North Carolina Supreme Court Warns Attorneys: Draft Carefully.

By Jeremy Demmitt

For those attorneys that routinely draft contracts, the North Carolina Supreme Court has recently issued a warning: draft carefully because the courts will not rewrite your contract.

In the case of *Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair*, 368 N.C. 693, 784 S.E.2d 457 (2016), the North Carolina Supreme Court addressed whether parties can contractually empower the courts to rewrite otherwise unenforceable contractual provisions. This case arose in the context of the enforceability of a covenant not to compete. The covenant not to compete was entered into when the plaintiff purchased from the defendants two companies that installed, supplied, and serviced beverage products and beverage dispensing equipment. As part of the sale, the individual defendants each entered into a "Non-Competition, Non-Solicitation and Confidentiality Agreement" that prohibited the individual defendants from competing with the plaintiff's business in North Carolina and South Carolina for approximately five years. The covenant not to compete contained a provision that authorized a court to revise the temporal and geographical limits should a court find the restrictions to be unreasonable (the "Provision").

The plaintiff later filed suit against the defendants, alleging, in relevant part, that the individual defendants had breached the covenant not to compete. The trial court granted summary judgment for the defendants on the basis that the geographical restrictions of the covenant not to compete were overbroad and unenforceable. The plaintiff appealed. In a split opinion the Court of Appeals found that the geographic restrictions were not limited to areas necessary to maintain the plaintiff's customer relationships and were therefore unreasonable. Although the geographical restrictions were unreasonable, the Court of Appeals noted that the courts may apply the "blue pencil doctrine," which allows courts to strike or not enforce distinctly separable parts of a covenant not to compete in order to render the remainder of the provision reasonable and enforceable. However, the Court of Appeals found that the blue pencil doctrine was unnecessary because the parties had contractually empowered the courts to revise the covenant not to compete with the Provision. As a result, the Court of Appeals found that the trial court erred by not revising the geographical restrictions within the covenant not to compete to be reasonable based on the evidence presented pursuant to the Provision.

In contrast, Judge Elmore, while agreeing that the geographical restrictions were overbroad and unreasonable, dissented from the majority's opinion that the trial court had the authority to revise the covenant not to compete. Instead, Judge Elmore contended that the Provision, at best, allowed the Court to apply the blue pencil doctrine and the Court could not rewrite the geographical restrictions of the covenant not to compete.

On appeal, the North Carolina Supreme Court sided with Judge Elmore and the defendants. The Supreme Court found that the trial court did not have the power to rewrite the geographical restrictions in the covenant not to compete. The Court noted that although the parties purported to give the courts the authority to rewrite the agreement, "parties cannot contract to give a court power that it does not have." *Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 699, 784 S.E.2d at 462. In refusing to accept such power, the Court stated:

> Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation. We see nothing but mischief in allowing such a procedure.

Id. at 700, 784 S.E.2d at 462.

The Court, quite clearly, dismissed any possibility of empowering itself, or the lower courts, with the authority to rewrite parties' contracts. As a result, the Court found that the geographical restrictions in the covenant not to compete were overbroad and therefore unenforceable and sided with the defendants.

The most important issue that readers need to consider is: how does this decision affect you? It is important to note that the North Carolina Supreme Court's reasoning and decision is not limited solely to covenants not to compete. Rather, the Court's decision appeared to issue a broader statement that it is not the province of the courts of this State to impose contractual obligations on parties for which the parties themselves did not bargain. Given the Court's strong language, it appears that the lower courts are to employ this same logic for any contract that contains a broad savings clause that authorizes a court to rewrite contractual provisions. Practitioners, therefore, should not rely on clauses that empower courts to rewrite otherwise unenforceable provisions.

Not only is it important to consider what the Court's Opinion states, but it is equally important to consider what is untouched by the Opinion. The Court's Opinion leaves untouched the blue pencil doctrine that allows courts to strike distinctly separable and unenforceable provisions of covenants not to compete. The Opinion also does not prohibit parties from empowering mediators or arbitrators to rewrite provisions that may otherwise become unenforceable.

If you have a question about a covenant not to compete, contact the law offices of Robinson & Lawing, LLP at 101 N. Cherry St. Suite 720, Winston-Salem, North Carolina, 336-631-8500.