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Introduction

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

Historically, successor liability was a flexible doctrine, designed to eliminate the harsh results that could attend strict application of corporate law. Over time, however, as successor liability doctrines evolved, they became, in many jurisdictions, ossified and lacking in flexibility. As this occurred, corporate lawyers and those who structure transactions learned how to avoid application of successor liability doctrines.[1] This article summarizes what has become of various species of non-statutory successor liability in Vermont.[2]

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. Both represent a distinct public policy that, in certain instances and for certain liabilities, the general rule of non-liability of a successor for a predecessor's debts following an asset sale should not apply. This article addresses the statues of the first group, judge-made successor liability in Vermont.

The current judge-made successor liability law is a product of the rise of corporate law in the last half of the nineteenth century and early part of the twentieth century. 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,[3] rather than as a creature of tort law, although it is used as a tool by plaintiffs who are involuntary tort claimants.

Many sources and authorities list four, five, or 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, for example.[4] In fact, the matter is more complicated than that. Each of these species of successor liability has, within it, different sub-species with different standards and variations in the jurisdictions that recognize them. Some use a list of mandatory elements while others are based on a non-exclusive list of factors and considerations to be weighed and balanced in a "totality of the circumstances" fashion. Some that began as an approach consisting of a flexible list of factors have evolved into one consisting of one or more mandatory elements. In any event, to state that there are only four, five, or six categories is to oversimplify the matter.[5]

The State of Successor Liability in Vermont

When examined in detail, the types of successor liability can be classified into five general species, each of which is specifically defined on a jurisdiction-by-jurisdiction basis. The five categories of successor liability 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.

When examining successor liability, one should keep in mind that there is variance and overlap between the species and their formulation in particular jurisdictions. 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; the underlying substance should always be examined.

1. 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.[6] Vermont recognizes the express or implied assumption of liability as an exception to the traditional rule of non-liability in asset sales.[7]

2. 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 interests and expectations of the company's creditors have been frustrated.[8] By allowing liability to attach to the successor corporation in such instances, the creditors' interests and expectations are respected. The challenge, of course, is defining the standard that separates the fraudulent scheme from the legitimate one.

Vermont recognizes the fraud exception to successor liability.[9] Interestingly, the court thus appears to have split the traditional fraud analysis into two types, actual fraud and constructive fraud, the later of which appears to have only one element—inadequate consideration—rather than the more common two alternative element approach of the Uniform Fraudulent Transfer Act.[10]

3. *De Facto* Merger

In a *statutory* merger, the successor corporation becomes liable for the predecessor's debts.[11] 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.

The court in *Cab-Tek, Inc. v. EBM, Inc.* addressed the distinction between consolidation and *de facto* merger.[12] Consolidation occurs when the "combining corporations are dissolved and lose their identity in a new corporate entity."[13] *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.[14] In other words, no asset purchase is required for a de facto merger in Vermont.[15]

4. Continuation of the Business: The Continuity Exceptions

An exception with two distinct subcategories permits successor liability when the successor continues the business of the seller: mere continuation and continuity of enterprise. Each has sub-species particular to specific jurisdictions within them. The two share roughly the same indications but continuity of enterprise does not require continuity of shareholders or directors or officers between the predecessor and the successor—a requirement said to be one of the mere continuation exception's dispositive elements or factors.[16] Courts are not altogether 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.[17]

A. Mere Continuation

The *Gladstone* court announced the contours of the mere continuation doctrine. The test, said the court, focuses on continuation of the corporate entity, not its business.[18] 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.[19] Although these are traditional indicators, they are not requirements.[20] *De facto* merger, on the other hand, focuses on the absorption of one corporation's business by another, and its traditional indicators include similarity of assets, locations, managements, personnel, shareholders, and business practices.[21] Inadequacy of consideration may also be present.[22]

The *Gladstone* court then returned to the mere continuation doctrine and considered its factors in declining order of significance: (1) continuity of ownership and management; (2) whether only the successor corporation survived, although survival as a mere shell or for a short period is not significant; (3) inadequate consideration; (4) similarity of the business operated by the successor to that of the predecessor; and (5) continuation of business practices, including how the company holds itself out to the public.[23] The court additionally considered whether or not recognition of the transfer as being free and clear of liabilities would work a fraud on creditors through a breach of the fiduciary duty that corporations and their directors owe to creditors of insolvent corporations on those operating in the zone of insolvency.[24]

B. The Two 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.[25] Further, continuity of enterprise generally does not include the requirement of dissolution of the predecessor upon or soon after the sale, which is often a factor—and sometimes a requirement—in jurisdictions applying the mere continuation doctrine.[26]

A detailed examination of continuity of enterprise in the jurisdictions that have adopted it discloses three subspecies at work. All the variations of the continuity of enterprise exception derive from *Turner v. Bituminous Cas. Co.*[27] Variations in the application of the *Turner* factors create the three subspecies.

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.[28] The court adopted the rule that, in the sale of corporate assets for cash, three criteria would be the threshold guidelines to establish whether there is continuity of enterprise between the transferee and the transferor corporations:

(1) there is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations;
(2) the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and
(3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the interrupted continuation of normal business operations of the seller corporation.[29]

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.*[30] 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.[31] 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."[32]

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* court's holding and not the three listed in its announcement of the rule.[33] The *Foster* court clarified that, in fact, only three items are involved in the *Turner* rule, and they are required elements.[34]

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."[35] The court's interpretation of the underlying rationale of *Turner* was "to provide a source of recovery for injured plaintiffs."[36] According to Justice Brickley, the *Turner* court expanded liability based on the successor's continued enjoyment of "certain continuing benefits": "[T]he test in *Turner* is designed to determine whether the company (or enterprise) involved in the lawsuit is essentially the same company that was allegedly negligent in designing or manufacturing the offending product."[37]

The *Foster* decision thus 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 it interpreted its own rule as one comprised of elements.

In Vermont, the *Gladstone* court noted that in *Ostrowski v. Hydra-Tool Corp.*,[38] it had declined to adopt either the continuity of enterprise or product line doctrines because the successor did not create the risk of harm or benefit from the proceeds of the product's sale, did not invite the product's use or make any safety representations, and could not enhance the safety of the product given that it had already been released into the market.[39]

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

In *Ray v. Alad*,[40] 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;[41] (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. The term "justifications" is somewhat ambiguous as to whether it connotes required elements or non-exclusive factors to be balanced, much like the *Turner* guidelines. Like the Michigan Supreme Court in *Foster*, which revisited *Turner* some years after the original opinion was issued, the California Supreme Court returned to *Ray v. Alad* some years later to "clarify" things. In *Henkel Corp. v. Hartford Acc. & Indemn. Co.*,[42] the 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.[43] 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."[44]

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

The *Gladstone* court declined to adopt the product line doctrines because the successor did not create the risk of harm or benefit from the proceeds of the product's sale, did not invite the product's use or make any safety representations, and could not enhance the safety of the product given that it had already been released into the market.[45]

Conclusion

This article and its more detailed companion pieces in the *Florida State University Business Review* and on the author's website attempt to detail some of the history and the current condition of successor liability law in Vermont. The purpose of the doctrines was to provide contract and tort creditors with an avenue of recovery against a successor entity in appropriate cases when the predecessor that contracted with them or committed the tort or the action that later gave rise to the tort had sold substantially all of its assets and was no longer a viable source of recovery. Its various species acted as a pressure relief valve on the strict limitation of liability created by corporate law. The doctrine is in the nature of an "equitable" 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.

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1 *See* George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 3 Fla. St. U. Bus. Rev. 1 (2006).

2 A detailed jurisdiction-by-jurisdiction analysis and explanation of the state of judge-made successor liability law may be found at www.law.utk.edu/Faculty/APPENDIXKuney.htm. The author intends to update this analysis at least twice a year so that it remains current.

3 *See generally* Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 Bus. Law. 109 (2004).

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

5 The variance in states' approaches to successor liability and to the related doctrines of alter ego or piercing the corporate veil are 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). *See* United States v. General Battery Corp., 423 F.3d 294, 298-301 (3d Cir. 2005) (collecting authorities).

6 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).

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

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

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

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

11 G. William Joyner, III, *Beyond* Budd Tire: *Examining Successor Liability in North Carolina*, 30 Wake Forest L. Rev. 889, 894 (1995).

12 571 A.2d 671 (Vt. 1990).

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

14 *Id.* at 221.

15 *Id.*

16 Rest. 3d Torts § 12, cmt. g; Am. L. Prod. Liab. 3d § 7:20 (2004). *See, e.g.*, Holloway v. John C. Smith's Sons, 432 F. Supp. 454, 456 (D.S.C. 1977) (denying summary judgment to the defendant successor in a products liability suit because: (1) the business continued at its same address with virtually all of the previous employees; (2) the successor was responsible for maintenance and repairs on the products sold by the predecessor prior to its sale of assets; (3) the successor continued manufacturing the same or similar products as the predecessor; and (4) the successor held itself out to the public as a business entity under a virtually identical name as its predecessor; not requiring continuity of ownership and control but calling the doctrine applied "mere continuation" anyway.); *see also* Mozingo v. Correct Mfg., 752 F.2d 168, 175 (5th Cir. 1985) (applying Mississippi law and citing Holloway Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974) (upon which Holloway relied) as cases following the continuity of enterprise theory); Am. L. Prod. Liab. 3d § 7:22 (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 & Own on Prod. Liab. § 19:6, n. 25 (3d. ed. 2003) (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., 30 Ohio St. 3d (1987) (this treatise is authored by David Owen, the Carolina Distinguished Professor of Law at the University of South Carolina); Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. Ill. L. Rev. 845, 854-55, n. 44 (1999) (noting that states following the continuity of enterprise approach include South Carolina (citing *Holloway*); Ohio (citing *Flaugher*), Alabama, Michigan, Mississippi, and New Hampshire (citing *Cyr v. B. Offen*); Philip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 Fla. J. Int'l L. 365, 375-76 (1996) (collecting cases applying the continuity of enterprise theory, including *Holloway* and *Flaugher*); 30 S.C. Jur. Products

Liability § 12 (stating that the court in *Holloway* denied the successor's motion for summary judgment "where the evidence indicated that the [successor] was a mere continuation of the predecessor corporation"); Rest. 3d Torts § 12, cmt. c (citing only Alabama, Michigan, and New Hampshire as jurisdictions that have adopted the continuity of enterprise theory).

[17] *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 272 to 274 and accompanying text.

[18] *Id.* at 222.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Gladstone*, 878 A.2d at 222.

[23] *Id.* at 222-223.

[24] *Id.* at 224.

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

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

[27] 244 N.W.2d 873 (Mich. 1976).

[28] *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873 (Mich. 1976).

[29] *Id.* at 879 (citing McKee v. Harris-Seybold Co., Div. of Harris-Intertype Corp., 264 A.2d 98, 103, 105 (1970)). 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.

[30] 597 N.W.2d 506 (Mich. 1999). In the interim, the court cited *Turner* in three decisions, none of which clarified the key *Turner* holding: Jeffery v. Rapid American Corp., 529 N.W.2d 644, 656 (Mich. 1995) (citing *Turner* for the proposition that corporate law principles should not be rigidly applied in products liability cases); *Stevens v. McLough Steel Prods. Corp.*, 466 N.W.2d 95, 99 (Mich. 1989) (citing *Turner* as a case where the Michigan Supreme Court discussed the doctrine of successor liability in the context of a products liability suit); *Langley v. Harris Corp.*, 321 N.W.2d 662, 664-65 (Mich. 1982) (citing *Turner* for the proposition that an acquiring corporation maybe held liable for products liability claims arising from activities of its predecessor corporation under a continuity of enterprise theory, but then holding that the *Turner* rationale will not allow a corporation to seek indemnity from the plaintiff's employer in a products liability suit). One appellate court decision between *Turner* and *Foster* concluded that satisfying the fourth consideration in *Turner* (the purchasing corporation's holding itself out as a continuation of the selling corporation) was not sufficient for a finding of successor liability where the first three considerations were not met. *Pelc v. Bendix Mach. Tool Corp.*, 314 N.W.2d 614, 620 (Mich. Ct. App. 982) (Where a successor bought only 8 percent of the assets of another corporation in a bankruptcy sale and did not meet the first three criteria of *Turner*, but held itself out as a continuation of the liquidating corporation, the mere continuation test was not satisfied. The court noted that to impose successor liability in such circumstances would effectively be an adoption of the broader "product line exception").

[31] 597 N.W.2d at 508.

[32] *Id.*

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

[34] 597 N.W. 2d at 510.

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

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

[37] *Id.* at 513.

[38] 479 A.2d 126 (Vt. 1984).

[39] *Gladstone*, 878 A.2d at 220 (citing Ostrowski, 479 A.2d at 127).

[40] 560 P.2d 3 (Cal. 1977).

[41] *Id.* at 9.

[42] 62 P.3d 69, 73 (Cal. 2003).

[43] George W. Kuney & Donna C. Looper, *Successor Liability in California*, 20 CEB Cal. Bus L. Pract. 50 (2005).

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

[45] *Gladstone*, 878 A.2d at 220 (citing Ostrowski, 479 A.2d at 127).

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