

# A Trend Toward Enforceability

## *Covenants Not to Compete in At-Will Employment Relationships Following Sheshunoff and Mann Frankfort*

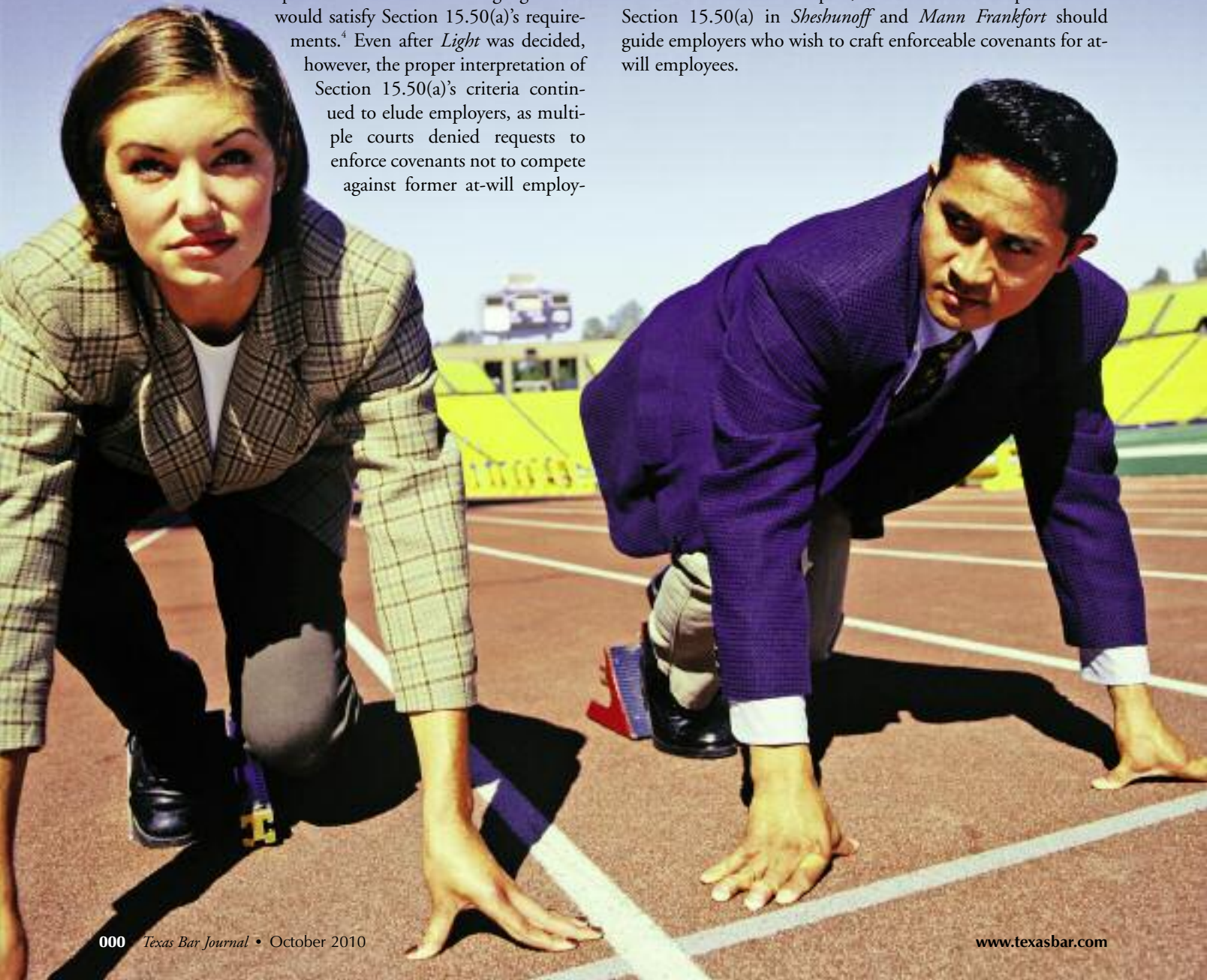
By Eric Behrens

Texas statute provides that every “contract, combination, or conspiracy in restraint of trade or commerce is unlawful.”<sup>1</sup> Although a covenant not to compete by its nature is a restraint on trade, Section 15.50(a) of the Texas Business & Commerce Code provides that such covenants are enforceable if they satisfy the narrow criteria dictated in the statute.<sup>2</sup> Since Section 15.50(a)’s enactment in 1989, employers across Texas have relied on those criteria as a guide for drafting covenants not to compete in at-will employment relationships.

A 1994 decision by the Texas Supreme Court in *Light v. Centel Cellular Company of Texas*<sup>3</sup> was initially perceived as having “blueprinted” contractual language that would satisfy Section 15.50(a)’s requirements.<sup>4</sup> Even after *Light* was decided, however, the proper interpretation of Section 15.50(a)’s criteria continued to elude employers, as multiple courts denied requests to enforce covenants not to compete against former at-will employ-

ees.<sup>5</sup> This was particularly troubling to employers who had provided their at-will employees with confidential information in reliance on such covenants, and yet were unable to enforce them when their employees took job positions with competitors.

The Texas Supreme Court’s 2006 and 2009 decisions in *Alex Sheshunoff Management Services, L.P. v. Johnson*<sup>6</sup> and *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*<sup>7</sup> have now abrogated several of those decisions, clarifying Section 15.50(a)’s criteria in a manner that would cause earlier rulings to be decided differently today. Consistent with the Texas Legislature’s original intention that Section 15.50 expand the enforceability of covenants not to compete,<sup>8</sup> the Court’s reinterpretation of Section 15.50(a) in *Sheshunoff* and *Mann Frankfort* should guide employers who wish to craft enforceable covenants for at-will employees.



## Exclusive Criteria for Enforcement Of a Covenant Not to Compete

Prior to 1989, the enforceability of a covenant not to compete was governed by common law alone.<sup>9</sup> In reaction to Supreme Court decisions that restricted the enforceability of covenants, however, the Texas Legislature in 1989 enacted new criteria for enforcing such covenants under the Covenants Not to Compete Act.<sup>10</sup> In 1993, the Legislature modified the criteria and added a section that provides that the Act preempts all common law criteria, procedures, and remedies relating to enforcement of non-compete covenants.<sup>11</sup>

The Act was also given retroactive effect, applying to non-compete covenants both before and after the effective date unless the enforceability of a particular covenant had already been adjudicated prior to Sept. 1, 1993.<sup>12</sup> Legislative history indicates that the amendments further clarify that non-compete covenants are “applicable to at-will employment situations.”<sup>13</sup>

The referenced “exclusive” criteria for enforceability of a covenant not to compete are set out in Section 15.50(a), which partially reads:

[A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made . . . .<sup>14</sup>

The Texas Supreme Court has stated that Section 15.50(a)’s “core inquiry” should be whether the covenant contains reasonable “limitations as to time, geographical area, and scope of activity to be restrained.”<sup>15</sup> Following the *Light* decision, however, many courts became focused on interpreting the first two requirements in Section 15.50(a).

## Two Initial Inquiries

Section 15.50(a) requires two initial inquiries as to formation of the covenant not to compete: 1) is there an otherwise enforceable agreement and 2) to which the covenant was ancillary or a part at the time the otherwise enforceable agreement was made.<sup>16</sup>

### *Requirements for an “otherwise enforceable agreement”*

A covenant not to compete, like any other contract, must be supported by an exchange of valuable consideration.<sup>17</sup> In most situations, this entails a bargained-for exchange of promises that consist of either a benefit to the promisor or a detriment to the promisee.<sup>18</sup>

In the context of at-will employment, however, long-standing Texas law holds that an employee may quit or be fired at any time, with or without cause.<sup>19</sup> Therefore, as *Light* and subsequent decisions explain, any bargained-for promises that depend on the at-will employee having an additional period of employment would fail to bind the promisor and are illusory: Either party could escape having to perform its so-called “promise” by terminating the employment relationship prior to

when performance is due.<sup>20</sup> *Light* cited a “promise of a raise to an at-will employee” as an example of such a non-binding promise.<sup>21</sup>

If such illusory promises are all that support a purported bilateral contract, then there is no contract.<sup>22</sup> Absent being salvaged as a unilateral contract, it fails for want of consideration.

The fact that the employment is at will, however, does not preclude an at-will employee from forming *other* contracts with his or her employer, so long as their exchange of promises is not premised on the employee having a continuing period of employment.<sup>23</sup> For example, if the parties exchange promises that would bind each of them even if employment were terminated, that would supply the exchange of valuable consideration needed to support the contract.

In *Light*, the employer required Debbie Light, an employee of two years, to execute an agreement as a condition to keeping her job. The parties’ written agreement included a covenant not to compete and expressly stated that Light’s employment was terminable “at the will” of either Light or the company.<sup>24</sup>

Any “promises” that presupposed Light would continue in her employment — such as her employer’s promises to give her “a salary and commission for sales” and an employee-benefits package — were illusory because the employer could fire Light before its performance was due. The Court noted, however, that the employer’s promise to train Light in exchange for her reciprocal promises to give 14 days’ notice of termination and to provide an inventory upon termination satisfied the “otherwise enforceable agreement” requirement of Section 15.50(a).<sup>25</sup>

Dicta in footnote six of *Light* described an additional method of creating an “otherwise enforceable agreement.” The *Light* Court noted that a conditioned promise by one party, and the other party’s performance of the condition, can form a binding *unilateral contract*. A non-illusory promise can serve as an offer, which the other party can accept by performance.<sup>26</sup> Formation of the unilateral contract is complete by the performance that was called for by the promisor, instead of by making a reciprocal binding promise as in a bilateral contract.<sup>27</sup>

Until such performance occurs, the promisor is still free to revoke the offer.<sup>28</sup> Once the offer is “accepted” through return performance, the exchange of valuable consideration results in a fully formed contract, and the promisor becomes bound.<sup>29</sup>

In summary, an otherwise enforceable agreement “‘can emanate from at-will employment so long as the consideration for any promise is not illusory.’”<sup>30</sup> Such consideration can take a couple of forms. First, the parties can exchange promises, each being both a promisor and a promisee, forming a bilateral contract. Second, one party’s promise can serve as an offer, which the other party is deemed to have accepted through its subsequent performance, forming a unilateral contract.<sup>31</sup>

### Requirements for the covenant to be “ancillary to or part of” an otherwise enforceable agreement

Section 15.50(a) dictates that the covenant not to compete be “ancillary to or part of” that otherwise enforceable agreement at the time the agreement was made.

To fulfill this requirement, the Court lists two conditions:

- 1) The “consideration given by the employer” in the otherwise enforceable agreement “must give rise to the employer’s interest in restraining the employee from competing”; and
- 2) The covenant not to compete “must be designed to enforce the employee’s consideration or return promise” in the otherwise enforceable agreement.<sup>32</sup>

Unless both conditions are satisfied, the covenant will not be ancillary to an otherwise enforceable agreement, and thus would fail as a “naked restraint of trade.”<sup>33</sup>

As to the first condition, the *Light* Court stated the agreement “must give rise to an ‘interest worthy of protection’” by a covenant not to compete, and cited business goodwill and confidential or proprietary information as examples of such worthy interests.<sup>35</sup> By comparison, Chief Justice Wallace B. Jefferson notes that an agreement between two strangers in which the covenant is supported only by a payment of money would not satisfy the statutory requirement.<sup>36</sup>

The covenant in *Light* failed under the second condition — *Light* did not reciprocally promise that she would not disclose confidential information shown to her.<sup>37</sup> Lacking such a connection, the covenant was not “ancillary to or a part of” the otherwise enforceable agreement between the parties and was therefore unenforceable.<sup>38</sup>

### *Sheshunoff*’s Departure From *Light*

Prior to *Sheshunoff*, one riddle for both courts and employers was determining which of two phrases in Section 15.50(a) the Legislature intended to be modified by the clause “at the time the agreement is made.” The statute could be parsed in either of two ways:<sup>39</sup>

- 1) The statute requires that the agreement must be enforceable at the same time the parties enter into it: “[A] covenant not to compete is enforceable if it is ancillary to or part of an *otherwise enforceable agreement at the time the agreement is made*,” or
- 2) The statute requires only that the covenant be ancillary to the agreement at the same time the parties enter into it: “[A] covenant not to compete is enforceable if it is *ancillary to or part of* an otherwise enforceable agreement *at the time the agreement is made*.”

The *Light* Court chose the first interpretation, meaning the statute would require a contract had to be immediately enforceable at the same time the parties entered into it. Under that interpretation, a unilateral contract could not satisfy Section

15.50(a), because it does not come into existence until the promisee “accepts” through subsequent performance.<sup>40</sup> Multiple courts followed *Light*’s dicta, and declined to enforce non-compete covenants even when an employer shared confidential information in return for a promise to maintain confidentiality.<sup>41</sup>

### The *Sheshunoff* Decision Corrected *Light*’s Misreading of the Statute

The *Sheshunoff* Court agreed with *Light*’s recitation of “basic contract law” regarding formation of a unilateral contract, but in an important departure, held such a contract could satisfy the Act. The parties in *Sheshunoff* tracked *Light*’s example of a unilateral contract to which the non-compete covenant would be ancillary or a part; under *Light*’s dicta, the covenant would be unenforceable.<sup>42</sup> *Sheshunoff*, however, found that the second interpretation was the correct reading of the statute: The non-compete covenant need only be ancillary to or a part of the parties’ agreement when the agreement was made, even if that agreement did not become enforceable until the illusory promise was subsequently performed.<sup>43</sup>

The *Sheshunoff* Court outlined several reasons for its partial turnaround of *Light*. Because Section 15.50(a)’s wording does not lend itself to precise textual analysis, the *Sheshunoff* Court traced the several iterations of the statute from the original bill through the passage of the 1993 amendments to glean legislative intent.<sup>44</sup> The sequence of changes show that the 1993 amendments’ inclusion of “at the time the agreement was made” was intended simply to “maintain the rule ... that a covenant could be signed after the date that employment began so long as the new agreement was supported by independent consideration,” and did not require the agreement be enforceable the instant it is made.<sup>45</sup> Moreover, a contrary interpretation would narrow enforcement of covenants, despite the history behind the 1993 amendments showing an intent to *expand* the enforceability of non-compete covenants, partly in reaction to prior decisions that had restricted enforcement.

The *Sheshunoff* Court also noted a pragmatic reason. In a typical at-will employment arrangement, the employer’s promise to provide confidential information is generally always prospective and would evaporate if employment were terminated.<sup>46</sup> Therefore, if *Light*’s dicta were correct, *most* non-compete covenants would be unenforceable despite the Legislature’s intent to expand enforceability in 1993,<sup>47</sup> because neither past nor future consideration would satisfy Section 15.50(a).

### Time Limit for “Acceptance” Through Performance?

Prior to *Sheshunoff*, some courts tried to finesse the issue of future performance, stating that confidential information “provided close to the time that the agreement was made” could be sufficiently contemporaneous with the contract to make the consideration non-illusory.<sup>48</sup>

However, even if an employer quickly performed its promise to provide confidential information to an at-will employee, the

promise itself would still have been illusory at the time it was made: The employer could just as quickly have terminated the at-will employee and avoided performance. *Sheshunoff* cut through such concerns, concluding that there is “no sound reason why a unilateral contract made enforceable by performance should fail under the Act.”<sup>49</sup>

In a concurrence by Chief Justice Jefferson, three justices agreed that the statute does not require an instantaneous exchange of consideration, but that “the employer’s exchange of consideration must occur within a reasonable time after the agreement is made” — an approach similar to the interpretation some courts of appeals had adopted.<sup>50</sup> Although *Sheshunoff* did not present the issue, the Chief Justice voiced the concern that the majority would permit an employer to enforce a non-compete covenant “months or even years after the employee signed it” so long as it eventually performed.<sup>51</sup> He noted that, absent a fixed time for performance, the law implies parties will perform within a reasonable time. If the employer fails to provide confidential information within a reasonable time, he argued that such performance ceases to be part of the same “transaction” that created the unilateral contract, is no longer the performance the employee had bargained for when it made its offer, and no longer can be considered a valid inducement for the employee to have entered into the agreement.<sup>52</sup>

Although the majority in *Sheshunoff* did not explicitly require performance of the unilateral contract within a “reasonable” time, its responses to the Chief Justice’s comments suggest that it would decline to enforce a covenant if an employer unduly delays providing confidential information to its at-will employee. Although the majority found it unlikely that a company would rush to disclose valuable trade secrets to a departing employee, it stated that in such a case a court could 1) determine that the employer’s belated performance was “‘unreasonable’ and unnecessary to protect the employer’s business interests,” thereby defeating Section 15.50(a)’s requirement that a covenant be “ancillary to or a part of” an enforceable agreement, or 2) “conclude that the employer’s unclean hands renders it ineligible for injunctive relief” under Section 15.51, the primary exclusive remedy permitted by the Act.<sup>53</sup>

In short, although the majority in *Sheshunoff* did not adopt an *explicit* requirement that performance occur within a reasonable time, as the Chief Justice would require, the remedies the majority outlined under the Act suggest that an employer faces a de facto deadline under either scenario. Although a unilateral contract can salvage the “otherwise enforceable agreement” requirement, the employer likely needs to perform (e.g., provide confidential information) within a reasonable time to ensure that its non-compete covenant satisfies the ancillary requirement.

#### Further Clarification Under *Mann Frankfort*

The Texas Supreme Court expanded on its *Sheshunoff* decision in *Mann Frankfort*. In *Sheshunoff*, the employment agree-

ment contained an express promise by the employer to provide training and access to confidential information (which the employer subsequently provided), and the at-will employee’s reciprocal promise to maintain the confidentiality of that information.

Unlike *Sheshunoff*, however, the employer in *Mann Frankfort* did not expressly promise to provide its employee with access to confidential information. The Court held, however, that the “nature of the work” for which the employee was hired would reasonably require Mann Frankfort to provide him confidential information to accomplish his contemplated job duties.<sup>54</sup> Under those circumstances, the Court determined that Mann Frankfort *impliedly* promised to provide confidential information to the employee, stating:

We hold that if the nature of the employment for which the employee is hired will reasonably require the employer to provide confidential information to the employee for the employee to accomplish the contemplated job duties, then the employer impliedly promises to provide confidential information and the covenant is enforceable so long as the other requirements of the Covenant Not to Compete Act are satisfied.<sup>55</sup>

Mann Frankfort was an accounting firm. Brendan Fielding was a CPA and senior manager in accounting firm Mann Frankfort’s tax department. To complete his job responsibilities of completing tax returns and other accounting duties for clients, Fielding would necessarily obtain from Mann Frankfort the identities and confidential financial information of its clients. The Court could reasonably infer that the firm promised to provide confidential information to Fielding despite the absence of an express recitation to that effect.

Similarly, Fielding could not act on his own express promise not to disclose confidential information unless he obtained access to such information: Fielding’s promise “meant nothing without a correlative commitment by Mann Frankfort” to provide Fielding that material.<sup>56</sup> The Court stated that if a party “makes an express promise that cannot reasonably be performed absent some type of performance by the other party, courts may imply a return promise so the dealings of the parties can be construed to mean something rather than nothing at all.”<sup>57</sup> Mann Frankfort performed its implied promise. Since the other requirements of Section 15.50(a) were satisfied, the Court found as a matter of law that the non-compete covenant was enforceable.

#### The *Vanegas* Court’s Further Clarification

The Court’s decision in *Vanegas v. American Energy Services*,<sup>58</sup> though it did not involve a covenant not to compete nor analyze Section 15.50(a) in any detail, discussed both *Light* and *Sheshunoff* at length. It relied on unilateral contract principles in reaching its result and explained *Light*’s reference to a “non-illusory promise” as applied to unilateral contracts.

The lower court in *Vanegas* held that an alleged unilateral contract failed because it was not supported by at least one non-illusory promise. Focusing on *Light*'s statement in footnote six that a "non-illusory promise" can serve as an offer for a unilateral contract, the lower court concluded that an illusory promise would not.<sup>59</sup> The Supreme Court, however, disagreed with how the court applied the quoted language explaining that *Light* and *Sheshunoff* actually had dealt with unsuccessful attempts to form a bilateral contract, and that footnote six addressed how a contract could still be formed under unilateral contract principles.

*Vanegas* explained it is irrelevant whether the promise that serves as the "offer" was illusory when it was made; "[a]lmost all unilateral contracts begin as illusory promises." What matters is whether "the promise became enforceable by the time of the breach" through the other party's performance.<sup>60</sup> This echoes *Sheshunoff*'s statement that "the typical arrangement" involves an offer to maintain confidentiality, which becomes enforceable only if the employer accepts by providing confidential information or training.<sup>61</sup> As *Vanegas* explained, that arrangement begins as an attempted but ineffective bilateral contract. The offer can salvage the ineffective bilateral contract once the other party accepts the offer through its performance, transforming it into a binding unilateral contract.<sup>62</sup>

## Conclusion

As noted by the American Law Institute, the trend in Texas following *Sheshunoff* and *Mann Frankfort* is toward enforceability.<sup>63</sup> *Light*'s description of the requirements for Section 15.50(a)'s two initial inquiries — 1) whether there is an "otherwise enforceable agreement" and 2) to which the covenant was ancillary or a part at the time the otherwise enforceable agreement was made<sup>64</sup> — continue to govern, but with *Sheshunoff*'s and *Mann Frankfort*'s clarifications. *Sheshunoff*, departing from *Light*'s footnote six, clarifies that the non-compete covenant need only be ancillary to or a part of the agreement at the time it was made, even if the agreement becomes enforceable only later as a unilateral contract.

*Mann Frankfort* states that if the nature of the work for which the employee is hired will reasonably require the employer to provide the confidential information to the employee to accomplish the contemplated job duties, the employer impliedly promises to provide confidential information even in the absence of an express recitation to that effect. Provided the other requirements of the Act are satisfied, the non-compete covenant would then be enforceable. The opinion leaves open that other types of implied promises might be found in satisfaction of Section 15.50(a) requirements, depending on the specific facts.

The trio of *Light*, *Sheshunoff*, and *Mann Frankfort*, read together, show a trend toward enforceability of non-compete clauses that is true to the legislative intent behind the Covenants Not to Compete Act and the 1993 amendments.

## Notes

1. Tex. Bus. & Comm. Code §15.05(a) (Vernon 2002).
2. *Harrison v. Williams Dental Group, P.C.*, 140 S.W.3d 912, 917 (Tex. App.—Dallas 2004, no pet.); *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 459 (Tex. App. — Austin 2004, pet. denied). The criteria are set out in Tex. Bus. & Comm. Code §15.50(a) (Vernon Supp. 2009).
3. *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642 (Tex. 1994).
4. See *Ireland v. Franklin*, 950 S.W.2d 155, 158 (Tex. App. — San Antonio 1997, no pet.); *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 297 & n.7 (Tex. App. — Beaumont 2004, no pet.).
5. The adverse decisions are unsurprising: the statutory interpretation described in *Light* would render "most covenants not to compete executed by [at-will] employees" unenforceable. *Alex Sheshunoff Mgt. Serv. L.P. v. Johnson*, 209 S.W.3d 644, 655 (Tex. 2006). See, e.g., *TMC Worldwide, L.P. v. Gray*, 178 S.W.3d 29, 38–39 (Tex. App. — Hous. [1 Dist.] 2005, no pet.) (affirming denial of injunctive relief for employer); *Trilogy Software*, 143 S.W.3d at 461 (affirming finding that covenant was unenforceable); *Tom James*, 109 S.W.3d at 886 (denying injunctive relief to employer); *Strickland v. Medtronic, Inc.*, 97 S.W.3d 835, 839 (Tex. App. — Dallas 2003, pet. dismissed w.o.j.) (reversing grant of injunctive relief).
6. *Alex Sheshunoff Mgt. Serv. L.P. v. Johnson*, supra, 209 S.W.3d 644 (Tex. 2006).
7. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009).
8. *Sheshunoff*, 209 S.W.3d at 654 (the Legislature "wanted to expand the enforceability of covenants not to compete beyond that which the courts had allowed").
9. *Donahue v. Bowles, Troy, Donahue, Johnson, Inc.*, 949 S.W.2d 746, 755 (Tex. App. — Dallas 1997, writ denied) (Moseley, J., concurring).
10. *Donahue*, 949 S.W.2d at 755 & n.3; *Sheshunoff*, 209 S.W.3d at 652–53, 654 (legislative intent to overturn adverse Court decisions); *Light*, 883 S.W.2d at 643 & n.2 (noting the same intent behind the Texas Business Law Foundation's sponsorship of the legislation).
11. Tex. Bus. & Comm. Code §15.52 (emphasis added); *Sheshunoff*, 209 S.W.3d at 653 n.5 (amendments intended to overrule *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830 (Tex. 1991), which held non-compete covenants in at-will employment unenforceable as a matter of law).
12. Section 5 of the 1993 amendatory act.
13. *Sheshunoff*, 209 S.W.3d at 653 & nn. 5, 6; *id.* at 655.
14. Tex. Bus. & Comm. Code §15.50(a) (Vernon Supp. 2009) (bracketed references and emphasis added). Subsection 15.50(b) sets out additional criteria applicable to covenants not to compete against licensed physicians.
15. *Sheshunoff*, 209 S.W.3d at 655.
16. *Mann Frankfort*, 289 S.W.3d at 849 (citing *Light*, 883 S.W.2d at 644).
17. *Sheshunoff*, 209 S.W.3d at 651 ("[A]n agreement not to compete, like any other contract, must be supported by consideration," quoting *DeSantis*, 793 S.W.2d at 681 n.6).
18. *Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 309 (Tex. App. — El Paso 2009) (mand. denied) (citing *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991)); compare *Sheshunoff*, 209 S.W.3d at 659 (Jefferson, C.J., concurring) ("Consideration for a promise may be either a performance or a return promise bargained for in a present exchange.").
19. *Light*, 883 S.W.2d at 645 (citing *East Line & Red River R. Co. v. Scott*, 10 S.W. 99, 102 (1888)); *County of Dallas v. Wiland*, 216 S.W.3d 344, 347 (Tex. 2007).
20. *Light*, 883 S.W.2d at 644–45; *id.* at 644 n.5. As Justice Hecht noted in his *Mann Frankfort* concurrence, an illusory promise is "in reality no promise at all." 289 S.W.3d at 857.
21. *Light*, 883 S.W.2d at 644 n.5. See also *Air America Jet Charter Inc. v. Lawhon*, 93 S.W.3d 441, 444 n.2 (Tex. App. — Hous. [14 Dist.] 2002, pet. denied) (Brister, C.J.) (same).
22. *Light*, 883 S.W.2d at 645; *Trilogy Software*, 143 S.W.3d at 460–61 (a promise to provide confidential information and training, in contrast to giving such information and training, would still be illusory and hence unenforceable).

23. *Light*, 883 S.W.2d at 644.
24. *Light*, 883 S.W.2d at 645–46 & n. 8 (§ 1 of the agreement).
25. *Light*, 883 S.W.2d at 645–46; *Sheshunoff*, 209 S.W.3d at 648–49.
26. *Light*, 883 S.W.2d at 645 n.6; *Mann Frankfort*, 289 S.W.3d at 849 (quoting *Light*); *Johnston v. Kruse*, 261 S.W.3d 895, 898 (Tex. App. — Dallas 2008, no pet.) (the unilateral contract initially lacks mutuality). *Light* cited E. Allan Farnsworth, *Contracts* 72–82 (1982), describing the non-illusory promise as a “disguised offer.” 883 S.W.2d at 645 n.6.
27. *Vanegas v. American Energy Serv.*, 53 Tex. Sup. Ct. J. 204, 2009 WL 4877734 at \*3 (Dec. 18, 2009). Acceptance can be by performance or forbearance. *Id.* (citing Richard A. Lord, *Williston on Contracts* §1.17 (4th ed. 2007)).
28. *Sunshine v. Manos*, 496 S.W.2d 195, 198 (Tex. Civ. App. — Tyler 1973, writ ref’d n.r.e.).
29. *Dodson*, 776 S.W.2d at 805; *Rolls-Royce Indus. Power, Inc. v. Zurn Indus., Inc.*, 2001 WL 315666 at \*2 (Tex. App. — Dallas 2001, no pet.) (not design. for publ.).
30. *Sheshunoff*, 209 S.W.3d at 648 (quoting *Light*, 883 S.W.2d at 645); *Mann Frankfort*, 289 S.W.3d at 849 (same).
31. *Light*, 883 S.W.2d at 645 n.6 (“The fact that the employer was not bound to perform because he could have fired the employee is irrelevant; if he has performed, he has accepted the employee’s offer and created a binding unilateral contract,” citing E. Allan Farnsworth, *Contracts* 76 (1982)).
32. *Sheshunoff*, 209 S.W.3d at 648–49 (emphasis added, quoting *Light*, 883 S.W.2d at 647); *id.* at 659 n. 1 (Jefferson, C.J., concurring); *Mann Frankfort*, 289 S.W.3d at 849; *DeSantis*, 793 S.W.2d at 682. Justice Wainwright, in his concurrence in *Sheshunoff*, disapproved of these two “court-made requirements” erected by *Light*. *Id.* at 664 (Wainwright, J. concurring) (citing payment of money as adequate consideration).
33. *Mann Frankfort*, 289 S.W.3d at 849; *Light*, 883 S.W.2d at 647; *Houston Solvents and Chemicals Co., Inc. v. Montealegre*, 1999 WL 219366 at \*3 n.5 (Tex. App. — Hous. (14 Dist.) 1999, no pet.) (not design. for publ.) (citing *Light*).
34. *Light*, 883 S.W.2d at 647 (quoting *DeSantis*, 793 S.W.2d at 682); *Sheshunoff*, 209 S.W.3d at 649 (quoting same); *Mann Frankfort*, 289 S.W.2d at 854 n.10.
35. *Light*, 883 S.W.2d at 647 (citing *DeSantis*); *Mann Frankfort*, 289 S.W.2d at 854 n.10; Restatement (Second) of Contracts §188 comments b, g (1981).
36. *Sheshunoff*, 209 S.W.3d at 658 (Jefferson, C.J., concurring) (citing the Restatement (Second) of Contracts §187 cmt. b).
37. *Light*, 883 S.W.2d at 647–48 & nn. 14–15.
38. *Light*, 883 S.W.2d at 648.
39. *Sheshunoff*, 209 S.W.3d at 651.
40. *Light*, 883 S.W.2d at 645 n.6 (emphasis added).
41. See, e.g., *Trilogy Software*, 143 S.W.3d at 461; *Tom James*, 109 S.W.3d at 886 (“Under section 15.50, the point in time relevant to this determination ‘is the moment the agreement is made ...’”); *Anderson Chemical*, 66 S.W.3d at 438.
42. *Sheshunoff*, 209 S.W.3d at 646–47; *Mann Frankfort*, 289 S.W.3d at 849.
43. *Sheshunoff*, 209 S.W.3d at 651, 661–62.
44. *Sheshunoff*, 209 S.W.3d at 651–52.
45. *Sheshunoff*, 209 S.W.3d at 654–55.
46. *Sheshunoff*, 209 S.W.3d at 655.
47. *Sheshunoff*, 209 S.W.3d at 655.
48. See, e.g., *Wright*, 137 S.W.3d at 297 (employer made confidential information available both before and after the agreement, satisfying Section 15.50(a)); *TMC Worldwide*, 178 S.W.3d at 38 (pre-*Sheshunoff*, discussing whether confidential information was provided “close to the time” the agreement was made and finding that an exchange one year after the contract was not sufficiently contemporaneous); *Guy Carpenter & Co. Inc. v. Provenzale*, 334 F.3d 459, 466 (5th Cir. 2003) (*Light* does not “pin the enforceability of non-solicitation agreements on whether an employer discloses confidential information at the time the employee signs an employment contract”).
49. *Sheshunoff*, 209 S.W.3d at 651.
50. *Sheshunoff*, 209 S.W.3d at 657–58, 661 (Jefferson, C.J., concurring).
51. *Sheshunoff*, 209 S.W.3d at 657 (Jefferson, C.J., concurring).
52. *Id.* at 661–62.
53. *Id.* at 655–56 n.8. The Chief Justice responded that the court’s equitable power would apply to Section 15.50(a)’s requirement that the covenant be reasonable with respect to time, geographical area, and scope of activity limitations — not to the issue of a delay in performance, which relates to contract formation itself. *Id.* at 663.
54. *Mann Frankfort*, 289 S.W.3d at 850.
55. *Mann Frankfort*, 289 S.W.3d at 845–46, 850–51.
56. *Mann Frankfort*, 289 S.W.3d at 851.
57. *Mann Frankfort*, 289 S.W.3d at 850–851.
58. *Vanegas v. American Energy Serv.*, 53 Tex. Sup. Ct. J. 204, 2009 WL 4877734 (Dec. 18, 2009).
59. *Vanegas*, 2009 WL 4877734 at \*3 (quoting *Vanegas v. American Energy Serv.*, 224 S.W.3d 544, 549 (Tex. App. — Eastland 2007), *reversed*, 53 Tex. Sup. Ct. J. 204 (Tex. 2009)).
60. *Vanegas*, 2009 WL 4877734 at \*3.
61. *Sheshunoff*, 209 S.W.3d at 655.
62. *Vanegas*, 2009 WL 4877734 at \*3.
63. Restatement (Third) of Employment Law §8.06 at Reporters’ Note e (Tent. Draft No. 4, 2009); *Id.* at §8.06 & illustration 11.
64. *Mann Frankfort*, 289 S.W.3d at 849 (citing *Light*, 883 S.W.2d at 644).



### ERIC BEHRENS

is a shareholder in Graves, Dougherty, Hearon & Moody in Austin. His practice focuses on creditors’ remedies, employment law, and trial litigation in both state and federal courts.

