

Stinson Secures Indiana Supreme Court Victory Reversing Broad Standard for Successor Liability

Press Release

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Stinson attorneys represented New Nello Operating Co., LLC before the Indiana Supreme Court in a decision which found that continuity of ownership is not just a factor, but a prerequisite to a finding of a de facto merger or continuation. *New Nello Operating Co., LLC v. CompressAir*, Case No. 20S-CC-578 (Ind. April 22, 2021). In April, the Supreme Court granted victory to New Nello and set a critical precedent in Indiana upholding the distinction between successor liability in asset sales versus stock sales – a distinction the prior opinion from the court of appeals implicitly threatened to eliminate.

The Supreme Court found that unrelated asset-purchasers or acquirers were not liable for the debts of the asset-sellers or transferors under either the de facto merger or mere continuation exceptions allowing for successor liability because each exception required continuity of ownership. Without this ruling, any asset-buyer who used all the assets it bought, including trade names, would potentially be liable to the same extent as if it had bought a predecessor's stock, rather than the assets.

This case arose when Nello Corporation began experiencing unexpected cash flow constraints and was unable to service its debt. The bank demanded repayment of the notes and was preparing to foreclose. An unrelated private equity firm created a new company that purchased the notes from the bank and followed the statutory strict foreclosure process to acquire Nello's assets and assume only specifically identified liabilities. CompressAir had performed work on Nello's facility, had received only partial payment, and was one of the liabilities the new company did not assume.

The new company, New Nello Operating Co., operated in the same facility, retained most of the same workforce, continued to use the "Nello" trade name, made no public announcement of new ownership, and retained Nello's former officers and shareholders as the management team to run the day-to-day operations of New Nello. However, no owner of the original Nello Corporation had any ownership of the

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new company. CompressAir obtained a judgment against the original Nello Corporation, then sought to enforce that judgement against the New Nello claiming successor liability based on fraudulent transfer, de facto merger, and mere continuation exceptions to the well-established corporate law rule against successor liability in asset transactions.

Before Stinson became involved, both the trial court and the court of appeals had ruled in CompressAir's favor imposing successor liability on New Nello, the unrelated asset-acquirer. For transactions involving most of a company's assets, the appellate court's ruling expanded the successor liability exceptions so broadly that Indiana was on the verge of removing any real distinction between asset sales and stock sales. The Indiana Supreme Court's opinion reversing the appellate court benefits all good faith asset-purchasers and should encourage their investment in the state by establishing clear guidelines for assuming or eliminating certain investment risks.

Stinson attorneys involved in the case include Matt Salzman and [Logan Fancher](#).

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