

ORIGINAL

IN THE SUPREME COURT OF OHIO

ACORDIA OF OHIO, LLC,

Appellant,

v.

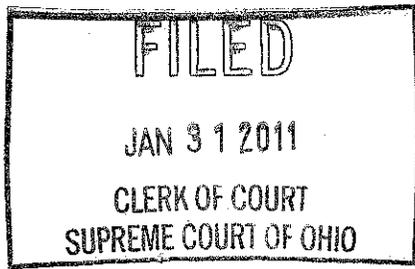
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FREYTAG, MARK TABER, SHEILA
DIEFENBACH, NEACE LUKENS
INSURANCE AGENCY, LLC, NEACE
& ASSOCIATES INSURANCE
AGENCY OF OHIO, INC., and JOSEPH
T. LUKENS,

Appellees.

Supreme Court Case No. 11-0163

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

Court of Appeals
Case No. C100071



MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICI CURIAE*,
OHIO CHAMBER OF COMMERCE, OHIO CHEMISTRY TECHNOLOGY COUNCIL,
USI HOLDINGS CORP., AND USI MIDWEST, INC.

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I. **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

Fifteen years ago, this Court addressed the question of whether Ohio's carefully crafted corporate code required that the surviving corporation in a merger be bound by all the obligations of the constituent corporations to that merger. In *ASA Architects, Inc. v. Schlegel* (1996), 75 Ohio St.3d 666, 665 N.E.2d 1083, this Court concluded that, in the absence of specific language to the contrary within the pre-merger contract, all the contract *obligations of* the constituent corporations passed, by operation of law, to the surviving corporation.

This case presents to the Court the question of whether the *obligations due to a* constituent corporation—the contract rights that entity owns—likewise pass, by operation of law, to the surviving corporation. The statutory framework makes no distinction between contract rights and contract obligations: “The surviving or new entity possesses all assets and property of every description, ... and *the rights* ... of each constituent entity, and ... 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.” R.C. 1701.82(A)(3) (emphasis added). The lower courts in this case, however, have made exactly that distinction.

At issue below was whether an employee's competition agreement can be enforced by a corporation that is a successor, by virtue of a merger, to the corporation that was the original party to the agreement. The competition agreement provided that the employees would not solicit customers or employees of the employer for a two-year period following termination of employment. The court of appeals refused to enforce the agreement, finding that only the original corporation had full enforcement rights. The court reasoned that the merger effected a termination of the employment relationship covered by the competition agreement and therefore started the two-year clock running.

This Court should take jurisdiction over this appeal for four important reasons.

1. This Court has not applied the Ohio merger law to the other side of the *ASA Architects* coin—a setting involving the rights of or obligations owed to a constituent corporation, as opposed to the constituent corporation’s own obligations.
2. In the absence of a definitive ruling from this Court, lower courts—both state and federal—have reached conflicting and confusing results by creating exceptions to the statutory rights that a surviving corporation in a merger is to have.¹
3. Those judicially created exceptions to Ohio’s merger laws create uncertainty in an important part of the commercial life of this State as companies contemplating mergers do not know the consequences of their transactions—an uncertainty that varies county to county and region to region within the state.
4. The lower courts here reached the wrong conclusion. They engrafted onto the statutory framework of merger law in Ohio an exception that nowhere appears in the statutes or the rationale behind them. The General Assembly should make such changes, not the courts.

II. STATEMENT OF INTERESTS OF AMICI CURIAE

The Ohio Chamber of Commerce (“Chamber”) was founded in 1893 and is Ohio’s largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena. The advocacy efforts of the Ohio Chamber of Commerce are dedicated to the creation of a strong pro-jobs environment and an Ohio business climate responsive to expansion and growth.

The Ohio Chemistry Technology Council (“OCTC”), formerly known as the Ohio Chemical Council, is a trade association representing over 80 chemical industry and related companies that do business in Ohio. The OCTC engages in activities to support its members’

¹ In 2006, this Court granted review in *Acordia of Ohio, LLC v. Davis*, Case No. 06-1081. That case concerned the same post-merger enforcement question at issue here. And although the Court subsequently dismissed that earlier appeal as moot because of Davis’ specific employment circumstances, the legal issues remain the same. The decisions discussed *infra* at Section IV(1) reflect that since 2006 the confusion in the lower courts has grown greater, not less. As is evident by the decision of *Amici Curiae* to support jurisdiction for this case (as they did in *Davis*), this case is important to entities beyond the parties in this action.

efforts to maintain and expand their business operations in Ohio. Given the large number of mergers, acquisitions, and divestitures in the chemical industry in recent years, the issue before the Court—that of maintaining enforceability of restrictive covenants including non-compete agreements after mergers—is an important one to the OCTC’s members.

USI Holdings Corp. (“USI Holdings”) is a distributor of property and casualty insurance, employee health and welfare insurance, financial products, and related consulting and administrative services. Its clients are primarily small and mid-sized businesses. Founded in 1994, USI Holdings has grown through acquisitions and organically to become the eighth largest insurance broker (as measured by annual revenue) in the United States. Since its inception, USI Holdings has built a national distribution system through the acquisition, consolidation, and integration of nearly 120 insurance brokers and related businesses.

USI Midwest, Inc. (“USI”) is an Ohio corporation and a subsidiary of USI Holdings. USI is an insurance agency and a competitor of Appellant Acordia of Ohio, LLC (“Acordia”). It has grown substantially by acquisition of other agencies. The issues presented in this case are of critical importance to USI and USI Holdings because they, like insurance agencies throughout Ohio, rely on restrictive covenants to protect their investment in their employees and customers.

III. STATEMENT OF THE CASE AND FACTS

Amici Curiae adopt the Statement of the Case and Facts as set forth in Acordia’s Memorandum in Support of Jurisdiction as if fully set forth here.

IV. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: Pursuant to Ohio's 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.

Under the Competition Agreements at issue in this case, the employees agreed not to solicit customers of their employer for two years after the termination of the employment relationship. The court of appeals held that after the merger, the surviving entity, Acordia, no longer had the right to enforce the non-solicitation provision for two years after termination of employment with Acordia. Instead, the court of appeals found that Acordia only had the right to enforce the agreement for two years after the merger because the employment relationship with the constituent entity had terminated at that point. That analysis was erroneous under Ohio law. Acordia simply "stepped into the shoes" of the original contracting corporate entity, by operation of law, and retained the same rights and obligations as the original corporate party.

1. **Decisions by both state and federal courts reveal confusion regarding the issue of what contract rights of the constituent corporation—particularly those due to the company—pass to the surviving corporation in a merger under Ohio law.**

This Court should grant review of this case to resolve lingering confusion in both state and federal courts regarding the question of what contract rights of constituent companies pass to the surviving corporation in a merger that is consummated under Ohio law—especially in the context of an employment or non-compete agreement.

The lower court refused to enforce the competition agreement because it concluded that the employee ceased to be an employee under the relevant contract as a legal consequence of the merger. At least two courts have come to the opposite result in the context of an analogous competition agreement. In *C.A. Litzler Company Inc. v. Libby* (Ohio App. Aug. 12, 1991),

5th Dist. No. CA-8512, 1991 WL 160850, the Fifth District Court of Appeals held that a restrictive covenant contained in an employment agreement survived a merger as a direct result of the operation of R.C. 1701.82(A)(3), the provision at issue here. The Fifth District specifically overruled an assignment of error that asserted the restrictive covenant was rendered unenforceable because the former employer “ceased to exist” upon its merger with the new corporation. *Id.* at *3. Similarly, the federal court in *Standard Register Co. v. Cleaver* (N.D. Ind. 1998), 30 F. Supp. 2d 1084, construing Ohio statutory merger law and R.C. 1701.82(A)(3) specifically, determined that an employment agreement with non-solicitation and non-disclosure requirements survived a merger. The court rejected the argument that the contract could not be “assigned” because a merger is not the same as an assignment to a new party. *Id.* at 1093. The result of this case would plainly have been different in either one of those courts.²

By contrast, a federal court in Ohio refused to enforce a non-compete agreement without first going through an analysis—similar to the one in this case—as to whether the parties to the non-compete had agreed that it could be enforced by a successor employer after a merger. In *Michael's Finer Meats, LLC v. Alfery* (S.D. Ohio 2009), 649 F. Supp. 2d 748, the court rejected the proposition that R.C. 1701.82(A)(3) was dispositive on whether a covenant not to compete survived a merger. That court found instead that the question hinged on whether the original contract was assignable or not, despite the merger.

In addition, several cases have determined, in a broader commercial context, that contract rights pass under R.C. 1701.82(A)(3) from the constituent corporations to the surviving

² As explained in further detail below, the fact that the First District did not explicitly decide the case on absence of an assignment clause in the contract (the way that it decided this case at the preliminary injunction stage) is not significant. There is no relevant difference between the First District's finding that the contract covered only employment with the specific constituent company named in the contract (and not the surviving corporation) and ignoring the merger statute in favor of an assignment analysis.

corporations regardless of whether the original contract defines the party or “Company” in terms that appear exclusive to the original contracting company and regardless of whether an assignment clause exists. See, e.g., *Wonderly v. Pepsi-Cola General Bottlers of Ohio, Inc.* (Ohio App. March 6, 1998), 6th Dist. No. L-97-1152, 1998 WL 114363; *Firstsource Solutions USA v. Harvest Info* (S.D. Ohio June 24, 2010), No. 1:09-CV-165, 2010 WL 2598205; *Transcontinental Ins. v. SimplexGrinnell* (N.D. Ohio July 18, 2006), No. 3:05CV7012, 2006 WL 2035571. These cases are also inconsistent with the result reached by the First District here.

Amici Curiae believe that this Court’s decision in *ASA Architects, Inc. v. Schelgel* (1996), 75 Ohio St.3d 666, 665 N.E.2d 1083, and its application of R.C. 1701.82(A)(3), should control all of these cases whether involving employment issues or not. Nevertheless, the fact that most of these cases post-date *ASA Architects* suggests that there are lingering doubts about what Ohio law provides in these cases. That may explain this Court’s earlier decision to grant review in *Davis*, and regardless, it certainly makes review in this case appropriate.

2. Under well-established Ohio corporate law, a constituent corporation’s contracts survive a merger and may be enforced by the surviving corporation.

Article XIII, Section 2 of the Ohio Constitution authorizes the legislature to establish the legal framework for corporations. Under that grant of power, the General Assembly has enacted a carefully-crafted statutory structure for corporate mergers. R.C. 1701.78, *et. seq.* For more than 150 years, statutes in this state have provided that a merger (originally known as a “consolidation”) of two corporations vests in the surviving corporation *all* of the property, including all rights and obligations, of the constituent corporations “without further act or deed.”

The concept of “consolidations” dates back to the 1850s when the legislature enacted “An Act to Provide for the Creation and Regulation of Incorporated Companies in the State of Ohio” (May 1, 1852). Under Section 23, when two railroad companies consolidated:

All and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, all and singular their rights and interests, in and to every species of property, real, personal and mixed, and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the right of way, and all other rights of property, in the same manner, and to the same extent, as if the said two or more corporations, parties to such agreement, should have continued to retain the title, and transact the business of such corporations.

The provision passed through several revisions, all with similar language and identical effect, until it arrived in General Code § 9038 enacted in 1910:

Upon the election of the first board of directors for the company created by the agreement of consolidation all the rights, privileges, franchises of each company to the agreement, and all property, debts due on account of subscriptions for stock, or other things in action, are deemed to be transferred to and vested in such new company, without further act or deed. All property, rights of way, and other interests shall be as effectually the property of the new company as they were of the companies parties to the agreement.

In 1924, this Court held that a merged railroad company could enforce contract rights of its predecessors. *Marfield v. Cincinnati, Dayton & Toledo Traction Co.* (1924), 111 Ohio St. 139, 144 N.E. 689. In *Marfield*, bondholders of a constituent corporation sought to hold the stockholders of the merged corporation personally liable for the corporation's debt, contrary to a limitation of liability included in the original bonds. The bondholder's theory was that the limitation was in a contract with a company that ceased to exist upon the merger—exactly the basis upon which the court of appeals here concluded employment was terminated. *Acordia of Ohio*, 2010-Ohio-6235, at ¶19. As formulated by this Court, the question was:

whether the Cincinnati, Dayton & Toledo Traction Company is to be viewed, for the purposes of this inquiry, as a new corporation and in the light of a purchasing corporation, or whether it is to be viewed as a merger of the two constituent companies, and therefore standing in the same relation to the bondholders as the constituent companies had theretofore stood.

Marfield, 111 Ohio St. at 154.

With a substitution of the word “employees” for the word “bondholders,” that description would exactly match the question decided below.

The Court’s answer to that question came directly from § 9038 of the General Code: “the conclusion is irresistible that the consolidated company *merely steps into the shoes of the constituent companies.*” *Id.* at 164 (emphasis added). That was true as to both rights and duties of its creditors—all were preserved, by the statute, in the new corporation; there was no distinction between the constituent entities’ obligations and their rights. *Id.* at 162 (“it would be a strange conception of sound legislation which would be applicable only to the ‘rights’ without taking into consideration the corresponding duties, and it would be stranger still if ‘rights’ should be thus carefully safeguarded without incumbering those rights with duties and obligations which were attached as conditions to the original acquisition of the right”).

Five years later in 1929, the legislature adopted the General Corporation Code for Ohio. Included in its §§ 8623-68 was comparable language to that which had governed railroad consolidations since 1852. Today’s version of that provision resides in R.C. 1701.82(A)(3):

The surviving or new entity possesses all assets and property of every description, ... and the rights, privileges, immunities, powers, franchises, and authority ... of each constituent entity, and, ... 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.

R.C. 1701.82(A)(3).

The statute is unambiguous and straightforward.³ 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; no distinction as to the type or nature of asset, right or obligation involved—“all assets,” “the rights,” “all obligations.” With no distinctions, the Revised Code acknowledges the resulting possession of *all* assets, rights and obligations by the surviving corporation without further action. In particular, it is clear the language of the statute applies directly to contracts—whether viewed as assets or as a bundle of rights and obligations.

This Court has taken the legislature at its word. In *ASA Architects*, 75 Ohio St.3d 666, after the corporation had merged into an S corporation and one of its shareholders left, the Court considered whether the constituent corporation’s shareholder agreement executed prior to the merger would require the surviving corporation to purchase the shares of the departing shareholder. This Court held:

A surviving corporation in a merger is liable for all obligations of a constituent corporation. Therefore, a properly executed mandatory

³ The same conclusion follows from R.C. 1705.38(A)(4), part of Ohio’s new limited liability company law enacted in 1997:

The surviving or new entity possesses all of the following, and all of the following are vested in the surviving or new entity without further act or deed:

* * *

- (i) All assets and property of every description of each constituent entity and every interest in the assets and property of each constituent entity, wherever the assets, property and interests are located.
- (ii) The rights, privileges, immunities, powers, franchises, and authority of each constituent entity, whether of a public or private nature.

(b) All obligations belonging to or due to each constituent entity.

It is hard to imagine that any member of the General Assembly in passing that legislation would have thought that a change in organization from a corporation under R.C. Chapter 1701 to a limited liability company under R.C. Chapter 1705 would have the effect of triggering the running of a restrictive covenant in an employment agreement, yet that is exactly what the First District Court of Appeals determined occurred upon the 2001 merger of Acordia of Ohio, Inc. into Acordia of Ohio, LLC. *Acordia of Ohio, LLC v. Fishel*, 2010-Ohio-6235, at ¶18 (“the restrictions under Diefenbach’s noncompete agreement were triggered in 2001, when Acordia of Ohio, Inc., was merged into Acordia of Ohio, LLC”).

stock purchase agreement entered into between a closely held constituent corporation and shareholders of the company is binding upon the surviving corporation in a merger unless the agreement explicitly sets forth that in the event of a merger, the obligations of the constituent corporation cease to exist.

75 Ohio St.3d 666, at paragraph 1 of the syllabus.

Examining the provisions of R.C. 1701.82(A), this Court concluded that the General Assembly had not intended that there be any distinctions in the treatment of different kinds of contractual obligations. Thus, it found that “as a result of the merger the contractual obligations of the constituent corporation, including the stock purchase agreement, flowed, by operation of law, to ASA.” 75 Ohio St.3d. at 673.

ASA Architects’ conclusion that a contract transfers in a merger unless there is an express intent in the contract not to transfer in the event of a merger flows directly from the “settled law that a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former.” *Id.* at 670-671. The lower court in this case effectively invoked the opposite presumption—a contract did not transfer unless it expressed a clear and articulated intent to transfer or continue in the event of a merger.

While *ASA Architects* dealt with specific obligations owed *by* the constituent corporation, the same result necessarily applies to obligations owed *to* that constituent corporation. The statute reads the same as to both: “all obligations *belonging to or due* each constituent entity” are vested in the surviving entity. R.C. 1701.82(A)(3) (emphasis added). *Charter One Bank v. Tutin* (March 8, 2007), 8th Dist. No. 88081, 2007-Ohio-999, at ¶15 (mortgage properly held by plaintiff Charter One Bank, where it had “acquired and became the successor to Cuyahoga Savings pursuant to R.C. 1701.82”).

The conclusion is consistent with the overall understanding of merger in Ohio law. Ohio courts have acknowledged the concept of merger as uniting two corporations into a single entity and the consequent merger of assets achieved by this corporate unity. *Morris v. Investment Life Ins. Co.* (1971), 27 Ohio St.2d 26, 31, 272 N.E.2d 105, 108 (“It is settled law that a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former”); *Marfield*, 111 Ohio St. at 164 (“the consolidated company merely steps into the shoes of the constituent companies”).

The application of these legal principles to this case is straightforward. Nothing about a competition agreement distinguishes it from other contracts in a merger.⁴ In the real business world of financial services and insurance, competition agreements are customarily executed and are among the most important contracts such businesses have. *Lake Land Emp. Group of Akron, LLC v. Columer* (2004), 101 Ohio St.3d 242, 244-245, 804 N.E.2d 27 (“The law upholds these

⁴ Numerous courts in other jurisdictions have held that competition agreements are fully enforceable by the surviving corporation to a series of corporate mergers. See, e.g., *HD Supply Facilities Maintenance, Ltd. v. Bymoan* (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 restrictive covenant is a corporate asset that “passes by operation of law to a successor corporation as a result of a merger”); *Corporate Express Office Products, Inc.* (Fla. 2003), 847 So.2d 406, 414 (holding, under merger statute similar to Ohio’s, that merger does not affect the enforceability of a noncompete agreement); *Farm Credit Services of North Central Wisconsin, ACA v. Wysocki* (2001), 243 Wis.2d 305, 627 N.W.2d 444 (surviving corporation following series of mergers had right to enforce employee’s non-compete with predecessor corporation); *Sevier Insurance Agency, Inc. v. Willis Corroon Corporation of Birmingham* (Ala. 1998), 711 So.2d 995, 1001 (successor corporation can enforce a nonsolicitation agreement entered into with a predecessor corporation; “[t]o hold otherwise would, we believe, ignore the reality that such agreements are often important assets that businesses tend to transfer during a purchase or merger”); *Equifax Services, Inc. v. Hitz* (C.A.10 1990), 905 F.2d 1355, 1361 (“In the case of a merger, as here, the surviving corporation automatically succeeds to the rights of the merged corporations to enforce employees’ covenant not to compete”); *Sager Spuck Statewide Supply Co., Inc. v. Meyer* (N.Y.App. 2000), 273 App. Div.2d 745, 710 N.Y.S.2d 429 (“As a result of its subsequent merger with Statewide, plaintiff succeeded to Statewide’s rights under an agreement not to compete executed by Meyer in connection with the sale of his interest in Statewide”); *UARCO, Inc. v. Lam* (D. Hawaii 1998), 18 F. Supp. 2d 1116 (covenants not to compete not assignable under Hawaii law; corporate merger does not effect an assignment of the covenant; covenant fully enforceable by surviving corporation); *Alexander & Alexander, Inc. v. Koelz* (Mo.App. 1986), 722 S.W.2d 311, 313 (non-competition covenant enforceable by surviving corporation following merger; “If 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”).

agreements because they allow the parties to work together to expand output and competition. If one party can trust the other with confidential information and secrets, then both parties are better positioned to compete with the rest of the world. *** By protecting ancillary covenants not to compete ..., the law ‘makes it easier for people to cooperate productively in the first place’”); Harlan M. Blake, “Employee Agreements Not to Compete,” 73 HARV. L. REV. 625, 627 (1960) (“From the point of view of the employer, postemployment restraints are regarded as perhaps the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information and customer relationships for their own benefit”); Malsberger, 2 Covenants Not to Compete ix (4th ed. 2004) (“Restrictions on postemployment activities designed to protect legitimate employer interests are relevant today more than ever. In a service-driven economy, the ability of a business to protect its investment in human resources, customer relationships and confidential business information is critical to ensuring continued economic viability. In this milieu, businesses increasingly rely upon postemployment covenants not to compete to protect these investments. The growth in the use of such covenants also represents a sound response to increased levels of employee mobility, the globalization of product market, and rapid advances in technology”).

3. The court of appeals’ analysis is fatally flawed.

The court of appeals’ decision rests upon two judicial sleights of hand, neither of which can withstand scrutiny.⁵ First, the court pulls out of context this Court’s language from *Morris v. Investment Life Ins. Co.* (1971), 27 Ohio St.2d 26, 31, 272 N.E.2d 105. At issue in *Morris* was whether a “Reinsurance agreement” between two insurance companies amounted to a merger of

⁵ In 1994, the Ohio General Assembly enacted a new limited liability corporation law to provide additional options for corporate structuring in Ohio. One cannot imagine that any member of the General Assembly in passing that legislation could have imaged that a change in organization from a corporation under R.C. Chapter 1701 to a limited liability company under R.C. Chapter 1705 would have the affect of triggering the running of a covenant not to compete, yet that is exactly what the Court of Appeals here determined. *Acordia of Ohio, LLC v. Fishel*, 2010-Ohio-6235, at ¶18.

the companies requiring a specific form of pre-approval under Ohio insurance law. This Court concluded that the agreement had all the characteristics of a merger, and therefore was invalid without having received the pre-approval. The Court described those characteristics: "It is settled law that a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity."

The court of appeals took the second sentence of the quote, truncated it to "the absorbed company ceases to exist," and concluded that the employees' employment referred to in the Competition Agreements terminated when the merger occurred:

Ohio law is clear that a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity. [citing *Morris*] The restrictions in the noncompete agreements in this case took effect when employment was terminated for any reason. Because the predecessor companies ceased to exist following the respective mergers, the Fishel team's employment with those companies was necessarily terminated at the time of the applicable merger. By their own terms, the agreements' restrictions were triggered by the relevant mergers

Acordia of Ohio, LLC v. Fishel,
2010-Ohio-6235, at ¶19.

The conclusion is just plain wrong. Under settled Ohio law, the absorbed company *does* continue, just not as a separate business entity. Following a merger, "the nominal existence of the several constituent companies terminated, *but their substantial existence is perpetuated* by being merged in the consolidated company." *Citizens Savings & Trust Co. v. Cincinnati & Dayton Traction Co.* (1922), 106 Ohio St. 577, 140 N.E. 380, at paragraph 9 of the syllabus (emphasis added). *Accord Marfield*, 111 Ohio St. at 143 ("the substantial existence of the constituent companies was thereby perpetuated by being merged in the consolidated company").

If the merger effects a termination of the employment of the constituent company's employees, there is no way that the merged company can be said to have "stepped into the shoes" of the constituent company. *Marfield*, 111 Ohio St. at 164.

For its second sleight of hand, the court of appeals focuses on the fact that the Competition Agreements here were drafted so as to be between the employees and a specifically identified employer, defined as the "company." Once the "company" changed, so the theory goes, the employment terminated and the covenants began to run. *Acordia of Ohio*, 2010-Ohio-6235, at ¶¶16-17. But every contract will define the parties to it—otherwise it is not a binding contract. In *ASA Architects*, the contracting party which had the obligation was likewise identified as a specific entity, defined in the agreement as the "Company." 75 Ohio St.3d. at 666. Yet this Court rejected the argument that the shareholder agreement of the constituent corporation disappeared when that corporation and its stock ceased to exist.

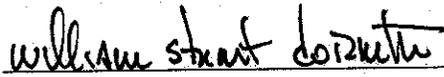
The only way that a Competition Agreement would identify the employer by name and still survive the lower court's analysis is if it specifically referenced any successor employer. Thus, what the court of appeals is saying is that the Competition Agreement will transfer to the surviving corporation after the merger if it has specific language that contemplates transfer in the event of a merger. But that is backwards. In *ASA Architects*, this Court specifically found that the agreement transferred unless it provided that it would not: "a properly executed mandatory stock purchase agreement entered into between a closely held constituent corporation and shareholders of the company is binding upon the surviving corporation in a merger *unless the agreement explicitly sets forth that in the event of a merger, the obligations of the constituent corporation cease to exist.*" 75 Ohio St.3d 666, at paragraph 1 of the syllabus (emphasis added).

Corporations entering into merger agreements must be able to rely upon Ohio corporate law unless the parties had contractually agreed to something else. They should not have to assume that the parties had agreed to something other than Ohio law when the agreement is silent on the subject.

V. CONCLUSION

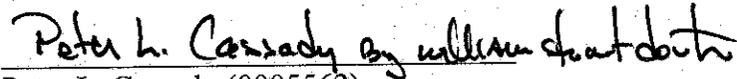
This Court recognized the importance of the issues presented in this case and possibly severe consequences to allowing reasoning of the type employed by the court of appeals here when it granted *Acordia of Ohio, LLC v. Davis*, No. 06-1081. Those issues are presented again in this case. *Amici Curiae* respectfully request that this Court step in, provide clarity, confirm the Constitution's delegation of authority in corporate matters to the General Assembly, and clear out the judicially-fashioned exceptions to the transfer of contract rights in a merger for the benefit of the *Amici*, their members, and all corporate entities in the state.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction of *Amici Curiae*, Ohio Chamber Of Commerce, Ohio Chemistry Technology Council, USI Holdings Corp., and USI Midwest, Inc. was sent via regular U.S. mail, postage prepaid this 31st day of January, 2011, to the following:

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