



One Minute Memo®

Texas Supreme Court Allows Stock Options as Consideration for Non-Compete Agreements

A recent decision by the Texas Supreme Court makes it easier for employers to enforce non-compete covenants. Employers often seek to obtain these types of contracts with key employees to prevent them from going to work for competitors, or leaving to start competing businesses. The enforceability of such contracts is governed by state law, resulting in a patchwork of differing standards across the United States, with some states favoring enforcement, and others precluding such agreements altogether.

A June 24, 2011 decision by the Texas Supreme Court continues the pendulum swing in Texas state law in favor of enforcing non-compete agreements. In *Marsh USA, Inc. v. Cook*, the Texas Supreme Court upheld a non-compete requirement contained in a stock option grant agreement. The court held that the stock option agreement was proper consideration for enforceability of a non-compete agreement, because it related to the protection of the employer's good will in the business.

Another Tool For Employers Seeking To Enforce Non-Compete Covenants

The *Marsh* decision is significant because for the first time, the Texas Supreme Court approved of something other than providing an employee confidential business information as appropriate consideration for a non-compete agreement. This decision reflects a continuing trend in non-compete opinions issued by the Texas Supreme Court that make it easier for an employer to enforce such agreements. Under prior case law interpreting the Texas Covenants Not To Compete Act, judicially-created hurdles made it difficult for employers to enforce non-competes. As a practical matter, the only judicially-approved consideration for a non-compete was the employer's providing of confidential information to allow the employee to perform his duties. Some Texas appellate courts had held that such consideration had to be exchanged with the employee at the precise moment the non-compete agreement was executed; otherwise the agreement was not enforceable. Employers who tried to enforce non-competes found themselves fighting evidentiary battles, not only over whether the information provided to the employee was truly "confidential," or whether it was really necessary for the employee to be able to perform the job, but also over the exact timing of the providing of such information in relation to execution of the agreement.

In *Alex Sheshunoff Management Services, Inc. v. Johnson* the Texas Supreme Court relaxed the timing requirement, holding that there is no requirement that confidential information be provided at the same time as the execution of the non-compete agreement.

In *Marsh*, the Court went further, giving employers the ability to obtain enforceable non-compete agreements tied to something other than the providing of confidential information. The court explained that the stock options were intended to provide the employee with an incentive to build the employer's good will, and that the employer's interest in protecting its good will was sufficient consideration to justify the non-compete. This means, as a practical matter, that employers who enter into similar agreements can more easily enforce the agreements and avoid court fights about whether confidential information given to an employee is sufficiently confidential to support the non-compete agreement.

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