



Law Alert

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Ohio Supreme Court Rules On The Enforcement Of Non-Compete Agreements By The Surviving Company In A Merger

The Ohio Supreme Court ruled 4-3 on May 24, 2012, that following a merger the surviving company may not be able to enforce employees' non-compete agreements where the agreements fail to contain an assignment clause and the time period of the employees' non-competes began to run as of the date of the merger.

In *Acordia of Ohio, L.L.C. v. Fishel et al.*, the Ohio Supreme Court ruled that a merger causes the original corporate party to non-compete agreements to cease to exist, while the surviving company takes ownership of the agreements. But where the non-compete agreement fails to contain an assignment clause, the surviving company may not enforce the non-compete agreement as if it "stepped into the shoes" of the company that had originally contracted with the employees. Although the employees' non-compete agreements transferred automatically by operation of law to the surviving company, the Ohio Supreme Court held that the non-compete agreements at issue provided only that the employees would avoid competition following their termination from the specific company identified in the non-compete agreements. Because the non-compete agreements did not state they could be assigned or would carry over to a successor, the Ohio Supreme Court ruled that the named parties intended the agreements to operate only between themselves – the employees and the specific employer. According to the *Acordia* decision, the termination of the employees' employment with the original company was triggered by the merger, which commenced the running of the non-compete periods. These periods expired on their own terms after two years of employment with the successor – *Acordia* – and thereby made the non-compete agreements unenforceable by *Acordia* when the employees later joined a competitor.

The dissenting opinion in *Acordia* noted that the lead opinion runs counter to Ohio's century-old precedent that in a merger, the consolidated party steps into the shoes of the constituent companies and that by operation of law, and in the absence of explicit contract language to the contrary, the surviving entity is vested with all the assets and obligations of the constituent entities. Those assets and liabilities historically have included agreements such as noncompete agreements and the ability to enforce them as if the surviving entity were a signatory to them.



Recommendations

It is too early to know the reach and impact of this ruling, but we can foresee that *Acordia's* analysis might be applied by Ohio courts to contracts other than non-compete agreements. Therefore, at a minimum, *Acordia* serves as a reminder to contracting parties to be mindful of the importance of considering the portfolio of contracts in place at a company involved in a merger.

Clients are cautioned to examine all of their agreements governed by Ohio law with respect to provisions that may be viewed as triggering a termination or dealing with an assignment by operation of law in the context of a merger to assure that the *Acordia* decision is followed. In order to assure that an agreement is fully transferred by a merger and that a surviving company may enforce the agreement on the same terms as the original corporate party, we recommend clients assure agreements do not restrict the "company" only to the original corporate party but that the term specifically includes the original corporate party's "successors and assigns."

Specifically with respect to non-compete agreements, we recommend clients review the language to assure it includes an appropriate assignment clause so that the commencement of a non-compete period is not triggered by a merger in which the original party to the agreement is not the surviving entity.

Acquiring companies' due diligence investigations on potential Ohio target companies will need to include a review of all business agreements to determine if Ohio law governs and to assure that the surviving entity in a merger is assuming full rights and responsibilities for all obligations of the constituent entity, including enforcement of such agreements on the same terms as the original corporate party.