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# Delaware Court of Chancery Continues Recent Trend of Refusing to Blue-Pencil Overbroad Restrictive Covenants

**WRITTEN BY**

Christopher B. Chuff | Akilah F. Craig | Brian R. Ellixson | Tyler Wilson

The Delaware Court of Chancery's latest refusal to enforce overbroad non-compete and nonsolicitation provisions, even in the sale-of-business context, confirms that if a restrictive covenant exceeds the edge of a legitimate and protectable interest, buyers cannot rely on Delaware courts to blue-pencil them back to safety.

**Background**

In *BluSky Restoration Contractors, LLC v. Robbins & Popwell*, the Delaware Court of Chancery found noncompetition, nonsolicitation, and confidentiality covenants arising out of the acquisition of a restoration company to be unreasonable, and refused to reform any of them. The decision should serve as a cautionary tale: if covenants go beyond the "competitive space reached by the seller" and the "buyer's legitimate economic interests," they may be struck rather than saved.

BluSky acquired a Tennessee?based restoration and mitigation company with a regional footprint and hired its co?founders (defendants) into senior roles. Restrictive covenants were included in (1) the equity purchase agreement (EPA), (2) employment agreements (EAs) the defendants entered into in connection with the acquisition, and (3) incentive unit agreements that were granted post-closing by BluSky's parent to the defendants (RCAs). The restrictive covenants were drafted to protect not only the acquired regional business, but the buyer, the buyer's parent, and their affiliates, in some cases across different geographic territories and business lines. When the defendants later formed a competing company in Tennessee, BluSky filed suit for breach of the restrictive covenants and sought injunctive relief. Defendants moved to dismiss, which was granted by the court.

**Analysis and Holdings**

In opposition to the motion to dismiss, BluSky argued that the non?competes in the EPA and EAs deserved more lenient scrutiny because they were tied to the sale of a business. The court acknowledged that "[r]estrictive covenants are subject to a less searching inquiry in the sale of a business than in an employment contract." However, the court also recognized that in the context of a sale of a business, covenants still must be tailored to the "competitive space reached by the seller and serve the buyer's legitimate economic interests." Here, that business was a regional Tennessee restoration company, so the legitimate interest was protecting that regional goodwill and footprint. The court found that both agreements exceeded the acquired company's regional reach, and that the purchase price or compensation paid to the defendants did not justify either a nationwide or worldwide restriction.

The court also held that the customer and employee nonsolicitation provisions were unenforceable. Indeed, the EPA, EAs, and RCAs prohibited not only actually hiring employees or diverting customers, but also "attempts to induce" employees to leave or "attempts to persuade" customers not to do business with the plaintiff. Following recent Delaware precedent, the court treated this "attempt to" language as overbroad because it captured noncompetitive conduct.

The court also addressed the inclusion of "affiliates" within the definition of certain terms applicable to the nonsolicitation restriction. The court found that it resulted in restrictions becoming broader than necessary to protect what the court deemed the plaintiff's legitimate interests and greater than what was reasonable based on the purchase price.

As to the breach of confidentiality and return-of-materials provisions, BluSky urged the court to treat those restrictive covenants as ordinary contract clauses, not subject to the same strict reasonableness limits as non-compete and non?solicit provisions. The court declined to do so, noting instead that Delaware courts evaluate confidentiality covenants under the same basic framework where they effectively operate as restrictive covenants. The court noted that the confidentiality provisions applied during and after employment, often with no fixed end date or lasting until information became public, and they were drafted to cover categories of nonpublic information about the buyer, its parent, and their affiliates. The court did not find that the lack of a temporal limitation was determinative. However, the court still deemed the provision to be overbroad and focused on the inclusion of "affiliates" in the definition, which extended the scope beyond the confidential information to which the defendants would have access.

Having found that the restrictive covenants in each of the agreements were unenforceable due to overbreadth, the court then declined BluSky's request that it blue?pencil the covenants to a reasonable scope. The court noted that doing so would "eliminate the goal [of] requiring parties to draft restrictions specifically tailored to the parties' circumstances and legitimate business interests" and "incentivize future parties to compose restrictions without appropriate accuracy and precision."

Without enforceable restrictive covenants, the court denied BluSky's preliminary injunction because it found that BluSky could not prove that it was likely to succeed on the merits.

**Takeaways**

The decision underscores that buyers and employers cannot count on Delaware courts to repair overbroad restrictive covenants after the fact. When drafting non?competition, non?solicitation, and confidentiality clauses under Delaware law, buyers and practitioners should consider the following guidelines to increase the likelihood of enforcement:

- **Tailor restrictive covenants to the acquired business's geographic footprint.** Limit the scope of the non?competes and non?solicits to the acquired business's actual geographic and product/service footprint.

- **Be intentional with affiliates.** Consider whether it is necessary to include affiliates and other corporate business lines in the scope of the restrictive covenant. Including unspecified and unrelated affiliates greatly increases the risk of the restrictive covenants being unenforceable as overly broad.

- **Avoid drafting restrictive covenants that prohibit "attempts" to do something.** Focus on concrete competitive conduct rather than sweeping prohibitions on "attempts" of competitive conduct that risk being deemed overbroad.

- **Draft confidentiality clauses like a restrictive covenant.** Narrowly define protected information, consider reasonable time limits, and re-examine "as broadly as possible" formulations.

- **Do not rely on blue penciling.** Given the severe consequences of the Chancery court's refusal to blue-pencil the agreements — here, denial of injunctive relief and dismissal of all claims — it is important to carefully draft restrictive covenants with the goal of enforceability without need for reformation by the court.

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