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Media, Privacy and Defamation Law Committee

IT’S TIME FOR FANNIE MAE AND FREDDIE MAC TO LET THE SUNSHINE IN

By: Adrianna C. Rodriguez

As the economy cautiously recovers from the collapse of the housing market, we’ve learned remarkably little about the role of two of the boom and bust’s most notorious players—Fannie Mae and Freddie Mac. One reason for the dearth of information is that Fannie and Freddie—federally chartered corporations created to promote home ownership—are not subject to the Freedom of Information Act (FOIA). On his first day in office, President Barrack Obama committed his administration to a new age of transparency within the government. However, since taxpayers poured $185 billion into Fannie and Freddie to save them from collapse, two legislative attempts to make them subject to FOIA have failed. As a result, we are no closer today than we were five years ago to understanding exactly how Fannie’s and Freddie’s unchecked actions fueled the boom that sent the economy into a tailspin we are still recovering from today.

Continued on page 8

1 Adrianna C. Rodriguez is an associate in the Washington, D.C., office of Holland & Knight LLP. She is a member of the firm’s Litigation Section and the National Media Practice Team. Ms. Rodriguez would like to thank Charles D. Tobin, chair of Holland & Knight’s National Media Practice Team for his help and guidance throughout the editing process.

2 Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009) (“My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.”).

This has been a good year for our committee. In addition to the three quality newsletters published this year, the committee also sponsored three top-drawer CLEs, including The New Media Economy in Kansas City, Role of the Media in High-Profile Cases in Washington D.C., and Libel Tourism in San Francisco.

I am proud to have had the opportunity to work with excellent fellow committee members and others, with special thanks to Leita Walker, who will assume the chair beginning in September. The redoubtable Shannon Zmud-Teicher will fill the chair-elect/editor spot, and Tom Curley will follow Shannon in 2014-15.

I will stay actively involved as vice-chair for membership and look forward to working will all of you going forward.

Joseph Larsen, Outgoing Chair
Media, Privacy and Defamation Committee
News that the U.S. government uses drones to conduct surveillance over American soil was not exactly well received. Many were appalled at the very notion while others more or less echoed Bob Dylan’s sentiments on receiving a death threat: “Hey man... I don’t mind being shot; I just don’t dig being told about it.” 1 And while recent polls suggest that a majority of the country approves of drone use in military capacities, 2 the notion of domestic drone use appears to be decidedly less so. Instead, to varying degrees, the public’s reaction to drone use at home is that it is, well, creepy. Now take that almost inherent “creep” factor and consider what happens when TMZ gets its hands on a drone... 3 With current estimates that there will be 10,000–30,000 drones in the domestic airspace by 2020, the question arises as to how drones will intersect with newsgathering. 4

Mark Your Calendars for September 30, 2015

In February 2012, President Obama signed the FAA Air Transportation Modernization and Safety Improvement Act of 2012. 5 The Act eschews the term “drone” in favor of the more formal “unmanned aircraft systems,” which is defined in the Act as “an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system.” 6 From a public perspective, the legislation mandated that law enforcement agencies be permitted to operate small (4.4 pounds or less) drones at a height of less than 400 feet, during daylight conditions, and within the line of sight of the operator. 7

The bill also requires the FAA to provide a plan “for the safe integration of civil unmanned aircraft systems into the national airspace system as soon as practicable, but not later than September 30, 2015.” 8 So there it is. By September 30, 2015, the FAA will reveal its plan to integrate civil drones into the domestic airspace. But while the FAA will develop safety regulations for the unmanned aircraft systems industry, it will not—it appears—address privacy concerns or sanctioned uses for civil drones. And so we are on the brink of the Pandora’s Box of drones.

Current Public Use

It took very little time for law-enforcement agencies to use drones and garner national press. In April 2012, six cows wandered into Rodney Brossart’s 3,000-acre North Dakota farm. 9 Mr. Brossart believed the cows’ meandering entitled him to keep them so he and his family chased the police from his property with high-powered rifles. A lengthy standoff ensued until the Grand Forks SWAT team used a drone to locate Mr. Brossart on his farm. Mr. Brossart was arrested and charged with various crimes. Upon his arrest, Mr. Brossart said that he wasn’t aware that the police had used a drone to locate him and vowed to fight the use of evidence obtained by the drone. To that end, Mr. Brossart’s attorney argued that dismissal of the charges was appropriate on account of the “warrantless use of [an] unmanned military-like surveillance aircraft.” The court disagreed, finding that “there was no improper use of an unmanned aerial vehicle” and noting that the drone “had no bearing on these charges being contested here.” 10

Public use of drones reached a new level earlier this year when ex-soldier and policeman Christopher Dorner embarked on a murderous rampage in southern California. Mr. Dorner promptly became the target of what was reported as “the first human target for remotely-controlled airborne drones on U.S. soil.” 11 Mr. Dorner ultimately took his own life.

Continued on page 12

1 American Masters: No Direction Home (2005).
2 See, e.g., Tom Curry, Poll Finds Overwhelming Support for Drone Strikes, NBC News (June 5, 2013).
3 In 2012, various outlets reported that TMZ was actively seeking a drone permit. TMZ vehemently denied these reports.
5 Pub. L. 112-95.
6 Id. sec. 331(9).
7 Id. sec. 334(c)(1).
8 Id. sec. 332(a)(3).
11 Mike Parker, Man hunt for Ex-Soldier who Shot Police Chief’s Daughter and Killed Policeman, Express (February 10, 2013).
THE PATH TO SUCCESS—SUCCESSOR LIABILITY, THAT IS

By: Eric Weslander

Introduction

When a model recently sued a modeling agency that she believed had wrongfully appropriated her image in violation of Illinois’ Right of Publicity Act, the U.S. Court of Appeals for the Seventh Circuit upheld the grant of summary judgment for defendant on grounds that plaintiff had offered “no evidence that would allow a jury reasonably to conclude that [Defendant] used her image at all, much less without her consent.” But the court also noted that the plaintiff could not succeed in her claim because of a corporate-law nuance she had failed to appreciate: the party she had sued was not a legal successor to the party she believed had improperly used her image, and had merely acquired some of that party’s assets.

The case illustrated that the doctrine of successor liability—more accurately described as a rule or presumption of non-liability by a company that purchases another company’s assets—can and does occasionally rear its head in the world of media and intellectual property. In a 2011 decision, for example, U.S. District Court for the Southern District of New York undertook a detailed analysis of successor liability in the context of a copyright-infringement claim, and a 2006 decision by the New Hampshire Supreme Court analyzed successor liability in the context of a former Olympic gold medalist’s claim for appropriation of likeness.

It is likely that the evolving media landscape, with ever-changing methods of dissemination and republication of information, will lead to increased importance of the successor-liability doctrine in years ahead, as plaintiffs seek creative means to impose liability on entities that they believe should bear responsibility for their reputation- or privacy-related injuries. This article will explore the basic contours to the rule of successor liability (perhaps more accurately termed “successor non-liability”), as well as its exceptions—which tend to be fact-intensive, overlapping and somewhat malleable—in light of the guidance from courts that successor liability is an “equitable doctrine and not an inflexible command.”

Overview of the doctrine

The most common recitation of the rule of successor liability (or non-liability) is as follows: a company that purchases the assets of another company does not succeed to the seller’s liabilities unless:

(a) the transaction is a fraudulent attempt to avoid liability; (b) the purchaser company is a “mere continuation” of the seller company; (c) the transaction amounts to a “de facto” merger between the purchaser and seller; or (d) the purchaser either expressly or impliedly has assumed the liability at issue.

It is likely that the evolving media landscape, with ever-changing methods of dissemination and republication of information, will lead to increased importance of the successor-liability doctrine in years ahead, as plaintiffs seek creative means to impose liability on entities that they believe should bear responsibility for their reputation- or privacy-related injuries.

Continued on page 14

1 Eric Weslander is an associate in the Kansas City office of Lathrop & Gage LLP.
2 765 ILCS 1075/30.
4 Id.
7 North Shore Gas Co. v. Salomon, Inc., 152 F.3d 642, 650 (7th Cir. 1998), overruled on other grounds by Healthcare, Inc. v. PreferredOne Ins. Co., 604 F.3d 983 (7th Cir. 2010); see also Ed Peters Jewelry Co. v. C&J Jewelry Co., 124 F.3d 252, 265 (1st Cir. 1997) (“[S]uccessor liability is an equitable doctrine, both in origin and nature.”).
8 E.g., Software Freedom Conservancy, Inc., 783 F. Supp. 2d at 653; North Shore Gas, 152 F.3d at 651.
A REVIEW OF RECENT CHANGES TO THE CHILDREN’S ONLINE PRIVACY PROTECTION ACT AND THE IMPACT ON SOCIAL NETWORKS

By: Michelle Bray and Brenda Robinson

FTC Introduces New Updates, Amended Rule Effective July 1, 2013

Recent FTC updates to the Children’s Online Privacy Protection Act (COPPA), introduced in December 2012, and the agency’s expansion of the definitions of such terms as “personal information” and “operator,” have had a notable impact on social networks, creators of plug-ins and other entities subject to regulation that collect personal information from children under the age of thirteen. The new regulations went into effect on July 1, 2013.

Liability for Third-Party Content

Pursuant to the new regulations governing content directed toward children, social media plug-in creators, mobile app developers and third-party ad providers may be considered “operators” under COPPA’s definitions, and therefore liable under the new rules. According to the FTC, the new rules place a heavier burden on website operators to be more actively engaged in monitoring what third-party content appears on their sites. In sum, the new rule covers websites directed to children that integrate third-party plug-ins or advertising networks that collect personal information from visitors. It also covers the ad network or plug-in with “actual knowledge” that such information is being collected.

The definition of “personal information”—which cannot be collected absent parental notice and consent—was also expanded to include persistent identifiers such as IP addresses and mobile device IDs, photographs, videos, images or audio files, and geolocation information. With respect to persistent identifiers, the FTC has clarified that any persistent identifier, such as targeted cookies, which can track the user over time across different sites or services will be included in the definition of “personal information.” On the other hand, basic “contextual” or first party ads meant to support internal operations of a site or service are not considered personal information and do not require prior parental consent, provided that no other personal information is collected and the persistent identifiers are not used or disclosed to contact a specific individual, including through behavioral advertising; to amass a profile on a specific individual; or for any other purpose.

This change will impact any placement of cookies (or other identifiers) by ad partners and social media plug-ins on a child-directed site. Accordingly, it will be important to examine what ad partners and vendors are actually doing and what any contractual agreements contain in this regard, and then take the appropriate steps to effect the proper changes, including any contractual amendments.

Regarding plug-ins such as Facebook’s “Like” button, Section 312.5(c)(8) of the Rule has an exception to parental notice and consent requirements if:

This change will impact any placement of cookies (or other identifiers) by ad partners and social media plug-ins on a child-directed site. Accordingly, it will be important to examine what ad partners and vendors are actually doing and what any contractual agreements contain in this regard, and then take the appropriate steps to effect the proper changes, including any contractual amendments.
1. a third-party operator only collects a persistent identifier and no other personal information;
2. the user affirmatively interacts with that third-party operator to trigger the collection; and
3. the third-party operator has previously conducted an age-screen of the user, indicating that the user is not a child.

Note that the third-party operator must meet all of these requirements. In addition, the exception does not apply to plug-ins where the third party collects more information than a persistent identifier—such as user comments or user-generated content.

**Determining Content Directed at Children**

The amended Rule provides several factors for determining whether a Web site or online service is directed to children. These include the subject matter of the site or service, the visual content, the use of animated characters or child-oriented activities and incentives, music or other audio content, the age of any models, the presence of child celebrities or celebrities who appeal to children, the language or other characteristics of the Web site or online service, or whether any advertising on the Web site or online service is directed to children.

The Rule also states that the Commission will consider competent and reliable empirical evidence regarding the audience composition, as well as evidence regarding the intended audience of the site or service. Accordingly, it is increasingly important to analyze the intended audience of a Web site or online service.

**Teen Privacy Enforcement**

Although COPPA does not strictly apply to teenagers, the FTC encourages child-directed website operators to consider voluntary implementation of regulations and certain protections aimed at this age group. In fact, even where a Web site or online service does not target children under the age of 13 as a primary audience, the subject matter and content of the site or service may attract a substantial number of children under the age of 13 as a secondary audience bringing the site or service within COPPA’s scope. Where children are not the primary audience of a service, the amended Rule does allow an age screen in order to provide COPPA’s protections to only those visitors who indicate that they are under the age of 13 (or to block children from providing personal information to the service).

First Amendment considerations become relevant here, as such a proposal begets more complicated constitutional questions when contemplating how regulations or restrictions on speech, advertising and access to content would apply to a child versus a teenager.

**Requests to Delay Implementation**

Several months after the December 2012 updates were introduced, in April 2013, two major online industry trade groups, the Application Developers Alliance and the Interactive Advertising Bureau, which counts among its members Google, Microsoft and Apple, petitioned the FTC to delay implementation of the changes until at least January 1, 2014, arguing that companies would not have sufficient time to review and fully understand the changes, and to articulate any concerns. Several consumer advocacy groups, including the Electronic Privacy Information Center and Consumer Watchdog, countered this effort.

In the end, the FTC ultimately denied this request, noting that recent revisions had been subject to consideration and feedback for longer than two years. In its unanimous response, the FTC noted that it had taken into account a number of factors, including the costs and burdens of compliance, in determining that the current deadline could be reasonably imposed. The FTC concluded that the changes gave companies sufficient flexibility in selection of cost-effective technologies that will permit them to appropriately comply with the new changes.

More recently, the FTC has concurred that compliance will not be automatic. Although the July 1, 2013 deadline has already taken effect, the FTC recognizes that companies will need additional ramp-up time, and has indicated an intention to be mindful of this in rolling out the new changes.
IT’S TIME FOR FANNIE MAE…  
Continued from page 1

For nearly half-a century FOIA has allowed the public not only to keep their government open and transparent in the present, but also to hold it accountable for its past blunders. Enacted in 1966, FOIA guarantees the public access to federal agency records. Agencies subject to FOIA include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” Under FOIA, these agencies are required to make their records “promptly available to any person” who requests them. The law’s presumption of access is subject to nine exemptions, including for information that is classified in the interest of national security and information reflecting the deliberative process of an agency. In addition, the law does not extend to federal courts, Congress, and many entities that straddle the private-public divide, such as government-sponsored enterprises (GSEs), like Fannie and Freddie. 

Fannie Mae and Freddie Mac

Fannie Mae, officially the Federal National Mortgage Association, and Freddie Mac, officially the Federal Home Loan Mortgage Corporation, are congressionally chartered, publicly traded, for-profit corporations. Congress created both corporations to promote homeownership by making it easier for prospective homebuyers to obtain mortgages. The corporations do this by operating in the secondary mortgage market where they purchase mortgages issued by private institutions in the primary mortgage market, package them into mortgage-backed securities, sell them to investors, and guarantee payment of the principal and interest of the security. Through their activities in the secondary mortgage market, Fannie and Freddie promote home ownership by creating the liquidity that enables private lenders to make more mortgages.

Between 2004 and 2007—the housing boom years—Fannie and Freddie aggressively purchased and guaranteed home mortgages to many people whose credit could not support the mortgages they were offered. This led to record homeownership rates and record profits for Fannie and Freddie. When housing prices plummeted in 2007, Fannie and Freddie were left holding billions of dollars in delinquent or defaulted mortgages for devalued properties. The enterprises did not have sufficient reserves to honor their debt obligations, including their guarantees of mortgage-backed securities. To save them from collapse, Congress created the Federal Housing Financing Agency (FHFA) as part of the Housing and Economic Recovery Act of 2008. The FHFA placed Fannie and Freddie into conservatorship on September 7, 2008. Under conservatorship, the FHFA, a federal agency subject to FOIA, “assumed all the powers of the shareholders, directors, and officers” of Fannie and Freddie.

Although Fannie and Freddie have received FOIA requests over the years, the federally created corporations consistently have taken the position that as government-sponsored enterprises they are not “agencies” subject to FOIA.

Although Fannie and Freddie have received FOIA requests over the years, the federally created corporations consistently have taken the position that as government-sponsored enterprises they are not “agencies” subject to

4 5 U.S.C. §552. See President Lyndon B. Johnson’s Signing Statement (July 4, 1966) available at [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/Document%2031.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/Document%2031.pdf) (“I signed this measure with a deep sense of pride that our nation, unlike some nations, values highly the right of people to know how their government is operating.”).


6 Id. §552 (a)(3)(ii).

7 Id. §552 (b). FOIA’s presumption of openness does not apply to 1) information classified in the interest of national security; 2) information related to internal personnel rules practices of an agency; 3) information specifically exempted from disclosure by statute; 4) trade secrets; 5) information reflecting agencies’ deliberative process; 6) information constituting “a clearly unwarranted invasion of personal privacy”; 7) records compiled for law enforcement purposes; 8) reports “prepared by, on behalf of, or for the use of an agency responsible for the regulation of an agency; 3) information specifically exempted from disclosure by statute; 4) trade secrets; 5) information reflecting agencies’ deliberative process; 6) information constituting “a clearly unwarranted invasion of personal privacy”; 7) records compiled for law enforcement purposes; 8) reports “prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;” and 9) geological information concerning wells.

8 Id. §551 (1).

9 12 U.S.C. §4172a. 1452


12 Id.

13 Where the Taxpayers’ Money Went, supra note 3, at 2.

14 Id.; see also 12 U.S.C. § 4501 et seq.


FOIA. The FHFA supports this position. Thus, despite having been placed entirely within the control of a federal agency, Fannie’s and Freddie’s records remain beyond FOIA’s reach. In addition, the D.C. Circuit has found that not even all the Fannie and Freddie records that the FHFA has access to are subject to FOIA. In 2010, Judicial Watch, a nonprofit government watchdog, made a FOIA request to the FHFA for “[a]ny and all Freddie Mac and/or Fannie Mae records concerning campaign contributions” and “[a]ny and all Fannie Mae and/or Freddie Mac records concerning policies, stipulations, and/or requirements concerning campaign contributions.” The U.S. District Court for the District of Columbia granted summary judgment for the FHFA finding that the agency did not control Fannie’s and Freddie’s records such as to make them subject to FOIA simply by being statutorily able to obtain the records from Fannie and Freddie as a result of conservatorship. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the decision. Interestingly, neither court questioned Fannie’s and Freddie’s status as private companies not subject to FOIA.

The structure of Fannie and Freddie has evolved over the years. Although the enterprises have not been subject to FOIA as they presently exist, both have been “agencies” subject to FOIA at some point in their history. In fact, Fannie was originally established as an agency within the Department of Housing and Urban Development. It was not until 1968 that Congress transferred Fannie to private control, and thus placed it outside of the reach of FOIA. In 1976, a decade before Freddie was transferred to private ownership, the U.S. Court of Appeals for the District of Columbia Circuit in Rocap v. Indiek held that Congress intended to bring entities like Freddie within the reach of FOIA. The court found that Freddie had “federal characteristics” that made it a “government controlled corporation” subject to FOIA, including that it was federally chartered, its Board was appointment by the president, it was “subject to close governmental supervision and control over its business transactions,” and it was empowered “to make and enforce such bylaws, rules, and regulations as may be necessary or appropriate to carry out the purposes or provisions” of its enabling act.

Making Fannie and Freddie FOIAble

The issue of access to Fannie and Freddie garnered renewed interest as the public began taking stock of the housing collapse, the recession and the billions spent in the bailout. In 2011, Representative Jason Chaffetz (R-UT) introduced the “Fannie Mae and Freddie Mac Transparency Act.” He originally introduced the bill in 2010, but it died in committee. Under Chaffetz’s bill, Fannie and Freddie would be considered agencies subject to FOIA “during any period that such entities are in conservatorship or receivership.” The bill had 19 cosponsors—17 Republicans and 2 Democrats.

The FHFA opposed the bill. In a hearing before the House Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises, Edward DeMarco, acting director of the FHFA, argued that making Fannie and Freddie subject to FOIA would not “enhance public understanding of the operations or activities of the government,” and would be counterproductive as it would raise concern for other corporations that may be put into conservatorship about the possibility of being subject to FOIA.
By contrast, supporters of the bill in prepared statements to the committee lauded efforts to open Fannie and Freddie. One supporter saw the bill as a way to “enable citizens to better understand how these two entities failed at such a massive cost.”31 Another criticized Fannie’s and Freddie’s chronic “opaqueness” suggesting the law should be expanded to ensure continued access to the corporations should they survive conservatorship. 32 Although the bill got further than its predecessor in 2010, the “Fannie Mae and Freddie Mac Transparency Act” again died in committee, and no attempts have been made to reintroduce the bill in later sessions.

The effort to bring private corporations subsidized by the government within the ambit of FOIA is not without precedent. The National Railroad Passenger Corporation, or Amtrak, a for-profit corporation created by Congress in 1970 to take over inter-city railway travel, is statutorily subject to FOIA.33 Other quasi-governmental entities like the U.S. Postal Service and the Federal Deposit Insurance Corporation (FDIC) have also been made subject to FOIA.34

Similar to Amtrak and the FDIC, Fannie and Freddie are private corporations that serve a congressionally delegated public function in the housing market. To many, the enterprises’ public purpose and close coordination with the government to regulate the housing market equate to an implicit guarantee by the government, and by extension the taxpayers, of Fannie’s and Freddie’s investments.35 Indeed, some have argued that this implicit backing encouraged Fannie and Freddie to take on the risks that contributed so heavily to the collapse of the housing market.36 Moreover, now that the FHFA has assumed complete control of Fannie and Freddie, the enterprises are more like “government-controlled corporations” than ever before.

Fannie, Freddie, and the FHFA have consistently opposed subjecting the enterprises to FOIA. They have argued that subjecting the enterprises to FOIA would open the flood-gates of requests from public interest groups, the press, and the public, among others, and that the costs of enacting procedures to comply with the FOIA and respond to these FOIA request would be burdensome on the enterprises.37 Their arguments are unpersuasive. Administrative costs have never excused an agency from complying with FOIA.38 Moreover, on the heels of the recession it is evident that the greatest cost to the public came not from the expense of transparency, but from unchecked actions of these enterprises.

In 2008, taxpayers were hit with the $185 billion bill to save Fannie and Freddie that they never knew they were on the hook for. Fannie and Freddie enjoyed a huge advantage in the secondary mortgage market with taxpayers’ implicit backing of their risky investments. In the years since the bust, taxpayers have learned the high-level account of what happened—that Fannie and Freddie were allowed to operate largely unregulated in the secondary mortgage market making risky investments with bad mortgages—and yet much remains in the dark. Without access to Fannie’s and Freddie’s records a deeper understanding is nearly impossible. Indeed, it is difficult to understand how the FHFA’s acting director can take the position before Congress that access to Fannie and Freddie records that could shed light on how the decisions to pursue such risky investments were made . . . would not enhance the public’s understanding of what happened and their government’s role in it.

31 Id. at 85-86 (statement of David C. John, senior research fellow at The Heritage Foundation).
32 Id. at 91 (statement of Anthony B. Sanders, distinguished professor of real estate finance at George Mason University).
35 N. Eric Weiss, Fannie Mae’s and Freddie Mac’s Financial Status: Frequently Asked Questions, Congressional Research Service, at 1 (Sept. 27, 2012) available at http://www.fas.org/sgp/crs/misc/R42760.pdf (“Congressional charters give the GSEs a special relationship with the federal government, and it is widely believed that the federal government implicitly guarantees their $1.2 trillion in bonds and $3.7 trillion in MBSs.”).
38 See, e.g., Rokac v. Indiek, 539 F.2d 174, 180 (1976) (“[B]y enacting the Freedom of Information Act, Congress determined that the benefits to be derived from ‘open government’ outweighed the costs and that these costs would, and should, be absorbed within the operating budgets of the agencies.”).
these risky investments were made, and what kind of support Fannie and Freddie received during this period from the government would not enhance the public’s understanding of what happened and their government’s role in it. Moreover, it is difficult to reconcile that position with the administration’s commitment to openness and transparency in government.

Despite their troubles, Fannie and Freddie continue to guarantee the majority of home mortgages in the country. The enterprises posted their biggest quarterly profits ever in the first quarter of 2013. Fannie reported $8.1 billion in profits—the largest in its history—and Freddie Mac posted $4.6 billion—the second largest in its history.39 Congress has also begun considering several proposals for what comes next for Fannie and Freddie after conservatorship: whether the enterprises will be allowed to continue, or whether they will be wound-up and replaced with an entity more like the FDIC. None of the proposals specifically consider access to what will be left of Fannie and Freddie, if anything, or access to any new entities that replace them.40

Taxpayers couldn’t access Fannie and Freddie records to understand their actions at the height of the market, and they still can’t access those records to understand what exactly happened to cause the crash. Consistent with the goal of FOIA in ensuring transparency and accountability in the functions of the government, Fannie and Freddie must be subject to FOIA—whether they remain in conservatorship, are restored to health and released from conservatorship, or wound-up and replaced by Congress. 50

Much has been written about the privacy and Fourth Amendment concerns attendant to drone use in the criminal context. Although that is beyond the scope of this article, I raise the tales of Messrs. Brossart and Dorner only to highlight the quick employment of drones in the public sector. By most accounts, the private sector’s response will be just as swift and incredibly profitable when civil use of drones is permitted.12

Speaking of uses...

The term drone used to conjure thoughts of science fiction—robot armies intent on the destruction of the human race. In recent years, drones bring to mind war—unmanned flying weapons intent on the destruction of enemies. There are, however, a host of non-violent and even potentially legitimate uses for drones that can benefit media outlets in their newsgathering endeavors. For example, because they are becoming more and more economical, drones could supplant traffic helicopters. Drones could also provide fairly expansive aerial coverage of severe storms, widespread protests, or even the local Fourth of July Parade, to name a few examples. Not surprisingly, the Reuters Institute for the Study of Journalism recently reported that journalistic use of drones will increase significantly in the coming years.13 What the law will permit, however, is anyone’s guess at this point, and the legislation on the books provides little guidance.

Trial and Error

States have been quick to react to the emergence of drones, with 42 states proposing drone-based legislation and at least six states enacting such legislation. It appears that any day now, Illinois may be the next state to enact drone legislation. The legislation is all over the proverbial map, however, suggesting, perhaps, that the states have reacted too quickly or perhaps without thinking through all the issues surrounding drone use.

Bills in Florida, Montana, Tennessee and Virginia, as well as the pending Illinois bill, focus on drone surveillance by law enforcement only. In Florida, for example, the statute prohibits law-enforcement agencies from using drones to gather information or other information except to counter “a high risk or a terrorist attack,” if the agency obtains a warrant, or if the agency determines that “swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to, facilitating the search for a missing person.” Montana’s bill is narrower, allowing drone-collected evidence only pursuant to a search warrant.15

There is no mention of media coverage as a stand-alone permissible use.

Some proposed bills seemingly trade First Amendment rights in for privacy insurance. In New Hampshire, for example, a proposed bill would have made it a crime to take any aerial photography without prior consent. The same bill as originally drafted prohibits the use of drones carrying weapons or a “LASER-type ray,” and you certainly cannot use drones in a “stalking game.” I’m not making this up. I think we can all agree that laser-type rays and stalking games are out of bounds, but that’s a digression for another article.

It is clear from this brief survey that legislating drones will be a trial-and-error process and so far, there has been quite a bit of error.

It is clear from this brief survey that legislating drones will be a trial-and-error process and so far, there has been quite a bit of error. States with laws on the books regulating law-enforcement use of drones will have to amend the laws to account for private use of them. States such as Texas that have endeavored to provide a complete list of permissible drone use will soon find that the creativity of the human brain can come up with...
a whole host of other, unobjectionable ways to use these machines. And underscoring the entire discussion is the tension of states enacting these bills against the federal government’s exclusive sovereignty over airspace.\textsuperscript{18} This will be a long process, and the law is likely to lag behind the technology.

| Media outlets that decide to employ drones for newsgathering functions will inevitably face the claims generally alleged in response to newsgathering activities: intrusion upon solitude, wiretapping, trespass, etc. |

Dust Off Your Torts

Although drone use by the media has significant potential, it is also fraught with peril. Media outlets that decide to employ drones for newsgathering functions will inevitably face the claims generally alleged in response to newsgathering activities: intrusion upon solitude, wiretapping, trespass, etc. Until now, newsgathering laws have been more or less well defined, but that is about to change.

Case law addressing newsgathering generally proclaims that the First Amendment “protects the ordinary newsgathering techniques of reporters and those techniques cannot be stripped of their constitutional shield by calling them tortious.”\textsuperscript{19} Courts have even condoned “‘tabloid’ style investigative television reportage.”\textsuperscript{20} But drones are not ordinary and, because they can be configured to include technology to literally see through walls and enhance listening capabilities, the newsgathering laws will be undergoing significant scrutiny.

It would be tempting and easy for media outlets to dismiss drone use as not worth the inevitable headaches. But the nature of the industry is to strive for the quickest, most comprehensive news coverage, and there is no doubt that drones can provide the upper hand in this regard. Although we will have to wait until 2015 to see the FAA’s plan for the integration of civil drones into the airspace, it is certainly not too early for media outlets and their attorneys to start working on drone plans of their own.\textsuperscript{21}

\begin{flushright}
18 49 U.S.C. § 40103.  \\
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years and corporate transactions have intervened and it is necessary to trace a previously existing company’s trail of liability to the present day. Yet the potential for successor liability is worth evaluating any time a party has a claim against a corporate entity that has undergone significant corporate restructuring involving the sale of all or a substantial portion of its assets, and must be considered while planning and implementing any such transaction.

Successor liability is not a free-standing cause of action but rather a means of transferring liability from one entity to another. In this regard, it is similar to the doctrine of “piercing the corporate veil,” under which plaintiffs seek to hold a shareholder liable for the acts of a corporate entity. Both doctrines also involve a fact-intensive analysis, in which labeled exceptions, formalistic tests, and long-standing rules embodied in decades’ worth of legal reporters ultimately yield to case-by-case analysis of whether a company’s conduct merits the imposition of liability against it in the circumstances. Successor liability, in other words, lends itself to creative, fairness-based arguments using detailed factual analysis.

Analysis of Exceptions

Of the above-listed exceptions, the first (related to fraud) is perhaps the least controversial and universally agreed upon, given that fraud is commonly recognized as creating a powerful exception to boilerplate rules of law, reflecting a societal judgment that certain blameworthy conduct will render a party unable to look to the law for help. The remaining three, however, are more elusive and difficult to describe consistently, and overlap to considerable extent.

In some jurisdictions, a showing that one company is a “mere continuation” of another entails analysis of the following factors and/or elements:

(a) Continuation of the seller’s enterprise such that there is continuity of management, personnel, physical location, assets, and general business operations.

(b) Whether the acquiring corporation pays for the assets it is acquiring with shares of its own stock, so that the seller corporation becomes a constituent part of the purchasing corporation. To some extent, the inquiry into whether shares change hands is intertwined with the question of the sufficiency of the consideration exchanged. Below is an illustration of how, at a simplistic level, this transaction might look:

BEFORE:

AFTER:

(c) Whether the seller ceases its ordinary business operations, liquidates and dissolves as soon as possible; and

(d) Whether the purchasing corporation assumes the obligations of the seller ordinarily necessary for uninterrupted continuation of the seller’s normal
business operation, such as its contracts, royalty obligations, and outstanding debts.

Even though courts have typically cast the “de facto” merger exception as a separate test, they have increasingly come to recognize that in reality, there is little, if any distinction between the two. As an example of how the doctrines overlap, in the 2006 New Hampshire case involving the former Olympic gold medalist’s failed attempt to impose successor liability on an asset purchaser for appropriation of likeness, the Court analyzed the Plaintiff’s claim under a theory of de facto merger, using the exact elements listed above for the commonly applied “mere continuation” exception. Similarly, in the 2011 copyright-infringement matter decided in the Southern District of New York, Judge Shira Scheindlin wrote that “Although the mere continuation and de facto merger theories have traditionally been considered separate grounds for finding successor liability, courts have perceived “the second to be merely a subset of the first.” De facto merger is, in other words, a de facto mere continuation. At bottom, both exceptions boil down to a question of judicial haberdashery: whether, in fairness, it must be said that the purchaser is merely the seller wearing a “new hat.”

Further, the little-used exception for “implied assumption of liability”—for which the Supreme Court of New York County recently acknowledged there is “no precise rule”—by its name would seemingly describe any scenario in which a party could become liable under a theory of “de facto merger” or “mere continuation.” As with the other exceptions, an analysis of implied assumption of liability can entail an inquiry into fundamental fairness, which is “necessarily fact-bound” and may include consideration of “the effect of the transfer upon creditors of the seller corporation.” Other factors that courts have considered in this analysis include whether the successor acquired a liability policy as part of the transaction or retained liability insurance post-sale covering the predecessor’s products or operations; whether the alleged successor held itself out to the public as such by using a similar name, taking credit for the predecessor’s work or stating that it was combining its business with the predecessor’s; whether it received customer accounts of the predecessor, and whether the purchaser took control of the “entirety” of the seller’s business. Despite its potentially broad scope, some courts have warned that this doctrine is not synonymous with an implied negligence-related duty that will be extended to a purchaser, absent specific facts implying intent to assume liability.

Varying treatment among jurisdictions

To make matters more confusing, the exceptions to the rule of successor non-liability are treated differently in different jurisdictions, at least according to boilerplate rules of law. “Beneath a veneer of uniformity,” the U.S. Court of Appeals for the Third Circuit observed, “the ‘entire issue of successor liability… is dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake.” It has been held that under California law, for example, inadequate consideration for the assets exchanged is the “crucial factor” required to establish a de facto merger or mere continuation. Yet under New York law, “[w]hether fair value is paid for the assets acquired has no bearing on whether a New York court will look at a transaction or series of transactions and deem them ‘in substance a consolidation or merger of seller and purchaser.’”

13 Software Freedom Conservancy, Inc. v. Best Buy Co., 783 F. Supp. 2d 648, 654 (S.D.N.Y. 2011) (citing Franklin v. USX Corp., 87 Cal. App. 4th 615, 621, 105 Cal. Rptr 2d 11 (Cal Ct. App. 2001)); see also National Gypsum Co., 895 F. Supp. at 336 (“While these two labels have been enshrined separately in the canonical list of exceptions to the general rule of no successor liability, they appear, in practice, to refer to the same concept… and courts have often used the two terms interchangeably.”); Gladstone v. Stuart Cinemas, Inc., 178 Vt. 104, 113 n.4 (2005) (stating that there is “little difference” between the two exceptions and that “[w]e view the name of the exception as unimportant”); Berg Chilling Sys., 435 F.3d at 464 (mere continuation and de facto merger are “generally treated identically”).
17 MBIA Ins., 965 N.Y.S. 2d at 310; see also Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F. Supp. 834, 839 (S.D.N.Y. 1977) (implied assumption more likely when creditors left without a remedy).
18 Florum v. Elliot Mfg., 867 F.2d 570, 576 (10th Cir. 1989).
19 City of Richmond, 918 F.2d at 450-51; Ladjevardian, 431 F. Supp. at 839.
20 City of Richmond, 918 F.2d at 451.
23 U.S. v. General Battery Corp., 423 F.3d 294, 301 (3d Cir. 2005) (quoting EEOC v. Viacom Inc., 842 F.2d 936, 944 (7th Cir. 1988)).
25 MBIA Ins. Corp. 965 N.Y.S.2d at 309 (emphasis added).
has been held that under the law of some states including Wisconsin, shares must change hands before there can be a finding of *de facto* merger; and that under New Jersey law, “all,” not just substantially all, of a party’s assets must be transferred before successor liability can even come into play.

Further highlighting the inconsistencies among jurisdictions, Illinois and other states characterize the tests for “*de facto* merger” and/or “mere continuation” as elemental tests in which all or certain key elements must be present, while other states such as New York describe them as multi-factor tests in which no single element is dispositive. As another example of the inconsistency on this subject, it has been suggested that Delaware, unlike some other jurisdictions, requires an additional finding of an intent to commit fraud or harm creditors as an element of *de facto* merger, and does not consider the “continuity of ownership” element satisfied unless the seller’s shareholders acquire a direct, not indirect, ownership stake in the purchasing company.

Finally, some courts have recognized even more lenient exceptions, known as the “product line” exception (specific to products liability cases, when the alleged successor carries on the manufacturing and/or distribution of a dangerous product), and the “substantial continuity” exception, a multi-factor analysis applied in some federal causes of action involving matters of national policy, including employment-related claims. Confusing matters more, courts at times use the term “mere continuation” to describe the “substantial continuity” doctrine.

A recurring and unsettled choice-of-law issue with regard to successor liability is the extent to which federal courts analyzing successor-liability arguments under federal statutes should apply state corporate law, which tends to be more conservative in who it will deem to be a successor, or federal common law. For example, some federal courts have recently rejected the lenient “substantial continuity” test in the context of claims analyzing successor liability under CERCLA, the Superfund law, and in the context of qui tam actions under the federal False Claims Act, in both instances citing the U.S. Supreme Court’s landmark 1998 decision in *United States v. Bestfoods*, which guides courts to be conservative in their analysis of when a federal statute has displaced state corporate law.

Another issue that is likely to shape the future of the successor-liability doctrine in coming years is the growing recognition that a party can become a successor not merely to an entire corporation, but also a business division or business line that is transferred to another entity.

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26 *U.S. v. Adaptive Microsystems, LLC*, No. 12-00122, 2013 WL 1459118 at *5 (U.S. Court of Int’l Trade, April 10, 2013) (“Courts interpreting Wisconsin law consistently refuse to apply the de facto merger exception when no shares have changed hands, regardless of the extent to which the other factors may be satisfied.”)


28 *Marnavi S.P.A. v. Keedeh*, 900 F.Supp.2d 377, 397 (D. Del. 2012) (Under Delaware law, a finding of a de facto merger requires a showing that: (1) one corporation has transferred all of its assets to another corporation; (2) payment was made in stock, issued by the transferee directly to the shareholders of the transferor corporation; and (3) in exchange for their stock, the transferee agreed to assume all the debts and liabilities of the transferor); *In re Acme Sec., Inc.*, 484 B.R. 475, 487 (Bkrtcy N.D. Ga. 2012) (“essential elements” for imposing liability under mere-continuation theory are “a substantial identity of ownership and a complete identity of corporate objects and assets”); *Int’l Flavors & Fragrances, Inc.*, v. *St. Paul Protective Ins. Co.*, 98 A.D.3d 854, 855-56 (N.Y.A.D. 1 Dept. 2012) (“The Illinois Courts have strictly enforced the exception, applying it only when all of the factors are met” and “have been ‘distinctly unreceptive’ to expansions of successor liability” (citation omitted)).


30 Id. (describing conflict).


32 E.g., *Teed v. Thomas & Betts Power Solutions, L.L.C.*, 711 F.3d 763, 764-65 (7th Cir. 2013) (collecting cases); *NECA-IBEW Pension Trust Fund v. Bays Elec., Inc.*, 894 F.Supp.2d 1071, 1087 (C.D. Ill. 2012) (noting that successor concept is broad in the ERISA context “in order to protect federal rights or effectuate federal policies” and that elements required for successor liability under ERISA are (1) sufficient indicia of continuity between the companies; and (2) notice by the purchaser of the predecessor’s liability). The “substantial continuity” test is at times characterized as involving the weighing of eight factors: (1) retention of the same employees by the buyer; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the buyer holds itself out as a continuation of the selling corporation. See, e.g., *U.S. v. Davis*, 261 F.3d 1, 53 (1st Cir. 2001).


34 See, e.g., *United States v. Davis*, 261 F.3d 1, 53, 54 (1st Cir. 2001) (rejecting “substantial continuity” test and holding that in CERCLA cases, court should apply state successor-liability rules as long as they are not hostile to federal interests); but see *U.S. v. GeneralBattery Corp.*, 423 F.3d 294 (3d Cir. 2005) (also rejecting “substantial continuity” test but holding that in interests of furthering CERCLA’s policies, applicable successor-liability standard under CERCLA should be “the general doctrine of successor liability in operation in most states”) (citation omitted).


36 524 U.S. 51, 63 (1998) (“CERCLA is thus like many other congressional enactments[s] in giving no indication that “the entire corpus of state corporation law is to be replaced simply because a plaintiff’s cause of action is based upon a federal statute””) (citing *Burks v. Laster*, 441 U.S. 471, 478 (1979)).

37 See *Cleveland v. Johnson*, 209 Cal. App. 4th 1315, 1328 (Cal. App. 2 Dist. 2012) (holding that because successor liability is an equitable doctrine, “we see no basis to conclude that, as a matter of law, a corporation… may not be found to be a ‘mere continuation’ of a separately operated line of business” it has acquired, as opposed to becoming a successor to the entire seller corporation); *Synergy Methods, Inc. v. Kelly Energy Sys.*, 695 F. Supp. 1362, 1365 (D.R.I. 1988) (concluding that “the policies and purposes of the de facto merger doctrine require that this doctrine be applied not only to the sale of assets constituting an entire corporation with its subsequent dissolution, but to the sale of assets constituting a corporate division as well”).
Implicit in this outcome is the recognition that the party conveying its assets need not entirely cease its business activities altogether, which some courts previously have cited as a requirement for imposing successor liability.

**Conclusion:**

In summary, a party should consider the potential successor-liability implications involved in any litigation or potential claim where a defendant has undergone significant corporate restructuring involving sale of assets, and should analyze all facts of the transaction, particularly those involving the consideration exchanged for the assets, overlap between officers/directors and stockholders, and the effect of the sale upon the creditors of the seller corporation. Corporations contemplating sale or purchase of a substantial portion of their assets should thoroughly analyze the potential for successor liability in the circumstances.

Additionally, parties should recognize that choice of law can be extremely important, depending on whether a litigant seeks to apply the law from a jurisdiction that requires a strict elemental test or a more flexible inquiry. The trend toward flexible application of these rules, particularly as the evolving media landscape leads to new and troublesome kinds of conduct for which courts may be eager to find a responsible party, will require counsel to make factually detailed, fairness-based arguments to either establish or defeat claims for successor liability, instead of relying on boilerplate rules.

Finally, regardless of whether any, some, or all of the elements of the traditional tests are missing, parties should be alert for the potential expansion of “implied assumption of liability” as a “catch-all” exception that analyzes not only the intent of the purchasing party but also the fairness to creditors of the selling party, and should recognize that a court may not require that the selling corporation cease its existence altogether before imposing successor liability on an asset purchaser. Asset purchasers must be vigilant to ensure that when the transaction has closed, they have not purchased an unwanted piece of headgear: a “new hat”

38 Ladjevardian. 431 F. Supp. at 838.
## 2013-2014 TIPS CALENDAR

### September 2013

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<td>Minneapolis Marriott Hotel Minneapolis, MN</td>
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<td>Symposium: Animal Shelter and Rescue Law</td>
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