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USA – Ohio: Trends and Developments

John F Petrony
Petrony Law, LLC

USA – OHIO

Trends and Developments

Contributed by:
John F Petrony
Petrony Law, LLC

Petrony Law, LLC is located in Poland, Ohio, and is primarily known for handling business transactional and planning matters. The firm attempts to work in a collaborative fashion with all parties to help achieve its clients' goals. It assists clients in completing mergers and acquisitions, commercial transactions, business reorganisations, franchise and distribution matters, private placements of securities, employment issues, form preparation and general entity organisational planning. While Petrony Law services a wide variety of businesses, over the years it has developed a concentration in the following industries: (i) manufacturing; (ii) healthcare; (iii) retail; (iv) construction; (v) consulting (including software consultants); (vi) banking/lending; (vii) real estate development; (viii) transportation; and (ix) distribution. Some of the firm's recent work includes: (i) the sale of a successful veterinary practice and related hospital to a national operator of veterinary hospitals; and (ii) the completion of a private placement for a data mining business.

Author

John F Petrony has over three decades of experience and focuses his practice exclusively on providing business law and real estate law services. John's business law services, comprising the majority of his practice, include: (i) business sales and acquisitions; (ii) commercial transactions; (iii) securities/private placements; (iv) franchise and distribution matters; (v) business reorganisations; and (vi) LLC/entity organisations. He is the exclusive corporate law member in Ohio for IR Global, a multi-disciplinary professional services network focused on the middle market. He is also a member of the OSBA Corporation Law Committee and the M&A Committee of the ABA.

Petrony Law, LLC

22 East McKinley Way, Suite B
Poland, Ohio 44514
USA

Tel: +1 330 758 2445
Fax: +1 330 757 2411
Email: john@petronylaw.com
Web: www.petronylaw.com

PETRONY LAW, LLC

Successor Liability in Ohio Asset Acquisitions

Buyers looking to acquire a business in Ohio via an asset acquisition must be aware of the risks posed by successor liability principles. In selecting a topic to write for this Guide, the author was surprised to find that not much had been written in the last 20 or so years about the Ohio-specific aspects of this important topic. This article examines the common law rules governing successor liability in Ohio, together with certain state tax provisions that can be a trap for the unwary in this arena.

Common Law Generally

Ohio's common law rules concerning successor liability do not differ greatly from those of most other US states. Specifically, a purchaser of an entity's assets is not generally liable for its liabilities unless:

- there is an express or implied assumption of such liabilities;
- the sale of assets amounts to a de facto merger/consolidation;
- the purchaser is a "mere continuation" of the seller; or
- the transaction is a fraudulent attempt to escape liability.

Aluminum Line Products Co. v Brad Smith Roofing Co., Inc., 109 Ohio App. 3d 246 (1996) at Syllabus No 20.

Assumption of Liabilities

Not surprisingly, perhaps, there has not been a great deal of case law regarding the assumption of liability exception. In one decision, a court held that a buyer's purchase of a warranty list did not mean, by implication, that it assumed the related warranty liabilities absent evidence to the contrary. See Id. at Syllabus No 21. Conversely, another court found that a successor had impliedly assumed liability for its predecessor's debt to a Certified Public Accountant where it had paid 14 monthly instalments on this pre-existing obligation. *Mohammadpour v Thomas*, 2005-Ohio-3853.

De Facto Merger/Consolidation

A buyer that purchases substantially all of the assets of another entity may be held responsible for the liabilities of its predecessor where the transaction amounts to a de facto merger or consolidation. 12 Ohio Jur. 3d Business Relationships 797 (2025). A "de facto merger" is a transaction that results in a dissolution of the predecessor and is in the nature of a total absorption of the previous business into the successor. *Welco Industries, Inc. v Applied Cos.*, 67 Ohio St 3d 344 (1993) at Syllabus No 8. The hallmarks of a de factor merger include a continuation of the previous business activity and personnel, continuity of owners resulting from a sale of assets in exchange for equity, the immediate or rapid dissolution of the predecessor and assumption by the buyer of all liabilities and obligations ordinarily necessary to continue the predecessor's business operations. See Id. at Syllabus No 10. All of the hallmarks of a de facto merger/consolidation do not need to be present in order for it to occur and a successor to be liable for the obligations of its predecessor. 12 Ohio Jur. 3d Business Relationships 797 (2025).

Courts have generally narrowly construed the de facto merger/consolidation exception in Ohio. In a seminal decision, the Ohio Supreme Court found that an asset purchase agreement was not a "de facto merger" where the transaction involved a sale of assets for cash and the selling corporation did not dissolve. *Welco* at Syllabus No 7. Likewise, the exception was found not applicable where the purchase at issue occurred at a public auction and did not involve any transfer of stock for assets, none of the seller's owners became owners of the purchaser, the seller dissolved before the purchase and did not continue as a going concern or merge into purchaser and there was no evidence that the purchaser assumed the seller's liabilities. *Aluminum Line Products* at Syllabus No 22. In one case, however, the exception was held to apply where the successor acquired the predecessor's assets for no apparent consideration, the principal owner remained the same for both entities, and the predecessor's contracts and equipment were transferred to the successor. *Mohammadpour v Thomas*, 2005-Ohio-3853.

Mere Continuation

Of the common law successor liability exceptions, it seems that the mere continuation theory has generated the most case law. In Ohio, the "mere continuation" exception requires a continuation of the predecessor

as an entity and not merely of its business operations. 12 Ohio Jur. 3d Business Relationships 798 (2025). It has been said that the successor entity must be a reincarnation of its predecessor (ie, the old entity in a new hat) as where one entity sells its assets to another with the same people owning both. Id. Thus, a key element in establishing continuation is a common identity of stockholders, directors and stock. Id. Inadequacy of consideration is another indication that the buyer is a mere continuation. Id.;*Welco* at Syllabus No 13.

In an important decision, the Ohio Supreme Court in *Welco* rejected an expansion of the mere continuation theory which would have allowed a court to impose successor liability where there are significant shared features between the predecessor and the successor. The court noted that the concerns for predictability and free transferability in corporate acquisitions that had previously led it to decline to expand the test for successor liability in tort were even more compelling where the claim was a contractual one. *Welco* at 348. Since *Welco*, Ohio courts have been reluctant to impose successor liability where an asset-for-cash transaction takes place among strangers at arm's length and there is no evidence that the transaction took place to escape liabilities. *Per-Co, Ltd. v Great Lake Factors, Inc.*, 509 F. Supp 642 (2007) at Syllabus No 7.

In *Welco*, an asset purchaser was found not liable for its predecessor's breach of contract claim where the buying and selling corporations were strangers and the owners of the purchasing corporation were not owners of the selling corporation. *Welco* at Syllabus No 11. It has also been held, on multiple occasions, that merely sharing the same physical plant and employees and continuing to market or manufacture the same products of the seller alone are not sufficient to establish a purchaser's liability under the mere continuation theory. *Aluminum Line Products* at Syllabus No 24;*Kuempel Service, Inc. v Zofko*, 109 Ohio App. 3d 591 (1996) at Syllabus No 8.

In *Aluminum Line Products*, it was held that the purchaser was not liable as a mere continuation of the seller, although it hired some of the seller's employees and one of the seller's former owners became an officer of the purchaser where the corporations were strangers prior to the sale and the state authorised the purchase of assets both at a public auction and afterwards. *Aluminum Line Products* at Syllabus No 23. Similarly, a new corporation that was formed by one of the principals of the predecessor was found not liable for the seller's judgment debt although it operated out of the same physical plant, had the same telephone number and some of the same shareholders, directors, and officers as the new corporation since it had its own ownership and assets, targeted a different market and was considered to exist on its own merits. *Kuempel Service, Inc*. at Syllabus No 9.

There have been some decisions, however, that imposed successor liability under the mere continuation exception. In one case, a factoring business was found liable for the debts of its predecessor where the acquiror was owned, managed and controlled by the same individuals who owned, managed and controlled the predecessor, the predecessor received inadequate consideration for its assets, and the same individuals who profited from the operation of the predecessor continued to share in the profits of the buyer. *Per-Co* at Syllabus No 8. In another case, an LLC was held to be a mere continuation of its predecessor, where the seller's sole shareholder was also the sole member of the LLC and managed the day-to-day operations for both entities, the LLC did not attempt to offer adequate consideration for the assets it acquired, and the LLC retained nearly everything from the seller apart from the corporate form. *WRK Rarities, LLC v United States*, 165 F. Supp 3d 631 (2016) at Syllabus No 9.

Fraudulent Attempt to Escape Liability

The fourth and final common law exception to the rule that a buyer in an asset sale does not generally inherit the seller's liabilities is fraud. Specifically, a fraudulent attempt to escape liability. It has been said that this exception essentially amounts to an application of the general rule against fraudulent conveyances and was created to prevent entities from changing their corporate form to escape liability. *Per-Co* at Footnote No 15. For the purposes of determining whether the fraud exception applies, indicia of fraud include inadequate consideration and a lack of good faith. *Welco* at Syllabus No 6.

As with the assumption of liability exception, there has been a limited amount of helpful case law interpreting this exception. There are a few decisions, however, which shed some light on its parameters. First, a purchaser was found not liable for the wrongful conduct of the seller on the ground that the sale was entered into fraudulently where the purchase was at a public auction for purposes of repaying the seller's debt to the state and the purchase of assets was authorised by the state. *Aluminum Line Products* at Syllabus No 25. Another court, however, did hold a factoring business liable under the exception where it found the transfer of assets was for inadequate consideration and the owners of the predecessor formed the acquiror to benefit themselves and protect the predecessor's stock from attachment by creditors. *Per-Co* at Syllabus No 9.

Ohio Income Taxes

Next, the discussion turns from the Ohio common law to an area that can be a real trap for the unwary. Specifically, as in most other states, there is potential for an asset buyer in Ohio to be held liable for the predecessor's state tax obligations. Strangely, in the author's experience, these requirements are often either overlooked by buyer's counsel or consciously regarded.

First, Ohio provides by statute that income tax required to be withheld and paid to the state prior to the time of sale becomes due and payable immediately and the employer must make a final return within 15 days after the date of sale. Ohio Revised Code Section 5747.07 (H) (Baldwin 2025). Most importantly, the successor to the seller's business must withhold enough of the purchase money to cover the amount of taxes, interest and penalties due until the former owner produces a receipt from the Ohio Tax Commissioner showing that the amount has been paid or a certificate indicating that no such taxes are due. Id. If the purchaser fails to withhold the requisite amount, the purchaser is personally liable for the payment of taxes, interest and penalties accrued and unpaid during the operation of the business by the former owner.

Ohio Excise Taxes

As with income taxes, if an entity liable for excise taxes sells its business, those taxes, along with interest and penalties owed prior to that time, become immediately due and payable. Ohio Revised Code Section 5739.14 (Baldwin 2025). The business is then required to make a final return concerning such taxes within 15 days after the date of selling the business. Id.

Again, as with Ohio income taxes, a sufficient amount of the purchase price must be withheld by the buyer in order to cover the amount of such taxes; which funds may be turned over to the former owner when it produces a receipt from the tax commissioner showing that the taxes have been paid or when the seller produces a certificate indicating that no taxes are due. Id. Should the purchaser fail to withhold a sufficient amount, then it becomes liable for the payment of the taxes, interest and penalties accrued and unpaid during the operation of the business by the former owner. Id.

Conclusion

Buyers looking to acquire substantially all of the assets of an Ohio-based business must be keenly aware of the governing successor liability rules that could expose them to the seller's pre-existing obligations post-closing. The common law requirements are particularly important when the seller is financially troubled and looking to either sell its assets to a third party or reorganise internally. The common law provides that a purchaser of an entity's assets is generally not liable for its pre-existing obligations, unless:

- there is an express or implied assumption of such liabilities;
- the sale of assets amounts to a de facto merger/consolidation;
- the purchaser is a "mere continuation" of the seller; or
- the transaction is a fraudulent attempt to escape liability.

Different concerns are presented by each of these exceptions. First, it seems that the assumption of liabilities exception can best be dealt with by careful drafting in the underlying deal documents, combined with a disciplined approach by the buyer in respecting the contractual allocation of liabilities in practice. The fraud exception risk may be minimised by ensuring that adequate consideration is paid in the acquisition

and other hallmarks of fraud laid out in, for example, fraudulent conveyance laws, are avoided.

It appears that the best way to avoid the de facto merger and mere continuation exceptions is through proper and careful planning and deal structuring by qualified counsel. These exceptions require extra attention in situations involving any of the following:

- a financially troubled seller;
- where there are questions about the adequacy of consideration;
- there is some commonality of ownership between the selling and buying entities; or
- where the seller will be dissolving fairly rapidly post-closing.

Lastly, buyers should familiarise themselves with the rules surrounding potential successor liability for the seller's Ohio income and excise taxes. Proper diligence should then be completed as to the scope of the seller's accrued and unpaid taxes. Once this amount is properly quantified, the buyer should ensure that its holdback or escrow is of an adequate amount and duration to account for this exposure.

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