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Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants not to Compete in North Carolina

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Covenants not to compete are often included in modern employment contracts to prevent employees from working for competitors for a specified amount of time after termination of employment. Although such covenants were initially unenforceable at common law because they represented invalid restraints on trade, most jurisdictions today enforce covenants not to compete where such covenants are reasonable. Jurisdictions differ, however, in their treatment of unreasonable covenants, choosing from one of three approaches: the all-or-nothing approach, which prohibits a court from striking out or modifying any part of a covenant; the “strict blue pencil doctrine,” which allows a court to strike out an unreasonable provision if separable and enforce the remainder of the covenant as written; or judicial modification, which grants a court greater flexibility to strike out or modify an unreasonable provision to allow partial enforcement of a covenant.

Courts, rather than legislatures, have usually developed the framework for evaluating covenants not to compete and determined each state’s approach to unreasonable covenants. For example, North Carolina’s framework for evaluating covenants, which focuses on the time, territorial breadth, and scope of the restriction, was developed over eighty years ago and remains largely intact today, despite the significant changes in how companies structure their businesses and leverage their employees’ skills. At the same time, North Carolina courts...
continue to adhere to the state's version of the strict blue pencil doctrine first adopted in 1961.

This Article examines the current state of covenants not to compete in North Carolina. Because of the jurisdiction's adherence to an outdated reasonableness framework and continued reliance on the strict blue pencil doctrine, North Carolina courts are faced with the task of evaluating twenty-first century covenants using twentieth century tools—leading to contradictory case law and strained reasoning. This Article concludes that North Carolina courts need a different equitable tool in order to truly ensure that covenants not to compete fairly balance the interests of employees and employers, and it suggests several judicial and legislative reforms that would create a consistent, yet flexible, framework for evaluating and enforcing non-compete agreements.

INTRODUCTION .................................................................................. 1933

I. DEVELOPMENT OF STANDARDS FOR EVALUATING COVENANTS NOT TO COMPETE IN NORTH CAROLINA ..... 1938
   A. Time and Territory as Key to Reasonableness in Early Decisions .................................................. 1940
   B. The Increasing Importance of Scope ........................................... 1945
   C. Employee Role and Value Weighed by Courts ............... 1948

II. NORTH CAROLINA'S USE OF THE STRICT BLUE PENCIL DOCTRINE TO ENFORCE UNREASONABLE COVENANTS .... 1950
   A. North Carolina's Adoption of the Strict Blue Pencil Doctrine .................................................. 1951
   B. The Limited and Inconsistent Application of the Strict Blue Pencil Doctrine .................................. 1953
   C. The Hidden Effects of North Carolina's Blue Pencil Doctrine .................................................. 1957

III. REEXAMINING THE JUDICIAL APPROACHES TO UNREASONABLE COVENANTS ........................................ 1960
   A. All-or-Nothing: Voiding Unreasonable Covenants ............. 1962
      1. Advantages ................................................................. 1963
      2. Limitations ............................................................... 1964
   B. The Strict Blue Pencil Doctrine: A Formalistic Compromise .................................................. 1966
      1. Advantages ................................................................. 1967
      2. Limitations ............................................................... 1968
Covenants not to compete, also known as non-compete agreements, are commonly included in employment contracts to prevent employees from working for competitors for a specified amount of time after termination of employment. Yet the acceptance of covenants not to compete in contract law is a relatively recent phenomenon. Initially at common law, such covenants were disallowed because they represented invalid restraints on trade. Courts were wary that restrictive covenants would negatively impact competition, encourage monopolies, and drive up prices. Eventually, however, the common law evolved to allow for enforcement of certain reasonable covenants not to compete. This reasonableness approach recognized the complex and competing interests of employers, employees, and society: the interest of employers in

1. The term "restrictive covenants" is more expansive than "covenants not to compete"; such covenants can be found in different kind of contracts, including contracts to sell a business, franchise contracts, and employment contracts. Reference to "restrictive covenants" in this Article is intended to describe non-compete agreements solely in the context of employment contracts.
3. Id. at 253.
4. Id. at 254–55.
prohibiting former employees from misappropriating business assets, the interest of employees in occupational mobility, and the interest of the public in fostering an efficient and innovative marketplace.\(^5\) In light of these conflicting interests, the reasonableness approach theoretically "allows employee non-compete agreements but imposes significant limits on restrictive covenants to assure that they are not overly burdensome to employees and harmful to the marketplace."\(^6\)

Although some state legislatures have provided statutory guidance on non-compete agreements, in most states the legality and interpretation of non-compete agreements remains governed by common law. Today, nearly all states are willing to enforce non-compete agreements so long as the restrictions are reasonably tailored and are not general restraints on competition.\(^7\) While there are no uniform standards for what constitutes a "reasonable" covenant not to compete,\(^8\) most courts, including those in North Carolina,\(^9\) weigh the time, territorial breadth, and scope of employment restricted by the covenant.\(^10\) Notably, North Carolina's reasonableness analysis remains largely the same today as it was over eighty years ago—before mass long-distance transit, telecommuting,


\(^6\) Id.

\(^7\) See Robert J. Orelup & Christopher S. Drewry, Judicial Review and Reformation of Noncompete Agreements, CONSTRUCTION LAW, Summer 2009, at 29, 33-44 (providing a fifty-state survey of judicial and legislative approaches toward covenants not to compete). California and North Dakota are two states that consider restrictive covenants generally void. Id. at 33, 40. Some states that allow restrictive covenants have set formal requirements, such as requiring covenants to be in writing or to be accompanied by consideration. See infra note 28. This Article will not address formality requirements but instead will focus on decisions to enforce covenants on account of the reasonableness of the provisions.


\(^9\) See infra notes 26-27 and accompanying text (discussing Scott v. Gillis, 197 N.C. 223, 148 S.E. 315 (1929), the first North Carolina case to articulate the reasonableness standard in the employment agreement context).

\(^10\) See Orelup & Drewry, supra note 7, at 29-30 (noting that despite "state-specific variations," most courts consider the "duration," "geographic scope," and "type of activity" prohibited by a non-compete agreement when determining reasonableness). This Article refers to activity restrictions—the types of activities the employee is prohibited from engaging in with another company—as the "scope" of the non-compete agreement.
and the Internet fundamentally altered the ways companies structure their business and leverage their employees.\textsuperscript{11}

While most states recognize the validity of reasonable covenants not to compete, they vary considerably in their enforcement of partially unreasonable covenants, choosing from one of three approaches: the all-or-nothing approach, the "strict blue pencil doctrine," or judicial modification.\textsuperscript{12} Under the all-or-nothing approach, a court may not strike out or modify an unreasonable portion of a covenant not to compete; the covenant is either enforced in its entirety or is given no effect.\textsuperscript{13} By the middle of the twentieth century, most jurisdictions followed the "strict blue pencil doctrine," which allows a court to strike out an unreasonable provision, if separable, and enforce the remainder of a covenant as written.\textsuperscript{14} Under this doctrine, a court has no power to strike out an unreasonable portion of the covenant if it is not separable, and a court cannot otherwise modify the language of the covenant.\textsuperscript{15} Judicial modification, sometimes referred to as the "liberal blue pencil doctrine," developed in response to the rigidity of the other approaches;\textsuperscript{16} it gives a court greater authority to strike out or modify an unreasonable portion of a covenant, irrespective of whether it is separable from the remainder of the covenant.\textsuperscript{17}

Although North Carolina courts initially adopted the all-or-nothing approach,\textsuperscript{18} they soon settled on a version of the strict blue pencil doctrine, which gives courts very limited authority to enforce

\begin{footnotes}
\item[12.] Kenneth R. Swift, Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial & Legislative Handling of Unreasonable Terms in Noncompete Agreements, 24 HOFSTRA LAB. & EMP. L.J. 223, 245 (2007) ("There are three basic approaches jurisdictions use in response to an unreasonable term: voiding the agreement, using the 'Blue Pencil' doctrine to eliminate an unreasonable term, and using the 'Blue Pencil' doctrine to eliminate an unreasonable term and replace it with a reasonable term.").
\item[13.] Griffin Toronjo Pivateau, Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements, 86 NEB. L. REV. 672, 682 (2008).
\item[14.] See id. at 681 ("The 'blue-pencil test' is a 'judicial standard for deciding whether to invalidate the whole contract or only the offending words.' " (quoting BLACK'S LAW DICTIONARY 183 (8th ed. 2004))).
\item[15.] Garrison & Wendt, supra note 5, at 118.
\item[16.] Id. at 130.
\item[17.] Swift, supra note 12, at 249–50.
\item[18.] See, e.g., Noe v. McDevitt, 228 N.C. 242, 245, 45 S.E.2d 121, 123 (1947) (announcing that North Carolina courts must determine the enforceability of covenants in their entirety).
\end{footnotes}
any restrictions within a covenant.\textsuperscript{19} Over time, as the framework for evaluating covenants not to compete no longer fit modern business operations, the limitations of the strict blue pencil doctrine left the courts in an increasingly untenable position. Because a court had no power to modify the language of a covenant not to compete, the enforceability of a particular covenant—and thus, whether the employee at issue would be free to work for any competitor—turned on how the court fit the covenant's language into this outdated framework. The result, as this Article shows, is a record of unpredictable results and seemingly contradictory outcomes.\textsuperscript{20}

Covenants not to compete have generated a fair amount of attention in legal scholarship;\textsuperscript{21} recently, some have questioned the role of such covenants, given the current employment environment.\textsuperscript{22} Legislatures in several states have joined the conversation over the proper role of non-compete agreements for constituent employers and employees.\textsuperscript{23} Despite the nationwide dialogue on the continued vitality of covenants not to compete, the judicial and legislative branches in North Carolina have remained silent. In fact, the Supreme Court of North Carolina has not squarely ruled on the enforceability of covenants not to compete since 1990.\textsuperscript{24} Recognizing the dearth of recent supreme court guidance, Judge Sanford L.

\textsuperscript{19} See, e.g., Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961) ("The court is without power to vary or reform the contract by reducing either the territory or the time covered by the restrictions."); Hartman v. W.H. Odell & Assocs., 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994) (noting that a court does not have the authority to rewrite a covenant).

\textsuperscript{20} See infra Part II.B–C; cf. Swift, supra note 12, at 244 ("Employment relationships and the products and services sold and provided are too varied for fixed terms to operate equitably.").

\textsuperscript{21} For a helpful resource discussing each state's approach to covenants not to compete and a list of legal scholarship relevant to each state's jurisprudence, see generally BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (Stacy A. Campbell et al. eds., 7th ed. 2010).

\textsuperscript{22} See, e.g., Norman D. Bishara, Covenants Not To Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment, 27 BERKELEY J. EMP. & LAB. L. 287, 291 (2006) (discussing the role of covenants not to compete in the wake of the shift from a manufacturing economy to a service economy).

\textsuperscript{23} See, e.g., IDAHO CODE ANN. § 44-2701–2704 (Supp. 2011) (providing comprehensive statutory guidance); see also Justin A. Steiner, Efficient and Effective Non-Compete Agreements in a Down Economy, 53 ADVOCATE 26 (2010) (discussing effects of the new statutory provisions in Idaho); infra Part IV (discussing legislative approaches to non-compete analysis).

\textsuperscript{24} Triangle Leasing Co. v. McMahon, 327 N.C. 224, 227, 393 S.E.2d 854, 856 (1990) (finding non-compete agreement reasonable in terms of time and territory and hence enforceable).
Steelman, Jr. wrote a concurrence in a 2010 North Carolina Court of Appeals decision calling for the Supreme Court of North Carolina to reevaluate “the law of restrictive covenants . . . in the context of changing economic conditions.”

This Article echoes Judge Steelman’s call to examine the current state of North Carolina law regarding covenants not to compete. Specifically, the Article analyzes the difficulties in evaluating modern covenants under the established reasonableness framework, as well as the limitations of North Carolina’s “strict blue pencil doctrine” in producing consistent, equitable results. Ultimately, this Article concludes that North Carolina courts need a different tool in order to truly ensure that non-compete agreements fairly balance the interests of employees and employers, and it suggests that the courts should adopt the judicial modification approach used by the majority of United States jurisdictions. Furthermore, the Article posits that the North Carolina legislature should clarify the state’s position on covenants not to compete, expressly authorize judicial modification, and provide additional guidance for courts to use in evaluating a covenant’s reasonableness.

Part I provides a brief introduction to case law and trends regarding covenants not to compete in North Carolina. This Part identifies the tests that courts have traditionally used to determine a covenant’s reasonableness—tests that focused on the time, territorial breadth, and scope of employment restricted by a covenant—and explains why courts have increasingly struggled to apply those tests to modern covenants. Part II explores the “strict blue pencil doctrine.” This Part discusses the initial adoption of the doctrine by the Supreme Court of North Carolina, examines the limited application of the doctrine in non-compete jurisprudence, and highlights the limitations of the doctrine in providing a predictable and equitable remedy for unreasonable covenants. Part III further addresses the advantages and limitations of the strict blue pencil doctrine as well as two alternative judicial approaches toward unreasonable covenants: the all-or-nothing approach and the judicial modification approach. This Part concludes that North Carolina courts should adopt a variant of the judicial modification approach as a more precise and predictable equitable tool to partially enforce covenants to which the parties agreed. Part IV discusses how the North Carolina legislature could bring further clarity to the enforcement of covenants not to

compete in the state. This Part examines legislation from other states, focusing on statutory provisions that identify the state’s position on the enforcement of covenants not to compete and guide courts in assessing the reasonableness of restrictions. Ultimately, the Article concludes that both judicial and legislative actions are needed in North Carolina to ensure that covenants not to compete appropriately balance the interests of employers, employees, and the general public.

I. DEVELOPMENT OF STANDARDS FOR EVALUATING COVENANTS NOT TO COMPETE IN NORTH CAROLINA

In the 1929 decision of Scott v. Gillis, the Supreme Court of North Carolina first recognized the enforceability of non-compete provisions in an employment agreement:

If the restrictions are not otherwise contrary to public policy, they must be held to be valid when they appear to be reasonably necessary for the fair protection of the employer's business or rights, and do not unreasonably restrict the rights of the employee, due regard being had to the subject-matter of the contract, and the circumstances and conditions under which it is to be performed.

Although the enforceability of a non-compete agreement in North Carolina is subject to several limitations, the most prominent limitation is that the agreement be “reasonable” in various respects—including the time, territorial breadth, and scope of the restriction.

27. Id. at 227, 148 S.E. at 317 (emphasis added) (quoting 6 WILLIAM M. MCKINNEY & BURDETT A. RICH, RULING CASE LAW § 206, at 805–06). Prior to the Scott decision, North Carolina courts had enforced restrictive covenants in the context of business acquisitions. See id.
28. Orkin Exterminating Co. of Raleigh v. Griffin, 258 N.C. 179, 181, 128 S.E.2d 139, 140–41 (1962) (stating that North Carolina courts will “enforce a covenant not to compete if it is: ‘(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy.’” (quoting Asheville Assocs. v. Miller, 255 N.C. 400, 402, 121 S.E.2d 593, 594 (1961))).
29. See, e.g., Med. Staffing Network v. Ridgway, 194 N.C. App. 649, 656, 670 S.E.2d 321, 327 (2009) (“To be valid, the restrictions ‘must be no wider in scope than is necessary to protect the business of the employer.’” (quoting Manpower v. Hedgecock, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979))); Okuma Am. Corp. v. Bowers, 181 N.C. App. 85, 86, 638 S.E.2d 617, 618 (2007) (“When considering the enforceability of a covenant not to compete, a court examines the reasonableness of its time and geographic restrictions, balancing the substantial right of the employee to work with that of the employer to protect its legitimate business interests.”)).
At the time when North Carolina courts were first developing tests for judging the reasonableness of non-compete agreements, business operations were vastly different than they are today; most companies had a limited geographic footprint, and they used non-compete agreements to restrict their employees, often salespersons, from taking positions with direct competitors in the immediate locale. Despite the vast changes in how companies leverage their businesses, the tests used for evaluating non-compete agreements remain largely the same today. Not surprisingly, this disconnect has led to inconsistent and unpredictable decisions as courts try to apply these older tests to modern business operations.

This Part identifies several aspects of the state’s non-compete jurisprudence and tracks their development. First, this Part examines the importance of time and territory in early decisions and their subsequent decline. Although there has been a recent shift toward allowing broader territorial restrictions, courts continue to struggle to evaluate non-compete agreements that do not fit the traditional model. Second, this Part identifies the increased scrutiny given to the scope of activities prohibited by a restrictive covenant. Even though scope has become an integral part of the reasonableness framework, courts have not consistently applied the rules for assessing its impact. Third, this Part discusses how an employee’s position within a company affects the evaluation of a covenant’s reasonableness. Although there is a recent trend of enforcing covenants against senior-level employees, the level of the employee has not been fully captured in the tests espoused by courts.

30. Cf. Louis Uchitelle, Small Companies Going Global, N.Y. TIMES, Nov. 27, 1989, at D1 (discussing the dramatic increase in the globalization of small businesses in the United States during the previous decade).
32. For a discussion of recent changes to the business environment and the impact of these changes on the effectiveness of covenants not to compete, see generally Chiara P. Orsini, Comment, Protecting an Employer’s Human Capital: Covenants Not to Compete and the Changing Business Environment, 62 U. PITTSB. L. REV. 175 (2000).
33. See infra Part I.A–C.
34. Interestingly, the increased scrutiny on the scope of a restriction evolved at the same time as courts’ willingness to allow broader territorial restrictions.
A. Time and Territory as Key to Reasonableness in Early Decisions

North Carolina courts require covenants not to compete to be reasonable in time and territory, and early state jurisprudence largely upheld covenants not to compete. These early cases established that time restraints would not be closely scrutinized, and restrictions up to five years were generally considered reasonable. Since then, decisions have reaffirmed five years as the “outer boundary” of reasonableness, while simultaneously noting that “five year restrictions are not favored.” On the other end of the spectrum, restrictions of six months and one year have been almost uniformly upheld, regardless of whether there were other problematic aspects of the covenant. While there has been little substantive discussion of

36. See, e.g., Sonotone v. Baldwin, 227 N.C. 387, 391, 42 S.E.2d 352, 355 (1947) (finding reasonable a covenant covering the employee’s sales territory plus a fifty-mile radius for twelve months); Orkin v. Wilson, 227 N.C. 96, 99, 40 S.E.2d 696, 698–99 (1946) (finding reasonable a covenant banning competition for two years in Winston-Salem); Moskin Bros. v. Swartzberg, 199 N.C. 539, 545, 155 S.E. 154, 157 (1930) (finding reasonable a covenant covering High Point and within a fifteen-mile radius).
37. See Welcome Wagon Int’l, Inc. v. Pender, 255 N.C. 244, 250, 120 S.E.2d 739, 743 (1961) (“In the cases cited and others, restrictive covenants have been approved for periods ranging from one to 20 years, and in one instance for the life of the covenanter.”).
38. See, e.g., Beam v. Rutledge, 217 N.C. 670, 671–73, 9 S.E.2d 476, 477–78 (1940) (finding a five-year restriction valid and enforceable); cf. Welcome Wagon, 255 N.C. at 250, 120 S.E.2d at 743 (“Research has not disclosed . . . any decision of this [c]ourt in which five years duration has been declared sufficient to avoid a restrictive covenant.”).
42. See, e.g., Precision Walls, 152 N.C. App at 638, 568 S.E.2d at 273 (enforcing one-year non-compete agreement prohibiting any employment with direct competitors and stating that the court would “evaluate the territorial restriction in light of the relatively short duration of the time restriction”); see also Wade S. Dunbar Ins. Agency v. Barber,
the propriety of time restrictions that "do not approach the treacherous five year boundary," in one recent decision, a North Carolina Superior Court judge invalidated a three-year restriction in part due to the short-term nature of the employer's relationships with customers and the fact that "employee turnover in the industry was extraordinarily high." Hence, despite repeated references to five years as the outer boundary of reasonableness, a truer line for reasonable restrictions is probably somewhere between one and two years.

Along with time, territory has proven to be a complex feature of the courts' analysis, often requiring an examination of the geographic breadth of an employee's responsibilities or influence. Early cases followed a similar paradigm: an employee, most often a salesperson or someone having a defined area of responsibility, entered into a non-compete agreement with a local company that restricted future employment within a well-defined geographic region. Thus, the enforceability of the covenant turned on the size of the restricted region and its relation to the employee's area of responsibility. Early jurisprudence indicated that, as with the time restrictions, there might be an outer limit to the territorial scope a court would allow—even

147 N.C. App. 463, 469, 556 S.E.2d 331, 335–36 (2001) (granting preliminary injunction on a six-month covenant despite inclusion of prohibition on soliciting employer's customers with whom employee had no previous contact).
44. Id. at *7–8. The court's recognition of the "business context" and its relationship to the length of the non-compete agreement would seem to be a logical extension of the non-compete jurisprudence, but it has not been picked up by the appellate courts in this state.
46. See Hartman v. W.H. Odell & Assocs., 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994) ("[T]o 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.").
47. See, e.g., James C. Greene Co. v. Arnold, 266 N.C. 85, 86, 145 S.E.2d 304, 305 (1965) (insurance claims manager entered into non-compete spanning a seventy-five-mile radius around Elizabeth City); Amdar v. Satterwhite, 37 N.C. App. 410, 411–12, 246 S.E.2d 165, 165–66 (1978) (dance instructor entered into non-compete agreement spanning a twenty-five-mile radius around a dance studio employer in Raleigh).
48. Compare Greene, 266 N.C. at 86–89, 145 S.E.2d at 305–07 (enforcing seventy-five-mile covenant because it fell within the territory in which employee had made significant contacts), with Henley Paper Co. v. McAllister, 253 N.C. 529, 534–35, 117 S.E.2d 431, 434 (1960) (invalidating covenant covering 300-mile radius in part because territory extended beyond areas in which employee had worked).
going so far as deeming nationwide restrictions to be "patently unreasonable."  

Beginning in the 1960s, North Carolina courts began hearing cases that tested the limits on multi-state and nationwide restrictions. For instance, in the 1966 decision of *Engineering Associates v. Pankow*, the Supreme Court of North Carolina invalidated a covenant restricting a project engineer from working with a competitor for five years. Although there were no explicit geographic restrictions in the covenant, the employer, an engineering corporation, was "one of only two such companies in the United States which are generally recognized as competent in the development and manufacture of . . . custom machinery." Despite the size of the employer's footprint and apparent market share, the opinion flatly stated that "there can be no doubt of [the covenant's] unreasonableness." 

By 1970, this presumption against nationwide covenants was expressly refuted in *Harwell Enterprises, Inc. v. Heim*, a decision that also stressed the value of non-compete agreements to protect an employer's business interests:

> Because of the increased technical and scientific knowledge used in business today, the emphasis placed upon research and development, the new products and techniques constantly being developed, the nation-wide activities (even world wide in some instances) of many business enterprises, and the resulting competition on a very broad front, the need for such restrictive covenants to protect the interests of the employer becomes increasingly important.

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50. 268 N.C. 137, 150 S.E.2d 56 (1966).

51. *Id.* at 139, 150 S.E.2d at 58.

52. *Id.* at 138, 150 S.E.2d at 57.

53. *Id.* at 139, 150 S.E.2d at 58. The opinion suggested that the covenant would operate worldwide, but similar covenants have been construed as nationwide restrictions. *See, e.g.,* Mkt. Am., Inc. v. Christman-Orth, 135 N.C. App. 143, 153, 520 S.E.2d 570, 578 (1999) ("In the instant case, the non-competition covenant contains no fixed geographic restriction, but given that Market America is a national company, it is likely that the covenant is intended to reach the entire United States.").


55. *Id.* at 480–81, 173 S.E.2d at 320.
The Harwell court upheld a nationwide restriction spanning two years and announced that the "old view" of nationwide restraints as patently unreasonable was gone.\textsuperscript{56}

On its face, the Harwell decision appeared promising, as it acknowledged the changes in business operations throughout the country and their effect on the enforceability of covenants not to compete. Since that decision, however, the Supreme Court of North Carolina has provided little guidance on how to evaluate territorial restrictions in the wake of continuing changes in business operations.\textsuperscript{57} The North Carolina Court of Appeals, for its part, has identified six factors that relate to the reasonableness of a geographic restraint, known as the Hartman factors:

(1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; (6) the nature of the employee's duty and his knowledge of the employer's business operation.\textsuperscript{58}

Furthermore, in order to demonstrate the reasonableness of a territorial restriction, 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."\textsuperscript{59}

If anything, the North Carolina Court of Appeals has made it more difficult for employers to demonstrate that broad territorial restrictions should be upheld, and several courts have refused to enforce covenants because employers have not provided enough detail about their customer footprint.\textsuperscript{60} Moreover, the Hartman

\begin{thebibliography}{9}
\item 56. Id.
\item 57. The Supreme Court of North Carolina has recognized that permissible territorial restrictions can be defined by reference to a geographic region or a set of client contacts. See United Labs., Inc. v. Kuykendall, 322 N.C. 643, 651, 370 S.E.2d 375, 381 (1988).
\item 59. See Safety Equip. Sales & Serv., Inc. v. Williams, 22 N.C. App. 410, 414, 206 S.E.2d 745, 748 (1974) (discussing state supreme court decisions that have upheld the validity of broader geographic and time restrictions).
\item 60. See, e.g., Prof'l Liab. Consultants v. Todd, 122 N.C. App. 212, 219, 468 S.E.2d 578, 582 (1996) (Smith, J., dissenting) ("[Employer's] assertion that the covenant's geographic scope equals its customer base is no more than a tautology."); rev'd, 345 N.C. 176, 478 S.E.2d 201; Hartman, 117 N.C. App. at 313, 450 S.E.2d at 917 ("With respect to the covenants in Articles 13(a) and 13(c), defendant failed to show where its customers were located. . . . Mr. Odell's testimony is, at best, an 'indefinite generality' that is insufficient to support a covenant not to compete.").
\end{thebibliography}
factors were identified in the mid-1970s and reflect the types of cases heard by North Carolina courts up to that time. For that reason, the Hartman factors provide beneficial guidance for determining the reasonableness of a covenant in a situation similar to the paradigm described earlier, in which a salesman or employee with a well-defined area of responsibility is restricted from activities in a particular region. By contrast, the Hartman factors are of marginal utility in assessing the reasonableness of restrictions where an employee does not have a well-defined area of responsibility or where an employee has general confidential information relating to the employer's business. These latter types of employment relationships are increasingly more common, which perhaps explains why North Carolina courts have rarely analyzed the Hartman factors in recent cases.

Recognizing the incongruence between the established tests for evaluating territorial restrictions and modern business practices, Judge Sanford L. Steelman, Jr. wrote a concurrence in a 2010 North Carolina Court of Appeals decision calling for the Supreme Court of North Carolina to take action. Judge Steelman suggested that "[t]he 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." In addition to arguing for an evolving view of geographic restrictions, Judge Steelman's concurrence noted the need for restrictive covenants to be limited to a narrowly defined type of business, thus limiting the scope of the restriction. The next Section further explores the impact of scope in the reasonableness framework.

B. The Increasing Importance of Scope

Early decisions assessing covenants not to compete focused on the reasonableness of the temporal and territorial restrictions, rather than the scope of employment activity that was prohibited by the covenant. For instance, in 1930, the Supreme Court of North Carolina upheld a restriction preventing a store manager from competing in any way with his former employer, a clothing store, for two years in a limited area.\(^5\) Thirty years later, however, in *Henley Paper Co. v. McAllister*,\(^6\) the supreme court struck down a non-compete agreement in part because it excluded the employee from performing “too many activities.”\(^7\) In analyzing the scope of employment restricted by a covenant not to compete, courts have added another component to the reasonableness calculation.

*Henley Paper* is instructive, for it exemplifies how North Carolina courts evaluate the scope of restrictions on employment. The employer, a wholesale distributor of a variety of paper products, entered into a non-compete agreement with its employee, a salesman assigned to the Fine Paper Division of the distributor’s business.\(^8\) The non-compete agreement restricted the employee from “either directly or indirectly engag[ing] in the manufacture, sale, or distribution of paper or paper products.”\(^9\) The court found the scope to be overbroad in two respects: first, because the employee had been prohibited from accepting employment that involved the manufacturing of paper or paper products,\(^7\) and second, because the employee had been restricted from selling other types of paper products than fine paper products.\(^10\) According to the court, the employer had a legitimate business interest only in preventing its employee from taking a similar position with a competitor of the employer.\(^11\) Applying this reasoning, subsequent decisions have highlighted hypothetical scenarios that could arise if the covenant

\(^6\) 253 N.C. 529, 117 S.E.2d 431 (1960).
\(^7\) Id. at 534–35, 117 S.E.2d at 434.
\(^8\) See id. at 533, 117 S.E.2d at 434.
\(^9\) Id. at 531, 117 S.E.2d at 432.
\(^10\) Id. at 534, 117 S.E.2d at 434 (“The prohibition would prevent the defendant from cutting pulpwood or gathering linen rags to be used in the manufacture of paper or paper products. Nothing need be added to show the conditions have too many ramifications and impose an undue hardship upon one who had been employed to do no more than sell and deliver fine paper.”).
\(^11\) See id.
\(^12\) See Med. Staffing Network v. Ridgway, 194 N.C. App. 649, 656, 670 S.E.2d 321, 327 (discussing *Henley Paper* as support for the proposition that covenants must protect an employer’s legitimate business interests).
were to be applied as written; the most-often repeated scenario being that “a covenant would appear to prevent [the employee] from working as a custodian” for a competitor of the employer.\footnote{73. Hartman v. W.H. Odell & Assocs., 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994); \textit{see also} Okuma Am. Corp. v. Bowers, 181 N.C. App. 85, 91, 638 S.E.2d 617, 621 (2007) (quoting Hartman); VisionAIR, Inc. v. James, 167 N.C. App. 504, 509 & n.1, 606 S.E.2d 359, 362-63 & n.1 (2004) (citing Hartman and noting that the broad covenant restriction would bar employee from “even wholly unrelated work at any firm similar to VisionAIR”).}

The heightened focus on the scope of employment restrictions initially appeared promising, in that courts developed clear rules by which they analyzed the restrictions. As a general matter, courts held that restrictive covenants that prevented an employee from working in any capacity for a competitor were unreasonable,\footnote{74. \textit{See, e.g.,} Digital Recorders, Inc. v. McFarland, No. 07-CVS-2247, 2007 WL 2570250, at *4 (N.C. Super. Ct. June 29, 2007) (“[C]ourts will not enforce a covenant that, rather than attempting to prevent a former employee from competing for business, instead requires the employee ‘to have no association whatsoever with any business that provides [similar] services.’” (quoting \textit{Hartman}, 117 N.C. App. at 317, 450 S.E.2d at 920)). \textit{But see} Whittaker Gen. Med. Corp. v. Daniel, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) (holding that, where an overly broad scope restriction is separable from the rest of a reasonable restriction, the court will enforce the reasonable provision). The concept of separable restrictions will be discussed in more detail in Part II.} while more narrow scope-based restrictions were evaluated on a case-by-case basis.\footnote{75. \textit{See, e.g.,} Med. Staffing, 194 N.C. App. at 656-57, 670 S.E.2d at 327-28 (refusing to enforce restrictive covenant because employer failed to demonstrate any legitimate interest for the scope of the restriction).} Yet later cases sometimes overlooked these rules\footnote{76. \textit{See, e.g.,} Mkt. Am., Inc. v. Christman-Orth, 135 N.C. App. 143, 146, 520 S.E.2d 570, 574 (1999) (enforcing covenant prohibiting any participation with companies “using a similar matrix marketing structure or handling similar products”).} or, worse yet, applied them in a contradictory manner. For instance, in \textit{Precision Walls v. Servie,}\footnote{77. 152 N.C. App. 630, 568 S.E.2d 267 (2002).} the North Carolina Court of Appeals deemed reasonable a one-year non-compete agreement spanning two states, despite the fact that it prohibited the employee from “directly or indirectly . . . be[ing] engaged in the Business, or employed, concerned, or financially interested in any entity engaged in the Business.”\footnote{78. \textit{Id.} at 632, 568 S.E.2d at 269.} The court acknowledged the employee’s argument that the covenant, among other restrictions, prevented him from working in any capacity for a competitor. Nevertheless, it enforced the covenant because the employee “would not be less likely to disclose the information and knowledge garnered from his employment . . . if
he worked for one of [the employer's] competitors in a position different from the one in which he worked for [the employer]."79

The outcome in *Precision Walls* and the reasoning espoused by the court are troubling, particularly as they pertain to the continued vitality of the scope-of-employment analysis. Presumably every time an employee leaves one position and obtains employment with a competitor, even in a wholly unrelated capacity, the employee will "likely feel the same pressure to disclose [confidential] information."80 If this idea were taken to its logical conclusion, there would be few limits on the types of permissible non-compete agreements.

Not surprisingly, decisions subsequent to *Precision Walls* have had difficulty squaring the outcome of that case with the rest of the non-compete jurisprudence. In *VisionAIR, Inc. v. James*,81 the North Carolina Court of Appeals was again faced with a non-compete agreement that was broad in scope, prohibiting the employee from "own[ing], manag[ing], be[ing] employed by or otherwise participat[ing] in, directly or indirectly, any business similar to [e]mployer's [business]."82 Despite the similarities between the covenants in the two cases, the *VisionAIR* court found that the covenant was overbroad.83 According to the court, the covenant "prevented [the employee] from doing even wholly unrelated work at any firm similar to VisionAIR," as well as "prohibited [the employee] from holding interest in a mutual fund invested in part in a firm engaged in business similar to VisionAIR."84 In a footnote, the court acknowledged the apparent contradiction with *Precision Walls*; however, it went on to recast *Precision Walls* as standing for the proposition that "it is within [the employer's] legitimate business interest to prohibit [the employee] from working in an identical position."85 Later decisions have likewise relied on this framing of

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79. Id. at 639, 568 S.E.2d at 273.
80. See id.
82. Id. at 506, 606 S.E.2d at 361.
83. Id.
Precision Walls, rather than on its substance, in evaluating non-compete agreements. 86

C. Employee Role and Value Weighed by Courts

In Scott v. Gillis, the court acknowledged the role of restrictive covenants in employment contracts, referring to a covenant not to compete as "especially applicable to agreements by assistants to professional men." 87 Since then, cases involving covenants not to compete have dealt with a variety of levels and types of employees. However, most cases involving such covenants deal with sales or management-level employees, who by the very nature of their employment are privy to customer lists, marketing strategies, and other confidential information. 88

Early jurisprudence indicated that the skill or ability of the employee should have no bearing on the reasonableness of the covenant. 89 Nevertheless, almost since the very beginning of the analysis of such covenants, it was clear that the particular role of the employee—which necessarily implicates skill or ability—factored into the determination of reasonableness. 90 In part, courts were concerned


87. Scott v. Gillis, 197 N.C. 223, 227, 148 S.E. 315, 317 (1929) (quoting MCKINNEY & RICH, supra note 27, § 206, at 806) (“Few professional men would take assistants... unless they were assured that the knowledge and skill imparted and the friendships and associations formed would not be used, when the services were ended, to appropriate the very business such assistants were employed to maintain and enlarge.” (quoting MCKINNEY & RICH, supra note 27, § 206, at 806)).


89. Scott, 197 N.C. at 228, 148 S.E. at 317 (“There is nothing in the law... which makes unique skill or ability a factor in the case. It is simply a question of reasonable protection to the employer... against competition by the covenantor who has received consideration for the covenant.” (citing Sarco Co. of New Jersey v. Gulliver, 129 A. 399, 402 (N.J. Ch. 1925)).

90. See Sonotone, 227 N.C. at 390, 42 S.E.2d at 355 (“A workman who has nothing but his labor to sell and is in urgent need of selling that may unwittingly accede to an unguarded restriction at the time of employment, but one who is competent to serve as District Manager of a large corporation is supposed to understand and fully appreciate the significance of his engagements.” (internal quotation marks omitted)).
with the difference in business acumen between lower-level and higher-level employees, as the former may readily accede to an unreasonable restriction at the time of his employment without taking proper thought of the morrow, but a professional man who is the product of modern university or college education . . . should [be able] to guard his own interest, especially when dealing with an associate on equal terms.\(^9\)

Courts also "attached significance to the fact of an employee's managerial position" because of "[t]he employee's opportunity to acquire intimate knowledge of the business and to develop personal association with customers."\(^9\)

Although North Carolina courts ostensibly consider the employee's role in determining the reasonableness of a covenant not to compete, the employee's place in the organizational hierarchy currently does not figure prominently in the traditional tests for judging the time, territory, or scope of the covenant.\(^9\) Increasingly, however, it is these higher-level employees who are litigating the enforceability of their non-compete agreements.\(^9\) In *Okuma America Corp. v. Bowers*,\(^9\) for example, the North Carolina Court of Appeals determined that a non-compete agreement prohibiting employment with competitors throughout North and South America may be reasonable.\(^9\) The court stressed that the employee was "one of the six most senior executives in the company," possessed considerable confidential information, and functioned as a key decisionmaker.\(^9\)

This decision seems to reflect an even greater willingness to enforce

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93. Arguably the employee's role is captured in part by the sixth Hartman factor: "the nature of the employee's duty and his knowledge of the employer's business operation." Hartman v. W.H. Odell & Assocs., 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994). However, that test relates only to the geographic reach of the restriction. See id.
96. Id. at 86, 638 S.E.2d at 618.
97. Id. at 91, 638 S.E.2d at 621.
covenants against the most senior members of management teams or sales departments.98

In the eighty years since North Carolina first recognized the enforceability of covenants not to compete between employers and employees, courts have emphasized that the reasonableness of a covenant must be determined on the facts and circumstances of each particular case, leaving "no broadly applicable benchmarks to follow."99 In some respects, this type of case-by-case analysis is to be expected given the nature of the standard by which covenants not to compete are judged. However, the tests by which courts determine reasonableness are themselves incongruous with the ways that companies conduct operations in the twenty-first century—operations that often involve business transactions of indefinite length and interactions with customers irrespective of geographical location.100 Furthermore, the types of employees challenging covenants not to compete have broadened to encompass higher-level employees, whose value is not tied to a particular geographic region, but rather to the operations of the business as a whole.101

II. NORTH CAROLINA'S USE OF THE STRICT BLUE PENCIL DOCTRINE TO ENFORCE UNREASONABLE COVENANTS

As discussed in Part I, North Carolina courts developed a framework for evaluating the reasonableness of covenants not to compete based on a business model that has become increasingly less common in the modern workplace. The disparity between this framework and the nature of employers' concerns has created more uncertainty in the enforceability of covenants that may be litigated. This Part raises a related issue that exacerbates this uncertainty: the extent to which North Carolina courts may enforce otherwise overbroad covenants by applying the strict blue pencil doctrine.

98. See, e.g., id.; Wachovia Ins., 2006 WL 3720430, at *2, *11 (enforcing covenant against former Senior Vice President).
100. JEREMY RIFKIN, THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM, WHERE ALL OF LIFE IS A PAID-FOR EXPERIENCE 256 (2000) ("Many [businesses] are migrating from geography to cyberspace and, in the process, loosening or even severing their traditional ties to geography."); Uchitelle, supra note 30 (discussing the rapid push for globalization among small businesses).
101. Cf. Peter Cappelli & Monika Hamori, The New Road to the Top, HARV. BUS. REV., Jan.–Feb. 2005, at 5, 25 ("Today's top managers of Fortune 100 companies are fundamentally different . . . [T]hey are increasingly moving from one company to another as their careers unfold."). Between 1980 and 2001, the mean tenure for executives declined by five years. Id. at 28.
Traditionally, if a covenant not to compete was deemed unreasonable, North Carolina courts refused to enforce any part of the covenant. Courts examined the covenant in its entirety and thus could not amend it to “make a new contract for the parties.” However, in Welcome Wagon International, Inc. v. Pender, the Supreme Court of North Carolina recognized a limited judicial remedy for excising unreasonable portions of covenants. Under North Carolina’s version of the blue pencil doctrine, which is often termed the “strict blue pencil doctrine” because of its limited application, an unreasonable provision that is determined to be separable from the remainder of an otherwise reasonable covenant will be struck out and the remaining covenant enforced according to its terms. Even with the supreme court’s adoption of the strict blue pencil doctrine, a court may not modify the terms of an unreasonable covenant nor may it strike out unreasonable portions of a non-separable covenant. This Part discusses the adoption of the strict blue pencil doctrine, examines its infrequent application in North Carolina’s non-compete jurisprudence, and identifies the limitations of this doctrine in providing a fair or predictable outcome for employers or employees.

A. North Carolina’s Adoption of the Strict Blue Pencil Doctrine

The Supreme Court of North Carolina first squarely addressed the issue of whether any part of an unreasonable covenant not to compete could be enforced in the 1947 decision of Noe v. McDevitt. Its position was stated clearly and concisely: “The court cannot by

102. See Noe v. McDevitt, 228 N.C. 242, 245, 45 S.E.2d 121, 123 (1947).
103. Id. at 245, 45 S.E.2d at 123; see also Henley Paper Co. v. McAllister, 253 N.C. 529, 535, 117 S.E.2d 431, 434-35 (1960) (“[T]he contract comes to us as a single document. We must construe it as the parties made it.”).
104. 255 N.C. 244, 120 S.E.2d 739 (1961).
105. Id. at 248, 120 S.E.2d at 742.
106. See Pivateau, supra note 13, at 682-88 (discussing different approaches to the blue pencil doctrine and categorizing North Carolina as a strict blue pencil state); see also infra Part III.
107. See Welcome Wagon, 255 N.C. at 248, 120 S.E.2d at 742 (“[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 divisions deemed unreasonable.”).
108. Id.
110. 228 N.C. 242, 45 S.E.2d 121 (1947).
splitting up the territory make a new contract for the parties—it must stand or fall integrally.” 111 The court elaborated on its hands-off approach thirteen years later in Henley Paper v. McAllister,112 trumpeting the paramount importance of honoring the parties’ freedom to contract.113 According to the Henley Paper court, “[w]hether part of the contract might be deemed reasonable and enforceable is not the question. It comes to us as a single document. We must construe it as the parties made it.” 114

In 1961, less than a year after Henley Paper was decided, the supreme court reversed course in Welcome Wagon. The language of the covenant at issue in Welcome Wagon restricted competition in four geographic areas:

(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 intentions to be, engaged in rendering its said service.115

Despite determining that the latter two provisions restricting competition throughout the United States were unreasonable and unenforceable, the court found that the provision restricting competition in Fayetteville was reasonable and held that it could be enforced.116 After acknowledging the rules laid out in Noe and Henley Paper, the Welcome Wagon court continued: “[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.”117 Thus, the supreme court announced a new equitable doctrine to permit North Carolina courts to partially enforce unreasonable

111. Id. at 245, 45 S.E.2d at 123.
113. Id. at 535, 117 S.E.2d at 434–35.
114. Id.
116. Id. at 248, 120 S.E.2d at 742. The opinion did not determine whether the second provision, which restricted competition throughout North Carolina, was reasonable. See id.
117. Id.
Notwithstanding its departure from past precedent, the Welcome Wagon court did not provide a normative rationale for adopting the strict blue pencil doctrine; rather, it merely noted that the approach had been adopted by a majority of states at the time. If anything, the court's cursory treatment of the issue suggests that it did not view the strict blue pencil doctrine as a significant departure from its prior precedent. On the other hand, the dissent, authored by Justice William Haywood Bobbitt, focused on the majority's adoption of the strict blue pencil doctrine, which it called "simple and convenient [but] unsound." In fact, the dissent pointed out that the covenant in Henley Paper had listed several types of prohibited activities in a similar fashion as the covenant in Welcome Wagon, and yet that opinion did not address the possibility of blue penciling the activities that were considered unreasonable. Justice Bobbitt warned that North Carolina's adoption of the strict blue pencil doctrine made it so that "legality . . . depend[s] upon form rather than substance."

B. The Limited and Inconsistent Application of the Strict Blue Pencil Doctrine

In one sense, Justice Bobbitt's concerns about the adoption of the strict blue pencil doctrine in North Carolina have been unfounded, for it rarely has been successfully applied to save an unreasonable covenant. As noted by the majority opinion in Welcome Wagon, courts still may not "vary or reform the contract by reducing...

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118. See id. Although the Welcome Wagon opinion did not use the term "separable," courts now use that term to describe the type of covenant that is subject to the blue pencil doctrine. See, e.g., Whittaker Gen. Med. Corp. v. Daniel, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) ("If the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision.").
119. See Welcome Wagon, 255 N.C. at 248, 120 S.E.2d at 742 (citing cases from Delaware and Indiana as well as two contract law treatises).
120. See id.
121. Id. at 255, 120 S.E.2d at 747 (Bobbitt, J., dissenting).
122. See id. at 256, 120 S.E.2d at 748 ("McAllister, a salesman, was engaged exclusively in the sale and distribution of paper products. The covenant, for a period of three years after the termination of his contract, restricted him from engaging in the manufacture, sale, or distribution of paper or paper products. . . . If we had applied the blue pencil rule, we would have disregarded the word manufacture and would have enforced the provision to the extent it related to sales and distribution." (internal quotation marks omitted)).
123. Id.
either the territory or the time covered by the restrictions." 124 Subsequent decisions have reiterated the doctrine's narrow scope:

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. 125

Given these limitations, it is not surprising that there are few cases in which North Carolina courts have applied the doctrine. 126

_Wachovia Insurance Services, Inc. v. McGuirt_ 127 is a recent example of a trial court applying the strict blue pencil doctrine to enforce part of a restrictive covenant. The employee was a senior vice-president for Wachovia Insurance Services ("WIS"). 128 In Paragraph 6(a) of the covenant at issue, the employee was prohibited from soliciting or servicing clients with whom he had previously worked while in his position at WIS. 129 Paragraph 6(a) further provided that the employee was permitted to solicit or service other WIS clients if the employee had not worked with those clients during the previous two years and knew no confidential information about them. 130 Paragraph 6(b) of the covenant, on the other hand, "impos[ed] a conclusive presumption deeming [the employee] to have violated the terms of the covenant if any WIS client, regardless of [the employee's] contact or relationship with that client, le[ft] WIS in favor of [the employee's] new employer." 131 The court determined that Paragraph 6(a) contained reasonable restrictions but Paragraph 6(b) rendered the covenant unreasonable because it prohibited the employee from working on accounts unrelated to his position at WIS.

124. _Id._ at 248, 120 S.E.2d at 742; _see also_ Pivateau, _supra_ note 13, at 685 (discussing how one court explained the blue pencil approach: "[t]he blue pencil marks, but does not write" (internal quotation marks omitted)).
126. _Cf._ Herbert, _supra_ note 2, at 265 ("The robust body of case law dealing with the reasonableness standards for noncompetition agreements reveals an unmistakable and pervasive conservatism in courts' interpretations of these agreements. The origin of such conservatism has been the consistent and deliberate intent of enforcing restrictive covenants only to the extent necessary to protect an employer's legitimate business interests.").
128. _Id._ at *1–2.
129. _Id._ at *2, *9.
130. _Id._
131. _Id._ at *11.
Despite acknowledging the limitations of the strict blue pencil doctrine, the court found that this case was "the exception" and struck out Paragraph 6(b) from the covenant and enforced the remainder of the covenant.\(^\text{132}\)

The unreasonable restriction at issue in *Wachovia Insurance* was uniquely suited to being blue penciled because it was contained in a separate paragraph—indicating that it was "distinctly separable"—and the other restrictions in the covenant were not dependent on that paragraph for enforcement. Indeed, the *Wachovia Insurance* opinion noted that Paragraph 6(b) was "inconsistent[\]" with the remainder of the covenant.\(^\text{133}\) In other cases, however, courts have declined to blue pencil a covenant because the unreasonable restriction was not separable from the remainder of the covenant. For example, in *MJM Investigations, Inc. v. Sjostedt*,\(^\text{134}\) the parties entered into a covenant that contained both a non-compete provision and a non-solicitation provision.\(^\text{135}\) The trial court determined that the non-compete provision, which contained a time restriction of two years, was unreasonable because of its "fail[ure] to confine itself to any geographic territory."\(^\text{136}\) On the other hand, the trial court determined that the non-solicitation provision was reasonable and attempted to enforce it by excising the non-compete provision from the covenant.\(^\text{137}\) The appellate court reversed, finding that the non-compete provision was not distinctly separable from the remainder of the covenant.\(^\text{138}\) Despite the fact that the two provisions were contained in separate clauses, only the non-compete provision included the two-year time restriction.\(^\text{139}\) Because a time restriction was required for enforcing the non-solicitation provision, the non-solicitation provision was deemed dependent upon the overbroad

\(^\text{132}\) *Id.* ("[T]he Court finds that it may excise the overly broad language of paragraph 6(b) of the covenant, while giving effect to the remaining terms."). At the outset, it was not clear whether courts could "blue pencil" provisions other than territorial restrictions. See *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961). Subsequent decisions clarified that the strict blue pencil doctrine could be applied to other unreasonable provisions. See, e.g., *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989) (applying blue pencil doctrine to restriction on scope of employment).

\(^\text{133}\) *Wachovia Ins.*, 2006 WL 3720430, at *11.


\(^\text{135}\) *Id.* at *1.

\(^\text{136}\) *Id.* at *2* (internal quotation marks omitted).

\(^\text{137}\) *Id.* at *2–3.

\(^\text{138}\) *Id.* at *4–5.

\(^\text{139}\) See *id.* at *5* ("[W]hen the trial court 'blue-penciled' the agreement, it struck the entire first sentence, which . . . included the only time restriction in the agreement. The remaining non-solicitation clause includes no time restriction . . . .").
non-compete provision and could not be saved by blue penciling the covenant. 140

_MJM Investigations_ is but one example of the difficulties courts have faced in applying the strict blue pencil doctrine, and appellate court decisions are littered with instances in which a trial court has improperly blue penciled an unreasonable covenant. 141 In part, this difficulty stems from the doctrine's formalism, including its requirement that the unreasonable restriction be distinctly separable from the remainder of the covenant. 142 This form-over-substance problem is what Justice Bobbitt warned about in his _Welcome Wagon_ dissent. 143 As an example, he posited that if the covenant in that case had restricted the employee from working “throughout the United States and Canada, the restriction would be held wholly unreasonable and void,” but if the language restricted the employee from working in “Fayetteville or elsewhere in the United States and Canada, the restriction w[ould] be enforced in Fayetteville.” 144 Indeed, cases in which courts decline to apply the blue pencil doctrine seem to reflect poorly drafted covenants rather than wholly overbroad restrictions. 145

The requirement that the unreasonable restriction be distinctly separable from the remainder of the covenant also has produced seemingly contradictory results, particularly when a covenant's restrictions are not contained in separate clauses. For instance, in _Schultz v. Ingram_, 146 the parties had entered into a covenant prohibiting the employee from “compet[ing] with the Principal's or Associate's business within any area or areas from time to time constituting the Principal's or Associate's area of activity in the

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140. _Id._ ("A non-solicitation clause without any time restriction is clearly too broad and, therefore, unenforceable, no matter the scope of the territorial limitation.").
142. _See Hartman_, 117 N.C. App. at 317, 450 S.E.2d at 920.
144. _Id._ at 256, 120 S.E.2d at 747.
145. _See, e.g., MJM Investigations_, 2010 WL 2814531, at *5 (declining to blue pencil agreement because overbroad non-compete clause contained the only time restriction); Se. Outdoor Prods., 2005 WL 1950247, at *3 (reversing the trial court's decision to partially enforce an overly broad territorial restriction); Elec. S. Inc. _v._ Lewis, 96 N.C. App. 160, 166–67, 385 S.E.2d 352, 356 (1989) (discussing ambiguity of conjunction “or” in regard to whether language of covenant was separable and ultimately declining to blue pencil covenant).
conduct of their respective businesses."\textsuperscript{147} The employee argued that the covenant was unenforceable because it restricted competition in the Principal’s area of activity, which rendered the covenant unreasonable.\textsuperscript{148} In affirming the trial court’s decision to order a preliminary injunction that covered only the Associate’s area of activity, the appellate court applied the blue pencil doctrine—despite its acknowledgment that “the areas are not enumerated separately.”\textsuperscript{149} Although the appellate court noted that it acted “without altering or amending the contract,” this seems improbable given that the covenant further stated that the employee was forbidden to compete “in the conduct of their respective businesses.”\textsuperscript{150} Moreover, even when covenants contain unreasonable terms that are connected with reasonable terms using the conjunction “or,” as in \textit{Schultz}, other courts have not always applied the strict blue pencil doctrine.\textsuperscript{151}

\textbf{C. The Hidden Effects of North Carolina’s Blue Pencil Doctrine}

While the effects of the strict blue pencil doctrine are obvious in the cases highlighted in the previous Section, the effects of the doctrine may reach even further, impacting cases in which courts never ostensibly discuss the doctrine at all. These “hidden effects” are more difficult to quantify, but they may serve to explain inconsistencies in North Carolina’s recent non-compete jurisprudence.

As discussed more fully in Part I.C, over the past twenty years there has been a noticeable shift in the substance of non-compete agreements being litigated North Carolina courts due to changes in business operations and in the nature of employment relationships.

\textsuperscript{147} Id. at 424, 248 S.E.2d at 347.
\textsuperscript{148} Id. at 429–30, 248 S.E.2d at 350–51.
\textsuperscript{149} Id. at 429, 248 S.E.2d at 351.
\textsuperscript{150} See id. at 429, 248 S.E.2d at 350–51 (emphasis added); see also Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 246, 120 S.E.2d 739, 747 (1961) (Bobbitt, J., dissenting) (“Under the ‘blue pencil’ rule, the court will not divide territory but will divide what is essentially a single restrictive covenant. The restrictive covenant, according to its terms, applies to all territory described therein in exactly the same manner it applies to Fayetteville.”).
Relatively fewer covenants follow the traditional paradigm in which a salesperson or similar type of employee is restricted from competing in the employee's assigned locale. Instead, courts are increasingly evaluating non-compete agreements in which employees, who are often in senior management or executive positions, have been restricted from accepting any type of employment with competitors, and such covenants are rarely limited to well-defined geographic regions. Not only have the standards for judging a covenant's reasonableness not adapted to changes in business practices, but the strict blue pencil doctrine has not changed since its adoption in 1961.

This latter point is significant because the types of covenants that most lend themselves to being blue penciled are those that fit the traditional paradigm: covenants in which the territorial restriction may be expressed in separate clauses and the scope-of-employment restriction is denoted by particular categories of positions. It is perhaps no coincidence, then, that there are few recent reported cases in which courts have successfully applied the doctrine.

Faced with these new types of covenants, and without the aid of an effective equitable tool to partially enforce unreasonable covenants, North Carolina courts are given a Hobson's choice: they may either refuse to enforce a covenant because it fails to meet the traditional tests of reasonableness, or they may enforce a covenant in its entirety against an employee despite its apparent overbreadth.

VisionAIR and Medical Staffing Network v. Ridgway are two cases that illustrate the first option. In those cases, which involved a

152. See supra Part I.
153. See supra Part I.
155. See, e.g., Whittaker Gen. Med. Corp. v. Daniel, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) (coovenant provided that employee was prohibited from "engag[ing] in the business of manufacturing, selling, renting, or distributing any goods manufactured, sold, rented, or distributed by the Employer during the term of his employment" (internal quotation marks omitted)); Welcome Wagon, 255 N.C. at 248, 120 S.E.2d at 742 (involving territories expressed in numbered clauses); Masterclean of N.C., Inc. v. Guy, 82 N.C. App. 45, 46, 345 S.E.2d 692, 693 (1986) (same).
software architect and local branch manager, respectively, the courts refused to enforce the covenants because the restrictions on the scope of employment were overbroad. Both cases cited and applied the traditional rule, first announced in *Henley Paper*, that “restrictive covenants are unenforceable where they prohibit the employee from engaging in future work that is distinct from the duties actually performed by the employee.”

*Okuma* and *Precision Walls*, on the other hand, reflect courts that have elected the second option. The covenants at issue in both cases went further than merely restricting the employees from taking positions that were “distinct” from those currently performed; they in fact restricted the employees from being “directly or indirectly” employed with a competitor in *any capacity*. Notwithstanding the seemingly bright-line rules regarding the reasonableness of scope-of-employment restrictions, both courts found that the covenants could be enforced.

By examining the *Okuma* and *Precision Walls* opinions, one can surmise several reasons why those courts did not follow the strictures of the traditional reasonableness analysis. First, the employees involved in the two cases, an Estimator/Project Manager and Vice President of Customer Service, respectively, were high-level employees and had access to valuable confidential information—information that the *Precision Walls* opinion indicated the employee could feel “pressure[d]” to reveal, even if employed in an unrelated capacity. Second, both courts stressed the fact that the employees had, in fact, taken an “identical position” with a direct competitor after they had resigned from their positions. It is well established that the type of position an employee takes after the termination of

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159. *Med. Staffing*, 194 N.C. App. at 656, 670 S.E. 2d at 327; accord VisionAIR, 167 N.C. App. at 509, 506 S.E.2d at 363 (stating that broad restrictions preventing employees from working in “wholly unrelated” areas “cannot be enforced”).
162. *Precision Walls*, 152 N.C. App. at 639, 568 S.E.2d at 273; see *Okuma*, 181 N.C. App. at 91, 638 S.E.2d at 621 (describing employee as “one of the six most senior executives in the company” with knowledge of “the most critical and strategic decisions made by the company”).
163. *Okuma*, 181 N.C. App. at 91, 638 S.E.2d at 621; *Precision Walls*, 152 N.C. App. at 638, 568 S.E.2d at 273.
employment should have no bearing on whether a covenant not to compete is reasonable; indeed, it is this type of fact pattern that gives rise to litigation over a covenant's enforceability. Yet it appears that equitable concerns did impact both decisions, and this type of sentiment is not unfamiliar in North Carolina non-compete jurisprudence. According to an often-quoted passage from a 1947 supreme court decision:

There is no ambiguity in the restrictive covenant. It was inserted for the protection of the plaintiff, and to inhibit the defendant, from doing what he now proposes to do . . . . The parties regarded it as reasonable and desirable when incorporated in the contract. Subsequent events, as disclosed by the record, tend to confirm, rather than refute, this belief . . . .

. . . .

. . . In undertaking to change horses for what the defendant regards a better mount, he is reminded of his obligation to the steed which brought him safely to midstream and readied him for the shift.165

Given the limitations of the strict blue pencil doctrine as an equitable tool to mollify the effect of unreasonable covenant terms, North Carolina courts are increasingly finding themselves in the same position as their earlier counterparts prior to the Welcome Wagon decision—they must either enforce covenants as written or decline to enforce any portion of them. And without the appropriate legal tools for evaluating a covenant's reasonableness, a court may turn to other equitable principles to guide this decision.

III. REEXAMINING THE JUDICIAL APPROACHES TO UNREASONABLE COVENANTS

Although common law courts in the 18th century were faced with ruling on the validity of restraints of trade,166 there have been several eras in which legal professionals, academics, and policymakers have

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164. See Shute v. Heath, 131 N.C. 281, 282, 42 S.E. 704, 704 (1902) (establishing that the reasonableness of a covenant is to be decided as a matter of law); see, e.g., Beasley v. Banks, 90 N.C. App. 458, 368 S.E.2d 885 (1998) (invalidating restrictive covenant that employee had admittedly breached on account of the breadth of the territorial restriction).
166. Blake, supra note 8, at 629 (discussing Mitchel v. Reynolds, 24 Eng. Rep. 347 (Q.B. 1711), which has been identified as one of the most prominent early decisions regarding covenants not to compete).
vigorously debated the enforceability and enforcement mechanisms for covenants not to compete. One such era spanned the early 1960s, around the time that the Supreme Court of North Carolina adopted the strict blue pencil doctrine. According to Professor Harlan Blake, who authored the influential 1960 article *Employee Agreements Not to Compete*, this focus was due to the competitive market for highly trained employees as well as the uncertainty surrounding whether and how courts would enforce covenants containing overbroad terms.167 Indeed, Blake's article suggested that the blue pencil doctrine, despite its limitations, could best serve the competing interests of employers and employees.168

Another such era began near the turn of the twenty-first century and has continued to the present. One reason cited for the renewed focus on restrictive covenants is the transformation in the United States from a manufacturing-based economy to a knowledge- or information-based economy.169 Another reason, related to the first, is the changing concept of the employment relationship from one of long-term stability and mutual loyalty to a more fluid workplace—one in which employees are incentivized to accept employment on the basis of the knowledge and skills they will acquire, rather than on employers' promises of long-term job security and commitment.170

Despite the flurry of activity in other jurisdictions,171 both the Supreme Court of North Carolina and the North Carolina legislature have remained silent. Their inaction is especially troubling given the inconsistency in the state's non-compete jurisprudence over the past twenty years—an inconsistency that is not surprising given the vast changes in the economy and the nature of the employment

167. *Id.* at 627–28.
168. *See id.* at 681–84.
171. *See, e.g., Khadye, supra* note 169, at 226–31 (detailing actions taken by the Georgia legislature over the last twenty years regarding the enforcement of restrictive covenants); Steiner, *supra* note 23, at 27–29 (analyzing recent statutory provisions governing restrictive covenants in Idaho).
Although there are several aspects of North Carolina's non-compete jurisprudence that could be reevaluated, this Part examines the use of the strict blue pencil doctrine to partially enforce covenants that include unreasonable terms. Besides the strict blue pencil doctrine, there are two competing approaches that have been adopted in other jurisdictions. Courts applying the all-or-nothing approach refuse to enforce any covenant containing an unreasonable restriction, whereas courts applying the judicial modification approach may strike out or modify a restriction to render the covenant reasonable and then enforce the covenant as altered. This Part examines the advantages and limitations of all three approaches, and it ultimately recommends that the Supreme Court of North Carolina adopt a variant of the judicial modification approach.

A. All-or-Nothing: Voiding Unreasonable Covenants

The all-or-nothing approach, also called the “no modification” rule, is not unfamiliar to North Carolina courts, as it was the approach used prior to the adoption of the strict blue pencil doctrine. In an all-or-nothing jurisdiction, a court will neither revise nor eliminate any provisions of the covenant. Instead, the court will determine the reasonableness of the covenant as written. Although the all-or-nothing approach at one time had fallen out of favor, the approach has recently received positive scholarly attention. Virginia and Wisconsin are two states that still follow the all-or-nothing approach.
1. Advantages

Proponents of the all-or-nothing approach cite several theoretical and practical advantages to its use. First, they argue that this approach is the most consistent with general contract principles. According to this view, parties to a contract agree to a particular set of terms at the time of its execution, and this "intersection of wills between contracting parties" comprises the essence of the contract. As an example, "[i]n reaching an agreement that Party A would not compete with Party B within 200 miles of Party B's business, the parties did not simultaneously agree to a geographic restriction of 199, 198, 197, or any other less mileage limit." Under this view, any changes to contract terms, even the striking out of unreasonable terms, would be contrary to freedom-of-contract principles. Indeed, the Supreme Court of North Carolina regularly stated this view as the justification for its use of the all-or-nothing approach prior to the Welcome Wagon decision.

Second, proponents argue that the all-or-nothing approach operates as a check on employer strong-arm tactics. If an employer knows that courts will refuse to enforce any part of an unreasonable covenant, the employer should be motivated to "take great precautions to ensure that [the covenant] does not include overreaching terms." By contrast, if an employer knows that courts might be inclined to partially enforce a restrictive covenant that contains unreasonable restrictions, an employer "can fashion truly ominous covenants with confidence that they will be pared down and

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178. See generally Samuel C. Damren, The Theory of "Involuntary" Contracts: The Judicial Rewriting of Unreasonable Covenants Not to Compete, 6 TEX. WESLEYAN L. REV. 71, 74–76 (1999) (arguing that the traditional will theory of contracts is inconsistent with the strict blue pencil doctrine and judicial modification); Pivateau, supra note 13 (recommending that all states recognizing non-compete agreements adopt the all-or-nothing approach).
179. See Damren, supra note 178, at 74.
180. Id.
181. See id.
183. See Khadye, supra note 169, at 240–41 (discussing "the unequal bargaining power between the employer and employee"); Swift, supra note 12, at 246–47; Orelup & Drewry, supra note 7, at 31–32.
184. Swift, supra note 12, at 246; see also Brian Kingsley Krumm, Covenants Not to Compete: Time for Legislative and Judicial Reform in Tennessee, 35 U. MEM. L. REV. 447, 472 (2005) (stating that the all-or-nothing approach encourages specificity and rationality in drafters); cf. Garrison & Wendt, supra note 5, at 173–74 (discussing assurances needed to make sure employee mobility is encouraged).
enforced when the facts of a particular case are not reasonable.\textsuperscript{185} The all-or-nothing approach, and its balance of risks and rewards, may ensure that employers thoughtfully evaluate the breadth of a proposed covenant at the time of contracting.

Third, the all-or-nothing approach arguably encourages employee mobility, which is increasingly important in the modern workplace. According to this view, restrictive covenants generally have an "in terrorem effect" on employees and competitor businesses because both sets of parties are uncertain whether covenants will be enforced by courts.\textsuperscript{186} Some claim that the strict blue pencil doctrine and judicial modification approach increase the in terrorem effect, because a court adopting either approach is more likely to enforce portions of an unreasonable covenant against an employee.\textsuperscript{187} The heightened uncertainty about the enforcement of restrictive covenants thus discourages employees to seek out different employment even when it might otherwise be beneficial.\textsuperscript{188} The all-or-nothing approach arguably minimizes the in terrorem effect by prohibiting the possible enforcement of covenants that have been drafted too broadly.

2. Limitations

Notwithstanding the perceived advantages of the all-or-nothing approach, critics have highlighted several disadvantages to the approach. First, it is not clear that the all-or-nothing approach is in fact consistent with freedom-of-contract principles. When a court declines to enforce a covenant not to compete, it does so despite the fact that such a covenant is often but one component of a much larger employment contract, and presumably a covenant for which the

\textsuperscript{185} Blake, \textit{supra} note 8, at 683.

\textsuperscript{186} Id. at 682; Pivateau, \textit{supra} note 13, at 689–91.

\textsuperscript{187} See, e.g., Rachel Arnow-Richman, \textit{Noncompetes, Human Capital, and Contract Formation: What Employment Law Can Learn from Family Law}, 10 \textit{TEX. WESLEYAN L. REV.} 155, 160 (2003) (stating concerns that "blue pencil" jurisdictions create "in terrorem effects . . . on employees whose cases settle, but also on those who are discouraged from leaving their employer altogether").

\textsuperscript{188} Pivateau, \textit{supra} note 13, at 690–92; see also Khadye, \textit{supra} note 169, at 240–41 (discussing the negative impact of non-compete agreements on employee mobility, particularly in jurisdictions that allow for modification of covenants). In fact, several scholars have argued that non-compete agreements have such a negative impact on employee mobility that they stifle business growth and development, and thus jurisdictions should void all such restrictions on public policy grounds. See Bishara, \textit{supra} note 22, at 311 (discussing common arguments against non-compete agreements).
COVENANTS NOT TO COMPETE 1965

employer compensated the employee. Viewed in this light, the all-or-nothing approach actually creates a windfall for employees, for they are not required to give back any consideration they received in exchange for agreeing to the covenant.

Second, the all-or-nothing approach presupposes that employers, if given an opportunity, will choose to draft restrictive covenants as broadly as courts will permit. While that premise might hold true for covenants with lower-level employees, who presumably have relatively little bargaining power, that premise does not necessarily hold true for covenants with higher-level employees, and it is these higher-level employees who are often the subject of modern non-compete disputes. Furthermore, it may be difficult for an employer to know, at the time that an employee signs a non-compete agreement, precisely what information and responsibilities will be entrusted to the employee throughout the course of employment. For that reason, an employer may have, in good faith, included a list of prohibited activities and territories in a covenant not to compete that did not ultimately reflect the employee's actual responsibilities.

Third, the all-or-nothing approach may not actually operate as an effective deterrent for employer overreaching. By its nature, the reasonableness standard is a "fuzzy" one, not capable of hard-and-fast guidelines. As discussed in Part I, North Carolina courts have struggled to identify any concrete principles that could assist in deciding future cases or guide employers who want to ensure that they draft reasonable covenants. A prime example of this struggle is in evaluating time restrictions; other than suggesting that restrictions over five years will be unreasonable, North Carolina courts have not

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189. Damren, supra note 178, at 82 ("At the time the enforceability of the restrictive covenants contained in the parties' agreement can first be tested and subjected to judicial review, the employer has generally provided the employee with the full value of the consideration that the employee bargained for in reaching their overall agreement. Nevertheless, at the same point in time, the employee has only provided the employer with part of the consideration to their overall agreement.").

190. See id. at 73 ("For example, when the court reduced the geographic boundary of a covenant not to compete from 200 miles to 125 miles, the court did not also reduce the employee's salary by any percentage amount, much less by 37.5%.").

191. See Blake, supra note 8, at 647-48 (noting the problem of unequal bargaining power, even as early as the 1960s).

192. Swift, supra note 12, at 253 ("It is unrealistic in many employment situations to expect the employer to be able to accurately predict the scope of an employee's duties in five, ten, or more years down the road.").

193. See id.

194. Id.
been able to articulate any concrete principles to follow. Because of the lack of clear guidance, employers are arguably put at a distinct disadvantage in drafting covenants, for they risk having the entire covenant held unenforceable on account of any overbroad term.

Finally, and perhaps most importantly, the all-or-nothing approach arguably produces even further uncertainty in the law, as courts struggle with the harsh effects of its application. The problem arises from the fact that courts, when faced with deciding whether to enforce a restrictive covenant, are tempted to "ignor[e] the reasonableness of the terms of the covenant as an abstract matter and concentrat[e] on the reasonableness of what the former employee is actually doing in breach of his agreement." While it is understandable for a court to be inclined to consider the equity of enforcing a restrictive covenant, its decision ultimately should rest on whether the covenant, as written, is reasonable. This tension would be most pronounced in jurisdictions that have adopted the all-or-nothing approach, for there is no way for a court to enforce any part of a covenant against an employee unless it finds the entire covenant to be reasonable.

B. The Strict Blue Pencil Doctrine: A Formalistic Compromise

Although most jurisdictions initially adopted an all-or-nothing approach, many rejected it in favor of the strict blue pencil doctrine. Courts applying this doctrine may enforce a covenant not to compete if it is possible to strike out unreasonable terms—without any additions or modifications—to produce a reasonable covenant. Even jurisdictions adopting this doctrine have applied it in one of two ways: some, like North Carolina, require that the offending terms be "distinctly separable" from the remainder of the covenant; others "review an agreement more generally to see if certain prohibitions

196. Blake, supra note 8, at 674.
197. See Swift, supra note 12, at 247; see also Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961) (noting that most jurisdictions had begun applying the doctrine at that time).
198. Swift, supra note 12, at 247-49 (describing the general approach); see also Pivateau, supra note 13, at 683-87 (providing examples of different states that have adopted the strict blue pencil doctrine).
199. See Swift, supra note 12, at 248; Hartman v. W.H. Odell & Assocs., 117 N.C. App. 307, 317, 350 S.E.2d 912, 920 (1994) (limiting application of strict blue pencil doctrine in North Carolina to covenants that contain a "distinctly separable part" that can be excised "in order to render the provision reasonable").
COVENANTS NOT TO COMPETE

may be removed,” without requiring that the offending terms be separable.200

1. Advantages

The strict blue pencil doctrine can be viewed as a practical compromise between the all-or-nothing approach and the judicial modification approach. On the one hand, it softens the sometimes harsh results of the all-or-nothing approach because it enables the enforcement of some covenant restrictions against an employee despite the existence of overbroad terms.201 This flexibility in enforcement theoretically has two positive practical effects: first, it ensures that some employees will be held to reasonable restrictions to which they agreed, and second, it lessens the pressure on courts to uphold entire covenants in order to enforce particular restrictions against employees.

At the same time, the limitations of the strict blue pencil doctrine ensure that the language enforced by a court is at least part of the actual language agreed to by the parties.202 This feature of the doctrine should appeal to those who view judicial modification as an “involuntary contract,” the terms of which neither side agreed to nor bargained for.203 Jurisdictions that further limit the doctrine’s application to separable provisions have an even stronger argument in this regard, because the contract was written to permit this type of enforcement.204

The covenant at issue in Welcome Wagon is one that aptly demonstrates how the strict blue pencil doctrine can be applied to enforce reasonable provisions of a restrictive covenant. Whereas the covenant contained one five-year time restriction, the territorial restriction was divided into four separately numbered subsections.205 Because of the way in which the covenant was drafted, the Welcome

200. Swift, supra note 12, at 223.
201. See Krumm, supra note 184, at 472 (discussing the use of the strict blue pencil doctrine to enforce portions of unreasonable restrictive covenants).
203. See Damren, supra note 178, at 71; see also Garrison & Wendt, supra note 5, at 119 (“Courts should not rewrite a contract and impose it on an employee who did not voluntarily agree to it.”).
204. See Blake, supra note 8, at 690–91.
205. Welcome Wagon Int’l, Inc. v. Pender, 255 N.C. 244, 246, 120 S.E.2d 739, 740 (1961). For more discussion of Welcome Wagon, see supra Part II.
Wagon court deemed the covenant separable and enforced the local territorial restriction against the employee.206

2. Limitations

The primary criticism of the strict blue pencil doctrine is that it is “too mechanical, placing undue emphasis on whether covenants are separate and thereby glorifying form over substance.”207 Justice Bobbitt, in his dissent in Welcome Wagon, warned that because of the adoption of the strict blue pencil doctrine, the enforceability of a covenant could turn on whether the covenant had separated divisions of territory using the conjunction “or” instead of “and”—an insignificant word choice that should have no bearing on a covenant’s enforcement.208 As noted in Part II, North Carolina courts have, at times, made such fine distinctions in deciding whether to apply the doctrine;209 yet, in other instances they have chosen to apply the doctrine to covenants that did not appear to be separable.210 Similarly, the doctrine’s requirement that the remaining covenant retain enforceable temporal, territorial, and scope-of-employment restrictions has further limited the practical application of the doctrine to covenants that are drafted in a particular manner.211

Simultaneously, the strict blue pencil doctrine provides a blueprint for employers to draft covenants containing extremely broad restrictions, provided that employers do so with the formalistic requirements of the doctrine in mind. Justice Bobbitt pointed out this issue in his Welcome Wagon dissent:

[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.212

206. See Welcome Wagon, 255 N.C. at 248–50, 120 S.E.2d at 742–43; see also supra Part II.
207. Garrison & Wendt, supra note 5, at 130.
208. See, e.g., Welcome Wagon, 255 N.C. at 256, 120 S.E.2d at 747 (Bobbitt, J., dissenting).
209. See supra notes 127–45.
210. See supra notes 146–51.
Indeed, if an employer were to construct a covenant in this manner, the court would effectively be given the power to "write" the provision for the parties—a result that is antithetical to the principles underlying the strict blue pencil doctrine.213 A 2009 article in the American Bar Association journal suggested that employers could "combat" the limitations of the strict blue pencil doctrine by "utiliz[ing] alternative restraints (e.g., establish geographic scopes by radius, by city, and by county)."214 Surely, this type of covenant drafting was not what was contemplated by jurisdictions when they adopted the strict blue pencil doctrine.

Finally, as recent North Carolina cases have demonstrated, the types of covenants that are included in modern non-compete agreements—such as those in Precision Walls, Okuma, and VisionAIR—are often not separable because they do not contain clearly defined territorial or scope-of-employment restrictions.215 Thus, the perceived advantages of the strict blue pencil doctrine over the all-or-nothing approach are limited to a relatively small number of cases that do not represent the types of restrictions that most concern North Carolina employers and employees.

C. Judicial Modification: Reformation of Unreasonable Covenants

In recent years, the majority of states have adopted a different and more flexible approach to enforcement of unreasonable covenants not to compete: judicial modification.216 Under this approach, also known as the "liberal blue pencil doctrine," courts are not only able to strike out unreasonable provisions from covenants, but they are also able to rewrite covenants in a manner that is reasonable and enforceable.217

213. See id.
215. See supra Part II.
216. Garrison & Wendt, supra note 5, at 130 ("[T]here has been a clear shift from the blue pencil doctrine to reformation."); Swift, supra note 12, at 247 ("At least one court noted that more recent decisions have rejected the all-or-nothing rule in favor of some form of judicial modification."). In a fifty-state survey conducted by the law firm Beck Reed Ridin LLP, twenty-nine states were classified as reformation states, with ten classified as blue pencil states, and five classified as "red pencil" or all-or-nothing states. RUSSELL BECK, BECK REED RIDEN LLP, EMPLOYEE NONCOMPETES: A STATE BY STATE SURVEY (2012), http://www.beckreedriden.com/wp-content/uploads/2012/04/Noncompetes-50-State-Survey-Chart-04-29-2012.pdf. Three states—New Mexico, Utah, and Vermont—were called undecided and three states—California, North Dakota, and Oklahoma—were classified as states where most restrictive covenants are void. Id.
217. Swift, supra note 12, at 247.
1. Advantages

Proponents of the judicial modification approach have identified several reasons for its adoption. First, it is touted as the most equitable of the three approaches since it enables the court "to fashion reasonable terms that are consistent with the general intent of the parties to enter into a binding noncompete agreement." Thus, the enforceability of a covenant depends upon its substance, rather than its form.

Second, judicial modification arguably better balances the interests of employers and employees, ensuring that neither is unduly benefiting from a court's decision regarding whether to enforce covenant restrictions that were mutually agreed upon. Whereas the other approaches restrict overreaching on the part of employers, the judicial modification approach also ensures that employees may not violate reasonable portions of restrictive covenants with impunity. Judge Steelman raised such a concern in his concurrence in *MJM Investigations*: "[i]t is clear from the facts of this case that [the employees] flagrantly violated the terms of the non-solicitation agreement that they voluntarily executed. Then, when confronted with their breach of contract, sought to have the courts relieve them of their contractual obligations." Under the judicial modification approach, a court may be able to enforce such restrictions without requiring that the entire covenant be reasonable.

Third, judicial modification brings more certainty to an area of law in which the results are, quite frankly, unpredictable. In part,
this lack of predictability is due to the fact that a court's determination of reasonableness is based on the "facts and circumstances of the particular case."\textsuperscript{225} The highly fact-specific nature of the determination makes it less likely that a different employer can rely on the outcome of a decided case in drafting future restrictive covenants. This uncertainty is exacerbated in jurisdictions that have adopted the all-or-nothing approach or the strict blue pencil doctrine, for in deeming a covenant to be unreasonable, it is unlikely that a court will explain how such a covenant could be made reasonable. By contrast, courts using the judicial modification approach will provide such guidance in the course of revising covenant terms.\textsuperscript{226} Employers, in turn, should be able to use this guidance to draft covenants in the future that will be enforceable as written.

Fourth, by increasing the degree to which employers can rely on the partial enforcement of covenant restrictions, employers will be encouraged to invest more money in human capital, including raising employee wages and increasing opportunities for employee training and knowledge acquisition.\textsuperscript{227} This argument is an important one because it lessens the concern that non-compete agreements will unduly restrict employees from accepting higher paying positions with competitors.\textsuperscript{228}

\section*{2. Limitations}

Although the judicial modification approach has been adopted in most jurisdictions, it has not gained universal acceptance. A common criticism of the approach is that it "does not discourage employers from broadly drafting their noncompete agreements."\textsuperscript{229} Some critics go further in arguing that judicial modification actually encourages

\begin{itemize}
\item[227.] See, e.g., Rogers v. Runfola & Assocs., Inc., 565 N.E.2d 540, 544 (Ohio 1991) (applying the judicial modification approach to rewrite unreasonable covenant). The Rogers court described its task in the following manner: "Although we conclude that the covenants not to compete create an excessive hardship on appellees, our inquiry, nevertheless, cannot end here. We must also determine whether some restrictions prohibiting appellees from competing are necessary to protect Runfola's business interests." \textit{Id.} The court continued by identifying the interests to be protected and modifying the covenant accordingly. See \textit{id}.
\item[228.] Bishara, \textit{supra} note 22, at 305.
\item[229.] Garrison & Wendt, \textit{supra} note 5, at 176.
\end{itemize}
employers to draft overbroad covenants because they are not penalized for their conduct.230

A related criticism of the judicial modification approach is that it has a disproportionate in terrorem effect on employees.231 According to one court:

For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenator, or who are anxious to maintain gentlemanly relations with their counterparts. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction.232

Because the judicial modification approach does not deter employers from including increasingly broad restrictions in covenants, employees will forego seeking and accepting positions that could be within an overbroad, yet ultimately unenforceable, covenant.

Critics of the judicial modification approach also claim that the approach creates uncertainty for employees, for they will not know which covenant terms may be enforceable unless the covenant becomes the subject of litigation.233 Justice Bobbitt echoed these concerns in his Welcome Wagon dissent:

In testing the reasonableness of a covenant restricting competition after termination of employment, the impact upon the employee so restricted should receive due consideration. The covenant, in its entirety, hangs over him. He cannot foresee whether a court, at the end of protracted litigation, will enforce

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230. See id. at 119 n.53 (“If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one’s employee’s cake, and eating it too.” (quoting Blake, supra note 8, at 682–83)).

231. See supra notes 186–88 and accompanying text.


233. Id. at 689–93; see Ingram, supra note 176, at 78 (suggesting that broad restrictions drafted by employers give employees the option of complying or bearing the cost of litigation); See also Hanna Bui-Eve, Note, To Hire or Not to Hire: What Silicon Valley Companies Should Know About Hiring Competitors’ Employees, 48 HASTINGS L.J. 981, 984 (1997) (discussing the costs of litigating company disputes over employees: “It takes time, drains resources, and distracts employees and employers from what they do best—developing new technology”).
the covenant as written or only within a segment of the territory therein explicitly described.\textsuperscript{234}

Even though Justice Bobbitt was discussing the court's adoption of the strict blue pencil doctrine, his concern would likely have been even greater had the supreme court adopted the judicial modification approach, for under such an approach an employee would be even less certain of the precise restrictions that would be enforced.\textsuperscript{235}

\textbf{D. North Carolina Courts: Ditching the Blue Pencil in Favor of Judicial Modification}

It has been over fifty years since the Supreme Court of North Carolina rejected the all-or-nothing approach in favor of the strict blue pencil doctrine. In the interim, North Carolina non-compete jurisprudence has become even more difficult to reconcile, leaving employers and employees alike with little guidance.\textsuperscript{236} To be sure, the adoption of the strict blue pencil doctrine is not the sole cause of this problem, but it is time for the judiciary to decide whether another approach would better promote the reasons for allowing parties to enter into covenants not to compete in connection with employment.

The categorical nature of the all-or-nothing approach and its adherence to the entire language of the non-compete agreement have theoretical appeal, but the primary reason put forth in favor of its adoption is that it discourages employer misconduct and thereby promotes employee mobility. For this reasoning to be persuasive, however, two assumptions must be made: first, that the all-or-nothing approach produces consistent outcomes; and second, that employers clearly understand the types of covenant restrictions that will be enforced. While these assumptions may be true in other jurisdictions, such is not the case in North Carolina. Nor would adopting the all-or-nothing approach lead to more consistent outcomes, as recent cases that are among the most difficult to reconcile—\textit{VisionAIR, Medical Staffing, Precision Walls}, and \textit{Okuma}—did not implicate the strict blue pencil doctrine. Thus, the all-or-nothing approach unduly shifts the burden of overbroad covenants onto employers, who cannot predict whether courts will uphold certain restrictions and yet face having an entire covenant invalidated if their prediction is incorrect.

\textsuperscript{234} Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 256-57, 120 S.E.2d 739, 748 (1961) (Bobbitt, J., dissenting).

\textsuperscript{235} See Pivateau, \textit{supra} note 13, at 694-97 (discussing the arguments against modification).

\textsuperscript{236} See \textit{supra} Part I.B–C.
This uncertainty likewise makes it less likely that the in terrorem
effect of non-compete agreements would be substantially lower under
the all-or-nothing approach than one of the other approaches.

Through its adoption of the strict blue pencil doctrine, the
Supreme Court of North Carolina has already acknowledged that in
some cases a court should be able to exercise its equitable powers to
alter a covenant.237 Both the strict blue pencil doctrine and judicial
modification approach are discretionary tools to be used by judges;238
however, the limitations of the strict blue pencil doctrine practically
prevent judges from exercising this discretion unless the form of the
contract makes the offending provision separable.239 These limitations
may also produce poorly reasoned decisions, as judges may be
inclined to uphold an overly broad covenant for the sake of equity.240

The judicial modification approach, like the strict blue pencil
doctrine, provides courts with a tool to partially enforce covenants
not to compete. Unlike the strict blue pencil doctrine, however, the
judicial modification approach does not depend on the form of the
covenant for its application. Thus, the primary advantage of the
judicial modification approach is that it gives courts a more precise
equitable tool to partially enforce a covenant, provided that the
restrictions are reasonable and consistent with the intent and
expectations of the parties.

The criticisms of the judicial modification approach should not
be ignored; rather, the Supreme Court of North Carolina should take
those concerns into account in developing standards for applying the
approach. Several jurisdictions that have adopted the judicial
modification approach have limited its application to cases in which
the employer has not acted in "bad faith,"241 and some of these
jurisdictions have placed the burden on the employer to show that it
acted in good faith in drafting the covenant.242 Although there is no
consensus regarding what evidence should be considered in making

238. See Swift, supra note 12, at 251 ("Whether a jurisdiction uses the blue pencil
doctrine solely to eliminate an unreasonable term, or it allows a court to rewrite the
agreement, the doctrine is generally a discretionary tool.").
239. See supra Part II.B.
240. See supra Part II.C.
241. See, e.g., Data Mgmt., Inc. v. Greene, 757 P.2d 62, 64 (Alaska 1988) (refusing to
enforce covenant if circumstances indicate employer acted in bad faith); BDO Seidman v.
Hirshberg, 712 N.E.2d 1220, 1226 (N.Y. 1999) (same); Cent. Adjustment Bureau, Inc. v.
Ingram, 678 S.W.2d 28, 37 (Tenn. 1984) (same).
242. See, e.g., Data Mgmt., Inc., 757 P.2d at 64.
such a determination, courts often consider procedural aspects, such as "whether the agreement was discussed during negotiations and whether the employer used unfair bargaining power to secure the agreement," as well as substantive aspects, such as "whether the degree of unreasonableness renders [the covenant] unfair." If properly constructed, these types of limitations should deter employers who would otherwise draft covenants as broadly as possible, thereby reducing the in terrorem effect on employees and ensuring occupational mobility.

Texas provides a different type of incentive to employers who draft restrictive covenants with care. Although Texas courts use the judicial modification approach, an employer may only recover monetary damages for breach when a covenant is enforceable as written. Furthermore, if an employee demonstrates that the employer knew at the time of the covenant's execution that it was overbroad, the employee may recover reasonable costs and attorney fees from the employer. If the judicial modification approach were to be adopted in North Carolina, similar incentives could be implemented to ensure that its adoption did not have an unintentional subversive impact on employer conduct.

The Supreme Court of North Carolina should reject the strict blue pencil doctrine and instead follow the judicial modification approach. At the same time, the supreme court should explicitly identify the circumstances in which the approach may be applied, limit its application to instances in which the employer can show that it acted in good faith, and identify the types of conduct that will be considered in making such a determination. That way, employers and employees will both be on notice that covenants may be partially enforced, provided that such restrictions are reasonable under the circumstances, consistent with general contract principles, and equitable to both parties.

243. See Garrison & Wendt, supra note 5, at 131.

244. Id. at 176 (discussing Freiburger v. J-U-B Eng'rs, Inc., 111 P.3d 100 (2005)); see also Estee Lauder Cosmetics v. Batra, 430 F. Supp. 2d 158, 180 (S.D.N.Y. 2006) (allowing partial enforcement of a restrictive covenant provided "the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct" (quoting BDO Seidman, 712 N.E.2d at 1226)).


246. See TEX. BUS. & COM. CODE ANN. § 15.51 (West 2011). See generally McDonald, supra note 224 (describing the Texas system).

247. § 15.51(c).

248. See id.
IV. SUGGESTIONS FOR LEGISLATIVE ACTIONS TO BRING THE ENFORCEMENT OF COVENANTS NOT TO COMPETE IN NORTH CAROLINA INTO THE TWENTY-FIRST CENTURY

Disputes over the enforceability of covenants not to compete have largely been governed by state common law rather than state or federal statutes. In some states, including North Carolina, courts have struggled to consistently evaluate covenants in light of the reasonableness framework and its consequences on enforcement. If the Supreme Court of North Carolina were to adopt the judicial modification approach, the outcomes of cases should be, on the whole, more equitable, and the courts' reasoning should be more consistent with the prevailing standards for evaluating the reasonableness of covenants. Yet as explained in Part I, these prevailing standards do not accurately reflect many modern business operations. At the same time, North Carolina courts have been reticent to articulate any concrete rules to judge the reasonableness of covenants, instead engaging in a highly fact-specific analysis for each case. Although the judicial modification approach should bring more consistency to the jurisprudence, employers and employees would benefit from more concrete guidance on the types of restrictions that may be included in modern covenants not to compete.

More recently, several state legislatures have enacted statutes that govern some aspects of the enforcement of covenants not to compete. These statutes serve several purposes. First, they clarify the state's public policy position toward covenants not to compete.

249. See RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. a (1981) (“The common law on restraint of trade has played a particularly important role with respect to promises to refrain from competition. Parties who have challenged such promises have ordinarily been content to assert their unenforceability under the common law and have not sought relief under federal or state legislation. There is, therefore, an especially well-developed and significant body of judicial decisions applying the general rule of reason . . . ”). Only eighteen states have enacted a form of legislative guidance on non-compete agreements. Norman D. Bishara, Fifty Ways To Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy, 13 U. PA. J. BUS. L. 751, 759 (2011).

250. See Bishara, supra note 249, at 757-58 (stating that there is “no truly uniform approach across jurisdictions” to determine whether a covenant should be enforced and noting the general consideration of a “reasonableness test”); supra Part I.

251. See supra Part III.D.

252. See supra Part I.

253. See infra Part IV.B.1.

254. See, e.g., Metro Traffic Control, Inc. v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573, 577 (Cal. Ct. App. 1994) (“California courts have consistently declared this provision an expression of public policy to ensure that every citizen shall retain the right to pursue
Second, they affirm—or occasionally alter—the common law rules that have developed regarding how covenants are evaluated and enforced. Third, if the statutes are drafted with care, they should produce more uniformity in judicial decisions concerning covenants, thus bringing more predictability to this area of the law.

This Part explores how legislative bodies may guide courts in resolving disputes over non-compete agreements, and it suggests a course of action for the North Carolina legislature. This Part first explains how a legislative body may formally establish a state’s approach toward the enforcement of unreasonable covenants, and it recommends that the North Carolina legislature enact a statute authorizing judicial modification of unreasonable covenants. The Part then explores statutory provisions enacted in other states that have established or clarified the types of restrictions that will be enforceable. While the North Carolina legislature would need to decide whether to enact such statutes according to the current state of the law or based on other public policy considerations, several promising alternatives are identified and discussed.

A. Solidifying North Carolina's Stance on Covenants Not to Compete

There is no statutory provision in North Carolina that directly addresses the extent to which covenants not to compete are enforceable in the state; the only indirect reference to such restrictions is in section 75-4 of the General Statutes of North Carolina, which requires that all agreements “limiting the rights of any person to do business anywhere in the State” comply with the statute of frauds. By contrast, legislative bodies in several other states have enacted statutes clarifying their state’s policy toward covenants not to compete. A few states, such as California, have enacted total or nearly total prohibitions on covenants not to compete. A discussion about the propriety of covenants not to compete is beyond the scope of this Article; rather, this Article assumes that the North Carolina legislature favors the enforcement of reasonable covenants not to compete, consistent with the current

any lawful employment and enterprise of their choice.”); Steiner, supra note 23, at 27 (discussing how a recent statutory change in Idaho law reflected a change in the policy toward non-compete agreements).

255. The approaches codified by statutes are the same ones used by courts and discussed supra Part III.C-D.


257. See, e.g., CAL. BUS. & PROF. CODE § 16600 (West 2008).

258. For legal scholarship examining the California’s position on restrictive covenants, see generally Bui-Eve, supra note 233.
common law of North Carolina and the law in the vast majority of states. 259

Given the convoluted state of the common law in North Carolina, however, it is time for the legislature to clarify its position on covenants not to compete, both in terms of their enforceability and the extent of their enforcement. As an example of the former, Florida revised its statutory provision regarding restraints on trade in 1996. 260 The new provision provided for the “enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business.” 261 Even though the enactment of such a provision in North Carolina would essentially codify the basic common law test, it would also make it clear that reasonable covenants not to compete are not highly disfavored in the law, as they once were, and covenants should not be viewed by courts with suspicion. 262

Even more important, however, is for the North Carolina legislature to address the extent to which unreasonable covenants will be enforced. As discussed in Part III, neither the all-or-nothing approach nor the strict blue pencil doctrine has been successful in North Carolina, and thus it is time for courts to adopt the judicial modification approach. Although it is presumably within the

259. See supra Parts I–II (discussing North Carolina’s common law approach to covenants not to compete); see also Bishara, supra note 249, at 778 (“From the 2009 ranking data, forty-nine states (96%) and the District of Columbia allow some sort of noncompete enforcement.”).


261. Id. § 542.335(1); see also Mich. Comp. Laws Ann. § 445.774a(1) (West 2011) (“An employer may obtain from an employee an agreement or covenant which protects an employer’s reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business.”).

discretion of the Supreme Court of North Carolina to change its approach, it has not done so. Thus, in conjunction with clarifying its policy on covenants not to compete in the state, the North Carolina legislature should also codify the use of the judicial modification approach.

Several so-called “statutory reformation states” have enacted laws that require or permit courts to modify overbroad covenants not to compete so that they are reasonable and enforceable. Statutes in Florida, Idaho, and Georgia help illuminate the ways in which such a statute could operate in North Carolina.

Under Florida law, an employer has the burden of proving that a covenant “is reasonably necessary to protect the legitimate business interest or interests justifying the restriction.” The burden then shifts to the employee to show that the covenant “is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests.” However, when a covenant is deemed unreasonable, the statute provides that “a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.”

In enacting this statute, the Florida legislature codified judicial modification as the state’s remedy for overbroad covenants, an approach previously recognized by Florida courts. Furthermore, by requiring that a court use the judicial modification approach to enforce otherwise unreasonable covenants that pertain to a legitimate business interest, the statute provides courts with guidelines for presumptively reasonable and unreasonable restrictions.

263. FLA. STAT. ANN. § 542.335(1)(c) (West 2007).
264. Id.
265. Id. (emphasis added).
266. See John A. Grant, Jr. & Thomas T. Steele, Restrictive Covenants: Florida Returns to the Original “Unfair Competition” Approach for the 21st Century, FLA. B.J., Nov. 1996, at 53, 55 (“Section 542.335(1)(c) makes plain that relief must be limited to that which is ‘reasonably necessary’ to protect the interest or interests established and that, if the restraint is ‘overbroad, overlong, or otherwise not reasonably necessary,’ the court must modify the restriction. This directive reaffirms prior Florida decisional law authorizing application of the ‘blue-pencil doctrine.’”). For an early Florida case recognizing the role of judicial modification, see Flammer v. Patton, 245 So. 2d 854, 859 (Fla. 1971) (“Where no limitations are contained in the restrictions it is within the discretion of the trial court to determine what limitations as to time and area would be reasonable under the circumstances.”).
267. § 542.335(1)(c) (“[A] court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.” (emphasis added)); see also Envtl. Servs., Inc. v. Carter, 9 So. 3d 1258, 1264 (Fla. Dist. Ct. App. 2009) (citing Health Care Fin. Enters., Inc. v. Levy, 715 So. 2d 341, 342 (Fla. Dist. Ct. App. 1998) (holding that
Effective July 1, 2008, Idaho enacted legislation that permits reasonable covenants not to compete between employers and “key employees” to protect employers’ legitimate business interests. Similar to the Florida statute, the “Idaho Noncompete Act” requires courts “to limit or modify” an unreasonable provision within a covenant so that it “reflect[s] the intent of the parties and render[s] it reasonable in light of the circumstances in which it was made and [to] specifically enforce the . . . covenant as limited or modified.” A recent article discusses the impact of this legislation and, in particular, its requirement that courts modify and enforce unreasonable covenants:

Prior to enactment of the Act, noncompetes were strongly disfavored by Idaho courts. Courts limited the enforceability of noncompete agreements and, despite authority to do so, often refused to modify overbroad noncompete agreements. The Idaho Legislature altered Idaho policy regarding noncompetes by . . . directing courts to limit or modify unreasonable noncompete agreements and specifically enforce the agreements as limited or modified. The cumulative effect of these changes is a broader policy change in Idaho favoring noncompetes.

Georgia also recently adopted the judicial modification approach by statute, but the evolution of the statute and its import are different than in Idaho or Florida. Georgia courts traditionally had applied the all-or-nothing approach to unreasonable covenants.

“courts were required to modify unreasonable restrictions as to time and place rather than refuse to enforce the agreement”.

268. § 542.335(1)(d) (“[A] court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than 2 years in duration.”).


270. Steiner, supra note 23, at 26 & n.10 (discussing the legislation referred to as “the Idaho Noncompete Act”).


272. Steiner, supra note 23, at 27 (footnotes omitted).


274. See, e.g., Boone v. Corestaff Support Serv., Inc., 805 F. Supp. 2d 1362, 1369–70 (N.D. Ga. 2011) (holding that because the contract at issue was formed before the passage of the new non-compete act, restrictive covenants were against public policy and blue penciling was not an available remedy); Murphree v. Yancey Bros., 716 S.E.2d 824, 826–27 (Ga. Ct. App. 2011) (“Restrictive covenants that are ancillary to employment contracts ‘receive strict scrutiny and are not blue penciled[,]’ This is because ‘it is generally true in the employer/employee relationship that the employee goes into a transaction such as this
However, in enacting section 13-8-54 of the Georgia Code, the state legislature provided that courts "may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible."  

At first glance, the differences between the mandatory reformation provisions in the Florida and Idaho statutes and the permissive reformation provision in the Georgia statute may seem slight. But as explained in Part III, if employers believe that they may securely rely on courts to later modify unreasonable covenants, they have less incentive to draft reasonable covenants at the outset. In turn, these overly broad covenants may negatively impact employees who wish to change positions.  

For this reason, it is recommended that the North Carolina legislature adopt permissive statutory reformation using discretionary language similar to that adopted by the Georgia legislature. Additionally, the statutory language could be strengthened by explicitly stating that courts "have the discretion" to reform and enforce covenants, provided that such covenants were drafted "in good faith."

B. Establishing Guidelines for Assessing a Covenant’s Reasonableness

For employers and employees contemplating entering into a covenant not to compete, the greatest uncertainty lies in whether a court will deem the covenant to be reasonable. The common law reasonableness analysis has no precise formula; rather, the outcome depends on a particular court’s evaluation of the facts and circumstances of the case. However, at least five state legislative

275. GA. CODE. ANN. § 13-8-54(b) (Supp. 2011) (emphasis added). The Michigan legislature has similarly given courts in that state the discretion to modify unreasonable provisions within covenants and enforce the covenants as modified, without mandating such a procedure. MICH. COMP. LAWS ANN. § 445.774a(1) (West 2011).

276. See supra notes 231–32 and accompanying text.

277. Cf. Data Mgmt., Inc. v. Greene, 757 P.2d 62, 65 (Alaska 1988) (stressing the good faith test inherent in section 45.02.302 of the Alaska Statutes, the statutory provision allowing for reformation of “unconscionable” provisions of contracts). According to the Alaska Supreme Court, the good faith test prevents a court from redrafting an overbroad covenant willfully imposed by an employer. Id.

278. See Beam v. Rutledge, 217 N.C. 670, 674, 9 S.E.2d 476, 478 (1940) ("The line of demarkation [sic], therefore, between freedom to contract on the one hand and public policy on the other must be left to the circumstances of the individual case. Just where this
bodies have provided further guidance to courts for assessing the reasonableness of a covenant's time, territory, and scope-of-employment restrictions. Such guidance usually takes the form of rebuttable or conclusive presumptions for covenants that contain certain types of restrictions.

1. Statutory Guidance Regarding Time

The most prevalent category of statutory guidance relates to the permissible duration of the restriction. Two states, Oregon and South Dakota, have enacted an absolute two-year limit on covenants not to compete, measured from the date of termination of employment. Although this type of limitation provides much greater certainty to the parties to a covenant, it gives employers no opportunity to demonstrate that a longer time restriction would reasonably protect their legitimate business interests.

Other states have created rebuttable presumptions for time restrictions. In Florida, "a court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than 2 years in duration." For covenants lasting less than six months or in excess of two years, their enforceability is much more predictable under this provision than without such guidance. At the same time, these presumptions may be rebutted by demonstrating that the covenant is reasonable or unreasonable given the nature of the employer's business or the activities to be prohibited by the covenant. On the other hand, this type of provision provides no guidance as to whether a court will


280. Or. Rev. Stat. Ann. § 653.295(2) (West 2007) ("The term of a noncompetition agreement may not exceed two years from the date of the employee's termination. The remainder of a term of a noncompetition agreement in excess of two years is voidable and may not be enforced by a court of this state."); S.D. Codified Laws § 53-9-11 (2004) ("An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers ... if the employer continues to carry on a like business therein.").


282. Id. § 542.335(d).
likely enforce time restrictions that last between six months and two years.

Georgia, like Florida, has enacted rebuttable presumptions relating to time restrictions. Yet unlike the provision in Florida, which leaves a gap between presumptively reasonable and presumptively unreasonable restrictions, the Georgia statute establishes that restrictions spanning two or fewer years are presumptively reasonable, while restrictions spanning more than two years are presumptively unreasonable. So written, this type of statute provides rebuttable presumptions for all time restrictions that could be included within covenants, while not mandating that the length of the restriction be dispositive.

North Carolina courts frequently state that a time restriction in excess of five years is generally disfavored, but case law reveals that most modern covenants being litigated are of much shorter durations. Likewise, the information and knowledge to be protected by modern non-compete agreements generally have much shorter shelf lives, which militates in favor of shorter time restrictions such as the ones codified in other states. Ultimately, the North Carolina legislature must determine the precise guideline to enact; however, a statute like Georgia's balances the desire to provide concrete guidance while still permitting the parties to a covenant to demonstrate that their circumstances differ from those of the typical business or employment relationship.

2. Statutory Guidance Regarding Territory and Scope

Perhaps not surprisingly, there is relatively less statutory guidance on the types of territorial and scope-of-employment restrictions that will be considered reasonable. An Idaho statute does provide such guidance, however, creating a "rebuttable presumption that an agreement or covenant is reasonable as to geographic area if it is restricted to the geographic areas in which the ... employee ...
provided services or had a significant presence or influence.”287 Idaho also has a similar rebuttable presumption regarding the scope of employment, providing that “an agreement or covenant is reasonable as to type of employment or line of business if it is limited to the type of employment or line of business conducted by the ... employee ... while working for the employer.”288 Georgia has gone even further, providing stock language for territorial and scope-of-employment restrictions that will likely be considered reasonable.289

Although the statutes in Idaho and Georgia have promise, they provide guidance in only one direction; that is, they indicate the types of territorial and scope of employment restrictions that will likely be deemed reasonable. On the other hand, the statutes do not state or imply that more broadly drafted restrictions will likely be considered unreasonable. If the North Carolina legislature chooses to enact these types of provisions to bring more certainty to the law and predictability to employers and employees entering into covenants, the provisions should include rebuttable presumptions governing both the reasonableness and unreasonableness of territorial and scope-of-employment restrictions.

C. Formalizing the Disparate Treatment of Higher-Level Employees

Within the last fifteen years, North Carolina courts have increasingly considered the employee’s role and level within the employer’s business in determining the reasonableness of a covenant not to compete.290 Nevertheless, courts have thus far not articulated the precise weight that an employee’s position has on the enforcement of a restrictive covenant. Several states have imposed statutory limitations on the types of covenants that may be enforced against an employee, based on the employee’s job responsibilities and role within the company.

287. IDAHO CODE ANN. § 44-2704(3) (Supp. 2011).
288. Id. § 44-2704(4).
289. GA. CODE ANN. § 13-8-53(c)(2) (Supp. 2011) (“Activities, products, or services shall be considered sufficiently described if a reference to the activities, products, or services is provided and qualified by the phrase ‘of the type conducted, authorized, offered, or provided within two years prior to termination’ or similar language containing the same or a lesser time period.... The phrase ‘the territory where the employee is working at the time of termination’ or similar language shall be considered sufficient as a description of geographic areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination.”).
290. See supra Part I.C.
In Idaho, an employer may only enter into a non-compete agreement with a “key employee” or “key independent contractor,” defined as a person who by reason of the employer’s investment of time, money, trust, exposure to the public, or exposure to technologies, intellectual property, business plans, business processes and methods of operation, customers, vendors or other business relationships during the course of employment, have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer’s legitimate business interests.\(^\text{291}\)

To assist in determining whether an individual meets this definition, the statute contains a rebuttable presumption that an individual who receives a salary among the highest five percent in the company is a key employee or independent contractor.\(^\text{292}\) Colorado and Oregon have likewise limited the enforcement of non-compete agreements to particular categories of employees, generally those having executive, management, or administrative roles within employers’ businesses.\(^\text{293}\)

North Carolina courts do not categorically restrict the enforcement of covenants not to compete to particular types of employees; however, the outcomes of recent decisions suggest that courts will view a covenant’s restrictions in the context of the employee’s responsibilities and access to confidential information.\(^\text{294}\) Given this trend, the North Carolina legislature may wish to create clearer rules for courts to follow. Such rules could take the form of those in Idaho, Colorado, and Oregon, which categorically prohibit covenants not to compete except for particular types of employees.

\(^{292}\) § 44-2704. The provision allows an individual to rebut the presumption by "show[ing] that it has no ability to adversely affect the employer's legitimate business interests." Id.
\(^{293}\) See Colo. Rev. Stat. § 8-2-113(2)(d) (2011) (limiting employer-employee covenants not to compete to "[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel"); Or. Rev. Stat. Ann. § 653.020 (West 2007) (limiting non-compete agreements to "individual[s] engaged in administrative, executive or professional work who: (a) Perform[] predominantly intellectual, managerial or creative tasks; (b) Exercise[] discretion and independent judgment; and (c) Earn[] a salary and [are] paid on a salary basis").
\(^{294}\) See supra Parts I.C, II.C.
Alternatively, the legislature could enact a provision that confirms the current approach taken by courts in the state, under which the position held by the employee affects how the time, territory, and scope-of-employment restrictions are evaluated.

There is no precise blueprint that the North Carolina legislature should follow in enacting statutes that govern covenants not to compete. At the very least, however, the legislature should formally announce the state's position regarding the enforceability of such covenants and mandate that state courts reject the blue pencil doctrine in favor of the judicial modification approach. Furthermore, the legislature should consider enacting provisions that guide courts—as well as potential parties to covenants not to compete—on how the reasonableness of covenants will be evaluated.

CONCLUSION

Non-compete jurisprudence in North Carolina is in urgent need of reform. Recent cases make it clear that the traditional reasonableness framework is incongruent with the modern employment environment. Further, this disconnect is exacerbated by the strict blue pencil doctrine, for its use as an equitable tool is limited by its formalistic application. By adopting the judicial modification approach, North Carolina courts would adopt the reform approach used by the majority of United States jurisdictions and, more importantly, have a flexible equitable tool. Yet judicial action should only be the first step. The North Carolina legislature should also announce the state's position on covenants not to compete, mandate the use of the judicial modification approach, and provide other statutory guidance to assist courts in evaluating the reasonableness of covenants not to compete.