

Seventh Circuit Rules that Company's Distributor Is Not its Competitor

The sale of a business virtually always involves a promise by the seller not to engage in competition with the purchaser, within certain time and geographic parameters. Frequently, such agreements contain robust prohibitions on the solicitation of the company's employees and customers, as well as aggressive prohibitions against providing direct or indirect assistance to any person or entity that competes with the company that has been sold. When it comes to enforcing these agreements, determining which companies are, or are not, competitors can be a point of heated debate and lead to costly litigation. In *E.T. Products, LLC v. D.E. Miller Holdings, Inc., et al.*, the Seventh Circuit Court of Appeals weighed in on this issue.

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Background:

In *E.T. Products*, Defendant Doug Miller owned two companies: E.T. Products, which blended and sold fuel additive products, and Petroleum Solutions, which blended and sold lubricant products. Petroleum Solutions also supplied a few customers with E.T. Products fuel additives. After a long career, Miller put his two businesses up for sale.

A group of investors purchased E.T. Products for nearly \$5 million. As part of the sale, Miller and his son signed noncompetition agreements. The noncompete agreements had a five-year duration and prohibited the Millers from "assisting anyone involved in any company either directly or indirectly engaged in the same industry as E.T. Products anywhere in North America." The Millers were also forbidden to "directly or indirectly own, operate, invest in, advise, render services for, or otherwise assist any such competitor."

About a year after he sold E.T. Products, Miller sold Petroleum Solutions. Following that sale, Miller provided a lease for the land on which Petroleum Solutions operated, training in lubricant blending, and consulting help as the purchaser learned the business. Miller's son also helped by training the purchaser on Petroleum Solutions' computer programs.

At first, Petroleum Solutions continued to purchase E.T. Products fuel additives for resale. At the time, resale of E.T. Products fuel additives was Petroleum Solutions' only venture into the additives business. In December 2012, E.T. Products ceased using Petroleum Solutions as its distributor. Thereafter, Petroleum Solutions began blending its own additives and distributing additives from other companies.

When Miller learned that E.T. Products had severed its relationship with Petroleum Solutions, he told Petroleum Solutions that he could no longer assist it in the additives business due to his obligations to E.T. Products under the noncompetition agreement. Petroleum Solutions' lease of the business property continued uninterrupted, but the Millers thereafter ceased all assistance to Petroleum Solutions.

E.T. Products sued the Millers for breach of their noncompete agreements. The district court granted summary judgment to the Millers, finding that the noncompete agreements were enforceable but had not been breached.

The Seventh Circuit affirmed that decision, holding that "a firm whose sole conduct in the relevant market consists of distributing one manufacturer's product plainly isn't that manufacturer's competitor." The Seventh Circuit rejected the notion that the Millers' assistance to Petroleum Solutions was a form of "indirect" involvement in the industry, pointedly characterizing that argument as "a bit much."

The Seventh Circuit went on to discuss whether Petroleum Solutions became E.T. Products' competitor following the end of its distributor relationship:

The [district court] judge thought that the noncompete wasn't triggered unless Petroleum Solutions engaged in all the same aspects of the additive business as E.T. Products: blending, packaging, marketing, and selling. That's not correct. Two companies

need not perfectly mirror each other before they are considered competitors, and the inclusion of the phrase “directly or indirectly” in the noncompete was designed to preclude precisely this kind of narrow construction. That language means, if nothing else, that complete overlap isn't required.

The Court concluded that once Petroleum Solutions began blending its own additives and distributing additives from other companies, it became E.T. Products' competitor. However, because the Millers stopped training and advising Petroleum Solutions once it became E.T. Products' competitor, the Seventh Circuit concluded that the Millers had not breached their agreements.

Employer Takeaways:

1. Although this case involved a noncompete connected to the sale of a business, the Seventh Circuit's guidance regarding “competitors” also applies to employee noncompete agreements.
2. At least in the Seventh Circuit (Wisconsin, Illinois, and Indiana), companies with whom you have a distributor relationship are unlikely to qualify as your competitor, unless the distributor also distributes competing products from other suppliers.
3. When enforcing or defending claims related to breach of a noncompetition or nonsolicitation agreement, keep in mind that a company does not need to engage in all of the same aspects of your business in order to qualify as your competitor. It is sufficient if there is at least some overlap in the products or services the companies provide.