

Ohio High Court: Terms of Non-Compete Agreements of Employees Acquired in Merger Determine Enforceability

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Practices

Restrictive Covenants, Trade Secrets and Unfair Competition

The Ohio Supreme Court has ruled that while non-compete agreements may be transferred by operation of law when two companies merge, the acquiring company may only enforce the agreements against the acquired employees according to the specific terms of the original agreement. *Acordia of Ohio, L.L.C. v. Fishel*, Slip Op. No. 2012-Ohio-2297 (May 24, 2012).

The case involved four insurance company sales employees who at various times entered into non-compete agreements with their employer, agreeing not to compete with it for two years after their employment terminated. The agreements did not contain language extending the employees' non-competition obligation to other employers, such as the employer's "successors or assigns."

One of the employees entered into a non-compete agreement with Acordia, Inc., directly, while the other three employees entered into their respective non-compete agreements with predecessors to Acordia, Inc. In May 2001, Acordia, Inc., was acquired by another entity. Seven months later, Acordia, Inc., merged into Acordia of Ohio, L.L.C. ("LLC"). Following the merger, only LLC remained in existence. The four employees continued to work for LLC until August 2005, when they left to begin employment with a competitor, the Neace Lukens Insurance Agency. The former LLC employees used their contacts to recruit customer accounts from LLC, and within six months, 19 LLC customers collectively transferred \$1 million in revenue to Neace Lukens.

As a result of a perceived breach of the non-compete agreements, in September 2005, LLC filed suit against the employees for injunctive relief and money damages. The trial court denied LLC's motion for a preliminary injunction and granted the employees' motion for summary judgment. LLC appealed, arguing that the employees' agreements had transferred to LLC because of the various mergers. Ohio's First District Court of Appeals affirmed the trial court's rulings, holding that the parties did not intend to make the non-compete agreements assignable to successors.

The Ohio Supreme Court affirmed the appellate court's ruling, but noted that the decision would not affect the statutory rights of the merged company under Ohio corporate law. Ohio Revised Code Section 1701.82, in relevant part, provides that when one company acquires another by way of a merger, the assets of the acquired company transfer to the acquiring company.

Agreeing that non-compete agreements are considered "assets" that transfer to the acquiring company pursuant to Section 1701.82, the Court concluded the terms of the agreements ultimately control what rights are transferred in the merger. The Court said, "Because the noncompete agreements [between the Employees and Acordia Inc.] did not state that they can be assigned or will carry over to successors, the named parties intended the agreements only to operate between themselves — the employees and the specific employer."

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In light of the Ohio Supreme Court's decision, employers with agreements that contain restrictive covenants governed by Ohio law should ensure that their non-compete agreements include language extending the employee's obligation in the event the employing entity is acquired by another company via merger or otherwise. Buyers of businesses that use non-compete agreements governed by Ohio law also should take note of the Court's ruling, especially where the company to be acquired has entered into non-compete agreements with its employees, or the assets to be purchased include non-compete agreements. If an employee is subject to a non-compete agreement governed by Ohio law and the agreement lacks "successors and assigns" language, the employer (or buyer) should consider whether and how to have that employee sign a new agreement containing this language.

Jackson Lewis attorneys are available to answer inquiries regarding this case and to assist in drafting non-compete agreements.

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