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RECENT DEVELOPMENTS REGARDING COVENANTS NOT TO COMPETE

Brett Bosis
Philip Durst

Author Contact Information:
Brett Bosis and Philip Durst
DEATS DURST & OWEN, P.L.L.C
707 West 34th Street
Austin, TX

512-474-6200

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Brett Bosis and Philip Durst
DEATS DURST & OWEN, P.L.L.C
707 West 34th Street
Austin, TX 78705
(512-474-6200)
pdurst@ddollaw.com

There are two significant developments regarding the enforceability of Covenants Not To Compete under TEX. BUS. & COMM. CODE §15.50, *et seq.,* in the Texas Supreme Court's holding in *Alex Sheshunoff Management Services, L.P. v. Johnson,* 209 S.W.3d 644, 651 (Tex. 2006).

First, of course, was the holding regarding §15.50's requirement that a restriction on competition had to be "ancillary to or part of an otherwise enforceable agreement at the time the agreement was made. . . ." As we all know, these were considered three separate requirements which engendered three separate legal disputes: (1) Was the covenant ancillary to or otherwise part of; (2) An otherwise enforceable agreement; (3) And what was the nature of the transaction "at the time the agreement was made."

In *Sheshunoff*, the Court reconsidered how these elements should be considered and reconsidered its earlier decision in *Light v. Centel Cellular Company of Texas,* 883 S.W.2d 642 (1994). The Court interpreted §15.50 to mean that the unilateral contract nature of the covenant did not matter because the contract could be fulfilled by the future performance of the employer.

Second, and the focus of this paper, is that the Court also held that it now considered the various issues and factors that were previously part of the fight over whether the covenant was "ancillary to or part of an otherwise enforceable agreement" should more logically be considered by a court in its decision of the covenant was "reasonable:"

> We also take this opportunity to observe that section 15.50(a) does not ground the enforceability of a covenant not to compete on the overly technical disputes that our opinion in *Light* seems to have engendered over whether a covenant is ancillary to an otherwise enforceable agreement. Rather, the statute's core inquiry is whether the covenant "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. & COM. CODE § 15.50(a). **Concerns that have driven disputes over whether a covenant is ancillary to an otherwise enforceable agreement-such as the amount of information an employee has received, its importance, its true degree of confidentiality, and the time period over which it is received-are better addressed in determining whether and to what extent a restraint on competition is justified.**

Alex Sheshunoff Mgmt. Services, at 655-656 (Tex. 2006)(all emphasis in this paper is added).

Three years later, when the Texas Supreme Court next addressed these covenants and §15.50 in *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 858-859 (Tex. 2009), (now Chief) Justice Hecht reiterated this re-formulation in his concurring opinion:

> Rather, the statute's core inquiry is whether the covenant "contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee". Concerns that have driven disputes over whether a covenant is ancillary to an otherwise enforceable agreement—such as the amount of information an employee has received, its importance, its true degree of confidentiality, and the time

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