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# Asset Purchase or Merger? Pennsylvania Superior Court Clarifies the Limits of De Facto Merger Doctrine

***By Alycia M. Vivona and Joseph C. Torres****

*In this article, the authors analyze a Pennsylvania court decision that provides a helpful review of the circumstances under which Pennsylvania's de facto merger doctrine would — and would not — impose successor liability after an asset purchase.*

A key advantage to structuring an M&A transaction as an asset purchase, rather than a stock purchase or merger, is the buyer's ability to limit the liabilities of the target that the buyer agrees to assume under the deal documents. But even the most careful drafting can be defeated if a court imposes successor liability on the buyer based on the equitable doctrine of de facto merger.

In *Campbell v. WeCare Organics*,[1] the Pennsylvania Superior Court provided a helpful review of the circumstances under which Pennsylvania's de facto merger doctrine would — and would not — impose successor liability after an asset purchase.

## THE DISPUTE

In 2014, Jonathan Campbell entered into a waste-hauling contract with WeCare Organics LLC. Two years later, Denali Water Solutions LLC purchased the core business assets of WeCare, with WeCare retaining certain customer contracts and equipment. WeCare also retained its debt to Campbell for unpaid amounts due under the hauling contract. Campbell sued both WeCare and Denali in 2019, asserting that Denali was liable for WeCare's unpaid debt under the de facto merger doctrine. The trial court agreed with Campbell and granted summary judgment against Denali in 2024. On Denali's appeal, the Pennsylvania Superior Court reversed and remanded the case for further proceedings.

## THE DE FACTO MERGER TEST

Citing the Pennsylvania Supreme Court's decision in *Fizzano Brothers Concrete Products*,[2] the Superior Court began by confirming the general rule that the buyer of a corporation's assets does not assume the seller's debts solely by reason of the purchase.

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[1] Campbell v. WeCare Organics, 2025 PA Super 44 (Pa. Super. Ct. Feb. 25, 2025).

[2] Fizzano Brothers Concrete Products v. XLN, 42 A.3d 951, 954 (Pa. 2012).

The court then identified five exceptions to this general rule:

1. If the buyer expressly or implicitly agreed to assume the debt.
2. If the transaction amounted to a consolidation or a de facto merger.
3. If the buyer is merely a continuation of the seller.
4. If the buyer fraudulently entered into the transaction to escape liability.
5. If the transfer was without adequate consideration and no provisions were made for creditors of the seller.

Proceeding to its specific analysis of the de facto merger doctrine, the Superior Court identified the four factors that would contribute to a finding of successor liability:

1. Continuity of ownership between the seller and buyer.
2. Cessation of the seller's ordinary business and dissolution as soon as practically and legally possible.
3. The buyer's assumption of liabilities ordinarily necessary for the uninterrupted continuation of the seller's business.
4. Continuity of management, personnel, physical location and general business operations between the seller and the buyer.

The Superior Court noted the Pennsylvania Supreme Court's admonition that these factors are not to be applied mechanically, but that they should serve to guide the reviewing court in its determination of whether a de facto merger has occurred.

## THE SUPERIOR COURT'S ANALYSIS

Denali conceded the third and fourth factors in the de facto merger analysis, acknowledging that it had assumed a significant portion of WeCare's liabilities and that there was significant continuity of management, operations and facilities between WeCare and Denali. The appeal, and the Superior Court's analysis, turned on the first two factors.

### Continuity of Ownership

While recognizing the *Fizzano* court's holding that continuity of ownership could be shown through forms of stockholder interest beyond a direct exchange of shares, including promissory notes, the Superior Court characterized as an issue of first impression the question of whether the asset purchase agreement's requirement that Denali enter into a three-year executive employment agreement with WeCare's founder, Jeffrey LeBlanc, coupled with a payment of cash for LeBlanc's indirect ownership interests in WeCare, would be sufficient to establish continuity of ownership for purposes of the de facto merger doctrine's first factor.

The trial court had reasoned that the executive employment agreement was a type of alternative merger consideration contemplated by Pennsylvania's merger statute and held that Campbell had established continuity of ownership between WeCare and Denali as a matter of law.

The Superior Court reversed. Relying on *Fizzano*'s holding that continuity of ownership requires "some sort of" proof that the seller's shareholders retained an ownership interest in the successor entity, the court held that LeBlanc's employment agreement did not, as a matter of law, constitute an ownership interest in Denali because it did not provide him with equity in Denali.

The court further explained that successor liability is justified under the de facto merger doctrine when it prevents one or more equity holders of a seller from retaining the benefits of ownership of the transferred assets after those assets have been cleansed of liabilities through the sale, leaving the creditors of the seller without any remedies to collect their debts. The court could not conclude as a matter of law that LeBlanc's employment agreement was the equivalent of an ownership interest in Denali, so Campbell had not established this prong of the de facto merger test for purposes of his motion for summary judgment.

**Prompt Cessation of Ordinary Business and Dissolution**

The Superior Court then turned to the question of whether WeCare had ceased its ordinary business and dissolved as soon as practically and legally possible, as required by the second factor of the de facto merger doctrine.

In essence, a merger provides for one company to survive while the other party to the merger ceases to exist. Thus, the second prong of the de facto merger doctrine requires not only that the seller's ordinary business activities cease, but that they cease more or less contemporaneously with the sale. The court emphasized that the timing in question is when the seller's ordinary operations cease, not when the seller entity is formally dissolved.

The Superior Court acknowledged that WeCare was undisputedly "defunct" as of August 2020, but it pointed to several facts indicating that WeCare and Denali did not intend for WeCare to cease all business activities after the closing of the asset sale in October 2016:

- The asset purchase agreement did not require WeCare to dissolve.
- WeCare represented that it would be a solvent "ongoing business" at closing.

- WeCare retained certain customer contracts and equipment after the sale.
- LeBlanc was permitted to remain as WeCare's president, notwithstanding his employment with Denali.
- WeCare wrote to its vendors in March 2017 stating it had sold only a portion of its business and was preparing for its upcoming season.

The court therefore held that there was a genuine issue of material fact as to whether WeCare maintained post-closing business operations at a level sufficient to negate the cessation of ordinary business and dissolution prong of the de facto merger test. Since Denali might be able to prove on remand that the second prong of the de facto merger test had not been satisfied, the Superior Court reversed the trial court's summary judgment for Campbell.

## APPLYING THE SUPERIOR COURT'S LESSONS

By clarifying two of the four factors that comprise the de facto merger doctrine, the Superior Court's opinion suggests ways in which buyers can reduce their risk of incurring successor liability under that doctrine.

First, a buyer will increase its risk of successor liability if the consideration for an asset purchase includes any issuance of the buyer's equity to the seller or its owners. This is true even if the equity issuance is based on an agreement other than the asset purchase agreement, such as an executive employment agreement with the seller's founder. At the same time, a court may find that non-cash consideration that allows the seller's owners to retain the benefits of ownership of the transferred assets after the sale (such as promissory notes or employment agreements) is sufficient to establish continuity of ownership under the first prong of the de facto merger doctrine. Buyers can reduce their risk of successor liability by avoiding such types of consideration in their asset purchase transactions.

In addition, the Superior Court makes clear that a de facto merger should not occur if the parties allow the seller to continue to conduct a portion of its business after the asset sale. This may be accomplished by allowing the seller to retain certain non-core assets or by providing for reinvestment of at least a portion of the sale proceeds into the seller's ongoing business. Even if the seller ultimately becomes insolvent, the buyer is more likely to be insulated from successor liability if the seller's creditors can pursue recovery against an operating seller entity after the asset sale. By contrast, requiring the seller entity to dissolve after closing of the asset sale would increase the buyer's risk of successor liability.

The parties' business needs will ultimately determine both the nature of the consideration and the scope of the assets transferred in an asset purchase, but buyers would be well advised to consider the factors that could lead to successor liability under the de facto merger doctrine when structuring their transactions.

**IN SUMMARY**

- A buyer in an asset purchase transaction is not liable for the seller's debts unless an exception applies.
- De facto merger is an equitable doctrine under which a buyer of business assets may be subjected to successor liability.
- A buyer can reduce its risk of successor liability based on the de facto merger doctrine by avoiding continuity of ownership with the seller and by allowing the seller to retain a portion of its business.