

Delaware Supreme Court Reaffirms Reluctance to Blue-Pencil Overbroad Restrictive Covenants in *Sunder v. Jackson*

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The Delaware Supreme Court's decision in *Sunder Energy, LLC v. Jackson*, No. 455, 2023, 2024 Del. LEXIS 407 (December 10, 2024) reaffirmed the courts' limited willingness to modify or "blue-pencil" overbroad restrictive covenants, emphasizing the importance of freedom of contract and the need for carefully drafted agreements. This case arose when Sunder Energy, a solar sales dealer, sought to enforce restrictive covenants against Tyler Jackson, a minority member and former employee who joined a competitor, Solar Pros.

The restrictive covenants prohibited Jackson and his "affiliates" from engaging in door-to-door sales in Sunder's markets or soliciting Sunder's employees. The Delaware Court of Chancery found these provisions overbroad and unreasonable. One provision was deemed so expansive that it could theoretically prevent Jackson's daughter from selling Girl Scout cookies door-to-door. Additionally, the noncompete's duration was indefinite because it depended on Sunder's discretion to repurchase Jackson's incentive units. The court concluded that these restrictions exceeded any legitimate business interest Sunder might have.

Sunder argued that the court should blue-pencil the covenants to make them enforceable, as Jackson's actions would have breached even a narrower restriction. However, the Court of Chancery declined, reasoning that modifying such agreements would incentivize employers to draft overly broad covenants with the expectation that the courts would rewrite them later. The court emphasized that fairness and enforceability must be evaluated based on each covenant's terms and the circumstances under which they were adopted—not the conduct of the restricted party.

Supreme Court Affirms: No Blue-Penciling Without Fair Bargaining

On appeal, the Delaware Supreme Court upheld this decision, affirming that blue-penciling is a matter of judicial discretion and should be applied sparingly. The Court noted that blue-penciling is typically reserved for cases where there is an equality of bargaining power between parties, such as when restrictive covenants are negotiated in good faith, supported by valuable consideration, or arise from a business sale. In this case, none of those factors were present.

The Court highlighted several key facts undermining Sunder’s position:

- Jackson did not participate in negotiating or discussing the restrictive covenants’ terms.
- The operating agreement was sent to Jackson for electronic signature on New Year’s Eve with instructions to sign before midnight, leaving him no meaningful opportunity to review or seek legal advice.
- Jackson received little to no separate compensation for agreeing to the covenants; instead, he was granted incentive units that he could not freely transfer, and which were later repurchased by Sunder for \$0 when he left under “bad leaver” status.

The Delaware Supreme Court rejected Sunder’s request to rewrite the covenants entirely, stating that such relief would contradict Delaware’s strong commitment to freedom of contract. Courts cannot craft entirely new agreements for parties who failed to negotiate reasonable terms themselves.

Implications for Employers: Draft Narrowly Tailored Covenants

The *Sunder* decision reflects a growing trend in Delaware courts to strike down overbroad restrictive covenants rather than modify them. This approach underscores the importance of narrowly tailoring noncompete and nonsolicitation provisions to protect only legitimate business interests. Employers should ensure these agreements are fair, supported by adequate consideration, and provide sufficient time for review and legal consultation.

The ruling serves as a reminder that courts will not rescue sophisticated parties from their own overly aggressive contractual terms. Instead, businesses must carefully draft enforceable agreements from the outset to avoid reliance on judicial intervention.

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