

The Changing Face

Of Noncompetition and Nondisclosure Covenants

Illustration By Winston Hughes



wise enforceable agreement.” Before assessing the latest developments, however, it is helpful to take a look at the cataclysmic changes in this area of the law over the last decade.

Historical Summary: Pre-1987

Prior to 1987, a long line of Texas judicial opinions had established that an agreement not to compete is a restraint of trade, and therefore unenforceable on

The continuing war between the Texas Supreme Court and the Texas Legislature over what constitutes an enforceable covenant not to compete reached its peak in *Travel Masters, Inc. v. Star Tours, Inc.* (827 S.W.2d 830 (Tex. 1991)), in effect slamming the judicial door on all noncompetition covenants in traditional at-will employment relationships. In June 1993, the Texas Legislature fired the next volley by amending the Covenant Not to Compete Act to: (1) specifically mention contracts at will, and (2) to preempt all existing common law concerning criteria for enforceability, and procedures and remedies utilized in an action to enforce a noncompetition covenant. The supreme court's latest retort, *Light v. Centel Cellular Co. of Texas* (37 Tex. S. Ct. J. 838 (June 2, 1994)), finally concedes the legislature's occupation of the field, while providing welcome and definitive standards for what is and what is not “ancillary to an other-

public policy grounds unless reasonable. See, e.g., *Frankiewicz v. National Comp Associates*, 633 S.W.2d 505, 507 (Tex. 1982), *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340, S.W.2d 950, 951 (1960). This rule of reasonableness was applied by the Texas courts on a case by case basis, both in employment and non-employment contexts, such as sale of a business and its good will. The Texas Supreme Court had also developed a second criterion, viz., that any contract in restraint of trade must be “ancillary to and in support of another contract.” (*Justin Belt Co., Inc. v. Yost*, 502 S.W.2d 681, 683 (Tex. 1973).) This notion was, in turn, based upon the principal that consideration must be given for a restrictive covenant. (*Garcia v. Laredo Collections, Inc.*, 601 S.W.2d 97, 98 (Tex. Civ. App. — San Antonio 1980, no writ).) In deciding the reasonableness of a noncompetition covenant, the

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courts applied a three prong analysis: (1) Was the limitation of the covenant as to time "reasonable"; (2) Was the limitation as to territory "reasonable"; and (3) Was the limitation as to scope of activity "reasonable"?¹ Utilizing their equitable powers, the courts enforced these "reasonable" restraints, not by voiding offending covenants, but by reforming them where necessary to bring them into compliance, based on the evidence. Where the three areas of inquiry were reasonable, they were usually enforced.² Unless the public interest was directly involved, as in antitrust cases, reasonableness was determined in light of whether the covenant imposed upon the employee "any greater restraint than necessary to protect the business and good will of the employer."³ Prior to the *Hill* decision, the nature and sufficiency of consideration supporting a noncompetition covenant was not an issue, as long as the covenant was ancillary to and in support of an otherwise valid contract. (*Justin Belt Co.*, 502 S.W.2d at 684.)

The Advent of *Hill v. Mobile Auto Trim*

In an abrupt departure from predictable standards already laid down for noncompetition covenants, *Hill v. Mobile Auto Trim, Inc.* (725 S.W. 2d, 168 (Tex. 1987)), gave birth to a new, four-part "reasonableness" test. In place of the former ancillary-to-agreement, reasonableness of duration-territory-scope test, the court engrafted requirements that a noncompetition covenant be: (1) necessary to protect a legitimate interest of the promisee *e.g.*, business good will or trade secrets; (2) reasonable as to restraints on time, territory and activity, so as not to oppress the promisor/employee; (3) non-injurious to the public; and (4) supported by valid consideration from the employer/promisor.

The four criteria delineated in *Hill* did not, at first blush, seem to do other than restate prior law in more specific terms. The significant aspect of *Hill* that departed from nearly a century of common law was its emphasis on the consideration, or lack thereof, supporting the covenant. The court's preoccupation with this issue is apparent in its question, "What value did Mobile give

in exchange for Hill's promise not to compete?"⁴ The court went on to discuss the fact that plaintiff Hill already possessed specialized training and knowledge prior to his franchise agreement with Mobile, and that no evidence was adduced by Mobile of its trade secrets, which allegedly provided consideration. In its frenetic attempt to point up the absence of consideration, the court finally opened the Pandora's box that it would take four years to shut, by adopting the "common calling" test. It elucidated the test thusly: "Covenants not to compete which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable."⁵

As noted by Justice Gonzalez in his dissent, the practical effect of *Hill* was to allow an erstwhile employee who is engaged in a "common calling" to divert customers of his former employer in disregard of a contractual agreement not to do so. (*Hill*, 725 S.W.2d at 177 (Gonzalez, J. dissenting).) While it was an obvious boon to employees signing covenants not to compete, *Hill* created much confusion on the topic of what constituted a "common calling." The court did not define "common calling," leaving a vacuum for lower courts to construe the standard on their own. In wrestling with the passage of legislation to solve the problem, members of the legislature made predictions of increased litigation and criticized the ambiguous new standard.⁶ Decisions following *Hill* found occupations as diverse as sales,⁷ hairstyling,⁸ and even physician,⁹ to be "common callings." Other courts found that certain other professions (*e.g.*, veterinarian office manager;¹⁰ office manager¹¹) were not common callings. Amidst this judicial melee, the Texas Legislature took matters into its own hands.

The Covenant Not to Compete Act

The passage in 1989 of the original Covenants Not to Compete Act¹² was the legislature's attempt to restore the state of the law prior to *Hill*. The statute made no mention of "common calling" as a defense to covenant enforcement. A reading of the 1989 statute, with its cumulative requirements that a covenant be "ancillary to

an otherwise enforceable agreement" and that it contain reasonable restrictions as to time, place, and scope of activity, shows that it was, in fact, largely a return to pre-*Hill* common law. This appears to be corroborated by the legislative history as evidenced by case law.¹³ Like pre-*Hill* common law, the original act required no independent consideration where a covenant was executed on the same day as the agreement to which it was ancillary.¹⁴ There was no statutory provision as to what type of underlying agreement would be required; the implicit assumption appeared to be that, as before *Hill*, the contemporaneous entry of an employment agreement was a sufficient indicium of consideration.

Unlike prior case law, however, the original act expressly required independent consideration to support a covenant signed on a date different from the underlying agreement.¹⁵ The practical effect of such a provision was to prevent an employer requiring an existing employee to execute a covenant without additional compensation or other benefit. This is supported by the legislative history.¹⁶ This provision amounted to rejection of earlier supreme court decisions which had implied that mere continuation of employment was sufficient consideration to support a noncompetition covenant.

The Demise of the "Common Calling" Test

Recognizing the polarity that had been created by the legislature's apparent rejection of the "common calling" defense, the supreme court in 1990 began to distance itself from the *Hill* rationale. In *DeSantis v. Wackenhut Corporation*¹⁷ the first major decision on the subject following passage of section 15.50, the court noted, "The references to 'common calling' in *Hill* and *Bergman* have proved confusing in determining whether to enforce agreements not to compete." After discussing the apparent judicial anomalies attributable to the test, the court relegated the "common calling" test to the status of merely an occasional factor to be used in determining the reasonableness of the covenant.¹⁸ Simultaneously the court noted that the legislature had now reject-

ed the common calling test, and declined to apply it. Instead, it focused on the need to protect a "legitimate interest" of the promisee, and the relative hardship of such protection on the promisor and on the public.¹⁹ In so doing, the court seemed to adopt a simpler form of balancing test than the one ensconced in the Covenant Not to Compete Act.

In *DeSantis*, the Texas Supreme Court applied a three-part test to determine the reasonableness of a covenant not to compete:

- a. The agreement not to compete must be ancillary to an otherwise valid transaction or relationship;
- b. The restraint created by the agreement not to compete must not be greater than necessary to protect the promisee's legitimate interest; and
- c. The promisee's need for the protection afforded by the agreement not to compete must not be outweighed by either the hardship to the promisor or any injury likely to the public.²⁰

Such test was substantially identical to the one set out in section 15.50 of the statute as then enacted, except that the *DeSantis* court employed an express balancing test not used in the statute: weighing the promisee's need for protection against both the hardship to the promisor and the injury likely to the public. The balancing test, which was the third prong of the *DeSantis* court's analysis, seemed inherently similar to the "[no] greater restraint than ... necessary" test of the act. The one difference is that the aspect of injury to the public appears nowhere in the statute, which instead focuses only on the business interest of the promisee. Furthermore, the statute uses the phrase "good will or other business interest of the promisee" in its balancing test; while *DeSantis* uses the promisee's "legitimate business interest."²¹ To the author's knowledge, no case has yet been decided which determines precisely which business interests are "legitimate" and which are not; although it seems beyond reasonable dispute that good will is a protectable interest.

"Otherwise Enforceable Agreements"

Martin v. Credit Protection Association, Inc.,²² decided the same day as *DeSantis*, focused on entirely

different issues than its companion case. *Martin* represents the supreme court's first attempt to grapple with the statutory language "otherwise enforceable agreement"²³ in the context of an "at-will" employer/employee relationship. The case involved the execution of a purported employment agreement by a company vice president three years following his hire as marketing director. He was required to sign the agreement on threat of termination. Two years thereafter, he separated from the company and set up a competing business. The so-called "employment agreement" consisted entirely of a covenant not to compete. The court held that, as a matter of law, the covenant not to compete was not ancillary to an "otherwise enforceable agreement" and therefore unenforceable.²⁴ Especially noteworthy is that, in dictum, the court attempted to harmonize *DeSantis*, *Hill*, and even *Justin Belt Co.* by the statement: "An enforceable covenant not to compete must be ancillary to an otherwise valid contract whose primary purpose is unrelated to the suppression of competition between the parties."²⁵ This statement provides a clue to the rationale behind the court's invalidation of the covenant. Clearly the court was most concerned with the nature of the "contract" to which the covenant was deemed ancillary; that such "contract" must be more than a document which had as its primary purpose the restriction of competition. With this decision the court took dead aim at those employment "contracts" which, despite their title, were mere noncompetition covenants and little more.

The *Martin* case went on to hold the covenant invalid on a second ground — lack of independent consideration — on the basis that it was executed on a date other than the inception of employment. It noted the trial court findings that the defendant company: (1) had no trade secrets; and (2) had a sufficiently significant interest in customer information to justify reasonable restrictions. The court flatly rejected the second finding with the ruling, grounded in *Hill*, that "customer information" is neither special training nor knowledge.²⁶ In an extremely enlightening footnote, the court explains how "customer information" cannot be independent consid-

eration for purposes of the *DeSantis* test, but can be a "legitimate interest" worthy of protection in an "otherwise enforceable" noncompetition covenant.²⁷ In so writing, the court betrayed its true thinking: that the threshold issue in employer-employee covenants not to compete is whether the alleged contract or agreement is more than a mere employment-at-will relationship. If it is not, *Martin* holds it is not an otherwise enforceable underlying agreement. Only if the "otherwise enforceable" milestone is passed, is independent valuable consideration an issue. Then, "customer information" will not be deemed, of itself, sufficient independent consideration where the covenant is executed after employment. The practical implications of *Martin* for employers were enormous: an employment agreement should seemingly be signed which is not "at-will," and a noncompetition covenant should be contemporaneously executed.

In contrast to case law which would follow, the *Martin* court had reached its conclusions almost entirely without reference to the act, choosing instead to predicate its ruling on *DeSantis* and *Hill*.²⁸

*Travel Masters, Inc. v. Star Tours, Inc.*²⁹ extended the sweep of *Martin* to include employment agreements executed at the inception of employment. It was the next logical step after *Martin*, which had rested its holding squarely on the insufficiency of a contract terminable-at-will as an "otherwise enforceable agreement." Obviously, if an employment contract terminable-at-will is not an "otherwise enforceable agreement" under *DeSantis*, *Martin*, or the Covenant Not to Compete Act, whether it was executed at the inception of or during the employment relationship is immaterial.

Travel Masters involved an employee who executed an employee noncompetition agreement at the inception of and as a condition of her employment.³⁰ As in *Martin*, the document was a bare noncompetition covenant, and was even styled as such. There was no written agreement memorializing the terms of the employment at will relationship.³¹ The employee, an experienced travel agent, left *Star Tours'* employment and joined a competing travel agency as its president. The plaintiff sought and obtained temporary

injunctive relief against the employee, preventing solicitation of certain customers.³² The temporary injunction withstood interlocutory appeal, but permanent injunction was denied on a directed verdict by the trial court, on grounds of unenforceability.³³ The court of appeals reversed and remanded as to the noncompete covenant, holding it enforceable as a matter of law.³⁴ In a succinct, unequivocal opinion, the Texas Supreme Court reversed and rendered on all claims, including a tortious interference jury verdict for Star Tours which had been at least partly based on the noncompete covenant.³⁵

The court's decision was a relatively easy one because the facts were extremely similar to those in *Martin*, except for the time of signing of the covenant. As in *Martin*, it based its holding on the fact that an employment-at-will contract is not an "otherwise enforceable agreement."³⁶ Its rationale seemed to be that an employment-at-will agreement is not enforceable for, at the very least, lack of a stated term.³⁷ By relying squarely on *Martin*, the court also accepted the rationale of that case that the absence of a description of duties, stated rate of compensation, position, and the like, were hallmarks of an at-will relationship.³⁸ The principal ground for the court's decision was the non-binding nature of the "at-will" employment relationship. *Travel Masters* decisively slammed shut the door which *Martin* had left ajar regarding the enforceability of the vast majority of noncompetition covenants executed with employers.

Making the At-Will Agreement "Otherwise Enforceable"

Zep Manufacturing Co. v. Harthcock,³⁹ was the first post *Travel Masters* case to address the enforceability of a noncompetition covenant contained in an employment agreement which is arguably at-will. The appellant company in *Zep* argued that Harthcock, a chemist and ex-employee, did not enter an at-will employment contract because the agreement contained language that allowed *Zep* to terminate Harthcock's employment if, in its president's "sole discretion," Harthcock's performance of his duties was "unsatis-

factory."⁴⁰ The court agreed, and found error in the trial court's finding that such a "satisfaction contract" is at-will as a matter of law.⁴¹ Unfortunately, the covenant not to compete in *Zep*, had no geographic limitation whatever, and therefore was invalid on other grounds.⁴² The court thus was not faced with the ideal fact situation of an arguably reasonable covenant which also happened to be integrated into an employment contract containing a satisfaction clause.

The legislature recently spoke again in an effort to silence the debate over discrepancies between the judicial tests hammered out by the supreme court, and the Covenants Not to Compete Act. Sections 15.50 and 15.51 of the act have been substantially amended, and a new section 15.52, preempting the common law on enforceability and procedure, enacted.⁴³ Regrettably, the amended statute, too new to have been litigated until recently⁴⁴ created almost as many problems as it solved. The new statute deleted section 15.50(1) in its entirety, and incorporated its provisions into the immediately preceding paragraph. In so doing, the legislature eliminated the "independent valuable consideration" requirement for covenants signed after the inception of employment. The difficulty with the amendment is that, on its face, it would appear to allow post-inception employment agreements containing noncompetition covenants to be enforceable with no new and independent consideration to support them. Unless the legislature intended to subsume that requirement within the phrase "an otherwise enforceable agreement" in new section 15.50, it would seem to be abrogating established law of contract. On the other hand, it may be leaving it to the courts to decide under what circumstances new consideration is necessary to make an agreement "otherwise enforceable." A further concern is the new pre-emption section which appears to, in effect, overrule *DeSantis*, *Martin*, and *Travel Masters*, to the extent their enforcement criteria differ. The obvious attempt to foreclose further judicial interpretation is problematic if read together with the deletion of the independent consideration requirement in former section 15.50(1).

The increasing tension between the legislature and the Texas Supreme Court regarding the interpretation and

application of the law in this area is manifest in the decision, *Light v. Centel Cellular Co. of Texas*.⁴⁵ This case breaks entirely new ground in creating definitive criteria with which to assess enforceability of noncompetition covenants. In *Centel Cellular*, the trial court had granted the plaintiff/employee a partial summary judgment holding unenforceable a noncompetition covenant which proscribed her from "acting as an independent agent of any mobile radio communications provider, agent or reseller in the Longview-Tyler-Marshall geographic service area." In a frank analysis utilizing the *DeSantis* reasonableness tests, the appellate court found the covenant enforceable on two grounds: (1) the covenant was ancillary to a written employment contract signed after employment, which supplemented or amended the existing at-will oral agreement between employer and employee, and (2) the covenant was supported by independent valuable consideration in the form of special training indigenous to cellular systems.⁴⁶ It held that, though the written agreement termed itself "at-will," it provided for commissions on sales of a new product in the employee's territory, and that this was sufficient to make it otherwise enforceable under the statute.⁴⁷ Having thus decided the ancillary agreement question, the appellate court went on to hold the covenant reasonable under section 15.50(2) of the act and under *DeSantis*.⁴⁸ The basis for the court's holding that the covenant was ancillary to an "otherwise enforceable agreement" was its finding that the later-executed written agreement supplemented or amended the original oral at-will relationship.⁴⁹

On appeal, the Texas Supreme Court soundly rejected such reasoning, taking as its touchstone the premise that the agreement at issue — whether later written or originally oral — was still an at-will contract.⁵⁰ The court then expressly conceded for the first time that the formation of an at-will contract does not necessarily preclude the formation of other enforceable contracts between employer and employee.⁵¹ Such other contracts, it held, can deal with any matter except attempts to limit the at-will relationship.⁵² Put differently, it is possible to have "otherwise enforceable agreements" arising



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out of an at-will employment contract, as long as the consideration for such agreements is not illusory. Since Petitioner Light was required to give two weeks' notice and provide an inventory to Centel Cellular upon termination, and Centel Cellular was obliged to provide specialized training, the court held that an "otherwise enforceable agreement" did in fact exist under the first revised act.⁵³

After first appearing to benignly follow the legislative criteria,⁵⁴ the court leveled the criticism that the legislature, in revising the act, failed to formulate any standards for determining whether a noncompetition covenant is ancillary to or part of an otherwise enforceable agreement.⁵⁵ The court accordingly adopted the standard that, for a restraint to be ancillary to a contract, it must be designed to enforce a contractual obligation of one of the parties; language strongly reminiscent of the "interest worthy of protection" standard employed in *DeSantis v. Wachenhut Corporation*.⁵⁶ With this as its basis, the court then proceeded to dramatically fashion a new test, crafted from the dissenting opinion of Justice Stevens in *Business Electronics Corporation v. Sharp Electronics Corporation* 485 U.S. 717 (1988).⁵⁷ The test thus created is: (1) Does the consideration given by the employer in the otherwise enforceable agreement give rise to the employer's interest in restraining the employee from competing? and (2) Is the covenant designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement?⁵⁸ Unless both elements can be answered in the affirmative the covenant is a naked restraint of trade and unenforceable, as it was in this case because Light's return promises (*i.e.*, 14 days' notice and return of inventory) were not sought to be enforced by the noncompetition covenant.⁵⁹

One of the best alternatives to unenforceable noncompetition covenants, even prior to *Centel Cellular*, was the trade secret nondisclosure covenant. An employer's important need to protect its trade secrets is proprietary in nature, and does not carry the stigma of suppression of competition or restraint of trade. In *Hi-Line Electric Co. v. Dowco Electric Products* (765 F.2d 1359 (5th Cir. 1985)), the court,

applying Texas law, held that a covenant not to disclose trade secrets is in line with public policy, whereas a covenant not to compete is not.⁶⁰ Furthermore, such covenants are not subject to reasonableness requirements as to duration, geographical area, or scope of activity.⁶¹ Practically speaking, such nondisclosure covenants can easily be made part of the agreement containing the noncompetition covenant, to make it "otherwise enforceable" within the rule of *Light v. Centel Cellular*. Under the *Centel Cellular* rationale, the noncompetition covenant would serve as the enforcement mechanism for specified trade secrets or confidential or proprietary information, designed to enforce the employee's promise not to use them. Even if the noncompetition covenant should be held unenforceable on other grounds or judicially modified, the remaining valid provisions of the employment agreement would be severable.⁶² Additionally, a nondisclosure covenant, even where declared judicially unenforceable, can provide a basis for a suit grounded in tortious interference with contractual relations.⁶³ One remaining drawback of such nondisclosure covenants, however, is that the enforcing party still must muster evidence to prove which, if any, trade secrets have been disclosed.

Conclusion

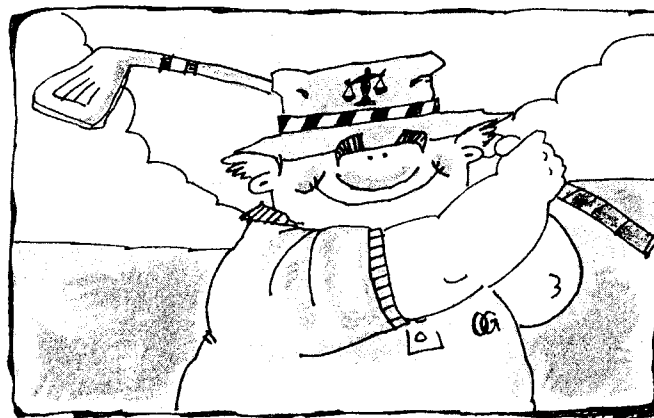
Noncompetition covenants in an employment context are now more than ever of doubtful enforceability, unless drafted in strict conformity with the new legislative amendments as construed by the latest supreme court decisions. Good practice dictates that covenants not to disclose trade secrets be relied upon more extensively, both as a basis for meeting the "otherwise enforceable and ancillary to" criteria, and as a safety net in the event the covenant not to compete is held invalid and severed. If noncompetition covenants are used, they should be eminently reasonable as to time, geographic area (usually the area in which the employee has worked), and scope of activity. In the relatively rare case where nondisclosure covenants are not feasible, and where a stated term of employment is not

possible, employment agreements should contain employer "satisfaction" clauses, employee notice and other definitive requirements, together with specific promissory language by the employee. In such cases, efforts should be made to tie the covenant not to compete to violation of specific promises of the employee. Consideration might be given to hybrid contracts which allow termination for cause the first employment year, but with or without cause in succeeding years, with automatic renewal of the employment term. Perhaps most important, all such contracts should be executed at the inception of employment. If they are not, new and independent consideration should be given the employee which is not dependent upon continued employment (e.g., cash, stock options), and which will withstand the "illusory consideration" analysis of *Light v. Centel Cellular*.

1. *Justin Belt Co.*, 502 S.W.2d at 685
2. *Garcia*, 601 S.W.2d at 99.
3. *Weatherford Oil Tool Co.*, 340 S.W.2d at 951.
4. 725 S.W.2d at 171.
5. *Id.* at 172.
6. *The Covenants Not to Compete Act: Hearings on Tex. H.B. 1026 Before the House Comm. on Bus. & Com.*, 71st Leg. (May 1, 1989) (tape available through the Office of the House Committee Coordinator).
7. *DeSantis v. Wackenhut Corp.*, 31 Tex. Sup. Ct. J. 616 (July 13, 1988) (opin. withdrawn).
8. *Bergman v. Norris of Houston*, 734 S.W.2d 673, 674 (Tex. 1987)
9. *Hoddeson v. Conroe Ear, Nose & Throat Associate, P.A.*, 751 S.W.2d 289, 290 (Tex. App. — Beaumont 1988, no writ).
10. *Cukjati v. Burkett*, 772 S.W.2d 215, 217 (Tex. App. — Dallas 1989, no writ).
11. *Travel Masters, Inc. v. Star Tours, Inc.*, 742 S.W.2d 837, 841 (Tex. App. — Dallas 1987, writ dismissed w.o.j.).
12. Act of June 16, 1989, 71st Leg., ch. 1193, 1989 Tex. Gen. Laws 4852 (amended 1993) (current version at Tex. Bus. & Com. Code Ann. §§ 15.50-51 (Vernon Supp. 1994)).
13. *Peat Marwick Main & Co. v. Haas*, 818 S.W.2d 381, 388 (Tex. 1991) (referring to legislative history).
14. Act of June 16, 1989, 71st Leg., ch. 1193, 1989 Tex. Gen. Laws. 4852 (reprinted in historical note following Tex. Bus. & Com. Code Ann. § 15.50 (Vernon Supp. 1994)).
15. *Id.*
16. Debate on Tex. H.B. 1026 on floor of the house, 71st Leg. (May 20, 1989) (tape available through the Office of the House Committee Coordinator).
17. 793 S.W.2d 670 (Tex. 1990).
18. *Id.* at 682.
19. *Id.* at 683.
20. *Id.* at 681-82.
21. Act of June 16, 1989, 71st Leg., ch. 1193, 1989 Tex. Gen. Laws. 4852 (effective Aug. 28, 1989) was the statute in effect when

- DeSantis* was decided. However, the quoted language is unchanged in the two subsequent versions of the amended act. See historical note following Tex. Bus. & Com. Code Ann. § 15.50 (Vernon Supp., 1994). The "injury to the public" aspect, likewise, remains absent from the statute. cf. *DeSantis*, 793 S.W.2d at 684.
22. 793 S.W.2d 667 (Tex. 1990).
 23. The first use of such language appeared in act of June 16, 1989, 71st Leg., ch. 1193, 1989 Tex. Gen. Laws 4852.
 24. 793 S.W.2d at 669-670.
 25. *Id.* at 669. (Emphasis added)
 26. *Id.* at 670.
 27. *Id.* at 670, n.3.
 28. The court specifically noted that, while *Martin* was pending before it, the legislature passed the act of June 16, 1989, 71st Leg., ch. 1193, 1989 Tex. Gen. Laws. 4852 to enact Tex. Bus. & Com. Code Ann. §§ 15.50-15.51. It chose not to deal with the issue of retroactivity of the act, since its result would have been identical to that reached in follow-

- ing *DeSantis*. *Id.* at 669, n.1. A later case, *Daytona Group of Texas, Inc. v. Smith*, 800 S.W.2d 285 (Tex. App. — Corpus Christi 1990, writ denied), was the first case to apply the act retroactively. *Id.* at 288.
29. 827 S.W.2d 830 (Tex. 1991).
 30. *Id.* at 832.
 31. *Id.*
 32. *Id.* at 831.
 33. *Id.*, and see n.1.
 34. *Id.*
 35. *Id.* at 830.
 36. *Id.* at 833. (Citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689 (Tex. 1989).) That case held that an at-will employment contract, though voidable, is valid and subsisting and may be tortiously interfered with.
 37. 827 S.W.2d at 833. The court rejected arguments that payment of the employee on a monthly basis removed her from the "at-will" realm. *Id.* n.2.
 38. *Martin v. Credit Protection Ass'n, Inc.*, 793 S.W.2d at 669.



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39. 824 S.W.2d 654 (Tex. App. — Dallas 1992 no writ) (applying Texas law).
40. 824 S.W.2d at 658.
41. *Id.* at 659. The court based the invalidation on § 15.50(2) of the statute. *Id.* at 661.
42. See *supra* text accompanying note 1.
43. Act of May 13, 1993, 73rd Leg., ch. 965, 1993 Tex. Gen. Laws 4204 (codified at Tex. Bus. & Com. Code Ann. §§ 15.50-15.52).
44. The amendments took effect Sept. 1, 1993. See act of May 13, 1993, 73rd Leg., ch. 965, 1993 Tex. Gen. Laws 4204, 5. Only two cases of significance construing the newly amended statute have been reported: *Light v. Centel Cellular Co.*, 37 Tex. Sup. Ct. J. 17 (June 2, 1994), see discussion *infra* note 45 and accompanying text, and *Burgess v. Permian Court Reporters*, 864 S.W.2d 725 (Tex. App. — El Paso 1993, writ dismissed w.o.j.), involving an independent contractor agreement. The latter case was decided on the basis that it was an "at will" agreement for court reporting services, and therefore unenforceable under the rule of *Travel Masters*. 864 S.W. 2d at 728. On rehearing the *Burgess* court, presented with the newly amended act, adhered to its earlier ruling.
45. 37 Tex. Sup. Ct. J. 17 (June 2, 1994). The case history of *Centel Cellular* is as follows: *Centel Cellular Co. v. Light*, 841 S.W.2d 95 (Tex. App. — Tyler 1992); rehearing denied Nov. 30, 1992; error denied March 31, 1993, order withdrawn; rehearing of writ of error granted Oct. 6, 1993; judgment reversed and remanded, 37 Tex. Sup. Ct. J. 17 (Oct. 6, 1993) (per curiam); error granted Feb. 2, 1994; opinion withdrawn, 37 Tex. S. Ct. J. 429, 437 (Feb. 2, 1994), judgment reversed and remanded, *Light v. Centel Cellular Co.*, 37 Tex. S. Ct. J. 838 (June 2, 1994).
46. *Centel Cellular Co.*, 841 S.W.2d 95, 99-100 (Tex App. — Tyler 1992). The lower opinion does not state that the written agreement was signed after employment, but gives a date of execution over two years following the employee's date of hire. Presumably, the agreement was signed in connection with the purchase of TeleSpectrum, her initial employer, by the defendant/appellant, Centel Cellular.
47. *Id.* at 99.
48. Citing also *Henshaw v. Kroencke*, 656 S.W.2d 416, 418 (Tex. 1983). The covenant restrained the plaintiff/appellee from using "customer related information [she] acquired in the course of [her] employment with [Appellant]." 841 S.W.2d. at 100.
49. *Id.* at 99.
50. *Light v. Centel Cellular Co.*, 37 Tex. Sup. Ct. J. 838 (June 2, 1994). See, especially, note 11.
51. *Id.* at 840.
52. *Id.* at 840.
53. *Id.*
54. In contrast to its rather blunt language in *Travel Masters* and in its earlier, now withdrawn opinion in *Central Cellular*, the court states, without apparent criticism, "Thus, we apply the Covenants Not to Compete Act to the facts of this case, in lieu of 'any other criteria for enforceability of a covenant not to compete under the common law or otherwise.'" *Id.* at 839. The court later states: "Section 15.50 requires us to make two initial inquiries as to formation of the covenant not to compete: (1) is there an otherwise enforceable agreement, to which (2) the covenant not to compete is ancillary [sic] to or a part of at the time the agreement is made." *Id.* at 840.
55. *Id.* at 842.
56. See *supra* notes 19-21 and accompanying text.
57. The court chose Justice Stevens' dissent over Justice Scalia's majority opinion because of the former's narrower construction of the appropriate test. The majority opinion had utilized language from the Restatement (Second) of Contracts stating that a legitimate restraint can be ancillary to a mere "transaction or relationship," language considered too broad by the Texas court in light of the statutory language at issue: "otherwise enforceable agreement." *Light*, 37 Tex. Sup. Ct. J. at 842. It is somewhat ironic that the court was forced by the statutory language to use the Steven's test. Originally, the court had formulated the broader *DeSantis* standard, of "valid transaction or relationship," a standard dropped from the original version of the 1993 amended act. See 37 Tex. S. Ct. J. at 840, n.4.
58. *Id.* at 842.
59. *Id.*
60. 765 F.2d 1359, 1363 n. 5.
61. *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663.
62. *Id.* at 662. (Citing *Murrco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 605-606 n.9 (Tex. App. — Dallas 1990, no writ), and *Hi-Line Elec. Co. v. Dowco Elec. Products*, 765 F.2d 1359, 1363 n.5 (5th Cir. 1985) (applying Texas law)).
63. *Hi-Line*, 765 F.2d at 1362 and 1363 n.5. The court's rationale was based upon the rule of *Clements v. Withers*, 437 S.W.2d 818, 821 (Tex. 1969), which held that the unenforceability of a contract which is not legally void is not a defense to tortious interference with its performance. A noncompetition covenant which is void on grounds of public policy would, by distinction, not support a tortious interference cause of action. See *Hi-Line Elec.*, 765 F.2d at 1362, and *NCH Corp. v. Share Corp.*, 757 F.2d 1540 (5th Cir. 1985) (applying Texas law).



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