

Noncompete News: Texas Values Clash in Noncompete Case High Court Agrees to Hear

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On April 9, the Texas Supreme Court granted review in Marsh USA Inc, et al. v. Cook, a case that will forever impact Texas law on covenants not to compete. The issue, when you cut to the meat of the coconut: Can money serve as consideration for an employee's agreement not to compete after leaving employment? Here is what occurred, according to the opinion by the 5th Court of Appeals, which was hearing the case on appeal from partial summary judgment: Rex Cook worked for Marsh USA Inc. in a high-level position and was awarded stock options. Before exercising them, he had to sign off on a noncompete. He signed, he exercised, he left. Marsh sued him, seeking enforcement of the noncompete. The 5th Circuit refused to enforce, holding that Texas law requires the consideration given to the employee to consist of the employer's confidential information. Why? The 5th Circuit understood Texas law to say that noncompetes are designed to protect confidential information given the employee — just that and only that. Essentially, the court adopted a restrictive view of when noncompetes are enforceable. But Marsh argued in its petition for review that this view is too restrictive and pays too little attention to an employer's interest in preserving its goodwill. It argued for a broad view of covenants, contending that giving money to an employee to work harder translates to increased goodwill for the company, and that bought-and-paid-for goodwill deserves protection by way of a noncompete.

The stakes are high. Cook's reply to Marsh's petition hits the nail squarely on the head: Marsh's "argument would allow an employer to impose on an employee a covenant not to compete in exchange for any benefit the employer provides to incentivize the employee to work hard and build the company." Marsh similarly homes in on the key issues, asserting the 5th Circuit's opinion "creates an environment hostile to economic development" and warning in its petition that "employers like Marsh, whose goodwill exists in the form of customer relationships, may have to consider relocating to states that clearly and consistently protect goodwill." In one corner, the Texas value of doing what it takes to allow individuals to make their own way in the world, with as few restraints as possible; in the other, the Texas value of promoting business and giving an individual the freedom to make a deal — money in exchange for a noncompete. Don't be fooled for a minute. This case is cloaked in legalisms but the issues go deep — way deep.

If you have any questions regarding this decision or non-compete agreements in general, please contact the Ford & Harrison attorney with whom you usually work or the author of this Noncompete News, Michael P. Maslanka, mmaslanka@fordharrison.com.

