UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GLORY N. NNA, ADMINISTRATRIX OF THE ESTATE OF HILLARY OBIOMA NNA, MICHAEL P. MASON, JORY S. MASON, AND PETER W. LEE, Plaintiffs, v. WABTEC CORPORATION F/K/A WESTINGHOUSE AIR BRAKE COMPANY, AND AMERICAN STANDARD, INC., Defendants.	CIVIL ACTION NO. 06-11950-DPW

MEMORANDUM AND ORDER
March 31, 2008

This case arises out of an accident in Medford, Massachusetts, in which a Massachusetts Bay Transportation Authority ("MBTA") train struck three MBTA employees, killing one. Glory Nna--on behalf of the estate of her deceased husband Hillary Nna--along with Michael Mason, his wife Jory Mason, and Peter Lee filed this negligence and breach of warranty action in state court alleging that the horn on the train was defective.

The Plaintiffs initially alleged that Wabtec Corporation ("Wabtec") was liable in negligence and breach of warranty because it purchased assets from American Standard Companies, Inc. ("ASI"), the manufacturer and seller of the specific horn at issue in this action, in 1990, after ASI sold the allegedly defective horn to the MBTA. I allowed discovery specific to the

issue of successor liability, that is, whether Wabtec Corporation is a proper party given that it did not itself manufacture the particular horn involved in the accident. Following that discovery, Wabtec filed a motion for summary judgment contending that it cannot be held liable for any defect in the horn because it is not a successor to ASI. At the conclusion of the summary judgment motion hearing, I permitted some additional discovery and further submissions on the issues.

The Plaintiffs no longer pursue a conventional successor liability theory. Rather they argue in their Supplemental Opposition that Wabtec had an independent duty to warn the MBTA of any defect in the design of the horn of which it became aware as a result of purchasing ASI's assets. This Memorandum resolving the summary judgment motion is entered after review of post-hearing submissions reflecting the products of that additional discovery.

I. BACKGROUND

On January 27, 2005, a train near the MBTA Wellington station struck three MBTA employees who were repairing a switch on an active rail line. One of the employees, Hillary Nna, was killed. Michael Mason and Peter Lee, the two other employees, were injured. The Plaintiffs allege that the pneumatic horn on the train was defective and that, had it been properly designed and manufactured, the train engineer should have been able to

sound the horn and prevent the disaster. The specific alleged defect is the lack of a deflective cone to prevent the horn from clogging with ice and snow in inclement weather.

ASI is the designer and manufacturer of the horn in question. In about 1979, ASI sold brake equipment including the allegedly defective pneumatic horn to Bombardier Transit Corporation, the manufacturer of cars for the MBTA Orange Line. Bombardier, which has since been dismissed from this case by stipulation, then sold and shipped the car involved in the accident to the MBTA in November 1980.

In 1976, before the sale to Bombardier, ASI had received a request from one of its customers, General Electric, to develop a horn with a deflector. In 1988 ASI began including a warning in its operation and maintenance manuals recommending "that newly purchased and now in service 'AA-2' Pneuphonic Horns . . . be equipped with 'Deflector Cones' which serve to restrict foreign matter from entering the horn bell openings once the Horn is installed on the vehicle."

Wabtec is a publicly traded corporation created in 1989. It is undisputed that Wabtec did not design or manufacture the allegedly defective horn involved in the 2005 accident. Pursuant to an agreement effective March 9, 1990, Wabtec (operating under the name Rail Acquisition Corporation) purchased most of the railroad assets of ASI's Wabco division, the division which sold the horn at issue here. Under the purchase agreement, Wabtec

expressly did not assume any of the liabilities or obligations of ASI arising out of products sold prior to the March 9, 1990 closing. The agreement provided:

> [Wabtec] shall not assume, nor be liable for, and Seller expressly agrees to remain liable for all of the liabilities, obligations, contracts, and commitments of Seller . . . including . . . any liabilities or obligations of the Seller or the Division resulting from any and all . . . Product Liability Claims arising out of, based on, or resulting from . . . products sold and shipped to third parties prior to the Closing Date . . . whether absolute or contingent, matured or unmatured, known or unknown.

Wabtec now manufactures and sells the same horns ASI's Wabco division sold to the MBTA in 1979. ASI is still in existence but there is no evidence as to whether it is also producing pneumatic horns.

The MBTA continues to purchase replacement horns and horn parts from Wabtec; it has bought fourteen horns and sixty horn parts since 1990 for a total gross price of just over $15,000. Wabtec performed some service and repair work for the MBTA in the early 1990s but none of this work was for train horns. Since March 9, 1990, Wabtec has not visited the MBTA facility nor has the MBTA made any visits to Wabtec's facility for service or repair of any horns.

II. DISCUSSION

A. Motion for Summary Judgment

Under conventional successor liability doctrine, Wabtec can be liable for the sale of a negligently manufactured or designed product if: (1) it was the manufacturer or seller of the product; (2) it assumed liability of ASI's sales through contract, or (3) it has successor liability for the horn under common law. In addition, any successor such as Wabtec may have an independent duty to warn the buyer of ASI's products arising out of a special relationship between Wabtec and the buyer.

It is clear and undisputed that Wabtec was not the seller or the manufacturer of the allegedly defective horn, it did not assume the liabilities of ASI via contract, and that no common law successor liability arose from Wabtec's asset purchase. Nevertheless, a brief discussion of the law of successor liability will provide context for addressing the remaining disputed issue: whether a special relationship exists between Wabtec and the MBTA.[1]

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[1] There is arguably a question of which state's law governs the question of successor liability in this case: that of Massachusetts, where the accident took place, or that of New York, which is the state chosen in the choice of law provision of the asset purchase agreement. I have detected no difference between the law of Massachusetts and that of New York regarding the issue of Wabtec's liability presented in this case. I am, nevertheless, of the view, that New York law applies. *See U.S. v. Davis*, 261 F.3d 1, 53 n.48 (1st Cir. 2001) (applying Connecticut law to the issue of successor liability where a purchase agreement contained a choice of law provision indicating Connecticut law should apply and neither party argued that another state's law should apply). Consequently, I rely upon New

In general, the purpose of an asset purchase is to avoid assuming the liabilities of the previous company. Thus, "it is a general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor." *See Schumacher v. Richards Shear Co., Inc.*, 59 N.Y.2d 239, 245 (1983). In order for a company to have successor liability arising from an asset purchase, (1) the purchaser must expressly or impliedly assume the liabilities of the predecessor corporation, (2) the transaction must be a *de facto* merger or consolidation, (3) the successor must be a mere continuation of the predecessor, which can be true only if the predecessor was extinguished, or (4) the transaction must be a fraudulent effort to avoid the liability of the predecessor. *Id.* Wabtec does not satisfy any of these tests for successor liability.[2]

York law for my resolution of the summary judgment motion.

[2] Nor could Wabtec be held liable for the torts of ASI based solely on the fact (as to which, in any event, there is no record support) that it currently produces the same pneumatic horn that ASI sold to the MBTA. New York, along with Massachusetts and a majority of states, has declined to adopt the "product-line" exception to the successor liability doctrine. *See Semenetz v. Sherling & Walden*, Inc., 7 N.Y.3d 194, 196 (2006) (declining to adopt the exception); *see also Guzman v. MRM/Elgin*, 409 Mass. 563, 567 (1991) (surveying state case law and declining to adopt the exception). The product-line exception, which originated in California, *Ray v. Alad Corp.*, 19 Cal.3d 22 (1977), holds that a party that acquires a manufacturing business and continues the output of its line of products assumes tort product liability for negligence and breach of warranty even if it is not liable under the traditional common law theory of successor liability. In *Semenetz*, the New York Court of Appeals explicitly rejected the "product-line" exception, stating that adoption of the exception

The Plaintiffs now focus their contention that Wabtec is liable for its own negligence because Wabtec discovered that the horns that ASI manufactured, and that Wabtec now manufactures, are defectively designed because they lack a snow shield. As a result, the Plaintiffs contend, Wabtec had a duty to warn its buyers and, more pertinently here, buyers from ASI who purchased the defective horns before the asset purchase. Wabtec, they say, failed to warn the MBTA or recall the horns, and this failure to warn caused the accident on January 27, 2005.

In order for Wabtec to be liable for negligently failing to warn the MBTA about any danger related to the horn, it must have a special relationship with the MBTA that gives rise to an independent duty to warn the MBTA. If a special relationship exists, then a successor corporation has an *independent* duty to warn its predecessor's customer even where there is no successor liability. *See Schumacher*, 59 N.Y.2d at 247.

Both Massachusetts and New York recognize a post-sale duty to warn of product dangers. *Lewis v. Ariens Co.*, 434 Mass. 643, 647-649 (2001); *Schumacher*, 59 N.Y.2d at 246-247. The courts

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would "mark a radical change from existing law implicating complex economic considerations better left to be addressed by the legislature." 7 N.Y.3d at 201 (internal quotes omitted). Thus, the fact that Wabtec purchased the pneumatic horn line from ASI and continues to manufacture that line itself is not a basis for liability in this case, where Wabtec is not otherwise a successor to ASI.

that have applied this concept to successor companies[3] have "focused upon the relationship between the defendant 'successor' corporation and the customers of the predecessor and the actual or potential economic advantage to the defendant successor corporation." *Schumacher*, 59 N.Y.2d at 247; *see Radziul v. Hooper, Inc.*, 125 Misc.2d 362, 368 (1984) (finding that the existence of a special relationship turns on "whether there is sufficient economic benefit accruing to the successor by virtue of its relationship with the customers of the predecessor"); *accord Florom v. Elliott Mfg.*, 867 F.2d 570, 577 (10th Cir. 1989); *Polius v. Clark Equip. Co.*, 802 F.2d 75, 84 (3d Cir. 1986); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 177 (5th Cir. 1985); *Gee v. Tenneco, Inc.*, 615 F.2d 857, 866 (9th Cir. 1980). This economic advantage is said to provide an expected benefit to the successor corporation that "justifies the requirement of special obligations." *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 442 (7th Cir. 1977) (quoting William L. Prosser, Law of Torts § 56, at 339 (4th ed. 1971)).

Courts evaluating whether a special relationship exists between a successor corporation and a predecessor's customer generally consider several factors. Important factors include whether there is (1) succession to a predecessor's service

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[3] Massachusetts case law, however, appears not to have had occasion as yet to address directly a successor company's duty to warn a *predecessor's* customer.

contracts, (2) coverage of the particular product under a service contract, (3) service of that product by the successor, and (4) knowledge by the successor corporation of defects and of the location or owner of that product. *Schumacher*, 59 N.Y.2d at 247; *see also Sherlock v. Quality Control Equip. Co., Inc.*, 79 F.3d 731, 734 (8th Cir. 1996); *Travis v. Harris Corp.*, 565 F.2d 443, 449 (7th Cir. 1977); *Leannais*, 565 F.2d at 442. This list is not exhaustive; the fundamental issue is "whether there is an adequate nexus between the successor and the predecessor's customers." *Sherlock*, 79 F.3d at 734; *see Radziul*, 125 Misc.2d at 368.

Although Wabtec performed some service and repair work for the MBTA in the early 1990s, there is no evidence it ever serviced any of the MBTA train horns. Thus, it appears that Wabtec had nothing to do with the servicing of the train horns; it only sold the MBTA horn parts and new horns. The Plaintiffs attempt to establish the existence of a special relationship by arguing that Wabtec held itself out "as the exclusive source for products, testing protocol, specifications, and information," but this argument must fail. It is a recasting of the product line exception that both New York and Massachusetts have explicitly rejected as a basis for successor liability. *See* Note 2 *supra*. Consequently, Wabtec cannot be liable merely for continuing ASI's exclusive product line of horns and horn parts. Unlike

Schumacher, where the purchaser corporation made a service call for the allegedly defective product and actively offered to service the product over an extended period of time, 59 N.Y.2d at 248, there is no evidence here that Wabtec provided that sort of service or repair for the particular horn involved in the accident or for any other MBTA train horn.

The Plaintiffs have also failed to present sufficient evidence that Wabtec had any special knowledge of any horn defect that it failed to communicate to the MBTA. They argue that Wabtec failed to warn the MBTA of the possibility of horn malfunction when clogged with snow and ice but the only specific post-sale evidence[4] they rely upon is a report by a Wabtec consultant from 2003 where "following consultation with Boston [MBTA] personnel concerning experience in this regard with current equipment, the issue was Closed." (Emphasis in original). The issue was raised in a meeting with the MBTA and resolved after consultation with MBTA personnel. There is no evidence that through the concerns raised Wabtec had some separately identifiable knowledge of any potential defects in the horn at

[4] The fact that ASI may have begun in 1988, some two years before the sale to Wabtec, recommending "Deflector Cones" be installed on "AA-2 Pneuphonic Horns" does not impose an independent duty on Wabtec to make separate warnings to previous ASI purchasers thereafter.

issue.[5] Indeed, it would appear the MBTA had no concerns sufficient to keep the issue open. "Absent knowledge of defects, nothing is known to warn against." *Travis*, 565 F.2d at 449.

Based on the record before me, Wabtec has not had sufficient pertinent contacts with the MBTA to overcome the traditional rule of no liability for a successor under these circumstances. The law of New York is settled: even a one-time service call for a particular product that caused an accident was not enough to establish a special relationship between the parties. *Sullivan v. Joy Mfg. Co.*, 70 N.Y.2d 806, 808 (1987). Instead, New York courts have required a more continual and regular form of servicing arrangements. *See Goldman v. Packaging Inds., Inc.*, 144 A.D.2d 533, 535-536 (N.Y. App. Div. 1988); *Ayala v. V & O Press Co.*, 126 A.D.2d 229, 236-237 (N.Y. App. Div. 1987) (per curiam). The Plaintiffs here have failed to show the existence of *any* servicing relationship for the train horn.

Although the factors involving servicing are not the only ones to consider, they are instructive. They provide information on the economic benefit necessary for imposing an independent duty to warn. "Knowledge of when and where various customers may

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[5] The Plaintiffs argue that Wabtec can be said to have had knowledge because ASI was informed of customer concerns as early as 1976. This evidence may implicate ASI's duty to warn of defects at the time of sale but it does not represent a defect discovered post-sale known to Wabtec but not communicated to the MBTA.

need additional machinery, and knowledge of the condition of equipment which may need replacement, are important sales resources." *Leannais*, 565 F.2d at 442. Although Wabtec continued to sell horns and horn parts to the MBTA, there is no indication that it relied on servicing of the horns to gain additional information for its own economic benefit. The most the evidence indicates is that Wabtec filled the MBTA orders when they were placed. This is not enough to form a special relationship. Consequently, I conclude that Wabtec did not have an independent duty to warn the MBTA of defects in a horn it did not manufacture.

III. CONCLUSION

For the reasons set forth more fully above, Wabtec's motion for summary judgment is GRANTED.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE