South Carolina Law Review

Volume 70
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 6

Summer 2019

Sharpening South Carolina's Blue Pencil: An Argument for Codifying a Strict Interpretation of the Blue-Pencil Doctrine

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SHARPENING SOUTH CAROLINA'S BLUE PENCIL: AN ARGUMENT FOR CODIFYING A STRICT INTERPRETATION OF THE BLUE-PENCIL DOCTRINE

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* J.D. Candidate, May 2020, University of South Carolina School of Law. I would like to extend special thanks to University of South Carolina School of Law Professor Martin C. McWilliams, Jr. for his extraordinary generosity, instruction, guidance, and support. I am sincerely grateful for his expertise and encouragement throughout this process and my law school career. I would also like to thank the numerous professors, mentors, and friends whose input greatly shaped this work. Lastly, I would like to thank the entire team of the *South Carolina Law Review* for their meticulous and thorough editing of this Note. Any errors remaining and all the views expressed herein are completely my own.

I. INTRODUCTION

When evaluating the enforceability of a non-compete agreement, courts may employ the blue-pencil doctrine to strike out overly broad provisions, while leaving the remainder of the terms in the contract intact. Non-compete agreements containing restrictions upon an employee once the employment relationship ends have become commonplace as employers seek to protect their business interests and preserve their investment in human capital.[1] The public policy behind the enforceability of such contracts is to "incentivize (rather than deter) employers from hiring employees who might have access to the employer's proprietary or confidential information."[2] Provisions within non-compete agreements may include constraints on the former employee such as the scope of the activity to be restricted, the geographic location in which the activity is to be restricted, and the duration for which the activity is to be restricted.[3] The enforceability of these terms is the subject of considerable litigation.[4]

Whether drafting, seeking to enforce, or seeking to contest a non-compete agreement,[5] a party must be capable of making a judgment concerning not just the enforceability of the agreement as written, but also concerning whether a court might enforce the agreement as modified by the

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1. Thomas H. Hogan, *Uncertainty in the Employment Context: Which Types of Restrictive Covenants Are Enforceable?*, 80 ST. JOHN'S L. REV. 429, 434 (2006); Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 723 (2002).

2. Justin C. Carlin, *Non-Compete Agreements: A (Potentially) Enforceable, Effective Way to Protect Your Florida Business*, CARLIN (Mar. 15, 2017), https://carlinfirm.com/non-compete-agreements-apotentially-enforceable-effective-way-protect-florida-business.

3. Hogan, *supra* note 1, at 436.

4. *Id.* at 430.

5. This Note will use the term "non-compete agreement" to describe such contracts. For a definition of the term and list of synonyms, see *Covenant Not to Compete*, BLACK'S LAW DICTIONARY (10th ed. 2014) (A "**covenant not to compete,**" also termed a "*noncompetition agreement*; *noncompete covenant*; *noncompetition covenant*; *restrictive covenant*; *covenant in restraint of trade*; *promise not to compete*; *contract not to compete*" is a promise, usually "in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer.").

court ("blue-pencilling"), or might extend its judgment to an equitable reformation—a substantive change to the agreement itself. While other states have drafted statutes governing the enforceability of restrictive covenants,[6] South Carolina's enforcement criteria is defined entirely by its courts.[7] Clarity on this topic is important to contracting parties, but in South Carolina, the common law offers more questions than answers.

Part I of this Note will introduce various approaches to non-compete enforcement and the judicial scrutiny South Carolina courts traditionally employ in reviewing such agreements. Part II of this Note will then dissect the most pertinent recent authority on non-compete enforcement and provide a comprehensive overview of the current state of the blue-pencil doctrine in South Carolina. Part III discusses the policy considerations for and against the blue-pencil doctrine and offers examples of how other jurisdictions have proceeded. Finally, Part IV recommends that South Carolina adopt an unequivocal stance on the blue-pencil doctrine by codifying its strict common law approach in statute.

A. South Carolina Treatment of Non-Compete Agreements

By default, South Carolina courts review restrictive covenants with skepticism.[8] Non-compete agreements are "generally disfavored and will be strictly construed against the employer."[9] Indeed, judicial skepticism towards employer efforts to restrict the activities of departing employees is evident in the factors courts consider when evaluating such agreements. For example, the enforceability of a non-compete agreement in South Carolina depends on whether it:

> (1) is necessary for the protection of the legitimate interest of the employer, (2) is reasonably limited in its operation with respect to time and place; (3) is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) is

6. Hogan, *supra* note 1, at 434.

7. *See* discussion *infra* section III.C.

8. Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) (stating that, "[g]enerally, covenants not to compete are looked upon with disfavor, examined critically, and strictly construed.") (citing *Cafe Assocs. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991))).

9. Rockford Mfg., Ltd. v. Bennet, 296 F. Supp. 2d 681, 686 (D.S.C. 2003).

reasonable from the standpoint of sound public policy; and (5) is supported by valuable consideration.[10]

B. The Differing Approaches that States Take to Enforcing Non-Compete Agreements

Endeavoring to protect their legitimate business interests, employers nationwide "may require their employees to sign a non-compete agreement."[11] Despite the ubiquity of this practice, however, "no federal or uniform law governing the interpretation of noncompetition provisions in employment contracts across the country" currently exists.[12] Accordingly, "what is enforceable in one state may be prohibited in another."[13]

States vary greatly in the manner and degree to which they will enforce non-competes. In some states, non-compete enforcement is determined by statute,[14] while in others, like South Carolina, it is determined exclusively by case law.[15] This Note contends that, whether South Carolina precedent explicitly recognizes the practice, its courts currently employ a strict interpretation of the blue-pencil doctrine, which should be codified in the

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10. *Id.* (citing Sermons v. Caine & Estes Insurance Agency, Inc., 275 S.C. 506, 508, 273 S.E.2d 338, 339 (1980); Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675–76, 301 S.E.2d 142, 143 (1983)).

11. Anthony Oncidi & John P. Barry, *Noncompete Laws by State*, XPERTHR, https://www.xperthr.com/fifty-state-charts/noncompete-laws-by-state/25386 (last updated Oct. 1, 2018).

12. *Id.*

13. *Id. See also* 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, 756 (2011) ("State-based law in the United States governs non-competes, as is the case with most of the law governing the relationship between employers and their employees, employment contracts, and thus, contractual restrictions found in the 'law of employee mobility.'" (citing Charles Tait Graves & James A. DiBoise, *Do Strict Trade Secret and Noncompetition Laws Obstruct Innovation?*, 1 ENTREP. BUS. L.J. 323, 323 (2007))).

14. *See, e.g.*, GA. CODE ANN. § 13-8-50 (West, Westlaw through 2011 Act 99) ("The General Assembly finds that reasonable restrictive covenants contained in employment and commercial contracts serve the legitimate purpose of protecting legitimate business interests and creating an environment that is favorable to attracting commercial enterprises to Georgia and keeping existing businesses within the state. Further, the General Assembly desires to provide statutory guidance so that all parties to such agreements may be certain of the validity and enforceability of such provisions and may know their rights and duties according to such provisions.").

15. David Dubberly, *Non-Compete Laws: South Carolina*, WESTLAW, https://www.westlaw.com/9-517-3821?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (last updated Oct. 9, 2018).

form of a statute as the appropriate compromise among the available non-compete enforcement methods.

Of the numerous variations among states' non-compete laws, one of the most significant is whether judges are permitted to reform overbroad agreements.[16] States currently rely on three primary enforcement doctrines for reviewing non-compete agreements: reformation, blue pencil, and red pencil.[17] Each of these doctrines provide courts with varying discretion to "determine the impact on the enforceability of a non-compete provision that includes elements that contravene state law."[18] As a result, an employer needs to be aware of the non-compete laws in each state in which it employs workers.

Additionally, employers who select another state's law in a choice of law provision of an employee's non-compete should anticipate defending that non-compete under multiple state laws. For example, in any South Carolina enforcement proceeding courts will examine a selected foreign state's law as well as South Carolina's own standards for non-compete agreements.[19]

1. Reformation

Reformation is a doctrine prevailing in some states which enables courts to rewrite a defective non-compete contract so as to render it non-defective.[20] Unlike the red-pencil or blue-pencil doctrines, which prohibit

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16. Christopher H. Lindstrom, *State Specific Quirks May Thwart Unwary Employers*, NUTTER (Oct. 12, 2015), https://www.nutter.com/non-compete-law-blog/state-specific-quirks-may-thwart-unwary-employers.

17. THE WHITE HOUSE, NON-COMPETE REFORM: A POLICYMAKER'S GUIDE TO STATE POLICIES 7 (Oct. 2016) [hereinafter NON-COMPETE REFORM], https://obamawhitehouse.archives.gov/sites/default/files/competition/state-by-statenoncompetesexplainer_unembargoedfinal.pdf (last visited Apr. 16, 2019).

18. *Id.* at 7–8.

19. Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005) ("Terms in a non-compete agreement may be construed according to the law of another state. But if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement.") (citation omitted); Phillip Kilgore & Jeff Dunlaevy, *Battle-Worthy Non-Competes: Lessons from the Wreckage of Recent Cases*, 19 S.C. LAW., 24, 27 ("Drafting counsel should advise their clients that they may not rely exclusively on the law of the chosen jurisdiction if the non-compete portion of the agreement may need to be enforced in South Carolina.").

20. U.S. DEP'T OF TREASURY, OFFICE OF ECON. POLICY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 14 (2016) (noting that this doctrine is also called "[e]quitable reform"). South Carolina has consistently repudiated reforming non-compete agreements through rewriting. *See* Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (reiterating that the restrictions in

adding new language, reformation "may entail insertions of new text."[21] This approach grants judges broad latitude "to amend the language in question to generate an enforceable contract consistent with the original intent of the existing contract."[22] In reformation states, "courts can use discretion to rewrite offending provisions so that they conform to state law."[23] For example, in a reformation state, a judge would be permitted to *rewrite* language in a non-compete so that it is reasonable. Thus, a judge *could* rewrite the terms of a geographic restriction to narrow the scope of the constraint from a two-hundred mile radius to a fifty mile radius while enforcing the remainder of the agreement as written.

2. The Red-Pencil Doctrine

In states adhering to the red-pencil doctrine, courts can "nullify the *entire non-compete agreement* if one of the provisions does not comply with an existing statute or case law standards."[24] Courts in these all-or-nothing jurisdictions "will neither revise nor eliminate any provisions of the covenant," but instead "will simply determine the reasonableness of the covenant as written." [25] Hence, an agreement will either stand or fall as written under this take-it-or-leave-it approach,[26] meaning that the draconian all-or-nothing rule invalidates the entire contract if any part of the non-compete agreement is determined to be overly broad.

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a non-compete clause cannot be rewritten by the court); *Stonhard*, 366 S.C. at 161, 621 S.E.2d at 354 (noting that the very act of adding a term not negotiated and agreed upon by the parties violates South Carolina public policy); Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."). *See also* Mailsource, LLC v. M. A. Bailey & Assocs., 356 S.C. 363, 369, 588 S.E.2d 635, 638–39 (Ct. App. 2003) (denying preliminary injunction enforcing non-compete agreement because the non-compete term was about to expire, and the court could not "re-write the parties' contract" to permit an extension).

21. U.S. DEP'T OF TREASURY, OFFICE OF ECON. POLICY, *supra* note 20, at 14.

22. *Id.* Note that, in some cases, this doctrine is (confusingly) also referred to as "blue-pencil." *See* discussion *infra* section II.A.1.

23. NON-COMPETE REFORM, *supra* note 17, at 8.

24. *Id.*

25. Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants Not to Compete in North Carolina*, 90 N.C. L. REV. 1931, 1962 (2012).

26. *Id.*

3. The Blue-Pencil Doctrine

Blue-pencilling takes a middle of the road approach to non-compete enforcement by permitting courts to excise overly broad language where severable and enforce the rest of the agreement.[27] Originally, the blue-pencil doctrine developed as state common law.[28] According to *Black's Law Dictionary*, blue-pencilling ("the blue-pencil test") is defined as "[a] judicial standard for deciding whether to invalidate the whole contract or only the offending words."[29] Furthermore, the definition clarifies that, "[u]nder this standard, only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words."[30] Hence, judges employing the blue pencil can strike through language, but cannot *rewrite* it.

II. BACKGROUND

A. What is the State of the Blue-Pencil Doctrine in South Carolina's Current Legal Landscape?

1. The Implication of Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.: *Non-compete Enforcement as a Hobson's Choice in South Carolina*

South Carolina law on defective non-compete agreements is unclear. For example, in *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*,[31] the South Carolina Supreme Court recently rejected the blue-pencil doctrine altogether, suggesting that the practice is dead in non-compete contract disputes.[32] However, numerous previous court opinions clearly

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27. Kilgore & Dunlaevy, *supra* note 19, at 27 ("The term 'blue penciling' is derived from the practice of 19th century British editors of using pencils with blue lead to edit manuscripts.").

28. Lawrence J. Del Rossi, *Part VII of "The Restricting Covenant" Series: Blue Pencils and Brokers*, NATIONAL LAW REVIEW (Sept. 11, 2017), https://www.natlawreview.com/article/part-vii-restricting-covenant-series-blue-pencils-and-brokers.

29. *Blue-Pencil Test*, BLACK'S LAW DICTIONARY (10th ed. 2014).

30. *Id.*

31. 387 S.C. 583, 694 S.E.2d 15 (2010).

32. *Id.* at 585, 694 S.E.2d at 16 ("Appellants also contend the trial court erred in 'blue penciling' the contract by replacing the unreasonable territorial restriction in the agreement with one of its own. We agree, and reverse."). While the court appears to clearly repudiate the blue-pencil doctrine, it should be noted that this characterization conflates "rewriting" and "blue-pencilling" as the same function. Rather than discussing rewriting and blue-penciling as

suggest that this judicial tool still has a pulse.[33] By ignoring previous South Carolina Supreme Court cases discussing the blue-pencil doctrine as an available tool—and a federal case permitting blue-pencilling under South Carolina law—the *Poynter* court created a discrepancy of authority that has yet to be reconciled. Furthermore, under the circumstances of the case, *Poynter*'s holding indicates that South Carolina has in fact rejected reformation, *not* blue-pencilling.[34] Nevertheless, South Carolina courts and practitioners applying *Poynter* are likely to interpret its decision as rejecting both reformation and blue-pencilling—or to construe them to have the same meaning.

In *Poynter*, the South Carolina Supreme Court reviewed the trial court's enforcement of a noncompetition agreement against a former employee.[35] Specifically, the court reviewed the trial court's decision to rewrite the territorial limitation in the non-compete clause at issue.[36] The lower court had removed language in the agreement that it deemed to be too broad, and then inserted its own language for that of the parties.[37] Ruling in favor of the company, the trial court rewrote the territorial restriction to apply "within Greenville County, South Carolina[,] and within an area encompassing fifteen miles in any direction from [the premises]."[38] On appeal, the court determined that the trial judge had exceeded his authority in "rewriting or 'blue penciling' the territorial restriction," reiterating its previous holding in *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.* that allowed a court to "insert a geographical limitation where none existed" would violate public policy.[39] Citing the holding of *Stonhard*, the court stated that "such a reformation would be void, as it would add a term to the contract that the parties neither negotiated nor agreed to."[40]

Importantly, the court made no distinction between the practice of blue-pencilling and rewriting, but instead seemed to conflate the two.[41] In doing

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separate and distinct approaches, the court addressed them as one and the same in its holding that "the trial judge exceeded his authority in rewriting or 'blue-penciling' the territorial restriction." *Id.* at 587, 694 S.E.2d at 17.

33. *See, e.g.*, Rockford Mfg., Ltd. v. Bennet, 296 F. Supp. 2d 681, 687 (D.S.C. 2003) ("Defendants contend that South Carolina does not permit courts to 'blue pencil' unreasonable provisions of an agreement and enforce reasonable ones. A survey of South Carolina law suggests otherwise.").

34. *Poynter Invs.*, 387 S.C. at 588, 694 S.E.2d at 18.

35. *Id.* at 585, 694 S.E.2d at 16.

36. *Id.*

37. *Id.* at 587, 694 S.E.2d at 17.

38. *Id.* at 586, 694 S.E.2d at 17.

39. *Id.* at 587–88, 694 S.E.2d at 17.

40. *Id.* at 588, 694 S.E.2d at 17.

41. *Id.* at 587, 694 S.E.2d at 17.

so, *Poynter* ignored several decisions recognizing the use of the blue-pencil doctrine to strike language as a separate and distinct judicial tool at the discretion of South Carolina courts.[42] Specifically, although the federal district court's decision in *Rockford Mfg., Ltd. v. Bennet* applied South Carolina law to blue-pencil (and enforce) a non-compete agreement, the Supreme Court of South Carolina neither mentioned—nor cited—the case in its *Poynter* opinion. Without the context provided by this important precedent, *Poynter* has created the illusion that non-compete enforcement in South Carolina is essentially a Hobson's Choice[43] and has become a damaging red herring in South Carolina authority on blue-pencil interpretation.

2. *Striking out Semantics: South Carolina Authority has not Written Off the Blue-Pencil Doctrine*

a. *Rockford Manufacturing, Ltd. v. Bennet*

Conspicuously absent from the *Poynter* decision, the federal district court's decision in *Rockford Mfg., Ltd. v. Bennet* provides arguably the clearest delineation of the blue-pencil doctrine's application in non-compete contracts in this jurisdiction. Relying on the logic of two previous South Carolina Supreme Court cases,[44] the District Court for the District of South Carolina concluded that, because the restrictive covenant at issue was divisible (or severable), and because the contract included a severability clause, the overly broad non-compete could be blue-penciled.[45] Perhaps most valuably, the court defined blue-pencilling with specificity, noting:

> Some courts have applied the so called "blue pencil test", that is, if the excessive restraint is severable in terms, it may be disregarded and the remaining part of the contract enforced; but if the contract is

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42. *See generally* Rockford Mfg., Ltd. v. Bennet, 296 F. Supp. 2d 681 (D.S.C. 2003); Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972); Somerset v. Reyner, 233 S.C. 324, 104 S.E.2d 344 (1958).

43. An English university slang term, "Hobson's choice" refers to "the choice of taking what is offered or nothing at all" and is supposedly a reference to Thomas Hobson (1544–1631), a "Cambridge stable manager who le[n]t horses and gave customers the horse next in line or none at all." *Hobson's Choice*, DICTIONARY.COM, https://www.dictionary.com/browse/hobson-s-choice (last visited Apr. 19, 2019). The phrase was "popularized c. 1660 by Milton, who was at Cambridge from 1625–29." *Id.*

44. *Eastern Business Forms, Inc.*, 258 S.C. at 433, 189 S.E.2d at 23; *Somerset*, 233 S.C. at 331, 104 S.E.2d at 347.

45. *Rockford Mfg.*, 296 F. Supp. 2d at 688–89.

> not severable in terms, the entire covenant falls. We recognize that some courts apply the rule that if the restrictive covenant as to time or space is unreasonable, even though *indivisible* in terms, it is nevertheless enforceable for so much of the performance as would be a reasonable restraint. These courts hold that the legality of restraint should not turn on the mere form of the wording but upon the reasonableness of giving effect to the indivisible promise to the extent that would be lawful.[46]

Furthermore, the court directly addressed the defendant's contention that South Carolina "does not permit courts to 'blue pencil' unreasonable provisions of an agreement and enforce reasonable ones"; it asserted confidently that "[a] survey of South Carolina law suggests otherwise."[47] Indeed, *Rockford* proffered two South Carolina Supreme Court cases—*Eastern Business Forms, Inc. v. Kistler* and *Somerset v. Reyner*—as proof that South Carolina "ha[d] not wholly rejected the 'blue pencil' test," averring that "[b]oth cases can be reasonably read to conclude that although an *indivisible* covenant may not be enforced to a reasonable extent, a *severable* and reasonable covenant may be enforced independent of any unreasonable provisions."[48]

In *Somerset v. Reyner*, the plaintiff sold his retail silver and jewelry business and signed an agreement not to "engage in the business of retail selling of jewelry, silverware, or similar items in the State of South Carolina for a period of twenty (20) years."[49] The court considered whether to apply the blue-pencil doctrine to the overly-broad territorial restriction but ultimately determined that the indivisibility of the agreement prevented it from doing so.[50] Because the covenant "cover[ed] the entire State of South Carolina" there was "no basis for drawing a sharply defined line separating the excess territory."[51] Similarly, in *Eastern Business Forms, Inc. v. Kistler*, an employer sought to enforce a restrictive covenant preventing a former salesman from selling "printing products of the type produced or sold by [the employer]" for twelve months within a "100-mile radius of the City of Greenville nor within a 100-mile radius of the central city of the assigned territory of Salesman."[52] The question before the court was whether "the

46. *Id.* at 687.
47. *Id.*
48. *Id.*
49. *Somerset*, 233 S.C. at 328, 104 S.E.2d at 345–46.
50. *Id.* at 332, 104 S.E.2d at 348.
51. *Id.*
52. *Eastern Business Forms, Inc.*, 258 S.C. at 433, 189 S.E.2d at 23.

trial judge could, after holding that the 100-mile radius provision of the contract was unreasonable, sever that part of the contract and enforce the restrictive covenant contained in the contract only in the counties of Spartanburg, Cherokee and Union."[53] The court determined that the agreement "must stand or fall integrally" because the covenant was "clearly indivisible" and—like the restrictive covenant in *Somerset*—furnish[ed] no basis for dividing [the] territory."[54] In both cases, the court contemplated severability as a pre-requisite for blue-pencilling the agreement, demonstrating a willingness to use the doctrine where the terms are divisible, or severable.

Regarding severability, the court in Rockford held that "[a] covenant is severable only where it 'is in effect a combination of several distinct covenants.'"[55] Furthermore, the court provided a valuable illustration of the distinction between provisions subject to permissible blue-pencilling and those that cannot be reformed.[56] The court discussed the *Eastern Business Forms* case as an example of the kind of provision that was deemed incapable of being severed.[57] The limitation at issue in *Eastern Business Forms* was a geographic territory restriction of a 100-mile radius that could only be altered by substituting new language in the agreement identifying a smaller geographic area.[58] The court reasoned that blue-pencilling the agreement was not an option because doing so would create a new term not negotiated and agreed to by the parties.[59] However, the relevant provision in need of reformation in Rockford demonstrates why restrictions that may be deemed excessive by a South Carolina court should be articulated in a manner of easy divisibility. Where the employer's covenant protected a listing of "Affiliated Companies," the court determined that the agreement was enforceable because some or all of the "Affiliated Companies" could simply be stricken from the list without adding or changing any existing language.[60] The court in Rockford expounded on the technical details of severability in the non-compete agreement at issue:

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53. *Id.* at 432, 189 S.E.2d at 22.
54. *Id.* at 433, 189 S.E.2d at 23.
55. Rockford Mfg., Ltd. v. Bennet, 296 F. Supp. 2d 681, 688 (D.S.C. 2003) (citing *Somerset*, 233 S.C. 324, 104 S.E.2d 344).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

> First, the covenant is mechanically divisible. In the structure of the covenant itself, Plaintiffs have manifested an intention regarding each company *individually*, by choosing to list them by name. Such an expression makes it possible, logistically, to extricate those companies, *without* a legitimate interest, from the more global intent concerning all "Affiliated Companies," while leaving intact the covenant as to those companies which *do* have a legitimate interest, knowing with full confidence that the intention of the parties has been expressed and preserved in the remainder of the abridged covenant. Accordingly, the covenant is potentially severable. Second, the parties have expressly stated their intent that the covenants be severable.[61]

Therefore, Rockford serves as a valuable example of applying South Carolina law to blue-pencil an overly broad restrictive covenant and demonstrates how the parties' intention to create a severable agreement favors its use.

b. Team IA, Inc. v. Lucas

Shortly after the Supreme Court of South Carolina's decision in *Poynter*, the Court of Appeals had the opportunity to interpret the holding in *Team IA, Inc. v. Lucas*.[62] Reviewing a non-compete agreement between a technology company and a former sales representative, the court determined that a nationwide territorial restriction was overly broad on its face.[63] Interestingly, the court explained its understanding of the holding in *Poynter* to mean that "a court may not 'blue pencil' the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable" and that "the parties may not of their own accord convert an overly broad territorial restriction into an enforceable one by entering into a subsequent agreement that artificially limits the actual terms used in the parties' original contract."[64] The South Carolina Court of Appeals held that the nationwide territorial restriction was overly broad, but could be replaced with a narrower restriction alternatively defined in a previous employment agreement, provided that the restriction was "not overly broad after further development

61. *Id.*
62. 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011).
63. *Id.* at 246, 717 S.E.2d at 107.
64. *Id.*

of the facts."[65] Significantly, the *Lucas* opinion demonstrates how *Poynter* blurred the lines between reformation and blue-pencilling for subsequent courts.

c. Palmetto Mortuary Transport, Inc. v. Knight Systems, Inc.

Quite recently, the Supreme Court of South Carolina, in *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*,[66] had the opportunity to review the Court of Appeals' *Lucas* decision to void a non-compete covenant's 150-mile territorial restriction on the seller of a mortuary transport business.[67] Evaluating the analysis of the lower court, the Court observed that, "[b]ecause South Carolina does not follow the 'blue pencil rule' and because the non-compete covenant does not include a 'step-down provision,' the court of appeals found it would be impermissible to redraw the Agreement to include a smaller territorial restriction."[68] Using its holding in *Somerset v. Reyner* for comparison, the Court stated that it had previously "declined to apply the 'blue pencil test' to redraw a reasonable territory for the restriction because the covenant was 'clearly indivisible' and 'furnishe[d] no basis for dividing this territory.'"[69] Furthermore, the Court reiterated its explanation that it could not "make a new agreement for the parties into which they did not voluntarily enter."[70]

Overturning the decision of the Court of Appeals, the Court found that the 150-mile territorial restriction was not greater than what was essential for reasonable protection of the rights purchased by the buyer and thus the restriction was reasonable.[71] The Court took into account that the covenant arose out of the sale of a business between two sophisticated parties that were represented by counsel, that the buyer was required to purchase body bags from the seller, who continued the body bag manufacturing aspect of business, and that the buyer considered opportunity for expansion when negotiating purchase of the business.[72]

The *Palmetto Mortuary* opinion is significant because the court entertained a discussion of what kind of agreements could be blue-penciled

65. *Id.*
66. 424 S.C. 444, S.E.2d 724 (2018).
67. *Id.*
68. *Id.* at 452, 818 S.E.2d at 729.
69. *Id.* at 455, 818 S.E.2d at 730; Somerset v. Reyner, 233 S.C. 324, 332, 104 S.E.2d 344, 348 (1958).
70. *Palmetto Mortuary Transp.*, 424 S.C. at 455, 818 S.E.2d at 730–33; *Somerset*, 233 S.C. at 332, 104 S.E.2d at 348.
71. *Palmetto Mortuary Transp.*, 424 S.C. at 458, 818 S.E.2d at 732.
72. *Id.* at 457–59, 818 S.E.2d at 731–32.

to be enforceable and what kinds could not.[73] This discussion is puzzling; if the blue-pencil doctrine is not followed in South Carolina, as *Poynter* clearly proffers, why did the court even bother to contemplate the presence or absence of step-down provisions and the divisibility of the language in the agreement as *sine quae non* to the court's facility to use the blue pencil? The *Palmetto Mortuary* court's discussion of the blue-pencil doctrine matters because it exhumes the practice as a discretionary tool at the court's disposal, demonstrating that South Carolina's judicial willingness to modify agreements through striking is alive and well under particular circumstances.

III. ANALYSIS

This Note acknowledges that guidance on comprehensive restrictive covenant reform—to correct systemic inequity concerns inherent in labor and employment dynamics—is beyond its scope. While it would be naïve to embrace the strict blue-pencil doctrine as the nonpareil solution to non-compete litigation, South Carolina's capricious legal landscape leaves parties waiting for the proverbial other shoe to drop—they know only that what is valid today may very well be invalid tomorrow. Codifying South Carolina courts' apparent receptiveness to the strict blue-pencil doctrine in statutory form would deliver clarity for all parties affected, without granting excessive deference to employers or imposing an additional burden on employees.

A. What are the Public Policy Arguments Against Blue Pencilling?

Courts that have declined to blue-pencil non-competes have voiced three primary apprehensions.[74] First, some courts have expressed concern that blue-pencilling "is tantamount to the construction of a private agreement and that the construction of private agreements is not within the power of the courts."[75] Others have observed that blue-pencilling may create an incentive for the employer to overreach and draft overly broad agreements, because even if the non-compete is deemed unenforceably broad as drafted, a narrower version could be substituted and enforced.[76] Finally, courts have

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73. *Id.*

74. Maria Kalogredis et al., *Addressing Increasing Uncertainty in the Law of Non-Competes*, ASS'N CORP. COUNS. DOCKET, Apr. 2018, at 34, 36.

75. *Id.*; CAE Vanguard, Inc. v. Newman, 518 N.W.2d 652, 655 (Neb. 1994).

76. Kalogredis et al., *supra* note 74, at 36; *Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972) (finding that "employers can fashion truly ominous

further noted that, "for every covenant that finds its way to court, there are thousands that exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor."[77] Opponents of the blue-pencil doctrine suggest that "most employees simply comply with their non-competes rather than challenging them in court," and thus "the law should provide a strong incentive for employers not to overreach."[78]

B. What are the Policy Reasons that Favor Embracing a Strict Interpretation of the Blue-Pencil Doctrine?

The blue-pencil doctrine provides a realistic tool to aid courts in resolving disputes where compelling interests exist on both sides. Despite the critiques discussed above, the blue-pencil doctrine has many practical advantages to recommend it—if only due to the shortcomings of competing approaches.

For example, the all-or-nothing approach embodied in the red-pencil doctrine may not actually operate as the powerful deterrent for employer overreach that its proponents contend.[79] Because the reasonableness standard is by nature nebulous, without hard-and-fast guidelines—or concrete principles that could assist in deciding future cases or guide employers who want to ensure that they draft reasonable covenants—employers are arguably put at a distinct disadvantage in drafting covenants and "risk having the entire covenant held unenforceable on account of any overbroad term."[80] Furthermore, the red pencil approach may engender even further uncertainty in the law, as courts grapple with the undeniably "harsh effects of its application."[81] This tension exists most prominently in jurisdictions that have adopted the all-or-nothing standard of the red-pencil doctrine because "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."[82] While courts are understandably inclined to consider the

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covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable").

77. Kalogredis et al., *supra* note 74, at 36; Golden Rd. Motor Inn, Inc. v. Islam, 376 P.3d 151, 157 (Nev. 2016).

78. Kalogredis et al., *supra* note 74, at 36.

79. McClanahan & Burke, *supra* note 25, at 1965.

80. *Id.* at 1965–66.

81. *Id.* at 1966.

82. *Id.* (emphasis added).

equity of enforcing a restrictive covenant, their finding "ultimately should rest on whether the covenant, as written, is reasonable."[83]

The strict blue-pencil doctrine is plausibly the most practical compromise among approaches to non-compete enforcement. The ability to strike objectionable language with the blue pencil softens the 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."[84] As a discretionary tool available to the courts, the blue-pencil doctrine allows flexibility in non-compete enforcement that can ensure that, in appropriate circumstances, "some employees will be held to reasonable restrictions to which they agreed," and that courts may be alleviated of the pressure to "uphold entire covenants in order to enforce particular restrictions against employees."[85]

While proponents of the red-pencil doctrine assert that it is the most consistent with general contract principles because any changes to contract terms, even the striking out of unreasonable terms, would be contrary to freedom-of-contract principles,[86] 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."[87] The blue-pencil doctrine is therefore more consistent with traditional contract principles than equitable reformation of an agreement, which arguably creates an involuntary contract containing terms not negotiated upon by either party.[88] Jurisdictions that embrace the strict blue-pencil doctrine and limit its application to divisible or severable provisions have an even stronger case in this regard, especially when the parties took care to draft the agreement specifically to permit this type of enforcement with divisible language or step-down provisions.[89]

For employers operating in multiple states—or simply for those employing residents of South Carolina—the vagaries in law across jurisdictions underscores the importance of providing coherence on the ever-evolving landscape of non-compete enforcement. Parties seeking to enforce or to challenge the use of these agreements are likely to be frustrated by the rampant ambiguity in South Carolina law. The proponents of blue-pencilling note that voiding an entire covenant because of modest overreach "would frustrate the intent of the contracting parties," particularly given that "a

83. *Id.*
84. *Id.* at 1967.
85. *Id.*
86. *Id.* at 1963.
87. *Id.* at 1967.
88. *Id.*
89. *Id.*

reasonable time period or geographical area is not capable of precise calculation."[90] Furthermore, the mere existence of a non-compete covenant is "evidence of the parties' shared intent to impose limitations on the employee's right to move to a competitor" and "an all-or-nothing approach to enforcement may effectively frustrate that intent."[91]

Arguably, enforcement doctrines function as incentives to "use language and terms that are less restrictive and more likely to stand up to judicial review" for employers contemplating the use of restrictive covenants.[92] While the red-pencil doctrine goes furthest in limiting the use of non-competes, giving employers in those states the strongest incentives to write contract language narrowly and carefully,[93] consideration should be given to the subjective nature of what constitutes reasonable restrictions on time and geographic scope. The red-pencil doctrine means that one overly broad term could void an entire agreement, effectively throwing the baby out with the bathwater.

Applied strictly, the blue-pencil doctrine excises the objectionable language only if it is possible to delete it simply by running a blue pencil through it. This practice circumvents changing, adding, or rearranging the words in a party's agreement. Importantly, the blue-pencil doctrine affords the possibility that an overly broad provision in a restrictive covenant is not necessarily always motivated by a sinister purpose.[94] Because its utilization is entirely discretionary,[95] the court can evaluate the good faith of the

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90. Health Care Fin. Enterprises, Inc. v. Levy, 715 So. 2d 341, 343 (Fla. Dist. Ct. App. 1998) (holding that declaring "the agreement void would frustrate the intent of the contracting parties" and noting that "a reasonable time period or geographical area is not capable of precise calculation").

91. Kalogredis et al., *supra* note 74, at 37.

92. NON-COMPETE REFORM, *supra* note 17, at 8.

93. *Id.*

94. Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 681 (2008) ("The blue-pencil doctrine is based in large part on the 'understanding that there is not necessarily a sinister purpose behind an overbroad restrictive covenant.' Courts can and do look to the good faith of the employer in determining whether to utilize the blue pencil doctrine." (citing Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 914 (W. Va. 1982))).

95. Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 251 (2007) ("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."); *see, e.g.*, Hilligoss v. Cargill, Inc., 649 N.W.2d 142, 147 (Minn. 2002) (noting that the court did not abuse its discretion in declining to apply the blue-pencil doctrine to make an agreement reasonable where the employer asserted that it should have been used).

employer in determining whether it is appropriate to exercise its option to blue pencil or invalidate the agreement completely.

The presence of compelling policy interests on both sides requires a reasonable and clear compromise. On the one hand, the blue-pencil doctrine promotes public policy interests "in the ability of businesses to safeguard their capital against pirating, counterfeiting, and unfair use by former employees."[96] On the other hand, critics of the doctrine assert traditional public policy interests "in the area of employee competition covenants, namely, that individuals have a right to practice their chosen trade and that society benefits from 'fair' competition."[97] Given that these policy considerations will likely always be at loggerheads, South Carolina should officially embrace the blue-pencil doctrine as a pragmatic approach that embodies compromise and flexibility.

C. How Should South Carolina Strike Out the Gray Area in the Law?

Although drafting non-compete agreements that are both reasonable and enforceable under South Carolina standards will never be an exact science, South Carolina authority's inconsistency on blue-pencilling creates gray area that only serves to make the venture more frustrating and unpredictable than necessary for practitioners. Because reasonableness is not a self-defining standard, but rather varies with the specific circumstances and facts of each case, determining enforceability is largely *ad hoc*.[98] *Poynter* would indicate that South Carolina courts may not blue-pencil or strike language in a non-compete agreement that is overly broad and severable.[99] However, South Carolina courts appear to condone the practice of blue-pencilling unreasonably broad provisions in non-compete agreements when the only action required is to strike through the unreasonable provision.[100] While this may seem like an exercise in semantics, the distinction between whether a court repudiates the concept of blue-pencilling as a liberal tool of judicial modification, capable of adding or rewriting terms as *Poynter* suggests, or embraces it as a strict instrument to excise objectionable language where

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96. Timothy D. Scrantom & Cherie Lynne Wilson, *Postemployment Covenants Not to Compete in South Carolina: Wizards and Dragons in the Kingdom*, 42 S.C. L. REV. 657, 668 (1991).

97. *Id.*

98. Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 911 n.4 (W. Va. 1982).

99. *See generally* Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010).

100. *See generally* Rockford Mfg., Ltd. v. Bennet, 296 F. Supp. 2d 681 (D.S.C. 2003).

severable, as *Rockford* recognizes the doctrine, will likely be outcome-determinative in many cases.

To evaluate how South Carolina should reconcile the vagaries of its authority's interpretations on non-compete enforcement and modification, consideration of other jurisdictional approaches as potential models provides a valuable frame of reference. In recent years, "several state legislatures have enacted statutes that govern some aspects of the enforcement of covenants not to compete."[101] These statutes serve several purposes:

> First, they clarify the state's public policy position toward covenants not to compete. 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."[102]

Accordingly, scrutiny of statutes adopted by other comparable states is valuable in considering how South Carolina should proceed to bring lucidity to its enforcement of non-compete agreements.

1. Florida

Covenants not to compete in the State of Florida are governed by statute, codifying the state's approach to the enforceability of such provisions.[103] To enforce a non-compete agreement, the statute employs a two-step process.[104] First, the non-compete must be reasonable with regard to time, area, and line of business.[105] Next, in order to be valid, the party seeking to enforce the non-compete must "plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant."[106] For reference, sections 542.335(1)(b)(1)–(5) provide a non-exclusive list of such "legitimate business interests."

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101. McClanahan & Burke, *supra* note 25, at 1976.

102. *Id.* at 1976–77.

103. *See* FLA. STAT. ANN. § 542.335 (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg). For a discussion of this statute, see Carlin, *supra* note 2.

104. *See* § 542.335 (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

105. *Id.* § 542.335(1) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

106. *Id.* § 542.335(1)(b) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

Furthermore, the statute delineates what is presumptively a reasonable time period and what is not, creating a framework of guidance that gives courts, and affected parties, a clear starting point.[107] The statute also enables a court to *modify* the agreement to be enforceable, if possible.[108] The reasonableness of the time restriction in a non-compete often depends on the interest to be protected, and the statute establishes the presumptions which courts must apply to the protection of different types of information.[109] For instance, most restrictive covenants—not based upon protection of trade secrets or sales of an ownership interest in a business entity—are presumed reasonable in time if the restraint is less than six months; but the restriction is presumed unreasonable if the restraint is more than two years in duration.[110]

Furthermore, the statute provides valuable guidance for the court's interpretation. After the employer establishes reasonable restrictions to protect its legitimate business interests, the burden of proof shifts to the employee to establish that the restraint is overbroad, overlong, or not reasonably necessary to protect a legitimate business interest.[111] In considering the employee's defenses, a court must construe a covenant in favor of providing reasonable protection to all legitimate business interests established by the employer.[112] If the court finds the restraint overbroad, a court may modify the restraint and grant only the relief that is reasonably necessary to protect the interest.[113]

Following the framework of Florida's statute, even when a court finds a provision in a non-compete agreement to be unreasonable (such as an unlimited geographic scope provision), the court should not strike down the agreement entirely, but instead should enforce the agreement to the extent reasonable and necessary to protect one or more legitimate business interests.[114] The statute provides that, "[i]f a contractually specified restraint

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107. *Id.* § 542.335(1)(d)–(e) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

108. *Id.* § 542.335 (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

109. *Id.* § 542.335(1)(d)–(e) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

110. *Id.* § 542.335(1)(d)(1) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

111. *Id.* § 542.335(1)(c) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

112. *Id.* § 542.335(1)(h) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

113. *Id.* § 542.335(1)(c) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg).

114. PartyLite Gifts, Inc. v. MacMillan, 895 F. Supp. 2d 1213, 1227 (M.D. Fla. 2012) (noting that the absence of a "temporal duration on [a] covenant does not render it

is overbroad, overlong or otherwise not necessary to protect the legitimate business interest or interests, a court *shall* modify the restraint and grant only the relief necessary to protect such interest or interests."[115] In most states that have adopted the blue-pencil doctrine, modification is limited and discretionary, not mandatory; however, Florida is an exception to that rule by statute, and embraces the court's ability to reform a non-compete through more liberal means that exceed the strict blue-pencil doctrine.

2. Georgia

In 2011, Georgia passed the Restrictive Covenants Act,[116] turning Georgia from a non blue-pencil state which limited courts from modifying the language used in a restrictive covenant, into a state where courts are expressly authorized to modify a covenant that is "otherwise void and unenforceable so long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties" in an overbroad restrictive covenant provision.[117] Prior to the statute's passage, if one part of a non-compete was unenforceable, the non-compete provision would be struck down in its entirety.[118]

In 2017, a federal court in Georgia interpreted the state's non-compete statute and found the Act's definition of "modification" to be lacking.[119] In Georgia's first-ever published opinion analyzing how a Georgia court may modify a non-compete clause that is overbroad after the statute's enactment, in *Lifebrite Labs, LLC v. Cooksey* the court opined about exactly when and how Georgia courts may modify overbroad non-compete provisions.[120]

The court in *Lifebrite Labs, LLC v. Cooksey* ultimately held that the term "modify" means that, "[t]hough courts may strike unreasonable restrictions, and may narrow overbroad territorial designations, courts may not completely reform and rewrite contracts by supplying new and material

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unenforceable" and that the "Court has the discretion to enforce it to the extent it is found reasonable and necessary to protect one or more legitimate business interests").

115. FLA. STAT. ANN. § 542.335(c) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg.) (emphasis added).

116. Jeffrey D. Mokotoff, *Noncompete News: Georgia's New Restrictive Covenants Act*, FORD HARRISON, https://www.fordharrison.com/noncompete-news-georgias-new-restrictive-covenants-act (last visited Apr. 16, 2019).

117. LifeBrite Labs., LLC v. Cooksey, No. 1:15-CV-4309-TWT, 2016 WL 7840217, at *6 (N.D. Ga. Dec. 9, 2016).

118. *Id.*

119. *Id.*

120. *See id.* at *6–7.

terms from whole cloth."[121] The court relied on language in *Hamrick v. Kelley*, the seminal ruling in which the Georgia Supreme Court held that "the 'blue pencil' marks, but it does not write"—"[i]t may limit an area, thus making it reasonable, but it may not rewrite a contract void for vagueness, making it definite by designating a new, clearly demarcated area."[122] Finally, the court reasoned that nothing in the 2011 statute indicated that the legislature intended to change Georgia's common-law approach to blue-pencilling "other than to allow it in more circumstances."[123] Thus, the court held that the term "modify" used in O.C.G.A. § 13-8-53(d) meant courts should use the *Hamrick* approach: "Though courts may strike unreasonable restrictions, and may narrow [overbroad] territorial designations, [they] may not completely reform and rewrite contracts by supplying new and material terms from whole cloth."[124] As a result, the court found the noncompetition provision in the agreement void and unenforceable because it could not rewrite the contract to supply a missing geographical term.[125]

The *Lifebrite* case makes demonstrates that Georgia employers must still draft restrictive covenants carefully and narrowly.[126] Indeed, although the "live or die on its face" rules for restrictive covenants no longer exist, the court was unwilling to rewrite the company's contract in order to correct its mistake.[127] Georgia's enactment of such a statute and the court's subsequent application thereof signifies that the strict blue-pencil doctrine can function as an effective check on employer strong-arm tactics by demonstrating that employers should remain mindful of the inherent risks of drafting overbroad restrictive covenants.

3. *How South Carolina Should Proceed*

South Carolina should look to the examples provided by its neighbors, Georgia and Florida, and codify its own strict blue-pencil approach to non-compete enforcement in the form of a statute. Specifically, South Carolina can emulate the constructive guidance in Florida's statute while rejecting the broad mandate to reform non-competes to enforceability. Similarly, South

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121. *Id.* at *7.
122. *Id.* (quoting Hamrick v. Kelley, 392 S.E.2d 518, 519 (Ga. 1990)).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. Jeffrey D. Mokotoff, *Non-Compete News—Georgia Court Interprets Georgia's Blue Penciling Statute*, FORD HARRISON (Feb. 2, 2017), https://www.fordharrison.com/non-compete-news-georgia-court-interprets-georgias-blue-penciling-statute.

Carolina can learn from the judiciary's interpretation of Georgia's statute and preemptively craft clear parameters for modification that are consistent with the strict blue-pencil doctrine approach.

The option to blue-pencil agreements protects parties that are using these agreements for legitimate purposes—like safeguarding customer goodwill and confidential information—who warrant the assurance that an agreement that has been drafted and is subsequently judicially reviewed will be enforced. By clearly and unequivocally adopting the strict blue-pencil doctrine in South Carolina, courts will have *discretion* to review the circumstances, hear the arguments, and decide that these parties did bargain for *some* restrictions, and enforce those restrictions which the court deems appropriate.

IV. CONCLUSION

By adopting a uniform interpretation of the blue-pencil doctrine—and defining when the court has the discretion to exercise it—South Carolina can allow the most limited judicial modification of an agreement that preserves the parties' intent and permits its enforcement. The current discord in state legal authority benefits no one, and clarifying the law is in the best interests of all affected parties to a restrictive covenant. While compelling policy interests exist on both sides, courts should not allow the perfect to be the enemy of the good in weighing the value of the freedom to contract and the freedom of competition. South Carolina should embrace a pragmatic solution to its incoherent precedent on non-compete enforcement; codifying its current practice in statutory form is the best way to do so.

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