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Traditional Tort Principles Dictate that Corporate Successors Are Not Liable to Consumers

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The Son had an automobile insurance policy with Hanover Insurance Company ("Hanover") at the time of the accident. As mandated by Massachusetts law, the policy provided both uninsured and underinsured coverage for policy owners and relatives living in their households. Mass. Gen. L. ch. 175, sect. 113L (1988). After Hanover denied a settlement to Mrs. Vaiarella under the underinsured provision of her Son's policy, she filed suit in Massachusetts Superior Court. She alleged that Hanover had violated a Massachusetts statute, Mass. Gen. L. ch. 93A, sections 2(a) and 9 (1988), by refusing to make an offer of settlement.

The superior court found no violation of the statute because, for the purposes of underinsured motorist coverage, Mrs. Vaiarella was not a member of her Son's household at the time of the accident. The court held for Hanover, and Mrs. Vaiarella appealed to the Massachusetts Supreme Judicial Court.

Flexible Definition of Household Member Does Not Include Future Intentions

On appeal, Mrs. Vaiarella argued that the superior court erroneously determined she was not a member of her Son's household for insurance purposes. She further alleged that Hanover had violated Massachusetts state law by not making a reasonable, good faith investigation of her status. Mrs. Vaiarella's primary support for both arguments was that the superior court, in making the determination as to her status, failed to consider her intention to live in her Son's household for about six months out of each year.

The supreme judicial court first considered Mrs. Vaiarella's claim of membership in her Son's household. It noted that because a variety of living arrangements exist in today's society, an inflexible and precise meaning should not be applied to the term "household member." However, the court indicated that since the household member requirement for underinsured motorist coverage was controlled by statute, ambiguities in the policy should not be construed against the

insurance company. The definition of household member, the court reasoned, was a question of law that required the examination of specific facts on a case by case basis.

The supreme judicial court reasoned that Mrs. Vaiarella's claim was based almost entirely on future intentions and not on an established living arrangement. Before August, 1984, the Vaiarellas had lived independently from both their children for forty years. Although the Vaiarellas planned to reside with their Son, they had lived with him for only a few months prior to the accident. Taken together, the Vaiarellas' history of living independently from their children, their four-month stay in the Son's home, and their long-term intentions were not enough to establish household membership.

The court added that Hanover would not have known about the Vaiarellas' intentions. Accurate calculations of insurance risks require a knowledge of the volume of persons covered; thus, the court said, companies must be able to identify all covered persons.

After discounting future intentions, the court considered other factors which indicated where the Vaiarellas had established residency. The court did not rule out the possibility of dual residences, but considered such matters as where the Vaiarellas received their mail, where they transacted business, where they maintained possessions, as well as whether the Vaiarellas were financially dependant upon their Son.

Although the Vaiarellas had lived with their Son in Brockton, they, nonetheless, transferred their mail to their daughter. Their daughter handled all their business affairs. Once in Florida, they also received mail there. At least some of their possessions were in Florida, and Mr. Vaiarella obtained an auto registration and driver's license in that state. (Since a Florida driver's license and registration were required to purchase the mobile home, the court noted that these factors did not significantly weaken Mrs. Vaiarella's claim of residence in Massachusetts.)

Even though some of the Vai-

arellas' possessions were with their Son, none of their activities or transactions significantly indicated residence with him or financial dependence upon him. Moreover, after the car accident, Mrs. Vaiarella went to recuperate in her daughter's home and then returned to Florida, never again living with her Son. Thus, the court concluded that Mrs. Vaiarella had failed to establish dual residences in Winter Haven, Florida and Brockton, Massachusetts.

Finally, the supreme judicial court found no reason to comment separately on whether Hanover had made a reasonable, good faith investigation to determine Mrs. Vaiarella's residency.

Clarinda Gipson

Traditional Tort Principles Dictate That Corporate Successors Are Not Liable To Consumers

In *Nissen Corp. v. Miller*, 594 A.2d 564 (Md. 1991), the Maryland Court of Appeals refused to extend tort liability to a successor corporation with no causal connection to the product causing a consumer's injury. The court reinforced the traditional principle that fault must exist before tort liability can be imposed.

Background

Frederick Brandt ("Brandt") purchased a treadmill from Atlantic Fitness Products ("Atlantic") in January, 1981. The treadmill was designed, manufactured, and marketed by American Tredex Corporation ("American Tredex").

In July, 1981, Nissen Corporation ("Nissen") purchased all assets of American Tredex. The asset purchase agreement specified that Nissen would assume certain American Tredex obligations and liabilities. However, the agreement explicitly stated that Nissen would not shoulder any liability ensuing from injuries associated with any product previously sold by Ameri-

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Tort Principles

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can Tredex. Furthermore, American Tredex would continue as a corporation for five years under a new name, AT Corporation.

Although the agreement did not require it, Nissen retained some American Tredex employees. Nissen also continued to sell replacement parts for equipment previously sold by American Tredex. After the sale, however, Nissen relocated the business from Indiana to Iowa. Dealers were notified of the asset purchase, and Nissen established a new customer service phone number.

In October, 1986, more than five years after his purchase, Brandt injured himself while adjusting his treadmill. In September, 1988, Brandt sued Nissen, Atlantic, American Tredex, and AT Corporation, which had dissolved pursuant to its contract. Brandt sought damages for negligence, breach of warranty, strict liability, and loss of consortium. Atlantic cross claimed against Nissen for indemnity and contribution.

The Maryland trial court granted Nissen's motion for summary judgment. Brandt and Atlantic appealed. The Court of Special Appeals reversed the trial court's decision. Maryland's highest court, the Court of Appeals, then considered whether Nissen could be held liable for Brandt's injuries as the successor to American Tredex.

The Traditional Rule of Corporate Successor Nonliability

Generally, a corporation that purchases the assets of another does not automatically embrace the predecessor's liabilities. The well-settled rule is one of successor nonliability, subject to four traditional exceptions. A corporate successor takes on its predecessor's liabilities when: (1) it expressly or impliedly agrees to assume the liabilities; (2) the transaction is a consolidation or merger; (3) the transaction is fraudulent; or (4) the relationship merely amounts to a continuation of the predecessor entity ("continuity of entity"). In addition to the four traditional

exceptions, some courts have also recognized a continuity of enterprise exception.

The continuity of entity exception evolved out of a need to protect consumers and creditors from transactions in which the purchasing corporation retained similar management and ownership from the predecessor corporation. The goal was to prevent the successor corporation from escaping liability when it remained in substantially the same form as its predecessor. Thus, the traditional continuation theory focused on continuation of the individual entity through its ownership and management. On the other hand, the continuity of enterprise exception contemplated continuation of the general business operation without a continuation of ownership.

The Parties' Contentions

Neither Brandt nor Atlantic contended that any of the traditional exceptions to the general rule of nonliability applied. However, Brandt and Atlantic claimed that public policy demanded the adoption of the continuity of enterprise exception.

Both Brandt and Atlantic argued that Nissen should not enjoy the fruits of its continued American Tredex enterprise while escaping the associated liabilities. Atlantic argued that because Nissen enjoyed American Tredex's good will and held itself out as the company's successor, Nissen should bear liability for Brandt's injuries caused by American Tredex's treadmill.

Nissen countered with three arguments. First, Nissen maintained that it was not a part of the manufacturing and selling chain. Rather, Nissen simply purchased the assets of American Tredex. Moreover, Nissen asserted, the asset purchase agreement specifically excluded liability emanating from defective products sold prior to the asset purchase. Finally, Nissen insisted that the continuity of enterprise theory was unfairly overbroad. Nissen contended that this liability theory would not extend solely to major corporations; small corporations that purchased and continued businesses but abandoned

their predecessor's injurious products would also incur liability under this rationale.

Court Rejected Liability Without Fault

The Court of Appeals reversed the appellate court and ruled that Nissen was not liable for Brandt's injuries. The court refused to adopt the continuity of enterprise exception since it contradicted the fundamental principle that tort liability requires the existence of fault. Because the continuity of enterprise theory found its basis in a public policy that failed to contemplate fault, a majority of the court rejected the exception and upheld the original grant of summary judgment in this case.

The court maintained that the basis for Maryland's strict liability law, the Restatement (Second) of Torts 402A, did not abandon the basic tort concept of fault. Under 402A, a seller who sent a defective and unreasonably dangerous product into the market was at fault when the product injured a consumer. Nissen, however, was not a seller and did not place the treadmill on the market.

Nonetheless, to some extent Nissen did continue the American Tredex operation. Nissen replaced parts for American Tredex products, serviced its customers, and retained some of its employees. The court reasoned, however, that these elements did not blossom into successor liability. Instead, the court recognized the societal benefit gained from Nissen's voluntary continuation of employment and customer service. The court also noted the societal value of protecting consumers, but reiterated the fact that Nissen was not responsible for Brandt's injuries.

Furthermore, the court found that the continuity of enterprise exception was inherently unjust because it favored large corporations. The court noted that large corporations could either effectively spread tort liability costs to consumers or afford no-fault insurance. The continuity of enterprise doctrine unfairly discriminated against small corporations that could not afford such costs.

Scott R. Anderson

Consumer News: Co-Op Agreements

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that way, so we are stuck," says Arnold Bronflin, owner of a chain of luggage and leather goods stores. Even retailers who can afford to advertise on their own are reluctant to give up co-op dollars. Barry Lefkowitz, a business representative for off-price retailers, such as Burlington Coat Factory Warehouse, Inc., explains that "[c]o-op advertising is a critical element in the pricing structure of a good. So if you do not have that allowance, the cost [of] advertising is going to be added to the product." In this way, a loss of co-op dollars translates into either a loss in profit margin or a loss in sales to competition.

Antitrust attorneys and consumer advocates alike agree that co-op advertising impacts consumers more than anyone else. Kristen Rand, an attorney with Consumers Union, explains that "[i]f a retailer can't advertise the discount, that takes away some of the advantage of discounting. And it also injures consumers because a lot of consumers shop around by reading ads." Also, co-op advertising restricts indirect forms of discounting, such as "meet- or-beat" price guarantees, which often apply only to published prices. One discount retailer says he works around the

restrictions by dropping hints in his ads, such as "call for package deals," or "financing available." That retailer explains that "when customers call, we tell people the real price in a heartbeat. . . . But getting them to call is the trick."

Many co-op ad agreements are so restrictive that they even prevent consumer-oriented publications from getting price information. Last year, the Washington Consumers' Checkbook, a consumers magazine, pulled some comparative price listings because retailers were reluctant to share the information. In a letter to the editors, one appliance retailer wrote that "General Electric has decided that pricing of certain pieces was not allowed to be published in a comparative pricing format such as your magazine. . . . Consequently, they are threatening to suspend our advertising co-op budget unless the information is retracted."

Co-op advertising agreements are not illegal. Federal antitrust authorities currently differentiate co-op ad agreements, which specify "advertised prices," from resale price maintenance agreements, which specify "retail prices." During the Carter administration, federal antitrust authorities considered co-op ad agreements to be price-fixing, in violation of the Sherman Act. Today, it is still possible to allege an antitrust violation arising from a co-op ad scheme, but the complaining party has to show that the manufacturer is so dominant that its actions affect price competition throughout the market. Kevin Arquit, of the Federal Trade Commission's ("FTC") Bureau of Competition, explains that "[t]here has to be a showing that the anti-competitive effects outweigh any efficiencies that the manufacturer wants to raise." Arquit noted "[w]e have looked into some allegations of co-op advertising abuse, but none yet have resulted in an enforcement action. . . . It would be speculative to guess whether current investigations will result in actions."

Antitrust attorneys and retailers say they expect the proliferation of co-op ad price supports to contin-

ue. In 1990, the FTC dropped its guidelines, in effect throughout the 70's and 80's, which expressly forbid agreements that required the retailer to advertise certain prices or refrain from advertising the price. However, some see a possible shift in the FTC's attitude toward antitrust. Recently, the FTC successfully sought to stop Nintendo America, Inc. from fixing retail prices. The International Mass Retailing Association has petitioned the FTC to revise the consent decree, signed in April, which says nothing about co-op advertising. Such an action might usher in a new era in which federal antitrust officials once again take a hard line position against co-op advertising.

ANNOUNCEMENT 1992 A.C.C.I. Conference

The American Council on Consumer Interests (A.C.C.I.) will hold its 38th annual conference March 25-28, in Toronto. For more information, contact program chair Brenda Cude, University of Illinois, 271 Bevier Hall, 905 S. Goodwin, Urbana, IL 61801 (217-244-2858).

ANNOUNCEMENT Brochure Available: Responsibility to Report Hazardous Consumer Products

The Coalition for Consumer Health and Safety is offering a free brochure detailing manufacturers' responsibilities to report hazardous consumer products to the Consumer Product Safety Commission (CPSC). Civil penalties for failure to report may run as high as \$1.25 million. To receive a free copy of the brochure, send a self-addressed stamped envelope to CFA, 1424 16th Street, N.W., Suite 604, Washington, DC 20036.

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