IN THE SUPREME COURT OF TEXAS

NO. 07-0490

MANN FRANKFORT STEIN & LIPP ADVISORS, INC., MFSL GP, L.L.C., AND MFSL EMPLOYEE INVESTMENTS, LTD., PETITIONER,

v.

BRENDAN J. FIELDING, RESPONDENT

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

JUSTICE HECHT, concurring.

I join most of the Court's opinion with two additional observations.

I

We granted the petition for review in this case for the same reason we granted the petition for review several years ago in *Gage Van Horn & Associates, Inc. v. Tatom*:[1] to consider whether the Texas Covenants Not to Compete Act[2] controls the award of attorney fees to an employee suing for a declaratory judgment construing a covenant not to complete when the employer is also suing to enforce the covenant. Our review of the record in *Tatom* revealed that the issue was not preserved, and we therefore withdrew the order granting the petition as having been improvidently granted. The issue is preserved in the present case, but the Court does not reach it, concluding instead that the employee, Fielding, is not entitled to attorney fees on the only basis still asserted —

[1] 87 S.W.3d 536 (Tex. 2002) (per curiam) (order granting petition for review withdrawn as having been improvidently granted); *see also Perez v. Texas Disposal Sys., Inc.*, 103 S.W.3d 591, 592-594 (Tex. App.–San Antonio 2003, pet. denied) (holding that an employer is not entitled to recover attorney fees under TEX. CIV. PRAC. & REM. CODE § 38.001, because the remedies provided by the Covenants Not to Compete Act are exclusive under TEX. BUS. & COM. CODE § 15.52) (after remand from *Texas Disposal Sys., Inc., v. Perez*, 80 S.W.3d 593 (Tex. 2002) (per curiam)).

[2] TEX. BUS. & COM. CODE §§ 15.50-.52.

a provision of his employment agreement allowing attorney fees for a prevailing party in litigation over the agreement. I would hold that even if the agreement would allow Fielding attorney fees, the Act controls.

Section 15.52 of the Act states:

> The criteria for enforceability of a covenant not to compete provided by Section 15.50 of this code and the procedures and remedies in an action to enforce a covenant not to compete provided by Section 15.51 of this code are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise.[3]

In *Tatom*, as in the present case, an employee sued for a declaration of his rights under a covenant not to compete he had given his former employer, and the employer sued to enforce the covenant.[4] In each case,[5] the trial court granted summary judgment holding the covenant unenforceable under section 15.50(a) of the Act.[6] The trial court in *Tatom* awarded the employee attorney fees, and the court of appeals affirmed.[7] The trial court in the present case did not award the employee attorney fees, but the court of appeals did.[8] In each case, the court of appeals held that suit by an employee

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[3] *Id.* § 15.52.

[4] *Gage Van Horn & Assocs., Inc. v. Tatom*, 26 S.W.3d 730, 732 (Tex. App.–Eastland 2000), *pet. denied*, 87 S.W.3d 536 (Tex. 2002) (per curiam); *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, 263 S.W.3d 232, 240 (Tex. App.–Houston [1st Dist.] 2007), *rev'd*, ___ S.W.3d ___ (Tex. 2009); *cf. Perez*, 103 S.W.3d at 592.

[5] *Tatom*, 26 S.W.3d at 732; *Hardy*, 263 S.W.3d at 240.

[6] TEX. BUS. & COM. CODE § 15.50(a) ("[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.").

[7] *Tatom*, 26 S.W.3d at 732, 734.

[8] *Hardy*, 263 S.W.3d at 241, 259.

for a declaratory judgment construing a covenant not to compete is not an action to enforce the covenant to which section 15.52 applies.[9]

When the declaratory judgment raises only issues related to the covenant's enforceability, the court of appeals' construction of section 15.52 is clearly wrong. The statute preempts the enforceability requirements, procedures, and remedies afforded by any other law with respect to covenants not to compete. An employee's suit for a declaration of rights as they pertain to enforcement of a covenant (they almost always do) and an employer's suit for breach are opposite sides of the same coin. To apply one law to the employee's claims and a different law to the employer's would often be impossible. For example, although the basic standards for enforcement are the same under the Act as under the common law,[10] the Act imposes special requirements when

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[9] *Tatom*, 26 S.W.3d at 733 ("[T]he procedures and remedies set forth in the Covenants Not To Compete Act have preemptive effect only in an action to enforce a covenant not to compete. The declaratory judgment action filed by Tatom, which was the first claim filed in this matter and the claim on which summary judgment was granted, was not and could not be an action to enforce a covenant. By the plain language of the Act, the procedures and remedies, including attorney's fees, set forth in section 15.51 of the Covenants Not To Compete Act had no preemptive effect on Tatom's declaratory judgment action." (footnote omitted)); *Hardy*, 263 S.W.3d at 255-256 (following *Tatom*); *see also Contemporary Contractors, Inc. v. Strauser*, No. 05-04-00478-CV, 2005 Tex. App. LEXIS 5868, at *7, 2005 WL 1774983, at *2 (Tex. App.–Dallas July 28, 2005, no pet.) (mem. op.) (following *Tatom*).

[10] *Compare* TEX. BUS. & COM. CODE § 15.50(a), quoted *supra* note 6, *with DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681-682 (Tex. 1990) ("The fundamental common law principles which govern the enforceability of covenants not to compete in Texas are relatively well established. An agreement not to compete is in restraint of trade and therefore unenforceable on grounds of public policy unless it is reasonable. An agreement not to compete is not a reasonable restraint of trade unless it meets each of three criteria. First, the agreement not to compete must be ancillary to an otherwise valid transaction or relationship. Such a restraint on competition is unreasonable unless it is part of and subsidiary to an otherwise valid transaction or relationship which gives rise to an interest worthy of protection. Such transactions or relationships include the purchase and sale of a business, and employment relationships. Second, the restraint created by the agreement not to compete must not be greater than necessary to protect the promisee's legitimate interest. Examples of legitimate, protectable interests include business goodwill, trade secrets, and other confidential or proprietary information. The extent of the agreement not to compete must accordingly be limited appropriately as to time, territory, and type of activity. An agreement not to compete which is not appropriately limited may be modified and enforced by a court of equity to the extent necessary to protect the promisee's legitimate interest, but may not be enforced by a court of law. Third, the promisee's need for the protection afforded by the agreement not to compete must not be outweighed by either the hardship to the promisor or any injury likely to the public. Before an agreement not to compete will be enforced, its benefits must be balanced against its burdens, both to the promisor and the public. Thus, such an agreement may, in a particular case, accomplish the salutary purpose of encouraging an employer to share confidential, proprietary information with an employee in furtherance of their common purpose, but must not also take unfair advantage of the disparity of bargaining power between them or too severely impair the employee's personal freedom and economic mobility. Whether an agreement not to compete is a reasonable restraint of trade is a question of law for the court." (citations and footnotes omitted)).

the employee is a physician licensed in Texas.[11] It would be impossible — or at least nonsense — to declare that, under the common law, the covenant limited the physician's right to compete with his former employer, while at the same time holding that, under the Act, the covenant was unenforceable. The common law and the Act could not both control the same issues without direct conflict.

There are other differences between the Act and the common law. The Act allocates the burden of persuasion in a case differently depending on whether the employment is primarily for rendition of personal services,[12] precludes a damages award for conduct prior to any necessary reformation of the scope of the covenant,[13] limits attorney fees awards to employers,[14] and does not

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[11] TEX. BUS. & COM. CODE § 15.50(b) ("A covenant not to compete is enforceable against a person licensed as a physician by the Texas State Board of Medical Examiners if such covenant complies with the following requirements: (1) the covenant must: (A) not deny the physician access to a list of his patients whom he had seen or treated within one year of termination of the contract or employment; (B) provide access to medical records of the physician's patients upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas State Board of Medical Examiners under Section 159.008, Occupations Code; and (C) provide that any access to a list of patients or to patients' medical records after termination of the contract or employment shall not require such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to the contract; (2) the covenant must provide for a buy out of the covenant by the physician at a reasonable price or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties; and (3) the covenant must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated.").

[12] *Id*. § 15.51(b) ("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. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this subsection, the 'burden of establishing' a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.").

[13] *Id*. § 15.51(c) ("If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief.").

[14] *Id*. ("If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest

provide for attorney fees awards to employees. The common law does not draw all of these distinctions. It would be inconsistent to declare under the common law that a covenant entitled an employer to damages or injunctive relief while denying such relief under the Act, or to declare that an employee was entitled to attorney fees that the Act would preempt.

The courts of appeals in this case and *Tatom* did not refuse to apply section 15.52's preemption because the declaratory judgment actions raised issues beyond enforcement of the covenants not to compete and therefore beyond the Act's scope. They refused to apply the statute simply because in each case the employee's action was for declaratory relief and therefore not "an action to enforce a covenant". But while the employees certainly sought to avoid enforcement, they were not the only parties to the actions. The employers sought enforcement. As a whole, the actions were to enforce, or not, covenants not to compete. I would hold that section 15.52 applied to the actions and to the employees' claims for attorney fees.

II

My second observation is this: in cases involving the enforceability of covenants not to compete, a shift in focus away from the reasonableness of the covenant's time, territory, and conduct restrictions toward issues of contract formation increases the risk that achieving what must in the end be an equitable result will cause a court to distort, confuse, or misstate contract law. Texas law has long been that unreasonable restrictions do not void a covenant not to compete but limit its enforcement.[15] Section 15.51(c) specifically requires a trial court to reform unreasonable

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of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.").

[15] *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973) ("[I]t can no longer be said that a covenant not to compete is void and unenforceable simply because it is not reasonably limited as to either time or area, and that a court of equity will nevertheless enforce the contract by granting an injunction restraining competition for a time and within an area that are reasonable under the circumstances."); *Weatherford Oil Tool Co. v. Campbell*, 340 S.W.2d 950, 952 (Tex. 1960) ("[A]lthough the territory or period stipulated by the parties may be unreasonable, a court of equity will nevertheless enforce the contract by granting an injunction restraining the defendant from competing for a time and within an area that are reasonable under the circumstances."); *Spinks v. Riebold*, 310 S.W.2d 668, 669 (Tex. Civ. App.–

restrictions.[16] In determining whether and how to enforce a covenant not to compete, a court must seek equity in reformation, not in the statement and application of general contract principles. The enforcement vehicle must be directed by steering, not by rebuilding the chassis.

Light v. Centel Cellular Co. of Texas[17] is a case in point. A concern in *Light* was that while an at-will employee could be held to a covenant not to compete, the employer should not be allowed to take advantage of the employee by requiring her to sign a broad covenant not to compete, terminating her soon afterward, and then enforcing the covenant as written.[18] The simple answer is that the court cannot enforce the restrictions beyond the limits reasonable to protect the employer's interest — in the example, perhaps not at all. Rather than focus on the reasonableness of the restrictions in *Light*, the Court concluded that a covenant is not enforceable at the time it is made if the only consideration given by the employer is a promise to provide training and confidential information in the future that is illusory because it is contingent on continued employment.[19] We have since withdrawn from that conclusion and held that a covenant not to compete must only be ancillary to another agreement at the time that agreement was made, even if that agreement is not

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El Paso 1958, writ ref'd) ("[C]ontracts of employment containing restrictive covenants . . . will not be declared void because said covenants are unreasonable as to time, or as to the extent of territory covered, or unreasonable as to both time and territory. . . . [This is] not making a new and different contract for the parties, but . . . it would hardly be doing violence to the established principles to hold that the restriction is merely void or unenforceable with respect to that portion of the time beyond what the court considers reasonable." (internal quotation marks omitted)); *Lewis v. Krueger, Hutchinson & Overton Clinic*, 269 S.W.2d 798, 799 (Tex. 1954) ("Merely because a limit has not been fixed for the duration of the restraint, the agreement will not be struck down but will be enforceable for such period of time as would appear to be reasonable under the circumstances."); *see also City Ice Delivery Co. v. Evans*, 275 S.W. 87, 90 (Tex. Civ. App.–Dallas 1925, no writ) (concluding that the trial court, instead of dissolving a temporary injunction, should have limited it to only the district assigned to the employee).

[16] TEX. BUS. & COM. CODE § 15.51(c), quoted *supra* note 13.

[17] 883 S.W.2d 642 (Tex. 1994).

[18] *Id.* at 646.

[19] *Id.* at 644-645.

yet enforceable because the promise of future action has not been performed.[20] Today we withdraw further and hold that the promise of future action need not be express but may be implied.[21]

The Court's estrangement from *Light* has not been over its result — its handling of the covenant not to compete — but over its seriously flawed statement of contract law. It is certainly true, as the *Restatement (Second) of Contracts* explains: "Words of promise which by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise."[22] Such a "promise" — in reality no promise at all — is often said to be "illusory" and "is not consideration for a return promise."[23] Employment at will can be terminated by the employer or the employee at any time and for any reason; continuation of the employment relationship is entirely optional for each.[24] Thus, as we said in *Light*, "[a]ny promise made by either employer or employee that depends on an additional period of employment is illusory because it is conditioned upon something that is exclusively within the control of the promisor."[25]

What the Court should have added in *Light* is that courts have long been reluctant to invalidate a contract because a promise given in consideration was technically illusory. When the only consideration one party gives for a contract is a promise that is illusory, there is no "mutuality

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[20] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson* 209 S.W.3d 644, 651 (Tex. 2006).

[21] *See ante* at ___.

[22] RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e (1981).

[23] *Id.* § 77 cmt. a ("Where the apparent assurance of performance is illusory, it is not consideration for a return promise.").

[24] *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (per curiam) ("The long-standing rule in Texas provides for employment at will, terminable at any time by either party, with or without cause, absent an express agreement to the contrary.") (citing *Schroeder v. Texas Iron Works*, 813 S.W.2d 483, 489 (Tex. 1991), and *East Line & R.R.R. v. Scott*, 10 S.W. 99, 102 (Tex. 1888)).

[25] 883 S.W.2d at 645 n.5 (citing E. ALLAN FARNSWORTH, CONTRACTS 72-82 (1982)).

of obligation", sometimes said (though not entirely accurately) to be required for a contract.[26] Thirty-five years ago, in *Texas Gas Utilities Co. v. Barrett*, we wrote:

> It is presumed that when parties make an agreement they intend it to be effectual, not nugatory. *Portland Gasoline Co. v. Superior Marketing Co., Inc.*, 150 Tex. 533, 243 S.W.2d 823 (1951). A contract will be construed in favor of mutuality, *Carpenter Paper Co. v. Calcasieu Paper Co., Inc.*, 164 F.2d 653 (5th Cir. 1947). The modern decisional tendency is against lending the aid of courts to defeat contracts on technical grounds of want of mutuality. *Armstrong v. Southern Production Co., Inc.*, 182 F.2d 238 (5th Cir. 1950).[27]

To avoid invalidating a contract, section 77 of the *Restatement (Second) of Contracts* explains:

> Illusory and Alternative Promises
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> A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless
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> * * *
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> (b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.[28]

The same principles should be employed in construing and applying the Act, the purpose of which, after all, is to facilitate, not impede, enforcement of covenants not to compete. The parties to an employment agreement are presumed to have intended it to be effectual, and the agreement should not be denied enforceability on technical grounds of want of mutuality if that result can be avoided. The Act does not ground the enforceability of a covenant not to compete on the overly technical disputes that *Light* seems to have engendered over whether a covenant is ancillary to an

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[26] *Compare*, *e.g.*, *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997) ("A contract must be based upon a valid consideration, in other words, mutuality of obligation."), *with* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981) ("If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.'") *and id.* cmt. a ("'[M]utuality of obligation' has been said to be essential to a contract. But experience has shown that [this is not an] essential element[] of a bargain or of an enforceable contract . . . .").

[27] 460 S.W.2d 409, 412 (Tex. 1970).

[28] RESTATEMENT (SECOND)OF CONTRACTS § 77 (1981).

otherwise enforceable agreement. Rather, the statute's core inquiry is whether the covenant "contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee".[29] 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.

There will certainly be covenant not to compete cases with important issues of contract formation, but the central concern will usually be the reasonableness of the restrictions. *Light* should not divert attention from the central focus of the Act.

Nathan L. Hecht
Justice

Opinion delivered: April 17, 2009

[29] TEX. BUS. & COM. CODE § 15.51(c).