Scribbles Squibs[1]# 66 (September 12, 2018):

WILL YOU OR YOUR NEXT CORPORATION BE LIABLE FOR THIS CORPORATION'S DEBTS? (PART II)/YOUR UNDERSTANDING HOW LAWYERS DETERMINE APPLICABLE LAW MIGHT SAVE YOU SOME MOINEY

By Massachusetts Construction Law Attorney Jonathan Sauer

I. INTRODUCTION.

In Squib # 49, Part I of this series, we gave an introduction to the subject of successor liability. Recently, the Appeals Court came out with a decision which addresses the issue of successor corporation liability for the debts of an earlier corporation, doing so in a possibly clearer and more concise way than the various court cases I referenced in the earlier Squib, in which eleven indicia or factors that are considered in determining successor liability were listed and/or discussed.[2]

This is a very important subject. After all, for better or worse, most construction companies will ultimately fail.[3]

So, this Squib is a review of a case handed down by the Appeals Court on August 20, 2018, this being the case of Fashionhaus, LLC v. T& C Main Street. (Current Case)[4]

A bit of a wrinkle. This decision is what is called an 'unpublished disposition'. That makes it somewhat less formal (and binding) on future courts and court cases because of this fact. While Current Case is an unpublished disposition, nonetheless, it is a well-written decision summarizing what appears to be the current state of the law and would most likely be followed by most future courts dealing with this subject matter. Moreover, our review of this case is more for educational purposes – not as something you or your lawyer can necessarily quote in a legal brief next week. And, it is excellent for that purpose.

The fact that this particular case might only have limited precedential value seems to be a natural *segue* to a discussion of how lawyers actually determine what the law is for a particular case. It has been on my list to write about for some time to describe for our readers exactly how a lawyer identifies what law will be applicable to any particular case. It is hoped that understanding this may help contractors better understand how to select a lawyer to represent

them *and* how this might potentially reduce their legal fees. One dozen specific ideas on how to potentially save money are given at the end of the next section of this Squib.

II. HOW A LAWYER 'DETERMINES' THE APPLICABLE LAW TO A MATTER IN CONTROVERSY AND SOME SUGGESTIONS AS TO HOW YOU POSSIBLY MIGHT SAVE MONEY.

Two initial things. First, lawyers don't look up the law in an encyclopedia - although legal encyclopedias can be a potential source of law, particularly where there is no substantive state controlling law on a certain subject. And, secondly, no lawyer can have expert level knowledge of every field within the law (e.g. wills and trusts, divorce, criminal). I practice construction law and, within the construction context, contract law. While I would be considered by many to be at the expert level as to both, there is a lot more that I don't know than I do know! And, that's because there is just so much material to learn and be aware of with more coming out *every day*.

The next sentence might seem a bit counter-intuitive. A Massachusetts law school doesn't actually teach Massachusetts law. Well, they *do* teach *some* Massachusetts law but don't specifically (or primarily) teach Massachusetts law. And, there are two good reasons for that.

The first is that there is no universal law. What the 'law' is varies from state to state. So, what law applies in Massachusetts might not apply in Michigan and conversely. There is also federal law. And, municipal law. And, administrative law.

The second is that new appellate decisions come out on an almost daily basis. The law is constantly changing and no one can keep up with everything. In the law school I went to, they taught the general 'common law' (not necessarily all applicable to Massachusetts). The 'common law' can be defined as those legal principles that are generally accepted. This might be the law on a particular topic in a majority of states.

What law school primarily does it to teach its students how to identify the legal issues in a complicated set of facts and then to have the skills to find out what was is the applicable law to that set of facts. In other words, how to conduct 'legal research'.

OK. So we want to help you understand how your lawyer determines the applicable law to your matter. There are two kinds of law that need be considered: procedural law and substantive law.

Procedural law defines itself. What procedures or steps or rules need be taken/followed in any particular matter to prosecute some legal dispute? There are myriad potentially applicable procedural rules.

There are the Massachusetts Rules of Civil Procedure (MRCP) and there are the Massachusetts Rules of Criminal Procedure. The MRCP generally, but not completely, follow the Federal Rules of Civil Procedure, which are a set of Rules applicable to federal courts. Federal courts, in addition, have what are called 'Local Rules'. Probate and land court have their own sets of rules.

In addition to these rules, most specific courts have their own Rules. I practice largely in the superior court and it has its own set of (additional) procedural rules. The state district court has its own set of rules. And, periodically, the Supreme Judicial Court comes out with new pronouncements on a variety of different sets of rules.

There are rules governing lawyers in terms of how they practice[5], which are under the jurisdiction of the Board of Bar Overseers. (These can be quite onerous.) Judges have their own set of rules governing their behavior. The American Arbitration Association has a variety of sets of rules which, for our purposes, are the Construction Industry Rules. (They have a separate set of rules applicable to commercial disputes.) Many state agencies have their own sets of rules. Administrative trials before state agencies have various sets of procedural rules.

There are a variety of statutes which deal with procedure. Trials before state administrative bodies have their own set of rules. And, any time that one appeals a court decision, each of these appellate bodies has its own set of rules and procedures. Some sets of applicable rules have rules that contradict the rules of other applicable procedural sets of rules. As an example, there is a rule (in one set of rules) that says that a party may only propound 30 interrogatories of the other party. Yet, there is a rule in another set of rules, which should be controlling, which is silent on the 30 interrogatory limitation. Which one do you believe? Which one do you follow?

Failure to follow all applicable rules has its consequences, sometimes severe, and I haven't identified all of the applicable rules that your lawyer has to follow to determine appropriate procedure. Suffice it to say that there are many and they can be quite detailed and complex. And, often, difficult to understand.

Now we come to substantive law, the actual legal principles that describe a party's rights and obligations. It is here where you have the possibility of saving money by only hiring lawyers who concentrate in specific subjects of the law, such as construction law and contract law. It stands to reason that lawyers are not going to have to perform legal research as to things that they already know.

What do lawyers have to look at to determine substantive law?

Well, there are both published appellate decisions and unpublished dispositions – such as Current Case - each with its own applications and ramifications. Judges of each kind of court issue decisions, which may have to be reviewed by or appealed to other judges, who will then issue decisions of their own. There are three different appellate courts of general application in Massachusetts, all of which have their own sets of rules.

There is an enormous set of statutes, which constitute the Massachusetts General Laws (MGL). The Legislature enacts Special Acts and Acts, which have legal validity but not all of which are incorporated into the MGL. There are published regulations included within the Code of Massachusetts Regulations (CMR), another enormous source of law. Various state agencies have their own regulations, some of which are part of the CMR and some of which are *not* part of the CMR. Other than 'published' regulations, there are unpublished regulations which, nonetheless, contain applicable law. Individual towns have their own by-laws and ordinances.

There are 'Uniform Acts' on a whole host of subjects, some of which are law in some states and some of which are not. An example is the Uniform Commercial Code, which is law in Massachusetts. But, even where a 'Uniform Act' is law in a particular state, it may be modified in different ways by different states. In a sense, they constitute 'ideal' laws or models as to what their authors think the law *should* be. There are books in the nature of encyclopedias. There are copious law review articles.

There is the 'Common Law', which applies in some states (but not in all states), sometimes with modifications, sometimes without. Various legal scholars write books on various subjects, which are referred to in law school as 'hornbooks'. Most states rely heavily on judicial pronouncements, such as appellate decisions. Some states, such as Louisiana, rely more heavily on statutory law, which they refer to as the Civil Code. (In Louisiana, reportedly, this law was initially established by Napoleon in 1804!) Massachusetts has *some* bid protest decisions on their website, although they are poorly indexed. And, there are various bid protest decisions that are *not* on their website because they were issued before the time period covered on the website. Nonetheless, some of the older decisions might have some application to a dispute and they are not generally available to lawyers. (Like many lawyers who do bid protest work, I have whole file cabinets full of these earlier decisions.)

Often, judges and lawyers will consult with authorities such as Black's Law Dictionary. Sometimes, in trying to figure out the meaning of words used in statutes, judges and lawyers will consult with ordinary dictionaries.

There is the Federal Constitution with amendments. And, of course, there is the Massachusetts Constitution.

The Massachusetts Attorney General issues certain advisory opinions to the Supreme Judicial Court, which can have applicable legal effect.

When my wife, Sally, went to law school, for just one course she had to read 2500 pages of cases.

Some authority is *mandatory,* meaning that judges and lawyers must follow it. Other law is *precatory* – such as Current Case - meaning that judges and lawyers *can* follow it but it will not control any particular result necessarily. Precatory law can include the law of other states, when there is no controlling law in your own state.

When I was working at Corwin & Corwin, I worked with Attorney Sally Corwin, who represented Manganaro Drywall, in preparing for the Supreme Judicial Court argument in the case of *Manganaro Drywall v. White Construction.* This case dealt with a public payment bond issue. Although this case was in a Massachusetts state court, the defendants made certain federal constitutional arguments. I have a specific recollection of researching an old case from Alaska, which dealt with mechanic liens – not with payment bonds – but which still might have had some application to the issues involved in the appeal.

Of course, the first dozen or so books of cases decided by the Supreme Judicial Court as to Massachusetts law came directly from English law.

Some law is simply hard to understand, even to students of the law.

Take the rule against perpetuities, for example. This is a rule applicable to inheritances, involved with estate planning (wills and trusts).

Black's Law Dictionary defines the rule against perpetuities as "[t]he common-law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created."

That’s not that many words.

Amazon.com is currently selling various books explaining this rule, one being 312 pages long, another being 436 pages along and still another that is 756 pages long! When I was in law school, my Wills and Trusts Professor said that someone had written a six volume set just on this rule. The Professor said that at a certain point in time, it was said in the legal academic community that there were only two people who understood this rule. *In the world!*

The point of this section is to simply point out to you, as potential clients, that finding and understanding the law can be a difficult, complicated and lengthy process.

So, how do you save money?

Here are a dozen specific ideas on how to possibly save some legal dollars, some of which ideas are tied into legal research (and familiarity with applicable legal principles through working in the field) and some of which ideas are not:

(1) To save money, you want to hire a lawyer who specializes in whatever field of law that is involved with your dispute.[6] That way, that individual should already know a lot of the applicable law to your issue. S/he doesn't have to legal research many points because of that knowledge. So, you don't have to pay the lawyer for what that lawyer already knows. That doesn't mean that there won't be some legal research. But, such legal research as is necessary should be less than that which would have to be performed by a non-specialist, someone new to construction and contract law, for example.

(2) If you are hiring a law firm that claims to have expertise in more than one legal discipline, with associates and partners and support staff working in each of these different fields of law, your construction case legal fees will be going to supporting that overhead as to a variety of legal fields which are of no use to you. Is having a 'full service' law firm necessary to file (or defend) a payment bond suit? Of course not.

(3) Also, when you are walking through a law firm for the first time, you might see a variety of administrative assistants and various paralegals and interns. This looks industrious and impressive. There might be fancy artwork in the reception area. And, the firm might have a prestigious address with a nice view of the ocean from the firm's upper floor. And, the firm might have more than one office, whether such additional offices are in Massachusetts or outside of Massachusetts. If you hire that firm, you'll be contributing towards paying for *all* of that. Does one really *need* all of this?

(4) Some firms have lawyers with well-deserved reputations in different areas of law. But, just because you might meet with that person – and you will likely be impressed by that person – that doesn't mean that this lawyer will actually perform any of the work on your case. That might be done by an associate with one or two years of experience, who will have to look a *lot* of things up. So, know who *exactly* will be working on your matter before you hire that firm and make sure that this associate has some prior degree of knowledge in your subject matter area. Whether it is a construction laborer or an attorney, that person's work and performance will improve with experience. But, wouldn't you prefer for that young lawyer to gain that knowledge and experience on some *other* contractor's file? As litigation *is* war, here's a military analogy. George Patton once said: "No dumb bastard ever won a war by going out and dying for his country. He won it by making some other dumb bastard die for his country." Let another contractor be that dumb bastard bearing the burden of training on his nickel some young, inexperienced associate!

(5) I frequently see legal pleadings which are signed-off by three attorneys. At first glance, that looks impressive. But, that means you are paying three lawyers to handle your one case. Might that not suggest a joke, such as how many lawyers do you need to change a light bulb? Shouldn't the answer usually be *one?* So, when you are discussing hiring that firm, make sure you have an understanding as to how many people will be working on your file.

(6) It will be difficult to develop realistic budgets for many forms of litigations. The facts might be complicated. The other side might be vindictive and uncooperative. The case might settle in three months. Or, in three years. Or, only after having gone through an appeal. But, for some routine tasks, you can develop at least *rough* budgets. These might include drafting and reviewing contracts and lien waivers. This might include bid protests. Also, for a litigation, discuss in advance of the hire what discovery the lawyer thinks needs doing. (Discovery is one of the most expensive items of pretrial activity.) Keep in mind, though, that some of your lawyer's time may be spent dealing with issues and actions that are raised or taken by the other side, something essentially beyond his/her knowledge and control and more particularly so before s/he starts working on your matter.

(7) Don't wait until the very last minute to hire a lawyer, which is what frequently happens. This is particularly so for contractors who do not have an ongoing relationship with a lawyer. But, it is also just human nature to delay taking an action that is distasteful until the very last minute. This can limit your choices and not provide you with sufficient time to do or consider some of the other ideas contained within these suggestions.

(8) Never lose sight of the fact that your case is *your* case. It is not your lawyer's case. Review the case with your attorney periodically to track how the case is coming along. Be reasonable in your expectations as to what result you can achieve and/or can live with. Keep in mind that half of the parties to lawsuits lose. And, although the lawyers may not like it, the parties to a case can *always* speak with one another. Sometimes, reaching some resolution will be accomplished by the parties themselves, not by the lawyers. Be leary of hiring 'pit vipers'. Cases are more easily resolved by more reasonable people and about 99% of all superior court civil litigations are resolved in some manner prior to the occurrence of a complete trial. Also, pit vipers might cause you to lose the other side's future business once the dispute is over with. Yeah, you might say *now:* 'I'd never work with that guy ever again.' If I had a nickel for every time someone said that, but who ultimately worked with that other guy later, I'd have a lot of nickels!

(9) Wherever/whenever possible, push for mediation as quickly and as early as possible. Compared with litigation in court, this is relatively inexpensive with a non-adversarial hearing of usually less than one day. Mediating a dispute has no effect on what you might do or argue in a litigation, if such proves to be necessary.

(10) A lot of contractors seem to be happier hiring larger law firms. I get that. And, to each his own. Here's a dynamic, though, that several contractors have shared with me which they have observed/experienced. The larger a law firm is, the more likely it is that any particular lawyer will see his/her primary relationship as being with that law firm and not with the contractor, the client. Put another way, that lawyer's relationship with any particular client is less important than that lawyer's relationship is with the law firm. Smaller firms have a greater tendency of having their lawyers seeing their primary relationship as being with you, the client. They may appreciate your business more than does a lawyer who works at a larger firm, who may think that new files (and clients) just drop out of the sky whenever they are needed. Everyone wants to be appreciated. Especially, when one is paying for something.

(11) Particularly with litigations, when you are interviewing potential lawyers, ask them to give you some kind of even brief written plan for the case should you give them the case. Then, if they start moving away from that plan as your lawyer, ask them why.

(12) These days, there seem to be a number of out of state law firms coming into Massachusetts looking for construction law clients. Using an expression generated in the South during Reconstruction after the Civil War, such might be called 'carpetbaggers'. As defined by Wikipedia: "the term 'carpetbagger', used exclusively as a pejorative term, originated from the carpet bags (a form of cheap luggage made from carpet fabric) which many of these newcomers carried. The term came to be associated with opportunism and exploitation by outsiders." Out-of-state law firms don't have a confirmed relationship with Massachusetts, the commitment to Massachusetts that local firms have. There are plenty of fine Massachusetts law firms who practice construction law. Rather than dealing with some out of state firm, which has the idea of Massachusetts as being 'an additional profit center' today, who knows tomorrow, using local vendors seems to make sense. After all, they won't be going anywhere.

III. THE FACTS AND HOLDING IN CURRENT CASE.

The following comes from the words of the actual decision, as heavily edited by yours truly. The facts are somewhat complicated, dealing with four different stores: two old ones operated by one corporation and two new ones operated by two new corporations.[7] To some extent, I have simplified the facts, changing them somewhat. Our interest in this case, after all, isn't with regard to the facts of this case. (Only the parties to Current Case would be interested in the facts.) Our interest is with regard to the law that was applied to those facts.

The issue in this case was whether or not the defendant two new companies (collectively, referenced as New Corps., individually as New Corp.) are the corporate successors to two earlier stores owned by a corporation we will refer to as Old Corp. After a jury-waived trial, a Superior

Court judge ruled that "New Corps. are in essence Old Corp. wearing a new hat." And, because of this, New Corps. were responsible for the debts of Old Corp. On appeal, the Appeals Court reversed the superior court judge's decision, finding that there was no successor liability.

Old Corp. began business in 1995 selling primarily women's clothing. There were two principals: Tess Enright, who owned fifty-one percent of the stock, and Carlos Pava, who owned forty-nine percent of the stock. Enright did the purchasing and selling of the merchandise and developed the relationships with customers and vendors. Pava was responsible for design and construction of the stores.[8]

From 1995 until roughly 2007, Old Corp. operated without significant financial issues, primarily out of two stores -- one in Newton and one in Cambridge. As of 2008, the Newton store was the central operating location. The Cambridge store merchandise was ordered and stocked out of the Newton store.

By 2008, however, Old Corp. was struggling.[9] It had made a series of business moves that had not worked out and, as a result, had incurred substantial debt. One unsuccessful business move was opening a store on Newbury Street in Boston in 2006; that store closed in 2009. During this time the relationship between Enright and Pava also deteriorated, both personally and professionally.[10] Pava was not involved in the business operations of Old Corp. after 2009.

In 2011, Enright formed New Corps. One of them operated a clothing store named "Tess & Carlos" in Concord, MA. The other operated a "Tess & Carlos" clothing store in Pittsford, New York. Enright was and is the sole officer and director of both New Corps. Pava never had an interest or involvement in either of them.

Both New Corps. sold women's clothing at retail, much as the Newton and Cambridge stores owned by Old Corp. had. The judge found that "[a]t least part of the reason for the formation of these two entities was to provide Ms. Enright with a 'fresh start' apart from the personal and professional involvement with Mr. Pava and without debt accumulated during that professional involvement in Tess & Carlos, Inc. (Old Corp.)" He also found that "[t]here was no sale of a significant amount of the assets of Old Corp. to either New Corp." Thus, as of September, 2011, Enright was operating four stores: two through New Corps., in which Pava had no interest, and two through Old Corp.

Old Corp. ceased operations in its Cambridge and Newton stores over the twelve months following September, 2011, but the manner in which it did so differed markedly by store. As to the Cambridge store, one of the New Corps. "assumed the operation" in "late 2011." Before it assumed the operation in Cambridge, all of the merchandise of Old Corp. in Cambridge was packaged and shipped to the Newton store. One of the New Corps. then acquired, stocked, and sold new merchandise in Cambridge. However, the Cambridge store kept the same name -- "Tess" -- as well as the same location, telephone number and Website address.

As to the Newton store, Old Corp. continued to operate that store for another year, until the store eventually closed in October of 2012. At that point Old Corp. ceased operations. The remaining Old Corp. merchandise was either packaged and labeled for storage, or returned to the vendors for credit. Some vendors of Old Corp. received at least partial payments, and went on to do business with New Corps. Many Old Corp. vendors, however, were not paid for their goods.

Plaintiff Fashionhaus, LLC (Fashion), was a supplier of merchandise to Old Corp. Fashion ceased selling to Old Corp. in 2006 and never did business with either New Corp. When it did not receive payment, it sued and obtained a judgment against Old Corp. in 2013. When execution[11] was returned unsatisfied, it initiated this action against New Corps. asserting, among other things, that New Corps. were liable as the legal successor to Old Corp.[12]

On the above facts, the Superior Court judge concluded that Defendant T & C Main Street, Inc., (one of the New Corps.) was "in essence" Old Corp. and that this corporation was responsible for the debts of Old Corp. under the doctrine of corporate successor liability. The Appeals Court disagreed.[13] As specifically stated by the Court:

"In general, a corporation is not responsible for the debts of another corporation absent a contractual obligation. See Scott v. NG US 1, Inc., 450 Mass. 760, 766-767 (2008). Corporations are distinct and separate entities, with distinct and separate assets and liabilities. See Gordon Chem. Co. v. Aetna Cas. & Sur. Co., 358 Mass. 632, 638 (1971); Scott, 450 Mass. at 766-767. There are well-established exceptions to these general rules, however, under which a successor corporation can be liable for the debts of a predecessor corporation. In Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 475 (2013), quoting from Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 556 (2008), the Supreme Judicial Court stated the exceptions as follows:

> "[T]he liabilities of a selling predecessor corporation are not imposed upon the successor corporation which purchases its assets, unless (1) the successor expressly or impliedly assumes liability of the predecessor, (2) the transaction is a de facto merger or consolidation, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor" (emphasis omitted).
>
> Fashion here relied primarily on two of these exceptions -- the so-called "de facto merger" and the "mere continuation" doctrines -- in asserting New Corps. successor liability.

The court in Premier Capital emphasized, however, that "[i]n order for one corporation to be deemed a successor corporation in the first place, it must be a successor to all, or substantially all, of another corporation's assets." Ibid., quoting from National Soffit & Escutcheons, Inc. v. Superior Sys., Inc., 98 F.3d 262, 266 (7th Cir. 1996). This transfer of assets requirement accordingly is a threshold requirement; there can be no successor liability, under any of the commonly recognized doctrines including "de facto merger" or "mere continuation," absent a

showing that "all, or substantially all," of the predecessor's assets were transferred to the successor. Ibid.

The plaintiff's claim founders on this threshold requirement. The facts found by the Superior Court judge, which neither party challenges, show that perhaps the most significant asset of Old Corp. -- its merchandise -- was never transferred to New Corp. Rather, Old Corp. retained that merchandise and either sold it, liquidated it, or returned it to vendors. Moreover, no assets from Old Corp.'s principal store in Newton were transferred to New Corp.. The Newton store instead continued to operate for over a year after New Corp. commenced operations. Eventually, Old Corp. ceased operations and its business was wound up.

On this record there can be no finding of a transfer of all, or substantially all, of the assets of Old Corp. to New Corp**.** Indeed, the judge did not make such a finding, instead stating that "[t]here was no sale of the assets of Old Corp. to New Corp."

We recognize that there were facts present in this case that pointed in the opposite direction, toward successor liability. New Corp. took over the operations of Old Corp.'s Cambridge store, and that store essentially continued in operation, with no outward signs of change. We are inclined to believe that New Corp. acquired some of Old Corp.'s assets at that time -- at the least, the goodwill associated with the location, customers, and ongoing business in Cambridge.[14] These facts, in isolation, have some of the earmarks of the "mere continuation" doctrine. And we recognize, as well, that the factual record presented was complicated and tangled because, as the judge found, Enright "largely ignored" corporate formalities as she conducted her businesses.

Nevertheless, despite evidence of the transfer of some assets, the bulk of the assets of Old Corp. were never transferred to New Corp., including, in particular, Old Corp.'s merchandise. The uncontested facts thus show no sale of all or substantially all of Old Corp.'s assets to New Corp. and, accordingly, successor liability cannot attach. We are bolstered in this view because, even if the plaintiff could make the required threshold showing of a sale of assets, there are other critical aspects of the mere continuation and de facto merger doctrines that also are absent here. For example, the mere continuation doctrine generally requires "at a minimum: continuity of directors, officers, and stockholders; and the continued existence of only one corporation after the sale of assets." Milliken, 451 Mass. at 557. These requirements were not met here, as Old Corp. had different shareholders than New Corp.., and continued to operate in Newton for a substantial period, with its own assets, after New Corp. began operations. Similarly, several of the de facto merger factors also were not present here, including that, for example "the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible" (emphasis supplied). Ibid. Once again, the circumstances here did not consist of a merger of New Corp. with Old Corp., given the separateness that was maintained for the Newton store and its assets.

Finally, we note that the judge expressly found that the plaintiff did not establish that the defendants committed any fraud in connection with the transactions and business structures at

issue. See Milliken, 451 Mass. at 556, quoting from Guzman v. MRM/Elgin, 409 Mass. 563, 566 (1991) (noting one basis for imposing liability upon a successor corporation could be whether "the transaction is a fraudulent effort to avoid liabilities of the predecessor").

Because on the uncontested facts there is not a basis to impose the liabilities of Old Corp. on New Corps., we reverse.

IV. CONCLUSION.

It is important to read again the four exceptions listed in the Premier Capital case set forth above.

What are the important factors involved with the Appeals Court decision?

1. The Appeals Court did not find that New Corp. was a successor corporation in the first place, because it must be a successor to all, or substantially all, of another corporation's assets, which was not the case here.

2. No significant amount of merchandise was transferred from Old Corp. to New Corp., although apparently a certain amount of merchandise was transferred.

3. There was a transfer of some of the assets of Old Corp. to New Corp. but not the bulk of the assets of Old Corp.

4. One of the Old Corp. stores continued in business for one year after one of the New Corp. stores started operating.

5. The transfer of the goodwill associated with the location, customers, and ongoing business of Old Corp. to New Corp. in Cambridge is an earmark of the "mere continuation" doctrine. However, this was insufficient in this case to have New Corp. be liable to the debtors of Old Corp.

6. The 'mere continuation doctrine' generally requires "at a minimum: continuity of directors, officers, and stockholders; and the continued existence of only one corporation after the sale of assets." In this case, Old Corp. and New Corp. had different officers and stockholders and one of the Old Corp. stores remained in business for a period of one year after New Corp. commenced operations.

7. "De facto merger factors also were not present here, including that, for example "the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible". As referenced above, one of the Old Corp. stores remained in business after the commencement of operations by New Corp.

8. No fraud was found with regard to the facts.

Although not specifically stressed in the decision, I think that the absence of Mr. Pava, a 49% owner of Old Corp., in the operation and ownership of New Corps. was significant.

Now, we listed and/or discussed in Squib #49 eleven factors or issues involved in the determination of successor liability. And, several other factors were discussed in Current Case.

In trying to avoid successor corporation liability, there is no one magical formula: Do this and you are *guaranteed* that the successor corporation will not have responsibility for the debts of the former corporation. At the same time, coming down on the happy side of as many of the elements in question as is possible tends to move towards no successor liability. It is clear that such determinations are heavily fact-dependent. For a company to just do what it feels like doing with no prior planning and without consideration of the various factors set forth in these two Squibs is not a wise strategy and may very well not be successful in preventing successor corporation liability. Frankly, I think that New Corps. here got lucky and dodged a bullet. Different judges looking at these same facts might have come to a different conclusion. The more prior, competent planning done before the move from the first corporation to the second corporation is the way to go to maximize chances of success in avoiding successor liability.

These issues become even more important when the debts of the former corporation are significant and the assets of the new corporation would be sufficient to pay them. If one is going from one hand to mouth company to another hand to mouth company and/or the debts are not significant, prior attention to these factors is less important. However one might want to, it is impossible to get blood from a stone.

Prior planning, probably over time with the help of a good lawyer and, possibly, a good accountant (for any tax ramifications) while considering the various exceptions identified in these two Squibs would seem to offer the best chance of the second corporation's remaining unscathed by the debts of an earlier corporation.

Also, keep in mind that the various cases discussed in these two Squibs are state court cases. And, the state courts are not particularly debtor-friendly. The way they are set up, they are neutral, not favoring creditor over debtor or vice versa. Bankruptcy, on the other hand, which is a federal remedy, *is* debtor-friendly. In many cases, filing bankruptcy with regard to the first corporation and getting a discharge of its debts may be the way to go.

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[1] A s*quib* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses

an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] All prior Squibs can be found on my website – www.sauerconstructionlaw.com - which is now *mobile friendly.*

[3] As I have reported in an earlier article, Squib or seminar, a statistic I saw on the internet stated that if 100 new construction corporations were formed today, less than 35 of them would still be in business five years from today. Not fabulous odds! In some ways, an older business entity is like an old car. At some point, the costs of maintaining it are greater than the benefit that can be obtained from retaining it. However, the nature of the outstanding debt has to be considered. A corporate bankruptcy will not discharge wage and alimony claims or tax liabilities. They will, on the other hand, discharge a personal indemnitor with regard to surety bond obligations assumed by a general agreement of indemnity and will at least limit the liability of a personal guarantor of a line of credit/loan to the value of whatever security (such as real estate) the bank has as to the personal guarantor's property.

[4] If you would like a copy of this court decision, send us an email and we'll send it along.

[5] While it may not appear so to the casual observer, lawyers in Massachusetts are very heavily regulated. This is primarily through the Board of Bar Overseers (BBO). Other than receiving an annual bill from the BBO, no lawyer ever wants to see any other envelopes from them. Such are akin to IRS audits, potentially much worse.

[6] I will refer out cases having to deal with different subject matters to those lawyers practicing in that area of law. I had a client who was going through a bitter divorce and he wanted to protect his ownership share in a prosperous company. That case when to a very sophisticated divorce lawyer. I usually refer out cases having to do with OSHA to lawyers who specialize on this. I've referred out a case to a specialist dealing with federal labor law issues and serious claims of violations of that law, which could have resulted in very serious fines and penalties.

[7] The owner of the old store was Tess & Carlos, Inc. The owners of the two new stores were T & C Main Street, Inc. and T & C Main, LLC. Both new stores were named "Tess and Carlos".

[8] Although not expressly stated in the decision, a reasonable inference can be made from the facts that there was some kind of romantic relationship between these two individuals.

[9] By 2008, unfortunately, a great many of us were suffering, thanks to our friends on Wall Street and the gutless and/or incompetent and/or bought and paid for Washington imbeciles who allowed them to get away with it.

[10] Gene Pitney, an American songwriter and singer, had a hit many years ago with the song "True Love Never Runs Smooth." (Ain't it the truth!)

[11] An 'execution' is the paper issued after a case goes to final judgment, which is used by a deputy sheriff in attempting to collect the debt from the debtor. Frequently, executions are returned as 'not satisfied' (paid).

[12] One of the reasons that legal research can be extensive (and expensive) is because legal principles have to be applied to the individual set of facts in each case. And, the facts in Current Case are quite complicated. Additionally, it is the rare contested case which has only one legal principle involved. There are cases with literally dozens of legal principles involved.

[13] Technically, after an adverse decision by the Appeals Court, an appellant can seek further review from the Supreme Judicial Court, Massachusetts' highest appellate court (and only appellate court until 1974). However, in the majority of cases, there is no 'right' to such further review. The SJC has to agree to hear the case, which it does in only about five percent of the time.

[14] In parts of Current Case, it is stated that no assets were transferred from Old to New. In other parts of the case, it is stated that maybe some assets were transferred from Old to New. Inconsistencies are part of the legal process/appellate decisions, unfortunately. The only way to avoid them for purposes such as ours is to get the original decision and to completely read it.