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Texas Supreme Court Gives Employers Greater “Independence” To Enter into Non-Competes

A recent Texas Supreme Court decision, *Marsh USA Inc., et al. v. Cook*, has held for the first time that stock option agreements awarded to key employees can be proper consideration for non-compete agreements.

In *Marsh*, Marsh sued Rex Cook, a former key employee, after Cook went to work for a competitor. Two years earlier, Cook had exercised his stock options under an agreement that stipulated that Cook would not work in the same type of business as Marsh’s for two years if he left the company.

The issue before the Texas Supreme Court in *Marsh* was whether a non-competition agreement signed by a valued employee in exchange for stock options is enforceable.

According to the Texas Supreme Court, the stock option was reasonably related to the company’s interest in protecting its goodwill, a business interest the Texas Non-Compete statute recognizes as worthy of protection, and therefore sufficient to support a non-compete. According to the court, by exercising stock options awarded to only certain valued employees, Cook linked his interests with those of the company’s long term business interests. This made the covenant not to compete ancillary to an otherwise enforceable agreement, which the Texas Non-Compete statute requires.

The *Marsh* decision substantially changes the Court’s long-held view that money or other financial incentives were not proper consideration for non-competes.

In reaching its decision the Texas Supreme Court cited a recent legal article by GDHM attorney, Eric Behrens entitled, *A Trend Toward Enforceability: Covenants Not to Compete in At-Will Employment Relationships Following Sheshunoff and Mann Frankfort*, recognizing the Court’s trend towards enforceability of non-compete clauses.

Graves, Dougherty, Hearon and Moody has had the opportunity to play a major role in the Texas Supreme Court’s move towards making non-competes more enforceable in Texas.

GDHM successfully litigated on behalf of the employer in *Alex Sheshunoff Management Services v. Johnson* where the Texas Supreme Court

unanimously ruled that its 1994 decision in *Light v. Centel Cellular Company of Texas* went too far in restricting the Texas Non-Compete statute.

In *Sheshunoff*, the Texas Supreme Court ruled that an employer only needs to give confidential information or training to an employee within “reasonable” time after the employee signs the non-compete. Once the employer does so, the non-compete becomes enforceable.

The Marsh Court continues the trend towards greater enforceability of non-competes and focusing on the reasonableness of the non-compete.

As a result of the *Marsh* and *Sheshunoff* decisions, employers will now be more readily able to protect confidential information and goodwill through enforcement of non-compete covenants. **This is something to celebrate!**

On behalf of the GDHM employment law section, have a safe and happy 4th of July!

For more information regarding the use of non-competes by employers or any other employment law related questions, please contact the head of GDHM's **Employment Law group, Susan Burton, sburton@gdhm.com, 512.480.5738.**

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