

Nos. 08-1040, 08-1047, and 08-1236

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KERR-McGEE CORPORATION and ORYX ENERGY COMPANY,
Appellants and Cross-Appellees,

v.

M.D. MARK, INC.,
Appellee and Cross-Appellant.

On Appeal from the United States District Court of the District of Colorado
Honorable John L. Kane, Presiding

**BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF
MANUFACTURERS IN SUPPORT OF APPELLANTS' PETITION FOR PANEL
REHEARING AND REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

The National Association of Manufacturers is a nonprofit trade association organized under the laws of New York. It has no parent corporation and has issued no stock.

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| CORPORATE DISCLOSURE STATEMENT | i |
| TABLE OF AUTHORITIES | iii |
| INTEREST OF AMICUS..... | 1 |
| ARGUMENT | 2 |
| I. The Panel Decision Contravenes a Corporate Law Principle That is Codified in Colorado and Throughout the Country | 3 |
| II. The Panel Decision Allows a Jury to Disregard the Law | 6 |
| CONCLUSION | 7 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|-------------|
| 3 MODEL BUS. CORP. ACT § 11.07(a)(3) (4 th ed. 2008) | 3, 6 |
| 3 MODEL BUS. CORP. ACT § 11.07 cmt. at 11-84 (4 th ed. 2008) | 4 |
| ARIZ. REV. STAT. ANN. § 10-1106 (2008)..... | 3 |
| ARK. CODE ANN. § 4-27-1110(a)(3) (2008)..... | 3 |
| COLO. REV. STAT. § 7-90-204(1)(a) (2008) | 3, 4 |
| COLO. REV. STAT. § 30-18-206(1)(a) | 5, 6 |
| CONN. GEN. STAT. § 33-820(4) (2008) | 3 |
| 8 DEL. CODE ANN. tit. 8, § 259 (2008)..... | 3 |
| FLA. STAT. § 607.1106 (2008)..... | 3 |
| GA. CODE ANN. § 14-2-1106(a)(2) (2008) | 3 |
| HAW. REV. STAT. § 414-316 (2008)..... | 3 |
| IDAHO CODE ANN. § 30-18-206(1)(c) (2008) | 3 |
| IND. CODE § 23-1-40-6 (2008) | 3 |
| IOWA CODE § 490.1107(1)(c) (2008) | 3 |
| KAN. STAT. ANN. § 17-6709 (2008)..... | 3, 4 |
| KY. REV. STAT. ANN. § 271B.11-060 (2008)..... | 3 |
| ME. REV. STAT. ANN. § 1107(1)(c) (2008) | 3 |
| MASS. GEN. LAWS ANN., ch. 156D § 11.07(a)(3) (2008) | 3 |
| MICH. COMP. LAWS ANN. § 450.1724 (2008) | 3 |
| MINN. STAT. ANN. § 308A.801 (2008)..... | 3 |

| | |
|--|---|
| MISS. CODE ANN. § 79-4-11.07(a)(3) (2008)..... | 3 |
| MONT. CODE ANN. § 35-1-817 (2008) | 3 |
| NEB. REV. STAT. § 21-20,133 (2008) | 3 |
| NEV. REV. STAT. § 92A.250 (2008) | 3 |
| N.C. GEN. STAT. ANN. § 55-11-06 (2008)..... | 4 |
| N.D. CENT. CODE § 10-15-42 (2008) | 4 |
| N.H. REV. STAT. § 293-A:11.06 (2008) | 3 |
| N.J. STAT. ANN. § 14A:10-6 (2008) | 4 |
| N.Y. BUS. CORP. LAW § 906 (2008)..... | 4 |
| OHIO REV. CODE § 1701.82 (2008)..... | 4 |
| OKLA. STAT. ANN., tit. 18, § 1088 (2008)..... | 4 |
| OR. REV. STAT. ANN. § 60.497 (2008) | 4 |
| 15 PA. CONS. STAT. ANN. § 1929 (2008) | 4 |
| S.D. CODIFIED LAWS § 47-1A-1107 (2008) | 4 |
| TENN. CODE ANN. § 48-21-108(a)(2) (2008) | 4 |
| TEX. BUS. ORG. CODE ANN. § 5.06(a)(2) (2008) | 4 |
| VT. STAT. ANN., tit. 11A § 11.06 (2008)..... | 4 |
| WASH. REV. CODE ANN § 23B.11.060 (2008) | 4 |
| W. VA. CODE § 31D-11-1107(3)–(4) (2008)..... | 4 |
| WIS. STAT. ANN. § 180.1106 (2008) | 4 |
| WYO. STAT. ANN. § 17-16-1106 (2008)..... | 4 |

The National Association of Manufacturers (“NAM”) respectfully submits this amicus curiae brief in support of the Petition by Appellants and Cross-Appellees Kerr-McGee Corporation and Oryx Energy Company for panel rehearing and rehearing en banc of the Tenth Circuit panel opinion dated May 11, 2009 (“Op.”) (a copy of which is attached to Appellants’ Petition).

INTEREST OF AMICUS

The NAM is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM’s mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America’s economic future and living standards.

This case involves license agreements that prohibit the transfer of data to a third party. The license agreements do not address mergers. The panel ruled that that the jury was entitled to determine that the merger of one corporation into another transferred data to a third party – the surviving corporation – without authorization.

The NAM has an interest in the resolution of the Petition because the panel opinion rejected a foundational tenet of corporate law on which NAM members rely. The panel opinion – and the \$50 million judgment the panel upheld – are contrary to the law that the rights of a merging corporation vest in the surviving corporation without impairment. That principle has broad application to contracts and corporate mergers beyond the facts of this case. Members of the NAM are adversely affected by the panel

opinion because it upsets settled merger law, creates significant doubt about whether corporate mergers vest the contractual rights and assets of the merging corporation in the survivor, and invites district courts to allow juries to issue verdicts that are contrary to the law of merger.

ARGUMENT

The issues raised in the Petition merit review by the en banc Court, and rehearing by the panel, for two main reasons. First, a merger of one corporation into another does not transfer, assign, or convey the contractual or property rights of the merging corporation to the survivor. The rights of the merging corporation vest by operation of law in the surviving entity without impairment. That is the law of over three dozen states, including the state law applied by the district court (Colorado) and other states within the Tenth Circuit. The panel rejected that law. The panel opinion may be cited as precedent for the contention that the rights of a merging corporation do not vest in the survivor without impairment.

Second, the panel upheld the jury verdict awarding tens of millions of dollars in damages because the jury determined that a corporate merger was an improper transfer or assignment of a license agreement to a third party. The panel ruled that the jury may reject merger law so long as some evidence appears in the record to support the verdict. This is of grave concern to the NAM because the panel transformed a fundamental legal principle upon which the NAM's members rely in drafting, interpreting, and applying contracts into a question to be decided by a jury on a case-by-case basis.

These issues are of extraordinary importance. The corporate form is a preferred structure of business organization. Corporate mergers are engines of commerce. That the rights of a merging corporation pass to the successor without impairment brings certainty to transactions, large and small. That certainty is now subject to question in the Tenth Circuit. The questions raised by the Petition are of exceptional public importance and merit review by the en banc Court, and rehearing by the panel.

I. The Panel Decision Contravenes a Corporate Law Principle That is Codified in Colorado and Throughout the Country.

The Model Business Corporation Act (“MBCA”) articulates basic principles of corporate law. Nearly every state has adopted some form of the MBCA. The MBCA provides that:

When a merger becomes effective . . . all property owned by, and every contract possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor *without reversion or impairment*.

3 MODEL BUS. CORP. ACT § 11.07(a)(3) (4th ed. 2008) (emphasis added). Thirty eight states have either adopted this provision verbatim, or have codified substantially similar language.¹ This includes Colorado and other states in the Tenth Circuit.²

¹ ARIZ. REV. STAT. ANN. § 10-1106 (2008); ARK. CODE ANN. § 4-27-1110(a)(3) (2008); COLO. REV. STAT. § 7-90-204(1)(a) (2008); CONN. GEN. STAT. § 33-820(4) (2008); 8 DEL. CODE ANN. tit. 8, § 259 (2008); FLA. STAT. § 607.1106 (2008); GA. CODE ANN. § 14-2-1106(a)(2) (2008); HAW. REV. STAT. § 414-316 (2008); IDAHO CODE ANN. § 30-18-206(1)(c) (2008); IND. CODE § 23-1-40-6 (2008); IOWA CODE § 490.1107(1)(c) (2008); KAN. STAT. ANN. § 17-6709 (2008); KY. REV. STAT. ANN. § 271B.11-060 (2008); ME. REV. STAT. ANN. § 1107(1)(c) (2008); MASS. GEN. LAWS ANN., ch. 156D § 11.07(a)(3) (2008); MICH. COMP. LAWS ANN. § 450.1724 (2008); MINN. STAT. ANN. § 308A.801 (2008); MISS. CODE ANN. § 79-4-11.07(a)(3) (2008); MONT. CODE ANN. § 35-1-817 (2008); NEB. REV. STAT. § 21-20,133 (2008); NEV. REV. STAT. § 92A.250 (2008); N.H.

Under the MBCA, a license held by a merging entity, like that at issue in this case, automatically vests with the survivor of that merger. It is not “assigned” or “transferred” to the survivor. A merger cannot violate a contractual prohibition on assignment or transfer unless the contract defines a merger as an assignment or transfer. The comments to the MBCA confirm and clarify this result: a “merger is not a conveyance, transfer, or assignment.” 3 MODEL BUS. CORP. ACT § 11.07 cmt. at 11-84 (4th ed. 2008).

Of course, subject to certain constraints, a contract can define its terms. So if two parties want to provide that a license or contract will terminate in the event of a merger, they are free to do so. But that is not the baseline. In the absence of such language, contract drafters have rightly concluded that mergers do not breach a prohibition on

REV. STAT. § 293-A:11.06 (2008); N.J. STAT. ANN. § 14A:10-6 (2008); N.Y. BUS. CORP. LAW § 906 (2008); N.C. GEN. STAT. ANN. § 55-11-06 (2008); N.D. CENT. CODE § 10-15-42 (2008); OHIO REV. CODE § 1701.82 (2008); OKLA. STAT. ANN., tit. 18, § 1088 (2008); OR. REV. STAT. ANN. § 60.497 (2008); 15 PA. CONS. STAT. ANN. § 1929 (2008); S.D. CODIFIED LAWS § 47-1A-1107 (2008); TENN. CODE ANN. § 48-21-108(a)(2) (2008); TEX. BUS. ORG. CODE ANN. § 5.06(a)(2) (2008); VT. STAT. ANN., tit. 11A § 11.06 (2008); WASH. REV. CODE ANN § 23B.11.060 (2008); W. VA. CODE § 31D-11-1107(3)–(4) (2008); WIS. STAT. ANN. § 180.1106 (2008); WYO. STAT. ANN. § 17-16-1106 (2008).

² See COLO. REV. STAT. § 7-90-204(1)(a) (2008) (“All of the rights, privileges, and powers of each of the merging entities, all real, personal, and mixed property, and all obligations due to each of the merging entities, as well as all other things and causes of action of each of the merging entities, shall vest as a matter of law in the surviving entity”); KAN. STAT. ANN. § 17-6709(a) (2008) (“all property . . . shall be vested in the corporation surviving or resulting from such merger or consolidation”); OKLA. STAT. TIT. 18, § 1088 (2008) (“all property . . . shall be vested in the corporation surviving or resulting from such merger or consolidation”); WYO. STAT. ANN. § 17-16-1106(a)(ii) (2008) (“title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment”).

assignment or transfer of contract rights, or give rise to a tort claim for misappropriation of those rights.

The district court applied Colorado law. Colorado has explicitly codified the concept that “[a] merger does not constitute a conveyance, transfer, or assignment.” COLO. REV. STAT. § 30-18-206(1)(a). The law is clear: the merger of a licensee does not transfer or assign a license.

The panel decision rejects the law. Op. 14-15. The panel ruled that a jury is entitled to ignore applicable law and conclude that a merger is a transfer or assignment of corporate assets. Op. 13. This ruling undermines fundamental corporate law principles accepted throughout the country and adopted by states within the Tenth Circuit.

The panel decision will have application far beyond this case. Numerous contracts – such as commercial contracts, equipment leases, and commercial real estate leases – preclude transfer to third parties but do not address corporate mergers. Under settled law, those contract rights pass without impairment in a merger. But under the panel decision a different rule applies in the Tenth Circuit. A merger may not vest the rights of the merging corporation in the survivor. The merging parties may be found to have breached contracts although their actions conform to law. The rule created by the panel transforms a granite principle into sand.

II. The Panel Decision Allows a Jury to Disregard the Law.

The district court instructed the jury that: “[a] merger between a licensee and another entity will breach the terms of the licensee’s agreement with a licensor *only* if the license agreement so provides.” Op. 12 (emphasis added). The license agreements at

issue did not so provide. But the jury held that a merger breached them anyway. Op. 9. The jury found that the licensee breached the license agreement at issue by “transferr[ing] the license agreement[s] to Kerr McGee Corp, without prior approval.” Op. 9.

The district court erroneously allowed the verdict to stand. The panel affirmed it. Op. 14-15.

The panel reasoned that Appellants were not entitled to a judgment as a matter of law because there was sufficient evidence in the record to support the jury’s finding that the merger of one corporation into another improperly transferred the contractual rights of the merging corporation to the survivor. Op. 13. The evidence in the record that the panel relied on is extrinsic to the contract. It consists of the opinions of three witnesses who opined that the language in the agreements precluded seismic data from being transferred to the surviving company. Op. 13-14. The three witnesses presented their opinions that a merger improperly transfers the rights of the merging corporation to the survivor. But those opinions defy the law. COLO. REV. STAT. § 30-18-206(1)(a); 3 MODEL BUS. CORP. ACT § 11.07(a)(3). In light of applicable law, the licenses at issue are not ambiguous: they do not provide that a merger violates a contractual prohibition on transfer. Construction of an unambiguous contract is for the court; the testimony of the three witnesses is irrelevant.

The panel decision invites district courts to permit juries to reject the law of merger. Within the Tenth Circuit the law of merger is no longer a hornbook legal principle codified in a model act. It is a jury issue. Under the panel decision, a party merely must present some shred of testimony – even simple opinions that do not relate to

intent in a given case – to transform the legal effect of a corporate merger into a jury question. The panel decision poses grave questions for future mergers.

CONCLUSION

NAM respectfully requests that: (1) the en banc Court grant the Petition; and (2) in the alternative, the panel grant rehearing of its opinion.

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CERTIFICATION OF DIGITAL SUBMISSION

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CERTIFICATE OF SERVICE

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