

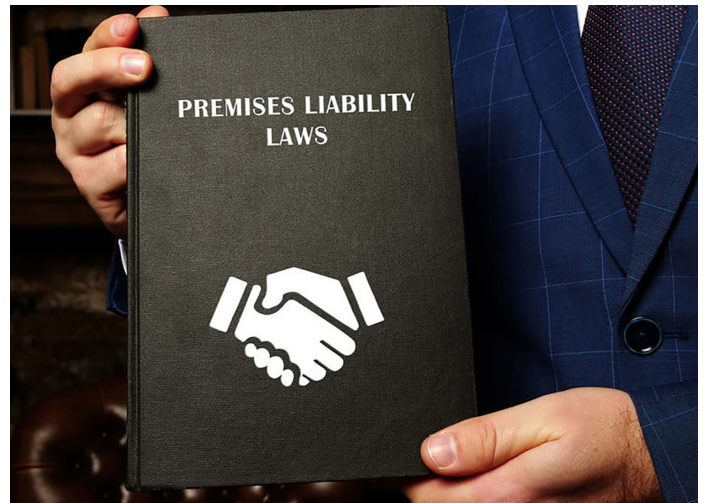
Seeking Successor Liability: Recent Applications of Schumacher Exceptions

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As a general matter of New York law, an entity that acquires the assets of another company is not liable for the predecessor's torts or contractual liabilities. But in the seminal decision of *Schumacher v. Richards Shear Co.*, the New York Court of Appeals identified four exceptions to this general rule. 59 N.Y.2d 239, 244 (1983). Over 40 years later, the contours of these exceptions continue to be litigated. This article examines two recent First Department decisions applying the *Schumacher* exceptions: *Avamer 57 Fee LLC v. Hunter Boot USA LLC*, 241 A.D.3d 401 (1st Dep't 2025) and *One River Run Acquisition, LLC v. Milde*, 239 A.D.3d 519 (1st Dep't 2025).

In *Schumacher*, the plaintiff, after being injured by a machine, brought a product liability claim not only against the manufacturer who sold the machine, but also the manufacturer's sole successor, an entity which had purchased substantially all of the manufacturer's assets. 59 N.Y.2d at 242. In assessing whether the claim brought against the successor was properly dismissed at summary judgment, the Court of Appeals identified four exceptions to the general rule that a successor corporation is not liable for the liabilities of its predecessor.



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As articulated in *Schumacher*, an acquiring entity is only on the hook for the liabilities of its predecessor if: (1) there is an “express or implied assumption of the predecessor’s liabilities”; (2) a “de facto merger” occurred between the successor and predecessor; (3) the successor and predecessor entered “into a fraudulent transaction . . . to escape liability”; or (4) “the successor is a ‘mere continuation’ of the predecessor.” *Avamer*, 241 A.D.3d at 1 (citing *Schumacher*, 59 N.Y.2d at 245). The Court of Appeals concluded that “[n]othing in the record suggest[ed] liability under any of these theories.” *Schumacher*, 59 N.Y.2d at 245.

In considering whether the successor was a mere continuation of the predecessor, the court

noted the terms and impact of the acquisition, remarking, “[i]n substance, the transaction was a sale of all assets because thereafter [the predecessor] discontinued its business of selling, manufacturing and servicing [products].” The court stated that the mere continuation exception referred to a “corporate reorganization... where only one corporation survives the transaction” and the predecessor “must be extinguished.” Thus, the court found that since the predecessor had “survived the instant purchase agreement as a distinct, albeit meager, entity,” the successor could not be held liable as a “mere continuation” of the predecessor. The court therefore ultimately held that the successor entity defendant was properly dismissed at summary judgment.

Forty years later, New York courts continue to grapple with these concepts and exceptions. In two recent decisions, the First Department assessed whether the *Schumacher* exceptions applied to claims brought against successors to a corporation and, in doing so, demonstrated the evolving nature of the doctrine of successor liability. In *Avamer*, the First Department’s decision largely focused on the mere continuation exception, whereas in *One River Run Acquisition, LLC*, the First Department focused primarily on the de facto merger exception.

In *Avamer*, a divided court held that the “mere continuation” exception applied and reversed the trial court’s dismissal of plaintiff’s breach of contract claim on a motion to dismiss against a corporation and its two successors. *Avamer*, 241 A.D.3d at 2. In doing so, the First Department ruled that the existence of more than one successor corporation “does not utterly refute the possibility that either or both defendants could be held liable under a mere continuation theory.”

The *Avamer* court explained, “[a]lthough no one factor is dispositive,” courts determining whether a successor entity is a “mere continuation” of its predecessor consider whether: “(1) all or

substantially all assets are transferred to the successor corporation; (2) the predecessor corporation has been effectively extinguished following the transaction; (3) the successor has assumed an identical or nearly identical name; (4) the successor has retained one or more of the same corporate officers, directors and/or employees; and (5) the successor has continued the same business.” (citing *Miot v. Miot*, 24 Misc.3d 1224(A), 2009 N.Y. Slip Op. 51605(U), at *6 (Sup. Ct. N.Y. Cnty. 2009), aff’d, 78 A.D.3d 464 (1st Dep’t 2010)).

Under the first factor, the *Avamer* court considered not only whether the predecessor’s assets were transferred, but also the relationship between the two successors relative to the predecessor and its assets. The First Department assessed the two successors’ separate purchase agreements in combination, finding that together the successors purchased all the predecessor’s stock, intellectual property, fixtures, and machinery.

The court explained that the plaintiff pled that the one successor is the “longtime U.S. partner in the marketing and sales of footwear brands acquired by” the other successor; that one successor acted as the other’s guarantor, principal obligor and agent “control[ing] the transaction” with the predecessor; and that together, the successors “purchased substantially all of [the predecessor’s] assets.” The First Department held that the plaintiff pled facts sufficient to satisfy the first factor and overall to state a claim under the mere continuation exception.

At the same time, the majority and dissent in *Avamer* presented differing interpretations of the court’s statement in *Schumacher* that the mere continuation exception applies when “only one corporation survives the transaction.” (Kennedy, J. dissenting in part). The dissent observed that “two separate entities” purchased “distinct assets” of the predecessor, which survived the transactions as

a “distinct” entity. Therefore, the dissent reasoned, the mere continuation exception cannot apply because “more than one corporation existed” after the asset purchase.

The majority disagreed with this interpretation for two reasons: (1) it disagreed that more than one successor necessarily barred the mere continuation exception under *Schumacher*; and (2) acknowledging that *Schumacher* involved a motion for summary judgment, the majority remarked that whether the predecessor survived the transaction as a “distinct” entity “is more appropriately left for determination” at summary judgment. The First Department’s holding demonstrates the fact-intensive nature of judicial decisions determining successor liability.

In *One River Run Acquisition, LLC*, the First Department likewise analyzed the *Schumacher* exceptions and reversed the dismissal of a breach of contract counterclaim against a corporation as a potential successor of the plaintiff. *One River Run Acquisition*, 239 A.D.3d at 519, 521. The First Department ultimately held that counterclaim plaintiff successfully pled the de facto merger exception to successor liability—the second exception articulated in *Schumacher*. (citing *Schumacher*, 59 N.Y.2d at 244).

With respect to the de facto merger doctrine, the First Department cited its prior decision in *Fitzgerald*, which identified the non-dispositive “hallmarks of a de facto merger”: “[1] continuity of ownership; [2] cessation of ordinary business and dissolution of the acquired corporation as soon as possible; [3] assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, [4] continuity of management, personnel, physical location, assets and general business operation.” *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 (1st Dep’t 2001) (citing

Sweatland v. Park Corp., 181 A.D.2d 243, 245-46 (4th Dep’t 1992)). Explaining the rationale behind this exception, the *Fitzgerald* court observed “that a successor that effectively takes over a company in its entirety should carry the predecessor’s liabilities as a concomitant to the benefits it derives from the good will purchased.” (quoting *Grant–Howard Assocs. v. Gen. Housewares Corp.*, 63 N.Y.2d 291, 296 (1984)).

Applying *Fitzgerald*, the First Department in *One River Run Acquisition* held that “[l]egal dissolution [of the predecessor] is not necessary” for this exception to apply, explaining that the predecessor essentially became a “shell” after the transaction. *One River Run Acquisition*, 239 A.D.3d at 521 (citing *Fitzgerald*, 286 A.D.2d at 575). Referencing plaintiff’s allegations that the same managers from the predecessor company, now working at the successor company, continued to manage projects originated at the predecessor, the First Department held that plaintiff properly plead *Schumacher*’s de facto merger exception.

These recent decisions in *Avamer* and *One River Run Acquisition* illustrate the continued application of the *Schumacher* exceptions. In doing so, courts consider the factual implications of the transaction between the corporation and its successor(s), looking beyond the mere terms of the purchase agreement or corporate structure. Both *Avamer* and *One River Run Acquisition* suggest that application of the *Schumacher* exceptions is a fact-intensive inquiry. Parties structuring transactions should be mindful of the *Schumacher* exceptions to avoid inheriting unwanted liabilities.

The opinions expressed in this article are those of the authors and do not necessarily reflect the views of Skadden or its clients.

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