

Client Alert

A report
for clients
and friends
of the firm April 2003

Proskauer Earns Major Victory In Florida's Highest Court

The Boca Raton Labor and Employment Law Department, on behalf of Corporate Express Office Products, Inc., obtained a victory of major significance to Florida businesses and, in particular, to corporate acquisitions. On April 17, 2003, the State's highest court unanimously reversed an intermediate appellate court decision that, in the context of a one-hundred percent stock purchase, merger and name change, had deprived a successor company's right to enforce non-compete agreements that its former employees had entered into with the predecessor company. With this victory, Proskauer prevented an anti-business trend that started in Vermont and began creeping into Florida's jurisprudence, and confirmed that, even in the context of non-compete agreements that are themselves *sui generis* and in derogation of the common law, established principles of corporate law nonetheless determine which rights and liabilities flow to a successor corporation.

In a unanimous opinion, the Supreme Court of Florida in *Corporate Express Office Products, Inc. v. Doug Phillips, et al.*, held that a surviving successor corporation resulting from a one-hundred percent stock purchase transaction, merger and name change obtains the right to enforce a pre-1996 non-compete agreement entered between its former employees and the predecessor corporation by operation of law, and no assignment or employee consent is necessary. In so holding, this decision represents the only decision of the highest court of any state to reject a culture and mode of operation analysis in favor of hornbook corporate law to determine the enforceability of non-compete agreements. Thus, while certainly impacting Florida law, the Florida Supreme Court's decision has the integrity and weight of authority that is capable of impacting and influencing decisions concerning the enforceability of non-compete agreements nationwide.

Corporate Express, whose right to enforce the non-compete agreements has now been affirmed, had been deprived the right to enforce non-compete agreements entered into between the predecessor corporations and its employees who had joined Corporate Express' sales force as a result of Corporate Express's acquisitions of the predecessor corporations. Initially, Corporate Express prevailed in obtaining preliminary injunctions against the former employees based upon the Trial Court's determination that Florida's corporate law provides that after the change in ownership or stock sale, merger or name change, liabilities and property rights are not changed. Because the rights to the former employees' pre-1996 non-compete agreements passed by operation of law, Corporate Express had the right to enforce the agreements, and no assignment was necessary. Accordingly, the Trial Court enjoined the employees from further breach of their non-compete agreements and enjoined the employees and their new employer from using and/or disclosing Corporate Express' trade secrets and other confidential information in violation of Florida statutory and common law.

On appeal, the Fifth District Court of Appeal reversed the entry of the preliminary injunctions and found that Corporate Express lacked standing to enforce the non-compete agreements that the former employees had entered into with the predecessor corporations. In so doing, the Fifth DCA eschewed reliance on the form of the corporate transactions at issue and, instead, substituted a novel test of changing corporate identity based on an analysis of changes in corporate "culture and mode of operations." Creating new precedent in Florida, the appellate court held that, regardless of the nature of the transaction (*i.e.* stock purchase, asset purchase, merger or name change), a "successor" corporation does not have the right to enforce a non-compete agreement absent the express consent of the employee because each company's culture and mode of operation is unique.

The Supreme Court of Florida rejected the lower appellate court's novel test and, instead, relied on settled principles governing corporate dissolutions, asset sales, stock sales and mergers. Agreeing with Corporate Express' arguments that traditional principles of corporate law determine the obligations and

liabilities of a successor corporation and dictate the outcome of the case, the Supreme Court of Florida held that based on fundamental principles of commercial transactions and the applicable statutes, in contrast to an asset purchase, neither a change in the ownership of corporate stock nor a merger nor a name change alters a corporation's existence, corporate identity, or corporate rights and, therefore, none affects the enforceability of a pre-1996 non-compete agreement that does not contain any "successors or assigns" language. The Supreme Court of Florida expressly rejected the intermediate appellate court's novel test because reliance on changes in corporate culture and mode of operation as a measure of whether an employer has changed identity, and therefore must obtain a consensual assignment of a non-compete agreement, would inject unnecessary uncertainty into corporate transactions. Acknowledging Corporate Express' arguments, the Supreme Court of Florida recognized that changes in corporate culture occur frequently, often in response to market forces and without a corresponding change in corporate structure. As such, provided the non-compete agreement is otherwise enforceable, neither a one-hundred percent stock purchase, nor a merger, nor a name change affects the enforceability of the non-compete agreement, and no additional assignments necessitating the employees' consent were required to enable Corporate Express to seek enforcement of the pre-1996 non-compete agreements.

In so ruling, the Supreme Court of Florida conformed its holding with the policy of preserving the sanctity of contract and providing uniformity and certainty in commercial transactions in Florida. Indeed, based on this case, the sole inquiry is limited to whether proper corporate form was followed and, therefore, whether an entity is a true "successor" or "assign" can no longer be questioned by arguing that differences in culture or mode of operations preclude such a label. Thus, this holding would be applicable to non-compete agreements entered into after 1996 by limiting the issue to whether proper corporate forms were utilized and, therefore, whether an entity is a "successor" or "assign" is not subject to attack based on an alleged change in "culture and mode of operation", but is determined solely by examining its corporate form.

Allan Weitzman, who argued the case before the Supreme Court of Florida, was assisted in this case by Sarah Mindes.

Congratulations to Allan and Sarah on this very important decision.

The decision can be found at: <http://www.flcourts.org>

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