2 Tex. Intell. Prop. L.J. 19

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THE NEW COVENANT NOT TO COMPETE STATUTE[d1]

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Table of Contents

I. Where We Are Now and How We Got There

A. Texas Law Prior to 1987

For decades, Texas courts applied a "reasonableness" test to covenants not to compete. The Texas Supreme Court gave its classic judicial formulation of the reasonableness test in *Weatherford Oil Tool Co. v. Campbell*:[1]

An agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable. Where the public interest is not directly involved, the test usually stated for determining the validity of the covenant as written is whether it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer . . . . The period of time during which the restraint is to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement.[2]

Accordingly, Texas courts refused to enforce covenants not to compete if their restrictions were greater than reasonably required or if the covenant imposed undue hardship upon the person restricted.[3] Furthermore, Texas courts required the covenants not to compete to be ancillary to and in support of an ***20** otherwise lawful relationship.[4] Examples of such contractual relationships where the Texas Supreme Court enforced covenants not to compete under the "reasonableness" test included employment relationships,[5] contracts for the sale of a business,[6] partnership agreements,[7] leasing arrangements,[8] and settlement agreements.[9]

In *Weatherford,* the court also articulated its views on the "reformation" of an overly broad covenant not to compete. The court reiterated the old common-law rule that "although the territory or period stipulated by the parties may be unreasonable, a court of equity will nevertheless enforce the contract by granting an injunction restraining the defendant from competing for a time and within an area that are reasonable under the circumstances."[10] However, the *Weatherford* court concluded that when a covenant not to compete was "reformed" by a court in equity, the promisee could not recover in an action for damages.[11] Thus, damages could not be awarded for violations of an overly broad covenant.

Texas courts reformed overly broad covenants even to the point of adding time and territorial limitations where the covenant did not include them. For instance, in *Justin Belt Co. v. Yost,*[12] the Texas Supreme Court affirmed a trial court's reformation of a noncompetition agreement which contained no limitations as to time or territory but merely stated that the two former employees would "not in any manner engage in the boot business or in the manufacture thereof."[13] The trial court reformed the noncompetition agreement by limiting it to a period of seven years and to the geographical area of the continental United States west of the Mississippi River. On appeal, the two former employees argued that the settlement agreement was void and unenforceable because it contained no time or territory limitations and that the trial court lacked the equitable power to reform the agreement. The Texas Supreme Court upheld the reformation, observing that:

> [I]t can no longer be said that a covenant not to compete is void and unenforceable simply because it is not reasonably limited as to either time or area, and that a court of equity will nevertheless enforce the contract by granting an injunction restraining competition for a time and within an area that are reasonable under the circumstances.[14]

B. Hill v. Mobile Auto Trim *and its Progeny*

On January 28, 1987, the Texas Supreme Court decided *Hill v. Mobile Auto Trim,*[15] a case involving the enforceability of a covenant not to compete between a franchisor of a mobile auto trim business and a former franchisee. The court articulated a four-part reasonableness test as follows: the covenant not to compete (1) must be necessary for the protection of the promisee (i.e., there must be a legitimate interest in protecting the business' good will or trade secrets); (2) the covenant must not be oppressive to the promisor; (3) the covenant must not be injurious to the public; and (4) the covenant should not be enforced unless the promisee gives consideration or something of value.[16] The *Hill* court went on to ***21** adopt a new test for covenants not to compete announcing that "[c]ovenants not to compete which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable."[17]

The majority view in *Hill* was criticized from the outset. The dissent in *Hill* accurately predicted the problems the "common calling" test would bring:

> The court implicitly holds that a former franchisee or employee who is engaged in a "common calling" is free to divert the customers of a former franchisor or employer in disregard of a prior contractual agreement not to do so. If this is what the court means, the practical effect of this is to void most, if not all, covenants not to compete in franchise agreements and/or to generate extensive and costly litigation until the court adopts a definition of "common calling" and/or litigants test the limits of this opinion. What about employees engaged in a "common calling" that also have knowledge of the employer's trade secrets? Are they free to divulge the trade secrets in violation of an agreement to the contrary?[18]

Several months later, the court issued its decision in *Bergman v. Norris of Houston.*[19] In *Bergman,* the Court held that a post-employment restraint against four hair stylists was unenforceable because the employees were "engaged in a common calling" and there was "no sale of a business or imparting of specialized information."[20]

On July 13, 1988, the Texas Supreme Court issued two more decisions involving covenants not to compete. In *DeSantis v. Wackenhut Corp.,*[21] the Texas Supreme Court held that Texas, not Florida, law governed. The court held that Florida law was contrary to the fundamental public policy of Texas because Florida did not have the "common calling" doctrine.[22] The Texas Supreme Court then applied Texas law and held the covenant unenforceable.[23] There was no attempt to reform the covenant and no discussion of reformation. The court dealt an additional blow to noncompetition agreements in *DeSantis I* by holding that Wackenhut's attempted enforcement of an overly broad noncompetition agreement violated the Texas Free Enterprise and Antitrust Act.[24] The court noted in its holding that the covenant was an unreasonable restraint of trade, then concluded that such a contract gave rise to antitrust liability.[25] Under Texas antitrust law, treble damages may be awarded if the conduct is willful or flagrant.[26] Thus, the court essentially espoused a *per se* view of antitrust liability for an overly broad covenant not to compete.

In a companion case styled *Martin v. Credit Protection Associates,*[27] the court stated that only two general varieties of

non-competition agreements were enforceable in Texas: "More specifically, we held [in *Hill* that] there are *only two instances* when covenants not to compete will be upheld: (1) covenants incident to the sale of a business; and (2) post-employment covenants to prevent utilizing special training or knowledge."[28]

***22** As noted, *Hill* and the "common calling" test were criticized from the outset. As *Bergman, DeSantis I* and *Martin I* came out, following *Hill,* a groundswell of opposition developed. For example, one Texas court reviewed the opinions in *Hill, Bergman, DeSantis I,* and *Martin I* and concluded as follows:

> [I]t seems clear that the opinions in *Hill, Bergman, DeSantis,* and *Martin* have effectively repudiated long-honored, common-law principles relating to consideration as applied to the law of contracts in cases involving post-employment covenants not to compete, or covenants and promises which limit an employee's right to compete with his former employer. We disagree with the Supreme Court's abolition of these sound common-law principles, as well as its disregard of the distinction between a restraint which forbids competition and one which only operated to prevent the employee, for a reasonable period of time, from diverting the clients or customers of his former employer.[29]

C. The 1989 Covenant Not to Compete Statute

In 1989, the Texas Legislature responded to pressure from the organized bar and parts of the business community by adopting a new Subchapter E to the Texas Business and Commerce Code (hereinafter the "1989 Act").[30] The 1989 Act read as follows:

Sec. 15.50. CRITERIA FOR ENFORCEABILITY OF COVENANTS NOT TO COMPETE. Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable to the extent that it:

(1) is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration; and

(2) contains reasonable limitations as to time, geographical area, and scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Sec. 15.51. PROCEDURES AND REMEDIES IN ACTIONS TO ENFORCE COVENANTS NOT TO COMPETE.

(a) Except as provided in Subsection (c) of this section, a court may award the promisee under a covenant not to compete damages, injunctive relief, or both damages and injunctive relief for a breach by the promisor of the covenant.

(b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisee has the burden of establishing that the covenant meets the criteria specified by Subdivision (2) of Section 15.50 of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this subsection, the "burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(c) If the covenant meets the criteria specified by Subdivision (1) of Section 15.50 of this code but does not meet the criteria specified by Subdivision (2) of Section 15.50, the court, at the request of the promisee, shall reform the covenant to the extent necessary to cause the covenant to meet the criteria specified by Subdivision (2) of Section 15.50 and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not meet the criteria specified by Subdivision (2) of Section 15.50 and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.[31]

***23** SECTION 2. This Act applies to a covenant entered into before, on, or after the effective date of this Act.[32]

Through the omission of a "common calling" factor for the reasonableness test, the 1989 Act was intended to overrule the "common calling" test announced in *Hill.*[33] The 1989 Act also mandated judicial reformation of overly broad covenants not to compete upon request. Prior to the 1989 Act, a court of equity had the ability, but not the obligation, to reform an overly

broad covenant.[34] Further, the 1989 Act codified the *Weatherford* rule that damages cannot be recovered *for the time period* before the date of reformation when a covenant not to compete has been reformed.[35]

D. Cases Decided After the 1989 Act

On June 6, 1990, the Texas Supreme Court handed down three decisions involving noncompetition agreements: *Juliette Fowler Homes, Inc. v. Welch Associates, Inc., [36] Martin v. Credit Protection Ass'n, Inc. ("Martin II"),*[37] and *DeSantis v. Wackenhut Corp. ("DeSantis II").*[38] In each of these cases, the court noted that the 1989 Act purported to retroactively apply to the covenants at issue. Nevertheless, the court refused to apply the 1989 Act in any of the cases, instead it held that the outcome in each of these cases would not differ from the court's common-law analysis (as guided by *Hill* and its progeny).[39]

One of the most far-reaching recent decisions was the holding in *Martin II* that covenants not to compete which are ancillary to an "at-will" employment agreement are unenforceable.[40] As a general rule, an "at-will" employment relationship is one where either (a) there is no definite term of employment, or (b) there exists no standard for employee discharge. An "at-will" employment relationship may be terminated by either the employee or the employer with or without cause and without liability for failure to continue the employment.[41] The Texas Supreme Court in *Martin II* dissolved the trial court injunction and held the covenant not to compete "void in all respects." The court first determined that employment "at will" does not constitute "an otherwise enforceable agreement" as required for an enforceable covenant not to compete.[42] Martin's employment "agreement" consisted only of a covenant not to compete, and lacked the usual employment terms such as title, position, duration of employment, compensation, duties and responsibilities.[43]

The *Martin II* court also held that a covenant not to compete executed on a date other than the date of execution of the underlying agreement was unenforceable as a matter of law absent "independent ***24** valuable consideration."[44] The court rejected the argument that continuation of employment constituted independent valuable consideration. The court allowed in dicta, however, that special training or knowledge acquired by the employee during employment could constitute such independent valuable consideration.[45] The court stated in a footnote that "customer information" was neither special training nor knowledge which may constitute independent valuable consideration, although it could constitute a proprietary and therefore protectable business interest which could support an otherwise enforceable noncompetition agreement.[46]

In *Travel Masters, Inc. v. Star Tours,*[47] the Texas Supreme Court again refused to enforce a covenant not to compete that was ancillary to an "at-will" employment agreement. In *Travel Masters,* a travel agent was hired by Star Tours and executed an "Employee Non-Competition Agreement" at the inception of her employment. When the agent left and helped found a competing travel agency, Star Tours sought and obtained a temporary injunction against her.[48] The Texas Supreme Court reversed the district court's opinion, holding the covenant unenforceable because it found that the employment relationship was "at-will" and that an employment-at-will situation was not binding on either party because it may be terminated by either party at any time. Hence, the court concluded that the covenant was not ancillary to an otherwise enforceable agreement.[49]

In *DeSantis II,*[50] the Texas Supreme Court first analyzed the enforceability of the covenant under common law principles, and specifically under the test set out in *Hill.*[51] In discussing the *Hill* test, the court noted that the "references to 'common calling' in *Hill* and *Bergman* have proven confusing in determining whether to enforce agreements not to compete."[52] The court agreed with the view of most observers when it noted that "the Legislature has now rejected common calling as a test for the reasonableness of non-competition agreements."[53] However, the court noted that the nature of the promisor's job, i.e., whether it was a common calling, may sometimes factor into the determination of reasonableness. Consequently, the court declined to apply the "common calling" doctrine.[54] In *DeSantis II,* the court found that the covenant was ancillary to an otherwise valid employment relationship.[55] The focus then turned to whether the agreement was necessary to protect some legitimate interest of the employer. Wackenhut claimed that its protectable interest was its business good will, which, it maintained, DeSantis had appropriated. The *DeSantis II* court, however, held that DeSantis developed only minimal, if any, business goodwill for Wackenhut,[56] that DeSantis did not appropriate for his own use any business ***25** goodwill developed for Wackenhut,[57] and that DeSantis did not take advantage of any confidential or secret information.[58] The court also held that Wackenhut, as the former employer, had not carried its burden to show that DeSantis' noncompetition agreement was necessary to protect a legitimate business interest.[59] Accordingly, the court concluded that the agreement was unreasonable and, therefore, unenforceable.[60] After deciding that the result would be the same if analyzed under the 1989 Act,[61] the *DeSantis II* court concluded that the court could not reform the agreement to meet either the criteria of the 1989 Act or the criteria under *Weatherford.*[62] Essentially, the court concluded that because Wackenhut failed to establish a protectable interest, *no* covenant not to compete could be reasonably necessary.

In *Juliette Fowler Homes,*[63] the Texas Supreme Court considered a covenant not to compete which required the promisor (a fund raising charity) not to enter into any form of contract for services with any of the promisee's (a fund raising campaign organization's) clients for a period of two years. Because the covenant not to compete contained no geographical or scope of

activity limitations, the court found that the covenant not to compete was "absolute, unequivocal and unreasonable," and unenforceable on grounds of public policy.[64]

In *Peat Marwick Main & Co. v. Haas,*[65] the Texas Supreme Court analyzed a provision in a partnership agreement which obligated a terminated or departing partner to pay compensation to his former firm if, within a set period of time, he solicited or furnished services to the partners' clients. The court first ruled that the agreement constituted a restraint on trade but was ancillary to an otherwise enforceable agreement (i.e., a merger agreement between different accounting businesses).[66] The court then applied the reasonableness test and balanced the following factors: the economic hardship which the covenant imposed on the departing party, whether the restriction was greater than necessary to protect the business and good will of the employer, and whether the restriction adversely affected the public interest.[67] Although recognizing a legitimate business interest in preventing employees or departing partners from taking away the firm's customers, the court held that inhibiting departing partners from engaging in accounting services for clients who were acquired *after* the partner left, or with whom the accountant had no contact while associated with the firm, was unreasonable and therefore unenforceable.[68] In *Haas,* the court refused to reform the covenant not to compete. Although it recognized that the 1989 Act may have modified the common law by providing for reformation in section 15.51(c), the court noted that the statute prohibited an award of damages for a breach of the covenant before its reformation. The court held that since Peat Marwick obtained no reformation of the covenant, the 1989 Act would also prohibit Peat Marwick from obtaining damages.[69]

***26 II. Where We Are Headed -- The 1993 Statute**

A. The Text

By 1993, and despite the 1989 Act, the Texas Supreme Court still had not enforced a single covenant not to compete in the seven years since its decision in *Hill.* As a result, another attempt to overrule the Texas Supreme Court was made. The following is the text of House Bill 7,[70] which became effective September 1, 1993:
SECTION 1. Section 15.50, Business & Commerce Code, is amended to read as follows:

Section 15.50. CRITERIA FOR ENFORCEABILITY OF COVENANTS NOT TO COMPETE. Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable *if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made* to the extent that it [÷]
[]

[] 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.

SECTION 2. Sections 15.51(b) and (c), Business & Commerce Code, are amended to read as follows:

(b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, *for a term or at will,* the promisee has the burden of establishing that the covenant meets the criteria specified by [] Section 15.50 of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For purposes of this subsection, the "burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(c) If the covenant *is found to be ancillary to or part of an otherwise enforceable agreement but 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* [], the court [] shall reform the covenant to the extent necessary to cause the *limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee* [] and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not *contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than* [] necessary to protect the goodwill or other business interest of the promisee, *and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee,* the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

***27** SECTION 3. Subchapter E, Chapter 15, Business & Commerce Code, is amended by adding Section 15.52 to read as follows:

Sec. 15.52. PREEMPTION OF OTHER LAW. The criteria for enforceability of a covenant not to compete provided by Section 15.50 of this code and the procedures and remedies in an action to enforce a covenant not to compete provided by Section 15.51 of this code are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise.

SECTION 4. This Act takes effect September 1, 1993.

SECTION 5. This Act applies to a covenant not to compete entered into before, on, or after the effective date of this Act unless the enforceability of the covenant has been finally adjudicated by a court of competent jurisdiction before the effective date of this Act.[71]

B. The Probable Impact

The 1993 Act contains a number of clarifying amendments to the 1989 Act. At least three provisions seem likely to substantially enhance the enforceability of covenants not to compete. First, section 15.50 is amended to delete the requirement of "independent valuable consideration" if the noncompetition agreement was entered into on a date other than the underlying agreement.[72] This allows the contracting parties to amend or restructure their agreement and include a covenant not to compete without having to guess at just what payments might be required to constitute "independent valuable consideration."

A second major change, which will likely have far-reaching effects, is the six-word amendment to section 15.51(b).[73] Section 15.51(b) on its face deals only with the burden of proof in cases where the underlying agreement is primarily for personal services. The amendment expressly applies the rule regarding the burden of proof to such agreements "for a term or at will."[74] The intended purpose is clear -- section 15.51(b) and therefore section 15.50 by implication allow the enforcement of a noncompetition agreement ancillary to an at will employment relationship. A review of the legislative history reveals exactly this intent. The relevant bill analysis notes that the amendment provides "that 'at will' personal service contracts are covered."[75] This statement is made after noting a "case invalidated covenants not to compete in connection with 'at will' employment contracts."[76] Hence, both the text of the 1993 Act and the legislative history clearly reflect an intent to overrule the rule applied in *Martin II* and *Travel Masters* which prohibits enforcing noncompetition agreements ancillary to an at will relationship.[77]

Finally, the 1993 Act adds section 15.52,[78] which essentially states that sections 15.50 and 15.51 are exclusive and "preempt" all other law regarding the criteria for enforceability or procedures or remedies for enforcement of a covenant not to compete.[79] Section 15.52 refers to the preemption of ***28** "common law or otherwise."[80] This reference may imply a preemption of equity principles as well as the common law. One could argue that section 15.52 preempts equitable defenses of the promisor, especially since section 15.51(c) provides that the court "shall" reform an overly broad covenant.[81] It seems quite possible that the authors of the 1993 Act were aware of footnote six in *DeSantis II,* which provided a "list" of legal and equitable defenses to the enforcement of a noncompetition agreement.[82] Given the breadth of the language used in section 15.52, one might argue that all common law and equitable defenses are now preempted. Whether such a sweeping effect was intended, however, is not at all clear from the limited legislative history available at the time this article was prepared. Instead, the bill analysis merely states that section 15.52 was intended to provide that the statutory requirements will "prevail over the common law."[83]

The 1993 Act contains still more interesting provisions. For example, it expressly allows a covenant not to compete to be ancillary to "or part of" an otherwise enforceable agreement.[84] This suggests that a noncompetition agreement may be included in an employment, partnership, franchise, license, confidentiality, or just about any other type of known agreement. If so, this approach seems consistent with *Blanton* and contrary to *Travel Masters*.[85]

Another interesting change is the amendment deleting the requirement that a promisee ask for reformation.[86] As amended, section 15.51(c) requires a court to reform an overly broad covenant and then enforce it as amended.[87] This change presumably will eliminate situations like *Gomez v. Zamora,*[88] in which the court of appeals refused to reform an overly broad covenant because the 1989 Act required that the promisee request reformation from the trial court.[89]

Finally, it is worth noting that the 1993 Act is expressly retroactive. The 1993 Act states that it applies to a covenant "entered

into before, on, or after" its effective date.[90] This provision is quite similar to the retroactivity clause used in the 1989 Act,[91] except that the 1993 Act does not purport to apply to covenants "finally adjudicated" by a court before September 1, 1993.[92]

The constitutionality of the 1989 Act's retroactive effect was addressed in *Webb v. Hartman Newspapers, Inc.*[93] Webb signed an employment agreement which included a covenant not to compete. In 1989, Hartman fired Webb. Webb later opened a competing newspaper business within the covered geographic area. The trial court entered a temporary injunction which modified the terms of the covenant not to compete, restricting the geographic scope of the covenant to within a 50-mile radius of Hartman's newspapers in Texas. Webb argued that the trial court applied sections 15.50 and 15.51 in violation of Article I, Section 16 of the Texas Constitution, which prohibits the making of any retroactive law. The court disagreed and ruled that "to enjoy the protection of Article I, Section 16, one's right must be vested, ***29** something more than a mere expectancy based upon an anticipated continuance of an existing law."[94] The court found that Webb did not breach the covenant until after the 1989 Act became effective and that his defensive rights did not vest prior to the application of the 1989 Act.[95] Under this view, the retroactive application of the 1993 Act depends upon when the covenant was actually breached, not when it was entered into. It remains unclear, however, just how the courts will decide the issues involving the constitutionality of the retroactive effect of the 1993 Act.

III. Conclusions

The 1993 Act eliminates several major obstacles to enforcing covenants not to compete. Because so many employment relationships are at will, the 1993 Act seems likely to have a significant impact on litigation in employer/employee cases. The legislature seems to have clearly rejected most of the efforts by the Texas Supreme Court to limit the enforceability of such covenants. The express preemption of the common law signals the Legislature's intent to have the Texas courts look at noncompetition agreements in a new light. Because the 1993 Act incorporates the traditional common law test of reasonableness, however, the common law and the courts will remain an important ingredient in the development of this area. Moreover, the 1993 Act's retroactive and preemptive effects remain unclear in many respects, thus leaving such issues for the courts.

IV. Epilogue

On October 6, 1993, the Texas Supreme Court issued a per curiam opinion on a motion for rehearing on an application for a writ of error in *Light v. Centel Cellular Co.*[96] In *Light,* the court overruled its earlier decision to deny the writ and, without oral argument, reversed the court of appeals. In its per curiam decision, the court went back to *Martin* and *Travel Masters,* holding that the covenant not to compete signed by an at will sales employee was "not ancillary to an otherwise enforceable agreement" and therefore could not be enforced.[97] In footnote 2 in its opinion in *Light,* the court noted the passage of the 1993 Act and its purported retroactive application. Without explaining why, the court simply stated that it "need not determine in this case whether amended sections 15.50 and 15.51 apply retroactively because section 15.50 would not require a result in this case different from the one we reach today."[98] The court seems to have held that the "at will" rule continues even under the 1993 Act. It must be noted, however, that the court did not refer to the language in section 15.51 regarding at will relationships, nor did the court refer to any of the relevant legislative history. Hence, the validity of the court's reasoning seems unclear.

Footnotes

a1 Vinson & Elkins L.L.P., Houston, Texas. The views in this article are only the current views of the author, not necessarily those of Vinson & Elkins L.L.P. or any of its clients.

1 340 S.W.2d 950 (Tex. 1960).

2 *Id.* at 951.

3 *E.g.,* Henshaw v. Kroenecke, 656 S.W.2d 416, 418 (Tex. 1983).

[4] *E.g.,* Justin Belt Co. v. Yost, 502 S.W.2d 681, 683 (Tex. 1973).

[5] *Weatherford,* 340 S.W.2d 950.

[6] Hanks v. GAB Business Servs., 644 S.W.2d 707 (Tex. 1982).

[7] *Henshaw,* 656 S.W.2d 416.

[8] City Prods. Corp. v. Berman, 610 S.W.2d 446 (Tex. 1980).

[9] *Justin Belt,* 502 S.W.2d 681.

[10] *Weatherford,* 340 S.W.2d at 952.

[11] *Id.* at 953.

[12] 502 S.W.2d 681 (Tex. 1973).

[13] *Id.* at 682-83, n.1.

[14] *Id.* at 685.

[15] 725 S.W.2d 168 (Tex. 1987).

[16] *Id.* at 170-71.

[17] *Id.* at 172.

[18] *Id.* at 176 (Gonzales, J., dissenting).

[19] 734 S.W.2d 673 (Tex. 1987).

[20] *Id.* at 674.

[21] 31 TEX. SUP. CT. J. 616 (July 13, 1988) ("DeSantis I"), withdrawn June 6, 1990; substituted opinion reported at 793 S.W.2d 670.

[22] *Id.* at 619.

[23] *Id.* at 620.

[24] *DeSantis I,* 31 TEX. SUP. CT. J. at 621.

[25] *Id.*

[26] TEX. BUS & COM. CODE ANN. § 15.21(a)(1) (West 1987).

[27] 31 TEX. SUP. CT. J. 626 (July 13, 1988) ("Martin I"), withdrawn June 6, 1990; substituted opinion reported at 793 S.W.2d 667.

[28] *Id.* at 626 (emphasis added).

[29] Bland v. Henry & Peters, P.C., 763 S.W.2d 5, 8 (Tex. App.--Tyler 1988, no writ).

[30] TEX. BUS. & COM. CODE ANN. §§ 15.50 & 15.51 (West Supp. 1992) [[[hereinafter the "1989 Act"].

[31] *Id.*

[32] *Id.* (statutory note).

[33] Philip P. Pfeiffer and W. Wendell Hall, *Employment and Labor Law,* 44 SW. L.J. 81, 134 (1990); *see generally* John H. Spurgin, II and Cynthia L. Hassman, *The At Will Employment Doctrine and Employment Handbook,* 53 TEX. B.J. 27 (1990).

[34] *See generally* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 682 (Tex. 1990) cert. denied, 111 S.Ct. 755 (1991) ("DeSantis II").

[35] *Weatherford,* 340 S.W.2d at 953.

[36] 793 S.W.2d 660 (Tex. 1990).

[37] 793 S.W.2d 667 (Tex. 1990).

[38] 793 S.W.2d 670 (Tex. 1990).

[39] Juliette Fowler Homes, Inc. v. Welch Assoc., Inc., 793 S.W.2d 660, 663 (Tex. 1990); *Martin II,* 793 S.W.2d at 669; *DeSantis II,* 793 S.W.2d at 688.

[40] 793 S.W.2d at 670.

[41] *See generally* Spurgin and Hassman, *The At Will Employment Doctrine and Employee Handbooks,* 53 TEX. B.J. 27 (1990).

[42] 793 S.W.2d at 669-70. *But cf.* Sterner v. Marathon Oil Co., 767 S.W.2d 686 (Tex. 1989) (holding that Texas law recognizes the tort of tortious interference with an at-will employment contract).

[43] *Martin II,* 793 S.W.2d at 669.

[44] *Id.* at 670; *see also* TEX. BUS. & COM. CODE ANN. § 15.50(1) (West Supp. 1992).

45 *Martin II,* 793 S.W.2d at 670 (citing *Hill*).

46 793 S.W.2d at 670, n.3.

47 827 S.W.2d 830 (Tex. 1991).

48 *Id.* at 831.

49 *Id.* A careful reading of *Travel Masters* reveals that the agreement included a confidentiality clause in addition to the covenant not to compete. *See id.* at 831. In Picker International, Inc. v. Blanton, 756 F. Supp. 971, 982 (N.D. Tex. 1990), the court held that the confidentiality provision was an otherwise enforceable agreement which could support a covenant not to compete. The result in *Travel Masters* thus implicitly rejected the approach taken in *Blanton.*

50 793 S.W.2d 670.

51 *Id.* at 682.

52 *Id.*

53 *Id.* at 683.

54 It is interesting to note that Justices Mauzy and Spears, in a concurring opinion, disagreed with the view that the 1989 Act abolished the "common calling" test. The concurrence reasoned that the "scope of activity" language in the 1989 Act left adequate room for the continued vitality of the "common calling" doctrine. *DeSantis II,* 793 S.W.2d at 689-90 (Mauzy, J., concurring).

55 *Id.* at 683.

56 *Id.*

57 *Id.*

58 *Id.* at 684.

59 *Id.*

60 *Id.*

61 *Id.* at 685.

62 *Id.*

63 793 S.W.2d 660 (Tex. 1990).

64 *Id.* at 663.

[65] 818 S.W.2d 381 (Tex. 1991).

[66] *Id.* at 386.

[67] *Id.*

[68] *Id.* at 388.

[69] *Id.*

[70] Act of May 29, 1993, ch. 965, 1993 TEX. SESS. LAW. SERV. 4204 (Vernon) [hereinafter the "1993 Act"]. An earlier version of House Bill 7 included a variety of detailed provisions addressing the enforceability of covenants not to compete in a wide variety of circumstances. A detailed discussion of the earlier version is beyond the scope of this article.

[71] *Id.*

[72] *Id.* at § 1.

[73] *Id.* at § 2.

[74] *Id.*

[75] HOUSE COMM. ON BUS. & COMMERCE, BILL ANALYSIS, Tex. H.B. 7, 73rd Leg., R.S. (1993).

[76] *Id.*

[77] *Id.*

[78] 1993 Act, § 3.

[79] *Id.*

[80] *Id.*

[81] *See id.*

[82] *DeSantis II,* 793 S.W.2d at 681, n.6.

[83] HOUSE COMM. ON BUS. & COMMERCE, BILL ANALYSIS, Tex. H.B. 7, 73rd Leg., R.S. (1993).

[84] 1993 Act, § 1.

[85] *See supra* note 49.

[86] 1993 Act, § 2.

[87] *Id.*

[88] 814 S.W.2d 114 (Tex. App.--Corpus Christi 1991, no writ).

[89] *Id.* at 119.

[90] 1993 Act, § 5.

[91] 1989 Act, § 2.

[92] 1993 Act, § 5.

[93] 793 S.W.2d 302 (Tex. App.--Houston [14th Dist.] 1990, no writ).

[94] *Id.* at 303 (citation omitted).

[95] *Id.* at 304.

[96] 37 TEX. SUP. CT. J. 17 (Oct. 6, 1993).

[97] *Id.* at 18.

[98] *Id.*