ASSUMING LIABILITIES/DEBT IN TRANSACTIONS: TRICKS AND TRAPS

First Run Broadcast: September 19, 2019
1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. **(60 minutes)**

This program will provide you a practical guide to drafting for the assumption and limitation of liabilities in business and commercial transactions. The program will cover the mechanics of assuming debt in a transaction, how it is identified, negotiated and documented. The program will discuss the related issue of how "bad conduct" carve-outs in indemnification and other limitation of liability provisions can defeat limitations on liability if the carve-outs are not carefully drafted. Successor liability in business transactions and techniques to avoid it will also be covered. This program will provide a real-world guide to handling debt and liabilities in transactions – identifying liabilities, negotiating and documenting their transfer or other treatment, and avoiding successor liability.

- Identifying and documenting the assumption of liabilities
- Successor liability and techniques to limit it
- "Bad conduct" carve-outs in indemnification and limitation of liability
- Risks of carve-out language being over-expansive and defeating liability protection
- Mistakes in the treatment of liabilities in transactions

Speakers:

Steven O. Weise is a partner in the Los Angeles office Proskauer Rose, LLP, where his practice encompasses all areas of commercial law. He has extensive experience in financings, particularly those secured by personal property. He also handles matters involving real property anti-deficiency laws, workouts, guarantees, sales of goods, letters of credit, commercial paper and checks, and investment securities. Mr. Weise formerly served as chair of the ABA Business Law Section. He has also served as a member of the Permanent Editorial Board of the UCC and as an Advisor to the UCC Code Article 9 Drafting Committee. Mr. Weise received his B.A. from Yale University and his J.D. from the University of California, Berkeley, Boalt Hall School of Law.

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Tricks and Traps in the Assumption of Liabilities in Transactions

Steve Weise
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1. *General considerations*

   1.1. *What are goals*

   - Transfer liabilities?
   - Avoid liabilities?

   1.2. *Policy issues*

   1.3. *Drafting issues*

2. *Overview of drafting*

   2.1. *Consider general issues*

   - *Chepkevich v. Hidden Valley Resort*, 2 A.3d 1174 (Pa. 2010) (exculpatory clause must not "contravene public policy")
   - *Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 22 N.Y.3d 799 (N.Y. 2014) ("Contract provisions limiting remedies are enforceable unless they are unconscionable.")

   2.2. *Interpretation of provisions*

   - *Maxim Technologies, Inc. v. City of Dubuque*, 690 N.W. 2d 896 (Iowa 2005) (general rules of contract interpretation apply to interpretation of a risk-allocation provision)
   - *Facilities Dev. Corp. v. Miletta*, 584 N.Y.S. 2d 491 (N.Y. App. Div. 1992) (an indemnification provision does not apply to indemnitee's own wrongdoing unless it does so "clearly")

- *Gross v. Sweet*, 400 N.E. 2d 306 (N.Y. 1979) (an exculpation provision does not apply to negligent activity unless the agreement explicitly says so)
- *Margolin v. New York Life Ins. Co.*, 297 N.E. 2d 80 (N.Y. 1973) (an indemnification provision does not apply to negligence of indemnitee unless it does so "expressly" or "unequivocally")
- *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 Del. Ch. LEXIS 171, at *56 n. 138 (Del. Ch. Aug.7, 2012) (choice-of-law provision applies to statute of limitations if choice of law provision does so explicitly)
- *Alcoa World Alumina LLC v. Glencore Ltd.*, C.A. 15C-08-032 EMD CCLD (Del. Superior Court February 8, 2016) (indemnification agreements are construed '*strictly*' against the indemnitee; an indemnification agreement must have an 'unequivocal undertaking' before the indemnitor has an obligation to indemnify for a contractual liability that the indemnitee has assumed from the indemnitor)
- *Huverserian v. Catalina Scuba Luv, Inc.*, 110 Cal. Rptr. 3d 112 (2010) (exculpation and similar provisions are often narrowly interpreted)
- *Peterson v. Flare Fittings, Inc.*, _ So. _ _ (Fla. 5th DCA October 9, 2015) (exculpatory clauses are "strictly construed" against the beneficiary of the clause and "the intention to be relieved from liability must be made clear and unequivocal")
- *Dilks v. Flohr Chevrolet*, 192 A.2d 682 (Pa. 1963) (indemnify for negligence of indemnitee must be "clear," is construed "strictly," and must state intention with "greatest particularity")
- *Kieffer v. Best Buy*, 14 A.3d 737 (N.J. 2011) (although indemnity agreements are interpreted under normal rules of contract law, any ambiguity is "strictly construed against" indemnitee)
- *Ruzzi v. Butler Petroleum*, 588 A.2d 1 (Pa. 1991) (indemnification provision will not cover indemnitee's own negligence unless it does so in "clear and unequivocal language")

2.3. Characterization of provisions

- *Charney v. American Apparel, Inc.*, 2015 Del. Ch. LEXIS __ (Del. Ch. Sept. 11, 2015) (indemnification right for claims "related to" former officer's status does not cover claims at issue)
- *Mahlum v. Adobe Systems, Incorporated*, ___ F. Supp. 2d ___ (N.D. Calif. 2015) (considering whether payment due upon early termination of agreement is an unenforceable "penalty" (as ineffective "liquidated damages") or is an enforceable alternative performance)
- *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141 (Ct. App. 2015) (forum-selection provision is not enforceable where it is likely that chosen forum will *not* enforce non-waivable statutory right available in forum where clause is being contested).
- *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital*, 2014 N.Y. Misc. LEXIS 1885 (N.Y. Sup. Ct. 2014) (a provision for "indemnity" applies *only* to losses suffered by the indemnitee from claims of third parties, unless the provision is "unmistakably clear" that it applies to claims between the parties)
- *MEG Holdings, LLC v. U.S. Bank National Association*, _ NY _ _ (N.Y. Sup. Ct. 2014) (indemnity provision does not cover claims between the contracting parties unless it does so "unequivocally")
- *Goshawk Dedicated Limited v. Bank of NY*, 2010 U.S. Dist. LEXIS 25498 (S.D.N.Y. 2010) (indemnity does not apply to costs arising from indemnitor's breach unless agreement clearly provides for that result)
- *Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC*, 2015 WL 139731 (Del. Ch. 2015) (a provision for "indemnity" applies *only* to losses suffered by indemnitee from claims of third parties, unless contract is "unmistakably clear" that it applies to claims between the parties)
- *Bear Stearns Mortgage Funding Trust 2007 ARZ v. EMC Mortgage LLC*, 2013 WL 164098 at *2 (Del. Ch. Jan . 15, 2013) (applying New York law)("[A] party seeking indemnification for first party claims must be able to point to specific language that is applicable to such claims. Here there is no such specific language. Rather the indemnification provisions contain language that indicates that they apply only to third party claims.").

- *Hot Rods, LLC v. Northrop Grumman Systems Corporation*, _ Cal. App. 4th _ (2015) ("indemnity" provision "generally" relates only to third party claims, but includes "direct liability" if the parties use the term in that manner)
- *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.* 394 A.2d 1160, 1165 (Del. 1978) (indemnity clause as applies only to third party claims and not to first party claims)
- *Starbrands Capital v. Original MW, Inc.*, _ F.Supp.3d _, 2015 WL 5305215 (D. Mass. 2015) (contractual indemnity clause should be interpreted to give effect to intention of parties and thus should not be interpreted as limited to third party claims)
- *ENI Holdings LLC v. KBR Group Holdings LLC*, 2013 WL 6186326 at *2 (Del. Ch. Nov 27, 2013) (considering when "indemnification" provisions that do not involve third-party claims in a stock purchase agreement constitute the sole and exclusive remedy for all claims between the parties)
- *Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd.*, 259 F.3rd 1086 (9th Cir. 2001) (applying California law) ("indemnity" provision covers compensation for losses directly caused by the indemnitor's breach and not just those arising from third party liability)
- *Wells Fargo Bank v. Trolley Indus.*, LLC, 2013 U.S. Dist. LEXIS 124326 (E.D. Mich. August 30, 2013) ("traditional" limitation of "indemnity" provision to third-party claims does not apply where court determines that parties intended indemnity agreement to apply to losses directly caused by indemnitor).

2.4. Lack of clarity regarding applicable standard

- *Le Metier v. Metier*, _ F. Supp. 2d _ (S.D.N.Y. 2015) (applying New York law) (an ineffectively drafted non-reliance provision, which would have been effective against a claim of fraud, is evaluated as a "general disclaimer" and was "by comparison [to a non-reliance provision] ineffective to preclude a fraud claim as a matter of law.")
- *Hartley v. Consolidated Glass Holdings*, 2015 Del. Ch. LEXIS __ (Del. Ch. Sept. 30, 2015) ("release" of claims "arising out of or in connection with" a stated agreement did not apply to a related non-competition agreement)

- *Chebotnikov v. Limolink, Inc.*, _ F.Supp.3d _ (D. Mass. 2015) ('As a general matter of contract interpretation, disputes "*arising under*," "*arising out of*," or "*arising from*" the terms of an agreement *must have their inception in the agreement itself*. That language does not encompass matters "*related*" to the agreement or the relationship of the parties. The phrase "*arising out of*" is construed by courts to be narrower than phrases such as "*with reference to*," "*relating to*," or "*in connection with*."')
- *BOKF, N.A. v Caesars Entertainment Corporation*, _ F. Supp. 3d _ (S.D.N.Y. 2016) (depending on the "context, "usage", and "intent" of the parties, "and" can have a *disjunctive* meaning and "or" can have a *conjunctive* meaning)

2.5. Jurisdiction whose law is applicable to provision

- *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989) ("While [a choice-of-law] provision is effective as to breach of contract claims, it does not apply to fraud claims, which sound in tort.")
- *Krock v. Lipsay*, 97 F.3d 640 (2d Cir. 1996) (choice-of-law provision must be "'sufficiently broad' to encompass the entire relationship between the contracting parties" in order to cover tort claims.)
- *Schuster v. Dragone Classic Motor Cars, Inc.*, 67 F. Supp. 2d 288 (S.D.N.Y. 1999) (court must determine whether "the express language of the [choice-of-law] provision. . . is sufficiently broad as to encompass the entire relationship between the parties.")
- *Turtur v. Rothschild Registry International*, 26 F.3d 310 (2nd Cir. 1994) (contract that provides that "this note shall be governed by, and interpreted under, the laws of the State of New York applicable to contracts". . . does not cover tort claim.)
- *In re Libor-Based Financial Instruments Antitrust Litigation*, 2015 U.S. Dist. LEXIS 107225 (S.D.N.Y. August 4, 2015) (choice-of-forum provision may apply to both contract and tort claims arising out of the contract where contract provides that choice-of-law clause applies to claims "relating" to the contract)

- *FdG Logistics LLC v. A&R Logistics Holdings*, 2015 WL _ (Del. Ch. 2016) (choice-of-law clause may cover tort claims relating to the enforcement of the agreement)
- *Vichi v. Koninklijke Philips Elecs.*, N.V., 85 A.3d 725, 769-70 (Del. Ch. 2014) (contractual choice-of-law provision may apply to fraud claim if the contract by its own terms so provides);
- *Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032-35 (Del. Ch. 2005), aff'd, 894 A.2d 407 (Del. 2005) (contractual choice of law applies to breach of fiduciary duty claim)
- *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (Cal. 1992) (contractual choice of law applies to breach of fiduciary duty claim)
- *Wise v. Zwicker & Associates*, _ F.3d _ (6th Cir. 2015) (contractual choice of law provision may apply to a claim "sounding in tort")
- *Masters Group Int'l. v. Comerica Bank*, 2015 WL 4076816 (Mont. 2015) (contractual choice of law provision may apply to tort claims if provision interpreted under standard principles of contract interpretation to cover them)

2.6. Conspicuousness of risk-allocation provisions

- *Balram v. Etheridge*, 449 N.Y.S.2d 389, 391 (1982) (clause in lease unenforceable because of failure to conform to minimum print size required by statute)
- *Fairfield Leasing Corp. v. Technigraphics, Inc.*, 607 A.2d 703, 706 (N.J. Super. Ct. Law Div. 1997) (finding no waiver because clause was 'utterly *inconspicuous*')
- *Colgate Constr. Corp. v. Hill*, 334 N.Y.S.2d 1002, 1004 (1972) (finding waiver invalid because clause located *inconspicuously* on back of home improvement contract).
- *Am. Gen. Fin., Inc. v. Bassett (In re Bassett*), 285 F.3d 882 (9th Cir. 2002) (courts considering whether language is "conspicuous" often "borrow" definition from U.C.C.); text in all capital letters may not be conspicuous; ". . . there is nothing magical about capitals. . . . Lawyers who think their caps lock keys are instant 'make conspicuous' buttons are deluded.")

3. *Common provisions on liability*

3.1. Introduction

- *Severn Peanuts Co.*, Inc. v Industrial Fumigant Co., _ F.3d _ (4th Cir. 2015) (applying North Carolina law) ("By allowing parties to bargain over the allocation of risk, freedom of contract permits individuals and businesses to allocate risks toward those most willing or able to bear them. Parties who allocate risks away from themselves thereby cap their future expected litigation and liability costs. Parties assuming risks often receive benefits in the form of lower prices in exchange.")

3.2. Disclaimer

- *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities, LLC*, _ F.3d _, _ n. 19 (2d Cir. 2015) (applying New York law) (a "valid disclaimer must contain explicit disclaimers of the *particular* representations that form the basis of the fraud claim" (emphasis in original)).
- *Proctor & Gamble Co. v. Bankers Trust Co.*, 925 F. Supp. 1270, 1290 (applying _____ law) (S.D. Ohio 1996) (commercial parties may have a duty to come forward with information where "one party to a contract has superior knowledge which is not available to both parties", which the court characterizes as a version of "fraud")

3.3. Exculpation

- *St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply*, 409 F.3d 73 (2d Cir. 2005) (a party to a contract may not exempt itself from liability for its own gross negligence or worse, but may receive indemnification for activity that does not involve intentional causation of injury)
- *Baidu v. Register.com, Inc.*, 760 F. Supp. 2d 312 (S.D.N.Y. 2010) (a party to a contract may not exempt itself from liability for its own gross negligence or worse)
- *Sommer v. Fed. Signal Corp.,* 593 N.E. 2d 1365 (N.Y. 1992) (a party to contract may not exempt itself from liability for its own gross negligence or worse)
- *Austro v. Niagra Mohawk Power Corp.*, 487 N.E. 2d 267 (N.Y. 1985) (a party to contract may not exempt itself from liability for its own gross

negligence or worse but may receive indemnification for activity that does not involve intentionally causing injury)

- *Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E. 2d 413 (N.Y. 1983) (a party to contract may not exempt itself from liability for its own gross negligence or worse)
- CAL. CIVIL CODE § 1668 (West 2011) (a contract may not exempt a party from its own fraud, willful injury, or willful or negligent violation of law)
- *City of Santa Barbara v. Superior Court*, 161 P.3d 1095 (Cal. 2007) (a party to a contract may exempt itself from liability for its own tortious conduct (including negligence), but not gross negligence).)
- *Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc.*, 530 F.3d 269 (3rd Cir. 2008) (an exculpatory provision is enforceable absent gross negligence or grossly unequal bargaining power, unless the public interest is involved)

3.4. Limitation of damages that may be recovered

- *World of Boxing, LLC v. King*, _ F.3d _ (2d Cir. 2015) (not precedential) (limitations on remedies are enforceable if the agreement "specifically" provides for the "remedies available")
- *The Bank of New York Mellon v. WMC Mortgage, LLC*, _ F. Supp. 3d 4th _ (applying New York law) (S.D.N.Y. 2015) (provision stating that it is the "sole remedy" available under the contract may be interpreted as *not* providing for a "sole remedy")
- *Hot Rods, LLC v. Northrop Grumman Systems Corporation*, _ Cal. App. 4th _ (2015) (Court interprets word based on definition in agreement even though the particular use is not capitalized to indicate that it is intended to have its defined meaning)
- *Lewis v. YouTube, LLC*, _ Cal.App.4th _ (2016) (Contract clause stating that service provider would bear no liability '***whatsoever***' for damages resulting from 'errors or omissions in any content or for any loss or damage of any kind incurred as a result of your use of and content posted, emailed, transmitted, or otherwise made available via the services, whether based on warranty, contract, tort, or any other legal theory.' Applied to contract claim. Limitation of liability was particularly appropriate in connection with provision of free service.)

The meaning of the term "consequential damages" often is not clear.

- *Powers v. Stanley Black & Decker Inc.*, No 1:2014 Civ. 2052 – Document 69 (S.D.N.Y. 2015) (contractual exclusion of "consequential" damages does not prevent recovery for diminished value of acquired asset attributable to breach of representations and warranties regarding the acquired assets)
- *Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 11 N.E. 3d 676 (N.Y. 2014) (damages are "consequential" damages when they do not "directly flow" from the breach, but are not "consequential" damages when they are the "natural and probable consequence" of the breach)
- *PNC Bank v. Wolters Kluwer Financial Services, Inc.*, 2014 WL 7146357 (S.D.N.Y. 2014) (applying *Biotronik* definition of "consequential" damages; a provision excluding liability for "indirect" and "consequential" damages is enforceable)
- *Severn Peanuts Co., Inc. v Industrial Fumigant Co.*, _ F.3d _ (4th Cir. 2015) (applying North Carolina law) (parties may "bargain over the allocation of risk" and limitation or exclusion of consequential damages is enforceable unless unconscionable)
- *Global Crossing Telecomm. v. CCT Commc'ns, Inc.*, 464 B.R. 97 (Bankr. S.D.N.Y. 2011) (applying New York law) (limitation of liability provision is not enforceable for liability arising from gross negligence or worse)
- *Soja v. Keystone Trozze, LLC,* 106 A.D.3d 1168 (N.Y. App. Div. 2013) (limitation of liability provision not enforceable for liability arising from gross negligence or worse)
- *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital*, 2015 N.Y. Slip Op. 07458 (1st Dept. Oct. 13, 2015) (contract that provided that the "sole remedy" for misrepresentations or breaches of warranty was "to cure [the defect or breach] or repurchase" the loan. The cure or repurchase remedy was impossible (because the loans had been liquidated or foreclosed). The "sole remedy" provision would "leave plaintiffs without a remedy." The court applied an equitable exception to the contractual limitation on remedies (which is generally enforceable under freedom of contract))

3.5. Indemnity

- *Majkowski v. American Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 589 (Del.Ch. 2006) ("hold harmless" language is synonymous with "indemnity" language)
- *Alcoa World Alumina LLC v. Glencore Ltd.*, C.A. 15C-08-032 EMD CCLD (Del. Superior Court February 8, 2016) ('hold harmless' clause generally ***not*** sufficient to create broad indemnity)
- *Queen Villas Homeowners Association v. TCB Property Management*, 56 Cal.Rptr.3d 528 ("hold harmless" language functions as a "release").
- *Crawford v. Weather Shield Manufacturing, Inc.*, 44 Cal. 4th 541 (2008) ("defend" language requires the provision of a legal defense but does not necessarily provide for any damages that the beneficiary of the promise has to pay).
- *SGS U.S. Testing Co., Inc. v. Takata Testing Corp'n*, 547 Fed. Appx. 147 (3rd Cir. 2013) (applying New Jersey law) (indemnification law distinguishes between vicarious liability and independent fault indemnity claims).
- *St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply*, 409 F.3d 73 (2d Cir. 2005) (applying New York law) (a party to a contract may not exempt itself from liability for its own gross negligence or worse, but may receive indemnification for activity that involves its gross negligence but does not involve intentional causation of injury)
- *Austro v. Niagra Mohawk Power Corp.*, 487 N.E. 2d 267 (N.Y. 1985) (a party to a contract may not exempt itself from liability for its own gross negligence or intentional conduct, but may receive indemnification where its own gross negligence contributes to its loss, so long as that activity does not involve intentional causation of injury)
- *Margolin v. New York Life Ins. Co.*, 297 N.E. 2d 80 (N.Y. 1973) (a party to contract may obtain indemnification for losses arising out of its own negligence if that contractual "intention is expressed in unequivocal terms")
- *Facilities Dev. Corp. v. Miletta*, 180 A.D.2d 97 (N.Y. App. Div. 1992) (an indemnification provision covers losses arising from the indemnified

party's "own wrongdoing only when the language in the agreement clearly connotes an intent to provide for such indemnification")

- *American Ins. Grp. v. Risk Enter. Mgmt., Ltd.* 761 A.2d 826, 829 (Del. 2000) ("[w]hile a contract for indemnification may provide for indemnification for [an] indemnitee's own negligence, that intention must be evidenced by unequivocal language")
- *Precision Air, Inc. v. Standard Chlorine of Delaware*, 654 A.2d 403, 407–08 (Del. 1995) (generally an indemnification provision "does not extend to indemnification for an indemnitee's own negligence")
- *Stewart v. RTP Holdings, Inc.*, No. 07C-10-177 FSS, 2009 Del. Super. LEXIS 221, at *6–7 (Del. Super. Ct. May 20, 2009) court will enforce the indemnification provision if parties clearly and unequivocally agree to indemnify one of the parties for its own negligence)
- CAL. CIVIL CODE §§ 2773, 2774 (West 2012) (an agreement to indemnify a party against a future act is void if the act is known to be unlawful at the time it is done, but an agreement to indemnify a party against a past act is valid even if the act was known to be unlawful at the time it was done)
- *Smoketree-Lake Murray Ltd. v. Mills Concrete*, 286 Cal. Rptr. 435 (Cal. Ct. App. 1991) (an indemnity may not cover future unlawful acts, if known to be unlawful by indemnified party when performed)
- *Lemat Corp. v. Am. Basketball Ass'n*, 124 Cal. Rptr. 388 (Cal. Ct. App. 1975) (an indemnity may not cover future unlawful acts, if [known] to be unlawful by indemnified party when performed)

4. *Successor liability issues*

4.1. Cases

- *Security Alarm Financing Enterprises, Inc. v. Parmer,* 2013 WL 593767 (N.D.W. Va. 2013) – Judgment lienor sufficiently alleged a basis for successor liability by claiming that the management and operation of the business remained the same after the sale.
- *In re Acme Security, Inc.,* 484 B.R. 475 (Bankr. N.D. Ga. 2012) – Secured party that acquired all the assets of the debtor in a *strict foreclosure* and then continued the same business at the same location could have successor liability as a "mere continuation" of the debtor

because the sole shareholder of the secured party was, with his wife, the sole shareholder of the debtor. However for equitable reasons, court did not impose successor liability because the strict foreclosure did not deprive the debtor's unsecured creditors with a remedy they otherwise would have had. The debtor was hopelessly insolvent, the secured obligation exceeded the value of the assets acquired, and the secured party did not target the landlord by selectively not paying it because the only other obligations of the debtor that the secured party did pay were *de minimis*.

- *Premier Pork, LC v. Westin Packaged Meats, Inc.*, 406 Fed. Appx. 613 (3d Cir. 2011) -- Entity that purchased some of the debtor's assets from a foreclosure sale buyer did not have successor liability as a "mere continuation" of the debtor's business because the purchaser and the debtor did not share the same stock, business operations, or location.
- *Call Center Technologies, Inc. v. Grand Adventures Tour & Travel Publishing Corp.*, 635 F.3d 48 (2d Cir. 2011) – Purchaser of all the assets of the original debtor at a foreclosure sale could have liability as a "mere continuation" of the debtor under "continuity of enterprise" theory even *without* continuity of ownership: some of the managers, the majority of employees, the physical location of the business, and most of the services provided were the same, the purchaser assumed at least some of the liabilities of the debtor, and the purchaser was formed for the purpose of acquiring the debtor's assets.
- *Ortiz v. Green Bull, Inc.*, 2011 WL 5554522 (E.D.N.Y. 2011) – Secured party entered into a *collateral transfer agreement* with the debtor pursuant to which secured party acquired most of the debtor's assets. *De facto* merger requires some continuity of ownership and tort claimant of debtor pled that it lacked knowledge of any such continuity. However, dismissal was premature because the transactions were confidential and tort claimant was entitled to discovery on the issue.
- *Mamacita, Inc. v. Colborne Acquisition Co.*, 2011 WL 881654 (N.D. Ill. 2011) – Entity that purchased assets of debtor at foreclosure sale did not have successor liability under either the *de facto* merger or mere continuation rules because there was no continuity of ownership.
- *Glentel, Inc. v. Wireless Ventures, LLC*, 362 F. Supp. 2d 992 (N.D. Ind. 2005) – Article 9 foreclosure sale does not preclude the imposition of

successor liability; foreclosure sale did *not* result in *de facto* merger and transferee that purchased failed company's assets in a foreclosure sale was not a continuation of the debtor because even though the same business was conducted at the same location, the management and ownership changed, although the new owner was a family member of the prior owners

4.2. Techniques

- Don't say anything that suggests that the business will "continue"
- Change the name, if possible
- Limit equity given to prior owners

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Speaker Contact Information

ASSUMING LIABILITIES/DEBT IN TRANSACTIONS: TRICKS AND TRAPS

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