SUCCESSOR LIABILITY IN ASSET ACQUISITIONS

David W. Pollak
Morgan, Lewis & Bockius LLP

Reprinted from Westlaw with permission. Reprinted from the PLI Course Handbook, Acquiring or Selling the Privately Held Company 2007 (Order #11522).
SUCCESSOR LIABILITY IN ASSET ACQUISITIONS

David W. Pollak
Morgan, Lewis & Bockius LLP

Copyright (c) 2003 Practising Law Institute

Reprinted from the PLI Course Handbook, Acquiring or Selling the Privately Held Company 2002 (Volume Two, B0-01AH)

*257 INTRODUCTION

I. SUCCESSOR PRODUCTS LIABILITY


1. The Traditional Rule of Non-Liability with Recognized Exceptions.
   a. General Rule.
      i. Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc., 13 F.3d 69 (3d Cir. 1993).
      iv. 15 W. Fletcher, Cyclopedia of the Law of Private Corporations, §§ 7122 - 7123.05.
   b. Express or Implied Assumption of Liabilities.
   c. Consolidation or Merger.
   d. Mere Continuation.
   e. Fraud.

   a. The "Continuity of Enterprise" Exception.
   b. Cases Declining to Adopt "Continuity of Enterprise" Exception.
      vii. Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977).
      xix. Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 376 N.W.2d 820 (1985).
   c. The "Product Line" Exception.


d. Duty to Warn.

i. Gee v. Tenneco, Inc., 615 F.2d 857 (9th Cir. 1980).


iii. Florom v. Elliott Mfg., 867 F.2d 570 (10th Cir. 1989).


B. Important Issues Regarding the Product Line Exception.

I. Choice of Law.


v. Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 376 N.W.2d 820 (1985).
(1983).

(Sup. Ct. 1985).
z. Santa Maria v. Owens-Illinois, Inc., 808 F.2d 848, 858, n. 11 (1st Cir. 1986).
dd. Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977).
m. Page v. Gulf Oil Co., 812 F.2d 249 (5th Cir. 1987).

ww. Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 376 N.W.2d 820 (1985).


2. Continuation of the Product Line.

3. Intermediate Successor.

4. Punitive Damages.

5. Loss of Remedy Against Predecessor and Causation.

C. Practical Suggestions and Alternatives.

1. Structure of Transaction.

2. Insurance.

3. Acquisition Via Reorganization Proceedings.
I. SUCCESSOR PRODUCTS LIABILITY ISSUES

As recently as 20 years ago, a corporation purchasing the assets of another corporation could be fairly certain that, if the purchase was carefully done, it would not be liable for claims resulting from defective products manufactured by the selling corporation. That, however, is no longer the case. Any corporation considering an asset acquisition today should carefully evaluate the risks of possible successor liability for defective products manufactured by the selling corporation.

In this section, we will review first the development of the law of successor liability for defective products looking at both the traditional rule of non-liability in asset acquisitions and also the recent exceptions that have developed which impose liability on the purchasing corporation. With that historical review as background, we will then discuss a number of issues relating to the emerging law of successor liability that should make the area of successor product liability one of serious concern to anyone thinking of making an asset acquisition. Finally, we will offer some comments on structuring asset acquisitions to protect the purchaser.

First, a brief review of the traditional rule and how the law in this area has reached its present unsettled state.

A. DEVELOPMENT OF THE LAW OF SUCCESSOR PRODUCT LIABILITY

1. The Traditional Rule of Non-Liability

The general rule of corporate successor liability has been -- and in fact continues to be -- that where one company sells or otherwise transfers all of its assets to another company, the acquiring company is not liable for the debts and liabilities of the selling company, simply by virtue of its succession to the ownership of the assets of the selling company. This general rule of corporate non-liability has served, in effect, as a security blanket which protects corporate successors from unknown or contingent liabilities of their predecessors. Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc., 13 F.3d 69 (3d Cir. 1993); Conway v. White Trucks, 692 F. Supp. 442 (M.D. Pa. 1988), aff'd, 885 F.2d 90 (3d Cir. 1989).
As the Third Circuit Court of Appeals has recently noted, the general rule of corporate successor liability "was designed for the corporate contractual world where it functions well." Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir. 1986). While construing the law of the Virgin Islands, the court wrote that the traditional rule protects creditors and dissenting shareholders, facilitates a determination of responsibility for taxes and promotes the free alienability of business assets. However, the court also noted that courts will not exalt form over substance; as a result, courts may, under appropriate circumstances, decide that "the new organization is simply the older one in another guise."

Traditionally, only four exceptions have been recognized to the rule of non-liability.

The first exception is in situations where the purchaser either expressly or implicitly has agreed to assume some or all of the debts and liabilities of the seller. The application of this exception usually is fairly straightforward. The purchasing corporation will normally assume certain liabilities necessary to the uninterrupted conduct of the business. For example, existing contracts of the selling corporation are often expressly assumed. Unwanted or contingent liabilities, such as liability for defectively manufactured products, are often avoided through a clause in the sales contract expressly denying responsibility for all liabilities not expressly assumed in the contract. When disputes occasionally arise regarding the assumption of liabilities, they typically involve the question of whether an unforeseen liability has been impliedly assumed. For instance, in Kessinger v. Greoco, Inc., 875 F.2d 153 (7th Cir. 1989), the Seventh Circuit Court of Appeals held that, whether construed under Pennsylvania or Illinois law, an asset-sale agreement whereby the buyer assumed and agreed "to pay, perform and discharge all debts, obligations, contracts and liabilities" of the seller included assumption of the seller's unforeseen liability for products liability claims. 875 F.2d at 155. The court rejected the buyer's argument that the assumption of liability provisions were ambiguous because they did not specifically mention products liability claims. Id. The problems that arise, as a rule, could have been avoided by careful drafting.

The second exception to the traditional rule of non-liability is in cases where the transaction is found to have amounted to a consolidation or merger of the seller and purchaser. The theory of a de facto merger developed in Pennsylvania as a way of providing dissenters' rights for shareholders disgruntled by a corporate transaction that was structured to avoid statutory dissenters' rights. In the early 1970's, a few courts began to apply the concept of a de facto merger in suits seeking to impose liability for defective products on a successor corporation. A number of factors have been looked to by particular courts in determining where a de facto merger has occurred so as to justify imposing products liability on a successor corporation, including whether stock is part of the purchase price for assets, whether there is continuity of business operations between the two companies and whether the successor assumed its predecessor's debts. Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc., 13 F.3d 69 (3d Cir. 1993). But the essential characteristics are first, a continuity of shareholders -- meaning that the acquisition was made with shares of the purchasing corporation, so that the shareholders of the seller became shareholders of the purchaser -- and second, prompt dissolution of the selling corporation.

An important development that contributed to the movement away from the traditional rule of
non-liability is to be found in connection with the exception for de facto mergers in the case of Knapp v. North American Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975). The Third Circuit did two important things in that case: first, it disregarded the requirement that the selling corporation dissolve after the transfer of the assets, and second, it analyzed the case in terms of the policies underlying strict product liability. The *273 court noted that the Pennsylvania courts, in resolving issues relating to the recognition of a cause of action in favor of an injured party, have emphasized the public policy considerations served by imposing liability on the defendant rather than formal or technical requirements. 506 F.2d at 368. Thus, although the selling corporation had not immediately dissolved after the transfer of assets, the court observed that if the successor were not held liable, the plaintiff would be left without a remedy. Although it recognized that neither the predecessor nor the successor were in a position to avoid the accident, the Third Circuit concluded that the successor was the party better able to spread the burden of the loss. While the Knapp case is important as a harbinger of recent developments in the area of successor liability, the expanded exception for de facto mergers developed by the Third Circuit has not been followed because it is limited to acquisitions made with stock and because a court wishing today to impose liability on a successor may do so more directly under the new theories we will be describing shortly.

We should note, however, that the de facto merger doctrine has, in one case, been applied to a sale of assets where no stock of either corporation was transferred. See Diaz v. South Bend Lathe, Inc., 707 F. Supp. 97 (E.D.N.Y. 1989). In Diaz, although no shares were exchanged, the court found a de facto merger had occurred based on evidence of the dissolution of the predecessor corporation, the assumption of liabilities by the successor, and a continuity of management, personnel and physical operation. The conclusion that a successor corporation was a continuation of its predecessor when no stock is exchanged, however, has more frequently occurred under the "continuity of enterprise exception" which we will discuss later. Indeed, in National Gypsum Co. v. Continental Brands Corp., 895 F. Supp. 328 (D. Mass. 1995), the district court remarked that while the Diaz court purported to find a de facto merger, it actually relied upon the "continuity of enterprise" reasoning to reach its result. Id. at 340 n. 17. Thus, the Diaz decision is of questionable precedential value.

The third exception to the traditional rule of non-liability is in situations where the purchasing corporation is merely a continuation of the selling corporation. This exception has traditionally focused on whether there is a continuity of ownership or corporate structure between the selling corporation and the buying corporation. The primary elements of continuation include the use by the buyer of the seller's name, location and employees and a common identity of stockholders and directors. It is important to emphasize that this exception was applied historically only in very limited circumstances where the successor corporation was materially identical to the predecessor. For instance, one court has noted that the "test is not the continuation of the business operation, but rather the continuation of the corporate entity." Elmer v. Tenneco Resins, 698 F. Supp. 535 (D. Del. 1988). However, a variation of this exception known as the "continuity of enterprise" doctrine is one aspect of the more liberal approach to successor liability that we will be discussing herein.

The fourth, and final, exception to the traditional rule of non-liability is where a transaction is
entered into fraudulently in order to evade liability for debts. The fraud exception has been used to impose liability on a successor corporation as, for example, where the consideration given for the assets was fictitious or inadequate. Recent cases have found the absence of adequate consideration for the sale or transfer to be a new, fifth exception to the rule of non-liability. Sullivan v. A.W. Flint Co., 1996 Conn. Super. LEXIS 2060 (1996); Lacy v. Carrier, 1996 U.S. Dist. LEXIS 8876 (1996). Thus, to impose liability on the successor corporation, the law requires a finding that the corporate transfer of assets is for the fraudulent purpose of escaping liability. Raytech Corp. v. White, 54 F.3d 187 (3d Cir. 1994), cert. denied, 116 S. Ct. 302 (1995). In essence, it is simply an application of the general rule against fraudulent conveyances. In the products liability context, the United States District Court for the District of Oregon, applying Oregon law, found that the fourth exception to the traditional rule of non-liability applied where a successor corporation had been formed for the purpose of avoiding liability for judgments entered against its predecessor in asbestos litigation. Schmoll v. AC & S, Inc., 703 F. Supp. 868 (D. Ore. 1988), aff'd, 977 F.2d 499 (9th Cir. 1992).

The traditional rule of non-liability in the sale of assets, along with the four exceptions discussed above, developed within the context of corporate law and was addressed particularly to the issue of liability for obligations and debts that were primarily financial in nature. As suggested by the Knapp case, however, the development of the modern law of products liability, with the application of strict liability in tort, has placed the traditional rule of non-liability in asset acquisitions under some conceptual strain.

As a quick aside, it is interesting to note that the Third Circuit has recently again discussed the policies underlying strict products liability in relation to successor liability. In Polius, the court wrote that recent developments in the area of successor liability, rest in large part on the need to compensate eligible plaintiffs. The court concluded "the better approach" is to reject these recent developments. According to the court, focusing exclusively on the needs of products liability plaintiffs encourages courts to overlook valid arguments of the business world. Unforeseen alterations in successor liability principles complicate transfers and increase transaction costs. According to the court, adhering to the traditional rule, with its familiar exceptions, fosters "a climate of relative certainty and reasonable predictability." The court wrote that such a climate is best for major economic decisions, which are "critical to society." As we will discuss below, a number of courts have recently refused to extend the traditional principles of successor liability in order to compensate plaintiffs. Instead, these courts have favored a return to the traditional rule of non-liability with its recognized exceptions.

Let us move now to a brief discussion of the cases that have departed from the traditional rule of non-liability.

*275 2. Modern Rules of Expanded Liability

a. The "Continuity of Enterprise" Exception

In 1976, the Michigan Supreme Court issued its decision in Turner v. Bituminous Casualty Co., 244 N.W.2d 873 (Mich. 1976). The Michigan Supreme Court in that case imposed liability on a
successor corporation in a situation where the traditional rule, even with the exceptions we have just described, would not have imposed liability. The analysis followed by the Michigan Supreme Court essentially expanded the third exception to the traditional rule of non-liability, that is, mere continuation of the selling corporation. After observing that there clearly would have been liability under the de facto merger exception if the acquisition had been made for stock rather than cash, the court stated that it could find no reason to treat acquisitions for stock or cash differently. In effect, the court held that the analysis in Knapp should also apply to cash transactions. The court thus found that it would be proper to impose liability on the purchasing corporation after evaluating such factors as the ownership and management of the successor's corporate entity, and its personnel, physical location, assets, trade name, and general business operation.

Although the continuity of enterprise exception articulated in Turner has not received as much attention as the product line exception, which we will be considering next, it has been adopted in Alabama (Andrews v. John E. Smith's Sons Co., 369 So. 2d 781 (Ala. 1979)), where it continues to be applied, Turner v. Wean United Inc., 531 So. 2d 827 (Ala. 1988), and has been recognized by implication in Ohio (McGaw v. South Bend Lathe, 74 Ohio App. 3d 8, 598 N.E.2d 18 (1991)) and the Fifth Circuit (Mozingo v. Correct Mfg. Co., 752 F.2d 168 (5th Cir. 1985)) (interpreting Mississippi law). Courts have also referred favorably to the exception in Pennsylvania (Dawejko v. Jorgensen Steel Co., 434 A.2d 106 (Pa. Super. 1981)) and New Jersey (Woodrick v. Jack J. Burke Real Estate, 703 A.2d 306 (N.J. Super. Ct. App. Div. 1997)) and used the exception very recently in Michigan (Foster v. Lenawee Cone-Blanchard Machine Co., 560 N.W.2d 664 (Mich. Ct. App. 1997)).

The continuity of enterprise exception has also received criticism. As noted above, the Third Circuit criticized the exception in Polius. Moreover, under New Hampshire law, proof of a manufacturer's responsibility remains an essential element of a plaintiff's strict liability claim. Simoneau v. South Bend Lathe, Inc., 130 N.H. 466, 543 A.2d 407 (1988). Recently, the Supreme Court of Minnesota has addressed this exception and rejected it. (Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989)). The Niccum court accepted the argument that the Turner exception should not be adopted because the successor corporation did not create the risk by placing a defective product into the market, did not represent to the public the safety of its predecessor's product, and received profit on the product only in a remote way. 438 N.W.2d at 99. In addition to Minnesota, other states rejecting the continuity of enterprise exception include:

Indiana: Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977) (applying Indiana and Ohio law);
Iowa: Pancratz v. Monsanto Co., 547 N.W.2d 198 (Iowa 1996);
Illinois: Green v. Firestone Tire, 460 N.E.2d 895 (Ill. App. Ct. 1984);
Kentucky: Conn. v. Fales Div. Of Matheson Corp., 835 F.2d 145, 147 (6th Cir. 1987) (applying Kentucky Law);
Maryland: Nissen Corp. v. Miller, 323 Md. 613, 594 A.2d 564 (1991);
b. The "Product Line" Exception

In 1977, the year after the decision in Turner, the California Supreme Court first articulated what is referred to as the "product line exception" in the case of Ray v. Alad Corp., 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977) (disapproving of Ortiz v. South Bend Lathe). In Ray, the buyer had purchased the physical plant, manufacturing equipment, inventories of raw materials and finished goods, trade name, goodwill, and records of manufacturing designs from the seller and had continued the employment of the factory personnel. The buyer also hired the seller's general manager as a consultant. Moreover, the buyer continued to manufacture the same line of product under the same name, and held itself out to potential customers as the same enterprise. The California Supreme Court concluded that "a party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired." Ray, 560 P.2d 3, 11 (1977). Its justification for imposing strict liability was three-fold:

1. The virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business,
2. The successor's ability to assume the original manufacturer's risk-spreading role, and
3. The fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business.

Id. at 11.

In the first few years following the decision in Ray, the product line exception was adopted by a number of other courts. New Jersey, for example, adopted the product line exception in 1981 in the case of Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 431 A.2d 811 (1981). After analyzing the differences between the continuity exception formulated by the Michigan Supreme Court in Turner and the product line exception in Ray, the New Jersey Supreme Court concluded that it would be best to adopt the rule of Ray with its focus on continuation of the manufacture of the product causing injury. The Supreme Court of Washington adopted the product line exception three years later. Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984). Finally, the Supreme Court of New Mexico adopted the *278 product line exception last year. Garcia v. Coe Mfg. Co., 123 N.M. 34, 933 P.2d 243 (1997).
When the issue of successor liability was first presented to the Pennsylvania Superior Court, however, in Dawejko v. Jorgensen Steel Co., 290 Pa. Super. 15, 434 A.2d 106 (Pa. Super. 1981), the court referred to Turner, Ray and Ramirez in deciding to impose liability on the successor corporation. The Pennsylvania Superior Court concluded that it would be best not to phrase the product line exception too tightly, "so that in any particular case the court may consider where it is just to impose liability on the successor corporation." Thus, although the formulation of the New Jersey Supreme Court in Ramirez looks particularly to continued manufacture of the same product line causing the injury, the Pennsylvania Superior Court appears to consider the manufacture of the same product line as one of several relevant factors, the presence or absence of any one of which is important but not controlling. The relevance of continuing to manufacture the same product line with respect to causing the injury in question is an important point that we will discuss below.


c. Duty to Warn

Before reviewing a number of important issues relating to the product line exception, we should discuss one other new approach to the question of successor liability that has developed. Concurrently with the developments we have just considered, a number of jurisdictions have found a separate basis for imposing liability as a result of a successor's failure to warn customers of defects in the predecessor's products that were discovered, or should have been discovered, by the successor. See Gee v. Tenneco, Inc., 615 F.2d 857 (9th Cir. 1980) (citing cases). Liability for failure to warn existing users of a defective product sold by a predecessor may be imposed under theories of strict liability, negligence, or failure of a successor to comply with federal regulations that impose a duty to report product problems to consumers or to warn prior purchasers of defects. Generally, courts have noted that succession alone does not impose a duty to warn the predecessor's customers of recently-discovered defects. Rather, the duty arises from a continuing relationship between the successor *279 and the predecessor's customers. Courts have required plaintiffs to prove such a relationship before imposing successor liability for a failure to warn. LaFountain v. Webb Indus. Corp., 951 F.2d 544 (3d Cir. 1991). For instance, the Tenth Circuit has concluded that a "court must look at factors such as the succession to service contracts, coverage of the particular machine by a contract, service of that machine by the successor, and the successor's knowledge of the defect and of the machine owner's location." Florom v. Elliott
Mfg., 867 F.2d 570 (10th Cir. 1989); Foster v. Lenawee Cone-Blanchard Machine Co., 560 N.W.2d 664 (Mich. App. Ct. 1997). In any case, because the existence of a duty to warn on the part of a successor is a question of fact, the successor should be sensitive to the possible presence of such a duty in any situation in which it may be involved.

B. IMPORTANT ISSUES REGARDING THE PRODUCT LINE EXCEPTION

With that brief outline of the development of the product line exception, we will now discuss a number of important issues relating specifically to the application of the product line exception.

1. Choice of Law

The first and most important open issue is that of choice of law.

With the adoption of the product line exception by Pennsylvania and New Jersey in the years following the Turner and Ray decisions, it appeared that the new, more liberal, approach to successor liability would sweep the country. This has not proven to be the case. Instead, recent cases from a variety of states have rejected the product line exception in favor of retaining the traditional rule on non-liability. States in which courts have rejected the product-line exception include:

- **Colorado**: Johnston v. Amsted Industries, Inc., 830 P.2d 1141 (Colo. App. 1992);
- **Florida**: Bernard v. Kee Mfg. Co., 409 So. 2d 1047 (Fla. 1982);
- **Georgia**: Bullington v. Union Tool Corp., 254 Ga. 283, 328 S.E.2d 726 (1985);
- **Iowa**: DeLapp v. Xtraman, Inc., 417 N.W.2d 219 (Iowa 1987);
- **Massachusetts**: Guzman v. MRM/Elgin, 409 Mass. 563, 567 N.E.2d 929 (1991);
- **Minnesota**: Niccum v. Hydra-Tool Corp., 438 N.W.2d 96 (Minn. 1989);
- **Missouri**: Young v. Fulton Iron Works Co., 709 S.W.2d 927 (Mo. Ct. App. 1986); Chemical Design, Inc. v. American Standard, Inc., 847 S.W.2d 488 (Mo. Ct. App. 1993);
- **Nebraska**: Jones v. Johnson Mach. and Press Co., 211 Neb. 724, 320 N.W.2d 481 (1982);
- **New Hampshire**: Simoneau v. South Bend Lathe, Inc., 130 N.H. 466, 543 A.2d 407 (1988);
- **North Dakota**: Downtowner, Inc. v. Acromental Products, Inc., 347 N.W.2d 118 (N. D. 1984);
- **Ohio**: Flaugher v. Cone Automatic Mach. Co., 30 Ohio St. 3d 60, 507 N.E.2d 331 (1987);
- **South Dakota**: Hamaker v. Kenwel-Jackson Mach. Inc., 387 N.W.2d 515 (S. D. 1986);
- **Vermont**: Ostrowski v. Hydra-Tool Corp., 144 Vt. 305, 479 A.2d 126 (Vt. 1984);
- **Virginia**: Harris v. T.I. Inc., 243 Va. 63, 413 S.E.2d 605 (1992); and
Wisconsin: Fish v. Amsted Indus., Inc., 376 N.W.2d 820 (Wis. 1985).

In Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 464 N.Y.S.2d 437, 451 N.E.2d 195 (1983), the New York Court of Appeals declined to adopt either the product line exception of Ray or the continuity of enterprise exception of Turner, but noted that both were factually distinguishable from the case before it. The opinion is not entirely clear as to the court’s position on the product line and continuity exceptions. One lower court reads the Schumacher opinion as rejecting those exceptions in favor of adopting a rule requiring the successor to warn, as we previously discussed. Radziul v. Hooper, Inc., 125 Misc. 2d 362, 479 N.Y.S.2d 324 (Sup. Ct. 1984). Another lower court reads Schumacher as leaving open the issue whether the New York Court of Appeals would adopt either the product line or continuity of enterprise exceptions. Salvati v. Blaw-Lenox Food & Chem. Equip., Inc., 130 Misc. 2d 626, 497 N.Y.S.2d 242 (Sup. Ct. 1985). The First Circuit Court of Appeals has speculated that the Schumacher court intended to reject the holdings in both Turner and Ray. See Santa Maria v. Owens-Illinois, Inc., 808 F.2d 848, 858 n.11 (1st Cir. 1986). In Howard v. Clifton Hydraulic Press Co., 830 F. Supp. 708 (E.D.N.Y. 1993), the court, applying New York law, declined to adopt either Turner or Ray under the facts presented. In any event, the New York Court of Appeals has yet to resolve the confusion created by its decision in Schumacher.

Federal courts have also expressed reservations that the product line or continuity of enterprise exceptions would be adopted by the state courts of:

- **Arkansas:** Swazy v. A.O. Smith Corp., 694 F. Supp. 619 (E.D. Ark. 1988);
- **District of Columbia:** LeSane v. Hillenbrand Indus., Inc., 791 F. Supp. 871 (D.D.C. 1992);
- **Indiana:** Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977);
- **Iowa:** Weaver v. Nash International, Inc., 730 F.2d 547 (8th Cir. 1984);
- **Kentucky:** Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145 (6th Cir. 1987);
- **Louisiana:** Page v. Gulf Oil Co., 812 F.2d 249 (5th Cir. 1987);
- **Maine:** Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir. 1997);
- **Maryland:** Giraldi v. Sears Roebuck & Co., 687 F. Supp. 987 (D. Md. 1988);
- **Mississippi:** Mozingo v. Correct Mfg. Co., 752 F.2d 168 (5th Cir. 1985)
- **Missouri:** Tucker v. Paxson Mach. Co., 645 F.2d 620 (8th Cir. 1981);  
- **Ohio:** Huynh v. Werke, 90 F.R.D. 447 (S.D. Ohio 1981); and  

*282 However, notwithstanding the trend away from adopting the product line exception, the choice of law rule applied in suits against successor corporations gives the product line and continuity of enterprise exceptions wider applicability than they would otherwise have.

Consider, for example, the case of Hickman v. Thomas C. Thompson Co., 592 F. Supp. 1282 (D. Colo. 1984), that was decided by the United States District Court for Colorado in September 1984. In that case, the plaintiff was injured by copper enameling products manufactured by a corporation that had sold all of its assets to another corporation. The contract of sale was signed and executed in Illinois and both corporations based their operations in Illinois. The plaintiff, however, was a resident of Colorado and was injured in Colorado by use of the products there.
The District Court concluded that Colorado law should govern the case and further, that the Colorado courts would adopt the product line exception. Thus, despite the fact that Illinois has rejected the product line exception, an Illinois business that purchased another Illinois business pursuant to a contract signed in Illinois was held liable under the product line exception because of an astute choice of forum by the plaintiff. Ironically, in Florom v. Elliott Mfg., 867 F.2d 570 (10th Cir. 1989), the Tenth Circuit Court of Appeals had an opportunity to predict whether Colorado would adopt the product line exception. The Florom court expressly disagreed with the Hickman court's conclusion and held that Colorado would reject the product line exception and continue to adhere to the traditional rule.

The havoc that can be caused by the unsettled state of the law of successor liability and a choice of law rule that, however phrased theoretically, ultimately looks to the law of the state where an injury occurred, is illustrated by the cases involving the power presses manufactured by the Johnson Machine and Press Company. In 1956, Johnson transferred its assets and liabilities to Bontrager Corporation in exchange for Bontrager common stock. Bontrager continued to manufacture presses under the Johnson trade name until 1962. At that time, Amsted Industries purchased all of Bontrager's assets for cash. Amsted, or a subsidiary, continued to manufacture presses under the Johnson trademark until 1975. Amsted then sold the press manufacturing business to LWE Incorporated, which also continued to manufacture Johnson presses.

In 1975, two years before the decision in Ray, a California court held that Amsted was not liable as a successor for defective products manufactured by its predecessors. Ortiz v. South Bend Lathe, 46 Cal. App. 3d 842 (1975) (subsequently overruled by Ray). In 1978, the United States District Court for the Eastern District of Wisconsin, evidently applying Wisconsin law, reached a similar conclusion. Verhein v. South Bend Lathe, Inc., 448 F. Supp. 259 (E.D. Wis. 1978), aff'd, 598 F.2d 1061 (7th Cir. 1979). The next case involving Amsted's liability for Johnson presses was Korzet v. Amsted Indus., Inc., 472 F. Supp. 136 (E.D. Mich. 1979). In that case, the United States District Court for the Eastern District of Michigan applied the continuity exception of the Turner case under Michigan law and held Amsted liable as a successor. The same year, an Illinois court, applying Illinois law, rejected the product line exception of Ray and held that Amsted was not liable as a successor. Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979). Two years later, the Ray approach was adopted in New Jersey and applied to Amsted in Ramirez v. Amsted Indus., Inc., 431 A.2d 811 (N.J. 1981). In 1982, in Mah Hung Nguyen v. Johnson Mach. & Press Corp., 104 Ill. App. 3d. 1141, 433 N.E.2d 1104 (1982), the Illinois court again held that Amsted was not liable and rejected the Turner, Ray, and Ramirez approaches. In Jones v. Johnson Mach. and Press Co., 320 N.W.2d 481 (Neb. 1982), the Nebraska Supreme Court rejected the product line exception and held Amsted not liable as a corporate successor. In 1984, in Burr v. South Bend Lathe, 18 Ohio App. 3d 19, 480 N.E.2d 105 (1984), an Ohio court held that Amsted was not a mere continuation of Johnson and thus found no successor liability. In 1985, in Fish v. Amsted Indus., Inc., 376 N.W.2d 820 (Wis. 1985), the Supreme Court of Wisconsin rejected the product line exception and held that Amsted was not liable as a successor corporation. In 1988, in Simoneau v. South Bend Lathe, Inc., 543 A.2d 407 (N.H. 1988), the Supreme Court of New Hampshire held that New Hampshire does not recognize the product line theory of successor liability and, therefore, that liability could not be imposed on Amsted on this basis. In 1989, in Diaz v. South Bend Lathe, Inc., 707 F. Supp. 97
Amsted liable under New York law under the de facto merger doctrine for an injury caused by a product manufactured by Johnson Machine and Press. In 1991, in McGaw v. South Bend Lathe, 74 Ohio App. 3d 8, 598 N.E.2d 18 (1991), the Ohio court again held that Amsted was not liable, rejecting the plaintiff's de facto merger and continuity of enterprise arguments. Most recently, in Johnston v. Amsted Indus., Inc., 830 P.2d 1141 (Colo. App. 1992), the Colorado Court of Appeals held that Colorado does not recognize the product line or continuity of enterprise theories of successor liability and Amsted could not be held liable. To date, therefore, Amsted has litigated the issue of successor liability thirteen times, once each under the laws of California, Colorado, Michigan, New Jersey, New York, New Hampshire and Nebraska, and twice under the laws of Illinois, Ohio and Wisconsin. Amsted has won ten times and lost three times: losing once under the Turner rule, once under Ray, and once under a de facto merger theory.

The experience of Amsted Industries serves as an important warning that in the context of the product line exception what is important in evaluating a potential acquisition is where the selling corporation -- and its predecessors -- have distributed products that may be potentially dangerous.

Now we will briefly discuss several other issues in addition to choice of law that should raise even further one's level of sensitivity with respect to the product line exception.

2. Continuation of the Product Line

The next issue is to determine what the effect would be if the purchasing corporation did not continue to manufacture the product of the predecessor that caused the injury. Remember that we noted out earlier that the New Jersey Supreme Court in Ramirez rejected the Turner case in favor of California's Ray case with its focus on continuation of the manufacture of the product causing injury. However, the New Jersey Superior Court has expanded the product line exception and allowed liability even when the company did not continue producing the product. Pacius v. Thermtroll Corp., 259 N.J. Super. 51, 611 A.2d 153 (Law Div. 1992).

In Pacius, the court stated that if the theory behind successor liability is to afford a remedy to the Plaintiff, any benefits received by purchasing the assets of the predecessor should be enough to establish the product line exception. This is obviously an expansion of the product line exception. Subsequent New Jersey decisions, however, have not applied Pacius' expanded definition. In Class v. American Roller Die Corp., 1998 WL 32523 (N.J. Super. Ct App. Div. Jan. 30, 1998), the Appellate Division apportioned liability between successor corporations based upon the number of units of the defective product that each successor manufactured. In Alloway v. Marine, 288 N.J. Super. 479, 672 A.2d 1177 (App. Div. 1996), rev'd on other grounds, 149 N.J. 620, 695 A.2d 264 (1997), the Appellate Division reiterated that successor liability attaches when a successor corporation undertakes "essentially the same manufacturing operation." It will be interesting to see if the New Jersey Supreme Court accepts Pacius' expanded interpretation.
Additionally, in practice, the California courts have not insisted on Ray’s focus on strict continuation of the same product line. In Rawlings v. D.M. Oliver, Inc., 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979), the California Court of Appeals held that a successor corporation may be liable even where the product causing injury was not mass-produced and the successor did not continue the identical product line. The court concluded that this result was consistent with the rationale of strict products liability which does not require the party held liable to be morally responsible for the injuries caused by the product. Rather than require the injured party to bear the loss, the court decided that the successor should bear the loss since it was benefitting from the going business and goodwill it had purchased and was in a position to spread the costs of the injury. Two subsequent cases, however, limited Rawlings. In Oliver v. Regis Builders, 211 Cal. App. 3d. 86, 259 Cal. Rptr. 160 (1989), the court declined to applied Rawlings in a construction context. Another court limits Rawlings to cases in which the successor: 1) could protect itself from loss by allocating the risk of liability; 2) could transfer the economic burden to the responsible party; and 3) enjoys the same ability as its predecessor to spread the cost of injury. Lundell v. Sidney Mach. Tool Co., 190 Cal. App. 3d 1546, 1987 Cal. Rptr. 70 (1987). It is also interesting to note a 1988 California Court of Appeal case in which the plaintiff sought to have the product line exception applied to a negligence cause of action. Maloney v. American Pharmaceutical Co., 207 Cal. App. 3d 282, 255 Cal. Rptr. 1 (1988). The court held that the product line exception only applies to causes of action based on strict liability.

3. Intermediate Successor

Another issue to be aware of is the problem faced by an intermediate successor. Even after a corporation has divested itself of assets acquired from a previous owner, it may still be held liable for defective products manufactured by the previous owner. In Nieves v. Bruno Sherman Corp., 86 N.J. 361, 431 A.2d 826 (1981), decided the same day as Ramirez, the New Jersey Supreme Court held that an intermediate successor -- who at the time of the injury complained of no longer owned the assets associated with the manufacture of the defective product -- could nonetheless be held liable, as a successor to the original owner, under the product line exception.

In a case involving the same company that was the intermediate successor in the Nieves case, a United States District Court has also held that an intermediate successor may be liable under the continuity of enterprise exception formulated in the Turner case. Trimper v. Harris Corp., 441 F. Supp. 346 (E.D. Mich. 1977). In Tretter v. Rapid American Corp., 514 F. Supp. 1344 (E.D. Mo. 1981), the United States District Court for the Eastern District of Missouri adopted Trimper in a case where two corporations had merged and held that a successor corporation which had merged with its predecessor was liable for the tort liabilities of its predecessor, notwithstanding the fact that the successor corporation had since transferred responsibility for such liabilities to another corporation. As in Trimper, the court in Tretter emphasized that its first concern was to compensate an injured plaintiff, and that the argument between the successor corporations as to the proper allocation of liability should not prevent the plaintiffs recovery.

We should note at this point that the cases imposing liability on an intermediate successor have also continued to hold the ultimate successor liable. As in Tretter, the courts indicate that they
will honor an agreement by the successive successors allocating the liability between them, but the plaintiff, in the first instance, is not to be deprived of a potential source of recovery.

4. Punitive Damages

The final issue under the product line exception to be aware of is the availability of punitive damages.

A federal district court has predicted that California will not grant punitive damages against successor corporations under the product line exception and, accordingly, granted summary judgment to the successor. In re Related Asbestos Cases, 566 F. Supp. 818 (N.D. Cal. 1983). Another California district court, however, defends imposing punitive damages against a successor. Certain Underwriters of Lloyd's of London v. Pacific Southwest Airlines, 786 F. Supp. 867 (C.D. Cal. 1992). The court reasons that punitive damages are appropriate if the predecessor entity makes up a "significant and identifiable part" of the successor entity.

In the case of Martin v. Johns-Manville Corp., 322 Pa. Super. 348, 469 A.2d 655 (1983), vacated on other grounds, 508 Pa. 154, 494 A.2d 1088 (1985), the Pennsylvania Superior Court, an intermediate appellate court, held that punitive damages could be awarded against a successor corporation in a proper case. The Pennsylvania Superior Court explained its decision as follows: *286 We believe that when a legal change in corporate identity is not accomplished by major changes in the identity of the predecessor's shareholders, officers, directors, and management personnel, the imposition of punitive damages against the successor for the reckless conduct of the predecessor may be proper as advancing the goals of punishment and deterrence. For the actors responsible for the predecessor's reckless conduct will be punished and also deterred from similar conduct in the future. The fact that the successor does not continue the product line recklessly marketed by the predecessor, or cures the defect, will not necessarily preclude punitive damages. For in either circumstance, the fact remains that those who are in control of the successor have demonstrated a willingness to act in reckless disregard of the rights of others. That the public is now safe from being injured by product x does not mean it is safe from the next reckless business practice these actors may undertake if not deterred.

Id.

In an opinion issued in 1985 in an appeal of that case, the Pennsylvania Supreme Court concluded that the plaintiff had not produced evidence sufficient to warrant the submission of his punitive damages claim to the jury. The court observed that it has never decided the question of whether punitive damages are available in an action grounded in strict liability for defective products and declined to do so in the case before it. Martin v. Johns-Manville Corp., 508 Pa. 154, 494 A.2d 1088 (1985). New Jersey has followed the Pennsylvania Superior Court's lead in holding that punitive damages can be awarded against a successor corporation in a proper case. Brotherton v. Celotex Corp., 202 N.J. Super. 148, 493 A.2d 1337 (1985). The New Jersey Superior Court in Brotherton noted that the imposition of punitive damages against a successor corporation may be necessary for the protection of the public from egregious conduct. 493 A.2d at 1344. The Brotherton opinion, however, emphasizes that the successor corporation must be sufficiently connected to the culpable conduct before punitive damages would be warranted.
The Superior Court of Delaware, in Sheppard v. A.C. & S Co., Inc., 484 A.2d 521 (Del. Super. 1984), appeal denied, 497 A.2d 783 (Del. 1985), has also suggested that punitive damages may be recovered from a successor corporation, particularly when the successor continues the manufacture and distribution of the product line which it acquires from its predecessor. The Delaware Superior Court stated that:

If, as the decisions indicate, deterrence is a policy goal supporting the allowance of punitive damages, the continuation by a successor of a product line with knowledge of its danger (as suggested by the affixing of warning labels) could be a reprehensible act properly discouraged through the imposition of punitive damages. 484 A.2d at 526. The Delaware Superior Court emphasized, though, that in products liability cases, punitive damages are assessable only for outrageous conduct, and even in jurisdictions which recognize strict liability, an additional showing of aggravated conduct is required.

We should note that the case law has indicated a greater willingness to impose punitive damages where the successor corporation is the product of a statutory merger, as was the case in Brotherton. The rationale has been that, in a statutory merger, a successor corporation expressly undertakes to become liable for all the liabilities of its predecessor, including any potential claims for punitive damages. The Celotex Corporation, as the successor corporation of a merger with Panacon Corporation, which itself was the successor of a merger with the Philip Carey Corporation, has been held liable for punitive damages as a result of the actions of its predecessors. See Hanlon v. Johns-Manville Sales Corp., 599 F. Supp. 376 (N.D. Iowa 1984); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982), aff'd sub nom., Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985); Celotex Corp. v. Pickett, 459 So. 2d 375 (Fla. App. Dist. 1984); Man v. Raymark Indus., 728 F. Supp. 1461 (D. Hawaii 1989); Aguirre v. Armstrong World Indus., Inc., 901 F.2d 1256 (5th Cir. 1990); Davis v. Celotex Corp., 187 W. Va. 566, 420 S.E.2d 557 (W. Va. 1992).

5. Loss of Remedy Against Predecessor and Causation

A final word on the product line exception. Recently in Conway v. White Trucks, 885 F.2d 90 (3d Cir. 1989), the Third Circuit Court of Appeals examined the product line exception as applied in Pennsylvania. The Third Circuit, noting the rejection of the product line exception by a number of state courts, expressed doubts as to whether the Pennsylvania Supreme Court would adopt the exception in any form. 885 F.2d at 93. Assuming, for purposes of argument, that the Pennsylvania Supreme Court would follow the Pennsylvania Superior Court's decision in Dawejko, the Third Circuit predicted that the Supreme Court would not apply the exception in cases where the claimant had a potential remedy against the original manufacturer but failed to exercise all available means to assert his claim. The Third Circuit noted that one of the justifications for the product line exception, as stated in Ray, is the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business. In the case before it, a fund in bankruptcy court had been set aside to accommodate claims such as those asserted by the plaintiff. The Third Circuit concluded that it would be inappropriate to impose liability on the successor where the plaintiff had an available remedy against the predecessor, but had failed to pursue that remedy.
The Third Circuit reaffirmed this view two years later in LaFountain v. Webb Indus. Corp., 951 F.2d 544 (3d Cir. 1991), where it declined to apply the product line exception to a case where the plaintiff did not lack for a remedy against the predecessor.


**C. PRACTICAL SUGGESTIONS**

A corporation may be held in an unforeseen jurisdiction for both punitive and compensatory damages because of a defective product acquired from a predecessor. Such liability seems unfair especially if the successor corporation does not manufacture the product, it cured the defect, or it was only an intermediate successor. It is vital that the corporation structure an asset acquisition to minimize the risk of successor liability.

However, we should emphasize that a correct approach to the problem requires a business evaluation of the realistic risks involved. While the prospect of punitive damages against, for example, an intermediate successor that has remedied a defect in a product, is cause for significant concern, the real question is whether it would be economically efficient to restructure an acquisition in attempting to minimize such a possibility. Sometimes, it could be better to allow the acquisition to take another form without reference to the problem of successor liability.

In any acquisition it is important to evaluate the importance of business considerations that suggest a particular structure for an acquisition and the manner of operating the business following the acquisition. Against those considerations might be weighed the potential magnitude of product liability claims and where these claims may be brought. The product line acquired could be one that is not inherently dangerous and has only been distributed in states like Illinois that have decisively rejected the product line exception in a number of cases. On the other hand, the products may be dangerous or toxic and may have been distributed in states like California and Pennsylvania which have adopted the product line exception to the traditional rule of non-liability.

Assuming in a particular situation that it is decided that the problem of successor liability is of some concern, the foregoing suggests a number of ways to reduce the purchaser's risks. Attention should focus on: the various factors that the courts have used to justify the imposition of
successor liability; agreements to indemnify the purchaser if the seller continues in business; and allocations of liability between various successors.

Rather than focusing on these generalized techniques here, we think it would be more instructive to describe two specific situations which are of some interest in this area.

The first situation involves a technique used to structure an acquisition for one of our English corporate clients. The English company wanted to acquire the business of an American company that had produced a product containing asbestos during the 1950's and 60's. Although the American company was not a manufacturer of asbestos and the asbestos contained in the products it had manufactured was not particularly dangerous, the American company had been named as a defendant in a number of personal injury suits. The possibility that the American company would ever be held liable for an amount anywhere near the $50-60 million sought from all the defendants was extremely remote, and yet it is easy to appreciate that the English company was somewhat concerned.

As we explored the situation, it became clear that the acquisition was going to be structured in a way that would clearly raise the issue of the product line exception: the English company was going to purchase all of the assets of the American company and continue its business. The American company was to be dissolved. The English company wanted to confine potential damage to the maximum extent possible.

An American subsidiary of the English company was incorporated and capitalized with a sufficient amount of cash to complete the acquisition and provide working capital for initial operations. We provided a detailed opinion on how to operate the American subsidiary so that the corporate veil between the American subsidiary and the English parent would not be pierced. At that point, the English company could at least be confident that its maximum exposure was limited to the amount of its investment.

However, what is unique is the next step. The English company was then able to secure through a New York insurance broker what was termed a "sleep easy" insurance policy. It was a policy specially written by Lloyd's of London that covered the amount of the English company's initial investment in its American subsidiary. Assuming that the sleep easy policy stands up, the end result should be that all the English company ultimately has at risk is the profits to be earned by the American subsidiary.

The second situation we want to mention briefly is the acquisition of a company that is in reorganization. The basic rule to remember is that acquiring the business of a company that is in reorganization -- even with the benefit of an order of the bankruptcy court that the assets are transferred free and clear of liabilities -- does not guarantee that the acquiring corporation will not be held liable as the successor of the corporation in reorganization. There are a few cases to be aware of in this context.

The first case is In the Matter of Mooney Aircraft, Inc., 730 F.2d 367 (5th Cir. 1984). The original Mooney Aircraft company filed a bankruptcy petition in 1969. The bankruptcy court
subsequently approved a sale of the assets of Mooney Aircraft free and clear of all claims and liabilities other than properly secured liens. The assets were subsequently sold two more times before coming to rest in a wholly-owned subsidiary of Republic Steel Corporation. A products liability suit was then begun in California against the Republic Steel subsidiary seeking to hold it liable as the successor of Mooney Aircraft for a defective plane manufactured prior to the filing of the bankruptcy petition. Upon application to the bankruptcy court by the Republic Steel subsidiary, the estate of Mooney Aircraft was reopened and an order entered enjoining the prosecution of the California products liability case. The Fifth Circuit ultimately held that the injunction was improper because the bankruptcy court did not have the power to sell the assets of Mooney Aircraft free and clear of claims by victims of an accident that had not yet occurred. Therefore, Mooney Aircraft stands for the proposition that a bankruptcy proceeding is not an adequate mechanism to protect against the imposition of successor liability for claims which have not accrued at the time of the bankruptcy proceeding. It is important to note, however, that a number of courts either reject Mooney, or argue that it has been pre-empted by the amended Bankruptcy Code. In re Paris Indus. Corp., 132 Bankr. 504 (D. Maine 1991); In re Chateauguay Corp., 112 Bankr. 513 (S.D.N.Y 1990), aff’d, 944 F.2d 997 (2d Cir. 1991); In re White Motor Credit Corp., 75 Bankr. 944 (N.D. Ohio 1987).

The second case to be aware of is Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir. 1985), cert. denied, 474 U.S. 864 (1985), which was decided in 1985. Unlike Mooney, the Schweitzer case did not involve a successor corporation, but rather the extent of the discharge of liability of the reorganized company itself. The Reading Railroad was one of the bankrupt northeast railroads whose rail assets were transferred to Conrail in 1976 pursuant to federal statute. Following the transfer of its rail assets to Conrail, the Reading Company was reorganized essentially as a real estate holding company. The Schweitzer case was brought after the reorganization of Reading was consummated, and involved a series of personal injury suits by former railroad employees of Reading who had been exposed to asbestos while working on the Reading Railroad. The Third Circuit in Schweitzer held that the claims of those injured employees had arisen at the point when they showed evidence of disease -- which was after the consummation of the Reading reorganization -- and that they thus did not have claims that could be discharged by the bankruptcy court. A number of courts consider Schweitzer, like Mooney, pre-empted by the amended Bankruptcy Code. In re National Gypsum Co., 139 Bankr. 397 (N.D. Tex. 1992); In re Chateauguay Corp., 112 Bankr. 513; In re Remington Rand Corp., 836 F.2d 825 (3d Cir. 1987).

Schweitzer should be read in conjunction with In re Erie Lackawanna Ry. Co., 803 F.2d 881 (6th Cir. 1986), cert. denied, 481 U.S. 1070 (1987). The facts of Erie are similar to those of Schweitzer. However, the plaintiffs in Erie were denied relief. The reason lies in the fact that in Erie, the entity that survived the bankruptcy proceeding was held by the court to be the product of a liquidation rather than of a reorganization. The Erie court thus did not address the issue in Schweitzer regarding the extent of discharge because the Erie court held that successor liability will not occur after a liquidation. In addition, an Ohio district court has questioned whether successor liability is ever appropriate in the context of a reorganization. In re White Motor Credit Corp., 75 Bankr. 944 (N.D. Ohio 1987).
Other courts have imposed successor liability after a reorganization preceding. In In the Matter of Penn Central Transp. Co., 92 B.R. 605 (E.D. Pa. 1988), the United States District Court for the Eastern District of Pennsylvania allowed plaintiffs who had been exposed to PCB's (polychlorinated biphenyls) while employed by Penn Central Transportation Company to assert claims for that exposure against Penn Central Corporation, the corporation which came into existence upon the reorganization of the Penn Central Transportation Company. Although an order entered by the bankruptcy court was intended to exonerate the reorganized company from liability for all tort claims, the district court, relying on Mooney and Schweitzer, concluded that the order could not discharge claims which had not accrued at the time of the reorganization proceeding.

In cases where we have represented clients who acquired the assets of a company in reorganization and there was a possibility of significant contingent tort liability, we have requested from any involved unions their express consent and waiver of claims. Note, however, that the procedure only applies to employees and does not help in the case of injured third parties, such as in Mooney.

END OF DOCUMENT