HB 499

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: February 27, 2002 **FURTHER REFERRALS:**

Date of Committee Action: 4·19·02

The JUDICIARY Committee considered: **HB 499**

HOUSE BILL NO. 499 **DISPOSITION OF BUSINESS ASSETS**

"An Act relating to the sale, lease, exchange, or other disposition of business property and assets."

Recommends it be replaced with ____**CS** HB499 (JUD) [ ] **Same Title** [✓] **New Title**
*For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR*____

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

List of Abbrev. for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
CED				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
	Berkowitz			✓	
	Meyer ✓	✓			
	Coghill			✓	
	JAMES			✓	
	Kookesh			✓	
Chair:	ROKEBEDL	✓			
Chair:					

22-LS1490\B
Bannister
4/19/02

Adopted 4.19.02

CS FOR HOUSE BILL NO. 499(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE

Conceptual Amendment #1 - tighten title.

A BILL

FOR AN ACT ENTITLED

"An Act relating to the liability of businesses acquiring assets of other businesses for the products liabilities of the businesses disposing of the assets."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. The legislature declares that it is the intent of this bill to reject the continuity of enterprise exception to the doctrine of successor liability adopted in Savage Arms, Inc. v. Western Auto Supply, 18 P.3d 49 (Alaska 2001) as it relates to products liability.

*** Sec. 2.** AS 09.68 is amended by adding a new section to read:

Sec. 09.68.070. Liability of successor for harm caused by defective products. (a) Notwithstanding any other provision of law to the contrary, a successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a

defective product sold or otherwise distributed commercially by the predecessor only if the acquisition

(1) is accompanied by an agreement for the successor to assume the liability;

(2) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor;

(3) constitutes a consolidation or merger with the predecessor; or

(4) results in the successor's becoming a continuation of the predecessor.

(b) In (a) of this section, "business entity" includes a sole proprietorship.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to the sale, lease, exchange, or other disposition of assets by a corporation, a limited liability company, a partnership, a limited liability partnership, a limited partnership, a sole proprietorship, or other business entity that occurs before, on, or after the effective date of this Act.

22-LS1490\S
Bannister
4/5/02

Adopted 4.5.02

CS FOR HOUSE BILL NO. 499(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to the sale, lease, exchange, or other disposition of business property and assets and to the liability of the acquiring person for the liabilities, including those arising from products liability, of the disposing business."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. The legislature declares that it is the intent of this bill to reject the continuity of enterprise exception to the doctrine of successor liability adopted in Savage Arms, Inc. v. Western Auto Supply, 18 P.3d 49 (Alaska 2001) as it relates to products liability.

*** Sec. 2.** AS 10.06 is amended by adding a new section to read:

Sec. 10.06.569. Treatment and consequences of disposition of assets. (a) Unless the disposition is a fraudulent transfer under AS 34.40 or is otherwise a fraudulent conveyance to escape liability for the debts or liabilities of the disposing

corporation, a sale, lease, exchange, or other disposition by a corporation of any, all, or substantially all of the property and assets of the corporation, whether or not the disposition requires the approval of the shareholders of the corporation,

(1) is not considered to be a merger or consolidation under AS 10.06.530 - 10.06.582 or under another statute unless the corporation adopts a plan of merger under AS 10.06.530 or consolidation under AS 10.06.536; and

(2) except as otherwise expressly provided by another statute, does not make the corporation, foreign corporation, or other person that is acquiring the property and assets responsible or liable, in tort or otherwise, for a liability or an obligation of the disposing corporation that the acquiring corporation, foreign corporation, or other person does not expressly assume.

(b) Notwithstanding (a) of this section, a sale, lease, exchange, or other disposition by a corporation of any, all, or substantially all of the property and assets of the corporation, whether or not the disposition requires the approval of the shareholders of the corporation, subjects the acquiring person to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the disposing corporation if the disposition

(1) is accompanied by an agreement for the acquiring person to assume the liability;

(2) results from a fraudulent conveyance to escape liability for the debts or liabilities of the disposing corporation;

(3) constitutes a consolidation or merger with the disposing corporation; or

(4) results in the acquiring person's becoming a continuation of the disposing corporation.

* **Sec. 3.** AS 10.50 is amended by adding a new section to read:

Sec. 10.50.580. Treatment and consequences of disposition of assets. (a) Unless the disposition is a fraudulent transfer under AS 34.40 or is otherwise a fraudulent conveyance to escape liability for the debts or liabilities of the disposing limited liability company, a sale, lease, exchange, or other disposition of any, all, or substantially all of the property and assets of a limited liability company by the limited

liability company, whether or not the disposition requires the approval of the members of the company,

(1) is not considered to be a merger or consolidation unless the limited liability company approves the disposition as part of a merger or consolidation under AS 10.50.510; and

(2) except as otherwise expressly provided by another statute, does not make the person acquiring the property and assets responsible or liable, in tort or otherwise, for a liability or an obligation of the limited liability company that the acquiring person does not expressly assume.

(b) Notwithstanding (a) of this section, a sale, lease, exchange, or other disposition by a limited liability company of any, all, or substantially all of the property and assets of the limited liability company, whether or not the disposition requires the approval of the members of the company, subjects the acquiring person to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the disposing company if the disposition

(1) is accompanied by an agreement for the acquiring person to assume the liability;

(2) results from a fraudulent conveyance to escape liability for the debts or liabilities of the disposing company;

(3) constitutes a consolidation or merger with the disposing company; or

(4) results in the acquiring person's becoming a continuation of the disposing company.

* **Sec. 4.** AS 32.05 is amended by adding a new section to article 7 to read:

Sec. 32.05.950. Treatment and consequences of disposition of assets. (a) Unless the disposition is a fraudulent transfer under AS 34.40 or is otherwise a fraudulent conveyance to escape liability for the debts or liabilities of the disposing partnership, a sale, lease, exchange, or other disposition of any, all, or substantially all of the property and assets of a partnership, whether or not the disposition requires the approval of the partners, is not considered to be a merger or consolidation, and, except as otherwise expressly provided by another statute, does not make the person

acquiring the property and assets responsible or liable, in tort or otherwise, for a liability or an obligation of the partnership that the acquiring person does not expressly assume.

(b) Notwithstanding (a) of this section, a sale, lease, exchange, or other disposition by a partnership of any, all, or substantially all of the property and assets of the partnership, whether or not the disposition requires the approval of the partners, subjects the acquiring person to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the disposing partnership if the disposition

(1) is accompanied by an agreement for the acquiring person to assume the liability;

(2) results from a fraudulent conveyance to escape liability for the debts or liabilities of the disposing partnership;

(3) constitutes a consolidation or merger with the disposing partnership; or

(4) results in the acquiring person's becoming a continuation of the disposing partnership.

* **Sec. 5.** AS 32.06 is amended by adding a new section to article 8 to read:

Sec. 32.06.901. Treatment and consequences of disposition of assets. (a) Unless the disposition is a fraudulent transfer under AS 34.40 or is otherwise a fraudulent conveyance to escape liability for the debts or liabilities of the disposing partnership, a sale, lease, exchange, or other disposition of any, all, or substantially all of the property and assets of a partnership, whether or not the disposition requires the approval of the partners,

(1) is not considered to be a merger or conversion unless part of a conversion under AS 32.06.902 or of a plan of merger under AS 32.06.905; and

(2) except as otherwise expressly provided by another statute, does not make the person acquiring the property and assets responsible or liable, in tort or otherwise, for a liability or an obligation of the partnership that the acquiring person does not expressly assume.

(b) Notwithstanding (a) of this section, a sale, lease, exchange, or other

disposition by a partnership of any, all, or substantially all of the property and assets of the partnership, whether or not the disposition requires the approval of the partners, subjects the acquiring person to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the disposing partnership if the disposition

(1) is accompanied by an agreement for the acquiring person to assume the liability;

(2) results from a fraudulent conveyance to escape liability for the debts or liabilities of the disposing partnership;

(3) constitutes a consolidation or merger with the disposing partnership; or

(4) results in the acquiring person's becoming a continuation of the disposing partnership.

* **Sec. 6.** AS 32.11 is amended by adding a new section to read:

Sec. 32.11.880. Treatment and consequences of disposition of assets. (a) Unless the disposition is a fraudulent transfer under AS 34.40 or is otherwise a fraudulent conveyance to escape liability for the debts or liabilities of the disposing partnership, a sale, lease, exchange, or other disposition of any, all, or substantially all of the property and assets of a partnership, whether or not the disposition requires the approval of the partners,

(1) is not considered to be a merger or conversion; and

(2) except as otherwise expressly provided by another statute, does not make the person acquiring the property and assets responsible or liable, in tort or otherwise, for a liability or an obligation of the partnership that the acquiring person does not expressly assume.

(b) Notwithstanding (a) of this section, a sale, lease, exchange, or other disposition by a partnership of any, all, or substantially all of the property and assets of the partnership, whether or not the disposition requires the approval of the partners, subjects the acquiring person to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the disposing partnership if the disposition

(1) is accompanied by an agreement for the acquiring person to assume the liability;

(2) results from a fraudulent conveyance to escape liability for the debts or liabilities of the disposing partnership;

(3) constitutes a consolidation or merger with the disposing partnership; or

(4) results in the acquiring person's becoming a continuation of the disposing partnership.

* **Sec. 7.** AS 32.11.890 is amended to read:

Sec. 32.11.890. Rules for conversions and other cases not covered by chapter. In a case not provided for in this chapter, including conversion of a limited partnership to a partnership **except as provided in AS 32.11.880**, the provisions of AS 32.06 govern.

* **Sec. 8.** AS 45 is amended by adding a new chapter to read:

Sec. 45.45.920. Treatment and consequences of disposition of assets by certain businesses. (a) Unless the disposition is a fraudulent transfer under AS 34.40 or is otherwise a fraudulent conveyance to escape liability for the debts or liabilities of the disposing business, a sale, lease, exchange, or other disposition of any, all, or substantially all of the property and assets of a covered business is not considered to be a merger or consolidation of the covered business and does not make the person acquiring the property and assets responsible or liable, in tort or otherwise, for a liability or an obligation of the covered business that the acquiring person does not expressly assume.

(b) Notwithstanding (a) of this section, a sale, lease, exchange, or other disposition by a covered business of any, all, or substantially all of the property and assets of the covered business subjects the acquiring person to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the disposing covered business if the disposition

(1) is accompanied by an agreement for the acquiring person to assume the liability;

(2) results from a fraudulent conveyance to escape liability for the

debts or liabilities of the disposing covered business;

(3) constitutes a consolidation or merger with the disposing covered business; or

(4) results in the acquiring person's becoming a continuation of the disposing covered business.

(c) In this section, "covered business" means a business that is not a corporation under AS 10.06, a professional corporation under AS 10.45, a limited liability company under AS 10.50, or a partnership under AS 32.05, AS 32.06, or AS 32.11.

* **Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to the sale, lease, exchange, or other disposition of property by a corporation, a limited liability company, a partnership, a limited liability partnership, a limited partnership, a sole proprietorship, or other business that occurs before, on, or after the effective date of this Act.

LEGAL SERVICES

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MEMORANDUM April 5, 2002

SUBJECT: CSHB 499(JUD) relating to business property dispositions and liabilities (Work Order No. 22-LS1490\S)

TO: Representative Norman Rokeberg, Chair
House Judiciary Committee
Attn: Heather

FROM: Theresa L. Bannister
Legislative Counsel

This memo accompanies the bill described above.

The new requested language added for the products liability situation refers to consolidations and mergers. Some of the other language in secs. 5 and 6 of the bill refers to mergers and conversions, based on the language in the particular chapter involved. Do you want the new language to be consistent with these modifications, or the other way around?

If I may be of further assistance, please advise.

TLB:lmb
02-055.lmb

Enclosure

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

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Heather M. Nobrega
Counsel to Committee

Sponsor Statement for HB 499

It is vitally important to Alaska commerce and business that a corporation, partnership or other entity that purchases assets from another company or business not be held legally responsible for the liabilities of the selling business, unless expressly agreed to by the purchasing company. However, the Alaska Supreme Court, in an interim ruling last year in *Savage Arms, Inc v. Western Auto Supply Co.*, 18 P.3d 49 (Alaska 2001), held otherwise under the doctrine of successor liability, and remanded the case to trial consistent with its opinion.

Generally, when one company sells all its assets to another, the acquiring corporation or company is not liable for the debts and liabilities of the selling company. Contrary to this rule, the Alaska Supreme Court adopted two theories of successor liability, "mere continuation" and "continuity of enterprise." These theories are exceptions to the general rule, and allow a purchasing company to be held responsible for the liabilities of the selling company, including those that may have been unknown at the time of the sale. The Supreme Court acknowledged that "continuity of enterprise" has been rejected by the *American Law Institute: Restatement (Third) of Torts*, and a vast majority of courts that have decided the issue.

The Supreme Court stated it was deciding the issue of successor liability because "...neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case..." The *Savage Arms* case is set for trial in November 2002, and before the Supreme Court's ruling becomes final following trial and appeal, we seek to respond to the invitation of the Supreme Court and fill the legislative void and declare the law of Alaska on this subject.

HB 499 is modeled after the 1979 Texas statute (Tex. Bus. Corp. Act art. 5.10(B)(2)) that adopted the standard that an entity that purchases assets from another business will not be held liable for liabilities of the selling business that the purchaser did not expressly assume. Similar to the present situation in Alaska, the Texas statute was passed after a Texas court had adopted a theory of successor liability that imposed liability on a purchaser who had not expressly assumed the liabilities of the seller. Texas court decisions following the passage of the Texas statue have upheld the statue and affirmed that it allows the imposition of successor liability only when the purchaser has expressly assumed a particular liability and that it rejects other theories of successor liability, including those adopted by the Alaska Supreme Court. We believe HB 499 will accomplish this same result because, in its opinion, the Alaska Supreme Court, noted that the Texas legislation seemed to disfavor successor liability unless the purchaser expressly assumed liability. The intent of HB 499 is to adopt this standard as the law of Alaska.

We believe this legislation will prevent inequities that will otherwise occur to the purchaser of assets who would be exposed to liabilities they did not anticipate and to sellers of assets who may receive less than fair market value if the purchaser must discount the purchase price to factor in unknown and unwanted liabilities.

This bill is expressly made retroactive so there will be uniformity of application.

The committee urges your support of this bill.

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

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Heather M. Nobrega
Counsel to Committee

Sectional Analysis for HB 499

Section 1: Amends Alaska Corporations Code by adding a new section regarding the treatment and consequences of disposition of assets.

A sale, lease, exchange or other disposition by a corporation of any, all, or substantially all of the property or assets of the corporation is not a merger or consolidation unless expressly created.

In addition, the disposition does not make the acquiring corporation responsible or liable for any of the liabilities of the disposing corporation unless expressly assumed.

Section 2: Same provisions as above created for limited liability companies.

Section 3: Same provisions as section 1 created for partnerships.

Section 4: Same provisions as section 1 created for partnerships.

Section 5: Same provisions as section 1 created for limited partnerships.

Section 6: Conforming amendment.

Section 7: Same provisions as section 1 created for businesses.

Section 8: The provisions of the bill are applied retroactively.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 499
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Community & Econ. Dev.
Title: Disposition of Business Assets
BRU: Banking, Securities & Corporations (115)
Component: Banking, Securities & Corporations
Sponsor: House Judiciary
Requester: House Judiciary
Component No.: 1233

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1156 RSS						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill allows corporations and other types of business entities to dispose of all or substantially all of their property and assets without having the buyers assume responsibility for the sellers' liabilities, unless the buyers expressly assume those liabilities.

The division does not anticipate any fiscal impact with the proposed legislation.

Prepared by: Franklin T. Elder, Division Director
Phone: 465-2521
Division: Banking, Securities and Corporations
Date/Time: 3/8/02 2:31 PM
Approved by: Commissioner Deborah B. Sedwick
Date: 3/8/2002
Agency: Department of Community & Economic Development

(Revised 9/2001 OMB)

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MEMORANDUM February 12, 2002

SUBJECT: Bill relating to disposition of business assets
(Work Order No. 22-LS1490\A)

TO: Representative Norman Rokeberg, Chair
House Judiciary Committee
Attn: Heather

FROM: Theresa L. Bannister
Legislative Counsel

This memo accompanies a draft of the bill described above.

1. Coverage. Since your instructions were to cover businesses, the bill does not cover the various types of nonprofit corporations and cooperatives, or corporations like BIDCOs that provide assistance rather than engage in business. The statutes of some types of businesses are not specifically amended because they are already covered by changes in other statutes, e.g. professional corporations under AS 10.45.

2. Scope. The scope of this bill is quite broad and undefined. I would recommend identifying the precise problem that the bill is trying to correct and addressing that, rather than using such a broad approach. With a broad provision like this one, it is difficult to determine just what situations are being covered, with the result that the bill may affect situations that you do not intend to be covered.

3. Applicability section. The applicability section applies the bill to dispositions of property that occur before the effective date of this Act. As a practical matter, this application may disrupt transfers that have been completed or that are in process and theoretically could apply backwards indefinitely. As a legal matter, the disruption may result in a reshifting of property rights that may result in a taking by the state for which just compensation is required under art. 1, sec. 18 of the Alaska Constitution.

If I may be of further assistance, please advise.

TLB:med
02-133.med

Enclosure

Savage Arms, Inc

v.

Western Auto Supply Co.

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FOLLOWING
DOCUMENT(S)
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statute of limitations has run, it is allowable if it "relates back" to the date of a timely original pleading.[24]

Civil Rule 15(c) sets out the circumstances under which an amended pleading will relate back to the original pleading:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[25]

According to this standard, Hebert's second amended complaint will relate back to her timely November 1995 complaint against Honest Bingo if (1) the claim asserted against FDA arises out of the same transaction or occurrence set forth in the initial complaint; (2) FDA received sufficient notice such that it would not be prejudiced in maintaining its defense on the merits; (3) FDA knew or should have known that it would have been included as a party in the original complaint but for a mistake concerning its identity; and (4) FDA received notice and knew or should have known that, but for a mistake concerning its identity, it would have been included as a party within "the period provided by law for commencing the action against" it.[26]

Given the fact-intensive nature of the Rule 15(c) "relation back" test, FDA can prevail on its Rule 12(c) motion only if the undisputed facts on the face of the pleadings clearly show that Hebert's second amended complaint cannot possibly relate back to her earlier timely complaint against Honest Bingo. But the relation back issue presents the following disputed fact questions, which prevent resolution on a motion for judgment on the pleadings: whether FDA received sufficient notice of Hebert's lawsuit within the limitations period and whether FDA knew or should have known that, but for a mistake concerning identity, it would have been included as a party within the applicable period.[27]

It is not clear from the pleadings whether FDA did or did not receive sufficient notice of Hebert's claim within the limitations period. Hebert's complaint asserted that the nature of the named business entities was unknown. It also included the permittee of the bingo game as a John Doe defendant. Hebert's amended complaint states that FDA "is one of the three permitees jointly operating Honest Bingo" and that FDA "was in fact receiving the benefits of the operation of the bingo game at the time and place in question." This statement alleges the existence of a close business relationship between Honest Bingo and FDA, or possibly a joint venture or partnership.[28] While admitting that it is a permittee for bingo games, FDA denied the allegations of jointly operating Honest Bingo and of receipt of benefits of the operation. Viewing the facts in the light most favorable to Hebert, as we must for the purposes of the motion, it is clear that the existence of some type of close business relationship is alleged.

A fact question also exists as to whether FDA knew or should have known that but for a mistake in identity, it would have been named as a party within the applicable limitations period. As an organization under whose permit the Honest Bingo game was run, FDA may have had notice of the complaint filed against Honest Bingo and the Monroe Foundation and consequently may or should have known that it was one of the "John Does" referred to in the initial complaint against Honest Bingo. Similarly, without further evidence, we are unable to determine whether FDA either knew or should have known that it was intended as a party in the suit prior to March 27, 1996, the one hundred twentieth day after filing of the original complaint.[29]

The pleadings on their face cannot reveal whether Hebert's second amended complaint relates back to the initial timely complaint filed against Honest Bingo. And determining whether FDA meets the standard for relation back involves a triable issue of fact. We therefore cannot affirm the granting of FDA's Rule 12(c) motion.[30]

[13] "The court either may consider a motion for judgment on the pleadings at a preliminary hearing as provided by Rule 12(d) or may postpone its determination until trial." [31] We conclude that where appropriate and when a motion for judgment on the pleadings is brought on the basis of the affirmative defense of statute of limitations, the interests of justice are best served if the trial court considers the motion at a preliminary hearing instead of waiting until trial.

V. *CONCLUSION*

Because fact questions exist as to whether Hebert's second amended complaint bringing FDA into the lawsuit related back to her initial complaint against Honest Bingo, FDA was not entitled to judgment on the pleadings under Rule 12(c). We therefore REVERSE the decision of the superior court and REMAND for proceedings consistent with this opinion.

24. *See Siemion v. Rumfelt*, 825 P.2d 896, 898-99 (Alaska 1992).

25. Alaska R. Civ. P. 15(c).

26. *See generally West v. Buchanan*, 981 P.2d 1065, 1068-71 (Alaska 1999). Several federal courts have held that amendments in which a plaintiff replaces a "John Doe" defendant with a named defendant are considered amendments to add new parties and will relate back only when the conditions of Rule 15(c) are satisfied. *See* 6A Wright & Miller, *supra* § 1498, at 105-06; *see also Craig v. United States*, 413 F.2d 854 (9th Cir.1969).

27. The parties do not dispute that the first requirement—that the claim against FDA arise out of the same basic claim in the complaint against Honest Bingo—is satisfied.

28. Hebert may have available to her a second avenue for relief. If she can demonstrate that Honest Bingo was a partnership or a joint venture of which Monroe Foundation and FDA were partners or joint venturers, it may not be necessary for the second amended complaint to relate back to the original complaint since service of the timely original complaint on Honest Bingo or the Monroe Foundation may be found sufficient to constitute service on FDA. *See* Alaska R. Civ. P. 4(d)(5); *Coleman v. Lofgren*, 593 P.2d 632, 634 (Alaska 1979).

29. *See* Alaska R. Civ. P. 4(j) (allowing 120 days after filing for service of process). The record shows that by October 31, 1996, FDA had refused to participate in settlement negotiations, but the record is silent as to how long before that time FDA was aware of Hebert's claims.

30. A Civil Rule 12(c) motion can be converted into a Rule 56 motion for summary judgment when the trial judge considers materials outside the pleadings. *See* Alaska R. Civ. P. 12(c). However, here the superior court explicitly stated that it did not consider matters outside the pleadings. Even if this court were to consider the additional materials contained in the record, it is still unclear whether FDA had notice of Hebert's lawsuit and knew or should have known that it would have been initially included as a defendant if Hebert had been aware of its identity.

31. 5A Wright & Miller § 1367, at 517. *See Pedersen v. Zielski*, 822 P.2d 903, 907 n. 4 (Alaska 1991).

SAVAGE ARMS, INC., Petitioner,

v.

WESTERN AUTO SUPPLY CO., Respondent.

Nos. 8612, 8721, 8511.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

Father brought products liability action against manufacturer and distributor of allegedly defective rifle, seeking recovery for injuries sustained by his minor son when rifle misfired. Distributor filed third-party complaint seeking indemnification from manufacturer's successor. The Superior Court, Third Judicial District, Kenai, Jonathan H. Link, J., concluded that law of Alaska governed suc-

cessor liability issue, entered judgment in favor of distributor on its third-party claim, and denied successor's motion to substitute distributor's insurers for distributor as real parties in interest. Successor petitioned for review. The Supreme Court, Eastaugh, J., held that: (1) law of Alaska governed issue of liability of rifle manufacturer's successor; (2) genuine issues of material fact existed as to whether successor was liable for injuries caused by rifle; and (3) distributor's insurers were proper parties to prosecute third-party indemnity claim.

Reversed and remanded.

1. Appeal and Error ⇐842(1)

The appropriate choice of law is a legal question to which the Supreme Court applies its independent judgment.

2. Appeal and Error ⇐842(1)

The Supreme Court answers legal question of first impression by adopting the rule of law that is most persuasive in light of precedent, reason, and policy.

3. Appeal and Error ⇐863

The Supreme Court will affirm a grant of summary judgment only if the record presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

4. Appeal and Error ⇐893(1), 949

Generally the Supreme Court will review rulings on joinder and ratification for abuse of discretion, but will review de novo the underlying legal questions, such as whether a party is a real party in interest.

5. Action ⇐27(1)

In the context of a claim that a defective product has caused personal injury, successor liability is most appropriately characterized as a torts question.

6. Weapons ⇐18(1)

Law of Alaska governed issue of liability of rifle manufacturer's successor in products liability action brought by father whose minor son was injured when allegedly defective rifle misfired, where father and son were Alaska residents, rifle was purchased in Alaska, and injury occurred in Alaska, even though successor's purchase of manufacturer's business occurred in Texas.

7. Corporations ⇐445.1

Generally, when one corporation sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company.

8. Corporations ⇐445.1, 590(1)

There are four exceptions to the general rule of non-liability of successor corporations: (1) the purchaser has expressly or implicitly agreed to assume liability; (2) the asset purchase amounts to a consolidation or merger; (3) the purchasing corporation is a "mere continuation" of the selling corporation; or (4) the transfer amounts to little more than a "sham" transaction to avoid liabilities.

9. Corporations ⇐445.1

Liability will be imposed on a successor corporation for the debts and liabilities of the selling company under the mere continuation exception where the successor continues to use the seller's name, location, and employees, and there exists a common identity of stockholders and directors.

10. Corporations ⇐445.1

The "mere continuation" exception to successor nonliability is available to claimants seeking to impose liability on a successor corporation for defective products manufactured by the predecessor.

11. Corporations ⇐445.1

Under the modern "continuity of enterprise" exception to successor nonliability, a successor corporation may be held liable for injuries caused by its predecessor's defective products where the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise.

12. Corporations ⇐445.1

Under the modern "continuity of enterprise" exception to successor nonliability, the successor corporation may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.

13. Corporations ⇐445.1

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

14. Judgment ⇐181(15.1)

Genuine issues of material fact existed as to whether rifle manufacturer's successor was liable for injuries caused by misfire of allegedly defective rifle, precluding summary judgment on third party indemnification claim filed against successor by distributor in connection with underlying products liability action.

15. Evidence ⇐244(7)

Statements attributed to successor corporation's chief executive officer that successor corporation held itself out to world as legal successor to rifle manufacturer whose assets it purchased were non-hearsay admissions of party-opponent with respect to third-party indemnity action brought by rifle distributor in connection with underlying products liability action against distributor and manufacturer. Rules of Evid., Rule 801(d)(2).

16. Evidence ⇐244(7), 318(1)

To extent journal articles were offered to prove truth of assertion that statements attributed to chief executive officer, that corporation held itself out to world as legal successor to rifle manufacturer, were in fact made by officer, authors of articles were the declarants, and such articles could not qualify as non-hearsay admissions of party-opponent with respect to third-party indemnity action brought by rifle distributor in underlying products liability; if articles were offered for their truth on remand, trial court would have to address author-as-declarant issue. Rules of Evid., Rule 801(d)(2).

17. Indemnity ⇐15(2)

Rifle distributor's insurers were proper parties to prosecute third-party indemnity claim brought by distributor against manufacturer's successor, where insurers had fully discharged distributor's liability in underlying products liability action. Rules Civ.Proc., Rule 17(a).

Theodore M. Pease, Jr., and Michael W. Sewright, Burr, Pease & Kurtz, Anchorage, for Petitioner.

James M. Powell and Kimberlee A. Colbo, Hughes, Thorsness, Powell, Huddleston & Bauman, LLC, Anchorage, for Respondent.

Before MATTHEWS, Chief Justice, EASTAUGH, FABE, BRYNER, and CARPENETI, Justices.

OPINION

EASTAUGH, Justice.

I. *INTRODUCTION*

Can a corporation that purchases assets of the manufacturer of a rifle sold in Alaska be held liable for personal injury caused in Alaska by a defect in the rifle? The superior court held that it could, and we agree. But we reverse and remand for application of the pertinent successor liability doctrines discussed below. We also hold that the indemnity claim brought by the rifle's distributor against the successor corporation must be prosecuted by the insurers which fully discharged the distributor's personal injury liability.

II. *FACTS AND PROCEEDINGS*

The relevant facts are few. Jack Taylor's minor son suffered personal injuries when a defective 22 caliber rifle discharged during target shooting near Nikiski. Savage Industries, Inc. manufactured the rifle, and Western Auto Supply Company, which claimed to have acquired the rifle from the manufacturer, sold it to a retail store in Maine; the rifle was eventually resold to Jack Taylor in Alaska. Taylor sued Savage Industries in 1990 for his son's injuries; in an amended complaint, he also sought recovery from Western Auto.

Western Auto filed a third-party complaint in its name seeking indemnity from Savage

Arms, Inc., which had purchased assets from Savage Industries in 1989. Western Auto settled with the Taylors in May 1995, and its insurers paid the entire settlement amount.

At issue here are three superior court orders. The first held that Alaska law governs the issue of successor liability. The second granted Western Auto summary judgment against Savage Arms, holding Savage Arms liable as "the legal successor to Savage Industries, Inc." The third denied Savage Arms' motion to substitute Western Auto's insurers for Western Auto as the real parties in interest, but required the insurers to ratify the litigation.

The superior court denied Savage Arms' motions for reconsideration. We granted Savage Arms' petitions for review and ordered full briefing. We review the three orders under AS 22.05.010 and Alaska Rule of Appellate Procedure 402.

III. *DISCUSSION*

A. *Standard of Review*

[1-3] The appropriate choice of law is a legal question to which we apply our independent judgment.[1] The scope of successor liability in Alaska is a legal question of first impression, which we answer by adopting "the rule of law that is most persuasive in light of precedent, reason, and policy."[2] In applying rules of successor liability to this case, we will affirm Western Auto's summary judgment only if the record presents no genuine issues of material fact and Western Auto is entitled to judgment as a matter of law.[3]

[4] Although we generally review rulings on joinder and ratification for abuse of discretion,[4] we review de novo the underlying legal questions,[5] such as whether a party is a real party in interest under Alaska Civil Rule 17(a).

B. *Choice of Law*

Savage Arms challenges the superior court's ruling that Alaska law governs the issue of successor liability. It argues that Texas law should apply because all transactions relevant to its purchase of Savage Industries' assets occurred in Texas. In Savage Arms' view, the case before the court deals with the transaction between Savage Arms and Savage Industries, and the underlying tort does not bear on the choice of law question.[6]

Western Auto defends the superior court's decision, contending that Alaska law should apply because the underlying injury occurred in Alaska. Western Auto also reasons that successor liability is but an extension of products liability law, which is itself a tort doctrine.

Texas statutory and case law seems to disfavor both traditional and modern doctrines of successor liability,[7] but neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case.

1. *See Langdon v. Champion*, 752 P.2d 999, 1001 (Alaska 1988).

2. *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

3. *See Newton v. Magill*, 872 P.2d 1213, 1215 (Alaska 1994).

4. *See Fairbanks N. Star Borough v. Kandik Constr., Inc. & Assoc.*, 795 P.2d 793, 802–03 (Alaska 1990), *vacated in part on other grounds*, 823 P.2d 632 (Alaska 1991).

5. *See Langdon*, 752 P.2d at 1001.

6. Savage Arms invokes our opinion in *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968), in which we held that Alaska law governs the question of interspousal tort immunity, even though the auto accident that inspired the tort suit occurred in Canada. *See id.* at 700–01. There, we treated the interspousal immunity question independently of the underlying tort question, and focused on the spousal relationship between the parties to the lawsuit. *See id.* But to apply the *Armstrong* approach here only begs the question of whether successor liability should be treated as wholly independent. *Armstrong* does not control.

7. *See* Tex. Bus. Corp. Act Ann. art. 5.10(B)(2) (Vernon 1997); *Mudgett v. Paxson Mach. Co.*, 709 S.W.2d 755, 758–59 (Tex.App.1986); *see also McKee v. American Transfer & Storage*, 946 F.Supp. 485, 487 (N.D.Tex.1996). *But see Western Resources Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783, 786 (Tex.Civ.App.1977) (noting exceptions for merger, consolidation, and fraud).

We look to the Restatement (Second) of Conflict of Laws for guidance in resolving choice-of-law issues.[8] The Second Restatement requires a separate choice-of-law analysis for each issue presented.[9] We likewise follow this rule of dépeçage,[10] and determine the proper choice of law on the issue of successor liability without regard to other issues in the case.

Before we can address which state's law should apply to this issue, we must first determine whether successor liability is better characterized in terms of contract or tort.[11] In one sense, successor liability derives from corporate and contract law, because it may require the interpretation of the contracts that governed the transfer of assets between corporations. But successor liability is also a creature of tort law when it is claimed that the successor is liable because a product defect has caused injury or death.

Other jurisdictions are split as to whether successor liability should be evaluated using the choice-of-law rules governing tort or corporate and contract law. The Fifth Circuit, for example, has held that the law of the state with the most significant corporate contacts should apply to successor liability questions.[12] The Seventh Circuit held similarly in *Ruiz v. Blentech Corp.*[13] But several federal district courts have explicitly applied the law of the state with the most significant torts contacts,[14] and state courts have split on the question.[15]

[5] We decline to follow the Fifth and Seventh Circuits, because we believe that when a defective product causes personal injury, successor liability is most appropriately characterized as a torts question. Successor liability is essentially an expansion of products liability law, which derives from tort principles of negligence and strict liability, and rejects contract-derived requirements such as privity. The purpose of the modern strict liability regime "is to insure that the cost of injuries resulting from defective products [is] borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[16] Treating a successor liability question solely as one of contract law would allow "the party who benefitted from

8. *See, e.g., Palmer G. Lewis Co. v. ARCO Chemical Co.*, 904 P.2d 1221, 1227 (Alaska 1995) ("When choice of law issues arise, we commonly refer to the *Restatement (Second) of Conflicts* for guidance.")

9. *See* Restatement (Second) of Conflict of Laws § 145 cmt. d (1971) ("The courts have long recognized that they are not bound to decide all issues under the local law of a single state."); *Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir.1996) (holding that under the Second Restatement test, "[a] court therefore conducts a separate choice-of-law analysis for each issue in a case, attempting to determine which state has the most significant contacts with that issue.").

10. *See* Black's Law Dictionary 448 (7th ed.1997) (defining dépeçage as "[a] court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis"); *see also* Bryan A. Garner, A Dictionary of Modern Legal Usage 2666 (2d ed.1995).

11. *See, e.g., Ruiz*, 89 F.3d at 326 ("[T]he courts of several states have struggled to decide whether [successor liability law] is a part of corporate law or tort law.").

12. *See Webb v. Rodgers Mach. Mfg. Co.*, 750 F.2d 368, 374 (5th Cir.1985).

13. 89 F.3d 320, 326 (7th Cir.1996).

14. *See, e.g., Ede v. Mueller Pump Co.*, 652 F.Supp. 656, 658 n. 1 (D.Colo.1987), *disagreed with on different grounds, Flamm v. Elliott Mfg.*, 867 F.2d 570, 579–80 (10th Cir.1989); *Reed v. Armstrong Cork Co.*, 577 F.Supp. 246, 248 (E.D.Ark.1983); *Koretz v. Amsted Indus.*, 472 F.Supp. 136, 141–42 (E.D.Mich.1979), *declined to follow on other grounds, Johnson v. Ventra Group, Inc.*, 191 F.3d 732, 746 (6th Cir.1999).

15. *See, e.g., In re Asbestos Litigation (Bell)*, 517 A.2d 697, 699 (Del.Super.1986) (holding that corporate law should apply because key question was legal effect of contracts between corporations); *American Nonwovens, Inc. v. Non Wovens Eng'g, S.R.L.*, 648 So.2d 565, 570 (Ala.1994) (holding that conflict rule for tort cases should apply to corporate successor liability issue). *See also* David W. Pollak, *Successor Liability in Asset Acquisitions*, 1126 PLI/Corp 85, 107–12 (1999) (discussing different jurisdictions' approaches to choice-of-law issues for successor liability claims).

16. *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 878 (Alaska 1979) (quoting *Clary v. Fifth Ave. Chrysler Ctr., Inc.*, 454 P.2d 244, 248 (Alaska 1969)); *see also Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 900–01 (1963).

the bargain [to] escape liability even though the party who transferred the benefit would have been liable had not the contract been consummated."[17] Such a result would undermine the principles that govern our products liability law. And although Savage Arms argues that the public policy behind products liability law is of "little interest" here because Western Auto purchased liability insurance that fully protected it, Western Auto's suit does not pursue a commercial cause of action. Because Western Auto's insurers settled the personal injury suit, Western Auto now stands in the tort plaintiff's shoes.

Thus, in context of a claim that a defective product has caused personal injury, we think successor liability is more aptly treated as a matter of tort law.

[6] Having determined that successor liability in a products liability context is best characterized as part of the law of tort, we must now decide which state's laws should apply to the case at hand. The Second Restatement states that "with respect to an issue in tort," courts should look to the local law of the state with the "most significant relationship" to the parties and the occurrence.[18] We conclude that Alaska has the most significant torts contacts with this legal issue. We look in particular to the underlying tort action that gave rise to this litigation. Jack Taylor and his son were both Alaska residents when the accident occurred. Taylor purchased the rifle in Alaska, and the rifle was being used here, where its defect injured his son. The defect that injured Taylor's son potentially endangered any person within a lethal vicinity while the rifle was being used in Alaska. Finally, Jack Taylor litigated his suit against Western Auto in Alaska's state courts. Because the relationship between the tort litigants is centered in Alaska, Alaska law should govern.

We therefore conclude that the superior court did not err by concluding that Alaska law applies to the issue of successor tort liability.

C. *Successor Liability*

Savage Arms challenges Western Auto's summary judgment on the issue of successor liability. It argues that it should not be held liable even if Alaska law applies. This argument raises issues of first impression in Alaska.

[7, 8] Generally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company.[19] Courts have traditionally recognized four exceptions to this rule of non-liability, where (1) the purchaser expressly or implicitly agrees to assume liability, (2) the asset purchase amounts to a consolidation or merger, (3) the purchasing corporation is a "mere continuation" of the selling corporation, or (4) the transfer amounts to little more than a "sham" transaction to avoid liabilities.[20] More recently, some courts have recognized three additional "modern" exceptions to the rule of non-liability: the "continuity of enterprise," "product line," and "duty-to-warn" exceptions.[21]

Western Auto argues that we should adopt any one of three different successor liability doctrines in this case: the traditional "mere continuation" exception and the modern "continuity of enterprise" and "product line" exceptions. We first identify which exceptions are available under Alaska law, and then remand for the factual analysis necessary to ascertain whether successor liability is proper in this case under any of the approved

17. *Korzetz*, 472 F.Supp. at 141.

18. *See* Restatement (Second) of Conflict of Laws § 145(1). To determine the place of most significant relationship, we look to:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

Id. § 145(2). We evaluate these factors and contacts in light of their "relative importance" to the particular issues in each case. *Id.*

19. *See* Pollak, *supra* note 15, at 99; *see also* Richard A. Epstein, *Torts* 400–02 (1999).

20. *See* Pollak, *supra* note 15, at 100–03.

21. *See id.* at 103–08.

exceptions. The superior court did not specify which exception justified its imposition of successor liability against Savage Arms.

1. *The traditional "mere continuation" exception*

[9] Courts have traditionally imposed liability on successor corporations where the successor corporation is "merely a continuation" of the selling corporation.[22] The primary elements of the "mere continuation" exception include use by the buyer of the seller's name, location, and employees, and a common identity of stockholders and directors.[23] This well-established exception stems from judicial refusal to honor a transaction which is "little more than a shuffling of corporate forms, lacking any fundamental change with independent significance."[24]

[10] The "mere continuation" exception is available to claimants seeking to impose liability on a successor corporation for products manufactured by a predecessor. Although Savage Arms argues that we should not adopt this exception, we disagree, because this is a well-recognized exception, and we see no reason to reject its application here. We therefore hold that it is available under Alaska law.

2. *The modern "continuity of enterprise" exception*

Western Auto also asks us to adopt the modern "continuity of enterprise" and "product line" exceptions. We conclude that the facts in this case are ill-suited to the "product line" exception, and we therefore decline to consider it at this time.[25] We do, however, adopt the "continuity of enterprise" exception, for the reasons explained below.

[11, 12] The "continuity of enterprise" exception is an outgrowth of the traditional "mere continuation" theory of liability.[26] Under this exception, a successor corporation may be held liable for injuries caused by its predecessor's products where the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise.[27] The successor may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.[28]

[13] 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.[29] The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*,[30] are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation

22. *See id.* at 101.

23. *See id.*; *see also* Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 Fla. J. Int'l L. 365, 371 (1996) ("The doctrine ... is applicable only where the successor has the same stockholders as the predecessor and conducts the same business with the same management, facilities, employees, products, and trade names.").

24. Blumberg, *supra* note 23, at 371.

25. Under the "product line" exception, a successor will be liable if it acquires substantially all of the predecessor's assets and undertakes essentially the same manufacturing operation of the same or similar products. *See Ray v. Alad Corp.*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3, 8–11 (1977); 63 Am.Jur.2d *Products Liability* § 133 (1997); Pollak, *supra* note 15, at 104–16. Because the facts in this case seem ill-suited to this exception, we decline to evaluate the wisdom of adopting the "product line" theory at this time. Our decision today does not preclude further consideration of this exception in an appropriate case.

26. *See* Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. Ill. L. Rev. 845, 848 & n. 16 (1999).

27. *See* 63 Am.Jur.2d *Products Liability* § 129.

28. *See Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873, 883–84 (1976); Cupp, *supra* note 26, at 848–49.

29. *See* 63 Am.Jur.2d *Products Liability* § 130.

30. 397 Mich. 406, 244 N.W.2d 873 (1976).

of corporate identity.[31] 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.

Only a minority of courts have thus far adopted the "continuity of enterprise" exception.[32] And the American Law Institute recently declined to adopt both this exception and the "product line" exception for the Restatement (Third) of Torts.[33] The Third Restatement's commentary indicates that the vast majority of courts considering these modern exceptions have rejected them.[34] Although there is some dispute about exactly how many jurisdictions have decided the issue,[35] it is clear that a majority of jurisdictions have not adopted the "continuity of enterprise" exception.

Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise.[36] For example, they assert that a buyer interested in purchasing substantially all of the assets of a corporation will, in some cases, decline to make the purchase if it will be forced to assume liability for past product defects as well. As a result, some corporations will be unable to find purchasers, and will instead be forced to sell off the corporate assets on a piecemeal basis, squandering any accumulated goodwill.[37] Such a piecemeal sale would give a corporation certain economic advantages: the seller's shareholders would be able to receive full value for the remaining assets, and successor liability would not flow to the purchasers under any of the traditional or modern theories.[38] But a piecemeal sale would cause an ongoing business to be lost to society, and potential claimants would be no better off.

This argument, although compelling in theory, seems to paint an incomplete picture of the economic realities. If successor liability is expanded to include the "continuity of enterprise" exception, some companies indeed might be unable to find buyers for their ongoing businesses. But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception (or the marginally more popular "product line" exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales.[39] And our research has not disclosed studies that have so concluded.

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.[40] 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.[41] 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.[42] 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.[43]

The same reasoning applies to the Restatement authors' concerns regarding potential "windfalls."[44] In many cases, a predecessor manufacturing company will be purchased by a larger, more financially-sound corporation. The rule we adopt here does not limit injured plaintiffs' recovery to the value of the assets purchased by the successor corporation, so there could conceivably be situations in which product defect victims would receive a larger recovery than they conceivably could have received had the predecessor company remained an ongoing concern, and been bankrupted by the total claims. The Restatement authors view the added recovery potential as an "injustice" to the successor corporation.[45] But we think the 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. And once again, purchasing corporations can attempt to account for this risk of loss in the purchase price.

The other objections to expanded successor liability rules are also not dispositive. Successor liability potentially conflicts with maximizing the value received for bankrupt estates.[46] But we see no persuasive reason to favor corporate creditors over claimants later injured by the seller corporation's products.[47] Also, some courts have argued that the modern exceptions impose liability on entities having no causal relationship with the harm.[48] But basic to the "continuity of enterprise" exception is the preservation of a substantial portion of the goodwill of the predecessor corporation; the successor is fundamentally the same enterprise as the predecessor. When a firm negotiates to purchase another corporation, keeping the

31. *See id.* at 883–84; *see also* Pollak, *supra* note 15, at 103; 63 Am.Jur.2d *Products Liability* § 132.

32. *See* Restatement (Third) of Torts: Products Liability § 12, Reporters' Note at 215–19 (1998).

33. *See id.* § 12 cmt. b at 210 & Reporters' Note at 215–19.

34. *See id.* § 12, Reporters' Note at 217–18. The Restatement identifies only three states where courts have adopted the "continuity of enterprise" exception: Alabama, Michigan, and New Hampshire. *See id.* at 219.

35. The Third Restatement lists twenty-two states in which state courts (or federal courts applying state law) have rejected both the "continuity of enterprise" and "product line" exceptions. *See id.* § 12, Reporters' Note at 217–18. But one commentator estimates that only eighteen jurisdictions as of mid–1998 had actually rejected the modern exceptions, when considering those states whose highest courts had yet to rule on the issue. *See* Cupp, *supra* note 26, at 852–54. Professor Cupp states that courts interpreting the law of Mississippi, Ohio, and South Carolina have also recognized and adopted the "continuity of enterprise" exception. *See* Cupp, *supra* note 26, at 854 n. 44.

36. *See* Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 211; Epstein, *supra* note 19, at 400–01; Michael D. Green, *Fairness and Successor Liability: The Limits of the Common Law Process*, 8 Kan. J.L. & Pub. Pol'y 119, 121 (1998).

37. *See* Epstein, *supra* note 19, at 401; Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 211.

38. *See* Epstein, *supra* note 19, at 401–02; Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 211.

39. *See, e.g.*, Restatement (Third) of Torts: Products Liability § 12 cmt. b at 211 & Reporters' Note at 215–21; Epstein, *supra* note 19, at 400–02; Green, *supra* note 36, at 121.

40. *See* Cupp, *supra* note 26, at 861–77.

41. *See* Michael D. Green, *Successor Liability: the Superiority of Statutory Reform to Protect Product Liability Claimants*, 72 Cornell L.Rev. 17, 40 (1986).

42. *See id.* at 40; Cupp, *supra* note 26, at 862 n. 90.

43. *See* Epstein, *supra* note 19, at 402 (explaining that corporations are learning to navigate modern successor liability rules).

44. *See* Restatement (Third) of Torts: Products Liability § 12 cmt. b., at 210–11.

45. *Id.* at 210.

46. *See* Michelle M. Morgan, *The Denial of Future Tort Claims in In Re Piper Aircraft: Will the Court's Quick-Fix Solution Keep the Debtor Flying High or Bring it Crashing Down?*, 27 Loy. U. Chi. L.J. 27, 36–37 (1995).

47. Nonetheless, federal bankruptcy law may govern whether potential claims for injuries not yet incurred may be discharged in a bankruptcy proceeding. In this case, the First Circuit has ruled that there is no discharge of Western Auto's claims. *See infra* note 56.

48. *See, e.g., Polius v. Clark Equip. Co.*, 802 F.2d 75, 82–83 (3d Cir.1986); *Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141, 1144 (Colo.App.1992); *see also* Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 210.

"enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of causation would give the successor an unwarranted windfall.

Finally, 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.[49] Corporations are currently motivated to correct defects to reduce their own exposure to liability, but the traditional successor liability regime undermines that incentive by giving the manufacturing corporation another option: offering itself for sale to a new investor. Without successor liability, the original shareholders can receive full compensation for the current value of the firm, without sharing the burden caused by any defective products manufactured before the sale. The rule we announce today will give manufacturing corporations additional incentives to market non-defective products, in order to maximize the corporations' market value in event of sale.[50]

Some commentators,[51] including the Restatement authors,[52] reason that legislatures are better situated than courts to define the parameters of successor liability. But we think this is an appropriate subject for judicial decision because it is directly related to products liability law, a doctrinal road long traveled by courts.[53] For example, the four traditional exceptions were created by the courts.[54] There is also some suggestion that legislation in other states has failed to address these problems.[55] We see no reason to await legislation before addressing this issue.

We therefore adopt the "continuity of enterprise" exception to the general rule of nonliability for corporate successors.

3. *Propriety of the summary judgment order*

[14] Although we here approve the "mere continuation" and "continuity of enterprise" exceptions, it is nonetheless necessary to reverse Western Auto's summary judgment order for two reasons. First, material factual disputes remain unresolved. Many key facts are uncontested, but certain important facts (such as the percentage of stock former shareholders in Savage Industries own in Savage Arms) are not established by the record. Second, the uncertainty regarding the proper legal standard governing successor liability appears to have prevented the parties from developing the record to address the applicable legal tests. We consequently remand for consideration of the "mere continuation" and "continuity of enterprise" exceptions in the context of this case.

We also note that Savage Arms is not shielded from liability by the fact that it purchased Savage Industries' assets through a bankruptcy proceeding. The First Circuit ruled in a related aspect of this case[56] that Western Auto and Taylor were not "afforded appropriate notice of the material terms of the all-asset transfer, nor of the chapter 11 plan" and therefore that the parties to the transfer, Savage Industries and Savage

49. *See* Cupp, *supra* note 26, at 860-63 (arguing that greater successor liability will channel responsibility back to original product manufacturer).

50. *See id.* This incentive holds true until the firm knows that its liabilities will outstrip any goodwill available to be sold. But companies in that position would not be relevant to this successor liability issue, because no buyer would pay for an ongoing concern valued at less than its assets.

51. *See, e.g.*, Green, *supra* note 41.

52. *See* Restatement (Third) of Torts: Products Liability § 12, Reporters' Note at 216-17.

53. *See* Cupp, *supra* note 26, at 877-78.

54. *See* Cupp, *supra* note 26, at 878.

55. *See* Cupp, *supra* note 26, at 879-83.

56. In April 1992 Western Auto filed a third-party complaint against Savage Arms for indemnification or apportionment of damages. Savage Arms contended that Western Auto's claims were barred by the terms of Savage Industries' bankruptcy. The First Circuit Court of Appeals ultimately resolved the issue in Western Auto's favor in December 1994. *See Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 723 (1st Cir.1994).

Arms, "are not entitled to rely on the protective jurisdiction of the bankruptcy court."[57] The failure to give proper notice and to seek approval of the plan from the bankruptcy court "precluded a legitimate basis for enjoining the Alaska state court action."[58]

D. *Journal Articles as Inadmissible Hearsay*

[15, 16] Savage Arms argues that the superior court abused its discretion by considering journal articles Western Auto submitted in support of its summary judgment motion. These articles included statements attributed to Savage Arms' chief executive officer supporting Western Auto's argument that Savage Arms holds itself out to the world as the legal successor to Savage Industries. Savage Arms asserts that the articles contain multiple levels of hearsay. Since we remand for other reasons, it is unnecessary to discuss this issue at length. But we address it briefly here because it may recur on remand. For purposes of our discussion, we assume that the CEO uttered the statements attributed to him.

In effect, the statements were uttered at least twice, first by Savage Arms' CEO and ultimately by the articles' authors upon publication. When the statements were first uttered, the declarant was Savage Arms' CEO and the statements were not hearsay, because they were admissions by a party-opponent.[59] But when the articles were offered to prove the truth of their assertions—that the CEO had made the statements the articles attributed to him—their authors became the declarants whose out-of-court statements were being offered into evidence. If the articles were offered for their truth, they normally would have been inadmissible hearsay.[60] The superior court rejected Savage Arms' hearsay objection, but so far as we can tell from the record, did not address the author-as-declarant issue. Whether it must do so on remand depends on whether the articles are offered for the truth of the matters they assert.

E. *Real Parties in Interest*

[17] Western Auto's liability insurers, Allstate Insurance Company and Certain Underwriters at Lloyd's of London (Underwriters), fully paid the expenses of defending and settling the Taylor lawsuit against Western Auto. Savage Arms moved to substitute the insurers as the plaintiffs in Western Auto's indemnity action. Savage Arms claimed that the insurers were the only real plaintiffs in interest under Alaska Civil Rule 17(a).[61] The superior court denied the motion, but at Western Auto's suggestion allowed the insurers to ratify the action or be subject to substitution.

We agree with Savage Arms that it was error not to substitute Western Auto's insurers as the real parties in interest. Western Auto admits that Allstate and the Underwriters are its fully subrogated insurers. Western Auto has identified no possible remaining interest it has in the indemnity claim. The superior court reasoned that Western Auto had an interest in the claim that was "difficult to define," and that joinder of the insurers might present an inaccurate picture to the jury. The court did not explain what Western Auto's interest was.

Although we have not previously addressed the proper procedural treatment of fully subrogated insurers, we held in *Municipality of Anchorage v. Rough Construction & Engineering Co.*[62] that ratification by partially subrogated insurers is an acceptable

57. *Id.*

58. *Id.* at 722.

59. *See* Alaska R. Evid. 801(d)(2) (defining statements by party opponents as non-hearsay).

60. Alaska R. Evid. 802.

61. Alaska Civil Rule 17(a) provides in relevant part:

> Every action shall be prosecuted in the name of the real party in interest.... [A] party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.... [R]atification, joinder, or substitution [of the real party in interest] shall have the same effect as if the action had been commenced in the name of the real party in interest.

62. 722 P.2d 919 (Alaska 1986).

substitute for joinder.[63] We there reasoned that Rule 17(a) did not require joinder of a partially subrogated insurer because ratification satisfied the policy concerns underlying that rule.[64] We explained that ratification is generally adequate in cases involving partially subrogated insurers because it protects against multiple lawsuits, ensures that the interested party makes a formal appearance in court, ensures that the party is subject to any court orders concerning discovery or attorney's fees, and assures that all interested parties bear the burdens of claims litigated on their behalf.[65] Implicitly acknowledging the key distinction between partially and fully subrogated insurers, we noted that the insured party was not a sham plaintiff because its claim had not been paid in full by the insurer:

> We further note that [the insurer's] absence as a named party in this case does not mean that the action would be prosecuted by a sham plaintiff. The municipality was a real party in interest as the amount of its claim had not been paid in full by [the insurer].[66]

This language implies that where, as here, the insurer *has* paid the full amount, the insured would be a sham plaintiff.

We have relied before on a Montana Supreme Court case, *State ex rel. Nawd's T.V. & Appliance Inc. v. District Court*,[67] in determining the proper procedural treatment of insurers.[68] The plaintiffs in *Nawd's T.V.* had received varying levels of compensation from their partly and fully subrogated insurers.[69] Although the court held that partially subrogated insurers could opt for ratification rather than substitution or joinder, it effectively upheld a lower court's ruling requiring substitution of fully subrogated insurers.[70]

Critical commentary bears out the significance of this distinction:

> The general rule in the federal courts is that if the insurer has paid the entire claim, it is the real party in interest and must sue in its own name. If no money or enforceable promise to pay money has been advanced, then there has not been any subrogation and the insured remains the real party in interest. This seems sound since it is logical that an insured who has no interest in the outcome of the litigation may not bring suit.[71]

We find this reasoning persuasive, and conclude that it was error not to require the insurers to substitute for their insured.

IV. *CONCLUSION*

We REVERSE the order denying Savage Arms' motion to require Western Auto's insurers to substitute for Western Auto, VACATE the orders imposing successor liability on Savage Arms, and REMAND for application of the doctrines adopted today and for further proceedings.

63. *See id.* at 926.

64. *See id.* at 925-26.

65. *See id.*

66. *Id.* at 926.

67. 168 Mont. 456, 543 P.2d 1336 (1975).

68. *See Baugh*, 722 P.2d at 926.

69. *See Nawd's T.V.*, 543 P.2d at 1337.

70. *See id.* at 1338-39.

71. 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1546, at 355-56 (2d ed.1990) (footnotes omitted).

Sally K. SLOANE, Appellant,

v.

George R. SLOANE, Appellee.

No. S-9195.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

Divorce judgment was entered by the Superior Court, Third Judicial District, Anchorage, Eric T. Sanders, J., and wife appealed. The Supreme Court, Carpeneti, J., held that: (1) record supported finding that $25,000 note that husband received from parties' son in connection with his purchase of parties' business was worth $10; (2) record supported assignment of 57% of marital property to wife; (3) wife was not entitled to have husband pay her future medical costs; (4) wife was not entitled to bifurcation of legal divorce; (5) wife was not entitled to travel and living expenses incurred by attending trial in Alaska; and (6) attorney fee award to wife of $3,186 was sufficient.

Affirmed.

1. Divorce ⇐252.1

The trial court has broad discretion in fashioning property divisions in divorce actions. AS 25.24.160(a)(4).

2. Divorce ⇐286(8)

The valuation of marital property is a factual determination which will not be set aside on appeal unless it is clearly erroneous. AS 25.24.160(a)(4).

3. Divorce ⇐286(8)

A valuation of marital property is clearly erroneous and should be set aside if the reviewing court is left with a definite and firm conviction on the entire record that a mistake has been made. AS 25.24.160(a)(4).

4. Divorce ⇐286(5)

The superior court's equitable distribution of property is reviewable under the abuse of discretion standard, and will not be disturbed on appeal unless it is clearly unjust. AS 25.24.160(a)(4).

5. Divorce ⇐223, 286(4)

The award of attorney's fees in divorce actions is within the broad discretion of the trial court, and the court's decision in that regard will not be reversed unless it is arbitrary, capricious, or manifestly unreasonable.

6. Divorce ⇐253(3)

Record in divorce case supported finding that, for equitable distribution purposes, $25,000 note that husband received from parties' son in connection with his purchase of parties' business was worth $10, husband signed sale agreement under time constraints on terms determined unilaterally by wife's attorney, and wife presented no evidence to refute husband's claim that business would not have sufficient funds to repay note. AS 25.24.160(a)(4).

7. Divorce ⇐253(2)

Record in divorce case supported assignment of 57% of marital property to wife, despite her claim that trial court did not sufficiently consider wife's age, i.e., 60; court did not find wife's age to be important because husband was of comparable age and both were approaching retirement. AS 25.24.160(a)(4).

8. Divorce ⇐282, 283

Wife waived appellate of her claim that, in awarding wife only 57% of marital estate, trial court did not consider wife's station in life during marriage; wife neither raised that issue before superior court nor presented evidence or argument in her briefs that would have made her station in life relevant to property distribution. AS 25.24.160(a)(4).

9. Divorce ⇐253(2)

Record did not support claim that, in awarding wife only 57% of marital estate, trial court did not consider wife's health; court simply was not convinced that wife needed any surgeries that she alleged, court also commented that wife's treatment might have been overly expensive, and court concluded that wife's health concerns were not so serious as to prevent her from continuing to work in future. AS 25.24.160(a)(4).

10. Divorce ⇐286(9)

Even if trial court incorrectly concluded in divorce case that wife was capable of being gainfully employed, any such error was harmless with respect to marital property division, as court valued wife's future earnings at zero. AS 25.24.160(a)(4).

11. Divorce ⇐239

Record in divorce case supported trial court's refusal to require husband to pay wife's future medical costs; superior court found that because wife received in excess of 50% of marital estate and because she was

MEMORANDUM

RE: Procedural Status of Western Auto Supply Co. (now Allstate Insurance Company and Certain Underwriters at Lloyd's of London) pending in the Superior Court for the State of Alaska, Third Judicial District at Kenai, Case No. 2KN-90-922 CI

DATE: February 12, 2002

Western Auto v. Savage Arms, Inc. is still a pending case in the Kenai Superior Court. The decision of the Supreme Court in *Savage Arms, Petitioner v. Western Auto Supply Co., Respondent*, 18 P.3d 49 (Alaska 2001) was an interlocutory decision by the Supreme Court on a petition for review. Western Auto and Savage Arms, Inc. filed cross-motions for summary judgment on the question of whether Savage Arms was liable as the "legal successor to Savage Industries, Inc." Judge Link, the Superior Court judge in Kenai, ruled in favor of Western Auto. This was not a final judgment as there were other issues remaining unresolved which would have to be decided by trial if not disposed of by additional pretrial motions.

Only final judgments of the Superior Court can be appealed to the Alaska Supreme Court. However, Appellate Rule 610 provides for an interlocutory review by the Supreme Court, before there has been a final judgment, at the discretion of the Alaska Supreme Court for issues which meet the criteria set forth in Appellate Rule 610. One of the grounds is if the decision of the lower court: "... involves a controlling question of law on which there is a substantial ground

Provided by: Burr, Pease + Kurtz

for difference of opinion and an immediate review of the order may materially advance the termination of the proceedings . . .."

Savage Arms petitioned the Supreme Court for a review of Judge Link's decision under this procedure. The Supreme Court granted the petition and ordered full briefing. Proceedings in the Superior Court were stayed pending the decision by the Supreme Court on the petition for review. After the Supreme Court decision (first handed down on March 2, 2001, with rehearing denied on April 4, 2001) the case was remanded to Judge Link for further proceedings. Trial has been scheduled by Judge Link for November of 2002.

(In its decision, the Supreme Court also ruled that because all of Western Auto's defense costs and attorney's fees and the entire amount of the settlement by Western with the plaintiff, Taylor, had been paid by Western Auto's insurers, Allstate and Certain Underwriters at Lloyd's, those insuring entities were the proper parties plaintiff and in compliance with that ruling, Allstate and Certain Underwriters at Lloyd's have been substituted in place of Western Auto as the plaintiff.)

Thus, *Allstate Insurance Company and Certain Underwriters of Lloyd's v. Savage Arms, Inc.* is very much still a pending case and there has been no final judgment. If legislation past by the legislature is made specifically retroactive and/or curative, it could be expected that the Alaska courts would apply such new legislation to the pending case in spite of the Supreme Court's prior ruling. *See Zurfluh v. State*, 620 P.2d 690, 693 (Alaska 1980).

Texas Legislation

LEXSTAT Tex. Bus. Corp. Act 5.10

TEXAS STATUTES AND CODES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2002 SUPPLEMENT (2001 SESSION) ***

CIVIL STATUTES

BUSINESS CORPORATION ACT

PART FIVE

GO TO TEXAS CODE ARCHIVE DIRECTORY

Tex. Bus. Corp. Act art. 5.10 (2002)

Art 5.10. Disposition of Assets Requiring Special Authorization of Shareholders; Effect of Disposition Requiring or Not Requiring Authorization; Liability of Acquiring Corporation

A. A sale, lease, exchange, or other disposition (not including any pledge, mortgage, deed of trust or trust indenture unless otherwise provided in the articles of incorporation) of all, or substantially all, the property and assets, with or without the good will of a corporation, if not made in the usual and regular course of its business, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation, domestic or foreign, as may be authorized in the following manner:

(1) The board of directors may adopt a resolution recommending that such sale, lease, exchange, or other disposition be approved by shareholders of the corporation, unless the board of directors determines that for any reason it should not make the recommendation in which case the board of directors may adopt a resolution directing that such sale, lease, exchange, or other disposition be submitted to shareholders without recommendation and, in connection with the submission, communicate the basis for its determination that the sale, lease, exchange or other disposition be submitted without recommendation.

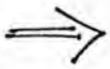
(2) The board of directors may submit the proposed sale, lease, exchange or other disposition for authorization by the corporation's shareholders at a meeting of shareholders, which may be either an annual or a special meeting.

(3) Written or printed notice shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided for in this Act for the giving of notice of meetings of shareholders, and, whether the meeting be an annual or a special meeting shall state that the purpose, or one of the purposes, of such meeting is to consider the proposed sale, lease, exchange, or other disposition.

(4) At such meeting, the shareholders may authorize such sale, lease, exchange or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require the affirmative vote of the holders of at least two-thirds of the outstanding shares of the corporation entitled to vote thereon, unless any class or series of shares of the corporation is entitled to vote as a class thereon, in which event the vote required for authorization by the shareholders shall be the affirmative vote of the holders of at least two-thirds of the outstanding shares within each such class or series entitled to vote thereon as a class and at least two-thirds of the outstanding shares otherwise entitled to vote thereon. Shares entitled to vote as a class shall be entitled to vote only as a

class unless otherwise entitled to vote on each matter submitted to the shareholders generally or provided in the articles of incorporation.

(5) After such authorization by vote of shareholders, the board of directors, nevertheless, in its discretion, may abandon such sale, lease, exchange or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders.



B. A disposition of any, all, or substantially all, of the property and assets of a corporation, whether or not it requires the special authorization of the shareholders of the corporation, effected under Section A of this article or under Article 5.09 of this Act or otherwise:

(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, foreign corporation, or other entity did not expressly assume.

Jeffrey MUDGETT, Appellant,

v.

PAXSON MACHINE COMPANY, Appellee.

No. 13-85-369-CV.

Court of Appeals of Texas, Corpus Christi.

April 24, 1986.

Rehearing Denied May 29, 1986.

Injured machinist brought product liability action against machine company and its successor. The 14th District Court, Dallas County, John McClellan Marshall, J., granted summary judgment for successor and machinist appealed. The Court of Appeals, Utter, J., held that: (1) invoice supported finding that machine was delivered prior to sale of manufacturer's assets; (2) successor had not assumed manufacturer's tort liability; and (3) successor was not liable under de facto merger, mere continuation, or product line theories.

Affirmed.

1. Corporations ⇐445.1

Invoice listing date of delivery of slitting machine that was subject of products liability action supported finding that machine had been manufactured, designed, assembled, sold, and delivered prior to date manufacturer had sold assets to defendant.

2. Corporations ⇐445.1

Successor to manufacturer's assets did not assume manufacturer's tort liability by agreeing to assume liabilities "incurred in ordinary course of business," where that phrase was limited by phrase "as disclosed by the balance sheet."

3. Corporations ⇐445.1

"De facto merger" doctrine imposing liability of corporation on purchaser of its assets, and "mere continuation" doctrine imposing liability upon successor corporations regardless of manner in which assets are acquired may not be applied under Texas law. V.A.T.S. Bus.Corp.Act, arts. 5.10, 5.10 comment.

4. Corporations ⇐445.1

Successor that continues output of line of products cannot be said to have created risk associated with product manufactured by its predecessor and does not assume strict liability for defective units; declining to follow *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811; *Ray v. Alad Corp.*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3.

Mike Felber, Denbow, Wells, Williford & Felber, Fort Worth, for appellant.

Eugene W. Brees, II, John P. Polewski, Thompson & Knight, Dallas, for appellee.

Before UTTER, SEERDEN and BENAVIDES, JJ.

OPINION

UTTER, Justice.

Appellant Mudgett brought suit against Thopax Investment Corporation (the former Paxson Machine Company) (Paxson I) and Paxson Machine Company (Paxson II) as a result of personal injuries he sustained in an accident involving a metal-slitting machine.[1] Prior to the accident, Paxson I sold its assets to Paxson II, and then changed its name to Thopax Investment Corporation. Paxson II filed a motion for summary judgment asserting that it had neither designed, manufactured, nor sold the machine in question. Paxson II further asserted that it did not assume tort liability by the purchase of Paxson I's assets. The trial court granted the summary judgment and severed the claims asserted against Paxson I from those asserted against Paxson II. Appellant Mudgett appeals the granting of the summary judgment.

1. The slitting machine is composed of three basic components, the coiler, the slitter, and the recoiler, and is used to cut and roll large pieces of sheet metal. The three components, as a unit, are called a "slitting line."

The summary judgment evidence shows that on December 23, 1963, Paxson I and R.P.B. Corporation entered into an agreement whereby R.P.B. Corp. was to purchase substantially all of the assets of Paxson I. The agreement states that December 30, 1968, was to be the closing date of the transaction. After the sale, Paxson I changed its name to Thopax Investment Company and R.P.B. Corp. changed its name to Paxson Machine Company (Paxson II).

By purchase orders dated October 1, 1963, Metal Goods Corporation (Metal Goods), a division of Alcoa Corporation, ordered a slitting line from Paxson I. A delivery date of November 1, 1968, was requested.

On February 8, 1983, Mudgett injured his left hand while operating the slitting machine for his employer, Metal Goods. Mudgett then sued Paxson I and Paxson II under the theory of products liability.

[1] By his first three points of error, appellant asserts that fact issues remain concerning whether Paxson I or Paxson II manufactured, designed, assembled, sold or delivered the slitting machine. Appellee's summary judgment evidence, a three page document which we consider to be an invoice, lists the specifications incorporated into each of the three basic components of the slitting line manufactured for Metal Goods. At the bottom of the first page is the handwritten notation, "Shipped 12/13/63 via Metal Goods Truck." Appellee further has shown, by summary judgment evidence, that the sale of the assets of Paxson I was closed on December 30, 1968. This evidence established that the slitting machine in question was manufactured, designed, assembled, sold and delivered *prior to* December 30, 1963, the date Paxson II purchased the assets of Paxson I. Since Paxson II (the movant) established these facts, the burden shifted to appellant (the non-movant) to set forth sufficient summary judgment evidence to give rise to a genuine issue of material fact. *First Federal Savings & Loan Ass'n v. Ritenour*, 704 S.W.2d 895 (Tex.App.—Corpus Christi, 1986, writ ref'd n.r.e.).

Appellant contends that:

> the notation only indicates that the uncoiler machine of the slitting line [the component described on the first page] was shipped that date. On the invoice for the slitting component, there is no indication of a date of shipment.

This argument is unfounded because the document was obviously intended to be a three page invoice as evidenced by the notations on the top of the invoices "page two of three" and "page three of three." Except for the above stated argument, appellant has not brought forth any summary judgment evidence which would show that a genuine issue of material fact exists as to the truthfulness or accuracy of these notations as to the date these articles were shipped. Points of error one, two and three are overruled.

By points of error four and five, appellant contends that a fact issue exists as to whether Paxson II assumed tort liability over the slitter in question as a result of the assets purchase. Appellant points out that the sales agreement provides that it shall be "construed and enforced by the laws of Ohio."

Appellant contends that Ohio law "recognizes that a successor [corporation] can expressly or impliedly assume the tort liability of its predecessor," citing *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir.1977) and *Chadwick v. Air Reduction Co.*, 289 F.Supp. 247 (N.D.Ohio 1965). Appellant first urges us to find that Paxson II *expressly* assumed "*all* liabilities, including tort liability," or secondly, to find "at least an implied agreement to assume liability including tort liability."

The laws of Texas and Ohio are in accord regarding the interpretation of written contracts. The entire agreement must be considered in order to ascertain the true intent of the parties and no single provision is to be given controlling effect. *Compare Coker v. Coker*, 650 S.W.2d 391 (Tex.1983); *Corriveau v. 3005 Investment Corp.*, 697 S.W.2d 766 (Tex.App.—Corpus Christi

1985, writ ref'd n.r.e.) *with Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 474 N.E.2d 271 (Ohio 1984). If the written agreement is worded so that it can be given a definite legal meaning or interpretation, then it is not ambiguous and the court will construe it as a matter of law. *Coker v. Coker*, 650 S.W.2d at 393; *Corriveau v. 8005 Investment Corp.*, 697 S.W.2d at 767; *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 474 N.E.2d at 272.

The sales agreement provides,[2] in pertinent parts, as follows:

> The said assets and business shall be sold free and clear of all liabilities, obligations ... of any description, except only those liabilities and obligations which the Buyer shall assume.
>
> * * * * * *
>
> ... the Buyer expressly assumes and guarantees ... all debts and liabilities of the Seller set forth in the November 30th Balance Sheet and all liabilities and obligations under normal contracts, orders and commitments incurred in the regular course of business to the closing date and specifically assumes Seller's liabilities for 1968 Federal Income tax ...
>
> * * * * * *
>
> Except to the extent reflected or reserved against in the November 30th Balance Sheet, the Seller as of such date had no liabilities or obligations of any nature, whether accrued, absolute, contingent or otherwise, including without limitation, those liabilities due or to become due, except for Federal Income taxes for the year 1968.
>
> * * * * * *

A separate document, executed on the closing date (December 30, 1963) and entitled "Assumption of Liabilities," provides for assumption of:

> a) All liabilities and obligations of Paxson Machine Company *in respect of the contracts and commitments* entered into in the ordinary course of business *as disclosed by the balance sheet* of Paxson Machine Company as of November 30, 1963, and *such further liabilities and obligations* of Paxson Machine Company only as have been incurred in the ordinary course of business from November 30, 1963 to December 30, 1963, all of which liabilities and obligations are set forth on Exhibit A which is attached hereto and expressly made a part hereof.
> b) All liabilities for Federal Income taxes for the year 1963 and thereafter. [emphasis ours]

The November 30th Balance Sheet lists liabilities as "[n]otes and accounts payable," "[a]ccrued liabilities," "[a]dvances on contracts," "[d]ividends payable" and, "[r]eserve for Federal taxes on income."

[2] Notwithstanding the presumption discussed in footnote 2, the agreement of the parties regarding the assumption of liabilities is unambiguous. Clearly the parties intended that Paxson II was only to assume those debts, liabilities or obligations as disclosed in the November 30th Balance Sheet, and those "liabilities and obligations under normal contracts, orders and commitments incurred in the regular course of business" between November 30th and December 30th which are not and could not have been reflected in the November 30th Balance Sheet. Appellant argues that the assumption of liabilities "incurred in the ordinary course of business" is evidence of an assumption of tort liability. We disagree. The phrase "incurred in the ordinary course of business," and similar phrases, are modified by phrases such as "as disclosed by the balance sheet." This indicates that such liabilities and obligations are only of the type listed in the balance sheet. When a matter is specifical-

2. Initially, we note that many portions of the sales agreement are illegible, and it can be presumed that the illegible portions not only support, but *establish* the correctness of the judgment. *See, e.g., Cliff Management Corp. v. Lovell*, 695 S.W.2d 301 (Tex.App.—Waco 1985, no writ); *Winters v. Highlands Underwriters Insurance Co.*, 693 S.W.2d 729 (Tex.App.—Houston [14th Dist.] 1985, no writ); *Castillo v. Sears, Roebuck & Co.*, 663 S.W.2d 60 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.).

ly addressed by the written terms of a contract no terms will be implied concerning the matter. *City of Cincinnati v. Cincinnati Reds*, 483 N.E.2d 1181 (Ohio App. 1984). Points of error four and five are overruled.

By points of error six and seven, appellant contends that a fact issue exists as to whether the assets purchase constituted a "de facto merger or [a] continuation under the doctrine of successor liability." The only application of the de facto merger doctrine by a Texas court occurred in *Western Resources Life Insurance Co. v. Gerhardt*, 553 S.W.2d 783 (Tex.Civ.App.—Austin 1977, writ ref'd n.r.e.). The doctrine was recently considered and rejected in *Suarez v. Sherman Gin Co.*, 697 S.W.2d 17 (Tex.App.—Dallas 1985, writ ref'd n.r.e.).[3] In 1979, the Texas Legislature amended TEX.BUS.CORP.ACT ANN. art. 5.10 (Vernon 1980), "the purpose of which [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...." TEX.BUS.CORP.ACT ANN. art. 5.10 comment. [emphasis ours] The amendment added section B:

> B. A disposition of all, or substantially all, of the property and assets of a corporation requiring the special authorization of the shareholders of the corporation under Section A of this article:
>
> (1) is not considered to be a merger or consolidation pursuant to this Act or otherwise; and
>
> (2) Except as otherwise expressly provided by another statute, *does not make the acquiring corporation responsible or liable for any liability or obligation of the selling corporation that the acquiring corporation did not expressly assume.* [emphasis ours]

The comment to art. 5.10 further expressly abrogated the decision in *Gerhardt* concerning its application of the de facto merger doctrine. We agree with the *Suarez* Court where it states, "the legislature's prompt action to override *Gerhardt* and statutorily preclude application of the de facto merger doctrine in Texas clearly states a public policy opposed to the doctrine." *Suarez v. Sherman Gin Co.*, 697 S.W.2d at 20.

[3] Appellant also contends that "the transaction was a mere continuation of the predecessor corporation," citing *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir.1974). The "mere continuation" doctrine[4] 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. *Compare Shannon v. Samuel Langston Co.*, 379 F.Supp. 797 (W.D.Mich.1974) (de facto merger factors) *with Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir.1974) (mere continuation factors). Certainly if the de facto merger doctrine is contrary to the public policy of our state, so must be the mere continuation doctrine. In any event, we decline to impose liability upon an acquiring corporation under either theory in the face of clear legislative intent to the contrary. Points of error six and seven are overruled.

[4] By his eighth and final point of error, appellant urges us to adopt the "product line" theory of successor liability. Under this theory, a successor that continues the output of a line of products assumes strict liability for defective units of the same product line *previously* manufactured and sold by its predecessor. *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811 (1981); *Ray v. Alad Corp.*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3 (1977). Whether Texas should adopt the product line theory was recently con-

3. For a list of the factors indicative of a de facto merger, see *Suarez v. Sherman Gin Co.*, 697 S.W.2d at 20.

4. This doctrine would impose liability upon a successor corporation, regardless of the manner in which the assets were acquired, if the buyer purchased the "good will" and name of the seller, operated the business in the same place, with the same employees and continued to produce the same product. *See Cyr v. B. Offen & Co.*, 501 F.2d at 1153.

sidered in *Griggs v. Capitol Machine Works, Inc.*, 690 S.W.2d 287 (Tex.App.—Austin 1985) (writ ref'd n.r.e. *per curiam*,) 701 S.W.2d 238 (Tex.1986). The *Griggs* Court thoroughly discussed the rationale of the product line theory, comparing it with the basis for products liability in Texas, the Restatement (Second) of Torts § 402 A (1965). The Court determined that the product line theory is incompatible with "the theory of products-liability tort actions, for *that* theory and cause of action, and the underlying 'social policies,' expressly *disclaim* imposing a duty upon one who has no ability to control the circumstances and events which preceded a specific plaintiff's injury." [emphasis in original] *Griggs v. Capitol Machine Works, Inc.*, 690 S.W.2d at 292. In short, the successor cannot be said to have created the risk associated with a product manufactured by its predecessor. The decision to make such a far-reaching change in the law is not ours, but uniquely within the province of the legislature. Points of error number eight is overruled.

The judgment of the trial court is AFFIRMED.

George S. WITHROW, Appellant,

v.

Richard Burton SHAW, Appellee.

No. 09 85 033 CV.

Court of Appeals of Texas,
Beaumont.

April 24, 1986.

Rehearing Denied May 21, 1986.

Driver brought negligence action against passing driver for personal injuries and property damages sustained in automobile accident. Jury found for passing driver and the 1-A District Court, Jasper County, Monte Lawlis, J., entered take-nothing judgment for driver, and driver appealed. The Court of Appeals, Dies, C.J., held that officer of Department of Public Safety who was qualified as accident reconstruction expert was not authorized to testify that passing driver was making legal pass to left of driver and was not violating law or any traffic violations when he tried and attempted to pass driver.

Reversed and remanded.

1. Evidence ⟹506

Department of Public Safety officer was not authorized to testify in negligence action arising out of automobile accident that defendant was making legal pass to left of plaintiff and was not violating law or any traffic violations when he tried and attempted to pass plaintiff, even though officer was qualified as accident reconstruction expert.

2. Trial ⟹186

Jury charge on statutes relating to rules when motorist is turning left off roadway onto another was improper comment on weight of evidence in negligence action arising out of automobile collision, where charge did not aid and assist jury in answering issues submitted. Vernon's Ann.Texas Civ.St. art. 6701d, §§ 60(a), 68(a, b), 69(a).

Michael McGown, Weller, Wheelus & Green, Beaumont, for appellant.

Julie A. Owens, Fenley & Bate, Lufkin, for appellee.

OPINION

DIES, Chief Justice.

George S. Withrow, as plaintiff below, sued Richard Burton Shaw, as defendant below, because of an automobile collision, alleging personal and property damage. A jury found for defendant, following which the court granted a take-nothing judgment.

Alaska Supreme Court rewrites liability law?

By Jim DeWitt and Aisha Tinker Bray

On June 30, 2000, the Alaska Supreme Court significantly rewrote the law of products liability as it affects a business that purchases the assets, but not the liabilities, of another. A business that purchases assets as an ongoing concern will be liable for the product liability claims of its seller, despite what the purchase documents may say.

In *Savage Arms, Inc. v. Western Auto Supply Co.*, Opinion No. 5293, (June 30, 2000) a minor was injured by an allegedly defective .22 rifle manufactured by Savage Industries, Inc. Savage Industries, Inc. sold its assets to Savage Arms, Inc. in 1990, apparently after the rifle in dispute had been manufactured. The court acknowledged that "[g]enerally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company," subject to four exceptions not relevant to the case. *Savage Arms*, No. 5293, slip op. at 9.

But the court elected to follow a minority rule, a rule that was rejected by the American Law Institute's Restatement (Third) of Torts and the majority of courts to consider it, that greatly expands the liability of a purchaser for the torts of the seller. Id. at 13. The court articulated a new "continuity of enterprise" theory as looking beyond the formal requirement of identical shareholders and considering the substance of the underlying transaction. Id. at 12.

> The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*, [244 N.W.2d 873 (Mich. 1976)] are: (1) continuity of key personnel, as on whether the business itself has been transferred as an ongoing concern.

Id. at 12 (internal footnotes omitted).

Critics may argue that the court would be better off leaving significant expansions of product liability to the Legislature,[1] but this article focuses instead on what appears to be a seriously flawed analysis of the benefits and detriments of adopting such an expansion.

The flaw is this: each of the rationales advanced by the court for adopting the "continuity of enterprise" standard logically argues only for prospective application, yet the court gives this new policy retroactive application.

The court first notes that the "continuity of enterprise" rationale has been criticized for its impact on the value of businesses which, for one reason or another, are attempting to sell the business as a whole or in substantial parts.

> Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise.

Id. at 14. The court's treatment of this concern is less than complete:

> But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception (or the marginally more popular "product line" exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales. And our research has not disclosed studies

is surprising, however, and could be criticized as conclusive.

The court next looks to the economic effects of imposing the "continuity of enterprise" rule:

> 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.

Id. at 15. The court's reasoning here is sound, but only provided the rule is given prospective and not retrospective application.

The flaw is this: each of the rationales advanced by the court for adopting the "continuity of enterprise" standard logically argues only for prospective application.

In fact, negotiations for the sale of assets can and usually do take the risk of liability into account. But for sales that were conducted under the old rule, negotiations are no longer possible, and the purchasers in those transactions will now find themselves saddled with a class of risks they did not assume. Indeed, in many cases, the sales would have been "asset sales" only, without liabilities - including contingent product liability claims - intentionally leaving the risk of such claims on the seller. For the court to simply state "we would ex-

for this risk of loss in the purchase price," is meaningless as to consummated transactions. Id. at 17.

The court acknowledges that this new rule will create complications in bankruptcy, where the goal is to maximize the value of assets for the creditors. Id. at 17. While the court is being a little presumptive in concluding federal law won't sell assets free and clear of all claims, including unknown tort claims, 11 U.S.C. § 365, the court's treatment of the issue borders on flippant.

> But we see no persuasive reason to favor corporate creditors over claimants later injured by the seller corporation's products.

Id. at 17. It does not seem to occur to the court that the "creditors" in bankruptcy can include tort claimants. In effect, the court proposes to diminish the bankruptcy recovery of known claimants for the benefit of potential future tort claimants. And, again, it is impossible to find justification for retrospective application in the court's arguments.

The court acknowledges that there may not be a causal relationship between the harm created and the purchaser, but argues that the "goodwill" it believes is inherent in an asset purchase justifies holding the purchaser liable. Id. at 17-18. It is in that context that the court comes closest to recognizing the retrospection problem:

> When a firm negotiates to purchase another corporation, keeping the "enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of

Institute's Restatement (Third) of Torts and the majority of courts to consider it, that greatly expands the liability of a purchaser for the torts of the seller. Id. at 13. The court articulated a new "continuity of enterprise" theory as looking beyond the formal requirement of identical shareholders and considering the substance of the underlying transaction. Id. at 12.

> The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*, [244 N.W.2d 873 (Mich. 1976)] are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity. This is a limited exception that looks past the identity of shareholders and directors, and focuses [illegible] destroying the value of the ongoing business enterprise.

Id. at 14. The court's treatment of this concern is less than complete:

> But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception (or the marginally more popular "product line" exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales. And our research has not disclosed studies that have so concluded.

Id. at 14-15 (internal footnote omitted). As the court acknowledged earlier, this doctrine has been recognized in only a few states, and only relatively recently. Id. at 13. It's hardly surprising that the court has not been able to find studies demonstrating its economic effects. For the court to rely upon the absence of data [illegible] appearance...

In fact, negotiations for the sale of assets can and usually do take the risk of liability into account. But for sales that were conducted under the old rule, negotiations are no longer possible, and the purchasers in those transactions will now find themselves saddled with a class of risks they did not assume. Indeed, in many cases, the sales would have been "asset sales" only, without liabilities - including contingent product liability claims - intentionally leaving the risk of such claims on the seller. For the court to simply state, "we would expect selling and purchasing firms simply to negotiate to a rational price that takes account of these potential claims" begs the question of how that is to be accomplished in a completed transaction. Id. at 16.

Put another way, a purchaser of assets that consist of a line of manufacturing or perhaps an entire company has presumably paid fair market value for those assets. The court in *Savage Arms* has changed the definition of "assets" to include a large class of "liabilities." As a result, the true fair market value of the "assets" necessarily changes. If the seller has subsequently distributed its assets to its shareholders, as is its right, and has subsequently dissolved itself, as is also its right, the purchaser has been deprived of the benefit of its bargain, and has no meaningful recourse.

If a purchaser is larger and wealthier than a seller, then the "pocket is deeper" for a tort plaintiff under the court's new rule. The court concludes that is only fair. Id. at 16-17. Without going into the justice of the situation, or whether or not this results in a "windfall" to a tort plaintiff, by giving this new rule retroactive application the new rule is made patently unfair. A large tort claim, unknown and perhaps unknowable to the purchaser, will simply deprive the purchaser of its bargain. The court's offhand comment in this regard, that "once again, purchasing corporations can attempt to account will" it believes is inherent in an asset purchase justifies holding the purchaser liable. Id. at 17-18. It is in that context that the court comes closest to recognizing the retrospection problem:

> When a firm negotiates to purchase another corporation, keeping the "enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of causation would give the successor an unwarranted windfall.

Id. at 18. The verb tenses are instructive: "must" and "would give;" again the court's justification speak to prospective application yet Savage Arms involves retrospective application.

Finally, the court concludes that the new doctrine will encourage the traditional purposes of products liability law: it will encourage manufacturers to create safer, defect-free products to maximize their business value for the future. Id. But in the cases of completed sales, the policy is preposterous.

For businesses that have already made asset purchases, the only option now is to purchase insurance or other suitable risk management solutions to take into account the new classes of claims that the court has created.[2] Those insurance premiums and similar costs are an unfair, unreasonable burden, but unless the court recognizes that its reasoning only justifies prospective and not retroactive application, the alternatives are even worse.

[1] An argument rejected by the court "because [successor liability] is directly related to products liability law, a doctrinal road long traveled by courts." Savage Arms, No. 5293, at 19.

[2] While the decision is limited to products liability, long-time observers of the court might anticipate the rule being [illegible] to services and well as products, and other kinds of claims besides torts.

MEMORANDUM

RE: Western Auto's Insurers v. Savage Arms

DATE: February 12, 2002

ISSUE

Can the Alaska legislature act and affect a pending case in which the Alaska Supreme Court has previously decided the law?

BRIEF ANSWER

Yes. The Alaska legislature is empowered by well-established statutory and case law authority to apply a statute retroactively. Further, even if the Alaska legislature does not expressly provide for retrospective application of a statute, legislation that is "curative" may be applied retroactively.

DISCUSSION

A. Retroactivity Expressly Provided

Restrospective legislation is not in and of itself unconstitutional. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985). In fact, a nearly forty-year old Alaska statute explicitly provides the legislature with authority to apply a statute retroactively. Specifically, Alaska statute Section 01.10.090 states: "No statute is retrospective unless expressly declared therein." The Alaska Supreme Court has also recognized the legislature's authority to apply statutes retroactively. *See, e.g., Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947, 948 (Alaska 1989) (stating statutes will be applied to causes of action arising prior to their enactment when the legislature so intends, either expressly or impliedly); *State v. Kaatz*, 572 P2d 775, 779 (Alaska 1977); *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 (Alaska 1985); *Brice v. State*, 669 P.2d 1311, 1315 (Alaska 1983); *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 711 (Alaska 1992); *State v. Alaska Pulp America, Inc.*, 674 P.2d 268, 272 (Alaska 1983); *Stephens v. Rogers Const. Co.*, 411 P.2d 205, 208 (Alaska 1966) (noting

Provided by: Burr, Pease + Kurtz

whether or not a statute operates retrospectively depends upon the language of the statute).

B. Curative Legislation

Even if the Alaska legislature does not expressly provide for retrospective application of a statute, the Alaska Supreme Court has recognized an exception to the general rule against retroactivity for legislation that is "curative." Curative legislation is legislation promptly enacted by the legislature in response to a particular judicial decision with which the legislature disagrees. *See, e.g., Zurfluh v. State*, 620 P.2d 690, 693 (Alaska 1980) (discussing the curative legislation exception to the general rule against retroactivity). In *Zurfluh*, the Alaska legislature acted within two months following an Alaska Supreme Court decision and statutorily instituted incarceration as a condition to a suspended sentence after the Alaska Supreme Court had decided against such a condition. Despite the lack of retroactive language in the newly enacted statute, the Alaska Supreme Court deemed the statute "curative" and applied it retroactively to the pending case, effectively overruling their own recent opinion.

Specifically, in *Zurfluh*, the defendant broke into a store and stole a safe containing over $42,000. In October 1978, the defendant turned himself in and pled no contest. Incarcerating a defendant as a condition of a suspended sentence was a common practice in Alaska before December 1, 1978, when the Alaska Supreme Court in *State v. Boyne*, held that the courts did not have the authority to do so. In response to *Boyne*, the next session of the Legislature, which began in January 1979, enacted a statute effective May 2, 1979, which allowed for incarceration as a condition of a suspended sentence.

The issue in *Zurfluh* was whether the newly enacted statute could be applied retrospectively to the 153-day period between the *Boyne* decision on December 1, 1978 and May 2, 1979, the statute's effective date. It was during this period that the defendant was sentenced.

After citing the general rule that "[n]o statute is retrospective unless expressly declared therein," the court noted that the new statute did not expressly provide for retrospective application. *Zurfluh*, 620 P.2d at 693. The court found, however, that the timing of the legislation and the hearing testimony on the bill indicated the statute was curative legislation proposed in reaction to the ruling in *Boyne*. *Id.* The court stated that curative legislation was an exception to the general rule against retroactivity and emphasized that retroactivity would be

ascribed to curative legislation more readily than to that which might disadvantageously, though legal, affect past relations and transactions. *Id.* Consequently, the court held that on remand the trial judge was to apply the new statute when he considered the defendant's sentence. *Id.*

CONCLUSION

The Alaska Legislature has well-established authority to enact a statute and apply it retroactively to pending cases. The legislature should expressly state that the statute is to be applied retroactively to all pending cases. Alternatively, or in addition, the statute should state that it is curative legislation in response to the Alaska Supreme Court's decision in *Savage Arms, Inc. v. Western Auto Supply Co.*

Liability Insurance

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February 8, 2002

By FaxNo. 907-586-8977

Joe L. Hayes, President
Legislative Consultants, Inc.
Juneau, AK

Re: Western Auto v. Savage Arms
Our File No. 2990-1

Dear Joe:

1. Allstate and Lloyd's are seeking to recover from Savage Arms, the cost of their settlement with the injured plaintiff in the amount of $5.4 million, plus their attorney's fees of somewhere around $1 million, plus accrued and accruing interest, which now totals in excess of $8 million.

2. This is a summary of the sequence of events:

a. The gun was manufactured in 1982 by Savage Industries ("SI") and sold by it to Western Auto, which sold it to a purchaser in Maine in 1983.

b. The gun was resold two or three times and was ultimately purchased by the injured plaintiff's father in Kenai.

c. On February 2, 1988, SI filed for bankruptcy.

d. The accident occurred in Kenai on April 8, 1989.

e. On November 1, 1989, SI sold part of its assets to Savage Arms, Inc. ("SA").

f. On December 3, 1990, the plaintiff filed a lawsuit against SI and others (but not SA or Western Auto).

g. On May 22, 1991, the plaintiff having learned of SI's bankruptcy, amended their complaint to add Western Auto as a defendant.

h. On April 27, 1992, Western filed its third-party complaint against SA asserting its successor liability theories.

3. Why didn't Savage Arms have insurance to cover this claim? The short answer is, it was not available. I enclose page 34 of Savage Arms' Opening Brief to the Supreme Court and call your attention to footnote 21.

I also enclose pages 349 and 350-351 of the record on appeal, which are pages from a deposition and which describe the insurance that was obtained. It excluded liabilities relating to personal injury claims except to the extent that certain claims were listed in an attachment. At that time, the lawsuit had not been filed and the claim was not known.

I also enclose a two-page affidavit by Ron Coburn, which was filed with the Supreme Court.

Standard products liability insurance is written on an occurrence basis. Thus, any insurance purchased by Savage Arms after it came into existence, would not cover the claim because the "occurrence," which was the accident, had occurred before Savage Arms came into existence.

Very truly yours,

BURR, PEASE & KURTZ

Theodore M. Pease, Jr.

Enclosures
51230

(listing cases); *Johnston*, 830 P.2d at 1144-46; *Niccum*, 438 N.W.2d at 99 n. 9. The theory has been rejected for the persuasive reasons expressed in those decisions, and as set out in Arms' December 15, 1993 opposition memorandum [Exc. 180-188].

> As synthesized, the reasoning in these decisions is that strict liability should not be imposed because: the successor corporation did not create the risk nor did it directly profit from the predecessor's sale of the defective product; it did not solicit the use of the defective product nor make any representations as to its safety; and it is not able to enhance the safety of a product that is already on the market. [citations]
>
> Moreover, according to these decisions, the exception is inconsistent with basic strict liability principles [citations], results in the imposition of liability without a corresponding duty [citations], is a drastic departure from traditional corporate law and should be left to legislative action[20] [citations], and threatens small successor businesses with economic annihilation because of their predecessor's products [citations].[21]
>
> We agree with this reasoning. We decline to hold a corporate successor liable "not for something it has done, but rather because it may be able to

---

warranting this Court's attention.

[20] In this context, it should again be noted that in 1988, when the Alaska Legislature essentially rewrote the Alaska Business Corporations Act, it did not expand the Act's existing provision that imposes successor liability only in the case of a formal consolidation or merger. See discussion supra at pp. 31-32. Because the Legislature had a recent opportunity to change its Corporations code to add "product line", "continuity of enterprise", or other liability in the case of asset transfers and did not do so, this Court should also decline the invitation. Accord, *Johnston*, 830 P.2d at 1143-44; *Stratton*, 676 P.2d 1290, 1298 (Kan. App. 1984).

[21] For that last statement, the *Johnston* court cited to *Bernard v. Kee Mfg. Co.*, 409 S.2d 1047 (Fla. 1982), and A. Schiff, Products Liability and Successor Corporations: Protecting the Product User and the Small Manufacturer through Increased Availability of Products Liability Insurance, 13 U.C. Davis L. Rev. 1000 (1980) ("Most small corporations are unable to secure policies covering liability for injuries caused by the predecessor's products. When such insurance is available, the cost is often prohibitive".) Accord, *Niccum*, 438 N.W.2d at 99-100. That is in fact the case here. [Exc. 348-350, 1020-1021].

11 state.

Q. What happened to this policy at the time of the asset sale?

A. Well, the policy at the time that we -- the first policy, September of '87, expired the same date, September of '88. The policy was renewed September of '88. It expired at the end of September -- 28, 29 of 1989 and that policy was not renewed.

Q. Now, I gather then that by the time the asset sale took place there was no insurance policy either to be assumed or not assumed?

A. Correct.

Q. And that then after the asset sale Savage Arms, Inc. made any insurance arrangement it chose?

A. Correct.

Q. Did it continue with either of these companies?

THE WITNESS: Do you want me to answer that?

MR. O'CONNELL: Yes. I have no problem.

THE WITNESS: Did you say yes?

EXHIBIT 2
PAGE 129 of 225

MR. O'CONNELL: Yes.

THE WITNESS: Yes, continued with SAIL, Sporting Arms.

I guess to better answer that then since we went ahead and answered it: The insurance policy that Savage Arms obtained from SAIL specifically excluded all Savage Industries and any prior products and only insured a specific listing of the inventory that was purchased from Savage Industries and all Savage Arms going forward, so it precluded any product that wasn't part of the asset sale, products by serial number.

Q. (By Mr. Rooney) How much did the 1987 policy cost Savage Industries?

A. Approximately $300,000. Might have been a little more than that but that's fair enough.

Q. How about the price in 1988?

A. Would have been about the same.

MR. ROONEY: Then there was -- In looking over the asset sale, apparently there was a schedule attached to it relating to product liability claims pending at the time of the bankruptcy and claims that came forward after the bankruptcy prior

EXHIBIT 2
PAGE 130 of 225

to the asset sale. I didn't see that in the copy that you gave to me.

MR. O'CONNELL: There was a schedule?

MR. ROONEY: That's what I understood from reading the Transfer Agreement. Just give me a second and see if I can find it.

If you look on Page 6, talking about the assumption of liabilities and exclusions, small Roman numeral four, essentially there is exclusion of liabilities relating to personal injury claims except to the extent set forth in Section 2, which we mentioned those four.

THE WITNESS: There's four.

MR. ROONEY: Or in Section 4(f) refers to Item 1 through 24 on Schedule 4(f), so I'm --

MR. O'CONNELL: So you are saying you don't have 4(f)?

MR. ROONEY: No, I don't have 4(f). I mean I have various types of Schedule 1, A through H. I have Schedule 2 and I have something called Schedule 6(b).

MR. O'CONNELL: If you want to just go off the record for a moment?

EXHIBIT 2
PAGE 131 of 225

IN THE SUPREME COURT FOR THE STATE OF ALASKA

SAVAGE ARMS, INC.

Third-Party Defendant/
Petitioner,

v.

WESTERN AUTO SUPPLY COMPANY,

Third-Party Plaintiff/
Respondent

Case No. 3KN-90-922 Cl

AFFIDAVIT OF RONALD COBURN

STATE OF MASSACHUSETTS)
) ss.
COUNTY OF)

RONALD COBURN, being first duly sworn, deposes and says:

1. I am the president of Savage Arms, Inc. ("Arms").

2. Arms is a relatively small sporting firearms manufacturing corporation struggling under immense debt going back to the transfer of partial assets agreement with Savage Industries, Inc. in 1989. That transfer did not include the *Taylor* case filed in Kenai, Alaska. Nothing was known about that claim at the time.

3. An adverse judgment against Arms in excess of $8 million (or $5.4 million

for that matter) will put Arms out of business. Neither do I see Arms being able to obtain a *supersedeas* bond to prevent execution upon an adverse judgment in that amount and enable appeal. It does not have the resources.

4. The Model 125 Stevens/Savage rifle involved in the alleged injury to Kevin Taylor has nothing to do with any of the products or product lines ever purchased, manufactured or sold by Arms. Arms has not manufactured the Model 125 in any form.

Ronald Coburn

SUBSCRIBED AND SWORN to before me this 20th day of April, 1998.

NOTARY PUBLIC FOR MASSACHUSETTS
My commission expires: 1/22/99

CHAPTER 3

LIABILITY OF SUCCESSORS AND APPARENT MANUFACTURERS

Section

---

§ 12. Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is 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:

(a) is accompanied by an agreement for the 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 the successor becoming a continuation of the predecessor.

Comment:

a. History. The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the 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." (Emphasis added.) Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not "sell or distribute" the defective product that caused the harm. 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.

When the transferor goes out of business upon, or shortly after, a transfer of productive assets, the rights of plaintiffs injured by defective products sold earlier by the transferor may be adversely affected. For tort plaintiffs who have existing judgments outstanding against the predecessor at the time of transfer and dissolution, the law governing corporations and other business entities provides, within limits, legal protection. Creditors, including tort creditors, who hold existing judgments against a corporation that is in the process of transferring its assets and going out of business may satisfy those claims out of the proceeds from the transfer of assets. Moreover, if the proceeds from the transfer of assets are distributed to shareholders of the transferor corporation in violation of applicable state corporation law or fraudulent transfer law, existing creditors of the corporation may pursue the proceeds in the hands of the transferor's shareholders. These rules, in some states expressed in statutes, are designed to protect, within the limits of practicality, creditors who are identifiable at the time of the transfer of the predecessor's assets to the successor corporation and the transferor's dissolution. The same principles have been applied to the transfer of assets of proprietorships, partnerships, and other busir ss entities.

Tort claimants who, as a result of defective products sold by a predecessor corporation, seek recovery only after transfer of assets to a successor corporation often face difficulties in attempting to bring their claims within the foregoing legal rules. Their claims typically accrue after the predecessor corporation has lawfully distributed to its shareholders the proceeds from the transfer of assets and has ceased to exist. Under these circumstances, tort claimants who were not

existing creditors at the time of the transfer of assets ordinarily have no recourse against the predecessor's shareholders. Unless they can pursue their claims against the successor corporation, or can reach other funds provided by existing insurance or by a statute, their only practical remedy lies with retailers and wholesalers in the predecessor's distributive chain, who may not be available as a practical matter. Statutes and judicial precedents governing the rights of creditors after a corporate assets transfer and dissolution generally do not address this problem of post-transfer claims accrual.

Few precedents recognize tort claims against the successor corporation for harm caused by defective products sold by the predecessor unless the transaction by which productive assets are acquired meets criteria established by one of several traditional exceptions. These exceptions apply generally to creditors whose claims accrue after dissolution of the predecessor, and are not limited to products liability claimants. They fall into two basic categories: those in which some conduct of the successor, in addition to acquiring the predecessor's assets, justifies holding the successor responsible (the successor either contractually agrees to be liable or knowingly participates in a fraudulent asset transfer); and those in which the successor itself can be said to have sold or distributed the defective products because the successor constitutes the same juridical entity as the predecessor, perhaps in somewhat different form (the successor merges with, or constitutes a "mere continuation" of, the predecessor). Under this Section, a products liability claimant has a recognized claim against a successor for harm caused by defective products distributed by the predecessor in these circumstances.

A minority of jurisdictions impose liability on a successor corporation based on a broader concept of continuation of the business enterprise, even when there is no continuity of shareholders, officers, or directors. Some courts hold that the continuation of a predecessor's product line by the successor is sufficient to support imposition of successor liability for harm caused by defects in products sold before the assets transfer.

b. Rationale. Limiting the liability of successor corporations to the circumstances described in this Section is supported by fairness and efficiency considerations. An alleged successor that purchases the predecessor's productive assets piecemeal, other than as part of a going concern, cannot, by that fact alone, be said to have either manufactured or sold defective products distributed by the predecessor before the transfer of assets. In the absence of circumstances in which the successor could be said to constitute a continuation of the predecessor, or somehow to have prejudiced subsequent tort plaintiffs by its own pre-acquisition conduct, imposing liability on a business

entity that did not make or distribute the defective products that caused harm could be justified only because it increases the amount of money available post-acquisition out of which to satisfy plaintiffs' claims. But that alone cannot be justification for successor liability. Thus, imposing liability on the piecemeal purchase of productive assets would, for no compelling reason, impede the free alienability of corporate assets, thereby discouraging shareholder investment of capital and increasing social costs.

Imposing liability on successor corporations constitutes acceptable public policy when the successor either agrees to be liable or is implicated in the transfer of assets in a way that, without such liability, would unfairly deprive future products liability plaintiffs of the remedies that would otherwise have been available against the predecessor. Subsections (a) through (d) describe the types of corporate asset transfers that have been determined to justify imposing liability on the successor. Subsection (a) recognizes that contractual promises by the successor to pay subsequent tort claims, for which promises the successor has presumably been compensated, should be honored. Subsection (b) provides that when a business entity makes a fraudulent transfer in which the transferee is implicated, successor liability is appropriate for the same reason that liability would be imposed in favor of other creditors. Thus, a predecessor may arrange an asset transfer at an artificially deflated price, accompanied by an agreement by the successor to compensate either the predecessor, its owners, or its managers in ways that escape easy detection; or a successor may knowingly participate in an asset transfer coupled with a liquidating dividend by the predecessor to its shareholders for the purpose of leaving tort plaintiffs without remedy. If those transfers are fraudulent under applicable state law, imposing tort liability on the transferee for having knowingly participated in such transfers is justified.

Subsections (c) and (d) deal with successors that, in a real sense, did produce and distribute the product that caused the harm, though in a somewhat different organizational form. Subsection (c) deals with the transferor corporation that merges by law or in fact into the transferee, typically with no substantial change in corporate management or ownership. Subsection (d) concerns the transfer of corporate assets in the context of a transaction involving only a change in organizational form. In both these situations, liability for harm caused by defective products distributed previously should be imposed on the business entity that emerges from the transaction. In substance, if not in form, the post-transfer entity distributed the defective products and should be held responsible for them. If mere changes in form were allowed to control substance, corporations intending to continue operations could periodically wash themselves clean of potential liability at

practically zero cost, in sham transactions, and thereby unreasonably undermine incentives for producers and distributors to invest in product safety and unfairly deny tort plaintiffs adequate remedies when defective products later cause harm.

A small minority of courts have fashioned successor liability rules more advantageous to products liability claimants than the rules stated in this Section. Those minority rules, in effect, extend the "change in form only" exception just described to include circumstances in which the successor continues a product line previously distributed by the predecessor. The minority position is based on the belief that a successor who purchases productive assets should not be allowed to benefit from receiving the goodwill and reputation of the predecessor's business without the burden of responding in tort to claims for harm caused by products sold by the predecessor prior to transfer. An argument advanced to support this minority view is that holding successors liable reduces the price that predecessors receive for transferring assets, thereby helping to strengthen incentives for the managers to invest in care before the transfer of the business.

This reasoning has proven unpersuasive to a substantial majority of courts that have considered the issue. Extending successor liability beyond the exceptions set forth in Subsections (a) through (d) would, in the judgment of most courts, be unfair and socially wasteful. Post-transfer plaintiffs harmed by pre-transfer defects have a right to expect that a transfer of assets will not be allowed to prejudice financially their chances of satisfying a judgment; they have no legitimate claim that the transfer should increase those chances over what they would have been if no transfer had occurred. In the likely event that the successor is financially stronger than the predecessor, imposing a broader liability for pre-transfer product defects would unjustifiably increase the funds available to those injured by such defects compared with what would have been available to them if no transfer had taken place.

As courts have recognized, it would be difficult, and often impossible, to implement and administer a liability rule that attempted to limit post-transfer plaintiffs' rights to an aggregate amount equal to the net value of the predecessor before transfer. Tort judgments are imposed independently of one another, in various jurisdictions; no central authority exists to assure that, in the aggregate, tort judgments do not exceed a predetermined total amount. Thus, the expanded successor liability rules in a minority of states, not limited to time-of-transfer net value, replace one risk of injustice—that the assets transfer may unfairly reduce plaintiffs' recoveries in cases that do not satisfy the traditional exceptions (reflected in Subsections (a) through (d))—with another, possibly greater, injustice: that the transfer may give tort

plaintiffs a windfall at the expense of companies who engage in asset transfers and, in turn, at the expense of the consuming public.

Moreover, a majority of courts have concluded that the substantial social costs of a more expansive liability rule would be incurred without actually benefiting very many tort plaintiffs. In most instances, the magnitude of future liability for products distributed pre-transfer is difficult, if not impossible, to assess. As a majority of courts have recognized, the result of imposing successor liability as a general rule would be to depress the prices for transferred assets to the point that piecemeal disposition of assets, which clearly would not subject the buyers to liability, would be a preferable alternative to sale of the assets as part of a going concern. In that event, the products liability claimant harmed by a pre-transfer product defect would still run the risk of ending up with an uncollectible judgment. The benefits to society of preserving the predecessor's assets as a going concern would be sacrificed, with no commensurate benefits to tort claimants.

And even if a more expansive successor liability rule did not invariably lead to piecemeal asset transfers, such a liability rule would depress the prices received for going-concern transfers to an extent that would threaten to undermine the objectives of the law governing corporations. One of the purposes served by the corporate structure is to provide limitation and certainty of risk to shareholders in order to encourage capital formation. Thus, the shareholders' initial risk is limited to the value of their shares of stock and they are able to withdraw from an investment by sale of the stock without incurring future potential liability. A more expansive successor liability rule might threaten shareholders' investments by significantly restraining corporate assets transfers, thereby tending to frustrate corporation law's objective of encouraging shareholder investment.

Some critics of the majority rule argue that, when the successor continues to manufacture the same products as the predecessor, often under the same trademark, consumers have legitimate expectations that the successor will stand behind the predecessor's products. Disappointing these expectations is unfair, according to the critics, quite apart from the effects of successor liability upon the formation of capital. But this argument overlooks the reality that the predecessor's products that cause harm in these cases were distributed prior to the assets transfer, when there could be no reliance by consumers on the financial viability of the successor. One cannot logically rely on post-transfer expectations regarding the successor to justify the imposition of liability on the successor for pre-transfer distributions by the predecessor.

c. Nonliability in the absence of special circumstances. In the absence of the circumstances described in Subsections (a) through (d), a successor company that buys productive assets from another company is not liable for harm caused by a defective product sold or otherwise distributed by the predecessor prior to the successor's acquisition of assets. When the assets are purchased piecemeal, the alleged successor did not "sell or distribute" the product under the liability rule stated in § 1; and attempts to establish continuation of the corporate entity are recognized only under the terms set forth in this Section. The successor is liable under §§ 1–4 for harm caused by defective products it sells after acquisition. In the absence of the circumstances described in this Section, however, the successor is not liable for defective products sold by another prior to that time.

Illustrations:

1. ABC Corp., which manufactures and sells lawn mowers, transfers all its assets to XYZ Corp., a manufacturing corporation with different officers, directors, and shareholders, for cash. ABC then dissolves, distributing the proceeds of the sale to its shareholders. ABC complies with all statutes governing its dissolution, and none of the exceptions in this Section applies. XYZ retains most of ABC's employees and managers and continues to manufacture lawn mowers, some of which are the same as previously manufactured by ABC. A defective lawn mower made and distributed by ABC prior to the transfer of assets to XYZ harms a user three years after the transfer. XYZ is not subject to liability for the harm to the user of the lawn mower.

2. The same facts as Illustration 1, except that a defective lawn mower made and distributed by XYZ after the transfer of assets harms a user three years after the transfer. XYZ is subject to liability for the harm to the user of the lawn mower.

d. Agreement for successor to assume liability. When the successor agrees to assume liabilities for defective products sold by its predecessor, liability is imposed under Subsection (a) in accordance with the terms of the agreement. As a general matter, contract law governs the application of this exception. Courts have interpreted general statements that the successor agrees to assume the liabilities of the predecessor to include products liability claims even though the agreement makes no specific mention of products liability. However, assumption of products liability is not implied by the successor's assumption of specific duties with regard to product service or replacement.

Illustration:

3. The same facts as Illustration 1, except that the transfer-of-assets agreement contains a promise by XYZ to assume all of ABC's liabilities. XYZ is subject to liability for the harm to the user of the lawn mower.

e. Fraudulent transfer in order to avoid debts or liabilities. Subsection (b) incorporates by reference the relevant state law governing fraudulent conveyances and transfers. In contexts other than successor products liability, fraudulent transfers can be set aside on behalf of existing creditors of the transferor. In this context, fraudulent transfers provide a basis for holding successors liable to post-transfer tort plaintiffs. The fact that general creditors are pursuing remedies against the transferee does not prevent tort plaintiffs from pursuing remedies under Subsection (b). What constitutes a fraudulent conveyance or transfer is determined by reference to applicable state law.

Illustration:

4. The same facts as in Illustration 1, except that the transfer of assets by ABC to XYZ is made as part of a plan between ABC and XYZ to leave tort claimants harmed by ABC's defective products without enforceable remedies. If a transaction constitutes a fraudulent transfer under applicable state law, XYZ is subject to liability for harm to the user of the lawn mower.

f. Consolidation or merger. When statutory consolidation or merger of two corporations takes place, products liability devolves on the successor corporation under Subsection (c). A more difficult question is whether, absent statutory merger, a de facto merger has taken place. Local law governing de facto mergers is determinative. Whether a de facto merger under Subsection (c) has occurred generally depends on whether: (1) there is a continuity of management, employees, location, and assets; (2) the successor corporation acquires the assets of the predecessor with shares of its own stock so that shareholders of the transferor corporation become shareholders of the transferee corporation; (3) the predecessor corporation ceases its ordinary business operations immediately or shortly after the transfer of assets; and (4) the successor assumes those liabilities and obligations of the predecessor necessary for the uninterrupted continuation of the normal operations of the predecessor.

Illustrations:

5. The same facts as Illustration 1, except that the transfer of assets is for stock in XYZ and constitutes a statutory merger of

ABC and XYZ under applicable state law. XYZ is subject to liability to the user of the lawn mower.

6. The same facts as Illustration 1, except that the transfer of assets is for stock in XYZ, with which ABC redeems its own stock from its shareholders. ABC then ceases to operate its own business, which XYZ resumes with the same management and employees, at the same location. If it is determined under applicable state law that a de facto merger between ABC and XYZ has occurred, XYZ is subject to liability for harm to the user of the lawn mower.

g. Continuation of the predecessor. The exception recognized in Subsection (d), referred to by many courts as the "mere continuation" exception, applies when there has been a formal redesignation of the predecessor corporate entity but little or no change in underlying substance. The most important indicia of continuation, in addition to the continuation of the predecessor's business activities, are common identities of officers, directors, and shareholders in the predecessor and successor corporations. A minority of jurisdictions recognize a broader exception, referred to as the "continuity of enterprise" exception, that imposes liability on the successor for continuing the business activities of the predecessor even when the corporate form of the successor is different from the predecessor. This Section does not follow that minority position.

Illustration:

7. The same facts as Illustration 1, except that XYZ is a corporation with the same officers, directors, and shareholders as ABC. After the assets transfer, XYZ continues the same manufacturing and distribution operations as ABC did previously. If XYZ is determined to constitute a "mere continuation" of ABC under Subsection (d), XYZ is subject to liability to the user of the lawn mower.

h. Necessity for the predecessor to transfer all of its assets and go out of business. Almost all of the reported decisions applying the bases of successor liability stated in this Section involve predecessors that transfer all of their assets to successors and then dissolve or otherwise cease operations. Indeed, the predecessor's termination is the circumstance that, as a practical matter, most often gives rise to the need for a post-transfer tort plaintiff to look to the successor for recovery. The exceptions set forth in Subsections (c) and (d), merger and continuation, most frequently have significance when the predecessor has transferred all of its assets to the successor and, at least formally, has ceased to exist. But there is no reason that the exceptions set forth in Subsections (c) and (d) might not arise in connection

with the transfer of a division of a large company, leaving the company in existence after the transfer. And the exceptions in Subsections (a) and (b) could arise in connection with transfers involving less than all of the predecessor's assets where the predecessor continues in existence after the transfer.

i. Relationship between the rule in this Section and the successor's independent duty to warn. This Section deals with a successor's liability for harm caused by the predecessor's defective products and is not premised on post-transfer wrongdoing by the successor itself. For the rules governing the liability of a successor for its own post-transfer failure to warn its predecessor's customers, see § 13.

REPORTERS' NOTE

Comment b. Rationale. In a much-cited case, Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir.1986) (applying Virgin Islands law), the court stated that the imposition of successor liability on a company that has merely purchased the assets of a predecessor for cash and does not otherwise fall within the stated exceptions would encourage the dissolution of a financially troubled corporation by piecemeal sale of assets rather than as a going business concern. In this event the plaintiff would not be able to reach the assets when the accident occurred years after dissolution. The end result would be the needless destruction of an ongoing business enterprise with no net advantage to anyone. Other courts have observed that the imposition of successor liability on small corporations could spell financial disaster to them. See, e.g., Bernard v. Kee Mfg. Co. Inc., 409 So.2d 1047 (Fla.1982); DeLapp v. Xtraman Inc., 417 N.W.2d 219, 221 (Iowa 1987); Nissen Corp. v. Miller, 594 A.2d 564, 570 (Md.1991); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 100 (Minn.1989). These courts have concluded that the imposition of strict liability on successor corporations is inconsistent with the principle of products liability law that imposes responsibility on the party who created the risk and was in a position to prevent its occurrence. See also Johnston v. Amsted Indus., Inc., 830 P.2d 1141 (Colo.Ct.App.1992); Downtowner v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D.1984); Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 827 (Wis. 1985).

Corporate successor liability has been the subject of considerable law review commentary. See, e.g., Phillips, Product Continuity and Successor Corporation Liability, 58 N.Y.U. L. Rev. 906 (1983) (the article contains an exhaustive listing of law review literature; author supports the "product line" exception); Green, Successor Liability: The Superiority of Statutory Reform to Protect Product Liability Claimants, 72 Cornell L. Rev. 17 (1986) (criticizing the rationale offered by courts and commentators in support of the liability based on "product line" or "continuity of business enterprise" and suggesting a statutory solution to the problem by requiring dissolving corporations to provide products liability plaintiffs with adequate protection); Note, A Policy Analysis of a Successor Corporation's Liability for Its Predecessor's

Defective Products When the Successor Has Acquired the Predecessor's Assets for Cash, 71 Marq. L. Rev. 815 (1982) (author criticizes the rationale offered to support expansive rules imposing liability on successor corporations and suggests expansion of independent duty to warn and fraudulent transfer category when the successor had actual or constructive knowledge of product defects); Rogala, Nontraditional Successor Product Liability: Should Society Be Forced to Pay the Cost?, 68 U. Det. L. J. 37 (1990) (economic analysis supports the retention of the four basic exceptions and the rejection of "product line" and "continuity of enterprise" theories); Comment, Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio Is Really No Debate at All, 21 Ohio N.L. Rev. 297 (author criticizes both "product line" and "continuity of enterprise" exceptions and predicts that Ohio will follow four traditional exceptions). Much of the law review commentary supports liberalizing the rules imposing liability on corporate successors. The articles acknowledge, however, the overwhelming judicial rejection of the liberalizing rules. It is interesting that, after an early spurt of cases in the late 1970s and early 1980s arguing for more expansive liability, courts have refused to impose liability unless the plaintiff is able to come within the four traditional exceptions. See Green, Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal, 87 Nw. U. L. Rev. 897, 909–10 (1993); Henderson and Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479, 492 and n.64 (1990).

Several courts and commentators have recognized that the problems set forth in this Comment can best be addressed by legislation. For an insightful analysis and recommendation, see Green, Successor Liability: The Superiority of Statutory Reform to Protect Product Liability Claimants, 72 Cornell L. Rev. 17 (1986) (criticizing the rationale offered by courts and commentators in support of liability based on "product line" or "continuity of business enterprise" and suggesting a statutory solution to the problem by requiring dissolving corporations to provide products-liability plaintiffs with adequate protection). Courts have repeatedly espoused the same view. See, e.g., Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 829 (Wis.1985):

> We conclude that the legislature is in a better position to make broad public policy decisions in actions based on products liability law. [Citation omitted]. The questions concerning the effect on the manufacturing business, the potential size and economic strength of successor corporations, the availability of commercial insurance and the cost of such insurance are all questions that ... the legislature is in a better position to ascertain.

A similar sentiment was expressed in Leannais v. Cincinnati, Inc., 565 F.2d 437, 441 (7th Cir.1977):

> In recent years, for a variety of reasons, many have thought it necessary to turn to the courts in search of solutions to social problems. Courts are ill-equipped, however, to balance equities among future plaintiffs and defendants.... [S]uch broad public policy issues are best handled by legislatures with their comprehensive machinery for public input and debate.

See also Myers v. Putzmeister, Inc., 596 N.E.2d 764 (Ill.App.1992); Welco Indus. v. Applied Co., 617 N.E.2d 1129 (Ohio 1993); Nguyen v. Johnson Mach. & Press Corp., 433 N.E.2d 1104 (Ill.App.Ct.1982); Holifield v. Setco Indus., Inc., 168 N.W.2d 177 (Wis.1969), overruled on other grounds, Hansen v. A.H. Robins, Inc., 335 N.W.2d 578 (Wis.1983).

One possible statutory approach might be to require that whenever a product manufacturer transfers a business or a product line as a going concern, some form of bond or other security must be posted by the predecessor manufacturer in an amount not to exceed the net value of the predecessor at time of transfer. The value of the bond or other security would be available to future tort plaintiffs to satisfy claims for harm caused by previously distributed defective products. The posting of such a security would, under terms of the statute, protect the successor from future liability for previously distributed products in excess of the value of the security. Presumably, obligations on the bond would be limited in time. Future plaintiffs injured by products previously distributed by the predecessor would be no worse off financially than if the transfer of assets had not occurred. The limit based on the value of the predecessor at the time of transfer, with an appropriate time limit, would render more calculable the amount of the security required, in contrast to the difficulty of calculating future liabilities without such limits under the more expansive successor liability rules applied in a minority of jurisdictions. The value of the predecessor's product line as a going concern, whenever that value exceeds the cost of the security against future liability, would be preserved without allowing the transfer of assets to prejudice tort plaintiffs' chances of recovery.

Comment c. Nonliability in the absence of special circumstances. The following jurisdictions have limited the liability of successor corporations to the four exceptions set forth in § 12 and would reject both the "continuity of enterprise" approach (Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976)) and the "product line" exception (Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)). See, e.g., Arkansas (Swayze v. A.O. Smith Corp., 694 F.Supp. 619, 623 (E.D.Ark. 1988); Reed v. Armstrong Cork Co., 577 F.Supp. 246, 247–48 (E.D.Ark. 1983)); Colorado (Florom v. Elliott Mfg., 867 F.2d 570 (10th Cir.1989) (applying Colorado law); Johnston v. Amsted Indus., Inc., 830 P.2d 1141 (Colo.Ct.App.1992)); Florida (Bernard v. Kee Mfg. Co., 409 So.2d 1047 (Fla. 1982)); Georgia (Bullington v. Union Tool Corp., 328 S.E.2d 726 (Ga.1985)); Illinois (Gonzalez v. Rock Wool Eng'g & Equip. Co., 453 N.E.2d 792 (Ill. App.Ct.1983); Domine v. Fulton Iron Works, 395 N.E.2d 19 (Ill.App.Ct. 1979)); Iowa (Pancratz v. Monsanto Co., 547 N.W.2d 198 (Iowa 1996)); Kentucky (Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145 (6th Cir. 1987) (applying Kentucky law)); Maryland (Nissen Corp. v. Miller, 594 A.2d 564 (Md.Ct.Spec.App.1991)); Massachusetts (Guzman v. MRM/Elgin, 567 N.E.2d 929 (Mass.1991)); Minnesota (Costello v. Unipress Corp., No. C6–95–2341, 1996 WL 106215 (Minn.Ct.App., Mar. 12, 1996); Cooper v. Lakewood Engineering & Mfg. Co., 45 F.3d 243 (8th Cir.1995) (applying Minnesota law)); Missouri (Bozell v. H & R 1871, Inc., 916 F.Supp. 951 (E.D.Mo.1996); Wallace v. Dorsey Trailers Southeast, Inc.,

849 F.2d 341, 343 (8th Cir.1988) (applying Missouri law)); Nebraska (Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481 (Neb.1982)); North Carolina (Budd Tire Corp. v. Pierce Tire Co., Inc., 370 S.E.2d 267 (N.C.Ct.App.1988); Comment, Beyond Budd Tire: Examining Corporate Successor Liability in North Carolina, 30 Wake Forest L. Rev. 889 (Winter 1995)); North Dakota (Downtowner Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D.1984)); Ohio (Welco Indus., Inc. v. Applied Co., 617 N.E.2d 1129 (Ohio 1993)); Oklahoma (Goucher v. Parmac, Inc., 694 P.2d 953 (Okla.Ct.App.1984)); South Dakota (Hamaker v. Kenwel–Jackson Mach., Inc., 387 N.W.2d 515 (S.D. 1986)); Texas (Griggs v. Capitol Mach. Works, Inc., 690 S.W.2d 287 (Tex.Ct.App.1985); Mudgett v. Paxson Mach. Co., 709 S.W.2d 755 (Tex. Ct.App.1986)); Vermont (Ostrowski v. Hydra–Tool Corp., 479 A.2d 126 (Vt. 1984)); Virginia (Harris v. T.I., Inc., 413 S.E.2d 605 (Va.1992)); West Virginia (Jordan v. Ravenswood Aluminum Corp., 455 S.E.2d 561 (W.Va. 1995) (per curiam)); Wisconsin (Fish v. Amsted Indus., Inc., 376 N.W.2d 820 (Wis.1985)); District of Columbia (LeSane v. Hillenbrand Indus., 791 F.Supp. 871, 873–74 (D.D.C.1992) (applying District of Columbia law)); Virgin Islands (Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir.1986, V. I.)). Only a few states appear to have adopted liability based on the successor corporation's continuation of the predecessor's line of products: California (Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)); New Jersey (Ramirez v. Amsted Indus., 431 A.2d 811 (N.J. 1981); (but see possible limit to "product line" exception recognized in dicta in Leo v. Kerr–McGee Chem. Corp., 37 F.3d 97, 100–01 (3d Cir.1994) (applying New Jersey law) ("It seems apparent that, except perhaps in design defect cases, a defect in a product when the manufacturer distributed the product is likely to manifest itself and cause injury within a reasonable time after the product is manufactured. Accordingly, as a practical matter, successor liability under *Ramirez* is likely to be imposed in most cases, if at all, for a limited period.")); New Mexico (Garcia v. Coe Manufacturing Co., 933 P.2d 243 (N.M.1997)); Pennsylvania (Dawejko v. Jorgensen Steel Co., 434 A.2d 106 (Pa.Super.Ct.1981)); Bogart v. Phase II Pasta Machs., Inc., 817 F.Supp. 547 (E.D.Pa.1993)); Washington (Martin v. Abbott Labs., 689 P.2d 368 (Wash.1984); Fox v. Sunmaster Prods., Inc., 821 P.2d 502 (Wash.Ct. App.1991) (the continued product line must be the one that harms the plaintiff)). Although the product line exception is still theoretically viable in Pennsylvania, if a plaintiff has a possible remedy against the predecessor, a recent opinion held the exception could not be invoked. LaFountain v. Webb Indus. Corp., 951 F.2d 544 (3d Cir.1991).

In an earlier draft of these Reporters' Notes, New Jersey was categorized as a jurisdiction that employs a very liberal test for corporate successor liability, a test premised on maximizing recovery rather than on evidence of express agreement to be liable or substantial deprivation of remedies for plaintiffs against the predecessor corporation. In support of this position Pacius v. Thermtroll Corp., 611 A.2d 153 (N.J.Super.Ct.Law Div.1992), was cited. In that case, the court held that *any* transfer of assets or use of the predecessor's goodwill entailed a de facto merger that, in turn, triggered successor liability. Id. at 157. Elaborat-

ing on the policy underlying this holding, the Pacius court quoted Rawlings v. DM Oliver Inc., 159 Cal.Rptr. 119, 124 (1979) for the following proposition:

> Fundamental fairness has been sought through a balancing of the rights of the injured party against the rights of those engaged in business, including the latter's reasonable commercial expectations. Placing the economic burden on those *best able to pay* for those costs, while permitting the transfer to those most culpable is consistent with the equitable considerations inherent in the resolution of the difficult problems which have been judicially posed. The thrust from our high court as a matter of first priority has been to *maximize recovery for the victim.*

Id. at 157 (emphasis added).

Recently, however, New Jersey has reigned in the "deep pocket" approach set forth above by the *Pacius* court. In Saez v. S & S Corrugated Paper Machinery Co., 695 A.2d 740 (N.J.Super.App.Div.1997), the court expressed disagreement both with the decision of the *Pacius* court and with this Restatement's earlier characterization of New Jersey law. The court first noted that, in contrast to the holding in *Pacius*, in order for a successor corporation to be liable under New Jersey law, the corporation must not only benefit from the predecessor's goodwill but must also continue to manufacture the predecessor's product. Id at 16. Moreover, the court stated that the question to answer in determining whether successor liability has been triggered is "not whether there was 'any benefit that the successor obtain[ed] from the acquisition of the assets of its predecessor' or if the successor eliminated a competitor [since] [s]o broad a test would be no test at all." Id.

Several other jurisdictions have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or a common identity of corporate directors. See, e.g., Andrews v. John E. Smith's Sons, Co., 369 So.2d 781, 785 (Ala.1979); Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976); MacCleery v. T.S.S. Retail Corp., 882 F.Supp. 13 (D.N.H.1994).

Comment d. Agreement for successor to assume liability.

1. For general authority that agreements to assume liability will be enforced in favor of plaintiffs with products liability claims, see cases cited in the Reporters' Note to Comment *c*.

2. General assumption of a predecessor's liability, even without specific mention of products liability, will be interpreted to include liability for products liability claims. See, e.g., Bouton v. Litton Indus., Inc., 423 F.2d 643 (3d Cir.1970) (applying New York law); Grugan v. BBC Brown Boveri, Inc., 729 F.Supp. 1080 (E.D.Pa.1990). If the contractual obligation as to the successor's assumption of products liability is subject to conflicting interpretations, the issue is for the trier of fact. See, e.g., Gee v. Tenneco, Inc., 615 F.2d 857, 862–63 (9th Cir.1980) (applying California law); Florom v. Elliott Mfg., 867 F.2d 570, 574–76 (10th Cir.1989) (applying Colorado law); Davis v. Loopco Indus., Inc., 609 N.E.2d 144 (Ohio 1993).

3. Contractual agreements by the successor to repair or service a product sold by the predecessor do not amount to an agreement to assume products liability for injuries caused

by the predecessor's defective products. See, e.g., Schwartz v. McGraw–Edison Co., 92 Cal.Rptr. 776 (Cal.Ct. App.1971) (disapproved on other grounds in Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)); Shane v. Hobam, Inc., 332 F.Supp. 526 (E.D.Pa.1971) (applying New York law). Whether agreements to service a predecessor's products may create an independent duty to warn about defects is discussed in connection with § 13.

Comment e. Fraudulent transfer in order to avoid debts or liabilities. For the reason set forth in the Comment, this exception has rarely been used to impose successor liability for products liability claims. However, in Schmoll v. AC & S, Inc., 703 F.Supp. 868 (D.C.Or.1988), the court found that a complex corporate restructuring was undertaken to avoid both pending and future liability to persons who were certain to suffer asbestos-related illness and was thus the functional equivalent of a fraudulent transfer. See also Morgan v. Cavalier Acquisition Corp., 432 S.E.2d 915 (N.C.Ct.App.1993) (reversing summary judgment when plaintiff's evidence raised a question of fact as to whether the defendant had purchased assets from the predecessor corporation in order to avoid creditors' claims); Budd Tire Corp. v. Pierce Tire Co., 370 S.E.2d 267 (N.C.Ct.App.1988); Mullen v. Alarmguard of Delmarva, Inc., No. CIV. A. 90C–11–40–1–CV, 1993 WL 258696 (Del.Super.Ct., Jun.16, 1993).

A much closer question is whether a successor corporation's actual or constructive knowledge that the predecessor's products are defective and likely to cause injury in the future is sufficient to render the transaction sufficiently tainted so as to come within the umbrella of this exception. There is little authority on the issue. In Nissen Corp. v. Miller, 594 A.2d 564, 569 n. 2 (Md.1991), the court noted that either knowledge of pending claims or knowledge of product defects might be sufficient to expose a successor liability since either would put in question the bona fides of the transaction.

Comment f. Consolidation or merger. For a discussion of what constitutes a "de facto merger," see Fletcher, Cyclopedia Corporations, § 7124.20; American Law of Products Liability § 7:10; Frumer and Friedman, Products Liability § 7.04[5]; Comment, Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio Is Really No Debate at All, 21 Ohio N.L. Rev. 297, 313 nn.136–137 (1994) (describing de facto merger and "mere continuation" doctrines). When the successor purchases the assets of the predecessor for cash, a de facto merger will not be found to have occurred. See, e.g., Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir.1977) (applying Indiana law); Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir.1995) (applying Maine law); Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989); Hamaker v. Kenwel–Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D.1986); Leannais v. Cincinnati, Inc., 565 F.2d 437, 439–40 (7th Cir. 1977) (applying Wisconsin law). Only courts applying the "continuity of enterprise" exception will impose liability when the successor corporation purchased the assets of the predecessor for cash and there is evidence of continuity of the original business. See Reporters' Note to Comment *c*.

Comment g. Continuation of the predecessor. For a discussion of the "mere continuation" exception, see Fletcher, Cyclopedia Corporations

§ 7124.10; American Law of Products Liability § 7:14; Frumer and Friedman § 7.04[4]. Also see Winch v. Yates Am. Mach. Co., Inc., 613 N.Y.S.2d 980 (N.Y.App.Div.1994); Swayze v. A.O. Smith Corp., 694 F.Supp. 619 (E.D.Ark.1988); Florom v. Elliott Mfg., 867 F.2d 570, 578 n. 3 (10th Cir.1989) (applying Colorado law); Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1146 (Colo.Ct.App. 1992); Nissen Corp. v. Miller, 594 A.2d 564, 567 (Md.1991); Tucker v. Paxson Mach. Co., 645 F.2d 620 (8th Cir.1981) (applying Missouri law); Chemical Design, Inc. v. American Standard, Inc., 847 S.W.2d 488 (Mo. Ct.App.1993); U.S. v. Atlas Minerals & Chem., Inc., 824 F.Supp. 46 (E.D.Pa.1993); Hamaker v. Kenwel–Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D.1986).

In analyzing continuation questions, some courts require purchase of stock or other benchmarks in order to establish the requisite continuity. See, e.g., Gehin–Scott v. Newson, Inc., 848 F.Supp. 585 (E.D.Pa.1994); Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996) ("[t]he exception has no application without proof of continuity of management and ownership between the predecessor and successor corporations"); Harris v. T.I., Inc., 413 S.E.2d 605 (Va.1992) (also requiring a common identity of officers, directors, and stockholders). Other courts deny a merger if no transfer of assets has taken place, as in Carreiro v. Rhodes Gill & Co., 68 F.3d 1443 (1st Cir. 1995). Contra, Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir. 1995) (applying Maine law) (holding that purchase of assets is not sufficient to warrant a finding of a de facto merger); Lemelle v. Universal Mfg. Corp., 18 F.3d 1268 (5th Cir. 1994) (applying Louisiana law). But several other states have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or common identity of corporate directors. See, e.g., Andrews v. John E. Smith's Sons, Co., 369 So.2d 781, 785 (Ala. 1979); Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976); MacCleery v. T.S.S. Retail Corp., 882 F.Supp. 13 (D. N.H. 1994). See generally Sweatland v. Park Corp., 587 N.Y.S.2d 54 (N.Y.App.Div.1992).

§ 13. Liability of Successor for Harm Caused by Successor's Own Post–Sale Failure to Warn

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 12, 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:

(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

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RESPONSE TO HOUSE BILL 499

The Alaska Academy of Trial Lawyers and the Alaska Action Trust oppose House Bill 499. This bill erases successor liability in Alaska and does so retroactively. This change in public policy is one that will ensure injured citizens of Alaska will have no recourse against negligent businesses that have changed hands. The Supreme Court of Alaska has adopted the successor liability standard because it is the rule of law that is most persuasive in light of precedent, reason, and policy.

Successor liability, which this bill erases, is part of products liability law. If a company puts a defective product on the market, it is that company that should bear the cost of the injuries the product causes, not the injured person. This bill undermines the principles that govern products liability law.

Generally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company. There are exceptions, however, and this bill encourages the use of mere "continuation of business" transfers and other sham transactions used to deceive. An example of an allowable action under this bill might be the sale of Enron's accountancy firm, Arthur Anderson, in which the liabilities brought on by Arthur Anderson's egregious and illegal actions were unacquired by the purchasing company.

Honest businesses attempting to buy or sell will negotiate a rational price that takes account of any potential claims; any incremental insurance premiums then become part of those negotiations. Any claims to the contrary are mere speculation and cannot outweigh the potential for harm to Alaskans.

In addition, the applicability clause of this legislation, which makes this bill apply to any business disposition "before, on, or after" the effective date is potentially in conflict with the federal constitution under the impairment of contracts clause.

Subject: Comment on HB 499
Date: Mon, 18 Mar 2002 14:24:15 -0900
From: Kimberlee Colbo <KAC@htlaw.com>
To: "'Representative_Norman_Rokeberg@legis.state.ak.us'" <Representative_Norman_Rokeberg@l
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"'Representative_Ethan_Berkowitz@legis.state.ak.us'" <Representative_Ethan_Berkowitz@legis
"'Representative_Albert_Kookesh@legis.state.ak.us'" <Representative_Albert_Kookesh@legis.s
CC: "'Heather_Nobrega@legis.state.ak.us'" <Heather_Nobrega@legis.state.ak.us>

My name is Kimberlee Colbo and I am a member of Hughes Thorsness Powell Huddleston & Bauman, attorneys for Allstate Insurance Company and Certain Underwriters at Lloyd's of London, the insurers for Western Auto Supply Company in the matter involving an injury to Kevin Taylor and a claim for successor liability against Savage Arms, Inc. I am writing to urge you to vote against HB 499 as currently proposed.

Summary of Lawsuit Involving Claims Against Savage Arms

Savage Industries, Inc. manufactured a Stevens Model 125, .22 caliber rifle in July, 1982. In November, 1992, Western Auto Supply Company ("Western Auto") sold the rifle to a retail store in Bucksport, Maine. In approximately December, 1986, Jack Taylor purchased the rifle from The Swap Shop in Soldotna, Alaska for his son. On April 8, 1989, 11 year old Kevin Taylor was severely injured when the rifle fell apart in his hands and he was shot in the head near Nikiski, Alaska.

In late 1990, a lawsuit was filed on Kevin's behalf. On May 13, 1992, Western Auto filed a third-party complaint against Savage Arms seeking implied indemnity from Savage Arms. Kevin's claims against Western Auto were tried in early 1994, resulting in a defense verdict. However, the court granted Kevin a new trial and found the gun was defective as a matter of law. Subsequently, Western Auto and its insurers settled with Kevin for $5.4 million and began pursuing the third-party complaint against Savage.

Savage Industries was a Massachusetts corporation that manufactured firearms for nationwide distribution and sale, including the Stevens Model 125 .22 caliber rifle found to be defective by the court in our case. On February 2, 1988, Savage Industries filed for Chapter 11 protection under the Bankruptcy Code. On March 29, 1988, less than two months later, Savage Arms was incorporated in Texas as a "shell corporation" which was intended "to be the corporate vehicle . . . to handle [the Savage Industries] asset sale." The asset sale was concluded on November 1, 1989.

Traditionally, a purchasing corporation assumes the liabilities of a selling corporation where: (1) there is an express or implied assumption of liability; (2) the transaction amounts to consolidation or merger; (3) the transaction was fraudulent; (4) some of the elements of a purchaser in good faith were absent; or (5) the transferee corporation was a mere continuation or reincarnation of the old corporation. All of these bases for imposing successor liability are well accepted and have been accepted in Alaska since at least the early 1970s. The "continuity of enterprise" theory adopted by the Alaska Supreme Court in Savage Arms, Inc. v. Western Auto Supply Company is a doctrine that only applies in strict products liability cases.

The following factors, among others, serve as the basis for the claim against Savage Arms in the pending lawsuit:
(1) Savage Arms acquired substantially all of Savage Industries' assets;
(2) Savage Arms was formed shortly before, and for the sole purpose of,

acquiring Savage Industries' assets;
(3) Savage Industries ceased operations on October 31, 1989 and Savage Arms began operations on November 1, 1989;
(4) there was commonality of Savage Arms' and Savage Industries' officers and directors (Ronald Coburn, President of Savage Industries, became President of Savage Arms, David Tolly, Vice President of Corporate Affairs of Savage Industries, became Vice President of Corporate Affairs of Savage Arms, and Thomas Humphrey, Controller of Savage Industries, became Vice President and Controller of Savage Arms);
(5) Savage Arms manufactured the same or similar products as Savage Industries;
(6) Savage Arms took over all of Savage Industries' offices and production facilities;
(7) Savage Arms hired no new employees and retained all employees employed by Savage Industries at the time of the asset transfer;
(8) Savage Arms assumed the liabilities and obligations of Savage Industries ordinarily necessary for continuation of normal business operations;
(9) Savage Arms did business using Savage Industries' trade names, patents, trade secrets, business goodwill, and customer information; and
(10) Savage Arms held itself out as a continuation of Savage Industries through its representations in its sales catalogs (i.e. "For almost 100 years, the Savage name has stood for quality, value and dependability in firearms.") and by manufacturing under the Savage name.

As the acquiring corporation, Savage Arms was just a new hat for, or reincarnation of, the Savage Industries. The only practical difference between the two companies was that on October 31, 1989, the company was called Savage Industries and faced large potential liability for products liability claims and on November 1, 1989, the company was called Savage Arms and thought it had eliminated its liability for products liability claims.

After a lengthy delay pending the Alaska Supreme Court's decision on petitions for review filed by Savage Arms, this case is set for trial in November, 2002. In this lawsuit, Savage Arms has consistently argued that it should not be held liable for the damage done by the defective rifle manufactured by Savage Industries because it did not manufacture the gun. What Savage Arms ignores is that Western Auto did not manufacture the gun either. Rather, Western Auto was an innocent retailer who did nothing more than pass on an already defective gun in the chain of distribution. Nonetheless, Western Auto's insurers had to pay to settle the claims resulting from injuries caused by the defective gun, even though, in contrast to Savage Arms, Western Auto has not taken advantage of, and benefited from, the goodwill of Savage Industries for the last 13 years. That is the reason Savage Arms may be held liable in this case.

Concerns With Respect to HB 499

We have two primary concerns with respect to HB 499 as it is currently drafted. First, to the extent that Section 8 of HB 499 is intended to shield, retroactively, Savage Arms, Inc. from liability in the currently pending litigation, it constitutes an unconstitutional ex post facto law. If the Committee is interested in clarifying Alaska law so that the "continuity of enterprise" theory will not be recognized as a basis for imposing successor liability in the strict products liability setting, then that goal can be met by crafting more narrowly drawn language and by making the change in the law effective for causes of action that accrue on or after the effective date of the Act.

Second, the broadly drafted bill will encourage fraud. For instance, if the Exxon Valdez oil spill were to occur tomorrow, all Exxon would have to do to avoid all liability for the consequences of such a spill would be to form a new corporation with a slightly different name, "sell" its assets to the new company and walk away from the liability. This is exactly what happened in connection with the "Savage Industries/Savage Arms" transaction. Such a result would be bad public policy. At a minimum, the Committee should amend

the legislation to recognize the traditional and well accepted bases for imposing successor liability when the successor corporation is a "mere continuation" of the predecessor corporation or where there has been a defacto merger and to recognize successor liability in situations involving fraud.

Successor liability rarely arises. It is a unique doctrine intended to address very unique and unusual business transactions that are not done on an arm's length basis. It has no applicability in the usual "run-of-the mill" corporate transaction that is truly done on an arm's length basis. The reason Allstate and Underwriters have a claim against Savage Arms is because the transaction whereby Savage Industries' assets were transferred to Savage Arms was not done at arm's length and, in fact, contains any number of indicia of fraud. Therefore, on behalf of Allstate and Underwriters, we urge you to vote against HB 499 as currently proposed.

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Response to Memo from Western Auto's counsel

To: Heather Nobrega
From: Ted Pease
Date: March 19, 2002

This is written to provide a response to the memo of Kim Colbo sent to the Judiciary Committee on March 18, 2002. This response will address the significant points in the order presented in Ms. Colbo's memo.

The first three paragraphs recite the history of the facts and largely appear to be accurate with the exception of quotes which are not attributed to any source and are of uncertain origin. The first significant dispute we have with her memo is a statement in the fourth paragraph. After listing the "traditional exceptions", she says that "all of these bases for imposing successor liability are well accepted and have been accepted in Alaska since at least the early 1970's." The truth of this statement is disputed. Even the Supreme Court in the *Savage Arms* opinion said: "neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case." *See Opinion* at page 5. In other words, the law regarding successor liability was not addressed before the Supreme Court opinion in 2001, and certainly has not been settled in Alaska since the early 1970's, and this proposed legislation would not be undoing decades of law.

Ms. Colbo then articulates her version of the asset purchase and concludes that "Savage Arms was just a new hat for, or reincarnation of, Savage Industries." What Ms. Colbo omits are the full facts regarding the asset purchase. The asset sale was part of a transaction whereby those assets were purchased by Challenger, Ltd., a publicly traded company, which was a distinct and separate company from Savage Industries or the owners of Savage Industries. In other words, the assets were not just shuffled to a new company managed by the same owners, but instead went to an independent third-party beyond the control of the original owners. It is Challenger, Ltd. and its then new division, Savage Arms, that sought to shield themselves from unknown and unwanted liabilities, just like any purchaser of assets, particularly those from a bankrupt estate would seek to accomplish. And just so that it is clear, the acquisition closed on November 1, 1989 and the underlying personal injury lawsuit was not filed until November 1990, a *year later.* Therefore, this case does not involve a situation where a seller was trying to defraud a creditor, because no "creditor" existed for another year.

Ms. Colbo then expresses her two primary concerns with HB 499. The first is that it constitutes an *ex post facto* law. Interestingly, she did not have that concern for Savage Arms when the Supreme Court adopted the new successor liability standard and made it retroactive to apply to Savage Arms. In any event, this is not an *ex post facto* law, and is merely the Alaska legislature availing itself of the powers enumerated in AS 01.10.090 to

extend the protection of this statute to acquisitions that have previously occurred and for which purchasers should not be exposed to unknown liabilities.

Ms. Colbo's second concern is that the "drafted bill would encourage fraud." Nothing could be further from the truth. This legislation does not seek to protect fraudulent transactions entered into with the intent to hinder, delay or defraud creditors. To underscore this, we are willing to add language to the bill to the effect that "unless otherwise expressly provided by another statute *or unless it results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor",* the purchaser will not be liable unless it expressly assumes the liability. The example of the Exxon case whereby Exxon could have another oil spill and merely transfer assets to another corporation it owned and avoid liability on the basis of this bill is ridiculous. Again, if the asset sale was a fraudulent conveyance designed to hinder creditors, as the Exxon example would be, then there would be no protection under this bill.

Of some significance, Western Auto has never sued Savage Arms for fraud or fraudulent conveyance. Therefore, when Ms. Colbo concludes that this asset sale "in fact, contains any number of indicia of fraud", she is welcome to sue on that theory, either because she says it has been the law of Alaska since the early 1970's or because such a theory is not prohibited by this Bill. The fact that Western Auto has not sued for fraud may be an indication of the "strength" of that case and may explain why Western Auto is pursuing these other more nebulous standards.

We feel the best way to proceed in light of the valuable goal of providing clarity and certainty to the buyers and sellers of assets, is to only allow successor liability when there is an express assumption by the buyer or there has been fraud with the intent to hinder a creditor. Any other standard, including "mere continuation", "de facto merger" or "continuity of enterprise" would only result in considerable litigation and a great deal of uncertainty about when the buyer acquires liabilities because these terms are not susceptible of certain definition. This legislation seeks to bring certainty while not prohibiting fraudulent transactions.

MEMORANDUM

TO: House Judiciary Committee Members

FROM: Jim Powell

RE: Retroactivity of Laws and Constitutional Takings (CSHB 499).

DATE: April 12, 2002

Retroactive Application of Law In Alaska

"It is a fundamental principle of jurisprudence that retroactive application of new laws is usually unfair." Norman J. Singer, Statutes and Statutory Construction, §41.2 (6th ed. 2001). Alaska has acknowledged this principle and placed statutory safeguards to prevent retrospective application of laws in all but the most narrow instances. Alaska Statute 01.10.090 states that "no statute is retrospective unless expressly declared therein." Before AS 01.10.090, the courts followed the "'well established rule of statutory construction that in absence of a clear expression to the contrary a law is presumed to operate prospectively only.'" Juneau v. Commercial Union Insurance Co., 598 P.2d 957, 958-59 (Alaska 1979).

While AS 01.10.090 allows retroactive application of statutory changes in certain limited circumstances, it is clear that Alaska law disfavors retroactive application of newly enacted statutes. The Alaska Supreme Court explained that "[r]etrospective laws are, indeed, generally unjust, and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." Watts v. Seward Sch. Bd., 421 P.2d 586 (Alaska 1966), vacated, 391 U.S. 592, 88 S. Ct. 1753, 20 L. Ed. 2d 842 (1968), judgment reinstated, 454 P.2d 732 (Alaska 1969) (citations omitted).

One strong policy reason that Alaska, along with numerous other states, disfavors retroactivity is that "people in conducting their business should be able to rely on existing laws with reasonable certainty." Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985).

It is true that statutes may be applied retroactively if the language used by the legislature clearly indicates such. However, the mere fact that retroactive application *can* occur, does not mean that it *should* occur. In this case, should the Legislature choose to make the legislation retroactive, it would constitute a compensable taking.

Compensable Takings in Alaska

Article I, Section 18 of the Alaska Constitution prohibits the taking of private property for a public purpose without just compensation. Alaska Const. Art. I, §18. "The underlying intent of the clause is to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects intended to benefit the public generally." DeLisio v. Alaska Superior Court, 740 P.2d 437, 439 (Alaska 1987). In order for the court to fulfill that purpose, "a liberal construction of the clause in favor of the private property owner is required." Id. at 439-440. The Supreme Court explained, "[w]e liberally interpret Alaska's Takings Clause in favor of property owners, whom it protects more broadly than the federal takings Clause. The Clause's protection extends to personal as well as real property." Waiste v. State, 10 P.3d 1141, 1154 (Alaska 2000) (emphasis added).

Alaska Statute 01.10.060, defines "personal property," for the purposes of the laws of this state, to include "things in action." A "thing in action" is a chose in action

(*Black's Law Dictionary* 1479 (6th ed. 1990)), and "a chose in action, such as [a] claim for personal injuries, is a form of property." Bush v. Reid, 516 P.2d 1215, 1219 (Alaska 1973); see also United States v. Stonehill, 83 F.3d 1156 (9th Cir. 1996) (a chose in action in contract or tort is considered personal property in California); and Bergen v. Estate of Kauppinen, 686 F.Supp. 786 (D. Alaska 1988) (a cause of action for bad faith failure to settle constitutes personal property). The cause of action currently pending against Savage Arms is a chose in action and hence, personal property under AS 01.10.060. Since Alaska's takings clause extends to personal property, any statutory enactment which would interfere with that cause of action (and in the case of HB 499 or CSHB 499, potentially defeat it entirely) would constitute a compensable taking under Alaskan law.

The simple solution to avoid this potential $14.5 million liability on the part of the State of Alaska is to make the changes applicable prospectively only.

165058

MEMORANDUM

FROM: Theodore M. Pease, Jr., Esq.

DATE: April 9, 2002

RE: Constitutionality of CSHB-499

This memorandum is submitted in response to Chairman Rokeburg's invitation to Jim Powell of Hughes Thorsness and Ted Pease of Burr, Pease & Kurtz to submit legal memoranda on the contention, raised at the House Judiciary Committee hearing on HB-499 on April 5, 2002, that the State of Alaska might be held monetarily liable to Allstate in the pending litigation if CSHB-499 is made retroactive in application. The possibility of such liability was suggested by Therese Bannister, legislative counsel, in her February 12, 2002 memorandum to Chairman Rokeburg in which she stated that a retroactive application of HB-499, ". . . may result in a taking by the state for which just compensation is required under Article 1, Section 18 of the Alaska Constitution."[1] Mr. Powell, in his April 5th testimony, stated, without citation to any legal authority, that the State of Alaska could become liable to his clients, Lloyds of London and Allstate, if HB-499 were given retroactive effect. This memorandum addresses the following:

1. Even if the court should find (which it will not) that the retroactive application of HB-499 to the Savage Arms case would constitute a taking of a vested property right, or would be a constitutionally prohibited *ex post facto* law,

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[1] "Eminent Domain. Private property shall not be taken or damaged for public use without just compensation." Constitution of Alaska, Article 1, Section 18.

under no possible procedural scenario could the State be found liable to Allstate and Underwriters.

2. Retroactive application of HB-499 to the Savage Arms case would not amount to the taking of or impairment to a property right.

3. Retroactive application of HB-499 is not an *ex post facto* law prohibited by Section 15, Article I of the Alaska Constitution.

1. **Under No Procedural Scenario Could the State of Alaska be Found Liable to Allstate and Underwriters.**

There has been no final judgment in *Savage Arms*; this is an on-going case that has been remanded to the Superior Court in Kenai (Judge Link) with a trial set for November 2002. (The procedural history and status of this case is described in a memorandum dated February 12, 2002 previously submitted. A copy of that memorandum is attached hereto for ready reference.) Under no possible outcome could the State of Alaska be found liable to anyone. Consider the following scenarios which are all the possible outcomes of the litigation if HB-499 is retroactive:

A. Judge Link recognizes the retroactivity of HB-499 and refuses to instruct the jury on the continuity of enterprise doctrine adopted by the Supreme Court. The case is submitted to the jury on other theories of liability and Allstate wins. The issue is now moot.

If, however, Allstate loses and there is a defense verdict, Allstate would then appeal to the Supreme Court advancing its claims that the retroactive application of HB-499 constitutes the taking of a vested property right or that retroactive application of HB-499 is an *ex post facto* law. If the Supreme Court rejects those arguments, upholds

Judge Link, and finds that there is no taking of property or impairment of a contract or an *ex post facto* law, the case is over. If, however, the court agrees with Allstate and finds that the retroactive application of HB-499 is constitutionally prohibited, it would vacate the judgment and send the case back to Judge Link to retry the case before a jury on the continuity of enterprise doctrine. If Allstate then wins, it has a judgment against Savage Arms; if it loses it has nowhere else to turn.

B. Alternatively, suppose Judge Link declines to recognize the retroactivity provision of HB-499 and presents the case to the jury on the continuity of enterprise doctrine. If the jury finds Savage Arms not liable under the continuity of enterprise doctrine, Allstate has had its day in court and the case is over. If the jury finds Savage Arms liable to Allstate and Underwriters under the continuity of enterprise doctrine, Savage Arms could then appeal to the Supreme Court asking the Supreme Court to uphold the retroactive application of HB-499 and find that there is no impairment of a vested property interest or an *ex post facto* law. If Savage Arms is unsuccessful in that appeal, then Allstate and Underwriters are free to pursue their judgment against Savage Arms. If, however, the Supreme Court agrees with Savage Arms and holds that HB-499 must be given retroactive effect, the case would be over and Allstate would have no claims against the State of Alaska or anyone else with the court having found that there is no taking of a property right, nor an impairment of a contract, nor an *ex post facto* law.

2. **Retroactive Application of HB-499 to the Savage Case Does Not Impinge on Any Vested Property Right.**

Vested property rights are protected against state action by the Fourteenth Amendment of the United States Constitution. Moreover, Article I § 7 of the Alaska state constitution further protects vested property rights: "No person shall be deprived of life, liberty, or property, without due process of law."

A right is vested when it has been so far perfected that it cannot be taken away by statute. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985). A "vested rights" analysis is not ordinarily used in determining whether a statute is retroactive; rather, it is traditionally used in determining whether a retroactive statute is unconstitutional. *Id.* at 1092; *see also Underwood v. State*, 881 P.2d 322, 327 (Alaska 1994), *cert. denied* 115 S.Ct. 1694, 514 U.S. 1064 (1995) (noting that in determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights).

Allstate and Underwriters Have No Vested Property Right in a Continuity of Enterprise Cause of Action. In *Kitchen v. United States*, 741 F.Supp. 182, 185 (D. Alaska 1989) (copy of decision attached), the United States District Court in Alaska rejected the plaintiff's claim that the retroactive application of a statute to her case deprived her of vested rights. In that case, Congress enacted a statute that effectively abolished the plaintiff's state law claims against the defendant. The plaintiff complained that the retroactivity of the statute, which was amended after she had filed suit in state

court and which provided protection for the defendant from the plaintiff's medical malpractice claim, deprived her of her state law causes of action.

The court held that the plaintiff had no vested rights in her state law causes of action. *Id.* The court noted that the question whether the rights asserted in the plaintiff's state law causes of action were "vested" could not be answered by looking to see whether suit had already been filed and how far it had proceeded when Congress enacted the statute. *Id.* Quoting the United States Supreme Court, the court held that no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. *Id.* The court stated that this is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. *Id.* The court concluded that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. *Id.* Because rights in tort do not vest until there is a final, unreviewable judgment, the court held that Congress abridged no vested rights of the plaintiff by enacting the statute and retroactively abolishing the plaintiff's cause of action in tort. *Id.* In making this ruling the District Court relied on the following quote from *Hammond v. U.S.*, 786 F.2d 8, 12:

> No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. Chief Justice Marshall first announced the principle in *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). The Supreme Court held in that case that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. For a more recent and stringent application of this rule, *see 149 Madison Avenue Corp.* v

> *Asselta,* 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947).
>
> Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting §2212 and retroactivity abolishing her cause of action in tort. *Id.*

Likewise, the Alaska Supreme Court has, on numerous occasions, upheld the retrospective application of statutes. For example, in *Underwood v. State* (copy of decision attached), the court held that the plaintiffs had no vested right to a 1993 permanent fund dividend (PFD). 881 P.2d 322, 327 (Alaska 1994). In that case, the Underwoods timed their move from Texas to Alaska with the specific intention of becoming Alaska residents in time to qualify for a 1993 PFD. The Underwoods understood that in order to qualify for the 1993 PFD, they had to be state residents on or before April 1, 1992. The Underwoods moved to Alaska on March 25, 1992.

On March 31, 1992, however, the governor of Alaska signed a statute that amended the eligibility requirements for a PFD to coincide with the calendar year. As a result, to be eligible for a 1993 PFD, applicants had to show Alaskan residency as of January 1, 1992. Accordingly, persons who established Alaskan residency between January 2, 1992 and April 1, 1992 were not eligible for a 1993 PFD, whereas under prior law they would have been eligible.

The Underwoods sued in superior court, challenging the constitutionality of the enactment. They specifically claimed that it violated the equal protection and due process guarantees of the federal and state constitutions, that it constituted an *ex post facto* law, that it was an impermissible taking of property, and that the state was equitably

stopped from amending the law. The superior court granted summary judgment in favor of the state on all of the Underwoods' claims and the Underwoods appealed.

Addressing the Underwoods' due process claim, the court noted that vested property rights are protected against state action by the due process clauses of the Alaska and United States Constitutions. *Id.* The court, however, rejected the Underwoods' claim that upon their arrival in Alaska in March 1992 they had a vested right to 1993 PFDs, subject only to their continuing residence, reasoning that at that time, the Underwoods possessed nothing more than an inchoate expectancy of a 1993 PFD that is not afforded constitutional protection. *Id.*

In addition, the court discarded the Underwoods' assertion that the 1992 amendment constituted an *ex post facto* law in violation of the Alaska Constitution. *Id.* The court noted that in determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights. *Id.* The court noted that the Underwoods had no vested right to a 1993 PFD as of March 31, 1992, just as no Alaskan had a vested right to a 1993 dividend at that time. *See also, Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567, 574 n. 12 (Alaska 1989) (holding that a statutory change which merely disappoints economic expectations and does not affect vested rights is not an *ex post facto* law); *Bidwell v. Scheele*, 355 P.2d 584, 586–87 (Alaska 1960); and memo of February 12, 2002 attached hereto entitled: Can the Alaska legislature act and affect a pending case in which the Alaska Supreme Court has previously decided the law?

3. **Summary.**

Based on the above authority, making this statute retroactive will not deprive Allstate or any other party of any vested rights and the state of Alaska would not be exposed to liability. Specifically, a supposed deprivation of property rights argument advanced by Allstate, wherein it might assert that it has a vested property right in the judicially announced Alaska law regarding successor liability, fails because no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained.

Here, the Alaska Supreme Court has simply announced the law and remanded the case back for trial under the applicable standards. Allstate has not yet received a final, unreviewable judgment. Consequently, its alleged right to this judicially announced law has not yet vested.

Furthermore, logically, any action for a deprivation of rights would necessarily have to involve some element of reliance on the law in existence at the time a party's conduct occurred. In this case, Allstate settled the case years before the Supreme Court adopted the continuity of enterprise theory and therefore it cannot claim to have relied upon that theory when making the settlement.

MEMORANDUM

RE: Procedural Status of Western Auto Supply Co. (now Allstate Insurance Company and Certain Underwriters at Lloyd's of London) pending in the Superior Court for the State of Alaska, Third Judicial District at Kenai, Case No. 2KN-90-922 CI

DATE: February 12, 2002

Western Auto v. Savage Arms, Inc. is still a pending case in the Kenai Superior Court. The decision of the Supreme Court in *Savage Arms, Petitioner v. Western Auto Supply Co., Respondent*, 18 P.3d 49 (Alaska 2001) was an interlocutory decision by the Supreme Court on a petition for review. Western Auto and Savage Arms, Inc. filed cross-motions for summary judgment on the question of whether Savage Arms was liable as the "legal successor to Savage Industries, Inc." Judge Link, the Superior Court judge in Kenai, ruled in favor of Western Auto. This was not a final judgment as there were other issues remaining unresolved which would have to be decided by trial if not disposed of by additional pretrial motions.

Only final judgments of the Superior Court can be appealed to the Alaska Supreme Court. However, Appellate Rule 610 provides for an interlocutory review by the Supreme Court, before there has been a final judgment, at the discretion of the Alaska Supreme Court for issues which meet the criteria set forth in Appellate Rule 610. One of the grounds is if the decision of the lower court:

"... involves a controlling question of law on which there is a substantial ground

for difference of opinion and an immediate review of the order may materially advance the termination of the proceedings . . .."

Savage Arms petitioned the Supreme Court for a review of Judge Link's decision under this procedure. The Supreme Court granted the petition and ordered full briefing. Proceedings in the Superior Court were stayed pending the decision by the Supreme Court on the petition for review. After the Supreme Court decision (first handed down on March 2, 2001, with rehearing denied on April 4, 2001) the case was remanded to Judge Link for further proceedings. Trial has been scheduled by Judge Link for November of 2002.

(In its decision, the Supreme Court also ruled that because all of Western Auto's defense costs and attorney's fees and the entire amount of the settlement by Western with the plaintiff, Taylor, had been paid by Western Auto's insurers, Allstate and Certain Underwriters at Lloyd's, those insuring entities were the proper parties plaintiff and in compliance with that ruling, Allstate and Certain Underwriters at Lloyd's have been substituted in place of Western Auto as the plaintiff.)

Thus, *Allstate Insurance Company and Certain Underwriters of Lloyd's v. Savage Arms, Inc.* is very much still a pending case and there has been no final judgment. If legislation past by the legislature is made specifically retroactive and/or curative, it could be expected that the Alaska courts would apply such new legislation to the pending case in spite of the Supreme Court's prior ruling. *See Zurfluh v. State*, 620 P.2d 690, 693 (Alaska 1980).

MEMORANDUM

RE: Western Auto's Insurers v. Savage Arms

DATE: February 12, 2002

ISSUE

Can the Alaska legislature act and affect a pending case in which the Alaska Supreme Court has previously decided the law?

BRIEF ANSWER

Yes. The Alaska legislature is empowered by well-established statutory and case law authority to apply a statute retroactively. Further, even if the Alaska legislature does not expressly provide for retrospective application of a statute, legislation that is "curative" may be applied retroactively.

DISCUSSION

A. Retroactivity Expressly Provided

Restrospective legislation is not in and of itself unconstitutional. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985). In fact, a nearly forty-year old Alaska statute explicitly provides the legislature with authority to apply a statute retroactively. Specifically, Alaska statute Section 01.10.090 states: "No statute is retrospective unless expressly declared therein." The Alaska Supreme Court has also recognized the legislature's authority to apply statutes retroactively. *See, e.g., Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947, 948 (Alaska 1989) (stating statutes will be applied to causes of action arising prior to their enactment when the legislature so intends, either expressly or impliedly); *State v. Kaatz*, 572 P2d 775, 779 (Alaska 1977); *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 (Alaska 1985); *Brice v. State*, 669 P.2d 1311, 1315 (Alaska 1983); *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 711 (Alaska 1992); *State v. Alaska Pulp America, Inc.*, 674 P.2d 268, 272 (Alaska 1983); *Stephens v. Rogers Const Co.*, 411 P.2d 205, 208 (Alaska 1966) (noting

whether or not a statute operates retrospectively depends upon the language of the statute).

B. Curative Legislation

Even if the Alaska legislature does not expressly provide for retrospective application of a statute, the Alaska Supreme Court has recognized an exception to the general rule against retroactivity for legislation that is "curative." Curative legislation is legislation promptly enacted by the legislature in response to a particular judicial decision with which the legislature disagrees. *See, e.g., Zurfluh v. State*, 620 P.2d 690, 693 (Alaska 1980) (discussing the curative legislation exception to the general rule against retroactivity). In *Zurfluh*, the Alaska legislature acted within two months following an Alaska Supreme Court decision and statutorily instituted incarceration as a condition to a suspended sentence after the Alaska Supreme Court had decided against such a condition. Despite the lack of retroactive language in the newly enacted statute, the Alaska Supreme Court deemed the statute "curative" and applied it retroactively to the pending case, effectively overruling their own recent opinion.

Specifically, in *Zurfluh*, the defendant broke into a store and stole a safe containing over $42,000. In October 1978, the defendant turned himself in and pled no contest. Incarcerating a defendant as a condition of a suspended sentence was a common practice in Alaska before December 1, 1978, when the Alaska Supreme Court in *State v. Boyne*, held that the courts did not have the authority to do so. In response to *Boyne*, the next session of the Legislature, which began in January 1979, enacted a statute effective May 2, 1979, which allowed for incarceration as a condition of a suspended sentence.

The issue in *Zurfluh* was whether the newly enacted statute could be applied retrospectively to the 153-day period between the *Boyne* decision on December 1, 1978 and May 2, 1979, the statute's effective date. It was during this period that the defendant was sentenced.

After citing the general rule that "[n]o statute is retrospective unless expressly declared therein," the court noted that the new statute did not expressly provide for retrospective application. *Zurfluh*, 620 P.2d at 693. The court found, however, that the timing of the legislation and the hearing testimony on the bill indicated the statute was curative legislation proposed in reaction to the ruling in *Boyne*. *Id.* The court stated that curative legislation was an exception to the general rule against retroactivity and emphasized that retroactivity would be

ascribed to curative legislation more readily than to that which might disadvantageously, though legal, affect past relations and transactions. *Id.* Consequently, the court held that on remand the trial judge was to apply the new statute when he considered the defendant's sentence. *Id.*

CONCLUSION

The Alaska Legislature has well-established authority to enact a statute and apply it retroactively to pending cases. The legislature should expressly state that the statute is to be applied retroactively to all pending cases. Alternatively, or in addition, the statute should state that it is curative legislation in response to the Alaska Supreme Court's decision in *Savage Arms, Inc. v. Western Auto Supply Co.*

Goodwill. Vocation rehabilitation had closed their file on Williams as rehabilitated. (Tr. p. 200).

When reviewing agency decisions concerning disability benefits, questions of fact, including the credibility of a claimant's subjective testimony, are primarily for the Secretary to decide, not the courts. To engage in fact-finding in a Social Security case is not within the province of a federal court. *Benskin v. Bowen*, 830 F.2d 878, 882–83 (8th Cir.1987). The Secretary's decision must be affirmed if it is supported by substantial evidence. 42 U.S.C. § 405(g); *Clark v. Heckler*, 733 F.2d 65 (1984). "Substantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.'" *Metcalf v. Heckler*, 800 F.2d 793, 794 (8th Cir.1986), *quoting Consolo v. Federal Maritime Commission*, 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate support for a conclusion." *Clark v. Heckler*, 733 F.2d at 68.

I find that the decision of the ALJ is supported by substantial evidence.

JUDGMENT

IT IS THEREFORE ORDERED that the decision of the Secretary is affirmed.

Lucy KITCHEN, Plaintiff,

v.

UNITED STATES of America, Defendant.

No. N89-001 Civ.

United States District Court, D. Alaska.

June 30, 1989.

Medical malpractice plaintiff moved to remand suit against Indian contractor to state court. The District Court, Holland, Chief Judge, held that Federal Tort Claims Act was plaintiff's exclusive remedy upon certification by Attorney General that contractor was federal employee acting within scope of his employment.

Motion denied.

1. Removal of Cases ⇐2

Removal statute for suits against federal employees, as amended in 1988, was applicable to pending state court case; moreover, amendment's requirement that removal motion be made within 60 days of enactment of amendment was not applicable to case which was not tried in state court. 28 U.S.C.A. § 2679(d)(2).

2. Removal of Cases ⇐21

Indian contractor was federal "employee" for purposes of removing medical malpractice claim against contractor to federal court; Federal Tort Claims Act was plaintiff's exclusive remedy upon certification by Attorney General that contractor was federal employee acting within scope of his employment. 28 U.S.C.A. §§ 1346(b), 2671 et seq., 2679(d)(2); Public Health Service Act, § 244(a), as amended, 42 U.S.C.A. § 233(a).

3. Constitutional Law ⇐253(4)
Removal of Cases ⇐2

Medical malpractice plaintiff had no vested right in state law cause of action prior to judgment such as would render unconstitutional retroactive application of statute pursuant to which case was removed to federal court. U.S.C.A. Const. Amend. 5.

William G. Azar, Anchorage, Alaska, for plaintiff.

Larry Card, Office of the U.S. Atty., R. Collin Middleton, Middleton, Timme & McKay, Anchorage, Alaska, Leon B. Taranto, Torts Branch, Civ. Div. U.S. Dept. of Justice, Washington, D.C., for defendant.

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The District Court, Holland, held that Federal Tort Claims intiff's exclusive remedy upon by Attorney General that con- federal employee acting within employment

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malpractice plaintiff had no in state law cause of action gment such as would render nal retroactive application of uant to which case was re- deral court. U.S.C.A. Const.

Azar, Anchorage, Alaska, for

l, Office of the U.S. Atty., R. eton, Middleton, Timme & orage, Alaska, Leon B. Taran- inch, Civ. Div. U.S. Dept. of ington, D.C., for defendant.

ORDER

Motion to Strike & Motion to Remand Denied

HOLLAND, Chief Judge.

The court has now before it plaintiff Lucy Kitchen's motion to remand this case to the Superior Court for the State of Alaska, Second Judicial District at Nome. The plaintiff has also filed a motion to strike the notice substituting the United States as the party defendant. Said motions are opposed by the defendant, United States of America. Plaintiff has requested oral argument, but the court does not deem oral argument necessary to the disposition of these motions.

This is a medical malpractice action originally brought against Norton Sound Health Corporation for the alleged negligence of one of its doctor employees. Plaintiff alleges that as a result of said doctor's negligence, while acting within the scope of his employment, plaintiff suffered severe permanent brain injuries

[1] The United States removed the instant case pursuant to 28 U.S.C. § 2679(d)(2). Plaintiff argues that said statute is inapplicable to this case. In the first place, plaintiff contends that Section 2679(d)(2) is applicable only to suits against federal employees arising out of their operation of motor vehicles in the scope of their employment. This argument is largely based on the assumption that Section 2679, as amended in 1988,[1] is not applicable to this case. Plaintiff also argues that, even if Section 2679(d)(2) is applicable to this case, the United States' removal of this case was untimely.

Section 2679(d)(2) provides:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a state court shall be removed without bond *at any time before trial* by the Attorney General to the District Court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(Emphasis added.) Section 2679(d)(2) of Title 28, United States Code, by its express, plain language, has application to pending state court cases such as this. This case was not tried in state court. It was properly and timely removed before trial.

Plaintiff contends that Public Law No. 100-694 at Section 8(c)[2] applies in this case. Public Law No. 100-694 at Section 8(c) provides as follows:

> (c) Pending State Proceedings.—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

This case was not removed within sixty days of enactment of Public Law No. 100-694. However, because the instant case was not *tried* in state court, the time for removal has not expired. Section 8(c) of Public Law No. 100-694 has no application to this case.

Returning to plaintiff's contention that Section 2679 applies to suits against federal employees arising from their operation of motor vehicles, the plain language of Public Law No. 100-694 makes it clear that this

1. Public Law No. 100-694

2. Federal Employees Liability Reform & Tort Compensation Act of 1988, Pub.L. No. 100-694, 1989 U.S.Code Cong. & Admin. News (102 Stat.) 4563, 4566.

amendment has application to all claims which are cognizable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.* The amendment to Section 2679(b)(1) makes no mention of suits against federal employees arising out of their operation of motor vehicles.[3] Plaintiff is mistaken in her contention that the removal statute in question applies only to suits against federal employees arising out of their operation of motor vehicles in the scope of their employment.

[2] Plaintiff also contends that "[n]o 'employee' was ever a Defendant in this action." Section 2679(d)(2) provides:

> This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

In the instant case, the attorney general has certified that Norton Sound Health Corporation was an employee acting within the scope of its employment. The question of whether or not an Indian contractor is an "employee" for purposes of Section 2679(d)(2) is answered by Public Law No. 100–446 which became law on September 27, 1988, and which provides in pertinent part:

> [F]or purposes of ... 42 U.S.C. § 233(a) ... with respect to claims by any person for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental or related functions ... an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under Sections 102 or 103 of this Act is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees ... *are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement.*[4]

Title 42 U.S.C. § 233(a) provides:

> (a) The remedy against the United States provided by Sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under Section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental or related functions, including the conduct of clinical studies or investigation by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

By virtue of the reference to 42 U.S.C. § 233(a), in Public Law No. 100–446, it is clear that the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.*, is the exclusive remedy for claims such as plaintiff's and that Indian contractors are "employees" protected by Public Law No. 100–446. Thus, Norton Sound Health Corpora-

3. "[I]f the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."
Kremer v. Chemical Construction Corp., 456 U.S. 461, 468, 102 S.Ct. 1883, 1890, 72 L.Ed.2d 262 (1982), *quoting Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976).
28 U.S.C. § 2679(b)(1), as amended by Public Law No. 100–694, now provides for actions against "any employee". 28 U.S.C. § 2679(b)(1) states:
(b)(1) The remedy against the United States provides by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

4. Public Law No. 100–446 modified Public Law No. 100–202, which preceded Public Law No. 100–446 (emphasis supplied)

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tion was an employee acting within the scope of its employment for purposes of 28 U.S.C. § 2679(d)(2) upon certification by the attorney general.

[3] Next, the court considers the plaintiff's contentions that Public Law No. 100-446 is unconstitutional because it is the product of illegal lobbying activities by Norton Sound Health Corporation, and/or because the retroactive application of Public Law No. 100-446 unconstitutionally deprives plaintiff of a vested right.

In the first place, the plaintiff has failed to provide the court with any authority whatsoever that "illegal lobbying efforts" by a defendant can have the effect of depriving a plaintiff of due process of law. Furthermore, plaintiff complains that the retroactivity of Public Law No 100-446 to her case deprives her of vested rights. Plaintiff filed her action in state court which, she claims, provided her with: "a trial by jury; liberal tolling of the statute of limitations in cases of brain injury; the ability to sue a private corporation for its acts of negligence; a convenient forum; the ability to place the action on a fast track system for quick resolution; and, the availability of the insurance coverage of the North Sound Health Corporation." Plaintiff's reply memorandum at 10.

Quite simply, the plaintiff has no vested rights in her state law causes of action.

The question whether the rights asserted in plaintiff's state-law causes of action are "vested" cannot be answered by looking to see whether suit had already been filed and how far it had proceeded when Congress enacted § 2212. "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. Chief Justice Marshall first announced the principle in *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). The Supreme Court held in that case that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. For a more recent and stringent application of this rule, *see 149 Madison Avenue Corp. v. Asselta*, 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947).

Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort.

Hammond v. United States, 786 F.2d 8, 12 (1st Cir.1986) (citations and footnote omitted).

On the foregoing authority, this court rejects plaintiff's argument that the retroactive application of Public Law No. 100-446 unconstitutionally deprives her of vested rights is contrary to established precedent.

For the foregoing reasons, the plaintiff's motions for remand and to strike notice of substitution of the United States as the party defendant are hereby denied.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff,

v.

Paula MARQUA, Personal Representative of the Estate of Jennifer W. Chamberlain, Defendant.

Brian CHAMBERLAIN and Paula Marqua, Personal Representative of the Estate of Jennifer W. Chamberlain, Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Defendant.

No. A87-574 Civ.

United States District Court, D. Alaska.

Nov. 8, 1989.

Husband and wife were named insureds under automobile policy, and suits

but will merely enforce the shifted obligation, as contemplated in the written agreement.[7]

B. *Equitable Estoppel Argument*

Deborah argues that the doctrine of equitable estoppel should apply to prevent a parent who has not actually had custody of the child from asserting a claim for child support arrearages. Deborah acknowledges that such an approach would violate the rigid rule against child support modifications, but she cites a line of Illinois cases which she claims have continued to apply equitable estoppel even after adopting the strict federal prohibition on retroactive modifications.

Regardless of the merits of the argument, the entire equitable estoppel discussion is moot in this appeal. Deborah acknowledges that the application of equitable estoppel would not entitle her to an award of child support for the period in question (October 1991 to March 1992). She merely claims that the doctrine should prevent Billy from asserting a claim for child support for this same period. This argument is moot because Billy has asserted both to the superior court and this court that he is not attempting to collect child support for this period, but merely for January 1991 to September 1991.

IV. *CONCLUSION*

For the reasons stated above, the order of the superior court is AFFIRMED.

7. Billy also disagrees with the master's failure to include the September 1991 payment in Deborah's past due obligation, and with her finding that Billy's obligation of $868.50 began in September and not October of 1991, even though Scott did not move out of his father's residence until sometime late in September. Billy did not raise this issue in his Statement of Points on Appeal, and therefore we consider it waived. *See Welcome v. Jennings*, 780 P.2d 1039, 1042 n. 4 (Alaska 1989)

Charles E. UNDERWOOD, Jr., Susie G. Underwood, and Anthony C. Underwood, Appellants,

v.

STATE of Alaska, Governor Walter J. Hickel and Department of Revenue, Appellees.

No. S-5802.

Supreme Court of Alaska.

Sept. 30, 1994.

Residents, who moved into state prior to April 1 of year in which statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, took effect, filed action claiming that denial of PFD violated constitutional rights. The Superior Court, Fourth Judicial District, Fairbanks, Mary E. Greene, J., granted summary judgment in favor of state. Residents appealed. The Supreme Court, Moore, C.J., held that: (1) enactment of amendment did not deprive residents of equal protection; (2) enactment of amendment did not violate due process rights of residents; (3) amendment was not impermissible "ex post facto" law; and (4) state was not estopped from denying PFD to residents.

Affirmed.

1. **Constitutional Law** ⇐234.6
States ⇐127

Enactment of statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, did not deprive residents who moved into state prior to April 1 of year in which change took effect of equal protection; changed qualifying date was fairly and substantially related to goal of improving overall

ERWOOD, Jr., Susie
and Anthony C.
l, Appellants,

v.

a, Governor Walter
Department of
Appellees.

3-5802.

urt of Alaska.

30, 1994.

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Court, Fourth Judicial
Mary E. Greene, J.,
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Statement of Points on
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80 P.2d 1039, 1042 n. 4

efficiency of PFD program. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14; AS 43.23.005(a).

2. Constitutional Law ⇐211(2)

Under sliding scale approach to equal protection questions adopted by Alaska Supreme Court, applicable standard of review for given case is to be determined by importance of individual rights asserted and by degree of suspicion with which Supreme Court views resulting classification scheme; as level of scrutiny selected moves up the sliding scale, the asserted governmental interest must be relatively more compelling, and legislation's means-to-ends fit must be correspondingly closer. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐213.1(2)

Under minimum level of scrutiny applicable to equal protection challenge regarding economic interest, state must show that challenged enactment was designed to achieve a legitimate governmental objective, and that means bear a fair and substantial relationship to accomplishment of that objective. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐291.6
States ⇐127

Enactment of statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, did not violate due process rights of residents who moved into state prior to April 1 of year in which change took effect; upon move into state, residents possessed nothing more than inchoate expectancy of PFD. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14; AS 43.23.005(a).

5. Constitutional Law ⇐197

"Ex post facto" law is law passed after occurrence of fact or commission of act, which retrospectively changes legal consequences or relations of such fact or deed. Const. Art. 1, § 15.

See publication Words and Phrases for other judicial constructions and definitions.

6. Constitutional Law ⇐188

In determining whether statute affecting preenactment conduct is unconstitutionally retrospective, one inquiry is into whether statute affects vested rights. Const. Art. 1, § 15.

7. Constitutional Law ⇐199
States ⇐127

Enactment of statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, did not constitute impermissible "ex post facto" law in violation of Alaska Constitution, where at time of amendment, no Alaskan had vested right to dividend, and change did not unfairly or unreasonably impinge upon any property rights or settled expectations. Const. Art. 1, § 15; AS 43.23.005(a)

8. Estoppel ⇐62.2(2)

State was not estopped from denying permanent fund dividend (PFD) to residents who moved into state prior to April 1 of year in which amendment changing eligibility requirements for PFD to coincide with calendar year, rather than the former date of April 1, took effect; residents took calculated risk when they decided to move to state prior to April 1, rather than later date they would allegedly have otherwise preferred, and state engaged in no conduct encouraging residents' action or guaranteeing that residents would qualify for PFD if they arrived prior to April 1. AS 43.23.005(a).

Robert John, Law Office of Robert John, Fairbanks, for appellants.

Vincent L. Usera, Asst. Atty. Gen., and Bruce M. Botelho, Atty. Gen., Juneau, for appellees.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

MOORE, Chief Justice.

At issue in this appeal is the constitutionality of a 1992 amendment to the permanent fund dividend (PFD) statutes, Chapter 4,

section 4, SLA 1992. The amendment changed the qualifying date set forth in AS 43.23.005(a) for a 1993 PFD. Charles E. Underwood, Jr., along with his wife and son, Susie G. Underwood and Anthony C. Underwood (the Underwoods), allege that they were unlawfully denied 1993 PFDs as a result of the change. They instituted this action against the State of Alaska, Governor Walter J. Hickel and the Department of Revenue (collectively "the State"), claiming that the amendment violated a number of their constitutional rights and that the State was estopped from denying their dividend applications. The superior court granted summary judgment in favor of the State. We affirm.

I. *FACTS AND PROCEEDINGS*

The facts are not in dispute. The Underwoods timed their move from Texas to Alaska with the specific intention of becoming Alaska residents in time to qualify for a 1993 PFD. According to Charles Underwood, he understood that in order to qualify for the 1993 PFD, the family members had to be state residents on or before April 1, 1992. Although Charles otherwise would have preferred to remain at his job in Texas until May 1992, he resigned in March. Had Charles remained at his job until late May as he desired, Charles claims he would have earned roughly another $3,000 in after tax wages. The family arrived in Alaska on March 25, 1992.

On March 31, 1992, Governor Hickel signed Chapter 4, section 4, SLA 1992, which amended AS 43.23.005 by changing the eligibility requirements for a PFD to coincide with the calendar year. As a result, to be eligible for a 1993 PFD, applicants had to show Alaska residency as of January 1, 1992. Accordingly, persons who established Alaskan residency between January 2, 1992 and April 1, 1992 were not eligible for a 1993 PFD, whereas under prior law they would have been eligible.

The Underwoods brought suit in superior court challenging the constitutionality of the enactment. They specifically claimed that it violated the equal protection and due process guarantees of the federal and state constitutions, that it constituted an ex post facto law, that it was an impermissible taking of property, and that the State was equitably estopped from amending the law.

The superior court granted summary judgment in favor of the State on all of the Underwoods' claims. The Underwoods appeal.

II. *DISCUSSION*

The parties agree that there are no issues of material fact, and that this case may be properly resolved as a matter of law. The constitutional and other purely legal questions at bar are issues to which this court will apply its independent judgment. *State v. Anthony*, 810 P.2d 165, 166–67 (Alaska 1991); *Croft v. Pan Alaska Trucking*, 820 P.2d 1064, 1066 (Alaska 1991).

A. *The Challenged Enactment Does Not Violate The Underwoods' Constitutional Rights.*

Alaska Statute 43.23.005 governs the eligibility requirements for a PFD. Following the enactment of Chapter 4, section 4, SLA 1992, the statute provided that:

> (a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if
>
> ....
>
> (3) the individual was a state resident for at least the calendar year immediately preceding *January 1* of the current dividend year; ....

AS 43.23.005(a)(3) (emphasis added). Prior to the 1992 amendment, the statute required Alaska residency for the twelve month period immediately preceding *April 1* of the current dividend year. AS 43.23.005(a)(2) (effective June 11, 1991).

1. *Equal Protection*

[1] The Underwoods assert that the 1992 enactment denied them equal protection and opportunity under both the Federal and Alaska Constitutions. *See* U.S. Const. amend. XIV; Alaska Const. art. I, § 1. Because Alaska's equal protection clause "is more protective of individual rights than the

federal equal protection clause," *State v. Anthony*, 810 P.2d at 157, we focus our analysis on the Alaska Constitution.[1]

[2] We have adopted a sliding scale approach to equal protection questions. *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978). Under this approach, "'[t]he applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.'" *State, Dep't of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993) (quoting *State v. Ostrosky*, 667 P.2d 1184, 1192-93 (Alaska 1983)). As the level of scrutiny selected moves up the sliding scale, the asserted governmental interests must be relatively more compelling, and the legislation's means-to-ends fit must be correspondingly closer. *Ostrosky*, 667 P.2d at 1193. Conversely, "if relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness in the means-to-ends fit will be tolerated." *Id.* (footnote omitted).

[3] We have held that an individual's interest in a PFD "is merely an economic interest and therefore is entitled only to minimum protection under our equal protection analysis." *Anthony*, 810 P.2d at 158. Under this minimum level of scrutiny, the State must show that the challenged enactment was designed to achieve a legitimate governmental objective, and that the means bear a "fair and substantial" relationship to the accomplishment of that objective. *Cosio*, 858 P.2d at 629; *Anthony*, 810 P.2d at 158-59.[2]

The State asserts that the purpose of the challenged legislation was to improve the overall efficiency of the PFD program. By moving the qualifying date to coincide with the calendar year, the PFD division of the Department of Revenue gains three months to process applications. This additional time should result in earlier detection of ineligible applicants and fewer improperly paid PFDs, less need for temporary staff to process applications, and quicker resolution of questioned applications, thereby decreasing the number of delayed payments. The State also asserts that the amendment was intended to simplify the PFD program, thereby decreasing public confusion and minimizing the many date-related errors that result in missed dividends.

These objectives are legitimate ones, and we reject the Underwoods' argument to the contrary. The Underwoods contend that the cited objectives are not legitimate because they are based on cost savings and efficiency. *See Herrick's Aero-Auto-Aqua Repair Serv. v. State, Dep't of Transp.*, 764 P.2d 1111, 1114 (Alaska 1988) ("[C]ost savings alone are not sufficient government objectives under [Alaska's] equal protection analysis."). However, the challenged legislation here is distinguishable from that in *Herrick's*. It is not justified solely by cost savings that are "achieved by excluding a class of persons from benefits they would otherwise receive." *Id.* (quoting *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 272 (Alaska 1984)). Moreover, the State's goals of improved efficiency and consumer understanding represent different objectives than the mere goal of cost savings discussed in *Herrick's* or in *Brown*. *See id.; Brown*, 687 P.2d at 272. We therefore conclude that the goals of the 1992 amendment pass the legitimacy test.

The means-to-ends tailoring of the amendment also satisfies the "fair and substantial relation" test. In arguing to the contrary, the Underwoods largely look to the fact that the State extended the application period for

1. Article I, section 1 of the Alaska Constitution states, "[t]his constitution is dedicated to the principle[ ] that ... all persons are equal and entitled to equal rights, opportunities, and protection under the law...." Although the parties do not specifically address the issue, the class allegedly subject to disparate treatment under the amendment includes all persons who would have been eligible for a 1993 PFD but for the three month change in the qualifying date.

2. Although the Underwoods acknowledge that the rational basis test ordinarily applies to a person's interest in a PFD, they assert that the 1992 enactment interferes with their right to travel, thereby implicating strict scrutiny analysis. However, the issues in this case do not implicate the right to travel and are properly subject to rational basis review.

1993 PFDs through June 1992.[3] Their argument is that, because the *application* period for 1993 PFDs was extended, the legislature also could and should have extended the *eligibility* period for 1993 PFDs.

However, the extended application period was specifically intended to reduce public confusion resulting from the 1992 statutory amendments, and it is substantially related to the purpose of the legislation. Moreover, the fact that the application time was extended says little about the claims at issue in this case. The State does not assert that it rejected the Underwoods' applications because of the additional burden in processing them. The issue is merely whether the changed qualifying date is fairly and substantially related to the goals of the 1992 amendments. Certainly, the State *could* have elected to permit applicants to achieve the one year residency requirement any time during the extended 1993 application period, thereby resulting in acceptance of the Underwoods' applications. However, the State's decision not to extend the qualifying date along with the application deadline does not mean that the enactment fails to satisfy the fair and substantial relation test. To the contrary, viewing the goals and means of the challenged legislation, we conclude that the State was not constitutionally required to extend the eligibility period for 1993 PFDs simply because it was feasible to do so.

The Underwoods next rely on *Isakson v. Rickey*, 550 P.2d 359, 363–65 (Alaska 1976), to argue that the exclusion of people in their situation from 1993 PFD eligibility fails the fair and substantial relation test. However, *Isakson* does not control the outcome in this case. There, the purpose of the challenged statute was to allocate limited entry commercial fishing permits, with selection to be based upon certain hardship standards. *Id.* at 360. To demonstrate hardship, the statute specified that the applicant must have been the holder of a gear license prior to a cut-off date of January 1, 1973. *Id.* at 360–61. It was assumed that holders of gear licenses obtained after January 1, 1973 could not show hardship. We determined that the January 1, 1973 cut-off date was not fairly and substantially related to identifying the hardship necessary for an entry permit. *Id.* at 365. We found that the cut-off date was both overbroad and underinclusive. It was overbroad because it would include pre-1973 gear license holders who were no longer involved in commercial fishing and could not show hardship; it was underinclusive because it would exclude other persons who actively participated in and were economically dependent upon the fishery. *Id.*

The statute at issue in *Isakson* cannot be logically compared to the challenged amendment in this case. Unlike the extremely loose tailoring in *Isakson*, the action moving the qualifying date for 1993 PFDs by three months is fairly and substantially related to the purpose of simplifying the PFD program in order to decrease public confusion and to improve efficiency and accuracy in administering the program. There is no significant danger of over or underinclusiveness as a result of the State's action.

Because the challenged amendment derives from a legitimate governmental objective, and the means bear a fair and substantial relation to that objective, the 1992 amendment to AS 43.23.005(a) survives minimal scrutiny under Alaska's Constitution. Accordingly, the Underwoods' equal protection claim fails.

2. *Due Process*

[4] The Underwoods next assert that the enactment violated their due process rights because upon their arrival in Alaska in March 1992, they had a vested right to 1993 PFDs, subject only to their continuing residence.[4] We disagree.

3. The PFD application period is governed by AS 43.23.011, which became effective on January 1, 1993 and requires that applications for PFDs be filed between January 2 and March 31 of the dividend year. Chapter 4, section 19(b), SLA 1992 provided that, notwithstanding this section, the application period for 1993 would extend through June 30, 1993.

4. Article I, section 7 of the Alaska Constitution provides:

"No person shall be deprived of life, liberty, or property, without due process of law...." The Fifth Amendment to the United States Constitution contains a similar guarantee.

We are satisfied that this change did not unfairly or unreasonably impinge upon any property rights or settled expectations. Thus, we find that the amendment does not violate the constitutional prohibition against retroactive legislation. The Underwoods' claim on this ground therefore fails. *See, e.g., ARCO Alaska, Inc. v. State*, 824 P.2d 708, 710-12 (Alaska 1992) (upholding a tax law amendment which retroactively applied to a seven month period); *Wien Air Alaska, Inc. v. State, Dep't of Revenue*, 647 P.2d 1087 (Alaska 1982) (assuming the constitutionality of amendments to a tax statute retroactively applying to a six month period).

B. *The State Is Not Equitably Estopped From Denying the Underwoods Their 1993 PFDs.*

[8] The Underwoods lastly claim that the State should be estopped from enforcing the 1992 amendment as to them because they acted in detrimental reliance on the prior law. We reject this claim. In short, the Underwoods undertook a calculated risk when they decided to move to Alaska in March rather than May of 1992. The State engaged in no conduct encouraging this action, or in any way guaranteeing that the Underwoods would qualify for a 1993 PFD if they arrived in March. Thus, while it is unfortunate that the Underwoods' calculated risk did not pay off, the State is not obligated to pay for any losses incurred by the Underwoods as a result of their decision to move to Alaska in March.

III. *CONCLUSION*

The State's amendment to the eligibility statute for 1993 PFDs did not violate the Underwoods' constitutional rights. Nor is the State equitably estopped from denying the Underwoods a 1993 dividend. Accordingly, the superior court's order granting summary judgment in favor of the State is AFFIRMED.

Joseph M. RUDDEN, Appellant,

v.

STATE of Alaska, Appellee.

No. A-4769.

Court of Appeals of Alaska.

Sept. 30, 1994.

Defendant was convicted by jury of attempted first-degree murder of service station mechanic during unprovoked attack following trial in the Superior Court, First Judicial District, Thomas E. Schulz, J. Defendant challenged 35-year sentence on appeal. The Court of Appeals, Bryner, C.J., held that: (1) failing to give greater weight to rehabilitation as sentencing goal was not clear mistake; (2) declining to treat crime as aggravated first-degree assault was not clear mistake; and (3) sentence was not excessive.

Affirmed.

1. Criminal Law ⇐986.2(1)

Determining priority and relationship of various goals of sentencing is primarily a matter for the sentencing court; the court need not emphasize rehabilitation in all cases, or even in all cases involving first offenders.

2. Homicide ⇐358(1)

Emphasizing sentencing goals other than rehabilitation for defendant convicted of attempted murder was not a clear mistake given defendant's poor prospects for rehabilitation and seriousness of crime. AS 11.31.100(a), 11.41.100(a)(1), 12.55.125(b).

3. Homicide ⇐358(1)

Declining to treat attempted first-degree murder as aggravated case of first-degree assault during sentencing was not clear mistake given that sentencing judge recognized that victim had not been killed and crime verged on completed act of murder. AS 11.31.100(a), 11.41.100(a)(1), 12.55.125(b).

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As of March 31, 1992, the Underwoods had been Alaska residents for approximately six days, far short of the twelve month requirement of AS 43.23.005 as it existed when the Underwoods arrived. At that time, the Underwoods possessed nothing more than an inchoate expectancy of a 1993 PFD that is not afforded constitutional protection. *See Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 n. 4 (Alaska 1985) (vested property rights are protected against state action by the due process clauses of the Alaska and United States Constitutions); *Bidwell v. Scheele*, 355 P.2d 584, 586 (Alaska 1960) (same).

The Underwoods cite to real property cases from other jurisdictions to support their claim that their reliance on AS 43.23.005 at the time of their move to Alaska should give them a vested right in the law as it existed on the date of their move. The Underwoods' analogy between real property transactions and the present case is unpersuasive. Unlike real property situations in which the complaining party indisputably possesses property rights in specific land, the Underwoods had no property right whatsoever in a 1993 PFD.[5] Accordingly, there is no due process violation in this case.

3. *Ex Post Facto Law*

[5] The Underwoods next assert that the 1992 amendment constitutes an ex post facto law in violation of the Alaska Constitution.[6] An ex post facto law is a law "'passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.'" *Danks v. State*, 619 P.2d 720, 722 n. 3 (Alaska 1980) (quoting *Black's Law Dictionary* 520 (5th ed. 1979)).

[6, 7] In determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights. *See Norton*, 695 P.2d at 1092; *see also Black's Law Dictionary* 1317–18 (6th ed. 1990) (A "retrospective" or "retroactive" law is generally defined as a law which "takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty or attaches a new disability in respect to transactions or considerations already past.") (citation omitted). The Underwoods had no vested right to a 1993 PFD as of March 31, 1992, just as no Alaskan had a vested right to a 1993 dividend at that time.[7] Therefore, under a vested rights inquiry, the amendment clearly does not constitute an impermissible ex post facto law in violation of the Alaska Constitution. *See Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567, 574 n. 12 (Alaska 1989) (a statutory change which merely disappoints economic expectations and does not affect vested rights is not an ex post facto law).

The Underwoods alternatively urge us to reject a vested rights inquiry and instead review the challenged enactment for fairness and reasonableness. *See Norton*, 695 P.2d at 1092–93 (noting the deficiencies of the vested rights analysis in determining whether a statute is in fact retroactive and whether it is unconstitutional); 2 Norman J. Singer, *Sutherland Statutory Construction* § 41.05, at 369–71 (5th ed. 1992) (fairness considerations represent a more meaningful standard of evaluating retroactive laws than a vested rights analysis). Even under such a standard, however, we find that the 1992 amendment at issue in this case withstands constitutional scrutiny.

The effective date of the 1992 amendment to AS 43.23.005 was January 1, 1993. The amendment made state residency during calendar year 1992 relevant to eligibility for a 1993 PFD, thereby bearing some relation to events dating back to January 1, 1992, instead of April 1, 1992 as under the prior law.

5. Similarly, because the Underwoods had nothing more than an inchoate expectancy of a 1993 PFD, they had no property that could have been the subject of a taking in violation of the Fifth Amendment of the Federal Constitution and Article I, section 18 of the Alaska Constitution. Accordingly, this argument also fails.

6. Article I, section 15 of the Alaska Constitution provides that "[n]o bill of attainder or ex post facto law shall be passed...."

7. In fact, because the entire dividend program is a creature of the legislature, it could have been abolished during the 1992 legislative session, so that no Alaskan received a 1993 PFD.

Alaska Action Trust

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April 16, 2002

The Honorable Norman Rokeberg
Chairman, House Judiciary Committee
State Capitol
Juneau, Alaska 99801
BY FAX: (907) 465-2040

Re: HCS 499 (Jud) for HB 499

Dear Chairman Rokeberg:

At the time of my testimony before the House Judiciary, I did not have a copy of the committee substitute for House Bill #499. I had several concerns regarding the original bill as proposed.

First, while I understood that the legislative intent was to overturn the Supreme Court's decision in Savage Arms, Inc., the bill went much further. As I understood the bill, it would not only apply to tort actions, but commercial and contractual disputes as well. Additionally, it would afford protection to a transferring corporation from not only tort liability (existing or potential) but, as worded, for debts and other obligations as well. In short, it would have made it much easier to escape a tort liability or other liability (including debts and other obligations to creditors including lending institutions and stockholders) by merely selling or transferring the corporation to an Alaskan corporation and not expressly assuming the debt or liability regardless of the ongoing nature of the enterprise. This would have made Alaska a sanctuary for unscrupulous foreign corporations transferring assets to avoid financial exposure. Moreover, it would place corporate executives or major shareholders of a corporation in a much better position than declaring bankruptcy. The sale or transfer of the assets in exchange for cash or stock would be without the burden of a set aside for preferential transfers in bankruptcy. This would also, arguably, protect foreign corporations as well since the cause of action relating to tort liability would always be in Alaska and if the choice of law provisions applied Alaska law after this statute was promulgated, the foreign corporation would, in all likelihood, be protected as well. I have personally been involved in two different contract/tort cases where this statute would have potentially adversely impacted Alaskans.

The committee substitute for House Bill #499 is much clearer in its intent. It is still very broad in that it allows a corporation to escape liquidated and unliquidated liabilities and existing debts from any source. In other words, it is still much broader in scope than necessary to address the Savage Arms' issue and encompasses cases in addition to tort. The language remains the same, i.e., "in tort or otherwise, for a liability or an obligation . . . ." This could leave not only Alaskan victims of tortuous activity without a remedy, it could also leave Alaskan creditors literally holding the bag. The potential commercial impact of this bill would probably be greater than the tort impact.

Subsection B addresses many of my concerns and, as worded, would provide adequate protection to the commercial case that I described during my testimony before the House Judiciary. That said, while I believe that the committee substitute is a much better bill, I agree with Mr. Powell's assessment that proving fraud can indeed be a daunting hurdle to overcome. I suspect that in most cases where this becomes an issue, the committee substitute will result in more litigation than leaving the holding in Savage Arms intact.

I hope that this adequately responds to the committee's questions.

Very truly yours,

DILLON & FINDLEY, P.C.

s/ RB by maf

Ray R. Brown

RRB/lk/maf