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## Texas Supreme Court Puts The Teeth Back In Non-Competes

Non-compete agreements in Texas historically were no more valuable in the employment at will context than the paper on which they were written. That changed late last month, when the Texas Supreme Court significantly expanded the enforceability of employers' non-competes against at-will employees. In *Alex Sheshunoff Management Services v Johnson*, 2006 WL 2997287 (Tex.), the court held that covenants not to compete in the context of at-will employment are enforceable once an employer provides confidential information upon which the non-compete agreement is premised, *regardless of when in the employment relationship the confidential information is provided*. Prior to this decision, Texas courts interpreted Texas' non-compete statute to require that the employer provide confidential information at the same time as the employment agreement containing the non-compete was formed in order for the non-compete to be enforceable. See *Light v Centel Cellular Co.*, 883 S.W.2d 642 (Tex. 1994). The courts consistently held that an at-will employment agreement which contained a future promise to provide confidential information or training was not an enforceable agreement. Given that confidential information is rarely provided to an employee at the same time they sign their employment agreements, this interpretation rendered most non-competes unenforceable in Texas.

Because non-competes were so difficult to enforce in Texas courts, particularly where injunctive relief to enforce the agreements was sought, employers found other ways to protect their customer relationships and goodwill. For example, employers argued that the information taken by the former employee is a confidential trade secret, and sought to obtain an injunction against former employees who are using that information based on a claim of misappropriation of trade secrets. With this new Texas Supreme Court decision, employers now have a new weapon at their disposal: a breach of contract claim against the former employee. Significantly, Texas law permits the recovery of attorneys' fees in a breach of contract claim. TEX. CIV. PRAC. & REM. CODE §38.001 (West 2004).

### Prior Requirements for Enforceable Non-Competes in Texas

Section 15.50 of the Texas Business Commerce Act (the "Act") states that a "covenant not to compete is enforceable if (1) "it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made" and (2) "it contains reasonable limitations as to time, geographical area, and scope of activity that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." **Texas Business and Commerce Code Section 15.50(a)**. (emphasis added) Texas courts previously held that for a covenant to be enforceable at all, it needed to be enforceable from the instant the covenant was made. See *Sheshunoff* at \*9. The effect of this rule was to preclude "a unilateral contract made enforceable by performance from ever complying with the Act because it was not enforceable at the time it was made." *Id.* at\*5.

### Sheshunoff's Departure from Prior Law

Last month's decision recognizes that *most* non-competes were unenforceable in Texas under its previous rule. The majority explicitly overruled its old requirement that a non-compete be enforceable at its moment of formation: "If the agreement becomes enforceable *after* the agreement is made because the employer performs his promise under the agreement [and provides confidential information] and a unilateral contract is formed, the covenant is enforceable if all other requirements under the Act are met (emphasis added)." *Id.* at \*9.

### Additional Considerations

The *Sheshunoff* Court also noted in its opinion that, despite lower court opinions to the contrary, the enforceability of a non-compete does not depend upon "overly technical disputes ... such as the amount of information an employee has received, its importance, its true degree of confidentiality, and the time period over which it is received." *Id.* at \*10.

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Finally, it should be noted that three of the nine justices filed a concurrence in which they criticized the Court's holding as permitting "an employer to enforce a non-compete covenant months or even years after the employee signed it, as long as the employer eventually fulfills its side of the bargain." *Id.* at \*11. Instead, the justices sought to hold that the employer's exchange of confidential information occur within a reasonable time after the formation of a non-compete covenant.

## Conclusion

The Texas Supreme Court opinion in *Sheshunoff* has put the teeth back in non-competes in at will employment agreements in Texas. Prior to this case, employers were forced to pursue a misappropriation of trade secret claim against departing employees to protect their confidential information because the "only at the time the agreement was formed" interpretation of Section 15.50(a) of the Texas Business Commerce Act rendered non-competes for the most part unenforceable. Now employers can also pursue breach of contract claims to enforce otherwise reasonable non-competes if the employer provided confidential information to the at will employee *at any time* during the employment relationship. The result is the realistic availability of a breach of contract claim which not only provides employers with another weapon to prevent competition by a departing employee but, if successful, also allows for the recovery of attorney's fees.

### ABOUT THE AUTHORS

Partners Jennifer Kenedy and Rusty Perdeu and Associate Natalia Cornelio work in Lord, Bissell & Brook LLP's Business Litigation Practice Group, and are national restrictive covenant counsel for an internationally-known financial services company. They and a team of Lord, Bissell & Brook LLP attorneys counsel clients on non-competes and obtain temporary restraining orders, permanent injunctions, and damage awards in state and federal jurisdictions and NASD tribunals across the country arising out of former employees' violations of their restrictive covenants.