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ISSUE TWO

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IN THIS ISSUE

Successor Liability for Environmental Liabilities 1-2

PA Adopts the Revised Uniform Arbitration Act: What You Need to Know 2-3

The Key to Your CGL Policy: The Misunderstood Word: "Occurrence" 3-4

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SUCCESSOR LIABILITY FOR ENVIRONMENTAL LIABILITIES

What happens when one company acquires the assets of another, then—many years later—receives a demand to participate in the clean-up of a contaminated site based on the acquired company's long-ago shipment of materials to the site?

As a general rule, the buyer of assets in an asset acquisition does not automatically assume the liabilities of the seller. However, under the doctrine of successor liability, a claimant may be able to seek recovery from the purchaser of assets for liabilities that were not assumed as part of an acquisition. This claim may be employed in cases involving environmental liabilities, especially when the original party is defunct or remediation costs are greater than the original entity's ability to pay for the cleanup.[1]

Courts have taken different positions on whether state law or federal common law governs the determination of successor liability for claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), known also as Superfund. This distinction may have little practical effect because federal common law follows the traditional state law formulation. Notably, though, when evaluating successor liability under federal law, and specifically environmental laws like CERCLA, the doctrine may be more liberally applied because of policy concerns about contamination.[2]

Under the successor liability doctrine, a buyer can be held responsible for liabilities of the seller if one of four "limited" exceptions applies:

> (1) the successor expressly or impliedly agrees to assume the liabilities; (2) a de facto merger or consolidation occurs; (3) the successor is a mere continuation of the predecessor; or (4) the transfer to the successor corporation is a fraudulent attempt to escape liability.

K.C.1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1021 (8th Cir. 2007) (citing *United States v. Mex. Feed & Seed, Co., Inc.*, 980 F.2d 478, 487 (8th Cir. 1992)). A fifth exception, the substantial continuity exception, is a broader standard,[3] but most circuit courts do not apply it in CERCLA cases.[4]

Exception 1, express or implied assumption, must be analyzed in terms of the specific asset agreement in question. Exception 4, fraud, is generally employed in circumstances where the acquired company shifts its assets to avoid exposure to another entity.[5]

Courts have addressed the main issue of successor liability by asking whether the transaction is simply the handing off of a baton in a relay race (successor liability) or whether the new company is running a separate race (no liability).[6]

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Examining factors relevant to the remaining elements—numbers 2 (de facto merger) and 3 (continuation)—helps answer the question. Under the doctrine of a de facto merger, successor liability attaches if one corporation is absorbed into another without compliance with statutory merger requirements. A court would look at whether there is a continuity of managers, personnel, locations, and assets; the same shareholders become part of the acquirer; the seller stops operating and liquidates; and the acquirer assumes the seller's obligations to continue normal business operations.[7] The "mere continuation" theory "emphasizes an 'identity of officers, directors, and stock between the selling and purchasing corporations.'"[8]

Given the high stakes that can be involved with CERCLA cleanups, assessing prospects for applying the successor liability doctrine could be an important part of the liability analysis.

[1] *See, e.g.,* JAMES T. O'REILLY, SUPERFUND AND BROWNFIELDS CLEANUP § 8:16, at 360 (2017-2018 ed.) [hereinafter O'REILLY] ("Mergers, sales of assets, and changing corporate names does not remove potential CERCLA liability.").

[2] *See* O'REILLY § 8:16; *see also, e.g., In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution,* 712 F. Supp. 1010, 1013-19 (D. Mass. 1989) (in the CERCLA context, concluding that successor liability applied where there would be "manifest injustice" if one of the companies could "contract away" liability for PCB contamination).

[3] *See K.C.1986 Ltd. P'ship v. Reade Mfg.,* 472 F.3d 1009, 1022 (8th Cir. 2007).

[4] *See Action Mfg. Co. v. Simon Wrecking Co.,* 387 F. Supp. 2d 439, 452 (E.D. Pa. 2005).

[5] *See, e.g., Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.,* 934 P.2d 715, 721 (Wash. Ct. App. 1997). This exception is rarely used. RESTATEMENT (THIRD) OF TORTS:PROD. LIAB. § 12 cmt. e (AM. LAW INST. 1998).

[6] *See, e.g., Oman Int'l Fin. Ltd. v. Hoiyong Gems Corp.,* 616 F. Supp. 351, 361-62 (D.R.I. 1985).

[7] *Asarco, LLC v. Union Pac. R.R. Co.,* No. 2:12-CV-00283-EJL-REB, 2017 WL 639628, at *18 (D. Idaho Feb. 16, 2017).

[8] *United States v. Mex. Feed & Seed Co.,* 980 F.2d 478, 487 (8th Cir. 1992) (quoting *Tucker v. Paxson Mach. Co.,* 645 F.2d 620, 626 (8th Cir. 1981)).

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PA ADOPTS THE REVISED UNIFORM ARBITRATION ACT: WHAT YOU NEED TO KNOW

On June 28, 2018, by House Bill 1644, Pennsylvania adopted the Revised Uniform Arbitration Act (RUAA), effective July 1, 2019. The RUAA replaces the 1955 Uniform Arbitration Act (UAA), 42 Pa.C.S. §§ 7301-7320, as the most up-to-date and complete law governing agreements to arbitrate in the United States.

BACKGROUND

Written agreements to arbitrate were first explicitly recognized as valid and enforceable in 1925 by the Federal Arbitration Act (FAA), 9 USCA Ch. 1, which applies to arbitration provisions in private contracts and encourages arbitration as a method of alternative dispute resolution. Following suit, in 1980 Pennsylvania—along with 49 other jurisdictions—adopted the original version of the UAA, which was created by the Uniform Law Commission as a way to provide uniformity in state arbitration law.

As a result of the FAA and the wide-spread adoption of the UAA, the last several decades have seen enormous growth and development in arbitration law. To address this rapid growth, the Uniform Law Commission promulgated the RUAA in 2000 as the "next generation" state arbitration act, with the goal of providing more complete arbitration procedures and provisions. Recognizing the need to resolve ambiguities in the UAA and codify interpreting case law, Pennsylvania adopted the RUAA.

KEY REVISIONS

The RUAA attempts to resolve ambiguities and conflicts in case authority by: (i) addressing aspects of arbitration not covered by the UAA, and (ii) supplementing the procedural rules for arbitration to meet modern needs. The RUAA also aligns state law with federal law to decrease the potential for federal preemption under the FAA.

Although there are many new provisions in the RUAA that attempt to clarify the ambiguities of the UAA and align the RUAA with the FAA, the Uniform Law Commission has highlighted some of the most notable new provisions:

- **Discovery.** The RUAA allows an arbitrator to issue subpoenas, and depositions may be permitted upon request of a party with respect to both party and non-party witnesses.
- **Provisional Remedies.** Before an arbitrator is selected, a court may order provisional remedies to protect the effectiveness of the arbitration and prevent delay in selecting an arbitrator. After an arbitrator is selected, the arbitrator has the same powers as a court in a judicial proceeding.
- **Consolidation.** An arbitrator may consolidate separate, but related, arbitration proceedings.
- **Waiving the RUAA.** The act expressly becomes a default act, allowing many of its provisions to be waived or varied by contract. However, certain provisions may not be waived or varied, including the rules that govern disclosure of facts by a neutral arbitrator and the rules guaranteeing enforcement or appeal of an arbitration decision in a court.
- **Grounds for Vacating an Award.** Before accepting appointment as an arbitrator, an individual must disclose any known

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facts that could affect impartiality, such as financial or personal interests in the outcome. Lack of disclosure may be a ground for vacating an arbitration award. Additional grounds for vacating an arbitration award include whether an award was procured by corruption, fraud, or other undue means.

- **Promoting Involvement.** To encourage individuals to serve as arbitrators, the RUAA provides arbitrators express immunity from civil liability to the same extent a judge acting in his or her judicial capacity would be immune.
- **Express Authority of Arbitrators.** The act contains a number of provisions intended to place arbitrators on the same level as judges. Such provisions include giving an arbitrator the express authority to make summary dispositions of claims or issues, to use discovery processes as necessary, and to otherwise conduct proceedings as appropriate to aid in a fair and expeditious disposition of the proceeding.
- **Punitive Damages/Other Relief.** Arbitrators are expressly authorized to award punitive damages or other exemplary relief when appropriate, but the arbitrator must state the basis in both fact and law for such an award in writing.

As noted by the American Arbitration Association in its July 10, 2000 letter of support to the Uniform Law Commission, the RUAA continues to support arbitration as "an expeditious, cost effective and efficient method of resolving disputes" without "judicializing" the arbitral process. Thus, the RUAA should further assist in the efficiency and fairness of arbitration as an alternative to litigation in Pennsylvania.

Additional information on the RUAA can be obtained at *http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000)*, last visited October 19, 2018.

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THE KEY TO YOUR CGL POLICY: THE MISUNDERSTOOD WORD: "OCCURRENCE"

Few words in insurance law create as much heartburn for insurers and coverage counsel as the unassuming word "occurrence." One might ask why this common word, which most people easily understand to mean an "event" or a "happening," would raise such concern.

The answer to this question lies in the particular importance given to this word in Comprehensive General Liability ("CGL") policies. Businesses reasonably expect that a claim alleging property damage, bodily injury or advertising injury triggers their CGL policies and the issuing insurance company will defend and indemnify them.

This reasonable expectation results from the seemingly broad grant of coverage in most CGL policies' insuring clause, which often states: "We will pay all amounts for which the insured becomes legally liable to pay as compensation arising out of personal injury, property damage or advertising liability as a result of an occurrence."

Insurance companies have placed uncertainty into this equation by redefining the word "occurrence" from its common meaning of an event or happening to something like "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Unfortunately, insurers exploit this definition to deny or to limit coverage that their policyholders reasonably expect and for which those policyholders have paid handsome premiums.

We too often see insurance companies issue automatic denials of tenders for defense when a claim or a lawsuit alleges some intentional conduct on behalf of the policyholder. In these circumstances, insurers commonly assert that because the policyholder's conduct was intentional, and that the claim cannot fit within the policy's "occurrence" requirement. Insurance companies that take this position in jurisdictions like Pennsylvania are wrong.

Courts in many jurisdictions, including Pennsylvania, have held that even in the face of an intentional act, if the policyholder did not intend the alleged harm, then coverage may exist and a defense should be provided. *See, e.g., United Services Automobile Association v. Elitzky,* 517 A.2d 982 (1986) (insurance coverage is not excluded because an insured's actions are intentional unless he also intended the resultant damage). Recently, the Pennsylvania Superior reaffirmed the foregoing principle in *Erie Insurance Exchange v. Moore,* 175 A.3d 999 (Pa. Super. 2017), an insurance coverage case concerning the estate of a very unsympathetic policyholder (*i.e.,* a man who killed his ex-wife and himself in a murder-suicide).

In *Moore,* the policyholder's estate was sued by the ex-wife's boyfriend, who alleged that the policyholder went to the home of his former wife to kill her and then to commit suicide. The ex-wife's boyfriend further alleged that after the policyholder killed his ex-wife, the boyfriend arrived at the ex-wife's home and a struggle ensued between the boyfriend and the ex-husband, who was still holding a gun. During that chaotic struggle, the ex-husband shot the boyfriend in the face. The insurance company denied coverage asserting that the injuries (*i.e.,* to the boyfriend's face) were not caused by an

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the boyfriend's face) were not caused by an "occurrence." The trial court agreed with the insurance company that the shooting of the boyfriend did not constitute an "occurrence."

The Pennsylvania Superior Court reversed the lower court's decision that had denied coverage for the policyholder's (*i.e.,* ex-husband's) estate because the ex-husband, though intending to murder his wife and to kill himself, was not alleged to have intentionally harmed the boyfriend as part of his planned murder-suicide. Confronted with such an unsympathetic policyholder and distasteful facts, the Pennsylvania Superior Court correctly and dispassionately applied Pennsylvania law, which requires that one go beyond the question of whether some act of the policyholder was intentional, and instead, requires that one analyze whether the policyholder intended the specific harm or damage alleged.[1]

While policyholders always should be skeptical of their insurance company's coverage determinations, they should be particularly skeptical when that denial involves the question of whether the allegations set forth an "occurrence." It is in this light that *Moore* provides a good example of the need to question an insurance company's denial of coverage when it involves the existence of an "occurrence."

[1]*Moore* is currently pending in the Pennsylvania Supreme Court. Because bad facts and unsympathetic parties sometimes result in bad law, we are closely monitoring this case to see if or how it may influence the state of insurance law in Pennsylvania.

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