IN THE SUPREME COURT OF TEXAS

NO. 03-1050

ALEX SHESHUNOFF MANAGEMENT SERVICES, L.P., PETITIONER,

v.

KENNETH JOHNSON AND STRUNK & ASSOCIATES, L.P., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued November 10, 2004

JUSTICE WILLETT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE BRISTER, JUSTICE GREEN, and JUSTICE JOHNSON joined.

CHIEF JUSTICE JEFFERSON filed a concurring opinion, in which JUSTICE O'NEILL and JUSTICE MEDINA joined.

JUSTICE WAINWRIGHT filed a concurring opinion.

In this case we revisit the Court's 1994 decision in *Light v. Centel Cellular Co.*[1] and again consider the enforceability of covenants not to compete in the context of at-will employment. The question today is whether an at-will employee who signs a non-compete covenant is bound by that agreement if, at the time the agreement is made, the employer has no corresponding enforceable obligation. Under *Light*, the answer to that question was always "no." Today we modify our holding

[1] 883 S.W.2d 642 (Tex. 1994).

in *Light* and hold that an at-will employee's non-compete covenant becomes enforceable when the employer performs the promises it made in exchange for the covenant. In so holding, we disagree with language in *Light* stating that the Covenants Not to Compete Act[2] requires the agreement containing the covenant to be enforceable the instant the agreement is made.

I. Background

Petitioner Alex Sheshunoff Management Services, L.P. (ASM) provides consulting services to banks and other financial institutions. Respondent Kenneth Johnson began working for ASM in 1993 as an at-will employee. In September, 1997, ASM promoted Johnson to director of its "Affiliation Program," a program designed to maintain relationships with clients and prospective clients. A few months after the promotion, ASM presented Johnson with an employment agreement (Agreement) containing a covenant not to compete. ASM informed Johnson that signing the agreement was a condition of continued employment. Johnson signed the Agreement in January 1998.

The Agreement was at-will in the sense that it had no fixed term of employment and stated that "[e]ither party may elect to terminate this Agreement at any time for any reason," subject to employer and employee notice provisions. The employer notice provision stated that ASM would give notice of termination to Johnson (unless the termination stemmed from employee misconduct)

[2] TEX. BUS. & COM. CODE §§ 15.50–15.52.

but then stated that ASM could immediately terminate Johnson so long as ASM paid a specified fee to Johnson.[3]

The Agreement also stated:

> To assist Employee in the performance of his/her duties, Employer agrees to provide to Employee, special training regarding Employer's business methods and access to certain confidential and proprietary information and materials belonging to Employer, its affiliates, and to third parties, including but not limited to, customers and prospects of the Employer who have furnished such information and materials to Employer under obligations of confidentiality.

The Agreement then specified information that qualified as confidential information, and provided that the employee agreed to keep all such information strictly confidential.

The Agreement included a covenant not to compete, providing that for one year after his termination, Johnson would not provide consulting services to any ASM clients to whom Johnson had "provided fee based services in excess of 40 hours within the last year of employment," and would not "solicit or aid any other party in soliciting any affiliation member or previously identified prospective client or affiliation member."

The parties dispute whether the nature of the training and confidential information Johnson received after he signed the Agreement was different from the information and training he had previously received. However, there is no dispute that after the Agreement was signed Johnson

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[3] The Agreement provided:

> Employer agrees that if it terminates this Agreement for any reason other than misconduct on the part of Employee (in which case no notice or pay in lieu thereof is required), it will give Employee at least two (2) weeks' advance notice of such termination, plus one (1) additional week of notice per year of service up to eight (8) years of service. If Employer fails to give Employee such notice, Employer will pay Employee an amount equivalent to the same number of weeks' salary, less applicable deductions and withholdings.

received confidential information. ASM also paid for training from third parties that was provided to Johnson after he signed the Agreement. ASM was under no preexisting contractual obligation to provide such information and training.

In 2001, Johnson participated in confidential meetings regarding ASM's plans to introduce a bank overdraft protection product. He requested and received an internal manual on this new product. The market leader for such products was Respondent Strunk & Associates, L.P. (Strunk). In early 2002, Strunk contacted Johnson about hiring him. ASM offered evidence that, after Strunk contacted Johnson, he continued to receive confidential information from ASM regarding its plans to offer the new overdraft product. In March 2002, Johnson told ASM that he was leaving to work for Strunk.

ASM sued Johnson, alleging breach of the covenant not to compete and seeking injunctive relief and damages. Strunk intervened. The court granted a temporary injunction. Strunk and Johnson then moved for summary judgment, arguing that the covenant was unenforceable as a matter of law. They argued that under footnote six of *Light*, 883 S.W.2d at 645 n.6 (discussed below), ASM's promises to provide confidential information and specialized training were illusory at the time the agreement was made and the covenant was therefore unenforceable. The district court granted the summary judgment motions. The court denied Strunk's request for attorney fees, however, and entered a final judgment.

The court of appeals affirmed. 124 S.W.3d 678. It held that under footnote six of *Light*, the covenant was unenforceable because the promises to provide specialized training and confidential

information were illusory when the agreement was made and therefore did not comport with the Act's requirement that the agreement be enforceable when it was made:

> At the heart of the parties' dispute is whether ASM's promise to provide special training and access to confidential information was illusory. Under section 15.50, the relevant inquiry is whether ASM's promise was binding at the time that the agreement was made. . . . ASM's promise to give Johnson access to training and confidential information in the future was illusory because ASM could have fired Johnson immediately after he signed the agreement and escaped its obligation to perform. . . . Thus, ASM's acceptance of Johnson's promise to maintain confidentiality by later providing confidential information created a unilateral contract but not an otherwise enforceable agreement at the time the agreement was made. *See Light*, 883 S.W.2d at 645 n.6.

124 S.W.3d at 685, 687.

II. Discussion

The Covenants Not to Compete Act (Act) states:

> [A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE § 15.50(a).

A. "At the Time the Agreement Is Made"

1. *Light*'s Analysis

In *Light*, we analyzed the requirements for enforceability of a covenant not to compete under section 15.50. In that case, an employee (Light) who had held her job since 1985 signed an agreement in 1987 containing a covenant not to compete. 883 S.W.2d at 643. The agreement stated that the employer "agrees to provide the [employee] initial and on-going specialized training

necessary to sell the mobile radio communications services [employer] offers." *Id.* at 646 n.8. It provided that "employment is terminable at the will of either [employee] or [employer]." *Id.* at 645-46 n.8.

We held that "otherwise enforceable" agreements under section 15.50(a) "can emanate from at-will employment so long as the consideration for any promise is not illusory." *Id*. at 645. We concluded that the agreement contained, in addition to the covenant not to compete, three non-illusory promises: (1) the employer's promise to provide initial specialized training; (2) the employee's promise to provide fourteen days' notice prior to termination; and (3) the employee's promise to provide an inventory upon termination. *Id.* at 645-46. We construed the employer obligation to provide initial training as not depending on whether the employee was still employed: "Even if Light had resigned or been fired after this agreement was executed, United would still have been required to provide the initial training." *Id.* at 646.

We held that these promises were not sufficient to make the covenant enforceable under the Act. We held that section 15.50 requires the covenant to be "ancillary to or part of" the otherwise enforceable agreement, and that to meet this requirement, two conditions must be met: "(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." *Id.* at 647. We concluded that the non-illusory promises in the agreement did not satisfy these requirements because the covenant not to compete was not designed to enforce the employee's promises to give notice and provide an inventory. *Id.* at 647 & n.15. We recognized that

the agreement must give rise to an "interest worthy of protection" by a covenant not to compete, *id.* at 647 (quoting *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 682 (Tex. 1990)), and that "business goodwill and confidential or proprietary information are examples of such worthy interests," *id.* We stated that the employer's promise to train the employee "might involve confidential or proprietary information," *id.*, and that a reciprocal promise by the employee not to disclose such confidential information would meet the requirement that the covenant be designed to enforce the employee's consideration provided in the agreement, *id.* at 647 & n.14. However, the covenant in *Light* failed because "Light did not promise in the otherwise enforceable agreement to not disclose any of the confidential or proprietary information given to her by" her employer. *Id.* at 647-48.

We do not disturb the holding in *Light*. The covenant in that case was part of an agreement that contained mutual non-illusory promises and was an "otherwise enforceable agreement." *Id.* at 646. The covenant was not enforceable, however, because it was "not designed to enforce any of Light's return promises in the otherwise enforceable agreement." *Id.* at 647. Unlike Johnson in the pending case, Light made no promise not to disclose confidential information. Under *Light*, for a covenant to be "ancillary to or part of" an enforceable agreement under section 15.50, "(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." *Id.* at 647.

In the pending case, ASM promised to disclose confidential information and to provide specialized training under the Agreement, and Johnson promised not to disclose confidential

information. The covenant was ancillary to or part of the agreement under the two requirements of *Light* quoted immediately above. However, under other language in *Light*, the Agreement was not enforceable at the time it was made.

In footnote six of *Light*, we discussed section 15.50's requirement that the covenant be "ancillary or part of an otherwise enforceable agreement *at the time the agreement is made*":

> If only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance. For example, suppose an employee promises not to disclose an employer's trade secrets and other proprietary information, if the employer gives the employee such specialized training and information during the employee's employment. If the employee merely sought a promise to perform from the employer, such a promise would be illusory because the employer could fire the employee and escape the obligation to perform. If, however, the employer accepts the employee's offer by performing, in other words by providing the training, a unilateral contract is created in which the employee is now bound by the employee's promise. 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. . . . Such a unilateral contract existed between Light and United as to Light's compensation. But such unilateral contract, since it could be accepted only by future performance, could not support a covenant not to compete inasmuch as it was not an "otherwise enforceable agreement at the time the agreement is made" as required by § 15.50.

Id. at 645 n.6 (citations omitted).

In the pending case, the court of appeals correctly held that under *Light*'s footnote six, the agreement was illusory insofar as it required ASM to provide confidential information and specialized training. Since ASM could fire Johnson after the agreement was signed, and before it provided any confidential information or specialized training, we have exactly the situation hypothesized in footnote six. Unlike the agreement in *Light*, the agreement in the pending case did not oblige ASM to provide initial training whether or not Johnson was still employed by ASM. The

agreement made no such promise, but instead stated that ASM agreed to provide training and access to confidential information "[t]o assist Employee in the performance of his/her duties." There was no promise to provide such training and access after the employee had been terminated. ASM argues that the contract was not illusory and was not an at-will contract at all because of the notice provisions in Agreement. Under the notice provision applicable to the employer, ASM could terminate Johnson immediately and without notice so long as it paid a specified sum to Johnson. The promises to provide confidential information and training to Johnson were therefore illusory at the time the agreement was executed. Under *Light*, "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," *id.* at 647, and if this particular consideration is never provided by the employer, the covenant not to compete cannot be enforced. Absent such consideration, the covenant is not "ancillary to or part of the otherwise enforceable agreement" under the Act as interpreted by *Light*. To hold otherwise would mean that an employer could enforce a covenant merely by promising to pay a sum of money to the employee in the agreement, a result inconsistent with *Light*'s requirements that the covenant must give rise to the employer's interest in restraining the employee from competing and the covenant must be designed to enforce the employee's consideration or return promise. A covenant not to compete is not designed to enforce a notice provision. *Id.* at 647 n.15. The court of appeals correctly held that under *Light*, "ASM's non-illusory promise to give at least two weeks' notice before terminating Johnson does not give rise to its interest in restraining Johnson from competing." 124 S.W.3d at 688.

2. Today's Departure From *Light*

We agree with *Light*'s recitation of basic contract law in footnote six that "[i]f only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance." Upon further review of the Act and its history, however, we disagree with footnote six insofar as it precludes a unilateral contract made enforceable by performance from ever complying with the Act because it was not enforceable at the time it was made.

At the outset, this language in *Light* was not essential to the holding in that case. *Light* held that the agreement in issue was not a unilateral contract but was an enforceable bilateral contract when made because, as the court construed the employer's promise to provide training in that case, the employer had made a promise to provide *initial* training that was enforceable when made. "Even if Light had resigned or been fired after this agreement was executed, United would still have been required to provide the initial training." *Light*, 883 S.W.2d at 646. As explained above, the fatal defect in the agreement in *Light* was not that it was unenforceable when made, but that there was no "ancillary" promise by the employee, such as a promise not to disclose confidential information, that the covenant not to compete was designed to enforce.

Revisiting the issue of what the clause "at the time the agreement is made" in the Act means, we conclude that we must disagree with *Light*'s view that a unilateral contract can never meet the requirements of the Act because such a contract is not immediately enforceable when made. Section 15.50 states that "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 . . . ." Simply reading the text, the clause

"at the time the agreement is made" can modify either "otherwise enforceable agreement" or "ancillary to or part of." No amount of pure textual analysis can tell us unequivocally which preceding clause is modified. *Light* stated that the agreement must be enforceable at the time the agreement is made, and therefore concluded that "at the time the agreement is made" must modify "otherwise enforceable agreement." We now conclude, contrary to *Light*, that the covenant need only be "ancillary to or part of" the agreement at the time the agreement is made. Accordingly, a unilateral contract formed when the employer performs a promise that was illusory when made can satisfy the requirements of the Act.

There is no sound reason why a unilateral contract made enforceable by performance should fail under the Act. We understand why the Legislature and the courts would not allow an employer to spring a non-compete covenant on an existing employee and enforce such a covenant absent new consideration from the employer. "[A]n agreement not to compete, like any other contract, must be supported by consideration." *DeSantis*, 793 S.W.2d at 681 n.6. The Act, as we now read it, addresses this concern. The covenant cannot be a stand-alone promise from the employee lacking any new consideration from the employer. *See, e.g.*, *Martin v. Credit Prot. Ass'n, Inc.*, 793 S.W.2d 667, 669 (Tex. 1990) (holding employment agreement consisting entirely of a covenant not to compete unenforceable because the covenant "must be supported by valuable consideration"). But if, as in the pending case, the employer's consideration is provided by performance and becomes non-illusory at that point, and the agreement in issue is otherwise enforceable under the Act, we see no reason to hold that the covenant fails.

3. The Act's Legislative History

Given the indefiniteness of the phrase "at the time the agreement is made," we have also examined the legislative history of the Covenants Not to Compete Act. Ordinarily, the truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on. This enacted language is what constitutes the law, and when a statute's words are unambiguous and yield a single inescapable interpretation, the judge's inquiry is at an end. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). Wherever possible, we construe statutes as written, but where enacted language is nebulous, we may cautiously consult legislative history to help divine legislative intent.[4] *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). In the present case, because the modifying clause "at the time the agreement is made" is imprecise and suggests two conflicting interpretations on the central issue before us, we consult the legislative history to help glean the statute's fair and ordinary meaning. Nothing in the Act's legislative history suggests a reading contrary to the one we adopt today. Indeed, the legislative materials suggest that the current wording of the Act was intended to cover covenants not to compete executed in the course of at-will employment of exactly the sort at issue in the pending case.

The Act originated in 1989 with Senate Bill 946. As originally filed, the bill provided:

> Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable to the extent that it:
>
> (1) is ancillary to an otherwise enforceable agreement; and

[4] We say "cautiously" because while the Code Construction Act expressly authorizes courts to use a range of construction aids, including legislative history, TEX. GOV'T CODE § 311.023, we are mindful that over-reliance on secondary materials should be avoided, particularly where a statute's language is clear. If the text is unambiguous, we must take the Legislature at its word and not rummage around in legislative minutiae.

> (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. S.B. 946, 71st Leg., R.S. (1989) (original version of bill).

Before passage, an amendment was offered and adopted which added language to subsection (1), so that as passed this subsection stated: "(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." Act of May 23, 1989, 71st Leg., R.S., ch. 1193, §1, 1989 Tex. Gen. Laws 4852.

The original and amended language of the 1989 legislation do not suggest that the Legislature intended to exclude unilateral contracts that become enforceable when, as occurred in this case, the employer proceeds to perform his promises to convey confidential information and provide training. The amendment by its terms was intended to cover the situation where the covenant is signed after the original employment agreement but is nonetheless enforceable if supported by new consideration.

The Act was passed to expand the enforceability of covenants not to compete. We explained in *Light* that the Act was a response to decisions from this Court. *Light*, 883 S.W.2d at 643. A Senate bill analysis noted:

> Recent Texas Supreme Court Cases, (notably *Hill v. Mobil Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987), and *DeSantis v. Wackenhut Corp.*, 31 Tex. Sup. Ct. J. 616 (July 13, 1988)[, *on rehearing*, 793 S.W.2d 670 (Tex. 1990)]) however, have severely restricted the enforceablility of these covenants in franchise and employment settings and raised questions about their use in other previously acceptable circumstances.

SEN. RESEARCH COMM., BILL ANALYSIS, Tex. S.B. 946, 71st Leg., R.S. (1989). A House bill analysis stated that *Hill* "overturned long-standing precedent," and that the bill "would simply restore over 30 years of common law developed by Texas Courts and remove an impairment to economic development in the state." HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. S.B. 946, 71st Leg., R.S. (1989). *See also Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991) (noting that "the purpose of the Act was to return Texas' law generally to the common-law as it existed prior to *Hill*").

The Act was amended in 1993 in response to more court decisions. The legislative history indicates that the primary purposes of the amendment were to make clear that covenants not to compete were applicable to at-will employment situations and that the statute prevailed over contrary common law. A House bill analysis stated:

> Texas courts have not consistently followed the requirements of Chapter 15. One case has implied that the common law on the subject remains applicable. Another case invalidated covenants not to compete in connection with "at will" employment contracts. . . . C.S.H.B. 7 clarifies the applicability of Chapter 15 and ensures that "at will" employment contracts are covered.[5] The bill further makes clear that the statutory requirements prevail over the common law.

HOUSE COMM. ON BUS. & INDUS., BILL ANALYSIS, Tex. H.B. 7, 73d Leg., C.S. (1993). To that end, section 15.51(b) of the Act was amended to make specific reference to at-will contracts,[6] and section

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[5] The at-will employment case the 1993 amendment sought to overrule was surely *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830 (1991), which held that "a covenant not to compete executed either at the inception of or during the employment-at-will relationship cannot be ancillary to an otherwise enforceable agreement and is unenforceable as a matter of law." *Id.* at 833.

[6] Section 15.51(b) now provides in part: "If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, *for a term or at will*, the promisee has the burden of establishing that the covenant meets the criteria specified by Section 15.50 of this code." (Emphasis added). The clause "for a term or at will" was added by the 1993 amendment.

15.52 was added to provide that the Act preempts common law. TEX. BUS. & COM. CODE §§ 15.51(b), 15.52.

The 1993 amendment also rewrote section 15.50 of the Act, the critical provision for our purposes. Prior to the 1993 amendment, section 15.50 provided:

> Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable to the extent that it:
>
> (1) is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration; and
>
> (2) contains reasonable limitations as to time, geographical area, and scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Act of May 23, 1989, 71st Leg., R.S., ch. 1193, §1, 1989 Tex. Gen. Laws 4852. The 1993 amendment to this provision was originally introduced in a bill that provided:

> (a) Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable to the extent that it:
>
> (1) is ancillary to an otherwise valid transaction or relationship but, if the covenant not to compete is executed on a date other than the date on which the transaction occurs or the relationship begins, 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. H.B. 7, 73d Leg., R.S. (1993) (original version of bill). A substituted bill was submitted that became law and provided:

> (a) Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do

> not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Act of May 29, 1993, 73d Leg., ch. 965, §1, 1993 Tex. Gen. Laws 4201. For the first time, the clause "at the time the agreement is made" appears in the statute.

The reason that the language of section 15.50 was changed in 1993 from "otherwise enforceable agreement" to "otherwise valid transaction or relationship" and then back to "otherwise enforceable agreement" is unclear, but apparently the new reference to "at the time the agreement is made" simply retained the notion that a covenant not to compete could be signed after the employment relationship began so long as the covenant is supported by new consideration in an enforceable contract. The House bill analysis states that the change "describes applicability of the Act in terms of a covenant which is part of an otherwise 'enforceable agreement' instead of a 'valid transaction or relationship.' The substitute deletes the need for independent consideration."

Cumulatively, this legislative history indicates that (1) in 1989 and 1993 the Legislature wanted to expand the enforceability of covenants not to compete beyond that which the courts had allowed, (2) in 1989 the Legislature specifically wanted to ensure that covenants could be signed after the employment relationship began so long as the agreement containing the covenant was supported by new consideration, and (3) in 1993 the Legislature specifically wanted to make clear that covenants not to compete in the at-will employment context were enforceable. As to this last purpose, the 1993 amendment likely deleted the reference in section 15.50 to "the date on which the underlying agreement is executed" because such a reference might suggest that at-will arrangements

are not covered by the statute, as there is no underlying or original executed employment agreement when the employment is at will.

As best we can tell, the language in the current version of the Act making reference to the agreement "at the time the agreement is made" was included in the 1993 amendment to maintain the rule, recognized in the 1989 version of the Act, that a covenant could be signed after the date that employment began so long as the new agreement was supported by independent consideration. This language was not intended to impose a new requirement that the agreement containing the covenant must be enforceable the instant it is made. There is no indication in the legislative history of the 1993 amendment of an intent to reduce the enforceability of covenants not to compete; all of the legislative history is to the contrary.

Moreover, the legislative history of the 1993 amendment indicates that one of its purposes was to make clear that at-will employment relationships can be the subject of a covenant not to compete. In this context, we think the typical arrangement would be similar to the covenant in the pending case. The employee had an at-will arrangement, and he signed a covenant not to compete as part of an agreement in which the employer promised to provide confidential information and specialized training and the employee promised not to reveal confidential information. In this typical arrangement, the employer's promise is prospective and becomes enforceable only after the employer provides such confidential information or training and a unilateral contract results. If "at the time the agreement is made" in section 15.50 means that the agreement must be enforceable the instant it is made, as *Light*'s footnote six requires, then most covenants not to compete executed by employees with at-will employment will be unenforceable. Only the peculiar agreement, such as the

one at issue in *Light* itself,[7] where the employer promises to provide confidential information or training even if the employee has been fired or has quit, would be covered by the Act. Such a reading would take language from the 1993 amendment, intended to *expand* the reach of the Act to cover at-will employment, and use that language to *restrict* the reach of the Act in this context.

4. The Act Applies to Unilateral Contracts

For these reasons, we hold that a covenant not to compete is not unenforceable under the Covenants Not to Compete Act solely because the employer's promise is executory when made. If the agreement becomes enforceable after the agreement is made because the employer performs his promise under the agreement and a unilateral contract is formed, the covenant is enforceable if all other requirements under the Act are met. In the pending case, these other requirements were met and, by the time Johnson left ASM, the agreement had become an enforceable unilateral contract because ASM had provided confidential information and specialized training as promised to Johnson, and Johnson had promised in return to preserve the confidences of his employer.

We also take this opportunity to observe that section 15.50(a) does not ground the enforceability of a covenant not to compete on the overly technical disputes that our opinion in *Light* seems to have engendered over whether a covenant is ancillary to an otherwise enforceable agreement. Rather, the statute's core inquiry is whether the covenant "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

[7] As explained above, the employer in *Light* was required to provide "initial . . . specialized training" whether or not the employee "had resigned or been fired after this agreement was executed." *Light*, 883 S.W.2d at 646.

promisee." TEX. BUS. & COM. CODE § 15.50(a). Concerns that have driven disputes over whether a covenant is ancillary to an otherwise enforceable agreement—such as the amount of information an employee has received, its importance, its true degree of confidentiality, and the time period over which it is received—are better addressed in determining whether and to what extent a restraint on competition is justified.[8] We did not intend in *Light* to divert attention from the central focus of section 15.50(a). To the extent our opinion caused such a diversion, we correct it today.

B. Reasonableness of the Covenant

Johnson and Strunk also contended in their motions for summary judgment, as they do here, that the covenant not to compete was unreasonable. The court of appeals did not reach this issue. The covenant in the parties' employment agreement provided in pertinent part:

> (a) In consideration of the training and access to Confidential Information provided by Employer, and so as to enforce Employee's agreement regarding such Confidential Information . . . , Employee agrees that while employed by Employer, and for a period of one (1) year following the termination of Employee's employment for any reason, Employee will not
>
> > (i) directly or indirectly, as an owner, employee, independent contractor or otherwise, provide consulting services to banks, savings and loans or other financial institutions where the Employee has provided fee based services in excess of 40 hours within the last year of employment, or with which Employee has conducted significant sales activity, including, but

[8] In this regard, CHIEF JUSTICE JEFFERSON's concurrence is concerned that an employer might try to pull a fast one by withholding confidential information up until the employee announces his intent to leave, and then quickly sharing the secret information to prevent the employee from working for a competitor. ___S.W.3d at___. Today's decision should not stoke such worries or embolden such "one-sided gamesmanship," ___S.W.3d at___, as the concurrence terms it. While it seems unlikely that a rational company would rush to disclose valuable trade secrets as a departing employee walks out the door, in such a case the court could, under the Act and the facts, deem such a last-minute gambit "unreasonable" and unnecessary to protect the employer's business interests under section 15.50(a). Further, it is axiomatic that injunctive relief is an equitable remedy, subject to equitable principles, *see, e.g.*, *In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002), and the court could easily conclude that the employer's unclean hands in such circumstances renders it ineligible for injunctive relief.

not limited to, more than one sales call, preparation of a sales proposal and actual sales, within the last year of employment. This restriction applies regardless of geographic location, it being acknowledged by the parties that Employer's clients are not confined to a particular geographic area;

(ii) solicit or aid any other party in soliciting any affiliation member or previously identified prospective client or affiliation member; or

(iii) solicit or aid any other party in soliciting for employment any then-current employee of Employer.

(b) Employee understands and acknowledges that Employer has made substantial investments to develop its business interests and goodwill, and to provide special training to Employee for the performance of Employee's duties under this Agreement. Employee agrees that the limitations as to time, geographical area, and scope of activity to be restrained contained in this Paragraph 6 are reasonable and are not greater than necessary to protect the goodwill or other business interests of Employer. Employee further agrees that such investments are worthy of protection, and that Employer's need for the protection afforded by this Paragraph 6 is greater than any hardship Employee might experience by complying with its terms.

Johnson argues that the covenant is overbroad because:

- its restriction on his solicitation of certain of ASM's prospective clients and "affiliation members" is unrelated to any training or confidential information ASM provided Johnson after he signed the employment agreement;
- ASM's protection of its goodwill is unrelated to any such information;
- there is no basis for restricting Johnson from calling on ASM's clients of whom he was aware before signing the employment agreement.

We disagree. With Johnson's help, as Director of Affiliation, ASM continued to develop clients for four years after the employment agreement was signed. Johnson helped develop ASM's goodwill and could have tried to capitalize on it unfairly after going to Strunk. Johnson was even privy to ASM's development of a product to compete with Strunk. Although ASM had given Johnson access to the same marketing information without a covenant not to compete, nothing precluded ASM from

seeking the greater protection of a covenant when it did. The summary judgment record shows that Johnson's covenant would have precluded him from calling on 821 ASM clients for one year. When Johnson began work with Strunk, he agreed he would not sell an overdraft protection product, not just to Strunk's customers, but to anyone in the industry, and not for one year, but for two years after leaving Strunk's employment. Johnson testified that his covenant with Strunk was reasonable, just as he admitted in his employment agreement that his covenant with ASM was reasonable.

We conclude that Johnson's covenant with ASM was reasonable under section 15.50(a). Johnson and Strunk were therefore not entitled to summary judgment on their contrary argument. Since the covenant was enforceable, Johnson and Strunk were not entitled to recover attorney fees. ASM did not move for summary judgment on the enforceability of Johnson's covenant; thus, the case must be remanded to the trial court. Obviously, the one-year period during which Johnson's activities were to be restricted has passed, and ASM is no longer entitled to the injunctive relief it sought, and for a while obtained, at the outset. But ASM's claim for damages for breach of the covenant remains pending.

III. Conclusion

We reverse the judgment of the court of appeals that ASM take nothing against Johnson and Strunk, affirm its judgment that Strunk not recover attorney fees against ASM, and remand the case to the trial court for further proceedings.

Don R. Willett
Justice

Opinion delivered: October 20, 2006