Dallas Bar Association
HEADNOTES
February 2012 | Volume 37 | Number 2 | Focus | Mergers & Acquisitions/Securities

The Texas Supreme Court's Latest On Post-Employment Non-Competition Agreements

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In June 2011, the Texas Supreme Court published its latest decision about post-employment non-competition agreements. The decision, *Marsh USA Inc. v. Cook*, No. 09-0558, --- S.W.3d ---, 2011 WL 2517019 (Tex. 2011), is important and will likely impact the enforcement and enforceability of employee non-competition agreements across the state.

Marsh & McLennan Companies, Inc. sued its former managing director, Rex Cook, to enforce a restrictive covenant against him. In exchange for Cook's promise not to compete post-employment, he received stock options. Never before had the Texas Supreme Court, or just about any Texas appellate court, held that non-compete agreements could be supported by a financial incentive like stock options. The Texas Supreme Court, however, reversed the Court of Appeals by a narrow majority, finding that the non-compete may be enforced.

The Court declared that as long as the consideration provided by the employer (here, stock options) is *reasonably related* to the protection of a company's goodwill, it will be worthy of protection under the Covenants Not to Compete Act, Tex. Bus. & Com. Code § 15.50. The Supreme Court also made clear what the heart of the issue is when it comes to non-competes:

"The [] 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…".

Since 1990, Texas non-competition law has been governed by statute (the Covenants Not To Compete Act) and, for the most part, the Texas Supreme Court's 1994 decision in *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 643. Without delving too much into the weeds, the Supreme Court in *Light* added technical requirements for drafting enforceable restrictions, and courts since then have spent an inordinate amount of time parsing *Light's* meaning.

Since 2007, the Texas Supreme Court has moved away from the rigidity of its *Light* decision. First, *Alex Sheshunoff Mgt. v. Johnson*, 883 S.W.3d 642 (Tex. 2007), reversed the principle that the contemporaneous exchange of confidential information at the time of execution was a requirement of the law. Next came *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009), which reversed the principle that confidential information had to be expressly promised by the employer to enforce a non-compete. *Marsh* further erodes *Light* by recognizing that even financial rewards in the form of stock options can support a non-compete.

All three cases address the conditions that *Light* placed on non-competes and, ultimately, conclude that the law was not intended to be what it had become. The cases likely reflect what our courts have always known: that any analysis of non-competes must involve a balancing of two interests—the right of companies to protect themselves from employees, and the right of employees to work in a profession or position of their choosing. Two cases long predating *Light*, for instance, illustrate these principles: *Bettinger v. N. Fort Worth Ice Co.*, 278 S.W. 466 (Tex. Ct. App. 1925); *Justin Belt v. Yost*, 502 S.W.3d 681 (Tex. 1973).

There is no question that the *Sheshunuff-Mann Frankfort-Marsh* trilogy is significant and that now it may be easier to advise clients and litigants regarding non-competition agreements. Courts may even be more receptive to upholding them. Ultimately, however, the validity of a non-compete agreement will turn on the need for the agreement and its reasonableness, a principle that has been around for nearly 100 years, if not longer. **HN**

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