

**ENFORCEMENT OF EMPLOYEE COVENANTS  
NOT TO COMPETE IN TEXAS**

**to**

**Houston Bar Association**

January 1998  
(Updated January 1999)

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## TABLE OF CONTENTS

<u>Section Heading</u>	<u>Page</u>
I. Determine Whether the Covenant Not to Compete is Enforceable.....	3
A. Law Governing Covenants Not to Compete.....	3
B. The Covenant Must be Ancillary to an Otherwise Enforceable Agreement .....	4
C. The Covenant Must Contain Reasonable Limitations .....	11
1. Reasonable Time Period.....	11
2. Reasonable Geographical Area.....	12
3. Reasonable Scope of Activity.....	13
II. If the Covenant is Unenforceable, Request Reformation .....	15
III. Draft and Timely File the Petition.....	16
A. Drafting the Petition.....	16
B. Timely File the Petition.....	18
IV. Seek Temporary Restraining Order and Temporary Injunction .....	18
A. Mechanics of Seeking the Temporary Restraining Order.....	18
B. Form of the Injunctive Order.....	20
V. Applicable Statutes of Limitations .....	20
VI. Conclusion.....	21

## **ENFORCEMENT OF EMPLOYEE COVENANTS NOT TO COMPETE IN TEXAS**

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The use of non-competition agreements to prevent employees from directly competing against their former employers is on the increase. High profile lawsuits over employee non-compete agreements, involving blue chip companies such as Aetna, Campbell Soup, H. J. Heinz, International Paper and Louisiana-Pacific, have recently made headlines.<sup>1</sup> Although long disfavored by judges as restraints of trade or unfair oppression of employees, Texas courts are now showing a greater willingness to uphold non-compete agreements in employment contracts. There seem to be several reasons for this.

First, recent case law indicates that the enforceability of non-compete agreements is becoming more predictable. Historically, judicial hostility towards covenant not to compete agreements, combined with the wide ranging factual and equitable situations surrounding these cases, lead to an erratic body of case law in Texas. In 1989, the legislature attempted to bring some stability to this area of law by adding sections 15.50 through 15.51 to the Texas Business and Commerce Code. These sections were amended, and section 15.52 added, in 1993 in an effort to provide even further stability.

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<sup>1</sup> Wall Street Journal, May 8, 1997, at B7, col. 1.

While the traditional judicial hostility to covenants remains<sup>2</sup>, it is clear that carefully drafted covenant not to compete agreements will be upheld in certain types of cases. This predictability has enabled employers to draft covenant not to compete agreements which are much more likely to stand up to judicial scrutiny. Employers have realized that, while over broad or oppressive non-competition agreements will not be enforceable, narrowly tailored agreements will. Thus, more and more employment agreements are likely to contain a well drafted non-competition agreement, and an employer will have more confidence with respect to enforcement. This encourages employers to enforce covenant not to compete agreements on a more frequent basis.

Second, as attested by the explosion of the Internet, the proliferation of low-cost high performance computers and instant accessibility of enormous amounts of Aon-line@ data, information itself is becoming an increasingly valuable asset for almost all businesses. In fact, we frequently refer to ourselves as an Ainformation age@ society. Confidential information often has tremendous importance, and companies are willing to expend ever greater efforts to protect it.

Third, covenants not to compete are often the only way a business can protect itself from certain types of harms. Covenants not to compete fill gaps in framework of Texas business law. For example, a confidential customer list is often an important business asset. A departing employee who misappropriates such a customer list, and uses it in a competing business, could significantly harm the

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<sup>2</sup> In the first sentence of the seminal case of *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642 (Tex. 1994), the Texas Supreme Court characterizes the case as a Arestraint of trade case.@

goodwill of the former employer=s business. The former employer could attempt to assert a claim for misappropriation of trade secrets against the former employee. However, this would entail proving that the customer list was, in fact, protectable as a trade secret. This could be a difficult task. Numerous cases go both ways on this issue, and an employer would probably have little certainty of the eventual outcome. By contrast, a well drafted covenant not to compete could immediately be asserted by the employer in this situation and enforced by injunction.

As the use of non-competition agreements increases, along with the willingness to assert them, it is likely that attorneys practicing employment or business law will be required to advise an increasing number of clients in this area. This paper is intended to provide some simple, step-by-step procedures for rapidly assessing the merits of a covenant not to compete and, if necessary, asserting the covenant against an ex-employee acting in violation of the agreement.

## **I. Determine Whether the Covenant Not to Compete is Enforceable.**

### **A. Law Governing Covenants Not to Compete**

The law governing the enforcement of covenants not to compete in Texas is now statutory. Section 15.50 of the Texas Business & Commerce Code states as follows:

Notwithstanding Section 15.05 of this Code, [relating to unlawful practices in restraint of trade] 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.<sup>3</sup>

All common law in Texas relating to the criteria for enforceability of covenants not to compete has been preempted by the statute. To make this perfectly clear, in 1993 the Legislature added Section 15.52 which states:

The criteria for enforceability of a covenant not to compete provided by Section 15.50 of this Code and the procedures and the 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.<sup>4</sup>

Even so, the case law developed prior to the statute is still persuasive authority to the extent it pertains to the criteria set forth in the statute as applied to specific facts. For example, Section 15.50 requires a court to consider whether the geographical area contained in the covenant not to compete is reasonable. If, in a particular case, the covenant restrains the employee from competing within a ten mile radius of the employer=s facility, pre-statute case law involving analogous factual situations would still be persuasive authority as to whether this is a reasonable geographical area.

Section 15.50 of the Texas Business in Commerce Code sets forth two essential requirements for enforceable covenants not to compete. The first requirement is that the covenant

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<sup>3</sup> Tex. Bus. & Com. Code ' 15.50 (Vernon 1993)

<sup>4</sup> Tex. Bus. & Com. Code ' 15.52 (Vernon 1993)

not to compete must be ancillary to or part of an otherwise enforceable agreement at the time the agreement is made.<sup>5</sup> The second requirement is that the covenant must contain reasonable limitations with respect to time, geographical area and scope of activity to be restrained. These requirements will be discussed in greater detail in sections B and C herein.

## **B. The Covenant Must be Ancillary to an Otherwise Enforceable Agreement**

The first step in analyzing the enforceability of a covenant not to compete is to determine whether an otherwise enforceable agreement exists between the employee and the employer. Typical examples of otherwise enforceable agreements to which covenants not to compete are ancillary are agreements for the sale of a business and employment agreements. This article will focus on employment agreements.

Employment agreements can be characterized as being for a fixed term or at-will.<sup>5</sup> If the parties entered into an employment agreement which provided for a fixed term of employment and substantial restrictions are imposed on the employer's right to terminate the employee, then the employment agreement may satisfy the requirement of an otherwise enforceable agreement. Most employment agreements, however, are at-will agreements. In fact the long-standing Texas rule is that employment relationships are terminable at any time by either party, with or without cause, unless there is an express agreement to the contrary.<sup>5</sup> *Federal Express Corp. v. Dutschmann*<sup>5</sup>

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<sup>5</sup> 846 S.W.2d 282, 283 (Tex. 1993).

The Texas Supreme Court has held that an at-will employee agreement, alone, cannot constitute an otherwise enforceable agreement. *Light v. Centel Cellular Co. Of Texas*<sup>6</sup>.

Nevertheless, otherwise enforceable agreements can emanate from at-will employment so long as the consideration for any promise is not illusory. Only one non-illusory promise in the employment agreement is required. *Ireland v. Franklin*<sup>7</sup>. Thus, when confronted by an at-will employment agreement, the attorney must carefully search the agreement for an exchange of promises which do not depend on continued employment by the employee. For example, the promise of a raise in wages to an employee is illusory because the employer can avoid this obligation by terminating the employee.<sup>8</sup> An employer's promise to provide training, however, is a non-illusory promise if the training is actually provided.<sup>9</sup>

Having identified the non-illusory promise, or promises, in the employment agreement, the second step is to determine whether the covenant is ancillary to them. For this step in the analysis, the focus is on the consideration behind the promises. The Texas Supreme Court has set forth the test for determining when a covenant not to compete is ancillary to an

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<sup>6</sup> 883 S.W. 2d 642, 645 (Tex. 1994).

<sup>7</sup> 950 S.W.2d 155, 158 (Tex. App. - San Antonio 1997, no writ).

<sup>8</sup> *Light*, 883 S.W.2d at 645, n.5.

<sup>9</sup> *Light*, 883 S.W.2d at 645.

otherwise agreement in *Light*. According to *Light*, a covenant not to compete is ancillary to an otherwise enforceable agreement if the following two requirements are met:

- (1) The consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interests in restraining the employee from competing; and
- (2) The covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement.<sup>10</sup>

The first prong of the test requires a nexus between the consideration given by the employer and some interest of the employer which is worthy of legal protection, such as business goodwill, confidential or proprietary information.<sup>11</sup> The second prong of the test requires that enforcement of the employee's return consideration will somehow serve to protect the employer's interest. Exactly how a particular consideration will give rise to a protectable interest, the range of interests that are protectable and how enforcement will serve to protect those interests will depend on the specific facts of each case and the creativeness of the attorney involved. Certain fact patterns have already been considered by the courts which shed light on these questions.

If the consideration involves a transfer of confidential and proprietary information or trade secrets in exchange for the employee's promise not to disclose them, then the consideration is likely to be upheld as giving rise to the employer's interest in restraining the employee from competing. For example, in *Ireland* the employee, Dr. Ireland worked for six years at Franklin

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<sup>10</sup> *Light*, 883 S.W. 2d at 647.

<sup>11</sup> *Light*, 883 S.W. 2d at 647.

Chiropractic and Accident Clinics, Inc. During these six years, Dr. Ireland entered into two employment contracts that lasted three years each. Each contract contained a covenant not to compete. The covenant not to compete required Dr. Ireland not to provide chiropractic services within twenty miles of any Franklin Clinic and to refrain from contacting any Franklin patients or hiring any Franklin employees for a period of 18 months after the termination of employment. A dispute arose between the parties and, in October, 1996 Dr. Ireland opened her own office within three miles of a Franklin clinic.<sup>12</sup>

Although the contract did not specifically state it was at-will, the court nevertheless found it to be an at-will contract in view of the fact that the specific term mentioned by the contract was qualified by the language unless sooner terminated. The court noted, however, that the contract was still not illusory because it contained a trade secret clause in which Franklin promised to share certain listed trade secrets with Dr. Ireland, and Dr. Ireland, in return, promised not to disclose or use the trade secrets during or after her employment.<sup>13</sup> The court stated that the covenant was ancillary to the trade secret clause because Franklin's consideration gave rise to its interest in restraining Dr. Ireland from competing, and the covenant not to compete was designed to enforce Dr. Ireland's consideration not to disclose or use the trade secrets.<sup>14</sup>

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<sup>12</sup> *Ireland*, 950 S.W.2d at 157.

<sup>13</sup> *Ireland*, 950 S.W. 2d at 158

<sup>14</sup> *Ireland*, 950 S.W. 2d at 158.

Another example of consideration which is likely to be upheld as giving rise to the employer=s interest in restraining the employee from competing is training, particularly if the training is lengthy and expensive. For example, in *American Express Financial Advisors, Inc. v. Scott*<sup>15</sup>, the defendant, Jack Scott, worked as a financial advisor for the plaintiff, American Express Financial Advisors, Inc. In May of 1992, Scott entered into a contract with American Express regarding their business relationship. The contract set forth obligations on the part of both Scott and American Express. The contract stated that Scott was an independent contractor, not an employee, although prior to the date of the contract, Scott trained at American Express= expense and was treated by American Express as its employee.

The contract specified that Scott could not solicit plaintiff=s customers for one year in the territory in which he worked if he were to terminate his affiliation with American Express. Further, Scott was prohibited from using any records and information about customers he served while affiliated with American Express. Scott also agreed that the identity of customers and potential customers was confidential information and he would refrain from using any such information in connection with any business in competition with American Express for one year after the contract ended.

Two days before resigning from American Express, Scott sent a letter, on American Express= letterhead, to customers that he had served while affiliated with American Express. The

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<sup>15</sup> 955 F. Supp. 688, 692 (N.D. Tex. 1996).

letter stated that Scott was changing his affiliation to another brokerage group and solicited the customers. American Express sued for, *inter alia*, injunctive relief pursuant to the covenant not to compete.

As an initial matter, the court held that the fact that Scott was an independent contractor, not an employee, had no bearing on the enforceability of the contract, citing *Keystone Life Insurance Co. v. Marketing Management, Inc.*<sup>16</sup> Scott argued that the at-will employment agreement gave American Express the ability to terminate its relationship without cause while Scott was forced to make all the promises. The court, however, found substantial consideration given by American Express to Scott in exchange for Scott=s obligations under the covenant not to compete.

For example, the court noted that American Express had incurred large expenses in establishing years of goodwill for the American Express name and trademarks which American Express allowed Scott to use. Also, American Express= established name gave Scott credibility that he would not have otherwise enjoyed as one who was beginning a new career as a financial planner. Additionally, American Express provided lengthy and expensive training to Scott who, according to the court, had no prior knowledge of the securities or financial planning business. Still further, American Express provided a substantial customer base of 120 referrals to Scott upon Scott=s affiliation.

In return, Scott promised not to solicit American Express clients, or to use American Express= confidential information for one year. Additionally, Scott had promised to return American

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<sup>16</sup> 687 S.W. 2d 89 (Tex. App.-Dallas 1985, no writ).

Express= files, change his telephone number, and cease using the American Express name. Thus, the court found that the promises were not illusory and an otherwise enforceable agreement existed between American Express and Scott<sup>17</sup>. The court also stated that the training, confidential information and trade secrets given by American Express to Scott gave rise to American Express= interest in restraining Scott from competing. The non-compete covenant in turn, enforced Scott=s promise not to use or disclose the confidential information and trade secrets<sup>18</sup>.

By contrast, an employer=s agreement to give the employee thirty (30) days notice before terminating the employment agreement is likely not to be upheld as giving rise to the employer=s interest in restraining the employee. See *Donahue v. Bowles, Troy, Donahue, Johnson, Inc*<sup>19</sup>. In *Donahue*, the court found two non-illusory promises, i.e., a promise by Donahue to surrender to the employer all lists, books of account and records relating to the company=s business, clients or prospective and all of the company property, at termination, and a mutual agreement between the parties to give the other party thirty (30) days written notice to terminate the employment agreement<sup>20</sup>. Holding that the only non-illusory promise made by the employer was to give Donahue thirty (30) days notice if it wished to terminate the employment agreement, the court

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<sup>17</sup> *American Express*, 955 F.Supp. at 692.

<sup>18</sup> *American Express*, 995 F. Supp. at 692.

<sup>19</sup> 949 S.W. 2d 746, 752 (Tex. App.-Dallas 1997, no writ)

<sup>20</sup> *Donahue*, 949 S.W. 2d at 751.

found this promise did not give rise to the employer=s stated interest in restraining Donahue from competing.<sup>21</sup>

After determining that the consideration given by the employer gives rise to the employer=s interest in restraining the employee from competing, the second prong of the test requires determination of whether the covenant is designed to enforce the employee=s return consideration. One example of a return promise which is enforced by a covenant not to compete, is an employee=s promise not to disclose confidential information or trade secrets in exchange for the employer=s promise to provide the information to the employee. The relationship between the covenant not to compete and the employee=s return promise in this case is clear. If the employee is restrained from directly competing with the employer, then it would be difficult for the employee to use the confidential information in a manner detrimental to the employer=s interests.

If, however, the employer provides confidential information to the employee in exchange for a return promise that the employee will give notice before terminating the employment contract, or an inventory of the confidential information upon termination, then the covenant not to compete is not designed to enforce either of those promises. For example, in *Light*, the Court identified three promises that were not illusory and thus capable of serving as consideration for the covenant: (1) the employer=s promise to provide Ainitial . . .specialized training@ to Light, (2) Light=s

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<sup>21</sup> *Donahue*, 949 S.W. 2d at 752.

promise to provide 14 days notice to the employer upon termination, and (3) Light=s promise to provide an inventory of all the employer=s property upon termination<sup>22</sup>.

Even if the promise to train had involved giving confidential information to Light, the Court stated that Light did not promise not to disclose any confidential information. Rather, Light=s only return promises were to provide notice and inventory upon termination, and neither of those promises would have been enforced by the covenant not to compete. Therefore, the covenant failed the Adesigned to enforce@ standard and was not ancillary to an otherwise enforceable agreement.<sup>23</sup>

### **C. The Covenant Must Contain Reasonable Limitations**

If the covenant not to compete meets the tests above and is ancillary to an otherwise enforceable agreement, then the next step in the analysis is to determine whether the covenant not to compete contains limitations as to time, geographical area and scope of activity that are reasonable and do not impose a greater restraint than necessary to protect the goodwill or other business interests of the employer.<sup>24</sup> Although the focus on this analysis is reasonableness, case law has developed which provides certain rules of thumb to be considered in analyzing these factors.

#### **1. Reasonable Time Period**

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<sup>22</sup> *Light*, 883 S.W. 2d at 646.

<sup>23</sup> *Light*, 883 S.W.2d at 647.

<sup>24</sup> Texas Business & Commerce Code, ' 15.50 (Vernon 1993).

In determining what time period is reasonable, courts frequently uphold time limitations of one to two years. *Property Tax Associates, Inc. v. Staffeldt*<sup>25</sup>. Longer time periods, up to five years, may be upheld under certain circumstances, such as if the covenant not to compete is ancillary to a contract for the sale of a business. *Chandler v. Mastercraft Dental Corp. Of Texas, Inc*<sup>26</sup>. Recently, the courts in *Ireland* and *American Express Corp.* have, respectively, upheld eighteen months and one year time limitations as reasonable when the covenant not to compete involved the employee=s agreement not to disclose trade secrets of the employer.

## 2. Reasonable Geographical Area

With respect to geographical area restrictions, the territory in which the employee worked while employed is likely to be considered a reasonable area by the courts. *Martin v. Linen Systems for Hospitals, Inc.*<sup>27</sup> The geographical limitations in the covenant should be definite. Typical geographical limitations are defined by a radius, county boundaries or state boundaries.

Geographical restrictions should not exceed the general boundaries in which the business operates. For example, in view of evidence that most pet owners only travel a few miles to obtain veterinary care for their pets, a covenant not to compete restraining a former employee from

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<sup>25</sup> 800 S.W. 2d 349, 350 - 351 (Tex. App. - El Paso 1990).

<sup>26</sup> 739 S.W. 2d 460, 464-65 (Tex. App. - Fort Worth 1987, no writ).

<sup>27</sup> 671 S.W. 2d 706, 709 (Tex. App. - Houston [1st District] 1984, no writ).

practicing anywhere within a twelve mile radius of the employer=s veterinary hospital is unreasonable.

*Cukjati v. Burkett*.<sup>28</sup> However, the evaluation of reasonableness must take into account the characteristics of the area affected. For example, in *Wilson v. Chemco Chemical Co.*<sup>29</sup>, the employee, Wilson, was an independent contractor acting as a salesman for the employer, Chemco. His assigned area, and the area covered by the covenant, embraced the four corners region of New Mexico, Arizona, Utah and Colorado, and included 21 counties in those four states. Pointing to *NCH Corp. v. Share Corp.*<sup>30</sup> Wilson argued that the size of the area in which he was restrained from operating was much larger than the one invalidated in that case. In upholding the covenant, the court noted that the region assigned to Wilson was vast, but sparsely populated. The court stated A[a] covenant that would be unreasonable in a dense, industrialized urban area may be reasonable when applied to less settled areas.<sup>31</sup>

### **3. Reasonable Scope of Activity**

Finally, with respect to the scope of activities to be restrained, the restraints must be related to the activities the employee performed while working for the employer.

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<sup>28</sup> 772 S.W. 2d 215, 217 (Tex. App. - Dallas 1989, no writ).

<sup>29</sup> 711 S.W.2d 265 (Tex. App. - Dallas 1986, no writ).

<sup>30</sup> 757 F.2d 1540 (5th Cir. 1985).

<sup>31</sup> *Wilson*, 711 S.W.2d at 268.

*Weatherford Oil Tool Company v. Campbell*.<sup>32</sup> A broad covenant which prohibits any competitive activity on the part of the former employee may be valid if the employer is engaged in only one area of business and the purpose of the covenant is to prevent employee=s who learn the business and know customer clients from engaging in a competing business for a reasonable time and area. <sup>33</sup> However, if the employer engages in a number of different types of business, then such a broad restriction on the former employee=s scope of activity may not be upheld. For instance, in *Diversified Human Resources v. Levinson-Polakoff*<sup>34</sup>, the employee, Levinson, worked for an employment agency on a commission basis. Levinson worked exclusively in the data processing department of the employment agency=s Dallas office, recruiting prospective employees for the employer=s data processing clients. After termination, Levinson took a position with another employment agency, recruiting and placing employees for insurance underwriting positions with insurance companies. The court recognized that the employer had a legitimate interest in restricting Levinson from recruiting data processors, but held that a covenant that prevented her from placing personnel in any other non-related field was unreasonable. The court stated that ALevinson-Polakoff may have acquired useful skills through her employment with Diversified, but it appears from the

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<sup>32</sup> 340 S.W. 2d 950, 952 (Tex. 1960).

<sup>33</sup> *Property Tax*, 800 S.W. 2d at 351.

<sup>34</sup> 752 S.W. 2d 8 (Tex. App.-Dallas 1988, no writ).

record that her true ability to compete with Diversified derives from her data processing related contacts.<sup>35</sup>

Another type of limitation on an ex-employee=s scope of activity is a requirement that the employee refrain from soliciting the employer=s customers for a certain period of time. These types of limitations, if reasonable, will be enforceable because of the employer=s legitimate interest in preventing departing employees from using the contacts and rapport established at the employer=s expense to take the employee=s customers away. *Ruscitto v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.*<sup>36</sup> However, for this type of restriction on the former employees scope of activity, there must be a connection between the personal involvement of the former employee and the client. *Peat Marwick Main & Company v. Haass.*<sup>37</sup> In *Peat Marwick*, the employee, Haass, was originally the youngest partner in an accounting firm that merged with another firm, Main Hurdman (AMH@), that eventually became Peat Marwick Main. After the merger, he became dissatisfied with the practices of MH and resigned, taking several employees with him, to form a new accounting firm. MH sued, seeking, among other things, enforcement of the non-compete agreement in the partnership agreement signed during the merger. The covenant not to compete restrained Haass from providing services to former MH clients existing at the time of the

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<sup>35</sup> *Diversified*, 752 S.W.2d at 11.

<sup>36</sup> 777 F.Supp. 1349, 1354 (N. D. Texas 1991).

<sup>37</sup> 818 S.W. 2d 381, 387 (Tex. 1991)

termination, but also to clients who became clients of MH after the departing partner left the firm. Moreover, it included all clients, not just those with whom the departing partner had actual contact. In view of these restrictions, the Court stated A[inhibiting departing partners from engaging accounting services for clients who were acquired after the partner left, or with whom the accountant had no contact while associated with the firm, does not further and is not reasonably necessary to protect [the employer=s] interest<sup>38</sup>.

## **II. If the Covenant is Unenforceable, Request Reformation**

If it appears that the covenant not to compete, as drafted, does not contain reasonable limitations as to time, geographical area or scope of activity, the covenant may still be enforceable upon reformation of the covenant. Section 15.51(c) of the Texas Business and Commerce Code provides that if a covenant imposes a greater restraint than is necessary to protect the goodwill or other business interest of the promisee,

A[T]he 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.@<sup>39</sup>

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<sup>38</sup> *Peat Marwick*, 818 S.W.2d at 388.

<sup>39</sup> Tex. Bus. & Comm. Code ' 15.51(c) (Vernon 1993).

Therefore, if the covenant appears over broad in time period of restraint, geographical scope or scope of activities, then the petition, or complaint, should include a request for reformation. It should be noted, however, that asking the court for reformation comes with a price. Section 15.51(c) also provides that if the covenant is reformed, A[T]he 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.<sup>40</sup>

Thus, reformation is a two-edged sword. While it may save the enforceability of the covenant not to compete reformation substantially reduces the scope of remedies available to the employer.

### **III. Draft and Timely File the Petition**

#### **A. Drafting the Petition**

Once it is decided that the covenant is enforceable, or may be reformed to be enforceable, then the next step is to draft the petition or complaint, depending on whether enforcement is sought in federal or state court. For purposes of the following discussion, enforcement in state court is presumed. For enforcement in federal court, the same general principles will apply, but reference should be made to appropriate federal rules. A good source of helpful information for

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<sup>40</sup> Tex. Bus. & Comm. Code ' 15.51(c) (Vernon 1993).

drafting the petition is found in *Dorsaneo*, Texas Litigation Guide, Chapter 201, and *Carlson*, Enforcing a Non-Compete.<sup>41</sup>

As always, the petition should plead the parties involved and state that the damages exceed the minimum jurisdictional limits of the court. When pleading damages, consider the loss of customers due to the competing business, the loss of good will, and the decrease in the value of the employer=s business resulting from the loss of any confidential business information or trade secrets.

Almost always the employer will want injunctive relief to stop the competing acts of the former employee. Therefore, the petition should also plead that the employer has no adequate remedy at law and that there is a likelihood of irreparable harm if the former employee=s actions are not stopped. Examples of evidence of irreparable harm are the speculative nature of money damages and the inability of the employee to pay damages.

Often the new employer is named as a defendant. The cause of action pled against the new employer is for inducing breach of contract and civil conspiracy to induce breach of contract.

The petition should also plead the existence and nature of the underlying agreement that the covenant not to compete is ancillary to, as well as existence of the covenant not to compete itself. Copies of these agreements should be attached to the petition.

The petition should describe the actions of the ex-employee which violate the terms of the covenant not to compete. Sufficient detail should be provided with respect to each of the types

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<sup>41</sup> 4 Tex. Intl. Prop. L.J. 149 (1996).

of limitations required by the statute to support a default judgment. For example, the petition should allege that: (1) geographical area in which the ex-employee is operating and the geographical area in which the employer is operating, (2) that the ex-employee is operating within the time period provided in the covenant not to compete, and (3) the scope of the activities which are currently being performed by the employee and that those activities are restrained by the covenant not to compete.

The petition should also allege the consideration given by the employer in exchange for the covenant not to compete and that the consideration was, in fact, provided to the ex-employee. The petition should also allege how the consideration meets the two prong test set forth in *Light*.

The petition should plead any further causes of action which may be available against the former employee, such as misappropriation of trade secrets or tortious interference with contractual obligations.

Finally, the allegations of the petition should be sworn by a verification to provide the basis for a temporary restraining order.<sup>42</sup>

## **B. Timely File the Petition**

Since the value of an injunction decreases as the time limit on the covenant not to compete expires, it is important to obtain injunctive relief as early as possible. Recognizing that delays in legal proceedings can emasculate a covenant not to compete, some covenantees have sought Acompensatory injunctions@ to extend the time for the restrictive covenant to compensate for the

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<sup>42</sup> Tex. R. Civ. Proc. 680.

breach. *See*, D. Aspelund and C. Eriksen, *Employee Noncompetition Law* (1997). In Texas, however, the rule is that a trial court may not enlarge the time of the covenant=s restriction from the period stated in the contract.<sup>43</sup> Thus, it is important not to delay in your efforts to obtain injunctive relief on behalf of your client.

#### **IV. Seek Temporary Restraining Order and Temporary Injunction**

##### **A. Mechanics of Seeking the Temporary Restraining Order**

At the time of filing the petition, it is often desirable to seek a temporary restraining order and then a temporary injunction to stop the ex-employee violations as quickly as possible and limit the damage to the employer. It is important to find out which judge will hear your request for a temporary restraining order. In many instances, the request for a temporary restraining order will be heard by the judge that has been assigned the case on the merits. However, some court systems, such as Harris County, designate an ancillary judge to hear motions for TROs. Therefore, you may need to appear before the ancillary judge for the temporary restraining order hearing, rather than the court to which the case has been assigned. Requests for temporary restraining orders and temporary injunctions are governed by Texas Rule of Civil Procedure 680. TRCP 680 provides, in part:

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before

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<sup>43</sup> *Wilson*, 711 S.W.2d at 268. (citations omitted).

notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice.<sup>44</sup>

Accordingly, every effort should be made to contact the former employee or his or her attorney in advance of the hearing and ensure that they are present. Otherwise, it is doubtful that the court will entertain your motion. The federal trial courts in Houston by custom, and the state trial courts by local rule, require notice to the opposing attorney before any temporary restraining order may be heard.

If you are successful in obtaining a temporary restraining order, Tex. R. Civ. 680 provides that the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character. Also, a temporary restraining order can last only fourteen days.<sup>45</sup> Thus, you should immediately begin preparing for the temporary injunction hearing. Consider moving the court for expedited discovery if needed to develop evidence or authenticate documents before the hearing. At a minimum you will need to authenticate the employment agreement and covenant not to compete and establish facts concerning the defendant's activities, the employer's harm, and why the legal remedy of damages is inadequate.

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<sup>44</sup> Tex. R. Civ. 680.

<sup>45</sup> Tex. R. Civ. 680.

Texas Rule of Civil Procedure Rule 684 requires that the applicant for either a temporary restraining order or a temporary injunction execute and file with the clerk a bond to the adverse party. Therefore, you should be prepared to argue the amount of the bond and to put up the required sum before you seek preliminary injunctive relief, whether in the form of a temporary restraining order or a temporary injunction.

If you are successful in obtaining a temporary injunction, Rule 683, Tex. R. Civ. requires an order setting the case for trial on the merits. Most cases settle before trial is reached.

#### **B. Form of the Injunctive Order**

Finally, Tex. R. Civ. Proc. 683 provides that every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained. Great care should be taken to draft an injunctive order which is definite as to the acts to be restrained. If the injunction is vague, then it will not be enforceable. For example, if the injunction does not give any grounds as to why the former employer would be harmed if the injunction is denied, then the injunction may not be enforceable. *Kees, v. Medical Directors, Inc*<sup>46</sup>.

#### **V. Applicable Statutes of Limitations**

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<sup>46</sup> 583 S.W.2d 475, 479 (Tex. Civ. App. --Houston [1st dist.] 1979, writ ref=d n.r.e.).

Breach of contract actions are covered, generally, under the four year statute of limitations which provides that the action must be brought within four years after the day the cause of action accrues<sup>47</sup>. However, an exception to the four year limitation is referred to as the Adiscovery rule. The discovery rule tolls the running of the period of limitations until the time the plaintiff discovers, or should have discovered, the nature of the injury. *Heron Fin. Corp. v. U.S. Testing Co., Inc.*<sup>48</sup>

Since covenant not to compete actions often include a claim of misappropriation of trade secrets, it is important to note some recent changes to the limitations period for these actions. The Texas Supreme Court recently held that the discovery rule does not apply to claims for misappropriation of trade secrets. *Computer Assoc. Int=l v. Altai, Inc.*<sup>49</sup>

In response, the Legislature passed a statute which overrules the Supreme Court=s holding in *Altai* and provides specifically for a limitations period for misappropriation of trade secrets:

A person must bring suit for misappropriation of trade secrets not later than three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered.<sup>50</sup>

Thus, the legislature has provided a limitations period of three years and restored the application of the discovery rule to claims for misappropriation of trade secrets. The new limitations

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<sup>47</sup> Tex. Civ. Prac. & Rem. Code ' 16.05 (Vernon 1985).

<sup>48</sup> 926 S.W.2d 329, 331 (Tex. App. - Austin 1996, no writ).

<sup>49</sup> 918 S.W.2d 453 (Tex. 1996).

<sup>50</sup> Tex. Civ. Prac. & Rem. Code ' 16.010 (Vernon 1997).

period applies to actions (1) commenced on or after May 1, 1997, and (2) pending on May 1, 1997 and in which the trial or any new trial or retrial following motion, appeal, or otherwise, begins on or after May 1, 1997.

## **VI. Conclusion**

A basic understanding of enforcement of covenant not to compete agreements will increasingly be required of Texas attorneys as employers become more willing to enforce these agreements against their former employees. While predictability of enforcement will remain uncertain for sometime, nevertheless, cases such as *Light*, *Donahue*, and *Miller Paper*, have established a pattern of enforceability in certain narrow, but common fact patterns. The understanding of the law set forth in these cases is necessary to provide good legal counsel to business clients.