HB

13

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 21, 2003 **FURTHER REFERRALS: Judiciary**

Date of Committee Action: April 2, 2003

The LABOR AND COMMERCE Committee considered: **HB 13**

HOUSE BILL NO. 13 **SUCCESSOR LIABILITY FOR PRODUCT LIABILITY**

"An Act declaring legislative intent 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; providing that 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 is accompanied by an agreement for the successor to assume the liability, results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor, constitutes a consolidation or merger with the predecessor, or results in the successor's becoming a continuation of the predecessor; defining 'business entity' that acquires assets to include a sole proprietorship; and applying this Act 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 on or after the effective date of this Act."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ (_____)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] 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** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

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

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	GATTO	X			
	CRAWFORD			X	
	GUTTENBERG			X	
	DAHLSTROM	X			
	ROKEBERG	X			
Chair:	ANDERSON	X			
Chair:					

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS:

RULES COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON OIL & GAS, MEMBER
LEGISLATIVE ETHICS COMMITTEE, MEMBER

website: http://www.akrepublicans.org/rokeberg/

INTERIM:
716 WEST 4TH AVENUE, SUITE 300
ANCHORAGE, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:
ALASKA STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 465-4968
FAX: (907) 465-2040

Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

MEMORANDUM

TO: Representative Lesil McGuire, Chair
House Judiciary Committee

FROM: Representative Norman Rokeberg HNR/HNR

DATE: April 2, 2003

RE: Request to hear HB 13

I respectfully request that HB 13, Successor Liability for Product Liability, be scheduled for a hearing. I have attached the following for your information:

1. HB 13
2. Sponsor Statement
3. *Savage Arms, Inc. v. Western Auto Supply Co.*
4. Alaska Bar Rag article
5. Restatement 3rd of Torts

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS:

RULES COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON OIL & GAS, MEMBER
LEGISLATIVE ETHICS COMMITTEE, MEMBER

website: http://www.akrepublicans.org/rokeberg/

INTERIM:
716 WEST 4TH AVENUE, SUITE 300
ANCHORAGE, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:
ALASKA STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 465-4968
FAX: (907) 465-2040

Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

SPONSOR STATEMENT FOR HB 13
BY: Representative Norman Rokeberg

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..." We seek to respond to the invitation of the Supreme Court by filling the legislative void and declaring the law of Alaska on this subject.

HB 13 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.

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.

Please join me in endorsing and passing HB 13.

ED 1: 2/25/03

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

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, 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-

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, 598(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. Mugill*, 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. Passon 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 266 (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. Atlantic Pump Co.*, 652 F.Supp. 656, 658 n. 1 (D.Colo.1987), *decision reversed on different grounds, Thorson v. Elkhart Mfg.*, 867 F.2d 570, 579–80 (10th Cir.1989); *Reed v. Armstrong Cork Co.*, 577 F.Supp. 246, 248 (E.D.Ark.1983); *Kossett v. Amoco 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 exceptions. The superior court did not specify which exception justified its imposition of successor liability against Savage Arms.

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.

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, 3–11 (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 E. 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 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]

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).

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

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

Alaska Supreme Court rewrites liability law?

By Jim DeWitt and Aesha 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] appropriated.

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 convince as well as products, and other kinds of claims besides torts.

LEXSTAT Torts Third Products Liab. 12

Restatement of the Law, Third, Torts: Products Liability

Case Citations

Chapter 3 - Liability of Successors and Apparent Manufacturers

Restat 3d of Torts: Products Liability, § 12

§ 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.

COMMENTS & ILLUSTRATIONS: 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 ofbusiness 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 business 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. Posttransfer 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 pretransfer 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, thesuccessor 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 ABCredeems 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.

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..989) (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 96, 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. Elaborating 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 a.

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).

REPORTERS NOTES: *Comment b. Rationale.* In a muchcited 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 754 (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 thebond 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.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 13
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Com & Econ Dev
Title: Product Liability for Successor Liability
BRU
Component
Sponsor: Representative Rokeberg
Requester: House Labor & Commerce
Component No.

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						
Other (Specify Type--Do not abbreviate)						
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 legislation has no fiscal impact on state spending.

Prepared by: Representative Tom Anderson
Phone
Division: House Labor & Commerce
Date/Time: 4/12/03 1:49 PM
Approved by: Representative Tom Anderson
Date: 4/12/2003
Agency: House Labor & Commerce

(Revised 9/2001 OMB)

Alaska Action Trust

P.O. Box 102323 • Anchorage, Alaska 99510
Office: 813 West Third Avenue • Anchorage, AK 99501
(907) 258-4040 • FAX (907) 258-8751

23 April 2003

The Honorable Lesil McGuire
House Judiciary Committee
State Capitol
Juneau, Alaska 99801

Dear Representative McGuire:

The House Judiciary Committee today hears House Bill 13 "An Act declaring legislative intent to reject the continuity of enterprise exception to the doctrine of successor liability adopted in Savage Arms, Inc...." The Alaska Action Trust strongly objects to this bill. This bill was offered during the last session and we testified at the request of the current bill's sponsor, Representative Rokeberg. That correspondence is attached. The Alaska Action Trust maintains its objection to this legislation.

This outcome is particularly unfair because Alaska is not now, nor is it likely to become, a manufacturing state. The burden borne by dead and injured citizens of Alaska will nearly always benefit corporate entities from other states and countries. Please do not pass legislation that hurts your constituents and neighbors.

Very Truly Yours.

Ray R. Brown
Co-Chair, Alaska Action Trust

Post-it® Fax Note 7671	Date	# of pages ▶ 3
To Judiciary CRHH	From ALASKA ACTION TRU
Co./Dept.	Co.
Phone #	Phone # 907.258.4040
Fax # 907.465.6598	Fax # 907.258.8751

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 13
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act declaring legislative intent to reject the continuity of enterprise exception to the doctrine of . . ."
BRU Civil Division
Component Commercial
Sponsor Representative Rokeberg
Requester House Labor and Commerce Committee
Component No. 2211

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
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						
Other (Specify Type–Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill would 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 product liability.

This bill concerns disputes between private parties, and will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 3/27/03 3:11 PM
Approved by: Joan M. Kasson for Gregg D. Renkes, Attorney General
Date 3/27/2003
Agency Department of Law

(Revised 9/2002 OMB)