UNREASONABLE STATE RESTRICTIONS ON BUSINESS TRANSACTIONS: THE ENFORCEABILITY OF NON-COMPETE AGREEMENTS POST-MERGER OR ACQUISITION

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I. INTRODUCTION

Within the last decade, the effect of a merger or acquisition on an employee non-compete agreement[1] has become a hot topic in state courts as well as state legislatures.[2] The central question within the growing controversy is whether, after a merger or acquisition, such agreements are and should be enforceable by the successor employer.

In the contemporary business world where mergers and acquisitions are quite common, the ability of a new entity to enforce agreements entered into between an employee and the original employer is of ever-increasing relevance.[3] Split decisions in state employment litigation, as well as the push in many legislative bodies to introduce rules restricting the use of such agreements after a merger or acquisition, highlight the growing tension surrounding non-compete enforcement.[4]

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[1] A non-competition agreement is defined by Black's Law Dictionary as "a promise, [usually] in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer." BLACK'S LAW DICTIONARY 420 (9th ed. 2009). This Article focuses on a non-competition agreement in the context of an employment contract; it is important to distinguish, from the outset, this context from a sale-of-business scenario, as state law treats the latter transaction differently.

[2] James Frazier III, *Employee Non-Compete Agreements in Mergers and Acquisitions,* NAT'L L. REV. (Aug. 12, 2013), http://www.natlawreview.com/article/employee-non-compete-agreements-mergers-and-acquisitions.

[3] William M. Corrigan, Jr. & Michael B. Kass, *Non-Compete Agreements and Unfair Competition—An Updated Overview*, 62 J. MO. B. 81, 87 (2006).

[4] *See* Frazier III, *supra* note 2.

An introductory example, which will be discussed in more detail later in this Article,[5] is the Ohio Supreme Court decision in *Acordia of Ohio v. Fishel II*.[6] Initially, in *Acordia of Ohio v. Fishel I*,[7] the Ohio Supreme Court concluded that a surviving company (after a merger or acquisition) does not completely "step[] into the shoes" of the original employer and therefore cannot enforce a non-compete agreement entered into by its employee and the former employer (merged or dissolved) unless the agreement includes "successors and assigns"[8] language.[9]

Upon reconsideration of that case, the same court reversed its decision and concluded that a surviving company *does* "step[] into the shoes" of the original employer, and *can* enforce such agreements even absent such successors and assigns language.[10] Nevertheless, Justice Pfeifer issued a dissenting opinion after reconsideration, in which he argued against enforcement and cited the growing policy across the states of generally disfavoring non-compete agreements.[11]

Justice Pfeifer's policy argument is not completely unfounded. State lawmakers' increased attention to non-compete agreements and the desire in many legislative bodies to add restrictions on such arrangements highlight a growing effort across the country to expand employee freedom, especially after witnessing the tough economic times of the great recession.[12] However, this Article will demonstrate that little evidence exists to conclusively establish the economic benefits of increased regulation.[13] In fact, evidence may support policies that allow an entity to fully protect itself during a merger or acquisition; this would undoubtedly include preserving the value of the coveted non-compete asset during business transactions.[14]

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[5] *See infra* Part III.A.

[6] 133 Ohio St.3d 356, 2012-Ohio-4648, 978 N.E.2d 823.

[7] 133 Ohio St.3d 345, 2012-Ohio-2297, 978 N.E.2d 814.

[8] *Acordia II* at ¶¶ 6–10.

[9] *Acordia I* at ¶¶ 9–13. To be clear, the absence of successors and assigns language meant the agreements did not explicitly state they could be assigned or would carry over to successors. *Id.* Therefore, the court concluded the named parties only intended the agreement to operate between themselves, and not any future entity. *Id.*

[10] *Acordia II* at ¶¶ 6–10.

[11] *Id.* at ¶¶ 20–30 (Pfeifer, J., dissenting).

[12] Marshall Tanick, *Noncompete Contracts: Fair of Abusive?*, STARTRIBUNE, April 22, 2013, at D6.

[13] *See infra* Part IV.

[14] *See infra* Part V.

This Comment will first provide a general overview of the enforceability of non-compete agreements across the fifty states, as such disputes are generally settled by state law.[15] Subsequently, it will focus on current trends across the United States with respect to non-compete enforcement post-merger or acquisition.[16] Beyond the aforementioned controversy in Ohio, other states such as Kentucky,[17] Florida,[18] Delaware,[19] and Nevada[20] have litigated this issue. While most state courts have generally held that such agreements are enforceable even absent specific contractual language, the variations between these state decisions and dissenting opinions issued within such cases demonstrate that the trend may be shifting toward the alternative.[21]

This Comment will then analyze the various policy arguments opponents of non-compete agreements make in advocating for increased regulation.[22] It will subsequently discuss the other side of the debate, explaining the policy implications of adding restrictions and obstacles to employers as they attempt to expand and grow, especially in the context of the current economic climate.[23] Finally, this Comment will briefly discuss the most important considerations an employer must keep in mind when

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[15] *See infra* Part II. This Article focuses on Ohio law with respect to enforceability as most states have laws mirroring those in Ohio and it is the state in which the author resides. *See infra* note 29 and accompanying text. Moreover, a complete analysis of all aspects of non-compete agreement enforceability is well beyond the scope of this article. The analysis included in this Comment will focus only on the most important and fundamental principles surrounding the enforceability of such agreements.

[16] *See infra* Part III.

[17] *See infra* Part III.B.

[18] *See infra* Part III.C.

[19] *See infra* Part III.D.

[20] *See infra* Part III.E.

[21] *See infra* Part III. Some states, including Florida, have not given an affirmative answer as to the enforceability of non-compete agreements post-merger or acquisition; in these states, the "issue remains unsettled." *See* Margaret DiBianca, *Enforceability of Noncompete Agreements Post-Merger*, LEXISNEXIS LEGAL NEWSROOM: LAB. & EMP. L. BLOG (Oct. 10, 2012, 10:12 AM), http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2012/10/10/enforceability-of-noncompete-agreements-post-merger.aspx.

[22] *See infra* Part IV.

[23] *See infra* Part V.

drafting its employment contracts, focusing on the anticipation of a potential merger or acquisition.[24]

In sum, this Article will demonstrate that, based on the weight of current state law, the surviving entity of a merger or acquisition should be entitled (automatically) to enforce the non-compete agreements of the absorbed entity even absent "successor or assigns" language within such agreements.[25] Moreover, this Article will ultimately explain why public policy supports the protection of corporate rights throughout any business expansion; employers should not be required to take additional steps prior to a merger or acquisition to ensure enforceability, absent an express state statutory provision to the contrary.[26]

II. THE ENFORCEABILITY OF NON-COMPETE AGREEMENTS.

State law governs the enforceability of non-compete agreements.[27] Generally, state courts agree that enforceability turns on the "reasonableness" of the agreement.[28] Therefore, a discussion of the nuances behind the "reasonableness" model, using Ohio as an example, is useful to gain a better understanding of how state courts handle non-compete disputes[29]

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[24] *See infra* Part VI. There are undoubtedly a plethora of considerations employers must keep in mind when drafting non-compete agreements, most of which are outside the scope of this article. *See generally* Kyle B. Sill, *Drafting Effective Noncompete Clauses and Other Restrictive Covenants: Considerations Across the United States*, 14 FLA. COASTAL L. REV. 365 (2013). This Comment will focus only on those considerations essential to avoiding legal issues after a merger or acquisition.

[25] *See infra* Part VII.

[26] *See id.*

[27] Wolters Kluwer Law & Business, HUMAN RES. COMPLIANCE LIBRARY ¶ 86,630 (CCH, Inc., 2014), *available at* 2013 WL 6716130. As such, the legality of these agreements varies slightly from state to state.

[28] Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 110–11 (2008) (explaining that while the traditional approach has been to review non-compete agreements based on a common law reasonableness test, the test has evolved and has been given a broader meaning in favor of the employer).

[29] Most U.S. states implement a very similar "reasonableness" standard to that of Ohio, balancing the necessary protection of the employer with the hardship on the employee. *See, e.g.*, Robert S. Weiss & Assoc., Inc. v. Wiederlight, 546 A.2d 216, 219 (Conn. 1988); St. Clair Med., P.C. v. Borgiel, 715 N.W.2d 914, 918–19 (Mich. Ct. App. 2006); Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 610 (Mo. 2006); BDO Seidman v.

In Ohio, a covenant not to compete (which imposes restrictions upon an employee) will be enforced to the extent necessary to protect the employer's legitimate interests.[30] "A covenant restraining an employee from competing with his [or her] former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public."[31] Factors considered by courts in making this determination include:

> The absence or presence of limitations as to time and space, . . . whether the employee is possessed with confidential information or trade secrets; whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; . . . whether the benefit to the employer is disproportional to the detriment to the employee.[32]

Many non-competition disputes arise from a former employee's dissemination of his former employer's confidential business information.[33] Ohio law has established that an employer has the right to protect confidential information by restricting an employee's post-employment activities when that employee is in possession of confidential information or trade secrets.[34]

Confidential information has been defined in Ohio as "known only to a limited few; not publicly disseminated."[35] The Ohio Revised Code provides the following example of a trade secret:

> [I]nformation, including . . . any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or

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Hirshberg, 712 N.E.2d 1220, 1223 (N.Y. 1999); Techworks, L.L.C. v. Wille, 770 N.W.2d 727, 731 (Wis. Ct. App. 2009).

[30] Raimonde v. Van Vlerah, 325 N.E.2d 544, 547 (Ohio 1975).

[31] *Id.*

[32] *Id.* (quoting Extine v. Williamson Midwest, Inc., 200 N.E.2d 297, 299 (Ohio 1964)).

[33] *See, e.g.*, Brentlinger Enters. v. Curran, 752 N.E.2d 994 (Ohio Ct. App. 2001) (employer sought injunctive relief to enforce a non-compete agreement signed by a former employee, primarily to protect the dissemination of confidential business information).

[34] *See* Frank, Seringer & Chaney, Inc. v. Jesko, Nos. 89CA004577, 89CA004613, 1989 WL 147951, at *3 (Ohio Ct. App. Dec. 6, 1989) (internal quotation marks omitted).

[35] Procter & Gamble Co. v. Stoneham, 747 N.E.2d 268, 277 (Ohio Ct. App. 2000) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 476 (1981)).

> improvement, or any business information or plans, . . . that satisfies both of the following: (1) It derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[36]

Another common non-compete dispute arises from the particular time and geographic limitations outlined within the agreement; employees often argue such limitations are unreasonable.[37] With respect to these restrictions, "each case must be decided on its own facts."[38] In determining the validity of such limitations, Ohio courts will typically balance the restraints and projected hardships on the employee with the legitimate interests of the employer.[39]

While most state courts across the country utilize a very similar "reasonableness" standard to that of Ohio when evaluating non-competition agreements,[40] California is an example of the minority of states that implement vastly different enforcement mechanisms.[41] Under California law, a non-compete agreement is void unless it falls under three exceptions[42]: (1) where one sells the goodwill of a business,[43] (2) the dissolution of a partnership,[44] or (3) between members of an LLC.[45] Thus, "[u]nlike most states, California generally prohibits noncompete agreements

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[36] OHIO REV. CODE ANN. § 1333.61(D) (West 2012).

[37] *See, e.g.*, Rogers v. Runfola & Assocs., Inc., 565 N.E.2d 540, 544 (Ohio 1990) (after employer sought enforcement of a covenant not to compete, employees successfully argued that the time and space restrictions contained in the agreement were unreasonable, hindering their ability to find other jobs in their field of work). To be clear, "time and geographic" limitations refer to either the time period post-employment restrictions remain enforceable, or the geographical area covered by post-employment restrictions. *See id.*

[38] Raimonde v. Van Vlerah, 325 N.E.2d 544, 547 (Ohio 1975) (internal quotation marks omitted) (quoting Extine v. Williamson Midwest, Inc., 200 N.E.2d 297, 297 (Ohio 1964)).

[39] *See Rogers*, 565 N.E.2d at 544.

[40] *See supra* note 29 and accompanying text.

[41] *See* CAL. BUS. & PROF. CODE §§ 16600–16602.5 (West 2008).

[42] *See* § 16600.

[43] § 16601.

[44] § 16602.

[45] § 16602.5.

between an employer and its employees through section 16600 of the California Business and Professions Code."[46]

Thus, notwithstanding states like California, non-compete agreements between an employer and an employee (in any setting) must typically be reasonable to be enforceable.[47] However, upon considering such agreements in the merger or acquisition context, controversy has emerged as to whether such agreements are inherently unreasonable, given the nature of employment with a somewhat different, successor entity.[48] The section that follows explains this issue state by state.

III. CURRENT STATE CONFLICT SURROUNDING THE ENFORCEABILITY OF NON-COMPETE AGREEMENTS POST-MERGER OR ACQUISITION

In the aftermath of a merger or acquisition, courts generally choose to enforce those non-compete agreements that expressly permit its assignment to a successor entity.[49] However, the scenario that generates the most litigation in state courts is an employer's enforcement of an agreement that does not explicitly address assignability.[50]

In some jurisdictions, the approach to assignability depends on the context in which the agreement was assigned; these states choose to enforce assignment in a merger context, but not in an asset purchase transaction.[51] Other jurisdictions uniformly permit assignment,[52] and still others are attempting to implement legislation barring the use of such agreements in the context of a merger or acquisition.[53]

The states on which this Article focuses were chosen based on the occurrence of recent controversy highlighting this issue. Indeed, the question of enforceability addressed in this Article remains unsettled in some states, demonstrating the importance of highlighting any recent legal activity.[54]

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[46] Christina L. Wu, *Noncompete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State's Law?*, 51 UCLA L. REV. 593, 593 (2003).

[47] *See* Raimonde v. Van Vlerah, 325 N.E.2d 544, 547 (Ohio 1975).

[48] *See infra* Part III.

[49] Adam Schneid, *Assignability of Covenants Not to Compete: When Can A Successor Firm Enforce A Noncompete Agreement?*, 27 CARDOZO L. REV. 1485, 1485 (2006).

[50] *Id.*

[51] *See infra* Part III.E.

[52] *See infra* Parts 0–B.

[53] *See infra* Parts III.F–G.

[54] DiBianca, *supra* note 21.

A. Ohio

Ohio recently considered this matter in *Acordia of Ohio v. Fishel I*,[55] where an employer filed suit against various employees that had breached noncompetition agreements with the company with which the employer had merged.[56] The case eventually reached the Ohio Supreme Court, where a majority ruled in favor of the employees.[57] The court reasoned that although all corporate assets transfer to a surviving company following a typical merger,[58] the inclusion of contractual language in this particular agreement, which explicitly limited enforceability to the former employer, allowed the court to apply the provisions *only* to the merged company that had originally hired the employee.[59] Therefore, the court explained it was unable to allow the surviving entity to enforce the applicable employment contracts.[60]

The Ohio Supreme Court subsequently reconsidered the case in *Acordia of Ohio v. Fishel II,*[61] and reversed its previous decision.[62] The court reasoned that *Acordia I* was based on an erroneous interpretation of precedent;[63] specifically, the precedent set in *Morris v. Inv. Life Ins. Co*.[64] The court explained, "While *Morris* [did indicate] that the absorbed company ceases to exist as a *separate* business entity, [it did] not state that the absorbed company is completely erased from existence. Instead, the [entity] becomes a part of the resulting company following [the] merger."[65]

The court concluded that a merged company "may enforce the noncompete agreements as if it had stepped into the shoes of the original

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[55] 133 Ohio St.3d 345, 2012-Ohio-2297, 978 N.E.2d 814.

[56] *Id.* at ¶¶ 3–8.

[57] *Id.* at ¶¶ 8–13.

[58] A non-compete agreement is generally seen as an "asset" to any company. Schneid, *supra* note 49, at 1505 (sales of non-compete agreements are factored into the economic worth of the stock price of a company).

[59] *Acordia I*, 133 Ohio St.3d 345, 2012-Ohio-2297, 978 N.E.2d 814, at ¶¶ 8–13. Specifically, the court explained: "Because the noncompete agreements do not state that they can be *assigned* or will *carry over to successors*, the named parties intended the agreements to operate only between themselves—the employees and the specific employer." *Id.* (emphasis added).

[60] *Id.*

[61] 133 Ohio St.3d 356, 2012-Ohio-4648, 978 N.E.2d 823.

[62] *Id.* at ¶¶ 10–16.

[63] *Id.*

[64] 272 N.E.2d 105 (Ohio 1971); *Acordia II*, 133 Ohio St.3d 356, 2012-Ohio-4648, 978 N.E.2d 823, at ¶¶ 6–10.

[65] *Acordia II* at ¶¶ 6–10.

contracting compan[y], provided that the noncompete agreements are reasonable."[66] The court made clear that this is the case even absent successors and assigns language within such agreements.[67]

Both *Acordia I* and *Acordia II* were split decisions,[68] demonstrating the current divide regarding the enforceability of such agreements in the merger and acquisition context. The dissenting opinion in *Acordia II* focused primarily on policy considerations, arguing that non-compete agreements are "an undue infringement on free enterprise," that they "unfairly protect[] the employer from competition from its former employees," and that they should always be strictly construed against the employer.[69]

Justice Pfeifer's dissent represents the view that non-compete law in general should be wholly revised to provide employees more freedom in the marketplace.[70] However, the degree to which business activities like mergers and acquisitions benefit the economy should impact the validity of such a restrictive view of non-compete agreements, as will be seen later in this Article.[71]

B. Kentucky

Kentucky also tackled this question in *Managed Health Care Assocs. v. Keethan.*[72] In that case, Managed Health Care Associates (MHA) sought a preliminary injunction to prohibit an employee from violating the non-compete agreement he executed while employed by the predecessor company with which MHA had merged.[73] Interpreting Kentucky state law, the Federal District Court held that the agreement was enforceable only by the predecessor company, and that it was not assignable to MHA without the employee's consent.[74]

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[66] *Id.* at ¶¶ 10–16.

[67] *Id.*

[68] *See id.*; *Acordia I*, 133 Ohio St.3d 345, 2012-Ohio-2297, 978 N.E.2d 814, at ¶¶ 18–24.

[69] *Acordia II*, 133 Ohio St.3d 356, 2012-Ohio-4648, 978 N.E.2d 823, at ¶¶ 24–29 (Pfeifer, J., dissenting).

[70] *See infra* Part IV.

[71] *See infra* Part V.A.

[72] 209 F.3d 923 (6th Cir. 2000). This action was decided by a Federal Court, which interpreted Kentucky state law. *Id.* at 927. While Kentucky did not directly address the issue in a state court system, this case is very persuasive authority because it demonstrates how Kentucky law would likely decide the issue.

[73] *Id.* at 925.

[74] *Id.*

The Sixth Circuit Court of Appeals reversed this decision, holding that the Kentucky Supreme Court would have concluded non-competition clauses are assignable and enforceable by the surviving entity.[75] The opinion began by recognizing that under Kentucky law, "a contract is generally assignable, unless forbidden by public policy or the contract itself."[76] Moreover, the court explained, "Kentucky courts have also acknowledged that noncompetition clauses play a critical role in business and are favored as long as they are reasonable in geographic scope and duration."[77]

After establishing these pillars of Kentucky non-compete law, the court examined Kentucky case law precedent, and eventually rested its decision on the Kentucky Supreme Court ruling in *Choate v. Koorsen Protective Servs., Inc*.[78] In that case, following an acquisition, the Kentucky Supreme Court decided on the enforcement of a temporary restraining order based on a non-compete agreement entered into by an employee of the dissolved company.[79] The employee argued that the clause was unenforceable because he had not expressly consented to the assignment.[80] The trial court rejected this argument and issued an injunction enforcing the clause.[81] The Court of Appeals subsequently affirmed the injunction.[82]

Consequently, the court in *Keethan* recognized that based on this precedent, non-competition clauses may be assigned as part of the sale of a business in Kentucky.[83] Moreover, in addition to reviewing Kentucky

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[75] *Id.* at 930.

[76] *Id.* at 928 (internal quotation marks omitted) (quoting Pulaski Stave Co. v. Miller's Creek Lumber Co., 128 S.W. 96, 101 (6th Cir. 1910)).

[77] *Id.* (citing Cent. Adjustment Bureau Inc. v. Ingram Assocs, Inc., 622 S.W.2d 681, 685 (6th Cir. 1981)).

[78] 929 S.W.2d 184, 184 (Ky. 1996).

[79] *Id.*

[80] Choate v. Koorsen Protective Servs, Inc., No. 95-CI-4293, slip op. at 4 (Jefferson Cnty. Cir. Ct. Jan. 16, 1996).

[81] *Id.* at 7–11.

[82] Choate v. Koorsen Protective Servs, Inc., No. 96-CA-171-I, slip op. at 1–2 (Ky. Ct. App. Feb. 8, 1996).

[83] Managed Health Care Assocs. v. Keethan, 209 F.3d 923, 928 (6th Cir 2000). With respect to the *Choate* decision, the court explained that by the time *Choate* had reached the Kentucky Supreme Court, the applicable non-compete agreement had expired. *Id.* Thus, "[b]ecause the issue was then moot, the Kentucky Supreme Court declined to address it. Consequently, the only Kentucky authority on point, as enunciated by both the trial and the

precedent, the court averred that it may also "use the rule adopted by most of the jurisdictions that have addressed the assignability issue as persuasive authority in determining how the Kentucky Supreme Court would likely decide the question."[84] And, upon such a review, the court concluded that "[a] majority of courts permit the successor to enforce the employee's restrictive covenant as an assignee of the original covenantee (the original employer)."[85]

Kethan was a split decision, with the dissent arguing that the application of *Choate* was erroneous.[86] Nevertheless, it demonstrates that Kentucky, like Ohio, still recognizes the enforceability of non-compete agreements post-merger or acquisition.[87]

C. Florida

While Florida has not yet explicitly addressed this issue in the context of a merger or acquisition, the state has discussed the assignability of non-compete clauses.[88] Florida was presented with this issue in *DePuy Orthopaedics, Inc. v. Waxman*,[89] where the District Court of Appeals of Florida reversed a trial court decision and held that non-compete agreements could be assigned under Florida law even absent an employee's consent.[90] The decision was based primarily on Florida statute, which allows assignment of non-compete agreements so long as the "covenant expressly authorize[s] enforcement by a party's assignee or successor."[91]

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appellate courts in *Choate*, recognizes that non-competition clauses may be assigned as part of the sale of a business's assets." *Id.*

[84] *Id.* at 929.

[85] *Id.* (internal quotations omitted) (quoting 6 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 13.13 (4th ed. 1995)).

[86] *Id.* at 931 (Wellford, J., dissenting). The dissenting opinion reasoned that because the Supreme Court in *Choate* did not address this issue, a more in-depth examination of the trial and appellate decisions was necessary. *Id.* And, because those decisions failed to cite any controlling Kentucky authority on the issue, the dissenting opinion argued its application was erroneous. *Id.*

[87] Frazier III, *supra* note 2.

[88] DiBianca, *supra* note 21.

[89] 95 So. 3d 928 (Fla. Dist. Ct. App. 2012).

[90] *Id.* at 935–36.

[91] *See id. See also* FLA. STAT. ANN. § 542.335(1)(f)(2) (West 2002) ("The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is . . . an assignee or successor to a party to such contract, provided: . . . the restrictive covenant expressly authorized enforcement by a party's assignee or successor.").

The Court of Appeals explained that the district court had erroneously applied case law precedent analyzing an incorrect predecessor statute, rendering the decision inapplicable to the facts of the case.[92] Moreover, the court buttressed its decision by including another section of the same statute, which reads: "[a] court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests . . . . A court shall not employ any rule . . . that requires a court to construe a restrictive covenant more narrowly, against the restraint, or against the drafter of the contract."[93] By including this language, the court implied that Florida courts should err on the side of the employer when resolving difficult issues of assignability of non-compete agreements.

Thus, unlike Ohio and Kentucky, Florida courts directly examine statutory authority when deciding upon the enforceability issue with respect to an assignment of a non-compete clause.[94] Florida also appears to have passed more stringent laws concerning enforceability; only if a non-compete agreement expressly authorizes its assignment can a successor employer enforce such an agreement after a merger or acquisition.[95]

D. Delaware

Delaware has recently addressed this issue in the context of an acquisition in *Great American Opportunities, Inc. v. Cherrydale Fundraising*,[96] where the Court of Chancery decided the question of "whether restrictive covenants contained in an employment agreement lacking an assignability clause are enforceable by a successor company that has purchased substantially all of the original employer's assets."[97]

Recognizing that this was an issue of first impression for Delaware, the court explained that "[w]hile personal service contracts usually may not be assigned, noncompete agreements and other restrictive covenants exist *for the benefit of the business* and not the individual parties. Thus, the business, whether as assignee or assignor, should enjoy the benefit by having the power to enforce such restrictive covenants."[98]

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[92] *DePuy*, 95 So. 3d at 935.

[93] *Id.* at 937 (quoting FLA. STAT. ANN. § 542.335(1)(h) (West 2002)).

[94] *Id.* at 936–37.

[95] *See id.* at 936. *See also* FLA. STAT. ANN. § 542.335(1)(f)(2).

[96] No. 3718–VCP, 2010 WL 338219 (Del. Ch. Jan. 29, 2010).

[97] *Id.* at *11.

[98] *Id.* The court recognized that the Defendant had cited a case in support of non-assignability, but that it was inapplicable as it was not decided based on Delaware law. *Id.*

The court eventually held: "absent specific language prohibiting assignment, noncompete covenants . . . remain enforceable by an assignee when transferred to the assignee as part of a sale or transfer of business assets regardless of whether the employment contract contains a clause expressly authorizing such assignability, so long as the assignee engages in the same business as the assignor.[99]"

Accordingly, Delaware allows a successor entity to obtain all of the rights of the original employer unless it is in a different business than the employer or there is specific prohibiting language within the contract.[100] Therefore, like Ohio and Kentucky, even absent successor and assigns language, non-compete agreements can be enforced post-merger or post-acquisition in this state.

It is important to note that Delaware is known in the business community for its advantageous laws,[101] prompting many companies to incorporate within the state.[102] One commentator explained, "As a result, [the] interpretation of Delaware corporate law has national significance."[103] Thus, the fact that Delaware conclusively allows corporations to enforce non-compete agreements after an acquisition, even absent consent or specific contractual language, is particularly significant in the broader, national context of enforceability.

The court noted that "[a]s a result, [the case cited] provides no additional insight as to the likely treatment of this issue in Delaware." *Id.*

[99] *Id.* at *12. The court, however, did note that the argument in favor of assignability was particularly strong in this case because the terms of the agreement directly addressed the assignability of contractual covenants contained in the applicable employment contracts. *Id.* Thus, the court implied that the absence of such language could potentially alter future court decisions in Delaware.

[100] *See id.*

[101] *See* ROBERT W. HAMILTON, JONATHAN R. MACEY & DOUGLAS K. MOLL, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 156 (11th ed. 2010) (explaining that the choice of where to incorporate "usually comes down to the jurisdiction where the business is to be conducted or Delaware, the most popular outside jurisdiction").

[102] Michael J. Keliher, *Anti-Takeover Measures—What Standard Should Be Used to Evaluate Them?*, 25 HOUS. L. REV. 419, 427 (1988).

[103] *Id.*

E. Nevada

Nevada recently clarified its previous Supreme Court decision in *Traffic Control Servs. v. United Rentals*,[104]which held that non-compete agreements were not assignable in an asset purchase context absent an explicit assignment clause negotiated at arm's length or supported by separate consideration.[105] While this decision supported the general proposition that personal services contracts are not assignable absent consent, it equivocally included broad language "leading some to believe that the nonassignability of employee noncompetition agreements extended to agreements acquired as the result of mergers as well as to those acquired through asset purchase transactions."[106]

Nevertheless, this issue was clarified in *HD Supply Facilities Maint. Ltd., v. Bymoen*,[107] where a successor corporation that acquired restrictive employment contracts as the result of a merger brought a federal action to enforce such contracts against a former employee.[108] The employee quickly moved to dismiss the employer's claims on grounds that the agreement at issue was "unenforceable under *Traffic Control* because he did not consent to [its] assignment."[109]

To resolve this dispute, the court distinguished non-compete agreements found in mergers from those in acquisitions, stating: "While this particular issue has never been directly confronted in Nevada, historically, this court has recognized a hard-and-fast distinction between the implications of a merger, which is a statutory creature, and an asset purchase, which is not."[110] As such, the court contrasted an asset purchase, "in which an acquirer does not assume the liabilities of the seller, with a merger, which 'imposes upon the surviving corporation all liabilities of the constituent corporations so merged.'"[111]

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[104] 87 P.3d 1054 (Nev. 2004).

[105] *Id.* at 1060.

[106] Robert B. Milligan, *Nevada Supreme Court Rules That Restrictive Employment Agreements Acquired Through Mergers Are Not Subject To Nevada's Strict Assignment Rule*, TRADING SECRETS (July 2, 2009), http://www.tradesecretslaw.com/2009/07/articles/restrictive-covenants/nevada-supreme-court-rules-that-restrictive-employment-agreements-acquired-through-mergers-are-not-subject-to-nevadas-strict-assignment-rule/.

[107] 210 P.3d 183 (Nev. 2009).

[108] *Id.* at 184.

[109] *Id.*

[110] *Id.* at 187.

[111] *Id.* (quoting Lamb v. Leroy Corp., 454 P.2d 24, 26 (Nev. 1969)).

The court further bolstered its decision by looking at a host of other jurisdictions, explaining that "[a]s the majority of courts have concluded when considering this issue, in a merger, the right to enforce the restrictive covenants of a merged corporation normally vests in the surviving entity."[112] Consequently, the court held "that *Traffic Control's* [general] rule of nonassignability [did] not apply when a successor corporation acquires restrictive employment covenants as the result of a merger."[113]

A concurring opinion was issued in the case, primarily to emphasize Nevada statute, which "provides that restrictive [agreements] in Nevada employment [contracts] are enforceable so long as [they are] 'supported by valuable consideration and [are] otherwise reasonable in . . . scope and duration.'"[114] Thus, despite the ruling in *Bymoen*, and in accordance with other jurisdictions, such agreements must still be reasonable in scope and duration to be deemed enforceable by Nevada state court.

Nevada exemplifies a different approach to this issue as it distinguishes enforceability based on the context of the business transaction.[115] As with Ohio, Kentucky, and Delaware, this state, based on the aforementioned case law, removes significant impediments for businesses that obtain non-compete assets as the result of a merger, "thereby reduc[ing] additional costs arising out [of]" business transactions.[116]

F. Connecticut

Like Ohio, Connecticut currently follows the "reasonableness" standard when determining the validity of non-compete agreements, examining factors such as: "(1) the length of time the restriction operates; (2) geographical area covered; (3) the fairness of the protection to the employer; (4) the extent of the restraint on the employee's opportunity to pursue his occupation; and (5) the extent of interference with the public's interest."[117] However, the Connecticut legislature recently passed a bill that significantly deviates from such a standard.[118] Specifically, the bill would void all non-

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[112] *Id.*

[113] *Id.* at 187–88.

[114] *Id.* at 188 (Pickering, J., Concurring) (citing NEV. REV. STAT. ANN. § 613.200 (LexisNexis 2012)).

[115] *See id.*

[116] Milligan, *supra* note 106.

[117] *See* Robert S. Weiss & Assocs., Inc. v. Wiederlight, 546 A.2d 216, 219 n.2 (Conn. 1988).

[118] Patricia Reilly, Matthew Curtin & Stephen Rosenberg, *New Connecticut Law Restricts the Use of Non-Compete Agreements in Acquisitions and Mergers*, ASAP (Littler Mendelson

compete agreements subjected to employees in the event of a business merger or acquisition.[119]

Under this new legislation, a non-compete agreement imposed by the successor entity following a merger or acquisition would be void "unless the employer provides the employee with both a written copy of the agreement and a reasonable period of time to consider the agreement."[120] A "reasonable period of time" was defined in the act as "not less than seven calendar days."[121]

Shortly after its passage, the Governor of Connecticut vetoed the bill due to its ambiguous requirements, stating that it left "certain key terms undefined or unclear."[122] However, the governor suggested the possibility of supporting a revised bill, mentioning that "additional protections for employees may be warranted to guarantee a reasonable period of time to review a written noncompete agreement."[123]

While there are currently no new statutory requirements in Connecticut with respect to non-compete agreements following a merger or acquisition, "this is an issue that the Connecticut General Assembly is likely to revisit in the near future."[124] Moreover, Connecticut is an example of the growing trend in state legislatures to provide additional protections to employees given the general enforceability and assignability of such agreements at common law.[125]

P.C., New Haven, Conn.), June 24, 2013, at 1, *available at* http://www.littler.com/files/press/pdf/2013_06_ASAP_New_CT_Law_Restricts_Non-Compete_Agreements_Acquisitions_Mergers_0.pdf.

[119] *Id.*

[120] *Id.*

[121] *Id.* An employee also has the right to waive the time period given to consider the non-compete agreement. *Id.*

[122] Patricia Reilly, Matthew Curtin & Stephen Rosenberg, *Connecticut's Governor Vetoes Restrictive Non-Compete Bill Due to Lack of Clarity*, ASAP (Littler Mendelson P.C., New Haven, Conn.), July 15, 2013, at 1, *available at* http://www.littler.com/files/press/pdf/2013_07_ASAP_CT_Governor_Vetoes_Restrictive_Non_Compete_Bill_Lack_Clarity.pdf (internal quotation marks omitted) (quoting OFFICE OF THE GOVERNOR, VETO MESSAGE: AN ACT CONCERNING EMPLOYER USE OF NONCOMPETE AGREEMENTS (2013), *available at* http://www.governor.ct.gov/malloy/lib/malloy/2013.7.12_-_veto_message_-_hb_6658.pdf).

[123] *Id.*

[124] *Id.*

[125] *See infra* Part III.G. *See also* Tanick, *supra* note 12.

G. Minnesota

Similar to the legislative activity in Connecticut, the state legislature in Minnesota is currently attempting to enact a bill that "would abolish nearly all . . . restrictive devices impeding or preventing employees from taking competitive positions with other employers."[126] If enacted, Minnesota would join a minority of other states in limiting contractual barriers with respect to an employee's ability to obtain a better job or maintain leverage in employment negotiations.[127]

"The proposed bill . . . would forbid any new noncompete agreements, except in connection with the sale of a business, termination of a partnership, or end of a limited liability company."[128] This would mirror California law regarding non-compete agreements, making such agreements almost per se unenforceable.[129]

After this bill was proposed, it stalled in the House committee, which had no further hearings planned during the session; the measure may be revived in the future by Minnesota lawmakers.[130] However, similar efforts have recently failed in Minnesota primarily due to opposition by business interests, which generally loathe the idea of government intrusion into the private marketplace.[131]

Minnesota is the most recent example of state legislative efforts to minimize the strength of a non-compete agreement between a business and its employees. The failure of these various proposals in Minnesota exemplifies the controversy surrounding whether businesses should be prohibited from enforcing non-compete agreements, not only in the event of a merger or acquisition, but in everyday employment contracts as well.

H. Conclusion

As evidenced by the preceding sections, there are a variety of ways in which state courts construe and enforce non-compete agreements in the

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[126] Tanick, *supra* note 12.

[127] *Id.*

[128] *Id.* These instances should not be confused with employee noncompete agreements; in these cases, the actual person or persons selling their business, partnership, or LLC would be prohibited from competing with the acquiring company. This is distinguished from an employee of the sold business competing with the successor entity.

[129] *Id. See also* CAL. BUS. & PROF. CODE §§ 16600–16602.5 (West 2008).

[130] Tanick, *supra* note 12.

[131] *Id.*

aftermath of a merger or acquisition.[132] In some states, like Ohio, Kentucky, and Delaware, courts are more lenient and employer-friendly, allowing a successor entity to enforce the non-compete agreements of the predecessor employer even absent specific language or employee consent.[133] Conversely, some states, like Florida, have a more stringent legal framework, allowing a successor entity to enforce non-compete agreements of a predecessor employer only when such agreements contain specific contractual language authorizing its assignment.[134]

Still other states, like Nevada, will distinguish the context in which the non-compete agreement was assigned.[135] Using Nevada as an example, if the enforceability issue arises in the context of an asset purchase transaction, courts are unlikely to enforce a non-compete on an employee of the predecessor company.[136] Alternatively, if such an issue arises in the context of a merger, courts in Nevada will enforce the agreement.[137]

Finally, as shown in Connecticut and Minnesota, many government representatives are increasingly wary of restrictive devices on employees in the midst of the great recession.[138] The introduction of new legislation barring the use of these agreements, especially in the context of a merger or acquisition, represents a potential shift toward employee friendly laws, effectively limiting the enforceability of such agreements.[139]

The uncertain, evolving nature of state law surrounding this issue, coupled with the proactive legislative activity in states like Connecticut and Minnesota, exemplifies the importance of examining the public policy implications that arise when a state decides whether to enforce the assignment of non-compete agreements. The following sections discuss such public policy implications and provide the most central arguments to both sides of the debate.

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[132] *See supra* Parts III.A–G.

[133] *See supra* Parts III.A, B, & D.

[134] *See supra* Part III.C.

[135] *See supra* Part III.E.

[136] *See supra* Part III.E.

[137] *See supra* Part III.E.

[138] *See supra* Parts III.F–G.

[139] *See supra* Parts III.F–G.

IV. THE ARGUMENT FOR INCREASED REGULATION AND RENDERING NON-COMPETE AGREEMENTS UNENFORCEABLE POST-MERGER OR ACQUISITION

Proponents of increased regulation[140] present many arguments when opposing the enforcement of non-compete agreements. This Article analyzes two of the main arguments this group frequently makes: (1) decreased competition—occurring as a result of the enforcement of various non-compete agreements—will have a negative effect on the economy; and (2) enforcement of such agreements can lead to inequitable results, mainly due to its positive impact on the employer versus its negative impact on the employee.[141]

A. Decreased Competition, Innovation, and Employee Freedom

Over the past decade there has been a significant increase of employers' use of non-compete agreements, which has led to a 60% rise in litigation over such agreements.[142] This increase likely coincides with the economic recession; as one law professor explained, "When you're in tough economic times, if there are contracts out there, people are more likely to enforce them if they feel damaged by violations."[143] With the frequency of these disputes on the rise, many critics worry these agreements are having the unintended effect of decreasing employee freedom and U.S. entrepreneurship by preventing people from obtaining jobs, launching their own businesses, or hiring workers.[144] These potential consequences of enforcement lead to the main argument non-compete opponents present: such agreements reduce competition among businesses.[145]

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[140] To be clear, increased regulation in this Article means an increase by state and local government in regulatory laws restricting businesses from enforcing non-compete agreements.

[141] *See infra* Parts IV.A–B.

[142] Ruth Simon & Angus Loten, *When a New Job Leads to a Lawsuit: Litigation Over Noncompete Clauses is Rising; Does Entrepreneurship Suffer*, WALL ST. J., Aug. 15, 2013, at B1.

[143] Aisling Swift, *In Tough Economic Times, Non-Compete Agreements Are Ending Up In Collier Courts*, NAPLESNEWS.COM (Dec. 1, 2012), http://www.naplesnews.com/news/2012/dec/01/in-tough-economic-times-non-compete-agreements/.

[144] Simon & Loten, *supra* note 142.

[145] *See* Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 IND. L.J. 979, 995 (2012).

A competitive marketplace is undoubtedly the "backbone of US economic policy."[146] As the U.S. Supreme Court stated, "The heart of our national economic policy long has been faith in the value of competition."[147] Moreover, promoting competition is generally accepted as an effective tool for enhancing consumer well-being, especially during an economic downturn.[148]

Given the importance of competition and its significance to the national economy, some say the benefit of employer protections these agreements offer is outweighed by the potential to increase restrictions on competition within the job market.[149] Indeed, some studies show that workers are less likely to start their own businesses or jump to small startups after a state begins strictly enforcing non-competes.[150] Relatedly, one study, which examined a new law allowing enforcement of non-compete agreements in Michigan, demonstrated that job mobility dropped 8.1% following the passage of the law compared with states that continued disallowing such agreements.[151] However, such studies are not always conclusive; other investigations have found that certain areas of the country, including cities in North Carolina, Texas, and Massachusetts, all experienced heavy job growth in the 1990s even while strictly enforcing non-compete agreements.[152]

Opponents also submit that when workers who are subjected to non-competes leave their place of employment, they often leave a particular industry and take jobs with lower compensation because of the various prohibitions outlined in the agreement.[153] For example, a recently-released MIT study showed that more than a third of 1,029 surveyed engineers who were subjected to non-compete agreements "ended up leaving the

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[146] Maurice E. Stucke, *Is Competition Always Good?*, J. ANTITRUST ENFORCEMENT, Apr. 2013, at 162.

[147] *Id.* at 162–63 (internal quotation marks omitted) (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951)).

[148] *Id.* at 163–64.

[149] Simon & Loten, *supra* note 142.

[150] *Id.*

[151] Jacquelyn Gutc, *Non-compete Agreements May Restrict Employees' Mobility, But Experts Say They Have Benefits*, WORCESTER BUS. J. (Sep. 3, 2012), http://www.wbjournal.com/ article/20120903/PRINTEDITION/308309983/non-compete-agreements-may-restrict-employees-mobility-but-experts-say-they-have-benefits.

[152] *Id.*

[153] *Id.*

[engineering] profession when they changed jobs."[154] As such, many courts that strictly construe non-compete agreements executed by employees do so based on the desire to prevent the individuals from contractually depriving themselves of needed support and consequentially becoming a public burden.[155]

However, most courts have recognized that allowing an employer to enforce any geographic or time restriction on an employee's post-employment desires, without limitation, is unfair.[156] To protect against this, courts have developed the previously described "reasonableness" test,[157] which includes examining such time and space limitations.[158]

Regardless, there are arguments to be made against the enforcement of non-compete agreements, especially in the merger or acquisition context, based on employee freedom, job mobility, and competition. These arguments are also likely intensified by the effects of the great recession and the downturn in the U.S. economy.[159]

B. Inequitable Results

Another argument opponents of enforceability present is that non-compete agreements, especially in the merger or acquisition context, have the propensity to produce inequitable results.[160] This is especially the case when there exists a large disparity in size between the acquiring company and the dissolved company.[161]

For instance, with respect to a smaller company, there is typically an increased personal relationship between the employer and employee due to the frequent daily contact between the parties.[162] In these entities, the original agreement is often reached informally, with trust and familiarity serving as a big factor in finalizing the resulting agreement.[163] As one commentator explained, "In small firms regular contact and communication

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[154] Swift, *supra* note 143.

[155] Albert O. Saulsbury, IV, *Devil Inside the Deal: An Examination of Louisiana Noncompete Agreements in Business Acquisitions*, 86 TUL. L. REV. 713, 737 (2012) (quoting SWAT 24 Shreveport Bossier, Inc. v. Bond, 808 So. 2d 294, 298 (La. 2001)).

[156] *See supra* Part II.

[157] *See* Garrison & Wendt, *supra* note 28, at 110–12.

[158] *See, e.g.*, Rogers v. Runfola and Assocs., Inc., 565 N.E.2d 540, 543–44 (Ohio 1991).

[159] Swift, *supra* note 143.

[160] Schneid, *supra* note 49, at 1504.

[161] *Id.*

[162] *Id.* at 1505–06.

[163] *Id.* at 1506.

with decision-takers who are in close proximity may form the basis for meaningful participation in decision-making and trust-based employee relations."[164] Therefore, some argue that it is unfair to subject an employee to a non-compete agreement with a new employer when the original agreement was made in the context of a small-firm, trust-based negotiation; the trust given to the owner of a small business may not be the same as that which the employee would be willing to give to the manager of a larger company.[165]

Inequity can also emerge if the new employer does not intend to utilize the employees at all, or in the same manner, as the predecessor employer. For example, if the successor entity enforces non-compete agreements of employees it chooses not to retain, the employee, without first being given the opportunity to demonstrate the requisite skill to avoid a potential layoff, is denied any chance to work for either the successor company or a competitor firm.[166] Consequently, the transfer of this asset to a larger company after a merger or acquisition is arguably unfair, as the impact of such a transition has a disproportionate negative effect on the employee versus the employer.[167]

Disproportionality issues do not arise when business transactions occur between large companies because the value and worth of such agreements are often equal and personal bonds between employees and employers often do not materialize.[168] In these instances, there is a stronger case for enforceability; a large company will suffer a greater loss if non-compete assets cannot be sold because these sales are factored into the economic worth of the stock price.[169] Accordingly, common law favors the ability to

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[164] Alex Bryson, *The Impact of Employee Involvement on Small Firms' Financial Performance*, 169 NAT'L INST. ECON. REV. 78, 87 (1999).

[165] Schneid, *supra* note 49, at 1504–06.

[166] *Id.* at 1510.

[167] *Id.* at 1513. It should be noted, however, that some states, like Delaware, protect against this inequity by requiring the assignee of a non-compete agreement to engage in the same business as the assignor. *See* Great Am. Opportunities, Inc. v. Cherrydale Fundraising, L.L.C., 2010 WL 338219 at *12 (Del. Ch. Jan. 29, 2010) (holding that non-compete agreements remain enforceable so long as the assignee engages in the same business as the assignor).

[168] Schneid, *supra* note 49, at 1504–05.

[169] *Id.* at 1505.

assign and transfer such agreements in the large company context, as it does other forms of property, because it increases free market efficiencies.[170]

Notwithstanding such considerations, an argument can be made that business transactions like mergers and acquisitions should be encouraged as they may produce a positive effect on the overall national economy (regardless of the size of each entity).[171] In addition, as the next section will demonstrate, alternative arguments do exist supporting the enforcement of these agreements in the merger or acquisition context.[172]

V. THE ARGUMENT IN SUPPORT OF THE ENFORCEABILITY OF NON-COMPETE AGREEMENTS POST-MERGER OR ACQUISITION

A. Mergers and Acquisitions Are Not Necessarily Bad For The Economy and Should Be Encouraged By Public Policy

"[M]ergers and acquisitions have tended to come in waves,"[173] and are linked to the availability of credit, changes in government policy, and bursts in business innovation.[174] Moreover, economic conditions, such as the strength in the stock market, heavily affect such corporate activity.[175] The increase in these business transactions has often been linked to positive overall economic growth across the country.[176]

Nevertheless, many critics oppose encouraging this activity for many of the same reasons they oppose the general use of non-compete agreements.[177] These critics suggest that mergers and acquisitions lead to decreased competition and entrepreneurial activity, and an overall increase in product prices.[178] Specifically, they contend that fewer companies competing for the same number of customers results in higher prices and a less efficient use of

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[170] Alice J. Baker, *Legislative Prohibitions on the Enforcement of Post-Employment Covenants Not to Compete in the Broadcasting Industry*, 23 HASTINGS COMM. & ENT. L. J. 647, 650 (2001).

[171] *See infra* Part V.A.

[172] *See infra* Part V.B.

[173] Christopher Matthews, *Mergers and Acquisitions Boom! Is This a Good Sign for the Economy?*, TIME (Feb. 15, 2013), http://business.time.com/2013/02/15/mergers-and-acquisitions-boom-is-this-a-good-sign-for-the-economy/.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] Edward Lotterman, *Real World Economics: Mergers Good, Mergers Bad; It Depends*, TWINCITIES.COM (Mar. 13, 2013), http://www.twincities.com/ci_22785207/real-world-economics-mergers-good-mergers-bad-it-depends.

[178] *Id.*

recourses.[179] For example, research indicates that consumers believe they receive better services or prices from only 29% of mergers.[180] Consequently, "states . . . have become [increasingly] aggressive in recent years in attacking merger activity on competitive grounds."[181]

However, mergers and acquisitions can have a positive effect on businesses, consumers, and the economy in general.[182] As an obvious example, such business activity can prevent small business from failing, allowing such companies to continue producing in the event of an economic downturn.[183] If these companies were forced to go out of business, the competition they would have offered would have been lost either way.[184]

Further, growing and expanding a company can increase individual specialization and development of expertise.[185] For example, a small company often restricts direct employee specialization due to the multiple areas in which each employee is required to function.[186] Conversely, a larger company can allow an employee to develop a discrete skill, increasing his or her productivity and value.[187]

Perhaps most importantly, mergers and buyouts are almost always good for consumers when they aid in the development and growth of a start up company.[188] In this respect, such business activity increases innovation; the resulting increase in capital—due to the merger or acquisition of a small company—helps the company thrive in the marketplace.[189] According to one business professor, "The reality is . . . [y]ou need the big guys with deep

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[179] *Id.*

[180] Jason DeRusha, *Good Question: Are Mergers Ever Good For Consumers?*, CBS NEWS (Mar. 21, 2011), http://minnesota.cbslocal.com/2011/03/21/good-question-are-mergers-ever-good-for-consumers/.

[181] THOMAS LEE HAZEN & JERRY W. MARKHAM, MERGERS, ACQUISITIONS, AND OTHER BUSINESS COMBINATIONS 513 (2003). *See, e.g.*, New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002) (joint actions were brought by the attorney generals of several states in an antitrust action against Microsoft Corporation).

[182] Lotterman, *supra* note 177.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id. See also* Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 299–303 (2006).

[188] DeRusha, *supra* note 180.

[189] *Id.*

pockets and the ability to blow it out into the marketplace . . . [w]ithout those kinds of buyouts and mergers, many consumer innovations would never have been widely available."[190]

The argument follows that mergers and acquisitions should be encouraged in our society, as they have been instrumental in creating and increasing technological innovation. Hence, public policy should be geared towards encouraging business activity and allowing the marketplace to create and define the bounds of business competition.

B. Non-Compete Agreements Are an Incredibly Valuable Asset to Companies; Mergers and Acquisitions Should Not Be Discouraged Because of Potential Issues with the Transferability of These Assets

Non-compete agreements are incredibly valuable to any given business.[191] These agreements help companies in a variety of ways, including: preventing employees from unfairly stealing business; eliminating the risk of wasting assets training and recruiting an employee only to lose him or her to a competitor; protecting valuable interests and information; and dissuading competitors from "cherry picking" valuable employees.[192] As one commentator explained, "[I]t goes without saying that a non-competition agreement is a valuable asset of a business that is likewise viewed as a valuable asset to a prospective business purchaser or candidate for merger."[193] Especially if a business has spent a lot of time and effort developing customer lists, highly specialized operating procedures, or revolutionary technology, it is always a wise course of action to arrange non-compete agreements to protect such information from possible competitors.[194]

1. The Loss of This Asset Can Lead To Increased Costs and a Decrease in the Value of the Company

In the merger or acquisition context, the loss of employees due to ineffective non-compete agreements can increase costs on the surviving

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[190] *Id.*

[191] Corrigan & Kass, *supra* note 3.

[192] David Metzger & Edward Richters, *Guide to Non-Compete Agreements: Are They Right for Your Business?*, CONN. BUS. & INDUS. ASS'N, http://www5.cbia.com/hr/guide-to-non-compete-agreements/ (last visited Feb. 20, 2014).

[193] Corrigan & Kass, *supra* note 3.

[194] *Protecting Business Information Through Confidentiality and NonCompete Agreements*, BIZFILINGS (May 24, 2012), http://www.bizfilings.com/toolkit/sbg/office-hr/managing-the-workplace/confidentiality-and-noncompete-agreeements.aspx.

entity; it is almost certain that employee turnover costs money—money that could undoubtedly be better utilized elsewhere.[195] Some commentators describe expenses associated with employee turnover to include "separation costs, replacement costs, training costs, and reduced productivity costs."[196]

In the current economic climate it is increasingly important to reduce such costs for any business to succeed. Suffering direct costs from the loss of an employee, and from the hiring of that employee by a competitor, will be detrimental to all types of corporations, especially after a large-scale reorganization characterized by a merger or acquisition.[197] Non-compete agreements in this context prevent a business from suffering such losses, evidencing their increased value in a business transaction context.

Moreover, with respect to a merger or acquisition, a business will suffer an *identifiable* economic loss if non-compete agreements become unenforceable prior to or during the transaction, as these assets are typically factored into the economic worth of the business.[198] Therefore, denying the assignment of a non-compete agreement reduces the amount an owner can obtain from the sale of his or her business or the value stockholders can utilize during negotiations for a merger of their company.[199]

2. An Employee Can Already Utilize Multiple Tools To Decrease the Negative Impact of a Non-Compete Agreement

When discussing the value and worth of a non-compete agreement to a business compared to the potential detrimental impact to an employee, one must remember that the contract was originally entered into, signed, and mutually agreed upon by both the employer and employee.[200] When the initial contract was executed, both sides had the opportunity to insist on a provision explicitly permitting or denying a future assignment.[201]

Further, in each state, there exists a multitude of defenses an employee can utilize when subjected to such an agreement.[202] Although each state has different variations, typical defenses include prior material breach, unclean

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[195] Griffin Toronjo Pivateau, *Preserving Human Capital: Using the Noncompete Agreement to Achieve Competitive Advantage*, 4 J. BUS. ENTREPRENEURSHIP & L. 319, 326 (2011).

[196] *Id.* at 327.

[197] *Id.* at 326.

[198] Schneid, *supra* note 49, at 1505.

[199] *Id.* at 1507.

[200] *Id.* at 1514.

[201] *Id.*

[202] *See* Corrigan & Kass, *supra* note 3, at 85–87.

hands, termination without cause, lack of consideration, and waiver.[203] Thus, if an employee is subjected to an unfavorable non-compete agreement with his or her company following a merger or acquisition, common law has developed several ways in which an employee can escape the jaws of the successor company.[204] And, if these options are insufficient, one must keep in mind that the agreement to which the employee may be subjected was executed willingly, with his or her approval; such observations seemingly prevent critics from deeming enforcement "unfair" in any way.[205]

Public policy may support the proposition that corporate rights should be protected during an expansion or change in ownership; specifically, employers should not be required to take additional steps prior to a merger or acquisition to ensure enforceability, absent an express statutory mandate. Despite that, it is always wise for the employer to protect against all possible future issues by including relevant language within each of its non-compete agreements.[206]

VI. DRAFTING AN EFFECTIVE NON-COMPETE AGREEMENT IN ANTICIPATION OF A MERGER OR ACQUISITION

Non-compete agreements are very common for any business, and as previously mentioned, the use of such agreements has been increasing over the last decade.[207] Upon drafting a non-compete agreement there are numerous considerations to take into account including, but not limited to, the following: duration and geographic limitations; the nature of the protected interests; the presence or absence of consideration; the possibility of severability and reformation of the agreement; potential remedies in the event of a dispute; the actual beneficiaries of the agreement; the presence or

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[203] *Id.* A discussion of the particularities behind each of these defenses is outside the scope of this Comment as they are vast and numerous; the knowledge that such defenses exist is sufficient for the purposes of this Article.

[204] *See generally id.*

[205] *See* Beit v. Beit, 63 A.2d 161, 163 (Conn. 1948). *See also* BLACK'S LAW DICTIONARY 420 (9th ed. 2009). A non-competition agreement by definition is a contractual promise between an employer and an employee; such an agreement cannot be executed unless each party signs, and consents to the agreement. *Id.*

[206] *See infra* Part VI.

[207] Simon & Loten, *supra* note 142.

absence of potential successors and assigns and; the choice of law construing the agreement.[208]

A complete examination of all the relevant criteria one should consider when drafting such agreements is unnecessary for the purposes of this Comment. Because this Article focuses specifically on enforceability in the context of a merger or acquisition, the most important consideration will be ensuring the assignability of such agreements.

A. Successor and Assigns Language

Assignability of non-compete agreements depends on the applicable state law, as evidenced earlier in this Article.[209] For example, in Florida, statutory law requires courts to enforce restrictive covenants against assignees and successors only if the covenant expressly authorizes enforcement by assignees or successors.[210] Alternatively, in Nevada, the assignability is different in the context of a merger versus an acquisition.[211] However, even if a business is located in a state (like Ohio) that specifically authorizes assignability in a merger context regardless of "successor[s] or assigns" language,[212] that business should still ensure that such language is included within the agreement in preparation for any potential employment disputes or changes in state law.

Therefore, an employer should take care to include language indicating that the agreement can be enforced by the employer's successors or assigns to the same extent as the employer and that nothing should otherwise limit the employer's ability to assign the agreement.[213] A clause articulating these principals may ensure enforceability after a merger or acquisition if a business is located in an unfavorable state.[214]

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[208] *See generally* Sill, *supra* note 24. *See, e.g.*, Brentlinger Enters. v. Curran, 752 N.E.2d 994 (Ohio Ct. App. 2001) (explaining the relevant criteria examined in Ohio when determining the validity of non-compete agreements).

[209] *See supra* Part III.

[210] *See* FLA. STAT. ANN. § 542.335(1)(f)(2) (West 2002). *See also supra* Part III.C.

[211] *See* Tamara Jankovic, Anthony Hall & Dora Lane, *Assigning Noncompete Agreements*, 15 No. 2 NEV. EMP. L. LETTER 1 (Nov. 2009). *See also supra* Part III.E.

[212] Acordia of Ohio, L.L.C. v. Fishel II, 133 Ohio St.3d 356, 2012-Ohio-4648, 978 N.E.2d 823, at ¶¶ 6–10.

[213] *See* Sill, *supra* note 24, at 410–11.

[214] *Id.*

B. Employee Consent

Consent of the employee after a merger or acquisition can also become an issue, as some states have limited the enforceability of non-compete agreements to those to which the employee has expressly consented.[215] Moreover, as previously discussed, some state legislatures have begun passing laws that limit enforceability to instances where the employee expressly consents to the new agreement after a merger or acquisition.[216]

Consequently, it is wise for an employer to include a clause within the agreement articulating that the employer is not required to seek prior consent of the employee upon the assignment of the contract.[217] The clause should also state that, by his or her signature, the employee consents to any such future assignment.[218]

VII. CONCLUSION

The weight of current state law appears to support the enforcement of non-compete agreements post merger or acquisition.[219] Some states will universally uphold the validity of non-competes while others will require "successor and assigns" language or employee consent.[220] Even with the latter, however, the inclusion of a few key sentences within an employment contract can make valid an otherwise unenforceable non-compete agreement.[221]

Furthermore, it is undeniable that non-compete law is continuously evolving. Changes in the strength of the economy have prompted the contention that these agreements, especially in the merger or acquisition context, restrict the freedom of every day workers and decrease their overall well-being.[222] These critics also contend that enforcement can lead to inequitable results, with the employee being subjected to unfair, archaic limitations with respect to his or her employment possibilities.[223]

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[215] *See, e.g.*, Virchow Krause & Co. v. Schmidt, No. 266271, 2006 WL 1751835, at *2 (Mich. Ct. App. June 27, 2006) (discussing when employee consent is required in Michigan with respect to the enforceability of non-compete agreements).

[216] *See supra* Parts III.E–F.

[217] *See* Sill, *supra* note 24, at 411.

[218] *Id.*

[219] *See supra* Part III.

[220] *See supra* Part III.C.

[221] *See supra* Part VI.

[222] *See supra* Part IV.A.

[223] *See supra* Part IV.B.

Yet, the economic benefits of mergers and acquisitions, the non-compete agreements' high value to businesses, and the already available defenses employees have against enforcement all support a policy favoring enforcement.[224] Hence, public policy should recognize the value of these agreements after a significant business reorganization like a merger or acquisition.

In the end, businesses and employers should always take care to include the relevant and highly litigated "successors and assigns" and consent language within their employment contracts to protect against any potential issues or changes to the previously discussed legal framework. The inevitable development and progression of state law concerning this issue will undoubtedly continue the debate for many years to come.

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[224] *See supra* Part V.