

IN THE SUPREME COURT OF OHIO

ACORDIA OF OHIO, LLC,

:

Supreme Court Case No. 11-0163

Appellant,

:

v.

:

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

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

:

:

Court of Appeals  
Case No. C100071

:

:

Appellees.

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**MEMORANDUM OF *AMICI CURIAE* OHIO CHAMBER OF COMMERCE,  
OHIO CHEMISTRY TECHNOLOGY COUNCIL, USI HOLDINGS CORP.,  
USI MIDWEST, INC., HYLANT GROUP, INC., AND  
CINTAS CORPORATION  
IN SUPPORT OF MOTION FOR RECONSIDERATION**

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## STATEMENT OF INTEREST OF AMICI CURIAE

The interests of Amici Curiae Ohio Chamber of Commerce, Ohio Chemistry Technology Council, USI Holdings Corp., USI Midwest, Inc., and Hylant Group, Inc. were set out in their Amicus Brief filed June 27, 2011. They share an interest in the growth of Ohio's economy through the maintenance of a healthy business climate.

Cintas Corporation is an Ohio-based company providing specialized business services to commercial companies all over the world. Headquartered in Cincinnati, Cintas employs 28,000 people and operates more than 430 facilities in North America, Europe, Latin America and Asia. Cintas' growth to its current annual revenues of \$3.8 billion has occurred both organically and through a series of mergers and acquisitions.

### ARGUMENT

The heart of this case is a simple question: when a lawyer drafts a competition agreement for a corporate client, does the lawyer need to include "successors and assigns" language or not. In the few days since this Court issued its decision in this case, the Internet has been filled with advice and reminders to lawyers to include such language when drafting all their employment agreements and other corporate contracts.<sup>1</sup> That is the power of this Court and the impact of its decisions, intentional or not. The rules it sets out impact what lawyers do when they draft

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<sup>1</sup> See, e.g., <http://www.ohioemployerlawblog.com/2012/05/time-to-re-read-your-non-competition.html> (last visited 6/4/12) ("you should be contacting your counsel to review all non-competition agreements for compliance with the *Acordia* case, and redrafting and reissuing to employees where necessary"); <https://www.worldservicesgroup.com/publications.asp?action=article&artid=4527> (last visited 6/4/12) ("When drafting any agreement with noncompete provisions or similar restrictive covenants, consider including language that clearly extends the protections of the agreement to successors and assigns"); <http://www.jacksonlewis.com/resources.php?NewsID=4110> (last visited 6/4/12) ("In light of the Ohio Supreme Court's decision, employers with agreements that contain restrictive covenants governed by Ohio law should ensure that their non-compete agreements include language extending the employee's obligation in the event the employing entity is acquired by another company via merger or otherwise"); <http://www.employerlawreport.com/#axzz1wZKwYn61> (last visited 6/4/12) ("In order to assure that an agreement is fully transferred by a merger and that a surviving company may enforce the agreement on the same terms as the original corporate party, we recommend clients assure agreements do not restrict the 'company' only to the original corporate party but that the term specifically includes the original corporate party's 'successors and assigns.'")

documents every day. Quite obviously, if counsel for Frederick Rauh & Company had known this rule twenty years ago, the competition agreements before this Court would have included that language, and this case would never have arrived at this Court's doorstep.

If this Court were writing on a blank slate and had the authority to make new corporate law, it could certainly promulgate a rule that all corporate contracts include "successors and assigns" language in order to be fully enforceable by a successor corporation in a merger. The rule could be justified, on policy grounds, as setting the right balance between corporations and employees and other entities with whom they contract. But there are two problems with that. First, the Ohio Constitution, starting in 1851, gave to the General Assembly, not this Court, the authority to establish and modify corporate law. Article XIII, Section 2. The policy determinations for the proper balance between a corporation and those who contract with it are for the General Assembly to make. Second, this Court is not writing on a blank slate. We have had 160 years of corporate activity in this state – corporations forming, entering into contracts, merging and being acquired. A lot of contracts have been drafted and executed in reliance upon a very different answer to the question posed in this case.

When the General Assembly *was* writing on a blank slate – when corporate law was brand new in Ohio – it set out a simple rule for assets in the hands of the surviving corporation after merger:

... such new corporation shall hold and enjoy the same ... 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.

An Act to Provide for the Creation and Regulation of Incorporated Companies in the State of Ohio, 50 v. 274; S.C. 271 (1852), §23.

The General Assembly was telling Ohio lawyers in 1852 that they did not need to include “successors and assigns” language for the contracts they were drafting to carry forward when a corporation subsequently went through a statutory merger. After merger, irrespective of contract language, the surviving corporation would hold a contract “in the same manner, and to the same extent, as if” the constituent corporations still were transacting business. Over the intervening 160 years this Court had never issued a decision telling lawyers that they must include “successors and assigns” language to get the contracts they were drafting through a merger. Until ten days ago.

From now on, lawyers know the rule and their clients can certainly follow it. But there are an untold number of entities who, like Acordia, have acted in reliance upon an unbroken century and a half of precedent. They assumed, quite reasonably based upon the earliest statutes of the General Assembly and consistent application of those statutes over the years by this Court, that they did not need to put in “successors and assigns” language in order to have the rights and obligations pass to a surviving corporation on merger. And now they have contracts that do not meet the new rule. Some of those contracts can be changed; others cannot because of differing bargaining positions; still others have now been impacted by a subsequent merger.

Moreover, the Court’s rationale is NOT limited to employment agreements. Precisely the same issues – an identified corporate entity that is not going to exist after a merger, and an obligation owing to or by that identified corporate entity – are written into contracts of all kinds every day in Ohio. Armed with the lead opinion’s analysis, enterprising trial lawyers across the state will test the contours of this new rule.

It is for these reasons that the Ohio Chamber of Commerce and the other Amici Curiae support this Court’s reconsideration of its May 24, 2012 decision.

**1. The Court has, intentionally or unintentionally, rewritten the Ohio merger statutes.**

The lead opinion rewrites Ohio's merger statutes. The Ohio General Assembly enacted the merger statutes to effect a consistent result following a merger or consolidation. The General Assembly has consistently described the unqualified and unconditional result: "The surviving or new entity possesses all assets and property of every description . . ." of the constituent companies. R.C. §1701.82(A)(3). With its judicial gloss, the lead opinion rewrites that sentence to read: *The surviving or new entity possesses all assets and property of every description if it contains "successor and assign" language; otherwise the asset has limited viability.* This rewrite of the merger statutes eradicates the principle of corporate continuity and reverses a fundamental principle of contract law.

Quoting *Morris v. Investment Life Ins. Co.*, 27 Ohio St. 2d 26, 31, 272 N.E.2d 105 (1971), "Of necessity, the absorbed company ceases to exist as a separate entity," the lead opinion erroneously concludes that all constituent companies following a merger cease to exist. (¶12). "After the L.L.C. absorbed Acordia, Inc., the companies with which the employees agreed to avoid competition had ceased to exist." (¶12). This conclusion undercuts the foundation of merger law – corporate continuity.

In fact *Morris* in no way compels the lead opinion's conclusion here. The lead opinion overlooks two words – "necessity" and "separate" – in the sentence it quotes from *Morris*, but they are keys to the meaning of that sentence. Immediately preceding the quoted sentence, the *Morris* Court concluded that the surviving company acquires the assets, liabilities, franchises and powers of the constituent company as a result of the merger. It continued on with the quoted language "[o]f necessity" – meaning logically – the absorbed company ceases to exist as a separate – meaning existing by itself or autonomous – business entity. In other words, without

any assets, liabilities, franchises and powers, the constituent company is logically no longer an autonomous entity. Rather, the constituent company has become an integral part of the surviving company.

The fact that a constituent company in a merger “ceas[es] to exist as a *separate* business entity,” does not mean it ceases to exist at all. As a practical and legal matter, the absorbed company does continue, just not as a separate business entity. That has been the consistent holding of this Court. 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.*, 106 Ohio St. 577, 140 N.E. 380 (1922), at paragraph 9 of the syllabus (emphasis added). *See also, Marfield v. Cincinnati, Dayton & Toledo Tracking Co.*, 111 Ohio St. 139, 143, 144 N.E. 689 (1924) (“the substantial existence of the constituent companies was thereby perpetuated by being merged in the consolidated company”). That huge difference between the concepts cannot be ignored. But that is exactly what the lead opinion does in overruling, by implication, the holdings in both *Citizens Savings & Trust* and *Marfield*.

Compounding its repudiation of the settled principle of merger law and corporate continuity, the lead opinion also abandons settled principles of contract law when it focuses on the drafting of the competition agreements between the employees and a specifically-identified employer, defined as the “company,” to interpret the effect of the Ohio merger statutes. “Because the non-compete agreements do not state that they can be assigned or will carry over to successors, the named parties intended in the agreements to operate only between themselves – the employees and the specific employer.” (§12). The notion is that contracts will transfer to the surviving corporation only if they include specific language that contemplates transfer is a

reversal of long-standing Ohio contract law, which has consistently found intent to transfer *absent* language prohibiting the transfer. In *ASA Architects, Inc. v. Schlegel*, 75 Ohio St. 3d 666, 665 N.E.2d 1083 (1996), this Court 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.*” *Id.*, 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 have specifically agreed to something else. *Doe v. Ronan* (2010), 127 Ohio St.3d 188, 194, 937 N.E.2d 556, n.5 (“applying the principle that existing statutory provisions are incorporated into a contract is recognition of a basic legal concept of longstanding and accepted use”).

**2. Any change in corporate law is the proper province of the General Assembly, not this Court.**

Under the Ohio Constitution, the General Assembly has the authority to establish and to modify the rules under which corporations in Ohio are governed. Article XIII, Section 2 (“Corporations may be formed under general laws; but all such laws may, from time to time, be altered, or repealed”). Pursuant to that authority, the General Assembly in 1852 set out the rule that contracts in the hands of a merged corporation were to be held in the same way as if the constituent corporations still were transacting business. *An Act to Provide for the Creation and Regulation of Incorporated Companies in the State of Ohio*, 50 v. 274; S.C. 271 (1852), §23.

The General Assembly was also the entity that set out a very different set of rules governing mergers from those that govern the sale and assignment of assets from one corporation

to another. Ohio Rev. Code §§1701.76-77. The distinction between what happens in a merger and what happens in an asset assignment is basic to corporate law and has a long-standing history in Ohio. *Toledo, Cincinnati & St. Louis Railroad Co. v. Hinsdale* (1888), 45 Ohio St. 556, 15 N.E. 665 (differentiating the transfer of a railroad's roadbed as an asset sale from a corporate consolidation of railroad companies in assessing the surviving corporation's contractual rights and obligations). "Successor and assigns" language is classic language that is found in contracts to permit them to be assigned, either individually or as part of an asset sale. By contrast, a statutory merger has never involved the assignment of contracts.

To the extent that those rules are to be changed for policy reasons – those changes are constitutionally required to be made by the General Assembly, not this Court.

### **3. The rationale underlying the lead opinion interjects substantial uncertainty into Ohio merger law.**

The concept underlying the lead opinion is that one must look to the terms of the contract to understand the impact of a merger on that contract. The statutory and case law of corporate merger is no longer relevant. Because a constituent corporation ceases to exist in a statutory merger, obligations owing to (or by) that named entity, when included in contracts to which it was a party, are no longer enforceable unless the contract specifically says so. The implications of such a principle extend far beyond the competition agreements at issue in this case.

- An employee has a five-year contract of employment with his employer. No "successors and assigns" language. Upon merger of his employer into another corporation after the first year of the contract, can the successor corporation walk away from the contract because the commitment was made by a named entity that has ceased to exist?
- A corporation has service contracts for its facilities. No "successors or assigns" language. After merger, is it free to walk away from those contracts because language of the contract only obligated the named entity that has now ceased to exist?

- The anchor tenant of a shopping center has a contractual obligation to remain open to provide traffic to the other tenants in the shopping center. There is no “successors or assigns” language. The shopping center owner merges into another entity and ceases to exist. Is the tenant’s obligation to remain open extinguished, because that was an obligation owed to the specific entity listed in the contract, which no longer exists?
- Same anchor tenant, but now the tenant merges into another entity and ceases to exist. Is its obligation to remain open extinguished, because the terms of the contract obligated only the entity named in the contract, which no longer exists?
- Another company enters into a long-term agreement to buy natural gas at a fixed price. No “successors or assigns” language. After natural gas prices fall, to avoid the contract the purchaser simply merges into another entity and continues business as it was before. Is the contractual obligation gone because the entity named in the contract has ceased to exist?

There is nothing so unique about a competition agreement that would distinguish the lead opinion in this case from being argued, as the law of Ohio, in each of those circumstances, and many more. At the very least those questions now become open issues under Ohio law. At worst, they are now to be answered very differently than they were ten days ago – or 160 years ago.

By changing the rules and creating uncertainty, the lead opinion renders Ohio a decidedly less business-friendly environment than it was prior to the entry of this decision. And an environment decidedly less business-friendly than the numerous other states whose courts have addressed this issue and found that, upon a statutory merger, the surviving corporation steps into the shoes of each of the constituent corporations.

Amici Curiae urge that the Court reconsider its decision in this case, reverse the decision of the First District Court of Appeals, and remand the case.

Respectfully submitted,

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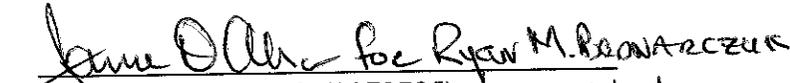
I hereby certify that a true copy of the foregoing Memorandum of Amici Curiae Ohio Chamber of Commerce, Ohio Chemistry Technology Council, USI Holdings Corp., USI Midwest, Inc., and Hylant Group, Inc. in Support of Motion for Reconsideration was sent via regular U.S. mail, postage prepaid this 4<sup>th</sup> day of June, 2012 to the following:

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