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## The Reasoning behind a "Good Reason" Standard: The Seventh Circuit's Analysis of Successor Liability in *Teed v. Thomas & Betts Power Solutions, L.L.C.*

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# THE REASONING BEHIND A “GOOD REASON” STANDARD: THE SEVENTH CIRCUIT’S ANALYSIS OF SUCCESSOR LIABILITY IN *TEED v. THOMAS & BETTS POWER SOLUTIONS, L.L.C.*

**Abstract:** On January 9, 2013, the U.S. Court of Appeals for the Seventh Circuit held in *Teed v. Thomas & Betts Power Solutions, L.L.C.* that a federal common law standard for successor liability applies to claims arising under the Fair Labor Standards Act. In doing so, the court established a new, broader standard for successor liability that applies to any claim arising from an employer’s violation of a federal labor or employment statute. This Comment argues that, although the court properly recognized congressional policies favoring employee protection, the new standard goes too far in liberalizing the successor liability exception. With little to guide the newly articulated standard, the Seventh Circuit cannot anticipate problems that might arise in deciding future cases.

## INTRODUCTION

On January 9, 2013, in *Teed v. Thomas & Betts Power Solutions, L.L.C.*, the U.S. Court of Appeals for the Seventh Circuit addressed whether the federal common law standard for successor liability applies to claims arising under the Fair Labor Standards Act (“FLSA”), or whether state law should govern these claims.<sup>1</sup> In a matter of first impression, the Seventh Circuit held that the federal common law standard—previously applied in other federal labor and employment statutes—also applies in the context of the FLSA.<sup>2</sup> In so holding, the *Teed* court also created an entirely new standard that allows for a broader successor liability exception for cases arising under federal labor and employment statutes.<sup>3</sup>

Part I of this Comment provides the factual and procedural background to *Teed*, introduces the general standard for successor liability applied in most

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<sup>1</sup> See *Teed v. Thomas & Betts Power Solutions, L.L.C.*, 711 F.3d 763, 765 (7th Cir. 2013).

<sup>2</sup> *Id.* at 767. The court chose to apply the federal common law standard instead of the related state standard under Wisconsin law. *Id.* at 765; see *Columbia Propane, L.P. v. Wis. Gas Co.*, 661 N.W.2d 776, 784 (Wis. 2003) (applying the state common law standard for successor liability to hold that a successor company that purchases the assets of another company does not assume the liabilities of the selling corporation).

<sup>3</sup> See *Teed*, 711 F.3d at 767.

state jurisdictions, and explains the development of the federal common law standard in the employment context.<sup>4</sup> Part II then discusses the Seventh Circuit's new liability standard and the reasoning underlying its decision.<sup>5</sup> Finally, Part III argues that, although the Seventh Circuit properly recognized the need for a distinct federal standard for successor liability in employment contexts, the new standard goes too far in liberalizing the rule because the court did not adequately explain the boundaries to be applied in future cases.<sup>6</sup>

## I. DIVERGENT FEDERAL AND STATE STANDARDS FOR SUCCESSOR LIABILITY

### A. *The State Standard of Non-liability and the Federal Employment Exception*

Successor liability is a key concept that arises when a company is sold in an asset sale.<sup>7</sup> This is because in such sales, there is often a question as to whether a buyer assumes the selling company's liabilities when it acquires its assets.<sup>8</sup> Accordingly, over time successor liability has developed under both federal and state law.<sup>9</sup> Most state courts apply a presumption of non-liability.<sup>10</sup> Under this approach, a company that purchases the assets of another company is not responsible for the selling company's liabilities.<sup>11</sup> There are, however,

<sup>4</sup> See *infra* notes 7–51 and accompanying text.

<sup>5</sup> See *infra* notes 52–76 and accompanying text.

<sup>6</sup> See *infra* notes 77–98 and accompanying text.

<sup>7</sup> See Byron F. Egan, *Asset Acquisitions: Assuming and Avoiding Liabilities*, 116 PENN ST. L. REV. 913, 914 (2012) (explaining that asset sales typically involve an assumption of specific liabilities that usually do not represent all of a selling company's liabilities); George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 15 (2007) (explaining that the general rule of successor liability is that a purchaser of assets does not become liable for the seller's liabilities).

<sup>8</sup> See *Teed*, 711 F.3d at 764; see also *Golden State Bottling Co. v. Nat'l Labor Relations Bd.*, 414 U.S. 168, 176 (1973) (requiring a successor to reinstate and provide back pay to a predecessor's aggrieved employee); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550–51 (1964) (requiring a successor to honor arbitration provisions in a collective bargaining agreement negotiated by the predecessor company); cf. *Columbia Propane*, 661 N.W.2d at 784 (holding that a successor does not need to assume all of its predecessor's liabilities).

<sup>9</sup> See *Teed*, 711 F.3d at 764; *infra* notes 10–18 and accompanying text.

<sup>10</sup> See, e.g., CAL. CORP. CODE § 1001 (West 2003 & Supp. 2014); DEL. CODE ANN. tit. 8, § 271 (2011); OHIO REV. CODE ANN. § 1701.76 (West 2009 & Supp. 2013); see also *Columbia Propane*, 661 N.W.2d at 784 (applying a presumption of non-liability in an asset sale). Wisconsin, whose state law governs in *Teed*, is a jurisdiction that has recognized the general rule of non-liability. See *Teed*, 711 F.3d at 764; *Columbia Propane*, 661 N.W. 2d at 784. Accordingly, if the court in *Teed* were to apply Wisconsin law, the purchasing company would not have been responsible for the selling company's liabilities. See *Teed*, 711 F.3d at 765.

<sup>11</sup> See *Columbia Propane*, 661 N.W.2d at 784; see also *Bielagus v. EMRE of N.H. Corp.*, 826 A.2d 559, 564 (N.H. 2003) (indicating that a purchaser in an asset sale is generally not responsible for

some circumstances where a court may impose successor liability on a purchasing company.<sup>12</sup> A court may impose liability when (1) the purchasing corporation agrees to assume liability; (2) the sale involves a consolidation or merger of the two corporations; (3) the purchasing corporation is a continuation of the selling corporation; or (4) the sale is an attempt to purposefully escape liability.<sup>13</sup>

Federal successor liability doctrine has recognized another exception to the presumption of non-liability.<sup>14</sup> Specifically, when the liability stems from a violation of a federal employment statute, federal courts impose successor liability on a purchaser.<sup>15</sup> Federal courts justify this broad successor liability exception on the grounds that it is more important to protect employees from unfair employment practices than to protect companies from successor liability.<sup>16</sup> Moreover, transferring liability to a purchaser in this context allows federal courts to provide a remedy that is unavailable to plaintiffs under state standards.<sup>17</sup> As a result, in employment liability cases, federal courts impose successor liability on a purchasing company when the applicable state law exceptions do not apply.<sup>18</sup>

### *B. The Development of the Labor and Employment Exception in Federal Courts*

The federal practice of holding successors liable for the actions of their predecessors in the context of federal labor and employment statutes is well established.<sup>19</sup> In 1964, in *John Wiley & Sons, Inc. v. Livingston*, the U.S. Supreme Court required a successor company to honor collective bargaining provisions that the employees’ union had negotiated into its agreement with a pre-

the selling corporation’s liabilities); *Lefever v. K.P. Hovnanian Enter., Inc.*, 734 A.2d 290, 292 (N.J. 1999) (same).

<sup>12</sup> *Columbia Propane*, 661 N.W.2d at 784.

<sup>13</sup> *See id.*

<sup>14</sup> *See Teed*, 711 F.3d at 764; *see also Steinbach v. Hubbard*, 51 F.3d 843, 845 (9th Cir. 1995) (noting that “federal courts have developed a federal common law successorship doctrine that now extends to almost every employment law statute”).

<sup>15</sup> *See Teed*, 711 F.3d at 76; *Steinbach*, 51 F.3d at 845.

<sup>16</sup> *See Steinbach*, 51 F.3d at 845 (explaining that successor liability might be necessary in employment contexts to vindicate statutory policy and to protect employee interests against other business interests).

<sup>17</sup> *See Teed*, 711 F.3d at 764.

<sup>18</sup> *See, e.g., id.* (indicating that the federal rule of successor liability applies when a predecessor violates an employment statute); *Einhorn v. M.L. Robertson Const. Co.*, 632 F.3d 89, 99 (3d Cir. 2011) (holding that a successor in an asset sale may be liable for the predecessor’s liabilities that arise from violation of a federal labor or employment statute); *Steinbach*, 51 F.3d at 845 (recognizing that the federal common law successor liability doctrine applies to most employment statutes).

<sup>19</sup> *See Golden State Bottling Co.*, 414 U.S. at 176; *John Wiley & Sons*, 376 U.S. at 550–51.

decessor company.<sup>20</sup> Specifically, the union challenged the successor company's refusal to arbitrate as a violation of the Labor Management Relations Act ("LMRA").<sup>21</sup> The Court reasoned that—under national labor policies—the interests of business owners must be balanced with the interest of protecting employees facing unexpected changes in employment relationships.<sup>22</sup> In the labor and employment context, the Court held that this balance favors the employees' interests over business interests.<sup>23</sup> Similarly, in 1973, in *Golden State Bottling Co. v. National Labor Relations Board*, the Court upheld an order of the National Labor Relations Board requiring a successor to reinstate and provide back pay to a predecessor's aggrieved employee.<sup>24</sup> In reaching its decision, the Court reasoned that avoiding labor strife and protecting victimized employees could be achieved at relatively small costs to successor corporations.<sup>25</sup> The Court's emphasis on federal labor policies thus further established the preference for employee protection over business interests as articulated in *John Wiley & Sons*.<sup>26</sup>

Prior to *Teed*, the U.S. Court of Appeals for the Seventh Circuit utilized a multifactor test to analyze successor liability in labor and employment contexts.<sup>27</sup> Under this multifactor standard, the court would first examine whether the successor employer had notice of the claim at the time of the purchase.<sup>28</sup> Second, the court would consider whether the predecessor would have been able to provide the relief sought in the lawsuit before the sale.<sup>29</sup> Third, the

<sup>20</sup> *John Wiley & Sons*, 376 U.S. at 550–51. The Court held that the successor must arbitrate with its employees' union because the arbitration provisions were included in the existing collective bargaining agreement. *Id.* This was true even where the existing collective bargaining agreement did not contain any express provisions making it binding on successors. *Id.* at 544.

<sup>21</sup> *Id.* at 544; see 29 U.S.C. § 185 (2012).

<sup>22</sup> *John Wiley & Sons*, 376 U.S. at 549.

<sup>23</sup> *See id.* at 549–50.

<sup>24</sup> 414 U.S. at 176

<sup>25</sup> *Id.* at 185.

<sup>26</sup> *See Golden State Bottling*, 414 U.S. at 176; *John Wiley & Sons*, 376 U.S. at 549.

<sup>27</sup> *See Wheeler*, 794 F.2d at 1236; *Musikiwamba*, 760 F.2d at 750; see also Equal Emp't Opportunity Comm'n v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974) (establishing a multifactor test that became the model for the Seventh Circuit's factors); cf. *Teed*, 711 F.3d at 765–66 (rejecting the Seventh Circuit's established multifactor test and implementing a default rule of successor liability in the labor and employment context).

<sup>28</sup> *See Wheeler*, 794 F.2d at 1236; *Musikiwamba*, 760 F.2d at 750; see also *Teed*, 711 F.3d at 765 (explaining that a successor company's notice of a lawsuit is relevant when analyzing successor liability). A successor's notice of a pending claim is a factor that the court will weigh in favor of successor liability. *See Teed*, 711 F.3d at 765.

<sup>29</sup> *See Wheeler*, 794 F.2d at 1236; *Musikiwamba*, 760 F.2d at 750; see also *Teed*, 711 F.3d at 765 (indicating that a predecessor company's ability to provide relief before the sale is a relevant factor when analyzing successor liability). A predecessor's inability to provide the plaintiffs with relief before the sale is a factor that counts against successor liability. *See Teed*, 711 F.3d at 765. If a predecessor could not have provided relief anyway, successor liability becomes a windfall to plaintiffs. *See id.*

court would examine whether the predecessor could have provided relief to the plaintiffs after the sale.<sup>30</sup> Fourth, the court would consider whether the successor could provide relief.<sup>31</sup> Finally, the court would consider whether there was a sufficient continuity in the business operations of the predecessor and successor.<sup>32</sup> After considering these factors for and against successor liability, the Seventh Circuit would determine whether the balance favored imposing successor liability on the purchasing company.<sup>33</sup>

In applying this multifactor test prior to *Teed*, the Seventh Circuit was protective of employees whose predecessor corporations violated federal employment statutes.<sup>34</sup> For example, in 1985, in *Musikiwamba v. ESSI, Inc.*, the U.S. Court of Appeals for the Seventh Circuit imposed successor liability on a purchaser for the predecessor’s violation of a federal statute outlawing racial discrimination in the workplace.<sup>35</sup> In the labor and employment context, the court stated plainly that a purchaser assumes liability “solely because the poli-

<sup>30</sup> See *Wheeler*, 794 F.2d at 1236; *Musikiwamba*, 760 F.2d at 750; see also *Teed*, 711 F.3d at 766 (explaining that a predecessor company’s capacity to provide relief after the sale is relevant when analyzing successor liability). The inability of the predecessor corporation to provide relief after the sale, however, favors successor liability. See *Teed*, 711 F.3d at 766. This factor favors liability because if the predecessor cannot provide relief even after receiving cash or other consideration from the sale, the plaintiffs’ claim is completely worthless. See *id.*

<sup>31</sup> See *Wheeler*, 794 F.2d at 1236; *Musikiwamba*, 760 F.2d at 750; see also *Teed*, 711 F.3d at 766 (indicating that a successor company’s ability to actually provide the relief is relevant when analyzing successor liability). The *Teed* court refers to this factor as the “goes without saying condition” because if the successor cannot provide the relief sought in the suit, successor liability is a “phantom.” See *Teed*, 711 F.3d at 766.

<sup>32</sup> See *Wheeler*, 794 F.2d at 1236; *Musikiwamba*, 760 F.2d at 750; see also *Teed*, 711 F.3d at 766 (explaining that both companies continuing to operate is relevant when analyzing successor liability). Sufficient continuity of business operations also favors the imposition of liability. See *Teed*, 711 F.3d at 766. The theory behind this factor is that employees should be able to obtain relief from a successor if there is sufficient continuity in the business operations of the company after the sale; that is, if “nothing really has changed” after the sale. See *id.*

<sup>33</sup> See *Wheeler*, 794 F.2d at 1236; *Musikiwamba*, 760 F.2d at 750. The first three factors, notice of the claim to the successor and ability of the predecessor to provide relief before or after the sale, are the most critical in determining whether the court should impose successor liability. See *Wheeler*, 794 F.2d at 1236; *Musikiwamba*, 760 F.2d at 750. Because successor liability is an equitable doctrine, it would be unfair to impose liability on a successor that had no knowledge of the claim, or when the predecessor was perfectly capable of providing relief to the plaintiffs. See *Musikiwamba*, 760 F.2d at 750.

<sup>34</sup> See *Blumenthal v. G-K-G, Inc.*, 39 F.3d 740, 747–48 (7th Cir. 1994); *Upholsterers’ Int’l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990); *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1236 (7th Cir. 1986); *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 746 (7th Cir. 1985).

<sup>35</sup> See 760 F.2d at 746. The claim was asserted under § 1981 of the Civil Rights Act of 1966. 42 U.S.C. § 1981 (2006); *Musikiwamba*, 760 F.2d at 746. The court held that violations of § 1981 in employment contexts could result in successor liability, even though § 1981 is not specifically an employment statute. See *Musikiwamba*, 760 F.2d at 748.

cies of the laws at issue are substantially promoted.”<sup>36</sup> Similarly, in 1986, in *Wheeler v. Snyder Buick, Inc.*, the U.S. Court of Appeals for the Seventh Circuit held that successor liability could be appropriate for claims arising under Title VII of the Civil Rights Act of 1964.<sup>37</sup> As in *Musikiwamba*, the court in *Wheeler* emphasized that congressional policies justified successor liability and concluded that these considerations render the rule of non-liability too harsh for the employment context.<sup>38</sup> Additionally, in cases involving other employment statutes, the Seventh Circuit has also reasoned that congressional policies justify imposing successor liability.<sup>39</sup>

### C. Factual and Procedural History of Teed

In *Teed* the Seventh Circuit considered whether the federal labor and employment exception applies to violations of the Fair Labor Standards Act (“FLSA”) and, if so, whether the exception authorizes successor liability under the particular facts at issue.<sup>40</sup> JT Packard & Associates (“Packard”), the predecessor company in *Teed*, was a subsidiary of parent company S.R. Bray Corporation (“Bray”), but operated as its own entity.<sup>41</sup> Prior to Packard’s sale of its

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<sup>36</sup> *Musikiwamba*, 760 F.2d at 747. In this case, the Seventh Circuit reasoned that federal policy against unfair employment practices, the reality that employers are helpless to protect their rights during a sale, and the fact that successors can provide relief at a minimum cost, justified imposing liability. *See id.* at 746.

<sup>37</sup> 794 F.2d at 1236; *see* 42 U.S.C. § 2000e (2006). Despite its assertion that the general rule of non-liability for successors is too harsh for application in an employment discrimination context, the Seventh Circuit refused to impose liability. *See Wheeler*, 794 F.2d at 1237. The court held that the absence of any timely notice on the part of the successor, along with the predecessor’s ability to pay a substantial part of the damages, justified not imposing successor liability. *Id.* Nevertheless, the court was clear in holding that successor liability could be appropriate for Title VII cases. *Id.* at 1236.

<sup>38</sup> *See Wheeler*, 794 F.2d at 1236, 1237; *Musikiwamba*, 760 F.2d at 746. The *Wheeler* court similarly explained that successor liability could be justified in light of congressional policy against unfair employment practices, the helplessness of employees to protect their rights, and the successor’s ability to provide relief at a minimum cost. *See Wheeler*, 794 F.2d at 1236.

<sup>39</sup> *See Blumenthal*, 39 F.3d at 748; *Upholsters’ Int’l*, 920 F.2d at 1327. In 1990, in *Upholsters’ International Union Pension Fund v. Artistic Furniture of Pontiac*, the U.S. Court of Appeals for the Seventh Circuit applied the federal exception to an Employee Retirement Income Security Act (ERISA) claim, holding that the congressional policies underlying ERISA compel imposition of successor liability. 920 F.2d at 1327. The court reasoned that ERISA policies are no less important than the policies requiring imposition of liability in preceding cases relating to the NLRA, Title VII, or § 1981. *Id.* Similarly, in the 1994 case *Blumenthal v. G-K-G, Inc.*, the court held that successor liability was appropriate in an Age Discrimination in Employment Act (ADEA) case. *See* 39 F.3d at 748. Importantly, the court emphasized that the successor had notice of the claim and there was substantial continuity in the operation of the business after the sale. *See id.* Considering the continuation of business is also one of the traditionally recognized state exceptions to successor liability. *See Columbia Propane*, 661 N.W.2d at 784. Underlying this exception is the policy that employees should not be penalized when a sale changes nothing in the employment relationship. *See Teed*, 711 F.3d at 766.

<sup>40</sup> *Teed*, 711 F.3d at 765; *see* 29 U.S.C. § 201 (2006).

<sup>41</sup> *Teed*, 711 F.3d at 765.

assets, Packard’s employees filed suit for overtime pay under the FLSA.<sup>42</sup> Several months after the filing of the FLSA suit, Bray defaulted on a \$60 million loan that it had received from the Canadian Imperial Bank of Commerce (“the Bank”).<sup>43</sup> Packard, as a subsidiary of Bray, had guaranteed the loan.<sup>44</sup> After defaulting, Bray’s stock in Packard was assigned to an affiliate of the Bank and auctioned off, with the Bank receiving the proceeds to pay off Bray’s debt.<sup>45</sup>

Thomas & Betts Corporation purchased Packard’s assets in the bank auction and placed them in a wholly owned subsidiary, Thomas & Betts Power Solutions, L.L.C (“Thomas & Betts”).<sup>46</sup> In the contract for the transfer of assets, a condition stated that the transfer must be “free and clear of all liabilities” that Thomas & Betts Corporation had not otherwise assumed.<sup>47</sup> Using this condition, Thomas & Betts Corporation expressly disclaimed all of Packard’s liabilities that might arise from the FLSA litigation.<sup>48</sup> After the transfer, Thomas & Betts Corporation continued to operate Packard as a parent entity and offered employment to many of the Packard employees.<sup>49</sup>

Despite the transfer condition, shortly after Thomas & Betts Corporation acquired Packard’s assets, the employees substituted Thomas & Betts as the defendant in the FLSA litigation.<sup>50</sup> Although Thomas & Betts objected to the substitution, the U.S. District Court for the Western District of Wisconsin ruled for the employees, imposing successor liability on Thomas & Betts.<sup>51</sup>

## II. THE COURT REJECTS A MULTIFACTOR TEST AND INTRODUCES THE BROADER “GOOD REASON” STANDARD

In *Teed v. Thomas & Betts Power Solutions, L.L.C.*, the U.S. Court of Appeals for the Seventh Circuit concluded that the federal common law standard of successor liability applies to a selling company’s labor and employment vio-

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<sup>42</sup> 29 U.S.C. § 207 (2012); *Teed*, 711 F.3d at 764.

<sup>43</sup> *Teed*, 711 F.3d at 765.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 764. By purchasing these assets, Thomas & Betts Corporation became the parent company of Thomas & Betts, which is essentially Packard renamed. *Id.* This sale gave rise to the question as to whether Thomas & Betts also assumed Packard’s liabilities. *Id.*

<sup>47</sup> *Id.* at 765.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 764. The employees technically substituted Thomas & Betts Corporation’s wholly owned subsidiary, Thomas & Betts Power Solutions. *Id.* It was Thomas & Betts Power Solutions that operated Packard after the transfer. *Id.*

<sup>51</sup> *Id.* Thomas and Betts’ objection to the substitution is the sole basis of appeal. *Id.* The appeal comes from a final judgment that was pursuant to a settlement agreement that was conditional on the outcome of the appeal. *Id.*



lations.<sup>52</sup> Accordingly, in a matter of first impression, the *Teed* court affirmed the district court and held that successor liability applies to FLSA violations.<sup>53</sup>

The court, however, articulated a new and broader standard for successor liability in employment suits than had existed prior.<sup>54</sup> Departing from the multifactor test, the Seventh Circuit made successor liability the default rule, thereby imposing successor liability for federal labor and employment law violations “unless there are good reasons to withhold such liability.”<sup>55</sup> The *Teed* court premised its articulation of this new standard on several grounds.<sup>56</sup> First, the court reasoned that unlike the prior multifactor test, the new federal standard would provide objective, predictable results.<sup>57</sup> In particular, the court noted that the factors in the prior test could not be easily balanced in the employment context because the factors are not sufficiently clear, valid, or exhaustive.<sup>58</sup> Thus, the court reasoned, the new default rule of successor liability would provide more predictable results because it presumes successor liability unless there are “good reasons” against imposing it.<sup>59</sup>

Second, the Seventh Circuit’s rationale for adopting a broader federal standard heavily relied on the policy considerations underlying federal employment statutes.<sup>60</sup> The court reasoned that a liberalized federal successor liability standard is necessary to uphold federal policy goals and protect workers who are vulnerable in the face of a corporate sale.<sup>61</sup> Alternatively, to apply the state rule of non-liability would have prevented aggrieved workers from obtaining relief and would thus hinder the policy of the FLSA.<sup>62</sup> Instead, a pre-

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<sup>52</sup> 711 F.3d 763, 769 (7th Cir. 2013) (holding that successor liability is appropriate in suits to enforce federal labor and employment laws).

<sup>53</sup> *Id.*

<sup>54</sup> *See id.* at 766; *supra* notes 27–33 and accompanying text (discussing the multifactor test in full).

<sup>55</sup> *See Teed*, 711 F.3d at 766.

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.* The *Teed* court did not specify which particular criteria of the old multifactor standard were problematic. *See id.* The court simply concluded that the old standard for successor liability could not provide predictability because its factors were not clear, valid, or exhaustive. *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.* For example, Congress enacted ERISA “to protect . . . participants in employee benefit plans,” 29 U.S.C. § 1001(b) (2012), the U.S. government enacted Title VII to provide equal opportunity in employment, Exec. Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969), *reprinted as amended* in 42 U.S.C. § 2000e app. at 3723 (2006), and in enacting the FLSA, Congress intended to eliminate adverse employment conditions, 29 U.S.C. § 202 (2012). Accordingly, the *Teed* court reasoned that these statutes promote a federal policy of fostering labor peace and protecting workers’ rights. *See Teed*, 711 F.3d at 766.

<sup>61</sup> *Teed*, 711 F.3d at 766.

<sup>62</sup> *Id.*; *see* 29 U.S.C. § 202(b) (stating that the policy of the FLSA is to eliminate adverse employment conditions). *But see* *Columbia Propane, L.P. v. Wis. Gas Co.*, 661 N.W.2d 776, 784 (Wis.

sumption of successor liability prevents a violator of the FLSA from escaping liability or making relief for employees more difficult to obtain.<sup>63</sup>

Third, the *Teed* court emphasized that the need for a consistent rule supports the application of the federal successor liability standard to all federal employment statutes, including the FLSA.<sup>64</sup> This reasoning is naturally premised on the belief that it should not matter whether the liability claim of a particular case stems from the FLSA or from a different federal employment statute.<sup>65</sup> Accordingly, by applying a uniform common law standard for successor issues to all federal employment statutes, the Seventh Circuit likely intended to provide predictability for future asset sales.<sup>66</sup>

Moreover, in applying the new federal successor liability standard to the FLSA, the *Teed* court concluded that impeding free transferability of assets and creating a “windfall” for employees were not sufficiently “good” reasons to not impose liability.<sup>67</sup> The court reasoned that, although burdening a purchaser with FLSA liability might impede the free transferability of assets, this possi-

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2003) (holding that a successor company in an asset sale does not assume the liabilities of the selling corporation and effectively denying employees any remedy under state law).

<sup>63</sup> See *Teed*, 711 F.3d at 766 (indicating that, in the absence of a presumption of successor liability, a purchasing company could make it more difficult for aggrieved employees to obtain relief); see also John H. Matheson, *Successor Liability*, 96 MINN. L. REV. 371, 383 (2011) (acknowledging the strain that limited liability for purchasing companies in asset sales places on claimants who find there are no accessible assets to provide relief).

<sup>64</sup> See *Teed*, 711 F.3d at 766–67. After concluding that all federal employment statutes should be governed by the same rule, the court laid out two possible options. *Id.* at 767. The court could either apply the same successor liability standard to all federal employment statutes or it could apply the standard to none of the statutes. *Id.* This all-or-nothing approach is evidence that the court valued a consistent approach for all federal employment statutes. See *id.*

<sup>65</sup> See *id.* at 767.

<sup>66</sup> See *id.* at 766. The U.S. Court of Appeals for the Ninth Circuit had already considered the same predictability question and arrived at the same conclusion in its 1995 decision in *Steinbach v. Hubbard*. See 51 F.3d 843, 845 (9th Cir. 1995). Like the Seventh Circuit in *Teed*, the Ninth Circuit similarly reasoned by analogy, holding that the analysis from cases extending successor liability under federal employment statutes justifies application of the doctrine to FLSA claims as well. See *id.*; see also *Teed*, 711 F.3d at 767 (stating that the purpose of the FLSA is as deserving of protection as the policies underlying other employment statutes for which there is a presumption of successor liability).

<sup>67</sup> See *Teed*, 711 F.3d at 769. In addition to these reasons, the *Teed* court also considered others. See *id.* at 767–69. For example, the court considered whether judge-made standards amounted to judicial amendment of federal employment statutes. See *id.* at 767. The issue presented in *Teed*, however, was not whether the court’s use of a federal standard was inappropriate altogether, but whether the court should extend that standard to FLSA claims. See *id.* Thus, the court held that because this concern about judge-made law is not specific to the FLSA, it is not a sufficiently “good” reason to reject imposing successor liability. *Id.* This reasoning is similar to the court’s analogy-based rationale for applying the federal standard in the first place. See *id.* When deciding to adopt the federal standard, the court valued legal predictability, and held that if liability is proper for one federal statute, it should be imposed for all. *Id.* Similarly, when considering judicial amendment, the court concluded that if concern over judicial amendment is not a “good reason” for rejecting liability under one statute, it could not be a “good reason” for the FLSA. See *id.*

bility is not a sufficient reason to reject the new default rule of successor liability.<sup>68</sup> The court found that imposing liability under these circumstances would not burden the market for asset sales as the predecessor's liability could be computed into the purchase price.<sup>69</sup> Therefore, in such instances, the successor company could simply pay less for the assets.<sup>70</sup> Accordingly, because imposing successor liability would not affect the market, the court held that impeding free transferability of assets is not a "good" reason to not impose liability.<sup>71</sup>

Further, the Seventh Circuit reasoned that the possibility of a "windfall" for employees is not a sufficiently "good" reason to reject imposition of liability.<sup>72</sup> The court acknowledged that imposing successor liability creates a means for employees to obtain relief when such means might not otherwise exist.<sup>73</sup> The Seventh Circuit held, however, that this reality was not a "good" reason to not impose liability.<sup>74</sup> Alternatively, the *Teed* court also reasoned that allowing Thomas & Betts to acquire assets without this liability could equally be characterized as a "windfall."<sup>75</sup> Thus, as with the free transferability of assets argument, the court held that the possibility of a "windfall" is not a sufficiently "good" reason to not impose liability.<sup>76</sup>

### III. WHAT IS A "GOOD REASON"?: THE DIFFICULTY OF APPLYING THE STANDARD WITHOUT CLEARER GUIDELINES

Federal courts should adopt the broad presumption of successor liability in the context of federal employment law violations but should better define the confines of the presumption to explain the "good reasons" for not imposing

<sup>68</sup> *See id.* at 766.

<sup>69</sup> *Id.* at 766–67.

<sup>70</sup> *See id.* Because the value of the predecessor company would be diminished by the associated liability, the *Teed* court suggested that the successor company could easily negotiate this liability into the purchase price. *See id.*

<sup>71</sup> *See id.* (indicating that successor liability might impede the free transferability of assets but nevertheless rejecting this possibility as a reason to not impose such liability).

<sup>72</sup> *Id.* at 768. A windfall is an "unanticipated benefit" to a recipient, typically "in the form of a profit and not caused by the recipient." *See* BLACK'S LAW DICTIONARY 1738 (9th ed. 2009). For example, a windfall occurred in *Teed* when the plaintiffs were able to collect money from a successor corporation when they were unable to collect from the predecessor. *See Teed*, 711 F.3d at 768.

<sup>73</sup> *See Teed*, 711 F.3d at 768. The employees could not have collected from the insolvent predecessor, as the company was financially unable to pay. *See id.* The emergence of a successor company willing to purchase the predecessor's assets represented the plaintiffs' only hope for recovery. *See id.*

<sup>74</sup> *See id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at 769; *supra* notes 67–71 and accompanying text (discussing the free transferability of assets argument in full). The court did, however, suggest that evidence that workers had filed a "flurry" of lawsuits to obtain relief from a solvent acquirer could constitute a "good reason" for denying liability. *See Teed*, 711 F.3d at 769. Nevertheless, the *Teed* court refused to accept the more general windfall argument proposed by Thomas & Betts. *See id.*

liability.<sup>77</sup> The default rule of successor liability articulated in *Teed v. Thomas & Betts Power Solutions, L.L.C.* properly recognizes congressional employment policies by allowing aggrieved workers to obtain relief when state law affords them no remedy.<sup>78</sup> Nevertheless, the court’s standard goes too far in broadening the standard to a default rule with no specific boundaries.<sup>79</sup> Because *Teed* provides little explanation to guide its “good reason” standard, the exception will be difficult to apply in future cases.<sup>80</sup> Although the liberalized standard was effective in *Teed*, where the liabilities were certain and modest,<sup>81</sup> it will be difficult, without further explanation of “good reasons,” to predict the problems arising in future cases with different facts or greater liabilities.<sup>82</sup>

In particular, protecting free transferability of assets is one potential “good reason” for not imposing successor liability in the employment context.<sup>83</sup> Predecessor companies in asset sales often have massive liabilities,<sup>84</sup>

<sup>77</sup> See *Teed v. Thomas & Betts Power Solutions, L.L.C.*, 711 F.3d 763, 766 (7th Cir. 2013) (establishing an exception to the general rule of imposing successor liability in the employment context if there are “good reasons” to do so, without designating or describing what would constitute a “good reason”); *infra* notes 78–96 and accompanying text (arguing that articulating “good reasons” is necessary to provide certainty regarding the scope of the successor liability presumption).

<sup>78</sup> See *Teed*, 711 F.3d at 766 (holding that the imposition of successor liability is necessary to foster labor peace, protect workers’ rights, and generally achieve statutory goals of federal labor and employment statutes); *cf.* *Columbia Propane, L.P. v. Wis. Gas Co.*, 661 N.W.2d 776, 784 (Wis. 2003) (holding that a successor company in an asset sale does not assume the liabilities of a predecessor and effectively denying employees any remedy under state law).

<sup>79</sup> See *Teed*, 711 F.3d at 766 (establishing a broad presumption of successor liability in the employment context with few explained limits to the standard); Mark Roe, *Mergers, Acquisitions and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559, 1561–62 (1984) (arguing that imposition of successor liability in tort contexts may stymie asset sales when potential liability is massive).

<sup>80</sup> See *Teed*, F.3d 711 at 766. See generally Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 222–23 (2011) (noting that vague and open ended judicial standards create difficulty in predicting legal outcomes). The concern is that with little guidance for what a “good reason” for not imposing liability might be, federal courts will reach differing conclusions on whether to impose liability, or will simply ignore the “good reason” exception altogether and impose successor liability in all cases. See generally Joseph A. Grundfest, A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002) (describing how vague or general standards and statutes will necessarily be interpreted differently by different courts and judges).

<sup>81</sup> See *Teed*, F.3d 711 at 769.

<sup>82</sup> See Roe, *supra* note 79, at 1562; see also Richard A. Epstein, *Imperfect Liability Regimes: Individual and Corporate Issues*, 53 S.C. L. REV. 1153, 1170 (2002) (recognizing potential issues for free transferability of corporate assets when a seller’s liabilities are significant relative to its assets).

<sup>83</sup> See Matheson, *supra* note 63, at 381 (“The viability of this traditional rule of successor nonliability in the world of modern business transactions flows fundamentally from the need to secure the free alienability of corporate assets.”); Roe, *supra* note 79, at 1561–62 (arguing that courts should attempt to prevent the rule of successor liability from hindering free transferability); Frederick Tung, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 CASE W. RES. L. REV. 435, 504 (1999) (acknowledging that uncertain or open-ended liability may discourage business deals where parties are unable to agree on mutually acceptable price for a seller’s assets); see

and requiring a purchasing corporation to be concerned with potential liability that it might incur as a successor would necessarily burden free transferability.<sup>85</sup> Where a selling company's liability is massive, a more specific "good reason" standard will provide predictability for the companies in the sale.<sup>86</sup> Expecting companies to factor preexisting liability into the purchase price, as the Seventh Circuit did, will not adequately resolve this issue.<sup>87</sup> Although the *Teed* court's broad standard may not discourage free transferability when a predecessor company has modest liabilities, this approach is unrealistic in cases involving massive liabilities.<sup>88</sup> A successor company will be unlikely to purchase a company's assets—no matter how valuable—if the predecessor's liabilities are too significant compared to its value.<sup>89</sup>

Moreover, considering free transferability of assets as a "good reason" encourages asset sales even where the amount of a predecessor's liability is not certain.<sup>90</sup> In cases involving uncertain liability, the *Teed* court's purchase price solution is completely ineffective.<sup>91</sup> A corporation cannot factor potential lia-

also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 cmt. a (1998) ("The general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholder's exposure to liability in order to facilitate the formation and investment of capital."). *But see Teed*, 711 F.3d at 766 (concluding that the burden on free transferability of corporate assets is not a sufficient reason to not impose successor liability).

<sup>84</sup> See *Roe*, *supra* note 79, at 1561 (arguing that successor liability issues are especially troublesome in the context of mass tort disasters).

<sup>85</sup> See *id.*; *Tung*, *supra* note 83, at 504 (acknowledging that open-ended successor liability may "kill any deal").

<sup>86</sup> See *Roe*, *supra* note 79, at 1561 (arguing that a broad successor liability rule cannot be successfully implemented unless liability is fairly predictable); see also *Matheson*, *supra* note 63, at 382 (arguing that successor non-liability promotes predictability in corporate transactions).

<sup>87</sup> See *Roe*, *supra* note 79, at 1568 (stating that, when imposing successor liability, the size of the liability is rarely certain); *cf. Teed*, 711 F.3d at 766–67 (reasoning that a presumption of liability does not impede free transferability of assets because the parties are able to negotiate the liability into the purchase price).

<sup>88</sup> See *Roe*, *supra* note 79, at 1561 (arguing that mass tort disasters stymie business transfers because assets are stuck with disabled management that is unable to sell its operations to a higher-valuing user); see also *Epstein*, *supra* note 81, at 1170 (noting the possibility that a company's liabilities could exceed the value of its assets and arguing that such liabilities would eliminate the market for an asset sale). In *Teed*, The Seventh Circuit emphasized that the liabilities were relatively insignificant, explaining that Packard was a profitable company that could sell for a "good price" and that its liabilities were "only" about \$500,000. See *Teed*, 711 F.3d at 769.

<sup>89</sup> See *Epstein*, *supra* note 82, at 1170; *Roe*, *supra* note 79, at 1563.

<sup>90</sup> See *Roe*, *supra* note 79, at 1562; *Tung*, *supra* note 83, at 504. In *Teed*, where the amount of liability was certain, the court concluded that free transferability was not a sufficiently "good reason" to not impose successor liability, but did not consider the issue where liability is uncertain. See 711 F.3d at 769. The parties had agreed to settle the worker's suit for \$500,000 subject to the outcome of the appeal, and accordingly, there was no uncertainty regarding the amount of liability. See *id.*

<sup>91</sup> See *Roe*, *supra* note 79, at 1562; *Tung*, *supra* note 83, at 504; *supra* notes 67–71 (explaining the *Teed* court's reasoning that a default rule of successor liability does not hinder free transferability because the parties are able to reflect liability in the purchase price). When considering the effect on

bilities into a purchase price when those liabilities are uncertain.<sup>92</sup> Instead, regardless of unpredictable liability, a standard that recognizes free transferability as a “good reason” will allow courts to better satisfy the two conflicting policy goals of protecting plaintiff’s legitimate claims while not impeding the free flow of corporate assets.<sup>93</sup>

Moreover, the articulated exceptions to the presumption of successor liability in the employment context should reflect whether successor liability will truly result in a windfall for a purchasing company in an asset sale.<sup>94</sup> Simply negotiating a fair sale price does not confer a windfall benefit on a successor company.<sup>95</sup> A windfall gain would occur, for example, if successor liability were not ultimately imposed after the parties had lowered the purchase price at the time of the transfer in anticipation of such liability.<sup>96</sup> Non-liability will generally not result in a windfall for a successor company and thus this factor cannot be a justification for applying a default rule of successor liability.<sup>97</sup> Accordingly, as in *Teed*, the fact that a purchasing corporation generally is not responsible for the illegal action of a predecessor, and that workers will receive

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free transferability, the default rule of successor liability is only effective when the liabilities are predictable at the time of the transfer. See *Roe*, *supra* note 79, at 1562; *Tung*, *supra* note 83, at 504.

<sup>92</sup> See *Roe*, *supra* note 79, at 1562; *Tung*, *supra* note 83, at 504; *cf. Teed*, 711 F.3d at 769 (acknowledging that the parties had agreed to settle the employment dispute for \$500,000 if the court ultimately imposed successor liability).

<sup>93</sup> See *Roe*, *supra* note 79, at 1561–62. Under the broad approach in *Teed*, companies are unable to avoid unpredictable liability even with provisions in the contract. See 711 F.3d at 766 (holding that successor liability is appropriate in the employment context even when the successor expressly disclaimed liability in the asset sale agreement). Moreover, the Seventh Circuit’s approach contradicts a “bedrock foundation for traditional successor nonliability” that a corporation should not be bound by a contractual provision that it did not agree to. See *Matheson*, *supra* note 63, at 381.

<sup>94</sup> See *Roe*, *supra* note 79, at 1566 (arguing that a successor company does not receive a windfall when it acquires assets without assuming liability); *cf. Teed*, 711 F.3d at 768 (holding that to allow a company to acquire assets without assuming liability would be a windfall).

<sup>95</sup> See *Roe*, *supra* note 79, at 1566. A rule of successor non-liability provides a liable predecessor corporation with a windfall gain because that corporation escapes liability and does not have an obligation to provide relief to aggrieved claimants. See *id.* at 1567 n.21. Additionally, non-liability creates a windfall loss for aggrieved claimants, who become unable to obtain relief. See *id.* Non-liability does not create a windfall gain for the successor corporation, however, because that corporation is not responsible for the illegal action of the predecessor. See *Matheson*, *supra* note 63, at 381. This concept illustrates another “bed rock” foundation of successor non-liability—one rooted in tort law—that generally states that a corporation should not be liable for the wrongdoing of a predecessor. See *id.* Because the purchaser corporation was not responsible for the predecessor’s actions, there is no windfall benefit if liability is not imposed. See *id.*; *Roe*, *supra* note 79, at 1566.

<sup>96</sup> See *Roe*, *supra* note 79, at 1567.

<sup>97</sup> See *id.* at 1566. *Thomas & Betts* argued that to allow the plaintiffs to obtain relief after the sale, when they had no chance to recover before the sale, was an unfair “windfall” for the plaintiffs. See *Teed*, 711 F.3d at 768. The *Teed* court concluded, without explanation, that to allow *Thomas & Betts* to acquire assets without liability was “equally a windfall.” See *id.*

a windfall if successor liability is imposed, should be potential “good reasons” for rejecting successor liability.”<sup>98</sup>

### CONCLUSION

In *Teed v. Thomas & Betts Power Solutions, L.L.C.*, the Seventh Circuit properly considered the importance of congressional policies favoring employee protection. The Seventh Circuit, however, provided little guidance for application of its “good reason” standard in the future and too quickly discredited arguments that could constitute “good reasons” for not imposing successor liability. Courts should implement the presumption of liability in the labor and employment context only if the boundaries of the standard are defined and specific “good reasons” are articulated. In particular, courts should consider the negative effects that a default rule creates for free transferability of assets. Moreover, courts should consider the “windfall” effects that a default rule could provide plaintiffs by holding innocent successors responsible for violations of insolvent predecessors. Without a more detailed explanation of what a “good reason” might be, it is unclear how future cases with different facts will be decided.

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<sup>98</sup> See Matheson, *supra* note 63, at 381; Roe, *supra* note 79, at 1567.