

Delaware Court of Chancery Strikes Down Another Sale of Business Noncompete

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In what is becoming an emerging trend for the Delaware Court of Chancery, the court recently held in *Intertek Testing Services NA, Inc. v. Eastman* that a sale of business noncompete with a worldwide scope was unenforceable.

In connection with co-founder Jeff Eastman's (Eastman) sale of his business to Intertek Testing Services NA, Inc. (Intertek), Eastman agreed to a five-year worldwide noncompete. Several years after the transaction closed, Eastman joined the board of a startup formed by his son, which allegedly shared competitive elements with the sold business. Intertek subsequently filed suit, claiming that Eastman violated his noncompete. In response, Eastman moved to dismiss, arguing, among other things, that the noncompete provision was facially overbroad and unenforceable.

Noting that Delaware courts do not mechanically enforce noncompetes, the court granted Eastman's motion to dismiss, finding that noncompetes must be "tailored to the competitive space reached by the seller and serve the buyer's legitimate economic interests" and holding that the noncompete at issue extended to markets not reached by the sold business because the sold business had only purported to serve clients nationwide. In so doing, the court cited language from its recent opinion in *Kodiak Building Partners, LLC v. Adams*, which also struck down a sale of business noncompete because over its overbreadth. And, as in *Kodiak*, despite arguments from Intertek, the court declined to blue pencil the overbroad noncompete, stating that "revising the [noncompete] to save Intertek — a sophisticated party — from its overreach would be inequitable."

The case serves as yet another reminder to buy-side M&A practitioners of the danger that accompanies aggressive and potentially overbroad noncompetes, even in the sale of business context.

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