ARTICLE

The Current State of Successor Liability in Michigan and Why the Michigan Supreme Court’s Clarification is Necessary

ALEX M. PETRIK

INTRODUCTION

Imagine you are a successful business owner and, in order to expand your business, you want to acquire the assets of another company—machinery, inventory, etc. You negotiate and execute an asset purchase agreement in which you expressly state that you are not assuming any liabilities from the company whose assets you are purchasing. Are you fully protected from the selling company’s liabilities? In Michigan, possibly not. Michigan’s rules regarding successor liability are, at best, in a state of confusion as exemplified by the Court of Appeals’ recent decision in Taizhou Golden Sun Arts & Crafts, Co., Ltd., v. Colorbök, LLC.¹

Michigan has among the most fully developed rules of law regarding successor liability, but its complex structure has not been well understood or correctly applied in some lower court decisions. This Article first provides a general overview of Michigan law governing successor liability as a framework for a critique of court decisions that have misapplied the law. The Michigan Supreme Court should clarify the rules regarding successor liability, and in doing so, should overrule RDM Holdings, LTD, v Continental Plastics Co.,² and Lakeview Commons v. Empower Yourself.³

---

I. BACKGROUND OF THE SUCCESSOR LIABILITY LAW IN MICHIGAN AND GENERAL PRINCIPLES OF SUCCESSOR LIABILITY

Successor liability is an exception to the general rule that, when one corporate entity sells assets to another entity, the assets are transferred free and clear of all but valid liens and security interests: “When successor liability is imposed, a creditor or plaintiff with a claim against the seller may assert that claim against and collect payment from the purchaser.”

Successor liability is considered an “equitable” doctrine and, traditionally, is to be “invoked when strict application of corporate law would offend the conscience of the court.” Successor liability law was developed by judges in response to the dramatic increase in power of corporate law in the last half of the nineteenth century and early part of the twentieth century. The doctrine’s original purpose of successor liability was as a “safety valve” for protection from liability afforded to corporations.

Successor liability has developed in many directions since then, but Michigan courts follow the traditional rule laid out in Chase v. Michigan Telephone Company. Under this framework, a court examined the nature of the transaction between predecessor and successor corporations to determine whether the predecessor’s liability should bind the successor corporation. If an acquisition is accomplished by way of a merger—where stock is exchanged as consideration—the successor corporation generally assumes all the predecessor’s liabilities. In contrast, if there is an exchange of cash for a predecessor corporation’s assets, “the successor is not liable for its predecessor’s liabilities unless one of five narrow exceptions applies.”

The Michigan Supreme Court identified the five exceptions as:

1. where there is an express or implied assumption of liability;
2. where the transaction amounts to a consolidation or merger;
3. where the transaction was fraudulent;
4. where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or

7. Id. at 13.
8. See id. at 11.
9. 80 N.W. 717, 718 (1899).
10. Kuney, supra note 4, at 11.
12. Kuney, supra note 4, at 27.
13. Foster, 597 N.W.2d at 509.
(5) where the transferee corporation was a mere continuation or reincarnation of the old corporation.\textsuperscript{14}

These five exceptions are narrowly construed in their application, but they apply generally.\textsuperscript{15} This traditional framework acknowledges “the general policy of the corporate contractual world that liabilities adhere to and follow the corporate entity,”\textsuperscript{16} while also serving to “protect creditors and shareholders, to facilitate determination of tax responsibilities, and to promote free alienability of business assets.”\textsuperscript{17} Of these five exceptions, only two have become especially problematic in Michigan: the de facto merger exception and the mere continuation or reincarnation of the old corporation exception.

A. De Facto Merger

A successor corporation will be responsible for the predecessor’s liabilities whenever the transaction amounts, in fact, to a consolidation or a merger. Courts will find a de facto merger when each of the following requirements are met:

(1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.

(2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.

(3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.\textsuperscript{18}

Because a cash transaction breaks the chain of continuity of shareholders, a de facto merger will not be found when a corporation

\textsuperscript{14} Id. at 509–10.
\textsuperscript{16} Foster, 597 N.W.2d at 510.
\textsuperscript{17} Id.
purchases another corporation with cash as the consideration rather than stock.\textsuperscript{19}

\subsection*{B. Mere Continuation}

The second exception deserving attention is the mere continuation or reincarnation of the old corporation exception. The Michigan Supreme Court has recognized the mere continuation exception since the turn of the twentieth century.\textsuperscript{20} When determining whether a successor corporation is a mere continuation of its predecessor, Michigan courts examine the totality of the circumstances and engage in a multi-factor analysis.\textsuperscript{21} The court will examine (1) whether there is common ownership between the successor and predecessor corporation,\textsuperscript{22} (2) whether substantially all of the predecessor corporation’s assets were transferred to the successor corporation,\textsuperscript{23} (3) whether the successor corporation’s main corporate purpose was the same as the predecessor corporation,\textsuperscript{24} (4) whether the successor corporation retains the predecessor corporation’s officers and employees,\textsuperscript{25} (5) whether the successor corporation occupies the old corporation’s place of business,\textsuperscript{26} and (6) whether the new corporation selectively repaid the old corporation’s debts.\textsuperscript{27} The “only indispensable prerequisites” to application of the exception appear to be common ownership and a transfer of substantially all assets.\textsuperscript{28}

\subsection*{C. Continuity of the Enterprise Doctrine and Products Liability}

As developed in Michigan, the five traditional exceptions to the general rule of nonliability apply in cases of voluntary contractual debt owed by the predecessor corporation. In 1976, the Michigan Supreme

\begin{itemize}
  \item \textsuperscript{19} Craig, 684 NW2d at 315 (stating “This transaction is not a de facto merger simply because . . . the purchasing corporation, paid in cash rather than stock.”).
  \item \textsuperscript{23} \textit{In re Clements}, 521 B.R. at 258–59. See, \textit{e.g.}, Pearce, 217 N.W. at 762; Shue, at 702; Gougeon Bros., at *2.
  \item \textsuperscript{24} \textit{In re Clements}, 521 B.R. at 258; Pearce, 217 N.W. 761 at 762; see also Shue, 511 N.W.2d at 702.
  \item \textsuperscript{25} See Shue, 511 N.W.2d at 702.
  \item \textsuperscript{26} See Gougeon Bros., 2000 WL 33534582 at *2.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} \textit{In re Clements}, 521 B.R. at 258. See, \textit{e.g.}, Pearce, 217 N.W. at 762; Shue, 511 N.W.2d at 702; Gougeon Bros., 2000 WL 33534582 at *2.
\end{itemize}
Court determined a different approach was necessary in products liability cases. In *Turner v. Bituminous Casualty Co.*, the Michigan Supreme Court created a new rule for successor liability in cases where a plaintiff was injured by a defective product manufactured by a non-existent corporation. In reviewing the equitable background of successor liability law, the Court determined that it would be “unfair” and “unbelievable” for a products liability plaintiff to be unable to recover from a successor corporation merely because the successor corporation engaged in a cash-for-assets transaction while the same plaintiff would be able to recover from the same successor corporation if the transaction amounted to a merger. The Court concluded that in a products liability case there was no basis for reaching a different result based solely upon how the transaction was structured. The Court therefore created a new exception based on a modification of the de facto merger doctrine to apply to successor corporations in a products liability context. The new exception provided relief to injured plaintiffs who otherwise would have had no recourse against a successor corporation following a cash transaction.

In *Turner*, the T.W. & C.B. Sheridan Company (hereinafter referred to as “Old Sheridan”) was formed in 1903 under the laws of New York. In 1964, Old Sheridan and Harris Intertype Corporation executed an agreement in which Harris would purchase Old Sheridan. The purchase and sale agreement also specified that Harris would assume certain liabilities of Old Sheridan. On April 27, 1964, the incorporators of Harris filed articles of incorporation for a new company called T.W. & C.B. Sheridan Company (hereinafter referred to as “New Sheridan”). On May 5, 1964, Harris paid $6.38 million to Old Sheridan, and Old Sheridan subsequently distributed those funds to its shareholders and dissolved. New Sheridan was used to transfer the assets from Old Sheridan to Harris, and New Sheridan remained as a subsidiary of Harris.

In 1968, Seaman Manufacturing Corporation purchased a power press that was manufactured by Old Sheridan. Then, in 1969, the plaintiff, Charles Turner, injured his hands while working with a power press.

---

29. 244 N.W. 2d 873 (Mich. 1976).
30. *Id.* at 878–79.
31. *Id.* at 880.
32. *Id.*
33. See *id*.
34. *Id.* at 875.
35. *Turner*, 244 N.W. at 875.
36. *Id*.
37. *Id*.
38. *Id.* at 875–76.
39. *Id.* at 876.
40. *Id.* at 875.
manufactured by Old Sheridan, which resulted in the amputation of both of his hands.\(^{41}\) Despite receiving workers’ compensation benefits, Turner filed a third-party claim against the manufacturer of the power press.\(^{42}\)

The trial court determined that Harris and New Sheridan had no relationship to the power press manufactured by Old Sheridan and that Old Sheridan had gone through the process of dissolution and liquidation.\(^{43}\) In particular, the trial court "held that Harris and New Sheridan 'are not responsible for a product to which they are corporate strangers in the manufacture, sale and distribution thereof, and for which they neither in fact nor law assumed legal liability.'"\(^{44}\) As a result, the trial court granted Harris and New Sheridan’s motion for summary disposition.\(^{45}\) The Michigan Court of Appeals denied leave to appeal, but the Michigan Supreme Court granted Turner’s application for leave to address the liability of the successor corporation.\(^{46}\)

Turner’s argument to the Michigan Supreme Court was that because the defendants Harris-Intertype Corporation and T.W. & C.B. Sheridan Company held themselves out to the public as the manufacturer of the press in question, it would be “totally unfair to permit an organization to assume the name of another, to use that name, to manufacture identical products and then when the crunch comes, to deny that it is one and the same as its predecessor.”\(^{47}\) Harris-Intertype Corporation and T.W. & C.B. Sheridan Company argued that because the successor corporation purchased assets from the predecessor corporation it could not be held liable for the liabilities of the predecessor corporation.\(^{48}\)

The Michigan Supreme Court began its analysis with the recognition that Turner was “a products liability case first and foremost”\(^{49}\) and that “[p]roducts liability law is a fast-developing area” in which “[a]ll the rules [regarding products liability] have not yet been formulated.”\(^{50}\) The Court noted that the general rules of successor liability law were fashioned primarily to deal with problems arising out of the creditor protection arena.\(^{51}\) The Court further explained that the general rule of non-liability was inadequate to meet the substantially different problems presented by

---

41. Turner, 244 N.W. at 875.
42. Id.
43. Id. at 876.
44. Id.
45. Id.
46. Id.
47. Turner, 244 N.W. at 876.
48. Id. at 877.
49. Id.
50. Id.
51. Id. at 878.
products liability cases. The main problem in the product liability arena that was not addressed by the general rules of nonliability was that an injured plaintiff only had recourse against the successor corporation, so to preclude a plaintiff from recovery from the successor corporation based on the distinction of the corporate transfer would be unfair. It makes no difference to an injured plaintiff whether the successor corporation accomplished its acquisition by merger or by transaction involving the sale of assets for cash. At the end of the day, the injured victim is still injured and seeking recovery for his injury. Furthermore, the Court noted that the successor corporation was in a better position to bear the costs of such an injury than was the victim. Unlike an injured victim, judgment creditors that enter into commercial contracts are not governed by the same one-sided risk allocation because both sides to an agreement are expected to negotiate the allocation of risk and receive the benefit of the bargain. A victim injured from a defective product, on the other hand, is unable to negotiate the risk allocation. With these policy considerations in mind, the Supreme Court decided to “develop a reasonable rule for products liability cases which arise subsequent to corporation transfers.”

In order to create this “reasonable rule,” the Michigan Supreme Court modified one of the existing limited exceptions, the de facto merger exception. After reviewing the elements of a de facto merger, the Court reasoned “it would seem illogical that a merger or de facto merger be encumbered by liability for a products liability suit while a cash acquisition of corporate assets is free from such liability.” The Court further stated that “if there are no real business reasons for choosing a cash acquisition of corporate assets and the only real reason is to avoid products liability suits, then it would seem that the machinery of corporate law is unreasonably geared up to accomplish a purpose not really intended for it or in the public interest.” What would be in the public interest, according to the Court, would be to allow an injured plaintiff to recover in the products liability context regardless of what type of corporate transfer was utilized to merge the successor and predecessor corporation. Additionally, the Court explained that the hazards of predicting and insuring for risk from defective products is “better borne by the manufacturer than by the consumer.”

52. Id.
53. Turner, 244 N.W.2d at 878.
54. Id. at 881.
55. C.T. Charlton Assocs., Inc. v. Thule, Inc., 541 F. App’x 549, 553 (6th Cir. 2013).
56. Turner, 244 N.W.2d at 878.
57. Id. at 880.
58. Id.
59. Id.
60. Id. at 881 (quoting Cyr v. B. Offen Co., 501 F.2d 1145, 1154 (1st Cir. 1974)).
As a result of these underlying policy reasons, the Supreme Court declared that it would remove the second requirement in the de facto merger exception, and stated that the first, third, and fourth requirements for a de facto merger “shall be guidelines to establish whether there is continuity between the transferee and the transferor corporations.” Thus, if the three guidelines are satisfied, then the transferee corporation must accept the liability for defective products along with the benefits of acquiring the corporation that made those defective products. These “guidelines” set forth in Turner are now known as the “continuity of the enterprise doctrine.” To prove the continuity of the enterprise in the products liability context a plaintiff must establish the following:

1. There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.
2. The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
3. The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Close examination of Turner clarifies that the new exception, based as it is on the policy concerns regarding plaintiffs injured by defective products, should be applied only in the context of products liability. In addition, the continuity of the enterprise is not the same as the mere continuation doctrine nor did it develop out of the mere continuation doctrine. Instead, the continuity of the enterprise doctrine modified the well-established de facto merger exception and “is best read as a relaxation of the de-facto merger doctrine in products-liability cases, not a redefinition of the mere continuity exception.” Third, nothing in Turner limits the five well-established traditional exceptions. In fact, Turner indicates that the well-established exceptions, which arose to ensure equitable treatment of judgment creditors, are generally applicable for use by future plaintiffs.

The Michigan Supreme Court further clarified the Turner holding twenty years later in Starks v Michigan Wielding Specialists, Inc. In Starks, plaintiff Charles Starks, Jr. attempted to collect a judgment from the

61. Id. at 883.
62. Id.
63. Foster, 597 N.W.2d at 510–11.
64. Turner, 244 N.W.2d at 879 (quoting McKee v. Harris-Seybold Co., Div. of Harris-Intertype Corp., 264 A.2d 98, 103–05 (1970), aff’d 288 A.2d 585 (1972); see also Foster, 597 N.W.2d at 510.
65. C.T. Charlton, 541 F. App’x at 551–52.
66. Id. at 552.
defendant, Michigan Wielding Specialists, Inc. In lieu of granting leave to appeal in Starks, the Michigan Supreme Court entered a peremptory order in a non-traditional fashion, affirming the decision of the Michigan Court of Appeals and reiterating the concepts from Turner. The Michigan Supreme Court merely stated:

Where, as here, a successor corporation acquires the assets of a predecessor corporation and does not explicitly assume the liabilities of the predecessor, the traditional rule of corporate successor non-liability applies. See, Foster v. Cone–Blanchard Machine Co., 460 Mich. 696, 702, 597 N.W.2d 506 (1999). Because an exception designed to protect injured victims of defective products rests upon policy reasons not applicable to a judgment creditor, the Court declines to expand the exception to the traditional rule set forth in Turner v. Bituminous Casualty Co., 397 Mich. 406, 244 N.W.2d 873 (1976), to cases in which the plaintiff is a judgment creditor.

Simply put, the Starks Court recognized that the continuity of the enterprise doctrine was created to assist plaintiffs injured by defective products, not to help judgment creditors. As recognized in Starks, the continuity of the enterprise rule was developed to prevent defendants from escaping liability for defective products based on the type of corporate transaction that was used to acquire a successor corporation. The goal of placing the costs of defective products on the party best able to bear those costs is not applicable to a judgment creditor because both parties to a commercial contract are equally able (and expected) to negotiate the risk of

68. Id.
69. See, Lawrence Opalewski, Jr., Comment, Why the Michigan Supreme Court in Saurman Was Wrong to Grant MERS the Authority to Foreclose By Advertisement in Michigan, 90 U. DET. L. REV. 273 (discussing the non traditional manner of issuing a peremptory order by stating:

Traditionally, the Court will either deny or grant leave to appeal. When leave is granted to appeal, the court allows the traditional process of oral arguments and submission of briefs to take place before it issues a final ruling and decision on the case. However, the Michigan Supreme Court has created a rule, Mich. Ct. R. 7.302(H)(1) which allows it to issue a peremptory order instead of granting or denying the application for leave to appeal. When issuing a peremptory order, the court is not required to listen to oral arguments or to read briefs on the issue. Additionally, Michigan is the only state that has this rule that allows its Supreme Court to decide the outcome of a case and issue by simply issuing an order of reversal without so much as listening to oral arguments. While the court did hear oral arguments about the application for leave to appeal, the court never allowed the full review process to take place. Id. at 277).
71. Id.
loss.\textsuperscript{72} The Court, therefore, correctly decided to limit the continuity of the enterprise to those cases involving products liability.

II. A WRONG TURN: MISAPPLICATION OF THE RULES

Despite the Michigan Supreme Court’s careful articulation of the underlying policy rationales that justify a distinction between the successor liability rules applicable in products liability cases from those to be applied in other cases, the Michigan Court of Appeals has, on several occasions, misapplied the mere continuation doctrine in ways that have made a mess of successor liability law in Michigan.\textsuperscript{73}

In \textit{RDM Holdings, LTD}, RDM Holdings, LTD (RDM) entered into a lease agreement with Continental Lighting, LLC (Con-Lighting), formerly known as Continental-Chivas, LLC (Con-Chivas).\textsuperscript{74} RDM alleged that Con-Lighting breached its lease agreement obligations to pay holdover rent and insurance, and RDM requested damages for repairs and cleanup.\textsuperscript{75} “RDM obtained an order granting partial summary disposition in its favor, but Con-Lighting then filed for Chapter 7-bankruptcy protection, staying further proceedings.”\textsuperscript{76} Subsequently, Continental-Coating LLC (Con-Coating) was created.\textsuperscript{77} RDM then filed suit against Con-Coating and alleged that Con-Coating should be held liable for the breach of the lease agreement as the successor corporation of Con-Lighting.\textsuperscript{78}

In concluding that a genuine issue of material fact existed regarding whether Con-Coating should be held liable on a successor liability theory, the Court explained that the traditional rule “examines the nature of the transaction between predecessor and successor corporations.”\textsuperscript{79} With regard to the traditional rule, the Court explained, where an “acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor’s liabilities. However, where the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor’s liabilities unless one of five narrow exceptions applies.”\textsuperscript{80} The Court restated the five traditional exceptions to the general rule of non-liability,\textsuperscript{81} but then inexplicably

\begin{itemize}
\item \textsuperscript{72} \textit{C.T. Charlton}, 541 F. App’x at 553–54.
\item \textsuperscript{74} \textit{Id.} at 553.
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Id.} at 552–53.
\item \textsuperscript{78} \textit{Id.} at 533.
\item \textsuperscript{79} \textit{Id.} at 552 (quoting \textit{Foster v. Cone-Blanchard Machine Co.}, 597 N.W.2d 506 (Mich. 1999)).
\item \textsuperscript{80} \textit{RDM Holdings}, 762 N.W.2d at 552.
\item \textsuperscript{81} \textit{Id.}
\end{itemize}
veered into a lengthy discussion of *Turner* and the continuity of the enterprise doctrine by stating:

> [P]olicy concerns shaped this Court’s expansion of the traditional rule in *Turner* [v Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873 (1976)]. After examining the relevant policy concerns, this Court in *Turner* concluded that a continuity of enterprise between a successor and its predecessor may force a successor to “accept the liability with the benefits” of such continuity. *Turner* held that a prima facie case of continuity of enterprise exists where the plaintiff establishes the following facts: (1) there is continuation of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation; (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the selling corporation. *Turner* identified as an additional principle relevant to determining successor liability, whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation.82

The Appellate Court never acknowledged or addressed the *Turner* Court’s painstaking articulation of these distinctions between products liability law and creditor rules nor did it examine the policies underlying those distinctions. As discussed previously, the continuity of the enterprise doctrine was created in response to the otherwise unfairness of leaving victims of defective products with no remedy. The discussion of *Turner* and the continuity of the enterprise doctrine was inapplicable to *RDM* because it was not a products liability case. Thus, the only viable exception to the general rule of nonliability should have been the mere continuation exception.

This misapplication of the rules laid out in *Turner* set the stage for another erroneous decision two years later. In *Lakeview Commons Ltd. Partnership v. Empower Yourself, LLC*, the Michigan Court of Appeals entirely conflated the mere continuation exception and the continuity of the enterprise doctrine, reversing and remanding the trial court’s summary disposition order in favor of defendant to litigate the issue of successor liability in another lease agreement dispute.83

In August 2007, Empower Yourself, L.L.C. (“Empower”) ceased operations and Hamsa, LLC (“Hamsa”) was created by the former owners of Empower, Troy Swalwell and Phyllis Swalwell.84 The plaintiff,
Lakeview Commons, sued Empower for breach of a lease agreement with the plaintiff and sued Hamsa under a successor liability theory. Troy even admitted that Empower ceased operations in part to avoid its lease agreement with plaintiff. The Court set forth the traditional rule of successor liability when it stated that it was required to examine:

the nature of the transaction between predecessor and successor corporations. If the acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor’s liabilities. However, where the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor’s liabilities unless one of five narrow exceptions applies.

The court further reiterated the five traditional exceptions to nonliability.

At that point, the Court was on solid ground, but then it went astray in much the same way as in RDM:

After examining the relevant policy concerns, this Court in Turner concluded that a continuity of enterprise between a successor and its predecessor may force a successor to “accept the liability with the benefits” of such continuity. Turner held that a prima facie case of continuity of enterprise exists where the plaintiff establishes the following facts: (1) there is continuation of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation; (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the selling corporation. Turner identified as an additional principle relevant to determining successor liability, whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation. [Foster, 460 Mich. at 703–04, 597 N.W.2d 506.]

Again, as in RDM, the Court of Appeals in Lakeview Commons mistakenly used the continuity of the enterprise doctrine to determine whether successor liability in a commercial case arose out of the breach of a lease agreement, which, clearly, was not a products liability case. Thus,

---

85. Id.
86. Id. at 717.
87. Id. at 715 (quoting Foster v. Cone-Blanchard Machine Co., 597 N.W.2d 506 (Mich. 1999)).
88. Lakeview Commons, 802 N.W.2d at 715.
89. Id. at 715–16 (quoting Foster v. Cone-Blanchard Machine Co., 597 N.W.2d 506 (Mich. 1999)).
any discussion regarding Turner was irrelevant to the resolution of the case. A proper analysis would have discussed the mere continuation doctrine, which would have required the Court to examine the totality of the circumstances and engage in a multi-factor analysis.90

These errors have continued most recently in Taizhou Golden Sun Arts & Crafts, Co., Ltd., v. Colorbök, LLC.91 While Colorbök is an unpublished decision,92 it demonstrates the trend of the Michigan Court of Appeals in either oversimplifying, conflating, or misconstruing the Michigan rules regarding successor liability.93

In Taizhou, Taizhou Golden Sun ("Taizhou"), a Chinese manufacturer of plush toys, contracted in 2006 with Colorbök, Inc., a Michigan corporation, to manufacture toys.94 Taizhou agreed to send plush toys it manufactured directly to Colorbök, Inc.’s customers, and Colorbök, Inc. agreed to pay Taizhou for those toys once it was itself paid by its customers.95

In 2010, Colorbök, Inc. entered into a major contract to supply Wal-Mart with plush toys.96 By 2011, Wal-Mart accounted for 38.4% of Colorbök, Inc.’s sales, generating more than $15 million, making Wal-Mart Colorbök, Inc.’s largest customer.97

Despite the Wal-Mart deal, Colorbök, Inc. had trouble fulfilling its payments to Taizhou.98 Taizhou eventually set up a payment plan for Colorbök, Inc., but Colorbök, Inc. still failed to pay Taizhou as agreed.99 Colorbök, Inc. owed approximately $2.75 million to its secured lenders, Fifth Third Bank and FdG Associates, but it owned assets substantially less than the amount owed.100 During this time, Colorbök, Inc. and its officers sought to sell the company at the end of 2011.101

On February 10, 2012, Colorbök, Inc. sent Wal-Mart a letter detailing its planned restructuring and indicating that it intended to transfer all of its business assets to Colorbök, LLC, which would be owned and operated by

92. MICH. CT. R. 7.215(c).
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Colorbök, 2015 WL 4932243, at *1.
101. Id.
current executives of Colorbök, Inc. Colorbök, Inc.’s officers wanted to continue to use the name “Colorbök” so that its customers, in particular Wal-Mart, would have “some brand recognition.”

In March 2012, Colorbök, Inc.’s secured creditor, Fifth Third Bank, foreclosed on its loan agreements with Colorbök, Inc. Fifth Third Bank sold Colorbök, Inc.’s assets at a foreclosure sale for less than the amount owed under the loans. As such, Colorbök, Inc. did not anticipate any payment to other creditors, including Taizhou. Ultimately, on March 8, 2012, Taizhou was informed of the foreclosure sale and that Colorbök, Inc. would be dissolved.

Taizhou obtained a judgment against Colorbök, Inc., but Colorbök, Inc. did not pay the judgment. Taizhou then brought suit against Colorbök, LLC, asserting that Colorbök, LLC, the successor corporation, was liable for Colorbök, Inc.’s debts. The trial court disagreed with Taizhou’s argument that Colorbök, LLC was the successor of Colorbök, Inc. and granted summary disposition in favor of Colorbök, LLC.

On appeal, the Michigan Court of Appeals affirmed the trial court’s decision to grant summary disposition with regard to Taizhou’s successor liability claim. The Court of Appeals recognized that “[a] successor company is generally not liable for the obligations of the predecessor company” except where the transferee corporation is “a mere continuation or reincarnation of the old corporation.” The Court of Appeals opined that a genuine issue of material fact existed regarding whether Colorbök, LLC was a mere successor of Colorbök, Inc., but, relying on Starks, concluded that “the relevant successor liability rule is simply not available here because this is not a products liability action.”

This was an erroneous statement of the law. While it is true that the continuity of the enterprise doctrine was not available to Taizhou because this was not a products liability case, the five credit-based exceptions to nonliability, including the mere continuation exception, were available to Taizhou. The Court of Appeals erroneously foreclosed the possibility that

102. Id. at 2–3.
103. Id. at 2.
104. Id. at 1–2.
105. Id.
107. Id.
108. Id.
109. Id. at *1.
110. Id.
111. Id. at *3.
113. Id.
114. Id.
Taizhou could establish liability under the proper creditor-based theory. The Court should have recognized that because the purchase of Colorbök, Inc.’s assets was accomplished by an exchange of cash for assets, the five traditional exceptions to nonliability were available to Taizhou to hold Colorbök, LLC liable for the liabilities of Colorbök, Inc.

Under the proper test, the Court should have examined the totality of the circumstances to determine this. In doing so, the Court should have determined whether the “only indispensable prerequisites”—common ownership and transfer of substantially all its assets—were satisfied. The Court also should have examined the nature of the business performed by the successor corporation—that is, whether Colorbök, LLC’s “main corporate purpose was to conduct the same business” as Colorbök, Inc.

Under the proper analysis, the Court should have taken into consideration the new corporation’s retention of the old corporation’s officers and employees, the new corporation’s occupancy of the old corporation’s place of business, and the new corporation’s selective repayment of the old corporation’s debts. Because Colorbök, LLC was to be “owned and operated by the current executives of Colorbök, Inc., and because Colorbök, Inc. transferred “all of its business assets to Colorbök, LLC,”

the Court should have recognized that the only “indispensable prerequisites” to establishing the mere continuation exception had been met. Furthermore, it seems undisputed that Colorbök, LLC’s main corporate purpose was to conduct a substantially similar business as Colorbök, Inc. as evidenced by the fact that Colorbök, LLC contracted with Wal-Mart for what Colorbök, Inc. had already been providing to Wal-Mart. As such, the nature of the two businesses was substantially the same. Now while there is no evidence of the new corporation’s occupancy of the old corporation’s place of business, Colorbök, LLC was “owned and operated” by the same executives of Colorbök, Inc., and Colorbök, LLC agreed with Wal-Mart to assume any of Colorbök, Inc.’s liabilities under the agreements between Wal-Mart and Colorbök, Inc. Under the totality of the circumstances test, therefore, there was at least a possibility that Taizhou would have been able to establish that Colorbök, LLC was a mere continuation of Colorbök, Inc. The Court, therefore, should have
concluded that a genuine issue of fact existed with regard to Colorbök, LLC’s successor liability and should have remanded the case to the trial court for further proceedings.

Because the Colorbök opinion failed to apply the proper test for successor liability, and especially because the Court of Appeals has repeatedly misstated or misapplied the rules governing this issue, the Michigan Supreme Court should review the Court of Appeals’ decision. Not only would this correct the injustice in Colorbök, it also would give the Michigan Supreme Court an opportunity to clarify the distinct origins and different policy purposes of the continuity of the enterprise doctrine and the mere continuation exception to nonliability. Furthermore, it would allow the Court to explain (once again) that, while the continuity of the enterprise doctrine applies only in the products liability context, the mere continuation exception is generally applicable. Failure to do so would continue to work against judgment creditors like Taizhou and may eventually undermine the original purpose of the continuity of the enterprise doctrine, leaving victims injured by defective products unable to obtain any remedy from successor corporations.