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Texas Supreme Court Opens Door to Enforcement of Non-Competition Covenants

In deciding *Alex Sheshunoff Management Services, L.P. v. Johnson*, 2006 WL 2997287 (Tex.), the Texas Supreme Court departed from its 1994 decision in *Light v. Centel Cellular Co.*, 883 S.W.2d 645, in which the Court had construed the Texas Covenant Not to Compete Act ("Act") such that a unilateral contract could never meet the requirements of the Act because such a contract is executory and not immediately enforceable when made. For example, an employer's covenant to provide confidential information to the employee in exchange for the employee's reciprocal promise not to disclose confidential information and/or not to compete with his employer was not enforceable unless the employer performed the promise by providing confidential information *at the very instant* the employee was hired, thereby eliminating the executory nature of the promise. This requirement was impractical for most employers because, among other things, confidential information is typically not provided at the very instant an employee is hired, but rather is provided to the employee gradually and throughout the course of employment. The *Light* decision resulted in over a decade of creative drafting and creative attempts to apply various common law theories to enforce non-competition agreements.

After examining the legislative history of the Act, the Court concluded in *Sheshunoff* that, contrary to *Light*, the covenant need only be "ancillary to or part of" the agreement at the time the agreement is made and need not be *immediately* enforceable when made. Thus, if the employer actually performs its promise to provide confidential information, a unilateral contract

is formed, which will satisfy the requirements of the Act if the other requirements of the Act are met as well. Specifically, the restrictions in the covenant as to time, scope of activity, and geographical area must be limited to what is reasonably necessary to protect the goodwill or other business interests of the employer. The Court's ruling is good news for employers in that it eliminates the impractical and highly technical timing requirements imposed by *Light*.

This alert was prepared by Bennee Jones and Margaret Braun of the Labor / Employment section of Andrews Kurth LLP.

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