



Ohio Appellate Court Rules That Non-Compete Agreement Is Unenforceable Following Corporate Merger

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The issue of whether a non-compete agreement is enforceable is frequently litigated. Typically, non-compete cases turn on whether the agreement's restrictions are reasonable in terms of duration and geographical scope. However, the First District Court of Appeals, which is located in Hamilton County, recently considered a different issue involving a non-compete -- whether a non-compete agreement is enforceable after the initial employer merges with another company and the employee continues to work for that new company?

In *Acordia of Ohio v. Fischel*, 2010-Ohio-6235 (1st Dist. 2010), an insurance agency, Acordia of Ohio, LLC ("Acordia"), sued four of its former employees for violating their non-compete agreements. Each of the employees had signed their non-compete agreement while working for a predecessor of Acordia, which was the product of six different mergers. Acordia also sued the former employees' new employer, a known competitor.

Citing to Ohio Revised Code 1701.82(A)(3), Acordia argued that noncompete agreements should be treated like any other asset in a merger or consolidation. ORC 1701.82(A)(3) specifically provides that, "When a merger or consolidation becomes effective . . . [t]he surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers . . . of each constituent entity." Acordia argued that successor companies, such as itself, inherit all of the predecessor company's assets, including the rights of any valid non-compete agreements, and that a merger does not start the clock on the non-compete agreements.

Both the trial court and the appellate court disagreed. The First District noted that following a merger, "the absorbed company ceases to exist as a separate business." Thus while the non-compete agreements do pass to the successor entity under ORC 1701.82(A)(3), the merger actually triggers the time period for the

restrictions. Accordingly, the court held that by the time *Acordia* filed suit for violations of the non-compete agreements, the two year time restriction set forth in all of the non-competes at issue had already expired.

While *Acordia of Ohio v. Fischel* is on appeal to the Ohio Supreme Court (and thus not yet final), all employers should be aware of this decision, particularly those that are considering or were recently involved in a merger, acquisition, consolidation, or some other change in business formation. Employers can proactively address this issue by revising the language they use in non-compete agreements. If the merger is already complete, employers should review the non-compete agreements of the absorbed company to determine if new non-compete agreements are needed.