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MEMORANDUM

TO: Matthew P. Bergman
FROM: Anna Knudson
DATE: September 18, 2004
RE: Asbestos Liability for Griscom Russell

Question Presented

Is Dial or Viad the successor-in-interest to Griscom Russell and thus liable for asbestos injuries caused by exposure to asbestos containing products manufactured by Griscom Russell?

Short Answer

Viad is the successor-in-interest to pre-1965 merger liabilities for Griscom Russell products. In 1965, Armour & Co. explicitly assumed preexisting liabilities when Baldwin-Lima-Hamilton, owner of Griscom-Russell, merged into Armour. Armour & Co. retained its corporate identity after it became a subsidiary of Greyhound in 1970. However, in 1992 Armour merged into Greyhound, which had been renamed The Dial Corp. Absent any evidence to the contrary, this second merger resulted in The Dial Corp., which has now been renamed Viad Corp., assuming from Armour the pre-1965 merger liabilities for Griscom Russell products.

Which entity is liable for *post-1965 merger* liabilities for Griscom Russell products is less clear. The answer may depend on provisions in corporate documents not yet in our possession, such as the certificate creating Baldwin-Lima-Hamilton as a Delaware subsidiary of Armour in 1965. I need some guidance on the importance of determining post-1965 merger liability for these products before I delve into this aspect further. The answer to this question

seems in part to depend on how long these products were manufactured, which is unknown at this point.

Finding of Facts

We have heard that in 1961, Baldwin-Lima purchased Hamilton, which owned Griscom Russell. According to one set of interrogatories, Baldwin-Lima-Hamilton acquired Griscom Russell in 1962, and shortly thereafter, Griscom Russell was dissolved.¹ In 1965, Baldwin-Lima-Hamilton merged into Armour & Company ("Armour").² This 1965 merger was of Baldwin-Lima-Hamilton, a Pennsylvania Corporation, into Armour, a Delaware corporation; at the same time, a new Baldwin-Lima-Hamilton was created as a Delaware corporation and a subsidiary of Armour, and the assets from the Pennsylvania company were transferred into the new entity.³ Assuming that the Armour subsidiary, the Delaware Baldwin-Lima-Hamilton, continued manufacturing Griscom-Russell products following the 1965 merger, then it seems the subsidiary is responsible for post-merger liabilities stemming from this product line and lasting until the line was discontinued altogether.

On December 28, 1970, Armour merged into a wholly-owned subsidiary of Greyhound Corporation.⁴ As a result, Greyhound came to own all of Armour's authorized and outstanding stock through the following transactions: Armour's par value \$5 common stock was converted into 3.25 shares of Greyhound common stock; the stock of the subsidiary was converted to Armour \$1 par value common stock, all of which was owned by Greyhound; and there was no

¹ DEFENDANT VIAD CORPORATION'S RESPONSES TO PLAINTIFF'S INTERROGATORIES, In re: All Asbestos Litigation Filed by Wise & Julian, P.C., v. VIAD CORP., f/k/a The Dial Corporation, Individually and as successor-in-interest to Griscom-Russell Company, et.al., p. 5 (date?).

² ARMOUR & CO., 1971 ANNUAL REPORT, p. 15 (April 10, 1972).

³ DEFENDANT VIAD CORPORATION'S RESPONSES, *supra*.

⁴ ARMOUR & CO., *supra*, note 1, at p. F-7.

change to Armour's \$4.75 preferred stock (with \$100 par value.) This type of transaction, in which a parent company creates a subsidiary and then merges the acquired company into the subsidiary, is known as a reverse triangular merger.

The 1970 merger agreement between Armour & Co. and the Greyhound subsidiary states,

The corporate existence of Armour, with all its purposes, powers and objects, shall, except as provided in Section 2.1 hereof, continue unaffected and unimpaired by the Merger, and as the Surviving Corporation it shall be governed by the laws of the State of Delaware and succeed to all rights, assets, liabilities and obligations of the Greyhound Subsidiary in accordance with the General Corporation Law of the State of Delaware. The separate existence and corporate organization of the Greyhound Subsidiary shall cease upon the Effective Date of the Merger and thereupon Armour and the Greyhound Subsidiary shall be a single corporation, to wit: Armour.⁵

The company's 1971 Annual Report presents the corporate structure as Greyhound owning 100 percent of the common stock of Armour, and Armour owning 100 percent of the common stock of Baldwin-Lima-Hamilton, a subsidiary of Armour.⁶

On January 2, 1971, Armour sold the Industrial Products Group for cash and contingent cash proceeds of up to \$7, 250,000, but it isn't clear if this Group included capital that had been acquired from Baldwin-Lima-Hamilton's operations.⁷ During 1971, Armour sold "a substantial portion of the operations of the Baldwin-Lima-Hamilton Corporation group."⁸ By the end of 1972, Armour had sold "substantially all of the net assets and businesses of its Baldwin-Lima-

⁵ CERTIFICATE OF AGREEMENT OF MERGER OF 111 CORPORATION (DEL.DOM.) MERGING INTO ARMOUR AND COMPANY (DEL.DOM.) UNDER NAME OF ARMOUR AND COMPANY (DEL.DOM.), p. 2 (December 28, 1970.)

⁶ ARMOUR & CO., *supra*, note 1, at p. 14.

⁷ *Id.*, at p. F-9.

⁸ *Id.*

Hamilton group.”⁹ The 1972 Annual Report does not include Baldwin-Lima-Hamilton as a subsidiary of Armour, unlike the submittal for the previous year.¹⁰ I have not found any information discussing what happened to Armour’s or Baldwin-Lima-Hamilton’s liabilities as a result of these asset sales.

In addition in 1972, Armour-Dial (“Dial”) became a wholly owned subsidiary of Armour through another reverse triangular merger.¹¹ Armour acquired the minority interest in Dial in exchange for Greyhound common shares and some warrants. On July 10, 1972, Baldwin-Lima-Hamilton, which had been incorporated in Delaware, officially changed its name to BLH, Inc. by filing documents with the Commonwealth of Pennsylvania.¹² On November 20, 1975, Armour’s Board of Directors voted to liquidate BLH, Inc., which was possible because Armour was its sole stockholder.¹³ Under the dissolution agreement, all remaining assets of BLH, both tangible and intangible, were transferred to Armour.¹⁴ However, the dissolution agreement does not address the question of BLH’s liabilities. At this point, it is still unknown exactly when production of Griscom Russell products ceased.

The 1990s witnessed repeated name changes for Greyhound Corporation, Armour’s parent company. On May 8, 1990, the Greyhound Corp. changed its name to Greyhound Dial Corporation.¹⁵ On May 14, 1991, Greyhound Dial Corporation changed its name to The Dial Corp.¹⁶ In 1992, Armour & Company merged into The Dial Corporation.¹⁷ On August 15,

⁹ ARMOUR & CO., 1972 ANNUAL REPORT, p. 9 (April 17, 1973).

¹⁰ *Id.*, at p. 15.

¹¹ *Id.*, at p. 7.

¹² AMENDED CERTIFICATE OF AUTHORITY, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, July 10, 1972.

¹³ CERTIFICATE OF DISSOLUTION, STATE OF DELAWARE, OFFICE OF SECRETARY OF STATE, June 21, 1976.

¹⁴ *Id.*

¹⁵ CAPITAL CHANGES REPORTER, p. 240,068

¹⁶ *Id.*

1996, the company changed its name to the Viad Corporation.¹⁸ At the same time, the consumer product business was removed from the other businesses comprising Viad and became a new entity named The Dial Corporation.¹⁹ On March 29, 2004, The Dial Corporation merged into a subsidiary wholly owned by the German company Henkel KGaA.

Argument & Authorities

A. Choice of Law

The first step in determining which corporate entity is the successor to Griscom Russell is to decide whether Washington or Delaware law applies. In Washington, a choice of law analysis is only appropriate if there are substantive differences between the laws of the two states. Rice v. Dow Chemical Company, 124 Wash.2d 205, 210, 875 P.2d 1213 (1994). Washington law applies if no conflict exists. Id. However, if there are differences between the laws of the two states, then Washington courts rely on the “most significant relationship” test to determine which state’s law to apply. Id., at 213.

The laws of Washington and Delaware both require liabilities of merging corporations to attach to the new corporate entity when statutory or *de jure* mergers occur. In Washington, “When a merger takes effect... .the surviving corporation has all liabilities of each corporation party to the merger.” RCWA 23B.11.060(1)(c). “Liabilities typically become the responsibility of the surviving company when two corporations merge.” Nivens. v. E.J. Bartells, 97 Wash.App. 507, 510, 983 P.2d 1193, (1999)(citing Hall v. Armstrong Cork, Inc., 103 Wash.2d 258, 261-262, 692 P.2d 787 (1984)). Along the same lines, the Delaware law states:

¹⁷ DEFENDANT VIAD CORPORATION’S RESPONSES, *supra*.

“When any merger or consolidation shall have become effective under this chapter...all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.”
8 Del.C §259(a).

There is no significant difference between the laws of Washington and Delaware regarding the attachment of predecessor liability to successors when companies merge explicitly. Therefore, the question of whether Viad is the successor-in-interest to the pre-1965 merger liabilities from Griscom Russell products may be answered by applying Washington law.²⁰

B. Viad Is The Successor-In-Interest to Griscom Russell As A Matter of Law

Three transactions occurred which caused Viad to succeed to Griscom Russell’s pre-1965 merger liabilities as a matter of law. First, in the early 1960s, Griscom Russell was dissolved into the Pennsylvania company, Baldwin-Lima-Hamilton, and as a result, the latter assumed Griscom Russell’s liabilities.²¹ (I need to obtain documentation of this transaction and transfer of liabilities – from PA.)

Two mergers resulted in Viad retaining pre-1965 merger liabilities from Griscom Russell. As noted, Baldwin-Lima-Hamilton of Pennsylvania was merged into Armour on April 20,

¹⁸ CAPITAL CHANGES REPORTER, *supra*.

¹⁹ DEFENDANT VIAD CORPORATION’S RESPONSES, *supra*.

²⁰ One Delaware court based its choice of law determination on whether successor liability is an issue in tort law or of contract law, noting that there is no unanimity in how courts categorize the issue. See In re Asbestos Litigation (Bell), 517 A.2d 697, 698-699 (1986). This court decided successor liability is an issue of contract law and therefore held the law of the forum with the most significant relationship to the transaction should apply, whereas if the court had found successor liability to be an issue in tort law, Delaware law would have required the law of the place where the tort occurred to have applied. *Id.*

²¹ DEFENDANT VIAD CORPORATION’S RESPONSES, *supra*.

1965.²² There is no doubt that this merger caused Baldwin-Lima-Hamilton's pre-merger liabilities to attach to Armour. The Joint Plan and Agreement of Merger, referring to Baldwin-Lima-Hamilton as "BLH," states,

At the time of merger, as defined in Article VIII hereof, BLH shall be merged into Armour, the separate existence of BLH shall cease (except insofar as it may be continued by statute) and Armour, as the surviving corporation, shall continue to exist by virtue of and shall be governed by the laws of Delaware with its present name. All property of every description, real, personal and mixed, interests, rights, privileges, powers and franchises of Armour prior to the merger shall not be affected by the merger, and at the time of merger, Armour shall, without further act or deed, own and possess all franchises of BLH, all as provided by the General Corporation Law of the State of Delaware and the Business Corporation Law of Pennsylvania. Also as provided by those laws, all rights of creditors and of any persons dealing with the Constituent Corporations and all liens upon any property of the Constituent Corporations shall be preserved unimpaired by the merger, and *all debts, liabilities, obligations and duties of BLH shall thenceforth attach to Armour and may be enforced against it to the same extent as if the same had been incurred by it.*²³ (emphasis added)

When Armour subsumed the Pennsylvania Baldwin-Lima-Hamilton operation, clearly it assumed the pre-merger liabilities for Griscom Russell products which Baldwin-Lima-Hamilton had absorbed from Griscom Russell. As noted, both Washington and Delaware law are clear in that when companies merge, the surviving corporation is the successor to all of the liabilities of the merging entities. As a matter of law, the court should find that Armour in 1965 inherited all of Baldwin-Lima-Hamilton's liabilities, including those stemming from the Griscom Russell operations.

²² JOINT PLAN AND AGREEMENT OF MERGER OF BALDWIN-LIMA-HAMILTON WITH AND INTO ARMOUR & CO. (April 20, 1965).

²³ *Id.*

A second merger resulted in Armour transferring its liabilities to the company which is today known as Viad Corp. As noted previously, Armour's parent company, Greyhound Corporation, changed its name to Greyhound Dial Corporation in 1990, and in 1991, changed its name again to The Dial Corp.²⁴ In 1992, Armour merged into The Dial Corp.²⁵ Then in 1996, The Dial Corp. spun off its consumer product business, naming it The Dial Corporation, and renamed its remaining operations Viad Corp.²⁶

Under Washington law, a merger causes the new corporate entity to inherit all liabilities from its constituent corporations. RCWA 23B.11.060(1)(c). By Viad's own admission, Armour merged into the company that eventually became Viad Corp. Therefore, it is reasonable to assume that Viad Corp. inherited Armour's liability for Griscom Russell. (I will obtain the 1992 merger documentation from the Delaware Secretary of State to strengthen this point.)

Conclusion and Recommendations

The court should reach summary judgment by finding that as a matter of law, Viad Corp. is the successor-in-interest to the pre-1965 merger liabilities from Griscom Russell. This argument is based on the simple fact that two explicit mergers occurred: in 1965, Baldwin-Lima-Hamilton into Armour; and in 1992, Armour into The Dial Corp., now known as Viad Corp.

Proving that Viad Corp. is also responsible for all post-1965 merger liabilities for Griscom Russell products will require further investigation and discovery. There are three key junctures involved which are relevant:

1. The creation of Baldwin-Lima-Hamilton of Delaware, a subsidiary of Armour, in 1965.

²⁴ DEFENDANT VIAD CORPORATION'S RESPONSES, *supra*.

2. The sale of Baldwin-Lima-Hamilton properties in 1971 and 1972, shortly following Greyhound's acquisition of Armour as a subsidiary.
3. The dissolution of Baldwin-Lima-Hamilton of Delaware, renamed BLH, Inc., in 1975.

Regarding the first juncture, we need to inquire: is there any reason to believe that although Baldwin-Lima-Hamilton of Delaware was a subsidiary of Armour, that post-1965 merger liabilities of the subsidiary actually attached to the parent? Both Washington and Delaware law maintain that parent companies are only held liable for the actions of their subsidiaries in special circumstances, such as fraud. *See Minton v. Ralston Purina Company*, 146 Wash.2d 385, 397-399, 47 P.3d 556 (2002); *Pauley Petroleum Inc. v. Continental Oil Co.*, 43 Del.Ch. 516, 521, 239 A.2d 629 (1968). At this point, we have no evidence suggesting such circumstances.

Regarding the sale of assets, it would be helpful to know who purchased the properties in 1971 and 1972, and whether those sale documents addressed assumption of liabilities for the post-1965 merger timeframe. It is also necessary to find out how long manufacturing of Griscom Russell asbestos-containing products continued following the 1965 merger with Armour. Were Griscom Russell products being manufactured at all from 1965 through 1970? If so, how much? Was there any interruption or changes in workforce, management and/or production when Griscom Russell merged into Baldwin-Lima-Hamilton in the early 1960s, when the latter merged into Armour in 1965, and when Greyhound sold the assets in the early 1970s? If so, what were

²⁵ *Id.*
²⁶ *Id.*

they? Finally, is there any documentation addressing assumption of post-1965 merger liabilities when BLH, Inc. of Delaware was dissolved in 1975?

There is a possibility that an entity other than Viad Corp. is the successor-in-interest to the post-1965 merger liabilities for Griscom Russell products. In Washington, successor corporations are held liable for their predecessors' obligations when: (1) the purchaser expressly or impliedly agrees to assume liability; or (2) the purchase is a *de facto* merger or consolidation; or (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability. George v. Parke-Davis, 684 F.Supp 249 (E.D. Wash.1988)(citations omitted).

To determine whether transactions between corporations are actually *de facto* mergers, Washington looks to the four factors set out in *W. Fletcher, Cyclopedia Corporations*. See e.g., Cashar v. Redford, 28 Wn.App 394, 398, 624 P.2d 194 (1981). The four factors signifying *de facto* mergers are as follows: (1) a continuity of ownership that occurs when the purchasing company uses its own stock as all or part of the purchase price of the assets of the seller company; (2) a continuity of enterprise that may occur when the purchasing company has retained use of the seller company's plant and management or other key personnel; (3) the dissolution or liquidation of the seller company as soon as practicable following the transaction; and (4) an assumption by the purchasing corporation of those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. 109 A.L.R.5th 301. It is possible that the sale of Baldwin-Lima-Hamilton assets in 1971 was actually a *de facto* merger, but currently the only information about this

transaction that we have comes from Armour's Annual Reports. We will need more, starting with the name of the entity that purchased these assets, to prove this aspect of the case.

One court put it aptly with, "As the decisional law teaches, each case of successor liability must turn on its particular facts." Sheppard, et al. v. A.C. and S. Co., Inc., 484 A.2d 521, 526 (1984). Determining which entity is responsible for the post-1965 merger liabilities for Griscom Russell products turns on many facts that remain unknown to us at this point, the most important being to what extent asbestos-containing products were even manufactured later than 1965. I'll assume you'd like the search to continue, unless I hear otherwise.

Written but not needed for final memo:

Why, if we rely on the *de facto* merger doctrine, we need to apply Washington, not Delaware, law:

There is surprisingly scant common law dealing with the nexus among corporate successor liability, personal injury liabilities and reverse triangular mergers among companies. There are no Washington state cases fully on point for this intersection of issues. While there are a couple of cases applying Delaware law that are on point, their holdings are against plaintiffs; these cases thus provide authority in favor of Viad's position. Therefore, it is imperative that we succeed in applying Washington, not Delaware, law to show that Viad or Dial is the successor-in-interest to Griscom Russell.

Before delving into ways to argue that Washington law applies, it is worth addressing in greater detail the cases Viad and Dial will embrace. One recent case dealt with the question of whether a parent corporation, Bristol-Myers-Squibb, could be held liable for injuries caused by breast implants manufactured by a subsidiary; the implants were sold prior to the parent's acquisition of the subsidiary through a reverse triangular merger. Binder v. Bristol-Myers-Squibb, Co., 184 F.Supp.2d 762 (N.D.Ill. 2001)(applying Delaware law). In finding that the parent did not assume the subsidiary's liabilities, the court quoted language from the Agreement and Plan of Merger that is very similar to the language outlined above from Armour's 1970 Certificate of Merger. Id., 184 F.Supp.2d at 769. In each case, the acquired corporation was to continue unaffected and unimpaired, the pre-existing subsidiary would disappear, and the

acquired corporation would succeed to the liabilities of the disappearing subsidiary. Neither set of agreements provided for the parent corporation to assume the liabilities of the acquired entity. Furthermore, in Binder, the court rejected plaintiff's argument that the merger was actually a *de facto* merger, stating, "the transaction that took place... ..was an actual merger with all remerge liabilities retained by Weck, the surviving corporation. Subsequently, the doctrine of *de facto* merger is not applicable where the transaction constituted a valid *de jure* merger." Id., 184 F.Supp.2d at 770.

My attempt at arguing that Washington and Delaware *de facto* merger common law is the same in an effort to ensure that Washington, not Delaware, law will be applied: (this is a real long shot given the paucity of Delaware *de facto* merger cases.)

In Washington, in the absence of statutory mergers, a corporation generally does not inherit another company's liabilities when it purchases assets from it; this is known as the successor non-liability rule. George v. Parke-Davis, 684 F.Supp 249 (E.D. Wash.1988)(citations omitted). However, there are four exceptions to this rule. Id. Successor corporations are held liable for their predecessors' obligations when:

- (1) the purchaser expressly or impliedly agrees to assume liability; or
- (2) the purchase is a *de facto* merger or consolidation; or
- (3) the purchaser is a mere continuation of the seller; or
- (4) the transfer of assets is for the fraudulent purpose of escaping liability. Id.

Delaware law??? Can't find these four exceptions laid out nicely in Delaware case law...

To determine whether transactions between corporations are actually *de facto* mergers, Washington looks to the four factors set out in *W. Fletcher, Cyclopedia Corporations*. See e.g., *Cashar v. Redford*, 28 Wn.App 394, 398, 624 P.2d 194 (1981). The four factors signifying *de facto* mergers are as follows: (1) a continuity of ownership that occurs when the purchasing company uses its own stock as all or part of the purchase price of the assets of the seller company; (2) a continuity of enterprise that may occur when the purchasing company has retained use of the seller company's plant and management or other key personnel; (3) the dissolution or liquidation of the seller company as soon as practicable following the transaction; and (4) an assumption by the purchasing corporation of those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. 109 A.L.R.5th 301.

While Washington courts may consider all of these factors when identifying *de facto* mergers, they have placed greatest emphasis on the continuity of ownership in making this determination. For example, in *Cashar*, when noting the absence of this type of merger, the appellate court explained, "In addition to other requirements... such a union can only be found when the consideration given to the selling corporation for its assets is shares of the purchasing corporation's stock, rather than cash." *Id.* More recently, another Washington appellate court stressed this factor in dismissing the possibility of a *de facto* merger, with:

"Generally, a *de facto* merger is found where a seller corporation continues its business existence as an absorbed part of the buyer and the seller's shareholders or officers continue their interest in the business after the dissolution of the selling corporate entity. Usually the seller's shareholders acquire shares in the purchaser corporation in

exchange for their stock, rather than selling for cash. The rationale behind imposing liability on the purchaser when shares rather than cash is given for the purchase is that the seller's stockholders retain an ownership interest in the continued business operations." Fox v. Sunmaster Products, Inc., 63 Wash.App. 561, 570, 821 P.2d 502 (Div. 1 1991).

There are few *de facto* merger cases applying Delaware law, in either state or federal courts.²⁷ However, in a couple of cases, courts applying Delaware law have focused on the continuity of ownership factor, or the stock-for-asset transfer, when determining the presence or absence of *de facto* mergers. In one case the Delaware Supreme Court wrote,

"...where one corporation transfers all of its assets to another corporation, and payment is made in stock, issued by the transferee directly to the shareholders of the transferring corporation, in exchange for their stock in that corporation, the transferee agreeing to assume all the debts and liabilities of the transferor, it is, also, well settled that persons having claims against the transferor may, in most cases at least proceed at law in the first instance, against the transferee and procure a personal judgment against that corporation, and this is true whether the claim and the action based thereon be in contract or in tort." Drug v. Hunt, 35 Del. 339, 361-362, 168 A. 87 (1933).

In Hunt, the Court went on to explain, "...under the facts of this case, it would seem that, so far as creditors are concerned, the theory that there was, in effect, a *de facto* merger, or combination between the two corporations entering into the contract, is the most reasonable one for us to adopt." Id., 35 Del. at 362. A federal court referenced Hunt and two other cases in describing the stock-for-assets exchange as the key criteria for *de facto* mergers in Delaware with, "Only in a few cases, where the consideration passed directly to the transferor's

²⁷ As recently as 1977, a federal district court could not find "any Delaware cases involving the assumption of products liability by successor corporations..." Fehl v. S.W.C. Corporation, 433 F.Supp. 939, 946 (D.Del. 1977).

stockholders without coming into possession of the transferor corporation, has a de facto merger been found.” Fehl v. S.W.C. Corporation, 433 F.Supp. 939, 947 (D.Del. 1977).