

**Superior Court Overturns Trial Court's Finding of Successor Liability
Upon Purchaser in Asset Sale**

On May 15, 2009, the Pennsylvania Superior Court entered an Order holding that a creditor of company that had sold its assets to a purchasing company did not have a claim against the purchasing company. *Fizzano Bros. Concrete Prods. v. XLN, Inc.*, 2009 PA Super 89, P20 (Pa. Super. Ct. 2009). In reaching its decision, the Pennsylvania Superior Court overturned a Pennsylvania Trial Court that had imposed successor liability upon the purchasing company.

The general rule under Pennsylvania law concerning the purchase and sale of a business is if the transaction is structured as an asset sale then the purchasing company is not liable for the liabilities of the selling company. Because of this general rule asset purchases may be preferred over stock purchases in those situations in which the selling company has liabilities. This general rule of non-liability to the purchasing company can be overcome if either of five exceptions is established: (1) the purchaser expressly or implicitly agreed to assume liability; (2) the transaction amounted to a consolidation or *de facto* merger; (3) the purchasing company was merely a continuation of the selling company; (4) the transaction was fraudulently entered into to escape liability; or (5) the transfer was without adequate consideration and no provision was made for creditors of the selling company.

In this case, the Trial Court grounded its imposition of “successor liability,” (i.e. liability upon the successor to the company that originally created the liability) upon the doctrine of *de facto* merger. The *de facto* merger doctrine proceeds from the basic equitable principle that a company should not be permitted to escape its obligations to others through sham corporate reorganizations. In determining whether a *de facto* merger has occurred, Pennsylvania courts consider four factors: (1) continuity of ownership; (2) cessation of the ordinary business by and dissolution of the predecessor as soon as practicable; (3) assumption by the successor of liabilities ordinarily necessary for uninterrupted continuation of the business; and (4) continuity of the management, personnel, physical location and the general business operation. If all four of the above factors exist and are proven a Court should find a *de facto* merger has occurred. If a *de facto* merger occurred, then the liabilities of the first company are imposed upon the purchasing company.

The Trial Court held that the creditor proved three of the four above factors and that the proving three of the four factors was sufficient to find a *de facto* merger occurred and to impose successor liability. The Superior Court held that the record did not support the Trial Court's findings that the three factors were established. Furthermore, the Superior Court held that the record indicated there was no “continuity of ownership” and that “continuity of ownership” is a key element that must exist in order to find a *de facto* merger. According to the Superior Court, the Trial Court had mistakenly believed that the Superior Court had ruled in a prior case that the “continuity of ownership” is not an essential element in a *de facto* merger claim.

For more information on successor liability, asset or stock purchase agreements, or any other business law-related matter, please do not hesitate to contact me at 717-657-7770.

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