

HB

499

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 499(JUD)
(H) Publish Date: 4/22/02

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						
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CHANGE IN REVENUES ()						
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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
Division: Banking, Securities and Corporations
Approved by: Commissioner Deborah B. Sedwick
Agency: Department of Community & Economic Development

Phone 465-2521
Date/Time 3/8/02 2:31 PM
Date 3/8/2002

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



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4990
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Heather M. Nobrega
Counsel to Committee

MEMORANDUM

TO: Senator Robin Taylor, Chairman
Senate Judiciary Committee

FROM: Rep. Norman Rokeberg, Chairman
House Judiciary Committee

DATE: May 4, 2002

RE: Request to hear HB 499

A handwritten signature in black ink, appearing to read "Norman Rokeberg".

I respectfully request that HB 499, Successor Liability for Product Liability, be scheduled for a hearing. I have attached the following for your information:

1. Copy of the bill
2. Sponsor Statement
3. Sectional Analysis
4. Zero fiscal note
5. *Savage Arms, Inc. v. Western Auto Supply Co.*
6. Outline for HB 499
7. Alaska Bar Rag article
8. Restatement 3rd of Torts
9. Various briefs on retroactivity provision

**REQUEST FOR
HEARING**

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE

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Sponsor Statement for HB 499 (JUD)

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 as it relates to products 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 in cases of products 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 product liabilities of the selling company, including those that may have been unknown at the time of the sale. While the "mere continuation" theory is a commonly recognized exception, 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 specifically addresses successor liability as it relates to products liability. The bill expressly rejects the continuity of enterprise exception adopted by the Supreme Court and adopts the generally recognized exceptions to the doctrine of successor liability as listed in the Restatement of Torts. Those four exceptions are: (1) the successor expressly assumed the liability; (2) the transfer was a fraudulent conveyance; (3) the transfer constituted a consolidation or merger; or (4) the transfer was a mere continuation of the predecessor.

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.

Sponsor Statement

ALASKA STATE LEGISLATURE

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Sectional Analysis for HB 499 (JUD)

- Section 1:** Legislative intent section indicating the intent of the bill is to reject the continuity of enterprise theory adopted by the Alaska Supreme Court.
- Section 2:** Creates a new provision in the Code of Civil Procedure listing the only exceptions to the general rule of successor liability.
- Section 3:** The provisions of the bill are applied retroactively.

Savage Arms, Inc.
v.
Western Auto Supply Co.

**INFORMATION
STATEMENT**

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

24. See *Sieman 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* § 1496, at 105-06; see also *Craig v. United States*, 413 F.2d 854 (9th Cir.1969).

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 permittees 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

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).

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 the motion, 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,

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

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.



SAVAGE ARMS, INC., Petitioner,

v.

WESTERN AUTO SUPPLY
CO., Respondent.

Nos. 8612, 8721, 8611.

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-

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).

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 \S 842(1)

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

2. Appeal and Error \S 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 \S 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 \S 893(1), 919

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 \S 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 \S 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 Alas-

ka, and injury occurred in Alaska, even though successor's purchase of manufacturer's business occurred in Texas.

7. Corporations \S 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 \S 445.1, 590A.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 \S 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 \S 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 \S 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 \S 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 \S 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 \S 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 \S 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 \S 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 \S 15(2)

Rifle distributor's insurers were proper parties to prosecute third-party indemnity claim brought by distributor against manu-

facturer'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.

tion 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(h)(2) (Vernon 1997); *Mudgett v. Payson Mach. Co.*, 701 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 Lp. Inv. Co. v. Garbath*, 553 S.W.2d 783, 786 (Tex. Civ. App. 1977) (making exceptions for merger, consolidation, and brand)

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

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*, *Flouren v. Elliott Mfg.*, 867 F.2d 570, 579-80 (10th Cir. 1989); *Reed v. Armstrong Cook Co.*, 577 F. Supp. 246, 248 (E.D. Ark. 1983); *Kozet v. Amsted Indus.*, 472 F. Supp. 136, 141-42 (E.D. Mich. 1979), *declined to follow on other grounds*, *Johnson v. Ventura Group, Inc.*, 191 F.3d 732, 746 (10th 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 Steamships, Inc. v. Sun Western 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 *Clay v. Fifth Ave. Chrysler Co., 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 697, 900-01 (1963).

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 Conflict of Law 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 *Wilde v. Blentech Mach. Mfg. Co.*, 750 F.2d 368, 374 (5th Cir. 1985).

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

2. *Gunn v. Hu*, 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 Barotach v. Knutik Garin, Inc. & Assoc.*, 795 P.2d 793, 802-03 (Alaska 1990), *vacated in part on other grounds*, 823 P.2d 632 (Alaska 1991).

5. See *Lamplon*, 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 ques-

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 relation-

ship 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

(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 "prod-

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, 5-11 (1977); 63 Am Jur.2d *Products Liability* § 133 (1997). Pollak, *supra* note 15, at 104-10. Be-

uct 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

cause 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 10 (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,

31. See *id.* at 883-84; see also Pollak, *supra* note 15, at 103; 63 *Ain 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. Pro-

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"

lessor 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.

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

40. See Cupp, *supra* note 26, at 661-77.

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 662 n. 50.

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.

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

46. See Michelle M. Morgan, *The Demol 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 50.

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 case⁵⁶ 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

Cite as 18 P.3d 49 (Alaska 2000)

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. Baugh Construction & Engineering Co.*⁶² that ratification by partially subrogated insurers is an acceptable

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).

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 879-81.

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).

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

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. Naud's T.V. & Appliance Inc. v. District Court*,⁶⁷ in determining the proper procedural treatment of insurers.⁶⁸ The plaintiffs in *Naud'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:

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.

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.



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, An-

69. See *Naud'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).

chorage, 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 \Rightarrow 252.1

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

2. Divorce \Rightarrow 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 \Rightarrow 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 \Rightarrow 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 \Rightarrow 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 \Rightarrow 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 \Rightarrow 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 \Rightarrow 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 \Rightarrow 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 \Rightarrow 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 \Rightarrow 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

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).