North Carolina Supreme Court Re-Affirms Classic View of "Blue-Pencil Doctrine" for Non-Competition Agreements

James C. Adams II
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The North Carolina Supreme Court, in a long-awaited decision, reaffirmed the Court's historic view on the "blue-pencil" doctrine in North Carolina as it relates to non-competition agreements. In *Beverage Systems Of The Carolinas, LLC v. Associated Beverage Repair, LLC*, 2016 N.C. Lexis 177 (N.C. Mar. 18, 2016), the Supreme Court considered and reversed a decision in which the Court of Appeals had, for the first time in North Carolina appellate history, held that a trial court had the authority and power under the "blue-pencil doctrine" to re-write a non-competition agreement because the parties had given the court authority to do so.

The dispute involved a non-compete agreement in an asset purchase agreement which purported to prohibit the seller from competing anywhere in the States of South Carolina and North Carolina. The lower court held that the agreement was unenforceable because the seller had only conducted business in isolated parts of North Carolina. The lower court had refused to apply the "blue-pencil doctrine" concluding that the agreement could not be salvaged. The Court of Appeals reversed. The Court of Appeals agreed the non-compete was unreasonably broad but concluded that the "blue-pencil doctrine" could save the agreement, holding that because the purchase agreement specifically gave the court the power to re-write the non-competition agreement, and because these were sophisticated parties, the trial court should consider how the non-compete should be re-written and, if possible re-write it so it was enforceable.

The Supreme Court completely rejected that result. Instead, the Supreme Court reaffirmed its own 1961 holding in *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961), that the "blue-pencil doctrine" is

available only to strike out distinct portions of an agreement that are unenforceable and enforcing only those portions that are enforceable. The Court held that "a court of equity will take notice of the divisions the parties themselves have made [in a covenant not to compete] and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable." *Welcome Wagon*, 255 N.C. at 248, 120 S.E.2d at 742. The Court also reaffirmed its 1989 holding in *Whitaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) that "[t]he courts will not rewrite a contract if it is too broad but will simply not enforce it." The Court therefore held that because all of the language in the non-compete was unenforceable, after the unenforceable portions were excised from the agreement there was nothing in the agreement remaining to be enforced. The Court also rejected the argument that the parties' agreement empowered the courts to re-write the non-competition agreement holding that "parties cannot contract to give a court power that it does not have." Thus, the Supreme Court reaffirmed that the "blue-pencil doctrine" merely permits courts to enforce divisions already agreed to by the parties.

Although the *Beverage Systems* decision was decided in the context of an asset purchase agreement, its impact is likely to be felt in the context of non-compete provisions in employment agreements. Over the last 10 to 20 years North Carolina courts, both state and federal, have taken an increasingly relaxed view of the "blue-pencil doctrine" in employment contexts, sometimes only striking words or phrases, in order to find an agreement to be reasonable and therefore enforceable. The Supreme Court's recent focus on only enforcing "the divisions the parties themselves have made" may impact the extent to which courts will in the future be willing to aggressively strike words or phrases in order to save otherwise unenforceable non-competition agreements.