

**THE ABILITY OF SUCCESSOR EMPLOYERS TO
ENFORCE COVENANTS NOT TO COMPETE**

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I. INTRODUCTION

An employee signs an employment contract with Company A to be a window washer, earning \$15.00 per hour. The employment contract states that the employee will not compete with Company A for one year after her termination within a 100 mile radius of Company A's principal place of business. Subsequently, all of Company A's assets are purchased by Company B, and shortly thereafter, Company B announces that it will cut the employee's wages to \$10.00 per hour. Having no desire to work for Company B for only \$10.00 per hour, the employee quits to go work for a competitor who pays \$15.00 per hour. Immediately, Company B seeks to prevent this by attempting to enforce the covenant not to compete entered into between the employee and Company A.

This hypothetical presents the issue of whether a successor employer can enforce a covenant not to compete between an employee and a predecessor employer. On this issue, courts are split three ways nationally and two ways in Ohio.¹

One group of courts, focusing on contract law, holds that successor employers can enforce covenants not to compete only where employees consent to the assignment of the covenant from the predecessor employer to the successor employer.² Some Ohio courts have adopted this approach.³ Thus, where employee consent is required, the successor employer in the above hypothetical can only enforce the covenant not to compete if the employee consents to the assignment of the covenant.⁴

A second group of courts, also focusing on contract law, holds that a successor employer can enforce a covenant not to compete between an employee and a predecessor employer because the successor employer is a third-party beneficiary of the covenant not to compete.⁵ Ohio courts have not adopted this approach.⁶ Under this view, the successor employer in the above hypothetical is entitled to enforce the covenant not to compete between the employee and the predecessor employer.⁷

A third group of courts ignores the traditional concepts of contract law altogether. This group focuses on property law, holding that successor

¹ Compare *Pestel Milk Co. v. Model Dairy Prods. Co.*, 52 N.E.2d 651, 657 (Ohio Ct. App. 1943), with *Supplies for Indus., Inc. v. Christensen*, 659 P.2d 660, 662 (Ariz. Ct. App. 1983), and *Safier's, Inc. v. Bialer*, 93 N.E.2d 734, 736-37 (Ohio Ct. Com. Pl. 1950).

² See, e.g., *Pestel Milk Co.*, 52 N.E.2d at 657.

³ See, e.g., *id.*

⁴ See *id.*

⁵ See, e.g., *Supplies for Indus., Inc.*, 659 P.2d at 662.

⁶ See generally *Artromick Int'l, Inc. v. Koch*, 759 N.E.2d 385, 387-88 (Ohio Ct. App. 2001) (discussing approaches adopted in Ohio).

⁷ *Supplies for Indus., Inc.*, 659 P.2d at 662.

employers are entitled to enforce covenants not to compete because such covenants are company assets, which are generally transferable where one business is being transferred to another.⁸ Some Ohio courts have adopted this approach.⁹ Under this approach, the successor employer in the above hypothetical acquired the covenant not to compete in the transfer of assets from the predecessor company and, therefore, can enforce the covenant not to compete.¹⁰

This Article argues that Ohio courts should chart a new course and only permit a successor employer to enforce a covenant not to compete under three circumstances. First, the employee must give express consent not to compete against the successor employer. Second, the contract of sale or merger between the predecessor employer and the successor employer must specify that any covenants entered into between the predecessor employer and its employees are transferable assets of the predecessor employer that are being assigned to the successor employer. Third, the successor employer must have an interest to protect by enforcing the covenant. Enforcing non-compete covenants only under these circumstances will ensure that an employee is not bound by the terms of a covenant to which she or he has not consented.

Part II of this Article discusses the general enforceability of covenants not to compete under Ohio law. Part III provides a detailed overview of the “Employee Must Consent,” the “Third-Party Beneficiary,” and the “Covenant is a Transferable Asset” approaches that courts, nationally, have used to resolve the issue of whether successor employers can enforce covenants not to compete. Part IV analyzes the strengths and weaknesses of each approach. Part V sets forth a comprehensive proposal that Ohio courts should consider in determining whether a successor employer can enforce a covenant not to compete. Further, Part V examines the effect that this proposal will have on employees, predecessor employers, and successor employers. Part VI concludes that the proposed approach: (1) incorporates the strengths of the “Employee Must Consent” approaches, the “Third-Party Beneficiary” approach, and the “Covenant is a Transferable Asset” approach; (2) will ameliorate the ambiguity in Ohio law; (3) will give guidance as to how predecessor employers, successor employers, and employees should act; and (4) will protect the rights and interests of employees, predecessor employers, and successor employers.

⁸ See, e.g., *Safier’s, Inc. v. Bialer*, 93 N.E.2d 734, 736-37 (Ohio Ct. Com. Pl. 1950).

⁹ See *id.*

¹⁰ See *id.*

II. THE ENFORCEABILITY OF COVENANTS NOT TO COMPETE

Early Ohio courts held covenants not to compete void as restraints on trade.¹¹ Because workers entered skilled trades only by serving in apprenticeships, mobility was minimal.¹² Accordingly, covenants not to compete were viewed as either destroying a worker's means of livelihood or binding workers to their masters for life.¹³ Nonetheless, as the character of the work world became more flexible, Ohio courts began looking for ways to eliminate this blanket prohibition on employment restrictions.¹⁴

Today, Ohio courts will only uphold covenants not to compete where the covenant is reasonable.¹⁵ In the 1975 case of *Raimonde v. Van Vlerah*, the Ohio Supreme Court held that a covenant restricting an employee from competing with his former employer is reasonable if (1) the restraint is no greater than is required for the protection of the employer; (2) the restraint does not impose undue hardship on the employee; and (3) the restraint is not injurious to the public.¹⁶ In determining whether non-compete covenants are reasonable, Ohio courts analyze each of the above requirements by considering the following factors: (1) whether the agreement contains time and space limitations; (2) whether the employee is the sole contact with the customer; (3) whether the employee has obtained confidential information or trade secrets in the course of employment; (4) whether the agreement seeks to limit only unfair competition or is designed more broadly to eliminate ordinary competition; (5) whether the agreement seeks to stifle the employee's inherent skill and experience; (6) whether the benefit to the employer is disproportional to the detriment to the employee; (7) whether the agreement bars the employee's sole means of support; (8) whether the skills that the agreement seeks to restrain were actually developed during the employment; and (9) whether the employment forbidden by the agreement is merely incidental to the main employment.¹⁷

A. *No Greater than Necessary*

Ohio courts will only enforce covenants not to compete where the restraint is no greater than what is required to protect the employer.¹⁸ The

¹¹ *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 546 (Ohio 1975) (citing *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (B.R. 1711)).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *Levine v. Beckman*, 548 N.E.2d 267, 270 (Ohio Ct. App. 1988).

¹⁶ *Raimonde*, 325 N.E.2d at 547.

¹⁷ *Id.* (citing *Extine v. Williamson Midwest, Inc.*, 200 N.E.2d 297 (Ohio 1964)).

¹⁸ *Id.*

case *Proctor & Gamble Co. v. Stoneham*¹⁹ from the Hamilton County Court of Appeals, First District, presents an example.²⁰ In *Proctor & Gamble Co.*, Paul Stoneham worked in the haircare division for Proctor & Gamble Company (“P&G”) and focused on hair-conditioning products.²¹ He was an expert in foreign markets, and he obtained knowledge of the needs of foreign consumers and the products that sold best in foreign markets by analyzing raw market research data obtained from a market research firm hired by P&G.²² Thus, as part of his job, Stoneham knew “which products were closest to market, when and where they would be launched, the target consumers, the type of advertising to be used . . . the strengths and weaknesses of the company’s scientific backup for its claims about the products, the price for the new products, and the targeted profits.”²³ Stoneham also produced “a confidential ten-year [marketing] plan for one of P&G’s hair-conditioning products, participated in the development of new products, and helped [fashion] a ten-year marketing plan for P&G’s best selling-brand, Pantene.”²⁴

Stoneham signed a covenant not to compete in return for receiving P&G stock options.²⁵ The covenant barred Stoneham from competing with P&G for three years after the termination of his employment.²⁶ After thirteen years of employment,²⁷ however, Stoneham left P&G to take a job with Alberto-Culver, a company whose haircare products competed with P&G products.²⁸ Shortly thereafter, P&G filed suit against Stoneham for damages and injunctive relief, alleging that he had breached the covenant not to compete.²⁹ However, the trial court dismissed P&G’s claim, holding that P&G had shown no right to relief.³⁰

On appeal, P&G argued that the trial court applied the wrong test to determine whether the non-compete agreement was legally valid.³¹ The appellate court agreed, holding that the trial court erred when it did not cite or refer to the factors enunciated in *Raimonde*.³² Applying six of these

¹⁹ 747 N.E.2d 268 (Ohio Ct. App. 2000).

²⁰ *Id.*

²¹ *Id.* at 271.

²² *Id.* at 271-72.

²³ *Id.* at 272.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 271.

²⁸ *Id.* at 272.

²⁹ *Id.* at 271-73.

³⁰ *Id.* at 271.

³¹ *Id.* at 275.

³² *Id.* at 276.

factors, the appellate court held that the covenant not to compete was reasonable.³³ First, the covenant did not impose an undue hardship on Stoneham because enforcement of the covenant not to compete “would not stifle Stoneham’s inherent skills in marketing or destroy Stoneham’s sole means of support[.]”³⁴ Second, the covenant was reasonable because it permitted Stoneham to work at another company such as Alberto-Culver in a department unrelated to haircare until the non-compete agreement expired.³⁵

Third, the covenant not to compete sought to limit only unfair competition by precluding Stoneham from working for a direct competitor in the international haircare industry.³⁶ Fourth, Stoneham developed his expertise regarding haircare marketing while P&G employed him.³⁷ Fifth, the court held that the three year limitation was reasonable because the “confidential information to which Stoneham had access had a useful life of three to five years.”³⁸

Sixth, the court held that “[t]he overwhelming weight of the evidence presented at the hearing demonstrates that Stoneham was privy to massive amounts of information that constituted trade secrets.”³⁹ Specifically, P&G presented evidence demonstrating that the raw data it received from the marketing firm, in conjunction with its analysis and interpretation of the data, constituted a trade secret because the raw “data was compiled and used in a way unique to P&G, and . . . it could have been duplicated only by the expenditure of vast amounts of time, money, and other resources.”⁴⁰ P&G used the raw data “to create a consumer model to guide all of the marketing for particular products [a]nd cross-indexed the information so that P&G could study subsets of the information, such as the consumer behavior in a certain country related to a certain product.”⁴¹

Lastly, the court found that P&G presented evidence that Stoneham had possession of and used a multitude of P&G’s confidential documents during the course of his employment.⁴² In particular,

³³ *Id.* at 276-78.

³⁴ *Id.* at 276.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 277.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 278. The court thus found sufficient evidence to meet the third prong announced by the *Raimonde* court—specifically, that the employee did in fact possess confidential information and trade secrets. *Id.* at 277-78.

[t]hese documents contained information about new products and their costs, advertising and marketing; about changes in marketing strategy for existing products; about consumer research analysis performed by P&G at great expense and effort, and the consumer research models that resulted from its analysis; and about P&G's future plans for its haircare business on an international level.⁴³

As such, the appellate court held that the covenant not to compete at issue was reasonable⁴⁴ and enforceable.⁴⁵

B. *No Undue Hardship*

In addition to requiring that covenants not to compete be only as restrictive as is necessary to protect employers' legitimate interests, Ohio courts will only enforce covenants not to compete where the restraint does not impose undue hardship on the employee.⁴⁶ In *Rogers v. Runfola & Associates, Inc.*,⁴⁷ the Ohio Supreme Court held that the covenants not to compete at issue were unreasonable because they imposed undue hardships on the employees.⁴⁸

In *Rogers*, Thomas Runfola began a court reporting service under the name "Runfola & Associates" in 1971.⁴⁹ In 1972, Barbara Rogers started working for Runfola, and the two parties signed an employment contract in 1975.⁵⁰ In 1977, Runfola incorporated the business.⁵¹ Soon thereafter, pursuant to an assignment agreement, Runfola transferred the sole proprietorship's assets and liabilities, including the rights and obligations arising under all employment contracts, to the new corporation.⁵²

In 1977, Nicholas Marrone began working for Runfola and signed an employment contract as well.⁵³ Rogers' and Marrone's employment contracts each contained a covenant not to compete.⁵⁴ The covenants prohibited Rogers and Marrone from engaging in court reporting or public

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 280.

⁴⁶ *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (Ohio 1975).

⁴⁷ 565 N.E.2d 540 (Ohio 1991).

⁴⁸ *Id.* at 544.

⁴⁹ *Id.* at 541.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

stenography work in Franklin County for two years.⁵⁵ Additionally, the covenants banned Rogers and Marrone from diverting or soliciting any of Runfola's clients and precluded Rogers and Marrone from "using any client list[s], notes, transcripts, exhibits, files, records or any documents received by or on behalf of Runfola."⁵⁶

In 1988, Rogers and Marrone resigned.⁵⁷ Rogers and Marrone agreed to continue working for Runfola until their contract anniversary dates, but stated that it was their intent to operate their own court reporting firm locally.⁵⁸ In response, Runfola's attorneys immediately sent letters to Rogers and Marrone reminding them of the covenants not to compete.⁵⁹ Rogers and Marrone then filed a declaratory judgment action in the Court of Common Pleas of Franklin County seeking clarification as to the enforceability of their employment contracts.⁶⁰ Runfola counterclaimed, seeking specific enforcement of the covenant not to compete and requesting that Rogers and Marrone be enjoined from violating its provisions.⁶¹

The trial court held that the employment contracts were unenforceable, and that even if the contracts were enforceable, the covenants not to compete were unenforceable because they were unreasonable.⁶² Runfola appealed.⁶³ The court of appeals affirmed the trial court, holding that the covenants were unreasonable, although the court disagreed with the trial court's assessment of the validity of the employment contracts, finding that they were indeed valid.⁶⁴

Using the *Raimonde* factors, the Ohio Supreme Court held that the covenants not to compete, and the hardships these covenants caused Rogers and Marrone, exceeded that which was reasonably necessary to protect Runfola's legitimate business interests.⁶⁵ In particular, the court, examining the space and time restrictions imposed on Rogers and Marrone, observed that the covenants precluded both employees from participating in court reporting or public stenography for two years in Franklin County.⁶⁶ Additionally, the agreement also prohibited Rogers and Marrone

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 542.

⁵⁹ *Id.*

⁶⁰ *Id.* at 541.

⁶¹ *Id.* at 542.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 543-44.

⁶⁶ *Id.* at 544.

from soliciting business from Runfola's or acting against Runfola's interests.⁶⁷ Moreover, the court noted that the profession of court reporting is unique, Rogers and Marrone attended classes to obtain their jobs, Rogers and Marrone worked in this profession for almost their entire professional careers, and that court reporting was the primary profession in which they were skilled.⁶⁸ As such, the court held that these space and time restrictions created an undue hardship on Rogers and Marrone.⁶⁹ Therefore, balancing the projected hardships on Rogers and Marrone against the legitimate business interests of Runfola, the court modified the covenant to prohibit Rogers and Marrone from engaging in court reporting or public stenography work in Columbus, Ohio and soliciting or diverting any of Runfola's clients for a period of one year.⁷⁰

C. *Not Injurious to the Public*

In addition to striking down a covenant not to compete when the covenant is greater than what is required for the protection of the employer and imposes an undue hardship on the employee, Ohio courts will also decline to enforce covenants not to compete if the restraint is injurious to the public.⁷¹ In *Robert W. Clark, M.D., Inc. v. Mount Carmel Health*,⁷² the Court of Appeals of Ohio, Tenth District, Franklin County, upheld a non-compete agreement because the agreement was not injurious to the public.⁷³

In this case, Robert W. Clark, M.D., a board-certified neurologist, owned and operated Robert W. Clark, M.D., Inc., an Ohio corporation practicing sleep medicine.⁷⁴ Early in the 1980's, Dr. Clark established and directed a sleep disorders clinic at Saint Anthony Hospital in Columbus, Ohio.⁷⁵ In light of fiscal difficulties suffered by Saint Anthony, Dr. Clark decided to leave Saint Anthony and relocate his practice.⁷⁶ Subsequently, Dr. Clark and the defendant, Mount Carmel Health ("Mount Carmel") entered into an agreement where Dr. Clark would transfer his sleep medicine practice to Mount Carmel East Hospital ("Mount Carmel East").⁷⁷

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See, e.g., Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (Ohio 1975).

⁷² 706 N.E.2d 336 (Ohio Ct. App. 1997).

⁷³ *Id.* at 343.

⁷⁴ *Id.* at 338.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

The agreement was to last for a seven-year term.⁷⁸ The parties further agreed that it would automatically renew upon expiration of the seven-year term unless one of the parties gave the other a termination notice in writing at least 360 days before the term expired.⁷⁹ Moreover, the agreement contained reciprocal covenants not to compete precluding both parties from providing sleep disorder services during and “upon [the] termination or nonrenewal of the agreement without cause.”⁸⁰ In particular, the covenant stated that in the event that either party, in the absence of just cause, elected to terminate or not renew the agreement, the party terminating or failing to renew could not operate or be involved in the operation of a similar sleep disorder clinic in Franklin County or any of the contiguous counties for two years following the agreement’s termination date.⁸¹

At the conclusion of the initial seven year term, Mount Carmel attempted to negotiate a new agreement with Dr. Clark.⁸² These negotiations failed, and Mount Carmel notified Dr. Clark that it did not intend to renew the agreement at the end of the following term.⁸³ Because Mount Carmel attempted to continue the operation of its sleep disorders clinic with a new medical director, Dr. Clark filed a complaint against Mount Carmel seeking to enforce the covenant not to compete and enjoin Mount Carmel from operating its sleep disorders clinic.⁸⁴ The trial court granted Dr. Clark’s motion for summary judgment, issued an injunction ordering Mount Carmel to close its sleep disorders clinic, and prohibited Mount Carmel from operating any sleep disorders clinic in Franklin County or any contiguous county for two years.⁸⁵ Mount Carmel appealed.⁸⁶

On appeal, Mount Carmel advanced three arguments contending that the covenant not to compete was injurious to the public.⁸⁷ First, Mount Carmel asserted that closing the clinic would deny patients who were being treated the opportunity to obtain necessary health care services.⁸⁸ The appellate court rejected this argument, observing that there were at least twelve other sleep disorder clinics in central Ohio that could provide sleep

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 339.

⁸¹ *Id.*

⁸² *Id.* at 338.

⁸³ *Id.*

⁸⁴ *Id.* at 339.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 343.

⁸⁸ *Id.*

disorder treatment to these patients.⁸⁹ Thus, the restrictive covenant would not prevent individuals from obtaining sleep disorder services as a result of Mount Carmel's temporary elimination from the market.⁹⁰

Second, Mount Carmel argued that individuals currently employed at the clinic would be adversely affected by the closure of the hospital's center.⁹¹ The appellate court rejected this argument, stating that Mount Carmel could absorb these employees in other departments, and the sleep technologists employed at Mount Carmel did not have non-compete agreements with Mount Carmel, and thus were free to leave and accept positions at one of the other sleep disorder clinics in central Ohio.⁹²

Finally, Mount Carmel argued that closing its center would adversely affect the other physician who worked there because he would no longer have the opportunity to choose the facility where he wanted to treat his patients.⁹³ The court rejected this proposition as well, both because there was no evidence that Mount Carmel was the facility of this physician's choice, and because it was "undisputed that this physician ha[d] privileges at other sleep disorders centers."⁹⁴ As such, the court held that the covenant not to compete failed to be injurious to the public.⁹⁵

Not only do Ohio courts recognize the enforceability of covenants not to compete where the three *Raimonde* requirements are satisfied, but the Ohio Supreme Court has also held that such covenants are assignable.⁹⁶ This presents the issue of whether successor employers may enforce otherwise valid covenants not to compete between predecessor employers and employees.

III. THE CONTRACT AND TRANSFERABLE ASSET APPROACHES

Nationwide, courts are split three ways in deciding the issue of whether successor employers can enforce covenants not to compete.⁹⁷ Ohio appellate courts have adopted two of these approaches.⁹⁸

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Rogers v. Runfola & Assocs., Inc.*, 565 N.E.2d 540, 543 (Ohio 1991).

⁹⁷ *Compare Pestel Milk Co. v. Model Dairy Prods. Co.*, 52 N.E.2d 651, 657 (Ohio Ct. App. 1943), *with Supplies for Indus., Inc. v. Christensen*, 659 P.2d 660, 662 (Ariz. Ct. App. 1983), *and Safier's, Inc. v. Bialer*, 93 N.E.2d 734, 736-37 (Ohio Ct. Com. Pl. 1950).

⁹⁸ *Compare Pestel Milk Co.*, 52 N.E.2d at 657, *with Safier's, Inc.*, 93 N.E.2d at 736-37.

One group of courts, focusing on contract law, holds that successor employers can enforce covenants not to compete only where employees consent to the assignment of the covenant from the predecessor employer to the successor employer.⁹⁹ Some Ohio courts have adopted this approach.¹⁰⁰ A second group of courts, also focusing on contract law, holds that successor employers can enforce covenants not to compete because successor employers are third-party beneficiaries of covenants not to compete.¹⁰¹ Ohio courts have not adopted this approach. A third group of courts ignores the traditional concepts of contract law altogether. This group focuses on property law, holding that successor employers are entitled to enforce covenants not to compete because such covenants are company assets, which are generally assignable where one business is being transferred to another.¹⁰² Some Ohio courts have adopted this approach as well.¹⁰³

A. *The “Employee Must Consent” Approaches*

Nationwide, courts requiring employee consent to the assignment of the covenant not to compete before the successor employer can enforce the covenant are split into two sub-groups.¹⁰⁴ One sub-group of courts holds that employees must expressly consent to the assignment of the covenant not to compete from the predecessor employer to the successor employer before a successor employer can enforce it.¹⁰⁵ Some Ohio courts have adopted this approach.¹⁰⁶ Where express consent is absent, another sub-group of courts considers employee behavior, holding that continued employment with the successor employer constitutes employee consent to the assignment of the covenant not to compete.¹⁰⁷ Ohio courts have not adopted this approach.

1. *Express Consent*

One sub-group of courts holds that a covenant not to compete is not assignable, and thus not enforceable by a successor employer without the employee’s express consent to the assignment.¹⁰⁸ *Pestel Milk Co. v. Model*

⁹⁹ See, e.g., *Pestel Milk Co.*, 52 N.E.2d at 657.

¹⁰⁰ See, e.g., *id.*

¹⁰¹ See, e.g., *Supplies for Industry, Inc.*, 659 P.2d at 662.

¹⁰² See, e.g., *Safier’s, Inc.*, 93 N.E.2d at 736-37.

¹⁰³ See, e.g., *id.*

¹⁰⁴ Compare *Pestel Milk Co.*, 52 N.E.2d at 657, with *Peters v. Davidson, Inc.*, 359 N.E.2d 556, 562-63 (Ind. Ct. App. 1977).

¹⁰⁵ See, e.g., *Pestel Milk Co.*, 52 N.E.2d at 657.

¹⁰⁶ See, e.g., *id.*

¹⁰⁷ See, e.g., *Peters*, 359 N.E.2d at 562-63.

¹⁰⁸ See, e.g., *Pestel Milk Co.*, 52 N.E.2d at 657.

Dairy Products Co., a case decided in 1943 by an Ohio appellate court, presents an example.¹⁰⁹ This case involved Pestel Milk Company, a successor company that purchased the assets of its predecessor, Corbin Brothers Milk Company, including all of the employment contracts between Corbin and its drivers.¹¹⁰ The contracts included the drivers' written agreements not to participate in the dairy product business, to refrain from soliciting Corbin's customers for six months after employment, and to refrain from disclosing the names of customers served by the drivers for six months after termination of employment.¹¹¹

After the sale of assets, two drivers continued their employment with Pestel, serving their old customers on behalf of Pestel until they left Pestel to work for a rival milk company, Model Dairy Products Company.¹¹² At no time did the two drivers expressly consent to the assignment of their employment contracts to Pestel.¹¹³ Moreover, while employed with Pestel, the two drivers continually refused Pestel's requests that they sign an employment contract similar to their prior contracts with Corbin. These contracts included covenants that they would not sell similar products in their territory or solicit Pestel's customers.¹¹⁴ After the drivers began working for Model Dairy and serving their old customers on behalf of Model Dairy, Pestel sued Model Dairy and the two drivers to recover damages for diversion of customers.¹¹⁵ Pestel also sought to enjoin both Model Dairy's employment of the two drivers and the two drivers' solicitation of Pestel's customers.¹¹⁶

As their first defense, the two drivers asserted that their conduct was not improper because they had, at all times, refused to sign employment agreements with Pestel.¹¹⁷ As their second defense, the drivers asserted that Pestel could not enforce the employment agreements that they had entered into with Corbin because they did not consent to the assignment of these agreements from Corbin to Pestel.¹¹⁸ The trial court found that neither driver assented to the proposed sale of their employment contract from Corbin to Pestel and that during the six months that the drivers were employed by Pestel, the drivers repeatedly declined Pestel's requests that they sign written employment agreement containing covenants not to

¹⁰⁹ *Id.* at 651.

¹¹⁰ *Id.* at 652.

¹¹¹ *Id.* at 653.

¹¹² *Id.*

¹¹³ *Id.* at 654.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 653.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 654.

¹¹⁸ *Id.*

compete.¹¹⁹ Further, the trial court concluded that, as a matter of law, the drivers were within their rights in accepting employment with Model Dairy, and that after accepting employment with Model Dairy, the drivers were within their legal rights in soliciting and selling milk on behalf of Model Dairy to those individuals who had been customers of the drivers while they were employees of Corbin and Pestel.¹²⁰ As such, the trial court dismissed Pestel's suit.¹²¹ Thereafter, Pestel appealed, arguing that the trial court's findings of fact were contrary to the evidence, that the trial court's conclusions of law were contrary to law, and that the trial court erred in finding for the drivers and not finding for Pestel.¹²²

The Ohio Court of Appeals, Second District, Franklin County, began by recognizing the rule that in the absence of an employee's express agreement not to compete, an employee, upon taking employment in a competing business, may solicit for his new employer the trade or business of his former employer.¹²³ In stating this rule, the *Pestel* court adopted the rationale of *Curry v. Marquart*, which suggests that allowing predecessor employers to assign covenants not to compete without the express consent of employees destroys employees' freedom to change employers within the same profession and thus reduces employees to a position of industrial servitude.¹²⁴

The *Pestel* court then held that the covenants at issue were effective between Corbin and the two drivers and could not be assigned without the express consent of the two drivers.¹²⁵ The court further noted that Pestel's frequent solicitation of the two drivers to sign a contract similar to the contract the drivers had signed with Corbin indicated Pestel's understanding that it could not acquire a right to restrict the drivers from soliciting Pestel customers without a definite agreement from the two drivers themselves.¹²⁶ Accordingly, the court held that Pestel could not enforce the covenants not to compete because the two drivers failed to expressly consent to Corbin's attempt to transfer their contracts to Pestel.¹²⁷

¹¹⁹ *Id.*

¹²⁰ *Id.* at 655.

¹²¹ *Id.* at 652, 655.

¹²² *Id.* at 655.

¹²³ *Id.* at 656 (citing *Curry v. Marquart*, 11 N.E.2d 868 (Ohio 1937)).

¹²⁴ *Curry*, 11 N.E.2d at 868-69.

¹²⁵ See *Pestel*, 52 N.E.2d at 657.

¹²⁶ *Id.*

¹²⁷ *Id.*

2. *Implied Consent*

Where express consent is absent, a second sub-group of courts considers employee behavior, holding that continued employment with the successor employer constitutes employee consent to the assignment of the covenant not to compete from the predecessor employer to the successor employer, therefore entitling the successor employer to enforce the covenant.¹²⁸ The Indiana case of *Peters v. Davidson, Inc.* presents an example. This case involved a sales engineer, William Peters, who signed an employment agreement with Avels, Inc., which contained a covenant not to compete.¹²⁹ The covenant stated that Peters would not compete in anyway with the business of Avels for one year after termination of his employment in the territory in which he was employed or in an adjacent county.¹³⁰ Further, Peters agreed not to refer to his employment for any purpose adverse to Avels, to divert Avels' customers, business, or suppliers for two years after termination of the employment, or to induce to leave, or hire Avels' employees.¹³¹ Peters continued to work for Avels until the day Avels merged with another corporation, Dividend Leasing, Inc., thus forming Davidson, Inc.¹³²

"Following the merger, Peters assumed the same position with [the newly-formed corporation], performing the same duties in the same territory."¹³³ Approximately three years after the merger, however, Peters resigned in order to incorporate a competing business, Fluid Connectors, which operated in the same area Peters previously serviced while at Davidson.¹³⁴ Davidson immediately sought injunctive relief to prohibit Peters from continuing his competitive business.¹³⁵

Davidson claimed that the employment agreement remained valid after the merger.¹³⁶ Additionally, Davidson argued that Peters breached the agreement when he "establish[ed] a competitive business, [sold] identical products to Davidson's customers, induc[ed] Davidson[s] employees to work for Fluid Connectors, and us[ed] Davidson's confidential information."¹³⁷ The trial court entered a preliminary injunction that (1) precluded Peters from participating in any business that was one of

¹²⁸ See, e.g., *Peters v. Davidson, Inc.*, 359 N.E.2d 556, 562-63 (Ind. Ct. App. 1977).

¹²⁹ *Id.* at 558.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 558-59.

¹³⁴ *Id.* at 559.

¹³⁵ See *id.*

¹³⁶ See *id.* at 559.

¹³⁷ *Id.*

Davidson's competitors for a period of one year; (2) precluded Peters for two years from attempting to solicit business from Davidson's clients or attempting to engage in transactions with Davidson's suppliers; and (3) for a two year period precluded clients or Peters from inviting Davidson's employees to work with him or to terminate their employment with Davidson.¹³⁸ Peters immediately appealed,¹³⁹ arguing that despite Davidson's right to enforce the covenant against him, that right lapsed on January 1, 1975 because the covenant's one-year and two-year restrictive periods began when the merger occurred.¹⁴⁰

The Court of Appeals of Indiana, First District,¹⁴¹ first acknowledged that after the merger, Peters' employment continued with Davidson because Peters solicited the business of customers in the same geographic region after the merger without objection.¹⁴² Additionally, the court found persuasive Peters' continued acceptance of all the benefits of his employment agreement, as well as the fact that he worked under the agreement in the same manner as before the merger.¹⁴³ As such, Peters' behavior constituted consent to the assignment of his covenant not to compete from Avels to Davidson.¹⁴⁴ Further, the court held that a simple name change following a valid merger, where the rights to an employment agreement are transferred, does not relieve employees of their contractual obligations.¹⁴⁵ Thus, the court held that Peters' termination of his employment on December 12, 1975, constituted the condition that triggered the terms of the covenant not to compete, and that Davidson, the corporation created by way of the merger, was entitled to enforce the covenant because it was the rightful successor to Peters' employment agreement.¹⁴⁶

B. *The "Third-Party Beneficiary" Approach*

Another group of courts, also focusing on contract law, holds that successor employers can enforce covenants not to compete because successor employers are third-party beneficiaries of such covenants.¹⁴⁷ Ohio courts have not adopted this approach.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 562.

¹⁴¹ *Id.* at 556.

¹⁴² *Id.* at 562.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 562-63.

¹⁴⁵ *Id.* at 562.

¹⁴⁶ *Id.* at 562-63.

¹⁴⁷ *See, e.g.,* *Supplies for Indus., Inc. v. Christensen*, 659 P.2d 660, 662 (Ariz. Ct. App. 1983).

The Arizona case of *Supplies for Industry, Inc. v. Christensen* illustrates this approach. In *Supplies for Industry, Inc.*, Larry Christensen sold the business he had founded, Supplies for Industry, Inc. (“SFI”) and entered into an employment agreement with the purchaser, IMC Magnetic Corp. (“IMC”), to act as president and general manager of SFI.¹⁴⁸ In the employment agreement, Christensen agreed that during his employment and for three years afterwards, he would not compete in any business supervised or co-supervised by him during his employment.¹⁴⁹ The employment agreement defined the SFI Division as “. . . ‘the subsidiary or subsidiaries or division or divisions of the Company which from time to time in the future operate the business conducted by [SFI] . . .’”¹⁵⁰

IMC then sold its division stock to another corporation, Bennett Investment, Corp. (“Bennett”).¹⁵¹ Under the sales contract, “Bennett agreed to honor the terms of Christensen’s employment contract [provided] Christensen so desired.”¹⁵² After continuing as president and then consultant, Christensen left to become an employee for a direct competitor.¹⁵³ SFI then sought to enjoin Christensen from competing with it.¹⁵⁴ After the trial court granted an injunction ordering that Christensen refrain from engaging in business competition with SFI for a period of three years, Christensen appealed.¹⁵⁵ Christensen argued that SFI had no right to enforce the covenant not to compete because SFI was neither an assignee nor a third party beneficiary of the contract.¹⁵⁶ Alternatively, Christensen argued that “even if SFI were an assignee or third party beneficiary of the contract, SFI [was] precluded from enforcing the covenant . . . because the release given to Christensen by IMC [constituted a] discharge of the covenant.”¹⁵⁷

The Court of Appeals of Arizona, Division Two,¹⁵⁸ began by stating that “[a] third party intended beneficiary is found where recognition of the right to performance in the beneficiary is appropriate to effectuate the intention of the parties, and the circumstances indicate that the promisee intended to give the beneficiary the benefit of the promised

¹⁴⁸ *Id.* at 661.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (omissions indicated in original).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 660.

performance.”¹⁵⁹ The court noted that SFI, the division’s successor, was the only subsidiary under Christensen’s contractual promise not to compete with any subsidiary of the purchaser conducting the business of his old corporation in the future.¹⁶⁰ Thus, SFI was an intended third-party beneficiary of the employment contract since the purpose of the covenant was to protect the business operated by SFI, even if SFI were to change its name.¹⁶¹ Consequently, the court upheld the covenant not to compete, thus entitling SFI to enforce it.¹⁶²

C. *The “Covenant Is a Transferable Asset” Approach*

While the cases discussed in Parts III(A) and III(B) of this Article examine the traditional concepts of contract law in deciding this issue, other courts look to property law. These courts hold that successor employers are entitled to enforce non-compete covenants because such covenants are company assets, which are generally assignable where one business is being transferred to another.¹⁶³ Some Ohio courts have adopted this approach.¹⁶⁴

An example is the 1950 Ohio Court of Common Pleas, Cuyahoga County, decision *Safier’s, Inc. v. Bialer*.¹⁶⁵ In *Safier’s, Inc.*, A.D. Goodman-Golden Co. (“A.D.”), a company engaged in a general cigarette, tobacco, and candy business, employed a salesman, Jack Bialer.¹⁶⁶ Bialer’s job was to make periodic calls on ninety-five of A.D.’s customers.¹⁶⁷ Bialer’s employment contract provided that if Bialer’s employment was terminated, he would not engage in the same business directly or indirectly as a salesman in the county in which A.D. operated for a period of one year.¹⁶⁸ After Bialer learned of A.D.’s attempts to sell all of its assets, he entered into a new employment agreement with A.D.¹⁶⁹ This contract was substantially similar to the original employment contract.¹⁷⁰ Although the original agreement made no reference to successors and assigns, the new

¹⁵⁹ *Id.* at 662 (citing RESTATEMENT (SECOND) OF CONTRACTS § 302 (1982)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See, e.g., Safier’s, Inc. v. Bialer*, 93 N.E.2d 734, 736-37 (Ohio Ct. Com. Pl. 1950).

¹⁶⁴ *See, e.g., id.*

¹⁶⁵ *Id.* at 734.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 735.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

contract stated that the agreement was “between [A.D.] ‘*their successors and assigns.*’”¹⁷¹

Soon thereafter, A.D. sold all of its assets and business to another corporation, Safier’s, Inc. (“Safier’s”).¹⁷² The written contract between the parties stated the following: “Seller agrees to assign to the Buyer all contracts of employment held by Seller with certain of its employees”¹⁷³ Bialer was one of the employees stipulated in the contract of sale.¹⁷⁴ Safier’s then offered Bialer employment under the terms of his employment contract with A.D., which Bialer accepted.¹⁷⁵ Several days later, however, Bialer changed his mind, quit, and began working for a competitor and soliciting Safier’s customers.¹⁷⁶ Subsequently, Safier’s sued Bialer, alleging that A.D. had a collective bargaining agreement with the Commission House Drivers and Employees Union, Local 400, A.F.L.; that this agreement covered its salespersons; and that A.D. assigned this agreement to Safier’s as part of the transaction between A.D. and Safier’s.¹⁷⁷

The Court of Common Pleas of Ohio, Cuyahoga County, held that a covenant is enforceable by a successor employer where an employment contract states that its provisions, including a covenant not to compete, are for the benefit of the predecessor employer, its successors, and assigns.¹⁷⁸ Before reaching this conclusion, however, the court addressed what it believed to be the central issue—whether a covenant not to compete is a business asset transferable with the business and enforceable by the successor.¹⁷⁹

The court began by stating that a business’s good will is a valuable asset.¹⁸⁰ Further, the court acknowledged that “[t]he right to sell as a part of a business the ‘good will’ developed over a period of years cannot be questioned and . . . ‘good will’ must in a case such as this include the trade built up over the years with particular tradesman.”¹⁸¹ The court continued by stating that good will, as property of an employer, can be protected by way of covenants not to compete.¹⁸² Additionally, the court acknowledged

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 736.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 739.

¹⁷⁹ *Id.* at 735-36.

¹⁸⁰ *Id.* at 736.

¹⁸¹ *Id.*

¹⁸² *Id.*

that covenants not to compete are themselves valuable assets of the company because they are necessary to protect the company's good will.¹⁸³

Consequently, the court concluded that good will, along with the covenants not to compete used to protect the good will, is a transferable asset, even though a contract of employment does not contain words or provisions extending the covenant's benefits to successors and assigns.¹⁸⁴ Thus, the court held that Bialer's restrictive covenant was a transferable property right, enforceable by the successor employer.¹⁸⁵

IV. ANALYSIS

A. *The "Employee Must Consent" Approaches*

1. *Express Consent*

Under the "Employee Must Expressly Consent" approach, a covenant not to compete is assignable and thus enforceable by the successor employer only where the employee expressly consents to the assignment.¹⁸⁶ This is the best policy approach for two reasons.

First, the "Employee Must Expressly Consent" approach adheres to the general principle of contract law that before either party is bound to a contract, both parties must manifest an intent (consent) to enter into the contract. Without an express provision (in the covenant not to compete itself or an employment contract of which the covenant is a part) indicating whether the covenant not to compete is assignable, it is impossible to know whether it is the employee's intent to allow the predecessor employer to assign the covenant not to compete to the successor employer. Accordingly, in the window washer example used at the beginning of this Article, the absence of an express provision makes it impossible to know whether it is the window washer's intent to enter into an agreement restricting her ability to compete with Company B. Therefore, the "Employee Must Expressly Consent" approach eliminates this employee intent ambiguity by making clear that an employee will be obligated not to compete against a successor employer only where the employee expressly agrees to the assignment of the covenant.

Second, as observed by the *Pestel* court, allowing predecessor employers to assign covenants not to compete without the express consent of employees effectively destroys employee freedom to obtain meaningful employment.¹⁸⁷ Such a practice substantially limits an employee's

¹⁸³ *See id.*

¹⁸⁴ *Id.* 736-37.

¹⁸⁵ *Id.* at 737.

¹⁸⁶ *Pestel Milk Co. v. Model Dairy Prods. Co.*, 52 N.E.2d 651, 657 (Ohio Ct. App. 1943).

¹⁸⁷ *See id.* at 656 (citing *Curry v. Marquart*, 11 N.E.2d 868 (Ohio 1937)).

freedom to change employers within the same profession. To use the window washer example, it would be inequitable to enforce the covenant not to compete because the window washer would be precluded from obtaining employment with another window washing company. When she signed her employment contract, she agreed to work for Company A at \$15.00 per hour. She did *not* agree to work for Company B; nor did she agree to work for Company B's proffered wage of \$10.00 per hour. The "Employee Must Expressly Consent" approach protects against this concern by taking into account employee intent, and it ensures that an employee's ability to move within the same profession is limited solely to that which the employee expressly agrees.

2. *Implied Consent*

Courts that adopt the "Implied Consent" approach hold that an employee's continued employment with the successor employer constitutes a manifestation of consent to the assignment of the employee's covenant not to compete.¹⁸⁸ This, however, is not the best policy approach.

Continued employment with a successor employer, where the employee performs the same job functions in the same area and accepts the same benefits, is simply the employee's manifestation of assent to work for the successor employer. It is not a manifestation of an intent to be bound by a non-compete covenant with the subsequent employer. This concept was acknowledged by the *Pestel* court, which accurately observed that the successor's numerous unsuccessful solicitations of its employees to sign a non-compete agreement similar to their old agreement indicated the successor's understanding that definite agreements with the employees were required in order for the successor to validly enforce the covenants not to compete.¹⁸⁹ Therefore, agreeing to employment is a separate agreement from agreeing not to compete with a successor employer, and each agreement requires separate consent on the part of the employee. Without this separate consent, the covenant should not be able to be assigned, and the employee should not be bound to the burden of refraining from competing against the successor employer.

B. *The "Third-Party Beneficiary" Approach*

In *Supplies for Industry, Inc.*, an Arizona appellate court held that successor employers can enforce covenants not to compete between employees and predecessor employers because successor employers are third-party beneficiaries of such covenants.¹⁹⁰ The court stated: "A third party intended beneficiary is found where recognition of the right to

¹⁸⁸ See, e.g., *Peters v. Davidson, Inc.*, 359 N.E.2d 556, 562-63 (Ind. Ct. App. 1977)).

¹⁸⁹ See *Pestel Milk Co.*, 52 N.E.2d at 657.

¹⁹⁰ *Supplies for Indus., Inc. v. Christensen*, 659 P.2d 660, 662 (Ariz. Ct. App. 1983).

performance in the beneficiary is appropriate to effectuate the intention of the parties, and the circumstances indicate that the promisee intended to give the beneficiary the benefit of the promised performance.”¹⁹¹ Under this definition of third-party beneficiaries, it is arguable that a successor employer is a third-party beneficiary of a covenant not to compete between the employee and the predecessor employer.¹⁹² This argument is only plausible, however, where the covenant, or the employment contract of which the covenant is a part, indicates that the covenant is for the benefit of the predecessor employer, its heirs, and assigns.¹⁹³ In the window washer example, such a provision is absent. Thus, it is unclear whether the covenant between the window washer and Company A is intended to benefit Company B. As such, where the covenant expressly states that it is for the benefit of the predecessor employer, its heirs, and assigns, it is clear that the employee intends the covenant to benefit both the predecessor employer and a successor employer.¹⁹⁴ Absent such a provision, it cannot be argued that a covenant was intended, *ab initio*, to benefit a successor employer because it would be impossible to glean whether the employee intends the agreement to benefit a third-party successor employer or merely the predecessor employer. Again, employees should not be bound to agreements to which they have not consented.

C. *The “Covenant Is a Transferable Asset” Approach*

As demonstrated in the Ohio case *Safier’s, Inc.*, some courts look outside the traditional concepts of contract law. Instead, these courts look to property law principles, holding that successor employers are entitled to enforce covenants not to compete because such covenants are company assets, which are generally assignable where one business is being transferred to another.¹⁹⁵ For example, the *Safier’s, Inc.* court recognized that both the good will established between the employee and the predecessor employer’s customers and the covenant not to compete, used to protect the good will, are property of the predecessor employer.¹⁹⁶ Thus, the court held that both the good will and the covenant not to compete, as assets of the predecessor employer, are generally transferable to the successor employer when the predecessor employer transfers its business to the successor employer.¹⁹⁷ Therefore, under the “Covenant Is a

¹⁹¹ *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 302 (1982)).

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See Safier’s, Inc. v. Bialer*, 93 N.E.2d 734, 736-37 (Ohio Ct. Com. Pl. 1950).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 737.

Transferable Asset’ approach, the successor employer can enforce the covenant not to compete.¹⁹⁸

The “Covenant Is a Transferable Asset” approach correctly recognizes that the good will established between an employer and its customers, as well as the covenant not to compete used to protect this good will, are transferable assets of the predecessor employer. Nonetheless, this approach is flawed for two reasons.

First, allowing a successor employer to enforce a covenant not to compete as part of an asset generally acquired in transactions between businesses ignores the right of the employee to have input in the contracts he or she enters. In fact, this broad approach runs the risk of ignoring the intent of the employee by precluding the employee from competing against the successor employer when the employee may have only agreed not to compete against the predecessor employer.¹⁹⁹ Second, applying the rationale used by the *Pestel* court,²⁰⁰ this sweeping approach effectively constrains an employee’s ability to gain meaningful employment by severely limiting the employee’s freedom to change employers within the same profession.

Accordingly, using the window washer example, it would be inequitable for Company B to enforce the covenant not to compete against the window washer. Enforcement would prohibit the window washer from gaining meaningful employment with another window washing company even when her original agreement was not to compete against Company A (not Company B) and provided for wages of \$15.00 per hour (not \$10.00 per hour). Consequently, the mere fact that a covenant not to compete is a transferable asset of the predecessor employer is not, in and of itself, sufficient to enable a successor employer to enforce the covenant.

V. PROPOSAL

As demonstrated above, Ohio courts have adopted two conflicting approaches in deciding the issue of whether successor employers can enforce covenants not to compete. As with the “Third-Party Beneficiary” approach, employees should not be bound by non-compete agreements to which they have not consented. In *Pestel Milk Co.* the court adopted the “Employee Must Expressly Consent” approach, holding that a covenant not to compete is not assignable and thus not enforceable by a successor company without the express consent of the employee, regardless of

¹⁹⁸ *Id.*

¹⁹⁹ *See, e.g.,* *Allredge v. Twenty-Five Thirty-Two Broadway Corp.*, 509 S.W.2d 744, 748-49 (Mo. Ct. App. 1974) (finding that the employer and employee did not intend for the covenant not to compete to be assigned to a successor).

²⁰⁰ *See Pestel Milk Co. v. Model Dairy Prods. Co.*, 52 N.E.2d 51, 656 (citing *Curry v. Marquart*, 11 N.E.2d 868 (Ohio 1937)).

whether or not the employee continued to work for the successor company after that company acquired the predecessor's assets.²⁰¹ On the other hand, in *Safier's, Inc.*, the court adopted the "Covenant Is a Transferable Asset" approach, holding that successor employers can enforce covenants not to compete because such covenants are company assets, assignable, in general, when one business is transferred to another.²⁰² Moreover, courts in other states have articulated a third approach, holding that successor employers can enforce covenants not to compete because successor employers are third-party beneficiaries of such covenants.²⁰³ This Article argues that Ohio courts should adopt the "Express Consent" approach and should permit a successor employer to enforce non-compete agreements only if three requirements are met.

First, employees must expressly consent not to compete against the successor employer. An employer may obtain express consent in two ways: (1) the covenant not to compete or the employment contract of which the covenant is a part must state that the covenant is an asset of the predecessor employer, transferable to successors and assigns; or (2) if the above language is absent, the employee must expressly agree to a new covenant not to compete against the successor employer. Second, the contract of sale or merger between the predecessor employer and the successor employer must specify that any covenants not to compete entered into between the predecessor employer and its employees are transferable assets of the predecessor employer that are being assigned to the successor employer. Third, the successor employer must have a recognizable interest to protect by enforcing the covenant.

These bright-line requirements serve four purposes. First, requiring employee express consent protects employees. It ensures that an employee's intent is recognized, and it preserves an employee's freedom to change employers within the same profession by making clear that an employee will be forbidden from competing against a successor employer only where the employee expressly accepts this burden.

Second, requiring express consent on the part of the employee eliminates the confusion of whether the employee's continued employment constitutes a manifestation of consent not to compete against the successor employer, or whether it merely constitutes an acceptance of employment from the successor employer. This proposal avoids any misunderstanding by making clear that absent an employee's express agreement not to compete against a successor employer, continued employment will only constitute acceptance of employment.

²⁰¹ *Id.* at 657.

²⁰² *Safier's, Inc.*, 93 N.E.2d at 736-37.

²⁰³ *See, e.g.,* *Supplies for Indus., Inc. v. Christensen*, 659 P.2d 660, 662 (Ariz. Ct. App. 1983).

Third, the requirement that the contract of sale or merger between the predecessor company and the successor company state that the covenant not to compete between the predecessor company and the employee is a transferable asset of the predecessor company and that this asset is being assigned to the successor company protects the rights and interests of both companies and the employee. This requirement recognizes that the good will established between an employee and a predecessor employer's customers is a transferable asset of the predecessor employer. Further, this requirement acknowledges that employers are not only entitled to protect this good will by requiring its employees to sign covenants not to compete, but also that the covenants themselves are transferable assets of the employer. As such, this proposal contractually protects the interests of both predecessor and successor employers by allowing the predecessor employer to receive valuable consideration for the transfer of these assets, while at the same time permitting a successor employer to obtain and protect significant assets and interests of the company it is acquiring. Additionally, this requirement gives all parties notice that the covenant has been transferred and that the successor employer now has the right to enforce the covenant.

Fourth, requiring that a successor employer have a recognizable interest to protect before it can enforce the covenant protects employees. In particular, this requirement prevents successor employers from arbitrarily limiting an employee's ability to seek alternative and meaningful employment when the successor employer's business is in no way threatened by the employee's leaving the successor employer to go work for another employer.

VI. CONCLUSION

Nationwide, courts are split three ways, and Ohio courts two ways, as to what requirements must be met before a successor employer can enforce a covenant not to compete.²⁰⁴ One group of courts, focusing on contract law, holds that successor employers can enforce covenants not to compete only where employees consent to the assignment of the covenant.²⁰⁵ Ohio courts have adopted this approach. Specifically, in *Pestel Milk Co.*, the court adopted the "Employee Must Expressly Consent" approach, holding that a covenant not to compete is not assignable and thus not enforceable by a successor employer without the express consent of the employee, regardless of whether the employee continues to work for the successor

²⁰⁴ Compare *Pestel Milk Co. v. Model Dairy Prods. Co.*, 52 N.E.2d 651, 657 (Ohio Ct. App. 1943), with *Supplies for Indus., Inc. v. Christensen*, 659 P.2d 660, 662 (Ariz. Ct. App. 1983), and *Safier's, Inc. v. Bialer*, 93 N.E.2d 734, 736-37 (Ohio Ct. Com. Pl. 1950).

²⁰⁵ See, e.g., *Pestel Milk Co.*, 52 N.E.2d at 657.

employer after the successor acquires the predecessor's assets.²⁰⁶ A second group of courts, also focusing on contract law, holds that successor employers can enforce covenants not to compete between employees and predecessor employers because successor employers are third-party beneficiaries of such covenants.²⁰⁷ Ohio courts have not adopted this approach.

A third group of courts ignores the traditional concepts of contract law altogether. This group focuses on property law, holding that successor employers are entitled to enforce covenants not to compete because such covenants are company assets, which are generally assignable where one business is being transferred to another.²⁰⁸ Ohio courts utilize this method as well.²⁰⁹

In light of the two conflicting approaches adopted by Ohio courts, Ohio law should require that before a successor employer can enforce a covenant not to compete: (1) employees must give express consent not to compete against the successor employer; (2) the contract of sale or merger between the predecessor employer and the successor employer must specify that any covenants entered into between the predecessor employer and its employees are transferable assets of the predecessor employer, and that they are being assigned to the successor employer; and (3) the successor employer must have an interest to protect by enforcing the covenant.

Adoption of these bright line requirements will accomplish four things: (1) incorporate the strengths of the "Employee Must Consent" approach, the "Third-Party Beneficiary" approach, and the "Covenant Is a Transferable Asset" approach; (2) ameliorate the ambiguity in Ohio law; (3) give guidance as to how predecessor employers, successor employers, and employees should act and; (4) protect the rights and interests of employees, predecessor employers, and successor employers.

²⁰⁶ See *id.* at 657.

²⁰⁷ See, e.g., *Supplies for Indus., Inc.*, 659 P.2d at 662.

²⁰⁸ See, e.g., *Safier's, Inc.*, 93 N.E.2d at 736-37.

²⁰⁹ See *id.*