

Successor Corporate Liability.

PLF claims DFT is liable to it for the debt that TPC owes to PLF.

< *Note: TPC = third party corporation.* >

To prove that DFT is responsible to PLF for the debt of TPC, PLF must prove that at least one of the following things is more probably true than not true:

< *delete any that is not relevant* >

1. < *if applicable* > DFT expressly or impliedly assumed TPC's obligation;
2. < *if applicable* > DFT effectively merged or consolidated with TPC;
3. < *if applicable* > DFT's business merely continued TPC's business;
or
4. < *if applicable* > DFT's business was a fraudulent effort to avoid TPC's liabilities.¹

I will now describe these matters in more detail.

(a) Express or Implied Assumption of Liabilities

PLF is claiming that DFT agreed to assume TPC's liabilities. You must decide whether PLF has proved that it is more likely true than not that DFT agreed, either expressly or through conduct, to assume TPC's liabilities.² For example, an individual may expressly agree in writing or orally to do something. Or an individual may indicate his or her agreement by performing the act at issue.

(b) Mere Continuation or Effectively a Merger

PLF could also show that DFT is liable for TPC's liabilities if it shows that TPC was essentially merged into DFT, so that TPC's business has essentially been

¹ *Milliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547, 556 (2008); *DeJesus v. Park Corp.*, 530 F. App'x 3, 6 (1st Cir. 2013).

² See, e.g., *Kraft Power Corp. v. Merrill*, 464 Mass. 145, 148 (2013).

continued by DFT under a new name.³ PLF must also show that TPC transferred its business to DFT in an attempt to eliminate its debt.⁴

In deciding whether the transfer of TPC's assets to DFT was a continuation of TPC, or effectively a merger of the two companies, you should consider the following factors:

- Has the management, personnel, physical location, assets, and general business operations remained the same;
- Did TPC acquire DFT's assets with shares of its own stock resulting in a continuation of shareholders;
- Did TPC stop its ordinary business operations, liquidate, and dissolve as soon as legally and practically possible; and
- Did DFT take responsibility for TPC's obligations which were necessary for TPC's normal business operations.⁵

No single factor is necessary or sufficient to establish a merger or mere continuation. You are to consider each of these factors in arriving at your findings with respect to DFT.⁶

(c) Fraudulent Effort to Avoid Liabilities

The final circumstance in which liability may be imposed upon DFT is if you find that it is more probably true than not true that DFT was involved in a fraudulent effort to help TPC wrongfully avoid its liabilities.

³ Cf. *Milliken*, 451 Mass. at 556 n.15 ("de facto merger" and "mere continuation" mean essentially same thing).

⁴ *Milliken*, 451 Mass. at 556 & 560.

⁵ *Milliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547, 557 (2008); *DeJesus v. Park Corp.*, 530 F. App'x 3, 6 (1st Cir. 2013); see also 15 W.M. Fletcher, *Cyclopedia of Corporations* § 7124.20, at 294–95 (rev. perm. ed. 2008) (discussing elements of "de facto merger").

⁶ See *Cargill, Inc. v. Beaver Coal & Oil Co.*, 424 Mass. 356, 360 (1997); *DeJesus v. Park Corp.*, 530 F. App'x 3, 6 (1st Cir. 2013).

Fraud is a false statement which a person [entity] intentionally takes or makes for the purpose of a person [entity] relying on it, to that person's [entity's] harm.

To prove DFT committed fraud to avoid the liabilities of TPC, PLF must prove that the following five things are more probably true than not true:

1. DFT said something that concerned a fact which, at the time made, was false about TPC's liabilities. That is to say, that DFT's act(s) or statement(s) were not an opinion or an estimate about a future event;
2. A reasonable company in PLF's position would consider DFT's statement(s) concerning that particular fact to be important in PLF's decision-making;
3. DFT knew that the statement(s) [was/were] false, or DFT recklessly made the statement(s) by intentionally disregarding [its/their] truth or falsity;
4. DFT made the false statement(s) with the intention that the PLF would rely on it/them;
5. PLF did in fact rely on DFT's statement(s); and
6. PLF suffered some financial loss as a result of relying on a DFT's false statement(s).⁷

⁷ See, e.g., *Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, 455 Mass. 458, 471 (2009); *Masingill v. EMC Corp.*, 449 Mass. 532, 540 (2007).