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Texas Supreme Court Provides Greater Protection to Employers Seeking to Enforce Non-Compete Covenants

Building on its 2006 decision in *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006), the Texas Supreme Court has further expanded the enforceability of non-compete covenants in the at-will employment setting. In *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, No. 07-0490 (Tex. April 17, 2009), a decision with significant practical implications for Texas employers, the court held that an employer's implied promise to provide confidential information to an at-will employee may give rise to an enforceable covenant not to compete. In so ruling, the court extended its holding in *Sheshunoff* – that an *express* promise to provide confidential information to an at-will employee, in exchange for the employee's *express* promise not to disclose or use such information, will create an enforceable non-compete covenant – to include an employer's *implied* promise to provide confidential information.

Writing for the majority, Justice Johnson reasoned:

"[I]f the nature of the employment for which the employee is hired will reasonably require the employer to provide confidential information to the employee for the employee to accomplish the contemplated job duties, then the employer impliedly promises to provide confidential information and the covenant is enforceable so long as the other requirements of the Covenant Not to Compete Act are satisfied."

After resigning from Mann Frankfort to open a competing accounting firm, Fielding filed a declaratory judgment action, asking the district court to declare the non-compete provisions of his at-will employment agreement unenforceable under the Texas Covenant Not to Compete Act ("Act"). Fielding insisted that his non-compete was not ancillary to an otherwise enforceable agreement, as required by the Act. According to Fielding, he had expressly promised in his employment agreement "not to use or disclose at any time. . .any secret or confidential information or knowledge obtained by [Fielding] while employed," but Mann Frankfort had not made a reciprocal promise to Fielding in the agreement that it would actually provide confidential information to him. The trial court agreed with Fielding. The court of appeals affirmed, finding that Mann Frankfort failed to provide any consideration to support the non-compete because it had made no promise to provide Fielding with confidential information.

Disagreeing with the court of appeals' analysis, the Texas Supreme Court concluded that Mann Frankfort had made an enforceable, implied promise to provide Fielding with confidential information. The court's rationale is twofold. First, Fielding's job duties as Mann Frankfort's tax manager required the company to provide, and required Fielding to use, confidential information, such as customer names, billing information, and tax/financial information. Second, the Supreme Court explained that Mann Frankfort had impliedly promised to provide confidential information to Fielding because, without an implied promise to provide the information, Fielding's express promise in his employment agreement not to disclose the information made no sense and could not be accomplished. As the Court opined: "[I]f one party makes an express promise that cannot reasonably be performed absent some type of performance by the other party, courts may imply a return promise so the dealings of the parties can be construed to mean something rather than nothing at all." Because Mann Frankfort fulfilled its implied promise by actually providing confidential information to Fielding during his employment, the Court determined that the parties had entered into an otherwise enforceable agreement to which the non-compete provisions were ancillary.

Mann Frankfurt represents a further shift away from the Texas Supreme Court's previous hostility to covenants not to compete and, when combined with the court's *Sheshunoff* decision, it should result in greater enforcement of non-compete covenants by Texas courts against employees who actually receive confidential information during their employment. Nevertheless, non-compete covenants are not immune from attack. Texas courts will likely shift their focus to whether the covenant at issue contains reasonable time, geographic scope and activity restrictions, or whether it imposes a greater restraint on competitive activity than necessary to protect the employer's legitimate business interests. Greater scrutiny will likely be given to, among other factors, (i) the quality and amount of confidential information the employee actually receives, (ii) the importance of the information to the employee's work and the employer's business, (iii) the legitimacy of the business interest(s) the employer seeks to protect, (iv) the harm that could be inflicted on the employer if the employee were permitted to compete, and (v) the employee's ability to pursue a chosen profession if the covenant is enforced. In short, the law will return to the core inquiry under the old common law and the Act – the reasonableness, in light of the circumstances, of the restrictions the covenant imposes.

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