

From: Julie Juergens

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Gallagher Sharp Newsflash: Non-Compete Agreements Enforceable by Successor Company

On October 11, 2012, the Supreme Court of Ohio reconsidered and reversed its recent ruling to hold that the surviving entity in a statutory merger **has** the right to enforce non-compete agreements as if it stepped into the shoes of the acquired company. *Acordia of Ohio, L.L.C. v. Fishel*, Slip Op. No. 2012-Ohio-4648 (“*Acordia II*”).

In a 6-1 decision, the Supreme Court partially overruled its May 24, 2012, decision, *Acordia of Ohio L.L.C. v. Fishel* (“*Acordia I*”). In *Acordia I*, the lead opinion held that the surviving company in a statutory merger could not enforce non-compete agreements that employees signed with the absorbed company, unless the agreements contained language stating that the “successors and assigns” of the original company were empowered to enforce the agreement. Based on that holding, the Court held that the surviving company lacked standing to enforce the acquired company’s non-compete agreements. Upon reconsideration of its prior decision, the Court held that *Acordia I* was erroneously decided based on a misreading of prior case law.

In *Acordia II*, the Court stated its original reading of Supreme Court precedent was incomplete and the fact that the absorbed company no longer exists as a *separate* entity does not mean it has been completely erased from existence. Instead, the absorbed company becomes a part of the surviving company after the merger. The surviving company, therefore, has the ability to enforce non-compete covenants as if it had “stepped into the shoes” of the absorbed company. As a result, the omission of “successors and assigns” language is immaterial.

The Court narrowly confined its holding to issues involving non-compete agreements. *Acordia II* does not apply to other contracts transferred as a result of a merger. Ohio merger law also went undisturbed, as the Court reaffirmed its view that, under R.C. 1701.82(A)(3), non-compete agreements transfer automatically to the surviving company by operation of law. The transfer of the non-compete agreement to the surviving company, however, does not foreclose relief under traditional principles of law governing non-compete agreements. In other words, employees may still challenge the validity of restrictive covenants based on whether the agreements are reasonable and whether the merger created additional obligations or duties such that the agreements should not be enforced on their original terms.

A link to the Ohio Supreme Court’s *Acordia II* opinion can be found at: <http://www.supremecourt.ohio.gov/ROD/docs/pdf/0/2012/2012-Ohio-4648.pdf>.

If you have any questions, please contact:

Julie L. Juergens

Gallagher Sharp

Sixth Floor, Bulkley Bldg.

1501 Euclid Avenue

Cleveland, OH 44115

Phone: (216) 241-5310

jjurgens@gallaghersharp.com

www.gallaghersharp.com