ORIGINAL

IN THE SUPREME COURT OF OHIO

ACORDIA OF OHIO, LLC,	:	**Case No. 2011-0163**
Appellant,	:	**On Appeal from the Hamilton County Court of Appeals, First Appellate District**
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.		

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SUPREME COURT OF OHIO

MOTION FOR RECONSIDERATION OF APPELLANT ACORDIA OF OHIO, LLC

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Appellant Acordia of Ohio, LLC ("Acordia") respectfully moves this Court to reconsider the lead opinion issued May 24, 2012 and adopt the dissenting opinion of Justice O'Donnell. The consequences and ramifications of the lead opinion will be devastating for Ohio businesses and Ohio employees alike. During trying economic times, as businesses struggle to meet the challenge of recovery and employees strain to hold on to their jobs, the law must continue to provide clarity, constancy and certainty for all. The lead opinion, however, will result in uncertainty and inconsistency because it rewrites Ohio's merger statutes, conflates merger with an assignment and abandons predictable and complementary century-old precedents that had assured continuity to rights and obligations following a merger. Before the lead opinion, companies and those doing business with those companies had clear and consistent legal principles which had clarity of command and certainty of application. Today, those companies and those doing business with those companies are set adrift in a sea of inconsistency in which the clever can manipulate the obligations which will be honored and the liabilities which will be satisfied following a merger. Ohio law can recapture the clarity, constancy and certainty with the opinion of Justice O'Donnell. Acordia respectfully moves that that opinion be adopted by a majority of this Court. This motion is made pursuant to Rule 11.2(B)(4) of the Rules of Practice of the Supreme Court of Ohio and the accompanying memorandum.

Respectfully submitted,

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MEMORANDUM

"This Court has invoked the reconsideration procedures set forth in S. Ct. Prac. R. [11]. . .. to 'correct decisions which, upon reflection, are deemed to have been made in error.'" *Buckeye Community Hope Foundation v. City of Cuyahoga Falls,* 82 Ohio St.3d 539, 541, 697 N.E.2d 181 (1998) quoting *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995). *See also State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections*, 67 Ohio St.3d 597, 622 N.E.2d 329 (1993) (reasoning contained in dissenting opinion adopted by a majority of this Court pursuant to a motion for reconsideration). Here, the lead opinion has rewritten the Ohio merger statutes, misinterpreted the General Assembly's clear intent and abandoned century old precedents governing statutory mergers. This description is confirmed by the simple fact that the lead opinion does not cite or even discuss the leading cases construing Ohio statutory mergers, including *ASA Architects, Inc. v. Schlegel*, 75 Ohio St.3d 666, 665 N.E.2d 1083 (1996), which has apparently been reversed by implication.

As a consequence of this lead opinion, untethered from precedent, Ohio companies and employees alike face uncertainty following a statutory merger. Where there had been clarity, the lead opinion has injected uncertainty. Where companies and employees alike enjoyed the benefits of a statutory merger – continuity of business operations, continuity of employment and continuity of obligations and liabilities - - the lead opinion has deprived them of those benefits. Where Ohio had been a progressive leader in corporate law, the lead opinion has placed Ohio outside the mainstream of corporate law in the United States. The lead opinion will engender immense uncertainty because it abandons the predictable and consistent complementary principles of corporate law: (1) a merger is not an assignment; and (2) the surviving company is a continuation of the constituent companies in a new shell.

A. <u>The lead opinion usurps legislative authority to modify the mandate of the merger statutes.</u>

Exercising its prerogative vested by the Ohio Constitution, the Ohio General Assembly adopted legislation which unequivocally declared the result of a merger. This Court previously recognized that authority of the General Assembly. "[T]he extent of the liability or obligation of a corporation may be dependent upon and measured by the law which establishes its existence as a legal entity. Thus, *that law may authorize the substitution*, for the liability and obligation of a corporation that it has created as a corporate entity, of the liability of another solvent legal entity into which it lawfully merged." *State ex rel. Safeguard Ins. Co. v. Vorys*, 171 Ohio St. 109, 114, 167 N.E.2d 910 (1960) (emphasis added). A party contracting with a corporation, therefore, was "in no position to complain where the law which created that corporation provides that (on the happening of certain events and without interfering with any pending legal proceedings) such corporation's obligations and liabilities shall cease to be the obligations and liabilities of such corporation and instead shall become the obligations and liabilities of a . . . legal entity into which said corporation merges." *Id* at 115.

Companies and employees, therefore, entered into contracts, including service agreements, leases, employment contracts, incentive agreements and noncompetition agreements, with the Ohio merger statutes as an integral part of the agreements. No "successor and assign" language was needed to transfer those contracts and agreements in a merger because a merger was not an assignment. Instead, the law, as an integral part of the agreements, would transfer the obligations and liabilities due to or from the constituent company to the surviving company and the surviving company would then be responsible to honor the liabilities and entitled to enforce the obligations as if it were an original party to the agreements. *Vorys*, 171 Ohio St. at 115 (". . . such corporation's obligations and liabilities shall cease to be the obligations and liabilities of such corporation and instead shall become the obligations and liabilities of a . . . legal entity into which said corporation merges").

The lead opinion usurps the clear mandate of the Ohio General Assembly and rewrites the merger statutes. As enacted, the merger statutes state unequivocally: "The surviving or new entity possesses *all* assets and property of every description . . ." R.C. 1701.82(A)(3) (emphasis added). The lead opinion has added: only those contracts with "successor and assign" language will continue to be enforceable by and against the surviving company as if it were an original signator to the agreement.

Now contracts which had presumptively transferred by operation of law to the surviving company and were being honored as if that company were the original signator are in jeopardy. With the unprecedented lead opinion, innumerable leases, contracts and agreements throughout Ohio have arguably expired and/or have been voided. Business arrangements have been unsettled. Businesses throughout Ohio have been potentially stripped of valuable assets – contracts which lack the clause "successor and assign."

A simple example will illustrate. A consulting company entered into a contract with a manufacturing company to provide efficiency services, including methods to improve manufacturing processes. The contract provided that the manufacturing company would not hire any consulting company employees for one year following termination of the consulting contract. The consulting contract contained no "successor and assign" clause. Later that same year, the manufacturing company was acquired and merged into the acquiring company. Eighteen months after the merger, the surviving company hired three key employees of the consulting company. According to the lead opinion, the surviving company has no liability for breach of the consulting agreement, despite having received the benefits of that agreement for eighteen months. "Because the [agreement did not state that it] can be assigned or will carry over to successors, the named parties intended the agreement to operate only between themselves…" (¶12).

With the lead opinion, litigation has supplanted clear principles of law to ascertain what contracts transfer and what contracts do not following a merger. Courts will now have to sort out to what extent contracts that lack a "successor and assign" clause terminated upon the consummation of a merger by one of its contracting parties. Even worse, performance under those contracts will, potentially years after the merger, have to be unwound, so that somehow termination would be effected at the time of the merger. Since those parties could not have foreseen such a result, the entanglements that would have to be unwound could be complex and the impact on unknowing parties could be harsh and inequitable.

Even more pernicious, the clever company can now manipulate what contracts, agreements and leases it will retain to the detriment of an unsophisticated supplier, landlord or employee. With the addition or deletion of three words - - "successor and assign" - - the company can manipulate what contracts, agreements and leases survive a merger and which do not. Entrepreneurs, small businesses, landlords and employees, unaccustomed to recent changes in the law and the need for "successor and assign" language, will sadly find themselves without the service agreement, the lease or the employment they had been counting on. Now companies wanting to shed unwanted contracts, leases, agreements and even employees need only merge and cite the language of the lead opinion - - "[b]ecause . . . the agreements do not state that they can be assigned or will carry over to successors, the named parties intended the agreements to operate only between themselves. . . "(¶12).

An example will illustrate how a company could shed unwanted contracts, leases and even employees. The officers of the company form a new limited liability company. After assessing the opportune time to cut off any accruing benefits, the company is merged with the limited liability company. Now with the merger, accruing benefits are tolled, seniority is erased, benefits due to vest are cut off and contracts are terminated. The simple reason – according to the lead opinion – the constituent company ceased to exist.

The fundamental change written into the Ohio merger statutes by the lead opinion will have substantial commercial costs to Ohio business. As a result of the lead opinion's introduction of the new prerequisite, companies will expend greater resources on due diligence. Higher due diligence costs will result in lower acquisition prices for Ohio businesses. In the end, the lead opinion will depress capital investment in Ohio businesses.

The unsettling consequences of the lead opinion are not restricted to businesses in Ohio. Employees too will face uncertainty. Now the employee with the employment agreement which provides for an annual bonus on the anniversary of her employment with the "company" has no right to her bonus following the merger because her employment agreement had no "successor and assign" clause. As the lead opinion explains, that contract without successor or assign language is not enforceable against the surviving company because the named parties intended the agreements to operate only on behalf of themselves – the employee and the specific employer. Likewise, the employee with an employment agreement which provides for retirement benefits following 25 years of employment with the "company" has no right to the benefit because the company merged on her 24th anniversary. The agreement had no "successor and assign" language and the employer ceased to exist with the merger. According to the lead opinion, the wording of the employment agreement prevents her from enforcing the retirement provision of the contract against the surviving company as if it were the original company with whom she began working 24 years ago.

Any suggestion that the employee could negotiate a resumption of such contract rights only heightens the anxiety for the employee and confirms the fundamental change wreaked by the lead opinion. Under prior precedent of this Court, e.g. *ASA Architects, Inc. v. Schlegel, supra.*, such employees were assured that those various obligations of the constituent company had passed by operation of law and were enforceable against the surviving company. Now, such confidence has been shaken. The lead opinion has concluded that those obligations are not enforceable against the surviving company because "the named parties intended the agreements to operate only between themselves - - the employees and the specific employer." (¶12). As the lead opinion explained, the "wording within those agreements prevents" the employees from enforcing those contract obligations against the surviving company. With the lead opinion, uncertainty has infiltrated where the General Assembly had intended a specific result.

B. The lead opinion conflates merger with assignment.

1. *The lead opinion recasts a merger as an assignment.*

The lead opinion has created a dichotomy between the types of obligations that transfer to the surviving company in a merger. Now agreements that do not state that they can be assigned or will carry over to successors are not enforceable by or against the surviving company as if it was a signator to the agreement. The lead opinion comes to this conclusion because the absence of such language is interpreted to be an expression of intent – "the named parties intended the agreements to operate only between themselves . . ." ¶12. Now, contracts without successor and assign language are not transferred to the surviving company in a merger fully enforceable because "the wording within those agreements prevents [the surviving company] from enforcing . . ." the agreement as if it were the original company. ¶12.

The opinion's requirement for "successor and assign" language in order for the surviving company to enforce a contract as if it were the original signator wreaks a fundamental change in Ohio corporate law. Requiring such language recasts a merger as an assignment. Previously, a merger was distinguishable from an assignment. The official comment to §11.07 of the Model Business Corporation Act (the "Model Act"), the basis for Ohio's merger statutes, explains: "A merger is not a conveyance, transfer or assignment. It does not give rise to claims of reverter or impairment. . . based on a prohibited conveyance, transfer, or assignment. It does not give rise to a claim that a contract with a party to the merger is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger." 3

Model Bus. Corp. Act Ann. §11.07 comt. (2008). The United States Court of Appeals for the Seventh Circuit explained the rationale for a merger being distinct from an assignment. The surviving company is not a "successor" or an "assign." The surviving company following a statutory merger still is the constituent company "with a new shell." *United States Shoe Corp. v. Hackett*, 793 F.2d 161, 165 (1986).

2. *The lead opinion also abrogates well-established contract law.*

Not only has the lead opinion abrogated fundamental corporate law, the opinion has altered well established contract law. Under Ohio law, "the general rule is that a contractual right can be assigned *unless assignment of that right is expressly forbidden* by the terms of the contract." *Beta LaserMike, Inc. v. Swinchatt*, 2nd Dist. No. 18059, 2000 Ohio App. LEXIS 887 at *10 (March 10, 2000) (emphasis added); *cf. Rogers v. Runfola & Assoc., Inc.*, 57 Ohio St. 3d 5, 8, 565 N.E.2d 540 (1991) (covenant not to compete assignable when change is made to corporate structure). "Noncompete agreements are one of the many contractual rights that are assignable." *Beta LaserMike*, 2000 Ohio App. LEXIS 887 at *10. Additionally, "Ohio courts have not required specific language approving assignability in the original non-competition agreement even in cases involving the more difficult question of whether the assignment of a covenant not to compete entered into with an original employee becomes a part of (i.e., becomes a condition of) the employees' subsequent employment with the successor employer and, therefore, is triggered when the employee leaves the employment of the successor employer." *Artromick International, Inc. v. Kock*, 143 Ohio App.3d 805, 808, 759 N.E.2d 385 (10th Dist. 2001). Instead, when a covenant not to compete is silent as to assignability,

> . . . courts should look to the purpose of the covenant and determine whether assignment of the covenant would protect that purpose. In most cases, covenants not to compete are meant to protect a business's goodwill. * * * As part of the goodwill of a business which he buys, a buyer normally wants the chance to make the customers of that business his own.

Rock of Ages Memorial, Inc. v. Braido, 7th Dist. No. 00 BA 50, 2002-Ohio-605 (citations omitted).

Through the mergers, the Defecting Employees continued to work for the same employer, at the same office, for the same customers, within the same geographic area, under the same supervision. Through the mergers, the Competition Agreements were a necessary asset to protect the legitimate business interests of Acordia in the Defecting Employees' work with its customers and trade secrets. As Acordia of Cincinnati, Inc. or as Acordia of Ohio, LLC, the Defecting Employees' employer was an insurance agency, engaged in the business of selling insurance products and services to particular customers. In this business, the customer relations and goodwill are the "sum and substance of a very valuable business." *Safier's, Inc. v. Bialer*, 58 Ohio Law Abs. 292, 93 N.E.2d 734 (C.P. 1952). As Fishel conceded, "this is a relationship business". (T.p. 795). To protect those valuable assets, to retain the customer relations and to preserve the goodwill created over years of service and transferred in a merger, the Competition Agreements were intended to be assignable and enforceable by Acordia of Cincinnati, Inc., Acordia of Ohio, Inc. and Acordia of Ohio, LLC.

C. <u>The lead opinion repudiates the principle of corporate continuity resulting in uncertainty for businesses and employees</u>.

The very premise of the Ohio merger statutes throughout their history has been that the successor company steps into the shoes of the constituent companies following a merger. Although the separate legal existence of the constituent companies may cease, the constituent companies continue to function as components of a consolidated whole. In the words of this Court, "the nominal existence of the several constituent companies terminated, but their substantial existence is perpetuated by being merged into the consolidated company." *Citizens Savings & Trust Co. v. Cincinnati, Dayton & Toledo Traction Co.*, 106 Ohio St. 577, 140 N.E. 280 (1922) at ¶9 of the syllabus; *Marfield v. Cincinnati, Dayton & Toledo Traction Co.*, 111

Ohio St. 139, 164, 144 N.E. 689 (1924) ("The doctrine of merger rather than the theory of a new, separate and distinct corporation must be weighed and considered. . . and when the two doctrines are joined, the conclusion is irresistible that the consolidated company merely steps into the shoes of the constituent companies."); *Anderson v. Cleveland-Cliffs Iron Co.*, 54 Ohio L. Abs. 65, 87-88, 87 N.E.2d 384 (C.P. 1948) (Although the separate existence of the constituent corporations may cease, "[t]he constituent corporations continue to function as components of a consolidated whole."); *See also* 12 Ohio Jurisprudence 3d, Business Relationships, Section 787, at 410 (2006) ("In large measure, the. . . merged corporation is a continuation of the old constituent corporations and stands in their shoes; the constituent corporations continue to function as components of a. . . merged whole.").

The lead opinion has abandoned this principle of corporate continuity. Rather than the constituent companies continuing to function as components of a consolidated whole, the constituent companies cease to exist. The consequence of this extinction is "the termination or complete severance of the employee – employer relationship. . ." with the constituent company, an event triggered by merger. (¶18).

With the abandonment of corporate continuity and the concomitant termination of employment triggered by merger as a matter of law, employees throughout Ohio will be automatically stripped of benefits which would have continued before this decision. Previously, a merger did not automatically terminate employment. Now, unemployment is automatically triggered by the merger as a matter of law.[1] Previously, a merger continued accrued benefits of employment – seniority, accumulated paid time off, etc. Now, the employee commences employment with a "new employer" without any accrued benefits. Previously, eligibility for

[1] Despite previous assurances that the merger did not terminate the employment of the Defecting Employees but continued employment along with the benefits they had been receiving, this Court concluded that employment had in fact been terminated as a matter of law. Likewise, future mergers will terminate employment as a matter of law and employees will suffer the consequences.

various benefits continued to progress following the merger. Now, eligibility must be restarted.

Now, a clever company can manipulate which employees will continue and which will be unemployed with virtual impunity. For example, one constituent company in the merger is a certified female enterprise, another constituent company has older workers, with higher health care costs and the third constituent company is a start up with younger workers and lower employment costs. Under prior precedent, no employee was terminated by the merger of these three companies. Now, depending upon which of the three companies survive the merger, the other two companies' employees will be automatically terminated as a matter of law. As the lead opinion explained, the "complete severance of the employee – employer relationship" was "triggered by merger." (¶8).

The lead opinion also raises serious questions for continuing eligibility for statutory benefits. The lead opinion is unequivocal - - ". . . the termination, or *complete severance of the employee-employer relationship*, occurred when the company ceased to exist, an event triggered by merger." (¶18). With the "complete severance of the employee – employer relationship" as a matter of law, not fact, have employees in Ohio lost eligibility under laws intended to provide benefits for continued employment? Before the lead opinion, the answer was definitive. Now, employees face uncertainty in the post-*Acordia* era.

D. <u>The lead opinion leaves Acordia with less than the constituent company</u>.

The plain language of the Ohio merger statutes transfers *all* assets and property of *every description* of each constituent company to the surviving company. R.C. §1701.82(A)(3) and R.C. §1705.39(A)(4). The lead opinion leaves Acordia with less! As the lead opinion conceded, Acordia "may not enforce the noncompete agreements as if [it] . . . had stepped into the shoes of the company that originally contracted with the employees." (¶11). Instead, Acordia "acquired only the ability to prevent the employees from competing two years after their employment terminated with the specific company named in the agreements." (¶12). Consequently, Acordia was left with an expiring restrictive covenant. All assets of every description did not transfer in the merger to Acordia and become enforceable by the surviving company as if it was the original signator.

More importantly, this dwindling asset is practically worthless to Acordia. Following termination of employment, such restrictive covenants are intended to protect the legitimate business interests of the former employer. "Protecting customer relations is a legitimate employer interest." *Penzone, Inc. v. Koster,* 10th Dist. No. 07AP-569, 2008-Ohio-327 ¶22. On the day after the merger, Fishel returned to the same office in the Kroger building, sat at the same desk, called on the same customers and sold the same commercial insurance policies, for which he received the same pay. Acordia did not need or want to restrict his activities. Acordia wanted him to call on its customers, solicit its customers and to write, accept or in any other manner perform any services relating to insurance business, insurance policies or related insurance services for its customers. Having an expiring restrictive covenant *during* employment provides no protection at all. There simply are no conceivable scenarios under those circumstances that Acordia would have precluded Fishel from soliciting its customers. Practically, the lead opinion leaves Acordia with none of the protections that the constituent companies had before the merger.

In place of the asset which should have transferred to Acordia by operation of law, the lead opinion would leave Acordia to fend for itself "by requiring. . . the employee [to] sign a new noncompete agreement as a condition of their at-will employment . . ." (¶15). Instead of acquiring the asset of the constituent company enforceable as if it were an original signator, Acordia must resort to draconian or demoralizing options to assure protection for the goodwill it had acquired in the merger. Acordia must either demand its employees sign new agreements or face termination.

This "let them eat cake" suggestion leaves Acordia at risk. The merger did not result in certainty. Instead, if the employees with the business relationships with the customers, that is, the goodwill acquired in the merger, refuse to sign the "new agreements," Acordia may not have acquired that goodwill after all. Instead, Acordia would face the real prospect that it may not make the customers of the constituent company its own. The unintended consequence of the lead opinion is that Acordia and other merging companies lose the goodwill which was to be acquired in the merger.

If employers in Ohio are left to draconian and demoralizing options in lieu of reliance upon the Ohio's merger statutes, employees will suffer exponentially greater burdens. If employers cannot realize the benefits of the merger, e.g., the ability to enforce employee restrictive covenants, there is no incentive for employers to extend the benefits of the merger, e.g., continued employment under the same terms and conditions, to employees. Instead of continuing employment under identical conditions, employees will be forced to forego benefits or seek employment else where, further aggravating unemployment throughout Ohio. Now, the employee may be forced to seek new employment – limited by the restrictive covenant in a job market which is already oversaturated with qualified employees.

E. Conclusion

Over 150 years ago the General Assembly enacted a merger statute intended to effect consistent and expected results following a merger. The General Assembly repeatedly reenacted the merger statute to have that same result. Likewise, this Court had interpreted those statutes to affect that same result. The lead opinion, however, has abandoned that precedent and rewritten the Ohio merger statutes. The lead opinion has, on its own and not as a matter of statutory construction, added a requirement to the statutes in order for the merger to affect its stated result. The lead opinion has added "successor and assign" as a prerequisite for the surviving company to stand in the shoes of the constituent companies. This revision of the merger statutes will infect mergers with uncertainty to the detriment of merging companies, their employees, their landlords and their vendors. Businesses and employees will suffer immeasurable losses from this revision. Acordia respectfully requests the Court to reconsider the lead opinion and moves that a majority of this Court adopt the dissenting opinion of Justice O'Donnell, restore stability to Ohio merger law and reconfirm the century old precedents of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion for Reconsideration of Appellant Acordia of Ohio, LLC was served via regular U.S. mail this 4th day of June, 2012 upon the following:

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