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The Broadened Scope of Successor Liability

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The Broadened Scope of Successor Liability:
Its application to the FLSA and the factors at play

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With the prevalence of asset sales in today's economy, FLSA practitioners need to combat what can be used as a tool to quickly devalue your client's claims. The FLSA's definition of "employer", like almost every other employment law, does not indicate whether a successor in interest is an "employer" or not. 29 U.S.C. § 203(d). The good news is, federal courts have largely sided with employees in applying a broader view of successorship law allowing employees to recover their wages from a company who purchases the assets of an employer in an asset sale or transfer.

I. Traditional state law successor liability provides little protection to an employee's FLSA claim.

When a company is sold through an asset sale, as opposed to a sale of stock, the buyer of the company acquires the company's assets, but not necessarily the liabilities. The general non-liability rule is that the "corporation which purchases the assets of another corporation does not, by reason of succeeding to the ownership of property, assume the obligations of the transferor corporation." *Forest Laboratories, Inc. v. Pillsbury Co.*, 452 F.2d 621, 625 (7th Cir. 1971). This general common law rule is "designed to maximize the fluidity of corporate assets…." *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1325 (7th Cir. 1990). Under this rule, an employee with an FLSA claim, whose employer transfers its assets to a different legal entity, has no recourse against the new company.

This general rule has various narrow state law exceptions where: (a) the purchasing corporation agrees to assume the liabilities, (b) the transaction amounts to a consolidation or merger, (c) the purchasing corporation is merely a continuation of the selling corporation, or (d) the transaction is entered into fraudulently. *Forest Laboratories,* 452 F.2d at 625.[1] The problem is that in many instances, these state law exceptions rarely provide any relief to the hard working employee with an FLSA claim. Lucky for these employees, federal courts have developed a federal common law doctrine of successor liability which is broader than these four state law exceptions.

II. A broader approach to the successorship problem grows out of the need for labor peace and now applies to most federal employment laws.

When liability is based on a violation of a federal statute relating to labor relations or employment, a federal common law standard of successor liability is applied that is more favorable to plaintiffs than most state-law standards to which the court might otherwise look. *Teed v. Thomas & Betts Power Solutions, L.L.C.*, 711 F.3d 763, 764 (7th Cir. 2013). The general state law non-liability rule is not the end of the story because "the parameters of the labor-law doctrine of successorship…have not been so narrowly confined." *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182 n. 5 (1973).

A. The successor liability doctrine has roots in Supreme Court case law interpreting the NLRA and the LMRA.

The Supreme Court has taken a broader approach to the common law successorship principles in cases brought under the Labor Management Relations Act ("LMRA") and the National Labor Relations Act ("NLRA") to achieve the objectives of those laws in the face of changes in corporate structure. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550-51 (1964); *Golden State*, 414 U.S. at 182-185.

The Supreme Court first considered the doctrine of successor liability in *Wiley* where the Court held that, after a *bona fide* merger, "in appropriate circumstances, present [in the case], the successor employer may be required to arbitrate with the union under the agreement" negotiated and agreed to by the predecessor entity. 376 U.S. at 548. The Supreme Court was mindful that employees are often helpless to protect their statutory rights when their employer sells its assets:

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees,

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[1] *Comstock v. Great Lakes Distributing Co.*, 209 Kan. 306, 310 (Kan. 1972); *J. F. Anderson Lumber Co. v. Myers*, 296 Minn. 33, 37-38 (Minn. 1973); *Pankey v. Hot Springs Nat. Bank*, 46 N.M. 10, 16 (N.M. 1941); *Timmerman v. American Trencher, Inc.*, 220 Neb. 175, 176 (Neb. 1985); *Lamb v. Leroy Corp.*, 85 Nev. 276, 279 (Nev. 1969); *Flaugher v. Cone Automatic Machine Co.*, 30 Ohio St. 3d 60, 62 (Ohio 1987); *Columbia Propane, L.P. v. Wisconsin Gas Co.*, 661 N.W.2d 776, 784 (Wis. 2003).

> whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations.

Id. at 549.

In light of this reality, the Supreme Court reasoned that the objectives of the LMRA, "reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *Id*. The Supreme Court explained that, because arbitration was such a key concept in the LMRA, a broader approach to successor liability was required. The successor liability doctrine was born providing protection of employees' federal employment rights. However, the protection provided by the doctrine is only afforded in appropriate circumstances where there is a substantial continuity of identity in the business before and after the business change and the successor had notice of the claims. *Id*. at 551. These two factors have become the backbone of a court's analysis of whether to apply the successor doctrine in a particular case which is discussed more below.

In a later case, the Supreme Court held that even though a successor could be required to bargain and arbitrate with the predecessor's union, a successor is not bound by the substantive provision of a collective bargaining contract negotiated with the predecessor. *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 284 (1972) The Supreme Court explained that the NLRA does not compel any agreement; rather, the NLRA guarantees the "free opportunity for negotiations with accredited representatives of employees [which] is likely to promote industrial peace and may bring about the adjustments and agreements which the [NLRA] in itself does not attempt to compel." *Id*. at 282-83 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937)). Because the NLRB has the power to require employers to negotiate with employees, but no power to compel a company and a union to agree to any substantive contractual provision of a collective-bargaining agreement, "successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors…." *Id*. 283-84. Such a requirement would be outside of the Congressional intent. The successor liability doctrine provides only the relief available in the underlying federal employment law.

In another Supreme Court case under the LMRA, the Court recognized that the doctrine was in play, but did not hold the successor liable because there lacked a continuity in the workforce between the old and new entities and there was only a partial sale of the assets leaving the predecessor able to provide the union with a realistic remedy. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 256-260 (1974). Because these two factors were not met, the balance weighed against binding the successor to arbitrating.

The Supreme Court in *Golden State* again employed the balancing test and applied the successor liability doctrine holding that the successor who acquires substantial assets of a predecessor, continues the predecessor's business without interruptions or substantial change and who had notice of the pending unfair labor practice charge can be required to remedy the predecessor's unfair labor practice. 414 U.S. at 185. The Supreme Court quoted *Perma Vinyl Corp.*, 164 NLRB 968, 969 (1967) approving the emphasis the NLRB placed on the protection of victimized employees' federally protected rights under the NLRA:

> Especially in need of help, it seems to us, are the employee victims of unfair labor practices who, because of their unlawful discharge, are now without meaningful remedy when title to the employing business operation changes hands.

Golden State, 414 U.S. at 181 (quoting *Perma Vinyl Corp.*, 164 NLRB at 969). The Supreme Court further explained the reasoning for the broader successor liability doctrine:

> To further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

Id., at 172, n. 2 (quoting *Perma Vinyl Corp.*, 164 NLRB at 969).

In these Supreme Court cases, the "Court found that the successor doctrine was applicable to the particular cause of action because it promoted the well-established national policy of 'extending protection to and providing relief to the victims of prohibited employment practices.'" *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 746 (7th Cir. 1985), *quoting EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1091 (6th Cir. 1974).

B. Various appellate level courts have expanded the application of the successor liability doctrine beyond the NLRA and LMRA.

The Supreme Court, in recognizing the successorship question being a difficult one, anticipated that it can arise in a "myriad of factual circumstances and legal contexts…." *Howard Johnson*, 417 U.S. at 256. Relying on the Supreme Court precedent from the NLRA and LMRA cases, various appellate courts have "embraced the view that, as in the context of Congressional regulation of labor relations, so in the context of Congressional prohibition of discrimination in employment, judicial importation of the concept of successor liability is essential to avoid undercutting Congressional purpose by parsimony in provision of effective remedies." *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1237 (7th Cir. 1986). "In our view, the analysis set forth by the Supreme Court to justify successor liability in cases arising under the NLRA also justifies successor liability in employment discrimination cases." *Musikiwamba*, 760 F.2d at 746.

Appellate Courts apply the broader successor liability doctrine "beyond the bounds of the common law rule in a number of different employment-related contexts in order to vindicate important federal statutory policies." *Artistic Furniture*, 920 F.2d at 1326. Courts have explained that, "when a claim arising from a violation of federal rights is involved, the courts allow the plaintiff to go against the purchaser of the violator's business even if it is a true sale and not a reorganization." *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 747-48 (7th Cir. 1994). *Wiley* and *Golden State*

> provided the foundation for a series of cases in which this court and others have concluded that the balance between the need to effectuate federal labor and employment discrimination policies and the need, reflected in the traditional common law rule, to facilitate the fluid transfer of corporate assets is best struck by the imposition of successor liability.

Artistic Furniture, 920 F.2d at 1326.

Courts have distilled three justifications for the expanded application of the doctrine: (1) the overriding congressional policy against unfair employment practices; (2) the helplessness of the victim to protect his rights when ownership of the business changes; and (3) the ability of the successor to provide relief at a minimum cost. *See Wheeler*, 794 F.2d at 1236 (citing *Musikiwamba*, 760 F.2d at 746); *Artistic Furniture*, 920 F.2d at 1326.

Appellate circuits across the country have consistently applied the federal successor liability standard in most employment related actions provided for by federal law.

- **42 U.S.C. § 1981** - *Musikiwamba*, 760 F.2d 746.

- **Title VII** - *Rojas v. TK Commc'ns.*, 87 F.3d 745 (5th Cir. 1996); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974); *Wheeler*, 794 F.2d 1228; *EEOC v. Vucitech*, 842 F.2d 936, 946 (7th Cir. 1988); *Bates v. Pac. Mar. Assoc.*, 744 F.2d 705 (9th Cir. 1984); *Trujillo v. Longhorn Mfg. Co.*, 694 F.2d 221 (10th Cir. 1982); *In re Nat'l Airlines*, 700 F.2d 695 (11th Cir. 1983).

- **<u>ADEA</u>** - *Criswell v. Delta Air Lines, Inc.*, 868 F.2d 1093 (9th Cir. 1989); *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 747-48 (7th Cir. 1994).

- **<u>ERISA</u>** - *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89 (3d Cir. 2011); *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 51 (7th Cir.1995); *Moriarty v. Svec*, 164 F.3d 323, 329 (7th Cir. 1998).

- **<u>Vietnam Era Veterans' Readjustment Assistance Act</u>** - *Leib v. Ga. Pac. Corp.*, 925 F.2d 240 (8th Cir. 1991).

- **<u>Mine Safety and Health Act</u>** - *Sec'y of Labor, Mine Safety & Health Admin. ex rel Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989).

In fact, the FMLA Regulations, 29 C.F.R. § 825.107, codified the nine-factor successor liability doctrine set forth in *MacMillan,* 503 F.2d at 1086 distilled from Supreme Court labor law cases. *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 554 (6th Cir. 2006).

C. The broader approach to successor liability has now been applied to the FLSA.

The result of this liberalized exception to the non-liability rule is the "successorship doctrine that now extends to almost every employment law statute." *Steinbach v. Hubbard*, 51 F.3d 843, 845 (9th Cir. 1995) (applying the concept of successor liability to the FLSA). The Seventh Circuit, in *Teed*, explained that "[t]he idea behind having a distinct federal standard applicable to federal labor and employment statutes is that these statutes are intended either to foster labor peace, as in the National Labor Relations Act, or to protect workers' rights, as in Title VII, and that in either type of case the imposition of successor liability will often be necessary to achieve the statutory goals because the workers will often be unable to head off a corporate sale by their employer aimed at extinguishing the employer's liability to them." *Teed,* 711 F.3d at 766.

> The FLSA was passed to protect workers' standards of living through the regulation of working conditions. 29 U.S.C. § 202. That fundamental purpose is as fully deserving of protection as the labor peace, anti-discrimination, and worker security policies underlying the NLRA, Title VII, 42 U.S.C. § 1981, ERISA, and MPPAA.

Steinbach, 51 F.3d at 845.

In the absence of successor liability, a violator of the Act could escape liability, or at least make relief much more difficult to obtain, by selling its assets without an assumption of liabilities by the buyer (for such an assumption would reduce the purchase price by imposing a cost on the buyer) and then dissolving. *Teed*, 711 F.3d at 766.

To date, there are no courts, district or appellate, which have refused to apply the broader federal successor law doctrine to claims brought under the FLSA. *Valdez v. Celerity Logistics, Inc.*, 2014 U.S. Dist. LEXIS 23981, 11 (N.D. Tex. Feb. 26, 2014).[2] Many, including both the Seventh and Ninth Circuits have now done so:

- **Second Circuit**: *De Ping Song v. 47 Old Country, Inc.*, 2013 U.S. Dist. LEXIS 143399, 17, 2013 WL 5498184 (E.D.N.Y. Oct. 3, 2013); *Wong v. Hunda Glass Corp.*, 2010 U.S. Dist. LEXIS 62653 (S.D.N.Y. June 23, 2010); *Battino v. Cornelia Fifth Ave.*, LLC, 861 F.Supp.2d 392 (S.D.N.Y. 2012); *Medina v. Unlimited Systems, LLC*, 760 F.Supp.2d 263 (D.Conn. 2010) (discussing both state common law and broader successor liability rules and finding successor liable under both theories); *Alvarez v. 40 Mulberry Rest., Inc.*, 2012 U.S. Dist. LEXIS 143317, 16, 20 Wage & Hour Cas. 2d (BNA) 1264, 2012 WL 4639154 (S.D.N.Y. Oct. 3, 2012) (recognizing that there are two standards, state and federal, not deciding which standard is applicable).

- **Fourth Circuit**: *United States EEOC v. County Comm'r of Worcester County*, 2013 U.S. Dist. LEXIS 102991, 5 (D. Md. Apr. 22, 2013).

- **Fifth Circuit**: *Valdez v. Celerity Logistics, Inc.*, 2014 U.S. Dist. LEXIS 23981, 12 (N.D. Tex. Feb. 26, 2014); *Cooke v. Jasper*, 2010 U.S. Dist. LEXIS 113307 (S.D.Tx. October 25, 2010).

- **Sixth Circuit**: *Thompson v. Bruister & Assocs.*, 2013 U.S. Dist. LEXIS 36057, 22, 2013 WL 1099796 (M.D. Tenn. Mar. 15, 2013).

- **Seventh Circuit**: *Teed v. Thomas & Betts Power Solutions, L.L.C.*, 711 F.3d 763, 766 (7th Cir. 2013); *Ordonez v. Akorat Metal Fabricators, Inc.*, 2011 U.S. Dist. LEXIS 145868 (N.D. Ill. December 20, 2011); *Sheils v. GateHouse Media, Inc.*, 2013 U.S. Dist. LEXIS 134668, 11, 21 Wage & Hour Cas. 2d (BNA) 731, 2013 WL 5311469 (N.D. Ill. Sept. 19, 2013).

- **Eighth Circuit**: *Brock v. La Grange Equip. Co.*, 1987 U.S. Dist. LEXIS 14532 (D.Neb. July 14, 1987); *Paschal v. Child Dev.*, Inc., 2012 U.S. Dist. LEXIS 66162, (E.D.Ark. May 11, 2012).

- **Ninth Circuit**: *Steinbach v. Hubbard*, 51 F.3d 843, 845 (9th Cir. 1995); *Solis v. Wok King Intern. Buffet, Inc.*, 2011 U.S. Dist. LEXIS 82819 (E.D.Wa. July 28, 2011).

[2] There are no district court level cases from the First, Third, or D.C. Circuits applying the federal common law approach of successor liability to the FLSA.

- **<u>Tenth Circuit</u>**: *Chao v. Concrete Mgt. Res., L.L.C.*, 2009 U.S. Dist. LEXIS 18619 (D.Kan. Mar. 5, 2009); *Spears v. Mid-America Waffles, Inc.*, 2011 U.S. Dist. LEXIS 145014, 10, 2011 WL 6304126 (D. Kan. Dec. 16, 2011); *Major v. Chons Bros.*, 53 P.3d 781, 785 (Colo. App. 2002) (applying the federal common law doctrine of successor liability in state court).

- **<u>Eleventh Circuit</u>**: *Cuervo v. Airport Servs.*, 2013 U.S. Dist. LEXIS 163239, 9 (S.D. Fla. Nov. 15, 2013).

In reviewing whether the broader approach to successor liability was applicable to the FLSA, the Seventh Circuit explained that "[t]he issues is not extension [of the doctrine], but exclusion." *Teed*, 711 F.3d at 767. The Court squarely rejected each argument that the FLSA was somehow not as worthy of the broader approach explaining that there is no good reason to exclude the application of the doctrine from the FLSA.

III. The courts use a series of factors to assist in determining whether applying the doctrine to a certain set of facts is equitable.

The Seventh Circuit suggested that "successor liability is appropriate in suits to enforce federal labor or employment laws—even when the successor disclaimed liability when it acquired the assets in question—<u>unless there are good reasons to withhold such liability</u>." *Teed*, 711 F.3d at 766 (emphasis added). Rather than requiring a plaintiff to meet an exacting strict multi-factor test, the successor liability factors call for a more open-ended inquiry. *Teed*, 711 F.3d at 765-66 (even though one factor counted against successor liability, successor liability was still found). These factors are not "a set of hoops to force plaintiffs to jump through." *Vucitech*, 842 F.2d at 946. Rather, the factors are constructed to facilitate the court's efforts to determine "whether such liability would strike a reasonable balance between the interest in fully sanctioning unlawful conduct and the interest in facilitating the market in corporate and other productive assets." *Id.*

Courts have generally distilled a set of factors from the Supreme Court successor liability cases to assist the courts in weighing the equities. Though the number of factors fluctuates from circuit to circuit, courts follow a similar approach. The Sixth Circuit in *MacMillan* used nine factors. *MacMillan*, 503 F.2d at 1094 ("1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product"). Other courts have distilled these nine factors into three factors, combining factor three through nine under the umbrella of continuity. *See*

Musikiwamba, 760 F.2d at 750-53 ((i) whether the purchaser had prior notice of the claim against the predecessor; (ii) whether the predecessor is able to provide the relief requested; and (iii) whether there has been a sufficient continuity in the business operations of the successor.).

The Seventh Circuit, though previously utilizing three factors, broadened those to five factors in *Teed*: (A) did the predecessor have notice of the claim (B) prior to the transfer of interest, could the predecessor have been able to provide the relief sought; (C) could the predecessor have provided the relief sought after the transfer of interest; (D) can the successor provide the relief; (E) is there continuity between the predecessor and the successor? 711 F.3d at 765-66.

Courts generally agree that no one factor is determinative, noting that the factors exist to assist the Court in balancing the equities. *De Ping Song v. 47 Old Country*, Inc., 2013 U.S. Dist. LEXIS 143399, 13, 2013 WL 5498184 (E.D.N.Y. Oct. 3, 2013). However, Courts generally place more weight on both the notice and the predecessor's inability to provide relief factors. *Id.* (noting that the first two factors are critical); *Musikiwamba*, 760 F.2d at 750. No one factor is controlling over whether to apply the broader successor liability doctrine to a set of facts; rather "[a] court must look to all of them and make its decision by balancing the interest of the injured employee and the national policy against discrimination." *Musikiwamba*, 760 F.2d at 750.

These factors strike the balance between the two competing factors. On the one hand "is the interest in preventing tortfeasors from externalizing the costs of their misconduct by selling their assets free of any liabilities and distributing the proceeds." *Vucitech*, 842 F.2d at 944. On the other hand "is the interest in a fluid market in corporate assets, which is impeded if purchasers acquire along with the assets legal liabilities of unknown, sometimes unknowable, dimensions." *Id.* Keeping in mind the equities of the situation in reviewing the factors will assist in arguing just why a court should apply the doctrine.

A. The successor must be on notice of the predecessor's liability.

In balancing the interests involved, "it would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser when … the successor did not have the opportunity to protect itself by an indemnification clause in the acquisition agreement or a lower purchase price." *Musikiwamba*, 760 F.2d at 750. Notice of the liability is critical because it ensures "the successor has some time to negotiate a change in the purchase agreement to reflect the potential liability of a lawsuit." *Id.* at 752; *Golden State*, 414 U.S. at 185 (since the successor must have notice before liability can be imposed, the successor's liability for remedying the violation of law is a matter that can be reflected in the price the successor pays for the business). The successor liability doctrine assumes that a reasonable company, armed with the knowledge of a "potential liability, will demand compensation in the form of a lower price for the assets." *Vucitech*, 842 F.2d at 945. Notice alone "prevents the externalizing of the liability without disappointing the reasonable expectations of investors (and hence impeding the market for corporate assets)." *Id*. Notice can be proven by facts conclusively demonstrating knowledge, "but also by presenting evidence that allows the fact finder to imply knowledge from the circumstances." *Artistic Furniture*, 920 F.2d at 1329.

B. The predecessor cannot make the employees whole (and the predecessor could have, and the successor can).

It is generally understood that it would be grossly unfair "to impose successor liability on an innocent purchaser when the predecessor is fully capable of providing relief." *Musikiwamba*, 760 F.2d at 750. In *Howard Johnson*, the Supreme Court refused to hold the successor liable where the predecessor sold only some of the assets and the predecessor employers remained viable corporate entities with substantial revenues to remedy the liability. 417 at 257. The Supreme Court contrasted the facts in *Howard Johnson* with those in *Wiley* where the predecessor disappeared as a result of the merger. *Id*. If the predecessor can still make the employees whole, there is no reason to hold some other entity liable for the predecessor actions. Doing so would simply be unfair.

In addition to the predecessor's inability to pay the liability, some courts (the Seventh Circuit) will weigh "whether the predecessor could have provided any or all the relief ... prior to the transfer of assets." *Musikiwamba*, 760 F.2d at 750. The *Musikiwamba* court took into consideration the predecessor's ability to provide relief because the court was concerned that if the predecessor did not have the ability to provide relief, allowing a successor to be liable would "inhibit the reorganization or transfer of assets of a failing business." 760 f.2d at 751. In other words, it could provide the employees a windfall. However, as the Seventh Circuit in *Teed* explained that allowing a successor "to acquire assets without their associated liabilities, thus stiffing workers who have valid claims under the Fair Labor Standards Act, is equally a 'windfall.'" 711 F.3d at 768. Moreover, because the assets involved in *Teed* had substantial value ($28 million), the assets would have been sold regardless of the liability ($500,000). In other words, the application of successor liability did not actually inhibit trade. The best evidence of this is the fact that there was a transfer, despite the notice of the claimed liabilities.

Although the Seventh Circuit did not discuss the factor at length, another factor was added in the *Teed* matter – that the successor can provide the relief sought in the lawsuit. *Teed*, 711 F.3d at 766. Remarking that this is a factor not usually mentioned, the Court explained that without this, successor liability would be a phantom. *Id*.

C. The predecessor and successor must share some continuity in the businesses operated.

The continuity of interest factor is really an amalgamation of many of the *MacMillan* factors. *Wheeler,* 794 F.2d at 1236 n. 7; *citing MacMillan,* 503 F.2d at 1086. Courts will look to the following facts to weigh whether the successor shares a continuity of the business operated with the predecessor:

- ✓ whether there has been a substantial continuity of business operations,
- ✓ whether the new employer uses the same plant,
- ✓ whether he uses the same or substantially the same work force,
- ✓ whether he uses the same or substantially the same supervisory personnel,
- ✓ whether the same jobs exist under substantially the same working conditions,
- ✓ whether he uses the same machinery, equipment and methods of production, and
- ✓ whether he produces the same product.

IV. Tips if you are going for successor liability

A. Make some noise!

One of the critical factors in determining whether successor liability is appropriate in a particular case is whether the successor had notice. The best way to establish that the successor had notice is to be as loud as you can be in whatever proceeding you are in to ensure that the successor knows.

- ➢ If a sale is coming up, write a letter to the predecessor about your intent to bring any purchasing company into the lawsuit. Such a letter will necessarily have to be disclosed to the purchasing company in the due diligence process.
- ➢ If there is a legal proceeding (assignment for the benefit of creditors, bankruptcy, or receivership) enter an objection about something, anything, and show up to the hearings. *See Russell v. Promove, LLC*, 2009 U.S. Dist. LEXIS 38284, 21, 2009 WL 1285885 (N.D. Ga. May 5, 2009) (denying the application of the successor liability doctrine after a sale of assets out of bankruptcy where the employees did not object in the bankruptcy sale which was “free and clear”).
- ➢ If there is a receiver, make the receiver aware that you will be bringing the purchasing company into your lawsuit.

- If you are in federal court, try to get into the record that you plan on going after the purchasing company (I had it in an ECF docket entry).

- If a particular purchaser is identified, send them and their counsel a letter explaining your intent.

B. Watch your statute of limitations, use FED.R.CIV.P. 25(c).

Arguably, if you simply amend your claim and add a new defendant, the statute of limitations may not relate back. To avoid such an argument, hopefully, utilize FED.R.CIV.P. 25(c) which is a procedural mechanism allowing a court to join an entity into an ongoing litigation. FED.R.CIV.P. 25(c) applies where there has been a transfer of interest during the pendency of the litigation and where there is some substantive law otherwise allowing the litigation to continue against the newly joined entity. FED.R.CIV.P. 25(c) is "designed to allow an action to continue unabated when an interest in a lawsuit changes hands, rather than requiring the initiation of an entirely new lawsuit." *ELCA Enters. v. Sisco Equip. Rental & Sales*, 53 F.3d 186, 191 (8th Cir. 1995) (internal quotation omitted). FED.R.CIV.P. 25(c) does not "determine which actions survive the transfer of an interest; rather it provides substitution procedures for an action that does survive" under some other substantive doctrine. *Id*. Basically, the successor will stand in the predecessor's shoes.

C. Watch out for the circumstance where the liability exceeds the value of the business.

Judge Posner expressed great concern with the potential that the imposition of successor liability could allow a secured debt (i.e. bank loan) to become junior to an unsecured claim (i.e. the FLSA liability). *Teed*, 711 F.3d at 768. Recognizing that this could be a good reason to not impose successor liability, the *Teed* Court explained that the predecessor claimed that it had not factored the potential liability into the purchase price and did not make the argument. Should an employer argue that they did factor the potential liability is setting the price, in response to Posner's invitation, then the obvious response is that the successor should not be allowed to obtain the assets at a reduced price, without remedying the unfair employment action. Doing otherwise would provide a successor with a windfall.