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COVENANTS NOT TO COMPETE IN TEXAS: SHIFTING SANDS FROM HILL TO LIGHT

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***147** Effective August 28, 1989, the Texas Legislature enacted the first statute on covenants not to compete in Texas.[1] The legislature was spurred to action by a bipartisan assault on prior common law evinced by a quartet of cases decided by the Texas Supreme Court, two in 1987 (*Hill*[2] and *Bergman*[3]) and two in 1988 (*DeSantis*[4] and *Martin*[5]). Not only did the 1989 legislation reject the approach mandated by the 1987 and 1988 supreme court cases, but the statute also changed the common law that existed prior to the court’s bipartisan assault.

Despite the fact that the legislature intended the 1989 statute to be applied retroactively, the Texas Supreme Court continued to apply common law principles to enforcement of covenants not to compete. The court reheard the two 1988 cases (*DeSantis* and *Martin*) and in 1990 rewrote their opinions to reach the same result with a different tack.[6] Although abandoning the “common calling” test[7], the court held, as a matter of law, that terminable-at-will employment contracts are not otherwise enforceable contracts to which a covenant not to compete can be ancillary.[8]

Reacting to the court’s refusal to apply the statute retroactively and its refusal to enforce covenants not to compete as part of terminable-at-will employment contracts, the legislature amended the statute in 1993.[9] The amendments were intended to make clear that at-will employment contracts could support an ancillary covenant not to compete and that the statute preempted the common law. In its 1993 opinion in *Light*, the Texas Supreme Court continued to apply the common law and refused to follow the legislature’s pronouncements.[10]

On rehearing, the *Light* (1993) opinion was withdrawn.[11] In June of 1994, almost five years after the first statute on covenants not to compete was enacted, the Texas Supreme Court ***148** applied the statute for the first time in *Light* (1994).[12] The court reached the same result as in *Light* (1993), but for different reasons, relying on a rigorous analysis of the statute.[13]

In the last seven years, the Texas Supreme Court has refused to enforce any covenant not to compete in a published opinion. To fully understand the current state of the law requires an understanding of the pitched battle between the legislature and the supreme court. Accordingly, this paper details the supreme court cases of concern to the legislature as well as the legislature’s responses to those cases. But first, we should take a glimpse at the current statute.

I. The New Statutory Law of Covenants Not to Compete

The current statute on covenants not to compete became effective on September 1, 1993, and provides as follows:

SUBCHAPTER E. COVENANTS NOT TO COMPETE.

Section 15.50. Criteria for Enforceability of Covenants Not to Compete.

Notwithstanding Section 15.05 of this code, 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.

Section 15.51. Procedures and Remedies in Actions to Enforce Covenants Not to Compete.

(a) Except as provided in Subsection (c) of this section, a court may award the promisee under a covenant not to compete damages, injunctive relief, or both damages and injunctive relief for a breach by the promisor of the covenant.

(b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, for a term or at will, the promisee has the burden of establishing that the covenant meets the criteria specified by Section 15.50 of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this subsection, the "burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(c) If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, ***149** the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

Section 15.52. Preemption of Other Law.

The criteria for enforceability of a covenant not to compete provided by Section 15.50 of this Code and the procedures and remedies in an action to enforce a covenant not to compete provided by Section 15.51 of this Code are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise.[14]
Contrary to many Texas Supreme Court cases, the statute requires enforcement of covenants not to compete without regard to the promisor's interests, the public's interest, the existence of "separate and independent" consideration to support the covenant, or whether the promisor is engaged in a "common calling." The 1993 amendments also make clear that the statute was meant to preempt the common law and to allow covenants not to compete as part of at-will employment contracts. The reasons for the reaction of the Texas Legislature will be apparent from a historical review of the supreme court cases and their progeny.

II. A Bipartisan Quartet of Texas Supreme Court Cases in 1987 and 1988 Assaulting Prior Common Law Spurred the Texas Legislature to Action

In January of 1987, the Texas Supreme Court began a bipartisan assault on the Texas common law of covenants not to compete. The first two opinions-*Hill* and *Bergman*-were authored by Justice Kilgarlin, a democrat. The next two opinions-*DeSantis* and *Martin*-were authored by republicans, Chief Justice Phillips and Justice Culver, respectively. By the spring of 1989, a movement was afoot to, in effect, overrule this quartet of cases. By the summer of 1989, the first statute was enacted.[15]

To understand the changes made by the 1989 statute, one must understand the cases which spurred the Texas Legislature to action.

A. First Assault: The Supreme Court Decision in *Hill v. Mobile Auto Trim*

The first of the quartet was *Hill v. Mobile Auto Trim, Inc*.[16] This case marked a turning point in the common law of covenants not to compete. The central thrust of the *Hill* opinion was that a covenant not to compete must meet four criteria in order to be considered reasonable and enforceable.[17] In addition, the court decided to apply a new standard to covenants not to compete adding a fifth requirement that the promisor not try to restrain a common calling or limit competition.[18] The court reaffirmed that certain types of covenants not to compete would continue to be enforced if reasonable. These types of enforceable covenants included restrictive covenants ancillary to the sale of a business and restrictive covenants ancillary to a contract of employment if ***150** the employee received special training or knowledge during the employment.[19] However, in *Hill*, the covenant did not fall precisely within these categories and was closely reviewed.[20]

1. The Facts Relied Upon by the Texas Supreme Court in the *Hill* Case

The salient facts recited and relied upon by the Texas Supreme Court in the *Hill* case were as follows:

> Mobile Auto Trim sells car trim franchises in which equipped vans are driven to car dealerships to make repairs at the premises. In August 1982, Mobile sold a franchise to Joel Hill for approximately $42,000 plus five percent of his gross revenues. Hill's franchise covered a large part of Dallas County and all of Denton county.[21]

The franchise agreement contained a covenant not to compete providing that Hill would not compete with Mobile Auto Trim or any of its franchisees for a period of three years in the two counties in which Hill did business as a franchisee, as well as five contiguous counties.[22]

For two and a half years, as Mobile's franchisee, Hill contacted car dealerships and made car trim repairs in his two-county area. In April 1985, after Hill had not paid his franchise fees for several months, Mobile Auto Trim picked up his van and terminated the franchise agreement. That day, after the franchise agreement had been terminated, Hill contacted a prior customer, a car dealership manager in Dallas County. Thereafter, Mobile Auto Trim sought a temporary injunction to enjoin Hill from competing with it or contacting car dealership managers in the seven counties listed in the covenant not to compete.[23]

2. The Procedural History of the *Hill* Case

The trial court granted a temporary injunction against Hill, the former franchisee, requiring compliance with the covenant in all seven counties recited in the franchise agreement.[24] On appeal, the Dallas Court of Appeals affirmed, holding that Mobile Auto Trim had shown a probable right and a probable injury.[25] A dissenting opinion took the position that the covenant should have been limited to the two counties in which Hill transacted business as a franchisee.[26] The dissent relied on and recited the following "undisputed facts:"

(1) While Hill was a franchisee, he called on no dealerships other than those in his assigned area; (2) while Hill was a franchisee, he acquired no relationship with any customers of Mobile or the general public other than those in his assigned area; (3) Mobile is not seeking to enjoin the use of any trade secrets; and (4) the goodwill that Hill may have developed in his designated area will not harm Mobile outside that area.[27]

***151** As a result of the dissenting opinion, the supreme court obtained jurisdiction.[28]

3. The *Hill* Decision in Brief

In an opinion authored by Justice Kilgarlin, the Texas Supreme Court in *Hill* reversed the judgment of the court of appeals, dissolved the temporary injunction, and held the "restrictive covenant in the franchise agreement void in all respects."[29] The court concluded that there was no probable right of recovery.[30] Justice Gonzalez filed a dissenting opinion that was joined by Justices Hill and Campbell.[31] The dissenters would have reformed the covenant and enjoined Hill from competing in his assigned two-county area and from contacting customers with whom he had prior contacts in the contiguous seven-county area.[32] Justice Robertson concurred and would have simply dissolved the temporary injunction for failure to comply with Rule 683, Texas Rules of Civil Procedure, that requires, in part, that the trial court set a date for trial on the merits as part of the temporary injunction order.[33]

4. The *Hill* Test: A Covenant Must Meet Four Criteria to Be Held Reasonable and Enforceable

After a recitation of the facts, the court began its opinion with a brief summary of the Texas law of covenants not to compete. The court explained that covenants not to compete are frequently included as part of contracts for the sale of businesses and for employment.[34] Continuing, the court explained that a restrictive covenant would be enforceable to the extent that the covenant was reasonable and that whether a covenant was reasonable was a question of law.[35] In support of its position, the court cited with approval several Texas Supreme Court cases.[36]

After these observations, the *Hill* court recited that a covenant not to compete must meet four criteria in order to be held reasonable and enforceable. The court listed these four criteria as follows:
First, the covenant must be necessary for the protection of the promisee. That is to say, the promisee must have a legitimate interest in protecting business goodwill or trade secrets. Second, the covenant must not be oppressive to the promisor, as courts are hesitant to validate employee covenants when the employee has nothing but his labor to sell. In this respect, the limitations as to time, territory, and ***152** activity in the covenant not to compete must be reasonable. Third, the covenant must not be injurious to the public, since courts are reluctant to enforce covenants which prevent competition and deprive the community of needed goods....

Finally, as with any contract, the non-competitive agreement should be enforced only if the promisee gives consideration for something of value.[37]
Regarding the requirement of consideration, the court explained that the purpose of this requirement was to promote "economic efficiency."[38] For example, explained the court, in the case of a contract for the sale of a business, a covenant not to compete on the part of the seller would increase the value of the business and increase the likelihood that the business would be purchased.[39] In the case of employment contracts, a covenant not to compete on the part of the employee would provide an incentive to the employer to impart special training or knowledge to the employee enhancing the value of the employee to other employers.[40]

5. The *Hill* Majority Reasons That Three of the Four Criteria Were Not Met by Mobile Auto Trim

The *Hill* majority concluded that the covenant not to compete was "plagued by a lack of reasonableness."[41] Focusing first on the consideration criterion, the court held that there was lack of consideration for the restrictive covenant, questioning and answering rhetorically, " w hat value did Mobile give in exchange for Hill's promise not to compete? It was not specialized training or knowledge, for that was acquired by Hill prior to his franchise agreement, nor was it Mobile's promise not to compete with Hill after their business relation terminated."[42] The court noted that although Mobile Auto Trim argued that its auto trim services comprise trade secrets, Mobile Auto Trim did not substantiate its argument, did not attempt to stop the use of its trade secrets by filing suit, and only sought to exclude Hill's use of its techniques in the Dallas-Fort Worth metroplex.[43]

Next, and more importantly, the majority found that Mobile had no legitimate business interest which the covenant was necessary to protect.[44] Addressing Mobile Auto Trim's contention that enforcement of the covenant was necessary to protect the goodwill established between customers and the franchise, the court concluded that "there exists not only business goodwill but also franchisee goodwill."[45] The court explained as follows:

> When people leave a business to work for another or to open a firm of their own, many are capable of taking with them a sizable number of the clients whom they had served at their previous place of employment. If they were not in possession of some type of personal magnetism or personal goodwill, they would be incapable of retaining those clients or customers. Shrewd employers and franchisors ***153** know this and seek to deprive the employee/franchisee of the fruits of his goodwill by requiring that he enter into an agreement containing a restrictive covenant. The covenant is generally unfair to the employee/franchisee, for when that person is placed in the position of being unable to compete with the former employer/franchisor, his personal goodwill is effectively neutralized.[46]

Third, and finally, the majority in *Hill* concluded that enforcement of the restrictive covenant would be "oppressive" to Hill.[47] The court reasoned that Hill had already lost his investment in the franchise and that to enforce the covenant would prevent him "from using his previously acquired skills and talent to support him and his family in the county of their residence."[48]

After concluding that three of the four necessary criteria had not been met by Mobile Auto Trim, the court held that there was "no probable right of recovery."[49] Accordingly, the *Hill* court reversed and remanded with instructions that the temporary injunction be dissolved.[50] Curiously, however, the court also apparently ruled on the merits of the litigation by holding "the restrictive covenant in the franchise agreement void in all respects."[51]

6. Significant Dicta in the *Hill* Opinion

There were a number of statements of interest made by the court in *Hill* that had little to do with its analysis of the four criteria. First, the court recognized that covenants not to compete are typically encountered in contracts for the sale of a business or contracts of employment.[52] The court concluded, however, that a restrictive covenant ancillary to a franchise agreement does not easily fit either category.[53] The court noted that the net effect of the franchise arrangement was that "Hill paid for the use of Mobile's name and accompanying goodwill."[54] Thereafter, the court treated the parties as though there was no distinction between a franchise and an employment relationship.

Second, the court noted that in the past it had "modified restrictive covenants in order to make the time, area and scope of the covenant reasonable."[55] But, the court continued, there was no presumption that a covenant could be reformed in all circumstances.[56] According to the majority, it would be necessary to ignore the fact that a franchisor ordinarily has no right to restrict fair competition in order to support such a presumption.[57] As a concluding comment, the court ***154** stated: "If fair competition is injurious to the franchisor, then so be it: it is but a normal effect of a free market economy."[58]

Third, the court observed that "a man's talents are his own," and that "[a]bsent clear and convincing proof to the contrary, there must be a presumption that he has not bargained away the future use of those talents."[59] As authority for this proposition, the court quoted Williston, as follows:

> A man's aptitudes, his skill, his dexterity, his manual or mental ability-all those things which in sound philosophical language are not objective, but subjective-they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large.[60]

Finally, the most significant dicta was the court's discussion of "common calling" as a new standard which it was adopting. The court stated:

Today, we are presented with an individual who is skilled in auto trim repair and are asked to prohibit him from engaging in a common calling. We refuse to do so.... In 1982, the Utah Supreme Court refused to enforce a hearing aid distributor's non-competition agreement against a former salesman, setting forth the standard which we adopt today: "[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."[61]

7. Ambiguities in the *Hill* Opinion

The *Hill* opinion had many ambiguities. The seriousness of those ambiguities was emphasized by the original dissenting opinion prior to rehearing. The original dissenting opinion stated: "For reasons not pled, argued or briefed, the court ignores well established Texas precedent and announces a new rule that eviscerates covenants not to compete."[62] After rehearing, the majority opinion remained unchanged, but the dissent changed its opinion to state: "For reasons not pled, argued or briefed, the court ignores well established Texas precedent and announces a new rule that puts into question the validity of covenants not to compete in franchise agreements."[63] This was the most positive result achieved as a result of the rehearing.

Depending upon whether a party was seeking to uphold or avoid enforcement of a restrictive covenant, language to support either position could be culled from *Hill*.

***155** a) Language in *Hill* That Supported Enforcement of Restrictive Covenants

The *Hill* opinion contains language favorable to enforcement of restrictive covenants and from which one could easily conclude that there has been no change in the Texas law of covenants not to compete. Factors in *Hill* that support this conclusion include:

1. The *Hill* majority opinion states that the law of Texas was, and continues to be, that covenants not to compete are enforceable to the extent they are reasonable.[64]

2. The *Hill* majority opinion does not attempt to overrule any prior Texas case law, but instead, cites with approval a long line of Texas cases that have either enforced restrictive covenants or indicated that restrictive covenants are enforceable.[65]

3. The four criteria recited by the *Hill* opinion that a covenant must meet to be considered reasonable and enforceable are assembled essentially from prior Texas cases.

b) Language in *Hill* That Supported an Argument That the Law of Restrictive Covenants Was Changing

After the majority recited the black letter law to be followed in cases of restrictive covenants, it applied that law to the facts of *Hill* in such a fashion as to create ambiguities in the meaning of the opinion. Some of those ambiguities are discussed below.

First, after reciting that a covenant must meet four criteria in order to be reasonable and enforceable, the court stated that the "standard" that it adopted was 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."[66] In this fashion, the court suggested that there was a fifth criterion that must be met.

Second, The majority stated that the fourth criterion to enforce a restrictive covenant was that the covenant must be supported by consideration.[67] Historically, covenants not to compete were enforceable if ancillary to an otherwise valid contract having a primary purpose unrelated to the suppression of competition. The consideration supporting the underlying contract also supported the ancillary covenant not to compete. However, although there was certainly an exchange of consideration sufficient to support the franchise agreement in *Hill*, the majority concluded that there was not sufficient consideration to sustain the covenant.[68] From this, it is not clear whether the majority was requiring that some element of consideration be present in addition to that required to support the primary purpose of the agreement.

***156** Third, the majority opinion recognized the differences between contracts for the sale of a business, contracts of employment and contracts establishing a franchise. However, it refused to find a legally protectable interest that would justify an ancillary covenant not to compete in this franchise agreement. The *Hill* franchise agreement was not unlike most franchise agreements, thus raising the question of whether a restrictive covenant can be ancillary to franchise agreements. On facts not significantly different from *Hill*, cases around the country have determined that the franchisor had a legally protectable interest to justify a restrictive covenant.[69]

Fourth, the court for the first time, and contrary to prior cases such as *Henshaw v. Kroenecke*,[70] recognized that goodwill developed during the course of the business may belong, in part, to the franchisee/employee.[71] This, of course, limits the range of protectable interests that can be asserted by the franchisor/employer. Rather than a general rule, however, this may have been a point for distinguishing the *Hill* case. In *Hill*, the franchisee ran his own business under the franchisor's name and was responsible for all customer contact, service, and satisfaction. In the typical employment situation, customer goodwill is developed by a number of employees working toward the goal of satisfying the customer, and no one employee is responsible for the entire company goodwill.

Probably the most disturbing aspect of the majority opinion was the decision to declare the covenant "void in all respects" rather than remand with instructions as to the law to be applied at a final trial on the merits.[72] By declaring the merits of this case on appeal, the court denied the parties the right to trial by jury. In addition, the court acted contrary to a long line of Texas cases that hold that on appeal from the grant or denial of a temporary injunction, the court will not decide the merits of the case.[73] This suggests that a new rule of law was being adopted by the court.

B. After *Hill*, but Before *Bergman*, the Court of Appeals Enforced Covenants Not to Compete As Usual

Due to the ambiguities present in the *Hill* opinion, the appellate decisions after *Hill*, but before *Bergman*, resolved those ambiguities in favor of enforcing covenants not to compete. Houston's Fourteenth Court of Appeals had little trouble distinguishing the *Hill* case and enforcing covenants in two cases. In the first decision, *DeSantis v. Wackenhut Corp.*, the court of appeals ***157** affirmed entry of a permanent injunction enforcing a covenant not to compete.[74] In the second, *Unitel Corp. v. Decker*, the court reversed and remanded, in part, directing entry of temporary injunctions to enforce covenants not to compete.[75]

The *DeSantis* case involved the application of Florida law to a Texas resident. Suit was filed by Wackenhut, a Florida corporation specializing in security services with offices in Houston. Wackenhut sought to enforce a covenant not to compete against its former office manager, DeSantis. The covenant prohibited DeSantis from competing with Wackenhut in Harris County and forty surrounding counties for a period of two years.[76] After a jury trial, the trial court entered a permanent injunction against DeSantis for two years in thirteen counties in which Wackenhut had actually done business.[77] On appeal, DeSantis, relying on *Hill*, argued that applying Florida law to enforce the covenant not to compete would undermine Texas public policy. The Fourteenth District Court of Appeals rejected this argument, concluding that enforcement of a covenant not to compete was not contrary to Texas public policy.[78] An application for writ of error was accepted from this decision, and the decision was reversed.[79]

At that time, the more authoritative treatment of *Hill* appeared in the Fourteenth Court of Appeals *Unitel* decision.[80] The Unitel Corporation was engaged in the business of selling and servicing cellular car phones, and selling air time for such phones. Three former salespersons for Unitel went to work for competing businesses. While employed by Unitel, each had signed a covenant not to compete running for one year and extending twenty five miles from the outer limits of Harris County.[81] Two separate suits were filed, and two different ancillary judges refused to enforce the restrictive covenants by temporary injunction.[82] On consolidated interlocutory appeals, the Fourteenth Court of Appeals reversed and remanded with instructions to enforce the restrictive covenants.[83]

In the *Unitel* opinion, the Fourteenth Court of Appeals determined that each of the four criteria set forth in *Hill* had been satisfied. Addressing each criterion separately, the court first held that the covenants were necessary to protect the employer due to the special training given to the salespersons which was considered unique and confidential by the employer.[84] Further, customer leads developed by the employer were confidential, and at least one of the employer's customers had been solicited.[85] Second, balancing the equities, the appellate court determined that due to ***158** their prior sales experience, there would be no hardship to these salespersons in requiring them "to find temporary employment in a different area of sales."[86] Regarding the third criterion, the appellate court concluded that there would be no harm to the public because the covenant "does not prevent competition or deprive the community of needed goods."[87] Finally, the appellate court concluded that the employer gave consideration to support the covenant in the form of special training, thus satisfying the fourth criterion.[88]

The appellate court in *Unitel* concluded that the covenant was reasonable and that "[p]roof of a continued breach of the non-competition agreement by a highly trained employee constitutes prima facie proof of probable injury."[89] Accordingly, the appellate court reversed and remanded with instructions to grant the temporary injunctions against the former salespersons.[90]

Of interest, there was no discussion of the "common calling" standard announced by the *Hill* court. Instead, the appellate court emphasized the four *Hill* criteria and relied on prior Texas Supreme Court cases such as *Weatherford Oil Tool Co. v. Campbell*,[91] and *Henshaw v. Kroenecke*,[92] as well as a number of pre-*Hill* appellate decisions. No application for writ of error was filed in the *Unitel* case.

C. Second Assault: The Supreme Court Gave a Further Definition of "Common Calling"

On July 15, 1987, the Texas Supreme Court rendered the second decision in the series of four in *Bergman v. Norris of Houston, Inc.*[93] The suit was brought by a hair styling salon chain called Norris of Houston which had six locations and 65 employees in the Houston area.[94] The suit was brought against four former employees named Aschwege, Bergman, Stewart, and Bobon.[95] Aschwege was a store manager who had attended Norris' barber college. Aschwege agreed to a covenant not to compete for three years in Harris County.[96] Bergman, Stewart and Bobon were employed as hair stylists. They received their training elsewhere and brought some customers with them to Norris. The court noted that while employed by Norris, the defendant hair stylists "acquired new customers through referrals and personal solicitations" and that there "was little ***159** walk-in business and no advertising to obtain new customers."[97] Bergman, Stewart and Bobon agreed to covenants not to compete for three years within fifteen miles of any Norris location.[98]

The four defendants (along with the manicurist) resigned, thereby leaving no one at the Norris salon.[99] They started to work for a competitor three miles away, and sent notices to 1,300 customers. After a jury trial, the trial court entered a permanent injunction, and the court of appeals affirmed in an unpublished opinion.[100] The supreme court reversed and rendered judgment dissolving the injunction.[101]

In an opinion authored by Justice Kilgarlin, the *Bergman* court explained that in *Hill*, the court specifically rejected covenants restricting the right to engage in a common calling as being unenforceable.[102] The *Bergman* opinion restated, however, that certain "non-competition agreements" were enforceable if reasonable and that permissible covenants included "covenants not to compete incident to the sale of a business or covenants not to compete where the employer provided special training or knowledge."[103] The *Bergman* court, in concluding that hairstyling was a common calling and that the covenants were not enforceable, stated:

> Barbering, however labeled, is a common calling. Conferring upon Aschwege the title of manager of a hair salon does nothing to alter that status. Whether an employee is engaged in a common calling is a question of law to be decided from the facts of each individual case. We hold that Aschwege, Bergman, Stewart, and Bobon are engaged in a common calling and as such the covenants not to compete are unenforceable as to them, there being no sale of a business or imparting of specialized knowledge or information involved.[104]

Justice Gonzalez filed an opinion dissenting and concurring, in part, in which Justice Hill joined.[105] The dissenters would have enforced the covenant not to compete against Aschwege and the store manager, but not the remaining defendants.[106] They reasoned as follows:

> Before Aschwege began working for Norris, she had no customers; when she left, she sent notices to 500 customers and now services 400 of those customers. She was the manager of the salon with authority to hire and fire. She attended monthly meetings in which the managers collectively formulated business policy to improve an already well-established and successful business. Norris' legitimate business interest as to Aschwege should be protected.[107]

*160 D. Appellate Cases After *Bergman*, But Before *DeSantis*, Continued to Routinely Enforce Covenants Not to Compete

There were eight published appellate court decisions on covenants not to compete after *Bergman* was decided and before the supreme court decided *DeSantis*. Of those eight, five cases held that the covenants not to compete before the courts were reasonable and enforceable.[108] Three cases held the covenants not enforceable, but for varying reasons.[109] One appellate court held the covenant not enforceable as written, being overly broad in the scope of activity and geographic area of restraint, but indicated that a lesser restriction would be enforceable.[110]

A number of general observations can be made concerning these cases. First, all of the cases which considered whether the covenant was reasonable and enforceable based their analysis on the four-part test of *Hill*. Second, the cases which considered *Bergman* in detail limited that case to hair stylists. Third, the "common calling" test was seriously considered by only half of the cases with varying analyses.[111]

Fourth, none of these cases read *Hill* or *Bergman* to herald a wholesale change in the law of covenants not to compete. When determining not to enforce a covenant not to compete, the case of *Hoddeson v. Conroe Ear, Nose and Throat Associates, P.A*. noted that since the *Hill* decision was rendered, covenants not to compete "receive[d] added scrutiny."[112]

***161** Fifth, only one case, *Hoddeson*, clearly indicated that the covenant not to compete in issue would not be enforceable regardless of its scope.[113] Even that case was a split decision with a strong dissenting opinion. Further, the basis for the appellate court's decision was the rather unusual reliance on the public interest as the determinative factor precluding enforcement of the covenant.[114] The court was concerned that a particular hospital would lose the services of the only ear, nose, and throat doctor on its staff.

Finally, at this point it appeared clear that the appellate courts had determined to resolve the ambiguities in the *Hill* case against a change in the common law of Texas.

Some additional points of interest about each of these appellate court decisions follow.

1. Dallas Court of Appeals: Two Opinions Consistent With Prior Common Law

The Dallas Court of Appeals published two opinions concerning covenants not to compete after *Bergman*, but before *DeSantis*. The most interesting was *Travel Masters, Inc. v. Star Tours, Inc*.[115] The significance of *Travel Masters* was the court's attempt to define the elusive phrase "common calling."

On December 1, 1983, Star Tours hired Ms. Donna Goldsmith to act as office manager for its Dallas office. Goldsmith was an experienced travel agent. As part of her employment contract, Goldsmith agreed not to solicit customers of Star Tours for a period of two years after termination.[116] Three days after leaving Star Tours, Goldsmith became president of Travel Masters and began soliciting Star Tours' clients. This caused a significant decrease in Star Tours' business.[117] Shortly thereafter, suit was filed, and the trial court entered a temporary injunction restraining Travel Masters and Goldsmith from contacting "a specified list of Star Tours' customers."[118]

Reviewing the four *Hill* factors, the court first concluded that the business goodwill created by its employees and its customer lists were legitimate interests which Star Tours could protect by a covenant not to compete.[119] Second, the covenant was not oppressive to Goldsmith because she could provide travel services anywhere so long as she did not service Star Tours' clients for two years.[120] Third, the court found that enforcement of the covenant would be in the public interest by encouraging Star Tours to entrust confidential information to its employees and preserving the right to freedom of contract.[121] Fourth, the court concluded that acceptance of employment was valid ***162** consideration to support a restrictive covenant not to compete.[122] In addition, her employment as an office manager "required additional skills and training beyond those required as a travel agent."[123]

Finally, the court addressed the "common calling" standard, noting that the Texas Supreme Court had not provided guidance in defining "common calling."[124] By reviewing dictionary definitions, the court determined that the office manager was not engaged in a common calling.[125] The court stated:

"Common" is defined as "of a usual type or standard; quite usual and average; entirely ordinary and undistinguished.... "Calling" is defined as "the activity in which one customarily engages as a vocation or profession...." We cannot hold that as a matter of law an office manager is a "vocation or profession", "of the usual type", which is "entirely ordinary and undistinguished."[126]

The *Travel Masters* case was reversed and remanded in 1992 on the basis that Goldsmith was an employee-at-will and that an at-will relationship is not an otherwise enforceable agreement to support a covenant not to compete.[127] This supreme court opinion is analyzed in detail later.[128]

The second case decided by the Dallas Court of Appeals was *Diversified Human Resources Group, Inc. v. Levinson-Polakoff*.[129] Applying well-established principles of common law, the court refused to award liquidated damages to the former employer because the covenant as written was overly broad.[130] The law in Texas was well-established that if a covenant cannot be enforced as written, then no damages could be recovered.[131]

The former employee was a recruiter of data processing personnel who worked out of the Dallas office of Diversified Human Resources Group (DHRG).[132] Her employment contract restricted her from competing in any type of recruiting services for six months within 50 miles of any city in which DHRG had a profit center.[133] Although the court indicated that a restriction against data processing recruiting in the territory in which the employee previously worked would be enforceable, the covenant as written was not.[134]

***163 2. Houston Courts of Appeals: One Opinion by the First District and Another by the Fourteenth District Enforce Covenants Not to Compete**

Houston's First District Court of Appeals reasoned that the "common calling" test had no application when the sale of a business is in issue.[135] In this case, Ms. Sheryl Woolf sold a records service business called Verbatim Records Service to M.R.S. Datascope and remained as an employee of the business. Thereafter, Woolf resigned her position and began working for a competitor, Exchange Data.[136] The court concluded that Woolf's three-year covenant not to compete in Houston and seven surrounding counties was ancillary to both the sale of her business and her employment.[137] Upon review of the four *Hill* factors, the court held the covenant to be reasonable and enforceable, reversing the trial court's refusal to enter a temporary injunction.[138]

In *Bertotti v. C.E. Shepherd Co., Inc.*, the Fourteenth District Court of Appeals affirmed the grant of a temporary injunction enforcing a covenant not to compete, but modified the injunction to limit its terms to competing goods only.[139] In 1984, Bertotti was hired as a sales manager handling wire and plastic products for C.E. Shepherd. At Shepherd, Bertotti had access to secret and confidential product information. C.E. Shepherd spent two to three hundred thousand dollars per year on research and development and maintained strict secrecy of its product manufacturing information.[140] Bertotti had a graduate engineering degree, but had no prior experience with Shepherd's products.[141] Bertotti was fired after he was seen copying documents that filled two brief cases but refused to reveal the contents.[142] As part of his employment agreement, Bertotti agreed not to compete with the company for two years following his termination.[143] The trial court issued a temporary injunction enjoining Bertotti from selling any kind of goods or materials to customers of C.E. Shepherd in any state or foreign country where C.E. Shepherd did business.[144]

On appeal, the court affirmed, but modified the injunction to cover only "competing" goods instead of "any" goods.[145] The court carefully considered the four *Hill* factors and held that each had been satisfied.[146] Much of the case focused on C.E. Shepherd's trade secrets and Bertotti's use and possible use of that information for himself and others. Of significance, the court ***164** determined that giving employment was valuable consideration to support a covenant not to compete, as was giving special training or knowledge.[147]

3. Corpus Christi Court of Appeals: A Further Definition of "Common Calling"

While holding a covenant not to compete enforceable, the Corpus Christi Court of Appeals held that a person engaged in sophisticated management functions is not engaged in a "common calling."[148] The court defined a person engaged in a "common calling" as "one who performs a generic task for a living, one that changes little no matter for whom or where an employee works."[149] Also of significance, the court found that a fifteen percent pay raise, plus a one percent commission on profits was sufficient consideration to support execution by an present employee of a new employment contract with a covenant not to compete.[150] Further, the employee's ten years experience prior to execution of the covenant gave the employee a great deal of special knowledge including "confidential information such as marketing strategies and price lists" which was an interest protectable by the employer.[151]

4. Fort Worth Court of Appeals: Two Cases Decided, One Enforcing a Restrictive Covenant and Another Refusing Enforcement

In *Chandler v. Mastercraft Dental Corp. of Texas Inc.*, the appellate court affirmed a judgment rendered in favor of a purchaser of a dental manufacturing business.[152] In addition to selling their business, the sellers remained as employees for about two years and had executed employment agreements containing three year covenants not to compete.[153] The purchaser/employer sought enforcement only of the five year covenant contained in the sales agreement ancillary to the sale of the business.[154] Siding with the purchaser/employer and based on the jury findings, the court enjoined the sellers from competing with the purchaser for five years and assessed $75,000 in damages for breach of the covenant.[155] Of interest, the court found that the dental products at issue were "not necessities where noncompetition would deprive the community of these goods."[156] As such, only the interests of the parties needed to be evaluated with respect to the covenant.[157]

***165** In the case of *Orkin Exterminating Co. v. Resurreccion*, the appellate court affirmed the trial court's refusal to enter a temporary injunction on the basis that the former employer, Orkin, failed to prove probable injury as a result of the employee's work for a competitor, Terminix.[158] The employee had not contacted former customers and there was conflicting evidence of the alleged existence of trade secrets.[159] The court expressly stated that the reasonableness of the covenant was not being addressed.[160]

5. Beaumont Court of Appeals: Enforcement of a Restrictive Covenant Against a Certain Doctor Would Be Injurious to the Public

The real reason for the court's decision in *Hoddeson v. Conroe Ear, Nose and Throat Associates* was that enforcement of a restrictive covenant against Dr. Hoddeson would deprive a hospital in The Woodlands, Texas of the only ear, nose, and throat

(ENT) doctor on its staff.[161] Hoddeson had performed 142 surgeries at the hospital in the prior year.[162] The court stated " t he proof shows, without question, that to deny Appellant the right to practice medicine would be injurious to the public and especially to those in The Woodlands area."[163] Of interest, the court appears to have decided that Dr. Hoddeson was engaged in a "common calling," concluding, " t he covenant before us was designed primarily to limit competition or restrain the right to engage in a common calling and ' is not enforceable."'[164]

The court also indicated that there were two competing interests with a restrictive covenant-one was to protect the investment made by employers in their employees, such as training given the employees, and the other was to allow employees to freely exercise their skills.[165] According to the court, Hoddeson received no training from his employer and the covenant was designed only to protect the employer from competition.[166] The majority made no mention of Hoddeson's $100,000 salary, his lack of a prior patient base, and the other benefits provided by his employer. A strong dissenting opinion would have affirmed the trial court's entry of a temporary injunction.[167]

E. Third Assault: The Supreme Court's 1988 Decision in *DeSantis v. Wackenhut Corp*. Was the Straw That Broke the Camel's Back

Both the *Hill* and *Bergman* opinions contained language which could readily be distinguished. *Hill* could be read to reaffirm the prior common law and *Bergman* could be limited ***166** to hair stylists. The appellate courts had little difficulty applying the four-step approach mandated by *Hill* and side-stepping the illusory "common calling" test. But, *DeSantis* was the straw that broke the camel's back.[168]

DeSantis held that covenants not to compete were against the public policy of Texas, that the promisee must show irreparable harm in order to enforce a covenant not to compete, and that consideration other than special training or knowledge was not sufficient to enforce a covenant against a former employee.[169] *DeSantis* also indicated that the "common calling" criteria was now a threshold criteria and if met, required that the promisee prove compliance with the remaining four *Hill* factors.[170] To this, *DeSantis* added that if the covenant not to compete was held unreasonable, any interim injunctive relief granted against the promisor would result in antitrust liability to the promisee for actual damages, costs, and reasonable attorney fees, and if willful or flagrant, would entitle the promisor to treble damages.[171]

1. The Facts in the *DeSantis* Case Leading to Entry of Temporary and Permanent Injunctions by the Trial Court

Mr. DeSantis was the area manager for the Houston office of Wackenhut Corporation, a Florida company providing security services in Houston. Wackenhut is the third largest company in the nation which provides security guards to businesses.[172] Prior to joining Wackenhut, DeSantis had made his career in the security business, working for the CIA and for private companies.[173] DeSantis was hired as the Houston area manager in June of 1981 and resigned upon threat of termination in March of 1984.[174] Following his resignation, DeSantis formed a new competitive company called Risk Deterrence, Inc. (RDI). In April of 1984, DeSantis sent announcements to ten or fifteen Wackenhut customers. One of these customers, Marathon Oil Company, signed a five-year agreement with RDI and another asked RDI to submit a proposal.[175]

Thereafter, Wackenhut filed suit against DeSantis and RDI.[176] DeSantis had signed an employment contract which included a covenant that DeSantis would not compete with Wackenhut in forty counties in and around Houston for two years.[177] The contract was to be governed by Florida law, since Florida was Wackenhut's home state and the place where DeSantis was hired.[178] Applying Florida law, the trial court entered a temporary injunction and after a jury trial, a permanent injunction enforcing the covenant in thirteen counties for two years from the date of ***167** DeSantis' March 1984 resignation, as well as precluding DeSantis from disclosing client lists or divulging confidential information.[179]

RDI and DeSantis counterclaimed for damages due to wrongful injunction and due to violation of the Texas Free Enterprise and Antitrust Act.[180] The jury found that RDI suffered $18,000 in actual damages and that DeSantis suffered no actual damages.[181] The trial court entered judgment for Wackenhut and JNOV against defendants, holding that defendants take nothing.[182]

2. The Appellate Court Affirms an Injunction Against DeSantis

During pendency of the appeal from the trial court decision, the *Hill* case was decided. In a post-submission brief, DeSantis argued that the *Hill* case established that covenants not to compete were against the public policy of Texas and that the trial court should not have applied Florida law or enforced the covenant not to compete. The Fourteenth District Court of Appeals rejected this argument, concluding that enforcement of a covenant not to compete was not contrary to Texas public policy.[183] The appellate court stated:

> Non-compete agreements that do not impose upon the employee any greater restraint than is reasonably necessary to protect the business and goodwill of the employer have been enforced in this state. The recent supreme court decision in *Hill v. Mobile Auto Trim, Inc.*, cited by appellants in a post-submission brief, does not vitiate such reasonable agreements. In that case the supreme court specified four criteria that a covenant not to compete must meet in order to be deemed reasonable and then found that the particular covenant at issue, which was contained in a franchise agreement, did not meet several of those criteria.[184]

3. *DeSantis* (1988): The Texas Supreme Court Held That Texas Law, Not Florida Law, Should Have Been Applied

Prior to the *DeSantis* case, the Texas Supreme Court had not addressed the question of how to treat choice of law provisions in contractual agreements.[185] The court adopted the provisions of Section 187 of the Restatement (Second) of Conflict of Laws.[186] The Restatement provides, generally, that choice of law provisions are enforceable so long as there is a reasonable relationship between the parties and the chosen state and the law of the chosen state is not contrary to a fundamental public policy of the forum state.[187] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Section 187 provides:
***168** (1) the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) the law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.[188]

The supreme court held in *DeSantis* that there was a reasonable relationship between the parties to the contract and Florida law because Wackenhut was a Florida corporation with its corporate headquarters in Florida.[189] DeSantis had been interviewed and hired in Florida and the Houston office was closely supervised by the Florida headquarters. To the Texas Supreme Court, however, the Florida law of covenants not to compete was "contrary to the fundamental public policy of Texas," and therefore did not satisfy the Restatement test.[190] The fundamental public policy which would be violated by the covenant not to compete was the "Texas public policy of promoting free movement of workers in the job market."[191]

In reaching this conclusion, the court focused on the differences between Florida law and Texas law concerning enforcement of covenants not to compete. The court concluded that Florida and Texas law were "substantially dissimilar" because:
1. Florida recognized by statute that covenants not to compete were enforceable, while, at that time, Texas had placed many restrictions on the enforceability of such covenants;[192]

2. Florida courts were limited to reviewing the reasonableness of the covenant in terms of time and area restrictions, while Texas courts applied a more rigorous analysis which included the four-part test set forth in *Hill*.[193] The Florida statute provided, in pertinent part, as follows:

> (2)(a) [O]ne who is employed as an agent ... or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, ... so long as such employer continues to carry on a like ***169** business therein. Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction;[194]

3. Florida courts were not empowered to consider the impact of the covenant on the employee, while Texas courts were required to determine whether enforcement would be oppressive to the employee;[195]

4. Florida courts were not empowered to consider the employee's type of work, while Texas courts were not permitted to preclude an employee from engaging in a "common calling;"[196] and

5. Florida law allows entry of a temporary injunction to enforce a covenant not to compete without a showing of irreparable injury while Texas requires a showing of probable irreparable injury for entry of a temporary injunction.[197]

This analysis is curious. The *DeSantis* court acknowledged that a fundamental public policy is not at stake simply because the law of choice and law of the forum would merely reach contrary results.[198] The court quoted the following passages from the Restatement with approval:

The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law.

....

To be "fundamental," a policy must ... be a substantial one .... [A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of bargaining power.[199]

Typically, this type of analysis is used to justify refusing to enforce contracts such as gambling contracts executed in Nevada as being contrary to fundamental policy.[200] In the case of covenants not to compete, both Florida and Texas enforce such covenants, but on different terms.[201] Therefore enforcement of a covenant not to compete would not appear to be contrary to a public policy of Texas. As such, this was a "false" conflict and Florida law should have been applied. Nonetheless, the *DeSantis* court determined that the merits of the case had to be reviewed applying Texas law.[202]

*170 4. *DeSantis* (1988): The Texas Supreme Court Held That DeSantis Was Not Engaged in a "Common Calling"

The supreme court began its analysis of Texas law by determining whether DeSantis was engaged in a "common calling." The court held that this was a question of law to be determined based upon the individual facts of each case.[203] DeSantis was held not to be engaged in a "common calling" because he was "a professional in the security business," was responsible for "all operations, contracts, proposals and client development for the Houston office," and managed large annual revenues in the millions of dollars.[204]

5. *DeSantis* (1988): The Texas Supreme Court Held That Two Parts of the Four-part *Hill* Test Were Not Satisfied

After holding that DeSantis was not engaged in a common calling, the court nonetheless held that the covenant not to compete was invalid under Texas law because it failed to comply with two of the four requirements of the *Hill* test.[205]

a) *DeSantis* (1988): The Supreme Court Concluded that the Covenant Was Not Necessary For Protection of the Promisee

Under *Hill*, the promisee must prove that the covenant not to compete is necessary for the protection of the promisee.[206] In this vein, the *Hill* case directed that the promisee must show "a legitimate interest in protecting business goodwill or trade secrets."[207] The *DeSantis* court held that Wackenhut failed to prove that the covenant was necessary for its protection, even though the trial court enjoined DeSantis from disclosing customer lists or divulging confidential information and the supreme court found that DeSantis was responsible for all "contracts, proposals and client development."[208] This holding was based upon a refusal by the jury to find that DeSantis' breach of the covenant would cause irreparable harm to Wackenhut.[209] The *DeSantis* court stated that " a lthough the wording differs from the *Hill* formulation, we hold that the jury's failure to find irreparable harm is essentially equivalent to a failure to find that the covenant was necessary to protect Wackenhut."[210]

***171** b) *DeSantis* (1988): The Supreme Court Also Concluded That There Was No Consideration to Support the Covenant

Under *Hill*, the court held that a non-competition agreement, just as any contract, should be enforced only if the promisee gives consideration for something of value.[211] The *Hill* court stated that "special training or knowledge acquired by the employee through his employer is valuable consideration and often enhances the value of the employee to other firms."[212] The *Hill* court held, in part, that the covenant was unenforceable due to a lack of consideration because there was no substantiation that Mobile Auto Trim had imparted any special knowledge such as trade secrets to Hill.[213]

Again, despite the entry by the trial court of an injunction against DeSantis to preclude his use of customer lists and other confidential information, the *DeSantis* court held that there was no consideration to support the covenant.[214] The supreme court stated: " T here is no evidence that DeSantis obtained any special knowledge or training from Wackenhut. DeSantis had more than fourteen years as an established professional in the security business before he joined Wackenhut, including two years experience immediately before joining Wackenhut in the management of security for a large corporation."[215]

6. *DeSantis* 1988: Because the Covenant Was Not Reasonable, the *DeSantis* Court Held Enforcement of the Covenant Resulted in Liability of Wackenhut For Wrongful Injunction and Violation of the Texas Free Enterprise and Antitrust Act

DeSantis and RDI advanced two theories at trial to hold Wackenhut liable for damages suffered by the defendants:

1. a common law cause of action for wrongful issuance of an injunction; and

2. a violation of the Texas Free Enterprise and Antitrust Act, because enforcement of the covenant constituted an illegal restraint on trade.[216]

The jury determined that $18,000 in damages would compensate defendant RDI for loss of profits on security accounts caused by enforcement of the covenant against DeSantis, but that DeSantis suffered no damages personally.[217] The Texas Supreme Court held that RDI and DeSantis could recover under either theory.[218] According to the court, because the covenant was unreasonable, the injunction was wrongful and the contract was in restraint of trade.[219] RDI was entitled to $18,000 ***172** in actual damages plus costs and attorney fees under the Texas Free Enterprise and Antitrust Act. RDI was not entitled to treble damages because there was no jury finding that Wackenhut's conduct was willful or flagrant. Likewise, although the jury found that DeSantis had not proven any actual damages, DeSantis was entitled to costs and attorney fees under the Act.[220] The case was remanded to the trial court so that damages could be computed in accordance with the supreme court's opinion.[221]

F. Final Assault: The Supreme Court's 1988 Decision in *Martin v. Credit Protection* Held a Salesperson to Be Engaged in a "Common Calling"

Though short in length, the fourth case in the quartet was sweeping in breadth, determining salespersons to be engaged in a "common calling" and describing "customer information" as insufficient special training or knowledge to support a covenant not to compete.[222] The *Martin* opinion was issued on the same day as the *DeSantis* opinion-July 13, 1988.

Martin involved a dispute between Collection Protection Association, Inc. (CPA), a collection service for cable systems and Martin, the director of marketing hired by CPA in 1980.[223] In 1983, Martin was promoted to vice president. Also in 1983, Martin executed an employment agreement containing a three-year covenant not to compete. He was required to execute the agreement as a condition of continued employment. In 1985, Martin resigned his position and started a competing business. The trial court found that there were no trade secrets in jeopardy, but found a sufficiently protectable interest in CPA's customer information to justify injunctive relief. The trial court enjoined Martin from contacting CPA's customers for a period of three years and the court of appeals affirmed.[224]

After reciting the four-part *Hill* test, the Texas Supreme Court reversed and held the covenant void.[225] The court concluded that "customer information" is neither special training, nor knowledge.[226] It further stated that Martin was a salesman, which is a "common calling" occupation.[227] The court explicitly refused to restrain the right of any individual to engage in a common calling.[228] In effect, the court held that the employer's goodwill was not a protectable interest which could be used to support a covenant not to compete.

***173 G. The Appellate Decisions After *DeSantis* and *Martin* Reflect a Change in the Law of Covenants Not to Compete**

After the *DeSantis* and *Martin* opinions were issued, three out of five published appellate court decisions refused to enforce covenants not to compete.[229] The two cases which did enforce such covenants affirmed the grant of temporary injunctive relief, but modified the injunctions to narrow their scope.[230] All of these cases demonstrated a careful scrutiny of the covenants in issue.

1. Tyler Court of Appeals: Disagrees with the Supreme Court's Repudiation of "Long-Honored, Common Law Principles"

From an analytical standpoint, the most significant of the post-*DeSantis/Martin* appellate cases was *Bland v. Henry & Peters*.[231] The *Bland* decision was first rendered on July 14, 1988, one day after the *DeSantis* and *Martin* opinions were issued by the Texas Supreme Court.[232]

As part of his employment agreement with the accounting firm of Henry & Peters, Bland agreed to a two-year covenant not to compete. The covenant provided that Bland could not solicit clients of the firm.[233] In the event of a breach of this covenant, Bland agreed to pay as liquidated damages two times the annual fees received from the client by the firm.[234] After leaving the firm, Bland solicited clients in violation of the covenant.

The case was tried before a jury, but at the close of all the evidence, the trial court granted a directed verdict in favor of Henry & Peters. The court awarded $28,060 in liquidated damages plus attorney fees.[235] The original appellate court decision in *Bland* affirmed the award of liquidated damages against Mr. Bland.[236] However, on rehearing, the appellate court was presented for the first time with the supreme court's opinions in *DeSantis* and *Martin*.[237] Based on ***174** those recent opinions, the *Bland* court reversed, directed entry of a take nothing judgment and assessed all costs against Henry & Peters.[238]

After summarizing the quartet of supreme court cases, the *Bland* court concluded that there was no consideration to support the covenant not to compete based upon the restrictive reading given the *Hill* case by the *DeSantis* court.[239] According to the appellate court, the *DeSantis* case held that "the *only* consideration that will support a covenant not to compete ancillary to contract of employment ... is the imparting by the employer to the employee of special training or knowledge."[240] Although Bland's skills were enhanced while working at Henry & Peters, the court found that he received no special training or knowledge from Henry & Peters.[241] As a result, the *Bland* court felt constrained to hold the covenant unenforceable.[242]

Of particular significance, the *Bland* court disagreed with the supreme court's new approach as established by the quartet of recent supreme court cases.[243] It felt that the supreme court had "repudiated" an established body of common law.[244] The *Bland* court expressed its disagreement by stating:

> [I]t seems clear that the opinions in *Hill, Bergman, DeSantis*, and *Martin* have effectively repudiated long-honored, common-law principles relating to consideration as applied to the law of contracts in cases involving post-employment covenants not to compete, or covenants and promises which limit an employee's right to compete with his former employer. We disagree with the Supreme Court's apparent abolition of these sound common-law principles, as well as its disregard of the distinction between a restraint which forbids competition and one which only operates to prevent the employee, for a reasonable period of time, from diverting the clients or customers of his former employer. Nevertheless, it is our duty to adhere to that Court's law pronouncements.[245]

2. Dallas Court of Appeals: Grants Summary Judgment That Covenant Running Against Veterinarian Was Not Enforceable

After five years of employment, Dr. Burkett, a veterinarian and office manager, resigned his position at Dr. Cukjati's North Irving Animal Clinic and became the manager of an identical competing business 2.2 miles away.[246] Burkett's employment contract with Cukjati provided that he would not compete within twelve miles of either of Cukjati's two animal clinics for a period of three years after termination of his employment.[247] There was an additional provision providing for ***175** payment of $50,000 in liquidated damages if Burkett were to advertise his departure from the North Irving Animal Clinic or contact customers within five years of termination.[248]

On motion for summary judgment, the trial court declared the covenant void as a matter of law.[249] The appellate court affirmed.[250] The appellate court reasoned that three of the four *Hill* criteria were not met because Cukjati had no legitimate interest to protect by the covenant, the twelve mile geographic restriction was overly broad, and there was a lack of consideration because no special training or knowledge was imparted to Burkett.[251]

When determining that Cukjati had no legitimate interest to protect by the covenant, the *Burkett* court accepted as uncontroverted evidence that the forty-five customers who followed Burkett to his new animal clinic were "personal friends or members of his church," and as such, did not evidence goodwill which Cukjati could legitimately protect.[252] Curiously, the court held the twelve mile limit in the covenant overly broad geographically because the "evidence demonstrates that most pet owners travel only a few miles to obtain pet care."[253] Yet, Burkett's new place of employment was only 2.2 miles away. There was no discussion of the possibility of reforming the covenant. Regarding consideration, the court focused only on the lack of evidence of special training or knowledge and did not consider the fact that the covenant was ancillary to an otherwise valid contract of employment.[254]

Additionally, the court, relying on the *Travel Masters* and *B. Cantrell Oil Co*. cases, concluded that Burkett, as a "veterinarian/office manager," was not engaged in a "common calling."[255] Furthermore, the appellate court affirmed the award of attorney fees to Burkett under section 37.009 of the Texas Civil Practice and Remedies Code.[256] Burkett initiated the proceeding by filing suit for a declaratory judgment that the covenant not to compete was void. Cukjati counterclaimed for enforcement of the covenant. Chapter 37 provides the mechanism for filing declaratory judgment actions relating to written contracts and section 37.009 provides for the award of "reasonable attorney's fees as are equitable or just."[257] Despite the fact that Burkett breached the contract and initiated the suit, he was awarded his attorney fees in this action, as the trial court did not abuse its discretion.

***176 3. San Antonio Court of Appeals: Enforces One Covenant but Refuses to Enforce Another**

In *Posey v. Monier Resources, Inc.*, the court affirmed the grant of a temporary injunction.[258] However, it limited the geographical scope of the injunction to the prior sales territory worked by Mr. Posey, Monier Resources' former salesman of concrete additives and district sales manager for the North Texas region.[259] Posey was also enjoined from using trade secrets or confidential information developed by Monier in any location.[260] Of interest, the court held that there was sufficient consideration for the covenant due to the "training and knowledge Posey received from Monier, as well as his continued employment after he signed the covenants."[261]

In *Peat Marwick Main v. Haass*, the court held that a liquidated damages provision was not a covenant not to compete.[262] In so doing, the court stated that, " a t this point, it is clear what this provision is not: It is not a covenant against competition; Haass remains free to practice his profession."[263] While this statement may be accurate, the liquidated damages provision did purport to impose substantial penalties if Haass engaged in competition which Peat Marwick Main (PMM) sought to discourage. Under the agreement, Haass agreed that if he serviced a former customer of PMM within two years of leaving the partnership, then Haass would make two categories of payments to PMM:

1. guarantee payment of all outstanding fees and expenses owed by that client at the time that Haass began providing services; and

2. reimburse PMM for all "direct costs" and "out-of-pocket expenses" paid or to be paid by PMM in connection with the acquisition of that client.[264]

PMM included category 2 "to make a person 'think twice' before leaving [PMM]."[265] When Haass left, taking a group of clients with him and started a competing firm, PMM filed suit to recover these sums.[266] The appellate court held that PMM could recover under category 1,[267] but not category 2.[268]

The court held that the category 2 reimbursement provisions were unreasonable and unenforceable for two reasons. First, the court held that the terms of the provision were overly ***177** broad.[269] In addition, the terms "direct costs" and "out-of-pocket expenses" were not clearly defined.[270] Second, the reimbursement payment was "not a reasonable forecast of just compensation for the harm caused by the breach."[271] Instead, the provision operated to penalize Haass. The court found this to be "in direct contradiction of the spirit of *Hill* which emphatically states that a person has a right to freely pursue his livelihood."[272] The court repeated the established common law rule that when a party seeks damages due to "breach of an unreasonable restraint of trade, a restrictive covenant must stand or fall as written."[273] Accordingly, the court refused to enforce the category 2 reimbursement provision.

In 1991, two years after the 1989 statute was enacted, the Texas Supreme Court affirmed the court of appeals decision refusing to enforce the category 2 reimbursement provisions.[274] The supreme court's opinion is discussed later.[275]

4. Corpus Christi Court of Appeals: Narrowed a Temporary Injunction Against a TV Station Manager

In *French v. Community Broadcasting of Coastal Bend, Inc.*, the court affirmed an injunction restraining Mr. French from vying with his former employer, Community Broadcasting of Coastal Bend (CBCB), for a license from the Federal Communications Commission (FCC) to operate Channel 25 in Victoria.[276] French was hired by CBCB to manage Channel 25.[277] He purchased ten percent of the outstanding stock, was given a salary of $100,000 and was made a director of the company.[278] As part of his employment agreement, French agreed not to compete with CBCB for three years within "the Area of Dominant Influence, as defined by Arbitron" in the business of television broadcasting.[279]

French was subsequently terminated. Thereafter, when CBCB's license to operate Channel 25 came up for renewal before the FCC, "French filed an application with the FCC for a construction permit to operate a television station on Channel 25."[280] CBCB filed suit seeking enforcement of the covenant not to compete and seeking to enjoin French from proceeding with the FCC application. The trial court granted the temporary injunction. Under the terms of the injunction, French not only was enjoined from proceeding with the application, but was also enjoined from communicating with FCC about CBCB's application. Furthermore, French was ***178** ordered to advise the FCC that he had no objection to CBCB's application. The appellate court affirmed the first portion of the order which enjoined French from proceeding with his own application, but dissolved the remaining terms as an abridgment of French's speech rights under the Texas Constitution.[281]

The appellate court found that all four parts of the *Hill* test had been satisfied.[282] First, the covenant was necessary for the protection of CBCB because French, as the chief operating officer, had access to customer lists, pricing schedules, financial reports concerning suppliers and other proprietary matters which were "matters held in strict confidence and ... extremely helpful to a competitor."[283] In addition, French had no prior experience as a station manager. Second, the covenant was reasonable in scope and did not forbid French from "employment in a radio station, which made up the bulk of his past work experience."[284] Third, there was no evidence of an adverse impact upon the public interest.[285] Finally, French received sufficient consideration in the form of his salary, directorship, stock bonuses and other benefits, as well as the special knowledge of learning how to operate a television station.[286] The covenant was also entered into as part of the purchase of stock. Although there was no mention of the "common calling" test, the court noted that French "was not an ordinary employee but was the chief operating officer of the station" responsible for promotions, sales, programming, hiring, firing, policies and marketing strategies.[287]

III. Reaction to the Supreme Court's Quartet of Cases Spurred the Texas Legislature to Enact the 1989 Statute

After the *DeSantis* and *Martin* opinions were issued in July of 1988, a movement began to legislatively overrule the recent quartet of supreme court cases. In early 1989, the Intellectual Property Law Section of the State Bar of Texas submitted the first proposed legislation which became House Bill 1026.[288] Shortly thereafter, Senator Whitmire submitted Senate Bill 946 for consideration by the Senate.[289] The Senate Bill was backed by the Texas Business Law Foundation, a non-profit corporation representing about 145 lawyers interested in promoting business in Texas, and the Texas Employment Law Council, an association of large employers in Texas. After brief hearings and one amendment, the Senate Bill was passed and became law effective August 28, 1989.

***179 A. The Proposal Submitted by the Intellectual Property Section of the State Bar of Texas**

The Intellectual Property Law Section of the State Bar of Texas proposed that the following statute be enacted to amend the Texas Business and Commerce Code:
SUBCHAPTER E. COVENANTS NOT TO COMPETE

Sec. 15.50. COVENANTS ENFORCEABLE.

Notwithstanding Section 15.05(a) of this code, a covenant not to compete that is ancillary to a lawful transaction is enforceable to the extent that it is reasonable.

Sec. 15.51. REASONABLENESS.

A covenant not to compete must meet the following criteria to be reasonable:

(1) the covenant must contain reasonable limitations as to time, geographical area, and scope of activity restrained that do not impose a greater restraint than is necessary to further a legitimate business interest of the promisee;

(2) enforcement of the covenant may not be injurious to the public; and

(3) the covenant must be supported by valuable consideration.

Sec. 15.52. ENFORCEABILITY:

A covenant not to compete may be enforced by the promisee in an action for damages, injunctive relief, or both. To support an action for damages the covenant must be reasonable as written.[290]

As explained in a paper presented at the 1989 Intellectual Property Law Section Institute, the purpose of this proposal was to overrule the "common calling" test and to codify the Texas common law prior to *Hill*. However, rather than simply codify the pre-*Hill* Texas common law, the legislature apparently determined to go further. The State Bar proposal was rejected in favor of Senator Whitmire's proposal.

B. Legislative History Underlying the 1989 Statute

When Senator Whitmire introduced Senate Bill 946, he also summarized the need for the legislation. According to Senator Whitmire, restrictive covenants can promote greater investment in Texas, but the Texas Supreme Court in *Hill* and *DeSantis* had "severely restricted the enforceability of these covenants."[291] Senator Whitmire stated:

It is generally held that these covenants, in appropriate circumstances, encourage greater investment in the development of trade secrets and goodwill employee training, provide contracting parties with a means to effectively and efficiently allocate various risks, allow the freer transfer of property interests, and in certain circumstances, provide the only effective remedy for the protection of trade secrets and good will.

Recent Texas Supreme Court cases (notably *Hill v. Mobile Auto Trim, Inc.*, and *DeSantis v. Wackenhut Corp.*), however, have severely restricted the enforceability of these covenants in franchise and employment settings and raised questions about their use in other previously acceptable circumstances.[292]

***180** The hearings on the Senate bill were brief. After introductory remarks by Senator Whitmire, a few minutes of testimony was received from one representative of the Texas Business Law Foundation and one representative from the Texas Employment Law Council. There was no further testimony.

Of interest, the representative for the Texas Business Law Foundation made the following statements concerning the importance of the legislation:

Covenants not to compete protect confidential information. Confidential business information or trade secrets can result in basically two areas. Research and development, programs requiring significant capital improvement, investments or, less formally, by trial and error in experiences in business. If in our state such valuable information cannot be effectively protected for some period of time, investment will be discouraged [to] the detriment of our general economy. Currently as Senator Whitmire alluded to, the common-law in the State of Texas with respect to covenants not to compete in sale [of] businesses, personal service agreements and other agreements, is in a horrible state of uncertainty. This uncertainty is discouraging business from making investments in people and business. This is because the courts recently overturned nearly thirty years of Texas common-law and refused to enforce or even reform covenants not to compete where the covenant involves a business engaged in a quote common calling or involves quote, both special training or knowledge, close quote, neither of which have been defined by the supreme court.

To make matters worse, as Senator Whitmire noted, the supreme court has indicated that anyone who seeks to enforce a covenant not to compete that is found to be unreasonable as to time, scope or geographic area, may be subjected to treble damages and attorneys fees and court costs themselves. Uncertainty and the potential draconian results from guessing wrong on how to draft these covenants has produced a very chilling effect upon our economy right now. As the Texas Court of

Appeals in Tyler recently stated, Judge Paul S. Colley, and I'll read briefly, it's the only reading I'm gonna make:
It seems clear that the opinions in *Hill, Bergman, DeSantis* and *Martin* have effectively repudiated long honored common-law principles related to consideration as applied to the law of contracts in cases involving post-employment covenants not to compete or covenants and promises which limit an employees right to compete with his former employer. We disagreed with the supreme court's apparent abolition of these sound, common-law principles, as well as the disregard of the distinction between a restraint which forbids competition and one which only operates to prevent the employee for a reasonable period of time from diverting the clients or customers of his former employer. Nevertheless it is our duty to adhere to that court's laws pronouncements.

The proposed legislation will alleviate this problem and bring certainty to the law and encourage businesses to come into and try and transact business in our state. Thank you.[293]

At the close of this statement, he was asked why the Texas Supreme Court had made these changes in the common law. In response, he advised:

> They have stated that there is a, at least in the *DeSantis* case, there is a ... fundamental public policy to promote free movement of workers. And they have fundamental policy of free movement of workers above, in my view, above the increased investment in business."[294]

On May 20, 1989, a House Floor Amendment made one addition to the Senate bill. Section 15.50(1) of the original bill proposed by Senator Whitmire required only that the covenant ***181** be "ancillary to an otherwise enforceable agreement."[295] However, opponents to the bill insisted on one addition to this section for situations in which the covenant is executed after the initial agreement between the parties becomes effective. The following language was added to Section 15.50(1) to address this concern:

> but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration.[296]

Shortly thereafter, Senate Bill 946 was passed. On June 18, 1989, the legislation was signed by Governor Clements.

C. The 1989 Statute: "Covenants Not to Compete"

In the 1989 statute, original sections 15.50 and 15.51 of Chapter 15 of the Texas Business and Commerce Code became effective on August 28, 1989 and provided as follows:
SUBCHAPTER E. COVENANTS NOT TO COMPETE.

Sec. 15.50. Criteria for Enforceability of Covenants Not to Compete.

Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable to the extent that it:

(1) is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration; and

(2) contains reasonable limitations as to time, geographical area, and scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Sec. 15.51. Procedures and Remedies in Actions to Enforce Covenants not to Compete.

(a) Except as provided in Subsection (c) of this section, a court may award the promisee under a covenant not to compete damages, injunctive relief, or both damages and injunctive relief for a breach by the promisor of the covenant.

(b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisee has the burden of establishing that the covenant meets the criteria specified by Subdivision (2) of

Section 15.50 of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this subsection, the "burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(c) If the covenant meets the criteria specified by Subdivision (1) of Section 15.50 of this code but does not meet the criteria specified by Subdivision (2) of Section 15.50, the court, at the request of the promisee, shall reform the covenant to the extent necessary to cause the covenant to meet the criteria specified by Subdivision (2) of Section 15.50 and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not meet the criteria specified by Subdivision (2) of Section 15.50 and the promisee ***182** sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.[297]

IV. Parry and Thrust: In a Trilogy of Opinions, the Texas Supreme Court Evades the Statute and Continues Its Attack on Covenants Not to Compete

On the same day in 1990, the Texas Supreme Court issued a trilogy of opinions which continued to chip away at the enforceability of covenants not to compete.[298] Contrary to the intent expressed by the legislature, none of these opinions applied the 1989 statute. Instead, each opinion was decided based on the common law and each determined that the result would have been the same if the statue had been applied.

Petitions for rehearing filed in the supreme court in 1988 in both the *DeSantis* and *Martin* cases sought to have the 1988 decisions reconsidered. These petitions were pending when the 1989 statute became effective. Although the 1989 statute was intended to apply retroactively "to a covenant entered into before, on, or after the effective date of this Act,"[299] the Texas Supreme Court refused to do so. However, the 1988 *DeSantis* and *Martin* opinions were soon rewritten in significant ways. Notably, without overruling *Hill*, the "common calling" test was not applied and was de-emphasized as "not the primary focus of inquiry."[300] In addition, the *DeSantis* (1988) opinion was modified to hold that the former employee could not, under these facts, recover on his counterclaims for wrongful injunction, malicious prosecution, or violation of the Texas Free Enterprise and Antitrust Act.[301] However, after making these concessions in *DeSantis* (1990), the *Martin* (1990) opinion opened a new can of worms by holding that a covenant not to compete cannot be ancillary to a terminable-at-will employment contract.[302] The third case, *Juliette Fowler Homes*, held that an action for tortious interference with contractual relations could not be maintained for interference with a covenant not to compete unless the covenant was enforceable as written.[303]

After the 1989 statute was enacted and before the supreme court issued the 1990 trilogy of *DeSantis, Martin*, and *Juliette Fowler Homes*, there were two opinions issued by Texas Courts of Appeals. Neither case cited or acknowledged the new statute.

The first opinion was issued by the Dallas Court of Appeals in *Spicer v. Tacito & Associates, Inc*.[304] In *Spicer*, the appellate court reversed a judgment granting damages and ***183** injunctive relief for the violation of a covenant not to compete.[305] Citing the 1988 *Martin* opinion by the Texas Supreme Court (which was later withdrawn and modified in 1990), the appellate court held that the covenant was not enforceable because as salesmen, Spicer and Tilden were engaged in a "common calling."[306] Furthermore, they received no trade secrets and the "customer information" which they did receive did not constitute specialized knowledge or training.[307]

In *TPS Freight Distributors, Inc. v. Texas Commerce Bank*, the appellate court held that the person receiving the benefit of a covenant not to compete must continue to pay for that benefit as part of the sale of a business even after the death of a person agreeing not to compete.[308] The court reasoned that the covenant not to compete was not a personal services contract and the business received the full benefit for which it bargained (i.e., no competition).[309] The following analysis of the case law assists an understanding of the 1989 amendments.

A. The 1990 *DeSantis* Opinion Discounts "Common Calling" and Restricts Counterclaims by Former Employees

Both the reasons underlying and the result mandated by the Texas Supreme Court's 1988 *DeSantis* decision changed substantially in the *DeSantis* opinion issued on June 6, 1990.[310] On motion for rehearing, the 1988 opinion and judgment were withdrawn.[311] Although Chief Justice Phillips authored the 1988 opinion, Justice Hecht authored the 1990 opinion. Like the 1988 opinion, the 1990 opinion also determined that Texas law, and not Florida law, should be applied to determine enforceability of the covenant.[312] As in the 1988 opinion, the 1990 opinion held that under Texas common law, the covenant was not enforceable.[313] Contrary to the 1988 opinion, however, the 1990 opinion determined that DeSantis and his company, Risk Deterrence, Inc. (RDI), were not entitled to recover on their counterclaims or for wrongful issuance of an injunction against them.[314] Instead, neither party had an award of damages affirmed.[315]

1. *DeSantis* (1990): The Forum Selection Clause Will Not Be Enforced

If writing on a clean page, the court's 1990 reasoning as to why the forum selection clause should not be enforced and why Texas law rather than Florida law should apply would be seductive. Of course, the 1990 opinion was written to reach the old result in a new way. The tack taken in 1988 was to compare the Florida statute on covenants not to compete with the law ***184** expressed in the *Hill* case to conclude that the law applied in Florida was so different from Texas law that to apply Florida law would contravene Texas public policy.[316] Although not acknowledged in the 1990 opinion, the Texas Legislature acted in 1989 to, in effect, overrule the *Hill* case and adopt a statute quite similar to that applied in Florida.[317] In 1988, the supreme court emphasized that Texas courts must apply the *Hill* factors, the "common calling" test, a requirement to balance the interests of the promisor, and a requirement to show irreparable harm, but noted the absence of an applicable statute.[318] In 1989, with enactment of the Texas statute, the primary bases expressed in 1988 for distinguishing Texas and Florida law were gone. Yet, in 1990, the court reached the same result-Texas law would be applied. Application of Texas law was fundamental to the result of the case. In fact, DeSantis apparently even admitted that the agreement would be enforceable under Florida law.[319]

Following section 187 of the Restatement (Second) of Conflict of Laws, the 1990 court concluded that a three part test controlled the issue of whether or not to enforce the forum selection clause:

> More particularly, we must determine: first, whether Texas has a more significant relationship to these parties and their transaction than Florida; second, whether Texas has a materially greater interest than Florida in deciding the enforceability of the noncompetition agreement in this case; and third, whether the application of Florida law in this case would be contrary to fundamental policy of Texas.[320]

The court had little trouble concluding that the first two prongs were satisfied and that Texas not only had a "more significant relationship" to these parties, but that Texas also had a "materially greater interest than does Florida" in deciding whether to enforce the covenant.[321] Essentially, because the contract was for personal services to be performed in Texas by a Texas resident, and because the agreement would determine whether a competing business could be established in Texas, Texas had a more significant relationship and a materially greater interest than Florida.

Again, the court concluded that the application of Florida law to decide this issue would violate a fundamental policy of Texas.[322] However, absent from this analysis was any comparison of Florida and Texas law. Unlike the 1988 opinion, no attempt was made to explain why Florida law was contrary to a fundamental policy of Texas. Furthermore, unlike the 1988 opinion, no fundamental public policy was expressed for the free movement of workers in the job market. Instead, the court concluded that one uniform law ought to apply to all employment relationships in Texas to determine whether or not a covenant not to compete is enforceable.[323] The court cited a ***185** litany of cases that have held that enforcement of non-competition agreements is "a matter of fundamental or important state policy."[324] Accordingly, Texas law would be applied.[325]

2. *DeSantis* (1990): The Covenant Not to Compete Is Not Enforceable Under Texas Law

Contrary to the directives of the legislature, the Texas Supreme Court determined to evaluate the covenant not to compete under the common law, not the statute, as the statute would not affect the result.[326] The common law test to be applied consisted of three parts: "First, the agreement not to compete must be ancillary to an otherwise valid transaction or relationship. ... Such transactions or relationships include the purchase and sale of a business, and employment relationships."[327] "Second, the restraint created by the agreement not to compete must not be greater than necessary to protect the promisee's legitimate interest. Examples of legitimate, protectable interests include business goodwill, trade secrets, and other confidential or proprietary information."[328] The covenant must be reasonable in terms of time, territory and scope of activity restrained and may be modified by a court of equity to limit the covenant to the legitimate interests of the promisee.[329] "Third, 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."[330] There must be a balancing of the benefits and burdens, "both to the promisor and the public."[331] Such a covenant may "accomplish the salutary purpose of encouraging an employer to share confidential, proprietary information with an employee in furtherance of their common purpose, but must not also take unfair advantage of the disparity of bargaining power between them or too severely impair the employee's personal freedom and economic mobility."[332] These are all questions of law for the court.[333]

Next, the court addressed the "common calling" test. According to the court, "references to 'common calling' in *Hill* and *Bergman* have proven confusing in determining whether to enforce agreements not to compete."[334] Acknowledging that "the Legislature has now rejected common calling as a test for the reasonableness of noncompetition agreements," the court chose not to apply the test.[335] At the same time, although the type of job should not be the focus of the inquiry, it is a ***186** factor to be analyzed when determining the reasonableness of the covenant. As the court noted, " t he nature of the promisor's job-whether it is a common calling-may sometimes factor into the determination of reasonableness, but it is not the primary focus of inquiry."[336]

Applying these principles, the court concluded that the first element of the test was satisfied-the covenant not to compete was ancillary to a valid employment relationship.[337] Regarding the second element, the court concluded that the record did not support the claim that the non-competition covenant was necessary to protect a legitimate business interest of Wackenhut.[338] As for Wackenhut's goodwill, the court found that there was no showing that DeSantis "did or even could divert that business goodwill to himself."[339] Instead, according to the court, only one former Wackenhut customer (Marathon Oil Company) terminated its contract with Wackenhut and signed a five-year contract with RDI, and another (TRW-Mission Drilling Products) was considering the same.[340] Further, the court found that there was evidence that both clients were considering moving their business to RDI because they were dissatisfied with Wackenhut's services.[341] There was no evidence that this move was "because of the goodwill DeSantis had developed with those customers while at Wackenhut."[342]

Regarding Wackenhut's alleged confidential information-such as customer identities and special requirements, pricing policies, cost factors and bidding strategies, Wackenhut failed to show that it needed protection in this case.[343] In particular, Wackenhut failed to show that its customers could not be readily identified and their needs could not be ascertained "simply by inquiry."[344] It also failed to show that its "pricing policies and bidding strategies were uniquely developed, or that information about its prices and bids could not, again, be obtained from the customers themselves."[345] Finally, there was no evidence that DeSantis had relied on any such information to try "to outbid Wackenhut or woo away its customers."[346] Therefore, the court concluded that Wackenhut had failed to demonstrate a need to protect any confidential information which would warrant limiting DeSantis' right to compete.[347]

Turning to the 1989 statute, the court concluded that it was unnecessary to determine whether the statute could be applied retroactively because the same result would be achieved in either event.[348] Under Section 15.50(2) of the Texas Business and Commerce Code, "a covenant ***187** not to compete is enforceable to the extent that it ... contains reasonable limitations ... that do not impose a greater restraint than is necessary to protect the goodwill or other business interests of the promisee. Under the statute, Wackenhut had the burden to establish a protectable business interest because this was a personal services contract."[349] Since, Wackenhut failed to make the required showing, the covenant not to compete would not be enforceable under the 1989 statute. Therefore, the questions of whether the statute is to be applied retroactively and whether the statute changes the common law were left to "another day."[350]

3. *DeSantis* (1990): DeSantis and RDI Cannot Recover Against Wackenhut for Wrongful Injunction or Their Counterclaims

In the 1988 opinion, the court concluded that because the covenant not to compete was unenforceable and had been reformed and enforced by the trial court for two years from DeSantis' date of resignation, March 1984, Wackenhut was liable for wrongful issuance of the injunction and violation of the Texas Free Enterprise and Antitrust Act.[351] But, the jury found that DeSantis suffered no actual damages as a result of the injunction, so the court awarded only attorney's fees and costs for this claim.[352] At that time, the court remanded with instructions to enter judgment against Wackenhut for actual damages, costs, and attorney fees.[353]

The 1990 opinion changed the 1988 results and rendered reversals on the awards of damages, fees, and costs.[354] Regarding wrongful issuance of an injunction, the court indicated that the two separate theories for recovery are against the bond filed to obtain the injunction, and another for malicious prosecution.[355] The cause of action relating to the bond is "predicated upon a breach of the condition of the bond."[356] Under Rule 684 of the Texas Rules of Civil Procedure, the applicant for the bond must pay all sums adjudged against him for wrongful issuance of the injunction "if the restraining order or temporary injunction shall be dissolved in whole or in part."[357] In this case, the temporary restraining order and temporary injunction orders were never dissolved.[358] Instead, by their terms, the temporary injunction expired in March of 1986, more than four years before the Texas Supreme Court finally concluded that the covenant was not enforceable.[359] Therefore, there could be no recovery against the bond, as it was not dissolved.[360] ***188** Since the defendants failed to request jury findings on the malicious prosecution claim and no evidence on the record supported it, that claim was waived.[361]

Under the Texas Free Enterprise and Antitrust Act, a covenant not to compete is not a per se violation, but must be analyzed under the rule of reason.[362] To establish that the restraint is an unreasonable restraint on competition, it must be shown that "the agreement has an adverse effect on competition in the relevant market" as opposed to just an adverse effect on the particular employer and employee involved.[363] The focus is on competition, not individual competitors.[364] In this case, defendants are not entitled to recover under the Act because they "offered no evidence of relevant market or anticompetitive effect, and requested no fact findings by the jury on these issues."[365]

4. *DeSantis* (1990): A Concurring Opinion Believes That "Common Calling" Is Alive and Well

In a concurring opinion joined by Justice Spears, Justice Mauzy took issue with the majority's discussion of "common calling."[366] According to Justice Mauzy, the majority's discussion of the "common calling" test was "unnecessary, gratuitous, and ill-advised."[367] Justice Mauzy believes that the "common calling" test was not rejected by the legislature, but can be read into the statute's requirement that the scope of activity restrained by the covenant not to compete must be reasonable, concluding, "'scope of activity' language, in my view, leaves adequate room for the continued vitality of the common calling doctrine."[368]

B. The 1990 *Martin* Opinion Substitutes "At-Will" For "Common Calling"

Although the 1988 and 1990 *Martin* decisions remained the same (i.e., the covenant not to compete was held not enforceable), the reasoning of the opinions was substantially different. In 1988, the Texas Supreme Court held that the non-competition covenant was not enforceable because Martin was a salesman, which the court determined was a "common calling."[369] Consistent with the 1990 *DeSantis* opinion, the "common calling" test-the linchpin of the 1988 *Martin* opinion-was not discussed in the 1990 *Martin* opinion.[370] Instead, the court concluded that Martin was an at-will employee and that at-will employment contracts are not otherwise ***189** enforceable agreements to which a covenant not to compete can be ancillary.[371] Further, there was no independent valuable consideration to support the covenant.[372] Therefore, the covenant was not enforceable.[373]

Although claiming to resolve this case based on an analysis of the common law, the Texas Supreme Court appears to have resolved the *Martin* case on rehearing under the 1989 statute. As indicated above, *DeSantis*, decided on the same day as *Martin* in 1990, recited a three-part test.[374] The first element required that "the agreement not to compete must be ancillary to an otherwise valid transaction or relationship."[375] The court indicated that one such relationship was employment.[376] There was no distinction drawn between at-will and other employment relationships.[377] Citing a passage from *DeSantis, Martin* (1990) states that the covenant not to compete "must be ancillary to an otherwise enforceable agreement."[378] The 1989 statute used the same language.[379] *Martin* also concludes that the result would be the same whether or not the court applied the common law or the statute.[380]

According to *Martin*, at-will employment agreements cannot support covenants not to compete because that type of employment agreement cannot be enforced against either party. The court indicated that "[a]n 'employment-at-will' relationship is not binding upon either the employee or employer. Either may terminate the relationship at any time."[381] Even though an employment agreement was signed by Martin, "he remained an employee-at-will and was subject to termination at any time."[382] Further, the employment agreement was criticized because it consisted entirely of a covenant not to compete and did not contain the usual terms of employment "such as title, position, duration of employment, compensation, duties or responsibilities."[383]

Citing both *DeSantis* and *Hill, Martin* also states that: "A covenant not to compete, executed on a date other than the date on which the underlying agreement is executed, is enforceable only if it is supported by independent valuable consideration."[384] This concern for an exchange of consideration for a later-signed covenant is not addressed in either *DeSantis* or *Hill*. ***190**

Nor is the phrase "independent valuable consideration" found in either case. Instead, this concern is incorporated into the language employed in the 1989 statute.[385]

In this case, Martin signed his employment agreement three years after his employment began employment and in the same year as his promotion to vice-president.[386] According to the supreme court, "continuation of an employment-at-will relationship does not constitute independent valuable consideration to support the covenant."[387] Further, although special training or knowledge can constitute independent valuable consideration, "'customer information' is neither special training nor knowledge."[388] At the same time, the *Martin* (1990) opinion indicated that customer information can constitute a legitimate business interest justifying enforcement of a covenant not to compete. "Although 'customer information' is neither special training nor knowledge which may constitute independent valuable consideration, business goodwill, trade secrets, and other confidential or proprietary information (including 'customer information') are legitimate interests which may be protected in an otherwise enforceable covenant not to compete."[389]

Accordingly, the court held that because the non-competition covenant was not ancillary to an otherwise enforceable agreement or supported by independent valuable consideration, the covenant was not enforceable and a take nothing judgment was rendered.[390] Although the court claimed to be resolving this case under the common law, *Martin* appears to be the first case to apply the language of the 1989 statute. Further, because most "common callings" involve at-will employment relationships, the court appears to be substituting an analysis of the language "otherwise enforceable agreement" for "common calling" to achieve the same result.

After the supreme court's 1990 *Martin* opinion, Martin sought to recover his attorney fees and business expenses at the trial court.[391] Martin's employment contract provided that attorney fees would be awarded to the prevailing party in any litigation over the contract.[392] The trial court denied Martin's request and the Dallas Court of Appeals affirmed.[393] According to the appellate court, because the supreme court reversed and rendered, the trial court was required to apply the mandate as issued, and had no jurisdiction to review, interpret, relitigate issues, or grant additional relief.[394]

Of interest, although the "common calling" analysis was not included in the supreme court's 1990 *Martin* opinion, the supreme court's mandate stated that "because an individual has the right to engage in a 'common calling' occupation, the judgment of the Court of Appeals is ***191** reversed."[395] The mandate also provided that the judgment was being rendered that the "restrictive covenant is void in all respects," and CPA shall pay, and Martin shall recover, costs of court.[396]

C. *Juliette Fowler Homes*: There Can Be No Tortious Interference With a Covenant Not to Compete Unless Enforceable As Written

Juliette Fowler Homes (Fowler) is a charitable non-profit organization affiliated with the Disciples of Christ Church.[397] In 1981, Fowler contracted with Welch Associates (Welch) to conduct a fund raising campaign for Fowler.[398] Welch subcontracted some of the work to John W. Butler Companies (Butler) which had a single employee, John W. Butler.[399] The subcontract with Butler contained a covenant not to compete that provided that Butler would not contract to provide services to Welch's customers for a period of two years after the subcontract was concluded.[400] The non-competition covenant was not limited to any particular activities or services and did not contain a geographical limitation.[401]

After Fowler became dissatisfied with Welch's performance, the contract was terminated in accordance with its terms. Butler was later hired to supervise Fowler's fund-raising campaign.[402] Welch sued Butler for breach of the covenant not to compete and sued Fowler for tortious interference with the non-competition clause of the Butler subcontract.[403] A jury found that Butler breached the non-competition clause and that Fowler tortiously interfered.[404] A judgment for damages was entered, and Butler was enjoined for one year from contacting any persons disclosed by Welch to Butler who reside in the United States for the purpose of soliciting funds.[405] The court of appeals affirmed.[406]

The supreme court reversed and rendered a take nothing judgment.[407] Since more than one year had passed from the date of the injunction, the injunction had already expired by its own terms, and the propriety of the injunction was not considered by the court.[408] Instead, the opinion focused only on the propriety of the judgment for damages.

Because the covenant not to compete was not limited in terms of the scope of activities restricted and did not contain any geographical limitations, the court concluded that the covenant ***192** was not enforceable as written.[409] Under the covenant, Butler was prohibited from providing any type of services to Welch's clients, whether competitive or not, and regardless of where the customers might be located.[410] Therefore, the second element of the 1990 *DeSantis* test was not met-the covenant was greater than necessary to protect Welch's interests.

Since the covenant not to compete was unenforceable as written, Welch was not entitled to damages from Butler for its breach.[411] The court also determined that the results reached under the common law would be the same as those they would have reached under the then recently enacted section 15.50 of the Business and Commerce Code. Therefore, the court did not have to decide whether to apply the statute retroactively since they were in accord with the current legislative intent.[412]

The next question presented was whether Fowler could be liable for tortious interference with a covenant not to compete that was not enforceable as written. While conceding that mere unenforceability of a contract is not a defense to a tortious interference claim, the supreme court concluded that there is no such liability when the contractual provision is an unreasonable covenant not to compete: "We now hold that covenants not to compete which are unreasonable on grounds of public policy cannot form the basis of an action for tortious interference."[413] Therefore, the unenforceability of the non-competition clause was "a valid defense to Welch's tortious interference claim against Fowler."[414]

V. Appellate Cases After the Trilogy

After the supreme court's trilogy of cases in July of 1990, and before the supreme court's September 1991 opinion, there were eight published cases concerning covenants not to compete. In three cases, the covenants were enforced to some extent.[415] In five cases, including three from the Corpus Christi Court of Appeals, the covenants were held to be unenforceable.[416]

193 A. Houston Court of Appeals (14th District): Statute Could Be Applied Retroactively and Covenant Was Enforced as Modified in *Webb

In *Webb v. Hartman Newspapers, Inc.*, the court of appeals held that the 1989 statute could be applied retroactively and affirmed, but modified the grant of a temporary injunction enforcing a covenant not to compete.[417] With more than twenty-five years of experience in the newspaper publishing business, Willis Webb was hired in 1985 by Hartman Newspapers, Inc. to be the business manager of *The Herald Coaster*, a newspaper in Rosenberg, Texas.[418] In 1987, Webb was promoted to editor and publisher of *The Fort Bend Mirror* and *The Mirror*, Hartman's general interest newspapers in Fort Bend County, Texas. On May 4, 1987, Webb signed an employment agreement containing a covenant that upon termination of employment, Webb would not engage in the publishing business within a fifty-mile radius of any Hartman newspaper for three years. In addition to the Mirror publications, Hartman has a dozen other publications in Texas and Oklahoma.[419]

On June 14, 1989, Hartman fired Webb.[420] Subsequently, Hartman formed a company called Business Publishing Venture, Inc. and began a new publication entitled *The Fort Bend Business and Legal Review*. This new publication targeted the Fort Bend legal community and other service businesses. After publishing his first issue in October of 1989, Webb was sued by Hartman. The trial court modified the covenant not to compete and limited the covenant geographically to a fifty-mile radius of Hartman's newspapers in Texas.[421] The court of appeals affirmed, but further limited the covenant to a three year limitation from soliciting advertising from those businesses which advertised in either Mirror publication during his tenure as a Hartman employee and to the distribution area of the Mirror newspapers, a ten-mile radius from their offices.[422]

Webb argued that the statute could not be applied retroactively and the covenant ought to be strictly construed under *Hill*. Webb relied on Article I, Section 16 of the Texas Constitution which "prohibits the making of any retroactive law."[423] However, the Fourteenth Court of Appeals indicated that the statute applies only to a "vested" right (i.e., one that gives a person a right to enforce a claim or to resist the enforcement of a claim by another).[424] In this case, Webb did not have a vested right because he did not "breach the covenant until after the statute became effective."[425]

***194 B. Beaumont Court of Appeals: *Isuani* Holds That Public Interest Is to Be Considered When Determining If Covenant Is Reasonable As Applied to a Physician and Covenant Was to Be Enforced**

After two appeals and one reversal by the Texas Supreme Court, the Ninth Court of Appeals in Beaumont affirmed a permanent injunction enforcing a covenant not to compete as written against a doctor.[426] Dr. Isuani was a stockholder, director, officer and employee of Manske-Sheffield. He executed an employment agreement which provided that, upon termination, he would not engage in the practice of medicine within fifteen miles of St. Mary Hospital in Port Arthur, Texas for a period of one year.[427] In January of 1990, Dr. Isuani tendered his resignation effective March 31, 1990, and advised Manske-Sheffield that, contrary to the covenant not to compete, he intended to practice his medical specialty at Park Place

Hospital in Port Arthur.[428] On April 11, 1990, the trial court entered a temporary injunction enforcing the covenant as written and scheduling the trial on the merits for June 4, 1990.[429]

In a first appeal from entry of the temporary injunction, the Beaumont Court of Appeals affirmed, but modified the temporary injunction.[430] Before the appeal from the temporary injunction was decided on September 13, 1990, the trial court had conducted a final trial on the merits and entered a permanent injunction on June 4, 1990.[431] Because a final judgment was entered before the first appeal from the temporary injunction was decided, the first appeal became moot and the court of appeals lost jurisdiction.[432] As a result, the Texas Supreme Court reversed, dissolved all orders pertaining to the temporary injunction, and directed the court of appeals to dismiss Isuani's appeal from entry of the temporary injunction.[433]

The record on the final trial of the merits was essentially identical to that of the temporary injunction proceeding.[434] At the final trial, Exhibit 1 was the transcript and Exhibit 2 was the statement of facts from the temporary injunction proceeding.[435] The evidence at the final trial also included twelve pages of testimony from Dr. Sheffield.[436] The court of appeals considered that the evidence at the two proceedings was "virtually and practically identical."[437] However, the decisions by the court of appeals were different.

***195** On the first appeal from the temporary injunction, the court of appeals modified the temporary injunction to allow Dr. Isuani to practice certain subspecialties of medicine at Park Place Hospital in contravention of the noncompetition agreement.[438] On the second appeal from the final trial on the merits, the court of appeals affirmed the trial court's entry of a permanent injunction enforcing the covenant as written.[439] The court of appeals reasoned that "where the record and the facts clearly demonstrate that one party is violating the substantive law, it then becomes the duty of the chancellor to enjoin that violation."[440] According to the court of appeals, the final judgment was affirmed because the trial court did not abuse its discretion.[441] Further, the court of appeals held that the trial court did not abuse its discretion by setting a supersedes bond for the final appeal at $500,000.[442]

A dissenting opinion from the final appeal would have denied a permanent injunction on the basis that Manske-Sheffield had, in the dissent's view, failed to prove that the remedy at law was inadequate.[443] According to the dissent, the trial court should have allowed Dr. Isuani to practice radiology at Park Place hospital and allowed Manske-Sheffield to prove whatever monetary damages it could.[444]

Of significance, on the same record, the first opinion from the court of appeals held that the covenant as written was not reasonable.[445] The reasonableness of the covenant is, of course, a question of law.[446] According to the first opinion, section 15.50(2) of the 1989 statute allows the court to consider the public interest when determining the reasonableness of the limitations placed on the scope of activities restrained.[447] The court determined "that the enjoining of Dr. Isuani in the practice of his personal subspecialties-but as to these subspecialties only-is and will be injurious to the public," because " a ppellees failed in the burden of establishing that the remaining members of the group themselves could perform these subspecialties."[448] The court recognized that this first appeal was moot, but determined to decide the appeal nonetheless because "the public health, public welfare and public weal paramountly intervene and supersede the usual rule."[449]

In the first opinion, the court of appeals also cited Texas Business and Commerce Code section 15.05(i) for the proposition that when determining whether a restraint related to professional services is reasonable, the court must consider whether the activities involved affect ***196** the quality or cost of services to benefit the public interest.[450] The term "professional services" is defined in the statute to refer to services provided by a licensed accountant, physician or professional engineer.[451] Section 15.05(i) provides, as follows:

> (i) In determining whether a restraint related to the sale or delivery of professional services is reasonable, except in cases involving price fixing, or other per se violations, the court may consider, but shall not reach its decision solely on the basis of, criteria which include: (1) whether the activities involved maintain or improve the quality of such services to benefit the public interest; (2) whether the activities involved limit or reduce the cost of such services to benefit the public interest. For purposes of this subsection, the term "professional services" means services performed by any licensed accountant, physician, or professional engineer in connection with his or her professional employment or practice.[452]

C. Dallas Court of Appeals: No Right to Reformation in if Section 15.50(1) Is Not Satisfied

Affirming the denial of a temporary injunction, the Dallas Court of Appeals held that if the evidence is in conflict, the trial court's order will not be considered an abuse of discretion.[453] Recon was in the business of using airborne microwave spectroscopy equipment to perform hydrocarbon gas surveys.[454] Defendant Hodges was a microwave spectrometer operator, and defendant Montgomery was a helicopter pilot who flew Hodges and the equipment over areas to be surveyed.[455] Both Hodges and Montgomery signed covenants not to compete without geographic limitation lasting ten years and prohibiting participation in any business competitive with that of Recon.[456] After being fired due to lack of work, defendants started a competitive business and began doing work for Amoco, a former Recon client.[457] Once the defendants started their business, Recon received no further business from Amoco.[458] At the time of the hearing, the defendants had received $86,500 in fees from Amoco.[459]

The trial court denied a temporary injunction.[460] The evidence conflicted as to whether or not Recon disclosed any trade secrets to the defendants and whether defendants received any specialized and unique training, even though Hodges admittedly received forth hours of equipment ***197** training.[461] The appellate court affirmed, reasoning that the trial court could not abuse its discretion if that court heard conflicting evidence which reasonably supports its order.[462] Further, there was evidence that the injury was not irreparable because the "interim damages can be measured and readily calculated."[463]

At the same time, in response to Recon's argument, the appellate court indicated that if the applicant for temporary relief relies on a statute which defines the requirements for injunctive relief, then the statute supersedes the common law requirement.[464] In this case, however, there was conflicting evidence as to whether the statutory requirements were met. According to the court of appeals, reformation of a covenant not to compete "can occur only if a court finds that the covenant meets the section 15.50(1) criteria."[465] The evidence was in conflict as to "whether the agreements were ancillary or supported by independent consideration," because Hodges claimed that his raise was not consideration for the covenant and Montgomery's only consideration for the covenant was a change in employee status.[466] Further, there was conflicting evidence as to whether Recon had a protectable business interest, and Recon did not show that it would probably prevail on the question of reasonableness.[467]

D. El Paso Court of Appeals: One Covenant Not to Compete Modified and Enforced Against Attorney Who Drafted It, but Another Not Enforced Against a Chiropractor

In *Property Tax Associates, Inc. v. Staffeldt,*[468] the court of appeals reversed the denial of a temporary injunction to enforce the covenant not to compete, modified the covenant, and remanded. In 1986, Property Tax Associates (PTA) employed Staffeldt, an attorney, to draft an employment contract including a noncompetition clause.[469] Mr. Staffeldt went to work as an employee of PTA in 1987, and in January 1988, he signed an employment contract. The noncompetition clause, which was part of the employment contract, provided that upon termination of employment, the employee would not directly or indirectly compete with PTA within PTA's existing marketing area for a period of two years.[470]

In 1990, Staffeldt terminated his employment and went into competition with PTA. At the time of the suit he provided services to eleven of PTA's former clients.[471] The court of appeals decided the case under the 1989 Act and found that (1) because the covenant was part of the ***198** employment contract it was enforceable without a showing of independent consideration, and (2) the covenant would not be unreasonable if it were modified to cover only El Paso County.[472] The court specifically stated that a period of two years and the scope of activity restricted by the covenant, namely the provision of ad valorem tax services, were not unreasonable.[473] The court modified the geographical area to cover only El Paso County because PTA admitted that El Paso County was its only base of operations.[474] The court of appeals expressly followed the holding in *Webb v. Hartman Newspapers, Inc.*,[475] echoing that court's statement that "the Legislature in effect overturned *Hill v. Mobile Auto Trim, Inc.*, and its progeny."[476]

It was significant that the employee attempting to avoid the covenant not to compete was the attorney who had prepared the covenant. The court of appeals pointed out that this covenant not to compete should be enforced because public policy mandates that a lawyer should not be permitted to violate an agreement that he prepared for his client.[477]

Finally, the court of appeals in *Property Tax Associates* observed that the *DeSantis* (1990) opinion required that the needs of the promisee be balanced against the hardship to the promisor and the likely injury to the public.[478] This is, of course, the third prong of the *DeSantis* (1990) test for enforcement of a covenant not to compete.[479] According to the appellate court, this third prong "does not appear to be the test under the statute which is applicable in this case. The test now is does the covenant impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee?"[480]

In *W.C. Larock, D.C., P.C. v. Enabnit, D.C.*,[481] the court of appeals affirmed the lower court's denial of a temporary injunction on the ground that the underlying contract was unenforceable.[482] One month after he began working as a chiropractor in a chiropractic clinic, Enabnit signed a contract labeled "Independent Contractor Agreement," which provided, *inter alia*, that Enabnit would not engage in competition within a thirty mile radius of any of the clinic's offices for a period of one year.[483] After setting out the two criteria required by the 1989 Act, the court of appeals found that the contract to which the covenant was ancillary was unenforceable because there was no meeting of the minds.[484] The contract purported to be a contract for the provision of independent chiropractic services when, in actuality, Enabnit was an employee of the ***199** clinic.[485] According to the appellate court, it was not clear whether the contract was "a sham to gain insurance or some other advantage," but " n o contract is formed by the signing of an instrument when the offeree is aware that the offeror does not intend to be bound by the wording of the instrument."[486] Therefore, the trial court did not abuse its discretion in denying the temporary injunction.[487]

E. Corpus Christi Court of Appeals: Three Cases Refuse to Enforce Non-Competition Covenants

In *Daytona Group of Texas, Inc. v. Smith*,[488] the court of appeals affirmed the trial court's refusal to enforce the covenant not to compete and the damages awarded to the appellee. Betty Smith had sold radio and newspaper advertising in the Valley from 1983 until May, 1989.[489] From June, 1986, until August, 1988, she worked for the radio station KRIX. During her tenure, KRIX was purchased by the Daytona Group. Some months after the purchase, Smith signed a covenant not to compete. In September, 1988, she left KRIX and immediately went to work for KBFM, again selling radio advertising.[490] The covenant not to compete was the sole agreement between the parties and provided that Smith would not sell radio or television advertising in eight specifically named counties for twelve months after termination of her employment.[491] After she joined KBFM, the Daytona Group attempted to prevent Smith from selling advertising and suit was brought.[492]

The appellate court stated that "[c]urrently, two separate but similar analyses" were required to answer the question of enforceability of the covenant.[493] The court said that it must first determine whether the covenant violated common law principles, and second, whether the covenant was in conflict with the Texas Business and Commerce Code sections 15.50-51.[494] In reviewing the common law principles governing covenants not to compete, the court set out the three requirements of *DeSantis* (1990) and *Martin* (1990). Namely, the court set out the requirements that the covenant: must be ancillary to a valid transaction, must be necessary to protect the promisee's business interests, and must provide legitimate benefits to the promisee that were not outweighed by hardship to the promisor.[495] Next, the court compared the requirements of the 1989 Act. The court concluded that the requirements of the Act were quite similar to the first two requirements of the common law in that both required that (1) the covenant not to compete be ***200** ancillary to an otherwise enforceable agreement, and (2) the covenant must be necessary to protect the legitimate business interest of the employer.[496]

The court of appeals held that Smith's covenant not to compete did not meet either of the two requirements. First, Smith was an "at will" employee and, therefore, citing *Martin* (1990), the covenant was not ancillary to an otherwise enforceable agreement.[497] Second, the court held that the contract was not necessary to protect the legitimate business interests of the radio station KRIX.[498] The court noted that the advertising client list of KRIX was a matter of public information, because it could be determined from listening to the radio station itself.[499] The court also relied on the findings that Smith did not solicit KRIX's customers or divert advertising sales, and that Smith had received no special training during the course of her employment.[500]

Finally, the trial court's award to Smith of $16,500 in damages and $25,175 in attorney fees for her counterclaim under the Texas Free Enterprise and Antitrust Act was affirmed.[501] The court of appeals observed that although the Texas Antitrust Act requires a showing of an adverse effect on competition in the relevant market, the existence of this showing was not challenged on appeal.[502]

The court of appeals decided *Gomez v. Zamora*[503] solely on the basis of the language of the 1989 Act. The court held that because the employer failed to establish that the covenant not to compete was reasonable as to geographic area and failed to request reformation, the temporary injunction granted by the trial court would be dissolved.[504] Jeffrey Gomez worked for Zamora's company, Texas Aries Medical Social Services (TAMSS).[505] TAMSS was in the business of assisting doctors and hospitals in recovering money spent to provide medical services to indigent patients.[506] This money comes from governmental entities and other similar sources. The services provided by TAMSS are highly technical, difficult and time consuming.[507] Although he was already an employee of TAMSS, Gomez signed a new employment contract, including a covenant not to compete, as a result of a promotion to a position involving greater responsibility and higher pay.[508] A year later, Gomez left TAMSS and started a competing company. He hired other former ***201** TAMSS employees and allegedly used specialized forms and techniques developed by TAMSS in his business.[509]

In support of dissolution of the injunction granted by the lower court, the court of appeals scrutinized the language of the 1989 Act and focused its analysis on the "reasonable limitations" and burden of proof provisions of the Act.[510] Specifically, the court held that the contract was one for the provision of personal services, and therefore, TAMSS had the burden of proving the covenant contained reasonable limitations as to time and geographical area.[511] The covenant recited the covered geographical area as the "existing market area of TAMSS " and a "future marketing area" described in an attachment.[512] The court held that TAMSS had failed to clearly define the intended area and failed to establish that area limitations were reasonable.[513] The court of appeals reasoned that " n on-competition covenants with such a broad geographic scope have generally been held unenforceable, particularly when no evidence establishes that the employee actually worked in all areas covered by the covenant."[514] As a result, the covenant was not enforceable as written.

The court also held that TAMSS had failed to properly request reformation of the covenant, and therefore, the covenant could not be reformed.[515] Instead, the failure to request reformation by the trial court operated as a waiver and could not be cured by requesting reformation on appeal. The appellate court stated "that merely requesting injunctive relief narrower in scope than the non-competition covenant, without reformation of the covenant, is not sufficient to meet the requirements of § 15.51(c)."[516]

In *Philip H. Hunke, D.D.S., Inc. v. Wilcox*,[517] the court of appeals affirmed the trial court's grant of summary judgment and held that the covenant at issue was an unreasonable restraint of trade because it attempted to prevent the promisor from utilizing his professional contacts, over which the promisee had no proprietary interest.[518] Dr. Hunke, a pediatric dentist in Hidalgo county, employed Patrick Wilcox, also a pediatric dentist, to practice dentistry in Hunke's office. Wilcox signed an employment contract that included a covenant not to compete with Hunke in Hidalgo county for three years after termination of his employment.[519] The contract provided that if Wilcox breached the covenant, a $75,000 promissory note would become due.

Two years after signing the employment contract, Wilcox left Hunke's practice and opened his own practice in another town in Hidalgo county. Hunke sued on the promissory note and the ***202** trial court granted Wilcox's motion for summary judgment.[520] In reviewing the lower court's decision, the court of appeals laid out the common law three-part *DeSantis* (1990) test, and then reviewed the facts of the case to determine whether the covenant was an "unreasonable restraint of trade."[521] The only advantage that Hunke asserted had been gained by Wilcox was the professional connections and reputation that his association with Hunke had allowed Wilcox to establish.[522] Wilcox had not taken any secret knowledge, had received no special training, and had not solicited any of Hunke's clients.[523] For these reasons, the court determined that allowing Hunke to protect such professional relationships would be an unreasonable restraint of trade because professional relationships do not form a legitimate proprietary interest.[524] "To allow the cultivating of these professional relationships to be thus protected would be an unreasonable restraint of trade, encouraging small exclusive groups of a profession to systematically exclude outsiders from practicing in a given location."[525] Therefore, the appellate court held "that the formation of professional contacts is in the realm of general experience that Wilcox may freely use and over which Hunke can assert no proprietary interest."[526] The appellate court distinguished *Isuani v. Manske-Sheffield Radiology Group*[527] because Hunke's clients are the patients he treats, unlike Isuani, who was engaged in a professional specialty of the nature that general practitioners within the profession were themselves his clients.[528]

The only notice the court took of the 1989 Act was in a footnote:

> As the majority opinion in *DeSantis* concluded, however, we also conclude that it is unnecessary to determine whether the common law principles governing enforcement or the statutory provisions of section 15.50 apply to the present case, since the employer's failure to establish a protectable business interest makes the covenant unenforceable under either case law or statute.[529]

VI. *Peat Marwick*: The Texas Supreme Court Treats Liquidated Damages Provision as a Covenant Not to Compete

In *Peat Marwick Main & Co. v. Haass*,[530] the Texas Supreme Court held "that a damages 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."[531] Peat Marwick Main & Company (PMM), as successor in interest to Main Hurdman (MH), merged with an accounting firm in San Antonio ***203** called Chorpening Jungman & Company (CJ). As part of the merger, Lawrence Haass became a partner with MH.[532] Under the merger agreement, Haass agreed that if he left MH and provided accounting services to "Firm clients" within twenty-four

months of leaving, he would be liable for paying two categories of liquidated damages to MH:
1. guarantee payment of all outstanding fees and expenses owed by that client at the time that Haass began providing services; and

2. reimburse MH for all "direct costs" and "out-of-pocket expenses" paid or to be paid by MH in connection with acquisition of that client.[533]
"Firm clients" were defined to include any of MH's clients as of the date of termination of Haass' employment or who became a client during the twenty-four month period after Haass' termination.[534]

The trial court entered judgment that MH take nothing.[535] On appeal, the appellate court held that the category one damages were recoverable by MH, but not the category two damages.[536] As a result, the appellate court reversed-in-part and affirmed-in-part remanding on the category one damages. Before the supreme court, both parties indicated that only the category two damages were in issue.[537] The supreme court reversed on the basis that a remand was unnecessary and affirmed the judgment of the trial court.[538]

MH contended that the liquidated damages provisions were not covenants not to compete because Haass could continue to practice his same profession in the same area for the same clients.[539] MH also contended that this type of provision was enforceable under *Henshaw v. Kroenecke*.[540] In *Henshaw*, the Texas Supreme Court enforced a liquidated damages provision as reasonable that required a payment of the average annual billings for each client taken by a departing partner in a two-man partnership.[541] "Clients" in *Henshaw* included clients at the time of departure or former clients who had ceased being clients within twelve months immediately prior to departure.[542] The supreme court held the non-competition/liquidated damages provision to be reasonable and enforceable.[543]

The supreme court in *Peat Marwick* did not conclude that the liquidated damage provision was a covenant not to compete, but did conclude that "the view adapted by most courts, that such ***204** covenants should be subject to the same standards of reasonableness as covenants not to compete, is the correct one."[544] There were two reasons for this conclusion. First, even though there was no express provision against competition, "the conduct for which damages are assessed is competing by furnishing accounting services to clients of the former business."[545] "The practical and economic reality of such a provision is that it inhibits competition virtually the same as a covenant not to compete."[546] Second, according to the court, the approach was consistent with prior cases such as *Henshaw* and *Frankiewicz v. National Comp. Associates*.[547] In *Frankiewicz*, the court refused to enforce a covenant that allowed an insurance agency to discontinue renewal commission payments to a former agent once that former agent began selling insurance for another agency.[548] The covenant was not considered reasonable because there was no territorial limitation and because it was not limited to competing lines of insurance.[549] Because the covenant was not enforceable as written, the agency was required to continue the payments.[550] According to the *Peat Marwick* court, "both *Henshaw* and *Frankiewicz* are consistent with reviewing damages provisions inhibiting the right to render personal services as covenants not to compete in restraint of trade."[551]

Although a liquidated damages provision was upheld in *Henshaw*, the *Peat Marwick* court concluded that the provisions went beyond what was held reasonable in *Henshaw*.[552] As indicated in *DeSantis* (1990), the court held that the liquidated damages provision must meet three requirements:
First, it must be ancillary to an otherwise valid contract, transaction or relationship.

Second, 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.

Third, the promisee's need for the protection given by the agreement must not be outweighed by either the hardship to the promisor or any injury likely to the public.[553]

According to the court, the first requirement was satisfied because the liquidated damages provisions were ancillary to the otherwise valid merger agreement.[554] The second test was not met because the competition restricted was far broader in this case than in *Henshaw*.[555] In *Henshaw*, clients were defined as those in existence at termination or those for whom work had been done during the prior twelve months.[556] In *Peat Marwick*, clients were defined to include present and ***205** future clients worldwide for whom Haass might have had no prior contact at MH.[557] According to the court, there was no fundamental business interest to be protected by a definition of clients with this breadth.[558] Instead, the damages provision must bear some relationship to the activities of Haass while at MH that would allow Haass some advantage in later competition with MH: "The fundamental legitimate business interest that may be protected by such covenants is in preventing employees or departing partners from using the business contacts and rapport established during the relationship of representing the accounting firm to take the firm's customers with him."[559] "Inhibiting departing partners from engaging accounting services for clients who were acquired after the partner left, or with whom the accountant had no contact while associated with the firm, does not further and is not reasonably necessary to protect that interest. We hold that the provision is over-broad and unreasonable."[560]

Alternatively, MH argued that under the 1989 statute, the court should reform the provision to make it reasonable and enforce the damages provision as reformed.[561] Without deciding whether the 1989 statute could be applied retroactively, the court concluded that even under the statute, MH would not be entitled to collect damages.[562] The court agreed with MH "that the purpose of the act was to return Texas' law generally to the common law as it existed prior to *Hill v. Mobile Auto Trim.*"[563] However, the common law prior to *Hill* clearly provided that damages could not be obtained for breach of a covenant not to compete unless the covenant was enforceable as written.[564] Significantly, the court indicated that the 1989 statute may have modified this aspect of the common law, but the statute makes clear that damages may not be awarded until after the covenant has been reformed to make it reasonable.[565] Because MH did not obtain reformation before suing for damages, the 1989 statute prohibits MH from obtaining damages.[566]

VII. Appellate Court Cases After Peat Marwick

In three published opinions following *Peat Marwick*,[567] only one case squarely considered the enforcement of a covenant not to compete, and that case held the covenant unreasonable and unenforceable.[568]

*206 A. Fort Worth Court of Appeals: No Temporary Injunction Against Salesperson Absent Irreparable Injury.

Without citing the 1989 statute, the Fort Worth Court of Appeals affirmed the denial of a temporary injunction for failure of the petitioner to prove irreparable injury.[569] Tom James Company (TJC) is a manufacturer of custom tailored clothing for men.[570] Bill Mendrop was a salesman for TJC, and as part of his employment agreement, agreed to a two-year covenant not to compete in a related business in the counties in which Mendrop worked. After a hearing, the trial court denied a temporary injunction and the appellate court affirmed.[571]

Citing *DeSantis* (1990), the court of appeals held that TJC was required to prove irreparable injury, *i.e.*, "an injury for which compensation cannot be made, or for which compensation cannot be measured by any certain pecuniary standard," in order to be entitled to a temporary injunction.[572] TJC alleged "irreparable injury due to loss of clients, goodwill, sales, and potential sales."[573] Mendrop testified that he brought with him when joining TJC a list of two hundred to five hundred prospective clients developed when selling law books for Matthew Bender, and that before attempting sales in competition with TJC, he always asked if that customer had been contacted recently by a TJC salesman.[574] It was not clear whether Mendrop did or did not proceed with the sale after asking that question. Therefore, TJC failed to show irreparable injury from loss of clients. In addition, the measuring tools of TJC were of general manufacture and were returned to TJC.[575] The sales techniques of TJC were similar to those Mendrop learned in prior sales positions, and Mendrop had rejected some TJC techniques in favor of his own methods.[576] For all of these reasons, TJC failed to establish an irreparable injury and the denial of a temporary injunction was affirmed. There was no discussion of the merits of the dispute which would be reserved for a final trial.

B. Dallas Court of Appeals: Identity of Customers Need Not Be Disclosed to Support a Permanent Injunction and a Tortious Interference Claim Could Be Maintained by Severing the Covenant Not to Compete.

In *Safeguard Business Systems, Inc. v. Schaffer*,[577] the court of appeals concluded that a permanent injunction could be entered against a former distributor enjoining that distributor from contacting the plaintiff's existing customers for a two year period provided in a covenant not to compete, even though the names of each of the customers was not made of record before the trial ***207** court.[578] Safeguard Business, a manufacturer, sought to enforce a two-year covenant requiring that Schaffer, a former distributor, "not sell or attempt to sell to any customers or persons" who were contacted by Schaffer for the purpose of becoming a customer of Safeguard Business.[579] There were 1800 such customer contacts made by Schaffer, but only one name was made of record, and the trial court enjoined Schaffer only from contacting that one customer.[580] The court of appeals modified the injunction to apply to all 1800 customers, and, as modified, affirmed.[581]

The court of appeals held that it was not bound by the abuse of discretion standard of review, and that review of the trial court's permanent injunction was de novo, stating: "The trial court's construction of restrictive covenants and its determination of the proper remedy for breach of such covenants are matters of law for our decision."[582] The appellate court concluded that broadening the injunction to include all customers without requiring that those customers be identified would not result in an overly broad injunction.[583] Instead, "he who is sought to be enjoined is sufficiently familiar with the employer's business and its customers to avoid violating the injunction."[584] Where, as here, "secret customer information was one of the main assets sought to be protected, the trial court would defeat that purpose by requiring the public disclosure of such information."[585] By enjoining contact with all customers, the injunction insures that the former distributor could not benefit from breach of the confidential relationship.[586]

In *General Devices, Inc. v. Bacon*,[587] the court of appeals held that the covenant not to compete was not reasonable and not enforceable, that enforcement of the covenant did not violate the antitrust laws, that the covenant not to compete was severable from the employment contract, and that the remaining contract could be subject to a claim of tortious interference.[588] General Devices, Inc. (GDI) is a temporary personnel agency that supplies highly skilled temporary employees to high-tech companies.[589] Each employee of GDI is required to sign a covenant not to compete that provides that the employee will not work for any of GDI's clients while GDI "has an existing contract, during and for a period of thirty (30) days beyond the period of association between" GDI and its client.[590] GDI placed defendants Bacon and Shannon, GDI employees, with LTV Aerospace & Defense. In 1987, the defendants, and twelve other GDI temporary employees placed with LTV, left GDI's employment.[591]

***208** GDI sued the defendants for interference with contractual relations with the twelve other GDI employees. The trial court granted summary judgment that the covenant not to compete was reasonable.[592] GDI then added a cause of action for breach of contract by the defendants for breach of the covenant not to compete.[593] At the close of evidence, the trial court directed a verdict for the defendants on the basis that there was insufficient evidence of damages.[594] The appellate court reversed and remanded, holding the covenant unenforceable, but also holding that the evidence of damage for interference with contractual relations was sufficient to go to the jury.[595]

The appellate court recited the three-part test of *DeSantis* (1990) and concluded that the covenant as written was not reasonable because it was not limited in terms of time or geographic area.[596] The court reasoned that because GDI's contracts with its clients could last indefinitely, the covenant limiting competition for a thirty-day period after termination of those contracts was unlimited in time.[597] In addition, referencing the 1989 statute and citing *Daytona Group of Texas v. Smith*,[598] the court stated that " f ailure to request reformation waives any right to have the court reform the covenant,"[599] and observed that "GDI never requested reformation."[600]

Although the covenant was unreasonable, the appellate court affirmed the trial court's dismissal of the defendants' counterclaims under the antitrust laws because the defendants failed to offer "evidence of the relevant market or any effect on that market."[601] Despite the fact that the covenant was unreasonable, the appellate court held that GDI's claim for tortious interference was unaffected because "GDI's claim is not for interference with the covenant not to compete."[602] As a result, invalidity of the covenant was not a defense, and the covenant could be severed from the remainder of the contracts.[603] "The contracts between GDI and its twelve employees may serve the basis for a tortious interference claim."[604] In this case, the evidence of damages presented a fact question for the jury, and the case was remanded.[605]

The opinion by the Dallas Court of Appeals was ordered published by the Texas Supreme Court on June 3, 1992.[606] The supreme court granted the defendants application for writ of error, vacated the judgment of the appellate court, and remanded for further proceedings consistent with ***209** the supreme court's later opinion in *Travel Masters, Inc. v. Star Tours*.[607] The supreme court did so in order to give the court of appeals a chance to reconsider its rulings "on the severability of an unenforceable covenant not to compete and the availability of a claim for tortious interference with the remaining contract."[608] A discussion of *Travel Masters* follows.

VIII. *Travel Masters*: Texas Supreme Court Holds That Regardless of When a Covenant Is Signed, an Employment-At-Will Relationship Is Not an Otherwise Enforceable Agreement to Which a Covenant Not to Compete Can Be Ancillary

After the 1990 opinions in *DeSantis* and *Martin*, but before the 1991 opinion in *Peat Marwick*, the Dallas Court of Appeals, in an unpublished opinion, upheld enforcement and liability for tortious interference with a covenant.[609] The Texas Supreme Court reversed, rendered a take nothing judgment, and directed that the opinion of the appellate court be published.[610] The

Texas Supreme Court held, consistent with *Martin* (1990), that an employment-at-will relationship is not an otherwise enforceable agreement to which a covenant not to compete can be ancillary, and consistent with *Juliette Fowler*,[611] that an unenforceable covenant not to compete could not form the basis for an action for tortious interference with a contract.[612]

In 1983, Star Tours, Inc. hired Donna Goldsmith to act as an office manager for its travel agency.[613] Although Donna had prior experience as a "reservationist" at another travel agency, she had no prior management experience.[614] Instead, she was "looking for employment that would offer advanced opportunities, particularly in management and sales."[615] She was trained in "airline accounting, international travel, and general managerial and supervisory skills."[616] She had greater authority than other employees and was compensated on a higher basis, including commissions.[617]

On the day she was hired, she signed an "Employee Non-Competition Agreement."[618] There were no additional terms other than provisions requiring non-competition and non-disclosure of customer information.[619] The covenant not to compete precluded Donna from soliciting Star Tours' customers for two years without geographical limitation. Donna was free to act as a travel ***210** agent and set-up shop anywhere she liked, so long as she did not solicit customers from Star Tours.[620]

In late 1986, Donna offered to buy Star Tours, but her offer was rejected.[621] She also sought unsuccessfully to buy out her non-competition agreement. In November of 1986, while still working at Star Tours, Donna and her parents, Walter and Betty Goldsmith, formed Travel Masters. Between November of 1986 and May of 1987, all preparations were made to open Travel Masters as a competing travel agency, including leasing office space, buying office furniture and equipment, opening bank accounts, and establishing a relationship with the Airline Reporting Corporation.[622]

On May 4, 1987, Donna quit Star Tours without notice, and Travel Masters opened for business with Donna as the president. Travel Masters immediately began serving Star Tours' customers, which comprised most of Star Tours' business.[623] Star Tours lost "ninety to ninety-five percent of its domestic travel business."[624] Star Tours sued Travel Masters for tortious interference with Donna's contract and sued Donna for breach of contract and fiduciary duty.[625] Star Tours sought damages and injunctive relief against Travel Masters and Donna.

The trial court granted a temporary injunction, the appellate court affirmed, and the supreme court dismissed for want of jurisdiction. Before final trial on the merits, Walter was added to the tortious interference claim as a defendant. Before submission to the jury, the trial court entered a directed verdict for Donna on the basis that the covenant not to compete was unenforceable for lack of consideration.[626] At the same time, the trial court entered judgment on a jury verdict for actual and punitive damages against Travel Masters and Walter.[627]

On appeal from the final judgment, the Dallas Court of Appeals affirmed the liability of Travel Masters and Walter Goldsmith, reversed the directed verdict for Donna, and remanded for further proceedings against Donna Goldsmith.[628] Reciting the three-part test of *DeSantis* (1990), the appellate court held that the covenant was enforceable as written.[629] The first element was met because the non-competition covenant was "ancillary to a valid employment relationship."[630] Distinguishing *Martin* (1990), the appellate court concluded that there was no need to consider whether or not there was independent valuable consideration to support the covenant because unlike *Martin*, Donna signed the covenant not to compete on the same day that her employment ***211** began.[631] The second requirement was met because the covenant was necessary to protect Star Tours' goodwill and customer list which were "vital to the continued success of Star Tours' business."[632] The third requirement was also met because Donna was free to be a travel agent "...anywhere she desired. The only limitation in the agreement was the prohibition against her soliciting any of Star Tours' established clients for twenty-four months."[633] According to the court of appeals, the covenant was enforceable as a matter of law.[634] There was no analysis of the covenant under the 1989 statute.

The supreme court reversed and rendered a take nothing judgment.[635] According to the supreme court, Donna "was an employee-at-will and was subject to termination at any time for any reason."[636] The court reasoned that the employment agreement was only a covenant not to compete, and "did not contain any terms or provisions usually associated with an employment contract."[637] The court further stated that "the mere fact that Donna was paid on a monthly basis by Star Tours, without any other evidence, does not prove she was other than an employee-at-will."[638] Relying on *Martin* (1990), the supreme court held that an employment-at-will relationship is not an otherwise enforceable agreement to which a covenant not to compete can be ancillary because such a "relationship is not binding upon either the employee or the employer."[639] Although a "valid" relationship, an employment-at-will contract is "not an otherwise enforceable agreement."[640] The court held that regardless of when the covenant was signed-either contemporaneously with initial employment as here, or years later in conjunction with a promotion as in *Martin*-it would not be enforceable:

> Because employment-at-will is not binding upon either the employee or the employer and is not an otherwise enforceable agreement, we conclude that a covenant not to compete executed either at the inception of or during an employment-at-will relationship cannot be ancillary to an otherwise enforceable agreement and is unenforceable as a matter of law.[641]

Relying on *Juliette Fowler Homes*, the supreme court also held that Star Tours could not recover for tortious interference because "[c]ovenants not to compete which are unreasonable restraints of trade and unenforceable on grounds of public policy cannot form the basis of an action for tortious interference."[642]

***212** Of significance, the supreme court vacated the judgment of the court of appeals in *General Devices, Inc. v. Bacon*[643] so that the court of appeals could reconsider its decision in light of the supreme court's *Travel Masters* opinion.[644] The Dallas Court of Appeals in *General Devices* allowed a cause of action to proceed for tortious interference after concluding that a non-competition covenant that was part of an at-will employment agreement was unenforceable.[645] However, the court of appeals made clear in its opinion that the tortious interference claim could proceed for interference with the at-will employment agreement, not for interference with the non-competition covenant.[646] The court cited and explained *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*[647] *Juliette Fowler Homes* made clear that interfence with an at-will agreement can be the subject of a tortious interference claim.[648] As a result, the intentions of the supreme court in vacating and remanding *Bacon* are not clear.

IX. Appellate Court Cases After *Travel Masters*

After the supreme court's September 1991 opinion in *Peat Marwick* and before the 1993 amendments became effective on September 1, 1993, there were five published cases by Texas appellate courts.[649] In four of five cases, the courts of appeals either enforced covenants not to compete or indicated that the covenants were enforceable. The lone published case that affirmed a refusal to enforce a covenant not to compete did so because the appeal was from the denial of a temporary injunction based upon conflicting evidence.[650] There was no indication in this case that the covenant could not be enforced.

A. Houston Court of Appeals: No Summary Judgment for a Software Sales Agent in *B.J. Software Systems*.

In *B.J. Software Systems, Inc. v. Osina*,[651] the court of appeals reversed a summary judgment in favor of an employee that a covenant not to compete was unenforceable and remanded for reformation of the covenant and for a new trial.[652] In 1988, Herculean Solutions and David Osina entered into a contract under which Osina was engaged as Herculean's primary sales ***213** agent.[653] The agreement contained a two-part covenant not to compete.[654] The first part restricted Osina from competing with Herculean while actively representing Herculean, *i.e.*, a "faithful servant" provision.[655] The second part of the covenant restricted Osina from competing with Herculean after a termination of the agreement for as long as Osina continued to receive commissions from Herculean in accordance with the agreement.[656]

Herculean claimed that after Osina began representing it, he actively competed with Herculean during the term of the agreement by selling his own similar software systems. Herculean terminated Osina alleging, breach of the covenant not to compete and refused to pay any further commission to Osina. Thereafter, Osina sued Herculean for breach of contract. Herculean asked for reformation, but the trial court refused and granted Osina's pretrial summary judgment motion ruling that both parts of the covenant not to compete were "null, void and unenforceable."[657] At trial, the jury returned a verdict for Osina.[658]

Osina offered three theories to support the trial court's grant of summary judgment: (1) no consideration was given to him by Herculean for execution of the covenant; (2) he was engaged in a common calling as a salesman; and (3) the covenant had no time or territorial restrictions.[659] The court of appeals held that none of the arguments alleged by Osina were sufficient to support the summary judgment order.[660]

The court of appeals rejected each of Osina's three arguments as follows. First, the court said that "it is undisputed that the covenant not to compete was ancillary to an otherwise enforceable agreement. Therefore, no independent consideration was required to support the covenant. The agreement itself contained sufficient consideration to support the covenant."[661] As for the second argument, the court said that it was "insufficient to support the summary judgment, because the common calling doctrine has been abolished by *DeSantis.*"[662] Finally, regarding the reasonableness of the covenant, Herculean requested reformation under Texas Business and Commerce Code section 15.51(c).[663] The court held that " t he trial court had a duty to decide whether § 15.50 applied, and if so, to reform the covenant so that it would be enforceable, or to declare that the covenant was incapable of being reformed. The trial judge's decision that the covenant was void was not sufficient to support the summary judgment, because the trial court was ***214** obligated to reform it consistent with the statute upon Herculean's request, and the court failed to do so."[664] Therefore, the trial court's denial of reformation was error.[665]

Of significance, the court of appeals made clear that it was not deciding whether or not the noncompete statute applies to a "'faithful servant provision,' which attempts to bind both parties when they are presumably seeking common interests."[666] Instead, the appellate court simply raised, but did not answer, the issue of whether the statute applies to a non-competition covenant during the primary term of the agreement.[667]

B. Dallas Court of Appeals: Employment Not At-Will if Termination Must Be Based on Unsatisfactory Conduct; Temporary Injunction Properly Denied if There Is Conflicting Evidence.

In *Zep Manufacturing Co. v. Harthcock*,[668] the Dallas Court of Appeals held that a non-compete clause in a former employee's contract was unenforceable because it was unreasonable due to the lack of geographical limitations, and therefore, could not be enforced in an action for damages or be the subject of an action for tortious interference.[669] At the same time, the court of appeals held that covenants against disclosure of secret and confidential information need not meet the requirements of covenants not to compete and could be the subject of an action for damages for breach and for tortious interference.[670] As a result, the trial court's grant of summary judgment was affirmed regarding the action to enforce the covenant not to compete, but reversed and remanded on the action for breach of the non-disclosure covenant and tortious interference with that covenant.[671]

In April of 1987, Harthcock was hired by Zep as a chemist despite the fact that he had no prior experience.[672] Harthcock signed an employment agreement which contained a non-compete covenant.[673] Harthcock could only be fired if his job performance was "unsatisfactory" as determined by Zep.[674] Zep trained Harthcock as an industrial chemist and gave him access to its chemical formulas.[675] On May 26, 1989, Harthcock resigned from Zep and subsequently began to work as a chemist for Panther Industries, Inc., a competing company in the manufacture and sale of industrial chemicals.[676] Zep filed suit, alleging among other things, that Harthcock had breached ***215** the non-compete and non-disclosure covenants contained in the employment agreement, and that Panther had tortiously interfered with those covenants. Harthcock filed a motion for summary judgment which was granted on all causes of action.[677]

The court of appeals reversed the trial court's finding that the covenant not to compete was not ancillary to an otherwise enforceable agreement.[678] The employment agreement provided for termination by Zep as follows: "If the president of Zep, *in his sole discretion, determines that Employee's performance of duties hereunder is unsatisfactory*, Employee's employment hereunder may be terminated by written notice . "[679] The court of appeals reasoned that because the employment agreement contained terms that limited Zep's right to terminate Harthcock's employment, it was an enforceable agreement rather than an unenforceable at-will contract.[680]

The court then held that the covenant not to compete did not contain a reasonable restriction of geographical area and was, therefore, unenforceable on the grounds of public policy.[681] The employment agreement contained a "Duties" section which defined "territory" to be within a 100-mile radius of DeSoto, Texas.[682] The court found, however, that the non-compete covenant did not limit its scope to the defined territory and made no reference to geographical location.[683]

The court of appeals also overruled Zep's point of error in which it argued that the trial court had a duty as a matter of law to reform the covenant not to compete if it was unreasonable.[684] The appellate court concluded that if the trial court had reformed the non-compete covenant, it could have awarded only injunctive relief under Texas Business and Commerce Code section 15.51(c).[685] The only issue on appeal, however, was whether Zep could pursue its causes of action for damages rather than injunctive relief because the two-year time limit in the covenant not to compete had expired.[686] "Thus, Zep no longer seeks the only relief available to it upon reformation of the unenforceable noncompete covenant."[687] The trial court erred, however, by granting summary judgment on the nondisclosure covenants.[688] Contrary to Harthcock's arguments, nondisclosure covenants "are not restraints on trade," and limitations of reasonable time, geographic area and scope of activity "are not prerequisites to enforceability."[689] These types of covenants do not limit competition, and "do not prohibit the former employee from using, *in* ***216** *competition with the former employer*, the *general* knowledge, skill, and experience acquired in the former employment."[690] Further, " t he mere fact that a non-compete covenant is void does not render void the remainder of the employment contract.... The promises not to compete and not to disclose are separable, and the unenforceability of the non-compete covenant does not render void the non-disclosure covenant."[691] As a result, the non-disclosure covenants could be enforced directly for breach and also by an action for tortious interference.[692]

In *Hilb, Rogal & Hamilton Co. v. Wurzman*,[693] the Dallas Court of Appeals affirmed a denial of an employer's request for temporary injunction pursuant to a non-competition and non-piracy provision of an employment agreement.[694] Hilb, Rogal & Hamilton (HRH) was in the business of bringing together those seeking insurance coverage with insurance companies seeking customers. Its major assets were its customer base, its customer information, and good will. HRH hired Wurzman in 1990 as a salesperson and required her to sign an employment agreement upon hiring and again annually as a condition of continued employment.[695] Wurzman had no prior experience selling insurance and was trained and sponsored by HRH to obtain an insurance license.[696] In 1992, Wurzman incorporated a competing agency and tendered her written resignation to HRH.[697] Before leaving, Wurzman rented a photocopy machine and copied over 1000 pages of HRH files.[698]

HRH argued that the trial court abused its discretion in denying its common law and statutory rights to a temporary injunction pending a full trial on the merits.[699] The court of appeals found no abuse of discretion in the denial of HRH's injunction on common law equitable grounds because the trial court heard conflicting evidence on both the issue of probable right of recovery and the issue of an adequate remedy at law for interim damages.[700] With regard to the trial court's refusal to grant relief on statutory grounds, the court of appeals found that HRH did not allege and submit such a theory to the trial court and, therefore, did not preserve that argument for review.[701]

The court of appeals made two statements of particular interest. First, "[t]he nature of this Court's question is not whether § 15.50 provides a cause of action, but whether HRH relied on § 15.50 in the trial court. If it did, the provisions of the statute supersede the common law requirements of injunctive relief."[702] Second, " t he criteria for enforceability of covenants not to ***217** compete under § 15.50 are completely different from the common law requirements for injunctive relief."[703]

C. Beaumont Court Of Appeals: One Covenant Enforced Against Franchisee and One Covenant Not Enforced.

In *Butts Retail, Inc. v. Diversifoods, Inc.*,[704] the Beaumont Court of Appeals affirmed an award of damages for breach of one covenant not to compete, but reversed an award of damages for breach of a second covenant not to compete in the same franchise agreement.[705] The court of appeals applied the 1989 statute retroactively, although the breach occurred before the statute was enacted.[706]

Butts Retail entered into a franchise agreement for a five year period with Diversifoods to operate a retail fruit and nut store known as Tropik Sun Fruit & Nut at Parkdale Mall in Beaumont, Texas.[707] The franchise agreement contained two restrictive covenants: (1) that if, prior to the expiration of the franchise agreement, Diversifoods terminated the franchise agreement, Butts Retail was prohibited from operating a business selling fruits and nuts in Parkdale Mall for a period of two years from the date Butts Retail ceased to conduct business pursuant to the agreement; and, (2) that during the five year term of the franchise agreement, Butts Retail would not operate another business selling fruits and nuts within the "metropolitan area" of the Parkdale Mall store in Beaumont, Texas.[708] In August of 1982, Butts Retail opened a fruit and nut store called Mr. Munch in the Central Mall of Port Arthur in Jefferson County, Texas.[709] Diversifoods terminated the franchise at Parkdale Mall, although Butts continued to operate the store there until January 1986.[710]

Diversifoods filed suit, alleging among other things, that Butts Retail had breached the non-competition clauses of the franchise agreement.[711] After a trial to a jury, the jury found that the covenants had been breached and that Diversifoods was entitled to approximately $7,300 in damages for breach of the Parkdale Mall covenant, approximately $42,000 in damages for breach of the "metropolitan area" covenant (*i.e.*, for establishing a business at Central Mall), and approximately $46,000 in attorney fees.[712] Judgment was entered on the jury verdicts.[713]

The appellate court applied sections 15.50 and 15.51 retroactively to both covenants. It explained that the statute became effective on August 28, 1989, and applied to a covenant entered ***218** into before, on, or after the effective date.[714] The court further noted that "all relevant dates of inception of the contract in question and alleged breach thereof giving rise to any cause of action occurred prior to the effective date of the statute in question."[715] The court also noted: "Appellee Diversifoods says § 15.50 is to be applied retroactively and cites *Recon Exploration, Inc. v. Hodges*. Appellant Butts Retail says § 15.50 should not be applied retroactively, citing *Webb v. Hartman Newspaper, Inc*. We do not think that *Recon* and *Webb* apply because the date of breach in each case occurred subsequent to the effective date of the statute."[716] Although the dates of breach occurred before the statute was first enacted in 1989, the court held that it was "now compelled to give effect to the language of the legislature and ... apply the statutory standards to the facts at hand."[717]

The appellate court held that the covenant not to compete regarding Parkdale Mall was reasonable as a matter of law.[718] Therefore, the damages award of $7,300 for the breach of that covenant was affirmed, as was the portion of attorney fees attributable to that award.[719] However, the court found that the covenant preventing any other business within the "metropolitan area" of Parkdale Mall was unreasonable and unenforceable as it was applied to the Mr. Munch store in Central Mall in Port Arthur because the term "metropolitan area" was not sufficiently precise to describe the geographical area in which Butts Retail could or could not operate.[720] As a result, the $42,000 damage award and the portion of attorney fees attributable to that award were to be set aside after allocation on remand.[721] The court of appeals refused Diversifoods' request that it take judicial notice that the cities of Beaumont, Port Arthur and Orange, Texas are in the same "metropolitan area" because "a judicially noticed fact must be one not subject to reasonable dispute and is either generally known within the jurisdiction of the court or is capable of accurate determination in utilizing sources which accurately cannot reasonably be questioned."[722]

Of further interest, the court of appeals stated that "[t]he doctrine of 'common calling' ... has been discarded by the supreme court ... and has been rejected as a test for reasonableness by statute."[723]

D. Fort Worth Court of Appeals: Covenant Enforceable Against a Service Manager.

In *Car Wash Systems of Texas v. Brigance*,[724] the Fort Worth Court of Appeals reversed the denial of an employer's application for a temporary injunction against a former employee based ***219** on a non-compete covenant and remanded with instructions to enter an appropriate temporary injunction.[725] Car Wash Systems (CWS), which was in the business of constructing and servicing car washes, hired Brigance in 1984.[726] In February 1987, Brigance signed a one year employment agreement which changed his status from an employee-at-will to "service manager," dischargeable only for cause.[727] The renewable agreement contained a non-compete covenant.[728]

In November 1992, Brigance resigned from CWS and began working for a competing business, Ultimate Car Wash Systems, which he helped start with a former customer of CWS.[729] CWS sued, but the trial court denied a temporary injunction. The trial court held that the noncompetition covenant was not in effect at the time Brigance quit in 1992 because the agreement terminated after the completion of a one year term, and the one year covenant tacked on to the end of the employment period had expired, although Brigance continued to be employed by CWS.[730]

The court of appeals, however, focused upon language in the agreement which stated, "the Employment Period shall terminate one (1) year from the date hereof unless extended thereafter from year to year or otherwise as may be agreed to by EMPLOYEE and approved by EMPLOYER."[731] It reasoned that the agreement was in full force at the time Brigance quit, finding that the agreement required no formality in order for an extension to take place.[732] It concluded that if the employee remained on the job and the employer continued to employ him, the terms of employment were extended for another year.[733]

The appellate court summarized the "virtually undisputed evidence"[734] as establishing that CWS's business was a "specialty area that requires prior knowledge, experience and training;" that CWS maintains a confidential customer list that is used on an "as needed or need-to-know basis by people filling orders;" that Brigance referred customers and one prospect to Ultimate Car Wash while employed at CWS; that after joining Ultimate, Brigance solicited orders from eleven CWS customers who had done $400,000 worth of business with CWS the prior year; that if Brigance was permitted to compete, CWS would probably go out of business; and that Brigance admitted he could work elsewhere for a year.[735] With this background, the appellate court reversed and remanded with instructions to enter a temporary injunction in accordance with the opinion.[736] The court of appeals stated, " t he virtually undisputed evidence clearly establishes the enforceability of the covenant in question under the above parameters *i.e., DeSantis* (1990) and the statute . Since ***220** the evidence also clearly established probable right and irreparable injury, the employer was entitled to injunctive relief."[737]

X. Reaction to the Supreme Court's 1990 Trilogy of Cases and to *Travel Masters* Spurred the Texas Legislature to Amend the 1989 Statute in 1993

Contrary to the legislature's 1989 directive that the 1989 statute was to apply "to a covenant entered into before, on or after" August 28, 1989, not a single Texas Supreme Court case purported to apply the 1989 statute to cases considered by the court. Although the *Martin* (1990) opinion appears to have been decided by application of the language of the statute, the court claimed to be applying the common law.[738] Many appellate court opinions have similarly applied the common law as restated in *DeSantis* (1990), but not the statute. One appellate court concluded that a noncompete covenant must be evaluated under both the common law and the statute.[739] Adding fuel to the fire, the Texas Supreme Court created the at-will employment exception to enforcement of covenants not to compete in *Martin* (1990) and *Travel Masters* as a substitute for the "common calling" analysis expressly rejected by the Texas Legislature. Responding to these obstacles to enforcement of non-competition agreements erected by the Texas Supreme Court, the legislature made three significant changes to the statute. First, the legislature added section 15.52 entitled "Preemption of Other Law" that provides expressly that the common law is preempted and the courts are only to apply the statute.[740] Second, the legislature made clear in section 15.51(b) that the statute applies to at-will employment agreements.[741] Third, the legislature eliminated the language of former section 15.50(1) requiring that the covenant be supported by independent valuable consideration if the covenant is signed on a date other than the date of execution of the underlying agreement.[742] At the same time, the 1993 amendments added language that a noncompete covenant is enforceable if ancillary to "an otherwise enforceable agreement *at the time the agreement is made.*"[743]

The amendments became effective on September 1, 1993, and apply "to [covenants] not to compete entered into before, on, or after the effective date of this Act unless the enforceability of the covenant has been finally adjudicated by a court of competent jurisdiction before the effective date of this Act."[744]

A. Legislative History Underlying the 1993 Amendments

The 1993 amendments were sponsored by Representative Carona in House Bill 7 during the 73rd Legislative Session. Representative Carona's opening statement of February 16, 1993, in ***221** support of the bill noted that the amendments were necessary in response to the supreme court's opinions in 1990 and to insure that "at-will-employment contracts are covered," as follows:

> Mr. Chairman, Members, a covenant not to compete is an agreement which restricts a person from competing with another in some activity for a period of time, typically in a certain geographical area. To be enforceable, a covenant not to compete must meet a variety of standards which have been established by Statute. Chapter 15 of the TEX. BUS. & COM. CODE deals with covenants not to compete and § 15.50 establishes the criteria under which a covenant not to compete is enforceable. Regrettably, Texas courts in recent years, most notably in 1990, have had rulings through our Supreme Court, which have had an adverse effect upon the enforceability of these employment agreements. One case has actually implied that "common law" on the subject remains applicable. Another case invalidated covenants not to compete in connection with at-will employment contracts. The purpose of this particular committee substitute is merely to clarify the applicability of Chapter 15 and it also will insure that at-will employment contracts are covered. The Bill further makes clear that statutory requirements prevail over the common law. It has very strong support from the business community and I have an expert here today to speak to you about the specifics of the legislation, and Mr. Chairman, with your approval, after our expert has given testimony, I'd like to reserve the right to close.[745]

As with the 1989 statute, testimony was also given by a representative from the Texas Business Law Foundation and the Texas Employment Law Counsel in support of the amendments:

The Texas Business Law Foundation is a non-profit Texas corporation. Its purpose is to promote the adoption of laws that will make Texas an attractive state in which to incorporate and transact business. The membership of the Foundation includes prominent businesses, law firms and law professors throughout out our State. The proposed amendments to § 15.50 *et seq*. would clarify for the courts what was clearly the legislative intent of the legislature in 1989. Specifically, the statute is proposed to be amended would require courts to enforce covenants not to compete that are part of and otherwise enforceable agreement, whether oral, written, at will, or for a term, and without regard to when the covenant is entered into. This is modified by one exception, and that is, except to the extent that they impose a restriction that is unreasonable as to scope of activity, time or geographic area. In addition, the legislation, as Rep. Carona mentioned, would make it clear that this is the law of the State and that there is not a separate set of rules or laws to be applied by the Supreme Court. That is the end of my statement.[746]

....

The Texas Employment Law Counsel is a voluntary, non-profit association. It is organized to promote the common interest of employers and the general public in well-reasoned laws and regulations affecting all aspects of employment in the private sector. TELC is incorporated under Texas law and is not affiliated with any other business organization in the State. Its members consist of approximately 50 corporations and businesses of diverse industries in Texas, including refining, petrochemical, banking, insurance, retail, just a diverse group. I have attached to the back of my written testimony, which I believe you have a copy of, a list of the member companies who have representatives on the Board of Directors of the TELC and that will give you an idea of the kinds of businesses that this group is made up of. The TELC supports HB 7 for the reasons that Rep. Carona and the Texas Business Law Foundation have already outlined, that essentially, the Texas Legislature has already spoken on this issue and apparently the courts have needed additional guidance into what the legislature's intention was. I would like to expand a little bit to say, to explain why it is that employers want covenants not to compete. That may address a little bit of your question, Representative. Covenants not to compete are designed, as Rep. Carona said, to prevent someone from competing with someone else for a certain period of time and, under the statute, these agreements have to be limited in scope of geographic area, scope of time, for how long they agree not to compete, and ***222** also with respect to the scope of activity that they agree not to do that constitutes competition covered by the agreement. Employers frequently will ask for such a covenant not to compete from an employee when the employer has invested a significant amount of expense and effort in training the employee, in educating the employee, the employee works for the employer and learns all about the employer's business and learns all about the employer's customers, and trade secrets, and confidential business information. Employers have a legitimate concern that, after they've invested all of this effort and expense in an employee, the employee does not then end the relationship and go out and compete with the employer and use all that information the employer gave the employee against the employer. That is the employer's motivation for having covenants not to compete. As long as the covenants not to compete are reasonable and within the limitations of the statute that this legislature enacted in '89, then they should be enforceable. The concept of employment at will is another concept that TELC supports and that Texas has a long history of supporting. Under this concept, either the employer or the employee can terminate the relationship at any time for any reasons. So either the employee can quit, or the employer can terminate the employee. They don't have to have a reason and they can do it at any time. TELC believes that this concept promotes business development and freedom of association and is a desirable concept to continue in Texas. The Texas Supreme Court has ruled that, despite the statute that was enacted in '89, a covenant not to compete that is ancillary to an employment at will situation would not be enforceable. The purpose of HB 7 is to clarify for the court that, in fact, it would be. There is no reason why the two concepts protecting legitimate interests by covenants not compete and promoting business development and freedom of association by employment at will cannot be combined in the same relationship. That concludes my remarks.[747]

After these statements, there were a number of questions asked by the legislature and answered by the witnesses. Some of those questions and answers were as follows:

Q: The right to compete covenants are basically tools for management and upper management. You wouldn't apply this to bartenders and waiters and store clerks and those types of individuals?

A: The statute doesn't specify a class of employees that it covers. But I believe that that would be determined by the reasonableness standard-if it's not reasonable in the scope of activity to regulate the bartender, then the court would not enforce it.

And that's also why there is the difference in this burden of proof. The burden of proof in an employment situation is on the employer to show that those limitations are reasonable, and, in the event that he is unreasonable in bringing an action to stop that person and seeks to enforce it to an extent that is unreasonable and knowingly does that, then he could be liable for the court costs and fees of the employee for bringing that. It's to prohibit some sort of employer being heavy handed with an employee in a bar type situation, bartender situation or a hair dresser.

....

Q: But what is the employee receiving for this agreement, because if it seems to me that it could be subject to abuse if the employer extracts such an agreement from an employee and then terminates them, then they have no protection and the employer has just saved himself competition ....

A: Well, I would answer that the employee is getting some consideration for the Agreement. He is being employed.

Q: But he's subject to be terminated at any time, is he not?

A: That's right, but he's also subject to quitting at any time. He can leave the employer at any time. That's the beauty of employment at will is that it is mutual-that the employee can quit; so the employer has invested a lot of time and effort in training and expense and education and has given the employee trade secrets and confidential information.

....

***223** Q: I understand that we always talk about and justify the at-will on the basis that the employee can leave at any time, but I think, normally when we talk about that, at will tends to run more toward the employer than it does for protection of the employee. Judging from the case law that I've read anyway, and it seems to be run counter and I'm just wondering what's built in there to protect the employee in this matter. Because it seems that once he signs the agreement, he's free game if they want to terminate him. He's got no time written into it. I've not read this case, but I presume that that's what the court was trying address when it came up with its decision.

A: Once again, Representative, excuse me, the burden of proof, the protection for the employee is that the burden of proof is on the employer. That, also, the employer has to establish that it is reasonable, that the limitations on the employee are reasonable. That's the protection right there.

And there's a chance that he may, if he is unreasonable and acts unreasonably, he is going to have to pay for court costs and attorneys fees for the employee.

....

Q: Is there any role for public interest to play in these no-compete clauses, given that same scenario, only in a community that needs that specialization or needs the additional health care? Is there any role for that to play in the legal process?

A: Again, I think that that is a consideration, another consideration that was weighed by the legislature when the statute was passed in '89.

I don't think that this Bill changes that, that to the extent the public does have an interest, it has already been addressed.

Q: And what is it?

A: I would have to defer to the Legislature. It's in the statute, and to the courts.

....

Q: I don't see a time period there, that person could be hired for a week and signed an agreement not to compete and then be fired and then they are out of business for say a year or two.

A: What happens in the courts, what I've seen from the courts, the way they apply it is they usually apply what we call the tail end of the covenant; which is the time period after the employment to the length of time during which they are employed. In order words, just a rule of thumb; that's just what the courts are doing with the legislation. They will say what we view as reasonable in that scenario is that if you've worked a week, then you are out a week and that's all. You cannot compete for a week. That's generally what I've seen the courts do. They don't import-they then take-and the court would sit there and say that's just not reasonable ....

Q: OK, but that's under the prior law right?

A: And this law as well.

Q: It would apply also to this.

A: Absolutely.[748]

At the end of the February 16, 1993 hearings, Representative Carona delivered the following closing statement:

> Let me emphasize a few points here in closing and I'll be brief so you can on to other business. We are not blazing any new trails here folks. The intent of this legislation is merely to return us back to the

> statute which prevailed in Texas for decades. It wasn't until we had some unfortunate court decisions from the Texas Supreme Court in 1990 that we find ourselves in this position today. What we have deliberately done in this legislation is allow for judicial review. Representative Romo, the concerns and points you brought up, I think, are important ones. What we've done in this legislation is ***224** to specifically provide for that opportunity for the court to come in and determine what is reasonable. We think that is very pro-employee in this instance and, in fact, as was mentioned in prior testimony, the burden of proof is going to be on the employer. The employer is going to have to convinced enough that a violation occurred and that, in fact, a real loss in good will to the business occurred sufficient enough to warrant going to the court. In the event that the employer does that in any fashion that is harassing in nature, this particular legislation allows for the court to turn around and sanction, if you will, that employer by passing the court costs and the legal fees back on the employer. So we think it strikes a very good balance. It's intended to be fair to employees, but at the same time, respect the very vast investment made by many employers in very delicate, very specific businesses throughout out State. This is legislation that is wholeheartedly endorsed by Texas Instruments, by EDS, by the Ben E. Keith Company, and a long list of other organizations that view it favorably. Mr. Chairman, what I would ask is that if it is the will of the committee, that it be voted out favorably and sent on to calendar.[749]

A further hearing on House Bill 7 was conducted on April 20, 1993.[750] After the second reading of the Bill, Representative Eckels summarized the intention of the Bill to clarify the statute to include "all contracts, both for term or at will:"
Mr. Speaker, members, this updates the covenants not to compete language to include reasonableness language. It clarifies the language about ancillary or part of agreements, specifically, covenants not to compete on employment contracts; clarifies that it includes all contracts, both for term or at will, but then puts a reasonableness standard and allows them to reform those covenants to make sure they are not unreasonable. I move passage.[751]

After public hearings, a bill analysis was published stating that the purposes of the 1993 amendments were to ensure that at-will employment contracts were covered and to make clear that the statutory requirements prevail over the common law.[752] The bill analysis also identified the differences between the original proposed 1993 amendments and the substitute amendments that were passed, as follows:

COMPARISON OF SUBSTITUTE WITH ORIGINAL BILL

> The substitute describes applicability of the Act in terms of a covenant which is part of an otherwise "enforceable agreement" instead of a "valid transaction or relationship." The substitute deletes the need for independent consideration. The substitute adds conforming language for court reformation and defense costs. The substitute also adds preemption language to ensure the Act prevails over common law.[753]

At the third reading of the Bill on May 17, 1993, Representative Carona stated simply: "This is covenants not to compete. It reestablishes law prior to 1990."[754]

With that, the Bill was passed.

***225 B. The 1993 Amendments to the 1989 Statute**

The 1993 amendments to the statute became effective on September 1, 1993, and provide as follows:
SYNOPSIS: An ACT relating to the criteria for enforceability of covenants not to compete and to certain procedures and remedies in actions to enforce those covenants.

NOTICE:
[A> **UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED** <A]

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

[*1] SECTION 1. Section 15.50, Business & Commerce Code, is amended to read as follows:

Sec. 15.50. CRITERIA FOR ENFORCEABILITY OF COVENANTS NOT TO COMPETE. Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable [A> **IF IT IS ANCILLARY TO OR PART OF AN OTHERWISE ENFORCEABLE AGREEMENT AT THE TIME THE AGREEMENT IS MADE** <A] to the extent that it [D> ÷ < D]

[D> <D] contains [D> <D] limitations as to time, geographical area, and scope of activity to be restrained that [A> **ARE REASONABLE AND** <A] do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

[*2] SECTION 2. Sections 15.51(b) and (c), Business & Commerce Code, are amended to read as follows:

(b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, [A> **FOR A TERM OR AT WILL,** <A] the promisee has the burden of establishing that the covenant meets the criteria specified by [D> <D] Section 15.50 of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this subsection, the "burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(c) If the covenant [A> **IS FOUND TO BE ANCILLARY TO OR PART OF AN OTHERWISE ENFORCEABLE AGREEMENT BUT CONTAINS LIMITATIONS AS TO TIME, GEOGRAPHICAL AREA, OR SCOPE OF ACTIVITY TO BE RESTRAINED THAT ARE NOT REASONABLE AND IMPOSE A GREATER RESTRAINT THAN IS NECESSARY TO PROTECT THE GOODWILL OR OTHER BUSINESS INTEREST OF THE PROMISEE** <A] [D> <D], the court [D> <D] shall reform the covenant to the extent necessary to cause the [A> **LIMITATIONS CONTAINED IN THE COVENANT AS TO TIME, GEOGRAPHICAL AREA, AND SCOPE OF ACTIVITY TO BE RESTRAINED TO BE REASONABLE AND TO IMPOSE A RESTRAINT THAT IS NOT GREATER THAN NECESSARY TO PROTECT THE GOODWILL OR OTHER BUSINESS INTEREST OF THE PROMISEE** <A] [D> <D] and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not [A> **CONTAIN LIMITATIONS AS TO TIME, GEOGRAPHICAL AREA, AND SCOPE OF ACTIVITY TO BE RESTRAINED THAT WERE *226 REASONABLE AND THE LIMITATIONS IMPOSED A GREATER RESTRAINT THAN** <A] [D> <D] necessary to protect the good will or other business interest of the promisee [A> , **AND THE PROMISEE SOUGHT TO ENFORCE THE COVENANT TO A GREATER EXTENT THAN WAS NECESSARY TO PROTECT THE GOODWILL OR OTHER BUSINESS INTEREST OF THE PROMISEE** <A], the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

[*3] SECTION 3. Subchapter E, Chapter 15, Business & Commerce Code, is amended by adding Section 15.52 to read as follows:

[A> **SEC. 15.52. PREEMPTION OF OTHER LAW. THE CRITERIA FOR ENFORCEABILITY OF A COVENANT NOT TO COMPETE PROVIDED BY SECTION 15.50 OF THIS CODE AND THE PROCEDURES AND REMEDIES IN AN ACTION TO ENFORCE A COVENANT NOT TO COMPETE PROVIDED BY SECTION 15.51 OF THIS CODE ARE EXCLUSIVE AND PREEMPT ANY OTHER CRITERIA FOR ENFORCEABILITY OF A COVENANT NOT TO COMPETE OR PROCEDURES AND REMEDIES IN AN ACTION TO ENFORCE A COVENANT NOT TO COMPETE UNDER COMMON LAW OR OTHERWISE.** <A]

[*4] SECTION 4. This Act takes effect September 1, 1993.

[*5] SECTION 5. This Act applies to a covenant not to compete entered into before, on, or after the effective date of this Act unless the enforceability of the covenant has been finally adjudicated by a court of competent jurisdiction before the effective date of this Act.

[*6] SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.[755]

XI. *Light* (1993): Texas Supreme Court Continues to Apply the At-Will Exception to Enforcement of Covenants Not to Compete

Despite the addition of the words "at will" to the statute and the clear intention of the legislature expressed in the bill analysis of the 1993 amendments, the Texas Supreme Court in *Light v. Centel Cellular Co. (Light* (1993)) held that an at-will employment agreement is not sufficient to support a covenant not to compete.[756] As a result, the covenant in that case was not enforceable.[757]

Before the 1993 amendments and after *Travel Masters*, the Tyler Court of Appeals upheld a covenant not to compete as a reasonable restraint of trade in *Centel Cellular Co. of Texas v. Light*.[758] After working for two years under an oral agreement, Debbie Light entered into a written contract of employment in October of 1987 with United TeleSpectrum to work as a sales person. The first four paragraphs of the contract detailed the compensation and benefits to be received by ***227** Light such as salary, commissions, and training, and it incorporated a separate policy manual.[759] Paragraphs five and six concerned notice of termination and procedures on termination. The last four paragraphs detailed the noncompete covenant and its enforcement.[760] United TeleSpectrum sold its entire business to Centel Cellular Company of Texas (Centel). Light continued to work for Centel as a salesperson. Light quit her job with Centel on May 30, 1988.[761] After quitting, Light requested a waiver of the covenant by Centel.[762] Centel refused to waive the covenant, but did not seek to enforce the covenant against Light.[763]

Light sued Centel alleging a cause of action under Texas Business and Commerce Code section 15.21(a)(1), claiming that the covenant not to compete was an illegal restraint on trade under the then-existing "common calling" doctrine declared in *Hill v. Mobile Auto Trim, Inc.*, and for tortious interference with prospective business relations.[764] The trial court granted a partial summary judgment, holding that the covenant not to compete was unenforceable because Light was engaged in a "common calling" occupation.[765] Pursuant to a motion to reconsider, the trial court vacated that order on July 13, 1990, and simply concluded that the covenant was unenforceable and constituted an unreasonable restraint on trade.[766] In August of 1990, the case was tried to a jury who returned a judgment in favor of Light for actual damages for tortious interference with prospective business relationships.[767]

The court of appeals reversed, concluding that the covenant was a reasonable restraint of trade under statutory and case law standards.[768] It noted that the restraints imposed by the covenant were for one year, in three Texas counties, and related only to business activities of Light that would permit her use of customer related information she had acquired in the course of her employment with Centel.[769] As such, the covenant satisfied the requirements of section 15.50(2) of the 1989 Act.[770] The court of appeals also concluded that the covenant was "well supported" by "independent valuable consideration" for subsequent execution of the written contract as required by section 15.50(1) of the 1989 Act because of the specialized training that she received from her employer. "The underlying facts and circumstances also show conclusively that Light , beginning in September of 1987, received on-going special training on the features of the cellular phone systems, their installation, and considerable exposure to helpful sales techniques specifically related to the sale of cellular systems."[771]

***228** The Texas Supreme Court reversed and remanded to the appellate court for further proceedings.[772] Citing *Martin* (1990) and quoting extensively from *Travel Masters*, the court concluded in *Light* (1993) that because Light was an employee-at-will, "the covenant not to compete is not ancillary to an otherwise enforceable agreement and is an unreasonable restraint of trade and unenforceable on grounds of public policy."[773] The case was remanded to the court of appeals to reconsider the arguments of the parties concerning Light's tortious interference claim.[774]

Significantly, the court recognized that the 1993 amendments had become effective, but without extensive elaboration, concluded that the result would be the same in this case under the statute: "We need not determine in this case whether amended sections 15.50 and 15.51 apply retroactively because section 15.50(1) would not require a result in this case different from the one we reach today."[775]

The *Light* (1993) opinion was withdrawn by the Texas Supreme Court on February 2, 1994, and set for rehearing. Before the *Light* (1993) opinion was withdrawn, however, one appellate court followed it.

XII. Appellate Court Cases After *Light* (1993): El Paso Court of Appeals Sees the *Light* and Refuses to Enforce Non-Compete Clause as Part of At-Will Independent Contractor Agreement

On appeal from the grant of a temporary injunction, the El Paso Court of Appeals held that a non-competition covenant could not be enforced against an at-will independent contractor.[776] Stanley Burgess was a court reporter licensed in three states who moved to Odessa, Texas in 1991.[777] In March of 1991, Burgess signed an "Independent Contractor Court Reporter Contract" with a one-year term.[778] The contract also provided that, on termination, Burgess would not engage in court reporting for two years within fifty miles of Midland and Odessa.[779] A second one-year contract was also signed by Burgess that expired in January of 1993. Because his work for Permian dropped off in late 1992, Burgess did not sign a further contract with Permian but began soliciting business on his own in violation of the non-competition agreement.[780]

Permian obtained a temporary restraining order on January 15, 1993, and a temporary injunction on January 25, 1993. Permian submitted evidence of the investment in its business, the amenities offered its clients, advance payments to its court reporters and the necessity of the non-competition covenants to its business.[781] Citing *Martin* (1990), *DeSantis* (1990), *Travel Masters*, ***229** and the statute, the court of appeals, in a first opinion dated October 6, 1993, held that this was an at-will contract and could not support a covenant not to compete.[782] The court reasoned:

> Burgess argues that the contract between Permian and himself is not an "otherwise enforceable agreement" because it creates merely an at-will relationship, severable by either party at any time and for any reason. We agree. Permian was not obliged to give Burgess jobs, and Burgess was free to decline work offered him by Permian. The parties were bound to do or refrain from certain acts only *if* Permian gave Burgess work and *if* Burgess accepted it.[783]

The Burgess court distinguished *Zep Manufacturing. Co. v. Harthcock* on the basis that the employment agreement in *Zep* allowed the employee to be terminated in the sole discretion of the employer if the employee's performance was not satisfactory.[784] This type of contract is not at-will because it can only be terminated if the employee's work was genuinely unsatisfactory. "Such 'satisfaction' clauses contain an implied condition that an employer will act only in good faith, and termination will be founded only upon *bona fide* dissatisfaction."[785] Finally, the court concluded its opinion stating that the covenant was not enforceable: "Although both parties did perform under the contract for two years, neither was required to do so. We find this was an at-will relationship, and that therefore the contract's non-competition clause is unenforceable as a matter of law."[786]

During the pendency of the appeal, the 1993 amendments to the statute were enacted and referred specifically to "at-will" employment agreements.[787] In a motion for rehearing, Permian asked for reconsideration, claiming that the 1993 amendments manifested "a legislative recognition that at-will contracts may be otherwise enforceable agreements which will support non-competition agreements."[788] In a supplemental opinion on rehearing dated November 3, 1993, the court of appeals, relying on the supreme court's *Light* (1993) opinion, held that the 1993 amendments did not require a different result:

> Following the Supreme Court's lead, we again note that the contract between Burgess and Permian was terminable at will by either party, for any reason. It was therefore not an "otherwise enforceable agreement" and cannot meet the criteria necessary to sustain a covenant not to compete. The recent legislative amendments to the relevant statutes do not change our conclusion.[789]

XIII. *Light* (1994): Texas Supreme Court Expressly Applies the Statute for the First Time

After refusing to apply the statute in six opinions over a period of five years, the Texas Supreme Court for the first time expressly applied the statute in its 1994 opinion in *Light v. Centel Cellular Company (Light* (1994)).[790] Although the court applied the statute, the result in *Light* (1994) was the same as the result in *Light* (1993). In both opinions, the court concluded that the ***230** covenant not to compete was not enforceable and could not be reformed. The reasoning was, however, quite different.

In *Light* (1993), the court concluded simply that because Light was engaged in at-will employment, the covenant not to compete was not enforceable.[791] In *Light* (1994), the court's reasoning is far more subtle and technical. The court reasoned that " a lthough Light and Centel did have an otherwise enforceable agreement between them, the covenant was not ancillary to or a part of that otherwise enforceable agreement."[792] According to the court, Light's covenant was not ancillary to her employment agreement because the covenant not to compete was not designed to enforce any of Light's "return promises in the otherwise enforceable agreement."[793]

To understand these statements requires an in-depth review of the court's *Light* (1994) opinion. After reciting the facts and the statutory law to be applied, the court determined to apply the statute noting that the statute was to be applied retroactively and that the constitutionality of retroactive application of the statute had not been preserved for review.[794] The court stated that under the statute, it must first determine whether the covenant not to compete is "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made."[795] According to the court, this is a two-part inquiry, "Section 15.50 requires us to make two initial inquires 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 to or a part of at the time the agreement is made."[796]

In this case, the Texas Supreme Court found it unnecessary to go beyond this initial two-part inquiry. The remainder of the court's *Light* (1994) opinion focused on these two issues. First, despite the fact that Light's employment agreement was at-will, the court concluded that Light and Centel entered into an "otherwise enforceable agreement."[797] The court reasoned that an otherwise enforceable agreement could be formed so long as there were promises made by the parties which were not illusory.[798] The court explained that " w hen illusory promises are all that support a bilateral contract, there is no contract."[799] Regarding at-will employment, the court stated: "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."[800]

Dissecting Light's at-will employment agreement, the court concluded that there were three non-illusory promises. First, Centel's promise to provide specialized training; second, ***231** Light's promise to provide fourteeen days notice to terminate her employment; and third, Light's promise to provide an inventory of Centel's property in her possession.[801] An example of one of the promises is that "even if Light had resigned or been fired after this agreement was executed, Centel would still have been required to provide the initial training."[802] The court reasoned that the remaining promises, such as Centel's promises to pay salary and bonuses and to provide other employee benefits, were illusory because they were dependent upon some period of continued employment.[803] As a result, the court held that there was an otherwise enforceable agreement between Light and Centel.[804]

The court also explained that the *Light* (1994) opinion was consistent with the *Travel Masters* discussion of at-will employment:

> In short, we hold that "otherwise enforceable agreements" can emanate from at-will employment so long as the consideration for any promise is not illusory. This holding does not conflict with our recent decision in *Travel Masters, Inc. v. Star Tours, Inc*. because in that case there was no otherwise enforceable agreement between the parties and we similarly held that the at-will employment relationship alone could not constitute an otherwise enforceable agreement.[805]

Next, the *Light* (1994) opinion turned to the "second inquiry compelled by Section 15.50," *i.e.*, "whether the covenant not to compete is ancillary to or a part of the otherwise enforceable agreement."[806] Relying on a dissenting opinion by Justice Stevens in *Business Electronics v. Sharp Electronics*, the Texas Supreme Court indicated that a covenant not to compete is not ancillary to an agreement unless the covenant is designed to enforce a contractual obligation of one of the parties.[807] This was termed the "designed-to-enforce-a-contractual-obligation standard."[808] The court stated the test as follows:
Therefore, in order for a covenant not to compete to be ancillary to an otherwise enforceable agreement between employer and employee:

(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and

(2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement.

Unless both elements of the test are satisfied, the covenant cannot be ancillary to or a part of an otherwise enforceable agreement, and is therefore a naked restraint of trade and unenforceable.[809]

The Texas Supreme Court also made the following statements of interest in *Light* (1994):
***232** 1. "Section 15.52 makes clear that the Legislature intended the Covenants Not To Compete Act to largely supplant the Texas common law relating to enforcement of covenants not to compete."[810]

2. "The enforceability of a covenant not to compete, including the question of whether a covenant not to compete is a reasonable restraint of trade, is a question of law for the court."[811]

3. "The original version of the 1993 amendatory act provided that the covenant had to be ancillary to or a part of a 'valid transaction or relationship.' This is identical to the common law requirement which we stated in *DeSantis* ... [a]lthough the Legislature appears to have intended to broaden the enforceability of covenants not to compete in employment relationships, the committee substitute selected the narrower concept of 'an otherwise enforceable agreement,' instead of 'an otherwise valid transaction or relationship.'"[812]

4. If only one promise is illusory, then a unilateral contract can be formed by acceptance through performance.[813] The example given by the court involved an employee's promise to keep trade secrets received from the employer secret if the employer gave secret training or information to the employee.[814] If the employer performs by giving the employee the training or information, then the employee is bound not to disclose the information.[815] According to the court:

> 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. To form such a unilateral contract, however, (1) the performance must be bargained-for so that it is not rendered past consideration ... and (2) acceptance must be by performance and not by a promise to perform.[816]

5. "[I]f an employer gives an employee confidential and proprietary information or trade secrets in exchange for the employee's promise not to disclose them, and the parties enter into a covenant not to compete, the covenant is ancillary to an otherwise enforceable agreement because:
(1) the consideration given by the employer [the trade secrets] in the otherwise enforceable agreement [exchange of trade secrets for promise not to disclose] must give rise to the employer's interest in restraining the employee from competing [employer has interest in restraining employee with knowledge of employer's trade secrets from competing] and

***233** (2) the covenant must be designed to enforce the employee's consideration or return promise [the promise not to disclose the trade secrets] in the otherwise enforceable agreement."[817]

6. When holding that an otherwise enforceable agreement can emanate from at-will employment so long as the consideration for any promise is not illusory, the court reached "this conclusion on the basis of black-letter contract law, and not because the legislature added the words 'at-will' to § 15.51.... As written, part (b) [of § 15.51] has no meaning because there cannot be an '[otherwise enforceable] agreement' which 'obligate[s]' a promisor 'at will.' Describing something as an at-will obligation is nonsensical."[818]

7. Justice Hightower concurred on the basis that an at-will "relationship" or "contract" cannot constitute an "otherwise enforceable agreement."[819]

XIV. The Statute As Enacted and Amended Changes the Common Law Both Before and After *Hill*

Clearly, the 1989 statute and the 1993 amendments have changed the common law of restrictive covenants in Texas. At a glance, to enforce a covenant, the statute requires proof only that the covenant is:

1. Ancillary: the covenant was ancillary to an otherwise enforceable agreement;

2. Reasonable: the covenant contains reasonable limitations as to time, geographical area, and scope of activity to be restrained; and

3. Necessary: the limitations of the covenant do not impose a greater restraint than is necessary to protect the promisee's

goodwill or other business interest.[820]

There is no longer a need to separately consider the public interest, the promisor's interest, the "common calling" test, or the existence of separate and independent consideration to support the covenant. In addition, the 1993 amendments make clear that the common law has been preempted and only the statute is to be applied.[821]

A. The New Statute Compared to the Prior Law

To focus the issues, the chart attached as Appendix A demonstrates the changes brought by the 1989 statute and the 1993 amendments.

***234 B. There Is No Longer a Requirement That the Court Consider the Interests of the Promisor**

Under the common law, courts considered the interests of the promisor when determining to enforce a covenant not to compete. The *Hill* court framed this interest as follows: "the covenant must not be oppressive to the promisor, as courts are hesitant to validate employee covenants when the employee has nothing but his labor to sell. In this respect, the limitations as to time, territory, and activity in the covenant not to compete must be reasonable."[822] This same concern was expressed by the pre-*Hill* common law and by *DeSantis* (1990) as the third factor in the three-part common law test.[823]

The new statute does not mention the interests of the promisor. Although it states the limitations of the covenant in terms of reasonable time, territory, and scope, the new statute focuses on the interests of the promisee.[824] The limitations of the covenant must be reasonable only when compared to the need to protect the business interests of the promisee.[825] This is a fundamental shift in thinking.

C. There Is No Longer a Requirement That the Court Consider the Public Interest

Under the common law both before and after *Hill*, the interest of the public was routinely considered and routinely satisfied. The *Hill* court expressed this interest as follows: "the covenant must not be injurious to the public, since courts are reluctant to enforce covenants which prevent competition and deprive the community of needed goods."[826] This was also a part of the third factor in the *DeSantis* (1990) common law test.[827] There were instances in which the public interest played a focal role, but those cases were rare.[828]

Under the present statute, there is no mention of the public interest.[829] Obviously, a court of equity has considerable discretion when granting equitable relief. However, the statute removes some of this discretion. If the covenant must be reformed to be considered reasonable in terms of time, territory, and scope, then the court "shall reform the covenant to the extent necessary ... and enforce the covenant as reformed."[830] The type of enforcement is not specified. On the other hand, if the covenant is reasonable as written, there is no provision expressly requiring the court to enforce the covenant. Instead, the statute states that the court "may award" damages, injunctive ***235** relief, or both.[831] In an appropriate case, this ambiguity in the statute may give the court some discretion in determining how to enforce the covenant.

In addition, although the statute on covenants not to compete does not expressly refer to the public interest as a factor to be considered, elsewhere in the Texas Business and Commerce Code, section 15.05(i) requires that when determining if a "restraint related to the sale or delivery of professional services is reasonable," the court may consider whether the activities involved maintain or improve the qualities of the services or reduce the cost of the services to benefit the public interest.[832] Professionals are defined to include a "licensed accountant, physician or professional engineer."[833] However, section 15.52, enacted in 1993, provides expressly that the criteria of sections 15.50 and 15.51 "are exclusive and preempt any other criteria for enforceability of a covenant not to compete."[834]

D. There Is No Longer a Requirement That the Court Find Separate and Independent Consideration to Support the Covenant

Starting with *Hill*, the Texas Supreme Court began requiring that separate and independent consideration be exchanged to support a restrictive covenant. The *Hill* court stated:

> Finally, as with any contract, the non-competitive agreement should be enforced only if the promisee gives consideration for something of value. This doctrine promotes economic efficiency. In the case of covenants not to compete incident to the sale of a business, the seller's promise not to compete with the

> buyer increases the value of the business to the buyer. Without such a covenant the value of the business would be reduced, lessening the likelihood that businesses would be purchased. In employee covenants, the special training or knowledge acquired by the employee through his employer is valuable consideration and often enhances the value of the employee to other firms. To allow employees to use or sell this valuable training or knowledge upon leaving a firm would create a disincentive for employers to train or educate employees.[835]

This language was interpreted by *DeSantis* (1988) and other cases to require that a certain type of separate and independent consideration, in addition to that exchanged as part of the overall agreement, be supplied by the promisee in order to enforce an otherwise ancillary covenant not to compete.[836] For example, in the case of an employment contract, "the *only* consideration that would support a covenant not to compete ancillary to a contract of employment ... was the imparting by the employer to the employee of special training or knowledge."[837]

The concern expressed by the pre-*Hill* common law was that a covenant not to compete was not enforceable unless ancillary to an otherwise valid transaction or relationship having a ***236** primary purpose unrelated to the suppression of competition between the parties.[838] For example, the primary purpose could be the sale of a business or franchise, creation of a partnership to conduct a lawful business, or a contract of employment. So long as there was an exchange of consideration to support the primary purpose of the agreement, the covenant not to compete was ancillary and also supported by that consideration.

The 1989 statute codified the pre-*Hill* common law. The 1989 statute provided that a covenant not to compete was enforceable to the extent that it "is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration."[839] The 1989 statute also appeared to codify a type of pre-existing duty rule by requiring that any covenants not to compete executed subsequent to the initiation of the relationship between the parties also be supported by "independent valuable consideration."[840] This provision was added by "House Floor Amendment" on May 20, 1989, by opponents to the legislation, but there appears to be no transcribed legislative history. In the employment context, both before and after *Hill*, Texas appellate courts have held that continued employment is sufficient consideration.[841] However, at least one commentator on the new act believes that continued employment does not constitute "independent valuable consideration."[842] Instead, that commentator believes that there must be some payment such as a bonus, stock dividend, or increase in salary, or additional training or special knowledge imparted.[843] The 1993 amendments eliminated this language from the statute.[844] However, the 1993 amendments also added the requirement that the covenant is enforceable if ancillary to "an otherwise enforceable agreement *at the time the agreement is made.*"[845]

E. The "Common Calling" Test Is Discarded

One of the most disturbing aspects of *Hill* and its progeny was the creation of the "common calling" test. In *Hill*, the supreme court announced that it was adopting a new standard for evaluating covenants not to compete, stating that "[t]he standard which we adopt today [is]: '[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.'"[846] According to the supreme court, common ***237** callings included auto trim repairmen as in *Hill*, barbers and hair stylists as in *Bergman*, and salesmen as in *Martin* (1988). On the other hand, *DeSantis* (1988) held that a business manager was not engaged in a common calling.

Under the statute, there is no such inquiry. Instead, the statute focuses on the goodwill or other business interest sought to be protected by the promisee.[847] The position held by the promisor is simply one factor to review in determining the promisee's need for the limitations of the restrictive covenant.[848] *DeSantis* (1990) also made clear that the common calling test is no longer applicable as a separate test for enforceability.[849] "The doctrine of 'common calling' ... has been discarded by the Supreme Court ... and has been rejected as a test for reasonableness by statute."[850]

F. Reformation of an Unreasonable Covenant Not to Compete Is Mandatory

The pre-*Hill* common law provided the court with discretion as to whether to reform or not reform an otherwise overly broad covenant not to compete.[851] If a covenant was overly broad, there was no right to damages. Instead, if reformed by the court, the covenant could be enforced only by an injunction.

The *Hill* quartet of supreme court cases suggested that reformation might no longer be available in Texas. For example, the

Hill opinion stated: "*In the past* this court has modified restrictive covenants in order to make the time, area and scope reasonable."[852] Due to the use of the words "in the past" and the conclusion on an interlocutory record that the covenant was "void," the *Hill* opinion was susceptible to an argument that covenants not to compete in Texas would stand or fall based upon the precise language expressed in the covenant, and would not be reformed as in the past to limit the scope of the covenant and enforce that lesser restraint. This argument was bolstered by the majority's reliance on the Utah case of *Robbins v. Finlay*[853] for the proposition that covenants "primarily designed to ... restrain the right to engage in a common calling are not enforceable."[854] It is not clear whether Utah courts will or will not reform a covenant determined to be unreasonable in scope as written, but may, instead, declare the covenant void and unenforceable.[855] In addition, the covenants not to compete in *Hill, Bergman, DeSantis* (1988), and *Martin* (1988) were declared void and unenforceable without any discussion as to whether the covenants could or could not be reformed.[856]

***238** Pre-*Hill* common law provided that the court could in its discretion reform covenants and enforce those covenants to the extent that the restraint imposed was reasonable.[857] Nationwide, three basic approaches have been taken regarding enforcement of covenants not to compete. Some jurisdictions will enforce the covenant if reasonable as written. A further approach is to apply the "blue pencil" rule. Under this approach, if the court can simply strike offending restrictions and obtain an otherwise reasonable covenant, then the covenant will be enforced. Otherwise, no part of the covenant will be enforced. The blue pencil rule has been rejected by the Restatement.[858] The final and better reasoned approach was followed in Texas. Under this approach, regardless of the precise language employed, the court could enforce only so much of a restrictive covenant that would be reasonable.[859] This was the approach also adopted by the Restatement.[860] This is also the approach advocated by Corbin and Williston. Corbin explains, as follows: "In the best considered modern cases, however, the court has decreed enforcement as against a defendant whose breach has occurred within an area in which restriction would clearly be reasonable, even though the terms of the agreement imposed a larger and unreasonable restraint."[861] Williston advocates "a broader rule to the effect that, even though a covenant in restraint of trade was regarded by the parties as indivisible, it should be given effect to the extent to which the court finds that it would not be unenforceable."[862]

The present statute provides that if the covenant is unreasonable, a court "shall" reform it and enforce it to the extent it is reformed.[863] The court no longer has discretion.[864] Under the 1989 statute, the person seeking reformation was required to request reformation or the right to reformation was waived.[865] However, the 1993 amendments eliminated the requirement that the promisee request reformation. A covenant cannot be reformed if it is not ancillary to an otherwise enforceable agreement.[866] As at common law, there can be no award of damages prior to reformation.[867]

***239 G. The Promisee's Goodwill And Other Business Interests Are Protectable**

In the *Hill* case, the court held that business goodwill developed by the promisor at the promisee's expense was not an interest that the promisee could protect.[868] The *Martin* (1988) opinion emphasized this point by holding that "customer information" was not special knowledge which could be used to justify enforcement of a restrictive covenant against a former salesperson.[869] In addition, one of the many objections to the *DeSantis* (1988) opinion was the court's holding that the promisee, Wackenhut, had failed to prove a protectable interest because the jury found that there would be no irreparable harm due to breach of the covenant.[870] Together, these cases limited substantially the range of protectable interests which could be relied upon by the promisee.

The *Hill, Martin* (1988) and *DeSantis* (1988) cases were departures from the prior common law. Under the prior common law, goodwill developed by the promisor belonged to the promisee.[871] In the *Henshaw* case, Henshaw invited Kroenecke to join his established business as a partner, and a covenant not to compete with Henshaw was included as a provision ancillary to the partnership agreement.[872] The court, expressly indicating that the goodwill developed by Kroenecke belonged to Henshaw, stated that "Henshaw had a right to protect himself from the possibility that Kroenecke would establish a rapport with the clients of the business and upon termination take a segment of that clientele with him.... Henshaw had a legitimate interest to protect, and therefore, the covenant was reasonable."[873] Other Texas cases indirectly support this proposition.[874]

The prior common law has now been incorporated in the statute. The statute provides that the limitations of the covenant should "not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee."[875] By statute, the Texas Legislature has clearly indicated that the promisee's goodwill is protectable. Further, there is no requirement that irreparable injury be shown. Instead, to be enforceable, the promisee need only show that the restrictive covenant is ancillary to an otherwise enforceable agreement and that the limitations of the covenant are reasonable and necessary.[876]

***240 H. The Promisor Has the Burden of Proof on Non-Personal Services Contracts**

Another major change by the statute from both the pre-*Hill* and post-*Hill* common law is the requirement that the promisor carry the burden of proof in certain instances.[877] Under the new statute, if the primary purpose of the contract is not the rendition of personal services, the promisor has the burden of proving that the limitations of the covenant are not reasonable under Texas Business and Commerce Code section 15.50.[878] With personal services contracts, the burden of proof remains on the promisee.[879]

I. The Promisor May Be Entitled to Costs and Attorney Fees in Certain Instances

Another departure from the common law relates to the discretionary award of costs and attorney fees to the promisor in certain instances.[880] The court "may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant" if the promisor establishes that:

1. the primary purpose of the agreement to which the covenant was ancillary was to obligate the promisor to render personal services;

2. the promisee knew at the time the agreement was executed that the covenant did not meet the criteria of section 15.50; and

3. the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee.[881]

The statute, in section 15.52, provides that "the procedures and remedies in an action to enforce a covenant not to compete provided by Section 15.51 of this Code are exclusive and preempt any other ... procedures and remedies."[882] This provision was added by the 1993 amendments and may preempt any other remedies to either the promisor or promisee.[883] There is no provision for the award of attorney fees to the promisee in the noncompete statute.[884] This provision may supersede other statutory provisions for the award of attorney fees such as Chapter 37 or 38 of the Texas Civil Practices and Remedies Code or the Texas Free Enterprise and Antitrust Act.[885]

***241 J. The Statute Is to Be Applied Retroactively**

The statute indicates that it applies retroactively to all existing contracts.[886] Section 2 of the 1989 enabling provisions states: "This Act applies to a covenant entered into before, on, or after the effective date of this Act."[887] The effective date of the 1989 Act was August 28, 1989.[888] Section 5 of the 1993 enabling provisions states: "This Act applies to a covenant not to compete entered into before, on or after the effective date of this Act unless the enforceability of the covenant has been finally adjudicated by a court of competent jurisdiction before the effective date of this Act."[889] The effective date of the 1993 amendments was September 1, 1993.[890]

Three cases have considered the retroactive application of the statute and each has applied the statute retroactively. The first was *Webb v. Hartman Newspapers, Inc.*, where the court of appeals held that the statute could be applied retroactively because the breach of the covenant occurred after the statute was enacted.[891] In the second, *Butts Retail Inc. v. Diversifoods, Inc.*, the court of appeals held that the statute could be applied retroactively by simply following the literal directives of the enabling provisions despite the fact that "all relevant dates" including breach of the covenant occurred before the statute became effective.[892] The third was *Light* (1994). In *Light* (1994), the Texas Supreme Court applied the statute retroactively noting that the constitutionality of retroactive application had not been preserved for review.[893]

K. The Statute Preempts the Common Law

Before *Light* (1994), none of the Texas Supreme Court cases purported to apply the statute. At least one appellate case stated that "two separate but similar analyses" were required to evaluate a covenant not to compete.[894] One analysis applies the common law, and one applies the statute. The 1993 amendments added a new section 15.52 to the Texas Business and Commerce Code entitled "Preemption of Other Law."[895] This section makes clear that the statute provides the "exclusive" vehicle for enforcement of a noncompete covenant and preempts "any other criteria ... procedures or remedies."[896] According to *Light* (1994), "the Legislature intended the Covenants Not to Compete Act to largely supplant the Texas common law relating to enforcement of covenants not to compete."[897]

***242 XV. Conclusion: A Comment on At-Will Employment**

In *Martin* (1990), the Texas Supreme Court held for the first time that a covenant not to compete could not be ancillary to an at-will employment relationship.[898] This holding was repeated by the court prior to the 1993 amendments to the statute in *Travel Masters* and after the 1993 amendments in *Light* (1993).[899] Each time, the holding became more direct and uncompromising. *Light* (1994) has retreated from this position while requiring a very rigorous analysis of at-will employment contracts.[900]

In *Martin* (1990), the court's opinion was ambiguous enough to be read to allow enforcement of a covenant not to compete as part of an at-will employment agreement if the covenant was signed on the date of initial employment and the employment agreement included the terms "usually associated with an employment contract,"[901] or to allow enforcement if the employee received "independent valuable consideration" in the form of special training or knowledge.[902] But *Travel Masters* was very direct, stating "a covenant not to compete executed either at the inception of or during an employment-at-will relationship cannot be ancillary to an otherwise enforceable agreement and is unenforceable as a matter of law."[903] After quoting extensively from *Travel Masters, Light* (1993) was equally adamant: "Based upon *Martin* and *Travel Masters*, the covenant not to compete is not ancillary to an otherwise enforceable agreement and is an unreasonable restraint of trade and unenforceable on grounds of public policy."[904]

All of these cases focus on the first requirement of the three-part *DeSantis* (1990) test for enforcement of a covenant not to compete at common law. The agreement not to compete must be ancillary to an otherwise valid transaction or relationship.[905] This is a correct statement of the common law. The Texas Supreme Court as recently as *Travel Masters* has also conceded that an at-will employment relationship is valid,[906] and in *Juliette Fowler Homes* that an at-will agreement is valid and subsisting and subject to a claim of tortious interference.[907]

Why then is an at-will relationship not an otherwise enforceable agreement sufficient to support a covenant not to compete? And how did the common law standard change from that in *DeSantis* (1990) of looking to see if the covenant was "ancillary to an otherwise valid transaction or relationship" to the standard in *Martin* (1990), *Travel Masters*, and *Light* (1993) of looking to see if the covenant was ancillary to an "otherwise enforceable agreement?" And is there a distinction between a "valid transaction or relationship" and an "enforceable agreement?" Is the Texas ***243** Supreme Court suggesting that the statute be further amended to replace the word "agreement" with "valid transaction or relationship" to encompass all forms of at-will agreements?

A central problem with the *Martin* (1990), *Travel Masters*, and *Light* (1993) cases is that there was no reason given for the rule announced. The court did not cite a single case or other authority that supported the approach taken.[908] Each case was finally decided after the 1989 statute was enacted, and each case purported to be applying the common law, but not the statute.

As indicated above, the common law recited by *DeSantis* (1990) focused on whether the non-compete covenant was ancillary to an otherwise "valid" relationship, not an otherwise "enforceable" agreement.[909] The *Martin* (1988) opinion refused to enforce the covenant because Martin was a salesperson, a common calling.[910] When the common calling test fell from favor and was not included in the 1989 statute, *Martin* (1990) was rewritten on rehearing to refuse to enforce the covenant again, but for the first time, as not being ancillary to an otherwise enforceable agreement.[911] *Martin* (1990) claimed to be applying the common law, citing *DeSantis* (1990), but used the words of the 1989 statute.[912]

The *Martin* (1990), *Travel Masters*, and *Light* (1993) cases conclude that because the at-will relationship is allegedly not binding on either party, it cannot support the covenant.[913] A fault of the opinions is that they do not explain why an at-will agreement is not "binding." Certainly, an employer is bound to pay for past services and the at-will employment agreement so binds the employer. Further, whether the non-compete covenant is part of an at-will agreement or for a term, upon termination, the same result obtains-namely, that there is some limit on the employee's ability to compete.[914] And if there is some unfairness to the hypothetical possibility that an ***244** employer can terminate an employee for no reason in an at-will relationship, that unfairness was not present in the *Martin* (1990), *Travel Masters*, or *Light* cases. Instead, the employees in each case voluntarily resigned their employment as they had a right to do not only under the contracts, but also under the prohibition against involuntary servitude from the Thirteenth Amendment to the United States Constitution.[915]

The Texas Supreme Court reconsidered its position on at-will employment contracts in *Light* (1994).[916] Now, the fact that an agreement is at-will does not end the inquiry. Instead, the inquiry focuses on whether there are "non-illusory" promises to determine if there is an "otherwise enforceable agreement," and whether the covenant is "designed-to-enforce-a-contractual obligation" to determine if the covenant is "ancillary." Struggling with these new tests still does not answer the question of why an at-will employment agreement should be treated so differently.

And the analysis in *Light* (1994) raises as many questions as it answers. For instance, why wasn't the covenant in *Light* designed to enforce a contractual obligation? In her employment agreement, Light acknowledged that she was receiving "confidential customer information" and that the covenant was intended to prevent her from using that information for competitors.[917] The supreme court also acknowledged that if her employment contract included an express obligation to keep that information confidential and secret, then the covenant would have been ancillary.[918] Applying the court's analysis, wasn't there at least an implied contractual duty not to disclose this information? To meet the court's requirement, did Centel need only add an express contractual requirement that Light keep any secret information she received secret?

Further, the statute is not simply directed at protection of secret information disclosed by the employer. The statute protects "goodwill or other business interest."[919] As above, Light's employment agreement referred expressly to the need to protect customer information. Why wasn't protection of customer goodwill an interest sufficient to make the covenant ancillary? Did the agreement require an express agreement by Light not to use customer goodwill for her own benefit or that of others to make the covenant ancillary?

Finally, was this hair splitting required by the supreme court based upon the perceived difference between the statute's use of the words "otherwise enforceable agreement" and the common law standard of "valid transaction or relationship?" Certainly, the court suggested that the Legislature had narrowed the protection in Texas for covenants not to compete by this difference.[920] Is it this difference in language that requires such a technical review of the "agreement" instead of the "relationship?" And can the rigorous analysis of *Light* (1994) be avoided by amending the statute to substitute the words "valid transaction or relationship?"

***245** Obviously, covenants not to compete in at-will employment agreements are to receive strict scrutiny. In the last seven years, the Texas Supreme Court has not enforced a covenant not to compete. How at-will employment agreements must be drafted to enforce a covenant not to compete is still an open question.

Footnotes

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Mr. Tayon's paper entitled "Covenants Not to Compete: New Legislation for Texans," presented at the 1990 Spring Institute of the Intellectual Property Law Section of the State Bar of Texas, was selected by the College of the State Bar as one of twenty outstanding articles of 1990 and given an Award of Special Merit.

1 Act of June 16, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852-53, *amended by* Act of June 19, 1993, 73rd Leg., R.S., § 1, 1993 Tex. Gen. Laws 4201-02.

2 Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168 (Tex. 1987).

3 Bergman v. Norris of Houston, 734 S.W.2d 673 (Tex. 1987).

[4] DeSantis v. Wackenhut Corp., 31 Tex. Sup. Ct. J. 616 (Tex. 1988).

[5] Martin v. Credit Protection Ass'n, Inc., 31 Tex. Sup. Ct. J. 626 (Tex. 1988).

[6] DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990); Martin v. Credit Protection Ass'n, Inc., 793 S.W.2d 667 (Tex. 1990).

[7] *DeSantis*, 793 S.W.2d at 683.

[8] Martin v. Credit Protection Ass'n, Inc., 793 S.W.2d 667, 669-70 (Tex. 1990).

[9] Act of June 19, 1993, 73rd Leg., R.S., ch. 965, § 1, 1993 Tex. Gen. Laws 4201-02 (codified at TEX. BUS. & COM. CODE ANN. §§ 15.50-.52 (West Supp. 1995)).

[10] Light v. Centel Cellular Co. of Texas, 37 Tex. Sup. Ct. J. 17 (March 31, 1993).

[11] Light v. Centel Cellular Co. of Texas, 883 S.W.2d 642, 643 n.1 (Tex. 1994).

[12] *Id*. at 643-44.

[13] *Id*. at 648.

[14] TEX. BUS. & COM. CODE ANN. § 15.50-.52 (West Supp. 1995).

[15] *See supra* note 1.

[16] 725 S.W.2d 168 (Tex. 1987).

[17] *Id*. at 170-71.

[18] *Id*. at 172.

[19] *Id*. at 171.

[20] *Id*.

[21] *Id*. at 169.

[22] *Id*. at 169-70.

[23] *Id*. at 170.

[24] *Id*. at 169.

[25] Hill v. Mobile Auto Trim, Inc., 704 S.W.2d 384, 385 (Tex. App.-Dallas 1985), *rev'd*, 725 S.W.2d 168 (Tex. 1987).

[26] *Id*. at 386.

[27] *Id*. at 385-86.

[28] *Hill*, 725 S.W.2d at 169; *see* TEX. GOV'T CODE ANN. §§ 22.001, 22.225 (West 1988); Hajek v. Bill Mowbray Motors, Inc., 647 S.W.2d 253 (Tex. 1983) (reviewing statute to determine that the Texas Supreme Court has jurisdiction to hear appeals from temporary injunctions if the main case is within supreme court jurisdiction and the court of appeals holding is inconsistent with prior supreme court holdings).

[29] *Hill*, 725 S.W.2d at 172.

[30] *Id*.

[31] *Id*. at 178 (dissenting).

[32] *Id*. at 175 (dissenting).

[33] *Id*. at 178 (citing Interfirst Bank San Felipe v. Paz Constr. Co., 715 S.W.2d 640 (Tex. 1986)).

[34] *Id*. at 170.

[35] *Id*.

[36] *Id. See generally* Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950 (Tex. 1960); Frankiewicz v. Nat'l Comp. Assoc., 633 S.W.2d 505 (Tex. 1982); Henshaw v. Kroenecke, 656 S.W.2d 416 (Tex. 1983).

[37] *Id*. at 170-71 (citations omitted).

[38] *Id*. at 171.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*. at 171-72.

[47] *Id*. at 172.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *Id*. at 170.

[53] *Id*. at 171.

[54] *Id*.

[55] *Id*. at 172.

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*. (quoting 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1646 (rev. ed. 1937) (citations omitted)).

[61] *Id*. at 172 (quoting Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982)).

62 *Hill*, 30 Tex. Sup. Ct. J. at 182.

63 *Hill*, 725 S.W.2d at 173.

64 *Id*. at 170.

65 *See* Henshaw v. Kroenecke, 656 S.W.2d 416 (Tex. 1983); Frankiewicz v. National Comp. Assoc., 633 S.W.2d 505 (Tex. 1982); Matlock v. Data Processing Sec., Inc., 618 S.W.2d 327 (Tex. 1981); Justin Belt Co. v. Yost, 502 S.W.2d 681 (Tex. 1974); Daniel v. Goesl, 341 S.W.2d 892 (Tex. 1960); Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950 (Tex. 1960); Spinks v. Riebold, 310 S.W.2d 668 (Tex. Civ. App.-El Paso 1958, writ ref'd).

66 *Hill*, 725 S.W.2d at 172 (quoting Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982)).

67 *Id*. at 171.

68 *Id*.

69 *See generally* Gafnea v. Pasquale Food Co., 454 S.2d 1366 (Ala. 1984); Snelling & Snelling, Inc. v. Dupay Enter., Inc., 609 P.2d 1062 (Ariz. Ct. App. 1980); Watson v. Waffle House, Inc., 324 S.E.2d 175 (Ga. 1985); Williams v. Shrimp Boat, Inc., 191 S.E.2d 50 (Ga. 1972); Shakey's, Inc. v. Martin, 430 P.2d 504 (Idaho 1967); McDonald's Sys., Inc. v. Sandy's Inc., 195 N.E.2d 22 (Ill. App. Ct. 1963); Piercing Pagoda, Inc. v. Hoffner, 351 A.2d 207 (Pa. 1976); Pelton's Spudnuts, Inc. v. Doane, 234 P.2d 852 (Utah 1951); Wilkinson v. Man Power, Inc., 531 F.2d 712 (5th Cir. 1976); Robert A. Brazener, Annotation, *Validity and Construction of Restrictive Covenant Not to Compete Ancillary to Franchise Agreement*, 50 A.L.R.3d 746 (1973).

70 656 S.W.2d 416 (Tex. 1983).

71 *Hill*, 725 S.W.2d at 171.

72 *Id*. at 172.

73 *See* Matlock v. Data Processing Sec., Inc., 618 S.W.2d 327 (Tex. 1981); Brooks v. Expo Chem. Inc., 576 S.W.2d 369 (Tex. 1979); Daniel v. Goesl, 341 S.W.2d 892 (Tex. 1960); Transport Co. of Texas v. Robertson Transp., Inc., 261 S.W.2d 549 (Tex. 1953).

74 732 S.W.2d 29 (Tex. App.-Houston [14th Dist.] 1987) (rendered on April 23, 1987), *aff'd in part, rev'd in part*, 793 S.W.2d 670 (Tex. 1990).

75 731 S.W.2d 636 (Tex. App.-Houston [14th Dist.] 1987, no writ).

76 *DeSantis*, 732 S.W.2d at 31.

77 *Id*.

78 *Id*. at 32.

[79] *See infra* parts II.E., IV.A.

[80] Unitel Corp. v. Decker, 731 S.W.2d 636 (Tex. App.-Houston [14th Dist.] 1987, no writ).

[81] *Id*. at 638.

[82] *Id*.

[83] *Id*. at 641.

[84] *Id*. at 639-40.

[85] *Id*.

[86] *Id*. at 640.

[87] *Id*.

[88] *Id*.

[89] *Id*. at 641.

[90] *Id*.

[91] 340 S.W.2d 950 (Tex. 1960).

[92] 656 S.W.2d 416 (Tex. 1983).

[93] 734 S.W.2d 673 (Tex. 1987).

[94] *Id*. at 674.

[95] *Id*.

[96] *Id*.

[97] *Id*.

[98] *Id*.

99 *Id*.

100 *Id*.

101 *Id*. at 675.

102 *Id*. at 673.

103 *Id*.

104 *Id*. at 674.

105 *Id*. at 675 (dissenting).

106 *Id*.

107 *Id*.

108 *See* B. Cantrell Oil Co. v. Hino Gas Sales, Inc., 756 S.W.2d 781 (Tex. App.-Corpus Christi 1988, no writ) (eighteen month covenant in one county enforceable against management level salesperson); Bertotti v. C.E. Shepherd Co., 752 S.W.2d 648 (Tex. App.-Houston [14th Dist.] 1988, no writ) (two year covenant against competition anywhere enforceable against sales manager); M.R.S. Datascope, Inc. v. Exchange Data Corp., 745 S.W.2d 542 (Tex. App.-Houston [1st Dist.] 1988, no writ) (three year covenant in seven counties enforceable against salesperson who sold business and remained as salesperson); Travel Masters, Inc. v. Star Tours, Inc., 742 S.W.2d 873 (Tex. App.-Dallas 1987, writ dism'd w.o.j.) (24 month covenant against contacting customers); H.H. Chandler v. Mastercraft Dental Corp. of Texas Inc., 739 S.W.2d 460 (Tex. App.-Fort Worth 1987, writ denied) (5 year covenant in two states enforceable against sellers of dental equipment manufacturing, sales, and service business who remained as employees).

109 *See* Diversified & Human Resources Group, Inc. v. Levinson-Polakoff, 752 S.W.2d 8 (Tex. App.-Dallas 1988, no writ) (covenant precluding any recruiting activities within 50 miles of any city in which employer did business was overly broad when employee performed only data processing recruiting in one city). Another court affirmed a trial court's refusal to enforce a covenant through a temporary injunction due to a failure of the former employer to prove probable harm as a result of the employee's work on behalf of a competitor, stating expressly that the reasonableness of the covenant was not being addressed as the review was an abuse of the trial court's discretion in granting the injunction. Orkin Exterminating Co. v. Resurreccion, 740 S.W.2d 607 (Tex. App.-Fort Worth 1987, no writ) (conflicting evidence precluded a holding of abuse of discretion; no evidence of trade secrets or that employee had contacted any customers of former employer). The third case refused to enforce a covenant not to compete against an ear, nose, and throat (ENT) doctor due to the court's concern for the public interest in having these services available. Hoddeson v. Conroe Ear, Nose and Throat Assoc., P.A., 751 S.W.2d 289 (Tex. App.-Beaumont 1988, no writ) (the doctor/former employee was the only ENT specialist on staff at a particular hospital in The Woodlands which filed an amicus brief in support of dissolving a temporary injunction).

110 *Diversified*, 752 S.W.2d at 12.

111 *Compare B. Cantrell Oil*, 756 S.W.2d at 783 (someone who performs sophisticated management functions is not engaged in a common calling); *M.R.S. Datascope*, 745 S.W.2d at 546 ("common calling" test does not apply when sale of a business is involved) *and Travel Masters*, 742 S.W.2d at 840-41 (office manager is not a "common calling") *with Hoddeson*, 751 S.W.2d at 290 (ear, nose, and throat doctor was engaged in a "common calling").

[112] 751 S.W.2d 289, 290 (Tex. App.-Beaumont 1988, no writ).

[113] *Id*. at 290-91.

[114] *Id*.

[115] 742 S.W.2d 837 (Tex. App.-Dallas 1987, writ dism'd w.o.j.), *rev'd*, 827 S.W.2d 830 (Tex. 1992).

[116] *Id*. at 839.

[117] *Id*. at 839-40.

[118] *Id*. at 839.

[119] *Id*. at 840.

[120] *Id*.

[121] *Id*.

[122] *Id*. at 841.

[123] *Id*.

[124] *Id*. at 840.

[125] *Id*. at 840-41.

[126] *Id*. (citations omitted).

[127] Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830, 832-33 (Tex. 1992).

[128] *See infra* part VIII.

[129] 752 S.W.2d 8 (Tex. App.-Dallas 1988, no writ).

[130] *Id*. at 11-12.

[131] *Id*. at 10.

[132] *Id*. at 9.

[133] *Id*. at 10.

[134] *Id*. at 11-12.

[135] M.R.S. Datascope, Inc. v. Exchange Data Corp., 745 S.W.2d 542, 546 (Tex. App.-Houston [1st Dist.] 1988, no writ).

[136] *Id*. at 544.

[137] *Id*. at 545.

[138] *Id*. at 546.

[139] 752 S.W.2d 648, 656 (Tex. App.-Houston [14th Dist.] 1988, no writ).

[140] *Id*. at 651.

[141] *Id*. at 650.

[142] *Id*.

[143] *Id*.

[144] *Id*.

[145] *Id*. at 656.

[146] *Id*. at 655.

[147] *Id*.

[148] B. Cantrell Oil Co. v. Hino Gas Sales, Inc., 756 S.W.2d 781, 783 (Tex. App.-Corpus Christi 1988, no writ).

[149] *Id*.

[150] *Id*.

[151] *Id*.

[152] 739 S.W.2d 460, 470 (Tex. App.-Fort Worth 1987, writ denied).

[153] *Id*. at 462.

[154] *Id*. at 462-63.

[155] *Id*.

[156] *Id*. at 465.

[157] *Id*.

[158] 740 S.W.2d 607, 610 (Tex. App.-Fort Worth 1987, no writ).

[159] *Id*. at 609.

[160] *Id*. at 610.

[161] 751 S.W.2d 289, 290 (Tex. App.-Beaumont 1988, no writ).

[162] *Id*.

[163] *Id*.

[164] *Id*. (citing Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982)).

[165] *Id*.

[166] *Id*.

[167] *Id*. at 294 (dissenting).

[168] DeSantis v. Wackenhut Corp., 31 Tex. Sup. Ct. J. 616 (July 13, 1988).

[169] *Id*. at 620.

[170] *Id*. at 619.

[171] *Id*. at 621.

[172] *Id*. at 617.

[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Id*.

[177] *Id*.

[178] *Id*. at 616-17.

[179] *Id*. at 617.

[180] *Id*.

[181] *Id*. at 620.

[182] *Id*. at 617.

[183] DeSantis v. Wackenhut Corp., 732 S.W.2d 29, 32 (Tex. App.-Houston [14th Dist.] 1987), *rev'd*, 793 S.W.2d 670 (Tex. 1990).

[184] *Id*. (citations omitted).

[185] *DeSantis*, 31 Tex. Sup. Ct. J. at 617-18.

[186] *Id*. at 618.

[187] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (1988).

[188] *Id*.

[189] *DeSantis*, 31 Tex. Sup. Ct. J. at 618.

[190] *Id*.

[191] *Id*. at 620.

[192] *Id*. at 619.

[193] *Id*.

[194] *Id. See* Fla. Stat. § 542.33(2)(a) (West 1988).

[195] *Id*.

[196] *Id*.

[197] *Id*. at 619-20.

[198] *Id*. at 618.

[199] *Id*. (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, cmt. g (1971)).

[200] *Id*. at 618-19. *See* Castilleja v. Camero, 414 S.W.2d 424 (Tex. 1967).

[201] *Id*. at 619.

[202] *Id*. at 620.

[203] *Id*.

[204] *Id*.

[205] *Id*.

[206] *Id*. at 619 (citing Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 170-71 (Tex. 1987)).

[207] *Hill*, 725 S.W.2d at 170-71.

[208] *DeSantis*, 31 Tex. Sup. Ct. J. at 620.

[209] *Id*.

[210] *Id*.

[211] *Hill*, 725 S.W.2d at 171.

212 *Id*.

213 *Id*.

214 *DeSantis*, 31 Tex. Sup. Ct. J. at 620.

215 *Id*.

216 *Id. See* TEX. BUS. & COM. CODE § 15.21(a)(1) (West Supp. 1995).

217 *Id*.

218 *Id*. at 621.

219 *Id*.

220 *Id*.

221 *Id*. at 622.

222 Martin v. Credit Protection Ass'n, Inc., 31 Tex. Sup. Ct. J. 626 (July 13, 1988).

223 *Id*.

224 *Id*.

225 *Id*.

226 *Id*.

227 *Id*.

228 *Id*.

229 Peat Marwick Main v. Haass, 775 S.W.2d 698 (Tex. App.-San Antonio 1989), *aff'd in part and rev'd in part*, 818 S.W.2d 381 (Tex. 1991) (refusing to enforce a liquidated damages provision which the court believed to be overbroad and unreasonable against former partner and accountant); Cukjati v. Burkett, 772 S.W.2d 215 (Tex. App.-Dallas 1989, no writ) (affirmed grant of summary judgment that three-year covenant for 12 miles against a veterinarian was not enforceable); Bland v. Henry & Peters, P.C., 763 S.W.2d 5 (Tex. App.-Tyler 1988, writ denied) (reversing enforcement of a liquidated damages provision for breach of a two-year covenant by accountant extending services to former clients of accounting firm).

230 Posey v. Monier Resources, Inc., 768 S.W.2d 915 (Tex. App.-San Antonio 1989, writ denied) (affirmed grant of temporary

injunction, but limited scope of injunction to prior sales territory for one year against salesman of concrete products); French v. Community Broadcasting of Coastal Bend, Inc., 766 S.W.2d 330 (Tex. App.-Corpus Christi 1989, writ dism'd w.o.j.) (affirmed grant of temporary injunction against television station manager enforcing a three year covenant in viewing area).

231 763 S.W.2d 5 (Tex. App.-Tyler 1988, writ denied).

232 *Id*.

233 *Id*. at 6.

234 *Id*.

235 *Id*.

236 *Id*. at 5.

237 *Id*.

238 *Id*. at 8.

239 *Id*.

240 *Id*.

241 *Id*.

242 *Id*.

243 *Id*.

244 *Id*.

245 *Id*.

246 Cukjati v. Burkett, 772 S.W.2d 215, 216 (Tex. App.-Dallas 1989, no writ).

247 *Id*.

248 *Id*.

249 *Id*.

[250] *Id*.

[251] *Id*. at 217-18.

[252] *Id*.

[253] *Id*. at 218.

[254] *Id*. at 217.

[255] *Id*.

[256] *Id*. at 218.

[257] *Id*.

[258] 768 S.W.2d 915, 919 (Tex. App.-San Antonio 1989, writ denied).

[259] *Id*. at 919.

[260] *Id*. at 917-18.

[261] *Id*. at 918.

[262] 775 S.W.2d 698 (Tex. App.-San Antonio 1989, writ denied).

[263] *Id*. at 708.

[264] *Id*. at 707.

[265] *Id*. at 710.

[266] *Id*. at 701.

[267] *Id*. at 710.

[268] *Id*. at 711.

[269] *Id*. at 710.

[270] *Id*.

[271] *Id*.

[272] *Id*.

[273] *Id*. at 711 (citing Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950 (Tex. 1960)).

[274] Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381 (Tex. 1991).

[275] *See infra* part VI.

[276] 766 S.W.2d 330, 336 (Tex. App.-Corpus Christi 1989, writ dism'd w.o.j.).

[277] *Id*. at 332.

[278] *Id*.

[279] *Id*.

[280] *Id*.

[281] *Id*. at 336.

[282] *Id*. at 334.

[283] *Id*. at 333.

[284] *Id*. at 334.

[285] *Id*.

[286] *Id*.

[287] *Id*.

[288] Tex. H.B. 1026, 71st Leg., R.S. (1989).

[289] Tex. S.B. 946, 71st Leg., R.S. (1989) (codified at TEX. BUS. & COM. CODE ANN. §§ 15.50-.52 (West Supp. 1995)).

[290] Tex. H.B. 1026, 71st Leg., R.S. (1989).

[291] Senator Whitmire, BILL ANALYSIS, Tex. S.B. 946, 71st Leg., R.S. (1989).

[292] *Id*. (citations omitted).

[293] Hearings on S.B. 946 before the Senate Economic Development Committee, 71st Leg., R.S. (April 3, 1989).

[294] *Id*.

[295] Tex. S.B. 946, 71st Leg., R.S. (1989).

[296] *Id*.

[297] Act of June 16, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852-53 (amended 1993).

[298] *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990); Martin v. Credit Protection Ass'n, Inc., 793 S.W.2d 667 (Tex. 1990); Juliette Fowler Homes, Inc. v. Welch Assoc., Inc., 793 S.W.2d 660 (Tex. 1990).

[299] *DeSantis*, 793 S.W.2d at 684-85 (citing Act of June 16, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989; Tex. Gen. Laws 4852-53 (effective Aug. 28, 1989) (amended 1993)).

[300] *Id*. at 683.

[301] *Id*. at 689.

[302] *Martin*, 793 S.W.2d at 667.

[303] *Juliette Fowler Homes*, 793 S.W.2d at 665.

[304] 783 S.W.2d 220 (Tex. App.-Dallas 1989, no writ).

[305] *Id*. at 222.

[306] *Id*.

[307] *Id*.

[308] 788 S.W.2d 456, 460 (Tex. App.-Fort Worth 1990, writ denied).

[309] *Id*. at 459.

[310] *DeSantis*, 793 S.W.2d at 670.

[311] *Id*. at 674.

[312] *Id*. at 681.

[313] *Id*. at 684.

[314] *Id*. at 689.

[315] *Id*.

[316] *DeSantis*, 31 Tex. Sup. Ct. J. at 618-19.

[317] *Compare*, Act of June 16, 1989, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852-53 (amended 1993) *with* Fla. Stat. § 542.33 (1988).

[318] *DeSantis*, 31 Tex. Sup. Ct. J. at 619-20.

[319] *DeSantis*, 793 S.W.2d at 680 n.5.

[320] *Id*. at 678.

[321] *Id*. at 679.

[322] *Id*. at 681.

[323] *Id*. at 680.

[324] *Id*. at 680-81. *See, e.g.*, Presser Indus., Inc. v. Sandvick, 732 F.2d 783, 787-88 (10th Cir. 1984); Nordson Corp. v. Plasschaert, 674 F.2d 1371, 1375 (11th Cir. 1982); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham, 658 F.2d 1098, 1100 n.5 (5th Cir. 1981).

[325] *Id*. at 681.

[326] *Id*. at 684-85.

[327] *Id*. at 681-82 (citations omitted).

[328] *Id*. at 682 (citations omitted).

[329] *Id*.

[330] *Id*. (citations omitted).

[331] *Id*.

[332] *Id*.

[333] *Id*. at 682-83.

[334] *Id*. at 682.

[335] *Id*. at 683.

[336] *Id*.

[337] *Id*.

[338] *Id*. at 684.

[339] *Id*. at 683.

[340] *Id. See id*. at 675-76.

[341] *Id*.

[342] *Id*.

[343] *Id*. at 684.

[344] *Id*.

[345] *Id*.

[346] *Id*.

[347] *Id*.

[348] *Id*. at 685.

[349] *Id*. (quoting TEX. BUS. & COM. CODE ANN. § 15.50(2) (West 1989) (current version at TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1995)).

[350] *Id*.

[351] *DeSantis*, 31 Tex. Sup. Ct. J. at 620-21.

[352] *Id*. at 621.

[353] *Id*. at 621-22.

[354] *DeSantis*, 793 S.W.2d at 689.

[355] *Id*. at 685.

[356] *Id*.

[357] *Id. See* TEX. R. CIV. P. 684 (West 1981).

[358] *Id*. at 686.

[359] *DeSantis*, 31 Tex. Sup. Ct. J. at 617.

[360] *DeSantis*, 793 S.W.2d at 685-86.

[361] *Id*.

[362] *Id*. at 688. *See* TEX. BUS. & COM. CODE ANN. § 15.05(a) (West 1987).

[363] *Id*.

[364] *Id*.

[365] *Id*.

[366] *Id*. at 689-90 (Mauzy, J., dissenting).

[367] *Id*. at 689 (Mauzy, J., dissenting).

[368] *Id*. at 689-90.

[369] Martin v. Credit Protection Ass'n, Inc., 31 Tex. Sup. Ct. J. 626 (July 13, 1988) (holding that the court would not restrain the right of an individual to engage in a common calling).

[370] Martin v. Credit Protection Ass'n, Inc., 793 S.W.2d 667 (Tex. 1990).

[371] *Id*. at 669-70.

[372] *Id*. at 670.

[373] *Id*.

[374] *DeSantis*, 793 S.W.2d at 681-82.

[375] *Id*. at 681.

[376] *Id*. at 682.

[377] *Id*.

[378] *Martin*, 793 S.W.2d at 669.

[379] TEX. BUS. & COM. CODE ANN. § 15.50(1) (West 1989) (current version at TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1995)).

[380] *Martin*, 793 S.W.2d at 669 n.1.

[381] *Id*. at 669.

[382] *Id*.

[383] *Id*.

[384] *Id*. at 670.

[385] TEX. BUS. & COM. CODE ANN. § 15.50(1) (West 1989) (current version at TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1995)).

[386] *Martin*, 793 S.W.2d at 668.

[387] *Id*. at 670.

[388] *Id*.

[389] *Id*. at 670 n.3. *See DeSantis*, 793 S.W.2d at 682.

[390] *Id*. at 670.

[391] *Martin*, 824 S.W.2d at 255.

[392] *Id*.

[393] *Id*.

[394] *Id*. at 255-56.

[395] *Id*. at 255.

[396] *Id*.

[397] *Juliette Fowler Homes*, 793 S.W.2d at 661.

[398] *Id*.

[399] *Id*.

[400] *Id*.

[401] *Id*. at 663.

[402] *Id*. at 661.

[403] *Id*.

[404] *Id*.

[405] *Id*. at 662 n.4.

[406] *Id*. at 661.

[407] *Id*. at 667.

[408] *Id*. at 662 n.4.

[409] *Id*. at 663.

[410] *Id*.

[411] *Id*.

[412] *Id*. at 663 n.6.

[413] *Id*. at 665.

[414] *Id*.

[415] Property Tax Assoc., Inc. v. Staffeldt, 880 S.W.2d 349 (Tex. App.-El Paso 1990, writ denied); Isuani v. Manske-Sheffield Radiology Group, P.A., 805 S.W.2d 602 (Tex. App.-Beaumont 1991, writ denied); Webb v. Hartman Newspapers, Inc., 793 S.W.2d 302 (Tex. App.-Houston [14th Dist.] 1990, no writ).

[416] Recon Exploration, Inc. v. Hodges, 798 S.W.2d 848 (Tex. App.-Dallas 1990, no writ); W.C. Larock, D.C., P.C. v. Enabnit, D.C., 812 S.W.2d 670 (Tex. App.-El Paso 1991, no writ); Daytona Group of Texas, Inc. v. Smith, 800 S.W.2d 285 (Tex. App.-Corpus Christi 1990, writ denied); Gomez v. Zamora, 814 S.W.2d 114 (Tex. App.-Corpus Christi 1991, no writ); Philip H. Hunke, D.D.S. v. Wilcox, 815 S.W.2d 855 (Tex. App.-Corpus Christi 1991, writ denied).

[417] 793 S.W.2d 302, 304-05 (Tex. App.-Houston [14th Dist.] 1990, no writ).

[418] *Id*. at 303.

[419] *Id*.

[420] *Id*.

[421] *Id*.

[422] *Id*. at 305.

[423] *Id*. at 303 (quoting TEX. CONST. art I, § 16).

[424] *Id*.

[425] *Id*. at 304.

[426] Isuani v. Manske-Sheffield Radiology Group, P.A., 805 S.W.2d 602 (Tex. App.-Beaumont 1991, writ denied).

[427] *Id*. at 605.

[428] *Id*.

[429] *Id*. at 604.

[430] Isuani v. Manske-Sheffield Radiology Group, P.A., 798 S.W.2d 346 (Tex. App.-Beaumont 1990), *rev'd*, 802 S.W.2d 235 (Tex. 1991).

[431] Isuani v. Manske-Sheffield Radiology Group, P.A., 802 S.W.2d 235, 236 (Tex. 1991).

[432] *Id*.

[433] *Id*. at 237.

[434] 805 S.W.2d at 604.

[435] *Id*. at 603.

[436] *Id*. at 604.

[437] *Id*.

[438] *Isuani*, 798 S.W.2d at 352.

[439] *Isuani*, 805 S.W.2d at 606-07.

[440] *Id*. at 607.

[441] *Id*.

[442] *Id*. at 608.

[443] *Id*. (dissenting opinion).

[444] *Id*. at 609 (dissenting opinion).

[445] *Isuani*, 798 S.W.2d at 351.

[446] *Id*. at 351-52.

[447] *Id*.

[448] *Id*. at 351-52.

[449] *Id*. at 353.

[450] *Id*. at 352.

[451] TEX. BUS. & COM. CODE ANN. § 15.05(i) (West 1994).

[452] *Id*.

[453] Recon Exploration, Inc. v. Hodges, 798 S.W.2d 848, 852 (Tex. App.-Dallas 1990, no writ). *See also* Hunke v. Wilcox, 815 S.W.2d 855 (Tex. App.-Corpus Christi 1991, writ denied); Gomez v. Zamora, 814 S.W.2d 114 (Tex. App.-Corpus Christi 1991, no writ); W.C. Larock, P.C. v. Enabnit, 812 S.W.2d 670 (Tex. App.-El Paso 1991, no writ); Daytona Group of Texas, Inc. v. Smith, 800 S.W.2d 285 (Tex. App.-Corpus Christi 1990, writ denied).

[454] *Recon Exploration*, 798 S.W.2d at 849.

[455] *Id*.

[456] *Id*. at 850.

[457] *Id*. at 849.

[458] *Id*. at 851.

[459] *Id*.

[460] *Recon Exploration*, 798 S.W.2d at 849.

[461] *Id*. at 850-51.

[462] *Id*. at 851-52.

[463] *Id*. at 852.

[464] *Id*.

[465] *Id*. at 853.

[466] *Id*.

[467] *Id*.

[468] 800 S.W.2d 349 (Tex. App.-El Paso 1990, writ denied).

[469] *Id*. at 350.

[470] *Id*.

[471] *Id*.

[472] *Id*. at 350-51.

[473] *Id*.

[474] *Property Tax Assocs.*, 800 S.W.2d at 351.

[475] 793 S.W.2d 302 (Tex. App.-Houston [14th Dist.] 1990, no writ).

[476] *Property Tax Assocs.*, 800 S.W.2d at 351 (citing *Hill*, 725 S.W.2d 168 (Tex. 1987)).

[477] *Id*. at 352.

[478] *Id*.

[479] *Id*. (citing *DeSantis*, 793 S.W.2d at 682).

[480] *Id*.

[481] 812 S.W.2d 670 (Tex. App-El Paso 1991, no writ).

[482] *Id*. at 671.

[483] *Id*.

[484] *Id*.

[485] *Id*.

[486] *W.C. Warlock*, 812 S.W.2d at 671.

[487] *Id*. at 671-72.

[488] 800 S.W.2d 285 (Tex. App.-Corpus Christi 1990, writ denied).

[489] *Id*. at 287.

[490] *Id*.

[491] *Id*. at 291-92.

[492] *Id*. at 287.

[493] *Id*. at 288.

[494] *Daytona Group*, 800 S.W.2d at 288.

[495] *Id*.

[496] *Id*.

[497] *Id*. at 289.

[498] *Id*.

[499] *Id*. at 289 n.3.

[500] *Id*. at 289.

[501] *Id*. at 290.

502 *Id*. at 291 n.4.

503 814 S.W.2d 114 (Tex. App.-Corpus Christi 1991, no writ).

504 *Id*. at 117-19.

505 *Id*. at 115.

506 *Id*.

507 *Id*.

508 *Id*. at 116.

509 *Id*.

510 *Id*. at 117.

511 *Id*.

512 *Id*.

513 *Id*. at 118.

514 *Id*.

515 *Id*. at 118-119.

516 *Id*. at 119.

517 815 S.W.2d 855 (Tex. App-Corpus Christi 1991, writ denied).

518 *Id*. at 858.

519 *Id*. at 856.

520 *Id*.

521 *Id*. at 857.

[522] *Id*. at 858.

[523] *Id*. at 857.

[524] *Id*. at 858.

[525] *Id*.

[526] *Id*.

[527] 798 S.W.2d 346 (Tex. App.-Beaumont 1990), *rev'd on other grounds*, 802 S.W.2d 235 (Tex. 1991).

[528] *Hunke*, 815 S.W.2d at 858 n.2.

[529] *Id*. at 857 n.1.

[530] 818 S.W.2d 381 (Tex. 1991).

[531] *Id*. at 382.

[532] *Id*. at 383.

[533] *Id*. at 383 n.3.

[534] *Id*.

[535] *Id*. at 384.

[536] *Id*.

[537] *Id*. at 384 n.6.

[538] *Id*. at 382.

[539] *Id*. at 384.

[540] *Id*. (citing Henshaw v. Kroenecke, 656 S.W.2d 416 (Tex. 1983)).

[541] *Henshaw*, 656 S.W.2d at 416.

[542] *Id*.

[543] *Id*.

[544] *Peat Marwick*, 818 S.W.2d at 385.

[545] *Id*.

[546] *Id*. at 385-86.

[547] *Id*. at 386 (citing Frankiewicz v. National Comp. Assocs., 633 S.W.2d 505 (Tex. 1982)).

[548] *Frankiewicz*, 633 S.W.2d at 506.

[549] *Id*. at 507.

[550] *Id*.

[551] *Peat Marwick*, 818 S.W.2d at 386.

[552] *Id*.

[553] *Id*. (citations omitted).

[554] *Id*.

[555] *Id*.

[556] *Henshaw*, 656 S.W.2d at 417.

[557] *Peat Marwick*, 818 S.W.2d at 386.

[558] *Id*. at 387.

[559] *Id*.

[560] *Id*. at 388.

[561] *Id*.

562 *Id*.

563 *Id*. (citations omitted).

564 *Id*.

565 *Id*.

566 *Id*.

567 General Devices, Inc. v. Bacon, 836 S.W.2d 179 (Tex. App.-Dallas 1991), *vacated and remanded*, 830 S.W.2d 106 (Tex. 1992); Tom James Co. v. Mendrop, 819 S.W.2d 251 (Tex. App.-Ft. Worth 1991, no writ); Safeguard Business Sys., Inc. v. Schaffer, 822 S.W.2d 640 (Tex. App.-Dallas 1991, no writ).

568 *General Devices*, 836 S.W.2d at 181.

569 Tom James Co. v. Mendrop, 819 S.W.2d 251 (Tex. App.-Ft. Worth 1991, no writ).

570 *Id*. at 252.

571 *Id*.

572 *Id*. at 253.

573 *Id*.

574 *Id*.

575 *Id*.

576 *Id*.

577 822 S.W.2d 640 (Tex. App.-Dallas 1991, no writ).

578 *Id*. at 644.

579 *Id*. at 641.

580 *Id*. at 642.

581 *Id*. at 641.

582 *Id*. at 644.

583 *Id*.

584 *Id*.

585 *Id*.

586 *Id*. at 644-45.

587 *General Devices, 836* S.W.2d 179.

588 *Id*. at 184.

589 *Id*. at 181.

590 *Id*. at 183.

591 *Id*. at 181.

592 *Id*.

593 *Id*. at 182.

594 *Id*.

595 *Id*. at 185.

596 *Id*. at 184.

597 *Id*.

598 800 S.W.2d 285 (Tex. App.-Corpus Christi 1991, writ denied).

599 *General Devices*, 835 S.W.2d at 183.

600 *Id*. at 184.

601 *Id*.

602 *Id*.

603 *Id*.

604 *Id*.

605 *Id*. at 185.

606 Bacon v. General Devices, Inc., 830 S.W.2d 106, 107 (Tex. 1992).

607 *Id*. (citing Travel Masters, Inc. v. Star Tours, 827 S.W.2d 830 (Tex. 1991)).

608 *Id*.

609 Travel Masters, Inc. v. Star Tours, Inc., 830 S.W.2d 614 (Tex. App.-Dallas 1991), *rev'd*, 827 S.W.2d 830 (Tex. 1991).

610 Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830, 833 (Tex. 1991).

611 *Juliet Fowler Homes*, 793 S.W.2d at 665.

612 *Travel Masters*, 827 S.W.2d at 833.

613 *Travel Masters*, 830 S.W.2d at 615.

614 *Id*. at 616.

615 *Id*.

616 *Id*.

617 *Id*.

618 *Id*. at 615-16.

619 *Id*. at 618.

620 *Id*.

[621] *Id*. at 616.

[622] *Id*.

[623] *Id*.

[624] *Id*. at 620.

[625] *Id*. at 617.

[626] *Id*.

[627] *Id*.

[628] *Id*. at 622.

[629] *Id*. at 618.

[630] *Id*. at 618 n.1.

[631] *Id*. at 618.

[632] *Id*.

[633] *Id*.

[634] *Id*.

[635] *Travel Masters*, 827 S.W.2d at 833.

[636] *Id*. at 832.

[637] *Id*.

[638] *Id*. at 832-33 n.2.

[639] *Id*. at 832.

[640] *Id*. at 833.

641 *Id*.

642 *Id*.

643 *General Devices*, 836 S.W.2d 179 (Tex. App.-Dallas 1991), *rev'd*, 830 S.W.2d 106 (Tex. 1992).

644 *General Devices*, 830 S.W.2d at 107.

645 *General Devices*, 836 S.W.2d at 184.

646 *Id*.

647 *Id*. at 183.

648 *Juliette Fowler Homes*, 793 S.W.2d at 666 (Tex. 1990).

649 *See* Hilb, Rogal & Hamilton Co. v. Wurzman, 861 S.W.2d 30 (Tex. App.-Dallas 1993, no writ); B.J. Software Sys., Inc. v. Osina, 827 S.W.2d 543 (Tex. App.-Houston [1st Dist.] 1992, no writ); Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654 (Tex. App.-Dallas 1992, no writ); Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770 (Tex. App.-Beaumont 1992, writ denied); Car Wash Sys. of Texas v. Brigance, 856 S.W.2d 853 (Tex. App.-Fort Worth 1993, no writ).

650 *Hilb, Rogal & Hamilton*, 861 S.W.2d at 34.

651 827 S.W.2d 543 (Tex. App.-Houston [1st Dist.] 1992, no writ).

652 *Id*. at 546.

653 *Id*. at 544.

654 *Id*.

655 *Id*. at 546.

656 *Id*. at 544.

657 *Id*.

658 *Id*. at 545.

659 *Id*.

[660] *Id*. at 545-46.

[661] *Id*. at 545.

[662] *Id*.

[663] *Id*. at 546.

[664] *Id*.

[665] *Id*.

[666] *Id*.

[667] *Id*. at 546 n.3.

[668] 824 S.W.2d 654 (Tex. App.-Dallas 1992, no writ).

[669] *Id*. at 661.

[670] *Id*. at 662-63.

[671] *Id*. at 664.

[672] *Id*. at 657.

[673] *Id*.

[674] *Id*. at 658.

[675] *Id*. at 662.

[676] *Id*. at 657.

[677] *Id*.

[678] *Id*. at 658-59.

[679] *Id*. at 658 (emphasis in original).

[680] *Id*. at 659.

[681] *Id*. at 661.

[682] *Id*. at 660.

[683] *Id*. at 660-61.

[684] *Id*. at 661.

[685] *Id*.

[686] *Id*.

[687] *Id*.

[688] *Id*. at 662.

[689] *Id*. at 663.

[690] *Id*. (emphasis by the court).

[691] *Id*. at 662.

[692] *Id*. at 664.

[693] 861 S.W.2d 30 (Tex. App.-Dallas 1993, no writ).

[694] *Id*. at 31.

[695] *Id*.

[696] *Id*. at 32.

[697] *Id*.

[698] *Id*. at 33.

[699] *Id*.

[700] *Id*. at 34.

[701] *Id*. at 35.

[702] *Id*. at 34.

[703] *Id*.

[704] 840 S.W.2d 770 (Tex. App.-Beaumont 1991, writ denied).

[705] *Id*. at 775.

[706] *Id*. at 773.

[707] *Id*. at 771-72.

[708] *Id*. at 772.

[709] *Id*.

[710] *Id*.

[711] *Id*.

[712] *Id*.

[713] *Id*.

[714] *Id*.

[715] *Id*.

[716] *Id*. at 772-73 (citations omitted).

[717] *Id*. at 773.

[718] *Id*.

[719] *Id*. at 774.

[720] *Id*.

[721] *Id*.

[722] *Id*.

[723] *Id*. at 773 (citations omitted).

[724] 856 S.W.2d 853 (Tex. App.-Fort Worth 1993, no writ).

[725] *Id*. at 859.

[726] *Id*. at 854.

[727] *Id*. at 854-55.

[728] *Id*. at 855.

[729] *Id*.

[730] *Id*.

[731] *Id*. at 857.

[732] *Id*. at 858.

[733] *Id*.

[734] *Id*. at 859.

[735] *Id*. at 856.

[736] *Id*. at 859.

[737] *Id*.

[738] *Martin*, 793 S.W.2d at 669.

[739] *Daytona Group*, 800 S.W.2d at 288.

[740] TEX. BUS. & COM. CODE ANN. § 15.52 (West Supp. 1995).

[741] *Id*. § 15.51(b).

[742] *Id*. § 15.50.

[743] *Id*. (emphasis added).

[744] *See* Tex. H.B. 7, 73d Leg., R.S., 1993 Tex. Gen. Laws 4202, §§ 4-5.

[745] Tex. H.B. 7, 73d Leg., R.S., House Tape Excerpts (copy on file in the office of TEX. INTELL. PROP. L.J.).

[746] *Id*.

[747] *Id*.

[748] *Id*.

[749] House Tape Excerpts, *supra* note 745.

[750] *Id*.

[751] *Id*.

[752] House Committee on Business and Industry, Bill Analysis, Tex. H.B. 7, 73d Leg., R.S. (1993).

[753] *Id*.

[754] House Tape Excerpts, *supra* note 745.

[755] Tex. H.B. 7, 73d Leg., R.S., 1993 Tex. Gen. Laws 4201 (codified as amended at TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1995).

[756] Light v. Centel Cellular Co., 37 TEX. SUP. CT. J. 17, 17-18 (October 6, 1993).

[757] *Id*. at 18.

[758] Centel Cellular Co. of Texas v. Light, 841 S.W.2d 95 (Tex. App.-Tyler 1992), *rev'd*, 883 S.W.2d 642 (Tex. 1994).

[759] *Id*. at 99.

[760] *Id*.

[761] *Id*. at 96.

[762] *Id*. at 100.

[763] *Id*.

[764] *Centel Cellular*, 841 S.W.2d at 96 (citing *Hill*, 725 S.W.2d 168 (Tex. 1987)).

[765] *Id*. at 96-97.

[766] *Id*. at 97.

[767] *Id*.

[768] *Id*. at 100-01.

[769] *Id*. at 100.

[770] *Id*.

[771] *Id*.

[772] *Light*, 37 TEX. SUP. CT. J. at 18.

[773] *Id*.

[774] *Id*.

[775] *Id*. at 17-18 n.2.

[776] Burgess v. Permian Court Reporters, Inc., 864 S.W.2d 725 (Tex. App.-El Paso 1993, writ dism'd w.o.j.).

[777] *Id*. at 726.

[778] *Id*.

[779] *Id*. at 727.

[780] *Id*.

[781] *Id*.

[782] *Id*. at 727-28.

[783] *Id*. (emphasis by the court).

[784] *Id*. at 728 (citing Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654 (Tex. App.-Dallas 1992, no writ)).

[785] *Id*.

[786] *Id*.

[787] *See* Tex. H.B. 7, 73d Leg., R.S., 1993 Tex. Gen. Laws 4201 (codified at TEX. BUS. & COM. CODE ANN. § 15.51(b)).

[788] *Burgess*, 864 S.W.2d at 728.

[789] *Id*. at 729.

[790] Light v. Centel Cellular Company, 883 S.W.2d 642 (Tex. 1994).

[791] Light v. Centel Cellular Company, 37 TEX. SUP. CT. J. at 18.

[792] *Light*, 883 S.W.2d at 643.

[793] *Id*. at 647.

[794] *Id*. at 644 n.3.

[795] *Id*. at 644.

[796] *Id*.

[797] *Id*. at 646.

[798] *Id*. at 645.

[799] *Id*.

[800] *Id*.

[801] *Id*. at 645-46.

[802] *Id*. at 646.

[803] *Id*. at 646 n.9.

[804] *Id*. at 646.

[805] *Id*. at 645 (citation omitted).

[806] *Id*. at 646-47.

[807] *Id*. at 647 (citing Business Elecs. v. Sharp Elecs., 485 U.S. 717 (1988)).

[808] *Id*.

[809] *Id*.

[810] *Id*. at 644.

[811] *Id*.

[812] *Id*. at 644 n.4.

[813] *Id*. at 645 n.6.

[814] *Id*.

[815] *Id*.

[816] *Id*.

[817] *Id*. at 647 n.14.

[818] *Id*. at 645 n.7.

[819] *Id*. at 648 (concurring opinion).

[820] TEX. BUS. & COM. CODE ANN. § 15.51 (West Supp. 1995).

[821] *Id*. § 15.52.

[822] *Hill*, 725 S.W.2d at 171.

[823] *DeSantis*, 793 S.W.2d at 682.

[824] TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1995).

[825] *Id*.

[826] *Hill*, 725 S.W.2d at 170.

[827] *DeSantis*, 793 S.W.2d at 682.

[828] *See, e.g.*, Hoddeson v. Conroe Ear, Nose and Throat Assocs., 751 S.W.2d 289 (Tex. App.-Beaumont 1988, no writ) (split decision reversing entry of temporary injunction on basis that public interest required the availability of this doctor at a certain hospital).

[829] *See Property Tax Assocs.*, 800 S.W.2d at 352 (needs of the promisor and the hardship to the public do "not appear to be the test under the statute").

[830] TEX. BUS. & COM. CODE ANN. § 15.51(c) (West Supp. 1995).

[831] *Id*. § 15.51(a).

[832] *Id*. § 15.05(i).

[833] *Id*. § 15.05(i)(2). *See also* Isuani v. Manske-Sheffield Radiology Group, P.A., 798 S.W.2d 346, 351-53, *rev'd on other grounds*, 802 S.W.2d 235 (Tex. 1991).

[834] TEX. BUS. & COMM. CODE ANN. § 15.52 (West Supp. 1995).

[835] *Hill*, 725 S.W.2d at 171 (citations omitted).

[836] *See, e.g.*, Bland v. Henry & Peters, 763 S.W.2d 5, 8 (Tex. App.-Tyler 1988, writ denied).

[837] *Id*. (citing *Hill*, 725 S.W.2d at 171).

838 *See, e.g.*, Justin Belt Co. v. Yost, 502 S.W.2d 681, 683-84 (Tex. 1973); 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1636, at 102 (3d ed. 1967).

839 TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 1989) (amended 1993).

840 *Id*.

841 *See, e.g.*, Posey v. Monier Resources, Inc., 768 S.W.2d 915, 918 (Tex. App.-San Antonio 1989, writ denied) (covenant not to compete signed six months after employee was hired).

842 Daunis, J., "*Covenants Not to Compete: New Texas Legislation, Case Law History, and Limits of the Obligations Which Can Be Placed On Employees Under Current Law,*" Southwest Legal Foundation, p.11-12 (Oct. 1989).

843 *Id*.

844 Tex. H.B. 7, 73d Leg., R.S., 1993 Tex. Gen. Laws 4201 (codified as amended at TEX. BUS. & COM. CODE ANN. §15.50 (West Supp. 1995)).

845 TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1995) (emphasis supplied).

846 Hill v. Mobile Auto Trim, 725 S.W.2d 168, 172 (Tex. 1987) (quoting Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982)).

847 TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1995).

848 *Id*.

849 DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 683 (Tex. 1990).

850 Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770, 773 (Tex. App. - Beaumont 1991, writ denied).

851 *See infra* note 857.

852 *Hill*, 725 S.W.2d at 172 (emphasis supplied).

853 645 P.2d 623, 627 (Utah 1982).

854 *Id*.

855 *See* System Concepts, Inc. v. Dixon, 669 P.2d 421 (Utah 1983); Robbins v. Finlay, 645 P.2d 623 (Utah 1982); Allen v. Rose Park Pharmacy, 237 P.2d 823 (Utah 1951); Pelton's Spudnuts, Inc. v. Doane, 234 P.2d 852 (Utah 1951).

856 *See generally, supra* Parts II.A., C., E., & F.

[857] *See* Justin Belt Co. v. Yost, 502 S.W.2d 681, 685 (Tex. 1973); Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950, 952 (Tex. 1960); Spinks v. Riebold, 310 S.W.2d 668, 669-70 (Tex. Civ. App.-El Paso 1958, writ ref'd).

[858] RESTATEMENT (SECOND) OF CONTRACTS § 184, reporter's note (1979).

[859] TEX. BUS. & COM. CODE ANN. § 15.51(c) (West Supp. 1995).

[860] RESTATEMENT (SECOND) OF CONTRACTS § 184 cmt. b (1979).

[861] 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1390, at 70-71 (1962).

[862] 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1647C, at 293 (3d ed. 1972).

[863] TEX. BUS. & COM. CODE ANN. § 15.51(c) (West Supp. 1995).

[864] *See, e.g.*, B.J. Software Systems, Inc. v. Osina, 827 S.W.2d 543, 546 (Tex. App.-Houston [1st Dist.] 1992, no writ) (if reformation is requested, trial court has a duty to reform consistent with the statute and failure to do so is error).

[865] *See, e.g.*, Gomez v. Zamora, 814 S.W.2d 114, 118-119 (Tex. App.-Corpus Christi 1991, no writ) (request for narrower injunction than language of the covenant does not constitute request for reformation).

[866] Recon Exploration, Inc. v. Hodges, 798 S.W.2d 848, 852-53 (Tex. App. - Dallas 1990, no writ).

[867] TEX. BUS. & COM. CODE ANN. § 15.51(c) (West Supp. 1995).

[868] Hill v. Mobile Auto Trim, 725 S.W.2d 168, 171-72 (Tex. 1987).

[869] Martin v. Credit Protection Assoc., Inc., 31 TEX. SUP. CT. J. 626 (1988).

[870] DeSantis v. Wackenhut Corp., 31 TEX. SUP. CT. J. 616, 620 (July 13, 1988).

[871] *See* Henshaw v. Kroenecke, 656 S.W.2d 416, 418 (Tex. 1983).

[872] *Id*.

[873] *Id*.

[874] *See, e.g.*, Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950, 951 (Tex. 1960); Spinks v. Riebold, 310 S.W.2d 668, 669 (Tex. Civ. App.-El Paso 1958, writ ref'd).

[875] TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1995).

[876] *Id*. §§ 15.50, 15.51(b).

[877] *Id*. § 15.51(b).

[878] *Id*.

[879] *Id*.

[880] TEX. BUS. & COMM. CODE ANN. § 15.51(c) (West Supp. 1995).

[881] *Id*.

[882] *Id*. § 15.52.

[883] *See* Tex. H.B. 7, 73d Leg., R.S., 1993 Tex. Gen. Laws 4202.

[884] *See generally*, TEX. BUS. & COM. CODE ANN. §§ 15.50-.52.

[885] *See* Daytona Group of Texas, Inc. v. Smith, 800 S.W.2d 285, 288 (Tex. App.-Corpus Christi 1990, writ denied) (awarding attorney fees to the promisor under the Texas Free Enterprise and Antitrust Act, TEX. BUS. & COM. CODE § 15.21(a)(1)); Cukjati v. Burkett, 772 S.W.2d 215, 218 (Tex. App.-Dallas 1989, no writ) (awarding attorney fees to the promisor under § 37.009, TEX. CIV. PRAC. & REM. CODE).

[886] Act of June 19, 1993, 73d Leg., R.S. 1993 Tex. Gen. Laws 4202, § 5.

[887] Act of June 16, 1989, 71st Leg., R.S. 1989 Tex. Gen. Laws 4852, § 2.

[888] *Id*. § 3.

[889] Act of June 19, 1993, 73d Leg., R.S. 1993 Tex. Gen. Laws 4202, § 1.

[890] *Id*. § 4.

[891] Webb v. Hartman Newspapers, Inc., 793 S.W.2d 302, 304 (Tex. App. - Houston [14th Dist.] 1990, no writ).

[892] Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770, 773 (Tex. App. - Beaumont 1991, writ denied).

[893] Light v. Centel Cellular Co., 883 S.W.2d 642, 644 n.3 (Tex. 1994).

[894] *See* Daytona Group of Texas, Inc. v. Smith, 800 S.W.2d 285, 288 (Tex. App. - Corpus Christi 1990, writ denied).

[895] Act of June 19, 1993, 73d Leg., R.S., 1993 Tex. Gen. Laws 4202, § 3.

[896] *Id*.

[897] *Light*, 883 S.W.2d at 646.

[898] *See supra* Part IV.B.

[899] *See supra* Part XI.

[900] *See supra* Part XII.

[901] Martin v. Credit Protection Assoc. Inc., 793 S.W.2d 667, 669 (Tex. 1990).

[902] *Id*. at 670.

[903] Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830, 833 (Tex. 1991).

[904] Light v. Centel Cellular Co., 37 TEX. SUP. CT. J. 17, 18 (October 6, 1993).

[905] *See supra* Part II.E.5.

[906] *See supra* Part VII.

[907] *See supra* Part IV.C.

[908] *See supra* Parts IV.B., VIII, & XI.

[909] *See supra* Part IV.A.

[910] *See supra* Part II.F.

[911] *See supra* Part IV.B.

[912] *See supra* Part IV.B.

[913] *See supra* Parts IV.B., VIII, & XI.

914 This logic in support of enforcing covenants as part of at-will employment relationships is not unusual. Many authorities have considered the enforceability of covenants not to compete in at-will employment relationships and have indicated their approval, including:

1. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g (1979) ("A restraint may be ancillary to a relationship although, as in the case of employment at will, no contract of employment is involved.");

2. 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1394 (1962) ("If the employment was at will of the employer, and it has continued for a very brief time, this may make the restriction unreasonable.");

3. 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1636 (3d ed. 1972) ("Where the contract is terminable at will, there has been some divergence among the jurisdictions as to the enforceability of a restrictive agreement. However, if a period of notice is required, the covenant is generally enforced.");

4. Ofsowitz v. Askin Stores, Inc., 306 S.W.2d 923, 924 (Tex. App.-Eastland 1957, no writ); Krueger, Hutchinson & Overton Clinic v. Lewis, 266 S.W.2d 885, 892 (Tex. App.-Amarillo 1954), *aff'd*, 269 S.W.2d 798 (Tex. 1954). Both cases holding that at-will employment agreements provide sufficient consideration to support non-compete agreements;

5. Justin Belt Co. v. Yost, 502 S.W.2d 681 (Tex. 1973). The Texas Supreme Court held that a covenant not to compete was ancillary to a settlement agreement entered into after employment had terminated restricting former employees from competing with their former employer although neither employee had a non-compete agreement during employment

915 U.S. CONST., amend. XIII, § 1.

916 *See supra* Part XIII.

917 *Light*, 883 S.W.2d at 646 n.8.

918 *Id*. at 647 n.13.

919 TEX. BUS. & COM. CODE ANN. § 15.50 (West Supp. 1995).

920 *See supra* Part XIII.

*246 Appendix A

Factor	Pre-*Hill* Common Law	Post-*Hill* Common Law	*DeSantis/Martin* 1990 Common Law	1989 Statute	1993 Statute
1. Covenant ancillary to otherwise enforceable agreement	Yes	Yes	Yes	Yes	Yes
2. Covenant necessary for the protection of the promisee	Yes	Yes	Yes	Yes	Yes
3. Covenant must not be oppressive to the promisor	Yes	Yes	Yes	No	No
4. Covenant must not be injurious to the public	Yes	Yes	Yes	No[a2]	No[a2]
5. Covenant supported by separate and independent consideration	No	Yes	No	No[aa1]	No[aa1]
6. "Common Calling" Exception	No	Yes	No	No	No
7. At-Will Exception	No	No	Yes	No	No

a2 Although the statute on covenants not to compete does not expressly refer to the public interest as a factor to be considered, elsewhere in the Texas Business and Commerce Code, section 15.05(i) requires that when determining if a “restraint related to the sale or delivery of professional services is reasonable” the court may consider whether the activities involved maintain or improve the qualities of the services or reduce the cost of the services to benefit the public interest under the statute. Professionals are defined to include licensed accountants, physicians, and professional engineers. At the same time, section 15.52 added in 1993 provides expressly that “any other criteria” are preempted.

aa1 > ***247** The 1989 statute appeared to codify a form of the pre-existing duty rule by requiring that a covenant not to compete be executed on a date different than the underlying ancillary agreement be supported by “independent valuable consideration.” This was not the “separate and independent” consideration required by *Hill* which required a certain type of “separate and independent consideration” regardless of when the non-compete covenant was signed in employment or personal services cases. The 1993 amendments eliminated this language, but added a requirement that the non-compete covenant be part of an otherwise enforceable agreement “at the time the agreement is made.”