REVISITING NON-COMPETE PROTECTIONS IN TEXAS:
THE USE OF NON-COMPETITION COVENANTS TO PROTECT CONFIDENTIAL INFORMATION IN THE DIGITAL AGE

BY JASON M. STORCK, LAURA FAUBER,
JOSEPH HORNE, AND RACHEL MATHISEN

***Note**: This paper is provided for informational purposes only and does not constitute legal advice. Always seek the advice of counsel for your specific situation.*

INTRODUCTION

Covenants not to compete can be an important—and often undervalued—tool for companies to use in protecting their confidential, proprietary, and trade secret information. While the public perception of such covenants has, at times, been seen as harmful or unduly restrictive,[1] these agreements can, when used properly, offer additional layers of protection that are crucial in protecting a company's sensitive business information in an age where it can be compromised with the stroke of a few keys or the download of a file.

Non-compete restrictions, however, may not be right for every employer, in every industry, or for every type of employee. And, as such, deciding whether to use covenants not to compete, the scope of any such restrictions, and which employees should be subject to them are questions that corporate counsel should take into consideration when evaluating how best to protect the company's sensitive business information.

Texas, like a number of states,[2] recognizes the importance of non-compete agreements in protecting a company's confidential, proprietary, and trade secret information and, therefore, will allow such restrictions, provided that they are drafted within applicable statutory and common law boundaries *or can be reformed to do so*. This paper provides an overview of covenants not to compete in Texas and the boundaries within which employers can use these restrictions, including in a more complicated world of constant connectivity and on-line services.

Section I of this paper provides an overview of Texas law on the enforceability covenants not to compete, including an overview of the Covenants Not to Compete Act and how the rules governing these restrictions and their enforcement have evolved over time. Section II of this paper offers practical considerations for effectively using non-competes in today's environment.

---

[1] In many cases, these perceptions are influenced and perpetuated by media coverage of overly broad non-competes that are used in the context of lower level employees. *See, e.g.*, Sarah Whitten, *Jimmy John's drops noncompete clauses following settlement*, CNBC, (June 22, 2016), https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html.

[2] In contrast, there are states that have completely prohibited the use of non-competition or similar restrictions, such as California, and others that have significantly restricted the overall use of such agreements, including setting very specific limitations on who can be bound by these kind of restrictions, such as Colorado, Hawaii, Oregon, and, most recently, Washington. *See* CAL. BUS. & PROF. CODE § 16600 (prohibiting employment-based non-competes); COLO. REV. STAT. ANN. § 8–2–113 (West) (prohibiting non-competes with exceptions for non-competes used to protect trade secrets, in the context of sale of a business, or for key employees); HAW. REV. STAT. ANN. § 480–4 (West) (prohibiting non-competes in information technology); OR. REV. STAT. ANN. § 653.295 (West) (limiting the enforceability of non-competes); Wash. H.B. 1450 (2019 session) (proposing disclosure requirements and employee-specific restrictions non-competes). Therefore, before using such restrictions outside of Texas, companies should be well-versed on the rules of the specific states in which they have employees.

I. ENFORCEABILITY OF NON-COMPETE COVENANTS IN TEXAS

a. The Covenants Not to Compete Act.

As discussed above, covenants not to compete are enforceable in Texas, provided that they fall within certain parameters. While Section 15.05 of the Texas Business & Commerce Code (the "Code") provides that, in general, any restraint on trade is unlawful, Section 15.50 of the Code, also known as the Covenants Not to Compete Act (the "Non-Compete Act"),[3] creates an exception for non-compete provisions, provided that they:

> (1) are ancillary to or part of an otherwise enforceable agreement at the time the agreement is made, and
>
> (2) contain 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.[4]

Accordingly, Section 15.50 codifies a two-part test for determining the enforceability of non-compete restrictions. Texas courts must first determine whether the non-compete is ancillary to an otherwise enforceable agreement. Although Texas courts have grappled with this requirement for decades, it is now clear that the ancillary prong simply requires that the non-compete be "part of [an] otherwise enforceable agreement between the parties" that is supported by sufficient consideration, as discussed below.[5]

Beyond the ancillary requirement, and more central to modern analysis of non-competes, a non-compete agreement must also be reasonable with respect to the time, geographic area, and subject matter (*i.e.*, the activity to be restricted).[6] Texas courts evaluate each of these factors on a case-by-case basis. Generally, the employer will bear the burden of establishing that a non-compete agreement meets each of the requirements of Section 15.50.

Finally, the Non-Compete Act requires courts to reform overbroad non-compete agreements, where appropriate.[7] However, a court may only reform the breadth of a non-compete. If the court finds that the non-compete is not otherwise ancillary to or part of an enforceable agreement, it may not be reformed.

---

[3] TEX. BUS. & COM. CODE ANN. § 15.50(a).

[4] *Id.* Section 15.50 also sets out specific requirements for the enforcement of physician non-compete agreements. *See* TEX. BUS. & COM. CODE ANN. § 15.50(b).

[5] *Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011).

[6] TEX. BUS. & COM. CODE ANN. § 15.50(a).

[7] TEX. BUS. & COM. CODE ANN. § 15.51.

Title search: Revisiting Non-Compete Protections in Texas: The Use of Non-Competition Covenants to Protect Confidential Information in the Digital Age

"

New Litigation Landmines
"