
# CAN THE JUDGE REWRITE YOUR NON-COMPETE?

08.13.2014
Susan H. Hargrove, Lauren H. Bradley and Francisco J. Benzoni

North Carolina has long followed the “strict blue-pencil doctrine,” meaning that the court has two options when faced with an overly broad non-competition agreement:

1. Strike the unreasonable portion of the non-compete if it can be separated from the rest of the agreement.
2. Void the non-compete entirely if the unreasonable portion cannot be stricken from the reasonable provisions.[1]

Neither option is ideal for a party who negotiated and paid, perhaps a considerable sum, for a non-competition agreement.

This past week, in ***Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC***,[2] the North Carolina Court of Appeals confronted whether the parties to a non-competition agreement can avoid North Carolina’s strict blue-pencil doctrine with a contractual provision allowing the judge to rewrite the non-compete. Two out of three judges said, “yes,” at least in the context of the sale of a business.

In *Beverage Systems*, the plaintiff, Beverage Systems of the Carolinas (Beverage Systems), purchased the assets of two businesses that were also in the beverage industry. *Slip Op*., p. 3. The sellers of the two businesses, Thomas, Kathleen and Ludine Dotoli, executed a non-competition agreement as part of the sale. *Id.* at 3-4. The non-compete prohibited the three sellers from “compet[ing], own[ing], operat[ing], control[ling], or participat[ing] or engag[ing] in the ownership, management, operation or control of, or be[ing] connected with . . . [a] business organization or enterprise that is engaged in the business of the Purchaser [Beverage Systems]” for a period of five years in both North Carolina and South Carolina. *Id.* The non-compete also authorized the court to modify any restriction determined to be unreasonably broad "to cover the maximum period, scope and area permitted by law." *Id.* at 4.

The majority and dissent agreed that the geographic scope of the non-compete was overbroad[3] *Id.* at 10-11; *Dissenting Op*., p. 2. The businesses that Beverage Systems purchased did not have accounts across the whole State of North Carolina and only had accounts in a discrete part of South Carolina. *Slip Op*., p. 10. Yet, the non-compete covered activities in all of North Carolina and South Carolina. *Id.*

The majority went on to determine that the judge should have revised the geographic scope of the non-compete to be reasonable, rather than refusing to enforce the agreement all together, because the judge was explicitly given this power in the agreement. *Id.* at 12. Based on the leniency given to non-competes in connection with the sale of a business and the relatively equal bargaining strength of the seller and buyer, the majority held that the

judicial revision provision was valid and would allow the court to revise the agreement. *Id.* at 12-13. Judge Hunter noted that "this practice makes good business sense and better protects both a seller's and purchaser's interests in the sale of a business. It not only protects the business interests of the purchaser, . . . but it also allows the seller to make more money than it would have had it just sold the assets of the business." *Id.* at 15. Judge Hunter pointed out further that the strict blue-pencil doctrine is an inflexible judicial tool in our "rapidly changing economy." *Id.* The case was remanded to revise the non-compete and proceed to trial on whether the defendants violated the non-compete as revised. *Id.* at 17-18.

Judge Rick Elmore disagreed with the majority, interpreting "permitted by law" to require application of the strict blue-pencil doctrine, which is the law of North Carolina. *Dissenting Op.*, p. 4. Otherwise, per the dissent, the language in the contract permitting judicial revision violated North Carolina public policy and could not be enforced.

Given the split decision, the defendants may appeal to the North Carolina Supreme Court as of right, opening the door for that body to revisit its historical reluctance to authorize judicial revision of private contracts.[4] For now, this case can be credited only as a tentative step toward judicial modification of noncompetition agreements. The wise drafter will continue to prepare restrictive covenants geared toward passing the "reasonableness" tests as written.

---

[1] *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989).

[2] A copy of the opinion is available HERE as well as on Westlaw by using the citation 2014 WL 3823714.

[3] The majority and dissent also disagreed about whether the agreement could have been revised by using the strict blue-pencil doctrine. The majority stated that the trial court "could have, but chose not to, strike the unreasonable territorial provisions of the non-compete," *slip op.*, p.12, while the dissent argued that "neither of those restrictions [on activities in North Carolina and South Carolina] taken separately are reasonable," *dissenting op.*, p. 5.

[4] *Henley Paper Co. v. McAllister*, 253 N.C. 529, 534-35, 117 S.E.2d 431, 434-35 (1960); *Noe v. McDevitt*, 228 N.C. 242, 245, 45 S.E.2d 121, 123 (1947).

## PRACTICE AREAS

Non-Compete & Trade Secrets