



Enforcement of Non-Competes After a Merger: Ohio Supreme Court Takes a Restrictive View

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[Full text of the Court's opinion](#)

The Ohio Supreme Court recently ruled 4-3 that the specific language of a non-compete agreement dictates whether the surviving company can enforce the agreement after a merger, as if it were the original company that entered into the non-compete. *Acordia of Ohio, L.L.C. v. Fishel*. The pivotal question before the Court was whether non-compete agreements apply only to the original contracting employer, or whether after a merger, the surviving company may enforce the non-compete as if it had stepped into the shoes of the original contracting employer.

The non-compete agreements at issue were between only the employee and the original company that entered into the non-compete. The term “Company” used in the agreement was not defined to include successors and assigns. The agreements did not contain provisions permitting assignment or enforcement by a successor employer. The Court recognized that after a merger, employment contracts do transfer automatically as a matter of law as an asset to the resulting (surviving) company. However, unless the non-compete agreement states that it can be assigned or will carry over to successors, the Court determined that the named parties who entered into the agreement intended the agreement to operate only between themselves — the employee and the specific signatory employer.

The Court stated that when a merger occurs, one of the companies — the absorbed company — ceases to exist as a separate business entity. As a result, the employment relationship with the absorbed company terminates, triggering the non-compete period unless the agreement contains language precluding this chain reaction. The non-compete contract passes to the surviving company following a merger; however, the surviving company obtains the same bargain agreed to by the preceding company and nothing more. The merger transaction, itself, does not alter the language of the agreement.

Thus, absent a “successors and assigns” provision, the surviving company can enforce the agreement, but only as written as to the original company to the agreement. The Court noted that the surviving company can protect its good will and proprietary information following the merger by requiring that employees sign a new non-compete as a condition of their continued at-will employment.

This case points out the need for companies, when considering a merger with another company, to conduct careful due diligence when reviewing non-compete agreements. Employers should examine non-compete agreements governed by Ohio law as to provisions regarding successorship and events that could trigger a termination of the agreement.

Best practice tips: We recommend that non-compete agreements not restrict the term “company” to the original corporate entity, but rather expand the term to include the original corporate party and the party’s “successors and assigns.” Also, we recommend inclusion of a provision permitting assignment by the employer. The assignment clause should be crafted to avoid commencement of a non-compete period by a merger in which the original contracting employer is not the surviving company.

Authors
