Marsh v. Cook: Texas Non-Competes Get More Teeth

Thanks to the Texas Supreme Court, non-compete agreements just got easier to enforce. Texas companies have steadily enforced non-competes when the employee got trade secrets or confidential information as consideration for the non-compete. In *Marsh v. Cook*, the Court opened up a whole new ball game. Other kinds of consideration—stock options in this case—can rope an employee into a non-compete.

But let's go light on the law and heavy on business points.

Marsh radically shifted Texas courts' take on non-competes. Under their old take, a non-compete was enforceable only when the consideration given along with the non-compete agreement "gives rise" to the company's need for the non-compete. Confidential information and trade secrets used to be about the only consideration that courts thought justified a non-compete. Other consideration wasn't enough.

Now, consideration that is "reasonably related to an interest worthy of protection" will satisfy Texas courts. The Supreme Court said that the stock options linked the employee to the company's "long-term business interests" in developing goodwill with clients. That deserved protection with a non-compete.

What consideration might work? Several possibilities could be tied closely enough to goodwill, depending upon how they're structured:

- Stock option plan
- Incentive bonus plan
- Specialized technical training
- Education tuition reimbursement
- Introductions to key client relationships

Any time you give employees one of these, it could be a choke point to require them to sign a non-compete. The pitch is simple: "No non-compete, no participation in the incentive bonus plan."

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Texas non-compete and non-solicit agreements

Non-compete agreement

Non-solicit agreement

You've got good reason to roll out non-competes for key employees. Non-competes make it easier for you to protect your business secrets.

Once again in *Marsh*, the Supreme Court reassured Texas companies that their non-competes deserve respect. The Court warned, however, that non-competes must impose only reasonable restrictions on the employee:

> The hallmark of enforcement is whether or not the [non-compete] is reasonable. The enforceability of the [non-compete] should not be decided on "overly technical disputes" of defining whether the covenant is ancillary to an agreement.

Reasonableness will be the new battleground on non-competes. And there are consequences for trying to hold your employees to a non-compete that is too broad.

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