

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)	
)	
PUREX INDUSTRIES, INC.)	ORDER WQ 97-04
)	
For Review of Administrative Civil)	
Liability Order 96-042 of the)	
California Regional Water Quality)	
Control Board, San Francisco Bay)	
Region. Our File A-1023.)	
)	

BY THE BOARD:

On March 20, 1996, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), adopted Order 96-042, imposing administrative civil liability on Purex Industries, Inc. The order was issued because the company failed to submit, at the Regional Water Board Executive Officer's request, an addendum to a workplan to investigate groundwater pollution at a site in Belmont, California. Purex Industries, Inc. (Purex Industries, Inc. or petitioner) filed a timely petition for review of Order 96-042 and for a hearing with the State Water Resources Control Board (State Water Board or Board).¹

¹ See Water Code sec. 13320; Cal. Code Reg., title 23, sec. 2050 et seq. Purex Industries, Inc. later granted the State Water Board a 60-day extension to resolve the petition. See Cal. Code Regs., tit. 23, sec. 2052(d). The time for final State Water Board action on the petition expires on or about May 14, 1997.

Purex Industries, Inc. challenges the Regional Water Board's action on the ground that the company was improperly named as a responsible party in the enforcement order. Purex Industries, Inc. requests that the Board find that it is not responsible for investigation or remediation of the Belmont site and that, conversely, responsibility resides with either Baron-Blakeslee, Inc. or AlliedSignal, Inc., or both.

The Regional Water Board named Purex Industries, Inc. in Order 96-042 as the corporate successor of several entities, including Purex Corporation, a former operator of the site. Ordinarily, this would be a proper basis for holding Purex Industries, Inc. liable. Petitioner contends, however, that a leveraged buy-out in 1982 shifted all liability for the Belmont site from Purex Corporation to Baron-Blakeslee, Inc.

This order concludes that the Regional Water Board properly named Purex Industries, Inc. in Order 96-042. While the leveraged buyout included an assumption of liability for the Belmont site by Baron-Blakeslee, Inc., the assumption agreement did not relieve Purex Corporation (and, hence, its successor, Purex Industries, Inc.) of liability. Rather, the Board concludes that, based on Baron-Blakeslee, Inc.'s assumption of liability, the Regional Water Board should add that company to the list of responsible parties for the site. At the present time, it is unclear whether AlliedSignal, Inc., the parent of

Baron-Blakeslee, Inc., can also be considered a responsible party.

I. BACKGROUND

A. *Site History*

In the late '80s volatile organic compounds (VOCs) were detected in groundwater beneath a site located at 500 Harbor Boulevard in Belmont. Groundwater samples collected in 1990 at the property line boundary between 500 Harbor Boulevard and adjoining property contained 28,823,000 parts per billion (ppb) of TCE and 586,000 ppb of DCE. There were no known sources of VOCs at the 500 Harbor Boulevard site; consequently, an off-site source was suspected. Later investigations revealed that the adjacent site, located at 511 O'Neill Avenue, had previously been used for solvent recycling and was, therefore, a potential source of the VOCs.

The Currier Company opened the 511 O'Neill Avenue site in 1960. The Currier Company and, later, Baron-Blakeslee, Inc., a California corporation (Baron-Blakeslee/Cal), operated a solvent sales and recycling operation there. On June 30, 1970, Baron-Blakeslee/Cal merged with Purex Corporation, a California corporation, and became a division of Purex Corporation. Purex Corporation, through its Baron-Blakeslee Division, continued to operate the solvent recycling facility until 1972, when the facility was closed. The site is currently owned by W. Howard

and Catherine Jones, who operate a small battery retail facility at that location.

B. *Corporate Activity*

In 1978 Purex Industries, Inc. was incorporated in Delaware (Purex Industries A) and acquired all of the stock of Purex Corporation. In March 1982, in anticipation of a leveraged buyout² of Purex Corporation and its parent, two shell companies were incorporated in Delaware--PII Holdings, Inc. and a wholly-owned subsidiary, PII Acquisitions, Inc. Later, in June 1982, nine additional shell corporations were created in Delaware, all wholly-owned subsidiaries of PII Acquisitions, Inc., to receive the assets and liabilities of nine divisions of Purex Corporation.

On August 11, 1982, Purex Corporation and Purex Industries A underwent a leveraged buyout. All of the 11,000,000 shares of Purex Industries A stock were purchased by private investors for \$360 million. On the same day, Purex Industries A was merged with PII Acquisitions, Inc., which then became the parent of Purex Corporation.

On August 13, 1982, Purex Corporation transferred all of the assets and liabilities relating to nine of its divisions to PII Acquisitions, Inc., which executed an agreement assuming

² A leveraged buyout consists of financing the purchase of a company mainly with debt that can be repaid from the company's assets or operations. 19 Am.Jur.2d, Corporations, sec. 2531, pp. 334-335.

all of the liabilities relating to these divisions. PII Acquisitions, Inc., in turn, transferred all of the assets and liabilities for the nine divisions to the nine similarly named shell corporations. The assets and liabilities for the Baron-Blakeslee Division, for example, were transferred to Baron-Blakeslee, Inc. (Baron-Blakeslee/Del). Baron-Blakeslee/Del also executed an agreement assuming all liabilities relating to the former division.

PII Acquisitions, Inc. was subsequently dissolved. On August 30, 1982, PII Holdings, Inc., the parent, underwent a name change to Purex Industries, Inc. Purex Industries, Inc. thus became the parent of both Baron-Blakeslee/Del and Purex Corporation.

Three years later Purex Industries, Inc. sold all of the stock of Baron-Blakeslee/Del to Allied Corporation, now known as AlliedSignal, Inc. The exact relationship between Baron-Blakeslee/Del and AlliedSignal, Inc. is unclear.

After August 13, 1982, Purex Corporation continued in existence although it underwent a name change 10 days later to T P Industrial, Inc. The company retained the Turco Products Division, the Purex Industrial Division, and other assets and liabilities. The company continued to do millions of dollars of business in the sale of cleaners, coatings, Brillo metal scouring pads, Franklin hand cleaner, and Old Dutch cleanser. In 1986

T P Industrial, Inc. merged with its parent, Purex Industries, Inc.

C. *Regional Water Board Action*

In March 1995, after several years of investigation at the 500 Harbor Boulevard site, the Regional Water Board requested that Purex Industries, Inc. submit a work plan for a soil and groundwater investigation at 511 O'Neill Avenue to determine whether the site was a source of the high VOC levels found in the groundwater.³ The 511 O'Neill Avenue site was a suspected source because of its past use for solvent recycling, the direction of groundwater flow, the elevated concentrations of solvents in groundwater at the boundary between the two properties, and other factors.

Purex Industries, Inc. submitted the workplan, but staff determined that the plan did not contain a sufficient number of soil borings to adequately characterize the site. Several months later, the Regional Water Board requested that the company submit an addendum to the workplan addressing this deficiency. Purex Industries, Inc. refused apparently on the ground that the company was improperly named.

In March 1996, the Regional Water Board imposed administrative civil liability in Order 96-042 on Purex Industries, Inc. for failure to submit the addendum.⁴ The

³ See Water Code sec. 13267.

⁴ See *id.*, secs. 13268, 13323 et seq.

Regional Water Board found that Purex Industries, Inc. was a responsible party because the company was the successor in interest to Baron-Blakeslee/Cal, Purex Corporation, and T P Industrial, Inc.⁵ This petition followed.

II. DISCUSSION

Purex Corporation of California, through its Baron-Blakeslee Division, operated the former solvent recycling facility at 511 O'Neill Avenue. Operation of the facility apparently caused groundwater pollution. Purex Industries, Inc. is the successor to Purex Corporation, due to the 1986 merger with T P Industrial, Inc.⁶ Purex Industries, Inc. is, therefore, liable for any pollution caused by its predecessor. Purex Industries, Inc. contends, however, that the 1982 leveraged buyout shifted liability to Baron-Blakeslee/Del or AlliedSignal, Inc., or both.

As a preliminary matter, the Board notes that both the Regional Water Board record and our record contain numerous submittals from Purex Industries, Inc. and AlliedSignal, Inc. on the issue of liability. The Board, therefore, concludes that an

⁵ See Order 96-042, fdng. 2.f., l., and m.

⁶ See, e.g., *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 304 [98 Cal.Rptr. 547] (as a general rule, a corporation formed by merger is liable for the debts and liabilities of the constituent corporations, whether based on contract or tort). See also California Corporations Code sec. 1107 (the surviving corporation of a merger is subject to all of the debts and liabilities of the disappearing corporation).

additional hearing, as requested by the petitioner, is unnecessary.

A. *Liability of Baron-Blakeslee/Del*

California follows the general rule that a corporation that purchases the assets of another corporation does not assume the liabilities of the seller.⁷ The courts recognize four exceptions to this general rule where:

(1) there is an express or implied agreement of assumption of liability;

(2) the transaction amounts to a consolidation or merger of the two corporations;

(3) the purchasing corporation is a mere continuation of the seller; or

(4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability.⁸

Purex Industries, Inc. argues that the first three exceptions apply in this case. The State Water Board conclude that only the first applies. Because the Board find that Baron-Blakeslee/Del expressly agreed to assume liability for the 511 O'Neill Avenue site, the Board further conclude that the Regional Water Board should consider Baron-Blakeslee/Del, and possibly

⁷ See, e.g., *Beatrice Co. v. State Board of Equalization* (1993) 6 Cal.4th 767, 778 [25 Cal.Rptr.2d 438, 863 P.2d 683]; *Ray v. Alad* (1977) 19 Cal.3d 22, 28 [136 Cal.Rptr. 574, 560 P.2d 3].

⁸ See *id.* The California Supreme Court has created a fifth exception to the general rule which imposes successor liability under certain circumstances in product liability cases. See *Ray v. Alad*, *supra* fn. 7. This exception is inapplicable here.

AlliedSignal, Inc., as additional responsible parties for investigation and remediation of the site.

1. Agreement of Assumption

Whether Baron-Blakeslee/Del expressly or impliedly assumed liability for the Belmont site is a question of fact.⁹ To resolve the issue, the Board must review the contractual agreements between Purex Corporation and PII Acquisitions, Inc. and between PII Acquisitions, Inc. and Baron-Blakeslee/Del.

The transfer of assets and liabilities between Purex Corporation and PII Acquisitions, Inc. included an assumption agreement.¹⁰ Under the agreement, PII Acquisitions, Inc. assumed all of the liabilities relating to "the assets and liabilities specifically identified" in paragraph 1 of the agreement.¹¹ Paragraph 1 identified these as the Distributed Assets and Liabilities, as defined in Purex Corporation's Plan of Partial Liquidation (Plan). The Distributed Assets and Liabilities were "all of [Purex Corporation's] assets and liabilities, real and personal, known and unknown," other than those retained by Purex Corporation, "including, but not limited to, all of the assets and liabilities related to . . . the Baron-Blakeslee Division . . . , including, but not limited to, all the land . . . and

⁹ See, e.g., *Schwartz v. Pillsbury Inc.* (9th Cir. 1992) 969 F.2d 840, 845-846; *Gee v. Tenneco, Inc.* (9th Cir. 1980) 615 F.2d 857, 862-863.

¹⁰ Instrument of Assignment and Assumption, dated August 13, 1982, between Purex Corporation and PII Acquisitions, Inc.

¹¹ *Id.*, paragraph 2.

other assets at the facilities and addresses listed on Exhibit B" (emphasis added) of the Plan.¹² The Belmont site was not listed on Exhibit B.

PII Acquisitions, Inc. and Baron-Blakeslee/Del, in turn, executed an assumption agreement in which Baron-Blakeslee/Del assumed all of the liabilities of PII Acquisitions, Inc. "with respect to the assets and liabilities specifically identified in paragraph 1" of the agreement.¹³ These were "all the assets and liabilities, known or unknown, relating to its Baron-Blakeslee Division, including, but not limited to, all the land . . . and other assets located at the facilities and addresses listed on Exhibit A (emphasis added)" of the assumption agreement.¹⁴ The Belmont site was not included on Exhibit A.

When the two assumption agreements were signed, the Belmont site was an unknown liability related to the former Baron-Blakeslee Division of Purex Corporation. In the Board's view, under the first assumption agreement, PII Acquisitions, Inc. assumed this unknown liability, which was, in turn, assumed by Baron-Blakeslee/Del. The Board base its conclusion on the expansive language used in the agreements, covering all unknown as well as known liabilities. In addition, although the

¹² Plan of Partial Liquidation between Purex Corporation and PII Acquisitions, Inc., dated August 13, 1982, paragraph 3, p. 2.

¹³ Instrument of Assignment and Assumption, dated August 13, 1982, between PII Acquisitions, Inc. and Baron-Blakeslee/Del, paragraph 2.

¹⁴ *Id.*, par. 1.

agreements enumerated certain liabilities, the listings were prefaced with the phrase "including, but not limited to." This indicated an intent to not restrict the assumed liabilities to those enumerated.

AlliedSignal, Inc. contends that liability for the Belmont site, nevertheless, remained with Purex Corporation because the site was not "specifically identified" in either assumption agreement. Assuming that use of this language created an ambiguity, the agreements are subject to the general rules of contract interpretation.¹⁵ The agreements must be interpreted as a whole, in order to give effect to every part.¹⁶ An interpretation which makes part of the agreement inoperative is to be avoided.¹⁷

AlliedSignal, Inc.'s interpretation of the agreements would make the language including "unknown liabilities" meaningless. Unknown liabilities existing when the agreements were executed obviously could not have been "specifically identified." In addition, AlliedSignal, Inc.'s interpretation would nullify the language "including, but not limited to," which indicated an intent to cover liabilities not specifically

¹⁵ See California Civil Code sec. 1637. See generally 17A Am.Jur.2d (rev.) Contracts, sec. 336 et seq.; 1 Witkin, Summary of California Law (9th ed. 1987), Contracts, sec. 681 et seq.

¹⁶ See California Civil Code sec. 1641; *Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 473-474 [27 Cal.Rptr. 2d 476].

¹⁷ See California Civil Code sec. 1643; *Titan Corp. v. Aetna Casualty & Surety Co.*, *supra* fn. 16.

enumerated. The Board concludes, therefore, that AlliedSignal, Inc.'s interpretation is unreasonable and that Baron-Blakeslee/Del expressly agreed to assume the unknown liability for the Belmont site.

Whether this agreement is binding on AlliedSignal, Inc. cannot be determined from the record before this Board. Although AlliedSignal, Inc. purchased the stock of Baron-Blakeslee/Del, this fact alone is insufficient to impose liability on the parent. As a general rule, a parent corporation, like any other stockholder, is protected from liability by the corporate veil.¹⁸ There is some evidence in the record, however, to indicate that the two companies may have merged.¹⁹ If this is true, AlliedSignal, Inc. would have acquired the liabilities of Baron-Blakeslee/Del.

2. De Facto Merger

Purex Industries, Inc. apparently contends that there was a de facto merger between the Baron-Blakeslee Division of Purex Corporation and Baron-Blakeslee/Del. Petitioner maintains that there was a de facto merger between Purex Corporation and PII Acquisitions, Inc., which, in turn, merged with Baron-Blakeslee/Del.

¹⁸ E.g., *McLaughlin v. L. Bloom Sons Co.* (1962) 206 Cal.App.2d 848 [24 Cal.Rptr. 311].

¹⁹ See Regional Water Board Administrative Record, Item 19, letter dated March 17, 1995, from Kenneth J. Burke, Senior Counsel, Allied Signal, Inc., to Mr. Stephen Morse, Chief, Toxics Cleanup Division, Regional Water Board, et al., Att. 2.

In general, a merger is the absorption of one corporation by another, which survives, retains its name and corporate identity together with the added capital, franchises, and powers of the merged corporation, and continues the combined business.²⁰ The merged corporation ceases to exist.²¹

Here, obviously there was no actual merger between Purex Corporation and PII Acquisitions, Inc. because Purex Corporation continued in business. Nor was there a de facto merger.

The doctrine of de facto merger was created to address cases in which a transaction cast as an asset sale achieves the same result as a merger. The California Supreme Court has recognized the de facto merger exception in two situations: (1) where one corporation takes all of another's assets without providing any consideration that could be available to meet claims of the other's creditors; and (2) where the consideration consists wholly of shares of the purchaser's stock which are promptly distributed to the seller's shareholders in conjunction with the seller's liquidation.²² Neither circumstance is applicable in this case. Purex Corporation apparently received a fair consideration for its stock and assets from PII

²⁰ *Phillips v. Cooper Laboratories, Inc.* (1989) 215 Cal.App.3d 1648, 1660 [264 Cal.Rptr. 311], citing *Heating Equipment Mfg. Co. v. Franchise Tax Board* (1964) 228 Cal.App.2d 290, 302 [39 Cal.Rptr. 453].

²¹ *Id.*

²² See *Ray v. Alad*, *supra* fn. 7, 19 Cal.3d at 28-29.

Acquisitions, Inc. And, Purex Corporation did not liquidate, but rather continued in business for a number of years. There can be no de facto merger where the seller corporation continues to exist.²³

Purex Industries, Inc. contends that PII Acquisitions, Inc. merged with Baron-Blakeslee/Del. Assuming that this is true, it does not change our conclusion. Purex Corporation did not merge with PII Acquisitions, Inc. Hence, there was no ultimate merger between Purex Corporation and Baron-Blakeslee/Del.

3. Mere Continuation

Purex Industries, Inc. also contends that Baron-Blakeslee/Del was a mere continuation of the Baron-Blakeslee Division of Purex Corporation. California cases holding that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts have required a showing of one or both of the following: (1) no adequate consideration was given for the predecessor's assets; and (2) one or more persons were officers, directors, or stockholders of both corporations.²⁴

As stated previously, there is no evidence of inadequate consideration in this case. Further, while it appears

²³ See, e.g., *Beatrice Co. v. Board of Equalization*, supra fn. 7, 6 Cal.4th at 778.

²⁴ See *Ray v. Alad*, supra fn. 7, 19 Cal.3d at 29.

that at least one person was an officer of both Purex Corporation and Baron-Blakeslee/Del, the Board cannot conclude that the latter was a mere continuation of the former. Liability is not imposed on an acquiring corporation when recourse to the seller corporation is available and the two corporations have separate identities.²⁵ In fact, the Board is aware of no California cases finding either a de facto merger or mere continuation between a purchasing corporation and a division of the seller corporation.

B. *Liability of Purex Industries, Inc.*

Purex Industries, Inc. is the successor to Purex Corporation, a former operator of the solvent recycling facility at the Belmont site. The State Water Board has concluded that Baron-Blakeslee/Del expressly agreed to assume the unknown liability for the site related to the former Baron-Blakeslee Division of Purex Corporation. Did this agreement relieve Purex Corporation and, thus, its successor, Purex Industries, Inc. from liability? The Board conclude that it did not.

Baron-Blakeslee/Del's agreement to assume the unknown liabilities related to the former division was contractual in nature.²⁶ Absent the agreement, the corporation was not legally obligated to assume the liabilities related to the former

²⁵ See *Beatrice Co. v. Board of Equalization*, supra fn. 7, 6 Cal.4th at 778.

²⁶ See *Beatrice Co. v. Board of Equalization*, supra fn. 7, 6 Cal.4th at 782-783 ("An agreement to assume liabilities is a contractual promise to perform the obligations of another.")

division because of the general rule that an asset purchaser does not assume the liabilities of the selling corporation. The legal effect of the agreement was to give PII Acquisitions, Inc., and its successors the right to compel Baron-Blakeslee/Del to perform its obligations under the assumption agreement.

The State Water Board conclude that the agreement is not binding on the State or Regional Water Boards for several reasons. First, this conclusion is consistent with past precedent. The Board has previously taken the position that contractual agreements between individuals regarding liability are not binding on the State or Regional Water Boards.²⁷ The Board has recognized the public policy considerations present in cases such as this. "[M]ultiple parties should properly be named in cases of disputed responsibility."²⁸

Second, this conclusion is consistent with the federal hazardous waste cleanup statute, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. Section 9601 et seq. Under CERCLA, contractual provisions regarding liability between an owner or operator of a site who is liable for a hazardous waste release and another party are

²⁷ State Water Board Order WQ 93-9, pp. 10-11. The Board has designated its decisions and orders as precedent decisions. State Water Board Order WR 96-1 at 18, n.11.

²⁸ State Water Board Order WQ 86-16, p. 13. In this regard, the Board note that Regional Water Board staff have indicated that they intend to recommend the addition of the landowners as secondarily responsible parties if site cleanup requirements are issued. Transcript of Regional Water Board hearing on February 21, 1996, p. 6.

unenforceable against the government.²⁹ This rule has been applied in circumstances similar to those presented here. In *United States v. Lang*, for example, the court held that a parent corporation, which was liable as an owner under CERCLA, could not shift liability to a subsidiary.³⁰ The parent had transferred assets to a subsidiary, which had apparently agreed, as a condition of the transfer, to accept all liabilities associated with the transferred assets. The court held that the parent remained liable and that, if the agreement were proven, the subsidiary could also be added to the chain of cleanup accountability.

III. CONCLUSIONS

For the reasons explained above, the Board concludes that the Regional Water Board acted properly in naming Purex Industries, Inc. in Order 96-042. The State Water Board further conclude that Baron-Blakeslee/Del expressly assumed the unknown liability for the Belmont site related to the former Baron-Blakeslee Division of Purex Corporation. The Board therefore concludes that the Regional Water Board should treat Baron-Blakeslee/Del as an additional responsible party for any future investigative or remedial work at the site. Although the evidence in the record indicates that AlliedSignal, Inc.

²⁹ See 42 U.S.C. Sec. 9607(e)(1).

³⁰ 864 F.Supp. 610 (E.D.Tex. 1994).

purchased all of the stock of Baron-Blakeslee/Del, it is unclear whether AlliedSignal, Inc. should also be considered a responsible party.

IV. ORDER

IT IS HEREBY ORDERED that the Regional Water Board should consider Baron-Blakeslee/Del as a responsible party for any future investigative or remedial work at the 511 O'Neill Avenue site.

IT IS FURTHER ORDERED that the petition of Purex Industries, Inc. is otherwise denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 14, 1997.

AYE: John Caffrey
James M. Stubchaer
Marc Del Piero
Mary Jane Forster
John W. Brown

NO: None.

ABSENT: None.

ABSTAIN: None.


Maureen Marche
Administrative Assistant to the Board