

ASSET SALES UNDER TEXAS LAW: DEFINING THE ACQUISITION AND EXPLORING SUCCESSOR LIABILITY

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INTRODUCTION

Business entities are creatures of state law.¹ This “creature” moniker reveals characteristics of the company that—in the eyes of the law—are like natural persons in many ways.² Companies can execute contracts, sue and be sued, and commit torts like natural persons.³ But in a different sense, a company can also change, grow, and cease to exist.⁴ Business lawyers must structure deals and resolve disputes with these more abstract concepts in mind.

Business organizations law facilitates company growth, change, and termination via various statutory merger and acquisition methods.⁵ One common method to effectuate an acquisition is the asset sale.⁶ Using this method, a buyer simply purchases an asset or a collection of assets from the target company.⁷ One can easily analogize this transaction with a natural person buying a piece of property from another natural person.⁸ By contrast, a merger is a transaction wherein the buyer acquires an interest in the target

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¹ See Sherwin D. Abrams, *Decisions, Decisions: Helping Clients Choose the Right Business Entity*, 101 ILL. BAR J. 530, 532 (2013) (opining upon the nature of a business entity, including a discussion about the similarities of a business entity to a natural person).

² *Id.* at 531.

³ See *id.*

⁴ See TEX. BUS. ORGS. CODE ANN. § 1.002(32) (defining “[f]undamental business transaction” to include various transactions through which an entity might change or grow); see also TEX. BUS. ORGS. CODE ANN. § 11.102 (providing when the “existence of a filing entity terminates”).

⁵ See ZOLMAN CAVITCH, BUSINESS ORGANIZATIONS WITH TAX PLANNING § 160.02 (2022).

⁶ See discussion *infra* Part I.

⁷ See *infra* Section I.B.

⁸ See discussion *infra* Section I.B.

business or the business itself—not just its assets.⁹ In other words, a merger changes the nature of the businesses.

One major advantage of an asset sale is that the buyer can acquire certain assets it wants from the target without taking on all of the target's liabilities.¹⁰ This is not the case with a traditional merger.¹¹ There, the buyer acquires the target itself—including any of the target's blemishes.¹² Even though asset sales provide the buyer a non-liability advantage, asset purchasers often agree to assume some of the target's liabilities as part of the deal.¹³ In doing so, the buyer effectively ends up acquiring the business as a whole—akin to a merger—albeit through an asset sale to limit liability or effectuate a particular tax outcome.

Texas law provides significant liability protection to buyers in an asset sale; however, questions remain about what it means to expressly assume a liability. This comment will explore the meaning of an asset sale, the definition of successor liability and predecessor liability, and whether successor liability terminates when predecessor liability terminates.

I. DEFINING A SALE OF ASSETS

Business lawyers can structure a merger or acquisition in a variety of ways. Both legal and business considerations drive the ultimate choice of deal structure.¹⁴ One common vehicle is the asset sale.¹⁵ This section addresses the asset sale as compared to other deal structures, discusses a company's general power to sell assets, and addresses instances where a sale of assets amounts to a fundamental business transaction.

⁹See *infra* Section I.A.

¹⁰See *infra* Part II.

¹¹See CAVITCH, *supra* note 5 (“[T]he surviving corporation assumes all of the assets and liabilities of the disappearing, or target, corporation. This assumption includes all known liabilities and assets as well as those unknown. It also includes contingent liabilities.”).

¹²*Id.*

¹³*Id.* § 161.03[2] (“[I]t is common for some significant assumption of liabilities to occur when all or substantially all of a corporation's assets are purchased.”).

¹⁴See, e.g., *id.* § 160.01 (listing legal constraints that determine the best deal structure, including the available statutory procedures to affect the transaction; the effects of federal, state, and local taxation; the financial condition of the business that is the subject of the transaction; securities laws; antitrust laws; and others).

¹⁵See discussion *infra* Section I.B.

A. The Asset Sale Compared to Other Acquisition Methods

Companies transact mergers and acquisitions for various strategic business reasons—be it a desire to grow a geographic presence, improve capabilities, or enter new industries.¹⁶ The underlying business reasons for a merger or acquisition notwithstanding, lawyers must consider a laundry list of legal concerns and constraints when structuring the deal—including approval requirements, tax consequences, and liability risk.¹⁷ One of the many concerns is which deal structure best serves the client’s needs. These structures generally fall into asset sales, stock purchases, and statutory mergers.¹⁸

The asset sale provides a distinct advantage over other deal structures because the buyer generally acquires the target’s assets without also acquiring all the target’s liabilities.¹⁹ By contrast, a buyer in a stock purchase or statutory merger acquires the entire target company—including its liabilities.²⁰ This liability concern may not dictate the best structure for every deal; however, it is a useful option for purchasers who primarily desire specific assets (e.g., machinery) and do not want to assume an excessive risk of liability.

B. Comparing the General Power to Buy and Sell Assets with a Sale of All or Substantially All Assets

Selling or acquiring an asset is not the same thing as a merger. Indeed, companies buy and sell assets regularly.²¹ To illustrate this concept, suppose

¹⁶CAVITCH, *supra* note 5, § 160.01.

¹⁷*See id.*; *see also* TEX. BUS. ORGS. CODE ANN. § 21.364 (listing approval requirements for fundamental actions).

¹⁸*See* CAVITCH, *supra* note 5.

¹⁹*See* discussion *infra* Part II; George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 11 (2007) (“Successor liability is an exception to the general rule that, when one corporate or other juridical person sells assets to another entity, the assets are transferred free and clear of all but valid liens and security interests.”).

²⁰*See* CAVITCH, *supra* note 5.

²¹The Texas Business Organizations Code provides:

Subject to any approval required by this code or the governing documents of the domestic entity, a domestic entity may transfer and convey by sale, lease, assignment, or another method an interest in property of the entity, including real property. The transfer and conveyance may:

- (1) be made with or without the goodwill of the entity;

a manufacturer purchases from a Texas corporation or limited liability company goods to manufacture a product, a machine to create the product, and a building to house the business. These actions are not mergers and should not be conflated with mergers. Oftentimes, they would not even amount to a fundamental business transaction.²²

On the other hand, the Texas Business Organizations Code deems a sale of all or substantially all assets a fundamental business transaction.²³ The Code defines a sale of all or substantially all of the assets of a corporation as follows:

[A] “[s]ale of all or substantially all of the assets” means the sale, lease, exchange, or other disposition, other than a pledge, mortgage, deed of trust, or trust indenture unless otherwise provided by the certificate of formation, of all or substantially all of the property and assets of a domestic corporation that is not made in the usual and regular course of the corporation’s business without regard to whether the disposition is made with the goodwill of the business.²⁴

Because it is a fundamental business transaction, the Code requires extensive approval procedures—unlike a run-of-the-mill purchase or sale in the ordinary course of business.²⁵ To illustrate this distinction, suppose a buyer agrees to purchase all of the property from the target discussed in the above hypothetical. Upon the sale, the target liquidates and dissolves. Here, the sale is more than just a simple business transaction. Instead, it is a fundamental business transaction within the Code definition.

Importantly, the Code also provides that a property disposition is not a merger or conversion for any purpose—regardless of whether the disposition

(2) be made on any terms and conditions and for any consideration, which may consist wholly or partly of money or other property, including an ownership interest in a domestic entity or non-code organization; and

(3) be evidenced by a deed, assignment, or other instrument of transfer or conveyance, with or without the seal of the entity.

TEX. BUS. ORGS. CODE ANN. § 10.251(a).

²² See *id.* § 1.002(32).

²³ *Id.*

²⁴ *Id.* § 21.451(2). Note that the phrase is not statutorily defined for a limited liability company.

²⁵ See *id.* § 21.455 (explaining the procedures to approve a sale of all or substantially all assets of a corporation under Texas law).

required the approval of the entity's owners or members.²⁶ This means the above hypothetical is not a merger or conversion—even though it may be a fundamental business transaction. Additionally, the Code creates a safe harbor for a corporation to sell assets that do not amount to a sale of all or substantially all assets. Section 21.451(2) of the Texas Business Organizations Code excludes transactions that result in the corporation directly or indirectly (1) continuing to engage in one or more businesses or (2) applying a portion of the consideration received in connection with the transaction to the conduct of a business that the corporation engages in after the transaction.²⁷ In these instances, no shareholder approval is required for the corporation to exercise its power to sell property.²⁸

II. SUCCESSOR LIABILITY

Asset purchasers are generally not liable for the seller's debts and obligations unless a non-liability exception applies. In Texas, a successor company (the buyer) may only be liable for the liabilities of the predecessor company (the target) if it expressly assumes those liabilities.²⁹ An open question exists as to whether general language in an asset purchase agreement includes assumption of liability for the predecessor's own negligence or strict liability. This section expounds upon the various theories of successor liability across different jurisdictions and addresses the effect of a predecessor's own liability upon the assumption of the liability by a successor.

A. General Theories of Successor Liability in Asset Sales

As a general rule of corporate liability, an asset purchaser is not liable for debts and obligations of the seller.³⁰ This rule finds support in fundamental rules of law—no person should be liable for torts they did not commit nor bound by contracts to which they did not voluntarily agree.³¹ In accord with these principles, an asset purchaser logically should not be treated as if they were at fault. Professor Matheson expresses this idea as follows:

²⁶ *Id.* § 10.254(a).

²⁷ *Id.* § 21.451(2).

²⁸ *Id.* § 21.455(a).

²⁹ See discussion *infra* Section II.B.

³⁰ See TEX. BUS. ORGS. CODE ANN. § 10.254(b).

³¹ John H. Matheson, *Successor Liability*, MINN. L. REV. 371, 381 (2011); George L. Lenard, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L.J. 677, 683–84 (1983).

Assume that you have a substantial physical asset, a car worth roughly \$10,000. You also have a thirty-six month unsecured installment loan obligation to a bank that you incurred to purchase the car. The loan has a \$9000 balance. I want to buy your car and I pay you \$9500 for it. I now own a car and I am \$9500 poorer, and you have \$9500 in cash to pay off a \$9000 loan. This appears to be a good deal for both of us. However, what if you fail to pay back the bank? Additionally, what if the week before you sold me the car, you hit and injured a pedestrian while driving the car? After I buy your car, the pedestrian sues for one million dollars in damages. Could the bank collect from me for the \$9000 loan obligation? Could the injured pedestrian hold me liable for one million dollars? Of course not.³²

The absurdity of Professor Matheson's example highlights the commonsense purpose behind non-liability for asset sales. Indeed, the free transferability of assets is a concept necessary to achieve the goals of corporate law.³³ Nevertheless, this general non-liability rule is not absolute.

Courts have crafted various exceptions to this non-liability rule that imputes "successor liability" on the purchaser entity.³⁴ Under this principle, a purchaser company that essentially continues the business of the seller company is deemed to be liable for the seller company's liabilities.³⁵ The Ninth Court of Appeals of Texas explains the nature of a "successor" business as "an entity that assumes the burdens and becomes invested with the rights of another entity by some form of legal succession."³⁶ The distinction between a successor and a third-party purchaser is paramount—a successor becomes much more than a mere purchaser because it is essentially

³² Matheson, *supra* note 31, at 372.

³³ *Id.* at 381–82; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 cmt. a (AM. L. INST. 1998) ("[T]he general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital."); Lenard, *supra* note 31, at 684 ("A final argument for the traditional rule is that successor nonliability promotes the free alienability and transferability of corporate assets.").

³⁴ See *supra* note 33; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 (AM. L. INST. 1998).

³⁵ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 (AM. L. INST. 1998).

³⁶ *Sammi Mach. Co. v. Mathews*, No. 09-19-00017-CV, 2019 Tex. App. LEXIS 5894, at *21 (Tex. App.—Beaumont July 11, 2019, pet. denied) (mem. op.) (citations omitted).

vested with the obligations of the predecessor corporation.³⁷ Thus, successor liability is appropriate in contexts where the predecessor transfers assets and then distributes its liquid assets to shareholders in an attempt to avoid liability.

Jurisdictions vary in their approaches to successor liability. The Restatement of Torts summarizes the four major exceptions to successor non-liability as follows: (1) an agreement for the successor to assume such liability, (2) fraudulent conveyance to escape liability for the debts or liabilities of the predecessor,³⁸ (3) a de facto consolidation or merger with the predecessor,³⁹ or (4) the successor becoming a continuation of the

³⁷See *id.*; but see Matheson, *supra* note 31, at 372 (Prof. Matheson’s hypothetical car purchaser never becomes a successor in interest—just a third-party purchaser. Note that the successor liability doctrine need not have a “human parallel;” business entities are legal fictions while human persons are not fictions).

³⁸Texas courts have generally held that TEX. BUS. ORGS. CODE ANN. § 10.254 does not create an exception for fraudulent transfers. See, e.g., *Barcelo v. Teva Pharms. U.S.A., Inc.*, No. H-20-00017, 2020 U.S. Dist. LEXIS 57887, at *9–10 (S.D. Tex. Apr. 2, 2020) (mem. op.); *Thatcher v. Dargel Boats, Inc.*, No. 1:19-cv-10, 2019 U.S. Dist. LEXIS 112686, at *14–15 (S.D. Tex. Apr. 29, 2019); *In re 1701 Commerce, LLC*, 511 B.R. 812, 824 (Bankr. N.D. Tex. 2014). Yet, the absence of a corporate statute under Texas law that imputes liability on a successor corporation does not deny a claimant the ability to equitably pursue a claim against the successor entity. See *Barcelo*, 2020 U.S. Dist. LEXIS 57887, at *9–10. The Texas Uniform Transfer Act—commonly known as TUFTA—provides creditors an independent remedy to recover damages for fraud regardless of successor liability. TEX. BUS. & COM. CODE ANN. § 24.005; see *Barcelo*, 2020 U.S. Dist. LEXIS 57887, at *10; *In re 1701 Commerce*, 511 B.R. at 824–25. The statute provides that:

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
 - (1) with actual intent to hinder, delay, or defraud any creditor of the debtor.

TEX. BUS. & COM. CODE ANN. § 24.005.

³⁹Scholars sometimes distinguish the de facto merger doctrine from other successor liability doctrines in that a de facto merger concerns the rights of the predecessor’s shareholders instead of its creditors. See generally ALAN R. PALMITER, *CORPORATIONS* 762 (9th ed. 2021). Notwithstanding this distinction, Texas courts apply the de facto merger doctrine to questions concerning the liability for contract and tort creditors. See, e.g., *W. Res. Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783, 786 (Tex. App.—Austin 1977, writ ref’d. n.r.e.) (applying the de facto merger doctrine to a creditor’s dispute in an asset sale); *Mudgett v. Paxson Mach. Co.*, 709 S.W.2d 755, 758 (Tex. App.—Corpus Christi 1986, writ. ref’d. n.r.e.) (holding that Tex. Bus. Corp. Act. art. 5.10 (repealed 2010) abrogates *Gerhardt* and expressly precludes the application of the de facto merger doctrine under Texas law).

predecessor.⁴⁰ Some jurisdictions recognize all of these exceptions; others recognize more than these exceptions; some jurisdictions only recognize one exception.⁴¹

B. Only Express Assumption Exists Under Texas Successor Liability Law

The Texas Legislature simplified the successor liability analysis by statute when it codified the express assumption successor liability exception as the only exception to non-liability.⁴² Originally enacted under the Texas Business Corporation Act and then recodified in the Texas Business Organizations Code, the statute states the following:

Except as otherwise expressly provided by another statute, a person acquiring property described by this section may not be held responsible or liable for a liability or obligation of the transferring domestic entity that is not expressly assumed by the person.⁴³

The Thirteenth Court of Appeals, in *Mudgett v. Paxson Machine Co.*, held that the statute's purpose was to preclude the application of the de facto merger in any sale, lease, exchange, or other disposition of all or substantially all the property and assets of a corporation.⁴⁴ Texas case law following the *Mudgett* case supports the conclusion that only express liability assumption imputes liability on the successor entity, to the exclusion of all other traditional successor liability exceptions.⁴⁵ This pronouncement reflects Texas business organization law's general policy preference that form prevails over substance in business transactions.⁴⁶ In practice, lawyers can structure asset sales with the confidence that the buyer will not be successively liable unless it expressly assumes the liability.

⁴⁰ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 (AM. L. INST. 1998).

⁴¹ See *Lockheed Martin Corp. v. Gordon*, 16 S.W.3d 127, 134–35 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); see also *CAVITCH*, *supra* note 5, § 161.03[1] n.2.

⁴² TEX. BUS. ORGS. CODE ANN. § 10.254.

⁴³ Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 28, 1997 Tex. Gen. Laws 1516, 1539 (expired Jan. 1, 2010); TEX. BUS. ORGS. CODE ANN. § 10.254(b).

⁴⁴ 709 S.W.2d at 758; see Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 28, 1997 Tex. Gen. Laws 1516, 1539 (expired Jan. 1, 2010).

⁴⁵ E.g., *Sammi Mach. Co. v. Mathews*, No. 09-19-00017-CV, 2019 Tex. App. LEXIS 5894, at *22–23 (Tex. App.—Beaumont July 11, 2019, pet. denied).

⁴⁶ See TEX. BUS. ORGS. CODE ANN. § 10.254.

Proceeding with the knowledge that Texas asset sales only impute liability on the buyer that the buyer expressly assumes, the question becomes how expressly must a buyer's assumption of the liability be to become successively liable? Black's Law Dictionary defines "express" as "made known distinctly and explicitly, and not left to inference."⁴⁷ Of course, this definition only raises the question of what distinct and explicit mean. But one thing is clear: A successor will not be liable under Texas law via implication, continuation, or other theories. Although the edges of what "express" means are blurry, transactional precedent and case law provide examples of sufficient language to assume liabilities.⁴⁸

Transactional precedent suggests that specific inclusion and exclusion of liabilities in the relevant purchase agreement is best practice. The following excerpt from a publicly filed asset purchase agreement provides an example of specific inclusion and exclusion:

Section 2.03 Assumed Liabilities. Subject to the terms and conditions set forth herein, Buyer shall assume and agree to pay, perform, discharge and be responsible for only the following Liabilities of a Seller (collectively, the "**Assumed Liabilities**"), and no other Liabilities

Section 2.04 Excluded Liabilities. Notwithstanding the provisions of Section 2.03 or any other provision in this Agreement to the contrary, Buyer shall not assume and shall not be responsible to pay, perform or discharge any Liabilities of any of the Sellers or any of their Affiliates of any kind or nature whatsoever other than the Assumed Liabilities (the "**Excluded Liabilities**"). Each of the Sellers shall, and shall cause each of its Affiliates to, pay and satisfy in due course all Excluded Liabilities which they are obligated to pay and satisfy. Without limiting the generality of the foregoing, the Excluded Liabilities shall include, but not be limited to, the following⁴⁹

Such language leaves no room for ambiguity—included and excluded liabilities are enumerated with clear and precise language. By doing so, the

⁴⁷ *Express*, BLACK'S LAW DICTIONARY (6th. ed. 1990).

⁴⁸ *Id.*

⁴⁹ *Asset Purchase Agreement Among Uncommon Giving Corporation, Uncommon Workplace LLC, and UGC Holdings, Inc.*, (2022), <https://www.sec.gov/Archives/edgar/data/1757190/000109690622000285/0001096906-22-000285-index.htm>.

parties to the sale can better predict the risks in the transaction and adequately determine the purchase price by accounting for potential liabilities. The buyer may also take additional steps to avoid unwanted liabilities by taking out certain insurance policies,⁵⁰ using a subsidiary entity to purchase the assets, and paying careful attention to characterize the transaction.⁵¹ Although these moves are considered best practice, they are not required. So, what then are the consequences to the asset purchaser if the controlling agreements use express but broad language when addressing liability assumption?

C. Does General Language in an Assumption Agreement Include Liability for the Predecessor's Own Negligence and Strict Liability?

Some courts have proffered the rule that general language in an assumption agreement stating that the purchaser assumes all liabilities includes the seller's negligence or strict liability because the agreement did not expressly exclude such liabilities. For example, in *Kessinger v. Grefco, Inc.*, the Seventh Circuit held that general language in an asset purchase agreement stating that the purchaser will assume all of the seller's liabilities is sufficient and unambiguous language that includes the seller's own negligence or strict liability.⁵² In holding such, the court expressly rejected the purchaser's argument that the contractual language was ambiguous because it omitted the phrases negligence or strict liability.⁵³ This holding stands for the proposition that assuming all liabilities means exactly what it says—the purchaser assumes *all* liabilities, whether known, contingent, or unknown.

The Third Circuit held that agreements that assume all liabilities except for one specific liability are sufficient to impute to the seller all other

⁵⁰See Memorandum from Jon T. Hirschhoff, John H. Lawrence Jr., and Daniel H. Peters to Judicial Interpretations Working Group of the M&A Committee (Jan. 12, 2019) (on file with the M&A Lawyers' Library).

⁵¹See, e.g., Samuel Hodson, *Successor Liability Risks in Asset Purchase Agreements*, TAFTLAW.COM (June 26, 2020), <https://www.taftlaw.com/news-events/law-bulletins/successor-liability-risks-in-asset-purchase-agreements> (discussing how acquisition agreements and other communications—like the successor's discussions with predecessor's vendors, employees, and customers—should properly characterize the transaction as an asset sale so that a court does not construe the transaction as a merger).

⁵²875 F.2d 153, 155 (7th Cir. 1989).

⁵³*Id.*

liabilities.⁵⁴ In *Philadelphia Electric Co. v. Hercules*, the Third Circuit held that a purchase agreement that stated the purchaser assumed “all the debts, obligations and liabilities” except for a specific warranty claim was sufficient to conclude that the purchaser assumed *all* of the seller’s liabilities.⁵⁵

Notably, courts have even extended this rule to the liability assumption of the seller’s own negligence or strict liability.⁵⁶ For example, in *Lee-Thomas, Inc. v. Hallmark Cards, Inc.*, the Eighth Circuit concluded that any liabilities arising solely out of the business conducted by a manufacturer was sufficient to conclude that the successor assumed all of the manufacturer’s prior liabilities arising from its business, including any strict liability related to the manufacture of defective products.⁵⁷

Despite some courts’ willingness to impute all liabilities to the asset purchaser, case law suggests that parties can contractually exclude negligence and strict liability to preclude successor liability under the express assumption exception.⁵⁸ In *Ramos v. Collins & Aikman Group*, the purchaser agreed to “assume and agree to perform and discharge . . . all other liabilities and obligations relat[ed] to the Acquisition Assets or arising under any contracts, agreements, commitments, understandings and leases constituting part of the Acquisition Assets.”⁵⁹ The parties to the lawsuit disputed the definition of Acquisition Assets; however, the district court construed the agreement as an unexhaustive list of transferred assets.⁶⁰ The *Ramos* court concluded that the purchasers assumed inchoate or contingent product liability claims because the agreement did not contain an express exception.⁶¹

Finally, courts are less willing to impute liability on the successor for Comprehensive Environmental Response, Compensation, and Liability Act

⁵⁴ *Phila. Elec. Co. v. Hercules*, 762 F.2d 303, 309 (3d Cir. 1985).

⁵⁵ *Id.*

⁵⁶ *Lee-Thomas, Inc. v. Hallmark Cards, Inc.*, 275 F.3d 702, 706 (8th Cir. 2002); *see also* *Bouton v. Litton Indus., Inc.*, 423 F.2d 643, 652 (3d Cir. 1970) (holding that an agreement clause providing for the purchaser’s assumption of liabilities “in respect of . . . all other contracts and commitments” to be so broad as to include product liability claims. The court also noted that the drafter’s broad language and lack of specifics supported the court’s broadly inclusive construction of the contract.); *see also* *Ramos v. Collins & Aikman Grp.*, 977 F. Supp. 537, 540 (D. Mass. 1997).

⁵⁷ 275 F.3d at 706.

⁵⁸ *Ramos*, 977 F. Supp. at 540.

⁵⁹ *Id.* at 539.

⁶⁰ *Id.* at 539–40.

⁶¹ *Id.* at 540.

(CERCLA) related liabilities—even when the parties use general language.⁶² In *Southland Corp. v. Ashland Oil Inc.*, the court, applying New Jersey law, held that parties can privately contract to transfer CERCLA liability amongst each other.⁶³ Nonetheless, it refused to conclude that the general language used in the agreement shifted responsibility to the purchaser so as to release the seller entity from CERCLA-related liabilities without specific language saying as much.⁶⁴

It is unclear whether a court applying Texas law could conclude that general language is sufficient to assume liability for the seller's own negligence or strict liability. As discussed *supra*, Texas law only recognizes the express assumption exception to the general rule of successor non-liability.⁶⁵ The outer bounds of “expressly” are unclear;⁶⁶ however, related Texas jurisprudence in the indemnification context may provide guidance for how to both expressly exclude and include the seller's own negligence or strict liability in an asset purchase agreement.⁶⁷

As a threshold matter, liability assumption and indemnification are similar concepts with distinct differences.⁶⁸ Liability assumption occurs when a party assumes the liability unto itself as though they were the transferor.⁶⁹ On the other hand, indemnification occurs when a party agrees to compensate another party for loss to prevent damage resulting from the loss.⁷⁰ These distinct theories are best illustrated by way of an example. Suppose, again, that a seller and purchaser are in negotiations surrounding their woodworking businesses. Liability assumption occurs if the purchaser

⁶²Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2018); *Southland Corp. v. Ashland Oil Inc.*, 696 F. Supp. 994, 1001 (D.N.J. 1988).

⁶³696 F. Supp. at 1000.

⁶⁴*Id.* at 1001.

⁶⁵TEX. BUS. ORGS. CODE ANN. § 10.254.

⁶⁶*Id.*

⁶⁷*See Dresser Indus. v. Page Petroleum*, 853 S.W.2d 505, 508 (Tex. 1993).

⁶⁸*Bouley v. Am. Cyanamid Co.*, Civ. A. No. 85-4368-Z, 1987 WL 18738, at *4 (D. Mass. 1987) (“[T]he doctrine of successor corporations is unrelated to theories of indemnification.”).

⁶⁹*United States v. Sunoco, Inc.*, 637 F. Supp. 2d 282, 288 (E.D. Pa. 2009); *Bouton v. Litton Indus., Inc.*, 423 F.2d 643, 651 (3d Cir. 1970); Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745, 746 (2003).

⁷⁰*Dresser*, 853 S.W.2d at 508 (“An indemnity agreement is a promise to safeguard or hold the indemnitee harmless against either existing and/or future loss liability.”); *Indemnity*, BOUVIER LAW DICTIONARY (2012) (“An indemnity agreement is a contract by which the indemnitor promises to hold the indemnitee harmless from loss or damage of some kind specified in the agreement, irrespective of the liability of any third person for that loss or damage.”).

promises to assume *as the purchaser's own obligation* any of the seller's contract or tort liabilities. Separately, indemnification occurs if the seller promises to indemnify the purchaser for any liabilities that arise from their transaction that the purchaser did not assume. Hypothetically, the purchaser could also agree to indemnify the seller for any liabilities arising out of the transaction that the purchaser did assume. The important distinction here is which parties are affected. In the indemnification context, the indemnitee (who is the one receiving the promise by the indemnitor to indemnify) remains liable to the claimant.⁷¹ The liability does not become the indemnitor's own liability; rather, the indemnitor simply promises to compensate the indemnitee for any losses related to the indemnity agreement so that the indemnitee does not suffer loss by the proceedings.⁷²

The Texas Supreme Court has set forth certain fair notice requirements as a prerequisite to an enforceable indemnity agreement to indemnify an indemnitee for the indemnitee's own negligence.⁷³ These requirements include the express negligence doctrine and the conspicuousness requirement.⁷⁴ Importantly, the court justifies these rules due to the extraordinary shifting of risk involved.⁷⁵ After all, the indemnitor is agreeing to pay for any loss the indemnitee causes such that the indemnitee will not have any damages resulting from a loss.⁷⁶ The court explains the two requirements as follows:

The express negligence doctrine states that a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract. The conspicuous requirement mandates "that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it."⁷⁷

⁷¹ *Dresser*, 853 S.W.2d at 508.

⁷² *Id.*

⁷³ *Id.*; see also 19 William V. Dorsaneo III, *Texas Litigation Guide* § 291.05[1][a][ii][B] (2021).

⁷⁴ *Dresser*, 853 S.W.2d at 508.

⁷⁵ *Id.*; *Fina, Inc. v. ARCO*, 200 F.3d 266, 269–70 (5th Cir. 2000) ("Texas [public policy] merely requires that, to merit enforcement as to such claims, an indemnity provision must expressly state that its coverage extends to the negligence of the indemnitee.").

⁷⁶ See *Dresser*, 853 S.W.2d at 508.

⁷⁷ *Id.* (alteration in original) (citations omitted) (quoting *Ling & Co. v. Trinity Sav. & Loan Ass'n*, 482 S.W.2d 841, 843 (Tex. 1972)).

As a general rule, a Texas court will deem an indemnity provision to be conspicuous if the language is in capital headings, contrasting in type or color, or in an extremely short document.⁷⁸

In line with the preceding discussion, the doctrine of fair notice should apply similarly in the successor liability context. Just like in the indemnity context, an asset purchaser, who is deemed successively liable, experiences an extreme shift of risk.⁷⁹ Returning to Professor Matheson's example of a used car purchaser discussed *supra*, it would be nonsensical to conclude that the used car purchaser should be liable for the car seller's own negligence.⁸⁰ Likewise, it would be nonsensical to conclude that a sloppy asset purchase agreement in the business context—even one in which the selling company subsequently winds up, liquidates, and distributes its assets—should result in the asset purchaser being liable for the seller's own negligence.

Another example of the inconsistency that will result from rejecting fair notice requirements in the successor liability context occurs when the parties agree to both express liability assumption and indemnity. Suppose two parties execute an asset purchase agreement that is a sale of all or substantially all assets. In the agreement, the purchaser agrees to “assume all liabilities of the seller” in the same size, font, and color as the rest of the agreement. In a separate section of the agreement, the seller agrees to “indemnify the purchaser for all liabilities,” using the same type of general language. Under Texas fair notice rules, the indemnity agreement would be deemed invalid as both inconspicuous and failing the express negligence doctrine.⁸¹ Yet, under the successor liability rules discussed *infra*, many courts would deem the purchaser in this context to be a successor in liability.⁸² It is inconsistent to enforce an express agreement to assume

⁷⁸ 19 William V. Dorsaneo III, *Texas Litigation Guide*, § 291.05[1][a][ii][C]; see also *Dresser*, 853 S.W.2d at 511; *Banta Oilfield Servs. v. Mewbourne Oil Co.*, 568 S.W.3d 692, 715 (Tex. App.—Texarkana 2018, pet. filed).

⁷⁹ *Cf. Dresser*, 853 S.W.2d at 508 (holding that fair notice requirements are justified in the indemnitee context because of the extreme degree of risk involved).

⁸⁰ See Matheson, *supra* note 31, at 372.

⁸¹ See *Dresser*, 853 S.W.2d at 508; but see *Lehman v. Har-Con Corp.*, 76 S.W.3d 555, 561 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that fair notice requirements do not apply to a release of past liability). It is unclear whether courts would apply this distinction between past and present in the acquisition context; however, courts dispute *Lehman's* holding. See, e.g., *Fina, Inc. v. ARCO*, 200 F.3d 266, 269–70 (5th Cir. 2000); *Pioneer Energy Servs. Corp. v. Burlington Ins. Co.*, No. 14-18-00879-CV, 2020 Tex. App. LEXIS 8528, at *18–19 (Tex. App.—Houston [14th Dist.] Oct. 29, 2020, pet. denied) (mem. op.) (Hassan, J., concurring).

⁸² See discussion *infra* Section II.D.

liabilities for a seller's own negligence while rejecting a seller's agreement to indemnify the purchaser that uses the same type of language in the same agreement. Such an outcome is contrary to Texas public policy as evidenced by multiple areas of relevant law, contrary to the Texas statute that expressly rejects all exceptions to successor non-liability other than express assumption, and inconsistent with the express negligence doctrine's requirement in the indemnity context that requires language to be specific to be sufficiently express.⁸³

Although Texas courts have not addressed this issue, best practice requires specific enumeration of the seller's own negligence and strict liability to satisfy Texas Business Organizations Code Section 10.254. Further, applying the fair notice requirements to the successor liability context promotes predictability and consistency between the distinct indemnification and successor liability concepts.

D. The Effect of Successor Liability on the Predecessor's Liability

Notwithstanding the foregoing discussion of the lengths required for parties to become successively liable, confusion surrounds the consequences to a predecessor's own liability after an effective agreement by a successor to assume the predecessor's liability. Can a company unilaterally release itself from liability by selling the assets of a division to another entity that assumes liability for any claims arising out of that division? The off-the-cuff answer seems obviously to be a resounding "no." After all, this looks like a fraudulent transfer.⁸⁴

Suppose, however, that the transaction went as follows: Target, LLC, a Texas limited liability company, designs, manufactures, and distributes various specialty wood products (e.g., handmade writing pens, jewelry boxes, and kitchen utensils). It decides to focus its resources on making only pens and jewelry boxes, so it makes a deal with Buyer, LLC, another Texas limited

⁸³ See, e.g., *Fina*, 200 F.3d at 269–70 (discussing the public policy of both Delaware and Texas that suggests fair notice rules ensure that an indemnitor is fully cognizant of the extraordinary risk that it is assuming). Such a policy concern also applies in the assumption context—a party ought to be fully cognizant of the risk it assumes in both an indemnification context and in the successor liability context.

⁸⁴ See *Barcelo v. Teva Pharms. U.S.A., Inc.*, No. H-20-00017, 2020 U.S. Dist. LEXIS 57887, at *10 (S.D. Tex. Apr. 2, 2020) (mem. op.); As established in *Barcelo*, TUFTA provides that "a transfer . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay, or defraud any creditor of the debtor." *Id.* Thus, a company could not intentionally defraud a creditor by transferring assets to another entity.

liability company, to sell the equipment and related assets it uses to make kitchen utensils. Bidder agrees in writing to purchase from Target a litany of equipment, and Buyer assumes “all liabilities arising out of the design, manufacture, or distribution of Target, LLC’s kitchen utensil division.”

Two months into Buyer’s new kitchen utensil business, hundreds of angry customers file a class action lawsuit against both Target and Buyer, claiming various product liabilities theories arising out of issues with the utensil product line. Neither Target nor Buyer had any knowledge of the issues until the plaintiffs filed the lawsuit. These facts lead to the following questions: (1) which companies are liable for the claims, and (2) did Buyer’s broad language in the asset purchase agreement suffice to assume all of the liabilities?

As a general rule, the successor’s assumption of liability should not extinguish the predecessor’s original liability. Texas courts have not addressed this issue; however, public policy considerations and other scholarship support this assertion.⁸⁵

Professor Green explains that an asset purchase “does not diminish or destroy the plaintiff’s remedies against the predecessor Rather, [it] provides the predecessor with a readily transferrable asset (cash or stock) for distribution to its stockholders and thereby facilitates its ability to wind up its affairs, dissolve, and liquidate.”⁸⁶ As such, the ability to pursue a claim against the predecessor company calls into question some justifications for successor liability—at least in instances where the predecessor company continues operation post-sale.

This point may be academic in nature because a sale of all or substantially all assets typically ushers in the end of the predecessor business.⁸⁷ Claimants and courts often conclude that the predecessor business effectively avoids liability unfairly by winding up its affairs, dissolving, and liquidating.⁸⁸ Further, facts that suggest the predecessor and successor entities are, in effect, the same (e.g., a continued product line in the successor business) may

⁸⁵The assertion that an asset seller cannot simply shed its own liability is consistent with public policy made evident in Texas merger law. Under this body of law, an entity that is liable at the time of a merger cannot shed a liability it has at the time of the merger even if the liability is allocated to another entity in the merger. TEX. BUS. ORGS. CODE ANN. § 10.008(a)(4); *see also* Michael D. Green, *Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants*, 72 CORNELL L. REV. 17, 32–33 (1986).

⁸⁶*See* Green, *supra* note 85.

⁸⁷*See infra* Part III.

⁸⁸*See* Green, *supra* note 85, at 31–33.

amplify this alleged injustice.⁸⁹ Yet, the asset sale did not cause the injustice. Rather, the alleged injustice—the inability to recover damages from a company because it no longer exists—is the company winding up its business and distributing its assets. The key inquiry becomes the cause of the harm. Concluding that the asset sale itself is the injustice mistakenly punishes the asset purchaser. This conclusion rests on the assumption that the asset purchaser has committed a wrong that justifies imposing liability by merely purchasing an asset.⁹⁰ Of course, activities that surround the asset purchase, like fraudulent activities, may make an asset purchase wrongful. But then again, the activity that makes the purchase wrongful is the fraud—not the mere sale.

Notwithstanding the foregoing, some jurisdictions have not concluded that a successor's liability assumption is secondary to the predecessor's original liability. For example, courts applying Pennsylvania law have adopted the rule that liability may be transferred from one contracting party to another so long as the assumption language is clear and specific.⁹¹ One Pennsylvania court went so far as to state that the transferor is no longer responsible for the transferred liability.⁹² These broad-stroke statements may be the consequence of sloppy wording, but the consequences of such a doctrine are striking. It would allow a company to unilaterally “transfer” its liabilities and assets to a different entity, avoid liabilities it would otherwise be responsible for, and continue operating without concern.⁹³ Aside from policy concerns, this rule abandons basic principles of law.

A fundamental concept of contract law is that one party may relieve itself from liability only by consent of the other contracting party.⁹⁴ In other words, an original obligor cannot unilaterally release itself from contractual liability to the original obligee by finding a third party to assume the obligor's

⁸⁹ See *id.* at 24–25.

⁹⁰ See *id.*

⁹¹ *AmerisourceBergen Drug Corp. v. Allscripts Healthcare, LLC*, No. 10-6087, 2011 U.S. Dist. LEXIS 83582, at *5 (E.D. Pa. 2011).

⁹² *Goodman v. Challenger Int'l, Ltd.*, No. 94-1262, 1995 U.S. Dist. LEXIS 9368, at *9–10 (E.D. Pa. 1995).

⁹³ *Id.*

⁹⁴ *Texas v. Am. Tobacco Co.*, 441 F. Supp. 3d 397, 432 (E.D. Tex. 2020) (“Texas law recognizes that an assignment does not relieve a party of its obligations under a contract. An assigning party ‘remains liable unless expressly or impliedly released by the other party to a contract.’” (citations omitted)).

contractual obligations.⁹⁵ This rule of contract law makes sense: no person should be bound by contracts to which they did not agree. As such, a company should not be able to relieve itself from contractual liability by “transferring” its liability to another company in an asset sale.⁹⁶ Importantly, the obligee may release the original obligor from liability and agree to continue the agreement with the party to whom the obligor is transferring assets; however, this occurrence relies on the original obligor obtaining the obligee’s consent.⁹⁷ Consent is not present in a unilateral transfer of assets and liabilities.

In sum, successor liability should not affect the predecessor’s liability absent an agreement by claimants to release the predecessor. Unless governed by law like that in Pennsylvania, a company cannot unilaterally transfer its liabilities in an asset sale and extinguish its own liability. Texas merger laws support this assertion by precluding an entity that continues to operate from divesting itself of a liability that it allocates to another entity in a plan of merger.⁹⁸

III. TERMINATING LIABILITY: CORPORATE SURVIVAL STATUTES AND OTHER LIMITATIONS

When a company reaches its end, it suffers a corporate death.⁹⁹ This means that it not only ceases to exist for general business purposes but also for liability purposes.¹⁰⁰ Corporate survival statutes counteract this issue by keeping a dissolved entity “alive” until it completes winding up and

⁹⁵ *Id.*

⁹⁶ The Restatement provides no indication that a successor’s voluntary assumption of liabilities releases the predecessor or otherwise affects the liability of the predecessor when discussing successor liability. *See generally* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 (AM. L. INST. 1998).

⁹⁷ *See Am. Tobacco Co.*, 441 F. Supp. 3d at 432.

⁹⁸ *See* TEX. BUS. ORGS. CODE ANN. § 10.008(4) (“[E]ach surviving or new domestic organization to which a liability or obligation is allocated under the plan of merger is the primary obligor for the liability or obligation, and . . . no other party to the merger, other than a surviving domestic entity . . . liable or otherwise obligated at the time of the merger . . . is liable for the debt or other obligation.”).

⁹⁹ *See* *Regal Ware, Inc. v. CFJ Mfg., L.P.*, No. 11-13-00044-CV, 2015 Tex. App. LEXIS 1918, at *7 (Tex. App.—Eastland Feb. 27, 2015, no pet.) (mem. op.) (“In a dissolution, the privileges, powers, rights, and duties of the corporation come to an end and suffer a corporate death.”).

¹⁰⁰ *See id.*

liquidation.¹⁰¹ The Texas survival statute provides that a terminated filing entity exists to defend and prosecute existing claims until the third anniversary of the effective date of its termination.¹⁰² These statutes are of particular import for asset purchasers in situations where the asset seller terminates its existence after the sale. Suppose that in the woodworking companies discussed in Section II.D *supra*, Target, LLC, terminated its existence and distributed all of its liquid assets to the members of the company. The survival statute in this hypothetical allows any claimant to prosecute existing and contingent claims against Target, LLC.¹⁰³

However, it is unclear whether a survival statute has any effect on a successor's assumed liability. In other words, can a successor entity assert extinguishment under the corporate survival statute as a defense to any claim against it by way of express assumption? Neither the statute nor any relevant case law supports such a conclusion. After all, such an assertion conflates two unrelated concepts that exist for different purposes. A corporate survival statute exists so that a terminated entity can wind up its business, satisfy any claims, and not defraud others by terminating too soon.¹⁰⁴ It does not exist to protect liability successors who expressly agree to assume a liability.

Concluding otherwise would also undermine the rights of the purchaser to enforce its assumed contracts—an outcome that would undermine the understood goals and outcomes of the acquisition. Extinguishment of claims under Section 11.359 of the Texas Business Organizations Code is a double-edged sword, for it applies to claims both by and against the terminated corporation.¹⁰⁵ Suppose a purchaser agrees to assume both a contract liability and a tort liability of the seller. Under a rule wherein a purchaser could assert Section 11.359 as a defense against the assumed tort liability, the purchaser would likewise be unable to assert a breach of contract claim against the original obligee to the assigned contract.¹⁰⁶ This extreme example highlights

¹⁰¹ 12 MARK KAUFMAN, BUSINESS ORGANIZATIONS WITH TAX PLANNING app. § 154A[2] (2022).

¹⁰² See TEX. BUS. ORGS. CODE ANN. § 11.356.

¹⁰³ See *id.*

¹⁰⁴ *Id.*

¹⁰⁵ TEX. BUS. ORGS. CODE ANN. § 11.359(a) (“[A]n existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.”).

¹⁰⁶ See *id.*

the weakness of arguing that Section 11.359 affects the rights or duties of the successor corporation in any way.¹⁰⁷

Further, successors have other avenues to protect themselves from liability and, thus, are not harmed by allowing a predecessor entity's liability to die when the entity suffers its corporate death. First, claims do not exist forever. Section 16 of the Texas Civil Practice & Remedies Code provides various statutes of limitation that establish hard time limits for a claimant to assert claims.¹⁰⁸ It also provides statutes of repose, which terminate certain defendants' liability after a certain period of time.¹⁰⁹ As such, a successor will not be liable forever for a claim it assumes. Second, purchasers contemplate and account for potential liabilities in the asset purchase agreement and when determining the deal's purchase price.¹¹⁰ These examples illustrate the reality that just outcomes still occur under the law generally.

CONCLUSION

Companies can change, grow, buy, and sell. One of the many methods companies transact is an asset sale, in which the buyer often agrees to purchase assets and agrees to assume some of the predecessor's liabilities. Under Texas law, this express assumption is the only recognized exception to the general rule that successor property owners are not liable for the predecessor's liabilities. In this context, public policy supports the adoption of fair notice requirements for the assumption of the predecessor's own negligence or strict liability. Importantly, a successor's agreement to assume a liability likely does not extinguish the predecessor's original liability under Texas law. Finally, a predecessor entity's termination and post-termination survival are irrelevant to a successor's assumed liability.

¹⁰⁷ See *id.*

¹⁰⁸ TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (establishing a two-year statute of limitations for injuries to property through trespass); *id.* § 16.004(a) (establishing a four-year statute of limitations for contract claims regarding property and debt).

¹⁰⁹ *Id.* §§ 16.008–.009 (establishing a ten-year statute of repose for contractors and other related professionals).

¹¹⁰ See Matheson, *supra* note 31, at 372 n.3 (suggesting that the hypothetical car purchaser would pay significantly less money for the car if he was to be liable for the seller's torts).