

ORIGINAL

IN THE SUPREME COURT OF OHIO

ACORDIA OF OHIO, LLC,

Appellant,

v.

MICHAEL FISHEL, JANICE FREYTAG,
MARK TABER, SHEILA DIEFENBACH,
NEACE LUKENS INSURANCE AGENCY,
LLC, NEACE & ASSOCIATES
INSURANCE AGENCY OF OHIO, INC.,
and JOSEPH T. LUKENS

Appellees.

Case No.

11-0163

Appeal from the Hamilton County Court
of Appeals, First Appellate District

Court of Appeals Case No. C100071

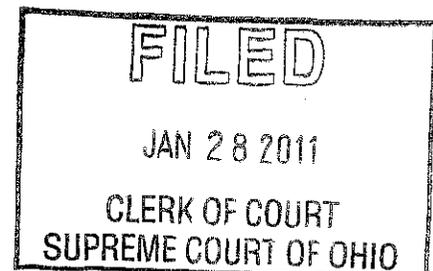
MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE
THE PNC FINANCIAL SERVICES GROUP, INC.

James F. McCarthy, III (0002245)
KATZ, TELLER, BRANT & HILD
255 East Fifth Street, Suite 2400
Cincinnati, Ohio 45202
(513) 721-4532
(513) 762-0006 (facsimile)
jmccarthy@katzteller.com

COUNSEL FOR APPELLANT
ACORDIA OF OHIO, LLC

Mark E. Lutz (0009062)
DENLINGER, ROSENTHAL &
GREENBERG
425 Walnut Street, Suite 2310
Cincinnati, Ohio 45202
(513) 621-3440
(513) 621-4449 (facsimile)
lutz@drgfirm.com

COUNSEL FOR APPELLEES MICHAEL
FISHEL, JANICE FREYTAG, MARK
TABER, SHEILA DIEFENBACH, NEACE
LUKENS INSURANCE AGENCY, LLC,
NEACE & ASSOCIATES INSURANCE
AGENCY OF OHIO, INC., and JOSEPH T.
LUKENS



Robert P. Ducatman (003571)
(Counsel of Record)
rducatman@jonesday.com
Meredith M. Wilkes (0073092)
mwilkes@jonesday.com
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939
(216) 579-0212 (facsimile)

COUNSEL FOR AMICUS CURIAE
THE PNC FINANCIAL SERVICES
GROUP, INC.

Peter L. Cassady (0005562)
petercassady@beckman-weil.com
BECKMAN WEIL SHEPARDSON LLC
The American Book Building
300 Pike Street, Suite 400
Cincinnati, Ohio 45202
(513) 621-2100
(513) 621-0106 (facsimile)

COUNSEL FOR AMICI CURIAE USI
HOLDINGS CORP. AND USI MIDWEST,
INC.

W. Stuart Dornette (0002955)
dornette@taftlaw.com
John B. Nalbandian (0073033)
nalbandian@taftlaw.com
TAFT, STETTINIUS & HOLLISTER, LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
(513) 381-2838
(513) 381-0205 (facsimile)

COUNSEL FOR AMICI CURIAE OHIO
CHAMBER OF COMMERCE AND OHIO
CHEMISTRY TECHNOLOGY COUNCIL

THIS APPEAL RAISES AN ISSUE OF PUBLIC AND GREAT GENERAL IMPORTANCE...1

STATEMENT OF THE CASE AND FACTS3

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW5

Proposition of Law: Pursuant to Ohio merger statutes, agreements between employees and employers that contain restrictive covenants are assets of the constituent company that transfer automatically by operation of law in a statutory merger from the constituent company to the surviving company and are enforceable by the surviving company according to the agreements' original terms as if the surviving company were a party to the original agreements.

CONCLUSION10

CERTIFICATE OF SERVICE

THIS APPEAL RAISES AN ISSUE OF PUBLIC AND GREAT GENERAL IMPORTANCE

This case presents the critically important question of the rights of a successor company under Ohio's merger statute. The court below refused to recognize that a successor should have the exact same rights as a constituent entity that is merged out of existence; holding instead that employees of a constituent entity were "terminated" on the date of the merger. Thus, while the court of appeals purports to give effect to Ohio's merger statute by stating that non-compete agreements "transferred to the surviving corporation by operation of law," it cut those rights drastically short by holding that the merger resulted in a termination of employment, albeit a fictional one, thereby triggering the two-year non-compete period. The end result of that ruling is that it circumvents Ohio's merger statute.

The consequences of the ruling below, if it stands, will be wide-ranging. To begin, the court of appeals' approach places a company's right to enforce contracts on a different footing than its obligations. Even more importantly, it endangers the policy of preserving the sanctity of contracts and providing uniformity and certainty in commercial transactions.

The merger statute was designed to inject certainty into the effects of a merger. That result is now in question. Unless this Court addresses the "rights" side of the merger equation, corporations will not know what contracts they can enforce after a merger without the courts imposing limitations not found in the original contract. The uncertainty that surrounds the issue has fostered concern and a proliferation of litigation. This Court has the opportunity to put an end to the continued uncertainty that the decisions of the court below, as well as other courts of this state and federal district courts, have created. It should do so.

The decision from which appellant seeks to appeal marks (to PNC's knowledge) the first time any court has held that, under the Ohio merger statute, an employee of a constituent entity

that does not survive the merger may be deemed “terminated” at the time of a merger regardless of his or her actual job status with the successor. According to the court of appeals, the determination as to “termination or not” turns on an analysis of the language in each individual contract between the constituent entity and its employees.

That decision conflicts with *ASA Architects, Inc. v. Schlegel* (1996), 75 Ohio St.3d 666, 665 N.E.2d 1083, in which this Court held that, in analyzing the effect of a merger, a court is to look directly to the merger statute — not to contract principles. Indeed, the decision of the court of appeals puts rights acquired in a merger on a different and unequal footing with liabilities. According to this Court, in a statutory merger, a successor is bound by the liabilities of a constituent entity that ceased to exist. It did not matter that the contract at issue was between a shareholder/employee and the non-surviving constituent entity.

In this case, however, the court of appeals held that, because the agreements at issue were with the non-surviving constituent entity, the employees were deemed “terminated” at the time of the merger. Hence, the time to enforce the non-compete provisions of the contract began to run on the effective date of the merger. Thus, as the law now stands, while a successor continues to be obligated under contracts entered into by the non-surviving entity, its right to enforce the contracts of that entity is cut short.

Moreover, the court of appeals’ decision conflicts with the vast majority of decisions in other jurisdictions in which courts have refused to engraft additional requirements relating to the enforceability of contracts by a successor in a statutory merger. In doing so, the court below has placed transactions subject to the Ohio merger statute at odds with transactions governed by the laws of other states.

Nor is the question presented hypothetical. Courts in this state, as well as federal courts, have been asked to decide what rights a successor company has to enforce non-compete provisions under Ohio's statutory merger law. The decisions are inconsistent and largely at odds with this Court's decision in *ASA Architects*. Indeed, within the last six months, a federal district court in Washington applied an assignability analysis to contracts that should have passed by operation of law under Ohio's merger statute. Other decisions are pending in both federal and state courts. Those courts are clearly in need of this Court's guidance. And so are the companies which have relied on Ohio's statutory merger provisions in effecting mergers. Whatever the law is, this Court should decide.

Because the court of appeals' ruling is of public and great general importance — and, indeed, will have wide-ranging consequences for corporations, if it is allowed to stand — this Court should accept jurisdiction and reverse the judgment below.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellant Acordia of Ohio, LLC (“Acordia”) is a limited liability company organized and existing under Ohio law.¹ It is an insurance agency, selling insurance products and services.

Appellees Michael Fishel, Janice Freytag, Mike Taber, and Sheila Diefenbach each entered into a competition agreement as a condition of their employment.² Appellees Fishel,

¹ Because PNC is not a party in this case, it has based this abbreviated statement of the case and facts on information available in the public record.

² Each agreement provided, in part:

For a period of two years following the termination of employment with the Company for any reason, I will not directly, indirectly, or through association with others solicit, write, accept or in any other manner perform any services relating to insurance business, insurance policies, or related insurance services for any of the following:
(1) Any individual or entity for whom the company has

Freytag and Taber were employed as account executives and appellee Diefenbach was employed as a customer service representative. Each was continuously employed until each resigned and began working for Neace-Lukens, a competitor of Acordia, in 2005.

Acordia filed suit in 2005 seeking monetary damages and injunctive relief. It also filed a motion for a preliminary injunction which the trial court denied. The court of appeals' affirmed the denial of a preliminary injunction in May of 2007. Following the court of appeals' decision on injunctive relief, the appellees filed motions for summary judgment which were granted by the trial court. Acordia appealed.

In its opinion, the court of appeals purported to recognize that, under R.C. 1701.82(A)(3), the non-compete agreements passed by operation of law to Acordia of Ohio LLC. *Acordia of Ohio, L.L.C. v. Fishel*, Hamilton Cty. App. No. C-100071, 2010-Ohio-6235, at ¶ 13.

Nonetheless, the court reasoned that, because the absorbed company ceases to exist at the time of a merger, the appellees/employees who had contracts with the absorbed company were "terminated" at that time even though they continued their employment with the successor. *Id.*,

(continued...)

written, accepted, or in any other manner performed any services relating to insurance business, insurance policies, or related insurance services at any time while I was employed by the Company;

The covenant contained above shall remain in full force and effect regardless of the cause of termination of employment. I acknowledge that the names of the company's customers, the company's financial statements, valuation appraisals, information regarding the customer's insurance coverage, customer premium arrangements and company commission structures are confidential information in which the company has a proprietary interest. Therefore, I agree that during the term of my employment with the company and for a period of two years following termination of my employment for any reason and thereafter, I shall not disclose such confidential information to any other person or entity for any purpose whatsoever.

at ¶ 19. According to the court, this fictional termination in turn triggered the two year limitation of the non-compete. *Id.* Hence, the court held that because the appellees/employees actually terminated their employment more than two years after their fictional termination, the two year non-compete period had already run.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: Pursuant to Ohio merger statutes, agreements between employees and employers that contain restrictive covenants are assets of the constituent company that transfer automatically by operation of law in a statutory merger from the constituent company to the surviving company and are enforceable by the surviving company according to the agreements' original terms as if the surviving company were a party to the original agreements.

Article XIII, Section 2 of the Ohio Constitution authorizes the legislature to establish the legal framework for corporations. Pursuant to that grant of power, the General Assembly has enacted a carefully-crafted statutory structure for corporate mergers. Ohio R.C. 1701.78, *et seq.*

As part of that structure, Ohio R.C. 1701.82(A)(3) provides:

(A) When a merger or consolidation becomes effective, all of the following apply:

* * *

(3) The surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers, franchises, and authority, of a public as well as of a private nature, of each constituent entity, and, subject to the limitations specified in section 2307.97 of the Revised Code, all obligations belonging to or due to each constituent entity, all of which are vested in the surviving or new entity without further act or deed. Title to any real estate or any interest in the real estate vested in any constituent entity shall not revert or in any way be impaired by reason of such merger or consolidation.

(Emphasis supplied).

The statute is unambiguous and straightforward. In a merger, there is no distinction between assets or rights of the corporation and its obligations; no distinction between obligations owed to the corporation and obligations owed by it; and no distinction as to the type or nature of asset, right or obligation involved.

That equality of treatment has been part of the Ohio merger statute for decades. Indeed, a treatise on Ohio's corporation law from seven decades ago makes clear that the assets, rights and property shall "be as fully and effectively the property of the consolidated corporation as they were the property of the several and respective constituent entities." Davies, E., 1 A TREATISE ON OHIO CORPORATION LAW (The W.H. Anderson Company 1942), at 963.

In *ASA Architects, Inc. v. Schlegel* (1996), 75 Ohio St.3d 666, 673, 665 N.E.2d 1083, this Court addressed the obligations side of the merger equation. In that case, a closely held corporation and its employees-shareholders entered into a stock purchase agreement. Under the agreements, Schlegel, one of the shareholder-employees, agreed to sell, and the company agreed to buy, his shares of the company upon termination of his employment. In 1988, a new corporation was formed, and the old corporation was merged into the new corporation ("ASA"). Subsequently, Schlegel terminated his employment and sought to have his shares purchased by ASA.

ASA sought a declaration that it was not obligated to do so and argued that: (1) its obligation to purchase the shares terminated at the time of the merger and (2) the continued viability of the obligation to purchase the shares turned on the intent of the parties. This Court rejected the arguments. In doing so, the Court recognized that "[o]f necessity, the absorbed company ceases to exist as a separate business entity." *Id.* at 671. But the fact that the entity

with which Schlegel had contracted had “ceased to exist” had no impact whatsoever on Schlegel’s right to enforce it against the successor. *Id.*

At least one federal district court has recognized that Ohio’s merger statute gives a successor the right to enforce a non-compete according to its original terms. *The Standard Register Co. v. Cleaver* (N.D.Ind. 1998), 30 F.Supp.2d 1084. In *Standard Register*, the employee worked for and had a non-compete agreement with UARCO, Inc. (“Uarco”). Uarco merged into Standard Register which survived the merger. *Id.* at 1092. The employee argued that Standard Register could not enforce the agreement because it was not a party to it. The court, relying on R.C. 1701.82(A)(3), held that because “the acquisition of Uarco was by merger, not an assignment, . . . under Ohio law, which governs as to the Uarco-Standard Register agreement, Standard Register automatically succeeded to the rights and obligations of its predecessor.” *Id.* at 1093.

But other courts have missed the mark. In *Michael's Finer Meats, LLC v. Alfery* (S.D.Ohio 2009), 649 F.Supp.2d 748, for example, the court blurs the distinction between a merger, in which an assignment is irrelevant, and an asset purchase where there must be an assignment. Thus, the court recognized that “all property interests” passed to the surviving company by operation of law, but nonetheless held that the merger statute did not address whether a “particular contract was assignable from the outset.” *Id.* at 753.

In this case, the fact that constituent entities ceased to exist at the time of a merger should have no effect on Acorida LLC’s right to enforce agreements between the constituent entity and its employees. To hold, as the court of appeals did, that because the companies “ceased to exist,” the employment with those companies “was necessarily terminated at the time of the applicable merger,” and hence the time to enforce the non-compete and non-solicitation provisions started

to run, engrafts contractual provisions into the merger analysis. This Court refused to do just that in *ASA Architects*. It should take this opportunity to make clear that the same principle applies on the “rights” side of the equation.

Moreover, the vast majority of courts considering merger statutes like Ohio’s have held that the right to enforce non-compete and non-solicitation agreements vest in the surviving or successor company by operation of law. *E.g.*, *Zambelli Fireworks Mfg., Co. v. Wood* (C.A.3, 2010), 592 F.3d 412, 422-23 (applying Pennsylvania law and holding that a stock sale, unlike a sale of assets, has no effect on the surviving corporation’s right to enforce a covenant not to compete, citing *Siemens Med. Solutions Health Servs. Corp. v. Carmelengo* (E.D.Pa. 2001), 167 F.Supp.2d 752, 758 (same)); *HD Supply Facilities Maintenance, Ltd. v. Bymoer* (Nev. 2009), 210 P.3d 183, 187 (“As the majority of courts have concluded when considering this issue, in a merger, the right to enforce the restrictive covenants of a merged corporation normally vests in the surviving entity.”); *Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.* (2008), 275 Neb. 642, 652 (applying Maryland law and holding that non-solicitation covenant is a corporate asset that “passes by operation of law to a successor corporation as the result of a merger”).

Corp. Express Office Prods. v. Phillips (Fla. 2003), 847 So.2d 406, is instructive. In that case, employees argued that they worked for, and had agreements with, companies that “ceased to exist” as the result of a merger. According to the employees, the successor had no right to enforce agreements to which it was not a party. The appellate court agreed with the employees. The Supreme Court of Florida reversed, holding that a corporate merger has no affect on the enforceability of a non-compete agreement. In so holding, the court observed:. “This holding also ‘conforms with the policy of preserving the sanctity of contract and providing uniformity

and certainty in commercial transactions.” Id. at 414 (citation omitted).³ The court of appeals’ ruling in this case fosters just the opposite — uncertainty in contract enforcement and commercial transactions.

The Sixth Circuit likewise has recognized that the issue of assignability has no place in analyzing the effects of a statutory merger. *Managed Health Care Assoc., Inc. v. Kethan* (C.A.6, 2000), 209 F.3d 923 (applying Kentucky law). While *Kethan* involved an asset transfer, and hence a question of assignability, the court recognized that “no assignment would have been necessary” if the successor had “purchased the stock of [the predecessor] rather than its assets” Id. at 929-30 (emphasis supplied). Rather, the rights to enforce the covenant not to compete would have vested by operation of law. Id.

Given Ohio’s statutory merger provisions, and this Court’s decision in *Schlegel*, there is no legitimate reason why Ohio’s merger law should be at odds with those of other states with similar or identical statutes. The surviving company in a statutory merger should have the right

³ *Accord Farm Credit Servs. of N. Cent. Wisc., ACA v. Wysocki* (Wis. 2001), 627 N.W.2d 444, 452-53 (surviving corporation following series of mergers had the right to enforce employee’s non-competition agreement with a predecessor corporation); *Sager Spuck Statewide Supply Co., Inc. v. Meyer* (N.Y.App.Div. 2000), 273 A.D.2d 745, 745 (noting that as a result of a merger, “plaintiff succeeded to [the merging company’s] rights under an agreement not to compete executed by [the defendant] in connection with the sale of his interest in [the merging company]”); *The Standard Register Co. v. Cleaver* (N.D.Ind. 1998), 30 F.Supp.2d 1084, 1093 (applying Indiana law and holding that, with a merger, “the surviving corporation succeeds to the covenant rights of the merged corporation” by operation of law; noting that the right to enforce the non-solicitation and non-disclosure provisions of salesman’s agreement would also apply under Ohio law pursuant to Ohio R.C. 1701.82(A)(3)); *Equifax Servs., Inc. v. Hitz* (C.A.10, 1990), 905 F.2d 1355, 1361 (holding that under Kansas law, “[i]n the case of a merger . . . the surviving corporation automatically succeeds to the rights of the merged corporations to enforce employees’ covenants not to compete”); *Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham* (Ala. 1998), 711 So.2d 995, 1000-01 (finding that non-competition agreements can be enforced by successor corporations following merger and explaining that “[t]o hold otherwise would . . . ignore the reality that such agreements are often important assets that businesses intend to transfer during a purchase or merger”); *UARCO, Inc. v. Lam* (D. Hawaii 1998), 18 F.Supp.2d 1116, 1122 (holding that a surviving corporation could enforce a covenant not to compete, even though state law did not permit assignment of covenants not to compete); *Alexander & Alexander, Inc. v. Koelz* (Mo.App. 1986), 722 S.W.2d 311, 313 (recognizing in the context of a statutory merger that “[i]f the rights which inure to the benefit of the surviving corporation did not include those conferred by contracts such as those involved here, the statutory scheme which allowed such mergers would be seriously disrupted.”). See generally 15 Fletcher, CYCLOPEDIA OF THE LAW OF CORPORATIONS, Section 7090, at 128 (2008) (citing cases and noting that “[a] covenant not to compete will survive a merger and is enforceable by the surviving corporation.”).

to enforce contracts of non-surviving constituent entities according to their original terms. Creating fictional terminations of employment to avoid that result, as the court of appeals did in this case, should not be permitted.

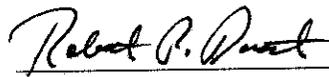
Courts and companies alike are in need of this Court's guidance on the effects of a merger on the "rights" side of the equation.

CONCLUSION

The Court should accept jurisdiction over this case and reverse the decision below.

Dated: January 28, 2011

Respectfully submitted,



Robert P. Ducatman (0003571)
(Counsel of Record)
rducatman@jonesday.com
Meredith M. Wilkes (0073092)
mwilkes@jonesday.com
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Attorneys for Amicus Curiae
The PNC Financial Services Group, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Memorandum in Support of Jurisdiction of Amicus Curiae The PNC Financial Services Group, Inc. was served upon the following by first class mail, postage prepaid this 28th day of January, 2011:

James F. McCarthy, III (0002245)
KATZ, TELLER, BRANT & HILD
255 East Fifth Street, Suite 2400
Cincinnati, Ohio 45202
(513) 721-4532
(513) 762-0006 (facsimile)
jmccarthy@katzteller.com

COUNSEL FOR APPELLANT
ACORDIA OF OHIO, LLC

Mark E. Lutz (0009062)
DENLINGER, ROSENTHAL & GREENBERG
425 Walnut Street, Suite 2310
Cincinnati, Ohio 45202
(513) 621-3440
(513) 621-4449 (facsimile)
lutz@drgfirm.com

COUNSEL FOR APPELLEES MICHAEL FISHEL, JANICE FREYTAG, MARK TABER,
SHEILA DIEFENBACH, NEACE LUKENS INSURANCE AGENCY, LLC, NEACE &
ASSOCIATES INSURANCE AGENCY OF OHIO, INC. and JOSEPH T. LUKENS

W. Stuart Dornette (0002955)
dornette@taftlaw.com

John B. Nalbandian (0073033)
nalbandian@taftlaw.com

TAFT, STETTINIUS & HOLLISTER, LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
(513) 381-2838
(513) 381-0205 (facsimile)

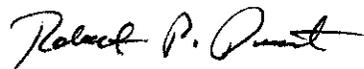
COUNSEL FOR AMICI CURIAE OHIO CHAMBER OF COMMERCE AND OHIO
CHEMISTRY TECHNOLOGY COUNCIL

Peter L. Cassady (0005562)

petercassady@beckman-weil.com

BECKMAN WEIL SHEPARDSON LLC
The American Book Building
300 Pike Street, Suite 400
Cincinnati, Ohio 45202
(513) 621-2100
(513) 621-0106 (facsimile)

COUNSEL FOR AMICI CURIAE USI HOLDINGS CORP. AND USI MIDWEST, INC.



Counsel for Amicus Curiae
The PNC Financial Services Group, Inc.