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Fighting the Temporary Injunction Fight

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INTRODUCTION

Section 15.50(a) of the Texas Business & Commerce Code ("Section 15.50(a)") imposes two requirements for the enforceability of a covenant not to compete in Texas.[1] The first is a technical requirement: the covenant must be ancillary to or part of an otherwise enforceable agreement. The second relates to reasonableness: the covenant must not impose a greater restraint than is necessary to protect the goodwill or other business interest of the party seeking the protection of the covenant.

On June 2, 1994, the Texas Supreme Court issued its decision in *Light v. Centel Cellular Co.*, 883 S.W.2d 642 (Tex. 1994), construing the requirements of Section 15.50(a). *Light's* analysis focused on Section 15.50(a)'s technical requirements and made the enforceability of a covenant not to compete (particularly one executed by an at-will employee) more a question of draftsmanship than legitimate business need.

On October 20, 2006, the Texas Supreme Court revisited the technical requirements of Section 15.50(a) in its *Alex Sheshunoff Management Services, L.P. v. Kenneth Johnson and Strunk & Associates, L.P.*, 209 S.W.3d 644 (Tex. 2006) decision. This time, the court pulled back from *Light* and advised courts not to become mired in technical analysis but instead to focus on the reasonableness of the covenant.[2]

On April 17, 2009, the Texas Supreme Court further clarified its retreat from *Light*'s technical analysis in *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 2009 WL 1028051 (Tex. Apr. 17, 2009). Building on the holding in *Sheshunoff*, the court held in *Mann Frankfort* that even an implied promise could support a covenant.

On December 16, 2011, the Texas Supreme Court again retreated from *Light*'s technical analysis in *Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011). In *Marsh* the court restored the common law understanding of the relationship between the employer's consideration and the employee's promise, permitting a wider range of consideration to support the employee's promise not to compete.

Section I of this paper explains the current state of *Light's* technical analysis, as modified by *Sheshunoff, Mann Frankfort* and *Marsh*. Section II analyzes Texas decisions addressing the reasonableness of time, geographic, and scope of activity restrictions in covenants not to compete. Section III briefly discusses the newly enacted Texas Uniform Trade Secret Act and how it may impact employee mobility. Section IV briefly reviews ethical issues an attorney should consider when communicating with a potential executive new-hire for a client.

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[1] Section 15.50(b) imposes additional requirements for the enforcement of a covenant not to compete against a physician. *See* TEX. BUS. & COMM. CODE § 15.50(b).

[2] For convenience, this paper frequently uses the term "covenant" as short-hand for "covenant not to compete."

I. TECHNICAL COVENANT ANALYSIS: FROM LIGHT TO SHESHUNOFF, MANN FRANKFORT AND MARSH

A. The Statute

Section 15.50(a) provides that a covenant not to compete is enforceable, if it:

> (1) is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made; and
>
> (2) contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COMM. CODE § 15.50(a).

Pursuant to Section 15.51 of the Texas Business and Commerce Code ("Section 15.51"), a court is obligated to reform an overbroad covenant not to compete, but only if the covenant is first found to be "ancillary to or part of" an otherwise enforceable agreement when made. TEX. BUS. & COMM. CODE § 15.50(c). In other words, if a covenant is *not* "ancillary to or part of" an otherwise enforceable agreement when made, it is fatally flawed and cannot be reformed or enforced. *See id.*

B. The Light Construction

In *Light*, the Texas Supreme Court focused its attention on the Section 15.50(a) requirement that a covenant not to compete be "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made" to be enforceable. *See Light*, 883 S.W.2d at 644-48. Among other things, *Light* held that the phrase "at the time the agreement is made" modified both the requirement that the underlying agreement be enforceable (at the time made) and the requirement that the covenant not to compete be ancillary to or part of the underlying agreement (at the time made). *See id.* at 645-46. In other words, under *Light*'s reading of Section 15.50(a), an agreement had to be enforceable when it was made to be capable of supporting a covenant not to compete *and* the covenant had to be ancillary to or part of that agreement when the agreement was made for the covenant to be enforceable. *Id.*

1. The Challenge for At-Will

Light's construction of Section 15.50(a) presented a challenge for covenants entered into with at-will employees. Any promise by an employer to an at-will employee that is dependent on any period of continued employment is not enforceable "when made," because the employer retains the right to terminate the employee at-will and thereby avoid performance of the promise.[3] *Light*,

[3] For example, if an employer promises to provide an at-will employee confidential information in connection with the employee's employment, the employer may avoid the promise by terminating the employee. *Light*, 883 S.W.2d at 645 n.5. However, if the employee promises not to disclose the employer's confidential information, a binding unilateral contract will be formed *if* the employer does in fact provide the confidential information. *Id.* at n.6. According to *Light*, such a unilateral agreement is not sufficient for purposes of Section 15.50(a), because the

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