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Refocusing Light: Alex Sheshunoff Management Services, L.P. v. Johnson Moves Back to the Basics of Covenants Not to Compete.

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REFOCUSING *LIGHT*: *ALEX SHESHUNOFF MANAGEMENT SERVICES, L.P. v. JOHNSON* MOVES BACK TO THE BASICS OF COVENANTS NOT TO COMPETE

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I. INTRODUCTION

The law regarding covenants not to compete is a product of the tension between competing rights, including the right of companies to protect trade secrets, market share, corporate goodwill, and the general societal norm of allowing the free flow of people to choose

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their professions and where they want to work.[1] Both the Texas Legislature and courts, which sometimes work at cross-purposes, attempt to resolve the tension between these opposing forces.[2] A review of a covenant not to compete is complicated because the court must conduct "an incredibly fact-sensitive and often confusing analysis" before reaching a decision.[3] In the October 2006 case of *Alex Sheshunoff Management Services, L.P. v. Johnson*,[4] the Supreme Court of Texas provided clarity to the issue of timing of consideration associated with the creation of covenants not to compete, which until then had been interpreted several different ways in the courts of appeals.[5] In doing so, the court clarified a misunderstood standard that existed since 1994 for interpreting non-compete agreements.[6]

Part II of this Article describes and defines non-compete agreements, and discusses general issues related to those types of agree-

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1. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 & cmt. a (1982) (identifying that when analyzing non-compete covenants, "the court may be faced with a particularly difficult task of balancing competing interests," and "[n]o mathematical formula can be offered for this process").

2. *See* Ted Lee & Leila Ben Debba, *Backdoor Non-Competes in Texas: Trade Secrets*, 36 ST. MARY'S L.J. 483, 503-06 (2005) (describing an extended battle between the supreme court and legislature on the enforcement of non-compete agreements); *see also* 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 53 (2000) (identifying that non-compete covenants are not favored by the courts; however, by enacting laws to enforce these agreements, "the [l]egislature reversed the presumption that the public policy of Texas is against the enforcement of noncompetition agreements").

3. *See* James J. Savina, *Labor and Employment Law*, 37 TEX. TECH L. REV. 1031, 1050 (2005) (summarizing recent Fifth Circuit cases during the survey period from June 1, 2003, through May 31, 2004, that highlight the difficulty of analyzing non-compete agreements).

4. 209 S.W.3d 644 (Tex. 2006).

5. *See* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 655 (Tex. 2006) (emphasizing that the supreme court took the "opportunity to observe that section 15.50(a) [of the Texas Business and Commerce Code] does not ground the enforceability of a covenant not to compete on the overly technical disputes that our opinion in *Light* seems to have engendered over whether a covenant is ancillary to an otherwise enforceable agreement").

6. *Compare* Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 645 n.6 (Tex. 1994) (pointing out a "unilateral contract, since it could be accepted only *by future performance*, could not support a covenant not to compete inasmuch as it was not an 'otherwise enforceable agreement at the time the agreement is made'" under the statute) (emphasis added) (quoting TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2002)), *with Alex Sheshunoff*, 209 S.W.3d at 656 (announcing "[w]e did not intend in *Light* to divert attention from the central focus of section 15.50(a). To the extent our opinion caused such a diversion, we correct it today").

ments, such as the reasonableness of the covenant and whether a covenant is designed to enforce a return promise from the employer. In addition, Part II reviews the Texas statutes and key cases that interpret non-compete covenants. Part III explains the 1994 Texas Supreme Court case of *Light v. Centel Cellular Co. of Texas*.[7] Part IV summarizes the time period between *Light* in 1994 and *Alex Sheshunoff* in 2006, as well as the differing interpretations of *Light* in the courts of appeals. Part V details the change in direction provided by *Alex Sheshunoff*. Finally, Part V analyzes how *Alex Sheshunoff* represents the return of a common-sense approach to enforcement of covenants not to compete in Texas.

II. BACKGROUND

A. *Definitions and Typical Issues in Non-Compete Agreements*

Non-compete agreements between employers and employees are as old as the medieval craft guild system, with disagreements between the master and apprentice played out in the court system since the fifteenth century.[8] In the United States, courts generally review covenants not to compete in the context of employees' rights, with the main analysis involving the reasonableness of the agreement.[9]

A covenant not to compete is generally defined as "[a] contractual provision—typically found in employment, partnership, or sale-of-business agreements—in which one party agrees to refrain from conducting business similar to that of the other party."[10] Courts generally enforce covenants concerning activities after the termination of employment if they are "reasonable in scope, time, and territory."[11] The promise cannot be an unreasonable restraint

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7. 883 S.W.2d 642 (Tex. 1994).

8. T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 6-7 (2005) (identifying that "[e]mployers began utilizing restrictive covenants in England as early as the fifteenth century," and the courts have reacted to unethical and anticompetitive activities since that time).

9. *See id.* at 8-9 (describing the doctrine of reasonableness as one where "judges balanced the interests of the employer, employee, and society on a case-by-case basis").

10. BLACK'S LAW DICTIONARY 370 (7th ed. 1999).

11. *Id.*; *see also* 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 57 (2000) (identifying how Texas courts have implemented the limitations on scope, time, and area).

on trade or restrict gainful employment,[12] and should be "ancillary to an otherwise valid transaction."[13] Likewise, a restraint on competition needs to be only as restraining as necessary to protect the promisee's rights, and should also be "ancillary to an otherwise valid transaction."[14] The covenant is usually viewed in the context of what could happen when a breach of promise occurs, and not what has already occurred.[15]

Typical subjects litigated concerning non-compete agreements include the reasonableness of the duration and geographic area of the covenant;[16] whether the consideration is adequate or whether

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12. RESTATEMENT (SECOND) OF CONTRACTS § 186 (1982) (providing "(1) [a] promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade," and "(2) [a] promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation"); *see also* 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 56 (2000) (identifying examples of reasonable restraints as determined by the Texas courts, such as "business goodwill, trade secrets, and other confidential or proprietary information").

13. RESTATEMENT (SECOND) OF CONTRACTS § 187 (1982) (identifying that for a non-compete promise to be reasonable, "the promisee must have an interest worthy of protection that can be balanced against the hardship on the promisor and the likely injury to the public").

14. *Id.* § 188. The Restatement identifies that:

> (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if
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> (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
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> (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.
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> (2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:
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> (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold;
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> (b) a promise by an employee or other agent not to compete with his employer or other principal;
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> (c) a promise by a partner not to compete with the partnership.

Id. Texas also requires the covenant be "ancillary to or part of an otherwise enforceable agreement." TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2002).

15. RESTATEMENT (SECOND) OF CONTRACTS § 186 cmt. a (1982).

16. *See* 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 66 (2000) (identifying the reasonable area of restraints as "the territory in which the employee worked while in the employment of his or her employer"); *see, e.g.*, Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 340 S.W.2d 950, 951-52 (1960) (failing to enforce damages associated with a not to compete covenant because the original agreement required the promisor not to compete in any area where the employer might choose to sell its products); Lewis v. Krueger, Hutchinson & Overton Clinic, 153 Tex. 363, 269 S.W.2d 798, 799 (1954) (confirming a not to compete agreement could be reformed when it included an unreasonable time duration).

there is a failure of consideration received by the employee in exchange for agreeing to the covenant;[17] lack of reasonableness;[18] and the scope of activities that the promisee cannot perform as a result of an overly-broad covenant.[19] Companies use non-compete covenants to protect "business goodwill, trade secrets, and other confidential or proprietary information"; deter competition from former employees; and discourage employees from job hopping.[20]

B. *Texas—Common Law of Covenants Not to Compete Before 1989*

Since the 1890s, Texas courts have confirmed the validity of non-compete agreements,[21] albeit somewhat reluctantly.[22] Over the

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17. *See, e.g.*, Martin v. Credit Prot. Ass'n, 793 S.W.2d 667, 670 (Tex. 1990) (finding "that the covenant not to compete was not supported by independent valuable consideration" and was "not ancillary to an otherwise enforceable agreement or supported by independent valuable consideration"); 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 69 (2000) (defining "[t]he giving or acceptance of employment constitutes valid consideration for a covenant not to compete").

18. *See, e.g.*, Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 171-72 (Tex. 1987) (refusing to enforce a not to compete covenant due to lack of reasonableness), *superseded by statute*, TEX. BUS. & COM. CODE ANN. §§ 15.50-.51 (Vernon 2002); 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 56 (2000) (defining what constitutes reasonableness in an agreement not to compete).

19. *See, e.g.*, Juliette Fowler Homes, Inc. v. Welch Assocs., Inc., 793 S.W.2d 660, 663 (Tex. 1990) (asserting the noncompetition clause in the "contract contains no limitations concerning . . . scope of activity," and was therefore unenforceable).

20. *See generally* 13 WILLIAM V. DORSANEO III ET AL., TEXAS LITIGATION GUIDE § 201.02[2] (2006) (outlining examples of business interests that companies can protect by creating and enforcing covenants not to compete).

21. *See Weatherford Oil*, 340 S.W.2d at 952-53 (1960) (confirming covenants not to compete are enforceable in Texas); Spinks v. Riebold, 310 S.W.2d 668, 669-70 (Tex. Civ. App.—El Paso 1958, writ ref'd) (allowing for a modified non-compete covenant to be enforced); Ofsowitz v. Askin Stores, Inc., 306 S.W.2d 923, 924 (Tex. Civ. App.—Eastland 1957, writ ref'd) (confirming an employee's non-compete agreement "against his employer after the termination of his employment contract, may be enforced if the restriction is reasonable in respect to the time it imposes, the territory it embraced and is reasonably necessary to protect some legitimate interest of the employer in the operation of his business"); Parker v. Smith, 254 S.W.2d 144, 146-47 (Tex. Civ. App.—San Antonio 1952, no writ) (holding the trial court should have issued a temporary injunction enforcing a covenant not to compete); Blaser v. Linen Serv. Corp. of Tex., 135 S.W.2d 509, 510 (Tex. Civ. App.—Dallas 1939, writ dism'd judgm't cor.) (identifying that "the validity of restrictive covenants in a contract, as here involved, has been upheld by the courts of this state in numerous cases"); Martin v. Hawley, 50 S.W.2d 1105, 1107-08 (Tex. Civ. App.—Dallas 1932, no writ) (stating the enforcement of non-compete employment contracts have "become the settled rule of law in this state"); Parisian Live Dyers & Cleaners v. Springfield, 275 S.W. 1098, 1099 (Tex. Civ. App.—Galveston 1925, writ ref'd) (confirming the enforce-

last fifty years, the Supreme Court of Texas and the Texas Legislature have played an ever increasing and sometimes competing role in the refinement of the requirements necessary for an effective covenant not to compete.[23] A non-compete covenant, however, still remains a disfavored contract because it is a restraint on trade, and the agreement will not be enforced unless specific statutory requirements are met.[24]

Several cases represent milestones in the development of the Texas common law on covenants not to compete. In *Lewis v. Krueger, Hutchinson & Overton Clinic*,[25] the Supreme Court of Texas, in the 1950s, confirmed that a covenant not to compete that included an open-ended time duration could be reformed by the court to be more reasonable.[26] In the 1960 case of *Weatherford Oil*

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ment of a non-compete agreement); Patterson v. Crabb, 51 S.W. 870, 871 (Tex. Civ. App. 1899, writ dism'd w.o.j.) (identifying that for a teacher who left a music school, the employment covenant that restricted the instructor from teaching in the same town was an enforceable agreement); *see also* Ted Lee & Leila Ben Debba, *Backdoor Non-Competes in Texas: Trade Secrets*, 36 ST. MARY'S L.J. 483, 498 n.87 (2005) (citing multiple cases that enforced such non-compete agreements).

22. *See, e.g.*, *Hill*, 725 S.W.2d at 170-71 (affirming covenants not to compete are enforceable if they are reasonable, but finding the covenant in this case to be unreasonable and void); Justin Belt Co. v. Yost, 502 S.W.2d 681, 682 (Tex. 1973) (discussing how "non-competition agreements in the employer-employee relationship are enforceable when made during employment"; however, the settlement in this case was unreasonable with respect to time and area and therefore the court could reform the agreement); Weatherford Oil, 340 S.W.2d at 951-53 (confirming covenants not to compete are enforceable, but finding the one in this case was unreasonable).

23. *See* Ted Lee & Leila Ben Debba, *Backdoor Non-Competes in Texas: Trade Secrets*, 36 ST. MARY'S L.J. 483, 498-506 (2005) (identifying how the supreme court's decisions regarding not to compete covenants have not always dovetailed the legislative initiatives on the same subject, nevertheless, the rules have become more precise over the last fifty years on creating effective not to compete covenants).

24. *See* TEX. BUS. & COM. CODE ANN. § 15.05 (Vernon 2002) (providing "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful"); *id.* § 15.50 (identifying the specific requirements necessary to create an enforceable non-compete agreement); *see also* 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 53 (2000) (addressing that "[a] covenant not to compete is essentially an agreement in restraint of trade and, therefore, illegal where unreasonable in scope").

25. 153 Tex. 363, 269 S.W.2d 798 (1954).

26. Lewis v. Krueger, Hutchinson & Overton Clinic, 153 Tex. 363, 269 S.W.2d 798, 799 (1954) (discussing that "[m]erely because a limit has not been fixed for the duration of the restraint, the agreement will not be struck down but will be enforceable for such period of time as would appear to be reasonable under the circumstances"). The court upheld the summary judgment in favor of the clinic; however, the supreme court agreed with the court of appeals's reformation of the time period of the covenant. *Id.* at 798-99.

Tool Co. v. Campbell,[27] the supreme court emphasized that although non-compete agreements were valid, the court would not enforce them unless the covenants were reasonable.[28] The supreme court stressed that a court could reform a covenant that it determined in equity was unreasonable in both time and area.[29] A decade later, in *Justin Belt Co. v. Yost*,[30] the supreme court reinforced the condition that a covenant not to compete "must be ancillary to and in support of another contract."[31] In the 1987 case of *Hill v. Mobile Auto Trim, Inc.*,[32] the supreme court identified that a covenant not to compete must meet four criteria: (1) it must be necessary to protect the employer's valid interests in trade secrets and business goodwill; (2) the limitations placed on the duration, locations, and activities that a former employee can perform must be reasonable; (3) the public must not be harmed; and (4) the employer must provide something of value as consideration for receiv-

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27. 161 Tex. 310, 340 S.W.2d 950 (1960).

28. Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 340 S.W.2d 950, 951 (1960) (emphasizing "[a]n 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"). The Texas Supreme Court further highlighted that "[w]here 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." *Id.* By the time the court decided *Weatherford*, the covenant's restraint period had expired, and because the agreement was deemed to be unreasonable, there was not an award of damages for breach of contract. *Id.* at 953. *See generally* Ted Lee & Leila Ben Debba, *Backdoor Non-Competes in Texas: Trade Secrets*, 36 ST. MARY'S L.J. 483, 498-99 (2005) (outlining that the lower courts followed the decision in *Weatherford* by "striking down [covenants] that were unreasonably broad . . . [and] reform[ing] unreasonable covenants not to compete to ensure their enforceability").

29. *Weatherford Oil*, 340 S.W.2d at 953; *see also* 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 53 (2000) (addressing that "[t]o be enforceable, a contract not to compete must contain stated restraints. Restraints not stated in the contract cannot be established by custom or inference") (citing Markwardt v. Harrell, 430 S.W.2d 1, 3-4 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.)).

30. 502 S.W.2d 681 (Tex. 1973).

31. Justin Belt Co. v. Yost, 502 S.W.2d 681, 683 (Tex. 1973) (declaring "contracts which are in reasonable restraint of trade must be ancillary to and in support of another contract"). This statement is consistent with section 187 of the Restatement (Second) of Contracts, which states "a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade." RESTATEMENT (SECOND) OF CONTRACTS § 187 (1982). The Texas Supreme Court in *Justin Belt* affirmed the trial court's reformation of the covenant not to compete and granted injunctive relief in favor of the employer. *Justin Belt*, 502 S.W.2d at 686.

32. 725 S.W.2d 168 (Tex. 1987).

ing the covenant not to compete from the employee.[33] The court also emphasized in *Hill* that a covenant not to compete cannot restrict one from practicing his "common calling," a skill that he had before the relationship was established with the employer.[34]

C. *Texas Legislative Initiatives—1989 and 1993*

In response to decisions from the Texas courts, the legislature passed the Covenants Not to Compete Act in 1989.[35] The Act established Texas Business and Commerce Code section 15.50, Criteria for Enforceability of Covenants Not to Compete,[36] and section 15.51, Procedures and Remedies in Actions to Enforce Covenants Not to Compete.[37] These sections of the code were modified in 1993,[38] and revised section 15.50 states that:

> [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.[39]

Section 15.52 was added in 1993 to clarify that non-compete covenants are governed by statutory requirements and not by common law.[40] Section 15.51 allows for three remedies: damages, injunctive

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33. Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 170-71 (Tex. 1987) (identifying a four-pronged test for determining the validity of a not to compete agreement), *superseded by statute*, TEX. BUS. & COM. CODE ANN. §§ 15.50-.51 (Vernon 2002). The test follows closely with section 188 of the Restatement (Second) of Contracts. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. a-g (1982).

34. *Hill*, 725 S.W.2d at 172 (quoting Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982)). The Supreme Court of Texas in *Hill* revoked the temporary injunction in favor of the past employer and found the restrictive covenant void. *Id.*

35. Act of May 20, 1989, 71st Leg., R.S., ch. 1193, § 1, sec. 15.50, 1989 Tex. Gen. Laws 4852-53 (codified as TEX. BUS. & COM. CODE ANN. §§ 15.50-.51 (Vernon 2002)); *see also* Ted Lee & Leila Ben Debba, *Backdoor Non-Competes in Texas: Trade Secrets*, 36 ST. MARY'S L.J. 483, 503 (2005) (explaining "[t]he Texas Legislature responded to the intense political, business, and commercial pressures to rein in the Texas Supreme Court by enacting the Covenants Not to Compete Act").

36. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2002).

37. *Id.* § 15.51.

38. Act of May 29, 1993, 73d Leg., R.S., ch. 965, § 2, sec. 15.51, 1993 Tex. Gen. Laws 4201 (codified as TEX. BUS. & COM. CODE ANN. § 15.51).

39. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2002).

40. Act of May 29, 1993, 73d Leg., R.S., ch. 965, § 3, sec. 15.52, 1993 Tex. Gen. Laws 4201-02 (codified as TEX. BUS. & COM. CODE ANN. § 15.52); *see also* R. Brandon Bundren,

relief, and an award of attorney's fees if the defendant successfully defends against a plaintiff trying to enforce an unreasonable covenant not to compete.[41] The enforceability of a non-compete agreement, including a determination of the reasonableness of that covenant, "is a question of law for the court."[42]

In the period between the first and second versions of the statute, the supreme court continued to decide non-compete cases, and in the five cases heard during that time, the court did not uphold a single covenant not to compete.[43] Although there was greater statutory direction on creating an effective non-compete covenant, the Supreme Court of Texas continued to find reasons in each case why the covenant was invalid as applied. This dichotomy among the Texas courts' decisions would continue even after the 1993 amendments to the statutes.

Comment, *To Give or Not to Give: Enforceability of Covenants Not to Compete in Texas*, 57 BAYLOR L. REV. 273, 276 (2005) (describing how in following the enactment of the Covenants Not to Compete Act in 1989, the Supreme Court of Texas continued to use the common law to decide non-compete covenants cases).

41. TEX. BUS. & COM. CODE ANN. § 15.51 (Vernon 2002). If the covenant not to compete is reformed by the court, the code does not permit the promisee to receive damages for breach of the covenant by the promisor before the reformation. *Id.* Therefore, "[a] breach of an unreasonable restraint of trade covenant will not support damages" in favor of the employer. 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 77 (2000) (quoting Gen. Devices, Inc. v. Bacon, 888 S.W.2d 497, 503 (Tex. App.—Dallas 1994, writ denied)).

42. Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 644-45 (Tex. 1994) (citing Martin v. Credit Prot. Ass'n, Inc., 793 S.W.2d 667, 668-69 (Tex. 1990)).

43. *See* Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830, 832 (Tex. 1991) (finding the "covenant not to compete is unenforceable as a matter of law because it was not ancillary to an otherwise enforceable agreement"), *superseded by statute*, TEX. BUS. & COM. CODE ANN. § 15.51 (Vernon 2002); Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 382 (Tex. 1991) (ruling the "provision affecting the right to render personal services operates as a restraint of trade and must be judged by the reasonableness standards for covenants not to compete, and that the sole relevant contractual provision at issue is unreasonable"); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 684 (Tex. 1990) (finding the not to compete covenant was unreasonable and unenforceable); *Martin*, 793 S.W.2d at 670 (declaring "the covenant not to compete was not supported by independent valuable consideration. . . . [and was] not ancillary to an otherwise enforceable agreement or supported by independent valuable consideration," and therefore, was not enforceable); Juliette Fowler Homes, Inc. v. Welch Assocs., Inc., 793 S.W.2d 660, 663 (Tex. 1990) (addressing the noncompetition clause in the "contract contains no limitations concerning geographical area or scope of activity," and therefore was "an unreasonable restraint of trade and unenforceable on grounds of public policy").

III. *LIGHT V. CENTEL CELLULAR CO. OF TEXAS*

Light v. Centel Cellular Co. of Texas was the first case in which the Supreme Court of Texas addressed the 1993 changes to the Covenants Not to Compete Act.[44] In *Light*, the petitioner sold pagers and pager services for United TeleSpectrum, Inc. in an at-will employment relationship.[45] After United obtained a license to sell cellular services, Debbie Light was required to sign an agreement that included a covenant not to compete.[46] She later resigned and sued Centel, United's successor-in-interest, seeking a judgment that the agreement was unenforceable and void.[47]

In the agreement, United promised to provide Light with specialized training.[48] In return, Light promised to provide United fourteen days notice prior to terminating her employment.[49] Light also "promise[d] to provide an inventory of all United property [in her possession] upon termination."[50] Importantly, United's prom-

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44. *See Light*, 883 S.W.2d at 644 (applying the Covenants Not to Compete Act retroactively). The 1993 amendment to the Act was effective September 1, 1993. *Id.* at 643. On April 23, 1990, Debbie Light received "a partial summary judgment [from the trial court] that the covenant not to compete was unenforceable." Centel Cellular Co. of Tex. v. Light, 841 S.W.2d 95, 96 (Tex. App.—Tyler 1992), *rev'd*, 883 S.W.2d 642 (Tex. 1994). Based on the fact she "was engaged in a common calling occupation," the covenant violated the code, and was a restraint on trade. *Id.* at 97. The case was argued before the Supreme Court of Texas on February 17, 1994, and decided on June 2, 1994. *Light*, 883 S.W.2d at 642.

45. *Light*, 883 S.W.2d at 643.

46. *Id.* Debbie Light started her employment with United TeleSpectrum, Inc. in 1985, and she was required to sign a non-compete agreement after United started selling cellular services in 1987. *Id.*

47. *Id.*

48. *Id.* at 645-46. While other promises were recited by the agreement, they were illusory. *Light*, 883 S.W.2d at 645-46. Specifically, the agreement provided three promises that were not illusory:

> 4. United TeleSpectrum agrees to provide the salesperson initial and on-going specialized training necessary to sell the mobile radio communications services United TeleSpectrum offers.
>
> 5. Salesperson agrees to provide United TeleSpectrum 14 days notice to terminate employment.
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> 6. Upon such notice, Salesperson agrees to provide United TeleSpectrum an inventory of all United TeleSpectrum property in his/her possession and agrees to make arrangements with his/her regional sales manager to return all such property. As used in this paragraph, United TeleSpectrum's property includes all customer-related material, in whatever form, whether prepared by Salesperson or others.

Id. at 645-46 n.8.

49. *Id.* at 646.

50. Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 646 (Tex. 1994).

ise to provide Light with specialized training was not contingent on her continued employment with United.[51]

The *Light* Court began its analysis by recapping the then-recent change to the Act by the 1993 amendment.[52] In order to be enforceable under the Act, the covenant not to compete must be:

> [A]ncillary to or part of an otherwise enforceable agreement at the time the agreement is made [and] . . . contain[ ] 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.[53]

The court recognized that the legislature intended to broaden the enforceability of non-compete agreements.[54]

To reach its holding, the court first noted that "[c]onsideration for a promise, by either the employee or the employer in an at-will employment, cannot be dependent on a period of continued employment."[55] In short, if the promisor can discontinue employment at any time, the promise is illusory, and under contract law, "[w]hen illusory promises are all that support a purported bilateral contract, there is no contract."[56] The court held that "'otherwise enforceable agreements'" under the statutes can result from at-will employment relationships so long as the return promise for the employee's covenant is not illusory.[57]

The court then performed a highly technical analysis of the "otherwise enforceable agreement at the time the agreement is made" language of Texas Business and Commerce Code section 15.50.[58] In footnote six, the court recognized established contract law:

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51. *Id.*

52. *Id.* at 643.

53. *Id.* (quoting TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2000)).

54. *Id.* at 644 (indicating it was "clear that the [l]egislature intended the Covenants Not to Compete Act to largely supplant the Texas common law relating to enforcement of covenants not to compete"; therefore, the supreme court applied the Act in lieu of the common law).

55. *Light*, 883 S.W.2d at 644-45.

56. *Id.* at 645.

57. *Id.* "Any promise made by either employer or employee that depends on an additional period of employment is illusory because it is conditioned upon something that is exclusively within the control of the promisor." *Id.* at 645 n.5 (citing E. ALLAN FARNSWORTH, CONTRACTS 72-82 (1982)).

58. *Id.* at 643.

> If only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance. . . . The fact that the employer was not bound to perform because he could have fired the employee is irrelevant; if he has performed, he has accepted the employee's offer and created a binding unilateral contract.[59]

The court noted that "[s]uch a unilateral contract existed between Light and United as to Light's compensation," but then noted that if the performance is not accepted by the employee at the time of the agreement, then it cannot support a covenant not to compete under the statute.[60] "[S]uch [a] unilateral contract, since it could be accepted only *by future performance*, could not support a covenant not to compete inasmuch as it was not an 'otherwise enforceable agreement at the time the agreement is made'" under the statute.[61] In other words, for at-will employment relationships, if employer promised employee training and confidential information as consideration for at-will employee's covenant not to compete, but fulfillment of this promise is dependent on continued employment, employer's promise is illusory until employer actually performs, which will be some time *later than the time the agreement is made*. Thus, the agreement would not be "otherwise enforceable" until some time *after* the agreement is made.[62]

The Light-United agreement required United to provide Light "initial and on-going specialized training necessary to sell" United's products and services.[63] The court determined that the Light-United agreement would have required United to provide the promised initial training "[e]ven if Light had resigned or been fired."[64] Accordingly, the court established that "an otherwise enforceable agreement . . . existed between Light and United."[65]

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59. *Light*, 883 S.W.2d at 645 n.6 (citing E. ALLAN FARNSWORTH, CONTRACTS 75-76 (1982)).

60. Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 645 n.6 (Tex. 1994) (citing E. ALLAN FARNSWORTH, CONTRACTS 75-76 (1982)).

61. *Id.* (emphasis added).

62. *See* TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2002) (recognizing "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").

63. *Light*, 883 S.W.2d at 645-46.

64. *Id.* at 646.

65. *Id.*

The court, however, found the non-compete agreement unenforceable:

> The covenant not to compete between Light and United is not ancillary to or a part of the otherwise enforceable agreement between them. While United's consideration (the promise to train) might involve confidential or proprietary information, the covenant not to compete is not designed to enforce any of Light's return promises in the otherwise enforceable agreement.[66]

In other words, the covenant not to compete was not designed to enforce either Light's promise to give fourteen days notice prior to termination or Light's promise to provide an inventory upon termination.[67] Since the Texas Supreme Court held that future performance would not be effective as consideration for a covenant not to compete, the decision in *Light* had the potential of being an effective guide on determining the timing of consideration necessary for an enforceable non-compete agreement.

IV. UNFOCUSED *LIGHT*—VARYING INTERPRETATIONS OF *LIGHT* IN THE COURTS OF APPEALS

In retrospect, *Light* did less than one would expect to settle issues concerning the enforceability of covenants not to compete. Instead of just focusing on the reasonableness of the restraints on employment imposed by such covenants,[68] or whether specific covenants were designed to enforce the employee's consideration in the otherwise enforceable agreement,[69] Texas courts also had to

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66. *Id.* at 647. The Texas Supreme Court bolstered their holding that an "otherwise enforceable agreement must give rise to the 'interest worthy of protection' by the covenant not to compete" by citing an earlier decision. *Id.* (citing DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 682 (Tex. 1990)).

67. *See Light*, 883 S.W.2d at 647-48 (pointing out "Light did not promise in the otherwise enforceable agreement to not disclose any of the confidential or proprietary information given to her by United").

68. *See* TEX. BUS. & COM. CODE ANN. § 15.50(a) (Vernon 2002) (requiring the limitations and scope of the activity to be restrained by the covenant are reasonable and no greater than necessary); *see, e.g.*, Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 386 (Tex. 1991) (affirming "the restraint created must not be greater than necessary to protect the promisee's legitimate interests such as business goodwill, trade secrets, or other confidential or proprietary information").

69. TEX. BUS. & COM. CODE ANN. § 15.50(a) (Vernon 2002) (identifying "a covenant not to compete is enforceable if it is . . . part of an otherwise enforceable agreement"); *see, e.g.*, *DeSantis*, 793 S.W.2d at 681-82 (advancing the idea that "the agreement not to compete must be ancillary to an otherwise valid transaction or relationship").

settle arguments about whether the consideration given was illusory or non-illusory, and whether it was given to make the agreement otherwise enforceable at the time it was made.[70] This issue arose most frequently with respect to employers' promises to disclose trade secrets or confidential information.

For example, in *Ireland v. Franklin*,[71] in what would appear to be a direct contradiction of footnote six in *Light*, the Fourth Court of Appeals of San Antonio held that a promise by Franklin to share trade secrets with Ireland was non-illusory, and thus supported the covenant not to compete.[72] The court held that the employment relationship was at-will, and the agreement listed certain items considered by Franklin to be trade secrets.[73] The disclosure of these trade secrets to Ireland was dependent on "her promise not to disclose or use [them] during or after her employment."[74] To support its holding, the court relied heavily on footnote fourteen of *Light*, which explained that if an employer gives confidential information in exchange for the employee's promise not to disclose that information, then the covenant is ancillary to an otherwise enforceable agreement.[75] The court acknowledged that "[t]his is the situation blueprinted [in *Light*]."[76] Without delving into when the confidential information was actually disclosed to Ireland, the court concluded that Franklin's consideration was his promise to, at some point in the future, share the trade secrets with Ireland.[77]

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70. *Compare* Strickland v. Medtronic, Inc., 97 S.W.3d 835, 839 (Tex. App.—Dallas 2003, pet. dism'd w.o.j.) (concluding the promise to provide confidential information to the employee was illusory because "Medtronic could . . . fir[e] Strickland on the day the employment agreement was executed"), *with* Ireland v. Franklin, 950 S.W.2d 155, 158 (Tex. App.—San Antonio 1997, no writ) (asserting there need be only one non-illusory promise for a non-compete agreement to be enforceable).

71. 950 S.W.2d 155 (Tex. App.—San Antonio 1997, no writ).

72. *Ireland*, 950 S.W.2d at 158 (declaring for a non-compete agreement to be enforceable, the court "need[s] to find one non-illusory promise that the covenant not to compete is ancillary to").

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Ireland*, 950 S.W.2d at 158 (emphasis added). The court held the covenant not to compete was valid and "the trial court did not abuse its discretion when it granted the temporary injunction" in favor of Franklin. *Id.*

In *Curtis v. Ziff Energy Group, Ltd.*,[78] the Fourteenth Court of Appeals of Houston questioned whether the consideration provided by Ziff Energy Group was non-illusory.[79] In reviewing the confidentiality and non-disclosure agreement signed by Timothy Curtis and Ziff, the court applied the rules from *Light*.[80] The court stated: "We only need to find one non-illusory promise to establish consideration for the agreement."[81] As part of their agreement, "Ziff promised to provide confidential information and trade secrets with Curtis [,and] [i]n return, Curtis promised to not disclose [that information]."[82] The court found this exchange of promises to be sufficient to enforce the agreement.[83] Without any discussion as to when the trade secrets were disclosed, or whether the promise was enforceable even after the termination of Curtis's employment, the court simply concluded that the agreement was enforceable.[84]

In *Beasley v. Hub City Texas, L.P.*,[85] the First Court of Appeals of Houston held that the promises between Fred Beasley and Hub City constituted sufficient consideration for a non-compete agreement.[86] An amendment to the non-compete agreement was signed when Beasley was promoted to president of Hub City.[87] According to the amendment, Beasley would be provided access to new confidential information upon being promoted, and "[i]n exchange, Beasley promised that he would not divulge . . . that information."[88] Relying on footnote fourteen of *Light*,[89] the court of ap-

78. 12 S.W.3d 114 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

79. *See* Curtis v. Ziff Energy Group, Ltd., 12 S.W.3d 114, 118 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (determining there need only be one non-illusory promise to establish consideration for a non-compete agreement).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Curtis*, 12 S.W.3d at 118-19 (holding the non-compete "covenant [was] ancillary to or part of an otherwise enforceable agreement," and therefore the agreement was enforceable).

85. No. 01-03-00287-CV, 2003 WL 22254692 (Tex. App.—Houston [1st Dist.] Sept. 29, 2003, no pet.) (mem. op.).

86. *See* Beasley v. Hub City Tex., L.P., No. 01-03-00287-CV, 2003 WL 22254692, at *7 (Tex. App.—Houston [1st Dist.] Sept. 29, 2003, no pet.) (mem. op.) (explaining for proper consideration to exist, "[t]he trial court had to find only one non-illusory promise to support the non-competition covenant").

87. *Id.* at *5.

88. *Id.*

peals noted that "[a]n employer's promise to provide confidential information or trade secrets, in exchange for an employee's agreement not to divulge or to use that information, forms an 'otherwise enforceable agreement' to which the employee's non-competition covenant can be ancillary."[90] The court then decided "sufficient evidence supported the trial court's finding that Hub promised to provide and actually did provide Beasley with new confidential information in exchange for his [covenant not to compete]."[91] Therefore, because at least one promise was non-illusory, the non-compete covenant was enforceable.[92]

To justify its holding, the *Beasley* Court discussed the types of confidential information to which Beasley would be privy after he signed the agreement,[93] but, as did the courts in *Curtis* and *Ireland*, failed to discuss the timing of the disclosure of the confidential information. In fact, the court noted that Beasley did not begin attending meetings in which confidential information was available until after he was president, thereby implying that the actual disclosure was not at the time the agreement was made.[94] The court noted that "Beasley should not have had access to much of, or at least to the full amount of, this information before having become president."[95] The court justified its holding that the promise to disclose was not illusory by declaring that "viewed in the appropriate light, sufficient evidence supported the trial court's finding that Hub promised to provide and *actually did provide* Beasley with new confidential information in exchange for his [covenants]."[96] This language certainly suggests the court viewed the later provision of the confidential information as relevant to holding the covenant not to compete enforceable, contrary to *Light*'s footnote six.[97]

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89. *Id.*

90. *Id.*

91. *Beasley*, 2003 WL 22254692, at *7.

92. *Id.* The court of appeals affirmed the trial court's decision enjoining Fred Beasley from competing against Hub City. *Id.* at *7-8.

93. *Id.* at *5.

94. *Id.* at *7.

95. *Beasley*, 2003 WL 22254692, at *7.

96. Beasley v. Hub City Tex., L.P., No. 01-03-00287-CV, 2003 WL 22254692, at *7 (Tex. App.—Houston [1st Dist.] Sept. 29, 2003, no pet.) (mem. op.) (emphasis added).

97. *Compare id.* at *7 (holding the promise was not illusory because Hub promised and provided to Beasley secret information in exchange for Beasley's signature on the non-

In *Wright v. Sport Supply Group, Inc.*,[98] the Ninth Court of Appeals of Beaumont examined whether consideration provided after the non-compete agreement was signed was sufficient, or whether consideration needed to be contemporaneous with the agreement.[99] Sport Supply Group acknowledged that it did not provide any contemporaneous consideration to Wright with the non-compete agreement he signed.[100] Wright then asserted that for there to be an enforceable agreement, consideration should have been provided at the instant the agreement was made.[101]

The court held that the promise to provide confidential information was non-illusory, and relied heavily on *Guy Carpenter & Co. v. Provenzale*,[102] a federal case in which the Fifth Circuit addressed this issue based on its understanding of Texas law.[103] Interestingly, in *Guy Carpenter*, the Fifth Circuit rejected Provenzale's argument that Guy Carpenter's promise to provide trade secrets was illusory because the trade secrets were not provided at the time the agreement was made.[104] "To hold otherwise would pin the enforceability of non-solicitation agreements on whether an employer discloses confidential information at the time the employee signs an employment contract. This is not what *Light*, or [section] 15.50, intends or requires."[105] Also relying heavily on *Ireland*, and despite the court's recognition that the confidential information was

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compete agreement), *with* Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 645 n.6 (Tex. 1994) (noting "[i]f only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance").

98. 137 S.W.3d 289 (Tex. App.—Beaumont 2004, no pet.).

99. *See* Wright v. Sport Supply Group, Inc., 137 S.W.3d 289, 296-97 (Tex. App.—Beaumont 2004, no pet.) (looking to other courts of appeals to determine when consideration needs to be given for an agreement to be enforceable).

100. *Id.* at 295-96.

101. *Id.* at 296 (citing CRC-Evans Pipeline Int'l, Inc. v. Myers, 927 S.W.2d 259, 263 (Tex. App.—Houston [1st Dist.] 1996, no writ)).

102. 334 F.3d 459 (5th Cir. 2003).

103. *See* Guy Carpenter & Co. v. Provenzale, 334 F.3d 459, 469 (5th Cir. 2003) ("revers[ing] the district court's determinations that the non-disclosure and non-solicitation covenants are unenforceable and hold[ing] that Guy Carpenter demonstrated a likelihood of success on the merits of its claims for (1) breach of the non-solicitation covenant and (2) breach of the non-disclosure covenant").

104. *Id.* at 466.

105. *Id.*

made available *subsequent to signing the agreement*, the court in *Wright* held that the consideration was non-illusory.[106]

Other Texas courts of appeals have taken a stricter approach to *Light* and its footnote six.[107] In *Anderson Chemical Co. v. Green*,[108] the Seventh Court of Appeals of Amarillo closely adhered to footnote six: "A promise not to disclose an employee's proprietary information which is later accepted by the employer's performance in providing that information to the employee is a unilateral contract that cannot support a covenant not to compete because it is not otherwise enforceable *at the time it is made*."[109]

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106. *Wright*, 137 S.W.3d at 297 (citing Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 647 n.14 (Tex. 1994), and Ireland v. Franklin, 950 S.W.2d 155, 158 (Tex. App.—San Antonio 1997, no writ)). Because Sport Supply Group provided the confidential information on a daily basis subsequent to signing the agreement, the court deemed that "there was adequate consideration to support the covenant not to compete." *Id.* After finding that the consideration provided was sufficient, the Beaumont Court of Appeals found that the non-compete agreement was "unreasonable as a matter of law," reversed the temporary injunction obtained by Sport Supply Group, and remanded the case to the trial court. *Id.* at 297-99.

107. *See* 31-W Insulation Co., v. Dickey, 144 S.W.3d 153, 158 (Tex. App.—Fort Worth 2004, pet. withdrawn) (holding the promise to provide confidential information was illusory because the employee could be terminated immediately after signing the agreement); Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 124 S.W.3d 678, 686 (Tex. App.—Austin 2003) (stressing the need to "evaluate the consideration given at the time the agreement was made"), *aff'd in part, rev'd in part*, 209 S.W.3d 644 (Tex. 2006); Strickland v. Medtronic, Inc., 97 S.W.3d 835, 839 (Tex. App.—Dallas 2003, pet. dism'd w.o.j.) (requiring a promise be binding "at the time the agreement is made"); Anderson Chem. Co. v. Green, 66 S.W.3d 434, 438 (Tex. App.—Amarillo 2001, no pet.) (following footnote six of *Light*, by requiring a covenant not to compete to be enforceable when the agreement is made); *see also* R. Brandon Bundren, Comment, *To Give or Not to Give: Enforceability of Covenants Not to Compete in Texas*, 57 BAYLOR L. REV. 273, 283-84 (2005) (describing the dichotomy between the two groups of court holdings: courts that require a contemporaneous exchange to make a non-compete agreement valid, and courts that do not). This potentially over-simplifies the courts' holdings. The issue is more precisely not whether the consideration given is contemporaneous, but whether the promise given by the employer—which in most cases is the promise to disclose trade secrets or confidential information—is illusory.

108. 66 S.W.3d 434 (Tex. App.—Amarillo 2001, no pet.).

109. Anderson Chem. Co. v. Green, 66 S.W.3d 434, 438 (Tex. App.—Amarillo 2001, no pet.) (emphasis added) (citing *Light*, 883 S.W.2d at 645 n.6). The court further noted that even if Anderson gave confidential information to Green, the agreement did not contain a promise by Anderson to do so. *Id.* "Thus, even if [Anderson] gave such information to Green, at the time it was made, there was no enforceable agreement." *Id.* The court concluded that the covenant not to compete was unenforceable and agreed with the trial court's refusal to issue a temporary injunction at the request of Anderson Chemical Company. *Id.* at 439.

In *Strickland v. Medtronic, Inc.*,[110] the Fifth Court of Appeals of Dallas reviewed the employment agreement at issue, which included a valid covenant not to compete.[111] The employment agreement included a statement that Medtronic would provide confidential information to Valerie Strickland.[112] Medtronic stated that this promise to provide confidential information represented additional consideration provided to the employee.[113] The court concluded that the promise to provide that information was illusory because Medtronic could "fir[e] Strickland on the day the employment agreement was executed."[114] The court stressed that "[t]he relevant inquiry under section 15.50 . . . is whether, *at the time the agreement is made*, there exists a binding promise to train."[115]

In *31-W Insulation Co. v. Dickey*,[116] the Second Court of Appeals of Fort Worth reviewed whether the promises provided in a non-compete agreement were non-illusory.[117] Phil Dickey signed an employment agreement that included a covenant not to compete.[118] The agreement included a promise by 31-W Insulation to provide confidential information.[119] Citing *Strickland*, the court held that the promise to provide confidential information was illusory, since "31-W could terminate Dickey's employment immedi-

110. 97 S.W.3d 835 (Tex. App.—Dallas 2003, pet. dism'd w.o.j.).

111. *See* Strickland v. Medtronic, Inc., 97 S.W.3d 835, 839 (Tex. App.—Dallas 2003, pet. dism'd w.o.j.) (holding the covenant not to compete was not created because the promise to provide confidential information was illusory).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* The court found an "otherwise enforceable agreement" did, in fact, exist because of other non-illusory promises made by Medtronic, but the court ultimately held that the non-compete covenant was unenforceable. *Strickland*, 97 S.W.3d at 839. The agreement could not be enforced because the non-competition agreement was not ancillary to the otherwise enforceable agreement, not because the promise to disclose information was illusory. *Id.*

116. 144 S.W.3d 153 (Tex. App.—Fort Worth 2004, pet. withdrawn).

117. *See* 31-W Insulation Co. v. Dickey, 144 S.W.3d 153, 157-58 (Tex. App.—Fort Worth 2004, pet. withdrawn) (emphasizing because the employee could be terminated directly after signing the agreement, the promise to provide confidential information was illusory).

118. *Id.* at 155.

119. *Id.*

ately after signing the [a]greement and thereby never be obligated to provide him with any confidential information at all."[120]

V. *ALEX SHESHUNOFF MANAGEMENT SERVICES, L.P. v. JOHNSON*: BACK TO THE BASICS

In 2006 in *Alex Sheshunoff Management Services, L.P. v. Johnson*, the Supreme Court of Texas addressed the issue of whether a covenant not to compete signed by an at-will employee is enforceable against that employee if there was no other corresponding enforceable obligation.[121] The court noted that under *Light* such a covenant would be unenforceable,[122] but expounded upon *Light* and departed from *Light*'s holding to permit enforcement of the agreement at issue.[123] In that sense, *Alex Sheshunoff* represents a return to a common-sense, more traditional approach to covenants not to compete rather than the highly technical reading of *Light*.[124]

Respondent Kenneth Johnson had been an employee of Alex Sheshunoff Management Services (ASM) under an at-will arrangement since 1993.[125] In 1997, ASM promoted Johnson to a new position, and shortly after his promotion presented him with an employment agreement that included a covenant not to compete.[126] Specifically, the agreement prohibited Johnson from providing consulting services to any of ASM's clients with whom Johnson had performed significant work.[127] Moreover, the agreement prohibited Johnson from directly or indirectly soliciting cur-

120. *Id.* at 158 (citing *Strickland*, 97 S.W.3d at 839). Separate from the covenant not to compete, the court found other parts of the employment agreement to be enforceable because it included non-illusory promises. *Id.* at 159. The court of appeals, however, did not overrule the trial court's refusal to grant a temporary injunction in favor of 31-W Insulation. *31-W Insulation Co.*, 144 S.W.3d at 159.

121. Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 646 (Tex. 2006).

122. *See id.* at 649 (declaring "under other language in *Light*, the [a]greement was not enforceable at the time it was made").

123. *See id.* at 650-51 (articulating the court's departure from *Light*).

124. *See id.* at 655 (announcing "section 15.50(a) does not ground the enforceability of a covenant not to compete on the overly technical disputes that our opinion in *Light* seems to have engendered over whether a covenant is ancillary to an otherwise enforceable agreement").

125. *Id.* at 646.

126. *Alex Sheshunoff*, 209 S.W.3d at 646.

127. *Id.* at 647.

rent or prospective clients of ASM.[128] ASM required Johnson to sign the agreement as a condition of continued employment.[129]

As consideration for the agreement, ASM promised to give notice to Johnson of any forthcoming termination, other than termination justified by employee misconduct.[130] Alternatively, the agreement provided ASM with the option of terminating Johnson immediately "so long as ASM paid a specified fee to Johnson."[131] ASM also agreed to provide Johnson with specialized training concerning ASM's business methods and to provide access to confidential and proprietary information.[132]

ASM, in fact, provided such training and confidential information, some of which was furnished indirectly through third parties, including respondent Strunk & Associates, L.P. (Strunk).[133] Strunk, one of ASM's competitors, later contacted Johnson about hiring him, and in early 2002 Johnson left ASM to work for Strunk.[134]

ASM sued Johnson under the agreement, and Strunk intervened to argue the covenant not to compete was unenforceable under footnote six of *Light*.[135] Specifically, Strunk and Johnson argued that ASM's promises to provide confidential information and training were illusory, and filed summary judgment motions to that ef-

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128. *Id.* The court stated:

> (a) In consideration of the training and access to Confidential Information provided by Employer, and so as to enforce Employee's agreement regarding such Confidential Information contained in paragraph 5 above, Employee agrees that while employed by Employer, and for a period of one (1) year following termination of Employee's employment for any reason, Employee will not
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> * * *
>
> (ii) solicit or aid any other party in soliciting any affiliation member or previously identified prospective client or affiliation member . . . .

Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 124 S.W.3d 678, 685 (Tex. App.—Austin 2003), *aff'd in part, rev'd in part*, 209 S.W.3d 644 (Tex. 2006).

129. *Alex Sheshunoff*, 209 S.W.3d at 646.

130. *Id.*

131. *Id.*

132. Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 647 (Tex. 2006).

133. *Id.*

134. *Id.*

135. *Id.*

fect.[136] The district court agreed and granted motions for summary judgment from Johnson and Strunk.[137]

The court of appeals affirmed.[138] In its review of this case, the court of appeals stressed that the key time frame for analyzing the agreement "is the *moment the agreement is made.*"[139] Because the company provided the new confidential information some time after the agreement was signed, the court of appeals reasoned that it was an illusory promise at the time of the agreement and was therefore unenforceable.[140]

In reviewing the case, the Supreme Court of Texas agreed that, under then-current law, the ASM-Johnson agreement was not enforceable at the time it was made.[141] Under *Light*, the court of appeals's affirmation of the district court was correct: because "ASM could fire Johnson after the agreement was signed, and before it provided any confidential information or specialized training, . . . the agreement . . . did not oblige ASM to provide initial training whether or not Johnson was still employed by ASM."[142]

Specifically, the court agreed with the *Light* Court's recitation of black-letter contract law that an illusory promise can still be accepted by performance.[143] Specifying its departure from *Light*, the court targeted footnote six.[144] More specifically, the court's departure from *Light* centered on the court's review of the legislative history behind the Covenants Not to Compete Act.[145] To justify its

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136. *Id.*

137. *Alex Sheshunoff*, 209 S.W.3d at 647.

138. *Id.*

139. Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 124 S.W.3d 678, 686 (Tex. App.—Austin 2003), *aff'd in part, rev'd in part*, 209 S.W.3d 644 (Tex. 2006).

140. *Id.* at 686-87.

141. *See Alex Sheshunoff*, 209 S.W.3d at 650 (establishing "[i]n the pending case, the court of appeals correctly held that under *Light*'s footnote six, the agreement was illusory insofar as it required ASM to provide confidential information and specialized training").

142. *Id.* at 650.

143. *See id.* (declaring "[u]pon further review[,] . . . we disagree with footnote six insofar as it precludes a unilateral contract").

144. *See id.* at 650-51 (confining their disagreement with the lower courts to its interpretation of the effect of footnote six).

145. *See* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 651-52 (Tex. 2006) ("consult[ing] the legislative history to help glean the statute's fair and ordinary meaning").

departure from *Light*, the court revisited the meaning of the phrase "at the time the agreement is made."[146] The court stated:

> Simply reading the text [of the Act], the clause "at the time the agreement is made" can modify either "otherwise enforceable agreement" or "ancillary to or part of." No amount of pure textual analysis can tell us unequivocally which preceding clause is modified. *Light* stated that the agreement must be enforceable at the time the agreement is made, and therefore concluded that "at the time the agreement is made" must modify "otherwise enforceable agreement."[147]

In rejecting this perhaps overly-analytical interpretation of the Act under which unilateral covenants not to compete would never be enforceable, the court found "no sound reason" as to why this should be the case.[148]

> We understand why the [l]egislature and the courts would not allow an employer to spring a non-compete covenant on an existing employee and enforce such a covenant absent new consideration. . . . But if, as in the pending case, the employer's consideration is provided by performance and becomes non-illusory at that point, and the agreement in issue is otherwise enforceable under the Act, we see no reason to hold that the covenant fails.[149]

After tracing the legislative history of the Act, the court concluded that the language "at the time the agreement is made" was included in the 1993 amendment to the Act so that a covenant not to compete could be signed after the date that employment begins, and not to require the agreement containing the covenant be enforceable when made.[150] "There is no indication in the legislative history of the 1993 amendment of an intent to reduce the enforceability of covenants not to compete; all of the legislative history is to the contrary."[151]

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146. *Id.* at 651.

147. *Id.*

148. *Id.*

149. *Id.* In reaching this conclusion, the court reaffirmed a "covenant cannot be a stand-alone promise from the employee lacking any new consideration from the employer." *Alex Sheshunoff*, 209 S.W.3d at 651 (citing Martin v. Credit Prot. Ass'n, Inc., 793 S.W.2d 667, 669 (Tex. 1990)).

150. *Id.* at 654.

151. *Id.* at 654-55. In interpreting a statute, the court's principal "objective is to determine and give effect to the [l]egislature's intent." Tex. Dep't of Transp. v. Needham, 82 S.W.3d 314, 318 (Tex. 2002) (quoting Nat'l Liab. & Fire Ins. Co. v. Allen, 15 S.W.3d 525,

In fact, one of the chief purposes of the 1993 amendment to the Act was to clarify that at-will employment agreements can still be the subject of a covenant not to compete,[152] and the court noted that this would be the typical employee-employer relationship where the employer's promise is prospective.[153] Other than for the simple reason of ensuring the validity of a covenant not to compete, why would an employer be prepared to disclose confidential information when the agreement is signed, prior to the employee going through training, becoming familiar with procedures, and building a relationship of trust? While it would make for an enforceable covenant not to compete under *Light*, it would be bad business. "Such a reading would take language from the 1993 amendment, intended to *expand* the reach of the Act to cover at-will employment, and use that language to *restrict* the reach of the Act in this context."[154]

Perhaps most importantly, the *Alex Sheshunoff* Court endeavored to spur a return to the basics of covenants not to compete—the reasonableness of the limitations on a former employee as to time, geographical area, and scope of activity to be restrained.[155] The court further explained that:

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527 (Tex. 2000)). "Wherever possible, [the Texas Supreme Court] construe[s] statutes as written, but where enacted language is nebulous, [the court] may cautiously consult legislative history to help divine legislative intent." *Alex Sheshunoff*, 209 S.W.3d at 652 (citing Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001)).

152. *Alex Sheshunoff*, 209 S.W.3d at 655. The court stated:

> Cumulatively, th[e] legislative history indicates that (1) in 1989 and 1993 the [l]egislature wanted to expand the enforceability of covenants not to compete beyond that which the courts had allowed, (2) in 1989 the [l]egislature specifically wanted to ensure that covenants could be signed after the employment relationship began so long as the agreement containing the covenant was supported by new consideration, and (3) in 1993 the [l]egislature specifically wanted to make clear that covenants not to compete in the at-will employment context were enforceable.

Id. at 654.

153. *See* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 655 (Tex. 2006) (emphasizing "[i]n this typical arrangement, the employer's promise is prospective and becomes enforceable only after the employer provides such confidential information or training and a unilateral contract results").

154. *Id.*

155. *See id.* (emphasizing that the supreme court "take[s] this opportunity to observe that section 15.50(a) does not ground the enforceability of a covenant not to compete on the overly technical disputes that our opinion in *Light* seems to have engendered over whether a covenant is ancillary to an otherwise enforceable agreement"). The court further added it "did not intend in *Light* to divert attention from the central focus of section

> Concerns that have driven disputes over whether a covenant is ancillary to an otherwise enforceable agreement—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—are better addressed in determining whether and to what extent a restraint on competition is justified.[156]

In the end, the court reversed the district court and court of appeals and ruled for ASM on the summary judgment motions.[157]

VI. CONCLUSION

Up to the 1960s, Texas courts generally applied only the reasonableness standard in enforcing non-compete agreements.[158] If the covenant not to compete was deemed unreasonable, the court had the latitude to reform the agreement.[159] Starting in the 1970s, the Supreme Court of Texas started defining additional requirements that significantly narrowed the enforceability of non-compete agreements.[160] In a reaction to the supreme court's decisions, the Texas Legislature twice enacted statutes that defined the scope and

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15.50(a). To the extent our opinion caused such a diversion, we correct it today." *Id.* at 656.

156. *Id.* at 655-56.

157. *Alex Sheshunoff*, 209 S.W.3d at 657. The reasonableness of the covenant was not so much in issue, as Johnson had testified that his covenant with Strunk, which was much more restrictive than his covenant with ASM, was reasonable. *Id.* When Johnson left ASM for Strunk, he agreed that he would not sell similar products to anyone in the industry for two years after leaving Strunk's employment. *Id.* In contrast, Johnson's agreement with ASM was limited only to ASM clients and prospective clients and only required a one-year limitation on solicitations. *Id.*

158. *See, e.g.*, Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 340 S.W.2d 950, 951 (1960) (declaring "[a]n 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").

159. *See, e.g.*, Lewis v. Krueger, Hutchinson & Overton Clinic, 153 Tex. 363, 269 S.W.2d 798, 799 (1954) (holding reformation of a non-compete agreement is allowed when the original agreement had an unreasonable time duration).

160. *See, e.g.*, Martin v. Credit Prot. Ass'n, 793 S.W.2d 667, 669 (Tex. 1990) (determining the non-compete agreement failed because it did not have independent consideration and was not "ancillary to an otherwise enforceable agreement"); Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 172 (Tex. 1987) (adding the requirement 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'") (citing Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982)), *superseded by statute*, TEX. BUS. & COM. CODE ANN. §§ 15.50-.51 (Vernon 2002).

enforceability of these covenants.[161] However, one year after the legislature reviewed the statute, the 1994 Texas Supreme Court case of *Light* added a new requirement—that for an agreement to be enforceable, there must be a contemporaneous exchange of consideration.[162]

Prior to *Alex Sheshunoff*, the agreement had to be enforceable (and therefore the return consideration for the covenant non-illusory) at the time the agreement was made.[163] Post-*Alex Sheshunoff*, however, employers and others who would disclose sensitive materials during the course of at-will employment have some breathing room.[164] Without doubt, the *Alex Sheshunoff* Court's holding provides a concession to employers in an otherwise pro-employee area of law. Prior to this holding, promisees seeking to uphold a covenant not to compete had almost nothing in their favor. The covenant had to (and still must) be reasonable as to time, geographic area, and scope of activity to be restrained; and unreasonable covenants could lead to recovery of attorney's fees by the promisor from an attempt at enforcement.[165] Moreover, the covenant also had to be designed to enforce a return promise of the covenantee, a very narrowing requirement.[166] Other than a promise not to disclose trade secrets and confidential information, little else seems to satisfy this prong of the statute.[167]

Post-*Alex Sheshunoff*, instead of worrying about determining the precise time that the ancillary agreement becomes enforceable, employers and employees can now focus more on what the legisla-

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161. Act of May 29, 1993, 73d Leg., R.S., ch. 965, § 2, sec. 15.51(b)-(c), 1993 Tex. Gen. Laws 4201-02 (codified as TEX. BUS. & COM. CODE ANN. §§ 15.50-.51); Act of May 20, 1989, 71st Leg., R.S., ch. 1193, § 1, secs. 15.50-.51, 1989 Tex. Gen. Laws 4852-53 (codified as TEX. BUS. & COM. CODE ANN. §§ 15.50-.51).

162. Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 645 n.6 (Tex. 1994) (recognizing that a "unilateral contract, since it could be accepted only *by future performance*, could not support a covenant not to compete inasmuch as it was not an 'otherwise enforceable agreement at the time the agreement is made'" under the statute) (emphasis added).

163. *Id.*

164. *See* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 656 (Tex. 2006) (declaring that the court "did not intend in *Light* to divert attention from the central focus of section 15.50(a). To the extent our opinion caused such a diversion, [the Supreme Court of Texas] correct[s] it today").

165. TEX. BUS. & COM. CODE ANN. §§ 15.50-.51 (Vernon 2002).

166. 51 TEX. JUR. 3D *Monopolies and Restraints of Trade* § 58 (2000).

167. *See id.* (acknowledging that "[c]onsideration may include special training or knowledge afforded the promisor, but it is not limited to such things").

ture intended of covenants not to compete—reasonableness of the restraints—without worrying about whether the employer must provide some sensitive information earlier than necessary simply to make what would be an otherwise unenforceable agreement enforceable. In this respect, *Alex Sheshunoff* represents a return to common sense in the enforcement of non-compete agreements.