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# COVENANTS NOT TO COMPETE: A REVIEW OF THE GOVERNING STANDARDS OF ENFORCEABILITY AFTER *DESANTIS V. WACKENHUT CORP.* AND THE LEGISLATIVE AMENDMENTS TO THE TEXAS BUSINESS AND COMMERCE CODE

by Alexandra Sowell

## I. INTRODUCTION

**B**USINESS employers commonly place restraints, often unreasonably, on the employee's ability to pursue other employment upon termination of current employment.<sup>1</sup> Indeed, such restraints upon postemployment competition form a standard part of many modern-day employment contracts.<sup>2</sup> Generally, employers require their employees to sign noncompetition covenants in which employees agree to not compete with their employers within a designated geographical area for a certain time period after termination of their employment.<sup>3</sup> The fact that courts have adjudicated the enforceability of contractual restraints of trade in the post-employment context for more than five hundred years indicates the serious problems created by such agreements.<sup>4</sup>

From an employer's perspective, an employee's competitive activity can result in significant harm to the business, such as loss of clientele, customer goodwill, and confidential information.<sup>5</sup> The employee's view is that enforcing the noncompetition covenant will result in great economic hardship for the employee because of an inability to engage in similar work he or she is

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1. See Hutter, *Drafting Enforceable Employee Non-Competition Agreements to Protect Confidential Business Information: A Lawyer's Practical Approach to the Case Law*, 45 ALB. L. REV. 311, 312 (1981).

2. See Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L. REV. 621, 622-23 (1977). Although conclusive empirical data is lacking, this comment discusses a survey indicating that employers across the American states utilize noncompetition covenants extensively. *Id.*

3. See Blake, *Employee Agreement Not to Compete*, 73 HARV. L. REV. 625, 627 (1960).

4. *Id.* at 631-32.

5. *Id.* at 627. "[Employers regard] postemployment restraints . . . as perhaps the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information and customer relationships for their own benefit." *Id.*

otherwise qualified to do.<sup>6</sup> Additionally, these restraints unduly limit competition by deterring employers in competing businesses who fear the legal consequences of hiring employees bound by noncompetition covenants.<sup>7</sup>

Texas courts have never favored covenants suppressing competition.<sup>8</sup> Consequently, in balancing the competing interests between the employer and the employee, Texas courts strictly scrutinize noncompetition covenants in determining their validity.<sup>9</sup> Two recent opinions of the Texas Supreme Court have greatly restricted the employer's ability to enforce noncompetition covenants.<sup>10</sup> Furthermore, the Texas Legislature's recent adoption of sections 15.50 and 15.51 to the Texas Business and Commerce Code alters the common law analysis dealing with the enforceability of covenants not to compete. Specifically, assuming the employer has a legitimate business interest worthy of protection, the legislation mandates that Texas courts modify covenants not to compete incorporating unreasonable restraints as to time duration, geographical area, and scope of activity so as to render them enforceable.<sup>11</sup>

Since the landmark decision of *Hill v. Mobile Auto Trim, Inc.*,<sup>12</sup> the Texas Supreme Court, in at least four instances, has flatly refused to modify post-employment noncompetition covenants that it deemed unenforceable.<sup>13</sup> The

6. *Id.* at 627.

7. *Id.*

8. See *Unitel Corp. v. Decker*, 731 S.W.2d 636, 639 (Tex. App.—Houston [14th Dist.] 1987, no writ). See also *Carpenter v. Southern Properties, Inc.*, 299 S.W. 440, 443 (Tex. Civ. App.—Dallas 1927, writ ref'd) (negative covenants are enforceable if the burden of proof is met). In *Carpenter* the court observed that:

[c]ourts, however, do not look upon such contracts with favor and, when such a covenant is attempted to be enforced, require that the employer establish the fact that such negative covenant was necessary . . . and that the prohibition is reasonable, both in its duration of time and in the territory over which it operates.

*Id.* (citations omitted).

9. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681-82 (Tex. 1990). In the *DeSantis* opinion, the court unequivocally stated that the benefits to the promisee must be balanced against the burdens to the promisor and the public prior to the enforcement of noncompetition covenants. *Id.* at 682. The court further observed:

[S]uch . . . agreement[s] 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.

*Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 188 comments c, g (1981)).

10. See *DeSantis*, 793 S.W.2d at 685; *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667, 670 (Tex. 1990).

11. See TEX. BUS. & COM. CODE ANN. §§ 15.50-.51 (Vernon Supp. 1991); see *infra* notes 167-75 and accompanying text.

12. 725 S.W.2d 168 (Tex. 1987).

13. See, e.g., *DeSantis v. Wackenhut Corp.*, 31 Tex. Sup. Ct. J. 616, 620 (July 13, 1988), *withdrawn*, 793 S.W.2d 670 (Tex. 1990) (court refused to reform overly broad covenant absent the employer's showing of protectable interest); *Martin v. Credit Protection Ass'n*, 31 Tex. Sup. Ct. J. 626, 626 (July 13, 1988), *withdrawn*, 793 S.W.2d 667 (Tex. 1990) (noncompetition covenant invalidated since not supported by independent valuable consideration and not ancillary to otherwise enforceable agreement); *Bergman v. Norris of Houston*, 734 S.W.2d 673, 674 (Tex. 1987) (noncompetition covenants restraining rights of hairstylists to compete wholly unenforceable because it is a common calling); *Hill*, 725 S.W.2d at 172 (no presumption exists

courts' unwillingness to reform unreasonable noncompetition covenants into more narrowly drawn and reasonable restrictions reflects the judiciary's belief in the importance of the employer's burden to establish that his or her business interest is legitimate and therefore entitled to protection by enforcement of a noncompetition covenant.<sup>14</sup> An examination of relevant Texas case law demonstrates a dramatic shift in the approaches of Texas courts in determining the enforceability of noncompetition covenants.

This Comment begins with a review of the historical trends and general principles reflected in Texas case law concerning the validity of postemployment noncompetition covenants. Next, this Comment analyzes *DeSantis v. Wackenhut Corp.*,<sup>15</sup> a recent supreme court decision outlining the most current developments concerning the enforceability of covenants not to compete. Next, this Comment reviews the potential impact that the 1989 Texas legislative amendments will have on the enforceability of noncompetition restrictive covenants, focusing specifically on whether the amendment will effectively abolish the previous common calling standard adopted by the supreme court<sup>16</sup> for determining the enforceability of a covenant not to compete. Finally, this Comment analyzes the implications of a return to judicial reformation in the enforcement of noncompetition agreements.

## II. GENERAL PRINCIPLES REGARDING THE ENFORCEABILITY OF NONCOMPETITION COVENANTS IN TEXAS

### A. Public Policy Disfavors Noncompetition Covenants

The common law of contracts does not generally enforce contracts that are in restraint of trade.<sup>17</sup> Unquestionably, most restraints of trade, includ-

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favoring the validity of noncompetition covenants despite courts' prior reformation of unreasonable covenants).

14. *But see* *Wabash Life Ins. Co. v. Garner*, 732 F. Supp. 692, 693 (N.D. Tex. 1989). In this case the plaintiff contended that § 15.50 substantially altered the previous common law cause of action so that the analysis now focused exclusively on whether the covenant was necessary to protect the employer's business interest. *Id.* The *Wabash* court, however, emphatically rejected this argument, instead citing language from three Texas Supreme Court cases that essentially track the language found in the statute. *Id.*; see *Hill*, 725 S.W.2d at 170-71; *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983); *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 951 (1960).

15. 793 S.W.2d 670 (Tex. 1990).

16. See *Hill*, 725 S.W.2d at 172. In the *Hill* case the court adopted a new test, the common calling standard, for determining enforceability of covenants not to compete in Texas. The standard essentially provides that "covenants not to compete which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable." *Id.* at 172.

17. See RESTATEMENT (SECOND) OF CONTRACTS §§ 186-188 (1981); 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1633-1635 (3d ed. 1972 & Supp. 1990). Some states prohibit all or most forms of restrictive covenants by statute. The following states are among those with statutes that prohibit or limit such postemployment covenants: Alabama: ALA. CODE § 8-1-1 (1975); California: CAL. BUS. & PROF. CODE § 16600 (West 1964); Colorado: COLO. REV. STAT. § 8-2-113 (1973) (the statute, however, permits employee noncompetition agreements where the employer wishes to recover the costs of educating or training an employee or when the employee is an executive or staff member of an executive); Louisiana: LA. REV. STAT. ANN. § 23.921 (West 1964) (a maximum two-year restriction is permitted, however, if the employer has trained or advertised for the employee); Michigan: MICH. COMP.

ing unreasonable covenants not to compete, contravene public policy.<sup>18</sup> Accordingly, Texas courts have repeatedly asserted that they strongly disfavor covenants not to compete.<sup>19</sup> Because noncompetition covenants create restraints of trade, courts have consistently held them to be unenforceable on public policy grounds unless the terms of the covenant are reasonable.<sup>20</sup> In *DeSantis v. Wackenhut Corp.*,<sup>21</sup> the most recent pronouncement of these principles, the Texas Supreme Court declared that the state's policy of freedom of movement in the job market benefitted both the state and the individual.<sup>22</sup> Moreover, covenants that cause hardships by interfering with a person's means of livelihood are generally at odds with the strong public policy favoring freedom of mobility for employees.<sup>23</sup>

### B. Two Types of Reasonable Noncompetition Covenants

Texas courts encounter two general varieties of covenants not to compete:<sup>24</sup> covenants specifying that the seller of a business will not compete with the buyer,<sup>25</sup> and covenants providing that an employee, after his or her termination, will not compete with the former employer.<sup>26</sup> Both types of covenants typically provide temporal, geographical, and scope of activity

LAWS § 445.761 (1967); North Dakota: N.D. CENT. CODE § 9-08-06 (1960); Oklahoma: OKLA. STAT. tit. 15, § 217 (1966); South Dakota: S.D. CODIFIED LAWS ANN. § 53-9-8 (1980).

18. See *Denny v. Roth*, 296 S.W.2d 944, 947 (Tex. Civ. App.—Galveston 1956, writ ref'd); RESTATEMENT (SECOND) OF CONTRACTS §§ 186-188 (1981).

19. See *DeSantis*, 793 S.W.2d at 680 (“[w]hat noncompetition agreements are reasonable restraints upon employees in this state . . . is a matter of public policy . . . that policy is fundamental in that it ensures a uniform rule for enforcement of noncompetition agreements in this state.”); *Diversified Human Resources Group, Inc. v. Levinson-Polakoff*, 752 S.W.2d 8, 10-12 (Tex. App.—Dallas 1988, no writ) (overbroad covenant restraining acts of employment agency injurious to public in that it prevents fair competition and goes beyond necessary purpose of promisee); *Travel Masters, Inc. v. Star Tours, Inc.*, 742 S.W.2d 837, 840 (Tex. App.—Dallas 1987, writ dismissed w.o.j.) (“courts are reluctant to enforce covenants which prevent competition and deprive the community of needed goods”); *Chandler v. Mastercraft Dental Corp.*, 739 S.W.2d 460, 464 (Tex. App.—Fort Worth 1987, writ denied) (“covenants against competition are not favored by the courts because of public policy considerations against restraints of trade”); *Bob Pagan Ford, Inc. v. Smith*, 638 S.W.2d 176, 178 (Tex. App.—Houston [1st Dist.] 1982, no writ) (covenants restraining competition disfavored by courts because of public policy against restraints of trade and hardships resulting from interference with a person's means of livelihood).

20. See *Frankiewicz v. National Comp Assocs.*, 633 S.W.2d 505, 507 (Tex. 1982); *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 951 (1960); *Arthur Murray Dance Studios v. Witter*, 105 N.E.2d 685, 694 (Ohio 1952); RESTATEMENT (SECOND) OF CONTRACTS § 186 (1981).

21. 793 S.W.2d 670 (Tex. 1990).

22. See *DeSantis*, 793 S.W.2d at 679. In asserting that the individual and state interests are both at stake, the court stated that “Texas is directly interested in *DeSantis* as an employee in this state, in *Wackenhut* as a national employer doing business in this state, in *RDI* as a new competitive business . . . in the state, and in consumers . . . in Texas.” *Id.* at 679.

23. See *Bob Pagan Ford, Inc. v. Smith*, 638 S.W.2d 176, 178 (Tex. App.—Houston [1st Dist.] 1982, no writ).

24. Throughout this Comment, “restrictive covenants”, “covenants not to compete” and “noncompetition covenants” will be used interchangeably.

25. See *Daniel v. Goesl*, 161 Tex. 490, 341 S.W.2d 892, 896 (1960).

26. See *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 682 (Tex. 1973) (noncompetition agreements between employers and employees are enforceable).

limitations on the promisor's ability to compete with the promisee.<sup>27</sup> Once again, in order for these covenants to survive judicial scrutiny, the restraints must be reasonable.<sup>28</sup> Texas courts have consistently held that the determination of whether a noncompetition covenant is reasonable is a question of law to be decided by the court.<sup>29</sup>

### C. *The Common Law Principles Governing Covenants Not to Compete*

The common law principles in Texas underlying the enforceability of noncompetition covenants are well settled. The Texas Supreme Court recently reinforced the three fundamental criteria that a noncompetition agreement must meet to constitute a reasonable restraint of trade.<sup>30</sup> Significantly, an independent covenant restraining competition is unenforceable in Texas.<sup>31</sup> Thus, the first criterion requires the covenant not to compete to be ancillary to an otherwise valid transaction<sup>32</sup> or relationship whose primary purpose is unrelated to the suppression of competition between the parties.<sup>33</sup> The *DeSantis* court explained that the existence of a valid transaction or relation-

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27. See *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 170 (Tex. 1987).

28. See generally *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 951 (1960) ("An agreement . . . not to compete . . . is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable.").

29. See *Hill*, 725 S.W.2d at 170 (reasonableness of covenant not to compete is question of law); see also *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983) ("The question of whether a covenant not to compete is reasonable is a legal question for the court."); *Travel Masters, Inc. v. Star Tours, Inc.*, 742 S.W.2d 837, 840 (Tex. App.—Dallas 1987, writ dismissed w.o.j.) (whether covenant not to compete is reasonable is question of law for the court); *Wilson v. Chemco Chem. Co.*, 711 S.W.2d 265, 267 (Tex. App.—Dallas 1986, no writ) (reasonableness of restrictive covenant as to time and area is question of law to be determined by the court); *Diesel Injection & Sales & Servs., Inc. v. Renfro*, 656 S.W.2d 568, 572 (Tex. App.—Corpus Christi 1983, writ refused n.r.e.) (Texas courts ordinarily consider determination of reasonableness of a postemployment noncompetition covenant a question of law).

30. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681-82 (Tex. 1990). These principles articulated by the supreme court essentially track the requirements stated in the RESTATEMENT (SECOND) OF CONTRACTS (1981).

31. *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 683-684 (Tex. 1974) (citing *Potomac Fire Ins. Co. v. State*, 18 S.W.2d 929, 934-45 (Tex. Civ. App.—Austin 1929, writ refused)). In *Justin Belt* the court noted that an agreement between two insurance companies to limit their agents' compensation and not to employ agents from noncomplying companies was an independent agreement to limit competition and would be unenforceable. *Id.* (citing *Potomac*, 18 S.W.2d at 934).

32. See *DeSantis*, 793 S.W.2d at 681-82; *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667, 669 (Tex. 1990). The court's reasoning in *Martin* illustrates the significance of the requirement that the covenant be ancillary to some enforceable agreement. In *Martin* the Texas Supreme Court ruled that the noncompetition covenant was not ancillary to an otherwise enforceable agreement for several reasons. *Id.* First, the employment agreement in that case consisted entirely of a covenant not to compete and lacked the usual terms of an employment contract. Second, employee *Martin* executed the covenant not to compete three years after he was first employed by the company. Significantly, the court's reliance on this fact indicated that the covenant needed some form of independent and supportive consideration to render it enforceable. Finally, noting that *Martin's* employment would have been terminated had he not signed the covenant, the court ruled that the covenant was not ancillary to an otherwise valid transaction. *Id.*

33. See *DeSantis*, 793 S.W.2d at 681-82; *Martin*, 793 S.W.2d at 669; *Justin Belt*, 502 S.W.2d at 683; *Potomac Fire*, 18 S.W.2d at 934; *LPC Leasing, Inc. v. Smith*, 550 S.W.2d 154, 155 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); RESTATEMENT (SECOND) OF CONTRACTS § 187 (1981).

ship gives rise to an "interest worthy of protection."<sup>34</sup> The court specifically identified employment relationships and the purchase and sale of a business as otherwise valid transactions or relationships.<sup>35</sup> Therefore, if a covenant not to compete is to be deemed enforceable by the courts, the employer must demonstrate that another permissible transaction, such as the two examples mentioned by the *DeSantis* court, supports the covenant.<sup>36</sup>

The second criterion requires the restraint created by the noncompetition covenant to be no greater than what is reasonably necessary to protect the promisee's legitimate interest.<sup>37</sup> The promisee or beneficiary of a covenant not to compete must have a legitimate interest that outweighs the restraint created by the covenant.<sup>38</sup> Texas courts consider the following to be legitimate and protectable interests: business goodwill;<sup>39</sup> trade secrets;<sup>40</sup> excep-

34. See *DeSantis*, 793 S.W.2d at 682.

35. *Id.*

36. *Id.*; see also *LPC Leasing*, 550 S.W.2d at 155 ("covenant not to compete must be ancillary to another undertaking, such as an employment contract, an agreement for the sale . . . of the business, or a settlement agreement.") *Id.*

37. See *DeSantis*, 793 S.W.2d at 682; *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983); *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 951 (1960); RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (a) (1981).

38. *DeSantis*, 793 S.W.2d at 682 (citations omitted). The *DeSantis* court provided several examples of "legitimate, protectable interests" including: business goodwill, trade secrets, confidential information and proprietary information. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 188 comments b, g (1981)).

39. Although Texas courts have defined goodwill in many different contexts, the meaning is essentially the same. One widely accepted definition of goodwill is "that value which inheres in fixed and favorable consideration of customers arising from established and well-conducted business. Such value is based necessarily upon prospective profits to result from voluntarily continued patronage of the public." See *Texas & Pac. Ry. Co. v. Mercer*, 58 S.W.2d 896, 900 (Tex. Civ. App.—Dallas 1933), *rev'd on other grounds*, 127 Tex. 220, 90 S.W.2d 557 (1936).

40. See *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 684-85 (Tex. 1973). The former employee could not disclose his former employer's trade secrets. The commonly cited definition for a trade secret is the definition provided in the RESTATEMENT (SECOND) OF TORTS § 757 comment b (1977):

A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers . . . . A trade secret is a process or device for continuous use in the operation of the business . . . .

To qualify as a trade secret, however, the information must actually be considered a secret. If a matter is readily ascertainable from independent sources, it is not a secret. See generally *Zoecon Indus. v. American Stockman Tag Co.*, 713 F.2d 1174, 1179 (5th Cir. 1983) (to qualify as a trade secret the information cannot be generally known by others in the same business nor readily ascertainable by independent investigation); *Gaal v. BASF Wyandotte Corp.* 533 S.W.2d 152, 155 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (former employee may legitimately compete for customers where former employer's customer lists can be readily ascertained from sources other than internal records). For a further discussion of trade secret law, see 8 W. DORSANEO & P. WINSHIP, *TEXAS LITIGATION GUIDE* §§ 200.30-33 (1977); see also Comment, *Noncompetition Covenants in Employment Contracts: A Texas Common Law Analysis*, 20 HOUS. L. REV. 1197, 1206-07 (1983) (discussing Texas courts' recognition of trade secrets as a protectable interest).

tional and unique knowledge, skill, and ability;<sup>41</sup> customer lists;<sup>42</sup> actual solicitation of clients;<sup>43</sup> and confidential or proprietary information.<sup>44</sup>

Assuming that the beneficiary possesses such a legitimate interest, application of the second common law principle then weighs the need to protect the beneficiary's interest against the restraint of trade. Implicit in this principle is the requirement that limitations as to time, territory, and scope of activity be reasonable and narrowly drawn so as to restrain occupations only to the extent necessary to protect the promisee's business interests.<sup>45</sup> Thus, if the court determines that the beneficiary's protectable interest exceeds the restraint, the covenant not to compete satisfies the second prong.<sup>46</sup>

The third criterion requires the hardship to the promisor or any likely injury to the public to not be greater than the promisee's need for the protection by enforcement of the noncompetition agreement.<sup>47</sup> In applying this

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41. See *Matuszak v. Houston Oilers, Inc.*, 515 S.W.2d 725, 728 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). See also Comment, *supra* note 40, at 1211 n.30.

42. An ordinary customer list is not a trade secret. See *Texas Shop Towel v. Haire*, 246 S.W.2d 482, 485 (Tex. Civ. App.—San Antonio 1952, no writ); but see *Zoecon*, 713 F.2d at 1176 (customer list that gave employees competitive advantage was trade secret). If the employer of a business can show, however, that it spent time and resources developing its customer list, a past employee who has signed an otherwise reasonable noncompetition covenant will generally be precluded from using this information. See *Rubin & Shedd, Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 97-98 (1981) (discussing the economic efficiency in using restrictive covenants to protect legitimate employer interests).

43. See *AMF Tuboscope v. McBryde*, 618 S.W.2d 105, 106 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.). In *McBryde* the ex-employee and one other employee were exclusively responsible for sales and solicitation of customers. Since the employee was hired to develop goodwill with potential customers, the court found that the employer had a legitimate business interest. *Id.* at 108. Consequently, the court enjoined the former employee from contacting any customers. *Id.*

Other Texas courts have reached the same conclusion. See e.g., *Dittmer v. Source E D P, Texas, Inc.*, 595 S.W.2d 877, 880-81 (Tex. Civ. App.—Dallas 1980, no writ) (evidence demonstrated employee's contacts with customers in computer business sufficiently valuable to constitute protectable assets); *Professional Beauty Prods., Inc. v. Derington*, 513 S.W.2d 236, 239 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.) (customer contacts between former employees and customers are business interests entitled to protection of a covenant not to compete); *Kidde Sales & Serv., Inc. v. Pearson*, 493 S.W.2d 326, 329-30 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ) (when goodwill of employer's customers attaches to employee, restrictive covenants are reasonable).

44. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 684 (Tex. 1990) (while confidential information is protectable by a covenant not to compete, employer is not entitled to such protection if he or she fails to establish information is proprietary); RESTATEMENT (SECOND) OF CONTRACTS § 188 comments b, g (1981). See also *Orkin Exterminating Co. v. Wilson*, 501 S.W.2d 408, 411 (Tex. Civ. App.—Tyler 1973, writ dis'm'd) (former employer had property interest in protecting his business techniques and confidential business secrets where former employee had access to such information). In *Orkin* the court held the employee's access to the employer's business information and technical developments would have been unfair competition since the nature of the business was highly competitive and secret. *Id.* at 411.

45. See RESTATEMENT (SECOND) OF CONTRACTS § 188 comment d (1981); *Frankiewicz v. National Comp. Assocs.*, 633 S.W.2d 505, 507 (Tex. 1982); *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973); *Weatherford Oil Tool Co. v. Campbell*, 340 S.W.2d 950, 951 (Tex. 1960).

46. *DeSantis*, 793 S.W.2d at 682.

47. *Id.* at 682; see also *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983) (agreement may not impose undue hardship on the promisor); see RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(b) (1981). Although this third principle is similar to the second criterion, the analysis encompasses a broader inquiry.



third principle, courts use a balancing test, weighing the possible benefits that would result from the enforcement of the covenant not to compete against its burdens to the promisor and to the public.<sup>48</sup> Again, the covenant satisfies the third criterion if the court finds that the promisee's need for the protection afforded by the noncompetition covenant exceeds both the hardship to the promisor and any injury to the public.<sup>49</sup> From a practical standpoint, Texas courts have placed more emphasis on the protection of an employer's business and the hardship imposed upon the employee with less emphasis on the public interest factor.<sup>50</sup>

#### D. *Valid Consideration Must Support a Covenant Not to Compete*

As with any contract, valid consideration must support a noncompetition covenant.<sup>51</sup> If a covenant not to compete is ancillary to a valid agreement, that agreement serves as sufficient consideration for the covenant.<sup>52</sup> Furthermore, by requiring the covenant not to compete to be ancillary to some permissible transaction, one commentator suggests that the courts will be assured not only that the employee voluntarily entered into the contract in good faith, but that the employer provided consideration in exchange for the employee's noncompetition covenant.<sup>53</sup>

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48. See *Matlock v. Data Processing Sec., Inc.*, 618 S.W.2d 327, 329 (Tex. 1981).

49. *Id.*

50. See Note, *Sakowitz v. Steck: Texas Looks at Covenants Not to Compete*, 38 BAYLOR L. REV. 211, 215 (1986); *contra Matlock*, 618 S.W.2d at 329 (determination of the "reasonableness of territorial restraints upon non-competition contracts requires a balance of the interests of the employer, the employee and the public").

51. See generally *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 n.6 (Tex. 1990) (agreement not to compete must be supported by consideration) (citing *B. Cantrell Oil Co. v. Hino Gas Sales*, 756 S.W.2d 781, 783 (Tex. App.—Corpus Christi 1988, no writ) (upholding trial court's holding that pay raise and commission in return for signing contract was valid consideration to support covenant)); *Travel Masters, Inc. v. Star Tours, Inc.*, 742 S.W.2d 837, 841 (Tex. App.—Dallas 1987, writ dismissed w.o.j.) (stating consideration must support covenant and holding acceptance of employment serves as valid consideration); *Chenault v. Otis Eng'g Corp.*, 423 S.W.2d 377, 382 (Tex. Civ. App.—Corpus Christi 1967, writ refused n.r.e.) (noncompetition covenants executed subsequent to employment contract enforceable only when supported by consideration).

52. See *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667, 670 (Tex. 1990). Significantly, in *Martin* the Texas Supreme Court held that the covenant not to compete was not ancillary to an otherwise enforceable agreement. In *Martin* the employment agreement consisted solely of a covenant not to compete and had been executed three years after employee Martin began his employment. In addition, the facts of the case indicated that Martin's employment would have been terminated had he not signed the agreement. In viewing all of these circumstances, the *Martin* court was unquestionably influenced in ruling that the covenant was unenforceable. *Id.*

53. See Comment, *Noncompetition Covenants in Employment Contracts: A Texas Common Law Analysis*, 20 HOUS. L. REV. 1197, 1198 (1983). Acceptance of employment is valid consideration for a restrictive covenant not to compete. See *Carl Coiffure, Inc. v. Mouriot*, 410 S.W.2d 209, 211 (Tex. Civ. App.—Houston 1966, writ refused n.r.e.); see also *Garcia v. Laredo Collections, Inc.*, 601 S.W.2d 97, 99 (Tex. Civ. App.—San Antonio 1980, no writ) ("When the execution of a covenant not to compete is contemporaneous with the acceptance of employment the latter becomes the consideration . . ."). Employment-at-will relationships are not binding upon either the employer or the employee since either party is free to terminate the employment at any time. *Martin*, 793 S.W.2d at 670. Thus, continuation of an employment-at-will does not constitute independent valuable consideration necessary to support the covenant. *But see Arevalo v. Velvet Door, Inc.*, 508 S.W.2d 184, 186 (Tex. Civ. App.—El Paso

Section 15.50 of the Texas Business and Commerce Code adds one qualification to the requirement of consideration for covenants not to compete. Under section 15.50(1),<sup>54</sup> a covenant not to compete, executed on a date other than the date on which the underlying agreement was executed, is enforceable only if independent valuable consideration supports the covenant.<sup>55</sup> The *DeSantis* court reasoned, contrary to *Bland v. Henry & Peter P.C.*,<sup>56</sup> that although consideration could include special training or knowledge to the promisor,<sup>57</sup> consideration was not limited to these two types.<sup>58</sup>

#### *E. Burden of Persuasion in Proving Reasonableness of Covenant Not to Compete*

The party seeking to enforce the postemployment noncompetition covenant has the burden of establishing the reasonableness of the covenant.<sup>59</sup> Consequently, whether an interest is sufficiently protectable to merit an injunction to enforce a covenant will depend on the employer's ability to establish the reasonableness of the covenant's terms. Accordingly, the overwhelming majority of Texas courts have required, in the postemployment noncompetition context, the employer meet this burden of establishing a protectable business interest before the noncompetition covenant will be enforced against his former employee.<sup>60</sup> Although some authority exists to the contrary,<sup>61</sup> the vast majority of Texas courts place the burden on the

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1974, writ ref'd n.r.e.) (consideration need not be monetary, but may take the form of continued employment in exchange for the covenant).

54. See TEX. BUS. & COM. CODE ANN. § 15.50(1) (Vernon Supp. 1991).

55. See *Martin*, 793 S.W.2d at 670 (citing *DeSantis*, 793 S.W.2d at 681); see *infra* note 173 and accompanying text.

56. 763 S.W.2d. 5 (Tex. App.—Tyler 1988, writ denied).

57. See *Martin*, 793 S.W.2d at 669. The court suggested that special training or knowledge acquired by an employee during employment, such as unique, extensive, or confidential training might constitute independent valuable consideration. *Id.* Customer information, the court argued, was not special training or knowledge. *Id.* Thus, the court refused to enforce the noncompetition covenant against *Martin* because it lacked supportive independent consideration. *Id.*

58. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990). In this regard, the *DeSantis* court expressed its disapproval with the language in *Bland* suggesting that special training and knowledge were the only forms of valuable consideration. *Id.*

59. See *McKelvey, Postemployment Noncompetitive Restrictive Covenants in Texas*, 30 S. TEX. L.J. 1, 5 (1988).

60. See *Voorhees v. Johnson*, 538 S.W.2d 271, 272 (Tex. Civ. App.—Beaumont 1976, no writ) (burden of proof is on former employer to show what is reasonably necessary to protect his business); *Hospital Consultants, Inc. v. Potyka*, 531 S.W.2d 657, 663 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (employer has burden to show noncompetition covenant reasonable through existence of supporting facts); *Munzenreider & Assocs. v. Daigle*, 525 S.W.2d 288, 291-92 (Tex. Civ. App.—Beaumont 1975, no writ) (burden is on former employer to establish covenant is no greater than reasonably necessary to protect business interest and goodwill); *Martin v. Kidde Sales & Serv., Inc.*, 496 S.W.2d 714, 719 (Tex. Civ. App.—Waco 1973, no writ) (burden of proof is on former employer to establish both necessity for, and reasonableness of, restrictive covenant it seeks to enforce).

61. Some reported cases in Texas have stated that the burden of proof is on the person challenging the enforcement of the covenant not to compete, and in most cases that person is the employee. See *Arrow Chem. Corp. v. Pugh*, 490 S.W.2d 628, 633 (Tex. Civ. App.—Dallas 1972, no writ); see also *Mosimann v. Employers Casualty Co.*, 354 S.W.2d 171, 172 (Tex. Civ. App.—Houston 1962, no writ) (unless restrictive covenant is unreasonable on its face as a

employer.<sup>62</sup>

Courts place this burden of proof upon employers because they are ostensibly in the best position to gather, organize, and produce evidence. Such evidence is crucial to the court's reasonableness determination and may include sales records, training materials and records, customer lists, employee records, and other relevant information regarding the execution of the non-competition covenant.<sup>63</sup> The employer, rather than the employee, is in the best position to gather evidence because he has free access to such information. Moreover, information solely within the employer's possession regarding the types of activities actually performed by the employee during the period of his employment will be valuable in establishing that the noncompetition covenant is necessary and reasonable. The employer's legitimate need argument is more persuasive if the employee has unique or extraordinary job responsibilities. If so, the employer can more effectively argue harm to his business since such an employee would presumably be difficult to replace.

Based upon the new legislation, the burden of persuasion for the reasonableness issue shifts depending on whether the contract at issue is for personal services<sup>64</sup> or non-personal services.<sup>65</sup> If the underlying agreement's primary purpose is to obligate the promisor to render personal services, the beneficiary carries the burden of establishing<sup>66</sup> that the covenant not to compete meets the criteria specified in section 15.50(2).<sup>67</sup> On the other hand, if the

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matter of law, it is presumptively valid, and burden to prove otherwise is on the party seeking to avoid liability under it); see Newman, *Restrictive Covenants In Employment Contracts*, 35 TEX. B.J. 225, 227 (1972).

62. See e.g., *Allan J. Richardson & Assocs., Inc. v. Andrews*, 718 S.W.2d 833, 835 (Tex. App.—Houston [14th Dist.] 1986, no writ) (burden of proving the reasonableness of and necessity for noncompetition covenant must be borne by employer); *Martin v. Linen Sys. for Hosps., Inc.*, 671 S.W.2d 707, 709 (Tex. App.—Houston [1st Dist.] 1984, no writ) (employer carries burden of proving necessity for and reasonableness of noncompetition agreement); *Waddell v. Lee*, 562 S.W.2d 32, 33 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (former employer must establish through competent evidence both necessity and reasonableness of covenant). The temporary injunction is the most common method by which an employer seeks to enforce the noncompetition covenant. Placing the burden on the employer is consistent with the typical burdens in a temporary injunction suit. Texas courts require the employer to demonstrate probable right to prevail on the merits and probable injury with regard to a legitimate business interest in order to justify enjoining the employee engaging in competitive activity. See *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968).

63. See McKelvey, *supra* note 59, at 6.

64. An example of a personal service contract is a standard contract between an employer and an employee. See Gray, *Covenants Not To Compete*, 1990 TEX. B.J. 585, 586.

65. See TEX. BUS. & COM. CODE ANN. § 15.51(b) (Vernon Supp. 1991). This phrase speaks to the question of whether the agreement's primary purpose is for the rendition of personal services as opposed to a different primary purpose. Since the statute distinguishes between these two types of contracts, courts will treat them differently. *Id.*

Examples of contracts for non-personal services are contracts providing for the sale of stock or assets of a business, sales of franchises, partnership agreements, and leases. Gray, *supra* note 64, at 586.

66. According to § 15.51(b), "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." TEX. BUS. & COM. CODE ANN. § 15.51(b) (Vernon Supp. 1991).

67. *Id.* § 15.51(b). Assuming the contract is one that obligates the promisor to render personal services, § 15.50(b) requires the promisee to make two showings to establish reasonableness: (1) that the covenant incorporate "reasonable limitations as to time, geographical area, and scope of activity to be restrained (2) that do not impose a greater restraint than is neces-

agreement contains a different primary purpose, such as a contract for non-personal services, the legislation shifts to the promisor the burden of establishing that the covenant not to compete fails to meet the criteria listed in section 15.50(2).<sup>68</sup> In other words, the promisor must show that the covenant contains limitations as to time, territory, and scope of activity that are not necessary to protect the goodwill or other business interest of the promisee.<sup>69</sup>

In sharp contrast, courts do not place a similar burden on the promisee in covenants not to compete for the sale of a business.<sup>70</sup> In *Daniel v. Goesl*<sup>71</sup> the court first noted that separate standards concerning the burden of proof governed the two types of noncompetition covenants.<sup>72</sup> Unlike the postemployment setting, a promisee seeking injunctive relief is not required to establish a probable right to prevail on the merits and probable injury because courts effectively presume harm following a breach of the covenant not to compete.<sup>73</sup> The court in *Daniel* concluded that in such situations, damages would be an inappropriate remedy.<sup>74</sup>

### III. THE HISTORICAL BACKGROUND OF NONCOMPETITION RESTRICTIVE COVENANTS

#### A. Types of Noncompetition Covenants Recognized in Texas

Two main categories of covenants not to compete exist in Texas: (1) covenants in which the promisor/seller of a business agrees not to compete with the promisee/buyer of the business<sup>75</sup> and (2) covenants in which the promisor/employee agrees not to compete with the promisee/employer upon termination of the employment relationship.<sup>76</sup> Historically, courts have not enforced all postemployment covenants.<sup>77</sup> Most jurisdictions, however, cur-

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sary to protect the goodwill or other business interest of the promisee." *Id.* Gray offers several examples of evidence that a beneficiary/promisee could present to demonstrate the reasonableness of a covenant not to compete: (1) investment in an employee through training or imparting knowledge; and (2) possession of confidential or proprietary information by an employee. Gray, *supra* note 64, at 586.

68. *Id.* § 15.51(b); see *supra* note 67.

69. *Id.* § 15.50(2). Gray remarks that "[o]nly in unusual circumstances would the promisor be able to sustain this burden of proof." Gray, *supra* note 64, at 586.

70. See *Daniel v. Goesl*, 161 Tex. 490, 341 S.W.2d 892, 896 (1960); see *supra* notes 59-60 and accompanying text.

71. 161 Tex. 490, 341 S.W.2d 892, 896 (1960).

72. *Id.* at 892.

73. *Id.* at 896.

74. *Id.*

75. See *Daniel*, 341 S.W.2d at 896.

76. *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 682 (Tex. 1973).

77. At early common law, postemployment noncompetition covenants were not allowed since courts viewed them as unreasonable restraints on trade and livelihood. See generally *Colgate v. Bacher*, 78 Eng. Rep. 1097, 1097 (Q.B. 1602) (voiding noncompetition covenant even though of limited duration and geographic scope and could be removed by payment); *The Dyer's Case*, Y.B. Mich. 2 Hen. 5, fo. 4, pl. 26 (C.P. 1414) (restraint voided without regard to geographical scope, duration, or reasonableness because illegal at common law); see *Carpenter, Validity of Contracts Not to Compete*, 76 U. PA. L. REV. 244, 244-45 (1928). Professor Blake stresses the significant impact that the guild system governing medieval economy had in shaping courts' initial harsh reaction to covenants not to compete. See *Blake, supra* note 3, at 632-

rently enforce the restrictions that they determine to be reasonable.<sup>78</sup> Because covenants incident to the sale of a business and postemployment noncompetition covenants arise under different factual contexts, separate and distinct principles govern each type of covenant.<sup>79</sup>

Some of the earliest Texas cases considering the enforceability of noncompetition covenants eschewed distinctions between noncompetitive restrictive covenants contained in employment contracts and similar covenants contained in contracts for the sale of a business.<sup>80</sup> A few early Texas cases, however, distinguished restrictive covenants incident to the sale of a business

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34. Commentators urge that the strict per se rule against noncompetition covenants generally existed because the Black Death had eradicated so much of the work force in fourteenth century England that the economy could not afford such restrictions on the alienability of labor. See Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 722-23 (1982).

By the eighteenth century, the apprentice system of the guilds was disappearing and the economic consequences of noncompetition covenants had diminished. See Blake, *supra* note 3, at 638. Consequently, in *Mitchel v. Reynolds* the court replaced the per se rule with a reasonableness inquiry. *Mitchel v. Reynolds*, 24 Eng. Rep. 347, 353 (Q.B. 1711) (court upheld noncompetition covenant where seller of bake shop agreed to pay lessee liquidated damages sum if he breached the covenant by competing in the business within designated area during the five year lease).

The salient issue in *Mitchel* was a restrictive covenant incident to the sale of a business rather than postemployment activities. The court cautioned, however, that postemployment noncompetition covenants were subject to "great abuses . . . from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them . . ." *Id.* at 350. The reasonableness test was nevertheless eventually applied in the employment context as well and, indeed, the "*Mitchel v. Reynolds* approach has survived virtually unchanged to the present-day." See Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 709 (1985).

78. See 14 S. WILLISTON, *supra* note 17, § 1636; RESTATEMENT (SECOND) OF CONTRACTS § 186 (1981) (agreement in restraint of trade unenforceable if "unreasonably" restrains trade); Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing With Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1196 (1973).

79. See *Daniel v. Goehl*, 161 Tex. 490, 341 S.W.2d 892, 896 (1960). In *Daniel* the court noted that separate standards controlled the two types of noncompetition covenants. *Id.* at 895-96. In this case, several doctors who formed a partnership executed a restrictive covenant providing that a retiring partner would not practice medicine, either directly or indirectly, for three years subsequent to his retirement. The remaining partners were obligated to execute a note to the retiring partner for an amount reflecting the book value and goodwill of the partnership. The court treated this obligation as a sale of the retiring partner's holding in the partnership. *Id.* at 894-95. Consequently, when one of the doctors started his own practice, the court found he violated the covenant not to compete and issued a temporary injunction. *Id.* at 894. The retiring partner challenged the issuance of the injunction on the basis that the remaining partners failed to show irreparable injury to the partnership or that the covenant was reasonable and necessary to protect their medical practice. *Id.* at 895-96. Significantly, the court of appeals openly rejected this argument and ruled that although the argument was meritorious in the postemployment context, the argument was inapplicable to a covenant incident to the sale of a business. *Id.* at 896. The court went on to state that the remaining partners did not need to establish irreparable harm because "[w]here an established business has been sold with its goodwill and there is a valid covenant not to compete, a breach is regarded as the controlling factor and injunctive relief follows almost as a matter of course . . ." *Id.* (quote currently found at 43A C.J.S. *Injunctions* § 94 (1978)).

80. See *Gates v. Hooper*, 90 Tex. 563, 565, 39 S.W. 1079, 1080 (1897). In *Gates, Hooper*, a merchant in Batesville, retired and sold his business to Gates. Included in the contract for sale of the business was a provision in which Hooper agreed not to engage in any business in Batesville for one year. The Supreme Court of Texas remanded and reversed the lower court's ruling that held the agreement not to compete void and held that the covenant in question did not violate the Texas Trust Act. *Id.* The court recognized that such covenants were necessary

and restrictive covenants contained in employment contracts.<sup>81</sup> Furthermore, present-day Texas courts recognize the distinctions between the two types of covenants.<sup>82</sup>

*B. The Judicial Evolution of a Reasonableness Test to Determine the Enforceability of Covenants Not to Compete*

In most of the early Texas cases, the courts enforced such covenants according to the letter of their terms.<sup>83</sup> Occasionally, however, the courts re-

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in order to assist the purchaser of a business in acquiring the seller's customers in the area serviced by the business. *Id.*

Subsequently, in *Randolph v. Graham*, 254 S.W. 402, 403 (Tex. Civ. App.—San Antonio 1923, writ ref'd), a physician agreed to refrain from practicing either in Schertz or within a 20-mile radius of Schertz at any time subsequent to the sale of his practice in Schertz, Texas. The court of appeals held that the contract provision in question did not constitute an unreasonable restraint on trade as applied to a skilled artisan or professional. *Id.* at 402-03. The San Antonio court of appeals agreed with the trial court's finding that the area limitation imposed by the covenant was not unreasonable and that the public interest would not be damaged by such an agreement. *Id.* at 403. The court further noted that given the extremely limited and narrow geographic area delineated in the restrictive covenant, the lack of a time restraint did not render the restriction unreasonable. *Id.*

In *Texas Ice & Cold Storage Co. v. McGoldrick*, 284 S.W. 615, 616-17 (Tex. Civ. App.—San Antonio 1926, writ ref'd) McGoldrick sold his ice business in Dallas to a large ice company for which he subsequently became an employee. The contract for the sale of McGoldrick's business included a noncompetition restrictive covenant stating that McGoldrick would not engage in the ice business within the city of Dallas for two years following the termination of his relationship with the ice company. After subsequently being laid off, McGoldrick sought to engage in the selling of ice to ice merchants and peddlers on a wholesale basis rather than selling to individual customers on a retail basis as he had previously done during his employ. The court held that the noncompetition covenant was valid and that the contractual restriction effectively prevented McGoldrick from engaging in the wholesaling as well as the retailing of ice within the city of Dallas. *Id.*

81. For the earliest Texas case recognizing the distinction between noncompetition covenants for the sale of a business and similar noncompetition covenants contained in employment contracts, see *Miller v. Chicago Portrait Co.*, 195 S.W. 619, 621 (Tex. Civ. App.—San Antonio 1917, writ ref'd). In *Miller* a portrait company sought to enforce a one-year noncompetition covenant and a one thousand dollar liquidated damages provision contained in Miller's employment contract after he left the company and began engaging in competitive business. The trial court granted the portrait company injunctive relief. On appeal, the court held that the parties intended the liquidated damages provision as the only available relief in case of breach of the noncompetition covenant. The *Miller* court, in discussing the general state policies regarding postemployment noncompetition covenants, noted:

Courts will not favor contracts that would drive a man out of Texas to seek occupation in a business, with which he is perhaps better acquainted than any other, or put him in another business for which he is not trained or suited. This is a different case from the sale of a business induced by a contract not to engage in a similar business in a named locality in a specified time. The contract in this case is aimed at the right to obtain employment in a similar business. It is an attempt to restrain the right to earn a living . . .

*Id.* at 621 (citation omitted). Accordingly, the San Antonio court of appeals reversed the trial court's issuance of a temporary injunction and remanded the case. *Id.*

82. See generally *Hospital Consultants, Inc. v. Potyka*, 531 S.W.2d 657, 663 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (restrictive covenant in sale of a business or goodwill is quite different from postemployment restrictions). As the *Hill* court suggested, perhaps the reason for the perceived difference lies in the fact that the postemployment noncompetition covenants receive greater scrutiny since employers are presumed to have a superior bargaining position compared to the employee. This inequality of bargaining power is arguably not as evident in the context of selling a business.

83. See generally *McKelvey*, *supra* note 59, at 8 (discussing enforcement of early postem-

fused to enforce the covenants as written and began to carve out a reasonableness standard with regard to the temporal limitations imposed by the covenants.<sup>84</sup> In a case that is illustrative of this trend, *Carpenter v. Southern Properties, Inc.*,<sup>85</sup> the Dallas court of appeals specifically held that noncompetition covenants would be upheld if they contained a reasonable time limitation.<sup>86</sup> In so holding, the court emphasized the fact that the employer properly held the burden of establishing a protectable interest since Texas courts did not look upon noncompetition covenants favorably.<sup>87</sup> Although in this instance the court ultimately enforced the restrictive covenant, finding it both reasonable and necessary to protect the business interests of Southern Properties, Texas courts appeared to be developing, at least with respect to time limitations, a reasonableness standard for evaluating the enforceability of noncompetition covenants. In fact, in a subsequent case, *Martin v. Hawley*,<sup>88</sup> the Dallas court of appeals reaffirmed its previous holding and stated that the applicable standard in determining the covenant's validity was whether the restrictive clause was reasonably necessary to protect the goodwill of the employer's business.<sup>89</sup> The court further held that for the covenant to be enforceable, the time restrictions should be limited and the territorial restriction should be limited to the geographical areas that the employee serviced during his employment.<sup>90</sup>

In a few early Texas cases regarding the enforceability of noncompetition

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ployment noncompetition covenants); see *Jennings v. Shephard Laundries Co.*, 276 S.W.2d 726, 726-27 (Tex. Civ. App.—Galveston 1925, no writ) (court enjoined employee to full extent permitted by covenant not to compete); see *supra* cases cited in note 80.

84. See *Carpenter v. Southern Properties, Inc.*, 299 S.W. 440, 443 (Tex. Civ. App.—Dallas 1927, writ ref'd).

85. *Id.* *Carpenter* managed and owned his own ice delivery business for over twenty years in a West Dallas location. He subsequently sold the assets and equipment of the business to Southern Properties and became a Southern employee, delivering ice within the same territorial areas he had serviced as a proprietor. Included in the contract for sale of *Carpenter's* business was a provision in which he agreed not to engage in any competitive activities such as the sale or delivery of ice within the city of Dallas for a two year period following termination of his relationship with Southern Properties.

86. *Id.*

87. *Id.*

88. 50 S.W.2d 1105, 1108-09 (Tex. Civ. App.—Dallas 1932, no writ). *Hawley*, the past employee, executed a noncompetition agreement providing that he would refrain from engaging in any competitive activities with his former employer, a water company, for a period of five years. One year later, however, *Hawley* became the owner and operator of a corporation selling distilled water. *Martin*, the employer, brought suit to enjoin *Hawley* from competing with his business. The court underscored their concern that "contracts restricting the liberty of employment are not viewed by the courts with favor." *Id.* at 1108. While the court ultimately held that the five-year period was not unreasonable as a matter of law, the court held that the lack of any geographical area limitation within the terms of the covenant rendered the covenant void on its face. *Id.* at 1108-09.

89. *Id.*

90. *Id.* at 1108. Some of the other early Texas cases concerning noncompetition covenants contained in employment contracts began to reflect the view that geographical scope limitations not only be reasonable, but that they also be limited to the areas in which the former employee had actually performed his duties. See *City Ice Delivery Co. v. Evans*, 275 S.W. 87, 90 (Tex. Civ. App.—Dallas 1925, no writ) (employer established necessity for restrictive covenant encompassing the territory or routes in which the former employee had actually delivered ice to the customers of City Ice); Comment, *supra* note 40, at 1208. See also *Bettinger v. North Fort Worth Ice Co.*, 278 S.W. 466, 470-71 (Tex. Civ. App.—Fort Worth 1925,

covenants, at least one appellate court<sup>91</sup> recognized a distinction between the types of services provided by employees who dealt directly with customers, such as the services provided by the route salesmen and ice delivery truck drivers, and those services involving little, if any, contact with customers.<sup>92</sup> The apparent difference was that route salesmen could potentially develop greater personal rapport and client relations that would induce these clients to follow with them if they started a competitive business.<sup>93</sup> By the very nature of the employee's duties, the court of appeals reasoned that Byers would not be able to develop such rapport with clients, nor be likely to secure their business for his own competitive endeavors.<sup>94</sup> This distinction disappeared from Texas case law during the following decades.<sup>95</sup>

Texas courts began to emphasize the protection of the business and goodwill of the employer as the pivotal factors in determining the enforceability of noncompetition covenants.<sup>96</sup> Consequently, some of the later Texas cases focused exclusively on whether the duration and geographical scope covered by the noncompetition covenant were reasonably necessary to protect the business and goodwill of the former employer.<sup>97</sup>

In the landmark case of *Weatherford Oil Tool Co. v. Campbell*,<sup>98</sup> the Supreme Court of Texas first articulated a judicial standard for determining the enforceability of noncompetition covenants.<sup>99</sup> The court noted at the outset that noncompetition covenants were in restraint of trade and thus must be reasonable before they would be enforced.<sup>100</sup> In declaring the proper test to evaluate the covenant's validity, the *Weatherford* court stated

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no writ) (court held that trial court should have limited scope of injunction issued in favor of employer to areas actually covered by employee's former routes).

91. See *Byers v. Pecos-Abstract Co.*, 18 S.W.2d 1096, 1098 (Tex. Civ. App.—El Paso 1929, writ dismissed).

92. *Id.* In *Byers* an abstract company sought to enforce a two-year noncompetition covenant restraining former employee Byers from pursuing future work as an abstractor in Brewster County. The trial court initially enjoined Byers from competing in the abstract business for two years, relying on the fact that during his employ, Byers had acquired knowledge of the business, clientele, books, records, and methods. *Id.* at 1098. The court of appeals distinguished the type of services provided by Byers and those services provided by route salesmen. *Id.* at 1099. First, the court noted that employees assigned to solicit customers in a certain territory or route were not engaged in the work of a common laborer, unlike Byers. Instead, the court reasoned that employers generally held route salesmen, along with persons engaging in similar activities, personally responsible for promoting the success of the business. *Id.* Next, the court argued that Byers could not be reasonably expected to take the customers or clients with him when he left the company, taking into account the types of activities Byers performed during his employ. Accordingly, the court reversed the trial court's judgment and ordered that the temporary injunction be dissolved. *Id.*

93. *Id.*

94. *Id.*

95. See *McKelvey*, *supra* note 59, at 16.

96. *Id.*; see *Southern Properties, Inc. v. Carpenter*, 21 S.W.2d 372, 374 (Tex. Civ. App.—Dallas 1929, writ dismissed).

97. See *Southern Properties*, 21 S.W.2d at 375; *Byers v. Pecos-Abstract Co.*, 18 S.W.2d 1096, 1099 (Tex. Civ. App.—El Paso 1929, writ dismissed).

98. 161 Tex. 310, 340 S.W.2d 950 (1960).

99. *Id.* at 951.

100. *Id.* at 951. The court stated that "[a]n agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable." *Id.*



that the covenant must not "impose[ ] any greater restraint [upon the employee] than is reasonably necessary to protect the business and goodwill of the employer."<sup>101</sup> In so holding, the court introduced an additional consideration into the determination of a covenant's validity—the hardship to the employee created by the restraint. Furthermore, the court held that a restraint on competition is unreasonable "if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted."<sup>102</sup>

The *Weatherford* court emphasized the importance of the duration of the restraint and the geographical limitations imposed by the covenant.<sup>103</sup> The court further held that the covenant not to compete must bear some relation to the employee's activities.<sup>104</sup> If a restriction contained in a noncompetition covenant is overbroad as to time, territory, or scope of activity, the covenant will not satisfy this requirement.<sup>105</sup>

*C. The Adoption of a Four-Part Reasonableness Test and the Common Calling Standard: Hill v. Mobile Auto Trim, Inc.*

The test announced in *Weatherford* remained the prevailing standard for judging the enforceability of postemployment noncompetition covenants until the Texas Supreme Court's landmark decision in *Hill v. Mobile Auto Trim, Inc.*<sup>106</sup> In that case, Mobile Auto Trim, the franchisor, obtained a

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101. *Id.* Further, the *Weatherford* court explained that under the RESTATEMENT (SECOND) OF CONTRACTS a restraint of trade is unreasonable "if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted." *Id.*

102. *Id.* Additionally, the RESTATEMENT (SECOND) OF CONTRACTS (1981) provides that a covenant is unenforceable if it is an unreasonable restraint on competition. Section 187 states that a covenant that is not ancillary to a valid transaction or relationship is unreasonable. Section 188 says that a covenant is unreasonable if the restraint is greater than is needed to protect the promisee's legitimate interests or if the promisee's need is outweighed by the hardship to the promisor and the interest of the public.

103. *Weatherford*, 340 S.W.2d at 951.

104. *Id.* at 952 (quoting *Wisconsin Ice & Coal Co. v. Lueth*, 213 Wis. 42, 250 N.W. 819, 820 (Wis. 1933)).

105. See *Tandy Brands, Inc., v. Harper*, 760 F.2d 648, 653 (5th Cir. 1985) (covenant covering "almost all of the North American continent" unreasonable) (applying Texas law); see also *Matlock v. Data Processing Sec., Inc.*, 618 S.W.2d 327, 329 (Tex. 1981) (covenant prohibiting competition in the entire United States invalidated since employer did not serve such an expansive market). In effect, the reasonableness of the territorial limitation will turn on whether the area is limited to the area that the former employee actually covered during his employ. Compare *Cawse-Morgan v. Murray*, 633 S.W.2d 348, 350 (Tex. App.—Corpus Christi 1982, no writ) (twenty-five mile limitation overbroad) with *Gillen v. Diadrill, Inc.*, 624 S.W.2d 259, 263 (Tex. App.—Corpus Christi 1981, no writ) (limitation covering marketing areas previously served by employee reasonable) and *Martin v. Kidde Sales & Serv. Inc.*, 496 S.W.2d 714, 718-19 (Tex. Civ. App.—Waco 1973, no writ) (limitation covering Harris County unreasonable).

106. 725 S.W.2d 168, 172 (Tex. 1987). *Hill* involved a franchise agreement executed between the franchisee Hill and the franchisor Mobile Auto Trim, Inc., (Mobile), covering seven counties, including all of Denton County and a substantial part of Dallas County. Mobile sold car trim franchises which required the franchisees to drive equipped vans to car dealerships in order to make car repairs on the dealerships' premises. The franchise agreement contained a covenant not to compete, providing that Hill would not compete with the business or any of the franchisees upon termination of his franchise. Accordingly, Hill agreed to tender a purchase price of \$42,000 plus 5% of his gross revenues in the franchise. The covenant not to

temporary injunction to enforce the covenant not to compete contained in the franchise agreement.<sup>107</sup> The Supreme Court of Texas reversed both lower courts, declaring the covenant not to compete unenforceable.<sup>108</sup> While the court repeated the fundamental principle that covenants not to compete had to be reasonable in order to be enforced by courts,<sup>109</sup> the *Hill* decision marked a dramatic shift by Texas courts from the post-Weatherford practice of reforming unreasonable covenants.

Rather than reforming the covenant as the dissent would have done, the court instead adopted a new test from the Supreme Court of Utah in *Robbins v. Finlay*,<sup>110</sup> known as the common calling standard. Specifically, the *Hill* court held that covenants not to compete created primarily to limit competition or restrain the rights of individuals to engage in common occupations were unenforceable.<sup>111</sup> Beyond the court's mere declaration that Texas courts would apply the Utah standard,<sup>112</sup> the court did not elaborate on the precise meaning of the common calling standard, nor did they provide any guidance as to what types of occupations would fall within the standard.<sup>113</sup> With the *Hill* court's assertion that restrictive covenants within the sphere of common callings were conclusively unenforceable, Texas courts would be precluded from employing the balancing test when the court found the employee engaged in a common calling.<sup>114</sup>

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compete extended for three years beyond Hill's termination of employment. Hill conducted business as Mobile's franchisee for two and a half years, contacting car dealerships and making auto trim repairs in his two-county area. When Hill subsequently fell behind on his franchise fees for several months, Mobile picked up his van and cancelled the franchise agreement. That same day, Hill contacted a car dealership manager within Dallas County who had previously been a Mobile customer.

107. *Id.* at 170. The trial court granted the temporary injunction covering the seven-county and three-year restrictions contained in the covenant not to compete, and the court of appeals affirmed the trial court's decision. *Id.*

108. *Id.*

109. *Id.* In so doing, the *Hill* court reinforced the previously accepted standard set forth in *Weatherford*, stating that a covenant is unreasonable "if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted." *Id.* at 170 (quoting *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 951 (1960)).

110. 645 P.2d 623, 627 (Utah 1982).

111. *Hill*, 725 S.W.2d at 172 (citing *Robbins*, 645 P.2d at 627).

112. Although the Supreme Court of Utah first utilized the common calling test which the Texas Supreme Court later adopted, even the Utah court itself later ignored the common calling test in holding a covenant not to compete enforceable in a decision after *Robbins*. See *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 426 (Utah 1983); *LaFuze, Proposed Covenant Not To Compete*, 52 TEX. B.J. 149, 150 (1989).

113. *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 172 (Tex. 1987) (quoting *Robbins*, 645 P.2d at 627). The court, however, suggested that a common calling consists of activities that do not require extensive, highly sophisticated training in a complex field. The level of sophistication that will prevent an occupation from being designated a common calling is uncertain. See *McKelvey*, *supra* note 59, at 93-94. See also *Unitel Corp. v. Decker*, 731 S.W.2d 636, 640 (Tex. App.—Houston [14th Dist.] 1987, no writ) (noncompetition agreement held enforceable after finding that employee received extensive, unique, and confidential training from employer).

114. *Hill*, 725 S.W.2d at 172. The prevailing standard prior to *Hill*, as set forth in *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950 (1960), called for a balancing of the business interest of the employer, the hardship to the employee, and the free competition interests of the public. *Id.* at 951.

Significantly, the *Hill* court set forth a four-part reasonableness test based on prior case law for determining the enforceability of all covenants not to compete under Texas law.<sup>115</sup> The four criteria are as follows: first, the covenant must be necessary for the protection of the promisee, generally meaning that the promisee must have a legitimate interest in business goodwill or trade secrets that is worthy of protection;<sup>116</sup> second, the covenant must not be oppressive to the promisor;<sup>117</sup> third, the covenant must not be injurious to the public;<sup>118</sup> and fourth, the covenant must be supported by consideration.<sup>119</sup> To date, the Texas Supreme Court has not provided a definition of common calling.<sup>120</sup> Moreover, the court left unanswered the perplexing question of what effect the standard would have on previous case law, particularly the *Weatherford* decision.<sup>121</sup>

In a subsequent case, *Bergman v. Norris of Houston*,<sup>122</sup> the Supreme Court of Texas attempted to expand the common calling standard while further limiting the scope of enforceable noncompetition covenants.<sup>123</sup> In *Bergman* the court invalidated postemployment noncompetition covenants contained in the employment contracts of three hairstylists, a manicurist, and the manager of a hairdressing salon.<sup>124</sup> The court noted that the manager's duties did not substantially differ from those of the hairstylists.<sup>125</sup> The court refused to enforce the restrictive covenants on the basis that they restrained the right to engage in a common calling.<sup>126</sup> The court specifically stated that barbering was a common calling occupation.<sup>127</sup> In creating this additional common calling class, the supreme court presumably meant to clarify its previous holding in *Hill*.<sup>128</sup> Nevertheless, the standard remained vague and

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115. *Hill*, 725 S.W.2d at 170-71.

116. *Id.*

117. *Id.* With regard to this second prong, the court indicated that time, territory, and scope of activity limitations had to be reasonable. *Id.* at 171.

118. *Id.* In articulating the public interest prong, the court noted that "courts are reluctant to enforce covenants which prevent competition and deprive the community of needed goods." *Id.* (citing *Weatherford*, 340 S.W.2d at 951).

119. *Id.* at 171.

120. *Hill*, 725 S.W.2d at 177 (Gonzales, J., dissenting). Likewise, the Utah Supreme Court in *Robbins*, the case from which the Texas Supreme Court borrowed the standard, is silent as to any definition for the standard.

121. *Id.* at 175.

122. 734 S.W.2d 673 (Tex. 1987).

123. *Id.* at 674.

124. *Id.* at 674-75. In this case, the three hairstylists and a manager signed noncompetition covenants contained in their employment contracts providing that for a three-year period and within a fifteen-mile radius, they would not "compete in any hair styling or barbering business, divulge any trade secret, or solicit or divert customers from Norris." *Id.* at 674. The former employees left one salon, Norris, and began working at another nearby salon located approximately three miles from the Norris salon. The former employees also took a large number of their clientele with them after leaving Norris. The owner of the first salon brought suit on the covenants signed by the former employees.

125. *Id.*

126. *Id.*

127. *Bergman v. Norris of Houston*, 734 S.W.2d 673, 674 (Tex. 1987) ("[b]arbering, however labeled, is a common calling.").

128. In fact, the *Bergman* court held that the issue of whether an employee is engaged in a common calling is a question of law to be decided on a case-by-case basis in light of the surrounding facts. *Id.*

unclear, providing relatively little guidance for the appellate courts.

#### IV. THE PRESENT STATUS OF TEXAS CASE LAW ON POSTEMPLOYMENT NONCOMPETITION COVENANTS

##### A. *The Struggle in Applying the Common Calling Standard*

Several recent cases have provided examples of what is and what is not a common calling.<sup>129</sup> The absence of a supreme court definition of common calling has left the determination of which occupations qualify as common callings solely to judicial interpretation. The supreme court's failure to articulate a precise definition has produced a quandary in the lower courts in attempting to delineate the parameters for the standard's application to post-employment restrictive covenants.

For example, in *Travel Masters, Inc. v. Star Tours, Inc.*,<sup>130</sup> the court of appeals, unable to find an applicable definition of the term, common calling, consulted a conventional dictionary and combined the separate definitions for "common" and "calling" in order to create a functional definition.<sup>131</sup> The court found that a common calling was "a vocation or profession of the usual type which is entirely ordinary and undistinguished."<sup>132</sup> Applying this formulation, the court held that an office manager of a travel agency was not engaged in a common calling.<sup>133</sup> The court then employed the four-part

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129. Compare *Martin v. Credit Protection Ass'n*, 31 Tex. Sup. Ct. J. 626, 626 (July 13, 1988), *withdrawn*, 793 S.W.2d 667 (Tex. 1990) (salesman is a common calling); *Bergman*, 734 S.W.2d at 673 (barbering is a common calling); *Hill*, 725 S.W.2d at 172 (auto trim repairman is a common calling) with *DeSantis v. Wackenhut Corp.*, 31 Tex. Sup. Ct. J. 616 (July 13, 1988), *withdrawn*, 793 S.W.2d 670 (Tex. 1990) (office manager who was key employee was not engaged in a common calling) and *Travel Masters Inc. v. Star Tours, Inc.*, 742 S.W.2d 837, 841 (Tex. App.—Dallas 1987, writ *dism'd w.o.j.*) (travel agent who was also office manager was not engaged in a common calling).

130. 742 S.W.2d 837, 839 (Tex. Civ. App.—Dallas 1987, writ *dism'd w.o.j.*). In this case Goldsmith, a travel agent and office manager, signed a noncompetition agreement with her employer, Star Tours, providing that she would "not disclose to any other persons, firms, or entities in the same or similar business as Employer, the names of customers." *Id.* After leaving Star Tours, Goldsmith subsequently joined another travel agency, violating the terms of the noncompetition agreement. The trial court entered a temporary injunction restraining the former employee from soliciting a specified list of Star Tours' customers. *Id.* The court of appeals affirmed the trial court, relying on the fact that Goldsmith actually solicited the clients and thus caused financial hardship to Star Tours as evidenced by a sharp decline in its business. *Id.*

131. *Id.* at 840. The Dallas court of appeals found that common is defined as "'of a usual type or standard; quite usual and average; entirely ordinary and undistinguished.'" Calling means "'the activity in which one customarily engages as a vocation or profession.'" *Id.* at 840-41.

132. *Id.* (quoting *Webster's New International Dictionary* 458 (3d ed. 1981)).

133. *Id.* at 841. See also *Cujkati v. Burkett*, 772 S.W.2d 215, 217 (Tex. App.—Dallas 1989, no writ) (veterinarian/office manager not engaged in common calling). Accordingly, in *Cujkati* the Dallas court of appeals analyzed the noncompetition covenant in question under the *Hill* framework. The court first concluded that *Cujkati*, the owner and employer of the veterinary clinic, did not have a legitimate interest in protecting its business since the employee had not received any special training nor acquired any trade secrets warranting such protection. *Id.* at 217. Next, the court found that a twelve-mile restriction was unreasonable based on the fact that most pet owners traveled short distances to obtain pet care. Finally, the court found that there was no consideration to support the noncompetition covenant, relying on the supreme court's previous holding in *DeSantis*, in which the court found a lack of consideration

*Hill* analysis and upheld the enforceability of the noncompetition covenant.<sup>134</sup>

In another case, *B. Cantrell Oil Co. v. Hino Gas Sales, Inc.*,<sup>135</sup> the court reviewed the *Travel Masters* opinion and elucidated the definition for common calling somewhat, adding that a person engaged in a common calling is "one who performs a generic task for a living, one that changes little no matter for whom or where an employee works."<sup>136</sup> In *Hoddeson v. Conroe Ear, Nose, & Throat Associates*<sup>137</sup> the court attempted to apply the common calling standard without furnishing a definition for it.<sup>138</sup> Over a vigorous dissent, the *Hoddeson* court held that a doctor specializing in ear, nose, and throat medicine was engaged in a common calling.<sup>139</sup> The *Hoddeson* court asserted that absent clear and convincing proof to the contrary, a presumption that the employee had not bargained away the future use of his talents properly applied.<sup>140</sup> A comparison of the definitions formulated by the courts in *Travel Masters* and *Hoddeson* reveals inconsistencies in the application of the common calling standard. Unfortunately, neither the dictionary

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because the employee had prior experience and did not obtain special knowledge or training. *Id.* at 218 (quoting *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 171 (Tex. 1987)).

134. *Id.* at 840. Applying the four-pronged test of *Hill*, the *Travel Masters* court found that: (1) the covenant was necessary since the travel agency business was a competitive business and the business goodwill and the customer list were important to the business's continued success; (2) the covenant was not oppressive to the promisor since the former employee could seek work anywhere, and since the only limitation simply prohibited the employee from soliciting any of the travel agency's clients for two years; (3) the public would not be harmed by restricting the former employee from soliciting a limited number of Star Tours' clients; and (4) the former employee received valid consideration in the form of continued employment and additional training for her managerial position. *Id.* at 840-41.

135. 756 S.W.2d 781, 783 (Tex. App.—Corpus Christi 1988, no writ). In *B. Cantrell*, employee Renteria worked for Hino Gas as a retail operations manager under an employment contract providing that he would not compete against Hino Gas in Cameron County for 18 months after termination of employment. Renteria subsequently went to work for Lone Star, a new competitor with Hino Gas. Hino Gas ultimately obtained an injunction preventing Renteria from violating the noncompetition covenant. The court of appeals affirmed, finding that the covenant was necessary for the protection of the company's confidential operations and that the temporal and territorial limitations were not oppressive to Renteria. *Id.* The court further held that the covenant was not injurious to the public, based on evidence that the propane business had escalated in Renteria's absence and that the price of gas had decreased. *Id.* Finally, the court ruled that Renteria's pay raise and share of company profits constituted valuable consideration supporting the covenant. *Id.*

136. *Id.*

137. 751 S.W.2d 289 (Tex. App.—Beaumont 1988, no writ).

138. *Id.* at 290. In *Hoddeson*, the Beaumont court of appeals reversed the trial court's issuance of a temporary injunction and refused to enforce a noncompetition covenant between a physician certified as an ear, nose, and throat specialist and his employer/clinic; the covenant restrained the doctor from practicing medicine in Montgomery County for five years after his termination of employment. *Id.* While the court found that the covenant violated each of the four *Hill* criteria in some respects, the court grounded much of its holding on the fact that the covenant was injurious to the public because it was designed solely to protect the clinic from competition. *Id.*

139. *Id.* In so holding, the court noted that the professional association, in its capacity as the doctor's employer, "did not impart trade secrets, specialized training, or confidential information to [the doctor]," and thus the covenant, if enforced, would effectively prevent the doctor "from using his previously acquired skills and talent to support him and his family . . . ." *Id.*

140. *Id.* (quoting *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 172 (Tex. 1987)).

definitions of the words "common" and "calling" nor the holding that an ear, nose, and throat specialist is a common calling occupation will prove instructive to lower courts in their future attempts to determine whether a particular occupation is a common calling.

Following *Hill* and its progeny, the courts placed noncompetition covenants under greater scrutiny, mandating strict compliance with the four-pronged *Hill* standard as a prerequisite for enforceability.<sup>141</sup> The courts stated that only covenants involving either the sale of a business or the imparting of specialized training or knowledge to the employee were enforceable.<sup>142</sup> Finally, if the primary purpose of a covenant was to limit competition and restrain the right of an individual to engage in a common calling, under no circumstances would the courts enforce such noncompetition covenants.<sup>143</sup>

### B. Two Recent Texas Supreme Court Decisions

The Supreme Court of Texas continued its assault upon contractual restraints on competition imposed by covenants not to compete in two recent cases. First, in *Martin v. Credit Protection Association*<sup>144</sup> the court invalidated a postemployment noncompetition covenant contained in Martin's employment contract.<sup>145</sup> The restrictive covenant prevented Martin from selling, soliciting, or contacting customers of the collection agency for a three-year period. Martin served first as a marketing director and soon advanced to the position of vice-president of the company. The supreme court held salesmen to be a common calling occupation, despite Martin's elevated position in the business.<sup>146</sup>

Applying the *Hill* criteria, the court found that the employer had no trade secrets, although the company's significant interest in its customer information warranted reasonable limitations.<sup>147</sup> The court summarily dismissed this justification, however, on the basis that customer information did not constitute special training or knowledge, thus strongly suggesting that there was no valuable consideration to support the noncompetition covenant.<sup>148</sup>

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141. See *Martin v. Credit Protection Ass'n*, 31 Tex. Sup. Ct. J. 626, 626 (July 13, 1988), *withdrawn*, 793 S.W.2d 667 (Tex. 1990) (postemployment covenant not to compete in the employment contract of a vice-president unenforceable); *DeSantis v. Wackenhut Corp.*, 31 Tex. Sup. Ct. J. 616, 617 (July 13, 1988), *withdrawn*, 793 S.W.2d 670 (Tex. 1990) (covenant not to compete included in office manager's employment contract unenforceable).

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

143. *Id.* at 172.

144. 793 S.W.2d 667, 670 (Tex. 1990).

145. *Id.* at 668. Martin, a salesman and also a vice-president for a credit protection collection agency, signed a noncompetition agreement in which he agreed not to sell, solicit, or contact customers of the business for three years following termination of his employment. Martin subsequently left the company and within a few days time, he started his own collection agency. As a result of his solicitation of the agency's customers, the former employer sought to enjoin Martin's competitive activities.

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

147. *Id.*

148. *Id.* Accordingly, the supreme court reversed the lower courts' holdings and indicated its unwillingness to restrain the right of any individual to pursue a common calling occupation. *Id.*

The *Martin* court further limited the scope of permissible noncompetition covenants by declaring that covenants not to compete were only enforceable in two instances: "(1) covenants incident to the sale of a business; and (2) postemployment covenants to prevent utilizing special training or knowledge."<sup>149</sup>

On the same day that the court decided the *Martin* opinion, the Supreme Court of Texas handed down another important decision, *DeSantis v. Wackenhut Corp.*,<sup>150</sup> in which the court declared a noncompetition covenant contained in the employment contract of a security company executive unenforceable.<sup>151</sup> A discussion of the salient facts in the *DeSantis* case is critical to an understanding of the court's complicated analysis. Edward DeSantis spent his career in the security business, both in the CIA and in the private sector. In 1981, George Wackenhut, the founder, president, and largest shareholder of Wackenhut Corporation, a company specializing in providing security guard services to various businesses, offered DeSantis a position as area manager of the corporation's regional Houston office.<sup>152</sup> Upon DeSantis's acceptance, he signed a noncompetition covenant that included an agreement that Florida law would govern any disputes concerning interpretation or enforcement of the covenant. Significantly, Florida statutory law generally approves the enforcement of postemployment noncompetition covenants.<sup>153</sup> The noncompetition covenant precluded DeSantis from engaging in any postemployment competition with Wackenhut in a forty-county area surrounding Houston for a two-year period.

After three years with the company, DeSantis resigned and started a new company, Risk Deterrence, Inc. (RDI), to provide security consulting and security guard services to a limited number of clients. DeSantis contacted approximately twenty or thirty companies, half of which were Wackenhut customers. Consequently, DeSantis obtained two of these customers as his own clients.<sup>154</sup> After learning of these contracts, Wackenhut brought suit against DeSantis and RDI for injunctive relief, monetary damages for breach of the noncompetition covenant, and tortious interference with contract and business relations.<sup>155</sup>

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149. *Id.*

150. 31 Tex. Sup. Ct. J. 616, 617 (July 13, 1988), *withdrawn*, 793 S.W.2d 670 (Tex. 1990).

151. *Id.*

152. Wackenhut Corporation, the third largest security service company in the industry, had a policy of requiring all company employees, including senior executives, to sign noncompetition covenants.

153. *DeSantis*, 793 S.W.2d at 680; see Fla. Stat. § 542.33 (1990). Moreover, injunctive relief may be more readily attainable in Florida since Florida courts presume irreparable harm to the employer when the past employee engages in competitive activities. By way of comparison, Texas applies a rigorous standard for parties seeking to enforce a restrictive covenant through a temporary injunction, placing the burden on the employer to establish a probable right to prevail on the merits, and probable irreparable injury in the interim. See *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968).

154. Two of Wackenhut's customers, Marathon Oil Company and TRW Mission Drilling Products, apparently dissatisfied with Wackenhut's services, entered into security services contracts with DeSantis' newly formed company, RDI.

155. *DeSantis*, 793 S.W.2d at 676. DeSantis and RDI counterclaimed for fraud, tortious interference with contract, and for money damages for wrongful issuance of a temporary in-

Subsequent to a jury trial, the court reformed the noncompetition covenant to cover only thirteen counties and enjoined DeSantis from competing with Wackenhut for a two-year period.<sup>156</sup> Once modified to a reasonable territorial limitation, the trial court enforced the covenant, and the court of appeals affirmed.<sup>157</sup> The Texas Supreme Court refused to apply Florida law to the covenant, holding that Florida law was inconsistent with the fundamental Texas public policy of promoting free mobility of its employees in the job market.<sup>158</sup>

The court initially determined that the former employee was not engaged in a common calling, given the extent of his responsibilities as an area manager,<sup>159</sup> but also held that the covenant failed to withstand scrutiny under the *Hill* four-part standard.<sup>160</sup> First, the supreme court concluded that the noncompetition covenant was not necessary to protect the employer.<sup>161</sup> While an employer's legitimate business interests in protecting business goodwill or trade secrets typically satisfy this prong, the court determined that Wackenhut lacked a legitimate business interest.<sup>162</sup> With regard to the consideration requirement of *Hill*, the *DeSantis* court concluded that there was no consideration to support the covenant since DeSantis did not obtain any special knowledge or training from Wackenhut.<sup>163</sup> The court also relied on the fact that DeSantis had acquired fourteen years of experience in the security business prior to signing on with Wackenhut.<sup>164</sup> Consequently, the court held that the covenant was unreasonable and vacated the prior issuance of an injunction.<sup>165</sup>

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junction, and other violations of the Texas Free Enterprise and Antitrust Act. *Id.* (citing TEX. BUS. & COM. CODE ANN. § 15.01 (Vernon Supp. 1991)).

156. *Id.* at 676. The trial court also prohibited DeSantis from disclosing client lists or divulging confidential business information. *Id.* With regard to RDI, the trial court permanently enjoined this company from disclosing or using any confidential or proprietary information acquired through DeSantis's efforts during his employ at Wackenhut. Furthermore, the court enjoined RDI from employing DeSantis for a two-year period in any capacity or for any competitive activities in the thirteen counties. All of the counterclaims brought by DeSantis and RDI were ultimately denied. *Id.*

157. *Id.* at 677.

158. *Id.* at 679-80. In fact, the court noted that the law governing enforcement of postemployment noncompetition covenants tracked fundamental Texas policy. Specifically, the court observed that "the freedom to move from one job to another . . . benefits both the state and the individual." *Id.* (citing *Hill*, 725 S.W.2d at 171). Therefore, Texas law governs the enforceability determination since Texas has a materially greater interest than Florida does in determining the enforceability of the covenant. *Id.* at 679. The court reasoned that "[a]t stake here is whether a Texas resident can leave one Texas job to start a competing Texas business." *Id.*

159. *DeSantis*, 31 Tex. Sup. Ct. J. at 620. As office manager in the Houston office, Wackenhut held DeSantis responsible for handling gross revenues in the millions of dollars. Additionally, DeSantis headed all operations, contracts, proposals, and client development for the Houston office. *Id.*

160. *Id.*

161. *DeSantis*, 793 S.W.2d at 684. Specifically, the court held that the jury's failure to find that Desantis was able to appropriate any business goodwill was tantamount to a failure to find that the covenant was necessary to protect Wackenhut. *Id.* at 683.

162. *Id.* at 684.

163. *DeSantis*, 31 Tex. Sup. Ct. J. at 620 (citing *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 171 (Tex. 1987)).

164. *Id.*

165. *Id.*



C. *The Legislative Amendments: Texas Business and Commerce Code Sections 15.50 and 15.51*

In 1989 while the *DeSantis* case was pending before the Texas Supreme Court for the second time, the Texas Legislature passed Senate Bill 946.<sup>166</sup> Consequently, the legislature amended Chapter 15 of the Texas Business and Commerce Code, adding sections 15.50 and 15.51, which address covenants not to compete.<sup>167</sup> The purpose of the new legislation is three-fold in that the sections: (1) codify the criteria for enforceability of covenants not to compete; (2) provide evidentiary standards for the enforceability of covenants not to compete; and (3) mandate judicial reformation of otherwise enforceable covenants that are unreasonable in terms of the scope of activity to be restrained or the geographical limitations imposed.<sup>168</sup> The legislature expressly made this amendment applicable to a covenant entered into before, on, or after the effective date of this Act.<sup>169</sup> Thus, the statute certainly governs covenants not to compete entered into after August 28, 1989, the effective date of the legislation.<sup>170</sup>

According to sections 15.50 and 15.51, a covenant not to compete will be enforceable when the following four questions are answered in the affirmative.

1. Is the covenant not to compete ancillary to an otherwise enforceable agreement?<sup>171</sup>
2. Will the covenant not to compete be executed on a date other than the date on which the underlying agreement is executed?<sup>172</sup>

If so, is the covenant not to compete supported by independent valuable consideration?<sup>173</sup>

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166. Senate Bill 946 amends the Texas Business and Commerce Code by adding Subchapter E (§§ 15.50-.51) which addresses covenants not to compete.

167. See TEX. BUS. & COM. CODE ANN. §§ 15.50-.51 (Vernon Supp. 1991). Sections 15.50-.51 appear in a subchapter of the Texas and Business Commerce Code entitled "Covenants Not to Compete." These sections set forth criteria which unquestionably govern the enforceability of covenants not to compete entered into after August 28, 1989, the effective date of the legislation. See Gray, *supra* note 64, at 585, 586 n.2.

Section § 15.50(1) of the Act entitled, "Criteria for Enforceability of Covenants not to Compete," provides that:

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.

TEX. BUS. & COM. CODE ANN. § 15.50(1) (Vernon Supp. 1991).

168. Gray, *supra* note 64.

169. *Id.*

170. *Id.* at 586 n.2.

171. See TEX. BUS. & COM. CODE ANN. § 15.50(1) (Vernon Supp. 1991).

172. *Id.*

173. One commentator and chairperson of the ad hoc committee of the Business Law Section that drafted the legislation, maintains that the drafters intended the statutory language requiring independent valuable consideration "to apply to a covenant not to compete that is obtained by an employer subsequent to the execution of an employment agreement" and therefore, effectively eliminate continued employment as sufficient consideration for such covenants.

If not, go to criterion 3.

3. Does the covenant not to compete incorporate reasonable limitations as to time, geographical area, and the scope of activity restrained?<sup>174</sup>

4. Do such reasonable limitations impose the minimal restraint necessary to protect the goodwill or other business interest of the beneficiary/promisee?<sup>175</sup>

*D. A Second Look at DeSantis v. Wackenhut Corp. by the Supreme Court of Texas*

Presumably in contemplation of the legislation's proposed intent to statutorily abolish the common calling standard and to reinstate judicial reformation of unreasonable covenants, the Supreme Court of Texas granted motions for rehearing in *DeSantis* on June 6, 1990.<sup>176</sup> With Justice Hecht writing for the majority, the court withdrew the prior *DeSantis* opinion and judgment<sup>177</sup> and substituted a new opinion<sup>178</sup>. Once again, the court held that Texas law governed the enforceability question and that the noncompetition covenant was therefore unenforceable.<sup>179</sup>

The *DeSantis* court held that the covenant in question was unreasonable, and thus unenforceable, based on its analysis of three common law criteria.<sup>180</sup> First, the covenant not to compete was indisputably ancillary to Wackenhut's employment of DeSantis, which the court deemed an otherwise valid relationship.<sup>181</sup> Second, the business goodwill arguably developed by DeSantis for Wackenhut failed to constitute a legitimate interest warranting protection by the enforcement of a covenant not to compete.<sup>182</sup> The

Gray, *supra* note 64. A literal reading of the statute as written, however, requires that there be independent valuable consideration (1) whether the covenant not to compete is executed before or after the underlying agreement, or (2) whether the underlying agreement is an employment agreement or another type of agreement. See TEX. BUS. & COM. CODE ANN. § 15.50(1) (Vernon Supp. 1991).

174. See TEX. BUS. & COM. CODE ANN. § 15.50(2) (Vernon Supp. 1991).

175. *Id.*

176. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 674 (Tex. 1990).

177. 31 Tex. Sup. Ct. J. 616, 617 (July 13, 1988).

178. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990), *withdrawing*, 31 Tex. Sup. Ct. J. 616 (July 13, 1988).

179. *Id.* at 684. The court used the rule of limited party autonomy formulated in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) to determine what law should govern the contract; it held that the enforceability of the covenant not to compete "must be judged by Texas law," not by Florida law as chosen by the parties. *DeSantis*, 793 S.W.2d at 677-81.

180. *DeSantis*, 793 S.W.2d at 684.

181. *Id.* at 683. The court specifically identified the legal dispute in the case to be "whether the agreement was necessary to protect some legitimate interest of Wackenhut, and whether that necessity was outweighed by the hardship of enforcement." *Id.*

182. *Id.* In fact, the *DeSantis* court stated that "[t]he evidence that DeSantis ever developed business goodwill for Wackenhut, . . . [was] exceedingly slight . . . little more than testimony that DeSantis occasionally entertained representatives of Wackenhut's clients." *Id.* Even assuming the existence of goodwill, the *DeSantis* court reasoned that "there [was] no showing that [DeSantis] did or even could divert that goodwill to himself for his own benefit after leaving Wackenhut." *Id.* But see *Henshaw v. Kroenecke*, 656 S.W.2d 416, 418 (Tex. 1983), where the Texas Supreme Court held that protection of client rapport was a legitimate interest to protect. *Id.* In that case, the court held that the original owner of a business in a

court pointed out that dissatisfaction with Wackenhut's services, not goodwill developed by DeSantis during his employ with Wackenhut, prompted one customer to move its business from Wackenhut to DeSantis.<sup>183</sup> Third, the court emphatically held that Wackenhut "failed to show that it needed such protection in this case."<sup>184</sup> For these reasons, the hardship of the restraint on DeSantis's right to compete outweighed any need to protect a legitimate business interest of Wackenhut.<sup>185</sup>

The *DeSantis* court carefully avoided application of the recent legislation although it specifically held that the noncompetition covenant at issue was no more enforceable under the new amendments than under established common law principles.<sup>186</sup> The court expressly declined to consider the effect of the new sections 15.50 and 15.51 on covenants not to compete entered into prior to the effective date of the Act, instead leaving the resolution of those issues for another day.<sup>187</sup> Additionally, the court did not address how the recent legislation altered the common law principles governing covenants not to compete.<sup>188</sup>

In holding the covenant unenforceable, the *DeSantis* court embraced a reasonableness analysis rather than applying either the four-part *Hill* test or the common calling standard.<sup>189</sup> The supreme court restated its adherence to long-standing fundamental principles governing the enforceability of non-competition covenants in Texas.<sup>190</sup> The *DeSantis* court discussed the state of confusion created by the common calling standard, emphasizing its own failure either to define the term or to elaborate on the purpose of the stan-

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two-member partnership had a right to protect himself from the possibility that Kroenecke, the other partner, would establish rapport with the clients and upon termination, take the clients' business with him. *Id.* The court's holding, however, may be limited to the specific facts in that case and the special nature of a two-member partnership.

183. *DeSantis*, 793 S.W.2d at 683.

184. *Id.* at 684. The *DeSantis* court rejected Wackenhut's contention that DeSantis acquired some confidential information while with Wackenhut that necessitated protection by a covenant not to compete. *Id.* Although the court held that "confidential information [such as customers' identities, special needs and requirements, and beneficiary's pricing policies, cost factors and bidding strategies] may be protected by an agreement not to compete," the court argued that Wackenhut failed to meet his burden. *Id.* Specifically, the court asserted that:

Wackenhut failed to show that its customers could not readily be identified by someone outside its employ, that such knowledge carried some competitive advantage, . . . [and] that its pricing policies and bidding strategies were uniquely developed, or that information about its prices and bids could not . . . be obtained from the customers themselves.

*Id.* Furthermore, there was no evidence that DeSantis took advantage of any knowledge he had of Wackenhut to try and outbid them or woo away any customers. *Id.*

185. *Id.*

186. *Id.* at 685. The court asserted that "[t]he agreement not to compete in this case is no more enforceable under sections 15.50 and 15.51 of the Texas Business and Commerce Code than it would be under the above-stated common law principles governing such agreements." *Id.*

187. *Id.* at 685. The legislation purported to apply to the agreement at issue in the *DeSantis* case since it expressly "applies to a covenant entered into before, on, or after the effective date of this Act." *Id.* at 684 (quoting TEX. BUS. & COM. CODE ANN. § 15.50 historical note (Act effective Aug. 28, 1989)).

188. *DeSantis*, 793 S.W.2d at 685.

189. *Id.* at 681-83.

190. See *supra* notes 30-50 and accompanying text.

dard.<sup>191</sup> The court stated that in determining whether an ancillary noncompetition covenant is reasonable, the "primary focus of inquiry" should be on the need to protect a legitimate interest of the promisee balanced against the burden of such protection on the promisor and the public.<sup>192</sup> In so holding, the court appeared to preserve the balancing test first announced in *Weatherford*.<sup>193</sup>

Since the district court ruling in *Wabash Life Insurance Co. v. Garner*,<sup>194</sup> the Texas Supreme Court has noted that section 15.50 may alter the application of the common calling test to determine the validity of covenants not to compete.<sup>195</sup> More recently, the *DeSantis* court may have signaled a sharp departure from the common calling standard in deciding the facts presented in that case. Although the court there did not explicitly reject the standard, the majority justified its own refusal to apply the common calling test in two ways.<sup>196</sup>

First, the court asserted that it would have held the covenants not to compete unenforceable in both seminal common calling cases,<sup>197</sup> whether or not the respective promisors engaged in common callings.<sup>198</sup> Second, the court argued that by excluding the test as a criterion, the Texas Legislature effectively abolished the common calling standard as a viable tool for determining the reasonableness of noncompetition covenants.<sup>199</sup> The *DeSantis* court ultimately found that Wackenhut, as an employer, had failed to establish a legitimate business interest worthy of protection through the enforcement of a noncompetition covenant.<sup>200</sup>

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191. *DeSantis*, 793 S.W.2d at 682-83.

192. *Id.* at 683.

193. *Id.* at 682. In fact, the court specifically noted that "[b]efore an agreement not to compete will be enforced, its benefits must be balanced against its burdens, both to the promisor and the public." *Id.*

194. 732 F. Supp. 692 (N.D. Tex. 1989).

195. *Id.* at 693-94. While the *Wabash* court did acknowledge that the new statute would alter the common law analysis of noncompetition covenants, it nonetheless maintained that the new statute effectively codified the previous case law formulation for determining the enforceability of covenants not to compete. *Id.* at 693. Noting that courts faced with deciding enforceability issues would still have to balance the interests of the employer and the employee, the court stated that "[t]he complicated and fact-intensive aspects of each individual business relationship [could] not fairly be evaluated without an examination of each party's particular needs and interests." *Id.* at 694 (citing *NCH Corp. v. Share Corp.*, 757 F.2d 1540, 1543 (5th Cir. 1985); *Diversified Human Resources Group, Inc. v. Levinson-Polakoff*, 752 S.W.2d 8, 11 (Tex. App.—Dallas 1988, no writ)).

196. *DeSantis*, 793 S.W.2d at 683.

197. *Id.* In this regard, the court referred to *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987), and *Bergman v. Norris of Houston*, 734 S.W.2d 673 (Tex. 1987).

198. *DeSantis*, 793 S.W.2d at 683.

199. *Id.*; see TEX. BUS. & COM. CODE ANN. §§ 15.50-51 (Vernon Supp. 1991).

200. *DeSantis*, 793 S.W.2d at 683. The court concluded that the meager evidence of business goodwill allegedly developed by *DeSantis* during his employ was insufficient to conclude that any goodwill ever existed. Furthermore, the court found that there was no evidence indicating that *DeSantis* was able to utilize, for his own interests, any goodwill he might have developed for *Wackenhut*. *Id.* The court also argued that *Wackenhut* failed to establish that its alleged confidential information in connection with the company was sufficiently protectable so as to warrant the issuance of an injunction. *Id.* at 684.

V. ANALYSIS: A DEPARTURE FROM THE COMMON CALLING  
STANDARD AND A RETURN TO REFORMATION OF  
UNREASONABLE COVENANTS NOT TO COMPETE

A. *Elimination of the Common Calling Standard*

The most recent *DeSantis* opinion raises serious questions as to whether the majority meant to reject the common calling standard previously applied by Texas courts in determining the enforceability of noncompetition covenants. The court identified the following three interests as the chief considerations in determining the reasonableness of an ancillary covenant not to compete: (1) the necessity to protect the promisee's legitimate interest; (2) the hardship of such protection on the promisor; and (3) the hardship to the public.<sup>201</sup> The Texas Supreme Court suggested that the common calling standard may have limited future application in evaluating the enforceability of covenants not to compete.<sup>202</sup> The court cautioned that although the question of whether the nature of an individual's job fell within the common calling classification could sometimes be a consideration in the reasonableness inquiry, the common calling test was not a crucial component in the determination of a covenant's enforceability.<sup>203</sup>

After making this sweeping statement, apparently in direct conflict with *Hill*, the majority boldly declared that the common calling standard did not form the basis for its holding in *DeSantis*, choosing to rely instead on the common law principles governing restrictive covenants.<sup>204</sup> Despite the court's express departure from the *Hill* test, it did not overrule the *Hill* decision.<sup>205</sup> The court buttressed its departure from the common calling test by recalling several recent decisions adjudicating the enforceability of noncompetition covenants where the courts declined to apply the common calling standard in determining that the covenants were unenforceable.<sup>206</sup> Perhaps a fair way to reconcile the majority and concurring opinions of the *DeSantis* holding with regard to the common calling test is by reading *DeSantis* as rejecting the common calling test as the sole analysis for the enforceability of covenants not to compete.

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201. *Id.* at 681-82.

202. *Id.* at 682.

203. *Id.* at 683.

204. *Id.*

205. In fact, Justice Mauzy's first comment in his concurring opinion was that "[t]he court takes great pains to avoid overruling *Hill v. Mobile Auto Trim, Inc.*, and *Bergman v. Norris* . . . by even discussing these cases, the Court reaches too far." *DeSantis*, 793 S.W.2d at 689 (citations omitted).

206. *Id.* at 682-83 (citing *Posey v. Monier Resources, Inc.*, 768 S.W.2d 915, 918 (Tex. App.—San Antonio 1989, writ denied); *French v. Community Broadcasting*, 766 S.W.2d 330, 333 (Tex. App.—Corpus Christi 1989, writ dismissed w.o.j.) (noncompetition covenant enforceable since purpose was to prevent employee's utilization of special knowledge); *Bland v. Henry & Peters, P.C.*, 763 S.W.2d 5, 7-8 (Tex. App.—Tyler 1988, writ denied) (covenant held unenforceable where employee received no special training or knowledge from former employer).

*B. The Concurring Opinion in DeSantis v. Wackenhut Corp.: Common Calling Standard Has Continued Vitality*

As to the resolution of the future applicability of the common calling standard, the concurring opinion, written by Justice Mauzy, and the majority opinion reveal other inconsistencies. Justice Mauzy, joined by Justice Spears, argued that the common calling doctrine has continued vitality and force in the context of noncompetition covenants.<sup>207</sup> To this end, Justice Mauzy vigorously disagreed with the majority's conclusion that the legislature rejected the common calling test in amending the Texas Business and Commerce Code.<sup>208</sup> To the contrary, the concurrence reasoned that the scope of activity language contained in section 15.50 could be broadly construed to permit application of the common calling standard.<sup>209</sup>

Justice Mauzy viewed the majority's discussion of the common calling standard as misplaced since the noncompetition covenant in question was unenforceable without regard to whether it restricted the right to engage in a common calling.<sup>210</sup> The concurrence implied that the majority went too far in analyzing the enforceability issue since the common law principles governing covenants not to compete would have effectively operated to invalidate the noncompetition covenant in question without the necessity of resorting to the common calling standard.<sup>211</sup> Justice Mauzy concluded his concurring opinion by first arguing that Texas courts have formulated precise definitions of the common calling notion despite the supreme court's failure to specifically define the standard.<sup>212</sup> Second, Justice Mauzy expressed his approval for the continued application of the common calling standard on a case-by-case basis.<sup>213</sup>

*C. Policy Reasons for and Against the Retention of the Common Calling Standard*

The Intellectual Property Law section of the State Bar of Texas endorsed the recent legislative amendments to the Texas Business and Commerce Code sections 15.50 and 15.51, which proposed to abolish the common calling test of *Hill*.<sup>214</sup> Reasons typically advanced in support of abolishing the standard include the uncertainty and vagueness in applying the test,<sup>215</sup> the

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207. *DeSantis*, 793 S.W.2d at 689-90 (Mauzy, J., concurring).

208. *Id.*

209. *Id.* For a review of the language expressed in § 15.50 of the Texas Business and Commerce Code, see *supra* note 167 and accompanying text.

210. *Id.* at 689-90. In fact, Justice Mauzy stated that the court's reference to the common calling standard was "unnecessary, gratuitous, and ill-advised," and asked, "Is this not the very definition of judicial activism?" *Id.* at 689.

211. *Id.*

212. *DeSantis*, 793 S.W.2d at 689 (citing Ray & McKelvey, *Drafting Enforceable Noncompetition Agreements in Texas*, 20 TEX. TECH. L. REV. 63, 68 (1989); White, *Common Callings and the Enforcement of Postemployment Covenants in Texas*, 19 ST. MARY'S L.J. 589, 611 (1988)).

213. *Id.* at 690. Justice Mauzy stated, "I am content to allow the common calling concept to be worked out on a case-by-case basis." *Id.*

214. See LaFuze, *supra* note 112, at 150.

215. *Id.*

expense incurred by private litigants to determine whether a particular occupation falls within the ambiguous meaning,<sup>216</sup> and the confusion created by the adoption of the standard with regard to courts' ability to reform unreasonable noncompetition covenants.<sup>217</sup> Significantly, since 1987 when the supreme court adopted the common calling standard in *Hill*, the court refused to reform any of the covenants found to be unreasonable, instead choosing to declare such covenants unenforceable.<sup>218</sup> The mandate of the new amendments unequivocally states that courts shall reform covenants with unreasonable restrictions to impose only reasonable restraints upon the promisor.<sup>219</sup> Thus, the impact of the *DeSantis* opinion and the recent amendments to the Texas Business and Commerce Code on the application of the common calling standard is uncertain. The *DeSantis* decision does make clear, however, that the common calling standard is unnecessary in situations where established common law principles render such covenants unenforceable.<sup>220</sup>

As a justification for retention of the common calling standard, one commentator urges that the common calling doctrine makes intuitive sense in the restrictive covenant context since courts should enforce such agreements only in situations where the employer is neither engaging in opportunistic behavior or exercising monopoly power, nor imposing significant negative social costs by restricting competition.<sup>221</sup> At best, the common calling standard serves as a filtering mechanism through which courts can establish a threshold standard by refusing to enforce those covenants restraining the right of individuals in common callings to pursue similar work after termination of their employment. Accordingly, courts are less burdened by needless litigation if the common calling standard is accepted, since employers will likely not seek to enforce covenants restraining competition in common calling occupations. The idea is that employees engaged in common occupations, such as salesmen and hairstylists, who compete with their employers after termination, do not present a great threat of harm to the employer even if they change jobs. Arguably, a business can replace a salesman position more readily from the marketplace than it could a petroleum engineer or highly skilled computer analyst position.

A different justification for the continued labeling of certain occupations as common callings is that common callings generally involve skills that are widely available to the public; this justification suggests that the public will be harmed if courts enforce covenants restraining competitive activity of individuals engaged in these common occupations.<sup>222</sup> In fact, one commenta-

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216. *Id.*

217. *Id.*; see *DeSantis*, 793 S.W.2d at 683.

218. See *DeSantis*, 793 S.W.2d at 685; *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667, 670 (Tex. 1990); *Bergman v. Norris of Houston*, 734 S.W.2d 673, 674 (Tex. 1987).

219. TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 1991).

220. *DeSantis*, 793 S.W.2d at 683.

221. See *White*, *supra* note 212, at 611 (citing *Blake*, *supra* note 3, at 684-85 (economic societal loss great when employee is restrained from using special abilities elsewhere)).

222. See *generally id.* (discussing some advantages and disadvantages from continued application of common calling standard).

tor urges that in deciding what skills constitute common callings, courts should focus on the degree to which a particular type of employee is represented in the workplace.<sup>223</sup> If the occupation tends to be represented in the labor market to a significant extent so that the employee is fungible from the employer's perspective, that occupation is presumably a common calling.<sup>224</sup> Such an approach will undoubtedly require courts to employ a case-by-case approach, focusing on the individual facts and circumstances associated with a given profession. In fact, this approach is not inconsistent with Justice Mauzy's view in *DeSantis*, that deciding the applicability of the common calling standard on a case-by-case method is appropriate.<sup>225</sup>

Another commentator argued that courts should enforce noncompetition covenants only where the employer expends considerable time, effort, or money in imparting techniques or knowledge to the employee.<sup>226</sup> In such situations, the employee will likely have specialized skills or knowledge that may be irreplaceable to the employer, providing the employer a stronger argument that his business will be harmed if the court does not enforce a noncompetition covenant to protect his interest.<sup>227</sup> Moreover, an employee with specialized and unique skills is arguably not engaged in a common calling.<sup>228</sup>

Common callings should not be abolished by Texas courts. While the somewhat vague standard admittedly creates some confusion in determining whether a given occupation fits within the common calling regime, ordinary trades and occupations should not be subject to the restraints on fair competition that covenants not to compete impose. Although there is no clear definition of the standard, the concurring justice in *DeSantis* argued that courts had in fact developed reasonably precise formulations for the standard.<sup>229</sup> Additionally, continued application of the common calling standard will effectively prevent the potential abuse of low-level employees by their employers. Retention of the common calling test will force employers to scrutinize the noncompetition covenants more carefully and to seek enforcement only of those covenants that genuinely harm his or her legitimate business interests. Thus, lower courts may interpret the *DeSantis* opinion to allow application of the common calling standard on a case-by-case method as Justice Mauzy suggested in his concurrence.<sup>230</sup>

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223. *Id.* at 612.

224. *Id.*

225. *DeSantis*, 793 S.W.2d at 690.

226. See Blake, *supra* note 3, at 684-85.

227. *Id.* at 661.

228. See Gray, *supra* note 64, at 586.

229. *DeSantis*, 793 S.W.2d at 690. In Justice Mauzy's endorsement of the common calling standard, he specifically noted that "it is the genius of the common law that it evolves slowly in the light of reason and experience." *Id.*

230. In fact, the majority in *DeSantis* even concedes that "[t]he nature of the promisor's job — whether it is a common calling — may sometimes factor into the determination of reasonableness . . ." *Id.* at 683. Although the majority then states that the common calling test will not be the primary focus of inquiry in suits about covenants not to compete, the majority's admission that the standard may conceivably still apply, coupled with Justice Mauzy's ostensi-



*D. No Explicit Rejection of the Common Calling Standard  
by the Texas Legislature*

Although the majority acknowledged that one of the legislative purposes of section 15.50 was to extinguish the common calling standard, the court chose not to explicitly reject the standard.<sup>231</sup> Whether the legislative amendments will accomplish the objective of removing the common calling standard from the reasonableness inquiry is questionable. Absent an explicit rejection by the Texas Supreme Court, lower courts are likely to apply the common calling standard depending on the individual facts and circumstances of each noncompetition covenant case.

To support the continued application of the common calling standard, the lower courts will undoubtedly argue that the legislature should have drafted the amendments more clearly if they in fact intended to eliminate the common calling standard in the reasonableness inquiry. The legislature was merely silent on the issue of common callings in the area of noncompetition covenants. Arguably, such silence should not be equated with the legislature's intent to abolish the common calling standard. Absent an express rejection of the common calling standard by the new statutes, the lower courts will possibly have some latitude in applying the standard to refuse enforcement of certain noncompetition covenants, particularly if the facts indicate that an employer is abusing the employee's freedom of movement in the marketplace when that employee is engaged in a common and non-specialized occupation. Since the courts' continued analysis of the common calling standard in the area of covenants not to compete will undoubtedly run counter to the legislature's intent, the legislature may have to resort to another amendment or express clarification of the present legislation's effect.

*E. A Return to Judicial Reformation of Broad Covenants  
Not to Compete in Texas*

In adjudicating the enforceability of covenants not to compete, courts will generally refuse to enforce covenants if the specific competitive activity the employee engages in is reasonable.<sup>232</sup> In balancing the competing interests of the employer and employee, however, the court may find that the employer has a legitimate business interest to protect but that the restraints incorporated in the covenant are unreasonable in scope. If so, the courts may reform the covenant to impose reasonable limitations concerning time, geographical area, and scope of activity. An appellate court sitting as a court of equity, based on the grant of an injunction, has broad powers to

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ble approval of the standard, appears to leave adequate room for courts to apply the standard in appropriate factual situations. *Id.* at 683, 690.

231. *DeSantis v. Wackenhut*, 793 S.W.2d 670, 683 (Tex. 1990). Despite the court's suggestion that the common calling test may apply in the appropriate situation, the court emphatically refused to apply the common calling test to the covenant at issue, reasoning that common law principles decided the enforceability question. *Id.*

232. *See Blake, supra* note 3, at 674.

modify a covenant in order to render it reasonable.<sup>233</sup> On the other hand, if the court simply sat as a court of law, then it would only be authorized to award damages and could not modify the covenant.<sup>234</sup> Thus, the perceived goal of a valid noncompetition covenant may be to strike an even balance between the burden on the employee and the protection to the employer warranted by his legitimate business interests. Whether reformation of noncompetition covenants achieves this ideal is highly debatable.<sup>235</sup>

The Texas legislature's recent addition of section 15.51(c) to the Texas Business and Commerce Code provides that courts shall reform covenants failing to meet the reasonableness requirements of section 15.50(2) when those covenants are otherwise ancillary to an underlying agreement or supported by independent valuable consideration.<sup>236</sup> Although the concept of judicial reformation of unreasonable noncompetition covenants is not new to Texas courts,<sup>237</sup> recent supreme court decisions appear to be moving away from the notion that the courts will redraft reasonable terms in situations where the employer did not.<sup>238</sup> This recent legislation unquestionably signals a return to reformation, provided that an employer can meet the threshold showing that he or she has a legitimate business interest entitled to protection through enforcement of a noncompetition covenant.<sup>239</sup> Once the employer satisfies this requirement, the court will pare down overly broad time, territorial, and scope of activity limitations so that they reasonably protect the employer's interest. The Texas Supreme Court made clear in *DeSantis*, however, that the employer must establish his protectable interest before courts will proceed to invoke section 15.51(c) in order to reform the noncompetition covenant.<sup>240</sup>

A covenant not to compete with indefinite duration and geographical scope limitations is unenforceable as a matter of law.<sup>241</sup> Under section

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233. *DeSantis*, 793 S.W.2d at 682; *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 952-53 (1960).

234. *DeSantis*, 793 S.W.2d at 682; TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 1991). Section 15.51 directly tracks the common law in this area allowing for reformation of covenants not to compete. *Id.*

235. See generally 6A A. CORBIN, CONTRACTS §§ 1390, 1394 (1951); 5 S. WILLISTON, *supra* note 17, at §§ 1659-1660 (rev. ed. 1981). Section 518 of the RESTATEMENT (SECOND) OF CONTRACTS limits severability to restraints that are divisible in terms. Professors Williston and Corbin, along with most American courts, do not follow the Restatement and freely reform restraints that are indivisible in terms.

236. See TEX. BUS. & COM. CODE ANN. §§ 15.50(1)-(2), 15.51(c) (Vernon Supp. 1991).

237. See *Lewis v. Krueger Hutchinson & Overton Clinic*, 153 Tex. 363, 366, 269 S.W.2d 798, 799 (1954).

238. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990); *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667 (Tex. 1990); *Bergman v. Norris of Houston*, 734 S.W.2d 673, 674 (Tex. 1987).

239. See TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 1991).

240. See *DeSantis*, 793 S.W.2d at 685. In fact, the court unequivocally states "that [since] Wackenhut has failed to make this required showing [to establish a protectable business interest], we cannot reform the agreement to meet either the criteria of section 15.50(2), or of *Weatherford* for that matter." *Id.* at 685.

241. See *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 952 (1960). The court determined an unlimited area restraint to be unreasonable since the restraints must bear some relation to the interest being protected. *Id.* at 952. Thus, the court found it unneces-

15.51(c), a court applying equity is now required to rewrite the unreasonable covenant and enforce it as modified.<sup>242</sup> In contrast, if the suit is for damages, then the covenant must stand or fall as written.<sup>243</sup> Courts may rewrite covenants only when a party seeks an injunction.<sup>244</sup> Moreover, courts enforce duration and geographic scope limitations only to the extent necessary to protect the promisee's legitimate interest.<sup>245</sup>

Beginning with the *Hill* decision, Texas courts began to evolve a trend toward not reforming unreasonable restraints in noncompetition covenants. The *Hill* court noted that in the past the Texas Supreme Court had modified restrictive covenants in order to make the time, area, and scope limitations incorporated by the covenant reasonable.<sup>246</sup> However, despite the courts' previous reformation practice, the *Hill* court carefully explained that a presumption favoring the validity of the covenant had never existed in Texas law simply because the area and time restrictions imposed were not overly broad.<sup>247</sup>

In *Hill* Justice Gonzalez wrote a vigorous dissent in which he argued against the majority's refusal to modify the covenant in question.<sup>248</sup> Although Justice Gonzalez agreed with the majority that a seven-county area restraint was unreasonable, he argued that reforming the restraint to a two-county area, along with prohibiting Hill from contacting any managers in the seven-county area he once serviced, was the proper approach.<sup>249</sup> Justice Gonzalez expressed shock at the court's repudiation of well established Texas precedent as indicated by the court's unwillingness to reform the covenant to impose reasonable limitations.<sup>250</sup>

Oddly enough, Justice Gonzalez correctly speculated that the supreme court's refusal to reform the covenant suggested that courts would no longer modify unreasonable covenants.<sup>251</sup> In dissent, Justice Gonzalez cited a line

sary for the protection of the employer's business to restrain the employee in an area where his former work had not taken him. *Id.*

242. *Weatherford*, 340 S.W.2d at 952. This equitable modification is available for over-broad time and geographic scope limitations. The Texas Supreme Court endorsed this statement in *Spinks v. Riebold*, 310 S.W.2d 668, 669-70 (Tex. Civ. App.—El Paso 1958, writ ref'd). The court of appeals explained that its duty was to determine the extent of enforceability, rather than to determine the validity of the contract in its entirety. In *Spinks* the court reformed both the duration and area restraints imposed by the covenant. *Id.* See also *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973) (unreasonable covenants which are void as to either duration or geographic scope restraints or both are not beyond reformation in equity).

243. See *Juliette Fowler Homes, Inc. v. Welch Assocs.*, 793 S.W.2d 660, 663 (Tex. 1990) (covenant lacking geographical area and scope of activity restraints unenforceable in suit for damages since covenant must stand or fall as written) (citing *Weatherford*, 340 S.W.2d at 952-53).

244. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 682 (Tex. 1990).

245. See *Electronic Data Sys. v. Kinder*, 497 F.2d 222, 224 (5th Cir. 1974).

246. See *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 172 (Tex. 1987); *Matlock v. Data Processing Sec., Inc.*, 618 S.W.2d 327, 329 (Tex. 1981); *Justin Belt*, 502 S.W.2d at 684; *Spinks*, 310 S.W.2d at 669.

247. *Hill*, 725 S.W.2d at 172.

248. *Id.* at 175.

249. *Id.*

250. *Id.*

251. *Id.* at 175. Justice Gonzalez noted that the supreme court's refusal to reform the

of Texas cases following the long-standing practice adhered to by Texas courts reforming covenants not to compete and enforcing those covenants to impose only reasonable restraints.<sup>252</sup> In closing, Justice Gonzales asserted that Texas courts should continue to follow this practice.<sup>253</sup>

Subsequent to *Hill*, the Texas Supreme Court did not even attempt to apply the reformation doctrine in three separate instances.<sup>254</sup> In *Bergman v. Norris of Houston* the court did not embrace a reasonableness analysis concerning the covenant's time and area restrictions, but instead found the non-competition covenant unenforceable because the four employee hairstylists were engaged in a common calling.<sup>255</sup> Likewise, in *Martin v. Credit Protection Association*,<sup>256</sup> the supreme court initially invalidated the noncompetition covenant on the basis that a salesman is a common calling occupation.<sup>257</sup> In the wake of the new legislative amendments to the Texas Business and Commerce Code, however, the supreme court refused to reform the covenant and held the noncompetition covenant unenforceable on the basis of two fundamental common law principles.<sup>258</sup>

Similarly, the court in *DeSantis v. Wackenhut Corp.*<sup>259</sup> expressly refused to reform the covenant even though the trial court previously modified the covenant's forty county limitation to thirteen counties.<sup>260</sup> In support of this decision, the supreme court emphasized the mandate of section 15.51(b), which requires that the promisee establish a protectable business interest in situations when the promisor renders personal services.<sup>261</sup> To this end, the time, geographical area, and scope of activity limitations imposed by the covenant must not be greater than reasonably necessary to protect this busi-

covenant in *Hill* "implied . . . that such covenants [would] not be modified by the court's equity powers in the future." *Id.*

252. See *Matlock v. Data Processing Sec., Inc.*, 618 S.W.2d 327, 329 (Tex. 1981); *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973); *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 340 S.W.2d 950, 952 (1960); *Dittmer v. Source E D P, Texas, Inc.*, 595 S.W.2d 877, 881-82 (Tex. Civ. App.—Dallas 1980, no writ). The court pointed out that the Restatement also followed this approach. See RESTATEMENT (SECOND) OF CONTRACTS § 184 comment b (1981).

253. *Hill*, 725 S.W.2d at 175.

254. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 685 (Tex. 1990); *Martin v. Credit Protection Ass'n*, 793 S.W.2d 667, 670 (Tex. 1990); *Bergman v. Norris of Houston*, 734 S.W.2d 673, 674 (Tex. 1987).

255. *Bergman*, 734 S.W.2d at 674.

256. 31 Tex. Sup. Ct. J. 626, 626 (July 13, 1988), *withdrawn*, 793 S.W.2d 667, (Tex. 1990).

257. *Id.* at 626.

258. See *Martin*, 793 S.W.2d at 668-670. Unlike the first decision, the supreme court did not make any reference to the common calling standard in this opinion. In analyzing the reasonableness of the covenant, the court found that the covenant not to compete was not ancillary to an employment agreement as a matter of law. *Id.* at 669. Indisputably, the employment agreement consisted solely of this covenant not to compete, lacking any of the provisions usually associated with an employment contract, such as job position and compensation. The court additionally noted that the covenant not to compete was unsupported by independent valuable consideration, a requirement for covenants executed on a separate date from the execution date of the underlying agreement. *Id.* at 670 (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990)).

259. 793 S.W.2d 670 (Tex. 1990).

260. *Id.* at 685.

261. *Id.*

ness interest or goodwill of the promisee.<sup>262</sup> Thus, the court refused to reform the noncompetition covenant in *DeSantis* based on the employer's failure to demonstrate a legitimate business interest worthy of protection.<sup>263</sup> Absent such a showing, the court reasoned that the covenant was equally unenforceable under section 15.50(2) of the Texas Business and Commerce Code.<sup>264</sup>

As a result of the new legislation, and assuming the employer successfully establishes a protectable business interest, lower courts will enforce covenants with narrower restrictions upon the employee's ability to compete rather than refuse enforcement altogether. Both courts and commentators have grappled with the question of whether reformation should be applied to postemployment noncompetition covenants. Judicial reformation of unreasonable noncompetition covenants appears valid in situations where employers truly have legitimate business interests at stake, such as confidential or proprietary information or goodwill. In these situations reformation is necessary to pare down overbroad restraints prior to their enforcement.

Despite its recognized utility, the more compelling arguments exist against judicial reformation of unreasonable noncompetition covenants. Because employers often require prospective employees to sign covenants not to compete as a precondition for their employment, the threat of enforcement of these restraints often has a chilling effect upon the employee's freedom of mobility in the workplace.<sup>265</sup> By reforming broad noncompetition covenants, courts may be facilitating the potential for employee abuse by creating disincentives for employers to draft reasonable restraints.<sup>266</sup> Although not all employers will automatically draft unreasonable covenants,<sup>267</sup> courts should at least consider the adverse consequences that reformation may create on the mobility of employees in pursuing their occupations.

## VI. CONCLUSION

Despite that fact that "[the] new law was intended to make [covenants not to compete] more enforceable,"<sup>268</sup> the Texas Legislature has unquestionably cast some doubt on the general enforceability of noncompetition covenants by adding sections 15.50 and 15.51 to the Texas Business and Commerce Code. In keeping with the legislature's intent to statutorily abolish the common calling standard and to reinstate judicial reformation of unreasonable

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262. See TEX. BUS. & COM. CODE ANN. § 15.50(2) (Vernon Supp. 1991).

263. *DeSantis*, 793 S.W.2d at 685.

264. *Id.*

265. See Blake, *supra* note 3, at 685.

266. One commentator has emphatically supported this argument. See *id.* at 685 n.197 ("If [reformation] is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's cake and eating it too.")

267. *Id.* at 683. Blake notes that the argument improperly assumes all contracts are contracts of adhesion with unequal bargaining power and greater burden to the employee. *Id.*

268. See Nolan, *What the Changes in Noncompete Agreements Actually Mean*, HOUS. MAG., Nov. 1980, at 32-33.

covenants not to compete, Texas courts appear to have no choice but to follow the new statute. The statute unequivocally mandates that courts shall reform covenants when the promisee establishes a protectable interest and when the restraints imposed by the covenant pertaining to time, area, and scope of activity are unreasonable.<sup>269</sup>

The legislature, however, does not explicitly convey a similar intent to abolish the common calling standard despite its well known intent to do so.<sup>270</sup> The common calling standard has admittedly engendered uncertainty since the supreme court has not expressly provided a definition for the standard.<sup>271</sup> Courts are thus left to determine whether a given occupation is a common calling without the benefit of a uniform meaning for the standard. Faced with further uncertainty as to the application of the common calling standard in light of the new legislation, lower courts are likely to continue applying the standard on a case-by-case approach. In *DeSantis*, a recent Texas Supreme Court decision, Justice Mauzy suggested that a precise definition for the standard would only develop after engaging in a case-by-case approach.<sup>272</sup>

In applying the standard, the courts will draw ample support from the concurrence of *DeSantis*, in which the concurring justice openly rejected the view that the legislature meant to eliminate the common calling standard. Although the court in *DeSantis* pointed out that other courts held many of the covenants unenforceable because the employers were effectively restraining the right of an individual to engage in a common occupation, the *DeSantis* court persuasively reasoned that the common calling standard was unnecessary where the courts could have simply invalidated the covenants under the common law principles.<sup>273</sup> Nevertheless, the majority in *DeSantis* conceded that the nature of the promisor's job may occasionally factor into the reasonableness inquiry.<sup>274</sup> While the common calling test may not prove to be the focal part of courts' future analysis of covenants not to compete, the *DeSantis* opinion made clear that adequate room remains for courts to apply the standard if the facts of a case necessitate such an analysis.

In light of section 15.51(c), judicial reformation will emerge again as a remedy in the enforcement of noncompetition covenants. Courts will tailor unreasonable time, geographical area, and scope of activity limitations contained in a noncompetition covenant, provided that the employer first meets his burden of establishing that he has a legitimate business interest that justi-

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269. See TEX. BUS. & COM. CODE ANN. § 15.51(c) (Vernon Supp. 1991).

270. See Gray, *supra* note 64, at 586 ("Senate Bill 946 also eliminated the 'common calling' limitation, . . . acknowledged in *DeSantis*").

271. See generally *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 682 (Tex. 1990) ("The references to 'common calling' in *Hill* and *Bergman* have proven confusing in determining whether to enforce agreements not to compete"). The uncertainty created by the court's failure to define common calling as well as the legislature's failure to expressly reject the standard, assuming such was the intent, will likely continue to plague practitioners and breed much litigation on the subject.

272. *Id.* at 690.

273. *Id.* at 682-83.

274. *Id.* at 683.

fies the issuance of an injunction enforcing the narrower terms. The possible adverse consequences of judicial reformation are evident. Employers, with the knowledge that courts will reform unreasonable covenants, may lose any incentive they arguably had prior to the amendment, to draft covenants with reasonable restraints. Such a situation will inevitably impair the mobility of employees in the workforce. Furthermore, such a result is at odds with the public policy in Texas favoring an employee's freedom of movement from one job to another.

Noncompetition covenants will continue to be governed by several fundamental principles. First, a covenant not to compete must be ancillary to an otherwise enforceable agreement, such as an employment contract or a contract for the sale of a business. If the parties execute the covenant not to compete on a different date than the original transaction, courts will require independent valuable consideration to support the covenant. Special training or knowledge imparted to the promisor by the promisee may be one form of supportive consideration, though not the only permissible consideration. The covenant must also contain only those reasonable time, geographical area, and scope of activity limitations reasonably necessary to protect the legitimate business interests of the employer. In enforcing such a covenant, courts should tailor the restraints in such a way that while the court protects the employer's interests, the burden to the employee in enforcing the covenant is minimal. Finally, the employer's interest in enforcing the covenant must not be outweighed by the burden on the employee or the possible harm to the public. The majority in *DeSantis* argues that covenants will effectively be adjudicated under these principles alone.

With regard to the common calling standard, the legislature should expressly clarify the intended effect of the statute upon the test to avoid further confusion over the purpose of the amendments. If the legislature chooses not to elaborate on this issue, courts will be in the awkward position of trying to second-guess the legislature when an employer tries to enforce a covenant that appears to fit within the common calling regime. Absent an explicit legislative rejection of the standard, courts in Texas may continue to utilize the common calling test depending on the particular facts and circumstances of cases.