Death of Covenants Not to Compete in Texas is Premature

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I. Introduction

Texas Business and Commerce Code § 15.50 contains the requirements for a covenant not to compete to be enforceable in Texas.[1] § 15.50 was first enacted by the Texas Legislature in 1989 as a response to Texas Supreme Court decisions unfavorable to covenants not to compete.[2] The Legislature sought to supersede the decisions through legislation, expanding the enforceability of covenants not to compete.[3] The Legislature revised § 15.50 in 1993 to clarify the statute's meaning, but the statute's purpose remained the same.[4]

§ 15.50 contains two requirements for an enforceable covenant not to compete.[5] First, an enforceable covenant not to compete must be "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made" (hereinafter "the agreement requirement").[6] Second, a covenant not to compete is only enforceable "to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee" (hereinafter "the reasonableness requirement").[7] A covenant not to compete that does not meet the agreement requirement is unenforceable.[8] A court must reform a covenant that does not meet the reasonableness requirement to make the covenant meet the requirement.[9]

The 1994 Texas Supreme Court case of *Light v. Centel Cellular Co. of Texas* dealt with the interpretation of the agreement requirement.[10] In *Light*, the court set out its definition of "ancillary to or part of," holding that a covenant not to compete must be related to the promises of the employer and employee in the otherwise enforceable agreement.[11] Additionally, in dicta in footnote six of *Light*, the court interpreted § 15.50 to mean that the otherwise enforceable agreement had to be enforceable at the time the agreement was made.[12] Due to the nature of at-will employment, most employers' promises that relate to covenants not to compete in employment agreements are illusory.[13] An illusory promise can create a unilateral contract under certain circumstances, but a unilateral contract is not enforceable at the time it is made.[14] *Light*'s interpretation of § 15.50 in footnote six meant that many covenants not to compete were unenforceable.[15] This interpretation was contrary to the intent of the Texas Legislature, which enacted § 15.50 to expand the enforceability of covenants not to compete.[16]

On October 20, 2006, the Texas Supreme Court revisited footnote 6 of *Light* in *Alex Sheshunoff Management Services, L.P. v. Johnson*.[17] The court's holding in *Alex Sheshunoff* explicitly overruled footnote 6 of *Light*.[18] The court held that a covenant not to compete could be ancillary to or part of a §unilateral contract, so long as that unilateral contract became enforceable before the employee left the employer.[19] The *Alex Sheshunoff* court read § 15.50 to mean that at the time a covenant not to compete is executed, it must be ancillary to or part of an otherwise enforceable agreement.[20] The agreement did not have to be enforceable when it was executed, but it had to become enforceable or the covenant not to compete would not be enforceable.[21]

Alex Sheshunoff's holding prevented many covenants not to compete commonly found in employment agreements from being unenforceable for not meeting the agreement requirement in § 15.50.[22] According to the *Alex Sheshunoff* court, *Alex Sheshunoff* enabled the expansion in the

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[1] Tex. Bus & Com. Code Ann. § 15.50 (Vernon 2006).
[2] Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 652-53 (Tex. 2006) (citing Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 643 (Tex. 1994)).
[3] *Id.* at 652, 54.
[4] *Id*. at 653-54.
[5] § 15.50. This article deals exclusively with § 15.50(a). § 15.50(b) contains additional requirements for a covenant not to compete to be enforceable against a licensed physician, but those requirements are outside of the scope of this article.
[6] *Id*.
[7] *Id*.
[8] § 15.52.
[9] § 15.51(c).
[10] Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 644-48 (Tex. 1994).
[11] *Id*. at 647.
[12] *Id*. at 645 n.6.
[13] *See* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 655 (Tex. 2006).
[14] *Light*, 883 S.W.2d at 645 n.6.
[15] *Alex Sheshunoff*, 209 S.W.3d at 655.
[16] *Id*. at 654-55.
[17] *Id*. at 650-51.
[18] *Id*.
[19] *Id*. at 655.
[20] *Id*. at 651.
[21] *Id*. at 655.
[22] *Id*.

enforceability of covenants not to compete that the Texas Legislature intended when the Legislature enacted § 15.50.[23] This article examines the interpretation of § 15.50's agreement requirement, beginning with *Light* and *Alex Sheshunoff* and discussing four opinions that have been released in the eight months following *Alex Sheshunoff*.

II. *Light v. Centel Cellular Co. of Texas*

The Texas Supreme Court examined the requirement of an otherwise enforceable agreement in *Light v. Centel Cellular Co. of Texas*.[24] Light worked for United Telespectrum (hereinafter "United"). After two years of employment, United required Light to execute an employment agreement containing the covenant not to compete.[25] Light was required to execute the agreement to continue her employment.[26] After Light resigned from United she sued Centel, United's successor, to invalidate the covenant not to compete.[27] The Texas Supreme Court considered whether the promises in the employment agreement were sufficient to make the covenant not to compete enforceable under § 15.50.[28]

The court began by determining whether the employment agreement was an "otherwise enforceable agreement" when the agreement was made.[29] Other than the covenant not to compete, the agreement contained four promises made by United and two promises made by Light.[30] Light's employment was at-will.[31] Because the employment relationship could be terminated by either party, any promises dependent on the employment relationship's continued existence were unenforceable illusory promises.[32] All of the promises in the agreement were illusory except three: United's promise to provide initial specialized training to Light, Light's promise to give notice before terminating her employment, and Light's promise to inventory and return United property at the termination of her employment.[33] United's promise to provide initial specialized training to Light was unusual in that it was enforceable regardless of Light's continued employment, while most similar promises are not.[34]

In footnote six, the court considered in dicta the possibility of a covenant not to compete being ancillary to a unilateral contract.[35] A non-illusory promise made in exchange for an illusory promise is treated as forming a unilateral contract.[36] The non-illusory promise is an offer that can be accepted by performance of the illusory promise.[37] Performance of the illusory promise makes the unilateral contract enforceable.[38] The court read § 15.50 to mean a unilateral contract could not sustain a covenant not to compete.[39] The court interpreted the phrase "at the time the agreement was made" to modify "otherwise enforceable agreement."[40] A unilateral contract is not enforceable until performance of the illusory promise, which occurs after the unilateral contract is made.[41] Therefore, under the *Light* court's interpretation of § 15.50, a unilateral contract is not an "otherwise enforceable agreement at the time the agreement is made," so it cannot sustain a covenant not to compete.[42]

Having determined that the employment agreement was otherwise enforceable because of the non-illusory promises, the court analyzed whether the covenant not to compete was ancillary to or part of that agreement.[43] Since the Texas Legislature did not provide guidance on when a covenant is ancillary to or part of an agreement, the Texas Supreme Court created its own definition.[44] The court decided that "part of an otherwise enforceable agreement" does not mean "in the same instrument as an otherwise enforceable agreement."[45] If that were the case, the phrase "at the time the agreement is made" would be redundant because every covenant that is in the same instrument as an agreement is necessarily part of the instrument at the time the agreement was made.[46]

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[23] *See id*. at 654-55.
[24] Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 644-48 (Tex. 1994).
[25] *Id*.
[26] *Id*. at 644.
[27] *Id*. at 643.
[28] *Id*. at 644-48.
[29] *Id*. at 644-646.
[30] *Id*. at 646-47 n. 9.
[31] *Id*. at 644.
[32] *Id*. at 644-45.
[33] *Id*. at 645-46.
[34] Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 655 (Tex. 2006) (calling the employment agreement in *Light* a "peculiar agreement" because United's promise was enforceable even if Light was fired or quit).
[35] *Light*, 883 S.W.2d at 645 n.6.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 651 (Tex. 2006); *See id.*
[41] *Light*, 883 S.W.2d at 645 n.6.
[42] *Id*.
[43] *Id*. at 646-47.
[44] *Id*. at 647-648.
[45] *Id*. at 647 n.12.
[46] *Id*.

The court adopted a two-part test for when a covenant not to compete is ancillary to an otherwise enforceable agreement: "(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement."[47] The court gave the example of an employer's promise to reveal confidential information to an employee in exchange for an employee's promise not to disclose the information as an example of the type of agreement that a covenant not to compete could be ancillary to.[48]

Applying the definition to the agreement between Light and United, the court found that the covenant not to compete was not ancillary to or part of the agreement.[49] The covenant not to compete was not designed to enforce Light's promise to give notice before terminating her employment or her promise to inventory and return United's property at the termination of her employment.[50] Since the covenant not to compete was not ancillary to or part of the employment agreement, it did not meet the agreement requirement and the court declared it unenforceable.[51] The court noted that if Light had promised not to disclose confidential information she received during the specialized training, the covenant not to compete would have been ancillary to the employment agreement and enforceable.[52]

III. *Alex Sheshunoff Management Services, L.P. v. Johnson*

The Texas Supreme Court considered covenants not to compete again in *Alex Sheshunoff Management Services, L.P. v. Johnson*.[53] Like *Light*, *Alex Sheshunoff* involved a former employee who had agreed to a covenant not to compete trying to invalidate the covenant as not meeting the agreement requirement.[54] Johnson was employed by Alex Sheshunoff Management Services (hereinafter "ASM").[55] After working for five years, Johnson executed an employment agreement as a condition of his employment.[56] The employment agreement contained the covenant not to compete.[57] Johnson later left ASM to work for a competitor, Strunk.[58] ASM sued Johnson for violating the covenant not to compete, and Johnson defended by claiming the covenant was unenforceable.[59] The Texas Supreme Court reaffirmed the holding of *Light*, including *Light*'s definition of the phrase "ancillary to or part of."[60] However, the *Alex Sheshunoff* court explicitly disapproved of the dicta in footnote six of *Light*.[61]

In the employment agreement, ASM promised to either give Johnson advance notice of termination other than for misconduct or pay Johnson a certain amount of money upon terminating his employment.[62] ASM also promised to give Johnson special training and access to confidential information, and Johnson did receive the training and confidential information.[63] Johnson promised not to disclose the confidential information and agreed to the covenant not to compete.[64] ASM argued that Johnson was not an at-will employee because ASM could not fire him without giving notice.[65] The court found that Johnson was still an at-will employee because ASM still could terminate Johnson without notice as long as it paid Johnson a specified sum.[66] Because ASM could terminate Johnson at any time, ASM's promise to provide Johnson with training and access to confidential information was illusory since it depended on Johnson's continued employment.[67] The court distinguished ASM's promise to provide training from United's promise to provide training in *Light* because United's promise would have been enforceable even if Light had been fired, while ASM's promise would not be enforceable if Johnson had been fired.[68]

ASM's other promise, to provide notice to Johnson or pay him a certain amount of money, and Johnson's promise not to reveal confidential information were not illusory, so under *Light* the employment agreement was otherwise enforceable at the time it was made.[69] Under *Light*, however, the covenant not to compete was not ancillary to or part

[47] *Id*. at 647.
[48] *Id*. at 647 n.14.
[49] *Id*. at 647-48.
[50] *Id*. at 648.
[51] *Id*.
[52] *Id*.
[53] Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 647-48 (Tex. 2006).
[54] *Id.*
[55] *Id*. at 646.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 647.
[60] *Id.* at 649.
[61] *Id*. at 650-51.
[62] *Id*. at 646 n.3.
[63] *Id*. at 647.
[64] *Id*. at 647.
[65] *Id*. at 650.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 650-51.
[69] *Id*. at 650.

of the employment agreement.[70] ASM's promise to provide notice before termination or pay money did not give rise to ASM's interest in restraining Johnson from competing.[71]

The *Alex Sheshunoff* court nonetheless held that the covenant not to compete was enforceable based on a unilateral contract in the employment agreement.[72] Footnote six of *Light* stated in dicta that a unilateral contract could not sustain a covenant not to compete because a unilateral contract is not enforceable at the time it is made.[73] The court disagreed with footnote 6 and reconsidered its interpretation of § 15.50.[74]

§ 15.50 states that a covenant not to compete must be "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made."[75] The court noted that the text is ambiguous as to whether the phrase "at the time the agreement is made" modifies the phrase "otherwise enforceable agreement," as the *Light* court had decided, or the phrase "ancillary to or part of."[76] Footnote 6 in *Light* was based on interpreting § 15.50 to require that the agreement be otherwise enforceable at the time the agreement is made.[77] To determine which of the two interpretations the Texas Legislature intended the court consulted the legislative history of the statute.[78]

The legislative history for the initial 1989 enactment of § 15.50 and its 1993 revision indicated that the Legislature was trying to broaden the enforceability of covenants not to compete.[79] According to the court, the phrase "at the time the agreement is made" was added in the 1993 revision as a restatement of the 1989 version's requirement that a covenant not to compete be supported by consideration independent of any consideration already given as part of an earlier employment agreement.[80] Based on this legislative history, the court concluded that "at the time the agreement was made" modifies "ancillary to or part of," not "otherwise enforceable agreement."[81] Under § 15.50, a covenant not to compete must be ancillary to or part of another agreement at the time the other agreement is made, and the other agreement must be otherwise enforceable.[82]

Based on its new interpretation of § 15.50, the court held the covenant not to compete met the agreement requirement.[83] Johnson's promise not to reveal confidential information in exchange for ASM's illusory promise to give Johnson specialized training and access to confidential information created a unilateral contract.[84] The covenant not to compete was ancillary to or part of the unilateral contract.[85] The unilateral contract became an enforceable agreement when ASM performed its illusory promise.[86]

The court stated that the "core inquiry" in § 15.50 is the reasonableness requirement, not the agreement requirement.[87] The court then considered the reasonableness requirement for the covenant between ASM and Johnson.[88] The covenant not to compete lasted for one year and prevented Johnson from working for 821 ASM clients that fit criteria defined in the covenant, soliciting those clients, and trying to hire ASM employees.[89] The court focused on the goodwill that Johnson developed for ASM and the confidential information Johnson received that Johnson could have used against ASM.[90] The court also considered that the covenant not to compete Johnson agreed to with Strunk lasted longer than the covenant with ASM, Johnson testified that the covenant was reasonable, and the covenant itself stated that Johnson acknowledged it was reasonable.[91] The court concluded that the covenant was reasonable, making it enforceable under § 15.50.[92]

IV. Cases post-Alex Sheshunoff

As of this writing, four published cases have cited *Alex Sheshunoff* for its holdings on § 15.50: *In re Bob Nicholas Enterprise, Inc.*, *Intermetro Industries Corp. v. Kent*, *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, and *Rimkus Consulting Group, Inc. v. Cammarata*.[93] *Rinkmus* involved a

[70] *Id*.
[71] *Id*.
[72] *Id*. at 651.
[73] *Id*.; Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 645 n.6 (Tex. 1994).
[74] *Alex Sheshunoff*, 209 S.W.3d at 645.
[75] Tex. Bus & Com. Code Ann. § 15.50 (Vernon 2006).
[76] *Alex Sheshunoff*, 209 S.W.3d at 651.
[77] *Id*.
[78] *Id*.
[79] *Id*. at 654.
[80] *Id*. at 654-55.
[81] *Id*. at 651.
[82] *Id*.
[83] *Id*. at 655.
[84] *Id*.
[85] *Id*. at 649.
[86] *Id*.
[87] *Id*. at 655-56.
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] In re Bob Nicholas Enter., Inc., 358 B.R. 693 (Bankr. S.D. Tex. 2007); Intermetro Indus. Corp. v.

challenge to personal jurisdiction and only cited *Alex Sheshunoff* for the proposition that a covenant not to compete may be enforceable in Texas.[94] The other three cases substantively applied § 15.50 and will be discussed in more detail.

A. *In re Bob Nicholas Enterprise, Inc.*

In re Bob Nicholas Enterprise, Inc. is an unusual case because in it the former employer sued for an alleged violation of a covenant not to compete that had occurred after the former employer had ceased operating.[95] Bob Nicholas and his wife Arita Nicholas formed Bob Nicholas Enterprise, Inc. (hereinafter "BNE"), a printing company.[96] To acquire one of BNE's printing presses, Bob Nicholas executed a covenant not to compete, agreeing that he personally would not compete with Innerfaith Printing Company and would not disclose BNE's customer information.[97] BNE was not financially successful and filed for bankruptcy.[98] Shortly before BNE filed for bankruptcy, the Nicholases contacted the printing company Earth Color about starting a second printing company.[99] The Nicholases and Earth Color started the printing company Nicholas/Earth.[100] Bob Nicholas began to work for Nicholas/Earth and disclosed BNE's customer information.[101] BNE's trustee in bankruptcy sued Earth Color for breach of Bob Nicholas's covenant not to compete.[102] The bankruptcy court noted that Earth Color was not a signatory to the agreement and Bob Nicholas was never personally sued for violating the covenant, but did not decide possible procedural issues.[103] Instead, the court decided the covenant was unenforceable under § 15.50.[104]

The bankruptcy court's decision that the covenant was unenforceable was based on both requirements of § 15.50.[105] Bob Nicholas received no consideration for the covenant.[106] The purpose of the covenant was to allow BNE to acquire the printing press, not to allow Bob Nicholas individually to acquire the printing press.[107] Thus, there was no otherwise enforceable agreement between BNE and Bob Nicholas for the covenant to be ancillary to or part of.[108] The bankruptcy court also found the covenant was unenforceable because it was unreasonable. The court found that BNE's customer list was not confidential and BNE was trying to enforce the covenant while BNE was no longer operating.[109] Thus, the court also invalidated the covenant because it was too restrictive.[110]

B. *Intermetro Industries Corp. v. Kent*

Intermetro Industries Corp. involved a motion for a temporary restraining order to prevent a former employee, Kent, from violating a covenant not to compete.[111] Kent, a Texas citizen, formerly worked for Intermetro Industries Corp. (Intermetro), a corporation with its principal place of business in Pennsylvania.[112] While employed by Intermetro, Kent agreed to a covenant not to compete in connection with an agreement where Intermetro promised to provide Kent with confidential information in exchange for Kent's promise not to reveal that information.[113] The employment agreement stated that Pennsylvania law would apply.[114]

Kent argued the temporary restraining order should not be granted because Texas law should govern the employment agreement and the covenant was unenforceable under Texas law.[115] The *Kent* court was a Pennsylvania federal court sitting with

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Kent, No. 3:CV-07-0075, 2007 WL 518345 (M.D. Pa. 2007); Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc., No. 01-05-01080-CV, 2007 WL 1299661 (Tex.App.–Houston [1st Dist.] 2007); Rimkus Consulting Group, Inc. v. Cammarata, No. H-07-0405, 2007 WL 1520993 (S.D. Tex. 2007).

[94] *Rinkmus*, 2007 WL 1520993 at *3.

[95] In re Bob Nicholas Enter., Inc., 358 B.R. 693, 699-700, 706-07 (Bankr. S.D. Tex. 2007).

[96] *Id*. at 697.

[97] *Id*. at 697, 705. The opinion does not directly identify the other party to the covenant. Presumably BNE acquired the press from Innerfaith Printing Company, and as a condition of the acquisition agreed to enter into the covenant with Bob Nicholas.

[98] *Id*. at 697-700 (giving the history of BNE).

[99] *Id.* at 699-700.

[100] *Id*. at 699-700.

[101] *Id*. at 705.

[102] *Id*. at 705-706.

[103] *Id.* at 705. The opinion does not discuss how Earth Color could be liable for Bob Nicholas's breach.

[104] *Id*. at 705-06.

[105] *Id*.

[106] *Id*. at 706.

[107] *Id*.

[108] *See id.*

[109] *Id.* at 706-707.

[110] *Id*.

[111] Intermetro Indus. Corp. v. Kent, No. 3:CV-07-0075, 2007 WL 518345, *1 (M.D. Pa. 2007).

[112] *Id*.

[113] *Id*. at *1, *4.

[114] *Id*. at *1.

[115] *Id*.

diversity jurisdiction, so it applied Pennsylvania law to determine which state's laws should apply.[116] Under Pennsylvania law, the choice-of-law provision would control unless the application of Pennsylvania law would be contrary to a fundamental policy of Texas.[117]

The court looked to *Alex Sheshunoff* for its discussion of Texas's policy on at-will employment and covenants not to compete.[118] Based on the legislative history discussion in *Alex Sheshunoff*, the *Kent* court decided that Texas has a policy in favor of enforcing reasonable covenants not to compete against at-will employees.[119] Kent had relied on footnote six of *Light* for the proposition the covenant was unenforceable under Texas law.[120] The court recognized that footnote 6 was not followed in *Alex Sheshunoff* and speculated that the covenant might be enforceable under Texas law.[121] Since Texas did not have a strong policy against enforcing covenants not to compete against at-will employees, the court upheld the choice of law provision and granted the temporary restraining order.[122]

C. *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*

Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc. applied § 15.50, *Light*, and *Alex Sheshunoff* to three covenants not to compete.[123] Fielding and Hardy were former employees of Mann Frankfort Stein & Lipp Advisors, Inc. (Mann Frankfort) who brought an action against their former employer and related entities for a declaratory judgment that covenants not to compete they had executed were unenforceable.[124] The defendants counterclaimed for breach of contract.[125] When Fielding began employment with Mann Frankfort he executed an employment agreement containing a covenant not to compete.[126] When Hardy began employment with an accounting firm that Mann Frankfort later acquired he executed an employment agreement containing a different covenant not to compete.[127] The accounting firm assigned its interest in the employment agreement to Mann Frankfort when Mann Frankfort acquired the firm.[128] Fielding and Hardy later executed identical limited partnership agreements, each containing an additional covenant not to compete, in connection with indirectly receiving interests in Mann Frankfort.[129]

The covenants not to compete in the agreements were written as "client-purchase provisions."[130] With varying limitations, all of the provisions required the employees, upon leaving Mann Frankfort, to pay Mann Frankfort before doing business with Mann Frankfort clients covered by the provisions.[131] Fielding's employment agreement stated that clients were "purchased" from Mann Frankfort by paying Mann Frankfort 90% of any amounts due to Fielding from the client.[132] Hardy's employment agreement stated that if Hardy did business with a client covered by the agreement, Hardy was required to pay a penalty of 150% of the fees Mann Frankfort billed to that client in the previous year.[133] The limited partnership agreements contained a similar penalty requirement.[134] The defendants argued that the client-purchase provisions were not covenants not to compete so the provisions were not required to meet the requirements of § 15.50.[135] The court focused on the effect the client-purchase provisions had as restraints on trade based on the substantial penalties the provisions required.[136] The court concluded that all of the client-purchase provisions were covenants not to compete to be analyzed under § 15.50.[137]

The *Hardy* court began with the covenants not to compete in the limited partnership agreements.[138] The limited partnership agreements stated that confidential information was valuable, but the agreements did not include any promises made by the employer to disclose confidential information and did not include any promises made by the employees not to reveal confidential information.[139] The employees gave no consideration in the agreements that the

[116] *Id*. at *2.
[117] *Id*. at *2 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)).
[118] *Id*. at *3.
[119] *Id*. at *3-*4.
[120] *Id*. at *3.
[121] *Id*. at *4.
[122] *Id*. at *4-*5.
[123] Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc., No. 01-05-01080-CV, 2007 WL 1299661, *6-*13 (Tex.App.–Houston [1st Dist.] 2007).
[124] *Id*. at *1.
[125] *Id*.
[126] *Id*.
[127] *Id*. at *2.
[128] *Id*.
[129] *Id*.
[130] *Id*. at *1.
[131] *Id*. at *5.
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*. at *4-*5.
[136] *Id*. at *5.
[137] *Id*. at *5-*6.
[138] *Id*. at *7.
[139] *Id*.

covenants were designed to enforce.[140] The covenants were unenforceable because they were not ancillary to or part of an otherwise enforceable agreement when they were executed.[141]

The court next considered the covenant not to compete in Fielding's employment agreement.[142] Unlike the partnership agreements, Fielding's employment agreement did include a promise by Fielding not to reveal confidential information.[143] However, the agreement did not include a promise by Mann Frankfort to give Fielding confidential information.[144] The court declined to find an implied promise to give Fielding confidential information in the agreement.[145] Even though Mann Frankfort gave Fielding confidential information, it had no duty to do so.[146] Under *Light*, for a covenant to be ancillary to or part of an agreement, the consideration given by the employer in the agreement must give rise to the employer's interest in the covenant.[147] Since Mann Frankfort gave no consideration in Fielding's employment agreement, the covenant not to compete in that agreement was unenforceable.[148]

Finally, the court considered the enforceability of the covenant not to compete in Hardy's employment agreement.[149] In Hardy's employment agreement the employer promised to give Hardy access to confidential information and Hardy promised not to reveal that information.[150] Mann Frankfort actually gave Hardy confidential information during his employment, so under *Alex Sheshunoff* whether Mann Frankfort's promise was illusory or not did not affect the enforceability of the agreement.[151] The covenant in Hardy's employment agreement passed the agreement requirement, so the court considered whether the covenant met the reasonableness requirement.[152]

The covenant lasted for twenty-four months after Hardy left the firm.[153] During that period, Hardy agreed not to solicit his former employer's clients, regardless of whether Hardy had personally served them.[154] If any client retained Hardy or anyone Hardy was associated with, Hardy was required to pay his former employer "an amount equal to 150% of the fees billed and accepted by such client" by the former employer during the preceding year.[155] The covenant had an unlimited geographic scope.[156] Because of the covenant's unlimited geographic scope, the covenant's application to all of Mann Frankfort's clients regardless of whether Hardy had personally served them, and the amount of the penalty, the court held that the covenant in Hardy's employment agreement was unenforceable because it was unreasonable.[157] The court did not reform the covenant to make it reasonable because the defendants did not ask for injunctive relief, the only relief available for violation of an unreasonable covenant before it is reformed.[158]

V. Conclusion

Together, *Light* and *Alex Sheshunoff* set out the current interpretation of the agreement requirement of § 15.50. To be enforceable, a covenant not to compete must first meet the agreement requirement of being "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made."[159] Under *Light*, a covenant is ancillary to or part of an agreement if "(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement."[160] Under *Alex Sheshunoff*, the phrase "at the time the agreement is made" means the covenant must be ancillary to or part of the agreement when the agreement is made, as opposed to being added onto an existing agreement.[161] An agreement where the employer's promise is illusory can still sustain a covenant not to compete if the

[140] *Id*. at *8.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*. at *9.
[145] *Id*.
[146] *Id*.
[147] *Id*. at *9-*10 (quoting Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 649 (Tex. 2006); Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 647 (Tex. 1994)).
[148] *Id*. at *10.
[149] *Id*.
[150] *Id*. at *10-*11.
[151] *Id*. at *11 (citing *Alex Sheshunoff*, 209 S.W.3d at 649).
[152] *Id*.
[153] *Id*. at *12.
[154] *Id*.
[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] *Id*. at *13.
[159] Tex. Bus & Com. Code Ann. § 15.50 (Vernon 2006).
[160] Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 647 (Tex. 1994).
[161] Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 651 (Tex. 2006).

employer has performed the illusory promise.[162] If the agreement requirement of § 15.50 has been satisfied then the enforceability of the covenant depends upon the reasonableness requirement.[163]

Light and *Alex Sheshunoff* approved of two types of employment agreements sustaining covenants not to compete. *Light* stated that an employment agreement where the employer makes a non-illusory promise to share confidential information with the employee and the employee promises to keep that information confidential would sustain a covenant not to compete.[164] *Alex Sheshunoff* held that an employment agreement where the employer makes an illusory promise to share confidential information with the employee and the employee promises to keep that information confidential would sustain a covenant not to compete if the employer has performed the illusory promise.[165] The covenant is still only enforceable to the extent it meets the reasonableness requirement.[166]

The purpose of § 15.50 was to expand the enforceability of covenants not to compete in Texas, but *Light* overlooked this purpose in its interpretation of the statute.[167] *Alex Sheshunoff* interpreted § 15.50 the way the Texas Legislature intended when it wrote and later revised the statute.[168] With the restriction created by footnote 6 of *Light* removed, Texas courts are likely to hold many more covenants not to compete enforceable.[169] Announcing the death of covenants not to compete in Texas is premature.

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[162] *Id*.
[163] § 15.50; *See id.* at 656-657.
[164] *Light*, 883 S.W.2d at 647 n.14.
[165] *Alex Sheshunoff*, 209 S.W.3d at 648-51.
[166] § 15.50.
[167] *See Alex Sheshunoff*, 209 S.W.3d at 655.
[168] *Id* at 654-55.
[169] *See id.* at 655 (noting that most covenants not to compete in the at-will employment context were unenforceable under *Light*).