Ohio Supreme Court Reverses Self On Noncompete In Merger Situation

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Earlier this year, the Ohio Supreme Court surprised observers in the *Acordia of Ohio LLC v. Fishel* case by holding that an acquiring company in a statutory merger could not enforce noncompetes entered into with the acquired company by employees who continued to be employed absent clear contractual agreement to that. Today, the Court in effect reversed itself, coming back into line with the great majority of the states. A summary from the court can be found here.

Historically, in a corporate merger where the acquirer buys a company in its entirety, the acquirer steps into the shoes of the acquired company with respect to all contractual obligations. The old company becomes part of the new company. (This is different than an asset purchase situation, where the

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acquirer buys only specified assets of the target company.) Courts to have addressed whether noncompete agreements are, like virtually all other contracts of the acquired company, enforceability by the acquirer have almost uniformly held that the acquirer does in fact step into the shoes of the old company and can enforce the agreements. Thus, what is now being called *Acordia I* (today's decision will be *Acordia II)* came as a surprise to most observers of the Ohio Supreme Court and of noncompete law generally. In an unusual move, the court agreed to reconsider *Acordia I,* so today's "correction" does not come as a surprise.

The key language in the majority decision is, "The language in *Acordia I* stating that the [acquirer] could not enforce the employees' noncompete agreements as if it had stepped into the original contracting company's shoes or that the agreements must contain 'successors and assigns' language in order for the [acquirer] to enforce the agreements was erroneous." While this decision comes as somewhat of a relief, it should not be viewed as diminishing the importance to companies of considering the enforceability of their noncompetes in future corporate transitions. Companies should also not confuse this situation as applying to *asset* purchases, where the rules are much different. In short, companies should have a brief conversation with their experienced employment counsel about where they stand with respect to the issues raised in this important case.