

Successor Liability in Arizona

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The purchase of a company or its assets occurs occasionally in the construction industry in Arizona. The purchaser should, however, consider structuring the transaction so that the purchaser is not saddled with responsibility for the debts and liabilities of the other company. A lawsuit naming the purchaser as the successor in interest for the other company has the potential for exposing the purchaser to millions of dollars of unforeseen liability for construction defects.

In Arizona, when a corporation sells or transfers its principal assets to a successor corporation, the successor corporation is not liable for the former corporation's debts and liabilities. See *A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co.*, 172 Ariz. at 329,; *Winsor v. Glasswerks Phx, LLC*, 204 Ariz. at 303, *Warne Investments, Ltd. v. Higgins et al.*, 219 Ariz. 186, 195 P.3d 645 (App. 2008). It is only when "[a] corporation goes through a mere change in form without a significant change in substance [that] it should not be allowed to escape liability." *Id.* at ¶ 18, citing *Gladstone v. Stuart Cinemas, Inc.*, 878 A.2d 214, ¶ 19, 178 Vt. 104 (Vt. 2005). The mere continuation exception for finding successor liability "reinforces the policy of protecting rights of a creditor by allowing a creditor to recover from the successor corporation whenever the successor is substantially the same as the predecessor." *Idearc Media, LLC v. Palmisano & Associates*, PC929 F. Supp. 2d 939 (D. Ariz. 2013) citing *Warne*, 195 P.3d at 650-51; *Gladstone v. Stuart Cinemas, Inc.*, 178 Vt. 104, 878 A.2d 214, 222, ¶ 19 (2005). The premise of this approach "is that, if [a] corporation goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability." *Id.* Of particular significance, in the *Winsor* case, Plaintiff filed a motion for reconsideration in order to expand Arizona law to recognize the product line and continuity of enterprise exceptions to imposing successor liability. Citing a 3rd circuit case, the Arizona appellate court specifically held "Accordingly, we agree that in considering the two exceptions 'such a profound change in tort law is

appropriately the subject of legislation, not judicial fiat.” *Winsor*, 204 Ariz. 313, citing *Polius v. Clark Equipment Co.*, 802 F.2d 75, 83 (3d Cir. 1986). To date, no such change at the legislative level recognizing any product line or continuity of enterprise exception has been enacted.

As discussed briefly above, successor liability can be avoided in Arizona through careful planning and drafting of the purchase documents. The same may not be true in other states. The purchaser should consult with knowledgeable counsel to help avoid the threat of successor liability.