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Push for successor liability comes with too little facts in asbestos case

A recent Wisconsin Supreme Court decision provided guidance on the "fraudulent transaction" exception to successor nonliability: It is not governed by the Wisconsin Uniform Fraudulent Transfer Act.

The plaintiff in *Springer v. Nohl Electric Products Corp.*, 2018 Wisc. LEXIS 227, alleged her husband's exposure to products containing asbestos during his employment contributed to his death. In her complaint, Penny Springer identified Powers Holdings Inc. as the successor to Fire Brick Engineers Co. Inc., the latter being a company that manufactured and distributed products containing asbestos.

There were several successors in interest to Fire Brick — many containing some variation of the company's name while assuming some, but not all, of the company's liabilities via an asset purchase agreement.

The liabilities assumed by the agreement were itemized and limited. All other liabilities were disclaimed by the agreement and the record before the court reflected that neither Powers nor Fire Brick ever manufactured or distributed products containing asbestos.

Powers averred that Springer sued the wrong company, arguing they were not liable for the torts of the predecessor corporation before moving for summary judgment. Springer's complaint did not name the original Fire Brick, nor did she recognize the creation of any Fire Brick successor corporation, including Powers. The pleadings also failed to assert facts or theories holding the Fire Brick successor corporations liable for Fire Brick's liabilities.

In response, Springer cited established exceptions to successor nonliability, and after Powers amended its motion, she argued, for the first time, the application of the "fraudulent transaction" exception to successor nonliability. The circuit court granted Powers' motion, dismissing Powers and Fire Brick.

Springer renewed all arguments on appeal, but the appellate court only addressed the fraudulent transaction exception. The court determined the Wisconsin Uniform Fraudulent Transfer Act was the appropriate context to determine whether a transfer transaction was fraudulently entered.

On remand, the circuit court was to apply the "badges of fraud" contained in the relevant statute to determine whether Powers should be held responsible for the predecessor company's liabilities.

The Wisconsin Supreme Court granted Powers' petition for review. The issue before the court was whether the Wisconsin fraud transfer act governs the fraudulent transaction exception to the rule of successor nonliability.

In Wisconsin, successor nonliability at common law, the court said, provides that a purchasing corporation does not succeed to the liabilities of the selling corporation. Citing the practical justifications of the rule, the court reasoned that protecting a bona fide purchaser from a predecessor corporation's liabilities, of which the bona fide purchaser is unaware, keeps assets marketable. The court noted that a purchaser would not know what he was purchasing in the absence of such a rule, and they determined that the rule — though not absolute — applies in the context of product liability.

The court identified four well-recognized exceptions to the rule, but only addressed the fourth exception: fraudulent transactions. From limited case law, the court gleaned that this exception is justified because a fraudulent transaction can leave no remedy for the aggrieved parties. But "the bare desire," the court said, is "insufficient rationale for imposing liability"; the court endorsed a threshold inquiry requiring a finding that the asset transfer is for the fraudulent purpose of shirking liability with the intent to defraud.

TOXIC TORT TALK

Craig T. Liljestrand

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The court agreed with the language of the U.S. Supreme Court that "the failure of the statute to speak to a matter fundamental as the liability implications of corporate ownership demands application of the rule that 'in order to abrogate a common-law principle, the statute must speak directly to the question addressed by common law.' " *U.S. v. Bestfoods*, 524 U.S. 51, 63 (1981). Therefore, the Wisconsin Supreme Court concluded the Wisconsin fraud act does not operate to supplant the common-law fraudulent exception.

The court noted that in response to Powers' motion for summary judgment, Springer "introduced an entirely new reason for holding Powers liable," but she "never made a claim out of any of these arguments; they were never more than a response to Powers' motion for summary judgment" while tacitly admitting "the relevant timeline made it impossible for [Fire Brick] or Powers to have been part of the causal chain" linking products containing asbestos and her husband's death.

The court reviewed Powers' motion de novo, and assumed "Springer adequately alleged Powers was in the causal chain that led to her husband's death, and pled the necessary elements of negligence and strict liability."

The court found that summary judgment for Fire Brick and Powers was appropriate. In reaching this conclusion, the court noted there was no dispute in the record that Fire Brick and Powers were not — and could not have been — in the causal chain because the former did not exist at the time of Springer's husband's exposure and the latter never bought or sold products containing asbestos.

The final question before the court was the viability of the claim brought against Powers. Returning to the pleadings, the court performed a *Twombly* analysis to determine whether the facts alleged were sufficient to plausibly suggest that Springer was entitled to relief.

The court noted that "as a separate legal entity, Powers enjoys the presumption that it is not liable for the misdeeds of its predecessor, even when it succeeded to all its assets."

The court stated that Springer had the burden to plead sufficient facts to show that Powers was the tortfeasor, not the successor to the tortfeasor. Successor nonliability exceptions, the court said, are focused on the transaction by which the assets were obtained, not facts underpinning liability in tort.

The court indicated that Springer had adequate notice that Powers and Fire Brick were not the tortfeasors she alleged. Continuing, the court noted that she had the opportunity, yet failed to amend her complaint.

The court pointed to the absence of any mention of successor liability in her complaint and identified the overall silence of her complaint on the sole theory advanced on appeal. The court's *Twombly* analysis concluded that Springer's complaint failed to allege facts making her claim viable.

The court terminated the inquiry and held that Powers was entitled to summary judgment.