

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10296 HOUSE JUDICIARY

PLEASE SUPPORT HB 489.

Thank you for your consideration.

Sincerely,

Sally Clampitt

President

Alaska Equine Rescue

P.O. Box 113265

Anchorage, AK 99511

1-888-LUV-HORS (588-4677)

[Fwd: animal cruelty bill]

**Subject:** [Fwd: animal cruelty bill]  
**Date:** Thu, 21 Mar 2002 14:37:29 -0900  
**From:** Representative Norman Rokeberg <Representative\_Norman\_Rokeberg@legis.state.ak.us>  
**Organization:** Alaska State Legislature  
**To:** Heather\_Nobrega@legis.state.ak.us

---

**Subject:** animal cruelty bill  
**Date:** Thu, 21 Mar 2002 11:55:35 -0900  
**From:** "Gregg & Dale Knutsen" <lkmoon@alaska.net>  
**To:** <Representative\_Norman\_Rokeberg@legis.state.ak.us>

Dear Representative Rokeberg,  
Please support the Alaska animal cruelty bill. Violence against animals is  
a horrific and cowardly act. It is very important to keep our animals safe!  
Thank you for your time.

Regards,  
Dale Knutsen  
P.O. Box 1404  
Valdez, AK 99686

[Fwd: Animal Cruelty]

**Subject:** [Fwd: Animal Cruelty]

**Date:** Fri, 22 Mar 2002 08:32:37 -0900

**From:** Representative Norman Rokeberg <Representative\_Norman\_Rokeberg@legis.state.ak.us>

**Organization:** Alaska State Legislature

**To:** Heather\_Nobrega@legis.state.ak.us

---

**Subject:** Animal Cruelty

**Date:** Fri, 22 Mar 2002 02:34:20 +0000

**From:** "Elena LaPella" <perke@hotmail.com>

**To:** Representative\_Norman\_Rokeberg@legis.state.ak.us

Dear Sir;

I am writing to ask your support in passing the Alaska animal cruelty bill. A society is often judged by how it treats those who cannot speak for themselves. Animals deserve to be protected against violence and neglect. Thank you for your time.

Sincerely,

Elena LaPella

P.O. Box 1601

Valdez, AK 99686

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Get your FREE download of MSN Explorer at <http://explorer.msn.com>.

**Subject:** [Fwd: HB 489]

**Date:** Thu, 21 Mar 2002 14:37:05 -0900

**From:** Representative Norman Rokeberg <Representative\_Norman\_Rokeberg@legis.state.ak.us>

**Organization:** Alaska State Legislature

**To:** Heather\_Nobrega@legis.state.ak.us

---

**Subject:** HB 489

**Date:** Thu, 21 Mar 2002 22:46:45

**From:** "Antonia Kwalick" <windspirit44@hotmail.com>

**To:** Representative\_Jeannette\_James@legis.state.ak.us,  
Representative\_Albert\_Kookesh@legis.state.ak.us,  
Representative\_Pete\_Kott@legis.state.ak.us, Representative\_Ken\_Lancaster@legis.state.ak.us,  
Representative\_Kevin\_Meyer@legis.state.ak.us,  
Representative\_Norman\_Rokeberg@legis.state.ak.us,  
Representative\_Ethan\_Berkowitz@legis.state.ak.us,  
Representative\_John\_Coghill@legis.state.ak.us, Representative\_Eric\_Croft@legis.state.ak.us,  
Representative\_Richard\_Foster@legis.state.ak.us,  
Senator\_Georgianna\_Lincoln@legis.state.ak.us

**CC:** grunt@alaska.net

To All Above With MY Concern,

I am writing to let you all know that I fully support HB 489 to make animal cruelty a felony instead of a slap on the wrist. I have been involved with the Valdez Animal Shelter for 5 years and feel very strongly about the link between animal abuse and child/spousal abuse. I understand HB 489 has been pulled to re-write and I am hoping that the main objective of the bill - to get criminal behavior off the street with more than a \$50.00 fine and 10 hours of community service. I am ok with a graduated sentencing approach but let's move forward to get this Bill passed and we can always "amend" later.

I know of a case in our little town of a man who was under suspicion of and (bragged about) his repeated abuse of his child. We could just never do anything but watch and warn him. He was later convicted of child molestation of a 7-year old girl. Maybe this little girl could have been spared the trauma if he was convicted of animal abuse first and put away.

The laws have to be tougher. The lack of concern by the General Public regarding animals and the blatant disregard of life (human and animal) is growing wild. We need to start somewhere and NOW is the time!

I am asking you all to SUPPORT this bill and Make Animal Abuse A Felony. Your questions and comments are welcome.

Very Sincerely,

Antonia Kwalick  
PO Box 3583  
Valdez Alaska 99686  
Day (907) 835-2984  
Evening (907) 835-3815

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Get your FREE download of MSN Explorer at <http://explorer.msn.com/intl.asp>.

## Criminal Code Backgrounders

### Cruelty Vignettes

Enforcement of Cruelty to Animals Section of the Criminal Code

### Enforcement Statistics

Linking Animal Cruelty and Violence to Humans

Serial Killers, School Shootings and Youth Crimes

Reform of the Criminal Code, Cruelty to Animals Sections

### Linking Animal Cruelty to Human Violence

FBI and Scotland Yard recognize that violence towards animals is one of five key indicators of a person who will commit violent acts against people. A past history of violence is a predictor of future aggression.

U.S. states have felony offences for animal cruelty, with prison sentences up to 10 years.

U.S. public opinion polls show that 81% of the surveyed respondents supported strengthening animal cruelty laws. 71% were in favour of upgrading cruelty offences from misdemeanors to felonies. 87% said cruelty to animals offences should protect wild animals as well as pets. 89% said social agencies, educators, law enforcers and animal welfare organizations should share information about animal abusers as a means of reducing child abuse.

Animal abusers often suffer from low self-esteem, a history of family abuse, frustration and an inability to manage anger. Childhood cruelty may provide a child with a sense of power and mastery over animals. Typical factors are revenge, retaliation, intimidation, deviant arousal or peer pressure.

In one American study, 118 out of 135 criminals, including robbers and rapists, admitted that when they were children, they had burned, hanged and stabbed domestic animals.

78% of 63 people charged with animal cruelty had also been charged with violence or threats of violence against people (Jim McIsaac, Winnipeg Police Services).

152 criminal subjects reported 373 acts involving undue harm to animals. 60% reported at least one or more acts of childhood cruelty toward animals. 41% reported 1 - 2 cruelties, 11% admitted 3 - 4 cruel acts towards animals and 8% indicated 5 or more animal cruelties during childhood. 25% of aggressive criminals reported 5 or more childhood cruelties compared to less than 6% of moderate and nonaggressive criminals. 3/4 of all aggressive criminal subjects reported excessive and repeated child abuse. (Kellert and Felthous "Childhood Cruelty Toward Animals Among Criminals and Non-Criminals", *Human Relations* Volume 38, No. 12, PP. 1113 - 1129).

61% of 39 women who had been abused by their partners and were living in women's shelters in Hamilton and Owen Sound said their pets had either been abused or killed by their partners. 48% said concern for the safety of their pets prevented them from leaving their abusive home sooner.

Three surveys of women's shelters in Wisconsin and Utah showed an average of 74% of women with pets reported that their animals had been threatened, injured or killed by their abuser.

83% of families in Britain with a history of animal abuse were identified by social service agencies as at risk for child abuse or neglect (Royal SPCA, Britain, 1981).

58% of sexual homicide perpetrators who were sexually abused as children recounted childhood animal cruelty (Dr. Patricia Schene "One By One Is Not the Only Way" *Advocate* Fall/Winter 1993).

See *Cruelty to Animals and Interpersonal Violence (Readings in Research)* edited by Dr. Randall Lockwood and Frank R. Ascione, Purdue University Press (800) 933 - 9637 (ISBN 1-55753-106-4) (\$24.95 U.S.) and *Child Abuse, Domestic Violence and Animal Abuse: Linking the Circles of Compassion for Prevention and Intervention* by Frank Ascione and Phil Arkow Purdue University Press (ISBN 1-55753-143-9) (\$24.95 U.S.)

### More information

## THE TANGLED WEB OF ANIMAL ABUSE:

### The Links between Cruelty to Animals and Human Violence

Addendum to The Humane Society of the United States News article, Summer, 19869 by Dr. Randall Lockwood and Guy R. Hodge

"One of the most dangerous things that can happen to a child is to kill or torture an animal and get away with it." Anthropologist Margaret Mead

- **JEFFREY L. DAHMER: Serial Killer, Sexual Deviant**

Dahmer confessed to killing, dismembering and, in some cases, cannibalizing, 17 men and boys. As a child, Dahmer impaled frogs, decapitated dogs, and staked cats to trees in his backyard. Dahmer was convicted to death but before the sentence was carried out he was killed by another inmate in 1994.

- **TED BUNDY: Serial Killer, Rapist**

Bundy killed numerous females who looked liked a woman for which he had a passion. In the 1970's he brought fear to college campuses in many states after killing 3 women in the Chi Omega sorority house at Florida State University. He was ultimately convicted of two killings, but is suspected of murdering over 40 females, primarily in the northwest. During his childhood he witnessed his father's brutality toward animals and he himself tortured animals. Bundy was executed in Florida.

- **RICHARD ALLEN DAVIS: Accused killer and rapist of 12 year old Polly Klaas**

Davis has been charged with the kidnapping of Polly Klass, 12, from her own home, raping and strangling her. As a 14-year-old he set cats on fire and used dogs as target to practice knife-throwing. In 1993 he was charged with the shooting death of Marlene Voris 20 years ago. "When he was little it was animals. When he got bigger it was people." said Zak Bucket a neighbor.

- **MICHAEL WAYNE ECHOLS (18), JESSIE LLOYD MISSKELLEY JR. (17), CHARLES JASON BALDWIN (16): Killed three 8 year-old-boys**

These three teenage boys were arrested in 1993 for the brutal murder of three 8-year old boys in West Memphis. The three young boys were lured into the woods, beaten into unconsciousness, one was sexually mutilated, another raped, and all three killed. For some time prior to the killing, the three teenagers were involved in satanic-type rituals. During an initiation ceremony they killed dogs, skinned them, and ate their flesh. Echols was also carrying a head of a cat with him.

- **EARL KENNETH SHRINER: Sexual Predator, Killer, and Rapist**

Shriner used threats to lure a 7-year-old boy into a wooded area in Washington state where he raped him, cut off his- penis, choked him, stabbed him in the back and neck, and left him for dead. At the age of 16, he confessed to 'he killing of a teen-age girl. Police say he \*was a man who put firecrackers in the anuse , of dogs and strung up cats." He was committed to a state mental hospital after several incidents, including the slaughter of nearly two dozen chickens.

- **ERIC SMITH:** Adolescent Killer of 4-year-old boy

When Eric Smith was 13 years old, he bludgeoned 4-year-old Derrick Robic to death and was charged with murder. Four years prior to the killing of Derrick, Smith killed the neighbor's cat with a gardenhose. There are no specific reasons why he killed the little boy or the cat.

- **THOMAS LEE DILLION:** Murderer and Suspected Serial killer

Dillion is said to be a serial killer. Dillion admitted to the shooting of Gary Bradley in 1992, while both were hunting. Dillion, an ardent hunter who also boasted of killing more than 1000 animals in illegal drive shootings, is serving a life sentence in Ohio on five murder convictions.

**MICHAEL CARTIER:** Stalker and Murderer

In 1992, Cartier stalked and killed Kristen Lardner in Boston, Massachusetts and then killed himself. In a prior relationship, Cartier held his girlfriend's kitten under a hot shower and then shaved all its hair off. Later he hurled it through a fourth floor window to its death.

**Cruelty to animals should be a felony offense. Both animals and people benefit when abusers are brought into the criminal justice system for sentencing or treatment. Fifteen states have already enacted felony cruelty laws.**

# First Strike Animal Cruelty/ Human Violence

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Posted by Shelter House on August 04, 1998 at 15:53:15:

Is harming an animal a warning sign of other possible acts of violence? Absolutely!

Animal cruelty can be one of the earliest and most dramatic indicators that an individual is developing a pattern of seeking power and control by inflicting suffering on others.

Studies in psychology, sociology, and criminology clearly show that violent offenders frequently have childhood and adolescent histories of serious and repeated animal cruelty. The FBI has used this correlation for years in profiling serial killers.

Recent research also shows that animal cruelty often occurs in tandem with family violence, child abuse, spouse abuse, and elder abuse.

Pets are part of the family in many American households. In homes where domestic violence occurs, pets are often threatened or injured by abusers.

IN SEVERAL RECENT SURVEYS OF WOMEN ENTERING SHELTERS FOR PROTECTION FROM DOMESTIC VIOLENCE, NEARLY HALF REPORTED THAT A PET HAD ALSO BEEN THREATENED, INJURED OR KILLED BY THEIR ABUSER. Many victims of domestic violence delay leaving their homes because they fear that their pet might be hurt when they leave.

SHELTER HOUSE DOES NOT WANT THIS TO BE A DETERRENT TO A VICTIM WHO IS CONSIDERING COMING TO A SHELTER AND WANTS THE COMMUNITY TO KNOW THAT IT HAS AN AGREEMENT WITH A LOCAL KENNEL, WHICH WILL HOUSE AN ANIMAL DURING THE LENGTH OF THE VICTIM'S STAY AT SHELTER HOUSE.

Shelter House has also joined in the First Strike Campaign, which is a new animal and human protection program developed by the Humane Society of the United States (HSUS). Leading the program locally are Cathy Holmes and Maureen Simmons, both from the Family Advocacy Office at Hurlburt Field in Florida. They want people to recognize the connection between animal cruelty and human violence, and get involved.

Shelter House recently participated in an inter-agency training program put together by Holmes and Simmons. The training session included presentation from Shelter House, the Panhandle Animal Welfare Society (PAWS), the Family Advocacy Office and the

Florida Department of Children and Families- each pointing out the connection between animal cruelty and human violence.

As a result of the campaign, Shelter House has added to it client intake forms, a question about animal cruelty within the household, and animal control officers now distribute Shelter House information cards to homes where animal cruelty has been reported. Holmes and Simmons are hoping to gain cooperation between civilian and military organizations so that all acts of violence are recognized and dealt with promptly and appropriately. They are hoping to protect victims of violence, prosecute and punish those who commit violent acts and prevent future violence through early identificaton of people with violent tendencies.

The First Strike Campaign was developed by the Humane Society of the United States. If you want more information about the program, call Cathy Holmes or Maureen Simmons at the Hurlburt Family Advocacy Office, or call the HSUS toll free 1-888-213-0956. The HSUS website is at [www.hsus.org](http://www.hsus.org)

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Follow Ups:

- Re: First Strike Animal Cruelty/ Human Violence Krista 23:43:00 2/21/99 (0)

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Post a Followup

Name: \_\_\_\_\_

E-Mail: \_\_\_\_\_

Subject: Re: First Strike Animal Cruelty/ Human Violence

Comments:

: Is harming an animal a warning sign of other p  
: acts of violence? Absolutely!  
: Animal cruelty can be one of the earliest and  
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Optional Link URL: \_\_\_\_\_

Link Title: \_\_\_\_\_

Optional Image URL: \_\_\_\_\_

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# Two More States Pass Felony Animal Cruelty Bills

The numbers are adding up. With the addition of Maine and Minnesota, there are now 34 states – plus the District of Columbia – that have passed felony animal cruelty laws.



■ States who prosecute certain forms of animal cruelty at the felony level.

This is an amazing effort that is rippling across the country, thanks to the persistent and dedicated work of so many individuals involved in animal protection.

These successes don't come easily, and certainly not without a lot of time invested. For the past five years, Minnesota animal protection advocates have worked to strengthen animal cruelty statutes – finally succeeding in 2001. Minnesota's new law covers companion animals, including dogs, cats, horses, and ferrets. Penalties are based on the harm done to the animal, and increase as the harm to the animal escalates.

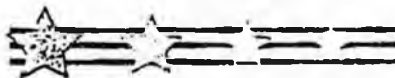
For intentional acts of torture or cruelty to a companion animal, the penalties elevate from a misdemeanor (90 days in jail, a \$1,000 fine, or

both) to a gross misdemeanor (one year in jail, a \$3,000 fine, or both) to a felony (two years in jail, a \$5,000 fine, or both). An additional provision increases the penalties for a person who causes great bodily harm or death to a companion animal in an effort to threaten, intimidate, or terrorize a person. This offense carries a penalty of four years in jail, a \$10,000 fine, or both. Currently, the state with the record for maximum confinement (10 years in prison) goes to Louisiana. Arizona has the maximum fine, \$150,000, and Oregon is a close second with a \$100,000 penalty.

Another benefit of Minnesota's new law is the added provision for psychological or other counseling for people who abuse animals. Minnesota is one of 15 states that permits the offender to undergo psychological counseling or anger management classes for animal cruelty – "Something that we are strongly encouraging as part of all new bills," says Ann Sparks, vice president of AHA's public policy.

In Maine, the new felony cruelty law went into effect on September 21, 2001. Maine's law now expands the definition of animal cruelty by establishing the category of aggravated animal cruelty, and increases the penalties for civil and criminal convictions. The penalty for repeat offenders and for those convicted under the new category of aggravated animal cruelty is increased to a felony. Juveniles adjudicated under the new law must receive psychological counseling.

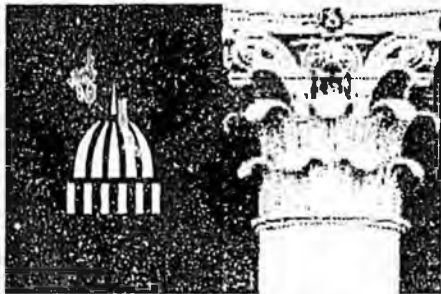
If your state needs help passing felony animal cruelty laws, e-mail our Washington, D.C., office at [dc@americanhumane.org](mailto:dc@americanhumane.org).



## States With Felony Animal Cruelty Provisions

Alabama	Indiana	Montana	Rhode Island
Arizona	Louisiana	North Carolina	South Carolina
California	<b>Maine</b>	New Hampshire	Texas
Connecticut	Maryland	New Mexico	Virginia
Delaware	Massachusetts	Nevada	Vermont
Florida	Maine	New York	Wisconsin
Georgia	Michigan	Oklahoma	Washington
Iowa	Minnesota	Oregon	District of Columbia
Illinois	Missouri	Pennsylvania	

(Bold indicates laws passed in the last two years.)



National Conference of State Legislatures

# LEGISBRIEF

BRIEFING PAPERS ON THE IMPORTANT ISSUES OF THE DAY

MARCH 2001

VOL. 9, No. 18

## Violence at Home: People and Pets

*By Rita Thaumert*

*Animal cruelty is often associated with domestic violence.*

Studies over the last two decades show that animal cruelty is often associated with domestic violence. Intentional cruelty or killing of pets by children or adults is recognized more and more as a significant indicator of violence at home. In one study, just over half of the women in a family shelter reported that pets had been harmed or killed by the abusers. About 25 percent of them said their concern for pets delayed their going to the shelter. Children also witnessed cruelty to their pets in about two-thirds of the cases. Thirteen percent of the children reported that they themselves had tried to hurt pets.

In most American homes, pets are treated like family members. If they are part of a violent family, however, they also become targets. Threats against a pet are also used by abusers as a control mechanism to silence or punish the victims. Frequently, pets are a vital source of support for both children and adult victims of violence. However, children may also become animal abusers, imitating the behavior they have experienced, and making the pet a victim.

*Cruelty to animals can be one of the earliest signs of a person's potential for violence.*

Cruelty to animals can be one of the earliest and most significant signs of a person's potential to control others through violence. Psychologists, sociologists and criminologists agree that animal abuse involves more than an abuser's personality flaw. It indicates a seriously disturbed family environment. Intervention in the beginning stages, while children are young, is vital.

### State Actions

*At least 27 states make cruelty to animals a felony under certain circumstances.*

All states have anticruelty laws, but most generally treat animals as property. At least 27 states, however, make cruelty to animals a felony under certain circumstances. The other 23 states have misdemeanor penalties for secondary forms of abuse. A recent Nevada law "requires the juvenile court to order counseling or other psychological treatment for a child who commits an offense involving cruelty to an animal." Nevada law also directs the court to order parents or guardians to pay for counseling or psychological treatment. At least 13 other states—California, Colorado, Illinois, Maryland, Maine, Michigan, Minnesota, New Mexico, Oregon, Virginia, Vermont, Washington and West Virginia—allow courts to order psychiatric counseling or anger management.

California's animal cruelty law requires that "the court shall order the defendant to pay for, and successfully complete, counseling, as determined by the court, designed to evaluate and treat behavior or conduct disorders." In some instances, animal cruelty agencies also protect children. A District of Columbia law authorizes the Washington Humane Society to include in its operations the protection of children from cruelty and abuse. Officers or agents of the Ohio Humane Society may remove a child if he or she is in cruel surroundings.

National Conference  
of State Legislatures

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Washington, D.C. 20001  
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Fax (202) 737-1069

California and Colorado require animal control officers and veterinarians to report suspected or known instances of child abuse. Minnesota and West Virginia require that veterinarians report suspected or known cases of animal abuse. Idaho does not require reporting, but provides immunity from civil and criminal liability for veterinarians who report cruelty. States are responding to the theory that many of the homes with a history of animal abuse are also the ones engendering calls to social service agencies about suspected child abuse.

### Federal Action

The 106<sup>th</sup> Congress enacted 10 laws that address animal welfare, including making it illegal to produce or import products made with dog or cat fur, making it illegal to commercially depict real acts of animal cruelty, and increasing funding for enforcement of the federal animal welfare act.

A report by the National Research Council says that early intervention for animal abusers is more likely to reduce adult crime than later criminal penalties, and that the behavior of a child is more significant than adolescent behavior in predicting future violence. Law enforcement has expressed increased support for stronger animal anticruelty laws. The First Strike Campaign of The Humane Society of the U.S. recommends community programs that consolidate the services of domestic violence shelters, child protection agencies, humane societies and police departments to provide shelters or foster homes for abused pets, and ensure that pets are safe after abused women and children leave abusive surroundings. These collaborations can bring about better reporting and more effective intervention.

The American Humane Association recommends reporting suspected animal abuse or child abuse to a local child welfare agency or humane society. They also recommend training professionals to observe and report other kinds of abuse in the home. Judges, doctors, social workers, teachers and ministers should become familiar with the connection between domestic violence and animal abuse. The association advocates stronger animal cruelty statutes, development of better reporting laws and definitions of animal cruelty, and penalties for abusers that include required mental health treatment.

The challenge is to prevent violence, whether it takes the form of cruelty to humans or cruelty to animals. The best response to early violence seems to be early intervention. Studies have found that community coalitions work where the criminal justice system, animal control agencies, health professionals (human and animal), social workers and domestic violence victims' advocates participate in training and share information. Policymakers can help educate citizens about violence, encourage services that intervene on behalf of people and pets and appropriate funds for delivery of those services.

### Contacts for More Information

Rita Thaumert  
NCSL—Denver  
(303) 830-2200, ext. 157  
[rita.thaumert@ncsl.org](mailto:rita.thaumert@ncsl.org)

The Humane Society of the U.S.  
(888) 213-0956  
[http://www.hsus.org/firststrike/factsheets/  
domestic-violence.html](http://www.hsus.org/firststrike/factsheets/domestic-violence.html)

National Clearinghouse on Child Abuse  
and Neglect  
(800) 394-3366  
[http://www.calib.com/nccanch/pubs/bibs/  
linkwanimal2.htm](http://www.calib.com/nccanch/pubs/bibs/linkwanimal2.htm)

American Humane Association  
(303) 792-9900  
[http://www.americanhumane.org/children/  
factsheets/viol\\_link.htm](http://www.americanhumane.org/children/factsheets/viol_link.htm)

*Cruelty to animals and cruelty to humans can be viewed as a continuous succession.*

*The challenge is to prevent violence, whether it takes the form of cruelty to humans or cruelty to animals.*

## Pet Love Shack - Non-Fiction

[www.petloveshack.com](http://www.petloveshack.com)

*This has to stop now!*

*Do you want your children and grandchildren  
to be brought up thinking that this is "ok" to do ?*

### Animal Cruelty and Human Violence

**People who are cruel to animals are more likely than others  
to be cruel to humans too,**

**says a 1997 report from the Humane Society of the United States**

The study, on the link between animal cruelty and human violence, was based on 401 newspaper accounts of animal cruelty between Sept. 1, 1996 and Aug. 31, 1997. It found the majority of abusers, 71 percent were men, and those men committed eight v-seven percent of the cases of abuse. Among abusers of animals, twenty-eight percent were also charged with domestic violence, twenty-seven percent with child abuse, ten percent with assault and six percent with murder.

### Hurting animals often a sign of abuse

Springfield, Oregon: Friends of 15 year old Kipland Kinkel of Springfield, Oregon say he displayed *all of the classic signs of violence, often bragging about torturing and killing small animals*. Reports indicate that Kinkel killed cats, possibly his own family's cat, and a cow.

He also has a fascination with guns and a quick temper that led him to be expelled from school twice in one week, for acts of violence against fellow students. He was accused of murdering both of his parents, then going on to his high school to open fire on his schoolmates, killing 2 and injuring another 22, on May 22, 1998. Police also found four bombs in his home

### In a press releases from the Humane Society of the United States

The tragedy in Oregon clearly illustrates the connection between animal cruelty and human violence," said Dr. Randall Lockwood, a psychologist and vice president for The HSUS. "It is alleged that the 15-year-old suspect in May's shooting, Kipland P. Kinkel, had a history of killing cats and other animals.

**Time and again, we see acts of cruelty to animals mature into violence against people.** We urge teachers, principals and parents to recognize this connection and to take reports of cruelty towards animals seriously. As in this case, **teens will often brag to their classmates about animal cruelty.** Early intervention by counselors can make a difference. Kinkel also reportedly bragged about torturing animals to classmates. According to Lockwood and many other experts in the field, violence towards animals can escalate to killing people. This is particularly true of family violence. "Abusers rarely stop to count the number of legs on their victims," Lockwood states.

The HSUS urges psychologists, educators and elected officials to take acts of animal cruelty seriously. "The days of thinking that violence against animals is boys being boys' are over. **Addressing the violence in our schools, our streets and our homes requires that we reject the conventional wisdom that killing animals is an acceptable part of growing up,**" Lockwood concluded

**The Humane Society found that animals are abused in 88% of the families where children are abused.** Animals in a home may be used by an abuser to control other family members. Family members are sometimes intimidated into silence about abuse through threats made toward a favorite pet. Pets are sometimes hurt or killed to punish children for something they have done, or physically or sexually abused children may kill their pets rather than have them hurt by the perpetrator in the home.

**Most criminals who have been violent toward people share a common history of cruelty to animals.**

**Recent school shootings and other high-profile violent crimes perpetrated by minors were prefaced by animal abuse.**

**Boy, 11, Accused of killing cat & kittens with bricks!**

**The Family Source of Florida, Inc**

**Pet Love Home Page**

3/12/02



**VALDEZ VETERINARY CLINIC**

P.O. Box 626 708

Valdez, Alaska 99686

Telephone: (907) 835-5280

We would like to express our support for HB489 regarding cruelty to animals. We feel it is important to change the penalty for animal cruelty from a misdemeanor to a felony for the following reasons:

Animals are an integral part of our lives and they should be treated with respect and compassion. We are responsible for their welfare since they have no voice of their own.

Individuals, especially young people, who abuse animals, are often individuals who show more and more disrespect for the law. The hands of the officials are "tied" so to speak when an animal cruelty case is only treated with a "slap on the hand" and the seriousness of the offense is not realized.

It is documented that animal cruelty is often linked to spouse and child abuse. If the animal cruelty penalty carried a felony punishment, cases of abuse to spouses/other household members and children may be avoided.

A felony judgment is more likely to deter an individual from repeating the offense. This would give incentive to the officials to pursue cases more intensively.

We urge you to support HB489 to not only protect the animals, but potentially impact human welfare as well.

*Kathryn A Hawkins DVM* *Kelly Hawkins*

Kathryn Hawkins D.V.M.

Kelly Hawkins D.V.M.

*Kathryn*

To: Rep Rokeburg / HJud  
From: Valdez LIO  
835-2111



# Alaska State Legislature

Please enter into the record my testimony to the Judiciary  
 committee on HB 489, dated 4/18  
 bill/subject committee name

I'm sorry but I can't wait all afternoon to testify on this bill. I have to run my business.

I am a agriculture livestock owner who has over 200 animals. In your zeal to punish dog & horse abusers, be careful you do not place legitimate livestock businesses in jeopardy.

We must be allowed to care for our animals using:

Normal & accepted animal husbandry practices

Signed:

Bill Dabard  
 Testifier  
Ward Farms  
 Representing (Optional)  
Helde Jet  
 Address  
207 895-5415  
 Phone No.



# ALASKA STATE LEGISLATURE

Please enter into the record my testimony to the Judiciary  
 Committee on HB 489 Committee Name Judiciary  
 Dated 4/19/02  
 Bill / Subject

PLEASE do NOT make the suggested changes to the Act Entitled "AN Act Relating to Cruelty to Animals. I Feel that Laws to Encarcerate people should be limited to INFRAction ON other people's freedoms, NOT FOR ANIMALS. WHO DO NOT HAVE WRights.

SIGNED:

Brett Hanker  
Testifier

SELF - B-Y FARM  
Representing

(907) 488-7738  
Address / Phone Number

**HB**

**499**



22-LS1490B  
Bannister  
4/19/02

*Adopted  
4-19-02*

**CS FOR HOUSE BILL NO. 499(JUD)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-SECOND LEGISLATURE - SECOND SESSION**

**BY THE HOUSE JUDICIARY COMMITTEE**

**Offered:  
Referred:**

**Sponsor(s): HOUSE JUDICIARY COMMITTEE**

*Conceptual  
Amendment #1  
- tighten title*

**A BILL**

**FOR AN ACT ENTITLED**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*held 4/17/02*

22-LS1490\S  
Bannister  
4/5/02

*Adopted  
4.5.02*

**CS FOR HOUSE BILL NO. 499(JUD)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-SECOND LEGISLATURE - SECOND SESSION**

**BY THE HOUSE JUDICIARY COMMITTEE**

**Offered:  
Referred:**

**Sponsor(s): HOUSE JUDICIARY COMMITTEE**

**A BILL**

**FOR AN ACT ENTITLED**

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

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

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

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

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

12 **Sec. 10.06.569. Treatment and consequences of disposition of assets. (a)**  
13 **Unless the disposition is a fraudulent transfer under AS 34.47 or is otherwise a**  
14 **fraudulent conveyance to escape liability for the debts or liabilities of the disposing**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 or

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

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

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

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

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

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

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

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

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

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

19 **Sec. 32.06.901. Treatment and consequences of disposition of assets.** (a)

20 Unless the disposition is a fraudulent transfer under AS 34.40 or is otherwise a  
21 fraudulent conveyance to escape liability for the debts or liabilities of the disposing  
22 partnership, a sale, lease, exchange, or other disposition of any, all, or substantially all  
23 of the property and assets of a partnership, whether or not the disposition requires the  
24 approval of the partners,

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

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

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

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

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

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

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

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

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

15 **Sec. 32.11.880. Treatment and consequences of disposition of assets.** (a)

16 Unless the disposition is a fraudulent transfer under AS 34.40 or is otherwise a  
17 fraudulent conveyance to escape liability for the debts or liabilities of the disposing  
18 partnership, a sale, lease, exchange, or other disposition of any, all, or substantially all  
19 of the property and assets of a partnership, whether or not the disposition requires the  
20 approval of the partners,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 debts or liabilities of the disposing covered business;

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

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

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

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

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

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

April 5, 2002

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

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

**FROM:** *TLB*  
Theresa L. Bannister  
Legislative Counsel

This memo accompanies the bill described above.

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

If I may be of further assistance, please advise.

TLB:lmb  
02-055.lmb

Enclosure

# ALASKA STATE LEGISLATURE

## HOUSE JUDICIARY COMMITTEE

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



State Capitol  
Juneau, AK 99801-1182  
Telephone: (907) 465-4990  
Fax: (907) 465-2040

Heather M. Nobrega  
Counsel to Committee

### Sponsor Statement for HB 499

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

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

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

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

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

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

The committee urges your support of this bill.

# ALASKA STATE LEGISLATURE

## HOUSE JUDICIARY COMMITTEE

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



State Capitol  
Juneau, AK 99801-1182  
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Fax: (907) 465-2040

Heather M. Nobrega  
Counsel to Committee

### Sectional Analysis for HB 499

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

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

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

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

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

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

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

**Section 6:** Conforming amendment.

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

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

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

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

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

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

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

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

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

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

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

# LEGAL SERVICES

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State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

February 12, 2002

**SUBJECT:** Bill relating to disposition of business assets  
(Work Order No. 22-LS1490A)

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

**FROM:** Theresa L. Bannister  
Legislative Counsel

This memo accompanies a draft of the bill described above.

1. Coverage. Since your instructions were to cover businesses, the bill does not cover the various types of nonprofit corporations and cooperatives, or corporations like BIDCOs that provide assistance rather than engage in business. The statutes of some types of businesses are not specifically amended because they are already covered by changes in other statutes, e.g. professional corporations under AS 10.45.
2. Scope. The scope of this bill is quite broad and undefined. I would recommend identifying the precise problem that the bill is trying to correct and addressing that, rather than using such a broad approach. With a broad provision like this one, it is difficult to determine just what situations are being covered, with the result that the bill may affect situations that you do not intend to be covered.
3. Applicability section. The applicability section applies the bill to dispositions of property that occur before the effective date of this Act. As a practical matter, this application may disrupt transfers that have been completed or that are in process and theoretically could apply backwards indefinitely. As a legal matter, the disruption may result in a reshifting of property rights that may result in a taking by the state for which just compensation is required under art. 1, sec. 18 of the Alaska Constitution.

If I may be of further assistance, please advise.

TLB:med  
02-133.med

Enclosure

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

THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
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statute of limitations has run, it is allowable if it "relates back" to the date of a timely original pleading.<sup>24</sup>

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.<sup>25</sup>

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

24. See *Siemion v. Rumpfelt*, 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).

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.<sup>26</sup>

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.<sup>27</sup>

It is not clear from the pleadings whether FDA did or did not receive sufficient notice of Hebert's claim within the limitations period. Hebert's complaint asserted that the nature of the named business entities was unknown. It also included the permittee of the bingo game as a John Doe defendant. Hebert's amended complaint states that FDA "is one of the three permittees jointly operating Honest Bingo" and that FDA "was in fact receiving the benefits of the operation of the bingo game at the time and place in question." This statement alleges the existence of a close business relationship between Honest Bingo and FDA, or possibly a joint venture or partnership.<sup>28</sup> While admitting that

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

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

it is a permittee for bingo games, FDA denied the allegations of jointly operating Honest Bingo and of receipt of benefits of the operation. Viewing the facts in the light most favorable to 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.<sup>29</sup>

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.<sup>30</sup>

[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."<sup>31</sup> We conclude that where appropriate and when a motion for judgment on the pleadings is brought on the basis of the affirmative defense of statute of limitations,

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

30. A Civil Rule 12(c) motion can be converted into a Rule 56 motion for summary judgment when the trial judge considers materials outside the pleadings. See Alaska R. Civ. P. 12(c). However, here the superior court explicitly stated that

the interests of justice are best served if the trial court considers the motion at a preliminary hearing instead of waiting until trial.

## V. CONCLUSION

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



SAVAGE ARMS, INC., Petitioner,

v.

WESTERN AUTO SUPPLY  
CO., Respondent.

Nos. 8612, 8721, 8511.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

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

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. Zieliski*, 822 P.2d 903, 907 n. 4 (Alaska 1991).

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

Reversed and remanded.

#### 1. Appeal and Error $\S$ 842(1)

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

#### 2. Appeal and Error $\S$ 842(1)

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

#### 3. Appeal and Error $\S$ 863

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

#### 4. Appeal and Error $\S$ 893(1), 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 $\S$ 27(1)

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

#### 6. Weapons $\S$ 18(1)

Law of Alaska governed issue of liability of rifle manufacturer's successor in products liability action brought by father whose minor son was injured when allegedly defective rifle misfired, where father and son were Alaska residents, rifle was purchased in Alas-

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

#### 7. Corporations $\S$ 445.1

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

#### 8. Corporations $\S$ 445.1, 590(1)

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

#### 9. Corporations $\S$ 445.1

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

#### 10. Corporations $\S$ 445.1

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

#### 11. Corporations $\S$ 445.1

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

#### 12. Corporations $\S$ 445.1

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

#### 13. Corporations $\S$ 445.1

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

#### 14. Judgment $\S$ 181(15.1)

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

#### 15. Evidence $\S$ 244(7)

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

#### 16. Evidence $\S$ 244(7), 318(1)

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

#### 17. Indemnity $\S$ 15(2)

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

facturer's successor, where insurers had fully discharged distributor's liability in underlying products liability action. Rules Civ.Proc., Rule 17(a).

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

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

Before MATTHEWS, Chief Justice, EASTAUGH, FABLE, 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.<sup>1</sup> 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."<sup>2</sup> 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.<sup>3</sup>

[4] Although we generally review rulings on joinder and ratification for abuse of discretion,<sup>4</sup> we review de novo the underlying legal questions,<sup>5</sup> 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.<sup>6</sup>

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,<sup>7</sup> but neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case.

tion of interspousal tort immunity, even though the auto accident that inspired the tort suit occurred in Canada. See *id.* at 700-01. There, we treated the interspousal immunity question independently of the underlying tort question, and focused on the spousal relationship between the parties to the lawsuit. See *id.* But to apply the *Armstrong* approach here only begs the question of whether successor liability should be treated as wholly independent. *Armstrong* does not control.

7. See Tex. Bus. Corp. Act Ann. art. 5.10(b)(2) (Vernon 1997); *Mudgett v. Paxon 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) (making exceptions for merger, consolidation, and fraud).

We look to the Restatement (Second) of Conflict of Laws for guidance in resolving choice-of-law issues.<sup>8</sup> The Second Restatement requires a separate choice-of-law analysis for each issue presented.<sup>9</sup> We likewise follow this rule of *dépeçage*,<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> The Seventh Circuit held similarly in *Ruiz v. Blentech Corp.*<sup>13</sup> But several federal district courts have explicitly applied the law of the state with the most significant tort contacts,<sup>14</sup> and state courts have split on the question.<sup>15</sup>

[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 tort 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."<sup>16</sup> Treating a successor liability question solely as one of contract law would allow "the party who benefitted from

13. 891 F.2d 320, 326 (7th Cir.1990).

14. See, e.g., *Ede v. Muelho Pump Co.*, 652 F.Supp. 656, 658 n.1 (D.Colo.1987), *disapproved with on different grounds*, *Floorn v. Elton Mfg.*, 867 F.2d 570, 570-80 (10th Cir.1989); *Reed v. Armstrong Cork Co.*, 577 F.Supp. 246, 248 (E.D.Ark.1983); *Kozet v. Amsted Indus.*, 472 F.Supp. 136, 141-42 (E.D.Mich.1979), *declined to follow on other grounds*, *Johanson 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. Berk*, 593 P.2d 871, 878 (Alaska 1979) (quoting *Clay v. Fifth Ave. Chrysler Co., Inc.*, 454 P.2d 244, 248 (Alaska 1969)); see also *Groeman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 900-01 (1963).

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

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

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

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

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

the bargain [to] escape liability even though the party who transferred the benefit would have been liable had not the contract been consummated."<sup>17</sup> 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.<sup>18</sup> We conclude that Alaska has the most significant torts contacts with this legal issue. We look in particular to the underlying tort action that gave rise to this litigation. Jack Taylor and his son were both Alaska residents when the accident occurred. Taylor purchased the rifle in Alaska, and the rifle was being used here, where its defect injured his son. The defect that injured Taylor's son potentially endangered any person within a lethal vicinity while the rifle was being used in Alaska. Finally, Jack Taylor litigated his suit against Western Auto in Alaska's state courts. Because the relation-

ship between the tort litigants is centered in Alaska, Alaska law should govern.

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

### C. Successor Liability

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

[7, 8] Generally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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

(d) the place where the relationship, if any, between the parties is centered,

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

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

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

21. See *id.* at 103-08.

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

### 1. The traditional "mere continuation" exception

[9] Courts have traditionally imposed liability on successor corporations where the successor corporation is "merely a continuation" of the selling corporation.<sup>22</sup> 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.<sup>23</sup> 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."<sup>24</sup>

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

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

Western Auto also asks us to adopt the modern "continuity of enterprise" and "prod-

22. See *id.* at 101.

23. See *id.*; see also Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Succession 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 *Ruy v. Alad Corp.*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3, 8-11 (1977); 63 Am.Jur.2d *Products Liability* § 133 (1997); Pollak, *supra* note 15, at 104-16. Be-

cause the facts in this case seem ill-suited to this exception, we decline to evaluate the wisdom of adopting the "product line" theory at this time. Our decision today does not preclude further consideration of this exception in an appropriate case.

[11, 12] The "continuity of enterprise" exception is an outgrowth of the traditional "mere continuation" theory of liability.<sup>26</sup> 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.<sup>27</sup> The successor may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.<sup>28</sup>

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

cause the facts in this case seem ill-suited to this exception, we decline to evaluate the wisdom of adopting the "product line" theory at this time. Our decision today does not preclude further consideration of this exception in an appropriate case.

26. See Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. Ill. L. Rev. 845, 848 & n. 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 673, 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 673 (1976). Be-

of corporate identity.<sup>31</sup> 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.<sup>32</sup> And the American Law Institute recently declined to adopt both this exception and the "product line" exception for the Restatement (Third) of Torts.<sup>33</sup> The Third Restatement's commentary indicates that the vast majority of courts considering these modern exceptions have rejected them.<sup>34</sup> Although there is some dispute about exactly how many jurisdictions have decided the issue,<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> And our research has not disclosed studies that have so concluded.

We also note that permitting successor liability under the "continuity of enterprise"

lessor Cupp states that courts interpreting the law of Mississippi, Ohio, and South Carolina have also recognized and adopted the "continuity of enterprise" exception. See Cupp, *supra* note 26, at 854 n. 44.

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

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

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

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

exception will not discourage large-scale transfers so long as anticipated successor liabilities do not exceed the value of the corporation's accumulated goodwill. Presumably, many corporations will continue to engage in efficient and productive transfers, with the purchasing firm merely factoring into the purchase price the cost of those successor liabilities.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

The same reasoning applies to the Restatement authors' concerns regarding potential "windfalls."<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> But we see no persuasive reason to favor corporate creditors over claimants later injured by the seller corporation's products.<sup>47</sup> Also, some courts have argued that the modern exceptions impose liability on entities having no causal relationship with the harm.<sup>48</sup> 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

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 Mitchell M. Morgan, *The Denial of Future Tort Claims in In Re Piper Aircraft: Will the Court's Quick-Fix Solution Keep the Debris 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.<sup>49</sup> 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.<sup>50</sup>

Some commentators,<sup>51</sup> including the Restatement authors,<sup>52</sup> 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.<sup>53</sup> For example, the four traditional exceptions were created by the courts.<sup>54</sup> There is also some suggestion that

legislation in other states has failed to address these problems.<sup>55</sup> 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<sup>56</sup> 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."<sup>57</sup> The failure to give proper notice and to seek approval of the plan from the bankruptcy court "precluded a legitimate basis for entering the Alaska state court action."<sup>58</sup>

### 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.<sup>59</sup> 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.<sup>60</sup> 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(n).<sup>61</sup> 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. Raugh Construction & Engineering Co.*<sup>62</sup> that ratification by partially subrogated insurers is an acceptable

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

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).

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(n) provides in relevant part:

Every action shall be prosecuted in the name of the real party in interest.... [A] party with

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

substitute for joinder.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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].<sup>66</sup>

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

We have relied before on a Montana Supreme Court case, *State ex rel. Naud's T.V. & Appliance Inc. v. District Court*,<sup>67</sup> in determining the proper procedural treatment of insurers.<sup>68</sup> The plaintiffs in *Naud's T.V.* had received varying levels of compensation from their partly and fully subrogated insurers.<sup>69</sup> 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.<sup>70</sup>

Critical commentary bears out the significance of this distinction:

63. See *id.* at 926.

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

65. See *id.*

66. *Id.* at 926.

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

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

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

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

#### IV. CONCLUSION

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



Sally K. SLOANE, Appellant,

v.

George R. SLOANE, Appellee.

No. S-9195.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

Divorce judgment was entered by the Superior Court, Third Judicial District, An-

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

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

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

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

Affirmed.

#### 1. Divorce ⇨252.1

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

#### 2. Divorce ⇨286(8)

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

#### 3. Divorce ⇨286(8)

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

#### 4. Divorce ⇨286(5)

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

#### 5. Divorce ⇨223, 286(4)

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

#### 6. Divorce ⇨253(3)

Record in divorce case supported finding that, for equitable distribution purposes, \$25,000 note that husband received from parties' son in connection with his purchase of

parties' business was worth \$10, husband signed sale agreement under time constraints on terms determined unilaterally by wife's attorney, and wife presented no evidence to refute husband's claim that business would not have sufficient funds to repay note. AS 25.24.160(a)(4).

#### 7. Divorce ⇨253(2)

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

#### 8. Divorce ⇨282, 283

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

#### 9. Divorce ⇨253(2)

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

#### 10. Divorce ⇨286(9)

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

#### 11. Divorce ⇨239

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

## MEMORANDUM

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

**DATE:** February 12, 2002

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

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

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

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

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

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

## Texas Legislation

LEXSTAT Tex. Bus. Corp. Act 5.10

TEXAS STATUTES AND CODES

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

CIVIL STATUTES

BUSINESS CORPORATION ACT

PART FIVE

GO TO TEXAS CODE ARCHIVE DIRECTORY

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

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

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

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

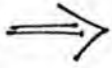
(2) The board of directors may submit the proposed sale, lease, exchange or other disposition for authorization by the corporation's shareholders at a meeting of shareholders, which may be either an annual or a special meeting.

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

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

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

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



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

(1) is not considered to be a merger or conversion pursuant to this Act or otherwise; and

(2) except as otherwise expressly provided by another statute, does not make the acquiring corporation, foreign corporation, or other entity responsible or liable for any liability or obligation of the selling corporation that the acquiring corporation, foreign corporation, or other entity did not expressly assume.

MUDGETT v. PAXSON MACH. CO.

Tex. 755

Cite as 709 S.W.2d 735 (Tex.App.—Corpus Christi 1986)

Jeffrey MUDGETT, Appellant,

v.

PAXSON MACHINE  
COMPANY, Appellee.

No. 13-85-369-CV.

Court of Appeals of Texas,  
Corpus Christi.

April 24, 1986.

Rehearing Denied May 29, 1986.

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

Affirmed.

1. Corporations ⇨445.1

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

2. Corporations ⇨445.1

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

3. Corporations ⇨445.1

"De facto merger" doctrine imposing liability of corporation on purchaser of its assets, and "mere continuation" doctrine imposing liability upon successor corpora-

1. The slitting machine is composed of three basic components, the collar, the slitter, and the recoller, and is used to cut and roll large pieces

tions regardless of manner in which assets are acquired may not be applied under Texas law. V.A.T.S. Bus.Corp.Act, arts. 5.10, 5.10 comment.

4. Corporations ⇨445.1

Successor that continues output of line of products cannot be said to have created risk associated with product manufactured by its predecessor and does not assume strict liability for defective units; declining to follow *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811; *Ray v. Alad Corp.*, 19 Cal.3d 22, 186 Cal.Rptr. 534, 560 P.2d 8.

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

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

Beau UTTER, SEERDEN and BENAVIDE, JJ.

OPINION

UTTER, Justice:

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

of sheet metal. The three components, as a unit, are called a "slitting line."

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

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

On February 8, 1968, Mudgett injured his left hand while operating the slitting machine for his employer, Metal Goods. Mudgett then sued Paxson I and Paxson II under the theory of products liability.

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

*Ritenour*, 704 S.W.2d 895 (Tex.App.—Corpus Christi, 1986, writ ref'd n.r.e.).

Appellant contends that

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

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

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

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

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

MUDGETT v. PAXSON MACH. CO.

Tex. 757

Cite as 709 S.W.2d 755 (Tex.App.—Corpus Christi 1986)

1985, writ ref'd n.r.e.) with Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc., 474 N.E.2d 271 (Ohio 1984). If the written agreement is worded so that it can be given a definite legal meaning or interpretation, then it is not ambiguous and the court will construe it as a matter of law. Coker v. Coker, 650 S.W.2d at 398; Corriveau v. 3005 Investment Corp., 697 S.W.2d at 767; Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc., 474 N.E.2d at 272.

The sales agreement provides, in pertinent parts, as follows:

The said assets and business shall be sold free and clear of all liabilities, obligations ... of any description, except only those liabilities and obligations which the Buyer shall assume.

... the Buyer expressly assumes and guarantees ... all debts and liabilities of the Seller set forth in the November 30th Balance Sheet and all liabilities and obligations under normal contracts, orders and commitments incurred in the regular course of business to the closing date and specifically assumes Seller's liabilities for 1968 Federal Income tax ...

Except to the extent reflected or reserved against in the November 30th Balance Sheet, the Seller as of such date had no liabilities or obligations of any nature, whether accrued, absolute, contingent or otherwise, including without limitation, those liabilities due or to become due, except for Federal Income taxes for the year 1968.

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

2. Initially, we note that many portions of the sales agreement are illegible, and it can be presumed that the illegible portions not only support, but establish the correctness of the judgment. See, e.g., Cliff Management Corp. v. Lovell, 695 S.W.2d 301 (Tex.App.—Waco 1985, no

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

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

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

writ); Winters v. Highlands Underwriters Insurance Co., 693 S.W.2d 729 (Tex.App.—Houston [14th Dist.] 1985, no writ); Castillo v. Sears, Roebuck & Co., 663 S.W.2d 60 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.).

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

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

B. A disposition of all, or substantially all, of the property and assets of a corporation requiring the special authorization of the shareholders of the corporation under Section A of this article:

(1) is not considered to be a merger or consolidation pursuant to this Act or otherwise; and

(2) Except as otherwise expressly provided by another statute, does not make the acquiring corporation responsible or liable for any liability or obligation of the selling corporation that the acquiring corporation did not expressly assume. [emphasis ours]

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

4. This doctrine would impose liability upon a successor corporation, regardless of the manner in which the assets were acquired, if the buyer

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

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

[4] By his eighth and final point of error, appellant urges us to adopt the "product line" theory of successor liability. Under this theory, a successor that continues the output of a line of products assumes strict liability for defective units of the same product line previously manufactured and sold by its predecessor. *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811 (1981); *Ray v. Alad Corp.*, 19 Cal3d 22, 136 Cal.Rptr. 584, 560 P.2d 8 (1977). Whether Texas should adopt the product line theory was recently con-

purchased the "good will" and name of the seller, operated the business in the same place, with the same employees and continued to produce the same product. See *Cyr v. B. Offen & Co.*, 501 F.2d at 1153.



# Alaska Supreme Court rewrites liability law?

By Jim DeWitt and Aisha Tenker Bray

**O**n June 30, 2000, the Alaska Supreme Court significantly re-wrote 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,<sup>1</sup> 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.

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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.

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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 slippant.

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 retrospective 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

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

apparently

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.<sup>1</sup> 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.

<sup>1</sup> 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. 8293, at 19.

<sup>2</sup> While the decision is limited to products liability, long-time observers of the court might anticipate the rule being given to services and well as products, and other kinds of claims besides torts.

## MEMORANDUM

RE: Western Auto's Insurers v. Savage Arms

DATE: February 12, 2002

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ISSUE

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

BRIEF ANSWER

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

DISCUSSION

A. Retroactivity Expressly Provided

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

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

#### B. Curative Legislation

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

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

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

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

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

### CONCLUSION

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

## Liability Insurance

**BURR, PEASE & KURTZ**  
A PROFESSIONAL CORPORATION

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February 8, 2002

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

*By Fax No. 907-586-8977*

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

Dear Joe:

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

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

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

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

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

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

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

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

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

Joe L. Hayes President  
February 8, 2002  
Page 2

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

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

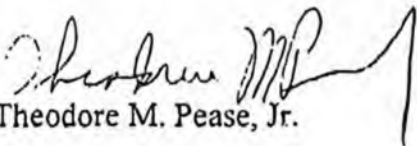
I also enclose pages 349 and 350-351 of the record on appeal, which are pages from a deposition and which describe the insurance that was obtained. It excluded liabilities relating to personal injury claims except to the extent that certain claims were listed in an attachment. At that time, the lawsuit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

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

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

Very truly yours,

BURR, PEASE & KURTZ

  
Theodore M. Pease, Jr.

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

As synthesized, the reasoning in these decisions is that strict liability should not be imposed because: the successor corporation did not create the risk nor did it directly profit from the predecessor's sale of the defective product; it did not solicit the use of the defective product nor make any representations as to its safety; and it is not able to enhance the safety of a product that is already on the market. [citations]

Moreover, according to these decisions, the exception is inconsistent with basic strict liability principles [citations], results in the imposition of liability without a corresponding duty [citations], is a drastic departure from traditional corporate law and should be left to legislative action<sup>20</sup> [citations], and threatens small successor businesses with economic annihilation because of their predecessor's products [citations].<sup>21</sup>

We agree with this reasoning. We decline to hold a corporate successor liable "not for something it has done, but rather because it may be able to

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warranting this Court's attention.

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

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

1 ll state.

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

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

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

13 A. Correct.

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

16 A. Correct.

17 Q. Did it continue with either of these  
18 companies?

19 THE WITNESS: Do you want me to answer  
20 that?

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

23 THE WITNESS: Did you say yes?

00349

EXHIBIT 2  
PAGE 129 of 225

1 MR. O'CONNELL: Yes.

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

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

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

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

17 Q. How about the price in 1988?

18 A. Would have been about the same.

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

00350

EXHIBIT 2  
PAGE 130 of 225

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

3 MR. O'CONNELL: There was a schedule?

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

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

13 THE WITNESS: There's four.

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

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

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

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


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EXHIBIT 2  
PAGE 131 of 225

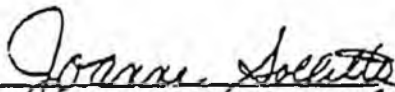


for that matter) will put Arms out of business. Neither do I see Arms being able to obtain a *supersedeas* bond to prevent execution upon an adverse judgment in that amount and enable appeal. It does not have the resources.

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

  
\_\_\_\_\_  
Ronald Coburn

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of April, 1998.

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

## CHAPTER 3

### LIABILITY OF SUCCESSORS AND APPARENT MANUFACTURERS

#### Section

12. Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor
13. Liability of Successor for Harm Caused by Successor's Own Post-Sale Failure to Warn
14. Selling or Distributing as One's Own a Product Manufactured by Another

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

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

- (a) is accompanied by an agreement for the successor to assume such liability; or
- (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
- (c) constitutes a consolidation or merger with the predecessor; or
- (d) results in the successor becoming a continuation of the predecessor.

#### Comment:

*a. History.* The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the successor is not within the basic

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liability rule in § 1 of this Restatement: "one ... *who sells or distributes* a defective product is subject to liability for harm ... caused by the defective product." (Emphasis added.) Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not "sell or distribute" the defective product that caused the harm. When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.

When the transferor goes out of business upon, or shortly after, a transfer of productive assets, the rights of plaintiffs injured by defective products sold earlier by the transferor may be adversely affected. For tort plaintiffs who have existing judgments outstanding against the predecessor at the time of transfer and dissolution, the law governing corporations and other business entities provides, within limits, legal protection. Creditors, including tort creditors, who hold existing judgments against a corporation that is in the process of transferring its assets and going out of business may satisfy those claims out of the proceeds from the transfer of assets. Moreover, if the proceeds from the transfer of assets are distributed to shareholders of the transferor corporation in violation of applicable state corporation law or fraudulent transfer law, existing creditors of the corporation may pursue the proceeds in the hands of the transferor's shareholders. These rules, in some states expressed in statutes, are designed to protect, within the limits of practicality, creditors who are identifiable at the time of the transfer of the predecessor's assets to the successor corporation and the transferor's dissolution. The same principles have been applied to the transfer of assets of proprietorships, partnerships, and other 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. Post-transfer plaintiffs harmed by pre-transfer defects have a right to expect that a transfer of assets will not be allowed to prejudice financially their chances of satisfying a judgment; they have no legitimate claim that the transfer should increase those chances over what they would have been if no transfer had occurred. In the likely event that the successor is financially stronger than the predecessor, imposing a broader liability for pre-transfer product defects would unjustifiably increase the funds available to those injured by such defects compared with what would have been available to them if no transfer had taken place.

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

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

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

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

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

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

**Illustrations:**

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

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

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

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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.

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

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

Illustrations:

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

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

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

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

**Illustration:**

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

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

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

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

#### REPORTERS' NOTE

*Comment b. Rationale.* In a much-cited case, *Polius v. Clark Equip. Co.*, 802 F.2d 75 (3d Cir.1986) (applying Virgin Islands law), the court stated that the imposition of successor liability on a company that has merely purchased the assets of a predecessor for cash and does not otherwise fall within the stated exceptions would encourage the dissolution of a financially troubled corporation by piecemeal sale of assets rather than as a going business concern. In this event the plaintiff would not be able to reach the assets when the accident occurred years after dissolution. The end result would be the needless destruction of an ongoing business enterprise with no net advantage to anyone. Other courts have observed that the imposition of successor liability on small corporations could spell financial disaster to them. See, e.g., *Bernard v. Kee Mfg. Co. Inc.*, 409 So.2d 1047 (Fla.1982); *DeLapp v. Xtraman Inc.*, 417 N.W.2d 219, 221 (Iowa 1987); *Nissen Corp. v. Miller*, 594 A.2d 564, 570 (Md.1991); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 100 (Minn.1989). These courts have concluded that the imposition of strict liability on successor corporations is inconsistent with the principle of

products liability law that imposes responsibility on the party who created the risk and was in a position to prevent its occurrence. See also *Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141 (Colo.Ct.App.1992); *Downtowner v. Acrometal Prods., Inc.*, 347 N.W.2d 118 (N.D.1984); *Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820, 827 (Wis. 1985).

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

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

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

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

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

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

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

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

served without allowing the transfer of assets to prejudice tort plaintiffs' chances of recovery.

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

849 F.2d 341, 343 (8th Cir.1988) (applying Missouri law)); Nebraska (Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481 (Neb.1982)); North Carolina (Budd Tire Corp. v. Pierce Tire Co., Inc., 370 S.E.2d 267 (N.C.Ct.App.1988)); Comment, Beyond Budd Tire: Examining Corporate Successor Liability in North Carolina, 30 Wake Forest L. Rev. 889 (Winter 1995)); North Dakota (Downtown 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 90, 100-01 (3d Cir.1994) (applying New Jersey law) ("It seems

apparent that, except perhaps in design defect cases, a defect in a product when the manufacturer distributed the product is likely to manifest itself and cause injury within a reasonable time after the product is manufactured. Accordingly, as a practical matter, successor liability under *Ramirez* is likely to be imposed in most cases, if at all, for a limited period.")); New Mexico (Garcia v. Coe Manufacturing Co., 933 P.2d 243 (N.M.1997)); Pennsylvania (Dawejko v. Jorgensen Steel Co., 434 A.2d 106 (Pa.Super.Ct.1981)); Bogart v. Phase II Pasta Machs., Inc., 817 F.Supp. 547 (E.D.Pa.1993)); Washington (Martin v. Abbott Labs., 689 P.2d 368 (Wash.1984); Fox v. Sunmaster Prods., Inc., 821 P.2d 502 (Wash.Ct. App.1991) (the continued product line must be the one that harms the plaintiff)). Although the product line exception is still theoretically viable in Pennsylvania, if a plaintiff has a possible remedy against the predecessor, a recent opinion held the exception could not be invoked. *LaFountain v. Webb Indus. Corp.*, 951 F.2d 544 (3d Cir.1991).

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

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