
WAKE FOREST JOURNAL OF BUSINESS
AND INTELLECTUAL PROPERTY LAW

VOLUME 12

SPRING 2012

NUMBER 2

**THE ROAD TO REDEMPTION: SAVING NORTH CAROLINA
NONCOMPETE LAW FROM ITSELF**

Kenneth P. Carlson, Jr.[†]

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[†] Partner, Constangy, Brooks & Smith, LLP in Winston-Salem, North Carolina, and Adjunct Professor, Wake Forest University School of Law. I am particularly grateful to Austin Walsh, a former student in one of my law school courses who provided invaluable research, proofreading and comments. Austin is a Wake Forest University School of Law 2012 J.D. Candidate and holds Bachelors Degrees in History and Economics, *magna cum laude*, from Auburn University where he was recipient of the Algernon Sydney Sullivan Award. Upon graduation, Austin intends to practice civil and commercial litigation in Charlotte, North Carolina. If the lawyer he becomes is anything close to the student and resource he has been for me, then his future is bright indeed.

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ABSTRACT

This article examines the current state of covenant not to compete law in North Carolina and recommends four changes to that law in order to help ensure one of its primary goals of protecting only an employer’s legitimate business interests. The article initially explores the elements of an enforceable noncompetition or customer-based nonsolicitation agreement, discussing how courts have interpreted and applied these elements in a manner that often places specific forms of drafting over the intended substance of properly protecting a company against unfair competition. Those elements consist of the noncompete agreement being in writing and part of the employment “contract,” based on valuable consideration, being reasonable as to time and

territory, and not being against public policy. Given those elements, four recommendations are made to correct the modern tendency of courts to parse apart noncompete language in a manner that holds the drafters of those agreements to an unrealistic standard for them to be enforceable or enforced: (1) reject an undue adherence to specific noncompete language regarding post-termination employment that ignores the larger restrictive covenant purpose of protecting against unfair competition; (2) reject interpreting “look back” periods that define and limit noncompete restrictions in a manner that instead expands their restricted periods; (3) allow competitor-based restrictions to substitute for or supplement geographic areas to satisfy the “reasonable as to territory” requirement of a valid noncompete agreement, especially given how geographic boundaries often do not adequately protect a company’s legitimate business interests in the Internet age; and (4) correct an unreasonably strict adherence to contract severability in a covenant not to compete setting, and adopt a blue pencil or reasonable judicial modification rule that still honors the five elements of an enforceable noncompete agreement. As discussed throughout the article, the time has come to redeem North Carolina noncompete law from its current course of inconsistent and often contradictory holdings based primarily on highly nuanced interpretations of an agreement’s precise wording that leave employers and employees alike in an unsettled state of restrictive covenant guesswork.

I. INTRODUCTION

It usually happens that the world of business develops faster than the universe of case law, and perhaps there is no better example than with covenants not to compete. Often referred to as “noncompetition” or “noncompete” agreements, these restrictive covenants – along with their progeny, “nonsolicitation agreements”¹ – provide important legal protection against unfair competition.² They do so by keeping individuals from working in a competing business for a specific period of time in a particular geographic area (noncompete agreements), or by restricting access to a particular customer or vendor base

¹ For the purposes of this article, and for ease of reference, the terms covenant not to compete, noncompetition agreement, noncompete agreement or anything similar are used interchangeably and should be considered as the same. The terms shall also apply to nonsolicitation agreements – and vice versa – unless otherwise expressly stated.

² See, e.g., *infra* note 8. North Carolina noncompete law has primarily developed in the employer-employee context, which is the focus of this article. However, covenants not to compete in North Carolina (as in most states) are also allowed with independent contractors and in business-to-business settings. See, e.g., *infra* note 19.

(nonsolicitation agreements).³ As a general rule, noncompete agreements protect business interests that a company has spent considerable effort developing and which are vital to its economic health.⁴ Those interests range from confidential information to customers, from products and services to research and development, from marketing strategies to market share, and a host of other concerns.⁵

But while North Carolina courts have increasingly recognized the importance of allowing companies to protect against unfair competition, especially in light of today's Internet age and extremely mobile workforce, it is precisely because noncompetition agreements restrict free enterprise that they are "not viewed favorably in modern law."⁶ That being said, covenants not to compete and nonsolicitation agreements are regularly enforced in North Carolina (like most states),⁷ but the critical enforcement inquiry is whether the restrictive covenant is considered an attempt to prevent normal competition

³ Nonsolicitation agreements can also serve as "anti-piracy" covenants, primarily restricting the solicitation to hire or hiring of a company's employees for a period of time after employment ends. Although North Carolina courts have not specifically discussed their enforceability, they have inferred such enforcement by accepting them without comment, allowing them to succeed or fail based on the validity of the larger noncompete agreements in which they appear. *See, e.g.*, *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 11, 652 S.E.2d 284, 292 (2007); *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 631, 568 S.E.2d 267, 269 (2002).

⁴ *See, Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315, 317 (1929).

⁵ *See, United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 651-52, 370 S.E.2d 375, 383 (1988); *see, e.g., Chemimetals Processing, Inc. v. McEneny*, 124 N.C. App. 194, 476 S.E.2d 374, 376-77 (1996) (stating general rule under North Carolina law and finding that restriction on manufacturing was reasonably related to protecting confidential information).

⁶ *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000) (quoting *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994), *rev. denied*, 339 N.C. 612, 454 S.E.2d 251 (1995)).

⁷ In fact, the extreme runs from California, where covenants not to compete between employers and employees are *prohibited* by statute, *see*, Cal. Bus. & Prof. Code Section 16600, to the state of Florida, whose covenant not to compete statute expressly provides that "[a] court shall construe a restrictive covenant *in favor* of providing reasonable protection to all legitimate business interests established by the person seeking enforcement." Fla. Stat. Ann. § 542.335(1)(h) (emphasis added). In between are other states where, despite narrowly construing restrictive covenants and having individualized state law requirements, courts will generally uphold noncompete and nonsolicitation agreements as often as they declare them invalid. The key is whether the agreement has been drafted, executed and is being enforced in a manner that satisfies a particular state's legal requirements. For an excellent overview of various state law requirements regarding restrictive covenants, *see* generally Brian M. Malsberger, *Covenants Not To Compete: A State-by-State Survey* (BNA eds., 7th ed. 2010).

versus contracting against unfair competition.⁸ If the former, the covenant will not be enforced; if the latter, it will likely be enforced when proper requisites are met.⁹

Although covenants not to compete are founded on a premise that business, by its very nature, has valid concerns over competition, it is precisely because competition is generally considered “good” for American society that any restriction on that “good” must necessarily be limited. For restrictive covenant purposes, this means that noncompetition and nonsolicitation agreements are valid only to the extent they protect the “legitimate interests” of the enforcing party, which is normally the employer or company that benefits from their restrictions.¹⁰ Determining those interests and any resulting damages from their unlawful breach can be a challenge for any judge or jury. However, almost universally, there is a recognition that unfair competition *is* a valid business concern that our laws will protect against if addressed in a proper way.¹¹

The requirements of an enforceable noncompete agreement are usually interpreted in light of the specific business interests being protected and the particular individual or entity being restrained. This interpretation involves a subjective analysis of the facts and interests at issue within a larger, objective framework of validity – an overlapping inquiry that fills covenants not to compete with potential traps in drafting, execution and enforcement. Avoiding these traps requires a realistic assessment of the interests being protected and those being restrained. This balancing act also requires careful drafting and

⁸ *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 407-08, 302 S.E.2d 754, 763 (1983) (quoting *Gillis*, 197 N.C. at 228, 148 S.E. at 317-18).

⁹ *See, e.g., A.E.P. Indus.*, 308 N.C. at 408, 302 S.E.2d at 763 (holding that an employer was entitled to enforcement of the covenant not to compete). *But see, e.g., Kadis v. Britt*, 224 N.C. 154, 159, 29 S.E.2d 543, 546 (1944) (holding that personal service contract with restrictive covenant is “offensive to public policy” where it does not involve a “legally protectible [*sic*] subject or because its practical effect is merely to stifle normal competition”); *see also Starkings Court Reporting Services, Inc. v. Collins*, 67 N.C. App. 540, 313 S.E.2d 614, 615-16 (1984) (invalidating noncompete agreement as an “unreasonable restraint of trade” and an effort to “stifle normal competition”).

¹⁰ *Kuykendall*, 322 N.C. at 649-50, 370 S.E.2d at 380 (quoting *Sonontone Corp. v. Baldwin*, 227 N.C. 387, 390, 42 S.E.2d 352, 355 (1947)). *Kuykendall* provides one of the best overviews of the history and development of noncompete law in North Carolina and remains one of the best summaries of its most important legal principles. *See Kuykendall*, 322 N.C. at 648-53, 370 S.E.2d at 379-82.

¹¹ *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 651, 370 S.E.2d 375, 381 (1988) (noting that “protection of customer relationships and good will against misappropriation by departing employees is well recognized as a legitimate protectable interest of the employer”).

execution of the covenant itself, while remembering that noncompete agreements are also governed by certain basic tenets of contract law. Two of the primary tenets include: (1) any ambiguities in the document will be “strictly construed against the drafting party;”¹² and (2) overly broad or otherwise unenforceable provisions are subject to “severability,” with a restrictive covenant twist that is perhaps best stated by the North Carolina Supreme Court:

If a contract by an employee in restraint of competition is too broad to be a reasonable protection to the employer's business it will not be enforced. The courts will not rewrite a contract if it is too broad but will simply not enforce it If the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision.¹³

Simply stated, those who draft noncompetition and nonsolicitation agreements must do it correctly or face the unfortunate consequence of potentially having them declared invalid years down the road when they are finally tested and needed most. While this may be a truism of most contract law, it has special importance with covenants not to compete whose litigation tends to focus on drafting and execution as much as any alleged breach. In fact, noncompete litigation often involves injunctive remedies, actual, consequential and exemplary damages, and ancillary claims that go far beyond a mere breach of contract and which, unlike most contract litigation, often depend upon the underlying agreement's validity. Further, this dynamic is played out before an often unfriendly court, schooled in the admonition that noncompetition and nonsolicitation agreements are “not viewed favorably in modern law.”¹⁴ While certainly understandable, if considered a restraint on trade, the fact also remains that an approach like this virtually ignores how competitive concerns in the marketplace *are* “legitimate interests” of a business. Moreover, those legitimate business interests exist independently of whether the agreement's drafter was clairvoyant enough to anticipate legal developments in noncompete interpretation years in advance or whether the drafter

¹² Reichhold Chems., Inc. v. Goel, 146 N.C. App. 137, 153, 555 S.E.2d 281, 291 (2001) (citing Camp v. Leonard, 133 N.C. App. 554, 562, 515 S.E.2d 909, 914 (1999)).

¹³ Whittaker Gen. Med. Corp. v. Daniel, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989).

¹⁴ Farr Assocs., Inc. v. Baskin, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000) (quoting Hartman v. W.H. Odell and Assocs., Inc., 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994), *rev. denied*, 339 N.C. 612, 454 S.E.2d 251 (1995)).

wrote particular provisions in enough “distinctly separable part[s]” to satisfy some future court looking for ways to defeat it.¹⁵

All of which brings us to the purpose of this article. North Carolina’s well-developed law of covenants not to compete has been recently sidetracked by an adherence to such rigid rules of construction that it has not only placed form over substance, it has made “form” the most substantive aspect of that law. And it has done so regardless of whether any legitimate business interests are present. This article first surveys the current state of North Carolina law on covenants not to compete, and then discusses how that law has gone astray in four key areas. It also recommends a path for recovery that, with one possible exception, is in keeping with every related principle our state Supreme Court has established. In the process, it attempts to breathe life into Judge Sanford Steelman’s astute observations about how further guidance from the state’s highest court is greatly needed:

At the time that our law in the area of restrictive covenants was developed, much of our commerce was local, and restrictive covenants were enforced only to protect specific local interests. Any covenants that attempted to protect broader commercial interests were held to be invalid as an improper restraint of trade. However, today’s economy is global in nature . . . The law of restrictive covenants should be re-evaluated by our Supreme Court in the context of changing economic conditions to allow restrictions upon competing business activity for a specific period of time, limited to a specific, narrow type of business, but with fewer geographic limitations.¹⁶

Judge Steelman shared those thoughts in a case that invalidated certain restrictive covenants despite involving defendants who “flagrantly violated” their “voluntarily executed” noncompete agreements, and “[t]hen, when confronted with their breach of contract, sought to have the courts relieve them of their contractual obligations.”¹⁷ As argued below, the path to follow in order to correct that injustice is surprisingly straight. What may at first glance appear to be a radical departure with one recommendation really is not so radical in light of modern business realities and the overall intent of

¹⁵ *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994), *rev. denied*, 339 N.C. 612, 454 S.E.2d 251 (1995).

¹⁶ *MJM Investigations, Inc. v. Sjostedt*, 205 N.C. App. 468, 698 S.E.2d 202, *5 (2010) (Table) (Stelman, J., concurring).

¹⁷ *Id.*

noncompete enforcement to recognize and protect only legitimate business interests. In fact, as discussed below, if our courts would simply reject one misguided principle, clarify two more, and then have the courage to adopt a fourth recommendation that better reflects the realities of modern business, then the door would be opened for a redirected law of covenants not to compete. This redirection would not only address Judge Steelman's concerns, it would place North Carolina squarely on a road to restrictive covenant redemption. The path should be paved as follows:

1. Reject the current practice of adding any pre-termination "look back" period to a defined, post-employment restricted period in order to extend that restricted period and risk making it unreasonably broad;
2. Clarify that competitor-based restrictions already satisfy the long-standing need for geographical territory limitations in a valid noncompete, or that they are a natural outgrowth of current law, and should be allowed as an appropriate restricted "territory";¹⁸
3. Clarify that covenants not to compete which are otherwise enforceable and prohibit a former employee from working in *any* position for a direct competitor may still be enforceable in certain situations, regardless of the precise language in the noncompete or the position held with the competing company; and
4. Adopt a blue pencil or reasonable judicial modification rule (or both) that allows courts to judicially modify a covenant not to compete in order to effectuate its intent, within the rubric of only protecting legitimate business interests. Further, courts should broaden an overly strict application of the severability rule that has repeatedly surfaced in noncompete cases.

II. THE CURRENT STATE OF NORTH CAROLINA NONCOMPETE LAW

For a noncompetition agreement to be valid and enforceable under North Carolina law, each of the following elements must be satisfied: (1) the noncompete must be in writing; (2) it must be part of the

¹⁸ Nonsolicitation agreements have long been relieved of needing territorial limits based on geography. *See, Okuma America Corp. v. Bowers*, 181 N.C. App. 85, 89, 638 S.E.2d 617, 621 (2007) (citing *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 660, 370 S.E.2d 375, 386 (1988)).

employment contract;¹⁹ (3) it must be based on valuable consideration; (4) it must be reasonable as to time and territory; and (5) it must not violate public policy.²⁰ Each of these elements operates under an overall requirement of only protecting the “legitimate business interest” of the enforcing party – an umbrella-type analysis that, if not satisfied on its own, can invalidate a noncompete agreement no matter how well-written or executed it might be.²¹ Whether a covenant not to compete has satisfied these elements and the legitimate business interest requirement, and is therefore valid and enforceable, are questions of law for the court.²²

Those are the requirements as consistently established by the North Carolina Supreme Court. For whatever reason, however, modern North Carolina noncompete law has developed in such a way that the overall “legitimate business interest” requirement has become

¹⁹ This element is understood as an employment relationship, regardless of whether the employee actually has a larger, written employment agreement containing noncompete obligations. *See, e.g., Hejl v. Hood, Hargett & Assocs., Inc.*, 196 N.C. App. 299, 304, 674 S.E.2d 425, 428 (2009) (holding that a separate non-compete satisfies the “part of the contract of employment” element where there is “‘new’ or ‘separate’ consideration”). Again, the focus of this article is on noncompete agreements within an employer-employee setting that comprises the vast majority of covenant not to compete litigation. However, North Carolina law is clear that covenants not to compete are also allowed in business-to-business settings, such as mergers and acquisitions, *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 662-63, 158 S.E.2d 840, 843 (1968), and between companies and their independent contractors. *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 520 S.E.2d 570, 578 (1999), *rev. denied*, 351 N.C. 358, 542 S.E.2d 213 (2000) (citing *Starkings Court Reporting Servs. v. Collins*, 67 N.C. App. 540, 313 S.E.2d 614 (1984)) (upholding noncompete agreements with independent contractors).

²⁰ *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 228, 393 S.E.2d 854, 857 (1990); *Kuykendall*, 322 N.C. at 649-50, 370 S.E.2d at 380 (citing *A.E.P. Indus. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983)).

²¹ *Kuykendall*, 322 N.C. at 650-51, 370 S.E.2d at 380-81 (addressing legitimate business interests of employer as being the framework for any covenant not to compete analysis, and finding those interests grounded in terms of customer-based protections and protecting “valuable [confidential] information as to the nature and character of the business”). *See also Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 656, 670 S.E.2d 321, 327 (2009) (following *Kuykendall* and *A.E.P. Indus.* in observing that customers and valuable [confidential] business information are legitimate interests of the employer for covenant not to compete purposes); *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 152-53, 520 S.E.2d 570, 578 (1999) (quoting *Starkings Court Reporting Servs. v. Collins*, 67 N.C. App. 540, 541, 313 S.E.2d 614, 615 (1984) (“Even if the covenant not to compete is permissible in all other respects, ‘the restraint is unreasonable and void if it is greater than is required for the protection of the promisee or if it imposes an undue hardship upon the person who is restricted.’”)).

²² *Kadis v. Britt*, 224 N.C. 154, 158, 29 S.E.2d 543, 545 (1944) (stating the rule that a court determines validity and reasonableness of a restrictive covenant).

secondary to an almost myopic analysis of a noncompete agreement's precise language. In doing so, it has strayed from a proper application of these accepted principles through dicta and slight variations on legal precedent that have an unfortunate consequence with future cases. As just one example of how these principles have mutated, certain Court of Appeals decisions have replaced the long-established, public policy element with the umbrella requirement of only protecting legitimate business interests. This variance began at least as early as 1990 with an incorrect citing of *A.E.P. Industries* by the Court of Appeals in *Young v. Mastrom, Inc.*²³ In *Young*, the court inaccurately listed the fifth element of an enforceable noncompete as "designed to protect a legitimate business interest of the employer," when the citation to *A.E.P. Industries* clearly lists the fifth element as "[n]ot against public policy."²⁴

This variation, which has been repeatedly adopted by numerous courts,²⁵ demonstrates a Court of Appeals trend that quite arguably goes beyond a mere inaccurate quote. Rather, it shows a willingness in this highly nuanced area of noncompete law to stray from the details by allowing new iterations of that law which then assume lives of their own. One impact of reducing this overall requirement of protecting legitimate business interests to just one of the five related elements for a valid covenant not to compete is that its umbrella nature is therefore compromised, which might help explain certain court decisions that focus more on the form of an agreement rather than its substance. In the process, they allow the precise language of a covenant to control its enforcement rather than whether its wording is a good-faith and reasonable attempt to protect against unfair competition, and then critically assessing as a court whether unfair competition exists. This tendency has perhaps reached its apex in the severability and "look back" issues that this article advocates changing, but as discussed below it has also surfaced in other ways that need correcting as well.

A. The Agreement Must Be In Writing And Must Be Part Of The Employment "Contract"

Perhaps the easiest element to satisfy is that a covenant not to

²³ Compare *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 122-23, 392 S.E.2d 446, 448 (1990) (listing "designed to protect a legitimate business interest of the employer" as the fifth element), with *A.E.P. Indus.*, 308 N.C. at 402-03, 302 S.E.2d at 760 (designating "[n]ot against public policy" as the fifth element).

²⁴ *Id.*

²⁵ See, e.g., *Okuma America Corp. v. Bowers*, 181 N.C. App. 85, 88, 638 S.E.2d 617, 620 (2007); *Farr Assoc., Inc. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000); *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994).

compete must be in writing and must be part of the employment “contract,” which is generally understood as the employment relationship itself. Two observations should be initially made. First, in North Carolina (as in most, if not all other states) a noncompete agreement may stand alone and does *not* have to be part of a larger written employment agreement governing the terms and conditions of employment.²⁶ Second, only the restricted party – *i.e.*, the employee in the typical employer-employee noncompete setting – must sign the agreement for it to be valid. In fact, this requirement is statutory in North Carolina:

No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory²⁷

B. The Agreement Must Be Supported By Adequate Consideration (New Employee v. Current Employee Distinction)

The second element of a valid and enforceable covenant not to compete in North Carolina is based upon elementary contract law. To have a valid agreement that restricts an individual’s ability to compete, he or she must be “paid” something of sufficient value for the economic “rights” being forfeited.²⁸ In North Carolina, courts further distinguish between consideration paid to new employees versus consideration paid to existing employees for signing a noncompete.

²⁶ *Ridgway*, 194 N.C. App. at 654-55, 670 S.E.2d at 326. In fact, for litigation purposes there may be good reasons to *not* draft a larger employment agreement around a covenant not to compete. For example, if the employer has allegedly violated other provisions in the employment agreement (which is often a counterclaim in a breach of employment contract action), its task could be more difficult when trying to enforce the noncompetition clause. The argument is that the company should not be able to enforce a contract that it has breached itself – which even if possible under the law, has a strong jury appeal as a defense.

²⁷ N.C. Gen. Stat. § 75-4 (2011). *See also* *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 519-20, 257 S.E.2d 109, 113 (1979) (indicating that the statute does not require that party seeking enforcement of a noncompete must also sign the agreement); *New Hanover Rent-A-Car, Inc. v. Martinez*, 136 N.C. App. 642, 644-47, 525 S.E.2d 487, 489-91 (2000) (noting that where defendant printed her name on identification line, but did not sign the noncompete agreement in cursive script or make any other writing on signature line, plaintiff was unable to show substantial likelihood of success on the merits and trial court’s issuance of preliminary injunction reversed).

²⁸ *See Kadis v. Britt*, 224 N.C. 154, 162-63, 29 S.E.2d 543, 548-49 (1944).

As for new employees, the promise or act of new employment alone is sufficient to support a covenant not to compete.²⁹ The safest way to demonstrate this consideration is to discuss the noncompete agreement's terms and conditions during the job application or interview process, provide a copy with any job offer (preferably in writing and referencing the enclosed noncompete), and have the agreement signed on or before the first day of employment. However, a limited but significant exception to this requirement exists where a noncompete agreement's required execution and material terms were disclosed or discussed in some detail before employment started. In that situation, even if a restrictive covenant is signed much later than an employee's first day of work, it may still be enforceable. The reason is that it was made "part of an original verbal employment contract" in which the "terms of the verbal covenant. . .[were] agreed upon at the time of employment".³⁰ This exception presumably helps protect against any intentional or inadvertent delay in signing that is not the employer's fault.

However, once the individual starts employment and is *then* presented with a noncompetition agreement for the first time, North Carolina takes a dramatically different approach. If the restrictive covenant is first presented and then executed *after* an employee is hired, then a promise of continued employment alone is not sufficient payment.³¹ Because consideration is not something that can be "given and taken in the same breath," the employee could be relieved of the immediate threat of discharge through guaranteed employment for a specific period – presumably because the employment (even if at-will) is something the employee already has where a promise of employment for a definite period is not.³²

²⁹ Wade S. Dunbar Ins. Agency, Inc. v. Barber, 147 N.C. App. 463, 468, 556 S.E.2d 331, 335 (2001); Farr, 138 N.C. App. at 279, 530 S.E.2d at 881; Young v. Mastrom, Inc., 99 N.C. App. 120, 122-24, 392 S.E.2d 446, 448-49 (1990).

³⁰ Young, 99 N.C. App. at 123, 392 S.E.2d at 448 (citing Stevenson v. Parsons, 96 N.C. App. 93, 97, 384 S.E.2d 291, 293 (1989)).

³¹ Kadis, 224 N.C. at 162-63, 29 S.E.2d at 548.

³² *Id.* Cf. states where continued employment alone *is* sufficient consideration to support a noncompetition agreement. The primary rationale for this approach is that because at-will employees can be discharged at any time for any reason or no reason, including if they refuse to sign a noncompete, then their employment continuation alone provides adequate consideration to support a restrictive covenant since they had no "rights" in their employment to start with. Simko, Inc. v. Graymar, 55 Md. App. 561, 464 A.2d 1104, 1106 (1983); Insurance Assocs. Corp. v. Hansen, 111 Idaho 206, 723 P.2d 190, 191-92 (Ct. App. 1986), *aff'd*, 116 Idaho 948, 782 P.2d 1230 (1989). That being said, some states have placed a caveat on this analysis, essentially noting that the employment must continue for a material amount of time, similar to the analysis in *Kadis*, in order to be considered valuable consideration for
continued . . .

But regardless of its form, an existing employee presented with a noncompete agreement for the first time or to replace an earlier version must be provided “new” or “separate” consideration to support the changed relationship of having forfeited future employment rights through that agreement.³³ Further, this “additional consideration”³⁴ must not be illusory, meaning that it must be sufficiently defined and actually result in a material benefit to the employee in order to support the newly executed restrictive covenant.³⁵ As for what constitutes new or separate consideration for existing employees to sign a noncompete agreement, courts have found sufficient everything from “continued employment for a stipulated amount of time;”³⁶ “a raise, bonus, or other change in compensation; a promotion; additional training; uncertified shares; or some other increase in responsibility or number of hours worked.”³⁷

relinquishing future employment rights through a noncompete agreement. *See, e.g.*, *Summits 7, Inc. v. Kelly*, 178 Vt. 396, 401-02, 886 A.2d 365, 370-71 (2005); *Zellner v. Conrad*, 589 N.Y.S.2d 903, 907, 183 A.D.2d 250, 256 (1992).

³³ *Hejl v. Hood, Hargett & Associates, Inc.*, 196 N.C. App. 299, 304-05, 674 S.E.2d 425, 428-29 (2009) (quoting *Greene Co. v. Kelley*, 261 N.C. 166, 168, 134 S.E.2d 166, 167 (1964)).

³⁴ *See, e.g.*, *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 636-37, 568 S.E.2d 267, 272 (2002) (referring to this new or separate payment as “additional” consideration); *Collier Cobb & Associates, Inc. v. Leak*, 61 N.C. App. 249, 254, 300 S.E.2d 583, 586, *rev. denied*, 308 N.C. 543, 304 S.E.2d 236 (1983).

³⁵ *See, e.g.*, *Milner Airco, Inc. of Charlotte, NC v. Morris*, 111 N.C. App. 866, 870, 433 S.E.2d 811, 813-14 (1993) (quoting *Wilmar v. Liles*, 13 N.C. App. 71, 185 S.E.2d 278 (1971), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972)) (holding that execution of noncompete agreement in order to become an account manager if and when the economy improved is illusory consideration which “keeps the promise to the ear while it breaks it to the hope”); *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 124, 392 S.E.2d 446, 449 (1990) (holding that mere promises of increased compensation, vacation and sick leave that were in board of directors’ discretion and stated no actual amounts were “so illusory that they could not provide consideration” for the covenant not to compete).

³⁶ Presumably a covenant not to compete could be supported by continued employment for a guaranteed period of time, essentially replacing the “employment at will” relationship with a contractual relationship governing the terms and conditions of employment. However, this author has found no such case in North Carolina.

³⁷ *Hejl*, 196 N.C. App. at 304, 674 S.E.2d at 428-29. *See, e.g.*, *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 527-28, 379 S.E.2d 824, 827-28 (1989) (recognizing how a raise or new job assignment can be new consideration to support a noncompete agreement for an existing employee, and holding that employee’s promotion to full-time salesperson and substantial raise in salary were sufficient to support signing of noncompete). *But see*, *Collier Cobb & Assocs. v. Leak*, 61 N.C. App. 249, 300 S.E.2d 583 (1983), *disc. rev. denied*, 308 N.C. 543, 304 S.E.2d 286 (1983) (no consideration found when long-time employees signed covenants but

continued . . .

The one aspect of this second element that gets relatively little attention from the courts is whether the new consideration is “adequate” or “valuable.” The best example of this cursory analysis is also one of the most recent. In *Hejl v. Hood*, a new and separate \$500.00 payment to an existing employee was deemed adequate enough to support the signing of a nonsolicitation agreement.³⁸ This determination was not made because the amount itself was specifically found adequate in a particular set of facts, but rather because “[t]he slightest consideration is sufficient to support the most onerous obligation, the inadequacy . . . is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.”³⁹

C. The Agreement Must Be Reasonable As To Time And Territory

The next element is probably the most litigated when deciding if a covenant not to compete is valid and enforceable – whether the restrictive covenant is reasonable as to time and territory. As usual, the reasonableness of a particular covenant depends upon the type of activity being restrained and a careful analysis of the circumstances within the context of the employer’s legitimate business interests. If either the length of time or the restricted territory that limits competitive actions after employment ends is determined to be overly broad in a manner that exceeds those interests, the noncompetition or nonsolicitation agreement will be found unreasonable and it will not be enforced.⁴⁰

Significantly, time and territory restrictions are considered in tandem by following a general rule of inverse relationship: the shorter the time period, the larger the territory that can usually be restricted;

their jobs did not change and they did not receive an increase in pay at time of signing).

³⁸ *Hejl*, 196 N.C. App. at 305, 674 S.E.2d at 429.

³⁹ *Id.* (quoting *Machinery Co. v. Insurance Co.*, 13 N.C. App. 85, 90-91, 185 S.E.2d 308, 310-12 (1971) (quoting *Young v. Highway Commission*, 190 N.C. 52, 57, 128 S.E.2d 401, 403 (1925)), *cert. denied*, 280 N.C. 302, 186 S.E.2d 176 (1972). *See also* *Keith v. Day*, 81 N.C. App. 185, 194, 343 S.E.2d 562, 568 (1986) (stating general rule that courts “ordinarily will not inquire into the adequacy of the consideration, unless the contract is a fraud upon the restrained party, for it is up to the parties themselves to determine the adequacy of the consideration to the restraint imposed”).

⁴⁰ *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 229, 393 S.E.2d 854, 856-58 (1990); *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 316, 450 S.E.2d 912, 919 (1994).

the longer the time period, the smaller the territory.⁴¹ Although a covenant's time or territory restriction alone might be reasonable, the "combined effect of the two may be unreasonable."⁴²

Courts will examine the specific facts of a particular situation to help determine if the time and territory restrictions operate together in a reasonable manner. Depending on those facts, the results of what activities may be restricted, where and for how long often vary, but they always reflect this individualized inquiry into the precise situation of a particular case.⁴³

⁴¹ *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 280, 530 S.E.2d 878, 881 (2000) (observing how time and territory restrictions must be considered "in tandem A longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa*"). *See also*, *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 665, 158 S.E.2d 840, 844 (1968) (establishing general rule of time and territory restrictions operating in tandem under North Carolina noncompete law).

⁴² *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 280, 530 S.E.2d 878, 881.

⁴³ For examples of cases where the restricted territory was found to be reasonable, *see, e.g.*, *Jewel Box* at 663-65, 158 S.E.2d at 843-45 (allowing prohibition from operating a jewelry store within a 10-mile radius of Morganton for 10 years after a business acquisition); *Asheville Assocs., Inc. v. Miller*, 255 N.C. 400, 402-03, 121 S.E.2d 593, 594 (1961) (23-county area in western North Carolina found reasonable when it only prohibited defendants from working as insurance salespeople for one year); *Kinesis Advertising, Inc. v. Hill*, 187 N.C. App. 1, 14-15, 652 S.E.2d 284, 194-95 (2007), *rev. denied*, 362 N.C. 177, 658 S.E.2d 485 (2008) (two-county area of North Carolina considered reasonable restriction given two-year restricted period); *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 89-90, 638 S.E.2d 617, 620-21 (2007) (stating general principle of considering time and territory restrictions in tandem, and finding six-month restriction from soliciting customers wherever they are located throughout North and South America reasonable given short duration); *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 637-38, 568 S.E.2d 267, 272-73 (2002) (covenant not to compete covering North and South Carolina was reasonable for one-year period where former employer operated in 12 states; although former employee worked in North Carolina he had exposure to confidential information regarding business operations and customers in both states of the restricted territory); *Market Am., Inc. v. Christman-Orth*, 135 N.C. App. 143, 153-54, 520 S.E.2d 570, 577-78 (1999) (noncompetition covenant that arguably restricted the entire United States found reasonable despite not identifying any fixed geographic territory, since plaintiff is a national company and the restricted period only lasted for six months after termination of independent contractor agreement); *Forrest Paschal Machinery Co. v. Milholen*, 27 N.C. App. 678, 687, 220 S.E.2d 190, 196-97 (1975) (350-mile radius of former employer's business location was reasonable where noncompete restrictions lasted for two years and former employer had almost nationwide and some international business presence).

For examples of cases where a noncompetition agreement's restricted territory was found to be unreasonably broad, *see, e.g.*, *Hartman*, 117 N.C. App. at 312-15, 450 S.E.2d at 917-19 (covenant not to compete restricting employee from competitive work in eight states for five years unreasonable); *Electrical South, Inc. v. Lewis*, 96 N.C. App. 160, 162, 385 S.E.2d 352, 353 (1989) (noncompete that prohibited employee for two years from working anywhere in the world for any

continued . . .

I. Reasonable as to time

Of the time and territory tandem, the reasonableness of a noncompetition agreement's time restriction has generally been the easiest to determine under North Carolina law. At least it was until the Court of Appeals started a misguided "look back" analysis in 1996 that has compromised this straightforward analysis ever since.

First, as a general rule, North Carolina courts in the employer-employee context will enforce post-employment noncompete restrictions of up to two years; three to four years will be closely scrutinized and held to a more rigorous standard; and five years or more will be virtually unenforceable.⁴⁴ It is also the very nature of noncompetition and nonsolicitation agreements that they address *post-employment* competitive behavior.⁴⁵ Although many covenants not to compete are written in a way that also mention how employees cannot compete against their employers *during* employment,⁴⁶ that prohibition is such an understood part of the employment relationship that its violation alone is virtually never addressed through actions for breach of contract. Rather, it tends to arise as the basis for claims against the employee such as fraud, breach of fiduciary duty, and unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 *et seq.*, and as a defense to any wrongful discharge claim brought by employees terminated for acting against their employer's best interests while still employed.⁴⁷

competitor who also conducted business within a 200-mile radius of Greensboro found unreasonably broad); *Manpower of Guilford Cnty. v. Hedgecock*, 42 N.C. App. 515, 522-23, 257 S.E.2d 109, 115 (1979) (25-mile radius of any city in country where former employer's franchisor had an office unreasonably broad where defendant only worked for franchisee with offices in three North Carolina cities).

⁴⁴ *See, e.g., Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 525-26, 379 S.E.2d 824, 826 (1989) (prohibiting defendant from working for a competing employer for two years following termination of employment with plaintiff was reasonable); *Hartman*, 117 N.C. App. at 315, 450 S.E.2d at 918 (quoting *Eng'g Assocs., Inc. v. Pankow*, 268 N.C. 137, 139, 150 S.E.2d 56, 58 (1966)) (holding that only in "extreme conditions" will a five-year restricted period after employment ends be considered reasonable).

⁴⁵ *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 470, 556 S.E.2d 331, 335 (2001).

⁴⁶ *Id.* at 464, 556 S.E.2d at 333 (addressing a covenant requiring the following: "(1) that defendant will not, during employment or after termination of employment . . .").

⁴⁷ *See, e.g., Dalton v. Camp*, 353 N.C. 647, 649, 548 S.E.2d 704, 706 (2001) (addressing a case where a current employee formed a separate entity to directly compete with the employer and was sued for "breach of fiduciary duty of loyalty, conspiracy to appropriate customers, tortious interference with contract, interference with prospective advantage, and unfair and deceptive trade practices . . ."); *Sara Lee Corp. v. Carter*, 351 N.C. 27, 29, 519 S.E.2d 308, 309 (1999) (addressing a

continued . . .

From this long-established concept of post-employment restrictive covenant time periods came an unexpected development in North Carolina law that simply defies logic – and whose unintended consequence works directly against North Carolina’s strict requirement that covenants not to compete should be drafted in a way that only protects an employer’s legitimate business interests. Over the past fifteen years, the Court of Appeals has repeatedly taken any pre-termination “look back” period for defining those customers affected by a nonsolicitation agreement (such as an employer’s ‘active customers during the twelve months before employment ended’), and for some misguided reason *added* that period to the post-employment restricted time period. The result in certain cases has been to completely ignore the look back period’s intent to simply define and limit the number of affected customers and instead create a longer and completely unintended restricted period that runs a significant risk of being declared unreasonably broad and therefore unenforceable.⁴⁸

As argued in Part III.B. below, this practice should be stopped and expressly rejected by North Carolina courts.

2. *Reasonable as to territory*

To be reasonable as to territory, a covenant not to compete may restrict competitive actions only in the geographical area where the employer is actively engaged in business.⁴⁹ This relatively simple concept has led to a number of cases in which North Carolina courts have wrestled with two related but quite distinct restrictive covenants: (1) noncompetition agreements that prohibit working for a competitor or in any competitive manner; and (2) nonsolicitation agreements that specifically address customer-based protections regardless of any competitor-based restrictive covenant. Directly associated with these similar but quite distinct agreements is a fundamental question of

scenario where an employee created separate entities, in violation of a restrictive covenant, to supply parts and services to his employer without reporting the self-dealing and was sued for “fraud, breach of fiduciary duty, and unfair and deceptive practices”).

⁴⁸ See *Prof'l Liab. Consultants, Inc. v. Todd*, 122 N.C. App. 212, 219, 468 S.E.2d 578 (1996); *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 280-81, 530 S.E.2d 878, 881-82 (2000). Although it has not yet been addressed by North Carolina courts, presumably such an approach would also be taken for any look back period that might apply to a restricted territory, such as a radius of those cities where an employee was assigned during his or her last twelve months of employment. See *also, infra*, note 119.

⁴⁹ *Safety Equip. Sales & Serv., Inc. v. Williams*, 22 N.C. App. 410, 206 S.E.2d 745 (1974) (holding territorial restrictions as reasonable only if plaintiff actively conducts business in those areas).

whether both require a geographical territory restriction in order to be valid.⁵⁰ Although North Carolina courts have not explored this precise question in any substantive detail, as discussed below, they generally enforce customer-based nonsolicitation agreements without defined restricted territories, observing that specific geographical areas are not required in those types of agreements.⁵¹ However, as also discussed below, that answer has taken a while to develop, thanks primarily to yet another example of some Court of Appeals language whose ripple effect has taken years to settle down.

a. Restricted territories required in competitor-based noncompetition agreements

It has long been accepted under North Carolina law that to restrict individuals from working for a competing company for a specific period of time after their employment ends, a noncompetition agreement must also include a defined geographic area in which the restriction applies.⁵² This defined area serves as a limitation on the restrictive covenant, keeping it from operating in areas where the employer does not actively or significantly conduct business, or at times from applying to former employees who were never actively or significantly engaged in the employer's business in that area.⁵³

To determine whether the geographic area in such a "competitor-based" noncompetition agreement is reasonable, North Carolina courts use six factors to guide their analysis:

⁵⁰ Both types of agreements are often called "covenants not to compete" or even "noncompetition agreements", depending on the language of the agreement and the court. *See, Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 465, 556 S.E.2d 331, 333 (2001) (including both a non-compete and a non-solicitation under the heading of "covenant not to compete"). But as mentioned above (*see, supra*, note 1), restrictive covenants based solely on customer-based restrictions are generally referred to in this article as "nonsolicitation" agreements.

⁵¹ *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 89, 638 S.E.2d 617, 620 (2007) (noting that the North Carolina Supreme Court has "recognized the validity of geographic restrictions that are limited not by area, but by a client-based restriction.").

⁵² *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d 375, 380 (1988) (citing *A.E.P. Indus. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983)).

⁵³ *See, e.g., Williams*, 22 N.C. App. 410, 206 S.E.2d 745 (finding that the territorial restriction of only those areas where plaintiff actively conducted business were reasonable for two-year period); *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 656-57, 670 S.E.2d 321, 327-28 (2009) (holding a noncompete agreement was overly broad where it restricted former employee from working for "any parent, division, subsidiary, affiliate, predecessor, successor, or assignee" of plaintiff-employer within a 60-mile radius of Raleigh even though employee's prior duties may have had "nothing to do with that business").

- (1) The area or scope of the restriction;
- (2) The area assigned to the employee;
- (3) The area where the employee actually worked;
- (4) The area in which the employer operated;
- (5) The nature of the business involved; and
- (6) The nature of the employee's duty and his knowledge of the employer's business operation.⁵⁴

Needless to say, a noncompete agreement's geographic territory will more likely be considered "reasonable" the more narrow the area or scope of the restriction, the more the employer actually conducted business in the area, the more the employee was assigned to and actually worked in the area, the more competitive the business, and the more integral the employee was to that business through his or her duties and knowledge of its operations. Conversely, the broader the area and scope of the restriction, and the less the employee or employer satisfies these conditions, the more likely a court will not find the geographic area reasonable.⁵⁵

As uncomplicated as that analysis might appear, once again a twist has emerged through the Court of Appeals that places anyone drafting a covenant not to compete in the position of threading a form-over-substance needle. In their most conservative decisions, North Carolina courts have found restricted territories to be unreasonably broad, not because of their inverse relationship with restricted time periods, but rather because an employee's job duties or customer contact were not sufficiently connected with that territory or the customers in that geographic area.^{56 57}

⁵⁴ *Farr*, 138 N.C. App. at 281-82, 530 S.E.2d at 882 (citing *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 312, 530 S.E.2d 912, 917 (1994)). *Farr* refers to the six factors as a "six-part test", which may be an overstatement as there is no indication that each factor must be satisfied in some qualitative manner for a reasonable geographical restriction to exist. *Farr*, 138 N.C. App. at 281, 530 S.E.2d at 882. Rather, *Hartman* refers to the factors as simply being "relevant to determining whether the geographic scope of a covenant not to compete is reasonable." 117 N.C. App. at 312, 450 S.E.2d at 971 (citing *Clyde Rudd & Assocs., Inc. v. Taylor*, 29 N.C. App. 679, 684, 225 S.E.2d 602, 605 (1976), *cert. denied*, 290 N.C. 659, 228 S.E.2d 451 (1976)). *Clyde Rudd* listed the factors for the first time in a North Carolina case, apparently deriving them from the overall legal discussion in *Seaboard Indus., Inc. v. Blair*, 10 N.C. App. 323, 178 S.E.2d 781 (1971), which appears to be their original source. *See Clyde Rudd*, 29 N.C. App. at 684, 225 S.E.2d at 605.

⁵⁵ *See, e.g., infra* note 128 (citing *Techworks*).

⁵⁶ *See, e.g., Ridgeway*, 194 N.C. App. at 656-57, 670 S.E.2d at 327-28 (finding a noncompete agreement overly broad where it restricted former employee from working for "any parent, division, subsidiary, affiliate, predecessor, successor, or
continued . . .

In essence, those and similar court opinions have examined the individual's new employment and determined whether it is sufficiently connected with his or her prior employment to justify a restriction on competitive activity.⁵⁸ But lost in the analysis is how protecting a company's legitimate business interests also includes a prophylactic goal of keeping unfair competitive activity from occurring, especially by protecting its customer base and its valuable business information to the extent it is confidential or proprietary.⁵⁹ When that second prong is considered, any "close nexus" requirement between the employee's former position and his or her position with the new competing company runs a significant risk of being an impractical sleight-of-hand as it is virtually impossible to monitor any confidentiality violation after the individual is newly employed. And in terms of drafting a noncompetition agreement, that type of requirement places such a burden on the drafter that it again becomes a form-over-substance issue that requires undue attention to the written word rather than legitimate protection against unfair competition. Perhaps one of the best examples of this is *Okuma America Corp. v. Bowers*, where although the court upheld a noncompete agreement for motion to dismiss purposes it focused on parsing apart the agreement's precise language rather than on whether unfair competition was occurring. Through its analysis, the court noted how the noncompete's terms "thread the needle between those in *Precision Walls*, which were found to be valid and enforceable, and those in *VisionAIR*, which were struck down."⁶⁰

assignee" of plaintiff-employer within a 60-mile radius of Raleigh even though employee's prior duties may have had "nothing to do with that business"); *Hejl v. Hood, Hargett & Associates, Inc.*, 196 N.C. App. 299, 307, 674 S.E.2d 425, 430 (2009) (holding that a noncompete agreement unreasonably broad and therefore unenforceable where it affects "not only clients, but potential clients, and extends to areas where Plaintiff had no connections or personal knowledge of customers"); *Hartman*, 117 N.C. App. at 313, 450 S.E.2d at 917 (noting that the restricted territory "should only be limited to areas in which the employee made contacts during the period of his employment").

⁵⁷ This approach is discussed in more detail, *infra*, as it is yet another example of how a strict adherence to formulistic requirements of the written word can overshadow the protection of legitimate business interests.

⁵⁸ See, e.g., *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508-09, 606 S.E.2d 359, 362-63 (2004).

⁵⁹ *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 650-51, 370 S.E.2d 375, 380-81 (1988) (noting that legitimate business interests in employer-employee context are understood in terms of customer-based protections and protecting "valuable information as to the nature and character of the business").

⁶⁰ *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 91-92, 638 S.E.2d 617, 621-22 (2007) (citing *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 638-39, 568

continued . . .

As discussed in more detail below, while employers should certainly be held to a standard of properly drafting noncompetition agreements, they should not be required to thread needles when doing so in order to protect against the unquestionable legitimate business interest of unfair competition.⁶¹

b. Restricted territories not required in customer-based nonsolicitation agreements

Until the mid-1990's, it was generally understood in North Carolina that noncompetition agreements whose intended purpose is only to protect the employer's customer base do not need a defined geographic territory. Rather, these "nonsolicitation" agreements apply to protect customers wherever they are located; therefore, geography is a secondary concern trumped by the customer relationship itself. For example, *Kuykendall* reversed a Court of Appeals' holding that a 1982 noncompetition agreement which included customer-based restrictions without any defined geographical territory was overly broad and unenforceable.⁶² As stated by the Supreme Court:

The narrow holding of the Court of Appeals effectively eliminates consideration of an employer's good will and customer relationships as a basis for enforcement of post-termination restrictions. However, protection of customer relationships and good will against misappropriation by departing employees is well recognized as a legitimate protectable interest of the employer.⁶³

Without even noting how the restrictive covenant at issue did not have any territorial limit on its prohibitions against soliciting customers, the court continued with a detailed discussion of North Carolina's "'customer contact' theory."⁶⁴ According to this "well recognized" theory, restrictive covenants that protect an employer's valuable information (such as price lists, catalogs, methods of pricing and customer buying habits and needs), along with its business relationships and goodwill with customers, are valid and enforceable to protect against a former employee's unfair competition.⁶⁵

S.E.2d 267, 273 (2002), and *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 606 S.E.2d 359 (2004)).

⁶¹ See *infra* Part III.A.

⁶² *Kuykendall*, 322 N.C. at 660, 370 S.E.2d at 386.

⁶³ *Id.* at 651, 370 S.E.2d at 381.

⁶⁴ *Id.*

⁶⁵ *Id.* at 651-53, 370 S.E.2d at 380-82.

Kuykendall was followed by *Whittaker General*, which involved, *inter alia*, a customer-based restrictive covenant without any specific geographical area other than a territory to be defined by the employee's future assignment at the time of termination.⁶⁶ *Whittaker General* also noted how *Kuykendall* had held that "customers developed by a salesperson are the property of the employer and may be protected by a contract under which the salesperson is forbidden from soliciting those customers for a reasonable time after leaving his or her employment."⁶⁷

From these accepted principles of allowing customer-based restrictions without any specific geographical territory emerged *Hartman, supra*, and *Todd, supra*. Together, these Court of Appeals decisions once again placed North Carolina covenant not to compete law on a wayward path. However, unlike the look back period issue, at least this time the path has essentially been corrected through subsequent opinions. Specifically, dicta in *Hartman* states: "to prove that a geographic restriction in a covenant not to compete is reasonable, an employer must first show *where its customers are located* and that the *geographic scope* of the covenant is necessary to maintain those customer relationships."⁶⁸ While accurate insofar as it reflects one of the two primary justifications for an employer's legitimate business interests, a company's customer base (see discussion, *supra*), *Todd's* dissent picked up on this language and stated in a *nonsolicitation* agreement context that "[i]t is plaintiff's burden to demonstrate the geographic scope of its customer base. Plaintiff has failed to do so, leaving the Court with no basis upon which to assess the reasonableness of the territory covered by the covenant."⁶⁹

As with the look back period issue, the North Carolina Supreme Court did not address that statement when it adopted *Todd's* dissenting opinion *per curiam*.⁷⁰ As a result, it became uncertain (at least among the practicing bar) as to whether customer-based nonsolicitation agreements actually require a defined geographical territory in the same manner as noncompete agreements that restrict working for a

⁶⁶ *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 525-26, 379 S.E.2d 824, 826 (1989).

⁶⁷ *Id.* at 526, 379 S.E.2d at 826.

⁶⁸ *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994) (emphasis added).

⁶⁹ *Prof'l Liab. Consultants, Inc. v. Todd*, 122 N.C. App. 212, 219, 468 S.E.2d 578, 582 (1996) (SMITH, J., dissenting).

⁷⁰ See generally, *Prof'l Liab. Consultants, Inc. v. Todd*, 345 N.C. 176, 478 S.E.2d 201 (1996) (reversing the Court of Appeals "[f]or the reasons stated by Smith, J., in the dissenting opinion . . .").

competitor.⁷¹ It took a number of years before that issue was resolved – but even then it has been in the context of appellate courts enforcing nonsolicitation agreements without specified territory limits rather than an expressed discussion and adoption of the allowance.⁷²

In summary, the requirement of reasonable time and territory restrictions for an enforceable covenant not to compete has taken new and unexpected twists from the relatively straightforward days of *A.E.P. Indus.*, *Kuykendall*, *Whittaker Gen.* and *Triangle Leasing*. But these twists have not come through any expressed analysis of the North Carolina Supreme Court – rather, they have come from lower court developments. As mentioned above and more fully explored below, North Carolina needs additional direction from its highest court regarding these and other issues if the state is to have a properly developing law on covenants not to compete. This is especially true given our modern age of highly mobile employees who can and do work from anywhere, and of Internet-based business activities with sales and customers that essentially have no borders.

D. The Agreement Must Not Violate Public Policy

The final requirement for a valid noncompetition agreement under North Carolina law is that it cannot violate public policy. This seldom-used argument is, however, usually the first line of attack when professionals such as doctors are trying to defeat a restrictive covenant, especially when an otherwise enforceable noncompete agreement likely exists.⁷³ It has also been used by the Court of

⁷¹ Complicating the development is how *Todd* failed to distinguish what is obviously just a nonsolicitation provision in a larger employment agreement from the broader term “covenant not to compete.” *Todd*, 122 N.C. App. at 212, 468 S.E.2d at 579. Then its dissent proceeded to merge the differing “territory” requirements of both in a manner that once again demonstrates how restrictive covenant nuances and details can be misconstrued in a manner with ripple effects that take some time to disappear.

⁷² See, e.g., *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 637-38, 565 S.E.2d 267, 272-73 (2002) (finding covenant not to compete that contained both noncompetition and nonsolicitation restrictions reasonable, even though nonsolicitation of customers provision did not have any restricted territory); *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 281, 530 S.E.2d 878, 882 (2000) (citing *Kuykendall* and stating that “our Supreme Court has recognized the validity of geographic restrictions that are limited not by area, but by a client-based restriction”); *Akzo Nobel Coatings, Inc. v. Rogers*, No. 11 CVS 3013, 2011 WL 5316772, *12 (N.C. Super. Nov. 3, 2011) (acknowledging how in a nonsolicitation of customer agreements “the North Carolina Supreme Court ‘has recognized the validity of geographic restrictions that are limited not by area, but by a client-based restriction.’”).

⁷³ See *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 598, 632 S.E.2d 563, 571 (2006).

Appeals in declining to apply New York law to a covenant not to compete, as doing so might circumvent North Carolina's requirement for an existing employee to receive additional consideration for signing a new noncompetition agreement.⁷⁴

Public policy is generally considered to be any policy, which, if violated, would have a significant and detrimental effect upon the best interests of the state's citizens at large.⁷⁵ Although the argument is seldom made, there have been at least some attempts to invalidate covenants not to compete as being against North Carolina public policy because they are a "restraint of trade" almost in and of themselves. This argument is generally based on language in *Kadis v. Britt*, where an employment contract with a restrictive covenant was found to be a restraint of trade and, according to the court, had the effect of "economic peonage" where it not only prohibited the former employee from working for a competitor for two years after his employment ended, but also "his wife and any member of his immediate family."⁷⁶ Although the court noted that the "strict early common law rule invalidating all restrains [*sic*] was relaxed [and was] subsequently replaced by the test of the reasonableness of the restraint", it also observed that:

Contracts in partial restraint of trade do not escape the condemnation of public policy unless they possess qualifying conditions which bring them within that exception. They are still contrary to public policy and void "if nothing shows them to be reasonable" When the contract is defective for want of a legally protectible [*sic*] subject or because its practical effect is merely to stifle normal competition, it is as much offensive to public policy as it ever was in promoting

⁷⁴ *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 778, 501 S.E.2d 353, 356 (1998).

⁷⁵ *See, e.g., Beam v. Rutledge*, 217 N.C. 670, 9 S.E.2d 476 (1940) (declining to rule that an "arbitrary standard" exists to hold noncompetes between physicians as against public policy; rather, circumstances showed that agreement may be reasonable as applied, and issuance of restraining order until hearing affirmed); *Kennedy v. Kennedy*, 160 N.C. App. 1, 584 S.E.2d 328 (2003) (upholding noncompete between dentists after finding no substantial harm to public health given level of dental competition in area, and distinguishing between such substantial harm versus mere inconvenience to patients if noncompete was honored); *Statesville Medical Group v. Dickey*, 106 N.C. App. 669, 418 S.E.2d 256 (1992) (invalidating an otherwise valid covenant not to compete where it restrained a doctor in a rural county needing more physicians from practicing medicine or entering into any business which would compete with his former medical group in that county).

⁷⁶ *Kadis v. Britt*, 224 N.C. 154, 157, 164, 29 S.E.2d 543, 545, 549 (1944).

monopoly at the public expense and is bad.⁷⁷

Kadis' excursion down the "restraint of trade" and "public policy" path of invalidating a covenant not to compete, outside of a protectable interest such as adequate access to medical care in rural counties, has been seldom followed. But its vitriolic dicta against unreasonable restrictive covenants has resonated with some courts when analyzing the reasonableness of a noncompete's time and territory restrictions within a purported "public policy" context.⁷⁸

However, soon after *Kadis* was decided, two other North Carolina Supreme Court cases held precisely the opposite, finding the noncompetition agreements at issue both reasonable and valid to protect legitimate business interests of an employer rather than, as coined by *Kadis*, invoking the falling "sword of Damocles" on an employee.⁷⁹ In fact, both *Orkin Exterminating Co. v. Wilson*, 227 N.C. 96, 40 S.E.2d 696 (1946) and *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 42 S.E.2d 352 (1947) distinguished *Kadis* while avoiding any direct mention of "public policy" or "restraint of trade." *Sonotone*, in particular, hammered home the point that covenants not to compete in North Carolina can and do have redeeming qualities:

While the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests. It is as much a matter of public concern to see that valid engagements are observed as it is to frustrate oppressive ones . . . In undertaking to change horses for what the defendant regards a better mount, he is reminded of his obligations to the steed which brought him safely to midstream and readied him for the shift. The purpose here is to all his attention to the matter.⁸⁰

Perhaps it is no surprise that *Sonotone* also referenced N.C. Gen.

⁷⁷ *Id.* at 158-59, 29 S.E.2d at 545-46.

⁷⁸ *See, e.g.,* *Electrical South, Inc. v. Lewis*, 96 N.C. App. 160, 165, 385 S.E.2d 352, 355 (1989) ("The public's interest in preserving an individual's ability to earn a living outweighs the employer's protection from competition '[w]hen the contract is defective . . . because its practical effect is merely to stifle normal competition . . .'" (quoting *Kadis*, 224 N.C. at 159, 29 S.E.2d at 546)). *See also*, *Welcome Wagon Intern., Inc. v. Pender*, 255 N.C. 244, 250-51, 120 S.E.2d 739, 743-44 (1961) (BOBBITT, J., dissenting) (quoting with approval *Kadis*' admonition that "[f]rom the beginning the argument against restraint of employment was – and still is – more powerful than those based on the evils of monopoly incident to restrictions in sales contracts").

⁷⁹ *See Kadis*, 224 N.C. at 164, 29 S.E.2d at 549.

⁸⁰ *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 391, 42 S.E.2d 352, 355 (1947).

Stat. § 75-4, which states, “No contract or agreement . . . limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory”⁸¹ This statute stands in stark contrast and as a pointed qualifier to N.C. Gen. Stat. § 75-1, which says, “Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal.”⁸² In other words, almost immediately after G.S. § 75-1’s restraint of trade statement is G.S. § 75-4’s express allowance of agreements that limit the ability to work if certain requisites are satisfied.

That broader allowance of enabling a proper restrictive covenant for another type of societal or economic good – protecting a company’s legitimate business interests – is the cornerstone for the remainder of this article. Given that North Carolina courts and statutes do recognize how noncompetition and nonsolicitation agreements help protect those interests, we will now explore how certain formalistic renderings of a covenant’s terms and a failure to account for the fluidity of modern business are keeping North Carolina noncompete law from its intended purpose. We will also examine some proposed solutions, three of which are quite in keeping with established Supreme Court precedent. The fourth, while definitely a departure, is still fundamentally grounded in that precedent and whose time has come.

III. HOW NORTH CAROLINA NONCOMPETE LAW HAS STRAYED FROM ITS PATH – BUT CAN STILL BE REDEEMED

If we accept the premise that protecting against unfair competition is a legitimate business interest under North Carolina law, then courts interpreting covenants not to compete should adopt and follow rules of construction that honor this focus and give those interests a more reasonable chance of being protected. What is especially surprising is how often that basic concept gets lost in the machinations of court opinions more concerned with exact contract-wording than the competitive realities of the facts before them. Although this might be explained by courts seeing themselves as being bound by contract law principles applying as equally to noncompetition and nonsolicitation agreements as they do other written contracts, the ground rules really

⁸¹ *Id.* at 389, 42 S.E.2d at 354 (citing N.C. Gen. Stat. § 75-4 (2011)).

⁸² N.C. Gen. Stat. § 75-1 (2011).

are different when applied to noncompetes. One of the primary differences is that noncompetition agreements, unlike contracts in general, operate under a presumption of being “not viewed favorably under modern law.”⁸³ In contrast, contracts *are* generally favored as enforceable agreements between consenting parties, and it is precisely because restrictive covenants *restrict* the ability to compete that there is a heightened scrutiny of their language. As a result, however, an unintended consequence has been court decisions that often strain for distinctions in order to reach a desired outcome, regardless of whether it works to benefit the employee or the employer.

In particular, four areas of inquiry have laid the foundation for these distinctions, and have had the most influence on North Carolina’s current state of inconsistently enforcing, or not enforcing, covenants not to compete. It is also these four areas, which, if corrected or clarified, could quickly return North Carolina to an appropriate path of protecting legitimate business interests while prohibiting unfair competition. In the process, it would help safeguard both the employers drafting these agreements and the employees who sign them – an overall goal firmly in line with established legal precedent.

The four primary areas of North Carolina covenant not to compete law that need correcting or clarifying are as follows: (1) rejecting an undue adherence to specific noncompete language regarding post-termination employment that ignores the larger restrictive covenant purpose of protecting legitimate business interests against unfair competition; (2) ending the “look back” rule that works completely counter to established principles of defining and limiting noncompete restrictions; (3) allowing competitor-based restrictions to substitute for or supplement geographic areas to satisfy the “reasonable as to territory” requirement of a valid noncompete agreement, which would also resolve those situations where geographic boundaries do not adequately protect a company’s legitimate business interests in the Internet age; and (4) correct an unreasonably strict adherence to contract severability in a covenant not to compete setting, and adopt a blue pencil or reasonable judicial modification rule that still honors the five elements of an enforceable covenant not to compete as stated in *Triangle Leasing, Kuykendall* and *A.E.P. Indus.*

⁸³ *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000) (quoting *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994), *rev. denied*, 339 N.C. 612, 454 S.E.2d 251 (1995)).

A. North Carolina Should Place The Protection Of Legitimate Business Interests Above Its Undue Adherence To Specific Noncompete Drafting Constructs, Provided That The Agreement Demonstrates A Good-Faith Effort in Drafting Reasonable Restrictions

As stated throughout this article, it is axiomatic that North Carolina's law on covenants not to compete is intended to protect no more and no less than legitimate business interests. Given that a company's customer base and confidential or proprietary information are the cornerstones of those interests, it is incongruous that court decisions so often focus on a noncompete's precise language restricting competitive behavior, rather than on whether the noncompete demonstrates good-faith compliance with drafting requirements. As a result, what is frequently lost in the analysis is whether the individual's post-termination employment actually constitutes or increases the risk of unfair competition. This lack of appropriate focus works for and against employers and employees alike, but in the process it leaves those who draft covenants not to compete in a constant guessing game as to which wording stands the best chance of being upheld regardless of whether all other requisites of an enforceable restrictive covenant are met.

1. Noncompete agreements prohibiting competitive employment

For example, when upholding a noncompete agreement in *Okuma*, the court observed with approval how the agreement's drafters had essentially weaved their way through this enforcement minefield:

Moreover, the language of the covenant not to compete does not bar Mr. Bowers from any or all employment in the field of either customer service or machine tooling technology. Rather, he is barred only from employment with a direct competitor, "unless ... in an area of the competitor's business which does not compete with [Okuma America]." *By allowing for employment with a direct competitor in a capacity unrelated to Okuma America's business, the terms thread the needle* between those in *Precision Walls*, which were found to be valid and enforceable, and those in *VisionAIR*, which were struck down.⁸⁴

⁸⁴ *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 91-92, 638 S.E.2d 617, 621-22 (2007) (citing *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 638-39, 568

What is implied by *Okuma* is the flip side of the enforcement coin – *i.e.*, if the noncompetition agreement had *not* specifically allowed working for a competitor in an area of business “which does not compete” with the plaintiff-employer, then the agreement would have been declared unreasonably broad and invalid. The court would have reached this conclusion even though the defendant-employee would be working for the same competitor in the same position that would have been prohibited if the phrase had been included. The end result is that such an approach makes “thread the needle” language controlling over protecting legitimate business interests at the cost of ignoring the competitive interests at stake and whether other key requirements of a valid noncompete agreement have been satisfied.

By contrast, *Precision Walls* demonstrates how this tortured rule of noncompete construction may be abandoned and still produce a desired result. In *Precision Walls*, plaintiff’s covenant not to compete restricted defendant from working in two of twelve states where plaintiff operated its business for one year after his employment terminated.⁸⁵ According to the noncompete:

During the term of his employment by the Company and for the [restricted] Period, Employee will not, directly or indirectly . . . (b) Within the Territory, be engaged in the Business, or employed, concerned, or financially interested in any entity engaged in the Business⁸⁶

Plaintiff introduced an affidavit that the former employee had gone to work for a competitor within one of the restricted states, North Carolina, performing an almost identical job.⁸⁷ The defendant-employee cried foul – not due to lack of consideration, or an unreasonable time or territory restriction, or because he was not actually competing in violation of the agreement, but rather because the language of the noncompete was not drafted to North Carolina’s exacting standards.⁸⁸ Specifically, defendant argued that “the scope of the activity prohibited . . . is unreasonable because it prevents him from working in plaintiff’s business in any capacity, not just as an Estimator/ Project Manager.”⁸⁹

S.E.2d 267, 273 (2002), and *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 606 S.E.2d 359 (2004)) (emphasis added).

⁸⁵ *Precision Walls*, 152 N.C. App. at 631-32, 568 S.E.2d at 269.

⁸⁶ *Id.* at 632, 568 S.E.2d at 269.

⁸⁷ *Id.* at 638, 568 S.E.2d at 273.

⁸⁸ *Id.* at 639, 568 S.E.2d at 273.

⁸⁹ *Id.*

But in a remarkable stroke of clarity, the Court of Appeals refused to accept that reasoning. Instead, and perhaps guided by the uncontroverted facts that defendant had resigned, gone to work for a direct competitor within a reasonable restricted territory, and was even working in the same capacity as he had been employed with plaintiff, the court said:

[W]e conclude that defendant would not be less likely to disclose the information and knowledge garnered from his employment with plaintiff if he worked for one of plaintiff's competitors in a position different from the one in which he worked for plaintiff. If defendant's new employer asked him about information he gained while working for plaintiff, defendant would likely feel the same pressure to disclose the information. *Thus, plaintiff's legitimate business interest allows the covenant not to compete to prohibit employment of any kind by defendant with a direct competitor.*⁹⁰

This application of business common sense in a noncompete setting was promptly distinguished two years later in *VisionAIR*. With quite similar facts in terms of uncontroverted competitive behavior that would violate the restrictive covenant if it were upheld, the Court of Appeals this time rejected as overly broad the following covenant not to compete language:

[Defendant] may not 'own, manage, be employed by or otherwise participate in, directly or indirectly, any business similar to Employer's . . . within the Southeast' for two years after the termination of his employment with *VisionAIR*.⁹¹

Noting how defendant "would not merely be prevented from engaging in work similar to that which he did for *VisionAIR* at *VisionAIR* competitors; [he] would be prevented from doing even wholly unrelated work at any firm similar to *VisionAIR* [and] from even 'indirectly' owning any similar firm," the court declared the noncompete unenforceable.⁹² In doing so, the court ignored Supreme Court precedent that has never focused on "indirectly" or "similar" as being disqualifying noncompete factors due to their purported breadth

⁹⁰ *Id.* (emphasis added).

⁹¹ *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004).

⁹² *Id.* at 508-09, 606 S.E.2d at 362-63.

– in fact, *Triangle Leasing* stated precisely the opposite:

We find that the employment contract does not restrict all competition between Mr. McMahon and Triangle throughout the State of North Carolina, but rather only prohibits the direct or indirect solicitation of Triangle's customers and accounts for the specified two year period. As such, we find the noncompetition clause reasonable as to both time and territory and conclude that its terms are enforceable.⁹³

Further, the Supreme Court in *A.E.P. Indus., Inc. v. McClure* reversed the Court of Appeals and remanded for a finding of damages after holding that a preliminary injunction should have been issued by the trial court.⁹⁴ Specifically, the Court held that plaintiff had demonstrated a likelihood of success on the merits of enforcing a noncompetition agreement that *inter alia* prohibited defendant from “[d]irectly or indirectly . . . [being] employed by or render[ing] service to, any corporation, firm, association, or other enterprise which shall market or sell the same or substantially similar products as those marketed or sold by A.E.P. . . .”⁹⁵

In addition to ignoring the state’s highest court, *VisionAIR* also selectively quoted *Precision Walls* in order to create an artificial distinction. That creation was based on a cursory observation of how the earlier case involved an employee who had actually gone to work “in an *identical position* with a competing business” and involved a one-year rather than two-year noncompete.⁹⁶ These distinctions were made despite the restricted period length not being contested in either case, and despite how *Precision Walls* expressly rejected an “identical position” requirement as discussed above.

This split in the Court of Appeals surfaced again in 2007 when *Kinesis Advertising* refused to follow *VisionAIR* or *Hartman*, and rather cited *Precision Walls* and *Okuma* as having the better rule.⁹⁷ Noting that defendants “contend that the ‘similar to’ language [in the noncompete agreement] is impermissibly vague because it does not sufficiently describe the activities they would be barred from

⁹³ *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 226-27, 393 S.E.2d 854, 856 (1990).

⁹⁴ *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 410, 302 S.E.2d 754, 764-65 (1983).

⁹⁵ *Id.* at 395, 302 S.E.2d at 756.

⁹⁶ *VisionAIR*, 167 N.C. App. at 509-10, 606 S.E.2d at 362 n.1.

⁹⁷ *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 14-15, 652 S.E.2d 284, 294-95 (2007).

pursuing”, the court said, “We find this argument to be unpersuasive.”⁹⁸ Then the court explicitly rejected *Hartman* and *VisionAIR* by observing how “We have concluded that similar language in other covenants-not-to-compete is not unreasonable as a matter of law.”⁹⁹

So given these divergent opinions, which should govern the drafting and enforcement of covenants not to compete? And does North Carolina law really want to ignore legitimate business interests against unfair competition by placing on employers the burden of having scribes whose pens are so sharp that they, for example, have to write “same business” instead of “similar business” when defining competition? If they do, what happens at lawsuit time if the two competitive businesses, or job positions, or other activities are not exactly the “same”? Will the restriction then be declared inapplicable because competitive behavior is not truly at issue? Or instead of using the word “indirectly”, should the noncompete drafter create some artificial construct in order to flesh out its meaning and hopefully increase its chance of being enforced – such as “Employee shall not compete with Employer through an agent, representative or other third party acting in concert with him”? According to *Precision Walls* and *Kinesis Advertising*, and as certainly implied by cases like *Triangle Leasing* and *A.E.P. Indus.*, that is precisely what we do *not* want to do in North Carolina. Such an approach not only rejects established legal precedent on covenants not to compete, it also discards the larger socio-economic goal of restrictive covenants to protect legitimate business interests against unfair competition. And perhaps even more importantly for purposes of drafting and interpretation, it is simply impractical as a matter of business common sense.

In summary, North Carolina courts should expressly follow the *Precision Walls / Kinesis Advertising* approach of interpreting the precise language of noncompetition agreements in terms of protecting legitimate business interests, and breathe new life into the Supreme Court’s supporting foundation in cases such as *Triangle Leasing* and *A.E.P. Indus.* In the process, the courts should expressly reject the *VisionAIR / Okuma* approach of requiring thread-the-needle language that can easily defeat a covenant not to compete regardless of the competitive interests at stake or having satisfied the five-part elements of an enforceable agreement absent a tortured exercise into becoming a wordsmith.¹⁰⁰ The path for doing so is actually quite clear, as they

⁹⁸ *Id.* at 14, 652 S.E.2d at 294.

⁹⁹ *Id.* at 14-15, 652 S.E.2d at 294-95.

¹⁰⁰ Arguably, *VisionAIR*’s analysis is also just another way to prove an unreasonably broad restricted territory. At least that is what the *VisionAIR* court
continued . . .

simply need to rediscover long-established Supreme Court precedent which refuses to engage in such a form-over-substance analysis that forgets the overall noncompete goal of protecting legitimate business interests.¹⁰¹

2. *Nonsolicitation agreements prohibiting solicitation or sales to customers*

Although usually not as draconian as the *VisionAIR* or *Okuma* approach with noncompete agreements, North Carolina courts have also parsed apart nonsolicitation agreements to the point where drafting becomes its own art form. *Hartman* is again a good place to start, and its reliance on a case from 1979, when the nation had a quite different business environment, helps explain some unfortunate legal analysis that is frequently repeated through the present. According to *Hartman*, “[w]here the alleged primary concern is the employee’s knowledge of the customers, ‘the [restricted] territory should only be limited to areas in which the employee made contacts during the period of his employment.’”¹⁰²

Although this language from *Manpower of Guilford Cnty., Inc. v. Hedgecock* is more applicable to noncompetition than nonsolicitation agreements, its customer-contact rationale is also repeatedly applied in the latter. But the difficulty with this maxim in today’s business world is that knowledge of pricing, discounts, buying preferences and other customer-specific information that is usually confidential and proprietary is often not limited to just those employees who have direct contact with the customers themselves. This potential was implicitly noted in *Precision Walls*, when the court restricted defendant from any position with his new employer as a result of having broad-based knowledge of confidential or proprietary

implies when ruling that plaintiff’s noncompete agreement was overly broad by restricting defendant from working for “similar” businesses and by prohibiting “indirect” competition and not just “direct.” *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508-09, 606 S.E.2d 359, 362-63 (2004).

¹⁰¹ See, e.g., *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 228, 393 S.E.2d 854, 857 (1990). There, a nonsolicitation clause was upheld even though it did not allow the employee to “directly or indirectly solicit or attempt to procure the customers, accounts, or business of Company, or directly or indirectly make or attempt to make car or truck-van rental sales to the customers of Company” within North Carolina or in “any other state or territory in which the company conducts business.” See also, *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 645, 370 S.E.2d 375, 378 (1988) (upholding a restriction against soliciting “actual or potential” customers).

¹⁰² *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App., 307, 313, 450 S.E.2d 912, 917 (1994) (quoting *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 522, 257 S.E.2d 109, 114-15 (1979)).

information that could be shared with a competitor regardless of his job title.¹⁰³ It was expressly addressed in *Okuma* by allowing a nonsolicitation restriction for six months throughout North and South America against the vice president of customer service given his role as “one of the six most senior executives in the company [who] ‘participated . . . in [its] most critical and strategic decisions.’”¹⁰⁴

When it comes to customer-based restrictions, the tendency is to limit their scope to approximately the following order of decreasing coverage: (1) all of the company’s customers; (2) those customers serviced by specific facilities where the employee worked; and (3) those customers serviced by the employee, or if appropriate (and before the right court), those serviced by the employee and any individuals he or she managed or supervised.¹⁰⁵ As a general rule, the more an employee knows about the specific details regarding the employer’s customer base, the larger the coverage area allowed – regardless of whether *Hartman’s* and *Welcome Wagon’s* customer-contact requirement for defining a restricted territory is satisfied.¹⁰⁶

At one end of the enforcement spectrum are cases like *Farr Assocs., Inc. v. Baskin*.¹⁰⁷ In *Farr*, defendant signed a “non-compete agreement” (actually a nonsolicitation agreement) that for three years prohibited him from “directly or indirectly rendering to any current client or customer who was a client or customer of the Company

¹⁰³ *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 639, 568 S.E.2d 267, 273 (2002).

¹⁰⁴ *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 91, 638 S.E.2d 617, 621 (2007). *See also, Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917 (noting that courts must consider “the nature of the employee’s duty and his knowledge of the employer’s business operations” when determining if time and territory restrictions of a covenant not to compete are reasonable).

¹⁰⁵ *See, e.g., Hejl v. Hood, Hargett & Associates, Inc.*, 196 N.C. App. 299, 306-07, 674 S.E.2d 425, 429-30 (2009) (invalidating nonsolicitation restriction where geographic area was not limited to location where former employee serviced customers and regardless of whether he had any “personal knowledge” of employer’s customers there, and where it extended to “potential customers” who had merely been “quoted a product or service”).

¹⁰⁶ *See, e.g., Kuykendall*, 322 N.C. at 649, 370 S.E.2d at 380 (noting how “intimate knowledge of the business operations or personal association with customers provides an opportunity [for a former employee] . . . to injure the business” of the employer); *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 408, 302 S.E.2d 754, 763 (1983) (stating how “personal contact” with customers or having held a job position that enabled the employee “to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers” would allow the employee to “take advantage of such knowledge of or acquaintance with the patrons” and create an unfair competitive advantage which supports injunctive relief).

¹⁰⁷ 138 N.C. App. 276, 530 S.E.2d 878 (2000).

during the two (2) year period immediately preceding the termination date of the Employee's employment with the Company, services of any kind similar to the services previously or presently rendered for such client or customer."¹⁰⁸ After two years of employment defendant resigned to start a competing business, and "immediately began providing consulting services to . . . a client of Farr's since 1988 that had worked directly with [defendant] while he worked for Farr."¹⁰⁹

In summary, defendant was competing with his former employer in direct violation of his restrictive covenant – yet because plaintiff had operations in 461 client offices in North Carolina and 41 other states and four foreign countries, the court found the nonsolicitation agreement's time and "territory" restrictions unreasonably broad.¹¹⁰ This was because the plain meaning of the noncompete's language restricted the solicitation of any client of the *entire* company for a *five-year* restricted period (three years post-employment plus the two-year look back period).¹¹¹ Although it is this author's position that the look back period should not have applied (see discussion *infra*), it is also true that the customer-based restriction in this case was so broad and without any reasonable relationship to those customers with whom defendant had personally contacted or had particularized knowledge of, that *Farr's* decision was proper, absent North Carolina adopting a blue pencil or judicial modification rule as advocated below.

Contrast *Farr*, however, with *Wade S. Dunbar Agency, Inc. v. Barber*,¹¹² where the court upheld a nonsolicitation clause for preliminary injunction purposes that read as follows: "that defendant will not solicit any customers of plaintiff who have an active account with plaintiff at the time of termination or any prospective client whom defendant has solicited within six months preceding the date of termination."¹¹³ Distinguishing *Farr* and *Hartman* without any substantive discussion, the court instead followed *Triangle Leasing* and its more expansive allowance of direct or indirect solicitation of all plaintiff's customers and accounts for a two-year period throughout North Carolina, regardless of having had any personal contact with them.¹¹⁴ In justifying the distinction, the court merely concluded "that the restrictions in *Farr* and *Hartman* are far broader than and inapposite to this case" and upheld the preliminary injunction, a

¹⁰⁸ *Id.* at 278, 530 S.E.2d at 880.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 280-83, 530 S.E.2d at 881-83.

¹¹¹ *Id.*

¹¹² 147 N.C. App. 463, 556 S.E.2d 331 (2001).

¹¹³ *Id.* at 465,469, 556 S.E.2d at 334-36 (2001).

¹¹⁴ *Id.* at 469, 556 S.E.2d at 335-36.

decision that was perhaps supported by an inferred business presence of plaintiff that appeared much smaller in scope than in either of those cases.¹¹⁵

In between *Farr* and *Wade S. Dunbar* are decisions like *Medical Staffing Network, Inc. v. Ridgway*,¹¹⁶ in which the specific nonsolicitation language warrants more detailed treatment. Specifically in *Ridgway*, the nonsolicitation clause prohibited defendant:

not only from engaging in business with current or former clients of MSN with whom he developed a relationship, but also prohibits him from soliciting the business of any ‘MSN client,’ which as defined by the agreement, includes clients of any of MSN’s affiliates or divisions outside of the medical staffing business with whom [defendant] would not have had contact.¹¹⁷

Given that plaintiff had not demonstrated any legitimate business interest regarding its affiliates or divisions, or relative to any solicitation by defendant of their clients, the nonsolicitation clause was declared unreasonably broad and unenforceable.¹¹⁸

All of this leads to three final observations concerning the drafting of nonsolicitation agreements. First, while specific language can certainly be as important as with noncompetition agreements, as a general rule there will be more flexibility in enforcing nonsolicitation covenants – primarily due to the narrower nature of customer-specific restrictions not bound by a geographic area. Second, the more an employer can demonstrate that an employee had particularized knowledge of confidential or proprietary information regarding its customer base, and the more direct or supervisory contact the employee had with the customers themselves, the larger the number of customers may be restricted. Third, in merging these two concepts for purposes of enforcement, the *Precision Walls / Kinesis Advertising* approach of interpreting restrictive covenants should also be applied. While good drafting that does not overreach justifiable competitive concerns should still be required in the nonsolicitation context, the emphasis should remain on protecting legitimate business interests – and to the extent that the interpretive analysis found in *Precision Walls* and *Kinesis Advertising* enables that to occur given the facts of a particular case, it should be allowed.

¹¹⁵ *Id.*

¹¹⁶ 194 N.C. App. 649, 670 S.E.2d 321 (2009).

¹¹⁷ *Id.* at 657, 670 S.E.2d at 328 (2009).

¹¹⁸ *Id.*

B. North Carolina Should Reject Interpreting “Look Back” Periods That Define And Limit Noncompete Restrictions In A Manner That Instead Expands Their Restricted Periods

As mentioned above in Part II.C.1., the Court of Appeals over the past 15 years has repeatedly interpreted any “look back” period for defining affected customers in a nonsolicitation agreement as an add-on to its post-employment restricted period.¹¹⁹ The genesis of this look back “rule” was in 1996, when the North Carolina Supreme Court adopted the lower court’s dissenting opinion *per curiam* and without any discussion in *Professional Liability Consultants, Inc. v. Todd*.¹²⁰ In *Todd*, Judge Smith’s dissent articulated that because the agreement prohibited solicitation of any clients that did business with the employer during the three years prior to the employee’s termination and five years after termination, the covenant was actually an eight-year restriction.¹²¹ In doing so, he provided the following example:

For instance, if a customer has ended its relationship with plaintiff 2 years and 364 days prior to defendant’s separation date, the customer may not be contacted for five years thereafter. Plaintiff has provided the Court with no compelling reason to uphold such an expansive time restriction, and I find this covenant to be “patently unreasonable.”¹²²

Regardless of whether *Todd*’s five-year post-employment restricted period might itself be unreasonable (which it likely would be with most courts, despite the majority’s analysis¹²³), what escapes the dissent is how the very language of the nonsolicitation agreement demonstrates how the look back period was never intended to apply

¹¹⁹ While this look back rule has not been applied in a competitor-based noncompetition agreement, the practice could easily be transferred. For example, a multi-state company that regularly transfers management between facilities may need to apply its noncompete restrictions to a specific radius of any facility where the employee was based during his or her final two years of employment in order to adequately protect its legitimate business interests. As discussed *infra*, under the current Court of Appeals approach, that two-year period would likely be added to the post-employment restricted period to create a new and completely unintended restricted period for not working for a competitor whose increased length might then be determined unreasonably broad.

¹²⁰ *Prof’l Liab. Consultants, Inc. v. Todd*, 345 N.C. 176, 478 S.E.2d 201 (1996) (*per curiam*) (adopting Smith, J., dissenting opinion in 122 N.C. App. 212, 468 S.E.2d 578 (1996)), *reh’g denied*, 345 N.C. 355, 483 S.E.2d 175 (1997).

¹²¹ *Todd*, 122 N.C. App. at 219, 468 S.E.2d at 582-83.

¹²² *Id.* at 219, 468 S.E.2d at 583.

¹²³ See *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 315, 450 S.E.2d 912, 918 (1994).

prospectively in order to expand a length of time. Rather, it was only intended to *define* and *limit* the customers being restricted after employment ended:

Accordingly, [Todd] agrees that during the term of his agreement with [plaintiff] and for a period of five (5) years thereafter he will not, unless acting as an officer or employee of the [plaintiff] or with its prior written consent, directly or indirectly: (i) contact or in any way attempt to solicit insurance business from any individual, corporation or organization *which is then or during the preceding three years was such a customer or client of [plaintiff]*, or (ii) disclose any information . . . which would enable any other individual, corporation or organization to solicit insurance business from such customers or clients.¹²⁴

In short, *Todd's* three-year look back was obviously meant to define a customer base for nonsolicitation purposes and help negate any attack that it was overly broad. It did so by reaching back three years before defendant's employment ended in order to limit the protected customers to only those the company had serviced within that period.¹²⁵ In fact, if the nonsolicitation agreement had not done so, the defendant could have argued it was unreasonably broad because the agreement *failed* to define or limit the customer base, thereby including "customers" no matter how long ago they had last conducted business with plaintiff. Yet somehow, the dissent interpreted this act of limitation as one of expansion, and when the Supreme Court adopted the dissenting opinion *per curiam* this look back analysis grew legs. As a result, *Todd's* approach has been repeated in numerous other court decisions that have taken North Carolina covenant not to compete law even further down the path of placing form over substance in terms of protecting an employer's legitimate business interests.¹²⁶

¹²⁴ *Todd*, 122 N.C. App. at 213, 468 S.E.2d at 579 (emphasis added).

¹²⁵ *See id.*

¹²⁶ *See, e.g., Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 281, 530 S.E.2d 878, 881-82 (2000) (holding that a three-year nonsolicitation agreement transformed into an unenforceable, five-year restricted period because the agreement restricted defendant from soliciting or selling to any client of plaintiff who had been a client during the two years immediately before defendant's termination); *Hejl v. Hood, Haget & Assocs., Inc.*, 196 N.C. App. 299, 306, 674 S.E.2d 425, 429 (2009) (expanding a two-year restricted period to three years due to look back period that prevented a former account executive from providing services to employer's clients who had been a client or received product or service quotes during the 12 months

continued . . .

Because the look back rule has no logical basis and works directly against the mandate to define and limit restrictive covenants so that only legitimate business interests are protected, it should be expressly rejected by North Carolina courts. In fact, the absurdity of its reasoning is even evidenced in *Farr*, which, as stated above, is one of the cases that followed it. Specifically, after finding that “[t]he real time restriction of the non-compete agreement is therefore five years – three years after the date of termination plus the two-year look-back period”, the same opinion later notes that “the client-based restriction is unduly vague. The covenant does not define whether the term ‘client or customer’ includes one-time attendees of a Farr workshop. And the covenant may extend to clients’ offices that never contacted Farr”¹²⁷ So on one hand the court chastises the noncompete agreement for not being sufficiently defined, and on the other hand punishes the agreement for its clear attempt at definition. Simply stated, this Hobson’s choice must end, and there is plenty of case law from other jurisdictions to guide North Carolina along the way.¹²⁸

C. North Carolina Should Allow Competitor-Based Restrictions In Lieu Of Or In Addition To Geographical Areas To Satisfy The “Reasonable As To Territory” Element Of A Valid Covenant Not To Compete

We live in a modern age of the Internet, e-mail and other electronic and digital communications. Countless businesses have their own websites and toll-free telephone numbers, selling products and services without regard to where customers might actually be

immediate before his employment terminated); *Wachovia Ins. Servs., Inc. v. McGuirt*, No. 06 CVS 13593, 2006 WL 3720430, at *10 (N.C. Super. Ct. Dec. 19, 2006) (noting in ¶¶ 80-82 that two years should be added to restricted period based on look back provision that prohibited former employee from servicing or soliciting clients to whom he had been assigned during final two years of employment).

¹²⁷ *Farr*, 138 N.C. App. at 282, 530 S.E.2d at 882.

¹²⁸ See, e.g., *Techworks, LLC v. Willie*, 318 Wis. 2d 488, 504-05, 770 N.W.2d 727, 734-35 (2009) (finding a time restriction reasonable as two-year look back period “significantly restricts the population of [plaintiff’s] customers who are on the no-contact list for two years” after his employment ended); *Steam Sales Corp. v. Summers*, 405 Ill.App.3d 442, 459-60, 937 N.E.2d 715, 730 (2010) (holding that a two-year look back period regarding customers was as limiting factor in noncompete agreement, with the court observing how defendant “is free to solicit and service customers who have not worked with [plaintiff] in the past two years”); *Gallagher Healthcare Ins. Svcs. v. Vogelsang*, 312 S.W.3d 640, 654-55 (Tex.App.-Houston [1st Dist.] 2009) (finding a noncompete agreement with two-year restricted period reasonable where look back period of clients with whom defendant had worked during her last two years of employment “limited” those clients to approximately 80).

located on a map. Yet, North Carolina covenant not to compete law still thinks in terms of physical presence. Courts repeatedly strike down noncompetition agreements that do not properly confine their reach to specific geographical areas, then hold employers accountable for including areas in which relatively little business may have been conducted during the time period at issue.¹²⁹

Resolving this dilemma is actually quite simple. North Carolina courts need only to recognize that naming *competitors*, whether alone or in conjunction with a restricted geographic area, is also an acceptable means to satisfy the “reasonable as to territory” requirement of a valid covenant not to compete. In fact, naming competitors as the operative prohibition is, in some ways, even less restrictive as the affected employee has much more freedom in terms of future employment opportunities. The foundation for doing so already exists under North Carolina case law, and with some important guidance from other jurisdictions the allowance should be even easier to expressly adopt.

First, as previously discussed, North Carolina already allows nonsolicitation agreements based on customer location rather than a specific geographic territory. (*See* Part II.C.2(b)) This tacit acknowledgement of how legitimate business interests are not necessarily tied to geography in a competitor-based noncompetition agreement has been best expressed in *Okuma*, where the following language was upheld in a six-month restrictive covenant that did not contain any specific restricted territory:

[Employee shall not become] employed by . . . a COMPETITOR, unless Employee accepts employment with a COMPETITOR in an area of the COMPETITOR’S business which does not compete with the Company. For purposes of this Agreement, a COMPETITOR shall be defined as any entity operating as a manufacturer, distributor or seller of machine tools

¹²⁹ Compare *Todd*, 122 N.C. App. at 219, 468 S.E.2d at 583 (Smith, J., dissenting) (arguing that a restriction that proscribes solicitation of the employer’s “customer base” but does not define who or where those customers are is unreasonable), and *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508-09, 606 S.E.2d 359, 362-63 (2004) (finding a non-compete overbroad where it proscribed competition in the “Southeast”), with *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 313-14, 450 S.E.2d 912, 918 (1994) (holding that a covenant was unreasonable where it proscribed soliciting clients in the state of Texas when the employee had no more than five clients in that state), and *Hejl*, 196 N.C. App. at 307, 674 S.E.2d at 430 (finding the geographic territory overbroad where employer had identified where the clients were, but had proscribed solicitation of customers whom were “merely quoted a product or service”).

that are substantially similar to machine tools manufactured, distributed or sold by the Company.¹³⁰

In recognizing that the noncompete agreement did not include a geographic territory in which the restrictions operated, the court also observed that:

[T]he agreement's restrictions are limited to "areas in which [Okuma America] does business," suggesting that it is a client-based, rather than geographic, limitation. Nevertheless, because Okuma America operates throughout both North and South America, the geographic effect of the restriction is quite broad. However, when taken in conjunction with the six-month duration, it is not *per se* unreasonable in light of our courts' past rulings . . . Rather, we must determine whether the scope is in fact "any wider than is necessary to protect the employer's reasonable business interests," . . . in light of where Okuma America's customers are located, and if the scope is necessary to maintain its existing customer relationships.¹³¹

The court then proceeded with its analysis and found the noncompete to be reasonable enough in its time and territory restrictions to survive a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.¹³²

So whether intended or not,¹³³ the Court of Appeals has at least opened the proverbial door to a competitor-based, "restricted territory." To walk through the door, however, some guidance from other jurisdictions might be helpful – and an excellent place to start is with Missouri, Michigan and Pennsylvania. In *Sigma Chemical*, the noncompete agreement restricted the employee from working for a competitor for two years after his employment ended.¹³⁴ Because the employer had a worldwide presence, it effectively created a very large scope that was in danger of being declared unenforceable for being too

¹³⁰ *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 86-87, 638 S.E.2d 617, 618-19 (2007).

¹³¹ *Id.* at 90, 638 S.E.2d at 620-21.

¹³² *Id.* at 92, 638 S.E.2d at 622.

¹³³ *Okuma* did not expressly discuss the propriety of using a company's competitors rather than a defined geographic area as satisfying the "restricted territory" element of a valid noncompetition agreement. Therefore, it would be an overstatement to say the Court of Appeals has authorized the development beyond its specific facts.

¹³⁴ *Sigma Chem. Co. v. Harris*, 586 F. Supp. 704, 707 (E.D. Mo. 1984).

broad.¹³⁵ However, the Missouri court held that because the restriction was limited to the employer's competitors, who were discernable from the company's annual report¹³⁶ and who were also operating on a worldwide basis, the restriction was reasonable.¹³⁷ As stated by the court, "There is no requirement that a restrictive covenant have some geographic *limit* to be valid. The requirement is that the geographic *scope* be reasonable."¹³⁸

A similar approach to allowing a competitor-based noncompetition agreement based on the intended scope of the restriction occurred in *Superior Consulting Co., Inc. v. Walling*, 851 F. Supp. 839 (E.D. Mich. 1994). Here, the employer was in the business of providing information systems and management consulting services to large healthcare institutions.¹³⁹ The noncompete agreement prohibited the employee, for six months after his employment ended, from engaging in the information systems consulting business as an employee or independent contractor of another consulting company or healthcare provider.¹⁴⁰ Citing *Sigma Chemical* for the proposition that a geographic limitation is not necessary where the employer can protect its legitimate business interests through a competitor-based restriction, the Michigan court upheld the lack of a specific geographic territory.¹⁴¹ In doing so, however, the court also noted that the geographic "scope" as expressed through the employer's identified competitors must still be no greater than needed to protect those interests.¹⁴²

Finally, in *Victaulic Co. v. Tieman*¹⁴³, the noncompetition agreement contemplated both a competitor-based and geographic-based restricted territory. Specifically, it stated that the former employee "would not sell or distribute the types of items regularly sold (or contemplated for sale) by Victaulic for 12 months (1) within a ten-state Restricted Victaulic Sales Region, or (2) *in any area in which Victaulic products are sold on behalf of nine named competitors*" of

¹³⁵ See *id.* at 710.

¹³⁶ *Id.* at 706 (noting that Sigma had five major competitors worldwide).

¹³⁷ *Id.* at 710.

¹³⁸ *Id.* (emphasis added).

¹³⁹ *Superior Consulting*, 851 F. Supp. at 841.

¹⁴⁰ *Id.* at 842.

¹⁴¹ *Id.* at 847.

¹⁴² *Id.* The competitor-based restriction in *Superior Consulting* was found to be unreasonably broad because it did not indicate the capacity or line of work the employee was restricted from pursuing. However, it was saved by the state's "blue penciling" rule which allowed the court to limit the scope to the type of duties the employee had performed while working for the employer. *Id.*

¹⁴³ 499 F.3d 227 (3rd Cir. 2007).

which his then-current employer was one.¹⁴⁴ Noting how each of the named companies were clearly direct competitors, the Third Circuit applied Pennsylvania law to reverse the district court's dismissal for failure to state a claim.¹⁴⁵ In doing so, the court also observed the following in rejecting defendants' argument that a lack of geographical territory for the competitor-based restriction automatically defeated at least that part of the noncompete:

In this Information Age, a *per se* rule against broad geographic restrictions would seem hopelessly antiquated, and, indeed, Pennsylvania courts (and federal district courts applying Pennsylvania law) have found broad geographic restrictions reasonable so long as they are roughly consonant with the scope of the employee's duties . . . Victaulic has alleged that Tieman developed relationships with customers across North America. From this, it is possible that the geographic scope of the covenant is reasonable.¹⁴⁶

Combined with *Okuma* and North Carolina's long history of allowing customer-based restrictive covenants without specific geographic areas, *Sigma Chemical*, *Superior Consulting* and *Victaulic* provide a framework for expressly allowing a competitor-based "restricted territory" for noncompetition agreements in North Carolina. The parameters of that framework should be as follows: (1) the employer must define the products or services that form its competitive business interests; and (2) if competitors are named in addition to or in lieu of a geographic restricted territory, they must be at least substantially engaged in the same business, with the same or similar customer base, and operating in substantially the same geographic areas as the employer.

¹⁴⁴ *Victaulic*, 499 F.3d at 230 (emphasis added). The precise language read as follows: I further agree that[,] for twelve (12) months following the date of termination of my employment with [Victaulic] . . . , I will not, within any geographic region in which Victaulic products are sold (which includes all of the continental United States, Canada & Mexico), engage either directly or indirectly in the sale or distribution of the types of items or products regularly sold, offered for sale, or contemplated for sale by [Victaulic] as an employee, consultant or independent contractor for or on behalf of any of the following businesses: Tyco International Ltd.; Star Pipe Products; Anvil International Inc.; Shurjoint Piping Products Inc.; Modgal Metal Ltd.; Viking Corporation & Viking SA; Mueller Industries, Inc.; Viega International; The Reliable Automatic Sprinkler Co., Inc.; and any and all of their subsidiaries, affiliates, or successors. *Id.* at n. 1.

¹⁴⁵ *Id.* at 237.

¹⁴⁶ *Id.* at 237-38.

D. North Carolina Courts Should Adopt A Blue Pencil Or Reasonable Judicial Modification Rule, While Broadening Their Overly Strict Application Of Severability In A Covenant Not To Compete Setting

Of all the recommendations advocated by this article, adopting a blue pencil or reasonable judicial modification rule (or both) over North Carolina's current adherence to an overly strict application of contract severability in a noncompete setting is the one that tests legal precedent. But its time has come – and in certain ways, it is a logical next step in a process of increased judicial discretion to address the specific competitive concerns and legitimate business interests invariably at issue in covenant not to compete litigation. Further, North Carolina courts should broaden their current severability regime that unnecessarily mandates a division of terms to a degree not necessarily required by the law. In fact, the severability rule, as currently applied to noncompetition agreements, largely undermines the overall goal of covenant not to compete enforcement – *i.e.*, acknowledging the legitimacy of unfair competition concerns within the rubric of protecting only a company's legitimate business interests.

1. Severability, blue penciling and judicial modification defined

We start this section by defining what North Carolina does not allow – “blue penciling” or “judicial modification.” Blue penciling in a covenant not to compete setting can have numerous meanings, ranging from striking unreasonable terms from a restrictive covenant to actually modifying those terms (usually time or territory restrictions) to make them reasonable and enforceable. Judicial modification is often an outgrowth of blue penciling, and it can be a separate or analogous term for blue penciling's broader application of inserting and revising words in addition to deleting them.¹⁴⁷

¹⁴⁷ See, e.g., *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 579, 264 A.2d 53, 57 (1970) (defining and adopting blue penciling as a method by which “offending portions of the covenant can be lined out and still leave the remainder grammatically meaningful and thus enforceable”); *Bess v. Bothman*, 257 N.W.2d 791, 794-95 (Minn. 1977) (affirming district court's broad “authority to modify” covenant not to compete in its discretion by supplying limitations to make the restrictive covenants enforceable); *Eichmann v. Nat'l Hosp. and Health Care Servs., Inc.*, 308 Ill. App. 3d 337, 347-48, 719 N.E.2d 1141, 1149-50 (1999) (holding that although Illinois courts may modify a restrictive covenant to help protect legitimate interests, they will not add terms where the agreement is silent, change the plain meaning of words, or conduct any modification where the degree of unreasonableness as drafted renders it unfair or requires such “drastic modifications” as to make it “tantamount to fashioning a new agreement”); *The Cmty. Hosp. Grp., Inc. v. More*, 183 N.J. 36, 50, *continued . . .*

The blue pencil rule overlaps and is often confused with long-established law in most jurisdictions about whether contract provisions are severable (or separable). If severable, then as a general rule, the unenforceable provision will be stricken and the court will then look to the remaining contract language and determine if enough material terms remain to constitute an enforceable agreement. If so, the contract survives; if not, it fails. North Carolina law on contract severability is straightforward: When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced.¹⁴⁸

When applying this rule, courts should remember that “[t]he heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed.”¹⁴⁹

In *American Nat'l*, the court found illegal a “pay when paid” clause that violated a North Carolina statute prohibiting contractors from conditioning payments to subcontractors on having first received payment by the property owner.¹⁵⁰ This clause appeared within the same sentence and at the end of an otherwise valid contract provision, not separated by commas, or a semicolon or by indenting it as a clearly separate subparagraph.¹⁵¹ Rather, the clause merely concluded the sentence as follows: “and the Contractor shall make payments to the Subcontractor on account of such claims only to the extent that the Contractor is paid thereof by the Owner.”¹⁵² Due to its illegality, the court severed this offending language – which was part of the *same* sentence as the inoffensive language – while enforcing the remaining obligations.¹⁵³ In doing so, the court noted that the invalid portion “is severable from the rest of the contract and does not defeat the other portions of the contract . . . which are in no way dependent on the

869 A.2d 884, 892 (2005) (quoting *Karlin v. Weinberg*, 77 N.J. 408, 420, 390 A.2d 1161, 1168 n. 4 (1978) (defining “blue pencil” rule as a court’s ability to “compress or reduce the geographical areas or temporal extent of [a restrictive covenant’s] impact so as to render the covenants reasonable”)).

¹⁴⁸ *Am. Nat’l Elec. Corp. v. Poythress Commercial Contractors, Inc.*, 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) (quoting *Rose v. Materials Co.*, 282 N.C. 643, 658, 194 S.E.2d 521, 532 (1973)).

¹⁴⁹ *White v. White*, 296 N.C. 661, 667-68, 252 S.E.2d 698, 702 (1979) (quoting *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E.2d 190, 196 (1975)).

¹⁵⁰ *Am. Nat’l*, 167 N.C. App. at 101, 604 S.E.2d at 317.

¹⁵¹ *See Am. Nat’l*, 167 N.C. App. at 99-100, 604 S.E.2d at 317.

¹⁵² *Id.*

¹⁵³ *Am. Nat’l*, 167 N.C. App. at 100-01, 604 S.E.2d at 317.

illegal provision.”¹⁵⁴

However, despite the relative simplicity of North Carolina’s severability rule, it has been transformed and given new meaning within the context of covenants not to compete. As a result, the courts have yet again inserted nuances into legal precedent that have led to artificial constructs in drafting and interpreting noncompete agreements. Those constructs not only have created increased challenges in working through the unpredictable legal minefield that noncompete litigation in North Carolina has become, they also work directly against the overall goal of allowing employers to appropriately protect against unfair competition.

2. *North Carolina’s approach to severability and blue penciling*

North Carolina appellate courts have repeatedly distinguished contract severability from blue penciling when analyzing noncompetition agreements, and in the process have developed an approach that does neither justice. While not specifically mentioning “blue penciling” or “severability”, one of the best examples of how not doing either can lead to a result antithetical with protecting legitimate business interests is *Electrical South, Inc. v. Lewis*¹⁵⁵. In that case, the court affirmed the trial court’s enjoining of defendant from disclosing plaintiff’s confidential information and its denial of a preliminary injunction regarding a covenant not to compete. The noncompete injunction was denied because the language of the agreement was determined to be unreasonably broad and therefore plaintiff could not demonstrate a likelihood of success on the merits, which is one of the critical elements required for a preliminary injunction to issue.¹⁵⁶ In the words of the court, “Consistent with contract interpretation rules . . . the covenant is not divisible and the Company has no right to

¹⁵⁴ *Id.*; see also *Holcomb v. Holcomb*, 132 N.C. App. 744, 745-49, 513 S.E.2d 807, 810 (1999) (applying proper rule of severability in analyzing whether separation agreement clause was a merger or integration clause provision); *Wachovia Ins. Services, Inc. v. McGuirt*, No. 06 CVS 13593, 2006 WL 3720430 at *11 (N.C. Super. Ct. Dec. 19, 2006) (following proper severability rule while nevertheless citing *Hartman* when excising overly broad “distinctly separable part” from restrictive covenant and enforcing the remainder).

¹⁵⁵ 96 N.C. App. 160, 385 S.E.2d 352 (1989), *rev. denied*, 326 N.C. 595, 393 S.E.2d 876 (1990).

¹⁵⁶ A preliminary injunction is an equitable remedy issued only if the movant can demonstrate: (1) a likelihood of success on the merits; and (2) a likelihood of suffering irreparable harm if the injunction is not issued, or that the injunction is necessary to protect the movant’s rights during the course of litigation. See, e.g., *Kennedy v. Kennedy*, 160 N.C. App. 1, 16, 584 S.E.2d 328 (2003) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)).

enforcement of the indivisible contract as it is written.”¹⁵⁷

However, to reach that determination the court declined to sever any provisions that it considered unreasonable, and then engaged in what is perhaps the best example of wordsmith sophistry in North Carolina noncompete law. By parsing apart conjunctions and other grammatical inferences through the general rule that ambiguous terms of a contract are strictly construed against its drafter, the court ultimately found the restrictive covenant unreasonably broad and therefore unenforceable (for preliminary injunction purposes), while ignoring how the defendant had unquestionably accepted employment with a direct competitor within a prohibited geographical radius in which the plaintiff regularly operated, and had even solicited its customers within that restricted territory.¹⁵⁸ In short, *Electrical South* is virtually a poster child for how not applying a proper severability rule can result in running roughshod over a company’s legitimate business interests in a noncompete context.¹⁵⁹

We note that the language of the contract, above, is ambiguous, because of the word “or”: “*or* which competes directly or indirectly with the company in such endeavors ...” (Emphasis added.) Grammatically, ‘or’ in this covenant can be read to mean “or” or “and.” It can indicate either two types of business ‘concerns’ or one business ‘concern’ with several characteristics. If one reads the covenant so that “or” is used in its disjunctive sense (“either/or”), the contract language seems to enumerate two types of “[business] concerns” that Employee cannot “be connected in any manner with” [sic]: the first ‘which manufactures,’ ‘designs’ or ‘repairs’ industrial solid state electronic equipment within 200 miles of Greensboro, *or* the second ‘which competes directly or indirectly with the Company’ within 200 miles of Greensboro. If, however, we read the “or” in its conjunctive (“and”) sense, the covenant describes only one type of business ‘concern’ having two prohibited attributes: one that ‘manufactures or designs,’ ‘repairs or services,’ *and* ‘which competes directly or indirectly with the Company’ within 200

¹⁵⁷ *Elec. South*, 96 N.C. App. at 167, 385 S.E.2d at 356.

¹⁵⁸ *Id.* at 163, 385 S.E.2d at 354.

¹⁵⁹ In addition, the court focused so much on obviously unintended drafting nuances that it illustrates yet again why the recommendations discussed above in Part III.A.1. regarding *Precision Walls* and *Kinesis Advertising* are so needed.

miles of Greensboro.' When the language in a contract is ambiguous, we view the practical result of the restriction by "construing the restriction strictly against its draftsman" . . . Construing the contract according to this tenet, we interpret the word 'or' in its conjunctive sense and do not determine whether the contract has a divisible provision which may be enforceable. A court can "enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable."¹⁶⁰

As if this tortured reasoning were not enough, the court continued with a detailed discussion of how the noncompetitor's language prohibited associating with plaintiff's competitors "wherever located."¹⁶¹ According to the court, and instead of just severing this offending language upon which the "valid" portions of the agreement did not depend, the consequence was to defeat the noncompetitor. By doing so, it overrode any concern for defendant's actual employment with a competitor within the given 200-mile restricted territory around Greensboro, a geographical area whose reasonableness was never questioned and which was obviously all the noncompetitor intended to accomplish as it was the only territorial restriction being enforced in the lawsuit.

In short, if there was ever a need for a proper application of the severability rule (or as argued in this section, a blue penciling or reasonable judicial modification rule), it is embodied in *Electrical South*. But additional support is also provided through *Hartman* and its progeny, which added another unique twist to severability and the refusal to blue pencil or otherwise modify noncompetitor agreements in North Carolina:

When the language of a covenant not to compete is overly broad, North Carolina's "blue pencil" rule severely limits what the court may do to alter the covenant. A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant.

The courts will not rewrite a contract if it is too broad but will simply not enforce it

¹⁶⁰ *Elec. South*, 96 N.C. App. at 167, 385 S.E.2d at 356.

¹⁶¹ *Id.*

(citations omitted). If the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision (citations omitted).

....

In this case, the trial court correctly overturned the jury verdict and ruled that the covenants could not be saved by “blue penciling.”¹⁶²

Although there is certainly legal precedent in North Carolina requiring contract terms to be identifiable enough to sever, *Whittaker General* never mentioned the word “distinctly” nor any of its derivations, much less associated it as *Hartman* did with the severability of contract provisions within a covenant not to compete by requiring a “distinctly separable part of a covenant in order to render the provision reasonable.”¹⁶³ Rather, *Whittaker General* merely observed that the paragraph of the contract at issue prohibiting defendant from soliciting, interfering or diverting plaintiff’s customers “contain[ed] a separate provision which provide[d] that [defendant] will not engage in the ‘business of manufacturing, selling, renting or distributing any goods manufactured, sold, rented or distributed by [plaintiff] during the term of his employment.’”¹⁶⁴ While noting how plaintiff was not even trying to enforce that provision, the Court held that “the part which is before us is separable and may be enforced by the award of damages.”¹⁶⁵

Hartman’s approach to severability has spawned a number of cases that refuse to sever unenforceable provisions in a covenant not to compete when there is no “distinctly separable part,” whatever that might mean since neither *Hartman* nor any of these other cases define it.¹⁶⁶ The closest our courts have apparently come to defining the

¹⁶² *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 317-18, 450 S.E.2d 912, 920 (1994) (quoting *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989)) (internal citations omitted) (indent in original).

¹⁶³ *Whittaker Gen.*, 324 N.C. at 528, 379 S.E.2d at 829; *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920.

¹⁶⁴ *Whittaker Gen.*, 324 N.C. at 528, 379 S.E.2d at 828.

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., *Prof'l Liab. Consultants, Inc. v. Todd*, 122 N.C. App. 212, 221, 468 S.E.2d 578, 583-84 (1996); *MJM Investigations, Inc. v. Sjostedt*, 205 N.C. App. 468, 698 S.E.2d 202 at *4-5 (2010) (Table); *Paper & Packaging, Inc. v. Dickinson*, 599 F.Supp.2d 664, 671-72 (M.D.N.C. 2009). The irony of *Hartman* is that the trial court in large part properly applied North Carolina’s severability rule with one exception. The trial court *inter alia* appropriately struck various parts of the

continued . . .

concept is actually in the dissenting opinion to *Welcome Wagon, Inter., Inc. v. Pender*.¹⁶⁷ In that case, the North Carolina Supreme Court in a 4-3 decision reversed the Court of Appeals and, for purposes of ruling that a restraining order should have been continued to hearing, found that the noncompetition agreement at issue was valid.¹⁶⁸ What is most interesting for this current discussion, is that the court in doing so actually engaged in a practice that the dissenting opinion called “blue penciling.”¹⁶⁹ This was due to the court having ruled that one, and depending on a subsequent trial court determination, perhaps two of four specifically numbered alternative geographical restrictions were reasonable.¹⁷⁰ Noting how the majority had approved the first alternative restrictions (“(1) in Fayetteville, North Carolina”), disapproved the third and fourth (locations throughout the United States where plaintiff actively engaged in business), and left the second alternative up to the trial court based on evidence to be heard (“(2) any other city, town, borough, township, village or other place in the State of North Carolina” where plaintiff was operating), Justice Bobbitt’s dissenting opinion called them to task for having applied “in substance, the so-called ‘blue pencil’ rule.”¹⁷¹

restricted territory that were overly broad, while leaving North Carolina, South Carolina and Georgia intact, but then inserted the words “in competition” which was the *only* addition actually written into the agreement (*i.e.*, the only words improperly “blue penciled”). Therefore, except for a single addition not in the original covenant not to compete, the trial court in *Hartman* did precisely what North Carolina law permits when severing unenforceable provisions from a contract. *See, e.g.*, *Am. Nat’l Elec. Corp. v. Poythress Commercial Contractors, Inc.*, 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004), and other cases cited above in this section. Unfortunately, the Court of Appeals never acknowledged this but instead charted its own course on severability versus blue penciling in North Carolina. *Hartman*, 117 N.C. App. at 317-18, 450 S.E.2d at 920.

¹⁶⁷ 255 N.C. 244, 120 S.E.2d 739 (1961).

¹⁶⁸ *Id.* at 248-50, 120 S.E.2d at 741-43.

¹⁶⁹ *Id.* at 255-56, 120 S.E.2d at 747-48 (BobbittBOBBITT, J., dissenting).

¹⁷⁰ *Id.* at 246, 248-50, 128 S.E.2d at 740-43. The specifically numbered alternative restrictions are as follows: “(1) in Fayetteville, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina, in which the Company is then engaged in rendering its said service, (3) in any city, town, borough, township, village or other place in the United States in which the Company is then engaged in rendering its said service, or (4) in any city, town, borough, township or village in the United States in which the Company has been or has signified its intention to be, engaged in rendering its said service.” *Id.* at 246, 120 S.E.2d at 740.

¹⁷¹ *Id.* at 255-56, 120 S.E.2d at 747-48. *Cf. Masterclean of North Carolina, Inc. v. Guy*, 82 N.C. App. 45, 48-51, 345 S.E.2d 692, 695-96 (1986) (distinguishing *Welcome Wagon* and declining to find as reasonable similar alternative restricted territory divisions).

From there, the dissenting opinion provided an example of what this rule might mean for drafting covenants not to compete in North Carolina. In a surprising twist, that has mostly been forgotten by later case law acknowledging how blue penciling is *not* permitted, Justice Bobbitt observed the following:

[I]f the “blue pencil” rule is adopted, there would seem no reason why the court should not uphold a provision it deems reasonable in respect of time if worded in the alternative, for example, a provision restricting competition (1) for one year, or (2) for two years, or (3) for three years, or (4) for four years, and so on *ad infinitum*.¹⁷²

Ironically, this is precisely what has happened despite courts repeatedly observing how the blue pencil rule is *not* followed in North Carolina. As a matter of practice, the uncertainty of what “distinctly separable part” might mean has caused drafters of noncompetition agreements to devise so many artificial constructs of periods, commas, semicolons, colons, paragraphs and subparagraphs – preferably with “alternative” language inserted – that it borders on the absurd. For example, consider the following hypothetical options for defining a covenant not to compete’s restricted territory for a company with sales operations that, depending on the direction, cover up to a 100-mile radius of two cities:

Option A

The Restricted Territory shall be defined as a 100-mile or 75-mile radius of Raleigh, NC, and Columbia, SC.

Option B

The Restricted Territory shall be defined as a 100-mile or 75-mile radius of Raleigh, NC, and Columbia, SC, whichever is the greater radius for each such city that a court of competent jurisdiction determines is reasonable and enforceable to protect the Company’s legitimate business interests.

Option C

The Restricted Territory shall be defined as a 100-mile radius of Raleigh, NC, and Columbia, SC; or, in the alternative, it shall be defined as a 75-mile radius of

¹⁷² *Welcome Wagon*, 255 N.C. at 256, 120 S.E.2d at 747-48.

Raleigh, NC, and Columbia, SC.

Option D

The Restricted Territory shall be defined as: (1) a 100-mile radius of Raleigh, NC, and Columbia, SC; or (2) a 75-mile radius of Raleigh, NC, and Columbia, SC.

Option E

The Restricted Territory shall be defined as a 100-mile radius of Raleigh, NC, and Columbia, SC. In the alternative, the restricted territory shall be defined as a 75-mile radius of each such city.

Option F

The Restricted Territory shall be defined as:

1. A 100-mile radius of Raleigh, NC; and
2. A 100-mile radius of Columbia, SC.

In the alternative, and only if a court of competent jurisdiction determines that such territory is overly broad or otherwise unenforceable and invalid, then the Restricted Territory shall be defined as:

1. A 75-mile radius of Raleigh, NC; and
2. A 75-mile radius of Columbia, SC.

The variations are virtually endless, from including specific conjunctions and punctuation to using completely separate paragraphs, sentences and numbering, to adding precise language about reasonableness and enforceability. But quite arguably this is what must be done under *Welcome Wagon*, whether it is called “blue penciling” or not. Regardless, however, it is scrivening nonsense given how each version uses the same geographical territory limited to the company’s demonstrated areas of operation, and how *substantively* there is no material difference between Options A and F or any point in between.¹⁷³

¹⁷³ The unintended drafting consequence of not implementing broad severability, or an appropriate blue penciling or reasonable judicial modification rule as also advocated by this article, is perhaps best expressed by the courts in Arizona. That state adopted a blue penciling rule defined as “cross[ing] out over broad, unreasonable provisions in an agreement while keeping in place less onerous, enforceable ones.” *Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 980 (D. Ariz. 2006). This has led to a widespread practice of using “step-down provisions” as the method of defining territory or time restrictions by providing successively
continued . . .

Assume also in this example that, based on the evidence, a court determines that a 100-mile radius of Raleigh but only a 75-mile radius of Columbia is reasonable. Applying a broader severability rule as reflected in *American Nat'l*, any of Options A through F could be “severed” to achieve this result – including even a strict reading of Option A, by simply severing the larger radius and using the lower, 75-mile area for both cities. But when a strict severability rule is applied, or when it is considered “blue penciling” as in *Hartman*, the result is quite different. In *Hartman*, the trial court modified the covenant not to compete in two ways: by deleting certain language that it considered overly broad from the same paragraph in which appropriate restrictions were found, and by inserting the words “in competition” into the paragraph to help clarify the limitations being imposed.¹⁷⁴ The court labeled *both* actions as having “blue penciled” the covenant, despite the former being quite arguably a mere application of a broader severability rule by striking terms that other portions of the covenant did not depend upon for their validity:

Paragraph (a) of the “blue penciled” or modified covenant submitted to the jury read as follows:

(a) Employee agrees that during his term as an employee of the Corporation and for five (5) years thereafter, he will not, either directly or indirectly, on his own account, or in the service of others, own, manage, lease, control, operate, participate, consult or assist any person or entity providing actuarial services or any other services of the same nature as the services currently offered by the Corporation to the insurance industry and others ~~{or otherwise compete}~~ **{in competition}** against the Corporation in the actuarial or consulting business. This covenant shall be binding upon Employee within the geographic territory of North Carolina, South Carolina and Georgia ~~{(the “Primary Territory”)} and those five (5) states, not including the Primary Territory, from which the Corporation has derived the greatest revenues during the twenty four (24) month period preceding the~~

decreasing restrictions if a broader one is first deemed unenforceable, similar to the examples given in Options A through F above. *Id.* In other words, once again form is placed over substance in terms of what covenant not to compete law is intended to accomplish.

¹⁷⁴ See *Hartman v. W.H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 309-10, 450 S.E.2d 912, 914 (1994).

~~termination of the Employee's employment, which five (5) states, along with the Primary Territory, shall constitute the "Restricted Territory].¹⁷⁵ Notwithstanding the foregoing, if Employee ceases to be employed by the Corporation, he shall have the right to work as a full-time employee of an insurance company so long as he renders services only for the exclusive benefit of such company.¹⁷⁵~~

However, while severing unenforceable provisions may overlap with blue penciling, the latter provides much more freedom in modifying a noncompete agreement to protect legitimate business interests as evidenced in states like Illinois, New Jersey and Pennsylvania. In those states, both practices are accepted parts of covenant not to compete litigation, and their blue pencil rules have either morphed into or been replaced by a rule of reasonable judicial modification.¹⁷⁶

So where does North Carolina go from here? One option is to leave *Hartman's* "distinctly separable part" language alone and keep using its rigid understanding of severability in a noncompete setting while continuing to reject blue penciling.¹⁷⁷ If that course is taken,

¹⁷⁵ *Id.* (emphasis and editing notations in original). See also *MJM Investigations, Inc. v. Sjostedt*, 205 N.C. App. 468, 698 S.E.2d 202 at *3 (noting how the court "blue penciled" the restrictive covenant by striking its entire first sentence, which consisted of noncompetition rather than nonsolicitation restrictions, rather than referring to the action as severing).

¹⁷⁶ See, e.g., *Pactive Corp. v. Menasha Corp.*, 261 F. Supp. 2d 1009, 1015 (N.D. Ill. 2003) ("Under Illinois law, a court, at its discretion, may modify or 'blue-pencil' an unreasonable agreement in order to make it comport with the law, or sever unenforceable provisions from a contract."); *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 585-86, 264 A.2d 53, 61 (1970) (overturning prior decisions regarding strict application of a severability rule and deeming overly broad noncompete agreements "void per se" in favor of a blue pencil rule that allows courts to modify restraints in order to protect an employer's legitimate interests); *Bahleda v. Hankison Corp.*, 228 Pa. Super. 153, 157, 323 A.2d 121, 123 (1974) (holding that although covenant may be overly broad in geographic scope to be enforced, it may nevertheless "be modified and enforced as restricted by the modification). An interesting variation is when the noncompetition agreement specifically authorizes a court to enforce its restrictions to the maximum extent permitted by law. Although this issue has apparently not been addressed under North Carolina law, at least in Illinois such authorization is honored and increases even more a court's ability to modify and not just sever unreasonable terms from the agreement. See, e.g., *Wyatt v. Dishong*, 127 Ill.App.3d 716, 719, 469 N.E.2d 608, 610 (1984).

¹⁷⁷ Although this article argues for a broad severability rule in a noncompete context, the North Carolina Supreme Court has at least implied that *Hartman's* more limited severability approach is acceptable (although not necessarily required). In *Tillman v. Commercial Credit Loans, Inc.*, a consumer loan arbitration agreement
continued . . .

however, expect attorneys and others who draft noncompete agreements to increasingly become scribes of form over substance, as the “art” of alternative or step-down provisions as allowed in *Welcome Wagon* will have as many finely-tuned brushstrokes as a Van Gogh painting in hopes that at least one provision will be found enforceable. As one who drafts and litigates these agreements, it is this author’s contention that such an approach not only misapplies a long-standing rule that allows much more freedom with severability, it is also antithetical to protecting the legitimate business interests of employers in an instantly mobile and often borderless modern business environment.

Therefore, I think the answer to this question is two-fold: At a minimum, North Carolina courts should consistently take the severability rule demonstrated by *American Nat’l* and apply it to covenants not to compete. But even more, North Carolina should adopt an appropriate blue penciling or reasonable judicial modification rule, or both, similar to that found in Illinois, Pennsylvania and New Jersey – with Illinois being particularly recommended.

3. Adopting a blue pencil or reasonable judicial modification rule in North Carolina

For North Carolina to consider a blue pencil or judicial modification rule, it does not have to reject severability. In fact, severability and blue penciling should not only co-exist, they can and do complement each other, just as blue penciling and judicial modification work together when both are properly implemented. As discussed above in Part III.D., an appropriate understanding of severability allows for unenforceable provisions of a contract to be severed and the remaining provisions to be enforced when they do not depend on the illegal portions for validity. North Carolina courts do not need to look beyond their own case law to re-establish those principles in the covenant not to compete context. However, for blue penciling and judicial modification guidance, North Carolina does need to consider the law in other jurisdictions. As mentioned above, three of the best examples of a blue pencil or reasonable judicial

was declared substantively unconscionable and invalid by the majority, which declined to invoke the agreement’s severability clause to remove the offending provisions as it would have required such a large extent of severing that it would “require the Court to rewrite the entire clause”. 362 N.C. 93, 108, 655 S.E.2d 362, 373 (2008). However, in his dissenting opinion, Justice Newby observed that severability should have and could have been applied, citing numerous instances of how courts have stricken offending language within specific clauses without any concern of rewriting or substituting their own terms for those of the parties. *Id.* at 125-26, 655 S.E.2d at 383-84.

modification rule that would honor North Carolina severability and its other elements of an enforceable noncompetition agreement are in the states of Illinois, Pennsylvania and New Jersey.

Interestingly, New Jersey saw itself as a late-comer to the blue pencil rule – and that was in 1970. The seminal case was *Solari*, in which the court applied the following rationale about why a new direction was needed, one that 42 years later rings equally true for North Carolina:

As the cited judicial opinions indicate, the rule of divisibility or selective construction has, at the expense of the basic values, *exalted formalisms and rewarded artful draftsmanship*. In the process individual results have been reached which hardly conform with any sound equitable concepts. In some instances, judges have upheld sweeping noncompetitive agreements . . . In other instances, they have stricken noncompetitive agreements in their entirety, as too broad, though justice and equity seemed to cry out for the issuance of appropriately limited restraints which would simply protect the legitimate interests of the covenantee in reasonable fashion, would not subject the covenantor to any undue hardship, and would not impair the public interest.¹⁷⁸

Through *Solari*, the New Jersey Supreme Court adopted a three-part test that holds a noncompete agreement enforceable if it “protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public.”¹⁷⁹ Through subsequent case law, New Jersey took the blue pencil rule and developed it into a modification rule through which courts have relative freedom to revise noncompete agreements based on the evidence presented in order to effectuate the three-part test of enforceability.¹⁸⁰

In Pennsylvania, courts have “broad powers to modify the restrictions imposed on the former employee to include only those

¹⁷⁸ *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 584, 264 A.2d 53, 60 (1970) (citations omitted) (emphasis added).

¹⁷⁹ *Id.* at 576, 264 A.2d at 56.

¹⁸⁰ *See, e.g., Platinum Mgmt., Inc. v. Dahms*, 285 N.J. Super. 274, 298, 666 A.2d 1028, 1039-40 (1995) (modifying a restrictive covenant by deleting provision that restricted solicitation of prospective customers); *Coskey's Television & Radio Sales & Serv., Inc. v. Foti*, 253 N.J. Super. 626, 602 A.2d 789 (1992) (discussing how trial court “did trim or ‘blue pencil’ the covenant in its scope of activity and area of enforceability”, but that such efforts were not enough as the covenant “required substantially narrower enforcement.”).

restrictions reasonably necessary to protect the employer.”¹⁸¹ Similar to New Jersey, this general rule of judicial modification for covenants not to compete operates within a three-part analysis of enforceability that includes determining whether a covenant is “incident to an employment relationship”, whether its restrictions are “reasonably necessary for the protection of the employer,” and whether those restrictions are “reasonably limited in duration and geographic extent.”¹⁸² Balancing this inquiry is the “important interest” of the employee “in being able to earn a living in his chosen profession.”¹⁸³

But of these three states, it is perhaps Illinois that provides the best model for North Carolina. The reason is that Illinois, like North Carolina, has an exceptionally well-developed body of noncompete case law that truly demonstrates an effort to reach fair and proper results for employers and employee alike, whether a restrictive covenant is enforced or not. In addition, when applying its blue pencil and judicial modification rules, Illinois courts have managed to establish guiding principles that keep an appropriate burden on those who draft noncompete agreements to do it right. Any covenant that obviously fails to satisfy the basic elements of enforceability under Illinois law will not be modified by a court in order to save it, but a covenant will not be struck down merely because of formalistic semantics that ignore a proper analysis and the protection of legitimate business interests.

Restrictive covenants are valid and enforceable in Illinois if they are “reasonable and necessary to protect a legitimate business interest of the employer.”¹⁸⁴ Whether a covenant is reasonable is a question of law for the court after considering “the hardship caused to the employee, the effect upon the general public, and the scope of the restrictions.”¹⁸⁵ This analysis also requires courts “to consider the propriety of the limitations in terms of their length in time, their territorial scope, and the activities that they restrict”, all of which

¹⁸¹ *All-Pak, Inc. v. Johnston*, 694 A.2d 347, 350-51 (Pa. Super. Ct. 1997).

¹⁸² *Id.*

¹⁸³ *Id.* See also *Bell Fuel Corp. v. Cattolico*, 375 Pa. Super. 238, 251-52, 544 A.2d 450, 457 (1988), *appeal denied*, 520 Pa. 612, 554 A.2d 505 (1989) (stating the rule that “a court of equity may not only remove an offensive term, but may supply a new, limiting term and enforce the covenant as so modified. This unique power to modify the parties’ contract in the restrictive covenant context arises from the general equity powers of the court.”).

¹⁸⁴ *Cambridge Eng'g, Inc. v. Mercury Partners, 90 BI, Inc.*, 378 Ill. App. 3d 437, 447, 879 N.E.2d 512, 522 (2007) (quoting *Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc.*, 292 Ill. App. 3d 131, 138, 685 N.E.2d 434, 441 (1997)).

¹⁸⁵ *Cambridge Eng'g*, 378 Ill. App. at 447, 879 N.E.2d at 522.

“depends on the unique facts and circumstances of each case.”¹⁸⁶ While courts may modify an overly broad covenant not to compete to make it more reasonable and enforceable, any such reformation must be narrowly applied in order to avoid creating any “incentive to draft restrictive covenants as broadly as possible” and simply rely upon a court to “automatically amend and enforce them” given the “particular circumstances of each case.”¹⁸⁷ At all times, “the fairness of the restraints contained in the contract is a key consideration.”¹⁸⁸

One of the best accounts of implementing these principles within the context of blue penciling or judicial modification is in *Eichmann v. Nat'l Hosp. and Health Care Services, Inc.*¹⁸⁹ In *Eichmann*, plaintiff filed a declaratory judgment action challenging a noncompetition agreement he had signed while employed with defendant.¹⁹⁰ The trial court refused to modify the restrictions as requested by defendant, granted partial summary judgment in favor of plaintiff and the Illinois Appellate Court affirmed.¹⁹¹ Although the parties and restrictive covenants were somewhat different from typical noncompetition and nonsolicitation provisions in an employer-employee setting, the court used the same type of analysis and discussed the following rules:

- Courts “may modify the restraints embodied in a covenant not to compete” but in doing so, “will neither add language or matters to a contract about which the instrument itself is silent, nor add words or terms to an agreement to change the plain meaning of the parties as expressed in the agreement”.¹⁹²
- Despite the ability to modify restrictive covenants, “*the fairness of the restraint initially imposed* is a relevant consideration to a court of equity.”¹⁹³
- “A restrictive covenant is unfair where its terms ‘clearly extend far beyond those necessary to the

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 456, 879 N.E.2d at 529.

¹⁸⁸ *Id.* at 457, 870 N.E.2d at 530.

¹⁸⁹ 308 Ill. App. 3d 337, 719 N.E.2d 1141 (1st Dist. 1999), *appeal denied*, 187 Ill.2d 567, 724 N.E.2d 1267, 244 Ill.Dec. 183 (2000).

¹⁹⁰ *Id.* at 339, 719 N.E.2d at 1143.

¹⁹¹ *Id.*

¹⁹² *Id.* at 347, 719 N.E.2d at 1149 (citing *Sheehy v. Sheehy*, 299 Ill. App. 3d 996, 1001, 702 N.E.2d 200, 204 (1998)).

¹⁹³ *Id.* (quoting *House of Vision, Inc. v. Hiyane*, 37 Ill.2d 32, 39, 225 N.E.2d 21, 25 (1967)) (emphasis in original).

protection of any legitimate interest' of the employer or, in other words, amount to 'unrealistic boundaries in time and space.'"¹⁹⁴

- Although courts may “modify a restrictive covenant . . . [they] should refuse to modify an unreasonable restrictive covenant, not merely because it is unreasonable, but where the *degree* of unreasonableness renders it unfair.”¹⁹⁵
- While “minor” modifications are allowed, “drastic” changes “tantamount to fashioning a new agreement” are not.¹⁹⁶
- Modification to protect an employer’s legitimate interests should never be implemented in such a way that it “discourag[es] the narrow and precise draftsmanship which should be reflected in written agreements.”¹⁹⁷

In summary, while Illinois courts are empowered to make minor modifications to a covenant not to compete in order to protect an employer’s legitimate interests, employers are still required to properly draft the agreements and to enforce them in an appropriate manner that only protects against unfair competition.¹⁹⁸ By

¹⁹⁴ *Id.* (quoting *House of Vision*, 37 Ill.2d at 39, 225 N.E.2d at 25).

¹⁹⁵ *Id.* (emphasis in original).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (quoting *Lee/O’Keefe Ins. Agency, Inc. v. Ferega*, 163 Ill. App. 3d 997, 1007, 516 N.E.2d 1313, 1319 (1987)). For examples of cases where judicial modification was allowed, see, e.g. *Weitekamp v. Lane*, 250 Ill. App. 3d 1017, 1027, 620 N.E.2d 454, 461 (1993) (upholding trial court’s modification of covenant not to compete as original covenant “was not extremely unfair nor did it extensively restrain trade”); *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 80, 589 N.E.2d 640, 652 (1992) (upholding slight modification of a restrictive covenant where “the balance of the restrictions were reasonable” to protect the company’s interests). *Cf.*, *Arcor, Inc. v. Haas*, 363 Ill. App. 3d 396, 404-06, 842 N.E.2d 265, 272-74 (2005) (refusing to blue pencil or modify noncompete agreement without geographical limitations where to do so would effectively create a “blanket prohibition” against competition). *See also Eichmann and Sheehy*, where the courts declined to modify overly broad restrictions.

¹⁹⁸ Similar limitations to judicial modification are found in New Jersey and Pennsylvania. *See, e.g., Solari Indus., Inc. v. Malady*, 55 N.J. 571, 576, 264 A.2d 53, 56 (1970) (courts will not blue pencil or modify a “deliberately unreasonable and oppressive noncompetitive covenant”); *Int’l Settlement Design Inc. v. Hickey*, 1995 WL 864463 *2-3 (Pa.Com.Pl. July 29, 1995) (refusing to engage in “substantial modification” to overly broad covenant not to compete in order to render it enforceable).

maintaining this “reasonable judicial modification” approach, Illinois is able to avoid highly structured drafting requirements that place form over substance, while helping to ensure that proper drafting is still mandated and that employers cannot simply rely upon courts to essentially write or rewrite their agreements for them if a noncompete is challenged. All of this appears to make Illinois’ blue penciling and judicial modification rules a natural fit for North Carolina, which does and should continue to require appropriate drafting, consideration and other elements of an enforceable covenant not to compete under its laws.

4. *Applying a blue pencil or reasonable judicial modification rule in North Carolina*

While in some ways this may seem like a radical departure from North Carolina legal precedent, in actuality, adopting an appropriate blue pencil or reasonable judicial modification rule – or both – can be seen as a natural outgrowth of how our courts already approach covenant not to compete cases. As previously discussed, North Carolina courts are repeatedly challenged with placing highly nuanced language of a noncompetition agreement into a larger legal framework of what constitutes an enforceable covenant not to compete, then determining that enforceability as a matter of law. This not only involves the five elements reflected in *Triangle Leasing, Kuykendall* and *A.E.P. Indus.*, it also means that courts are, to a great extent, already using their discretion and fair judgment to reach a particular result. Invariably, that process involves making a determination based on evidence presented at a hearing or trial. Toward that end, the five elements and whether they all operate together to only protect an employer’s legitimate business interests are definitely at issue. If so, then they create an enforceable, or likely enforceable, agreement for purposes of trial or motion, respectively, either of which embodies the court’s discretion in making that determination. In other words, North Carolina courts are already using their discretion and fair judgment anyway, and by applying severability they are using it even more – whether in its current strict form or in the broader sense advocated above. So the foundation already exists for blue penciling and judicial modification, if our courts are willing to go there.

Three examples of how our trial or appellate courts *have* been willing to “go there” include *Welcome Wagon, Redlee/SCS, Inc. v. Pieper*,¹⁹⁹ and *Southeastern Outdoor Products, Inc. v. Lawson*.²⁰⁰ As

¹⁹⁹ 153 N.C. App. 421, 571 S.E.2d 8 (2002).

²⁰⁰ 172 N.C. App. 592, 616 S.E.2d 693 (2005) (Table) (unpublished).

previously mentioned, not only did the court in *Welcome Wagon* engage in what the dissenting opinion labeled as “blue pencil[ing]”, it also observed the following: “[W]here, as here, the parties have made divisions of the territory, a court of equity will take notice of the divisions the parties themselves have made, and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable.”²⁰¹ Taking notice and ruling accordingly is the embodiment of discretion and fair judgment, and that is precisely what is and should continue to be allowed by our courts in noncompete cases.

In *Redlee*, a company sued two former employees and their new employer in order to enforce a covenant not to compete. One employee’s covenant expired and was considered moot by the time the Court of Appeals rendered its decision, but the other was still in effect and therefore its likelihood of enforcement was at issue given defendants’ appeal of the trial court’s granting of a preliminary injunction.²⁰² The remaining covenant was contained in a larger employment agreement governed by Texas law. That law includes a covenant not to compete statute *instructing* courts to “reform” any unreasonably broad restrictions of time, territory or scope of activity and to “impose a [reasonable] restraint that is not greater than necessary” to protect legitimate business interests.²⁰³ The North Carolina court did so by reducing the covenant’s territorial limitation from several counties to just Mecklenburg County, which was where the remaining individual defendant had worked for plaintiff, and the Court of Appeals approved this reformation in affirming the trial court’s decision.²⁰⁴

Redlee’s enforcement in *North Carolina* of a Texas statute mandating the blue penciling or judicial modification of an overly broad time, territory or activity restriction is another indication that our current prohibition against blue penciling might not be as final as it may appear. For example, if the blue pencil rule is prohibited based on a public policy argument, then *Redlee* would have refused to reform the covenant despite its being governed by Texas law.²⁰⁵ That

²⁰¹ *Welcom Wagon, Int’l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E. 2d 739, 742 (1961).

²⁰² *Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 421-22, 571 S.E.2d 8, 10-11 (2002).

²⁰³ *Id.* at 425, 571 S.E.2d at 12 (quoting Tex. Bus. & Comm. Code Ann. § 15.51(c) (2011)).

²⁰⁴ *Id.* at 426-27, 571 S.E.2d at 13-14.

²⁰⁵ *See Cable Tel. Servs., Inc. v. Overland Contr’g, Inc.*, 154 N.C. App. 639, 643, 574 S.E.2d 31, 33-34 (2002) (North Carolina will generally enforce a contractual provision choosing another state’s law to govern the agreement unless

precise question appears to have only been addressed once in North Carolina, and in *Akzo Nobel Coatings Inc. v. Rogers*,²⁰⁶ the North Carolina Business Court refused to consider as void against public policy a Delaware law allowing liberal blue penciling of noncompete agreements.²⁰⁷ The court did limit its findings to its set of facts alone, but nevertheless applied Delaware's blue penciling rule to two noncompete agreements because they were "bargained for and should be honored."²⁰⁸ In contrast, *Cox v. Dine-A-Mate* refused to apply New York law to a covenant not to compete on "public policy" grounds in that North Carolina requires additional consideration for existing employees to sign new noncompete agreement whereas New York does not.²⁰⁹ Whatever the eventual North Carolina rule might be concerning blue penciling or judicial modification, there is at least a good argument that it is not a "public policy" violation of the type described in *Cox* as its rejection has apparently never been couched that way by our courts.

One of the latest examples of rejecting the blue pencil rule serves another purpose as well. That purpose is demonstrating how blue penciling (and here, judicial modification) can lead to a reasonable result that properly protects legitimate business interests when an underlying restrictive covenant would otherwise fail. In *Southeastern Outdoor Products, Inc. v. Lawson*,²¹⁰ defendant resigned his employment with plaintiff and began working for one of plaintiff's direct competitors in a geographical area that without question was within his noncompete agreement's restricted territory. Plaintiff sued and moved for a preliminary injunction.²¹¹

After considering the testimony and other evidence at hearing, the trial court granted injunctive relief, but in the process reduced and revised the overly broad restricted territory of North Carolina and South Carolina to read as follows in the injunction: "all North Carolina counties east of Interstate 77 from Virginia to South Carolina to the Atlantic Ocean . . . [and] all counties in . . . South Carolina east of Interstate I-77 to the Atlantic Ocean that border the state of North

there is no "substantial relationship" with the other state, or there is no other "reasonable basis for the parties' choice," or if applying the chosen law "would be contrary to a fundamental policy" of North Carolina).

²⁰⁶ No. 11 CVS 3013, 2011 WL 5316772 (N.C. Super. Ct. Nov. 3, 2011) (unpublished).

²⁰⁷ *Id.* at *8-9.

²⁰⁸ *Id.*

²⁰⁹ *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 778, 501 S.E.2d 353, 356 (1998).

²¹⁰ No. COA04-1545, 2005 WL 1950247 (N.C. Ct. App. Aug. 16, 2005).

²¹¹ *Id.* at *1.

Carolina.”²¹² Quoting *Hartman*’s distinction between separability and blue penciling, the Court of Appeals reversed because “the trial court ‘rewrote’ the covenant and granted a preliminary injunction based on this ‘blue-penciled’ version.”²¹³ While obviously accurate, completely absent from the court’s discussion was whether this revised restricted territory was now, in fact, reasonable in scope and effectively protected only the plaintiff’s legitimate business interests from unfair competition.

These same comments about the practical and legal effects of an appropriate blue penciling or reasonable judicial modification rule could be applied to and significantly affect the outcome of cases like *Electrical South, Todd, Hartman, Farr, VisionAIR* and a host of others. In particular, it could affect those cases where noncompete violations and an employer’s legitimate business interests were clearly at stake, but the covenants not to compete were struck down for some meticulous drafting violation that did not satisfy a specific court. As argued above, the time has come to correct that approach and better address the unique challenges of unfair competition in the modern business world. North Carolina is already behind the blue pencil / judicial modification curve regarding covenants not to compete, but it is never too late to change.

IV. CONCLUSION

It is a fact of economic life that today’s employees are highly mobile, can and do work from anywhere with the proper technology, and often change jobs from one employer to another – whether voluntarily or involuntarily. It is also a fact that Internet-based business activities have no meaningful borders; that the product and service areas of companies frequently change with the speed of cyberspace; that trade secrets and other confidential information can be accessed, downloaded and transported in seconds by employees intent on misappropriation; and that employers regularly entrust their employees with training and exposure to confidential and proprietary information, products, services, methods, processes and customers that the *employers* developed. Given that this investment ultimately leads to product development, sales and customer relationships which remain the economic lifeblood of most companies, employers should be able to provide that information and customer contact with at least reasonable assurance that they can be protected against unfair

²¹² *Id.* at *2.

²¹³ *Id.* at *3.

competition if an employee leaves to compete against them.

In the legal landscape of covenants not to compete, certain protections already exist through proper adherence to the five elements reflected in *Triangle Leasing*, *Kuykendall* and *A.E.P. Indus.* However, applying and interpreting those elements has not kept pace with how modern business is actually conducted, assuming of course that North Carolina truly is open to employers protecting their legitimate business interests in a highly competitive, constantly changing and increasingly mobile world.

This article has proposed four ways that our courts can correct that deficiency, three of which can occur merely by revisiting legal precedent and taking a different direction instead of an entirely new path. The fourth will require a new road of sorts – but the foundation already exists and the direction is being repeatedly tested in case after case before our courts. As discussed throughout this article, the time has come to redeem North Carolina noncompete law from its current course of inconsistent and often contradictory holdings based primarily on highly nuanced interpretations of an agreement's precise wording. Such an approach leaves employers and employees alike in an unsettled state of restrictive covenant guesswork, and there is no better time than now to correct it.