

Delaware Supreme Court Declines to Enforce Noncompete Against Company Founder Who Joined Competitor

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As previously reported ([here](#) and [here](#)), some Delaware courts have recently declined to “blue pencil,” i.e., modify and narrow overbroad restrictive covenants. Instead, they have stricken in their entirety covenants deemed overbroad and declined to enforce them. On December 10, 2024, in [Sunder Energy, LLC v. Tyler Jackson, et al.](#), the Delaware Supreme Court affirmed that Delaware courts have the discretion to decline to blue pencil overbroad restrictive covenants, even if the defendant’s conduct would violate a more narrowly circumscribed covenant.

In *Sunder Energy*, the plaintiff, a solar sales dealer, sought to enforce a noncompete against one of its founders, Tyler Jackson, after he departed to Solar Pros, a competitor. The noncompete prohibited Jackson, as a holder of incentive units, and his “affiliates” from engaging in any door-to-door sales business in the markets where Sunder operated or reasonably anticipated operating. The Delaware Court of Chancery held that the noncompete was overbroad because it “requires that Jackson prevent his [a]ffiliates from engaging in any sales of products to consumers in their homes. As written, Jackson’s daughter cannot go door to door selling Girl Scout cookies.” In addition, the court opined the noncompete’s duration was potentially indefinite because it lasted for two years after Jackson ceased to own incentive units, which Jackson could not freely transfer. Instead, only Sunder could decide when and if to purchase the units, which meant that Jackson was bound by the noncompete until Sunder decided to trigger the restriction. As a minority member, Jackson did not have the rights of an owner, such as voting and information rights and, per the court, was effectively an employee, not a partner.

Sunder argued that the court should “blue pencil” the noncompete because Jackson’s actions would have constituted a breach of even the most narrowly circumscribed restrictive covenant. The Court of Chancery declined to do so, and denied Sunder’s motion for a preliminary injunction.

On appeal, the Delaware Supreme Court affirmed, reasoning that Sunder’s argument “turns the

analysis on its head and creates perverse incentives for employers drafting restrictive covenants,” who would “be less incentivized to craft reasonable restrictions from the outset.” The Court explained, whether a restriction should be blue-penciled “cannot turn on the egregiousness of the employee’s conduct,” but rather “should be based on the covenants themselves and the circumstances surrounding their adoption.” The Court noted that Delaware courts have exercised their discretion to blue-pencil restrictive covenants under circumstances that indicate an equality of bargaining power between the parties, such as where the language of the covenants was specifically negotiated, valuable consideration was exchanged for the restriction, or in the context of the sale of a business. In this case, the Court found:

- Jackson was not involved in any negotiations or discussions concerning the restrictive covenants or their scope. Rather, while Sunder’s attorneys explained the terms of the operating agreements to the majority members, Jackson was not present for that meeting or even invited to it. Further, the majority members testified they would not have been able to understand the agreement without the help of counsel.
- The majority members sent Jackson and the minority members the operating agreement for electronic signature on New Year’s Eve and encouraged Jackson to sign the operating agreement “before midnight.” Jackson signed the agreement less than an hour later.
- Jackson received “minimal-to-no separate compensation in exchange for his agreement to be bound by the Covenants.” Instead, he was given incentive units that could not be freely transferred and were later repurchased by Sunder for \$0 because he left Sunder without “good reason,” i.e. “bad leaver status.”

The Court explained that the relief Sunder sought was not simply a constraint on the restrictive covenants’ temporal or geographic scope, but rather, would have required the court to “craft an entirely new covenant to which neither side agreed.” This, the Court held, was “the opposite of the freedom of contract principles that are esteemed by Delaware’s legal system.”

The *Sunder* decision affirms a trend in Delaware: Courts are increasingly refusing to modify overreaching and overbroad restrictive covenants.

This decision is a reminder that employers should narrowly tailor noncompetition provisions and other restrictive covenants to protect only their legitimate business interests, and must resist the temptation to expand beyond that construct. Employers should ensure that the restricted party is provided adequate consideration, has sufficient time to consider the agreement, understands the restrictions, and is given an opportunity to obtain the advice of counsel. The case also calls into question the use of bad leaver forfeiture provisions.

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National Law Review, Volume XIV, Number 355

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