCT LIABILITY § 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)); 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*)); Phillip 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"); RESTATEMENT (THIRD)

careful or uniform in labeling which exception they are applying. There appear to be four general sub-species of mere continuation and three of continuity of enterprise. The similarity of these doctrines to those of *de facto* merger is striking.[57]

1. The Four Species of Mere Continuation

a. Type 1: Element-Based Mere Continuation

For some courts, mere continuation is a conclusion derived from a showing of a set of required elements. For example, "[t]he 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."[58] 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 goodwill, but if not, that too could be dropped—or not even acquired—to further insulate the transaction from successful attack.

b. 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.

OF TORTS: PRODUCTS LIABILITY § 12 cmt. c. (AM. LAW INST. (1998)) (citing only Alabama, Michigan, and New Hampshire as jurisdictions that have adopted the continuity of enterprise theory).

[57] 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 274–76 and accompanying text.

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

Then they consider other relevant factors on an *ad hoc* basis.[59] As with the *de facto* merger sub-species that employs a requirement of continuity

[59] 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., No. 92C-10-100, 1994 WL 89643, at *4 (Del. Super. Ct. Feb. 4, 1994) ("[I]t must be established that the transaction . . . was an arms' length transaction and not simply a corporate name and that [the successor] has different owners than [the predecessor]"); Amjad Minim, M.D., P.A. v. Avar, M.D., 648 So. 2d 145, 154 (Fla. Dist. 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 Bags, 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); Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996); Pearson *ex rel* Trent, v. Nat'l Feeding Sys., 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 Mfg. Co., 933 P.2d 243, 247 (N.M. 1997) (noting that the "key element of a 'continuation' is a common identity of officers, directors and stockholders in the selling and purchasing corporations"); G.P. Publ'ns., Inc. v. Quebecor Printing—St. Paul, Inc., 481 S.E.2d 674, 680 (N.C. Ct. App. 1997) (indicating that continuity of ownership may not be necessary under corporate successorship, but did not clarify to which exception this analysis would apply); Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1133 (Ohio 1993) (stating 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 (Wis. 1982) (noting 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).

of ownership as its touchstone (*de facto* merger type 2[60]), 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).

c. 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, these factors include commonality of directors, officers, or shareholders; continuation of business practices; dissolution of the predecessor; sufficiency of consideration, and the like. As with the *de facto* merger, this flexible approach is probably superior in terms of allowing the doctrine to operate flexibility 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 rule and safe harbors.

d. 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.[61]

Arizona courts require proof of both insufficient consideration and continuity of ownership as a threshold matter. *See* A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co., 836 P.2d 1034, 1039-40 (Ariz. Ct. App. 1992) (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 corporation").

[60] *See supra* notes 51–53 and accompanying text.

[61] 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

2. The Three Species of Continuity of Enterprise

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.[62] Further, continuity of enterprise generally does not require 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.[63]

A detailed examination of continuity of enterprise in the jurisdictions that have adopted it discloses three sub-species at work. All

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completion of the transfer.") (emphasis added); Scott v. NG U.S. 1, Inc. No. 023898BLS, 2003 WL 22133177, at *10 (Mass. Super. Ct. Sept. 3, 2003) ("[T]he *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., 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. Acromental 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. Se. Window Mfg. Co., No. E2000-02699-COA-R3-CV, 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 Pub. Bldg. Asbestos Litig., 454 S.E.2d 413, 424–25 (W. Va. 1994); Polius v. Clark Equip. Co., 608 F. Supp. 1541, 1545 (D.V.I. 1985).

[62] Mozingo v. Correct Mfg., 752 F.2d 168, 174–75 (5th Cir. 1985) (noting that the traditional mere continuation exception requires identity of stockholders, directors and officers); *see also* Savage Arms Inc. v. W. Auto Supply, Co., 18 P.3d 49, 55 (Alaska 2001) (mere continuation theory requires "the existence of identical shareholders").

[63] *See, e.g.*, Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 879 (Mich. 1976) (dissolution of the seller soon after the sale one of four enumerated factors indicating continuity of enterprise).

the variations of the continuity of enterprise exception derive from *Turner v. Bituminous Cas. Co.*[64] 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 enterprise theory of successor liability.[65] 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) "[t]he seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible;" and (3) "[t]he purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the interrupted continuation of normal business operations of the seller corporation."[66]

The *Turner* court went on to state that:

> Because 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

[64] 244 N.W.2d 873 (Mich. 1976).

[65] *Id.* at 878–79.

[66] *Id.* at 879 (citing McKee v. Harris-Seybold Co., Div. of Harris-Intertype Corp., 264 A.2d 98, 103–05 (N.J. 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. The court in *Turner* decided that the absence of the factor omitted in this article—that "[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."—should not be conclusive. *Id.* at 880.

> omitting to do otherwise, as in effect a continuation of the original manufacturing enterprise, a strong indication of continuity is established.[67]

If continuity is established, "then the transferee must accept the liabilit[ies] with the benefits."[68] 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, apparently, 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 corporations, (4) The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.[69]

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

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[67] *Turner*, 244 N.W.2d at 882.

[68] *Id.* at 883.

[69] *Id.* at 883–84.

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.*[70] 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.[71] 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."[72]

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 continuity of enterprise test was comprised of four elements or factors, following the four items enumerated in the *Turner*

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[70] 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. Jeffrey v. Rapid Am. 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., 446 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. The court noted that to impose successor liability in such circumstances would effectively be an adoption of the broader "product line exception." Pelc v. Bendix Mach. Tool Corp., 314 N.W.2d 614, 620 (Mich. Ct. App. 1981) (finding 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).

[71] Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 508 (Mich. 1999).

[72] *Id.*

court's holding and not the three listed in its announcement of the rule.[73] 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.[74]

In a footnote, the *Foster* court recognized the relationship between the three necessary elements for continuity of enterprise and the fourth

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[73] Fenton Area Pub. Sch. v. Sorensen-Gross Constr. Co., 335 N.W.2d 221, 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 Mgmt Ser., Inc., No. 205164, 1999 WL 33451719, at *1 (Mich. Ct. App. Apr. 2, 1999).

[74] *Foster*, 597 N.W.2d at 510 (emphasis added).

"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.[75]

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.[76]

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."[77] The court's interpretation of the underlying rationale of *Turner* was "to provide a source of recovery for injured plaintiffs."[78] 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

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[75] *Id.* at 510 n.6

[76] Meram v. Clark Refining & Mktg., Inc., No. 221342, 2001 WL 1606883, at *2 (Mich. Ct. App. Dec. 14, 2001) (quoting *Foster,* 597 N.W.2d).

[77] *Foster*, 597 N.W.2d at 511.

[78] *Id.* Justice Brickley, in dissent, disagreed with the majority as to the underlying rationale of *Turner*.

product."[79] Furthermore, the dissent stated that the *Turner* court had explained that the policy basis for the continuity of the enterprise requirement was that "the enterprise, the going concern, ought to bear the liability for the damages done by its defective products."[80] The court reasoned that, because "[the] enterprise enjoys certain continuing benefits, such as goodwill and expertise, [it must] also accept continuing responsibility for the costs that the enterprise has imposed on society through its negligence."[81] 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.[82]

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

a. Type 1: Element-based Continuity of Enterprise

Some courts apply the *Turner* factors as elements.[83] As with other rigid, element-based forms of successor liability, this renders the

[79] *Id.* at 513; Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 513 (Mich. 1976).

[80] *Id.* at 513–14 (citing *Turner*, 244 N.W.2d at 876).

[81] *Id.* at 514.

[82] *See id.*

[83] Asher v. KCS Int'l, Inc., 659 So. 2d 598, 599–600 (Ala. 1995); *Foster*, 597 N.W.2d at 510 (Michigan courts also consider, to the extent discussed above,

doctrine susceptible to the "draft around." Structuring the transaction to avoid continuities of the seller business with the same management, personnel, assets and location, will defeat the first element. 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. For 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 with the proceeds of the sale, perhaps even as a passive investor, 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.

b. 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 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.[84]

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an additional factor identified in *Turner*: "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. Sup. Ct. Spec. Term 1985) (neglecting to cite the fourth "consideration" of *Turner* and relaxing *Turner's* requirement of prompt dissolution).

[84] Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 55; *see also* Paradise Corp. v. Amerihost Dev., Inc., 848 So. 2d 177, 180 (Miss. 2003).

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*,[85] 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.[86]

> [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) successor holds itself out as the continuation of the previous enterprise.

[85] 560 P.2d 3 (Cal. 1977).

[86] *Id.* at 9.

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

Like the Michigan Supreme Court in *Foster*, which revisited *Turner* some years after the original opinion was issued, 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.[87] 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."[88]

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"[89] condition is strictly required in order to permit recovery. The third type is too ambiguously defined to analyze.

1. Type 1: Causation By Destruction of Other Remedies Requirement

Some courts include in the conditions in *Ray*, 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."[90] This requirement is said to limit the product line doctrine to

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

[88] *Hall*, 692 P.2d at 791 n.1 (refusing to apply product line test to successor that purchased but one of many asbestos product lines).

[89] *Ray*, 560 P.2d at 9.

[90] *Id.*; *see also* Sullivan v. A.W. Flint Co., No. CV 920339263, 1996 WL 469716, at *7 (Conn. Super. Ct. Aug. 5, 1996); *Garcia*, 933 P.2d at 249; *In re* Seventh

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 for the plaintiff.[91] "Second, elemental fairness demands that there be a causal connection between the successor's acquisition and the unavailability of the predecessor."[92] A sale of substantially all the assets of a business satisfies these twin requirements; sale of a single product line of many may not.[93] This approach to the product line doctrine renders it virtually identical to type 1 element-based continuity of enterprise.[94]

2. 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.[95] 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, good will, and the continuation of an established . . . enterprise.'"[96] A Pennsylvania court, after examining

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Judicial Dist. Asbestos Litig., 788 N.Y.S.2d 579, 583 (N.Y. App. Div. 2005); Garcia v. Coe Mfg. Co., 933 P.2d 243, 249 (N.M. 1997); *Hall*, 692 P.2d at 790.

[91] *Hall*, 692 P.2d at 792.

[92] *Id* at 791.

[93] *See Garcia*, 933 P.2d at 249 (adopting *Ray v. Alad* and discussing justifications for product line and continuing enterprise liability).

[94] *See Ray*, 560 P.2d at 9.

[95] LeFever v. K.P. Hovnanian Enter., Inc., 734 A.2d 290, 298–99 (N.J. 1999); Dewejko 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).

[96] *LeFever*, 734 A.2d at 299 (quoting Mettinger v. Globe Slicing Machine Co., 709 A.2d 779, 785 (153 N.J. 371, 384 (N.J. 1988) (Pollock, J., dissenting) (other citations omitted)).

whether it was better to expand the mere continuation doctrine or adopt the product line doctrine, decided upon the latter 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 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.[97]

3. Type 3: Ambiguous

[97] *Dawejko*, 434 A.2d at 106.

Georgia and Indiana have both commented upon the product line exception, arguably favorably, without expressly adopting it.[98]

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 amount courts adopting continuity of enterprise is whether the predecessor must have become defunct, in some sense. *Turner v. Bituminous Casualty Co.*,[99] is the ovular case for the continuity of enterprise theory and it includes dissolution of the predecessor as a factor, noting that if the predecessor "legally and/or practically becomes defunct. [The injured person] has no place to turn for relief except to the second corporation."[100] The court set forth the following as "guidelines"[101] 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[;]

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[98] *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, 483–87 (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).

[99] 244 N.W.2d 873 (Mich. 1976).

[100] *Id.* at 878.

[101] *Id.* at 883.

> (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.[102]

There is variation within the continuity of enterprise species of successor liability on the point of whether the predecessor entity must actually be dissolved for liability to attach and recovery against the predecessor to occur. Some courts allow recovery against the successor without addressing whether or not the predecessor dissolved.[103]

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

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[102] *Id.* at 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 supra* note 94–96 and accompanying text regarding similarity of product line liability to the continuation of the business doctrines.

[103] *See* Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 173, 175–76 (5th Cir. 1985) (products liability action allowed to proceed against successor under continuity of enterprise theory where the successor "splitoff" from an extant predecessor; applying Mississippi law). *See generally* Holloway v. John E. Smith's Sons, 432 F. Supp. 454, 454–56 (D.S.C. 1977) (unclear whether the predecessor ceased operations, liquidated or dissolved).

dissolved (regardless of whether or not it has merely ceased ordinary business operations and exists only as a legal, not a practical, matter).[104]

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.[105] While failure of the predecessor to dissolve may not be fatal in every action for continuity of enterprise successor liability, especially where the predecessor remains a viable source for recourse, this is generally fatal to the successor's liability.[106] This appears to be the most rational approach in terms of the policies underlying successor liability.[107]

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 has not only failed to dissolve, but remained operating and viable.[108] This being so, it is hard to conclude that

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[104] *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) for the rule that "the corporation must cease ordinary business operations, liquidate, and dissolve."). 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 ten 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 by providing a convenient bright-line rule.

[105] *See* Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 511 (Mich. 1999) (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.'").

[106] *See* Knapp v. N. Am. Rockwell Corp., 506 F.2d 361, 369 (3d Cir. 1974).

[107] Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 878 (Mich. 1976); *Foster*, 597 N.W.2d at 511.

[108] *See* Santa Maria v. Owens-Illinois, Inc., 808 F.2d 848, 859, 862 (1st Cir. 1986) (applying New York law, the court stated 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 injury" (emphasis in original)—in that case, the predecessor

dissolution of the predecessor is, or should be, required.[109] 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 Predecessory 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 it is 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."[110] Moreover, federal courts, in

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continued to operate and "maintain[] a substantial ongoing sales and manufacturing presence . . . ."); Diaz v. South Bend Lathe Inc., 707 F. Supp. 97, 102–03 (E.D.N.Y. 1989) (court notes that continuity of enterprise exception applies, *inter alia*, where the "original entity ceased its ordinary business operation by dissolving 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—there, in that case the predecessor continued to operate and manufacture electrical components); Flaugher v. Cone Automatic Mach. Co., 507 N.E.2d 331, 340 (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").

[109] Judge Posner notes as much in Brandon v. Anesthesia & Pain Mgmt. Assocs., 419 F.3d 594, 600 (7th Cir. 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. *Brandon*, 419 F.3d at 600.

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

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.[111]

Finally, the Third Circuit and Pennsylvania district courts have held that under Pennsylvania's product line continuation exception, there can be no successor liability remedy afforded by filing a claim in bankruptcy proceedings.[112] 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*, a case 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 where the plaintiff failed to *make any effort* to assert his potentially available remedies in bankruptcy or in a

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[111] *See* Chicago Truck Drivers v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995) (successor liability for delinquent pension fund payments and withdrawal liability); *see also* Rojas v. TK Communications, Inc., 87 F.3d 745, 749 (5th Cir. 1996) (sexual harassment under Title VII); Central States, Se. and Sw. Areas Pension Fund v. Wiseway Motor Freight, No. 99 C 4202, 2000 WL 1409825, at *5 (N.D. Ill. Sept. 26, 2000) (pension withdrawal liability); Anderson v. J.A. Interior Applications, Inc., No. 97 C 4552, 1998 WL 708851, at *5 (N.D. Ill. Sept. 28, 1998) (successor liability for delinquent employee benefit contributions); Ninth Ave. Remedial Group v. Allis-Chalmers, 195 B.R. 716, 724, 726–27, 730–31 (N.D. Ind. 1996) (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).

[112] Zerand-Bernal Group v. Cox, 23 F.3d 159, 163 (7th Cir. 1994); LaFountain v. Webb Indus. Corp., 951 F.2d 544, 547–48 (3d Cir. 1991); Forrest v. Beloit Corp., 278 F. Supp. 2d 471, 478 (E.D. Pa. 2003); Shaffer v. South State Mach., Inc., 995 F. Supp. 584, 585–86 (W.D. Pa. 1998).

pending lawsuit against the original manufacturer."[113] However, in *LaFountain v. Webb Industries Corporation*,[114] 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,[115] and subsequent courts have followed this seemingly erroneous interpretation.[116]

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

In terms of required elements or factors for consideration, the better approach appears to be to look at the availability of relief against the predecessor as 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

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[113] Conway v. White Trucks, 885 F.2d 90, 97 (3d Cir. 1989) (emphasis added).

[114] 951 F.2d 544. (3d Cir. 1991).

[115] *Id.* at 547.

[116] *See, e.g.*, Keselyak v. Reach All, Inc., 660 A.2d 1350, 1353-54 (Pa. Super. Ct. 1995) (citing *Conway* and *LaFountain* in affirming trial court holding that, "the continued existence of a viable cause of action against [the predecessors] precluded application of the product line exception so as to permit suit against [the successor]."); Kradel v. Fox River Tractor Co., 308 F.3d 328, 332 (3d Cir. 2002) (citing *Keselyak*, which cited *LaFountain*, for the proposition that "[clearly the] inability to recover from an original manufacturer is a prerequisite in Pennsylvania to the use of the product line exception.").

[117] *See, e.g.*, Foster v. Cone-Blanchard, 597 N.W.2d 506, 511. (Mich. 1999).

[118] Musikiwamba 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 48, 51 (7th Cir. 1995).

remedies against the predecessor and are likely not to apply the "equitable" successor liability doctrine in these circumstances.[120] This is consistent with the origins of the doctrine as an escape valve for satisfaction of liability that would otherwise be suppressed by the general no-liability-for-asset-purchasers rule.

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:

> [T]he Restatement 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.[121]

Thus, the majority—and probably the better—approach is that courts should treat the ability to recover against the predecessor as a factor,[122] not a bar to successor liability. For example, in *Anderson v. J.A. Interior Applications*,[123] a case in which the predecessor was a debtor in an ongoing Chapter 7 action, the court rejected the successor's arguments

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[120] *See, e.g.*, Conway v. White Trucks, 885 F.2d 90, 97 (3d Cir. 1989); Callahan & Sons v. Dykeman Elec. Co., 266 F. Supp. 2d 208, 226 (D. Mass. 2003) (failure to file a claim in a receivership); *see also* Central States, Se. & Sw. Pension Fund v. Wiseway Motor Freight, Inc., No. 99 C 4202, 2000 WL 1409825, at *8 (N.D. Ill. Sept 26, 2000).

[121] Savage Arms, Inc. v. W. Auto Supply, 18 P.3d 49, 57 (Alaska 2001).

[122] *See Chicago Truck Drivers*, 59 F.3d at 51.

[123] Anderson v. J.A. Interior Applications, No. 97 C 4552, 1998 WL 708851 (N.D. Ill. Sept. 28, 1998).

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 the 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

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[124] *Id.* at *6–7 (citing Chicago Truck Drivers v. Tasemkin, 59 F.3d 48, 50–51 (7th Cir. 1995)).

[125] *Id.* at *5, 7.

[126] 501 F.2d 1145 (5th Cir. 1974).

[127] 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. v. Cox, 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).

Solely relating to 363(f) claims. *See In re* Portrait Corp. of Am., Inc., 406 B.R. 637, 641 n.4 (Bankr. S.D.N.Y. 2009) ("Courts in this circuit clearly view section 363(f) to have a broader reach than *Zerand* did."); *see, e.g., In re* Chrysler, 405 B.R. at 98; *In re* Lawrence United Corp., 221 B.R. 661, 668 (Bankr. N.D.N.Y. 1998) ("interests" under section 363(f) are not limited to in rem interests).

rejected the product line theory of successor liability[129] because risk-spreading was a primary justification for that theory.[130] The court had denounced risk-spreading as a justification for imposing strict liability in an earlier decision, maintaining that "strict liability is not a no-fault system of compensation."[131] The court also stated "to the extent *Cyr* does suggest that we embrace risk-spreading, it is no longer a valid interpretation of New Hampshire law."[132] Then, in *Bielagus v. EMRE,*[133] 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.[134] This position is noteworthy not just because it states the law of New Hampshire, but also because *Cyr* was an important case and courts in twenty-seven other states either accepted it, considered it with ambivalence, or disapproved of it.[135]

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[128] 543 A.2d 407 (N.H. 1988).

[129] *See supra* notes 86–89 and accompanying text.

[130] *Simoneau*, 543 A.2d at 408–09.

[131] *Id.* at 409 (quoting Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 845–46 (N.H. 1978)).

[132] *Id.* at 409.

[133] 826 A.2d 559 (N.H. 2003).

[134] *Id.* at 569. In rejecting this position, the New Hampshire Supreme Court denounced *Cyr* and Kleen Laundry and Dry Cleaning Servs. v. Total Waste Mgmt. I (817 F. Supp. 225 (D.N.H. 1993)) & II (867 F. Supp. 1136 (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.

[135] 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*: Ray v. Alad Corp., 560 P.2d 3, 8 (Cal. 1977) (creating the product

line exception); Rawlings v. D.M. Oliver, Inc., 159 Cal. Rptr. 119, 123–24 (Cal. Ct. App. 1979); *Connecticut*: A.G. Assocs. v. Parafati, No. CVN0041808 NE, 2002 WL 1162890, at *3 (Conn. Super. Ct. Apr. 11, 2002) (applying the continuity of enterprise exception). *Delaware*: Sheppard v. A.C. & S. Co., 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 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. Bitiminous 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, 108–10 (Pa. Super. Ct. 1981) (citing *Cyr* with approval and then adopting the product line exception). *Washington*: Martin v. Abbott Labs., 689 P.2d 368, 385–87 (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 (N.Y. 1983) (citing *Cyr* for the proposition that 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) (Callow, J. dissenting) (critiquing 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.,

In opposition to this contracting 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:

> 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

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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., 460 N.E.2d 895, 899 (Ill. App. Ct. 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. App. Ct. 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, 571–72 (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, 124 (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 the consumer," but holding that any extension of the traditional 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.I, Inc., 413 S.E.2d 605, 609–10 (Va. 1992) (expressly rejecting the "product line exception" and the "expanded mere continuation exception").

> 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.
>
> ….
>
> 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 corporation'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 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.[136]

Commentators have noted that growth of the product line and continuity of enterprise theories began to wane in the 1980s.[137] Although some are optimistic that the expanded exceptions have recently received favorable treatment by some courts,[138] others recognize that "a number of courts have recently refused to extend the traditional principles of successor liability in order to compensate plaintiffs."[139] Regardless of the current state of the law, commentators routinely caution businesses to carefully structure asset sales because the law is not settled in many jurisdictions.[140]

4. The Restatement as Misstatement

The Restatement (Third) of Torts: Products Liability rejected the continuity of enterprise theory of successor liability.[141] The Products

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[136] Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 55, 56–57 (Alaska 2001).

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

[138] *Id.*

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

[140] *Id.* at 288–89; *see also* Jo Ann J. Brighton, *How Free is "Free and Clear"? A Practical Guide to Protection against Successor Liability when Purchasing Assets Out of a Bankruptcy Estate*, 21 SEP. AM. BANKR. INST. J. 1, 42–43 (Sept. 2002).

[141] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12, cmts. b, g (1998).

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 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.[142]

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 states where the law is less developed."[143] 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."[144] Moreover, Professor Cupp has pointed out that the Products Liability Restatement "overstates courts' fondness for the traditional approach" to successor liability and

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[142] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 cmt. a (1998).

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

[144] 2 MADDEN & OWEN ON PRODUCTS LIABILITY § 19:6, n. 25.

understates the number of courts applying the broader continuity of enterprise theory (omitting Ohio and Mississippi).[145] 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.[146]

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 gone ahead of state courts and announced a position that was not reflective of the state of the law at the time it was adopted. It overstated the "trends" in applying the traditional approach over the less restrictive continuity exceptions of enterprise and product line theories, and it relied on corporate principles to the exclusion of principles underlying tort law.[147] It was, however, cited and relied upon heavily in *Lockheed Martin Corp. v. Gordon*,[148] in which the court states "Texas strongly embraces the non-liability rule."[149] On the other hand,

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[145] Cupp, *supra* note 135 at 857; *see also* Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 56–58 (Alaska 2001). Since then, South Carolina has rejected continuity of enterprise even while finding that Bankruptcy Code § 363(f) sales do not preempt state successor liability laws. Simmons v. Mark-Lift Indus., 622 S.E.2d 213, 223 (S.C. 2005).

[146] *See* Cupp, *supra* note 135, at 856–57, 894 (suggesting that the predictions of "serious future consequences" of the less restrictive approaches broadly applied are outdated).

[147] *See, e.g.*, Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 56–58 (Alaska 2001); 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, *supra* note 135, at 856–57, 894.

[148] Lockheed Martin Corp. v. Gordon, 16 S.W.3d 127, 139 (Tex. Ct. App. 2000).

[149] *Id.* at 139; *cf.* Holland v. Williams Mountain Coal Co., 256 F.3d 819, 825 (D.C. Cir. 2001) (noting that the "majority" of courts follow the traditional mere continuation rule and citing the Restatement section 12 and Pearson v. Nat'l Feeding Sys., 90 S.W.3d 46, 51 (Ky. 2002) (referring to "Restatement

the Alaska Supreme Court rejected the Restatement (Third) approach in *Savage Arms*.[150]

G. Statutory Abolishment – One Last Approach

Texas has adopted a statute that limits successor liability to express assumption and statutory mergers.[151] The statute was passed expressly to legislatively overrule common law successor liability doctrine.[152] While this standard is probably the most efficient to administer in terms of cost—"just say no"—it is inflexible and invites sharp drafting, thereby providing little or no recourse to involuntary creditors who have no place at the table when the transactional documents are being prepared.

H. So What is Successor Liability, Really?

1. Is it a Type of Fraudulent Conveyance Liability?

In her article *Making Sense of Successor Liability*,[153] Professor Reilly suggests that, except for express assumption, the basis of common law forms of the successor liability is to serve the same purpose as fraudulent transfer law: protecting a predecessor's creditors from the effect of a

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(Third) of Torts: Products Liability § 12 (1998) for a general review of successor-in-interest liability")); New York v. Charles Pfizer & Co., 260 A.D.2d 174, 176 (N.Y. App. Div. 1999) (citing "Restatement 3d § 12 comment b and note thereto" and stating "[w]ere 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 be addressed by the legislature").

[150] *Savage Arms, Inc.*, 18 P.3d at 56–58; *see* Lefever v. K.P. Hovnanian Enter. Inc., 734 A.2d 290, 294–95 (N.J. 1999); Saez v. S & S Corrugated Paper Mach. Co., 695 A.2d 740, 746–47 (N.J. Super. Ct. App. Div. 1997).

[151] TEX. BUS. CORP. ACT ANN. § 10.254(b) (West 2007).

[152] *See* C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 791–92 (Tex. Ct. App. 2004).

[153] Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745, 748–49 (2003).

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;[154] 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 of 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—specifically, future claimants who can take no action to protect themselves from the effects of the transfer.[155]

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

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[154] 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.

[155] Frank Fagan, *From Policy Confusion to Doctrinal Clarity: Successor Liability from the Perspective of Big Data*, 9 VA. L. & BUS. REV. 391, 433 (2015).

pay?[156] 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.[157]

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 and 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, a better rule is a flexible standard that is resistant to the "draft around."[158] Such a 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.

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156 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).

157 George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FL. ST. U. BUS. L. REV. 9, 53 (2007).

158 *Id.*

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

Successor liability may appear at first blush to be an interest in property. Thus, it may appear to 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 servitudes 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.[159] 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 otherwise follow the assets to the successor.[160] 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." For this reason, 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

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[159] Conway v. White Trucks, 692 F. Supp. 422 (M. D. Penn. 1988).

[160] 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, 121 (1987); *see also In re* Grumman Olson Indus., Inc., 467 B.R. 694, 702 (S.D.N.Y. 2012); 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 Carlson's position as arguing "Section 11 U.S.C. § 363(f)(5) of the Bankruptcy Code 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 a cash proceeds would be paid.").

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 when 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.[161] 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 uses, successor liability will not lie.[162] The necessary elements 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 mere continuation species is to view successor liability as arising out of *the business* that is conducted with the assets involved.[163] 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.[164] Once the purchaser's conduct or the use of the assets to operate a business matches one of the applicable species of

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[161] *See* Kuney, *supra* note 155, at 55.

[162] Carlson, *supra* note 158, at 121.

[163] *See* Kuney, *supra* note 155, at 55.

[164] *See* Jerry J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. REV. 906, 908 (1983).

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 stripping it of the normal protections of corporate law. And when there is a *de facto* merger, a consolidation, or a continuation of a business or when 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.[165]

Courts that embrace plaintiff's entreaties to do substantial justice and 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). 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 back or adjustment of the purchase price, an escrow, or insurance) seems a small price to pay to afford otherwise injured but

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

uncompensated parties a means of recovery.[166] 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.[167] As the old saying goes, "you pay your money and

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[166] 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, outside of bankruptcy, claimants seeking to impose successor liability frequently, if not usually, will be among the *disfavored* class of creditors of the transferor. If a 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 certain favored creditors, such as trade creditors and others holding debts incurred in the ordinary course of business, will have been paid 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*, 61 BUS. LAW. 179, 188 (2005) (emphasis in original) (internal footnotes and citations omitted).

[167] 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, 918 F.2d 438, 455–56 (4th Cir. 1990) (collecting authorities); Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 106–07 (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, or, presumably, continuity of enterprise. *See* Lloyds of London v. Pac. Sw. Airlines, 786 F. Supp. 867, 869 (C.D. Cal. 1992). This subject, however, is beyond the scope of this article.

you take your chances."[168] Why change that rule to benefit capital to the detriment of future claimants who, by their very nature, can do nothing to protect themselves?

IV. 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 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 of 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 has an incentive to bargain for the

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[168] Gardener v. Zulu Soc. Aid & Pleasure Club, Inc., 729 So. 2d 675 (La. Ct. 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 "throw" (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.).

seller to remain in existence for some predetermined time period. The purchasers should also provide the proper or other consideration to assure that it will.[169] If necessary, the successor could require the predecessor to remain in some sort of active business using the proceeds of sale rather than distributing the proceeds to equity after paying existing creditors. Similarly, if a jurisdiction adheres to the continuity doctrine, then the well-advised purchaser has an incentive 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.[170]

Erecting barriers to a flexible examination of the totality of the circumstances within a multi-factor framework when a claim is later asserted invites structuring transactions in form, rather than substance,

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[169] This appears to be exactly what had occurred in Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd., 419 F.3d 594 (7th Cir. 2005).

[170] 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 doctrines. This order, if entered without modification, becomes final after a 10-day-notice-of-appeal period and is binding on all parties in interest nationwide due to the supremacy clause of the federal Constitution. At least one bankruptcy attorney called it "putting the business through the shower" to wash off the undisputed so that it can emerge clean on the other side. *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235 (2002) (describing the process and practice).

to avoid successor liability.[171] 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 borne 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

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[171] Yet arms-length 11 U.S.C. § 363 sales should not bring with them the specter of successor liability at all.

> In an article currently being prepared for publication, Professor George Kuney will contend that if a bankruptcy sale is at arms-length and properly conducted, the purchaser should not be subject to successor liability under non-bankruptcy law. With regard to certain categories of successor liability, that is undoubtedly the case. If (1) a bankruptcy sale 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.

Michael H. Reed, *Successor Liability Revisited – New Paridigms*, 61 BUS. LAW. 179, 188 (2005) (emphasis added, internal footnotes and citations omitted).

officers, directors, or shareholders have been officers, directors, or shareholders to predecessor.[172] If this requirement is applied rigidly, it will foreclose liability when, for instance, an insolvent business' 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.[173] But, as the last priority of claimants that were "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 debt holders, and a well-reasoned argument can be made that they should be treated as such.[174] 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 the 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, no one will bring cases like this. The transaction can be structured to avoid the appearance of a qualifying transaction under either rule.

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

173 *See, e.g., In re* The Colad Group, Inc., 324 B.R. 208 (W.D.N.Y. 2005) (purchaser of secured debt controlled the debtor and caused it to commence a Chapter 11 case and 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).

174 *See, e.g.*, Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twighlight*, 56 STAN. L. REV. 673, 696 (2003); David A. Skeel, Jr., *The Natural 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).

Adoption of rigid standards or preemptive litigation practices like those 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."[175] 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.

V. 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, such as 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" 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

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[175] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (Harper Torchbooks 1967).

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, walked like a duck, and sounds like a duck, it is a duck. And so it is with this duck. We reverse.[176]

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

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[176] People v. Pac. Gaming Techs., 82 Cal. App. 4th 699, 700 (2004); *see also* 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."); Pieper v. Commercial Underwrites Ins. Co., 59 Cal. App. 4th 1008, 1014 (Cal. Ct. App. 1997) (""if it looks like a duck, walked like a duck and quacks like a duck, it's a duck' – not a platypus"); *cf.* Aetna Cas. & Surety Co. v. Humboldt Loaders, Inc., 249 Cal. Rptr. 175, 180 n.5 (Cal. Ct. App. 1988) ("respondents advanced . . . the argument that, '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.' [In the context of pleadings,] the Legislature has quite clearly stated that no such 'ducks' are permitted . . ."); Perry v. Robertson, 247 Cal. Rptr. 74, 75 n.1 (Cal. Ct. App. 1988) ("the tort-contract action" could be seen as "either as a duck or as a rabbit, . . . depending on the will of the viewer.")

APPENDIX

Appendix to George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. BUS. L. REV. 9 (2007), last update completed June 31, 2013.

This appendix represents the author's attempt to explain the characteristics of each of the judge-made forms of successor liability in the 50 states and other jurisdictions listed. These presentations should be thought of as a set of "field notes" as they are often based on sketchy, brief observations of the doctrines in jurisdictions where the reported case law is thin or where the state supreme court has not spoken. As the story of *Cyr v. Offen* in New Hampshire shows, at times, long standing assumptions about the doctrine can be quickly reversed or undermined.

This appendix is updated regularly to track the state of the law in this field. Please note that while the author and editors are cognizant of the formalities of the blue-book form, we have chosen to abandon the use of "*Id.*" in this appendix in order to avoid confusion between multiple layers of citation.

Comments are welcome and will be incorporated into future editions of this document, which can also be found at http://www.law.utk.edu/people/george-w-kuney/, under "publications" following the article listing for the original article.

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Alabama

Alabama recognizes the four traditional exceptions and the continuity of enterprise exception to the general rule of successor non-liability in asset purchases.[177] The general rule and traditional exceptions are described as follows:

> As a general rule, where one company sells or otherwise transfers all its assets to another company, the transferee is not liable for the debts and liabilities of the transferor unless (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.[178]

In *MPI Acquisitions*, the Supreme Court of Alabama ruled that the state's successor liability laws were preempted by an order from the United States Bankruptcy Court declaring a successor's purchase of the

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[177] Prattville Mem'l Chapel & Memory Gardens, Inc. v. Parker, 10 So. 3d 546, 555–56 (Ala. 2008) (quoting Andrews v. John E. Smith's Sons Co., 369 So. 2d 781, 785 (Ala. 1979)). *But see* Daake v. 331 Partners, LLC (*In re* 331 Partners, LLC), No. 11-00049-CG-C, 2011 WL 3440099, at *5 (S.D. Ala. Aug. 8, 2011) ("Liability will be imposed on a successor only where: (1) the successor expressly or impliedly assumes obligations of the predecessor, (2) the transaction is a de facto facto merger, (3) the successor is a *mere continuation* of the predecessor, or (4) the transaction is a fraudulent effort to avoid the liabilities of the predecessor.") (emphasis added) (internal quotations omitted) (citing Amjad Munim, M.D., P.A. v. Azar M.D., 648 So. 2d 145, 153–54 (Fla. Dist. Ct. App. 1994)). The *331 Partners* case reinforces Alabama's recognition of the four traditional exceptions to the general rule of non-liability as stated in the *Prattville* case.

[178] *Prattville Mem'l Chapel*, 10 So. 3d at 555 (quoting *Andrews*, 369 So. 2d at 785).

predecessor's assets to be free and clear of liability for any claims involving products manufactured and sold by the predecessor.[179]

Alabama: The Express Assumption Exception

Unlike many states which include implied assumption in the traditional exceptions, Alabama requires "an *express* agreement to assume the obligations of the transferor."[180] In *Watts v. TI, Inc.*, for example, the plaintiff argued that a paragraph of the asset purchase agreement entitled "Indemnification" constituted an express agreement to assume.[171.1] The court rejected this argument, stating: "After reviewing the indemnification portion of the asset purchase agreement, we conclude that that document, while indicating an agreement to assume some existing contractual obligations, does not amount to an express agreement to assume future claims in tort."[181] Alabama courts have also rejected an 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 vendor commitments from the selling corporation."[182]

Of note is that courts appear to have confused the application of the mere continuation or continuity of enterprise exception with the express assumption exception, treating express assumption as merely a

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[179] MPI Acquisition, LLC v. Northcutt, 14 So. 3d 126, 128–30 (Ala. 2009) (overturning Glenn v. Steelox Bldg. Systems, Inc. 698 So. 2d 142 (Ala. Civ. App. 1997)).

[180] *Prattville Mem'l Chapel*, 10 So. 3d at 555 (emphasis added) (quoting *Andrews*, 369 So. 2d at 785).

[171.1] Watts v. TI, Inc., 561 So. 2d 1057, 1060 (Ala. 1990).

[181] *Watts*, 561 So. 2d at 1060.

[182] Asher v. KCS Int'l, 659 So. 2d 598, 600–01 (Ala. 1994) (citing Brown v. Econ. Baler Co., 599 So. 2d 1, 3 (Ala. 1992); Turner v. Wean United, Inc., 531 So. 2d 827, 831 (Ala. 1988).

factor in analyzing the continuation or continuity of enterprise exceptions.[183]

Alabama: The Fraud Exception

Alabama courts will review the record for evidence of fraud, without applying any specific test.[184]

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.[185] In *Matrix-Churchill v. Springsteen*, for example, the court stated in finding that an asset purchase was a *de facto* merger that "the trial court doubtless was

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[183] Turner v. Wean United, 531 So. 2d at 831(stating in applying the continuity of enterprise exception: "The third factor to be considered is whether [the successor] expressly assumed the liabilities of [the predecessor] . . . . The motives behind the sale of assets in 1961 are not relevant to the question of whether there was an express assumption of liability for damages in products liability actions. An assumption of liability would be a strong indicator of continuity of enterprise, and its absence here tends to indicate the contrary."); Matrix–Churchill v. Springsteen, 461 So. 2d 782, 788 (Ala. 1984) (noting in applying the mere continuation exception that "the record does not disclose any express agreement between [the successor and predecessor] whereby the former was to assume the obligations of [the latter] . . ."); Rivers v. Stihl, Inc., 434 So. 2d 766, 772 (Ala. 1983) (applying the continuity of enterprise exception, the court stated: "Another factor . . . militates in favor of the imposition of liability on Stihl, Inc. [the successor]. Here, Stihl, Inc. expressly assumed liability for damages in products liability actions arising out of sales of Stihl products by [the predecessor]."); *see also Prattville Mem'l Chapel*, 10 So. 3d at 556 ("This Court [in *Rivers v. Stihl, Inc.*] never stated the four factors of the continuation [sic] exception, but based its finding on several 'factors' from *Andrews* and *Turner v. Bituminous Casualty Co.*, including *an express assumption of liabilities*.") (emphasis added).

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

[185] *See, e.g.*, *Matrix–Churchill*, 461 So. 2d at 786–88 (applying guidelines for determining continuity of enterprise to resolve whether there was a *de facto* merger between a predecessor and a successor).

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 ([Mich.] 1976) . . . ."[186] 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 successorwas] supported by the facts[.]"[187] 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.[188]

In *Daake v. 331 Partners, LLC (In re 331 Partners, LLC)*, the federal district court recited its restatement of Alabama law on de facto merger:

> "To find a de facto merger there must be continuity of the selling corporation evidenced by the same management, personnel, assets and physical location; a continuity of the stockholders,

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[186] *Matrix–Churchill*, 461 So. 2d at 786.

[187] *Matrix–Churchill*, 461 So. 2d at 787.

[188] *Matrix–Churchill*, 461 So. 2d at 787–88.

> accomplished by paying for the acquired corporation with shares of stock; a dissolution of the selling corporation; and assumption of the liabilities.[189] 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 another."[190]

This summary is, of course, from a federal court and should not be dispositive as to Alabama state law.

Alabama: The Continuity of Enterprise Exception

The Alabama Supreme court explicitly adopted the continuity of enterprise exception in *Andrews v. John E. Smith's Sons Co.*[191] Later, however, Alabama adopted the *Turner v. Bituminous Casualty* factors as a set of required elements holding that there must be "substantial evidence" of each in order to impose successor liability:

> 1) There was a basic continuity of the enterprise of the seller corporation, including, apparently, a retention of key personnel, assets, general business operations and even the [seller's] name.
>
> 2) The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of

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189 Daake v. 331 Partners, LLC (*In re* 331 Partners, LLC), No. 11-00049-CG-C, 2011 WL 3440099, at *5 (S.D. Ala. Aug. 8, 2011) (citations omitted) (quoting Amjad Munim, M.D., P.A. v. Azar M.D., 648 So. 2d 145, 153–54 (Fla. Dist. Ct. App. 1994) (citing Matrix–Churchill, 461 So. 2d at 787).

190 *In re* 331 Partners, LLC, 2011 WL 3440099, at *5 (quoting 300 Pine Island Assocs., LTD v. Steven L. Cohen & Assocs., P.A., 547 So. 2d 255, 256 (Fla. Dist. Ct. App. 1989) (citations omitted)).

191 *Andrews v. John E. Smith's Sons Co.,* 369 So. 2d 781, 785 (Ala. 1979).

> 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 of the seller corporation.
>
> 4) The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.[192]

Alabama: The Mere Continuation Exception

Alabama courts have blurred the distinction between the mere continuation exception and continuity of enterprise exception, using the terms interchangeably and applying the same test for both. In order to show 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.[193]

As the Supreme Court of Alabama explained in *Brown v. Economy Baler Co.*:

> In *Turner v. Wean United, Inc.*, 531 So.2d 827, 830–31 (Ala.1988) . . . this Court addressed [whether] "the transferee corporation is a mere continuation of the

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[192] Prattville Mem'l Chapel & Memory Gardens, Inc. v. Parker, 10 So. 3d 546, 555–57 (Ala. 2008) (quoting Asher v. KCS Int'l, Inc., 659 So. 2d 598, 599–600 (Ala. 1995) ((quoting Brown v. Econ. Baler Co., 599 So. 2d 1, 3 (Ala. 1992) (quoting Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 883–84 (Mich. 1976)) (citing Pietz v. Orthopedic Equipment Co., 562 So.2d 152 (Ala. 1989)) (rejecting the plaintiff's argument that Alabama cases supported a totality of the circumstances test for mere continuation and requiring substantial evidence supporting each *Turner* criterion).

[193] Parrett Trucking, Inc. v. Telecom Solutions, Inc., 989 So. 2d 513, 519–20 (Ala. 2008) (citing *Brown*, 599 So. 2d at 3); Asher v. KCS Int'l, Inc., 659 So. 2d 598, 599–600 (Ala. 1995) (citing *Brown*, 599 So. 2d at 3).

> transferor"[;] there we referred to it as the "continuity of the enterprise test." Under that test, [transferee] would be a mere continuation of [the transferor] if there is substantial evidence of *each* of the following factors:
>
> "1) There was 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.
>
> "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."[194]

In subsequent cases the Supreme Court has introduced its test by stating: "This court has adopted a four-factor test for determining whether a purchasing corporation is a mere continuation of the selling corporation. If there is substantial evidence of *each* of the four factors,

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[194] *Brown*, 599 So. 2d at 3 (quoting Turner v. Wean United, Inc., 531 So. 2d 827, 830 (Ala. 1988) (quoting Turner v. Bituminous Casualty Co., 397 Mich. 406, 244 N.W.2d 873, 883–84 (Mich. 1976) (citations omitted) and citing Pietz v. Orthopedic Equipment Co., 562 So.2d 152 (Ala. 1989)).

then [the purchasing corporation] may be held liable as a successor corporation."[195]

In a 2010 bankruptcy case in the Southern District of Alabama, the court stated that "[t]he indices of a continuation are, at a minimum, continuity of directors, officers, and stockholders, and the continued existence of only one corporation after the sale of assets"[196] and ruled "[i]n this case, the minimum indices of continuation are not met."[197]

In *Parrett Trucking, Inc. v. Telecom Solutions, Inc.*, the Alabama Supreme Court elucidated the prong of the mere continuation exception which requires that the predecessor corporation be dissolved, holding the predecessor must be absolutely dissolved in order to satisfy this requirement of the test.[198] Previously, the trial court had held that where a predecessor corporation had no remaining assets, did not pay any taxes, and was in the process of dissolution but still made filings with the Alabama secretary of state as required by law, the predecessor had "effectively dissolved."[199] The Supreme Court reversed, stating "[t]hat [though the predecessor] is 'for all practical purposes dissolved,' as [plaintiff] states in its brief, or 'effectively dissolved,' as the trial court found in its order, [this] is insufficient. There must be evidence of dissolution."[200]

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195 *Parrett Trucking, Inc.*, 989 So. 2d at 519–20 (quoting *Asher*, 659 So. 2d at 599) (citing *Brown*, 599 So. 2d at 1).

196 *In re* 331 Partners, LLC, No. 10-00846-MAM, 2010 WL 4676621, at *6 (Bankr. S.D. Ala. Nov. 9, 2010) (citing Milliken & Co. v. Duro Textiles, LLC, 887 N.E.2d 244 (Mass. 2008)).

197 *In re 331 Partners, LLC*, 2010 WL 4676621, at *6.

198 *Parrett Trucking, Inc.*, 989 So. 2d at 520–21 (finding that testimony that the predecessor may have been dissolved to be insufficient and holding instead that "[t]here must be evidence of dissolution").

199 *Parrett Trucking, Inc.*, 989 So. 2d at 520–21.

200 *Parrett Trucking, Inc.*, 989 So. 2d at 521; *see also* Prattville Mem'l Chapel & Memory Gardens, Inc. v. Parker, 10 So. 3d 546, 557–58 (Ala. 2008) ("Although the evidence clearly shows that PMG no longer operated the cemetery after it was purchased by Jefferson and that Jefferson no longer operated the cemetery

Alaska

In the 2001 *Savage Arms* case, the Supreme Court of Alaska adopted two species of successor liability: mere continuation and continuity of enterprise.[201]

In 2002 the Alaska legislature passed a bill (CSHB 499(JUD)) that would have expressly overturned the portion of *Savage Arms* that adopted the continuity of enterprise exception; the bill, however, was vetoed by the governor.[202] Alaska's attorney general recommended that the bill be vetoed, stating, *inter alia,* "while this bill may be legally defensible, we anticipate lengthy and costly litigation to challenge the bill. Additionally, we believe that the Alaska Supreme Court properly decided the case."[203]

Alaska: The Mere Continuation Exception

In *Savage Arms*, the court adopted the "traditional" mere continuation exception.[204] The court stated, "[t]he 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."[205]

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after it was purchased by Memorial Chapel, no evidence shows whether Jefferson and PMG dissolved soon after those sales.").

[201] Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 55–58 (Alaska 2001).

[202] H.B. 499, 22ND LEG., 3RD SPEC. SESS. (Alaska 2002) (vetoed by the Governor).

[203] Office of the Attorney Gen., Re: CSHB 499(JUD)—declaring legislative intent to reject the continuity of enterprise exception to the doctrine of successor liability adopted in Savage Arms, Inc. v. W. Auto Supply, 18 P.3d 49 (Alaska 2001), as it relates to products liability, 2002 WL 32388334, Alaska Att'y Gen. (Jun. 11, 2002).

[204] *Savage Arms*, 18 P.3d at 55.

[205] *Savage Arms*, 18 P.3d at 55.

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."[206] The court then stated: "[t]his 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."[207]

Before expressly adopting the continuity of the enterprise exception, the court reviewed multiple policy considerations that weighed against the exception, ultimately discounting each.[208] The court then stated, "this new rule will also have the effect of encouraging existing corporations to produce safer products, in keeping with the public policy goals that underlie product liability law generally."[209] The court was also concerned that the traditional exceptions did 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

[206] *Savage Arms*, 18 P.3d at 55–56 (citing Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 883–84 (Mich. 1976)); David W. Pollak, *Successor Liability in Asset Acquisitions*, 1126 PLI/CORP. 85, 103 (1999); 63 AM. JUR. 2d *Prod. Liab.* § 132).

[207] *Savage Arms*, 18 P.3d at 56.

[208] *Id.* at 56–58.

[209] *Id.* at 58.

> to maximize the corporations' market value in event of sale.[210]

Arizona

In *Winsor v. Glasswerks PHX, L.L.C.*, the Arizona appellate court 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.[211] 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.[212]

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

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[210] *Id.* at 58 (citations omitted).

[211] Winsor v. Glasswerks PHX, L.L.C., 63 P.3d 1040, 1044–50 (Ariz. Ct. App. 2003).

[212] *Winsor*, 63 P.3d at 1044 (quoting A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co., 836 P.2d 1034, 1039 (Ariz. Ct. App. 1992)); *see also* Warne Invs., Ltd. v. Higgins, 195 P.3d 645, 650 (Ariz. Ct. App. 2008) (noting that Arizona courts recognize the four traditional exceptions to the general rule of successor non-liability) (citing *Teeters*, 836 P.2d at 1039).

> 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.[213]

The court reasoned that it would "defer to the legislature in its representative capacity, because (i) the core issue is one of policy for the legislature, (ii) predictability in our commerce should be encouraged, (iii) the proposed exceptions modify or minimize fundamental principles of tort liability, and (iv) our present rule already allows for liability against certain successor corporations."[214]

The Arizona courts have not developed any tests for the express/implied assumption, *de facto* merger, or fraud exceptions. As the court recently explained in *Beals v. Moore*, successor liability applies in Arizona "only when '[a] corporation goes through a mere change in form without a significant change in substance[.]'"[215] Limits in Arizona also ensure that liability is not extended "beyond those entities who are causally linked to the defective product by having placed it into the stream of commerce."[216]

Arizona: The Mere Continuation Exception

"A crucial factor in determining if a successor corporation is a 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,

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213 *Winsor*, 63 P.3d at 1047.

214 *Winsor*, 63 P.3d at 1047–50.

215 Beals v. Moore, No. 2 CA-CV 2008-0090, 2009 WL 499531, at *5 (Ariz. Ct. App. Feb. 27, 2009) (quoting *Warne Invs.*, 195 P.3d at 645 (quoting Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214, 222–23 (Vt. 2005)).

216 Antone v. Greater Ariz. Auto Auction, Inc., 155 P.3d 1074, 1076 (Ariz. Ct. App. 2007) (citing *Winsor*, 63 P.3d at 1048–49).

goods and services, and location)."[217] Arizona, like California, also requires proof of "insufficient consideration running from the new company to the old."[218] Successor liability in Arizona based on the mere continuation exception can be found even if the only assets transferred are intangible—e.g. goodwill.[219] If mere continuation is found, the successor corporation may be held liable for all debts of the predecessor.[220]

Arkansas

The Arkansas courts recognize the general rule of successor non-liability in asset purchases[221] and the four traditional exceptions.[222] In addition, the Arkansas Supreme Court appears to have recognized a continuity of enterprise theory without actually using the term.[223] In *Ford*

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[217] *Teeters*, 836 P.2d at 1039–40. (citing Culinary Workers & Bartneders Union No. 596 Health & Welfare Tr. v. Gateway Cafe, 91 588 P.2d 1334, 1343 (Wash. 1979)).

[218] *Teeters*, 836 P.2d at 1040 (quoting Maloney v. Am. Pharm. Co., 255 Cal. Rptr. 1 (Cal. Ct. App. 1989)) ("[B]efore one corporation can be said to be a mere continuation or reincarnation of another it is required that there be insufficient consideration running from the new company to the old."); *see also Warne Invs.*, 195 P.3d at 651 (stating that there must be proof of "insufficient consideration running from the new company to the old" to find that a corporation is a mere continuation of a predessor) (quoting *Teeters*, 836 P.2d at 1040).

[219] *Warne Invs.*, 195 P.3d at 651–653.

[220] *Id.* at 657.

[221] Ford Motor Co. v. Nuckolls, 894 S.W.2d 897, 903 (Ark. 1995) (citing Fort Smith Refrigeration & Equip. Co. v. Ferguson, 230 S.W.2d 943 (Ark. 1950)); Granjas Aquanova S.A. de C.V. v. House Mfg., Co., No. 3:07CV00168 BSM, 2010 WL 2243673, at *3 (E.D. Ark. Jun. 4, 2010) ("The general rule in Arkansas is that a purchaser corporation does not succeed to the liabilities of the selling corporation.") (citing *Ford Motor*, 894 S.W.2d at 903).

[222] *Ford Motor*, 894 S.W.2d at 903 (citing Swayze v. A.O. Smith Corp., 694 F. Supp. 619, 622 (E.D. Ark. 1988)).

[223] *See Ford Motor*, 894 S.W.2d at 904 (finding that a common identity of managers and employees and a continuity in good production between the selling and purchasing corporations was sufficient evidence for a jury to consider the continuation exception or the express assumption exception).

Motor Co. v. Nuckolls, the court held that the evidence presented was sufficient to warrant jury instructions on the "continuation exception or the express assumption exception[.]"[224] The court noted that although the successor's new owner "was in charge after the purchase, [he] relied on employees of the [successor] . . . to continue the day-to-day operation of the company."[225] Moreover, the successor's president and "[o]ther managers and employees testified as to their continued employment and the continuity in production of goods after the . . . purchase."[226]

California

California courts recognize the four traditional exceptions to the general rule of successor non-liability in asset purchases.[227] Importantly, the California Supreme Court is also responsible for creating the product line exception to non-liability.[228]

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[224] *Ford Motor*, 894 S.W.2d. at 904.

[225] *Ford Motor*, 894 S.W.2d. at 904.

[226] *Ford Motor*, 894 S.W.2d at 904; *see also Granjas Aquanova*, 2010 WL 2243673, at *3 ("[M]ost jurisdictions that recognize the "mere continuation" doctrine emphasize a common identity of officers, directors, and stock between the selling and purchasing corporations.") (citing *Swayze*, 694 F. Supp. at 622). In addition to these factors, Arkansas courts have applied the exception where there is a continuation of management. *See Ford Motor*, 894 S.W.2d at 904 (considering the common identity of managers between the selling and purchasing corporations in concluding that there was sufficient evidence for a jury to consider the continuation exception).

[227] Daniell v. Riverside Partners I, L.P., 142 Cal. Rptr. 3d 717 (Cal. Ct. App. 2012) (citing, *inter alia*, Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977)) (noting that successor liability would also entitle the purported successor to the defenses of the predecessor, including anti-SLAPP (Strategic Lawsuit Against Public Participation) protection); *see In re* Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d, 1011, 1031 (N.D. Cal. 2007) (citing Ray, 560 P.2d at 7); Orthotec, LLC v. REO Spineline, LLC, 438 F. Supp. 2d 1122, 1128 (C.D. Cal. 2006) (quoting Franklin v. USX Corp., 105 Cal. Rptr. 2d 11 (Cal. Ct. App. 2001)); Henkel Corp. v. Hartford Acc. & Indem. Co., 62 P.3d 69, 73 (Cal. 2003); CenterPoint Energy, Inc. v. Superior Court, 69 Cal. Rptr. 3d 202, 218 (Cal. Ct. App. 2007); Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1063 (N.D. Cal. 2007) (quoting Ray, 560 P.2d at 7).

[228] *Ray*, 560 P.2d at 11.

California: The Express or Implied Assumption Exception

In determining whether there was an express or implied assumption of liability, courts will examine the language of the asset purchase agreement or other document governing the transaction as well as consider extrinsic evidence if there are alleged ambiguities in the contract language.[229]

California: The De Facto Merger Exception

The California Supreme Court 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 . . . 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 . . .[230]

In *Marks v. Minnesota Mining & Mfg. Co.*, the Court of Appeal of California set out a five factor test to determine "whether a transaction cast in the form of an asset sale actually achieves the same practical result as a merger:"[231] (1) [W]as the consideration paid for the assets solely

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[229] *See* Fisher v. Allis–Chalmers Corp. Product Liability Trust, 116 Cal. Rptr. 2d 310, 315–18 (Cal. Ct. App. 2002) (finding an assumption of successor liability based on the language of a transfer agreement and extrinisic evidence concerning the transfer agreement).

[230] *Ray*, 560 P.2d at 7 (citations omitted) (citing Shannon v. Samuel Langston Co., 379 F. Supp. 797, 801 (W.D. Mich. 1974); Malone v. Red Top Cab Co. of Los Angeles, 60 P.2d 543 (Cal. Ct. App. 1936)).

[231] Marks v. Minnesota Mining & Mfg. Co., 232 Cal. Rptr. 594, 598 (Ct. App. 1986) (citing *Shannon*, 379 F. Supp. at 801; Kloberdanz v. Joy Mfg. Co., 288 F.

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?[232]

The Court of Appeal addressed the *de facto* merger exception at length in *CenterPoint Energy, Inc. v. Superior Court* and appeared to combine the standards applying to mere continuation and *de facto* merger. First, the court stated that to prevail on a *either* a *de facto* merger or mere continuation theory:

> [The] plaintiff would have to demonstrate (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 . . . . However, it is not dispositive that some of the same persons may serve as officers or directors of the two corporations.The relevant inquiries are whether the two corporations have preserved their

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Supp. 817, 821–822 (D. Colo. 1968); 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 7122, 7165.5, pp. 188–90, 339–40 (rev. perm. ed. 1983)).

[232] *Marks*, 232 Cal. Rptr. at 598 (citing *Shannon*, 379 F. Supp. at 801; Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817, 821–822 (Colo. 1968); 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 7122, 7165.5, pp. 188–90, 339–40 (rev. perm. ed. 1983)); *see also* Leve v. Patient Safety Techs., Inc., No. B220274, 2011 WL 2347578, at *6 (Cal. Ct. App. June 15, 2011) (quoting *Marks*, 232 Cal. Rptr. at 598) (stating that the five factors enumerated in *Marks* are "pertinent to a determination of whether an asset sale achieves the same practical result as a merger[.]").

> separate identities and whether recourse to the debtor corporation is available. [233]
>
> To constitute a valid reorganization that results in two separate entities, a corporate transaction must meet certain standards: An asset acquisition can amount to a de facto merger. This may occur where the purchaser acquires *all* assets, including *choses in action*, and also assumes *all liabilities* of the seller; the purchaser continues to operate the business and the seller dissolves. The crucial factor in determining whether a corporate acquisition constitutes either a de facto merger or a mere continuation is the same: whether adequate cash consideration was paid for the predecessor corporation's assets. [234]

The *CenterPoint* court then set out the five *de facto* merger factors articulated in *Marks v. Minnesota Mining & Mfg. Co.*, referring to them as "a checklist for determining whether a de facto merger had taken place that would render the successor company liable for the plaintiff's product liability claim[.]"[235]

The California Supreme Court has not recently addressed the applicable tests for *de facto* merger, although the court of appeal, in *Ibanez v. S&S Worldwide, Inc.,* No. B238269, 2013 WL 2243841 (Cal. Ct. App.

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[233] *CenterPoint Energy*, 69 Cal. Rptr. 3d at 219 (citations and quotations omitted) (quoting *Ray*, 560 P.2d at 3; Beatrice Co. v. State Bd. of Equalization, 863 P.2d 683, 690 (Cal. 1993)).

[234] *CenterPoint Energy*, 69 Cal. Rptr. 3d at 219 (citations and quotations omitted) (quoting Franklin v. USX Corp., 105 Cal. Rptr. 2d 11, 17 (Cal. Ct. App. 2001)).

[235] *CenterPoint Energy*, 69 Cal. Rptr. 3d at 219 (quoting *Marks*, 232 Cal. Rptr. at 598).

May 20, 2013), recent as of this writing, relied on the "adequate consideration" test.[236]

In *625 3rd St. Assoc., L.P. v. Alliant Credit Union* the district court held that California's *de facto* merger doctrine was barred in that case by federal preemption because it conflicted with the National Credit Union Administration's authority to repudiate a lease.[237]

California: The Mere Continuation Exception

In *Ray v. Alad*, 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.[238]

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[236] Ibanez v. S&S Worldwide, Inc., No. B238269, 2013 WL 2243841, at *4 (Cal. Ct. App. May 20, 2013) (quoting *Franklin*, 105 Cal. Rptr. 2d at 19).

[237] 625 3rd St. Assocs., L.P. v. Alliant Credit Union, 633 F. Supp. 2d 1040, 1047 (N.D. Cal. 2009).

[238] Ray v. Alad Corp., 560 P.2d 3, 7 (Cal. 1977) (citing Stanford Hotel Co. v. M. Schwind Co. 181 P. 780 (Cal. 1919); Higgins v. Cal. Petroleum & Asphalt Co. 55 P. 155 (Cal. 1898); Econ. Ref. & Serv. Co. v. Royal Nat'l Bank of New York, 97 Cal. Rptr. 706 (Ct. App. 1971); Blank v. Olcovich Shoe Corp. 67 P.2d 376 (Cal. Ct. App. 1937); Malone v. Red Top Cab Co. of Los Angeles, 60 P.2d 543 (Cal. Ct. App. 1936)); *accord* Daniell v. Riverside Partners I, L.P., 142 Cal. Rptr. 3d 717, 722–723 (Cal. Ct. App. 2012) (holding that successor entity can invoke SLAPP Act protection when the predecessor entity would have been able to do so if the first three forms of successor liability are present).

Subsequent California decisions have held, however, that these two elements must be present to impose liability[239] even when a successor holds itself out as being a continuation of the predecessor.[240] Indeed, "'[t]he crucial factor in determining whether a corporate acquisition constitutes either a de facto merger or a mere continuation is the same: whether adequate cash consideration was paid for the predecessor corporation's assets.'"[241]

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.'"[242]

California: The Product Line Exception

In 1977 in *Ray v. Alad*, the Supreme Court of California imposed liability on a successor corporation for an injury sustained by a plaintiff

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239 *See* Beatrice Co. v. State Bd. of Equalization, 863 P.2d 683, 690–91 (Cal. 1993) (holding that the predecessor could "not rely on a suggestion that because the second element is present here, [the successor] was liable for the liabilies covered by the assumption agreement"); *Franklin*, 105 Cal. Rptr. 2d at 18–19 (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"); Bradford v. Winter, 2d Civil No. B216235, 2010 WL 3260011, *1–4 (Cal. Ct. App. Aug. 19, 2010) (following *Franklin v. USX*); *accord* Orthotec, LLC v. REO Spineline, LLC, 438 F. Supp. 2d 1122 (C.D. Cal. 2006) (quoting *Ray*, 560 P.2d 3) (citing *Franklin*, 105 Cal. Rptr. 2d 11).

240 Maloney v. Am. Pharm. Co., 255 Cal. Rptr. 1, 4 (Cal. Ct. App. 1989) (citing *Ray*, 560 P.2d 3; Ortiz v. South Bend Lathe, 120 Cal. Rptr. 556 (Cal. Ct. App. 1975)); *see* Annuityzone.com, Inc., v. Indep. Advantage Fin. & Ins. Serv., Inc., No. D045176, 2005 WL 1745393, at *5 (Cal. Ct. App. 2001) (relying on *Maloney* in holding that mere continuation liability did not exist for a successor corporation despite the successor holding itself out as a continuation of the predecessor because there was adequate consideration).

241 *Center Point Energy*, 69 Cal. Rptr. 3d at 219 (quoting *Franklin*, 105 Cal. Rptr. 2d at 17) (other citations omitted).

242 Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 73 (Cal. 2003) (quoting *Beatrice*, 863 P.2d at 690).

who fell from a ladder manufactured by the predecessor corporation.[243] The court imposed liability under a new species of successor liability: the "product line" exception.[244] The California product line exception is based upon the following justifications set forth in *Ray*:

> 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.[245]

These justifications have generally been treated by California courts as elements, *i.e.*, requirements.[246] In 2003, the California Supreme Court implicitly affirmed this treatment by the lower courts, referring to the "conditions" of *Ray v. Alad*.[247]

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[243] *See Ray*, 560 P.2d at 10–11 (imposing liability for a product defect on a successor corporation that acquired a manufacturing business and continued producing the line of products previously distributed by the acquired manufacturing business).

[244] *Ray*, 560 P.2d at 11.

[245] *Id.* at 8–9.

[246] *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").

1. *The First Condition of Ray v. Alad*

Under the first condition of *Ray v. Alad*, the successor's acquisition of the business must cause the virtual destruction of the plaintiff's remedies against the predecessor.[248] Courts applying the first condition consistently require some level of causation.[249] In *Henkel*, the California Supreme Court concluded the first condition is not met when "there are no grounds for claiming that [the predecessor] was destroyed by the . . . sale of its . . . business to [the successor]."[250] In K*aminski*, a successor corporation exercised complete control over the predecessor and "could have at any time forced [the predecessor] into bankruptcy;" the California Court of Appeal held that the causation element was satisfied, despite the fact that the successor did not expressly require the dissolution of the predecessor.[251] 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[.]"[252] For example, 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 dissolve, the causation or substantial contribution requirement was not met.[253] "[T]o be liable, [the successor] must have 'played some role in curtailing or destroying the [plaintiff's] remedies.'"[254]

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[247] *Henkel Corp.*, 62 P.3d at 73 (quoting *Ray*, 560 P.2d at 9).

[248] *Ray*, 560 P.2d at 9.

[249] *See, e.g.*, *Stewart*, 1 Cal. Rptr. 2d at 674 ("[S]ome causual connection between the succession and the destruction of the plaintiff's remedy must be shown.").

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

[251] Kaminski v. W. MacArthur Co., 220 Cal. Rptr. 895, 902–03 (Ct. App. 1985); *see* Phillips v. Cooper Labs., Inc., 264 Cal. Rptr. 311, 316 (Cal. Ct. App. 1989) (relying on the *Kaminski* rationale for the first condition of *Ray*).

[252] *Kaminski*, 220 Cal. Rptr. at 903.

[253] *Chaknova*, 81 Cal. Rptr. 2d at 876–77.

[254] Lundell v. Sidney Mach. Tool Co., 236 Cal. Rptr. 70, 75 (Cal. Ct. App. 1987) (quoting *Kaminski*, 220 Cal. Rptr. at 902); *see also* Kline v. Johns-Mansville, 745

The causation requirement in the first condition of *Ray v. Alad* 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.[255] The Ninth Circuit articulated this general principle in *Nelson v. Tiffany Industries, Inc.*[256] In *Nelson*, the predecessor manufactured grain augers.[257] Four years after manufacturing the auger at issue, the predecessor filed a voluntary petition under Chapter 11.[258] The successor purchased all of the predecessor's assets in a bankruptcy court-approved sale.[259] The court stated:

> It is our view that the California Supreme Court's decision in *Ray* does not apply where there is a good faith dissolution in bankruptcy which is not intended to avoid future tort claims against the predecessor. Under such circumstances, the successor corporation has not contributed to or caused the destruction of the plaintiff's remedies.[260]

The court remanded the case to the district court because the record did not specify whether the court "considered the evidence offered by the plaintiff for the purpose of showing that [the predecessor] filed its

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F.2d 1217, 1220 (9th Cir. 1984) (concluding that *Ray* "require[s] that the asset sale contribute to the destruction of the plaintiffs' remedies").

255 *See* Nelson v. Tiffany Indus., Inc., 778 F.2d 533, 538 (9th Cir. 1985) ("[W]here there is a good faith dissolution in bankruptcy which is not intended to avoid future tort claims against the predecessor[,] . . . the successor corporation has not contributed to or caused the destruction of the plaintiff's remedies.").

256 *Nelson*, 778 F.2d at 538.

257 *Nelson*, 778 F.2d at 537.

258 *Nelson*, 778 F.2d at 537.

259 *Nelson*, 778 F.2d at 537.

260 *Nelson*, 778 F.2d at 538.

petition pursuant to a collusive agreement with [the successor]."[261] The Ninth Circuit noted that "[i]f 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."[262]

In *Stewart v. Telex Commc'ns, Inc.*, the California Court of Appeal addressed successor liability relating to a predecessor's manufacture of a defective antenna design.[263] The court noted that "the sole distinction between *Alad* and the present case is that [the successor] purchased [the predecessor] assets through the intermediary of the bankruptcy courts[ ] rather than directly."[264] This court noted that the *Kaminski* court 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."[265] The court discussed 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.[266]

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[261] *Nelson*, 778 F.2d at 538.

[262] *Nelson*, 778 F.2d at 538.

[263] Stewart v. Telex Commc'ns, Inc., 1 Cal. Rptr. 2d 669, 670 (Cal. Ct. App. 1991).

[264] *Id.* at 673.

[265] *Id.* at 674–75.

[266] Id. at 675 (quoting Hall v. Armstrong Cork, Inc., 692 P.2d 787, 792 (Wash. 1984).

The *Stewart* court held the product line exception did not apply, 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*[.]"[267]

Thus, both California and Ninth Circuit precedent demonstrate a continued causation requirement in applying the first condition of *Ray*. 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.[268]

2. *The Second Condition of Ray v. Alad*

Under the second condition from *Ray v. Alad*, the court must consider "the successor's ability to assume the original manufacturer's risk-spreading role[.]"[269] 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."[270]

3. *The Third Condition of Ray v. Alad*

The third condition of *Ray v. Alad* requires the court to consider "the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business."[271] The court noted the successor's

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[267] *Id.* at 676.

[268] *See* PATRICK A. MURPHY, CREDITOR'S RIGHTS IN BANKRUPTCY 7:5 (2d ed. 2004) (citing the following cases applying California law: Nelson v. Tiffany Indust., Inc., 778 F.2d 533, 537, 538 (9th Cir. 1985); Stewart v. Telax Commc'ns., Inc., 1 Cal. Rptr. 2d 669 (Cal. Ct. App. 1991)).

[269] Ray v. Alad, 560 P.2d 3, 9 (Cal. 1977).

[270] *Id.* at 10 (citing Cyr v. B. Offen & Co., 501 F.2d 1145, 1154 (1st Cir. 1974)).

[271] *Id.* at 9.

"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.[272] 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.[273] This final condition of fundamental fairness results in a very fact specific analysis.

California: Personal Jurisdiction of Successor Corporations

"In a case raising liability issues, a California court will have personal jurisdiction over a successor company if: (1) the court would have had personal jurisdiction over the predecessor, and (2) the successor company effectively assumed the subject liabilities of the predecessor."[274]

Colorado

Colorado courts recognize the general rule of successor non-liability and the four traditional exceptions.[275] In *Johnston v. Amstead* the Colorado Court of Appeals expressly rejected the product-line and continuity of enterprise exceptions after examining the relevant public

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[272] *Id.* at 10–11.

[273] *Id.* at 11.

[274] CenterPoint Energy, Inc. v. Super. Ct., 69 Cal. Rptr. 3d 202, 218 (Cal. Ct. App. 2007) (citing Williams v. Bowman Livestock Equipment Co., 927 F.2d 1128, 1132 (10th Cir. 1991); Richmond v. Madison Management Group, Inc., 918 F.2d 438, 455 (4th Cir. 1990); Ray v. Alad, 560 P.2d 3 (Cal. 1977); Sanders v. CEG Corp., 157 Cal. Rptr 252 (Cal. Ct. App. 1979); 9 WITKIN, SUMMARY OF CALIFORNIA LAW, CORPORATIONS § 17 796–98 (10th ed. 2005).

[275] Johnston v. Amstead Indus., Inc., 830 P.2d 1141, 1142–43 (Colo. App. 1992) (citing Ruiz v. ExCello Corp., 653 P.2d 415 (Colo. App. 1982)); CMCB Enters. v. Ferguson, 114 P.3d 90, 93 (Colo. App. 2005) (citing Alcan Aluminum Corp. v. Elec. Metal Prods., Inc., 837 P.2d 282, 283 (Colo. App. 1992); Baca v. Depot Sales, LLC, 2007 WL 988061, at *3 (D. Colo. Mar. 30, 2007) (citations omitted).

policy issues espoused by other courts that have adopted one or both of the exceptions.[276] At least one Colorado court has found that the indirect transfer of assets from a predecessor to a purported successor will not, by itself, bar a claim of successor liability.[277]

Colorado: The Mere Continuation Exception

In *Alcan Aluminum Corp., Metal Goods Division v. Electronic Metal Products*, the Colorado Court of Appeals set out 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. . . . Thus, the test for determining whether this exception applies focuses on whether the purchasing corporation is, in effect, a continuation of the selling corporation, and not whether there is a continuation of the seller's business operation.[278]

In *CMCB Enterprises, Inc. v. Ferguson*, the Colorado Court of Appeals noted:

> The Tenth Circuit Court of Appeals has held that under Oklahoma law, a prerequisite for the imposition of liability against a corporation as a mere continuation of a predecessor is a sale or

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[276] *Johnston*, 830 P.2d at 1143–47.

[277] *Id.* at 1146–47.

[278] *Alcan Aluminum Corp.*, 837 P.2d at 283 (citing Nissen Corp. v. Miller, 594 A,2d 564 (Md. 1991); *see* Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451 (11th Cir. 1985) (purchasing corporation); Martin v. Abbot Labs., 689 P.2d 368 (Wash. 1984) (discussing distinction in applying the successor liability doctrine in products liability, as opposed to commercial, context)).

> transfer of all or substantially all the assets of the latter to the former. However, another federal circuit court of appeals has held that the plaintiff need only demonstrate a transfer of corporate assets, and it is not necessary, as a matter of law, that a single corporation acquire all the divesting corporation's assets, though that may be a pertinent factor. Here, even if we assume, without deciding, that a transfer of substantially all the assets is a factor in imposing liability, such a transfer in effect occurred.[279]

Colorado: The De Facto Merger Exception

Colorado courts have not set out a test for the *de facto* merger exception. The *Johnston* court, in discussing the merits of the continuity of enterprise exception, stated that continuity of shareholders is probably the most essential element of the *de facto* merger exception test.[280] Thereafter, in *Cohig & Assocs. v. Stamm*, an unpublished opinion, 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

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[279] CMCB Enters. v. Ferguson, 114 P.3d 90, 93–94 (citing Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128 (10th Cir. 1991); Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252 (1st Cir. 1997); Patin v. Thoroughbred Power Boats, Inc., 294 F.3d 640 (5th Cir. 2002); *Alcan Aluminum Corp.*, 837 P.2d at 283; Ed Peters Jewelry Co., 124 F.3d at 252)).

[280] *Johnston*, 830 P.2d at 1146–47 (citing Nguyen v. Johnson Machine & Press Corp., 433 N.E.2d 1104 (Ill. App. Ct. 1982)).

> 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.[281]

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."[282]

Colorado: The Express/Implied Assumption and Fraud Exceptions

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

Connecticut

In *Chamlink Corp. v. Merritt Extruder Corp.*,[283] the Connecticut Court of Appeals adopted the four exceptions to the traditional rule of non-liability following a corporate asset purchase:

> The mere transfer of the assets of one corporation to another corporation or individual generally does not make the latter liable for the debts or liabilities of the first corporation except where the purchaser expressly or impliedly agrees to assume the obligations, the purchaser is merely a continuation of the selling corporation, the companies merged or the

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[281] Cohig & Assocs. v. Stamm, No. 97-1119, 149 F.3d 1190 (unpublished table decision), 1998 WL 339472, at *4 (10th Cir. June 10, 1998); *see* Johnston, 830 P.2d at 1146–47; *cf* Ekotek Site PRP Comm. V. Self, 948 F. Supp. 994, 1002 (D. Utah 1996); V.C. Video, Inc. v. National Video, Inc., 755 F. Supp. 962, 969 (D Kan. 1990).

[282] *Cohig & Assocs.*, 149 F.3d at 1190, at *4.

[283] Chamlink Corp. v. Merritt Extruder Corp., 899 A.2d 90, 93 (Conn. App. Ct. 2006).

> transaction is entered into fraudulently to escape liability.[284]

In doing so, it followed the holding of *Ricciardello v. J.W. Gant & Co.*, in which the federal district court had preceded and predicted this same holding seventeen years earlier.[285]

The *Chamlink* court also considered the continuity of enterprise exception as an alternative to the common law mere continuation exception, but it did not expressly accept the doctrine because it was not applicable to the facts of the case.[286] In *Kendall v. Amster*, the appellate court, following *Chamlink*, upheld the imposition of successor liability based on the continuity of enterprise exception. [287] One unpublished superior court decision prior to *Chamlink* recognized the product line exception.[288]

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.[289] That court did not articulate a specific test.

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[284] *Chamlink*, 899 A.2d at 93 (quoting 19 C.J.S. 314, *Corporations* § 657 (1990) (citing LiButti v. United States, 178 F.3d 114, 124 (2d Cir. 1999))).

[285] Ricciardello v. J.W. Gant & Co., 717 F. Supp. 56, 59–60 (D. Conn. 1989).

[286] *Chamlink*, 899 A.2d at 93.

[287] Kendall v. Amster, 948 A.2d 1041, 1051 (Conn. App. Ct. 2008); *see also* Altman v. Motion Water Sports, Inc., 722 F. Supp. 2d 234, 242–43 (D. Conn. 2010) ("In *Kendall* the Appellate Court makes it plain that 'continuity of enterprise' is not just a theory of successor liability, it is a recognized principle of Connecticut law.").

[288] Sullivan v. A.W. Flint Co., No. CV 920339263, 1996 WL 469716, at *8 (Conn. Super. Ct. Aug. 5, 1996); *see also* Beriguette v. Innovative Waste Systems, 2009 WL 2450773 at *5 n.2 (Conn. Super. Ct. Jul. 7, 2009) (noting that the Superior Court had accepted the product line exception in *Chamlink*).

[289] Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp., No. CV020813164S, 2002 WL 1610037, at *7 (Conn. Super. Ct. June 19, 2002).

Connecticut: The Mere Continuation Exception

The *Chamlink*[290] court set forth a simple test for the mere continuation exception: "Under the common law mere continuation theory, successor liability attaches when the plaintiff demonstrates the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations."[291] According to a 2009 Superior Court case, factors considered in determining if this test has been met include:

> [C]ontinuity of management; continuity of personnel; continuity of physical location, assets and general business operations; and cessation of the prior business shortly after the new entity is formed. Also relevant is the extent to which the successor intended to incorporate the predecessor into its system with as much the same structure and operation as possible.[292]

Further, although not mentioned in *Chamlink*, at least one court of appeals has found that a threshold requirement for mere continuation liability is that the predecessor "no longer represents a viable source of relief."[293]

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[290] *Chamlink*, 899 A.2d at 93.

[291] *Id.* (quoting Graham v. James, 144 F.3d 229, 240 (2d Cir. 1998)).

[292] Robbins v. Physicians for Women, No. CV065002633, 2009 WL 1218818, at *3 (Conn. Super. Ct. April 16, 2009).

[293] Robbins v. Physicians for Women's Health, LLC, 133 Conn. App. 577, 587 (Conn. App. Ct. 2012).

Connecticut: The Continuity of Enterprise Exception

The court in *Chamlink*[294] discussed the continuity of enterprise exception as a potential alternative to the traditional test for mere continuation. The court noted that under the "continuity of enterprise" theory, a mere continuation exists "if the successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers."[295] The court stated, however, that "[b]ecause it is clear under both [the traditional mere continuation theory and the continuity of enterprise theory] that Merritt Extruder Connecticut is not a mere continuation of Merritt Davis, we need not adopt one theory over the other at this time."[296]

In *Kendall v. Amster*, however, the Connecticut Appellate Court, following *Chamlink*, upheld the imposition of successor liability based on the continuity of enterprise exception where the successor "was in the same business [as the predecessor], restoring rare, expensive, vintage automobiles; used the same personnel[;] . . . and had the same customers." [297] Moreover, a federal district court in Connecticut recently stated: "In *Kendall* the Appellate Court makes it plain that 'continuity of enterprise' is not just a theory of successor liability, it is a recognized principle of Connecticut law."[298] As with mere continuation, a threshold

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[294] *Chamlink*, 899 A.2d at 93.

[295] *Id.*; *Robbins*, 2009 WL 1218818, at *3 (citing B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir. 1996)).

[296] *Chamlink*, 899 A.2d at 93 n.3.

[297] Kendall v. Amster, 948 A.2d 1041, 1051 (Conn. App. Ct. 2008).

[298] Altman v. Motion Water Sports, Inc., 722 F. Supp. 2d 234, 242–43 (D. Conn. 2010); *accord* Call Ctr. Techs., Inc. v. Grand Adventures Tour & Travel Publ'g Corp., 635 F.3d 48, 53 (2d Cir. 2011); Garcia v. Serpe, No. 3:08cv1662, 2012 U.S. Dist. LEXIS 14026, at *38.

requirement for continuity of enterprise liability is that the predecessor is not a viable source of liability.[299]

Connecticut: The De Facto Merger Exception

The courts have not developed a test for *de facto* merger that differs from the factor-based mere continuation test used by Connecticut superior courts prior to the *Chamlink* decision.[300] The factor based balancing test consists of four non-dispositive factors:

> (1) whether there is a continuity of management, personnel, physical location, assets and general business operations; (2) whether there is a continuity of shareholders; (3) whether the [predecessor] ceased its ordinary business operations, liquidates, and dissolves; and (4) whether [the successor] assumed those liabilities and obligations of [the predecessor] ordinarily necessary for the uninterrupted continuation of normal business operations of [the predecessor].[301]

The court goes on to say that "[n]ot every one of these indicia must be established, however, . . . the court should apply a balancing test."[302]

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[299] Robbins v. Physicians for Women's Health, LLC, 133 Conn. App. 577, 587 (Conn. App. Ct. 2012).

[300] Peglar & Assocs., Inc. v. Prof'l Indem. Underwriters Corp., No. CV020813164S, 2002 WL 1610037, at *7 (Conn. Super. Ct. June 19, 2002).

[301] Sav. Bank of Manchester v. Daly, No. CV020813164S, 2004 WL 3130581, at *1 (Conn. Super. Ct. Dec. 23, 2004) (citing Peglar & Assocs., Inc., 2002 WL 1610037, at *7); *see also* Wells Fargo Bank, N.A. v. Konover, No. 3:05–cv–1924, 2011 WL 1225986, at *18–19 (D. Conn. Mar. 28, 2011); Collins v. Olin Corp., 434 F. Supp. 2d 97, 103 (D. Conn. 2006).

[302] *Sav. Bank of Manchester*, 2004 WL 3130581, at *1 (citing *Peglar & Associates, Inc.*, 2002 WL 1610037, at *7; *Collins*, 434 F. Supp. 2d, at 103); *see also* Cargill, Inc. v. Beaver Coal & Oil, Inc., 676 N.E.2d 815, 818 (Mass. 1997).

Connecticut: The Fraud Exception

The fraud exception is governed by Connecticut's Uniform Fraudulent Transfers Act found at Conn. Gen. Stat. § 52-552(e) (2005).[303]

Connecticut: The Product Line Exception

The *Sullivan v. A.W. Flint*[304] decision provides the only insight into Connecticut's version of the product line exception, as no other Connecticut court has discussed or applied the product line exception; however, a 2009 Superior Court decision stated that it has been accepted.[305] The *Sullivan* court listed the following requirements needed in order to establish the product line exception:

> (1) the transferee has acquired substantially all the transferor's assets, leaving no more than a corporate shell, (2) the transferee is holding itself out to the general public as a continuation of the transferor by producing the same product line under a similar name, and (3) the transferee is benefiting from the goodwill of the transferor.[306]

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303 S. Conn. Gas Co. v. Waterview of Bridgeport Ass'n., No. CV054005335, 2006 WL 1681005, at *3 (Conn. Super. Ct. June 1, 2006); *see also* Pirrotti v. Respironics, Inc., No. 3:11–CV–00439, 2011 U.S. Dist. LEXIS 99775, at *9 (D. Conn. Sept. 6, 2011).

304 Sullivan v. A.W. Flint, No. CV 920339263, 1996 WL 469716, at *161 (Conn. Super. Ct. 1996)).)

305 Beriguette v. Innovative Waste Sys., No. CV054006895, 2009 WL 2450773, at *1 n.2 (Conn. Super. Ct. Jul. 7, 2009) (noting that the superiorSuperior Csuperior ourt had accepted the product line exception).

306 *Sullivan*, 1996 WL 469716 at *6; *see* Ramirez v. Amsted Indust., Inc., 431 A.2d 811, 825 (N.J 2011); Ray v. Alad Corp., 560 P.2d 3, 9–11 (Cal. 1977); Martin v. Abbott Labs., 689 P.2d 368, 387 (Wash. 1984).

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."[307] 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.[308] If the plaintiff can proceed against the predecessor, then the product line exception does not apply.[309]

Delaware

A federal district court decision provides the most comprehensive discussion of Delaware successor liability law. In *Elmer v. Tenneco Resins, Inc.*, the District Court of Delaware adopted the traditional exceptions to successor non-liability and then discussed the express/implied assumption and mere continuation exceptions.[310] *Elmer v. Tenneco Resins* has been cited with approval in unreported decisions by the Delaware Superior Court.[311]

Delaware: The Express or Implied Assumption Exception

Based on *Elmer*, the Delaware courts will review the language of the asset purchase agreement to determine if there was an express or implied assumption of liabilities.[312] In the *Elmer* case, the purchasing corporation expressly assumed, subject to certain conditions, all liabilities

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307 *Sullivan*, 1996 WL 469716 at *8.

308 *Id.*

309 *Id.*

310 Elmer v. Tenneco Resins, Inc., 698 F. Supp. 535, 540 (D. Del. 1988); *see also In re* Stone & Webster, Inc., 558 F.3d 234, 241 (3d Cir. 2009); *In re* Safety-Kleen Corp., 380 B.R. 716, 739–40 (Bankr. D. Del., 2008).

311 Ross v. Desa Holdings Corp., No. 05C-05-013, 2008 WL 4899226, at *4 n.11 (Del. Super. Ct. Sep. 30, 2008); *In re* Asbestos Litig. v. Haveg Indust., Inc., C.A., No. 92C-10-100, 1994 WL 89643, at *3 (Del. Super. Ct. Feb. 4, 1994).

312 *In re Safety-Kleen Corp.*, 380 B.R. at 735.

of the seller that existed at the closing date.[313] "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."[314] 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.[315]

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]."[316] The court based its conclusion on the fact that "[the purchaser] agreed to assume 'all . . . liabilities of [the seller] . . . whether accrued . . . contingent or otherwise . . . exist[ing] at the Closing Date.'"[317] The court reasoned that the asset purchase agreement was contradictory, as one section expressly rejected all liabilities not listed, while another expressly assumed all liabilities.[318]

Delaware: The Mere Continuation Exception

Delaware employs a narrow mere continuation exception. The test is 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

313 *Elmer*, 698 F. Supp. at 541.

314 *Id.*

315 *Id.*

316 *Id.* at 541; *see* Gee v. Tenneco, 615 F.2d 857, 863 (9th Cir. 1980) (Tenneci documents reasonably susceptible to conflicting interpretations); Bouley v. American Cyanamid, 1987 WL 18738 (D. Mass. Oct. 21, 1987) (reasonable persons may differ as to meaning of 1963 contract).

317 *Elmer*, 698 F. Supp. at 541.

318 *Id.*

> 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." The test is not the continuation of the business operation, but rather the continuation of the corporate entity.[319]

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]."[320]

Delaware: The De Facto Merger and Fraud Exceptions

There are currently no cases employing 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.[321] In *Bingham v. Goldberg*, the Court of Appeals for the District of Columbia elaborated on the mere continuation exception but did not address the other

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[319] *Id.* at 542 (quoting Fountain v. Colonial Chevrolet Co., No. 86C–JA–117, 1988 WL 40019, at *7 (Del. Super. Ct. Apr. 13, 1988)); *see also* Ross v. Desa Holdings Corp., 2008 WL 4899226, at *4 n. 11 (Del. Super. Ct. Sept. 30, 2008).

[320] *In re* Asbestos Litig. v. Haveg Indust., Inc., C.A., No. 92C–10–100, 1994 WL 89643, at *4 (Del. Super. Ct. Feb. 4, 1994).

[321] Goldberg. Marchesano. Kohlman. Inc. v. Bingham, 637 A.2d 81, 89–90 (D.C. Cir. Ct. 1994); Reese Bros., Inc. v. U.S. Postal Serv., 477 F. Supp. 2d 31, 40–41 (D.D.C. 2007) (quoting Acheson v. Falstaff Brewing Corp., 523 F.2d 1327, 1329–30 (9th Cir. 1975)); *see also* Baltimore Luggage v. Holtzman, 562 A.2d 1286, 1289–90 (Md. Ct. Spec. App. 1989), *cert denied*, 568 A.2d 28 (Md. 1990); *Brockman*, 565 S.W.2d at 798.

three.[322] In *Debnam v. Crane Co.*, the Court of Appeals for the District of Columbia held that summary judgment was improper where the purchase agreement was ambiguous and susceptible to the reasonable interpretation that the defendants expressly or impliedly assumed the liability at issue.[323] In *Reese Brothers, Inc.*, the federal district court held that a claim for successor liability shall go to trial unless the defendant "can show beyond doubt" that the plaintiff "can prove no set of facts in support of its claims."[324]

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.[325] Although the court stated that a "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.[326] The court did note, however, that the key inquiry is whether or not there is a continuation of the *entity*, rather than the business operations of the predecessor.[327]

Florida

Florida courts have adopted the four traditional exceptions to the general rule of successor non-liability and expressly rejected the continuity of enterprise and product-line exceptions.[328] In *Laboratory*

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322 *Bingham*, 637 A.2d at 90.

323 Debnam v. Crane Co., 976 A.2d 193, 198–200 (D.C. 2009).

324 *Reese Bros.*, 477 F. Supp. 2d at 41.

325 *Bingham*, 637 A.2d at 91–92.

326 *Bingham*, 637 A.2d at 91 (citing Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1458–59 (11th Cir. 1985).

327 *Bingham*, 637 A.2d at 92 (citing *Bud Antle*, 758 F.2d at 1458).

328 Bernard v. Kee Mfg. Co., Inc., 409 So. 2d 1047, 1049–51 (Fla. 1982); Graef v. Hegedus, 698 So. 2d 655, 655–56 (Fla. Dist. Ct. App. 1997); *see* Gary Brown & Assocs., Inc. v. Ashdon, Inc., 268 F. App'x Appx837, 842–84343 (11th Cir. 2008) (quoting Orlando Light Bulb Serv. v. Laser Lighting & Elec. Supply, Inc,

Corporation, the appellate court appeared to collapse the *de facto* merger and mere continuation exceptions, setting out the same test for both: whether "one corporation is absorbed by another, i.e., there is a continuity of the selling corporation evidenced by such things as the same management, personnel, assets, location, and stockholders."[329]

Florida: The De Facto Merger Exception

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

> A *de facto* merger occurs where one corporation is absorbed by another, but without compliance with the statutory requirements for a merger. To find a de facto merger there must be 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.[330]

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523 So. 2d 740, 742 (Fla. Dist. Ct. App. 1988)); Miller v. R.J. Reynolds Tobacco Co., 502 F. Supp. 2d 1265, 1269 (S.D. Fla. 2007) (quoting Lab. Corp. of Am. v. Prof'l Recovery Network, 813 So. 2d 266, 269 (Fla. Dist. Ct. App. 2002)); Jones v. Honeywell Int'l., Inc., 385 F. Supp. 2d 1268, 1269 (M.D. Fla. 2005); *In re* Metro Sewer Servs., Inc., 374 B.R. 316, 322–23 (Bankr. M.D. Fla. 2007) (quoting *Orlando Light Bulb Serv.*, 523 So. 2d at 742 (citing *Bernard*, 409 So. 2d at 1049)); Reina v. Gingerale Corp., 472 So. 2d 530 (Fla. Dist. Ct. App. 1985); *cf* Kelly v. American Precision Indust., 438 So. 2d 29 (Fla. Dist. Ct. App. 1983).

329 *Lab. Corp.*, 813 So. 2d at 270.

330 Amjad Munim, M.D., P.A. v. Azar, 648 So. 2d 145, 153–54 (Fla. Dist. Ct. App. 1994) (citing Arnold Graphics Indus. v. Indep. Agent Ctr., 775 F.2d 38 (2d Cir. 1985)) (other citations omitted); Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F. Supp. 834, 839 (S.D.N.Y. 1977)); *see* Carnes v. Fender, 936 So. 2d 11, 14 (Fla. Dist. Ct. App. 2006); *Lab. Corp.*, 813 So. 2d at 270; Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Florida, Inc., 832 So. 2d 810, 814 (Fla. Dist. Ct. App. 2002).

In *Florio v. Manitex Skycrane, LLC*, the federal district court collected cases to summarize the *de facto merger* doctrine as applied in Florida and noted that the state has not adopted the continuity of enterprise exception:

> In applying the de facto merger doctrine, Florida courts have uniformly required a finding of substantial continuity of ownership. *Compare Bernard*, 409 So.2d at 1049 (declining to "delet[e] a historical requirement of substantial identity of ownership"), and *Viking Acoustical*, 767 So.2d at 636 (de facto merger did not occur when there was no identity of officers, directors, or shareholders), with *Kelly v. Am. Precision Indus.*, 438 So.2d 29 (Fla. 5th DCA 1983) (successor corporation was responsible for liability of predecessor corporation in delivering allegedly defective garbage truck where successor purchased all of predecessor's stock and stripped it of all its assets, with the benefit thereof going solely to successor), and *Lab. Corp. of Am. v. Prof'l Recovery Network*, 813 So.2d 266, 269-70 (Fla. 5th DCA 2002) (fact questions remained as to whether a de facto merger occurred where the owner was the sole officer and shareholder in both corporations). Although a minority of jurisdictions have expanded corporate successor liability by adopting the "continuity of enterprise" exception, which eliminates the necessity of proving a common identity of officers, directors, and shareholders, *see*, *e.g.*, *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873 (Mich. 1976), Florida has not done so.[331]

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[331] Florio v. Manitex Skycrane, LLC, No. 6:07-cv-1700-Orl-28KRS, 2010 WL 5137626, at *5 (M.D. Fla. Dec. 10, 2010).

Florida: The Mere Continuation Exception

In Florida, the mere continuation exception is based primarily on continuity of officers, directors, and stockholders in the selling and purchasing corporations. The "change is in form, but not in substance."[332]

In *Serchay v. NTS Fort Lauderdale Office Joint Venture*, the court stated that a successor is a continuation of the predecessor when it has "the same assets, management, personnel, stockholders, location, equipment, and clients."[333] In *Azar,* 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.[334]

Florida: The Fraud Exception

Florida courts have not developed or adopted a test for fraud that is specific to the issue of successor liability. The court in *Azar*, however, imposed liability on a successor corporation based on the doctrine of fraudulent transfers but then continued its analysis, holding that the successor was also liable under common law successor liability

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

[333] Serchay v. NTS Fort Lauderdale Office Joint Venture, 707 So. 2d 958, 960 (Fla. Dist. Ct. App. 1998); *see also Azar*, 648 So. 2d at 154.

[334] *Azar,* 648 So. 2d at 154.

principles.[335] In Florida, therefore, the fraud exception may not have utility based on the fact that the Uniform Fraudulent Transfer Act already governs fraudulent contractual obligations, thus, such an exception may be redundant.

Florida: The Express or Implied Assumption Exception

There are few Florida cases that directly address the express or implied assumption exceptions; one, however, expressly recognized the effectiveness of disclaimers of successor liability in an asset purchase agreement.[336] Another, from the Federal District Court, indicates that a purported successor's preferential assumption of some but not all of a predecessor's liabilities is not fraudulent and provides no basis for imposing successor liability, generally, to benefit the non-preferred creditors of the predecessor.[337]

Georgia

Georgia courts have expressly adopted the traditional exceptions to the general rule of successor non-liability and have declined to adopt the continuity of enterprise and product line exceptions based on particular facts at issue in each respective case.[338]

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335 *Id.* at 152–55.

336 Krogen Express Yachts, LLC v. Nobili, 947 So. 2d 581, 583 (Fla. Dist. Ct. App. 2007).

337 Mitutoyo Am. Corp. v. Suncoast Precision, Inc., No. 8:08-MC-36-T-TBM, 2011 WL 2802938, at *2–3 (M.D. Fla. July 18, 2011)).

338 *See* Farmex, Inc. v. Wainwright, 501 S.E.2d 802, 804 (Ga. 1998) (holding that the continuity of enterprise exception set out in Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974) and the product line exception set out in Ray v. Alad, 560 P.2d 3 (Cal. 1977) were 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) (declining to adopt the continuity of enterprise or product line exceptions because the facts presented would not satisfy either, since the successor did not manufacture or sell the same type of product (table saws) that injured the plaintiff). Note that in 1987, the Georgia State Legislature amended its strict liability laws to limit the imposition of strict liability only on manufacturers, rather than mere sellers, of defective products. *See* Ga. Code Ann., § 51-1-11.1.

Georgia: The De Facto Merger Exception

Under Georgia law, the following four elements 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.[339]

Georgia: Mere Continuation

Under Georgia law, the mere continuation exception to non-liability applies when "'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." [340] Note that complete identity of ownership is not required.[341]

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[339] Perimeter Realty v. GAPI, Inc., 533 S.E.2d 136, 145–46 (Ga. Ct. App. 2000) (citing Howard v. APAC-Georgia, Inc., 383 S.E.2d 617, 619 (Ga. Ct. App. 1989)); *see also* Douglas v. Bigley, 628 S.E.2d 199, 208 n.27 (Ga. Ct. App. 2006).

[340] *Perimeter Realty*, 533 S.E.2d at 145 (quoting Davis v. Concord Commercial Corp., 434 S.E.2d 571, 573 (Ga. Ct. App. 1993) (holding no successor liability

Georgia: The Fraud Exception

There are no cases employing Georgia law that explain the current state 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.[342] In *Gwinnett*, the successor had expressly assumed all liabilities of the predecessor. The court noted: "Had [the successor] wished to limit its liabilities to certain types of claims, or to those occurring within a certain time period, it could have done so in the agreement."[343]

Hawaii

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

The [successor] corporation may be held liable for the debts and liabilities of the [predecessor] corporation when[:]

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where there was not identity of assets); *see also* Ney-Copeland & Assocs., Inc. v. Tag Poly Bags, Inc., 267 S.E.2d 862, 862–63 (Ga. Ct. App. 1980).

341 Pet Care Prof'l Ctr., Inc. v. BellSouth Adver. & Publ'g. Corp., 464 S.E.2d 249, 251 (Ga. Ct. App. 1995) (successor liability established where both businesses used the same name, operated from the same location, used the same telephone service and accounts, and three of four partners in predecessor corporation became stockholders in new corporation; the court noted that "[a]lthough less than a complete identity of ownership between Center and Pet Care resulted, only some identity of ownership was required." (quoting Bullington v. Union Tool Corp., 328 S.E.2d 726 (Ga. Ct. App. 1985); Cilurso v. Premier Crown Corp., 769 F. Supp. 372, 374 (M.D. Ga. 1991).

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

343 *Gwinnett Hosp. Sys.*, 469 S.E.2d at 731 (buyer agreed to assume liabilities and obligations 'only as of and with respect to periods following the [c]losing [d]ate' (quoting Blum v. RES Assoc., 439 S.E.2d 712 (Ga. Ct. App. 1993).

> (1) there is an express or implied assumption of liability;
>
> (2) the transaction amounts to a consolidation or merger;
>
> (3) the transaction was fraudulent;
>
> (4) *some of the elements of a purchase in good faith were lacking, as where the transfer was without consideration; or*
>
> (5) the transferee corporation was a mere continuation or reincarnation of the old corporation. [344]

The Hawaii courts have not articulated or applied tests for any of these exceptions. However, in *Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co.*, [345] the Hawaii Supreme Court held that a transfer of all the predecessor's assets and liabilities to the successor did not include an assignment of the predecessor's rights under insurance policies where the policies contained a no assignment clause. The court explained:

> Because Hawaii law requires every insurance policy to be subject to the general rules of contract construction, *see* HRS § 431:10-237, and an assignment by operation of law is merely an extension of the common-law tort rule of successor liability, *see Northern Insurance*, 955 F.2d at 1358, we hold the circuit court erred when it concluded that an assignment by operation of law is consistent with Hawaii's rules governing construction of insurance policies.[346]

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[344] Evanston Ins. Co. v. Luko, 783 P.2d 293, 294 (Haw. Ct. App. 1989) (emphasis added) (quoting 19 AM. JUR. 2D CORPORATIONS §2704 at 513 (1986)).

[345] Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co., 183 P.3d 734, 745 (Haw. 2007).

[346] *Del Monte Fresh Produce, Inc.*, 183 P.3d at 745.

Idaho

Idaho courts have recognized assumption of liabilities and fraud as exceptions to the general rule of successor non-liability in asset purchasers.[347] Courts have also recognized successor liability in the case of a "reorganization," which appears to be a fusion of the mere continuation, continuity of enterprise, and de facto merger exceptions.[348] There are few modern Idaho cases in this area, and it is uncertain how the Idaho courts would define the current state of successor liability law.

Idaho has a state constitutional provision that prevents the legislature from allowing "the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor . . . ."[349] This would seem to limit the legislature's ability to pass anti-successor liability laws.[350]

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[347] Anderson v. War Eagle Consol. Min. Co., 72 P. 671, 673, 675 (Idaho 1903) (rejecting a rough continuity theory premised on commonality of management and stock ownership in successor and predecessor).

[348] Seymour v. Boise Co., Ltd., 132 P. 427, 430–31 (Idaho 1913) ("The organization of the Boise Railroad Company and the transfer of all the property and franchises of the Boise Traction Company to the railroad company was in fact and law only a reorganization of the old company; the new corporation having a board of directors who composed a majority of the board of directors of the old corporation, and more than 98 percent of the subscribed stock of the new corporation being held by the same stockholders who held the stock of the old corporation"); *see* Moore v. Boise Land & Orchard Co., 173 P. 117, 118 (Idaho 1918); Super Grade, Inc. v. Idaho Dep't of Commerce & Labor, 162 P.3d 765, 771 (Idaho 2007)).)

[349] IDAHO CONST. art. XI, § 15.

[350] Towle v. Great Shoshone & Twin Falls Water Power Co., 232 F. 733, 738 (D. Idaho 1916), *aff'd sub nom.*, Am. Waterworks & Elec. Co. v. Towle, 245 F. 706, 709–10 (9th Cir. 1917) (personal injury judgment against predecessor becomes a lien against the franchise and property of the corporation in the hands of a successor).

Illinois

Illinois courts recognize only the four traditional exceptions to the general rule of successor non-liability of asset purchasers.[351] The Illinois courts "have consistently rejected taking a product line approach to successor liability."[352]

Illinois: The Mere Continuation Exception

Under Illinois law, a "common identity of ownership" is an essential requirement of the mere continuation exception.[353] In *Vernon v. Schuster*, the Illinois Supreme Court explained the mere continuation exception as follows:

> The continuation exception to the rule of successor corporate nonliability applies

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351 Vernon v. Schuster, 688 N.E.2d 1172, 1175–76 (Ill. 1997) (citing Steel Co. v. Morgan Marshall Indust., Inc., 662 N.E.2d 595 (Ill. App. Ct. 1995)); Green v. Firestone Tire & Rubber Co., 460 N.E.2d 595 (Ill. App. Ct. 1984) (quoting Hernandez v. Johnson Press Corp., 388 N.E.2d 895 (Ill. App. Ct. 1979)); *see* Brandon v. Anesthesia & Pain Mgmt. Assocs., 419 F.3d 594, 599 (7th Cir. 2005) (citing North Shore Gas Co. v. Salomon, Inc., 152 F.3d 642, 653 (7th Cir. 1998)); GMAC, LLC v. Hillquist, 652 F. Supp. 2d 908, 918 (N.D. Ill. 2009); DeGuilio v. Goss Int'l Corp., 906 N.E.2d 1268, 1276 (Ill. App. Ct. 2009); Consol. Servs. and Const., Inc. v. S.R. McGuire, 854 N.E.2d 715, 720 (Ill. App. Ct. 2006); Flanders v. Cal. Coastal Cmtys., Inc., 828 N.E.2d 793, 798 (Ill. App. Ct. 2005).

352 Diguilio v. Goss Int'l Corp., 906 N.E.2d 1268, 1278 (Ill. App. Ct. 2009); *see* Myers v. Putzmeister, Inc., 596 N.E.2d 754 (Ill. App. Ct. 1992) (citing Gonzales v. Rock Wool Engineering & Equip. Co., 453N.E.2d 792 (Ill. App. Ct. 1983); Nguyen v. Johnson Mach. & Press Corp., 433 N.E.2d 1104 (Ill. App. Ct. 1982); Domine v. Fulton Iron Works, 395 N.E.2d 19 (Ill. App. Ct. 1979); *Hernandez*, N.E.2d at 778; Johnson v. Marshall & Huschart Mach. Co. 384 N.E.2d 141 (Ill. App. Ct. 1978)); *see* Nilsson v. Cont'l Mach. Mfg. Co., 621 N.E.2d 1032, 1035 (Ill. App. Ct. 1993).

353 *Vernon*, 688 N.E.2d at 1176 (quoting Tucker v. Paxson Mach. Co., 645 F.2d 620, 625–26 (8th Cir. 1981) (citing, *inter alia*, Leannais v. Cincinnati, Inc., 565 F.2d 437, 440 (7th Cir. 1977)); *see also* Diguilio v. Goss Int'l., 906 N.E.2d at 1277 (citing *Nilsson*, 621 N.E.2d at 1032; *Nguyen*, 433 N.E.2d at 10321275 Joseph Huber Brewing Co., Inc. v. Pamado, Inc., 2006 WL 2583719, at *11–13 (N.D. Ill. 2006); *see, e.g.,* Park v. Townson & Alexander, 679 N.E.2d 107, 110 (Ill. App. Ct. 1997).

> when the purchasing corporation is merely a continuation or reincarnation of the selling corporation. In other words, the purchasing corporation maintains the same or similar management and ownership, but merely wears different clothes. . . . [T]he majority of courts considering this exception emphasize a common identity of officers, directors, and stock between the selling and purchasing corporation as the key element of a continuation. In accord with the majority view, our appellate court has "consistently required identity of ownership before imposing successor liability under the continuation exception.[354]

The court rejected the dissent's argument that continuity of ownership should be one of several factors that the court considers under a totality of circumstances evaluation.[355] This approach has been mirrored in the Courts of Appeal. Since *Vernon*, the Illinois Supreme Court has held that the continuation exception cannot apply without commonality of ownership, regardless of what other facts may apply. In *Dearborn Maple Venture, LLC v. Sci Illinois Services, Inc.*[356] the court of appeals noted:

> The test used to determine whether one corporate entity is a continuation of another is "whether there is a continuation of the *corporate entity of the seller—not* whether there is a continuation of the *seller's business operations*." A common identity of officers, directors, ownership and stocks between the selling and purchasing corporation is a key

[354] *Vernon*, 688 N.E.2d at 1176 (quoting *Nilsson*, 621 N.E. at 1032) (other citations omitted).

[355] *Vernon*, 688 N.E.2d at 1176, 1178.

[356] 968 N.E.2d 1222 (Ill. App. Ct. 2012), *reh'g denied*, (May 29, 2012).

> element of what constitutes a "continuation." However, "the continuity of shareholders necessary to finding of mere continuation does not require complete identity between the shareholders of the former and successor corporations."[357]

The Seventh Circuit Court of Appeals, citing *Vernon v. Schuster*, has held that successor liability may lie under the mere continuation exception even if the predecessor has not been dissolved.[358]

Illinois: The De Facto Merger Exception

The Illinois Court of Appeals held that, like the mere continuation exception, a prerequisite for imposing liability under the *de facto* merger exception is continuity of ownership.[359] The court noted that the mere continuation and *de facto* merger exceptions are similar but apply in different circumstances: the former applies where no corporation existed before the asset purchase and the latter involves the combination of two existing corporations.[360] Aside from stating this obvious difference between the exceptions, the *Nilsson* court provided no further guidance on the contours of the *de facto* merger exception.

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357 *Id.* at 1234 (emphasis added) (quoting Vernon, 688 N.E.2d at 1176; Park v. Townson & Alexander, Inc., 679 N.E.2d 107, 110 (Ill. App. Ct. 1997)) (other citations omitted); *accord* Workforces Solutions v. Urban Servs. Of Am. Inc., Nos. 1-11-1410 and 1-11-3046 2012 Ill. App. LEXIS 714 (Ill. App. Ct. 2012); Conser FS, Inc. v. Von Bergen Trucking, Inc., No. 2-10-1225, 2011 Ill. App. Unpub. LEXIS 2165 (Ill. App. Ct. 2011) (the supreme court has hinted that the common identity of officers, directors, and shareholders between the selling and purchasing corporations need not be exact).

358 Brandon v. Anesthesia & Pain Mgmt. Assocs., 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 of ownership for successor liability purposes).

359 Nilsson v. Cont'l Mach. Mfg. Co., 621 N.E.2d 1032, 1035 (Ill. App. Ct. 1993).

360 *Nilsson*, 621 N.E.2d at 1034.

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

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets and general business operations.
>
> (2) There is continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
>
> (3) The seller corporation ceases its ordinary business operations, liquidates and dissolves as soon as legally and practically possible.
>
> (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.[361]

A later decision by the Court of Appeals affirmed that all four elements are required for a showing of a de facto merger.[362] Recently, a federal district court in *Baxi v. Ennis Knupp & Assocs.*,[363] as well as the

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

[362] *Gray*, 695 N.E.2d at 1388.

[363] Baxi v. Ennis Knupp & Assocs., No. 10-CV-6346, 2011 WL 3898034, at *17 (N.D. Ill. Sept. 2, 2011).

Illinois Court of Appeals in *Diguilio v. Goss Int'l. Corp.* have indicated that "the most important factor" in determining whether de facto merger has occurred is the identity of the ownership of both the new and the prior corporations.[364] Both courts treated identity of ownership as a requirement—an "element" rather than a "factor" to be considered—holding that neither the *de facto* merger or the mere continuation exception applied because there was no common identity of ownership.[365]

Illinois: The Express/Implied Assumption Exception

In determining whether the successor corporation assumed the liabilities of the predecessor, the Illinois courts are "governed by the express provisions of the written document which dictates the agreement between the parties."[366]

Illinois: The Fraud Exception

Illinois courts have not developed a specific test for the fraud exception. However, the court in *Putzmeister* concluded that there was no evidence of fraud in the transaction "notwithstanding the disparity between the value of the predecessor's debts and assets."[367] The Seventh Circuit held in *Brandon*, that, under Illinois law, it is not necessary to demonstrate the existence of a majority of the eleven "badges of fraud" listed in the fraudulent conveyance statute.[368]

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364 Diguilio v. Goss Int'l. Corp., 906 N.E.2d 1268, 1277 (Ill. App. Ct. 2009).

365 *Baxi*, 2011 WL 3898034, at *17; *Diguilio*, 906 N.E.2d at 1277–78.

366 Putzmeister, 596 N.E.2d at 756.

367 *Id.* at 756.

368 Brandon v. Anesthesia & Pain Mgmt. Assocs., 419 F.3d 594, 599–600 (7th Cir. 2005).

Indiana

Indiana courts recognize the four traditional exceptions to the general rule of successor non-liability.[369] Indiana courts have also required that the predecessor corporation dissolve before a court can impose liability on the successor under any of the exceptions.[370]

Although the Indiana courts have not expressly adopted either the continuity of enterprise or product line exceptions, the court in *Guerrero v. Allison Engine Co.*, after discussing the supporting and opposing policies of the product line exception, stated:

> The product line exception *may* be an appropriate means by which to balance the seemingly juxtaposed concepts of strict liability under the Indiana Product Liability Act, and freedom of contract - long supported by common law, as well as both state and federal constitutions.[371]

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—the predecessor was still in existence at the time of the suit.[372] The court stated "the inequities which would warrant our full consideration of this proposed fifth exception to successor non-liability under Indiana law are not present."[373] Based on

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[369] Cooper Indust., LLC v. S. Bend, 899 N.E.2d 1274, 1287–91 (Ind. 2009); Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1233 (Ind. 1994); Rodriguez v. Tech Credit Union Corp., 824 N.E.2d 442, 447 (Ind. Ct. App. 2005); *see* U.S. Automatic Sprinkler Co. v. Reliable Automatic Sprinkler Co., 719 F. Supp. 2d 1020, 1028 (S.D. Ind. 2010); *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).

[370] Ziese & Sons Excavating, Inc. v. Boyer Constr. Corp., 965 N.E. 2d. 713 (2012) (citing Sorenson v. Allied Prods. Corp., 706 N.E.2d 1097, 1099 (Ind. Ct. App. 1999)); Guerrero v. Allison Engine Co., 725 N.E.2d 479, 483 (Ind. Ct. App. 2000).

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

[372] *Id.*

[373] *Id.*

the *Guerrero* court's favorable treatment of the product-line exception, an Indiana appellate court may adopt the product line exception if it is presented with the appropriate factual record. Note that the *Guerrero* court's approval of the product line exception directly contradicts *Hernandez v. Johnson Press Corp.*,[374] a 1979 case in which an Illinois Appellate Court applying Indiana law expressly rejected the product line exception on the theory that the legislature, not the court, is the appropriate forum to resolve policy concerns related to expanded successor liability.[375] In *U.S. Automatic Sprinkler Co. v. Reliable Automatic Sprinkler Co.*, the federal district court declined to apply the product line exception in a commercial dispute. The court stated, citing *Guerrero*, "this exception applies only when the claim is one for product liability involving personal injury."[376]

In cases involving the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Indiana courts will impose liability under CERCLA upon a successor corporation without regard to contract or merger.[377] CERCLA is the federal "catch-all environmental statute" that applies to cases where "environmental legal action" is possible.[378] In *P.R. Mallory*, the court stated that under CERCLA: "Kraft is considered a corporate successor to Mallory because there is sufficient corporate succession to support the transfer of Mallory's liability and rights to coverage to Kraft by operation of law."[379]

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374 Hernandez v. Johnson Press Corp., 388 N.E.2d 778, 780 (Ill. App. Ct. 1979).

375 *Hernandez,* 388 N.E.2d at 780.

376 U.S. Automatic Sprinkler Co. v. Reliable Automatic Sprinkler Co.,719 F. Supp. 2d 1020, 1031 (S.D. Ind. 2010) (quoting *Guerrero,* 725 N.E.2d at 480).

377 P.R. Mallory & Co., Inc. v. Am. States Ins. Co., No. 54C01-0005-CP-00156, 2004 WL 1737489, at *10 (Ind. Cir. Ct. July 29, 2004); *see also* Terra Products, Inc. v. Kraft General Foods, Inc., 653 N.E.2d 89, 90–91 (Ind. Ct. App. 1995).

378 Cooper Indus., LLC v. S. Bend, 899 N.E.2d 1274, 1280–81 (Ind. 2009).

379 *P.R. Mallory*, 2004 WL 1737489, at *10.

Indiana: The Express or Implied Assumption Exception

No Indiana decision has defined a particular test for the express or implied assumption exception. The courts look to the language of the applicable contract.[380]

Indiana: The Fraud Exception

In Indiana the fraud exception is based on evidence of "a fraudulent sale of assets done for the purposes of escaping liability."[381] In *Gorski v. DRR, Inc.*, the court noted:

> Gorski filed his wrongful death action on March 6, 1998, and LMB, Birk, and Oliphant entered into their agreement on August 26, 1998. Although this does not definitively prove that DRR transferred its assets to LMB and Birk due to Gorski's complaint, it is sufficient evidence to survive a Trial Rule 12(B)(6) challenge. Therefore, the trial court erred in granting LMB's and Birk's Motion to Dismiss on the fraudulent transfer of assets claim.[382]

In *Ziese & Sons Excavating Inc. v. Boyer Constr. Corp.*,[383] the court evaluated the existence of fraud by examining eight "badges of fraud," which include:

> 1) the transfer of property by a debtor during the pendency of a suit;
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> 2) a transfer of property that renders the debtor insolvent or greatly reduces his

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380 *See, e.g.,* Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1233 (Ind. 1994).

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

382 Gorski v. DRR, Inc., 801 N.E.2d 642, 647 (Ind. Ct. App. 2003).

383 Ziese & Sons Excavating Inc. v. Boyer Construction Corp., 965 N.E.2d 713, 722 (Ind. Ct. App. 2012).

> estate;
>
> 3) a series of contemporaneous transactions which strip the debtor of all property available for execution;
>
> 4) secret or hurried transactions not in the usual mode of doing business;
>
> 5) any transaction conducted in a manner differing from customary methods;
>
> 6) a transaction whereby the debtor retains benefits over the transferred property;
>
> 7) little or no consideration in return for the transfer; and
>
> 8) a transfer of property between family members.[384]

The court goes on to state, "When the facts of a case implicate several badges of fraud, an inference of fraudulent intent may be warranted."[385]

Indiana: The De Facto Merger Exception

In *Cooper Industries, LLC v. South Bend.*, a 2009 case, the Indiana Supreme Court set out several non-exclusive factors for determining if there was a *de facto* merger, stating: "Some pertinent findings might include continuity of the predecessor corporation's business enterprise as to management, location, and business lines; prompt liquidation of the seller corporation; and assumption of the debts of the seller necessary to the ongoing operation of the business."[386]

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[384] *Id.* at 722 (quoting Lee's Ready Mix and Trucking, Inc. v. Creech, 660 N.E.2d 1033, 1037 (Ind. Ct. App. 1996).

[385] *Id.*

[386] Cooper Indus., LLC v. S. Bend, 899 N.E.2d 1274, 1288 (Ind. 2009); *see also* Sorenson v. Allied Prod. Corp., 706 N.E.2d 1097, 1100 (Ind. Ct. App. 1999).

The court further noted, "To be sure, Delaware's version of *de facto* merger is far more restrictive, . . . Focused as it is on shareholder rights, Delaware may be something of an outlier on this subject, though obviously a very influential one."[387]

In a 2005 case, *Rodriguez v. Tech Credit Union Corp.,*[388] the court of appeals generally stated that "'[a s]uccessor in assets liability, under these exceptions, takes place only when the predecessor corporation no longer exists, such as when a corporation dissolves or liquidates in bankruptcy.'"[389]

Indiana: The Mere Continuation Exception

In Cooper, the Indiana Supreme Court set forth that:

> The doctrine of "mere continuation" has a slightly different focus [than *de facto* merger]. [The doctrine of mere continuation] asks whether the predecessor corporation should be deemed simply to have re-incarnated itself, largely aside of the business operations. Factors pertinent to this determination include whether there is a continuation of shareholders, directors, and officers into the new entity.[390]

[387] *Cooper,* 899 N.E.2d at 1288 n.10.

[388] Rodriguez v. Tech Credit Union Corp., 824 N.E.2d 442, 447 (Ind. Ct. App. 2005).

[389] *Id.* (quoting Markham v. Prutsman Mirror Co., 565 N.E.2d 385, 387 (Ind. Ct. App. 1991)).

[390] *Cooper*, 899 N.E. 2d at 1290 (citing Chicago Title Ins. Co. v. Alday–Donalson Title Co., 832 So.2d 810 (Fla. Dist. Ct. App. 2002)).

Iowa

Iowa courts recognize four exceptions to the general rule of successor non-liability: express or implied assumption or liabilities, fraud, consolidation or merger, and mere continuation.[391] The Iowa Supreme Court expressly rejected the product line exception, stating:

> We believe the product-line theory is inconsistent and, as the law currently stands, theoretically irreconcilable with our law of strict liability in tort as well as with our law of corporate liability. We find the logic of those courts which have rejected the doctrine more persuasive than the logic of those courts which have adopted it. Accordingly, we decline to adopt the doctrine as the law of this state. If the law is to be changed, the legislature is the appropriate forum for action.[392]

The Iowa Supreme Court also expressly declined to expand the mere continuation exception based on the *Cyr* and *Turner* decisions.[393]

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[391] Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 751–52 (Iowa 2002) (citing Arthur Elevator Co. v. Grove, 236 N.W.2d 383, 391–92 (Iowa 1975); Pancratz v. Monsanto Co., 547 N.W.2d 198, 200 (Iowa 1996)); Lumley v. Advanced Data-Comm, Inc., 773 N.W.2d 562 (Table), No. 09–0224, 2009 WL 2514084, at *1–2 (Iowa Ct. App. Aug. 19, 2009).

[392] Delapp v. Xtraman, Inc., 417 N.W.2d 219, 222–23 (Iowa 1987) (citing Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 311, 376 N.W.2d 820, 828–29 (1985); Grand Labs., Inc. v. Midcon Labs of Iowa, 32 F.3d 1277, 1281 (8th Cir. 1994).

[393] *Pancratz*, 547 N.W.2d at 201 ("We have never applied the mere continuation exception where the buying and selling corporations had different owners . . . . Moreover, we 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 . . . . Such a radical departure from traditional corporate principles, we observed, should be left to the legislature . . . . "); *Grand Labs.*, 32 F.3d at 1281; Oeltjenbrun v. CSA

Iowa: The Express or Implied Assumption Exception

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."[394] In *Archer Daniels Midland Co. v. Eco, Inc.*, the federal district court stated, "[a]n implied agreement is one in which the agreement is inferred from the acts or conduct of the parties, instead of being expressed by them in written or spoken words."[395] The district court then went on to apply five factors to determine if an implied agreement to assume liability had taken place:

> 1) whether the successor used the same name as the predecessor;
>
> 2) whether the successor took credit for the predecessor's work;
>
> 3) whether the successor assumed responsibility for completing a project;
>
> 4) whether the successor made efforts to collect money on a project; and
>
> 5) whether a successor participated in repairs to the predecessor's work.[396]

Investors, Inc., 3 F. Supp. 2d 1024, 1048–49 (N.D. Iowa 1998) (quoting *Pancratz*, 547 N.W.2d at 201 ("Although the Iowa Supreme Court noted that there were more expansive formulations of the [mere continuation] rule, which examine the 'totality of the circumstances,' it reaffirmed Iowa's adherence to the 'traditional' formulation of the rule.")).

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

395 Archer Daniels Midland Co. v. Eco, Inc., 821 F. Supp. 2d 1083, 1101 (S.D. Iowa 2011) (citing Ambrose v. Southworth Prods. Corp., 953 F.Supp. 728, 735 (W.D.Va.1997)).

396 *Archer*, 821 F. Supp. 2d at 1101 (citing Richmond v. Madison Mgmt. Grp., Inc., 918 F.2d 438, 450–51 (4th Cir. 1990)).

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."[397] In *Pancratz,* the court stated, "The mere continuation exception, as traditionally applied, focuses on continuation of the *corporate entity*."[398] Furthermore, "[t]he exception has no application without proof of continuity of management and ownership between the predecessor and successor corporations. Thus, [t]he key element of a continuation is a common identity of the officers, directors and stockholders in the selling and purchasing corporations."[399] The *Pancratz* court also examined the new and expanded versions of the continuation exception that originated in the *Cyr* and *Turner* decisions.[400] 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."[401]

Iowa: The Fraud Exception

The court in *Pancratz* stated 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.'"[402] In

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[397] *Grundmeyer*, 649 N.W.2d at 752 (citing Arthur Elevator Co. v. Grove, 236 N.W.2d 383, 392–93 (Iowa 1975)).

[398] *Pancratz*, 547 N.W.2d at 201 (emphasis in original) (citing Grand Labs., Inc. v. Midcon Labs of Iowa, 32 F.3d 1277, 1283 (8th Cir. 1994)).

[399] *Pancratz*, 547 N.W.2d at 201 (internal quotations omitted) (quoting Leannais v. Cincinatti, Inc., 565 F.2d 437, 440 (7th Cir. 1977)) (citing Weaver v. Nash Int'l, Inc., 730 F.2d 547, 548 (8th Cir. 1984); Tucker v. Paxson Mach. Co., 645 F.2d 620, 625–26 (8th Cir. 1981)).

[400] *Pancratz*, 547 N.W.2d at 201.

[401] *Id.* at 201; *see also Lumley*, 2009 WL 2514084 at *3–4.

[402] *Pancratz*, 547 N.W.2d at 202 (quoting *Grand Labs.*, 32 F.3d at 1283); *see also* C. Mac Chambers v. Iowa Tae Kwon Do Acad., 412 N.W.2d 593 (Iowa 1987).

Chambers a father, the sole owner of a corporation, formed a new corporation and transferred all of his businesses' assets to the newly-formed corporation. His son was the sole shareholder and director, but the father continued to manage the business.[403] The *Pancratz* 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."[404] The *Pancratz* court held that the *Chambers* decision does not indicate that Iowa courts do not require continuity of ownership under the mere continuation exception.[405] In *Lumley v. Advanced Data-Comm, Inc.*, the court applied the traditional elements of fraud in determining that the fraud exception did not apply, noting: "The elements of fraud are: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, (7) resulting injury and damage."[406]

Kansas

Kansas courts apply the four traditional exceptions to the general rule of successor non-liability.[407] However, unlike other traditional rule jurisdictions, Kansas does not require continuity of ownership under the mere continuation exception.[408]

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[403] *Chambers,* 412 N.W.2d at 595.

[404] *Pancratz,* 547 N.W.2d at 202.

[405] *Id.*

[406] *Lumley*, 2009 WL 2514084, at *4 (citing Wilden Clinic, Inc. v. Des Moines, 229 N.W.2d 286, 292 (Iowa 1975).

[407] Gillespie v. Seymour, 876 P.2d 193, 199–200 (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* YRC, Inc. v. Magla Prods, L.L.C., No. 12-2179-SAC, 2012 WL 2045954 (D. Kan. June 6, 2012); 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.").

[408] *Stratton*, 676 P.2d at 1299 (quoting Tift v. Forage King Indust., Inc., 322 N.W.2d 14 (1982) ("A court merely need determine that the defendant, despite

In *Avery v. Safeway Transfer & Storage, Co.*, the Supreme Court of Kansas applied a narrow form of the mere continuation exception as early as 1938, though it did not classify it as such.[409] 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.*[410] The *Avery* court held that where certain facts were presented, the effect of a transaction was fraudulent, regardless of the intent of the parties involved.

> 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.[411]

The *Avery* court, therefore, subjected the transferee to liability based on the going concern value of the purchased assets. Unlike other jurisdictions that have imposed liability under similar circumstances, limiting a creditor's recovery to the liquidation value of the predecessor's assets at the time of the transfer (*e.g.*, California), Kansas courts imposed

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business transformations, is substantially the same as the original manufacturer")).

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

[410] Mank v. S. Kansas Stage Lines Co., 56 P.2d 71 (Kan. 1936).

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

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

Currently, there do not appear to be any Kansas cases that define a test for or discuss the contours of the express or implied assumption of liabilities exception.

Kansas: The Mere Continuation Exception

Kansas courts use a five element test in finding a mere continuation:

> (1) [The] 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."[412]

Note, 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.[413]

Kansas: The De Facto Merger Exception

In *Comstock v. Great Lakes Distributing Company*, the Kansas Supreme Court defined the consolidation or merger exception by

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412 *Gillespie*, 876 P.2d at 200 (quoting *Stratton*, 676 P.2d at 1298–99); *see also* Crane Const. Co. v. Klaus Masonry, LLC, 114 F. Supp. 2d 1116, 1119 (D. Kan. 2000).

413 *Gillespie*, 876 P.2d at 200 (citing *Stratton*, 676 P.2d at 1297–98) (refusing to impose successor liability against the successor because the claimant sued a partner of the predecessor).

reference to Fletcher's Cyclopedia of the Law of Private Corporations, stating:

> Strictly speaking, a consolidation signifies such a union as necessarily results in the creation of a new corporation and the termination of the constituent ones, whereas a merger signifies the absorption of one corporation by another, which retains its name and corporate identity with the added capital, franchises and powers of a merged corporation.[414]

The court held the continuation or merger exception did not apply because there was no evidence of direct dealing between the successor and the predecessor; rather, the successor acquired its interest from intervening purchasers of the predecessor's assets.[415]

Kansas: The Fraud Exception

In *Comstock*, the Supreme Court 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."[416]

In *Moore v. Pyrotech*,[417] the Tenth Circuit, applying Kansas law, upheld a finding of successor liability based on the fraud exception. In that case, the trial court had found:

> [The predecessor] entered into the share exchange agreement about a month after

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414 Comstock v. Great Lakes Distrib. Co., 496 P.2d 1308, 1311 (Kan. 1972) (quoting 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7041 (rev. perm. ed. 1983)).

415 *Comstock*, 496 P.2d at 1311; 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (rev. vol. Sept. 2008).

416 *Comstock*, 496 P.2d at 1312.

417 Moore v. Pyrotech, 13 F.3d 406 (Table), No. 92-3404, 1993 WL 513834 (10th Cir. Dec. 10, 1993).

> signing the letter of intent with plaintiffs, but did not inform plaintiffs. Lee Derr, president of [the predecessor] and [the successor], testified that the [predecessor's] shareholders were getting restless, and the reverse takeover was designed to provide them some immediate return on their investment. But by this time, [the predecessor] was contractually obliged to reimburse plaintiffs for their costs of investigating the project. . . . [T]he net result was in legal effect a fraud. The plaintiffs negotiated in good faith while [the predecessor] and its principals secretly created an intricate web of self-dealing to create a business successor for [the predecessor]. As Derr testified, this was designed to give the investors a return on their investment, not in and of itself improper, but clearly so if done at plaintiffs' expense.[418]

The Tenth Circuit also noted: "Kansas cases finding successor liability have found fraud, *see Avery*, 80 P.2d at 1101, whereas those finding no liability have generally specifically indicated there was no fraud."[419]

Kentucky

Kentucky recognizes the general rule of successor non-liability and the four traditional exceptions.[420] Also, while not using the term,

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[418] *Moore*, 1993 WL 513834 at *6 (quoting Moore v. Pyrotech Corp., No. 90-2178-0, 1992 U.S. Dist. LEXIS 6425, at *3 (D. Kan. Apr. 7, 1992)).

[419] *Moore*, 1993 WL 513834 at *6 (citing *Stratton*, 676 P.2d at 1299; *Comstock*, 496 P.2d at 1312).

[420] Pearson v. Nat'l Feeding Sys., Inc., 90 S.W.3d 46, 49 (Ky. 2002) (citing Am. Ry. Express Co. v. Kentucky, 228 S.W. 433 (Ky. Ct. App. 1920); *see also* Excel Energy, Inc. v. Cannelton Sales Co., 337 F. App'x 480, 482 (6th Cir. 2009);

Kentucky appears to have recognized the continuity of enterprise exception or seems to employ a more expansive mere continuation exception. For example, in *Parker,* the appellate court stated:

> In Kentucky, a determination of the continuity of a corporation after a sale depends on examining the sale agreement to determine continuity of shareholders *or* management. Even where an adequate consideration was paid for the assets, a successor company which continues with the same business, by the same officers and personnel, in the same location with only a slight change in name will be considered liable for the debts and liabilities of the selling company. [421]

However, in *Pearson,* the Kentucky Supreme Court expressly rejected the product-line exception.[422]

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.[423] Even though the successor expressly assumed certain liabilities that existed on the closing date, and the contract did not specifically address pre-closing tort liabilities, the court found that the successor did not impliedly assume pre-closing tort liabilities.[424]

Parker v. Henry A. Petter Supply Co., 165 S.W.3d 474, 478–79 (Ky. Ct. App. 2005).

421 *Parker*, 165 S.W.3d at 479 (emphasis added) (citations omitted); *see also* Core Med., LLC v. Schroeder, No. 2009-CA-000670-MR, 2010 WL 2867820, at *3 (Ky. Ct. App. Jul 23, 2010).

422 *Pearson*, 90 S.W.3d at 53.

423 *Id.* at 50.

424 *Id.*

Kentucky: The De Facto Merger Exception

Without defining a specific test for the *de facto* merger exception, the *Pearson* court held that liability would not be imposed on a successor that purchases assets "essentially" through a bankruptcy sale.[425] 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.[426]

In *Wallace v. Midwest Fin. & Mortg. Servs., Inc.*, the federal district court noted that Kentucky recognizes the four traditional exceptions and states:

> The following factors guide the Court in its determination whether to apply the de facto merger doctrine:
>
> (1) continuity of management, personnel, location, assets, and general business operations; (2) continuity of shareholders which results from the purchasing corporations paying for the acquired assets with shares of its own stock; (3) whether the seller corporation ceases business operation and liquidates or dissolves as soon as is legally or practically possible; (4) whether the purchasing corporation assumes the obligations of the sellers which are ordinarily necessary for the continuation of the seller's normal business; and (5) adequacy of the consideration received by the selling corporation. [427]

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[425] *Id.* at 51.

[426] *Id.*

[427] Wallace v. Midwest Fin. & Mortg. Servs., Inc., 728 F. Supp. 2d 906, 926 (E.D. Ky. 2010) (quoting Ogle v. U.S. Shelter Corp., No. 95–51, 1996 WL 380707, at *5 (E.D. Ky. Apr. 25, 1996)).

Kentucky: The Mere Continuation Exception

Based on the *Pearson* court's interpretation of the mere continuation exception, there must be "continuity of shareholders or management" in order to create a continuation sufficient to impose liability on the purchasing corporation.[428] The court, however, did not specify if continuity of ownership *and* control is necessary. 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.[429]

In *Parker v. Henry A. Petter Supply Co.*, the court held: "Even where an adequate consideration was paid for the assets, a successor company which continues with the same business, by the same officers and personnel, in the same location with only a slight change in name will be considered liable for the debts and liabilities of the selling company."[430] However, in that case the court held that there was no "continuation" or "continuity of a corporation," as the ownership, management, and business practices of the successor differed substantially from its predecessor.[431] In *Competitive Auto Ramp Services v. Kentucky Unemployment Insurance*, the court stated that "merely continuing the same business, even in the same location, is not, by itself, sufficient to impose successor liability."[432]

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[428] *Pearson*, 90 S.W.3d at 51; Parker v. Henry A. Petter Supply Co., 165 S.W.3d 474, 479 (Ky. Ct. App. 2005).

[429] *Pearson,* 90 S.W.3d at 51; *Parker*, 165 S.W.3d at 479.

[430] *Parker,* 165 S.W.3d at 479; *see also* Core Med., LLC v. Schroeder, 2010 WL 2867820, at *3 (Ky. Ct. App. Jul 23, 2010).

[431] *Parker*, 165 S.W.3d at 479–80.

[432] Competitive Auto Ramp Serv. v. Ky. Unemployment Ins., 222 S.W.3d 249, 253 (Ky. Ct. App. 2007).

Kentucky: The Fraud Exception

The court in *Pearson* did not address the fraud exception because the plaintiff in *Pearson* conceded that "no fraud exists in this case."[433] There does yet not appear to be a subsequent case addressing this specific exception.

Louisiana

In *Pichon v. Asbestos Defendants*, a 2010 case, a Louisiana appellate court set out what it referred to as the "basic principle of corporate successor liability[:]"

> The general rule of corporate liability is that, when a corporation sells all of its assets to another, the latter is not responsible for the seller's debts or liabilities, except where (1) the purchaser expressly or impliedly agrees to assume the obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability.[434]

In *Bourque v. Lehmann Lathe, Inc.*, the court stated that the second exception to non-liability, mere continuation, "would include the surviving corporation in most mergers" as well as "some non-merger sales in which one corporation or other business entity sells all its assets to another legal entity."[435] In discussing the third exception—entering into a transaction in order to escape liability—the court used the term

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[433] *Pearson*, 90 S.W.3d at 51 (stating that the holding in *American Railway* still governs successor non-liability in the state of Kentucky); *Parker*, 165 S.W.3d at 479.

[434] Pichon v. Asbestos Defendants, 52 So. 3d 240, 243 (La. Ct. App. 2010) (quoting Golden State Bottling Co. v. Nat'l Labor Relations Bd., 414 U.S. 168, 182 n. 5 (1973).

[435] Bourque v. Lehmann Lathe, Inc., 476 So. 2d 1125, 1126–27 (La. Ct. App. 1985).

"defraud."[436] The fraud exception is also found in long standing Louisiana precedent.[437]

Finally, Louisiana courts have not adopted, or expressly rejected, the product line theory of California's *Ray v. Alad*.[438] Most recently, the court in *Pichon* stated the exception did not apply to the facts before it because the predecessor was a "viable defendant" when the suit was filed and, in fact, was named as a defendant.[439] The court added: "The fact that [the predecessor] subsequently filed for bankruptcy (but has not been dissolved) is irrelevant to the determination of the legal question presented here."[440]

Louisiana: The Express or Implied Assumption Exceptions

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

> [I]s premised upon the concept that a voluntary sale of all assets includes, or should include, negotiations as to the transfer of all aspects of the corporate balance sheet. The parties to the sale are free to bargain, and potential liability is certainly one of the factors that rational businessmen include in the negotiations of such sales.[441]

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[436] *Bourque*, 476 So. 2d at 1127; *see also* Wolff v. Shreveport Gas, 70 So. 789 (La. 1916) (successor liability imposed based on fraudulent schemes to escape liability through sale of a company's assets to a newly formed corporation following an explosion).

[437] *Wolff*, 70 So. at 794–95.

[438] *Pichon*, 52 So. 3d at 244–45; *Bourque*, 476 So. 2d at 1128.

[439] *Id.* at 245.

[440] *Id.* at 245, n. 5.

[441] *Bourque*, 476 So. 2d at 1127.

The court noted that "[q]uite obviously, an auction pursuant to involuntary bankruptcy proceedings is not a voluntary transaction in which both parties negotiate terms of sale."[442]

Biller v. Snug Harbor Jazz Bistro of Louisiana, L.L.C., [443] deserves mention. The case involved a restaurant that was transferred from a deceased uncle (Mr. Brumat) to his living niece (Ms. Brumat) and an injury that occurred at the restaurant while the deceased was still living. Upon receiving her inheritance, Ms. Brumat formed Snug Harbor L.L.C. with Mr. Schmidt, the former manager of Snug Harbor. The question for the court was whether Snug Harbor, L.L.C. was a mere continuation of Snug Harbor:

> A newly organized corporation would be liable as the successor of the old upon a showing that the transaction was entered into in fraud of the creditors of the old corporation or when the circumstances attending the creation of the new and its succession to the business and property of the old were of such a character as to warrant a finding the new corporation was merely a continuation of the old.[444]

Ultimately, the court held that "Snug Harbor, L.L.C., is a separate, distinct entity from the late Mr. Brumat and his estate, and therefore, not liable for the debts of the succession . . . . Snug Harbor, L.L.C., did not exist at the time of Mr. Biller's accident and was formed after Mr. Brumat's death."[445]

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[442] *Id.*

[443] Biller v. Snug Harbor Jazz Bistro of Louisiana, L.L.C., 99 So. 3d 730, 733 (La. Ct. App. 2012), *reh'g denied*, (Sept. 20, 2012), *writ denied*, 2012–2151 (La. Nov. 21, 2012), 102 So. 3d 60.

[444] *Snug Harbor*, 99 So. 3d at 732 (citing Wolff v. Shreveport Gas, 70 So. 789, 794 (La. 1916)).

[445] *Id.* at 733.

Louisiana: The Fraud or To Escape Liability Exception

Based on *Wolff v. Shreveport Gas*,[446] a 1916 case from the Louisiana Supreme Court, courts will impose successor liability when there is evidence of fraud in the transaction.[447] The *Wolff* court relied on the trust fund doctrine, which holds that a surviving corporation is liable to the predecessor's creditors if the transaction was entered into fraudulently.[448] The court in *Wolff* stated:

> [A] newly organized corporation is liable for the debts of an old one . . . where it is shown that the succession was the result of a transaction entered into in fraud of the creditors of the old corporation, or that the circumstances attending the creation of the new . . . were of such a character as to warrant the finding that the new, is merely a continuation of the old, corporation.[449]

A "transaction . . . entered into to escape liability" is also an enumerated exception to the general rule of non-successor liability.[450] Although, on its face, this exception appears to be potentially broad, the court in *Bourque*, limits this exception to one involving fraud.[451] Also, in

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446 Wolff v. Shreveport Gas, 70 So. 789 (La. 1916).

447 *See* Roddy v. NORCO Local 4-750, Oil, Chem., & Atomic Workers Int'l Union, 359 So. 2d 957, 960 (La. 1978) (quoting *Wolff*, 70 So. at 794; *see also* Hollowell v. Orleans Reg'l Hosp. LLC, 217 F.3d 379, 390 (5th Cir. 2000) (emphasizing the difference between the fraud exception and the mere continuation exception).

448 *Wolff*, 70 So. at 794.

449 *Id.*

450 Pichon v. Asbestos Defendants, 52 So. 3d 240, 243 (La. Ct. App. 2010) (quoting 414 U.S. 168, 182 n.5 (1973); Bourque v. Lehmann Lathe, Inc., 476 So. 2d 1125, 1127 (La. Ct. App. 1985)).

451 *Bourque*, 476 So. 2d at 1127.

Pichon, the court indicated the exception applies only to "transaction[s] entered into for the *sole* purpose of escaping liability."[452]

Louisiana: The De Facto Merger Exception

Although Louisiana courts do not use the term "de facto" merger in discussing exceptions to the general rule of non-successor liability, the *Wolff* court's description of transactions that may give rise to liability in part resembles the traditional *de facto* merger doctrine.[453]

The *Wolff* court summarized the four general categories of business reorganizations that may produce a "continuation" resulting in successor liability—consolidations, mergers, continuations, and *de facto* mergers:

> 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.[454]

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[452] *Pichon*, 52 So. 3d at 244 (emphasis added).

[453] *Wolff*, 70 So. at 794.

[454] *Id.*

Louisiana: The Mere Continuation Exception

The court in *Bourque* explained the rationale for imposing liability under the mere continuation exception, listing the following factors to be considered:

> [T]his rationale for liability would include some non-merger sales in which one corporation or other business entity sells all its assets to another legal entity. The key consideration is whether the successor is, in fact, a "continuation" of the predecessor. The extent to which predecessor and successor have common shareholders, directors, officers, or even employees are pertinent considerations. Further, prior business relationships should be considered, as should the continuity of the identity of the business in the eyes of the public.[455]

Recently, the appellate court ruled that the sale of *all* of a predecessor's assets to a successor is a threshold requirement.[456] In *Pichon*, on appeal from summary judgment granted in favor of the defendants, a successor purchased a division of General Motors ("GM"), known as Detroit Diesel Allison Division. The sales agreement provided that the successor would not assume or be liable for "any liabilities, obligations or commitments of GM or of any of its Affiliates, . . ."[457] The court first noted:

> In the absence of a transaction entered into for the sole purpose of escaping liability, which is covered by exception # 3 above, we believe the facts showing one corporation to be merely a continuation

[455] *Bourque*, 476 So. 2d at 1127.

[456] *Pichon*, 52 So. 3d at 240.

[457] *Id.* at 243.

> of the other would have to be especially compelling to impose liability upon a corporation that has expressly contracted out of such liability.[458]

The court did reach that issue, however, as it held that the plaintiff failed to satisfy a threshold element. The court stated specifically that "[a] threshold requirement to trigger a determination of whether successor liability is applicable under the 'continuation' exception is that one corporation must have purchased '*all*' the assets of another."[459]

The dissent disagreed and maintained that summary judgment was improper because the inquiry was factually intensive and required a balancing and examination of the eight factors set forth in *Hollowell v. Orleans Regional Hospital LLC*;[460] the factors are as follows:

> (1) retention of the same employees;
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> (2) retention of the same supervisory personnel;
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> (3) retention of the same production facility in the same physical location;
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> (4) production of the same product;
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> (5) retention of the same name;
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> (6) continuity of assets;
>
> (7) continuity of general business operations; and

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458 *Id.* at 244 (citation omitted).

459 *Id.* (emphasis added) (citing Golden State Bottling Co. v. Nat'l Labor Relations Bd., 414 U.S. 168, 182 n. 5 (1973)); National Sur. Corp. v. Pope Park, Inc., 121 So. 2d 240 (La. 1960); Wolff v. Shreveport Gas, Electric Light & Power Co., 70 So. 789 (La. 1916).

460 217 F.3d 379, 390 (5th Cir. 2000).

> (8) whether the successor holds itself out as the continuation of the previous enterprise.[461]

Note that the majority did not address *Hollowell* or its eight factor test associated with the continuity of enterprise doctrine.

In *Russell v. SunAmerica Securities., Inc.*,[462]a 1992 case, the United States Court of Appeals for the Fifth Circuit used the eight factor continuity of enterprise test found in *Mozingo v. Correct Manufacturing Corp.*[463] as its test for the Louisiana continuation exception; this is the same test employed in *Hollowell* (2000) as well as in the precedential *Cyr*. Federal district courts in Louisiana have followed *Russell* in using this test, referring to it as "mere continuation," rather than "continuity of enterprise."[464] It appears though that this test was, at least implicitly, rejected by the Court of Appeal of Louisiana in the 2010 *Pichon* case.[465]

Also note that in a 1960 case, the Louisiana Supreme Court explained that under *Wolff*, that, in order for a continuation to be found, there must be continuity of ownership between the selling and purchasing corporations:

> [T]he "continuation" doctrine of the *Wolff* case can be invoked only when it is shown that the major stockholders of the selling corporation also have a substantial or almost identical interest in the purchasing corporation, for, otherwise, there would be no premise for

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461 *Pichon*, 52 So. 3d at 246–47 (Belsome, J., dissenting) (quoting *Hollowell*, 217 F.3d at 390).

462 962 F.2d 1169, 1175 (5th Cir. 1992) (citing Monzingo v. Correct Mfg. Corp., 752 F.2d 168, 174 (5th Cir. 1985)).

463 752 F.2d at 175 (applying Mississippi law).

464 *Hollowell*, 217 F.3d at 390.

465 52 So. 3d at 240.

> concluding that the new corporation is a reincarnation of the old.[466]

However, more recent cases indicate that the key requirement is that all of a predecessor's assets be sold to the successor rather than merely just identity of ownership.[467]

Finally, in more recent cases involving contract-based or tax claims, Louisiana appellate courts have not imposed successor liability based on the perceived separate nature of the defendants involved.[468]

Maine

In *Director of Bureau of Labor Standards v. Diamond Brands, Inc.*, a case involving liability for severance pay under M.R.S.A. § 625-B, the Supreme Court of Maine stated:

> [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.[469]

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

467 *Pichon*, 52 So. 3d at 243; Bourque, v. Lehmann Lathe Inc.,476 So. 2d 1125, 1127 (La. Ct. App. 1985).

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

469 Dir. of Bureau of Labor Standards v. Diamond Brands, Inc., 588 A.2d 734, 736 (Me. 1991) (citation omitted) (citing Whiting v. Malden & Melrose R.R., 88 N.E. 907, 910 (Mass. 1909); 8 Z. CAVITCH, BUSINESS ORGANIZATIONS §

The court rejected the 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. However, the court did not explicitly state that the mere continuation exception was not recognized as a successor liability doctrine in Maine.[470]

Maine state courts do not appear to have addressed successor liability in the tort context, and federal court cases provide mixed guidance as to how state courts might approach successor liability in this area.[471]

Maryland

In *Nissen Corp. v. Miller*, the Maryland Court of Appeals (Maryland's highest court) adopted "the general rule of nonliability of a successor corporation, with its four traditional exceptions."[472] 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

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163.02(2)(c) (1990); 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (rev. perm. ed. 1983).

[470] *Diamond Brands*, 588 A.2d at 737. *But see* Janet M. Sing, Inc. v. Maine Dept. of Labor, 492 A.2d 892 (Me. 1985) (discussing statutory employer continuation liability under M.R.S.A. Title 26, § 1228).

[471] Jordan v. Hawker Dayton Corp., 62 F.3d 29, 32–33 (1st Cir. 1995) (declining to rule whether Maine would adopt the "majority rule" with the four traditional exceptions, but stating the product line doctrine "is at most a minority rule which has plainly not been adopted by Maine"); Ramirez v. DeCoster, 194 F.R.D. 348, 366 n.33 (D. Me. 2000) (citing *Diamond Brands*, 588 A.2d at 736 n.5) ("Under 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."); Saco River Tel. & Tel. Co. v. Shooshan Jackson, Inc., 826 F. Supp. 580, 583 (D. Me. 1993) (stating Maine did not appear to recognize the de facto merger and continuity of enterprise "exceptions to the common law rule").

[472] Nissen Corp. v. Miller, 594 A.2d 564, 565 (Md. 1991); *see also* Sherwin-Williams Co. v. Coach Works Auto Collision Repair Ctr., Inc., No. WMN–07–2918, 2011 WL 709714, at *10 (D. Md. Feb. 22, 2011); Charter Oak Fire Ins. Co. v. Marlow Liquors, LLC, No. JKS 09–1894, 2010 WL 2245039, at *3–4 (D. Md. June 1, 2010).

Act.[473] The court also concluded that the mere continuation exception is based on sound policy.[474] Importantly though, the *Nissen* court expressly rejected the continuity of enterprise exception.[475]

Maryland: The Express and Implied Assumption Exceptions

Maryland courts look to the language of the asset purchase agreement to determine if the purchasing corporation expressly assumed the liabilities of the seller.[476] Unlike most jurisdictions, Maryland has articulated a more narrow, totality-of-the-circumstances test to determine whether 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.[477]

The *Baltimore Luggage* court, applying the preceding standard, 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

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[473] *Nissen*, 594 A.2d at 566.

[474] *Id.* (citing Baltimore Luggage v. Holtzman, 562 A.2d 1286, 1293 (Md. 1989)).

[475] Id. at 570–74; *see also* Academy of IRM v. LVI Environmental Services, Inc., 687 A.2d 669, 678–79 (Md. 1997) (quoting *Nissen*, 594 A.2d at 567 ("The gravamen of the traditional 'mere continuation' exception is the continuation of the *corporate entity* rather than continuation of the business operation.")); EHA Consulting Group v. Hardin & Assoc., No. RDB 09–2859, P.C., 2010 WL 1137514, at *3 (D. Md. March 19, 2010).

[476] *Baltimore Luggage*, 562 A.2d at 1286.

[477] *Baltimore Luggage*, 562 A.2d at 1292. (citing 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (rev. perm. ed. 1983)).

payments from the amount that the purchaser paid for the seller's assets.[478] In contrast, the purchaser was held liable in *Ramlall v. MobilPro Corp.*[479] in which a reverse triangular merger agreement contained a clause expressly assuming the seller's liabilities.

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; in order for a purchasing corporation to be liable for the debts of it predecessor, the successor corporation must meet certain "indicia of continuation," which are:

> [C]ommon 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 separate identities of the corporation without the necessary considerations that justify such an action.[480]

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478 *Baltimore Luggage*, 562 A.2d at 1286.

479 202 Md. App. 20 (Md. Ct. Spec. App. 2011).

480 *Baltimore Luggage*, 562 A.2d at 1293 (quoting 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (rev. perm. ed. 1983)).

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, holding itself out as the same entity so that customers would not know that the ownership had in fact changed.[481] The Maryland Court of Appeals reversed because there was no continuity of ownership between the corporations, the seller remained in existence, and there was sufficient consideration given for the assets.[482]

In a later Court of Special Appeals decision, the court analyzed the facts in front of them using a continuation test adopted by Rhode Island—though they did not expressly endorse the test.[483] 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."[484]

"[T]he 'mere continuation' exception is 'designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of reach of [a] predecessor's creditors.'"[485]

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[481] *Baltimore Luggage*, 562 A.2d at 1293.

[482] *Id.* at 1294.

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

[484] *IRM*, 687 A.2d at 680 (quoting H.J. Baker & Bros., Inc. v. Orgonics, Inc., 554 A.2d 196, 205 (R.I. 1989)).

[485] Progressive Septic, Inc. v. SeptiTech, LLC, No. ELH-09-03446, 2011 WL 939022, at *3 (D. Md. Mar. 15, 2011) (quoting *Baltimore Luggage*, 562 A.2d at 1293).

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 the mere continuation exception applies where "the purchasing corporation maintains the same or similar management and ownership but wears a 'new hat.'"[486] In discussing the four traditional exceptions, the *Nissen* court cited this quote from *Baltimore Luggage* with approval.[487] In 2010, the United States District Court for the District of Maryland, stated:

> In Maryland, jurisdiction based upon a theory of continuity of the *entity* is a basis for successor liability, whereas jurisdiction based upon continuity of the *enterprise* is not a basis for successor liability . . . . As the Court of Appeals of Maryland held in *Nissen*, "The mere continuation or continuity of entity exception applies where there is a continuation of directors and management, shareholder interest and, in some cases, inadequate consideration. The gravamen of the traditional mere continuation exception is the continuation of the corporate entity rather than continuation of the business operation." . . . In comparison, "[A] continuity of enterprise analysis seeks to establish whether there is substantial continuity of pretransaction and posttransaction business activities resulting from the use of the acquired assets. . . ."[488]

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[486] *Baltimore Luggage*, 562 A.2d at 1293. (quoting Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451 (11th Cir. 1985).

[487] Nissen Corp. v. Miller, 594 A.2d 564, 566 (Md. 1991) (citing *Baltimore Luggage*, 562 A.2d at 1293).

[488] EHA Consulting Grp., Inc. v. Hardin & Assocs., P.C., No. CIV.A RDB 09-2859, 2010 WL 1137514, at *3 (D. Md. Mar. 19, 2010) (emphasis in original)

Based on the current case law, it is difficult 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 statute does not use the term "*de facto* merger," it provides that the surviving entity in a merger situation is liable for the debts of the predecessor and does not specify that such liability extends only to statutory mergers.[489] Maryland courts have not yet articulated a test for what constitutes a *de facto* merger.

Maryland: The Fraud Exception

In discussing the fraud exception, the *Nissen* court noted that "the Maryland Uniform Fraudulent Conveyance Act, § 15-201 et seq., Commercial Law Article, Maryland Annotated Code, protects the rights of creditors of a corporation which transfers its assets with an intent to defraud or without fair consideration in a manner similar to the fourth [fraud] exception noted above."[490]

Massachusetts

Massachusetts courts:

> "follow 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 (1) the successor expressly or impliedly assumes liability of the predecessor, (2) the transaction is a de facto merger or

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(citations omitted) (quoting *Nissen*, 594 A.2d at 564 & n.1; and citing *IRM*, 687 A.2d 669).

[489] MD. CODE ANN. § 3-114(e)(1) (1998).

[490] 594 A.2d at 566 (internal quotations omitted) (quoting Smith v. Navistar Intern. Transp. Corp., 687 F. Supp. 201, republished as corrected, 737 F. Supp. 1446, 1449 (D. Md.1988)).

> consolidation, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor."' [491]

The court in *Guzman v. MRM/Elgin* also expressly rejected the product line exception, deferring to the legislature on this "matter[] of social policy."[492]

Massachusetts: The Express or Implied Assumption Exception

Courts determine whether a purchasing corporation expressly or impliedly assumed the liabilities of the selling corporation by looking at the language of the relevant contract documents.[493]

Massachusetts: The De Facto Merger Exception

In Massachusetts "[t]he 'de facto merger' theory of successor liability 'has usually been applied to situations in which the ownership, assets and management of one corporation are combined with those of another, preexisting entity.'"[494]

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

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[491] Milliken Co. v. Duro Textiles, LLC, 887 N.E.2d 244, 254–55 (Mass. 2008) (citations omitted) (quoting Guzman v. MRM/Elgin, 567 N.E.2d 929, 931 (Mass. 1991)); Carreiro v. Rhodes Gill and Co., Ltd., 68 F.3d 1443, 1447 (1st Cir. 1995) (citations omitted); JSB Indus., Inc. v. Nexus Payroll Servs., Inc., 463 F. Supp. 2d 103, 109 (D. Mass. 2006) (quoting *Guzman*, 567 N.E.2d at 931).

[492] *Guzman*, 567 N.E.2d at 933 (quoting Mason v. General Motors Corp., 490 N.E.2d 437, 442 (Mass. 1986)).

[493] Scott v. NG U.S. 1, Inc., 854 N.E.2d 981, 992 (Mass. App. Ct. 2006), *rev'd*, 450 Mass. 760 (2008); Goguen v. Textron Inc**.,** 476 F. Supp. 2d 5, 12 (D. Mass. 2007).

[494] *Milliken*, 887 N.E.2d at 255 (quoting National Gypsum Co. v. Cont'l Brands Corp., 895 F. Supp. 328, 336 (D. Mass. 1995)).

> (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 . . . . No single factor is necessary or sufficient to establish a *de facto* merger . . . .[495]

Thus, under Massachusetts law, continuity of ownership is not a threshold requirement for finding a *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."[496] "[I]mposition 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

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[495] Cargill, Inc. v. Beaver Coal & Oil Co., 676 N.E.2d 815, 818 (Mass. 1997) (citations omitted) (citing *In re* Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 712 F. Supp. 1010, 1015 (D. Mass. 1989)); *see also Milliken*, 887 N.E.2d at 255; Gregorio v. Excelergy Corp., No. 07-2754BLS2, 2008 WL 2875430, at *4 (Mass. Super. 2008); *Goguen*, 476 F. Supp. 2d at 12–14; *JSB Indus., Inc.*, 463 F. Supp. 2d at 109–10; (quoting *Acushnet*, 712 F. Supp. at 1015); *Scott*, 854 N.E.2d at 991; Am. Paper Recycling Corp. v. IHC Corp., 707 F. Supp. 2d 114, 119–20 (D. Mass. 2010) (citations omitted).

[496] *Cargill*, 676 N.E.2d at 819.

on whether one company has become another for purposes of its corporate debt."[497]

In Massachusetts there is also no requirement that the predecessor be formally dissolved.[498] "Rather, the principles of successor liability will be imposed where a corporation ceases all of its ordinary business operations, which are assumed by another corporation, and liquidates its assets. When this occurs, the predecessor corporation, for all practical purposes, has ceased to exist."[499] In addition, *Cargill* allows for the finding of a *de facto* merger when stock is only part of the value exchanged in the deal, though the court noted that "[w]here no stock is exchanged, corporate successor liability has more frequently been imposed on a theory of 'continuity of enterprise.'"[500]

In ruling that successor liability could be imposed under the *de facto* merger and mere continuation exceptions, the Massachusetts Supreme court in *Milliken* explained:

> Here, it was undisputed that Old Duro ceased its ordinary business operations following the foreclosure sale, it currently has no offices or employees, and the former chief executive officer of Old Duro is now the chief executive officer of New Duro. Fundamentally, Old Duro, as a dyer, printer, finisher, and distributor of textile products, no longer exists. It sold its operating assets to New Duro, thereby enabling New Duro to maintain the same production capabilities and sell the same goods without any interruption to the business. We recognize that Old Duro did not legally dissolve as a corporate entity. Instead, it changed its name and now rents to New Duro the real estate

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497 Milliken Co. v. Duro Textiles, LLC, No. BRCV2002-1364, 2005 WL 1791562, at *8 (Mass. Super. June 10, 2005).

498 *Milliken*, 887 N.E.2d at 256.

499 *Id.* (citations omitted).

500 *Cargill*, 676 N.E.2d at 819 n.8.

> that it still owns in Fall River and recovers tax refunds. Notwithstanding this particular fact, only one among several for consideration, we decline to elevate form over substance by concluding that the nature of Old Duro's corporate existence as Chace Street trumps the existence of New Duro as the successor corporation on whom liability properly should be imposed. The existence of Chace Street simply does not undermine the nonexistence of Old Duro as a going concern.[501]

Massachusetts: The Mere Continuation Exception

In *Milliken* the supreme court described the mere continuation exception as consisting of "minimal indices" as well as flexible factors:

> The "mere continuation" theory of successor liability "envisions a reorganization transforming a single company from one corporate entity into another . . . ." "[T]he indices of a continuation are, at a minimum: continuity of directors, officers, and stockholders; and the continued existence of only one corporation after the sale of assets . . . ." In essence, the purchasing corporation "is merely a 'new hat' for the seller." . . . Similar to the considerations underlying a finding of a "de facto merger," the factors characterizing a continuing corporation are traditional indicators, but no single factor is dispositive, and the facts of each case must be examined independently . . . .[502]

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[501] *Milliken*, 887 N.E.2d at 256 (footnote omitted).

[502] *Id.* at 255–56 (citations omitted) (quoting McCarthy v. Litton Indus., Inc., 570 N.E.2d 1008, 1013); Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451,

Massachusetts: The Fraud Exception

In *Groman v. Watman*, the court held that a sale that violated the Uniform Fraudulent Transfer Act satisfied the fraud exception to the general rule of no successor liability.[503] There, the court concluded the plaintiff had proven (1) "a transfer by the debtor[/predecessor], (2) a debt owed to [the plaintiff by the debtor/predecessor] that preceded the transfer, (3) that [the debtor/predecessor] did not receive a reasonably equivalent value in exchange for what it transferred, and (4) that the [debtor/predecessor] was insolvent at the time of the transfer, or became insolvent as a result thereof."[504] In addition, the court found that many factors or "badges of fraud" were present that indicated an "actual intent to hinder, delay, or defraud any creditor of the debtor."[505]

In *JSB Industries, Inc. v. Nexus Payroll Services, Inc.*, the federal district court stated that the lack of a showing of inadequate consideration was significant to the negation of allegations of fraud.[506]

Massachusetts: The Continuity of Enterprise Exception

The Massachusetts Supreme Court in *McCarthy v. Litton Indus., Inc.*[507] applied the continuity of enterprise exception using all four of the *Turner v. Bituminous* considerations, including "retention of key personnel, assets, general business operations, and. . . name", as elemental criteria for the inquisition.[508] The court decided that neither the mere continuation nor the continuity of enterprise exceptions were applicable to the given facts, and therefore declined to adopt the continuity of

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1458 (11th Cir. 1985)); *see also* Gregorio v. Excelergy Corp., No. 07-2754BLS2, 2008 WL 2875430, at *5 (Mass. Super. 2008).

503 Groman v. Watman, 27 Mass. L. Rptr. 359, No. 0300646, 2010 WL 4244833, at *3–5 (Mass. Super. July 1, 2010); MASS. GEN. LAW. ANN. Ch. 109A (Uniform Fraudulent Transfer Act), §§ 5 & 6.

504 *Groman*, 2010 WL 4244833, at *2.

505 *Groman*, 2010 WL 4244833, at *4.

506 463 F. Supp. 2d 103, 110–11 (D. Mass. 2006).

507 570 N.E.2d at 1013.

508 Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 883–84 (Mich. 1976).

enterprise doctrine at that time.[509] The court did not state whether or not it would adopt the continuity of enterprise exception if given the proper set of facts but noted in a footnote that the exception was "distinctly a minority approach."[510]

Michigan

Michigan recognizes five exceptions to the general rule of non-liability including 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."[511] Most importantly, Michigan expanded the continuation exception to what has become known as the "continuity of enterprise" exception.[512] The continuity of enterprise exception applies in the context of products liability and not always in a purely commercial context.[513]

Gorge v. Rapid Advance LLC[514] bears mentioning. The case offers no analysis regarding any of the exceptions to successor non-liability; however, it does describe (in atypical terms) the general rule of successor non-liability: "The mere fact that a corporation acquires all the assets of another does not necessarily mean it will be liable for the obligations of

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[509] *McCarthy*, 570 N.E.2d at 1013.

[510] *McCarthy*, 570 N.E.2d at 1013 n. 6.

[511] Oliver v. Perry, No. 296871, 2011 WL 2204128, *6 (Mich. Ct. App. June 7, 2011), *appeal denied*, 490 Mich. 983, 806 N.W.2d 531 (2011) (quoting *Turner*, 244 N.W.2d at 878 n.3)*; see also* Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 509–510 (Mich. 1999) (the *Turner v. Bituminous* court recognized only the four traditional exceptions at the time it expanded the "mere continuation" exception); Starks v. Mich. Welding Specialists, Inc., 722 N.W.2d 888 (Mich. 2006); Jeffrey v. Rapid Am. Corp., 529 N.W.2d 644 (Mich. 1995); *accord* First Presbyterian Church of Ypsilanti v. H.A. Howell Pipe Organs, Inc., 2010 WL 419972, at *7 (E.D. Mich. Feb. 1, 2010); Perceptron, Inc. v. Silicon Video, Inc., 423 F. Supp. 2d 722, 727 (E.D. Mich. 2006).

[512] *See Turner*, 244 N.W. 2d at 883.

[513] *Starks*, 722 N.W.2d at 889.

[514] Gorge v. Rapid Advance LLC, No. 10-11474, 2011 WL 679842, at *1 (E.D. Mich. Feb. 16, 2011).

its predecessor. If it is liable for the predecessor's obligations, however, it will be subject to longarm jurisdiction in a suit to enforce the obligation if the predecessor would have been subject to such jurisdiction."[515]

Michigan: The Express/Implied Assumption Exception

Michigan recognizes express or implied assumption of liabilities as an exception to the general rule of successor nonliability.[516] The Michigan appellate court 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.[517]

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."[518]

Both the fraud and mere continuation exceptions share the element of inadequacy of consideration. A Michigan appellate court addressed a trial court's application of the fraud exception in *Gougeon Bros., Inc. v. Phoenix Resins, Inc.*[519] In reviewing the trial 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

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[515] *Gorge*, 2011 WL 679842, at *4 (quoting Inter-Americas Ins. Corp. v. Xycor Systems, Inc., 757 F.Supp. 1213, 1217 (Miss. 2006); Neagos v. v. Valmet-Appleton, Inc., 791 F. Supp. 682, 688–89 (E. D. Mich. 1992)).

[516] *See Foster*, 597 N.W.2d at 509–10.

[517] Safeco Ins. Co. v. Pontiac Plastics & Supply Co., No. 214079, 2000 WL 33538535, at *3 (Mich. Ct. App. Jan. 21, 2000).

[518] *Turner*, 244 N.W.2d at 886–87 (Coleman, J., dissenting).

[519] No. 211738, 2000 WL 33534582, at *2 (Mich. Ct. App. Feb. 8, 2000).

> fraudulent transfer designed to defraud Matrix' creditors and because defendant was a mere continuation of Matrix. To support this holding, the court made the following findings of fact: defendant bought Matrix' assets for $3,000, while Matrix' sales had exceeded $115,000; the same two persons were equal shareholders of both Matrix and defendant; defendant conducts business at same [sic] address as did Matrix; and defendant notified Matrix' distributors that MAS epoxy was now one of defendant's products, that defendant would pay any currently owed invoices, and that the distributors should continue to use Matrix literature until the new literature was available . . . . These findings demonstrate, at least, that defendant is a mere continuation of Matrix.[520]

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

Michigan: The De Facto Merger Exception

The court in *Turner v. Bituminous*, though most interested in fashioning the continuity of enterprise exception, cited *Shannon v. Samuel Langston Co.*[521] for the requirements 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 a continuity of shareholders which results from the purchasing

[520] *Gougeon*, 2000 WL 33534582, at *2.

[521] 379 F. Supp. 797 (W.D. Mich. 1974).

> 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.[522]

The *Turner* court noted that "the general results of a [*de facto*] merger are that [(1)] the acquired corporation ceases to exist, [(2)] the acquiring corporation takes over the entire operation of the acquired corporation and [(3)] shareholders of the acquired corporation become shareholders of the acquiring corporation," and held that all three of these criteria must be present in order to fulfill the *de facto* merger doctrine and override the traditional rule of successor non-liability.[523]

Michigan: The Mere Continuation Exception

As noted by the dissent in *Turner*, the mere continuation exception is "the most confused of the four exceptions."[524] "[T]he

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[522] *Turne*r, 244 N.W.2d at 891; (Coleman, J., dissenting) (quoting *Shannon* 379 F. Supp. at 801); *see also* Craig v. Oakwood Hosp., 684 N.W. 2d 296, 314–15 (Mich. 2004) (holding there was no *de facto* merger "simply because . . . the purchasing corporation paid cash, not stock"); Tassos Epicurean Cuisine, Inc. v. Triad Bus. Solutions, Inc., No. 2:05-CV-71510-DT, 2007 WL 956745, at *9 (E.D. Mich. 2007); Bestfoods v. Aerojet-General Corp., 173 F. Supp. 2d 729, 757–58 (W.D. Mich. 2001).

[523] *Turner*, 244 N.W.2d at 892 (Coleman, J. dissenting).

[524] *Id.* (Coleman, J., dissenting).

exception seems to encompass the situation where one corporation sells its assets to another corporation with the same people owning both corporations."[525] A recent Michigan decision has elucidated the situation though, stating that "[a] new entity with different owners and a different business purpose does not constitute a mere continuation of the old entity."[526]

The Sixth Circuit examined the disparity among Michigan cases dealing with the mere continuation exception, noting that "[t]he only indispensable prerequisites to application of the exception appear to be common ownership and a transfer of substantially all assets."[527] Further, "[b]eside these two factors, the most important consideration appears to be the nature of the business performed by the successor corporation—that is, whether its 'main corporate purpose was to conduct the same business' as its predecessor."[528]

Michigan: The Continuity of Enterprise Exception

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

> (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

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525 *Id.* (Coleman, J., dissenting).

526 Belfor USA Group, Inc. v. Alexis Manor Apts., No. 281444, 2009 WL 609558, at *2 (Mich. Ct. App. 2009) (citing Shue & Voeks v. Amentiy Design & Mfg., 511 N.W.2d 700, 702 (Mich. 1993)).

527 Stramaglia v. United States, No. 08–2624, 2010 WL 1923764, at *3 (6th Cir. 2010) (footnote omitted) (citatations omitted).

528 *Id.* at *3 (citations omitted) (quoting Pearce v. Schneider, 242 Mich. 28, 31, 217 N.W. 761, 762 (1928)).

> 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. . . . [A]n additional principle relevant to determining successor liability [is] whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation.[529]

The court in *Foster v. Cone-Blanchard* concluded that this test "applies only when the transferor is no longer viable and capable of being sued."[530] The Michigan Supreme Court, in denying an application for leave to appeal, indicated that the *Turner* exception is inapplicable outside of the products liability context.[531]

Minnesota

"Minnesota follows the traditional approach to corporate successor liability."[532] The Minnessota Supreme Court described the approach as follows:

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[529] Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 510 (Mich. 1999) (footnote omitted) (citing *Turner*, 244 N.W.2d at 883–84).

[530] 597 N.W.2d at 511 (citations omitted).

[531] Starks v. Michigan Welding Specialists, Inc., 772 N.W.2d 888, 889 (Mich. 2006) ("Because an exception designed to protect injured victims of defective products rests upon policy reasons not applicable to a judgment creditor, the Court declines to expand the exception to the traditional rule set forth in Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich. 1976), to cases in which the plaintiff is a judgment creditor."); *see also* DeWitt v. Sealtex Co., Nos. 273387, 273390, 274255, 275931, 2008 WL 2312668, at *2–4 (Mich. Ct. App. Jun 5, 2008).

[532] Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989); *see also* Noack v. Colson Const., Inc., 2009 WL 305114, at *9 (Minn. Ct. App. Feb. 10, 2009); Dunn v. National Beverage Corp., 729 N.W.2d 637, 645 (Minn. Ct. App. 2007), *aff'd*, 745 N.W.2d 549 (Minn. 2008).

> [W]here 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, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (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.[533]

In addition to the four traditional exceptions, "[another] exception, sometimes incorporated as an element of one of the [traditional four] exceptions, is the absence of adequate consideration for the sale or transfer."[534]

Minnesota: The Mere Continuation Exception

A Minnesota appellate court has listed factors that are to be considered when making the determination of whether or not a successor is the mere continuation of its predecessor. The test articulated by the *Huray* court is as follows:

> 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

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[533] *Niccum*, 438 N.W.2d at 98 (alteration in original) (quoting J. F. Anderson Lumber Co. v. Myers, 206 N.W.2d 365, 368–69 (Minn. 2015); *see also Noack*, 2009 WL 305114, at *9; *Dunn*, 729 N.W.2d at 645; Sweeter v. Power Indus., Inc., No. A05-2466, 2006 WL 2865329, at *3 (Minn. Ct. App. 2006); Knott v. AMFEC, Inc., No. 09–CV–1098, 2010 WL 1528393, at *6 (D. Minn. April 15, 2010); A.P.I., Inc. v. Home Ins. 706 F. Supp. 2d 926, (D. Minn. March 31, 2010).

[534] *J. F. Anderson Lumber Co.*, 206 N.W.2d at 369 (citing McKee v. Harris-Seybold Co, Division of Harris-Intertype Corp., 264 A.2d 98, 102 (N.J. 1970)).

> 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.[535]

Minnesota: The Fraud Exception

Minnesota's successor liability fraud exception is governed by the Minnesota Fraudulent Transfers Act, which can be found in section 513.44 of the Minnesota Statutes.[536]

Mississippi

Mississippi courts recognize the four traditional exceptions to the general rule of successor nonliability.[537] In addition, Mississippi has adopted a variation of the "continuity of enterprise" exception and accepts the "product line theory as a viable basis for recovery."[538]

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[535] Huray v. Fournier NC Programming, Inc., No. C9-02-1852, 2003 WL 21151772, at *4 (Minn. Ct. App. 2003) (citations omitted).

[536] Matson Logistics, LLC v. Smiens, 2012 U.S. Dist. LEXIS 77454, at *25 (D. Minn. 2012); *see also Sweeter*, 2006 WL 2865329, at *4.

[537] *See* Paradise Corp. v. Amerihost Dev., Inc., 848 So. 2d 177, 179–80 (Miss. 2003); *see also* Stanley v. Mississippi State Pilots of Gulfport, Inc., 951 So. 2d 535, 538 (Miss. 2006).

[538] Beck v. Koppers, Inc., Nos. 3:03CV60-P-D, 3:04CV160-P-D, 2006 WL 2228911, at *1 (N.D. Miss. Apr. 7, 2006); *Paradise Corp.*, 848 So. 2d at 180 (continuity of enterprise); Huff v. Shopsmith, Inc., 786 So. 2d 383, 388 (Miss. 2001); Gregory *ex rel.* v. Central Sec. Life Ins. Co., 953 So. 2d 233, 238 (Miss. 2007) (acknowledging that Huff had accepted the product-line exception); *Stanley*, 951 So. 2d at 539–40 (quoting the Paradise factors for continuity of enterprise).

Mississippi: The Continuity of Enterprise Exception

In *Paradise Corporation v. Amerihost Development, Inc.*, the court stated:

> [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.[539]

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."[540] The *Paradise* court borrowed its analysis from a Fifth Circuit case, *Mozingo v. Correct Mfg. Corp.*,[541] in which it was made clear that the continuity of enterprise test adds more factors but does not treat the common ownership factor as dispositive.

Mississippi: The Product Line Theory

The Mississippi Supreme Court explained the product line exception as follows:

> [U]nder the product line theory, successor corporations which undertake the manufacture of the same products as the predecessor are liable for injuries caused by the defects in that product and inherit the liabilities associated with the product

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[539] *Paradise Corp.*, 848 So. 2d at 180 (citing Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 174 (5th Cir. 1985)); *see also Stanley*, 951 So. 2d at 540.

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

[541] Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175 (5th Cir. 1985).

> even if sold and manufactured by the predecessor corporation. . . . [C]ertain elements must be present to subject a successor corporation to liability for the products of a predecessor. The successor must produce the same product under a similar name, have acquired substantially all of the predecessor's assets leaving no more than a corporate shell, hold itself out to the public as a mere continuation of the predecessor, and benefit from the good will of the predecessor.[542]

Mississippi: The Fraud Exception

The Mississippi Supreme Court stated in *Stanley v. Mississippi State Pilots of Gulfport, Inc.*[543] that the determination of whether or not a transaction is fraudulent for purposes of successor liability is governed by the Mississippi Uniform Fraudulent Transfers Act; this piece of legislation was enacted in 2006 and can be found in sections 15-3-101 through 15-3-121 of the Mississippi Code Annotated.[544]

Missouri

Missouri follows the general rule of successor liability and recognizes the four traditional exceptions.[545] The Missouri Court of Appeals in *Chemical Design, Inc. v. Am. Standard, Inc.* addressed the

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[542] *Huff*, 786 So. 2d at 387–88 (citing Ramirez v. Amstead Indus., Inc., 431 A.2d 811, 825 (N.J. 1981)); Ray v. Alad Corp., 560 P.2d 3, 8–11 (Cal. 1977)); *see also Gregory*, 953 So. 2d at 238; Sharp v. Atwood Mobile Products, No. 2:12–CV–82–KS–MTP, 2012 WL 3024726, at *3 (S.D. Miss. July 24, 2012).

[543] Stanley v. Mississippi State Pilots of Gulfport, Inc., 951 So. 2d 535, 540 (Miss. 2006).

[544] *Id.* at 540.

[545] Chem. Design, Inc. v. Am. Standard, Inc., 847 S.W.2d 488, 491 (Mo. Ct. App. 1993); *see also* Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc., 336 F.3d 801, 803 (8th Cir. 2003); ARE Sikeston Ltd. P'ship v. Weslock Nat'l, *et. al.*, 120 F.3d 820, 828 (8th Cir.1997); Wallace v. Dorsey Trailers Se., Inc., 849 F.2d 341, 343 (8th Cir. 1988); Young v. Fulton Iron Works Co., 709 S.W.2d 927, 938 (Mo. Ct. App. 1986).

possibility of extending successor liability through the adoption of the continuity of enterprise and product line exceptions, ultimately choosing not to adopt either.[546] Public policy in Missouri favors successor liability in cases involving nursing homes to prevent successors from avoiding paying sanctions and penalties imposed against the predecessor.[547]

The general rule in Missouri is that when all of the assets of a corporation are sold or transferred the transferee is not liable for the transferor's debts and liabilities. There are, however, four exceptions to the general rule of nonliability . . . (1) where the purchaser expressly or impliedly agrees to assume the debts or liabilities of the transferor; (2) where the transaction amounts to a merger or consolidation; (3) where the purchasing corporation is merely a continuation of the selling corporation; or (4) where the transaction is entered into fraudulently for the purpose of escaping liability for the debts and liabilities of the transferor.[548]

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.[549]

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[546] *Chem. Design*, 847 S.W.2d at 492 ("[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."). *But see* Roper Elec. Co. v. Quality Castings, Inc., 60 S.W.3d 708, 711–12 (Mo. Ct. App. 2001) (distinguishing the case from *Chem. Design* by qualifying that opinion as one including the "extent of the involvement of prior officers . . . as consultants.").

[547] Cedar Hill Manor, LLC v. Dept. of Soc. Servs., 145 S.W.3d 447, 454 (Mo. Ct. App. 2004).

[548] *ARE Sikeston Ltd. P'ship*, 120 F.3d at 828 (citing Chem. Design, Inc. v. Am. Standard, Inc., 847 S.W.2d 488, 491 (Mo. Ct. App. 1993); Ernst v. Ford Motor Co., 813 S.W.2d 910, 917 (Mo. Ct. App. 1991)).

[549] *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).

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, Inc. v. American Standard, Inc.*, the Missouri Court of Appeals noted that Missouri continues to adhere to the concept that the phrase "continuation of the corporation" should be applied literally, necessitating the continuation of the corporate organization, management, and operations, rather than merely the continuation of the enterprise or the product line. [550] In *Roper Elec. Co. v. Quality Castings, Inc.*, the Missouri Court of Appeals stated that "Missouri case law strongly leans toward the view that a lack of identity of officers, directors, and shareholders *does not preclude* a finding of corporate continuation, but that such identity is merely one factor in making this determination."[551] 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."[552] The court noted that other jurisdictions take a contrary view and require "identity of officers, directors, and shareholders in both corporations before a corporate continuation can

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[550] Chem. Design, Inc. v. American Standard, Inc., 847 S.W.2d 488, 493 (Mo. Ct. App. 1993); *see also* Young v. Fulton Iron Works Co., 709 S.W.2d 927 (Mo. Ct. App. 1986).

[551] Roper Elec. Co. v. Quality Castings, Inc., 60 S.W.3d 708, 711 (Mo. Ct. App. 2001) (emphasis in original); *see also* Osborn v. Prime Tanning Corp., No. 09–6082–CV–SJ–GAF, 2010 WL 1935980, at *9 (W.D. Mo. May 11, 2010); Sundance Rehab. Corp. v. New Vision Care Assocs. II, Inc., No. 04-3571-CV-S-FJG, 2006 WL 2850556, at *2 (W.D. Mo. Sept. 29, 2006); Boycom Cable Vision, Inc. v. Howe, No. 1:04CV 38 LMB, 2006 WL 2727984, at *5 (E.D. Mo. Sept. 22, 2006).

[552] *Roper Elec. Co.*, 60 S.W.3d at 712 (citing Flotte v. United Claims, Inc., 657 S.W.2d 387, 389 (Mo. Ct. App. 1983); Brockmann v. O'Neill, 565 S.W.2d 796, 798 (Mo. Ct. App. 1978)).

be found to exist[,]" but that "Missouri does not ascribe to this . . . view."[553]

Missouri: The De Facto Merger Exception

The court in *Harashe v. Flinkote, Co.* used the term "elements" in setting out the test for a *de facto* merger but then stated that not all were necessary in order to satisfy this exception; this view would appear to indicate that they are factors to be considered (indicators) rather than elements (requirements):

> 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; and (4) the purchasing corporation assuming those obligations necessary to continue normal, ordinary business operations . . . . It is not necessary to find all the elements to find a *de facto* merger.[554]

The court in *Harashe* found that the facts satisfied all of the considerations (be they elements or factors) listed. There, the predecessor, Zonolite, was purchased by the successor, Grace, under an agreement where Zonolite would be dissolved as soon as possible, and Grace would assume all obligations of Zonolite necessary to continue the ordinary business of the predecessor.[555] Even though the agreement

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[553] *Roper Elec. Co.*, 60 S.W.3d at 712 (emphasis omitted).

[554] Harashe v. Flinkote Co., 848 S.W.2d 506, 509 (Mo. Ct. App. 1993) (citing15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7124.40 (rev. perm. ed. 1983)); *see also Osborn*, 2010 WL 1935980, at *7.

[555] *Harashe*, 848 S.W.2d at 509.

was "delineated as a reorganization through a purchase of assets, it satisfied the test for a *de facto* merger."[556]

Montana

In *Buck v. Billings Montana Chevrolet, Inc.*, the Supreme Court of Montana described the state of of successor liability law in that state:

> A successor corporation can be liable for the debts of its predecessor, if it is merely a continuation or reincarnation of the first corporation. Generally, however, before a corporation can be deemed a successor, certain showings must be made. For example, it is generally required that the plaintiff establish that insufficient consideration ran from the new company to the old and that only one corporation existed at the completion of the transfer.[557]

The *Buck* court ultimately concluded that successor liability should not be imposed in the case, stating:

> The facts here do not support the conclusion that Frontier Montana is a successor corporation to Billings Montana Chevrolet. According to the record Billings Montana Chevrolet sold some assets to Frontier-Montana. However, Billings Montana Chevrolet has actively remained in business and holds equipment and real property received from the sale of Frontier-Delaware. There is no evidence that there was fraud in the sale of the corporate assets from Billings Montana Chevrolet to Frontier-Montana or lack of consideration that would justify

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[556] *Id.*

[557] Buck v. Billings Montana Chevrolet, Inc., 811 P.2d 537, 543 (Mont. 1991) (citations omitted) (citing 19 AM. JUR. 2D *Corporations* § 271 (1964)).

> a finding that it was a successor corporation.[558]

Since the decision in *Buck*, there does not appear to have been a published opinion in Montana addressing successor liability. In *Hanson v. Dix*, an unpublished opinion, the Supreme Court of Montana held that the successor owner of hotel was not liable for its predecessor's wrongful discharge of an employee where the predecessor did not transfer the hotel in order to escape liability (rather, he died) and where the successor had no notice of a legal obligation owed to the former employee.[559] A 2008 published opinion mentions claims of successor liability in the plaintiff's amended complaint, but the case was decided on other grounds.[560]

Nebraska

The Supreme Court of Nebraska has addressed successor liability at least three times: twice in the context of products liability and once in the context of successor liability for contracts.[561] The Nebraska Supreme Court first adopted the traditional rule of successor nonliability in asset sales, excluding for the four traditional exceptions, in *Jones v. Johnson Mach. & Press Co. of Elkhart, Indiana.*[562] The court listed the four exceptions as follows:

> (1) When the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2)

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[558] *Buck*, 811 P.2d at 543.

[559] Hanson v. Dix, 100 P.3d 167 (Table), No. 03-605, 2004 WL 2095539, at *3 (Mont. Sep. 21, 2004).

[560] *See* Tin Cup Cnty. Water v. Garden City Plumbing & Heating, Inc., 200 P.3d 60, 70 (Mont. 2008).

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

[562] *Jones*, 320 N.W.2d at 484.

> When the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) When the purchaser corporation is merely a continuation of the seller corporation; or (4) When the transaction is entered into fraudulently to escape liability for such obligations.[563]

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."[564] The court identified three different theories used to "expand the focus of legal liability:" the *de facto* merger (citing *Shannon v. Samuel Langston Co.*),[565] continuity of enterprise (citing *Turner v. Bituminous Cas. Co.*),[566] and the product-line exception (citing *Ray v. Alad Corp.*[567]).[568] However, the court decided not to depart from the traditional exceptions under the facts of the case before them, finding "no basic justification" for departing from the traditional rule.[569]

Although many states treat *de facto* merger as a traditional exception, the court in *Jones* viewed it as a more expansive theory, stating: "Various theories have been adopted to expand the focus of legal liability. Some courts have looked to the nature and consequences of the transaction and found a de facto merger for product liability purposes

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563 *Id.* at 483.

564 *Id.* at 484.

565 Shannon v. Samuel Langston Co., 379 F. Supp. 797 (W.D. Mich. 1974).

566 Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich. 1976).

567 Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977).

568 *Jones*, 320 N.W.2d at 483.

569 *Id.* at 484.

even though the formal characteristics of a corporate merger were not present."[570]

In *Farris Engineering, Inc. v. Folgers Architects & Facility Design, Inc.*, a Nebraska appellate court applied a *de facto* merger test while addressing the mere continuation exception (see below).[571]

Nebraska: The Mere Continuation Exception

In *Timmerman v. American Trencher, Inc.*, the Nebraska Supreme Court analyzed the factors necessary for the mere continuation exception, a task which had not been undertaken in *Jones*.[572] Continuing the business operations of a predecessor by itself is not enough to constitute mere continuation.[573] "[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."[574] The *Timmerman* court also looked back to a 1903 Nebraska case, *Douglas Printing Co. v. Over*,[575] reiterating 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) the] creation of the purchasing corporation simply became a means of refinancing a major secured debt of the selling corporation."[576]

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[570] *Id.*; *see Shannon* 379 F. Supp. 797.

[571] Farris Eng'g, Inc. v. Folgers Architects & Facility Design, Inc., Nos. A-99-1384, A-99-1385, 2001 WL 47017, at *5–6 (Neb. Ct. App. Jan. 16, 2001).

[572] Timmerman v. Am. Trencher, Inc., 368 N.W.2d 502, 506 (Neb. 1985).

[573] *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; 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 Eng'g Corp., 469 F. Supp. 1198, 1201 (E.D. Wis. 1979)).

[574] *Timmerman*, 368 N.W.2d at 506 (citing Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977); Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977); Armour-Dial, Inc. v. Alkar Engineering Corp., 469 F. Supp. 1198, 1201 (E.D. Wis. 1979)*;* Weaver v. Nash Intern., Inc., 562 F. Supp. 860 (S.D. Iowa 1983).

[575] Douglas Printing Co. v. Over, 95 N.W. 656 (Neb. 1903).

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

In *Farris Engineering, Inc. v. Folgers Architects & Facility Design, Inc.*, a Nebraska appellate court reversed a summary judgment order holding the defendant liable as successor under the mere continuation exception.[577] In its analysis, the court relied on *Timmerman* as well as various *de facto* merger factors, stating:

> The trial court based its decision on the third exception set out in *Timmerman v. American Trencher, Inc.*, stating that as a matter of law, FAL was a mere continuation of FAFD [(Folgers Architects & Facility Design)].
>
> The factors for establishing a de facto merger are that (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; and (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.[578]

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[577] Farris Eng'g, Inc.. v. Folgers Architects & Facility Design, Inc., Nos. A-99-1384, A-99-1385, 2001 WL 47017, at *5–6 (Neb. Ct. App. Jan. 16, 2001).

[578] *Farris*, 2001 WL 47017, at *5 (citing Hernandez v. Johnson Press Corp., 388 N.E.2d 778 (Ill. App. Ct. 1979).

The court concluded:

> In contrast [to *Timmerman*], in the instant case, the facts support an inference that FAL is not merely a continuation of FAFD. The record shows that although FAFD and FAL share common officers, there is no commonality regarding FAFD and FAL's shareholders and directors. While both Folgers and Pappalardo were shareholders and directors at FAFD, Pappalardo is FAL's sole shareholder and director. Given these facts, we conclude that reasonable minds may differ as to whether the inference that FAL is merely a continuation of FAFD can be drawn. Thus, we conclude that the trial court erred in concluding as a matter of law that FAL was merely a continuation of FAFD, and we reverse that portion of the trial court's order granting summary judgment in favor of Farris on its contract action.[579]

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.[580] To date, no Nebraska case has addressed the fraud or express/implied assumption exceptions to the traditional rule.

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

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[579] *Farris*, 2001 WL 47017, at *6.

[580] Earl v. Priority Key Servs., Inc., 441 N.W.2d 610, 613-14 (Neb. 1989).

enterprise exception in the negligence context.[581] Additionally, the court stated: "We will leave the consideration of this exception in CERCLA and products liability claims for another day."[582] It is difficult to predict whether the Nevada Supreme Court would adopt the continuity of enterprise exception. This 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."[583] However, the court also stated that it was persuaded by the fact that "the 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."[584]

The court set forth the following test for *de facto* merger's: "(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."[585] 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."[586] The court opined that "[t]his 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

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

582 *Id.* at 1091.

583 *Id.* at 1091 (citing Roll v. Tracor, Inc., 140 F. Supp. 2d 1073, 1083 (D. Nev. 2001); Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977)).

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

585 *Id.* at 1087.

586 *Id.* (quoting *Kleen Laundry I*, 817 F. Supp. at 230–31 (quoting *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1015 (D. Mass.1989))).

liability by transferring their assets to another corporation that continues to operate profitably as virtually the same entity."[587]

In applying the mere continuation exception, the court noted that "[o]ne federal district court has opined that 'the gravamen of the "mere continuation" exception is the continuation of corporate control and ownership, rather than continuation of business operations.' Many courts have likewise concluded that the key inquiry in resolving this issue is whether there exists a continuation of the corporate entity. We agree."[588]

New Hampshire

New Hampshire courts follow the general rule of successor nonliability for asset purchases and recognize the four traditional exceptions: express or implied assumption, *de facto* merger, mere continuation, and fraud.[589] In *Bielagus v. EMRE of New Hampshire Corp.,* the New Hampshire Supreme Court expressly rejected the product-line exception and other "risk spreading" doctrines (including the continuity of enterprise exception).[590] The court has also stated unequivocally that *Cyr v. B. Offen & Co., Inc.*[591] does not represent a valid interpretation of

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[587] *Id.* at 1088.

[588] *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)).

[589] *See* J.G.M.C.J. Corp. v. C.L.A.S.S., Inc, 924 A.2d 400, 405-06 (N.H. 2007); Thompson v. C&C Research & Dev. LLC, 898 A.2d 495, 501 (N.H. 2006); Bielagus v. EMRE of New Hampshire Corp., 826 A.2d 559, 564 (N.H. 2003); *see also* Members of Beede Site Group v. Fed Home Loan Mortg. Corp., No. 09-370 S, 2011 U.S. Dist. LEXIS 30185 (D.N.H. 2011) (discussing standard of CERCLA, *de facto* merger, and mere continuation successor liability).

[590] *See Bielagus*, 826 A.2d at 569; Simoneau v. S. Bend Lathe, Inc., 543 A.2d 407 (N.H. 1988); *see also* Appeal of SAU #16 Coop. Sch. Bd., 103, 719 A.2d 613, 617 (N.H. 1998) (using federal successor liability standard); Russell v. Philip D. Moran, Inc., 449 A.2d 1208, 1209–10 (N.H. 1982) (contractual indemnification and warranty claims could be viable under a theory of successor liability); Zimmerman v. Suissevale, Inc., 438 A.2d 290, 292 (N.H. 1981) (successor liability under stock purchase agreement).

[591] Cyr v. B. Offen & Co., Inc., 501 F.2d 1145 (1st Cir. 1974).

New Hampshire law.[592] To date, no New Hampshire case has dealt with the fraud or express/implied assumption exceptions to the traditional rule of successor non-liability.

New Hampshire: The De Facto Merger Exception

The New Hampshire Supreme Court addressed the de factor merger exception in detail in *Bielagus, stating*: "Under the *de facto* merger exception, successor liability will be imposed 'if the parties have achieved virtually all of the results of a merger' without following the statutory requirements for merger of the corporations."[593] Further, "a de facto merger occurs when a company is completely absorbed into another through a sale of assets; continues its operations by maintaining the same management, personnel, assets, location and stockholders; but leaves its creditors without a remedy for its outstanding debt."[594] The court goes on to say, "The fact-finder may look to other factors indicative of commonality or distinctiveness with the corporations. '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.'"[595]

The court also adopted the four, non-exclusive factor test articulated in *Kleen Laundry I*:

> (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.
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets

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[592] *Bielagus*, 826 A.2d at 569; *see also* J.G.M.C.G. Corp. v. C.L.A.S.S. Inc., 924 A.2d 400, 405–07 (N.H. 2007).

[593] *Id.* at 565 (quoting Kleen Laundry & Dry Cleaning v. Total Waste Mgt., 817 F. Supp. 225, 230 (D.N.H. 1993) (referred to as "Kleen Laundry I").

[594] *Id.* at 565.

[595] *Id.* (quoting and citing 300 Pine Island Assocs., Inc. v. Stephen L. Cohen & Assocs., P.A., 547 So. 2d 255, 256 (Fla. Dist. Ct. App. 1989)); *see also* J.G.M.C.J. Corp. v. C.L.A.S.S., Inc., 924 A.2d 400, 405 (N.H. 2007); Thompson v. C&C Research & Dev. LLC, 898 A.2d 495, 501 (N.H. 2006).

> 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 obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.[596]

The court noted that "[t]he factor that usually 'tips the scales in favor of finding a merger is continuity of ownership, usually taking the form of an exchange of stock for assets.'"[597]

New Hampshire: The Mere Continuation Exception

The Supreme Court noted in *Bielagus* that the mere continuation exception is similar to that of the *de facto* merger.[598] The court explained:

> "[U]nder the traditional application of the 'mere continuation' exception, the court should not find a corporation to be the continuation of a predecessor unless only one corporation remains after the transfer of assets and unless there is an identity of stock, stockholders and directors between the two corporations."

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[596] *Bielagus*, 826 A.2d at 565-66 (citing *Kleen Laundry I*, 817 F. Supp. at 230-31); *see also J.G.M.C.G. Corp.*, 924 A.2d at 405; *Thompson*, 898 A.2d at 501.

[597] *Bielagus*, 826 A.2d at 566 (quoting Devine & Devine Food v. Wampler Foods, 313 F.3d 616, 619 (1st Cir. 2002) (citing Welco Indus., Inc., v. Applied Co., 617 N.E.2d 1129, 1134 (Ohio 1993))); *see also J.G.M.C.G. Corp.*, 924 A.2d at 405.

[598] *Bielagus*, 826 A.2d at 559.

> This traditional theory envisions a corporate reorganization where one company sells its assets to another company under the same ownership. Successor liability is imposed upon the purchasing corporation because the purchaser is merely the seller reincarnated as a different entity. While continuity of ownership is the key factor for imposing successor liability under this exception, some courts also look to the adequacy of the consideration given in the asset sale and to whether there is evidence of a purchase made in good faith.[599]

New Jersey

New Jersey courts recognize the four traditional exceptions to the general rule of corporate successor nonliability, as well as a "'fifth exception, sometimes incorporated as an element of one of the above exceptions[:] . . . the absence of adequate consideration for the sale or transfer.'"[600] In 1981, the New Jersey Supreme Court also adopted the

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[599] *Id.* at 567–68 (citations omitted) (quoting *Kleen Laundry I*, 817 F. Supp. At 231 (citing Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1134 (Ohio 1993))); *see also* G.P. Publ'ns. v. Quebecor Printing, 481 S.E.2d 674, 680 (N.C. 1997).

[600] 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), *aff'd*, 288 A.2d 585 (N.J. Super. Ct. App. Div. 1972), *abrogated by* Ramirez v. Amsted Indus., Inc., 431 A.2d 811 (N.J. 1981)); *see* Marshak v. Treadwell, 595 F.3d 478, 490 (3d Cir. 2009); G-I Holdings, Inc. v. Bennet, 380 F. Supp. 2d 469 (D.N.J. 2005); *see also* Mark IV Transp. & Logistics, Inc. v. Lightning Logistics, LLC, NO. 09-6480, 2012 U.S. Dist. LEXIS 141721, at *2 (D.N.J. Sept. 28, 2012) (accord); Fink v. EdgeLink, Inc., No. 09-5078, 2012 U.S. Dist. LEXIS 42656, at *4 (D.N.J. Mar. 27, 2012) (accord); Menkevich v. Delta Tools, No. A-1950-10T2, 2012 WL 986995, at *3 (N.J. Super. Ct. App. Div. Mar. 26, 2012); Oticon, Inc. v. Sebotek Hearing Sys., LLC, No. 08-5489, 2011 U.S. Dist. LEXIS 93219, at *3 (D.N.J. Aug. 27, 2011) (accord); Ascencea LLC v. Zisook, No. 08-5339, 2011 U.S. Dist. LEXIS 36786, at *3 (D.N.J. Apr. 5, 2011) (accord); Tatum v. Chrysler Group LLC, No.10-cv-4269, 2011 U.S. Dist. LEXIS 32362, at *8 (D.N.J. Mar. 28, 2011) (reciting general rule of successor non-liability and the four traditional exceptions).

product-line exception.[601] In doing so, the court stated it "has long recognized the significance of the social policy of risk-spreading in establishing the manufacturer's duty to the product user under the rapidly expanding principles of strict liability in tort."[602] In New Jersey, where successor liability has been found, the jury will assess the defendant's financial condition at the time of the wrongful conduct in order to determine punitive damages.[603]

New Jersey: The Express or Implied Assumption Exception

New Jersey courts have not extensively analyzed the express or implied assumption exceptions to the general rule of corporate successor nonliability. In *McKee v. Harris-Seybold, Co.*, the court 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,

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[601] *Ramirez*, 431 A.2d at 825. ("[W]e hold that where one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor."); *see also* Bowen Eng'g v. Estate of Reeve, 799 F. Supp. 467 (D.N.J. 1992) (holding the product line exception adopted by Ramirez did not apply to the case before it brought under CERCLA).

[602] *Ramirez*, 431 A.2d at 820. *But see* Jenkins v. Anderson Mach. Sys., Inc., No. A-3707-00T5, 2002 WL 31398172, at *6–7 (N.J. Super. Ct. App. Div. Aug. 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).

[603] Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 943 A.2d 866, 871 (N.J. 2008).

> so as to give effect to the general purpose and intention of the parties.[604]

Applying these general rules of construction, the court concluded that the purchase agreement in question did not include any express assumption by the purchasing corporation.[605]

New Jersey: The Fraud Exception

Similar to the express or implied assumption exception, New Jersey courts have not offered very much analysis regarding the fraud exception.[606] In *McKee*, the court quickly disposed of both the fraud and inadequate consideration exceptions.[607] While some jurisdictions have concluded that inadequacy of consideration is the primary element of fraud, the *McKee* court, though discussing both together, kept them

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[604] *McKee*, 264 A.2d at 102 (citations omitted) (citing Hudson County Newspaper Guild v. Jersey Pub. Co., 88 A.2d 682 (N.J. Super. Ct. Law Div.1952); S.G. Young, Inc. v. B. & C. Distributors Co., 92 A.2d 519 (N.J. Super. Ct. App. Div. 1952)).

[605] *McKee*, 264 A.2d at 102.

[606] In a fraudulent transfer case that is roughly similar to a successor liability action, in an unpublished opinion, *Spikes v. Hamilton Farm Golf Club, LLC*, No. 13-3669, 2014 U.S. Dist. LEXIS 9088, at *10 (D.N.J. Jan. 22, 2014), the Federal District Court for New Jersey confronted a plaintiff alleging that a golf club transferred property to a business trust to "hinder, delay, or defraud any creditor or debtor." The court examined a number of factors for determining fraudulent conveyance, including whether the transfer was to an insider; the debtor retained possession or control of the property transferred after the transfer; the transfer or obligation was disclosed or concealed; the transfer was of substantially all the debtor's assets; the value of consideration received by the debtor was not reasonably equivalent to the value of the asset transferred; and the debtor was insolvent or became insolvent shortly after the transfer was made. The court held that the plaintiff's allegations were insufficient, as the golf club remained open for a substantial time after the transfer, and the plaintiffs failed to show that the golf club was unable to pay its debts.

[607] *McKee*, 264 A.2d at 106–07. (Although *McKee* has been overruled or severely qualified by Wilson v. Fare Well Corp., 356 A.2d 458, 464 (N.J. Super. Ct. 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).

analytically separate. The court quoted *West Texas Refining & Dev. Co. v. Comm'r of Internal Revenue*,[608] 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.[609]

Merrill Lynch Bus. Fin. Servs., Inc. v. Kupperman[610] provides a list of the badges of fraud, derived from *Gilchinsky v. Nat'l Westminister Bank N.J.*[611] and New Jersey Statute § 25:2-26.

New Jersey: The Mere Continuation and De Facto Merger Exceptions

In *Woodrick v. Jack. J. Burke Real Estate, Inc.*, a 1997 case, the court noted that "[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."[612] "The standards for

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608 West Texas Refining & Dev. Co. v. Comm'r of Internal Revenue, 68 F.2d 77 (10th Cir. 1933).

609 *McKee*, 264 A.2d at 107 (quoting W. Tex. Refining & Dev. Co. v. Comm'r, 68 F.2d 77, 81 (10th Cir. 1933).

610 Merrill Lynch Bus. Fin. Servs., Inc. v. Kupperman, No. No. 064802DMC MCA, 2010 WL 2179181, at *24 (D.N.J. May 28, 2010), *aff'd*, 441 F. App'x 938 (3d Cir. 2011).

611 Gilchinsky v. Nat'l Westminister Bank N.J., 732 A.2d 482, 489 (N.J. 1999).

612 Woodrick v. Jack J. Burke Real Estate, Inc., 703 A.2d 306, 312 (N.J. Super. Ct. App. Div. 1997) (citing Glynwed, Inc. v. Plastimatic, Inc., 869 F. Supp. 265, 276 (D.N.J.1994)); *see also* Forman Indus., Inc. v. Blake-Ward, No. L-5332-06, 2008 WL 4191155, at *5 (N.J. Super. App. Div. Sept. 15, 2008); Einhorn v. M.L. Ruberton Const. Co., 665 F. Supp. 2d 463, 475–476 (D.N.J. 2009).

application of the continuation theory of corporate successor liability are not entirely clear."[613] New Jersey decisions from the early 1970's list factors for a *de facto* merger, such as "transfer or sale of all assets, exchange of stocks, change of ownership whereby stockholders, officers and creditors go to the surviving corporation, and assumption of a variety of liabilities pursuant to previously negotiated agreements."[614] Elements needed to find a mere continuation include "use of the same name, at the same location, with the same employees and common identity of stockholders and directors."[615] In *McKee v. Harris-Seybold Co.*, a New Jersey superior court stated that continuity of interest was a necessary, threshold requirement for mere continuation.[616] 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 . . ."[617]

The court *Woodrick v. Jack. J. Burke Real Estate, Inc.* listed the following 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*

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[613] Tatum v. Chrysler Group LLC, No.10-cv-4269, 2011 U.S. Dist. LEXIS 32362, at *6 (D.N.J. Mar. 28, 2011).

[614] Wilson v. Fare Well Corp., 356 A.2d 458, 464 (N.J. Super. Ct. 1976).

[615] *Id.* at 464; *see also* Merrill Lynch Bus. Fin. Servs., Inc. v. Kupperman, 441 Fed. App'x 938, 941 (3d Cir. 2011) (offering a brief and vague description of the mere continuatioin and *de facto* merger doctrines, concluding that one of the defendants was liable thereunder due to proof of continuity of ownership, continuity of management, continuity of a physical location, assets, and general business operations, and cessation of the prior business of the predecessor shortly after the successor entity was formed).

[616] McKee v. Harris-Seybold Co., 264 A.2d 98, 106 (N.J. Super. Ct. Law Div. 1970) (citing Bergman & Lefkow Ins. Ag. v. Flash Cab Co., 24 N.E.2d 729 (Ill. App. Ct. 1969) ("For liability to attach, the purchasing corporation must represent merely a 'new hat' for the seller.").

[617] Russell-Stanley Corp. v. Plant Indus., Inc., 595 A.2d 534, 547 (N.J. Super. Ct. Ch. Div. 1991).

> 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.[618]

"Not all of these factors need be present for a *de facto* merger or continuation to have occurred. Rather, [t]he crucial inquiry is whether there was an 'intent on the part of the contracting parties to effectuate a merger or consolidation rather than a sale of assets.'"[619]

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."[620] Applying the factors listed above, the court concluded: "[b]ased on the foregoing facts, it appears that the intent of the asset purchase transaction was to effectuate a merger of the two firms. This

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618 Woodrick v. Jack J. Burke Real Estate, Inc., 703 A.2d 306, 312 (N.J. Super. Ct. App. Div. 1997) (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)).

619 *Woodrick*, 703 A.2d at 312 (citations omitted) (citing and quoting Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc., 13 F.3d 69, 73 (3rd Cir.1993) (applying New Jersey law); *see* Berg Chilling Sys., Inc. v. Hull Corp., 435 F.3d 455, 462–63 (3d Cir. 2006); Marsdale v. Port Liberte Partners, No. L-5117-97, 2007 WL 92666, at *5 (N.J. Super. Ct. App Div. Jan. 9, 2007).

620 *Woodrick*, 703 A.2d at 313.

transaction resulted in nothing more than a change of hat for Burke, thus constituting a mere continuation of the predecessor's business."[621]

Thus, two courts have indicated that *McKee v. Harris-Seybold* does not reflect the modern trend in New Jersey law.[622] Indeed, the court in *Wilson v. Fare Well Corp.,* stated that *McKee*'s application of both doctrines was too narrow, limited, and harsh.[623]

The right approach, according to *Wilson*, is to evaluate the "continuity of management, personnel, physical location, assets and general business operations; [the] continuity of shareholders since the purchasing corporation pays with its stock; [whether or not the] seller ceases operations and dissolves; [and the] assumption of obligations necessary for the uninterrupted continuation of normal business operations," in order to determine whether a successor corporation is the product of a *de facto* merger or a mere continuation.[624]

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

> the most relevant factor is the degree to which the predecessor's business entity remains intact. The more a corporation physically resembles its predecessor, 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.[625]

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[621] *Id.* at 314.

[622] McKee v. Harris-Seybold Co., 264 A.2d 98, 106 (N.J. Super. Ct. Law Div. 1970); *see also* Wilson v. Fare Well Corp., 356 A.2d 458, 464 (N.J. Ch. Div. 1976).

[623] *Wilson*, 356 A.2d at 468.

[624] *Id.* at 466.

[625] *Id.*

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

New Jersey: The Product Line Exception

In *Ramirez v. Armsted Industries, Inc.*,[626] the Supreme Court of New Jersey substantially adopted the product line analysis as articulated by the California Supreme Court in *Ray v. Alad*. The *Ramirez* court applied the same "three-fold justification" applied by the *Ray* court. 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.[627]

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 required by the first prong of *Ray*.[628] In addressing the question of whether the product line

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[626] Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 819–20 (N.J. 1981).

[627] Ray v. Alad, 560 P.2d 3, 9 (Cal. 1977).

[628] 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.").

exception might apply to assets purchased at a bankruptcy sale, the court opined,

> We share the instinctive reaction of those who hesitate to apply the product-line exception to a successor at a bankruptcy sale. At first glance, to apply the doctrine to one who could be contemplating the purchase of assets free and clear of any predecessor liability seems unfair. That concern turns out to be unfounded.[629]

In justifying its departure from California's more strict application of the product line exception, the New Jersey Supreme Court noted, "Ultimately, 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."[630]

On the same day that the New Jersey Supreme Court decided *Ramirez*,[631] it also decided *Nieves v. Bruno Sherman Corp*[632] in which it held that the product line exception should be extended to include intermediate successor corporations. The court noted that the intermediate corporation had contributed to the destruction of plaintiffs' remedy against the original manufacturer and that the company "became 'an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.'"[633] This theory was employed again in 1998 in *Class v. American Roller Die Corp.*[634] In both the *Nieves* and the *Class* cases, one of the key factors

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[629] *Id.* at 300; *see also In re* Grumman Olson Indus., Inc., 467 B.R. 694, 697 (S.D.N.Y. 2012) (applying New Jersey law and holding that the plaintiff's product line claims could not be foreclosed by a Bankruptcy Code § 363(f) sale order that was entered before plaintiff's injuries had occurred).

[630] *LeFever*, 734 A.2d at 301.

[631] *Ramirez*, 431 A.2d at 811.

[632] Nieves v. Bruno Sherman Corp., 431 A.2d 826, 831 (N.J. 1981).

[633] *Id.* (quoting Ray v. Alad, 560 P.2d 3, 11 (Cal. 1977)).

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

influencing the court's decision was that the intermediate companies expressly retained liability for products sold prior to the asset sale when they were liquidating the product line. This leaves the question open as to whether or not intermediate successor corporations would be liable under the product line theory if the companies they sold to were to assume all liabilities as part of the sale.[635]

The appellate court in *Class* went on to determine how fault should be apportioned between multiple successor corporations.[636] The court concluded that the Market Share method of apportionment was most "fair," imposing fault based on the number of units produced by each successor corporation.[637] The court stated that this method most comports with the policy reasons used to justify the imposition of product line successor liability in the first place, namely each successor corporation is liable for the portion of good will and benefit obtained from their respective use of the original producers product line.[638] The court then pointed out that data was not available on the number of products sold by each corporation in this case.[639] It decided that in the absence of data on number of units produced the court would apportion fault based on the number of years that each company had actually produced the product:[640]

> [I]t is fair and reasonable to apportion plaintiff's damages among multiple

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[635] *Nieves*, 431 A.2d at 831–832; *see also* Class, v. Am. Roller Die Corp., 683 A.2d 595, 599 (N.J. Super. Ct. 1996) (published trial court decision affirmed without further comment by *Class*, 705 A.2d 390, on the issue of whether successor liability applied).

[636] *Class*, 705 A.2d at 394–96.

[637] *Id.* at 394.

[638] *Id.* at 395 ("[T]he market share analysis 'provides a ready means to apportion damages among the defendants,' by holding that '[e]ach defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries.'") (quoting Sindell v. Abbott Laboratories, 607 P.2d 924, 937 (Cal. 1980)).

[639] *Id.* at 394–96.

[640] *Id.* at 394–95.

> successors based on the benefits received from the product line as reflected by the number of units produced, and in the absence of that information, the number of years that each corporation manufactured the product. Similar to damages apportioned based upon a defendant's share of the market, these are both appropriate measures to allocate plaintiff's damages. . . .[641]

The *Class* trial court also analyzed the potential affect of the product line exception on a hypothetical company that had purchased a product line through an asset sale but had ultimately never produced anything from the line.[642] The court decided that such a company would not be liable through the product line exception because such a company did not actually receive a benefit from the assets or goodwill of the predecessor—the hallmark of the *Ramirez* rationale for imposing liability.[643] The *Class* appellate court did not review this determination, as it was not contested by the parties.[644]

The New Jersey Supreme Court in *Mettinger v. Globe Slicing Mach. Co.*[645] decided the question of whether a defendant distributor or retailer could use the product line exception to seek indemnification from a corporate successor (normally, absent an asset sale, in New Jersey a distributor can seek such indemnification against a manufacturer).[646] However, the court in *Mettinger* decided to expand the product line exception to include defendant distributors and retailers.[647] It concluded that, even though the principle purpose of the product line exception was to provide a remedy to victims, applying the product line exception

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641 *Id.* at 396.

642 *Class*, 683 A.2d 595, 606 (N.J. Super. Ct. Law Div. 1998).

643 *Id.* at 606–07.

644 *Class*, 705 A.2d at 393 n.1.

645 Mettinger v. Globe Slicing Mach. Co., 709 A.2d 779 (N.J. 1998)

646 *Id.* at 783.

647 *Id.* at 783.

to the defendant distributor seeking indemnification from the successor manufacturer furthered the purpose "'of spreading the risk to society at large for the costs of injuries from defective products.'"[648] The court stated:

> "Public policy requires that having received the substantial benefits of the continuing manufacturing enterprise, the successor corporation should also be made to bear the burden of the operating costs that other established business operations must ordinarily bear . . . ." Ordinarily, the manufacturer must bear the cost of indemnifying entities lower in the chain of distribution for injuries caused by defects in its products . . . . Therefore, the successor manufacturer also must bear that cost.[649]

New Mexico

The New Mexico Supreme Court first addressed the issue of successor liability in *Pankey v. Hot Springs National Bank,* a 1941 case in which the court adopted the four traditional exceptions to the general rule of successor non-liability.[650] The Supreme Court of New Mexico

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[648] *Id.* at 785 (citations omitted) (quoting Ramirez v. Amstead Indus., Inc., 431 A.2d 811, 813 (N.J. 1981)).

[649] *Id.* at 785 (citations omitted) (quoting *Ramirez*, 431 A.2d at 822–23).

[650] Pankey v. Hot Springs Nat. Bank, 119 P.2d 636, 640 (N.M. 1941) (quoting W. Tex. Refining & Dev. v. Comm'r of Int. Rev., 68 F.2d 77, 81 (10th Cir. 1933)) ("'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 to escape liability for such debts . . . .'").

did not address successor liability in the context of products liability until 1997, when it recognized the four traditional exceptions as well as adopted the product line exception.[651] In *Garcia v. Coe Mfg. Co.*, the only traditional exception potentially applicable to the facts of the case was the mere continuation exception.[652] 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.'"[653] "Thus, the mere continuation exception 'has no application without proof of continuity of management and ownership between the predecessor and successor corporations.'"[654] The *Garcia* court, finding the mere continuation exception inapplicable, adopted the product-line exception as articulated in *Ray v. Alad.*[655] The *Garcia* court held that "[w]hen a successor corporation continues to market many of the same products and represents to the public and its predecessor's customers that it is continuing the predecessor's enterprise, it essentially picks up where the predecessor left off."[656]

New York

The law of successor liability in New York appears unsettled in several key areas.[657] In general, New York courts recognize the four traditional exceptions to the general rule of nonliability for asset purchasers.[658] In 2006, the Court of Appeals, New York's court of last

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[651] *See* Garcia v. Coe Mfg. Co., 933 P.2d 243, 247–50 (N.M. 1997).

[652] *Id.* at 246.

[653] *Id.* at 247 (quoting Leannais v. Cincinnati, Inc., 565 F.2d 437, 440 (7th Cir. 1977)).

[654] *Id.* (quoting Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996)).

[655] *Id.* at 248.

[656] *Id.*

[657] *See In re* Seventh Jud. Dist. Asbestos Litig., 788 N.Y.S.2d 579, 582–83 (N.Y. 2005).

[658] Schumacher v. Richards Shear Co., 451 N.E.2d 195, 198 (N.Y. 1983); *see* Battino v. Cornelia Fifth Ave., LLC, 861 F. Supp. 2d 392 (S.D.N.Y. 2012); Semenetz v. Sherling & Walden, Inc., 851 N.E.2d 1170 (N.Y. 2006); BT Ams. Inc. v. ProntoCom Mktg., Inc., 859 N.Y.S.2d 893 (N.Y. Sup. Ct. 2008); Morales v. N.Y., 849 N.Y.S.2d 406, 408–09 (N.Y. Sup. Ct. 2007); Hoover v.

resort, expressly rejected the product line exception in *Semenetz v. Sherling & Walden, Inc.*, an issue which had previously split the Appellate division.[659] The *Semenetz* court made no decision on the continuity of enterprise exception, noting that the plaintiff was no longer relying on that theory.[660] Although the continuity of enterprise exception was adopted by a lower court in 1985, no New York court has adopted or applied the exception since *Semenetz* was decided.[661]

New York: The Express/Implied Assumption Exception

New York courts recognize the express or implied assumption exception to the general rule of nonliability. In cases that have addressed this exception, courts have looked at the language of the purchase agreement and other sale documents in order to determine whether the successor has expressly or impliedly assumed any of the liabilities of the predecessor.[662]

New Holland N. Am., Inc., 898 N.Y.S.2d 401, 402 (N.Y. App. Div. 2010); I & G Lexington L.L.C. v. Ayers Serota Assocs., Inc., 836 N.Y.S.2d 39 (N.Y. App. Div. 2007).

[659] *Semenetz*, 851 N.E.2d at 1173–75; *see also* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 214 (2d Cir. 2006); Colon v. Multi-Pak Corp., 477 F. Supp. 2d 620, 627 (S.D.N.Y. 2007); Broydo v. Baxter D. Whitney & Sons, Inc., No. 36387/04, 2009 WL 1815092, at *2–3 (N.Y. Super. Ct. June 23, 2009).

[660] *Semenetz*, 851 N.E.2d at 1173 n. 2.

[661] *See, e.g.*, Salvati v. Blaw-Knox Food & Chem. Equip., Inc., 497 N.Y.S.2d 242, 247 (N.Y. Sup. Ct. 1985) (adopting the continuity of enterprise exception as articulated in *Turner* v. Bituminous Cas. Co., 244 N.W.2d 873, 879 (Mich. 1976)).

[662] *See, e.g.*, *In re* Parmalat Sec. Litig., 493 F. Supp. 2d 723, 730 (S.D.N.Y. 2007) (finding successor corporation liable when they had assumed "all debts" of the predecessor over objections of the successor that they did not assume the "acts" of the predecessor. "[T]he issue is not the assumption of acts. It is the assumption of liability for those acts."); *see also, e.g.*, Hartford Accident & 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 N.Y., Inc., 455 N.Y.S.2d 996, 998 (N.Y. Sup. Ct. 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."); Wensing v. Paris Indus., 558 N.Y.S.2d 692, 694 (N.Y. App. Div. 1990) ("The applicable documents in this

New York: The Fraud Exception

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."[663] A federal court has held that this exception would apply where the evidence demonstrates a fraudulent conveyance under New York Debtor and Creditor Law § 276.[664] Under § 276 a fraudulent conveyance is one made "with actual intent . . . to hinder, delay, or defraud either present or future creditors. . . ."[665] The court in *Silverman Partners LP v. Verox Group* articulated the test for a finding of fraud, holding that:

> Circumstantial evidence may be used to infer actual intent to defraud and there are certain "badges of fraud" to be used when determining if actual intent exists, which include: (1) the inadequacy of consideration received, (2) the close relationship between the parties to the transfer, (3) information that the transferor was insolvent by the conveyance, (4) suspicious timing of

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case reveal [the successor] purchased the assets without assuming 'any warranty obligations or product liability claims . . . with respect to any inventory sold, shipped or delivered prior to [August 28, 1987].' They further provide that [successor] took the assets 'free and clear . . . of . . . all claims for products liability (to the extent that such claims are in existence or arise out of products manufactured and sold prior to the closing date).' These provisions evince a clear intent that [the successor] was not assuming any liability for products sold prior to its acquisition of assets."); 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."); *see also Hoover*, 898 N.Y.S.2d at 402.

663 *Schumacher*, 451 N.E.2d at 198.

664 Silverman Partners LP v. Verox Grp., No. 08 CIV 3103(HB), 2010 WL 2899438, at *6 (S.D.N.Y. July 19, 2010).

665 N.Y. DEBT. & CRED. LAW § 276 (LexisNexis 2013).

> transactions or existence of pattern after the debt had been incurred or a legal action against the debtor had been threatened, or (5) the use of fictitious parties.[666]

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."[667] "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 . . . ."[668] The following factors are considered "the hallmarks" of a *de facto* merger in New York:

> continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of management, personnel, physical location, assets and general business operation . . . .[669]

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[666] *Silverman Partners*, 2010 WL 2899438, at *6 (citing A.J. Heel Stone, L.L.C. v. Evisu Int'l, S.R.L., No. 03 CIV. 1097 (DAB), 2006 WL 1458292, at *3 (S.D.N.Y. May 25, 2006)).

[667] *Schumacher*, 451 N.E.2d at 198.

[668] *In re* New York City Asbestos Litig., 15 A.D.3d 254, 256 (N.Y. App. Div. 2005).

[669] Fitzgerald v. Fahnestock & Co., 286 A.D.2d 573, 574, , 72 (N.Y. App. Div. 2001) (citation omitted); *see also New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201 (2d Cir. 2006); Battino v. Cornelia Fifth Ave., LLC, 861 F. Supp. 2d 392 (S.D.N.Y. 2012); Crowley v. VisionMaker, LLC, 512 F. Supp. 2d 144 (S.D.N.Y. 2007); Colon v. Multi-Pak Corp., 477 F. Supp. 2d 620, 626 (S.D.N.Y. 2007); Riverside Mktg., LLC v. SignatureCard, Inc., 425 F. Supp. 2d 523, 535

Courts have stated that not all of these factors necessarily need be present for a finding of *de facto* merger.[670] There is a split of authority, however, regarding whether continuity of ownership is a threshold element as opposed to a mere factor.[671] In *New York City Asbestos Litigation* the court noted: "It has been held that, because continuity of ownership is 'the essence of a merger,' it is a necessary element of any de facto merger finding, although not sufficient to warrant such a finding by itself . . . ."[672]

Since then, several federal courts in the Second Circuit have held that continuity of ownership is a required element of the de facto merger exception.[673] At least one New York state court has agreed,[674] though another has held that the four factors should be analyzed in a flexible

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(S.D.N.Y. 2006); Rodriguez v. Printco Indus., No. 9420/07, 2010 WL 2679898, at *4 (N.Y. Sup. Ct. May 11, 2010); Buja v. KCI Konecranes Int'l. PLC., 815 N.Y.S.2d 412 (N.Y. Sup. Ct. 2006); *In re* Seventh Jud. Dist. Asbestos Litig., 788 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005); *In re New York City Asbestos Litig.*, 15 A.D.3d at 256; Wash. Mut. Bank, F.A. v. SIB Mortg. Corp., 801 N.Y.S.2d 821 (N.Y. App. Div. 2005); Sweatland v. Park Corp., 587 N.Y.S.2d 54, 56 (N.Y. App. Div. 1992).

[670] *Fitzgerald*, 286 A.D.2d at 573–74; *see also Sweatland*, 587 N.Y.S.2d at 56; Morales v. N.Y., 849 N.Y.S.2d 406, 411–13 (N.Y. Sup. Ct. 2007).

[671] *Silverman Partners*, 2010 WL 2899438, at *4; *In re New York City Asbestos Litig.*, 15 A.D.3d at 256 (citing *Fitzgerald*, 286 A.D.2d at 573–74); Kretzmer v. Firesafe Prods. Corp., 805 N.Y.S.2d 340, 341 (N.Y. App. Div. 2005); *Wash. Mut. Bank*, 801 N.Y.S.2d at 822 (N.Y. App. Div. 2005); *In re Seventh Jud. Dist. Asbestos Litig.*, 788 N.Y.S.2d at 583; *Morales*, 849 N.Y.S.2d at 411; *Buja*, 815 N.Y.S.2d at 415); *see also Rodriguez*, 2010 WL 2679898 at *4.

[672] *In re New York City Asbestos Litig.*, 15 A.D.3d at 256 (quoting Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 46–47 (2d Cir. 2003)).

[673] *See e.g.,* New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 213-14 (2d Cir. 2006) (declining to certify the question to the Court of Appeals); *Silverman Partners*, 2010 WL 2899438, at *4; *Colon*, 477 F. Supp. 2d at 626; Care Envtl. Corp. v. M2 Techs., Inc., No. CV-05-1600, 2006 WL 148913, at *11 (E.D.N.Y. Jan. 18, 2006); *Riverside Marketing*, 425 F. Supp. 2d at 536.

[674] *Buja*, 815 N.Y.S.2d at 415 (quoting *In re New York City Asbestos Litig.*, 15 A.D.3d at 256) ("Courts have determined that continuity of ownership 'is a necessary element of any de facto merger finding . . . .'").

manner, with no single one, including continuity of ownership, being determinative.[675] One federal district court has held that the continuity of enterprise and *de facto* merger exceptions are "so similar that they may be considered a single exception."[676]

Shortly before *New York City Asbestos Litigation* was decided, a New York supreme court held that the buyer of an auto parts store could not be held liable for an injury allegedly caused by its predecessor's sale of asbestos-containing products, neither under the *de facto* merger theory nor the continuity of enterprise theory because the predecessor was not immediately dissolved, the buyer did not assume seller's liabilities, and the store's operations changed from primarily retail to primarily wholesale.[677] That court noted:

> Assuming . . . there is no one factor, including continuity of ownership, which is determinative of [a *de facto* merger], there is very little, if any, distinction between the exceptions of "continuity of enterprise" and consolidation and merger. In either instance, a court must weigh the various factors on a case by case basis to determine if tort liability should be imposed upon a successor corporation.[678]

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[675] *Morales*, 849 N.Y.S.2d at 411–13; *see also Rodriguez*, 2010 WL 2679898, at *11 (appearing to balance the factors in a flexible manner, ultimately denying summary judgment in favor of the successor where there was evidence that "some" (not most) of the owners of the predecessor and successor were the same).

[676] *Battino*, 861 F. Supp. 2d at 401 (quoting Cargo Partner AG, 352 F.3d at 45 n.3).

[677] *In re Seventh Jud. Dist. Asbestos Litig.*, 788 N.Y.S.2d at 583–84.

[678] *Id.* at 583; *see also* Doktor v. Werner Co., 762 F. Supp. 2d 494 (E.D.N.Y. 2012); Jalili v. Xanboo Inc., No. 11 CIV. 1200 DLC, 2011 WL 4336690, at *2 (S.D.N.Y. Sept. 15, 2011); *see also* Optigen, LLC v. Int'l Genetics, Inc., 777 F. Supp. 2d 390, 394 (N.D.N.Y. 2011); Ortiz v. Green Bull, Inc., No. 10-CV-3747, (ADS)(ETB), 2011 U.S. Dist. LEXIS 131601, at *4 (E.D.N.Y. Nov. 14, 2011); Wexler v A.O. Smith Water Prod. Co., No. 190223/11, 2012 N.Y. Misc. LEXIS 3233, at *3 (N.Y. Sup. Ct. July 2, 2012).

New York: The Mere Continuation Exception

In order for the mere continuation exception to apply, the predecessor must be completely extinguished; where the predecessor survives the sale transaction as "a distinct, albeit meager, entity[,]" the successor "cannot be considered a mere continuation . . . ."[679] Note that the court in *Morales* held that "the dissolution of the predecessor/seller corporation is not necessary for there to be a 'de facto merger.'"[680]

New York: The Continuity of Enterprise Exception

A New York supreme court, in 1985, adopted the continuity of enterprise exception as articulated in *Turner*.[681] The court adopted *Turner's* three criteria test: "[(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."[682] Interestingly, the court's application of *Turner* did not appear to require the destruction of a plaintiff's remedies in order to satisfy the second prong of the

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[679] Schumacher, 451 N.E.2d at 198; *see also* Sweatland v. Park Corp., 587 N.Y.S.2d 54, 56 (N.Y. App. Div. 1992) (mere continuation exception inapplicable where the predecessor "survived the transaction, albeit in bankruptcy, for several years"); Wensing v. Paris Indus., 558 N.Y.S.2d 692, 694 (N.Y. App. 694 (N.Y. App. Div. 1990) ("The record reveals that [the predecessor] survived the asset transfer as a distinct corporation, albeit in bankruptcy. Under such circumstances, [the successor] cannot be cast as its mere continuation"); *Morales*, 849 N.Y.S.2d at 410; *In re Seventh Jud. Dist. Asbestos Litig.*, 788 N.Y.S.2d at 581–82 ("In summary, if a 'predecessor corporation continues to exist after the transaction, in however a gossamer of form, the mere continuation exception is not applicable.'") (quoting Diaz v. S. Bend Lathe Inc., 707 F. Supp. 97, 100 (E.D.N.Y. 1989)).

[680] *Morales*, 849 N.Y.S.2d at 410–11.

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

[682] *Salvati*, 497 N.Y.S.2d at 243 (citing Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 879, 883 (Mich. 1976)).

continuity of enterprise test.[683] 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."[684] This particular application of *Turner* (without the destruction of remedy requirement) begins to look more like a *Turner-Ray* hybrid.

In the 2006 *Semenetz* case, however, the Court of Appeals of New York expressly rejected the product line exception but made no decision on the continuity of enterprise exception, since the plaintiff had not relied on that theory on review.[685] The Court of Appeals has yet to directly address the continuity of enterprise exception since expressly deciding not to adopt it in the 1983 *Schumacher* case.[686] Additionally, in 1984, the Monroe County Supreme Court reiterated that *Schumacher* refused to adopt the continuity of enterprise exception,[687] and as of February 2017, no New York court has adopted or applied the continuity of enterprise exception since *Semenetz* was decided.

Note that in *In re Seventh Judicial Dist. Asbestos Litigation*, a 2005 case, the Ontario County Supreme Court (a New York trial court) stated that if no one factor in the *de facto* merger exception is determinative, then "there is very little, if any, distinction between the exceptions of "continuity of enterprise" and consolidation and merger. In either instance, a court must weigh the various factors on a case by case basis to determine if tort liability should be imposed upon a successor corporation."[688]

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683 *Salvati*, 497 N.Y.S.2d at 242–48.

684 *Id.* at 247.

685 Semenetz v. Sherling & Walden, Inc., 851 N.E.2d 1170, 1173 n.2, 1173–1175 (N.Y. 2006).

686 *Schumacher*, 451 N.E.2d at 198; *see also* Radziul v. Hooper, Inc., 479 N.Y.S.2d 324, 326 (N.Y. Sup. Ct. 1984) (stating that the New York Court of Appeals has "refused to adopt" the product line or continuity of enterprise exceptions).

687 *Radziul*, 479 N.Y.S.2d at 326.

688 *In re Seventh Jud. Dist. Asbestos Litig.*, 788 N.Y.S.2d at 583; *see also Battino*, 861 F. Supp. 2d at 392 (accord).

New York: Jurisdiction over Successor Corporations

One interesting question that has arisen in New York is whether or not a successor corporation can be subject to personal jurisdiction under New York's long arm statute. At least one federal court has answered this question in the affirmative.[689]

North Carolina

North Carolina courts follow the traditional approach, recognizing the four traditional exceptions to the general rule of successor nonliability: "(1) where there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) where the transfer amounts to a *de facto* merger of the two corporations; (3) where the transfer of assets was done for the purpose of defrauding the corporation's creditors; or (4) 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."[690]

The court in *G.P. Publ'ns, Inc. v. Quebecor Printing-St. Paul, Inc.,* further noted that:

> [a] review of the case law reveals that North Carolina follows the traditional approach to the "mere continuation" theory . . . . This jurisdiction also considers two factors in addition to the issue of continuity of ownership: (1)

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689 Hughes v. BCI Int'l. Holdings, Inc., 452 F. Supp. 2d 290, 301 (S.D.N.Y. 2006) (citing Linzer v. EMI Blackwood Music, Inc., 904 F. Supp. 207, 213 (S.D.N.Y. 1995)); *see also* Abbacor, Inc. v. Miller, No. 01 Civ. 803, 2001 WL 1006051, at *4 (S.D.N.Y. Aug. 31, 2001) (internal quotations omitted) ("acts of a predecessor corporation can be attributed to a successor corporation for the purpose of establishing long arm jurisdiction where the predecessor and the successor are one and the same").

690 G.P. Publ'ns, Inc. v. Quebecor Printing-St. Paul, Inc., 481 S.E.2d 674, 679 (N.C. Ct. App. 1997) (citations omitted) (citing Budd Tire Corp. v. Pierce Tire Co, 370 S.E.2d 267, 269 (N.C. Ct. App. 1988)); *see* Atwell v. DJO, Inc., 803 F. Supp. 2d 369 (E.D.N.C. 2011); Lattimore & Assocs., LLC v. Steaksauce, Inc., No. 10 CVS 14744, 2012 WL 1925729, at *3 (N.C. May 25, 2012).

> 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* . . . .[691]

The last sentence is particularly perplexing because the court noted that North Carolina follows the traditional approach to mere continuation in which at least some continuity of ownership is required but then goes on to reject the "substantial continuity" or "continuity of enterprise" exception.[692] The court stated:

> In the instant case, we find that the trial court erred by applying the "substantial continuity" test rather than the more restrictive traditional test to determine whether a successor corporation is a mere continuation of its predecessor. In the context of a commercially reasonable sale under UCC § 9-504, allowing successor liability based on factors other than inadequate consideration and identity of ownership might have a chilling effect on potential purchasers who would have to be concerned that by acquiring a foreclosed business, they would also acquire liabilities they never intended to assume.[693]

It is worth noting that *G.P. Publ'ns, Inc.* indicated that the purchaser could be the "corporate successor" versus the "mere continuation" of the selling corporation even if there was not continuity

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691 *G.P. Publ'ns.*, 481 S.E.2d at 680 (citations omitted) (emphasis added).

692 *Id.* at 680–81; *see also* Atwell, 803 F. Supp. 2d at 372.

693 *G.P. Publ'ns.*, 481 S.E.2d at 682.

of ownership. 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 under the fraud exception. Indeed, *L.J. Best Furniture v. Capital Delivery Serv.*, which the court cited, dealt exclusively with the fraud and mere continuation exceptions.[694]

North Dakota

North Dakota follows the traditional rule of corporate successor nonliability, subject to the four traditional exceptions.[695] In *Downtowner v. Acrometal Prods. Inc.*, the North Dakota Supreme Court analyzed the expanded approaches to successor liability found in *Turner* and *Ray v. Alad*. After extensive analysis, the court concluded that the decision to adopt an expanded exception should be made by the legislature, stating:

> [W]hen the issue is whether successor corporations should assume the liability of their predecessors, and the primary justification for the assumption is the successors' ability to bear the costs, then before the successors should be required to bear the costs we must be sure they can do so. Legislatures and not courts are in a much better position to determine the issue. . . . We therefore conclude that the established principles pertaining to the liability of a cash purchaser of assets are applicable to products liability cases.[696]

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[694] L.J. Best Furniture Distribs., Inc. v. Capital Delivery Serv., 432 S.E.2d 437, 440 (N.C. Ct. App. 1993) (vacating summary judgment because there was a dispute of fact as to whether or not the successor was a mere continuation of the predecessor or whether the transfer of assets was made to defraud creditors); *see also* Atwell, 803 F. Supp. 2d at 372.

[695] Benson v. SRT Commc'ns, Inc., 813 N.W. 2d 552 (N.D. 2012); *see also* Drayton Grain Processors v. NE Foods, Inc., No. CIV. 3:05-CV-73, 2007 WL 983825, at *5 (D.N.D. Mar. 30, 2007); Kristy's Inc. v. Allied Prods. Corp., No. A2–89–100, 1991 WL 541160, at *2 (D.N.D. Jun 21, 1991); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 121 (N.D. 1984).

[696] *Downtowner*, 347 N.W.2d at 124–25.

In *Axtmann v. Chillemi*, in which the majority opinion addressed piercing the corporate veil, not successor liability, Justice Kapsner's concurrence in part and dissent in part discussed five "factors" to be considered when attempting to impose successor liability under the mere continuation exception:

> (1) [The] 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 of paying its creditors' claims because it was dissolved in either fact or law.[697]

In this case, Main Realty had been somewhat dissolved, but real estate agents continued to work under its name and used the commissions to pay off the prior debts of Main Realty, a fact which was not made clear to the purchasers of real estate through those agents.[698] "The trial court found each of the five factors . . . applied to the facts of th[e] case," and thus, Justice Kapsner maintained that liability should have been imposed against the defendant corporation under the mere continuation doctrine. [699]

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-

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[697] Axtmann v Chillemi, 740 N.W. 2d 838, 855 (N.D. 2007) (Kapsner, J., concurring/dissenting) (quoting Jackson v. Diamond T. Trucking Co., 241 A.2d 471, 476 (N.J. Super. Ct. Law Div. 1968)).

[698] *Axtmann*, 740 N.W.2d at 845–47.

[699] *Id.* at 855.

liability in the context of products liability claims.[700] In *Welco Industries, Inc. v. Applied Cos.*, the Supreme Court of Ohio refused to expand the traditional exceptions or adopt the continuity of enterprise exception in the context of contract liabilities.[701] The *Flaugher* court also declined to adopt the product line exception, concluding that the legislature should make major policy decisions.[702]

Note that a federal court has held that it is not necessary to use the phrase "successor liability" in the complaint in order to pursue the theory at later stages of litigation.[703]

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.[704] If the court cannot determine, based on the "four corners of the contract," whether the successor assumed the liabilities of the

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[700] Flaugher v. Cone Automatic Mach. Co., 507 N.E.2d 331, 336 (Ohio 1987); *see also* Delphi Auto. Sys., LLC v. Universal Pallets, Inc., No. 2:10-CV-113, 2011 WL 3297239, at *5 (S.D. Ohio Aug. 1, 2011); Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 861 N.E.2d 121, 130 (Ohio 2006); Rondy & Co.,Rondy & Co., Inc. v. Plastic Lumber Co., No. 25548, 2011 WL 5377741, at *4 (Ohio Ct. App. Nov. 9, 2011).

[701] Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1133 (Ohio 1993); *see also Pilkington N. Am.*, 861 N.E.2d at 130; Kuempel Serv., Inc. v. Zofko, 672 N.E.2d 1026, 1033 (Ohio Ct. App. 1996).

[702] *Flaugher*, 507 N.E.2d at 337.

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

[704] *Welco*, 617 N.E.2d at 1134 ("It is clear that [the purchaser] did not expressly or impliedly assume any contractual liability to [the seller]. The purchase agreement expressly disclaimed both Welco's rights in its claim against Applied and its liability in the counterclaim."); *see also Pilkington N. Am.*, 861 N.E.2d at 130–31; Dobbelaere v. Cosco, Inc., 697 N.E.2d 1016, 1022 (Ohio Ct. App. 1997).

predecessor, the fact-finder must resolve any ambiguities in the contract.[705]

Ohio: The De Facto Merger Exception

The *Welco* court described a *de facto* merger as "a transaction that results in the dissolution of the predecessor corporation and is in the nature of a total absorption of the previous business into the successor. . . . A *de facto* merger is a merger in fact without an official declaration of such."[706] Subsequently the 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 necessary to continue the predecessor's business operations.[707]

The court also indicated that a "transfer of assets for stock is the sine qua non of [a *de facto*] merger."[708] Even though the court initially referred to them as "hallmarks," the court later referred to the four listed

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

[706] *Welco*, 617 N.E.2d at 1134 (emphasis added) (citations omitted) (citing Flaugher, 507 N.E.2d at 340).

[707] *Welco*, 617 N.E.2d at 1134 (citing *Turner* v. Bituminous Cas. Co., 244 N.W.2d 873, 879 (Mich. 1976)); *see also* Rondy & Co., 2011 WL 5377741, at *4 (Ohio Ct. App. Nov. 9, 2011); *Kennedy*, 505 F. Supp. 2d at 476–80 (noting that "the fourth factor does not examine if the specific liability in question was transferred; rather, the fourth factor asks whether the predecessor company transferred to the successor company the 'liabilities ordinarily necessary to continue' regular business operations.") This analysis appears to keep the *de facto* merger doctrine conceptually distinct from the assumption of liabilities doctrine.

[708] *Welco*, 617 N.E.2d at 1134.

characteristics as "elements."[709] 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.[710] Federal district courts, however, have held that under *Welco* not all four hallmarks are required in order to find a de facto merger.[711] Also, Ohio courts will liberally construe the "rapid dissolution" hallmark to include situations where a predecessor survives but retains too few assets to satisfy creditors.[712]

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[709] *Id.* at 1134 (stating that "this transaction fails to satisfy the elements of a de facto merger").

[710] Mohammadpour v. Thomas, No. 85474, 2005 WL 1793515, at *2 (Ohio Ct. App. July 28, 2005) (referring to the hallmarks individually as "elements"); Howell v. Atlantic-MEECO, Inc., No. 01CA0084, 2002 WL 857685, at * 3 (Ohio Ct. App. Apr. 26, 2002) ("Although AMI arguably meets the first of those hallmarks of a *de facto* merger, because it is engaged in the same business as its predecessors, the manufacture and sale of marine dock systems, that alone cannot subject AMI to liability as a successor to the manufacturer of the Buck Creek catwalk. The others must be shown, as well, and they are not.").

[711] Cytec Indus. Inc. v. B.F. Goodrich Co., 196 F. Supp. 2d 644, 657 (S.D. Ohio 2002) ("The Supreme Court of Ohio has never stated that it is an absolute requirement that all of the "hallmarks" of a de facto merger be present before concluding that a particular transaction is in fact a de facto merger. Further, despite that court's acknowledgment that one court had found that an assets-for-stock transfer is the sine qua non of a de facto merger, the court has never stated that this is the only transaction in which there exists continuity of shareholders. A rule mandating the presence of all of the 'hallmarks' of a de facto merger or always requiring an assets-for-stock transaction would be too rigid, as it would likely except some 'transaction[s] that result[ ] in the dissolution of the predecessor corporation and [that] [are] in the nature of a total absorption of the previous business into the successor.' Such a rule would dilute the de facto merger doctrine, which recognizes transactions that are mergers in fact without an official declaration of such") (citing Welco, 617 N.E.2d at 1134); *Kennedy*, 505 F. Supp. 2d at 478 ("It is not a requirement that all four factors be present for a court to find that a de facto merger occurred.") (citing Welco, 617 N.E.2d at 1134).

[712] Pottschmidt v. Klosterman, 865 N.E.2d 111, 119 (Ohio Ct. App. 2006) ("[A]s to the fact that the original corporation technically still exists, we have previously held that the continued existence of the transferor corporation does not defeat a claim for de facto merger except if 'the transferor retains sufficient assets to satisfy the claims of its creditors.' As has been discussed above, the original corporation retained no assets. Moreover, the original corporation

Ohio: The Mere Continuation Exception

The *Flaugher* court discussed the narrow and broad constructions of the mere continuation exception but ultimately did not adopt either approach.[713] The major distinction between the two approaches, according to the court in *Flaugher*, is that one focuses on the continuation of the entity and the other focuses on the continuation of the business operation. The court declined to adopt one approach over the other, stating: "It is obvious that even the expanded view of continuity has no application under these facts."[714]

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.[715] In the same year that the Supreme Court of Ohio issued the *Welco* decision, it was presented with a "certified question presented by the appellate court" asking "whether [*Flaugher*] adopted the traditional test or the expanded test to determine whether a successor corporation is a mere continuation of a predecessor corporation."[716] Unfortunately, the court declined to answer the certified question, concluding there was an issue of fact as to whether liabilities were assumed under the asset purchase agreement.[717]

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closed its corporate bank account, changed the name on the profit-sharing accounts, and filed a final tax return with the IRS, which effectively constituted an end of the original corporation") (citations omitted) (citing Crisplip v. Twentieth Century Heating & Ventilating Co., No. 13721, 1989 WL 11795, at *4 (Ohio Ct. App., Feb. 15, 1989)).

713 *Flaugher*, 507 N.E.2d at 336.

714 *Id.*

715 *Welco*, 617 N.E.2d at 1133; Mandalaywala v. Omnitech Elecs., Inc., No. 05AP-1216, 2006 WL 1556773, at *7–8 (Ohio Ct. App. June 8, 2006).

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

717 *Id.*

Subsequently, it appears that Ohio appellate courts and federal courts in the sixth circuit have concluded that the expanded mere continuation test is also inapplicable in tort actions.[718]

Ohio: The Fraud Exception

Under Ohio law, indicia of fraud include inadequate consideration and lack of good faith.[719] It appears that inadequacy of consideration is also one of the indicia of mere continuation.[720]

Oklahoma

Oklahoma follows the traditional approach to successor liability, recognizing the four traditional exceptions to the general rule of successor nonliability; they include:

> (1) Where there is an agreement to assume such debts or liabilities (2) Where the circumstances surrounding the transaction warrant a finding that there was a consolidation or merger of the corporations, or (3) that the transaction was fraudulent in fact or (4) that the

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[718] Miami Cty. Incinerator Qualified Trust v. Acme Waste Mgmt. Co., 61 F. Supp. 2d 724, 729–30 (S.D. Ohio 1999) (collecting cases); *see also* Aluminum Line Prods. Co. v. Brad Smith Roofing Co., 671 N.E.2d 1343, 1355 (Ohio Ct. App. 1996); *Howell*, 2002 WL 857685, at *4; *Pottschmidt*, 865 N.E.2d at 120.

[719] *Welco*, 617 N.E.2d at 1134; *Howell*, 2002 WL 857685, at *3; *see also Pottschmidt*, 865 N.E.2d at 120 (holding that the evidence supported the imposition of successor liability based on the fraudulent transaction exception where the new corporation was formed one month after a third party sued predecessor corporation; predecessor's and successor's sole shareholder acknowledged that new corporation was formed to escape liability, albeit distinct from third party's lawsuit; and sole shareholder's accountant-attorney testified that accountant-attorney had discussed lawsuit and damages with sole shareholder before the new corporation was formed); Per-Co, Ltd. v. Great Lakes Factors, Inc., 509 F. Supp. 2d 642, 653–54 (N.D. Ohio 2007).

[720] *Rondy & Co.*, 2011 WL 5377741, at *4; Delphi Auto. Sys., LLC v. Universal Pallets, Inc., No. 2:10-CV-113, 2011 WL 3297239 (S.D. Ohio Aug. 1, 2011).

> purchasing corporation was a mere continuation of the selling company.[721]

Also, in order to establish the liability of a once-removed successor corporation, "each company along the line of succession [must meet] one of the four exceptions to non-liability."[722]

The Oklahoma Supreme Court explained in *Crutchfiled*: "The mere continuation exception covers a re-organization of a corporation. For this exception, the test is not whether there is a continuation of business operations, but whether there is a continuation of the corporate entity."[723] In making this determination, courts "look[] to whether there is a common identity of directors, officers, and stockholders before and after the sale, whether there was good consideration for the sale, and whether the seller corporation continues to exist in fact."[724] Further, "[t]he bare de jure existence of the seller corporation after the sale is insufficient alone to establish that the successor corporation is not a mere continuation of the seller company.[725] The *Crutchfield* court further noted that "[i]n many states that employ the mere continuation exception, the common identity of directors, officers, and shareholders is the most important factor."[726]

In 1985, the Oklahoma appellate court addressed the product-line exception, concluding that the rationale articulated by the Oklahoma Supreme Court in *Pulis*, that is,"[t]he test is not the continuation of the

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[721] Pulis v. U.S. Elec. Tool Co., 561 P.2d 68, 69 (Okla. 1977); *see also* Murrah v. EOG Res., Inc., No. CIV-10-994-M, 2011 WL 227652, at *2 (W.D. Okla. Jan. 21, 2011); CTI Servs. LLC v. Haremza, No. 09-CV-144-GKF-TLW, 2011 WL 2472566, at *6 (N.D. Okla. June 21, 2011); Crutchfield v. Marine Power Engine Co., 209 P.3d 295, 300 (Okla. 2009); Coline Oil Corp. v. State, 88 P.2d 897, 898 (Okla. 1939).

[722] *Crutchfield*, 209 P.3d at 300.

[723] *Id.* at 301.

[724] *Id.* at 300 (collecting cases and listing pertinent facts supporting imposition and non-imposition of liability).

[725] *Id.* at 301–02.

[726] *Id.* at 302.

business operation, but the continuation of the corporate entity," foreclosed any possibility of adopting the product-line exception.[727]

Oregon

The Supreme Court of Oregon articulated the general rule of successor nonliability and its four traditional exceptions in *Erickson v. Grande Ronde Lumber Co.*[728] In this case, the court addressed whether a successor corporation had assumed liability for services rendered to its predecessor.[729] The other three exceptions to the general rule were not analyzed. In 2000, an Oregon appellate court addressed successor liability where a purchasing corporation had been ordered to reinstate a worker injured while working for the selling corporation.[730] The court noted the general rule and reiterated the four traditional exceptions, ultimately holding that the consolidation or merger exception did not apply because—among other things—the predecessor company continued to exist, and the predecessor and successor companies had "completely different ownership and management."[731] The Ninth Circuit, applying Oregon law, declined to adopt a broad interpretation of the mere continuation exception that would include the substantial continuation doctrine.[732]

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[727] Goucher v. Parmac, Inc., 694 P.2d 953, 954 (Okla. Ct. App. 1984).

[728] Erickson v. Grand Ronde Lumber Co., 92 P.2d 170, 174 (Or. 1939); Dahlke v. Cascade Acoustics, Inc., 171 P.3d 992, 997 (Or. Ct. App. 2007); *see* Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358 (9th Cir. 1997); Century Indem. Co. v. Marine Group, LLC, 848 F. Supp. 2d 1238 (D. Or. 2012).

[729] *Erickson*, 92 P.2d at 174 (Or. 1939).

[730] Tyree Oil, Inc. v. Bureau of Labor and Indus., 7 P.3d 571, 571–72 (Or. Ct. App. 2000).

[731] *Tyree Oil, Inc.*, 7 P.3d at 574.

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

Oregon has explicitly declined to extend successor liability to include the product line exception. In *Dahlke v. Cascade Acoustics, Inc.*,[733] a case involving the alleged successor to an asbestos manufacturer, the Oregon Court of Appeals stated:

> "[In a previous case] we explained that, apart from the four exceptions [to successor liability], '[i]t has long been the general rule in Oregon that, when one corporation purchases all of the assets of another corporation, the purchasing corporation does *not* become liable for the debts and liabilities of the selling corporation.' . . . Plaintiff's proposed modification of successor liability would require us to depart from that established rule."[734]

Pennsylvania

Pennsylvania courts generally recognize five species of successor liability for corporate asset purchasers, including where

> (1) the purchaser expressly or impliedly agreed to assume liability, (2) the transaction amounted to a consolidation or merger, (3) the purchasing corporation was merely a continuation of the selling corporation, (4) the transaction was fraudulently entered into to escape liability, or (5) the transfer was without adequate consideration and no provision

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733 171 P.3d 992 (Or. Ct. App. 2007). *See generally* Cox v. DJO, Inc., No. 07–1310–AA, 2009 WL 3855084, at *3–4 (D. Or. Nov. 16, 2009) (quoting *Dahkle*, 171 P.3d at 992 (quoting *Tyree Oil, Inc.*, 7 P.3d at 573)).

734 *Dahlke*, 171 P.3d at 998 (quoting *Tyree Oil, Inc.*, 7 P.3d at 573 (citing Erickson v. Grande Ronde Lbr. Co., 92 P.2d 170 (Or. 1939)) (first and second alterations added) (emphasis in original).

> were made for creditors of the selling corporation.[735]

In addition, in the context of products liability, the Superior Court of Pennsylvania adopted a flexible product line exception based on a combination of *Ramirez v. Amsted Indus. Inc.*[736] and *Ray v. Alad Corp.*,[737]

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[735] McClure v. Workers' Comp. Appeal Bd., 28 A.3d 951 (Pa. Commw. Ct. 2011); Cont'l Ins. Co. v. Schneider, Inc., 873 A.2d 1286, 1291 (Pa. 2005) (footnote omitted) (citations omitted) (quoting Simmers v. American Cyanamid 576 A.2d 386 (Pa. Super. Ct.1990) (citing Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 308–09 (3rd Cir. 1985), and Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 110 (Pa. Super. Ct. 1981)); *see, e.g.*, Adani Exports Ltd. v. AMCI Corp., No. 2:05-cv-00304, 2006 WL 1785707, at *2 (W.D. Pa. Jun. 26, 2006) (citing Granthum v. Textile Mach. Works, 326 A.2d 449 (1974), and Lopata v. Bemis Co., Inc., 383 F. Supp. 342 (E.D. Pa. 1974)); *In re* Total Containment, Inc., 335 B.R. 589, 617 (Bankr. E.D. Pa. 2005) (quoting *Cont'l Ins. Co.*, 873 A.2d at 1291 (citing *Philadelphia Elec. Co.*, 762 F.2d at 308–09); Fizzano Bros. Concrete Prods., Inc. v. XLN, Inc., 973 A.2d 1016, 1019 (Pa. Super. Ct. 2009) (citing *Cont'l Ins. Co.*, 873 A.2d at 1291, and *Hill*, 603 A.2d at 605), *appeal granted on other grounds*, 994 A.2d 1081 (Pa. 2010) (quoting Hayduk v. Workers' Comp. Appeal Bd., 906 A.2d 622, 632 (Pa. Commw. Ct. 2006); *In Re* Thorotrast Cases, No. 1135, 1994 WL 1251120, at *488–95 (Pa. Com. Pl. Jan. 13, 1994); *see also* Tender Touch Rehab Servs. LLC v. Brighten at Bryn Mawr, No. 11-7016, 2012 U.S. Dist. LEXIS 40656, at *10–11 (E.D. Penn. Mar. 23, 2012) (citing Aluminum Co. of America v. Beazer East, Inc., 124 F.3d 551, 565 (3d Cir 1997) (citing *Philadelphia Elec. Co.*, 762 F.2d at 308)); Vital Pharms., Inc. v. USA Sports, LLC, No. 3:11-CV-975, 2012 WL 760561, at *4 (M.D. Penn. Mar. 8, 2012) (quoting Chicago Title Ins. Co. v. Lexington & Concord Search & Abstract, LLC, 513 F. Supp. 2d 304, 315 (E.D. Pa. 2007) (citing *Cont'l Ins. Co.*, 873 A.2d at 1291)).

[736] 431 A.2d 811, 825 (N. J. 1981).

[737] 560 P.2d 3, 7–8 (Cal. 1977) (citing Ortiz v. South Bend Lathe, 46 Cal. App. 3d 842, 846 (1975); Schwartz v. McGraw-Edison Co., 14 Cal. App. 3d 767, 780–81 (1971); Pierce v. Riverside Mtg. Secs. Co., 77 P.2d 226 (Cal. App. Ct. 1938); Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973); *see also Tender Touch Rehab Svcs. LLC*, 2012 U.S. Dist. LEXIS 40656, at *10–11 (citing *Aluminum Co. of America*, 124 F.3d at 565 (citing *Philadelphia Elec. Co.*, 762 F.2d at 308)); *Vital Pharms.*, 2012 WL 760561, at *4 (quoting *Chicago Title Ins. Co.*, 513 F. Supp. 2d at 315 (citing *Cont'l Ins. Co.*, 873 A.2d at 1291)); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817, 820 (D. Colo. 1968).

choosing to adopt a new exception rather than expanding the traditional exceptions.[738]

In *Schmidt v. Boardman Co.*, the appellant/successor challenged the product line exception, purporting that it was "inconsistent with the rationale underlying strict products liability[] because it penalizes successor corporations which did not design, make, sell, or otherwise profit from a defective product, and which lacked any opportunity to make the product safe."[739] The Pennsylvania Supreme Court did not decide the issue, however, ruling that because it had not been raised in the lower courts, the matter was waived.[740] While acknowledging that it had not adopted the product line exception, the court held that the exception, as it existed in the lower courts, consisted more of flexible factors, rather than elements or requirements.[741]

The court in *Cont'l Ins. Co. v. Schneider, Inc.* held that a sale of assets by a secured creditor "pursuant to Section 9-504 of the UCC [13 Pa.C.S. § 9504] does not, as a matter of law, preclude a creditor's claim against the purchaser based upon successor liability."[742]

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738 *Dawejko*, 434 A.2d at 10–11 ("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."); *see also* Fizzano Bros. Concrete Prods., Inc. v. XLN, Inc., 42 A.3d 951, 965–69 (Pa. 2012) (quoting Glentel, Inc. v. Wireless Ventures, LLC, 362 F. Supp. 2d 992, 1003 (N.D. Ind. 2005) (citing Gallenberq Equip., Inc. v. Agromac Int'l., Inc., 10 F. Supp. 2d 1050, 1055 (E.D. Wis. 1998)); *Cont'l Ins. Co.*, 873 A.2d at 1291 n.6 (noting that the product line exception applies in the context of products liability, but not otherwise).

739 Schmidt v. Boardman Co., 11 A.3d 924, 936 (Pa. 2011) (citing Cafazzo v. Cent. Med. Health Servs., Inc., 688 A.2d 521, 524 (Pa. 1995)).

740 *Schmidt*, 11 A.3d at 942.

741 *Id.* at 944–45 (citing *Ramirez*, 431 A.2d 811 (N. J. 1981); *Ray*, 560 P.2d 3 (Cal. 1977); *Hill*, 603 A.2d 602 (Pa. Super. Ct. 1992); *Dawejko*, 434 A.2d 106 (Pa. Super. Ct. 1981)).

742 810 A.2d 127, 133 (Pa. Super. Ct. 2002).

Pennsylvania: The Mere Continuation and De Facto Merger Exceptions

Many Pennsylvania courts note that, under Pennsylvania law, the mere continuation and *de facto* merger exceptions are interrelated or difficult to distinguish.[743] The court in *Commonwealth v. Lavelle* explained:

> "[T]he first of the four exceptions rendering the purchasing corporation liable for duties of the seller is a transaction amounting to a merger or consolidation. In a merger a corporation absorbs one or more other corporations, which thereby lose their corporate identity. "A merger of two corporations contemplates that one will be absorbed by the other and go out of existence, but the absorbing corporation will remain.". . . . "Another of the . . . exceptions to the general rule of nonliability arises when there is a continuation. In a continuation,

[743] Atlas Tool Co. v. Comm'r, 614 F.2d 860, 871 (3d Cir. 1980) ("As is illustrated by the de facto merger cases, that exception is interrelated to the second exception for continuity"); United States v. Gen. Battery Corp., 423 F.3d 294, 307 (3d Cir. 2005); Fiber-Lite Corp. v. Molded Acoustical Prods. of Easton, Inc., 186 B.R. 603, 608 (E.D. Pa. 1994) (noting that "the continuity exception which Fiber-Lite contended applied is actually subsumed by the de facto merger exception"); *Lavelle*, 555 A.2d 218, 227 (Pa. Super. Ct. 1989) (citing Knapp v. North American Rockwell Corp., 506 F.2d 361, 365 (3d Cir. 1974)) (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"); *see also* Berg Chilling Sys., Inc. v. Hull Corp., 435 F.3d 455, 468 (3d Cir. 2006); Johnson v. Corr. Physician Servs., 725 F. Supp. 2d 481, 488 (E.D. Pa. 2010); Tender Touch Rehab Servs. LLC v. Brighten at Bryn Mawr, No. 11-7016, 2012 U.S. Dist. LEXIS 40656, at *11–12 (E.D. Penn. Mar. 23, 2012) (citing *Lavelle*, 555 A.2d at 228; *Berg Chilling Sys., Inc.*, 435 F.3d at 468–69); Johnson v. Svcs.2010) (citing *Gen. Battery Corp.*, 423 F.3d at 305; *Cont'l Ins. Co.*, 810 A.2d at 134–35; *Berg Chilling Sys., Inc.*, 435 F.3d at 468–69; Greenway Conter. Inc v. Essex Ins. Co., 369 Fed. App'x. 348, 352 (3d Cir. 2010)); *Vital Pharms.*, 2012 WL 760561, at *4–5 (quoting *Berg Chilling Sys., Inc.*, 435 F.3d at 468; *Cont'l Ins. Co.*, 810 A.2d at 134; *Lavelle*, 555 A.2d at 227).

> a new corporation is formed to acquire the assets of an extant corporation, which then ceases to exist." There is in effect but one corporation which merely changes its form and ordinarily ceases to exist upon the creation of the new corporation which is its successor."[744]

There is a difference in the iteration of the two tests, however. The term "elements" is used in the context of a mere continuation and "factors" used with de facto merger: "The primary elements of the continuation exception are identity of the officers, directors, or shareholders, and the existence of a single corporation following the transfer."[745] "[W]hen determining if a *de facto* merger has occurred, courts generally consider four factors:"[746]

> (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."[747]

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[744] *Lavelle*, 555 A.2d at 227 (quoting Knapp v. N. Am. Rockwell Corp., 506 F.2d 361, 365 (3d Cir. 1974) (footnote omitted) (citing *Dawejko*, 434 A.2d at 107).

[745] *Cont'l Ins. Co.*, 810 A.2d at 134–35 (citing *Fiber-Lite Corp.*, 186 B.R. 603; Widerman v. Mayflower Transit Inc., No. CIV.A. 96–2036, 1997 WL 539684 (E.D. Penn. Aug. 6, 1997); *see also Berg Chilling Sys., Inc.*, 435 F.3d at 468–69 (quoting Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 310 (3d Cir. 1985)).

[746] *Cont'l Ins. Co.*, 810 A.2d at 135 (citing *Lavelle*, 555 A.2d at 227)

[747] *Cont'l Ins. Co.*, 810 A.2d at 135 (citing *Lavelle*, 555 A.2d at 227); *see also Berg Chilling Sys., Inc.*, 435 F.3d at 468–69 (citing *Philadelphia Elec. Co.*, 762 F.2d at 310); *In re* Total Containment, Inc., 335 B.R. at 617 (quoting *Philadelphia Elec. Co.*, 762 F.2d at 310); Chicago Title Ins. Co. v. Lexington & Concord Search and Abstract, LLC., 513 F. Supp. 2d 304, 315 (E.D. Pa. 2007) (citing *Lavelle*,

Moreover, courts have noted that not all of the *de facto* merger factors must be present for the exception to apply.[748]

It may be that the tests have become interrelated in application because, as a practical matter, if the facts fail to satisfy the factor-based *de facto* merger exception, the same facts will fail to meet the elemental requirements of the mere continuation exception.

Further confusion, though, is evidenced by the ruling of the Superior Court in *Fizzano Bros. Concrete Prods., Inc. v. XLN, Inc.*, that continuity of ownership is perhaps not a mere factor of *de facto* merger; rather, "[c]ontinuity of ownership is a key element that must exist in order to apply the *de facto* merger doctrine[.]"[749] In response to this Superior Court decision, "[t]he Pennsylvania Supreme Court issued a lengthy opinion explaining [the] contours [of the de facto merger exception in 2012]."[750] The Supreme Court stated:

> [A] broad holding could state that when the underlying cause of action is contractual or commercial in nature, the *de facto* merger exception does require a strict continuity of ownership, but where the underlying cause of action is rooted in a cause of action that invokes important public policy goals, the continuity of ownership prong may be relaxed.

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555 A.2d at 227); *In re* Asousa P'ship., No. 01-12295DWS, 2006 WL 1997426, *8 (Bankr. E.D. Pa. June 15, 2006) (citing *Cont'l Ins. Co.*, 810 A.2d at 130))

748 *Cont'l Ins. Co.*, 810 A.2d at 135 (citing *Lavelle*, 555 A.2d at 227); *see also Berg Chilling Sys., Inc.*, 435 F.3d at 469; *Chicago Title Ins. Co.*, 513 F. Supp. 2d at 315 (citing *Lavelle*, 555 A.2d at 227); *Asousa P'ship.*, 2006 WL 1997426 at *8.

749 Fizzano Bros. Concrete Prods., Inc. v. XLN, Inc., 973 A.2d 1016, 1020 (Pa. Super. Ct. 2009).

750 Lehman Bros. Holdings Inc. v. Gateway Funding Diversified Mortg. Servs., L.P., 942 F. Supp. 2d 516, 524 (E.D. Pa. 2013) (citing Fizzano Bros. Concrete Prod., Inc. v. XLN, Inc., 42 A.3d 951, 956 (Pa. 2012)).

> However, the better course requires that we tailor our holding to the narrow facts of the case *sub judice* . . . .
>
> . . . [A]lthough the majority of the case law that we have reviewed from other jurisdictions would support a rigid holding that where, as here, the underlying cause of action is in contract or breach of warranty, continuity of ownership would be a necessary factor for establishing a *de facto* merger, we resist a mechanical, un-nuanced ruling . . . .
>
> . . . [I]t would be incongruous [with Pennsylvania statutory law] to adopt a blanket rule that a *de facto* merger **would always** require a rigid showing that the shareholders of the predecessor corporation have exchanged their ownership interests for shares of the successor corporation. . . .
>
> . . . [A] *de facto* merger analysis . . . requires that a court look beyond the superficial formalities of a transaction in order to examine the transactional realities and their consequences.
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> . . . .
>
> Accordingly, we hold that in cases rooted in breach of contract and express warranty, the *de facto* merger exception requires "some sort of" proof of continuity of ownership or stockholder interest . . . . However, such proof is not restricted to mere evidence of an exchange of assets from one corporation for shares in a successor corporation. Evidence of other forms of stockholder

> interest in the successor corporation may suffice; indeed 15 Pa.C.S. § 1922(a)(3) contemplates that continuing shareholder interest pursuant to a statutory merger may take the form of "obligations" in lieu of shares in the new or surviving corporation. Further, *de facto* merger, including its continuity of ownership prong, will always be subject to the fact-specific nature of the particular underlying corporate realities and will not always be evident from the formalities of the proximal corporate transaction. These realities may include an issue concerning which entity is actually the true predecessor corporation . . . . Finally, the elements of the de facto merger are not a mechanically-applied checklist, but a map to guide a reviewing court to a determination that, under the facts established, for all intents and purposes, a merger has or has not occurred between two or more corporations, although not accomplished under the statutory procedure.[751]

Pennsylvania: The Fraud Exception

In *Commonwealth v. Lavelle* the court held that the fraud exception applied where:

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[751] *Fizzano Bros. Concrete Products, Inc.*, 42 A.3d at 966–69 (citations omitted) (emphasis in original) (quoting 15 PA. CONS. STAT. § 1922(a)(3)) (citing *Berg Chilling Systems, Inc.*, 435 F.3d at 465; Kaiser Foundation Health Plan of Mid–Atlantic States v. Clary & Moore, P.C., 123 F.3d 201, 206 (4th Cir.1997)); Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1458 (11th Cir. 1985); Fizzano Bros. Concrete Products, Inc. v. XLN, Inc., 994 A.2d 1081 (Pa. 2010); Farris v. Glen Alden Corp., 143 A.2d 25, 28, 31 (Pa. 1958); *Lavelle*, 555 A.2d at 230.

> [The] . . . evidence was, when viewed as a whole, sufficient to establish that William A. Lavelle, III, was, at all relevant times, possessed of an undisclosed ownership interest in [the successor,] Lavco, Inc., and that the sole purpose for the concealment of that ownership interest was to avoid liability for the criminal acts committed by [the predecessor] Wm. A. Lavelle & Son, Co. under the direction of William A. Lavelle III.[752]

Pennsylvania: The Product Line Exception

In 1981, in *Dawejko v. Jorgensen Steel Co.*, the Superior Court of Pennsylvania adopted the product line exception.[753] The court was careful to keep the product line exception from being too restrictive.[754] In essence, the court adopted the New Jersey product line exception set forth in *Ramirez* while acknowledging the relevance of the factors in California's *Ray v. Alad* by stating:

> 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

[752] 555 A.2d at 230.

[753] 434 A.2d 106, 111 (Pa. Super. Ct. 1981) (citing Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 825 (N.J. 1981)).

[754] *Dawejko*, 434 A.2d at 111 (citations omitted); *see also* Kradel v. Fox River Tractor Co., 308 F.3d 328, 331 (3d Cir. 2002) (quoting *Dawejko*, 434 A.2d at 110); Takacs v. Cyril Bath Co., No. Civ.A. 04–59, 2006 WL 840350, at *3–4 (W.D. Pa. Mar. 29, 2006) (quoting Dawejko, 434 A.2d *passim*). *But see* Schmidt v. Boardman Co., 958 A.2d 498, 514 n.3 (Pa. Super. Ct. 2008) (citing *Takacs*, 2006 WL 840350, *aff'd on other grounds*, 11 A.3d 924 (Pa. 2011)).

> 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.[755]

Since the 1981 *Dawejko* decision, 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.[756] In *Hill v. Trailmobile, Inc.*,[757] the Pennsylvania

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[755] *Dawejko*, 434 A.2d at 111 (citations omitted) (emphasis added); *see Ramirez*, 431 A.2d at 811, 825 ("[W]here 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.").

[756] No. 2676, 1983 WL 265433, at *452 (Pa. Com. Pl. Feb. 9, 1983) (citing Ray v. Alad Corp., 560 P.2d 3, 8–9 (Cal. 1977)) ("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

Superior Court recast the three *Ray* factors as requirements.[758] Soon thereafter, the Court of Common Pleas of Pennsylvania 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."[759]

In *Schmidt v. Boardman Co.*, the appellant/successor (1) challenged the validity of product line exception product-line exception maintaining it was "inconsistent with the rationale underlying strict products liability, because it penalizes successor corporations which did not design, make, sell, or otherwise profit from a defective product, and which lacked any opportunity to make the product safe," and (2) argued in the alternative that the product line exception should consist entirely of mandatory requirements versus flexible factors.[760]

The Pennsylvania Supreme Court did not decide whether the product line exception was valid, ruling that the issue had not been raised below and was thus waived.[761] Although it did not adopt the product

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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.").

[757] 603 A.2d 602 (Pa. Super. Ct. 1992).

[758] *Hill*, 603 A.2d at 606–07 (quoting *Dawejko*, 434 A.2d at 109 (quoting *Ray*, 560 P.2d 3 (Cal. 1997)); *see also Schmidt*, 958 A2d at 507; *Kradel*, 308 F.3d at 332; Dillman v. Indiana Rolls, Inc., No. 2001-C-1963, 2004 WL 2491772 at *299–300 (Pa. Com. Pl. 2004) (citing *Hill*, 603 A.2d at 602); Griffiths v. Knoedler Mfg. Inc., No. 2634 Civil 1995, 2004 WL 3321079, at *188– 89 (Pa. Com. Pl. 2004) (citing *Dawejko*, 434 A.2d at 106).

[759] *In re* Thorotrast Cases, No. 1135, 1994 WL 1251120, at *504 (Pa. Com. Pl. Jan. 13, 1994); *see also Kradel*, 308 F.3d at 332 ("It is thus clear that the inability to recover from an original manufacturer is a prerequisite in Pennsylvania to the use of the product line exception.").

[760] Schmidt v. Boardman Co., 11 A.3d 924, 936, 943–44 (citing Cafazzo v. Cent. Med. Health Servs., Inc., 668 A.2d 521, 524 (1995) and Schmidt v. Boardman, 958 A.2d 498, 513–14 (Pa. Super. Ct. 2008)) (Pa. 2011).

[761] *Schmidt*, 11 A.3d at 942.

line exception, the court addressed the second issue because of the conflict in lower court cases and confirmed the flexible approach to the product line exception set out in *Dawejko*.[762] The court stated:

> Initially, it obviously poses some difficulty for this Court to address the boundaries of the product-line exception, where we have not yet decided on developed reasoning whether to adopt it in the first instance. Nevertheless, there is confusion manifest in both the trial and intermediate appellate courts' opinions, which arises from inconsistencies in the Superior Court's application of the exception it has adopted.
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> . . .
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> . . . [T]he *Dawejko* panel took pains to clarify that it was adopting the *Ramirez* test as the core, governing standard, subject to more flexible consideration of other relevant factors, including those identified in *Ray*.
>
> . . .
>
> Thus, the most appropriate approach to reconciling governing Superior Court precedent is to correct *Hill's* mistake and to revert to *Dawejko*.[763]

[762] *Schmidt*, 11 A.3d at 944–45.

[763] *Schmidt*, 11 A.3d at 944–45 (citations omitted).

Rhode Island

Rhode Island courts have recognized the four traditional exceptions to the general rule of non-successor liability.[764] Of the four traditional exceptions, the Supreme Court of Rhode Island has articulated a test for the mere continuation exception[765] and has recognized the express assumption, *de facto* merger, and fraud exceptions.[766] The court in *Angell v. Parillo,* a 1986 case, briefly discussed the product-line exception, concluding that the doctrine was inapplicable because the predecessor did not dissolve subsequent to the asset purchase.[767] That exception has not since been addressed by the Rhode Island Supreme Court.

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[764] Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc. 124 F.3d 252, 266 (1st Cir. 1997); Blouin v. Surgical Sense, Inc., No. PC 07-6855, 2008 WL 2227781, at *15–16 (R.I. Super. Ct., May 12, 2008); Asea Brown Boveri, S.A. v. Alcoa Fujikura, Ltd., No. PC 02-1084, 2007 WL 1234523, at *46–58 (R.I. Super. Ct., April 11, 2007); Angell v. Parrillo, No. PC 02-1084, 1986 WL 716005, at *1 (R.I. Super. Ct., Feb. 14, 1986).

[765] *See*, *e.g.*, Casey v. San-Lee Realty, Inc., 623 A.2d 16, 18–19 (R.I. 1993) (citing Jackson v. Diamond T. Trucking Co., 241 A.2d 471, 477 (N.J. Super. Ct. 1968); H.J. Baker & Bro. v. Orgonics, Inc., 554 A.2d 196, 205 (R.I. 1989); Richmond Ready-Mix v. Atlantic Concrete Forms, Inc., No. Civ. A. 92-0960, 2004 WL 877595, at *9 (R.I. Sup. Ct. April 21, 2004) (quoting *H.J. Baker & Bro.*, 554 A.2d at 205) (citing Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc., 124 F.3d 252, 268 (1st Cir. 1997) and *Casey*, 623 A.2d at 18–19)) .

[766] Douglas v. Bank of New Eng., 566 A.2d 939, 941–42 (R.I. 1989) (affirming the imposition of successor liability, stating: "Here we have not only a de facto but a formal de jure merger governed by a federal statute and an agreement formulated by the parties in pursuance thereto . . . . [W]e have a successor corporation that has expressly assumed the liabilities as a part of a business decision to utilize a formal de jure merger."); *see also H.J. Baker & Bro.*, 554 A.2d at 205 (remanding for a new trial on the issue of the fraud exception, noting the trial court's grant of a new trial on the count of actual fraud was inconsistent with its denial of a new trial on the count of successor liability based on fraud); *Blouin*, 2008 WL 2227781, at *17.

[767] *Angell*, 1986 WL 716005, at *2 (citing Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F.Supp. 834
(S.D.N.Y. 1977)).

Rhode Island: The Assumption of Liability

Courts look to the language of the pertinent documents covering the transaction in determining whether the successor has expressly assumed liability.[768] In *Douglas v. Bank of New England*, the Rhode Island Supreme Court held that the following language in a merger agreement included an assumption of liability for punitive damages:

> "All assets as they exist at the effective time of the merger, including trust powers of each of the merging banks, shall pass to and vest in the Association (Bank of New England-Old Colony, N.A.) without any conveyance or other transfer; and the Association shall be responsible for *all the liabilities of every kind and description,* including arising out of the exercise of trust powers of each of the merging banks existing as of the effective time of the merger."[769]

Rhode Island: The Mere Continuation Exception

The Rhode Island Supreme Court cited *Jackson v. Diamond T. Trucking Co.*,[770] for the following "five persuasive criteria for finding a 'continuing' entity[:]"[771]

> (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

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[768] *See*, *e.g.*, *Douglas*, 566 A.2d at 941; *Asea Brown*, 2007 WL 1234523 at *51–58.

[769] *Douglas*, 566 A.2d at 941 (emphasis supplied in original) (quoting merger agreement).

[770] 241 A.2d 471 (N.J. Sup. Ct. 1968).

[771] *H.J. Baker & Bros.*, 554 A.2d at 205 (citing Jackson, 241 A.2d at 477).

> 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.[772]

The court noted 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."[773] The court considered all of these factors when holding that a successor was indeed the mere continuation of its predecessor.[774] The *Asea Brown* court, when analyzing the mere continuation exception, noted that it "does not necessarily disagree" that all five factors are not required but stressed the importance of the "less than adequate consideration" factor, stating that "in this case, the Plaintiffs' claim cannot be maintained without at least some showing that less than adequate consideration was paid."[775] The court in *Blouin v. Surgical Sense, Inc.*, noted that all of the facts and circumstances should be considered as a whole and that not all factors need be met for the mere continuation exception to apply.[776]

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[772] *H.J. Baker & Bros.*, 554 A.2d at 205 (citing *Jackson*, 241 A.2d at 477); *see also* Casey v. San-Lee Realty, Inc., 623 A.2d 16, 18–19 (R.I. 1993) (quoting *H.J. Baker & Bros.*, 554 A.2d at 205); Richmond Ready-Mix v. Atlantic Concrete Forms, Inc., No. Civ.A. 92-0960, 2004 WL 877595, at *8–9 (R.I. Sup. Ct. April 21, 2004) (quoting *H.J. Baker & Bros.*, 54 A.2d at 205); Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc. 124 F.3d 252, 268 (1st Cir. 1997) (citing *H.J. Baker & Bros.*, 554 A.2d at 205 and *Jackson*, 241 A.2d at 477).

[773] *H.J. Baker & Bros.*, 554 A.2d at 205 (citing Dayton v. Peck, Stow & Wilcox co., 739 F.2d 690, 693 (1st Cir. 1984); Bergman & Lefkow Ins. Agency v. Flash Cab Co., 249 N.E.2d 729, 737 (Ill. App. Ct. 1969)) (other citations omitted).

[774] *H.J. Baker & Bros.*, 554 A.2d at 205; *see also* Barry v. PMC Film Can., Inc., No. PC 07-3163, 2011 R.I. Super. LEXIS 110, at *1 (Aug. 4, 2011); Cone v. AGCO Corp., No. PC 08-0575, 2011 R.I. Super. LEXIS, at *11 (Feb. 1, 2011).

[775] *Asea Brown*, 2007 WL 1234523 at *57.

[776] Blouin v. Surgical Sense, Inc., 2008 WL 2227781, 2008 R.I. Super. LEXIS 63, at *20–21 (R.I. Super. Ct. May 12, 2008).

Rhode Island: The De Facto Merger Exception

The Rhode Island Supreme Court has not articulated a test for *de facto* merger; however, superior courts have used the following factors derived from *Kleen Laundry and Dry Cleaning Servs., Inc. v. Total Waste Management Corp.* in determining whether or not a *de facto* merger had occurred:[777]

> 1. [t]hat there was a continuation of the enterprise of the selling corporation vis a visa [sic] a continuation of management, personnel, physical location, assets, and general business operation;
>
> 2. [t]hat there is a continuity of shareholders resulting from the purchase of the assets with shares of stock, rather than cash;
>
> 3. [t]hat the selling corporation ceases operations, liquidate, or dissolves as soon as possible; and
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> 4. [t]hat the purchasing corporation assumes the obligations of the selling corporation necessary for uninterrupted continuation of business.[778]

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[777] 817 F. Supp. 225, 230–31 (D.N.H. 1993) (quoting Acushnet River & New Bedford Harbor Proceedings, 712 F. Supp. 1010, 1015 (D. Mass. 1989)).

[778] Richmond Ready-Mix, No. Civ.A. 92-0960, 2004 WL 877595, at *9 (quoting *Kleen Laundry & Dry Cleaning Servs., Inc.*, 817 F. Supp. at 230–31) (alterations in original); *see also* Blouin v. Surgical Sense, Inc., No. PC 07-6855, 2008 WL 2227781, 2008 R.I. Super. LEXIS 63, *17–20 (R.I. Super. Ct., May 12, 2008) (stating "'it is not necessary that all the factors be found for there to be a de facto merger'") (quoting 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7124.20 at 295 (rev. perm. ed. 1983)); Asea Brown, 2007 WL 1234523 at *47 n.28.

Rhode Island: The Fraud Exception

Although the Rhode Island Supreme Court has recognized the fraud exception, it has not articulated a test or standard for determining when it applies.[779] The superior court in *Asea Brown* indicated the fraud exception was predicated on a fraudulent transfer and stated as *dicta* that, "[c]riteria for finding a fraudulent transfer are set forth in the Uniform Fraudulent Transfer Act, G.L. 1956 §§ 6-16-1 to 6-16-12 (UFTA)."[780] The fraud exception was not at issue in that case, however.[781]

South Carolina

In *Brown v. American Railway Express Co.,* a 1924 decision, the Supreme Court of South Carolina adopted the traditional exceptions to the general rule of successor non-liability.[782] In *Holloway v. John E. Smith's Sons Co.*, a 1977 case, 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 v. Offen.*[783] In 2005, 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."[784] In doing so, the court

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[779] H.J. Baker & Bro., Inc. v. Orgonics, Inc., 554 A.2d 196, 205 (R.I. 1989) (remanding for a new trial on the issue of the fraud exception, noting the trial court's grant of a new trial on the count of actual fraud was inconsistent with its denial of a new trial on the count of successor liability based on fraud).

[780] Asea Brown, 2007 WL 1234523 at *47–48 n. 29.

[781] *Id.* at *47.

[782] Brown v. Am. Ry. Express Co., 123 S.E. 97, 98 (S.C. 1924); *accord* Nationwide Mut. Ins. Co. v. Eagle Windows & Doors, Inc., 714 S.E.2d 322 (S.C. 2011).

[783] Holloway v. John E. Smith's Sons Co., 432 F. Supp. 454, 455–456 (D.S.C. 1977) (citing Cyr v. B. Offen & Co., Inc., 501 F.2d 1145 (1st Cir. 1974)).

[784] Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213, 215 (S.C. 2005) (citing *Brown*, 123 S.E. at 97); *see also* Walton v. Mazda of Rock Hill, 657 S.E.2d 67, 70 (S.C. Ct. App. 2008) (citing *Simmons*, 622 S.E.2d at 15 n.1); Pac. Capro Indus. v. Global Advantage Distrib., Inc., No. 4:08–cv–4155–RBH, 2010 WL 890052, at *4 (D.S.C. Mar. 8, 2010) (citing *Brown*, 123 S.E. at 97; *Simmons*, 622 S.E.2d 213; *Walton*, 657 S.E.2d 67).

stated that the *Holloway* court did not establish a new test of successor liability, but rather it applied the mere continuation exception.[785] The court noted:

> [T]he majority of courts interpreting the mere continuation exception have found it applicable **only when there is commonality of ownership**, *i.e.,* **the predecessor and successor corporations have substantially the same officers, directors, or shareholders**. We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders.[786]

In determining whether there was an agreement to assume liabilities, the appellate court in *Walton v. Mazda of Rock Hill* looked to the asset purchase agreement, stating, "'When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense.'"[787]

Regarding the fraud exception, the same court explained:

> To meet the fraud exception to successor liability, the general rule is that a successor must knowingly participate in a fraudulent asset transfer . . . . Proving such knowledge is difficult, and a few courts have advocated expanding the fraud exception to include reviewing the successor's actual or constructive knowledge . . . . Under either interpretation of the fraud exception to successor liability, we find no genuine

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[785] *Simmons*, 622 S.E.2d at 215 n.1.

[786] *Id.* (discussing *Holloway*, 432 F. Supp. 454); *see also Capro Indus.*, 2010 WL 890052, at *4 (quoting *Simmons*, 622 S.E.2d at 215 n.1).

[787] *Walton*, 657 S.E.2d at 69 (quoting S.C. Farm Bureau Mut. Ins. Co. v. Oates, 588 S.E.2d 643, 645 (S.C. Ct. App. 2003)).

> issue of material fact. Walton provides no theory supporting a claim of fraud. For instance, there is no evidence of inadequate consideration and no indication that McManus and Sigmon were not bona fide purchasers for value.[788]

South Dakota

South Dakota recognizes the four traditional exceptions to the general rule of nonliability for asset purchases, which the South Dakota Supreme Court set forth as follows:

> (1) when the purchasing corporation expressly or impliedly agrees to assume the selling corporation's liability;
>
> (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations;
>
> (3) when the purchaser corporation is merely a continuation of the seller corporation; or
>
> (4) when the transaction is entered into fraudulently to escape liability for such obligations.[789]

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[788] Walton v. Mazda of Rock Hill, 657 S.E.2d at 70 (citations omitted) (emphasis in original) (citing Richard L. Cupp, Jr., Redesigning Successor Liability, 1999 U. Ill. L. Rev. 845, 875–76 (1999); *see also* Pac. *Capro Industries*, 2010 WL 890052 at *4 (quoting *Walton*, 657 S.E.2d at 70) (stating that the court in *Walton* "confirmed that to 'meet the fraud exception to successor liability, the general rule is that a successor must knowingly participate in a fraudulent asset transfer'").

[789] Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D. 1986) (citing Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481, 483 (Neb. 1982); *see also* Parker v. W. Dakota Insurors, 605 N.W.2d 181, 184–85 (S.D. 2000); Groseth Intern., Inc. v. Tenneco, Inc., 410 N.W.2d 159, 169 (S.D. 1987); Mitchell Mach., Inc. v. Ford New Holland, Inc., 918 F.2d 1366, 1370 (8th Cir. 1990) (quoting *Hamaker*, 387 N.W.2d at 518); Global Polymer Indus., Inc. v. C & A Plus, Inc., No. 05-4081, 2006 WL 3743845, at *2 (D.S.D. Dec. 14, 2006) (quoting *Hamaker*, 387 N.W.2d at 518); Parker v. W. Dakota Insurors, Inc., 605

In *Parker v. Western Dakota Insurors*, the South Dakota Supreme Court explained that these exceptions would apply more expansively in the context of products liability:

> All these exceptions, we caution to explain, evolved under the traditional rules applicable to corporate law. They have, however, undergone some expansion under the law of products liability. Strict liability in tort for defective products applies regardless of negligence or privity. Liability for defective products rests on the need to compensate eligible plaintiffs; thus, the burden of economic loss is shifted not just to the manufacturer of the defective product, but also at times to the successor manufacturer who by purchasing assets from the predecessor is able to continue making the same or similar products. Yet, these strict liability concepts created for the protection of injured persons do not have the same expansive application in a purely contractual dispute.[790]

South Dakota: The Express or Implied Assumption Exception

In determining whether a successor expressly or impliedly assumed liabilities, courts look to the language of the documents surrounding the asset purchase or other pertinent transaction.[791]

N.W.2d 181, 184–85 (S.D. 2000) (quoting Downtowner , Inc. v. Acrometal Prod. Inc., 347 N.W.2d 118, 121 (N.D. 1984))).

[790] *Parker*, 605 N.W.2d at 185.

[791] *See*, *e.g.*, *Id.* at 185–87 (finding no assumption of liabilities) (quoting purchase agreement); *Groseth Intern., Inc.*, 410 N.W.2d at 169 (finding express and implied assumption) (citing purchase agreement); *Hamaker*, 387 N.W.2d at 518 ("There is no language in the contract between these parties to suggest that Kenwel-Jackson impliedly assumed responsibility for future products liability actions against Kenwel. In fact, the purchase agreement expressly conditioned the sale of assets upon Kenwel's promise to discharge, or to provide for, all of its current or long-term liabilities incurred or unsatisfied as of the date of closing.") (referencing purchase agreement).

Moreover, in *Parker,* the court stated: "'[a] buyer of assets can avoid the implied assumption of liabilities by enumerating liabilities assumed and explicitly excluding the assumption of liabilities not enumerated.'"[792]

South Dakota: The De Facto Merger Exception

The Supreme Court of South Dakota explained in *Hamaker*: "[A] merger involves the actual absorption of one corporation into another, with the former losing its existence as a separate corporate entity. 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."[793]

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.[794] The *Hamaker* court stated: "The

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[792] *Parker*, 605 N.W.2d at 185 (quoting Philadelphia Elec. Co. v. Hercules, Inc., 587 F. Supp. 144, 148 (E.D. Pa.1984), *rev'd on other grounds*, 762 F.2d 303 (3rd Cir. 1985), *cert. denied*, 474 U.S. 980 (1985)); *see also Hamaker*, 387 N.W.2d at 518 (referencing purchase agreement).

[793] *Hamaker*, 387 N.W.2d at 518 (citing Leannais v. Cincinatti, Inc., 565 F.2d 437, 439 (7th Cir. 1977) (quoting Bazan v. Kux Mach. Co., 358 F. Supp. 1250 (E.D. Wis. 1973)).

[794] *Hamaker*, 387 N.W.2d at 519 (noting: "Many of the factors relied upon in Turner exist here . . . . However, we 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. We find, therefore, that Kenwel-Jackson's cash purchase of Kenwel's assets does not fall within the "merger" or "continuation" exceptions to the general rule) (discussing Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 883–84 (Mich. 1976). *But see* Global Polymer Indus., Inc. v. C & A Plus, Inc., No. 05-4081, 2006 WL 3743845, at *2 (D.S.D. 2006) (seemingly misinterpreting *Hamaker*'s rejection of *Turner*, stating: "The South Dakota Supreme Court has indicated that cash consideration is sufficient to establish a prima facie case of continuation of a successor corporation's responsibility for liability if: '(1) There was basic continuity of the enterprise of the seller corporation, including, apparently, a retention of key personnel, assets, general business operations,

key element of a 'continuation' is a commonality of the officers, directors, and stockholders in the predecessor and successor corporations."[795]

South Dakota: The Product Line Exception

South Dakota has expressly rejected the product line exception, following the Supreme Court of 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.[796]

Tennessee

The Tennessee Supreme Court has not yet addressed or adopted a test for successor liability. Tennessee appellate courts, however, have approved the four traditional exceptions and a possible fifth, involving inadequate consideration, as follows:

> (1) The purchaser expressly or impliedly agrees to assume such debts; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape liability for such debts . . . . A fifth exception, sometimes incorporated . . . is the

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and 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.'") (citing *Hamaker*, 387 N.W.2d at 519).

795 *Hamaker*, 387 N.W.2d at 518 (citing *Leannais*, 565 F.2d at 440); *see also* Mitchell Machinery, Inc. v. Ford New Holland, Inc., 918 F.2d 1366, 1371 (8th Cir. 1990) (quoting *Hamaker*, 387 N.W.2d at 518).

796 *Hamaker*, 387 N.W.2d at 520–21 (citing Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 121 (N.D. 1984)).

> absence of adequate consideration for the sale or transfer.[797]

In *Mapco Express, Inc. v. Interstate Entertainment, Inc.* the court stated the general rule of successor non-liability and discussed the implied assumption, mere continuation, and *de facto* merger exceptions.[798]

Addressing the implied assumption doctrine, the district court stated: "A party seeking to recover under the theory of contract implied in law must prove '[a] benefit conferred upon the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof.'"[799]

As for the *de facto* merger exception, the court noted, "In a *de facto* merger, 'there is a sale of substantially all of one corporation's assets in exchange for the stocks and bonds of the purchasing corporation[]'"[800] and that "[i]n a *de facto* merger, as opposed to a legal merger, the original company maintains its legal entity, despite retaining no assets and going out of business."[801]

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[797] Hopewell Baptist Church v. Se. Window Mfg. Co., No. E2000-02699-COA-R3-CV, 2001 WL 708850, at *4 (Tenn. Ct. App. June 25, 2001) (citations omitted) (quoting 1 L. Frumer & M. Friedman, Products Liability § 5.06(2), at 70.58(2)-(3) (1981) (quoting McKee v. Harris Seybold Co., 109 N.J.Super. 555, 264 A.2d 98 (1970)); Gas Plus of Anderson Cty., Inc. v. Arowood, No. 03A01-9311-CH-00406, 1994 WL 465797, at *3–4 (Tenn. Ct. App. Aug. 30, 1994); *see also* Flake v. Schrader-Bridgeport Int'l, Inc., Nos. 3:07–0925, 3:07–926, 3:07–927, 2011 WL 1106694, at *8 n.6 (M.D. Tenn. Mar. 23, 2011) (quoting *Hopewell*, 2001 WL 708850, at *4); Great Am. Ins. Co. v. Potter, No. 4:04-cv-112, 2006 WL 2854386, at *3 (E.D. Tenn. Oct. 3, 2006) (citing *Hopewell*, 2001 WL 708850; *Gas Plus of Anderson Cty., Inc.*, 1994 WL 465797); Woody v. Combustion Engineering, Inc., 463 F. Supp. 817, 819 (M.D. Tenn. 1978).

[798] No. 3:08-cv-1235, 2011 WL 12556959, at *14–17 (M.D. Tenn. Aug. 11, 2011).

[799] *Mapco*, 2011 WL 12556959 at *15 (quoting *Hopewell*, 2001 WL 708850, at *6) (alteration in original).

[800] *Mapco*, 2011 WL 12556959, at *15 (quoting Signature Combs, Inc. v. United States, 331 F. Supp. 2d 630, 641 (W.D. Tenn. 2004)).

[801] *Mapco*, 2011 WL 12556959, at *15 (alteration added) (citing IBC Mfg. Co. v. Velsicol Chem. Corp., 187 F.3d 635 (6th Cir. 1999); *Signature Combs*, *Inc.*, 331 F. Supp. 2d at 641).

And, finally, regarding the mere continuation exception, the court stated:

> An acquiring corporation will be deemed a mere continuation of the acquired company if: "(1) a corporation transfers its assets; (2) the acquiring corporation pays less than adequate consideration for the assets; (3) the acquiring corporation continues the selling corporations business, (4) both corporations share at least one common officer who was instrumental in the transfer, and (5) the selling corporation is left incapable of paying is creditors."[802]

Texas

Texas does not recognize the four traditional exemptions to non-liability for asset purchases. Successor liability in Texas is governed by statute and is limited to the express assumption of liability.[803] The Texas legislature first codified the rule for successor liability in asset purchases in a legislative reversal of a court of appeals decision to impose the doctrine.[804]

In 1977, the Texas Court of Appeals applied the *de facto* merger doctrine in *Western Res. Life Ins. Co. v. Gerhardt.*[805] In its first session following the *Gerhardt* decision, the Texas legislature passed Texas Business Corporation Act art. 5.10 § B, which stated:

> A disposition of any, all, or substantially all, of the property and assets of a corporation, whether or not it requires

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[802] *Mapco*, 2011 WL 12556959, at *17 (citing *IBC Mfg. Co.*, 187 F.3d at 637); Cricket Comm'ns, Inc. v. Talk Til You Drop Wireless, Inc., No. 3:09–128, 2009 WL 2850687, at *4 (M.D. Tenn. Sept. 1, 2009)).

[803] TEX. BUS. ORGS. CODE § 10.254.

[804] *See generally* TEX. BUS. CORP. ACT art. 5.10(B) (expired Jan. 1, 2010).

[805] *See* 553 S.W.2d 783 (Tex. Civ. App. 1977).

> 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.[806]

The abovementioned statute expired on January 1, 2010, and was replaced with one that is similar, limiting successor liability only to express assumption:

> (a) A disposition of all or part of the property of a domestic entity, regardless of whether the disposition requires the approval of the entity's owners or members, is not a merger or conversion for any purpose.
>
> (b) Except as otherwise expressly provided by another statute, a person acquiring property described by this section may not be held responsible or liable for a liability or obligation of the transferring domestic entity that is not expressly assumed by the person.[807]

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[806] TEX. BUS. CORP. ACT art. 5.10(B) (expired Jan. 1, 2010).

[807] TEX. BUS. ORGS. CODE § 10.254; *see* Ford, Bacon & Davis, L.L.C. v. Travelers Ins. Co., 635 F.3d 734, 737 (5th Cir. 2011) ("Where, as here, the entity purchasing assets has expressly not assumed liability for the assets it purchased, such liability will not extend under 'operation of Texas law.'") (referencing purchase agreement).

As noted in *Mudgett v. Paxson Mach. Co.*,[808] "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."[809] 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."[810] Later, in *Shapolsky v. Brewton* the court also rejected the fraud exception, reaffirming that Texas only acknowledges the single exception to the non-liability rule.[811] As noted by the 1st District Court of Appeals of Texas in *Lockheed Martin Corp. v. Gordon*, "Texas strongly embraces the non-liability rule. To impose liability for a predecessor's torts, the successor corporation must have expressly assumed liability." [812] 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."[813]

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808 709 S.W.2d 755 (Tex. App. 1986) (emphasis in original) (alteration added).

809 *Mudgett*, 709 S.W.2d at 758 (quoting TEX. BUS. CORP. ACT. ANN. art. 5.10 cmt).

810 *Id.* (alteration added) (emphasis added) (footnote omitted) (citations omitted) (citing Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974)).

811 Shapolsky v. Brewton, 56 S.W.3d 120, 137–39 (Tex. Ct. App. 2001).

812 Lockheed Martin Corp. v. Gordon, 16 S.W.3d 127, 139 (Tex. App. 2000) (citing TEX. BUS. CORP. ACT art. 5.10(B)(2)); *see also* Ford, Bacon & Davis, L.L.C., 635 F.3d at 737 (quoting Keller Founds., Inc. v. Wausau UnderwritersTravelers Ins. Co., 635 F.3d 871, 877 (5th Cir. 2010)).

813 *Lockheed Martin Corp.*, 16 S.W.3d at 134 (citations omitted) (citing Elmer v. Tenneco Resins, 698 F. Supp. 535, 540 (D. Del. 1988); Nissen Corp. v. Miller, 594 A.2d 564, 565–66 (Md. 1991); *see also Lockheed Martin Corp.*, 16 S.W.3d a 139–40); C.M. Asfahl Agency v. Tensor, Inc., 135 S.W. 3d 768, 780–81 (Tex. Ct. App. 2004) (citing TEX. BUS. CORP. ACT art 5.10(B)(2004); Sitaram v. Aetna U.S. Healthcare of N. Tex., Inc., 152 S.W.3d 817, 826 (Tex. App. 2004) (citing TEX. BUS. CORP. ACT art 5.10(B)(2); *C.M. Asfahl Agency*, 135 S.W.3d at 778)); Suarez v. Sherman Gin Co., 697 S.W.2d 17, 20–21 (Tex. Ct. App. 1985).

Utah

Utah adheres to the traditional approach to successor liability.[814] 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."[815] 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.'"[816]

In response to certified questions from the 10th Circuit Court of Appeals,[817] in 2007, the Utah Supreme Court held: (1) "Utah adheres to the traditional rule of successor nonliability, subject to four widely recognized exceptions[,]" and (2) "Utah law imposes on successor corporations an independent post-sale duty to warn consumers of defects in products manufactured and sold by the predecessor corporation."[818]The court set out the four traditional exceptions as follows:

> A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is

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[814] *See*, *e.g.*, Tabor v. Metal Ware Corp., 182 F. App'x 774, 776 (10th Cir. 2006); Decius v. Action Collection Serv., Inc., 105 P.3d 956, 958–59 (Utah Ct. App. 2004); Macris & Assocs., Inc. v. Neways, Inc., 986 P.2d 748, 752 (Utah Ct. App. 2004), *aff'd*, 16 P.3d 1214 (Utah 2000); Herrod v. Metal Powder Prods., 413 F. App'x 7, 12 (10th Cir. 2010) (citing Tabor v. Metal Ware Corp., 168 P.3d 814, 815 (Utah 2007)).

[815] *Decius*, 105 P.3d at 959 (citing Shannon v. Samuel Langston Co., 379 F.Supp. 797, 801 (W.D. Mich. 1974).

[816] *Decius,* 105 P.3d at 959 (citations omitted) (quoting Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977) (citing Polius v. Clark Equip. Co., 802 F.2d 75, 86 (3d Cir. 1986) (Mansmann, J., dissenting)); *see also* Icon Health & Fitness, Inc. v. Fisher-Price, Inc., 2011 U.S. Dist. LEXIS 17340, at *6 (D. Utah 2011).

[817] Tabor v. Metal Ware Corp., 182 F. App'x 774, 776–77 (10th Cir. 2006) [hereinafter *Tabor I*], *certified question answered*, 168 P.3d 814.

[818] Tabor v. Metal Ware Corp., 168 P.3d 814, 816–17 (Utah 2007) [hereinafter *Tabor II*] (emphasis in the original).

> subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:
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> (a) is accompanied by an agreement for successor to assume such liability; or
>
> (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
>
> (c) constitutes a consolidation or merger with the predecessor; or
>
> (d) results in successor becoming a continuation of the predecessor.[819]

The Utah Supreme Court declined to further extend the rules of successor liability stating, "[i]n our view, the general rule of successor nonliability, together with the four exceptions provided . . . affords adequate protection to consumers, and we accordingly decline to expand the exceptions."[820]

The court did, however, adopt the position of the Restatement (Third) of Torts, which imposes on successors a duty to warn in these circumstances:

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

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819 *Tabor II*, 168 P.3d at 816–17 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (AM. LAW INST. 1998)).

820 *Tabor II,* 168 P.3d. at 817; Herrod v. Metal Powder Prods., 413 F. App'x 7, 12 (10th Cir. 2010) ("The Utah Supreme Court has declined to adopt the 'product line' or 'continuity of enterprise' exceptions recognized by some other states.") (quoting Tabor v. Metal Ware Corp., 168 P.3d 814, 815)).

> (1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and
>
> (2) a reasonable person in the position of the successor would provide a warning.
>
> (b) A reasonable person in the position of the successor would provide a warning if:
>
> (1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
>
> (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
>
> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
>
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning.[821]

Regarding the determination of whether a duty to warn has been discharged, the Supreme Court of Utah stated:

> If a successor corporation has a duty to warn under section 13, one factor in determining whether a successor corporation has discharged its duty to warn is whether it provided warning to the end user, not just an intermediary like

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821 *Tabor II,* 168 P.3d at 818 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 13 (AM. LAW INST. 1998)).

> a distributor or retailer. In making this determination, the successor has a duty to only warn the end user if it has a reasonable means of doing so. Another factor to consider in this case might be the effect of the closed [product] recall. Other factors may be relevant, but the factual development of this case is insufficient for us to identify them.[822]

Vermont

In 2005, the Vermont Supreme Court had the opportunity to restate its position on successor liability in *Gladstone v. Stuart Cinemas, Inc.*[823] The court began by reciting the traditional rule of non-liability in asset sales, unless one of five traditionally accepted exceptions applied: (1) express or implied assumption, (2) de facto merger or consolidation, (3) mere continuation, (4) a fraudulent scheme to avoid liability, or (5) inadequate consideration for the sale.[824] Interestingly, the court appears to have split the traditional fraud analysis into two types: actual fraud and constructive fraud. The latter of which appears to have only one element, inadequate consideration, rather than the more common alternative, the two-element approach set forth in the Uniform Fraudulent Transfer Act.[825]

In *Gladstone*, the Supreme Court of Vermont noted that in *Ostrowski v. Hydra-Tool Corp.*,[826] it had declined to adopt either the continuity of enterprise or product line exceptions because the successor was not responsible for creating the risk of harm nor did it benefit from the proceeds of the product's sale; it also did not invite the product's use

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[822] *Tabor II*, 168 P.3d at 818 (footnote omitted).

[823] Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214 (Vt. 2005); Post v. Killington, Ltd., No. 5:07–CV–252, 2010 WL 3323659, at *8 (D.Vt. 2010).

[824] *Gladstone*, 878 A.2d at 220.

[825] *See, e.g.*, 11 U.S.C. § 348 (2012) (UFTA enacted as part of the Bankruptcy Code).

[826] 479 A.2d 126 (Vt. 1984).

or make any safety representations, and it could not enhance the safety of the product given that it had already been released into the market.[827] The *Gladstone* court then turned to *Cab-Tek, Inc. v. E.B.M., Inc.*,[828] which addressed the distinction between consolidation and *de facto* merger. Consolidation occurs when the "'combining corporations are dissolved and lose their identity in a new corporate entity.'"[829] *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.[830] Simply put, no asset purchase is required for a *de facto* merger in Vermont.

The *Gladstone* court then announced the contours of the mere continuation doctrine noting, "[a]s they have evolved, there is little difference between the de facto merger exception and the mere continuation exception . . . . We view the name of the exception as unimportant."[831] The mere continuation doctrine, said the court, focuses on continuation of the corporate entity, not its business.[832] 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.[833] Although these are traditional

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827 *Gladstone*, 878 A.2d at 220 (citing Ostrowski, 479 A.2d at 127).

828 571 A.2d 671 (Vt. 1990).

829 *Cab-Tek, Inc.*, 571 A.2d at 672 (quoting Leannais v. Cincinnati, Inc., 565 F.2d 437, 440 (7th Circ. 1977)) (citing Forest Laboratories, Inc. v. Pillsbury Co., 452 F.2d 621, 625 (7th Cir. 1971)); Ladjevardian v. Laidlaw–Coggeshall, Inc., 431 F.Supp. 834, 838 (S.D.N.Y.1977).

830 *Gladstone*, 878 A.2d at 221 (citing *Cab-Tek, Inc.*, 571 A.2d at 672).

831 *Gladstone*, 878 A.2d at 222 n.4 (citations and quotations omitted) (citing Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 45 n.3 (2d Cir. 2003); Nat'l Gypsum Co. v. Cont'l Brands Corp., 895 F. Supp. 328, 336 (D. Mass. 1995); *Cab-Tek, Inc.,* 571 A.2d at 672); Morrison Enters., Inc. v. Perrotta, No. 292-8-04 Bncv, 2006 Vt. Super. LEXIS 34, at *5–6 (Vt. Super. Ct., Oct. 19, 2006).

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

833 *Gladstone*, 878 A.2d at 222; *see also* Post v. Killington, Ltd., 424 F. App'x 27 (2d Cir. 2011) (court discusses the factors that determine whether the mere continuation exception applies: (1) whether there is continuity of ownership and management between the purchasing and selling corporations, (2) only the

indicators, they are not requirements in Vermont.[834] The court stated that d*e 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.[835] Inadequacy of consideration may also be present.[836]

The *Gladstone* court then returned to the mere continuation doctrine—considering, listing, and discussing its factors in declining order of significance: (1) continuity of ownership and management, "[t]he single most important factor[;]"(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.[837]

The court also considered whether or not recognition of the transfer as being free and clear of liabilities would work a fraud on creditors by way of 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.[838] The court concluded that a duty to creditors did exist here because "[the successor corporation's] actions advanced [its] own interests while leaving [the predecessor corporation] insolvent and unable to pay its debt to plaintiffs . . . ."[839]

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successor corporation has survived, (3) adequate consideration supported the sale, and (4) the successor operates the same business as the seller).

[834] *Gladstone*, 878 A.2d at 222.

[835] *Id.*

[836] *Id.*

[837] *Id.* at 222–23; *see also* Post v. Killington, Ltd., 2010 WL 3323659, at *9–13 (D. Vt. 2010).

[838] *Gladstone*, 878 A.2d at 224.

[839] *Gladstone*, 878 A.2d at 225 (citing *Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors*, 46 VAND. L. REV. 1485, 1489 (1993)).

Virginia

Virginia follows the traditional rule of successor liability and recognizes only the four traditional exceptions.[840] 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."[841] 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.[842]

Virginia: The Express or Implied Assumption Exception

In *Harris v. T.I., Inc.*, the Supreme Court of Virginia looked at provisions of the asset purchase agreement and determined that there was no expressed or implied assumption of tort liability by the purchaser.[843] In *States Roofing Corp. v. Bush Construction Corp.*, the appellate court found an implied assumption of liabilities in the context of a

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[840] Harris v. T.I., Inc., 413 S.E.2d 605, 609 (Va. 1992) (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)); *see also* Fuisz v. Lynch, 147 F. App'x 319, 322 (4th Cir. 2005); Bizmark, Inc. v. Air Prods., Inc., 427 F. Supp. 2d 680 (W.D. Va. 2006).

[841] *Harris,* 413 S.E.2d at 609 (citing Pepper v. Dixie Splint Coal Co., 165 Va. 179, 191, 181 S.E. 406, 410 (Va. 1935); Peoples Nat. Bank v. Morris, 152 Va. 814, 819, 148 S.E. 828,829 (Va. 1929); *see also* Kaiser Found. Health Plan of Mid-Atlantic States v. Clary & Moore, P.C., 123 F.3d 201, 204–05 (4th Cir. 1997); States Roofing Corp. v. Bush Constr. Corp., 426 S.E.2d 124, 126–27 (Va Ct. App. 1993); 1993MDM Assocs. v. Johns Bros. Energy Techs., Inc., No. L01-1190, 2002 WL 31989156, at *5 (Va. Cir. Ct. 2002).

[842] *Harris*, 413 S.E.2d at 609–10 (citations omitted).

[843] *Id.* at 608–09.

worker's compensation case where the conduct of the successor evidenced the intention to assume the role of predecessor.[844]

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.' . . . When, however, the purchase of all the assets of a corporation is a bona fide, arm's-length transaction, the 'mere continuation' exception does not apply."[845]

In *Fuiz v. Lynch*, the United States Court of Appeals for the Fourth Circuit, applying Virginia law, further explained:

> Several factors have been identified for assessing whether a business entity constitutes a mere continuation of a predecessor entity. The key element for such an assessment, according to the Supreme Court of Virginia, is the "common identity of the officers, directors, and stockholders" in the successor and predecessor corporations . . . . Also relevant is whether a successor entity "continues in the same business as its predecessor," although this factor is less important than identity of ownership . . . . Other factors identified as pertinent to such an assessment include "whether two corporations or only one remain" and whether the successor continues to

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[844] States Roofing Corp. v. Bush Constr. Corp., 426 S.E.2d 124, 127 (Va. 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 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).

[845] *Harris,* 413 S.E.2d at 609 (citations omitted); *Bizmark, Inc.*, 427 F. Supp. 2d at 694; *In re* Meredith, 357 B.R. 374, 381 (Bankr. E.D. Va. 2006).

> operate at the same location with the same telephone number as its predecessor . . . . Additionally, when a predecessor entity's assets are transferred for less than adequate consideration, the successor is "likely to be a mere continuation." . . . Finally, notwithstanding these factors, Virginia law provides that the mere continuation exception does not apply when the "purchase of all the assets of a corporation is a bona fide, arm's-length transaction."[846]

In *Fuiz v. Lynch*, the court concluded that the mere continuation exception applied where (1) there was complete continuity of ownership, (2) the successor operated the same business in the same offices, using the same phone number, (3) the predecessors ceased to exist, and (4) even though adequate consideration was paid, the transaction was not conducted as if the seller and buyer were "strangers" and thus, was not a bona fide arm's length transaction. [847]

Virginia: De Facto Merger Exception

The Virginia state circuit court has used the four traditional factors in deciding whether a *de facto* merger has occured, stating:

> Generally, courts look for four factors to determine whether a *de facto* merger has occurred: (1) continuity of enterprise; (2) continuity of shareholders; (3) cessation of operations by seller; and (4) assumption of the obligations necessary

[846] Fuisz v. Lynch, 147 F. App'x 319, 321–22 (4th Cir. 2005) (citations omitted) (quoting Harris, 413 S.E.2d at 609; Clary & Moore, 123 F.3d at 20); *see* also Beck v. Va. Sash & Door, Inc., 58 Va. Cir. 65, 70 (Va. Cir. Ct. 2001).

[847] *Fuisz*, 147 F. App'x at 322–23; *see also Beck*, 58 Va. Cir. at 70 (concluding that the purchasers were liable under the mere continuation exception); *Clary & Moore*, 123 F.3d at 208 (same).

> to uninterrupted continuation of normal business operations by the seller.[848]

The court in *Augusta Lumber Co., Inc. v. Broad Run Holdings* used the term "factors" (and all four were present in the case's fact pattern), but the cases cited by *Augusta* had previously described these considerations as "elements," with continuity of ownership being the most important.[849] Thus, it appears to remain an open question whether the *de facto* merger exception in Virginia is made up of factors (indicators) or elements (requirements).

Washington

Washington recognizes the traditional four exceptions to the general rule of non-liability in asset purchases as well as the product line exception.[850] The Washington Supreme Court noted that the adoption of the product line exception was preferable to expanding the mere continuation exception- a rule "designed for other purposes."[851]

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[848] Augusta Lumber Co. v. Broad Run Holdings, LLC, 71 Va. Cir. 326, 327 (Va. Cir. 2006) (footnote omitted); *see also* Blizzard v. Nat'l R.R. Passenger Corp., 831 F. Supp. 544, 547 (E.D. Va. 1993); Crawford Harbor Assocs. v. Blake Const. Co., 661 F. Supp. 880, 884 (E.D. Va. 1987).

[849] *Augusta Lumber, Co.*, 71 Va. Cir. at 328 (citing *Blizzard*, 831 F. Supp. at 547; Bud Antle, Inc. v. E. Foods, Inc., 758 F.2d 1451, 1458 (11th Cir. 1985)); *Crawford Harbor Assocs.*, 661 F. Supp. at 884.

[850] *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)); *see also In re* Bellingham Ins. Agency, Inc., 702 F.3d 553, 572 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (U.S. 2013); U.S. *ex rel.* Klein v. Omeros Corp., 897 F. Supp. 2d 1058, 1065–66 (W.D. Wash. 2012); Cambridge Townhomes, LLC v. Pac. Star Roofing, 209 P.3d 863, 868 (Wash. 2009); Creech v. AGCO Corp., 138 P.3d 623, 624 (Wash Ct. App. 2006).

[851] Martin v. Abbott Labs., 689 P.2d 386, 386 (Wash. 1984) (citing Ray v. Alad Corp., 19 Cal.3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1997); *see also* Hall v. Armstrong Cork, Inc., 692 P.2d 787, 790 (Wash. 1984) ("Rather than

In 2009, the Washington Court of Appeals held, applying Wash. Rev. Code 51.16.200, which makes successors liable for the unpaid taxes of the business they succeed, that "selling or conveying a significant or substantial portion of the closing business's property to another business triggers successor liability." [852] In *Orca Logistics*, the court determined that a significant portion of a closing business is "a major part of the materials, supplies, merchandise, inventory, fixtures, or equipment[,]" including intangible property that "has no physical existence, but may have value[,]" such as goodwill and customer lists.[853] The court found that the successor corporation was a liable successor to the predecessor corporation due to the "'sale or transfer of four trucks, four trailers, [and other materials],' which constituted a "significant… portion of the closing business" and thus, the successor was liable for the predecessor's unpaid premiums of workers' compensation coverage.[854]

Washington: The Express or Implied Assumption Exception

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

> "[U]nless the corporation has expressly assumed the debts and obligations of its predecessor, its liability, if it exists at all, must arise by implication or presumption, out of the facts and circumstances attending the incorporation, and the acquisition by the corporation of the assets and property of the firm or association, and it is quite obvious that these must be peculiar to each case and are very seldom exactly the same in any

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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 . . . .").

[852] Orca Logistics, Inc. v. State, No. 62264-1-I, 2009 WL 1589366 at *2 (Wash. Ct. App. Jun. 8, 2009) (footnote omitted).

[853] *Orca Logistics*, *Inc.*, 2009 WL 1589366 at *2.

[854] *Orca Logistics*, *Inc.*, 2009 WL 1589366 at *2. (footnotes omitted) (quoting assessment of the Board).

> 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.*"[855]

An express assumption of liability by the successor corporation is determined from the fair meaning of the language in the contract.[856]

Washington: The Fraud Exception

In *Eagle Pacific Insurance Co.*, the appellate court noted, "The different common law tests for applying for [the fraud] 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."[857] 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.[858]

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[855] Mill & Logging Supply Co. v. W. Tenino Lumber Co., 265 P.2d 807, 812 (Wash. 1954) (quoting 8 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA CORPORATIONS 393, § 4012 (perm. ed., rev. vol. 1999)) (emphasis added by the court).

[856] Creech v. AGCO Corp., 138 P.3d 623, 624–25 (Wash. Ct. App. 2006); Optimer Int'l., Inc. v. Bellevue, L.L.C., No. 55967-2-I, 2006 WL 2246197, at *4 (Wash. Ct. App. Aug. 7, 2006).

[857] Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 934 P.2d 715, 721 (Wash. Ct. App. 1997) aff'd, 959 P.2d 1052, 1056–60 (Wash. 1998) (quoting 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)) (affirming the Appellate Court on the issue of Fraudulent Transfer); *see also* Hamer Elec., Inc. v. TMB-NW Liquidation, LLC, No. 3:12-CV-5332 RBL, 2012 WL 3239190, at *4 (W.D. Wash. 2012); Gremp v. Ramsey, No. C08-558RS, 2009 WL 112674, at *6 (W.D. Wash. 2009).

[858] Eagle Pac. Ins Co. v. Christensen Motor Yacht Corp., 959 P.2d 1052 at 1059–60; (Wash. 1998); Long v. Home Health Servs. of Puget Sound, Inc., 719 P.2d 178, 181 (Wash. Ct. App 1986).

Washington: The De Facto Merger Exception

Washington courts have not set out a definitive test for *de facto* merger. One Washington appellate court did list one key element of a *de facto* merger:

> In addition to other requirements . . . 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.[859]

Washington: The Mere Continuation Exception

In 2009 the Supreme Court of Washington determined that a successor corporation to a sole proprietorship was a mere continuation of the sole proprietorship.[860] The court explained:

> Washington courts rely on several factors to determine whether a successor business is a mere continuation of a seller . . . . These include a common identity between the officers, directors, and stockholders of the selling and purchasing companies, and the sufficiency of the consideration running to the seller corporation in light of the assets being sold . . . . In considering these factors, the objective of the court is to discern

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[842] Cashar v. Redford, 624 P.2d 194, 196 (Wash. Ct. App. 1981); *see also* Payne v. Saberhagen Holdings, Inc., 190 P.3d 102, 108 n. 11 (Wash. Ct. App. 2008) ("de facto merger '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 . . . .'") (quoting *Cashar*, 624 P.2d at 196).

[860] Cambridge Townhomes, LLC v. Pac. Star Roofing, 209 P.3d 863, 868–69 (Wash. 2009).

> whether the "purchaser represents 'merely a "new hat" for the seller.'"[861]

The court rejected the successor's argument that a corporation, as a matter of law, could not be a mere continuation of a sole proprietorship, holding that the continuity of officers, directors, and shareholders was not a "rigid requirement," stating:[862]

> The successor liability doctrine is a common law rule, and the principle it embraces is not linked to statutes or laws governing corporate entities. Though there is no continuation of officers, directors, or shareholders where a sole proprietorship is involved, we can consider the continuity of individuals in control of the business as satisfying this factor, which at any rate is not a rigid requirement for finding successor liability.[863]

Previously, several appellate courts had treated the mere continuation test as more stringent. Some required that the plaintiff establish three requirements in order to prove that a successor is a mere continuation of a predecessor; the requirements were set forth as follows:

> (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.[864]

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[861] *Cambridge Townhomes, LLC*, 209 P.3d at 868 (citations omitted) (quoting and citing *Cashar*, 624 P.2d at 196); McKee v. Harris-Seybold Co., 264 A.2d 98, 106 (N.J. Super. Ct. Law Div. 1970).

[862] *Cambridge Townhomes*, *LLC*, 209 P.3d at 868.

[863] *Id.*

[864] Rendoni v. Pac. Fleet & Lease Sales, Inc., No. 43049-1-I, 1999 WL 674584, at *2 (Wash. Ct. App. June 1, 1999) (footnotes omitted); Gall Landau Young

Others required proof of the first two requirements but not the third.[865] In either case, the mere consideration test was treated as having more rigid requirements than in *Cambridge Townhomes, LLC v. Pac. Star Roofing*.[866]

Washington: The Product Line Exception

In Washington, a court applying the product line exception is required to determine:

> "(1) whether the transferee has acquired substantially all the transferor's assets, leaving no more than a mere corporate shell; (2) whether the transferee is holding itself out to the general public as a continuation of the transferor by producing the same product line under a similar name; and (3) whether the transferee is benefiting from the goodwill of the transferor."[867]

Much like California, Washington requires that the successor, in some manner, cause the destruction of a plaintiff's remedies in order to satisfy the first element of the product line test.[868] The successor must

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Constr. Co., v. Hedreen, 816 P.2d 762, 765–67 (Wash. Ct. App. 1991), *rev. denied*, 118 Wash. 2d 1022, 827 P.2d 1392 (Wash. 1992).

[865] Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 934 P.2d 715, 721 n.1 (Wash. Ct. App. 1997) aff'd, 959 P.2d 1052, 1056–60 (Wash. 1998); *see* Long v. Home Health Servs. of Puget Sound, Inc., 719 P.2d 178, 181 (Wash. App 1986).

[866] *Cambridge Townhomes*, 209 P.3d at 868.

[867] *Hall*, 692 P.2d at 790 (quoting Martin v. Abbott Labs., 689 P.2d 368, 387 (Wash. 1984)); *see also* George v. Parke-Davis, 733 P.2d 507, 510 (Wash. 1987) (for the exception to apply, the successor must continue to manufacture the specific type of product).

[868] *Hall*, 692 P.2d at 792 ("A key premise of the product line exception is that successor liability is only appropriate when the successor corporation by its acquisition actually played some role in curtailing or destroying the claimants' remedies."); Fox v. Sunmaster Prods., Inc., 821 P.2d 502, 508 (Wash. Ct. App. 1991); *see also* Stewart v. Telex Comm., Inc., 1 Cal. Rptr. 2d 669, 675 (Cal. Ct.

also continue to produce the same specific type of product at issue in the lawsuit.[869] Although Washington courts have not expressly addressed the application of the second element, the court in *Hall v. Armstrong Cork, Inc.,* addressed the application of the third, 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."[870]

West Virginia

In *In re State Pub. Bldg. Asbestos Litigation*, the Supreme Court of Appeals of West Virginia set out the traditional exceptions to the general rule of successor nonliability but then applied the implied assumption and mere continuation exceptions quite broadly.[871] The court described the traditional exceptions as follows:

> "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."[872]

App. 1991) ("[S]ome causal connection between the succession and the destruction of the plaintiff's remedy must be shown").

[869] George v. Parke-Davis, 733 P.2d 507, 510 (Wash. 1987) (holding that the product line exception did not apply where the predecessor produced DES, and the successor produced various pharmaceuticals but not DES).

[870] *Hall*, 692 P.2d at 792 (citing *Abbott Labs.,* 689 P.2d at 388–89); Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977).

[871] *In re* State Pub. Bldg. Asbestos Litigation, 454 S.E.2d 413, 424–25 (W. Va. 1994).

[872] *Id.* (quoting Davis v. Celotex Corp., 420 S.E.2d 557 (W. Va. 1992)).

The court then affirmed the trial court's finding of successor liability, stating: "Grace [(the successor)] acquired all of Zonolite's assets and continued to manufacture the same products as Zonolite. Therefore, the trial judge could conclude that Grace impliedly assumed responsibility or that it is a mere continuation or reincarnation of its predecessor."[873]

A year later, though, the Supreme Court of Appeals of West Virginia indicated that "'[t]he mere continuation exception to the rule of nonliability envisions a common identity of directors and stockholders and the existence of only one corporation at the completion of the transfer.'"[874] The court then held that the mere continuation exception did not apply because there was no commonality of ownership and only one common director shared between the predecessor and the successor.[875]

Wisconsin

Wisconsin follows the traditional approach to successor liability as well as the four traditional exceptions to the general rule of non-liability of asset purchasers:

> "(1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) when the purchaser corporation is merely a continuation of the seller corporation; or (4) when the transaction is entered into

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[873] *In re State, Pub. Bldg. Asbestos Litig.*, 454 S.E.2d at 425 (footnote omitted); Carter Enters., Inc. v. Ashland Specialty Co., Inc., 257 B.R. 797, 803 (S.D. W. Va. 2001).

[874] Jordan v. Ravenswood Aluminum Corp., 455 S.E.2d 561, 564 (W. Va. 1995) (quoting AM. JUR. 2D *Corporations* § 2711 (1986)).

[875] *Jordan*, 455 S.E.2d at 564.

> fraudulently to escape liability for such obligations."[876]

The Supreme Court of Wisconsin expressly declined to adopt the product line exception or the "expanded continuation" exception (continuity of enterprise) set out in *Turner v. Bituminous Cas. Co.*[877]

Wisconsin: The Express or Implied Assumption Exception

Wisconsin recognizes express or implied assumption of liabilities as one way that a successor may be liable for the liabilities of its predecessor.[878] "The first exception under *Fish* [*v. Amsted Industries, Inc.*] requires an express or implied *assumption* of liabilities, not an express exclusion of liabilities."[879] The *Columbia Propane, L.P. v. Wisconsin Gas Co.* court noted the importance of not blurring "the well-established and fundamental distinction between an asset purchase and a stock purchase."[880]

In *Briggs & Stratton Power Products Group, LLC v. Generac Power Systems, Inc.*, the court noted, "[T]he express mention of one matter excludes other similar matters [that are] not mentioned."[881] Thus, the

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[876] Fish v. Amsted Indus., 376 N.W.2d 820, 823 (Wis. 1985) (quoting Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977)); Columbia Propane, L.P. v. Wis. Gas Co., 661 N.W.2d 776, 784 (Wis. Ct. App. 2003).

[877] *Fish*, 376 N.W.2d at 829 (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,* 244 N.W.2d 873 (Mich. 1976), exception, "we decline to adopt the 'expanded continuation' exception to nonliability for the same reasons that we declined to adopt the product line exception."); Red Arrow Prods. Co. v. Emp'r Ins. of Wausau, 607 N.W.2d 294, 299–300 (Wis. Ct. App. 2000).

[878] *See Fish*, 376 N.W.2d at 823.

[879] Columbia Propane, L.P. v. Wis. Gas Co., 661 N.W.2d 776, 785 (Wis. 2003) (citing Fish v. Amsted., Indus., Inc., 126 Wis. 2d 293, 376 N.W.2d 820 (Wis. 1985)).

[880] *Id.* at 785.

[881] Briggs & Stratton Power Products Grp., LLC v. Generac Power Sys., Inc., 796 N.W.2d 234, 238 (Wis. Ct. App. 2011) (citation omitted) (quoting FAS, LLC v. Town of Bass Lake, 733 N.W.2d 287, 297 (Wis. 2007)).

court reasoned: "The liabilities Briggs expressly assumed in the Agreement were numerous; however, products liability was not expressly included. Because products liability was not included in other Assumed Liabilities under the Agreement, we conclude that Briggs did not assume Generac's products liability under the Agreement." [882]

Wisconsin: The De Facto Merger Exception

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

> "(1) the assets of the seller corporation are acquired with shares of the stock in the 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." [883]

Although not every factor need be present, "[t]he key element in determining whether a merger or defacto [sic] merger has occurred is that the transfer of ownership was for stock in the successor corporation rather than cash."[884]

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[882] *Briggs & Stratton*, *Power Products Grp., LLC*, 796 N.W.2d at 238 (citing *Town of Bass Lake*, 733 N.W.2d at 287).

[883] Sedbrook v. Zimmerman Design Group, Ltd., 526 N.W.2d 758, 760 (Wis. Ct. App. 1994) (quoting Parson v. Roper Whitney, Inc., 586 F. Supp. 1447, 1449 (W.D. Wis. 1984)); *see* Smith v. Meadows Mills, 60 F. Supp. 2d 911, 917 (E.D. Wis. 1999).

[884] *Fish*, 376 N.W.2d at 824 (citing Leannais v. Cincinnati, Inc., 565 F.2d 437, 439 (7th Cir. 1977)); *Sedbrook*, 526 N.W.2d at 761; Smith v. Meadows Mills, Inc., 60 F. Supp. 2d 911, 917–18 (E.D. Wis. 1999).

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.'"[885]

Wyoming

As of February 2017, Wyoming courts do not appear to have addressed successor liability.

The U.S. Virgin Islands

In 1985, the Federal District Court for the Virgin Islands adopted the four traditional exceptions to the general rule of successor nonliability as well as the continuity of enterprise exception, citing, among other cases, *Korzetz v. Amsted Industries, Inc.*,[886] and *Turner v. Bituminous Casualty Co.*,[887] for the respective guidelines.[888] The court expressly rejected the product line theory, concluding that it was a minority rule and not the "modern trend."[889] The Third Circuit 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 that 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."[890]

The Third Circuit set forth the traditional exceptions as follows:

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[885] *Fish*, 376 N.W.2d at 824 (quoting *Leannais*, 565 F.2d at 440); *see also* Smith v. Meadows Mills, Inc., 60 F. Supp. 2d 911, 917–18 (E.D. Wis. 1999).

[886] 72 F. Supp. 136 (E.D. Mich. 1979).

[887] 244 N.W.2d 873 (Mich. 1976).

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

[889] *Id.* at 1545.

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

> (1) [the purchaser] 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.[891]

Regarding the *de facto* merger exception, the district court in *Martin v. Powermati, Inc.* stated:

> A transaction deemed an "asset purchase agreement" may be a de facto merger where:
>
> "(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

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[891] *Polius*, 802 F.2d at 78; (citations omitted); Martin v. Powermatic, Inc., No. 01–0137, 2008 WL 2329642, at *3 (D.V.I. Jun. 4, 2008).

> business of operations of the seller corporation."[892]

Regarding the mere continuation exception, the Third Circuit stated: "[W]hen 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 [is] applicable."[893]

Guam

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

The Northern Mariana Islands

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

Puerto Rico

Puerto Rico has, on several occasions, addressed the issue of successor liability and has adopted the traditional exceptions. Successor corporations are not liable for the debts or acts of a predecessor corporation except: (1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) when the purchaser corporation is merely a continuation of the seller corporation; or (4) when the transaction is entered into fraudulently to escape liability for such obligations.[894]

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[892] *Martin*, 2008 WL 2329642 at *4 (quoting Berg Chilling Sys. v. Hull Corp., 435 F.3d 455, 468–69 (3d. Cir. 2006)).

[893] *Polius*, 802 F.2d at 78; *Martin,* 2008 WL 2329642 at *4; *see Postdissolution Product Claims and the Emerging Role of Successor Liability*, 64 VA. L. REV. 861, 866 (1978).

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