IN THE SUPREME COURT OF TEXAS

NO. 09-0558

MARSH USA INC. AND MARSH & MCLENNAN COMPANIES, INC.,
PETITIONERS,

v.

REX COOK, RESPONDENT

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

Argued September 16, 2010

JUSTICE WILLETT, concurring in the judgment only.

I agree the trial court should take first crack at assessing whether today's noncompetition covenant "contains limitations as to time, geographical area, and scope of activity . . . that are reasonable and do not impose a greater restraint than is necessary."[1] That inquiry—essentially, "Are the restrictions *too* restrictive?"—received scant attention below, rendering the record before us underdeveloped. The affidavit submitted by Marsh USA (Marsh) asserts that the stock-incentive plan aimed to boost goodwill by giving Cook a stake in Marsh's long-term success.[2] Growing

[1] TEX. BUS. & COM. CODE § 15.50(a).

[2] Though styled a "Non-Solicitation Agreement," the agreement also operates as a kitchen-sink noncompetition agreement. Besides stating Cook may not "solicit" business from Marsh's clients or prospects, it also says Cook may not "accept," "perform," or "supervise" business involving them.

goodwill is all well and good, but the affidavit then says this: The noncompete "prevents employees from using that goodwill . . . to attract the customer to a competitor." On the surface, this seems just another way of saying the noncompete's purpose is to stifle competition, but perhaps a fuller record on remand will paint a less protectionist picture.

So I agree to remand, but I write separately to underscore this admittedly obvious point: Restrictions on employee mobility that exist only to squelch competition are per se illegal in Texas, and for good reason. Economic dynamism in the 21st century requires speed, knowledge, and innovation—imperatives that must inform judicial review of efforts to sideline skilled talent.[3] Courts must critically examine noncompetes in light of our contemporary, knowledge-based economy that prizes ingenuity and intellectual talent. This much is clear: Courts cannot countenance covenants too contemptuous of competition.

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Amid increasing labor fluidity, there is no shortage of debate surrounding the propriety of enforcing restrictive covenants that tie up skills, knowledge, ideas, and expertise. The fault line runs between first principles—freedom of contract versus freedom of competition—and judicial treatment

[3] The efficacy of restrictions on employee mobility is a matter of spirited debate among economists, lawyers, and legal scholars. A growing body of nascent scholarship contends that overbroad noncompete agreements actually harm innovation rather than foster it when they irrationally impede job-hopping. *See, e.g.*, Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation From Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 306–07 (2006) [hereinafter "Bishara, *Covenants Not to Compete in a Knowledge Economy*"]; Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 594–619 (1999); Charles Tait Graves and James A. DiBoise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L. J. 323, 323 (2006) [hereinafter "Graves and DiBoise, *Strict Trade Secret and Non-Competition Laws*"]; Alan Hyde, *Should Noncompetes Be Enforced?*, REGULATION (Cato Inst.), Winter 2010–11, at 6; Alan Hyde, *The Wealth of Shared Information: Silicon Valley's High-Velocity Labor Market, Endogenous Economic Growth, and the Law of Trade Secrets* (Sept. 1998), http://andromeda.rutgers.edu/~hyde/WEALTH.htm.

of noncompetes has been, well, eclectic.[4] Some jurisdictions favor freedom of contract (enforcing a noncompete because the employee signed it) and fret little about whether the company's interest is legitimate;[5] other jurisdictions (most notably, California) champion freedom of competition and void virtually all noncompetes;[6] Texas courts, like most, enforce "reasonable" ones necessary to protect legitimate interests.[7] This multiplicity of standards across states—dubbed "fifty ways to leave your employer"[8]—makes for an unsteady legal landscape, particularly for far-flung employers that operate throughout the country.

Today's case, like many before it, involves a familiar tension between company and employee, both intent on self-protection. The interest Marsh aims to protect, though, is less familiar. Marsh does not argue that the noncompete was needed here to protect costly investments in specialized training or to ensure its trade secrets or other confidential information[9] do not wind up

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[4] As noted in 1960—and this persists a half-century later—court precedent "has reflected the evolution of industrial technology and business methods, as well as the ebb and flow of such social values as freedom of contract, personal economic freedom, and business ethics. But the fundamental interests which come into conflict have not basically changed." Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 626–27 (1960) [hereinafter "Blake, *Employee Agreements*"].

[5] *See* Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1302–03 (2005) ("For instance, some courts have found that freedom of contract principles support enforcing all contracts made between competent parties, so long as those contracts are neither illegal nor unconscionable.") (footnote omitted).

[6] CAL. BUS. & PROF. CODE § 16600; Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem With Noncompetition Agreements*, 52 WM. & MARY L. REV. 873, 877 n.5 (2010) [hereinafter "Moffat, *The Wrong Tool*"].

[7] Moffat, *The Wrong Tool*, at 880.

[8] Bishara, *Covenants Not to Compete in a Knowledge Economy*, at 317.

[9] The mere fact that the noncompete prohibited Cook from disclosing trade secrets or confidential or proprietary information is immaterial given the absence of anything in the record showing that Cook ever received such information. *See* Plaintiffs' Resp. to Defendant's Mot. Summ. J. at 18 ("Cook's reliance on *Sheshunoff* is particularly misplaced. *Sheshunoff* involved confidential information, not stock.") (citation omitted); Pet. Br. at 11 n.10 ("[C]onfidential information was not at issue."); Transcript of Oral Argument at 2, *Marsh USA Inc. v. Cook*, __ S.W.3d __ (2011) (No.

on WikiLeaks.[10] Marsh speaks of safeguarding its goodwill, and that is a protectable interest. But uttering the word goodwill is not enough; magic words do not boast auto-enforceability. Marsh must demonstrate that it is not invoking goodwill to camouflage a less noble interest: escaping future competition from Cook.[11]

As the trial court begins its examination, I add these two points:

First, while goodwill is a protectable interest, protectionism—going too far to protect what may be protectable—is verboten. Texas courts must probe noncompete covenants in that pro-free-market spirit. The Free Enterprise and Antitrust Act declares the public policy of Texas: "Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful."[12] The Act's paramount purpose "is to maintain and promote economic competition in trade and commerce . . . and to provide the benefits of that competition to consumers in the state."[13]

09-0558) ("This is a not a confidential information case . . . ."). As we explained in *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, the employer must at some point provide consideration for the agreement, such as confidential information, in order for the agreement to be enforceable. 209 S.W.3d 644, 650–51 (Tex. 2006).

[10] As *Light v. Centel Cellular Co. of Tex.* demonstrates, however, even these alleged interests would not automatically render the covenant valid. *See* 883 S.W.2d 642, 646–48 (Tex. 1994) (holding invalid a covenant not to compete that pertained to specialized training, even though confidential or proprietary information was involved).

[11] There is no significance to the fact that Cook was paid in stock options for the covenant not to compete. Where the goal is restricting competition, the manner of payment is irrelevant. If stock options permit such a covenant because, as the affidavit states, they align the interests of the employee with "the long-term success of the company, which, in turn enhances the goodwill of" the employer, then *any* reward for a job well done—a raise, promotion, bonus, or pension—could justify a noncompete on grounds it aligns employer/employee interests and thus bolsters "goodwill." At bottom, none of these rewards, like "merely promising to pay a sum of money to the employee," can be used to purchase a noncompete whose only purpose is to eliminate competition. *Sheshunoff*, 209 S.W.3d at 650. Absent some other legitimate reason, such a restraint on trade is unenforceable.

[12] TEX. BUS. & COM. CODE § 15.05(a).

[13] *Id.* § 15.04.

One obvious exception is the Covenants Not to Compete Act,[14] which permits a noncompete clause, but only "to the extent 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."[15] This exception is just that—an exception—with the rule favoring robust competition.

As for who decides whether limitations (1) are reasonable, (2) are more severe than necessary, and (3) relate to a legitimate business interest, the Covenants Not to Compete Act expressly vests that duty with courts.[16] Judges must divine when competition becomes *unfair* competition and when a restraint becomes an *unreasonable* or *unnecessarily restrictive* restraint. To be sure, the standard has a certain eye-of-the-beholder flavor—a vagueness that inexorably produces the case-by-case unpredictability that haunts this area of employment law.[17]

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[14] *See id.* § 15.50(a) ("Notwithstanding Section 15.05 of this code . . . a covenant not to compete is enforceable . . . .").

[15] *Id.* (emphasis added).

[16] *Id.* §§ 15.50–.51.

[17] In a sense, the "reasonableness" inquiry resembles the oversight long exercised by courts when applying the rule of reason under antitrust laws. While "reasonableness" analysis in noncompete cases and "rule of reason" analysis in antitrust cases are not identical, both inquiries envision a front-and-center judicial role in scrutinizing agreements that curb competition.

> Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law. Rule of reason analysis tests the effect of a restraint of trade on *competition*. By contrast, whether a noncompetition agreement is reasonable depends upon its effect on the parties, the *competitors*, as it were. The two standards are not directly related.

DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 688 (Tex. 1990). While this portion of our analysis draws upon the instant contract's effect on competition, that analysis stems from an initial consideration of the contract's effect on the parties, who are—at bottom—actors in a broader competitive scheme. This slight distinction demonstrates that while the two standards may not be directly related, in practice they are indirectly related.

Alongside "reasonableness," the statute also requires that the agreement "not impose a greater restraint than is necessary."[18] We have never squarely addressed whether the Act envisions two separate inquiries: (1) that the time/geography/scope limitations be "reasonable," and also (2) that the restraint not reach beyond that which is "necessary" to protect the company's protectable interests. The latter suggests more exacting scrutiny than mere "reasonableness." The Act separates the latter from the former with the conjunction "and," suggesting separateness, while the pre-1993 version of the Act fused the two explicitly.[19] None of our cases declares whether "reasonable" and "necessary" are two separate inquiries or whether the latter is simply blended into the former. Many courts implicitly subsume everything under an overarching banner of reasonableness,[20] while others treat them as separate prongs.[21] Either way, it is not an issue we reach today.

So while Texas law allows limited noncompetes, it does not allow protectionism to trump individual or societal interests in a dynamic marketplace. And even assuming a company is trying to guard a bona fide business interest, Texas courts must strike down restrictions that are unreasonable or more severe than necessary.

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[18] TEX. BUS. & COM. CODE § 15.05(a).

[19] Under the pre-1993 version, a noncompete was enforceable to the extent it "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 (amended 1993) (current version at TEX. BUS. & COM. CODE § 15.50(a)) (emphasis added). The current version reads, "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); Act of May 29, 1993, 73d Leg., ch. 965, § 1, 1993 Tex. Gen. Laws 4201 (emphasis added).

[20] *See, e.g.*, *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 660 (Tex. App.—Dallas 1992, no writ).

[21] *See, e.g.*, *Am. Express Fin. Advisors, Inc. v. Scott*, 955 F. Supp. 688, 691 (N.D. Tex. 1996).

The underpinnings of this principle long predate Texas (or America) and draw from the recognition that bustling markets best spur and reward ingenuity.[22] The Lone Star State lauds economic dynamism. And while it is perhaps natural for a profit-maximizing company to bend toward collusive or monopolistic restriction,[23] Texas law is hostile to such noncompetitive impulses. Nor can it be doubted that some companies try to tilt the playing field via dubious noncompete covenants, even facially unenforceable ones, knowing that even the *specter* of enforcement action will chill employees (and their potential employers) into preemptive capitulation.[24]

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[22] Adam's Smith ode to laissez-faire economics, *The Wealth of Nations*, remains worthy of study today:

> It is the interest of [the] sovereign . . . to open the most extensive market for the produce of his country, to allow the most perfect freedom of commerce, in order to increase as much as possible the number and the competition of buyers; and upon this account to abolish, not only all monopolies, but all restraints upon the transportation of the home produce from one part of the country to another . . . . He is in this manner most likely to increase both the quantity and value of that produce, and consequently of his own share of it, or of his own revenue.

ADAM SMITH, THE WEALTH OF NATIONS: BOOK II 411–12 (P.F. Collier & Son 1902) (1776). Similarly, the domino effect that would result from permitting such restraints to remain cannot be understated. *See id.* at 371 ("[A monopoly] not only hinders, at all times, . . . capital from maintaining so great a quantity of productive labor as it would otherwise maintain, but it hinders it from increasing so fast as it would otherwise increase, and consequently from maintaining a still greater quantity of productive labor.").

[23] *See id.* at 412 ("Their mercantile habits draw [merchants] in this manner, almost necessarily, though perhaps insensibly, to prefer upon all ordinary occasions the little and transitory profit of the monopolist to the great and permanent revenue of the sovereign . . . .").

[24] *See infra* note 40 and related text. Some legal commentators are unsubtle in their market-based objections to non-solicitation agreements specifically:

> As to the non-solicitation of customers, such covenants are monopolistic and overreaching. What if the customer would prefer to do business with the former employee, or at least seek a competing price quote, but does not know that the former employee has resigned and started a new business? Something is amiss when consenting businesses cannot transact business together, merely because another business got there first. As with non-competition covenants generally, such contracts appear to restrict competitive activities that might lower prices, provide better services for customers, and allow businesses to partner together where that might be most productive.

Graves and DiBoise, *Strict Trade Secret and Non-Competition Laws*, at 334.

Given this firm foundation, courts' broad discretion in scrutinizing noncompetes, and the Legislature's clearly stated opposition to contracts that unduly restrain competition, I would underscore that a noncompete rooted in protectionism alone is per se invalid under the Covenants Not to Compete Act and surely offends the Act's purpose of giving Texans the benefits of competition that is fierce yet also fair. Restraint of trade for its own sake is not a protectable "business interest" under Section 15.50, any more than violations of employee wage, hour, or safety laws are legitimate business interests that can be protected through a restrictive covenant.

More to the point, while "goodwill" is a bona fide business interest under the Act, it is not enough merely to mutter the word. You cannot simply buy a covenant not to compete. A court cannot uphold a noncompete on goodwill grounds absent a record that demonstrates the limitations are reasonable and as nonburdensome as possible. Every company has customer relationships and attendant goodwill it wants to cultivate by incentivizing employees to stay, but merely *asserting* goodwill is not enough. Marsh contends "Cook could take the customer relationships grown as a result of the stock incentive and use them to compete with Marsh,"[25] but that unadorned assertion is insufficient. And even assuming the incentive spurred Cook to grow Marsh's goodwill (which strikes me as a curious and slippery proposition), does that prove too much, lest any workplace benefit—a bonus, a raise, a promotion, a better parking space—suffice to justify a noncompete because it theoretically motivates an employee to strengthen client relationships? The evidentiary record must demonstrate special circumstances beyond the bruises of ordinary competition such that, absent the covenant, Cook would possess a grossly unfair competitive advantage. And even then

[25] Pet. Br. at 31.

the restrictions imposed must be as light as possible and not restrict Cook's mobility to an extent greater than Marsh's legitimate need.

Second, naked restraints of trade are particularly onerous because, besides stifling beneficial competition, they also meddle with people's right to earn an honest living. Sixty-five years ago, we declared the right to use one's "own labor in any lawful employment . . . one of the first and highest of civil rights."[26] The right to pursue a chosen occupation and career path is indeed highly cherished, but it is also highly vulnerable. For many people, their livelihood is inextricably tied to a certain pursuit of happiness, and losing this liberty should never be lightly regarded. Fittingly, courts have recognized a right to work of constitutional dimension, at least in cases where state action was alleged. Nearly a century ago, the United States Supreme Court explained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."[27] The Court made a similar point around that time in a case arising from Texas:

> In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.[28]

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[26] *Int'l Printing Pressmen & Assistants' Union of N. Am. v. Smith*, 198 S.W.2d 729, 740 (Tex. 1946) (Brewster, J., dissenting).

[27] *Truax v. Raich*, 239 U.S. 33, 41 (1915) (citations omitted). *See also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (recognizing the right "to engage in any of the common occupations of life" as a constitutional liberty interest); *Stidham v. Tex. Comm'n on Private Sec.*, 418 F.3d 486, 491 (5th Cir. 2005) ("We have confirmed the principle that one has a constitutionally protected liberty interest in pursuing a chosen occupation.") (citations omitted).

[28] *Smith v. Texas*, 233 U.S. 630, 636 (1914).

Such eloquence has spanned centuries. Saint Thomas Aquinas addressed the connection between work and existence itself: "[I]t is natural to a man to love his own work (thus it is to be observed that poets love their own poems); and the reason is that we love to be and to live, and these are made manifest especially in our action."[29] Ralph Waldo Emerson, typically transcendentalist, called it "the high prize of life, the crowning fortune of a man . . . to be born with a bias to some pursuit, which finds him in employment and happiness,—whether it be to make baskets, or broadswords, or canals, or statues, or songs."[30] Voltaire took the utilitarian, albeit narrow, view: "[O]ur labour keeps off from us three great evils," he said, "idleness, vice, and want."[31] We would be unwise not to linger where a priest, a poet, and a polemicist all miraculously agree. Where the judiciary is empowered to pass upon a subject that so viscerally affects the citizenry, it should do so with utmost care. Sometimes that care will demand a painstaking weighing of interests. In other moments, it will demand that certain constraints—those that restrict the right to work for no better reason than to erase the competition a company sought by entering the marketplace—be declared categorically void. In *all* cases, it requires chary judges who respect our law's rootedness in economic liberty and vitality.

This is doubly true in times of economic hardship. President Franklin Roosevelt's first inaugural address is largely remembered for the iconic phrase, "the only thing we have to fear is fear

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[29] 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II, q. 26, art. 12, at 519 (Fathers of the English Dominican Province trans., Daniel J. Sullivan rev., Encyclopedia Britannica, Inc. 1952) (1265–74).

[30] RALPH WALDO EMERSON, CONDUCT OF LIFE 234 (1860).

[31] VOLTAIRE, CANDIDE 119 (Samuel Johnson ed., George Rutledge and Sons 1884) (1694).

itself"[32]—a potent sound bite that is often removed from the crucial context that surrounded it. The fear President Roosevelt spoke about in 1933 sprang largely from the financial crater left by the Great Crash of 1929 and the agonizing Great Depression that followed. The Depression's devastating effects prompted the new president to couple his discussion of fear with an emphasis on the salve to that fear: the importance of "[t]he joy and moral stimulation of work."[33] It was the process—the act of committing oneself—that mattered. "Happiness lies not in the mere possession of money," he explained, "it lies in the joy of achievement, in the thrill of creative effort."[34] The virtue of work is no less fundamental today. Companies must tread lightly when undertaking to curb that liberty. And if employers pass uncalled-for limits, we call on judges to pass upon them.

The "true beginning of the modern law"[35] on post-employment restraints is *Mitchel v. Reynolds*,[36] a 1711 English-court decision that stood as the most cited case on the subject for two-and-a-half centuries.[37] While introducing the so-called "rule of reason" for evaluating such agreements—whether a legitimate economic or business purpose justified the restriction[38]—*Mitchel* expressed concern that such agreements were subject to "great abuses . . . from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to

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[32] President Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933).

[33] *Id.*

[34] *Id.*

[35] 8 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 60 (2d ed. 1973).

[36] (1711) 24 Eng. Rep. 347 (Q.B.); 1 P. Wms. 181.

[37] Blake, *Employee Agreements*, at 629.

[38] *See* Moffat, *The Wrong Tool*, at 880.

procure such bonds from them, lest they should prejudice them in their custom, when they come up to set up for themselves."[39] Though the contours of noncompete doctrine have changed as the American economy has changed, this astute observation merits remembering. The "vexation" feared in 1711 is no less real 300 years later. In 2011, overbroad restrictions can strain the gears of an economic engine that has propelled this country so well, and so far. In 2011, terms too severe to be enforced can also escape challenge altogether, instead acting *in terrorem* to freeze an untold number of employees in place rather than allowing human capital to find its highest and best use and thus augment economic and technological growth.[40] This seems especially notable in today's era of dizzying technological change, when implicit lifetime tenure is obsolete and frequent job-hopping is ordinary (unless someone has been forced to sign away his or her right to compete).[41]

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[39] *Mitchel*, 24 Eng. Rep. at 350; 1 P. Wms. at 190.

[40] *See* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 406 (2006) ("An overbroad non-compete—one that lasts too long or that covers activities that do not threaten the employer's legitimate interests—may deter the employee from quitting and competing even when she has a right to do so, or it may deter a competitor from hiring the employee."). The *in terrorem* effect is magnified in jurisdictions like Texas, where judges simply "blue pencil" overbroad noncompetes to make them enforceable. *See* TEX. BUS. & COM. CODE § 15.51(c); *e.g.*, *Prod. Action Int'l, Inc. v. Mero*, 277 F. Supp. 2d 919, 931 (S.D. Ind. 2003) ("A current employee may be frozen in his or her job by an unreasonably broad covenant. Even if the employee believes the covenant is too broad, she may be able to test that proposition only through expensive and risky litigation."); *Richard P. Rita Pers. Servs. Int'l., Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972) ("If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable.").

[41] Noncompetes also shelter struggling companies that are facing headwinds of recession or industry turmoil. An at-will employee might see dire times ahead for the company but is unable to find new employment if the prospect of litigation spooks the employee or a potential new employer. "As a result, the individual may lose opportunities to advance her career and compensation, and the employer may be able to insulate itself at least temporarily from the competition of more vibrant enterprises for productive employees." Kate O'Neill, *"Should I Stay or Should I Go?"–Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L. J. 83, 118 (Winter 2010).

Restrictive covenants are not costless, and even a mutually acceptable noncompete can impose a deadweight loss on broader society. Courts should not confuse a noncompete's impact on the employee with its impact on competition. A restraint may be perfectly agreeable to both parties today but still harm consumers tomorrow. Moreover, as our economy becomes even more technologically advanced and knowledge-based (key contributors to a so-called high-velocity labor market), overreaching restrictions lock up human capital and decelerate the beneficial knowledge spillover that accrues from greater mobility. It remains the job of courts to be vigilant for practices that tend to servility, that deprive the public of desired services, and that quash rivals via forced restriction rather than forceful competition.[42]

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I recognize that a free market is not innately utopian, with frictionless edges that never need sanding. "If men were angels, no government would be necessary,"[43] much less antitrust laws to curb monopolistic impulses. Under Texas law, we must dutifully enforce noncompetes that impose reasonable limitations that are no more restrictive than necessary in order to advance legitimate business interests. But this duty requires circumspection, lest the "Covenants Not to Compete Act" exception swallow the "Free Enterprise and Antitrust Act" rule. The latter sides with the virtues of economic liberty—the basic right to pursue what you choose, where you choose, and among whom you choose—not the vice of unduly denying skilled people the rewards of their earned success or

[42] Burdens on inter-firm mobility are especially acute in a fast-paced and tumultuous 21st-century economy. Greater mobility would, one suspects, spur, not curb, the pace of high-tech advances and the dissemination of ideas and knowledge.

[43] THE FEDERALIST NO. 51 (James Madison).

injuring society by depriving the wider public of someone's talents and enterprise. So while free enterprise recognizes—*demands*, actually—that economic actors will doggedly pursue self-interest, Texas noncompete law recognizes the difference between constructive self-interest and destructive selfishness. Where a naked restraint of trade masquerades as a covenant not to compete, we must strike it down—always.

Summing up: Post-employment restrictions are restraints on trade and, as such, deserve rigorous legal scrutiny, particularly given today's pace of warp-speed economic change. Noncompetes tailored to protectable business interests have their lawful place, but they should be used sparingly and drafted narrowly. And employers must demonstrate special facts that legitimize the noncompete agreement. Squelching competition for its own sake is an interest unworthy of protection. Competition by a former employee may well rile an employer, but companies do not have free rein to, by contract, indenture an employee or dampen everyday competition that benefits Texas and Texans.

Don R. Willett
Justice

OPINION DELIVERED: June 24, 2011