

# Non-Compete Agreements Under N.C. Law

## The Basics and Some Wrinkles

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# Non-Compete Requirements

- In writing;
- Part of an employment contract;
- Based on valuable consideration;
- Reasonable as to time and territory; and
- Protects a legitimate business interest

# Writing Requirement

- N.C. Gen. Stat. § 75-4: Covenants not to compete must be signed by employee
- Implied terms
  - *Market Am., Inc. v. Christman-Orth*, 520 S.E.2d 570, 578 (N.C. App. 1999): “For a period of six months from my written resignation or termination” applied prior to termination of distributorship
- Ambiguous terms
  - *Novacare Orthotics & Prosthetics v. Speelman*, 528 S.E.2d 918 (N.C. App. 2000): Covenant that applied two years after “the date of termination of the Employee’s employment by the Employer” was not triggered by voluntary resignation



# Employment Contract

- Covenant must be entered into at the time and as part of the contract of employment.
- Not valid if it is “the main purpose of the contract.” *Collier v. Cobb*, 300 S.E.2d 583 (N.C. App. 1983)

# Valuable Consideration

- Continued employment insufficient in NC.
- New employment sufficient.
  - Sufficient when covenant is part of original oral contract if written agreement executed after employee starts work.
  - The terms of the covenant must be agreed upon prior to employment. *See Young v. Mastrom*, 392 S.E.2d 446 (N.C. App. 1990).
  - Credibility contest.
- New consideration required if employment exists.

# New Consideration

- Linked to the covenant.
- How much is enough?
  - Promotions and compensation changes generally sufficient.
  - Discretionary raises or promotions promised if “economy improved” not sufficient.
  - *Quality Merchandising Group, Inc. v. Sides*, 582 S.E.2d 80 (N.C. App. 2003) (unpublished): 30-day termination notice insufficient consideration.
  - \$500 almost certainly enough. See *Hejl v. Hood, Hargett & Assoc.*, 392 S.E.2d 446 (N.C. App. 2009)



# Illusory Compensation Not Permitted

- Consideration Must Be Real, Not “Illusory.”
- *MSC Indus. Direct Co., Inc. v. Steele*, 2009 WL 2501762 (N.C. App. 2009).
- “The Grant was made more than thirty days *before* defendant entered into the Agreement. At the time the Grant was given, defendant had no rights to the shares, merely an expectation of rights in the future. Pursuant to the terms of the Award, plaintiff retained the right to discharge defendant at any time without cause, including the right to discharge him only moments after signing the Award and the Agreement.”

# Reasonable as to Time and Territory

- Question of law.
- Employer has burden of proving reasonableness.
- General Rule: Covenant “[m]ust be no wider in scope than necessary to protect the business of the employer.” *Manpower of Guilford County v. Hedgecock*, 257 S.E.2d 109 (N.C. App. 1979)
- Considered together.



# Geographic Restrictions

- Employer must show where customers are located.
- Employer must demonstrate that territory is no greater than necessary to protect business.

# Geographic Restrictions

*(Continued)*

- 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; and
- (6) the nature of the employee's duty and his knowledge of the employer's business operation.

# Customer Contact Restrictions or Non-Solicits

- With geographic limits.
- Without geographic limits.
  - *Farr Assocs., Inc. v. Baskin*, 530 S.E.2d 878 (N.C. App. 2000)
  - *Professional Liab. Consultants, Inc. v. Todd*, 478 S.E.2d 201 (N.C. 1996)

## A “Belt and Suspenders” Approach



# Time Restrictions

- Five years is generally the outside limit.
- “Look back” period counts.
- Tolling provision may be reasonable.
  - *Manpower of Guilford County v. Hedgecock*, 257 S.E.2d 109 (1979): one-year covenant tolled during period of violation is reasonable.
  - *Hartman v. W.H. Odell & Assoc., Inc.*, 450 S.E.2d 912 (N.C. App. 1994), *rev. denied*, 454 S.E.2d 251 (1995): five-year covenant that renews after judgment is “patently unreasonable.”

# Legitimate Business Interests

- Customer relationships;
- Confidential information; and
- Covenant must be limited to the legitimate business interest.

# Limitation Cannot Exceed Scope of Interest

- *VisionAir, Inc. v. James*, 606 S.E.2d 359 (N.C. App. 2004): Restriction that prohibited work “wholly unrelated” to the work performed for former employer is overbroad.
- *Precision Walls, Inc. v. Servie*, 568 S.E.2d 267 (N.C. App. 2002): Knowledge of confidential information justified restriction on working in any capacity for competitor.



# Public Policy Considerations for Physicians

- Focus is on interference with public's ability to obtain health care; and
- More difficult to enforce against specialists.

# Liquidated Damages

- *Eastern Carolina Internal Medicine, P.A. v. Faidas*, 564 S.E.2d 53 (N.C. App. 2002), *aff'd. per curiam*, 572 S.E.2d 780 (2002): Enforced provision requiring physician to pay a specified share of the practice's operating expenses if she resigned and then competed; not subject to same scrutiny as to reasonableness.

# The Blue Pencil Rule

- NC courts will not rewrite covenants.
- Court may choose not to enforce separable portion of the contract.



# Relief – Equitable

- Injunctive relief:
  - Damage from breach presumed irreparable;
  - Moot if noncompete expires during litigation; and
  - Orders granting and denying motions for preliminary injunctions are interlocutory but appealable.
- Declaratory Judgment
  - Jurisdiction Issues.

# Relief – Damages

- Lost profits recoverable when:
  - (1) Reasonably certain that profits would be realized except for the breach of contract;
  - (2) Amount can be determined with reasonable certainty; and
  - (3) Profits within contemplation of parties when contract made.

# Questions?

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