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Recent Developments

***Nissen Corp. v. Miller*: MARYLAND REJECTS THE CONTINUITY OF ENTERPRISE THEORY IN DETERMINING PRODUCTS LIABILITY OF SUCCESSOR CORPORATIONS.**

In *Nissen Corp. v. Miller*, 594 A.2d 564 (Md. 1991), the Court of Appeals of Maryland adopted the general rule of non-liability of successor corporations, with its four traditional exceptions. In reaching its decision, the court considered and expressly rejected adding as a fifth exception, the "continuity of enterprise" theory. The court held that a corporation which acquires all or part of the assets of another corporation does not acquire the liabilities and debts of the predecessor, unless the transaction comes within one of the four well-recognized exceptions. With the court's decision, Maryland joined the majority of states adhering to the traditional rule of non-liability of successor corporations and its four exceptions.

In January of 1981, Frederick B. Brandt purchased a treadmill which was designed, manufactured and marketed by American Tredex Corporation ("Tredex"). In July of the same year, Tredex sold its assets, including inventory, patents and trademarks, for an undisclosed sum to the Nissen Corporation ("Nissen"). Nissen expressly agreed not to assume any liability for injuries arising from any products previously sold by Tredex. As contemplated in the asset purchase agreement, Tredex continued to oper-

ate under a new name, AT Corporation, for over five years until terminating operations in December of 1987.

In October of 1986, Brandt injured himself on the treadmill. One year and eleven months later, Brandt and his wife filed suit against Nissen claiming negligence, strict liability, breach of implied and express warranties, and loss of consortium. The trial court granted Nissen's motion for summary judgment. Brandt appealed and the court of special appeals reversed the trial court. The Court of Appeals of Maryland granted certiorari to consider whether Nissen, as a successor to American Tredex, was liable to Brandt for his injuries. *Nissen*, 594 A.2d at 565.

The court of appeals first considered whether to adopt the general rule of non-liability of successor corporations, with its four well-recognized exceptions, and if so, whether it should add a fifth exception for the "continuity of enterprise." *Id.* The general rule, as stated in the court's opinion, provided that a successor corporation did not acquire the liabilities and debts of the predecessor, unless (1) there existed an express or implied agreement to assume liabilities, (2) the corporations had in effect merged or consolidated as a result of the transaction, (3) the successor corporation was a "mere continuation" of the previous corporation, or (4) the transaction was fraudulent, lacked good faith or lacked adequate consideration. *Id.* at 565-66 (citing American Law of

Products Liability 3d § 7:1, at 10-12 (Travers, rev. ed. 1990)).

The court of appeals then reviewed Maryland case law and found that the general rule and the four exceptions had been accepted by the courts both in logic and in theory. *Nissen*, 594 A.2d at 566. In fact, the first, second and fourth exceptions had been expressly codified in the Maryland Annotated Code. *Id.* The third exception, known as the "mere continuation" or "continuity of entity" theory, although never formally adopted or codified, had been discussed and accepted in the dicta of the lower courts. *Id.* (citing *Baltimore Luggage v. Holtzman*, 562 A.2d 1286, 1293 (Md. Ct. Spec. App. 1989)).

The only issue before the court, therefore, was whether a fifth exception, the "continuity of enterprise" theory, should be adopted. *Nissen*, 594 A.2d at 566. The continuity of enterprise theory, adopted by a minority of states, focused on the continuation of a business operation or enterprise where there was no continuation of ownership. *Id.* at 567. The exception was based on the theory that, irrespective of fault, a party was accountable for the acts of another. *Id.* Distinguishing this more "liberal" exception from the "mere continuation" exception, the court stated that the "gravamen of the traditional exception is the continuation of the *corporate entity* rather than continuation of the business operation." *Id.* (emphasis in original).

Brandt argued that public policy demanded that major corporations should not be permitted "to purchase only the benefits in an asset purchase transaction, while denying its attendant liabilities to the consuming public." *Id.* Nissen countered that the asset purchase agreement was a valid and fully negotiated contract in which the burden of liability for injuries caused by defective products had been expressly allocated to the predecessor corporation. *Id.* Nissen urged the court to adopt the general rule with only the four traditional exceptions, because the rule balanced the "rights of creditors and successor corporations," as well as "maintain[ed] adequate protection for the interests of consumers . . . from fraudulent and unjust corporate transactions." *Id.* at 568.

Before reaching its decision, the court of appeals considered the doctrine of strict liability and its concept of fault. *Id.* The court acknowledged that public policy concerns for shifting the financial risk of loss to those better able to bear it was a policy consideration in adopting the doctrine into Maryland law. *Id.* at 569 (citing *Phipps v. General Motors Corp.*, 363 A.2d 955, 963 (Md. 1976)). The court, however, emphasized that the thrust of strict liability actions was that the sellers of products were at fault when they put a defective or unreasonably dangerous product on the market and a user was injured. *Id.* at 569. The court found that a corporate successor "[was] not a seller," and therefore, not involved in "bringing the product and the user together." *Id.* In addressing the present case, the court stated that it would be "unfair to require a party to bear the cost of unassumed and un contemplated products liability claims primarily because it [was] still in business and [was] perceived as a 'deep pocket.'" *Id.*

The court lastly reviewed the holdings from a minority of states who have adopted the continuity of enterprise theory. *Id.* at 571-73. In analyzing

these cases, the court failed to find a compelling reason to deviate from the traditional corporate successor liability rule. *Id.* at 573. The court concluded that the adoption of the continuity of enterprise theory would be inconsistent with Maryland law, because it would require the court to abandon its fundamental principle that there must be fault to impose tort liability. *Id.* at 574. Thus, the court of appeals expressly rejected the continuity of enterprise theory. Because Brandt's claim rested solely upon the court's adopting that theory as a fifth exception, the court affirmed the trial court's decision granting Nissen's motion for summary judgment. *Id.*

In *Nissen Corp. v. Miller*, the Court of Appeals of Maryland formally adopted the general rule of non-liability of successor corporations, together with its four traditional and well-recognized exceptions. The rule and the four exceptions were found to be sufficient to protect both the interests of the consumer and business in products liability cases. With the court's decision, Maryland joined the majority of states adhering to a traditional rule of non-liability of successor corporations with its four exceptions.

- Linda M. Googins

Optic Graphics, Inc. v. Agee: MARYLAND COURT DEFINES "TRADE SECRET" AND DETERMINES WHEN SANCTIONS ARE APPROPRIATE FOR BAD FAITH CLAIM UNDER MARYLAND UNIFORM TRADE SECRET ACT.

For the first time ever, an appellate court has examined the terms of the Maryland Uniform Trade Secret Act of 1989. In *Optic Graphics, Inc. v. Agee*, 591 A.2d 578 (Md. Ct. Spec. App. 1991), the Court of Special Appeals of Maryland held that Maryland's Uniform Trade Secret Act protects a broader scope of information as trade secrets than the Restatement of Torts. The court noted, however, that the

Restatement should still serve as a guide in determining what information qualifies as a trade secret. The court also upheld the part of Maryland's Uniform Trade Secret Act providing for sanctions against parties who initiate or maintain a claim in bad faith or without reasonable justification, but only if the claim was entirely without color and imputed egregious behavior.

Co-defendant Ross Agee worked for Optic Graphics ("Optic"), an established vinyl looseleaf binder manufacturer with a work force of nearly 375 people and annual revenues of \$27 million. Agee's responsibilities initially included estimating costs related to printing jobs for which Optic intended to bid. Agee's duties required that he have access to certain information which Optic considered confidential. As with all of its employees, the company maintained a personnel file on Agee which included a confidentiality agreement.

Agee and his co-defendant, Michael Zanella, made efforts over a number of years to join resources and buy a printing business. In June, 1989, without Optic's knowledge, Agee and Zanella took the opportunity to buy a looseleaf bindery business and formed what eventually became the third and final co-defendant in this case, A to Z Looseleaf, Inc. ("A to Z"). In order to obtain financing for the deal, Agee and Zanella prepared a formal business plan including, among other things, a marketing strategy. By October, 1989, they had secured a loan which would lead to the settlement of their new business venture in February, 1990.

Optic first found out about the forthcoming A to Z when Agee resigned from his position with Optic in December, 1989. At this time, A to Z had no contracts, assets, customers, or raw material orders. On January 24, 1990, Optic filed suit alleging that Agee had misappropriated Optic's trade secrets and breached a confidentiality agreement. Specifically, Optic