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Wisconsin Supreme Court Addresses What it Takes to Properly Plead a Claim of Successor Liability in Wisconsin and How, When Properly Pled, the Fraudulent Transaction Exception to Wisconsin's Successor Non-Liability Rule is Analyzed

In a split decision, the Wisconsin Supreme Court recently held in *Springer v. Nohl Electric Products Corp.*, No. 2015AP829 (May 15, 2018) that a plaintiff who pled only allegations of negligence and strict liability failed to state a claim of successor liability. Although it did not need to reach the issue given its decision, the supreme court held in the process that the Wisconsin Uniform Fraudulent Transfer Act ("WUFTA") does not govern the "fraudulent transaction" exception to the general rule of successor non-liability in Wisconsin. In other words, had the plaintiff properly pled a claim of successor liability based on the fraudulent transaction exception to successor non-liability, her claim would have been governed by the common law of fraudulent conveyances, not the WUFTA.

The facts of *Springer* are somewhat complicated. Plaintiff sued several companies alleging negligence and strict liability after her husband died of mesothelioma allegedly due to asbestos exposure. Two of the defendants were Fire Brick Engineers Company Inc. and Powers Holding Inc. That is where things get complicated.

Fire Brick Engineers "FBE1" was formed in the 1940s and had several successors up until 1983, when a group of investors formed a company also known as Fire Brick Engineers Company "FBE2", for the purpose of acquiring the assets of FBE1. As part of the asset purchase, FBE2 agreed to accept some of FBE1's liabilities but disclaimed the assumption of most of FBE1's liabilities, including tort liabilities. Years later, FBE2 merged with Curtis Industries, and the two companies became Powers Holdings, Inc., which currently does business under the name Fire Brick Engineers Company. FBE2 no longer exists as a separate entity, and importantly, neither FBE2 nor Powers ever manufactured, distributed, or dealt with asbestos-containing products.

Plaintiff did not name FBE1 as a defendant and did not allege that Powers Holdings Inc. was liable for Fire Brick's negligence as the successor to Fire Brick Engineers Company Inc. in her complaint. Based on this corporate history, Powers asserted that Plaintiff had sued the wrong company and moved for summary judgment. In opposition, Plaintiff argued for the first time that Powers was liable as a successor to FBE1 under the "mere continuation" or "de facto merger" exceptions to Wisconsin's general successor non-liability rule. After additional discovery, Powers amended its motion, and Plaintiff additionally argued that the "fraudulent transaction" exception should apply. But Plaintiff never amended her complaint to add allegations of successor liability against Powers.

The circuit court granted Powers' motion and dismissed FBE2 and Powers from the case. Plaintiff

appealed, and the court of appeals determined that the circuit court failed to properly analyze the fraudulent transaction exception under the WUFTA. It therefore reversed and remanded so that a jury could

determine whether Powers should be held responsible for the liabilities of FBE1 under the WUFTA.

The supreme court granted further review and reversed, reinstating the circuit court's dismissal of FBE2 and Powers. The supreme court disagreed that the WUFTA governs the fraudulent transaction exception to the rule of successor non-liability. But it went a step further. Rather than remanding for further proceedings, the supreme court held sua sponte that Plaintiff had not pled a claim of successor liability so as to warrant further proceedings as to FBE2 and Powers.

The supreme court began by addressing the fraudulent transaction exception, which was the sole issue raised on appeal. As background, a corporation which purchases the assets of another corporation generally does not succeed to the liabilities of the selling corporation. This rule protects an innocent purchaser from liabilities caused by a predecessor corporation. But there are four well-recognized exceptions to the general rule of successor non-liability, including a fraudulent transaction exception, which allows for successor liability when a transaction is entered into fraudulently to escape liability of their obligations. The issue before the supreme court in Springer was how the exception should be analyzed.

The supreme court held that the exception remains a common-law exception and that the WUFTA has not supplanted the common law when it comes to applying the fraudulent transaction exception to the rule of successor non-liability. Unlike the fraudulent transaction exception, which is meant to prevent successor companies from avoiding obligations incurred by their predecessors, the WUFTA is designed to assist creditors in collecting on claims that may be frustrated by recent asset transfers. The WUFTA thus fulfills a purpose quite separate from that of the fraudulent transaction exception.

But, again, the supreme court did not stop there. The supreme court went on to hold that Plaintiff's claims against FBE2 and Powers were properly dismissed because Plaintiff had failed to properly plead a claim of successor liability. The court reasoned that a claim of successor liability, as distinct from a claim based on the underlying tort, puts on the plaintiff the burden of establishing one of the exceptions to the general rule of successor non-liability in Wisconsin. In other words, the elements of a successor liability claim are distinct from the familiar elements of duty, breach, causation, and damage that a plaintiff must plead to state a negligence claim. Because Plaintiff pled the latter and not the former, the supreme court determined that her claims were properly dismissed.

Two justices dissented. They would have held that courts may consult the WUFTA when determining whether the fraudulent transaction exception applies. But they also took issue with the majority's sua sponte dismissal of Plaintiff's claims against FBE2 and Powers, expressing due process concerns.

If you have questions regarding the Wisconsin Supreme Court's decision or any other general liability issues, please contact Lance D. Meyer or one of our Firm's other liability attorneys at (952.831.6544).