Key Takeaway: Delaware courts will not enforce unreasonable restrictive covenants in the employment context, and are hesitant to “blue pencil” such agreements to make them reasonable.

In Ainslie v. Cantor Fitzgerald, L.P., six former partners sued Cantor Fitzgerald (“Cantor”) to recoup payments withheld by Cantor, which Cantor refused to turn over to the partners because they allegedly breached restrictive covenants by engaging in competitive activity within a year of leaving Cantor. The former partners claimed the restrictive covenants were unreasonable restraints on trade. Cantor moved for summary judgment under Court of Chancery Rule 56, arguing that it does not need to pay anything to the breaching former partners. Vice Chancellor Morgan T. Zurn granted in part and denied in part both parties’ motions, finding that the restrictive covenants were unenforceable as an unreasonable restraint on trade, and that Cantor could not withhold payments from the former partners for purportedly breaching unenforceable covenants.

Companies’ noncompete and nonsolicit agreements are carefully reviewed by courts to ensure they are not unreasonable restraints of trade. Contracts are read as a whole, and courts may uphold forfeiture and non-penalty liquidated damages clauses in limited partnership contracts where agreed upon in unambiguous language, as statutorily permitted by Delaware’s Limited Partnership Act. Even still, the enforceability of such remedies depends on the enforceability of the underlying promise that was breached. An agreement is not per se enforceable based on the parties’ signing. Delaware courts will not generally enforce provisions requiring the breaching party to pay a preset amount “untethered” to the actual damages of the breach. If the restrictive device is a condition, the Court will make a public policy determination along with an evaluation for reasonableness in determining any restraint of trades enforceability.

Words and phrases such as “if,” “provided that,” and “on the condition that,” generally indicate the parties have created a condition precedent. Delaware courts will uphold such restrictive trade covenants
when they: (1) are reasonable in geographic scope and temporal duration, 
(2) advance a legitimate economic interest of the party seeking their 
enforcement, and (3) survive a balancing of the equities. The courts favor 
freedom of trade over freedom of contract and are hesitant to “blue pencil” 
such contracts to make them reasonable.

Cantor Fitzgerald’s former partners agreed to several interlocking 
provisions designed to restrict them from competing, soliciting clients or 
employees, or using confidential information for up to four years after the 
partner leaves. The Court first addressed whether the restrictive devices 
were damages or conditions. The Court reasoned since the provisions 
contained the verbiage “provided,” they were conditions precedent. 
Cantor’s obligation to pay the former partners was to be triggered so long 
as the partners had not engaged in any impermissible competitive activity. 
However, unenforceable restrictive covenants are inactionable breaches.

The Court determined that the partnership agreements did not 
provide Cantor with the ability to refuse paying the former partners 
because the conditions were unenforceable. The former partners’ payment 
was subject to two conditions (1) not breaching any partner obligation, and 
(2) not engaging in any competitive activity for up to four years. The Court 
deemed the former unenforceable for three reasons. First, the global 
restrictions for up to four years were unreasonable in geographic scope 
and temporal duration. Second, prohibition against competitive activities 
not only against Cantor, but also to any affiliated entities provided an 
unreasonable scope of protection to Cantor’s economic interests. This was 
further aggravated by the broad language providing that a breach is 
committed by conduct that “is or could be considered” a breach.\footnote{The former partners are considered to have breached the contract when Cantor unilaterally determines they have breached, even though a breach may not have occurred.} Third, 
the Court reasoned that the contracts were overbroad and risky for former 
partners to find any employment in the financial service field; It 
determined the restrictions did not survive the balancing of the equities. 
Accordingly, the no breach restrictive covenants are unenforceable.

The Court found the forfeiture-for-competition provisions to be 
unreasonable restraints of trade as well. After determining that the 
reasonableness standard shall apply, the Court deemed the provisions 
enforceable for the same three reasons as outlined above: unreasonable 
geographic and temporal scope, no protection of a legitimate economic 
interest, and failure to survive the balancing of the equities. Cantor’s duty 

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\footnote{The former partners are considered to have breached the contract when Cantor unilaterally determines they have breached, even though a breach may not have occurred.}
to pay the former partners, therefore cannot be conditioned on the ‘breach’
or competitive activity of the former partners.2

Vice Chancellor Zurn denied Cantor’s motion for summary
judgment and granted in part the former partners motion, finding that all
of the restrictive covenants were unenforceable as unreasonable restraints
on trade, and that Cantor could not withhold payments owed to former
partners for breaching unenforceable restrictive covenants.

2 Ainslie is not entitled to his base amount (separate from the conditioned payment)
because he failed to sign a release. The partnership agreement permits Cantor to request releases
in connection with the payment of a withdrawing partner’s base amount.