

ORIGINAL

IN THE SUPREME COURT OF OHIO

ACORDIA OF OHIO, LLC,	:	Supreme Court Case No. 11-0163
	:	
Appellant,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
	:	
v.	:	
	:	Court of Appeals Case No. C100071
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.	:	

**MEMORANDUM OF *AMICI CURIAE* PROFESSORS SEAN K. MANGAN AND
JOHN A. BARRETT JR. IN SUPPORT OF MOTION FOR RECONSIDERATION**

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Professor Sean K. Mangan is a member of the faculty of the College of Law at the University of Cincinnati. Professor Mangan joined the faculty after eight years of private practice and teaches transactional skills with a particular focus on contract drafting, corporate transactions, and corporate governance. Professor Mangan's sole interest in this case is the consistency of the law governing mergers in Ohio.

Professor John A. Barrett Jr. is a member of the faculty of the College of Law at the University of Toledo. Professor Barrett joined the faculty after six years of private practice as a corporate/transactional attorney. Professor Barrett has been on the faculty at the College of Law for seventeen years and teaches in the areas of business law, transactional law, corporations and business associations. Professor Barrett's sole interest in this case is the consistency of the law governing mergers in Ohio.

A. The lead opinion is a sudden and abrupt sea change in Ohio merger law.

Since the inception of corporate law in Ohio under the authority granted by Article XIII Section 2 of Ohio's 1851 Constitution, corporate mergers have been based on the principle that a merger or consolidation of two companies vests the surviving company with *all* of the property of the constituent company without further act or deed. Over the same period, Ohio courts have consistently recognized that companies that have merged under statute can fully enforce contractual rights -- and are bound to perform contractual obligations -- held by their constituent companies. For over 100 years, the surviving company has possessed the right to enforce constituent contracts as if it were an original signatory because Ohio law recognizes that the constituent company is *not* erased from existence but rather absorbed into the surviving entity.

The constituent entity becomes part of the surviving entity, with the latter acquiring all rights of the former by operation of law.

The lead opinion abandons this fundamental principle of Ohio merger law. Now a merger under Ohio results in the cessation, not continuation, of the constituent companies. See ¶12 and ¶18. “As a consequence, the termination or complete severance of the employer-employee relationship occurred when the company . . . ceased to exist, an event triggered by merger.” (¶18). In the past, all rights and assets of the constituent company -- including its contracts, employment relationships, and intangibles – passed to the surviving company as a matter of law, premised on the fundamental merger principle of corporate continuity. The lead opinion has radically altered that premise.

B. The lead opinion has far ranging consequences for companies and employees.

The lead opinion requires all merged companies, regardless of the date or number of mergers, to comb through thousands of acquired contracts to determine whether the terms of those contracts are enforceable in the post-*Acordia* landscape. The scale of such an undertaking is overwhelming and its costs immeasurable. While the risk created for surviving merged companies by the lead opinion is obvious, a less obvious (but more problematic) risk now exists for the employees of such companies: employment rights and benefits based on service to the “employer” as defined in pre-merger contracts may not be enforceable against the surviving entity. For example, seniority, paid time off and vesting eligibility will be forfeited because employment is commenced with a “new employer” following the merger. Those that contract with companies pre-merger (such as employees, vendors, and small business service providers) are more vulnerable than they were under pre-*Acordia* law.

The lead opinion also creates significant uncertainty for those engaged in commercial activity. This uncertainty will likely cause a slower pace for commercial activity and may also lower the price at which companies change hands in Ohio. Now, an acquiring company has little assurance that it will possess *all* assets and property of *every description* and *all obligations* to or due each constituent entity as a matter of law. Instead, the language of contracts executed several years prior to the merger will now preempt the clear and unequivocal mandate of the Ohio General Assembly. Ironically, the language such contracts will need to include to be fully transferable is an assignability clause that lawyers drafting contracts would have considered unnecessary to include in the merger context prior to the lead opinion.

In addition, the lead opinion eradicates the simplicity of mergers under Ohio law. The primary advantages of a merger as opposed to any other deal structure are continuity of operations and lower transaction costs. Both characteristics are significantly curtailed by the lead opinion and will result in far fewer mergers under Ohio law. When mergers do occur, the parties will face more problematic pre-transaction due diligence, more difficult negotiations, lower valuations, and significantly higher deal costs. The lead opinion thus adversely affects the choice of deal structure pre-merger and creates an uncertain and arduous environment post-merger. For example, the buyer in a merger cannot simply continue use of the target's pre-merger phone service; it must instead review the phone vendor's contract, determine if the post-*Acordia* language exists, evaluate the contract's enforceability, and then adjust accordingly.

As educators, we have no interest in the final outcome between the parties before the Court. Our interest is in the integrity and consistency of Ohio law. In our opinion, Justice O'Donnell has accurately and clearly stated the merger law of Ohio. We would encourage the

Court to reconsider the lead opinion and adopt Justice O'Donnell's dissenting opinion as the majority opinion, restoring clarity and consistency to Ohio merger law.

Respectfully submitted,

*Timothy M. Burke by J. Al. Cook
per email authorization on 6/4/12*

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum of Amici Curiae Professors Sean K. Mangan and John A. Barrett Jr. in Support of Motion for Reconsideration was sent via regular U.S. mail, postage prepaid this 4th day of June, 2012 to the following:

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