Steven P. Watten
Strasburger & Price, LLP
2801 Network Boulevard
Suite 600
Frisco, TX 75034
(469) 287-3939
Steve.Watten@strasburger.com
vCard
Bio
Website

LinkedIn
Twitter
Blog
JD Supra

Kim Moore
kim.moore@strasburger.com

Despite the Trend, Some Texas Noncompetes Remain Unenforceable

In the wake of the Sheshunoff[1] and Mann-Frankfort[2] Texas Supreme Court decisions numerous courts have followed the state high court's lead and ruled that Texas noncompetes in at-will employment agreements are enforceable.

In Sheshunoff, the Texas Supreme Court held that for a noncompete to be enforceable an employer does not have to have an enforceable obligation at the time the agreement was signed. Instead, the Court held the agreement could be enforced if the employer supplied the consideration for the noncompete, generally confidential information, after the noncompete was signed during employment.[3] In Mann Frankfort, the Texas Supreme Court made enforcement easier holding that it would imply a promise to provide confidential information to an employee when the employee agreed not to disclose information which was reasonably necessary for the employee's work.[4]

Despite the current momentum which unquestionably favors noncompete enforcement, recent cases emphasize that the traditional noncompete analysis is not only required but it could effect enforcement. Specifically, the noncompete must (1) be ancillary to or part of an otherwise enforceable agreement at the time the agreement was made; and (2) the noncompetes must be reasonable in terms of time, scope and geography.[5] To be ancillary to or part of an otherwise enforceable agreement, the consideration given to the employee must "give rise" to the employer's interest in restraining the employee from competing and the covenant must be designed to enforce the employee's return promise in the otherwise enforceable agreement.[6]

In Marsh USA, Inc. and Marsh & McLennan Co., Inc. v. Rex Cook,[7] the Defendant was managing director for Marsh, who employed him in 1983. He signed a stock option plan in 1992 and was awarded options in 1996. Before Cook could exercise the options, he was required to sign a nonsolicitation and noncompete agreement. A year before Cook left to work for a Marsh competitor, he exercised the options. When Marsh attempted to enforce its Agreement, Cook challenged the enforceability of the noncompete because the stock options, as with other forms of compensation, "did not give rise to a reason to restrain trade." The Court agreed and also noted that the other interests in restraining trade existed before the agreement was signed. There are numerous historic noncompete cases holding that past consideration is not good consideration which is the Court's clear implication.[8] Marsh argued that protection of its goodwill gave rise to the reason to restrain trade. However, the Court distinguished fostering employee goodwill through offering options to valued employees and the options thereby giving rise to the employer's valid basis in restraining competition. The Court also relied on the Olander v. Compass Bank[9] decision which previously concluded that stock options did not give rise to a reason to restrain trade.

Likewise, a noncompete agreement was not enforced in Kenyon International Emergency Services v. Malcolm.[10] Kenyon is in the business of responding to mass casualties. As such, it uses independent contractors in addition to full time doctors, nurses, therapists and coroners when an accident or disaster requires their services. Kenyon has agreements attempting to prevent its workers from competing against it or soliciting other workers in addition to using or disclosing its information. Kenyon attempted to enforce its agreement against eight different type workers each with separate and distinct agreements. The Court found basic problems with the agreements. Specifically, the agreements were too broad as they did not limit the area, the tasks or the time the employees were prohibited from competing as is required by Tex. Bus. & Com. Code §15.50(a). The Court also found issues with the scope of the prohibition because employees could not solicit business from current, former or potential clients and the noncompete prohibited work with any competitor even if the employee had only performed limited Kenyon work such as one lecture or limited training. The Court also found issue with the unlimited, indefinite nature of the prohibition finding it unenforceable. While the facts may be a bit unusual given the transient nature of the Kenyon employees, the traditional noncompete analysis remains sound. An enforceable noncompete must be reasonable in terms of time, scope and geography and as the Marsh Court observed, the consideration must also give rise to a reason to restrain trade.

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[1] *Alex Sheshunoff Management Services, L.P. v. Johnson,* 209 S.W.3d 644 (Tex. 2006).
[2] *Mann Frankfort Stein & Lipp Advisors v. Fielding,* 289 S.W.3d 844 (Tex. 2009).
[3] *Alex Sheshunoff Management Services, L.P. v. Johnson,* 209 S.W.3d 644 (Tex. 2006).
[4] *Mann Frankfort Stein & Lipp Advisors v. Fielding,* 289 S.W.3d 844 (Tex. 2009).
[5] Tex. Bus. & Com. Code §15.50(a).
[6] *Light v. Centel Cellular* Co. *of Tex.,* 883 S.W.2d 642, 647 (Tex. 1994).
[7] *Marsh USA Inc. v.* Cook, 287 S.W.3d 378 (Tex. App. — Dallas 2010, pet. granted).
[8] *Trilogy Software, Inc. v. Callidus Software, Inc., and Liu,* 143 S.W.3d 452, 459-90 (Tex. App. —Austin 2004, *pet filed).*
[9] *Drummond Am , LLC v. Share Corp.,* 692 F. Supp. 2d 650 (E.D. Tex. 2010)
[10] *Kenyon Int'l Emergency Servs. V. Malcolm,* 2010 U. S. Dist. LEXIS 55283 (S.D. Tex. June 7, 2010).

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